

INTERNATIONAL CENTRE FOR SETTLEMENT OF INVESTMENT DISPUTES

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

ICSID Case No ARB/21/16

RIVERSIDE COFFEE, LLC

INVESTOR

v.

REPUBLIC OF NICARAGUA

RESPONDENT

MEMORIAL OF THE INVESTOR

OCTOBER 21, 2022

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I. OVERVIEW

- 1) This arbitration involves the patent disregard of fairness and the general rule of law in the Republic of Nicaragua (“Nicaragua”). Nicaragua laid waste to economic justice, social justice, and environmental justice concerning the investment in Nicaragua by Riverside Coffee, LLC (“Riverside” or “Investor”). In so doing, Nicaragua engaged in uncompensated expropriations and breaches of fair and equitable treatment, full protection and security, national treatment, and MFN treatment.
- 2) The egregious facts of the invasions and taking of Hacienda Santa Fé are described in depth below. This CAFTA claim concerns the unlawful seizure and destruction of an avocado plantation in Nicaragua owned by Riverside, the American controlling shareholder of a Nicaraguan corporation, Inversiones Agropecuarias, S.A. (“Inagrosa”),¹ which owned and operated Hacienda Santa Fé.
- 3) Nicaragua has failed to meet the following obligations owed to the Investor and its Investment under the Treaty:
 - a) To compensate Riverside for the **expropriation** of its property.
 - b) To provide the Investment with treatment in accordance with international law, including fair and equitable treatment and full protection and security.
 - c) Because of the operation of the **Most Favored Nation Treatment Clause**, to not provide more favorable treatment offered to Russian Investors and their investments in Nicaragua than that offered to U.S. Investors and their investments; and

¹ Articles of Incorporation - Inversiones Agropecuarias S.A. (Inagrosa), February 27, 1996 (**C-0041-SPA**)

- d) To provide treatment as favorable to American investors as that provided by Nicaragua to nationals of any third state.
- 4) The specific breaches of the Dominican Republic and Central American Free Trade Agreement (“CAFTA” or the “Treaty”) by Nicaragua include measures more fully described below. All arose from the internationally wrongful acts Nicaragua took concerning the seizure of the Hacienda Santa Fé commencing on June 16, 2018. These measures resulted in the following Treaty violations:
- a) **Most Favored Nation (MFN) Treatment** - Nicaragua offered treatment to investors of third states under another bilateral investment treaty that was more favorable than the treatment provided to the United States under the Treaty. To the extent that this treatment to nationals of Third-Party states is better, there is a violation of the MFN Treatment obligation.
- b) **Expropriation**- Nicaragua failed to meet the CAFTA requirements upon the expropriation of property:
- a. Nicaragua failed to pay fair market value compensation at the time of the taking to the Investor for the land taken.
 - b. Nicaragua did not expropriate the lands for a public purpose. Instead, Nicaragua failed to pay fair market value to the Investor upon the expropriation of their land; and
 - c. Nicaragua failed to follow the requirements of due process and the general principles of CAFTA Article 10.5, such as fair and equitable treatment and full protection and security concerning the expropriation.
- 5) **International law standards of treatment** - Nicaragua engaged in a breach of fair and equitable treatment and full protection and security as follows:
- a) Nicaragua failed to afford Riverside’s Investment with fair and equitable treatment and full protection and security regarding the seizure of Hacienda Santa Fé. Such actions were inconsistent with international

standards of treatment on the interference by the State with property, a failure of due process, and adherence to the rule of law.

- 6) Riverside's losses arising from these breaches are fully set out in the Expert Valuation Statement of Vimal Kotecha (**CES-01**) described below.
- 7) The evidence produced in this arbitration demonstrates that:
 - a) Members of Nicaragua's government (its police, its voluntary police, its elected officials, and others) unlawfully seized Hacienda Santa Fé starting on June 16, 2018. Such actions create state responsibility upon Nicaragua for the unlawful seizure and destruction of the business at Hacienda Santa Fé.
 - b) Nicaragua admitted that it currently has the expropriated property but refuses to return it unconditionally.² Nicaragua has not paid any compensation to Riverside for the taking of Hacienda Santa Fé.³
 - c) Nicaragua's police failed to protect Inagrosa, the lawful landowners, and the police actively assisted the wrongdoers⁴ – in gross violation of fair and equitable treatment and full protection and security.
 - d) Nicaragua also failed to protect against significant environmental harm to the protected rare forest preserve located at Hacienda Santa Fé and destroyed by the paramilitaries.

² Letter from Foley Hoag LLP to Appleton & Associates regarding offer to return Hacienda Santa Fe, September 9, 2021 (**C-0116-ENG**); Letter from Appleton & Associates to Foley Hoag LLP, September 9, 2021 (**C-0118-ENG**).

³ Witness Statement of Carlos J. Rondón – Memorial – ENG at ¶ 231 (**CWS-01**).

⁴ Witness Statement of Luis Gutierrez – Memorial – SPA at ¶¶ 40, 49-54, 72,98, 101, 129 (**CWS-02**).

- e) Better treatment was available to local Nicaraguans than was provided to Riverside and its Investment in violation of national treatment.
 - f) Nicaragua provided better treatment to Russian investors through the Nicaragua-Russia bilateral investment treaty (“Russian Treaty”) than provided to Americans under the CAFTA. As a result, as detailed below, a number of provisions of the CAFTA are replaced in this claim by more favorable provisions in the Russian Treaty.
- 8) The issues in this claim expose systemic practices by the government of Nicaragua to undermine fairness and the rule of law, causing egregious harm to the respect for fundamental human rights. The measures are troubling as they involve using the police not to serve and protect but to steal and harass. In this case, the Tribunal will see evidence of state-sponsored invasions, looting, and death threats. These astonishing actions undermine the rule of law and are antithetical to its very concept.
- 9) These measures involve the environmental degradation of the rare forest reserve⁵ and occurred amongst the deplorable erosion of the full respect for human rights and the imposition of an obstacle to the conditions for free and fair elections. These measures, which are internationally wrongful and unacceptable under international law, give context to the treaty breaches in this claim.
- 10) In summary, Inagrosa management informed the National Police of suspicious activity around its lands in the days before the first invasion, which occurred on June 16, 2018, by unlawful invaders led by armed paramilitaries.⁶

⁵ Witness Statement of Carlos J. Rondón – Memorial – ENG at ¶¶ 10, 100, 233 (CWS-01). Witness Statement of Luis Gutierrez – Memorial – SPA at ¶ 128 (d) (CWS-02).

⁶ Witness Statement of Luis Gutierrez – Memorial – SPA at ¶ 34 (CWS-02).

- 11) The term “paramilitary” refers to organized invaders who acted at the behest of Nicaragua to carry out the government’s political objectives.⁷ The paramilitaries are a part of the Nicaraguan State.⁸ The paramilitaries are rewarded from the proceeds of their unlawful pillaging.⁹ Paramilitaries are armed units led by a commander (“Comandante”). The Comandante leads the paramilitary unit based on instructions from the Nicaraguan government, including the elected government leaders and the police.
- 12) The National Chief of Police has confirmed that the paramilitaries are deputized national police officers.¹⁰ The action of the police, including the voluntary police, are central to this claim. Not only did the National Police not provide police protection to the lawful landowner,¹¹ but the National Police actively assisted the armed paramilitaries in taking Hacienda Santa Fé, going so far as to disarm the Hacienda Santa Fé’s security guards.¹²
- 13) Hacienda Santa Fé was looted, its crops, avocado orchards, and facilities destroyed, and its land was redistributed in smaller lots to others who farmed it.¹³ This was part of an ongoing systemic practice in Nicaragua where the parapolice and paramilitary forces invasions are tolerated by the national

⁷ Expert Statement of Prof. Justin Wolfe– Memorial –ENG at ¶ 28 (**CES-02**).

⁸ Expert Statement of Prof. Justin Wolfe– Memorial –ENG at ¶ 40 (**CES-02**).

⁹ Expert Statement of Prof. Justin Wolfe– Memorial –ENG at ¶ 60 (**CES-02**).

¹⁰ See also the Expert Statement of Prof. Justin Wolfe– Memorial – ENG at ¶ 50 (**CES-02**). The statement from Francisco Diaz is discussed below. See Transcript -Dagbladet TV interview to Francisco Diaz, Director General of the Nicaraguan National Police, uploaded February 4, 2019 (**C-0133-SPA/ENG**); see also Dagbladet TV interview to Francisco Diaz, Director General of the Nicaraguan National Police, uploaded February 4, 2019 (**C-0132-SPA**).

¹¹ Witness Statement of Luis Gutierrez – Memorial – SPA at ¶ 34 (**CWS-02**).

¹² Witness Statement of Luis Gutierrez – Memorial – SPA at ¶ 49-50 (**CWS-02**).

¹³ Witness Statement of Luis Gutierrez – Memorial – SPA at ¶ 56-58 (**CWS-02**).

police and generally sanctioned by regional police commanders to deprive lawful landowners of their property.¹⁴

- 14) Witnesses to the invasion describe how the paramilitaries intended to form a cooperative called El Pavón to facilitate land redistribution by transferring the Hacienda Santa Fe's legal title.¹⁵ This process of land redistribution was done at gunpoint. There was no legal process applied. No court hearing or application of Nicaraguan domestic law. No lawful process known to Nicaraguan law was followed. The Investor lost its Investment through the use of force applied by those working for the State. The rule of law was replaced with the "rule of the jungle."
- 15) The measures taken by Nicaragua constituted a flagrant abuse of process, a failure of good faith, a total abnegation of the rule of law and human rights, and a breach of the obligation of full protection and security.
- 16) The measures raised in this claim are shocking. The paramilitaries engaged in death threats against Inagrosa's management.¹⁶ When they could not find the management, they sent out death squads to locate and, if found, put to death, Inagrosa's senior management.¹⁷ Thankfully none of the management was killed, but they underwent deeply traumatic experiences.

¹⁴ Expert Statement of Prof. Justin Wolfe– Memorial – ENG at ¶ 65 (**CES-02**).

¹⁵ El Pavón was an old traditional name used for the area around Hacienda Santa Fe. That was the name used by the paramilitary invaders after the taking of the lands. Witness Statement of Luis Gutierrez – Memorial – SPA at ¶ 62 (**CWS-02**).

¹⁶ Witness Statement of Carlos J. Rondón – Memorial – ENG at ¶¶81,103-104,110 (**CWS-01**) and Witness Statement of Luis Gutierrez – Memorial – SPA at ¶¶76,93 115,135 (**CWS-02**).

¹⁷ Witness Statement of Luis Gutierrez – Memorial – SPA at ¶ 76, 93, 113 (**CWS-02**); Witness Statement of Jaime Francisco Henrriquez Cruz – Memorial – SPA at ¶ 58- 59 (**CWS-06**); Witness Statement of Carlos J. Rondón – Memorial – ENG at ¶12, and ¶¶102-105. (**CWS-01**).

- 17) This arbitration claim involves the taking and destruction of Riverside's Investment under the CAFTA.¹⁸ The extraordinary circumstances surrounding the taking and destruction of the Hacienda Santa Fé, located in Jinotega, Nicaragua, are grossly inconsistent with the Treaty.
- 18) The deprivation to the Investor, Riverside, and its Investment, Inagrosa, caused catastrophic losses due to the outright seizure of Riverside's Nicaraguan business at Hacienda Santa Fé. There were also profoundly destructive impacts on a private wildlife preserve under the environmental stewardship of Inagrosa's management that contained a sustainable forest that included valuable and rare hardwood species that would have been sustainably harvested.¹⁹ The massive deforestation put many environmental species at risk and destroyed Inagrosa's investment in the forest.²⁰
- 19) CAFTA investment protections were created to protect foreign investors from these forms of internationally unlawful activity. The CAFTA prohibits such grossly improper practices from disrupting commercial certainty and cross-border investment. The measures impugned in this claim are contrary to the core of international law, which is reflected in the obligations in CAFTA Chapter Ten.

¹⁸ List of the ICSID Contracting States and Other Signatures of the ICSID Convention, June 9, 2020 (**C-004-ENG**). US Proclamation 7987 of February 28, 2006, Vol 71, US Federal Register No. 41 at 10827, March 2, 2006, (**C-0005-ENG**).

¹⁹ Witness Statement of Carlos J. Rondón – Memorial – ENG at ¶¶ 10, 53-60 (**CWS-01**).

²⁰ Witness Statement of Carlos J. Rondón – Memorial – ENG at ¶ 233 (**CWS-01**).

A. The CAFTA Claim

- 20) In 2006, CAFTA came into force.²¹ This Treaty established investment treaty rights for U.S. citizens who invested in Nicaragua. In particular, as it relates to Nicaragua:
- a) Article 10.3 (**National Treatment**) of the CAFTA provides for no less favorable treatment to investors of another Party as Nicaragua accords to Nicaraguan investors in like circumstances concerning the establishment, acquisition, expansion, management, conduct, operation, and sale or other disposition of investments in its territory.
 - b) Article 10.4 (**Most Favored Nation Treatment**) of the CAFTA provides for no less favorable treatment by Nicaragua to investors of another Party as it accords to investors of any other Party or of any non-Party concerning the establishment, acquisition, expansion, management, conduct, operation, and sale or other disposition of investments in its territory.
 - c) Article 10.5 of the CAFTA establishes an obligation by Nicaragua to provide **fair and equitable treatment** to investments owned by American investors; and
 - d) Article 10.7 of the CAFTA provides immediate compensation upon property **expropriation**.
- 21) This claim raises issues of uncompensated expropriation (contrary to CAFTA Article 10.7), breach of National Treatment and MFN Treatment (contrary to CAFTA Articles 10.3 and 10.4) and a breach of customary international law including fair and equitable treatment and full protection and security (contrary to CAFTA Article 10.5).

²¹ Instrument to OAS ratifying CAFTA for Nicaragua, 1 April 2006 (**C-0001-SPA**).

1. MFN violations

- 22) The CAFTA establishes a Most Favored Nation treatment (MFN) obligation upon Nicaragua. Under this obligation in CAFTA Article 10.4, Nicaragua must provide treatment no less favorable to the treatment it provides in like circumstances to investments of investors from the United States.
- 23) As detailed below, Nicaragua has offered more favorable treatment to Russian investors with investments in Nicaragua than it has offered to Americans under the CAFTA.
- 24) States are sovereign. The International Court of Justice has confirmed that states can freely extend treaty protections under the fair and equitable treatment category beyond what is required by customary international law.²²
- 25) Nicaragua is a sovereign state and is entitled to enter into treaties that provide better treatment to the Russian Federation than it provides under the CAFTA. The MFN obligation in the CAFTA automatically extends that better treatment granted by Nicaragua to Russia in the Russian Treaty (entered into well after the CAFTA came into force) to investors and investments from the CAFTA Parties.
- 26) The effect of better treatment under the Russian Treaty is to automatically make the expropriation and fair and equitable treatment obligations autonomous rather than restricted to customary international law, as otherwise would occur under the CAFTA alone. This issue is reviewed in detail against the terms of the CAFTA And the Russian treaty in Part IV of this Memorial below. This Tribunal must give effect under the CAFTA to the sovereign

²² Ahmadou Sadio Diallo (Guinea v Democratic Republic of Congo), Preliminary Objections Judgment, 2007 ICJ 582 at ¶ 60 (CL-0164-ENG).

decision of Nicaragua to extend broader protections than those under customary international law.

- 27) In particular, the MFN obligation will have an impact on the following:
- a) The meaning of expropriation in CAFTA Article 10.7.
 - b) the meaning of fair and equitable treatment in CAFTA Article 10.5
 - c) the meaning and limitations on MFN and National Treatment in CAFTA Articles 10.3 and 10.4.
 - d) The definition of investment in the CAFTA and the basis for filing required consents and waivers, if any.

b) Expropriation

- 28) CAFTA Article 10.7 required Nicaragua to provide Inagrosa and its investors with fair market value compensation upon direct or indirect expropriation. The evidence in this arbitration demonstrates that Nicaragua failed to follow due process, the rule of law and fairness, and to provide compensation upon expropriation. There was no adequate protection for the rule of law and fundamental fairness issues in violation of the CAFTA. As detailed in this Memorial, Nicaragua failed to meet its obligations regarding national and most favored treatment.
- 29) The meaning of expropriation obligations is well known and has been well canvassed by international tribunals, including CAFTA tribunals.
- 30) CAFTA Article 10.7 and Annex 10-C only oblige states to provide compensation for expropriations under customary international law. There are detailed tests concerning indirect seizures of land. However, all of those limitations are inapplicable in this claim due to Nicaragua's sovereign decision to provide better treatment on expropriation under the Russian BIT.

- 31) As detailed below, Nicaragua has offered more favorable treatment to Russian investors with investments in Nicaragua than it has offered to Americans under the CAFTA. The MFN obligation in the CAFTA operates to extend the better treatment granted to Russians to investors and investments from CAFTA Party states.

c) Fair and Equitable Treatment

- 32) The CAFTA required Nicaragua to provide Inagrosa and its investors with fair and equitable treatment and compensation upon expropriation. The evidence in this arbitration demonstrates that Nicaragua failed to follow due process, the rule of law and fairness, and to provide compensation upon expropriation. There was no adequate protection for the rule of law and fundamental fairness issues in violation of the CAFTA. As detailed in this Memorial, Nicaragua failed to meet its obligations regarding national and most favored treatment.
- 33) The meaning of the international standard of treatment in CAFTA is well known and has been well canvassed by international tribunals, including CAFTA tribunals.
- 34) CAFTA Article 10.5 and Annex 10-B only oblige states to provide fair and equitable treatment as it is known under customary international law. However, that limitation has been removed due to the better treatment in the Russian BIT.
- 35) As detailed below, Nicaragua has offered more favorable treatment to Russian investors with investments in Nicaragua than it has offered to Americans under the CAFTA. Nicaragua provides better treatment to Investors from the Russian Federation than it provides under the CAFTA concerning fair and equitable treatment. The MFN obligation in the CAFTA operates to extend the better treatment granted to Russians to investors and investments from CAFTA Party states.

- 36) In this obligation, Nicaragua must respect the autonomous standard of fair and equitable treatment to the American Investor and its investments, as Nicaragua is obliged to do so for Russian Investors and their investments in Nicaragua.
- 37) The most cursory review of the facts indicates that the treatment imposed by Nicaragua upon the Investor was egregiously unjust and discriminatory and falls below the threshold for fair and equitable treatment.

d) National Treatment and MFN

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

e) The definition of investment and procedural matters

- 39) Article 10.28 of the CAFTA defines the term “**investment**” in relevant part as follows:

investment means every asset that an investor owns or controls, directly or indirectly, that has the characteristics of an investment, including such characteristics as the commitment of capital or other resources, the expectation of gain or profit, or the assumption of risk. Forms that an investment may take include:

- (a) an enterprise.
(b) shares, stock, and other forms of equity participation in an enterprise.²³

²³ Dominican Republic - Central American Free Trade Agreement (CAFTA) signed on August 5, 2004 (CL-0001-ENG).

- 40) The term “investment” covers every asset that an investor owns or controls, directly or indirectly, and has the characteristics of an investment. The term “includes” confirms that this is not an exhaustive list. It is merely illustrative.
- 41) Riverside’s investment in Inagrosa is an “investment” covered under the Treaty. Riverside owns 95% of the shares of Inagrosa.²⁴ Riverside has controlled Inagrosa since 2003.²⁵ Inagrosa, as a company in Nicaragua, qualifies as an enterprise.²⁶ The equity participation of Riverside in the shares of Inagrosa meets the definitions of an investment.
- 42) Riverside meets the characterization test in Article 25 of the ICSID convention for its investment. This investment was for a business purpose and with the expectation of gain. All of these property interests constitute investments under the CAFTA. The risk, amount, duration, and impact upon the economic development and diversification of the Nicaraguan export economy meet the requirements of investment under Article 25(1) of the ICSID Convention and the CAFTA requirement (to the extent that it applies).²⁷
- 43) However, the definition of investment under the Russian BIT means that only the ICSID definition needs to be assessed – as there is no characterization test of investments under the Russian BIT.
- 44) On March 19, 2021, Riverside filed a CAFTA Notice of Arbitration for damages under CAFTA Article 10.16 against the Republic of Nicaragua over the unlawful confiscation of an avocado plantation and avocado processing facility in Nicaragua owned and controlled by an American Investor in August of 2018.

²⁴ Inagrosa Share Certificate No. 23 dated August 28, 2020 (**C-0053-SPA**).

²⁵ Witness Statement of Melvin Winger – Memorial – ENG at ¶30 (**CWS-04**); Witness Statement of Melva Jo Winger de Rondón – Memorial – ENG at ¶ 37 (**CWS-03**).

²⁶ Certificate of active and legally valid status in favor of Inagrosa issued by the Masaya Property Registry dated December 16, 2019 (**C-0056-SPA**).

²⁷ See the discussion below in the Jurisdiction Section.

The claim is filed under the ICSID Convention and the 2006 International Centre for Settlement of Investment Disputes (ICSID) Convention Rules.

- 45) As set out in this Memorial, Riverside seeks damages of not less than **US\$644,098,011** plus an additional US\$45 million in moral damages (for a total claim of not less than **US\$689,098,011**).
- 46) Riverside owns and controls Hacienda Santa Fé, located in Jinotega, Nicaragua. Inagrosa owns this property.²⁸ Riverside controls²⁹ and owns Inagrosa, the registered owner of the 12,248,251.99 square meters plantation (an area of approximately 1224.8-hectares).³⁰
- 47) Inagrosa was a business innovator. It developed and cultivated Hass avocados in Jinotega for sale in export markets.³¹ Inagrosa had a full avocado nursery with developed nursery stock to permit additional local farms to grow Hass avocados to be processed and marketed by Hacienda Santa Fé for export sale.³²
- 48) Inagrosa played an essential role in enhancing and diversifying the Jinotega region from its dependence on a coffee-based agricultural economy.³³ In 2018, Inagrosa was poised to be Nicaragua's largest avocado plantation and processor.³⁴ Of the approximately 1225 hectares area of Hacienda Santa Fé,

²⁸ Public Auction Certificate No. 43, December 15, 1997 (**C-0042-SPA**); Forced Sale Agreement of Hacienda Santa Fe (Public Instrument No. 13, dated April 29, 1998) (**C-0173-SPA**).

²⁹ Inagrosa Share Certificate No. 22, August 28, 2022 (**C-0052-SPA**); Inagrosa Share Certificate No. 23, August 28, 2022 (**C-0053-SPA**).

³⁰ Literal Certificate of Property Hacienda Santa Fe issued by the Jinotega Property Registry, December 17, 2019 (**C-0080-SPA**); Related Certificate of Property Hacienda Santa Fe issued by the Jinotega Property Registry dated June 30, 2022 at 0001037 (**C-0060-SPA**).

³¹ Witness Statement of Carlos J. Rondón – Memorial – ENG at ¶192 (**CWS-01**).

³² Witness Statement of Carlos J. Rondón – Memorial – ENG at ¶ 196 (**CWS-01**).

³³ Witness Statement of Carlos J. Rondón – Memorial – ENG at ¶ 7 (**CWS-01**).

³⁴ Witness Statement of Carlos J. Rondón – Memorial – ENG at ¶ 29 (**CWS-01**).

a 2015 hydrology study determined that Hacienda Santa Fé had the irrigation capacity to support 1,050 hectares of avocado trees.³⁵

- 49) At the time of the taking of its lands, Inagrosa had plans underway to plant 700 hectares with Hass avocados.³⁶ Inagrosa planted 40 hectares of avocados³⁷ and was expanding its production by 240,000 avocado trees,³⁸ including 140,000 new avocado saplings on 200 hectares. Inagrosa's Hass avocado harvest was nearly ready for picking at the time of the invasion.³⁹ Inagrosa had approximately 800,000 kg of Hass Avocado fruit in its avocado orchards ready for harvest.⁴⁰ In addition, it had 7,000 grafted avocado saplings and 3,000 non-grafted avocado trees maturing in its in-house nursery.⁴¹ It was preparing to plant 240,000 new Hass avocado trees over the following 12 months as part of its overall expansion to 1000 hectares of Hass avocado trees.⁴² Hacienda Santa Fé had a corporate office, production facilities, residences for the field workers and administrative personnel, a weather data station, a warehouse, a mechanical workshop, a shed, and three nursery facilities.⁴³

³⁵ Hydrology Study at Hacienda Santa Fe prepared by Engineer Federico Sanabria at 0000796 (**C-0087-SPA**); Witness Statement of Carlos J. Rondón – Memorial – ENG at ¶ 132 (**CWS-01**).

³⁶ Witness Statement of Carlos J. Rondón – Memorial – ENG at ¶ 207 (**CWS-01**); Management Representation Letter from Riverside Coffee, LLC to Richter Inc., September 12, 2022 at ¶28 (**C-0055-ENG**).

³⁷ Witness Statement of Carlos J. Rondón – Memorial – ENG at ¶ 130 (**CWS-01**); Management Representation Letter from Riverside Coffee, LLC to Richter Inc., September 12, 2022 at ¶9 (**C-0055-ENG**)

³⁸ Management Representation Letter from Riverside Coffee, LLC to Richter Inc., September 12, 2022 at ¶32 (**C-0055-ENG**).

³⁹ Witness Statement of Carlos J. Rondón – Memorial – ENG at ¶ 177 (**CWS-01**).

⁴⁰ Witness Statement of Carlos J. Rondón – Memorial – ENG at ¶ 202 (**CWS-01**).

⁴¹ Witness Statement of Carlos J. Rondón – Memorial – ENG at ¶ 71 (**CWS-01**).

⁴² Management Representation Letter from Riverside Coffee, LLC to Richter Inc., September 12, 2022 at ¶¶ 28, 32 (**C-0055-ENG**).

⁴³ Witness Statement of Carlos J. Rondón – Memorial – ENG at ¶ 32 (**CWS-01**); Witness Statement of Luis Gutierrez – Memorial – SPA at ¶ 25 (**CWS-02**).

- 50) In addition to the development of Hass avocado cultivation, Hacienda Santa Fé had a protected bio-reserve forest of over 35,000 hardwood trees being maintained for sustainable harvest.⁴⁴
- 51) Avocado trees take approximately three years to produce mature fruit from grafting⁴⁵. Inagrosa planted 16,000 avocado trees in January 2014.⁴⁶ Avocado harvest occurs once a year in Jinotega between July and November.⁴⁷ The first avocado crop in 2017 was successful.⁴⁸ That crop was tested for quality.⁴⁹ The test results showed high ratings for dry matter content.⁵⁰ A successful 2018 harvest from the 16,000 mature Hass avocado trees was about to commence at the beginning of June 2018.⁵¹
- 52) Inagrosa management sought to raise capital to accelerate the development of over 672,000 Hass avocado trees⁵² on 760 hectares⁵³ of the 1,000 hectares of land available for Hass avocado cultivation at Hacienda Santa Fé.⁵⁴

⁴⁴ Witness Statement of Luis Gutierrez – Memorial – SPA at ¶ 31 (**CWS-02**).

⁴⁵ Witness Statement of Carlos J. Rondón – Memorial – ENG at ¶ 11, 119 (**CWS-01**); Management Representation Letter from Riverside Coffee, LLC to Richter Inc., September 12, 2022 at ¶16 (**C-0055-ENG**).

⁴⁶ Witness Statement of Carlos J. Rondón – Memorial – ENG at ¶130 (**CWS-01**); Witness Statement of Luis Gutierrez – Memorial – SPA at ¶ 150 (**CWS-02**); Management Representation Letter from Riverside Coffee, LLC to Richter Inc., September 12, 2022 at ¶ 16 (**C-0055-ENG**).

⁴⁷ Witness Statement of Carlos J. Rondón – Memorial – ENG at ¶ 171 (**CWS-01**).

⁴⁸ Witness Statement of Carlos J. Rondón – Memorial – ENG at ¶ 25 (**CWS-01**).

⁴⁹ Witness Statement of Carlos J. Rondón – Memorial – ENG at ¶ 76 (**CWS-01**); Laquisa Laboratory analysis results on 2017 avocado crop produced at Hacienda Santa Fe (**C-0054-SPA**).

⁵⁰ Witness Statement of Carlos J. Rondón – Memorial – ENG at ¶ 76 (**CWS-01**); Laquisa Laboratory 2017 avocado crop test analysis results on the avocado crop produced at Hacienda Santa Fe, November 17, 2017 (**C-0054-SPA**).

⁵¹ Witness Statement of Carlos J. Rondón – Memorial – ENG at ¶ 178 (**CWS-01**).

⁵² Witness Statement of Carlos J. Rondón – Memorial – ENG at ¶ 201 (**CWS-01**).

⁵³ Witness Statement of Carlos J. Rondón – Memorial – ENG at ¶ 200 (**CWS-01**).

⁵⁴ Witness Statement of Carlos J. Rondón – Memorial – ENG at ¶196 (**CWS-01**).

- 53) Ultimately, Inagrosa was not reliant on capital from outside its existing ownership for this expansion to occur.⁵⁵ Riverside was prepared to provide the necessary capital if satisfactory terms or amounts of outside investment were not obtained or if more capital was necessary.⁵⁶ The expansion of the operations at Hacienda Santa Fé was underway in 2018 without capital investment from outside of the existing Investor.⁵⁷
- 54) Management projected that Inagrosa would produce over 30 million kilograms of Hass avocados and generate almost US\$90 million in revenue through the expansion.⁵⁸

B. This Memorial

- 55) Riverside submits together with its Memorial:
- a) The Witness Statement of **Carlos Rondón (CWS-01)**, Inagrosa's Chief Operating Officer. Mr. Rondón addresses operational matters in connection with Inagrosa.
 - b) The Witness Statement of **Luis Gutierrez (CWS-02)**, Inagrosa's Chief Agronomist and administrator. Mr. Gutierrez addresses agricultural operational matters in connection with Inagrosa and his knowledge of the seizure of Hacienda Santa Fé.

⁵⁵ Witness Statement of Carlos J. Rondón – Memorial – ENG at ¶ 208 (**CWS-01**); Management Representation letter from Riverside Coffee, LLC to Richter Inc. executed September 12, 2022, at ¶31 (**C-0055-ENG**).

⁵⁶ Witness Statement of Melva Jo Winger de Rondón – Memorial – ENG at ¶ 35 (**CWS-03**); Witness Statement of Mona Winger – Memorial – ENG at ¶27 (**CWS-05**).

⁵⁷ Witness Statement of Carlos J. Rondón – Memorial – ENG at ¶ 208 (**CWS-01**). Management Representation letter from Riverside Coffee, LLC to Richter Inc. executed September 12, 2022 at ¶ 31 (**C-0055-ENG**).

⁵⁸ Witness Statement of Carlos J. Rondón – Memorial – ENG at ¶ 208 (**CWS-01**); Management Representation letter from Riverside Coffee, LLC to Richter Inc., September 12, 2022, at ¶ 20 (**C-0055-ENG**).

- c) The Witness Statement of **Melva Jo Winger de Rondón (CWS-03)**, the owner of 100% of the shares in Riverside and the wife of Carlos Rondón. Mrs. Rondón was Riverside's representative to Inagrosa starting in 2013 and served as Inagrosa's Corporate Secretary. She addresses Inagrosa's shareholder composition and Riverside's relationship to Inagrosa in the period before the taking.
- d) The Witness Statement of **Melvin Winger (CWS-04)**, the father of Melva Jo Winger de Rondón, long-time Operating Manager of Riverside, and former President of Inagrosa. Mr. Winger addresses Riverside's investment in Inagrosa.
- e) The Witness Statement of **Mona Winger (CWS-05)**, the mother of Melva Jo Winger de Rondón. Mrs. Winger was a longtime investor in Inagrosa through the provision of debt financing. That holding became part of Riverside's interest in 2016. Mrs. Winger discusses her investment in Inagrosa before the unlawful taking of Hacienda Santa Fé.
- f) The Witness Statement of **Jaime Henrriquez Cruz "Jaime Vivas" (CWS-06)**, former field operations supervisor at Hacienda Santa Fé who witnessed the invasion and atrocities at Hacienda Santa Fé carried out by the paramilitaries. Mr. Vivas' legal name is Jaime Francisco Henrriquez Cruz, but he was known in the Hacienda Santa Fé as "Jaime Vivas." He experienced direct death threats from armed paramilitaries due to his role with Inagrosa. He suffers from anxiety and other forms of suffering. Mr. Vivas fled Nicaragua out of fear for his physical safety.
- g) The Witness Statement of **Tom Miller (CWS-07)**, a third-generation co-owner of Miller Veneer Inc., a well-established hardwood veneer manufacturer based in Indiana, who visited the private forest at the

Hacienda Santa Fé and evaluated the hardwood trees in the private forest.

- h) The Expert Valuation Statement of **Vimal Kotecha (CES-1)** from Richter Inc., a certified business valuator who has prepared a report on the valuation of damages that concludes that the midpoint value of damages solely arising from Nicaragua's wrongful actions (contrary to the Chapter Ten of the CAFTA).
- i) The Expert Statement of Professor **Justin Wolfe (CES-2)**. Professor Wolfe is a historian specializing in Latin American politics from Tulane University. He has filed an expert report on Nicaragua's use of paramilitary forces to carry out governmental functions, the use of government authority to address political dissent, the destruction of the rule of law, and the erosion of civil, political, and religious expression rights in Nicaragua.
- j) The Expert Report of **Carlos Pfister (CES-03)**, a business consultant from Promofin in Mexico. Mr. Pfister provided a report on Mexican agricultural land values for Hass avocado producing lands in Mexico.

C. The Invasion of Hacienda Santa Fé

- 56) In June 2018, between 200 and 300 armed persons led by paramilitaries invaded the upper part of Hacienda Santa Fé.⁵⁹ They occupied upper part of Hacienda Santa Fé and took possession of the facilities.⁶⁰

⁵⁹ Witness Statement of Luis Gutierrez – Memorial – SPA at ¶ 35 (**CWS-02**); Witness Statement of Carlos J. Rondón – Memorial – ENG at ¶ 76 (**CWS-01**).

⁶⁰ Witness Statement of Luis Gutierrez – Memorial – SPA at ¶ 35 (**CWS-02**); Witness Statement of Jaime Francisco Henrriquez Cruz – Memorial – SPA at ¶ 16 (**CWS-06**); Witness Statement of Carlos J. Rondón – Memorial – ENG at ¶ 76 (**CWS-01**).

- 57) The occupation of Hacienda Santa Fé commenced in the first wave (starting on June 16, 2018).⁶¹ Management regained control for a few days in August 2018⁶², but the total occupation was made permanent not later than August 18, 2018.⁶³ Inagrosa management has been unable to control Hacienda Santa Fé since August 18, 2018.⁶⁴
- 58) The first wave of unlawful occupiers (starting on June 16, 2018) proclaimed during their seizure of Hacienda Santa Fé that they were sent by the Government of Reconciliation and National Unity (the term used for the current Government of the Republic of Nicaragua headed by President Daniel Ortega) to take the property.⁶⁵
- 59) Inagrosa Management called upon the local police to assist in repulsing the paramilitaries and the invaders.⁶⁶ Astonishingly, the local police did not assist in evicting the paramilitaries or the persons under their control.⁶⁷

⁶¹ Witness Statement of Luis Gutierrez – Memorial – SPA at ¶ 35 (**CWS-02**); Witness Statement of Carlos J. Rondón – Memorial – ENG at ¶ 76 (**CWS-01**).

⁶² Witness Statement of Luis Gutierrez – Memorial – SPA at ¶¶ 106-109; (**CWS-02**); Witness Statement of Jaime Francisco Henríquez Cruz – Memorial – SPA at ¶ 53-55; (**CWS-06**); Witness Statement of Carlos J. Rondón – Memorial – ENG at ¶ 48 (**CWS-01**).

⁶³ Witness Statement of Luis Gutierrez – Memorial – SPA at ¶ 120 (**CWS-02**); Witness Statement of Carlos J. Rondón – Memorial – ENG at ¶ 94 (**CWS-01**).

⁶⁴ Witness Statement of Carlos J. Rondón – Memorial – ENG at ¶¶ 99-103 (**CWS-01**). Witness Statement of Luis Gutierrez – Memorial – SPA at ¶ 63 (**CWS-02**).

⁶⁵ Witness Statement of Luis Gutierrez – Memorial – SPA at ¶ 42 (**CWS-02**); Witness Statement of Jaime Francisco Henríquez Cruz – Memorial – SPA at ¶ 16 (**CWS-06**); Witness Statement of Carlos J. Rondón – Memorial – ENG at ¶ 76 (**CWS-01**).

⁶⁶ Witness Statement of Luis Gutierrez – Memorial – SPA at ¶ 40 (**CWS-02**); Witness Statement of Carlos J. Rondón – Memorial – ENG at ¶ 77 (**CWS-01**).

⁶⁷ Witness Statement of Carlos J. Rondón – Memorial – ENG at ¶ 78 (**CWS-01**).

- 60) Instead, the police aided the paramilitaries by disarming the guards protecting Hacienda Santa Fé.⁶⁸
- 61) Paramilitaries led the unlawful occupiers. There was a close connection between the government and paramilitary leaders, which is discussed below. As noted below, Nicaragua's national police chief confirmed that the paramilitaries were deputized law enforcement agents.⁶⁹ Those armed paramilitaries who invaded and occupied Hacienda Santa Fé were proclaimed by the Government of Reconciliation and National Unity (the name used for the current Government of the Republic of Nicaragua headed by President Daniel Ortega), and they claimed that Hacienda Santa Fé was now their property.⁷⁰
- 62) On July 16, 2018, the second wave of 60 additional armed invaders led by paramilitaries entered Hacienda Santa Fe.⁷¹ The invaders led by the paramilitaries occupied the lower area of Hacienda Santa Fé and took possession of the remaining buildings.⁷² The paramilitaries said that they were

⁶⁸ Witness Statement of Carlos J. Rondón – Memorial – ENG at ¶¶ 49-54 (**CWS-01**); Witness Statement of Carlos J. Rondón – Memorial – ENG at ¶ 79 (**CWS-01**).

⁶⁹ Transcript excerpt of Euronews TV, Interview with Nicaragua's President Daniel Ortega on the Country's Deadly Crisis, Uploaded July 30, 2018 [Minutes 8:40-9:37] (**C-0124-ENG**); Daglabel TV interview to Francisco Diaz, Director General of the Nicaraguan National Police, uploaded February 4, 2019 (**C-0132-SPA**).

⁷⁰ Witness Statement of Luis Gutierrez – Memorial – SPA at ¶ 42 (**CWS-02**); Witness Statement of Jaime Francisco Henrriquez Cruz – Memorial – SPA at ¶ 16 (**CWS-06**); Witness Statement of Carlos J. Rondón – Memorial – ENG at ¶ 76 (**CWS-01**).

⁷¹ Witness Statement of Luis Gutierrez – Memorial – SPA at ¶ 64 (**CWS-02**); Witness Statement of Jaime Francisco Henrriquez Cruz – Memorial – SPA at ¶23 (**CWS-06**); Witness Statement of Carlos J. Rondón – Memorial – ENG at ¶ 80 (**CWS-01**).

⁷² Witness Statement of Luis Gutierrez – Memorial – SPA at ¶ 64 (**CWS-02**); Witness Statement of Jaime Francisco Henrriquez Cruz – Memorial – SPA at ¶ 23 (**CWS-06**); Witness Statement of Carlos J. Rondón – Memorial – ENG at ¶ 80 (**CWS-01**).

sent to occupy Hacienda Santa Fé under the order of Leónidas Centeno, Mayor of the Municipality of Jinotega.⁷³

- 63) The armed paramilitaries led invaders who broke into Hacienda Santa Fé buildings and violently removed the workers from the rooms.⁷⁴ Ciro Montenegro Cruz and five other paramilitaries violently kicked open the room where field supervisor and member of senior management Jaime Francisco Henrriquez Cruz (known in Hacienda Santa Fé as “Jaime Vivas”) was located and threw him out of the room.⁷⁵ The paramilitaries led the invaders into breaking into the rest of the rooms by force.⁷⁶ They dispossessed the workers in the same violent manner.⁷⁷ The paramilitaries verbally and physically assaulted the workers.⁷⁸ They beat a security guard to disarm him.⁷⁹ The paramilitaries forced their way into private living quarters, taking a computer from one of the rooms.⁸⁰
- 64) The paramilitaries and the invaders made an inventory of the riches at upper Hacienda Santa Fé.⁸¹ Jaime Vivas witnessed the paramilitaries making an inventory of the looting of Hacienda Santa Fé.⁸² Mr. Vivas saw the inventory

⁷³ Witness Statement of Luis Gutierrez – Memorial – SPA at ¶ 73 (CWS-02); Witness Statement of Carlos J. Rondón – Memorial – ENG at ¶ 80 (CWS-01).

⁷⁴ Witness Statement of Jaime Francisco Henrriquez Cruz – Memorial -SPA at ¶¶ 25-26. (CWS-06).

⁷⁵ Witness Statement of Jaime Francisco Henrriquez Cruz – Memorial -SPA at ¶¶ 25-26. (CWS-06).

⁷⁶ Witness Statement of Jaime Francisco Henrriquez Cruz – Memorial -SPA at ¶ 26 (CWS-06).

⁷⁷ Witness Statement of Jaime Francisco Henrriquez Cruz – Memorial -SPA at ¶ 26 (CWS-06).

⁷⁸ Witness Statement of Jaime Francisco Henrriquez Cruz – Memorial -SPA at ¶ 27 (CWS-06).

⁷⁹ Witness Statement of Luis Gutierrez – Memorial – SPA at ¶¶ 66-72 (CWS-02); Witness Statement of Jaime Francisco Henrriquez Cruz – Memorial -SPA at ¶ 27 (CWS-06).

⁸⁰ Witness Statement of Luis Gutierrez – Memorial – SPA at ¶ 75 (CWS-02); Witness Statement of Jaime Francisco Henrriquez Cruz – Memorial -SPA at ¶ 28 (CWS-06).

⁸¹ Witness Statement of Luis Gutierrez – Memorial – SPA at ¶ 48 (CWS-02).

⁸² Witness Statement of Jaime Francisco Henrriquez Cruz – Memorial -SPA at ¶ 28 (CWS-06) Witness Statement of Luis Gutierrez – Memorial – SPA at ¶ 48 (CWS-02).

document preparations underway.⁸³ Mr. Vivas witnessed how the paramilitaries violently opened the agrochemical warehouse at Hacienda Santa Fé looking for loot.⁸⁴

- 65) The paramilitaries forcibly gathered the Hacienda Santa Fé workers to inform them that they were now in control of Hacienda Santa Fé.⁸⁵ The paramilitaries also proclaimed that no foreign “son of a bitch” (referring to Carlos Rondón) had anything to do with the property and that the property [Hacienda Santa Fé] was now theirs.⁸⁶
- 66) Municipal government officials and other government officials also played a direct role in facilitating the seizure and ongoing control of the private lands and facilities for the occupiers’ benefit.⁸⁷ The final occupation of Hacienda Santa Fé was completed on August 18, 2018.⁸⁸
- 67) As a result of the actions by the paramilitaries, Hacienda Santa Fé lost its avocado crops, its avocado nursery facilities, and processing facilities in the years 2018 – 2022.⁸⁹ In addition, Inagrosa lost future avocado crops for at least an additional three years necessary to replant to harvestable products.⁹⁰ Inagrosa also suffered significant deforestation of valuable exotic wood forests

⁸³ Witness Statement of Jaime Francisco Henrriquez Cruz – Memorial -SPA at ¶ 28 (CWS-06).

⁸⁴ Witness Statement of Jaime Francisco Henrriquez Cruz – Memorial -SPA at ¶ 26 (CWS-06).

⁸⁵ Witness Statement of Jaime Francisco Henrriquez Cruz – Memorial -SPA at ¶ 29 (CWS-06).

⁸⁶ Witness Statement of Jaime Francisco Henrriquez Cruz – Memorial -SPA at ¶ 29 (CWS-06).

⁸⁷ Witness Statement of Luis Gutierrez – Memorial – SPA at ¶¶ 98-104, 106-107, 125 (CWS-02); Witness Statement of Jaime Francisco Henrriquez Cruz – Memorial -SPA at ¶¶ 43-52 (CWS-06).

⁸⁸ Witness Statement of Luis Gutierrez – Memorial – SPA at ¶ 118 (CWS-02); Witness Statement of Jaime Francisco Henrriquez Cruz – Memorial -SPA at ¶ 62-63 (CWS-06); Witness Statement of Carlos J. Rondón – Memorial – ENG at ¶ 94 (CWS-01).

⁸⁹ Witness Statement of Carlos J. Rondón – Memorial – ENG at ¶ 101 (CWS-01).

⁹⁰ Witness Statement of Carlos J. Rondón – Memorial – ENG at ¶ 101 (CWS-01).

cultivated in a private sustainable biosphere located on the Hacienda Santa Fé grounds.⁹¹

- 68) Similar invasions have occurred across Nicaragua as part of the systemic Nicaraguan government plans to direct government supporters to take private property and use wrongfully seized property to reward them.⁹²
- 69) Statements by Nicaraguan President Daniel Ortega⁹³ confirm that the paramilitaries acted on the Nicaraguan government's behalf. On July 30, 2018, in the aftermath of the violence and human rights abuses committed by the Ortega regime, President Ortega granted an interview to Euronews and confirmed:

Interviewer: There are many examples of the paramilitary collaborating with the security forces. The BBC went to Nicaragua to a town and said that they were collaborating with the police without any kind of shame.

President Ortega: No, here what we have is called the voluntary police.

Interviewer: No, but these were masked people because the volunteer police are not masked.

President Ortega: Because the voluntary police in special operations are masked in all the time. There are even countries in Latin America where judges are masked so that they don't get killed.

⁹¹ Witness Statement of Carlos J. Rondón – Memorial – ENG at ¶ 100 (CWS-01); Witness Statement of Luis Gutierrez – Memorial – SPA at ¶ 97 (CWS-02); Management Representation letter from Riverside Coffee, LLC to Richter Inc. September 12, 2022, at ¶ 6 (C-0055-ENG).

⁹² Union of Agricultural Producers (UPANIC) Report On Land Takings dated July 11, 2019 (C-0018-SPA); see also Video: UPANIC President Denounces That The Government Is Behind The Tomatierras, La Trinchera De La Noticias , June 22, 2018 (C-0019-SPA).

⁹³ Video: Euronews, Interview of Nicaragua's President Daniel Ortega on Country's Deadly Crisis July 30, 2018 (C-0031-ENG); Transcript excerpt of Euronews TV, Interview with Nicaragua's President Daniel Ortega on the Country's Deadly Crisis, Uploaded July 30, 2018 [Minutes 8:40-9:37] (C-0124-ENG).

Interviewer: So, these people who define themselves as paramilitaries were still voluntary police?

President Ortega: Yes, that's right. They are volunteer police officers.⁹⁴

- 70) On February 2, 2019, Francisco Diaz, the Nicaraguan National Police Director General, and Jaime Vanegas, Inspector General of the Nicaraguan National Police, admitted:

Police Director General Francisco Diaz: We have what we call the volunteer police. That is not new in the law of the National Police. If you review the National Police Law, the Volunteer Police is established there and also has its specific missions, and this volunteer police participates together with the Professional Police in preventive actions.

Interviewer: It is correct that these what you call volunteer policemen participated against the protesters?

Police Director General Francisco Diaz: But they are duly legalized. They participated as established by our legal norms, not as established by what the Nicaraguan right says.

Interviewer: Why were they wearing masks?

Police Director General Francisco Diaz: No, not all of them were volunteer policemen also our policemen professionals. Legally, it is established that we can use what we call the ski mask to protect their identity. Many of them who were in civilian clothes were not volunteer policemen, they were our professional policemen. Most of them were professional policemen in undercover work.

⁹⁴ Transcript excerpt of Euronews TV, Interview with Nicaragua's President Daniel Ortega on the Country's Deadly Crisis, Uploaded July 30, 2018 [Minutes 8:40-9:37] (C-0124-ENG).

Police Inspector General Jaime Vanegas: who directed all the [police] actions, is a professional policeman, and the volunteer policemen are there for support.⁹⁵

- 71) In addition, since the police⁹⁶ and elected officials⁹⁷ engaged actively in the unlawful taking of Hacienda Santa Fé,⁹⁸ there can be no significant issue of a lack of state responsibility for the unlawful acts arising in this claim.

D. Damages

- 72) The Investor has engaged Vimal Kotecha, a chartered business valuator, from the Toronto office of Richter, Inc., to determine the fair market value of the Investment at the time of the expropriation. As required by Article 10.07 of the CAFTA, the chartered business valuator had provided the fair market value of the Inagrosa business at the time of June 16, 2018 when the taking of Hacienda Santa Fé began to be known.
- 73) In determining the fair market value, Richter Inc. applied a risk-adjusted cash flow to determine the fair market value of the destruction of the Hass avocado business, plus the terminal loss arising from the destruction of the rare hardwood forest.⁹⁹

⁹⁵ Transcript -Dagbladet TV interview to Francisco Diaz, Director General of the Nicaraguan National Police, uploaded February 4, 2019 (**C-0133-SPA/ENG**); see also Dagbladet TV interview to Francisco Diaz, Director General of the Nicaraguan National Police, uploaded February 4, 2019 (**C-0132-SPA**).

⁹⁶ Witness Statement of Luis Gutierrez – Memorial – SPA at ¶¶ 53-54, 129 (**CWS-02**); Witness Statement of Carlos J. Rondón – Memorial – ENG at ¶ 80 (**CWS-01**); Letter from Carlos Rondón to Police Captain Herrera, August 10, 2018 (**C-0012-SPA**).

⁹⁷ Witness Statement of Luis Gutierrez – Memorial – SPA at ¶¶ 98-104, 106-107, 125 (**CWS-02**); Witness Statement of Jaime Francisco Henrriquez Cruz – Memorial -SPA at ¶¶ 43-52 (**CWS-06**); La Gaceta No. 221, List of Elected Citizens- Municipal Elections 2017- Jinotega Department, November 20, 2017 (**C-0130-SPA**).

⁹⁸ Letter from Carlos Rondón to Police Captain Herrera, August 10, 2018 (**C-0012-SPA**).

⁹⁹ Expert Valuation Statement of Vimal Kotecha – Appendix 4 – Methodology at pages 26-29 (**CES-01**).

- 74) The standing timber has been valued at least US\$5.1 million.¹⁰⁰ Tom Miller, from Indiana-based Miller Veneer visited the forest at Hacienda Santa Fé.¹⁰¹ The rare wood veneering company was prepared to purchase the entire supply of granadillo available from the forest.¹⁰²
- 75) Damages suffered by Riverside are discussed in detail in a separate section of this Memorial. Based on the Expert Valuation Statement of Vimal Kotecha (**CES-01**), the damages arising from the taking of Hacienda Santa Fé are assessed at **USD\$629,356,643**.¹⁰³ This fair market value considers the productive capacity of Hacienda Santa Fé, the fact that there were successful avocado harvests and the market value of Hass avocados.
- 76) Table 1 in the Expert Valuation Statement sets out a summary of valuation losses.¹⁰⁴

Table 1 – Net Present Value at different Discount Rates and time periods

| Economic Loss - Summary | |
|--|--------------------|
| in \$USD | |
| Economic Loss, before interest | 437,051,603 |
| Interest ⁽¹⁾ | 207,046,408 |
| Economic Loss, including interest | 644,098,011 |

(1) 9% compounded interest was applied to the Economic Loss from the Expropriation Date.

¹⁰⁰ Witness Statement of Carlos J. Rondón – Memorial – ENG at ¶ 60 (**CWS-01**).

¹⁰¹ Witness Statement of Carlos J. Rondón – Memorial – ENG at ¶ 62 (**CWS-01**); Witness Statement of Tom Miller– Memorial – ENG at ¶ 8 (**CWS-07**).

¹⁰² Witness Statement of Carlos J. Rondón – Memorial – ENG at ¶ 62 (**CWS-01**); Witness Statement of Tom Miller– Memorial – ENG at ¶ 13 (**CWS-07**).

¹⁰³ Expert Valuation Statement of Vimal Kotecha -Table 1 (**CES-01**).

¹⁰⁴ Expert Valuation Statement of Vimal Kotecha – Table 1. (**CES-01**).

- 77) This value does not include claims for non-economic losses, namely the US\$45 million claimed for moral damages. Moral damages reflect harm, stress, humiliation, and suffering arising from the unlawful invasion, the death threats, and the suffering caused to the senior management of Inagrosa. The police and the armed paramilitaries (deputized voluntary national police) made an unlawful mass intrusion into Inagrosa's property and corporate headquarters in Nicaragua. In addition, the paramilitaries, police, and elected officials participating in the invasion caused significant anxiety and suffering to the senior management of the company due to repeated death threats and the use of squads of armed persons with instructions to kill those members of the Inagrosa management.¹⁰⁵ That is precisely the type of situation designed for the awarding of moral damages.
- 78) The Investor also provides an alternative damages model. This model only provides value for limited business expansion that had commenced at the time of the taking. This more limited valuation assesses a fair market value of not less than **USD\$184 million** in the summer of 2018.¹⁰⁶ This is set out in Table 12 to Appendix 9 of the Expert Valuation Statement as follows:

TABLE 12

| Economic Loss - 240 Hectares Summary in \$USD, unless otherwise stated | |
|---|--------------------|
| Economic Loss, before interest | 107,767,905 |
| Interest ⁽¹⁾ | 51,053,371 |
| Economic Loss, including interest | 158,821,277 |
| <i>(1) 9% compounded interest was applied to the Interest</i> | |

¹⁰⁵ These death threats are canvassed in detail below. For example, Witness Statement of Carlos J. Rondón – Memorial – ENG at ¶¶ 81,103-104,110 (**CWS-01**) and Witness Statement of Luis Gutierrez – Memorial – SPA at ¶¶ 76,93 115,135 (**CWS-02**).

¹⁰⁶ Expert Valuation Statement, Appendix 9, Table 12 (**CES-01**).

- 79) This alternative valuation model values the mature Hass avocado orchards and the 200-hectare Hass avocado expansion underway at the time of the Invasion. This economic model does not include the amount of US\$45 million for moral damages. With moral damages (and net of costs for legal representation, disbursements, and arbitration), the total claimed is not less than a range between USD \$204 million.
- 80) Moral damages are claimed in the amount of USD\$45 million. The basis for these damages is discussed below.
- 81) Costs for legal representation and arbitration costs are not included in this total. The Investor will submit such costs at a time noted in the *Procedural Order No. 2* when deemed appropriate by the Tribunal.

E. The American Investor – Riverside Coffee, LLC

- 82) Riverside is a limited liability company that was incorporated in the state of Kansas in 1999.¹⁰⁷ This Kansas company was designed to support the Nicaraguan agricultural investments in Hacienda Santa Fé, a property owned by Inagrosa.¹⁰⁸
- 83) At the time of filing the CAFTA claim, Riverside owned 95% of the shares of Inagrosa¹⁰⁹ (with the remaining 5% owned personally by Carlos Rondón, the

¹⁰⁷ Articles of Incorporation- Riverside Coffee, LLC, June 18, 1999 (C-0040-ENG).

¹⁰⁸ Witness Statement of Melva Jo Winger de Rondón – Memorial – ENG at ¶18 (CWS-03); Witness Statement of Melvin Winger – Memorial – ENG at ¶7 (CWS-04); Witness Statement of Mona Winger – Memorial – ENG at ¶ 9 (CWS-05).

¹⁰⁹ Inagrosa Share Certificate No. 23 dated August 23, 2020 (C-0053-SPA).

Chief Operating Officer of Inagrosa).¹¹⁰ Mr. Rondón was also an Operating Manager of Riverside as of January 1, 2019.¹¹¹

1. Riverside controlled Inagrosa

84) At the time of the Invasion, Riverside controlled more than 50% of Inagrosa's voting shares.¹¹² At the time of the Invasion, Riverside owned 25.5% of Inagrosa shares directly.¹¹³ Melvin Winger owned 25.5% of Inagrosa shares; Carlos Rondón owned 25% of Inagrosa shares, and Ward Nairn - a close friend of Melvin Winger, owned the remaining 24% minority of Inagrosa shares.¹¹⁴

85) On account of U.S. tax considerations after March 2010, Melvin Winger always avoided control of a foreign corporation such as Inagrosa.¹¹⁵ Melvin Winger's Revocable Trust voted his Inagrosa shares with Riverside.¹¹⁶ They and Riverside consistently voted a combined total of 51% of Inagrosa shares, sufficient to allow Riverside to control Inagrosa.¹¹⁷ 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.¹¹⁸

¹¹⁰ Inagrosa Share Certificate No. 22 dated August 23, 2020 (**C-0052-SPA**).

¹¹¹ Amended and Restated Operating Agreement-Riverside Coffee LLC, January 2, 2019 (**C-0140-ENG**); Witness Statement of Carlos J. Rondón – Memorial – ENG at ¶ 223 (**CWS-01**)

¹¹² Witness Statement of Melva Jo Winger de Rondón – Memorial – ENG at ¶¶ 38-39 (**CWS-03**); Witness Statement of Melvin Winger – Memorial – ENG at ¶ 24 (**CWS-04**).

¹¹³ Inagrosa Share Certificate No. 12, August 31, 2004, issued to Riverside Coffee, LLC. (**C-0043-SPA**). Inagrosa Share Certificate No. 15, August 31, 2004, issued to Riverside Coffee, LLC. (**C-0046-SPA**).

¹¹⁴ Witness Statement of Melva Jo Winger de Rondón – Memorial – ENG at ¶ 38 (**CWS-03**).

¹¹⁵ Witness Statement of Melvin Winger – Memorial – ENG at ¶ 26 (**CWS-04**).

¹¹⁶ Witness Statement of Melvin Winger – Memorial – ENG at ¶¶ 25,30 (**CWS-04**) Witness Statement of Melva Jo Winger de Rondón – Memorial – ENG at ¶¶ 39-40. (**CWS-03**).

¹¹⁷ Witness Statement of Melva Jo Winger de Rondón – Memorial – ENG at ¶ 39 (**CWS-03**); Witness Statement of Melvin Winger – Memorial – ENG at ¶¶ 30. (**CWS-04**).

¹¹⁸ Witness Statement of Melva Jo Winger de Rondón – Memorial – ENG at ¶ 39. (**CWS-03**).

- 86) As of January 30, 2013, Melva Jo Winger de Rondón was Riverside's representative before the Inagrosa Board of Directors.¹¹⁹ Melva Jo Winger de Rondón was Riverside's voice and participated actively and fully in the discussions and planning process of the business proposals presented by Inagrosa to the Inagrosa Board of Directors.¹²⁰ Riverside vetted all significant decisions made by the Inagrosa Board of Directors and had the final word.¹²¹
- 87) Melva Jo Winger de Rondón, Corporate Secretary of Inagrosa and Riverside's representative to Inagrosa, had direct knowledge of Riverside's interest in Inagrosa since January 30, 2013.¹²² Mrs. Rondón confirms in her testimony that Riverside consistently voted in combination with the shares held by Ward Nairn and the interests of Melvin Winger and then the Melvin Winger Revocable Trust.¹²³
- 88) Riverside always maintained voting control over Inagrosa.¹²⁴ The Riverside voting bloc ensured that Riverside controlled board decisions at Inagrosa from 2013 onwards.¹²⁵
- 89) Inagrosa's board minutes from 2013 until the last meeting before the June invasion on April 5, 2017, confirm that Riverside voted its shares as a control bloc in each of the ten Inagrosa corporate board meetings over this period.¹²⁶

¹¹⁹ Witness Statement of Melva Jo Winger de Rondón – Memorial – ENG at ¶ 109 (**CWS-03**); Witness Statement of Melvin Winger – Memorial – ENG at ¶15 (**CWS-04**); Inagrosa Shareholder Meeting Minute No.48 dated January 30, 2013 (**C-0126-SPA**).

¹²⁰ Witness Statement of Melva Jo Winger de Rondón – Memorial – ENG at ¶ 30 (**CWS-03**).

¹²¹ Witness Statement of Melva Jo Winger de Rondón – Memorial – ENG at ¶ 30 (**CWS-03**).

¹²² Witness Statement of Melva Jo Winger de Rondón – Memorial – ENG at ¶ 40 (**CWS-03**).

¹²³ Witness Statement of Melva Jo Winger de Rondón – Memorial – ENG at ¶¶ 40, 43 (**CWS-03**).

¹²⁴ Witness Statement of Melva Jo Winger de Rondón – Memorial – ENG at ¶¶ 40, 46 ((**CWS-03**)).

¹²⁵ Witness Statement of Melva Jo Winger de Rondón – Memorial – ENG at ¶ 39 (**CWS-03**).

¹²⁶ Witness Statement of Melva Jo Winger de Rondón – Memorial – ENG at ¶ 42 (**CWS-03**); Witness Statement of Carlos J. Rondón – Memorial – ENG at ¶ 217(**CWS-01**).

The same persons who were officers of Riverside in 2013 continued in their role continuously through the period of the invasion and even after that.¹²⁷

Riverside continued to exercise its control over Inagrosa from April 5, 2017 and throughout the invasion in 2018.¹²⁸

- 90) The following chart, Table 2, identifies each Inagrosa board meeting from 2013 until the start of the invasion on June 16, 2018.¹²⁹ In each meeting, Mrs. Winger de Rondón represented Riverside as Secretary of the Inagrosa Board, and her father, Mr. Winger continued as President of Inagrosa.¹³⁰

TABLE 2 – INAGROSA RESOLUTIONS 2013- 2017

¹²⁷ Witness Statement of Melva Jo Winger de Rondón – Memorial – ENG at ¶ 41 (CWS-03).

¹²⁸ Witness Statement of Melva Jo Winger de Rondón – Memorial – ENG at ¶ 41 (CWS-03).

¹²⁹ The next Inagrosa Directors meeting did not take place until after the June 16, 2018 invasion. That meeting simply re-elected the existing officers into a new term of office.

¹³⁰ Inagrosa Shareholder Meeting Minute No.48 dated January 30, 2013 (C-0126-SPA).

| Inagrosa Corp Minute | Date | Items passed by Board |
|---------------------------------|-------------------|---|
| Minute 48 - C-0126-SPA | January 30, 2013 | Appointment of Officers: Melvin Winger-President Carlos Rondón - VP Riverside-Secretary Ward Nairn- Treasurer MJ Rondón named Riverside representative to Inagrosa |
| Minute 49 - C-0144-SPA | February 4, 2013 | Authorized Carlos Rondón to represent Inagrosa before the Bank of Central America. |
| Minute 50 - C-0145-SPA | January 6, 2014 | Authorized Carlos Rondón to subscribe Inagrosa to uniRSE Foundation |
| Minute 51 - C-0146-SPA | January 19, 2015 | Authorized purchase of a vehicle and a loan for the vehicle purchase |
| Minute 52 - C-0147-SPA | November 8, 2015 | Authorized a special power of attorney |
| Minute 53 - C-0148-SPA | November 15, 2016 | Authorized a special power of attorney |
| Minute 54 - C-0149-SPA | February 16, 2016 | Authorized a special power of attorney |
| Minute 55 - C-0150-SPA | April 26, 2016 | Authorized a special power of attorney |

| | | |
|-----------------------------------|----------------|---|
| Minute 56 - C-0151-SPA | June 15, 2016 | Revised the Inagrosa financial statements and outstanding debts with Riverside and Santa Fe State Co. Inagrosa converted Riverside debt to equity. Inagrosa converted Santa Fe State Co debt into equity. |
| Minute 57- C-0152-SPA | March 28, 2017 | Authorized a special power of attorney |
| Minute 58 - C-0141-SPA/ENG | April 5, 2017 | Authorized a special power of attorney |

- 91) Riverside controlled Inagrosa at every meeting. Melva Jo Winger de Rondón - in her capacity as the former Riverside representative - acted as the Secretary of Inagrosa and has testified about her direct knowledge in her witness statement.¹³¹ Riverside consistently deployed a controlling majority voting interest in the shares of Inagrosa.¹³² On behalf of Riverside, Melva Jo Winger de Rondón ensured that Riverside consistently voted its shares with the unwavering support of Melvin Winger.¹³³ That alone added to 51% of the shares of Inagrosa. In addition, Ward Nairn's unwavering support consolidated Riverside's vote count, allowing Riverside to control 75% of every vote.¹³⁴

¹³¹ Witness Statement of Melva Jo Winger de Rondón – Memorial – ENG at ¶ 43 (CWS-03).

¹³² Witness Statement of Melva Jo Winger de Rondón – Memorial – ENG at ¶ 43 (CWS-03).

¹³³ Witness Statement of Melva Jo Winger de Rondón – Memorial – ENG at ¶¶ 26,29 (CWS-03); Witness Statement of Mona Winger – Memorial – ENG at ¶¶10-11 (CWS-05); Witness Statement of Melvin Winger – Memorial – ENG at ¶ 8 (CWS-04).

¹³⁴ Witness Statement of Melva Jo Winger de Rondón – Memorial – ENG at ¶ 43 (CWS-03).

92) Riverside continues to control Inagrosa.¹³⁵

2. Riverside's Investments in Inagrosa

93) The first investment in Inagrosa was made in 1997, before the 1999 incorporation of Riverside.¹³⁶

94) Mona Winger made numerous loans to Inagrosa over the years. Those loans detailed in paragraph 17 of Mona Winger's Witness Statement are summarized in Table 3 as follows:

Table 3 –Investments from Mona Winger or the Mona Winger Revocable Trust

| Year | Additional financing (USD\$) | Note |
|------|------------------------------|---|
| 2001 | 154,700 | Loan repaid by 2010 ¹³⁷ |
| 2002 | 184,400 | Loan repaid in December 2012 ¹³⁸ |
| 2003 | 230,900 | Loan repaid in December 2012 ¹³⁹ |
| 2004 | 342,000 | |
| 2005 | 134,600 | |
| 2006 | 10,000 | |
| 2007 | 15,000 | |
| 2014 | 634,350 | Made by Mona Winger Revocable Trust |

¹³⁵ Witness Statement of Melvin Winger – Memorial – ENG at ¶ 32 ((CWS-04); Witness Statement of Melva Jo Winger de Rondón – Memorial – ENG at ¶ 46 (CWS-03).

¹³⁶ Witness Statement of Mona Winger – Memorial – ENG at ¶ 11 (CWS-05).

¹³⁷ Witness Statement of Mona Winger – Memorial – ENG at ¶ 14 (CWS-05).

¹³⁸ Witness Statement of Mona Winger – Memorial – ENG at ¶ 15 (CWS-05).

¹³⁹ Witness Statement of Mona Winger – Memorial – ENG at ¶ 17 (CWS-05).

- 95) Mona Winger made a total of US\$1,763,050 in loans to Inagrosa.¹⁴⁰ Inagrosa repaid almost one-third of the principal of the loans.¹⁴¹ ¹⁴²~~[OBJ]~~¹⁴³~~[OBJ]~~ This debt also meets the definition of “investment” set out in CAFTA Chapter Ten.
- 96) Riverside was fully aware of Inagrosa’s expansion plans.¹⁴⁴ Riverside was prepared to make additional capital available to Inagrosa if necessary.¹⁴⁵
- 97) If Inagrosa did not secure outside funding to implement the expansion,¹⁴⁶ Riverside was prepared to invest up to US\$17.5 million into Inagrosa’s expansion of the Hass avocado production at Hacienda Santa Fé and move Inagrosa into Hass avocado sales into export markets such as the United States.¹⁴⁷ Like all of Riverside’s investments since 1999, this investment was made on an interest-only basis.¹⁴⁸ Riverside charged U.S. bank prime to Inagrosa on its loans.¹⁴⁹
- 98) By the time of the events described in this Memorial, Riverside had invested approximately U.S.\$8 million in the Nicaraguan investment and was prepared

¹⁴⁰ Witness Statement of Mona Winger – Memorial – ENG at ¶ 22 (CWS-05).

¹⁴¹ Witness Statement of Mona Winger – Memorial – ENG at ¶ 22 (CWS-05).

¹⁴² Witness Statement of Mona Winger – Memorial – ENG at ¶ 22 (CWS-05).

¹⁴³ Witness Statement of Mona Winger – Memorial – ENG at ¶ 22 (CWS-05).

¹⁴⁴ Witness Statement of Melva Jo Winger de Rondón – Memorial – ENG at ¶ 31 (CWS-03); Witness Statement of Melvin Winger – Memorial – ENG at ¶ 20 ((CWS-04); Witness Statement of Mona Winger – Memorial – ENG at ¶¶ 23,27(CWS-05).

¹⁴⁵ Witness Statement of Melva Jo Winger de Rondón – Memorial – ENG at ¶ 35 (CWS-03); Witness Statement of Melvin Winger – Memorial – ENG at ¶ 23 ((CWS-04); Witness Statement of Mona Winger – Memorial – ENG at ¶ 27 (CWS-05).

¹⁴⁶ Witness Statement of Mona Winger – Memorial – ENG at ¶ 34 (CWS-05).

¹⁴⁷ Witness Statement of Mona Winger – Memorial – ENG at ¶ 34 (CWS-05).

¹⁴⁸ Witness Statement of Mona Winger – Memorial – ENG at ¶ 24 (CWS-05); Witness Statement of Melva Jo Winger de Rondón – Memorial – ENG at ¶ 34 (CWS-03).

¹⁴⁹ Witness Statement of Mona Winger – Memorial – ENG at ¶ 24 (CWS-05); Witness Statement of Melva Jo Winger de Rondón – Memorial – ENG at ¶ 34 (CWS-03).

to provide significant additional capital for the Inagrosa Hass avocado expansion already underway in 2018.

- 99) There can be no question that Riverside is an Investor as defined by the express terms of CAFTA.
- 100) Thus, Riverside can establish that it owns and controls the Investment in Nicaragua. Accordingly, Riverside has the standing to bring this claim.

F. The Investment - Inagrosa

- 101) Hacienda Santa Fé is a large agricultural farm in Jinotega Department, Nicaragua. Hacienda Santa Fé is owned by Inagrosa.¹⁵⁰
- 102) Since at least 2003, Riverside directly has controlled Inagrosa.¹⁵¹ At this time of the Invasion, Riverside controlled more than 50% of Inagrosa's voting shares.¹⁵² Riverside directly owned 25.5% of Inagrosa's shares, Melvin Winger owned 25.5%, and Ward Nain owned 24% of Inagrosa's shares. Melvin Winger owned 25.5%.¹⁵³

G. The Respondent - Nicaragua

- 103) The Republic of Nicaragua is the largest country in Central America by geographic area.¹⁵⁴ Nicaragua had a GDP of US\$12.52 billion in 2019.¹⁵⁵

¹⁵⁰ Related Certificate of Property Hacienda Santa Fe issued by the Jinotega Property Registry, June 30, 2022 (**C-0060-SPA**); Literal Certificate of Property Hacienda Santa Fe issued by the Jinotega Property Registry December 17, 2019 (**C-0080-SPA**).

¹⁵¹ Witness Statement of Melva Jo Winger de Rondón – Memorial – ENG at ¶37 (**CWS-03**); Witness Statement of Melvin Winger – Memorial – ENG at ¶ 30 (**CWS-04**).

¹⁵² Witness Statement of Melva Jo Winger de Rondón – Memorial – ENG at ¶36-37 (**CWS-03**); Witness Statement of Melvin Winger – Memorial – ENG at ¶¶ 28-30 ((**CWS-04**).

¹⁵³ Witness Statement of Melva Jo Winger de Rondón – Memorial – ENG at ¶38 (**CWS-03**); Witness Statement of Melvin Winger – Memorial – ENG at ¶ 28 (**CWS-04**).

¹⁵⁴ Statista, Largest countries in Central America, by total area, July 27, 2022 (**C-0244-ENG**).

¹⁵⁵ World Bank, World Development Indicators 2019, Nicaragua GDP (**C-0245-ENG**).

Figure 1 – Map of Nicaragua



- 104) Daniel Ortega is the leader of the Sandinista National Liberation Front ('FLSN').¹⁵⁶ In 1979, the FLSN overthrew the dictatorship of Antonio Somoza and set up a government.¹⁵⁷ Under Daniel Ortega as President, the Sandinista government ruled from 1979 until it was defeated in democratic elections in 1990¹⁵⁸, and there was a peaceful transition of power¹⁵⁹.
- 105) Daniel Ortega returned as president in 2007.¹⁶⁰ He has served continuously as President of Nicaragua since then.¹⁶¹

¹⁵⁶ Expert Statement of Prof. Justin Wolfe– Memorial – ENG at ¶ 17 (CES-02).

¹⁵⁷ Britannica, Sandinista National Liberation Front at p. 1 (C-0247-ENG).

¹⁵⁸ Britannica, Sandinista National Liberation Front at p. 1 (C-0247-ENG).

¹⁵⁹ Inter-American Commission on Human Rights, Annual Report of the Inter-American Commission on Human Rights 1989-1990, May 17, 1990 at p.2 (C-0246-ENG).

¹⁶⁰ Expert Statement of Prof. Justin Wolfe– Memorial – ENG at ¶ 23 (CES-02).

¹⁶¹ Expert Statement of Prof. Justin Wolfe– Memorial – ENG at ¶ 17 (CES-02).

- 106) Since returning to office, the government of President Ortega has dismantled institutional checks on presidential power. President Ortega's party approved a constitutional amendment, which controls the National Assembly, that abolished term limits in 2014.¹⁶²
- 107) The Nicaraguan Electoral Council, stacked with the president's supporters, removed opposition lawmakers in 2016, and has barred opposition political parties ahead of the 2021 presidential elections.¹⁶³ Leaders of rival political parties have been arrested and detained without charge in El Chipote, a notorious Nicaraguan prison.¹⁶⁴
- 108) President Ortega was elected to a fourth consecutive term in November 2021 amid government repression of critics and the political opposition.¹⁶⁵ José Miguel Vivanco, a former director of Human Rights Watch, commented on Daniel Ortega's repression of political expression freedoms and human rights in the June 19, 2022 edition of the American news show *60 Minutes*, stating:

Ortega's deliberate and flagrant crackdown against peaceful opposition leaders is something without any precedent in Latin America since the '70s and '80s, when most of the region was under military dictatorship.¹⁶⁶

¹⁶² Expert Statement of Prof. Justin Wolfe– Memorial – ENG at ¶ 23 (**CES-02**); Human Rights Watch, World Report 2022, Events of 2021, Nicaragua, January 10, 2022 at p. 2 (**C-0091-ENG**).

¹⁶³ Human Rights Watch, World Report 2022, Events of 2021, Nicaragua, January 10, 2022, Bates 0000944 (**C-0091-ENG**).

¹⁶⁴ Expert Statement of Prof. Justin Wolfe– Memorial – ENG at ¶ 79 (**CES-02**).

¹⁶⁵ Human Rights Watch, World Report 2022, Bates 0000944 (**C-0091-ENG**); also, Sharyn Alfonsi, CBS "60 Minutes" news show – "It's completely Orwellian": How Daniel Ortega tightened his grip on power in Nicaragua, June 19, 2022, Bates 0001332 (**C-0135-ENG**).

¹⁶⁶ José Miguel Vivanco from Human Rights Watch in Sharyn Alfonsi, CBS "60 Minutes" news show – "It's completely Orwellian": How Daniel Ortega tightened his grip on power in Nicaragua, June 19, 2022 Bates 0001334-0001335 (**C-0135-ENG**).

- 109) The National Police and the Volunteer Police¹⁶⁷ are part of the executive branch of the government as a matter of Nicaragua's internal law. In 2014, the Law on the Organization, Functions, Career and Special Social Security Regime of the National Police was enacted by the Nicaraguan Legislative Assembly.¹⁶⁸ This law subsumed the National Police under the executive-controlled "National System of Democratic Security".¹⁶⁹ Under Article 17 of the Sovereign Security Law of the Republic of Nicaragua, the President of the Republic of Nicaragua is the Supreme Chief of the National Police, giving the president broad, unilateral powers.¹⁷⁰
- 110) Prof. Justin Wolfe from Tulane University has addressed the extensive human rights abuses in his Expert Report (**CES-02**). Prof. Wolfe has outlined the following categories of issues:
- a) Abuse of due process and the rule of law from the government through the use of paramilitary forces;¹⁷¹
 - b) The arrest of political opposition leaders;¹⁷²
 - c) An end to freedom of the press;¹⁷³
 - d) The arrest of religious leaders;¹⁷⁴ and

¹⁶⁷ Law of Organization, Functions, Career and Special Social Security Regime of the National Police (Law No. 872), 2014 at articles 24-25 (**C-0007-SPA**).

¹⁶⁸ Expert Statement of Prof. Justin Wolfe– Memorial – ENG at ¶ 79 (**CES-02**);

¹⁶⁹ Law of Organization, Functions, Career and Special Social Security Regime of the National Police (Law No. 872), 2014 at article 2 (**C-0007-SPA**).

¹⁷⁰ Ley de Seguridad Soberana de la República de Nicaragua, 2015 at Article 17 (**C-0225-SPA**); Expert Statement of Prof. Justin Wolfe– Memorial – ENG at ¶ 79 (**CES-02**);

¹⁷¹ Expert Statement of Prof. Justin Wolfe– Memorial – ENG at ¶101 (**CES-02**).

¹⁷² Expert Statement of Prof. Justin Wolfe– Memorial – ENG at ¶87-88 (**CES-02**).

¹⁷³ Expert Statement of Prof. Justin Wolfe– Memorial – ENG, at ¶81-84 (**CES-02**).

¹⁷⁴ Expert Statement of Prof. Justin Wolfe– Memorial – ENG at ¶89-91 (**CES-02**).

- e) The arrest of non-governmental organization leaders.¹⁷⁵

1. 2018 Civil Society Protests

- 111) In April 2018, Nicaragua experienced a widespread series of social protests across the country of Nicaragua. One of the principal causes was the reform of the social security system.¹⁷⁶

On April 18th, peaceful protests were quelled by means of a type of violence that had been observed in previous years to the point of becoming a standard pattern. This consisted of the repression of protests by shock groups allied with the government that intervened in the demonstrations and assaulted protesters, in order to disperse the demonstration. According to the modus operandi of this modality of repression, the National Police would intervene and secure the zone with blockades, divert traffic, and use tear gas, without directly perpetrating the assaults, while allowing them to happen and failing to detain aggressors.¹⁷⁷

- 112) The government used the Nicaraguan National Police to intervene with peaceful protests.¹⁷⁸ The police would secure the protest area with blockades, diverted traffic, and tear gas.¹⁷⁹ The Police would not directly perpetrate the assaults.¹⁸⁰ Instead, the police followed a tactic of relying on “shock troops.”¹⁸¹ Shock troops were masked members of the FSLN Youth movement who

¹⁷⁵ Expert Statement of Prof. Justin Wolfe– Memorial – ENG at ¶ 87 (CES-02).

¹⁷⁶ Organization of American States (OAS) Group of Interdisciplinary Independent Experts (GIIE), “*Report on Violent Events That Took Place in Nicaragua between April 18th and May 30th: Executive Summary*” at page 2 (C-0024-ENG) [Hereinafter ‘OAS GIIE Report – Executive Summary’].

¹⁷⁷ OAS GIIE Report – *Executive Summary* at p. 2 (C-0024-ENG).

¹⁷⁸ OAS GIIE Report – *Executive Summary* at p. 2 (C-0024-ENG).

¹⁷⁹ OAS GIIE Report – *Executive Summary* at p. 2 (C-0024-ENG).

¹⁸⁰ OAS GIIE Report – *Executive Summary* at p. 2 (C-0024-ENG).

¹⁸¹ OAS GIIE Report – *Executive Summary* at p. 2 (C-0024-ENG).

would attend peaceful civil protests against the government.¹⁸² The shock troops engaged in assaults on the protestors, which the police would allow occurring without detaining aggressors.¹⁸³

2. Government Repression of Public Protests

- 113) This violent actions of the shock groups on April 18, 2018 only served to provoke an increase in the number of mass demonstrations since April 19th.¹⁸⁴ Faced with the intensification of protests, on April 19th and 20th, Nicaragua launched a more severe repressive strategy.¹⁸⁵ At this time, Nicaragua began the systemic disproportionate and indiscriminate use of force.¹⁸⁶
- 114) The Organization of American States Interdisciplinary Group of Independent Experts Group (IGIE) reports that this included the use of firearms and even weapons of war.¹⁸⁷
- 115) These armaments were directly aimed at protesters. The IGIE experts confirmed situations in which indiscriminate force was used against protesting civilians including marches or street gatherings, occupied university campuses, and roadblocks (street barricades and road blockades (known as tranques)).¹⁸⁸

¹⁸² Expert Statement of Prof. Justin Wolfe– Memorial – ENG at ¶ 26 (**CES-02**) (see footnote 8); The *Havana Times* reports that the government used the strategy of having the shock troops and armed paramilitaries create violence in the civil disturbances to permit the police to step in and use force against the demonstrators. *Havana Times* “Faces of the Repression in Nicaragua” June 1, 2019 at p. 1 (**C-0172-ENG**).

¹⁸³ Expert Statement of Prof. Justin Wolfe– Memorial – ENG at ¶ 48 (**CES-02**); OAS GIIE Report – *Executive Summary* at p. 2 (**C-0024-ENG**).

¹⁸⁴ Expert Statement of Prof. Justin Wolfe– Memorial – ENG at ¶ 26 (**CES-02**).

¹⁸⁵ Expert Statement of Prof. Justin Wolfe– Memorial – ENG at ¶ 26 (**CES-02**).

¹⁸⁶ OAS GIIE Report – *Executive Summary* at p. 2 (**C-0024-ENG**).

¹⁸⁷ OAS GIIE Report – *Executive Summary* at p. 2 (**C-0024-ENG**).

¹⁸⁸ OAS GIIE Report – *Executive Summary* at p. 2 (**C-0024-ENG**).

3. Paramilitary Groups Controlled by the State

- 116) There was coordination and collaboration between government bodies including the National Police, Mayors' offices, and parapolice (paramilitary) groups.¹⁸⁹ The parapolice (paramilitary) groups include the shock groups, as well as more lethal and organized factions that are commonly known as "paramilitary" or "parapolice".¹⁹⁰ The paramilitaries comprise unidentified individuals who bear firearms, sometimes even weapons of war, and act in coordination with the national police forces.¹⁹¹
- 117) The Interdisciplinary Group of Independent Experts confirms that it determined that most of the killings and serious bodily harm were attributed to the National Police, whose members acted directly and also in coordination with armed parapolice groups.¹⁹² These actions attributed to the National Police were executed by the Managua police force, as well as the departmental units of those places where violent events took place and special units within the central structure of the National Police.¹⁹³ The magnitude of the repression implies that most of the resources of the National Police were utilized.¹⁹⁴
- 118) The information gathered by the Interdisciplinary Group of Independent Experts corroborates the coordination of various sectors within the Police in suppressing the protests, particularly among the police forces of each region or department and police officers from the Unit of Special Operations (DOEP), which played a central role in the repression observed throughout the

¹⁸⁹ OAS GIIE Report – *Executive Summary* at p. 2 (C-0024-ENG).

¹⁹⁰ OAS GIIE Report – *Executive Summary* at p. 2 (C-0024-ENG).

¹⁹¹ OAS GIEE Report – *Executive Summary* at p. 2 (C-0024-ENG).

¹⁹² OAS GIIE Report – *Executive Summary* at p. 2 (C-0024-ENG).

¹⁹³ OAS GIIE Report – *Executive Summary* at p. 3 (C-0024-ENG).

¹⁹⁴ OAS GIIE Report – *Executive Summary* at p. 3 (C-0024-ENG).

country.¹⁹⁵ This level of reiterated coordination between distinct sections of the National Police can be explained only as being the result of a decision taken at the highest level and sustained over time.¹⁹⁶

- 119) The Organization of American State's Interdisciplinary Group of Independent Experts recommended the investigation of Nicaraguan President Daniel Ortega for criminal responsibility for the events.¹⁹⁷ It also recommended charges against the Supreme Chief of the National Police and the investigation of its General Directors (Aminta Granera and Francisco Díaz).¹⁹⁸
- 120) The OAS's Interdisciplinary Group of Independent Experts recommended that those in charge of Nicaragua's operations and intelligence units, and members of the National Command; the authorities of various Departmental and Regional Offices; members of the Managua Police, the chief of DOEP, and the chiefs of the specialized units that constitute DOEP, among other civil servants.¹⁹⁹
- 121) The OAS noted how the Nicaraguan government's official statements about the victims of State-sponsored violence (including violence done by paramilitaries) has blamed the victims of the violence.²⁰⁰
- 122) The Nicaraguan government publicly supported the actions of the National Police.²⁰¹ The OAS reports that the government failed to reference serious

¹⁹⁵ OAS GIIE Report – *Executive Summary* at p. 3 (C-0024-ENG).

¹⁹⁶ OAS GIIE Report – *Executive Summary* at p. 3 (C-0024-ENG).

¹⁹⁷ OAS GIIE Report – *Executive Summary* at p. 3 (C-0024-ENG).

¹⁹⁸ OAS GIIE Report – *Executive Summary* at p. 3 (C-0024-ENG).

¹⁹⁹ OAS GIIE Report – *Executive Summary* at p. 3 (C-0024-ENG).

²⁰⁰ OAS GIIE Report – *Executive Summary* at p. 3 (C-0024-ENG).

²⁰¹ OAS GIIE Report – *Executive Summary* at p. 3 (C-0024-ENG).

abuses of authority by the police and publicly promoted those police officers responsible for repressing the public protests.²⁰²

H. Land Invasions are Part of a Government Policy of Repression

- 123) The Government of Nicaragua bears responsibility for taking land at Hacienda Santa Fé and the losses suffered by Riverside because it caused the wrongful act.
- 124) Inagrosa management informed the police of suspicious activity around its lands in the days before the invasion²⁰³, when the invasion occurred on June 16, 2018.²⁰⁴ Not only did the police take no measures to provide actual protection to the lawful landowner, but the Police actively assisted the paramilitaries in the taking of Hacienda Santa Fé, going so far as to disarm the Hacienda Santa Fé's security guards.²⁰⁵ This constitutes an abuse of process, a failure of good faith, an abnegation of responsibility, and a breach of full protection and security.
- 125) The Government's use of land takings as a form of intimidation is not new. According to Nicaraguan sociologist Cirilo Otero, land taking is an old practice and "*pressure method*" that the Ortegismo uses against its opponents.²⁰⁶
- 126) Land occupations in Nicaragua date back to the 1990s when poor farmers and members of Sandinista revolution-era farming cooperatives sought to claim what they thought was their due from the revolution.²⁰⁷ In more recent times,

²⁰² OAS GIIE Report –: *Executive Summary*” at page 3 (C-0024-ENG).

²⁰³ Witness Statement of Luis Gutierrez – Memorial – SPA at ¶ 34 (CWS-02).

²⁰⁴ Witness Statement of Luis Gutierrez – Memorial – SPA at ¶ 40 (CWS-02); Witness Statement of Carlos J. Rondón – Memorial – ENG at ¶ 77 (CWS-01).

²⁰⁵ Witness Statement of Luis Gutierrez – Memorial – SPA at ¶¶ 49-50, 129 (CWS-02).

¹³ Expert Statement of Prof. Justin Wolfe– Memorial – ENG at ¶¶ 57-58 (CES-02); La Prensa, *Ortegismo uses land takings as a political weapon in Nicaragua*, July 29, 2018 (C-0010-ENG).

²⁰⁷ Expert Statement of Prof. Justin Wolfe– Memorial – ENG at ¶ 57 (CES-02).

the FSLN has used land occupations with a dual purpose- to help their supporters without using public funds and at the same time as a way to punish their critics by not having police intervene to protect private property.²⁰⁸

- 127) In the context of the 2018 social unrest, the practice of land occupations has taken a different meaning.²⁰⁹ Land occupations is being used as a form of payment is a spoils system for the acts of the parapolice and paramilitaries. Properties belonging to opposition figures, particularly in the business community, and some of which are owned in full or part by foreign companies have been selected for their political and financial value.²¹⁰ The local police do not interfere with the seizures carried out by the paramilitaries.²¹¹
- 128) A report from *La Prensa* confirmed that the lands invaded belonged to businesspersons and producers that criticized the Government.²¹² The report also confirmed that the lands owned by Sandinistas had not been taken.¹⁴

I. Government practice to reward Paramilitaries with private land

- 129) The land takings were part of an agreement between the paramilitaries and the government.²¹³ The paramilitaries supported and assisted the Government with the protestors, and in exchange, they would receive land.²¹⁴

²⁰⁸ Expert Statement of Prof. Justin Wolfe– Memorial – ENG at ¶ 58 (CES-02).

²⁰⁹ Expert Statement of Prof. Justin Wolfe– Memorial – ENG at ¶ 60 (CES-02).

²¹⁰ Expert Statement of Prof. Justin Wolfe– Memorial – ENG at ¶ 60 (CES-02).

²¹¹ Expert Statement of Prof. Justin Wolfe– Memorial – ENG at ¶ 61 (CES-02).

²¹² *La Prensa, Ortegaismo uses land takings as a political weapon in Nicaragua*, July 29, 2018 (C-0010-ENG); Expert Statement of Prof. Justin Wolfe at ¶ 61 (CES-02).

¹⁴ *La Prensa, Ortegaismo uses land takings as a political weapon in Nicaragua*, July 29, 2018 (C-0010-ENG).

²¹³ *Todo Aqui, Invaders reveal agreement with the government*, September 23, 2018 (C-0014-ENG).

²¹⁴ *Todo Aqui, Invaders reveal agreement with the government*, September 23, 2018 (C-0014-ENG).

- 130) An invader interviewed by a local television channel confirmed that the Government's practice rewarded paramilitaries with land taken from private property. He said that:

...as long as we supported the government in some activities, taking out barricades, protesting, dedicated directly to support the Commander [President Ortega] in exchange, they opened that door to us, and we were able to come into those places [the invaded properties] by means of that promise...²¹⁵

- 131) The paramilitaries are closely connected to Nicaragua's government, and the government played a significant role in creating, supporting, and directing their conduct.²¹⁶

1. The Business Sector Denounces the Land Takings

- 132) In addition to newspaper reports confirming the land takings' political nature, public figures in the private sector of Nicaragua also have spoken out against the practice.²¹⁷
- 133) José Pallais, a former member of the Justice Commission of the National Assembly, noted that the land takings were ordered by President Ortega's Government. In an interview with the local press, Mr. Pallais stated:

These invasions are directed by the Government with the intention of getting revenge for breaking the agreement (consensus model)²¹⁸ that was in place²¹⁹ OBJ

²¹⁵ Transcript Excerpt of video titled: Todo aquí, "Tomatierras sacan a luz acuerdos con el gobierno ayudarían a desmontar tranques" at min. 1:15 (C-0015-ENG).

²¹⁶ OAS GIIE Report –: *Executive Summary*" at page 3 (C-0024-ENG).

²¹⁷ Expert Statement of Prof. Justin Wolfe– Memorial – ENG at ¶¶ 62-63 (CES-02).

²¹⁸ La Prensa, Government goes against the properties of the private sector, June 21, 2018 (C-0016-ENG). "For a decade, the Government and COSEP had a dialogue and consensus model in which only economic matters were discussed and not the institutional and political situation of the country".

¹⁷ La Prensa, Government goes against the properties of the private sector, June 21, 2018 at Bates 0000181 (C-0016-ENG).

- 134) The agreement Mr. Pallais refers to is a silent pact between the Government and the Council of the Private Enterprise (“COSEP”), under which private enterprises would refrain from criticizing the government in exchange for business-friendly policies.²²⁰
- 135) Business leaders in Nicaragua have condemned the land takings as continuing an attack on the private sector. José Adán Aguerri, president of the Council of the Private Enterprise, described the land takings as confiscation. In an interview with the local press, Mr. Aguerri stated:

The information that we have received information indicates that there are government officials, municipal officials, and party members behind these acts. These properties belong to private producers, some with ties to unions. Among the property owners affected there are no known government party members. From the private sector we have been denouncing this new violation to the rule of law and that it is a directed repression measure given the situation in the country.²²¹

- 136) On June 29, 2018, COSEP issued a statement that groups of “parapolice” were directly intimidating the private sector through land taking. The statement included the following:

These groups continue to act with total impunity, and it is now demonstrated that they are been used to directly intimidate and repress the private sector by directing and organizing the taking of lands outside the Constitution and the law, violating the right to private property with the complicity of the Government authorities and the National Police, which we observe with great concern the de fact confiscations in our country.²²²

- 137) The Union of Agricultural Producers (“UPANIC”) monitored and documented the takings of private properties by the government through the paramilitaries.

²²⁰ La Prensa, Government goes against the properties of the private sector, June 21, 2018 at bates 0000181 (C-0016-ENG).

²²¹ La Prensa, “Orteguismo Uses Land Takings As A Political Weapon In Nicaragua,” July 29, 2018 at Bates 0000130 (C-0010-ENG).

²²² El Nuevo Diario, Tomatierras cause damages of US \$24 million, October 31, 2018 at Bates 0000188 (C-0017-ENG).

UPANIC has received 66 complaints on the takings of 10,200 manzanas (71,400 square meters) of land. As of July 4, 2019, 30 private properties, which UPANIC claims correspond to 5,071 manzanas, (35,497 square meters), still were occupied in seven departments.²²³

- 138) Michael Healy, the President of the Union of Agricultural Producers (UPANIC), confirmed that the Government was behind private property taking by armed paramilitaries. In a statement to the local press, he said:

In the last few weeks, in the last two or three weeks, we have seen how in Leon, Managua, Esteli, and the Rivas Departments there have been land invasions. These invasions are sponsored by leaders of the Sandinista Front, in which political secretaries are involved and in certain places the Mayors and people close to the government, who have invaded properties that do not belong to them by orders, I imagine, of the same government, the high commands, to pressure and intimidate the private sector.²²⁴

- 139) The evidence of the Government's involvement in land takings across the country is compelling.

2. Human Rights Abuses

- 140) The Nicaraguan government made a democratic commitment to its citizens, in the Inter-American Democratic Charter. Nicaragua joined the Charter twenty years ago, resolving that its citizens have a right to democracy, and the Nicaraguan government has an obligation to promote and defend that right.

- 141) In August 2018, Nicaraguan writer Gioconda Belli writing in *Foreign Affairs* wrote:

Over the past four months at least 317 people have been killed, more than 2000 wounded, and hundreds more put in jail. Police and paramilitaries arbitrarily detain citizens every day. They are tortured, accused of

²²³ Union of Agricultural Producers (UPANIC) Report on land takings, July 11, 2019 (C-0018-SPA).

²²⁴ UPANIC President denounces that the government is behind the tomatieras, La Trinchera de la Noticias, June 22, 2018 (C-0019-SPA).

terrorism, organized crime, illegal possession of weapons, and a litany of other crimes. Hooded, heavily armed irregular forces roam the streets, shooting at will. After 6 PM, most cities in the country look deserted. The Nicaraguan government, much as it did under Somoza, has declared war on its people.²²⁵

- 142) Gioconda Belli noted in *Foreign Affairs* about the aftermath of the extensive Nicaraguan government repression after the April 18 protests:

By May [of 2018], with the military sitting on the sidelines, armed paramilitary forces loyal to Ortega began dismantling barricades and killing unarmed civilians. Prisoners have been tortured, according to the International Commission of Human Rights, and prevented from hiring private lawyers, instead being assigned public defenders of the government's choosing. Many have been forced to flee the country. Doctors were fired from public hospitals for disobeying the order to refuse care to wounded protesters. No one who has spoken out against the regime is safe. On July 9, for instance, the papal nuncio to Nicaragua, accompanied by a Nicaraguan cardinal and a bishop, was attacked by a pro-Sandinista mob, after Ortega had accused them of participating in a conspiracy against the government. Human rights organizations and the OAS's International Commission for Human Rights have reported more than 300 deaths since the beginning of the protests, most of them young men.²²⁶

- 143) The OAS Grupo Interdisciplinario de Expertos Independientes (Interdisciplinary Group of Independent Experts, "GIEI") issued a Report that verified that the Nicaraguan National Police carried out a massive and indiscriminate policy of arbitrary and illegal detention of men, women, and adolescents during police raids.²²⁷ In addition, these detainees were subjected to disproportionate and illegitimate use of force, and there were complaints about inhuman conditions of detention in police cells and prisons.²²⁸ There

²²⁵ Bell, Gioconda, "How Daniel Ortega Became a Tyrant - From Revolutionary to Strongman". *Foreign Affairs* August 24, 2018 at Bates 0001342 (C-0136-ENG).

²²⁶ Bell, Gioconda, "How Daniel Ortega Became a Tyrant ". *Foreign Affairs*, August 24, 2018 at Bates 0001350 (C-0032-ENG).

²²⁷ OAS GIIE Report –: *Executive Summary*" at p. 3 (C-0024-ENG).

²²⁸ OAS GIIE Report –: *Executive Summary*" at p. 3 (C-0024-ENG).

were also reports that describe various forms of torture and sexual violence, which must be investigated when there are adequate institutional conditions to do so.²²⁹ The situation of detainees was further aggravated by the ineffectiveness of the writ of habeas corpus and judicial control over such abusive practices.²³⁰

144) Human Rights Watch in its 2022 Annual Report on Nicaragua reports that:

To pave the way for his re-election, authorities arbitrarily arrested and prosecuted government critics and political opponents, including presidential candidates, journalists, lawyers, and leaders of community, business, and student groups.²³¹

145) These included the use of the police force to suppress fundamental human rights. Human Rights Watch reports that “Police abuses committed during a brutal crackdown by the National Police and armed pro-government groups in 2018 have gone unpunished.”²³²

146) As part of a process of what the Inter-American Commission on Human Rights (“IACHR”) referred to as the “closure of democratic forums,” the Ortega government began arresting journalists, civil society leaders, and opposition candidates in December 2018.²³³

147) More recently, as the 2021 presidential elections neared, the Ortega regime began systematically arresting and eliminating opposition candidates,

²²⁹ OAS GIIE Report –: *Executive Summary*” at p. 3 (C-0024-ENG).

²³⁰ OAS GIIE Report –: *Executive Summary*” at p. 3 (C-0024-ENG).

²³¹ Human Rights Watch, World Report 2022 at Bates 0000944 (C-0091-ENG).

²³² Human Rights Watch, World Report 2022 at Bates 0000944 (C-0091-ENG).

²³³ Expert Statement of Prof. Justin Wolfe– Memorial – ENG at ¶ 87 (CES-02).

beginning with Cristiana Chamorro, the former editor of La Prensa and a presidential candidate in 2021.²³⁴

- 148) Not even faith leaders have escaped the Ortega regime repression. The Ortega regime tried to silence the Catholic Church, which owned a number of radio stations from which it aired its protests alongside its normal content, by closing these stations.²³⁵ In August 2022, Bishop Rolando Álvarez, a vocal critic of the Ortega regime, was placed under house arrest.²³⁶
- 149) In addition, hundreds of NGOs, including some with a focus on religion and human rights, have lost permission to operate under Ortega's government.²³⁷

3. Government attack on Due Process

- 150) Between late May and October 2021, authorities arbitrarily detained seven presidential candidates and 32 prominent government critics.²³⁸ Prosecutors opened investigations against most on alleged “treason” charges.²³⁹ Since February, an amendment to the Code of Criminal Procedure has allowed prosecutors to request detentions of up to 90 days without charge; in most cases involving critics, courts have permitted them.²⁴⁰
- 151) Human Rights Watch reports that:

In August [2021], the Attorney General’s Office filed charges against most of the detainees, in criminal proceedings that lacked basic due process guarantees. Charges, carrying prison sentences of 15 to 25 years, ranged from money laundering to, most commonly, “conspiracy to undermine

²³⁴ Expert Statement of Prof. Justin Wolfe— Memorial – ENG at ¶ 88 (CES-02).

²³⁵ Expert Statement of Prof. Justin Wolfe— Memorial – ENG at ¶¶ 89, 91 (CES-02).

²³⁶ Expert Statement of Prof. Justin Wolfe— Memorial – ENG at ¶ 91 (CES-02).

²³⁷ Expert Statement of Prof. Justin Wolfe— Memorial – ENG at ¶ 92 (CES-02).

²³⁸ Human Rights Watch, World Report 2022 at Bates 0000944 (C-0091-ENG).

²³⁹ Human Rights Watch, World Report 2022 at Bates 0000944 (C-0091-ENG).

²⁴⁰ Human Rights Watch, World Report 2022 at Bates 0000944 (C-0091-ENG).

national integrity.” Prosecutors failed to identify specific acts by the defendants to support the charges in at least 14 cases.

Most critics have been held incommunicado and subjected to abuses in detention, including daily interrogations, prolonged solitary confinement, and insufficient food. Authorities have barred critics’ lawyers from participating in public hearings, assigning public defenders instead. Despite repeated requests, most lawyers had no access to court documents for months.²⁴¹

4. Suppression of basic political rights

- 152) President Ortega has faced considerable public criticism due to social unrest from his administration’s social policy reforms.²⁴² Among other things, the government implemented a mass oppression policy that included intimidation and land seizures in response to that criticism.²⁴³
- 153) Ortega's government employed two strategies to silence opposition to its ongoing rule and human rights violations: first, eradicating opposition media and suppressing public gatherings; second, arresting journalists, activists, and opposition politicians and detaining them arbitrary.²⁴⁴
- 154) El Nuevo Dario and Metro shut down in 2019 due to pressure from the Ortega government and difficulty accessing ink and paper.²⁴⁵ The oldest and last major newspaper in Nicaragua, La Prensa, experienced the same fate in 2020, and was forced to turn to digital in August 2021, with its publisher Juan Lorenzo Holmann being arrested by the police.²⁴⁶ A majority of the staff of La Prensa has fled to exile in Costa Rica, where Carlos Fernando Chamorro and

²⁴¹ Human Rights Watch, World Report 2022 at Bates 0000945 (C-0091-ENG).

²⁴² Expert Statement of Prof. Justin Wolfe– Memorial – ENG at ¶¶ 66-67 (CES-02).

²⁴³ Expert Statement of Prof. Justin Wolfe– Memorial – ENG at ¶ 61 (CES-02).

²⁴⁴ Expert Statement of Prof. Justin Wolfe– Memorial – ENG at ¶ 81 (CES-02).

²⁴⁵ Expert Statement of Prof. Justin Wolfe– Memorial – ENG at ¶ 82 (CES-02).

²⁴⁶ Expert Statement of Prof. Justin Wolfe– Memorial – ENG at ¶ 82 (CES-02).

his Confidential reporting have also set up shop after facing threats in Nicaragua.²⁴⁷

- 155) Between late May and October 2021, authorities arbitrarily detained 7 presidential candidates and 32 prominent government critics.²⁴⁸ Prosecutors opened investigations against most on alleged “treason” charges.²⁴⁹
- 156) Since February 2021, an amendment to the Code of Criminal Procedure has allowed prosecutors to request detentions of up to 90 days without charge; in most cases involving critics, courts have permitted them.²⁵⁰
- 157) In August 2021 the Attorney General’s Office filed charges against most of the detainees, in criminal proceedings that lacked basic due process guarantees. Charges, carrying prison sentences of 15 to 25 years, ranged from money laundering to, most commonly, “conspiracy to undermine national integrity.”²⁵¹ Prosecutors failed to identify specific acts by the defendants to support the charges in at least 14 cases.²⁵²
- 158) Most critics have been held incommunicado and subjected to abuses in detention, including daily interrogations, prolonged solitary confinement, and insufficient food.²⁵³ Authorities have barred critics’ lawyers from participating

²⁴⁷ Expert Statement of Prof. Justin Wolfe– Memorial – ENG at ¶ 82 (CES-02).

²⁴⁸ Human Rights Watch, World Report 2022 at Bates 0000944 (C-0091-ENG).

²⁴⁹ Human Rights Watch, World Report 2022 at Bates 0000944 (C-0091-ENG).

²⁵⁰ Human Rights Watch, World Report 2022 at Bates 0000944 (C-0091-ENG).

²⁵¹ Human Rights Watch, World Report 2022 at Bates 0000945 (C-0091-ENG).

²⁵² Human Rights Watch, World Report 2022 at Bates 0000945 (C-0091-ENG).

²⁵³ Human Rights Watch, World Report 2022 at Bates 0000945 (C-0091-ENG).

in public hearings, assigning public defenders instead.²⁵⁴ Despite repeated requests, most lawyers had no access to court documents for months.²⁵⁵

- 159) The violent crackdown by the Nicaraguan Government during the 2018 civil protests and the subsequent reduction of civil liberties have led to massive waves of migration from Nicaragua to nearby Costa Rica. The UN High Commissioner for Refugees From April 2018 through June 2021, more than 110,000 people fled Nicaragua,²⁵⁶ By 2019, over 55,000 Nicaraguans filed for asylum in Costa Rica.²⁵⁷
- 160) Costa Rica hosts some 80,000 Nicaraguan refugees and asylum seekers.²⁵⁸ Thousands more live in Mexico, Panama, Europe, and the United States.²⁵⁹

J. International Community Sanctions Against Nicaragua

- 161) No international monitoring bodies have been allowed into the country since 2018, when the government expelled the IACHR Special Monitoring Mechanism for Nicaragua, the IACHR-appointed Interdisciplinary Group of Independent Experts, and OHCHR.²⁶⁰
- 162) In February 2021, OHCHR urged the government to enact meaningful electoral reforms, end arbitrary arrests, guarantee freedoms to civil society, investigate and prosecute rights abuses in the context of protests, and amend laws that seriously restrict rights to freedom of expression and association and

²⁵⁴ Human Rights Watch, World Report 2022 at Bates 0000945 (C-0091-ENG).

²⁵⁵ Human Rights Watch, World Report 2022 at Bates 0000945 (C-0091-ENG).

²⁵⁶ Human Rights Watch, World Report 2022 at Bates 0000946 (C-0091-ENG).

²⁵⁷ Anastasia Moloney, "Nicaragua crisis forces 60,000 people to flee homes in past year - U.N." Reuters, April 16, 2019 (C-0134-ENG).

²⁵⁸ Human Rights Watch, World Report 2022 at Bates 0000946 (C-0091-ENG).

²⁵⁹ Human Rights Watch, World Report 2022 at Bates 0000946 (C-0091-ENG).

²⁶⁰ OAS Press Release – IACHR condemns the arbitrary expulsion of human rights defender in Nicaragua, November 28, 2018 (C-0121-ENG).

could undermine free and fair elections. The IACHR has also continued to monitor the situation from afar.

- 163) The UN Human Rights Council adopted a resolution in March urging the government to repel or amend legislation that undermines fundamental rights and to adopt electoral reforms to ensure free and fair elections with international oversight.²⁶¹
- 164) In June, 2021, the OAS Permanent Council expressed concern that the Ortega regime had not implemented electoral reforms consistent with international standards before a deadline set for May.²⁶² The resolution condemned harassment and arbitrary restrictions on presidential candidates, opposition parties, and independent media.²⁶³ In November 2021, the OAS Permanent Council condemned the elections saying they “were not free, fair or transparent, and lack[ed] democratic legitimacy.”²⁶⁴
- 165) As of September, the US Treasury Department had imposed targeted sanctions on 26 Nicaraguans for abuses or corruption, including twenty three pursuant to Executive Order 13851²⁶⁵ and three pursuant to the Global

²⁶¹ United Nations Human Rights Council Resolution, Promotion and Protection of Human Rights in Nicaragua, March 23, 2021 (A/HRC/RES/46/2) **(C-0093-ENG)**.

²⁶² Organization of American States Permanent Council Resolution, The Situation in Nicaragua (CP/RES. 1175 (2324/21), June 15, 2021 at Bates 0000953 **(C-0094-ENG)**.

²⁶³ Organization of American States Permanent Council Resolution, The Situation in Nicaragua (CP/RES. 1175 (2324/21), June 15, 2021 at Bates 0000953 **(C-0094-ENG)**.

²⁶⁴ U.S. Mission to the Organization of American States, OAS General Assembly Condemns the Ortega-Murillo Regime in Nicaragua, November 12, 2021 at Bates 0000954 **(C-0095-ENG)**.

²⁶⁵ U.S. Department of Treasury Press Release, Treasury Sanctions Nicaraguan Officials for Supporting Ortega’s Efforts to Undermine Democracy, Human Rights, and the Economy, June 9, 2021 **(C-0096-ENG)**; U.S. Department of Treasury Press Release, Treasury Sanctions Three Nicaraguan Officials Supporting Ortega Regime, December 21, 2020 **(C-0097-ENG)**; U.S. Department of Treasury Press Release, Treasury Sanctions Nicaraguan Financial Institution and Officials Supporting Ortega Regime, October 9, 2020 **(C-0098-ENG)**; U.S. Department of Treasury Press Release, Treasury Sanctions Members of Nicaragua President Ortega’s Inner Circle, July 17, 2020 **(C-0099-ENG)**; U.S. Department of Treasury Press Release, Treasury Sanctions Senior Nicaraguan Government Officials, Increasing

Magnitsky Act of 2016, which allows for sanctions against human rights violators.²⁶⁶ Of the twenty six, six were also sanctioned pursuant to the Nicaraguan Human Rights and Corruption Act of 2018.²⁶⁷ The Treasury Department has also sanctioned nine entities, including financial and state security institutions.²⁶⁸

- 166) In November, the US Congress passed the RENACER Act to monitor, report on, and address corruption by the Ortega government, as well as human rights abuses by Nicaraguan security forces.²⁶⁹ The law had been approved by the Senate in August, 2021.²⁷⁰
- 167) The European Parliament, in July, condemned the Ortega government's repression of opposition groups and other opponents and called for the release of arbitrarily detained political prisoners, including presidential candidates.²⁷¹ In August, the EU imposed targeted sanctions on eight more Nicaraguans accused of "serious human rights violations" and undermining

Pressure on President Ortega's Regime, May 22, 2020 **(C-0100-ENG)**; U.S. Department of Treasury Press Release, Treasury Sanctions Nicaraguan National Police and Police Commissioners Involved in Human Rights Abuse, March 5, 2020 **(C-0101-ENG)**; U.S. Department of Treasury Press Release, Treasury Sanctions Son of Nicaraguan President Ortega for Money Laundering and Supporting Corruption, December 12, 2019 **(C-0102-ENG)**; U.S. Department of Treasury Press Release, Treasury Sanctions Members of Nicaraguan President Ortega's Inner Circle Who Persecute Pro-Democracy Voices, June 21, 2019 **(C-0103-ENG)**; U.S. Department of Treasury Press Release, Treasury Targets Finances of Nicaraguan President Daniel Ortega's Regime, April 17, 2019 **(C-0104-ENG)**; Federal Register Vol. 83, No. 230, Presidential Documents, Executive Order 13851-Blocking Property of Certain Persons Contributing to the Situation in Nicaragua, November 27, 2018 **(C-0107-ENG)**.

²⁶⁶ U.S. Department of Treasury Press Release, Treasury Sanctions Three Nicaraguan Individuals for Serious Human Rights Abuse and Corrupt Acts, July 5, 2018 **(C-0105-ENG)**; U.S. Department of Treasury, Specially Designated Nationals List Update, July 5, 2018 **(C-0106-ENG)**.

²⁶⁷ United States Congress, Public Law 115-335, Nicaragua Human Rights and Anticorruption Act of 2018, December 20, 2018 **(C-0250-ENG)**.

²⁶⁸ U.S. Department of Treasury Press Release, Treasury Sanctions Public Ministry of Nicaragua and Nine Government Officials Following Sham November Elections, November 15, 2021 **(C-0108-ENG)**.

²⁶⁹ United States Congress, Public Law 117-54, RENACER Act November 10, 2021**(C-0109-ENG)**.

²⁷⁰ United States Congress, Public Law 117-54, RENACER Act November 10, 2021**(C-0109-ENG)**.

²⁷¹ European Parliament, Situation in Nicaragua, July 8, 2021 **(C-0248-ENG)**.

democracy, including Vice President Rosario Murillo, for a total of 14 Nicaraguans sanctioned since 2020.²⁷² Sanctions against all 14 were renewed for another year in October 2021.²⁷³ Following EU foreign ministers' discussions in October, EU foreign policy chief Josep Borrell once again condemned the Nicaraguan government's repression, referring to it as 'one of the worst dictatorships in the world', whose scheduled elections were going to be 'fake'.²⁷⁴

- 168) Canada has imposed restrictions on Nicaragua since 2018.²⁷⁵ In July 2021, Canada imposed targeted sanctions on 15 government officials implicated in human rights violations, for a total of 24 sanctioned.²⁷⁶

²⁷² European Council of the European Union Press Release, Nicaragua: EU imposes sanctions on eight more individuals, August 2, 2021 **(C-0110-ENG)**.

²⁷³ European Council of the European Union Press Release, Nicaragua: EU sanctions prolonged for one year, October 11, 2021 **(C-0111-ENG)**.

²⁷⁴ France 24, EU foreign policy chief slams 'fake' Nicaragua vote, November 2, 2021 **(C-0112-ENG)**.

²⁷⁵ Global Affairs Canada News Release, Canada imposes sanctions on Nicaraguan officials, June 21, 2019 **(C-0113-ENG)**; Global Affairs Canada News Release, Canada imposes sanctions on additional individuals in response to ongoing human rights violations in Nicaragua, July 14, 2021 **(C-0114-ENG)**; Global Affairs Canada News Release, Canada imposes third round of sanctions in response to ongoing human rights violations in Nicaragua, November 15, 2021 **(C-0115-ENG)**.

²⁷⁶ Global Affairs Canada News Release, Canada imposes sanctions on additional individuals in response to ongoing human rights violations in Nicaragua, July 14, 2021 **(C-0114-ENG)**.

II. THE FACTS

A. The Invasion of Hacienda Santa Fé

- 169) In April 2018, the Republic of Nicaragua was beset by civil protests against the Sandinista government.²⁷⁷ The Nicaraguan government commenced a campaign of oppression against these democratic protests.²⁷⁸ The government used paramilitary forces to intimidate protestors²⁷⁹ and took land from non-supportive businesses²⁸⁰. Inagrosa was not involved in the civil disturbance at that time.²⁸¹
- 170) Prof. Justin Wolfe from Tulane University has addressed the government use and control of paramilitary forces in his Expert Statement (**CES-02**).²⁸²
- 171) The term “paramilitary” refers to unidentified individuals who bear firearms, sometimes even weapons of war and act in coordination with the national police forces²⁸³ and who act at the behest of the Government of Nicaragua to carry out the government’s political objectives.²⁸⁴ The paramilitary unit follows instructions from elected government leaders and the police.²⁸⁵
- 172) In the days leading to the Invasion, a group of unknown persons were seen outside the Hacienda Santa Fé workers.²⁸⁶ The local residents confirmed that

²⁷⁷ Expert Statement of Prof. Justin Wolfe– Memorial – ENG at ¶18 (**CES-02**).

²⁷⁸ Expert Statement of Prof. Justin Wolfe– Memorial – ENG at ¶¶ 43-46 (**CES-02**).

²⁷⁹ Expert Statement of Prof. Justin Wolfe– Memorial – ENG at ¶¶ 43, 101 (**CES-02**).

²⁸⁰ Expert Statement of Prof. Justin Wolfe– Memorial – ENG at ¶ 60 (**CES-02**).

²⁸¹ Witness Statement of Carlos J. Rondón – Memorial – ENG at ¶ 6 (**CWS-01**).

²⁸² Expert Statement of Prof. Justin Wolfe– Memorial – ENG at ¶ 50-56 (**CES-02**).

²⁸³ Expert Statement of Prof. Justin Wolfe– Memorial – ENG at ¶ 28 (**CES-02**).

²⁸⁴ Expert Statement of Prof. Justin Wolfe– Memorial – ENG at ¶¶ 54-56 (**CES-02**).

²⁸⁵ Expert Statement of Prof. Justin Wolfe– Memorial – ENG at ¶ 50 (**CES-02**).

²⁸⁶ Witness Statement of Luis Gutierrez – Memorial – SPA at ¶ 28 (**CWS-02**).

these prowlers intended to invade Hacienda Santa Fé.²⁸⁷ Inagrosa management also confirmed the presence of the paramilitaries and their intentions to invade Hacienda Santa Fé.²⁸⁸

- 173) Inagrosa management promptly notified Inagrosa's Chief Operating Officer, Carlos Rondón about the situation. Mr. Rondón told Inagrosa Management to notify the situation to the National Police.²⁸⁹ Police Captain William Herrera, the local captain of the National Police, received the report and informed Inagrosa management that the police were monitoring the situation.²⁹⁰
- 174) On **June 16, 2018**, a force of paramilitaries led approximately 200 to 300 armed invaders in the invasion and occupation of Hacienda Santa Fé.²⁹¹ They initially occupied the upper area of Hacienda Santa Fé (also known as "Santa Fé Arriba") and took possession of the facilities.²⁹²
- 175) The paramilitaries declared openly that they were present to take Hacienda Santa Fé away from its owners. They said that they were sent on behalf of the government, which they called the "Government of Reconciliation and National Unity." The Government of Reconciliation and National Unity" is a title used by the current Government of the Republic of Nicaragua.²⁹³ On June 16, 2018,

²⁸⁷ Witness Statement of Luis Gutierrez – Memorial – SPA at ¶ 28 (CWS-02).

²⁸⁸ Witness Statement of Jaime Francisco Henrriquez Cruz – Memorial -SPA at ¶ 14 (CWS-06); Witness Statement of Luis Gutierrez – Memorial – SPA at ¶ 31 (CWS-02).

²⁸⁹ Witness Statement of Luis Gutierrez – Memorial – SPA at ¶ 34 (CWS-02).

²⁹⁰ Witness Statement of Luis Gutierrez – Memorial – SPA at ¶ 34 (CWS-02).

²⁹¹ Witness Statement of Luis Gutierrez – Memorial – SPA at ¶ 35 (CWS-02); Witness Statement of Jaime Francisco Henrriquez Cruz – Memorial -SPA at ¶ 16 (CWS-06); Witness Statement of Carlos J. Rondón – Memorial – ENG at ¶ 76 (CWS-01).

²⁹² Witness Statement of Luis Gutierrez – Memorial – SPA at ¶ 36 (CWS-02); Witness Statement of Carlos J. Rondón – Memorial – ENG at ¶ 76 (CWS-01).

²⁹³ Witness Statement of Luis Gutierrez – Memorial – SPA at ¶ 42 (CWS-02); Witness Statement of Jaime Francisco Henrriquez Cruz – Memorial -SPA at ¶ 16 (CWS-06); Witness Statement of Carlos J. Rondón – Memorial – ENG at ¶ 76 (CWS-01).

the paramilitary leaders told the workers at Hacienda Santa Fé that Nicaraguan President Ortega had given the paramilitaries the lands at Hacienda Santa Fé that Hacienda Santa Fé was now their property.²⁹⁴ The paramilitaries said that they were not stealing anything and that they were just taking possession of what the Nicaraguan government had given them.²⁹⁵

- 176) Inagrosa management called the local police while the invasion was taking place, seeking immediate assistance to protect the property and the workers.²⁹⁶ However, Police Captain William Herrera told Inagrosa management to tell the workers to leave Hacienda Santa Fé completely. He said to do this because the police had been informed that the paramilitaries intended to burn Hacienda Santa Fé down.²⁹⁷ The police never came to the assistance of management.²⁹⁸
- 177) The workers remained at Hacienda Santa Fé.²⁹⁹ They continued with their work and did not go near the upper area of Hacienda Santa Fé, which was occupied by the paramilitaries and invaders.³⁰⁰
- 178) Following that call, Mr. Rondón called Police Captain Herrera directly to demand an explanation for the lack of police assistance.³⁰¹ Captain Herrera responded that he had orders from Police Commissioner Marvin Castro, the

²⁹⁴ Witness Statement of Luis Gutierrez – Memorial – SPA at ¶ 42 (CWS-02).

²⁹⁵ Witness Statement of Luis Gutierrez – Memorial – SPA at ¶ 42 (CWS-02).

²⁹⁶ Witness Statement of Luis Gutierrez – Memorial – SPA at ¶ 39-40 (CWS-02).

²⁹⁷ Witness Statement of Luis Gutierrez – Memorial – SPA at ¶ 40 (CWS-02); Witness Statement of Carlos J. Rondón – Memorial – ENG at ¶ 273 (CWS-01).

²⁹⁸ Witness Statement of Carlos J. Rondón – Memorial – ENG at ¶ 274 (CWS-01).

²⁹⁹ Witness Statement of Luis Gutierrez – Memorial – SPA at ¶ 40 (CWS-02).

³⁰⁰ Witness Statement of Luis Gutierrez – Memorial – SPA at ¶ 40 (CWS-02).

³⁰¹ Witness Statement of Carlos J. Rondón – Memorial – ENG at ¶ 78 (CWS-01).

Chief of Police for the Jinotega Department, not to remove the paramilitaries.³⁰²

179) Later that day, members of the police arrived at Hacienda Santa Fé.³⁰³ The police told the Hacienda Santa Fé security guards that they were at Hacienda Santa Fé to confiscate the guns.³⁰⁴

180) Inagrosa management called Police Captain William Herrera to inquire why the police confiscated the guns from Inagrosa's security guards.³⁰⁵ Police Captain William Herrera replied that he was acting on the orders of Police Commissioner Marvin Castro.³⁰⁶ The police took five shotguns away with them.³⁰⁷ Raymundo Palacios and the workers managed to hide the rest of the shotguns from the police.³⁰⁸ The assembled police officers did not present any court order or basis of other lawful authority to confiscate the guns from the security guards Hacienda Santa Fé.³⁰⁹

181) That same day, the systematic destruction of Hacienda Santa Fé and terrorizing of Hacienda Santa Fé management and workers was sent in motion. The paramilitaries started to divide the spoils at Hacienda Santa Fé, and allocate the Hacienda Santa Fé lands among themselves.³¹⁰ The paramilitaries and invaders started clearing the fields and cutting down coffee

³⁰² Witness Statement of Carlos J. Rondón – Memorial – ENG at ¶ 78 (CWS-01).

³⁰³ Witness Statement of Luis Gutierrez – Memorial – SPA at ¶¶ 49-54 (CWS-02).

³⁰⁴ Witness Statement of Luis Gutierrez – Memorial – SPA at ¶ 52 (CWS-02).

³⁰⁵ Witness Statement of Luis Gutierrez – Memorial – SPA at ¶ 52 (CWS-02).

³⁰⁶ Witness Statement of Luis Gutierrez – Memorial – SPA at ¶ 52 (CWS-02).

³⁰⁷ Witness Statement of Luis Gutierrez – Memorial – SPA at ¶ 53 (CWS-02).

³⁰⁸ Witness Statement of Luis Gutierrez – Memorial – SPA at ¶ 53 (CWS-02).

³⁰⁹ Witness Statement of Luis Gutierrez – Memorial – SPA at ¶ 53 (CWS-02).

³¹⁰ Witness Statement of Luis Gutierrez – Memorial – SPA at ¶ 56 (CWS-02); Witness Statement of Jaime Francisco Henrriquez Cruz – Memorial -SPA at ¶ 17 (CWS-06)

trees planted.³¹¹ The paramilitaries began to use Hacienda Santa Fé as their operational headquarters.³¹²

- 182) On July 16, 2018, another contingent of armed invaders led by paramilitaries entered the lower part of Hacienda Santa Fé (known as “Santa Fé Abajo”).³¹³ The paramilitaries told the Hacienda Santa Fé workers that Mayor Leónidas Centeno had sent them to occupy Hacienda Santa Fé.³¹⁴ The paramilitary leaders stated that Mayor Leonidas Centeno had promised them that they could keep part of the lands.³¹⁵
- 183) A paramilitary leader told the Hacienda Santa Fé workers that they no longer had reason to be at Hacienda Santa Fé because Carlos Rondón no longer was their boss.³¹⁶ Unless the workers joined the paramilitaries, they were expelled from Hacienda Santa Fé.³¹⁷ The paramilitary then announced that the Inagrosa management were “dead men.”³¹⁸
- 184) That same day, after fleeing the Hacienda Santa Fé in fear for his life, one of the employees encountered a government employee of the Ministry of

³¹¹ Witness Statement of Luis Gutierrez – Memorial – SPA at ¶60 (CWS-02); Witness Statement of Jaime Francisco Henrriquez Cruz – Memorial -SPA at ¶ 18 (CWS-06).

³¹² Witness Statement of Luis Gutierrez – Memorial – SPA at ¶60 (CWS-02); Witness Statement of Jaime Francisco Henrriquez Cruz – Memorial -SPA at ¶ 19 (CWS-06).

³¹³ Witness Statement of Luis Gutierrez – Memorial – SPA at ¶ 66 (CWS-02); Witness Statement of Jaime Francisco Henrriquez Cruz – Memorial -SPA at ¶ 23 (CWS-06); Witness Statement of Carlos J. Rondón – Memorial – ENG at ¶ 80 (CWS-01).

³¹⁴ Witness Statement of Luis Gutierrez – Memorial – SPA at ¶ 73 (CWS-02); Witness Statement of Carlos J. Rondón – Memorial – ENG at ¶ 80 (CWS-01).

³¹⁵ Witness Statement of Luis Gutierrez – Memorial – SPA at ¶ 73 (CWS-02); Witness Statement of Carlos J. Rondón – Memorial – ENG at ¶ 80 (CWS-01).

³¹⁶ Witness Statement of Luis Gutierrez – Memorial – SPA at ¶77 (CWS-02); Witness Statement of Jaime Francisco Henrriquez Cruz – Memorial -SPA at ¶ 29 (CWS-06).

³¹⁷ Witness Statement of Luis Gutierrez – Memorial – SPA at ¶ 77 (CWS-02); Witness Statement of Jaime Francisco Henrriquez Cruz – Memorial -SPA at ¶ 29 (CWS-06).

³¹⁸ Witness Statement of Luis Gutierrez – Memorial – SPA at ¶ 77 (CWS-02); Witness Statement of Jaime Francisco Henrriquez Cruz – Memorial -SPA at ¶ 30 (CWS-06).

Agriculture, Cattle Raising and Forestry (known by its Spanish acronym “MAGFOR”).³¹⁹ The public official told the employee that the government of Nicaragua was taking Hacienda Santa Fé to pressure the business sector.³²⁰ That employee informed Inagrosa Management of the information from that conversation.³²¹

185) From that day on, the paramilitaries and invaders started to destroy the centerpiece of the Investment, the 40 hectares of Hass avocados.³²² In the summer of 2018, Inagrosa Management was expecting yields from 3-year-old Hass avocado trees to be in excess of 50 kg per tree.³²³ The scientific scholarship projects a mature Hass avocado tree to yield 53.6 kg of fruit per tree per year.³²⁴

186) The paramilitaries and invaders started to cut down and clear the 40 hectares with the avocado trees that were ready for harvest.³²⁵ To obtain better access to lands at the Hacienda Santa Fé, the paramilitaries destroyed the existing fences that protected the avocado crops at Hacienda Santa Fé.³²⁶

³¹⁹ Witness Statement of Luis Gutierrez – Memorial – SPA at ¶ 82 (CWS-02).

³²⁰ Witness Statement of Luis Gutierrez – Memorial – SPA at ¶ 82 (CWS-02).

³²¹ Witness Statement of Carlos J. Rondón – Memorial – ENG at ¶ 83 (CWS-01).

³²² Witness Statement of Luis Gutierrez – Memorial – SPA at ¶ 79 (CWS-02); Witness Statement of Jaime Francisco Henrriquez Cruz – Memorial -SPA at ¶ 31 (CWS-06).

³²³ Witness Statement of Luis Gutierrez – Memorial – SPA at ¶ 81 (CWS-02).

³²⁴ 1999. Revista Chapingo Serie Horticultura 5:89-94. G. Adar, “The Annual Production and Utilization of Dry Matter of an Avocado (*Persea americana* Mill.) Tree” (C-0138-ENG)

³²⁵ Witness Statement of Luis Gutierrez – Memorial – SPA at ¶ 80 (CWS-02); Witness Statement of Jaime Francisco Henrriquez Cruz – Memorial -SPA at ¶ 32 (CWS-06).

³²⁶ Witness Statement of Luis Gutierrez – Memorial – SPA at ¶ 80 (CWS-02); Witness Statement of Jaime Francisco Henrriquez Cruz – Memorial -SPA at ¶ 32 (CWS-06).

- 187) On July 24, 2018, a heavily armed paramilitary leader entered Hacienda Santa Fé with an additional forty-armed persons.³²⁷ The heavily armed paramilitary leader declared that the Government of Nicaragua had sent them to Hacienda Santa Fé.³²⁸
- 188) At this point, the paramilitaries made Hacienda Santa Fé as the paramilitaries's operational headquarters from where he would leave to suppress the protests in Jinotega.³²⁹ The Government of Nicaragua started to send the paramilitaries food provisions³³⁰
- 189) On July 26, 2018, the paramilitaries brutally assaulted Jaime Francisco Henrriquez Cruz, known in the Hacienda Santa Fé as "Jaime Vivas",³³¹ who was the field operations supervisor at Hacienda Santa Fé.³³² Mr. Vivas refused to divulge the location of the cattle thought to be at Hacienda Santa Fé.³³³ The paramilitaries had eaten the sheep and had given away some the sheep.³³⁴ The leader of the paramilitaries had a meeting with some of the paramilitaries and ordered them to search for the cattle.³³⁵

³²⁷ Witness Statement of Luis Gutierrez – Memorial – SPA at ¶ 87 (**CWS-02**); Witness Statement of Jaime Francisco Henrriquez Cruz – Memorial -SPA at ¶ 34 (**CWS-06**).

³²⁸ Witness Statement of Luis Gutierrez – Memorial – SPA at ¶ 89 (**CWS-02**); Witness Statement of Jaime Francisco Henrriquez Cruz – Memorial -SPA at ¶ 34 (**CWS-06**).

³²⁹ Witness Statement of Jaimie Vivas – Memorial -SPA at ¶ 36 (**CWS-06**); Witness Statement of Luis Gutierrez – Memorial – SPA at ¶ 91 (**CWS-02**).

³³⁰ Witness Statement of Jaimie Vivas – Memorial -SPA at ¶37 (**CWS-06**); Witness Statement of Luis Gutierrez – Memorial – SPA at ¶ 92 (**CWS-02**).

³³¹ Witness Statement of Jaimie Vivas – Memorial -SPA at ¶8 (**CWS-06**); Witness Statement of Luis Gutierrez – Memorial – SPA at ¶ 19 (**CWS-02**).

³³² Witness Statement of Luis Gutierrez – Memorial – SPA at ¶ 30 (**CWS-02**).

³³³ Witness Statement of Luis Gutierrez – Memorial – SPA at ¶ 40 (**CWS-02**).

³³⁴ Witness Statement of Luis Gutierrez – Memorial – SPA at ¶ 94 (**CWS-02**); Witness Statement of Jaime Francisco Henrriquez Cruz – Memorial -SPA at ¶ 41 (**CWS-06**).

³³⁵ Witness Statement of Jaime Francisco Henrriquez Cruz – Memorial -SPA at ¶ 40 (**CWS-06**).

- 190) The Government of Nicaragua not only targeted³³⁶ and backed³³⁷ the invasion and taking of Hacienda Santa Fé but also offered to provide housing, electricity, and water infrastructure projects to the paramilitaries and invaders occupying Hacienda Santa Fé³³⁸. The Mayor of San Rafael del Norte, Norma Herrera, made two visits to Hacienda Santa Fé. On both occasions, she was escorted into Hacienda Santa Fé in police patrol cars.³³⁹ In one of her visits, on August 6, 2018, Mayor Herrera proposed that the Municipality would provide housing, electricity, and water infrastructure projects for the benefit of the paramilitaries and invaders occupying Hacienda Santa Fé.³⁴⁰
- 191) On August 10, 2018, Mr. Rondón sent a letter to Police Captain William Herrera complaining about the lack of police action.³⁴¹ Mr. Rondón's letter outlined the failure to take timely action, which would have protected the property (including the Hass avocado trees) and the workers' physical safety at Hacienda Santa Fé.³⁴² Mr. Rondón never received a response to this letter.³⁴³
- 192) On August 11, 2018, Jinotega Mayor Leónidas Centeno, and Police Commissioner Marvin Castro, gave an order to the occupiers to depart the Hacienda Santa Fé.³⁴⁴ The paramilitaries followed the orders of the Jinotega Mayor and the Police Commissioner. Approximately 550 occupiers began to

³³⁶ Witness Statement of Luis Gutierrez – Memorial – SPA at ¶ 82 (**CWS-02**).

³³⁷ Witness Statement of Luis Gutierrez – Memorial – SPA at ¶¶ 42, 73, 92, 129 (**CWS-02**).

³³⁸ Witness Statement of Luis Gutierrez – Memorial – SPA at ¶ 101 (**CWS-02**).

³³⁹ Witness Statement of Luis Gutierrez – Memorial – SPA at ¶¶ 98, 101 (**CWS-02**).

³⁴⁰ Witness Statement of Luis Gutierrez – Memorial – SPA at ¶ 101 (**CWS-02**).

³⁴¹ Letter from Carlos Rondón to Police Captain Herrera, August 10, 2018 (**C-0012-SPA**); Witness Statement of Carlos J. Rondón – Memorial – ENG at ¶87 (**CWS-01**).

³⁴² Letter from Carlos Rondón to Police Captain Herrera, August 10, 2018 (**C-0012-SPA**).

³⁴³ Witness Statement of Carlos J. Rondón – Memorial – ENG at ¶ 88 (**CWS-01**).

³⁴⁴ Witness Statement of Luis Gutierrez – Memorial – SPA at ¶ 106 (**CWS-02**); Witness Statement of Jaime Francisco Henríquez Cruz – Memorial -SPA at ¶ 53 (**CWS-06**).

evacuate Hacienda Santa Fé under the leadership of a paramilitary commander.³⁴⁵ As the paramilitaries left, they looted through the remains of Hacienda Santa Fé.³⁴⁶

- 193) Inagrosa Management returned to Hacienda Santa Fé with Carlos Alberto Monzón, Attorney and Notary Public, Police Captain William Herrera, with five additional police officers and two Inagrosa security guards, to inventory the damaged items and list stolen property.³⁴⁷
- 194) Less than one week later, on August 17, 2018, approximately 50 armed invaders led by paramilitaries returned to Hacienda Santa Fé and started to re-occupy Hacienda Santa Fé.³⁴⁸ The next day, on August 18, 2018, approximately 100 armed invaders led by paramilitaries entered and entirely occupied the Hacienda Santa Fé.³⁴⁹
- 195) There was widespread destruction of nursery plants. This destruction included:
- a) Loss of the 7,000 Hass avocado trees grafted in the nursery and 3,000 non-grafted Hass avocado saplings,³⁵⁰

³⁴⁵ Witness Statement of Luis Gutierrez – Memorial – SPA at ¶ 107 (**CWS-02**); Witness Statement of Jaime Francisco Henrriquez Cruz – Memorial -SPA at ¶¶ 54-55 (**CWS-06**).

³⁴⁶ Witness Statement of Luis Gutierrez – Memorial – SPA at ¶ 108 (**CWS-02**); Witness Statement of Jaime Francisco Henrriquez Cruz – Memorial -SPA at ¶ 55 (**CWS-06**).

³⁴⁷ Witness Statement of Luis Gutierrez – Memorial – SPA at ¶ 111 (**CWS-02**); Witness Statement of Jaime Francisco Henrriquez Cruz – Memorial -SPA at ¶ 56 (**CWS-06**); Inventory of damages at Hacienda Santa Fe, August 14, 2018 (**C-0058-SPA**).

³⁴⁸ Witness Statement of Luis Gutierrez – Memorial – SPA at ¶ 117 (**CWS-02**); Witness Statement of Jaime Francisco Henrriquez Cruz – Memorial -SPA at ¶ 61 (**CWS-06**).

³⁴⁹ Witness Statement of Luis Gutierrez – Memorial – SPA at ¶ 120 (**CWS-02**); Witness Statement of Jaime Francisco Henrriquez Cruz – Memorial -SPA at ¶ 94 (**CWS-06**); Witness Statement of Carlos J. Rondón – Memorial – ENG at ¶ 94 (**CWS-01**).

³⁵⁰ Witness Statement of Luis Gutierrez – Memorial – SPA at ¶ 96 (**CWS-02**); Witness Statement of Carlos J. Rondón – Memorial – ENG at ¶ 98 (**CWS-01**).

- b) Other plants in the nursery, including over 1,200 Black Walnut tree saplings ready for transplantation,³⁵¹ and
- c) The harvest of grains and tubers was destroyed.³⁵²
- 196) As a result of the illegal occupation by the paramilitaries and the large-scale destruction of the crops, orchards and facilities at Hacienda Santa Fé, Inagrosa lost the Hass avocado crop,³⁵³ its nursery to support the coming crop, and then its entire plantation.³⁵⁴
- 197) As noted, the paramilitary forces destroyed the unharvested 2018 Hass avocado crop³⁵⁵. The paramilitaries laid waste through deliberate acts of destruction to the Hass avocado trees³⁵⁶ and damaged other avocado trees through reckless mishandling.³⁵⁷ This wanton destruction, moreover, resulted in the loss of the future Hass avocado crops.³⁵⁸
- 198) The paramilitary force also felled, stole, or destroyed valuable trees in the private forest, stole equipment, and robbed the investment of its equipment, and dissipated its corporate records and files.³⁵⁹ The business could not operate. The destructive effect on the business was total.

³⁵¹ Witness Statement of Carlos J. Rondón – Memorial – ENG at ¶ 98 (**CWS-01**).

³⁵² Witness Statement of Luis Gutierrez – Memorial – SPA at ¶ 96 (**CWS-02**); Inventory of damages at Hacienda Santa Fe, August 14, 2018 (**C-0058-SPA**).

³⁵³ Witness Statement of Jaime Francisco Henrriquez Cruz – Memorial – SPA at ¶ 31 (**CWS-06**).

³⁵⁴ Witness Statement of Carlos J. Rondón – Memorial – ENG at ¶ 101 (**CWS-01**); Witness Statement of Luis Gutierrez – Memorial – SPA at ¶ 96 (**CWS-02**).

³⁵⁵ Witness Statement of Carlos J. Rondón – Memorial – ENG at ¶ 113 (**CWS-01**).

³⁵⁶ Witness Statement of Jaime Francisco Henrriquez Cruz – Memorial – SPA at ¶31 (**CWS-06**).

³⁵⁷ Witness Statement of Luis Gutierrez – Memorial – SPA at ¶¶ 81,128 (**CWS-02**).

³⁵⁸ Witness Statement of Carlos J. Rondón – Memorial – ENG at ¶ 113 (**CWS-01**).

³⁵⁹ Witness Statement of Luis Gutierrez – Memorial – SPA at ¶ 128 (**CWS-02**); Witness Statement of Carlos J. Rondón – Memorial – ENG at ¶¶ 99-100 (**CWS-01**).

- 199) In August 2021, the Republic of Nicaragua took steps to remove paramilitaries and other unlawful occupants from Hacienda Santa Fé.³⁶⁰ However, the Republic of Nicaragua has failed to return the property to Inagrosa unconditionally, and thus Riverside still does not have the return of Hacienda Santa Fé.³⁶¹
- 200) In addition to the deprivation of the land, the wrongdoers did the following:
- a) Took equipment and farm machinery.³⁶²
 - b) Looted computers, records, and books of Hacienda Santa Fé.
 - c) Ruined the commercial use, harvest, and future crops of the avocado trees and their fruit.³⁶³
 - d) Engaged in widespread deforestation and destruction of Hacienda Santa Fé's orchards, crops and facilities on its lands, resulting in significant and irreparable environmental damage to the sensitive ecological conditions at Hacienda Santa Fé, including its private wildlife reserve.³⁶⁴

³⁶⁰ *Nicaragua Actual*, "Police evicts Sandinistas from Hacienda Santa Fe" dated August 14, 2021 (**C-0059-SPA**); Witness Statement of Luis Gutierrez – Memorial – SPA at ¶ 144 (**CWS-02**).

³⁶¹ Letter from Foley Hoag LLP to Appleton & Associates regarding offer to return Hacienda Santa Fe, September 9, 2021 (**C-0116-ENG**); Letter from Appleton & Associates to Foley Hoag LLP, September 9, 2021 (**C-0118-ENG**).

³⁶² Witness Statement of Carlos J. Rondón – Memorial – ENG at ¶ 100 (**CWS-01**); Witness Statement of Luis Gutierrez – Memorial – SPA at ¶ 128 (**CWS-02**).

³⁶³ Witness Statement of Carlos J. Rondón – Memorial – ENG at ¶ 96,101 (**CWS-01**); Witness Statement of Luis Gutierrez – Memorial – SPA at ¶ 128 (**CWS-02**).

³⁶⁴ Witness Statement of Carlos J. Rondón – Memorial – ENG at ¶ 233 (**CWS-01**); Witness Statement of Luis Gutierrez – Memorial – SPA at ¶ 128 (**CWS-02**).

- e) Redistributed lands at Hacienda Santa Fé to the paramilitaries and their supporters.³⁶⁵
- f) Made credible threats of physical harm against the management of Hacienda Santa Fé.³⁶⁶

1. The First Invasion

- 201) In April 2018, anti-government protests in Nicaragua erupted as a result of proposed government social welfare reforms.³⁶⁷ In response, the Sandinista National Liberation Front (SNLF), the political party under the leadership of President Daniel Ortega, implemented a strategy of repression across the country.³⁶⁸
- 202) This campaign involved seizing land from businesspersons who criticized the Sandinista government.³⁶⁹ The Government rewarded its paramilitary supporters with the ill-gotten lands that they had seized:

Former Army Major Roberto Samcam explained that Ortega's paramilitary forces are made up of state workers, members of the Sandinista Party, and demobilized members of the Army whose payment has been in lots of land.³⁷⁰

³⁶⁵ Witness Statement of Luis Gutierrez – Memorial – SPA at ¶¶ 56-58, 128 (**CWS-02**); Witness Statement of Jaime Francisco Henrriquez Cruz – Memorial -SPA at ¶ 17 (**CWS-06**).

³⁶⁶ Witness Statement of Luis Gutierrez – Memorial – SPA at ¶¶ 71, 76, 93, 113,128 (**CWS-02**); Witness Statement of Jaime Francisco Henrriquez Cruz – Memorial -SPA at ¶ 12, 81, 103 (**CWS-06**); Witness Statement of Jaime Francisco Henrriquez Cruz – Memorial -SPA at ¶ 38, 58-59 (**CWS-06**).

³⁶⁷ Expert Statement of Prof. Justin Wolfe at ¶ 49 (**CES-02**).

³⁶⁸ Expert Statement of Prof. Justin Wolfe at ¶ 43-46 (**CES-02**).

³⁶⁹ Expert Statement of Prof. Justin Wolfe at ¶ 61 (**CES-02**).

³⁷⁰ La Razon, "Ortega Pays With Land the Support of the Paramilitaries in Nicaragua," August 23, 2018 at Bates 0000459 (**C-0039-SPA**).

- 203) These land seizures were well-organized and led by members of the Sandinista party or by state-controlled paramilitaries:³⁷¹

The sociologist Cirilo Otero explains that the abuses and land seizures have been an old practice of Sandinismo and Ortegaism. He gave an example when the FSLN lost power in 1990 and sent his people to take land, promising that he would later legalize them.³⁷²

- 204) As part of this campaign, the taking of Hacienda Santa Fé commenced on June 16, 2018, and was completed on August 18, 2018.³⁷³

1. The First Invasion (Upper Santa Fé)

- 205) Once, more than fifteen years ago, in the early 1990s, there had been some prowlers at Hacienda Santa Fé. At that time, the security team called the local police, who immediately came and apprehended the prowlers.³⁷⁴

- 206) In the days leading to the invasion, Juan Gómez, Luis Gómez y Alfredo González, workers from the Hacienda Santa Fé told Luis Gutierrez that they saw a large group of unknown persons prowling around the surroundings of Hacienda Santa Fé and having meetings outside the Hacienda's grounds.³⁷⁵ Hacienda Santa Fé had a onsite security team that would patrol the grounds of Hacienda Santa Fé and ensure the security of equipment and production.³⁷⁶

³⁷¹ El Confidential Newspaper, "Who are the Tomatierras", December 9, 2018 (C-0011-SPA).

³⁷² *La Prensa*, "Orteguismo Uses Land Intakes as a Political Weapon in Nicaragua," July 29, 2018 at Bates 0000127 (C-0010-SPA).

³⁷³ Witness Statement of Luis Gutierrez – Memorial – SPA at ¶¶ 35, 64, 87, 118 (CWS-02); Witness Statement of Jaime Francisco Henrriquez Cruz – Memorial -SPA at ¶¶ 16, 23, 34, 61-62 (CWS-06); Witness Statement of Carlos J. Rondón – Memorial – ENG at ¶¶ 76, 80, 87 (CWS-01).

³⁷⁴ Witness Statement of Carlos J. Rondón – Memorial – ENG at ¶ 75 (CWS-01).

³⁷⁵ Witness Statement of Luis Gutierrez – Memorial – SPA at ¶ 28 (CWS-02); Witness Statement of Jaime Francisco Henrriquez Cruz – Memorial -SPA at ¶ 11 (CWS-06).

³⁷⁶ Witness Statement of Luis Gutierrez – Memorial – SPA at ¶ 31 (CWS-02).

- 207) Luis Gutierrez asked the Hacienda Santa Fé workes, Juan Gómez, Luis Gómez y Alfredo González, to inquire with local residents in Jinotega if they had any information on the identity of these people and their intentions.³⁷⁷ The local residents confirmed that these prowlers intended to invade Hacienda Santa Fé.³⁷⁸
- 208) Luis Gutierrez confirmed the presence of the prowlers outside of Hacienda Santa Fé.³⁷⁹ Hacienda Santa Fe and held a meeting with the Hacienda Santa Fé security team.³⁸⁰ Mr. Gutierrez told the Hacienda Santa Fé security team to monitor the situation and keep a close watch on the large group of prowlers outside the Hacienda Santa Fé's grounds.³⁸¹
- 209) Luis Gutierrez asked Jaime Vivas to get information about the group of prowlers.³⁸² He was to investigate more and report back to him on his findings.³⁸³
- 210) Jaime Vivas attended one of the meetings held by the prowlers.³⁸⁴ Mr. Vivas reported to Mr. Gutierrez that the large group of prowlers was of approximately 200 people.³⁸⁵ Mr. Vivas also reported that among the large group of prowlers

³⁷⁷ Witness Statement of Luis Gutierrez – Memorial – SPA at ¶ 28 (CWS-02).

³⁷⁸ Witness Statement of Luis Gutierrez – Memorial – SPA at ¶ 28(CWS-02).

³⁷⁹ Witness Statement of Luis Gutierrez – Memorial – SPA at ¶ 30 (CWS-02); Witness Statement of Jaime Francisco Henrriquez Cruz – Memorial -SPA at ¶ 12 (CWS-06).

³⁸⁰ Witness Statement of Luis Gutierrez – Memorial – SPA at ¶ 30 (CWS-02).

³⁸¹ Witness Statement of Luis Gutierrez – Memorial – SPA at ¶ 30 (CWS-02).

³⁸² Witness Statement of Luis Gutierrez – Memorial – SPA at ¶ 33 (CWS-02); Witness Statement of Jaime Francisco Henrriquez Cruz – Memorial -SPA at ¶ 13 (CWS-06).

³⁸³ Witness Statement of Luis Gutierrez – Memorial – SPA at ¶ 30 (CWS-02); Witness Statement of Jaimie Vivas – Memorial -SPA at ¶¶ 12-15 (CWS-06).

³⁸⁴ Witness Statement of Jaime Francisco Henrriquez Cruz – Memorial -SPA at ¶¶ 14-15 (CWS-06); Witness Statement of Luis Gutierrez – Memorial – SPA at ¶¶ 31, 33 (CWS-02).

³⁸⁵ Witness Statement of Luis Gutierrez – Memorial – SPA at ¶ 31 (CWS-02).

there were paramilitaries and that the paramilitaries leaders were Vidal Herrera, Wendel Adrián Mairena (known as “Wama”), José Dolores Estrada, Efren Zeledón Orozco, (known as “Comandante Cinco Estrellas”), Vinicio Garcia (known as “Comandante Gorgojo”), Elida Maria Galeano Cornejo known as “Comandante Chaparra”, and Blas Villagra.³⁸⁶ Mr. Vivas informed that two paramilitaries, whom he identified as Efren Zeledón Orozco “Comandante Cinco Estrellas” and Ciro Montenegro “Avispa” were in charge of recruiting the invaders to take Hacienda Santa Fé.³⁸⁷

- 211) Luis Gutierrez called Mr. Rondón to inform him of the situation. Mr. Rondón told him to monitor the situation and inform him of any developments.³⁸⁸ Mr. Rondón also told Mr. Gutierrez to call the police.³⁸⁹ Luis Gutierrez notified Police Captain William Herrera at the local National Police delegation of the Municipality of San Rafael del Norte to inform him of the potential situation.³⁹⁰ Police Captain Herrera told him not to worry about the issue and that the Police were monitoring the situation.³⁹¹
- 212) During that week in June 2018, the Hacienda security team took no action against the prowlers camping outside Hacienda Santa Fé.³⁹² There were only three security guards in charge of protecting Hacienda Santa Fé; the group of

³⁸⁶ Witness Statement of Luis Gutierrez – Memorial – SPA at ¶ 33 (CWS-02)

³⁸⁷ Witness Statement of Luis Gutierrez – Memorial – SPA at ¶ 33 (CWS-02)

³⁸⁸ Witness Statement of Luis Gutierrez – Memorial – SPA at ¶ 34 (CWS-02); Witness Statement of Carlos J. Rondón – Memorial – ENG at ¶ 75 (CWS-01).

³⁸⁹ Witness Statement of Luis Gutierrez – Memorial – SPA at ¶ 34 (CWS-02)

³⁹⁰ Witness Statement of Luis Gutierrez – Memorial – SPA at ¶ 34 (CWS-02).

³⁹¹ Witness Statement of Luis Gutierrez – Memorial – SPA at ¶ 34 (CWS-02).

³⁹² Witness Statement of Luis Gutierrez – Memorial – SPA at ¶ 38 (CWS-02).

prowlers was about 200 people.³⁹³ They could not defend themselves from such a large group of people.³⁹⁴

213) The Hacienda Santa Fé security team continued to monitor the situation and closely watched the prowlers outside the grounds of Hacienda Santa Fé,³⁹⁵

214) On June 16, 2018, approximately 200-to-300 armed invaders directed by paramilitaries stormed into the upper part of Hacienda Santa Fé and took possession of the facilities.³⁹⁶ The Hacienda Santa Fé's security team was completely overwhelmed by the large number of armed invaders led by paramilitaries.³⁹⁷

215) The paramilitary leaders of the invasion were Vidal Herrera, Wendel Adrián Mairena (known as "Wama"), José Dolores Estrada, Efred Zeledón Orozco, (known as "Comandante Cinco Estrellas"), and Blas Villagra.³⁹⁸

216) Among the invaders and paramilitaries was a former Congresswoman from the Sandinista National Liberation Front and Jinotega native, Elida Maria Galeano Cornejo known as "Comandante Chaparra".³⁹⁹ She was elected for a four-year term as Deputy in the Nicaraguan National Assembly for the period 2007-

³⁹³ Witness Statement of Luis Gutierrez – Memorial – SPA at ¶ 31 (**CWS-02**); Witness Statement of Jaime Francisco Henrriquez Cruz – Memorial -SPA at ¶ 15 (**CWS-06**).

³⁹⁴ Witness Statement of Luis Gutierrez – Memorial – SPA at ¶ 31 (**CWS-02**).

³⁹⁵ Witness Statement of Luis Gutierrez – Memorial – SPA at ¶ 30 (**CWS-02**).

³⁹⁶ Witness Statement of Luis Gutierrez – Memorial – SPA at ¶ 35 (**CWS-02**); Witness Statement of Jaime Francisco Henrriquez Cruz – Memorial -SPA at ¶16 (**CWS-06**); Witness Statement of Carlos J. Rondón – Memorial – ENG at ¶ 76 (**CWS-01**).

³⁹⁷ Witness Statement of Luis Gutierrez – Memorial – SPA at ¶ 36 (**CWS-02**).

³⁹⁸ Witness Statement of Luis Gutierrez – Memorial – SPA at ¶ 43 (**CWS-02**).

³⁹⁹ Witness Statement of Luis Gutierrez – Memorial – SPA at ¶ 44 (**CWS-02**); Congresswoman Elida Maria Galeano Cornejo, National Assembly of the Republic of Nicaragua website, accessed on August 26, 2022 (**C-0129-SPA**).

2011.⁴⁰⁰ In 2011, she was reelected for a second term which she served between 2012-2016.⁴⁰¹

- 217) The paramilitary leaders told the Hacienda Santa Fé workers that they were sent by the Government of Reconciliation and National Unity (the term used for the current Government of the Republic of Nicaragua headed by President Daniel Ortega).⁴⁰² The paramilitaries declared they were not stealing anything and were collecting what the Nicaraguan government had given them.⁴⁰³
- 218) Luis Gutierrez called the local police for help on behalf of Inagrosa.⁴⁰⁴ Police Captain William Herrera told Inagrosa Management to abandon Hacienda Santa Fé because Police Captain William Herrera had received word that the paramilitaries intended to burn down the plantation.⁴⁰⁵
- 219) Mr. Gutierrez called Mr. Rondón to inform him of the invasion.⁴⁰⁶ Mr. Rondón, in turn, spoke with Police Captain William Herrera, who advised him that Regional National Police Commissioner Marvin Castro had issued orders not to evict the paramilitaries.⁴⁰⁷ Police Commissioner Marvin Castro was the

⁴⁰⁰ Witness Statement of Luis Gutierrez – Memorial – SPA at ¶ 44 (**CWS-02**); La Gaceta No. 228, National Elections Proclamation 2006, November 23, 2006 (**C-0182-SPA**)

⁴⁰¹ Witness Statement of Luis Gutierrez – Memorial – SPA at ¶ 44 (**CWS-02**); La Gaceta No. 217, National Elections Proclamation 2011 (**C-0183-SPA**)

⁴⁰² Witness Statement of Luis Gutierrez – Memorial – SPA at ¶ 42 (**CWS-02**); Witness Statement of Jaime Francisco Henrriquez Cruz – Memorial -SPA at ¶16 (**CWS-06**); Witness Statement of Carlos J. Rondón – Memorial – ENG at ¶ 76 (**CWS-01**).

⁴⁰³ Witness Statement of Luis Gutierrez – Memorial – SPA at ¶ 42 (**CWS-02**).

⁴⁰⁴ Witness Statement of Luis Gutierrez – Memorial – SPA at ¶ 39 (**CWS-02**).

⁴⁰⁵ Witness Statement of Luis Gutierrez – Memorial – SPA at ¶ 40 (**CWS-02**); Witness Statement of Carlos J. Rondón – Memorial – ENG at ¶ 77 (**CWS-01**).

⁴⁰⁶ Witness Statement of Carlos J. Rondón – Memorial – ENG at ¶ 76 (**CWS-01**). Witness Statement of Luis Gutierrez – Memorial – SPA at ¶ 41 (**CWS-02**); Witness Statement of Carlos J. Rondón – Memorial – ENG at ¶ 77 (**CWS-01**).

⁴⁰⁷ Witness Statement of Carlos J. Rondón – Memorial – ENG at ¶ 78 (**CWS-01**).

highest-ranking police officer of all the police departments in the Department of Jinotega.⁴⁰⁸

- 220) That day, the chief of the security guards, Raymundo Palacios, met with the paramilitary leaders Efred Zeledón Orozco, “Comandante Cinco Estrellas”, Ciro Montenegro “Avispa”, Wendel Adrián Mairena “Wama”, and the former Congresswoman Elida Maria Galeano Cornejo “Comandante Chaparra”.⁴⁰⁹ The paramilitaries and the former Congresswoman Elida Maria Galeano Cornejo “Comandante Chaparra told Mr. Palacios that they wanted them to surrender peacefully because the government had sent them to take possession of Hacienda Santa Fé.⁴¹⁰
- 221) Later that morning, Police Inspector Calixto Vargas accompanied by five police arrived at Hacienda Santa Fé.⁴¹¹ Police Inspector Vargas demanded that the Hacienda Santa Fé workers hand over their weapons rather than retain them to defend the business and the lives of the workers at Hacienda Santa Fé.⁴¹² When Inagrosa Management inquired with Police Inspector Vargas about this approach, Police Inspector Vargas said that he acted on the direct orders of Police Captain William Herrera.⁴¹³
- 222) Mr. Gutierrez contacted Police Captain William Herrera to seek an explanation and was told that the police followed National Police Commissioner Marvin Castro’s instructions.⁴¹⁴ Mr. Gutierrez requested a confiscation order as proof

⁴⁰⁸ Witness Statement of Carlos J. Rondón – Memorial – ENG at ¶ 78 (CWS-01).

⁴⁰⁹ Witness Statement of Luis Gutierrez – Memorial – SPA at ¶ 45 (CWS-02).

⁴¹⁰ Witness Statement of Luis Gutierrez – Memorial – SPA at ¶ 45 (CWS-02).

⁴¹¹ Witness Statement of Luis Gutierrez – Memorial – SPA at ¶ 49 (CWS-02).

⁴¹² Witness Statement of Luis Gutierrez – Memorial – SPA at ¶ 53 (CWS-02).

⁴¹³ Witness Statement of Luis Gutierrez – Memorial – SPA at ¶ 51 (CWS-02).

⁴¹⁴ Witness Statement of Luis Gutierrez – Memorial – SPA at ¶ 52 (CWS-02).

of the legitimacy of the police action.⁴¹⁵ Mr. Gutierrez refused to tell the Hacienda Santa Fé's security team to surrender their guns to the police until Police Captain William Herrera showed him a confiscation order for the guns.⁴¹⁶ Captain Herrera responded that he would take the guns by force.⁴¹⁷ Mr. Gutierrez then called Mr. Rondón and told him that Police Inspector Calixto Vargas accompanied by five police arrived at Hacienda Santa Fé to confiscate the guns without any lawful explanation.⁴¹⁸ When Mr. Rondón called Police Captain William Herrera, he told him that he was following the orders of Police Commissioner Marvin Castro and refused to discuss the matter any further.⁴¹⁹

223) After this first call, Mr. Gutierrez called Mr. Rondón again and told him that he would tell Raymundo Palacios to hand over five shotguns and hide the remaining guns from the police.⁴²⁰ Mr. Gutierrez then told Raymundo Palacios to hand over five shotguns and hide the remaining guns from the police.⁴²¹ There was no basis for the actions taken by the local police.⁴²² Accordingly, Inagrosa Management concluded that the Jinotega police department was assisting the paramilitaries by disarming the security guards.⁴²³ As ordered by their superior commanding officer, Police Commissioner Marvin Castro⁴²⁴, the

⁴¹⁵ Witness Statement of Luis Gutierrez – Memorial – SPA at ¶ 53 (CWS-02).

⁴¹⁶ Witness Statement of Luis Gutierrez – Memorial – SPA at ¶ 53 (CWS-02).

⁴¹⁷ Witness Statement of Luis Gutierrez – Memorial – SPA at ¶ 53 (CWS-02).

⁴¹⁸ Witness Statement of Carlos J. Rondón – Memorial – ENG at ¶ 53 (CWS-01); Witness Statement of Carlos J. Rondón – Memorial – ENG at ¶ 79 (CWS-01).

⁴¹⁹ Witness Statement of Carlos J. Rondón – Memorial – ENG at ¶ 79 (CWS-01).

⁴²⁰ Witness Statement of Luis Gutierrez – Memorial – SPA at ¶ 53 (CWS-02); Witness Statement of Carlos J. Rondón – Memorial – ENG at ¶ 79 (CWS-01).

⁴²¹ Witness Statement of Luis Gutierrez – Memorial – SPA at ¶ 53 (CWS-02); Witness Statement of Carlos J. Rondón – Memorial – ENG at ¶ 79 (CWS-01).

⁴²² Witness Statement of Luis Gutierrez – Memorial – SPA at ¶ 54 (CWS-02).

⁴²³ Witness Statement of Luis Gutierrez – Memorial – SPA at ¶ 54 (CWS-02).

⁴²⁴ Witness Statement of Carlos J. Rondón – Memorial – ENG at ¶ 78 (CWS-01).

police did not remove the invaders and paramilitaries from the Hacienda Santa Fé lands.⁴²⁵

- 224) The paramilitaries started to allocate the Hacienda Santa Fé lands among themselves.⁴²⁶ Vinicio Garcia “Comandante Gorgojo,” Ciro Montenegro, “Avispa,” and Blass Villagra were in charge of allocating the lands of upper Hacienda Santa Fé.⁴²⁷ The Hacienda Santa Fé lands were distributed by verbal agreements⁴²⁸ and no formal maps were made. After the paramilitaries distributed the upper Hacienda Santa Fé lands, the invaders marked the areas that supposedly belonged to them with stakes as boundary markers.⁴²⁹
- 225) The invaders and paramilitaries started to clear the fields of upper Santa Fé, cutting down the coffee trees that were planted.⁴³⁰
- 226) The paramilitaries started to use Hacienda Santa Fé as their base of operations.⁴³¹ As the protests intensified, the paramilitaries started to get more organized.⁴³²
- 227) The paramilitaries started to refer to Hacienda Santa Fé as “El Pavón,” which was the traditional name of the area that some of the former Hacienda workers

⁴²⁵ Witness Statement of Luis Gutierrez – Memorial – SPA at ¶ 54 (CWS-02).

⁴²⁶ Witness Statement of Luis Gutierrez – Memorial – SPA at ¶¶ 56-58 (CWS-02).

⁴²⁷ Witness Statement of Luis Gutierrez – Memorial – SPA at ¶ 56 (CWS-02); Witness Statement of Jaime Francisco Henrriquez Cruz – Memorial -SPA at ¶17 (CWS-06).

⁴²⁸ Witness Statement of Luis Gutierrez – Memorial – SPA at ¶ 58 (CWS-02); Witness Statement of Jaime Francisco Henrriquez Cruz – Memorial -SPA at ¶17 (CWS-06).

⁴²⁹ Witness Statement of Luis Gutierrez – Memorial – SPA at ¶ 58 (CWS-02); Witness Statement of Jaime Francisco Henrriquez Cruz – Memorial -SPA at ¶17 (CWS-06).

⁴³⁰ Witness Statement of Luis Gutierrez – Memorial – SPA at ¶ 59 (CWS-02); Witness Statement of Jaime Francisco Henrriquez Cruz – Memorial -SPA at ¶18 (CWS-06).

⁴³¹ Witness Statement of Luis Gutierrez – Memorial – SPA at ¶ 60 (CWS-02); Witness Statement of Jaime Francisco Henrriquez Cruz – Memorial -SPA at ¶19 (CWS-06).

⁴³² Witness Statement of Luis Gutierrez – Memorial – SPA at ¶ 60 (CWS-02); Witness Statement of Jaime Francisco Henrriquez Cruz – Memorial -SPA at ¶19 (CWS-06).

used to refer to Hacienda Santa Fé.⁴³³ The invaders and paramilitaries intended to form a cooperative called El Pavón to facilitate the transfer of Hacienda Santa Fé's legal title to the invaders and paramilitaries.⁴³⁴

- 228) After the invasion, the workers did not abandon Hacienda Santa Fé.⁴³⁵ The workers were careful not to go near the area occupied by the paramilitaries.⁴³⁶

2. The Second Invasion (Lower Santa Fé)

- 229) On July 16, 2018, the second wave of approximately 60 armed invaders led by the paramilitary leaders Vinicio Garcia "Comandante Gorgojo" and Comandante Ciro Montenegro "Avispa" entered the lower part of Hacienda Santa Fé (Santa Fé abajo).⁴³⁷ The invaders led by the paramilitaries occupied the lower area of Hacienda Santa Fé and took possession of the remaining buildings.⁴³⁸ The paramilitaries invaded and occupied the workers and administrative personnel living quarters.⁴³⁹

- 230) The paramilitary leaders told the Hacienda Santa Fé workers that the Mayor of the Jinotega Municipality, Leónidas Centeno sent them and promised the

⁴³³ Witness Statement of Luis Gutierrez – Memorial – SPA at ¶ 62 (CWS-02); Witness Statement of Jaime Francisco Henrriquez Cruz – Memorial -SPA at ¶ 20 (CWS-06).

⁴³⁴ Witness Statement of Luis Gutierrez – Memorial – SPA at ¶ 62 (CWS-02); Witness Statement of Jaime Francisco Henrriquez Cruz – Memorial -SPA at ¶ 20 (CWS-06).

⁴³⁵ Witness Statement of Luis Gutierrez – Memorial – SPA at ¶ 63 (CWS-02); Witness Statement of Jaime Francisco Henrriquez Cruz – Memorial -SPA at ¶ 21 (CWS-06).

⁴³⁶ Witness Statement of Luis Gutierrez – Memorial – SPA at ¶ 63 (CWS-02); Witness Statement of Jaime Francisco Henrriquez Cruz – Memorial -SPA at ¶ 21 (CWS-06).

⁴³⁷ Witness Statement of Luis Gutierrez – Memorial – SPA at ¶ 64 (CWS-02); Witness Statement of Jaime Francisco Henrriquez Cruz – Memorial -SPA at ¶ 23 (CWS-06); Witness Statement of Carlos J. Rondón – Memorial – ENG at ¶ 80 (CWS-01).

⁴³⁸ Witness Statement of Luis Gutierrez – Memorial – SPA at ¶ 64 (CWS-02); Witness Statement of Jaime Francisco Henrriquez Cruz – Memorial -SPA at ¶ 23 (CWS-06).

⁴³⁹ Witness Statement of Jaime Francisco Henrriquez Cruz – Memorial -SPA at ¶24 (CWS-06).

invaders could keep the lands.⁴⁴⁰ In addition, Arlen Chavarria, a local elected councilwoman in San Rafael del Norte, joined Comandante Gorgojo and Comandante Cinco Estrellas at Hacienda Santa Fé.⁴⁴¹ Astonishingly, while supporting the invaders, Councilwoman Chavarria reserved some of the ill-gotten lands for herself and her family.⁴⁴²

- 231) At the time of the invasion, Jaime Vivas was in his room when Ciro Montenegro (known as "Comandante Avispa") along with five other people violently broke the door of the room he was in and forcibly removed him.⁴⁴³ When Mr. Vivas was outside, he witnessed how the paramilitaries were forcibly opening the rest of the rooms and violently removing the workers who were inside.⁴⁴⁴ Mr. Vivas witnessed one of the paramilitaries steal one of the laptops from one of the rooms.⁴⁴⁵ Mr. Vivas witnessed the paramilitaries opened the agrochemical warehouse outside.⁴⁴⁶
- 232) That same day, Mr. Vivas was taken by two paramilitaries to see an inventory they were making of the goods in the upper part of the Hacienda Santa Fé but he never got to see the document.⁴⁴⁷ Cristobal Luque, a volunteer police, told Mr. Gutierrez that they had made an inventory of the assets in lower Hacienda Santa Fé.⁴⁴⁸

⁴⁴⁰; Witness Statement of Jaime Francisco Henrriquez Cruz – Memorial -SPA at ¶ 23 (**CWS-06**): Witness Statement of Carlos J. Rondón – Memorial – ENG at ¶ 80 (**CWS-01**).

⁴⁴¹ Witness Statement of Luis Gutierrez – Memorial – SPA at ¶ 74 (**CWS-02**).

⁴⁴² Witness Statement of Luis Gutierrez – Memorial – SPA at ¶ 74 (**CWS-02**).

⁴⁴³ Witness Statement of Jaime Francisco Henrriquez Cruz – Memorial -SPA at ¶ 25 (**CWS-06**).

⁴⁴⁴ Witness Statement of Jaime Francisco Henrriquez Cruz – Memorial -SPA at ¶ 26 (**CWS-06**).

⁴⁴⁵ Witness Statement of Jaime Francisco Henrriquez Cruz – Memorial -SPA at ¶ 26 (**CWS-06**).

⁴⁴⁶ Witness Statement of Jaime Francisco Henrriquez Cruz – Memorial -SPA at ¶ 26 (**CWS-06**).

⁴⁴⁷ Witness Statement of Jaime Francisco Henrriquez Cruz – Memorial -SPA at ¶ 28 (**CWS-06**):

⁴⁴⁸ Witness Statement of Luis Gutierrez – Memorial – SPA at ¶ 75 (**CWS-02**).

- 233) When the paramilitaries entered Hacienda Santa Fé, Mr. Vivas witnessed when the paramilitaries attempted to disarm Domingo Ferrufino, the security guard on duty.⁴⁴⁹ Vinicio Garcia (known as “Comandante Gorgojo”) and Ciro Montenegro (known as Comandante “Avispa) ordered Mr. Ferrufino to hand over his shotgun.⁴⁵⁰ Domingo Ferrufino refused to comply with the orders from the paramilitary commanders.⁴⁵¹
- 234) Cristobal Luque, a voluntary police officer, tried to disarm Domingo Ferrufino.⁴⁵² When Mr. Domingo Ferrufino refused to turn over his shotgun to Cristobal Luque, he hit in the back with a rocket mortar.⁴⁵³ Since Mr. Ferrufino Domingo refused to obey the paramilitaries’ demands, approximately 25 invaders and paramilitaries started to beat him Domingo with the shotgun, then sat him down over some metal farming tools and started to kick him.⁴⁵⁴ The paramilitaries told him they were punishing him because he disobeyed their orders.⁴⁵⁵
- 235) After being brutally attacked, Domingo Ferrufino was taken to meet with the paramilitary leader Vinicio Garcia “Comandante Gorgojo”.⁴⁵⁶ Vinicio Garcia “Comandante Gorgojo,” demanded to know where the rest of the shotguns were.⁴⁵⁷ Domingo Ferrufino refused to tell the paramilitaries where the

⁴⁴⁹ Witness Statement of Jaime Francisco Henrriquez Cruz – Memorial -SPA at ¶ 27 (CWS-06):

⁴⁵⁰ Witness Statement of Luis Gutierrez – Memorial – SPA at ¶ 66 (CWS-02).

⁴⁵¹ Witness Statement of Luis Gutierrez – Memorial – SPA at ¶ 66 (CWS-02).

⁴⁵² Witness Statement of Luis Gutierrez – Memorial – SPA at ¶ 67 (CWS-02).

⁴⁵³ Witness Statement of Luis Gutierrez – Memorial – SPA at ¶ 67 (CWS-02).

⁴⁵⁴ Witness Statement of Luis Gutierrez – Memorial – SPA at ¶ 67 (CWS-02).

⁴⁵⁵ Witness Statement of Luis Gutierrez – Memorial – SPA at ¶ 67 (CWS-02).

⁴⁵⁶ Witness Statement of Luis Gutierrez – Memorial – SPA at ¶ 68 (CWS-02).

⁴⁵⁷ Witness Statement of Luis Gutierrez – Memorial – SPA at ¶ 68 (CWS-02).

shotguns were stored.⁴⁵⁸ By then, other paramilitaries had broken into Raymundo Palacios's room and taken the shotguns.⁴⁵⁹ One of the paramilitaries called Mr. Ferrufino a liar because he told the police that there were no more guns at Hacienda Santa Fé.⁴⁶⁰

- 236) The paramilitaries took the cell phone of Domingo Ferrufino and the rest of the workers so that that they could not report what was going on at the Hacienda Santa Fé, and to give them time to look for any information they might have.⁴⁶¹ After several hours, Mr. Ferrufino asked the paramilitaries for his phone back to call his family. At that time, Vinicio Garcia "Comandante Gorgojo" gave the order to return the worker's cell phones.⁴⁶²
- 237) After the paramilitaries returned the cell phones, Mr. Ferrufino contacted Raymundo Palacios, Hacienda Santa Fé's head of security, who was away at the time, to inform him that invaders and paramilitaries had invaded the lower part Hacienda Santa Fé and that he had been brutally attacked.⁴⁶³ When Mr. Palacios arrived to Hacienda Santa Fé, he discovered that the paramilitaries had removed the shotguns and rifles.⁴⁶⁴
- 238) That same day, the paramilitaries forcibly grouped all the workers of the Hacienda Santa Fé. Mr. Vivas heard a paramilitary say that no foreign son of a

⁴⁵⁸ Witness Statement of Luis Gutierrez – Memorial – SPA at ¶¶ 68 (CWS-02).

⁴⁵⁹ Witness Statement of Luis Gutierrez – Memorial – SPA at ¶¶ 68 (CWS-02).

⁴⁶⁰ Witness Statement of Luis Gutierrez – Memorial – SPA at ¶¶ 72 (CWS-02).

⁴⁶¹ Witness Statement of Luis Gutierrez – Memorial – SPA at ¶¶ 69 (CWS-02).

⁴⁶² Witness Statement of Luis Gutierrez – Memorial – SPA at ¶¶ 69 (CWS-02).

⁴⁶³ Witness Statement of Luis Gutierrez – Memorial – SPA at ¶¶ 70 (CWS-02).

⁴⁶⁴ Witness Statement of Luis Gutierrez – Memorial – SPA at ¶¶ 71 (CWS-02).

bitch (referring to Carlos Rondón) had anything to do there that the property was theirs.⁴⁶⁵

- 239) Raymundo Palacios called Luis Gutierrez to inform him that invaders led by paramilitaries had invaded the lower part of Hacienda Santa Fé.⁴⁶⁶ Mr. Gutierrez informed Mr. Gutierrez of the paramilitaries brutal attack on Domingo Ferrufino and that there were people there that were making threats against Mr. Gutierrez saying he should not be a snitch with Don Carlos (referring to Carlos Rondón).⁴⁶⁷
- 240) Luis Gutierrez went to Hacienda Santa Fé and encountered Efren Zeledón Orozco (known as “comandante Cinco Estrellas”).⁴⁶⁸ Mr. Gutierrez heard Efren Zeledón Orozco (“Comandante Cinco Estrellas”) say that they were sent to occupy Hacienda Santa Fé under the order of Mayor Leónidas Centeno and that he had promised the invaders that each of them could keep part of the Hacienda Santa Fé lands.⁴⁶⁹
- 241) Mr. Gutierrez saw Arlen Chavarría, a member of the Sandinista National Liberation Front and councilwoman of the Municipality of San Rafael del Nort accompanied by family members.⁴⁷⁰ Mr. Gutierrez witnessed a meeting between Arlen Chavarría and the paramilitary leaders Vinicio Garcia “Comandante Gorgojo” and Efren Zeledón Orozco “Comandante Cinco Estrellas”.⁴⁷¹ Mr. Gutiérrez heard Arlen Chavarría ask the paramilitary leaders

⁴⁶⁵ Witness Statement of Jaime Francisco Henriquez Cruz – Memorial -SPA at ¶ 29 (CWS-06).

⁴⁶⁶ Witness Statement of Luis Gutierrez – Memorial – SPA at ¶ 71 (CWS-02).

⁴⁶⁷ Witness Statement of Luis Gutierrez – Memorial – SPA at ¶ 71 (CWS-02).

⁴⁶⁸ Witness Statement of Luis Gutierrez – Memorial – SPA at ¶ 73 (CWS-02).

⁴⁶⁹ Witness Statement of Luis Gutierrez – Memorial – SPA at ¶ 73 (CWS-02).

⁴⁷⁰ Witness Statement of Luis Gutierrez – Memorial – SPA at ¶ 74 (CWS-02).

⁴⁷¹ Witness Statement of Luis Gutierrez – Memorial – SPA at ¶ 74 (CWS-02).

to reserve some of the Hacienda Santa Fé lands for herself and her family⁴⁷²⁴⁷³

- 242) Ultimately, the paramilitaries took over all of the remaining buildings and prevented the employees from doing work at the plantation.⁴⁷⁴ The paramilitaries informed the workers that they had to leave unless they joined them.⁴⁷⁵ The workers of Hacienda Santa Fé did not join the invaders and paramilitaries and began to leave the Hacienda Santa Fé to protect their lives.⁴⁷⁶
- 243) During this invasion, the paramilitaries grew more violent and made death threats toward Hacienda Santa Fé workers and senior management.⁴⁷⁷
- 244) On one occasion, Comandante Gorgojo threatened Mr. Gutierrez, proclaiming Inagrosa senior management members Mr. Gutierrez and Mr. Rondón to be “dead men.”⁴⁷⁸

⁴⁷³ Witness Statement of Luis Gutierrez – Memorial – SPA at ¶ 74 (**CWS-02**).

⁴⁷⁴ Witness Statement of Luis Gutierrez – Memorial – SPA at ¶¶ 77-78 (**CWS-02**); Witness Statement of Jaime Francisco Henrriquez Cruz – Memorial -SPA at ¶ 29 (**CWS-06**).

⁴⁷⁵ Witness Statement of Luis Gutierrez – Memorial – SPA at ¶ 77 (**CWS-02**); Witness Statement of Jaime Francisco Henrriquez Cruz – Memorial -SPA at ¶ 29 (**CWS-06**).

⁴⁷⁶ Witness Statement of Jaime Francisco Henrriquez Cruz – Memorial -SPA at ¶ 29 (**CWS-06**).

⁴⁷⁷ Witness Statement of Luis Gutierrez – Memorial – SPA at ¶ 76 (**CWS-02**); Witness Statement of Jaime Francisco Henrriquez Cruz – Memorial -SPA at ¶ 30 (**CWS-06**); Witness Statement of Carlos J. Rondón – Memorial – ENG at ¶ 81 (**CWS-01**).

⁴⁷⁸ Witness Statement of Luis Gutierrez – Memorial – SPA at ¶ 76 (**CWS-02**); Witness Statement of Jaime Francisco Henrriquez Cruz – Memorial -SPA at ¶ 30 (**CWS-06**); Witness Statement of Carlos J. Rondón – Memorial – ENG at ¶ 81 (**CWS-01**).

- 245) From that date on, the invaders and paramilitaries started planting vegetables and basic grains on the field they had previously cleared.⁴⁷⁹ They also started to cut down and clear the 40 hectares of avocado trees and uncultivated areas in lower Santa Fé. In that area, planted vegetables, legumes, and basic grains.⁴⁸⁰
- 246) To obtain better access to Hacienda Santa Fé, the paramilitaries destroyed the fences that protected approximately 40 hectares of avocado plantation.⁴⁸¹ As they were passing through the crops, the invaders began to cut down the avocados that were ready for harvest.⁴⁸²
- 247) Once the paramilitaries completely had occupied Hacienda Santa Fé, Mr. Gutierrez left.⁴⁸³ At one of the barricades, Mr. Gutierrez encountered Enriquez Fabio Darío,⁴⁸⁴ a Nicaraguan government official, who confirmed that the Government was taking Hacienda Santa Fé to pressure the business sector.⁴⁸⁵

⁴⁷⁹ Witness Statement of Luis Gutierrez – Memorial – SPA at ¶ 79 (**CWS-02**): Witness Statement of Jaime Francisco Henriquez Cruz – Memorial -SPA at ¶ 31 (**CWS-06**).

⁴⁸⁰ Witness Statement of Luis Gutierrez – Memorial – SPA at ¶ 79 (**CWS-02**): Witness Statement of Jaime Francisco Henriquez Cruz – Memorial -SPA at ¶ 31 (**CWS-06**).

⁴⁸¹ Witness Statement of Luis Gutierrez – Memorial – SPA at ¶ 80 (**CWS-02**): Witness Statement of Jaime Francisco Henriquez Cruz – Memorial -SPA at ¶ 32 (**CWS-06**).

⁴⁸² Witness Statement of Luis Gutierrez – Memorial – SPA at ¶ 80 (**CWS-02**): Witness Statement of Jaime Francisco Henriquez Cruz – Memorial -SPA at ¶ 32 (**CWS-06**).

⁴⁸³ Witness Statement of Luis Gutierrez – Memorial – SPA at ¶ 82 (**CWS-02**).

⁴⁸⁴ Enriquez Fabio Darío worked for the Ministry of Agriculture, Cattle Raising and Forestry (known by the acronym “MAGFOR”) in the Jinotega Department. Facebook profile of Enriquez Fabio Dario, Last accessed May 7, 2019 (**C-0021-SPA**); Witness Statement of Luis Gutierrez – Memorial – SPA at ¶ 82 (**CWS-02**).

⁴⁸⁵ Witness Statement of Luis Gutierrez – Memorial – SPA at ¶ 82 (**CWS-02**).

3. The Third Invasion

a) Death threats and property destruction

- 248) On July 24, 2018, a heavily armed paramilitary leader, Luis Antonio Rizo (known as Comandante “Toño Loco”),⁴⁸⁶ entered Hacienda Santa Fé with approximately 40 armed paramilitaries.⁴⁸⁷
- 249) Luis Gutierrez was present at Hacienda Santa Fe when Luis Antonio Rizo “Toño Loco” invaded Hacienda Santa Fé. Mr. Gutierrez heard the paramilitaries Sergio Roberto Zelaya Rouk, Efred Zeledón Orozco (Known as “Comandante Cinco Estrellas”), Vinicio Garcia (known as “Comandante Gorgojo”), Ciro Manuel Montenegro (known as Comandante “Avispa”) say that they were being sent to Hacienda Santa Fé by the Nicaraguan government.⁴⁸⁸
- 250) The Nicaraguan government started to send food and provisions to the invaders and paramilitaries at Hacienda Santa Fé.⁴⁸⁹ The paramilitary leader Ciro Montenegro (Comandante “Avispa”) was in charge of distributing the food provisions.⁴⁹⁰
- 251) The paramilitaries continued utilizing the seized Hacienda Santa Fé as an operational headquarters to suppress the protests in Jinotega.⁴⁹¹

⁴⁸⁶ Toño Loco’s real name is Luis Antonio Rizo. He is described as the head of the paramilitaries of Jinotega.

⁴⁸⁷ Witness Statement of Luis Gutierrez – Memorial – SPA at ¶ 87 (**CWS-02**); Witness Statement of Jaime Francisco Henrriquez Cruz – Memorial -SPA at ¶ 34 (**CWS-06**); Witness Statement of Carlos J. Rondón – Memorial – ENG at ¶ 86 (**CWS-01**).

⁴⁸⁸ Witness Statement of Luis Gutierrez – Memorial – SPA at ¶ 89 (**CWS-02**).

⁴⁸⁹ Witness Statement of Jaime Francisco Henrriquez Cruz – Memorial -SPA at ¶37 (**CWS-06**); Witness Statement of Luis Gutierrez – Memorial – SPA at ¶ 92 (**CWS-02**).

⁴⁹⁰ Witness Statement of Jaime Francisco Henrriquez Cruz – Memorial -SPA at ¶37 (**CWS-06**); Witness Statement of Luis Gutierrez – Memorial – SPA at ¶ 92 (**CWS-02**).

⁴⁹¹ Witness Statement of Luis Gutierrez – Memorial – SPA at ¶ 91 (**CWS-02**); Witness Statement of Jaime Francisco Henrriquez Cruz – Memorial -SPA at ¶ 36 (**CWS-06**).

- 252) Jaime Vivas, the field supervisor at Hacienda Santa Fé reported that Comandante Toño Loco and Comandante Gorgojo frequently had made death threats against Mr. Gutierrez.⁴⁹² According to Mr. Vivas, those two had told the workers, “*when that little engineer presents himself here, I am going to fill his chest with bullets.*”⁴⁹³
- 253) Shortly after that, on July 26, 2018, Ney Ariel Ortega Kuan, (known as “El Chino,”), brutally assaulted Jaime Vivas for refusing to share information about Hacienda Santa Fé assets with them.⁴⁹⁴ The paramilitaries began to slaughter sheep owned by Hacienda Santa Fé and gave away some of the sheep.⁴⁹⁵
- 254) The paramilitaries and invaders appeared focused on obtaining arable land to plant subsistence crops such as beans and potatoes.⁴⁹⁶
- 255) In July 2018, Inagrosa management was expecting yields for the 2018 harvest to be in excess of 50 kg per tree, which was decimated due to the actions of the paramilitaries.⁴⁹⁷ There also was widespread destruction of the nursery saplings,⁴⁹⁸ the cornerstone of the plantation’s expansion plans. The plantation also lost access to the water and forest conservation areas.⁴⁹⁹

⁴⁹²Witness Statement of Jaime Francisco Henrriquez Cruz – Memorial -SPA at ¶38 (CWS-06): Witness Statement of Luis Gutierrez – Memorial – SPA at ¶ 93 (CWS-02).

⁴⁹³Witness Statement of Jaime Francisco Henrriquez Cruz – Memorial -SPA at ¶38 (CWS-06): Witness Statement of Luis Gutierrez – Memorial – SPA at ¶ 93 (CWS-02).

⁴⁹⁴ Witness Statement of Jaime Francisco Henrriquez Cruz – Memorial -SPA at ¶40 (CWS-06): Witness Statement of Luis Gutierrez – Memorial – SPA at ¶ 94 (CWS-02).

⁴⁹⁵ Witness Statement of Jaime Francisco Henrriquez Cruz – Memorial -SPA at ¶ 38 (CWS-06).

⁴⁹⁶ Witness Statement of Luis Gutierrez – Memorial – SPA at ¶ 79 (CWS-02): Witness Statement of Jaime Francisco Henrriquez Cruz – Memorial -SPA at ¶ 31 (CWS-06).

⁴⁹⁷ Witness Statement of Luis Gutierrez – Memorial – SPA at ¶ 81 (CWS-02).

⁴⁹⁸ Witness Statement of Luis Gutierrez – Memorial – SPA at ¶ 96 (CWS-02): Witness Statement of Jaime Francisco Henrriquez Cruz – Memorial -SPA at ¶ 57 (CWS-06).

⁴⁹⁹ Witness Statement of Luis Gutierrez – Memorial – SPA at ¶ 97 (CWS-02).

4. Police escorted Mayor Herrera and paramilitaries into Hacienda Santa Fé

256) On August 4, 2018, the Mayor of the Municipality of San Rafael del Norte, Norma Herrera, and the paramilitary leader Efren Zeledón Orozco “Comandante Cinco Estrellas” were escorted into the Hacienda Santa Fé by members of the Nicaraguan National Police, including Police Captain Herrera in police patrol vehicles.⁵⁰⁰ Instead of ordering the paramilitaries and invaders to leave, Police Captain William Herrera conversed with them.⁵⁰¹

257) That same day, Efren Zeledón Orozco “Comandante Cinco Estrellas” met with the invaders to discuss the land distribution from the seized lands for retired military officers and civilians.⁵⁰² The lands were assigned to persons following their rank.⁵⁰³ Some of the members of the police department of San Rafael del Norte arranged for reserved lots in the Hacienda Santa Fé lands through representatives.⁵⁰⁴

5. Mayor Herrera addressed the Paramilitaries

258) On August 6, 2018, Mayor Norma Herrera, the Mayor of the Municipality of San Rafael del Norte, accompanied by her advisor Noél Gutiérrez,⁵⁰⁵ met with the paramilitaries at Hacienda Santa Fé.⁵⁰⁶ Members of the National Police

⁵⁰⁰ Witness Statement of Luis Gutierrez – Memorial – SPA at ¶ 98 (CWS-02); Witness Statement of Jaime Francisco Henrriquez Cruz – Memorial -SPA at ¶ 43 (CWS-06).

⁵⁰¹ Witness Statement of Luis Gutierrez – Memorial – SPA at ¶ 98 (CWS-02).

⁵⁰² Witness Statement of Luis Gutierrez – Memorial – SPA at ¶ 99 (CWS-02); Witness Statement of Jaime Francisco Henrriquez Cruz – Memorial -SPA at ¶ 44 (CWS-06).

⁵⁰³ Witness Statement of Jaime Francisco Henrriquez Cruz – Memorial -SPA at ¶ 44 (CWS-06); Witness Statement of Luis Gutierrez – Memorial – SPA at ¶ 99 (CWS-02).

⁵⁰⁴ Witness Statement of Jaime Francisco Henrriquez Cruz – Memorial -SPA at ¶ 45 (CWS-06); Witness Statement of Luis Gutierrez – Memorial – SPA at ¶ 100 (CWS-02).

⁵⁰⁵ Noél Gutiérrez López is also a political secretary for the SFLN (Sandinista Political Party) (see C-0240-SPA).

⁵⁰⁶ Witness Statement of Jaime Francisco Henrriquez Cruz – Memorial -SPA at ¶ 47 (CWS-06); Witness Statement of Luis Gutierrez – Memorial – SPA at ¶ 101 (CWS-02).

escorted these government officials Hacienda Santa Fé in police patrol vehicles.⁵⁰⁷

- 259) Approximately 400 invaders and paramilitaries gathered around Mayor Herrera to hear her speak.⁵⁰⁸ Mayor Herrera proposed that the municipality support the invaders and paramilitaries with new water, electricity, and housing infrastructure projects at Hacienda Santa Fé for their benefit.⁵⁰⁹ Mayor Herrera said that the paramilitaries only had to get organized.⁵¹⁰
- 260) At no point during Mayor Herrera's visit did she, or any of the National Police members, instruct nor demand the paramilitaries to end their unlawful occupation of Hacienda Santa Fé.⁵¹¹

⁵⁰⁷ Witness Statement of Jaime Francisco Henriquez Cruz – Memorial -SPA at ¶ 47 (**CWS-06**): Witness Statement of Luis Gutierrez – Memorial – SPA at ¶ 101 (**CWS-02**).

⁵⁰⁸ Witness Statement of Jaime Francisco Henriquez Cruz – Memorial -SPA at ¶ 48 (**CWS-06**): Witness Statement of Luis Gutierrez – Memorial – SPA at ¶ 101 (**CWS-02**).

⁵⁰⁹ Witness Statement of Jaime Francisco Henriquez Cruz – Memorial -SPA at ¶ 49 (**CWS-06**): Witness Statement of Luis Gutierrez – Memorial – SPA at ¶ 101 (**CWS-02**).

⁵¹⁰ Witness Statement of Jaime Francisco Henriquez Cruz – Memorial -SPA at ¶ 50 (**CWS-06**): Witness Statement of Luis Gutierrez – Memorial – SPA at ¶ 102 (**CWS-02**).

⁵¹¹ Witness Statement of Jaime Francisco Henriquez Cruz – Memorial -SPA at ¶ 51 (**CWS-06**): Witness Statement of Luis Gutierrez – Memorial – SPA at ¶ 103 (**CWS-02**).

6. Paramilitaries leave for one day

- 261) On August 10, 2018, Mr. Rondón sent a letter to Police Captain William Herrera complaining about the inaction of the police to protect the workers at Hacienda Santa Fé and the property from the armed paramilitaries.⁵¹² 513514
- 262) On August 11, 2018, Mayor Leónidas Centeno and Police Commissioner Marvin Castro ordered Luis Antonio Rizo “Toño Loco” to tell the paramilitaries to leave the premises of Hacienda Santa Fé.⁵¹⁵ Approximately 550 paramilitaries left Hacienda Santa Fé, looting what they could as they departed.⁵¹⁶
- 263) Raymundo Palacios received a call from Police Captain William Herrera and informed him that the management team could return to Hacienda Santa Fé because the invaders and paramilitaries had left.⁵¹⁷
- 264) Raymundo Palacios requested that the police return the confiscated shotguns and rifles. However, the police refused.⁵¹⁸ The local police told the Inagrosa

⁵¹² Letter from Carlos Rondón to Police Captain Herrera, August 10, 2018 (**C-0012-SPA**); Witness Statement of Carlos J. Rondón – Memorial – ENG at ¶ 87 (**CWS-01**); Witness Statement of Luis Gutierrez – Memorial – SPA at ¶ 105 (**CWS-02**).

⁵¹⁴ Witness Statement of Carlos J. Rondón – Memorial – ENG at ¶ 88 (**CWS-01**):

⁵¹⁵ Witness Statement of Jaime Francisco Henriquez Cruz – Memorial -SPA at ¶53 (**CWS-06**); Witness Statement of Luis Gutierrez – Memorial – SPA at ¶ 106 (**CWS-02**).

⁵¹⁶ Witness Statement of Jaime Francisco Henriquez Cruz – Memorial -SPA at ¶55 (**CWS-06**); Witness Statement of Luis Gutierrez – Memorial – SPA at ¶ 107 (**CWS-02**).

⁵¹⁷ Witness Statement of Luis Gutierrez – Memorial – SPA at ¶ 109 (**CWS-02**).

⁵¹⁸ Witness Statement of Luis Gutierrez – Memorial – SPA at ¶ 109 (**CWS-02**).

Management that it was inevitable that the paramilitaries would return and take the weapons.⁵¹⁹

- 265) Mr. Rondón received a call from PRONicaragua, Nicaragua's official investment and export promotion agency.⁵²⁰ Based on that call, Mr. Rondón authorized Mr. Gutierrez to return to Hacienda Santa Fé.⁵²¹
- 266) On August 14, 2018, Mr. Gutierrez returned to Hacienda Santa Fé with a Public Notary, Captain Herrera, five armed police officers, Raymundo Palacios, Domingo Ferrufino and Jaime Vivas to assess the damage done by the paramilitaries.⁵²² While Mr. Gutierrez and Captain Herrera were doing an inventory check, Mr. Gutierrez found a note in Jaime Vivas' office that read, "*we will return, and we will kill you for being a snitch.*"⁵²³ Mr. Gutierrez showed the note to Captain Herrera and the notary.⁵²⁴ After that, Jaime Vivas left Hacienda Santa Fé.⁵²⁵

7. Paramilitaries return the next day

- 267) On August 17, 2018, the paramilitaries returned and started to re-occupied the Hacienda Santa Fé.⁵²⁶ The next day, on August 18, 2018, approximately 100

⁵¹⁹ Witness Statement of Luis Gutierrez – Memorial – SPA at ¶ 109 (CWS-02).

⁵²⁰ Witness Statement of Carlos J. Rondón – Memorial – ENG at ¶ 89 (CWS-01); Witness Statement of Luis Gutierrez – Memorial – SPA at ¶ 110 (CWS-02).

⁵²¹ Witness Statement of Carlos J. Rondón – Memorial – ENG at ¶ 89 (CWS-01); Witness Statement of Luis Gutierrez – Memorial – SPA at ¶ 110 (CWS-02).

⁵²² Witness Statement of Luis Gutierrez – Memorial – SPA at ¶ 111 (CWS-02); Witness Statement of Jaime Francisco Henriquez Cruz – Memorial -SPA at ¶ 56 (CWS-06).

⁵²³ Witness Statement of Jaime Francisco Henriquez Cruz – Memorial -SPA at ¶ 58 (CWS-06); Witness Statement of Luis Gutierrez – Memorial – SPA at ¶ 113 (CWS-02).

⁵²⁴ Witness Statement of Jaime Francisco Henriquez Cruz – Memorial -SPA at ¶ 58 (CWS-06); Witness Statement of Luis Gutierrez – Memorial – SPA at ¶ 113 (CWS-02).

⁵²⁵ Witness Statement of Jaime Francisco Henriquez Cruz – Memorial -SPA at ¶ 60 (CWS-06); Witness Statement of Luis Gutierrez – Memorial – SPA at ¶ 113 (CWS-02).

⁵²⁶ Witness Statement of Luis Gutierrez – Memorial – SPA at ¶ 117 (CWS-02); Witness Statement of Jaime Francisco Henriquez Cruz – Memorial -SPA at ¶ 61 (CWS-06).

invaders led by paramilitaries entered Hacienda Santa Fé and occupied the entire property.⁵²⁷

268) They told the workers that they would kill them to ensure that there would be no witnesses.⁵²⁸ Mr. Gutierrez did not call Captain Herrera to inform him that the paramilitaries had returned.⁵²⁹ At this point, It was clear to him that the National Police was colluding with the paramilitaries.⁵³⁰

269) The paramilitaries attacked and threatened to kill Mr. Chavarría, a security guard at the plantation, as punishment for keeping the management informed of their activities on the plantation.⁵³¹ Mr. Chavarría then forcibly was removed from the property and threatened to kill him if he remained.⁵³²~~[OBJ]~~

270) Mr. Chavarría called Police Captain Herrera and told him of the attack.⁵³³ Police Captain Herrera explained to Mr. Chavarría that the paramilitaries were only trying to scare him and that he should not worry about it.⁵³⁴

271) On August 19, 2019, Omar Gómez, another Hacienda Santa Fé worker, went to see Councilwoman Arlene Chavarría to ask for her help with the death threats he and his family were receiving.⁵³⁵ Councilwoman Chavarría told Mr.

⁵²⁷Witness Statement of Luis Gutierrez – Memorial – SPA at ¶118 (**CWS-02**): Witness Statement of Jaime Francisco Henriquez Cruz – Memorial -SPA at ¶ 62 (**CWS-06**).

⁵²⁸ Witness Statement of Luis Gutierrez – Memorial – SPA at ¶ 120 (**CWS-02**).

⁵²⁹ Witness Statement of Luis Gutierrez – Memorial – SPA at ¶ 122 (**CWS-02**).

⁵³⁰ Witness Statement of Luis Gutierrez – Memorial – SPA at ¶ 122 (**CWS-02**).

⁵³¹ Witness Statement of Luis Gutierrez – Memorial – SPA at ¶ 123 (**CWS-02**).

⁵³² Witness Statement of Luis Gutierrez – Memorial – SPA at ¶ 123 (**CWS-02**).

⁵³³ Witness Statement of Luis Gutierrez – Memorial – SPA at ¶ 124 (**CWS-02**).

⁵³⁴ Witness Statement of Luis Gutierrez – Memorial – SPA at ¶ 124 (**CWS-02**).

⁵³⁵ Witness Statement of Luis Gutierrez – Memorial – SPA at ¶ 125 (**CWS-02**).

Gómez that Mayor Leonidas Centeno had ordered the invasion of the Hacienda Santa Fé.⁵³⁶

- 272) Since the paramilitary returned on August 18, 2018, the local police have not provided any assistance to the workers or the plantation owners.⁵³⁷
- 273) An employee of MAGFOR Jinotega (whose name is not disclosed for personal security reasons) told Mr. Gutierrez that the National Police delegation of San Rafael del Norte provided the guns to the invaders of Hacienda Santa Fé.⁵³⁸
- 274) On August 13, 2021, the government of Nicaragua removed the paramilitaries from Hacienda Santa Fé.⁵³⁹ While the paramilitaries are no longer present, the government continues to occupy Hacienda Santa Fé illegally.⁵⁴⁰ It has not returned Hacienda Santa Fé to Inagrosa⁵⁴¹
- 275) Inagrosa does not have the property, it has suffered long-lasting destruction of its facilities, including but not limited to its orchards, its seed bank, its processing facilities, its nurseries, the physical plant, and the deforestation and destruction of the rare wood forests.⁵⁴²

⁵³⁶ Witness Statement of Luis Gutierrez – Memorial – SPA at ¶ 125 (CWS-02).

⁵³⁷ Witness Statement of Luis Gutierrez – Memorial – SPA at ¶ 126 (CWS-02).

⁵³⁸ Witness Statement of Luis Gutierrez – Memorial – SPA at ¶ 129 (CWS-02).

⁵³⁹ Witness Statement of Luis Gutierrez – Memorial – SPA at ¶ 144 (CWS-02).

⁵⁴⁰ Witness Statement of Luis Gutierrez – Memorial – SPA at ¶ 147 (CWS-02); Witness Statement of Carlos Rondón – Memorial – ENG at ¶ 235 (CWS-02).

⁵⁴¹ Witness Statement of Carlos Rondón – Memorial – ENG at ¶ 231 (CWS-02).

⁵⁴² Witness Statement of Luis Gutierrez – Memorial – SPA at ¶ 128 (CWS-02).

B. Civic Organizations Confirm the Taking of Hacienda Santa Fé

- 276) Civic organizations observed and reported on the taking of Hacienda Santa Fé by the government-supported paramilitaries.⁵⁴³
- 277) The Civic Alliance for Democracy and Justice is a coalition of human rights activists, students, peasant movement members, and business sector members.⁵⁴⁴ The Jinotega Chapter of this coalition confirmed the armed paramilitaries' occupation of Hacienda Santa Fé on its social media page:

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

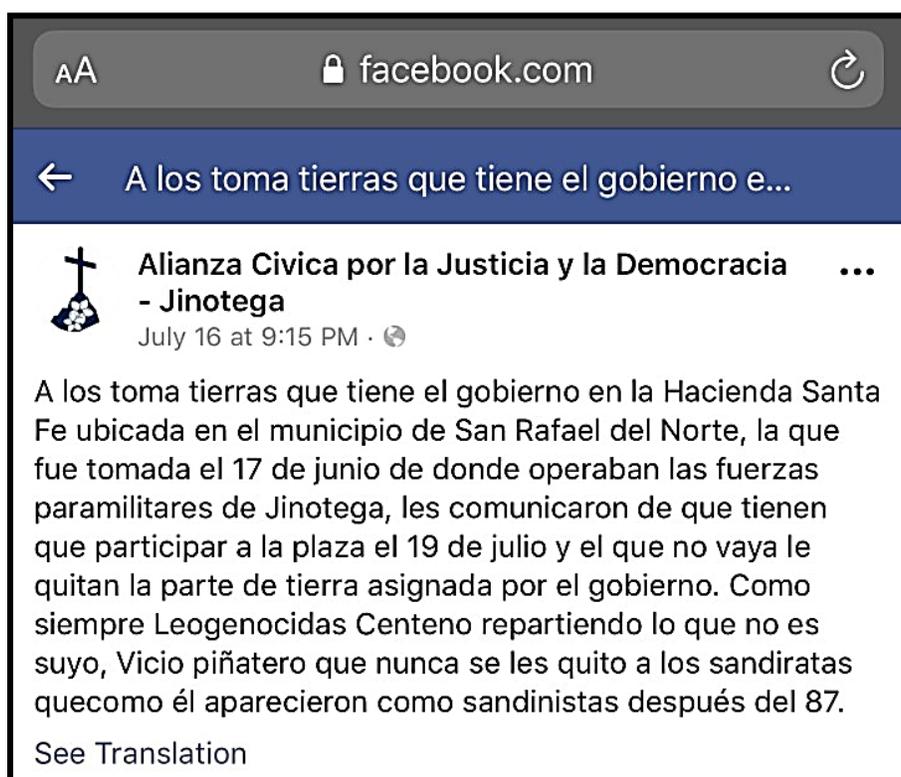


Figure 2 English Translation:

⁵⁴³Civic Alliance Facebook Post, July 16, 2018 - includes translation into English (C-0035-SPA).

⁵⁴⁴ Civic Alliance for Democracy and Justice Official Website, accessed on October 9, 2019 (C-0020-ENG).

To the land takers that the government has in Hacienda Santa Fé located in the Municipality of San Rafael del Norte, which was taken on June 17th from where the paramilitary forces in Jinotega operated, they were told that they had to go to the square on July 19th and anyone that does not attend will have the land assigned to them from the government taken away. As always, Leogenocides Centeno⁵⁴⁵ distributing what is not his, the Vice of taking private property [Vicio piñatero], that never left the [sandidratas]⁵⁴⁶ that called themselves sandinistas after 87.

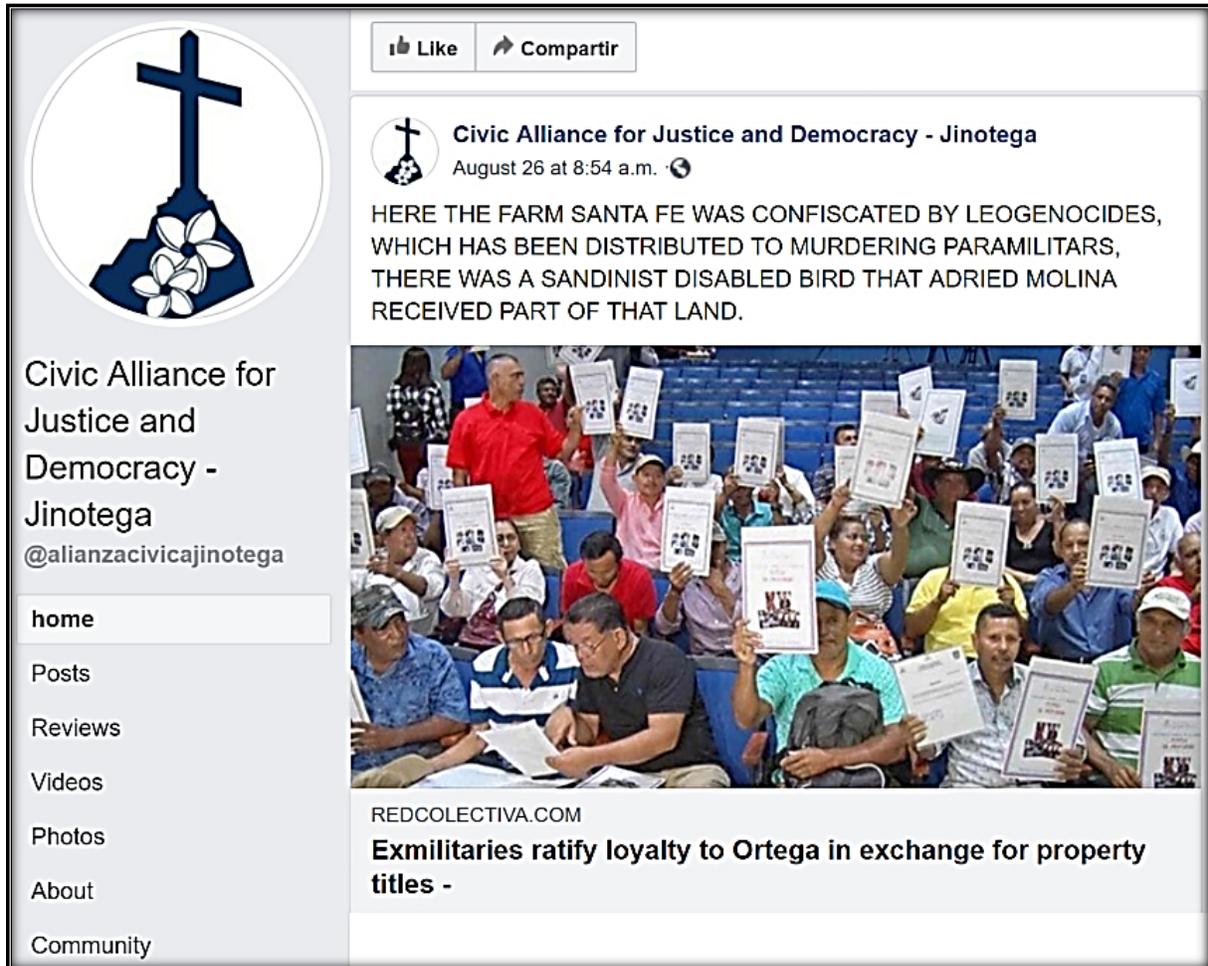
- 278) In a second post, the coalition also confirmed that Mayor Leónidas Centeno ordered Hacienda Santa Fé taken and that the lands were distributed amongst the paramilitaries⁵⁴⁷:

⁵⁴⁵ Leogenocides Centeno is a term used in Nicaragua to refer to Leonidas Centeno, Mayor of Jinotega.

⁵⁴⁶ Sandiratas is a pejorative term to refer to the Sandinistas.

⁵⁴⁷ Civic Alliance Facebook Post, August 26, 2018 (C-036-ENG).

Figure 3 – Civic Alliance Facebook Post – Aug 26, 2018



C. Government of Nicaragua directed the Paramilitaries to invade and take possession Hacienda Santa Fé

279) On every wave of the invasions and on the ultimate taking of Hacienda Santa Fé the paramilitaries proclaimed that they were sent to invade and take possession of Hacienda Santa Fé by the Government of Nicaragua.⁵⁴⁸

⁵⁴⁸ Witness Statement of Luis Gutierrez – Memorial – SPA at ¶¶ 35, 42, 64, 73, 82, 87, 89, 117-118, (CWS-02); Witness Statement of Jaime Francisco Henriquez Cruz – Memorial -SPA at ¶¶ 16, 23, 34-35, 61-62 (CWS-06).

- 280) Domingo Ferrufino was the security guard on duty at the time of the first invasion on June 16, 2018.⁵⁴⁹ The paramilitaries told Mr. Ferrufino that by the Government of Reconciliation and National Unity (the term used for the current Government of the Republic of Nicaragua headed by President Daniel Ortega) and that Hacienda Santa Fé was now their property.⁵⁵⁰ The paramilitaries also told him that they were not stealing anything and that they were just taking possession of what the Nicaraguan government had given them.⁵⁵¹
- 281) Domingo Ferrufino was a direct witness. Mr. Ferrufino identified the paramilitary leaders of the first invasion as Vidal Herrera, Wendel Adrián Mairena (known as “Wama”), José Dolores Estrada, Efren Zeledón Orozco, (known as “Comandante Cinco Estrellas”), and Blas Villagra.⁵⁵²
- 282) Domingo Ferrufino called Raymundo Palacios, chief of the Hacienda Santa Fé security team, who was not present and the time of the invasion to inform him of that the paramilitaries had invaded the upper part of Hacienda Santa Fé.⁵⁵³ Raymundo Palacios went to the Hacienda Santa Fé and when he arrived to the Hacienda Santa Fé he saw that among the invaders and paramilitaries was a former Congresswoman from the Sandinista National Liberation Front and Jinotega native, Elida Maria Galeano Cornejo known as “Comandante Chaparra.”⁵⁵⁴
- 283) That same day, Raymundo Palacios met with the paramilitaries and spoke with Efren Zeledón Orozco, “Comandante Cinco Estrellas”, Ciro Montenegro “Avispa”, Wendel Adrián Mairena “Wama”, and the former Congresswoman

⁵⁴⁹ Witness Statement of Luis Gutierrez – Memorial – SPA at ¶¶ 36 (CWS-02).

⁵⁵⁰ Witness Statement of Luis Gutierrez – Memorial – SPA at ¶¶ 42 (CWS-02).

⁵⁵¹ Witness Statement of Luis Gutierrez – Memorial – SPA at ¶¶ 42 (CWS-02).

⁵⁵² Witness Statement of Luis Gutierrez – Memorial – SPA at ¶¶ 43 (CWS-02).

⁵⁵³ Witness Statement of Luis Gutierrez – Memorial – SPA at ¶¶ 36 (CWS-02).

⁵⁵⁴ Witness Statement of Luis Gutierrez – Memorial – SPA at ¶¶ 44 (CWS-02).

Elida Maria Galeano Cornejo “Comandante Chaparra”. The paramilitaries told Raymundo that they wanted them to surrender peacefully because the Government of Nicaragua had sent them to take possession of Hacienda Santa Fé.⁵⁵⁵

284) On the second invasion, on July 16, 2018, Domingo Ferrufino was also on duty that day and saw the invaders led by the paramilitaries enter Hacienda Santa Fe and take possession of the remaining buildings in the lower part of Hacienda Santa Fé.⁵⁵⁶

285) Domingo Ferrufino identified the paramilitary leaders of the second invasion as Vinicio Garcia “Comandante Gorgojo” and Ciro Montenegro “Avispa”.⁵⁵⁷

286) Raymundo Palacios arrived at Hacienda Santa Fé after receiving a call from Domingo ferrufino informing him that the paramilitaries had invaded the lower part of Hacienda Santa Fé. When Mr. Palacios arrived he heard the paramilitaries say that they were there with the support of the Government of Nicaragua.⁵⁵⁸ He also heard them say that Carlos [referring to Carlos Rondón] had nothing because they were backed by the Government of Nicaragua.⁵⁵⁹

287) That day, Luis Gutierrez went to the Hacienda Santa Fé.⁵⁶⁰ Mr. Gutierrez heard Efren Zeledón Orozco “Comandante Cinco Estrellas” say that they [were sent to occupy Hacienda Santa Fé under the order of Mayor Leónidas

⁵⁵⁵ Witness Statement of Luis Gutierrez – Memorial – SPA at ¶ 45 (CWS-02).

⁵⁵⁶ Witness Statement of Luis Gutierrez – Memorial – SPA at ¶¶ 64-65 (CWS-02).

⁵⁵⁷ Witness Statement of Luis Gutierrez – Memorial – SPA at ¶ 64 (CWS-02).

⁵⁵⁸ Public Instrument No. 132, Affidavit of Raymundo Palacios, August 19, 2018 (C-0214-ENG).

⁵⁵⁹ Public Instrument No. 132, Affidavit of Raymundo Palacios, August 19, 2018 (C-0214-ENG).

⁵⁶⁰ Witness Statement of Luis Gutierrez – Memorial – SPA at ¶ 72 (CWS-02).

Centeno and that he had promised the invaders that each of them could keep part of the Hacienda Santa Fé lands.⁵⁶¹

- 288) Later that day, Luis Gutierrez encountered a Nicaraguan government official, Enrique Fabio Darío who told him that the Government of Nicaragua was taking the Hacienda Santa Fé to put pressure on the business sector.⁵⁶²
- 289) On the July 24, 2018, a heavily armed forty person paramilitary contingent led by the infamous para military leader Luis Antonio Rizo known as “Toño Loco” invaded Hacienda Santa Fé.⁵⁶³ Luis Gutierrez witnessed the invasion.⁵⁶⁴ Mr. Gutierrez heard the paramilitaries Sergio Roberto Zelaya Rouk, Efred Zeledón Orozco “Comandante Cinco Estrellas”, Vinicio Garcia “Comandante Gorgojo”, Ciro Manuel Montenegro “Avispa” say that they were being sent to Hacienda Santa Fé by the Nicaraguan government.⁵⁶⁵
- 290) Since that day, the paramilitaries used Hacienda Santa Fé as the paramilitaries’s operational headquarters from where he would leave to suppress the student protests in Jinotega.⁵⁶⁶
- 291) In August 17, 2018, Domingo Ferrufino and Raymundo Palacios witnessed the return of the paramilitaries to Hacienda Santa Fé.⁵⁶⁷ The taking was complete on August 18, 2018.⁵⁶⁸

⁵⁶¹ Witness Statement of Luis Gutierrez – Memorial – SPA at ¶ 73 (CWS-02).

⁵⁶² Witness Statement of Luis Gutierrez – Memorial – SPA at ¶ 82 (CWS-02).

⁵⁶³ Witness Statement of Luis Gutierrez – Memorial – SPA at ¶ 87 (CWS-02).

⁵⁶⁴ Witness Statement of Luis Gutierrez – Memorial – SPA at ¶ 88 (CWS-02).

⁵⁶⁵ Witness Statement of Luis Gutierrez – Memorial – SPA at ¶ 88 (CWS-02).

⁵⁶⁶ Witness Statement of Luis Gutierrez – Memorial – SPA at ¶ 88 (CWS-02).

⁵⁶⁷ Witness Statement of Luis Gutierrez – Memorial – SPA at ¶ 117 (CWS-02).

⁵⁶⁸ Witness Statement of Luis Gutierrez – Memorial – SPA at ¶ 117 (CWS-02).

- 292) A day after the taking of Hacienda Santa Fé by paramilitaries on behalf of Government of Nicaragua was complete, on August 19, 2018, Domingo Ferrufino and Raymundo Palacios went before a Public Notary to declare the events had witnessed during the invasions of Hacienda Santa Fé by the paramilitaries.⁵⁶⁹
- 293) A year after the taking of Hacienda Santa Fé, on August 19, 2019, Omar Gómez, a Hacienda Santa Fé worker, told Luis Gutierrez that Arlen Chavarría told him that Mayor Leonidas Centeno ordered the invasion of the Hacienda Santa Fé.⁵⁷⁰

D. Nicaraguan National Police assisted the Paramilitaries to invade and take Hacienda Santa Fé

- 294) The National Police delegation of San Rafael del Norte had advance knowledge of the taking of Hacienda Santa Fé and actively aided the paramilitaries.⁵⁷¹
- 295) As the invasion of Hacienda Santa Fe was taking place, Luis Gutierrez called National Police delegation of San Rafael del Norte for assistance.⁵⁷² Police Captain William Herrera told him that they had received information that the invaders intended to burn Hacienda Santa Fé down and told him that the

⁵⁶⁹ Public Instrument No. 131, Affidavit of Domingo German, August 19, 2018 (C-0211-SPA); Public Instrument No. 132, Affidavit of Raymundo Palacios, August 19, 2018 (C-0214-ENG).

⁵⁷⁰ Witness Statement of Luis Gutierrez – Memorial – SPA at ¶ 125 (CWS-02).

⁵⁷¹ Witness Statement of Luis Gutierrez – Memorial – SPA at ¶ 40 (CWS-02).

⁵⁷² Witness Statement of Luis Gutierrez – Memorial – SPA at ¶ 40 (CWS-02).

workers should leave the Hacienda Santa Fé for their safety.⁵⁷³ The police knew that the paramilitaries were planning to invade the Hacienda Santa Fe and did nothing to prevent it.

- 296) In a subsequent call with Carlos Rondón, Police Captain William Herrera revealed that he actually had orders from Police Commissioner Marvin Castro not to remove the paramilitaries.⁵⁷⁴
- 297) Later the same day, the National Police confiscated the shotguns of the Hacienda Santa Fé without any lawful explanation.⁵⁷⁵ As ordered by their superior officer, Police Commissioner Marvin Castro, the police officers did not remove the invaders or the paramilitaries.⁵⁷⁶
- 298) At the time of the second invasion, on July 16, 2018, Domingo Ferrufino told Luis Gutierrez that one of the paramilitaries had called him a liar because he had told the police that there were no more weapons at Hacienda Santa Fé.⁵⁷⁷ Presumably, the police told the paramilitaries that they had confiscated the guns from the security guards and that there were no more guns at Hacienda Santa Fé.
- 299) Members of the National Police escorted Mayor Herrera into Hacienda Santa Fe in police patrol cars twice and again did not do anything to remove the invaders and paramilitaries from Hacienda Santa Fé.⁵⁷⁸ On one of these occasions, on August 4, 2018, Jaime Vivas saw Police Captain William

⁵⁷³ Witness Statement of Luis Gutierrez – Memorial – SPA at ¶ 40 (CWS-02).

⁵⁷⁴ Witness Statement of Carlos Rondón – Memorial – ENG at ¶ 78 (CWS-02).

⁵⁷⁵ Witness Statement of Carlos Rondón – Memorial – ENG at ¶ 78 (CWS-02); Witness Statement of Carlos Rondón – Memorial – ENG at ¶ 79 (CWS-02).

⁵⁷⁶ Witness Statement of Luis Gutierrez – Memorial – SPA at ¶ 54 (CWS-02).

⁵⁷⁷ Witness Statement of Luis Gutierrez – Memorial – SPA at ¶ 72 (CWS-02).

⁵⁷⁸ Witness Statement of Luis Gutierrez – Memorial – SPA at ¶¶ 96, 101 (CWS-02).

Herrera speaking to the paramilitaries.⁵⁷⁹ Jaime Vivas heard the invaders say that members of the National police had reserved lands at Hacienda Santa Fé through representatives.⁵⁸⁰

E. Consequences of the Invasion

300) As a result of the invasion, Riverside has lost its extensive investment in its Nicaraguan avocado business, the value of the land itself, and its rare hardwood tree forest.⁵⁸¹

301) In addition to the deprivation of land, the wrongdoers did the following:

- a) Took equipment and farm machinery.⁵⁸²
- b) Looted computers, records, and books of Hacienda Santa Fé.⁵⁸³
- c) Ruined the commercial use and harvest of the avocado trees.⁵⁸⁴
- d) Engaged in widespread deforestation and destruction of the private forests, resulting in significant and irreparable environmental damage to

⁵⁷⁹ Witness Statement of Jaime Francisco Henriquez Cruz – Memorial -SPA at ¶ 43 (**CWS-06**): Witness Statement of Luis Gutierrez – Memorial – SPA at ¶98 (**CWS-02**).

⁵⁸⁰ Witness Statement of Jaime Francisco Henriquez Cruz – Memorial -SPA at ¶ 45 (**CWS-06**): Witness Statement of Luis Gutierrez – Memorial – SPA at ¶ 100 (**CWS-02**).

⁵⁸¹ Witness Statement of Carlos Rondón – Memorial – ENG at ¶¶ 30, 106, 232-233 (**CWS-02**).

⁵⁸² Witness Statement of Carlos Rondón – Memorial – ENG at ¶ 100 (**CWS-02**): Witness Statement of Luis Gutierrez – Memorial – SPA at ¶ 47 (**CWS-02**).

⁵⁸³ Witness Statement of Carlos Rondón – Memorial – ENG at ¶ 99 (**CWS-02**): Witness Statement of Luis Gutierrez – Memorial – SPA at ¶ 112 (**CWS-02**): Witness Statement of Jaime Francisco Henriquez Cruz – Memorial -SPA at ¶26 (**CWS-06**).

⁵⁸⁴ Witness Statement of Carlos Rondón – Memorial – ENG at ¶ 101 (**CWS-02**): Witness Statement of Luis Gutierrez – Memorial – SPA at ¶ 80 (**CWS-02**): Witness Statement of Jaime Francisco Henriquez Cruz – Memorial -SPA at ¶ 32 (**CWS-06**).

the sensitive ecological conditions at Hacienda Santa Fé, including its private wildlife reserve.⁵⁸⁵

- e) Redistributed lands at Hacienda Santa Fé to the paramilitaries and their supporters.⁵⁸⁶
- f) Made ongoing credible threats of physical harm against the management of Hacienda Santa Fé.⁵⁸⁷

302) Inagrosa's investment in Nicaragua has been decimated on account of the taking which makes it impossible to engage in avocado production.⁵⁸⁸

⁵⁸⁵ Witness Statement of Carlos Rondón – Memorial – ENG at ¶ 10 (**CWS-02**); Witness Statement of Luis Gutierrez – Memorial – SPA at ¶46 (**CWS-02**).

⁵⁸⁶ Witness Statement of Carlos Rondón – Memorial – ENG at ¶ 10, 81, 103 (**CWS-02**); Witness Statement of Luis Gutierrez – Memorial – SPA at ¶¶ 71, 76, 93, 135, 138 (**CWS-02**).

⁵⁸⁷ Witness Statement of Luis Gutierrez – Memorial – SPA at ¶ 128 (**CWS-02**).

⁵⁸⁸ Witness Statement of Carlos Rondón – Memorial – ENG at ¶¶ 100-101 and ¶235. (**CWS-01**)

III. AVOCADO PRODUCTION

A. The Avocado

- 303) Avocados are considered a superfood. They are nutrient-dense, contain relatively few calories, and provide a substantial amount of vitamins, minerals, and other nutrients. One-fifth of a medium-sized avocado (1 ounce) has 50 calories and nearly 20 vitamins, minerals, and phytonutrients, including 4% of the recommended Daily Value (DV) for vitamin E, 4% vitamin C, 6% folate, 8% fiber, 2% iron, 4% potassium, with 81 micrograms of lutein and 19 micrograms of beta-carotene ⁵⁸⁹
- 304) The 2010 Dietary Guidelines for Americans recommends that Americans increase their dietary fiber intake and states that dietary fiber that occurs naturally in foods may help reduce the risk of cardiovascular disease, obesity, and type 2 diabetes, as well as help provide a feeling of fullness and promote healthy laxation. One-fifth of a medium avocado (1 ounce) provides 8% of the Daily Value for fiber while enjoying one-half of a medium avocado provides 20% of the Daily Value for fiber. Avocados can act as a “nutrient booster” by enabling the body to absorb more fat-soluble nutrients, such as vitamins A, D, E, and K, in foods that are eaten with the fruit. ⁵⁹⁰
- 305) Avocados come in a variety of shapes, sizes, and colors. They can be shaped like a ball, a teardrop, or a football. Depending on the variety, the interior flesh ranges from bright yellow to yellow-green to pale yellow. Although the shapes and colors vary, all avocados have smooth, creamy flesh and a delicate nutty flavor. The avocado tree (*Persea americana*) is a tropical evergreen tree with three horticultural races: Guatemalan, Mexican, and West Indian. Trees can

⁵⁸⁹ USDA National Nutrient Database for Standard Reference, Release 21, Avocados, raw, all commercial varieties, per 100 grams”. NDB Number:9037 (Published April 1, 2019) (C-0071-ENG); Daily averages from NutritionData.com (C-0072-ENG); Avocados: Food Source Information, University of Colorado - (C-0090-ENG).

⁵⁹⁰ Avocados: Food Source Information, University of Colorado at Bates 0000936 (C-0090-ENG).

reach up to 60 feet (18 meters) tall and grow throughout the year; they do not enter a dormant state. The timing and length of each crop cycle depend primarily on temperature.⁵⁹¹

- 306) Avocado trees are native to the humid, sub-tropical, and tropical regions of central and northern South America.
- 307) Avocados grown from grafts bear fruits earlier than those grown from seeds. On average, avocado trees grown from grafts take 3 to 4 years to produce fruits after planting. Those grown from seeds may not produce fruits until after 5 to 13 years.⁵⁹²
- 308) Avocado trees do not require extensive pruning, especially in their younger years. Most pruning takes place every other year and involves removing dead branches from the top of the canopy and maintaining the desired width. Trees are kept at or below 20 feet high, so they do not topple over from high winds. Avocado tree roots are shallow in the soil. The top layers of the soil can dry out quickly, and trees do not tolerate flooding.⁵⁹³
- 309) Avocado flowers (petals, stigmas, and anthers) are modified shoots and leaves. Flower buds grow during late summer or fall and continue to develop through winter. Blossoming and fruit set occur from late winter through early summer, but most harvested fruits develop from flowers that were pollinated in spring. Avocado flowers are about 2/5 inch wide (1 cm) and occur in groups of about 4 to 10 inches. A mature avocado tree can yield thousands of flowers

⁵⁹¹ Avocados: Food Source Information, University of Colorado, at p. 0000929-30 (C-0090-ENG).

⁵⁹² ThinkAvocado.com, "How are avocado produced? 7 facts about commercial avocados" C-0075-ENG; Also - Avocado Information from the University of California – Agriculture and Natural Resources Answers to Questions by Dr. Mary Lu Arpaia and Dr. Ben Faber (C-0076-ENG).

⁵⁹³ Avocados: Food Source Information, University of Colorado, at p. 0000932 (C-0090-ENG).

per year. The flower contains both female and male parts. Once matured, the female part opens first, and the male parts open the following day.⁵⁹⁴

From pollination to maturity, avocados take at least six to seven months to mature. Mature fruits can stay on the tree for months without ripening; avocados do not ripen until after they are picked from the tree.⁵⁹⁵

B. Hass Avocado

- 310) The Hass avocado (*Persea americana Hass*) was discovered in La Habra Heights, California, in the 1920s by Rudolph Hass.⁵⁹⁶ Mr. Hass patented the tree that bore his name in 1935 and partnered with Whittier California grower Harold H. Brokaw to promote the Hass variety.⁵⁹⁷
- 311) Unlike other avocados, which have smooth green skin, the Hass avocado fruit has dark green bumpy skin that darkens as it ripens, eventually reaching an almost black and very dark shade.⁵⁹⁸
- 312) Hass avocados ripen only once they are picked from the tree, and they can be left on the tree for several months after the fruit has matured.⁵⁹⁹
- 313) At first, the Hass avocado was not widely accepted among consumers because of its dark skin color.⁶⁰⁰ However, it is now the most widely-consumed type of avocado produced in the U.S.⁶⁰¹

⁵⁹⁴ Avocados: Food Source Information, University of Colorado at p. 0000932 (C-0090-ENG).

⁵⁹⁵ Avocados: Food Source Information, University of Colorado at p. 0000932 (C-0090-ENG).

⁵⁹⁶ Avocados: Food Source Information, University of Colorado at p. 0000930 (C-0090-ENG).

⁵⁹⁷ Brian Handwerk, "Holy Guacamole: How the Hass Avocado Conquered the World: Why one California postman's delicious mistake now graces toast and tacos from California to New Zealand". Smithsonian Magazine, July 28, 2017, (C-0074-ENG).

⁵⁹⁸ Agricultural Holdings International LLC -Facebook Post - What is HASS Avocado- (C-0073-ENG).

⁵⁹⁹ Agricultural Holdings International LLC -Facebook Post - What is HASS Avocado- (C-0073-ENG).

⁶⁰⁰ Avocados: Food Source Information, University of Colorado at page 0000932 (C-0090-ENG).

⁶⁰¹ Avocados: Food Source Information, University of Colorado at page 0000932 (C-0090-ENG).

FIGURE – 4 - HASS AVOCADOS



314) Brian Handwerk reports in *The Smithsonian* that:

Americans devour 7 pounds of avocado per person each year, compared to 1 pound on average back in 1989. Per capita consumption of avocado has tripled since the early 2000s, according to the USDA. Yet nearly all of these avocados—some 95 percent in the U.S. and about 80 percent worldwide—are of a single variety: the ubiquitous Hass.

That's especially crazy because, while people have cultivated avocados for thousands of years and come up with more than 400 different varieties, the pebbly, black-skinned Hass didn't even exist a century ago.⁶⁰²

⁶⁰² Brian Handwerk, "Holy Guacamole: How the Hass Avocado Conquered the World: Why one California postman's delicious mistake now graces toast and tacos from California to New Zealand". *Smithsonian Magazine*, July 28, 2017 (C-0074-ENG).

- 315) When it comes to nutritional content, Hass avocados are higher in fat than other varieties, which gives them a richer taste and smoother, creamier texture.⁶⁰³

C. Cultivation - Land preparation:

- 316) There were three existing nurseries at Hacienda Santa Fé.⁶⁰⁴ The main nursery was initially used for Hass avocado propagation and grafting.⁶⁰⁵ The expansion plan contemplated the use of the large secondary nursery for additional 10,000 Hass avocado saplings commencing in 2018.⁶⁰⁶ Figure 5 shows a picture of the main nursery with Hass avocado saplings in January 2017. That plan was revised in 2018. Inagrosa planned to expand Hass Production in 2018/2019 to plant the next 200 hectares with 140,000 Hass avocado saplings.

⁶⁰³Agricultural Holdings International LLC -Facebook Post - What is HASS Avocado (C-0073-ENG).

⁶⁰⁴ Management Representation Letter from Riverside Coffee, LLC to Richter Inc. September 12, 2022 ¶ 19 (C-0055-ENG); Witness Statement of Carlos Rondón – Memorial – ENG at ¶ 72 (CWS-01).

⁶⁰⁵ Witness Statement of Carlos Rondón – Memorial – ENG at ¶ 72 (CWS-01).

⁶⁰⁶ Witness Statement of Carlos Rondón – Memorial – ENG at ¶ 72 (CWS-01).

FIGURE – 5 - HASS AVOCADO SAPLINGS IN THE INAGROSA NURSERY – 2017



- 317) Land preparation for avocado orchard planting at Hacienda Santa Fé⁶⁰⁷_[OBJ]⁶⁰⁸_[OBJ]
In the spring of 2018, the Hacienda Santa Fé workers staked and started preparation on the next 200 hectare.⁶⁰⁹ After staking, work would be done with multiple hand tools (shovels, axes, etc.) This land preparation task would need to be completed before we planted. It would take 3 days per hectare with eight workers working 8 hours per day.⁶¹⁰
- 318) Additional plantings were planned for lands that had been converted from coffee production.⁶¹¹ Such plantings would be done interspaced around

⁶⁰⁷ Witness Statement of Carlos Rondón – Memorial – ENG at ¶ 135 (CWS-01).

⁶⁰⁸ Witness Statement of Carlos Rondón – Memorial – ENG at ¶ 135 (CWS-01).

⁶⁰⁹ Witness Statement of Carlos Rondón – Memorial – ENG at ¶ 135 (CWS-01).

⁶¹⁰ Witness Statement of Carlos Rondón – Memorial – ENG at ¶ 135 (CWS-01).

⁶¹¹ Witness Statement of Carlos Rondón – Memorial – ENG at ¶ 136 (CWS-01).

existing coffee plants.⁶¹² The coffee plants provided cover for the newly planted avocado trees until the avocado trees were at least two meters tall.⁶¹³ The dead coffee plants posed no threat to avocados, and we used as many as possible for mulch for the avocado trees.⁶¹⁴

- 319) Avocado orchard layout and grading for erosion control and planting spaces design.
- 320) The soil where the avocado trees were planted was mostly volcanic.⁶¹⁵ The newly planted avocado trees had to be watered when necessary.⁶¹⁶

D. Planting

- 321) Inagrosa used the volcanic soil at Hacienda Santa Fé.⁶¹⁷ The soil was screened and then disinfected for pathogens.⁶¹⁸
- 322) Seeds were planted in disinfected treated soil and put in bags to germinate.⁶¹⁹ The seedlings in the nursery received nutrients including fertilizer, urea and phosphate, boron, potassium, zinc, and magnesium.⁶²⁰

⁶¹² Witness Statement of Carlos Rondón – Memorial – ENG at ¶ 136 (CWS-01).

⁶¹³ Witness Statement of Carlos Rondón – Memorial – ENG at ¶ 136 (CWS-01).

⁶¹⁴ Witness Statement of Carlos Rondón – Memorial – ENG at ¶ 136 (CWS-01).

⁶¹⁵ Witness Statement of Carlos Rondón – Memorial – ENG at ¶ 140 (CWS-01).

⁶¹⁶ Witness Statement of Carlos Rondón – Memorial – ENG at ¶ 140 (CWS-01).

⁶¹⁷ Witness Statement of Carlos Rondón – Memorial – ENG at ¶ 138 (CWS-01).

⁶¹⁸ Witness Statement of Carlos Rondón – Memorial – ENG at ¶ 138 (CWS-01).

⁶¹⁹ Witness Statement of Carlos Rondón – Memorial – ENG at ¶ 138 (CWS-01).

⁶²⁰ Witness Statement of Carlos Rondón – Memorial – ENG at ¶ 147 (CWS-01).

- 323) All Hass avocados are grafted onto a disease-resistant rootstock.⁶²¹ When the seed has germinated and the sapling has reached about 50 cm and a thickness of 2 – 2.5 cm, it is ready for grafting.⁶²²
- 324) Once ready for planting, the saplings were taken to the orchard field that had been prepared for planting.⁶²³ The field was cleared of weeds one meter in diameter around the hole, and the soil in the hole to receive the seedling was treated with lime.⁶²⁴
- 325) Inagrosa had been carrying out a planned phased expansion of its avocado production in June 2018.⁶²⁵ At the time of the June 16, 2018 invasion, the Inagrosa nursery had over 7,000 grafted avocado Hass avocado saplings.⁶²⁶ Another 3,000 seedlings were in the nursery awaiting grafting.⁶²⁷ Once the grafted seedlings were planted, additional seedlings would be grown to take their place.⁶²⁸
- 326) Planting operations included using drills and shovels to dig holes. The sapling was planted with topsoil mixed with nutrients.⁶²⁹

⁶²¹ Witness Statement of Carlos Rondón – Memorial – ENG at ¶ 145 (**CWS-01**).

⁶²² Witness Statement of Carlos Rondón – Memorial – ENG at ¶ 145 (**CWS-01**).

⁶²³ Witness Statement of Carlos Rondón – Memorial – ENG at ¶ 148 (**CWS-01**).

⁶²⁴ Witness Statement of Carlos Rondón – Memorial – ENG at ¶ 148 (**CWS-01**).

⁶²⁵ Witness Statement of Carlos Rondón – Memorial – ENG at ¶ 196 (**CWS-01**); Witness Statement of Luis Gutierrez – Memorial – SPA at ¶ 177 (**CWS-02**).

⁶²⁶ Witness Statement of Carlos Rondón – Memorial – ENG at ¶ 71 (**CWS-01**); Witness Statement of Luis Gutierrez – Memorial – SPA at ¶ 167 (**CWS-02**).

⁶²⁷ Witness Statement of Carlos Rondón – Memorial – ENG at ¶ 71 (**CWS-01**).

⁶²⁸ Witness Statement of Carlos Rondón – Memorial – ENG at ¶ 148 (**CWS-01**).

⁶²⁹ Witness Statement of Carlos Rondón – Memorial – ENG at ¶ 141 (**CWS-01**).

- 327) A layer of mulch in the tree rows was applied as a ground cover in order to help reduce water evaporation, and erosion.⁶³⁰ This also assisted in suppressing weeds.⁶³¹
- 328) Trees spaced 2 x 5' or 400 trees per acre were planted in 2014. Aisles were established every 5 meters between the rows.⁶³²
- 329) All of the trees were grafted onto Hass material obtained from Rodrigo Jimenez, the avocado consultant in Costa Rica.⁶³³
- 330) Clonal Dusa rootstocks from Brokaw Nurseries in California were also being considered for use in the spring of 2018.⁶³⁴ The Dusa rootstock is currently the most tolerant rootstock to avocado root rot disease.⁶³⁵
- 331) The cost for developing, grafting and planting a Hass avocado seedling was estimated to be \$14.55 per tree.⁶³⁶

⁶³⁰ University of California, Avocado Establishment and Production Costs and Profitability Analysis in High Density Planting, 2020 **(C-0174-ENG)**.

⁶³¹ University of California, Avocado Establishment and Production Costs and Profitability Analysis in High Density Planting, 2020 **(C-0174-ENG)**.

⁶³² Witness Statement of Carlos Rondón – Memorial – ENG at ¶ 130 **(CWS-01)**; Witness Statement of Luis Gutierrez – Memorial – SPA at ¶ 150 **(CWS-02)**.

⁶³³ Witness Statement of Carlos Rondón – Memorial – ENG at ¶ 129 **(CWS-01)**; Witness Statement of Luis Gutierrez – Memorial – SPA at ¶ 149 **(CWS-02)**.

⁶³⁴ Witness Statement of Carlos Rondón – Memorial – ENG at ¶ 128 **(CWS-01)**.

⁶³⁵ Avocado Costs and Returns Study High Density Planting, San Diego County – 2020 UCCE, AIC, UC Davis-ARE 5 5.] **(C-174)**; Witness Statement of Carlos Rondón – Memorial – ENG at ¶ 146 **(CWS-01)**.

⁶³⁶ The \$5 cost for avocado tree planting would be lower in the event of full orchard planting. Witness Statement of Carlos Rondón – Memorial – ENG at ¶¶ 70, 204 **(CWS-01)**; Management Representation Letter from Riverside Coffee, LLC to Richter Inc., at ¶ 11 **(C-55)**; Avocado Costs and Returns Study High-Density Planting, San Diego County – 2020 UCCE, AIC, UC Davis-ARE 5 5.] **(C-174-ENG)**.

- 332) Indian cane windscreens were erected to reduce risk of wind damage to younger avocado plants until they were 2 meters high.⁶³⁷ The windscreens were erected around the newly planted areas.⁶³⁸

E. Pruning

- 333) Pruning keeps the trees from crowding.⁶³⁹ The traditional method of pruning is to prune all the sides and top yearly.⁶⁴⁰
- 334) Pruning was done in January and February; however, it involves alternate side pruning starting with the southwest side first.⁶⁴¹ The pruned side was heavily pruned creating a 60-degree angle from the lowest branch on the pruned side to the seven-foot height of the tree.⁶⁴² The non-pruned side was left alone to preserve as much fruiting wood as possible.⁶⁴³ The following year the northeast side was pruned heavily, and back to the southwest side the following year.⁶⁴⁴ Trees were skirt pruned simultaneously to one foot off the ground.⁶⁴⁵ Pruning of the avocado trees began in 2014.⁶⁴⁶
- 335) Clearing the aisles was part of the pruning process. In 2018, it was necessary to begin clearing the aisles between the trees to allow sufficient room for workers to walk around the trees and to allow sunlight to reach the lower

⁶³⁷ Witness Statement of Carlos Rondón – Memorial – ENG at ¶ 151 (CWS-01).

⁶³⁸ Witness Statement of Carlos Rondón – Memorial – ENG at ¶ 151 (CWS-01).

⁶³⁹ Witness Statement of Carlos Rondón – Memorial – ENG at ¶ 153 (CWS-01).

⁶⁴⁰ Witness Statement of Carlos Rondón – Memorial – ENG at ¶ 153 (CWS-01).

⁶⁴¹ Witness Statement of Carlos Rondón – Memorial – ENG at ¶ 154 (CWS-01).

⁶⁴² Witness Statement of Carlos Rondón – Memorial – ENG at ¶ 154 (CWS-01).

⁶⁴³ Witness Statement of Carlos Rondón – Memorial – ENG at ¶ 154 (CWS-01).

⁶⁴⁴ Witness Statement of Carlos Rondón – Memorial – ENG at ¶ 154 (CWS-01).

⁶⁴⁵ Witness Statement of Carlos Rondón – Memorial – ENG at ¶ 154 (CWS-01).

⁶⁴⁶ Witness Statement of Carlos Rondon – Memorial – ENG at ¶ 154 (CWS-01).

branches.⁶⁴⁷ Branches were cut back or removed that were growing into the neighboring trees. Clearing the aisles was done multiple times each year. Clearing the aisles was estimated to take 10 person-hours per hectare per year.⁶⁴⁸

F. Irrigation

- 336) Frequency and amount of irrigation water use depended on weather, rainfall, and location. The orchards producing Hass avocados did not require irrigation. The 2018 production was totally sustained by the existing hydrology resources at the Hacienda Santa Fé.⁶⁴⁹
- 337) In 2015, Management obtained a hydrology study. The study confirmed that there was sufficient water to cultivate avocados on more than 1000 hectares of Hacienda Santa Fé.⁶⁵⁰
- 338) While irrigation was not required for product, drip irrigation was contemplated for expanded areas to ensure nutrient flow and to better predict harvest timing.⁶⁵¹

G. Pest Management

- 339) There are different varieties of pests found in avocado orchards. Some common types of pests include thrips, anthracnosis, boring insects, rodents, and ground squirrels.⁶⁵²

⁶⁴⁷ University of California, Avocado Establishment and Production Costs and Profitability Analysis in High Density Planting, (C-0174-ENG).

⁶⁴⁸ Witness Statement of Carlos Rondón – Memorial – ENG at ¶ 156 (CWS-01).

⁶⁴⁹ Witness Statement of Carlos Rondón – Memorial – ENG at ¶ 131 (CWS-01).

⁶⁵⁰ Hydrology Study at Hacienda Santa Fé prepared by Engineer Federico Sanabria (C-0087-SPA).

⁶⁵¹ Witness Statement of Luis Gutierrez – Memorial – SPA at ¶ 153 (CWS-02); Witness Statement of Carlos Rondón – Memorial – ENG at ¶¶ 131, 170, 171, 204 (CWS-01).

⁶⁵² Witness Statement of Carlos Rondón – Memorial – ENG at ¶ 158 (CWS-01).

- 340) Hacienda Santa Fé avoided the use of pesticides where possible and followed organic farming practices.⁶⁵³ The avocado orchards at Hacienda Santa Fé are under good biological control due to beneficial insects that prey on parasitic harmful pests.⁶⁵⁴
- 341) The nursery had occasional ant issues with seedling plants namely, the sompopo, leaf-cutting ant prevalent in Central America.⁶⁵⁵ These were treated with a variety of natural repellants.⁶⁵⁶
- 342) Squirrel control is needed throughout the life of avocado trees or until squirrels are under control.⁶⁵⁷ Inagrosa did not use traps. Instead, it applied natural ways to repel squirrels.⁶⁵⁸

H. Weed Management

- 343) Weeds can harbor insects and pests, making it difficult for rodent control.⁶⁵⁹ Also, too much weed interferes with the efficient application of irrigation water to the avocado trees.⁶⁶⁰
- 344) Typical weed management practices focus on weed whipping.⁶⁶¹

⁶⁵³ Witness Statement of Carlos Rondón – Memorial – ENG at ¶ 159 (CWS-01).

⁶⁵⁴ Witness Statement of Carlos Rondón – Memorial – ENG at ¶ 159 (CWS-01)

⁶⁵⁵ Witness Statement of Carlos Rondón – Memorial – ENG at ¶ 160 (CWS-01).

⁶⁵⁶ Witness Statement of Carlos Rondón – Memorial – ENG at ¶ 160 (CWS-01).

⁶⁵⁷ Witness Statement of Carlos Rondón – Memorial – ENG at ¶ 161 (CWS-01).

⁶⁵⁸ Witness Statement of Carlos Rondón – Memorial – ENG at ¶ 161 (CWS-01).

⁶⁵⁹ Witness Statement of Carlos Rondón – Memorial – ENG at ¶ 162 (CWS-01).

⁶⁶⁰ Witness Statement of Carlos Rondón – Memorial – ENG at ¶ 162 (CWS-01).

⁶⁶¹ Witness Statement of Carlos Rondón – Memorial – ENG at ¶ 163 (CWS-01).

345) Weed cutting is estimated to take 2 hours per hectare per year.⁶⁶² It would be done one per year in March using a weed whip.⁶⁶³ Weed management will most likely reduce as trees grow bigger because the canopy shade will reduce weed growth.⁶⁶⁴ Annual weed whipping will continue throughout the production years. We anticipated doing this three times a year.⁶⁶⁵ We estimated that it would take approximately 2.4 minutes per avocado tree.⁶⁶⁶ We would clear one meter around each plant with a weed whip.⁶⁶⁷

I. Fertilization

346) Fertilizer nutrients were applied to each avocado tree on planting and then subsequently.⁶⁶⁸ Calcium ammonium nitrate (CAN-17%) is the most commonly used compound source for Nitrogen (N) for avocado fertilization. CAN-17% costs approximately \$1.00 per gallon based on bulk purchase price in 2019.⁶⁶⁹

347) Growth formula was used in the Nursery.⁶⁷⁰

348) The seedlings in the nursery received the proper nutrients including fertilizer, urea and phosphate, boron, potassium, zinc, and magnesium.⁶⁷¹ Suppliers of

⁶⁶² Witness Statement of Carlos Rondón – Memorial – ENG at ¶ 164 (CWS-01).

⁶⁶³ Witness Statement of Carlos Rondón – Memorial – ENG at ¶ 164 (CWS-01).

⁶⁶⁴ Witness Statement of Carlos Rondón – Memorial – ENG at ¶ 164 (CWS-01).

⁶⁶⁵ Witness Statement of Carlos Rondón – Memorial – ENG at ¶ 164 (CWS-01).

⁶⁶⁶ Based on 16 hours of labor per hectare with 400 trees: Witness Statement of Carlos Rondón – Memorial – ENG at ¶ 164 (CWS-02).

⁶⁶⁷ Witness Statement of Carlos Rondón – Memorial – ENG at ¶ 164 (CWS-01).

⁶⁶⁸ Witness Statement of Carlos Rondón - Memorial at ¶ 147 (CWS-01).

⁶⁶⁹ Takele, et al, 2011). the fertilization process takes Avocado Costs and Returns Study High Density Planting, San Diego County – 2020 UCCE, AIC, UC Davis-ARE 8 place every other month on a 9-month application program from February through October. (C-0174-ENG).

⁶⁷⁰ Witness Statement of Carlos Rondón – Memorial – ENG at ¶ 147 (CWS-01).

⁶⁷¹ Witness Statement of Carlos Rondón – Memorial – ENG at ¶ 147 (CWS-01).

fertilizer for Inagrosa were local. Most nutrients were obtained from Formunica, Ramac Cisa Agro and Agro Amigo.⁶⁷²

J. Labor

- 349) In 2018, the monthly labor rate for agricultural manual labor was NIO\$4,176.49 Cordobas (approximately \$129 per month).⁶⁷³ In 2021, minimum agricultural labor rates were increased to NIO\$4,723.95 per month – which was worth approximately US\$ 132 per month).⁶⁷⁴
- 350) Inagrosa paid its workers substantially more than the minimum rate.⁶⁷⁵ Its manual labor workers were paid approximately NIO\$300 a day and equipment operators were paid approximately NIO\$400 (on a six-day work week).⁶⁷⁶ These salaries at Hacienda Santa Fe were significantly higher than other farms.⁶⁷⁷ In addition to these livable wages, food and accommodation was provided for the work team members.⁶⁷⁸ These rates were net of our employers' share of payroll taxes, social security, housing, and food.⁶⁷⁹

⁶⁷² Witness Statement of Carlos Rondón – Memorial – ENG at ¶ 147 (CWS-01)

⁶⁷³ Witness Statement of Carlos Rondón – Memorial – ENG at ¶ 165 (CWS-01).

⁶⁷⁴ Witness Statement of Carlos Rondón – Memorial – ENG at ¶ 165 (CWS-01).

⁶⁷⁵ Witness Statement of Carlos Rondón – Memorial – ENG at ¶ 166 (CWS-01).

⁶⁷⁶ Our payroll records were destroyed in the taking of Hacienda Santa Fe in 2018.; Witness Statement of Carlos Rondón – Memorial – ENG at ¶ 166 (CWS-01).

⁶⁷⁷ Witness Statement of Carlos Rondón – Memorial – ENG at ¶ 166 (CWS-01).

⁶⁷⁸ Witness Statement of Carlos Rondón – Memorial – ENG at ¶ 166 (CWS-01).

⁶⁷⁹ Witness Statement of Carlos Rondón – Memorial – ENG at ¶ 166 (CWS-01).

K. Harvest

- 351) Avocados are harvested by hand and start to ripen once they are picked from the tree. Since fruit can stay on the tree for long periods of time without ripening, harvesting may easily overlap from year to year.⁶⁸⁰
- 352) Avocados pickers work from the ground, use ladders, or remove the fruit using a pole equipped with a pull-cord operated terminal blade and fruit catching bag.⁶⁸¹ When the fruit is picked off the tree, it is not ripe. As soon as it is picked, the ripening process begins.⁶⁸²
- 353) Growers typically harvest from July to November, depending on weather and production level.⁶⁸³
- 354) Harvesting costs include picking and hauling costs.⁶⁸⁴ There is no difference in harvest rates between establishment and mature trees as trees are always pruned to 8' feet high for ease of labor.⁶⁸⁵
- 355) Additional temporary workers were required for the 2018 harvest.⁶⁸⁶ Additional permanent field workers would be necessary for subsequent harvests.⁶⁸⁷ With the expanded area under cultivation, we estimated that up to 20 additional field workers and perhaps three more equipment operators would be needed for the picking, packing, and processing of the avocado fruit in

⁶⁸⁰ Avocados: Food Source Information, University of Colorado, at page 0000933 (C-0090-ENG).

⁶⁸¹ Avocados: Food Source Information, University of Colorado, at page 0000933 (C-0090-ENG).

⁶⁸² Avocados: Food Source Information, University of Colorado, at page 0000933 (C-0090-ENG).

⁶⁸³ Witness Statement of Carlos Rondón – Memorial – ENG at ¶ 171 (CWS-01).

⁶⁸⁴ Witness Statement of Carlos Rondón – Memorial – ENG at ¶ 172 (CWS-01).

⁶⁸⁵ Witness Statement of Carlos Rondón – Memorial – ENG at ¶ 172 (CWS-01).

⁶⁸⁶ Witness Statement of Carlos Rondón – Memorial – ENG at ¶ 181 (CWS-01).

⁶⁸⁷ Witness Statement of Carlos Rondón – Memorial – ENG at ¶ 181 (CWS-01).

2019.⁶⁸⁸ In subsequent years, we might add another 60 – 70 field workers with one equipment worker per 10 field workers (as up to another 7 field workers).⁶⁸⁹

356) In the United States, there are three grades of avocado: US No 1, US No 2 and US No. 3.⁶⁹⁰

- a) **“U.S. No. 1”** consists of avocados of similar varietal characteristics which are mature but not overripe, well-formed, clean, well-colored, well-trimmed and which are free from decay, anthracnose, and freezing injury, and are free from damage caused by bruises, cuts, or other skin breaks, pulled stems, russeting or similar discoloration, scars or scab, sunburn, sunscald or sprayburn, cercospora spot, other disease, insects, or other means. Since these fruits are visibly appealing, they are usually shipped to grocery stores and displayed on shelves.⁶⁹¹
- b) **“U.S. No. 2”** consists of avocados of similar varietal characteristics which are mature but not overripe, fairly well-formed, clean, fairly well-colored, well-trimmed and which are free from decay and freezing injury and are free from serious damage caused by anthracnose, bruises, cuts or other skin breaks, pulled stems, russeting or similar discoloration, scars or scab, sunburn, sunscald or sprayburn, cercospora spot, other disease, insects, or other means. These fruits are not as nice in appearance as U.S. No. 1 fruits, but still taste the same. They are usually shipped to food service

⁶⁸⁸ Witness Statement of Carlos Rondón – Memorial – ENG at ¶ 181 (CWS-01).

⁶⁸⁹ Witness Statement of Carlos Rondón – Memorial – ENG at ¶ 181 (CWS-01).

⁶⁹⁰ Avocados: Food Source Information, University of Colorado, at page 0000934 (C-0090-ENG).

⁶⁹¹ Avocados: Food Source Information, University of Colorado, at page 0000934 (C-0090-ENG).

establishments and other retail settings for ingredients in food products, such as guacamole.⁶⁹²

- c) **“U.S. No. 3”** consists of avocados of similar varietal characteristics which are mature but not overripe, which are not badly misshapen, and which are free from decay and are free from serious damage caused by anthracnose and are free from very serious damage caused by freezing injury, bruises, cuts or other skin breaks, pulled stems, russeting or similar discoloration, scars or scab, sunburn, sunscald or sprayburn, cercospora spot, other disease, insects, dirt or other means. Sometimes the damage does not allow these fruits to ripen correctly, so they are often used as animal feed.⁶⁹³

L. Expenses

- 357) Jinotega Department charges a base property tax rate of one percent on the assessed cadastral value of land.⁶⁹⁴
- 358) The equipment complement includes pick-up trucks for material deliveries and for trips for supplies; a UTV, an ATV and tractors for movement within the orchard grove.⁶⁹⁵
- 359) Inagrosa already had most of the necessary farming equipment for avocado cultivation from its coffee operations. Management planned 5 x 2.5 meter spacing for the avocado trees and expected an average of 700 trees per hectare. Much of the expansion would require additional labor at harvest time and an addition to the permanent Hacienda staff. Inagrosa would have

⁶⁹² Avocados: Food Source Information, University of Colorado, at page 0000934 (C-0090-ENG).

⁶⁹³ Avocados: Food Source Information, University of Colorado, at page 0000934 (C-0090-ENG).

⁶⁹⁴ Witness Statement of Carlos Rondón – Memorial – ENG at ¶ 167 (CWS-01)

⁶⁹⁵ Witness Statement of Carlos Rondón – Memorial – ENG at ¶ 169 (CWS-01)

obtained some additional equipment to optimize harvests from the year 2020 onwards as follows:

- a) Install a three-phase electricity upgrade at the cost of about US\$240,000;
- b) Over time Install drip irrigation at the cost of approximately US\$300,000 per 100 hectares;
- c) Obtain additional equipment for field installation, maintenance, and some specialized harvest/processing equipment; and
- d) Expand crop packing and processing facilities.⁶⁹⁶

M. Packing

360) For 2018-2019, Inagrosa intended to rely upon its existing infrastructure at Hacienda Santa Fé.⁶⁹⁷

361) Inagrosa intended to ship the 2018 and 2019 harvest to Costa Rica. As the expansion was underway, and the U.S.D.A. applications were approved, the fruit would be shipped to final destinations on the east and west coasts of the United States.⁶⁹⁸

362) To handle export sales outside of Central America, Inagrosa would hire dedicated logistics and market staff.⁶⁹⁹

⁶⁹⁶ Witness Statement of Carlos Rondón – Memorial – ENG at ¶ 168 (CWS-01)

⁶⁹⁷ Witness Statement of Carlos Rondón – Memorial – ENG at ¶ 183 (CWS-01)

⁶⁹⁸ Witness Statement of Carlos Rondón – Memorial – ENG at ¶ 183 (CWS-01)

⁶⁹⁹ Management Representation Letter from Riverside Coffee, LLC to Richter Inc., September 12, 2022 at ¶ 9(a) (C-0055-ENG).

- 363) Sorting by size and weight would initially be done in person.⁷⁰⁰ Over time, equipment could be installed to automate the measurement and sorting of avocados by size and weight.⁷⁰¹
- 364) Shipping to the United States market required access to cold chain logistics. From the refrigerated room, the fruit is palletized, then transferred to refrigerated containers.⁷⁰² Fruit for the US market would be packaged and shipped in refrigerated containers that would go to the US distribution centers.
- 365) Avocados do not ripen on the tree.⁷⁰³ As a result, they have a long shelf life if properly cooled.⁷⁰⁴ Fruit could be kept for 90 days from harvest if shipped under optimal conditions.⁷⁰⁵
- 366) If the avocado volumes supported the decision, Inagrosa considered setting up a separate packing facility in Jinotega.⁷⁰⁶ This facility could handle fruit from Hacienda Santa Fé and nearby farms that could grow Hass avocados in conjunction with Inagrosa.⁷⁰⁷
- 367) The logistics from this point are provided by the shipping company, which brings the refrigerated containers for packing and then takes the containers away to the port for shipment to the United States.

⁷⁰⁰ Witness Statement of Carlos Rondón – Memorial – ENG at ¶ 187 (**CSW-01**)

⁷⁰¹ Witness Statement of Carlos Rondón – Memorial – ENG at ¶ 187 (**CWS-01**)

⁷⁰² Witness Statement of Carlos Rondón – Memorial – ENG at ¶ 185 (**CWS-01**).

⁷⁰³ Witness Statement of Carlos Rondón – Memorial – ENG at ¶ 178 (**CWS-01**).

⁷⁰⁴ Witness Statement of Carlos Rondón – Memorial – ENG at ¶ 178 (**CWS-01**).

⁷⁰⁵ McGlasson, W.B. 1989. MA packaging: A practical alternative to CA shipping containers. Fifth Proceedings, International Controlled Atmosphere Research Conference, Wenatchee, Washington USA, 2:235-240. (**C-0078-ENG**); and Eksteen, G.J., Truter A.B., Vorster, L.L. 1992. Long-Distance Controlled Atmosphere Transport of Avocados, Second World Avocado Congress at pp.463-466 (**C-0243-ENG**).

⁷⁰⁶ Witness Statement of Carlos Rondón – Memorial – ENG at ¶ 196 (**CWS-01**).

⁷⁰⁷ Witness Statement of Carlos Rondón – Memorial – ENG at ¶ 196 (**CWS-01**).

N. Markets

- 368) The two major global markets for Hass Avocados are the United States and the EU. Inagrosa sought to sell to the U.S. market. The Hass avocado is steadily increasing its participation in the European market. The European market has the potential for expansion for the Hass variety.⁷⁰⁸ Avocados have a high market demand due to their nutritious nature and many applications.
- 369) The US is the world's largest importer of avocados. The insufficiency of domestic production creates opportunities for other exporting countries.⁷⁰⁹
- 370) The avocado market is a demand-driven market such that the global rise of avocado consumption is driving the production increase. This is particularly important for the US market for the years 2020. US domestic production is insufficient to meet the demand.⁷¹⁰.
- 371) Exhibit 3 to Appendix 2- The Avocado Market of the Expert Valuation Statement (**CES-01**) demonstrates the dramatic increase in consumption of avocado in the US. Between 2001 to 2018 avocados consumption tripled, The US increased its imports of avocados, to satisfy this growing demand.⁷¹¹

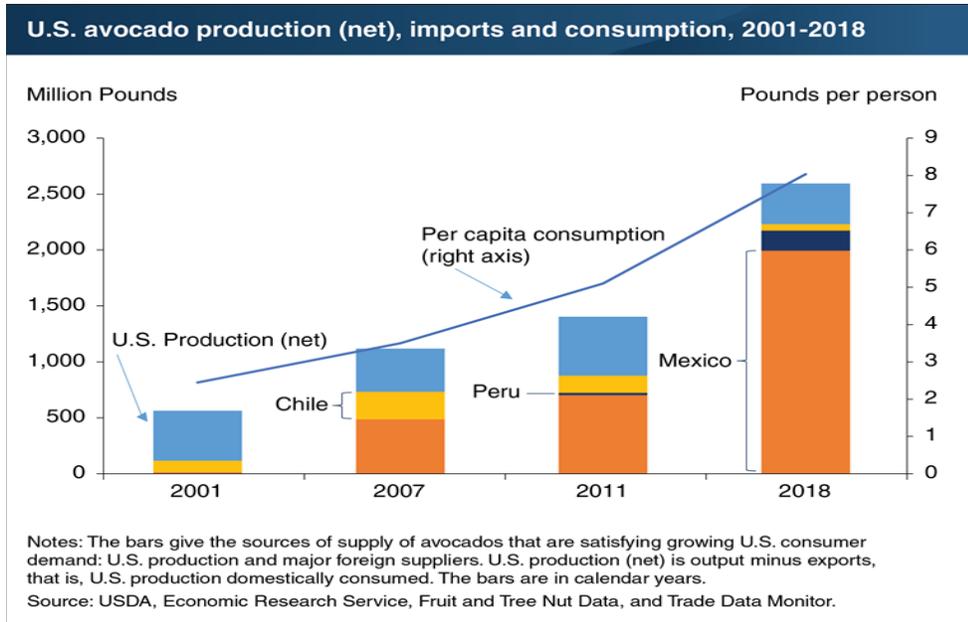
⁷⁰⁸ Global Hass Avocado Market Report 2022-2027, at page 0004154 (**C-0155-ENG**); Expert Valuation Report at Appendix 2- The Avocado Market at A2.2(d). (**CES-01**); BusinessWire Global Hass Avocado; at page 0004329. (**C-0170-ENG**).

⁷⁰⁹ Global Hass Avocado Market Report 2022-2027 at Bates 0004116, 0004118 (**C-0155-ENG**).

⁷¹⁰ Expert Valuation Statement of Vimal Kotecha– Memorial – ENG at Appendix 2- The Avocado Market at ¶A2.9. (**CES-01**), Global Hass Avocado Market Report 2022-2027 at page 0004116 (**C-0155-ENG**).

⁷¹¹ USDA Avocado Demand at page 0004166 (**C-0156-ENG**).

EXHIBIT 3



372) Exhibit 4 to Appendix 2-of the Expert Valuation Statement (**CES-01**) illustrates the growth for Hass avocados in the United States is expected at 12.5% compounded annual growth rate in volume for the Hass avocado consumption in North America between 2022 and 2027.⁷¹²

⁷¹² Global Hass Avocado Market Report 2022-2027 at Bates 0004117 (**C-0155-ENG**).

EXHIBIT 4

HASS AVOCADO MARKET, VALUE IN USD THOUSAND, VOLUME IN METRIC TONS, NORTH AMERICA, 2017-2027

CAGR (VALUE) (2022 TO 2027): 13.1%

CAGR (VOLUME) (2022 TO 2027): 12.5%

**1. Production**

373) Exhibit 5 to Appendix 2 of the Expert Valuation Statement of Vimal Kotecha (**CES-01**) illustrates global avocado production volumes. These volumes have followed the increase in demand. They grew from approximately 2.5 million metric tons in 2000 to 8 million metric tons in 2020.⁷¹³

2. Pricing

374) The Expert Valuation Statement of Vimal Kotecha (**CES-01**) notes that Avocado prices vary significantly throughout the year and are sensitive to production volumes and seasonality.⁷¹⁴ This is particularly true on the US market where availability of avocados depends heavily on US and Mexico

⁷¹³ Global Avocado Market Statista 2000-2020, at Bates 0004168 (**C-0158-ENG**).

⁷¹⁴ Expert Valuation Statement of Vimal Kotecha at Appendix 2- The Avocado Market, at ¶ A2.18 (**CES-01**).

production. US production can vary significantly year-over-year depending on climate conditions.⁷¹⁵

375) Consumption is also seasonal across the year and special events such as the American Superbowl can have a significant impact on Hass avocado prices. This results in highest prices in spring and summer, and lowest prices during winter as illustrated in the exhibit below.⁷¹⁶

Exhibit 7

Avocados: U.S. imports unit value (\$ per pound)

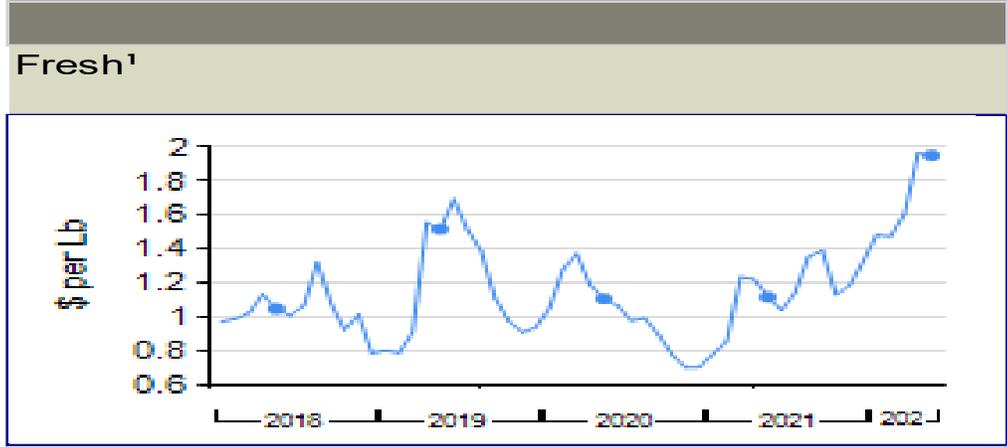
| Market year* | Quarter 1 | | | Quarter 2 | | | Quarter 3 | | | Quarter 4 | | | Avg |
|--------------|-----------|------|------|-----------|------|------|-----------|------|------|-----------|------|------|------|
| | Jan | Feb | Mar | Apr | May | Jun | Jul | Aug | Sep | Oct | Nov | Dec | |
| 2022 | 1,48 | 1,47 | 1,60 | 1,96 | 1,95 | NA | NA | NA | NA | NA | NA | NA | 1,68 |
| 2021 | 0,78 | 0,85 | 1,23 | 1,22 | 1,11 | 1,04 | 1,14 | 1,35 | 1,39 | 1,13 | 1,18 | 1,33 | 1,13 |
| 2020 | 1,05 | 1,28 | 1,37 | 1,18 | 1,10 | 1,06 | 0,98 | 0,99 | 0,89 | 0,77 | 0,70 | 0,70 | 0,99 |
| 2019 | 0,80 | 0,79 | 0,91 | 1,55 | 1,51 | 1,69 | 1,51 | 1,39 | 1,11 | 0,98 | 0,91 | 0,93 | 1,13 |
| 2018 | 0,97 | 0,99 | 1,02 | 1,13 | 1,04 | 1,01 | 1,06 | 1,32 | 1,07 | 0,92 | 1,01 | 0,78 | 1,03 |

⁷¹⁵ Expert Valuation Statement of Vimal Kotecha– Memorial – ENG at Appendix 2- The Avocado Market, at ¶ A2.18 (CES-01).

⁷¹⁶ USDA import unit value by commodity at page 0004169. (C-0159-ENG)

Exhibit 8

Avocados: U.S. imports unit value (\$ per pound)



IV. PRIVATE FOREST

- 376) Hacienda Santa Fé had a protected bioreserve forest of over 35,000 hardwood trees being maintained for sustainable harvest.⁷¹⁷ The private forest was designated as a wildlife reserve.⁷¹⁸
- 377) Hacienda Santa Fé had a private forest reserve consisting of black walnut (*Juglans Nigra*) granadillo, and other species.⁷¹⁹ The private forest had approximately 35,000 trees. Of this total, around 20,300 were black walnut, and another 1000 were granadillo.⁷²⁰ The forest also had mature coyote wood trees.
- 378) According to a tree census conducted by Luis Gutierrez in January 20 2018, there were 16,000 mature black walnut trees (with an average diameter of 60 cm and a height of 10 meters).
- 379) One thousand eight hundred black walnut trees were planted between 2015-2016. They had an average diameter of 20 cm and an average height of 3.5 meters. Finally, the growing black walnut trees planted during 2017-2018 (2500) had an average diameter of 10 cm and average height of 2 meters. As of 2017, there were 3,000 black walnut saplings in the nursery. The black

⁷¹⁷ Witness Statement of Luis Gutierrez – Memorial – SPA at ¶ 21 (**CWS-02**).

⁷¹⁸ Witness Statement of Carlos J. Rondón – Memorial – ENG at ¶¶ 10, 47, 56 (**CWS-01**).

⁷¹⁹ Witness Statement of Carlos J. Rondón – Memorial – ENG at ¶ 57 (**CWS-01**); and Witness Statement of Tom Miller at ¶ 6 (**CWS-07**).

⁷²⁰ Witness Statement of Carlos J. Rondón – Memorial – ENG at ¶ 57 (**CWS-01**); Witness Statement of Tom Miller at ¶¶ 6-8 (**CWS-07**) Witness Statement of Luis Gutierrez at ¶ 21(**CWS-02**); The number of black walnut trees were confirmed in Tree Census at Hacienda Santa Fé prepared by Luis Gutierrez, January 20, 2018 (**C-0084-SPA**); The number of granadillo was confirmed in the Witness Statement of Luis Gutierrez at ¶ 24 (**CWS-02**).

walnut saplings were scheduled to be transplanted from the nursery to the forest in the summer of 2018.⁷²¹

- 380) Inagrosa Management started in 2012 to take steps towards regarding sustainable management of the forest to provide an additional revenue source for Inagrosa.⁷²² By 2018, approximately 20,300 black walnut trees were growing at Hacienda Santa Fé.⁷²³
- 381) Inagrosa planned to sell sustainably harvested wood from the private forest as an additional revenue source.⁷²⁴
- 382) Black walnut is renowned for its strong, dark heartwood that is often used for high quality furniture and veneer.⁷²⁵
- 383) Black walnut is renowned for its strong, dark heartwood used in high-quality furniture and veneer. The quantity and quality of the black walnut forest were high. The private reserve had approximately 20,300 black walnut trees (*Juglans nigra*) growing on site.⁷²⁶
- 384) In addition, the quality of the granadillo trees in the Hacienda Santa Fe's private forest was high.⁷²⁷ Granadillo is a dense, fine-textured tropical hardwood from Central America. The heartwood color is a dark reddish brown.

⁷²¹ Tree Census at Hacienda Santa Fé prepared by Luis Gutierrez, January 20, 2018 (C-0084-SPA).

⁷²² Witness Statement of Tom Miller– Memorial – ENG at ¶¶12-13 (CWS-07).

⁷²³ Tree Census at Hacienda Santa Fé prepared by Luis Gutierrez, January 20, 2018 (C-0084-SPA)

⁷²⁴ Witness Statement of Carlos J. Rondón – Memorial – ENG at ¶ 58 (CWS-01) and the Witness Statement of Tom Miller Witness at ¶¶ 7, 12 (CWS-07).

⁷²⁵ Witness Statement of Tom Miller– Memorial – ENG at ¶ 11. (CWS-07).

⁷²⁶ Tree Census at Hacienda Santa Fé prepared by Luis Gutierrez, January 20, 2018 (C-0084-SPA)

⁷²⁷ Witness Statement of Tom Miller– Memorial – ENG at ¶ 11. (CWS-07).

It is used for both veneers and lumber. It is a valuable wood that is hard to obtain. Given its highly valued for use in musical instruments.⁷²⁸

- 385) According to a tree census conducted by Luis Gutierrez on January 20, 2018, the 16,000 mature black walnut trees had an average diameter of 60 cm and a height of 10 meters.⁷²⁹ The standing volume of black walnut in 2018 was total standing volume of black walnut trees was estimated to be 44,620 cubic meters.⁷³⁰ Management estimated that there were 1000 mature granadillo trees.⁷³¹
- 386) Miller Veneer, a large veneer company in the United States, sent Tom Miller to visit the forest in 2012. He inspected the forest and had samples taken for evaluation in the United States.⁷³² Miller Veneer indicated its desire to purchase all of the available granadillo wood in the Hacienda Santa Fé forest.⁷³³
- 387) As a result of the invasion, the private forest reserve was totally deforested.⁷³⁴ Inagrosa Management estimated the market value of the mature black walnut in the private forest reserve to be US\$5.1 million.⁷³⁵

⁷²⁸ Witness Statement of Tom Miller – Memorial – ENG at ¶ 11. (CWS-07); Witness Statement of Carlos J. Rondón – Memorial – ENG at ¶61. (CWS-01).

⁷²⁹ Witness Statement of Carlos J. Rondón – Memorial – ENG at ¶ 59 (CWS-01); Witness Statement of Luis Gutierrez at ¶21 (CWS-02).

⁷³⁰ Witness Statement of Carlos J. Rondón – Memorial – ENG at ¶ 60 (CWS-01).

⁷³¹ Witness Statement of Carlos J. Rondón – Memorial – ENG at ¶ 60 (CWS-01); Witness Statement of Tom Miller at ¶ 6 (CWS-07).

⁷³² Witness Statement of Carlos J. Rondón – Memorial – ENG at ¶ 62 (CWS-01); Witness Statement of Tom Miller at ¶¶ 8-10 (CWS-07).

⁷³³ Witness Statement of Carlos J. Rondón – Memorial – ENG at ¶ 62 (CWS-01); Witness Statement of Tom Miller at ¶13. (CWS-07).

⁷³⁴ Witness Statement of Carlos J. Rondón – Memorial – ENG at ¶ 10 (CWS-01).

⁷³⁵ Witness Statement of Carlos J. Rondón – Memorial – ENG at ¶ 60 (CWS-01).

388) In addition, at the time of the Expropriation, the nursery at Hacienda Santa Fé had 1,200 Black Walnut saplings to facilitate the sustainable future harvest of hardwood trees from this private forest reserve.⁷³⁶ As a result of the Expropriation, these saplings were destroyed along with the nursery.⁷³⁷

⁷³⁶ Witness Statement of Carlos J. Rondón – Memorial – ENG at ¶ 59 (CWS-01).

⁷³⁷ Witness Statement of Carlos J. Rondón – Memorial – ENG at ¶ 98 (CWS-01).

V. CAFTA TREATY CLAIMS

- 389) Chapter Ten of CAFTA authorizes a Claimant to commence an investment claim under the CAFTA for a governmental breach of an obligation in Chapter Ten. This current investment claim raises violations of the expropriation and the fair and equitable treatment obligations in the Treaty.
- 390) Breaches of treaty obligations in this claim occurred through non-state actors – namely paramilitaries and their supporters. The international law of state responsibility has specific rules that confirm Nicaragua’s responsibility in this claim.
- 391) This assessment first considers the primary breach of the Treaty obligations and then considers the international laws on state responsibility.
- 392) The most relevant CAFTA Chapter Ten investment obligations owed to the American investors in this claim are:
- a) Expropriation
 - b) Fair and Equitable Treatment
 - c) MFN Treatment
 - d) National Treatment

A. Most Favored Nation (MFN)

- 393) A MFN Treatment clause is a commitment between the treaty parties that none of the parties will give preferential treatment to a third State against the beneficiaries of the treaty.
- 394) CAFTA Article 10.4 imposes a Most Favored Nation or MFN Treatment obligation upon Nicaragua. The CAFTA describes this obligation:

Article 10.4:
Most-Favored-Nation Treatment

1. Each Party shall accord to investors of another Party treatment no less favorable than that it accords, in like circumstances, to investors of any other Party or of any non-Party with respect to the establishment, acquisition, expansion, management, conduct, operation, and sale or other disposition of investments in its territory.

2. Each Party shall accord to covered investments treatment no less favorable than that it accords, in like circumstances, to investments in its territory of investors of any other Party or of any non-Party with respect to the establishment, acquisition, expansion, management, conduct, operation, and sale or other disposition of investments.

- 395) CAFTA Article 10.4 imposes a requirement that the treatment provided by Nicaragua to an American Investor, like the Investor, must be as favourable as the treatment provided to an investor, or investment of an investor, from a Non-Treaty Party (also described as a “Third country”).
- 396) The MFN obligation is required to be provided to those investments of the nationals or companies of the other Treaty Party. This most favoured treatment relates to “the establishment, acquisition, expansion, management, conduct, operation and sale or other disposition of covered investments.”
- 397) CAFTA Article 1.1.1 also provides that MFN is an “interpretive principle and rule” of the CAFTA. Thus, one has to view MFN as a fundamental principle that is embedded in CAFTA Article 10.4, but which has a more structural function within the CAFTA as a whole.
- 398) The natural and ordinary meaning of the MFN obligation in CAFTA Article 10.4 requires that consideration is given to its terms.
- 399) Often, in the case of investment obligations, the issue of MFN Treatment arises when a claimant seeks to rely on a provision of another investment

treaty, with more favourable substantive, and most often, procedural provisions. While such situations arise in this arbitration, Claimant contends that the obligation was violated here when Nicaragua offered better treatment to investors from foreign countries as compared to the treatment provided to the Investment.⁷³⁸

- 400) The term “measure’ is defined by CAFTA Article 2.1 to mean: “measure includes any law, regulation, procedure, requirement, or practice”.
- 401) Better treatment from Nicaragua to Russian Investors (and their investments in Nicaragua) is a practice. This offer of treatment is not hypothetical – but instead it is a binding treaty “requirement” and thus a measure on that basis as well. This the offer to Russians under the Russian BIT is at the same time a measure capable of consideration by this CAFTA Tribunal.
- 402) As discussed below, Nicaragua provided treatment under other Investment Treaties to foreign investors that are more favourable to investments of Non-Treaty Parties than it provided in like circumstances to the Claimant and its Investment.

1. The Meaning of MFN Treatment

- 403) MFN Treatment forms one of the most basic standards of international law. The United Nations International Law Commission (ILC) studied MFN in 1967 and adopted final Draft Articles in 1978, which provide a useful definition of MFN Treatment. It stated:

treatment accorded by the granting State to the beneficiary State, or to persons or things in a determined relationship with that State, not less

⁷³⁸ The Investor relies upon the MFN Obligation contained in CAFTA Article 10.4 in this pleading and intend to rely upon this Treaty provision with respect to subsequent pleadings in this arbitration, as may be required.

favourable than treatment extended by the granting State to a third State or to persons or things in the same relationship with that third State.⁷³⁹

404) In 2015, the ILC concluded an additional study on MFN. In its final study report, it concludes that the key elements of MFN include:

First, under such a provision each State agrees to grant a particular level of treatment to the other State or States, and to persons and entities in a defined relationship with that State or those States.

Second, the level of treatment provided by an MFN provision is determined by the treatment given by the State granting MFN to third States (“no less favourable”).

Third, an MFN commitment applies only to treatment that is in the same category as the treatment granted to the third State (“*ejusdem generis*”).

Fourth, the persons or entities entitled to the benefit of MFN treatment are limited to those in the same category as the persons or entities of the third State that are entitled to the treatment being claimed.⁷⁴⁰

2. The Overriding Economic Considerations of MFN Treatment

405) Consistent amongst commentators, lawyers, and economists, is that the concept of MFN is central from a legal point of view and is rooted in strong economic rationales.⁷⁴¹ Viewed as a “central pillar of the international trading system,” the MFN Treatment obligation has served as an important tool in multilateral trade negotiations:

[B]y giving the investors of all parties benefitting from a country’s MFN clause the right, in similar circumstances, to treatment no less favourable than a country’s closest or most influential partners can negotiate on the

⁷³⁹ ILC Final Report of the Study Group on the Most-Favored Nation Clause, 2015 at ¶ 13 (CL-0126-ENG).

⁷⁴⁰ ILC Final Report on MFN, 2015, at ¶ 35 (CL-0126-ENG).

⁷⁴¹ Horn, Henrik and Petros C Mavroidis, “*Economic and legal aspects of the Most-Favored Nation Clause*”, *European Journal of Political Economics* Volume 17, 2001, at 234 (CL-0127-ENG).

matters the clause covers, MFN avoids economic distortions that would occur through more selective country-by-country liberalisation.⁷⁴²

- 406) The MFN Treatment standard also has had a major impact on economic liberalization in the field of international investment law.⁷⁴³ In both legal regimes, the MFN Treatment standard seeks to ensure uniform treatment without discrimination.⁷⁴⁴ Through MFN Treatment agreements, governments have ensured that the content of their bilateral investment treaty is always maintained at the best and highest level of investment protection. Thus, the MFN Treatment clause seeks to ensure a “level playing field between all trading partners.”⁷⁴⁵
- 407) MFN plays a direct role of ensuring equality of treatment and conditions between foreign investors. It also helps to establish equality of competitive opportunities between investors of different countries.⁷⁴⁶
- 408) Tribunals considering Most Favored Nation clauses have interpreted these clauses to ensure they fulfill their purpose. In his writing, John Jackson has confirmed that MFN plays a crucial role of avoiding economic distortions amongst parties to a treaty. It often has been linked to policy makers seeking to favour liberal trade.⁷⁴⁷

⁷⁴² Organization for Economic Cooperation and Development (OECD), “*Most-Favoured-Nation Treatment in International Investment Law*”, Working Papers on International Investment Law No. 2004/2, OECD Paris, September 2004, at 2 (“MFN Treatment has been a central pillar of trade policy for centuries.”) **(CL-0128-ENG)**.

⁷⁴³ Organization for Economic Cooperation and Development (OECD), “*Most-Favoured-Nation Treatment in International Investment Law*”, Working Papers on International Investment Law No. 2004/2, OECD Paris, September 2004, at 2 **(CL-0128-ENG)**.

⁷⁴⁴ See Tony Cole, “The Boundaries of Most-Favoured Nation Treatment in International Investment Law”, at 3 **(CL-0129-ENG)**.

⁷⁴⁵ United Nations Conference on Trade and Development (UNCTAD), *Most Favoured Nation Treatment*, UNCTAD Series on Issues in International Investment Agreements II, 2010, at 13 **(CL-0130-ENG)**.

⁷⁴⁶ United Nations Conference on Trade and Development (UNCTAD), *Most Favoured Nation Treatment*, UNCTAD Series on Issues in International Investment Agreements II, 2010, at 13 **(CL-0130-ENG)**.

⁷⁴⁷ Jackson, J.H. “*The World Trading System - Law and Policy of International Economic Relations*,” Second Edition, MIT Press, 1997, at 134 **(CL-0131-ENG)**.

- 409) MFN Treatment is also favourably equated with the concept of “multilateralism”. Particularly in the multilateral trade context, MFN also has served an important economic purpose that is connected to the principle of comparative advantage. In this vein, economists observe that MFN mitigates the danger of organizing relationship with foreign governments by offering a “standard of equal treatment of foreign nations.” Thus, in addition to the concept of National Treatment, the concept of MFN Treatment has been a foundational principle in the context of trade in goods.⁷⁴⁸
- 410) The MFN obligation appears throughout many bilateral investment treaties, the NAFTA and the WTO agreements, including all of the U.S. Model BITs. Moreover, although the MFN Treatment obligation originated over a century ago, the main influence on the US Model Bilateral investment treaties were the equivalent provisions in the GATT and GATS.⁷⁴⁹
- 411) Prof. Martins Paparinskis references the speech from the former US Secretary of State, Elihu Root, over a century ago, where Secretary Root explains the nature of the MFN obligation by stating:

If any state chooses to extend privileges to alien residents ..., the state will be forbidden by the operation of the treaty to discriminate against the resident citizens of the particular country with which the treaty is made and will be forbidden to deny to them the privileges which it grants to the citizens of other foreign countries.⁷⁵⁰

⁷⁴⁸ Horn, Henrik and Petros C Mavroidis, “*Economic and legal aspects of the Most-Favored Nation Clause*”, European Journal of Political Economics Volume 17, 2001, at 234 (CL-0127-ENG).

⁷⁴⁹ Both Articles 103 and 1103 strongly support a relationship between these WTO agreements and the CAFTA and the NAFTA. In addition, the impact of the GATT upon the most-favoured-nation non-discrimination provision is evidenced by the early drafting stages of NAFTA Article 1103, which centered upon the Mexican-US proposal for additional “GATT exception”-type language; See Kinnear, M., Andrea K. Bjorklund, John F.G. Hannaford, “*Investment Disputes Under NAFTA: An Annotated Guide to NAFTA Chapter 11*”, June 2006, Article 1103 Most-Favoured Nation Treatment, (Kluwer 2006) at 2-1103 (CL-0132-ENG).

⁷⁵⁰ Martins Paparinskis, *The International Minimum Standard and Fair and Equitable Treatment*, at 105 (CL-0111-ENG), relying on E. Root, “The Real Question under the Japanese Treaty and the San Francisco School Board Resolution” (1907) 1 AJIL, 273, at pp. 277-278.

- 412) In 1910, Secretary Root explained in a speech to the American Society of International Law that the effect of an MFN clause was that it was an “essentially commercial clause.”⁷⁵¹
- 413) Plain and simple, the MFN Treatment obligation compares treatment. It makes no difference whether the source of that better treatment arises from a contract, legislation, policy, or practice. The source is irrelevant – what is relevant is whether more favourable treatment is provided.
- 414) The MFN obligation requires even-handedness in all the aspects of treatment concerning the establishment, management, conduct, and operation of investments.
- 415) The NAFTA Chapter Twenty panel in *Re: Cross-Border Trucking*⁷⁵² considered the meaning of the MFN obligation. The NAFTA Article 1203 MFN obligation for cross-border services is virtually identical to the wording of CAFTA Articles 10.3 and 10.4 except that the basis of comparison is upon service providers in NAFTA Article 1203 rather than investors or investments.
- 416) The NAFTA Chapter Twenty panel noted Canada’s position on the meaning of the MFN obligation required a comparison between a foreign service provider providing services into the United States with a domestic American service provider providing services in the United States.⁷⁵³ The Chapter Twenty panel stated:

The major issue in interpreting Article 1202 is a comparison between a foreign service provider providing services cross-border (here, from Mexico into the United States), and a service provider providing services domestically. Canada also contends that a “blanket” refusal

⁷⁵¹ E. Root, “The Basis of Protection to Citizens Residing Abroad” (1910) 4 ASIL Proceedings, cited in Martins Paparinskis, *The International Minimum Standard and Fair and Equitable Treatment*, Oxford University Press, 2013 (“*Paparinskis*”), at 105 (CL-0111-ENG).

⁷⁵² *In the Matter of Cross-Border Trucking Services*, NAFTA Secretariat File No. USA-MEX-98-2008-01, Final Report of the Panel (February 6, 2001) (“*Cross-Border Trucking - Panel Report*”) (CL-0133-ENG).

⁷⁵³ *Cross-Border Trucking - Panel Report*, at ¶ 244 (CL-0133-ENG).

by the United States to permit Mexican carriers to obtain operating authority to provide cross-border truck services would necessarily be less favorable than the treatment accorded to U.S. truck services providers in like circumstances.⁷⁵⁴

- 417) The same approach to interpretation should be followed by this Tribunal in the meaning to be given to CAFTA Article 10.3 as well as 10.4 as both have the same tests for likeness and treatment.
- 418) The NAFTA Tribunal in *ADF Group* also considered the meaning of MFN in the NAFTA investment chapter. The *ADF* Tribunal found that the substantive meaning of MFN permitted the NAFTA Tribunal to automatically provide enhanced treatment given by the United States arising from other investment treaties to the Canadian claimant.⁷⁵⁵
- 419) In *Bayindir v. Pakistan*, an ICSID tribunal had to consider that treaty's MFN obligation. The *Bayindir* Tribunal found in interpreting the MFN obligation that "treatment" includes all dealings between the host state and the investor. The Tribunal held that, even though all investors are subject to the same legal and regulatory framework, MFN was violated by treatment that involves the exercise of discretion within that framework in a manner that favours some investors in "similar situations" over others.⁷⁵⁶ The Tribunal also noted the requirement that an investor provide "sufficiently specific data" to allow for the comparison of the more favourable treatment.⁷⁵⁷

⁷⁵⁴ Cross- Border Trucking - Panel Report, at ¶ 244 (CL-0133-ENG).

⁷⁵⁵ *ADF Group v. United States of America*, Award, ICSID Case No. ARB(AF)/001 (January 9, 2003) at ¶ 137 (CL-0134-ENG).

⁷⁵⁶ *Bayindir Insaat Turzim Ticaret Ve Sanayi, AS. v. Islamic Republic of Pakistan*, ICSID Case No. ARB./03/29, Decision on Jurisdiction, November 14, 2005, at ¶ 206 (CL-0135-ENG).

⁷⁵⁷ *Bayindir v. Pakistan*, at ¶ 417 (CL-0135-ENG).

a) Better treatment offered by Nicaragua

420) Nicaragua as a Treaty Party must provide the best treatment provided to foreign companies in like circumstances.

421) In *Renta 4 S.V. S.A. v. Russian Federation*, Judge Charles Brower considered whether having a range of different dispute settlement options constituted more favourable treatment that would trigger the MFN Treatment requirement.⁷⁵⁸ He concluded that having different options, was in itself, the provision of more favourable treatment than having fewer options. He wrote:

In any case, strictly speaking, it is not relevant, in my view, to attempt evaluation of whether one dispute settlement mechanism objectively is “more favorable” than another. What is relevant is that Danish and Spanish investors in Russia are afforded “different” dispute settlement options. The purpose and rationale of MFN clauses is, as the International Court of Justice has so clearly stated in *Rights of Nationals of the United States of America in Morocco* to “establish and to maintain at all times fundamental equality without discrimination among all of the countries concerned.. From this perspective, the mere existence of differences in the available dispute settlement mechanisms is sufficient to trigger an MFN clause and thereby to extend the treatment afforded by the Danish treaty to those benefitting from the MFN clause in the Spanish treaty.

422) In this claim, there are more options available to the American Investor arising from certain obligations in the Nicaraguan-Russian BIT. That range of different options constitutes more favourable treatment.

423) As permitted under CAFTA Article 10.13, the Republic of Nicaragua made no reservations in Nicaragua’s Annex I Schedule (Annex I -NI). Nicaragua also made no reservation to Annex II (Annex II – NI) that applies to private landholdings, agriculture, forestry, or commercial operations.

⁷⁵⁸ *Renta 4 S.V.S.A, et al. v. The Russian Federation*, SCC Case No. 24/2007, Separate Opinion of Charles N. Brower, at ¶ 21 (CLA-275).

- 424) Nicaragua made a reservation in Annex II at II-NI-5 with respect to obligations in bilateral treaties signed or in treaties that were in force before the coming into force of the CAFTA. This MFN reservation does not apply to obligations taken after the signing of CAFTA, such as those in the Russia-Nicaragua BIT (“Russian BIT”), which was signed in 2012 and came into force in 2013.⁷⁵⁹
- 425) 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.

3. Better Treatment Provisions in the Russian BIT

- 426) The Russian Federation -Nicaragua Bilateral Investment Treaty (“Russian BIT”) was signed on January 26, 2012 in Moscow and it came into force on September 3, 2013. The Treaty was authenticated in Russian, Spanish and English.⁷⁶⁰
- 427) Nicaragua did not meet its obligation to provide Most Favoured Nation Treatment to Riverside and its Investments under CAFTA Article 10.4. These failures to provide treatment as favourable to Riverside as provided to nationals of third countries, including those of Russians, is set out below. In every case, this treatment was provided in relation to “the establishment, acquisition, expansion, management, conduct, operation and sale or other disposition of covered investments.”
- 428) Nicaragua provided better treatment to investors and investments in like circumstances from non-Treaty Parties in the following ways:

⁷⁵⁹ Nicaraguan-Russian Bilateral Investment Treaty, September 3, 2013, (CL-033-ENG).

⁷⁶⁰ Nicaraguan-Russian Bilateral Investment Treaty, 3 September 2013, (CL-0033-ENG).

- a) By offering more favorable Expropriation terms than that offered in the CAFTA Treaty;⁷⁶¹
- b) By offering broader and more expansive coverage for the national treatment and the fair and equitable treatment obligation than that offered in the CAFTA Treaty;⁷⁶²
- c) By offering broader and more expansive scope of coverage to those investments covered by the benefits of Treaty Protection.⁷⁶³

429) As permitted by Article 10.4 of the CAFTA Treaty, the Investor in this arbitration claims the benefit of the better treatment offered by Nicaragua to Third Parties in like circumstances to the Investor and its investments.

a) **Likeness**

430) For the purposes of National Treatment and MFN Treatment, all persons possessing private land in the territory of Nicaragua, as well as those seeking protection of private landholdings, are in like circumstances to Inagrosa, the investment of the Investor, Riverside.

431) Riverside and its investment Inagrosa received less favorable treatment with respect to the establishment, acquisition, expansion, management, conduct, operation, and sale or other disposition of investments than that received by other locals and investments of other Parties and non-Parties in Nicaragua.

b) **Broader MFN Scope**

432) This obligation in the Russian BIT is not limited to the “establishment, acquisition, expansion, management, conduct, operation, and sale or other

⁷⁶¹ The Investor will address MFN in relation to Expropriation within the detailed discussion of expropriation below. The broader obligation is in the Russian BIT at ¶4. (CL-0033-ENG).

⁷⁶² Russian BIT at ¶3. (CL-0033-ENG).

⁷⁶³ Nicaraguan-Russian Bilateral Investment Treaty, 3 September 2013 at ¶1. (CL-0033-ENG).

disposition of investments” as in CAFTA. Also, there are no reservations or exceptions to the MFN obligation in the Russian BIT obligation, unlike those in the CAFTA.

- 433) To the extent that treatment to Investors and Investments of Investors in the Russian BIT is more favorable, Nicaragua is required to extend that more favorable treatment to investments of investors of the United States. Riverside, and its investment Inagrosa, are in like circumstances to any Russian investor or its investment in Nicaragua.
- 434) Nicaragua has provided treatment through the extension of more favorable treatment obligations to the investments of non-parties to the CAFTA in other treaties. For example, these other treaties include, but are not limited to, the more favorable treatment Nicaragua offered to Investors and the investments of Investors of the Russian Federation. Such investments are covered by the terms of the Agreement between the Russian BIT, which offers more favorable treatment than provisions in the CAFTA. Riverside relies on other more favorable treaties with non-Parties to the CAFTA, including the entirety of the Russian BIT.

4. The Effect of the MFN clause in this claim

- 435) There is a substantive effect that this Tribunal must give to Nicaragua’s sovereign decision to extend broader treatment under international law to Russian Investors and their Investments under the Russian BIT. Without limitation, Riverside is entitled to rely on and expect, at least, for treatment as favourable as that offered by Nicaragua in regard to the following provisions in the Russian BIT:
- a) the more favorable definition of investment and the absence of such obligations on consents and waivers contained in Article 1 of the Russian BIT;

- b) the more favorable fair and equitable treatment obligation contained in Article 3(1) of the Russian BIT;
- c) the more favorable national treatment obligation contained in Article 3(2) of the Russian BIT; and
- d) the more favorable expropriation obligation contained in Article 4 of the Russian BIT.

c) Better Definition of Investment

436) Article 1 of the Russian BIT provides a broader definition of Investment than that provided in the CAFTA. It provides a meaning of investment without the characterization test included in the CAFTA definition. This broader definition under the Russian BIT reads:

a) “investments” are all kinds of property assets invested by investors of the State of one Contracting Party in the territory of the State of the other Contracting Party in accordance with the legislation of the State of the latter Contracting Party, in particular:

movable and immovable property, as well as rights related with them; shares, stocks and other forms of participation in the capital of enterprises; exclusive rights to intellectual property such as copyrights, patents, models and industrial designs, trademarks and service marks, “know-how”, technology and information having commercial value;⁷⁶⁴

437) This definition applies to all kinds of property assets, and it does not include the “characteristics of an investment” language that has been included in the definition found in CAFTA.

438) In addition. Nicaragua provides more favorable treatment to investments of investors in like circumstances from Russia in Article 8 of the Russian Treaty

⁷⁶⁴ Russian BIT at ¶1 - investment. (CL-0033-ENG).

by not imposing any requirement for the filing of consents and waivers under the Russia- Nicaragua BIT. That Russian BIT also does not impose any consultations or negotiation (which also would be less onerous and thus more favorable treatment). This treatment is more favorable than the treatment offered to Riverside Coffee, and thus the more favorable treatment must be offered by Nicaragua with respect to consultations, consents and waivers under the CAFTA.

d) Better Fair and Equitable Treatment obligations

- 439) Under Article 10.5 of the CAFTA, the CAFTA parties are obliged to “accord covered investments treatment in accordance with customary international law, including fair and equitable treatment and full protection and security”. The CAFTA sets out in Article 10.5.2 that this “prescribes the customary international law minimum standard of treatment to aliens as the minimum standard to be afforded to covered investments.”
- 440) Under the terms of CAFTA Article 10.5.2(a), the obligation of fair and equitable treatment includes “the obligation not to deny justice in criminal, civil or administrative adjudicatory proceedings in accordance with the principle of due process embodied in the principal legal systems of the world.” The fair and equitable treatment obligation is not limited to that example.
- 441) Under Article 10.5.2(b), the CAFTA states that full protection and security requires each Party to provide the level of police protection required under customary international law. The full protection and security obligation is not limited to this example, it simply includes it.
- 442) In an unusual treaty drafting approach, the definition of the international law standards is further influenced by the use of a footnote. As a result of footnote 1 to the title above CAFTA Article 10.5, Article 10.5 is subject to interpretation under CAFTA Annex 10-B. CAFTA Annex 10-B discusses the methodology for

determining whether a rule constitutes customary international law sufficient to be included within the coverage of CAFTA Article 10.5.

- 443) States are sovereign. The International Court of Justice has confirmed that states freely can extend treaty protections under the fair and equitable treatment category beyond what is required by customary international law.⁷⁶⁵
- 444) This Tribunal must give effect to the sovereign decisions of Nicaragua to accept an obligation for fair and equitable treatment. The obligation for “fair and equitable treatment for the investments” is not limited only to customary international law as expressly set out in CAFTA Article 10.5. The Russian BIT gives a definition and naturally follows the full sources of international law (such as treaty law, general principles of law, international tribunal decisions and scholarly writings) in addition to customary international law in giving meaning and content to the meaning of the term “fair and equitable treatment.”⁷⁶⁶
- 445) The application of the full range of sources of international law is generally described as the autonomous standard for fair and equitable treatment. The autonomous standard is what is offered by Nicaragua in the Russian BIT. This must form the basis for Nicaragua’s obligations to its CAFTA Party partners under the CAFTA’s MFN obligation.
- 446) As Article 3(1) of the Russian BIT provides a broader definition of fair and equitable treatment than that in the CAFTA, this autonomous fair and equitable treatment obligation must be extended to Riverside. Thus, any restriction of

⁷⁶⁵ Ahmadou Sadia Diallo (Guinea v Democratic Republic of Congo), Preliminary Objections Judgment, 2007 ICJ 582 at ¶ 60 (**CL-0164-ENG**).

⁷⁶⁶ Article 38 of the Statute of the International Court of Justice, 26 June 1945 (**CL-0169-ENG**). Article 38 sets out at least four sources of international law. Customary international law is one of those four sources. Treatment in accordance with international law would require consideration of all four sources and not just one source, customary international law.

fair and equitable treatment only to “customary international law” contained in CAFTA Article 10.5 and CAFTA Annex 10-B are inapplicable, as the autonomous standard must apply.

447) In the Russian BIT, Nicaragua agreed to the following:

Each Contracting Party shall provide in the territory of its State fair and equitable treatment for the investments made by investors of the State of the other Contracting Party in respect of management, maintenance, enjoyment, use or disposal of such investments.⁷⁶⁷

448) The autonomous obligation is based on the ordinary meaning of the treaty wording combined with the typically expressed purpose of BITs as set out by the interpretative rules codified in Articles 31 and 32 of the Vienna Convention on the Law of Treaties.⁷⁶⁸ This is also consistent with the interpretative approach to the CAFTA mandated under CAFTA Article 10.2.⁷⁶⁹

449) The broader treatment under the Russian BIT applies only to the fair and equitable treatment part of CAFTA Article 10.5. The Russian BIT does not mention full protection and security, and thus the broader obligations do not extend to other elements of the international law standard of treatment. That obligation is still limited by the CAFTA obligation and the scope limitations obligation in CAFTA Annex 10-B. But, the fair and equitable treatment obligation under the Russian BIT is significantly broader and offers more favourable treatment to investors and their investments located in Nicaragua.

⁷⁶⁷ Russian BIT at ¶ 3(1). (CL-0033-ENG).

⁷⁶⁸ Vienna Convention on the Law of Treaties. Articles 31 and 32 (CL-0121-ENG).

⁷⁶⁹ CAFTA Article 1.1.2 provides that the CAFTA is to be interpreted in a manner consistent with international law. CAFTA Article 1.1.1 provides that “the objectives of this Agreement, as elaborated more specifically through its principles and rules, including national treatment, most-favored-nation treatment, and transparency”

e) Better National Treatment obligations

450) Article 3(2) of the Russian BIT provides a broader definition of national treatment than that contained in the CAFTA. Nicaragua agreed to a broader obligation that was not limited by any reservations contained in the CAFTA or by additional scope limitations (upon the management, conduct, operation, maintenance, use, disposal, or alienation of the investments) within the CAFTA obligation. In the Russian BIT, Nicaragua agreed to the following:

The treatment referred to in paragraph 1 of this Article shall not be less favorable than a treatment granted by a Contracting Party to the investments of investors of its own State or to investments of investors of any third State.⁷⁷⁰

451) This obligation in the Russian BIT is not limited to the “establishment, acquisition, expansion, management, conduct, operation, and sale or other disposition of investments” as in the CAFTA. Also, there are no reservations or exceptions to the Russian BIT obligation, unlike those in the CAFTA.

f) Better Expropriation obligations

452) Article 4 of the Russian BIT provides a broader definition of the obligations regarding expropriation than that contained in the CAFTA. Nicaragua agreed to a broader obligation that was not limited by additional scope limitations on the obligation in CAFTA Annexes 10-B or 10-C. In the Russian BIT, Nicaragua agreed to the following:

1. Investments of investors of the State of one Contracting Party made in the territory of the State of the other Contracting Party and returns of such investors shall not be expropriated, nationalized or subjected to any measures, having effect equivalent to expropriation or nationalization (hereinafter referred to as expropriation) except when such measures are carried out in the public interests and in accordance with the procedure

⁷⁷⁰ Russian BIT at ¶ 3(2) (CL-0033-ENG).

established by the legislation of the State of the latter Contracting Party, when they are not discriminatory and entail payment of prompt, adequate and effective compensation.⁷⁷¹

- 453) 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.
- 454) Inagrosa is entitled to treatment as favorable as that provided to those in like circumstances to those investments and investors from Nicaragua and those from states other than the United States. Others in like situations were treated more favorably with respect to the establishment, acquisition, expansion, management, conduct, operation, and sale or other disposition of investments.

B. Expropriation

- 455) Article 10.7 of CAFTA sets out the expropriation and compensation provisions. It reads:

1. 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.
2. Compensation shall:
 - (a) be paid without delay.
 - (b) be equivalent to the fair market value of the expropriated investment immediately before the expropriation took place ("the date of expropriation").

⁷⁷¹ Russian BIT at ¶ 4 (CL-0033-ENG).

- (c) not reflect any change in value occurring because the intended expropriation had become known earlier; and
- (d) be fully realizable and freely transferable.

456) As a result of footnote 3 to the title of CAFTA Article 10.7, Article 10.7 is subject to mandatory interpretation under Annexes 10-B and 10-C.

457) A footnote to CAFTA Article 10.7 says that it is to be interpreted in accordance with Annex 10-C. The reference to Annex 10-B is necessary as CAFTA Article 10.7 also imposes duties under CAFTA Article 10.5, it also requires interpretation of the CAFTA Article 10.5 obligation against Annex 10-B.

458) Annex 10-C (1) provides that “Article 10.7.1 is intended to reflect customary international law concerning the obligation of States with respect to expropriation.”

459) Annex 10-C (4) provides the discussion of direct expropriation which is the situation where there has been a taking through formal transfer of title or outright seizure.

460) Annex 10-C (4) provides guidance on what the CAFTA terms “indirect expropriation”. Indirect expropriation is the situation where there has been an effect equivalent to direct expropriation without formal transfer of title or outright seizure. It reads:

1. The second situation addressed by Article 10;7.1 is indirect expropriation, where an action or series of actions by a Party has an effect equivalent to direct expropriation without formal transfer of title or outright seizure.

- (a) The determination of whether an action or series of actions by a Party, in a specific fact situation, constitutes an indirect expropriation, requires a case-by-case, fact-based inquiry that considers, among other factors:

- (i) the economic impact of the government action, although the fact that an action or series of actions by a Party has an adverse effect on the economic value of an investment, standing alone, does not establish that an indirect expropriation has occurred.
 - (ii) the extent to which the government action interferes with distinct, reasonable investment-backed expectations; and
 - (iii) the character of the government action.
- 461) Annex 10-B is discussed *infra* with respect to the international law standard of treatment.
- 462) As Article 4 of the Russian BIT provides a broader definition of state obligations upon an expropriation than that in the CAFTA, this autonomous expropriation treatment obligation must be extended to Riverside. Thus, any restriction of expropriation treatment only to “customary international law” as contained in CAFTA Articles 10.7 and 10.5 and CAFTA Annexes 10-B and 10-C is inapplicable, as the autonomous standard must apply.
- 463) However, as noted in the MFN discussion above, the impact of Nicaragua’s commitments under the Russian BIT means that there is no need to rely upon Annexes 10-B on fair and equitable treatment or 10-C in the interpretation of CAFTA Article 10.7.

a) Right to bring a claim of expropriation as an investor

- 464) The Respondent is entitled to expropriate property. This is clear from the terms of CAFTA Article 10.7 set out above. However, there are obligations upon Nicaragua when it so expropriates. These obligations are to follow due process and fair and equitable treatment standards (as required by CAFTA Article 10.7(1)(d) and to provide fair market compensation as required by CAFTA Article 10.7(1)(c). Indeed, Nicaragua has failed to meet any of the four obligations set out in CAFTA Article 10.7(1).

- 465) To obtain fair market compensation for expropriation, an Investor must meet the following criteria:
- a) The CAFTA covers the expropriated investment, and
 - b) The State expropriated the investment either directly or indirectly.
- 466) These criteria have been met in this claim. The taking was direct, and the Treaty covered the Investment.
- 467) The Treaty covers the Investment. The CAFTA defines an investment as “every asset that an investor owns or controls, directly or indirectly, that has the characteristics of an investment.”⁷⁷² These characteristics include the commitment of capital or other resources, the expectation of gain or profit, or the assumption of risk.”⁷⁷³ As noted above, the CAFTA definition obligations of characteristics of an investment do not apply because of the operation of the MFN obligation and the Russian BIT.
- 468) At the time of the seizure, Riverside controlled Inagrosa and had a direct equity investment in it. Riverside’s investment in Inagrosa is an investment covered under the Treaty. Riverside currently owns 95% of the shares of Inagrosa.⁷⁷⁴
- 469) Riverside also invested additional capital into both Inagrosa and Hacienda Santa Fé by way of loans.⁷⁷⁵ The equity and debt investments were for a business purpose and with the expectation of gain. All of these property interests constitute investments under the Treaty.

⁷⁷² CAFTA Treaty, Chapter Ten, Section C – Definitions (CL-0001-ENG).

⁷⁷³ CAFTA Treaty, Chapter Ten, Section C – Definitions (CL-0001-ENG).

⁷⁷⁴ Inagrosa Share Certificate No. 23 dated August 28, 2020 (C-0053-SPA).

⁷⁷⁵ These loans are detailed in the Witness Statement of Mona Winger at ¶¶ 17-24 (CWS-05).

470) We note that as a result of the operation of CAFTA's Article 10.4 MFN obligation and Nicaragua's entry into obligations under the 2013 Russian BIT,⁷⁷⁶ the definition of investment under the CAFTA has been expanded to the broader definition under the Russia BIT. While Riverside is entitled to rely upon the broader definition in the Russian BIT, factually Riverside meets the definition in the narrower CAFTA definition and the broader Russian BIT definition.

471) The CAFTA provides an expropriation can either be direct or indirect.

i. Direct Expropriation

472) A permanent seizure of private property is a direct expropriation. Annex 10-C of the CAFTA states that a direct expropriation is one in which:

...an investment is nationalized or otherwise directly expropriated through formal transfer of title or outright seizure.⁷⁷⁷

473) In this claim, the expropriation resulted from a seizure. This makes it a direct expropriation.

474) The law of expropriation is clear:

- a) The act of expropriation requires an adverse taking of property by the government.
- b) Only a taking by the government can result in a taking. For there to be a taking, the actual property must be adversely taken by Nicaragua.
- c) Nicaragua did not engage in a *de jure* taking or condemnation. Such an action would have given notice, certainty, and due process to the Investor

⁷⁷⁶ This issue is discussed below in Part V.C – MFN in this Memorial. The Russian Federation -Nicaragua Bilateral Investment Treaty was signed on January 26, 2012 in Moscow and it came into force on September 3, 2013. The Treaty was authenticated in Russian, Spanish and English. An Authentic English version is at (CL-0033-ENG).

⁷⁷⁷ CAFTA Treaty, Chapter Ten, Annex 10-C (CL-0001-ENG).

with respect to the title the lands taken and compensation for the lands taken. Such an approach was always available to Nicaragua, it chose not to follow this route.

- d) Nicaragua instead did a *de facto* taking. Thus, the Tribunal must look at what steps Nicaragua actually took. This requires application of the “sole effects” doctrine.
- 475) The Investor notes that international law generally applies the “sole effects” doctrine to determine the existence of an expropriation. The sole effects doctrine provides that a measure constitutes an indirect expropriation depending on the degree of interference with the property rights of the investor. The interference with the right of property is the only criterion for determining if indirect expropriation has taken place. No other factor is relevant for determining indirect expropriation.
- 476) The 1961 *Draft Convention on the International Responsibility of States for Injuries to Aliens* (1961 Harvard Draft) was intended as a codification of customary international law. It provides that all takings are to be compensated and defines a taking as follows:

A ‘taking of property’ includes not only an outright taking of property but also any such unreasonable interference with the use, enjoyment, or disposal of property as to justify an inference that the owner thereof will not be able to use, enjoy, or dispose of the property within a reasonable period of time after the inception of such interference.⁷⁷⁸

- 477) Prof. G.C. Christie first discussed the sole effects doctrine in his 1962 article in the *British Yearbook of International Law* entitled “What Constitutes Taking of Property under International Law”. Prof. Christie stated that:

⁷⁷⁸ Louis B. Sohn and R. R. Baxter, *The American Journal of Int'l Law, Responsibility of States for Injuries to the Economic Interests of Aliens, Title II: Draft Convention on the International Responsibility of States for Injuries to Aliens*, Vol. 55, No. 3, at p. 553, July 1961 (CL-0105-ENG).

a State's mere declaration that expropriation is not intended is not determinative of the issue. Even when these protestations are made in good faith the cases have shown that expropriation can be an unintended result of a State's action. For example, when the use of certain property is so intimately connected with the control of other property which has been expropriated as to be useless without it, then the former property may itself be said to have been 'taken' or expropriated.⁷⁷⁹

- 478) Expropriation looks to what the state has done, rather than what it says. For example, in the *Jeno Hartmann* case,⁷⁸⁰ the U.S. Foreign Claims Settlement Commission found that the Claimant was the owner of a plot of land which had been improved by a building containing living quarters and a bakery. Hungary stated that title to the real property was properly owned by the State despite the fact that registered title was held by Mr. Hartmann. The Foreign Claims Settlement Commission ruled that the claimant's property had been taken. It relied on the fact that claimant was not receiving any compensation for the use being made of his property, and it stressed that claimant could not use or enjoy the property as he saw fit, nor could he alienate it. The Foreign Claims Commission stated:

Although the government of Hungary has stated that title to the real estate in question has not been taken into state ownership, it is hard to conceive of a more effective method of taking a property that appears in the instant case with respect to the claimant's realty. Claimant has been prohibited from entering up on his property, from using and enjoying it, and from alienating it. Accordingly, while the method of taking of claimant's realty utilised in the present situation leaves the claimant endowed with the

⁷⁷⁹ G.C. Christie, 38 British Yearbook of International Law, *What Constitutes Taking of Property under International Law*, 1962 at p. 337 (CL-0101-ENG); See also Aniruddha Rajput, Kluwer Law Int'l, Regulatory Freedom and Indirect Expropriation in Investment, Chapter 4: The Sole Effects Doctrine and the Nature of the Measure Arbitration at pp. 47 – 72, 2018 (CL-0100-ENG).

⁷⁸⁰ *Jeno Hartmann v Government of Hungary*, US Foreign Claims Settlement Commission, Decision No. Hung-717 (1958), Final Decision, February 5, 1958 (CL-0099-ENG); also reported at Tenth Semiannual Report to the Congress for the Period Ending June, 1959, at p. 45. This case is referenced by Prof. G.C. Christie, 38 British Yearbook of International Law, *What Constitutes Taking of Property under International Law*, 1962, at pp. 313 – 314 (CL-0101-ENG).

indicia of ownership, the Commission nevertheless finds that such realty has been effectively taken from the Claimant...⁷⁸¹

479) In this situation, the fact that claimant still enjoyed the formal indicia of ownership could not prevent the Foreign Claims Settlement Commission from looking to what actually occurred and concluding that the claimant's property had been taken from him.

480) Andrew Newcombe and Luis Paradell in *Law and Practice of Investment Treaties* at section 7.4 reference two key US Iran Claims cases: *Starrett Housing Corporation v. Iran* and *Tippetts, Abbett, McCarthy, Stratton and TAMS-AFFA Consulting Engineers of Iran v. Iran*. They explain that:

In *Starrett* the tribunal held that:

... [it] is recognized in international law that measures taken by a state can interfere with property rights to such an extent that these rights are rendered so useless that they must be deemed to have been expropriated, even though the state does not purport to have expropriated them and the legal title to the property formally remains with the original owner.

And in *Tippetts*:

The Tribunal prefers the term 'deprivation' to the term 'taking,' although they are largely synonymous, because the latter may be understood to imply that the Government had acquired something of value, which is not required.

A deprivation or taking of property may occur under international law through interference by a state in the use of that property or with the

⁷⁸¹ *Jeno Hartmann v Government of Hungary*, US Foreign Claims Settlement Commission, Decision No. Hung-717 (1958), Final Decision, February 5, 1958 at pp. 1-2 (CL-0099-ENG).

enjoyment of its benefits, even where legal title to the property is not affected.⁷⁸²

- 481) The first tribunal to expressly apply the sole effects doctrine was in *Metalclad v. Mexico* wherein the Tribunal stated that a State is responsible for expropriation for:

covert or incidental interference with the use of property which has the effect of depriving the owner, in whole or in significant part, of the use or reasonably-to-be-expected economic benefit of property even if not necessarily to the obvious benefit of the host State.⁷⁸³

- 482) The tribunal in *Tecmed v. Mexico* adopted the sole effects doctrine by taking the view that, while deciding cases of indirect expropriation, a tribunal must find if the investor was “radically deprived of the economical use and enjoyment of its investments.”⁷⁸⁴ The tribunal based its observations on three grounds: customary international law, principles of treaty interpretation, and proportionality analysis developed by the European Court of Human Rights.
- 483) The *Pope & Talbot* tribunal focused on the sole effects doctrine. The *Pope & Talbot* Tribunal interpreted expropriation in light of state practice, treaties, and international law to carry “the connotation of ‘taking’ by a government-type authority of a person’s ‘property’ with a view to transfer ownership of that

⁷⁸² Andrew Newcombe and Lu s Paradell, *Kluwer Int’l Law, Law and Practice of Investment Treaties: Standards of Treatment*, Chapter 7, 2009, at p. 326 (**CL-0104-ENG**); referencing *Starrett Housing Corporation et. al. v. Government of the Islamic Republic of Iran et. al.*, Final Award No. 314-24-1, 16 Iran-US CTR. (**CL-0102-ENG**); and *Tippetts, Abbett, McCarthy v. TAMS-AFFA Consulting Engineers of Iran*, Award 16 Iran-US CTR, 1984 (**CL-0041-ENG**).

⁷⁸³ *Metalclad Corporation v. United Mexican States*, Award, 2000 WL 34514285 (August 30, 2000) at ¶ 103 (**CL-0087-ENG**).

⁷⁸⁴ *T cnicas Medio ambientales, TECMED S.A. v. The United Mexican States*, ICSID Case No. ARB(AF)/00/2, Award, 2003 WL 24038436 (May 29, 2003), at ¶ 115 (**CL-0008-ENG**).

property to another person, that exercised its de jure or de facto power to do the ‘taking.’”⁷⁸⁵

- 484) As the tribunal in *Sempra Energy v Argentina* concluded, expropriation requires more than adverse effects. It requires that “the investor no longer be in control of its business operation, or that the value of the business have been virtually annihilated.”⁷⁸⁶ That is what occurred with the occupation of Hacienda Santa Fé.
- 485) Inagrosa owned the land, which constitutes a covered investment under the Treaty. The land constituted tangible property and thus was covered by the CAFTA’s definition of investment.
- 486) Expropriation arises under international law when there has been a fundamental interference of rights by the government.
- 487) Cases considering expropriation have considered that there can very well be interferences with rights that do not constitute expropriation. An example can be seen in the U.S.-Iran Claims Tribunal decisions in *Foremost Tehran Inc v Iran*⁷⁸⁷ and in *Eastman Kodak v. Iran* case.⁷⁸⁸
- 488) Nicaragua took measures severe enough to permanently deprive the lawful owners of their property of their rights starting on June 16, 2018. At that time, the rightful owners of the land could not exercise possession and control their

⁷⁸⁵ *Pope & Talbot v. Canada*, Interim Merits Award (June 26, 2000) at ¶ 102 (CL-0035-ENG).

⁷⁸⁶ *Sempra Energy International v. The Argentine Republic*, Decision on Objections to Jurisdiction, ICSID Case No. ARB/02/16, May 11, 2005 at ¶ 285 (CL-0037-ENG).

⁷⁸⁷ *Foremost Tehran, Inc v. Iran*, 10 Iran-US CTR 229 at 251 (CL-0098-ENG).

⁷⁸⁸ *Eastman Kodak Co. v Government of Iran*, IUSCT Case No. 227, Vol 27, Final Award, July 1, 1991 (CL-0103-ENG).

air rights. They could not have quiet possession; they could not enjoy their real property.

489) Throughout this entire time the Investor received no compensation payments.⁷⁸⁹

ii. Indirect Expropriation

490) In addition to the direct expropriation of the land, the CAFTA addresses the situation of indirect expropriation. Under Annex 10-C of the CAFTA-DR, indirect expropriation is defined as follows:

4. The second situation addressed by Article 10.7.1 is indirect expropriation, where an action or series of actions by a Party has an effect equivalent to direct expropriation without formal transfer of title or outright seizure.

- (a) The determination of whether an action or series of actions by a Party, in a specific fact situation, constitutes an indirect expropriation, requires a case-by-case, fact-based inquiry that considers, among other factors:
 - (i) the economic impact of the government action, although the fact that an action or series of actions by a Party has an adverse effect on the economic value of an investment, standing alone, does not establish that an indirect expropriation has occurred.
 - (ii) the extent to which the government action interferes with distinct, reasonable investment-backed expectations; and
 - (iii) the character of the government action.

491) Indirect expropriation requires that the State have taken an action or series of actions that had the same effect as a direct expropriation. In this claim, the adverse impact on the Investor factor under Annex 10-C(a)(i) has been met.

⁷⁸⁹ Witness Statement of Carlos Rondón – Memorial – ENG at ¶ 231 (CWS-01).

492) The adverse impact of indirect expropriation is demonstrated through the decisive factors of 1) intensity and 2) duration of the economic deprivation suffered by the investor.⁷⁹⁰ Both of these factors have been met in this claim.

493) However, as noted in the MFN discussion above, the impact of the Nicaragua's commitments under the Russian BIT means that there is no need to rely upon Annex 10-C or the customary international law limitations imposed in CAFTA Article 10.7.

iii. Intensity

494) Intensity is defined as the State's actions having a synonymous effect to the Investor as a direct expropriation would. Intensity can be demonstrated in a couple of ways:

- a) Loss of property rights in such a devastating manner that it is synonymous to if the claimant were to have lost the property; and
- b) Devaluation of the business to the point that it is equivalent to a taking.

iv. Devastating loss of property rights

495) In *Railroad Development Corporation v. Republic of Guatemala* (RDC v. Guatemala),⁷⁹¹ the CAFTA Tribunal considered the meaning of expropriation under Article 10.5 of the CAFTA. The Tribunal noted that the key test for expropriation was the need to demonstrate deprivation of substantially the use and benefits of the investment. The Tribunal noted at paragraph 151 of its award:

⁷⁹⁰ *Telnor Mobile Communications A.S. v. The Republic of Hungary*, ICSID Case No. ARB/04/15, September 13, 2006 ¶ 70 (CL-0097-ENG).

⁷⁹¹ *Railroad Development Corporation v. Republic of Guatemala*, Award, ICSID Case No. ARB/07/23 (29 June 2012) at ¶ 151 (CL-0165-ENG).

151. The question here is whether in the circumstances there was an expropriation of the railway enterprise. The authorities on expropriation are numerous and largely depend on their own facts. A common theme is that an effect of the measures is that the claimant is deprived substantially of the use and benefits of the investment. Thus the statements to this effect in cases such as, *inter alia*, Metalclad Corporation v United Mexican States,⁷⁹² Pope and Talbot, Inc v Canada,⁷⁹³ Técnicas Medioambientales Tecmed SA v United Mexican States,⁷⁹⁴ CMS Gas Transmission v. Argentina,⁷⁹⁵ Telenor Mobile Communications SA v Republic of Hungary⁷⁹⁶ and Fireman's Fund Insurance Company v United Mexican States.⁷⁹⁷

- 496) Fundamentally a substantial deprivation of an investment occurs when an investment is no longer capable of generating a commercial return.⁷⁹⁸ Such a situation might involve a loss, wholly or in part of the reasonable expected economic benefit of the investment.⁷⁹⁹ Similarly, it could apply to an investment whose most economically optimal use has been rendered useless

⁷⁹² Metalclad v Mexico. ICSID Case No. ARB(AF)/97/1, Award of August 30, 2000, at ¶ 103: 'Thus, expropriation ... includes ... interference with the use of property which has the effect of depriving the owner, *in whole or in significant part*, or the use or reasonably-to-be-expected economic benefit of property even if not necessarily to the obvious benefit of the host State' (emphasis added). (CL-0087-ENG).

⁷⁹³ Pope & Talbot, Partial Award of June 26, 2000, at ¶102 (CL-0035-ENG).

⁷⁹⁴ TECMED, Award (CL-0008-ENG).

⁷⁹⁵ CMS Gas v Argentina, Award at ¶ 262 (CL-0053-ENG) 'The essential question is therefore to establish whether the enjoyment of the property has been effectively neutralized. The standard that a number of tribunals have applied in recent cases ... is that of substantial deprivation'.

⁷⁹⁶ Telnor, Award of September 13, 2006, at ¶ 65: '...the interference with the investor's rights must be such as *substantially to deprive* the investor of the economic value, use or enjoyment of its investment' (emphasis added) (CL-0097-ENG).

⁷⁹⁷ Fireman's Fund Insurance Company v United Mexican States. ICSID Case No ARB(AF)/02/1, Award of July 14, 2006 at ¶ 176(c): 'The taking must be a substantially complete deprivation of the economic use and enjoyment of the rights to the property, or of identifiable distinct parts thereof'.

⁷⁹⁸ Burlington Resources v. Ecuador, Decision on Liability, ICSID Case No. ARB/08/5 (December 14, 2012), ¶ 398 (CL-0166-ENG).

⁷⁹⁹ Metalclad Corp. v. Mexico at ¶ 103 (CL-0087-ENG).

or whose value has been neutralized or destroyed.⁸⁰⁰ As noted above in *RDC v. Guatemala*, customary international law affirms that the deprivation need only be lasting and substantial to constitute an expropriation.⁸⁰¹

- 497) The Tribunal in *Pope & Talbot* articulated the current test of what constitutes a devastating loss of property rights. The Tribunal stated that the intensity of the interference suffered by the Investor should amount to a “taking” of the Investor’s property by a substantial deprivation.⁸⁰² This means that the actions by the State were such that they prevented, unreasonably interfered with, or unduly delayed the Investor’s right to enjoyment of their property and must be so detrimental that the owner could not use, enjoy, or dispose of their property.⁸⁰³
- 498) The Tribunal in *Sola Tiles* supports the above definition of what constitutes a devastating loss of property rights by holding that a taking of property by a State can happen through the deprivation of the Investor’s fundamental rights of ownership of the property by interference with the Investor’s use of that property or enjoyment of its benefits.⁸⁰⁴

⁸⁰⁰ *TECMED S.A. v. United Mexican States* at ¶ 115, (CL-0008-ENG); *Electrabel S.A. v. Hungary*, ICSID Case No. ARB/07/19, Decision on Jurisdiction, Applicable Law and Liability, (November 30, 2012) at ¶ 6.62 (CL-0167-ENG); *CME Czech Republic B.V. v. The Czech Republic*, Partial Award at ¶ 604 (CL-0038-ENG).

⁸⁰¹ *Railroad Development Corporation v. Republic of Guatemala*, ICSID Case No. ARB/07/23, Award (29 June 2012) at ¶ 151 (CL-0165-ENG).

⁸⁰² *Pope & Talbot Inc. v. The Government of Canada*, Interim Award on the Merits Phase 1, June 26, 2000 at ¶ 102 (CL-0035-ENG).

⁸⁰³ *Pope & Talbot Inc. v. The Government of Canada*, Interim Award on the Merits Phase 1, June 26, 2000 at ¶ 102. (CL-0035-ENG).

⁸⁰⁴ *Sola Tiles Inc. v. Iran*, (1987) 14 Iran-US C.T.R. 223, ¶29. (CL-0036-ENG).

v. Devaluation of the Business

499) The Tribunal in *Sempra v. Argentina* discussed the factor of devaluation of a business through an indirect expropriation by saying that the value of the business is being “virtually annihilated.”⁸⁰⁵

500) In *CME v. Czech Republic*, the Tribunal stated that a devaluation of a business occurs when a State takes steps “that *effectively neutralize* the benefit of the property for the foreign owner.”⁸⁰⁶

501) In *Wena Hotels*, the Tribunal noted that year-long deprivation of access to its investment was sufficient to establish a deprivation that was more than “ephemeral.”⁸⁰⁷ A subsequent decision by another ICSID Tribunal, interpreting the original award in *Wena Hotels v. Egypt*, found:

... the Original Tribunal concluded that Egypt had deprived Wena of its ‘fundamental rights of ownership, i.e., in the given case where ... no tangible property rights but rather leasehold rights are at stake, Wena’s rights to make use of its investments made under the Hotel Leases and to enjoy the benefits thereof in accordance with the Leases.’⁸⁰⁸

502) The more than “merely ephemeral” standard arises from the jurisprudence of the Iran-U.S. Claims Tribunal in *Tippets, Abbett, McCarthy, Stratton v. TAMS-AFFA*:

[W]hile assumption of control over property by a government does not automatically and immediately justify a conclusion that the property has been taken by the government, thus requiring compensation under

⁸⁰⁵ *Sempra Energy International v. The Argentine Republic*, ICSID Case No. ARB/02/16, September 28, 2007 ¶ 285. (CL-0037-ENG).

⁸⁰⁶ *CME Czech Republic B.V. v. The Czech Republic*, Partial Award, September 13, 2001 ¶ 150. (CL-0038-ENG).

⁸⁰⁷ *Wena Hotels Limited v. Arab Republic of Egypt*, Award, ICSID Case No. ARB/98/4, 2005 WL 3814820 December 8, 2000, ¶ 99 (CL-0039-ENG).

⁸⁰⁸ *Wena Hotels Ltd/ v. Arab Republic of Egypt*, Decision on the Application for Interpretation of the Arbitral Award, ICSID Case No. ARB/98/4; 2005 WL 3814820 October 31, 2005 ¶ 119. (CL-0040-ENG).

international law, such a conclusion is warranted whenever events demonstrate that the owner has been deprived of fundamental rights of ownership and it appears that this deprivation is not merely ephemeral.⁸⁰⁹

503) Riverside has been deprived of the use and enjoyment of its investment for more than four years. As noted, there has been a destruction of the Hass avocado trees,⁸¹⁰ the private forest reserve,⁸¹¹ and the widespread destruction of the facilities at Hacienda Santa Fé.⁸¹² As set forth more fully below, under any sense, the interference at Hacienda Santa Fé was more than ephemeral.

C. International Law Treatment

504) Article 10.5 of the Treaty provide treatment in accordance with customary international law, including Fair and Equitable and full protection and security to the investments of American investors in Nicaragua. The CAFTA Treaty obligation states:

1. Each Party shall accord to covered investments treatment in accordance with customary international law, including fair and equitable treatment and full protection and security.

2. For greater certainty, paragraph 1 prescribes the customary international law minimum standard of treatment of aliens as the minimum standard of treatment to be afforded to covered investments. The concepts of “fair and equitable treatment” and “full protection and security” do not require treatment in addition to or beyond that which is required by that standard, and do not create additional substantive rights. The obligation in paragraph 1 to 3 provides:

(a) “fair and equitable treatment” includes the obligation not to deny justice in criminal, civil, or administrative adjudicatory proceedings in accordance

⁸⁰⁹ Tippetts, Abbott, McCarthy, Stratton v. TAMS-AFFA, 6 Iran-US CTR 219 at ¶225 (CL-0041-ENG).

⁸¹⁰ Witness Statement of Carlos Rondón – Memorial – ENG at ¶ 97 (CWS-01)

⁸¹¹ Witness Statement of Carlos Rondón – Memorial – ENG at ¶100 (CWS-01)

⁸¹² Witness Statement of Carlos Rondón – Memorial – ENG at ¶¶ 97-100 (CWS-01)

with the principle of due process embodied in the principal legal systems of the world; and

(b) “full protection and security” require each Party to provide the level of police protection required under customary international law.

3. A determination that there has been a breach of another provision of this Agreement, or of a separate international agreement, does not establish that there has been a breach of this Article.

505) Article 10.5 of the CAFTA specifies that Fair and Equitable Treatment includes an:

a. obligation not to deny justice in criminal, civil, administrative adjudicatory proceedings in accordance with the principle of due process.

506) CAFTA Annex 10-B limits the obligation only to “the customary international law principles that protect the economic rights of aliens.”⁸¹³ Annex 10-B states:

The Parties confirm their shared understanding that “customary international law” generally and as specifically referenced in Articles 10.5, 10.6, and Annex 10-B results from a general and consistent practice of States that they follow from a sense of legal obligation. With regard to Article 10.5, the customary international law minimum standard of treatment of aliens refers to all customary international law principles that protect the economic rights and interests of aliens.⁸¹⁴

507) This claim addresses Nicaragua’s fundamental customary international law violations with respect to:

a) The breach of fair and equitable treatment; and

b) The breach of full protection and security.

⁸¹³ CAFTA, Chapter Ten, Annex B (CL-0001-ENG).

⁸¹⁴ CAFTA, Chapter Ten, Annex B (CL-0001-ENG).

2. Fair and Equitable Treatment

508) The concept of Fair and Equitable Treatment has been applied repeatedly by judges and arbitrators. The Permanent Court of Justice opined that what are “widely known as principles of equity have long been considered to constitute part of international law, and as such, they have often been applied by international tribunals.”⁸¹⁵ Fair and Equitable Treatment incorporates requirements of fairness, good faith, non-discrimination, and due process.⁸¹⁶

509) The obligation of fair and equitable treatment is a recognized part of customary international law. For example, this was confirmed explicitly by the *Merrill & Ring* Tribunal which noted:

A requirement that aliens be treated fairly and equitably in relation to business, trade, and investment [...] has become sufficiently part of widespread and consistent practice so as to demonstrate that it is reflected today in customary international law as *opinio juris*.⁸¹⁷

510) This evolutionary approach was also endorsed by the *Waste Management II* Tribunal.⁸¹⁸

511) There is ample state practice to demonstrate that fair and equitable treatment has a meaning in customary international law that protects the property of foreign investors. In his treatise on the International Minimum Standard and Fair and Equitable Treatment, Prof. Martins Paparinskis notes that:

⁸¹⁵ Individual Opinion of Judge Hudson, *Diversion of Water from the Meuse Case* (Netherlands v. Belgium). [1937], P.C.I.J. (Ser. A/B) No. 70. at 321 (CL-0002-FR/ENG).

⁸¹⁶ Cox J., *Expropriation in International Investment Treaty Arbitration*, (Oxford University Press 2019) p.255 (CL-0003-ENG).

⁸¹⁷ *Merrill & Ring Forestry L.P. v. Canada*, UNCITRAL Arbitration, Award, March 31, 2010 (“*Merrill & Ring*”), ¶ 210 (CL-0004-ENG).

⁸¹⁸ *Waste Management, Inc. v. United Mexican States*, Award, 2004 WL 3249803 (April 30, 2004) (CL-0005-ENG).

In the Barcelona Traction case, Belgium explicitly referred to FCN Treaty rules on equitable treatment as assuring ‘something that is customary in public international law, namely treatment that is fair, reasonable and objective, that is neither arbitrary, nor abusive, nor discriminatory’. Barcelona Traction Pleadings (ICJ Pleadings Volume VIII 56–7,) ... It also referred to ‘the minimum of equitable treatment that the qualifying aliens may invoke pursuant to international law’, in Barcelona Traction Pleadings (ICJ Pleadings Volume I 174 fn 3 (Memorial) (author's translation) (Spain rejected the substance of the ‘equitable treatment’ argument without questioning the appropriateness of addressing the law on the treatment of aliens under this heading, ICJ Pleadings Volume IV 556 [225], 557 [228], 558 [229] (Counter-Memorial of Spain)).⁸¹⁹

- 512) Prof. Paparinskis also notes that the United States formally confirmed a position. He states:

In the *ELSI* case, the US described its treaty practice prohibiting arbitrary or unreasonable treatment, and pointed out the similar practice by which ‘other treaties, rather than prohibiting unfair or unequal treatment, affirmatively guarantee fair and equitable treatment’, *Elettronica Sicula S.p.A. (ELSI) (US v Italy)* ICJ Pleadings Volume I 77 fn 2 (for US, ‘arbitrariness’ was closely linked to ‘due process of law’ in takings and the customary minimum standard, Pleadings at 93) (Memorial).⁸²⁰

- 513) In *Teco v Guatemala*, the CAFTA Tribunal came to the following articulation of the fair and equitable treatment standard under CAFTA Article 10.5, by holding that:

The Arbitral Tribunal considers that the minimum standard of FET under Article 10.5 of CAFTA-DR is infringed by conduct attributed to the State and harmful to the investor if the conduct is arbitrary, grossly unfair or

⁸¹⁹ Martins Paparinskis, *The International Minimum Standard and Fair and Equitable Treatment*, Chapter 6 at FN 49 (CL-0111)

⁸²⁰ Martins Paparinskis, *The International Minimum Standard and Fair and Equitable Treatment*, Chapter 6 at FN 49 (CL-0111)

idiosyncratic, is discriminatory or involves a lack of due process leading to an outcome which offends judicial propriety.⁸²¹

- 514) After reviewing the facts, The *Teco* tribunal found arbitrary regulatory treatment violated due process which was inconsistent with fair and equitable treatment under CAFTA Article 10.5.⁸²²
- 515) Due to the operation of the MFN obligation and the 2013 Russian BIT, the definition of fair and equitable interest under the CAFTA has been expanded to the broader and more generous definition under that Treaty. However, in any event, the Investor meets the specific definition in the CAFTA.
- 516) CAFTA Annex 10-B sets out interpretative limits upon CAFTA's fair and equitable treatment obligation. However, CAFTA Annex 10-B is not a limitation affecting the current case as a result of the operation of the MFN Treatment obligation in CAFTA Article 10.4 and Nicaragua's 2013 entry into the Russian BIT which sets out an autonomous meaning to fair and equitable treatment that is not limited in any way like that in CAFTA Annex 10-B.
- 517) As a result, in this CAFTA claim, the Tribunal is free to follow the approach to fair and equitable treatment followed by hundreds of other international tribunals around the world. Such unfettered tribunals consider the meaning of the term considering the facts and circumstances of a case.⁸²³ In *Mondev International Ltd v. United States of America*, the Tribunal held:

⁸²¹ *Teco* at ¶ 454 (CL-0161-ENG).

⁸²² *Teco* at ¶ 711 (CL-0161-ENG).

⁸²³ Cox J., *Expropriation in International Investment Treaty Arbitration*, (Oxford University Press 2019) p.255. (CL-0003-ENG).

A judgment of what is fair and equitable cannot be reached in the abstract; it must depend on the facts of a particular case. It is part of the essential business of courts and tribunals to make judgments such as these ⁸²⁴

a) Good Faith

518) The duty of good faith and the duty to provide Fair and Equitable Treatment are interrelated as fundamental principles of the international law standard. A state's failure to act will be judged against a standard of taking reasonable and good faith steps to address wrongful conduct.

519) Several Tribunals have considered the good faith principle in interpreting the treaty obligation to provide the Fair and Equitable Treatment:

- a) The *S.D. Myers* Tribunal said that "Article 1105 imports into the NAFTA the international law requirements of due process, economic rights, obligations of good faith and natural justice."⁸²⁵
- b) The *Tecmed* Tribunal said that "the commitment of fair and equitable treatment included in Article 4(1) of the [Spain-Mexico] Agreement is an expression and part of the *bona fide* principle recognized in international law."⁸²⁶
- c) The *Eureko v. Poland* Tribunal endorsed the *Tecmed* Tribunal's reliance on the good faith principle in interpreting the obligation to provide Fair and Equitable Treatment.⁸²⁷

⁸²⁴ *Mondev International Ltd v. United States of America*, Award, October 11, 2002, ¶ 118 (**CL-0006-ENG**).

⁸²⁵ *S.D. Myers, Inc. v. Government of Canada*, First Partial Award, 2000 WL 34510032 (November 13, 2000) at ¶134 [*emphasis added*] (**CL-0007-ENG**).

⁸²⁶ *Técnicas Medioambientales, TECMED S.A. v. The United Mexican States*, ICSID Case No. ARB(AF)/00/2, Award, 2003 WL 24038436, May 29, 2003, ("*TECMED*") ¶ 153 (**CL-0008-ENG**)

⁸²⁷ *Eureko B.V. v. Republic of Poland*, Partial Award, 2005 WL 2166281 (19 August 2005) at ¶235 (**CL-0027-ENG**): "The Tribunal finds apposite the words of an ICSID Tribunal in a recent decision that the

- d) The Tribunal in *Saluka v. The Czech Republic* held that a foreign investor was entitled to expect a State, "... implements its policies bona fide by conduct that is, as far as it affects the investor's investment, reasonable justifiable by public policies and that such conduct does not manifestly violate the requirements of consistency, transparency, even-handedness and non-discrimination [emphasis added]."⁸²⁸

520) The principle whereby a State acts in good faith and acts reasonably in addressing disturbances caused by private actors has been reaffirmed on multiple occasions.

521) It has been reaffirmed by academics such as Prof. James Crawford:

In the case of localized riots and mob violence, substantial neglect to take *reasonable* precautionary and preventative action and inattention amounting to outright indifference or connivance on the part of responsible officials may create responsibility for damages to foreign public and private property in the area.⁸²⁹

522) Professor Crawford's articulation of responsibility draws attention to the elements of a failure to take reasonable steps, as well as a lack of good faith on the part of the state comparable to "indifference or connivance."⁸³⁰

guarantee of fair and equitable treatment according to international law means that: "... this provision of the Agreement, in light of the good faith principle established by international law, requires the Contracting Parties to provide to international investments treatment that does not affect the basic expectations that were taken into account by the foreign investor to make the investment.; *TECMED*, at ¶ 154 (CL-0008),

⁸²⁸ *Saluka Investments B.V. v. Czech Republic*, UNCITRAL Arbitration Rules, Partial Award, 2006 WL 1342817, March 17, 2006, ¶ 307 (CL-0009-ENG)

⁸²⁹ Crawford, J., *Brownlie's Principles of Public International Law*, (Oxford University Press 2008), page 551 (CL-0010-ENG); citing Ziat, Ben Kiran (1924) 2 RIAA 729; Youmans (1926) 4 RIAA 110; Noyes (1933) 6 RIAA 308; Pinson (1928) 5 RIAA 327; Sarropoulos v Bulgaria (1927) 4 ILR 245.

⁸³⁰ Crawford, J., *Brownlie's Principles of Public International Law*, (Oxford University Press 2008), page 551 (CL-0010-ENG).

b) Protection against the abuse of rights

523) The protection against the abuse of rights is an obligation within the international law standard of treatment that the writings of eminent scholars such as Prof. Bin Cheng⁸³¹ and Sir Hersch Lauterpacht⁸³² have reinforced as a part of the duty of good faith.

524) In his treatise about the central role of general principles of law within international law, Professor Bin Cheng has explained that the obligation to act in good faith includes an obligation on the state not to abuse powers. He wrote:

[T]he theory of abuse of rights (*abus de droit*), recognized in principle both by the Permanent Court of International Justice and the International Court of Justice, is merely an application of this principle [of good faith] to the exercise of rights.⁸³³

525) He further explained that:

The principle of good faith requires that every right be exercised honestly and loyally. Any fictitious exercise of a right for the purpose of evading either a rule of law or a contractual obligation will not be tolerated. Such an exercise constitutes an abuse of the right, prohibited by law.⁸³⁴

526) This long-standing principle also applies within the context of abuses of administrative authority. Sir Hersch Lauterpacht demonstrates that the

⁸³¹ Cheng B., *General Principles of Law as applied by International Courts and Tribunals* (Cambridge University Press 1987), at p. 123 **(CL-0028-ENG)**.

⁸³² Lauterpacht H., *The Function of Law in the International Community* (Oxford University Press, 1933), at p. 289 **(CL-0030-ENG)**.

⁸³³ Cheng, B *General Principles of Law* at p. 121 **(CL-0028-ENG)**.

⁸³⁴ Cheng, B. *General Principles of Law* at p. 123 **(CL-0028-ENG)**; see also Marion Panizzon, *Good Faith in the Jurisprudence of the WTO: The Protection of Legitimate Expectations, Good Faith Interpretation and Fair Dispute Settlement* (Portland: Hart Publishing, 2006) (“Panizzon”), at p. 31, **(CL-0029-ENG)** referencing Cheng, at pp. 121–32.

principle allows international tribunals to ensure that the actions of states are judged according to modern views of morality.⁸³⁵

527) In the context of the international law standard of treatment, the abuse of rights arises several ways, namely:

- a) A state exercises powers in such a way as to hinder an investor in the enjoyment of the investor's rights, resulting in injury to the investor;
- b) A fictitious exercise of a right; or
- c) An abuse of discretion in the exercise of governmental powers.⁸³⁶

528) The Treaty should be read as preserving and affirming the right of Nicaragua to regulate for legitimate purposes, but each of these manifestations of improper governmental action is a fundamental violation of the most longstanding part of the international law standard of treatment.

529) Alexandre Kiss in his article on Abuse of Rights in the *Encyclopedia of Public International Law* agrees with this type of three-part abuse of rights catalog and concludes that no proof of intention to cause harm is necessary where there is an abuse of discretion in the exercise of governmental powers.⁸³⁷ However, such intent is necessary when looking at the fictitious exercise of a right (such as where a right is exercised intentionally for an end that is different from that for which that right was created).⁸³⁸

⁸³⁵ Lauterpacht, H, *The Function of Law* at p. 287 (CL-0030-ENG).

⁸³⁶ Panizzon, M *Good Faith* at p. 30 (CL-0029-ENG).

⁸³⁷ Alexandre Kiss, "Abuse of Rights," in *Max Plank Encyclopedia of Public International Law*, 1992, at ¶¶ 5-6 (CL-0031-ENG).

⁸³⁸ Alexandre Kiss, "Abuse of Rights," in *Max Plank Encyclopedia of Public International Law*, 1992, at ¶¶ 5-6 (CL-0031-ENG).

530) In his Separate Opinion for *Impregilo v. Argentina*, Judge Charles Brower carefully examined a series of actions by Argentina that were “nothing less than deliberate abuse of administrative power with a political motive.”⁸³⁹

3. Human Rights violations support the meaning of Fair and Equitable Treatment

531) Property law and the international law instruments recognize the “State’s capacity to guarantee its free exercise and State’s capacity to impose some limitations in the name of public interest.”⁸⁴⁰ The right to private property against expropriation is an element of many international treaties to which Nicaragua is a party. For example:

532) Article 17 of the Universal Declaration of Human Rights (1948)⁸⁴¹ states:

(1) Everyone has the right to own property alone as well as in association with others.

(2) No one shall be arbitrarily deprived of his property

533) Article XXIII of the American Declaration of the Rights and Duties of Man (1948),⁸⁴² states

Every person has a right to own such private property as meets the essential needs of decent living and helps to maintain the dignity of the individual and of the home (Article XXIII of the American Declaration of the Rights and Duties of Man, 1948).

⁸³⁹ Separate Opinion of Judge Charles Brower, *Impregilo S.p.A. v. Argentine Republic*, ICSID Case No. ARB/07/17 (June 21, 2011), at ¶7. **(CL-0042-ENG)** Judge Brower concurred with the majority of the Tribunal that had accepted Impregilo’s arguments on “fair and equitable treatment.” However, he disagreed with the deferential attitude towards government actions, which he believed constituted further violations of Argentina’s “fair and equitable treatment” obligations under the treaty.

⁸⁴⁰ Manuel Monteagudo, SECO Working Paper, *The Right to Property in Human Rights and Investment Law: a Latin American Perspective of an Unavoidable Connection*, June 2013 at p. 10 **(CL-0122-ENG)**.

⁸⁴¹ Universal Declaration of Human Rights (1948) §17 **(CL-0123-ENG)**.

⁸⁴² Inter-American Commission of Human rights, *American Declaration of the Rights and Duties of Man*, 1948 § XXIII **(CL-0124-ENG)**.

534) The Charter of the OAS authorizes the Inter-American Commission on Human Rights (“IACHR”) to “promote the observance and protection of human rights” in the Hemisphere. The Commission hears individual petitions and provides recommendations principally on the basis of two international human rights instruments, the American Declaration of the Rights and Duties of Man (“American Declaration”) and the American Convention on Human Rights (“American Convention”). The American Declaration is a nonbinding statement adopted by the countries of the Americas in a 1948 resolution. The American Convention is an international agreement that sets forth binding obligations for States parties.

535) Article 21 of the American Convention ⁸⁴³ states

1. Everyone has the right to the use and enjoyment of his property. The law may subordinate such use and enjoyment to the interest of society.
2. No one shall be deprived of his property except upon payment of just compensation, for reasons of public utility or social interest, and in the cases and according to the forms established by law.

536) The human rights obligations in international treaties support the fundamental obligations of fair and equitable treatment that are contained in the Treaty. In any event, since the United States and Nicaragua are both parties to these treaties, Article 31(3)(c) of the *Vienna Convention of the Law of Treaties* also points the Tribunal to an interpretation under international law that takes both sources into account.⁸⁴⁴

537) Indeed, the ICSID Tribunal in *Impregilo* ⁸⁴⁵ concluded that:

⁸⁴³ Inter-American Commission of Human Rights, *American Convention on Human Rights*, 1969 § 21 (CL-0125-ENG). Nicaragua is a party. The United States has signed but not ratified the American Convention.

⁸⁴⁴ *Vienna Convention on the Law of Treaties* (1969), Article 31(3)(c) (CL-0121-ENG).

⁸⁴⁵ *Impregilo S.p.A. c. Argentina*, Award, ICSID No ARB/07/17, 21 June 2011 at ¶ 230 (CL-0120-ENG).

the obligations assumed by the Argentine Republic as regards investments do not prevail over the obligations assumed in treaties on human rights. Therefore, the obligations arising from the BIT must not be construed separately but in accordance with the rules on protection of human rights. Treaties on human rights providing for the human right to water must be especially taken into account in this case.⁸⁴⁶

- 538) In *Total v. Argentina*,⁸⁴⁷ the ICSID Tribunal concluded that the protection of legitimate expectations applied against legislative measures when human rights obligations over the right to property are violated. The Tribunal stated:

129. In domestic legal systems the doctrine of legitimate expectations supports the entitlement of an individual to legal protection from harm caused by a public authority retreating from a previous publicly stated position, whether that be in the form of a formal decision or in the form of a representation". This doctrine, which reflects the importance of the principle of legal certainty (or rule of law), appears to be applicable mostly in respect of administrative acts and protects an individual from an incoherent exercise of administrative discretion, or excess or abuse of administrative powers. [...] However, it appears that only exceptionally has the concept of legitimate expectations been the basis of redress when legislative action by a State was at stake. Rather a breach of the fundamental right of property as recognized under domestic law has been the basis, for instance, for the European Court of Human Rights to find a violation of the First Protocol to the European Convention on Human Rights protecting the peaceful enjoyment of property.⁸⁴⁸

- 539) The European Court of Human Rights in *Sporrong and Lönnroth v. Sweden*,⁸⁴⁹ considered the situation of *de facto* expropriation as a violation of human rights law. In this case, the owners of the property had been detrimentally affected

⁸⁴⁶ Impregilo S.p.A. c. Argentina at ¶ 230 (CL-0120-ENG).

⁸⁴⁷ *Total S.A. v. The Argentine Republic*, ICSID Case No. ARB/04/01, 27 December 2010 (CL-0119-ENG).

⁸⁴⁸ *Total S.A. v. The Argentine Republic*, ICSID Case No. ARB/04/01, 27 December 2010 at ¶ 129 (CL-0119-ENG).

⁸⁴⁹ *Sporrong and Lönnroth v. Sweden* (1982), 52 Eur. Ct. H.R., at ¶ 63 (CL-0118-ENG), also see the discussion of *Eastman Kodak Co. v Government of Iran*, IUSCT Case No. 227, Vol 27, Final Award, July 1, 1991 (CL-0103-ENG),

for more than twenty years by government prohibitions and limitations to build in their own property without taking a formal expropriation. This longstanding deprivation allowed the European Court of Human Rights to look behind the appearances and investigate the substantive realities of the situation.⁸⁵⁰

4. Legitimate Expectations

540) The fair and equitable treatment obligation also includes the obligation to protect legitimate expectations. Numerous tribunals interpreting modern investment treaties have come to this conclusion.⁸⁵¹

541) Riverside's investments in Nicaragua were covered by the protections of the CAFTA. Nicaragua therefore was required to consider Riverside's legitimate expectations regarding its investments in Nicaragua. Nicaragua failed to meet the fair and equitable treatment required of US companies in Nicaragua under the CAFTA.

542) The earliest definition of legitimate expectations was provided by the *TECMED* Tribunal and requires:

[T]he contracting parties to provide to international investments treatment that does not affect the basic expectations that were taken into account by the foreign investor to make the investment. The foreign investor expects the host State to act in a consistent manner, free from ambiguity and

⁸⁵⁰ *Sporrong and Lonnroth v. Sweden*. 52 Eur. Ct. H.R. (Application no. 7151/75; 7152/75) Judgement. 23 September 1982. See section C, at ¶ 63 (CL-0118-ENG).

⁸⁵¹ *TECMED S.A. v. The United Mexican States*, ICSID Case),No. ARB(AF)/00/2, Award, (“*TECMED*, Award”), 2003 WL 24038436 (May 29, 2003), (CL-0008-ENG); *Metalclad Corporation v. United Mexican States*, Award, 2000 WL 34514285 (August 30, 2000) (CL-0087-ENG); *MTD Equity v. Republic of Chile*, Award, 2004 WL 3254661 (May 25, 2004), (CL-0088-ENG); *Occidental Production Company v. Republic of Ecuador*, UNCITRAL Arbitration Rules, Final Award, 2004 WL 3267260 (July 1, 2004), (CL-0058-ENG). *CMS Gas Transmission Company v. Argentine Republic* (Case No. ARB/01/8), Award, (12 May 2005), (CL-0053-ENG); *Saluka, Investments B.V. v. Czech Republic*, UNCITRAL Arbitration Rules, Partial Award, 2006 WL 1342817 (March 17, 2006), ¶¶301-302,(CL-0009-ENG) (calling legitimate expectations the “dominant element” of the fair and equitable treatment standard); *Suez, Sociedad General de Aguas de Barcelona, S.A. and Vivendi Universal, S.A. v. Argentine Republic* (ICSID Case No. ARB/03/19), Decision on Liability, 30 July 2010, (CL-0089-ENG).

totally transparently in its relations with the foreign investor, so that it may know beforehand any and all rules and regulations that will govern its investments.⁸⁵²

543) Thus, legitimate expectations must be known by the investors for there to be an expectation of a particular type of treatment by a party responsible for protecting such an investor under a Treaty.⁸⁵³ It follows, therefore, that where there is treatment that does not conform with that expectation (wrongful conduct), a breach under the Treaty has occurred.⁸⁵⁴

544) The tribunal in *Lemire v. Ukraine* further observed that tribunals applying the fair and equitable treatment standard have recognized that legitimate expectations “can be defined.”⁸⁵⁵ Thus, in addition to specific expectations such as those arising from a contract with an organ of a State, investors may legitimately expect a host State to provide an appropriate investment environment. Professors Reisman and Sloane recognized this in the following terms:

[I]n a BIT regime, the host State must do far more than open its doors to foreign investment and refrain from overt expropriation. It must establish and maintain an appropriate legal, administrative, and regulatory framework, the legal environment that modern investment theory has come to recognize as a *condition sine-qua-non* of the success of private enterprise.⁸⁵⁶

⁸⁵² *TECMED*, Award, p. 61 ¶154 (CL-0008-ENG).

⁸⁵³ *TECMED*, Award, p. 61 ¶154 (CL-0008-ENG).

⁸⁵⁴ *TECMED*, Award, p. 61 ¶154 (CL-0008-ENG).

⁸⁵⁵ *Joseph Charles Lemire v. Ukraine* (ICSID Case No. ARB/06/18) Award, 28 March 2011 (*Lemire v. Ukraine*), ¶ 69, (CL-0072-ENG). See also *Ron Fuchs v. The Republic of Georgia*, (ICSID Case No. ARB/07/15), Award, 3 March 2010, at ¶441, (CL-0091-ENG) (distinguishing between the “specific assurances” of the investor and the investor’s legitimate expectations for the investment environment provided by the State).

⁸⁵⁶ W. Michael Reisman & Robert D. Sloane, “Indirect Expropriation, and its Valuation in the BIT Generation,” 74 *The British Yearbook of International Law* 115 (2004), p. 117, (CL-0092-ENG).

- 545) As part of its duty to provide an appropriate investment environment, a State also must treat foreign investment in a manner that is consistent, predictable, and transparent.⁸⁵⁷ As the award in *TECMED v. Mexico* stated, a state's obligation to act consistently includes conduct that does not arbitrarily revoke any pre-existing decisions or permits issued by the State that were relied upon by the investor to assume its commitments as well as to plan and launch its commercial and business activities.⁸⁵⁸
- 546) In *TECMED*, the tribunal observed that the "fair expectations of the Claimant were that the Mexican laws applicable to such investment, as well as the supervision, control, prevention and punitive powers granted to the authorities in charge of managing such system, would be used for the purpose of assuring compliance with environmental protection, human health and ecological balance goals underlying such laws."⁸⁵⁹
- 547) The *TECMED* tribunal further noted the evidence revealed "inconsistencies" between this stated purpose and the governmental authority's actions and concluded the government's decision to not renew the investor's permit was "actually used to permanently close down a site whose operation had become a nuisance due to political reasons relating to the community's opposition expressed in a variety of forms..."⁸⁶⁰
- 548) Interference with the regulatory process that is motivated by the "social and political" pressures was held to be inconsistent with the obligation to provide

⁸⁵⁷ *Metalclad v. Mexico*, ¶ 99, **CL-0087-ENG**; see also *Joseph Charles Lemire v. Ukraine* (ICSID Case No. ARB/06/18) Decision on Jurisdiction and Liability, 14 January 2010, ¶ 267 (**CL-0093-ENG**).

⁸⁵⁸ *TECMED*, Award, ¶¶ 153-154 (**CL-0008-ENG**).

⁸⁵⁹ *TECMED*, Award, ¶157 (**CL-0008-ENG**).

⁸⁶⁰ *TECMED*, Award, ¶164 (**CL-0008-ENG**).

fair and equitable treatment under the treaty and was also “objectionable from the perspective of international law.”⁸⁶¹ The *TECMED* tribunal said:

.. in light of the good faith principle established by international law, requires the Contracting Parties to provide to international investments treatment that does not affect the basic expectations that were taken into account by the foreign investor to make the investment.⁸⁶²

549) The *TECMED* tribunal also noted that legitimate expectations included the expectation that the state will conduct itself in a coherent manner, without ambiguity, and transparently, so as to enable the investor to plan its activities, and to adjust its conduct to the governing statutes, regulations, policies and administrative directions.⁸⁶³

550) The *Metalclad* NAFTA tribunal similarly held that Mexico failed to fulfill its obligation because it acted contrary to Metalclad’s legitimate expectations:

Mexico failed to ensure a transparent and predictable framework for Metalclad’s business planning and investment. The totality of these circumstances demonstrates a lack of orderly process and timely disposition in relation to an investor of a Party acting in the expectation that it would be treated fairly and justly in accordance with the NAFTA.⁸⁶⁴

551) Recent investor-state arbitration tribunal decisions are to the same effect. In *MTD v. Chile*, after expressly adopting the *TECMED* standard, the tribunal

⁸⁶¹ *TECMED*, Award, ¶163 (CL-0008-ENG).

⁸⁶² *TECMED*, Award, ¶154 (CL-0008-ENG).

⁸⁶³ *TECMED*, Award, ¶154, (CL-0008-ENG).

⁸⁶⁴ *Metalclad* (2000) - Award, at ¶99, (The *Metalclad* Award was subsequently partially set aside by the Supreme Court of British Columbia. The court held that NAFTA. Chapter 18 exhaustively addressed transparency within NAFTA. However, only the Tribunal’s incorporation of transparency in the international standard of treatment was set aside. Their remaining comments on the standard were not questioned), (CL-0087-ENG).

found that Chile failed to meet that standard by “authorizing an investment that could not take place for reasons of its urban policy.”⁸⁶⁵

- 552) The NAFTA tribunal in *Bilcon* found that Canada breached the Investors’ legitimate expectations through representing that they were free to pursue their coastal quarry and marine terminal project at a site that was later classified as a “no go” zone for such projects.⁸⁶⁶
- 553) Similarly, the *Occidental v. Ecuador* tribunal found that, after Occidental had made investments, Ecuador changed its tax law “without providing any clarity about its meaning and extent” and that the state’s “practice and regulations were also inconsistent with [the] changes [to the law].”⁸⁶⁷ The tribunal concluded these actions fell below the standard established in the *TECMED* case, and accordingly found a breach of the Treaty.⁸⁶⁸ The *Occidental* Tribunal thereby also recognized a state may breach its obligation to treat an investor fairly and equitably by failing to follow its own laws.⁸⁶⁹
- 554) The tribunal in *Parkerings*, noted that an investor’s right to a stable and predictable investment environment is considered along with whether they properly assessed the related risks:

In principle, an investor has a right to a certain stability and predictability of the legal environment of the investment. The investor will have a right of protection of its legitimate expectations provided it exercised due diligence and that its legitimate expectations were reasonable in light of the circumstances. Consequently, an investor must anticipate that the

⁸⁶⁵ *MTD Equity*, Award, ¶¶ 114- 115, 188, (CL-0088-ENG).

⁸⁶⁶ *Bilcon v. Canada*, Award on Jurisdiction and Liability, (PCA) Case No. 2009-04, March 17, 2015, ¶ 589 (CL-0089-ENG).

⁸⁶⁷ *Occidental* - Final Award, ¶ 184 (CL-0058-ENG).

⁸⁶⁸ *Occidental* - Final Award, ¶ 184 (CL-0058-ENG).

⁸⁶⁹ *Occidental* - Final Award, ¶ 184 (CL-0058-ENG).

circumstances could change, and thus structure its investment in order to adapt it to the potential changes of legal environment.⁸⁷⁰

- 555) Customary international law recognizes specific expectations such as those arising from property ownership or a contract with an organ of a State, and investors may legitimately expect a host State to provide an appropriate investment environment.⁸⁷¹
- 556) A state's obligation to act consistently includes acting without arbitrarily revoking any pre-existing decisions or permits issued by the State that were relied upon by the investor to assume its commitments as well as to plan and launch its commercial and business activities.⁸⁷²
- 557) The Rumeli Tribunal standard provided, "The precise scope of the [fair and equitable treatment] standard is left to the determination of the Tribunal which will have to decide whether in all the circumstances the conduct in issue is fair and equitable or unfair and inequitable."⁸⁷³
- 558) Nicaragua has failed to protect the legitimate expectations of the covered investments Riverside owned. This is demonstrated where Nicaragua failed to act in good faith in interpreting and enforcing its own laws and regulations.
- 559) The failure of Nicaragua to follow these foundational expectations of basic legality resulted in an abuse of process and an arbitrary and unfair reliance upon form over substance which formed a part of this abuse of process. Also, as noted above, government officials such as the police acted with a willful neglect of duty.

⁸⁷⁰ *Parkerings-Compagniet AS v. Lithuania*, ICSID Case No. ARB/05/8, Award (September 11, 2007), ¶ 333 (emphasis added), (CL-0094-ENG).

⁸⁷¹ *Azurix v. Argentina*, at ¶ 318, (CL-0095-ENG).

⁸⁷² *TECMED*, Award, at ¶¶ 153-154 (Emphasis added.) (CL-0008).

⁸⁷³ *Rumeli*, ¶ 610, (emphasis added) (CL-0091-ENG).

- 560) Nicaragua has failed to provide the covered investments owned by Riverside with fair and equitable treatment. This is demonstrated where:
- a) Nicaragua failed to act in good faith. Instead, it acted with willful neglect of duty and engaged in an abuse of process.
 - b) Nicaragua failed to provide due process to Riverside.
 - c) Nicaragua wrongfully engaged in arbitrary, unfair, and capricious conduct;
 - d) Nicaragua failed to consider the legitimate expectations of Riverside; and
 - e) Nicaragua failed to provide full protection and security to Riverside.

D. Full protection and security

- 561) The full protection and security standard in CAFTA Article 10.5 imposes an obligation on a State not to harm foreign investors or their investments through acts of State organs or acts otherwise attributable to the State and to provide protective services to foreigners and their investments. Such protective services have included police protection, fire protection, and other general obligations of the State.
- 562) Full protection and security is an element of customary international law that addresses the obligations of the State to provide protective services to foreigners and their investments.⁸⁷⁴ Such protective services have included police protection, fire protection and other general obligations of the State.⁸⁷⁵
- 563) In this claim, the actions of the police raise issues of full protection and security. As outlined above, the police involvement in this claim is the local

⁸⁷⁴ Sebastian Blanco, Full Protection and Security in International Investment Law. Springer, November 2018.chapters 7 – 10. (CL-0161-ENG).

⁸⁷⁵ Sebastian Blanco, Full Protection and Security in International Investment Law. Springer, November 2018.chapters 7 – 10. (CL-0161-ENG).

police and the voluntary police. Both are covered by the full protection and security obligation.

- 564) The requirement of “full protection and security” is commonly incorporated in bilateral investment treaties. It requires a host country to exercise reasonable care to protect investments against injury by private parties.⁸⁷⁶ This obligation does not impose strict liability on the host country to protect foreign investment but requires the host country to do so with the level of “diligence” required by customary international law.
- 565) There is a long customary international law history to this obligation. Full protection and security looks at whether the host state took adequate steps to apprehend a wrongdoer, or otherwise adequately enforce a penalty⁸⁷⁷ and whether the standard of police protection for foreign nationals was less than what is provided generally for a State’s own nationals.⁸⁷⁸
- 566) The very first ICSID investment treaty award, *Asian Agricultural Products Ltd. v. Sri Lanka*, considered the meaning of the “full protection and security” obligation with respect to a shrimp farm that was destroyed during an armed conflict between the government and rebel forces.⁸⁷⁹ The ICSID Tribunal

⁸⁷⁶ UNCTAD, *Bilateral Investment Treaties in the Mid-1990s* (New York: United Nations, 1998). (CL-0151-ENG).

⁸⁷⁷ *Francisco Mallén (The United Mexican States) v. United States of America*, US-Mexico Claims Commission, (1927) IV R.I.A.A. 173 (CL-0152-ENG). *Thomas H. Youmans (U.S.A.) v. United Mexican States*, RIAA IV (23 Nov. 1926) p. 110-117. (CL-0153-ENG). *S.J. Stallings (U.S.A.) v. United Mexican States*, RIAA IV (22 April 1929) p. 478-480. (CL-0154-ENG). *Richard A. Newman (U.S.A.) v. United Mexican States*, RIAA IV (6 May 1929) p. 518-520. (CL-0155-ENG). *Sarah Ann Gorham (U.S.A.) v. United Mexican States*, RIAA IV (24 October 1930) p. 640-645. (CL-0156-ENG). *Norman T. Connolly and Myrtle H. Connolly (U.S.A.) v. United Mexican States*, RIAA IV (15 October 1928) p. 387-388. (CL-0157-ENG). *Lillian Greenlaw Sewell, In Her Own Right and As Guardian of Vernon Monroe Greenlaw, a Minor (U.S.A.) v. United Mexican States*, RIAA IV (24 October 1930) p. 626-632. (CL-0158-ENG).

⁸⁷⁸ *Too v. Greater Modesto Insurance Associates and the United States of America*, US-Iran Claims Tribunal, Award No. 460-880-2, 1989 WL 663898 (29 December 1989) at ¶ 2 (CL-0150-ENG).

⁸⁷⁹ *Asian Agricultural Products v. Sri Lanka*, ICSID Case No. ARB/87/3, Award, (June 27, 1990) at ¶ 50. (CL-0147-ENG). [Hereinafter “*Asian Agricultural Products*”]

unambiguously rejected the submission that the full protection and security obligation implied responsibility without fault.⁸⁸⁰ However, the Tribunal did find Sri Lanka liable for the failure of its security officials to inform the Claimant's management that they were about to conduct a dangerous counter-insurgency operation.⁸⁸¹ Had Sri Lanka done so, the deaths of several of the Claimants' employees could have been avoided along with related property damage.⁸⁸² The Tribunal found liability even though there was inconclusive evidence regarding whether the deaths and property destruction were the result of government or rebel forces.⁸⁸³

- 567) In a recent decision, *Zhongshan v. Nigeria*, the Tribunal concluded that the active participation of the Nigerian police in assisting the wrongdoers rather than in protecting the foreign investor was a clear violation of the full protection and security standard. The Tribunal held:

Article 2(2) was infringed by Nigeria because Zhongfu's interests in the Zone were entitled to "the continuous protection" of Nigeria. This article is normally invoked where the investment has been harmed by someone other than the state, and the state has failed, by action or by law, to prevent or reverse the harm. However, in this case, far from stepping in to prevent or even discourage threats being made to Zhongfu and its staff, the police, whose function it is to prevent and deal with breaches of the law, actually supported those threats and helped carry them into effect.⁸⁸⁴

⁸⁸⁰ *Asian Agricultural Products* at ¶ 50. (CL-0147-ENG).

⁸⁸¹ *Asian Agricultural Products* at ¶ 50. (CL-0147-ENG).

⁸⁸² *Asian Agricultural Products* at ¶ 86. (CL-0147-ENG).

⁸⁸³ *Asian Agricultural Products* at ¶ 86. (CL-0147-ENG).

⁸⁸⁴ *Zhongshan Fucheng Industrial Investment Co. Ltd. V. Federal Republic of Nigeria*, Final Award, March 26, 2021 at ¶ 183. (CL-0160-ENG) See also Sebastian Blanco, *Full Protection and Security in International Investment Law*. Springer, November 2018. (CL-0161-ENG).

568) The full protection and security standard is well established as a matter of customary international law.⁸⁸⁵

569) The *Asian Agricultural Products* Tribunal adopted the following description of the diligence standard that the host government is required to meet:

The “due diligence” is nothing more nor less than the reasonable measures of prevention which a well-administered government could be expected to exercise under similar circumstances ...⁸⁸⁶

570) This standard is fact-dependent.⁸⁸⁷ However, the standard does not require negligence.⁸⁸⁸ Liability is established by the “mere lack or want of diligence, without any need to establish malice or negligence.”⁸⁸⁹

571) In *American Manufacturing & Trading v. Republic of Zaire*, the Tribunal expounded on the content of the duty of the host state.⁸⁹⁰ It found that the full protection and security obligation was an “obligation of vigilance.”⁸⁹¹ The Tribunal stated:

[the Host State] as the receiving State of investments made by [the Investor], shall take all measures necessary to ensure the full enjoyment of protection and security of [the Investment] and should not be permitted to invoke its own legislation to detract from any such obligation.⁸⁹²

⁸⁸⁵ Sebastian Blanco, Full Protection and Security in International Investment Law. Springer, November 2018.chapters 7 – 10. (CL-0161-ENG)

⁸⁸⁶ *Asian Agricultural Products* at ¶77 (CL-0147-ENG).

⁸⁸⁷ *Asian Agricultural Products* at ¶77 (CL-0147-ENG).

⁸⁸⁸ *Asian Agricultural Products* at ¶77 (CL-0147-ENG).

⁸⁸⁹ *Asian Agricultural Products* at ¶77 (CL-0147-ENG).

⁸⁹⁰ *American Manufacturing & Trading v Republic of Zaire*, ICSID Case No. ARB/93/1 Award of 21 February 1997 at ¶ 6.05 (CL-0148-ENG).

⁸⁹¹ *American Manufacturing & Trading v Republic of Zaire*, ICSID Case No. ARB/93/1 Award of 21 February 1997 at ¶ 6.05 (CL-0148-ENG).

⁸⁹² *American Manufacturing & Trading v Republic of Zaire*, ICSID Case No. ARB/93/1 Award of 21 February 1997 at ¶ 6.05 (CL-0148-ENG).

572) The exercise of diligence needs to be reasonable in the circumstances. The *Lauder* Tribunal considered this issue and stated:

Article II(2)(a) of the Treaty provides that “[i]nvestment (...) shall enjoy full protection and security”. There is no further definition of this obligation in the Treaty. The Arbitral Tribunal is of the opinion that the Treaty obliges the Parties to exercise such due diligence in the protection of foreign investment as reasonable under the circumstances.⁸⁹³

573) In *Wena Hotels v. Egypt*, the Tribunal considered several factors to determine whether there had been a breach of the diligence standard.⁸⁹⁴ Wena, a UK investor, signed lease agreements with EHC, a state-owned company, to manage hotels in Egypt. Subsequently, the Egyptian company forcibly removed all Wena personnel from the properties and repossessed the hotels.⁸⁹⁵ The hotels were eventually returned to Wena by court order, but not before they were looted.⁸⁹⁶ The Tribunal found that Egypt had violated its obligation to provide full protection and security because Egypt was aware of the intentions of EHC and took no actions to prevent it or to immediately return the property to the Investor.⁸⁹⁷ The Tribunal weighed the following factors in determining liability:

- a) the delay on the part of the authorities to go to the investment to investigate;
- b) the failure to take any immediate act of protection;
- c) the delay in returning the investment to the investor;
- d) the damage to, and deterioration of, the investment;

⁸⁹³ *Lauder v. the Czech Republic* at ¶ 308 (CL-0149-ENG). (*emphasis added*)

⁸⁹⁴ *Wena Hotels v. Egypt* ICSID Case No. ARB/203/98/4, Award, December 8, 2000 at ¶¶ 89-95 (CL-0039-ENG).

⁸⁹⁵ *Wena Hotels v. Egypt* ICSID Case No. ARB/203/98/4, Award, December 8, 2000 at ¶¶ 89-95 (CL-0039-ENG).

⁸⁹⁶ *Wena Hotels v. Egypt* ICSID Case No. ARB/203/98/4, Award, December 8, 2000 at ¶¶ 89-95 (CL-0039-ENG).

⁸⁹⁷ *Wena Hotels v. Egypt* ICSID Case No. ARB/203/98/4, Award, December 8, 2000 at ¶¶ 89-95 (CL-0039-ENG).

- e) the failure of the Host State to provide compensation; and
- f) the lack of serious punishment to the perpetrators.⁸⁹⁸

- 574) The repetitive nature of the failure to protect is also relevant. *Eureko B.V. v. the Republic of Poland* concerned a dispute that arose out of Poland's privatization of the Polish state insurance company, PZU. A Dutch company, Eureko, purchased a minority interest in the company through a share purchase agreement with the Polish state treasury which was later amended.⁸⁹⁹ Poland later reneged on this agreement, and it was alleged that the Investor's management had been subject to harassment.⁹⁰⁰ Although the Tribunal did not find Poland liable based on their determination of facts, the Tribunal concluded concerning the full protection and security obligation that if the harassment of the investor's personnel was "repeated and sustained, it may be that the responsibility of the [Host State] would be incurred by a failure to prevent them."⁹⁰¹
- 575) The full protection and security obligation is broader than simply police protection. It extends to all state protective obligations. For example, damage to private property caused by degradation of protected forest reserves would be another example of a breach of the full protection and security obligation.
- 576) Riverside notes that CAFTA Chapter Seventeen on the Environment provides relevant context for purposes of interpretation of Chapter Ten, including Articles 10.5 and 10.7.⁹⁰² Chapter Seventeen highlights the importance the CAFTA Parties placed on ensuring respect for domestic levels of

⁸⁹⁸ *Wena Hotels v. Egypt*, ICSID Case No. ARB/203/98/4, Award, December 8, 2000 at ¶¶ 89-95 (**CL-0039-ENG**)

⁸⁹⁹ *Eureko BV v. Republic of Poland*, Partial Award, 19 August 2005 at ¶ 237 (**CL-0027-ENG**).

⁹⁰⁰ *Eureko BV v. Republic of Poland*, Partial Award, 19 August 2005 at ¶ 237 (**CL-0027-ENG**).

⁹⁰¹ *Eureko BV v. Republic of Poland*, Partial Award, 19 August 2005 at ¶237 (**CL-0027-ENG**).

⁹⁰² Article 31(1) of the Vienna Convention on the Law of Treaties which states "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." (**CL-0121-ENG**).

environmental protection and enforcement provisions. The CAFTA Preamble provides that the Parties are to:

IMPLEMENT this Agreement in a manner consistent with environmental protection and conservation, promote sustainable development, and strengthen their cooperation on environmental matters[.]

- 577) CAFTA Chapter Seventeen, together with the treaty's preamble, its objectives in Chapter One, and the obligations in CAFTA Article 10.11, are relevant to the interpretation of other remaining provisions of CAFTA Chapter Ten. All these provisions underscore the commitment of the CAFTA Parties to the application and enforcement of domestic laws aimed at achieving a high level of environmental protection. Accordingly, the application of the content of the customary full protection and security obligation would naturally also address the degradation arising from Nicaragua's failure to protect its designated rare forest reserves. This failure to protect speaks directly to full protection and security.
- 578) The *CAFTA* Treaty contains an obligation upon Nicaragua to provide fair and equitable treatment as well as full protection and security. These two concepts are mutually dependent and inter-linked.⁹⁰³ Recent tribunals have found that the obligation to provide full protection and security includes an obligation upon governments to provide a stable legal and business environment to foreign investors. For example, in *Azurix v. Argentina*, the Tribunal noted that

⁹⁰³ *Azurix Corp. v. Argentine Republic*, Award, (July 14, 2006) at ¶408: "The Tribunal is persuaded of the interrelationship of fair and equitable treatment and the obligation to afford the investor full protection and security." (CL-0095-ENG).

the obligation to provide full protection and security includes an obligation to provide a “secure investment environment”.⁹⁰⁴

579) The *Azurix* Tribunal stated:

The cases referred to above show that full protection and security was understood to go beyond protection and security ensured by the police. It is not only a matter of physical security; the stability afforded by a secure investment environment is as important from an investor’s point of view. The Tribunal is aware that in recent free trade agreements signed by the United States, for instance, with Uruguay, full protection and security is understood to be limited to the level of police protection required under customary international law. However, when the terms ‘protection and security are qualified by ‘full’ and no other adjective or explanation, they extend, in their ordinary meaning, the content of this standard beyond physical security. To conclude, the Tribunal, having held that the Respondent failed to provide fair and equitable treatment to the investment, finds that the Respondent also breached the standard of full protection and security under the BIT.⁹⁰⁵

580) The obligation upon governments to provide a stable legal and business environment to foreign investors is an element of fair and equitable treatment as well as being a part of full protection and security. For example, the *Azurix v. Argentina* Tribunal noted:

It is not only a matter of physical security; the stability afforded by a secure investment environment is as important from an investor’s point of view.⁹⁰⁶

581) That stability is a basic fairness norm that is part and parcel with fair and equitable treatment, even under customary international law approaches. The *Azurix* Tribunal went on to note that the qualifier “full” in “full protection”

⁹⁰⁴ *Azurix Corp. v. Argentine Republic*, Award, at ¶408. (CL-0095-ENG) “ See ¶ 375 for the Tribunal’s conclusion that Argentina’s failure to allow Azurix to assess tariffs consistent with the concession agreement breached Argentina’s obligation to provide fair and equitable treatment. (CL-0095-ENG).

⁹⁰⁵ *Azurix Corp. v. Argentine Republic*, Award, at ¶408. (CL-0095-ENG).

⁹⁰⁶ *Azurix*, Award, ¶408 (CL-0095-ENG).

supports its interpretation of protection and security going beyond the physical realm.⁹⁰⁷

- 582) Full protection and security must be read to include protection for the rule of law and fundamental fairness, and the legitimate expectation of an investor to be afforded full protection and security in a manner corresponding to this understanding. This understanding was endorsed by the Tribunal in *Metalclad*.

Mexico failed to ensure a transparent and predictable framework for *Metalclad*'s business planning and investment. The totality of these circumstances demonstrates a lack of orderly process and timely disposition in relation to an investor of a party acting in the expectation that it would be treated fairly and justly in accordance with the NAFTA.⁹⁰⁸

- 583) The inter-relationship of fair and equitable treatment and full protection and security is clear. As the Tribunal in *CMS Gas v. Argentina* said “[t]here can be no doubt, therefore, that a stable legal and business environment is an essential element of fair and equitable treatment.”⁹⁰⁹

- 584) The *Occidental v. Ecuador* Tribunal found that, after Occidental had made investments, Ecuador changed its tax law “without providing any clarity about its meaning and extent” and that the state’s “practice and regulations were also inconsistent with [the] changes [to the law].”⁹¹⁰ The *Occidental* Tribunal, therefore, recognized a state may act inconsistently with an investor’s legitimate expectations and breach its obligation to treat an investor fairly and equitably, by failing to adhere to the rule of law by not following its own laws.⁹¹¹

⁹⁰⁷ *Azurix*, Award, ¶ 408 (CL-0095-ENG).

⁹⁰⁸ *Metalclad* ¶ 99 (CL-0087-ENG).

⁹⁰⁹ *CMS Gas* – Award, ¶ 274 (CL-0053-ENG).

⁹¹⁰ *Occidental*, at ¶ 84 (CL-0058-ENG).

⁹¹¹ *Occidental*, at ¶ 84 (CL-0058-ENG).

585) It is for this reason that Prof. Martins Paparinskis notes that an interpretation of full protection and security to include an investor's legitimate expectation to benefit from full protection and security such that it reaches beyond the physical security of the investment, to include the rule of law and due process, is consistent with international law.⁹¹²

586) In *Opel Austria*⁹¹³, the European Court of First Instance (CFI) took the opportunity to identify that individuals will have their legitimate expectations protected. As Prof. Panizzon comments:

In *Opel Austria*, the CFI explicitly used general public international law to support its conclusion that the individual economic operator, Opel Austria was entitled to protection of its legitimate expectations and that Austria was entitled to oppose according to the principle of good faith, the creation of a regulation that would become illegal within the few days of Austria's entry into the EEA.⁹¹⁴

587) The *Paushok v. Mongolia* Tribunal noted that other tribunals, including that in *Rumeli*, found that "respect of the investor's reasonable and legitimate expectations" are part of the definition of the fair and equitable treatment standard.⁹¹⁵ Therefore, one cannot disassociate legitimate expectations with the other factors that make up the Fair and Equitable Treatment standard, which include, "transparency, good faith, conduct that cannot be arbitrary, grossly unfair, unjust, idiosyncratic, discriminatory, lacking in due process or procedural propriety."⁹¹⁶

588) At its core, reasonable expectations related to process is rooted in fairness.⁹¹⁷ The framework for assessing whether or not the expectations were met is set

⁹¹² *Paparinskis*, at p. 252-253, (CL-0111-ENG).

⁹¹³ *Opel Austria GmbH v Council* [1997], Case T-115/94, ECR-II-39, (CL-0112-ENG).

⁹¹⁴ *Panizzon*, at p. 19 (CL-0113-ENG).

⁹¹⁵ *Paushok*, at ¶ 253, (CL-0114-ENG).

⁹¹⁶ *Paushok*, at ¶ 253, (CL-0114-ENG).

⁹¹⁷ *Klager*, at p. 167 (CL-0115-ENG).

out by an analysis of whether or not the rule of law has been followed.⁹¹⁸ The Tribunal in *LG&E Energy Corp. v. Argentina* described legitimate expectations as such:

[The expectations] are based on the conditions offered by the host state at the time of the investment; they may not be established unilaterally by one of the parties; they must exist and be enforceable by law; in the event of infringement by the host state, a duty to compensate the investor for damages arises except for those caused in the event of state of necessity; however, the investor's fair expectations cannot fail to consider parameters such as business risk or industry's regular patterns.⁹¹⁹

- 589) Furthering the argument that an investor's legitimate expectations relate to the legal environment, and its proper operation, the Tribunal in *Parkerings-Compagniet AS v. Lithuania* said:

In principle, an investor has a right to a certain stability and predictability of the legal environment of the investment. The investor will have a right of protection of its legitimate expectations provided it exercised due diligence and that its legitimate expectations were reasonable in light of the circumstances. Consequently, an investor must anticipate that the circumstances could change, and thus structure its investment in order to adapt it to the potential changes of legal environment.⁹²⁰

- 590) International law at the WTO also has expressed a connection between an investor's legitimate expectations, fair and equitable treatment, and the requirements of full protection and security and how those translate into a stable and fair environment guided by a commitment to due process.

⁹¹⁸ *Klager*, at p. 167, (CL-0115-ENG).

⁹¹⁹ *LG&E Energy Corp and others v. Argentina*, ICSID Case No. ARB/02/1, Decision on Liability (October 3, 2006), ¶ 130, (CL-0116-ENG).

⁹²⁰ *Parkerings-Compagniet AS v. Lithuania*, ICSID Case No. ARB/05/8, Award (September 11, 2007), ¶ 333 (CL-0094-ENG).

- 591) In the *US Section 301* case, the Tribunal looked to the WTO treaty's preamble to stress the critical role of full protection and security to fulfill the multilateral trade objectives of the WTO. The Panel stated:

7.75 Providing security and predictability to the multilateral trading system is another central object and purpose of the system which could be instrumental to achieving the broad objectives of the Preamble...

7.76 The security and predictability in question are of "the multilateral trading system." The multilateral trading system is, per force, composed not only of States but also, indeed mostly, of individual economic operators. The lack of security and predictability affects mostly these individual operators.⁹²¹

- 592) Marion Panizzon argues that treaty goals can prove the basis for a "claim of frustration of expectations."⁹²²

- 593) The objectives of the CAFTA are set out in Chapter One as follows:

Article 1.2: Objectives

1. The objectives of this Agreement, as elaborated more specifically through its principles and rules, including national treatment, most-favored-nation treatment, and transparency, are to:

- (a) encourage expansion and diversification of trade between the Parties;
- (b) eliminate barriers to trade in, and facilitate the cross-border movement of, goods and services between the territories of the Parties;
- (c) promote conditions of fair competition in the free trade area;
- (d) substantially increase investment opportunities in the territories of the Parties;
- (e) provide adequate and effective protection and enforcement of intellectual property rights in each Party's territory;
- (f) create effective procedures for the implementation and application of this Agreement, for its joint administration, and

⁹²¹ United States – Sections 301-310 of the Trade Act of 1974, Report of the Panel, 22 December 1999, WT/DS152/R, at p. 323 (CL-0117-ENG).

⁹²² Panizzon, at p. 158 (CL-0113-ENG).

(g) for the resolution of disputes; and establish a framework for further bilateral, regional, and multilateral cooperation to expand and enhance the benefits of this Agreement.

2. The Parties shall interpret and apply the provisions of this Agreement in the light of its objectives set out in paragraph 1 and in accordance with applicable rules of international law

594) Trade between State Parties to the CAFTA would be severely frustrated and hindered if investors could not legitimately expect that their investments would benefit from fair and transparent treatment at the hands of State regulators. Any other standard would lead to an unpredictability and risk that would work against securing the CAFTA's stated objectives of increasing trade and economic opportunity.⁹²³

E. National Treatment

595) CAFTA Article 10.3 establishes a non-discrimination norm of National Treatment. CAFTA Article 10.3 prescribes the treatment the CAFTA Parties are to provide to the investors of another Party and their investments. The CAFTA National Treatment obligation states:

Article 10.3: National Treatment

1. Each Party shall accord to investors of another Party treatment no less favorable than that it accords, in like circumstances, to its own investors with respect to the establishment, acquisition, expansion, management, conduct, operation, and sale or other disposition of investments in its territory.

2. Each Party shall accord to covered investments treatment no less favorable than that it accords, in like circumstances, to investments in its

⁹²³ CAFTA Article 1.2 sets out the objectives.

territory of its own investors with respect to the establishment, acquisition, expansion, management, conduct, operation, and sale or other disposition of investments.

3. The treatment to be accorded by a Party under paragraphs 1 and 2 means, with respect to a regional level of government, treatment no less favorable than the most favorable treatment accorded, in like circumstances, by that regional level of government to investors, and to investments of investors, of the Party of which it forms a part.

- 596) CAFTA Article 10.3 obliges the CAFTA Parties to treat investors from other CAFTA Parties and their investments as favorably as it treats domestic investors and their investments operating in like circumstances.
- 597) Nicaragua treated the Investor and its Investment less favorably than domestic investors operating in like circumstances. Other investors or Investments in like circumstances were treated more favorably.
- 598) Each of the ways in which Nicaragua treated the Investor and its Investment less favorably than other Nicaraguan investors and investments in like circumstances constitutes a violation of CAFTA Article 10.3.
- 599) The purpose of CAFTA Article 10.3 is to ensure that investors and the investments of investors from other CAFTA receive treatment equivalent to that provided to the most favorably treated Nicaraguan investor or its investment. The purpose of the obligation is clear: it is to ensure that the Nicaraguan government does not provide better treatment to locals than that provided to foreigners.
- 600) CAFTA Article 10.4 on MFN Treatment provides a similar obligation to provide investors and their investments the best treatment provided to investors of a third-party state.

- 601) The terms “national treatment”, “most favored nation treatment”, and “fair and equitable treatment”, are not specifically defined in the CAFTA, but they have been used in more than 1,000 bilateral investment treaties.
- 602) The meaning of “national treatment” is therefore based on the ordinary meaning of the words, in their context, and in light of CAFTA’s object and purpose, as the *Vienna Convention* mandates.
- 603) NAFTA has similar national treatment and MFN treatment obligations to those in CAFTA Articles 10.3 and 10.4. Acknowledging NAFTA Article 1102’s national treatment origins in, and similarity to, GATT Article III:4, several NAFTA Tribunals have drawn from GATT Article III:4 jurisprudence in interpreting the elements of Article 1102.⁹²⁴ Indeed, in applying this jurisprudence, the *Feldman* Tribunal noted that GATT Article III:4 is “analogous” to Article 1102 of the NAFTA.⁹²⁵
- 604) There are three elements which an investor or investment needs to establish for a CAFTA Party to be held in breach of CAFTA Article 10.3.
- a) The foreign investor or investment must be in like circumstances with local Investor or investments;
 - b) The CAFTA Party treated the foreign investor or investment less favorably than it treated local investors or investments; and
 - c) The treatment must be with respect to the establishment, acquisition, expansion, management, conduct, operation, and sale or other disposition of investments.

⁹²⁴ *S. D. Myers* - First Partial Award, at ¶ 244 (CL-0007-ENG); *Pope & Talbot Inc. v. The Government of Canada*, Award on the Merits of Phase 2 (April 10, 2001) (“*Pope & Talbot* - Award on Merits of Phase 2”) ¶ 68, 69 and footnote 68 (CL-0137-ENG); *Feldman* - Award, at ¶ 165 ((CL-0044-ENG).

⁹²⁵ *Feldman v. United Mexican States*, Award, (December 16, 2002) at ¶ 165 (CL-0044-ENG). “The national treatment/non-discrimination provision is a fundamental obligation of Chapter 11”.

1. Likeness

- 605) Similar to the likeness test under CAFTA Article 10.4, the likeness test under CAFTA Article 10.3 compares, for the purposes of the arbitration, the “like circumstances” between local Nicaraguan investments and a foreign CAFTA Party investor and its investment.
- 606) The comparison between the circumstances of foreign and domestic investments needs only be “like”. There can be many differences in circumstances, but once the threshold of likeness is met, a comparison of treatment follows.
- 607) Likeness needs to be considered in the circumstances. Where the question of likeness arises in the context of government regulations, likeness requires the Tribunal to consider all of those who are competing for similar regulatory permissions. This was the approach taken by the NAFTA Tribunal in *Grand River*,⁹²⁶ and the approach taken in *Occidental Petroleum*.⁹²⁷
- 608) In this CAFTA claim, all of those lawful possessors of private land in Nicaragua, like Inagrosa, are in like circumstances. This is the class of investments and investors whose treatment needs to be considered.
- 609) For the purposes of National Treatment and MFN Treatment, all persons possessing private land in the territory of Nicaragua, as well as those seeking protection of private landholdings, are in like circumstances to Inagrosa.
- 610) As noted in the Expert Statement of Prof. Justin Wolfe (**CES-02**), there were privately-owned lands in Nicaragua which were treated more favourably than the lands that were invaded by paramilitaries, such as those owned by

⁹²⁶ Grand River Enterprises Six Nations, Ltd. et al. v. United States of America, Award (January 12, 2011) at ¶167 (**CL-0146-ENG**).

⁹²⁷ Occidental Production Company v. Republic of Ecuador, Final Award, (July 1, 2004) at ¶ 173 (**CL-0058-ENG**).

Riverside. The private lands owned by supporters of the FSLN (the Sandinista Party) were not seized by the government or the paramilitaries.⁹²⁸ Such private landowners are in like circumstances with Riverside and its investment, Inagrosa.

- 611) In *Grand River*, the Tribunal surveyed the approach taken by five recent NAFTA Tribunals to discern a pattern and common approach to the analysis of “like circumstances”. The Tribunal in *Grand River* reviewed the approach taken by Tribunals in *Pope & Talbot, Inc. v. Canada*, *ADF Group, Inc. v. United States of America*, *Feldman v. Mexico*, *Methanex Corp. v. United States of America*, and *United Parcel Service of America v. Canada (UPS)*. It concluded that what matters most in ascertaining whether investors and investments are in like circumstances is whether they are governed by the same legal regime.⁹²⁹
- 612) The reasoning of these cases shows the identity of the legal regime(s) applicable to a claimant and its purported comparators to be a compelling factor in assessing whether like is indeed being compared to like for purposes of Articles 1102 and 1103.⁹³⁰
- 613) Although the origin of the obligation dates back over a century, the main influences on CAFTA Article 10.3 are equivalent provisions in the WTO’s GATT and GATS.⁹³¹ The relationship between the CAFTA and the GATT is expressed in the first article of the CAFTA in Article 1, where the CAFTA Parties expressly recognize that the CAFTA is an agreement that is a regional

⁹²⁸ Expert Statement of Prof. Justin Wolfe at ¶60 (CES-02).

⁹²⁹ Grand River - Award at ¶167 (CL-0146-ENG)

⁹³⁰ Grand River - Award at ¶167 (CL-0146-ENG)

⁹³¹ The interpretive principle of Most-Favoured Nation Treatment contained in CAFTA Article 1.1.1 would also strongly support a relationship between these agreements and NAFTA. So does Article 1, which specifically addresses that relationship.

agreement made consistent with the parties' WTO obligations.”⁹³² The CAFTA and WTO national treatment provisions are virtually identical. GATT Article III:4 states:

The products of the territory of any contracting party imported into the territory of any other contracting party shall be accorded treatment no less favorable than that accorded to like products of national origin in respect of all laws, regulations and requirements affecting their internal sale, offering for sale, purchase, transportation, distribution or use.

614) Similarly, Article XII of the GATS says:

... each Member shall accord to services and service suppliers of any other Member, in respect of all measures affecting the supply of services, treatment no less favorable than it accords to its own like services and service suppliers...

615) The requirement of “no less favorable” treatment is the same. Indeed, the *Pope & Talbot* Tribunal described Article 12 of the GATS as “identical” to NAFTA Article 1102(2).⁹³³

616) The origins of NAFTA Article 1102, GATT Article III, the common wording in the provisions, the equivalent purposes and Canada’s acknowledgement of the influence of the WTO provisions on the NAFTA enshrines that GATT/WTO national treatment jurisprudence informs the meaning of the three elements of NAFTA Article 1102. It is for this very reason that NAFTA Tribunals have drawn from GATT/WTO jurisprudence to interpret the elements of NAFTA Article 1102.⁹³⁴

⁹³² The preamble forms an integral part of the NAFTA, and it must be given meaning in the interpretation of the NAFTA pursuant to CAFTA Article 1.1.2 and the Vienna Convention.

⁹³³ *Pope & Talbot* - Award on Merits of Phase 2, at ¶ 52 (CL-0137-ENG).

⁹³⁴ *S. D. Myers* - First Partial Award, at ¶ 244, (CL-0007-ENG). *Pope & Talbot* - Award on Merits of Phase 2, at para. 68 - 69, footnote 68 (CL-0137-ENG); *Feldman* – Award, at ¶ 165 (CL-0044-ENG).

617) The WTO Panel in *Canada – Renewable Energy* concluded that Canada had violated the GATT Article III:4 national treatment obligation in its operation of the FIT Program, especially on account of the presence of clear discriminatory provisions within the program.

618) Relying on the findings from the Panel, the WTO Appellate Body considered that likeness was to be considered on the basis of “products that are directly competitive to or substitutable with the product purchased under the challenged measure” and concluded:

Article III:8(a) thus concerns, in the first instance, the product that is subject to the discrimination. The coverage of Article III:8 extends not only to products that are identical to the product that is purchased, but also to “like” products. In accordance with the Ad Note to Article III:2, it also extends to products that are directly competitive to or substitutable with the product purchased under the challenged measure. For convenience, this range of products can be described as products that are in a competitive relationship. What constitutes a competitive relationship between products may require consideration of inputs and processes of production used to produce the product.⁹³⁵

619) The existence of a difference does not make one investor unlike another for the purposes of like circumstances. That is why the words used in the CAFTA are “like circumstances”, and not “identical circumstances”.

620) As the GATT has recognized, judgment needs to be applied.⁹³⁶ And the interpretation and application of the test of likeness must further the objectives

⁹³⁵ Canada - Renewable Energy - AB Report, at ¶ 5.63 (CL-0138-ENG).

⁹³⁶ United States - Measures Affecting Alcoholic and Malt Beverages DS23/R, GATT Panel Report, (June 19, 1992) BISD 395/206 at ¶¶ 5.23 – 5.26 (CL-0139-ENG).

of equality of competitive opportunity.⁹³⁷ In other words, the analysis is, in substance, a matter of functional common sense.

2. Treatment No Less Favorable

- 621) CAFTA Article 10.3's second element is the obligation to accord a foreign investor and its investments with "treatment no less favourable" than that provided to domestic investors in like circumstances.
- 622) The interpretive task for the Tribunal therefore begins with the text of CAFTA Article 10.3. However, that task is not completed until CAFTA Article 10.3 is examined in the context of the CAFTA as a whole.
- 623) The context and objectives of the CAFTA make it clear that CAFTA Article 10.3 requires the CAFTA Parties to provide equality of competitive opportunities. The notion of equality of competitive opportunities allows for different treatment that is not less favorable treatment. It allows a regulatory process to produce different outcomes, as long as the process demonstrably treats the parties with evenhandedness, to ensure that investments are granted equal opportunities. To be evenhanded, the treatment need not be identical. Neither does the result need to be equal. But the opportunities must be equal.
- 624) The text of CAFTA Article 10.3 makes clear that it requires a difference of nationality between the more favourably treated local investor or investment and the Claimant investor or its investment. But it contains no requirement of intentional nationality-based discrimination. A violation of national treatment

⁹³⁷ The words "treatment no less favorable" were used in NAFTA Article 1102 as their meaning had been considered extensively in GATT jurisprudence. This jurisprudence had interpreted "treatment no less favorable" as requiring equality of competitive opportunities. See, for example, *United States - Taxes in Petroleum and Certain Imported Substances*, Report of the Panel 1987 WL 421960 (G.A.T.T.) (June 17, 1987) at ¶ 5.2.2 (**CL-0140-ENG**); *EC Asbestos - AB Report*, at ¶ 99 (**CL-0141-ENG**).

can be easily seen when there is actual nationality-based discrimination, but intentional nationality-based discrimination is not an element of CAFTA Article 10.3.

625) The *Feldman* Tribunal pointed out that the similarly worded NAFTA Article 1102 does not require an investor to demonstrate explicitly that a distinction is a result of their foreign nationality.⁹³⁸ It also noted the *Pope & Talbot* Tribunal's observation that requiring proof of intent effectively would limit NAFTA Article 1102 national treatment obligation only to *de jure* violations, thereby severely limiting the effectiveness of the National Treatment concept in protecting foreign investors.⁹³⁹

626) The *Feldman* Tribunal also noted:

... requiring a foreign investor to prove that discrimination is based on his nationality could be an insurmountable burden to the Claimant, as that information may only be available to the government. It would be virtually impossible for any claimant to meet the burden of demonstrating that a government's motivation for discrimination is nationality rather than some other reason.⁹⁴⁰

627) However, both *de jure* and *de facto* discrimination is covered by CAFTA Article 10.3.

628) We can see this from a simple example of state practice. A Joint Review Panel administered by the Canadian Environmental Assessment Agency requested that the Canadian Department of Foreign Affairs and International Trade to send an official to public hearings to explain the meaning of Chapter Eleven of the NAFTA, the predecessor of CAFTA Article 10.3. The Department sent a

⁹³⁸ Feldman – Award, at ¶ 181 (CL-0044-ENG).

⁹³⁹ Feldman - Award, at ¶¶ 183, 184 (CL-0044-ENG), citing to Pope & Talbot, Award on the Merits of Phase 2, April 10, 2001, at paras. 78 and 79 (CL-0137-ENG) According to the Pope & Talbot Tribunal, was that showing discrimination based on nationality would “tend to excuse discrimination that is not facially directed at foreign owned investments.”

⁹⁴⁰ Feldman - Award, at ¶ 183 (CL-0044-ENG).

senior official, Gilles Gauthier, the Director of the Investment Trade Policy Division, together with departmental legal counsel, to provide an official government explanation of the meaning of Chapter Eleven of the NAFTA. In his formal presentation, Mr. Gauthier confirmed that NAFTA Article 1102 “prohibits both *de facto* or *de jure* discrimination”.⁹⁴¹

- 629) *De jure* discrimination occurs when government measures on their face impose a difference in treatment based on nationality.
- 630) *De facto* discrimination is established by facts that show the detrimental treatment of a foreign investor, not only in the nature and magnitude of a difference in treatment, but in relation to whether it can be objectively justified by non-nationality based legitimate considerations.
- 631) In essence, the National Treatment obligation to accord “treatment no less favourable” means that a Party cannot modify the “competitive opportunities” to the detriment of another Party’s investors and its investments.⁹⁴² GATT/ WTO case law establishes that it is an objective test, applicable to both *de jure* and *de facto* measures,⁹⁴³ and serves to guarantee that foreign economic interests receive the best treatment given to domestic interests. NAFTA Tribunals have adopted the same approach.⁹⁴⁴
- 632) After an investor has demonstrated that the different results stem from different competitive opportunities, the evidentiary burden shifts to the

⁹⁴¹ Transcript of Mr. Gilles Gauthier’s Presentation by the Department of Foreign Affairs and International Trade to the Bilcon of Delaware Joint Review Panel, June 19, 2007, at p. 2 (CL-0142-ENG).

⁹⁴² See, for example, European Communities - Protection of Trademarks and Geographical Indications for Agricultural Products and Foodstuffs, WT/DS290/R, Report of the Panel (March 15, 2005) (“EC-Agricultural Products”), at ¶ 178 (CL-0143-ENG); Taxes in Petroleum - Panel Report, at para. 5.2.2 (CL-0140-ENG).

⁹⁴³ For clarity, “de jure” means by law, whereas “de facto” means while not law, there is evidence in practice.

⁹⁴⁴ Merrill & Ring – Award, at ¶ 80 (CL-0004-ENG); S.D. Myers, First Partial Award, at ¶ 254 (CL-0007-ENG); and Feldman – Award, at ¶ 187 (CL-0044-ENG).

Government to excuse the *prima facie* violation of national treatment.⁹⁴⁵ And the burden on the government is a strict one. It requires the government to show that the less favorable treatment was necessary.⁹⁴⁶

633) So, where there is different treatment in like circumstances, the burden is on Nicaragua to show that the different treatment was not less favourable or not necessary.

634) Common to NAFTA tribunals -most explicitly in *Feldman*-and recent decisions of the WTO Appellate Body on National Treatment- is the notion that once the nature and magnitude of the difference of treatment between “likes” has been established by the Investor, the burden shifts to the Respondent to show that this difference, both its nature and magnitude, can be fully accounted for by legitimate regulatory considerations such as non-nationality related considerations.⁹⁴⁷

635) This was the approach taken by the WTO Appellate Body in *Tuna II*:

With respect to the burden of showing that a technical regulation is inconsistent with Article 2.1 of the *TBT Agreement*, we recall that it is well-established “that the burden of proof rests upon the party, whether complaining or defending, who asserts the affirmative of a particular claim or defence”. Where the complaining party has met

⁹⁴⁵ William Ralph Clayton, William Richard Clayton, Douglas Clayton, and Bilcon of Delaware, Inc. v. Canada, Award on Jurisdiction and Liability, (PCA) Case No. 2009-04, March 17, 2015 at ¶ 723. (CL-0089-ENG).

⁹⁴⁶ William Ralph Clayton, William Richard Clayton, Douglas Clayton, and Bilcon of Delaware, Inc. v. Canada, Award on Jurisdiction and Liability, (PCA) Case No. 2009-04, March 17, 2015 at ¶ 723 (CL-0089-ENG).

⁹⁴⁷ William Ralph Clayton, William Richard Clayton, Douglas Clayton, and Bilcon of Delaware, Inc. v. Canada, Award on Jurisdiction and Liability, (PCA) Case No. 2009-04, March 17, 2015 at ¶ 723. (CL-0089-ENG).

the burden of making its *prima facie* case, it is then for the responding party to rebut that showing.⁹⁴⁸

- 636) In these circumstances, it is entirely reasonable to require a full demonstration on Nicaragua's part that all differences of treatment between Inagrosa and other Nicaraguan entities were fully justified by objective regulatory considerations.
- 637) As the difficulties with the discovery process in this case illustrate, the Investor cannot easily access the internal deliberations of governments to reveal all the considerations that affected the treatment Inagrosa received. This is exactly why the law puts the onus on the Responding State to prove that objective legitimate considerations can fully account for the difference in treatment.
- 638) Nicaragua's obligation to provide Riverside and Inagrosa with "treatment no less favorable" required that Nicaragua accord treatment that was the same as the best treatment received by domestic investors in like circumstances as Riverside or Inagrosa. This is not only required by the jurisprudence,⁹⁴⁹ but by the plain wording of CAFTA Article 10.3 itself:

The treatment accorded by a Party under paragraphs 1 and 2 means, with respect to a state or province, treatment no less favorable than *the most favorable treatment* accorded, in like circumstances, by that state or province to investors, and to investments of investors, of the Party of which it forms a part. [emphasis added]

3. "With Respect to the Establishment, Acquisition, Expansion, Management, Conduct, Operation, and Sale or Other Disposition of Investments"

- 639) CAFTA Article 10.3 requires that the treatment involved must be with respect to the establishment, acquisition, expansion, management, conduct, operation,

⁹⁴⁸ United States – Measures Concerning the Importation, Marketing and Sale of Tuna and Tuna Products, WT/DS381/AB/R, Report of the Appellate Body (May 16, 2012) ("US-Tuna II-Appellate Body") ¶ 216 (CL-0144-ENG)

⁹⁴⁹ United States - Section 337 of the Tariff Act of 1930, General Agreement on Tariffs and Trade, Report of the Panel (November 7, 1989), ("US-Section 337"), at ¶ 511 (CL-0145-ENG).

and sale or other disposition of investments. The seizure of land is a disposition of an investment. It also affected the expansion, management, conduct, and operation of the investment.

- 640) The Investment however was provided with less favourable treatment than those local private landowners who supported the FSLN and President Ortega. Riverside was entitled to receive such more favorable treatment in Nicaragua.

VI. THE FACTS APPLIED TO THE LAW

A. International Law of State Responsibility

- 641) Nicaragua is responsible for the actions that resulted in the harm to Inagrosa and the taking of Hacienda Santa Fé. This arises due to the role of members of organs of the State (such as police officers, voluntary police, and local government officials (such as mayors). As well, there was responsibility arising from actions of Senior Government officials who controlled and directed the paramilitaries in Nicaragua.
- 642) The principles of state responsibility apply after a breach of a primary obligation, such as a treaty violation, can be established. These longstanding principles of international law have been codified by the International Law Commission in the Articles of Responsibility of States for Internationally Wrongful Acts (ASRIWA) and constitute customary international law.

1. Responsibility for Government Branches – ASRIWA Article 4

- 643) ASRIWA Article 4 codifies the international law standards for international responsibility for acts taken by members of organs of the State. It provides:
1. The conduct of any State organ shall be considered an act of that State under international law, whether the organ exercises legislative, executive, judicial, or any other functions, whatever position it holds in the organization of the State, and whatever its character as an organ of the central Government or of a territorial unit of the State.
 2. An organ includes any person or entity which has that status in accordance with the internal law of the State.⁹⁵⁰

⁹⁵⁰ ASRIWA at art. 4, p. 40 (CL-0017-ENG).

- 644) A State is responsible for the acts of any and all persons or organs of a State that exercises its respective powers.
- 645) In the *Caire* case, the French Mexican Claims Commission stated that responsibility could be excluded only where “the act had no connection with the official function and was, in fact, merely the act of a private individual.”⁹⁵¹ In *Caire*, the actions of an off-duty Mexican police officers were attributable to Mexico.⁹⁵²
- 646) The police are an integral part of the executive branch of government. They are an organ of the State. Nicaragua’s internal law confirms that the national police⁹⁵³ and the voluntary police⁹⁵⁴ are a part of the State. A State never can avoid international responsibility for the actions of the police.⁹⁵⁵ Nicaragua is responsible for the actions at Hacienda Santa Fé under ASRIWA Article 4.
- 647) Specifically, Nicaragua has responsibility for the actions of the police, the voluntary police, and government officials, including the Mayor, in the taking of the lands at Hacienda Santa Fé.
- 648) As described above, throughout the invasions of Hacienda Santa Fé, the national police engaged in multiple acts that assisted the paramilitaries. The assistance provided by the national police has been discussed at length in the CAFTA breaches section; however, some key events worth reiterating is:

⁹⁵¹ Crawford, *International Law Commission Commentary*, p. 99 (CL-0019-ENG). *Gustave Caire (France) v. United Mexican States*, Decision No. 40 of June 13, 1929 (CL-0168-ENG).

⁹⁵² *Gustave Caire (France) v. United Mexican States*. (Decision No. 40 of June 13, 1929. (CL-0168-ENG).

⁹⁵³ Ley de la Policía Nacional, 1996 at articles 1, 9 (C-0222-SPA).

⁹⁵⁴ Expert Statement of Prof. Justice Wolfe at ¶ 102 (CES-02).

⁹⁵⁵ Crawford, *International Law Commission Commentary*, p. 98 (CL-0019-ENG).

- a) During the initial invasion, Police Captain Herrera informed management that Commissioner Marvin Castro gave an order to not evict the paramilitaries from Hacienda Santa Fé.⁹⁵⁶
- b) Police Inspector Calixto Vargas, and other members of the police, came to Hacienda Santa Fé and demanded that the Hacienda Santa Fé workers hand over their weapons without lawful orders or authorizations.⁹⁵⁷
- c) On July 24, 2018, Cristobal Luque, a voluntary police officer, tried to disarm the security guard at Hacienda Santa Fe, and when he refused, Officer Luque violently assaulted the guard.⁹⁵⁸
- d) On August 4, 2018, members of the Nicaraguan National Police, including Mayor Herrera, escorted a paramilitary leader into Hacienda Santa Fé.⁹⁵⁹
- e) On August 6, 2018, the National Police escorted Mayor Herrera to Hacienda Santa Fé to give a speech on assisting the paramilitaries to live at the Hacienda Santa Fé.⁹⁶⁰

649) These acts demonstrate the integral governmental role of the police, which actively engaged in measures to assist the paramilitaries and harm Riverside's investment.

a) The Paramilitaries are a part of the State

650) The role of the voluntary police is essential to the understanding the extent of state responsibility in this case. As noted above, the voluntary police are a part

⁹⁵⁶ Witness Statement of Carlos Rondón – Memorial – ENG at ¶ 78 (CWS-01); Letter from Carlos Rondón to Police Captain Herrera, August 10, 2018 (C-0012-SPA)

⁹⁵⁷ Witness Statement of Luis Gutierrez – Memorial – SPA at ¶¶ 49-50 (CWS-02).

⁹⁵⁸ Witness Statement of Luis Gutierrez – Memorial – SPA at ¶ 67 (CWS-02).

⁹⁵⁹ Witness Statement of Luis Gutierrez – Memorial – SPA at ¶ 98 (CWS-02).

⁹⁶⁰ Witness Statement of Luis Gutierrez – Memorial – SPA at ¶ 101 (CWS-02).

of the executive branch of the State under the internal law of Nicaragua.⁹⁶¹ This has been addressed extensively in the Expert Statement of Prof. Justin Wolfe from Tulane University (**CES-02**). Prof. Wolfe has reviewed the historical evidence and has confirmed that the paramilitaries were both a part of the state (operating under the Volunteer Police Act),⁹⁶² and as persons operating under the control and direction of the government of Nicaragua.⁹⁶³

- 651) As a matter of state responsibility, the fact that the paramilitaries are considered to be an organ of the State under Nicaragua's internal law is definitive in establishing state responsibility for their actions under ASRIWA Article 4.⁹⁶⁴ The matter of control and direction (a matter under ASRIWA Article 8) is moot in light of the paramilitaries' admitted role as a part of the state under Nicaragua's internal law.
- 652) The Voluntary Police was organized on a national basis and was subordinate to the National Police.⁹⁶⁵ Parapolice and paramilitaries as voluntary police are part of the executive branch of the Nicaraguan government.⁹⁶⁶ The voluntary police were paid from the general revenues of the State in Nicaragua's General Budget.⁹⁶⁷

⁹⁶¹ Ley de la Policía Nacional, 1996 at article 1 (**C-0222-SPA**); Expert Statement of Prof. Justice Wolfe at ¶¶ 33 and ¶ 102. (**CES-02**).

⁹⁶² Expert Statement of Prof. Justin Wolfe at ¶ 39 (**CES-02**).

⁹⁶³ Expert Statement of Prof. Justin Wolfe at ¶ 102 (**CES-02**).

⁹⁶⁴ ASRIWA at art. 4, p. 40 (**CL-0017-ENG**).

⁹⁶⁵ Article 5 of the Voluntary Police Law (**C-0038-ENG**); Expert Statement of Prof. Justice Wolfe at ¶ 39. (**CES-02**).

⁹⁶⁶ Expert Statement of Prof. Justice Wolfe at ¶ 40 (**CES-02**).

⁹⁶⁷ Expert Statement of Prof. Justice Wolfe at ¶ 39 (**CES-02**). Nicaragua Investiga, "Paramilitaries are Paid with Village Money, for being 'volunteer police,'" July 31, 2018. (**C-0008-ENG**).

- 653) Nicaragua integrated its voluntary police under its 1996 National Police Law.⁹⁶⁸ In 2014, the voluntary police came under the control of the National System of Democratic Security and the National Police.⁹⁶⁹ The National Police are under the control of Nicaragua's President.⁹⁷⁰
- 654) All voluntary police are subject to the 1996 Law of the National Police, which placed them under the direction and supervision of the National Police.⁹⁷¹
- 655) Tulane University Professor Justin Wolfe reviewed the role of the voluntary police in his Expert Statement (**CES-02**). Professor Wolfe concludes at paragraph 50 of his Expert Statement ⁹⁷²(**CES-02**):

The "semi-official" armed groups that operate in Nicaragua have been called by different names such as "shock groups" (grupos de choque), "Sandinistas mob" (turbas), "parapolice groups" and "paramilitary".⁹⁷³ Many of these, particularly the paramilitaries are integrated by Sandinista ex-military and police forces and are run like a military unit. According to Nicaragua security expert Roberto Cajina, these paramilitary units "are people with military training, operational tactical capacity and in the case of gang members they have their own operational capabilities because of the way these gang groups operate. However, this is coordinated by a chain of command that leaves Rosario Murillo (vice president of the Republic and wife of Daniel Ortega) and Fidel Moreno (Secretary of the Mayor's Office of Managua)."⁹⁷⁴

⁹⁶⁸ Ley de la Policía Nacional, 1996 at article 1 (**C-0222-SPA**); Expert Statement of Prof. Justice Wolfe at ¶ 33 (**CES-02**). Roberto Cajina, "¿Reformar la Policía o fundar una nueva?," Envío, No. 447, June 2019 (**C-0223-SPA**).

⁹⁶⁹ Expert Statement of Prof. Justin Wolfe at ¶ 34 (**CES-02**)

⁹⁷⁰ Expert Statement of Prof. Justice Wolfe at ¶ 34. (**CES-02**). Law of Organization, Functions, Career and Special Social Security Regime of the National Police (Law No. 872) (**C-0007-SPA**).

⁹⁷¹ Expert Statement of Prof. Justice Wolfe at ¶ 38. (**CES-02**).

⁹⁷² Expert Statement of Prof. Justice Wolfe at ¶ 50. (**CES-02**).

⁹⁷³ Interdisciplinary Group of Independent Experts, Report at page 54 (**C-0131-ENG**).

⁹⁷⁴ Infobase, "How the paramilitary army Rosario Murillo put together for her husband, Daniel Ortega works," May 26, 2019 (**C-0034-ENG**).

656) Prof. Wolfe continued by noting:⁹⁷⁵

The paramilitaries, always hidden under masks, carry firearms and act in coordination with the National Police. The 2019 GIEI report states:

Another significant feature that could be observed was the mutual collaboration between several State organs or structures linked to the State: the National Police, Mayor's Offices and parapolice groups. The latter include the aforementioned shock groups, as well as more lethal and organized factions that are commonly known unidentified individuals who bear firearms, sometimes even weapons of war, as "paramilitary" or "parapolice". These groups comprised of and act in coordination with the official police forces.⁹⁷⁶

657) Indeed, the chief of the National Police freely admitted that the paramilitaries were voluntary police and were serving as deputized police officers as part of the state.⁹⁷⁷

658) President Ortega has admitted a connection between paramilitaries and the State in confirming that the paramilitaries are "volunteer police."⁹⁷⁸ President Ortega is the 'supreme chief' of the National Police and can command and dismiss them at will. An admission from President Ortega on this issue is legally causative and highly compelling.⁹⁷⁹

⁹⁷⁵ Expert Statement of Prof. Justice Wolfe at ¶ 51. **(CES-02)**.

⁹⁷⁶ Interdisciplinary Group of Independent Experts, Report at p. 178 **(C-0131-ENG)**.

⁹⁷⁷ Transcript -Dagbladet TV interview to Francisco Diaz, Director General of the Nicaraguan National Police, uploaded February 4, 2019 **(C-0133-SPA/ENG)**; see also Dagbladet TV interview to Francisco Diaz, Director General of the Nicaraguan National Police, uploaded February 4, 2019 **(C-0132-SPA)**.

⁹⁷⁸ Video: Euronews, Interview of Nicaragua's President Daniel Ortega on Country's Deadly Crisis, Uploaded July 30, 2018 **(C-0031-ENG)**.

⁹⁷⁹ Human Rights Watch, "Crackdown in Nicaragua: Torture, Ill-Treatment and Prosecutions," June 2019 at p. 2 **(C-0023-ENG)**.

b) The paramilitaries admitted their government instructions

- 659) While it is not necessary to demonstrate control once the role of paramilitaries as a part of the State has been established, the paramilitaries themselves admitted their connection to the State.⁹⁸⁰
- 660) Mayor Leonidas Centeno⁹⁸¹ and Mayor Herrera⁹⁸² were directly involved with the paramilitaries at Hacienda Santa Fé.
- 661) Mayor Leonidas Centeno sent the paramilitaries to invade Hacienda Santa Fé on behalf of the Government and was acting in his official capacity as he said the orders were given on behalf of the Government.⁹⁸³
- 662) Mayor Herrera, while acting in her official capacity, came to Hacienda Santa Fé to give a speech telling the paramilitaries about her efforts to help them in getting electricity, water and allowing them to build housing on the Hacienda Santa Fé lands.⁹⁸⁴
- 663) Both mayors were officials of organs of the State. As a result, Nicaragua has international law responsibility for the measures taken by these mayors with respect to measures against the Investor that were internationally wrongful.

2. Direction of persons by the State - ASRIWA Articles 8

- 664) ASRIWA Article 8 addresses the special situation where state responsibility stems from a factual relationship between the private entity or person(s) and

⁹⁸⁰ Witness Statement of Luis Gutierrez – Memorial – SPA at ¶¶ 42,73, 89 (CWS-02); Witness Statement of Jaime Francisco Henrriquez Cruz – Memorial -SPA at ¶ 16, 35 (CWS-06).

⁹⁸¹ Witness Statement of Luis Gutierrez – Memorial – SPA at ¶¶ 73, 106-107, 125 (CWS-02); Witness Statement of Jaime Francisco Henrriquez Cruz – Memorial -SPA at ¶¶ 53-54 (CWS-06).

⁹⁸² Witness Statement of Luis Gutierrez – Memorial – SPA at ¶¶ 98, 101 (CWS-02); Witness Statement of Jaime Francisco Henrriquez Cruz – Memorial -SPA at ¶¶ 43, 47 (CWS-06).

⁹⁸³ Witness Statement of Luis Gutierrez – Memorial – SPA at ¶ 73 (CWS-02).

⁹⁸⁴ Witness Statement of Luis Gutierrez – Memorial – SPA at ¶ 101 (CWS-02).

the State.⁹⁸⁵ ASRIWA Article 8 on Conduct Directed, or Controlled by a State provides that:

The conduct of a person or group of persons shall be considered an act of a State under international law if the person or group of persons is, in fact, acting on the instructions of, or under the direction or control of, that State in carrying out the conduct.⁹⁸⁶

665) The International Court of Justice ('ICJ') elaborated on this in the *Bosnian Genocide* case:

international responsibility would be incurred owing to the conduct of those of its own organs which gave the instructions or exercised the control resulting in the commission of acts in breach of its international obligations. What must be determined is whether [FRY] organs ...originated the genocide by issuing instructions to the perpetrators or exercising direction or control, and whether, as a result, the conduct of organs of the Respondent, having been the cause of the commission of acts in breach of its international obligations, constituted a violation of those obligations.⁹⁸⁷

666) Under the ICJ's decision, a State is responsible when an organ of the State either instructed, directed, or controlled the violation of international law. To attribute conduct under this ASRIWA Article, it is not enough that the State supported or assisted with the execution of the wrongful action. Still, the responsibility is shown when the State caused the breach through its own conduct.

⁹⁸⁵ ASRIWA at Art.8, p 47. (CL-0017-ENG).

⁹⁸⁶ ASRIWA at art. 8, p. 47 (CL-0017-ENG). Crawford, *International Law Commission Commentary*, Article 8, p. 110 (CL-0019-ENG).

⁹⁸⁷ ICJ, Case Concerning the Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro), February 26, 2007 (hereinafter, "ICJ, Bosnian Genocide Case"), ¶ 397. (CL-0043-ENG).

667) In the *Bosnian Genocide* case, the ICJ asserted that instructions from a State organ must be given:

in respect of each operation in which the alleged violations occur, not generally in respect of the overall actions taken by the persons or groups of persons having committed the violations.⁹⁸⁸

668) Prof. Wolfe has reviewed the historical evidence to confirm that the paramilitaries were persons operating under the control and direction of the government of Nicaragua.⁹⁸⁹

669) Consequently, state responsibility occurs if a person or groups of persons are specifically instructed to commit the internationally wrongful act. Organs of Nicaragua sent paramilitary leaders to the Hacienda Santa Fé. Those leaders identified themselves as being sent by the “Government of Reconciliation and National Unity”.⁹⁹⁰ They proclaimed that they were occupying the Hacienda Santa Fé on the orders of Leonidas Centeno, Mayor of Jinotega, and on behalf of the Government of the Republic of Nicaragua.⁹⁹¹

670) A government official, Fabio Enrique Dario, admitted that the government took Hacienda Santa Fé to pressure the business sector.⁹⁹² These spontaneous statements by the paramilitary leaders and the State officials constitute admissions that Nicaragua instructed the taking of Hacienda Santa Fé.⁹⁹³ They also constitute acknowledgement of the measures.

⁹⁸⁸ ICJ, *Bosnian Genocide Case* at ¶ 400. (**CL-0043-ENG**).

⁹⁸⁹ Expert Witness Statement of Prof. Justin Wolfe at ¶ 102 (**CES-02**).

⁹⁹⁰ Witness Statement of Luis Gutierrez – Memorial – SPA at ¶ 42 (**CWS-02**).

⁹⁹¹ Witness Statement of Luis Gutierrez – Memorial – SPA at ¶ 73 (**CWS-02**).

⁹⁹² Copy of the Facebook Profile of Fabio Enrique Dario Confirming that he is a Government Official, Last accessed May 7, 2019 (**C-0021-SPA**).

⁹⁹³ Witness Statement of Luis Gutierrez – Memorial – SPA at ¶¶ 42, 73, 89 (**CWS-02**); Witness Statement of Jaime Francisco Henrriquez Cruz – Memorial -SPA at ¶¶ 16, 35 (**CWS-06**).

671) State responsibility under ASRIWA Article 8 can also be the result of a private person or group of persons acting under the State's direction or control.⁹⁹⁴ The commentary to ASRIWA Article 8 states that:

More complex issues arise in determining whether conduct was carried out "under the direction or control" of a State. Such conduct will be attributable to the State only if directed or controlled the specific operation and the conduct complained of was an integral part of that operation. The principle does not extend to conduct which was only incidentally or peripherally associated with an operation and which escaped from the State's direction or control.⁹⁹⁵

672) According to the ASRIWA, the State's direction or control must be directly related to the specific conduct of the private person.⁹⁹⁶

673) The degree of control necessary to incur state responsibility was a key issue in the case of *Nicaragua v. The United States of America*. In the *Nicaragua* case, the ICJ found that responsibility is attributable if:

it would in principle have to be proved that State had effective control of the military or paramilitary operations in the course of which the alleged violations were committed.⁹⁹⁷

674) Effective control requires that the State be more than a mere influencer or supporter of the conduct.⁹⁹⁸ In order to meet the effective control test, the Claimant has to demonstrate the existence of:

⁹⁹⁴ Crawford, J, *State Responsibility – the General Part* (Cambridge University Press) at p. 144 (CL-0021-ENG).

⁹⁹⁵ Crawford, *International Law Commission Commentary*, p. 110 (CL-0019-ENG). ASRIWA at Art. 8, (CL-0017-ENG).

⁹⁹⁶ Crawford, *International Law Commission Commentary*, pp. 47-48 (CL-0019-ENG).

⁹⁹⁷ ICJ, *Nicaragua v. United States of America, Military and Paramilitary Activities*, Judgement of 27 June 1986, ¶ 115 (CL-0022-ENG).

⁹⁹⁸ Boon, K. "Are Control Tests Fit for the Future? The Slippage Problem in Attribution Doctrines" (2014) 15(2) *Melbourne Journal of International Law* 329. (CL-0024-ENG) (Citing *Nicaragua* (Separate

- a) *De facto* link by virtue of factors such as assistance, financing, organizing, training, selecting targets and planning.
- b) Control such that it is clear that the acts had been ordered or imposed on the relevant individuals and entities by the State.
- c) Effective control can also be shown in the level of operational control the state has throughout the act itself.⁹⁹⁹

675) The Government can be shown to have exercised effective control over the paramilitaries that took the land at Hacienda Santa Fé:

- a) The State planned and selected the paramilitaries targets;¹⁰⁰⁰
- b) The State provided the means to assist the commission of expropriations and other violations;¹⁰⁰¹
- c) The State exercised control through local municipalities and the National Police;¹⁰⁰² and
- d) The State imposed its will on the paramilitaries.¹⁰⁰³

Opinion of Judge Ago [1986] ICJ Rep 14, 188 [16]); See also Perova, N., "Disentangling 'Effective Control' Test for the Purpose of Attribution of the Conduct of UN Peacekeepers to the States and the United Nations" (2017), 86 *Nordic Journal of International Law*, 30-67, 54; **(CL-0045-ENG)** and Talmon S. "The Responsibility of Outside Powers for Acts of Secessionist Entities" (2009), 58(3), *International & Comparative Law Quarterly* 493-517. **(CL-0046-ENG)**

⁹⁹⁹ Crawford, J, *State Responsibility – the General Part* (Cambridge University Press) at p. 147 **(CL-0021-ENG)**

¹⁰⁰⁰ Witness Statement of Luis Gutierrez – Memorial – SPA at ¶¶ 82,125 **(CWS-02)**.

¹⁰⁰¹ Witness Statement of Luis Gutierrez – Memorial – SPA at ¶ 129 **(CWS-02)**.

¹⁰⁰² Witness Statement of Luis Gutierrez – Memorial – SPA at ¶¶ 73,106,125 **(CWS-02)**.

¹⁰⁰³ Witness Statement of Luis Gutierrez – Memorial – SPA at ¶¶ 106-107 **(CWS-02)**.

- 676) The land confiscation at Hacienda Santa Fé was not an isolated event but was rather part of a statewide campaign of government oppression.¹⁰⁰⁴ The invasion of Hacienda Santa Fé can be traced back to the initiation of the government's campaign of repression.
- 677) Many of the paramilitaries confirmed they were acting on the government's instruction¹⁰⁰⁵ and that the land was gifted to them as a quid pro quo in exchange for their support.¹⁰⁰⁶
- 678) Government official Fabio Enrique Dario also verified that the paramilitaries were at Hacienda Santa Fé at the direction of the government.¹⁰⁰⁷
- 679) Inagrosa Management was told the State selected the target, in this case, Hacienda Santa Fé, as part of a plan to put pressure on businesses.¹⁰⁰⁸ As a result of the State's planning and instruction, the paramilitaries arrived at the Hacienda.
- 680) To ensure that the paramilitaries had the means to commit land takings and other violations, the State provided them with weapons and support.¹⁰⁰⁹ Interviews with former members of the State, paramilitaries, and pro-government land paramilitaries have revealed how the State provided the paramilitaries with the means and the support necessary to exercise its will.¹⁰¹⁰

¹⁰⁰⁴ Expert Statement of Prof. Justin Wolfe at ¶ 58 (**CES-02**).

¹⁰⁰⁵ Witness Statement of Luis Gutierrez – Memorial – SPA at ¶¶ 42, 73, 89 (**CWS-02**); Witness Statement of Jaime Francisco Henrriquez Cruz – Memorial -SPA at ¶ 16, 35 (**CWS-06**).

¹⁰⁰⁶ Witness Statement of Luis Gutierrez – Memorial – SPA at ¶¶ 42, 73 (**CWS-02**).

¹⁰⁰⁷ Witness Statement of Luis Gutierrez – Memorial – SPA at ¶ 82 (**CWS-02**).

¹⁰⁰⁸ Witness Statement of Luis Gutierrez – Memorial – SPA at ¶ 82 (**CWS-02**).

¹⁰⁰⁹ Infobae, *"How the paramilitary army Rosario Murillo put together for her husband,"* Daniel Ortega works, May 26, 2019 (**C-0034-ENG**).

¹⁰¹⁰ Infobae, *"How the paramilitary army Rosario Murillo put together for her husband,"* Daniel Ortega works, May 26, 2019 (**C-0034-ENG**).

681) Edgardo Antonio Solís Arias, a member of the paramilitaries, spoke to *La Prensa* newspaper and described how the paramilitaries were armed to remove blockades set up by protestors. In his own words:

“All of us were given weapons, shotguns so that we could clean the blocks, and as proof of that we have videos.”¹⁰¹¹

682) According to information provided to Mr. Gutierrez by an anonymous employee from the Ministry of Agriculture, Cattle Raising and Forestry (‘MAGFOR’), the police station of San Rafael del Norte provided guns to the paramilitaries at Hacienda Santa Fé.¹⁰¹²

c) The Government Admits the Connection Between the Paramilitaries and the Police

683) As noted, President Ortega has admitted a connection between paramilitaries and the State in saying that the paramilitaries are “volunteer police.”¹⁰¹³ President Ortega is the ‘supreme chief’ of the National Police and can command and dismiss them at will.¹⁰¹⁴ An admission from President Ortega is meaningful and compelling.¹⁰¹⁵

684) Other Government members also have referred to the paramilitaries as “volunteer police,” including Nicaraguan Vice Minister of Foreign Affairs Valdrack Jaentschke.¹⁰¹⁶

¹⁰¹¹ Infobae, “How the paramilitary army Rosario Murillo put together for her husband,” Daniel Ortega works, May 26, 2019 (C-0034-ENG).

¹⁰¹² Witness Statement of Luis Gutierrez – Memorial – SPA at ¶ 129 (CWS-02).

¹⁰¹³ Video: Euronews, Interview of Nicaragua’s President Daniel Ortega on Country’s Deadly Crisis, Uploaded July 30, 2018 (C-0031-ENG).

¹⁰¹⁴ Video: Euronews, Interview of Nicaragua’s President Daniel Ortega on Country’s Deadly Crisis, Uploaded July 30, 2018 (C-0031-ENG).

¹⁰¹⁵ Human Rights Watch, “Crackdown in Nicaragua: Torture, Ill-Treatment and Prosecutions,” June 2019 at p.2 (C-0023-ENG).

¹⁰¹⁶ Al Jazeera, “Upfront: Who is responsible for violence in Nicaragua: September 28, 2018 (C-0033-ENG).

- 685) The recognition of paramilitaries as voluntary police under Nicaraguan law demonstrates the State's control over the paramilitaries. According to Nicaraguan law, volunteers are dependent on the State and are accountable to certain State authorities.¹⁰¹⁷
- 686) To the extent that the volunteer police are part of the police, they incur state responsibility under ASRIWA Article 4. To the extent that they are directed and controlled, the State incurs responsibility under ASRIWA Article 8. However, there is no need to establish direction and control in the case of the voluntary police because of their role as members of an organ of the state under ASRIWA Article 4.
- 687) Furthermore, a report by independent observers (GIEI), on the protests in Nicaragua between April 18, 2018 and May 30, 2018, discusses how the paramilitaries have been involved in government efforts such as quelling protests and have been recognized by the Government as voluntary police.¹⁰¹⁸
- 688) Specifically, the report discusses how President Ortega's government relied heavily on paramilitaries to attack protesters and outlines how military weapons were used by the police and paramilitaries against protesters opposing President Ortega.¹⁰¹⁹
- 689) The State maintained a level of control over the paramilitaries who were a party to the armed land invasions both generally and specifically at Hacienda Santa Fé.

¹⁰¹⁷ The Organization, Functions, Career, and Special Regime of Social Security of the National Police (hereinafter "National Police Law") came into force on July 17, 2014; The Voluntary Police of the Sandinista Police (hereinafter "Voluntary Police Law") entered into force on November 15, 1983 (C-0038-ENG); see also Nicaragua Investiga, "Paramilitaries are Paid with Village Money, for being 'volunteer police,'" July 31, 2018, July 31, 2018 (C-0008-ENG).

¹⁰¹⁸ Giancarlo Fiorella, "Analysis of Nicaragua's Paramilitary Arsenal," February 12, 2019 (C-0032-ENG)

¹⁰¹⁹ Giancarlo Fiorella, "Analysis of Nicaragua's Paramilitary Arsenal" February 12, 2019 (C-0032-ENG).

d) The State Exercised Control Through Municipalities and National Police

690) To organize the campaign of land takings and oppression, the Government used municipal structures and national police to recruit, direct, and organize the paramilitaries.¹⁰²⁰

691) The link between the State, the municipalities, the national police, and the paramilitaries has been identified and explained in several reports by NGOs and other international organizations. The Group of Interdisciplinary Independent Experts (GIEI) found that the State collaborated with paramilitary groups using municipal structures and national police. The GIEI Report states that:

Another significant feature that could be observed was the mutual collaboration between several State organs or structures linked to the State: the National Police, Mayor's offices, and parapolice groups. The latter include the aforementioned shock groups, as well as more lethal and organized factions that are commonly known as 'paramilitary' or 'parapolice.' These groups comprise unidentified individuals who bear firearms, sometimes even weapons of war, and act in coordination with the official police forces.¹⁰²¹

692) The Inter-American Court of Human Rights reports the relationship between the paramilitaries and police was more than a mutual collaboration. The Inter-American Court of Human Rights Report exposes that the paramilitaries act on instructions from State institutions:

Based on the information available to the Commission, it transpires that in many cases those groups act on instructions from the National Police, or

¹⁰²⁰ Group of Interdisciplinary Independent Experts, "Report on Violent Events That Took Place in Nicaragua between April 18th and May 30th: Executive Summary," Dec. 21, 2108, p. 2 (**C-0024-ENG**).

¹⁰²¹ Group of Interdisciplinary Independent Experts, "Report on Violent Events That Took Place in Nicaragua between April 18th and May 30th: Executive Summary," Dec. 21, 2108, p. 2 (**C-0024-ENG**).

else are organized and armed, and act on instructions from local mayors or district political secretaries.¹⁰²²

- 693) In a Human Rights Watch Report, Crackdown in Nicaragua, Human Rights Watch reveals that ‘political secretaries’ served as the means of communication between paramilitary groups and the police:

During the 2018 protests, political secretaries in the police and other agencies were told to collaborate with armed pro-government groups in responding to anti-government protests.¹⁰²³

- 694) In Nicaragua, political secretaries are municipal employees who act as liaisons between government agencies, the current political party, and the paramilitaries.¹⁰²⁴ The level of coordination and collaboration described explains how the Government used local municipalities and national police to create, assist, and control the paramilitaries.

- 695) The police were active aids in the expropriation of Hacienda Santa Fé. When the paramilitaries arrived on June 16, 2018, the police disarmed the Hacienda Santa Fé workers.¹⁰²⁵ On August 4, 2018, Police Captain Herrera, along with the police themselves, escorted a paramilitary leader into Hacienda Santa Fé.¹⁰²⁶ During these events, the police used their power and authority over the paramilitary to assist and direct the execution of the land taking at Hacienda Santa Fé.

¹⁰²² InterAmerican Commission on Human Rights (ACHR), “*Gross Human Rights Violations in the Context of Social Protest in Nicaragua*,” ¶ 122. (C-0025-ENG)

¹⁰²³ Human Rights Watch, “*Crackdown in Nicaragua: Torture, Ill-Treatment and Prosecutions*,” June 2019 p. 15 (C-0023-ENG).

¹⁰²⁴ Human Rights Watch, “*Crackdown in Nicaragua: Torture, Ill-Treatment and Prosecutions*,” June 2019 p. 15 (C-0023-ENG). In Nicaragua, government institutions are intimately connected to the FSLN, as every agency, including the National Police and the Attorney General’s Office, has an employee who is also a ‘political secretary’.

¹⁰²⁵ Witness Statement of Luis Gutierrez – Memorial – SPA at ¶ 16 (CWS-02).

¹⁰²⁶ Witness Statement of Luis Gutierrez – Memorial – SPA at ¶ 48 (CWS-02).

696) The municipal authorities aided the taking of Hacienda Santa Fé. On August 6, 2018, Mayor Herrera came to Hacienda Santa Fé, escorted by the police, to give a speech to the paramilitaries in which she promised to provide water and electricity to them and stated that they could make plans of projects of what they wanted to do with the lands at Hacienda Santa Fé.¹⁰²⁷

e) The State Controlled the Paramilitaries

697) Nicaragua directed land invasions to reward supporters and punish critics. After the paramilitaries successfully took the lands, the government-maintained control over its supporters through the use of their municipalities and political organs.¹⁰²⁸

698) The systemic approach used by the paramilitaries as explained by an El Confidential newspaper source:

coordinator's first task is to take the core group that will settle on the elected property. The orientation they have received since May is to invade the properties of businessmen who have expressed their opposition to the Government. Once the first group is installed, they attract more people.¹⁰²⁹

699) The coordinators are generally appointed by the local political secretary or an official of the corresponding City Hall. The coordinators maintain a connection as part of the control mechanism with the municipality and organize services such as water for occupied lands.¹⁰³⁰

¹⁰²⁷ Witness Statement of Luis Gutierrez – Memorial – SPA at ¶ 51 (CWS-02).

¹⁰²⁸ Confidential News Article, “Who are the Tomatierras?”, last updated 18 November 2019, at 0000154 (C-0011-ENG).

¹⁰²⁹ Confidential News Article, “Who are the Tomatierras?”, last updated 18 November 2019, at 0000154 (C-0011-ENG).

¹⁰³⁰ Confidential News Article, “Who are the Tomatierras?”, last updated 18 November 2019, p. 17 (C-0011-ENG).

- 700) The Government promised that it would legalize land that had been taken. There is evidence of occupiers paying coordinators for the land.¹⁰³¹
- 701) Mayor Herrera, escorted by the police, promised that “city hall would provide new water, electricity, and housing infrastructure’ for the paramilitaries.”¹⁰³² This promise was based on the condition they organize themselves.¹⁰³³
- 702) The Civic Alliance for Democracy and Justice statement said that Mayor Leonidas Centeno forced the paramilitary at Hacienda Santa Fé to attend a meeting on July 16, 2018.¹⁰³⁴ The Civic Alliance for Democracy and Justice Facebook post explained that if members of the paramilitary do not attend the rally, their land shall be taken away.¹⁰³⁵
- 703) This level of management exercised by the municipality overrunning the occupation indicates that the State maintains actual control over the paramilitaries at Hacienda Santa Fé.

3. Acknowledgement & Adoption – ASRIWA Article 11

- 704) ASRIWA Article 11 recognizes that a State is responsible for the actions of private individuals where the State acknowledges and adopts the conduct of those persons as their own. This responsibility under ASRIWA Article 11 is additional to state responsibility arising under ASRIWA Article 8.

¹⁰³¹ Confidential News Article, “*Who are the Tomatierras?*”, last updated 18 November 2019, at (C-0011-ENG); La Prensa, The Ortega government will legalize the stolen lands in the last two months in Nicaragua, July 21, 2018 (C-0222-ENG).

¹⁰³² Witness Statement of Luis Gutierrez – Memorial – SPA at ¶ 101 (CWS-02).

¹⁰³³ Witness Statement of Luis Gutierrez – Memorial – SPA at ¶ 102 (CWS-02).

¹⁰³⁴ Figure 2 - Civic Alliance Facebook Post – July 16, 2018 (C-0035-SPA).

¹⁰³⁵ Figure 2 - Civic Alliance Facebook Post – July 16, 2018 (C-0035-SPA).

705) To be clear there is no need to consider ASRIWA Articles 8 or 11 in the event of responsibility by any person who is a part of the government as there is complete responsibility under ASRIWA Article 4

706) ASRIWA Article 11 provides:

Conduct which is not attributable to a State under the preceding articles shall nevertheless be considered an act of that State under international law if and to the extent that the State acknowledges and adopts the conduct in question as its own.¹⁰³⁶

707) The Nicaraguan Government repeatedly has acknowledged and adopted the actions of the paramilitaries. For example, President Ortega, as the ‘supreme chief’ of the National Police, has the power to command and dismiss the police at will.¹⁰³⁷

708) In a TV interview with *Euronews* on July 30, 2018, Nicaraguan President Ortega acknowledged a connection between paramilitaries and the State. President Ortega admitted that the paramilitaries are volunteer police.¹⁰³⁸ President Ortega confirmed:

Interviewer: There are many examples that the paramilitary collaborating with the security forces. The BBC went to Nicaragua to a town and said that they were collaborating with the police without any kind of shame.

President Ortega: No, here what we have is called the voluntary police.

Interviewer: No, but these were masked people because the volunteer police are not masked.

¹⁰³⁶ Int’l Law Commission Draft Articles of State Responsibility for Internationally Wrongful Acts with commentaries, Vol. II, Part Two, 2001, Article 11 at p. 52. **(CL-0017-ENG)**

¹⁰³⁷ Human Rights Watch, “*Crackdown in Nicaragua: Torture, Ill-Treatment and Prosecutions*,” June 2019 p. 2 **(C-0023-ENG)**.

¹⁰³⁸ Video: Euronews, Interview of Nicaragua’s President Daniel Ortega on Country’s Deadly Crisis, Uploaded July 30, 2018 **(C-0031-ENG)**.

President Ortega: Because the voluntary police in special operations are masked in all the time. There are even countries in Latin America where judges are masked so that they don't get killed.

Interviewer: So, these people who define themselves as paramilitaries were still voluntary police?

President Ortega: Yes, that's right. They are volunteer police officers.¹⁰³⁹

709) Two of the highest members of the Nicaraguan National Police admitted that members of the National police directed the volunteer police. On February 2, 2019, Francisco Diaz, the Nicaraguan National Police Director General, and Jaime Vanegas, Inspector General of the Nicaraguan National Police, admitted:

Police Director General Francisco Diaz: We have what we call the volunteer police. That is not new in the law of the National Police. If you review the National Police Law, the Volunteer Police is established there and also has its specific missions and this volunteer police participates together with the Professional Police in preventive actions.

Interviewer: It is correct that these what you call volunteer policemen participated against the protesters?

Police Director General Francisco Diaz: But they are duly legalized. They participated as established by our legal norms, not as established by what the Nicaraguan right says.

Interviewer: Why were they wearing masks?

Police Director General Francisco Diaz: No, not all of them were volunteer policemen also our policemen professionals. Legally, it is established that we can use what we call the ski mask to protect their identity. Many of them who were in civilian clothes were not volunteer policemen, they were our professional policemen. Most of them were professional policemen in undercover work.

¹⁰³⁹ Transcript excerpt of Euronews TV, Interview with Nicaragua's President Daniel Ortega on the Country's Deadly Crisis, Uploaded July 30, 2018 [Minutes 8:40-9:37] (C-0124-ENG).

Police Inspector General Jaime Vanegas: who directed all the actions is a professional policeman and the volunteer policemen are there for support.¹⁰⁴⁰

710) Both of these statements from the most senior members of the executive branch of government confirm that the paramilitaries in Nicaragua were agents of the government or part of a branch of the government.

711) According to José Pallais, a former member of the Justice Commission of the National Assembly, President Ortega's Government ordered the land takings. In an interview with the local press, Mr. Pallais stated:

These invasions are directed by the Government with the intention of getting revenge for breaching the agreement (consensus model)¹⁰⁴¹ that was in place.¹⁰⁴²

712) Rafael Solís, a former magistrate of the Supreme Court of Justice (CSJ) and ex-ally of President Ortega, also revealed that the President and Vice-President Rosario Murillo allowed the arming of people to remove barriers raised by protestors.¹⁰⁴³

713) In Mayor Herrera's speech to the paramilitaries, on August 6, 2018, she promised to assist the paramilitaries to stay at Hacienda Santa Fé.¹⁰⁴⁴ Mayor Herrera stated that she would ensure the paramilitaries were given water and

¹⁰⁴⁰ Transcript -Dagbladet TV interview to Francisco Diaz, Director General of the Nicaraguan National Police, uploaded February 4, 2019 **(C-0133-SPA-ENG)**; see also Dagbladet TV interview to Francisco Diaz, Director General of the Nicaraguan National Police, uploaded February 4, 2019 **(C-0132-SPA)**.

¹⁰⁴¹ "For a decade, the Government and COSEP had a dialogue and consensus model in which only economic matters were discussed and not the institutional and political situation of the country." La Prensa, "Government Goes Against the Properties of The Private Sector," June 21, 2018 **(C-0016-ENG)**.

¹⁰⁴² La Prensa, "Government Goes Against the Properties of The Private Sector," June 21, 2018 **(C-0016-ENG)**.

¹⁰⁴³ Video: Euronews, Interview of Nicaragua's President Daniel Ortega on Country's Deadly Crisis, Uploaded July 30, 2018 **(C-0031-ENG)**

¹⁰⁴⁴ Witness Statement of Luis Gutierrez – Memorial – SPA at ¶ 101 **(CWS-02)**.

electricity to live at the plantation and that the paramilitaries only would have to organize themselves.¹⁰⁴⁵

714) Nicaragua acknowledges and adopts the actions of the paramilitary and identifies with the actions taken by the paramilitaries.

f) Conclusion on State Responsibility

715) The fact that the voluntary police are a part of the executive branch of the government is a matter set out in Nicaraguan law.¹⁰⁴⁶ This confirmation under Nicaragua's internal law means that state responsibility applies under ASRIWA Article 4 to the actions of the paramilitaries, as voluntary police as well as the actions of the national police.

716) Because of this overarching responsibility, there is no need to consider the application of ASRIWA Articles 8 and 11, but state responsibility would attach under those articles in the absence of the application of ASRIWA Article 4.

717) Further, the international law of state responsibility expressly makes Nicaragua responsible for the actions of government officials, including elected officials at all levels of government and those who work in government departments, such as MAGFOR.

B. Facts Demonstrating Expropriation

718) The invasions led by the paramilitaries, the police and the other government officials resulted in the outright seizure of Hacienda Santa Fé lands and assets. The property was looted of items of value: the avocado crop was left in a condition where it was totally lost, including the avocado tree orchards; the

¹⁰⁴⁵ Witness Statement of Luis Gutierrez – Memorial – SPA at ¶ 101 (CWS-02).

¹⁰⁴⁶ Ley de la Policía Nacional, (1996) at article 1 (C-0222-SPA); Expert Statement of Prof. Justice Wolfe at ¶ 33. (CES-02).

nurseries were destroyed.¹⁰⁴⁷ Livestock was taken along with valuable farm equipment.¹⁰⁴⁸ The corporate officers were looted, ransacked and the corporate records destroyed.¹⁰⁴⁹ The land was systemically divided up and redistributed and called the El Pavón.¹⁰⁵⁰ The protected ecological reserve was deforested and destroyed putting wildlife and biodiversity at risk.¹⁰⁵¹

719) Nicaragua admits that it has taken total control of the Hacienda Santa Fé as recently as 2021 yet it refused to unconditionally return Hacienda Santa Fé to Inagrosa.¹⁰⁵²

720) There was no lawful act that justified the destruction of the business. The seizure was total. Every element of the ransacking, looting and taking of Inagrosa's operations at Hacienda Santa Fé constituted a taking by the state.

721) Nicaragua failed to comply with the obligations of CAFTA Article 10.7. This was not a taking for a public purpose, or under due process and compliant with the obligations in CAFTA Article 10.5 and no payment of compensation was made for the taking. As a result, this was an unlawful expropriation.

1. *Improper Purpose*

722) CAFTA Article 10.7 sets out four elements for a lawful expropriation. Those elements are public purpose; non-discrimination; payment; and due process and treatment in accordance with Article 10.5

¹⁰⁴⁷ Witness Statement of Carlos J. Rondón – Memorial – ENG at ¶¶ 96-98, **(CWS-01)**.

¹⁰⁴⁸ Witness Statement of Luis Gutierrez – Memorial – SPA at ¶ 95-97 **(CWS-02)**.

¹⁰⁴⁹ Witness Statement of Carlos J. Rondón – Memorial – ENG at ¶ 99-100, **(CWS-01)**;

¹⁰⁵⁰ Witness Statement of Luis Gutierrez – Memorial – SPA at ¶ 62 **(CWS-02)**.

¹⁰⁵¹ Witness Statement of Carlos J. Rondón – Memorial – ENG at ¶10,233 **(CWS-01)**;

¹⁰⁵² Letter from Foley Hoag LLP to Appleton & Associates regarding offer to return Hacienda Santa Fe, September 9, 2021 **(C-0116-ENG)**; Letter from Appleton & Associates to Foley Hoag LLP – September 9, 2021 **(C-0018-ENG)**

723) The reasons why this expropriation in Nicaragua is unlawful are the following:

- a) Nicaragua did not take the land for a public purpose.
- b) Nicaragua acted in an arbitrary and discriminatory manner.
- c) Nicaragua failed to follow due process and Article 10.5 of the CAFTA Treaty.
- d) Nicaragua failed to provide fair market value compensation after the taking.

724) The Investor has suffered considerable damage arising from the actions of Nicaragua. These damages are reviewed in the Damages Section below.

725) The Investor has provided a detailed and thorough valuation of damages. These damages include a principal amount related to the loss of the underlying investment, and then an interest component to address the effect of the loss of use of the funds for the last eighteen years.

726) The definition of public purpose and public policy is broad, and a wide ambit is provided to the state to permit expropriation where there is a legitimate public policy issue. However, the requirement that the expropriation is for a public purpose expressly is in the CAFTA and the Tribunal must consider the issue.

727) In this arbitration, there is evidence that the primary reason for the land taking was for political purposes, and not for legitimate public purposes. There was no process and no official statement about the taking. The burden to establish that the taking for a public purpose falls on the Respondent. It cannot meet that burden in these particular circumstances.

728) International tribunals have recognized that the Tribunal must consider this issue and that it will rule that there was no public purpose when such circumstances exist.

729) For example, in *ADC v Hungary*, the Tribunal stated:

A treaty requirement for “public interest” requires some genuine interest of the public. If mere reference to “public interest” can magically put such interest into existence, and therefore satisfy this requirement, then this requirement would be rendered meaningless since the Tribunal can imagine a situation where this requirement would not have been met.¹⁰⁵³

730) In the *Libyan Oil Concession* case, the arbitrator rejected the legitimacy of the Libyan expropriation of an oil concession on the basis that it was arbitrary as it was politically motivated.¹⁰⁵⁴

731) The ICSID Tribunal in the *LETCO* claim found that the revocation of a timber concession in Liberia was not for a bona fide public purpose.¹⁰⁵⁵

732) The US-Cuba Claims Commission in the *Walter Fletcher Smith* claim¹⁰⁵⁶ rejected the reason for a taking of land by the state as not being consistent with a *bona fide* public policy.¹⁰⁵⁷ The land in that case was taken by the state

¹⁰⁵³ *ADC Affiliate Limited and ADC & ADMC Management Limited v. The Republic of Hungary*, ICSID Case No. ARB/03/16, October 2, 2006 at ¶ 366 (**CL-0106-ENG**).

¹⁰⁵⁴ *BP v. Libya*, Award, Oct. 10, 1973 and Aug. 1, 1974, 53 ILR 297 at p. 329 (**CL-0107-ENG**).

¹⁰⁵⁵ *Liberian Eastern Timber Corp. v. Republic of Liberia*, ICSID Case No. ARB/83/2 (**CL-0108-ENG**).

¹⁰⁵⁶ Reports of Int'l Arbitral Awards, *Walter Fletcher Smith Claim* (Cuba, USA), Vol. II at pp. 913-918, May 2, 1929, at p. 915 (**CL-0109-ENG**).

¹⁰⁵⁷ Reports of Int'l Arbitral Awards, *Walter Fletcher Smith Claim* (Cuba, USA), Vol. II at pp. 913-918, May 2, 1929, at p. 915 (**CL-0109-ENG**).

and then turned over to a private concern.¹⁰⁵⁸ The tribunal found that was not a bona fide public policy.¹⁰⁵⁹

733) In deciding about the public interest, the absence of the rule of law is highly relevant in this case.

2. Failure to Provide Due Process and Fair and Equitable Treatment

734) The failure to provide due process and the rule of law are part of the obligations owed by Nicaragua under CAFTA Article 10.5's fair and equitable treatment obligation. This is also a requirement for a lawful expropriation under CAFTA Article 10.7(1).

735) Similarly, there is an action that the taking not be arbitrary or discriminatory. Given the circumstances of this outright seizure, both the due process and arbitrary principles are inter-related and co-determinative.

736) Nicaragua has an expropriation law.¹⁰⁶⁰ There was an expropriation process set out under that domestic law that was not followed in this claim. Nicaragua did not use lawful measures to expropriate Hacienda Santa Fé. After the invasion, while Inagrosa has no possession of the land, the legal title to Hacienda Santa Fe remains in the name of Inagrosa.¹⁰⁶¹

737) The failure to follow local Nicaraguan law is important. For example, the tribunal in *CMS Gas Transmission v Argentina* stated:

¹⁰⁵⁸ Reports of Int'l Arbitral Awards, Walter Fletcher Smith Claim (Cuba, USA), Vol. II at pp. 913-918, May 2, 1929, at p. 917 (**CL-0109-ENG**).

¹⁰⁵⁹ Reports of Int'l Arbitral Awards, Walter Fletcher Smith Claim (Cuba, USA), Vol. II at pp. 913-918, May 2, 1929, at p. 917 (**CL-0109-ENG**).

¹⁰⁶⁰ Expropriation Law (Decree No.229), March 9, 1976 (**C-0249-SPA**).

¹⁰⁶¹ Literal Certificate of Property Hacienda Santa Fe issued by the Jinotega Property Registry, December 17, 2019 (**C-0080-SPA**); Related Certificate of Property Hacienda Santa Fe issued by the Jinotega Property Registry, June 30, 2022 (**C-0060-SPA**).

A direct relationship can be established if those general measures are adopted in violation of specific commitments given to the investor in treaties, legislation or contracts. What is brought under the jurisdiction of the relevant (treaty) is not the general measures in themselves but the extent to which they may violate those specific commitments.¹⁰⁶²

- 738) The Memorial details several specific violations of fair and equitable treatment and full protection and security. These actions were arbitrary and discriminatory. These violations include abuse of process, gross unfairness and violations of legitimate expectations.
- 739) For greater certainty, the measures taken by Nicaragua in this arbitration that evidence a lack of good faith also must constitute further violations of CAFTA Treaty Article 10.5.

3. Failure to Provide Compensation

- 740) Nicaragua is required to provide compensation for a lawful expropriation under CAFTA Article 10.7(1).
- 741) Nicaragua confirmed in 2021 to the Investor that Nicaragua had possession and control over Hacienda Santa Fé.¹⁰⁶³ Even after the admission of possession and control, Nicaragua has refused to unconditionally return the property to its lawful owner.
- 742) The Investor has confirmed that no compensation has been paid for the taking by Nicaragua.¹⁰⁶⁴

¹⁰⁶² *CMS Gas Transmission Company v. The Argentine Republic*, Decision of the Tribunal on Objections to Jurisdiction, Case No. ARB/01/8, July 17, 2003 at ¶¶ 26 – 27. **(CL-0110-ENG)**.

¹⁰⁶³ Letter from Foley Hoag LLP to Appleton & Associates regarding offer to return Hacienda Santa Fe, September 9, 2021 **(C-0116-ENG)**

¹⁰⁶⁴ Witness Statement of Carlos Rondón – Memorial – ENG at ¶ 231 **(CWS-01)**.

4. Intensity

743) Riverside has no ability to use or enjoy its investment. The paramilitaries have destroyed all of the Hacienda Santa Fe's assets to the extent that the property has lost its value.¹⁰⁶⁵ The avocado crops have been utterly and completely destroyed or removed, the interference with management has made tending the crops impossible, and then the trees were completely decimated.¹⁰⁶⁶ Further, the standing forest in the private forest reserve was rendered valueless due to logging, leaving Inagrosa without the ability to sustainably manage and obtain revenue from the forest.¹⁰⁶⁷ As noted above, the staff and management no longer can access the property.

744) The outright seizure of the Hacienda Santa Fé lands resulted in other consequential crop losses, including:

- a) 7,000 grafted saplings and 3,000 ready to be grafted at the nursery;¹⁰⁶⁸
- b) harvest of grains and tubers¹⁰⁶⁹; and
- c) forest conservation area.¹⁰⁷⁰

745) Riverside has lost both its initial investment in the avocado project at Hacienda Santa Fé, as well as all future projected profits. Also, significant and

¹⁰⁶⁵ Witness Statement of Luis Gutierrez – Memorial – SPA at ¶ 112 (**CWS-02**); Witness Statement of Carlos J. Rondón – Memorial – ENG at ¶ 96 (**CWS-01**); Inventory of damages at Hacienda Santa Fe, August 14, 2018 (**C-0058-SPA**).

¹⁰⁶⁶ Witness Statement of Luis Gutierrez – Memorial – SPA at ¶ 59, 96 (**CWS-02**); Witness Statement of Carlos J. Rondón – Memorial – ENG at ¶¶ 97-98 (**CWS-01**); Jaime Francisco Henrriquez Cruz – Memorial -SPA at ¶¶ 31-32 (**CWS-06**)

¹⁰⁶⁷ Witness Statement of Luis Gutierrez – Memorial – SPA at ¶ 128 (**CWS-02**); Witness Statement of Carlos J. Rondón – Memorial – ENG at ¶ 100, 233 (**CWS-01**)

¹⁰⁶⁸ Witness Statement of Carlos J. Rondón – Memorial – ENG at ¶ 98 (**CWS-01**).

¹⁰⁶⁹ Witness Statement of Luis Gutierrez – Memorial – SPA at ¶ 96 (**CWS-02**).

¹⁰⁷⁰ Witness Statement of Carlos J. Rondón – Memorial – ENG at ¶ 100 (**CWS-01**).

irreparable environmental damage has occurred to the sensitive ecological conditions at Hacienda Santa Fé, including its private wildlife reserve.¹⁰⁷¹

- 746) The State has international responsibility for actions of the paramilitaries. Groups explicitly have accepted the Government's involvement in the outright seizure of the Hacienda lands.¹⁰⁷² The Civic Alliance for Democracy and Justice, for example, confirmed that the Hacienda Santa Fé was taken under the orders of Mayor Leonidas Centeno, with the ill-gotten lands later distributed arbitrarily among the paramilitaries.¹⁰⁷³
- 747) As a result, the reality of the situation is that Riverside cannot use or enjoy Hacienda Santa Fé. It has lost its land and has had its business aspirations in the avocado industry virtually destroyed.

5. Duration

- 748) The duration of the expropriation of Hacienda Santa Fé has been more than two years since the expropriation was completed when the paramilitaries permanently seized the entire hacienda on August 17, 2018, complying with the standard set out in *Wena Hotels* above.
- 749) Since the arrival of the paramilitaries on June 16, 2018 Riverside by definition has lost the ability to enjoy or control the Hacienda Santa Fé.

a) The Impact of MFN on expropriation

- 750) The operation of the MFN obligation and the 2013 Nicaragua-Russia BIT, the definition of fair and equitable interest under the CAFTA has been expanded to the broader definition under the Nicaragua-Russia BIT.

¹⁰⁷¹ Witness Statement of Carlos J. Rondón – Memorial – ENG at ¶¶ 100, 233 (CWS-01)

¹⁰⁷² Figure 2. Facebook post, dated July 16 at 9:15 PM. (C-0035-SPA).

¹⁰⁷³ Figure 3. Facebook post, dated August 26 at 8:54 a.m. (C-0036-SPA).

751) For the avoidance of doubt, the actions involved in this claim meet meets the specific definition in the CAFTA, however, a broader standard fair and equitable treatment standard is owed to the Investor due to the operation of MFN obligation. Riverside meets both standards (either under MFN or under the CAFTA) but it is entitled to receive the more favourable treatment under the Russian Treaty.

6. Compensation

752) If there is a finding of expropriation, compensation is required, even if the taking is for a public purpose, non-discriminatory, and in accordance with due process of law.¹⁰⁷⁴

753) The Hacienda Santa Fé land invasions constitute an outright seizure of the lands and a destruction of the Inagrosa business. It also constitutes a governmental interference with Riverside's investment equivalent to an expropriation. Either way, the acts in this case are both in line with past cases in which tribunals have discussed the definition of expropriation, as well as the ordinary meaning of the terms under the Treaty. Therefore, as outlined in both the Treaty and in the decisions of past cases, Riverside is entitled to compensation.

C. Facts Demonstrating a Breach of Fair and Equitable Treatment

754) Nicaragua has failed to provide the investments owned by Riverside with fair and equitable treatment. This is demonstrated where:

¹⁰⁷⁴ CAFTA Article 10.7.1(c), (CL-0001-ENG); see also *Marvin Feldman v. Mexico*, Award, 2002 WL 32818521 (December 16, 2002) at ¶ 98. (CL-0044-ENG).

- a) Nicaragua failed to act in good faith. Instead, Nicaragua acted with willful neglect of duty and engaged in an abuse of process and an arbitrary and unfair reliance upon form as part of this abuse of process.
- b) Nicaragua failed to provide due process to Inagrosa.
- c) Nicaragua wrongfully engaged in arbitrary, unfair, and capricious conduct.
- d) Nicaragua failed to consider the legitimate expectations of Inagrosa and its investor, Riverside.
- e) Nicaragua failed to provide full protection and security to Inagrosa.

755) Riverside's investment in Inagrosa was harmed with respect to the following:

- a) The conspiracy where the State acted to facilitate and assist the paramilitaries in the seizure of the Hacienda Santa Fé and its continued occupation.¹⁰⁷⁵
- b) The failure of the State to protect the legitimate ownership expectations of the foreign investors.
- c) The failure of the State to take steps to remove the unlawful occupiers.¹⁰⁷⁶
- d) The positive steps the State took to arm and equip the occupiers¹⁰⁷⁷; and
- e) The steps the State took to assist the unlawful occupiers in the taking and continued occupation at Hacienda Santa Fé¹⁰⁷⁸.

¹⁰⁷⁵ Witness Statement of Carlos J. Rondón – Memorial – ENG at ¶ 78 (CWS-01).

¹⁰⁷⁶ Letter from Carlos Rondón to Police Captain William Herrera, August 10, 2018 (C-0012-SPA).

¹⁰⁷⁷ Witness Statement of Luis Gutierrez – Memorial – SPA at ¶ 129 (CWS-02).

¹⁰⁷⁸ Witness Statement of Luis Gutierrez – Memorial – SPA at ¶¶ 101,129 (CWS-02).

- 756) The actions and omissions of the state officials during the first invasion of Hacienda Santa Fé on June 16, 2018 constitute an abuse of rights and a violation of the duty to act in good faith under the obligation of Fair and Equitable Treatment.
- 757) The police orders, issued by Commissioner Castro, not to evict the paramilitaries from the Hacienda Santa Fé¹⁰⁷⁹ and to assist in disarming the Hacienda Santa Fé workers, constituted an abuse of rights and a violation of good faith.¹⁰⁸⁰ The actions taken by volunteer police member Cristobal Luque, the officer who assaulted and threatened a Hacienda Santa Fé security guard, also constituted an abuse of power and violation of reasonable conduct.¹⁰⁸¹ Volunteer police member Cristobal Luque used his position and power as a police officer to intimidate staff.¹⁰⁸²
- 758) The police continued to act contrary to principle of good faith when on August 4, 2018, they escorted paramilitary Comandante Cinco Estrellas into Hacienda Santa Fé.¹⁰⁸³ This cannot be seen as anything other than a manifest failure to comply with the obligation of Fair and Equitable Treatment.¹⁰⁸⁴
- 759) On August 6, 2018, the police continued to evade their responsibilities when they escorted Mayor Herrera to Hacienda Santa Fé to give a speech to the

¹⁰⁷⁹ Witness Statement of Carlos J. Rondón – Memorial – ENG at ¶ 78 (**CWS-01**).

¹⁰⁸⁰ Witness Statement of Carlos J. Rondón – Memorial – ENG at ¶ 78 (**CWS-01**).

¹⁰⁸¹ The acts of the voluntary police are acts of a government organ. Ley de la Policía Nacional, 1996 at article 1 (**C-0222-SPA**); Expert Statement of Prof. Justice Wolfe at ¶ 33. (**CES-02**).

¹⁰⁸² Witness Statement of Luis Gutierrez – Memorial – SPA at ¶ 52 (**CWS-02**); Witness Statement of Carlos J. Rondón – Memorial – ENG at ¶ 78(**CWS-01**).

¹⁰⁸³ Witness Statement of Luis Gutierrez – Memorial – SPA at ¶ 49 (**CWS-02**).

¹⁰⁸⁴ J.F. O'Connor, *Good Faith in International Law* (Dartmouth Press), p. 124. (**CL-0011-ENG**). Prof. O'Connor defines good faith as, "The principle of good faith in international law is a fundamental principle from which the rule *pacta sunt servada* and other legal rules distinctively and directly related to honesty, fairness and reasonableness are derived, and the application of these rules is determined at any particular time by compelling standards of honesty, fairness and reasonableness prevailing in the international community at that time."

paramilitaries.¹⁰⁸⁵ The police have also been providing weapons to the paramilitaries in order to assist them.¹⁰⁸⁶

- 760) Nicaragua, through the police force, actively has taken steps to reduce the physical protection of the Investor's investments. They have failed to treat Hacienda Santa Fé fairly and equitably and have not acted in good faith.

D. Facts Demonstrating National Treatment and Most Favored Nation

- 761) Others lawfully possessing or owning land in the territory of Nicaragua were treated more favorably than Inagrosa. All of these measures were with respect to the establishment, acquisition, expansion, management, conduct, operation, and sale or other disposition of investments.
- 762) Such more favorable treatment to nationals of Nicaragua constituted a violation of Nicaragua's national treatment obligation in Article 10.3.
- 763) Tulane University Professor Justin Wolfe in his Expert Statement confirmed that others in Nicaragua were not subjected to unlawful seizure of their lands.¹⁰⁸⁷ Thus, more favourable treatment was provided by Nicaragua to others' investments.
- 764) Such more favorable treatment to nationals of other CAFTA Parties or to nationals of Non-CAFTA Parties constituted a violation of Nicaragua's Most Favored Nation treatment obligation in Article 10.4.
- 765) For the purposes of National Treatment and MFN Treatment, all persons possessing private land in the territory of Nicaragua, as well as those seeking protection of private landholdings, are in like circumstances to Inagrosa.

¹⁰⁸⁵ Witness Statement of Luis Gutierrez – Memorial – SPA at ¶ 103 (CWS-02).

¹⁰⁸⁶ Witness Statement of Luis Gutierrez – Memorial – SPA at ¶ 129 (CWS-02).

¹⁰⁸⁷ Expert Statement of Prof. Justin Wolfe – Memorial – ENG at ¶ 60 (CES-02).

- 766) Inagrosa received less favorable treatment with respect to the establishment, acquisition, expansion, management, conduct, operation, and sale or other disposition of investments than that received by other locals and investments of other Parties and non-Parties in Nicaragua.
- 767) Inagrosa is entitled to treatment as favorable as that provided to those in like circumstances to those investments and investors from Nicaragua and those from states other than the United States. Others in like situations were treated more favorably with respect to the establishment, acquisition, expansion, management, conduct, operation, and sale or other disposition of investments.

VII. DAMAGES

- 768) The international law principle of compensation requires Nicaragua to compensate Riverside for all loss caused to the Investment resulting from Nicaragua's violation of its international law obligations.
- 769) Riverside is required to establish a nexus between its damages and the seizure and destruction of its investment in Nicaragua under CAFTA Article 10.16. Riverside must show that the loss or damage arises from the breach of the CAFTA.
- 770) Riverside raises this claim for damages under CAFTA Articles 10.16(1)(a) and (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. Because of the outright seizure of the underlying productive asset, and the fact that it was fully controlled, the extent of damages under CAFTA Articles 10.16(1)(a) and (1)(b) is co-extensive. The complete investment has been destroyed and there is a complete loss.
- 771) Riverside has demonstrated that its Inagrosa business was rendered worthless, and that Nicaragua had international responsibility for those internationally wrongful acts. Accordingly, Riverside turns to the next step, the quantification of the damages naturally arising from the internationally wrongful measures for which Nicaragua has responsibility under international law and the CAFTA.
- 772) The main legal and accounting principles of valuation are:
- a) **The But For test** – Once a violation has been established, the remedial objective of an international tribunal is to place the injured Investor and its Investments in the position they would have been in but for the illegal conduct. In the words of the *S.D. Myers* Tribunal, "Compensation should

undo the material harm inflicted by a breach of an international obligation.”¹⁰⁸⁸

b) **Consequential damages** - In *Sapphire International Petroleum Arbitration*, the Tribunal held that:

This compensation includes the loss suffered (*damnum emergens*), for example the expenses incurred in performing the contract, and the profit lost (*lucrum cessans*), for example the net profit which the contract would have produced. The award of compensation for the lost profit or the loss of a possible benefit has been frequently allowed by international arbitral tribunals.¹⁰⁸⁹

773) **Lost Profits** - Damages for lost profits includes loss that is a foreseeable consequence of the breach, where the lost profits can be calculated with reasonable certainty.¹⁰⁹⁰

774) To this total, US\$45 million has been attributed to moral damages. Moral damages can consider the wrongful effects of the conspiracy and other wrongful actions taken by the Government against Inagrosa. They address reparative justice for non-economic losses and are a part of international law reparations. No pre-judgment interest has been ascribed to the moral damages.

¹⁰⁸⁸ *S.D. Myers* - First Partial Award, at ¶ 315 (CL-0007-ENG).

¹⁰⁸⁹ *Sapphire International Petroleum, Ltd. v. National Iranian Oil Company*, Arbitral Award, March 15, 1963, 35 ILR 136, at p.186 (CL-0048-ENG).

¹⁰⁹⁰ In J. Gillib Wetter and Stephen Schwebel “Some Little-Known Cases on Concessions - The *Greek Telephone Company Case*” (1964) 40 *British Yearbook of International Law* 216, at p. 221 (CL-0049-ENG), the Tribunal found that Greece must compensate the investor for the lost profits “for what it would have obtained” had the concession contract been implemented by the State. In *Sea-Land Service, Inc. v. Iran*, Iran, Award 135-33-1, June 20, 1984 (1984) 6 Iran-US CTR 149, p. 204 (CL-0050-ENG), the Tribunal cited its decision in *Pomeroy et al. v. Iran*, Iran - United States Claims Tribunal, Case No. 40, Award No. 50-40-3, 2 Iran-US CTR 372 (June 8, 1983) (CL-0051-ENG) as a basis for this determination.

- 775) The Treaty sets out the standard of compensation only for breaches of the expropriation obligation under Article 10.7.2.
- 776) The CAFTA sets out the standard of compensation for breaches of the Expropriation obligation under Chapter Ten. Nicaragua must pay “prompt, adequate, and effective compensation” whenever there is taking.¹⁰⁹¹ Article 10.7.3 confirms that this requires fair market value plus interest at a commercially reasonable rate.
- 777) The Treaty does not set out the standard for breaches of other provisions of the Treaty. To determine the standard of compensation for breaches of other Treaty provisions, recourse must be had to the sources of international law.

A. **Compensation for Breaches of Expropriation – CAFTA Treaty**

- 778) The Treaty contains rules in Article 10.7 that address the process for compensation in the event of expropriation. Article 10.7 provides:
1. 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.
 2. Compensation shall:
 - (a) be paid without delay.
 - (b) be equivalent to the fair market value of the expropriated investment immediately before the expropriation took place (“the date of expropriation”).

¹⁰⁹¹ CAFTA Article 10.7(1)(c). (CL-0001-ENG).

- (c) not reflect any change in value occurring because the intended expropriation had become known earlier; and
- (d) be fully realizable and freely transferable.¹⁰⁹²

B. The Standard of Compensation – Fair and Equitable Treatment

- 779) The Tribunal can award damages on the breaches of Fair and Equitable Treatment under CAFTA Article 10.5.1 in addition to damages for expropriation under CAFTA Article 10.7.
- 780) International law requires that parties be compensated for the entirety of their loss and put back into the position they would have been in but for the internationally unlawful behavior.
- 781) The principle of full reparation is provided in Article 38(1) of ASRIWA. The Commentary to Article 38(1) in ASRIWA, state that:
- an injured State is entitled to interest on the principal sum representing its loss if that sum is quantified as at an earlier date than the date of the settlement of, or judgment or award concerning, the claim and to the extent that it is necessary to ensure full reparation.¹⁰⁹³
- 782) The principle of making a Claimant whole was addressed in *Chorzów Factory*. *Chorzów Factory* provides:

The essential principle contained in the actual notion of an illegal act ... is that reparation must, as far as possible, wipe out all the consequences of the illegal act and reestablish the situation which would, in all probability, have existed if that act had not been committed. Restitution in kind, or, if this is not possible, payment of a sum corresponding to the value which a restitution in kind would bear; the award, if need be, of damages for loss sustained which would not be covered by restitution in kind or payment in

¹⁰⁹² CAFTA Treaty, Article 10.7(2)(d) (CL-0001-ENG).

¹⁰⁹³ Report of the ILC on the work of its Fifty-third Session, Official Records of the General Assembly, Fifty-sixth Session, Supplement No. 10 ((A/56/10), Ch. IV.E.2) - November 1, 2001 at p. 107 (CL-0070-ENG).

place of it - such are the principles which should serve to determine the amount of compensation for an act contrary to international law.¹⁰⁹⁴

783) The Permanent Court of International Justice in this case stated that any award must make the claimant whole, as if it had suffered no loss.¹⁰⁹⁵ Where the loss is quantifiable, any award should ensure that the claimant is compensated for the entire amount of the loss.¹⁰⁹⁶ Thus, an investor should be able to recover all damages caused to it by the government's wrongful conduct. These damages would extend to all proximate damages, including consequential damages or lost profits.

784) Judge Brower in his Concurring Opinion in *Amoco* clarified the decision of the *Chorzow Factory* case in the context of a modern valuation and business analysis as follows:

In my view Chorzow Factory presents a simple scheme: If an expropriation is lawful, the deprived property is to be awarded damages equal to 'the value of the undertaking' which it has lost, including any potential future profits, as of the date of taking; in the case of an unlawful taking, *however, either the injured party is to be actually restored to enjoyment of his property, or, should this be impossible or impractical, he is to be awarded damages equal to the greater of (i) the value of the undertaking at the date of loss (again including lost profits), judged on the basis of information available as of that date, and (ii) its value (likewise including lost profits) as shown by its probable performance subsequent to the date of loss and prior to the date of the award, based on actual post-taking experience, plus (in either alternative) any consequential damages. Apart from the fact that this is what Chorzow Factory says, it is the only*

¹⁰⁹⁴ *Factory at Chorzów* (Germ. v. Pol.), 1928 P.C.I.J. (ser. A) Judgment No. 13 ("*Chorzów Factory*"), at p. 47 (CL-0012-FR/ENG).

¹⁰⁹⁵ *Chorzów Factory*, p. 47 (CL-0012-FR/ENG).

¹⁰⁹⁶ *Chorzów Factory*, p. 47. (CL-0012-FR/ENG).

*set of principles that will guarantee just compensation to all expropriated properties.*¹⁰⁹⁷

- 785) A Tribunal should assess the extent of the economic harm suffered by the Investor and the Investment, including the extent of economic benefits foregone “in all probability.” All losses must naturally flow from the treaty violation.
- 786) On account of the egregious conduct of the Government of Nicaragua, the damages arising from a breach of CAFTA Article 10.5 are co-extensive with the damages calculated under CAFTA Article 10.7. In addition to the value of the lost business interest, all amounts would be entitled to interest at commercial market rates and costs.
- 787) As detailed above, Inagrosa was an established business with a successful and established Hass avocado orchard. Generally, the valuation of established businesses follows a Discounted Cash Flow (“DCF”) analysis.
- 788) In *CMS v. Argentina*, the Tribunal commented on the appropriateness of applying discounted cash flow analysis to damages.¹⁰⁹⁸ The CMS Tribunal stated:

This leaves the Tribunal with the DCF method, and it has no hesitation in endorsing it as the one which is the most appropriate in this case. TGN was and is a going concern. DCF Techniques have been universally adopted, including by numerous arbitral tribunals, as an appropriate method for valuating business assets.

¹⁰⁹⁷ *Amoco International Finance Corp. and The Government of the Islamic Republic of Iran, et al.* (1987) 15 Iran-US CTR 189, Concurring Opinion of Judge Brower, p. 8, ¶¶ 17-19 (emphasis added) (CL-0052-ENG).

¹⁰⁹⁸ *CMS Gas Transmission Co. v. The Republic of Argentina*, ICSID Case No. ARB/01/8, Award, April 25, 2005. (CL-0053-ENG).

789) Inagrosa was in the course of expanding its existing business.¹⁰⁹⁹ Those plans were established before the internationally unlawful acts arose and the first phase (its 200-hectare expansion) was already underway at the time of the internationally unlawful measures.¹¹⁰⁰ DCF is especially appropriate as the business in this claim was investing to create future profits when the internationally wrongful acts took place.

C. The Obligation to Pay Damages

790) As noted above, international law requires that parties be compensated for the entirety of their loss and to be put back into the position they would have been in but for the internationally unlawful behaviour.

791) The principle of full reparation is provided in Article 38(1) of the ILC Draft *Articles on State Responsibility*. The Commentary to the Draft *Articles on State Responsibility* states that:

an injured State is entitled to interest on the principal sum representing its loss, if that sum is quantified as at an earlier date than the date of the settlement of, or judgment or award concerning, the claim and to the extent that it is necessary to ensure full reparation.¹¹⁰¹

792) The international law standards for compensation requires that parties be compensated for the entirety of their losses and put back into the position they would have been in but for the internationally unlawful behaviour. The *Chorzów Factory* decision provides:

The essential principle contained in the actual notion of an illegal act ... is that reparation must, as far as possible, wipe out all the consequences of the illegal act and re-establish the situation which would, in all probability,

¹⁰⁹⁹ Witness Statement of Carlos J. Rondón – Memorial – ENG at ¶¶ 196-200 (CWS-01).

¹¹⁰⁰ Witness Statement of Carlos J. Rondón – Memorial – ENG at ¶ 71, 135 (CWS-01).

¹¹⁰¹ Factory At Chorzów (Claim for Indemnity) (The Merits), Germany v. Poland, Judgment, 13 September 1928 ¶ 125 (CL-0053-FR/ENG).

have existed if that act had not been committed. Restitution in kind, or, if this is not possible, payment of a sum corresponding to the value which a restitution in kind would bear; the award, if need be, of damages for loss sustained which would not be covered by restitution in kind or payment in place of it - such are the principles which should serve to determine the amount of compensation for an act contrary to international law.¹¹⁰²

793) In *Chorzów Factory*, the Permanent Court of International Justice stated that any award must make the claimant whole as if it had suffered no loss.¹¹⁰³

Where the loss is quantifiable, any award should ensure that the claimant is compensated for the entire amount of the loss.¹¹⁰⁴ Thus, an investor should be able to recover all damages caused to it by the government's wrongful conduct. These damages would extend to all proximate damages, including consequential damages or lost profits.¹¹⁰⁵

794) Judge Brower in his Concurring Opinion in *Amoco* clarified the decision of the *Chorzow Factory* case in the context of a modern valuation and business analysis:

In my view Chorzow Factory presents a simple scheme: If an expropriation is lawful, the deprived property is to be awarded damages equal to 'the value of the undertaking' which it has lost, including any potential future profits, as of the date of taking; in the case of an unlawful taking, however, either the injured party is to be actually restored to enjoyment of his property, or, should this be impossible or impractical, he is to be awarded damages equal to the greater of (i) the value of the undertaking at the date of loss (again including lost profits), judged on the basis of information available as of that date, and (ii) its value (likewise

¹¹⁰² *The Factory at Chorzów (Claim for Indemnity) (The Merits), Germany v. Poland*, Judgment, 13 September 1928, ¶ 125 [emphasis added] (CL-0054-FR/ENG).

¹¹⁰³ *Factory At Chorzów (Claim for Indemnity) (The Merits), Germany v. Poland, Judgment*, 13 September 1928 ¶ 125 (CL-0053-FR/ENG).

¹¹⁰⁴ *Factory At Chorzów (Claim for Indemnity) (The Merits), Germany v. Poland, Judgment*, 13 September 1928 ¶ 125 (CL-0053-FR/ENG).

¹¹⁰⁵ *Factory At Chorzów (Claim for Indemnity) (The Merits), Germany v. Poland, Judgment*, 13 September 1928 ¶ 125 (CL-0053-FR/ENG).

including lost profits) as shown by its probable performance subsequent to the date of loss and prior to the date of the award, based on actual post-taking experience, plus (in either alternative) any consequential damages. Apart from the fact that this is what Chorzow Factory says, it is the only set of principles that will guarantee just compensation to all expropriated properties.¹¹⁰⁶

795) Hence, a Tribunal should assess the extent of the economic harm suffered by Riverside and its investments, including the extent of economic benefits foregone “in all probability”.

796) All losses must naturally flow from the treaty violation.¹¹⁰⁷

D. The Standard of Compensation

797) The Treaty’s expropriation provisions address the process for compensation in the event of expropriation.

798) The ASRIWA summarize the international law on the matter in Article 36 stating:

1. The State responsible for an internationally wrongful act is under an obligation to compensate for the damage caused thereby, insofar as such damage is not made good by restitution.

2. The compensation shall cover any financially assessable damage including loss of profits insofar as it is established.¹¹⁰⁸

799) Damages arising for a breach of an obligation in CAFTA Article 10.4 will essentially be calculated on the same basis as damages under Treaty Article

¹¹⁰⁶ *Amoco International Finance Corp. and The Government of the Islamic Republic of Iran, et al.* (1987) 15 Iran- US CTR 189, Concurring Opinion of Judge Brower (“*Amoco v. Iran*, Concurring Opinion of Judge Brower”), at 300–02, ¶¶ 17–19. (CL-0052-ENG).

¹¹⁰⁷ *S.D. Myers v. Government of Canada*, (Second Partial Award) (21 October 2002) at ¶ 122 (CL-0064-ENG). Also ASRIWA at art. 36, p. 98 (CL-0017-ENG).

¹¹⁰⁸ ASRIWA at art. 36, p. 98 (CL-0017-ENG).

10.5. The damages would be the fair market value of the real property that has been deprived and interest at commercial market rates at the time that the wrongful conduct took place.

800) The international law principle of compensation requires Nicaragua to compensate the Investor for all loss caused to the Investor and its Investment resulting from Respondent's violation of its international law obligations.

801) The main legal and accounting principles of valuation are:

a) **The But For test** – Once a violation has been established, the remedial objective of an international tribunal is to place the injured Investor and its Investments in the position they would have been in but for the illegal conduct. In the words of the *S.D. Myers* NAFTA Tribunal, “Compensation should undo the material harm inflicted by a breach of an international obligation.”¹¹⁰⁹

b) **Consequential damages** - In *Sapphire International Petroleum Arbitration*, the Tribunal held that:

This compensation includes the loss suffered (*damnum emergens*), for example the expenses incurred in performing the contract, and the profit lost (*lucrum cessans*), for example the net profit which the contract would have obtained. The award of compensation for the lost profit or the loss of a possible benefit has been frequently allowed by international arbitral tribunals.¹¹¹⁰

¹¹⁰⁹ *S. D. Myers* - First Partial Award, at ¶ 315, (CL-0007); *S.D. Myers v. Government of Canada*, (Second Partial Award) 21 October 2002, at ¶ 122 (CL-0064-ENG).

¹¹¹⁰ *Sapphire International Petroleums Ltd. v. National Iranian Oil Company*, Arbitral Award, March 15, 1963, 35 ILR 136 (“Sapphire - Award”), at p. 186 (CL-0048-ENG).

- c) **Lost Profits** - Damages for lost profits includes loss that is a foreseeable consequence of the breach, where the lost profits can be calculated with reasonable certainty.¹¹¹¹
- d) **Interest and Costs** - International tribunals have broad discretion to take into account all relevant circumstances, including equitable considerations on a case-by-case basis, to ensure that full compensation ensues.¹¹¹² These types of considerations usually take the form of an award dealing with opportunity loss (that is, interest of some form) and awards of costs.

E. Interest

- 802) The CAFTA tells this Tribunal in Article 10.7 that it must award interest upon the fair market value of the investment at the time of the expropriation. Under international law, interest also may be claimed on any sum awarded by an international tribunal. Interest is to ensure that a claimant receives full compensation. Interest must be applied from the time at which damage occurs until any compensation paid is due.
- 803) The law is settled that interest must be paid on damages for losses arising from the internationally wrongful conduct of a state.¹¹¹³ It is settled that interest

¹¹¹¹ In J. Gillib Wetter and Stephen Schwebel "Some Little-Known Cases on Concessions - The Greek Telephone Company Case" (1964) 40 British Yearbook of International Law 216 ("Gillib and Schwebel (1964)"), at p. 221, the Tribunal found that Greece must compensate the investor for the lost profits "for what it would have obtained" had the concession contract been implemented by the State, (**CL-0049-ENG**); In *Sea-Land Service, Inc. v. Iran*, Iran, Award 135-33-1, June 20, 1984 (1984) 6 Iran-US CTR 149 (**CL-0050-ENG**), the Tribunal cited its decision in *Pomeroy et al. v. Iran*, Iran - United States Claims Tribunal, Case No. 40, Award No. 50-40-3, 2 Iran-US CTR 372 (June 8, 1983,) as a basis for this determination (**CL-0051-ENG**).

¹¹¹² *Compañía del Desarrollo de Santa Elena, S.A. v. Republic of Costa Rica*, Case No. ARB/96/1, Final Award (February 17, 2000) ("Santa Elena - Award"), at ¶¶ 90-92, (**CL-0055**). This view was also maintained by a number of Iran-US Claims Tribunal awards such as *Phillips Petroleum Co. Iran v. Iran*, Iran - United States Claims Tribunal, Case No. 39, Award 425-39-2, 29 June 1989, 21 Iran-US CTR 79 ("Phillips Petroleum - Award"), at ¶¶ 111-112, 157 (**CL-0056-ENG**).

¹¹¹³ ASRIWA at Art. 38, p. 107 (**CL-0017-ENG**).

is awarded on a compound basis.¹¹¹⁴ This is consistent with recent awards which provide for compound interest as a basis for putting the harmed party in the position they would have been in but for the internationally wrongful act of the government.¹¹¹⁵

804) The CAFTA provides some guidance on the interest applicable in this claim. The damages have been suffered in Nicaraguan Cordoba's and US dollars. Article 10.7 of the CAFTA addresses the situation where damages are suffered in a currency that is not "freely usable" such as the Nicaraguan Cordoba. The Treaty requires that the Cordoba amounts be converted to a freely usable currency and that a commercial interest rate for that freely usable currency be applied. CAFTA Article 10.7 (3) and (4) states:

3. If the fair market value is denominated in a freely usable currency, the compensation paid shall be no less than the fair market value on the date of expropriation, plus interest at a commercially reasonable rate for that currency, accrued from the date of expropriation until the date of payment.

4. If the fair market value is denominated in a currency that is not freely usable,

(a) the fair market value on the date of expropriation, converted into a freely usable currency at the market rate of exchange prevailing on that date, plus

(b) interest, at a commercially reasonable rate for that freely usable currency, accrued from the date of expropriation until the date of payment.

¹¹¹⁴ Gold Reserve Inc. v. Bolivarian Republic of Venezuela, Award, ICSID Case No. ARB(AF)/09/1, September 22, 2014, at ¶ 854 (**CL-0057-ENG**); Occidental Petroleum Corporation, Occidental Exploration and Production Company (OEPC) v. Ecuador, Award, October 5, 2012, at ¶ 834 (**CL-0058-ENG**); see generally *Compania de Aguas Del Aconquija S.A. and Vivendi Universal S.A. v. Argentine Republic*, Case No. ARB/97/3, August 20, 2007, at 9.2. (**CL-0059-ENG**)

¹¹¹⁵ Borzu Sabahi, *Compensation and Restitution in Investor-State Arbitration: Principles and Practice* (New York, Oxford University Press: 2011), p.152 (**CL-0062-ENG**). Colon J. and Knoll M., *Prejudgment Interest in International Arbitration*, Fordham University Legal Studies Research Paper No.

- 805) A “freely usable” currency is defined in the IMF’s Articles of Agreement as a member’s currency that the Fund determines is, in fact, widely used to make payments for international transactions and is widely traded in the principal exchange markets.¹¹¹⁶ Freely usable currencies are used in the IMF special drawing rights (SDRs). The last IMF determination was in August 2022.¹¹¹⁷ There are five freely usable currencies which include the US dollar, the Japanese Yen, the Chinese Yuan, the Pound Sterling and the Euro.¹¹¹⁸
- 806) Under paragraphs 3 or 4 of CAFTA Article 10.07, the applicable interest rate will be a “commercially reasonable rate” relating to a freely usable currency rather than the Nicaraguan Cordoba.
- 807) As this claim involves damages denominated in US dollars and in Nicaraguan Cordobas, the Cordoba damages have been converted into US dollars. Commercially reasonable interest rates applicable to US dollar investments have been applied by the valuation team pursuant to the terms of CAFTA Article 10.7.4.
- a) The Expert Valuation Statement of Vimal Kotecha (**CES-01**) sets out interest calculations in Appendix 8 and it is clearly shown in the summaries in Table 11.¹¹¹⁹ Mr. Kotecha has relied upon the Nicaraguan civil interest rate to best approximate commercial interest rates in Nicaragua in 2018. The domestic court interest rate at the time of the invasion was 9%.¹¹²⁰

¹¹¹⁶ IMF Articles of Agreement, Article XXX(f) (Bates 0005306) (**C-0242-ENG**).

¹¹¹⁷ International Monetary Fund Press Release No. 22/281 – IMF Determines New Currency Amounts for the SDR Valuation Basket, July 29, 2022 (**C-0212-ENG**).

¹¹¹⁸ International Monetary Fund Press Release No. 22/281 – IMF Determines New Currency Amounts for the SDR Valuation Basket, July 29, 2022 (**C-0212-ENG**).

¹¹¹⁹ Expert Valuation Statement of Vimal Kotecha – Schedule 8. (**CES-01**)

¹¹²⁰ Article 3402 of the Nicaraguan Civil Code (**CL-0034-SPA**) sets the interest rate for debts at 9%.

- b) Although simple interest has been used in international arbitration there is a growing tendency to use a compound interest rate.¹¹²¹ Notably, more recent cases have consistently applied compound interest.

F. Arbitration & Legal Costs

808) The 2006 ICSID Arbitration Rules permit the awarding of costs to the successful party. Costs are typically considered separately from professional fees, which are often treated in a similar manner. These are claimed in a separate submission after award or partial award has been rendered.

809) ICSID Convention Rule 28 provides:

Rule 28

Cost of Proceeding

(1) Without prejudice to the final decision on the payment of the cost of the proceeding, the Tribunal may, unless otherwise agreed by the parties, decide:

(a) at any stage of the proceeding, the portion which each party shall pay, pursuant to Administrative and Financial Regulation 14, of the fees and expenses of the Tribunal and the charges for the use of the facilities of the Centre.

(b) with respect to any part of the proceeding, that the related costs (as determined by the Secretary-General) shall be borne entirely or in a particular share by one of the parties.

810) 2006 ICISD Convention Rule 47(1)(j) and ICSID Rule 28 allows the Tribunal to order costs in its final award.. ICSID Rule 28(b) explicitly provides that the Tribunal may in its discretion award costs to the successful party in respect of costs for legal representation.

¹¹²¹ Jeffery Colon and Michael Knoll, Prejudgment Interest in International Arbitration, Fordham University Legal Studies Research Paper No. 1029710, at p. 10 (CL-0060-ENG); Borzu Sabahi, *Compensation and Restitution in Investor-State Arbitration: Principles and Practice* (New York, Oxford University Press: 2011) at p. 152. (CL-0062-ENG).

VIII. FACTUAL BASIS FOR DAMAGES IN THIS CLAIM

- 811) Riverside made investments into its Nicaraguan investment, Inagrosa and Hacienda Santa Fé, since at least 1997.¹¹²²
- 812) In addition, Inagrosa reinvested its profits into the business operations. This included approximately \$1 million invested in 2013 in building employee housing at Hacienda Santa Fé (funded by a fully paid off \$1 million loan from the Latin American Agricultural Development Bank)¹¹²³ and in reinvested profits.
- 813) The Latin American Agricultural Development Bank informed Inagrosa management at the time of its 2013 employee housing loan that the value of the Hacienda Santa Fé property was US\$22 million.¹¹²⁴
- 814) The Expert Valuation Statement has assessed the land value of the Hacienda Santa Fé property at the time of the seizure at US\$38 million.¹¹²⁵ This value is based upon comparative land values for producing and plantable Hass avocado lands in Mexico set out in the Expert Statement of Carlos Pfister (**CES-03**).¹¹²⁶ This value is for the land alone. No amount has been included in Appendix 7 of the Expert Valuation Statement to account for the loss of Inagrosa's operating business.

¹¹²² Witness Statement of Mona Winger – Memorial – ENG at ¶ 10-11 (**CWS-05**); Witness Statement of Melva Jo Winger de Rondón – Memorial – ENG at ¶ 26 (**CWS-03**); Witness Statement of Melvin Winger – Memorial – ENG at ¶ 8 (**CWS-04**).

¹¹²³ LAAD loan payment and cancelation LAAD lien on Hacienda Santa Fé (Public Instrument No. 1 dated January 6, 2016) (**C-0181-SPA**).

¹¹²⁴ Witness Statement of Carlos J. Rondón – Memorial – ENG at ¶ 42 (**CWS-01**).

¹¹²⁵ Expert Valuation Statement of Vimal Kotecha at Appendix 7 and Table 10 (**CES-01**).

¹¹²⁶ Expert Valuation Statement of Vimal Kotecha at Appendix 7- (**CES-01**); Also see the Expert Statement of Carlos Pfister – Executive Summary (**CES-03**).

A. Loss of the 2018 Crop

- 815) Avocado harvest begins in July and can go until November at Hacienda Santa Fé.¹¹²⁷ The 2018 invasion occurred before the 2018 avocado harvest took place.¹¹²⁸
- 816) The avocado trees that had been planted by Inagrosa were destroyed by the invaders in the summer of 2018.¹¹²⁹ There were 16,000 mature and producing avocado trees planted on 40 hectares (100 acres) in 2018.¹¹³⁰ The orchard had 400 Hass avocado trees per hectare.¹¹³¹
- 817) Mature annual avocado production was expected to be approximately 53kg/tree¹¹³² at an export price of \$6/kg.¹¹³³ This results in an annual crop value of \$450 per tree. With 400 trees/ha, that results in \$180,000 revenue/ha/yr.
- 818) With the 40 ha of already producing avocado trees in 2018, the 2018 crop would have resulted in at least 848,000 kg of Hass avocado worth generating almost US\$5.1 million in export revenue if sold in the US market.

¹¹²⁷ Witness Statement of Carlos J. Rondón – Memorial – ENG at ¶ 171 (CWS-01).

¹¹²⁸ Witness Statement of Carlos J. Rondón – Memorial – ENG at ¶ 177 (CWS-01).

¹¹²⁹ Witness Statement of Carlos J. Rondón – Memorial – ENG at ¶¶ 96-98, 232 (CWS-01).

¹¹³⁰ Witness Statement of Carlos J. Rondón – Memorial – ENG at ¶130 (CWS-01).

¹¹³¹ Witness Statement of Carlos J. Rondón – Memorial – ENG at ¶130 (CWS-01).

¹¹³² Witness Statement of Carlos J. Rondón – Memorial – ENG at ¶ 97 (CWS-01). 1999. Revista Chapingo Serie Horticultura 5:89-94. G. Adar, "The Annual Production and Utilization of Dry Matter of an Avocado (*Persea americana* Mill.) Tree" (C-0138-ENG).

¹¹³³ Expert Valuation Statement of Vimal Kotecha– Memorial – ENG at Appendix 3 and also -Appendix 3, Table 2 (CES-01).

B. Loss of the plant nursery

- 819) The plant nursery was a key driver of the expansion program for the avocado plantation (and also for the sustainable forest).
- 820) At the time of the invasions, there were 7,000 avocado grafted saplings and 3,000 non-grated saplings in the nursery.¹¹³⁴ The cost to develop and graft an avocado tree was approximately US\$14.55 per tree.¹¹³⁵
- 821) Inagrosa management believed that farmers outside of Hacienda Santa Fé could pursue avocado tree development. Such farms would require seedlings developed by Inagrosa's nursery and crop processing expertise from Inagrosa.¹¹³⁶ These would add additional business lines to the Investment and enhance economic diversification for the overall Nicaraguan agricultural sector in this region of the country.¹¹³⁷
- 822) Inagrosa management could obtain additional revenue from selling avocado by-products such as avocado oil manufacture.¹¹³⁸ The Investment completed successful tests of avocado oil manufacturing in 2017.¹¹³⁹ Both operations

¹¹³⁴ Witness Statement of Carlos J. Rondón – Memorial – ENG at ¶ 71 (CWS-01); Witness Statement of Luis Gutierrez – Memorial – SPA at ¶ 167 (CWS-02).

¹¹³⁵ Witness Statement of Carlos J. Rondón – Memorial – ENG at ¶ 70 (CWS-01); Witness Statement of Luis Gutierrez – Memorial – SPA at ¶ 166 (CWS-02).

¹¹³⁶ Witness Statement of Carlos J. Rondón – Memorial – ENG at ¶ 196 (CWS-01).

¹¹³⁷ Management Representation Letter from Riverside Coffee, LLC to Richter Inc., September 12, 2022 at ¶ 36 (C-0055-ENG).

¹¹³⁸ Management Representation Letter from Riverside Coffee, LLC to Richter Inc., September 12, 2022 at ¶ 37 (C-0055-ENG).

¹¹³⁹ Witness Statement of Carlos J. Rondón – Memorial – ENG at ¶ 176 (CWS-01); Witness Statement of Luis Gutierrez – Memorial – SPA at ¶ 174 (CWS-02).

would add to Inagrosa's revenues.¹¹⁴⁰ The additional crop volumes would benefit from Inagrosa's existing economies of scale and markets.¹¹⁴¹

C. Specific Basis for Damages

- 823) Chartered Business Valuator, Vimal Kotecha, from Richter Inc. prepared a valuation report for the Investor, the Expert Valuation Statement of Vimal Kotecha (**CES-01**). Mr. Kotecha is a chartered business valuator and professional accountant.¹¹⁴²
- 824) The Expert Valuation Statement of Vimal Kotecha (**CES-01**) sets out an independent expert calculation of the quantification of the damage sustained by the Investor and its Investments.¹¹⁴³ As more fully set out in the *Valuation Report*, the Investor has suffered substantial loss.
- 825) Based on the expert valuation report of Vimal Kotecha, a chartered business valuator with Richter, Inc, the fair market value of the damages arising from the taking of Hacienda Santa Fé was **US\$644,098,011**¹¹⁴⁴ when valuing the fully operationalized business.
- 826) The Expert Valuation Statement also provided an alternative valuation of **US\$159 million (rounded from US \$158,821,277)** when valuing the more limited business expansion underway at the time of the taking.¹¹⁴⁵

¹¹⁴⁰ Management Representation Letter from Riverside Coffee, LLC to Richter Inc., September 12, 2022 at ¶¶ 36-37 (**C-0055-ENG**).

¹¹⁴¹ Management Representation Letter from Riverside Coffee, LLC to Richter Inc., September 12, 2022 at ¶ 30 (**C-0055-ENG**).

¹¹⁴² Expert Valuation Statement of Vimal Kotecha– Memorial – ENG at Appendix 14 (**CES-01**).

¹¹⁴³ Expert Valuation Statement of Vimal Kotecha– Memorial – ENG at ¶ 3.1- 3.3(**CES-01**).

¹¹⁴⁴ Expert Valuation Statement of Vimal Kotecha– Memorial – ENG at ¶ 3.1 (see Table 1) (**CES-01**).

¹¹⁴⁵ Expert Valuation Statement of Vimal Kotecha – Memorial–ENG- at Appendix 9- Table 12 (**CES-01**).

- 827) This more restricted model does not attribute any value to the overall expansion underway and focused on the active growing areas and but the 200-hectare Hass avocado expansion already underway at Hacienda Santa Fé at the time of the Invasion. This model does not include the US\$45 million for moral damages for harm, stress, humiliation, and suffering which like costs for legal representation, disbursements and arbitration costs must be added to this total. With moral damages (and net of costs for legal representation, disbursements, and the arbitration) the total is not less than **US\$204 million**.
- 828) The fair market value of the Investor's avocado business is valued after taxes.¹¹⁴⁶ Table 1 in the Expert Valuation Statement sets out a summary of valuation losses.¹¹⁴⁷

Table 1 – Net Present Value at different Discount Rates and time periods

| Economic Loss - Summary in \$USD | |
|---|--------------------|
| Economic Loss, before interest | 437,051,603 |
| Interest ⁽¹⁾ | 207,046,408 |
| Economic Loss, including interest | 644,098,011 |

(1) 9% compounded interest was applied to the Economic Loss from the Expropriation Date.

- 829) The total fair market value of the economic losses assessed by the expert valuator is **US\$644,098,011**.¹¹⁴⁸ Moral damages of \$45 million bring the total losses to **US\$ 689,098,011** (rounded to **US\$689 million**).
- 830) Under international law, Riverside is entitled to full compensation from Nicaragua for all harm caused to it and to its investments resulting from

¹¹⁴⁶ The Corporate Tax Rate in Nicaragua is 30%. See Deloitte International Tax Nicaragua Highlights 2019, January 2019, at p. 1 (**C-0171-ENG**).

¹¹⁴⁷ Expert Valuation Statement of Vimal Kotecha – Memorial–ENG- at Table 1 (**CE-01**).

¹¹⁴⁸ Expert Valuation Statement of Vimal Kotecha – Memorial–ENG- at Table 1 (**CE-01**).

Nicaragua's unlawful actions. The purpose of damages is to restore the investment to the position it would have been in "but for" Nicaragua's internationally wrongful actions. The well-established international law compensation principle is that damages should wipe out the consequences of the wrongful act and put the harmed party back to the *status quo*.¹¹⁴⁹ The calculation of damages also needs to take into account what would have been earned by the Investment but for Nicaragua's unlawful actions.

- 831) In *CMS v. Argentina*, the Tribunal commented on the appropriateness of applying discounted cash flow analysis. The Tribunal stated:

This leaves the Tribunal with the DCF method, and it has no hesitation in endorsing it as the one which is the most appropriate in this case. TGN was and is a going concern. DCF Techniques have been universally adopted, including by numerous arbitral tribunals, as an appropriate method for valuating business assets.¹¹⁵⁰

- 832) In *S.D. Myers v. Canada*, the respondent considered the same type of income valuation approach followed by Mr. Kotecha. The *S.D. Myers* Tribunal held in relation to the losses suffered by S.D. Myers International (SDMI) that:

The Tribunal concludes that compensation should be awarded for the overall economic losses sustained by SDMI that are a proximate result of Canada's measure, not only those that appear on the balance sheet of its investment.¹¹⁵¹

¹¹⁴⁹ *Case Concerning the Factory at Chorzów*, Merits Award, Permanent Court of International Justice, September 13, 1928, PCIJ, Series A, No. 17, at p. 47 (**CL-0054-ENG**); *Amco Asia Corp. v. Indonesia*, Award, ICSID Reports Volume 1, 413 (Nov. 20, 1984), at ¶ 267 (**CL-0063-ENG**) adopted the reasoning of the Chorzow Factory Case, calling Chorzow the "basic precedent" in international law on compensation.

¹¹⁵⁰ *CMS Gas - Award*, at ¶ 416. (**CL-0053-ENG**).

¹¹⁵¹ *S.D. Myers v. Government of Canada*, (Second Partial Award), 21 October 2002) at ¶ 122 (**CL-0064-ENG**).

- 833) The *S.D. Myers* Tribunal later reiterated its decision stating “As stated above, the Tribunal has determined that the appropriate compensation is the value of SDMI’s lost net income stream”.¹¹⁵²
- 834) This tribunal should follow this same approach when assessing the fair market value of the investment.

1. Avocado Business Valuation

- 835) The total value of the avocado business is based on Inagrosa’s business/ financial plan to expand its operations from 40 hectares to 1000 hectares.¹¹⁵³
- 836) Inagrosa started to implement the expansion in 2018 before the invasion occurred.¹¹⁵⁴ This included the planting and grafting of new avocado saplings for planting¹¹⁵⁵ and preparations of the newest Hass avocado orchards on a 200-hectare area of Hacienda Santa Fé.¹¹⁵⁶ This was part of an overall 1000-hectare avocado development that Management decided to undertake in Spring 2018.¹¹⁵⁷

2. Forest Valuation

- 837) The private forest is described in detail above in Part IV of this Memorial.
- 838) Luis Gutierrez in his witness statement (**CWS-02**) discusses the results of his 2018 tree census, which was completed shortly before the invasion.¹¹⁵⁸

¹¹⁵² *S.D. Myers v. Canada*, (Second Partial Award) at ¶ 174 (**CL-0064-ENG**).

¹¹⁵³ Witness Statement of Carlos J. Rondón – Memorial – ENG at ¶ 196 (**CWS-01**).

¹¹⁵⁴ Management Representation Letter from Riverside Coffee, LLC to Richter Inc., September 12, 2022 at ¶ 32 (**C-0055-ENG**).

¹¹⁵⁵ Witness Statement of Carlos Rondón – Memorial – ENG at ¶¶ 199-200 (**CWS-01**).

¹¹⁵⁶ Witness Statement of Carlos Rondón – Memorial – ENG at ¶¶ 199-200 (**CWS-01**).

¹¹⁵⁷ Witness Statement of Carlos Rondón – Memorial – ENG at ¶ 196 (**CWS-01**).

¹¹⁵⁸ Witness Statement of Luis Gutierrez – Memorial – SPA at ¶ 22 (**CWS-02**).

- 839) As discussed in Part IV above, the private forest could be sustainably managed to provide an additional revenue source for Inagrosa. By 2018, approximately 20,300 black walnut trees were planted at Hacienda Santa Fé.¹¹⁵⁹
- 840) The Witness Statement of Tom Miller (**CWS-07**) discusses Miller Veneer's interest in obtaining the wood from the 1000 rare and valuable mature granadillo trees. These would have been purchased by, and transported to, Miller Veneer, a large American user of hardwoods operating in the state of Indiana in the United States.¹¹⁶⁰ Mr. Miller had been working with Inagrosa to obtain hardwoods from the forest since 1992.¹¹⁶¹
- 841) The Expert Valuation Statement (**CES-01**) considers the losses arising from the deforestation and destruction of the environmentally sensitive private forest reserve in Appendix 6 of Mr. Kotecha's valuation statement.¹¹⁶²
- 842) The preliminary value of the private forest lands used for black walnut has been valued at US \$5,100,000.¹¹⁶³ This value referenced in the Expert Valuation Statement only represents the value of the black walnut and does not include the value of the 1000 mature granadillo trees to be sustainably harvested at the rare forest reserve.

D. Summary of Valuation Report

- 843) The Investor's losses arising from Nicaragua's failure to act in accordance with its Treaty Obligations have been calculated by Vimal Kotecha in the *Valuation*

¹¹⁵⁹ Witness Statement of Carlos Rondón – Memorial – ENG at ¶ 57 (**CWS-01**); Witness Statement of Luis Gutierrez – Memorial – SPA at ¶ 22 (**CWS-02**).

¹¹⁶⁰ Witness Statement of Tom Miller – Memorial – ENG at ¶ 13 (**CWS-07**).

¹¹⁶¹ Witness Statement of Tom Miller – Memorial – ENG at ¶¶ 6-10 (**CWS-07**).

¹¹⁶² Expert Valuation Statement of Vimal Kotecha – Memorial – ENG at Appendix 6 (**CES-01**).

¹¹⁶³ Witness Statement of Carlos J. Rondón – Memorial – ENG at ¶ 60 (**CWS-01**).

Statement. On the basis of the international law of damages, the Investor's compensable losses include:

- a) Economic Losses;
 - b) Moral Damages;
 - c) Interest; and
 - d) Professional fees and costs of this arbitration.
- 844) The award of interest is to compensate the Investor and the Investment from the time of the breach through to the date of the award.
- 845) The valuation methodology considers the investments on a going concern basis. It then applied a discounted cash flow approach. In so doing, the valuator considered:
- a) The certainty adjusted for business risk of the operation of the Investor's business for Hass avocados.
 - b) The total is the volume of revenue lost by the Investment.
 - c) The revenue loss is then assessed to produce a loss of cash flow attributable to the Investment after deducting all appropriate expenses and considering the required capital investment. This figure constitutes the net cash flow discounted to its present value equivalent at the date of loss using a risk-adjusted rate of return considered to be appropriate.
 - d) An amount has been added for the loss of the private forest. To this, an applicable rate of interest is added to this base lost cash flow figure to produce the total amount required to put the Investor and the Investment in the position they would have been in but for the wrongful acts of the

Republic of Nicaragua, net of the costs of this arbitration, including professional representation.¹¹⁶⁴

- 846) Moral damages of **US\$45 million** claimed by Riverside have then been added to these Economic losses.
- 847) The *Valuation Statement* calculates the total fair market damage at the first date of the taking resulting from Nicaragua's actions that were inconsistent with its Treaty obligations. The Report calculates the resulting damages that flow from the economic losses.¹¹⁶⁵
- 848) Mr. Kotecha used the discounted cash flow approach (DCF) for economic loss, which was considered the most appropriate and reliable.¹¹⁶⁶ Cash flows are identified for a period into the future and discounted to the date of the analysis by an appropriate discount rate.
- 849) The Expert *Valuation Statement* calculates future losses using Riverside's Business Forecast. It uses the DCF approach to determine the economic losses sustained over the future loss period. A DCF approach calculates the present value of future losses by converting the losses to their present value equivalent. The discount rate used to convert the future losses to their present value equivalent reflects both the time value of money and the perceived risk of the loss of cash flows arising as forecast. The DCF approach is based on a projection of future cash flows that would have been realized from the ongoing

¹¹⁶⁴ Expert Valuation Statement of Vimal Kotecha– Memorial – ENG – Appendix 4 – Methodology at pages 26-29 (**CER-01**).

¹¹⁶⁵ Expert Valuation Statement of Vimal Kotecha – Memorial – ENG at Appendix 4 – Methodology at pages 26-29 (**CES-01**).

¹¹⁶⁶ Expert Valuation Statement of Vimal Kotecha – Memorial – ENG at Appendix 4 – Methodology at ¶A1.12 (**CES-01**).

operations of the affected investment.¹¹⁶⁷ The cash flows to be discounted are determined on an after-tax basis.

850) In arriving at the discounted cash flows, Mr. Kotecha identified the revenue that would be generated from the investment.

851) Mr. Kotecha adjusted the after-tax equity rate of return to be applied to those cash flows having regard to the weighted average cost of capital as set out in the Valuation Report.¹¹⁶⁸ The cost of equity represents the after-tax cost of equity to the Investment. The Valuation Report determined the cost of equity to be approximately 17%.¹¹⁶⁹

852) The *Valuation Statement* concludes the damages for Economic loss incurred by the Investor is:

| | |
|-----------------|--|
| Economic Losses | US\$ 644,098,044. ¹¹⁷⁰ |
|-----------------|--|

853) The Investor also provides an alternative damage mode of a midpoint of not less than **US\$159 million** based upon valuing the more limited business expansion that had commenced at the time of the taking.¹¹⁷¹ This alternative model does not attribute any value to the overall expansion that was not underway. Instead, it is focused on the active growing areas and the 200-hectare Hass avocado expansion underway at Hacienda Santa Fé at the time of the Invasion.¹¹⁷²

¹¹⁶⁷ Expert Valuation Statement of Vimal Kotecha – Memorial – ENG at Appendix 4 – Methodology at pages 26-29 (**CES-01**).

¹¹⁶⁸ Expert Valuation Statement of Vimal Kotecha – Memorial–ENG- at Appendix 5 (**CES-01**).

¹¹⁶⁹ Expert Valuation Statement of Vimal Kotecha – Memorial–ENG- at Appendix 5 (**CER-01**).

¹¹⁷⁰ Expert Valuation Statement of Vimal Kotecha – Memorial–ENG- at Table 1 (**CES-01**).

¹¹⁷¹ Expert Valuation Statement of Vimal Kotecha – Memorial–ENG- at Appendix 9, Table 12 (**CES-01**).

¹¹⁷² Expert Valuation Statement of Vimal Kotecha – Memorial–ENG- at Appendix 4 – Methodology, at ¶A9.2. (**CES-01**).

- 854) This model does not include the **US\$45 million** for moral damages for harm, stress, humiliation, and suffering which like costs for legal representation, disbursements and arbitration costs must be added to this total. With moral damages (and net of costs for legal representation, disbursements, and the arbitration) the total is not less than a range between **US\$204 million**.
- 855) Legal costs and Moral damages have not been included in this total and are an appropriate addition at the discretion of the Tribunal.
- 856) Mr. Kotecha's calculations are set out in a summary table in Table 1 of his Valuation Report.¹¹⁷³

¹¹⁷³ Expert Valuation Statement of Vimal Kotecha – Memorial–ENG- at ¶ 3.1-3.3 (CES-01).

IX. MORAL DAMAGES

- 857) Moral damages address reparative justice for non-economic losses and are a part of international law reparations. They also address the concept of accountability that is associated with the international law remedy of satisfaction. Riverside is entitled to the moral damages for the reputational, psychological, and emotional harm suffered by Inagrosa and its management due to the unlawful entrance into private property and internationally wrongful measures taken by Nicaragua, including systemic violations arising from measures contrary to the rule of law and the Treaty.
- 858) In this claim, the actions of Nicaragua have implied physical threat and unlawful entrance into private property. This ill-treatment involved contravenes the norms according to which civilized nations are expected to act.
- 859) The International Court of Justice held in the *Diallo* case that “non-material injury can be established even without specific evidence.”¹¹⁷⁴
- 860) The International Law Commission Articles on State Responsibility for Internationally Wrongful Acts (ASRIWA) Article 31 provides that a state must make full reparation for any “injury” caused to another state by any “internationally wrongful act.”¹¹⁷⁵ The ILC recognized moral damages. The definition of “injury” includes “any damage, whether material or moral.”¹¹⁷⁶

¹¹⁷⁴ Ahmadou Sadio Diallo (Republic of Guinea v. Democratic Republic of the Congo), ICJ, Judgment – Compensation, at ¶ 21 (CL-0086-ENG).

¹¹⁷⁵ The ILC clearly recognized the concept of moral damages. See also the associated discussion of satisfaction in Article 30. Yearbook of the International Law Commission, Int'l Law Commission Draft Articles of State Responsibility for Internationally Wrongful Acts with commentaries, Vol. II, Part Two, 2001, Article 30 and 31 (CL-0065-ENG).

¹¹⁷⁶ Int'l Law Commission Draft Articles of State Responsibility for Internationally Wrongful Acts with commentaries, Vol. II, Part Two, 2001, Article 31 (CL-0065-ENG).

- 861) The existence of moral damages has been a longstanding part of reparation in international law, as stated in the *Lusitania* case:

[E]ven if moral damages are “difficult to measure or estimate by money standards” it nevertheless remains that they are “very real” and must therefore be compensated.¹¹⁷⁷

- 862) The Commentary to ASRIWA provides an illustration of the types of moral damages can arise:

Non-material damage is generally understood to encompass loss of loved ones, pain and suffering as well as the affront to sensibilities associated with an intrusion on the person, home or private life.¹¹⁷⁸

- 863) In International Law Commission noted in its 2001 Yearbook that moral damages were available for a personal affront associated with an intrusion on one’s home or private life.¹¹⁷⁹ The ILC noted:

“Moral” damage includes such items as individual pain and suffering, loss of loved ones or personal affront associated with an intrusion on one’s home or private life. Questions of reparation for such forms of damage are dealt with in more detail in chapter II of this Part.¹¹⁸⁰

- 864) This is an arbitration where moral damages should be awarded by the Tribunal.

¹¹⁷⁷ Rep. Int’l Arbitral Awards, Mixed Claims Commission, United States - Germany, Opinion in the *Lusitania* Cases, Vol. VII pp. 32-44, November 1923 - October 1939, at p. 40 (CL-0016-ENG).

¹¹⁷⁸ Yearbook of the International Law Commission, Int’l Law Commission Draft Articles of State Responsibility for Internationally Wrongful Acts with commentaries, Vol. II, Part Two, 2001, Commentary on Article 36, at ¶ 16 (CL-0065-ENG).

¹¹⁷⁹ Yearbook of the International Law Commission, 2001, Vol 2, Part Two – Article 31(2), pp. 91-92 at ¶ 5 (CL-0065-ENG).

¹¹⁸⁰ Yearbook of the International Law Commission, 2001, Vol 2, Part Two – Article 31(2), pp. 91-92 at ¶ 5 (CL-0065-ENG).

- 865) In this case, the police and the voluntary police in the form of armed paramilitaries made an unlawful mass intrusion in the headquarters of Inagrosa. In addition, they caused significant anxiety and suffering upon the senior management of the company due to repeated armed death threats and the use of squads of armed persons with instructions to kill those members of the Inagrosa management along with the physical invasion of private property. That is exactly the type of exceptional situation designed for the awarding of moral damages.
- 866) As the *Lusitania* tribunal explained, moral damages are appropriate where there is “an injury inflicted resulting in mental suffering, injury to [the claimant’s] feelings, humiliation, shame, degradation, loss of social position or injury to his credit or reputation.”¹¹⁸¹
- 867) In *Arif v. Moldova*, the ICSID Tribunal noted:
- There is no doubt that moral damages may be awarded in international law (see, for example, Article 31(2) of the International Law Commission’s Articles on State Responsibility) although they are an exceptional remedy.¹¹⁸²
- 868) In 2008 and 2009 alone, five arbitration awards discussed the issue of moral damages. In one such case, *Desert Line Projects LLC v. Yemen*, the arbitral tribunal awarded the successful claimant moral damages of US \$1 million under an investment treaty.¹¹⁸³

¹¹⁸¹ Rep. Int’l Arbitral Awards, Mixed Claims Commission, United States - Germany, *Opinion in the Lusitania Cases*, Vol. VII pp. 32-44, November 1923 - October 1939, at p. 40 (CL-0016-ENG); See also P. Dumberry and S. Cusson, *Journal of Damages in International Arbitration, Wrong Direction: Exceptional Circumstances and Moral Damages in Int’l Investment Arbitration*, 2014, at p. 33. (CL-0067-ENG).

¹¹⁸² *Arif v Moldova*, Award, 8 April 2013, at ¶ 584 (CL-0068-ENG).

¹¹⁸³ *Desert Line Projects L.L.C. v. Yemen*, ICSID Case No. ARB/05/17, Award, Feb. 6, 2008, ¶ 290. (CL-0069-ENG).

- 869) The Tribunal held that Yemen should provide compensation to a corporation for its officers' psychological suffering (in this case, the "stress and anxiety of being harassed, threatened and detained") directly resulting from physical actions, i.e., physical duress and other related measures of coercion, interference or intimidation conducted by army/police forces.¹¹⁸⁴
- 870) The *Desert Line* Tribunal also recognized that an injury to a corporation's credit, reputation and prestige constitutes moral damages that can be compensated in a final award.¹¹⁸⁵ The tribunal's award marks one of the earliest awards for moral damages.¹¹⁸⁶
- 871) Additionally, the ILC provides the following illustration of the type of moral damages that can properly be the subject for compensated:
- non-material damage is generally understood to encompass loss of loved ones, pain and suffering as well as the affront to sensibilities associated with an intrusion on the person, home or private life.¹¹⁸⁷
- 872) The *Desert Line* Tribunal awarded \$1 million for the physiological suffering, stress, and anxiety that corporate officials suffered due to the actions of Yemen.¹¹⁸⁸
- 873) The measures surrounding the expropriation of Riverside's investments contravenes Nicaragua's Treaty obligation in Article 10.7. Nicaragua failed to

¹¹⁸⁴ *Desert Line v. Yemen*, Award, at ¶ 290. (CL-0069-ENG).

¹¹⁸⁵ *Desert Line v. Yemen*, Award, Feb. 6, 2008, at ¶ 289. (CL-0069-ENG).

¹¹⁸⁶ *Desert Line v. Yemen*, Award, (CL-0069-ENG). However, Tribunals have raised invited claimants to make moral damages submissions such as the Pope & Talbot NAFTA Tribunal which invited Pope & Talbot to seek moral damages for improper prosecutorial threats made by Canada, but the successful claimant declined to make any moral damages claim notwithstanding the Tribunal's invitation.

¹¹⁸⁷ Report of the ILC on the work of its Fifty-third Session, Official Records of the General Assembly, Fifty-sixth Session, Supplement No. 10 ((A/56/10), Ch. IV.E.2) - November 1, 2001, ASRIWA Article 36, ¶ 16. (CL-0070-ENG)

¹¹⁸⁸ *Desert Line v. Yemen*, Award at ¶ 290. See also the \$30 million moral damages award in *Mohammed Al-Kharafi & Sons v Libya*, Final Arbitral Award, p. 366 (CL-0071-ENG).

treat Riverside's investments in the manner required by international law. The wrongful expropriation under the Treaty also morally damaged Riverside Coffee, Inagrosa and its shareholders, management, employees, and equity holders.

- 874) Moral damages in international law compensate a claimant for an injury that resulted in "mental suffering, injury to feelings, humiliation, shame, degradation, loss of social position or injury to his credit or reputation."¹¹⁸⁹ This type of damage is increasingly common in international arbitration law. Moral damages have even been awarded by tribunals for loss of reputation and psychological suffering,¹¹⁹⁰ however, damages for loss of reputation and psychological suffering are awarded in exceptional circumstances.¹¹⁹¹
- 875) In *Desert Line Projects v. Yemen*, the Tribunal considered the cause of the moral damages to be "stress and anxiety of being harassed, threatened and detained", and "intimidated" as well as the "significant injury" to the claimant's reputation and prestige.¹¹⁹²
- 876) In *Desert Line v. Yemen*, the tribunal awarded \$1 million of moral damages on account of the physiological suffering, stress, and anxiety that corporate officials suffered due to the actions of Yemen.¹¹⁹³

¹¹⁸⁹ Rep. Int'l Arbitral Awards, Mixed Claims Commission, United States - Germany, Opinion in the *Lusitania Cases*, Vol. VII pp. 32-44, November 1923 - October 1939, p. 40. (CL-0066-ENG).

¹¹⁹⁰ In *Desert Line Projects v Yemen*, ICSID Arb/05/17, (CL-0069-ENG). the tribunal awarded \$1 million in moral damages to the claimant on account of the physiological suffering, stress, and anxiety that their corporate officials suffered due to the actions of Yemen. Similarly, in *Mohammed Al-Kharafi & Sons v Libya*, Final Arbitral Award, March 22, 2013, the tribunal awarded \$30 million for the loss of reputation caused by Libya. (CL-0071-ENG).

¹¹⁹¹ *Desert Line Projects v Yemen*, ICSID Arb/05/17 ¶ 289 (CL-0069-ENG).

¹¹⁹² *Desert Line Projects v Yemen*, ICSID Arb/05/17 ¶ 286 (CL-0069-ENG).

¹¹⁹³ Int'l Law Commission Draft Articles of State Responsibility for Internationally Wrongful Acts with commentaries, Vol. II, Part Two, 2001, Commentary on Article 36, at ¶ 16 (CL-0070-ENG).

877) The *Lemire v. Ukraine* award provides a test of factors that may constitute exceptional circumstances:

the States actions imply physical threat, illegal detention or other analogous situations in which the ill-treatment contravenes the norms according to which civilized nations are expected to act.

- the State's actions cause a deterioration of health, stress, anxiety, other mental suffering such as humiliation, shame and degradation, or loss of reputation, credit and social position; and
- both cause and effect are grave or substantial.¹¹⁹⁴

878) Moral damages are appropriate here considering that the expropriation was caused by an unlawful invasion for which Nicaragua has international responsibility. In addition, the egregious circumstances here include the existence of death threats against members of Inagrosa management, the collaboration of the state (including the police) in these death threats, and the government measures towards Inagrosa itself constituted measures that violated legitimate expectations, were in breach of due process, fairness and the rule of law.

B. Moral Damages in International Human Rights Law

879) International human rights tribunals have also considered moral damages.¹¹⁹⁵ However, the same physical injury also may lead to other forms of emotional harm, which must be assessed as moral damage. Conversely, some "mental" injury (such as, for instance, humiliation or defamation) may not only be purely moral and may, indeed, cause pecuniary losses (e.g., medical expenses).¹¹⁹⁶

¹¹⁹⁴ *Joseph Charles Lemire v. Ukraine*, ICSID Case No. ARB/06/18 ¶ 333, Award. (CL-0072-ENG).

¹¹⁹⁵ P. Dumberry and S. Cusson, Wrong Direction. (CL-0067-ENG).

¹¹⁹⁶ P. Dumberry and S. Cusson, Wrong Direction at 249 ("This non-pecuniary damage may include both the suffering and distress caused to the direct victims and their next of kin, and the impairment of values that are highly significant to them, as well as other sufferings that cannot be assessed in financial terms."). (CL-0067-ENG).

- 880) On the issue of compensation for moral damages in the *Lusitania* cases, Umpire Parker made the following observation:

That one injured is, under the rules of international law, entitled to be compensated for an injury inflicted resulting in mental suffering, injury to his feelings, humiliation, shame, degradation, loss of social position or injury to his credit or to his reputation, there can be no doubt, and such compensation should be commensurate to the injury. Such damages are very real, and the mere fact that they are difficult to measure or estimate by money standards makes them nonetheless real and affords no reason why the injured person should not be compensated therefore as compensatory damages, but not as a penalty.¹¹⁹⁷

- 881) A more comprehensive definition of moral damages has been developed by Prof. Stephen Wittich in an article on *Non-Material Damage and Monetary Reparation in International Law* in the *Finnish Yearbook of International Law*.¹¹⁹⁸ Prof. Wittich includes within moral damages personal injury that does not produce loss of income or generate financial expenses.¹¹⁹⁹ He suggests that moral damages also comprise the various forms of emotional harm, such as indignity, humiliation, shame, defamation, injury to reputation and feelings, but also harm resulting from the loss of loved ones and, on a more general basis, from the loss of enjoyment of life.¹²⁰⁰ Non-material damage of a “pathological” character, such as mental stress, anguish, anxiety, pain, suffering, stress, nervous strain, fright, fear, threat or shock; and minor

¹¹⁹⁷ Opinion in the *Lusitania* Cases, United States–Germany Mixed Claims Commission, 1923, VII UNRIAA 32, at p. 40 (emphasis added) **(CL-0016-ENG)**.

¹¹⁹⁸ Stephan Wittich, *Non-Material Damage and Monetary Reparation in International Law*, 15 *Finnish Y.B. Int'l L.*, p. 329 (2004) (Wittich uses the term “non-material” instead of “moral” damages) **(CL-0073-ENG)**.

¹¹⁹⁹ Stephan Wittich, *Non-Material Damage and Monetary Reparation in International Law*, 15 *Finnish Y.B. Int'l L.*, p. 329 (2004) (Wittich uses the term “non-material” instead of “moral” damages) **(CL-0073-ENG)**.

¹²⁰⁰ Stephan Wittich, *Non-Material Damage and Monetary Reparation in International Law*, 15 *Finnish Y.B. Int'l L.*, p. 329 (2004) (Wittich uses the term “non-material” instead of “moral” damages) **(CL-0073-ENG)**.

consequences of a wrongful act, e.g., the affront associated with the mere fact of a breach or, as it is sometimes called, “legal injury.”¹²⁰¹

- 882) Prof. Dumberry adds that moral damages apply to injury to the credit and reputation of a legal entity, i.e., a corporation.¹²⁰²

C. How A Tribunal May Remediate through Moral Damages

- 883) Under the ASRIWA, compensation is the appropriate reparation measure whenever *restitutio in integrum* is not possible. In this case, it is not possible to provide *restitutio in integrum* due to the destruction of the private forest reserve and also through the passage of time resulting in the loss of crops and avocado tree growth. The only limitation to compensation as the appropriate measure of reparation is that the damage be “financially assessable.” According to the ILC, “material and moral damage resulting from an internationally wrongful act will normally be financially assessable and hence covered by the remedy of compensation.”¹²⁰³
- 884) Investors have claimed compensation for moral damages in several disputes. Such claims have been submitted for moral damages suffered by both natural persons and legal entities.¹²⁰⁴
- 885) Moral damages are awarded as a matter of international law. They address conduct when a State has engaged in measures that have damaged a company and its management. Loss of reputation, physical and mental stress, harassment, threats, and intimidation are examples of situations in which

¹²⁰¹ Stephan Wittich, Non-Material Damage and Monetary Reparation in International Law, 15 Finnish Y.B. Int'l L., p. 329 (2004) (CL-0073-ENG).

¹²⁰² P. Dumberry and S. Cusson, Wrong Direction, at p. 34. (CL-0067-ENG).

¹²⁰³ ASRIWA, Art. 37, Note (3) (CL-0070-ENG).

¹²⁰⁴ Limited Liability Co. AMTO v. Ukraine, Arbitration Institute of the Stockholm Chamber of Commerce, Case No. 080/2005, Award, Mar. 26, 2008 (CL-0074-ENG); Europe Cement Investment & Trade S.A. v. Turkey, ICSID Case No. ARB(AF)/07/2, Award, Aug. 13, 2009 (CL-0075-ENG); Cementownia “Nowa Huta” S.A. v. Turkey, ICSID Case No. ARB(AF)/06/2, Award, Sept. 17, 2009 (CL-0076-ENG).

where moral damages are warranted. Moral damages address the human (and human rights aspects) of internationally wrongful conduct by states. They are an integral element of restorative justice. Not only do they fulfil the compensation function, but at the same time, moral damages assist in the accountability of states. Abuses of rights are situations in which moral damages are particularly warranted.

886) In the *Fabiani* case, a sole arbitrator awarded compensation for Mr. Fabiani's moral damages because of an abuse of process constituting a denial of justice by Venezuela. This was a review of an earlier arbitration in France.¹²⁰⁵ The Arbitrator awarded moral damages against two Venezuelan business partners. However, the business partners successfully prevented enforcement of the award against them in Venezuela by arbitrary and abusive acts of the government executive branch.¹²⁰⁶ The Arbitrator considered the hostile role of Venezuela's government as an aggravating factor and concluded that this constituted a denial of justice.¹²⁰⁷ The failure to collect resulted in Mr. Fabiani's economic ruin. The sole Arbitrator confirmed the award of 1.8 million francs for "material and moral loss."¹²⁰⁸ In this case, the Claimant sought moral damages nearly equating to all other claimed damages. No separate report or valuation supported the moral damages claim.¹²⁰⁹

¹²⁰⁵ Antoine Fabiani case, 1905 Venezuela – Italy Mixed Commission Decision, X UNRIAA 83, at p. 93 (CL-0077-ENG).

¹²⁰⁶ Antoine Fabiani case, 1905 Venezuela – Italy Mixed Commission Decision, X UNRIAA 83, at p. 93 (CL-0077-ENG).

¹²⁰⁷ Antoine Fabiani case, 1905 Venezuela – Italy Mixed Commission Decision, X UNRIAA 83, at p. 93 (CL-0077-ENG).

¹²⁰⁸ Antoine Fabiani case, 1905 Venezuela – Italy Mixed Commission Decision, X UNRIAA 83, at p. 93 (CL-0077-ENG).

¹²⁰⁹ Antoine Fabiani case, X UNRIAA 83, at p. 93 (CL-0077-ENG).

- 887) In *Desert Line*, the Tribunal considered whether moral damages should be quantified like other economic losses. In paragraph 63, the *Desert Line* Tribunal held:

Based on international law, the Claimant claims the amount of OR 40,000,000 for moral damages including loss of reputation. The Claimant states that it has suffered extensive moral damages as a result of the Respondent's breaches of its obligations under the BIT: The Claimant's executives suffered the stress and anxiety of being harassed, threatened, and detained by the Respondent as well as by armed tribes; the Claimant has suffered a significant injury to its credit and reputation and lost its prestige; the Claimant's executives have been intimidated by the Respondent in relation to the Contracts. The quantified amount, representing one-third of the Claimant's claims in the present arbitration, is in harmony with other cases, such as the Fabiani Case.¹²¹⁰

- 888) The *Desert Line* Tribunal took the overall damages that had been quantified, The Tribunal used its discretion. It awarded one-third of that amount (\$1million) to Desert Line as moral damages.¹²¹¹ The Tribunal confirmed that moral damages could be awarded to a corporate claimant and noted:

The Respondent has not questioned the possibility for the Claimant to obtain moral damages in the context of the ICSID procedure. Even if investment treaties primarily aim at protecting property and economic values, they do not exclude, as such, that a party may, in exceptional circumstances, ask for compensation for moral damages. It is generally accepted in most legal systems that moral damages may also be recovered besides pure economic damages. There are indeed no reasons to exclude them. The Arbitral Tribunal knows that it is difficult, if not impossible, to substantiate a prejudice of the kind ascertained in the present award. Still, as it was held in the Lusitania cases, non-material damages may be "very real, and the mere fact that they are difficult to measure or estimate by monetary standards makes them none the less real and affords no reason why the injured person should not be

¹²¹⁰ *Desert Line v. Yemen*, Award, ¶ 63 (CL-0069-ENG).

¹²¹¹ *Desert Line v. Yemen*, Award, ¶ 289 (CL-0069-ENG).

compensated,” us.... It is also generally recognized that a legal person (as opposed to a natural one) may be awarded moral damages, including loss of reputation, in specific circumstances only.¹²¹²

889) There is no practice of substantiating moral damages by way of a valuation report where substantial moral damages were awarded, such as in the *Fabiani, Desert Line* or the *Al Kharafi* cases.¹²¹³ The Tribunals considered the economic losses and assessed moral damages based on the internationally wrongful conduct.

890) This Tribunal has authority and discretion to award moral damages that it deems fair and equitable and the Claimant’s request of \$45 million in moral damages is reasonable considering the valuation of such damages as evidenced. Bearing in mind the facts and circumstances of Nicaragua’s extreme and unwarranted conduct resulting in Nicaragua’s breach of the Treaty and its breach of obligations under international law.

D. Case Law supports Claimant’s Moral Damages Claim

891) No arbitration case has been found where the arbitral Tribunal expressly refused, as a matter of principle, to award compensation to an investor for moral damages.¹²¹⁴

892) International investment tribunals, such as the Tribunal for the Law of the Sea,¹²¹⁵ and various human rights bodies¹²¹⁶ have awarded compensation for

¹²¹² *Desert Line v. Yemen*, Award, at ¶ 289 (CL-0069-ENG).

¹²¹³ *Mohammed Al-Kharafi & Sons v Libya*, Final Arbitral Award, March 22, 2013, p. 126; 182-183. (CL-0071-ENG).

¹²¹⁴ P. Dumberry and S. Cusson, *Wrong Direction*, at p. 36 (CL-0067-ENG).

¹²¹⁵ See, e.g., *The M/V Saiga (No. 2) (Saint Vincent and the Grenadines v. Guinea)*, International Tribunal for the Law of the Sea, Judgment, July 1, 1999, where the tribunal included damages for injury to the crew of a ship, their unlawful arrest, detention, and other forms of ill-treatment (CL-0047-ENG).

¹²¹⁶ See D. Shelton, *Remedies in International Human Rights Law* (Oxford University Press, 1999) at 319-320. (CL-0079-ENG); See Velásquez Rodríguez (Compensatory Damages), Inter-Am. Ct. H.R. (ser. C)

moral damages.¹²¹⁷ Well-known examples of such tribunals include the *Fabiani* and *Lusitania* cases. A recent example is the United Nations Compensation Commission (UNCC).¹²¹⁸ Another is the Ethiopia–Eritrea Claims Commission.¹²¹⁹

893) Moral damages are a discretionary remedy based on the facts of the claim. As noted above, the *Desert Line*, *Al-Kharafi*, *Benvenuti* and *Fabiani*, cases all awarded moral damages. The situation in the current arbitration strongly would support the award of moral damages.

1. Desert Line Projects v. Yemen

894) In *Desert Line*, the Tribunal ordered moral damages:

The Arbitral Tribunal finds that the violation of the BIT by the Respondent, in particular the physical duress exerted on the executives of the Claimant, was malicious and therefore constitutive of a fault-based liability. Therefore, the Respondent shall be liable to reparation for the injury suffered by the Claimant, whether it be bodily, moral or material in nature. The Arbitral Tribunal agrees with the Claimant that its prejudice was substantial since it affected the physical health of the Claimant's executives and the Claimant's credit and reputation.¹²²⁰

No. 7 (July 21, 1989), in 95 I.L.R. 233, 315–16 (1990), at ¶ 38 (CL-0080-ENG); Godínez Cruz (Compensatory Damages), Inter-Am. Ct. H.R. (ser. C) No. 8 (July 21, 1989) (CL-0081-ENG).

¹²¹⁷ Stephan Wittich, *Non-Material Damage and Monetary Reparation in International Law*, 15 Finnish Y.B. Int'l L. 329 (2004) (CL-0073-ENG).

¹²¹⁸ U.N.C.C. Governing Council Decision No. 3 on Personal Injury and Mental Pain and Anguish, S/AC.26/1991/3 (Oct. 23, 1991) provides, inter alia, that “compensation will be provided for non-pecuniary injuries resulting from ... mental pain and anguish.” (CL-0082-ENG).

¹²¹⁹ Agreement on Cessation of Hostilities Between the Government of the Federal Democratic Republic of Ethiopia and the Government of the State of Eritrea, June 18, 2000, 2138 U.N.T.S. 86 (CL-0062-ENG); Agreement Between the Government of the Federal Democratic Republic of Ethiopia and the Government of the State of Eritrea, Dec. 12, 2000, 2138 U.N.T.S. 94 (CL-0066-ENG).

¹²²⁰ *Desert Line v. Yemen*, at ¶ 290 (CL-0069-ENG).

895) The Tribunal held that Yemen had to make reparation for “moral damages, including loss of reputation” in the sum of U.S.\$1 million (without interest).¹²²¹ It added that this amount for moral damages was “indeed more than symbolic yet modest in proportion to the vastness of the project.”¹²²²

2. Al-Kharafi v. Libya

896) International tribunals have found moral damages. In *Al-Kharafi v Libya*, the tribunal awarded \$30 million for the loss of reputation caused to the Plaintiff by Libya.¹²²³ The 392-page opinion offers specific bases of how and why moral damages were assessed.¹²²⁴

897) The *Al-Kharafi* Tribunal considered not only the Libyan civil code in terms of the damages award, but also the terms of the Unified Agreement for the Investment of Arab Capital in the Arab States (“Unified Agreement”).¹²²⁵ The Unified Agreement is an international treaty between 22 member states, constituted an international agreement that protected the investor outside the local, domestic laws.¹²²⁶

898) Among other things, the purpose of this agreement was to provide a suitable investment climate to stimulate Arab economic resources for their citizens and investors. The Tribunal specifically recognized a breach of this international agreement provided a separate basis for damages.¹²²⁷ Specifically:

¹²²¹ *Desert Line v. Yemen*, at ¶ 290 (CL-0069-ENG).

¹²²² *Desert Line v. Yemen*, at ¶ 290 (CL-0069-ENG).

¹²²³ *Mohammed Al-Kharafi & Sons v Libya*, Final Arbitral Award, March 22, 2013, p. 392 (CL-0071-ENG).

¹²²⁴ *Mohammed Al-Kharafi & Sons v Libya*, Final Arbitral Award, pp. 126, 182-183 (CL-0071-ENG).

¹²²⁵ *Mohammed Al-Kharafi & Sons v Libya*, Final Arbitral Award, p. 392 (CL-0071-ENG).

¹²²⁶ Unified Agreement for the Investment of Arab Capital in the Arab States, 7 September 1981. Article 10(1) (a-d) (CL-0083-ENG).

¹²²⁷ *Mohammed Al-Kharafi & Sons v Libya*, Final Arbitral Award, p. 366 (CL-0071-ENG).

The Arab investor shall be entitled to compensation for damages which he sustains due to any one of the following actions by a State Party or one of its public or local authorities or institutions...by breach of any international obligations or undertakings binding on the State Party and arising from this Agreement in favour of the Arab investor or failing to take the necessary steps to implement them, whether deliberately or through negligence.¹²²⁸

- 899) In addition, the substantive point of the *Al-Kharafi* decision analyzes that damages were awarded because of all the violations of the defendant through violations of the civil code, various domestic laws and the Unified Agreement.¹²²⁹

3. Benvenuti and Bonfant v. Congo

- 900) In 1973, an agreement was entered into between the Government of the Congo and Benvenuti and Bonfant S.R.L., an Italian corporation, for the establishment of a joint-venture company; 60% was to be owned by the Government, 40% by the private company.¹²³⁰
- 901) In 1977, the Italian company commenced ICSID proceedings against Congo alleging that it had expropriated its 40% interest in the joint venture.¹²³¹ The company also claimed that, upon physically possessing the corporate premises (expropriating the company), the Congolese Government initiated criminal proceedings against Mr. Bonfant, the Managing Director of the Company;¹²³² believing the charges fraudulent, Mr. Bonfant fled to Italy,

¹²²⁸ Unified Agreement for the Investment of Arab Capital in the Arab States, 7 September 1981. Article 10(1) (a-d) (CL-0083-ENG).

¹²²⁹ *Mohammed Al-Kharafi & Sons v Libya*, Final Arbitral Award, p. 366-367 (CL-0071-ENG).

¹²³⁰ *S.A.R.L. Benvenuti & Bonfant v. People's Republic of the Congo*, ICSID Case No. ARB/77/2, Award, 08 August 1980, ¶ 2.1-2.7 (CL-0078-ENG).

¹²³¹ *Benvenuti & Bonfant v. Congo*, Award, at ¶ 1.1 (CL-0078-ENG).

¹²³² *Benvenuti & Bonfant v. Congo*, Award at ¶ 4.59 (CL-0078-ENG).

leaving many corporate documents behind.¹²³³ Still, Mr. Bonfant was able to provide thorough testimony during the proceedings, and likewise the government had ample opportunity to respond.¹²³⁴ The Congolese government failed to adequately justify its actions, or the charges brought against Mr. Bonfant.¹²³⁵

- 902) The Tribunal concurred with Mr. Bonfant and awarded compensation to the investor for non-receipt of profits, value of 40% of the shares, loans made for the companies benefit, debts, and interest, totaling over CFA 318,179,189 (plus interest).¹²³⁶ The Tribunal also awarded CFA 5,000,000 for “Intangible loss (‘Prejudice Moral’),¹²³⁷ as Mr. Bonfant had claimed for:

Lost work and investment opportunities.

Inability to resume commercial activities due to “lack of capital” resulting from the expropriation.

Loss of “its credit with suppliers and banks.”

Personal loss as result of management “following the forced and hasty departure from the Congo.”¹²³⁸

- 903) In awarding these “Intangible loss (‘Prejudice Moral’) damages, the *Benvenuti* Tribunal held:

Indeed B&B limits itself to simple statements, unsupported by any concrete evidence. Equally, it has not been established whether, even after receiving the compensation owed to it, with interest, it would have the

¹²³³ *Benvenuti & Bonfant v. Congo*, Award at ¶ 2.23 (CL-0078-ENG).

¹²³⁴ *Benvenuti & Bonfant v. Congo*, Award at ¶ 4.15-4.65 (CL-0078-ENG).

¹²³⁵ *Benvenuti & Bonfant v. Congo*, Award at ¶ 4.15-4.65 (CL-0078-ENG).

¹²³⁶ *Benvenuti & Bonfant v. Congo*, Award at p. 32 (CL-0078-ENG).

¹²³⁷ *Benvenuti & Bonfant v. Congo*, Award at ¶ 4.95-4.96 (CL-0078-ENG).

¹²³⁸ *Benvenuti & Bonfant v. Congo*, Award at ¶ 4.95-4.96 (CL-0078-ENG).

possibility to work or to invest or to resume its activities in Italy or elsewhere. The Tribunal has reason to doubt B&B's simple statement that it lost its credit with its suppliers or bankers or that it could not obtain the necessary personnel. Taking into account, however, the measures of which B&B was the object and the proceedings resulting therefrom, which have certainly disturbed B&B's activities, the Tribunal considers it equitable to award it the sum of CFA 5,000,000 as damages for intangible loss.¹²³⁹

- 904) The *Benvenuti* Tribunal did not explicitly indicate which "measures" justified the moral damages. It is most likely a reference to the institution of criminal proceedings against Mr. Bonfant, a corporate officer, who led the Italian diplomatic authorities to advise him to leave the country.¹²⁴⁰ The disputing parties had agreed that the tribunal had the power to decide the dispute *ex aequo et bono*.¹²⁴¹ While this tribunal may have used this basis, the authority to award moral damages comes from the inherent powers of the Tribunal and does not arise from its *ex aequo et bono* authority.¹²⁴²

E. Facts supporting Moral Damages

- 905) This is an arbitration where moral damages should be awarded by the tribunal. Moral damages apply to incorporeal harm affecting a company or the corporate officers of the company.
- 906) Since the fateful day of the first invasion to Hacienda Santa Fé, on June 16, 2018, Inagrosa's management and the Hacienda Santa Fé workers have suffered from anxiety, stress and fear arising from threats of physical violence

¹²³⁹ *Benvenuti & Bonfant v. Congo*, Award, at ¶ 4.95-4.96 (CL-0078-ENG).

¹²⁴⁰ *Benvenuti & Bonfant v. Congo*, Award, at ¶ 4.59 (CL-0078-ENG).

¹²⁴¹ *Benvenuti & Bonfant v. Congo*, Award, at ¶ 4.65 (CL-0078-ENG).

¹²⁴² *Benvenuti & Bonfant v. Congo*, Award, at ¶ 4.65 (CL-0078-ENG).

and even death threats. These are among the many anxiety causing impacts which emanate directly and naturally from the actions of the paramilitaries.¹²⁴³

- 907) Fundamentally, the witnesses in this claim have had to deal with anxiety caused by generalized risks of reprisals and threats to themselves and concerns over their families. . Their vulnerability as witnesses is courageous as they personally have participated in the process of international justice.
- 908) The government-backed paramilitaries repeatedly demeaned the standing of Inagrosa’s Chief Operating Officer to employees at Hacienda Santa Fé.¹²⁴⁴
- 909) On June 16, 2018, the government-backed paramilitaries gathered the terrified Hacienda Santa Fé workers and told them that their boss (referring to Carlos Rondón) was a foreign “son of bitch” and that Hacienda Santa Fé was their property now.¹²⁴⁵
- 910) On July 16, 2018, Vinicio Garcia “Comandante Gorgojo” threatened Mr. Gutierrez, proclaiming Inagrosa senior management members including Mr. Gutierrez and Mr. Rondón to be “dead men.”¹²⁴⁶ This was a real and credible death threat made by an armed paramilitary. The threats were taken very seriously by Inagrosa staff including Carlos Rondón and Luis Gutierrez.¹²⁴⁷ Mr. Gutierrez eventually fled Nicaragua in fear for his life.¹²⁴⁸

¹²⁴³Witness Statement of Carlos J. Rondón – Memorial – ENG at ¶ 116 (**CWS-01**).

¹²⁴⁴ Witness Statement of Luis Gutierrez – Memorial – SPA at ¶ 77 (**CWS-02**); Witness Statement of Jaime Francisco Henrriquez Cruz – Memorial -SPA at ¶ 29 (**CWS-06**)

¹²⁴⁵ Witness Statement of Carlos J. Rondón – Memorial – ENG at ¶ 114 (**CWS-01**); Witness Statement of Luis Gutierrez – Memorial – SPA at ¶ 49 (**CWS-02**).

¹²⁴⁶ Witness Statement of Carlos J. Rondón – Memorial – ENG at ¶115 (**CWS-01**); Witness Statement of Luis Gutierrez – Memorial – SPA at ¶ 77 (**CWS-02**).

¹²⁴⁷ Witness Statement of Carlos J. Rondón – Memorial – ENG at ¶115 (**CWS-01**); Witness Statement of Luis Gutierrez – Memorial – SPA at ¶ 77 (**CWS-02**).

¹²⁴⁸ Witness Statement of Carlos J. Rondón – Memorial – ENG at ¶115 (**CWS-01**); Witness Statement of Luis Gutierrez – Memorial – SPA at ¶ 77 (**CWS-02**).

- 911) In the absence of Carlos Rondón, Luis Gutierrez as the Administrator of Hacienda Santa Fé was the face of Inagrosa's senior management. This made Mr. Gutierrez the paramilitaries prime target.
- 912) After the third invasion on July 24, 2018, Luis Antonio Rizo "Toño Loco" and Vinicio Garcia "Comandante Gorgojo" told the Hacienda Santa Fé workers that "*when that little engineer presents himself here, I am going to fill his chest with bullets.*" ¹²⁴⁹ As a result of these threats, psychological anguish, anxiety, and emotional distress increased. ¹²⁵⁰
- 913) Another frequent target of the paramilitaries anger was Jaime Vivas, Hacienda's Santa Fé's field supervisor. On August 14, 2018, while Luis Gutierrez was inspecting the damages done by the paramilitaries and invaders to Hacienda Santa Fé, he discovered a note in the office of Jaime Vivas that said, "*we will return.*" ¹²⁵¹
- 914) The Hacienda Santa Fé security team also was the target of death threats from the paramilitaries. On August 17, 2018, the invaders led by the paramilitaries returned to Hacienda Santa Fé and told Domingo Ferrufino and Raymundo Palacios as they were expelling them from Hacienda Santa Fé they told them that they were going to kill them because they did not want any witnesses to what when on. ¹²⁵²
- 915) The death threats continued after the taking of Hacienda Santa Fé. Ney Ariel Ortega Kuan known as "El Chino", who assumed command of Hacienda Santa

¹²⁴⁹ Witness Statement of Luis Gutierrez – Memorial – SPA at ¶ 93 (CWS-02); Witness Statement of Jaime Francisco Henriquez Cruz – Memorial -SPA at ¶ 38 (CWS-06).

¹²⁵⁰ Witness Statement of Carlos J. Rondón – Memorial – ENG at ¶116 (CWS-01); Witness Statement of Luis Gutierrez – Memorial – SPA at ¶ 171 (CWS-02).

¹²⁵¹ Witness Statement of Luis Gutierrez – Memorial – SPA at ¶ 114 (CWS-02).

¹²⁵² Witness Statement of Carlos J. Rondón – Memorial – ENG at ¶119 (CWS-01); Witness Statement of Luis Gutierrez – Memorial – SPA at ¶ 171 (CWS-02).

Fé¹²⁵³ after the death of Luis Antonio Rizo “Toño Loco” and Haniel Rizo, Luis Antonio Rizo “Toño Loco son, constantly made death threats against Luis Gutierrez and his family. They told Luis Gutierrez that he had a family, and they had many problems and that one day they were going to take it out on his family. ¹²⁵⁴ On another occasion, Ney Ariel Ortega Kuan “El Chino” told Luis Gutierrez that he knew that he was going to Hacienda Santa Fé. He told him that he had bought weapons and reinforced the security at Hacienda Santa Fé. ¹²⁵⁵ Ney Ariel Ortega Kuan, known as “El Chino”, informed Luis that the paramilitaries authorized a shoot to kill order that would allow Mr. Gutierrez to be killed on the spot. ¹²⁵⁶

F. Conclusion on Moral Damages

- 916) The facts and acts in this claim warrant moral damages. The wrongs committed against the management of the Investor included threats of violence and death.
- 917) Senior staff were threatened with death. These death threats escalate the relevance and suitability of moral damages significantly.
- a) The death threats were made by persons for whom the state has international responsibility as a matter of international law. ¹²⁵⁷

¹²⁵³ Witness Statement of Luis Gutierrez – Memorial – SPA at ¶ 171 (CWS-02).

¹²⁵⁴ Witness Statement of Luis Gutierrez – Memorial – SPA at ¶ 135 (CWS-02).

¹²⁵⁵ Witness Statement of Luis Gutierrez – Memorial – SPA at ¶ 139 (CWS-02).

¹²⁵⁶ Witness Statement of Luis Gutierrez – Memorial – SPA at ¶ 139 (CWS-02).

¹²⁵⁷ Witness Statement of Luis Gutierrez – Memorial – SPA at ¶¶ 71, 76 93,135 (CWS-02); Witness Statement of Jaime Francisco Henrriquez Cruz – Memorial -SPA at ¶¶ 38,58 (CWS-06).

- b) A member of the voluntary police¹²⁵⁸ and paramilitaries¹²⁵⁹ physically assaulted a Hacienda Santa Fé workers .
 - c) There were unjustified invasions of private property.¹²⁶⁰
 - d) During the invasions, Hacienda Santa Fé staff were harassed, humiliated and threatened.¹²⁶¹
 - e) Threats were made to all employees who would not support the invaders¹²⁶²
 - f) On several occasions, staff members were physically castigated.¹²⁶³
- 918) Additionally, the invaders at the behest of the paramilitary often engaged in erratic conduct such as killing sheep, destroying property and burning down trees. Fearing for their lives and safety some staff fled the plantation and have never returned.
- 919) In addition, the abuse of process caused by the involvement of the police is nothing short of egregious.
- 920) Moral damages apply to the harm, stress, humiliation, and suffering caused to the Claimant including those arising from invasion of private property. The suffering caused is widespread and without color of right or due process of law. This is a case where moral damages are warranted and appropriate. The

¹²⁵⁸ Witness Statement of Luis Gutierrez – Memorial – SPA at ¶ 67 (CWS-02).

¹²⁵⁹ Witness Statement of Jaime Francisco Henrriquez Cruz – Memorial -SPA at ¶ 41 (CWS-06).

¹²⁶⁰ Witness Statement of Luis Gutierrez – Memorial – SPA at ¶¶ 35, 64, 87, 117-118 (CWS-02); Witness Statement of Jaime Francisco Henrriquez Cruz – Memorial -SPA at ¶¶ 16, 23, 24, 61-62 (CWS-06).

¹²⁶¹ Witness Statement of Luis Gutierrez – Memorial – SPA at ¶¶ 71, 76 93,135 (CWS-02); Witness Statement of Jaime Francisco Henrriquez Cruz – Memorial -SPA at ¶¶ 38,58 (CWS-06).

¹²⁶² Witness Statement of Luis Gutierrez – Memorial – SPA at ¶¶ 71, 76 93,135 (CWS-02); Witness Statement of Jaime Francisco Henrriquez Cruz – Memorial -SPA at ¶¶ 38, 58 (CWS-06).

¹²⁶³ Witness Statement of Luis Gutierrez – Memorial – SPA at ¶ 67 (CWS-02); Witness Statement of Jaime Francisco Henrriquez Cruz – Memorial -SPA at ¶ 41 (CWS-06).

Claimant seeks an award of \$45 million for moral damages in addition to its claim for economic damages.

X. THE TRIBUNAL HAS JURISDICTION

- 921) The Respondent has not filed any defense to the detailed allegations raised in the Notice of Arbitration.
- 922) Further, the Respondent has not filed any observations within the 45-day timeline pursuant to CAFTA Article 24.5 with respect to motions regarding a manifest absence of jurisdiction.
- 923) For the avoidance of any doubt, the Investor affirmatively submits that this Tribunal has jurisdiction to rule on this CAFTA claim.

A. Temporal Jurisdiction

- 924) CAFTA-DR came into force after 2006.¹²⁶⁴ The facts in this claim first arose in 2018. There is no issue regarding the temporal scope of the CAFTA with respect to the matters raised in this claim.
- 925) Riverside filed a Notice of Investment Dispute was filed on August 28, 2020.¹²⁶⁵
- 926) The Notice of Arbitration was filed on March 18, 2021 well after the required cooling off period under the CAFTA.¹²⁶⁶
- 927) As Riverside's claim for harm first caused on June 16, 2018, the Notice of Arbitration falls within the appropriate CAFTA timeframe set out in the CAFTA Articles 10.16 and 10.18.

¹²⁶⁴ Instrument to OAS ratifying CAFTA for Nicaragua, 1 April 2006 (C-0001-SPA).

¹²⁶⁵ Notice of Investment Dispute, August 28, 2020. Riverside Coffee, LLC Notice of Intent to Submit a Claim to Arbitration under the CAFTA, (C-006-ENG).

¹²⁶⁶ Notice of Arbitration, March 18, 2021

B. Personal Jurisdiction

928) To obtain treaty protection by the CAFTA, an investor must be an investor of another party or have a covered investment under the treaty. The CAFTA defines an investor of a party as follows:

investor of a Party means a Party or state enterprise thereof, or a national or an enterprise of a Party, that attempts to make, is making, or has made an investment in the territory of another Party; provided, however, that a natural person who is a dual national shall be deemed to be exclusively a national of the State of his or her dominant and effective nationality.¹²⁶⁷

929) Riverside is an American limited liability company incorporated in Nicaragua. Riverside owned shares and debt in Inagrosa at the time of the expropriation in 2018.¹²⁶⁸

930) Riverside has made an investment in Nicaragua. Riverside owns shares in Inagrosa directly.¹²⁶⁹

931) In addition, Riverside has been the controlling shareholder of Inagrosa for many years before the June 2018 invasion.¹²⁷⁰ Riverside controlled Inagrosa at the time of the Invasion. As the controlling shareholder, in 2018.¹²⁷¹ Riverside can bring a claim arising from its control of Inagrosa.¹²⁷²

932) Further, the Investment meets the definition of an investment under Article 25(1) of the ICSID Convention. In this case, Riverside clearly meets all the

¹²⁶⁷ CAFTA, Article 10.28: Definitions.

¹²⁶⁸ Articles of Incorporation- Riverside Coffee, LLC, June 18, 1999 **(C-0040-ENG)**; Management Representation Letter from Riverside Coffee, LLC to Richter Inc., September 12, 2022, at ¶ 3 **(C-0055)**.

¹²⁶⁹ Inagrosa Share Certificate No. 12, August 31, 2004 issued to Riverside Coffee, LLC. **(C-0043-SPA)**; Inagrosa Share Certificate No. 15, August 31, 2004 issued to Riverside Coffee, LLC. **(C-0046-SPA)**.

¹²⁷⁰ Witness Statement of Melva Jo Winger de Rondón – Memorial – ENG at ¶ 39 **(CWS-03)**

¹²⁷¹ Witness Statement of Melva Jo Winger de Rondón – Memorial – ENG at ¶ 37 **(CWS-03)**. Witness Statement of Melvin Winger – Memorial – ENG at ¶ 30 **(CWS-04)**; Witness Statement of Carlos J. Rondón – Memorial – ENG at ¶¶ 212, 220 **(CWS-01)**.

¹²⁷² Witness Statement of Melvin Winger – Memorial – ENG at ¶ 32 **(CWS-04)**; Witness Statement of Melva Jo Winger de Rondón – Memorial – ENG at ¶ 46 **(CWS-03)**.

requirements of an investment including those with respect to the contribution of money, duration of the investment, risk, and its contribution to the economic development of Nicaragua.¹²⁷³

- 933) Similarly, Riverside meets the similar characterization of an investment set out in CAFTA's Article 10.28 definition of Investment. In particular, Riverside's investment displays the commitment of capital, the expectation of gain or profit and the assumption of risk. The investment took the form of an enterprise, equity, loans, and tangible and intangible property. All of these forms, directly and indirectly, are covered by the definition in CAFTA Article 10.28.
- 934) While procedural matters are not issues of jurisdiction, Riverside also met the procedural requirements for this arbitration to the extent that they are necessary in light of the operation of the MFN obligation.
- a) Riverside filed the waiver and consent to arbitration within its Notice of Arbitration and with it.¹²⁷⁴ The filing of the waiver and consent to arbitration confirms Riverside filed a Notice of Intent on August 28, 2020.¹²⁷⁵ To be clear, Riverside was not obliged to file any consents or waivers with respect to CAFTA Articles 10.16(1)(a) and (1)(b) because of the operation of the MFN Treatment obligation and the terms of Article 8 of the Russian BIT.
- b) Riverside Coffee offered consultations and negotiations pursuant to CAFTA Article 10.15 regarding the issues in dispute with the Republic of

¹²⁷³ *Salini Costruttori S.p.A. and Italstrade S.p.A. v. Kingdom of Morocco*, ICSID Case No. ARB/00/4 - Decision on Jurisdiction, at ¶ 52 (**CL-0085-ENG**).

¹²⁷⁴ Member's Resolution of Riverside Coffee, L.L.C. Consent & Waiver for Claim under CAFTA, 17 March 2021 (**C-027**); Officer's Resolution of Riverside Coffee, L.L.C. Consent and Waiver for Claim under CAFTA, 17 March 2021(**C-028-ENG**).

¹²⁷⁵ Riverside Coffee, LLC Notice of Intent to Submit a Claim to Arbitration under the CAFTA, August 28, 2020 (**C-006-ENG**).

Nicaragua with the filing of the Notice of Intent.¹²⁷⁶ The period was more than six months long. Not receiving any response to the request for consultations and negotiations,¹²⁷⁷ on March 19, 2021, Riverside filed a Notice of Arbitration.¹²⁷⁸ Again, Riverside was not obliged to file any consents or waivers with respect to CAFTA Articles 10.16(1)(a) and (1)(b) because of the operation of the MFN Treatment obligation and the terms of Article 8 of the Russian BIT.

- c) With that Notice of Arbitration, Riverside filed any necessary waiver and consent to arbitration, dated March 17, 2021¹²⁷⁹ No waiver or consent to arbitration is necessary with respect to the claim from the Investment because of the operation of the MFN obligation in CAFTA Article 10.4.
- d) Riverside has had no recourse to the courts of Nicaragua, nor has Riverside made any allegation of a breach of an obligation under CAFTA Section A in any proceedings before a court or administrative tribunal of a CAFTA Party.¹²⁸⁰

935) Riverside gave its valid consent to arbitration. Nicaragua, the Respondent, is a contracting party to the CAFTA treaty. As a contracting Party, Nicaragua has consented to the adjudication of investment disputes before the ICSID as has the United States. Both States are Parties to the ICSID Convention.¹²⁸¹

¹²⁷⁶ Notice of Arbitration, March 19, 2021.

¹²⁷⁷ Notice of Arbitration, March 19, 2021, at ¶ 64.

¹²⁷⁸ Notice of Arbitration, March 19, 2021, at ¶ 64.

¹²⁷⁹ Member's Resolution of Riverside Coffee, L.L.C. Consent & Waiver for Claim under CAFTA, 17 March 2021 (**C-027-ENG**); Officer's Resolution of Riverside Coffee, L.L.C. Consent and Waiver for Claim under CAFTA, 17 March 2021 (**C-028-ENG**).

¹²⁸⁰ Notice of Arbitration, March 19, 2021, at ¶ 62.

¹²⁸¹ CAFTA Article 10.17: Consent of Each Party to Arbitration.

936) Nicaragua has also consented to the application of the ICSID Convention to investment disputes arising from CAFTA Chapter Ten.¹²⁸² Further to Nicaragua's ratification of the ICSID Convention, Riverside's investment in Nicaragua was for a business purpose and with the expectation of gain. These property interests constitute investments that are protected subject matter under the CAFTA.

C. Subject Matter Jurisdiction

937) The Claimant raises Nicaragua's non-conformity with CAFTA articles 10.2, 10.3 and 10.5. The allegations of internationally wrongful measures with respect to the dispute over Nicaragua's international law obligations outlined in these CAFTA obligations falls clearly within the subject matter jurisdiction of this Tribunal.

938) Further, pursuit to the election of remedies requirement in the CAFTA, at no time did Riverside seek any recourse from courts in any CAFTA Party with respect to the matters in dispute.¹²⁸³

939) The measures at issue involve organs of the state from at least two branches of government. The measures involve internationally wrongful measures taken by the police, other government officials, and elected officials. The measures of taken by paramilitaries, as members of the Voluntary Police, are measures taken by the government of Nicaragua. As a matter of international law, these measures directly confirm state responsibility and subject matter jurisdiction for the Tribunal.

¹²⁸² List of the ICSID Contracting States and Other Signatures of the ICSID Convention (**C-004**); US Proclamation 7987 of February 28, 2006, Vol 71, US Federal Register No. 41, March 2, 2006, at Bates 10827 (**C-005**).

¹²⁸³ Notice of Arbitration, at ¶ 62.

- 940) As part of an organ of the state, all the actions of the paramilitaries create state responsibility for Nicaragua. The armed paramilitaries who seized Hacienda Santa Fé claimed to be acting under the direction of local elected officials. While such direction would also create state responsibility under the application of ASRIWA Article 8, it is unnecessary to engage in that consideration in light of the scope and operation of state responsibility under ASRIWA Article 4.¹²⁸⁴
- 941) The confirmation that the paramilitaries are a part of the state are numerous and at the highest levels. Nicaragua's national chief of police has confirmed that the paramilitaries were deputized police officers of the Nicaraguan state, as did Nicaragua's President, who called them voluntary police.¹²⁸⁵
- 942) The public statements by Nicaraguan President Daniel Ortega confirm that the paramilitaries were an organ of the Government of Nicaragua.¹²⁸⁶ On July 30, 2018, in the aftermath of the violence and human rights abuses committed by the Ortega regime, President Ortega granted an interview to Euronews. The video of the interview and a transcript are in the record. President Ortega confirmed that the paramilitary forces were "voluntary police." He said:

Interviewer: There are many examples of the paramilitary collaborating with the security forces. The BBC went to Nicaragua to a town and said that they were collaborating with the police without any kind of shame.

President Ortega: No, here what we have is called the voluntary police.

¹²⁸⁴ ASRIWA, at Articles 4 and 8, **(CL-0017-ENG)**.

¹²⁸⁵ Transcript -Dagbladet TV interview to Francisco Diaz, Director General of the Nicaraguan National Police, uploaded February 4, 2019 **(C-0133-SPA/ENG)**; see also Dagbladet TV interview to Francisco Diaz, Director General of the Nicaraguan National Police, uploaded February 4, 2019 **(C-0132-SPA)**.

¹²⁸⁶ Video: Euronews, Interview of Nicaragua's President Daniel Ortega on Country's Deadly Crisis July 30, 2018 **(C-0031-ENG)**; Transcript excerpt of Euronews TV, Interview with Nicaragua's President Daniel Ortega on the Country's Deadly Crisis, Uploaded July 30, 2018 [Minutes 8:40-9:37] **(C-0124-ENG)**.

Interviewer: No, but these were masked people because the volunteer police are not masked.

President Ortega: Because the voluntary police in special operations are masked in all the time. There are even countries in Latin America where judges are masked so that they don't get killed.

Interviewer: So, these people who define themselves as paramilitaries were still voluntary police?

President Ortega: Yes, that's right. They are volunteer police officers.¹²⁸⁷

- 943) On February 2, 2019, Francisco Diaz, the Nicaraguan National Police Director General, and Jaime Vanegas, Inspector General of the Nicaraguan National Police, admitted that the volunteer police were actually "duly legalized" deputized members of the Nicaraguan Police:

Police Director General Francisco Diaz: We have what we call the volunteer police. That is not new in the law of the National Police. If you review the National Police Law, the Volunteer Police is established there and also has its specific missions and this volunteer police participates together with the Professional Police in preventive actions.

Interviewer: It is correct that these what you call volunteer policemen participated against the protesters?

Police Director General Francisco Diaz: But they are duly legalized. They participated as established by our legal norms, not as established by what the Nicaraguan right says.

Interviewer: Why were they wearing masks?

Police Director General Francisco Diaz: No, not all of them were volunteer policemen also our policemen professionals. Legally, it is established that we can use what we call the ski mask to protect their identity. Many of them who were in civilian clothes were not volunteer policemen, they were our professional policemen. Most of them were professional policemen in undercover work.

¹²⁸⁷ Transcript excerpt of Euronews TV, Interview with Nicaragua's President Daniel Ortega on the Country's Deadly Crisis, Uploaded July 30, 2018 [Minutes 8:40-9:37] (C-0124-ENG).

Police Inspector General Jaime Vanegas: who directed all the actions is a professional policeman, and the volunteer policemen are there for support.¹²⁸⁸

- 944) The acts of the paramilitary are thus actions of the voluntary police. The voluntary police are a part of the state under Nicaragua's internal law. As discussed above, the paramilitaries are the responsibility of the ministry of the interior and answerable to the national police.¹²⁸⁹ Professor Justin Wolfe has confirmed the status of the paramilitaries as part of the state in his Expert Statement (**CES-02**) as well.¹²⁹⁰
- 945) In addition, since the police¹²⁹¹ and elected officials¹²⁹² engaged actively in the unlawful taking of Hacienda Santa Fé¹²⁹³, there can be no significant issue of a lack of state responsibility for the unlawful acts arising in this claim.

¹²⁸⁸ Transcript -Dagbladet TV interview to Francisco Diaz, Director General of the Nicaraguan National Police, uploaded February 4, 2019 (**C-0133-SPA/ENG**); see also Dagbladet TV interview to Francisco Diaz, Director General of the Nicaraguan National Police, uploaded February 4, 2019 (**C-0132-SPA**).

¹²⁸⁹ Expert Statement of Justin Wolfe, at ¶¶ 31, 33-36,39-40(**CES-02**).

¹²⁹⁰ Expert Statement of Justin Wolfe, at ¶¶ 39-40(**CES-02**)

¹²⁹¹ El 19 Digital, Promotion ceremony on occasion of the 39th anniversary of the National Police, September 12, 2018 (**C-0213-SPA**).

¹²⁹² La Gaceta No. 221, List of Elected Citizens- Municipal Elections 2017- Jinotega Department, November 20, 2017 (**C-0130-SPA**).

¹²⁹³ Letter from Carlos Rondón to Police Captain Herrera, August 10, 2018 (**C-0012-SPA**).

XI. RELIEF REQUESTED

- 946) For the reasons set out in this Memorial, without limitation and reserving Riverside's right to supplement this request for relief in accordance with Rule 20 of the ICSID Arbitration Rules, Riverside respectfully requests that the Tribunal grant the following relief for its claims under CAFTA Article 10.16(1)
- a) A Declaration that Nicaragua has acted inconsistent with its Treaty obligations under CAFTA Articles 10.1, 10.2, 10.3, and 10.5;
 - b) An award for Economic Loss Damages to the Investor for its claims under Article 10.16 (1)(a) in the amount not less than **US\$ 644,098,011** plus interest from the date of the award at a rate set by the Tribunal;
 - c) An award for Moral Damages to the Investor for its claims under Article 10.16 (1)(a) in the amount of US\$ 45 million plus interest from June 16, 2018 at a rate set by the Tribunal.
 - d) Alternatively, or in combination, an award for Economic Loss Damages to the Investment for its claims under Article 10.16(1)(b) in the amount not less than **US\$ 644,098,011** plus interest from the date of the award at a rate set by the Tribunal;
 - e) An award for Moral Damages to the Investment for its claims under under Article 10.16(1)(b) in the amount of US\$ 45 million plus interest from June 16, 2018 at a rate set by the Tribunal; and

- f) An award in favor of the Investor on behalf of itself and / or on behalf of its Investment for their costs, disbursements, and expenses incurred in the arbitration for legal representation and assistance, plus interest, and for the costs of the Tribunal.

ALL OF WHICH IS RESPECTFULLY SUBMITTED



Prof. Barry Appleton
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