INTERNATIONAL CENTRE FOR SETTLEMENT OF INVESTMENT DISPUTES

RIVERSIDE COFFEE, LLC

Riverside

v.

REPUBLIC OF NICARAGUA

Respondent

(ICSID Case No. ARB/21/16)

COUNTER-MEMORIAL ON JURISDICTION AND THE MERITS

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DEFINED TERMS AND ABBREVIATIONS

APHIS	Animal and Plant Health Inspection Service
Castro I	Witness Statement of Marvin Antonio Castro Orozco I **(RWS-002)**
CETREX	Centro de Trámites de las Exportaciones
Claimant	Riverside Coffee, LLC
Counter Memorial	Respondent's Counter Memorial on Jurisdiction and the Merits of March 3, 2023
Credibility I	Credibility International Damages Expert Report (**RER-002**)
DCF	Discount Cash Flow
Respondent	Republic of Nicaragua
Duarte I	Expert Report of Dr. Odilo Duarte (**RER-001**)
FET	Fair and Equitable Treatment
FMV	Fair Market Value
FPS	Full Protection and Security
Government	Government of the Republic of Nicaragua
Gutierrez I	Witness Statement of Luis Gutierrez I (**CWS-02**)
Gutiérrez-Rizo I	Witness Statement of Diana Yuslibis Gutiérrez Rizo I **(RWS-01)**
Hacienda Santa Fé	Hacienda Santa Fé – El Pavón
Henrriquez I	Witness Statement Jaime Henrriquez Cruz I (**CWS-06**)
Herrera I	Witness Statement of William Ramón Herrera González I **(RWS-003)**
ILC	International Law Commission's Draft Articles on Responsibility of States for Internationally Wrongful Acts
INAFOR	Instituto Nacional Forestal
Inagrosa	Inversiones Agropecuarias, S.A.

IPSA	Instituto de Protección y Sanidad Agropecuaria
Kotecha I	Expert Valuation Statement of Vimal Kotecha I (**CES-01**)
González I	Witness Statement of Norma del Socorro Gonzalez Argüello I (MARENA) **(RWS-009)**
Lacayo I	Witness Statement of Rodolfo José Lacayo Ubau **(RWS-007)**
López I	Witness Statement of José Valentin López Blandón I **(RWS-004)**
MARENA	Ministerio del Ambiente y Recursos Naturales
Melvin Winger I	Witness Statement of Melvin Winger I (**CWS-04**)
Memorial	Claimant's Memorial of October 21, 2022
Mena I	Witness Statement of Xiomara Mena Rosales I (CETREX) **(RWS-006)**
Méndez I	Witness Statement of Álvaro Méndez Valdivia (INAFOR) **(RWS-008)**
MFN	Most-Favored Nation
Miller I	Witness Statement of Tom Miller I (**CWS-07**)
Mona Winger I	Witness Statement of Mona Winger I (**CWS-05**)
Moncada I	Witness Statement of Alcides Rene Moncada Casco (IPSA) **(RWS-005)**
Nicaragua	Republic of Nicaragua
NT	National Treatment
Pfister I	Expert Statement of Carlos Pfister I (**CES-03**)
Police	National Police of Nicaragua
Riverside	Riverside Coffee, LLC
Rondón I	Witness Statement of Carlos Rondón I (**CWS-01**)
Rondón Letter	Management Representation Letter from Riverside Coffee, LLC to Richter Inc., September 12, 2022 (**C-0055**)

Treaty / DR-CAFTA	Dominican Republic-Central America Free Trade Agreement
USDA	U.S. Department of Agriculture
Winger de Rondón I	Witness Statement of Melva Jo Winger de Rondón I (**CWS-03**)
Wolfe I	Expert Statement of Prof. Justin Wolfe I (**CES-02**)
NIO or **C$**	Córdobas

I. INTRODUCTION

1. Riverside Coffee, LLC ("Riverside" or "Claimant") brings investment claims under the Dominican Republic–Central America Free Trade Agreement ("DR-CAFTA" or the "Treaty") against the Republic of Nicaragua ("Nicaragua" or the "Government") based on the alleged destruction of its investments in a Nicaraguan agricultural company, Inversiones Agropecuarias, S.A. ("Inagrosa"), which has at all times owned a 1,142.5-hectare property located in the northeast region of the Municipality of San Rafael del Norte in Nicaragua's Department of Jinotega ("Hacienda Santa Fé").

2. Riverside wants this Tribunal to believe this is a case about a lawless government seizing property from political opponents and foreign investors through "paramilitary" violence. Without regard for the scope of the Tribunal's jurisdiction, Riverside loads its Memorial with political criticisms of Nicaragua and accusations of human rights violations unrelated to the dispute at hand. Nicaragua firmly rejects Riverside's irrelevant accusations.

3. Riverside' story of its case is recited in a 44-page Facts section, which presents a sequence of events that occurred in a period of less than two months, from June 16, 2018 to August 4, 2018. But the facts of this case cannot be encapsulated in a period of two months. Riverside's story is devoid of any historical background that would allow the Tribunal to assess the facts taking into account the context under which events occurred. For example, Riverside did not find it necessary to explain to the Tribunal that the June 2018 invasions to the Hacienda Santa Fé were not the first time that the Hacienda had been occupied by invaders. The story of the invasions to the Hacienda Santa Fé dates to the 1990s, before Inagrosa acquired it. Claimant was aware of this situation and in fact lived together with the invaders in different sectors of the Hacienda for more than a decade.

4. Partly for this reason, and notwithstanding the mud that Riverside slings, the reality of this case is entirely different than how Riverside attempts to paint it.

5. ***First***, the evidence will show that Nicaragua had no role in the undisputedly illegal invasion and occupation of Hacienda Santa Fé except in trying to end it, while upholding the undisputed rights of the Hacienda's lawful private owners, avoiding unnecessary violence, and peacefully relocating the illegal occupants.

6. Nicaragua did so despite the fact that the 2018 invasion and occupation of Hacienda Santa Fé arose in an extremely sensitive context for the Government of Nicaragua. Crucially, the invaders and illegal occupiers of the Hacienda were led, not by agents of the State, but in largely part by heavily-armed former members of the *Resistencia Nicaragüense* or *Contras*—the U.S.-backed rebel group that fought a decade-long civil war against the Government in the 1980s. The invaders of the Hacienda insisted that they were entitled to occupy the land in consideration of their demobilization at the end of that bloody conflict. And their illegal invasion of Hacienda Santa Fé occurred at a point in 2018 when Nicaragua was experiencing months of widespread civil strife and political violence. Thus, in responding to the illegal occupation, Nicaragua had to contend with stretched resources while, at the same time, not escalating a tense situation involving landless former rebel fighters.

7. Nicaragua successfully navigated this legal, political, and security thicket in a manner fully consistent with its obligations under the DR-CAFTA. Having ended the occupation of Hacienda Santa Fé, Nicaragua has repeatedly invited Riverside and Inagrosa to reoccupy the property, thus far without result.

8. ***Second***, and despite Nicaragua's success in peacefully clearing the Hacienda Santa Fé of illegal occupants, Riverside has repeatedly declined to take back its investment. Rather than

actually invest in the development of Hacienda Santa Fé, it seems that Riverside prefers to invest in pursuing claims for ***no less than $644,098,011*** in damages from a developing country. Riverside bases this extraordinary claim on the supposed economic harms sustained by its Hass avocado and forestry business as a consequence of Nicaragua's alleged breaches of the DR-CAFTA.

9. As set out fully below, Riverside's damages case is mostly based on a hypothetical Hass avocado business seemingly willed into place after the failure of Inagrosa's coffee crop from the Roya fungus in 2013. As Riverside tells it, Inagrosa's President and Chief Operating Officer, Mr. Carlos José Rondón, convinced Riverside to transform Inagrosa into a Hass avocado business overnight, despite that: (i) neither Mr. Rondón nor anyone else at Inagrosa had any experience in the Hass avocado business; (ii) Inagrosa never obtained a technical report, feasibility study, or economic analysis that concluded this transformation was feasible; and (iii) there is no record of any entity in Nicaragua having successfully cultivated, sold, or exported Hass avocados at a commercial scale.

10. Armed only with what Mr. Rondón describes as "some research" and intermittent consulting from a Costa Rican avocado grower,[1] Inagrosa allegedly planted 16,000 Hass avocado trees across a 40-hectare orchard at Hacienda Santa Fé in 2014. Riverside alleges that the first Hass avocado harvest from this orchard was "successful,"[2] despite providing no documentary evidence about this harvest (not even a picture) and despite the undisputed fact that Inagrosa never sold any avocados that were allegedly picked during this harvest. Based on this alleged success, Riverside claims that Inagrosa committed to expanding the Hass avocado business by 4,300 percent, *i.e.*, from 40 hectares to 1,000 hectares in total. Riverside alleges that a 200-hectare component of this

[1] Rondón I, ¶¶ 45, 99.

[2] Memorial, ¶ 51.

expansion was underway as of the time the alleged measures occurred, again without any evidence to this effect.

11. And because the alleged expansion would have required Inagrosa to totally deforest the 556-hectare forest located on the property, Riverside alleges that Inagrosa committed to log, process, and sell timber from the deforested trees, despite having no prior experience in the forestry business nor any third-party confirmation that this business venture would be profitable, feasible, or even legal.

12. Against this backdrop Riverside would have the Tribunal believe that from the time it lost its coffee plantation in 2013 to the time of the alleged invasion in 2018, Inagrosa went from being a failed coffee producer to having one of the most valuable Hass avocado plantations in the world (without having sold even ***one*** avocado) and an extremely valuable forestry business (that never even got off the ground).

13. As the adage goes, if a story sounds too good to be true, it probably is. And the case here is no exception. As set out fully in **Section II** of this pleading, Riverside's story—with respect to both Nicaragua's supposed breaches of the DR-CAFTA and its spectacular damages—is a work of fiction.

14. This is evident from the complete and utter lack of documentary support for Riverside's allegations. Riverside, for example, does not produce any of the business records that a business worth hundreds of millions of dollars should generate. There are no tax returns, no financial projections, no feasibility studies, no bank documents, no directorial resolutions, no plans of any kind, no internal business e-mails, no audited financials, and no indication whatsoever that any party, other than Riverside, in any way believed in Inagrosa's ability to generate profits, much

less hundreds of millions of dollars in profits, through its unprecedented Hass avocado and forestry businesses.

15. Instead, Riverside bases its story almost entirely on *post-hoc* testimonials from Mr. Rondón and other individuals affiliated with Riverside and Inagrosa. For example, Riverside bases ***every*** allegation about the Hass avocado and forestry businesses on the uncorroborated and unsupported testimony of Mr. Rondón, who claims that he used to have documents to support his account but those documents have since been lost and, so, the Tribunal will just have to take his word for it. Riverside also bases its claims about the Hacienda Santa Fé invasion on testimonials from individuals who were not there for the invasion or whose accounts about this invasion amount to unreliable hearsay testimony.

16. The very limited contemporaneous evidence that Riverside ***did*** produce, however, severely undermines Riverside's story as seen from the following, non-exhaustive examples. ***First***, a 2014 report from Inagrosa's avocado consultant reveals that, far from being seamless, Inagrosa's knee-jerk transformation from coffee producer to an avocado producer was riddled with setbacks. ***Second***, information that Riverside submitted about Inagrosa reveal that, far from being a company with a fair market value in the hundreds of millions of dollars, Inagrosa had millions of dollars in debt and about USD $1,000 in liquid cash, had been rejected by investors in 2017 and 2018 during investment pitches, and had not received investments of any kind from its only known investor, Riverside, after 2014. ***Third***, a 2017 ProNicaragua report confirms that Inagrosa's plan to generate massive profits by exploiting the lucrative U.S. consumer market for this fruit was dead on arrival because the U.S. agricultural authorities have a policy that ***prohibits the importation of avocados from Nicaragua***, due to concerns about a fruit fly that is endemic to Nicaragua. ***Fourth***, an August 2018 letter from Mr. Rondón reveals that, instead of believing that the Government was behind

the invasion, Inagrosa viewed the Government as its ally and requested its assistance on more than one occasion to rid the Hacienda of the invaders.

17. The expert testimony submitted by Riverside also undermines its case. For instance, Riverside relies extensively on a report from expert Prof. Justin Wolfe to support its claim that the Hacienda Santa Fé invasion was conducted by Government-led paramilitaries. But that report does not include that conclusion and, in fact, never even mentions the Hacienda Santa Fé invasion. Moreover, that report's description of paramilitaries is completely irreconcilable with Riverside's description of the invaders, as explained fully in **Section II.B** of this pleading.

18. Accordingly, Riverside has not met its burden of proving any of the components of its fantastical story. If anything, that story is controverted by the evidence Riverside produced with its Memorial. In any event, Riverside's story must be rejected because it is completely refuted by the evidence that Nicaragua presents with this pleading.

19. Indeed, in **Section II.A** of this pleading, Nicaragua details the ***real*** story behind the Hacienda Santa Fé invasion. This story, which is largely based on contemporaneous evidence, proves that the invaders were by no means "paramilitaries" acting on behalf of the Government. They were members of a farming cooperative called "Cooperativa El Pavón" comprised in significant part of former members of the Resistencia Nicaraguense—the "contras"—who in fact fought against the Government of Nicaragua during the country's decade-long civil war. These individuals invaded Hacienda Santa Fé in 1990 to reclaim the land known as "El Pavón," located in the upper part of Hacienda Santa Fé, where they had lived without legal title in informal settlements between 1990 and 2004. Although these individuals erroneously maintained that they had been promised this land in exchange for demobilization at the end of the war, the Government evicted those individuals from the Hacienda in 2003, at the request of Inagrosa, because they had

no legal right to possess that land. But some of these individuals returned to the Hacienda when they noticed that Inagrosa had all but deserted it. This attempted reoccupation of Hacienda Santa Fé by members of Cooperativa El Pavón is the "invasion" at issue in this case

20. The evidence in **Section II.A** also proves that the Hacienda Santa Fé invasion began in June 2017, *i.e.*, a full year before the date Riverside alleges the invasion began. Riverside chose to ignore the June 2017 invasion and start the story in June, 2018 because the real story of the invasion would have left Claimant outside the limitations period under DR-CAFTA. This timeline is fatal to Riverside's theory of the case. This timeline, for example, refutes Riverside's claim that Nicaragua ordered the invasion in response to civil strife and unrest that plagued Nicaragua in 2018, given that the invasion occurred ten months ***before*** that strife and unrest began. And this timeline refutes Riverside's allegation that the Hass avocado and forestry businesses were thriving at the Hacienda in 2017 and 2018, given that several hundred individuals invaded the Hacienda in June 2017 and occupied that property for ***an entire year*** before being spotted by Inagrosa.

21. Nicaragua also proves in **Section II.A** that its reaction to the invasion was diligent and reasonable. When Inagrosa called the Government about the invasion, on June 16, 2018, the country was experiencing unprecedented violent unrest that had consumed the Government's limited resources. Under those extraordinary circumstances, the Government was completely incapable of taking immediate, forceful action at Hacienda Santa Fé. Nor, given the historical roots of the illegal occupants' asserted claims to the property, would such a course have necessarily been appropriate where, as was the case, de-escalatory alternatives were available. The Government coordinated with Inagrosa, conducted its own investigation, and relocated the invaders in a peaceful and orderly fashion in a process that ended on August 11, 2018, *i.e.*, less than two months after Inagrosa requested Government assistance.

22. The only reason that the story does not end there is because the invaders re-invaded the Hacienda on August 17, 2018 after Riverside and Inagrosa failed to secure it or do anything at all to mitigate against the risk of another invasion. This failure by Riverside and Inagrosa is what caused the invasion to continue for another three years. Finally, in August 2021, thanks only to the Government's efforts, and without having received a single denunciation from Riverside or request for Government assistance, the Hacienda was rid, yet again, of the illegal occupants. Because Riverside and Inagrosa have inexplicably refused Nicaragua's invitation to re-take and secure the Hacienda, Nicaragua has expended significant resources to ensure that the now-abandoned Hacienda remains free of invaders.

23. In **Sections II.C and II.D**, Nicaragua presents evidence confirming that Inagrosa's Hass avocado and forestry businesses were not viable. Indeed, this conclusion is evident from the remarkable fact that Inagrosa ***never obtained the required permits and authorizations*** for these businesses. In fact, it did not even attempt to get those permits. As fully explained in those Sections, this fact means that the activities that Riverside alleges Inagrosa conducted for these businesses – *e.g.*, importing seeds, creating tree nurseries, clearing the soil, planting avocados, using water resources to sustain the avocado plantation, and preparing to export avocados and timber to the Costa Rica and/or the U.S. – were ***illegal***.

24. To be sure, this lack of permitting is not just a technicality that Inagrosa could have easily overcome. Rather, the permitting processes Inagrosa needed to complete for its businesses are uncertain and cannot be assumed. And Inagrosa's failure to adhere to the permitting processes in this case is not trivial. Each violation carries a substantial monetary penalty and the fact that the violations persisted over a five-year period suggests that Inagrosa could be susceptible to the more severe sanctions under Nicaraguan law, including the suspension or forced closure of the business.

25. **Sections II.C and II.D** also present evidence demonstrating that Inagrosa was ***not*** expanding the Hass avocado plantation to 1,000 hectares or preparing to deforest the 556-hectare forest, as Riverside alleges here. Rather, contemporaneous documents from Inagrosa confirm that, between 2015 and 2018, Inagrosa was actively soliciting the Government to classify the Hacienda as a private wildlife reserve, which resulted in a resolution to this effect from the environmental authorities in early 2018. This fact is dispositive because, under this classification, it would have been ***illegal*** to deforest the trees on the property or otherwise engage in any activity that could in any way disrupt the flora and fauna in the Hacienda. Inagrosa was aware of this fact, as clear from the handwritten application that Mr. Rondón submitted to the environmental authorities on behalf of Inagrosa, which states that Inagrosa the purpose of the application was to "conserve the forest area, protect the sources of water, in order to provide habitation to the fauna and flora and that way protect all of the animals that inhabit the forest."[3]

26. **Sections II.C and II.D** also present evidence confirming Inagrosa and Riverside had effectively deserted Hacienda Santa Fé by 2017, refuting Riverside's claim that the Hacienda was teeming with activity in 2017 and 2018 in advancement of Inagrosa's Hass avocado and forestry businesses. This evidence includes a contemporaneous letter from certain of the invaders that confirms these invaders entered the property in 2017 because it was in a state of abandonment. and the testimony of Mr. José Valentín Lopez Blandón, the founder of Cooperativa El Pavón who communicated on a regular basis with the invaders and has personal knowledge of the facts and circumstances that led members of his community to invade the Hacienda in June 2017.

27. Finally, **Sections II.C and II.D** present other evidence that independently repudiate Riverside's claim that Inagrosa had viable Hass avocado and forestry businesses on June 16, 2018

[3] Inagrosa application form for a Private Wildlife Reserve (**R-0032**)

with a combined fair market value in the hundreds of millions of dollars. In summary, this evidence provides that: (i) Inagrosa's avocado business was technically infeasible; (ii) Inagrosa had tried, but failed, to secure investor capital for either of the business ventures at issue here; (iii) Inagrosa had no more cash on hand to do any of the activities Riverside avers that Inagrosa was on the verge of doing in 2018; (iv) Inagrosa had fired almost all of its workers years before the invasion began; and (v) Inagrosa was effectively broke, owing more than a million dollars to Riverside and tens of thousands of dollars in unpaid property taxes to the Government.

28. The other Sections respond to, and refute, Riverside's arguments concerning the Tribunal's jurisdiction, the applicable legal standards with respect to the Treaty claims and their application here, and the amounts that should be awarded to Riverside, if any, in the unlikely event that Riverside wins on any of its asserted claims.

29. **Section III** will demonstrate the claims Riverside attempts to bring on behalf of Inagrosa under Article 10.16.1(b) are inadmissible under DR-CAFTA because Riverside failed to comply with the notice requirement under DR-CAFTA Article 10.16.2 and with the waiver requirement under DR-CAFTA Article 10.18.2(b)(ii). Riverside's attempt through this arbitration to recover losses suffered by Inagrosa is improper. Riverside has failed to show that the Tribunal has jurisdiction over claims for damages to Inagrosa because it has not demonstrated that it controlled Inagrosa at the time of the alleges breaches. Additionally, Riverside demonstrates these claims are outside of the Tribunal's jurisdiction because Riverside failed to demonstrate that Nicaragua agreed to treat Inagrosa as a "national of another Contracting State" as required by Article 25(2)(b) of the ICSID Convention and therefore the tribunal lacks jurisdiction *ratione personae* over those claims. .

30. **Section IV** will demonstrate that the Tribunal should reject all of Riverside's claims under DR-CAFTA. Fundamentally, there can be no Treaty breach without conduct attributable to Nicaragua. Such is the case here. Nicaragua is not responsible for the invasion; to the contrary, it opposed it at every turn. And the invaders are not Government agents. They are local farmers and members of a cooperative with no affiliation to the Government. In fact, many of these individuals are former members of the group known as *Resistencia Nicaragüense* or *Contras* that had fought for many years against the same Sandinista Government that is in charge today.

31. Because the invasion and occupation were not measures attributable to Nicaragua, the only action at issue is Nicaragua's response to the illegal invasion and occupation of Hacienda Santa Fé. Where Nicaragua ultimately peacefully resettled all of the illegal occupants Riverside's complaint is, at best, that Nicaragua did not use force to clear the illegal invaders immediately and instead pursued a peaceful solution. But, as demonstrated below, Nicaragua's approach was fully in line with its DR-CAFTA obligations and appropriate to the circumstances. The illegal invasion and occupation of Hacienda Santa Fé was carried out by hundreds of people, many heavily armed, and led by former *Contras* who had participated in a bloody war against the Government. The invasion also came at an especially sensitive time when Nicaragua was being rocked by months of unrest and political violence that caused hundreds of deaths and widespread property damage.

32. Amid these events, the Nicaraguan National Police had no more than eight officers in San Rafael del Norte, where the Hacienda is located. Moreover, a violent clash at Hacienda Santa Fé, potentially pitting Government forces against ex-*Contras* presented the risk of an even worse political conflagration,. The State's calibration of its response to the occupation of Hacienda Santa Fé therefore implicated Nicaragua's interests in both calming and containing the civil strife that was then rocking the country and maintaining the settlement that ended the civil war. Under

these circumstances, Nicaragua's response fell within the scope of DR-CAFTA's non-precluded measures (Article 21.2(b)) and civil strife (Article 10.6) clauses. These provisions provide a complete defense against all of Riverside's claims based on measures Nicaragua considered necessary for its essential security interests and took in response to conditions of civil strife. It follows that Nicaragua's peaceful removal and relocation of the illegal occupants from Hacienda Santa Fé cannot be a source of liability for the State.

33. Yet even if these special Treaty provisions did not apply, Riverside's claims would fail. There was no expropriation because the State did not take anything from the Claimant, has always recognized Inagrosa's right to Hacienda Santa Fé, and has actually offered the Hacienda back to Riverside and Inagrosa on more than one occasion. There was no breach of the duty of Fair and Equitable Treatment, whether broadly or narrowly construed, because Nicaragua acted lawfully, reasonably, and in good faith to resolve the illegal occupation, while always recognizing Inagrosa's legal title to the property. Nor did Nicaragua fail to accord Full Protection and Security to Riverside's investment but took contextually appropriate and ultimately successful measures to restore Hacienda Santa Fé to its lawful owners. There was likewise no discrimination against Riverside or its investment, and Riverside has not shown that similarly situated investors or investments received better treatment.

34. Finally, in **Section V**, Nicaragua proves that the quantum of damages that Riverside seeks in this case is completely baseless and precluded by DR-CAFTA and relevant investor-State jurisprudence. As an initial matter, Riverside has not satisfied – and cannot satisfy – its burden of demonstrating that Nicaragua proximately caused the alleged harm because, as already explained above, the alleged harm did not result from Nicaragua's actions. Moreover, Riverside's requested damages must be denied because they derive from a Discounted Cash Flow ("DCF") methodology

that is wholly inappropriate here. Indeed, dozens of investment tribunals have concluded that this methodology must be discarded as entirely unreliable where, as here, the investments at issue are in businesses that are pre-operational, greenfield in nature, or not going concerns. And as explained above, the Hass avocado and forestry businesses at issue here fit that description. Actually, these businesses are even worse because they have no semblance of viability, as evident from the fact that they were operated illegally, lacked requisite permits and authorizations, were never tested via feasibility reports, and had no funding or buy-in from any independent investors or banks.

35. Also, in **Section V**, Nicaragua proves that the inputs in Riverside's DCF model are baseless, flawed, and, frankly, bogus. This conclusion is dispositive because, when garbage is put into a DCF model, its outputs will also be garbage. For that reason, Nicaragua offers an alternative methodology that, unlike Riverside's model, does not invite rank speculation. Nicaragua, however, explains that, even under that methodology, any award of damages to Riverside must be offset in significant fashion due to Riverside's contributory fault, its failure to mitigate damages, and also to account for the permitting sanctions and unpaid property taxes.

36. Nicaragua also submits the following with this pleading:

a. The Witness Statement of **Diana Yuslibis Gutiérrez Rizo** (**RWS-001**), describing relevant historical context regarding Hacienda Santa Fé, the invasions of that property, and the process carried out by the Government to vacate the property.

b. The Witness Statement of **Commissioner Marvin Castro** (**RWS-002**), describing the role of the National Police and the Voluntary Police, the lack of ties between the so called "paramilitaries" with the Government, and the steps icaragua took to effectively evict all illegal occupants in Hacienda Santa Fé.

c. The Witness Statement of **Deputy Commissioner William Herrera** (**RWS-003**), describing the unrest that took place in 2018 in Nicaragua, the invasion of Hacienda Santa Fé in 2018, and the steps that Nicaragua took to effectively evict all illegal occupants in Hacienda Santa Fé.

d. The Witness Statement of **José Valentín Lopez Blandón** (**RWS-004**), narrating the formation of Cooperativa El Pavón and the history of invasions in Hacienda Santa Fé that started in 1990 and continued through 2018.

e. The Witness Statement of **Alcides Altamirano** (**RWS-005**, discussing the phytosanitary permits required for an avocado business and Inagrosa's lack of phytosanitary compliance to export Hass avocado.

f. The Witness Statement of **Xiomara Mena Rosales** (**RWS-006),** discussing the process to export products, Inagrosa's lack of registration as an exporter of Hass avocado and timber, and that Nicaragua has never exported Hass avocado before.

g. The Witness Statement of **Rodolfo Jose Lacayo Ubau** (**RWS-007**), discussing the regulatory framework to grant a water concession and Inagrosa's lack of water permits to maintain his avocado plantation in Nicaragua.

h. The Witness Statement of **Alvaro Mendez Valdivia** (**RWS-008**), discussing the permits related to the exploitation of the forest and Inagrosa's lack of permits to have a forestry business.

i. The Witness Statement of **Norma del Socorro Gonzalez Arguello** (**RWS-009**), discussing the environmental permits for an avocado and forestry business and Inagrosa's lack of compliance with the environmental regulatory framework.

j. The Expert Report of **Dr. Odilo Duarte** (**RER-001**), analyzing and refuting Claimant's allegations, projections and estimates pertaining to their alleged avocado export business and expansion.

k. The Expert Report of **Credibility International (RER-002),** showing that the Kotecha Report submitted by Claimant to calculate its alleged damages is erroneous on several grounds and that the DCF approach used in the Kotecha Report is based on assumptions of future income and cash flow for Inagrosa's avocado experiment and hypothetical forestry business that are entirely speculative and inappropriate.

II. STATEMENT OF FACTS

1. In its Memorial, Riverside alleges that armed "paramilitaries" invaded Hacienda Santa Fé between June 2018 and August 2018 and then occupied the property for another three years. According to Riverside, this invasion and occupation was an act of political retribution, authorized at the highest levels of the Government, to intimidate and oppress Inagrosa. Riverside also alleges that the Government assisted and facilitated the invasion by refusing to take immediate action, disarming the Hacienda's guards, and sending supplies to the invaders. And Riverside alleges this invasion and occupation destroyed its investments in the start-up Hass avocado and forestry businesses that its subsidiary, Inagrosa, was actively pursuing at the Hacienda at time of the invasion. None of this is true.

2. The record confirms the ***real*** reason for the Hacienda Santa Fé invasion had nothing to do with acts of political retribution, paramilitaries, or the Government. Rather, the invasion was the latest iteration of a decades-long land dispute between Inagrosa and Cooperativa El Pavón, a community organized by demobilized fighters of the *Resistencia Nicaragüense* (otherwise known as the *Contras*) who believed that they had been promised Inagrosa's land in exchange for their demobilization at the end of Nicaragua's decade-long civil war in the early 1990s. Their invasion was encouraged by Inagrosa's abandonment of Hacienda Santa Fé and made dangerous by the ongoing widespread violent unrest and of civil strife throughout Nicaragua that existed between April 2018 and July 2018, as well as the underlying anti-Government history of the invaders. In any case, far from assisting the unlawful invasion of the Hacienda Santa Fé, the evidentiary record shows that the Government opposed it (just as it had opposed the prior invasions of Hacienda Santa Fé), acted diligently under the circumstances to counteract it, succeeded on two separate occasions in removing the invaders from the property peacefully and without any violent escalation, and prevented future invasion of the property.

3. The key takeaways are:

a) In 1990 former members of the *Resistencia Nicaragüense* illegally settled the upper part of Hacienda Santa Fé after being promised land by the government of President Violeta Chamorro in exchange for their demobilization at the end of Nicaragua's decade-long civil war.[4] This portion of the property came to be known as "El Pavón."[5]

b) The *Resistencia Nicaragüense* opposed the Government in an internal conflict that lasted from approximately 1979 to 1990 and during which an estimated 65,000 Nicaraguans died.[6] At the time, the President of Nicaragua was Daniel Ortega. President Ortega was reelected President of Nicaragua in 2007.

c) From 1990 until 2004, hundreds of these individuals continuously lived on El Pavón, established a farming cooperative, and attempted various times to obtain legal title to that land, to no avail.[7] Their applications were rejected because the government recognized the land a private property.[8] In 1995, this informal community established Cooperativa El Pavón, a legal entity, to represent their interests.

d) In late 2003, at Inagrosa's request, the National Police evicted almost everyone located on El Pavón. The rest of the illegal occupants left sometime in 2004.[9]

e) In June 2017, members of the Cooperativa returned to Hacienda Santa Fé to re-take El Pavón because they saw that Inagrosa had deserted the property.[10]

f) In June 2018, after living on El Pavón for about a year, the members of the Cooperativa invaded the lower part of Hacienda Santa Fé – known as the "Santa Fé" sector – because that area had also been neglected by Inagrosa.[11] This is

[4] López ¶¶ 9-10 (**RWS-04**).

[5] López ¶¶ 9-10 (**RWS-04**).

[6] The war, in which the *Resistencia Nicaragüense* received support from the United States, gave rise to notable international proceedings. *See generally Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America)*, ICJ, Judgment - Merits, June 27, 1986 (**CL-0022**).

[7] López ¶ 12 (**RWS-04**).

[8] Gutiérrez-Rizo I, ¶ 49 (**RWS-01**).

[9] Gutiérrez-Rizo I, ¶ 50 (**RWS-01**); Castro I, ¶ 21 (**RWS-02**); Herrera I, ¶ 17 (**RWS-03**); López I, ¶ 12 (**RWS-04**).

[10] Gutiérrez-Rizo I, ¶ 61 (**RWS-01**); Castro I, ¶ 21 (**RWS-02**); Herrera I, ¶ 18 (**RWS-03**); López I, ¶ 21 (**RWS-04**).

[11] Gutiérrez-Rizo I, ¶ 63 (**RWS-01**); Herrera I, ¶¶ 19-33 (**RWS-03**); López I, ¶ 24 (**RWS-04**).

what Riverside incorrectly refers to as the "first invasion" of Hacienda Santa Fé and where Riverside's account of the facts begins.

g) In July 2018, two other waves of illegal occupants descended from El Pavón to Santa Fé.[12] Riverside refers to these waves as the second and third invasions of Hacienda Santa Fé.

h) Contemporaneous with these events, and unrelated to the dispute over Hacienda Santa Fé, Nicaragua was rocked by violent civil strife and widespread unrest in the summer of 2018. These events, which led to hundreds of deaths and widespread destruction of property across the country, placed a serious strain on the Government's resources that could have otherwise been used to remove the invaders.[13] At the same time, the political orientation of the illegal occupants—led by armed former *Contra* fighters—made it important to avoid any unnecessary use of force at Hacienda Santa Fé, especially while the Government was obliged to contend with civil strife and violent unrest on a widescale.[14]

i) On August 11, 2018, less than two months after Inagrosa requested assistance from the Government, the Government succeeded in evicting all of the illegal occupants from the property.

j) On August 17, 2018, however, the illegal occupants returned to the Hacienda because Riverside and Inagrosa failed to secure the premises.

k) From August 17, 2018 to August 2021, the Government met with leaders of the Cooperativa to negotiate their eviction from the Hacienda.[15] During this period, the illegal occupants exited the property in waves at various times, the final exodus occurring in August 2021.

l) From September 2021 through the present, the Government imposed around-the-clock surveillance to protect against the threat of future invasions.[16] Although Inagrosa and Riverside have yet to reclaim their undisputed property, the Government of Nicaragua currently holds the Hacienda in safekeeping for its return to its lawful owners.

[12] Gutiérrez-Rizo I, ¶ 63 (**RWS-01**); Herrera I, ¶¶ 19-33 (**RWS-03**); López I, ¶ 24 (**RWS-04**).

[13] Herrera I, ¶ 20 (**RWS-03**).

[14] Herrera I, ¶ 20 (**RWS-03**).

[15] Gutiérrez-Rizo I, ¶¶ 60-65 (**RWS-01**).

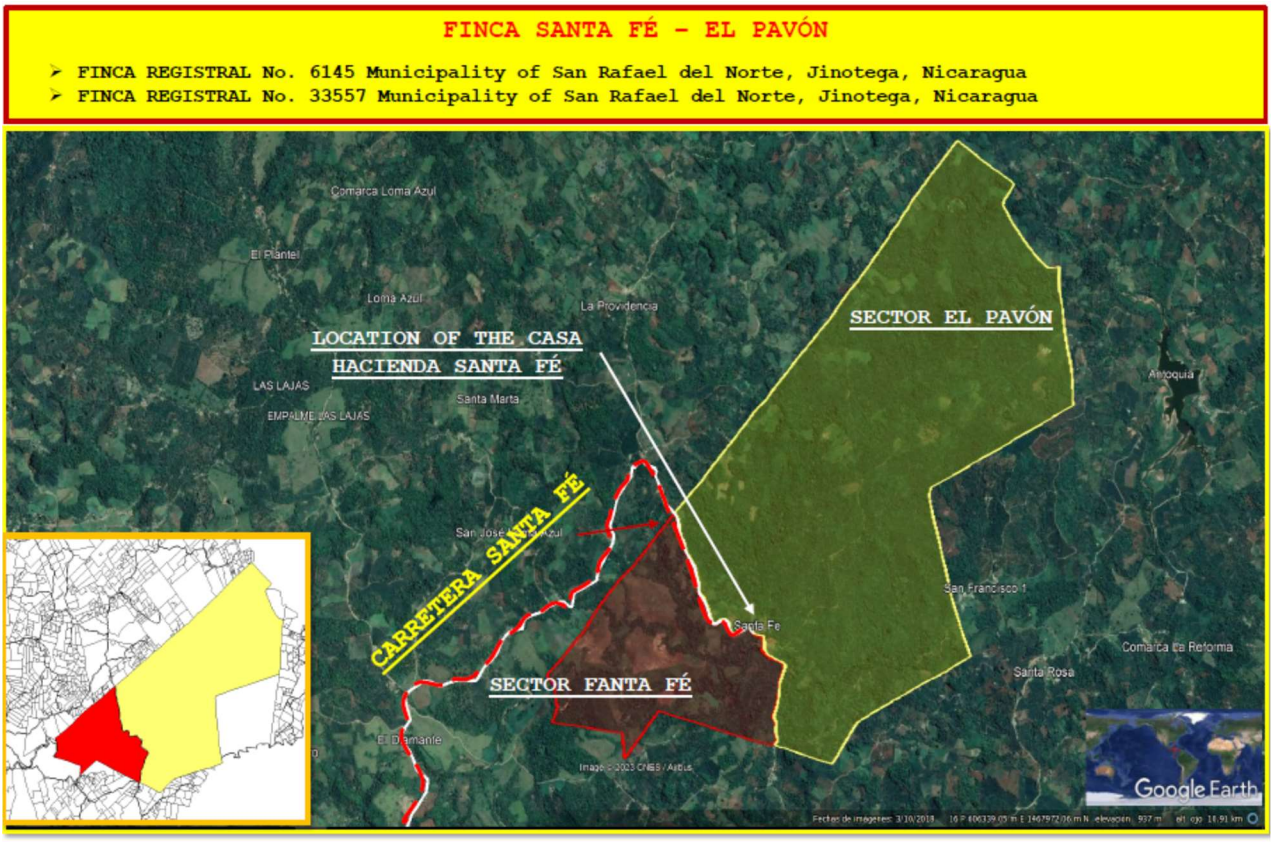
[16] Gutiérrez-Rizo I, ¶ 79 (**RWS-01**).

4. Accordingly, Riverside's contention that the Hacienda Santa Fé invasion was a paramilitaristic operation that was directed and facilitated by the Government is completely refuted by the evidentiary record, including facts known to Riverside that it omitted from its Memorial. Below is the story Riverside does not want the Tribunal to hear.

A. The Real Story of the Hacienda Santa Fé Invasion

1. Farmers Invaded Hacienda Santa Fé and Occupied the Upper Part of the Property between 1990 and 2004

5. Before this story can be told, it is important to understand certain details regarding Hacienda Santa Fé, since those details play a key role in the invasions that are disputed here. Below is a map of the Hacienda with certain of these details.[17]



[17] Gutiérrez-Rizo I, ¶ 22 (**RWS-01**); Herrera I, ¶ 16 (**RWS-03**); López I, ¶ 7 (**RWS-04**).

6. As can be seen, Hacienda Santa Fé sits in the northeast region of the Municipality of San Rafael del Norte in the Department of Jinotega. This property is listed as "*Finca Santa Fé – El Pavón*" in the local registry. And this property is comprised of two lots – identified as Nos. 6145 and 33557 in the registry – that are divided by a public road named "Carretera Santa Fé" that traverses through the southern part of the Hacienda.[18] The lot located southwest of this road is referred to as "Sector Santa Fé" or the "lower part" (*parte baja*) of the Hacienda and spans 302.90 hectares in surface area.[19] The lot located northeast of this road is referred to as "Sector El Pavón" or the "upper part" (*parte alta*) of the Hacienda and spans 915.50 hectares in surface area.[20] The main Hacienda house is located just north of the public road, towards the middle of the Hacienda.

7. The relevant story concerning Hacienda Santa Fé begins in 1990. That was the year that Mrs. Violeta Barrios de Chamorro assumed the presidency of Nicaragua from President José Daniel Ortega Saavedra.[21] In or around November 1990, President Chamorro promised to give land to members of the *Resistencia Nicaragüense* who had opposed the Sandinista government of the 1980s lands in consideration for their demobilization.[22]

8. In furtherance of that objective, President Chamorro appointed a commission – *La Comisión Agraria Regional de la Sexta Región* – to identify properties where these individuals and their families may live and work.[23] On November 22, 1990, that commission identified three

[18] Gutiérrez-Rizo I, ¶¶ 21-22 (**RWS-01**).

[19] Gutiérrez-Rizo I, ¶¶ 21-22 (**RWS-01**).

[20] Gutiérrez-Rizo I, ¶¶ 21-22 (**RWS-01**).

[21] Gutiérrez-Rizo I, ¶¶ 21-22 (**RWS-01**); López I, ¶ 14 (**RWS-04**).

[22] Gutiérrez-Rizo I, ¶¶ 13-16 (**RWS-01**).

[23] Gutiérrez-Rizo I, ¶ 16 (**RWS-01**); Agreement of the Regional Agrarian Commission of the Sixth Region, November 22, 1990 (**R-0052**).

properties where a faction of the *Resistencia Nicaragüense* could live, one such property being Hacienda Santa Fé.[24]

9. Contemporaneous records confirm the commission identified Hacienda Santa Fé as a possible place for resettlement of demobilized *Contras* because, at that time, the property was in an apparent state of "abandonment."[25] But the commission understood that the Government could not confer title over this property because it was privately owned.[26] Hence, the commission made clear to the *Resistencia Nicaragüense* members that they could not occupy this property until a deal could be struck with the private landowner.[27]

10. Nevertheless, members of the *Resistencia Nicaragüense* ignored the commission's instruction and almost immediately began occupying El Pavón without permission from the private landowner.[28] Because this property was effectively abandoned, however, these individuals did not receive any pushback.[29]

11. In the ensuing years, this informal community grew in size to approximately 117 families.[30] Although they had no legal title to their land, these families planted crops, farmed

[24] Gutiérrez-Rizo I, ¶ 16 (**RWS-01**); Agreement of the Regional Agrarian Commission of the Sixth Region, November 22, 1990 (**R-0052**).

[25] López I, ¶ 6 (**RWS-04**); Agreement of the Regional Agrarian Commission of the Sixth Region, November 22, 1990 (**R-0052**).

[26] López I, ¶ 6 (**RWS-04**); Agreement of the Regional Agrarian Commission Sixth Region of November 22, 1990. (**R-0052**).

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

[28] López I, ¶ 7 (**RWS-04**); Gutiérrez-Rizo I, ¶ 41 (**RWS-01**).

[29] López I, ¶ 12 (**RWS-04**) ("The communities lived peacefully in the "el Pavón" area for approximately 14 years, until they were evicted between 2003 and 2004 […]"); Gutiérrez-Rizo I, ¶ 42 (**RWS-01**).

[30] Gutiérrez-Rizo I, ¶ 45 (**RWS-01**).

livestock, built houses, schools, and other structures and even constituted a baseball team on the property.[31] Below are some photographs depicting life at El Pavón during this multi-year period.

12. In 1995, the community incorporated itself as "Cooperativa El Pavón R.L."[32] This was a private organization representing the interests of the community living informally on the property. Over the years that followed, the cooperative repeatedly asked the Oficina de Titulación Rural ("OTR") (the government agency responsible for overseeing property disputes) to grant it legal title to the property.[33] OTR denied these requests because it recognized that Hacienda Santa

[31] López I, ¶ 12 (**RWS-04**) ("While the communities occupied the Property, houses and schools were built, the lands were farmed and staple crops were sown to feed the families."); Gutiérrez-Rizo I, ¶ 42, 58 (**RWS-01**).

[32] López I, ¶ 10 (**RWS-04**); Gutiérrez-Rizo I, ¶ 45 (**RWS-01**); Application for titling submitted by the El Pavón R.L Cooperative to the Minister Director of INRA, November 1997 (**R-0058**).

[33] Gutiérrez-Rizo I, ¶ 42 (**RWS-01**).

Fé was privately owned and its landowner had not agreed to transfer title to the disputed land to the El Pavón cooperative.[34]

13. This property dispute came to a head in 2003. That year, Inagrosa, which purchased Hacienda Santa Fé in or around 1997, petitioned the National Police to evict the individuals living on El Pavón.[35] Because Inagrosa had legal title to that land, the Police proceeded to evict most of the illegal occupants and to destroy the structures that had been erected on the property.[36] The rest of the illegal occupants left the property months later in 2004.[37] This event was memorialized by the newspaper, *El Nuevo Diario*, in a November 2003 article titled "Scorched earth in El Pavón" (*Tierra arrasada en el Pavón*) as depicted below.[38]

DEPARTAMENTALES

SÁBADO, 22 de noviembre de 2003 — EL NUEVO DIARIO — 11B

Reyes Hernández, de 65 años, aseguró que está amenazado con ser desalojado este sábado de su ranchita construida con madera, teja, manila y plástico negro, si no por su voluntad.

Éste es el portón que la administración de la agropecuaria Inagrosa mandó a encadenar para no dejar pasar a los miembros de la cooperativa El Pavón, a pesar de que es una vía pública construida por el gobierno de Nicaragua.

Ésta era la vivienda del campesino Dionisio Rugama, la que fue derrumbada y quemada por los CPF y trabajadores de la Empresa Inagrosa.

00 campesinos, niños y ancianos, lanzados a la muerte

Tierra arrasada en El Pavón

Escenas evocan la guerra de Vietnam
Entrega, burla sangrienta del gobierno
Desalojadores queman hasta la escuelita
Alguien tiene que parar esta barbarie

ANCISCO MENDOZA S.
RAFAEL DEL
TE, JINOTEGA

Niños con su escuela des... las casas de sus padres ...tadas y quemadas y ...der sacar la cosecha de ...rque los portones es... ...rados por órdenes de ...pietarios de la Agropecuaria Inagrosa, es la odisea ...les ha tocado vivir a unas ...personas de la comunidad El Pavón, municipio de ...Rafael del Norte.

Valentín López Blandón, ...dente de la Cooperativa ...vón, compuesta por des...lizados de la Resistencia ...ragüense, manifestó que ...que han sembrado el te... ...son el administrador de ...presa, Marcos Molina, ...l mandador Juan Rivera ...no, quienes mandan a CPF y trabajadores a desbaratar las humildes casas de los campesinos ubicados en la finca Santa Fe.

El desmovilizado de la Resistencia Nicaragüense expresó que con la acción del pasado diez de noviembre, unos 75 niños de primero a cuarto grado quedaron sin concluir sus estudios porque los CPF, acompañados de policías y trabajadores de la hacienda, llegaron a desbaratar la escuela y a llevarse los pupitres, tablas y zinc, hasta las instalaciones de la hacienda donde están guardados.

Así mismo, también barrieron con un preescolar donde estudiaban 25 menores y con una casa donde se daba educación de adultos, para luego seguir con 16 viviendas que fueron desbaratadas y quemadas, mientras los propietarios de las mismas quedaban en la intemperie y obligados a firmar un recibo donde les entregaban mil córdobas, haciendo constar que los recibían voluntariamente.

Dionisio Rugama Espinoza, cuya vivienda fue quemada, aseguró que unos 48 hombres —entre CPF, trabajadores de la hacienda y policías— se presentaron y rodearon su humilde casita. Los tres agentes entraron a su casa y le quitaron todos los machetes, luego lo obligaron a firmar un recibo, donde le dieron mil córdobas a su mujer, mil a él y otro tanto a su cuñada. Luego botaron la casa y le pegaron fuego.

Al igual que este campesino, otros quince más narraron la brutalidad con la que fueron tratados a la hora del desalojo que realizaron los trabajadores de la hacienda sin ninguna orden judicial, solamente con la orden del mandador y administrador de la agropecuaria.

Una delegación del Centro Nicaragüense de Derechos Humanos, Cenidh, encabezada por el doctor Edmundo Gutiérrez, delegado Regional de este organismo humanitario para los departamentos de Matagalpa y Jinotega, y María Elena Altamirano, avanzaron unas cinco horas a caballo para constatar en el lugar de los hechos la represión con que fueron tratados los ex miembros de la desaparecida contrarrevolución y sus hijos.

Doña Teresa Chavarría, quien colinda con los cafetales de Inagrosa, dijo que está atemorizada por la forma en que llegaron los tres policías, diciendo que el que se corría se moría. Así mismo le dijeron a su marido, que saliera o de lo contrario lo sacarían por la fuerza, pero al ver que no salían de la casa, cortaron la casa con motosierra.

La mayoría de los miembros de la cooperativa El Pavón, supuestamente están siendo amenazados con ser desalojados. Unos hasta tienen fecha de vencimiento este próximo sábado. El problema es que lo están haciendo sin orden judicial, pero el juez de Jinotega mandó a detener estos desalojos.

EL NUEVO DIARIO y el Cenidh lograron conversar con el doctor Juan Carlos López Bonilla, quien se identificó como apoderado general de la familia Rondón, quienes son los dueños de Inagrosa, y con el ingeniero Marcos Molina, administrador de finca Santa Fe, quienes negaron todo lo actuado, manifestando que ellos convocaron a los que ocupan las 800 manzanas de tierra que son de la agropecuaria, quienes voluntariamente aceptaron mil córdobas para abandonar sus parcelas con el compromiso de irlos a ubicar al lugar donde ellos quieran.

A la vez, aseguraron que más bien ellos son los amenazados, y como éstos ahora no quieren salir después de haber firmado papeles, es que los están desalojando por no cumplir con lo acordado, y que la destrucción de la escuela también ya estaba en los documentos firmados. Hasta la maestra que daba clases a los niños, que ya perdieron su año académico, también había firmado y estaba clara de que el quince de noviembre se desbarataba la escuela.

Al parecer, todo se debe a una gran cantidad de dólares que quieren invertir en la propiedad donde están ubicados los desmovilizados, debido que el propio apoderado general de la familia Rondón aseguró que, por la renuencia de los desmovilizados, un préstamo de tres millones de dólares, no ha podido ser desembolsado.

Además del mejoramiento de la infraestructura, se piensan sembrar varias manzanas de helechos, a pesar de que el manejo de esta planta ya está contaminando las aguas subterráneas, como sucede en Matagalpa con las principales fuentes abastecedoras de agua.

Los desmovilizados aseguraron que si les toca derramar la sangre nuevamente por defender su tierra, lo harán, porque ellos no se han tomado la propiedad, sino que se las entregó el gobierno en cumplimiento de los acuerdos firmados al momento en que cambiaron las armas por el machete para integrarse a la producción y levantar la economía del país.

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[34] Gutiérrez-Rizo I, ¶ 49 (**RWS-01**); Letter from the Office of Rural Title Registration of the Ministry of Finance and Public Credit to Máximo Castillo and Edwin Castro, May 10, 2002 (**R-0060**) ("[the property] is claimed by the Rondón family, who are U.S. citizens. Such property will be returned to its original owners, and the land claimants will be relocated to another land eligible for title registration.").

[35] Gutiérrez-Rizo I, ¶ 50 (**RWS-01**); Castro I, ¶ 21 (**RWS-02**); Herrera I, ¶ 17 (**RWS-03**); López I, ¶ 12 (**RWS-04**).

[36] Gutiérrez-Rizo I, ¶ 50 (**RWS-01**); López I, ¶¶ 13-14 (**RWS-04**).

[37] Gutiérrez-Rizo I, ¶ 54 (**RWS-01**); López I, ¶15 (**RWS-04**).

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

14. Mr. Rondón appears to reference this eviction in his Witness Statement, stating that "[o]nce, more than fifteen years ago, in the early 1990s, there had been some prowlers who came into Hacienda Santa Fé. At that time the security team called the local police, who immediately came and apprehended the prowlers."[39] To the extent that Mr. Rondón is referring to the events of 2003-2004, his account is both incorrect and misleading. The invasion of Hacienda Santa Fé was not limited to just one occurrence in "the early 1990s," as Mr. Rondón suggests but, rather, occurred continuously from 1990 through 2004.[40] Further, the men, women, and children who invaded the Hacienda were not "prowlers"[41] but, rather, a collection of local farmers, including demobilized *Contras*, who believed (albeit incorrectly) that they had a valid claim on the property. And the Police did not "apprehend []"[42] these individuals – it just evicted them.

15. It is telling that Mr. Rondón misrepresents the duration and circumstances behind the historical invasions of Hacienda Santa Fé given that he and his family were personally involved in negotiations between Inagrosa and Cooperativa El Pavón in the 1990s and early 2000s regarding those invasions, a fact reported by two newspapers at the time.[43] And it is telling that he omits to mention Cooperativa El Pavón from his 54-page Witness Statement, given that Riverside and two other witnesses allege that some of the people who invaded Hacienda Santa Fé in 2018 declared the invasion was being carried out on behalf of Cooperativa El Pavón,[44] a fact that undermines

[39] Rondón I, ¶ 75 (**CWS-01**).

[40] Gutiérrez-Rizo I, ¶¶ 37-55 (**RWS-01**); López I, ¶¶ 4-13. *See also* Scorched earth in El Pavón, *El Nuevo Diario*, November 22, 2003 (**R-0032**); Luis Alemán Saballos, Denuncia abuso policial, *La PrensaNi*, 8 de noviembre de 2003 (**R-0093**).

[41] Rondón I, ¶ 75 (**CWS-01**).

[42] Rondón I, ¶ 75 (**CWS-01**).

[43] *See* Scorched earth in El Pavón, *El Nuevo Diario*, November 22, 2003 (**R-0032**); Luis Alemán Saballos, Denuncia abuso policial, *La PrensaNi*, November 8, 2003 (**R-0093**).

[44] Memorial, ¶ 227 ("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."); Gutiérrez I, ¶ 62 (**CWS-02**); Henriquez I, ¶ 21 (**CWS-06**).

Riverside's theory that the invasions were Government-sanctioned. The only plausible reason for this omission is that this contextual history controverts Riverside's theory that the Government was responsible for the Hacienda Santa Fé invasion at issue here.

16. Riverside's theory is also debunked by the testimony from Mr. López, who founded Cooperativa El Pavón. Mr. López lived in Hacienda Santa Fé in the 1990s and early 2000s before being evicted by the Police in late 2003.[45] In his testimony, Mr. López confirms that the individuals responsible for the most recent invasion of Hacienda Santa Fé are not Government agents or "paramilitaries," as Riverside contends, but, rather, displaced members of Cooperativa El Pavón who had been looking for an opportunity to re-occupy the land they once called home.

2. In 2017, Displaced Members of Cooperativa El Pavón Re-Took El Pavón Because It Had Been Deserted by Inagrosa

17. The real story behind the invasion of Hacienda Santa Fé resumes in June 2017 when displaced members of Cooperativa El Pavón re-invaded the El Pavón sector of the Hacienda. From 2004-2017, certain of the displaced members of this cooperative settled within a few kilometers of Hacienda Santa Fé.[46] Although there is no record of any attempted invasion during that period, Mr. López confirms that members of the cooperative kept monitoring the property in the event there was an opportunity to re-take it.[47] In other words, the property dispute between Inagrosa and Cooperativa El Pavón still existed beyond 2004, as did the risk that members of the cooperative would re-invade the property in another unauthorized attempt to occupy it. Importantly, Riverside at all relevant times knew about this risk when it made the investments at issue here.

[45] López I, ¶¶ 4-13 (**RWS-04**).

[46] López I, ¶ 19 (**RWS-04**).

[47] *See generally* López I, ¶¶ 21 (**RWS-04**) ("In June 2017, the former member of the Resistance, Adrián Wendel Mairena Arauz, a.k.a. "Wama", invited me to take part in the taking of the "El Pavón" sector of the Property. Wama was of the opinion that we should recover our lands.").

18. This risk materialized in June 2017. According to Mr. López – who since 2004 has lived less than one kilometer from Hacienda Santa Fé and who has kept in touch with leaders from Cooperativa El Pavón at all relevant times – it was common knowledge in 2017 among locals that Inagrosa had deserted the property.[48] This understanding derived from the fact that, in 2013, the Roya fungus had wiped out the coffee crop at Hacienda Santa Fé,[49] causing a marked reduction of activity. Locals on the public roads that surrounded and traversed Hacienda Santa Fé could see that the terrain had not been properly tended to for years, as evident by the large amount of undergrowth, weeds, and brush that blanketed the ground.[50]

19. Against this backdrop, in June 2017, Mr. Adrian Wendel Mairena Arauz (who goes by the alias "Wama"), one of the leaders of Cooperativa El Pavón, committed to invade Hacienda Santa Fé and re-occupy El Pavón.[51] When asked to participate in this invasion, Mr. López refused because he knew that occupying that land without Inagrosa's permission would have been illegal and would have resulted in yet another Police-led eviction (as ended up being the case here).[52] Mr. López, however, remained in close contact with Wama and learned that, in June 2017, Wama and approximately 170 individuals, including individuals whom Riverside refers to as "Avispa" and "Gorgojo," re-invaded Hacienda Santa Fé and re-occupied El Pavón on behalf of Cooperativa El Pavón.[53] Because the El Pavón sector had been effectively deserted by Inagrosa, no one affiliated with Inagrosa saw, much less confronted, the illegal occupants during the invasion.[54]

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[48] López I, ¶ 21 (**RWS-04**).

[49] Rondón I, ¶ 43 **(CWS-01).**

[50] López I, ¶20 (**RWS-04**); Gutiérrez-Rizo I, ¶ 26 (**RWS-01**).

[51] López I, ¶21 (**RWS-04**).

[52] López I, ¶21 (**RWS-04**).

[53] López I, ¶22 (**RWS-04**).

[54] López I, ¶21 (**RWS-04**) ("In June 2017, the former member of the Resistance, Adrián Wendel Mairena Arauz, a.k.a. "Wama", invited me to take part in the taking of the "el Pavón" sector of the Property. Wama was of the opinion that

20. Mr. López's testimony is supported by the evidentiary record. On October 28, 2019, certain individuals who invaded Hacienda Santa Fé in 2017 admitted in a letter that they had been living and working in El Pavón for "two years" as of the date of that letter, *i.e.*, since 2017.[55]

21. Mr. López further testifies that in mid-June 2018 Wama and approximately 50 men (including men known as "Gorgojo" and "Cinco Estrellas"), descended from El Pavón towards the Hacienda central house, located just north of Carretera Santa Fé.[56] As Mr. López learned from his conversations with Wama, the men made this descent because they wanted to see if Inagrosa had also deserted the lower part of the Hacienda known as Sector Santa Fé.[57] It was during this descent that Wama and his men were spotted by the security guards stationed at the Hacienda house.[58] This event is what Riverside wrongly refers to as "the first invasion of Hacienda Santa Fé."[59]

22. Mr. López's testimony is important for three reasons. ***First***, Mr. López's testimony refutes Riverside's timeline. Riverside alleges that the invasions of Hacienda Santa Fé commenced in June 2018.[60] That timeline is paramount to Riverside's case because Riverside alleges that the Government ordered the invasion of Hacienda Santa Fé in reaction to violent civil strife and widespread unrest that overtook the country in or around April 2018.[61] The fact that these invasions

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we should recover our lands. The "el Pavón" sector seemed to be abandoned. This was a fact known to us, as we were able to see, from outside the property, that no one was farming the land.").

[55] Letter from land occupiers to the Attorney General Office in Jinotega dated October 28, 2019 (**R-0094)**.

[56] López I, ¶ 24 (**RWS-04**) ("Then, in June 2018, Messrs. Gorgojo, Cinco Estrellas and José Dolores Pérez Estrada, together with a group of approximately 50 men, went down from the upper part of the property to the lower part, where the Residence is located, to occupy that area of the property.").

[57] López I, ¶¶ 24 (**RWS-04**) ("As explained, the communities could see that there was not much movement in the southern area of Hacienda Santa Fé, and they believed they could occupy that area, too.")

[58] López I, ¶ 25 (**RWS-04**).

[59] *Cf.* Memorial, ¶¶ 201-228 (saying that the alleged "First Invasion" took place in June 2018).

[60] Memorial, ¶¶ 205-228.

[61] Memorial, ¶ 169.

actually began in June 2017, *i.e.*, ***ten months before the 2018 unrest began***, undermines Riverside's theory of the case.

23. ***Second***, Mr. López's testimony refutes Riverside's allegation that Inagrosa's Hass avocado business was expanding exponentially as of June 2018. Specifically, Riverside avers that: (i) Inagrosa had its first Hass avocado harvest in 2017;[62] and (ii) the first harvest was so "successful" that in early 2018 Inagrosa undertook to expand its Hass avocado business by 2500%, first with a 200-hectare expansion that was supposedly "underway" as early as the Spring of 2018, and then with a 760-hectare expansion that would have occurred soon thereafter.[63] But this account is implausible given Mr. López's corroborated testimony that approximately 170 people invaded Hacienda Santa Fé in June 2017 and had lived there continuously for one year ***without ever being detected*** by anyone at Inagrosa. The more plausible inference is that Hacienda Santa Fé had been largely abandoned by Inagrosa, a fact separately supported by the October 2019 letter authored by certain of the invaders (detailed above), and other contemporaneous evidence detailed at length in Section II.C, *infra*.

24. ***Third***, Mr. López's testimony confirms that the invaders were not "paramilitaries" acting at the instruction of the Government. Rather, the invaders were many of the same members of Cooperativa El Pavón, including many demobilized former *Contras*, who had been evicted from Hacienda Santa Fé in 2003 (after many years of living there) and who had been mired in a decades-long property dispute with Inagrosa regarding who had legal title to that Hacienda.[64] This account

[62] Memorial, ¶ 51.

[63] Memorial, ¶¶ 49, 52.

[64] López I, ¶ 27 (**RWS-04**) ("I understand that Claimant argues that the people who invaded Hacienda Santa Fé in June 2017 and 2018 are "paramilitaries," who were allegedly acting under instructions from the government and in order to intimidate the business sector in Nicaragua. However, I can confirm that this is not true, these invaders are mostly farmers and they are part of a community incited by the former members of the Nicaraguan Resistance. I know

is consistent with the testimony of Riverside's witnesses who testify that the individuals who invaded Hacienda Santa Fé declared the invasion was being carried out on behalf of Cooperativa El Pavón.[65]

3. When Inagrosa Requested Assistance, the Government Reacted Diligently under the Circumstances and Succeeded in Evicting the Invaders and Securing Order

25. It is undisputed that, on or around June 16, 2018, Inagrosa called the National Police to assist in evicting the illegal occupants at Hacienda Santa Fé, just as it had done in 2003. Unlike before, however, the Police could not take immediate action given that its resources were allocated at that time towards containing violent civil strife and widespread unrest that plagued Nicaragua at the time. However, the Government acted diligently under the circumstances and, ultimately, succeeded in ridding the Hacienda of these invaders and restoring order.

a. *Ongoing Civil Strife and Violent Unrest Across Nicaragua Made It Impossible for National Police to Take Immediate Action Regarding the Hacienda Santa Fé Invasion*

26. Beginning in April 2018, violent civil strife and widespread unrest erupted across Nicaragua in response to changes announced by President Ortega to Nicaragua's pension system.[66] At first, the backlash was led mainly by students in peaceful fashion but this backlash soon turned violent when *Resistencia Nicaragüense* and other political opponents of the Government exploited this backlash to pursue their anti-Government agendas.[67]

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the communities in the area and am not aware that either the Police or the government have ever given them instructions to invade Hacienda Santa Fé.")

[65] Memorial, ¶ 227. *See also* Gutiérrez I, ¶ 62 (**CWS-02**); Henriquez I, ¶ 21 (**CWS-06**).

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

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

27. In the city of San Rafael del Norte, where Hacienda Santa Fé is located, the civil strife became increasingly more violent in May 2018.[68] Armed individuals constructed barricades (*tranques*) blocking all the exits and entrances to the city.

28. At the time of these violent disturbances, the National Police only had eight officers who were assigned to patrol San Rafael del Norte.[69] These officers allocated almost all of their efforts toward keeping the peace by, *inter alia*, confiscating shotguns, revolvers, homemade bombs, and clubs that were being used in the ongoing violence.[70]

29. By late May 2018, during a period of a negotiation between government officials and civic groups seeking to bring the violent civil strife to an end, President Ortega ordered Police officers to remain in their barracks so that peace talks could continue without the police being accused of any escalation.[71] This order was given during a televised interview and remained in place until late July 2018, when the nationwide unrest finally subsided.[72]

30. According to official reports, three months of violent civil strife and widespread unrest across Nicaragua had resulted in: (i) approximately 1,171 barricades being erected throughout the country; (ii) 198 deaths, including 22 members of the National Police; (iii) 1,240 people injured, including 401 members of the National Police; (iv) 252 buildings being vandalized; (v) 209 kilometers of roads being destroyed; and (v) 389 vehicles being destroyed.[73] The damages resulting from the 2018 unrest have been estimated at approximately USD $205.4 million to the

[68] Herrera I, ¶ 9 (**RWS-03**).

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

[70] Herrera I, ¶ 9 (**RWS-03**).

[71] Herrera I, ¶ 11 (**RWS-03**).

[72] Herrera I, ¶ 11 (**RWS-03**).

[73] Castro I, ¶ 23 (**RWS-02**); National Report issued for the Universal Periodic Report of the United Nations Human Rights Council, 28 January 2019, ¶ 4 (**R-0019**).

public sector, USD $231 million to the tourism sector; and USD $525 million to the transportation sector. This economic devastation caused the loss of approximately 120,000 jobs in a country of approximately 7 million inhabitants.[74]

31. This context is important to understand the extraordinary circumstances that were present in San Rafael del Norte when Inagrosa first requested assistance from the National Police on or around June 16, 2018. Inagrosa's call came at a particularly uncertain moment, when police officers were largely restricted to their barracks and focused on restoring order.[75] Given limited resources and nationwide violent unrest, the National Police were in no position to take immediate coercive action against hundreds of invaders at Hacienda Santa Fé, especially when some of those invaders were heavily armed.[76]

32. The day after the call from Inagrosa, the Police sent an officer to the Hacienda to assess the situation.[77] Having confirmed that the Hacienda had been invaded by hundreds of individuals, some of whom were armed, the Police told Inagrosa to evacuate its workers from the Hacienda to ensure their personal safety.[78] The Police explained to Inagrosa that it was simply not possible at that time for the Police to evict or arrest the illegal occupants in light of the widespread unrest and violent civil strife across the country.[79]

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[74] Castro I, ¶ 23 (**RWS-02**); National Report issued for the Universal Periodic Report of the United Nations Human Rights Council, 28 January 2019, ¶ 4 (**R-0019**).

[75] Carlos Fernández Álvarez, Article: This is how the coup in Nicaragua was experienced and defeated, El 19 Digital (**R-0037**).

[76] Herrera I, ¶ 12 (**RWS-03**) ("[…] the context of the events taking place from April 2018 in Nicaragua proves to be utterly relevant and shows that the Police were trying to cope with a number of riots across the country; while trying to afford security to the individual requirements of the population.").

[77] Herrera I, ¶ 21 (**RWS-03**).

[78] Herrera I, ¶ 21 (**RWS-03**).

[79] Herrera I, ¶ 21 (**RWS-03**) ("[…] Claimant fails to explain that it was informed that, as a result of the situation in the country at the time, where a large number of blockades were in place, we were confined to the police units and were unable to respond to the request immediately.").

33. Also around this time, the Police confiscated the guns from Inagrosa's guards.[80] This measure was not undertaken to assist the invaders, as Riverside claims.[81] Rather, the purpose of this measure was to mitigate against the risk of deadly violence.[82] Had the guards kept and used their weapons on the illegal occupants, a massacre might have ensued, given some of these occupants were heavily armed.[83] The situation was made even more sensitive by the fact that the occupants' leaders included a number of former *Resistencia Nicaragüense* and the consideration that the situation at Hacienda Santa Fé should not be allowed to escalate in a manner that could further inflame the widespread unrest and political violence throughout Nicaragua at the time. The only reasonable action at that time was for the weapons to be confiscated and for the guards to go home

b. *Nicaragua Evicted the Illegal Occupants from the Hacienda on August 11, 2018*

34. By August 2018, the violent unrest that consumed the country for months had come to an end. That month, the National Police and the Attorney General's office in Jinotega summoned leaders of the illegal occupants at Hacienda Santa Fé to arrange for their peaceful departure from the property.[84]

35. On August 11, 2018, the Mayor of Jinotega, Mr. Leónidas Centeno, and the highest-ranking police officer in the region, Commissioner Marvin Castro, travelled to Hacienda Santa Fé

[80] Herrera I, ¶ 21 (**RWS-03**).

[81] Memorial, ¶ 221.

[82] Herrera I, ¶ 23 (**RWS-03**) ("[…] this measure was adopted in order to avoid further violence, and to prevent the invaders from getting more weapons and using them to keep attacking the population and the Police.").

[83] Herrera I, ¶ 24 (**RWS-03**) ("The use of the force to remove the invaders when other more peaceful methods were available to the State would have implied a higher risk of violence and, due to the context of invasions in Hacienda Santa Fé, it was neither reasonable nor advisable.").

[84] Gutiérrez-Rizo I, ¶ 66; Summons to Gorgojo, Gerardo Rufino Arauz, Mauricio Mercado, José Estrada, Adrián Wendell Mairena Arauz, Yolanda del Socorro Téllez Cruz, José Dolores Zelaya, Gerardo Benicio Matus Tapia dated August 9, 2019 (**R-0049**).

to meet with the invaders.[85] In this meeting, Commissioner Castro and Mayor Centeno made clear that the occupation of Hacienda Santa Fé was illegal and that each of the illegal occupants had to leave immediately.[86] As Riverside concedes,[87] the illegal occupants left the property immediately after this meeting.[88]

36. But, on August 17, 2018, the invaders returned to the Hacienda because Inagrosa and Riverside inexplicably failed to secure the Hacienda in the days following the August 11, 2018 eviction.[89]

37. Inagrosa alerted the Police about this most-recent invasion but never brought a criminal action against the invaders or sought any other formal assistance from the Government. Its management also left the region.[90]

c. *Nicaragua Acted Diligently to Evict the Illegal Occupants Again after They Re-Invaded Due to the Property Being Abandoned by Riverside and Inagrosa*

38. In the months that followed the re-invasion of the property, Nicaragua opened a dialogue with the leaders of the illegal occupants to achieve a peaceful and orderly resolution to

[85] Castro I, ¶ 37 (**RWS-02**).

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

[87] Memorial, ¶ 192.

[88] Castro I, ¶ 38 (**RWS-02**).

[89] Castro I, ¶ 37 (**RWS-02**) ("At the meeting of August 11, most of the families agreed to vacate the estate. However, the owners or representatives of Hacienda Santa Fé did not show up to take possession. The estate was unoccupied for a few days, and when the invaders noted the owners were not there, they returned."); Letter from Foley Hoag LLP to Appleton & Associates regarding offer to return Hacienda Santa Fé of September 8, 2021 (**C-0116**) ("During 2018, for reasons unrelated to any actions by the Government, portions of the property were occupied unlawfully by local farmers and farm workers, at their own initiative. The Government managed to persuade them to leave peacefully, but, when it appeared that the property had been abandoned by its owners, they returned, again on their own initiative and despite the policy of the Government to respect private property.").

[90] *See* Castro I, ¶ 38 (**RWS-02**). *See also* Gutiérrez I, ¶ 127.

this matter.[91] During this period, these leaders again demanded legal title over the El Pavón sector of Hacienda Santa Fé.[92]

39. In January 2019, representatives from the Attorney General's Office of Jinotega as well as the Mayor of Jinotega, Mr. Leónidas Centeno, traveled to Hacienda Santa Fé and ordered the illegal occupants to leave the property. Some families obeyed the order and left the Hacienda.[93] Hundreds of illegal occupants, however, refused to leave because they had nowhere else to go and because they already planted approximately 350 hectares with crops (corn and beans) that were in the process of being harvested.[94]

40. The Government thereafter formed a commission exclusively devoted to peacefully removing the remaining illegal occupants and which comprised of Commissioner Castro, Mayor Centeno, and the Attorney General of Jinotega, Mr. Juan Bentanco.[95] On January 24, 2019, the commission issued a handwritten resolution declaring the commission's sole objective was to guarantee "the delivery (eviction) of the property known as Santa Fé – El Pavón, which is private and must be returned to its owners."[96] This resolution was signed by members of the commission and certain of the leaders of the illegal occupants, including Mr. Efrén Humberto Orozco Orozco,[97] known the alias "Cinco Estrellas" and whom Riverside identifies as an architect of the invasion.[98]

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[91] Gutiérrez-Rizo I, § D.3 (**RWS-01**); Castro I, ¶ 39 (**RWS-02**).

[92] Gutiérrez-Rizo I, ¶ 67 (**RWS-01**); Letter from Cooperative El Pavón to Nicaragua's Attorney General, September 5, 2018 (**R-0065**).

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

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

[95] Gutiérrez-Rizo I, ¶ 69 (**RWS-01**); Castro I, ¶ 39 (**RWS-02**).

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

[97] Minutes of the Meeting of the Commission in charge of the eviction of the unlawful occupants of January 24, 2019 (**R-0050**).

[98] Memorial, ¶ 210.

41. The resolution declared that the commission endeavored to achieve its objective in two phases. ***First***, the illegal occupants would relinquish control of the lands on the property that had not been farmed. ***Second***, after the corn and bean crops harvested, the illegal occupants would relinquish control over the remaining lands.[99]

42. This resolution also declared that the illegal occupants would produce a list with all of their names.[100] As indicated on the resolution, the purpose of this request was for the commission to have a better understanding as to how many people the Government needed to relocate to other lands.[101] And the resolution declared that the commission would coordinate on a periodic basis with certain of the leaders of the illegal occupants about this anticipated relocation.[102]

43. Over the next two years, the two-phase plan was put into action. During this period, many families peacefully evacuated Hacienda Santa Fé and were relocated to other lands. Others, however, refused to abide by the timelines and conditions in the resolution.[103] Still, the commission diligently continued with its mandate, coordinating with the leaders of the families that remained on the property and identifying other lands on which to relocate these individuals.[104]

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

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

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

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

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

[104] Gutiérrez-Rizo I, ¶¶ 70-72 (**RWS-01**).

44. By April 2021, many of the illegal occupants had evacuated Hacienda Santa Fé and had been relocated.[105] That month, Nicaragua summoned the leaders of the remaining illegal occupants to a meeting at the Attorney General's Office in Managua in an effort to expedite the process of evaluating Hacienda Santa Fé's illegal occupants.[106] At a subsequent meeting on May 4, 2021 at Hacienda Santa Fé, the Government presented relocation options to the remaining illegal occupants, advising them that they would face legal consequences if they did not agree to a peaceful and orderly relocation.[107]

45. As a result of this meeting, the Government entered into relocation agreements with most of the community members and almost all of the remaining illegal occupants left Hacienda Santa Fé and were relocated.[108] Below are pictures taken during the May 4, 2021 meeting at Hacienda Santa Fé:[109]

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

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

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

[108] Gutiérrez-Rizo, ¶ 73 (**RWS-01**); Relocation minute between farmers and the Attorney General Office in Jinotega dated May 5, 2021 (**R-0050**).

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

46. By August 2021, there were approximately 112 illegal occupants remaining on the property. On August 13, 2021, Government officials convened another meeting at Hacienda Santa

47. Between August 2018 and August 2021, no person affiliated with Inagrosa or Riverside filed a criminal complaint regarding the invasion or made any outreach concerning the status of Hacienda Santa Fé.[113]

48. On September 9, 2021, Nicaragua sent a letter to Riverside advising that Hacienda Santa Fé had been completely secured.[114] Through that letter, Nicaragua also offered Riverside the prompt return of the property, as demonstrated by the below excerpt:

> [A]fter a considerable and costly effort, Nicaragua has managed to clear the property of all unauthorized occupants in a peaceful and lawful manner. The property is thus in a position to be controlled, managed and developed by its legal owners.

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

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

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

[113] Gutiérrez-Rizo I, ¶ 75 (**RWS-01**).

[114] Letter from Foley Hoag to Appleton & Associates dated September 9, 2021 (**C-0116**).

> For your information, Nicaragua has never interfered with the rights of the legal owners. Its position concerning the Santa Fé property is, and has always been, to respect the rights of its private owners. During 2018, for reasons unrelated to any actions by [Nicaragua], portions of the property were occupied unlawfully by local farmers and farm workers, at their own initiative. [Nicaragua] managed to persuade them to leave peacefully [in August 2018], but, when it appeared that the property had been abandoned by its owners, they returned, again on their own initiative and despite the policy of [Nicaragua] to respect private property.
>
> If your clients are in a position to demonstrate their ownership of the property, Nicaragua would be willing to meet with them and establish the conditions for ensuring that the property is properly and securely placed in their hands, as promptly as possible.[115]

49. That same day, Riverside's representatives sent a response that inquired about the conditions referenced in Nicaragua's letter.[116] But noticeably missing from Riverside's response was any indication that Riverside or Inagrosa was willing to take back the property promptly. This fact meant that Hacienda Santa Fé would remain abandoned for the foreseeable future, thereby remaining susceptible to re-invasion.

50. To protect the Hacienda from future invasion while its status was being resolved, Nicaragua took further action. On September 29, 2021, Nicaragua hired a security company, Empresa de Servicios de Seguridad Privada S.A., to protect the Hacienda Santa Fé perimeter and provide around-the-clock surveillance of the property for one year. To date, Nicaragua has paid NIO 3,567,913.12, plus taxes, under this contract (approximately USD $100,000).[117]

51. Further, in November 2021, Nicaragua's Attorney General filed a petition with the local court to be named depositary of Hacienda Santa Fé.[118] This petition was necessary for the

[115] Letter from Foley Hoag to Appleton & Associates dated September 9, 2021 (**C-0116**).

[116] Letter from Appleton & Associates to Foley Hoag dated September 9, 2021 (**C-0118**).

[117] Gutiérrez-Rizo I, ¶ 79 (**RWS-01**); Security Services Agreement dated September 29, 2021 (**R-009**).

[118] Application for Urgent Precautionary Measures to appoint a judicial custodian for Hacienda Santa Fé dated November 30, 2021 (**C-0253**).

State to continue to be able to take necessary measures to protect Hacienda Santa Fé from further invasion and preserve the *status quo* during this arbitration.[119] This petition was approved on December 15, 2021.[120]

52. In December 2022, Nicaragua again invited Riverside and Inagrosa to take back the Hacienda.[121] But, to date, neither Riverside nor Inagrosa have retaken this property.

B. Riverside Omits, Mischaracterizes or Distorts Relevant Facts About the Invasion of Hacienda Santa Fé[122]

53. Riverside's omission of the historical dispute between Cooperativa El Pavón and Inagrosa is glaring given that Mr. Rondón and his family personally participated in negotiations arising from that dispute in the early 2000s and were the ones who in 2003 enlisted the National Police to evict the members of the cooperative from the property.[123] And this omission is even more glaring given that Riverside's witnesses – Messrs. Gutiérrez and Henriquez – each testify that the individuals who carried out the invasion declared on several occasions that they intended to "form a cooperative called El Pavón" on the property.[124] Riverside omits this relevant historical context because it does not suit its theory that the Hacienda Santa Fé invasion was a Government-ordered act of political retribution executed by paramilitaries.

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[119] Gutiérrez-Rizo I, ¶ 78 (**RWS-01**).

[120] Court Order appointing judicial custodian for Hacienda Santa Fé issued by the Second Oral Court of the Civil District Court of Jinotega Northern District dated December 15, 2021 (**C-0251**).

[121] Nicaragua's Rejoinder Letter in response to Riverside's submission dated December 12, 2022.

[122] Riverside's Memorial contains too many mischaracterizations and distortions of the facts, and Nicaragua only discusses the most relevant in this section. The fact that Nicaragua does not discuss or analyze some or other facts alleged by Riverside in its Memorial does not imply that Nicaragua has consented to them. Thus, Nicaragua reserves the right to expand or further defend itself in its Rejoinder.

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

[124] Gutiérrez I, ¶ 62 (**CWS-02**); Henriquez I, ¶ 20 (**CWS-06**).

54. As the adage goes, "never let the truth get in the way of a good story." And that is precisely what Riverside does here. Indeed, Riverside asserts that the invasion of Hacienda Santa Fé began in June 2018 – not in June 2017 as confirmed by the record – to fit its narrative that the invasion was somehow carried out in response to the civil strife that began in April 2018. Riverside asserts that the invaders were paramilitaries, notwithstanding the well-documented fact that they were members of a farming cooperative that used to be located on the Hacienda. Riverside asserts that these invaders were acting on behalf of the Government, notwithstanding the well-documented fact that the Government always opposed their illegal occupation of the property. And Riverside asserts that the Government assisted the invasion, notwithstanding the well-documented fact that the Government evicted the illegal occupants and expended considerable resources to prevent future invasions.

55. Nevertheless, Riverside contends that Nicaragua is responsible for the invasion for three reasons. ***First***, Riverside argues that Nicaragua was responsible for the invasion because the invaders were Government-sympathizing paramilitaries.[125] ***Second***, Riverside argues that Inagrosa workers overheard the invaders declare that they had been "sent" by Nicaragua.[126] ***Third***, Riverside argues Nicaragua provided assistance to these invaders by, *inter alia*, refusing to evict them from the Hacienda.[127]

56. As demonstrated in this section, Riverside presents these arguments without citing to any contemporaneous evidence. Riverside instead relies on *post-hoc* accounts from unreliable witnesses, uncorroborated hearsay testimony, and a report from its expert, Prof. Justin Wolfe, that wholly undermines Riverside's theory of the case. Moreover, as also demonstrated in this section,

[125] Memorial, ¶¶ 169-171.

[126] Memorial, ¶¶ 279-293.

[127] Memorial, ¶¶ 212.

Riverside's fanciful attempt to blame Nicaragua for the Hacienda Santa Fé invasion is refuted by the evidentiary record.

1. Riverside Has Not Proven the Invaders Were Paramilitaries

57. Riverside argues the invasion of Hacienda Santa Fé was borne out of a "campaign of oppression" waged at the highest levels of Government.[128] As Riverside tells it, the Nicaraguan Government sought to retaliate against political opponents by directing so-called "paramilitaries" to "intim[id]ate protestors and [take] land from non-supportive businesses" and other entities and individuals that the Government viewed as its political opponents.[129] Riverside contends that the invasion of Hacienda Santa Fé was a politically-motivated landgrabs executed by paramilitaries.[130]

58. To support its theory, Riverside relies mainly on an expert report authored by Prof. Wolfe. But that report does not support Riverside's theory. At most, Prof. Wolfe alleges a supposed state policy of using paramilitaries and land invaders against political opponents. Nicaragua rejects that allegation and many other of Prof. Wolfe's opinions, but they are also irrelevant to the case at hand. Crucially, Prof. Wolfe's report does ***not*** conclude ***the individuals who invaded Hacienda Santa Fé*** were "paramilitaries" acting for the Government. In fact, Prof. Wolfe's report ***never even addresses*** the Hacienda Santa Fé invasion.

59. Even by its own terms, Prof. Wolfe's report demonstrates that the invaders of Hacienda Santa Fé were ***not*** the "paramilitaries" that, he alleges, have acted on behalf of the Government. This is the case for several reasons:

[128] *See* Memorial, ¶¶ 123-128.

[129] Memorial, ¶ 169.

[130] Memorial, ¶¶ 171-172.

60. ***First***, according to Prof. Wolfe's report, the term "paramilitaries" refers to individuals whose faces are "always hidden under masks" to conceal their identities.[131] Here, however, Riverside does ***not*** allege that the individuals who invaded Hacienda Santa Fé wore masks of any kind. Nor does Riverside allege that these individuals attempted to hide their identities. Quite to the contrary, Riverside repeatedly alleges these individuals identified themselves to the security guards located at the Hacienda and repeatedly met with government officials.[132]

61. ***Second***, Prof. Wolfe alleges that paramilitary groups in Nicaragua "are composed of youths" who are recruited by Government officials.[133] But the individuals Riverside identifies as paramilitaries who invaded the Hacienda ("Wama," "Cinco Estrellas," "Gorgojo," "Chaparra" and "Avispa") were in their 50s and 60s when the invasion took place.[134] This is a demographic far more consistent with a population of demobilized anti-government *Resistencia Nicaragüense* making claims to land.

62. ***Third***, Prof. Wolfe opines that Nicaraguan paramilitaries are exclusively instructed by the National Police.[135] That is not what Riverside alleges here. Indeed, Riverside alleges that

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[131] Wolfe I, ¶ 52 (**CES-02**).

[132] Memorial, ¶ 210 ("Mr. Vivas informed that two paramilitaries, whom he identified as Efrén Zeledón Orozco "Comandante Cinco Estrellas" and Ciro Montenegro "Avispa" were in charge of recruiting the invaders to take Hacienda Santa Fé").

[133] Wolfe I, ¶ 51 (**CES-02**).

[134] *See* Profile of Mr. Benicio de Jesús González Pérez prepared by the National Police of Jinotega (**R-0038**); Profile of Mr. Benicio de Jesús González Pérez prepared by the National Police of Jinotega (**R-0039**); Profile of Mr. Adrián Wendell Mairena Arauz prepared by the National Police of Jinotega (**R-0040**); Profile of Mr. Ciro Manuel Montenegro Cruz prepared by the National Police of Jinotega (**R-0041**); Profile of Mr. Efrén Humberto Orozco Orozco prepared by the National Police of Jinotega (**R-0042**); Profile of Mr. Blas de Jesús Villagra Gonzalez prepared by the National Police of Jinotega (**R-0043**); Profile of Mr. Luis Antonio Rizo Reyes prepared by the National Police of Jinotega (**R-0044**); Profile of Mr. Haniel Samuel Rizo Torrez prepared by the National Police of Jinotega (**R-0045**); Profile of Mr. José Cristóbal Luqués Flores prepared by the National Police of Jinotega (**R-0046**); Profile of Mr. José Dolores Pérez Estrada prepared by the National Police of Jinotega (**R-0047**); Profile of Mr. Sergio Roberto Zelaya Rourk prepared by the National Police of Jinotega (**R-0048**).

[135] Wolfe I, ¶ 50 (**CES-02**).

the invasions were ordered by Mayor Centeno,[136] who has no affiliation with the National Police. For avoidance of doubt, Nicaragua rejects Riverside's allegation that Mayor Centeno ordered the Hacienda Santa Fé invasions and presents evidence that refutes that allegation completely. But the point is that Riverside's claim that the invaders were paramilitaries cannot be reconciled with the conclusions in the expert report that Riverside cites for this proposition.

63. ***Fourth***, the paramilitaries described by Prof. Wolfe were allegedly deployed by the Government after the civil strife and unrest began in April 2018 to remove barricades (*tranques*) erected by participants in the violent unrest and civil strife that was then roiling Nicaragua. But Riverside presents no evidence that the invaders of Hacienda Santa Fé had any role in this activity or that they had any interest in the ongoing civil strife and violent unrest across Nicaragua at the time.[137] Even on Riverside's case, the invaders of Hacienda Santa Fé appear to have been interested in occupying and farming the land at Hacienda Santa Fé.[138]

64. ***Fifth***, Prof. Wolfe opines that, when paramilitaries take private lands in Nicaragua, they do so to turn over the property to the Government, itself, or to confiscate the valuables located on the property for the Government's benefit.[139] Neither of these acts is alleged here. Riverside, for example, alleges that the invaders ***destroyed*** all valuable items located on the property, such as trees, nurseries, and crops, rather than confiscating them for the Government's benefit.[140] And Riverside does ***not*** allege that the invaders occupied Hacienda Santa Fé in order to turn it over to the Government. Rather, Riverside alleges the invaders divided up the land among themselves and

[136] Memorial, ¶ 62.

[137] Wolfe I, ¶ 64 (**CES-02**).

[138] Wolfe I, ¶ 64 (**CES-02**).

[139] *See* Wolfe I, ¶¶ 61-65 (**CES-02**).

[140] Memorial, ¶ 275.

proceeded to live there.[141] And, as explained in Section II.A, *supra*, Riverside's theory is further refuted by the fact that, rather than taking Hacienda Santa Fé for itself, Nicaragua tried to return it to Inagrosa on several occasions.

65. ***Sixth***, Prof. Wolfe alleges in his report that during the violent civil strife and unrest that occurred in Nicaragua over the summer of 2018, the Government used paramilitaries to target individuals identified as opponents of the Sandinista government, the ruling party in Nicaragua from 1979-1990 and again from 2006-present.[142] But that description does not work here because Riverside admits that "Inagrosa was not involved" in the 2018 unrest and its management were apolitical rather than opponents of the Sandinista government.[143]

66. ***Seventh***, the report's conclusion that the "paramilitary" invaders of Hacienda Santa Fé were supporters of the Sandinista government does not support Riverside's case because many of the alleged invaders were ***opposed*** to President Ortega and his political party. Rather than fighting ***for*** the Government, these individuals – most of whom are high-profile former members of the *Resistencia Nicaragüense* – fought ***against*** the President Ortega and his Sandinista Government for many years.[144]

67. To the extent that some of the invaders may have had other political inclinations, this only further undercuts Riverside's case because it shows that the invasion of Hacienda Santa Fé was part of a long-running local dispute over land, rather than one constructed on political lines. Below is a description of the backgrounds of the alleged leaders of the invaders of Hacienda Santa Fé, taken from the National Police's files.

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[141] Memorial, ¶ 181.

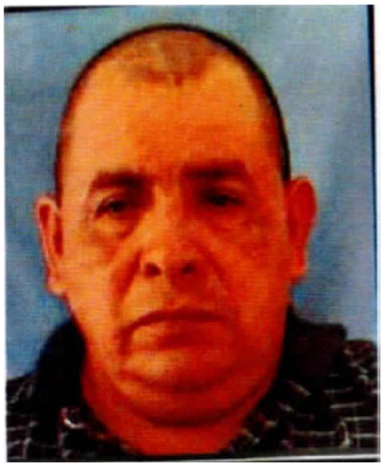
[142] *See* Wolfe I, ¶¶ 85-86 (**CES-02**).

[143] Rondón I, ¶ 6 (**CWS-01**).

[144] Castro I, ¶ 32 (**RWS-02**).

a. **<u>Adrián Wendell Mairena Arauz ("Wama").</u>** 59-year-old former member and commander of the *Resistencia Nicaragüense* who fought against the Sandinista government between 1983 and 1990.[145]

b. **<u>Benicio de Jesús González Pérez ("Gorgojo")</u>**. 67-year-old former member and leader of the *Resistencia Nicaragüense* who fought against the Sandinista government between 1983 and 1990.[146]



[145] *See* Characterization of Mr. Adrián Wendell Mairena Arauz, National Police of Jinotega (**R-0038**).

[146] *See* Characterization of Mr. Benicio de Jesús González Pérez, National Police of Jinotega (**R-0039**).

c. **Ciro Manuel Montenegro Cruz ("Avispa").** 58-year-old former member of the *Resistencia Nicaragüense* who fought against the Sandinista government between 1983 and 1990.[147]

d. **Efrén Humberto Orozco Orozco ("Cinco Estrellas").** 65-year-old former member and commander of the *Resistencia Nicaragüense* who fought against the Sandinista government between 1983 and 1990.[148]

[147] *See* Characterization of Mr. Ciro Manuel Montenegro Cruz, National Police of Jinotega (**R-0040**).

[148] *See* Characterization of Mr. Efrén Humberto Orozco Orozco, National Police of Jinotega (**R-0041**).

e. **Blas Jesús Villagra Gonzalez.** Former member of *Resistencia Nicaragüense* who fought against the Sandinista government between 1983 and 1990 and who passed away in 2021 at the age of 68.[149]

f. **Luis Antonio Reyes (Toño Loco)**.- 55-year-old former member of the military who sympathizes politically with the Sandinista government.[150]

g. **Ney Ariel Ortega Kuan (El Chino).** 33-year-old sympathizer of the Sandinista Government who was arrested for actions taken during the invasion.[151]

[149] *See* Characterization of Mr. Blas de Jesús Villagra Gonzalez, National Police of Jinotega (**R-0042**).

[150] *See* Characterization of Mr. Luis Antonio Rizo Reyes, National Police of Jinotega (**R-0043**).

[151] *See* Characterization of Mr. José Dolores Pérez Estrada, National Police of Jinotega (**R-0047**).

68. Riverside has not presented any evidence that demonstrates that these invaders are agents of the Sandinista-led Government. The only exceptions are Facebook posts published by the "Civic Alliance for Justice and Democracy" that suggest these invaders collaborated with the Government.[152] But these posts are unreliable because they are anonymous and the organization that issued them is an anti-Sandinista opposition group that is known for propagandizing politically motivated falsehoods about the Government.[153]

69. Based on the foregoing, Riverside has not proven – and cannot prove – the invasion was an act of political retribution carried out by Sandinista-sympathizing paramilitaries. To the contrary, it was the latest episode in a longstanding dispute over land with a local population that included numerous historical opponents of the Government.

2. Riverside's Allegations about What Inagrosa Workers Heard During the Invasion Constitute Unreliable Hearsay

70. Riverside also alleges that Nicaragua is responsible for the invasion of Hacienda Santa Fé because this is what the invaders reportedly told Inagrosa workers during the invasion.[154] Riverside also alleges that Inagrosa workers heard similar statements from Nicaraguan officials.[155] None of this is "evidence" should be taken seriously by the Tribunal.

71. As an initial matter, Riverside does not cite to any documentary evidence in support of these allegations. Rather, Riverside relies entirely on "hearsay" testimony *i.e.*, testimony that is not based on the witness's personal knowledge but, rather, on another party's unsworn statement. In other words, the allegations are supported only by testimony from witnesses who ***cannot*** attest

[152]Civic Alliance Facebook Post, July 16, 2018 (**C-0035**); Civic Alliance Facebook post, August 26, 2018 (**C-036).** *See also* Memorial, ¶¶ 276-278.

[153] Castro I, ¶19 (**RWS-02**).

[154] Memorial, ¶¶ 279-293.

[155] Memorial, ¶ 293.

to the veracity of the statement. Riverside cannot meet its burden of proof relying entirely on such unreliable testimony.

72. Indeed, none of the witnesses propounded by Riverside was present during what Riverside calls the "first invasion," *i.e.*, the moment in mid-June 2018 when illegal occupants were spotted descending onto the central house at the Hacienda. Mr. Rondón admits he was in the United States at that time,[156] as were his wife, parents-in-law, and alleged business partner Mr. Miller.[157] Messrs. Gutiérrez and Henriquez testify that they were present in Nicaragua but, according to Mr. Gutiérrez's testimony, neither was present at the Hacienda when the invasion occurred.[158] Instead, Mr. Gutiérrez confirms that the only Inagrosa representatives present for this invasion were three security guards,[159] none of whom is a witness in this case.

73. Against this backdrop, Riverside's allegation that the invaders said during the first invasion that they were sent by Nicaragua is unreliable. Indeed, this allegation is presented through testimony from Mr. Gutiérrez, who testifies he was told this supposed fact by head security guard, Mr. Raymundo Palacios, who, in turn, heard this supposed fact from ***another*** guard, Mr. Domingo Ferrufino.[160] This is an example of ***triple*** hearsay, *i.e.*, there are three hearsay statements presented in one witness account: (i) the account from Mr. Ferrufino is hearsay because he has no personal knowledge as to whether what the invader said is true; (ii) the account from Mr. Palacios is hearsay because he has no personal knowledge as to whether what Mr. Ferrufino said is true; and (iii) the

[156] Rondón I, ¶ 74 (**CWS-01**).

[157] *See generally* Winger de Rondón I (**CWS-01**); Melva Winger I; Melvin Winger I; Miller I (none of them mention that they were in Nicaragua when the invasions took place in 2018).

[158] Gutiérrez I, ¶ 36 (**CWS-02**) ("At the time of invasion, there were only three security guards on duty.").

[159] Gutiérrez I, ¶ 37 (**CWS-02**).

[160] Gutiérrez I, ¶¶ 42-46 (**CWS-02**).

account from Mr. Gutiérrez is hearsay because he has no personal knowledge as to whether what Mr. Palacios told him is true. This account cannot be used for the truth of the matter asserted here.

74. The same is true with respect to Riverside's account about what Inagrosa workers heard during what Riverside calls the "second invasion," *i.e.*, the expansion of the original invasion that occurred in mid-July 2018. With respect to this invasion, Riverside sets forth three separate allegations that attempt to pin the invasion on Nicaragua: (i) the allegation that "Cinco Estrellas" "told" Inagrosa workers that Mayor Centeno and his office sent invaders to occupy Hacienda Santa Fé;[161] (ii) the allegation that Inagrosa workers heard Councilwoman Arlen Chavarría collaborating with invaders;[162] and (iii) the allegation that a Nicaraguan government official, Mr. Fabio Darío, told Mr. Gutiérrez that the invasion had been ordered by the Government to pressure the business sector.[163] Each of these allegations constitutes hearsay or double hearsay and, thus, cannot be used for the truth of the matter asserted. Further, as explained in the section above, the allegation about Mayor Centeno is inconsistent with Riverside's theory that the invaders were paramilitaries acting at the orders of the National Police,[164] with which Mayor Centeno is not affiliated.

75. Finally, the same is true with respect to allegations concerning the "third invasion," *i.e.*, the expansion of the original invasion that occurred in late July 2018. Specifically, Riverside alleges with respect to that invasion that Mr. Gutiérrez overheard paramilitaries say that they were being sent to Hacienda Santa Fé by the Government.[165] Again, this testimony is hearsay and cannot be used for the truth of the matter asserted.

[161] Memorial, ¶¶ 230, 240.

[162] Memorial, ¶¶ 230, 241.

[163] Memorial, ¶ 247.

[164] Memorial, ¶¶ 294-299.

[165] Memorial, ¶ 249.

76. Furthermore, the hearsay testimony is not credible because it lacks corroboration from contemporaneous documents. Indeed, had Inagrosa or Riverside truly believed at the time that Nicaragua was behind this invasion, there would have been discussion of this incredible fact in a correspondence or business record. But Riverside does not submit any evidence to this effect.

77. On this point, it should be noted that Riverside submitted an August 10, 2018 letter from Mr. Rondón to Deputy Commissioner Herrera requesting police assistance.[166] Riverside uses this letter to support its contention that the National Police did not do enough to assist Inagrosa. Nicaragua refutes that argument in the following section.[167] But Nicaragua submits that the most intriguing fact about this letter is what it ***does not state***. Specifically, nowhere in this letter does Mr. Rondón state that Inagrosa believed the Government ordered the invasion, notwithstanding his testimony in this arbitration that this was his prevailing belief at the time and notwithstanding Riverside's hearsay allegations in this arbitration (addressed above) that the invaders and others repeatedly told Inagrosa that the invasion had been ordered by the Government as some political act of retribution.[168] Indeed, had Mr. Rondón believed that the Government – and, specifically, the National Police – was behind the invasion, then ***what would have been the point of sending this letter in the first place***? In sum, the contents of this contemporaneous letter cannot be squared with Riverside's after-the-fact account presented with its Memorial.

78. As explained in the next section, the hearsay testimony offered by Riverside is also not credible because Nicaragua took reasonable steps to evict the invaders and protect Hacienda Santa Fé from further invasions.

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

[167] *See* section II.A.3.b. *infra*.

[168] *See* section II.A.3.b. *supra*.

3. Riverside's Claim that Nicaragua Assisted the Invaders Is Unproven and Refuted by the Record

79. Riverside alleges that when Inagrosa requested help from the National Police as the invasion occurred, the Police refused to help[169] and instead facilitated the invasion by confiscating weapons from the security guards at Inagrosa and ordering them to vacate the area.[170] Riverside further alleges Nicaragua assisted the invaders by sending them food, water, and supplies.[171] These allegations, which are presented without supporting evidence, are false.

80. As an initial matter, those allegations are internally inconsistent with the rest of the allegations in the Memorial. Indeed, the Memorial elsewhere provides that the Police remained in close contact with Inagrosa as the invasion continued, taking Inagrosa's calls and conducting its own investigation into the circumstances behind the invasion.[172] Further, the Memorial provides that, on August 11, 2018, the highest-ranking Police officer in the area and Mayor Centeno went to the Hacienda and "ordered . . . the paramilitaries to leave the premises of Hacienda Santa Fé,"[173] which resulted in the invaders leaving the Hacienda that day.[174] And the Memorial provides that, when the invaders returned to the Hacienda,[175] the Government continued opposing the invasion

[169] Memorial, ¶ 176.

[170] Memorial, ¶ 180.

[171] Memorial. ¶ 188.

[172] Memorial, ¶ 211 ("Luis Gutiérrez 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."); ¶ 218 ("Luis Gutiérrez called the local police for help on behalf of Inagrosa. 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."); ¶ 221 ("Later that morning, Police Inspector Calixto Vargas accompanied by five police arrived at Hacienda Santa Fé."); ¶ 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.").

[173] Memorial, ¶ 262.

[174] Memorial, ¶¶ 262, 267.

[175] Memorial, ¶ 269.

and, in 2021, succeeded to evict all of the illegal occupants from the property.[176] These allegations cannot be reconciled with Riverside's theory that the Government both ordered and facilitated the invasion.

81. Nor can Riverside's theory be reconciled with all of the other evidence in the record demonstrating that the Government worked tirelessly for years to evict the illegal occupants from the Hacienda. Specifically, this evidence demonstrates that:[177]

a. **August 11, 2018**. Mayor Centeno and Commissioner Castro personally travel to Hacienda Santa Fé and order the illegal occupants to leave immediately.[178] The illegal occupants leave the property but return about a week later on August 17, 2018, due to Inagrosa's and Riverside's failure to secure the Hacienda.[179]

b. **August 2018 – January 2019.** The Government establishes a dialogue with the leaders of the illegal occupants and, in that dialogue, confirms that the Hacienda is privately owned by Inagrosa, and its unauthorized occupation is illegal.[180]

c. **January 2019**. Mayor Centeno and the Attorney General of Jinotega met with the leaders of the illegal occupants and ordered them to leave without violence. Some of the illegal occupants voluntarily left the Hacienda immediately after this meeting.[181]

d. **January 24, 2019**. Continuing with the process to evict the invaders, a "Commission for the purpose of evicting Finca Santa Fé" was formed. This commission comprised of Commissioner Castro, Mayor Centeno, and Attorney General Betanco. That same day, the commission and certain of the leaders of the illegal occupants executed a resolution providing that: (i) the Hacienda is privately owned; (ii) its occupation by Cooperativa El Pavón is illegal; (iii) the illegal occupants would leave the premises in two phases; and (iv) Nicaragua would relocate these individuals elsewhere.[182]

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[176] Memorial, ¶ 274.

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

[178] Castro I, ¶ 37 (**RWS-02**).

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

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

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

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

e. **January 2019 – April 2021.** Many of the illegal occupants exit Hacienda Santa Fé. The commission continues to identify lands to relocate the illegal occupants that remain on the property.[183]

f. **April 28, 2021.** The Government summoned the leaders of the families that still occupied Hacienda Santa Fé to meet with them and discuss the relocation situation.[184] Two days later, a meeting between the parties takes place at the Attorney General's office in Managua that concerned the eviction of the illegal occupants that remained on the property.[185]

g. **May 4, 2021.** The Government meets with remaining illegal occupants at the Hacienda, presents relocation options, and orders them to leave immediately.[186] Almost all of the remaining illegal occupants leave immediately and only about 112 illegal occupants remain on the property.[187]

h. **August 13, 2021**. The Government convenes another meeting at the Hacienda, wherein these officials gave remaining illegal occupants a firm deadline to leave the property.[188]

i. **August 18, 2021**. The Government successfully evicted all illegal occupants from Hacienda Santa Fé.[189]

j. **September 9, 2021**. The Government invites Inagrosa to reclaim the Hacienda, but Inagrosa inexplicably decided not to take possession of the property.[190]

k. **September 29, 2021.** The Government hires security team to provide around-the-clock surveillance of Hacienda Santa Fé.[191]

l. **November 30, 2021**. Due to Inagrosa's unwillingness to take back the Hacienda the Government is forced to seek a protective order from a court that allows the Government to place around-the-clock surveillance around the perimeter of the

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

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

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

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

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

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

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

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

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

property to prevent against future invasions.[192] The court issues this order on December 15, 2021.[193]

m. **December 2021 – Present**. Nicaragua has spent NIO 3,567,813.12, plus taxes, in its ongoing efforts to secure Hacienda Santa Fé.[194] Inagrosa still has not taken back its property, despite repeated invitations to do so.

82. Accordingly, Riverside's theory that Nicaragua ordered and assisted the invasion of Hacienda Santa Fé is refuted by the myriad evidence in the record demonstrating that, far from being in favor of this invasion, Nicaragua expended considerable time and resources in ensuring that the invaders were peacefully removed from the property and the Hacienda protected from future invasions. These uncontroverted facts speak for themselves and neither hearsay testimony nor sensational stories about paramilitaries can prove otherwise. Accordingly, Riverside's theory that Nicaragua is responsible for the invasion must be rejected.

C. Riverside's Allegations Concerning Inagrosa's Hass Avocado Business Are Unfounded and Controverted by the Evidentiary Record

83. Riverside alleges that Inagrosa purchased Hacienda Santa Fé in December 1997 to pursue a coffee business[195] but that, in 2013, a Roya fungus wholly destroyed the coffee plantation, forcing Inagrosa to abandon the coffee business.[196] Riverside then alleges that Inagrosa thereafter pursued a Hass avocado business, notwithstanding that nobody at Inagrosa or Hacienda Santa Fé had any experience in seeding, planting, harvesting, processing, or exporting Hass avocados.[197] Riverside next alleges that, in 2014, Inagrosa planted 16,000 avocado trees in a 40-hectare orchard

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

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

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

[195] Rondón I, ¶¶ 36, 40 (**CWS-01**).

[196] Rondón I, ¶¶ 43, 45 (**CWS-01**).

[197] Rondón I, ¶¶ 68-69, 120 (**CWS-01**).

in the southwestern section of Hacienda Santa Fé as an inaugural batch.[198] And Riverside alleges the harvest of the inaugural batch, which supposedly occurred in 2017, was so "successful" that Inagrosa took steps to expand its avocado business significantly – first with a 200-hectare, 140,000 avocado tree expansion that began in the Spring of 2018 and would have finished in 2019 and later with a 760-hectare, 532,000 avocado tree expansion that would have begun in or around 2021.[199] Riverside concludes that Inagrosa's Hass avocado business and its ongoing expansion was worth approximately USD $184 million in June 2018 and "would have" been worth more than USD $629 million by the end of the alleged expansions.[200]

84. Riverside has not met its burden of proof with respect to the foregoing allegations. Riverside does not submit ***any*** documents demonstrating that Inagrosa successfully planted 16,000 Hass avocado trees across a 40-acre orchard in 2014. Nor does Riverside submit ***any*** documents demonstrating that Inagrosa was in the process of planting another 140,000 trees across a 200-acre orchard in 2018 or that Inagrosa had viable plans and sufficient resources to maintain the avocado orchards while planting 532,000 additional Hass avocado trees across 760 hectares by 2023. In fact, Riverside failed to submit any of the typical business records that an avocado business supposedly worth hundreds of millions of dollars should generate, such as a balance sheet, credit and debit reports, bank statements, feasibility reports, work plans, and financial projections, to name a few.

85. Rather, the ***only*** support for Riverside's allegations about Inagrosa's Hass avocado business comes from the testimony of Messrs. Rondón and Gutiérrez, two Inagrosa representatives

[198] Memorial, ¶ 51; Rondón I, ¶ 33 (**CWS-01**).

[199] Memorial, ¶¶ 49, 52.

[200] Memorial, ¶¶ 72-78.

with every incentive to exaggerate the size and performance of Inagrosa's avocado business.[201] In their respective witness statements – parts of which are presented verbatim – they contend that, in just four years (from 2014 to 2018), Inagrosa started a Hass avocado business from scratch, without prior experience, and grew it into a multi-hundred million dollar enterprise with little-to-no costs, without investor capital or loans from financial institutions, and armed only with some research and intermittent guidance from a remote avocado consultant.[202] Importantly, neither witness cites to contemporaneous documents that in any way support this extraordinary account. They just ask that the Tribunal take their word for it.

86. Riverside's allegations about Inagrosa's Hass avocado business, apart from being unsupported, are refuted by the record: (i) far from undergoing an expansion, Inagrosa's avocado business appears to have been abandoned by the time of the invasions; (ii) Inagrosa had not secured any of the permits and authorizations it needed to pursue an avocado business and, in fact, there is no record demonstrating that Inagrosa ever applied for those permits or authorizations; (iii) there is no guarantee that the conditions at Hacienda Santa Fé, Jinotega or Nicaragua are suited for Hass avocado production at a commercial scale, as evidenced by a report from Inagrosa's agricultural consultant, Mr. Rodrigo Jimenez,[203] as well as the irrefutable fact that ***there has never been a Nicaraguan business that has ever sold or exported Hass avocados***; (iv) Inagrosa's avocado business, as described by Riverside, is infeasible from a technical perspective; and (v) Inagrosa's alleged avocado business was not financially viable.

[201] *See* Rondón I (**CWS-01**), Gutiérrez I (**CWS-02**).

[202] Memorial, ¶¶ 72-79; Rondón I, ¶¶ 45, 99, 208 (**CWS-01**); Gutiérrez I, ¶¶ 17, 150, 152 (**CWS-02**).

[203] *See* Avocado Cultivation Recommendations from Rodrigo Jiménez, January 2014 (**C-0086**).

1. Riverside Has Not Proven that Inagrosa Had a Successful Avocado Business

87. Riverside has not proven its claim that, in January 2014, Inagrosa planted 16,000 Hass avocado trees across a 40-hectare orchard in Hacienda Santa Fé.[204] The documents submitted by Riverside only show that: (i) Inagrosa bought an unspecified amount of Hass avocado seeds from Costa Rica from its consultant, Mr. Jimenez;[205] (ii) Inagrosa used those seeds to create a few thousand avocado saplings that it kept at a nursery at Hacienda Santa Fé;[206] (iii) Inagrosa intended to graft those saplings onto trees and then plant those trees in the southwestern region of Hacienda Santa Fé[207] and (iv) Inagrosa planned to commercialize the seedlings developed in Inagrosa's nursery as an additional business line.[208] Nothing in those documents, however, supports Riverside's contention that Inagrosa ***succeeded*** in growing 16,000 Hass avocado saplings, in grafting them onto avocado trees, and in planting those trees at Hacienda Santa Fé. Nor does the evidence support Riverside's allegation that Inagrosa believed that other farmers in the area "could engage in the cultivation of avocado trees" opening new lines of business for Inagrosa.[209] There are no pictures or records of any kind that support those conclusions. Rather, that conclusion derives ***entirely*** from unsupported testimony from Messrs. Rondón and Gutiérrez.[210]

[204] Memorial, ¶¶ 49, 51; Gutiérrez I, ¶ 150 (**CWS-02**).

[205] Memorial, ¶ 329; Rondón I, ¶¶ 122, 129 (**CWS-01**); Gutiérrez, ¶149 (**CWS-02**).

[206] Rondón I, ¶ 129 (**CWS-01**).

[207] Memorial, ¶¶ 325, 836.

[208] Memorial, ¶ 821; Rondón I, ¶ 196; Riverside Management Representation Letter dated September 12, 2022, ¶ 36 (**C-0055**)

[209] Memorial, ¶ 821; Riverside Management Representation Letter dated September 12, 2022, ¶ 36 (**C-0055**).

[210] *See* Rondón I (**CWS-01**), Gutiérrez I (**CWS-02**).

88. Satellite images taken over the area where Hacienda Santa Fé is located show that, as of 2015, only an area of approximately 5.84 hectares had been recently cultivated.[211] Assuming, *arguendo*, that this area contained Hass avocado trees, it can be deduced that Inagrosa planted only about 2,336 avocado trees at Hacienda Santa Fé in 2014, based on the allegation that Inagrosa planted approximately 400 avocado trees per cultivated hectare.[212]

89. This conclusion is consistent with the documents that Riverside submitted with its Memorial. Specifically, Riverside submits a January 2014 report authored by Inagrosa's consultant – Mr. Jiménez – regarding Inagrosa's efforts to plant its inaugural tranche of Hass avocado trees.[213] Nothing in that report shows that Inagrosa was on pace to plant 16,000 grafted Hass avocado trees that month.[214] To the contrary, that report states that the inaugural crop of avocado trees would be planted throughout ***various stages*** between 2014 and 2016 – not all at once as Riverside alleges – due to myriad setbacks encountered during the plantation process caused by insects, issues with the nursery, and the wind, as demonstrated in this excerpt (emphasis in original).[215]

[211] Satellite image of the land use of February 2015 of Hacienda Santa Fé prepared by the National Environmental Information System (**R-0074**); 2015-2018 Map analysis by technicians of the Ministry of Natural Resources (MARENA) showing development of avocado orchards (**R-0092**).

[212] Memorial, ¶ 816.

[213] Avocado Cultivation Recommendations from Rodrigo Jiménez, January 2014 (**C-0086**).

[214] Avocado Cultivation Recommendations from Rodrigo Jiménez, January 2014 (**C-0086**).

[215] Claimant submitted the Spanish original of Mr. Jiménez's Avocado Cultivation Recommendations as exhibit **C-0086-SPA**, Respondent is submitting an English version of the recommendations as exhibit **R-0108-ENG**.

> We asked about wind seasons, and we were told that there are still 2 months of possible threat to go, which is why we recommend NOT GRAFTING DURING MARCH AND APRIL, AND PREPARE FOR MAY, with Hass materials from Guatemala, El Salvador, making it clear that we have the capacity to graft 1000 grafts per week given graft tip hydration.
>
> The first cultivated plot of land was visited, and it does not differ much from the rest. Without a doubt, we have had many problems in this plot, such as May beetle grubs (jobotos), nursery issues and wind. I HIGHLIGHT THAT WIND IS ONE OF OUR LIMITING FACTORS.

90. Further, Mr. Jimenez's report reveals that a "very large group" of the avocado trees that Inagrosa planted in its inaugural plantation ***were never grafted with Hass avocado saplings***.[216] This statement contradicts Riverside's allegation that all trees had been grafted with Hass avocado saplings prior to plantation.[217] More importantly, this statement confirms it is impossible to know how many – if any – of the avocado trees bore Hass avocado as their fruit, as opposed to some other, less valuable type of avocado.

91. Riverside also fails to support its assertion that Inagrosa's avocado harvest in 2017 had been "very successful."[218] Specifically, Riverside alleges that Inagrosa's inaugural avocado harvest resulted in "more than 20 kg of Hass avocado" for each of the 16,000 trees that Inagrosa allegedly planted three years earlier, *i.e.*, more than 320,000 kgs of Hass avocados.[219] For that fact, Riverside appears, yet again, to rely exclusively on testimony from Messrs. Rondón and Gutiérrez, each of whom testify (without citing to any corroborating evidence) that this harvest resulted in more than 20 kg of Hass avocados per tree.[220] There are no pictures, business records, tax returns,

[216] Avocado Cultivation Recommendations from Rodrigo Jiménez, January 2014, page 789 (**C-0086**).

[217] Memorial, ¶ 51; Rondón I, ¶ 130 (**CWS-01**).

[218] Memorial, ¶ 51; Rondón I, ¶ 130 (**CWS-01**).

[219] Rondón I, ¶ 130 (**CWS-01**); Gutiérrez, ¶150 (**CWS-02**).

[220] Rondón I, ¶ 130 (**CWS-01**); Gutiérrez, ¶150 (**CWS-02**).

or communications in the evidentiary record that prove that there was even a harvest in the Fall of 2017, much less that it was successful. This omission is glaring given that a harvest this size would have generated a significant paper trail, such as labor-related records demonstrating that Inagrosa hired workers to help pick, clean, process, and store the more than 320,000 kgs of Hass avocados, or documents noting what Inagrosa did with so many Hass avocados.

92. Riverside's allegations about the "expansions" of Inagrosa's avocado business are also unsupported. Riverside alleges that the supposed success of the 2017 harvest caused Inagrosa to fast-track two waves of expansions.[221] The first wave, which is alleged to have begun in the Spring of 2018 and was supposedly interrupted in June 2018 by the invasions, would have added 200 hectares to the existing avocado plantation, on which Inagrosa intended to plant an additional 140,000 grafted Hass avocado trees in late 2018 and early 2019.[222]The second wave would have added 760 hectares, on which Inagrosa intended to plant another 532,000 grafted Hass avocado trees.[223]

93. Yet again, Riverside offers no evidence to support its claims about these so-called "expansions" of Inagrosa's Hass avocado business. For example, Riverside does not cite to a technical study or feasibility report to demonstrate that these expansions were feasible or viable. And Riverside does not cite to financial projections detailing how much this expansion would have cost Inagrosa or how much Inagrosa needed from investors or financial institutions to execute this expansion. Rather, as best as can be told from the unsupported allegations about these expansions,

[221] Memorial, ¶¶ 51-52.

[222] Memorial, ¶ 49; Rondón I, ¶ 202.

[223] Memorial, ¶ 49; Rondón I, ¶¶ 200-201; Riverside Management Representation Letter dated September 12, 2022, ¶ 28 (**C-0055**).

Inagrosa management just came up with the parameters concerning these expansions on the back of a napkin.

94. Nor does Riverside cite to documents demonstrating that the first expansion began in early 2018. This omission is odd given the testimony of Messrs. Rondón and Gutiérrez, which provides that, starting in the Spring of 2018, Inagrosa staked a 200-acre orchard, started the process of removing existing trees and brush using hand tools (such as axes and shovels), and even tested the soil that had been cleared "for pH level, organic material, aluminum, phosphorus, potassium, calcium, magnesium, sodium, sulfur, boron, zinc, copper, and iron."[224] Mr. Gutiérrez alleges that this process was time-consuming, taking Inagrosa "3 days per hectare with eight workers working 8 hours."[225] Based on this testimony, there should be documents demonstrating the location of the 200-acre orchard that was supposedly staked, field records detailing who worked this property and for how long, payment records and tax documents for those payments, and lab results from the soil samples. Instead, as with all other allegations about the performance of Inagrosa's Hass avocado business, the only support cited for these allegations is the unsupported testimony of Messrs. Rondón and Gutiérrez.

95. But apart from being unreliable and unsupported, the testimony of Messrs. Rondón and Gutiérrez is also internally inconsistent. Indeed, both witnesses claim that the first expansion would have resulted in the planting of 140,000 grafted Hass avocado trees sometime in late 2018 and early 2019.[226] Yet both witnesses also testify that, as of June 2018, the Inagrosa nursery only had 10,000 Hass avocado saplings ready to be planted and that only 7,000 of those saplings had

[224] Rondón, ¶¶ 135, 139 (**CWS-01**).

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

[226] Rondón, ¶¶ 199-202 (**CWS-01**); Gutiérrez, ¶ 155, 177 (**CWS-02**).

been grafted onto avocado trees.[227] In other words, Inagrosa still needed to create, from scratch, another 130,000 Hass avocado saplings and graft those (along with the 3,000 un-grafted saplings already in the nursery) onto avocado trees. Riverside offers no explanation as to how those tasks would have been completed by late 2018 or early 2019 – the timeline provided by Riverside – considering Messrs. Rondón and Gutiérrez agree it takes approximately seven months for a seed to develop into a Hass avocado sapling that could be planted.[228]

96. The reality is that this expansion never occurred. Far from being in a rapid state of expansion, Inagrosa's avocado business had been effectively abandoned when the June 2018 invasions began.

97. ***First***, Inagrosa had all but deserted Hacienda Santa Fé in the months leading up to the invasions. Mr. López confirms that two-hundred individuals belonging to the "El Pavón" cooperative had re-taken the upper part of the Hacienda in the middle of 2017.[229] According to Mr. López , these invaders did not encounter anyone from Inagrosa until June 2018 when some of these individuals reportedly went to the Hacienda house located in the middle of the property and clashed with the security guards located in that area of the Hacienda.[230] In other words, hundreds of these invaders had already been living within Hacienda Santa Fé for ***almost a year*** before they ran into anyone working for Inagrosa. This fact cannot be reconciled with Riverside's account that Inagrosa workers had been staking and working the property heavily since the Spring of 2018 as part of the alleged "expansion."[231]

[227] Rondón, ¶ 71 (**CWS-01**); Gutiérrez, ¶ 167 (**CWS-02**).

[228] Rondón, ¶ 71 (**CWS-01**); Gutiérrez, ¶ 167 (**CWS-02**).

[229] López I, ¶ 22 (**RWS-04**).

[230] López I, ¶ 22 (**RWS-04**).

[231] Memorial, ¶ 317.

98. ***Second***, Inagrosa never secured (or attempted to secure) permits that were required under Nicaraguan law to switch from a coffee growing operation to an avocado business. To summarize, expanding the Hass avocado business in the manner alleged required Inagrosa to obtain permits that authorized Inagrosa, *inter alia*, to import and plant Hass avocado seeds, clear hundreds of hectares needed for the expansion, use the nearby waterways to sustain the new Hass avocado orchards, and export the harvested crop.[232] ***As of June 2018, Inagrosa had not secured any of these permits and, in fact, had never even applied for them***.[233] This fact cannot be squared with Riverside's allegation that a significant expansion of Inagrosa's avocado business was "underway" when the invasions occurred.[234]

99. ***Third***, Inagrosa's efforts between 2015 and 2018 to classify Hacienda Santa Fé as a private wildlife reserve prove that Inagrosa had no intention of expanding its avocado business. In 2015, Carlos Rondón applied MARENA (Nicaragua's environmental agency) to classify the Hacienda as a private wildlife reserve[235] and later re-filed the application on behalf of Inagrosa.[236] According to Inagrosa's application, Inagrosa requested this classification to preserve the myriad species of flora and fauna found across most of the Hacienda.[237] Over the next two years, Inagrosa continued to pursue this classification, allowing MARENA inspectors onto the property and submitting all the information required under this process.[238] In February 2018, MARENA

[232] *See* Section II.C.2 *supra*.

[233] *See* Section II.C.2 *supra*

[234] Memorial, ¶¶ 49, 53.

[235] Rondón I, ¶ 48 (**CWS-01**); Inagrosa Ministry of Environment and Natural Resources (MARENA) Form application for designation of Private Wildlife Reserve (**C-0083**).

[236] Inagrosa application form for a Private Wildlife Reserve (**R-0032**).

[237] Inagrosa application form for a Private Wildlife Reserve (**R-0032**).

[238] Technical report, technical valuation of the farm "Inversiones Agropecuarias S.A." proposed as a Private Wildlife Reserve in the Municipality of San Rafael del Norte, Department of Jinotega (**R-0034**).

approved the application through a resolution that formally classified Hacienda Santa Fé as a private wildlife reserve.[239] At no point did Inagrosa seek to withdraw its application. Nor did Inagrosa communicate to MARENA at any point its newfound intention of expanding its avocado business across the entire Hacienda, which would have effectively required Inagrosa to destroy the natural habitats that it was simultaneously seeking to preserve.[240] Accordingly, Riverside's *ex post facto* account that Inagrosa was expanding its Hass avocado business cannot be reconciled with contemporaneous statements and actions of Inagrosa, which demonstrate that Inagrosa wanted to preserve the existing landscape.

100. ***Fourth***, there is no evidence that Inagrosa received funding to pay for the alleged expansion. To the contrary, the evidentiary record confirms that, by June 2018, it had been several years since Inagrosa received any significant amounts of cash. Inagrosa stopped generating coffee-related income in 2012, given that the Roya fungus destroyed its coffee plantation in 2013.[241] And Inagrosa's principal investor, Riverside, made its ***final investment*** in Inagrosa in October 2014, *i.e.*, about four years before the alleged expansion took place.[242] To be sure, Inagrosa did not appear to use that final investment to fund its avocado business. Instead, Inagrosa appears to have used that investment to pay off an approximately USD $1,000,000 debt that Inagrosa had with the Latin American Agribusiness Development Corporation since 2013.[243] In sum, Inagrosa had no access to enough new cash its Hass avocado business.

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[239] Ministerial Resolution No. 021.2018, Government of the Republic of Nicaragua, Ministry of the Environment and Natural Resources (**R-0012**).

[240] Certificate issued by MARENA No. 4 (**R-0073**).

[241] Rondón I, ¶¶ 43, 45 (**CWS-01**).

[242] Mona Winger I, ¶¶ 20, 24 (**CWS-05**).

[243] Memorial, ¶ 812; Rondón I, ¶ 42 (**CWS-01**); LAAD loan payment and cancelation LAAD lien on Hacienda Santa Fé (Public Instrument No. 1 dated January 6, 2016 (**C-0181**).

101. ***Fifth***, Inagrosa could not have funded the alleged "expansion" using other assets because the evidentiary record confirms that Inagrosa had been effectively broke as of 2015. This conclusion is evident from Inagrosa's financial statements, which reflect that Inagrosa maintained cash balances in its account ranging from USD $418 and USD $1,066 in 2015, 2016, and 2017.[244] This conclusion is further evident from the fact that, while the "expansion" was supposedly taking place, Inagrosa owed ***more than $1.35 million***, plus interest, under loans dating back to 2004.[245] Since 2015, Inagrosa stopped paying its property taxes, as depicted by the table below, which catalogs the property taxes that Inagrosa paid since 2008.[246] As of today, Inagrosa owes tens of thousands of dollars in unpaid property taxes to the local government.[247]

PAGOS DE IBI INAGROSA SA			
FECHA	NOMBRE Y APELLIDOS	MONTO	NO BOLETA
6/8/2008	INAGROSA	C$22,324.86	60779
21/10/2008	INAGROSA	C$22,000.00	62688
17/9/2009	INAGROSA	C$37,333.93	65169
17/9/2009	INAGROSA	C$37,333.93	70844
24/5/2010	INAGROSA	C$37,311.16	78276
28/6/2010	INAGROSA	C$37,311.16	79306
16/1/2012	Inagrosa	C$149,999.03	95406
5/11/2013	INAGROSA	C$30,000.00	117854
15/11/2013	INAGROSA	C$171,371.90	118119
9/10/2014	INAGROSA	C$119,764.10	130627
19/12/2014	INAGROSA	C$50,000.00	133448
6/3/2015	INAGROSA	C$67,000.00	137832
28/9/2015	INAGROSA	C$50,000.00	145600
27/10/2015	INAGROSA	C$50,000.00	146493

102. ***Sixth***, Inagrosa did not have enough workers to execute the expansion. In their witness statements, Messrs. Rondón and Gutiérrez allege (without citing to any corroborating

[244] Inagrosa Annual Declaration of Income Tax (**C-0062**); Inagrosa Annual Declaration of Income Tax (**C-0063**); Inagrosa Annual Declaration of Income Tax (**C-0064)**.

[245] Memorial, ¶¶ 95, 469.

[246] Gutiérrez-Rizo I, ¶ 27 (**RWS-01**).

[247] Gutiérrez-Rizo I, ¶ 27 (**RWS-01**); Payment Agreement between Inagrosa and the Municipal Government of San Rafael del Norte dated December 18, 2014 (**R-0056**).

evidence) that "[a]s of June 2018, 20 full-time workers were living at Hacienda Santa Fé."[248] However, as of August 2013 Inagrosa stopped requesting social security benefits on behalf of its workers.[249] This fact suggests that Inagrosa had no active workers since August 2013, given that it would have been illegal for Inagrosa to employ workers without requesting these social security benefits. And this conclusion is further supported by labor records demonstrating that Inagrosa had massive layoffs in 2013.

103. For all these reasons, Riverside has not proven – and cannot prove – that Inagrosa had a successful Hass avocado business, much less that it was in a state of expansion and worth hundreds of millions of dollars when the June 2018 invasions occurred.

2. The Alleged Hass Avocado Business Was Illegal Because Inagrosa Did Not Secure the Permits and Authorizations Required under Nicaragua Law to Run Such a Business

104. Riverside's contention that, in June 2018, Inagrosa had a valuable and viable Hass avocado business is belied by the fact that Inagrosa never secured the permits or authorizations that it needed to secure to run that business. Worse, there is no record that Inagrosa even ***attempted*** to secure any of those permits or authorizations.

105. Nicaraguan law requires that any natural or legal entity operating in Nicaragua and with intention to cultivate and commercialize an agricultural product must obtain certain permits and authorizations from relevant agencies. These include: (i) phytosanitary permits to ensure food safety; (ii) environmental permits to seek the conservation and protection of the environment; (iii) water permits to promote conservation and the sustainable and equitable use of Nicaraguan water resources, and (iv) exportation permits, to ensure an efficient and viable export process.

[248] Rondón, ¶ 32 (**CWS-01**); Gutiérrez, ¶ 26 (**CWS-02**).

[249] Letter from Dr. Roberto López (Executive President of the Nicaraguan Institute of Social Security - INSS) to Ms. Wendy Morales (Attorney General of Nicaragua) (**R-0085**).

106. These permits and authorizations are not optional or aspirational. Rather, they ***must*** be obtained prior to engaging in the regulated business activities. Indeed, failure to obtain any such permit or authorization will lead to significant penalties, including large fines, the cancellation of other permits, or even the forced closure of the business.

107. Inagrosa's complete failure to obtain these permits and authorizations with respect to the Hass avocado business is fatal to Riverside's claims. These omissions mean that the alleged business was not viable, since it was never approved by the relevant agencies. And these omissions mean that the alleged business was not valuable. Indeed, if anything, Inagrosa's abject failure to secure the required permits and authorizations meant that its Hass avocado business was subject to crippling economic sanctions or, worse, that the business would be shut down permanently.

a. *Inagrosa Did Not Have the Required Phytosanitary Permits and Authorizations Required to Import Avocado Seeds*

108. Riverside alleges the Hass avocado seeds used by Inagrosa for the alleged avocado business came from Costa Rica and were provided by Inagrosa's Costa Rican consultant, Mr. Jiménez.[250] Riverside presents no bills of lading or other importation documents to support this allegation. That fact may be fortunate for Riverside because the importation would be illegal. This alleged activity could not be undertaken under Nicaraguan law without securing phytosanitary permits from Nicaragua's Instituto de Protección y Sanidad Agropecuaria ("IPSA").[251] Indeed, Nicaragua's Law Regarding the Production and Commerce of Seeds, known as "Law No. 280," imposes obligations Inagrosa had to follow and sanctions.[252]

[250] Memorial, ¶ 329; Rondón I, ¶ 129 (**CWS-01**); Gutiérrez I, ¶¶ 149 (**CWS-02**).

[251] Moncada I, ¶¶ 11-12 (**RWS-05**).

[252] Seed Production and Trade Law, Law No. 280 (**RL-0019**).

109. ***First***, Inagrosa had to register as a seed importer with the *Departamento de Semillas*, a department of IPSA.[253]

110. ***Second***, Inagrosa had to register the seeds with the *Registro de Variedades*, a registry currently maintained at IPSA, obtain a certificate from the *Dirección de Sanidad Vegetal y de Semillas*, a subdivision of IPSA, and comply with the regulations established by the *Departamento de Cuarentena Vegetal* and the *Departamento de Semillas* of IPSA, ensuring Inagrosa would abide by the phytosanitary norms.[254]

111. ***Third***, Inagrosa had to request a permit before importing any seeds. To obtain this permit, Inagrosa had to present information about the seeds' nature, purpose, and intended use, as well as the entity or individual who supplied those seeds to Inagrosa.[255]

112. ***Fourth***, during the importation of the seeds, Inagrosa had to comply with the requirements to enter the seed to the country, which required an inspection, seed sampling and a quarantine, to confirm that the seeds complied with phytosanitary requirements under Nicaraguan law.[256]

113. Inagrosa never completed any of these requirements.[257] Put differently, its alleged importation of seeds from Costa Rica to Nicaragua did not follow the legal process, as confirmed by Mr. Moncada:

> [T]he records have been verified, and there is no evidence with the Department of Seeds of any registration in the name of Inagrosa,

[253] Moncada I, ¶ 15 (**RWS-05**); Seed Production and Trade Law, Law No. 280, December 10, 1997, ("Law. 280"), Art. 16, 21, 22 (**RL-0019**); Decree No. 26/98, Regulation of the Seed Production and Trade Law, April 3, 1998 ("Decree No. 26/98"), Art 54 (**RL-0011**); General Law on the Environment and Natural Resources with its incorporated reforms, Law No. 217, January 17, 2014 ("Law No. 217"), Art. 78 (**RL-0017**).

[254] Moncada I, ¶ 16 (**RWS-05**); Decree No. 26/98, Art. 55 (**RL-0011**).

[255] Moncada I, ¶ 17 (**RWS-05**); Decree No. 26/98, Art. 56 (**RL-0011**).

[256] Moncada I, ¶ 18 (**RWS-05**); Decree No. 26/98, Art. 58 (**RL-0011**).

[257] Moncada I, ¶ 32 (**RWS-05**); Certificate issued by IPSA No. 1 (**R-0015**).

Riverside or Rodrigo Jiménez as importers, distributors or traders of seeds.[258]

114. These omissions are material. Law No. 280 provides that failure to abide by these requirements could lead to sanctions of NIO 100,000 per violation and, in the case of recidivism, the forced closure of the business would ensue.[259]

115. Accordingly, Inagrosa's Hass avocado business, which supposedly relied entirely on seeds that were imported from Costa Rica, was illegal and subject to economic sanctions and forced closure.

b. *Inagrosa Did Not Have the Required Phytosanitary Permits and Authorizations Required to Maintain Hass Avocado Sapling Nurseries at Hacienda Santa Fé*

116. Riverside also alleges that Inagrosa maintained nurseries of Hass avocado seedlings at Hacienda Santa Fé.[260] According to Riverside, these nurseries contained thousands of seedlings that Inagrosa planted, or intended to plant, at Hacienda Santa Fé[261] and which it also intended to commercialize with local farmers.[262] If true, Law No. 280 required that Inagrosa comply with the following obligations.

117. ***First***, Inagrosa would have to register with IPSA's *Direccion de Sanidad Vegetal y Semillas* as a business that stores and commercialize seedlings grafted at the nurseries.[263]

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[258] Moncada I, ¶ 32 (**RWS-05**).

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

[260] Memorial, ¶ 49.

[261] Memorial ¶¶ 49, 316; Rondón I ¶72 (**CWS-01**); Management Representation Letter from Riverside Coffee, LLC to Richter Inc., ¶19 (**C-0055**).

[262] Memorial, ¶ 821, Rondón I, ¶196 (**CWS-01**); Management Representation Letter from Riverside Coffee, LLC to Richter Inc., ¶ 36 (**C-0055**).

[263] Moncada I, ¶ 19 (**RWS-005**); Law No. 280, Art. 16 (**RL-0019**); Decree No. 26/98, Art. 27 (**RL-0011**).

118. ***Second***, Inagrosa would have to allow IPSA to inspect the nurseries and the related facilities at Hacienda Santa Fé to ensure that the business is complying with phytosanitary norms and regulations promulgated under Law No. 280.[264]

119. Inagrosa did not comply with these obligations. IPSA could not find any indication that Inagrosa registered as a company storing and commercializing avocado plant nurseries.[265] And there is no evidence of any inspection of the alleged Hass avocado sapling nurseries at Hacienda Santa Fé.

120. These omissions are material. Similar to the other phytosanitary requirements under Law No. 280, failure to comply with the foregoing obligations will subject a business to sanctions, including economic sanctions and the forced closure of the business.[266]

121. Accordingly, Inagrosa's avocado business, which stored and utilized nurseries that had Hass avocado saplings for its own production and which intended to commercialize with third parties, was illegal and subject to economic sanctions and forced closure.

c. *Inagrosa Did Not Have the Required Phytosanitary Permits and Authorizations Required to Export Avocados to Other Countries*

122. Riverside alleges Inagrosa intended to export Hass avocados to Costa Rica in 2018 and 2019 and, later, to the United States.[267] If true, Nicaraguan law required Inagrosa to obtain key phytosanitary authorizations and permits from IPSA before realizing this activity. Specifically, the Basic Law on Animal and Plant Health, also known as "Law No. 291," required Inagrosa to do the following:

[264] Moncada I, ¶ 20 (**RWS-005**); Decree No. 26/98, Art. 30 (**RL-0011**).

[265] Moncada I, ¶ 35; Certificate issued by IPSA No. 4 (**R-0068**).

[266] Moncada I, ¶¶ 30, 36; Law No. 280, Arts. 20-23 (**RL-0019**).

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

123. ***First***, Inagrosa had to register with IPSA as an exporter of agricultural products[268] and Inagrosa had to keep updated the list of plants and crops it exported before the Phytosanitary Certification Department.[269]

124. ***Second***, Inagrosa would be subject to inspection by the Phytosanitary Certification Department at IPSA, which verifies whether the exporter meets the minimum requirements for the production and packaging of agricultural products.[270]

125. ***Third***, Inagrosa would have to apply for a Phytosanitary Export Certificate. To get this certificate, the Phytosanitary Certification Department would have to inspect the agricultural products that Inagrosa wanted to export and this inspection would have to conclude that the Hass avocados comply with the phytosanitary requirements under Nicaraguan law.[271]

126. ***Fourth***, Inagrosa would have to acknowledge to IPSA in writing about the existence of any plagues or diseases associated with the avocados that it plans to export.[272]

127. In this case, Riverside alleges Inagrosa would have exported Hass avocados as soon as Fall of 2018. However, Inagrosa never registered as an exporter of Hass avocados and, thus, never went through the required inspections or obtained the required phytosanitary certificates to carry out its planned exportation activities.[273]

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[268] Moncada I, ¶ 25 (**RWS-005**); Law creating the Institute for Agricultural Protection and Health, Law No. 862, October 29, 2014 ("Law No. 862"), Arts. 4.15 y 12 (**RL-0023**); Technical standard for the phytosanitary certification of fresh and processed agricultural products for export. Reg No. 6228 -M- 0333816 (2001), August 29, 2001 ("Technical Standards 2001"), Art 4.1.2. (**RL-0026**).

[269] Moncada I, ¶ 26 (**RWS-005**); Technical Standards 2001, Art. 4.1.2.10 (**RL-0026**).

[270] Moncada I, ¶ 25 (**RWS-005**); Technical Standards 2001, Art. 4.1.2.10 (**RL-0026**).

[271] Moncada I, ¶ 27 (**RWS-005**); Technical standard for the phytosanitary certification of fresh fruit and vegetable products and by-products. Reg No. 10926 – M. 822406 (2002), February 27, 2002 ("Technical Standards 2002"), Arts. 4.1.1.1, 5.3.1 (**RL-0027**).

[272] Moncada I, ¶¶ 28-29 (**RWS-005**); Basic Law on Animal Health and Plant Health, Law No. 291, April 16, 1998 ("Law No. 291"), Art. 55 (**RL-0020**).

[273] Moncada I, ¶ 39 (**RWS-005**); Certificate issued by IPSA No. 3 (**R-0067**).

128. This omission was not accidental. IPSA records confirm that Inagrosa knew about this regulatory process and, in fact, obtained the Phytosanitary Certificates to export coffee[274] and it has not notified the Phytosanitary Certification Department that it would export hass avocado.[275] This fact is clear from the testimony of Mr. Moncada:

> IPSA's records show that phytosanitary certificates in the name of Inagrosa were issued in the 2010-2017 period for the export of gold coffee for export. However, no phytosanitary certificates were issued for the export of Hass avocado, fresh fruit or vegetable materials to any destination country for the 2009-2022 period for Inagrosa, Riverside, Hacienda Santa Fé or Carlos Rondón. There is also no evidence that these companies and Carlos Rondón informed IPSA of the change of product to be exported, from coffee to Hass avocado.[276]

129. This omission is material. Failure to abide by these requirements could lead to fines of NIO 100,000 per infraction and repeated offenses could lead to the forced closure of the business, confiscation of the entire inventory, the cancellation of any other agricultural permits, and higher economic penalties.

130. Accordingly, Inagrosa has never been able to export Hass avocados. And it cannot be assumed Inagrosa would have been able to export avocados in the future because the process is not automatic but, rather, is subject to significant phytosanitary scrutiny. If anything, it should be assumed that Inagrosa would ***not*** have cleared this significant permitting hurdle because the Hass avocados it planned to export were cultivated using unregistered and uninspected seeds from Costa Rica, as explained above.

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[274] Moncada I, ¶ 39 (**RWS-005**); Certificate issued by IPSA No. 2 (**R-0016**).

[275] Moncada I, ¶ 42; Certificate issued by IPSA No. 3 (**R-0067**).

[276] Moncada I, ¶ 39 (**RWS-005**); Certificate issued by IPSA No. 2 (**R-0016**); Certificate issued by IPSA No. 3 (**R-0067**).

131. For the foregoing reasons, Riverside's position that Inagrosa would have been able to export Hass avocados outside Nicaragua must be rejected.

d. *Inagrosa Did Not Have the Required Export Authorizations to Export Avocados to Other Countries*

132. Similarly, Inagrosa did not have the requisite commercial authorizations to be able to export avocados to other countries. This authorization is emitted by the agency that oversees all matters related to exportation, the Centro de Trámites de las Exportaciones ("CETREX").

133. As confirmed by Ms. Xiomara Mena Rosales, the Director of CETREX, any entity wishing to export agricultural products out of Nicaragua must first obtain the phytosanitary permit described in the section immediately above as well as, depending on the type of the product, any other certificates issued by any other competent authority. [277] Once obtained, the would-be exporter would need to apply for an authorization from CETREX that ensures the intended transaction is in compliance with the commercial and trade agreements involving Nicaragua.[278] This authorization may differ depending on the intended location of the exported good.[279]

134. Either way, according to Ms. Rosales, the private entity would have to register with CETREX and, in so doing, provide all information related to its business, the goods it plans to export, and the countries to which it plans to export those goods.[280] Only after this information is obtained will CETREX issue the authorization in question, at which point the private entity may begin its exportation activities.[281]

[277] Mena I, ¶ 13 (**RWS-06**).

[278] Mena I, ¶ 14 (**RWS-06**).

[279] Mena I, ¶ 14 (**RWS-06**).

[280] Mena I, ¶¶ 16-17 (**RWS-06**); Exporter registration form (**R-0031**).

[281] Mena I, ¶ 15 (**RWS-06**).

135. But CETREX's records confirm that Inagrosa never registered as an exporter of Hass avocados; it has only registered as an exporter of coffee.[282] And these records confirm that Inagrosa never applied or requested CETREX to add Hass avocado to its export portfolio.[283]

136. Accordingly, Riverside's contention that Inagrosa would have exported the Hass avocados allegedly being farmed at Hacienda Santa Fé is unfounded.

e. *Inagrosa Never Obtained the Necessary Environmental Permits to Change the Use of the Soil at Hacienda Santa Fé*

137. Ms. Norma Del Socorro Gonzalez Argüello, the head of the legal division of MARENA, explains that Section 97 of Decree No. 20/2017, as well as its predecessor, requires agricultural businesses to obtain an environmental permit before modifying the business's soil use.[284] This process entails the submission of declarations detailing the anticipated modification and an on-site inspection by the agency.[285] This permit is granted as long as the intended affected area is not protected by other environmental regulations and the land is available for the intended soil modification.[286] Failure to comply with this process exposes the business to sanctions, such as fines, suspensions, cancellation of permits, and forced closure of the business.[287]

138. Here, there were two soil modifications that Inagrosa allegedly executed without this permit. The first modification took place in 2014 when Inagrosa supposedly cleared an area

[282] Mena I, ¶ 27 (**RWS-06**); Certificate issued by CETREX No. 4 (**R-0023**).

[283] Mena I, ¶ 27 (**RWS-06**); Certificate issued by CETREX No. 1 (**R-0020**); Certificate issued by CETREX No. 2 (**R-0021**).

[284] González I, ¶ 11 (**RWS-09**); Decree No. 20/2017, System of Environmental Evaluation of Permits and Authorizations for the Sustainable Use of Natural Resources, November 28, 2017 ("Decree No. 20/2017"), Art. 97 (**RL-0009**).

[285] González I, ¶¶ 12-15 (**RWS-09**); Decree No. 20/2017, Art. 97 (**RL-009**).

[286] González I, ¶ 16 (**RWS-09**).

[287] González I, ¶¶ 22-23; Decree No. 20/2017, Art. 100 (**RL-0009**); Law No. 217, Arts. 159-161 (**RL-0017**).

to create a stable surface to plant Hass avocado trees over 40 hectares.[288] The second modification took place in the spring of 2018, when Inagrosa cleared 200 hectares, changing the use of the soil, to supposedly plant new Hass avocado trees. Inagrosa never pursued this permit during either of its alleged modifications of the soil at Hacienda Santa Fé.[289] The Government never approved Inagrosa's decision to use the soil at the Hacienda to plant Hass avocado trees.[290] Inagrosa is thus subject to a multitude of sanctions, including the closure of the business.

139. Accordingly, Inagrosa's alleged 40-hectare plantation of Hass avocado trees and the clearing of 200-hectare were illegal.

f. *Inagrosa Planted Avocado Trees in a Prohibited Area*

140. Riverside alleges Inagrosa planted 16,000 Hass avocado trees across a 40-hectare orchard located on the southwestern portion of Hacienda Santa Fé.[291] Riverside further alleges this process required Inagrosa workers to use hand tools, such as axes and shovels, to clear the brush, trees, and undergrowth in that orchard.[292]

141. Although Riverside does not provide coordinates for the 40-hectare orchard, high-definition satellite images taken in February 2015 reveal the only location that appears to match Riverside's description of this orchard.[293] As can be seen, the Hacienda (delineated in orange) has a cultivated patch of land on the southwestern portion (delineated in purple) that straddles the nearby river (delineated in royal blue), surrounded by a private forest, and that appears to match

[288] González I, ¶¶ 25, 31 (**RWS-009**); Map of Hacienda Santa Fé prepared by the National Environmental Information System (**R-0033**); Certificate issued by the Ministry of Agriculture (**R-0018**).

[289] González I, ¶¶ 32-34 (**RWS-009**); Certificate issued by MARENA No. 3 (**R-0072**).

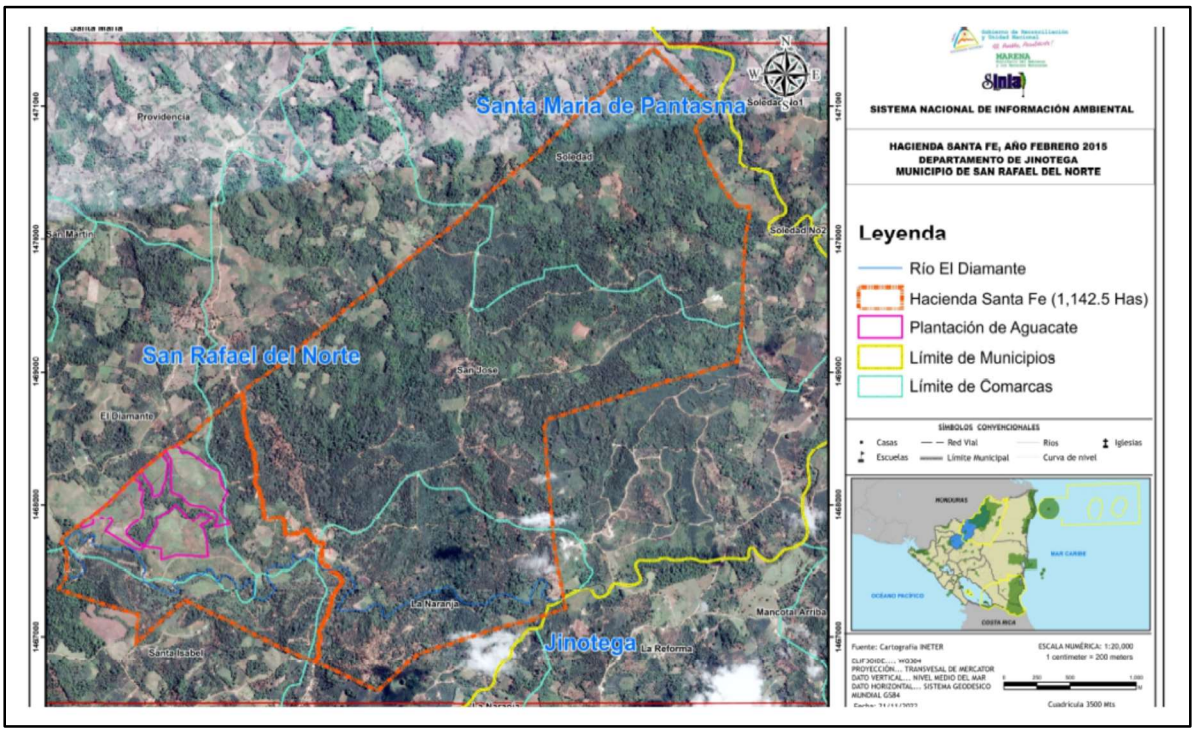
[290] Certificate issued by the Ministry of Agriculture (**R-0018**); Certificate issued by MARENA No. 3 (**R-0072**).

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

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

[293] Satellite image of the land use of February 2015 of Hacienda Santa Fé prepared by the National Environmental Information System (**R-0074**).

the description in the Memorial regarding the location of the 40-hectare Hass avocado orchard that Inagrosa supposedly planted in or around January 2014.



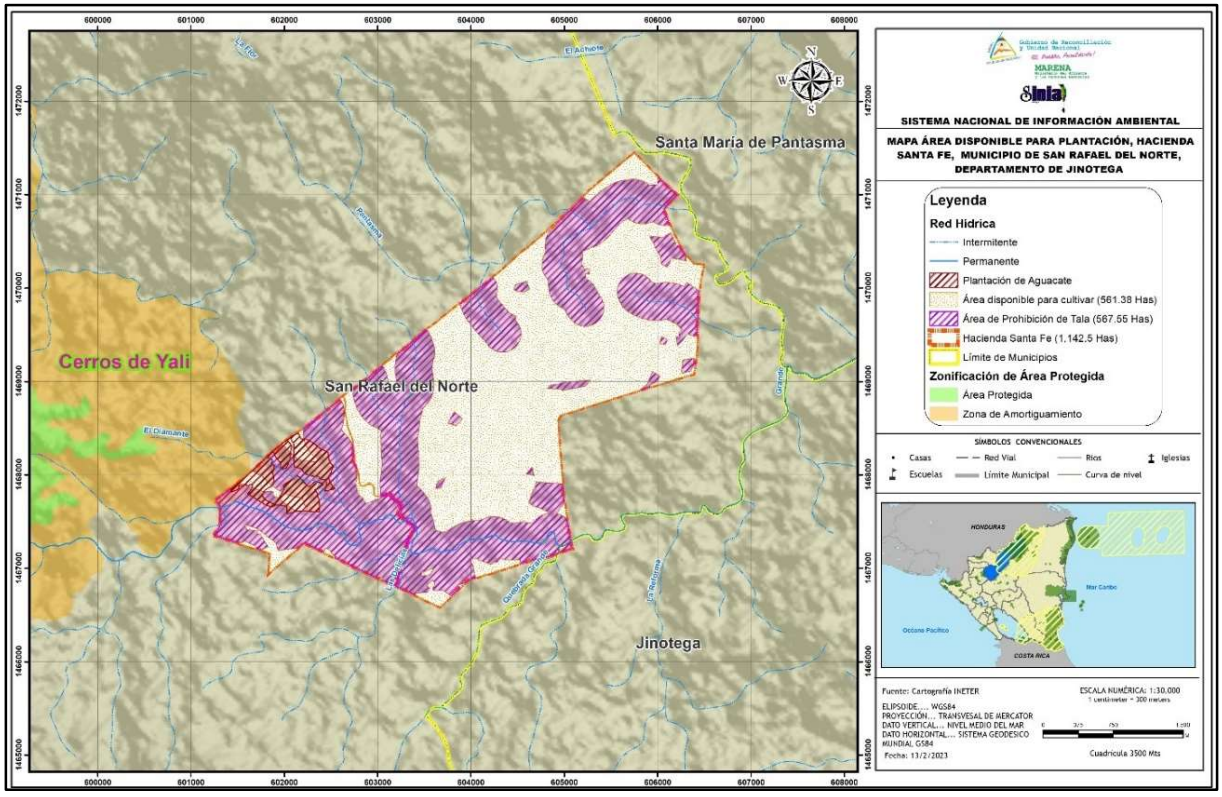
142. If that is, in fact, the location where Inagrosa's 40-hectare avocado orchard sits, then Inagrosa broke the law because the majority of that orchard is located in an area where it is prohibited to clear the land for cultivation.

143. Nicaraguan environmental laws provide that: (i) it is prohibited to clear land where a private forest is located[294] and (ii) it is prohibited to clear land located within 200 meters from the riverbank and/or lake or lagoons.[295] MARENA refers to the lands that fit these descriptions as the "Prohibited Area" because it is prohibited to clear trees or brush from those lands.

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

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

144. This backdrop is dispositive here because the 40-hectare avocado orchard appears to be located within this Prohibited Area. Indeed, that orchard is almost entirely within 200 meters of the *El Diamante* river that cuts through the lower part of the Hacienda. Furthermore, portions of this orchard also appear to overlap with land where a private forest is located. This conclusion is evident from the below graphic, which MARENA created and which depicts the Prohibited Area in purple. As can be seen from this graphic, the alleged 40-hectare avocado orchard is located almost entirely within this Prohibited Area.[296]



145. Accordingly, Inagrosa's 40-hectare avocado plantation violated key environmental regulations. Inagrosa had no legal right to use that land to cultivate avocados (or any other crop). Inagrosa's Hass avocado business is, therefore, illegal and subject to severe sanctions.

[296] Map of Hacienda Santa Fé prepared by the National Environmental Information System (**R-0033**).

g. *Inagrosa Could Have Never Expanded the Plantation to 1000 Hectares*

146. Riverside alleges that Inagrosa intended to expand the existing avocado plantation by 960 additional hectares, reaching an overall size of 1000 hectares.[297] But, as explained below, this expansion would have been legally impossible under Nicaragua's environmental laws because more than half of the land at the Hacienda is located within the Prohibited Area identified in the section immediately above.

147. It is undisputed that Hacienda Santa Fé spanned over approximately 1,142.5 hectares in surface area. That means that Inagrosa's supposed plan to expand the avocado plantation from 40 hectares to 1000 hectares would have resulted in almost the entire Hacienda being covered by the avocado plantation.

148. But, as Ms. Gonzalez confirms in her Witness Statement, this expansion was simply not possible because approximately 567.5 hectares within the Hacienda fall within the Prohibited Area.[298] This only leaves approximately 561 hectares that theoretically could be used for avocado plantation.

149. But, as argued above, Inagrosa could not plant avocados across those 561 hectares unless and until it obtained a permit from MARENA that allowed Inagrosa to modify its use of the soil located in those lands. Because Inagrosa never sought that permit, it was not in position to do the "expansion" that Riverside alleges in its Memorial.

150. Furthermore, because Inagrosa succeeded in classifying Hacienda Santa Fé as a private wildlife reserve, it could not use the remaining 561 hectares to plant avocados unless and until it received a separate authorization from MARENA. The purpose of that authorization would

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

[298] González I, ¶¶ 36-37 (**RWS-09**).

have been to ensure that the planned activities would not in any way disturb or negatively affect the private forest and the flora and fauna it contains.[299]

h. *Inagrosa Never Obtained a Concession for Exploitation and Use of Water Resources for the Alleged Avocado Business*

151. Riverside alleges that Inagrosa used the existing hydrology resources at Hacienda Santa Fé to sustain the alleged 40-hectare Hass avocado orchard.[300] Riverside further alleges Inagrosa intended to use those water resources to sustain the additional 960 hectares that it planned to plant in the coming years.[301] If so, Inagrosa would have needed to obtain a concession from the relevant water authority, *Autoridad Nacional del Agua* ("ANA"), prior to utilizing the hydrology sources at Hacienda Santa Fé.

152. This conclusion is confirmed by the Executive Director at ANA, Mr. Rodolfo José Lacayo Ubau. And, as he explains in his Witness Statement, the process for obtaining a water concession is not automatic and depends on myriad assessments to be carried out by ANA.[302] To carry out these assessments, ANA requires the private entity to present detailed analyses, according to Mr. Lacayo's testimony:

> As regards the procedure, in accordance with Section 49 of the General Law on National Waters, requests must be submitted in writing and contain at least (a) identification of the requesting party or their legal representative, as the case may be, (b) information or location of the site and body of water where the resource is to be collected, (c) certificate of ownership or assignment of rights by the landowner, (d) environmental impact study, where necessary, (e)

[299] González I, ¶¶ 68-70 (**RWS-09**); Decree No. 1/2007, Regulation of Protected Areas, January 8, 2007 ("Decree No. 1/2007"), Arts. 51, 54 (**RL-0007**).

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

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

[302] Lacayo I, ¶ 13 (**RWS-07**); General National Water Law, Law No. 620, May 15, 2007 ("Law No. 620"), Art. 46 (**RL-0022**).

> information about the current use of water, (f) the required water flow or volume expressed in the metric decimal-based system, on a monthly basis, (g) specifications about the initial use of the water, (h) the term of the initial use of the water, (h) the term of the requested concession or authorization, (i) final disposal, volume, and characteristics of discharges, (j) a permit for the performance of works and any other additional requirements mentioned in the Regulations to the General Law on National Waters.[303]

153. If a private entity utilizes water resources without first obtaining this concession, it will be subject to sanctions under Nicaraguan law, including economic fines, suspensions, permit cancellation, or even the forced closure of the business.[304]

154. Here, Inagrosa never obtained a concession that allowed it to use the natural water resources for its Hass avocado plantation and did not start the administrative proceeding to obtain them,[305] notwithstanding Riverside's allegation that Inagrosa had been using water resources at Hacienda Santa Fé for this plantation since 2014 and notwithstanding the alleged fact that Inagrosa planned to utilize the water resources at the Hacienda for another 960 hectares of Hass avocado orchards in the near future.[306] In addition, as Nicaragua's expert, Dr. Odilo Duarte, explains, during the dry season (the months featuring the lowest rainfall levels), Inagrosa would have used up all the water available to irrigate such a large avocado plantation, which could cause problems with neighboring farms.[307] Adding that "the consumption of the entire amount of water available from natural sources for irrigation during dry months will have adverse effects on humans and wildlife."[308]

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[303] Lacayo I, ¶ 16 (**RWS-07**); Law No. 620, Art. 49 (**RL-0022**).

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

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

[306] Memorial, ¶¶ 336-338; Rondón I, ¶¶ 131-132 (**CWS-01**); Gutiérrez I, ¶ 154 (**CWS-02**); Hydrology Study at Hacienda Santa Fé prepared by Engineer Federico Sanabria (**C-0087**).

[307] Duarte I, ¶ 8.5.4 (**RER-01**).

[308] Duarte I, ¶ 8.6.2 (**RER-01**).

155. Accordingly, Inagrosa's alleged Hass avocado business was in violation of the laws and regulations concerning water use. It was thus subject to sanctions, including forced closure of the business. For these reasons, Inagrosa's Hass avocado business was not viable, and Riverside cannot seek damages related to this business.

3. The Hass Avocado Business, as Alleged by Riverside, Is Infeasible from a Technical Perspective

156. Hass avocado is a finicky fruit. It requires precise conditions to grow. Rich volcanic soil. Not too much water. Not too much wind. Plenty of sun. Mild temperatures. And lots of care to ensure the crop is not destroyed by root rot, insects, and disease. Even with all of the above, expected yields and fruit quality will vary.

157. Not surprisingly, very few countries in the world have reliable and profitable Hass avocado businesses. Notably, Nicaragua is not one of them. In fact, ***no Nicaraguan entity has ever exported Hass avocados at any scale***, much less at the scale that Riverside alleges Inagrosa would have exported this fruit. For this reason alone, it strains credulity that, in four years, Inagrosa turned its failed coffee plantation in Nicaragua into a multi-hundred-million-dollar Hass avocado farm, as is alleged here.

158. The undisputed fact that Inagrosa had absolutely no experience or historical know-how with respect to the Hass avocado business makes Riverside's allegations in this case that much more fanciful. Indeed, it is alleged that when Inagrosa switched Hacienda Santa Fé from a coffee plantation into a Hass avocado plantation it did so based on "some research" and advice from an avocado consultant who lived in another country.[309] No feasibility reports were prepared. No supervisors or people with prior experience in the day-to-day management and care of a Hass

[309] Rondón I, ¶¶ 45, 120-121 (**CWS-01**).

avocado plantation were hired at the Hacienda. And no experimental batches of Hass avocado trees were planted to see if this could even work in Nicaragua, which would have been logical given the fact that no Nicaraguan business had ever done what Inagrosa set out to do in Nicaragua.

159. Riverside's contention that Inagrosa had an unprecedented case of "beginner's luck" is not only unsupported by evidence but is otherwise undermined by the fact that the alleged Hass avocado business was infeasible from a technical perspective.

a. *Inagrosa Would Not Have Been Able to Access the U.S. Market*

160. Riverside alleges without presenting a single document that Inagrosa was in the process of obtaining approvals from the relevant United States authorities to be able to export Hass avocados into the United States.[310] This allegation is critical to Riverside's damages case, since its lofty damages projections are predicated on the assumption that Inagrosa would be able to capitalize on the lucrative Hass avocado consumer market in the U.S. early in the life of Inagrosa's Hass avocado business.[311] But, in reality, this assumption is a pipe dream. Inagrosa would not have been able to access this market.

161. As an initial matter, Riverside has submitted ***no evidence*** to support its contention that Inagrosa would have been able to tap into the U.S. Hass avocado consumer market. Again, as with everything related to Inagrosa's Hass avocado business, this allegation only comes from Mr. Rondón's testimony. Specifically, Mr. Rondón testifies, without corroborating evidence, that he had called his local senator in Colorado to assist with the approval process required by the U.S. Drug Administration ("USDA").[312] He also alleges that he called unnamed USDA agents stationed

[310] Rondón, ¶ 193 (**CWS-01**).

[311] Memorial, ¶¶ 371-375; Expert Valuation Statement by Vimal Kotecha (**CES-01**) at A2.9-13, A2.18-19, A2.24-26, A3.7; USDA Avocado Demand (**C-0146**); Global Hass Avocado Market Report 2022-2027 pertaining to the U.S. market (**C-0155**); USDA import unit value by commodity (**C-0159**).

[312] Rondón I, ¶ 193 (**CWS-01**).

at the U.S. embassy in San Jose, Costa Rica, with whom he allegedly reviewed the USDA approval process by telephone.[313] Based only on that, Riverside assumes that the USDA approval was just around the corner.

162. But placing a few calls with your senator or with U.S. embassy representatives will not get the job done. Rather this process is handled by the Plant Protection and Quarantine Division of the Animal and Plant Health Inspection Service ("APHIS") within the USDA. The first step in this process is for APHIS to make a Pest Risk Assessment, which examines the health risk that the imported goods in question could pose to the United States.[314]

163. If APHIS determines that the product can be safely imported into the United States, APHIS will initiate the regulatory administrative process. This administrative process requires the USDA to post a notice in the Federal Register to give the public an opportunity to submit comment as appropriate.[315]

164. As Dr. Duarte explains, it is extremely unlikely that this process would have been completed by Inagrosa in a couple of years, as Riverside claims. For example, Dr. Duarte explains that "in Peru's case, this process took almost 10 years and cost more than a million US dollars"[316] and adds that "it took Colombia 4 years to complete the process."[317] That best-case scenario implies that the entity pursuing the permit would have sufficient capital to finance the extremely detailed and costly studies and analyses required by this process.[318] And this scenario also implies

[313] *Id*.

[314] USDA's Commodity Import Approval Process, updated August 23, 2018 (**R-0091**).

[315] *Id*.

[316] Expert Report of Dr. O. Duarte, ¶ 9.2.4 (**RER-01**).

[317]Expert Report of Dr. O. Duarte, ¶ 9.2.4 (**RER-01**).

[318] Expert Report of Dr. O. Duarte, ¶¶ 9.2.1-9.2.5 (**RER-01**).

that U.S. and Nicaraguan authorities would coordinate quickly and in an efficient manner, which is unlikely in today's geopolitical climate.

165. But the case here is not the "best case" scenario. Quite to the contrary, this is more akin to a "worst case" scenario because the USDA has already declared that ***the United States will not take any avocados from Nicaragua due to a fruit fly local to Nicaragua that plagues avocado trees***. Ironically, this fact is conspicuously cited in the ProNicaragua study that Riverside produced with its Memorial.[319] And this fact is also found on the APHIS website.[320]

166. Compounding this defect is the fact, explained in Section II.C.2, that Inagrosa has not even satisfied the phytosanitary requirements imposed under Nicaraguan law.

167. Accordingly, the statistics and projections relating to the demand, export and import volumes, and selling price in the U.S. Hass avocado market alleged by Riverside and used by its quantum expert[321] should not be taken into consideration by this Tribunal because they are wholly infeasible.

b. *Inagrosa Would Have Planted Too Many Trees Too Close Together*

168. Riverside presents conflicting information about the trees per hectare that Inagrosa planned to plant. As already mentioned, Riverside claims that, in January 2014, Inagrosa planted 400 trees per hectare across a 40-hectare lot.[322] Riverside then states that Inagrosa planned to plant an average of 700 trees per hectare in the immediate future,[323] but elsewhere alleges that Inagrosa

[319] Avocado in Nicaragua Marketing Study prepared by Pro Nicaragua, page 0000780 (**C-0085**).

[320] Avocado from Inadmissible Countries into All Ports, December 7, 2022, listing Nicaraguan as a country that cannot export avocados to the US (**R-0078**).

[321] See, Claimant's Memorial, ¶¶ 371-375; Expert Valuation Statement by Vimal Kotecha (**CES-01**) at A2.9-13, A2.18-19, A2.24-26, A3.7; USDA Avocado Demand (**C-0146**); sections of the Global Hass Avocado Market Report 2022-2027 pertaining to the US market (**C-0155**); USDA import unit value by commodity (**C-0159**), etc.

[322] Memorial, ¶¶ 49, 51.

[323] Memorial, ¶ 359.

sought to raise capital to accelerate development of 672,000 Hass avocado trees on 760 hectares, which would imply a density of 884 plants per hectare.[324]

169. Dr. Duarte explains that the main objective of implementing high densities is to maximize early yields, so that the returns of the first years are greater and thus the business can recover more quickly the capital invested in the installation and maintenance of the plantation.[325] But, as Dr. Duarte explains, Hass avocado production levels in the early years are very low and, in some cases, non-existent.[326] Accordingly, it would have been a costly mistake for Inagrosa to plant too many trees too close together this early in the process.

170. Rather, the feasible approach would have been to space these trees further apart, at approximately every 6 x 2.5 meters, resulting in a density no higher than 666 plants per hectare.[327] As Dr. Duarte explains, this approach is better because it allows the roots the opportunity to grow, ensures that the tree's lower branches will receive enough sunlight, and increases the chance of having a good harvest.[328]

171. Accordingly, Inagrosa's plan to plant 700 or 884 avocado trees per hectare was infeasible and made it more likely that the avocado plantation at Hacienda Santa Fé would have failed.

[324] Memorial, ¶ 52.

[325] Expert Report of Dr. O. Duarte, ¶¶ 7.5.1-7.5.5, 8.4.1 (**RER-01**).

[326] Expert Report of Dr. O. Duarte, ¶¶ 7.2.1-7.2.2, 7.5.2 (**RER-01**).

[327] Expert Report of Dr. O. Duarte, ¶ 7.5.5 (**RER-01**).

[328] Expert Report of Dr. O. Duarte, ¶ 7.5.5 (**RER-01**).

c. *The Alleged Yields Are Not Realistic*

172. Riverside alleges that Inagrosa expected to harvest 50kgs of avocados from each of the 16,000 trees that it allegedly planted in 2014.[329] In other words, Riverside alleges that Inagrosa would have harvested 800,000 kgs of Hass avocados in the Fall of 2018.[330]

173. To support this claim, Riverside cites to an academic paper prepared by a graduate student at the Hebrew University of Jerusalem on the annual production and utilization of dry matter of an avocado tree, a topic that has nothing to do with the fruit yield of an avocado tree.[331] In this paper, the author assumes, without providing any explanation or bibliographical reference, a crop of 53.6 kg. per tree for the compilation of a table setting forth "the yearly utilization of dry matter in the organs of an avocado tree."[332]

174. Riverside's estimates are overly high, taking into account the age of the plants and the state of the plantation according to what Mr. Jiménez addresses in his report and in the few pictures he attaches.[333] Indeed, Dr. Duarte explains that it is ***impossible*** to achieve yields of 50 kg or more with 3- or 4-year-old trees (*i.e.*, the alleged age of the Hass avocado trees that Inagrosa purportedly planted in 2014) because during the early years the trees will not have fully matured, and the plant will use all the nutrients and fertilizers to grow in height, develop its leaves and branches, and thicken its trunk.[334] Until then, an expected yield of 50 kg per tree is unfounded.[335]

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[329] Memorial, ¶ 185.

[330] Memorial, ¶¶ 49, 51.

[331] It is worth noting that neither the study, nor the table for which the assumption was made, pertain in any way to the expected yield of an avocado tree. *See* The Annual Production and Utilization of Dry Matter of an Avocado Tree, page 1368, Table 2 on page 1369 (**C-0138**).

[332] The Annual Production and Utilization of Dry Matter of an Avocado Tree, page 1368 (**C-0138**).

[333] Avocado Cultivation Recommendations from Rodrigo Jiménez (**C-0086**).

[334] Expert Report of Dr. O. Duarte, ¶ 7.2.2 (**RER-01**).

[335] Expert Report of Dr. O. Duarte, ¶¶ 5.6, 7.4.1 (**RER-01**).

175. Moreover, Dr. Duarte explains that the fruit production of a young avocado tree of 3 to 4 years may also decrease based on extraneous factors such as the climate, temperature, soil characteristics, available water, application of fertilizers, the cleaning of the land around the plant, and pest control.[336]

176. To better illustrate this point, Dr. Duarte includes in his expert report information on the yields that occur in the early years, as analyzed across six separate Hass avocado plantations located in Peru, Mexico, Guatemala, California and Chile.[337] As seen in the table below, none of these plantations report 50 kg yields.[338] The highest yield is reported by Cerro Prieto, a plantation in the northern coast of Peru, which achieved an average yield of 39 kg of Hass avocados from its 5-year-old trees. It is also worth noting that these companies report yields ranging from 5 kg to 30 kg for trees aged 3-4 years.

a. TALSA, Perú (https://web.talsa.com.pe/en/)

One of the best-performing plantations in Peru. Density: 666 plants per hectare

Ing. Hilvio Castillo, Agricultural Manager

Age	Yield
Year 1 (newly planted)	0 kg
Year 2	1 to 4 kg
Year 3	12 to 15 kg
Year 4	20 to 25 kg
Year 5	25 to 30 kg
Year 6 and on	30 kg

b. Cerro Prieto, Perú (https://www.acpagro.com/)

Plantation in Peru with more than 1,000 hectares of Hass avocado. Density: 666 plants per hectare

[336] Expert Report of Dr. O. Duarte, ¶¶ 7.3.1-7.3.4 (**RER-01**).

[337] Expert Report of Dr. O. Duarte, ¶¶ 7.4.2 (**RER-01**).

[338] Expert Report of Dr. O. Duarte, ¶¶ 7.4.2 (**RER-01**); Memorial, ¶ 185.

Ing. Alfredo Chan Way, Agricultural Manager

Age	Yield
Year 2	4.5 kg
Year 3	14 kg
Year 4	30 kg
Year 5	39 kg

c. Plantación en México

Dr. Alejandro Barrientos, International Avocado Consultant

Age	Yield
3 to 4 years on rootstock grown from seed	5 to 8 kg

d. Palo Blanco, Plantation in Guatemala

Density: 416 plants per hectare
Ing. Adolfo del Cid, Agricultural Manager

Age	Yield
Year 4	24 to 25 kg

e. California, EE.UU.

(Dra. Mary Lou Arpaia, University of California)

Age	Yield
Year 3	7 to 9 kg
Year 4	13 to 18 kg
Year 5	18 to 21 kg

f. Chile

Gardiazabal & Rosenberg
Hass avocado grafted on 10 different rootstocks (It can be clearly seen how different rootstocks radically affect the yields

Age	Yield
Year 1 (newly planted)	0 kg
Year 2	0 to 3.84 kg
Year 3	0.81 to 7.48 kg
Year 4	0.60 to 29.7 kg

177. In addition to being unfounded, Riverside's allegations about the expected yields at Hacienda Santa Fé are internally inconsistent with Inagrosa's documents. Indeed, a presentation

created by Inagrosa to lure potential investors reveals that Inagrosa's best-case-scenario for trees aged five years or older was a per-tree yield of 40 kg.[339] Of course, even that figure is way too high considering the analysis from Dr. Duarte. But the key point is that Riverside's estimates are far greater than what ***Inagrosa*** thought was even possible.

178. For these reasons, Riverside's claims about the expected yields at Hacienda Santa Fé are unfounded and must be rejected.

d. *Riverside Has Not Proven that there Was Sufficient Water at Hacienda Santa Fé to Sustain the Hass Avocado Crops*

179. Riverside alleges that there was sufficient water at Hacienda Santa Fé to sustain the anticipated 1,000 hectares of Hass avocado trees that Inagrosa purportedly planned to cultivate.[340] Its basis for this allegation is a 2015 hydrological study that concluded that there was enough water at the Hacienda to properly sustain up to 1,050 hectares of avocado trees.[341] Riverside's reliance on this report, however, is misguided for three reasons.

180. ***First***, as Dr. Duarte explains, the hydrology report is faulty because it does not take into account the disparity between Nicaragua's different seasons.[342] Nicaragua's climate has a dry season from November to April and a wet season from May to October. As evident from the names of these seasons, the amount of rainfall varies drastically throughout the year. During dry season, the scarcity of rainwater will make the lands dusty, which could prove fatal for the Hass avocado crops. For these reasons, it is extremely likely that Inagrosa would have to irrigate the crops during the dry season.

[339] Rio Verde Hass Avocado Financial Presentation 2018-2027, p. 507 (**C-0117**).

[340] Memorial, ¶¶ 49, 337.

[341] Memorial, ¶ 48; Hydrology Study at Hacienda Santa Fé prepared by Engineer Federico Sanabria (**C-0087**).

[342] Expert Report of Dr. O. Duarte, ¶¶ 8.5.2-8.5.4 (**RER-01**).

181. ***Second***, the hydrology report does not actually confirm that Hacienda Santa Fé has enough water to sustain 1,050 hectares of avocado trees. Rather, that report only provides that the Hacienda has enough water to sustain 600 hectares of avocado trees.[343] The report provides that infrastructure development (construction of lakes, access roads, etc.) would be necessary to sustain another 450 hectares of avocado trees.[344] As Dr. Duarte explains, the existing hydrology resources were not enough to irrigate a plantation of 1000 hectares and infrastructure work for water storage would have been needed. However, Riverside did not prove that the construction of a water storage infrastructure was feasible. Inagrosa did show that it had obtained nor initiated any administrative process to obtain the environmental permits to construct the infrastructure work.

182. ***Third***, the hydrology report assumes Inagrosa has secured the authorizations for water use required under Nicaraguan law. But, as proven in Section II.C.2, *supra*, Inagrosa has not applied for those authorizations, much less secured them.

183. Based on the foregoing, Riverside's claim that Inagrosa had a viable and valuable Hass avocado business must be rejected.

D. Riverside's Arguments Concerning Inagrosa's Forestry Business Are Contradictory and Unfounded

184. Riverside alleges Inagrosa intended to exploit the private forest located in Hacienda Santa Fé for profit. Specifically, Riverside alleges that the forest had 35,000 trees that contained valuable and rare timber, such as the granadillo, coyote, and black walnut trees.[345] According to Riverside, Inagrosa intended to sell and export their timber, as an additional revenue source.[346]

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[343] Hydrology Study at Hacienda Santa Fé prepared by Engineer Federico Sanabria, Conclusions, page 796 (**C-0087**).

[344] Hydrology Study at Hacienda Santa Fé prepared by Engineer Federico Sanabria, Conclusions, pages 796-797 (**C-0087**).

[345] Memorial, ¶ 376, 377; Rondón I, ¶¶ 57-61 (**CWS-01**); Gutiérrez I, ¶¶ 21, 22 (**CWS-02**).

[346] Memorial, ¶¶ 380-381; Rondón I, ¶ 58 (**CWS-01**).

One of the allegedly buyer was a United States hardwood manufacturer, Miller Veneer Inc. for considerable profit.[347] But the Hacienda Santa Fé invasion of 2018 put an end to this business because the invaders "totally deforested" the private forest.[348]

185. Just like the allegations about the Hass avocado business, however, Riverside does not submit any evidence that corroborates this account. For example, there is no business plan that lays out the parameters of this forestry business. There are no financial projections or documents of any kind that discern how profitable this business could be, particularly given that Inagrosa has no reported experience in this business. There is no indication that Inagrosa bought the machinery and supplies needed to cut, process, and ship large pieces of timber. Nor is there any evidence that the private forest was "totally deforested." Once again, this story is presented in "you'll just have to take my word for it" fashion.

186. But the Tribunal need not take Riverside's word for it because the alleged forestry business was not a business venture that Inagrosa was actively pursuing.

187. ***First***, Riverside's contentions about this forestry business are flatly contradicted by the fact that, in early 2018, Inagrosa succeeded in having Hacienda Santa Fé classified as a private wildlife reserve. This fact is not in dispute. Riverside admits on several occasions that "the private forest was designated as a wildlife reserve" months before the invasion began.[349] This is dispositive here because, under Nicaraguan law, private forests designated as private wildlife reserves cannot be exploited but, rather, must be preserved.[350] Given this backdrop, Riverside's allegations about

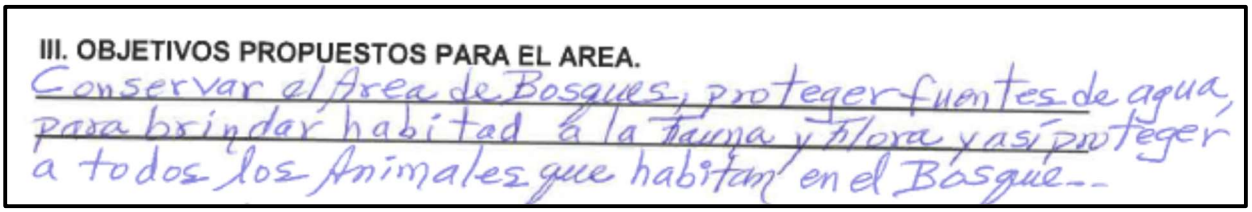
[347] Memorial, ¶ 386; Rondón I, ¶62 (**CWS-01**); Miller, ¶¶ 6, 7, 8, 10 (**CWS-07**).

[348] Memorial, ¶¶ 7, 18, 198, 718, 743; Gutiérrez I, ¶¶ 97, 128 (**CWS-02**); Rondón I, ¶¶ 10, 100, 233 (**CWS-01**).

[349] Memorial, ¶ 376; Rondón I, ¶¶ 47, 48, 50 (**CWS-01**); Certificate issued by MARENA No. 4 (**R-0073**); Inagrosa Ministry of Environment and Natural Resources (MARENA) Form application for designation of Private Wildlife Reserve (**C-0083**) y Inagrosa application form for a Private Wildlife Reserve (**R-0032**).

[350] González I, ¶¶ 65-68; Law No. 217, Art. 116 (**RL-0017**); Decree No. 1/2007, Arts. 3.28, 98.8 (**RL-0007**); Méndez I, ¶ 20 (**RWS-008**); Law for the Conservation, Promotion and Sustainable Development of the Forestry Sector, Law

Inagrosa's alleged forestry business cannot be reconciled with the well-documented fact that, from 2015 through 2018, Inagrosa was actively trying to conserve the forest. Indeed, Mr. Rondón, who applied for the private wildlife reserve classification on behalf of Inagrosa, stated in the application that the purpose of the application was to "conserve the forest area, protect the sources of water, in order to provide habitation to the fauna and flora and that way protect all of the animals that inhabit the forest," as evident from the below excerpt.[351]


III. OBJETIVOS PROPUESTOS PARA EL AREA.
Conservar el Area de Bosques, proteger fuentes de agua, para brindar habitad a la fauna y flora y así proteger a todos los Animales que habitan en el Bosque..

188. ***Second***, even before Hacienda Santa Fé was classified as a private wildlife reserve, Inagrosa would have needed at least two permits in order to be able to pursue a forestry business. First, Inagrosa would have required a permit from Nicaragua's Instituto Nacional Forestal ("INAFOR"). As explained by Mr. Álvaro Méndez Valdivia, a delegate for INAFOR, this permit is mandatory for any business that plans on cutting or processing timber.[352] According to INAFOR's records, Inagrosa never secured this permit.[353] Moreover, if the forest plantation or the forest exceeds 500 hectares of extension, an environmental permit from MARENA should have been secured to exploit the forest.[354] However, Inagrosa did not obtain this permit.[355] Hence, there is no evidence that Inagrosa was pursuing this business at all.

No. 462, June 26, 2003 ("Law No. 462"), Art. 26 (**RL-0021**); See Decree No. 73/2003, Regulation of Law No. 462, Law for the Conservation, Promotion and Sustainable Development of the Forestry Sector, November 3, 2003 ("Decree No. 73/2003"), Arts. 60-63 (**RL-0015**).

[351] Inagrosa application form for a Private Wildlife Reserve (**R-0032**).

[352] Méndez I, ¶ 16 (**RWS-08**); Law No. 462, Art. 21 (**RL-0021**).

[353] Méndez I, ¶ 32 (**RWS-008**); Certificate issued by INAFOR No. 1 (**R-0017**).

[354] González I, ¶ 41 (**RWS-009**); Law No. 462, Art. 17 (**RL-0021**).

[355] González I, ¶ 50 (**RWS-009**); Certificate issued by MARENA No. 1 (**R-0070**).

189. ***Third***, to export granadillo and coyote timber it is required to have a special permit issued by MARENA because these species are protected by the Convention on International Trade in Endangered Species of Wild Fauna and Flora.[356] However, as Ms. Gonzalez confirms, there is no record that Inagrosa obtained this permit.[357]

190. ***Fourth***, Riverside's contention that Inagrosa maintained black walnut tree specimens at the nurseries at Hacienda Santa Fé does not establish that Inagrosa had a forestry business.[358] Under Nicaraguan law, any business that maintains forest nurseries must register with the National Forest Registry.[359] Here, however, there is no record indicating that Inagrosa ever undertook this required step.[360] Accordingly, to the extent that Inagrosa maintained a forest nursery, that activity was illegal and, thus, cannot be used to prove that Inagrosa had a viable forestry business.

191. ***Fifth***, there is no evidence that Inagrosa ever registered with CETREX, the local export agency, as an exporter of timber or that Inagrosa had obtained any permit or authorization to export timber to the United States or any other country.[361] This omission is dispositive because Inagrosa could not have exported timber without those required authorizations.[362] Thus, Riverside has not proven – and cannot prove – that Inagrosa had a viable forestry business.

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[356] González I, ¶¶ 42-43 (RWS-009); Decree No. 20/2017, System of Environmental Evaluation of Permits and Authorizations for the Sustainable Use of Natural Resources, November 28, 2017, ("Decree No. 20/2017"), Art. 90, 92 (**RL-0009**).

[357] González I, ¶ 53 (**RWS-009**); Certificate issued by MARENA No. 2 (**R-0071**).

[358] Memorial, ¶¶ 379, 388; Rondón I, ¶¶ 59, 98 (**CWS-01**).

[359] Méndez I, ¶ 21 (**RWS-008**); Law No. 462, Art. 8 (**RL-0021**); Decree No. 73/2003, Art. 17 (**RL-0015**).

[360] Méndez I, ¶ 36 (**RWS-008**); Certificate issued by INAFOR No. 1 (**R-0017**).

[361] Mena I, ¶¶ 38-39 **(RWS-08**); Certificate issued by CETREX No. 4 (**R-0023**).

[362] Mena I, ¶ 15 (**RWS-08**).

192. ***Sixth***, Riverside's reliance on Mr. Tom Miller's testimony is unavailing. Riverside cites to this testimony for the proposition that Inagrosa was on the cusp of cutting down the trees in the private forest because it had a buyer lined up in the United States to purchase the timber.[363] However, Mr. Miller's testimony makes clear that Mr. Miller inquired about the timber located on the property back in 1992, *i.e.*, more than thirty years ago.[364] There is no evidence that Mr. Miller visited the Hacienda or communicated with Inagrosa about the private forest in that Hacienda at any time after 1992. Moreover, there is no evidence demonstrating that Inagrosa had the means or the U.S. approvals that would be required to import timber from Nicaragua to the United States. For these reasons, the testimony of Mr. Miller cannot be used to credit Riverside's assertions about Inagrosa's forestry business.

193. ***Seventh***, Riverside's claim that illegal occupants "totally deforested" the private forest at Hacienda Santa Fé borders on the absurd. This forest is approximately 556.8 hectares long and occupies 55.68% of the Hacienda. To put this in perspective, the area of the forest is equivalent to the space occupied by ***1,113 football fields[365] or 675 international competition soccer fields.***[366] Hence, it is entirely implausible that a few hundred so-called "paramilitaries" could cut down the 35,000 large trees located in that forest in a span of weeks, as Riverside alleges,[367] without heavy machinery. Of course, no deforestation occurred. This conclusion is evident from an October 2022

[363] Memorial, ¶ 386; Miller I, ¶¶ 6, 8, 10, 13 (**CWS-07**).

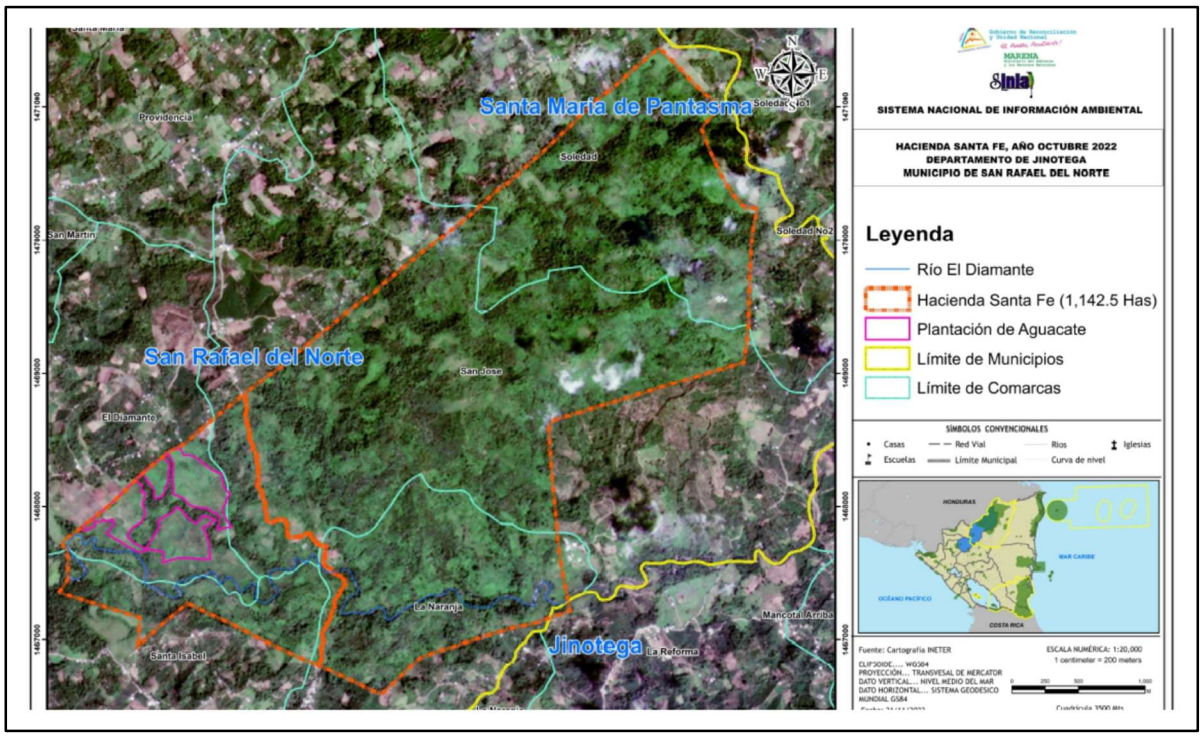
[364] Miller I, ¶¶ 6, 8, 10, 13 (**CWS-07**).

[365] To make this comparison, we consider a regulation football stadium to have 100 meters long by 50 meters wide which is equivalent to 5000 square meters and occupies 0.5 hectares.

[366] To make this comparison, we consider that a regulatory football stadium according to FIFA has a maximum measure of 110 meters long by 75 meters wide which is equivalent to 8250 square meters and occupies 0.825 hectares.

[367] Memorial, ¶¶ 7, 18, 198, 718, 743; Gutiérrez I, ¶¶ 97, 128 (**CWS-02**); Rondón I, ¶¶ 10, 100, 233 (**CWS-01**).

high-definition satellite image taken over the Hacienda, which demonstrates that the private forest is still there.[368]



194. Based on the foregoing, Riverside's allegations about Inagrosa's forestry business should be rejected.

[368] Satellite image of the land use of October 2022 of Hacienda Santa Fé prepared by the National Environmental Information System (**R-0077**).

III. CLAIMS SUBMITTED FOR THE FIRST TIME IN CLAIMANT'S MEMORIAL ON BEHALF OF INAGROSA, A NICARAGUAN COMPANY, ARE INADMISSIBLE AND OUTSIDE THE TRIBUNAL'S JURISDICTION UNDER DR-CAFTA AND THE ICSID CONVENTION

195. Riverside relegates the Tribunal's jurisdiction to just six pages at the back of its 300-page Memorial.[369] The questions and issues relating to the Tribunal's jurisdiction in this case, however, are profound. In this Section, Nicaragua identifies these questions and issues and proves that, under DR-CAFTA, ICSID Convention, and investor-State jurisprudence, the claims submitted by Riverside on behalf of Inagrosa are inadmissible and outside the Tribunal's jurisdiction.

196. In its ***Memorial***, Riverside alleges, ***for the first time***, that "Riverside raises this claim for damages ***under DR-CAFTA Articles 10.16.1(a) and 10.16.1.(b)***. The claims are for the harm done to the shareholder's interest in the investment ***and*** to the harm done to the investment itself."[370]

197. Riverside's attempt to bring claims on behalf of Inagrosa under Article 10.16.1(b) for the first time in its Memorial fails for at least two reasons: (i) Riverside failed to comply with the Notice Requirement under DR-CAFTA Article 10.16.2; and (ii) Riverside failed to comply with the Waiver Requirement under DR-CAFTA Article 10.18.2(b)(ii). Claims purportedly asserted on behalf of Inagrosa are therefore inadmissible.

198. Riverside's attempt through this arbitration to recover losses suffered by Inagrosa is improper. Riverside has failed to show that the Tribunal has jurisdiction over claims for damages to Inagrosa because it has not demonstrated that it controlled Inagrosa at the time of the alleges breaches.

[369] Memorial, ¶¶ 921-939.

[370] Memorial, ¶ 770.

199. Additionally, the Tribunal lacks jurisdiction *ratione personae* over any claims asserted on behalf of Inagrosa under Article 25(2) of the ICSID Convention because Nicaragua never agreed that Inagrosa should be treated as a "national of another Contracting State."

A. Applicable Legal Principles

200. Before setting out its jurisdictional objections, Nicaragua takes this opportunity to highlight four fundamental principles that must guide this Tribunal's jurisdictional analysis.

201. ***First***, the Tribunal will only have jurisdiction over the dispute if Riverside has fulfilled all jurisdictional requirements of both the instrument containing the consent of the parties (in the case, DR-CAFTA), and the ICSID Convention.[371]

202. Article 10 of DR-CAFTA includes a section on "Investor-State Dispute Settlement," which sets out the jurisdictional requirements for an arbitration between an investor and a State. Three of those requirements are relevant to this case: (i) the notice requirement established in Article 10.16.2 of DR-CAFTA; (ii) the waiver requirement established in Article 10.18.2(b) of DR-CAFTA; (iii) the definition of "investment" provided in Article 10.28 of DR-CAFTA.

203. Article 25(1) of the ICSID Convention establishes three requirements delimiting the Tribunal's jurisdiction: (i) the dispute must be legal in nature and result directly from an investment ("any legal dispute arising directly out of an investment") *(ratione materiae)*; (ii) the dispute must arise "between a Contracting State ... and a national of another Contracting State"

[371] *Global Trading Resource Corp. and Globex International, Inc. v. Ukraine*, ICSID Case No. ARB/09/11, Award, December 1, 2010, ¶ 43 (**RL-0079**) ("[T]here are two independent parameters that must both be satisfied: what the parties have given their consent to, as the foundation for submission to arbitration; and what the Convention establishes as the framework for the competence of any tribunal set up under its provisions").

(*ratione personae*); and (iii) the parties must have "consent[ed] in writing to submit [the dispute] to the Centre" (*ratione voluntatis*).[372]

204. ***Second***, no international tribunal has jurisdiction to decide whether the State has breached its obligations in the absence of consent, which must be unequivocal and indisputable.[373] In addition, "[c]onsent of the parties must exist when the [ICSID] is seized."[374] Therefore, all conditions to which Nicaragua's consent is subject under the Treaty must have been met by the date of Claimant's Notice for Arbitration. Additionally, the Treaty (in this case, DR-CAFTA), includes some conditions that need to be met by the time Claimant submits its Notice of Intent.

205. ***Third***, the burden of establishing this Tribunal's jurisdiction rests with Riverside, who must demonstrate that it has met each of the relevant jurisdictional requirements.[375] Since Riverside argues that the Tribunal has jurisdiction to hear its claims, Riverside bears the burden of proving the fulfillment of the relevant jurisdictional requirements.[376]

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[372] ICSID Convention, Art. 25(1) (**RL-0014**).

[373] *Fábrica De Vidrios Los Andes, C.A. and Owens-Illinois De Venezuela, C.A. v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB/12/21, Award, November 13, 2017, ¶ 277 (**RL-0080**) ("The "jurisdiction of the Centre" is thus founded upon perfected consent and that is hardly surprising as the consent of all parties to ICSID arbitration is the *sine qua non* of arbitration under the ICSID Convention."); *Daimler Financial Services AG v. Argentine Republic*, ICSID Case No. ARB/05/1, Award, August 22, 2012, ¶ 174-175 (**RL-0081**) ("[w]hat is not permissible is to presume a state's consent ... Non-consent is the default rule; consent is the exception. Establishing consent therefore requires affirmative evidence").

[374] Report of the Executive Directors on the Convention on the Settlement of Investment Disputes between States and Nationals of Other States, March 18, 1965, ¶ 24 (**RL-0082**).

[375] *Hussein Nuaman Soufraki v. United Arab Emirates*, ICSID Case No. ARB/02/7, Award, July 7, 2004, ¶ 58 (**RL-0083**) ("In accordance with accepted international (and general national) practice, a party bears the burden of proof in establishing the facts that he asserts").

[376] *Spence International Investments, LLC, et al. v. Republic of Costa Rica*, ICSID Case No. UNCT/13/2, Interim Award, May 30, 2017, ¶ 239 (**RL-0084**) ("[T]he burden is therefore on Claimants to prove the facts necessary to establish the Tribunal's jurisdiction."); *National Gas S.A.E. v. Arab Republic of Egypt*, ICSID Case No. ARB/11/7, Award, April 3, 2014, ¶ 118 (**RL-0085**) ([T]the burden of establishing jurisdiction, including consent, lies primarily upon the Claimant. Although it is the Respondent which has here raised specific jurisdictional objections, it is not for the Respondent to disprove this Tribunal's jurisdiction. Under international law, as a matter of legal logic and the application of the principle traditionally expressed by the Latin maxim '*actori incumbit probatio*', it is for the Claimant to discharge the burden of proving all essential facts required to establish jurisdiction for its claims.").

206. ***Fourth***, the Tribunal must not proceed unless it is fully satisfied that it has jurisdiction. The Tribunal shall determine*, ex officio and proprio motu*, that it is competent to adjudicate the dispute. In *Micula v. Romania,* the tribunal explained that:

> The Tribunal understands its duty to determine its jurisdiction, including through examination of the jurisdictional requirements, *sua sponte*, if necessary, as it has an obligation to reject a claim if the record shows that jurisdiction is lacking. Or, put differently, ***a tribunal can rule on and decline its jurisdiction even where no objection to jurisdiction is raised if there are sufficient grounds to do so on the basis of the record***.[377]

207. In summary, Riverside has the burden to establish the Tribunal's jurisdiction, which depends on the existence of Nicaragua's unequivocal and indisputable consent to arbitration and requires the fulfillment of all jurisdictional requirements imposed under both the ICSID Convention and DR-CAFTA.

208. In the case at hand, Riverside has not proven that this Tribunal has jurisdiction over each of its claims. In particular, Riverside has noticeably failed to establish the Tribunal's jurisdiction over claims that it purports to have brought on behalf of Inagrosa—a Nicaraguan entity—rather than in respect of its alleged 25.5 percent stake in Inagrosa.

B. Claims on Behalf of Inagrosa that Riverside Asserts for the First Time in Its Memorial Are Inadmissible Under Articles 10.16.1(b) and 10.18.2(b)(ii) of DR-CAFTA

209. Article 10.16.1(a) of DR-CAFTA allows a claimant to submit a claim to arbitration "on its own behalf" and under Article 10.16.1(b) on "behalf of an enterprise of the respondent that is a juridical person that the claimant owns or controls directly or indirectly."[378]

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[377] *Ioan Micula and others v. Romania*, ICSID Case No. ARB/05/20, Decision on Jurisdiction and Admissibility, September 24, 2008, ¶ 65 (**RL-0086**) (emphasis added). *See also The "Grand Prince" Case*, ITLOS, Award, April 20, 2001, ¶¶ 77, 79 (**RL-0098**) ("[a]ccording to the settled jurisprudence in international adjudication, a tribunal must at all times be satisfied that it has jurisdiction to entertain the case submitted to it. For this purpose, it has the power to examine *proprio motu* the basis of its jurisdiction ... As a consequence, the Tribunal possesses the right to deal with all aspects of the question of jurisdiction, whether or not they have been expressly raised by the parties.").

[378] DR-CAFTA, Article 10.16.1(a) and (b) (**CL-0001**).

210. As mentioned above, Riverside alleges, ***for the first time***, in its Memorial, that "Riverside raises this claim for damages ***under DR-CAFTA Articles 10.16.1(a) and 10.16.1.(b).*** The claims are for the harm done to the shareholder's interest in the investment ***and*** to the harm done to the investment itself."[379]

211. Riverside's attempt to bring claims on behalf of Inagrosa under Article 10.16.1(b) for the first time in its Memorial fails for at least two reasons: (i) Riverside failed to comply with the Notice Requirement under DR-CAFTA Article 10.16.2; and (ii) Riverside failed to comply with the Waiver Requirement under DR-CAFTA Article 10.18.2(b)(ii). Claims purportedly asserted on behalf of Inagrosa are therefore inadmissible.

1. Riverside Failed to Comply with the Notice Requirement Under Article 10.16.2 of DR-CAFTA With Respect to the Claims it Attempts to Bring on Behalf of Inagrosa

212. Article 10.16.2 of CAFTA requires that at least 90 days before submitting any claim to arbitration, a claimant shall deliver to the respondent a written notice of its intention to submit the claim to arbitration ("Notice of Intent"). The Notice Requirement provides as follows:

> At least 90 days ***before submitting any claim to arbitration*** under this Section, a claimant ***shall deliver*** to the respondent a written notice of its intention to submit the claim to arbitration ("notice of intent"). The notice ***shall specify***:
>
> (a) the name and address of the claimant and, ***where a claim is submitted on behalf of an enterprise,*** the name, address, and place of incorporation of the enterprise.[380]

213. Riverside did not comply with this requirement. In fact, Riverside did ***not*** provide proper notice to Nicaragua that it was submitting claims on behalf of Inagrosa.

214. The Notice of Intent submitted by Riverside on August 28, 2020 contains not a single statement that Riverside intended to submit a claim to arbitration on behalf of Inagrosa. To

[379] Memorial, ¶ 770.

[380] DR-CAFTA, Article 10.16.2(a) (**CL-0001**) (emphasis added).

the contrary, that document identifies Riverside as "the Investor" and Inagrosa only as its "Investment."[381] The Notice of Intent did not give Nicaragua notice that Riverside planned to submit any claim to arbitration on behalf of Inagrosa.

215. The fact that Riverside only noticed claims it was bringing on its own behalf, and not on behalf of Inagrosa, is also evident in the "Treaty Breach" and "Relief Requested" sections of the Notice of Intent. In the Treaty Breach section, Riverside states that "[t]he ***Investor*** claims breaches of Chapter 10 of DR-CAFTA, including but not limited to, the following sub-provisions of the DR-CAFA…"[382] There is no reference whatsoever to the investor (Riverside) alleging breaches of Chapter 10 on behalf of a local company that it allegedly owns and controls.

216. Moreover, under the Relief Requested Section, Riverside states that:

> If the matter proceeds to arbitration, the ***Investor*** will seek the following relief: a) Damages not less than US$ 545 million as compensation for the economic loss, harm, and damage arising from Nicaragua's breach of its obligations in Section A of CAFTA Chapter Ten, b) Moral damages of US$ 45 million arising from the improper actions of Nicaragua against the Investor and the Investments.[383]

217. Again, there is no mention that Riverside is seeking relief not only on behalf of the investor (Riverside), but also on behalf of Inagrosa.

218. Further demonstrating that Riverside submitted a Notice of Intent *only* on its own behalf, Riverside states that "the ***Investor*** [defined as Riverside] invites Nicaragua to engage in discussions and negotiations" and that "[i]f such consultations with Nicaragua are unsuccessful,

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[381] Notice of Intent, p. 1 (**C-0006**).

[382] Notice of Intent, ¶ 33 (**C-0006**).

[383] Notice of Intent, ¶ 36 (**C-0006**). Despite the fact that procedurally, the instance when Claimant needs to bring a claim on behalf of the enterprise is in the Notice of Intent as per Article 10.16(2) of the Treaty, it is worth noting that in it its Memorial, and now aware of the fatal mistake, Claimant augmented its Request for Relief, specifically requesting economic and moral damages under Article 10.16(1)(a), and "alternatively, or in combination", economic and moral damages under Article 10.16(1)(b) of DR-CAFTA. *See* Memorial, ¶ 946.

the ***Investor*** intends to submit a claim for arbitration under the Treaty…"[384] Once again, there is no notice that Riverside intended to bring aims on behalf of Inagrosa.

219. This failure of notice is fatal to Inagrosa's claims. The tribunal in *Supervisión y Control v. Costa Rica* explained the consequences of a failure to notice claims in accordance with the notice requirements of the applicable treaty:

> The failure to duly notify the State receiving the investment of the existence of a dispute constitutes a violation of Article XI.l of the Treaty. This implies that ***any claim that has not been notified is inadmissible in the respective proceeding, because the prior negotiation process agreed to by the parties has not been exhausted***.[385]
>
> In the event that the Investor notifies certain claims to the State, but upon presenting the Request for Arbitration or its Claim Memorial it adds claims different and not directly related to those previously presented, all the claims not notified will be inadmissible.[386]

220. Therefore, Riverside's failure to provide proper notice that it intended to bring claims on behalf of Inagrosa as well as itself renders those claims inadmissible. This result means that Inagrosa is not a Party to this proceeding, and that, with respect to Inagrosa, the prior negotiation process required by Article 10.16 in respect of such claims has not elapsed. It follows that the Tribunal may consider only Riverside's claims for alleged damage to its own investment, and not to Inagrosa's.

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[384] Notice of Intent, ¶ 37 (**C-0006**) (emphasis added).

[385] *Supervisión y Control S.A. v. Republic of Costa Rica*, ICSID Case No. ARB/12/4, Award, January 18, 2017, ¶ 340 (**RL-0087**).

[386] *Supervisión y Control S.A. v. Republic of Costa Rica*, ICSID Case No. ARB/12/4, Award, January 18, 2017, ¶ 341 (**RL-0087**) (emphasis added).

2. Even if Claimant Had Properly Included Inagrosa's Claims in the Notice of Intent, Riverside's Claims on Behalf of Inagrosa Are Inadmissible Because Claimant Failed to Submit a Waiver on Behalf of Inagrosa as Required by Article 10.18.2(b)(ii) of DR-CAFTA

221. Riverside also may not pursue Inagrosa's supposed claims in this arbitration because Claimant failed to submit a waiver on behalf of Inagrosa pursuant to Article 10.18.2(b)(ii) of DR-CAFTA.

222. Article 10.18.2 of DR-CAFTA establishes specific requirements for a claimant to be able to submit a claim on its own behalf or on behalf of an enterprise, including the requirement that a claimant submit a written waiver with respect to its right to bring its claims before another tribunal ("Waiver Requirement"). Article 10.18.2 reads as follows:

> ***No claim may be submitted to arbitration*** under this Section ***unless***:
>
> (a) the claimant consents in writing to arbitration in accordance with the procedures set out in this Agreement; and
>
> ***(b) the notice of arbitration is accompanied,***
>
> > (i) for claims submitted to arbitration under Article 10.16.1(a), by the claimant's written waiver, and
> >
> > ***(ii) for claims submitted to arbitration under Article 10.16.1(b), by the claimant's and the enterprise's written waivers***
>
> ***of any right to initiate or continue before any administrative tribunal or court under the law of any Party, or other dispute settlement procedures, any proceeding with respect to any measure alleged to constitute a breach referred to in Article 10.16***.[387]

223. In its Memorial, Claimant affirms that "[w]ith the Notice of Arbitration, Riverside filed any necessary waiver and consent to arbitration."[388] But the ***only*** waivers submitted by

[387] DR-CAFTA, Article 10.18.2 (**CL-0001**) (emphasis added).

[388] Memorial, ¶ 934 (d).

Riverside with its Notice of Arbitration are "Consents and Waivers" executed by Riverside.[389] Claimant has failed to fulfill the Waiver Requirement established in Article 10.18.2(b)(ii) of DR-CAFTA ("Waiver Requirement") with respect to claims it attempts to bring on behalf of Inagrosa.

224. Consistent with the Notice of Intent, the Notice of Arbitration filed by Riverside on March 19, 2021, lacks ***any*** reference to Riverside submitting a claim under 10.16(1)(b) on behalf of Inagrosa. Therefore, Claimant did not submit ***any*** written waiver executed by Inagrosa of any right to initiate or continue proceedings with respect to any measure that allegedly constitutes a breach of DR-CAFTA as required by Article 10.18.2(b)(ii).[390] Effective consent to arbitration requires compliance with any conditions established in DR-CAFTA for resort to arbitration. Absent a waiver that fully complies with DR-CAFTA, Nicaragua did not consent to arbitrate claims for Inagrosa's losses, and therefore the Tribunal should not hear them.

225. Claimant's failure to satisfy the Waiver Requirement with respect of Inagrosa is independently fatal to its attempt to raise claims on behalf of that entity for the first time in its Memorial. In *Renco v. Peru,* a case decided under a provision of the US-Peru TPA identical to Article 10.16.1 of DR-CAFTA, the Tribunal found that "the object and purpose of [the Waiver Requirement] is to protect a respondent-State from having to litigate multiple proceedings in different fora relating to the same measure, and to minimize the risk of double recovery and inconsistent determinations of fact and law by different tribunals."[391]

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[389] Member's Resolution of Riverside Coffee, L.LC. Consent & Waiver for Claim under CAFTA, March 17, 2021, (**C-0027**); Officer's Resolution of Riverside Coffee, L.L.C. Consent and Waiver for Claim under CAFTA, March 17, 2021, (**C-0028**); Member's Resolution of Riverside Coffee, L.L.C. re ICSID CAFTA Claim, March 17, 2021, (**C-0026**); Officer's Resolution of Riverside Coffee, L.L.C. re ICSID CAFTA Claim, March 17, 2021, (**C-0029**).

[390] Even if Claimant *had* submitted waivers on behalf of Inagrosa, those claims would still be inadmissible because Riverside did not specify in the Notice of Intent that it was submitting claims on behalf of Inagrosa.

[391] *Renco v. Peru,* UNCITRAL, Partial Award on Jurisdiction, July 15, 2016, ¶ 84 (**RL-0088**).

226. In *Renco*, Peru objected that Renco's treaty claims, while characterized as "investor" claims under one particular provision of the U.S.-Peru TPA, were in fact "enterprise" claims that had been submitted ***without the necessary waiver from the relevant Peruvian company***, Doe Run Peru (DRP). The Tribunal found that "given the unequivocal language of Article 10.18(2), this is not a trivial defect which can be easily brushed aside – the defective waiver goes to the heart of the Tribunal's jurisdiction."[392] The tribunal further explained that:

> Under Article 10.18, the submission of a valid waiver is a condition and limitation on Peru's consent to arbitrate. This is a precondition to the initial existence of a valid arbitration agreement, and as such leas to a clear timing issue: ***if no complaint waiver is served with the notice of arbitration, Peru's offer to arbitrate has not been accepted***; there is no arbitration agreement; and the Tribunal is without any authority whatsoever.[393]

227. The tribunal stressed that having Renco submit a new waiver could not cure the problem because the provision of a timely waiver had been a condition of Peru's consent to arbitration under the Treaty.[394] Renco's failure to provide a proper waiver meant that there was in fact no valid arbitration agreement between the parties.[395]

228. Here, Claimant did not submit a waiver executed by Inagrosa as required by Article 10.18.2(b)(ii) of DR-CAFTA. Inagrosa's claims are accordingly inadmissible and Claimant lacks standing to make claims for damages allegedly suffered by its local enterprise, as discussed below.

3. Claimant Improperly Seeks through this Arbitration to Recover Losses Suffered by Inagrosa

229. DR-CAFTA offers a claimant two roads to recover damages: (a) under Article 10.16.1(a), a claimant can recover compensation for damages it suffered directly, and (b) under

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[392] *Renco v. Peru,* UNCITRAL, Partial Award on Jurisdiction, July 15, 2016, ¶ 138 (**RL-0088**).

[393] *Renco v. Peru,* UNCITRAL, Partial Award on Jurisdiction, July 15, 2016, ¶ 158 (**RL-0088**) (emphasis added).

[394] *Renco v. Peru,* UNCITRAL, Partial Award on Jurisdiction, July 15, 2016, ¶ 152 (**RL-0088**).

[395] *Renco v. Peru,* UNCITRAL, Partial Award on Jurisdiction, July 15, 2016, ¶ 138 (**RL-0088**).

Article 10.16.1(b), a claimant can recover compensation for damages suffered by an enterprise organized under the law of the host State that it directly or indirectly owns or controls.

230. As explained above, Riverside did not meet the requirements established in DR-CAFTA for bringing a claim on behalf of Inagrosa by failing to include those claims in the Notice of Intent and by failing to submit the required waivers by Inagrosa.

231. There is a crucial difference between the two mechanisms for recovery offered by DR-CAFTA, depending on the section of the Article 10.16.1 invoked. While section (a) only allows a claim where "the *claimant* has incurred loss or damage by reason of, or arising out of, that breach,"[396] recovering the ***direct injury it sustained***, section (b) allows a claim that "the *enterprise* has incurred loss or damage by reason of, or arising out of, that breach,"[397] recovering ***on behalf of a local enterprise, the damage that enterprise sustained***.

232. Yet, in its Memorial, and ***for the first time***, Claimant asks the Tribunal to grant relief for ***both***: (i) alleged damages suffered by Claimant, recoverable under DR-CAFTA Article 10.16.1(a)[398] and (ii) alleged damages suffered by its local enterprise, Inagrosa, recoverable under DR-CAFTA Article 10.16.1(b).[399]

233. Indeed, the evolving formulation of the damages requested in the Notice of Intent, Notice of Arbitration and in the Memorial confirm that Claimant initiated this arbitration ***only*** on its own behalf, requesting relief for damages Riverside allegedly suffered directly and not damages on behalf of Inagrosa, before belatedly attempting to broaden its claim in its Memorial.

[396] DR-CAFTA, Art. 10.16.1(a) (**CL-0001**).

[397] DR-CAFTA, Art. 10.16.1(b) (**CL-0001**).

[398] Memorial, ¶ 946 (b)-(c).

[399] Memorial, ¶ 946 (d)-(e).

Relief Sought		
Notice of Intent	**Notice of Arbitration**	**Memorial**
If the matter proceeds to arbitration, the **Investor** [Riverside Coffee LLC] will seek the following relief: a. **Damages of not less than US$545 million** as compensation for the economic loss, harm, and damage arising from Nicaragua's breach of its obligations in Section A of CAFTA Chapter Ten. b. **Moral damages of US$45 million** arising from the improper actions of Nicaragua against the Investor and the Investments. (Notice of Intent, ¶ 36, C-0006).	The **Investor** [Riverside Coffee LLC] seeks the following relief: a. **Damages of not less than US$545 million** as compensation for the economic loss, harm, and damage arising from Nicaragua's breach of its obligations in Section A of CAFTA Chapter Ten. b. **Moral damages of US$45 million** arising from the improper actions of Nicaragua against the Investor and the Investments. (Notice of Arbitration, March 19, 2021, ¶ 301).	Riverside respectfully requests that the Tribunal grant the following relief for its claims under CAFTA Article 10.16(1) a. […] b. An award for Economic Loss Damages to the Investor for its claims under **Article 10.16 (1)(a)** in the amount **not less than US$ 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 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. (Memorial, October 21, 2022, ¶ 946)

234. Claimant cannot claim damages under both mechanisms because it properly noticed and submitted a claim ***only*** on its own behalf under subsection (a), which means losses or damages that Riverside suffered ***directly***. Where Claimant has failed to provide proper notice or waivers supporting a claim by Inagrosa pursuant to Articles 10.18 and 10.16 of the DR-CAFTA, it follows that Nicaragua has not consented to arbitrate such claims under the Treaty. Claimant's attempt to recover compensation for damages allegedly sustained by Inagrosa is inadmissible and should be dismissed.

235. To the contrary, investment tribunals have consistently held that the scope of compensation of shareholders is limited to ***the value of their equity participation in the company or direct assets.*** In *Union Fenosa Gas v. Egypt*, the tribunal found that:

> This is not a case of a claimant claiming as damages a loss or expense incurred by a company in which it has only a minority interest and no direct control over that company. In such circumstances, a minority shareholder may make a claim for the diminution in the value of its shareholding; but it cannot claim, even prorated

according to the number of its shares, the damages suffered only by the company. Such a claim is not pleaded by the Claimant in this arbitration.[400]

236. Similarly, in *ST-AD v. Bulgaria,* the tribunal found that:

> ***an investor whose investment consists of shares*** cannot claim, for example, that the assets of the company are its property and ask for compensation for interference with these assets. ***Such an investor can, however, claim for any loss of value of its shares resulting from an interference with the assets or contracts of the company in which it owns the shares.***[401]

237. For all these reasons, Claimant cannot now seek recovery for losses or damages sustained by Inagrosa beyond the extent of its claimed shareholding in Inagrosa.[402]

C. Riverside Has Not Shown that the Tribunal Has Jurisdiction Over Claims for Damage to Inagrosa Because It Has Not Shown that It Controlled Inagrosa at the Time of the Alleged Breaches

238. Even if the Tribunal were to put to one side the failure of notice and disregard of DR-CAFTA's waiver requirements—each independently sufficient to dismiss any claim brought on behalf of Inagrosa—Riverside has failed to meet its burden of establishing the Tribunal's jurisdiction over such claims because it has not shown that it controlled Inagrosa at the time of the alleged breaches.

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[400] *Union Fenosa Gas S.A. v. Arab Republic of Egypt*, ICSID Case No. ARB/14/4, Award, August 31, 2018, ¶ 10.119 (**RL-0089**).

[401] *ST-AD GmbH v. The Republic of Bulgaria*, PCA Case No. 2011-06, Award on Jurisdiction, July 18, 2013, ¶ 282 (**RL-0090**).

[402] Riverside's claimed investment in Nicaragua consists solely of an alleged shareholding in Inagrosa. Claimant states that "Riverside made its first investment in Inagrosa in 1999 and was of a continuous duration," (*see* Notice of Arbitration, ¶ 87 (a)) but has not placed a single document into evidence showing when it first acquired its shares in Inagrosa or how much it paid for them. Nor has Riverside demonstrated that it acquired such shares for more than a nominal price or made any economic contribution to Inagrosa sufficient to qualify as an "investment" within the meaning of the ICSID Convention. *See generally KT Asia v. Kazakhstan,* ICSID Case No. ARB/09/8, October 17, 2013, ¶ 206 (**RL-0096**) ("payment of a nominal price for a shareholding is but one aspect out of a number of factors that may assist in ascertaining the existence of an investment . . . under Article 25(1) of the ICSID Convention and under the BIT").; *Quiborax S.A., Non-Metallic Minerals S.A. v. Plurinational State of Bolivia*, ICSID Case No. ARB/06/2, February 6, 2006, ¶ 233 (**RL-0097**) (mere ownership of shares is, in and of itself, insufficient to prove a contribution of money or assets). Nicaragua reserves the right to seek production of relevant documents in due course and to advance further jurisdictional objections in this regard.

239. Riverside alleges that it became a majority shareholder of Inagrosa on August 28, 2020, the same day it submitted its Notice of Intent.[403] Riverside did not control Inagrosa when the alleged breaches occurred in June 2018. At that time, by its own admission, Riverside was a minority shareholder, holding only 25.5 percent of Inagrosa's shares. Yet none of Riverside's other shareholders from that timeframe—Mr. Winger, Mr. Rondón, or Mr. Nairn—is a claimant in this arbitration.[404] As set out further below, Riverside cannot bring claims for damage to their investments. Riverside can only bring claims to redress its own alleged harm.

240. To state a claim for damage to Inagrosa beyond the extent of its own shareholding, Claimant must establish that it owned or controlled Inagrosa ***at the time of the treaty breaches***.[405] Claimant has failed to do.

241. The following chronology shows who owned and controlled Inagrosa at all relevant times, based solely on Claimant's own exhibits and submissions.

Date	**Description**	**Exhibit**
February 27, 1996	**Constitution of Inversiones Agropecuarias S.A. ("Inagrosa")** **Social Capital:** C$25,000 córdobas divided in 50 shares with a value of C$500 córdobas each. **Founding shareholders**: - Leonel Altamirano: 30 shares - José Espinoza: 15 shares - Carmen Sequeira: 5 shares	(C-041)
April 29, 1998	Acquisition of Hacienda Santa Fé **by Inagrosa** S.A. in a Forced Sale Agreement	(C-173) (C-042)
June 18, 1999	**Constitution of Riverside Coffee** (Articles of Organization).	(C-040) (C-053)

[403] *See* Inagrosa Share Certificate No. 22 (**C-0052**) and Inagrosa Share Certificate No. 23 (**C-0053**). *See also* Notice of Intent, August 28, 2020 (**C-0006**).

[404] Notice of Arbitration, ¶ 3.

[405] *Vito G. Gallo v. Government of Canada,* UNCITRAL, Award, September 15, 2011, ¶ 332 (**RL-0091**).

	Operating Managers: - Archie Nairn - Ward Nairn - Melvin Winger	
Unknown	Riverside Acquires Shares in Inagrosa	No documentary evidence submitted by Claimant demonstrating when it first acquired Shares in Inagrosa. Claimant only submits a document showing an ***increase*** of social capital on 24 September 2003 including Riverside as minority shareholder as of that date.
September 24, 2003	Inagrosa – ***Increase*** of Social Capital from 50 shares to 100,000 shares. **Riverside,** represented Daniel Senestraron, owner of 25 shares became owner of **50,000 shares** (50% shareholder) Melvin Winger, owner of 2 shares, became owner of 4,000 shares. Carlos Rondón, owner of 13 shares, became owner of 26,000 shares Ana Lorena Rondón, Owner of 10 shares became owner of 20,000 shares.	(C-043) (C-044) (C-045) (C-046) (C-047)

Unknown	Inagrosa – Sale of Shares Social Capital: 100,000 shares. **Riverside,** represented by Melva Jo Winger de Rondón, becomes owner of **25,500 shares** Melvin Winger, becomes owner of 25,500 shares Carlos Rondón, becomes owner of 25,000 shares Ward Nairn, becomes owner of 24,000 shares. [It appears that Ana Lorena Rondón sold its shares]	No documentary evidence submitted by Claimant. This fact is described as background information in document C-126, but it does not explain when it happened.
January 30, 2013	Inagrosa - Board Meeting – Election of Board Social Capital: 100,000 shares. President: Melvin Winger (owner of 25,500 shares) Vice President: Carlos Rondón (owner of 25,000 shares) **Secretary: Riverside**, represented by Melva Jo Winger de Rondón (owner of 25,500 shares) Tesorero: Ward Nairn (owner of 24,000 shares)	(C-126)
January 2, 2019	Riverside – Amended and Restated Operating Agreement of Riverside Coffee LLC	(C-149)
August 27, 2020	Inagrosa – Transfer of Shares and Election of Board Social Capital: 100,000 shares **Riverside,** represented by Melva Jo Winder de Rondón, owner of 25,500 shares became owner of **95,000 shares.** Melvin Winger, owner of 25,500 shares, became owner 0 shares. Carlos Rondón, owner of 25,000 shares, became owner of 5,000 shares	(C-127) (C-052) (C-053)

	Ward Nairn, Owner of 24,000 shares became owner of 0 shares. Board: President: Carlos Rondón (owner of 5,000 shares) Vice President: Riverside, represented by Melva Jo Wigner (owner of 95,000 shares) Secretary: Riverside, represented by Melva Jo Wigner (owner of 95,000 shares) Tesorero: Riverside, represented by Melva Jo Wigner (owner of 95,000 shares)	
August 28, 2020	Riverside's Notice of Intent	(C-006)
March 17, 2021	Riverside Member's Resolution (consent to arbitration and waiver)	(C-027)
March 17, 2021	Riverside Officer's Resolution (consent to arbitration and waiver)	(C-028)
March 19, 2021	Riverside's Notice of Arbitration	

242. Riverside has failed to submit ***a single document*** showing ***when*** it became a shareholder in Inagrosa. Ms. Melva Jo de Rondón states that "my mother, Mona, made her first investment in Inagrosa in 1997, as pre-incorporation investments in Riverside."[406] But Riverside was constituted on June 18, 1999.[407] Investments allegedly made ***before*** Riverside came to exist are totally irrelevant.

243. What we ***do*** know from the evidence submitted by Claimant and shown in the above chart, is that from ***at least*** January 30, 2013[408] until August 27, 2020, Riverside only owned 25.5 percent of the shareholding in Inagrosa.[409] That is undisputed. In fact, Claimant admits it.[410] In the

[406] Winger de Rondón I, ¶ 26 (**CWS-03**).

[407] *See* **C-0040** and **C-0053**.

[408] Sometime between September 24, 2003 and January 30, 2013, Riverside' shareholding in Inagrosa decreased from 50 percent to 25.5 percent (*See* chart above).

[409] *See* chart above.

[410] Memorial, ¶ 84.

words of Claimant, "[a]t the time of the Invasion, Riverside owned 25.5 percent of Inagrosa shares directly. Melvin Winger owned 25.5 percent of Inagrosa shares, Carlos Rondón owned 25 percent of Inagrosa shares, and Ward Nairn – a close friend of Melvin Winger, owned the remaining 24 percent minority of Inagrosa shares."[411]

244. Therefore, at the time of the alleged breaches in June 2016, Riverside only owned 25.5 percent of Inagrosa's shares.

245. With respect to the ***control*** of Inagrosa, Claimant alleges that "Riverside has controlled Inagrosa since 2003."[412] While it is true that Riverside controls Inagrosa since August 27, 2020, when it acquired 95 percent of Inagrosa's shares,[413] Claimant has been unable to demonstrate that it controlled Inagrosa before that date or when the alleged breaches occurred, a time where it only owned 25.5 percent of Inagrosa's shareholding. Notably, Claimant became a majority shareholder of Inagrosa the same day it submitted its Notice of Intent, and ***after*** the alleged breaches and damage to its investment occurred. The natural inference to be drawn from this transaction is that Riverside did so to control the arbitration process—and that prior to this point, ***such control was lacking***.[414]

246. To be sure, Claimant alleges that at the time of the alleged invasion, Riverside controlled more than 50 percent of Inagrosa's voting shares.[415] To support this allegation, it makes a series of assertions—all lacking evidentiary support—to the effect that Riverside controlled

[411] Memorial, ¶ 84.

[412] Memorial, ¶ 41; Melvin Winger I, ¶ 30 (**CWS-04**); Winger de Rondón I, ¶ 37 (**CWS-03**).

[413] Inagrosa Share Certificate No. 22, August 28, 2020 (**C-0052**); Inagrosa Share Certificate No. 23, August 28, 2020 (**C-0053**); Memorial, ¶ 46.

[414] Inagrosa Share Certificate No. 22, August 28, 2020 (**C-0052**); Inagrosa Share Certificate No. 23, August 28, 2020 (**C-0053**); Notice of Intent, August 28, 2020; Memorial, ¶ 83.

[415] Memorial, ¶ 84; Winger de Rondón I, ¶ 37 (**CWS-03**).

Inagrosa at the time of the alleged breaches, even though it was then only admittedly a minority shareholder.

247. ***First,*** Claimant alleges that:

> Riverside Coffee was able to exercise effective control over Inagrosa ***through a voting bloc agreement between Riverside Coffee, LLC, Carlos Rondon (CEO of Inagrosa) and his father in Law, Melvin Wigner***. As a result, Riverside Coffee ***controlled 80% of the voting shares of Inagrosa since August 31, 2004.*** This voting agreement continued to maintain control and ownership over Inagrosa until August 28,2020, when Inagrosa obtained 95% of the shares in tis own name and maintained the voting agreement with Mr. Rondón to effectively control 100% of the shares.[416]

248. Claimant has not produced the "voting bloc agreement" between Riverside, Mr. Rondón and Mr. Wigner. There is no documentary evidence in the record that such an agreement ever existed.

249. ***Second,*** Claimant asserts that:

> Melvin Winger's Revocable Trust voted his Inagrosa shares with Riverside. They and Riverside ***consistently voted*** a combined total of 51% of Inagrosa shares, sufficient to allow Riverside to control Inagrosa. Ward Nairn ***consistently voted*** his 24% of Inagrosa shares along with Riverside. As a result, ***Riverside always presented a control bloc of 75% of Inagrosa shares***.[417]
>
> Riverside ***voting bloc*** ensured that Riverside controlled board decisions from 2013 onwards.[418]

250. These assertions are supported ***only*** by the testimony of Ms. Melva Jo Winger de Rondón and Mr. Melvin Winger. No documentary evidence as to any "voting bloc" agreement or control by Riverside over the voting of the majority of Inagrosa's shareholders appears in the record. The only evidence that Claimant submits to support its alleged "control" over Inagrosa, despite being a 25.5 percent shareholder, are eleven sets of minutes from Inagrosa's Board of

[416] Notice of Intent, ¶ 75.

[417] Memorial, ¶ 85; Winger de Rondón I, ¶ 38 (**CWS-03**).

[418] Memorial, ¶ 88; Winger de Rondón I, ¶¶ 39-40 (**CWS-03**).

Director meetings between January 2013 - April 2017.[419] But these Minutes show no more than that Riverside (represented by Ms. Melva Jo Winger de Rondón), and Messrs. Winger, Rondón and Nairn took certain decisions such as authorizing powers of attorney or deciding the purchase of a vehicle "by unanimity of votes."[420]

251. This is evidence merely of consensus on limited issues, not control. That a group of shareholders agreed on business decisions does not suffice to show that one controlled the others, or the company. The question is not "alliance" or "common interests," but "control." That Mr. Nairn "loyally supported" Riverside does not show that Riverside controlled his vote on the board in the relevant legal sense.[421] Indeed, the most natural inference that can be drawn from this evidence is that Riverside, with a mere 25.5 percent stake, ***did not control Inagrosa***.

252. In this regard, the reasoning of the tribunal in *Aguas del Tunari S.A. v. Bolivia*, is instructive:

> The Tribunal, by majority, concludes that the phrase ―controlled directly or indirectly means that one entity may be said to control another entity (either directly, that is without an intermediary entity, or indirectly) if that entity possesses the legal capacity to control the other entity. Subject to evidence of particular restrictions on the exercise of voting rights, such legal capacity is to be ascertained with reference to the percentage of shares held. ***In the case of a minority shareholder, the legal capacity to control an entity may exist by reason of the percentage of shares held, legal rights conveyed in instruments or agreements such as the articles of incorporation or shareholders' agreements, or a combination of these***.[422]

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[419] Winger de Rondón I, ¶ 42 (**CWS-03**).

[420] Minute 48, January 30, 2013 (**C-0126**); Minute 49, February 4, 2013 (**C-0144**); Minute 50, January 6, 2014 (**C-0145**); Minute 51, January 19, 2015 (**C-0146**); Minute 52, November 8. 2015 (**C-0147**), Minute 53, November 15, 2016 (**C-0149**); Minute 54, February 16, 2016 (**C-0150**); Minute 55, April 26, 2016 (**C-0150**); Minute 56, June 15, 2016 (**C-0151**); Minute 57, March 28, 2017 (**C-0152**); Minute 58, April 5, 2017 (**C-0141**).

[421] Melvin Winger I, ¶ 28.

[422] *Aguas del Tunari S.A. v Republic of Bolivia*, ICSID Case No. ARB/02/3, Decision on Respondent's Objections to Jurisdiction, October 21, 2005, ¶ 265 (**RL-0092**).

253. To paraphrase the *Aguas del Tunari* tribunal, Claimant has simply not provided any evidence of its "legal capacity to control" Inagrosa, whether by "the percentage of shares held, legal rights conveyed in instruments or agreements such as the articles of incorporation or shareholders' agreements, or a combination of these."[423] In any case, the last Board of Director Meeting Minute submitted by Claimant is from April 5, 2017, more than a year before the alleged breaches occurred. Claimant has ***not submitted a single document*** showing that it controlled Inagrosa at the time of the alleged breaches in June-August 2018. And even if the evidence were to be considered sufficient and accurate, it clearly shows that Riverside did not control Inagrosa.

254. Claimant has failed to establish that it controlled Inagrosa at the time of the alleged treaty breaches. For this reason, also, Riverside may at most pursue claims only for alleged breaches of the Treaty that damaged its minority investment in Inagrosa.

D. The Tribunal Lacks Jurisdiction *Ratione Personae* Over Any Claims Asserted on Behalf of Inagrosa Under Article 25(2) of the ICSID Convention Because Nicaragua Never Agreed that Inagrosa Should Be Treated as a "National of Another Contracting State"

255. For the Tribunal to have jurisdiction to hear this case it is necessary that Claimant fulfills the requirements set forth both not only in DR-CAFTA but also in the ICSID Convention. Therefore, if the Claimant fails to satisfy the jurisdictional requirements of both DR-CAFTA and the ICSID Convention, the State's consent is not effective, and the Tribunal is without jurisdiction.

256. Article 25(1) of the ICSID Convention limits the ICSID's jurisdiction to disputes "between a Contracting State ... and a national of another Contracting State," thus establishing a *ratione personae* jurisdictional requirement (based on nationality).[424] The nationality requirement

[423] *Aguas del Tunari S.A. v Republic of Bolivia*, ICSID Case No. ARB/02/3, Decision on Respondent's Objections to Jurisdiction, October 21, 2005, ¶ 265 (**RL-0092**).

[424] ICSID Convention, Art. 25(1) (**RL-0014**).

under Article 25(1) of the ICSID Convention embodies the general principle of international law that a State cannot be sued internationally by its own nationals.[425]

257. Inagrosa is a company incorporated in Nicaragua and, as such, of Nicaraguan nationality. Consequently, Inagrosa does not meet the *ratione personae* jurisdictional requirement of nationality under Article 25(1) of the ICSID Convention.

258. Nonetheless, the ICSID Convention contains a specific provision to address the phenomenon of foreign investments made through corporations that are registered in the host State. Article 25(2)(b) of the ICSID Convention deals with juridical persons that are incorporated in the host State but are controlled by nationals of another State. These may be treated as foreign nationals on the basis of an agreement. The relevant part of Article 25(2)(b) of the ICSID Convention provides:

> 'National of another Contracting State' means … any juridical person which had the nationality of the Contracting State party to the dispute on [the date on which the parties provided their consent] ***and which, because of foreign control, the parties have agreed should be treated as a national of another Contracting State for the purposes of this Convention***.[426]

259. To meet the requirements under Article 25(2)(b) of the ICSID Convention, there must be an agreement to treat the local company as a foreign investor. Having failed to prove its control of Inagrosa, Claimant has not even attempted to show any agreement between itself and Nicaragua by which Inagrosa "should be treated as a national of" the United States "for the purposes of" the ICSID Convention. Claimant simply ignores Article 25(2)(b) of the ICSID Convention. The reason is simple: such an agreement does not exist. Nicaragua has never agreed to treat Inagrosa as a national of another Contracting State.

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[425] *Autopista Concesionada de Venezuela, C.A. v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB/00/5, Decision on Jurisdiction, September 27, 2001, ¶ 102 (**RL-0093**).

[426] ICSID Convention, Art. 25(2)(b) (**RL-0014**).

260. A Contracting State's agreement to treat a juridical person incorporated in its own territory as a national of another Contracting State must be unequivocal and not open to doubt. [427] The tribunal in *Cable Television of Nevis v. St. Kitts and Nevis* explained:

> The solution which [an agreement under Article 25(2)(b)] is intended to achieve constitutes an exception to the general rule established by the Convention, and one would expect that parties should express themselves ***clearly and explicitly*** with respect to such a derogation. Such an agreement should therefore normally be explicit. An implied agreement would only be acceptable in the event that the specific circumstances would exclude any other interpretation of the intention of the parties, which is not the case here.[428] (Emphasis added)

261. A company incorporated in the host State will not qualify as an investor entitled to protection under investment treaties and will not be able to bring a claim unless there is clear evidence of an agreement to treat it as a foreign national. Claimant bears the burden of proving that Nicaragua agreed to treat Inagrosa—clearly and explicitly— as a national of the United States for the purposes of Article 25(2)(b) of the ICSID Convention. Claimants have made no effort to satisfy their burden of proof on this point.

262. Consequently, the Tribunal lacks jurisdiction *ratione personae* over claims for damage to Inagrosa because Inagrosa does not fulfill the nationality requirement set out in Article 25(2)(b) of the ICSID Convention.[429]

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[427] *Daimler Financial Services AG v. Argentine Republic*, ICSID Case No. ARB/05/1, Award, August 22, 2012, ¶ 175 (**RL-0081**).

[428] *Cable Television of Nevis, Ltd. and Cable Television of Nevis Holdings, Ltd. v. Federation of Saint Christopher and Nevis*, ICSID Case No. ARB/95/2, Award, January 13, 1997, ¶ 5.24 (citing *Holiday Inns v. Morocco*) (**RL-0094**).

[429] As Nicaragua has explained in Section II, *supra*, Inagrosa's apparent abandonment allowed unlawful invaders to enter the property as early as June 2017. Nicaragua has serious doubts that Riverside or Inagrosa were not aware of these invaders despite the fact that the Hacienda was abandoned. If Riverside or Inagrosa were aware of that invasion, the Tribunal would not have jurisdiction *ratione temporis* pursuant to Article 10.18.1. *See also generally* ARSIWA Art. 15 (2) (explaining that a breach consisting of a composite act "***extends over the entire period starting with the first of the actions or omissions of the series*** and lasts for as long as these actions or omissions are repeated and remain not in conformity with the international obligation") (emphasis added). Nicaragua expressly reserves the right to seek disclosure about Riverside or Inagrosa's knowledge of the events that took place in 2017 or seek adverse inferences with respect to the same, as well as further supplement an objection to jurisdiction *ratione temporis* in its Rejoinder.

IV. RIVERSIDE'S CLAIMS ON THE MERITS FAIL

263. Riverside's merits claims under DR-CAFTA fail as well. Nicaragua has always recognized and protected Inagrosa's and Riverside's apparent property interests in Hacienda Santa Fé in a manner consistent with its obligations under DR-CAFTA and public international law.

264. In the following sections of this Counter-Memorial, Nicaragua demonstrates that (i) Claimant has failed to overcome its burden of proving that the alleged measures are attributable to the State; (ii) Nicaragua's response to the invasion of Hacienda Santa Fé cannot give rise to liability under DR-CAFTA because the State's approach to the land invasion was warranted in light of essential security interests of Nicaragua pursuant to Article 21.2(b) of the Treaty; (iii) Nicaragua's response to the invasion of Hacienda Santa Fé cannot give rise to liability under DR-CAFTA because Nicaragua was responding to ongoing civil strife within the country within the meaning of Article 10.6; (iv) Nicaragua did not fail to accord Fair and Equitable Treatment to Riverside's investment or deny it Full Security and Protection under Article 10.5; (v) Nicaragua did not expropriate Hacienda Santa Fé in breach of Article 10.7; and (vi) Nicaragua did not breach Article 10.4 by according better treatment (or assistance) to any investors, either its own nationals or from other countries, in like circumstances.

A. Riverside Has Not Proven that the Alleged Measures Are Attributable to the State and Thus a Basis for International Liability

265. As a preliminary matter, Claimant has failed to prove the core factual contention of its case—namely, that the alleged unlawful invasion of Hacienda Santa Fé—occurred at the "direction and control" of the Nicaraguan State. Only conduct by or attributable to the State provides a basis for liability under the DR-CAFTA.[430]

[430] DR-CAFTA, Art. 10.22(1) (**CL-0001**) ("[T]he tribunal shall decide the issues in dispute in accordance with this Agreement and applicable rules of international law."); ARSIWA, Art. 2, Commentary, ¶ 1 (**CL-0017**) ("Article 1 states the basic principle that every internationally wrongful act of a State entails its international responsibility. Article

266. To that end, Riverside attempts to attribute the illegal invasion of Hacienda Santa Fé to the State on the basis of three different principles of customary international law.

267. ***First***, Riverside alleges that state organs of Nicaragua conducted the invasion of Hacienda Santa Fé themselves in a manner attributable to the State under the principles reflected in Article 4 of ARSIWA.[431] According to Riverside, paramilitary voluntary police, assisted by the National Police, invaded the Property at the supposed orders of the Mayor of the Municipality of Jinotega.[432]

268. ***Second***, Riverside alleges that unnamed government officials directed and organized the invasion of Hacienda Santa Fé in a manner attributable to the State under the principles reflected in Article 8 of ARSIWA, including providing the illegal invaders with weapons, and assisting them by disarming the workers at Hacienda Santa Fé.[433]

269. ***Third***, Riverside alleges that Nicaragua—through none other than President Ortega himself—acknowledged and accepted the conduct of the invaders of Hacienda Santa Fé as its own, such that the invasion is supposedly attributable to the State under the principles reflected in Article 11 of ARSIWA.[434]

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2 specifies the conditions required to establish the existence of an internationally wrongful act of the State, i.e., the constituent elements of such an act. Two elements are identified. First, the conduct in question must be attributable to the State under international law. Secondly, for responsibility to attach to the act of the State, the conduct must constitute a breach of an international legal obligation in force for that State at that time."); *Id.*, Art. 1, Commentary, ¶ 3 (**CL-0017**) ("That every internationally wrongful act of a State entails the international responsibility of that State, and thus gives rise to new international legal relations additional to those which existed before the act took place, has been widely recognized[.]") (internal citations omitted).

[431] *See* ARSIWA, Art. 4 (**CL-0017**) ("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.").

[432] *See* Memorial, ¶ 647.

[433] *See* Memorial, ¶¶ 680-682.

[434] *See* Memorial, ¶ 708.

270. But Riverside's evidence—in the form of the expert report of Prof. Wolfe, and the witness statements of Messrs. Vivas and Gutierrez—comes nowhere near meeting its burden of proving these extraordinary claims.

271. That is because the facts are entirely otherwise. As detailed above, the invasion of Hacienda Santa Fé in 2018—like the earlier 2017 incursions onto the property—constituted private conduct by private individuals.[435] The invasion was not conducted, directed, instigated, or in any way supported or condoned by the State.

1. Professor Wolfe's Report Is Not Evidence of State Conduct

272. Claimant alleges that Prof. Wolfe has "reviewed the historical evidence" to conclude that "the paramilitaries" that invaded Hacienda Santa Fé were "operating under the control and direction of the government of Nicaragua."[436] But Prof. Wolfe draws no such conclusion with respect to the events at Hacienda Santa Fé in 2018. His report contains not a *single* mention of Hacienda Santa Fé, the Jinotega region or San Rafael del Norte. Prof. Wolfe's opinions and general statements are simply not competent factual evidence of the specific events giving rise to Riverside's claim.[437]

273. Nor does Prof. Wolfe claim otherwise. Prof. Wolfe does not opine as to the direction and control of the invaders at Hacienda Santa Fé or the involvement of the State in the particular events at Hacienda Santa Fé in 2018. Prof. Wolfe was not present at Hacienda Santa Fé in 2018 and does not claim to have been. Instead, Prof. Wolfe characterizes aspects of Nicaraguan politics in general terms and explains that there are "voluntary police" units operating in

[435] *See* Section II, *supra*.

[436] Memorial, ¶ 650.

[437] *See* Section II, *supra*.

Nicaragua.[438] That, so far as it goes, is true.[439] But Prof. Wolfe's report does not once presume to identify who invaded Hacienda Santa Fé in the summer of 2018 or conclude that it was the National Police or the voluntary police. Rather, as Prof. Wolfe admits, "there is a history of land occupation in Nicaragua that dates from the 1990s," while "invasions of private properties . . . multiplied rapidly" during the 2018 crisis as a result of "land grabbers are taking advantage of the sociopolitical crisis."[440] None of this is inconsistent with the reality that the invaders acted independently of the State and that their leaders were in large part demobilized former fighters from the anti-government side of Nicaragua's decade-long civil war.

2. Claimant's Fact Witness Testimony Does Not Establish a State-Led Conspiracy to Invade Hacienda Santa Fé

274. Beyond Prof. Wolfe, Riverside relies near exclusively on the witness statements of Luis Gutiérrez and Jaime Francisco Henrríquez Cruz (*i.e.*, "Jaime Vivas"). But these witness statements are equally insufficient to show a State-led conspiracy that Claimant must show in order to prove, firstly, State attribution and, secondly, wrongful State conduct.

275. The statements of Messrs. Gutiérrez and Vivas are the *only* evidence Claimant has adduced to attribute the conduct of the illegal occupants to the State. Not a single piece of contemporaneous documentary evidence has been produced demonstrating even an inference that the State colluded with the invaders. These two witness statements themselves must carry the

[438] Wolfe I, ¶¶ 32-33, 38-40, 54-56, 102 (**CES-02**).

[439] For the avoidance of doubt, Nicaragua strongly rejects Prof. Wolfe's characterization of, among other things, the voluntary police's role, as well as the nature of its operations. In addition, Riverside overstates and distorts the statements by President Ortega. *See* Memorial, ¶ 708. President Ortega's statement mentions the general existence of "voluntary police" but nothing in his statement suggests that the voluntary police had anything at all to do with the invasion or illegal occupation of Hacienda Santa Fé or that the invasion or occupation of Hacienda Santa Fé was ordered by the State.

[440] Wolfe I, ¶¶ 57-58 (**CES-02**) *citing* La Prensa, *Gobierno permite masivas invasiones de tierras,* June 20, 2018 (**C-0229**).

entirety of Claimant's burden of proof on State attribution.[441] They cannot bear that weight, because Messrs. Gutiérrez's and Vivas' testimonies are little more than conclusory, vague statements or outright hearsay.[442] Especially in light of Nicaragua's unrefuted contrary evidence, as demonstrated in Section I, *infra*, Claimant's witness statements do not provide any meaningful evidence that would tend to attribute the invasion of Hacienda Santa Fé to the State.

276. Mr. Vivas' testimony is conclusory and lacks any specificity or detail. For instance, according to Mr. Vivas, "as of June 16, 2018" he "saw" the invaders engage in numerous acts, such as: (i) dividing up Hacienda Santa Fé;[443] (ii) marking the distributed lands in the "upper area" of the Hacienda;[444] (iii) clearing the fields in the "upper areas" of the Hacienda;[445] (iv) knocking down the coffee trees;[446] (v) establishing a "base of operations";[447] and (vi) conspiring to transfer legal title of the Hacienda.[448] The sheer number and intensity of events that Mr. Vivas allegedly

[441] It is striking that Claimant characterizes Domingo Ferrufino—a security guard at Hacienda Santa Fé—as a "direct witness" of alleged events during the 2018 invasions that are suggestive of acts attributable to the State. Memorial, ¶ 281. But Mr. Ferrufino has not been presented as a witness in this arbitration. Claimant's statement thus implicitly concedes that the witnesses it has actually put forward have no firsthand testimony on the issue of attribution.

[442] While testimony based on hearsay is admissible in international arbitration, the International Court of Justice and investor-State tribunals have rejected hearsay due to its lack of probative value. *See, e.g.*, *EDF (Servs.) Ltd. v. Republic of Romania*, ICSID Case No. ARB/05/13, Award, October 8, 2009, ¶ 224 (**RL-0029**) (ruling that a statement by a witness was inadmissible hearsay because it was based, not on his own knowledge, but rather on information purportedly imparted to him by a third-party); *Siag v. Egypt*, ICSID Case No. ARB/05/15, Award, June 1, 2009, ¶ 347 (**RL-0030**) (declining to admit hearsay evidence when no other evidence is submitted to support statements); *Methanex Corp. v. United States*, UNCITRAL, Final Award, August 3, 2005, ¶¶ 49, 56 (**RL-0031**) (refusing to admit "double hearsay" offered by a party); Case Concerning Military and Paramilitary Activities in and Against Nicaragua (*Nicaragua v. United States of America*), ICJ Rep. 1984, ¶ 68 (**CL-0022**) (rejecting "testimony of matters not within the direct knowledge of the witness, but known to him only from hearsay").

[443] Vivas I, ¶ 17 (**CWS-06**).

[444] Vivas I, ¶ 17 (**CWS-06**).

[445] Vivas I, ¶ 18 **(CWS-06)**.

[446] Vivas I, ¶ 18 (**CWS-06**). The coffee business of Inagrosa no longer existed at this time. *See* Section I, *supra*.

[447] Vivas I, ¶ 19 (**CWS-06**).

[448] Vivas I, ¶ 20 (**CWS-06**).

witnessed on a single date ("as of June 16, 2018") is incredible. But even if true, it proves nothing about State attribution.

277. Mr. Vivas is also swift to claim that "[a]s of July 24, 2018, the Nicaraguan government began sending food and supplies to the invaders and paramilitaries."[449] But Mr. Vivas makes this statement without providing any basis for his belief that the alleged "food and supplies" were directly from the Nicaraguan government. His testimony is conclusory and should be disregarded accordingly.

278. Furthermore, Mr. Vivas relies nearly exclusively on flagrant hearsay to support his allegations that the *invaders* were involved in a conspiracy with the Nicaraguan government. For instance, without any particular detail, Mr. Vivas proffers the following statements that are plainly not from his firsthand experience:

- "I ***heard the paramilitaries say*** they were sent to Hacienda Santa Fé by the Nicaraguan government"[450]
- "I ***heard the invaders commented*** [sic] that some members of the National Police of the delegation of San Rafael del Norte reserved plots in the Hacienda Santa Fé through representatives"[451]

279. The lack of specificity or supporting details calls the probative value and credibility of Mr. Vivas' statements into question. His statements are certainly no basis for attributing the unlawful conduct of armed land invaders led by former members of the *Resistencia Nicaragüense* to the State.

[449] Vivas I, ¶ 37 (**CWS-06**).

[450] Vivas I, ¶ 35 (**CWS-06**).

[451] Vivas I, ¶ 45 (**CWS-06**).

280. Mr. Gutiérrez's statement likewise relies heavily on hearsay from multiple individuals who are not witnesses in this arbitration. For instance, Mr. Gutiérrez testifies that

a) Although he was "outside of Hacienda Santa Fé" during the invasion, Mr. Gutiérrez knew the security guards were overwhelmed because he somehow was aware that "Domingo Ferrufino, one of the Hacienda's security guards hurriedly called the Hacienda Santa Fé's Chief of Security, Raymundo Palacios, who was on leave at the time, to inform him on what was happening."[452]

b) "Raymundo Palacios ***told me*** that Domingo Ferrufino ***informed him*** that the large group of invaders…were sent by the Government[.]"[453]

c) "Raymundo Palacios ***told me*** that Domingo Ferrufino ***informed him***" of the names of alleged leaders of the *invaders*.[454]

d) "Raymundo Palacios ***told me*** that he met with the paramilitaries that day" where ***they stated*** their alleged reasons for entering the property.[455]

e) "Raymundo Palacios ***told me*** that Domingo Ferrufino ***told him*** that the invaders led by the paramilitaries caused great damage to the fauna and flora in the upper part of the Hacienda Santa Fé."[456]

f) "As I was making my way through the nearby town, I encountered a Nicaraguan government official, Enrique Fabio Darío, at one of the barricades. … ***He told me*** the government of Nicaragua was taking the Hacienda Santa Fé to put pressure on the business sector."[457]

281. Mr. Gutiérrez's layered hearsay evidence is not competent evidence and should be disregarded.

[452] Gutiérrez I, ¶¶ 36-37 (**CWS-02**).

[453] Gutiérrez I, ¶ 42 (**CWS-02**).

[454] Gutiérrez I, ¶ 43 (**CWS-02**).

[455] Gutiérrez I, ¶ 45 (**CWS-02**).

[456] Gutiérrez I, ¶ 46 (**CWS-02**).

[457] Gutiérrez I, ¶ 82 (**CWS-02**).

282. Finally, Claimant's Memorial relies heavily on an alleged speech by Mayor Herrera to support its attribution arguments.[458] The only evidence Claimant's Memorial references for this alleged speech is Messr. Vivas's and Gutiérrez's statements, which are not credible.[459] Mr. Gutiérrez states that he "was informed by Jaime Vivas" of Mayor Herrera's alleged speech, which merely constitutes further unreliable hearsay that must be disregarded.[460] And Mr. Vivas's account of the speech provides only conclusory statements without any detail or evidentiary support in the form of a transcript or recording.[461]

283. Finally, although he has submitted a witness statement, Mr. Rondón's testimony about the events of the invasion adds nothing to Claimant's claims because, as Mr. Rondón admits, he was not in Nicaragua when the *invaders* entered the property in June and July 2018.[462] Mr. Rondón's entire testimony in this regard is based on hearsay and not his own experience—the same fatal flaws as the statements of Mr. Vivas and Mr. Gutiérrez.

284. In light of Nicaragua's overwhelming contrary evidence,[463] Claimant's thin and conclusory statements provide no basis for finding Claimant to have satisfied its burden of proof on the critical issue of whether the illegal invasion and occupation of Hacienda Santa Fé was in any manner attributable to the State (and it was not). It follows that the only conduct attributable

[458] *See* Memorial, ¶¶ 190, 258-260.

[459] *See* Vivas I, ¶ 48 (**CWS-06**); Gutiérrez I, ¶ 101 (**CWS-02**).

[460] Gutiérrez I, ¶ 101 (**CWS-02**).

[461] *See* Vivas I, ¶¶ 49-50 (**CWS-06**).

[462] Rondón I, ¶¶ 74-93 (**CWS-01**).

[463] *See* Section I, *supra* (where Nicaragua extensively and through witness statements and contemporary documents proves that the illegal occupants were not paramilitaries sent by the Government and rather these invaders were private individuals – acting on their own - who are members of the Cooperativa El Pavón lead by ex-members of the *Resistencia Nicaragüense*).

to the State in connection with the invasion of Hacienda Santa Fé was the State's ***response*** to the invasion and occupation.

285. That response, however, was fully compliant with Nicaragua's treaty obligations and appropriate in the circumstances and provides no basis for liability under the Treaty. As detailed in the following sections, Nicaragua's response to the invasion and occupation of Hacienda Santa Fé is appropriately considered within the special frameworks of Articles 21.2(b) and 10.6 of the Treaty, analysis under either of which shows that Nicaragua is not liable for measures that Nicaragua respectively considered necessary for the protection of its own ***essential security interests*** and that Nicaragua adopted in relation to conditions of widespread unrest and civil strife.[464] And, even if those specialized treaty frameworks did not apply, Nicaragua's response to the illegal occupation and invasion of Hacienda Santa Fé did not expropriate Claimant's investment, deny Claimant or its investment fair and equitable treatment, full protection and security, or in any way discriminate against Claimant or its investment.

B. Nicaragua Is Not Liable to Riverside in Light of the Non-Precluded Measures Clause at Article 21.2(B) of DR-CAFTA

286. From the outset, Riverside's claims fail under Article 21.2(b) of DR-CAFTA because they seek to hold Nicaragua liable for non-precluded measures—specifically the measured and de-escalatory strategy that Nicaraguan authorities successfully used to remove the illegal occupants from Hacienda Santa Fé peacefully—that Nicaragua considered necessary for the protection of its own essential security interests.

1. Article 21.2(b) Is an Expansive Non-Precluded Measures Clause

287. Article 21.2(b) of DR-CAFTA provides:

Nothing in this Agreement shall be construed:

[464] DR-CAFTA, Art. 10.6 (**CL-0001**).

. . .

> (b) ***to preclude a Party from applying measures that it considers necessary for*** the fulfillment of its obligations with respect to the maintenance or restoration of international peace or security, or ***the protection of its own essential security interests***.[465]

288. Pursuant to Article 21.2(b), measures taken to protect "essential security interests" fall outside of the scope of the Treaty, and thus cannot be a basis for international responsibility under the Treaty. Such measures are instead considered "non-precluded measures" that are not internationally wrongful so long as the State considers them necessary to achieve the objectives carved out by Article 21.2(b).

289. A non-precluded measures clause thus constitutes *lex specialis* that "limits the applicability of an international treaty with respect to certain types of conduct."[466] The effect of a such a clause is to "preclude[] the existence of a violation with respect to any and all substantive treaty provisions."[467] Article 21.2(b) accordingly provides a *complete defense* to liability under DR-CAFTA on the basis of any measures that the State considered necessary for protecting its own essential security interests.

2. Article 21.2(b) Is Self-Judging

290. Article 21.2(b) contains what is sometimes called a "self-judging" non-precluded measures clause. The hallmark of a self-judging clause is the phrase "that it considers," which is present in Article 21.2(b) and which makes explicit the self-judging nature of the clause. As a result, whether Nicaragua's response to the illegal invasion and occupation of Hacienda Santa Fé

[465] DR-CAFTA, Art. 21.2(b) (**CL-0001**).

[466] Burke-White and Von Staden, "Investment Protection in Extraordinary Times," 48 *Va. J. Int'l. L.* 307 (2008), p. 322 (**RL-0032**).

[467] Burke-White and Von Staden, "Investment Protection in Extraordinary Times," 48 *Va. J. Int'l. L.* 307 (2008), p. 331 (**RL-0032**).

was necessary to protect its own essential security interests is a matter to be determined by Nicaragua under Article 21.2(b).

291. Self-judging non-precluded measures clauses are common in United States investment treaties like DR-CAFTA. As scholars have explained:

> One of the more notable modifications occurred in the late 1990s when the United States clarified its position on the self-judging nature of the NPM clauses in its BITs by including explicit language to that effect, now stating that a party was not precluded from taking any measures that "it considers necessary" for the protection of the stated permissible objectives. In the most recent 2004 U.S. Model BIT, the NPM provision reads: "Nothing in this Treaty shall be construed: …to preclude a Party from applying measures that it considers necessary for the fulfillment of its obligations with respect to the maintenance or restoration of international peace or security, or the protection of its own essential security interest."[468]

292. The non-precluded measures clause in Article 21.2(b) contains language identical to that found in the 2004 U.S. Model BIT.[469] As a leading scholar on United States treaty practice and one of the principal negotiators of United States treaties during the 1980s has observed:

> United States negotiators sought to draft BITs which provided rigorous protection for investors. At the same time, the practical reality is that the United States increasingly has relied upon various forms of economic sanctions to effect other foreign policy goals. The inclusion of a non-precluded measures provision preserved the flexibility to use economic sanctions. At the same time, however, it provided a textual justification for actions by BIT partners against United States investors….[470]

293. Article 21.2(b)'s self-judging character does not mean that a state's conduct is entirely immunized from a tribunal's review. That said, a tribunal's review of a self-judging non-precluded measures clause is limited to whether its invocation is consistent with the bounds of

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[468] Burke-White and Von Staden, "Investment Protection in Extraordinary Times," 48 *Va. J. Int'l. L.* 307 (2008), p. 327 (**RL-0032**).

[469] *See* 2004 U.S. Model BIT, Art. 18(2) (**RL-0033**).

[470] *See Continental Casualty Company v. Argentine Republic*, ICSID Case No. ARB/03/9, Award, September 5, 2008, fn. 258 (**RL-0034**) (citing expert report of Professor Kenneth Vandevelde).

"good faith" as prescribed by Article 26 of the Vienna Convention.[471] In order to pass the good faith test, "the question a tribunal must ask is whether a reasonable person in the State's position *could have* concluded that there was a threat to national security or public order sufficient to justify the measures taken."[472] Put another way, a "self-judging clause indicates…that the state invoking the clause is to have a very wide margin of appreciation as to whether a measure is necessary to protect one of the permissible objectives" stated in the non-precluded measures clause.[473]

294. For the reasons set forth below, Nicaragua has far surpassed the good faith test required to successfully invoke the self-judging non-precluded measures clause found under Article 21.2(b) of DR-CAFTA.

3. The Invasion of Hacienda Santa Fé Implicated Nicaragua's "Essential Security Interests"

295. As explained above, Nicaragua has wide discretion to determine the measures it considered necessary to preserve its essential security interests. Where DR-CAFTA does not provide a definition of "essential security interest," a sovereign in the midst of civil unrest has broad discretion to pursue its security needs as it determines necessary within the context of Article 21.2(b)'s self-judging provisions. In any event, tribunals and scholars have recognized that a State's "essential security interest" may be external, internal, or even economic.[474]

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[471] Burke-White and Von Staden, "Investment Protection in Extraordinary Times," 48 *Va. J. Int'l. L.* 307 (2008), p. 371 (**RL-0032**).

[472] Burke-White and Von Staden, "Investment Protection in Extraordinary Times," 48 *Va. J. Int'l. L.* 307 (2008), p. 380 (**RL-0032**). *See also Nicaragua v. United States of America*, Military and Paramilitary Activities, Judgement, ICJ, June 27, 1986 (**CL-0022**) ("The Court has therefore to assess whether the risk run by these "essential security interests" is reasonable").

[473] Burke-White and Von Staden, "Investment Protection in Extraordinary Times," 48 *Va. J. Int'l. L.* 307 (2008), p. 370 (**RL-0032**).

[474] *See Nicaragua v. United States of America*, Military and Paramilitary Activities, Judgement, ICJ, June 27, 1986 (**CL-0022**) (ICJ observing that "[i]t is difficult to deny that self-defence against an armed attack corresponds to measures necessary to protect essential security interests. But the concept of essential security interests certainly extends beyond the concept of an armed attack, and has been subject to very broad interpretations in the past"); *see also* Burke-White and Von Staden, "Investment Protection in Extraordinary Times," 48 *Va. J. Int'l. L.* 307 (2008), p. 351 (**RL-0032**) ("The ICJ's interpretation of 'essential security' is indicative of a broad reading of the term that goes

296. Nicaragua's essential security interests implicated by its response to the invasion of Hacienda Santa Fé were twofold.

297. ***First***, contemporaneous with the 2018 events at Hacienda Santa Fé, Nicaragua faced an unprecedented period of civil strife and nationwide unrest marked by high levels of violence that lasted several months. The episodes of violence took place from April to July 2018, but the crisis was prolonged through the end of 2018.[475] What initially started as a series of demonstrations led by students spiraled into a period of nationwide turmoil during which armed groups acting outside the law caused chaos and widespread destruction.[476] As a result of the violent acts committed by armed groups during this period, 198 people, including 22 police officers, lost their lives; some 1,240 persons were injured; and 401 police officers were injured with firearms.[477] This widespread disorder also involved substantial destruction to public and

well beyond pure military threats and encompasses other types of threats that may impact a state's security."). *See also LG&E Energy Corp., LG&E Capital Corp. and LG&E International Inc. v. Argentine Republic*, ICSID Case No. ARB/02/1, Decision on Liability, October 3, 2006, ¶ 226 (**CL-0116**) (finding that the economic crisis present in Argentina justified the State's "measures to maintain public order and protect its essential security interests"); *Continental Casualty Company v. Argentine Republic*, ICSID Case No. ARB/03/9, Award, September 5, 2008, ¶ 175 (**RL-0034**) ("As to 'essential security interests,' it is necessary to recall that international law is not blind to the requirement that States should be able to exercise their sovereignty in the interest of their population free from internal as well as external threats to their security and the maintenance of a peaceful domestic order. It is well known that the concept of international security of States in the Post World War II international order was intended to cover not only political and military security but also the economic security of States and of their population."); ¶ 180 (concluding that responses to a "severe economic crisis" were non-precluded measures, while also holding that permitting the State to invoke the non-precluded measures clause does not "require that 'total collapse' of the country or that a 'catastrophic situation' has already occurred before responsible national authorities may have recourse to its protection").

[475] Carlos Fernández Álvarez, This is how the coup in Nicaragua was experienced and defeated, El 19 Digital, December 30, 2018, p. 2 (**R-0037**).

[476] Castro I, ¶ 22 (**RWS-02**); Herrera I, ¶ 8 (**RWS-03**).

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

private property including numerous invasions of private land and construction of at least 1,711 illegal roadblocks on main roads.[478] A total of 273 persons were charged in relation to the events.[479]

298. San Rafael del Norte in the Department of Jinotega was not spared from this violent unrest and civil strife. The usual National Police detachment of eight officers, including Captain Herrera,[480] faced widespread violence from armed groups who blockaded major roads and burned vehicles with Molotov cocktails, even as similar events gripped the rest of the country, including the capital.[481]

299. In late May 2018, moreover, the National Police received orders to remain in their barracks. President Ortega gave this order on live television.[482] This order was the result of a negotiation between the Government and civil society leaders and an attempt by President Ortega to deescalate the wave of violence that was disrupting the entire country. President Ortega's order was not lifted until late in July 2018.[483] This order was issued in respect of a major internal threat to Nicaragua's peace and security.[484] It was thus a measure taken in respect of an essential security interest of Nicaragua's and further to a deliberate policy decision by President Ortega's

[478] Nicaraguan National Report submitted in accordance with paragraph 5 of the Annex to Human Rights Council resolution 16/21, January 28, 2019, pp. 3-4 (**R-0019**) (describing that these groups also damaged public infrastructure: 252 buildings were vandalized, 209 kilometers of streets and roads were destroyed, 278 pieces of heavy machinery were vandalized and burned, and 389 vehicles were destroyed.).

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

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

[481] Herrera I, ¶ 9 (**RWS-03**).

[482] Castro I, ¶ 24 (**RWS-02**); Carlos Fernández Álvarez, This is how the coup in Nicaragua was experienced and defeated, El 19 Digital, December 30, 2018, p. 6 (**R-0037**) ("The Government agreed to withdraw the police from the streets, trusting in the good will of the leaders of the Catholic Church who endorsed the proposal. The measure was seized as an opportunity, and roadblocks increased.").

[483] Herrera I, ¶ 25 (**RWS-03**); Carlos Fernández Álvarez, This is how the coup in Nicaragua was experienced and defeated, El 19 Digital, December 30, 2018, p. 6 (**R-0037**).

[484] Herrera I, ¶ 9 (**RWS-03**).

government to seek to deescalate the unrest gripping the entire country. To have deployed large groups of police to Hacienda Santa Fé or engage in a physical, likely armed, confrontation with the land occupiers would have been inconsistent with the Government's efforts to resolve the ongoing national crisis in the summer of 2018.

300. ***Second***, it should be emphasized that the invasion of Hacienda Santa Fé, though occurring in the midst of an outbreak of nationwide violence and disorder, was closely linked to an earlier and far worse conflict—Nicaragua's so-called "counter-revolution"—a bloody internal conflict that lasted from roughly 1979 to 1990 and that cost tens of thousands of Nicaraguan lives.[485] That conflict pitted the *Resistencia Nicaragüense* against the government of Nicaragua led by President Daniel Ortega.[486] After his term ended in 1990, Mr. Ortega was re-elected to the Presidency in 2007.[487]

301. In 1990, as part of the negotiated peace process bringing that conflict to a close, then-President of Nicaragua Violeta Barrios de Chamorro promised land to former contra fighters and their families in exchange for their demobilization.[488] Implementation of President Barrios de Chamorro's promises to the *Resistencia Nicaragüense* proved challenging, however. Nicaragua's system of land titles, neglected over several decades of conflict, is still undergoing a process of reorganization ordered by President Ortega in 2007.[489] In some instances, properties that ex-members of the *Resistencia Nicaragüense* claimed had been promised to them were privately held, requiring the government to find alternative locations for resettlement. On some occasions, former

[485] Organization of American States, The International Commission for Support and Verification, Demobilizing and Integrating the Resistencia Nicaragüense 1990-1997, at 3-5 (**R-0026**).

[486] *See* Section II, *supra*.

[487] Gutiérrez-Rizo I, ¶ 18 (**RWS-01**).

[488] Herrera I, ¶ 14 (**RWS-03**); Gutiérrez-Rizo I, ¶ 37 (**RWS-01**).

[489] Gutiérrez-Rizo I, ¶¶ 18, 33 (**RWS-01**).

Resistencia Nicaragüense members have simply occupied lands they claim they were promised, taken up arms against the State to enforce their claims, or threatened to do so—irrespective of the political party in power at the time.[490] Given Nicaragua's historical experience and the importance of national reconciliation, the Nicaraguan government's policy has been to deal with land claims by former *Resistencia Nicaragüense* members peacefully and where possible without resort to coercive police measures.[491]

302. As set out above and detailed in the witness statements of Ms. Gutierrez-Rizo and Commissioner Castro, the property at Hacienda Santa Fé has long been subject to precisely these kinds of claims. In November of 1990, and contingent upon the successful conclusion of negotiation with the land's private owners, President Chamorro's government caused a group of ex-members of the *Resistencia Nicaragüense* and their families to anticipate resettlement in the northern area of the property known as "Pavón."[492] Although title to the land was never acquired, members of this community moved onto it informally, ultimately organizing themselves into a

[490] *See* Contras Promise to Give Up Arms As Managua Vows to Yield Land, N.Y.TIMES, May 31, 1990 (**R-0029**); Lindsey Gruson, *Ex-Contras, Citing Broken Promises, Seize Land and Talk Again of War*, N.Y.TIMES, October 29, 1990 (**R-0030**). *See also* Edward Cody, *Up to 200 Disenchanted Contras Take Up Arms Again*, WASHINGTON POST, April 9, 1991 (**R-0010)** ("The Organization of American States' International Support and Verification Commission, formed to oversee the demobilization, reported 124 farms have been turned over to 7,700 former rebels as part of the government resettlement plan"); Contras Promise to Give Up Arms As Managua Vows to Yield Land, N.Y. TIMES, May 31, 1990 (**R-0029**) ("In the development zones, the rebels are to integrate themselves back into civilian life. Most zones will be in war regions around the country, but the exact areas have not yet been determined."); Lindsey Gruson, Ex-Contras, *Citing Broken Promises, Seize Land and Talk Again of War*, N.Y. TIMES, October 29, 1990 (**R-0030**); Organization of American States, The International Commission for Support and Verification, Demobilizing and Integrating the *Resistencia Nicaragüense* 1990-1997, at 29 (**R-0026**) (explaining that a land identification program was put in place and that different international organizations conducted meetings between the Government, landowners and land occupants to discuss ownership issues); Denise Spencer, Demobilization and Reintegration in Central America, Bonn International Center for Conversion, Paper 08, February 1997, at 17-29 (**R-0075**); Salvador Martí Puig, El proceso de desmovilización y "reinserción" de la contra nicaraguense: algunas claves para el análisis de la violencia rural en Nicaragua, Fundación CIDOB, at 89-90 (**R-0076**) (explaining that only 20% of the promised farmland was allocated to ex-*Resistencia Nicaragüense* members, leading to conflict between these groups and the government). Nicaragua does not necessarily accept the characterization of historic and recent events in these articles.

[491] Gutiérrez-Rizo I, ¶ 65, 71, 75 (**RWS-01**).

[492] López I, ¶ 6 (**RWS-04**); Agreement of the Regional Agrarian Commission of the Sixth Region of November 22, 1990 (**R-0052**).

cooperative under the name of "El Pavón R.L."[493] Although without legal title, they built homes and planted crops, with the knowledge and, at first, the apparent acquiescence of the property's lawful owners.[494]

303. Crucially, while Nicaragua does not dispute that the property has always lawfully belonged to Inagrosa and/or the Rondón family, the fact remains that it has also been long claimed and at times occupied by rural communities led by former contra fighters and their families. These communities, it should be emphasized, claim the property on the basis of promises made for the purposes of demobilizing the *Resistencia Nicaragüense* members and ending Nicaragua's civil war. Indeed, the leaders of the group of armed invaders who seized the Hacienda in 2018 were almost all former *Resistencia Nicaragüense* members who insist that the Hacienda was promised to them during the demobilization at the end of Nicaragua's civil war.[495]

304. In such circumstances—and especially when the 2018 invasion of the Hacienda Santa Fé coincided with an outbreak of nationwide political violence and civil strife—the situation at Hacienda Santa Fé was highly sensitive. An outbreak of violence between armed ex-*Resistencia Nicaragüense* members and National Police acting at the orders of President Ortega could have implicated the negotiated settlement from the early 1990s. Thus, and as noted in Ms. Gutierrez's Witness Statement, decisions about relocating the occupiers at Hacienda Santa Fé were handled at a Presidential level.[496]

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[493] López I, ¶ 10 (**RWS-04**).

[494] López I, ¶ 12 (**RWS-04**) ("While the communities occupied the Property, houses and schools were built, the lands were farmed and staple crops were sown to feed the families."). *See also* López I, ¶ 13 (**RWS-04**) ("Between 1990 and 2003, before we were completely evicted, the possession of the El Pavón estate had always been peaceful. What is more, the Rondón family never requested that we should be removed, and we coexisted without problems. They were aware that the communities were settled there and they respected our area.").

[495] Gutiérrez-Rizo I, ¶¶ 37-40 (**RWS-01**); López I, ¶¶ 5-7 (**RWS-04**).

[496] Gutiérrez-Rizo I, ¶ 65 (**RWS-01**) ("In view of this problem, President Ortega issued instructions to initiate an eviction proceeding, and relocate the unlawful occupants").

305. Because the Nicaraguan State's response to the seizure of Hacienda Sana Fé related to both (i) to the preservation of order during the 2018 unrest and (ii) claims to land based on the negotiated settlement to a civil war in which the individuals leading the land seizure had participated in more than a decade of war against the State, then also led by President Ortega, it must be recognized as having been adopted with regard to what are, by any reasonable standard, foremost among the essential security interests of Nicaragua. The State's measured and de-escalatory response therefore falls within the non-precluded measures clause of Article 21.2(b) and cannot be a source of liability for Nicaragua under the DR-CAFTA.

C. Article 10.6(1) of DR-CAFTA Also Provides Nicaragua With A Complete Defense To Riverside's Claims

306. Nicaragua also has a complete defense to Riverside's claims under Article 10.6 of DR-CAFTA.

307. Article 10.6 establishes a special treaty regime applicable during times of armed conflict or civil strife. Article 10.6 applied at the time of the 2018 invasion, which was also a period of nationwide unrest and violence during which hundreds of people, including dozens of police, were killed and injured.[497]

308. Under this provision, Nicaragua can be subject to international liability for measures related to the invasion of Hacienda Santa Fé only if Riverside can prove that the State's response to such conditions compensated or otherwise treated the investments of nationals or investors from third countries more favorably than it did Claimant's investment. Absent such discrimination, there is no liability.

[497] *See* Section II, *supra*.

1. DR-CAFTA Article 10.6 Is a *Lex Specialis* Applicable to Measures Adopted in Response to Armed Conflict or Civil Strife

309. Article 10.6.1 in relevant part provides:

> . . . . [E]ach Party shall accord to investors of another Party, and to covered investments, non-discriminatory treatment with respect to measures it adopts or maintains relating to losses suffered by investments in its territory owing to armed conflict or civil strife.[498]

310. This type of clause is common in investment treaties and serves to limit a State's liability for damage to foreign investments flowing from measures adopted in response to armed conflict or civil strife.[499] Article 10.6 reflects the traditional customary international position that a State is not liable to foreign investors for damage to investments caused by armed conflict within its territory, except to the extent that it discriminates against those investors.[500] The DR-CAFTA extends this principle to circumstances of "civil strife."[501]

311. Where a treaty contains express provisions governing its operation in specified circumstances, these provisions apply over more general provisions by operation of the principle

[498] DR-CAFTA, Art. 10.6 (**CL-0001**).

[499] *See* Christoph Schreuer, *The Protection of Investments in Armed Conflicts* in Freya Baetens, INVESTMENT LAW WITHIN INTERNATIONAL LAW (Cambridge: Cambridge University Press, 2013) at 9 (**RL-0036**); Martti Koskkenniemi, Report of the Study Group of the International Law Commission: Fragmentation of International Law: Difficulties Arising from The Diversification and Expansion of International Law, DOCUMENT A/CN.4/L.682 and Add.1, p. 19 (**RL-0037**).

[500] For example, in the *Castel* case before the United States-Venezuelan Claims Commission it was held that a "[n]eutral property in a belligerent's territory shares the fate of war the same as that of subjects or citizens" and "the public law furnishes the owner no redress against such government." J.H. Ralston, *The Law and Procedure of International Tribunals* (Cambridge, 1926), at 387 (**RL-0039**). Before that same commission in the *American Electric and Manufacturing* case, the umpire concluded that the "general principles of international law which establish the non-responsibility of the government for damages suffered by neutral property . . . incidentally caused by the means of destruction employed in the war which are not disapproved by the law of nations, are well known," J.H. Ralston, at 388 (**RL-0039**). Likewise, in the *Blumenkron* case before the Mexican-American Commission of 1868, the umpire held that "the property of a foreigner residing in the besieged city, more particularly when that is real property, can be looked upon as more sacred than that of the natives . . . Those who prefer to take up their residence in a foreign country must accept the disadvantages of that country with its advantages whatever they may be." J.H. Ralston, at 386 (**RL-0039**).

[501] DR-CAFTA, Art. 10.6 (**CL-0001**).

lex specialis derogat lex generali.[502] Article 10.6 is a *lex specialis* governing the special case of losses suffered as a result of measures taken in response to episodes of civil strife or armed conflict. It is the only source of possible treaty liability in these types of circumstances.[503] When a protected investor's loss is the result of civil strife within a DR-CAFTA host State, Article 10.6's narrowed liability regime applies: compensation is owed only where a State discriminatorily compensates *some* investors for damages caused in an armed conflict (*i.e.*, only national investors or foreign investors from third countries) but not others. Under Article 10.6 of DR-CAFTA, Nicaragua cannot be held liable for harm to a foreign investment during a period of armed conflict or civil strife if it did not accord better treatment to its own nationals or other foreign investors than it did to the foreign investment in question.

312. Investor-State jurisprudence confirms the operation of these principles. In *LESI & Astaldi v. Algeria*, the tribunal considered claims for damage to an investment amid internal violence in Algeria in the face of a clause similar to Article 10.6. The relevant provision of the Italy-Algeria BIT, Article 4.5, provided that:

> Nationals or legal entities of one Contracting State whose investments have suffered losses due to war or any other armed conflict, revolution, state of national emergency or insurrection in the territory of the other Contracting State shall be accorded by the latter treatment no less favorable than that accorded to its own nationals or legal entities, or to nationals or legal entities of the most favored nation.[504]

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[502] Martti Koshkenniemi, Report of the Study Group of the International Law Commission: Fragmentation of International Law: Difficulties Arising from The Diversification and Expansion Of International Law, Document A/CN.4/L.682 and Add.1, p. 19 (**RL-0037**) ("The principle that special law derogates from general law is a widely accepted maxim of legal interpretation and technique for the resolution of normative conflicts."); ILC draft articles on the effects of armed conflicts on treaties, with commentaries, U.N. Doc. A/66/10 (2011), Art. 4 (**RL-0042**). *See also* Christoph Schreuer, *The Protection of Investments in Armed Conflicts* in Freya Baetens, INVESTMENT LAW WITHIN INTERNATIONAL LAW (Cambridge: Cambridge University Press, 2013) at 2 (**RL-0036**).

[503] *See* DR-CAFTA, Article 10.6 (**CL-0001**). *See LESI, S.p.A. and Astaldi, S.p.A. v. People's Democratic Republic of Algeria*, ICSID Case No. ARB/05/3, Award, November 12, 2008, ¶ 174 (**RL-0041**).

[504] *LESI, S.p.A. and Astaldi, S.p.A. v. People's Democratic Republic of Algeria*, ICSID Case No. ARB/05/3, Award, November 12, 2008, ¶ 173 (**RL-0041**).

313. The *LESI* tribunal held that the inclusion of a war clause indicated a derogation from the FPS standard in times of conflict that functioned as *lex specialis*.[505] Accordingly, the *LESI* tribunal reasoned, such a clause operates to displace other BIT protections that "provide for different levels of protection for investments" because they "cannot be applied cumulatively."[506] Based on this principle, the *LESI* tribunal held that pursuant to Article 4.5 of the BIT, the State was not required to provide to the investor full protection and security from damages caused by armed conflict—that guarantee did not apply under the special circumstances that engaged the *lex specialis*.[507] Under those special circumstances, the State was simply required to accord treatment not less favorable than that provided to its own nationals or to those of a most favored nation.[508]

314. DR-CAFTA extends an analogous *lex specialis* regime to "civil strife" rather than to a "state of national emergency or revolt" as under the Italy-Algeria BIT at issue in *Astaldi*. But the logic of the provisions is the same. The State is not obligated to prioritize foreign investments in times of domestic upheaval or civil strife. It retains its sovereign freedom of action and need do no more than not discriminate against them.

315. Because Article 10.6 is a *lex specialis* concerned with discriminatory treatment during times of civil strife and armed conflict, Riverside is only entitled to compensation if it can show that Nicaragua acted in a discriminatory manner towards the protected investor "with respect

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[505] *LESI, S.p.A. and Astaldi, S.p.A. v. People's Democratic Republic of Algeria*, ICSID Case No. ARB/05/3, Award, November 12, 2008, ¶ 177 (**RL-0041**).

[506] *LESI, S.p.A. and Astaldi, S.p.A. v. People's Democratic Republic of Algeria*, ICSID Case No. ARB/05/3, Award, November 12, 2008, ¶ 174 (**RL-0041**).

[507] *LESI, S.p.A. and Astaldi, S.p.A. v. People's Democratic Republic of Algeria*, ICSID Case No. ARB/05/3, Award, November 12, 2008, ¶ 175 (**RL-0041**) ("[T]he Contracting State is under no obligation to guarantee investors of the other State 'constant, full and complete' protection and security, which would be impossible for it to ensure, but should simply provide treatment no less favorable than that accorded to its own nationals or to those of the most favored nation.").

[508] *LESI, S.p.A. and Astaldi, S.p.A. v. People's Democratic Republic of Algeria*, ICSID Case No. ARB/05/3, Award, November 12, 2008, ¶ 175 (**RL-0041**).

to measures" it adopted "relating to losses . . . owing to armed conflict or civil strife."[509] Absent such discrimination—and Riverside has shown none—Riverside's other Treaty claims must fail. Article 10.6 is the only potential basis for liability under DR-CAFTA in the context of alleged damages to an investment from measures "owing to armed conflict or civil strife."

2. Nicaragua's Response to the Invasions of Hacienda Santa Fé Was a Measure "Relating to Losses Suffered by Investments in Its Territory Owing to Armed Conflict or Civil Strife"

316. As detailed above,[510] Nicaragua's response to the invasion of Hacienda Santa Fé was a measure taken in relation to a loss suffered by a foreign investor owing to civil strife. This is the case for at least two reasons.

317. ***First***, the land invasion at Hacienda Santa Fé happened at a time when the Nicaraguan State was confronting nationwide unrest and violence.[511] Although the term "civil strife" is not defined in the DR-CAFTA, it has generally been interpreted to denote a situation of widespread disorder and violence within a State.[512] Nicaragua submits that the months long unrest and violence across Nicaragua in 2018 satisfies any reasonable definition of "civil strife."[513]

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[509] DR-CAFTA, Art. 10.6 **(CL-0001)**.

[510] *See* Section IV.C.2, *infra*.

[511] *See* Section II, *supra*.

[512] *See*, *e.g.*, *Methanex Corporation v. United States of America*, UNCITRAL, Amended Statement of Defense, December 5, 2003, ¶ 376 (**RL-0018**) (equating "times of mob violence or unrest, armed conflict or civil strife") and n. 604 ("insurrection or riot or . . . mob violence . . ."") (collecting the same indemnities as it accords to its own nationals in similar circumstances.") (citing League of Nations, Bases of Discussion: Responsibility of States for Damage Caused in their Territory to the Person or Property of Foreigners, League of Nations Doc. C.75.M.69.1929.V. at 104-23 (1929)); "United States," Lee M. Caplan & Jeremy K. Sharpe, in *Commentaries on Selected Model Investment Treaties* (Chester Brown, ed. 2013) at 786 (characterizing analogous provision of the U.S. 2012 Model Bilateral Investment Treaty as "address[ing] standards of treatment during armed conflict and *civil disturbance*") (emphasis added). *See also* Vienna Convention on the Law of Treaties, Vienna, 23 May 1969, 1155 UNTS 331, Art. 31(1) (**RL-0113**) ("A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose."). *See also* Section II, *supra*.

[513] Castro I, ¶¶ 22-23 (**RWS-02**); Nicaraguan National Report submitted in accordance with paragraph 5 of the Annex to Human Rights Council resolution 16/21 dated January 28, 2019 (**R-0019**); Carlos Fernández Álvarez, This is how the coup in Nicaragua was experienced and defeated, El 19 Digital, December 30, 2018, p. 2 (**R-0037**).

318. It follows that policing decisions—including President Ortega's decision to order the National Police to remain in their barracks in an effort to deescalate the situation—were being made at a national level and in response to that civil strife.[514] Separately from President Ortega's order, moreover, the ongoing violence placed an immense strain on limited police resources. As Deputy Commissioner Herrera explains, the State's response to the invasion at Hacienda Santa Fé was constrained by its ongoing response to the widespread violent disorder throughout the country at the time.[515] Riverside complains that the police did not immediately come and defend its property, but the State's response to that invasion was a measure "owing to" circumstances then prevailing across Nicaragua. Absent a showing that Nicaragua discriminated against Riverside in its response to that strife, no liability under the DR-CAFTA can result.

319. ***Second***, the land invasions were themselves episodes of civil strife—indeed, of civil strife anchored in, and made more dangerous by the unsettled legacy of a serious armed conflict. The land invaders, led by former commanders of the *Resistencia Nicaragüense* who fought a prolonged civil war against the Nicaraguan government, were armed, some, by Claimant's account, with heavy weapons.[516] They seized the Hacienda by force and, if Claimant's account is to be accepted, did so through the use of violence and threatened violence, all contrary to law.[517] For this reason, also, the Nicaraguan State's response to that seizure was thus necessarily a measure "relating to losses suffered by" Riverside's investment "owing to armed conflict or civil strife" in

[514] Castro I, ¶ 24 (**RWS-02**); Carlos Fernández Álvarez, This is how the coup in Nicaragua was experienced and defeated, El 19 Digital, December 30, 2018, p. 2 (**R-0037**).

[515] Herrera I, ¶ 20 (**RWS-03**).

[516] *See* Memorial, ¶ 234 (Although the allegations are derived from Mr. Gutiérrez's layered hearsay, Claimant makes reference to the presence of "a rocket mortar").

[517] *See e.g.*, Memorial, ¶ 234 ("When Mr. Domingo Ferrufino refused to turn over his shotgun to Cristobal Luque, he hit in the back with a rocket mortar.").

Nicaragua. Again, absent a showing that Nicaragua discriminated against Riverside in its response to that strife, no liability under the DR-CAFTA can result.

3. Nicaragua's Response to the Invasion of Hacienda Santa Fé Was Not "Discriminatory"

320. As stated above, Article 10.6 of DR-CAFTA is concerned with discriminatory treatment during times of civil strife and armed conflict. Once Article 10.6 applies, liability is possible only to the extent that the State discriminates against the investor in responding to the harms caused by the relevant armed conflict or civil strife.

321. But that is not the case here. Riverside argues that "[o]thers lawfully possessing or owning land in the territory of Nicaragua were treated more favorably than Inagrosa,"[518] but Riverside has not provided *any* evidence showing that a single other investor was treated "more favorably" than Inagrosa, or that any other investor was compensated by the State in respect of similar damages sustained during April-August of 2018. Nor, as set out below,[519] can Riverside show that Nicaragua's de-escalatory response to the invasion of Hacienda Santa Fé constituted discrimination when compared to the State's response to other land invasions or injuries to property occurring at the same time. To the contrary, the record shows that immediately after the invasion of Hacienda Santa Fé, the State began a successful process that resulted in the peaceful removal of the illegal occupants from the property.[520]

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[518] Memorial, ¶ 761.

[519] *See* Section IV.D.4 *infra*.

[520] Gutiérrez-Rizo I, ¶¶ 66-75 (**RWS-01**); Castro I, ¶¶ 39-40 (**RWS-02**). *See also* Summons to Gorgojo, Gerardo Rufino Arauz, Mauricio Mercado, José Estrada, Adrián Wendell Mairena Arauz, Yolanda del Socorro Téllez Cruz, José Dolores Zelaya, Gerardo Benicio Matus Tapia, August 9, 2019 (**R-0049**).

322. To review the above: (i) Article 10.6 of DR-CAFTA contains a *lex specialis* that applies during cases of armed conflict or civil strife and under which compensation is owed only if the States discriminates against the investor in its response to damage the investor sustains as a consequence of armed conflict or civil strife; (ii) the invasion of Hacienda Santa Fé took place during a period of acute civil strife throughout Nicaragua; and (iii) Nicaragua's measures in response to the invasion were adopted in consideration of the ongoing civil strife; and (iv) Nicaragua's response to the invasion of Hacienda Santa Fé was not discriminatory and Riverside has not shown that any similarly situated national or foreign investor received better treatment in analogous circumstances. Nicaragua accordingly has no liability by operation of Article 10.6. Moreover, because a breach of Article 10.6 is the only path to liability under the Treaty with respect to measures Nicaragua "adopts or maintains relating to losses suffered by investments in its territory owing to armed conflict or civil strife," Claimant's other Treaty claims fail as well.

D. Even if Articles 21.2 and 10.6 of DR-CAFTA Did Not Displace the Other Treaty Provisions, Nicaragua Is Still Not Liable for a Breach of the Treaty

323. Even if the special provisions of Articles 21.2(b) and 10.6 did not apply, Riverside's case would still fail on the merits. Riverside alleges that Nicaragua expropriated Hacienda Santa Fé and, more particularly, that the Nicaraguan police's alleged collusion with "paramilitary" land invaders resulted in an expropriation, breached the FET and FPS obligation under the Treaty, and discriminated against a U.S. investor because, Riverside alleges, other landowners received better treatment from Nicaragua with respect to illegal land invasions or occupations. None of this is correct. Each of Claimant's allegations of breach of the DR-CAFTA is refuted by the evidence.

1. Nicaragua Accorded Fair and Equitable Treatment to Riverside's Investment as Well as Full Protection and Security

324. Riverside alleges that Nicaragua breached Article 10.5 of DR-CAFTA, which establishes the obligation to accord fair and equitable treatment ("FET") and full protection and security ("FPS") to covered investments in accordance with customary international law.[521]

325. Riverside accordingly invests considerable effort in arguing that the MFN clause of the Treaty should entitle it to rely on "more favorable" provisions of the Russia-Nicaragua BIT.[522] This highly doctrinal point is premised on an understanding of FET as an autonomous standard rather than one anchored in customary international law and Nicaragua rejects this position for the reasons that the United States and other DR-CAFTA States have repeatedly adduced when interpreting DR-CAFTA.[523] Notwithstanding, as demonstrated in this section,

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[521] Memorial, ¶ 754.

[522] Memorial, ¶¶ 426-429.

[523] *Daniel W. Kappes and Kappes, Cassidy & Associates v. Republic of Guatemala*, ICSID Case No. ARB/18/43, Submission of the United States of America, Feb. 19, 2021, ¶ 11. (**RL-0043**) ([Article 10.5.1 and Article 10.5.2] provisions demonstrate the Parties' express intent to establish the customary international law minimum standard of treatment as the applicable standard in Article 10.5. The minimum standard of treatment is an umbrella concept reflecting a set of rules that, over time, has crystallized into customary international law in specific contexts. The standard establishes a minimum "floor below which treatment of foreign investors must not fall."); *Aaron C. Berkowitz, Brett E. Berkowitz and Trevor B. Berkowitz v. Republic of Costa Rica*, ICSID Case No. UNCT/13/2, Submission of the United States of America, April 17, 2015 (**RL-0044**) ("([Article 10.5.1 and Article 10.5.2] demonstrate the States Parties' express intent to establish the customary international law minimum standard of treatment as the applicable standard in DR-CAFTA Article 10.5. The minimum standard of treatment is an umbrella concept reflecting a set of rules that, over time, has crystallized into customary international law. The standard establishes a minimum "floor below which treatment of foreign investors must not fall."); *David R. Aven, Samuel D. Aven, Carolyn J. Park, Eric A. Park, Jeffrey S. Shioleno, Giacomo A. Buscemi, David A. Janney and Roger Raguso v. The Republic of Costa Rica*, ICSID Case No. UNCT/15/3, Submission of the United States of America, Dec. 2, 2016, ¶ 11 (**RL-0045**) (restating the same position adopted in *Berkowitz v. Costa Rica*); *Methanex v. United States of America*, NAFTA/UNCITRAL, Memorial on Jurisdiction and Admissibility of Respondent United States of America, Nov. 13, 2000 at 42 (**RL-0046**) ("Accordingly, [the drafters] chose a formulation that expressly tied fair and equitable treatment to the customary international minimum standard rather than some subjective, undefined standard."); *TECO Guatemala Holdings, LLC v. Republic of Guatemala*, ICSID Case No. ARB/10/23, Non-Disputing Party Submission of the Republic of Honduras, Nov. 15, 2012, ¶ 6 (**RL-0047**) (Original in Spanish "Thus, the terms of Article 10.5 of the Treaty clearly reflect the intention of States parties to adopt the most restrictive concept possible of "fair and equitable treatment" as part of the minimum standard of treatment under customary international law."); *TECO Guatemala Holdings, LLC v. Republic of Guatemala*, ICSID Case No. ARB/10/23, Submission of the Dominican Republic as Non-Disputing Party, Nov. 5, 2012, ¶ 3 (**RL-0109**) ("Therefore, the Dominican Republic reiterates that the purpose and object of Article 10,5 of the Treaty is limited to the "Minimum Standard of Treatment" afforded to foreigners under customary international law, and not "fair and equitable" as autonomous concept."); *TECO Guatemala Holdings, LLC v. Republic of Guatemala*, ICSID Case No. ARB/10/23, Non-Disputing Party Submission

Riverside's attempt to incorporate the Russia-Nicaragua BIT's FET provision makes little practical difference on the facts of this case, as Nicaragua's conduct complied fully with either understanding of the FET standard. Moreover, regardless of the differences that may ultimately exist between an autonomous standard of fair and equitable treatment and the minimum standard under customary international law, the standard of fair and equitable treatment requires that an investor-claimant exceed a very high threshold to show that a State has breached its obligation to accord fair and equitable treatment.[524]

326. Riverside alleges five separate FET breaches. According to Riverside, Nicaragua (i) failed to act in good faith; (ii) failed to provide due process to Inagrosa; (iii) engaged in arbitrary, unfair, and capricious conduct; (iv) failed to respect the legitimate expectations of Inagrosa and its investor, Riverside; and (v) failed to provide full protection and security to Inagrosa. All of Riverside's FET theories fail, both under customary international law and Claimants' imported version of that standard.

a. *Nicaragua Acted in Good Faith with Respect to the Land Invasion and Inagrosa's Property Rights in Hacienda Santa Fé*

327. Riverside claims that Nicaragua acted contrary to a duty of good faith which it reads into Article 10.5's FET clause. Among other things, Riverside alleges that the National Police, acting at the orders of Commissioner Castro, operated in bad faith by colluding with the invaders

of the Republic of El Salvador, Oct. 5, 2012, ¶ 9 (**RL-0048**) ("The terms of Article 10.5 of the Treaty clearly reflect the State Parties' intention to adopt the most limited concept possible of "fair and equitable treatment" as part of the Minimum Standard of Treatment under customary international law, not as an autonomous concept.").

[524] *SunReserve Luxco Holdings SRL v. Italy*, SCC Case No. 132/2016, ¶ 691 (**RL-0049**) ("For instance, numerous tribunals have alluded to the FET standard being high, such that only 'manifestly' unfair, unreasonable or inequitable conduct by the host State would create a breach of the FET standard").

of the Hacienda Santa Fé, disarming the Hacienda workers; and providing protection for Comandante Cinco Estrellas, a leader of the land invaders.[525]

328. For the avoidance of doubt, Nicaragua does not accept that "good faith" is part of the FET standard under Article 10.5 of DR-CAFTA.[526] But this is an academic debate: even if it were, Nicaragua's conduct towards Riverside was in good faith. The invasion of Hacienda Santa Fé emphatically did not occur at the instigation or with the encouragement of the State. To the contrary, the Nicaraguan State has always recognized and continues to recognize that the Hacienda belongs to Inagrosa, the Nicaraguan company through which Riverside invested.[527] The National Police and other Nicaraguan officials acted diligently and ultimately successfully to relocate the invaders, avoid an escalation of violence, and restore the Property to Inagrosa peacefully, with limited resources and in the context of widespread and violent civil strife.

329. Indeed, even if it were accepted that good faith is part of the FET standard, the tribunal in *Waste Management II* explained that showing a breach of good faith requires two elements that Claimant has failed to establish: (i) that the State did not act rationally and pursuant to its rules, but in an "unjustified" manner; and (ii) that that the State acted "deliberately" and

[525] Memorial, ¶¶ 756-760.

[526] *But see Daniel W. Kappes and Kappes, Cassidy & Associates v. Republic of Guatemala*, ICSID Case No. ARB/18/43, Submission of the United States of America, Feb. 19, 2021, ¶ 25 (**RL-0043**) (observing that "good faith" is not an element of Fair and Equitable Treatment under customary international law and that "a claimant 'may not justifiably rely upon the principle of good faith' to support a claim, absent a specific treaty obligation, and the DR-CAFTA contains no such obligation"); *Aaron C. Berkowitz, Brett E. Berkowitz and Trevor B. Berkowitz v. Republic of Costa Rica*, ICSID Case No. UNCT/13/2, Submission of the United States of America, April 17, 2015, ¶ 17-18 (**RL-0044**) ("Neither the concepts of 'good faith' nor 'legitimate expectations' are component elements of 'fair and equitable treatment' under customary international law that give rise to an independent host State obligation").

[527] *See* Protective Order Request filed by Attorney General of Nicaragua dated November 30, 2021 (**C-0253**).

"consciously" to destroy or frustrate the investment.[528] As the tribunal in *Chemtura* observed, "the standard of proof for allegations of bad faith or disingenuous behavior is a demanding one."[529]

330. As to the first element, Riverside cannot show that Nicaragua acted in an unjustified manner. Riverside's case is that the Nicaraguan State helped the illegal invaders and occupants to enter the property, that it provided them with weapons, and that it did not act to remove them.[530]

331. But the evidence shows that this is not true. Both Commissioner Castro and Deputy Commissioner Herrera confirm that the State has absolutely no ties to the invaders who were led by former *Resistencia Nicaragüense* commanders with a history of hostility to the State.[531] They also explain that given the nationwide civil strife and violent unrest, the police did not have the force to immediately remove all the occupiers from the land peacefully, and were in any case largely confined to barracks as part of an effort to deescalate the violence.[532]

332. Nevertheless, from the outset, the Police advised the occupiers that the Property was privatly owned.[533] Disarming the Hacienda workers was done in part to prevent the invaders from obtaining more weapons, in part for the workers own protection, and to avoid the escalation of violence if the Hacienda workers decided to take matters into their own hands.[534] It was not bad

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[528] *Waste Management, Inc. v. United Mexican States*, ICSID Case No. ARB(AF)/00/3, Award, April 30, 2004, ¶ 138. *See also SunReserve Luxco Holdings SRL v. Italy*, SCC Case No. 132/2016, ¶ 740 (**CL-0005**) ("In any event, the Tribunal considers it important to emphasize that in order for bad faith or *mala fide* conduct to be established, the burden on the investor is high. In light of the overall high standard to establish a breach of the FET obligation alluded to above […], the Tribunal considers that for any course of action to qualify as bad faith or mala fide, a willfulness or intention, on part of the host State, of committing the unfair or inequitable action has to be established. Not every unfair or inequitable action automatically qualifies as an action in bad faith.").

[529] *Chemtura Corp. v. Government of Canada*, UNCITRAL, Award, August 2, 2020, ¶ 137 (**RL-0050**).

[530] Memorial, ¶ 757.

[531] *See* Castro I, ¶ 34 (**RWS-02**) (describing the profile of the leaders of the invaders as being ex-members of the *Resistencia Nicaragüense*).

[532] Castro I, ¶ 26 (**RWS-02**); Herrera I, ¶ 9 (**RWS-03**).

[533] Castro I, ¶ 37 (**RWS-02**).

[534] Herrera I, ¶ 23 (**RWS-03**).

faith to prioritize preventing violence, especially given prevailing conditions in the country.[535] Such an approach was in good faith where the police lacked resources to do much more and were outnumbered by the heavily armed[536] illegal invaders and amid a broader national crisis marked by political violence on a large scale.

333. As to the second element, Riverside has not shown that the State acted "deliberately" and "consciously" to destroy or frustrate the investment. To the contrary, Nicaragua has submitted abundant evidence that once the situation calmed, the State took effective steps to remove the occupiers from the Property peacefully.[537] In fact, in every instance in which Inagrosa requested assistance to evict the illegal occupants, Nicaragua effectively provided it.[538]

334. Riverside's Memorial seems deliberately to ignore the wider context of what was happening in Nicaragua at the time of the invasion. As explained by Deputy Commissioner Herrera, when Mr. Rondón called the Police on June 16, 2018, Deputy Commissioner Herrera explained to him that, as Mr. Rondón was aware, nationally the government was dealing with widespread disorder, and they had very limited resources to provide assistance.[539] Additionally, Deputy Commissioner Herrera explained that as part of an effort to calm violence that had erupted in the capital and around the country, President Ortega himself had ordered the National Police to

[535] Herrera I, ¶ 23 (**RWS-03**).

[536] *See* Memorial, ¶ 289.

[537] *See* section II *supra*.

[538] In 2003, Inagrosa requested assistance from the Police to evict the illegal occupants, and the Police evicted them. *See* Scorched earth in El Pavón, *El Nuevo Diario*, November 22, 2003 (**R-0036**). On August 11, 2018, the Mayor of Jinotega and Commissioner Marvin Castro travelled to Hacienda Santa Fé to meet with the invaders. In this meeting, Commissioner Castro and Mayor Centeno made clear that the occupation of Hacienda Santa Fé was illegal and that each of the illegal occupants had to leave immediately. As Riverside concedes, the illegal occupants left the property immediately after this meeting. *See* Castro I, ¶ 37 (**RWS-02**); Memorial, ¶¶ 262-263. Finally, in August 2021, the Government effectively evicted all illegal occupants and since then, it has been safeguarding the property. *See* Gutierrez-Rizo I, ¶ 74 (**RWS-01**).

[539] Castro I, ¶ 26 (**RWS-02**); Herrera I, ¶ 19 (**RWS-03**).

remain in barracks until further notice.[540] Besides the shelter order, the National Police were massively outnumbered and outgunned.[541] The Police did not have the force to immediately clear Santa Fé.[542] As the evidence shows, in Jinotega, and specifically in San Rafael del Norte, there were only eight members of the National Police assigned.[543] It was not in bad faith to seek to avoid more violence and potentially civil casualties.

335. Placed in context, the National Police's actions acquire a very different complexion from that placed on them by the Claimant. The day after the 2018 invasion began, Deputy Commissioner Herrera, acting at the advice of Commissioner Castro, sent Inspector Calixto Vargas to the property to assess the situation.[544] The Police had heard that a large group of invaders was heading to Hacienda Santa Fé (the lower part of the property) and advised all workers to abandon the site.[545] This was not done to help the invaders but to protect the workers and avoid a possible escalation of violence, in light of the tense situation at the Hacienda and nationally and limited police resources.[546] The National Police's action to collect weapons from Hacienda employees should be viewed in a similar light. As Deputy Commissioner Herrera's testimony confirms, Nicaraguan officials reasonably apprehended that the workers might use weapons against the invaders, with potentially disastrous consequences.[547] And, Claimant's own witnesses

[540] Herrera I, ¶¶ 19-20, 26 (**RWS-03**).

[541] Herrera I, ¶ 25 (**RWS-03**).

[542] Herrera I, ¶ 25 (**RWS-03**).

[543] Herrera I, ¶ 25 (**RWS-03**); Certificate issued by the National Police of November 18, 2022 (**R-0028**) (showing that only eight agents were assigned to San Rafael del Norte).

[544] Herrera I, ¶ 21 (**RWS-03**).

[545] Castro I, ¶ 26 (**RWS-03**); Herrera I, ¶ 21 (**RWS-03**).

[546] Memorial, ¶¶ 176, 757.

[547] Herrera I, ¶¶ 21-27 (**RWS-03**).

confirm that they hid weapons to evade police instructions, suggesting that they may well have contemplated using them and that the Police's approach was the correct one.[548]

336. *Third*, Riverside's allegations that Nicaragua's police were "arming" the invaders are false and unsupported.[549] Claimant submits no evidence in support of this allegation other than Mr. Gutierrez's statement that someone told him that another person had said (i.e., second level hearsay) that police were arming the invaders.[550] Claimant's Memorial is full of this kind of "evidence" but anonymous statements are no basis on which to conclude that President Ortega's government was secretly arming former *Resistencia Nicaragüense* members. The Tribunal should disregard these outrageous and unsupported claims. [551]

337. *Fourth*, Nicaragua repeatedly demonstrated its good faith towards the Claimant by working diligently to achieve a peaceful resolution that would remove the occupiers from the Property and restore Hacienda Santa Fé to its lawful owners. Among other things, Nicaragua took the following steps:

a) **June 17, 2018.** After a large group of people first illegally invaded Hacienda Santa Fé, and despite only having eight officers on duty assigned to San Rafael del Norte, the Police visit Hacienda Santa Fé to assess the situation.[552]

[548] Gutiérrez I, ¶ 53 (**CWS-02**) ("After their call, I called Mr. Rondón again and told him that I was going to hand over 5 shotguns that we were repairing and that I was going to tell Raymundo Palacios to hide the rest of the guns. I then told Raymundo to hand over 5 shotguns and to hide the rest of the guns.").

[549] Gutierrez, ¶ 129 (**CES-02**) ("An employee of MAGFOR Jinotega (whose name is not disclosed for personal security reasons), called me and told me that Chimeco, one of the paramilitaries that had invaded Hacienda Santa Fé told her that the National Police delegation of San Rafael del Norte was providing the guns to the invaders of Hacienda Santa Fé.").

[550] Gutierrez, ¶ 129 (**CES-02**).

[551] *See* section II, *supra*.

[552] Herrera I, ¶ 21 (**RWS-03**); Memorial, ¶ 221.

b) **August 6-9, 2018**. A few weeks after the invasion, the Attorney General Office in Jinotega and the Police send notifications to the individuals that had led the invasion to start the eviction process.[553]

c) **August 11, 2018**. Mayor Centeno and Commissioner Castro personally travel to Hacienda Santa Fé and order the illegal occupants to leave immediately.[554] The illegal occupants leave the property but return about a week later on August 17, 2018 due to Inagrosa's and Riverside's failure to secure the Hacienda.[555]

d) **August 2018 – January 2019.** The Government establishes a dialogue with the leaders of the illegal occupants and, in that dialogue, confirms that the Hacienda is privately owned by Inagrosa, and its unauthorized occupation is illegal.[556]

e) **January 2019**. Mayor Centeno and the Attorney General of Jinotega met with the leaders of the illegal occupants and ordered them to leave without violence. Some of the illegal occupants voluntarily left the Hacienda immediately after this meeting.[557]

f) **January 24, 2019**. Continuing with the process to evict the invaders, a "Commission for the purpose of evicting Finca Santa Fé" was formed. This commission comprised of Commissioner Castro, Mayor Centeno, and Attorney General Bentanco. That same day, the commission and certain of the leaders of the illegal occupants executed a resolution providing that: (i) the Hacienda is privately owned; (ii) its occupation by Cooperativa El Pavón is illegal; (iii) the illegal occupants would leave the premises in two phases; and (iv) Nicaragua would relocate these individuals elsewhere.[558]

g) **January 2019 – April 2021.** Many of the illegal occupants exit Hacienda Santa Fé. The commission continues to identify lands to relocate the illegal occupants that remain on the property.[559]

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[553] Castro I, ¶ 37 (**RWS-03**); Summons to Gorgojo, Gerardo Rufino Arauz, Mauricio Mercado, José Estrada, Adrián Wendell Mairena Arauz, Yolanda del Socorro Téllez Cruz, José Dolores Zelaya, Gerardo Benicio Matus Tapia of August 9, 2019 (**R-0049**).

[554] Castro I, ¶ 37 (**RWS-03**).

[555] Castro I, ¶ 37 (**RWS-03**) ("The meeting was chaired by me, along with the Jinotega Delegate from Nicaragua's Attorney General's Office and the Jinotega Mayor, and the settlers were ordered to leave the estate because it was private property and did not belong to them. This has been admitted by Claimant […]"); ¶ 39.

[556] Gutierrez-Rizo I, ¶ 68 (**RWS-01**).

[557] Gutierrez-Rizo I, ¶ 68 (**RWS-01**).

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

[559] Gutierrez-Rizo I, ¶¶ 70-72; Castro I, ¶ 40.

h) **April 28, 2021.** The Government summoned the leaders of the families that still I occupied Hacienda Santa Fé to discuss the relocation situation.[560] Two days later, a meeting between the parties takes place at the Attorney General's office in Managua that concerned the eviction of the illegal occupants that remained on the property.[561]

i) **May 4, 2021.** The Government meets with remaining illegal occupants at the Hacienda, presents relocation options, and orders them to leave immediately.[562] Almost all of the remaining illegal occupants leave immediately and only about 112 illegal occupants remain on the premises.[563]

j) **August 13, 2021**. The Government convenes another meeting at the Hacienda, wherein these officials gave remaining illegal occupants a firm deadline to leave the premises.[564]

k) **August 18, 2021**. The Government successfully evicted all illegal occupants from Hacienda Santa Fé.[565]

l) **September 9, 2021**. The Government invites Inagrosa to reclaim the Hacienda, but Inagrosa inexplicably decided not to take possession of the property.[566]

m) **September 29, 2021.** The Government hires a private security team to provide around-the-clock surveillance of Hacienda Santa Fé.[567]

n) **November 30, 2021**. Due to Inagrosa's unwillingness to take back the Hacienda the Government is forced to seek a protective order from a court that allows the Government to maintain around-the-clock surveillance around the perimeter of the property to prevent against future invasions.[568] The court issues this order on December 15, 2021.[569]

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

[561] Gutierrez Rizo I, ¶ 71 (**RWS-01**).

[562] Gutierrez Rizo I, ¶ 72 (**RWS-01**).

[563] Gutierrez Rizo I, ¶ 72 (**RWS-01**).

[564] Gutierrez Rizo I, ¶ 74 (**RWS-01**).

[565] Gutierrez Rizo I, ¶ 74 (**RWS-01**).

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

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

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

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

o) **December 2021 – Present**. Nicaragua has spent more than NIO 3,567,813.12 in its ongoing efforts to secure Hacienda Santa Fé.[570] Inagrosa still has not taken back its property, despite repeated invitations to do so.

338. Nicaragua's response to the illegal invasion and occupation of Hacienda Santa Fé was in the utmost good faith. Nicaragua worked to clear illegal occupants from Hacienda Santa Fé despite the challenges presented by the 2018 violence and civil strife and Riverside and Inagrosa's striking lack of engagement with the situation after August of 2018.[571] And, as the Tribunal is aware, Nicaragua has consistently recognized Inagrosa's rights in the property and has offered Claimant to receive the property back.[572] Nicaragua is presently safeguarding the property given the sensitivity of the situation and its commitment to its DR-CAFTA obligations.

339. For all these reasons, Riverside cannot show that the State's treatment of Riverside's investment was in bad faith. Any FET claim on this basis must fail.

b. *Nicaragua Has Not Denied Claimant "Due Process"*

340. Riverside also alleges that Nicaragua breached the FET standard by denying due process to Inagrosa.[573] Riverside's due process argument is heavily conclusory, but, as set out in Riverside's Memorial, appears to consist of the allegation (i) that Nicaragua did not abide by its expropriation law in supposedly expropriating Hacienda Santa Fé[574] and (ii) a bare assertion, that "Nicaragua failed to provide due process to Inagrosa."[575]

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

[571] *See* Certification Issued by National Police of Jinotega on January 2, 2023 (**R-0109**) (showing that there was no formal complaint received at the Office of the National Police of Jinotega by Inagrosa or any of its representatives).

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

[573] Memorial, ¶ 754 *et seq*; Procedural Order No. 4, ¶ 23.

[574] *See* Memorial, ¶ 736.

[575] Memorial, ¶ 754(b).

341. None of this is correct. ***First***, as set out below in Section IV.D.3, there has been no expropriation.[576]

342. ***Second***, the facts alleged do not allow any scope for a claim that Nicaragua denied Riverside or Inagrosa due process. To be sure, Article 10.5.2(a) of DR-CAFTA provides in relevant part that FET: "includes the obligation not to deny justice ***in criminal, civil, or administrative adjudicatory proceedings*** in accordance with the principle of due process [.]"[577] But there is no basis for this claim where neither Riverside nor Inagrosa has ever made any effort to avail themselves of remedies available under Nicaraguan law. Indeed, the record contains not one formal complaint filed by Inagrosa with the Police or any other authority, including any administrative or adjudicatory body.[578] All of the cases cited by Claimant where a due process claim linked to FET was raised arose in the context of judicial or administrative proceedings.[579] But Claimant cannot have been denied due process that it never sought.

343. ***Third***, to the extent that the Nicaraguan judiciary has nevertheless been presented with issues related to the land seizure at Hacienda Santa Fé, it has acted solely to protect the rights of Inagrosa, the recognized and undisputed owner of the property.[580] The Nicaraguan judiciary has done so, moreover, not at Claimant's request but at the initiative of Nicaragua's Attorney General in Jinotega.[581]

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[576] *See* Section IV.D.3, *infra*.

[577] DR-CAFTA, Art. 10.5.2(a) **(CL-001)** (emphasis added).

[578] *See* Certification Issued by the Police on January 2, 2023 **(R-0119)**; Herrera I, ¶ 20 **(RWS-03)**; Gutiérrez-Rizo, ¶ 61 **(RWS-01)**.

[579] *See* Memorial, ¶¶ 512, 514 (referring to *Teco v. Guatemala*, a case arising out of the decision of a regulator in Guatemala to set tariffs for an electricity company and where the Tribunal found "arbitrary regulatory treatment"); ¶ 519 (referring to *S.D. Myers v. Canada*, a case arising out of a legislative and regulatory ban on the export of chemical waste); ¶ 587 (referring to *Paushok v. Mongolia* a case arising out of the Government's enactment of a law).

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

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

344. For all these reasons, Riverside cannot show that it was denied due process and any FET claim on this basis must fail.

c. *Nicaragua's Approach to the Land Invasion Was Consistent with Riverside's Legitimate Expectations*

345. Riverside alleges that Nicaragua's response to the invasion of Hacienda Santa Fé breached the FET standard in Article 10.5 of DR-CAFTA by failing to protect its "legitimate expectations."[582]

346. As a preliminary matter and for the avoidance of doubt, Nicaragua, like the United States, does not accept that "legitimate expectations" form part of the Minimum Standard of Treatment under customary international law protected by the FET clause in Article 10.5.[583]

347. Yet even assuming *arguendo* that legitimate expectations formed part of the minimum standard of treatment, Riverside would still need to show that (i) the relevant

[582] Memorial ¶ 754, d).

[583] For example, the United States has expressed that "[t]he concept of "legitimate expectations" is not a component element of "fair and equitable treatment that gives rise to an independent host State obligation […] An investor may develop its own expectations about the legal regime governing its investment, but those expectations impose no obligation on the State under the minimum standard of treatment." *See Daniel W. Kappes and Kappes, Cassidy & Associates v. Republic of Guatemala*, ICSID Case No. ARB/18/43, Submission of the United States of America, Feb. 19, 2021, ¶ 26 (**RL-0043**). *See also Aaron C. Berkowitz, Brett E. Berkowitz and Trevor B. Berkowitz v. Republic of Costa Rica*, ICSID Case No. UNCT/13/2, Submission of the United States of America, April 17, 2015, ¶ 17-18 (**RL-0044**) ("Neither the concepts of "good faith" nor "legitimate expectations" are component elements of "fair and equitable treatment" under customary international law that give rise to an independent host State obligation.") El Salvador and Honduras have agreed with this interpretation.[583] *TECO Guatemala Holdings, LLC v. Republic of Guatemala*, ICSID Case No. ARB/10/23, Non-Disputing Party Submission of the Republic of El Salvador, Oct. 5, 2012, ¶ 14 (**RL-0048**) ("Because the focus must be on the conduct of the State, it is incorrect to make reference to the legitimate expectations of the investor to decide if the State has complied with the Minimum Standard of Treatment."); *TECO Guatemala Holdings, LLC v. Republic of Guatemala*, ICSID Case No. ARB/10/23, Non-Disputing Party Submission of the Republic of Honduras, Nov. 15, 2012, ¶ 10 (**RL-0047**) (Original in Spanish "However, because the focus must be on the conduct of the State, the Republic of Honduras does not consider valid or necessary to make reference to the expectations of the investors to decide whether the minimum standard of treatment has been breached."). *Railroad Development Corp. v. Republic of Guatemala*, ICSID Case No. ARB/07/23, Award, June 29, 2012 (Sureda, Eizenstat, Crawford), ¶¶ 209-211 (**RL-0165**); *Obligation to Negotiate Access to the Pacific Ocean (Bolivia v. Chile)*, ICJ, Judgement, October 1, 2018, ¶ 162 (**RL-0038**) ("The Court notes that references to legitimate expectations may be found in arbitral awards concerning disputes between a foreign investor and the host State that apply treaty clauses providing for fair and equitable treatment. *It does not follow from such references that there exists in general international law a principle that would give rise to an obligation on the basis of what could be considered a legitimate expectation.* Bolivia's argument based on legitimate expectations thus cannot be sustained.") (emphasis added).

expectations were legitimate and reasonable; (ii) based on conditions offered or commitments assumed by the State; and (iii) relied upon by the investor when deciding whether to make the investment.[584] Riverside cannot establish these elements.

348. ***First***, the Nicaraguan Government never made specific commitments or promises to Riverside. It follows that the only expectations upon which Riverside could have relied were those of an ordinary foreign investor in Nicaragua. Such expectations would have been based on the business climate and associated risks known to a reasonably informed investor and the generally applicable Nicaraguan legal framework.[585]

349. ***Second***, to the extent the FET standard protects expectations, it protects the *reasonable* expectations of a reasonably informed and diligent investor.[586] International investment law does not excuse an investor from diligence or allow an investor to pretend that the risks of its investment in a particular jurisdiction do not exist.

350. In this regard, Riverside would or should have been well aware of Nicaragua's complex recent history including the armed conflict with the *Resistencia Nicaragüense* members and its settlement at the beginning of the 1990s. More specifically, Riverside should have known—and in fact did know—that the Hacienda Santa Fé had long been claimed by communities led by demobilized ex-*Resistencia Nicaragüense* members and had been the target of repeated

[584] *Duke Energy Electroquil Partners and Electroquil S.A. v. Republic of Ecuador*, ICSID Case No. ARB/04/19, Award, August 18, 2008, ¶¶ 340, 347 **(RL-0040)**.

[585] *Cavalum SGPS, S.A. v. Kingdom of Spain*, ICSID Case No. ARB/15/34, Decision on Jurisdiction, Liability and Directions on Quantum, August 31, 2020, ¶ 470 (**RL-0110**) ("In determining an investor's legitimate expectations at the time of investment, the legal and commercial environment has to be considered in the light of the due diligence which an investor can be expected to undertake.").

[586] *South American Silver Limited v. Bolivia,* PCA Case No. 2013-15, Award, November 22, 2018, ¶ 648 (**RL-0016**) ("First, several international investment tribunals have established that the investor is entitled to protection of its legitimate expectations provided (i) that it exercised due diligence, and (ii) that its legitimate expectations were reasonable in light of the circumstances.").

unlawful land invasions.[587] Indeed, in 2003, the Rondón family had sought help from the police to evict illegal occupants in an operation that generated considerable ill will on the part of local communities, and involved the clearing of illegally-built schools and homes.[588] Thus, from at least the 1990s, the Rondón family and therefore, Riverside, would have known that title to the property was disputed.[589] There is even contemporaneous evidence that shows that negotiations were ongoing with the communities to recover the property in the 1990s and early 2000s.[590] In June of 2017, moreover, Riverside made no complaint when the northern area of Hacienda Santa Fé was informally occupied.[591]

351. All this knowledge is reasonably imputable to Riverside. Claimant's future business plans for the property – *if any* – including for its purported avocado business should necessarily have been made taking these conditions into consideration. Any *legitimate* expectations that Claimant might have had with respect to the risks of its investment should have been informed by Claimant's knowledge of the demobilized *Resistencia Nicaragüense* ex-members' claims to the property and of what those claims meant in the broader Nicaraguan context.

352. As the *Duke Energy v. Ecuador* tribunal explained

> To be protected, the investor's expectations **must be legitimate and reasonable at the time when the investor makes the investment.** The assessment of the reasonableness or legitimacy **must take into account** all circumstances, including not only the facts surrounding the investment, but also the **political, socioeconomic, cultural and historical conditions prevailing in the host State**.

[587] *See* Section II, *supra*.

[588] Scorched earth in El Pavón, *El Nuevo Diario*, November 22, 2003 (**R-0036**).

[589] Memorial, ¶ 205 (acknowledging that in the early 1990s, there had been some "prowlers" at Hacienda Santa Fé).

[590] Letter from José Valentin López Blandón and Miguel Díaz Altamirano to Property Intendency of Jinotega dated December 12, 2005 (**R-0035**).

[591] Lopez I, ¶ 22 **(RWS-04)** ("It is my understanding that the 2017 invasion was peaceful and at the time no confrontation took place with the owners, and they did not ask for the eviction). *See* Certification Issued by the Police on January 2, 2023 (**R-0119**).

> In addition, such expectations must arise from the conditions that the State offered the investor and the latter must have relied upon them when deciding to invest.[592] (Emphasis added)

353. *Third*, Nicaragua has acted in a manner consistent with what reasonably should have been Claimant's expectations under the circumstances. Nicaragua has never questioned Inagrosa's ownership of the property or disputed its right to exclude trespassers. To the contrary, the State has repeatedly protected Inagrosa's rights and—in a deliberate, de-escalatory and peaceful manner—did so and continues to do so here.

354. In the summer of 2018, however, Nicaragua had to contend with nationwide violent unrest and civil strife at the same time that several hundred individuals led by former armed members of the *Resistencia Nicaragüense* invaded the property.[593]

355. Riverside did not have a legitimate expectation that Nicaragua would behave other than it did under those circumstances. Riverside did not have a legitimate expectation that a small and beleaguered force of eight police would force hundreds of people, many of them armed, and their families from land they had occupied for purposes of illegal settlement. Riverside likewise did not have a legitimate expectation that President Ortega's government would favor a forceful and likely dangerous approach to a decades-old land dispute over a peaceful one, or that the sensitive issue of resettling demobilized *Resistencia Nicaragüense* members should give way to the government's acting to restore Riverside's control of the Hacienda faster.

356. Put another way, Riverside did not have a legitimate expectation that Nicaragua would adopt confrontation rather than conciliation in dealing with the land invaders and legacy of

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[592] *Duke Energy Electroquil Partners and Electroquil S.A. v. Republic of Ecuador*, ICSID Case No. ARB/04/19, Award, August 18, 2008, ¶ 340 (**RL-0040**). *See also South American Silver Limited v. Bolivia,* PCA Case No. 2013-15, Award, November 22, 2018 (**RL-0016**) ("The circumstances to be taken into consideration by the investor are not merely legal in nature, but they should also include the social, cultural, and economic environment of the host State of the investment, amongst other factors.").

[593] Castro I, ¶ 22-23 (**RWS-02**); Herrera I, ¶ 8-12 (**RWS-03**).

its civil war. It had even less of a legitimate expectation that Nicaragua would do so when violence was raging across the country. To the contrary, as numerous tribunals have recognized, the expectations that investors have during episodes of civil strife are attenuated and do not extend to 'second-guessing" a state's use of its police to defuse or address a crisis.[594]

357. To the contrary, and as the tribunal in *Copper Mesa v. Ecuador* recognized, the fair and equitable treatment standard requires a weighing of the legitimate interests of the foreign investor with the legitimate interests of the host State and others, including (in particular) its own citizens and residents.[595] In other words, States enjoy maximal flexibility in times of civil strife to restore order and need to prioritize and balance the interests at stake. Riverside, therefore, in these circumstances, could not have a legitimate expectation that Nicaragua would engage in State violence against its own citizens to protect Inagrosa's property — especially where other more peaceful means of resolving the situation and upholding the Claimant's rights were available. The record shows that Nicaragua's method worked and as of today, the property is free of any trespassers and is being guarded by private security at the government's expense.

358. As explained in detail in the next section, the Government of Nicaragua and specifically the Police in Jinotega made every reasonable effort to protect Claimant's interests and

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[594] *See generally Pantechniki S.A. Contractors & Engineers v. Republic of Albania*, ICSID Case No. ARB/07/21, Award, July 30, 2009, ¶ 77 (**RL-0051**). *See also Louis Dreyfus Armateurs SAS v. Republic of India*, PCA Case No. 2014-26, Final Award, September, 11 2018, ¶ 382 (**RL-0052**) ("The Tribunal considers such questions about the proper deployment of law enforcement resources to be generally judgment calls, to be made by a State acting in good faith to protect individuals and local businesses from intimidation and violence, and exercising the degree of due diligence required by international law, based on the foreseeability of unrest in a particular area, the extent of available resources, and competing demands for allocation of those resources among other areas potentially also in need of law enforcement protection. In general, tribunals should be wary of second-guessing these judgment calls, except where the evidence suggests bad faith, improper intent, or a serious lack of due diligence in response to a reasonably foreseeable and otherwise manageable threat.").

[595] *Copper Mesa Mining Corporation v. Republic of Ecuador*, PCA Case No. 2012-2, Award, March 15, 2016, ¶ 6.81 (**RL-0053**) ("Under this FET standard, there is a balancing exercise permitted to the host State, weighing the legitimate interests of the foreign investor with the legitimate interests of the host State and others, including (especially) its own citizens and local residents.").

property under the circumstances. The Government of Nicaragua did not stop its efforts until it had successfully and peacefully removed all illegal occupants from Hacienda Santa Fé.[596]

2. Nicaragua Accorded Riverside's Investment Full Protection And Security Consistent With Article 10.5 Of DR-CAFTA.

359. Riverside also claims that Nicaragua breached Article 10.5 by failing to provide "full protection and security" to Riverside's investment in Inagrosa.[597] Specifically, Riverside alleges that Inagrosa was damaged by the State's failure to remove the unlawful occupiers and by what it alleges were positive steps the State took to arm and equip the occupiers.[598]

360. Claimant's FPS claim is without factual or legal merit: (i) to the extent FPS encompasses a "legal" element, Nicaragua has provided—and continues to provide—Riverside's investment with legal security; (ii) the FPS standard is not an absolute obligation and only requires a State to exercise due diligence appropriate in the circumstances, which it did; (iii) Nicaragua adopted measures appropriate in light of available law enforcement resources and that effectively balanced both the protection of Inagrosa's undisputed rights in the Property with the imperative to avoid unnecessary risks of escalated violence and harm to individuals, including to families illegally occupying the Property; and (iv) DR-CAFTA's FPS clause does not oblige the State to use force against its own citizens when more peaceful alternatives are available.

361. ***First***, as with the FET standard, Nicaragua shares the United States' position that the FPS clause under DR-CAFTA is limited to the rights provided under the minimum standard of treatment of customary international law.[599] That "more traditional, and commonly accepted

[596] Gutierrez-Rizo, ¶¶ 66-75 (**RWS-01**).

[597] Memorial, ¶ 754, e).

[598] Memorial, ¶ 755, c), d), e).

[599] DR-CAFTA, Art. 10.5.(b) (**CL-001**) ("full protection and security" requires each Party to provide the level of police protection required under customary international law."). *See also Daniel W. Kappes and Kappes, Cassidy &*

view," as the *Gold Reserve* tribunal recognized, "is that this standard of treatment refers to protection against physical harm to persons and property."[600]

362. Nevertheless, the record shows that Nicaragua has consistently provided full legal security to Claimant's investment. Claimant does not and cannot allege that Nicaragua ever legalized or ratified the unlawful land occupations. To the contrary, from the very start of the invasions of Hacienda Santa Fé, Nicaraguan officials consistently warned the invaders that Hacienda Santa Fé was private property.[601] Despite threats of violence from the invaders and their leaders, Nicaragua acted to remove them from Hacienda Santa Fé and resettle them peacefully, as it has successfully done.[602] Nicaragua currently holds the Hacienda Santa Fé for the benefit of Inagrosa, pursuant to a court order sought as a protective measure by none other than Nicaragua's Attorney General.[603]

363. ***Second***, international investment law recognizes that FPS is an obligation of means, not of results.[604] The FPS standard is not an absolute obligation and only requires a State to

Associates v. Republic of Guatemala, ICSID Case No. ARB/18/43, Submission of the United States of America, Feb. 19, 2021, ¶ 23 (**RL-0043**).

[600] *Gold Reserve Inc. v. Venezuela*, ICSID Case No. ARB(AF)/09/1, Award, September 22, 2014, ¶¶ 622–623 (**RL-0064**). *See also Saluka v. Czech Republic*, UNCITRAL Arbitration Rules, Partial Award, March 17, 2006, ¶¶ 484 (**RL-0009**) ("[t]he practice of arbitral tribunals seems to indicate, however, that the "full security and protection" clause is not meant to cover just any kind of impairment of an investor's investment, but to protect more specifically the physical integrity of an investment against interference by use of force."); *AWG v. Argentina*, UNCITRAL, Decision on Liability, April 9, 2015, ¶ 179 (**RL-0055**) ("Consequently, the Tribunal concludes that under all the applicable BITs, Argentina is obliged to exercise due diligence to protect investors and investments primarily from physical injury, and that in any case Argentina's obligations under the relevant provisions do not extend to encompass the maintenance of a stable legal and commercial environment.").

[601] *See* Gutiérrez-Rizo I, ¶¶ 52, 64-65, 69, 72 (**RWS-01**); Castro I, ¶¶ 37-40 (**RWS-02**).

[602] *See* Gutiérrez-Rizo I, ¶ 74 (**RWS-01**); Castro I, ¶ 40 (**RWS-02**).

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

[604] *See* Christoph H. Schreuer, 'Full Protection and Security', in Thomas Schultz (ed), Journal of International Dispute Settlement, Oxford University Press, Volume 1 Issue 2), p. 354-357 (2010) (**RL-0056**).

exercise due diligence appropriate to the circumstances. Thus, whether a State has breached its FPS obligations is highly contextual and not a matter of strict liability.[605]

364. For example, in the *ELSI* case, the ICJ applied a provision in a Friendship, Commerce, and Navigation (FCN) treaty that granted "the most constant protection and security" to the nationals and their property of the respective States. The court said that "[t]he reference in Article V to the provision of 'constant protection and security' cannot be construed as the giving of a warranty that property shall never in any circumstances be occupied or disturbed."[606] To the contrary, international investment law has long recognized that a host State's obligation to protect foreign investments does not exist in a factual vacuum but requires the State "to exercise only that degree of vigilance which corresponds to the means at its disposal" and that the "vigilance which from the point of view of international law a state is obliged to exercise, may be characterized as *diligentia quam in suis*."[607] Likewise, the comments to the ARSIWA observe that "obligations of prevention are usually construed as best efforts obligations, requiring States to take all reasonable or necessary measures to prevent a given event from occurring, but without warranting that the event will not occur."[608]

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[605] *See* Christoph H. Schreuer, 'Full Protection and Security', in Thomas Schultz (ed), Journal of International Dispute Settlement, Oxford University Press, Volume 1 Issue 2), p. 354-357 (2010) (**RL-0056**).

[606] *Elettronica Sicula SpA (ELSI)* (*U.S v Italy*) [1989] ICJ Rep 15, July 20, 1989, ¶ 108 (**RL-0057**).

[607] British Claims in the Spanish Zone of Morocco, as discussed in Andrew Newcombe and Lluís Paradell, Law and Practice of Investment Treaties: Standard of Treatment (Kluwer Law International 2009), p. 310 **(RL-0058)** (citing Bing Cheng, *General Principles of Law as Applied by International Courts and Tribunals* (1953)); *see also id*. ("*Diligentia quam in suis*, a principle of Roman law, requires a level of care that one applies in one's own affairs. In his work on state responsibility, Ian Brownlie has argued that the *diligentia quam in suis* principle applies to due diligence…that measures conduct based on what could be reasonably expected of the state in question in light of its resources. The extent of due diligence an investor may expect will vary, therefore, according to local conditions. This means that due diligence is limited by a state's capacity to act – a state will not be responsible when action would have been impossible.").

[608] *See* ARSIWA, Article 14, Commentary, ¶ 14 (**CL-0017**).

365. Investment arbitration tribunals have consistently affirmed the same principle: the FPS standard requires a State to exercise "due diligence" in protecting an investment from physical damage in a manner that is reasonable under the circumstances.[609] In *Lauder v. Czech Republic,* the Arbitral Tribunal opined that:

> […] the Treaty obliges the Parties to exercise such due diligence in the protection of foreign investment **as reasonable under the circumstances**, but the Treaty does not oblige the parties to protect foreign investment against any possible loss of value caused by persons whose acts could not be attributed to the State. Such protection would indeed amount to strict liability, which cannot be imposed to a State absent any specific provision in the Treaty. [610] (emphasis added).

366. Under this standard, the State is required to take reasonable measures of prevention.[611] As noted in *Copper Mesa v. Ecuador*, a tribunal must evaluate the State's obligation, "weighing the legitimate interests of the foreign investor with the legitimate interests of the host State and others, including (especially) its own citizens and local residents."[612]

367. *Pantechniki v. Albania* is especially instructive as the tribunal found that liability under the FPS standard in a situation involving analogous conditions of civil strife depended on the host State's resources. The tribunal specifically said:

> A failure of protection and security is to the contrary likely to arise in an unpredictable instance of civil disorder which could have been readily controlled by a powerful state, but which overwhelms the limited capacities of one which is poor and fragile. There is no issue of incentives or disincentives with regard to unforeseen breakdowns of public order; ***it seems difficult to maintain that a***

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[609] *See* Christoph H. Schreuer, 'Full Protection and Security', in Thomas Schultz (ed), Journal of International Dispute Settlement, Oxford University Press, Volume 1 Issue 2), p. 354-355 (2010) (**RL-0056**). *See also Técnicas Medioambientales Tecmed, S.A. v. United Mexican States*, ICSID Case No. ARB(AF)/00/2, Award, May 29, 2003, ¶176 (**RL-0059**) ("The Arbitral Tribunal agrees with the Respondent, and with the case law quoted by it, in that the guarantee of full protection and security is not absolute and does not impose strict liability upon the State that grants it.").

[610] *Ronald S. Lauder v. Czech Republic*, Award, September 3, 2001, ¶ 308 (**RL-0060**).

[611] *Bernhard von Pezold and Others v. Republic of Zimbabwe*, ICSID Case No. ARB/10/15, Award, July 28, 2015, ¶ 596 (**CL-0162**).

[612] *Copper Mesa Mining Corporation v. Republic of Ecuador*, PCA No. 2012-2, Award, March 15, 2016, ¶ 6.81 (**RL-0059**).

government incurs international responsibility for failure to plan for unprecedented trouble of unprecedented magnitude in unprecedented places.[613]

368. Along these lines, Newcombe and Paradell warn that "[a]n investor investing in an area with endemic civil strife and poor governance cannot have the same expectation of physical security as one investing in London, New York or Tokyo."[614]

369. Consistent with these authorities, Nicaragua took appropriate measures given the context in which the invasion of Hacienda Santa Fé occurred. As described above, the Nicaraguan State had limited resources with which to address the invasion and needed to take into account widespread unrest—and the possibility of making that unrest worse—in calibrating its response to the invasion, even while upholding Inagrosa's rights to the Hacienda.[615] Nicaragua's diligent and peaceful approach to removing the illegal occupants from Hacienda Santa Fé prevented additional violence while successfully clearing the property for return to its lawful owners.

370. Finally, it is worth briefly considering the implications of a finding that Nicaragua somehow breached Article 10.5's FPS standard. The eight policemen based in Jinotega were in

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[613] *Pantechniki S.A. Contractors & Engineers v. Republic of Albania*, ICSID Case No. ARB/07/21, Award, 30 July 2009, ¶ 77 (**RL-0051**) (emphasis added). *See also Louis Dreyfus Armateurs SAS v. Republic of India*, PCA Case No. 2014-26, Final Award, September, 11 2018, ¶ 382 (**RL-0052**) ("The Tribunal considers such questions about the proper deployment of law enforcement resources to be generally judgment calls, to be made by a State acting in good faith to protect individuals and local businesses from intimidation and violence, and exercising the degree of due diligence required by international law, based on the foreseeability of unrest in a particular area, the extent of available resources, and competing demands for allocation of those resources among other areas potentially also in need of law enforcement protection. In general, tribunals should be wary of second-guessing these judgment calls, except where the evidence suggests bad faith, improper intent, or a serious lack of due diligence in response to a reasonably foreseeable and otherwise manageable threat.").

[614] Andrew Newcombe and Lluís Paradell, *Law and Practice of Investment Treaties: Standard of Treatment* (Kluwer Law International 2009), p. 310 **(RL-0058)**. *See also* N. Monebhurrun, "*Diligentia Quam In Suis* as a Technique for a Contextual Application of the Full Protection and Security Standard: Considering the Level of Development of Host States in International Investment Law," *African Journal of International and Comparative Law* (2020), p. 600 **(RL-0062)** ("[T]he *diligentia quam in suis* rule offers the possibility of taking into account the level of development of host states…As such, it moulds the [Treaty] standard's flexibility and enables a conciliation between the protection due to foreign investors and the protection which can concretely be made available by host states[.]"; p. 600 ("[T]he *diligentia quam in suis* rule offers the possibility of taking into account the level of development of host states…As such, it moulds the [Treaty] standard's flexibility").

[615] *See* Section II, *supra*.

no position to confront 300-plus armed individuals led by former *Resistencia Nicaragüense* commanders. Article 10.5 cannot mean that Nicaragua was obliged to deploy military scale force against its own citizens, some of whom had settled on the property with their families, just to clear the land faster, where more peaceful options were available—and ultimately proved successful. Still less can it mean that Nicaragua was required to do so in the midst of a national crisis marked by dangerously escalating political violence.[616]

371. DR-CAFTA's FPS clause required nothing more than was done—peacefully and effectively—to restore the Hacienda Santa Fé to Riverside without bloodshed. Nicaragua is not liable under Article 10.5.[617]

3. There Has Been No Expropriation and Nicaragua's Consistent Policy with Respect to Hacienda Santa Fé Has Been to Ensure that It Is Peacefully Returned to Inagrosa

372. Claimant alleges an unlawful expropriation on the theory that the Nicaraguan State sent the land invaders to Hacienda Santa Fé and encouraged and supported their occupation of the property. To succeed on such a claim, Claimant would have to establish the elements of an unlawful expropriation under Article 10.7 of DR-CAFTA. Specifically, DR-CAFTA provides that an expropriation by the State will be unlawful unless undertaken: "(a) for a public purpose; (b) in

[616] Lopez I, ¶12 **(RWS-04)**.

[617] Claimant's few cited authorities are not to the contrary. *See* Memorial. ¶¶ 566-574. *AAPL v. Sri Lanka* is inapposite. It concerned damage to an investment from a government military operation against rebel forces and found liability where it found that the government should have undertaken more precautions before launching an attack at suspected rebels on the investor's property. The AAPL tribunal nevertheless recognized that FPS was a contextual inquiry and looked to whether the government's measures were appropriate in the circumstances, characterizing its analysis as going to a "due diligence obligation." In *Zhongshan v. Nigeria*, Riverside contends that the tribunal found that the active participation of the Nigerian police in assisting wrongdoers was a breach of the FPS standard. Zhongshan is also inapposite here because Riverside's assertions that the Nicaraguan State supported the invasion of the Hacienda are unsupported by the evidence. And in *Wena Hotels v. Egypt*, Riverside contends that Egypt was found to have breached its obligation to provide full protection and security where the State was aware of the malicious intentions of private actors and took no actions to prevent the intended harm to the claimant's investment. Here, the Nicaraguan state had no knowledge of the planned invasion of Hacienda Santa Fé and extremely limited ability to respond to one. Nevertheless, as soon as the Police were advised of the invasion, they took what steps they could despite the challenging circumstances, as set out above.

a non-discriminatory manner; (c) on payment of prompt, adequate, and effective compensation…; and (d) in accordance with due process of law and Article 10.5."[618]

373. Under any version of the facts, there has been no expropriation for which Nicaragua can be held liable under DR-CAFTA because Nicaragua never took the Hacienda in the first place. The reality is that the Nicaraguan State has never varied in its recognition of Inagrosa's ownership rights in the Property. Nor has it ever recognized the legality of any seizure of Riverside's investment or condoned any effort to regularize the status of illegal occupants on Inagrosa's land. Having appropriately de-escalated a dangerous situation at the time of the invasion in 2018, Nicaraguan authorities subsequently peacefully cleared the land of unlawful occupiers through a considerable and costly effort.[619] Since 2022, Nicaragua has held the Hacienda in trust for Inagrosa, despite Inagrosa's remarkable and continuing refusal to accept back its undisputed property.[620] When faced with these facts during Claimant's unnecessary motion practice before this Tribunal, Claimant had no answer.[621] No "taking" by the State has occurred.

374. In any event, for the additional reasons set forth below, Claimant's expropriation claim must fail.

a. *Claimant Has Not Proven that the Invaders' Conduct Is Attributable to the State as Required Under International Law*

375. As Riverside acknowledges, "the act of expropriation requires an adverse taking of property by the government," and "***only*** a taking by the government" can result in an

[618] DR-CAFTA, Art. 10.7 (**CL-0001**).

[619] Gutiérrez-Rizo I, ¶¶ 68-80 (**RWS-01**).

[620] Gutiérrez-Rizo I, ¶¶ 79-80 (**RWS-01**). *See also* Procedural Order No. 4 ¶¶ 33-34 (holding that the protective order issued by the court is a provisional measure for the purpose of protecting the property and that the order, by its terms, does not preclude the Claimant from seeking repossession of the property at any time) and Nicaragua's Response to Riverside's Submission dated November 13, 2022.

[621] *See generally* Procedural Order No. 4.

expropriation.[622] It is undisputed that Hacienda Santa Fé was invaded. But an invasion by private actors, however wrongful, does not give rise to liability for expropriation under the Treaty. Riverside's entire expropriation case rests on the premise that the *invaders* were "part of the state" and "operating under the control and direction of the government of Nicaragua."[623] Unless the *invaders'* conduct is attributable to the State, Riverside cannot satisfy the crucial element of State action and its claim must fail.

376. In a seeming effort to brush the issue aside, Riverside breezily asserts that the "matter of control and direction…is moot in light of the paramilitaries' admitted role as a part of the state under Nicaraguan law."[624] But this is anything but a moot point—it is a general principle of international law that "the conduct of private persons or entities is not attributable to the State under international law."[625] And it is likewise a general principle of international law that the claimant bears the burden of proving State responsibility for a breach of the applicable treaty.[626]

377. In other words, the burden of proof is on Claimant to show that are attributable to the State. That burden is especially high where, as here, Claimant effectively alleges a conspiracy between governmental and non-governmental actors.[627] Conspiracy "must…be proved by

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[622] Memorial, ¶ 474 (emphasis added).

[623] Memorial, ¶ 650.

[624] Memorial, ¶ 651.

[625] ARSIWA, Art. 8 (**CL-0017**) ("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."). ARSIWA, Art. 8, Commentary, ¶ 1 (**CL-0017**) ("As a general principle, the conduct of private persons or entities is not attributable to the State under international law. Circumstances may arise, however, where such conduct is nevertheless attributable to the State because there exists a specific factual relationship between the person or entity engaging in the conduct and the State.").

[626] *See* ARSIWA, Art. 19, Commentary, ¶ 8 (**CL-0017**) (explaining that "[i]n a bilateral dispute over State responsibility, the onus of establishing responsibility lies in principle on the claimant"); *Rupert Joseph Binder v. Czech Republic*, Final Award, July 15, 2011, ¶ 392 (**RL-0063**); *Louis Dreyfus Armateurs SAS v. The Republic of India*, PCA Case No. 2014-26, Award, September 11, 2018, ¶ 316 (**RL-0052**) ("A claimant bears the burden of showing not only that certain State conduct has occurred, but also that it occurred *vis-à-vis* (*i.e.*, with the requisite connection to) the protected investment.").

[627] *See* Memorial, ¶¶ 268, 755, 774.

evidence which leads clearly and convincingly to the inference that a conspiracy has occurred."[628] That is because, as the *Besserglick v. Mozambique* tribunal observed, conspiracy "is easy to allege" but "not that easy to prove."[629] To prove a conspiracy, Riverside must demonstrate through clear and convincing evidence that "different actions pursued on different paths by different actors are linked together by a common and coordinated purpose."[630] And as Judge Higgins noted in the *Oil Platforms* case, "the graver the charge the more confidence must there be in the evidence relied upon."[631]

378. Riverside comes nowhere close to meeting this burden.

379. Riverside has shown that an unlawful land invasions of Hacienda Santa Fé took place. That much is undisputed, although Nicaragua strongly disagrees with the way in which Claimant mischaracterizes these events. An unlawful invasion of Hacienda Santa Fé—one which Nicaragua considered unlawful at the time—did occur. But it was not an invasion by or under the direction or control or supported by the State.

380. To the contrary, the evidence is that the State did not direct or control, and never acquiesced in the invasion or occupation of Hacienda Santa Fé. The State also took extensive and successful measures to return the property to Inagrosa, as detailed above at in the facts section.[632]

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[628] *Rumeli Telekom A.S. and Telsim Mobil Telekomunikasyon Hizmetleri A.S. v. Republic of Kazakhstan*, ICSID Case No. ARB/05/16, Award, July 29, 2008, ¶ 709 (**CL-0096**).

[629] *Oded Besserglik v. Republic of Mozambique*, ICSID Case No. ARB(AF)/14/2, Award, October 28, 2019, ¶ 362 **(RL-0064)**; see also *Bayindir Insaat Turizm Ticaret Ve Sanayi A.S. v. Islamic Republic of Pakistan (I)*, ICSID Case No. ARB/03/29, Award, August 27, 2009, ¶¶ 223-224 **(RL-0065)** ("At the outset, the Tribunal recalls that the standard for proving a conspiracy involving a bad faith component is a demanding one. The Claimant has referred to the award in Waste Management v. Mexico, which defines conspiracy as 'a conscious combination of various agencies of government without justification to defeat the purposes of an investment agreement.' The Tribunal considers that this definition provides good guidance.").

[630] *The Rompetrol Group N.V. v. Romania*, ICSID Case No. ARB/06/3, Award, May 6, 2013, ¶ 273 **(RL-0067)**.

[631] Separate Opinion of Judge Higgins in the *Oil Platforms* case, ICJ Reports 2003, p. 234 **(RL-0066)**.

[632] *See* Section II, *supra*.

381. In addition, it is undisputed that Nicaragua has *always* and at *all relevant times* to this dispute recognized Inagrosa as the sole owner of Hacienda Santa Fé. Riverside has not produced a single piece of contemporaneous evidence to refute that conclusion. Moreover, as Nicaragua previously demonstrated before this Tribunal, Claimant declined to retake possession of Hacienda Santa Fé after Nicaragua cleared the property of the illegal occupants in 2021. To this day, Nicaragua continues to hold Hacienda Santa Fé in judicial trust for Inagrosa despite Claimant having abandoned the property.[633]

382. As of September 9, 2021, Claimant was informed that it could re-take possession of Hacienda Santa Fé as it was "in a position to be controlled, managed and developed by its legal owners."[634] In that same communication, Claimant was made aware that its apparent abandonment of the property had encouraged the illegal invaders to return.[635] Despite Claimant's failure to take possession of Hacienda Santa Fé at that time, Nicaragua continues to hold and protect Hacienda Santa Fé for the benefit of Inagrosa—in full recognition of its proprietary interests—free from unlawful, third-party occupants.

383. On these facts, there can be no liability for expropriation under Article 10.7.[636]

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[633] Nicaragua's Response to Riverside's Submission dated November 13, 2022.

[634] Letter from Foley Hoag to Appleton & Associates dated September 9, 2021 (**C-0116**).

[635] Letter from Foley Hoag to Appleton & Associates dated September 9, 2021 (**C-0016**) ("During 2018, for reasons unrelated to any actions by the Government, portions of the property were occupied unlawfully by local farmers and farm workers, at their own initiative. The Government managed to persuade them to leave peacefully, but, when it appeared that the property had been abandoned by its owners, they returned, again on their own initiative and despite the policy of the Government to respect private property.").

[636] Assuming *arguendo* Claimant could overcome its burden of proving State attribution, Riverside frames its expropriation claim in a contradictory manner. Riverside, in one brief paragraph, alleges that "the expropriation resulted from a seizure. This makes it a direct expropriation." Memorial, ¶ 473. Yet, in the very next paragraph, Riverside alleges that "Nicaragua instead did a *de facto* taking" and that the Tribunal should consider the "sole effects" doctrine. Memorial, ¶ 474. While Claimant insists that the "law of expropriation is clear," it has apparently conflated the two distinct standards for direct and indirect expropriation. Memorial, ¶ 474. Nicaragua reserves its rights to defend itself more fully in its Rejoinder, if Claimant further articulates its indirect expropriation theory. While Claimant concedes that "a substantial deprivation of an investment occurs when an investment is no longer capable of generating a commercial return" and when "an investment whose most economically optimal use has been rendered useless or whose value has been neutralized or destroyed," *see* Memorial, ¶ 496, Claimant does not explain how a

4. Nicaragua Did Not Discriminate Against Riverside's Investment in Breach of the Treaty's National Treatment or Most Favored Nation Obligations

384. Riverside claims that Nicaragua has breached its obligations under Article 10.3 and Article 10.4 of DR-CAFTA.[637] These Articles respectively provide:

> **Article 10.3: National Treatment**
>
> 1. Each Party shall accord to investors of another Party treatment no less favorable than that it accords, in like circumstances, to its own investors with respect to the establishment, acquisition, expansion, management, conduct, operation, and sale or other disposition of investments in its territory.
>
> 2. Each Party shall accord to covered investments treatment no less favorable than that it accords, in like circumstances, to investments in its territory of its own investors with respect to the establishment, acquisition, expansion, management, conduct, operation, and sale or other disposition of investments.
>
> 3. The treatment to be accorded by a Party under paragraphs 1 and 2 means, with respect to a regional level of government, treatment no less favorable than the most favorable treatment accorded, in like circumstances, by that regional level of government to investors, and to investments of investors, of the Party of which it forms a part.
>
> **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,

"substantial" deprivation could result from the occupation of a largely abandoned property or from an even an unlawful occupation that was swiftly cleared. Indeed, a mere reduction in value of the investment does not amount to expropriation, even where the reduction in value is a significant one. *See El Paso Energy International Company v. Argentine Republic*, ICSID Case No. ARB/03/15, Award, October 31, 2011, ¶ 233 (**RL-0068**); *Glamis Gold, Ltd. v. United States of America*, UNCITRAL, Award, June 8, 2009, ¶¶ 361, 536 (**RL-0069**); *Tza Yap Shum v. Republic of Peru*, ICSID Case No. ARB/07/6, Award, July 7, 2011, ¶ 151 (**RL-0070**); *Grand River Enterprises Six Nations, Ltd. et al. v. United States of America*, UNCITRAL, Award, January 12, 2011, ¶ 151 (**CL-0146**) ("Non-NAFTA tribunals also have held that an expropriation requires very great loss or impairment of all of a claimant's investment. The Iran-U.S. Claims Tribunal looked to actions 'depriving the owner of virtually all of its property or property rights.'").

[637] Memorial, Section V.E.

expansion, management, conduct, operation, and sale or other disposition of investments.

385. Specifically, Riverside claims that Nicaragua breached these Articles because "[o]thers lawfully possessing or owning land in the territory of Nicaragua were treated more favorably than Inagrosa."[638]

386. Claimant's Article 10.3 and 10.4 claims are legally meritless and factually unsubstantiated. ***First***, Claimant has failed to prove that Nicaragua accorded better treatment to other investors in like circumstances; ***second***, any difference that might have existed with respect to the State's response to other land invasions *if any* was justified under the unique circumstances surrounding Hacienda Santa Fé's invasion; and ***third***, CAFATA-DR and international law did not require that, in the context of a civil strife, Riverside should have received better treatment than other investors.

a. *Claimant Has Failed to Prove That Nicaragua Accorded Better Treatment to Other National and Foreign Investors*

387. National treatment and MFN are relative standards.[639] They are intended to ensure that foreign investors and their investments are treated no less favorably than other domestic investors or those from third-party countries.[640] Therefore, a comparison between investors and their investments is inherent in the analysis.

388. In this context, the standard for a national or MFN treatment claim is the same[641] and includes three elements: (i) other investors or their investments must have been in like

[638] Memorial, ¶ 761.

[639] Anqi Wang, *Applying the MFN Clause for higher Substantive Treatment* in The Interpretation and Application of the Most-Favored Nation Clause in Investment Arbitration, 74, 92 (Brill, 2022) (**RL-0071**).

[640] *See* DR-CAFTA, Articles 10.3 and 10.4 (**CL-0001**).

[641] *See* Memorial, ¶¶ 599-600 ("True 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

circumstances with Claimant or Inagrosa; (ii) Claimant or Inagrosa must have received a certain treatment from the State; and (iii) Claimant or Inagrosa must have been treated less favorably than the comparators in like circumstances.[642] The burden of proving each element rests squarely with the Claimants,[643] but as explained below, Claimant does not satisfy the burden for any of these elements.

389. Regarding the first element, the tribunal in *Apotex v. United States* set out a list of factors to consider, namely whether the comparators (i) are in the same economic or business sector; (ii) the investment in or are businesses that compete with the investor or its investments in terms of good or services; (iii) are subject to a comparable legal regime or regulatory requirements.[644]

390. At the threshold, while applying the standard, Claimant makes the wrong comparison. Riverside claims that all others lawfully possessing or owning land are in like circumstances to Inagrosa.[645] Ownership or possession of land is an extremely broad category. But even then, it would only be relevant if the State had actually seized the property.[646] And even in

investor […] CAFTA Article 10.4 on MFN Treatment provides a similar obligation to provide investors and their investments […]").

[642] *United Parcel Service of America Inc. v. Canada*, UNCITRAL, Award, May 24, 2007, ¶ 83 (**CL-0015**).

[643] *United Parcel Service of America Inc. v. Canada*, UNCITRAL, Award, May 24, 2007, ¶ 84 (**CL-0015**) ("Failure by the investor to establish one of those three elements will be fatal to its case. This is a legal burden that rests squarely with the Claimant. That burden never shifts…").

[644] *Apotex v. United States*, ICSID Case No. ARB(AF)/12/1, Award, August 25, 2014, ¶ 8.15 (**RL-0072**).

[645] Memorial, ¶¶ 608, 761.

[646] The purpose of national and MFN treatment, as many tribunals and treaty parties have unanimously affirmed, is to prevent "nationality-based discrimination." *See Marvin Feldman v. United Mexican States*, ICSID Case No. ARB(AF)/99/1, Award, December 16, 2002, ¶ 181 (**CL-0044**) ("It is clear that the concept of national treatment as embodied in NAFTA and similar agreements are designed to prevent discrimination on the basis of nationality, or 'by reason of nationality.'"); *Cargill v. Mexico*, ICSID Case No. ARB(AF)/05/2, Award, September 18, 2009, ¶ 220 (**RL-0073)** ("Moreover, the Tribunal also concludes that the discrimination was based on nationality both in intent and effect."); *GAMI Investments Inc. v. Mexico*, UNCITRAL, Final Award, November 15, 2004, ¶ 115 (**RL-0075**) ("It is not conceivable that a Mexican corporation becomes entitled to the anti- discrimination protections of international law by virtue of the sole fact that a foreigner buys a share of it."); *The Loewen Group Inc. et al v. United States*, ICSID Case No. ARB(AF)/98/3, Award, June 26, 2003, ¶ 139 (**RL-0075**) ("Article 1102 [national treatment] is directed only

that situation, Claimant would need to prove that the comparator investors are in the same economic sector or compete with Claimant to meet the standard.[647] Nicaragua did not seize Hacienda Santa Fé (the property remains available for Claimant to take possession),[648] and the actions of the illegal invaders and occupants were not attributable to the State.[649] The proper question for any discrimination analysis in thus how the State responded to similar private land invasions during the 2018 disturbances. This is a fact-intensive enquiry that needs to take into account the circumstances of the investors in question.[650]

391. To be sure, Prof. Wolfe superficially refers to one case in which the State allegedly gave better treatment to land invasions.[651] But Claimant cannot pretend to fulfill its burden of proof by submitting two news articles that contain very limited information that makes it almost impossible to make a proper comparison.[652] Claimant makes no effort at all to analyze how that case was comparable to the invasions of Hacienda Santa Fé. Even with the limited available information in the news articles, it is clear that this case widely differs for multiple reasons, and in any event, the treatment was no different.

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to nationality-based discrimination and that it proscribes only demonstrable and significant indications of bias and prejudice on the basis of nationality […]").

[647] *See Mercer International, Inc. v. Canada*, ICSID Case No. ARB(AF)/12/3, Award, March 6, 2018, ¶ 7.35 (**RL-0076**) (holding that the comparisons cannot be made in the abstract and need to be made on the particular circumstances of the impugned treatment).

[648] *See* Section II, *supra*.

[649] *See* Section II, *supra*.

[650] Anqi Wang, *Applying the MFN Clause for higher Substantive Treatment* in The Interpretation and Application of the Most-Favored Nation Clause in Investment Arbitration, 74, 91 (Brill, 2022) (**RL-0071**). *See also Apotex Holdings Inc. and Apotex Inc. v. United States of America*, ICSID Case No. ARB(AF)/12/1, Award, August 25, 2014, ¶ 8.4 (**RL-0072**) ("[E]stablishing a violation of [the MFN clause] involves an inherently fact-specific analysis ").

[651] Wolfe, ¶ 59 (**CES-02**); Wilfredo Miranda Aburto, "Ortega ordena desalojar a tomatierras," *Confidencial*, September 23, 2018 (**C-0230**); "Mal paga el régimen de Daniel Ortega a toma tierras que le han apoyado," *La Prensa*, October 14, 2018. (**C-0231**).

[652] *United Parcel Service of America, Inc. (UPS) v. Government of Canada*, Award on the Merits, May 24, 2007, ¶ 84 (**CL-0015**) (saying that failure by the investor to establish the elements to prove a breach of MFN/NT standard will be fatal to its case and that this burden never shifts to the State).

392. ***First***, the events described in the articles referenced by Prof. Wolfe took place in different areas of the country, not only in Jinotega, and Claimant has not demonstrated that the circumstances or the level of violence in those areas was the same.

393. ***Second***, the articles referenced by Prof. Wolfe say nothing about when the other invasions started. As demonstrated above, the communities at El Pavón have been disputing this property since 1990 and cannot be compared to any land taking that possibly, was just a wrongdoing resulting from the unrest in 2018.

394. ***Third***, the articles referenced by Prof. Wolfe do not identify the invaders. Based on the information gathered by the Police, the invaders at Hacienda Santa Fé were mainly led by former members of the *Resistencia Nicaragüense*. This was, as discussed above, an important factor in determining the approach that the Police would take in responding to their unlawful invasion and occupation of Hacienda Santa Fé during the 2018 civil strife.

395. *Fourth*, the referenced articles do not explain the conditions in which other land invasions may have happened. Again, such circumstances materially impact the approach that the authorities would take in different circumstances.

396. The likeness criterion is considered a threshold issue when it comes to establishing a *de facto* MFN/NT breach, and the failure to make out a case on the issue of likeness has been one of the main reasons for tribunals to reject these types of claims.[653] Claimant has not presented any analysis on this element.

397. Regarding the second element, Claimant argues that Article 10.3 of DR-CAFTA requires that the relevant treatment must be with respect to the establishment, acquisition,

[653] Anqi Wang, *Applying the MFN Clause for higher Substantive Treatment* in The Interpretation and Application of the Most-Favored Nation Clause in Investment Arbitration, 74, 92 (Brill, 2022) (**RL-0071**).

expansion, management, conduct, operation, and sale or other disposition of investments and that the alleged seizure of land is a disposition of an investment.[654] Nicaragua has not interfered with Claimant's investment in any way. There has not been any seizure, administrative or judicial order or any regulatory measure that has prevented Claimant from pursuing its business objectives or interfered with its rights in Hacienda Santa Fé.

398. With respect to the third element, in both cases referred to by Prof. Wolfe, the illegal occupants were removed once the situation had eased, and the risk of violence was reduced, *i.e.*, the illegal occupants were not removed at the height of the widespread unrest and civil strife that Nicaragua experienced in 2018.[655] This is consistent with the peaceful and de-escalatory approach that the government took at Hacienda Santa Fé, and by which the police started to take steps to relocate the illegal occupants once the risk of violence was reduced.[656]

399. For the reasons stated above, Claimant has failed to prove the elements for a breach of National or MFN treatment. Claimant has likewise failed to identify other cases in which the State provided better treatment to investors or investments in like circumstances.

b. *Nicaragua's Approach Was Particularly Appropriate with Respect to The Invaders at Hacienda Santa Fé*

400. Claimant argues that Inagrosa is entitled to treatment as favorable as that provided to those in like circumstances to those investments and investors in Nicaragua.[657] As demonstrated in the previous section, Claimant has failed to show that other investors in like circumstances were treated better.

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[654] Memorial, ¶¶ 639-640.

[655] Wilfredo Miranda Aburto, "Ortega ordena desalojar a tomatierras," *Confidencial*, September 23, 2018 (**C-0230**); "Mal paga el régimen de Daniel Ortega a toma tierras que le han apoyado," *La Prensa*, October 14, 2018 (**C-0231**).

[656] Castro I, ¶ 24 (**RWS-02**); Herrera I, ¶ 24 (**RWS-03**).

[657] Memorial, ¶ 767.

401. Tribunals in investment arbitration have noted that different treatment does not constitute discriminatory treatment if the investors were in distinct circumstances.[658] Indeed, even if Claimant had meaningfully identified other comparable cases (and it has not), factors unique to the situation made Nicaragua's approach to the unlawful occupation of Hacienda Santa Fé particularly appropriate.

402. ***First***, the 2018 unrest was not the sole cause of Hacienda Santa Fé's taking. The unlawful occupation of the property started in the early 1990s after the administration of then-President Violeta Barrios de Chamorro raised the possibility of resettling demobilized contra fighters on properties including Hacienda Santa Fé.[659] As noted above, many of these agreements were not fulfilled.[660] In some instances, the properties were private, so the government had to find alternative solutions to deal with the problem. Negotiation and relocations processes have taken years and the Government's policy has been to seek to peacefully resolve the situation while respecting private property rights.[661]

403. ***Second*****,** and separately, at the height of 2018 unrest the National Police adopted a non-interventionist approach to land invasions. In the context of discussions between the government and civil society groups, President Ortega ordered the Police to stay in their stations

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[658] *See e.g., Mercer International, Inc. v. Canada*, ICSID Case No. ARB(AF)/12/3, Award, March 6, 2018, ¶ 7.46 (**RL-0076**) (deciding that the different treatment did not constitute "discriminatory treatment," and that the investors were in distinct circumstances resulting from Canada's consistent application of its domestic policy.); *Grand River Enterprises Six Nations, Ltd., et.al. v. United States of America*, Award, January 12, 2011, ¶ 165 (**CL-0146**) (denying an MFN claim because the claimant failed to identify a qualified comparator); *Pope & Talbot v. Government of Canada*, Award on the Merits of Phase 2, April 10, 2001, ¶ 79 (**CL-0137**) (determining that discrimination could not arise if the foreign and domestic investors were not in like circumstances, even if the two categories of investors were treated differently). *See also Windstream Energy LLC v. The Government of Canada (I)*, PCA Case No. 2013-22, Submission of the United States of America, January 12, 2016, ¶¶ 30-31 (**RL-0077**).

[659] Gutiérrez-Rizo, ¶¶ 13-16 (**RWS-01**); Herrera I, ¶ 14 (**RWS-03**).

[660] *See* Section II, *supra*.

[661] Gutiérrez-Rizo, Section 1D.3 (**RWS-01**); Castro I, ¶ 39 (**RWS-02**).

as a de-escalatory measure and in the interests of calming a violent situation.[662] This meant that during this time, Police response capacity was reduced.[663]

404. ***Third***, the invasion of Hacienda Santa Fé by nearly over 300 people in June 2018 was led by heavily armed ex-members of the *Resistencia Nicaragüense*.[664] Nicaragua entered into peace accords with ex-members of the *Resistencia Nicaragüense* in 1990.[665] Taking a non-violent approach in this context was especially important given Nicaragua's recent history.

405. ***Fourth***, Inagrosa's employees could have resorted to violence. According to the testimony of Mr. Gutierrez, the guards and employees at Hacienda Santa Fé had several weapons which they refused to hand over to the Police.[666] He even admits giving an order to hide some of the guns.[667] This demonstrates that there was a plausible risk that employees were planning to fight back the invaders which would have inevitably resulted in more violence and potentially civil casualties.

406. ***Fifth***, the National Police had only eight police agents assigned to San Rafael del Norte, where the Hacienda is located.[668] The nationwide crisis made reinforcement of the Police in San Rafael del Norte unrealistic.

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[662] *See* Herrera I, ¶ 20 (**RWS-03**); Castro I, ¶ 24 (**RWS-02**) (explaining that President Ortega ordered the Police to stay in their stations to avoid an escalation of violence; this order was in place from the end of May until the end of July).

[663] *See* Section II, *supra*.

[664] *See* Castro I, ¶ 34 (**RWS-02**) (summarizing profiles of the illegal occupants' leaders). *See also* Section II *supra*.

[665] Memorial, ¶ 289.

[666] Gutierrez, ¶ 53 (**CWS-02**).

[667] Gutierrez, ¶ 53 (**CWS-02**).

[668] Herrera I, ¶ 25 (**RWS-03**); Certification issued by the National Police dated November 18, 2022 (**R-0028**) (saying that there are only 8 members assigned to the Police in San Rafael del Norte).

407. In sum, the unique circumstances that surrounded the invasion of Hacienda Santa Fé in June and July of 2018 show that the approach and measures taken by the Police were necessary and reasonable.

c. *DR-CAFTA and International Law Do Not Require That, in a Context of Civil Strife, Riverside Should Have Received Better Treatment Than Other Investors*

408. Nicaragua has already demonstrated that in the context of civil strife, a state cannot be held liable for interference with a foreign investment unless the investor can demonstrate that the state accorded better treatment to its own nationals or foreigners from third countries.[669] This is supported by Article 10.6 of DR-CAFTA and customary international law.[670]

409. Given the situation in Nicaragua in 2018, the logical implication of Riverside's claims is that Nicaragua should have deployed hundreds of police agents to forcefully remove the roughly 300 armed invaders that occupied Hacienda Santa Fé in June and July of 2018.[671] That is not what DR-CAFTA, or international law requires and would have constituted treatment far "better" than that received by any other foreign or Nicaraguan investor at the time.

410. The State and especially the Police acted diligently and provided reasonable measures to protect the lives of the workers in Hacienda Santa Fé and to protect the property in compliance with its obligations under DR-CAFTA.

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[669] *See* Section IV.C, *supra*.

[670] Martti Koshkenniemi, Report of the Study Group of the International Law Commission: Fragmentation of International Law: Difficulties Arising from The Diversification And Expansion Of International Law, DOCUMENT A/CN.4/L.682 and Add.1, p. 19 (**RL-0037**); Monebhurrun, "*Diligentia Quam In Suis* as a Technique for a Contextual Application of the Full Protection and Security Standard: Considering the Level of Development of Host States in International Investment Law," *African Journal of International and Comparative Law* (2020), p. 60 (**RL-0062**); Legal Opinion of the Law Officers of the British Crown, 16 Feb. 1863, in L. McNair, International Law Opinions (1956), ii, at 245 (**RL-0072**).

[671] Memorial, ¶ 174, 176 (saying that on June 16, 2018, a force of paramilitaries led approximately 200 to 300 armed invaders and that Inagrosa management called the local police while the invasion was taking place seeking immediate assistance).

* * *

411. For all the reasons stated above, Riverside has failed to satisfy the NT and MFN standards. Specifically, Riverside has failed to identify any other national or foreign investors or investments in like circumstances to which the State provided better treatment. And even if the Tribunal were to conclude that Riverside satisfied NT and MFN standards, these claims, together with Riverside's expropriation, FET, and FPS claims, would still fail because Nicaragua's actions were subject to the provisions of Articles 21.2(b) and 10.6 of DR-CAFTA.

V. RIVERSIDE IS NOT ENTITLED TO COMPENSATION

412. Riverside has no right to the damages it seeks. Specifically, Riverside is seeking three categories of damages: (i) damages related to the alleged destruction of its investment in Inagrosa and Hacienda Santa Fé; (ii) moral damages; and (iii) interest.[672] To assess the quantum of these alleged damages, Riverside submits an expert report from Mr. Vimal Kotecha (the "Kotecha Report").

413. To calculate the fair market value ("FMV") of Riverside's investment in Inagrosa and Hacienda Santa Fé when the invasion allegedly began, *i.e.*, on June 16, 2018 (the "Valuation Date"), the Kotecha Report utilizes a discounted cash flow ("DCF") methodology, designed to calculate profits Riverside allegedly would have earned from businesses Inagrosa was allegedly pursuing at Hacienda Santa Fé by the Valuation Date: the Hass avocado and forestry businesses. Using this methodology, the Kotecha Report concludes that Riverside is owed the extraordinary sum of USD $644,098,011 based on the assumptions that Inagrosa would have expanded its avocado business from 40 hectares to 1,000 hectares (as Riverside claims Inagrosa was prepared to do) and that Inagrosa would have, at some point, operated a forestry business (it is undisputed that Inagrosa had not yet started this business as of the Valuation Date).[673]

414. In the alternative, the Kotecha Report concludes that Riverside is owed the sum of USD $158,821,277, if the Tribunal finds that Inagrosa would only have expanded its avocado business by 200 hectares to a total of 240 hectares, an expansion Riverside claims to have been "underway," but not completed, as of the Valuation Date.[674]

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[672] *See* Memorial, § VII.

[673] *See* Memorial, ¶¶ 852-853.

[674] *See* Memorial, ¶¶ 852-853.

415. The Kotecha Report does not provide a quantum of damages in the event that the Tribunal finds it cannot credit ***any*** component of the alleged expansion of the avocado business, thus restricting the lost profits calculus to those profits generated only by the 40-hectare orchard that Inagrosa had allegedly planted as of the Valuation Date.

416. Nor does the Kotecha Report provide a quantum of damages in the event that the Tribunal finds it cannot reliably compute lost profits related to the forestry business, given that this business did not even exist as of the Valuation Date.

417. Notably, the Kotecha Report does not provide an alternative methodology to the DCF methodology when assessing the FMV of Inagrosa's investments in these businesses. As a result, if the Tribunal finds the DCF methodology is inappropriate here because calculating lost profits derived from the Hass avocado and forestry businesses would be an entirely speculative exercise (as Nicaragua argues in this case), Riverside would have failed to prove any damages in relation to these alleged investments.

418. In addition to its assessment of the FMV of Riverside's investments, the Kotecha Report concludes that a compounded interest rate of 9 percent must be applied to any damage award.[675] This interest rate is based on Nicaragua's statutory domestic court interest rate in 2018.

419. Finally, Riverside contends that, in addition to economic damages, it is owed USD $45 million in moral damages.[676]

420. As Nicaragua's quantum experts, Messrs. Timothy Hart and Kenneth Kratovil of Credibility International ("Credibility") explain in their expert report (the "Credibility Report"), the Kotecha Report's use of the DCF methodology is inappropriate here because: (i) the Report

[675] Memorial, ¶ 807.

[676] *See* Memorial, ¶ 854.

does not consider ***any*** contemporaneous financial records in its DCF model (since Riverside produced almost none); and (ii) assessing lost profits for pre-operational avocado and forestry businesses, like those that Inagrosa purported to operate at Hacienda Santa Fé, is an exercise that requires rank speculation.[677]

421. Indeed, the Kotecha Report's conclusion that Nicaragua owes Riverside hundreds of millions of dollars in damages is based entirely on a letter from Mr. Rondón to Mr. Kotecha, dated September 12, 2022 (*i.e.*, 32 days before Riverside submitted the Memorial), that spoonfed Mr. Kotecha a slew of unverifiable, self-serving factual assumptions, which the Kotecha Report adopted wholesale in its DCF model without qualification (the "Rondón Letter").[678] This act calls into question Mr. Kotecha's independence in this case.[679] And it explains how the Kotecha Report concluded that Riverside is owed hundreds of millions of dollars in lost profits associated with alleged avocado and forestry "businesses" that had no track record, no permits, no documents, no employees, no funding, no working capital and no chance of getting off the ground.[680]

422. In any event, Riverside's damages claim must be rejected because: (i) Riverside has not proven (and cannot prove) Nicaragua caused the alleged harm, (ii) if anything, the evidentiary record confirms Inagrosa and Riverside abandoned the avocado and forestry businesses before the alleged measures began; (iii) the DCF methodology is completely inappropriate because the alleged businesses were, at best, overly speculative and, at worst, illegal and subject to sanctions under Nicaraguan law; and (iv) the Kotecha Report's DCF methodology

[677] Credibility I, § 4.1 (**RER-02**).

[678] *See* Management Representation Letter from Riverside Coffee, LLC to Richter Inc., September 12, 2022 (**C-0055**).

[679] Credibility I, § 3.1 (**RER-02**).

[680] *See* Credibility I, § 4.1 (**RER-02**); Sections I.C, I.D, *supra*.

is riddled with unsupported inputs and assumptions derived entirely from the self-serving Rondón Letter and refuted by the evidentiary record.

423. Further, any damages award must be offset or reduced in order to account for the facts that: (i) Riverside contributed to its own alleged harm when it abandoned Hacienda Santa Fé on two separate occasions – first, in 2017, allowing hundreds of invaders to invade and occupy the Hacienda for a year without detection and, second, in August 2018, allowing the evicted invaders to return to the Hacienda,; (ii) Riverside failed to mitigate its alleged damages when it failed to take back the Hacienda in September 2021, after Nicaragua succeeded (yet again) in evicting the invaders; and (iii) each of the avocado and forestry businesses were operating illegally, without any of the required permits or authorizations, and are, thus, subject to significant economic sanctions under Nicaraguan law; and (iv) Inagrosa and Riverside stopped paying the property taxes related to the Hacienda, which amount to approximately USD $140,772.26 (as of December 2022).

424. Furthermore, as also set forth below, Riverside has no standing to claim moral damages and otherwise has not satisfied the exacting standard associated with that claim.

A. Riverside Has Not Proven that Nicaragua Caused the Damage It Claims

425. Should this Tribunal hold that Nicaragua breached the Treaty, Nicaragua would owe Riverside only the damages resulting from that breach. Riverside, thus, bears the burden of establishing a causal link between the alleged breach and the requested damages.[681] Riverside has not met this burden.

[681] *See* ARSIWA, Art. 31, Commentary, ¶ 9 (**CL-0017**) ("Paragraph 2 [of Article 31] addresses a further issue, namely the question of a causal link between the internationally wrongful act and the injury. It is only '[i]njury … caused by the internationally wrongful act of a State' for which full reparation must be made. This phrase is used to make clear that the subject matter of reparation is, globally, the injury resulting from and ascribable to the wrongful act, rather than any and all consequences flowing from an internationally wrongful act."), ¶ 10 ("The notion of a sufficient causal link which is not too remote is embodied in the general requirement in article 31 that the injury should be in consequence of the wrongful act[.]"); *S.D. Myers, Inc. v. Government of Canada*, UNCITRAL, Partial Award, November 13, 2000, ¶ 316 (**CL-0007**) ("[C]ompensation is payable only in respect of harm that is proved to have a sufficient causal link with the specific [treaty] provision that has been breached"); *Electrabel S.A. v. Republic of*

426. Well-settled investor-State caselaw confirms investors will satisfy the causal link requirement through a showing that the State's misconduct proximately caused the alleged harm. As explained by the tribunal in *Lemire v. Ukraine*, a showing of proximate cause is made if the causal relationship is direct and not remote.

> The Tribunal agrees with Respondent that it is a general principle of international law that injured claimants bear the burden of demonstrating that the claimed quantum of compensation flows from the host State's conduct, and that the ***causal relationship is sufficiently close (i.e. not "too remote")***. The duty to make reparation extends only to those damages which are legally regarded as the consequence of an unlawful act.[682]

427. The *Lemire* tribunal also held that, to show proximate cause, the claimant had to show "(A) cause, (B) effect, and (C) a logical link between the two."[683] The tribunal specified that this showing is comprised of two aspects, a positive one and a negative one:

> The causal link can be viewed from two angles: the positive aspect requires that the aggrieved party prove that an uninterrupted and proximate logical chain leads from the initial cause (in our case the wrongful acts of [the State]) to the final effect (the loss in value of [the investment]); while the negative aspect permits the offender to break the chain by showing that the effect was caused - either partially or totally - not by the wrongful acts, but rather by intervening causes, such as factors attributable to the victim, to a third party or for which no one can be made responsible (like force majeure).[684]

428. Hence, to establish proximate cause, Riverside must prove the alleged misconduct was the direct, non-remote cause (*i.e.*, the "positive aspect") of the alleged harm and, separately, that there existed no intervening causes for this harm (*i.e.*, the "negative aspect").

Hungary, ICSID Case No. ARB/07/19, Decision on Jurisdiction, Applicable Law and Liability, November 30, 2012, ¶ 6.62 (**CL-0167**) (making reference to the requirement that, for an expropriation to take place, a claimant should demonstrate "substantial, radical, severe, devastating or fundamental deprivation of its rights or the virtual annihilation, effective neutralization or factual destruction of its investment, its value or enjoyment").

[682] *Joseph Charles Lemire v. Ukraine*, ICSID Case No. ARB/06/18, Award, March 28, 2011, ¶ 155 (**CL-0072**) (emphasis added).

[683] *Joseph Charles Lemire v. Ukraine*, ICSID Case No. ARB/06/18, Award, March 28, 2011, ¶ 157 (**CL-0072**).

[684] *Joseph Charles Lemire v. Ukraine*, ICSID Case No. ARB/06/18, Award, March 28, 2011, ¶ 163 (**CL-0072**).

429. Riverside has not satisfied either aspect of the proximate cause test. As to the first aspect, Riverside has not demonstrated the Nicaragua caused the alleged harm. This conclusion is manifest from the evidence Nicaragua summarized in Sections II.A and II.B, *supra*. In sum, Riverside's theory that Nicaragua instructed paramilitaries to invade and occupy Hacienda Santa Fé as an act of political retribution is unsupported and relies entirely on unreliable hearsay testimony. More importantly, that theory is refuted by the evidentiary record, which proves that the invaders were local farmers – not paramilitaries – whose invasion was the latest iteration of a decades-long property dispute between their cooperative and Inagrosa regarding Hacienda Santa Fé. And far from instructing or assisting the invasion, the record proves that Nicaragua opposed the invasion from the outset (as it opposed prior invasions of the Hacienda by the same group of farmers), evicted the invaders from the Hacienda on two separate occasions (in August 2018 and August 2021), and continues to expend considerable resources preventing the now-abandoned property from yet another invasion.

430. Riverside has also failed to establish the "positive aspect" of the proximate cause standard because it has not proven the alleged harm. Riverside's ***only*** damages theory is that it lost out on hundreds of millions of dollars in profits that Inagrosa's avocado and forestry would have supposedly generated. But, as explained fully in Sections II.C and II.D, *supra*, those businesses were never pursued and, if anything, the record demonstrates that Inagrosa had all but abandoned any idea of pursuing those businesses, as evident by the fact that, as of 2018, Inagrosa was focused on converting Hacienda Santa Fé into a private wildlife reserve. Moreover, even if the Tribunal were to find that those businesses existed as of the time of the invasion, the absence of any records related to those businesses makes it impossible to discern what, if any, profits they would have generated. The only certainty is that those businesses (if they existed) would have been subject to

severe sanctions, including hefty fines and their forced closure, since they never obtained the necessary permits to conduct any of the activities that those businesses would have needed to conduct to generate any revenue.[685]

431. Riverside also cannot establish the "negative" aspect of the proximate cause test. In the unlikely event that the Tribunal finds Nicaragua is responsible for the invasion and that the invasion harmed Riverside, Riverside cannot establish proximate cause here because there were intervening events that more proximately caused the alleged harm. As proven in section II.A and II.B, *supra*, the intervening event that allowed the invasion to occur was Inagrosa's desertion of Hacienda Santa Fé in or around 2017. Because of this desertion, hundreds of invaders entered the Hacienda in June 2017 and occupied the property for an entire year without detection. Similarly, it was Inagrosa's neglect of Hacienda Santa Fé that more directly caused the invasion to last as long as it did. Indeed, the record confirms that Nicaragua succeeded in evicting the invaders on August 11, 2018 but those invaders returned on August 17, 2018 because Inagrosa did not secure the Hacienda. This is why the invasion continued until 2021.

432. Accordingly, because Riverside cannot establish proximate cause as to Nicaragua, its claims for damages must be dismissed as a matter of international law.

B. Riverside's DCF Valuation for Inagrosa Has No Legal Basis

433. Riverside argues the principle of full reparation applies when the State is liable under the relevant investment treaty and the investor shows that the alleged measures caused the damages claimed.[686] Nicaragua does not dispute that the principle of full reparation, as set forth in

[685] *See* Sections II.C.2, II.D, *supra*.

[686] *See* Memorial, ¶¶ 779-783.

Chorzów Factory, applies under such circumstances. However, Riverside's application of that standard is fundamentally incorrect under the circumstances present here.

434. According to Riverside, Inagrosa was "an established" entity that ran a successful Hass avocado plantation and would have run a successful forestry businesses and, thus, a DCF analysis should be applied when calculating the FMV of Riverside's investments in Inagrosa.[687] But, as Credibility explains in its Report, these businesses never reached a pre-operational stage, there is no evidence to suggest these businesses were feasible (let alone successful), and these businesses have no documented history of generating revenue (let alone profits).[688] Further, these businesses never secured the permits and authorizations they needed to be legitimate under Nicaraguan law.

435. Under these irrefutable circumstances, the DCF methodology used by the Kotecha Report is unavailable under DR-CAFTA and the well-established principles of international law and arbitral jurisprudence it incorporates.

1. Compensation Under DR-CAFTA and International Law

436. DR-CAFTA provides the compensation owed by a State if it commits an illegal expropriation of a covered investment, in violation of Article 10.7, is equal to "the fair market value of the expropriated investment immediately before the expropriation took place."[689] DR-CAFTA, however, does not provide a damages standard for breaches of Articles 10.5 (Minimum Standard of Treatment), 10.4 (Most-Favored-Nation Treatment), or 10.3 (National Treatment). In similar circumstances, where an investment treaty is silent on how to calculate damages arising from substantive breaches, investment tribunals have fashioned a damages standard that focuses

[687] Memorial, ¶ 787.

[688] *See* Sections II.C.-II.D., *supra*; Credibility I, Section 4.2 (**RER-02**).

[689] DR-CAFTA, Art. 10.7.2(b) (**CL-0001**).

on the ***actual*** damage the State's conduct caused the covered investment. For example, in *PSEG v. Turkey*, the tribunal noted that:

> [T]he BIT, like most treaties of its kind, provides for the fair market value as the measure for compensation only in connection with expropriation. Since the Tribunal has found above that there is no expropriation in this case, either direct or indirect, the fair market value does not appear to be justified as a measure for compensation in these circumstances.[690]

437. Importantly, not all investment treaty breaches have an effect that is equivalent to an illegal expropriation. Indeed, illegal expropriations only exist where there was a "substantial deprivation" of the covered investment.[691] Other breaches, however, may have a lesser economic impact. That is why, in the absence of an express mandate, tribunals assess the specific effects of a particular breach to determine what damages (if any) must be awarded. As the tribunal in *S.D. Myers and Canada* held:

> By not identifying any particular methodology for the assessment of compensation in cases not involving expropriation, the Tribunal considers that the drafters of the NAFTA intended to leave it open to tribunals to determine a measure of compensation appropriate to the specific circumstances of the case, taking into account the principles of both international law and the provisions of the NAFTA. ***In some non-expropriation cases a tribunal might think it appropriate to adopt the "fair market value" standard; in other cases it might not***. In this case the Tribunal considers that the application of the fair market value standard is not a logical, appropriate or practicable measure of the compensation to be awarded.[692]

438. The standard from the seminal award in *Chorzów Factory*[693] is an appropriate starting point for the calculation of compensation owed in cases where a treaty is silent on that

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[690] *PSEG Global, Inc. & Konya Ingin Electrik Üretim ve Ticaret Limited Sirketi v. Republic of Turkey,* ICSID Case No. ARB/02/5, Award, January 19, 2007, ¶ 305 (**RL-0099**).

[691] *See, e.g.*, *CMS Gas Transmission Company v. The Argentine Republic*, ICSID Case No. ARB/01/8, Award, May 12, 2005, ¶ 262 (**CL-0053**) ("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 where indirect expropriation has been contended is that of substantial deprivation.").

[692] *S.D. Myers, Inc. and Government of Canada*, UNCITRAL, Partial Award, November 13, 2000, ¶ 309 (**CL-0007**).

[693] *The Factory at Chorzów*, PCIJ, Judgment No. 13, September 13, 1928, ¶¶ 124-126 (**CL-0012**).

issue, or where the treaty specifies the applicable damages standard for one type of claim (*i.e.*, illegal expropriation) but not for others. According to that award, the principle of full reparation is as follows:

> [R]eparation must as far as possible wipe out all the consequences of the illegal act and re-establish the situation which would, in all probability, have existed if that act had not been committed.[694]

439. The parties accept this principle. But as argued in the ensuing section, Riverside misapplies it when it contends that the FMV of its investment in Inagrosa can be assessed using a DCF methodology.

2. The DCF Methodology Should Not Be Used in This Case

440. The DCF methodology Riverside elected here attempts to calculate the lost profits Riverside supposedly would have earned under its investments in Inagrosa. This method utilizes a model that takes into account myriad inputs related to the company or project that is the subject of the investment, such as forecasted sales growth, profit margins, rate of interest on the initial investment, the cost of capital, and potential risks to the company's underlying value. As noted by Credibility, the DCF methodology "is designed 'to calculate the value at one specified time (the 'valuation date') of cash flows that are to be received at a different time.'"[695]

441. There is a catch with this methodology. It is only reliable if the data inputted into the model is objectively verifiable or has basis in fact, as opposed to speculation. If, however, the data inputted into the DCF model is based only on speculation, this methodology is not a reliable method to calculate the FMV of an investment.[696] As Credibility explains, this phenomenon is

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[694] *The Factory at Chorzów*, PCIJ, Judgment No. 13, September 13, 1928, p. 47 (**CL-0012**).

[695] Credibility I, ¶ 112 (**RER-02**) (*citing* W. Lieblich, *Determining the Economic Value of Expropriated Income* (1991), p. 72).

[696] *See* Credibility I, ¶ 117 (**RER-02**).

referred to as "garbage in, garbage out"[697] because, "for the DCF model to be credible, the core assumptions must be reasonable" and "the underlying evidence must be sound[.]"[698]

442. Indeed, tribunals routinely refuse to adopt the DCF approach when the investment is in a pre-operational business or a greenfield project, both of which have no performance track records. The rationale is it would be overly speculative for a tribunal to forecast future revenues and profits under those circumstances.

443. In *PSEG v. Turkey*, for example, the covered investment was in a pre-operational company.[699] Because of this fact, the tribunal rejected the DCF methodology, finding this method was unreliable because the model's projections about future cash flows were entirely speculative. When reaching this decision, the tribunal noted:

> The Tribunal is mindful that, as the award in Aucoven noted, ICSID tribunals are "reluctant to award lost profits for a beginning industry and unperformed work." This measure is normally reserved for the compensation of investments that have been substantially made and have a record of profits, and refused when such profits offer no certainty.
>
> The Respondent convincingly invoked in support of its objections to this approach the awards in *AAPL* and *Metalclad*, which required a record of profits and a performance record, just as the awards in *Wena*, *Tecmed* and *Phelps Dodge* refused to consider profits that were too speculative or uncertain. The Respondent also convincingly noted that in cases where lost profits have been awarded, such as *Aminoil*, this measure has been based on a long history of operations.[700]

[697] Credibility I, ¶ 117 (**RER-02**) (*citing* Mark A. Kantor, Chapter 4: "Important Components of DCF Valuations", in Valuation for Arbitration, International Arbitration Law Library, Volume 17 (Kluwer Law International, 2008), p. 134).

[698] Credibility I, ¶ 117 (**RER-02**) (*citing* Mark A. Kantor, Chapter 4: "Important Components of DCF Valuations", in Valuation for Arbitration, International Arbitration Law Library, Volume 17 (Kluwer Law International, 2008), p. 133).

[699] *PSEG Global, Inc. & Konya Ingin Electrik Üretim ve Ticaret Limited Sirketi v. Republic of Turkey,* ICSID Case No. ARB/02/5, Award**,** January 19, 2007, ¶ 308 (**RL-0099**).

[700] *PSEG Global, Inc. & Konya Ingin Electrik Üretim ve Ticaret Limited Sirketi v. Republic of Turkey,* ICSID Case No. ARB/02/5, Award**,** January 19, 2007, ¶¶ 310-311 (**RL-0099**).

444. The *PSEG* tribunal's analysis is consistent with the Articles on the Responsibility of States for Internationally Wrongful Acts, which provide that an asset-based valuation is more suitable for pre-operational or greenfield businesses.[701]

445. Several other tribunals have refused to award lost profits because the investment was in a pre-operational business or greenfield project. For example, in *Metalclad v. Mexico*, despite the fact the investor had purchased, permitted, financed, and constructed a waste disposal facility in Mexico, the tribunal ruled that because this facility was never operational, the "fair market value is best arrived at […] by reference to Metalclad's actual investment in the project."[702]

446. Also, in *Wena Hotels v. Egypt*, the investment at issue was with a business that had only operated one of its hotel projects for less than 18 months and had not yet completed the construction of the other project at issue in that case.[703] Because of the greenfield nature of these projects, the tribunal rejected the DCF methodology and resorted to the investment costs of the enterprise as the more reliable methodology for assessing the FMV of those projects.[704]

447. Further, if the covered investment is in an enterprise that is not a going concern, *i.e.*, the enterprise does not have the resources to operate or demonstrable future earning power, investment tribunals have refused to award damages under the DCF methodology. This notion was confirmed in *Arif v. Moldova* where the tribunal rejected a DCF valuation of an airport store because it never opened or generated any revenue. Accordingly, the tribunal there found that:

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[701] ARSIWA, Art. 36, Commentary, ¶ 25 (**CL-0017**) ("In cases where a business is not a going concern, so-called 'break-up', 'liquidation' or 'dissolution' value is generally employed. In such cases, no provision is made for value over and above the market value of the individual assets. Techniques have been developed to construct, in the absence of actual transactions, hypothetical values representing what a willing buyer and willing seller might agree.").

[702] *Metalclad v. Mexico*, Award, August 30, 2000, ¶¶ 121-122 (**CL-0087**).

[703] *Wena Hotels Limited v. The Arab Republic of Egypt*, ICSID Case No. ARB/98/4, Award on Merits, December 8, 2000, ¶ 124 (**CL-0039**).

[704] *Wena Hotels Limited v. The Arab Republic of Egypt*, ICSID Case No. ARB/98/4, Award on Merits, December 8, 2000, ¶ 123 (**CL-0039**).

> [T]he DCF methodology is not appropriate for a business that never operated and where a satisfactory basis for its projected revenues has not been demonstrated. Use of a DCF methodology in these circumstances gives an excessively speculative outcome.[705]

448. Consequently, the *Arif* tribunal only awarded claimant sunk costs. The exact same outcome occurred in *Vivendi v. Argentina*, where the enterprise was not a going concern and never turned a profit,[706] resulting in the tribunal rejecting the DCF methodology and finding that the investment value was the "closest proxy" for fair market value.[707] And this outcome occurred in *Siemens v. Argentina*, where the tribunal rejected the DCF methodology and awarded only the investor's sunk costs because the underlying business was not a going concern.[708]

449. Nothing Riverside cites is to the contrary. Put differently, Riverside does not cite to an award where a tribunal applied the DCF methodology to assess damages suffered by an investment in a pre-operational business, a greenfield project, or an enterprise that was not a going concern.

450. This backdrop is dispositive here. The "lost profits" Riverside seeks here are tied to two businesses Inagrosa purported to run at Hacienda Santa Fé when the invasion occurred: a Hass avocado business and a forestry business. It is undisputed that neither of these businesses has a performance track record.[709] In other words it is undisputed that Inagrosa never sold any Hass avocados or timber and that Inagrosa was not in a position to sell either of these products when the

[705] *Arif v. Moldova*, ICSID Case No. ARB/11/23, Award, April 8, 2013, ¶ 576 (**CL-0068**).

[706] *Compañía de Aguas del Aconquija S.A. and Vivendi Universal S.A. v. Argentine Republic (I)*, ICSID Case No. ARB/97/3, Award, August 20, 2007, ¶ 8.3.5 (**CL-0059**).

[707] *Compañía de Aguas del Aconquija S.A. and Vivendi Universal S.A. v. Argentine Republic (I)*, ICSID Case No. ARB/97/3, Award, August 20, 2007, ¶ 8.3.13 (**CL-0059**).

[708] *Siemens A.G. v. Argentine Republic*, ICSID No. ARB/02/8, Award, February 6, 2007, ¶¶ 362-389 (**RL-0100**).

[709] *See* Section II.C, II.D, *supra*.

invasion occurred.[710] These businesses were, thus, pre-operational, greenfield in nature, and not going concerns, as confirmed by Credibility in its expert report.[711] Accordingly, any projection of future cash flows would be entirely speculative, making the DCF methodology unreliable in this case just as it was in the other cases cited in this section.

451. The situation here is actually ***worse*** than what tribunals faced in the other cases cited above. Indeed, the businesses at issue in those cases had ***some*** semblance of viability, such as permits, feasibility reports, bank loans, financial projections, and business plans, to name a few. In contrast, here, there is no evidence that supports the notion that Inagrosa had viable Hass avocado or forestry businesses. Indeed, the Kotecha Report relies wholly on the Rondón Letter to make this inference. If anything, the evidentiary record demonstrates that these businesses were not feasible, as explained fully in Section II.C and II.D, *supra.*

452. Indeed, Inagrosa never secured any of the permits that it needed for either of these businesses. This fact means that Inagrosa's alleged activities with respect to these businesses – such as its alleged importation of seeds, creation of tree nurseries, plantation of 40 hectares of avocado trees, and supposed expansion of the avocado tree orchard – were ***illegal*** and subject to sanctions, which include the forced closure of Inagrosa. And this fact means that Mr. Kotecha's assumption that Inagrosa would have exported avocados and timber to Costa Rica and the United States is unfounded, since Inagrosa never registered as an exporter of those goods in Nicaragua,[712] much less completed the rigorous process of obtaining authorization from Nicaraguan authorities to be allowed to export those goods.[713]

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[710] *See* Moncada I, ¶ 39 (**RWS-05**); Certificate issued by IPSA No. 3 (**R-0067**); Mena I, ¶ 27 (**RWS-06**); Certificate issued by CETREX No. 2 (**R-0021**); Certificate issued by CETREX No. 4 (**R-0023**).

[711] Credibility I, ¶ 90 (**RER-02**).

[712] Certificate issued by CETREX No. 4 (**R-0023**).

[713] Certificate issued by IPSA No. 3 (**R-0067**).

453. This is not just a technicality that Inagrosa could have easily overcome. Rather, the permitting processes that Inagrosa needed to complete for its businesses are uncertain and cannot be assumed. This is especially the case here given that the United States has a policy currently in place that ***prohibits the importation of avocados from Nicaragua*** as well as the fact that Nicaragua classified Hacienda Santa Fé as a private wildlife reserve, meaning that Inagrosa was ***legally prohibited*** from cutting down trees from its private forest to sell the timber or to use the land for avocado cultivation,[714] as the Kotecha Report assumes that Inagrosa would do.

454. Further, it is nonsensical for the Kotecha Report to espouse the DCF methodology where, as here, there is no independent assessment that any of Inagrosa's businesses was viable. There are no feasibility reports from agricultural or timber experts. There is no project financing from financial institutions. There is no regulatory body that signed off on these businesses. There is no economist or accountant that separately arrived at the lofty financial projections contained in the Rondón Letter. Instead, every financial input in the Kotecha Report's model came directly from Mr. Rondón, the man who has every reason to exaggerate and inflate the numbers since he is married to the 100 percent owner of Riverside.

455. Finally, utilizing the DCF methodology here is even more inappropriate considering the fact that Inagrosa and Riverside had already abandoned the avocado and forestry businesses by the Valuation Date. Indeed, the record shows that, by that Date, Inagrosa: (i) had fired its workers; (ii) had operating cash balances of about USD $1,000; (iii) had over USD $1 million in outstanding debt; (iv) owed tens of thousands of dollars in property taxes after failing to make payments since 2015; and (v) was devoting its limited resources to converting Hacienda Santa Fé into a private wildlife reserve, which cannot be reconciled with its litigation position that

[714] González I, ¶¶ 65-68 (**CWS-009**).

Inagrosa was in the process of clearing the trees at the Hacienda to make way for its avocado and forestry businesses. In fact, the record demonstrates that Hacienda Santa Fé was so deserted by the Valuation Date that ***hundreds of illegal occupants managed to live on the property for a year without being detected by anyone at Inagrosa***.

456. Based on the foregoing, and in light of the well-established investor-State caselaw cited in this section, the DCF methodology must be rejected here.

C. Mr. Kotecha's Inputs and Assumptions for the DCF Methodology Are Fundamentally Flawed and Must Be Withdrawn

457. The inapplicability of the DCF methodology in this case is further confirmed by the fact that the inputs in the Kotecha Report's DCF model are unfounded, refuted by the record, and, frankly, bogus.

458. As explained above, each and every one of these inputs derives from the Rondón Letter.[715] The Rondón Letter is an 8-page document that contains Mr. Rondón's assumptions and beliefs about what Inagrosa's businesses "would have" done had the invasion not occurred. The Rondón Letter was written in late 2022, about a month before Riverside submitted its Memorial and more than four years after the invasion occurred. The Letter encloses no attachments or exhibits. This Letter does not incorporate by reference any evidentiary documents. Nor does the Letter cite to any evidentiary support. As with everything else related to Inagrosa's businesses, the information contained in that letter comes from Mr. Rondón and is presented on the basis that the reader will just have to take his word for it.

459. Mr. Kotecha took Mr. Rondón's word for it. The Kotecha Report entirely adopts Mr. Rondón's self-serving, unsupported musings about Inagrosa's businesses without conducting

[715] *See* Management Representation Letter from Riverside Coffee, LLC to Richter Inc., September 12, 2022 (**C-0055**).

an independent analysis. As a result, the assumptions and inputs in the Report's DCF model are unreliable, making that model's conclusions equally unreliable. As Credibility puts it, "garbage in, garbage out."[716] Below are some of the defects with this model.

1. No Historical Financial Data or Credible Evidence Underlies the Kotecha Report's Analysis

460. As alluded to above, the main defect with the Kotecha Report's DCF model is the dearth of verifiable financial information that it contains. Riverside alleges that Inagrosa oversaw a multi-hundred-million dollar avocado business and a multi-million dollar forestry business. But the record is devoid of the documents that successful avocado and forestry businesses should be generating.

461. The Credibility Report identifies these conspicuous omissions in Table 2.1, which is included below:[717]

Table 2.1: Example Financial And Operational Documents Not Produced And Excluded From The Kotecha Report

Document	Riverside	Inagrosa
Financial Documents		
Balance Sheets	X	2015-2018: [C-65]-[C-67], [C-120]
Income Statements	X	2015-2018: [C-68]-[C-70], [C-119]
Statements of Cash Flows	X	X
Income Tax Returns	X	2015-2017: [C-62]-[C-64]
Equipment Lists/Depreciation Schedules	X	X
Debt Balances and Terms	X	X
Equity/Loan Contributions to Inagrosa	X	X
Operational Documents		
Articles of Incorporation	[C-40]	[C-41]
Operating Agreement	[C-139]-[C-140]	X
Feasibility Studies	X	X
Business Plans	X	X
Environmental Studies	X	X
Customer/Supplier Lists	X	X
Cultivation Permits	X	X
Export Permits	X	X
Ownership Documents/Share Transfers	[C-142]	[C-43]-[C-53]

[716] Credibility I, ¶ 117 (**RER-02**).

[717] *See* Credibility I, Table 2.1, p. 7 (**RER-02**).

462. Credibility explains that these documents, which were not but should have been produced, are critical for "[a]nalyzing the actual historical operations of Claimant and Inagrosa" in order to "understand the general business, but also to gain insight into management's competence in decision making, execution and ability to make future investments."[718] Accordingly, Credibility explains that "the importance of the analysis of the historical financial records cannot be understated" because one cannot place "reliance on future forecasts of businesses that do not provide sufficient historical records of operations, including where companies failed to make a profit."[719]

463. The lack of feasibility reports is particularly glaring here. As Credibility explains, an inexperienced company like Inagrosa would need a feasibility study to pursue a Hass avocado business, particularly given that this type of business has ***never succeeded before in Nicaragua***. Specifically, Credibility provides:

> A feasibility study is an assessment of the practicality of a proposed plan or project. It is generally done by an independent consultant with expertise in the specific area of business. Inagrosa had no experience in avocado farming and so it would have been even more important to have a feasibility study by an independent consultant. As avocado production takes a toll on the environment, impacting climate change and resulting in biodiversity loss and degradation of the soil, the feasibility study would consider and discuss the type of regulatory and environmental approvals required for avocado production. However, as there is no feasibility study, the Kotecha Report fails to discuss or even consider any of these requirements.[720]

464. To the extent that Riverside's position will be that the documents were destroyed in the invasion – a position that Riverside appears to tee up in its Memorial[721] – that defense will not work. As an initial matter, most of the missing documents concern Riverside, a company

[718] Credibility I, ¶ 27 (**RER-02**).

[719] Credibility I, ¶ 38 (**RER-02**).

[720] Credibility I, ¶ 16 (**RER-02**).

[721] Memorial, ¶ 301(b).

located in the United States that is not alleged to have housed its records in Nicaragua.[722] As for Inagrosa, it strains credulity that a multi-hundred-million-dollar enterprise (as Riverside refers to Inagrosa) would keep the bulk of its business records in paper form, in one single location, and without any electronic copies.[723]

465. Also underscoring the Kotecha Report's lack of credibility is the inexplicable fact that it fails to consider any of the financial information that Riverside ***did*** produce. As noted in the table above, Riverside produced limited financial information about Inagrosa, including tax returns for some years, balance sheets, and income statements. The Kotecha Report does not use any of that information to support its lofty financial projections for Inagrosa because the data in those documents controverts the Report's conclusions about how much Inagrosa was worth as of the Valuation Date.[724] Indeed, those documents demonstrate that, far from being a multi-hundred-million-dollar company, Inagrosa had extremely low liquidity and only about USD $1,000 in cash on hand from 2015 through 2017.[725] And according to Claimant, Inagrosa had over $1 million of

[722] *See* Credibility I, ¶¶ 35-36 (**RER-02**) ("Claimant in this arbitration is Riverside, which is a US-based entity as Mr. Kotecha acknowledges. Riverside, as the alleged entity above Inagrosa, would include the financials of Inagrosa within its financial records. Accordingly, the starting point in the Kotecha Report should have been the Riverside financial records. This would have included, but is not limited to, the Riverside annual reports, which would have the Riverside: income statements; balance sheets; statement of cash flows; changes in equity; notes to the financials; management statements; and, if audited, any statements from the auditor. . . . However, ***there is no evidence that Mr. Kotecha reviewed any Riverside financial records***, including Riverside financial statements or tax returns") (emphasis added).

[723] *See* Credibility I, ¶ 51 (**RER-02**) ("Claimant claims that it does not have the laptop computer that Mr. Gutiérrez kept in his room at HSF" but "Claimant has in fact produced documents which it alleges are corporate records of Inagrosa, including income statements, balance sheets and tax returns.").

[724] *See* Credibility I, ¶ 32 (**RER-02**) ("We reviewed all the citations in the Kotecha Report and appendices and find that the documents listed in Appendix 12 encompass all of documents cited in the Kotecha Report. Accordingly, Appendix 12 of the Kotecha Report is essentially Mr. Kotecha's list of documents relied upon. ***None of the documents relied upon in the Kotecha Report contain any contemporaneous financial information*** such as balance sheets or income statements.") (emphasis added).

[725] *See* Credibility I, ¶ 57 (**RER-02**) ("Inagrosa's tax filings show that the company had $418, $1,066 and $1,000 of cash in the bank in 2015, 2016 and 2017, respectively.").

debt.[726] That the Kotecha Report would ignore these facts while adopting wholesale Mr. Rondón's self-serving beliefs says everything the Tribunal should know about the reliability of that Report.

466. But Mr. Kotecha does not only blindly accept the unverified values of the Rondón Letter. The Kotecha Report also adopts Riverside's fantastical factual claims. That Report, for instance, adopts wholesale Riverside's ridiculous claim that, in a span of a few weeks, a hundred or so individuals "totally deforested" a forest at Hacienda Santa Fé – which spans 556.8 hectares contained at least 35,000 large trees – with hand tools and without the use of heavy machinery.[727] Any reasonable person would question this claim or, at least, require more information before assuming it to be true. But that is not what Mr. Kotecha did. He adopts that allegation as one of the critical assumptions in his damages model with respect to Inagrosa's forestry business.

2. Mr. Kotecha Assumes Inagrosa's Avocado Business Was Successful Despite No Evidence to This Effect

467. The Kotecha Report's conclusion that Riverside is owed hundreds of millions of dollars is based almost entirely on a lost profits calculation relating to Inagrosa's purported Hass avocado business. As explained above, all of the inputs in the Report's DCF model pertaining to this business were taken wholesale from the Rondón Letter without corroborating evidence.

468. According to that Letter, Inagrosa started the Hass avocado business in or around 2014, after Inagrosa's coffee business failed. The Letter also states that the original orchard was planted in January 2014 and consisted of 16,000 avocado trees across a 40-hectare piece of land at Hacienda Santa Fé.[728] The Letter further provides that the inaugural harvest for this crop, which supposedly happened in the Fall of 2017, was successful and that this success inspired Inagrosa to

[726] Memorial, ¶¶ 95, 469.

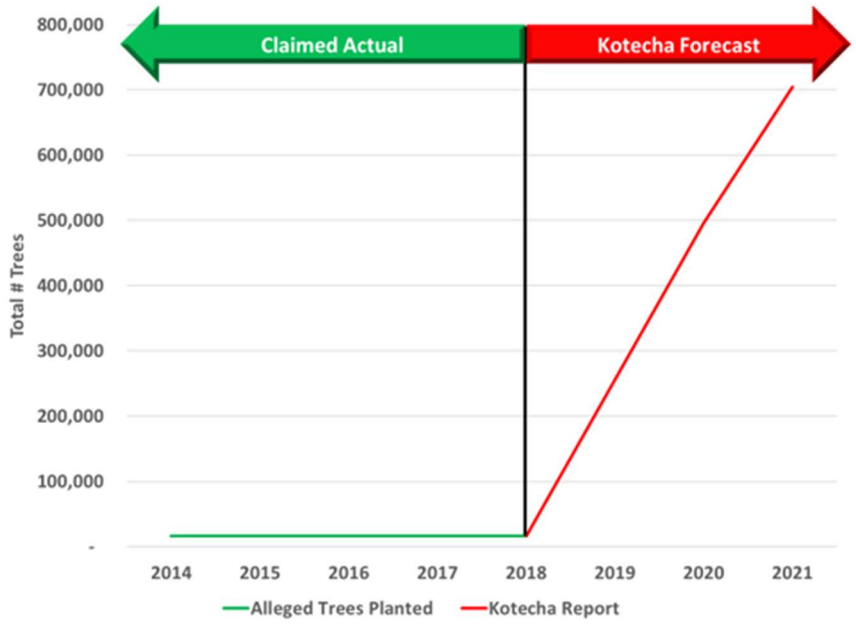
[727] Memorial, ¶ 387 ("As a result of the invasion, the private forest reserve was totally deforested.").

[728] Riverside Management Representation Letter dated September 12, 2022, ¶ 9 (**C-0055**).

expand its business.[729] On this point, the Letter and in Carlos Rondón's witness statement, provide that in early 2018 Inagrosa commenced a 200-hectare expansion that would have added 140,000 avocado trees to the plantation, and that it "planned" to do another 760-hectare expansion that would have added an additional 532,000 avocado trees to the plantation.[730]

469. In other words, Rondón states, without support, that Inagrosa's avocado business was set to go through an approximately 4,300 percent cumulative increase in the number of avocado trees.[731] The Kotecha Report adopts this premise wholesale. Below is Figure 4.1 of the Credibility Report, which depicts the exponential expansion that the Kotecha Report forecasts (albeit without any proof).[732]

Figure 4.1: Claimed Avocado Trees Planted Versus Mr. Kotecha's Forecast[195]



[729] Riverside Management Representation Letter dated September 12, 2022, ¶¶ 10, 17-19 (**C-0055**).

[730] Riverside Management Representation Letter dated September 12, 2022, ¶ 20 (**C-0055**); Rondón I, ¶¶ 198-203 (**CWS-001**).

[731] Credibility I, ¶ 19 (**RER-02**).

[732] Credibility I, Figure 4.1 (**RER-02**).

470. Apart from being unfounded, this forecast is refuted by the record. Nicaragua has proven as much in Section II.C, *supra*. Below are the reasons supporting this conclusion:

471. ***First***, the record proves that, far from pursuing an exponential expansion of the avocado business at Hacienda Santa Fé, Inagrosa had actually deserted the Hacienda sometime in 2017. This fact is evident from the fact that hundreds of individuals snuck into the Hacienda in or around June 2017 and lived there for a year without detection.[733] And this fact is evident from other eyewitness accounts and contemporaneous documents.

472. ***Second***, Inagrosa never secured the requisite permits and authorizations to run the avocado business. To summarize, Inagrosa needed permits or authorizations from Government agencies to import and plant Hass avocado seeds, to maintain an avocado tree nursery, to use the soil to plant avocado trees, to use nearby waterways to sustain the orchards, and to export the harvested crop.[734] ***As of June 2018, Inagrosa had not secured any of these permits and, in fact, had never even applied for them***.[735]

473. ***Third***, the record confirms that, instead of pursuing permits for the Hass avocado business, Inagrosa was busy trying to classify Hacienda Santa Fé as a private wildlife reserve (a classification that Inagrosa successfully obtained in early 2018).[736] This undisputed fact is fatal to Riverside's damages calculation since this classification reconfirmed that half of the land at the Hacienda (about 556 hectares of private forest) could not be altered in any way and instead needed

[733] *See* Section II.A.2, *supra*.

[734] *See* Section II.C., *supra*.

[735] *See* Section II.C., *supra*; Certificate issued by IPSA No. 1 (**R-0015)**; Certificate issued by IPSA No. 2 (**R-0016**); Certificate issued by IPSA No. 3 (**R-0067**); Certificate issued by IPSA No. 4 (**R-0068**); Certificate issued by CETREX No. 1 (**R-0020**); Certificate issued by CETREX No. 2 (**R-0021**); Certificate issued by CETREX No. 4 (**R-0023**); Certificate issued by CETREX No. 6 and Annex (**R-0025**); Certificate issued by the Ministry of Agriculture (**R-0018**); Certificate issued by MARENA No. 3 (**R-0072**); Certificate issued by the National Water Authority (**R-0027**).

[736] *See* Section II.D., *supra*; Ministerial Resolution No. 021.2018, Government of the Republic of Nicaragua, Ministry of the Environment and Natural Resources (**R-0012**).

to be conserved.[737] Given that the Hacienda consists of 1,142.5 hectares, it would have been impossible for Inagrosa to cultivate 1,000 hectares of avocado trees at the Hacienda, as the Kotecha Report blindly assumes.[738] Moreover, the private wildlife reserve classification also meant that Inagrosa had to seek permission from MARENA, the relevant environmental agency, before it could undertake any other activity on the non-forest part of the Hacienda.[739] Thus, it simply cannot be assumed that Inagrosa could have cultivated Hass avocados anywhere in the Hacienda due to this classification.

474. ***Fourth***, there is no evidence that Inagrosa had any funding to pay for the alleged expansions to its avocado business. The final investment it received from Riverside came nearly four years before the valuation date and was used entirely to pay off another loan.[740] By 2018, the cash balances at Inagrosa were nearly zero and Inagrosa owed tens of thousands of dollars to the Government in unpaid property taxes[741] and owed more than USD $1 million to pay off prior loans,[742] according to Claimant. In other words, Inagrosa was not profitable; it was broke.

475. ***Fifth***, there were no workers to carry out the alleged expansion. Labor records confirm Inagrosa fired almost all its workers in 2013 after the coffee plantation failed.[743] Workers are critical to agricultural businesses particularly where, as is the case here, no one at Inagrosa had

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[737] González I, ¶¶ 65-68; General Law on the Environment and Natural Resources with its incorporated reforms, Law No. 217, Art. 116 (**RL-0017**); Decree No. 1/2007, Arts. 3.28, 98.8 (**RL-0007**); Méndez I, ¶ 20 (**RWS-008**); Law for the Conservation, Promotion and Sustainable Development of the Forestry Sector, Law No. 462, Art. 26 (**RL-0021**); See Decree No. 73-2003, Regulation of Law No. 462, Law for the Conservation, Promotion and Sustainable Development of the Forestry Sector, Arts. 60-63 (**RL-0015**).

[738] *See* Credibility I, § 3.1.3 (**RER-02**).

[739] González I, ¶¶ 68-70 (**RWS-09**); Decree No. 1/2007, Arts. 51, 54 (**RL-0007**).

[740] *See* Credibility I, ¶ 62 (**RER-02**).

[741] Gutiérrez-Rizo I, ¶ 27 (**RWS-01**).

[742] Memorial, ¶¶ 95, 469.

[743] *See* Section II.C.1, *supra*. Letter from Dr. Roberto López (Executive President of the Nicaraguan Institute of Social Security - INSS) to Ms. Wendy Morales (Attorney General of Nicaragua) (**R-0085**).

any prior experience in cultivating avocados. Accordingly, the Kotecha Report's assumption that Inagrosa "would have" completed these expansions in the time frames given by Inagrosa is baseless.

476. The Credibility Report provides additional reasons to ignore the Kotecha Report's unsupported assumptions about Inagrosa's avocado business. Specifically, Credibility provides that "the Kotecha DCF model inexplicitly assumes production levels from the inexperienced management at [Hacienda Santa Fé] would be 189% higher than the experienced high density avocado producers in California and 452% higher than California producers in general."[744] That comparison would be staggering even if Inagrosa was an experienced avocado enterprise, which Inagrosa is not. And this comparison borders on the absurd when taking into account the irrefutable fact that ***no Nicaraguan business has ever exported Hass avocados at a commercial scale, much less the scale included in the Kotecha Report***.[745]

477. For these reasons, the Kotecha Report's assumption that Inagrosa had a viable and successful avocado business at the time of the invasion does not hold up and must be rejected.

3. Mr. Kotecha Wrongly Assumes Inagrosa Could Export Avocados to the United States

478. The Kotecha Report's DCF model is also unreliable because it blindly assumes that Inagrosa would have been able to export avocados to the United States by 2020.[746] As with all other inputs in this model, this assumption comes directly from the Rondón Letter. And this assumption is critical to the model's outputs because the U.S. Hass avocado consumer market offers lucrative revenues and profits to avocado producers.

[744] Credibility I, ¶ 19 (**RER-02**).

[745] Certificate issued by CETREX No. 6 and Annex (**R-0025**).

[746] *See* Kotecha I, ¶ 2.13, Schedules 2, 10 (**CES-01**).

479. As an initial matter, and as explained in the prior section, it cannot be assumed that Inagrosa would have exported avocados. Inagrosa never registered as an avocado exporter with the relevant Nicaraguan exportation authority, CETREX,[747] and, thus, never went through the rigorous inspections that IPSA, the phytosanitary authority, needed to conduct before Inagrosa could export its avocados outside of Nicaragua.[748]

480. This assumption is also meritless because the record proves that Inagrosa was not going to obtain the necessary approvals from the USDA to be able to export its Hass avocados to the United States by 2020 (or at all). For starters, Nicaragua's avocado expert, Dr. Duarte, notes that this approval process takes several years in the best-case scenario, due to rigorous and time-consuming phytosanitary controls required by the USDA.[749] Further, the USDA, via its sub-agency Animal and Plant Health Inspection Service ("APHIS"), has included Nicaragua in a list of countries that cannot export avocados to the United States ***due to a fruit fly local to Nicaragua that plagues avocado trees***. This fact is publicly available through the APHIS website.[750] And it is contained in an exhibit that ***Riverside*** produced here,[751] making it unfathomable that the Kotecha Report would ignore it altogether.

481. Moreover, in the (very) unlikely event that Inagrosa obtained the approvals that it needed to export avocados into the United States, the Kotecha Report never addresses the sizable

[747] Certificate issued by CETREX No. 2 (**R-0021**); Certificate issued by CETREX No. 4 (**R-0023**); Certificate issued by CETREX No. 6 and Annex (**R-0025**).

[748] Certificate issued by IPSA No. 3 (**R-0067**).

[749] Duarte I, § 9.2 (**RER-01**).

[750] APHIS, Avocado from Inadmissible Countries into All Ports, December 7, 2022 (**R-0078**) (listing Nicaraguan as a country that cannot export avocados to the United States).

[751] Avocado in Nicaragua Marketing Study prepared by Pro Nicaragua, page 0000780 (**C-0085**).

costs that would have to be expended to be able to safely and efficiently ship the avocados to the U.S. border. As Credibility explains:

> Another element of the feasibility study would be the transport of the avocados. Even if appropriate permits could have been obtained from Nicaragua and the US, the feasibility study would consult export companies to determine if Claimant, through Inagrosa, would even be able to transport the avocados to Nicaraguan ports and ship them to the US, given the fragility of the avocado fruit and the requirement for temperature-controlled transportation. As there is no feasibility study, there is no evidence of this critical input, as well.[752]

482. For these reasons, the lofty projections in the Kotecha Report's model, which are based in large part on the assumption that Inagrosa would have been able to export avocados to the U.S. by 2020, are unreliable and overstated.

4. Mr. Kotecha Adopted Mr. Rondón's Unsupported Cost Inputs Resulting in Inflated and Unrealistic Profit Margins

483. The Kotecha Report's DCF model is also unreliable because the cost inputs in the model are inflated and unrealistic.

484. As Credibility explains, the Kotecha Report arrives at a gross margin of 94.8 percent and an EBITDA margin of 84.6 percent for Inagrosa's avocado enterprise.[753] Credibility demonstrates that these margins far exceed (to the tune of 7x) those of experienced avocado producers, which Mr. Kotecha incorrectly asserts are comparable companies here.[754] The reason why Mr. Kotecha arrives at such unrealistic profit margins is because he blindly accepted the cost inputs provided by Mr. Rondón in the Rondón Letter.

[752] Credibility I, ¶ 17 (**RER-02**).

[753] Credibility I, Table 4.6 (**RER-02**).

[754] Credibility I, ¶¶ 147-148 (**RER-02**).

485. This conclusion is evident from Figure 4.7 of the Credibility Report, which has a side-by-side comparison of the costs table in the Kotecha Report and the costs table included in the Rondón Letter. As can be seen from this Figure, these two tables are identical.

Figure 4.7: Kotecha Report Directly Uses Unsupported Costs From Mr. Rondón[261]

Kotecha Report

TABLE 3

Item	$US
Potting soil (for the seedlings)	$ 0.15
Seedling bags	$ 0.20
Avocado Seeds	$ 3.00
Avocado Graft plugs	$ 2.00
Metalaxyl fungicide	$ 0.30
Carbendazin fungicide	$ 0.10
NPK Fertilizer	$ 3.10
Misc, plastic bags, carton bags, and alcohol for grafting	$ 0.70
Total per Hass Seedling	$ 9.55
Planting (preparation & move)	$ 5.00
Total Cost	**$ 14.55**

Representation Letter

Item	$US
Potting soil (for the seedlings)	$ 0.15
Seedling bags	$ 0.20
Avocado Seeds	$ 3.00
Avocado Graft plugs	$ 2.00
Metalaxyl fungicide	$ 0.30
Carbendazin fungicide	$ 0.10
NPK Fertilizer	$ 3.10
Misc, plastic bags, carton bags, and alcohol for grafting	$ 0.70
Total per Hass Seedling	$ 9.55
Planting (preparation & move)	$ 5.00
Total Cost	**$ 14.55**

486. Those cost inputs, which Credibility explains cannot be based in reality for any avocado plantation,[755] could not be covered by Inagrosa even if it had a full-scale plantation. As Credibility explains, "[t]he limited financial documents also show that Inagrosa reported it never sold any avocados and had operating losses in (1) 2016 of -$4,086; (2) 2017 of -$71,401; and (3) 2018 of -$44,649" and "Inagrosa had a very low level of liquidity reporting that it only had cash totaling (1) $418 in 2015; (2) $1,066 in 2016; and (3) $1,000 in 2017."[756] In addition, Inagrosa or Riverside have not provided any evidence of having access to additional capital.

487. Yet, Mr. Kotecha incorporated Mr. Rondón's unrealistic cost inputs as part of his DCF analysis, which has had the effect of grossly inflating Inagrosa's margins to an extent not possible even for experienced producers.

[755] Credibility I, ¶ 150 (**RER-02**).

[756] Credibility I, ¶ 13 (**RER-02**).

5. Other Notable Defects with the Kotecha Report's DCF Model

488. There are many other defects with the Kotecha Report's DCF Model. Nicaragua refers the Tribunal to the Credibility Report, which addresses these defects in detail and explains how these defects artificially inflate the outputs in the model.[757] Below are some of the more notable defects in the model, which contribute to the Kotecha Report's incredible conclusion that Riverside should realize ***a 732,569 percent return*** on its investments in Inagrosa.[758]

489. ***First***, the Kotecha Report assumes Riverside would have received 100 percent of the profits that Inagrosa would have supposedly generated through the Hass avocado and forestry businesses.[759] But that assumption is wrong. It is undisputed here that Riverside only owned 25.5 percent of Inagrosa as of the Valuation Date.[760] Riverside, thus, would only recover, at most, 25.5 percent of Inagrosa's damages, if any.[761]

490. ***Second***, the Kotecha Report never addresses or considers the fact that no financial institution or third-party investor ever showed any interest in investing in Inagrosa's avocado or forestry business.[762] This is the proverbial elephant in the room. How can these businesses be worth hundreds of millions of dollars when every party who had a chance to invest in these

[757] Credibility I, ¶ 19, § 4.2 (**RER-02**). A notable flaw in the Kotecha Report, which further diminishes the credibility of his DCF model, is the discount rate applied. Credibility explains in detail why the discount rate applied in the Kotecha Report is completely unsubstantiated and otherwise makes no sense from an economic perspective. *See* Credibility I, § 4.2.4.4 (**RER-02**).

[758] Credibility I, ¶¶ 78-79 (**RER-02**).

[759] Credibility I, ¶¶ 69-71 (**RER-02**).

[760] *See* Winger de Rondón, ¶ 36 (**CWS-03**).

[761] See Credibility I, ¶ 195 (**RER-02**).

[762] *See* Management Representation Letter from Riverside Coffee, LLC to Richter Inc., September 12, 2022, ¶ 31 (**C-0055**) ("The operations at Hacienda Santa Fé started the expansion without outside third-party capital.").

businesses opted not to invest? As Credibility confirms, this is a red flag that an independent quantum expert cannot ignore.[763]

491. ***Third***, the Kotecha Report assumes completely implausible avocado yields for the avocado business. Specifically, that Report assumes that from 2018 to 2020 Inagrosa would have produced 800 tons of Hass avocados and that this yield figure would have increased annually by 1,219 percent in 2021, 114 percent in 2022, and 51 percent in 2023.[764] The Kotecha Report bases this conclusion on the assumption that each avocado tree would produce an annual yield of 50kg.[765] But Nicaragua's avocado expert has confirmed that this yearly yield amount is ***impossible***.[766] To be sure, the Kotecha Report does not cite to any data to support this figure. Again, Mr. Kotecha just takes Mr. Rondón's word for it. Credibility, however, did not take Mr. Rondón's word for it and instead conducted an independent analysis into this matter. In so doing Credibility uncovered that the yearly yield figure espoused by Mr. Rondón is approximately 452 percent higher than some of the more experienced and well-performing avocado producers in California, as evident from the table below:

[763] Credibility I, ¶ 18 (**RER-02**).

[764] Kotecha I, Schedule 2 (**CES-01**).

[765] Kotecha I, ¶ A3.6 (**CES-01**).

[766] Duarte I, ¶¶ 7.4.1, 7.6.2 (**RER-01**).

Table V.1: California Avocado Production Per Hectare Compared To Kotecha Forecast[767]

	2018	2019	2020	Average
California Actual				
lbs / Acre	7,935	4,882	7,556	6,791
Acre / Hectare	2.47	2.47	2.47	2.47
kg / lbs	0.45	0.45	0.45	0.45
kg / Hectare	8,894	5,472	8,469	7,612
Inagrosa				
kg				35,200,000
Hectares				1,023
kg / Hectare				34,409
kg / Hectare				
California Actual				7,612
Inagrosa Forecasted				34,409
Kotecha DCF assumes Inagrosa could yield 452% more kg/hectare than California				**452%**

492. ***Fourth***, the Kotecha Report blindly assumes that Inagrosa would have exported a sizable amount of avocados to Costa Rica in 2018 and 2019, and later to the United States.[768] Inagrosa had none of the permits or authorizations needed to export these avocados. But, even assuming that Inagrosa did have the ability to export avocados, the forecasts in the Kotecha Report's model are absurd because they assume Inagrosa would have supplied more avocados to Costa Rica than Nicaragua, as a country, supplied to Costa Rica (or to any other country) in 2018 and 2019. Credibility depicts this point through its Table 4.5 and Figure 4.6, included here:[769]

[767] *See* California Avocado Commission State-of-the-Industry Survey: Summary Report of Findings, dated November 2021, p. 4 (**C-0166**); Kotecha I, Appendix 11, Schedule 2 (**CES-01**).

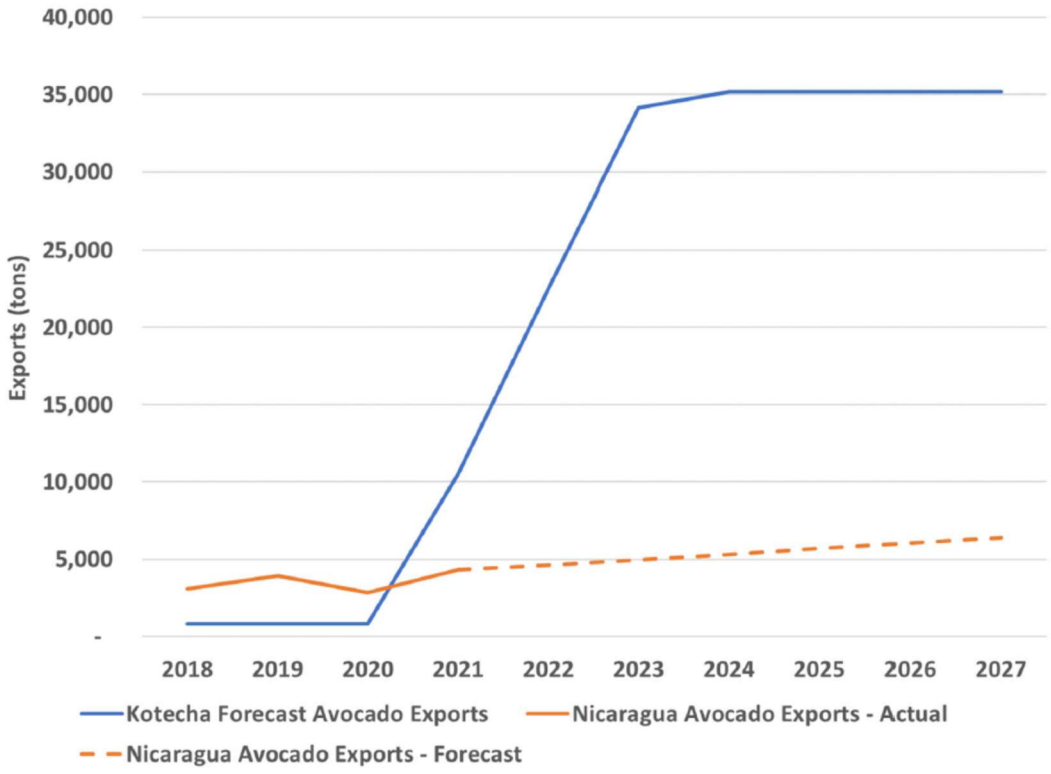
[768] Memorial, ¶¶ 360, 361; Rondón I, ¶¶ 183, 192 (**CWS-01**).

[769] Credibility I, Table 4.5, Figure 4.6 (**RER-02**); *see also* Kotecha I, Appendix 11, Schedule 1 (**CES-01**).

Table V.2: Kotecha Forecasted Exports to Costa Rica

USD	2018	2019
Avocado Exports		
Inagrosa - Kotecha Forecast	1,627,342	1,141,961
Total Nicaragua to Costa Rica	134,730	181,240
Total Nicaragua	160,640	203,920
Kotecha Forecast % of Costa Rica Market	1208%	630%
Kotecha Forecast % of Total Market	1013%	560%

Figure 4.6: Actual And Market Forecast For Avocado Exports From All Nicaragua Companies Versus Mr. Kotecha's Forecast[254]



493. For these reasons, the Kotecha Report's model is unreliable because the inputs in the model are flawed, baseless, or bogus. And, as noted earlier, when garbage goes into a DCF model, the resulting "lost profits" figure is also garbage. That is precisely the case here.

D. Any Damages Awarded Must Be Reduced Because Inagrosa Contributed to the Alleged Damages, Failed to Mitigate Its Damages, and Has Outstanding Debts to Nicaragua

494. In the unlikely event that Riverside is awarded damages in this case, the Tribunal should reduce that award to account for Riverside's contributory negligence as well as its failure to mitigate damages.

1. The Principle of Contributory Fault Dictates a Reduction in Damages

495. Under international law, certain limitations, such as "the duty of mitigation and contributory negligence,"[770] must also be considered when assessing damages. "The concept of contributory fault is also linked with the concepts of inadequate assessment of risk, or voluntary assumption thereof, 'where a victim evidenced an understanding of a dangerous situation and voluntarily encountered it.'"[771]

496. These principles are further elaborated in Article 39 of the ILC Articles on State Responsibility, which provides:

> In the determination of reparation, account shall be taken of the contribution to the injury by willful or negligent action or omission of the injured State or any person or entity in relation to whom reparation is sought.[772]

497. Under that standard, when contributory fault is established, the compensation must be reduced proportionally.[773] As outlined below, investment tribunals have routinely adopted this principle:

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[770] Herfried Wöss and Adriana San Román, "Full Compensation, Full Reparation and the But-For Premise," *The Guide to Damages in International Arbitration* (4th ed. 2021) (**RL-0101**).

[771] Sergei Ripinsky and Kevin Williams, *Damages in International Investment Law* (2008) pp. 314-315 (**RL-0102**).

[772] ARSIWA, Art. 39 (**CL-0017**).

[773] Sergei Ripinsky and Kevin Williams, *Damages in International Investment Law* (2008) p. 316 (**RL-0102**).

a. In *MTD v. Chile*, the tribunal decreased damages by 50 percent due to the poor business judgment by claimant, including its complete lack of due diligence and failure to secure proper licenses before pursuing its investment.[774]

b. In *Copper Mesa v. Ecuador*, the tribunal applied the "general approach…deriving from a consistent line of international legal materials" and decreased claimant's damages by 30 percent due to its own contribution.[775]

c. In *Yukos v. Russia*, the tribunal stated that "an award of damages may be reduced if the victim of the wrongful act of the respondent State also committed a fault which contributed to the prejudice it suffered," and apportioning 25 percent of the responsibility for injury on the claimants.[776]

d. In *Occidental Petroleum v. Ecuador*, the tribunal decreased damages by 25 percent due to the claimant's contributory fault.[777]

498. The same reduction in damages should be applied here because the record proves that Riverside's negligent conduct contributed to the alleged harm. This contributory negligence is evident in three separate occasions.

499. ***First***, Riverside knew or should have known that Hacienda Santa Fé has been the subject of a property dispute between Inagrosa and Cooperativa El Pavón that dates all the way back to 1990. This dispute resulted in numerous invasions of Hacienda Santa Fé between 1990 and 2014. When Riverside began investing in Hacienda Santa Fé in the late 1990s, it did not do anything to mitigate the risk of future invasions. For example, it did not build walls that impeded would-be invaders from entering the property or install security cameras that surveilled the exits and entryways into the Hacienda. This negligent behavior contributed to the Hacienda's invasion in 2017.

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[774] *See MTD Equity Sdn. Bhd. And MTD Chile S.A. v. Republic of Chile*, ICSID Case No. ARB/01/7, Award, May 25, 2004, ¶ 243 (**CL-0088**).

[775] *Copper Mesa Mining Corporation v. The Republic of Ecuador*, PCA Case No. 2012-2, Award, March 15, 2016, ¶¶ 6.97-6.102 (**RL-0053**).

[776] *Yukos Universal Limited (Isle of Man) v. The Russian Federation*, PCA Case No. AA 227, Final Award, July 18, 2014, ¶¶ 1633-1637 (**RL-0111**).

[777] *See Occidental Petroleum Corporation and Occidental Exploration and Production Company v. Republic of Ecuador*, ICSID ARB/06/11, Award, October 5, 2012, ¶¶ 659-687 (**CL-0058**).

500. ***Second***, Riverside compounded its lack of vigilance over Hacienda Santa Fé by actively deserting that Hacienda in or around 2017. As proven in Section II.A, Riverside stopped investing in the Hacienda in 2014, after the Roya fungus destroyed the coffee plantation that had been the main source of income on the property. The record evinces that, from 2014 to 2017, Riverside and Inagrosa practically abandoned the Hacienda. This abandonment was so stark that, in June 2017, hundreds of invaders entered the property and occupied it for a year without ever being detected. As noted above, this was the main cause for the invasion of Hacienda Santa Fé, and Riverside and Inagrosa only have themselves to blame for it.

501. ***Third***, Riverside contributed to the alleged harm when it (once again) failed to do anything to secure Hacienda Santa Fé in the days following Nicaragua's successful eviction of the illegal occupants from the Hacienda on August 11, 2018. Indeed, it is undisputed that each of the illegal occupants left the property on that date at the Government's behest. And the record is clear that these illegal occupants returned days later, on August 17, 2018, because Riverside and Inagrosa did not secure the perimeter of the Hacienda. This negligent behavior is the main reason that the invasion carried on for three more years, until the Government (once again) evicted each of the illegal occupants from the Hacienda in August 2021.

502. For these reasons, any damages award in this case must be reduced to account for Riverside's negligence, which greatly contributed to the alleged harm.

2. <u>Riverside Did Not Mitigate Its Losses Following the Illegal Invasion</u>

503. Any damages award in this case must also be reduced to account for Riverside's complete failure to mitigate its damages.

504. International law follows the general principle that there is a duty to mitigate damages. The ARSIWA commentaries note that the question of "mitigation of damages" is "[a]

further element affecting the scope of reparation" and that "a failure to mitigate by the injured party may preclude recovery to that extent."[778]

505. The principle that a claimant must take reasonable steps to mitigate their losses is also a well-established principle in investment arbitration.[779] As the *Middle East Cement v. Egypt* tribunal held, mitigation of damages "can be considered to be part of the General Principles of Law which, in turn, are part of the rules of international law which are applicable in this dispute according to Art. 42 of the ICSID Convention."[780] According to an investment tribunal, "the duty to mitigate is a restriction on compensatory damages" and the principle applies if "a claimant is unreasonably inactive following a breach of treaty."[781] Indeed, it has been held that whether the investor "has taken reasonable steps to reduce the loss is a question of fact" and "[w]hat is reasonable depends largely on the facts of the case."[782]

506. Here, Riverside had the opportunity to mitigate its losses by taking possession of the Hacienda when Nicaragua offered it in September 2021. But Riverside inexplicably dithered. And, as a result, the property has been completely abandoned for nearly two years, likely leading to further reductions in its value.

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[778] ARSIWA, Art. 31, Commentary, ¶ 11 (**CL-0017**).

[779] *See William Ralph Clayton, William Douglas Clayton, Daniel Clayton and Bilcon of Delaware, Inc. v. Government of Canada*, PCA Case No. 2009-04, Award on Damages, January 10, 2019, ¶ 204 (**RL-0103**); *Hrvatska Elektroprivreda d.d. v. Republic of Slovenia*, ICSID Case No. ARB/05/24, Award, December 17, 2015, ¶ 215 (**RL-0104**); *EDF International S.A., SAUR International S.A. and León Participaciones Argentinas S.A. v. Argentine Republic*, ICSID Case No. ARB/03/23, Award, June 11, 2012, ¶ 1302 (**RL-0105**).

[780] *Middle East Cement Shipping and Handling Co. v. Arab Republic of Egypt*, ICSID Case No. ARB/99/6, Award, April 12, 2002, ¶ 167 (**RL-0106**).

[781] *William Ralph Clayton, William Douglas Clayton, Daniel Clayton and Bilcon of Delaware, Inc. v. Government of Canada*, PCA Case No. 2009-04, Award on Damages, January 10, 2019, ¶ 204 (**RL-0103**).

[782] *EDF International S.A., SAUR International S.A. and León Participaciones Argentinas S.A. v. Argentine Republic*, ICSID Case No. ARB/03/23, Award, June 11, 2012, ¶ 1306 (**RL-0105**).

507. Hence, should the Tribunal award any damages to Riverside in this case, it should be Riverside – ***not*** Nicaragua – that should pay for the reduction in value to Hacienda Santa Fé since September 2021.

3. Any Damages Awarded Must Be Offset by Nicaragua's Costs for Providing Security to Hacienda Santa Fé and Inagrosa's Outstanding Tax Debt

508. As Nicaragua explained in its December 12, 2022 letter to the Tribunal, Nicaragua has provided around-the-clock security for Hacienda Santa Féin order to protect the property from further illegal occupants entering its grounds.[783] Nicaragua also explained that it entered into a security services agreement with a private company,[784] and since Inagrosa has left the property abandoned and refused to re-take possession, Nicaragua has borne all costs associated with protecting the property.[785] Under the terms of that security services agreement, Nicaragua continues to bear monthly expenses to keep the property secure.

509. In addition, as Ms. Gutiérrez Rizo explains, Inagrosa has been delinquent on its tax obligations in Nicaragua since 2015 and currently has outstanding tax debts to the Municipality of Jinotega, which continue to accrue to this day.[786] Inagrosa's tax debt is estimated to be approximately USD $140,772.26 (as of December 2022).[787]

510. Accordingly, should the Tribunal award any damages—which it should not—that amount must be offset by: (i) Nicaragua's expenses to provide security for Hacienda Santa Fé,

[783] *See* Nicaragua's Second Response to Claimant's Motion, December 12, 2022.

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

[785] *See* Nicaragua's Second Response to Claimant's Motion, December 12, 2022.

[786] *See* Gutiérrez-Rizo I, ¶¶ 26-28.

[787] *See* Report of the Municipal Cadastre Section of the San Rafael del Norte Mayor's Office, December 12, 2022 (**R-0055**). Nicaragua reserves the right to update this amount in its Rejoinder.

which Nicaragua would not have had to provide ***but for*** Inagrosa's choice to leave the property abandoned; and (ii) Inagrosa's outstanding tax debts.

E. The Tribunal Should Apply an Alternative Valuation Methodology

511. As established above, any claim for damages under a DCF methodology must be rejected in this case. Riverside only requests damages under the DCF methodology and does not advance an alternative valuation method.[788] Accordingly, Riverside has not established any viable methodology through which it can be awarded damages related to the investments at issue here.

512. In the unlikely event that Riverside establishes a breach and the Tribunal believes that a damages award is necessary, Nicaragua refers the Tribunal to the Credibility Report, which espouses an alternative methodology for assessing damages in this case. According to Credibility, the only non-speculative methodology for valuing Riverside's investments in Inagrosa would be "the change in the value or status of the business or investment from the Valuation Date and today, or when Respondent secured the property and requested Inagrosa to maintain it."[789]

513. Credibility completed this analysis and included the results in its Report, which presents three damages scenarios.[790] But as Credibility expressly notes, this analysis must be qualified because Riverside has not submitted credible evidence demonstrating a change in value of the property.[791] Credibility has therefore arrived at its alternative valuation using the information that Riverside and Mr. Kotecha rely upon *pro tem* until Riverside provides credible financial data.

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[788] For the avoidance of doubt, Claimant's Expert Report of Carlos Pfister (**CES-03**), provides a comparative land value analysis of avocado plantations in Mexico, not Nicaragua, and does not purport to calculate the land or infrastructure value of Hacienda Santa Fé.

[789] Credibility I, ¶ 192 (**RER-02**).

[790] Credibility I, § 4 (**RER-02**).

[791] Credibility I, ¶ 192 (**RER-02**) ("Claimant has not provided any evidence as to the change in the status of the property, but to assist the Tribunal, we have analyzed information that Claimant and Mr. Kotecha rely upon for such indications and thus the potential change in value.").

As such, Nicaragua and Credibility expressly reserve the right to amend the alternative valuation calculations subject to further disclosures from Claimant.

514. In conducting this analysis, Credibility started with the (unproven) premises in the Kotecha Report that the 40-hectare orchard at Hacienda Santa Fé was valued at USD $57,500 per hectare and uncultivated land at Hacienda Santa Fé was valued at USD $30,000 per hectare.[792] If it is assumed that the passage of time has caused the cultivated land in the orchard to revert back to an uncultivated status, the change in the value of the planted land is USD $1,100,000 (*i.e.*, USD $27,500 x 40).[793] Credibility then relies on Inagrosa's balance sheet to find that infrastructure at Hacienda Santa Fé (*e.g.*, housing, roads, nurseries, etc.) was worth USD $1,767,948. If it can be proven by Riverside that this infrastructure was totally destroyed, then the change in value of the business property is USD $2,867,948. This amount would then be reduced by 74.5 percent, since that is the percentage of Inagrosa that Riverside owned as of the Valuation Date. At the end the final damages amount under this scenario is USD $731,327, as shown in the table below:

Table V.3: Potential Damages (Scenario 1)[794]

	Hectares	FMV / Ha	Amount (USD)
Land			
Jun-18	40	57,500	2,300,000
Mar-23	40	30,000	1,200,000
Difference			**1,100,000**
Infrastructure			
Jun-18			1,767,948
Mar-23			-
Difference			**1,767,948**
Total			2,867,948
Claimant Ownership			25.50%
Claimant Total			**731,327**

[792] Credibility I, ¶ 193 (**RER-02**).

[793] Credibility I, ¶ 193 (**RER-02**).

[794] Credibility I, Appendix I.1: Alternative Damages - Scenario 1 (**RER-02**).

515. For the second scenario, Credibility assumes that the infrastructure still exists but has not been maintained.[795] Using Inagrosa's balance sheets, Credibility calculates the infrastructure would have lost a value approximating USD $624,403 since the Valuation Date. If so, the final damages amount is USD $1,724,403 and Riverside's 25.5 percent share of that amount is USD $439,723, as demonstrated in the below table:

Table V.4: Potential Damages (Scenario 2)[796]

	Hectares	FMV / Ha	Amount (USD)
Land			
Jun-18	40	57,500	2,300,000
Mar-23	40	30,000	1,200,000
Difference			**1,100,000**
Infrastructure			
Jun-18			1,767,948
Mar-23			1,143,545
Difference			**624,403**
Total			1,724,403
Claimant Ownership			25.50%
Claimant Total			**439,723**

516. For the third and final scenario, Credibility considers the situation where Inagrosa would have begun properly maintaining Hacienda Santa Fé in September 2021, when Nicaragua offered to return the property back to Inagrosa (an offer that Riverside and Inagrosa did not agree to).[797] Assuming Riverside would have made this mitigating effort, Credibility concludes that the difference in value from the Valuation Date to September 2021 approximated USD $1,173,651 and that Riverside's 25.5 percent share of that amount is USD $299,281, as demonstrated below:

[795] Credibility I, ¶ 196 (**RER-02**).

[796] Credibility I, Appendix I.2: Alternative Damages - Scenario 2 (**RER-02**).

[797] Credibility I, ¶ 198 (**RER-02**).

Table V.5: Potential Damages (Scenario 3)[798]

	Hectares	FMV / Ha	Amount (USD)
Land			
Jun-18	40	57,500	2,300,000
Sep-18	40	38,783	1,551,326
Difference			**748,674**
Infrastructure			
Jun-18			1,767,948
Sep-18			1,342,971
Difference			**424,977**
Total			1,173,651
Claimant Ownership			25.50%
Claimant Total			**299,281**

517. This is the least speculative methodology available to the Tribunal should it award damages to Riverside. Nicaragua notes, however, that these amounts are subject to significant reduction. As Nicaragua has proven, the activities that Inagrosa was undertaking at Hacienda Santa Fé vis-à-vis the Hass avocado and forestry businesses were illegal because Inagrosa never obtained requisite permits and authorizations.[799] This fact means that Inagrosa is subject to severe sanctions, including sizable economic penalties and the forced closure of the business. Moreover, these amounts must be reduced by the amounts Nicaragua spent for providing security over the Hacienda as well as the amounts owed by Riverside and Inagrosa for years of unpaid property taxes. For these reasons, Credibility and Nicaragua reserve their right to adjust these figures once more information is available about the penalties that Inagrosa stands to incur for its alleged activities.[800]

* * *

518. In conclusion, Riverside's request for economic damages, which is exclusively based on the DCF methodology, as set forth in the Kotecha Report, must be withdrawn in light of

[798] Credibility I, Appendix I.3: Alternative Damages - Scenario 3 (**RER-02**).

[799] *See* Sections II.C and II.D, *supra*.

[800] Credibility I, ¶ 202 (**RER-02**).

Riverside's abject failure to provide any historical financial records that would support a DCF approach. A DCF analysis is wholly inapplicable and entirely speculative in the context of a greenfield project, like Inagrosa's avocado and forestry businesses. If the Tribunal does find that Riverside has proven liability, causation, and entitlement to damages based on sufficient contemporaneous evidence (which it has not yet produced) and is thus inclined to award damages—which it should not—it should adopt a far less speculative approach, as Credibility puts forth in its alternative valuation methodology.[801]

F. Riverside Requests an Interest Rate that Is Incompatible under the Express Terms of DR-CAFTA

519. The interest rate proffered by Riverside should be rejected because it is not based on the currency in which the FMV of damages is denominated, as required under DR-CAFTA.[802]

520. Article 10.7(3) of DR-CAFTA mandates that the interest rate must be consistent with the currency in which the damages claim is denominated:

> 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.[803]

521. However, here, Riverside claims damages denominated in USD $, but then argues it is entitled to Nicaragua's statutory "domestic court interest rate" in 2018 of 9 percent, which is denominated in Nicaraguan Córdobas ("NIO").[804] This request is invalid under Article 10.7(3) of DR-CAFTA.

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[801] *See* Credibility I, Appendix I.3: Alternative Damages - Scenario 3 (**RER-02**).

[802] *See* DR-CAFTA, Art. 10.7(3) (**CL-0001**).

[803] *See* DR-CAFTA, Art. 10.7(3) (**CL-0001**).

[804] Memorial, ¶ 807.

522. The Tribunal should instead apply the 10-year U.S. Treasury bond rate should any economic damages sums be awarded here, if any. As Credibility explains, the "typical base rate of pre-judgment interest would be a US risk-free rate" because of "its fair and predictable outcomes, no subjective risks, and also because it avoids speculation by trying to predict returns on alternative investments."[805]

523. Accordingly, if the Tribunal awards any damages, which it should not, it must reject any interest rate denominated in NIO to comply with the express terms of DR-CAFTA and apply the more appropriate and commercially reasonable interest rate based on the 10-year U.S. Treasury bond rate.

G. Riverside's Moral Damages Claim Must Be Rejected

524. Riverside contends that the "wrongful expropriation…also morally damaged Riverside Coffee, Inagrosa and its shareholders, management, employees, and equity holders."[806] In recompense, Riverside seeks an astounding $45 million in moral damages. This claim should be rejected in its entirety.

525. As demonstrated above, Nicaragua has not engaged in any unlawful conduct, thus Riverside is not entitled to damages or compensation in any form.[807] However, even if the Tribunal were to conclude that Nicaragua had breached its Treaty obligations, Riverside's request for moral damages is legally unfounded and factually unsupported for the following reasons: (1) Riverside has no standing to claim moral damages because those persons present during the invasion were only Inagrosa employees; and (2) Riverside has not even attempted to overcome its burden of proving its moral damages claim, which carries a heightened standard of proof.

[805] Credibility I, ¶ 161.

[806] *See* Memorial, ¶ 873

[807] *See* Section IV, *supra*.

526. As a preliminary matter, Nicaragua must qualify its response to Riverside's moral damages claim because said claim is internally inconsistent and requires clarification before a fulsome response can be furnished. Indeed, at one point, Riverside alleges that its moral damages request "reflects harm, stress, humiliation, and suffering arising from the unlawful invasion, the death threats, and the suffering caused to the senior management of Inagrosa."[808] Yet, throughout its argument, Riverside appears to contend that it suffered moral damages related to its loss of credit and reputation as a corporate entity.[809] The nature of these two claims are, as both a legal and evidentiary matter, materially distinct and cannot be proven under the same set of facts.

527. In any event, Riverside has failed to present any evidence that it suffered any diminution in business, goodwill, or credit that would warrant an award of moral damages. Accordingly, Nicaragua will assume that any claim to moral damages relates only to the alleged incursions on Hacienda Santa Fé and alleged treatment of natural persons employed by Inagrosa; but Nicaragua expressly reserves the right to amend its argument if Riverside later asserts a claim for loss of credit and reputation as a legal person.

1. Riverside Does Not Have Standing to Claim Moral Damages

528. As an initial matter, Riverside's claim for moral damages must be rejected since Riverside has no standing to claim moral damages here. As shown below, the only entity that has standing to bring this claim under the alleged facts is Inagrosa.

529. Riverside contends that its "claim warrant[s] moral damages" for the "wrongs committed against the Investor."[810] But the "wrongs" asserted by Riverside in this context are the

[808] Memorial, ¶ 77.

[809] Memorial, ¶¶ 870, 873-874, 882, 894-899.

[810] Memorial, ¶ 916.

alleged threats and violence that transpired at Hacienda Santa Fé during the invasion. And those wrongs, as alleged by Riverside, were committed against ***Inagrosa***, not Riverside.

530. Indeed, Riverside has at all times been a company located in the United States and without any physical presence in Nicaragua. Riverside is not alleged to have directly employed anyone located at Hacienda Santa Fé. And to be sure, the individuals who were threatened and physically hurt during the invasion were employees of Inagrosa, not Riverside.

531. Investment tribunals have rejected claims for moral damages on the grounds that the persons harmed by government misconduct were not physically present during the alleged measures and those that were harmed by those measures were employed directly by the domestic company, not the foreign shareholder.[811] For example, in *Bernhard von Pezold v. Zimbabwe*, the tribunal excluded certain natural persons from its moral damages analysis precisely because they were abroad at the time of the alleged conduct.[812] There, the only natural person to be awarded moral damages was a named claimant that suffered direct incorporeal harm by organs of the State. Ultimately, that tribunal held that the "von Pezolds, other than Heinrich, were outside Zimbabwe and so, for that reason, the Tribunal finds that they cannot recover moral damages."[813]

532. Similarly, in *Oxus Gold v. Uzbekistan*, the tribunal refused to consider moral damages because the alleged misconduct did not affect natural persons directly affiliated with the investor. Instead, the alleged misconduct was affected against employees of a subsidiary of the

[811] *See Oxus Gold plc v. Republic of Uzbekistan*, Final Award, December 17, 2015, ¶¶ 903-904 (**RL-0107**) ("As to the treatment by Respondent of some members of AGF's personnel (see above para. 893), the persons concerned (i.e., Messrs Ashurov, Narziev, Salamatin, and Yunusov) were employees of AGF, not of Claimant directly. … As to the prosecutions against some members of AGF's personnel, they concerned employees of AGF and not of Claimant.").

[812] *Bernhard von Pezold and others v. Republic of Zimbabwe*, ICSID Case No. ARB/10/15, Award, July 28, 2015, ¶ 922 (**RL-0061**).

[813] *Border Timbers Limited, Timber Products International (Private) Limited, and Hangani Development Co. (Private) Limited v. Republic of Zimbabwe*, ICSID Case No. ARB/10/25, Award, July 28, 2015, ¶ 917 (**RL-0108**).

investor. Accordingly, the tribunal held the investor had no standing to bring a claim for moral damages.[814]

533. The same result should occur here. The alleged basis for moral damages in this case is the allegation that workers located at the Hacienda suffered incorporeal harm or physical duress during the invasion. Each of those workers, however, is employed only by Inagrosa. None of the representatives of Riverside were present during the invasion.

534. Accordingly, the moral damages claims must be dismissed because Riverside has no standing to bring them.

2. Riverside Has Not Overcome the High Threshold for Establishing Its Right to Moral Damages

535. A claim for moral damages is a serious charge requiring the claimant to overcome an exacting burden of proof. Investment tribunals have uniformly held that the "bar for recovery of [moral] damages has been set high" and will be awarded in "exceptional circumstances."[815] As the tribunal in *Arif v. Moldova* noted, while the tribunal has some discretion in determining whether to award moral damages, such an award is an "exceptional remedy."[816] That limit, the tribunal noted, "must be acknowledged and respected."[817]

536. Nothing Riverside cites is to the contrary. In fact, Riverside's own authorities—*Desert Line v. Yemen* and *Lemire v. Ukraine*—likewise establish that moral damages are only available under exceptional circumstances.

[814] *See Oxus Gold plc v. Republic of Uzbekistan*, Final Award, December 17, 2015, ¶¶ 903-904 (**RL-0107**).

[815] *Oxus Gold plc v. Republic of Uzbekistan*, Final Award, December 17, 2015, ¶ 895 (**RL-0107**).

[816] *Arif v. Moldova*, ICSID Case No. ARB/11/23, Award, April 8, 2013, ¶¶ 590-592 (**CL-0068**).

[817] *Arif v. Moldova*, ICSID Case No. ARB/11/23, Award, April 8, 2013, ¶ 598 (**CL-0068**).

537. Riverside attempts to skirt around this heightened standard by arguing that "non-material injury can be established even without specific evidence."[818] This self-serving argument has been rejected by tribunals assessing moral damages claims. For example, in *Rompetrol v. Romania*, the tribunal noted that when evidence cannot be provided for moral damages claims, "[t]o resort instead to a purely discretionary award of moral solace would be to subvert the burden of proof and the rules of evidence," which that Tribunal did not do.[819]

538. That is precisely what Riverside attempts to do here. Indeed, Riverside has made no attempt to substantiate how it arrived at its USD $45 million sum for moral damages. Nor has Riverside produced a single piece of contemporaneous evidence that suggests its U.S.-based employees suffered any form of distress, anguish, or suffering from the events that transpired thousands of miles away in Nicaragua.

539. Even if Inagrosa employees were considered part of this claim—which they should not—Riverside likewise has not produced ***any*** evidence demonstrating injury, distress, or injury of the like.

540. Therefore, the Tribunal should dismiss Claimant's request for moral damages.

[818] Memorial, ¶ 859.

[819] *The Rompetrol Group N.V. v. Romania*, ICSID Case No. ARB/06/3, Award, May 6, 2013, ¶ 289 (**RL-0067**).

VI. PRAYER FOR RELIEF

541. For the reasons set out in this Counter-Memorial,[820] the Republic of Nicaragua respectfully requests that the Tribunal:

a. DECLARE that the claims brought by Riverside Coffee, LLC on behalf of Inagrosa S.A. are inadmissible;

b. DECLARE that even if they were admissible, it has no jurisdiction to hear the claims brought by Riverside Coffee, LLC on behalf of Inagrosa S.A.;

c. DISMISS Claimant's claims brought under Articles 10.3, 10.4, 10.5, and 10.7 of DR-CAFTA as meritless;

d. DISMISS Claimant's request for compensation in its entirety, including its request for moral damages;

e. ORDER Claimant to pay Nicaragua the costs of providing security to preserve the abandoned Hacienda Santa Fé, as well as the amount of outstanding tax debt owed by Inagrosa S.A. or debt with the government of any other nature; and

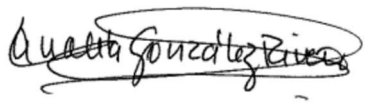
f. ORDER Claimant to pay all costs and expenses related to this arbitration, including but not limited to the fees and expenses of the Tribunal, the administrative fees and expenses of ICSID, and all costs of Nicaragua's legal representation and expert assistance, plus pre-award and post-award compound interest accrued thereon until the date of payment estimated at a rate determined by the Tribunal.

[820] The Republic of Nicaragua expressly and unequivocally reserves its right to supplement its objections to jurisdiction and admissibility, defenses on the merits, and arguments related to damages—as well as its right to seek any other appropriate relief from the Tribunal—in the event the document production phase uncovers new information about Riverside, Inagrosa, or the shareholders of either entities.

g. GRANT any other or additional relief as may be appropriate under the circumstances or as may otherwise be just and proper.

March 3, 2023

Respectfully submitted,



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