IN THE MATTER OF AN ARBITRATION UNDER CHAPTER 10 OF THE DOMINICAN REPUBLIC-CENTRAL AMERICAN FREE TRADE AGREEMENT AND THE ICSID ARBITRATION RULES

RIVERSIDE COFFEE, LLC

Investor

٧.

REPUBLIC OF NICARAGUA

Respondent

INVESTOR'S POST-HEARING SUBMISSION OCTOBER 25, 2024

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Abbreviations

For this submission:

Abbrev.	Definition
§	"§" means Section or Article.
¶	"¶" means paragraph (¶¶ means paragraphs)
Action	"Action" means the CAFTA arbitration-initiated claim by the Investor against the Republic of Nicaragua via the Notice of Arbitration dated March 19, 2021, is currently pending before Arbitrators Veijo Heiskanen, Lucy Greenwood, and Philippe Couvreur.
APPLICATION	"APPLICATION" means the application for a protective order against Riverside made to court filed by the Attorney General of Nicaragua on November 30, 2021.
ARSIWA	"ARSIWA" means the International Law Commission's Draft Articles on Responsibility of States for Internationally Wrongful Acts.
AG	"AG" means Attorney General.
CAFTA	"CAFTA" means the Dominican Republic–Central American Free Trade Agreement (see also "Treaty").
СМ	"CM" means the Respondent's Counter-Memorial on the Merits, including Jurisdictional Objections, dated March 3, 2023 (Counter-Memorial or CM).
DCF	"DCF" means Discounted Cash Flow method of damages valuation.
ES	"ES" means essential security.
ESI	"ESI" means the essential security interests clause in CAFTA § 21.2.
ESM	"ESM: means the specific essential security measures identified by Nicaragua as being covered by Essential Security Interests in §21.2 in this claim. Nicaragua identified these as: (a) The August 2018 steps to request invaders to leave HSF. (b) The process from August 11, 2018, until August 2021 is to have occupiers leave. (c) finding other land, and meetings between the members of the El Pavon cooperative and the interagency body. (d) allowing individuals to remain at HSF until they finish their harvest in 2021.
FET	"FET" means Fair and Equitable Treatment.
FPS	"FPS" means Full Protection and Security.
HSF	"HSF" refers to the lands owned by INAGROSA located in Jinotega Department, Nicaragua, known as Hacienda Santa Fé.
ICJ	"ICJ" means the International Court of Justice
ICSID	"ICSID" means the International Centre for the Settlement of Investment Disputes.

ICSID Convention	"ICSID Convention" means the Convention on the Settlement of Investment Disputes between States and Nationals of Other States.			
Judicial Order	"Judicial Order" means the Court Order issued by the Second Oral Court of the civil district of Jinotega Northern District on December 15, 2021 (C-0251-SPA-ENG).			
ILC	"ILC" means the United Nations International Law Commission.			
IRS	"IRS" means the Internal Revenue Service of the United States of America.			
INAGROSA	"INAGROSA" means Inversiones Agropecuarias, S.A.			
Invasion	"Invasion" or "Invasions" means the trespass of Hacienda Santa Fé by those other than the lawful owner of the property, commencing on June 16, 2018, and continuing after that. The continuation of the Invasion is referred to as the Occupation.			
Investor	"Investor" means Riverside Coffee, LLC. ("Investor" or "Riverside").			
Investment	"Investment" means all investments as defined in CAFTA Article 10.28 owned or controlled by Riverside, including but not limited to Inversiones Agropecuarias S.A. ("INAGROSA").			
IPSA	"IPSA" means the Institute of Agricultural Protection and Health of Nicaragua.			
Judicial Order	"Judicial Order" means the Court Order issued by the Second Oral Court of the civil district of Jinotega Northern District on December 15, 2021 (C-0251-SPA-ENG).			
LAAD	"LAAD" means the Latin American Agribusiness Development Corporation.			
Memorial	"Memorial" means the Investor's Memorial, dated October 21, 2022, unless otherwise explicitly referring to the Respondent's Counter-Memorial, dated March 3, 2023.			
MFN	"MFN" means Most Favored Nation Treatment			
NAFTA	"NAFTA" means the North American Free Trade Agreement			
National Police	"National Police" means the National Police of Nicaragua.			
NT	"NT" means National Treatment			
Nicaraguan Resistance	"Nicaraguan Resistance" or "Resistance" means the US-backed rebel group that fought a decade-long civil war against the Government of Nicaragua in the 1980s, as referred to in, among other places, paragraph 6 of the Respondent's Counter-Memorial. Also referred to as the "Resistance."			
NDPS Response	"NDPS" means the Non-Disputing Party Submission of the United States of America.			
NDPS Response	"NDPS Response" means Riverside's Response to the Non- Disputing Party Submission of the United States of America.			
NIO	"NIO" means the Nicaraguan Cordoba.			
NOA	"NOA" means the Notice of Arbitration filed by Riverside in this arbitration.			
NPM	"NPM" means non-precluded measures.			

Nottebohm case	"Nottebohm case" means the International Court of Justice decision in Nottebohm, Liechtenstein v Guatemala, Preliminary Objection (Second phase), Judgment, [1955] ICJ Rep 4, ICGJ 185 (ICJ 1955), 6th April 1955, International Court of Justice [ICJ]
Occupiers	"Occupiers" means the continuing trespass of Hacienda Santa Fé by those other than the lawful owner of the property, from June 16, 2018, and continuing after that. The ongoing activity of the Occupiers is referred to as the Occupation.
Party	A Contracting Party to the CAFTA Treaty (such as the Republic of Nicaragua).
Party	A party to the CAFTA arbitration (also known as a disputing party)
PHB	Post Hearing Brief
Resistance	"Resistance" means the former Nicaraguan Resistance.
Respondent	"Respondent" means the Republic of Nicaragua.
Rejoinder	"Rejoinder" means Nicaragua's Rejoinder Memorial
Reply	"Reply" means the Investor's Reply Memorial
Russian Treaty	"Russian Treaty" means the 2012 Agreement on the Promotion and Reciprocal Protection of Investments between the Governments of the Russian Federation and the Republic of Nicaragua.
Second Application	"Second Application" means the application for a renewal protective order against Riverside made to the court filed by the Attorney General of Nicaragua in 2024.
Sandinista	Sandinista means the Sandinista National Liberation Front.
SNLF	"SNLF" means the Sandinista National Liberation Front.
Treaty	"Treaty" means the Dominican Republic-Central American Free Trade Agreement (DR-CAFTA or CAFTA).
UN	"UN" means the United Nations
UNCITRAL	"UNCITRAL" means the United Nations Commission on International Trade and Law.
UNCITRAL Rules	"UNCITRAL Rules" means the UNCITRAL Arbitration Rules
VCLT	"VCLT" means the Vienna Convention on the Law of Treaties, United Nations, Treaty Series, vol. 1155, p. 331, 23 May 1969.

A. Overview

- 1. Nicaragua refuses to accept responsibility for the unlawful occupation that devastated Riverside's investment at HSF. Despite orchestrating these internationally wrongful acts and bearing responsibility for them, Nicaragua denies its role. While Nicaragua may offer its opinion, it cannot invent facts or rewrite the law.
- 2. Nicaragua denies responsibility for the unlawful occupation that devastated Riverside's investment. While orchestrating and perpetuating these internationally wrongful acts, Nicaragua attempts to distance itself from their consequences. However, it cannot escape the truth: the evidence of its complicity in the devastation is overwhelming, and no amount of revisionism will absolve it of responsibility. Nicaragua has been non-compliant with international legal norms and its CAFTA obligations.
- 3. After nearly two weeks of testimony, the weakness of Nicaragua's defense is apparent: it is built on the unstable foundation of a regime void of independent voices. The reality is undeniable: Riverside's substantial investment was systematically destroyed. Nicaragua permitted the illegal occupation for years, intervening only years later when confronted by this CAFTA claim.
- 4. Although it presents itself as a constitutional democracy, even its former counsel, Paul Reichler, has acknowledged in his public resignation letter that the Ortega-Murillo regime is, in fact, a dictatorship.¹
- 5. Riverside has provided compelling, independent evidence from international bodies, including the UN and OAS, proving the regime's total control over all branches of government. As Prof. Wolfe testified, it is inconceivable that the armed occupation continued without the regime's explicit approval.² This independent evidence paints a consistent and irrefutable picture: Nicaragua incited and perpetuated the civil unrest of 2018. Nicaragua's systematic expropriation of property and suppression of dissent demonstrate its flagrant disregard for the rule of law.³
- 6. Nicaragua's defense relies solely on evidence from regime loyalists, lacking any independent corroboration.⁴ No credible, independent witness supports its claims, and key figures involved in the occupation are conspicuously absent from Nicaragua's case.

² **CES-05** ¶¶120-125.

¹ **C-0671-ENG** p.3.

³ For example, in **CES-02** ¶103, Prof. Wolfe says, "In this context, all those that the Ortega government deems its opponents find themselves denied access to constitutional guarantees and the rule of law." And in **CES-05** ¶28, he says, "On balance, there is significant evidence of ongoing failures to respect the rule of law and human rights by the [Sandinista] government".

⁴ All of Nicaragua's fact witnesses are government officials. Nicaragua's Legal Expert, Dr. Sequeira, worked as a consultant for the Nicaraguan Supreme Court of Justice, the Attorney General Office of Nicaragua, and the Nicaraguan State in an arbitral proceeding (see Transcript 1684:15-1687:7).

- 7. The occupation of Riverside's property escalated in July 2018, yet Nicaragua took no action to prevent it. While other investments received police protection, Riverside was deliberately left exposed, violating CAFTA's FET and FPS obligations.⁵ As acknowledged by Police Captain Herrera, the state's failure was not incidental but the result of deliberate orders,⁶ culminating in the destruction of INAGROSA's plantation and infrastructure.
- 8. Nicaragua's damages experts ignored the evidence of damage expressly contained in Nicaragua's documents and executed by Police Captain Herrera. His sworn statement on August 14, 2018, confirmed the devastation: avocado production ceased, infrastructure was looted, and the plantation was destroyed. Despite the evident destruction, Nicaragua remained inactive for years, even though it protected other investments during the same period. Riverside reasonably expected Nicaragua to uphold the law, to but its investment was left to be systematically destroyed.
- 9. Under cross-examination, Police Captain Herrera admitted that his superiors ordered him not to intervene, allegedly based on a presidential directive. He provided no documentary evidence to justify this phantom directive, 11 highlighting the arbitrary and lawless nature of Nicaragua's response.
- 10. Nicaragua facilitated the occupation and destruction of Riverside's investment. Police Captain Herrera's testimony acknowledged that the police's inaction violated Nicaragua's obligation to provide FPS, defying Riverside's legitimate expectations that Nicaragua would uphold its legal commitments. This neglect violated FPS, FET, and NT obligations under CAFTA and international law. This is in addition to the expropriation caused by Nicaragua at HSF.
- 11. Even without direct orders, Nicaragua was aware of and encouraged the illegal occupation. ¹² It failed to stop the occupiers or safeguard Riverside's rights. While police protected other investors, ¹³ they deliberately left Riverside vulnerable. Police Captain Herrera further confirmed that Riverside's only means of defense—its weapons—were confiscated. ¹⁴ This selective inaction against the unlawful armed invaders threatening HSF workers with death was compounded by a lack of transparency, violated CAFTA's standards, and left Riverside in profound legal uncertainty.

⁵ C-0326-SPA; Reply ¶128 Charts C1 and C2.

⁶ Transcript 1243:23-1244:7;124716-19;1263:4-8:1272:17-21.

⁷ Transcript 1994:25-1997:24.

⁸ C-0058-SPA/R-0148-ENG.

⁹ C-0326-SPA; Reply ¶128 Charts C1 and C2.

¹⁰ **CWS-01** ¶8; See also Transcript 1239:1-7.

¹¹ Transcript 1252:13-16.

¹² C-0284-SPA-ENG; C-0035-SPA-ENG; C-0736-SPA-ENG.

¹³ Transcript 1241:1-10.

¹⁴ Transcript 1242:2-7.

B. Essential Security Interests: Nicaragua's Misguided Invocation

- 12. Nicaragua's reliance on the Essential Security Interests (ESI) exception under CAFTA §21.2 is a transparent attempt to shield its wrongful conduct under the guise of national security. Invoking ESI in bad faith undermines CAFTA's purpose and opens the door for states to abuse international law. Riverside urges the Tribunal to carefully weigh Nicaragua's security claims, ensuring they are made in good faith, rational, and proportionate to any actual threat.
- 13. Nicaragua asserts that its refusal to provide police protection to Riverside qualifies as an Essential Security Measure (ESM). However, this conflates ordinary security concerns with the narrower, more stringent definition of "essential" security interests, which must directly relate to the state's survival or core interests. International jurisprudence from the ICJ and WTO firmly rejects unchecked deference to states in such matters, insisting on objective scrutiny of ESI claims.
- 14. While some deference is afforded to states on essential security matters, international law imposes clear limits: actions must be necessary, proportionate, and carried out in good faith. CAFTA's ESI clause reinforces this, requiring that state measures genuinely protect an essential interest—beyond ordinary security concerns.
- 15. Not every state measure qualifies as ESI. In Saudi Arabia—Intellectual Property Rights, the WTO panel ruled that Saudi Arabia's approach to criminal procedures and penalties did not meet the ESI threshold, 15 as it was too remote from any true essential security objective. Similarly, in the Riverside claim, Nicaragua's measures do not plausibly relate to any essential security interest.
- 16. The Tribunal's approach to whether interpretive doctrines, such as the standard of review or *lex specialis* principles, apply in this case is crucial. Such doctrines can affect the ordinary application of the VCLT. As established in *Seda*, exceptions only modify general international law when treaty language explicitly reflects the parties' shared intent.¹⁶
- 17. Even granting Nicaragua a wide margin of discretion, its ESI claim falls apart. No evidence suggests that withholding police protection from Riverside addressed any essential security interest. On the contrary, Nicaragua provided police protection to other landowners facing similar threats, revealing the inconsistency in its reasoning.¹⁷
- 18. Nicaragua has failed to explain why the situation at HSF warranted the withholding of essential protective services. The absence of exceptional circumstances at HSF

¹⁵ **CL-0234-ENG** ¶7.289.

¹⁶ Angel Samuel Seda et al v. Colombia, Final Award, June 27, 2024 ¶638 ("Seda") (CL-0423-ENG).

¹⁷ **C-0326-SPA**; Reply ¶128 Charts C1 and C2.

undermines Nicaragua's claim that its actions were necessary to protect a vital security interest.

1. Proportionality

19. The principle of proportionality further weakens Nicaragua's invocation of ESI. International law consistently mandates that state security measures be proportionate to the threats they address. Yet, Nicaragua inflicted avoidable and excessive harm on Riverside's investment, failing to act responsibly under CAFTA. The state's grossly disproportionate actions, compounded by procedural failings—such as presenting false claims before the Tribunal like the alleged refusal to accept the offer to return HSF—expose its bad faith.¹⁸

2. Good Faith

- 20. Nicaragua's lack of good faith is evident. The Tribunal noted in *Procedural Order No. 4* that Nicaragua failed to notify Riverside of judicial orders related to HSF despite a legal obligation to do so.¹⁹ This act undermined Riverside's ability to protect its legal rights.²⁰ Additionally, using incorrect addresses on court documents highlights Nicaragua's procedural dishonesty and lack of transparency.²¹
- 21. Nicaragua presented false evidence before this Tribunal, claiming that Riverside rejected an offer to return HSF in 2021—a claim easily disproven by reviewing the documents.²² Similarly, Nicaragua falsely portrayed the Nicaraguan Resistance as enemies of the state when, in reality, they were allies of the Sandinista Party.²³ These misrepresentations demonstrate a blatant lack of good faith and further erode Nicaragua's credibility.

3. The US Government's Silence Speaks Volumes

22. Nicaragua misconstrues the US government's silence as tacit support for its ESI claim. This interpretation is misguided. While the US explicitly backed other elements of Nicaragua's position, it notably withheld any support for the ESI invocation. In addition, no other CAFTA non-disputing Party provided supporting comments on Nicaragua's provocative ESI assertions over basic policing functions. This silence likely reflects state party concern over Nicaragua's bad-faith reliance on the ESI exception in this arbitration.

¹⁸ Transcript 1089:19-1090:7.

¹⁹ Procedural Order No. 4 ¶37.

²⁰ **CES-06** ¶¶53-57.

²¹ Transcript 1095:7-1096:16.

²² Transcript 1089:19-1090:16.

²³ Transcript 43:10-44:13; **CES-05** ¶¶29-36.

4. Conclusion

- 23. Nicaragua's ESI invocation is legally indefensible and riddled with factual inconsistencies. International law demands that states invoking ESI do so in good faith, with credible evidence, and in a manner proportionate to the threat. Nicaragua has failed to meet any of these standards. Its refusal to provide police protection to Riverside lacks justification, and its failure to demonstrate an essential security threat at HSF exposes the pretextual nature of its defense.
- 24. Given these facts, Nicaragua's invocation of ESI cannot withstand scrutiny. Its claims lack credibility, and its actions fall far short of the legal standards required under CAFTA. The Tribunal should reject Nicaragua's ESI defense and hold the state accountable for its treaty obligations.

C. Damages

- 25. Nicaragua has presented no credible alternative damages model, relying on unfounded criticisms of Riverside's valuation. Riverside, in contrast, has provided substantial evidence of the damage, including the notarized August 2018 inventory documenting the destruction of avocado crops, infrastructure, and valuable hardwood forests.²⁴
- 26. Riverside has also provided substantial evidence of its thriving Hass avocado operations. By the time of the invasion, Riverside successfully produced two Hass avocado crops on 44.75 hectares at HSF, with expansion into an additional 200 hectares underway. The loss of the 2018 crop and the existing plantations was confirmed in a notarized inventory from August 2018, supported by extensive nursery operations and on-site infrastructure. Leveraging its established transport and logistics capabilities from previous successful coffee exports, INAGROSA was poised to ship Hass avocados to foreign markets, including Costa Rica in 2018 and Canada in 2019—both countries accepting Hass avocados without regulatory modifications. As other producers had done, Riverside was also on track to obtain US market access, further expanding into US and Canadian markets.
- 27. The damage to Riverside's investment, resulting from Nicaragua's failure to provide police protection, is undeniable. The hearing confirmed the loss of INAGROSA's avocado harvest, the destruction of the plantation, and severe damage to infrastructure.²⁹ Deforestation—corroborated by witness testimony and photographic evidence—represents a profound environmental and economic loss.³⁰ Moreover,

²⁴ Transcript 2080-2092:2; **C-0058-SPA/R-0148-ENG.**

²⁵ C-0058-SPA/R-0148-ENG.

²⁶ See coffee contracts and invoices **C-0518-ENG- C-0533-SPA.**

²⁷ Transcript 996:5-8; 996:25-997-5.

²⁸ Reply ¶985.

²⁹ Transcript 562:3-563:4; 882:9-883:13.

³⁰ Transcript 690:8-692:11; 883:14-884:13.

Credibility International's valuation, which underreported the land's value and relied on flawed calculations, was thoroughly discredited during the hearing.³¹

- 28. Riverside presented two rigorous, independent valuation models based on DCF to project business losses and replacement land value. These well-supported valuations—\$93 million for land replacement and \$38 million in an earlier appraisal—accurately reflect the true scope of Riverside's losses, as detailed in response to Tribunal Question Four. An alternative land valuation, supported by expert Carlos Pfister and public land price data cited by Mr. Kotecha, places the value between \$38 million and \$99 million before applying interest.³² At the hearing, Riverside showed it was due \$37,820,00 million, even using Nicaragua's expert's flawed model (excluding pre-judgment interest).³³
- 29. The amount of the damages, including interest, calculated to July 1, 2025, is:

Economic Loss Summ	ary	DCF	DCF	Land Value	Land Value
		1000 Hectares	245 Hectares	Land - Mexican Proxy Pfister	Land - Nicaraguan Proxy
Total before interest		142,106,125	99,376,988	38,700,000	97,934,569
Interest	9%	117,669,431	82,288,034	32,045,114	81,093,655
Economic Loss		259,775,557	181,665,022	70,745,114	179,028,224

- 30. As noted in the response to Question 4, Riverside totally controlled INAGROSA, making INAGROSA's loss effectively Riverside's loss. Riverside also lost its direct opportunity to continue its investment in the avocado program and its expansion. Both of these are directly claimable by Riverside for 100% of the losses suffered.
- 31. Nicaragua cannot escape responsibility for destroying Riverside's investment. Its direct involvement and willful neglect violated its obligations under CAFTA. The law and principles of justice demand that Nicaragua be held fully accountable, with Riverside compensated for its losses.
- 32. Riverside respectfully urges the Tribunal to recognize the full extent of the harm Nicaragua's breaches caused and to award full compensation—including the value of

³¹ Transcript 2080-2092:2.

³² **CES-01** Table 10-Value of Land; **CES-04** Chart 5- Alternative Calculation, Asset Methodology.

³³ Transcript 2091:15-22.

the land, lost avocado production, and damage to infrastructure and facilities—with appropriate interest.

INVESTOR'S RESPONSE TO TRIBUNAL QUESTIONS

I. Question One – Consent to Arbitration

- 33. Nicaragua's consent to arbitration under CAFTA §10.17 was perfected when Riverside filed its Notice of Arbitration on March 19, 2021.³⁴ Riverside's Notice of Arbitration, filed on March 19, 2021, included express consent from its members and officers ³⁵ and reiterated consent.³⁶ Both CAFTA and ICSID requirements were met, and Nicaragua did not raise any jurisdictional objections within the required timeframes.
- 34. Riverside fulfilled the §10.17(2)(i) requirement by submitting its written consent, thus formalizing a second, specific agreement to arbitrate. This bilateral consent meets both CAFTA's consent provisions and the ICSID Convention's requirement under Article 25(1), which precludes unilateral withdrawal of consent once given.
- 35. Riverside has maintained investments in Nicaragua since 1997, before its formal incorporation in 1999. These investments, including loans, capital commitments, shareholdings, investment opportunities, and management control, were well established before the 2018 invasion. Therefore, Nicaragua's obligations under CAFTA Chapter Ten to Riverside were fully effective by June 16, 2018, the date of the first wrongful acts at HSF.
- 36. Nicaragua did not challenge the justiciability of ESI. However, in its pleadings, Nicaragua challenged the Tribunal's jurisdiction to hear that ESI covered the claims arising from the measures it claimed.³⁷ Otherwise, Nicaragua's invocation of ESI proceeded as a defense.

A. There are no Admissibility Issues.

37. **The invocation of ESI is not an admissibility question**. Nicaragua raises no question of justiciability. While Nicaragua did not comment on justiciability, Nicaragua's expert did. In ¶35 of **RER-06**, Prof. Burke-White states, "The NPM clause does not render the matter non-justiciable or challenge the Tribunal's jurisdiction." Riverside concurs with this specific non-admissibility issue.

³⁴ According to CAFTA §10.16(4)(a) and ICSID Institution Rule 2(3), consent was perfected on this March 19, 2021

³⁵ C-0027-ENG, C-0028-ENG.

³⁶ NOA ¶5.

³⁷ Rejoinder ¶533.

³⁸ **RER-06** ¶35.

B. There is no *Bong Fide* Jurisdictional Issue.

- 38. In interpreting and applying the treaty, a threshold question is whether the exception affects the tribunal's jurisdiction. As *Seda* indicates, treaty drafters sometimes have excluded certain matters, including ES, from the tribunal's jurisdiction. There is no such total exclusion.³⁹
- 39. In ¶544 of its Rejoinder, Nicaragua raised arguments regarding consent to arbitrate, claiming §21.2(b) is "a provision essential to the parties' consent to enter into the DR-CAFTA." The absence of consent to arbitrate is a jurisdictional issue. Under ICSID Convention §41, this Tribunal has *Kompetenz-Kompetenz* to determine its jurisdiction.
- 40. Even if ESI was a proper jurisdictional objection, it is untimely. Nicaragua did not raise this alleged jurisdictional objection of a lack of consent by the deadline set out in ICSID Rule 35. ICSID Rule 41 provides that a jurisdictional objection must be made no later than the filing of the CM. The CM's jurisdictional defense was required to specify Nicaragua's alleged ESI jurisdictional objection, but Nicaragua did not raise §10.21 as a jurisdictional objection in its CM or Rejoinder.
- 41. In the CM, Nicaragua's jurisdictional defenses were confined to arguments regarding proof of control and initiating a claim under CAFTA §10.16(1)(b).⁴⁰ Moreover, in its Rejoinder, Nicaragua explicitly acknowledged the absence of jurisdictional objections.⁴¹

II. Question Two: ESI

42. Nicaragua's reliance on the ESI exception under CAFTA §21.2 is a transparent attempt to justify its wrongful actions by invoking national security. Allowing such non-good faith invocations undermines the treaty's purpose and would give states a pretext to violate international law under the guise of security concerns. The ESI exception was never intended as a blanket excuse for states to circumvent their international obligations. For this reason, Nicaragua's claim warrants rigorous, objective scrutiny.

A. The Essential Security Measures:

43. Nicaragua's reliance on the ESI exception under CAFTA §21.2 must be tied to specific measures. Yet, Nicaragua has failed to identify concrete ESM within its pleadings. Only under pressure during the hearing from the Tribunal did Nicaragua belatedly assert the following ESM:

³⁹ **CL-0423-ENG** ¶¶636-640.724.

⁴⁰ CM ¶¶195-262.

⁴¹ Rejoinder ¶¶471-477.

- (a) Requests for invaders to vacate HSF around August 11, 2018.42
- (b) Efforts from 2019 to 2021 to encourage the unlawful occupiers to leave.43
- (c) Meetings between the El Pavón cooperative, residents, and interagency bodies to seek alternative lands to relocate the unlawful invaders.⁴⁴
- (d) Permitting individuals to remain unlawfully on the land until they complete their harvest.⁴⁵
- 44. Nicaragua must demonstrate that these measures were necessary for its ESI, taken in good faith, and proportionate to the harm caused.

B. The Legal Framework for Interpreting ESI

- 45. The Tribunal must determine whether Nicaragua's invocation of ESI aligns with CAFTA and international law principles, including the VCLT and the principles of state responsibility under ARSIWA. While CAFTA §21.2 allows states to adopt measures necessary to protect essential security interests, it does not grant *carte blanche* to disregard treaty obligations.
- 46. The ESI exception does not strip the Tribunal of jurisdiction. Instead, it places upon Nicaragua the burden of proving that its actions meet the stringent conditions required for invoking ESI, including necessity, proportionality, and good faith. Prof. Crawford notes that:

The onus of proof' for all circumstances excluding wrongfulness lies with the State invoking the relevant defence.,,, This will often be the case as only the invoking State is fully aware of the circumstances of the case.⁴⁶

- 47. Before invoking ESI as a defense, Nicaragua must establish a *prima facie* breach of CAFTA. The Tribunal must then evaluate whether Nicaragua has met the stringent conditions for invoking ESI.
- 48. Under VCLT Article 31, treaties must be interpreted according to their ordinary meaning in light of their object and purpose. Tribunals have clarified that the ESI exception is

⁴² Transcript 210:21-24. Nicaragua said "the immediate response in 2018 that Ms. González showed you that had the individuals removed from the land two months after the occupation." But the evidence shows that the invaders did not all leave in August 2018.

⁴³ Transcript 210:25-211:5. Nicaragua said "the process of dialogue, the repeated meetings, the special commission, the interagency body being established to persuade these individuals to leave the Hacienda peacefully, to find other land for them, to encourage them to do so, to encourage them to move their families there."

⁴⁴ Transcript 211:15-18.

⁴⁵ Transcript 211:18-21.

⁴⁶ James Crawford Second ILC Report on State Responsibility that the ". James Crawford, Addendum to Second Report on State Responsibility, UN Doc. A/CN.4/498/Add.2 (1999), ¶351 (**CL-0429-ENG**).

reserved for extraordinary circumstances threatening national survival.⁴⁷ As noted in *Deutsche Telekom*, general issues, such as "societal interests" that are not "essential" or necessary to protect "essential security" fail to meet the definition of ESI.⁴⁸ The facts of this case fall far short of that threshold.

- 49. The Tribunal must assess whether any special interpretive rule—such as a modified standard of review—affects the application of the VCLT and whether any *lex specialis* of state responsibility must be considered. For instance, the *Seda* Tribunal, interpreting an ESI footnote in the US-Colombia treaty along with an ESI clause, recognized that such provisions only modify or exclude general international law when the explicit language demonstrates that it reflects the common intent of the treaty parties.⁴⁹
- 50. In GATT/WTO cases, adjudicative panels interpreting similar ES exceptions have noted that the term "considers" implies some deference to a state's good-faith determination of necessity. However, as the panel in *Russia Traffic in Transit* held, the existence of a genuine national security threat is not subject to such deference and must be objectively proven.⁵⁰
- 51. The situation must present a genuine and severe threat to the state's security. It cannot be a disguised restriction on international investment obligations.⁵¹ The crisis must be of such magnitude that it endangers the state's functioning or essential public interests. Not all difficulties will justify an invocation of ESI. The word "essential" must be given its meaning. Only extreme circumstances that risk a complete collapse of the governmental and economic order would meet this high threshold of essential security.⁵²
- 52. While the term "considers" may afford some deference, it does not exempt the state from observing general principles of proportionality, even in cases involving ES exceptions. Otherwise, the drafters could have used "stipulates" or "declares." A considered view implies some rational deliberation on the facts and the necessity of the measures ultimately adopted, of which there is no evidence here. For example, there is no evidence that the ESM involving HSF was derived from legal norms or regulations based on a considered view of ESI.
- 53. Once an essential security threat is established, the Tribunal must assess the degree of deference to the state's determination that its measures are necessary. Good faith is a non-negotiable requirement, regardless of any deference. Establishing good faith becomes problematic if no rational connection exists between the measures taken and

⁴⁷ RL-0034-ENG ¶¶180-181, CL-0116-ENG ¶257

⁴⁸ **CL-0224-ENG** ¶¶236-238.

⁴⁹ **CL-0423-ENG** ¶¶636-640,724.

⁵⁰ **CL-0233-ENG** ¶¶7.101,7.82,7.65-7.77.

⁵¹ CL-0233-ENG ¶7.93.

⁵² **RL-0034-ENG** ¶193.

the stated security objective. As in *Seda*, good faith is a non-negotiable requirement regardless of any deference.53

1. The Need for a Balanced Approach to ESI Claims

- 54. While states deserve discretion in determining their security needs, this discretion is not absolute. ESI determinations must be exercised in good faith, based on a rational and proportionate response to a genuine threat. ESI cannot become a shield for avoiding legal responsibilities without accountability, as this would erode the protection of private property and destabilize the rule of law. Riverside emphasizes the need for a balanced approach to evaluating Nicaragua's invocation of ESI, ensuring that security claims are neither arbitrary nor disproportionate.
- 55. International jurisprudence makes clear that the term "considers" in ESI clauses does not grant states unlimited discretion. ESI claims must be objectively assessed for good faith, proportionality, and genuine necessity. The Tribunal must scrutinize Nicaragua's actions under these criteria and ensure that the ESI exception is not abused to shield the state from its obligations under CAFTA.
- 56. Nicaragua bears the burden of proving that its invocation of ESI was made in good faith. Yet, it seeks to diminish this burden by advocating for a "light touch" or margin of appreciation in the Tribunal's evaluation.
- 57. Nicaragua's expert, Prof. Burke-White, supports this "light touch" argument but admits that his factual assertions rely solely on Nicaragua's pleadings, not independent factfinding.⁵⁴ His conclusions lack concrete evidence linking Nicaragua's actions to any alleged essential security interests. Notably, he fails to engage with Prof. Wolfe's expert statements, which directly address those factual and historical issues central to this case.
- 58. Furthermore, Prof. Burke-White relies entirely on Nicaragua's assertion that the state acknowledged and protected private property rights at HSF when addressing good faith. The evidence shows otherwise.
- 59. Despite asserting "abundant evidence," Nicaragua's pleadings lack concrete proof of any specific ESM. Prof. Burke-White fails to verify the facts, leaving his conclusions unsupported. Prof. Burke-White relies entirely on Nicaragua's assertion that the state acknowledged and protected the private property rights at HSF. The evidence of Nicaragua's actions in the record discloses a different story. Despite admitting that INAGROSA held title to the property, Nicaragua failed to protect these ownership rights, allowing the unlawful occupation to continue. Congressman Edwin Castro, for instance,

⁵³ CL-0423-ENG ¶755.

⁵⁴ RER-06 ¶41, Prof. Burke-White states, "I above, I do not purport to be an expert on Nicaraguan history and politics, and I therefore base my analysis on the submissions of the parties."

recognized HSF as privately owned but simultaneously ordered the occupation to persist.⁵⁵ At the same time, Edwin Castro claimed the government was finding money to pay the lawful owners of HSF.⁵⁶ No internal documents were produced to show that Congressman Castro's statement of government intent to expropriate the lands was *bona fide* – but his instructions to the armed invaders to remain in possession speaks for itself. This information, known to Police Commissioner Castro, was communicated to the most senior national police officials as early as July 2018.⁵⁷ This underscores Nicaragua's bad faith in failing to protect private property rights.

- 60. Prof. Burke-White ignores the extensive independent evidence concerning the 2018 disturbances, including the UN and the OAS reports and the expert warnings Prof. Wolfe provided. Prof. Wolfe thoroughly reviewed the record and concluded that Nicaragua systematically misrepresented the facts regarding public opposition to the government in the Spring of 2018.⁵⁸ By disregarding this evidence, Prof. Burke-White uncritically follows Nicaragua's narrative and ignores the overwhelming contrary evidence undermining his conclusions regarding Nicaragua's alleged good faith invocation of essential security.
- 61. Prof. Burke-White lacks expertise in Nicaraguan politics and society. His assertions on factual matters fall outside the mandate of an expert witness and must be disregarded.
- 62. Nicaragua's actions, including failing to protect ownership rights and allowing the unlawful occupation to continue, underscore its bad faith.
- 63. Prof. Wolfe further advised that this Tribunal should not afford Nicaragua any margin of appreciation concerning the 2018 civil unrest. In ¶124 of **CES-05**, after reviewing independent third-party evidence, Prof. Wolfe concludes that Nicaragua's explanations regarding the 2018 events are neither credible nor reliable and demand heightened scrutiny. He notes:

124) Factual statements made by the Republic of Nicaragua regarding its motivations and actions in connection with the events arising since April 2018 need to be carefully examined for consistency and trustworthiness. As can be seen from the responses to the serious human rights concerns raised by the UN Human Rights Council and the Organization of American States experts, Nicaragua has provided justifications of events that lack balance, candor, and credibility. In these circumstances, this Tribunal may require the application of extra scrutiny in its consideration of unsupported statements arising from the Republic of Nicaragua.⁵⁹

⁵⁵ **C-0284-SPA-ENG** p.2.

⁵⁶ **C-0284-SPA-ENG** p.2.

⁵⁷ Transcript 1193;14-1194:4; **C-0284-SPA-ENG** p.2.

⁵⁸ **CES-05** ¶¶73-77.

⁵⁹ **CES-05** ¶124.

64. Significantly, Nicaragua has not contested Prof. Wolfe's expert testimony or the extensive third-party evidence presented by independent experts that Nicaragua's state-sanctioned use of violence against peaceful demonstrators caused the civil disturbance. That evidence, as noted in the Reply, came from highly credible third-party expert sources such as those from the UN and the OAS. Prof. Wolfe noted the conclusions of the UN Human Rights Committee, Group of Human Rights Experts on Nicaragua (GHREN). The GHREN, in their final 2023 report on the civil disturbance, concluded that Nicaragua's response, which forms the foundation for the ESM in this claim, gave rise to severe breaches of international law. The GHREN stated:

The violations, abuses, and crimes investigated by the GHREN and described in this report trigger both the responsibility of the State of Nicaragua, as well as individual criminal responsibility, under international criminal law.⁶⁰

- 65. In contrast, Prof. Wolfe advised that this Tribunal should not afford Nicaragua any margin of appreciation concerning the 2018 civil unrest. He concludes that Nicaragua's explanations lack balance, candor, and credibility, demanding heightened scrutiny.⁶¹
- 66. Prof. Wolfe severely criticized Nicaragua's misleading description of the Nicaraguan Resistance, highlighting the incorrect portrayal of the relationship between the Resistance and the government.⁶² Independent organizations like the UN Human Rights Council and the OAS have condemned Nicaragua's actions, further undermining its credibility.
- 67. There is no plausible connection between HSF and the settlement of hostilities from the 1979 revolution. The lands at HSF were continuously privately owned since before the fall of the Somoza regime in 1979,⁶³ and there is no evidence to support Nicaragua's claims. Only non-private lands were available for resettlement after the revolution.⁶⁴ There is no plausible connection between HSF and the thirty-year-old settlement of hostilities.
- 68. Given Nicaragua's established lack of candor and systemic misrepresentation, the Tribunal should apply a rigorous standard of proof in assessing Nicaragua's invocation of good faith.

⁶⁰ CES-05 ¶16 citing the GHREN Final Report, C-0535-ENG ¶115.

⁶¹ **CES-05** ¶36. In addition, ¶52, he notes, "Since 2006, the Nicaraguan Resistance Party has been in a political alliance with the Sandinista Party. Rather than being opponents, the Nicaraguan Resistance Party is working under the direction of Sandinista President Daniel Ortega and Vice President Rosario Murillo.

⁶² **CES-05** ¶¶29-36.

⁶³ Transcript 475:12-15; Mr. Rondón confirmed that before his father acquired HSF, it had been owned for nearly 40 years by Cayetano Castellon. The lands at HSF were never plausibly available for land resettlement.

⁶⁴ Transcript 157:10-15.

2. Nicaragua's Failure to Satisfy the ESI Threshold

- 69. International law requires that treaty exceptions, including ESI, be invoked in good faith. The ICJ has reinforced this in cases like *Djibouti v. France* and *Oil Platforms*. 65 Nicaragua's invocation of ESI does not meet this standard. Its timing, lack of transparency, and inconsistent justifications suggest an attempt to misuse this provision for purposes outside its intended scope.
- 70. To invoke the CAFTA §21.2(b) ESI clause in good faith, Nicaragua must show that the measures taken directly serve an essential security interest. These measures must be plausible and genuinely connected to protecting that interest. ⁶⁶ Nicaragua has not met this burden. Its actions lack a credible link to any genuine security concern and appear aimed at shielding itself from liability rather than addressing a legitimate threat.
- 71. Nicaragua argues that its refusal to provide police protection constitutes an ESM and that the Tribunal should defer to the State's good faith in this regard. This interpretation is flawed. International jurisprudence, including *Russia—Traffic in Transit* and *Saudi Arabia—Intellectual Property Rights*, rejects unchecked deference to states in ESI matters.⁶⁷ States must demonstrate that their measures are necessary to protect their survival or fundamental security interests, not merely routine concerns.
- 72. No contemporaneous evidence links the occupation of HSF to any essential security interest. Nicaragua did not raise ESI as a defense at the early stages of this dispute, only invoking it later in an apparent effort to avoid liability after substantial damage to Riverside's investment had already occurred. This delayed and inconsistent invocation mirrors the reasoning in *CC/Devas v. India*, where the tribunal rejected a similarly opportunistic use of ESI for lack of good faith.⁶⁸
- 73. Nicaragua's ESI claim was not made in good faith. Its procedural dishonesty—such as failing to notify Riverside of key judicial orders—undermined Riverside's legal position. Nicaragua also presented false evidence, including the disproven claim that Riverside rejected an offer to return HSF in 2021. Additionally, its portrayal of the Nicaraguan Resistance as adversaries of the state is factually incorrect, as the Resistance was aligned with the Sandinista Party at the relevant time.

3. Failure to Meet CAFTA's "Essential" Standard

74. Nicaragua's refusal to provide police protection in a routine criminal situation, such as a land invasion, does not meet the high threshold of an "essential" security event under CAFTA. While law enforcement is indeed a security function, its failure to protect

⁶⁵ Djibouti v. France **CL-0428-ENG** ¶145; **CL-0311-ENG** ¶73.

⁶⁶ CL-0233-ENG ¶7.138; CL-0234-ENG ¶7.285.

⁶⁷ CL-0233-ENG ¶¶7.101,7.82,7.65-7.77; CL-0234-ENG ¶7.289.

⁶⁸ **CL-0223-ENG** ¶¶468-470.

Riverside's property during ordinary criminal acts does not rise to the level required for an ESM under CAFTA. Nicaragua's measures fail to meet this essential security standard.

4. Necessity and Proportionality under CAFTA

75. The CAFTA ESI provision requires that any measures taken must be necessary and proportionate to the threat they seek to address. This is a safeguard against states misusing the ESI exception to evade their treaty obligations. The Tribunal must assess whether Nicaragua's actions were genuinely necessary for its essential security and proportionate to the alleged threat.

5. Limited Deference to States in ESI Matters

- 76. Jurisprudence, including *Russia—Traffic in Transit* and GATT/WTO case law, shows that while states are afforded some deference in ESI matters, this deference is not absolute. International law demands good faith and proportionality. As in *EC-Bananas III*, Tribunals have consistently held that ESI exceptions do not grant states unchecked discretion.
- 77. Even if Nicaragua were granted some discretion, its actions do not pass the necessity and proportionality test. Nicaragua has failed to demonstrate that refusing to protect Riverside's investment was necessary to protect its essential security. In fact, Nicaragua provided police protection to other landowners facing similar risks while denying it to Riverside without justification. This inconsistency weakens Nicaragua's ESI defense and highlights the implausibility of its claim.
- 78. Nicaragua's conduct throughout this process points to bad faith. The government's own officials admitted that no internal communications linked the events at HSF to national security concerns, and police testimony confirmed no preventive action was taken to mitigate the damage to Riverside's investment. Nicaragua's failure to act promptly and transparently in 2018 further undermines its ESI claim.

6. Opportunistic Use of ESI

- 79. Nicaragua's reliance on ESI appears opportunistic. It did not invoke ESI during the CAFTA cooling-off period, the filing of the Notice of Arbitration, or any preliminary procedural meetings, further demonstrating the lack of a genuine connection between its actions and essential security concerns. Moreover, the creation of a community tree nursery on Riverside's property in 2021, long after the original occupation, had no link to national security and further discredits Nicaragua's invocation of ESI.
- 80. Nicaragua also did not invoke ESI at key procedural stages of arbitration, such as the cooling-off period, the filing of the Notice of Arbitration, or the preliminary procedural

meetings. This omission highlights the lack of any genuine connection between Nicaragua's actions and essential security concerns.

- 81. Nicaragua bears the burden of proving that its actions were necessary to protect its essential security interests and that they were taken in good faith. The absence of credible evidence, procedural inconsistencies, and the disproportionate harm to Riverside's investment demonstrate that Nicaragua has failed to meet this burden.
- 82. Nicaragua's delayed invocation of ESI is a pretext to shield itself from liability for its wrongful conduct. The Tribunal should carefully scrutinize Nicaragua's claims, as international law requires states to demonstrate a clear and genuine connection between their measures and the essential security interests they seek to protect. Nicaragua's failure to do so renders its invocation of ESI legally and factually unsustainable.

C. Good Faith

- 83. Nicaragua has not provided contemporaneous evidence that it considered the 2018 occupation of HSF as relating to an ESI. It did not raise the ESI defense during the early stages of this dispute, and its belated invocation appears to be an afterthought designed to shield the state from liability, long after the most significant damage to Riverside's investment had occurred. This mirrors CC/Devas v. India, where the tribunal rejected India's ESI defense for a lack of good faith.⁶⁹
- 84. In key cases involving Argentina (*CMS*,⁷⁰ *Enron*,⁷¹ *Sempra*,⁷² *LG&E*,⁷³ and *Continental Casualty*, tribunals scrutinized the plausibility of ESI claims by reviewing the measures' necessity and their connection to national security interests. Nicaragua's defense fails under this scrutiny—it lacks factual support and a legitimate policy basis.
- 85. Nicaragua's reliance on ESI is arbitrary and contrary to the principles of good faith. As the WTO Appellate Body noted in *Shrimp-Turtle*, abusing rights is incompatible with good faith conduct.⁷⁵ Similar conclusions were reached in *Russia—Transit* by the EU, Singapore, and Moldova, underscoring that ESI cannot be invoked arbitrarily.⁷⁶
- 86. Tribunals, such as in *LG&E*, have emphasized that a state's contribution to the emergency is crucial in assessing the validity of an ESI defense.⁷⁷ Nicaragua's role in

⁶⁹ CL-0223-ENG ¶¶468-470.

⁷⁰ CL-0053-ENG.

⁷¹ CL-0212-ENG

⁷² CL-0037-ENG.

⁷³ CL-0116-ENG.

⁷⁴ RL-0034-ENG.

⁷⁵ **CL-0426-ENG** ¶158.

⁷⁶ **WBW-018** ¶¶7.42-7.43 (EU position), ¶¶7.46-7.47 (Moldova) and ¶¶7.48-7.4 (Singapore).

⁷⁷ **CL-0116-ENG** ¶256.

exacerbating the situation at HSF further undermines its claim to invoke ESI in good faith.

- 87. There is no credible evidence that the 2018 occupation of HSF posed a genuine threat to Nicaragua's essential security. Instead, the record suggests that the ESI defense is being invoked opportunistically to deflect responsibility. Testimony from Nicaragua's officials further weakens its case: AG Gutierrez admitted there were no internal communications linking the occupation to national security concerns, and police testimony confirmed that no preventive action was taken to protect Riverside's investment.
- 88. By July 2018, Nicaragua was fully aware of the risks posed by the occupation, yet it failed to take meaningful action or bring criminal charges against the occupiers. This failure casts doubt on the sincerity of Nicaragua's subsequent ESI claims.
- 89. Nicaragua never mentioned essential security concerns to Riverside throughout the occupation.⁸⁰ There are no official records suggesting ESI was a factor in its decision-making.⁸¹ Moreover, Nicaragua failed to raise the ESI defense during the CAFTA cooling-off period or at the start of arbitration, further reinforcing that its ESI invocation is a post hoc attempt to shield itself from liability.
- 90. Nicaragua's reliance on *Seda* to justify its delayed invocation of ESI is misplaced. In *Seda*, the tribunal accepted a late ESI defense due to a bona fide delay tied to a complex criminal investigation, and the case involved a "super" self-judging ESI clause through a treaty footnote—neither of which applies to CAFTA or the facts here. Furthermore, *Seda* dealt with issues of organized crime and narco-terrorism in Colombia, 82 which are far removed from the circumstances of Nicaragua's case.
- 91. Unlike *Seda*, Nicaragua's invocation of ESI is arbitrary and capricious. International law, as established in *Nottebohm* ⁸³ and *Shrimp-Turtle* ⁸⁴ rejects such measures and requires ESI claims to be made in good faith. Nicaragua's arbitrary reliance on ESI constitutes an abuse of rights.
- 92. Nicaragua has not identified any credible period in which essential security concerns existed. No evidence supports the claim that legitimate security issues persisted beyond

⁷⁸ Transcript 1073:6-1074:20.

⁷⁹ C-0284-SPA-ENG.

⁸⁰ Transcript 1062:25-1068:7.

⁸¹ Transcript 1073:6-1074:20.

⁸² **C-0423-ENG** ¶773.

⁸³ Nottebohm Case, Dissenting Opinion of Judge Read CL-0425-ENG p. 37

⁸⁴ Shrimp-Turtle **CL-0426-ENG** ¶158.

2018.85 This pattern of retroactive justification only reinforces the lack of good faith in Nicaragua's invocation of ESI.

- 93. Nicaragua's conduct after the invasion, including the 2021 *de jure* expropriation of INAGROSA's exclusive title over the land in 2021.86 further undermines its defense. It failed to invoke ESI in connection with these later actions, demonstrating the opportunistic nature of its claims.87
- 94. Professor Wolfe has cautioned the Tribunal that, given Nicaragua's history of misleading and deceitful statements regarding the 2018 civil disturbances, 88 its factual assertions demand close scrutiny rather than deference. Good faith requires transparency and consistency, both of which are absent in Nicaragua's conduct. Its behavior—from encouraging the invaders to stay at HSF to its delayed invocation of ESI—suggests a defense aimed at evading responsibility rather than addressing genuine security concerns.
- 95. Several other indicators of bad faith further undermine Nicaragua's ESI defense, including its control over the invaders, support from local officials, and fabricated evidence presented to this Tribunal.
- 96. Nicaragua has not demonstrated any plausible connection between its 2021 expropriation of INAGROSA's land—almost three years after the invasion—and any legitimate ESI.
- 97. In *Russia—Traffic in Transit*, the WTO panel held that essential security exceptions must be narrowly interpreted and granted only after demonstrating a genuine security threat.⁸⁹ Nicaragua has provided no credible evidence of such a threat, rendering its ESI invocation unjustified and unsupported.
- 98. While there may be a security issue, Nicaragua has failed to present any supporting evidence or independent second-order indicators to substantiate a reasonable basis for invoking "essential" security concerns concerning HSF. Prof. Wolfe has cautioned the Tribunal that, given Nicaragua's history of misleading and deceitful statements regarding the 2018 civil disturbances, its factual assertions demand close scrutiny rather than deference or a margin of appreciation. To invoke CAFTA §21.2(b) in good faith, Nicaragua must demonstrate a clear connection between the measures it claims to have taken and the essential security interest it seeks to protect. These measures

⁸⁵ Transcript 208:13-209:14.

⁸⁶ CES-06 ¶¶73-84.

⁸⁷ This Tribunal has jurisdiction over matters arising naturally from this dispute even after the claim has been filed. For example, see **CL-0137-ENG** (Phase 2 Merits Award in *Pope & Talbot*) ¶181 and its decision on the verification review incident.

⁸⁸ CES-05 ¶¶73-77.

⁸⁹ **CL-0233-ENG** ¶¶7.130-7.132.

⁹⁰ CES-05 ¶124.

must, at a minimum, meet the standard of plausibility concerning the asserted essential security interests.⁹¹

- 99. Good faith demands a minimum standard of transparency and candor, which was not upheld in this case. Instead, the government's actions were marked by inconsistency and malmanagement. While its position evolved, it did so consistently to the detriment of the investment. This included explicit government proposals encouraging the invaders to remain in occupation while the government sought funds to purchase HSF from its rightful owners. The government gave little, if any, indication to Riverside of how it could cooperate to resolve the problem of providing the property back to its owners or, indeed, what the government authorities' strategy was at any given point in time.
- 100. Riverside was perpetually uncertain about the return of its property and the restoration of its business operations throughout the occupation from 2018 to 2021.
- 101. Riverside did not advocate using force as the only way to reclaim its property. Instead, Riverside sought transparency, information, and a constructive pathway to resolve the issue involving the full range of options open to the government. The Nicaraguan authorities, however, acted in a manner that failed to provide Riverside with FET and FPS to formulate such a plan.
- 102. The Tribunal must remain mindful of the *nullus commodum* principle, which asserts that no party should benefit from its own wrongful acts.⁹² Nicaragua's failure to act in 2018, when the most substantial damage to Riverside's investment occurred, followed by its delayed invocation of ESI, strongly suggests that the defense is being used as a shield to excuse its internationally wrongful conduct.
- 103. Beyond Nicaragua's lack of good faith in invoking ESI, several other indicators point to a bad-faith invocation of this defense:
 - (a) Nicaragua's control over the invaders is confirmed by an independent organization's social media. During the 2018 invasion, the Civic Alliance for Democracy and Justice posted contemporaneous third-party messages confirming that the armed invaders at HSF acted under the orders of Jinotega Mayor Centeno.⁹³
 - (b) Congressman Edwin Castro openly supported the invasion and aided the invaders. He instructed them to remain in occupation of HSF while the government sought "a way to buy it." 94

⁹¹ **CL-0233-ENG** ¶7.138.

⁹² **CL-0028-ENG** p. 150; **CL-0170-ENG** p.149.

⁹³ C-0035-SPA-ENG.

⁹⁴ **C-0284-SPA** p.3.

- (c) Nicaragua did not consider the HSF invasion a security threat. AG Gutierrez admitted that the Jinotega AG's Office produced no written reports on the invasion despite instructions from the Nicaraguan AG's Office to document such events. Moreover, Gutierrez confirmed that there were no communications or reports with Nicaragua's security agencies or ministries regarding the invasion or any alleged security threat posed by the invaders.
- (d) Independent international experts debunked Nicaragua's unfounded allegations of a coup. United Nations experts concluded that the peaceful protests over social security reforms, which began in April 2018, were not part of any coup d'état attempt.⁹⁷
- (e) Nicaragua fabricated evidence alleging Riverside's refusal of an offer in 2021. The government presented a false rejection to its courts, which was unsupported by any written communication. AG Gutierrez conceded that no evidence existed to support this claim.⁹⁸
- 104. Nicaragua bears the burden of proving that its measures were necessary to protect ESI and were taken in good faith. The absence of credible evidence and the disproportionate harm to Riverside's investment demonstrates that Nicaragua has failed to meet this burden.
- 105. Considering these facts, Nicaragua's invocation of ESI cannot be justified in good faith. Its belated, opportunistic reliance on ESI is legally and factually groundless.

D. The Pretextual Nature of Nicaragua's ESI Defense

- 106. Nicaragua's reliance on ESI is a pretext for evading its responsibilities under CAFTA. As in *Deutsche Telekom v. India*, the Tribunal should reject this defense as an illegitimate attempt to shield unlawful conduct.⁹⁹ Nicaragua has not demonstrated any genuine connection between the occupation of HSF and national security. In *Seda*, the tribunal held that an ESI invocation must be based on authentic extraordinary circumstances essential to the state's security, which must be clearly expressed.¹⁰⁰
- 107. Nicaragua's ESI defense is not grounded in fact but is instead a pretext for avoiding liability. There is no objective evidence that the occupation of HSF or Nicaragua's failure to act was tied to national security. Expert testimony discredits Nicaragua's claims regarding the Nicaraguan Resistance and civil unrest, further highlighting the bad-faith

⁹⁵ Transcript 1058:18-1059.

⁹⁶ Transcript 1073:6-1074:20.

⁹⁷ **CES-05** ¶¶73-77.

⁹⁸ Transcript 1089:19-1090:16.

⁹⁹ CL-0224-ENG ¶¶ 284-291.

¹⁰⁰ CL-0423-ENG ¶722.

- nature of its ESI defense. Prof. Justin Wolfe's expert testimony, as well as independent experts at the UN and the OAS, supported this conclusion.
- 108. The alleged security threat posed by the occupiers—former members of the Nicaraguan Resistance—was exaggerated. In reality, many leaders of the invasion were aligned with the state. Nicaragua's claim that the Resistance threatened the state in 2018 is misleading and undermines its good faith defense. During the hearing, Luis Gutierrez testified that police deaths reported by Nicaragua included shootings of police officers who would not comply with the unlawful orders of the state by other police officers.¹⁰¹
- 109. Similarly, the reference to the 2018 invasion and seizure being related to earlier issues 30 years earlier was absurd and without foundation. Mr. Lopez's claims about the 2017 alleged invasion were also shown to be untrue, and he admitted that the local media report about the 2004 evictions of persons at HSF departed from the truth.¹⁰²
- 110. Any good-faith review of Nicaragua's invocation of ESI would need to consider the *bona fides* of Nicaragua's role in the two foundational events that support its claim.
 - (a) Nicaragua's argument about the danger posed by the Resistance was a complete misrepresentation. The Resistance was the ally, not the enemy, of the state in 2018. Nicaragua's reliance was not taken in good faith.
 - (b) Nicaragua's reliance on the civil unrest in 2018 was equally not taken in good faith, given Nicaragua's predominant and controlling role in causing the violence. The use of force by the state was not a reaction but the ongoing, calculated, and systemic process applied by the government of Nicaragua to carry out its wishes.
- 111. In sum, Nicaragua's invocation of ESI is not only factually unsupported but also constitutes an abuse of process. The Tribunal should reject this defense as a pretext to avoid responsibility under CAFTA.

E. Proportionality

112. Nicaragua's reliance on the ESI exception falters under the principle of proportionality. International tribunals consistently affirm that security measures must be proportionate to the threat. Here, Nicaragua's actions caused significant, avoidable harm to Riverside's investment—harm that far exceeded any legitimate **essential** security concerns. Instead of acting responsibly under CAFTA, Nicaragua's failure to provide police protection at HSF was disproportionate to any *bona fide* threat to national security.

¹⁰¹ Transcript 559:9-15.

¹⁰² Transcript 1341:21-1342:9.

- 113. Proportionality requires balancing security interests with investor rights. A state must ensure that any harm inflicted on an investor is not excessive in relation to the security benefits gained. AG Gutierrez admitted that no such evidence exists supporting Nicaragua's ESI invocation. Nicaragua, however, has failed to demonstrate that its measures were necessary or proportionate to protect ESI. In *Enron v. Argentina*, the tribunal emphasized that a state must prove both necessity and proportionality when invoking ESI. Nicaragua has provided no credible evidence of either.
- 114. In *Continental Casualty*, the Tribunal held that a state cannot invoke ESI arbitrarily; the threat must genuinely endanger essential security, and the measures taken must be objectively assessed.¹⁰⁵ Allowing unchecked state discretion would undermine the rule of law in international investment protection.
- 115. The 2023 ICJ decision on *Certain Iranian Assets* reaffirmed that ESI measures are subject to objective review. The ICJ emphasized that determining whether a measure is "necessary" is not a matter for the subjective judgment of the state alone—the court must scrutinize the situation. Nicaragua's invocation of ESI cannot evade such scrutiny.
- 116. The ICJ reaffirmed its approach in previous cases, such as *Oil Platforms* and *Nicaragua v. United States*, emphasizing that determining whether a measure is "necessary" is not solely a matter for the subjective judgment of the state invoking the ESI exception. Instead, this assessment is subject to objective review by the Court. The ICJ noted, "whether [the] measure[s] taken [were] 'necessary' is '[not] purely a question for the subjective judgment of the party' . . . and may thus be assessed by the Court."¹⁰⁷ The ICJ recognized that while the term "considers" in the treaty text grants a degree of discretion to the invoking state, it is ultimately the Court's role to review the lawfulness of the invocation.
- 117. Proportionality is a general principle of law. 108
 - (a) CAFTA §21.2 requires ESI measures to be necessary and proportionate. The ILC's commentary on ARSIWA Article 25 underscores that even necessary actions must be proportionate to the protected interest.
 - (b) The ICJ in *Gabcíkovo-Nagymaros* applied proportionality to the necessity defense, holding that the harm caused must not exceed the benefit gained.¹⁰⁹

¹⁰³ Transcript 1073:6-1074:20.

¹⁰⁴ CL-0212-ENG ¶306; CL-0037-ENG ¶348.

¹⁰⁵ **RL-0034-ENG** ¶181.

¹⁰⁶ Certain Iranian Assets (Iran v. United States) Merits, March, 30, 2023, ¶106 (CL-0431-ENG).

¹⁰⁷ **CL-0431-ENG** ¶106, citing **CL-0311-ENG** (*Oil Platforms*) ¶43, in turn citing **CL-0022-ENG** (*Nicaragua v. US*) ¶282.

¹⁰⁸ **CL-0365-ENG** pp. 114-116.

¹⁰⁹ Gabčikovo-Nagymaros Project, *Hungary v. Slovakia*, Judgment, Merits, [1997] ICJ Rep 88, (1998) (ICJ 1997) ¶85 (**CL-0427-ENG**).

- (c) In its Advisory Opinion on the Legality of the Threat or Use of Nuclear Weapons, the ICJ affirmed that any military action, even in self-defense, must be proportionate to the objectives sought.¹¹⁰
- (d) The ICJ in *Certain Iranian Assets*, found that the US freezing of Iranian assets was disproportionate to the threat posed, failing the criteria of necessity and good faith required for invoking ESI.¹¹¹
- (e) Tribunals in cases like *S.D. Myers* ¹¹² and *Occidental* ¹¹³ have emphasized that public policy measures must not disproportionately harm investors, particularly when less harmful alternatives exist.
- (f) In *TECMED*, the Tribunal ruled that revoking an operating permit was disproportionate, especially since the decision was driven by political motives, not environmental concerns.¹¹⁴
- (g) Similarly, in *LG&E*, the tribunal held that measures taken under a "state of necessity" must be proportionate to the crisis addressed, ensuring that the harm to investors does not exceed the benefit to the state.¹¹⁵
- 118. The measure must not be excessive in relation to the interest protected. Nicaragua has not demonstrated how the significant detrimental effect of this measure upon Riverside is related to an ESI or how it evaluated the ESM to minimize the detrimental impact on Riverside.
- 119. Nicaragua has not shown that the harm inflicted on Riverside is proportional to any purported security interest. The detrimental impact of these measures, including the deprivation of Riverside's investment and future economic opportunities, is unjustifiable. Nicaragua's ESI invocation lacks the necessary good faith and objective security threat to warrant deference under international law.
- 120. In sum, Nicaragua's actions were disproportionate to any alleged security interest and caused undue harm to Riverside's investment. The ESI exception under CAFTA requires necessity and proportionality, and Nicaragua has failed to meet this standard. Its invocation is both legally and factually defective, lacking the urgency, gravity, and proportionality required to justify an ESI defense.

¹¹⁰ Advisory Opinion on the Legality of the Threat or Use of Nuclear Weapons (1996), ¶42 (CL-0430-ENG).

¹¹¹ **CL-0431-ENG** ¶¶112,149-156.

¹¹² CL-0007-ENG ¶103.

¹¹³ CL-0058-ENG ¶445,450,452.

¹¹⁴ **RL-0059-ENG,** ¶133.

¹¹⁵ **CL-0116-ENG** ¶¶195.

F. Lack of Nexus Between ESI and Riverside's Investment at HSF

- 121. Nicaragua has failed to establish any rational link between the harm inflicted on HSF and its invocation of ESI. Under CAFTA §21.2, ESI requires a high threshold that the interest be essential —not merely a generalized security concern. The occupation of HSF did not present an "essential" security threat.
- 122. In *Continental Casualty,* the tribunal noted that it would reject Argentina's invocation of ESI, if the measures taken did not meet the high necessity bar. ¹¹⁶ Similarly, in *LG&E*, the tribunal emphasized that ESI requires extraordinary circumstances—such as a threat to national survival. ¹¹⁷ Nicaragua has shown no such existential threat regarding HSF. The government's response was slow, ineffective, and inconsistent with its alleged security concerns.
- 123. The Tribunal in *Seda* concluded that ESI must relate to core functions of the state and involve protection from significant threats.¹¹⁸ Nicaragua has failed to demonstrate this at HSF. The most significant damage occurred between June 16 and August 10, 2018, *before* any measures Nicaragua now claims as ESI. Its reliance on post-hoc justifications years later mirrors bad-faith tactics seen in *Yukos v. Russia*, where belated defenses were dismissed as pretexts for wrongful conduct.¹¹⁹
- 124. There is no evidence that Nicaragua, including its police forces, referred to any security policy during the occupation. 120 Testimony from AG Gutierrez confirmed that essential security concerns were neither raised nor acted upon. 121 The failure to take action or communicate any security considerations at the time undermines Nicaragua's ESI defense.
- 125. Nicaragua does not claim that ESI covered every measure taken, but it broadly asserted ES for all actions as of August 18, 2018. This ES defense, however, crumbles under scrutiny:

¹¹⁶ **RL-0034** ¶¶198-199.

¹¹⁷ **CL-0116-ENG** ¶257.

¹¹⁸ CL-0423-ENG ¶642.

¹¹⁹ **CL-0232-ENG** ¶¶1430-1433.

¹²⁰ Transcript 307:20-24; Mrs. Winger testified that they never received any kind of communication from the Nicaraguan government relating to the invasion of HSF.

¹²¹ Transcript 1073:6-1074:20.

Date	ES Measures Claimed	Impact on HSF
June 16, 2018 - August 17, 2018	Before the time of ESM	Primary Damage: Avocado plantation destruction, crops, nursery destruction, business disruption, deforestation of rare woods.
August 18, 2018 - August 2021	(a) August 2018: Steps to request invaders to leave HSF.	Ongoing failures: Continued occupation of HSF; failure to prosecute those responsible.
	(b) Subsequent attempts (2019-2021) to encourage occupiers to vacate.	Continued occupation of HSF; failure to prosecute those responsible.
	(c) Use of police power "in the background."	Failure to prosecute responsible parties.
	(d) Interagency meetings to relocate squatters.	No action on death threats against Riverside's senior management.
	(e) Allowing individuals to remain until after harvest.	Lack of due process in enforcing protective orders.
April 2021	None claimed but within the overall ESM period.	Seizure of HSF land for a public forest reserve commemorating FSLN invasion leader Toño Loco.
December 2021 onward	After the ESM	De facto taking of exclusive legal title.

- 126. The issues at HSF were local criminal matters involving trespass, assault, and theft of property." Nicaragua failed to provide any factual or legal basis linking essential security to the measures in question. The harm caused to HSF was not part of an **essential** security strategy, nor was it related to any external threat. Rather, it resulted from **ordinary policing failures** that have no plausible connection to essential security concerns.
- 127. The measures Nicaragua claims under ESI—such as attempts to resolve the occupation and belated police involvement—are insufficient to invoke this powerful treaty exception. Not only did Nicaragua fail to act when the most significant damage occurred (July 2018), but its later actions were inadequate to protect Riverside's investment.
- 128. There is no evidence that Nicaragua operated under any national security framework, such as an emergency decree or legislation, to justify its inaction at HSF. The state's broad assertion of ESI for actions post-August 2018 crumbles under scrutiny. For example:

- (a) Before August 18, 2018, significant damage—including crop destruction and deforestation—occurred without any ESI claim.
- (b) After August 2018, Nicaragua's half-hearted measures, such as requesting one of the invader leaders to leave and belated police involvement, were insufficient to protect Riverside's investment. Commissioner Castro failed to evict the occupiers for three years and took no action in 2018, other than participating in a meeting with the invaders.
- (c) The 2021 expropriation of part of HSF land to create a community forest nursery had no plausible connection to ESI.¹²⁴
- (d) No essential security conditions were mentioned in any government document provided to the occupiers¹²⁵ or public statements.¹²⁶
- 129. The testimony at the hearing was clear. The ESM was unconnected to *bona fide* essential security interests. Testimony at the hearing confirming this lack of good faith nexus included:
- 130. Nicaragua made no statement to INAGROSA or Riverside at the time of the invasion of HSF regarding the relationship between its decision not to act and the essential security conditions.
- 131. No essential security conditions were mentioned in any government document provided to Riverside or INAGROSA. AG Gutierrez confirmed that Nicaragua did not consider essential security interests at the relevant time when responding to the invasion of HSF in 2018. Under questioning, she confirmed the absence of any communications related to HSF from key governmental bodies—including the Ministry of the Interior, the Ministry of Defense, the Army, the Office of the Public Prosecutor, or the police. AG Gutierrez, who assumed her position in May 2019, testified that she received no information from the police about any "security risk for Nicaragua caused by the invasion of HSF" and did not see any police documents related to the 2018 events at HSF when she made her witness statements years later.
- 132. AG Gutierrez testified that, in the summer of 2018, no objective considerations necessitated reliance on essential security concerns at HSF. Whatever the reasons for non-action, they were not based on critical security considerations.

¹²² Transcript 1206:23-25-1208:19.

¹²³ Transcript 1217:2-25.

¹²⁴ C-0736-SPA-ENG.

¹²⁵ R-0049-SPA-ENG.

¹²⁶ See National Police Press Statements R-0180-SPA- R-0185-SPA; R-0188-SPA- R-0190-SPA, and R-0191-SPA.

¹²⁷ Transcript 1072:10-1074:20.

¹²⁸ *Idem*.

- 133. Nicaragua's actions were part of ordinary policing failures, not a national security strategy. The harm caused to HSF resulted from inaction and mismanagement, not from addressing any external threat. Nicaragua's invocation of ESI was a pretext to avoid liability long after the most severe damage had already occurred. The state has not provided any factual or legal basis linking its actions to a legitimate national security threat.
- 134. Nicaragua's actions after the fact further demonstrate bad faith. The state did not invoke ESI during the CAFTA cooling-off period or at the outset of arbitration. The WTO panel in *US Steel and Aluminum Products* found that ESI claims must be timely and subject to continuous review. ¹²⁹ The *Continental Casualty* tribunal pointed out that any invocation of the ESI clause must be time-bound and subject to continuous review. Once the circumstances justifying the invocation have ceased, the state must return to normal compliance with its treaty obligations. ¹³⁰

G. Requirement to Address Secondary Responsibility.

- 135. The preclusion of wrongfulness at the time of the conduct does not negate all remedial obligations under the law of state responsibility. For instance, while a state's requisition of an investor's factory for military purposes during an emergency may be wrongful at the time, the existence of the emergency does not absolve the state of its responsibility to restore the property (restitution) once the emergency passes. If restitution is not possible, the state is obligated to provide compensation.
- 136. The ESI defense does not apply to the portions of this claim where Nicaragua has failed to meet its burden of proof. Nicaragua bears the responsibility of demonstrating that the ESI exception applies.
- 137. CAFTA §21.2(b)'s ESI provision does not exempt Nicaragua from compensating for breaches of the FPS standard. While §21.2(b) may excuse a temporary lapse in FPS if appropriately invoked, it does not absolve Nicaragua of liability. Even if the provision is self-judging, which it is not, it does not negate the consequences of its invocation.
- 138. Nicaragua erroneously conflates the self-judging nature of §21.2(b) with an alleged immunity from liability and review by this Tribunal. As highlighted in the Reply, this Tribunal can assess the ESI claim much like the *Eco Oro* tribunal evaluated the environmental exception in the US-Colombian treaty.¹³¹
- 139. In the *Eco Oro* decision, the tribunal did not rely on the clause's self-judging nature to find Colombia liable for treaty breaches. 132 The tribunal accepted that Colombia properly

¹²⁹ US – Steel and Aluminum Products **CL-0424-ENG** ¶¶7.140-7.149.

¹³⁰ **RL-0034-ENG** ¶222.

¹³¹ Reply 1218-1222.

¹³² **CL-0225-ENG** ¶¶623-699, 743-821, 826-837.

invoked the exception to protect its environment.¹³³ However, Colombia was still liable for damages because, despite invoking the exception, it failed to meet its other obligations under the treaty concerning the investors. As such, while Colombia could not be prevented from adopting protective measures, it was still required to compensate the investors.¹³⁴

- 140. Whether Colombia's measures were necessary to achieve their stated goal did not affect the tribunal's finding of liability. Where states intend to preclude both jurisdiction and liability upon invoking an ESI provision, they do so expressly and have not relied on the self-judging nature of the clause. This is not the case here.
- 141. Nicaragua's interpretation is at odds with treaty practice. When states intend to preclude liability through ESI provisions, they include explicit language. Indeed, none of the US Treaty Provisions include such language. This demonstrates that the U.S. Treaty Provisions (followed in the CAFTA) do not intend to have such a wide-reaching impact, as they could have adopted such express language carving out jurisdiction and liability but did not do so. The absence of such language in CAFTA demonstrates that the treaty was not designed to allow Nicaragua's interpretation, which would void the investment protections of Chapter Ten in favor of Chapter Twenty-One.
- 142. Nicaragua's interpretation negates compensation upon the invocation of ESI, which would unjustly enrich the state. It would allow the state to seize or sequester an investor's property without compensation, effectively enabling a forced transfer of wealth. This is fundamentally in opposition to the object and purpose of the CAFTA. Investors must be compensated for their losses resulting from such a transfer.
- 143. In *Gabcikovo-Nagymaros*, the ICJ confirmed that the obligation to compensate remained even when the necessity defense applied.¹³⁷ The *Seda* tribunal concluded that the invocation of ESI did not require the state to incur any international responsibility.¹³⁸ This tribunal failed to properly give effect to the ARSIWA in its decision, thus coming to an erroneous conclusion.
- 144. The ordinary meaning of §21.2(b), as the Investor advances, aligns with the principle of *effet utile*. This principle requires provisions to be interpreted to give full effect to all text parts, ensuring that each word is attributed meaning and purpose.¹³⁹ The Investor's

¹³³ **CL-0225-ENG** ¶642.

¹³⁴ **CL-0225-ENG** ¶836.

¹³⁵ Reply ¶1222.

¹³⁶ CAFTA Art 1.2 includes the objectives (c) to "promote conditions of fair competition in the free trade area"; and (d) "substantially increase investment opportunities in the territories of the Parties. "Deprivation of investment without compensation as proposed by Nicaragua is contrary to both of these CAFTA objectives.

¹³⁷ **CL-0427-ENG** ¶152.

¹³⁸ CL-0423-ENG ¶801.

¹³⁹ CL-0226-ENG ¶179-181.

- interpretation honors the ordinary meaning of every word in §21.2(b) and harmonizes the provision with the rest of CAFTA, avoiding unnecessary conflicts.
- 145. ARSIWA §27(b) explicitly preserves the requirement for compensation even when wrongfulness is precluded:
 - 27. The invocation of a circumstance precluding wrongfulness in accordance with this chapter is without prejudice to: ... (b) the question of compensation for any material loss caused by the act in question.
- 146. Thus, while a non-precluded measure may absolve the state of its primary obligation, it does not affect secondary rules such as the requirement for compensation. This is expressly affirmed by §27(b).
- 147. By contrast, Nicaragua's proposed interpretation forces a conflict between the substantive protections in Chapter Ten and §21.2. It effectively strips Chapter Ten of its meaning in favor of §21.2(b). However, the treaty can be interpreted to avoid unnecessary conflict. When §21.2 is interpreted according to its ordinary meaning, as required by VCLT §31, it does not unilaterally empower Nicaragua to divest Chapter Ten's investment protections of all effect, further supporting the Investor's interpretation.

H. Conclusion on ESI: Nicaragua's Invocation of ESI Fails

- 148. Nicaragua's invocation of ESI is legally indefensible and factually inconsistent. 140 Its actions lack the necessary connection to any essential security interest and were neither made in good faith nor proportionate to any genuine threat. By failing to meet the stringent requirements for invoking the ESI exception, Nicaragua's defense is both legally and factually defective
- 149. The Tribunal should reject Nicaragua's ESI claim, uphold the integrity of CAFTA, and hold Nicaragua accountable for its treaty obligations.

III. Question Three – Key Facts and Arguments on FPS

150. In mid-July 2018, the situation escalated with an expansion of the scale of the occupation of INAGROSA's premises. This resulted in the seizure of its operational headquarters, the destruction of avocado plantations, and the illegal logging of valuable hardwood species. Despite clear obligations, Nicaraguan authorities failed to take any protective action, causing severe damage to INAGROSA and Riverside.

 $^{^{140}}$ ESI, as Nicaragua asserts, would shield the government from liability in even the most egregious circumstances. Rejoinder ¶¶533, 554-556.

- 151. Nicaragua's FPS obligation requires due diligence in safeguarding Riverside's investment, ensuring physical and legal security within the rule of law. While Riverside has emphasized physical protection, FPS also encompasses legal security, which is intertwined with the FET standard in the same CAFTA provision. The legal foundation for this claim has already been established in previous pleadings and need not be reiterated here.¹⁴¹
- 152. To establish a breach of FPS, Riverside must demonstrate two elements: (a) that Nicaragua knew or should have known of the risk, and (b) that Nicaragua failed to take reasonable steps to mitigate that risk. Here, both elements are satisfied:
 - (a) **Failure of Protective Services**: INAGROSA informed the police about the initial occupation on June 16, 2018. Police Captain Herrera admitted under oath that the police had prior intelligence of the invasion¹⁴² but failed to warn INAGROSA or take preventive action. Despite repeated requests, including a formal letter from Carlos Rondón on August 10, 2018, the authorities took no protective measures. As confirmed by Captain Herrera, the failure to act in June or July 2018 constitutes a clear dereliction of duty. AG Gutierrez also admitted that no response was given to Mr. Rondón's letter.¹⁴³
 - (b) **Admitted Policy of Non-Action**: Captain Herrera testified that he was under orders from his superiors not to intervene, citing an unwritten presidential directive limiting police action to station premises.¹⁴⁴ This testimony confirms that no protective action was taken, and this inaction was not communicated to INAGROSA or the Investor.

A. Key Facts

- 153. Testimony confirmed that Nicaragua's failure to protect the Investor's investment was deliberate. Despite warnings and intelligence about the occupation, Nicaragua took no action to prevent the destruction of HSF. The state's selective enforcement of its duties further supports the claim of violation under CAFTA's FPS standard.
 - (a) Captain Herrera admitted that he did not verify the removal of the armed invaders when he signed the notarized statement, 145 nor did he follow up to ensure that the property was secured. No handover certificate was issued, 146 and testimony confirmed that there was no verification of the invaders' departure. 147

¹⁴¹ Memorial ¶¶561-594 and Reply ¶¶1271-1320.

¹⁴² **RWS-03** ¶¶21, 34.

¹⁴³ Transcript 1064:25-1068:7

¹⁴⁴ Transcript 1243:11-1244:7.

¹⁴⁵ Transcript 1271:14-1272:4.

¹⁴⁶ Transcript 693 :25-694:5.

¹⁴⁷ Transcript 736:2-737:2.

- (b) Nicaragua's claim that the invaders returned due to INAGROSA's alleged failure is baseless. The evidence clarifies that HSF was not returned to Riverside in 2018.
- 154. The so-called "measures" Nicaragua cites—including a meeting with squatter leaders in January 2019,¹⁴⁸ and a witness summons in April 2021¹⁴⁹—are woefully insufficient. These actions, taken months or years after the invasion, fail to meet the diligent protection standard required by international law.
- 155. Nicaragua pretends that its measures at HSF were about peaceful negotiation without requiring state coercive action to remove invaders. Nicaragua pointed to voluntary removals in May 2021, but it omits the forceful removal that it took in August 2021. Media reports describe Nicaragua's violent removal of invaders at HSF in August 2021. This only underscores Nicaragua's ineffectiveness of its prolonged inaction. Before that time in August 2021, Nicaragua never cleared HSF of all the invaders. The article does not describe government statements claiming ES objectives surrounding the removal. What is clear is that Nicaragua could have acted years earlier but chose to let the situation deteriorate to the point of necessitating violent intervention by its police and security services
- 156. Nicaragua's police records confirm that no diligent steps were taken in 2018 to protect INAGROSA's property from the armed invaders—a failure that persisted for three years. Even now, Nicaragua has taken no steps to safeguard INAGROSA and Riverside management from ongoing death threats.¹⁵¹
- 157. Nicaragua's actions and inactions clearly violated its FPS obligations under CAFTA. FPS is not a mere formality but a substantive duty requiring states to take all necessary measures to protect foreign investments. Nicaragua's failure to act in the face of clear threats to Riverside's investment is a gross breach of this duty.
- 158. This Tribunal does not need to establish that Nicaragua directly ordered the invasion of HSF to find it in breach of CAFTA. Nevertheless, Riverside maintains that the state orchestrated the invasion. ¹⁵² Nicaragua treated the armed invaders as allies, not adversaries. ¹⁵³ Senior government officials, including Congressman Edwin Castro, met with the invaders, and Mayor Centeno also met with them and assisted in its perpetuation. Mr. Enriquez's oral admission to Mr. Gutierrez at a government-created

¹⁴⁸ Transcript 1208:20-1209:8.

¹⁴⁹ Transcript 1165:4-12.

¹⁵⁰ C-0059-ENG.

¹⁵¹ Transcript 1217:2-25; Commissioner Castro testified that no charges were pressed against the invaders for trespass to private property, assault, illegal possession of weapons, destruction, or robbery.

¹⁵² Reply ¶1063(a).

¹⁵³ Transcript 43:10-45:24. See **C-0059-ENG**- Even the media reporting on the August 2021 eviction of the invaders described some of them as Sandinistas.

barricade in July 2018 confirms this overall plan, 154 which Mayor Centeno ordered. Social media reports from 2018 also describe the invasion as a reward for those supporting the government's violent crackdown on peaceful protests. HSF was used as a paramilitary base for persons assisting the Sandinista state to engage in violent confrontations with peaceful protestors under "Operation Clean-up." These provocations were to justify police violence and intervention against those who had differing views from the dictatorship. In addition, a "taking" is generally recognized as including not merely outright expropriation of property but also unreasonable interference with its use, enjoyment, or disposal. Nicaragua's judicial order taking possession of HSF based on misrepresentations of Riverside's position and its subsequent acts in obtaining nonexclusive legal title over HSF, singly and in combination, constitute takings of property without due process of law and FMV compensation. The failure to follow the rule of law and due process in Nicaragua's actions (before the local courts and in its implementation of the local court orders) makes the Judicial Order itself a taking. INAGROSA lost its exclusive legal rights over its property now having co-ownership with state on the legal title at HSF. The combination of misrepresentation, lack of due process, and physical control over HSF all comport with an uncompensated expropriation. 155

- 159. Nicaragua was not a passive observer but an active participant. Its actions deprived Riverside of its entire investment, including the permanent destruction of its avocado business and the deforestation of its land, wiping out years of investment and effort.
- 160. This systemic wrongfulness persisted long after the initial occupation. Nicaragua failed to maintain the *status quo* during arbitration, widening the dispute by:
 - (a) Taking the lands at HSF through *de jure* manipulation of legal title, effectively nullifying INAGROSA's ownership.¹⁵⁶
 - (b) Taking lands from HSF to create a community forest nursery in April 2021, dedicated in the memory of slain Sandinista HSF invasion leader Comandante Toño Loco.
 - 1. Independent Experts Confirm that There Was No Shelter Order

¹⁵⁴ **CWS-10** ¶109; Transcript 685:21-25; 686:1-11.

¹⁵⁵ In *ELSI*, the ICJ emphasized the importance of due process, stating that the protection of property rights must be accompanied by procedural fairness. The Court observes that interference with property, where procedural guarantees such as the right to a hearing are denied, could qualify as a taking. In Riverside's case, Nicaragua's judicial order seizing HSF without proper legal justification and the absence of an effective right to a hearing due to not being served with notice of the Judicial Order align with the ICJ's principle. The evidence of a failure of due process and the rule of law differentiate Riverside's claim from the ELSI situation. **RL-0057-ENG** at ¶¶108-111, ¶¶125-128.

¹⁵⁶ **C-0251-SPA-ENG**; See also ¶¶74-79.

- 161. The OAS Interdisciplinary Group of Independent Experts corroborates that no formal "shelter order" was in effect during June 2018. The collapse of negotiations to withdraw police from protests is well-documented, and Nicaragua has failed to produce any such order from its records. Additionally, the Catholic Church, a key participant in the National Dialogue, disputes the existence of any shelter order after May 2018.
- 162. Nicaragua's failure to act despite the known risks to the Investor's investment violates its FPS obligations under CAFTA, leading to substantial and lasting damage for which Nicaragua must now be held accountable.

2. Breach of FPS

- 163. Nicaragua's failure to take protective measures during the 2018 occupation of HSF constitutes a clear breach of its FPS obligations. Despite being aware of the risks, the State took no meaningful action to prevent irreparable harm to INAGROSA.
- 164. During the same period, the National Police evicted illegal occupiers from 18 other locations yet failed to protect INAGROSA. This unequal treatment violates FPS and supports Riverside's NT and MFN claims.
- 165. Nicaragua relies on an alleged executive order from President Ortega instructing police to remain in their barracks, yet no written evidence of this "shelter order" has been produced. Even if such an order existed, it would not have absolved Nicaragua of its FPS obligations. Longstanding international jurisprudence confirms that FPS obligations endure during civil unrest and are even more critical.
- 166. No protective measures were taken for HSF. Police Captain Herrera admitted he did not intend to provide protection and made no requests to increase security.at HSF. The police confiscated INAGROSA's private security weapons, leaving the property defenseless.
- 167. Riverside reasonably tried to maintain security, but Nicaragua actively discouraged such measures. Under Nicaraguan Law 872, INAGROSA was entitled to police protection for its property—a duty acknowledged by AG Gutierrez.¹⁶⁰
- 168. In *Wena Hotels v. Egypt*, the tribunal outlined key FPS diligence factors, including failure to prevent harm, investigate, or provide restitution. ¹⁶¹ Nicaragua exhibited all these failures in handling HSF:

¹⁵⁷ **C-0131-ENG** Bates 0001111.

¹⁵⁸ **C-0131-ENG** Bates 0001111.

¹⁵⁹ Transcript 1260:18-1261:21.

¹⁶⁰ Transcript 1079:7-11.

¹⁶¹ CL-0039-ENG ¶¶89-95.

- (a) Knowledge of the invasion, yet no intervention.
- (b) No protection of HSF or Riverside/INAGROSA in June or July 2018.
- (c) A belated, ineffective offer to return HSF in December 2023.
- (d) Continued damage to the investment through 2018.
- (e) State expropriation for a Toño Loco memorial forest reserve in April 2021.
- (f) No compensation despite government acknowledgment of responsibility.
- (g) No criminal charges against the invaders.
- (h) Procedural due process failures noted in Procedural Order No. 4.162
- 169. Riverside's FPS claim is well-founded. In *AAPL v. Sri Lanka*, the tribunal held that a state's failure to prevent harm to an investment violates its due diligence obligations, primarily when it can act but fails to.¹⁶³ The same principles apply here.
- 170. The AAPL tribunal confirmed that a state's awareness and failure to prevent harm constitutes an FPS breach.¹⁶⁴ Similarly, in *von Pezold v. Zimbabwe*, failing to protect property from occupation and violence breaches FPS, particularly when police neglect to respond.¹⁶⁵
- 171. International law establishes a state's due diligence duty to protect investments from third-party threats, as in *Eastern Sugar*. Nicaragua's failure to act in June and July 2018 violates this standard. That tribunal noted:

As the Tribunal understands it, the criterion in Art. 3(2) of the BIT concerns the obligation of the host state to protect the investor from third parties. In the cases cited by the Parties, mobs, insurgents, rented thugs, and others engaged in physical violence against the investor in violation of the state monopoly of physical force. Thus, where a host state fails to grant full protection and security, it fails to act to prevent actions by third parties that it is required to prevent. 166

172. The FPS obligation extends to protection from both third parties and state actors. This dual obligation, recognized in *Cengiz v. Libya*, is also at issue. 167 Nicaragua's reliance on an unsubstantiated executive order does not absolve its duty under international law. Its claim of civil strife as justification is unsustainable.

¹⁶² Transcript 1696:15-22.

¹⁶³ Memorial ¶566 discussing AAPL CL-0147-ENG ¶114.

¹⁶⁴ **CL-0147-ENG** ¶85(d).

¹⁶⁵ **CL-0162-ENG** ¶¶597–599.

¹⁶⁶ **CL-0219-ENG** ¶203.

¹⁶⁷ **CL-0192-ENG** ¶¶403-404,437, 442.

- 173. Expert reports, including Prof. Wolfe's, confirm that Nicaragua itself was a primary instigator of violence, ¹⁶⁸ amplifying unrest to justify repression. UN experts further corroborate that this violates Nicaragua's treaty obligations to act in good faith.
- 174. Nicaragua cannot evade its FPS obligations by citing its own unlawful actions. ¹⁶⁹ The principle of *nullus commodum*—no one should benefit from their own wrongdoing—precludes Nicaragua from excusing its non-performance of treaty duties. This is not merely a clean-hands doctrine, but addresses active abuse of process or unfairness. This also breaches the *pacta sunt servanda* principle and fair and equitable treatment standards. ¹⁷⁰
- 175. As emphasized in Riverside's Reply, Nicaragua actively protected over 18 other properties while neglecting HSF.¹⁷¹ This disparity underscores Nicaragua's intentional and unjustified failure to uphold its FPS obligations to Riverside.
- 176. Nicaragua's prolonged inaction and disregard for its legal obligations manifestly breach its FPS duty, for which it must now be held accountable.
 - 3. Examples of Due Diligence Being Provided at the Same Time
- 177. Nicaragua's failure to protect INAGROSA during the summer of 2018 contrasts sharply with its diligent police actions elsewhere, as detailed in the Reply (¶¶1321-1360). These are set out in Reply Charts C1, C2 and C3.
- 178. Police records confirm that law enforcement intervened in numerous other property invasions during the same period when HSF was left unprotected.¹⁷³ This selective inaction highlights Nicaragua's discriminatory treatment of HSF.
- 179. Despite clear evidence of active police operations elsewhere, no action was taken at HSF. Testimonies from Luis Gutierrez¹⁷⁴ and Captain Herrera confirm that no steps were taken to enhance security, and INAGROSA's weapons were confiscated, leaving the property vulnerable.
 - 4. August 2018 and Aftermath

¹⁶⁸ CES-02 ¶¶43-46.

¹⁶⁹ Reply ¶¶1516-1518. In Reply ¶1518, Riverside noted the *nullus commodum* rule applies to situations where a state uses "connivance" in its wrongfulness. These are "disingenuous" explanations. In such a case, "the State is prevented from invoking the breach to the disadvantage of the other party either to found a right or as a defense." ¹⁷⁰ **C-0535-ENG** ¶¶123-124.

¹⁷¹ Reply ¶¶128,1330.

¹⁷² C-0326-SPA.

¹⁷³ Reply ¶¶1330-1360; **C-0326-SPA.**

¹⁷⁴ Transcript 869:10-12.

- 180. Nicaragua claims that a meeting on August 11, 2018, led to the eviction of invaders from HSF. However, INAGROSA was excluded from this meeting, and not all invaders left. Testimony confirms that no accurate count was made, ¹⁷⁵ there is no evidence that all the invaders vacated HSF, the police never checked and some invaders remained at HSF for years.
- 181. Riverside witnesses observed invaders on-site during a visit on August 14, 2018. The property remained under occupation for years, resulting in irreversible damage to INAGROSA.
- 182. The police failed to secure HSF during the August 14, 2018 visit, leaving invaders in control. INAGROSA never fully regained possession of HSF.

5. Later Developments

- 183. In April 2021, the Nicaraguan government created a community forest reserve at HSF, led by individuals involved in the initial invasion. This event deepened the breach of Nicaragua's obligations.
- 184. On September 9, 2021, Nicaragua notified Riverside that HSF was free of invaders. However, this did not resolve the FPS breach, as the state failed to protect INAGROSA management from ongoing death threats. To date, no criminal charges have been filed against the armed leaders of the invasion or against anyone making the ongoing death threats against Riverside and INAGROSA's management. While Nicaragua made a grand production at the hearing offering to return the damaged lands at HSF to Riverside, it has taken no measures to protect the physical safety of Riverside's management from longstanding risks to their physical safety and security. This is astonishing, given Nicaragua's knowledge of threats to the life and physical safety of Riverside's management and that of its investment. Nicaragua has refused to carry out its international law obligation to protect the security of Riverside's management. Without proof of Nicaragua's protective actions, it would never have been reasonable for Riverside to return to HSF.

B. Legal Arguments on FPS

- 185. This sequence of events underscores Nicaragua's complete failure to uphold its FPS obligation, leading to severe and ongoing harm to Riverside's investment.
- 186. In stark contrast, Nicaragua's internal police reports show that, during the same period, the National Police actively investigated and evicted illegal occupiers from other properties, including large-scale invasions involving up to 200 armed individuals. Yet, these decisive actions were conspicuously absent at HSF.

¹⁷⁵ Transcript 1130:17-24.

187. Nicaragua has not explained this disparity. The contrast between robust police intervention elsewhere and total inaction at HSF highlights the state's reckless and intentional misconduct. Charts C1, C2, and C3 in the Reply¹⁷⁶ further details these protective actions taken at other sites.

C. Relevance of Riverside's Conduct on FPS.

- 188. Riverside consistently sought police protection and took no actions that interfered with Nicaragua's duty to uphold FPS. The law on contribution, as outlined in the Reply¹⁷⁷, confirms that the elements for contributory fault, as discussed in *Bear Creek v. Peru*,¹⁷⁸ were not met. Riverside in no way aggravated the dispute; thus, it has no contributory fault.
- 189. **Mitigation duties met**: Riverside's interest in reclaiming HSF in 2021 was evident as it sought further clarification from Nicaragua on the terms.¹⁷⁹ However, Nicaragua failed to respond. Despite Nicaragua's mischaracterization of this as a refusal, Riverside's concern for the safety of its management and the political instability rendered a return impractical.
- 190. Mr. Rondón testified that Reichler's resignation in December 2021, citing a new dictatorship under President Ortega and the lack of judicial independence, deeply influenced Riverside's concerns about returning to HSF.¹⁸⁰ This political instability, compounded by ongoing unresolved death threats against INAGROSA's senior management, made the land's return impractical. Under the circumstances, further mitigation was unreasonable and potentially dangerous.
- 191. Testimony from both Mr. and Mrs. Rondón highlighted the impact of these death threats and threats against personal security,¹⁸¹ while Police Commissioner Castro admitted that no criminal charges were brought against the invaders.¹⁸² Luis Gutierrez's testimony further confirmed the destruction of rare hardwoods, avocado plantations, and critical equipment.¹⁸³
- 192. The notarized "inventory" also confirmed the destruction of forests, the avocado plantations, the harvest, the nursery with the saplings ready for planting into the expansion zone, and equipment and facilities.

¹⁷⁶ Reply pp. 35-37.

¹⁷⁷ Reply ¶1757-1776.

¹⁷⁸ **CL-0187-ENG** ¶410.

¹⁷⁹ Reply ¶¶508-513,517-519.

¹⁸⁰ Transcript 476:6-20.

¹⁸¹ Transcript 305:22-306:19 (Mrs. Rondón);473:24-474:11 (Mr. Rondón).

¹⁸² Transcript 1217:2-25.

¹⁸³ Transcript 690:8-692:11.

- 193. In total, the presence of death threats against INAGROSA management and the fundamental change in legal security in Nicaragua made acceptance of the return of the land economically non-viable after December 2021.
- 194. The duty to mitigate only requires taking reasonable measures, not ones that pose unreasonable risks or exacerbate harm. Given these threats and the breakdown of legal security, the return of HSF was impractical and dangerous. It was not a reasonable option.

IV. Question Four: The FPS Damages

- 195. Nicaragua's breach of its FPS obligation has caused substantial losses to Riverside:
 - (a) The invasion into HSF on June 16, 2018, initially affected the coffee cultivation zones rather than the avocado production areas.
 - (b) By July 16, 2018, the occupation had expanded due to a lack of police protection and damaged offices, avocado cultivation, and propagation facilities.
 - (c) On August 14, 2018, the police signed an inventory documenting the destruction: loss of avocado plantations and nurseries, deforestation of valuable timber, and damage to equipment and infrastructure.
 - (d) The occupation persisted, rendering the damage effectively permanent.
- 196. The quantum of damages resulting from the continuing invasion and occupation is directly linked to the time the initial invasion spread to the avocado-producing areas in July 2018. Riverside has shown that irreparable harm to the avocado plantation and forest began with the July 2018 invasion.
- 197. Nicaragua's damages experts presented three scenarios to assess the value of HSF based on expropriation following an unlawful invasion. These scenarios hinge on three key control dates—August 2018, September 2021, and March 2024—that Nicaragua uses to calculate Riverside's damages. However, Riverside has shown that these dates contradict the factual record and fail to reflect Riverside's ability to access and manage the property. Testimony and documentary evidence confirm that Riverside had not regained effective control of HSF on any dates cited by Nicaragua's experts.
- 198. Riverside provided clear evidence of its ongoing Hass avocado operations. By the time of the invasion, it had successfully harvested two Hass avocado crops on 44.75 hectares and expanded into 200 more hectares. The loss of the 2018 crop and existing plantations was confirmed in the August 2018 notarized inventory, supported by extensive nursery operations and infrastructure. INAGROSA's logistics, proven through prior coffee export successes, were primed to ship avocados to markets that could

accept Nicaraguan Hass avocados without regulatory modification,¹⁸⁴ including Costa Rica and Canada,¹⁸⁵ with future access to the US expected in due course a few years later.¹⁸⁶

- 199. The loss is corroborated by the August 2018 notarized inventory, which documented the destruction of (a) 16,000 avocado trees with fruit, (b) Nursery plants, (c) Valuable forest timber, and (d) Equipment and infrastructure at HSF.
- 200. In cross-examination, Mr. Hart admitted to seeing the evidence of this destruction in the record. Mr. Hart's and Kratovil's analysis is fundamentally flawed as it fails to account for the loss of the entire land. Their claim that the unplanted portions of the land were included as infrastructure is deceptive and misleading. This omission demonstrates that Nicaragua's damages assessment is unreliable, as it does not consider the totality of Riverside's loss. The President of the Tribunal aptly highlighted this inconsistency, noting that there is "a different logic for the land and for the infrastructure." Therefore, the incomplete analysis undermines the credibility of Nicaragua's quantum scenarios, as it overlooks a key element of the damages.

A. Deforestation and Damage

- 201. The Tribunal heard compelling evidence of deforestation at HSF. Luis Gutierrez reviewed drone footage from Nicaragua, and Tom Miller testified to the destruction of rare hardwoods. This was corroborated by written evidence, 2019 social media reports, and media coverage in 2021.
- 202. By 2023, HSF had been irrevocably altered, with soil degradation from planting different crops. The police also failed to protect Riverside's management from death threats, and no criminal charges have been filed against those responsible.
- 203. Riverside's damages must be calculated based on the fair market value of its investment before Nicaragua's unlawful actions. The breach of FPS began with the June 2018 invasion, with more severe losses following the expanded occupation in July. The August 2018 inventory confirms the timeline of destruction.

¹⁸⁴ Transcript 996:5-8; 996:25-997-5.

¹⁸⁵ Transcript 996:5-8; 996:25-997-5.

¹⁸⁶ Reply ¶985.

¹⁸⁷ Transcript 1994:4-1997:1.

¹⁸⁸ Transcript 2046: 3-22.

¹⁸⁹ Trannscript 2097:10-19.

¹⁹⁰ Transcript 690:8-692:11.

¹⁹¹ Transcript 442:12-19.

¹⁹² C-0061-SPA.

- 204. The date of loss for FPS coincides with FET, NT, and MFN breaches, though damages are non-cumulative across these obligations. 193
- 205. Valuation dates for the four claims vary slightly. According to CAFTA, expropriation is dated June 18, 2018, the first day of the invasion. At the same time, FPS, NT, and MFN are pegged a month later to July 14, 2018, when the invasion expanded into the Hass avocado production area and INAGROSA's offices at Casa Hacienda Santa Fe. The destruction of Riverside's business was confirmed in the August 2018 notarized inventory.

B. LOSSES AND QUANTIFICATION

- 206. The Tribunal requested specific references to quantify FPS losses:
 - (a) **DCF Valuation**: The DCF value is \$142,106,125 before interest.¹⁹⁴ Mr. Kotecha proposed an alternative DCF of \$99,376,988 before interest for the operational 245 hectares, including land under expansion and avocado-producing zones.¹⁹⁵ After interest, these amounts are \$259,775,557 and \$181,665,022.
 - (b) **Alternative Land Valuation**: (a) Mr. Kotecha valued HSF at \$97,934,569 before interest (**CES-04**). Carlos Pfister's proxy appraisal (**CES-03**) gave an alternative valuation of \$38.7 million. After interest, these amounts are \$179,028,224 and \$70,745,114.
- 207. Riverside's losses became concrete after the July 2018 invasion expansion:
 - (a) **Avocado Plantation and Nurseries**: Invaders destroyed Hass avocado trees ready for harvest, resulting in the loss of the 2018 crop¹⁹⁶ and irreparable damage to the remaining plantation.¹⁹⁷ The 2018 harvest (75,000 kg) would have sold for \$2.03/kg in Costa Rica¹⁹⁸, , with future exports to Canada priced between \$1.43 and \$3.77/kg from 2019-2021.¹⁹⁹
 - (b) **Rare Woods in the Forest**: Invaders logged valuable hardwoods, as confirmed by Luis Gutierrez's testimony,²⁰⁰ independent media, and other evidence. As of 2018, the private hardwood forest at HSF was valued at \$5.1 million before interest.²⁰¹ During the hearing, Luis Gutierrez demonstrated

¹⁹³CL-0054-ENG ¶181; CL-0055-ENG ¶¶77-78.

¹⁹⁴ CES-04 ¶2.6.

¹⁹⁵ **CES-04,** Chart 7.

¹⁹⁶ Transcript 882:9-883:1; **CWS-06** ¶¶31-32.

¹⁹⁷ **CWS-10** ¶292

¹⁹⁸ **CES-04,** Chart 6.

¹⁹⁹ **CES-04,** Chart 6.

²⁰⁰ Transcript 689:20-24.

²⁰¹ **CES-04** ¶7.5.

- through photographs from Nicaragua's drone video and other physical evidence, such as the notarized inventory proof, to corroborate claims about deforestation at HSF since the invasion.²⁰²
- (c) **Land Value**: Mr. Kotecha valued HSF land at \$38.7 million based on 40ha of planted land and 960ha of unplanted land, forest, and infrastructure.²⁰³ Using an asset-based approach, his second report calculated the land value at \$97,934,569 before interest.²⁰⁴ At the hearing, Riverside showed it was due \$37,820,00 million, even using Nicaragua's expert's flawed model (excluding pre-judgment interest).²⁰⁵
- (d) **Infrastructure:** Invaders looted INAGROSA's corporate office,²⁰⁶ damaged worker residences, and destroyed warehouses.²⁰⁷ Infrastructure damage, including housing, roads, and nurseries, is estimated at \$2.5 million.²⁰⁸ INAGROSA's worker housing was financed with a paid-off \$1 million LAAD loan.²⁰⁹
- (e) **Machinery and Equipment**: Agricultural tools,²¹⁰ fumigation pumps, trucks,²¹¹ and supplies were stolen or destroyed.

C. FLAWS IN NICARAGUA'S DAMAGES

208. Furthermore, the deficiencies in the scenarios presented by Messrs. Hart and Kratovil during their cross-examination are undeniable, critically undermining the credibility of their analysis and casting serious doubt on the reliability of their conclusions.

1. Incomplete Valuation of HSF

209. Nicaragua's damages experts, Messrs. Hart and Kratovil, presented fundamentally flawed scenarios. Their focus on the 44.75 hectares of planted avocado land overlooks the unplanted portion of the property, which constitutes a significant part of HSF.²¹² They lump the remaining land into infrastructure, failing to specify what constitutes buildings, trees, or other assets. This lack of transparency distorts the true value of the property.²¹³

²⁰² Transcript 690:8-692:11; 883:14-884:13; **C-0058-SPA/R-0148-ENG.**

²⁰³ **CES-01,** Table 10.

²⁰⁴ **CES-04,** Chart 5.

²⁰⁵ Transcript 2091:15-22.

²⁰⁶ CWS-06 ¶26.

²⁰⁷ CWS-06 ¶26.

²⁰⁸ CWS-06 ¶26.

²⁰⁹ LAAD C-0181-SPA, C-0421-ENG, C-0422-ENG; Construction contracts-C-0401-SPA, C-0402-SPA, C-0403-SPA.

²¹⁰ CWS-10 ¶9(c).

²¹¹ CWS-02 ¶136.

²¹² Transcript 2062:9-14.

²¹³ Transcript 2060:1-22.

210. Mr. Kratovil's valuation scenarios rely on arbitrary and unsupported control dates— August 2018, September 2021, and March 2024—contradicting the factual record. His assumption that Riverside regained control of the property by August 2018 is directly refuted by testimony from Captain Herrera, confirming that invaders were not fully evicted until September 2021.²¹⁴ The September 2021 date, too, is baseless, as evidenced by correspondence from Analia Gonzalez in April 2023, outlining unresolved conditions for Riverside's resumption of control.²¹⁵ Lastly, using March 2024 as a control date is arbitrary and lacks any factual foundation.²¹⁶ This unfounded assumption renders the entire valuation unreliable.

2. Selective Valuation of the Expropriation

- 211. Messrs. Hart and Kratovil's valuations fail to account for the full scope of expropriation. Their scenarios address using only the market value for the planted land and inexplicably using old "book value" for the unplanted portion,²¹⁷ thereby minimizing the economic loss Riverside suffered.²¹⁸ Messrs. Hart and Kratovil admitted that book value is not fair market value.²¹⁹ Furthermore, their analysis distorts the property's actual value by improperly lumping unplanted land into infrastructure without a clear delineation of assets. In contrast, Mr. Pfister's report provides a detailed breakdown of planted and unplanted land, buildings, and other assets, offering a more accurate and complete valuation.²²⁰ By failing to provide a clear breakdown of how each asset class contributes to the property's overall value and using years-old book value,²²¹ the scenarios offer an artificially low assessment that does not reflect the property's actual worth.
- 212. The experts' real estate valuation is compromised by two critical errors: reliance on non-comparable data and inconsistent application of valuation metrics. Mr. Kratovil admitted using data from properties that are not directly comparable to HSF,²²² introducing uncertainty and undermining the credibility of his conclusions. In contrast, Mr. Kotecha relies on comparable sales data, reflecting HSF's unique characteristics.²²³ Additionally, Mr. Kratovil applies different metrics to the planted and unplanted land, arbitrarily subsuming the latter under infrastructure without explanation, further weakening his analysis.²²⁴ Mr. Pfister consistently applies valuation metrics across different components of the property.²²⁵

²¹⁴Transcript 2044: 3-23.

²¹⁵ **C-0352-ENG**; Transcript 2072:22-2073:6.

²¹⁶ Transcript 2058:10-13.

²¹⁷ Transcript 2101:9-2105:24.

²¹⁸ Transcript 2062:9-14.

²¹⁹ Transcript 2101:9-2105:24.

²²⁰ **CES-03** pp.2-3.

²²¹ Transcript 2101:9-2105:24.

²²² Transcript 2021:11-2030:11.

²²³ Transcript: 2015:4-9.

²²⁴ Transcript: 2085:14-2086:25.

²²⁵ **CES-03** pp.6-17.

3. Mr. Hart's Speculative Third-Party Investor Decision Assumptions

- 213. Mr. Hart's assumption that third-party investors declined to participate in Riverside's project based on his identified deficiencies is wholly speculative. He admitted that he conducted no independent investigation or consulted with any investors. His conclusions, unsupported by empirical evidence or testimony, are unreliable and cannot be the basis for a credible expert testimony.
- 214. The valuations presented by Messrs. Hart and Kratovil are riddled with errors, including flawed control date assumptions, incomplete consideration of the expropriation, and inconsistent methodologies. Their reliance on speculative reasoning and non-comparable data renders their conclusions legally and factually unsound. Accordingly, the Tribunal should reject these valuations as unreliable and insufficient to reflect Riverside's damages.

D. THE TRIBUNAL SHOULD GIVE SIGNIFICANT WEIGHT TO RIVERSIDE'S ASSET-BASED VALUATION

- 215. Riverside suggests that asset-based valuation is the most appropriate method for valuing HSF. This approach accurately captures the intrinsic and tangible value of the land, infrastructure, and improvements while accommodating market comparability and historical context.²²⁸
- 216. The primary asset—HSF—comprises significant tracts of agricultural land, both planted and unplanted, along with related infrastructure. An asset-based approach is particularly well-suited for such physical assets, as it reflects the inherent worth of the land and its improvements, aligning with its actual fair market value.
 - 1. Asset-based Approach Accounts for the Highest and Best Use of the Land
- 217. A key factor in valuing HSF is considering its highest and best use, which in this case is as productive agricultural land. The asset-based approach uses market comparisons with similar properties to evaluate the land's potential output. This method fully captures the land's potential, particularly when factoring in development possibilities, as demonstrated in Mr. Kotecha's high-low range scenarios. His high estimate assumes the development of 81.6% of HSF (1,000 hectares), while the low estimate assumes 20% (245 hectares).²²⁹
 - 2. Reflection of Historical and Current Values

²²⁶ Transcript: 2007:1-2008:16.

²²⁷ Transcript: 2007:1-2008:16.

²²⁸ **CES-04** ¶2.6; Transcript: 1804:2-5; 1806:19-1807-18.

²²⁹ Transcript 1804:21-1806:18.

- 218. The asset-based approach is flexible, considering both historical and current market values. This flexibility is vital here, where Hart and Kratovil improperly focus solely on 2023 values, disregarding the property's 2018 value at the time of the wrongful act.²³⁰ Kotecha's method accounts for these historical valuation points, ensuring an accurate reflection of the property's worth both before and after the damage caused by Nicaragua's actions.²³¹
- 219. Moreover, this method adjusts for permanent damage, such as losing centuries-old hardwood trees, significantly affecting future productive land potential. Considering the historical value and environmental damage, the asset-based approach ensures a fair and comprehensive assessment of Riverside's losses.

3. Mitigating Speculative Assumptions

- 220. The asset-based approach's strength lies in its reliance on tangible, physical assets. The asset-based method is grounded in present, observable factors. This makes the asset-based approach more reliable in disputes where external factors significantly impact business prospects.
- 221. Riverside's asset-based approach presents two scenarios:232
 - (a) Scenario 1, derived from Mr. Pfister's expert report, values unplanted land at \$30,000 per hectare and planted land at \$57,500 per hectare, resulting in a total pre-interest valuation of approximately \$39 million. This reflects a conservative yet robust assessment based on expert real estate principles.
 - (b) Scenario 2, based on comparable properties, as suggested by persons who are familiar with HSF, such as Luis Gutierrez and Mr. Rondon, ²³³ results in a pre-interest valuation of \$99 million, which aligns closely with the amount from the DCF method. This consistency between the two approaches underscores Riverside's valuation reliability. ²³⁴
- 222. By grounding the valuation in the actual market value of the assets, Kotecha's approach mitigates the risk of overestimating or underestimating the property's worth based on uncertain business prospects. This makes the asset-based approach more reliable in property disputes where future business outcomes are uncertain or may be significantly affected by external factors, such as government interference or political instability.
- 223. While the listings used in the asset-based valuation were not from final sales, the comparability of the data is more important than whether the transactions were

²³⁰ Transcript 1818:25-1819:9.

²³¹ Transcript 1819:4-9.

²³² Transcript 1806:19-1807:8.

²³³ Transcript 1923:4-13.

²³⁴ Transcript 1923:14-1924:12.

completed. The asset-based approach remains comprehensive, reflecting the land's highest and best use, incorporating historical data, and avoiding speculation. In contrast, Hart and Kratovil's valuation is flawed, narrowly focused, reliant on contemporary values alone, and fails to account for lost business opportunities, permanent damage, and essential control factors.²³⁵

F. Interest Rate

- 224. Interest must be paid as part of Nicaragua's reparation duty. Nicaragua's suggestion to use the 10-year US Treasury rate is inappropriate due to the higher risk of holding US dollars in Nicaragua than holding US dollars in America.²³⁶ The Nicaraguan sovereign risk rate (9.2%) best reflects the risks involved. Riverside is a creditor holding US dollar debt in Nicaragua, and the sovereign risk rate should apply to both pre- and post-award interest. This reflects Nicaragua's credit rating and aligns with the principle of full reparation.
- 225. Riverside's expert used Nicaragua's sovereign debt rate,²³⁷ and applied a 9% interest rate in Exhibit **C-0661** (rounded down from the 9.2% sovereign risk rate). Pre-award interest was calculated in Mr. Kotecha's Report up to July 16, 2024. Nicaragua's expert suggested annually compounded interest,²³⁸ but Mr. Kotecha applied semi-annual compounding in his earlier report.²³⁹ The estimated damages, including interest, calculated to July 1, 2025, with annual compound interest (as proposed by Nicaragua's expert), are as follows:

Economic Loss Summar	y DCF	DCF	Land Replacement	Land Replacement
	1000 Hectares	245 Hectares	Land - Mexican Proxy Pfister	Land - Nicaraguan Proxy
Total before interest	142,106,12	5 99,376,988	38,700,000	97,934,569
Interest 9	% 117,669,43	1 82,288,034	32,045,114	81,093,655
Economic Loss	259,775,55	7 181,665,022	70,745,114	179,028,224

²³⁵ Transcript 1819:9-19.

²³⁶ CES-04 ¶8.16.

²³⁷ Reply ¶¶2042-2052.

²³⁸ **RER-02** ¶164.

²³⁹ **CES-04** ¶8.24

F. Moral Damages

- 226. A home is a place of profound personal connection. Moral damages address these deep emotional harms and threats to physical safety and psychological well-being. Nicaragua took that home from Melva Jo Winger de Rondón and her family. The ongoing death threats against Mr. Rondón make it impossible for them to return. Mr. Rondón, COO of INAGROSA, has faced severe threats to his life and the safety of his family (including Mrs. Rondón).
- 227. Mrs. Rondón testified to the psychological impact on her family of Nicaragua's failure to protect HSF.²⁴¹ The alignment between Riverside and INAGROSA's interests further supports moral damages for the threats against Luis Gutierrez and Jaime Vivas.
- 228. Nicaragua's failure to protect Riverside's management from severe threats to their physical safety and liberty and Nicaragua's disregard for Riverside's security meet the high threshold required for moral damages. Moral damages are discretionary non-economic damages. Riverside proposed an amount of \$45 million for moral damages. The Tribunal should award such damages.

G. Counterclaims

- 229. Nicaragua has claimed set-off damages in this arbitration.²⁴² However, its claims are improper, untimely, and incorrect. Set-off is a form of counterclaim. Due to the CAFTA's narrow consent to arbitration, counterclaims fall outside the scope of consent. Only claims and counterclaims pleaded directly arising from a breach of Section A of the CAFTA may be considered.
- 230. There can be no setoff or counterclaims unless they involve a violation of Section A of CAFTA Chapter 10. There is no need to consider ICSID Convention Rules 40 on counterclaims. These claims did not arise out of the investment in INAGROSA.

 Nicaragua has pleaded no counterclaims or ancillary claims that fit within the scope of the CAFTA consent within this arbitration.

V. The Extent of Riverside's Claim Under §10.16.1(a)

231. Nicaragua seeks to reduce Riverside's damages from 100% to 25.5%, relying on a restrictive reading of CAFTA §10.16(1) that limits recovery to direct investor losses. However, this interpretation ignores the operational losses of Riverside's controlled

²⁴⁰ The law regarding moral damages can be found in Memorial ¶¶857-904 and Reply ¶¶2071-2082.

²⁴¹ Transcript 305:22-306:22.

²⁴² Rejoinder ¶785.

- subsidiary, INAGROSA, and the direct losses Riverside itself suffered. The text of §10.16(1) does not support Nicaragua's narrow reading.²⁴³
- 232. As the US has noted, expropriation of an entire enterprise constitutes an indirect taking. In its NDPS, the US recognized that CAFTA §10.16(1) mirrors NAFTA §§1116 and 1117, allowing shareholders to claim for damages incurred by their investments.²⁴⁴
- 233. The broad language of §10.16(1) permits such shareholder claims, a position that tribunals affirmed. If the CAFTA Parties intended to restrict claims in this way, they would have amended the language as they did in other contexts. They did not, reinforcing the scope of §10.16(1)(a).
 - A. Nicaragua Admitted Riverside Could Claim Damages Based on Control.
- 234. This claim from Riverside for all the damages was the original claim advanced by Riverside under CAFTA §10.16(1)(a) and was not affected by Riverside's withdrawal of its claim under CAFTA §10.17,
- 235. Nicaragua concedes that claims beyond shareholding are possible if Riverside demonstrates control over INAGROSA. Nicaragua acknowledges that Riverside may claim damages if it can prove ownership or control during the breaches.²⁴⁵
- 236. Riverside has conclusively proven its control, with testimony from key figures such as Melvin Winger ²⁴⁶ and Melva Jo Rondón, ²⁴⁷ which Nicaragua did not challenge during the hearing. With Riverside's control over INAGROSA established, Nicaragua's jurisdictional objections fall away. Nicaragua concedes Riverside's control, ²⁴⁸ entitling Riverside to claim for the damages at HSF.
 - B. Cases confirm that the controlling shareholder can obtain 100% of the damages.
- 237. In *Pope & Talbot*, interpreting NAFTA provisions identical to CAFTA §10.16(1)(a), the tribunal allowed full recovery by a controlling shareholder, noting the clarity of the treaty

²⁴³ Riverside NDP Response ¶¶84-86.

²⁴⁴Mondev v. US (CL-0006-ENG); Antoine Goetz v Burundi I (CL-0263-FRE); Webuild v. Argentina (CL-0264-ENG); CMS Gas v. Argentina (CL-110-ENG).

²⁴⁵ CM ¶240.

²⁴⁶ CWS-04 ¶¶24-32.

²⁴⁷ Transcript 303:16:22.

²⁴⁸ CM ¶240.

- text.²⁴⁹ NAFTA §1117, like CAFTA §10.17, does not mandate limitations on shareholder claims under §1116.²⁵⁰
- 238. Riverside's Reply has extensively cited case law supporting full recovery by controlling shareholders.²⁵¹ For example, in *Kappes v. Guatemala*, the Tribunal affirmed that §10.16(1)(a) permits a shareholder's claim without restriction, even when other provisions may apply.²⁵²

C. There is no Risk of Double Recovery in this Case.

- 239. Riverside owns 95% of INAGROSA,²⁵³ with the remaining 5% held by Carlos Rondón,²⁵⁴ who cannot file a CAFTA claim due to timing restrictions. Consequently, there is no risk of double recovery.
- 240. Nicaragua's reliance on *Unión Fenosa* is misplaced. Unión Fenosa confirms that a controlling investor may bring a reflective loss claim.²⁵⁵ Since Riverside owns 95% and no other party can claim, it is entitled to full recovery.
- 241. Numerous NAFTA cases, such as *S.D. Myers* and *Pope & Talbot* confirm that controlling shareholders can recover the total damages suffered by the enterprise under §1116, the parallel to CAFTA §10.16(1). In each of these cases, the Tribunals thoroughly analyzed the treaties and applied the VCLT to this task.
- 242. This position is the prevailing view. The wording of §10.16(1) does not exclude recovery by an investor for damages suffered by the investment.
- 243. David Gaukrodger noted that "in ISDS the existence of a separate legal basis for a claim in the treaty has been seen as sufficient to allow for claims for reflective loss." Mr. Gaukrodger notes that the *Impregilio v. Argentina* Tribunal "concluded that *Impregilo* could recover for reflective loss." ²⁵⁷
- 244. Nicaragua was unable to convince the CAFTA Tribunal in *Lopez-Goyne v. Nicaragua* that CAFTA §10.16(1)(b) exhausted the ability of shareholders to claim under 10.16(1)(a). The Tribunal concluded that where the impact was to shareholders (such as in an expropriation), the damages naturally flowed to the shareholder and thus were

²⁴⁹ **CL-0014-ENG** ¶80. The *Pope & Talbot* Tribunal applied the VCLT to interpret the NAFTA. See **CL-0014-ENG**, ¶12.

²⁵⁰ CL-0014-ENG ¶80.

²⁵¹ Reply ¶¶1133-1139.

²⁵² CL-0258-ENG ¶136.

²⁵³ C-0053-SPA.

²⁵⁴ C-0052-SPA.

²⁵⁵ CM ¶235 relying on **RL-0089-ENG** ¶10.119.

²⁵⁶ **CL-0387-ENG**, p. 27.

²⁵⁷ CL-0387-ENG p. 27; CL-0120-ENG ¶138.

recoverable under §10.16(1)(a).²⁵⁸ This is the same situation present here where the damage caused to INAGROSA is *ipso facto* damage caused to the Investor in terms of its demonstrated and long-term control over INAGROSA and terms of the loss of its direct right to participation in future investment opportunities in INAGROSA. Both are rights directly owned by it – enabling it to receive 100% of the damages suffered from the investment in Nicaragua.

D. Treaty Drafting Supports Riverside.

- 245. Had the CAFTA drafters intended to limit reflective loss claims under §10.16(1)(a), they would have included such restrictions in the treaty language, as they did in Annexes 10-B and 10-C. The absence of such language indicates no such limitation was intended.
- 246. Nicaragua's reliance on NAFTA subsequent practice is irrelevant. CAFTA, a separate treaty with different parties, cannot be bound by unrelated interpretative statements made in the NAFTA context.
- 247. Numerous tribunals have held that CAFTA §10.16(1)(a) does not require an investor to file a claim under §10.16(1)(b) for damages. Imposing such a limitation without express treaty language is unwarranted.

E. Nicaragua Treated the Investor as the Alter Ego of INAGROSA.

- 248. Riverside effectively controlled INAGROSA, both operationally and financially. Nicaragua consistently treated Riverside as INAGROSA's alter ego,²⁵⁹ and US tax filings confirm Riverside's control long before the expropriation.²⁶⁰
- 249. The Judicial Order transferring INAGROSA's exclusive title to joint title with the state further confirms Riverside's standing to claim damages.
- 250. The evidence demonstrates that Riverside and INAGROSA operated as a single economic entity, making it equitable for Riverside to recover the full measure of damages.
- 251. As the *S.D. Myers* tribunal noted corporate form should not bar a meritorious claim.²⁶¹ The economic reality of control is paramount, a principle applicable here.

²⁵⁸ **RL-0185-ENG** ¶377.

²⁵⁹ Transcript 1090:25-1091:5.

²⁶⁰ C-0320-ENG, C-0321-ENG, C-0322-ENG, and C-0323-ENG.

²⁶¹ **CL-0007-ENG** ¶229; Reply ¶¶1120-1140.

F. Direct Loss to Riverside

- 252. Aside from reflective losses, Riverside suffered direct harm, fully recoverable under CAFTA §10.16(1). The total loss of its investment, including the opportunity to continue its Hass avocado business, directly results from Nicaragua's actions.
- 253. Nicaragua's reliance on *Bilcon* is unavailing. Even in *Bilcon*, the tribunal awarded damages for the direct loss of an investment opportunity.²⁶²
- 254. Riverside's investment was wholly extinguished, including the opportunity to continue the Hass avocado business. Riverside's direct losses, as in *Kappes* and *López-Goyne*, are fully recoverable under CAFTA §10.16(1)(a).²⁶³
- 255. Riverside made extensive loans to INAGROSA, which were documented. Expert Renaldy Gutierrez confirmed that the loans were legally recognized under the law of Nicaragua.²⁶⁴ Riverside made its last investment in March 2018 when it forgave 1.5 million in interest owed by INAGROSA.²⁶⁵ Riverside also committed to making additional investments. The destruction of Riverside's investment and its plans for further expansion, such as the \$16 million investment guarantee and its already expended \$1.5 million in interest relief, confirm the extent of its lost opportunity to invest in INAGROSA. As in *Bilcon*, Riverside's direct loss to invest, along with the loss of its existing loans to INAGROSA, and its lost equity is covered by its claim §10.16(1)(a). This represents 100% of the damages suffered.

VI. War Losses Clause (CAFTA Article 10.6)

- 256. Nicaragua asserts that civil strife occurred in June 2018.²⁶⁶ However, Nicaragua has failed to demonstrate that the harm at HSF resulted from civil strife. Nicaragua denies that paramilitary forces were involved in the invasion of HSF.²⁶⁷
- 257. Furthermore, Nicaragua contends that CAFTA §10.6 operates as *lex specialis*, superseding all other treaty obligations.²⁶⁸ This reflects a fundamental misunderstanding of the *lex specialis* doctrine under international law.²⁶⁹ Even assuming, *arguendo*, that the civil strife clause applies (which the Investor disputes), Nicaragua's interpretation is still flawed.²⁷⁰

²⁶² Rejoinder ¶486.

²⁶³ CL-0258-ENG ¶159.

²⁶⁴ **CES-06** ¶¶189-195.

²⁶⁵ C-0286-ENG; C-0287-ENG.

²⁶⁶ CM ¶¶ 317-319.

²⁶⁷ CM ¶¶30, 429.

²⁶⁸ Reply ¶1258.

²⁶⁹ Reply ¶1259.

²⁷⁰ Reply ¶1259.

- 258. Nicaragua relies on cases such as *LESI* to argue that the War Losses clause overrides CAFTA's other provisions.²⁷¹ This reliance is misplaced. The Algeria-Italy BIT in *LESI* included an explicit "notwithstanding" clause, which expressly established *lex specialis* under that treaty. Article 4.5 in the Algerian BIT differs from the wording in CAFTA §10.6.
- 259. The *Cengiz* tribunal distinguished the LESI approach by noting that "the relevant treaty, the BIT between Italy and Algeria, had a drafting which differs from that of the Turkey-Libya BIT: the war clause (Article 4.5) was included in the same Article as the FPS standard (Article 4.1), and it lacks any reference to compensation for losses." ²⁷² No such clause exists in CAFTA. The CAFTA does not apply to measures not related to losses (such as police protection). In contrast, the Algeria BIT wording offers broader protection, covering losses irrespective of state action.
- 260. CAFTA's focus on governmental measures means that the protection is engaged only when the state takes specific actions related to the losses. If losses occur without any state measure (e.g., due to private acts during civil strife), the CAFTA provision does not apply.
- 261. Nicaragua's position has been rejected repeatedly in arbitral practice. Tribunals in Cengiz, Strabag v. Libya, Way2B v. Libya, and Guris v. Libya dismissed similar claims that the War Losses clause overrides investment protections.
 - (a) In *CMS*, the tribunal examined a war losses clause nearly identical to CAFTA §10.6 and found that it does not derogate from other treaty rights. Instead, it ensures that any mitigating measures are applied non-discriminately.²⁷³
 - (b) In *El Paso*, Argentina's argument that the civil strife clause displaced the entire treaty was decisively rejected, ²⁷⁴ as it was again in *Guris*. ²⁷⁵ In *Cengiz*, the tribunal reached the same conclusion, citing *CMS*, *El Paso*, *Suez*, and others. ²⁷⁶ Numerous tribunals have consistently rejected the argument that the civil strife clause nullifies broader treaty protections. ²⁷⁷

²⁷¹ Reply ¶1260, fn 1363 CM ¶¶312-313; **RL-0041-ENG** ¶173.

²⁷² See the discussion of this case in *Cengiz* **CL-0192-ENG** at FN 377. The *Cengiz Tribunal* distinguished the LESI approach by noting that "the relevant treaty, the BIT between Italy and Algeria, had a drafting which differs from that of the Turkey-Libya BIT: the war clause (Article 4.5) was included in the same Article as the FPS standard (Article 4.1), and it lacks any reference to compensation for losses. The tribunal in Lesi invoked the dissenting opinion of Samuel Asante in AAPL."

²⁷³ **CL-0053-ENG** ¶375.

²⁷⁴ **RL-0068-ENG** ¶558.

²⁷⁵ **CL-0191-ENG** ¶235.

²⁷⁶ **CL-0192-ENG**¶¶364-368.

²⁷⁷ CL-0037-ENG ¶363; See also CL-0147-ENG, ¶65 and CL-0195-ENG ¶104.

- (c) The *Strabag* tribunal also rejected the notion that the War Losses clause functions as *lex specialis* to exclude investment protection obligations under the treaty.²⁷⁸
- 262. Nicaragua's interpretation seeks to turn the civil strife clause into a sweeping exception to the government's obligations under CAFTA- a gross misreading of the text. §10.6 does not provide the broad immunity Nicaragua claims and is irrelevant to this case.

VII. Conclusion

- 263. Nicaragua is entitled to its own opinions but not to invent facts. Considering the overwhelming evidence presented, Nicaragua's responsibility for the egregious violations of CAFTA and international law is unmistakable. Once a flourishing enterprise, the Investment has been reduced to devastation due to the state's deliberate actions and neglect. Nicaragua failed in its most fundamental duties—to uphold the rule of law and protect foreign investments under the clear standards established by CAFTA.
- 264. Nicaragua's attempt to obscure its obligations behind unfounded defenses, particularly its bad-faith invocation of the ESI clause, cannot absolve it of responsibility. There is no credible nexus between Nicaragua's purported justifications and the destruction wrought upon Riverside's investment. What stands before this Tribunal is a state's failure to act in good faith, an unlawful seizure of property, and an utter disregard for the rights enshrined in an international treaty. These are not mere technical violations. They are a fundamental departure from the rule of law and Nicaragua's international obligations.
- 265. Justice requires that Nicaragua be held fully accountable for the harm inflicted. Riverside has made a compelling and substantiated case for full compensation for the destruction of its investment—the ruined avocado plantations, the deforested lands, the lost infrastructure, the environmental damage, and the thwarted business opportunities. Riverside urges this Tribunal to award Riverside the full measure of its damages, together with appropriate interest, thereby reaffirming the core principles of CAFTA and international law. By doing so, the Tribunal will send a clear message that no state can escape its treaty obligations through bad faith or malfeasance and that the integrity of investor protections remains paramount.
- 266. Through independent evidence, Riverside demonstrated the extent of the harm suffered and the direct causation of Nicaragua's breaches. The destruction of the avocado plantation, deforestation of rare hardwoods, irreversible damage to infrastructure, and loss of business opportunities represent profound and enduring losses.
- 267. For these reasons, Riverside respectfully requests that this Tribunal:

²⁷⁸ **CL-0222-ENG** ¶¶224-228.

- (a) Find that Nicaragua has breached CAFTA Articles 10.2, 10.3, 10.5 and 10.7.
- (b) Award Riverside full reparation for the losses sustained as a result of these breaches, including compensation for the damaged assets, loss of profits, and moral damages and
- (c) Order Nicaragua to bear the costs of these proceedings, including legal and arbitration costs.

Submitted this 25th day of October on behalf of Riverside Coffee, LLC.

Appleton & Associates International Lawyers LP Reed Smith LLP Gunster