INTERNATIONAL CENTRE FOR SETTLEMENT OF INVESTMENT DISPUTES
1818 H STREET, NW | WASHINGTON, DC 20433 | USA
TELEPHONE +1 (202) 458 1534 | FACSIMILE +1 (202) 522 2615
WWW.WORLDBANK.ORG/ICSID

CERTIFICATE

RIVERSIDE COFFEE, LLC

v.

REPUBLIC OF NICARAGUA

(ICSID CASE NO. ARB/21/16)

I hereby certify that the attached document is a true copy of the English version of the Tribunal's Award dated 17 October 2025.

Martina Polasek
Secretary-General

Washington, D.C., 17 October 2025

INTERNATIONAL CENTRE FOR SETTLEMENT OF INVESTMENT DISPUTES

In the arbitration proceeding between

RIVERSIDE COFFEE, LLC

Claimant

and

REPUBLIC OF NICARAGUA

Respondent

ICSID Case No. ARB/21/16

AWARD

Members of the Tribunal

Dr Veijo HEISKANEN, President
Mr Philippe COUVREUR, Arbitrator
Ms Lucy GREENWOOD, Arbitrator

Secretary of the Tribunal

Ms Ana Constanza CONOVER BLANCAS

Date of dispatch to the Parties: 17 October 2025

REPRESENTATION OF THE PARTIES

Representing Riverside Coffee, LLC:

Prof Barry Appleton
Cristina Cardenas
Lillian De Pena
Joseph Garvey
Appleton & Associates International Lawyers LP
121 Richmond St W, Suite 602
Toronto, ON M5H 2K1
Canada

Edward Mullins
Alan Bart
Reed Smith LLP
200 South Biscayne Boulevard,
Suite 2600, Miami, FL, 33131
United States of America

William Hill
Gunster PA
600 Brickell Ave., Suite 3500
Miami, FL 33131
United States of America

Melva Jo Winger de Rondón
Carlos Rondón
Riverside Coffee, LLC

Representing the Republic of Nicaragua:

Ms Wendy Morales Urbina
Mr Hernaldo Chamorro
Procuraduría General de la República de Nicaragua
Kilómetro 3 y 1/2, Carretera Sur
Managua, Nicaragua

Mr Erwin Ramirez Colindres
Ministerio de Fomento, Industria y Comercio
Kilómetro 6 Carretera Masaya
frente a Camino de Oriente
Managua, Nicaragua

Ms Analía González
Mr Paul Levine
Ms Nahila Cortés
Mr James East
Mr Fabian Zetina
Ms Jillian Timko
Mr Diego Zúñiga
BakerHostetler LLP
1050 Connecticut Avenue NW
Suite 1100
Washington, DC 20036
United States of America

Mr Marco Molina
Mr Carlos Ramos-Mrosovsky
BakerHostetler LLP
45 Rockefeller Plaza
New York, NY 10111
United States of America

TABLE OF CONTENTS

TABLE OF SELECTED ABBREVIATIONS AND DEFINED TERMS

Burke-White Report	Expert Report of Professor William W. Burke-White, dated 8 March 2024
C-[#]	Claimant's exhibit
DR-CAFTA or the Treaty	Dominican Republic-Central America Free Trade Agreement signed on 5 August 2004, which entered into force between the United States and Nicaragua on 1 April 2006
Cl. Mem. or Memorial	Claimant's Memorial on the Merits, dated 21 October 2022
Cl. PHB	Claimant's Post-Hearing Submission, dated 25 October 2024
Cl. Reply or Reply	Claimant's Reply on the Merits and Counter-Memorial on Jurisdiction, dated 3 November 2023
CL-[#]	Claimant's legal authority
Claimant or Riverside	Riverside Coffee, LLC
Enríquez Gómez Statement	Witness Statement of Mr Favio Darío Enríquez Gómez, dated 8 March 2024
FET	Fair and Equitable Treatment
First Castro Statement	Witness Statement of Police Commissioner Marvin Castro, dated 3 March 2023
First Credibility International Report	Expert Report of Credibility International on damages, prepared by Timothy H. Hart, CPA, CFE and Kenneth J. Kratovil, ASA, CFE, dated 3 March 2023
First Duarte Report	First Expert Report of Dr Odilo Duarte, dated 3 March 2023
First González Argüello Statement	Witness Statement of Ms Norma del Socorro González Argüello, dated 3 March 2023
First Gutiérrez Rizo Statement	Witness Statement of Ms Diana Gutiérrez Rizo, dated 3 March 2023

First Gutiérrez Statement	Witness Statement of Mr Luis Gutiérrez, dated 5 October 2022
First Herrera Statement	Witness Statement of Police Sub-commissioner William Herrera, dated 3 March 2023
First Lacayo Ubau Statement	Witness Statement of Mr Rodolfo José Lacayo Ubau, dated 3 March 2023
First López Blandón Statement	Witness Statement of Mr José Valentín López Blandón, dated 3 March 2023
First Méndez Valdivia Statement	Witness Statement of Mr Álvaro Méndez Valdivia, dated 3 March 2023
First Moncada Casco Statement	Witness Statement of Mr Alcides René Moncada Casco, dated 25 January 2023
First Richter Report	Expert Report titled "*Economic Loss Suffered by Riverside Coffee, LLC as a Result of the Expropriation of Hacienda Santa Fé by the Republic of Nicaragua on June 16, 2018*", prepared by Vimal Kotecha of Richter Inc., dated 14 October 2022
First Rondón Statement	Witness Statement of Mr Carlos J. Rondón, dated 30 September 2022
First Winger de Rondón Statement	Witness Statement of Ms Melva Jo Winger de Rondón, dated 16 September 2022
First Wolfe Report	Expert Statement prepared by Dr Justin Wolfe, dated 13 October 2022
FPS	Full Protection and Security
García Guatemala Statement	Witness Statement of Mr Ramón García Guatemala, dated 8 March 2024
Gutiérrez Report	Expert Statement by Mr Renaldy J. Gutiérrez, Esq., dated 12 October 2023
Hearing	Hearing on jurisdiction and merits held in Washington, D.C. and by videoconference from 1 to 11 July 2024
Henrriquez Cruz Statement	Witness Statement of Mr Jaime Francisco Henrriquez Cruz, dated 7 October 2022

Huerta Cañedo Report	Expert Report titled "*Agricultural Land Value Comparative Report*" prepared by Mr Carlos Pfister Huerta Cañedo, dated 6 October 2022
Huerta Gómez Statement	Witness Statement of Vidal de Jesús Huerta Gómez, dated 8 March 2024
IACHR	Inter-American Commission on Human Rights
ICJ	International Court of Justice
ICSID Arbitration Rules	ICSID Rules of Procedure for Arbitration Proceedings in force as of 10 April 2006
ICSID Convention	Convention on the Settlement of Investment Disputes Between States and Nationals of Other States, which entered into force on 14 October 1966
ICSID or the Centre	International Centre for Settlement of Investment Disputes
ILC Articles	International Law Commission's Articles on Responsibility of States for Internationally Wrongful Acts
Inagrosa	Empresa Inagrosa S.A.
Mena Rosales Statement	Witness Statement of Ms Xiomara Mena Rosales, dated 3 March 2023
MFN	Most-Favored Nation
Miller Statement	Witness Statement of Mr Tom Miller, dated 13 October 2022
Parties	Claimant and the Respondent
R-[#]	Respondent's exhibit
Resp. CM. or Counter-Memorial	Respondent's Counter-Memorial on Jurisdiction and the Merits, dated 3 March 2023
Resp. PHB	Respondent's Post-Hearing Submission, dated 25 October 2024
Resp. Rej. or Rejoinder	Respondent's Rejoinder on Jurisdiction and the Merits, dated 8 March 2024

Respondent or Nicaragua	Republic of Nicaragua
RL-[#]	Respondent's legal authority
Rev. Tr. Day [#] [Speaker(s)] [page:line]	Transcript of the Hearing, as revised by the Parties and circulated to the Tribunal and the Parties on 10 October 2025
Rosales Mondragón Statement	Witness Statement of Mr Martín Agenor Rosales Mondragón, dated 8 March 2024
Russian BIT	Agreement between the Government of the Russian Federation and the Government of the Republic of Nicaragua on the Promotion and Reciprocal Protection of Investments, which entered into force on 3 September 2013
Second Castro Statement	Second Witness Statement of Police Commissioner Marvin Castro, dated 8 March 2024
Second Credibility International Report	Second Expert Report of Credibility International on damages, prepared by Timothy H. Hart, CPA, CFE and Kenneth J. Kratovil, ASA, CFE, dated 8 March 2024
Second Duarte Report	Second Expert Report of Dr Odilo Duarte, dated 8 March 2024
Second González Argüello Statement	Second Witness Statement of Ms Norma del Socorro González Argüello, dated 8 March 2024
Second Gutiérrez Rizo Statement	Second Witness Statement of Ms Diana Gutiérrez Rizo, dated 8 March 2024
Second Gutiérrez Statement	Second Witness statement of Mr Luis Gutiérrez, dated 27 October 2023
Second Herrera Statement	Second Witness Statement of Police Sub-commissioner William Herrera, dated 8 March 2024
Second Lacayo Ubau Statement	Second Witness Statement of Mr Rodolfo José Lacayo Ubau, dated 8 March 2024
Second López Blandón Statement	Second Witness Statement of Mr José Valentín López Blandón, dated 8 March 2024

Second Méndez Valdivia Statement	Second Witness Statement of Mr Álvaro Méndez Valdivia, dated 8 March 2024
Second Moncada Casco Statement	Second Witness Statement of Alcides René Moncada Casco, dated 8 March 2024
Second Richter Report	Expert Report titled "*Comments on the Report of Timothy Hart and Kenneth Kratovil of Credibility International regarding Riverside Coffee, LLC v. Republic of Nicaragua*", prepared by Vimal Kotecha of Richter Inc., dated 1 November 2023
Second Rondón Statement	Second Witness Statement of Mr Carlos J. Rondón, dated 31 October 2023
Second Winger de Rondón Statement	Second Witness Statement of Ms Melva Jo Winger de Rondón, dated 28 October 2023
Second Wolfe Report	Expert Statement prepared by Dr Justin Wolfe, dated 11 October 2023
Sequeira Report	Expert Report of Dr Byron Israel Sequeira Pérez, dated 8 March 2024
Swiss BIT	Agreement between the Swiss Confederation and the Republic of Nicaragua on the Promotion and Reciprocal Protection of Investments, which entered into force on 2 May 2000
Tribunal	Arbitral tribunal constituted on 6 May 2022 in ICSID Case No. ARB/21/16
Vienna Convention or VCLT	Vienna Convention on the Law of Treaties
Welty Statement	Witness Statement of Mr Russell Welty, dated 28 October 2023
Winger Statement	Witness Statement of Mr Melvin Winger, dated 20 September 2022

I. INTRODUCTION

1. This dispute has been submitted to the International Centre for Settlement of Investment Disputes ("**ICSID**" or the "**Centre**") pursuant to the Dominican Republic-Central America Free Trade Agreement signed on 5 August 2004, which entered into force between the United States of America and the Republic of Nicaragua on 1 April 2006 ("**DR-CAFTA**" or the "**Treaty**"), and the Convention on the Settlement of Investment Disputes between States and Nationals of Other States, which entered into force on 14 October 1966 (the "**ICSID Convention**"). The proceeding is conducted in accordance with the ICSID Rules of Procedure for Arbitration Proceedings in force as of 10 April 2006 (the "**ICSID Arbitration Rules**"), except to the extent modified by the Treaty.

2. The parties to the arbitration are Riverside Coffee, LLC ("**Riverside**" or the "**Claimant**"), a limited liability corporation incorporated in 1999 under the laws of the state of Kansas, United States of America, and the Republic of Nicaragua ("**Nicaragua**" or the "**Respondent**" and, together with the Claimant, the "**Parties**").

3. The dispute arises out of the unlawful invasion and occupation in the course of June and July 2018 of Hacienda Santa Fé, a 1arge plantation located in the municipality of San Rafael del Norte, Jinotega Department, Nicaragua, and the alleged damage caused by the invaders to the Claimant's avocado and forestry businesses. The Claimant owns Hacienda Santa Fé through Empresa Inagrosa S.A. ("**Inagrosa**"), a company incorporated in Nicaragua in 1996. According to the Claimant, the invaders acted at the behest of the Nicaraguan government and their conduct is attributable to the Respondent. The Claimant further contends that the Respondent failed to take action to return the property to the Claimant and instead expropriated the property by way of a judicial order.

4. The Claimant alleges that Nicaragua has breached its obligations under Articles 10.1, 10.2, 10.3, 10.4, 10.5 and 10.7 of DR-CAFTA, and seeks compensation for damage caused to its investment as a result of the Respondent's alleged breaches. The Claimant initially claimed compensation in the amount of USD 644,098,011, but subsequently reduced its claim to

USD 240,995,140, plus interest. The Claimant also seeks moral damages in the amount of USD 45 million, plus interest.

5. The Respondent contends that the Claimant misrepresents the facts. According to the Respondent, the invasion of Hacienda Santa Fé that commenced in June-July 2018 was not the first one and that the property had been occupied by invaders previously. The Respondent maintains that the invasions date back to the early 1990s, before the property was acquired by Inagrosa. The Respondent had no role in the unlawful invasion and occupation that took place in June-July 2018, which was led by former members of the Nicaraguan resistance, or the *Contras,* at a point in time when Nicaragua was experiencing months of widespread civil strife. According to the Respondent, the Nicaraguan government sought to end the unlawful occupation, while protecting the rights of Hacienda Santa Fé's private owners, avoiding unnecessary violence and eventually peacefully relocating the illegal occupants. The Respondent also denies that it has expropriated the property by way of a judicial order, as alleged by the Claimant. In any event, according to the Respondent, its liability is excluded under the national security exception in Article 21.2(b) and the civil strife defense under Article 10.6 of DR-CAFTA, which limit the liability of CAFTA parties to compensate investors of other CAFTA parties for loss and damage sustained in connection with a civil strife.

II. PROCEDURAL HISTORY

6. On 19 March 2021, the Claimant filed a Notice of Arbitration with the ICSID Secretariat, together with supporting evidence (the "**NfA**"). In its NfA, the Claimant appointed Lucy Greenwood, a national of the United Kingdom, as arbitrator pursuant to Articles 10.16.6 and 10.19 of DR-CAFTA.

7. On 2 April 2021, the Secretary-General of ICSID registered the NfA in accordance with Article 36(3) of the ICSID Convention and notified the Parties of the registration. In the Notice of Registration, the Secretary-General invited the Parties to inform ICSID of any agreed provisions as to the number of arbitrators and the method of their appointment, and

further invited the Parties to constitute the arbitral tribunal as soon as possible in accordance with Articles 37 and 40 of the ICSID Convention.

8. On 7 April 2021, the Claimant wrote to the Centre stating that the Parties' agreement regarding the constitution of the tribunal was contained in Article 10.19 of DR-CAFTA, to which the Parties had consented and on which the Claimant had relied when appointing its arbitrator in the NfA.

9. On 8 April 2021, the Centre wrote to the Parties, acknowledging receipt of the Claimant's letter of 7 April 2021 and recording the Centre's understanding that the Parties had agreed to constitute the arbitral tribunal in accordance with Article 10.19 of DR-CAFTA.

10. On 9 April 2021, the Centre wrote to the Parties informing them that Ms Lucy Greenwood, a national of the United Kingdom, had accepted her appointment as arbitrator in this case.

11. On 4 May 2021, following appointment by the Respondent, Mr Philippe Couvreur, a national of Belgium, accepted his appointment as arbitrator.

12. By letter of 5 October 2021, the Centre noted that the Parties had not taken any steps in the proceeding during five consecutive months. The Centre indicated that, pursuant to ICSID Arbitration Rule 45, if no steps were taken by the Parties by 4 November 2021 (*i.e.* within six consecutive months since the last step in the proceeding), the Secretary-General would discontinue the proceeding after giving notice to the Parties. The Centre also reminded the Parties that the six-month period could be extended by agreement of the Parties.

13. By communications of 3 November 2021, the Parties informed the Centre that the Parties were engaged in consultations regarding the dispute and requested that the Centre not take any steps to discontinue the proceeding for a period of not less than 120 days, *i.e.* until 4 February 2022.

14. By communications of 2 February 2022, the Parties informed the Centre that they continued their consultations and requested that the Centre not take any steps to discontinue the proceeding for a period of 30 days, *i.e*. until 4 March 2022.

15. By communications of 5 March 2022, the Parties informed the Centre that they continued their consultations and requested that the Centre not take any steps to discontinue the proceeding for a further period of 24 days, *i.e.* until 28 March 2022.

16. On 25 March 2022, the Claimant advised the Centre that the Parties had been unable to reach an agreement on the presiding arbitrator and requested that the Chairman of the Administrative Council proceed with the appointment of the presiding arbitrator pursuant to Article 38 of the ICSID Convention.

17. On 28 and 31 March 2022, 8 and 29 April 2022 and 3 May 2022, the Parties and the Centre exchanged communications regarding the appointment of the presiding arbitrator. On 4 May 2022, the Parties informed the Centre that they had jointly agreed to appoint Dr Veijo Heiskanen as President of the Tribunal.

18. On 6 May 2022, following appointment by agreement of the Parties, Dr Veijo Heiskanen, a national of Finland, accepted his appointment as presiding arbitrator.

19. On the same date, the Secretary-General, in accordance with Rule 6(1) of the ICSID Arbitration Rules, notified the Parties that all three arbitrators had accepted their appointments and that the Arbitral Tribunal (the "**Tribunal**") was therefore deemed to have been constituted on that date. Ms Ana Constanza Conover Blancas, ICSID Legal Counsel, was designated to serve as Secretary of the Tribunal.

20. In accordance with ICSID Arbitration Rule 13(1), the Tribunal held a first session with the Parties on 22 June 2022 by videoconference.

21. Following the first session, on 27 June 2022, the Tribunal issued Procedural Order No. 1 recording the agreement of the Parties on procedural matters and the decision of the Tribunal on disputed issues. Procedural Order No. 1 established, *inter alia*, that (i) the applicable ICSID Arbitration Rules would be those in effect from 10 April 2006, except to the extent modified by Section B of Chapter Ten (Investment) of DR-CAFTA; (ii) the procedural languages would be English and Spanish; (iii) the Tribunal's award and procedural orders, the Notice of Intent, the NfA and other case materials would be publicly available subject to the deletion of protected information; and (iv) the place of the

proceeding would be Washington D.C. Procedural Order No. 1 also indicated that the applicable procedural calendar for the arbitration would be established in a subsequent procedural order.

22. On the same date, the Tribunal invited the Parties to indicate their availability and preferences regarding proposed dates for the hearing and the pre-hearing conference, pursuant to sections 19.1 and 20 of Procedural Order No. 1. By communications of 30 June 2022, the Parties confirmed their availability on the dates proposed by the Tribunal.

23. On 1 July 2022, the Tribunal issued Procedural Order No. 2, setting out the procedural calendar for the arbitration.

24. By letter of 5 July 2022, the Parties were invited to indicate by 19 July 2022 whether they considered that the Notice of Intent, the NfA or the Tribunal's Procedural Orders Nos. 1 and 2 contained protected information that required redaction prior to their publication on the ICSID website. In such case, the Parties were invited to confer on the necessary redactions and jointly provide the redacted versions for publication by 19 July 2022.

25. On 19 July 2022, the Parties informed the Tribunal of their agreement to publish Procedural Orders Nos. 1 and 2 without any redactions on the ICSID website and extend the deadline for filing comments on the issue of publication of the Notice of Intent and the NfA. On 20 July 2022, according to the agreed extension, the Parties filed simultaneous submissions setting out their respective positions on the publication of the Notice of Intent and the NfA.

26. On 9 August 2022, the Tribunal issued Procedural Order No. 3, ordering the publication of the unredacted versions of the Notice of Intent and the NfA on the ICSID website.

27. On 21 October 2022, the Claimant filed a Memorial on the Merits (the "**Memorial**"), with exhibits C-0001 to C-0250 and legal authorities CL-0001 to CL-0169. The Memorial was accompanied by six witness statements and three expert reports, as follows (i) Witness Statement of Mr Carlos J. Rondón, dated 30 September 2022 ("**First Rondón Statement**"); (ii) Witness Statement of Mr Luis Gutiérrez, dated 5 October 2022

("**First Gutiérrez Statement**"); (iii) Witness Statement of Ms Melva Jo Winger de Rondón, dated 16 September 2022 ("**First Winger de Rondón Statement**"); (iv) Witness Statement of Mr Melvin Winger, dated 20 September 2022 ("**Winger Statement**"); (v) Witness Statement of Mr Jaime Francisco Henrriquez Cruz, dated 7 October 2022 ("**Henrriquez Cruz Statement**"); (vi) Witness Statement of Mr Tom Miller, dated 13 October 2022 ("**Miller Statement**"); (vii) Expert Report titled "*Economic Loss Suffered by Riverside Coffee, LLC as a Result of the Expropriation of Hacienda Santa Fé by the Republic of Nicaragua on June 16, 2018*," prepared by Vimal Kotecha of Richter Inc., dated 14 October 2022 ("**First Richter Report**"); (viii) Expert Statement prepared by Dr Justin Wolfe, dated 13 October 2022 ("**First Wolfe Report**"); and (ix) Expert Report titled "*Agricultural Land Value Comparative Report*" prepared by Mr Carlos Pfister Huerta Cañedo, dated 6 October 2022 ("**Huerta Cañedo Report**").

28. On 13 November 2022, the Claimant informed the Tribunal that it had discovered, after the filing of the Memorial, a court order issued on 15 December 2021 by the Respondent which allegedly amounted to a judicial seizure of Hacienda Santa Fé (the "**Court Order**") and sought relief from the Tribunal to address the alleged consequences of the Court Order. The Claimant's communication was accompanied by exhibits C-0251 to C-0253. On 23 November 2022, following an invitation from the Tribunal to provide observations, the Respondent filed a response to the Claimant's request of 13 November 2022, with accompanying exhibits A through D.

29. On 28 November 2022, the Claimant requested an opportunity to reply to the Respondent's response of 23 November 2022. On the same date, the Tribunal granted the Claimant's request and invited it to submit a reply by 2 December 2022. The Tribunal also invited the Respondent to submit any additional observations by 8 December 2022.

30. On 2 December 2022, the Claimant filed a reply submission to the Respondent's response of 23 November 2022, with accompanying exhibits C-0254 to C-0277 and legal authorities CL-0170 to CL-0173. On 12 December 2022, following an extension request granted by the Tribunal, the Respondent filed a rejoinder submission to the Claimant's reply

submission of 2 December 2022, with accompanying exhibits R-0001 to R-0009 and legal authorities RL-0001 to RL-0006.

31. On 19 December 2022, the Tribunal issued Procedural Order No. 4 concerning the Claimant's request of 13 November 2022.

32. On 29 December 2022 and on 4, 5, 6 and 13 January 2023, the Parties and the Tribunal exchanged communications regarding adjustments to the procedural calendar. The Claimant's communication of 4 January 2023 was accompanied by exhibits C-0278 to C-0281[1] and the Claimant's communication of 5 January 2023 was accompanied by exhibit C-0282.

33. On 17 January 2023, the Tribunal issued Procedural Order No. 5, approving the Parties' proposed amendments to the procedural calendar and setting out a revised procedural calendar.

34. On 3 March 2023, the Respondent filed a Counter-Memorial on Jurisdiction and the Merits (the "**Counter-Memorial**"), with exhibits R-0010 to R-0109 and legal authorities RL-0007 to RL-0113. The Counter-Memorial was accompanied by nine witness statements and two expert reports, as follows: (i) Witness Statement of Ms Diana Gutiérrez Rizo, dated 3 March 2023 ("**First Gutiérrez Rizo Statement**"); (ii) Witness Statement of Police Commissioner Marvin Castro, dated 3 March 2023 ("**First Castro Statement**"); (iii) Witness Statement of Police Sub-commissioner William Herrera, dated 3 March 2023 ("**First Herrera Statement**"); (iv) Witness Statement of Mr José Valentín López Blandón, dated 3 March 2023 ("**First López Blandón Statement**"); (v) Witness Statement of Mr Alcides René Moncada Casco, dated 25 January 2023 ("**First Moncada Casco Statement**"); (vi) Witness Statement of Ms Xiomara Mena Rosales, dated 3 March 2023 ("**Mena Rosales Statement**"); (vii) Witness Statement of Mr Rodolfo José Lacayo Ubau, dated 3 March 2023 ("**First Lacayo Ubau Statement**"); (viii) Witness Statement of Mr Álvaro Méndez Valdivia, dated 3 March 2023 ("**First Méndez Valdivia Statement**"); (ix) Witness Statement of Ms Norma del Socorro González Argüello, dated

[1] By email of 15 April 2023, the Claimant introduced exhibit C-0283 into the record, noting that it had been omitted from its communication of 4 January 2023.

3 March 2023 ("**First González Argüello Statement**"); (x) First Expert Report of Dr Odilo Duarte, dated 3 March 2023 ("**First Duarte Report**"); and (xi) Expert Report of Credibility International on damages, prepared by Timothy H. Hart, CPA, CFE and Kenneth J. Kratovil, ASA, CFE, dated 3 March 2023 ("**First Credibility International Report**"), with supporting documents CRED-1 to CRED-65.

35. By letter of 16 March 2023, the Claimant informed the Tribunal and the Respondent of the withdrawal of its claim under Article 10.16.1(b) of DR-CAFTA on behalf of Inagrosa, which the Claimant had asserted in addition to its claim under Article 10.16.1(a) of DR-CAFTA, in order to "*narrow the issues in dispute and expedite the hearing of this matter.*" On the same date, the Claimant filed a motion to dismiss Nicaragua's admissibility and jurisdictional objections on the issue of Riverside's control of Inagrosa, with legal authorities CL-0174 to CL-0182. Also on 16 March 2023, the Respondent submitted observations taking note of the Claimant's withdrawal and requesting that the Claimant's motion be addressed as part of the Claimant's Reply on the Merits and Counter-Memorial on Jurisdiction.

36. On 17 March 2023, the Tribunal took note of the Claimant's withdrawal of its DR-CAFTA Article 10.16.1(b) claim on behalf of Inagrosa and rejected the Claimant's motion of 16 March 2023 as premature, directing the Claimant to respond to the Respondent's remaining jurisdictional and admissibility objections in its Reply on the Merits and Counter-Memorial on Jurisdiction due on 22 September 2023.

37. On 19 May 2023, following exchanges between the Parties, the Parties submitted their applications to the Tribunal for decision on their respective contested requests for production of documents. The Claimant's application was accompanied by legal authorities CL-0183 to CL-0204 and the Respondent's application was accompanied by exhibit R-0110 and legal authorities RL-0114 to RL-0118.

38. On 29 May 2023, the Tribunal issued Procedural Order No. 6 concerning production of documents.

39. On 9 June 2023, the Tribunal and the Parties were informed that the Secretary of the Tribunal would be taking temporary leave and that Ms Sara Marzal, ICSID Legal Counsel, would serve as Secretary of the Tribunal during her absence.

40. On 4 October 2023, the Respondent filed a request for security for costs, with exhibits R-0111 to R-0132 and legal authorities RL-0119 to RL-0138.

41. On 3 November 2023, the Claimant filed a Reply Memorial on the Merits and Counter-Memorial on Jurisdiction (the "**Reply**"), with exhibits C-0284 to C-0672 and legal authorities CL-0205 to CL-0294. The pleading was accompanied by five witness statements and three expert reports, as follows: (i) Second Witness Statement of Mr Carlos J. Rondón, dated 31 October 2023 ("**Second Rondón Statement**"); (ii) Second Witness statement of Mr Luis Gutiérrez, dated 27 October 2023 ("**Second Gutiérrez Statement**"); (iii) Second Witness Statement of Ms Melva Jo Winger de Rondón, dated 28 October 2023 ("**Second Winger de Rondón Statement**"); (iv) Witness Statement of Mr Russell Welty, dated 28 October 2023 ("**Welty Statement**"); (v) Witness Statement of Mr Domingo Ferrufino, dated 31 October 2023 ("**Ferrufino Statement**"); (vi) Expert Report titled "*Comments on the Report of Timothy Hart and Kenneth Kratovil of Credibility International regarding Riverside Coffee, LLC v. Republic of Nicaragua*," prepared by Vimal Kotecha of Richter Inc., dated 1 November 2023 ("**Second Richter Report**"); (vii) Expert Statement prepared by Dr Justin Wolfe, dated 11 October 2023 ("**Second Wolfe Report**"); and (viii) Expert Statement by Mr Renaldy J. Gutiérrez, Esq., dated 12 October 2023 ("**Gutiérrez Report**").

42. On 10 November 2023, the Claimant filed a response to the Respondent's request for security for costs, together with exhibits C-0673 to C-0676 and legal authorities CL-0295 to CL-0324.

43. On 17 November 2023, the Respondent filed a reply to the request for security for costs, with exhibits R-0133 to R-0143 and legal authorities RL-0139 to RL-0140.

44. On 20 November 2023, following an invitation from the Tribunal, the Parties filed observations on the organization and modalities of the hearing.

The Claimant's observations were accompanied by exhibits C-0677 to C-0699 and legal authorities CL-0325 to CL-0348. The Respondent's observations were accompanied by legal authorities RL-0141 and RL-0142.

45. On 24 November 2023, the Claimant filed a rejoinder on the Respondent's request for security for costs, with exhibits C-0700 and C-0701 and legal authority CL-0349.

46. On 20 December 2023, the Tribunal issued Procedural Order No. 7 denying the Respondent's request for security for costs.

47. On 12 January 2024, the Tribunal held a procedural meeting with the Parties by video conference to discuss the organization and modalities of the hearing.

48. On 16 January 2024, the Tribunal issued Procedural Order No. 8 concerning the organization and modalities of the hearing. The Tribunal determined that the hearing would take place in person in Washington, D.C. and directed the Parties to immediately start the visa application process for all hearing participants.

49. On 19 January 2024, the Respondent wrote to the Claimant, copying the Tribunal, regarding the expiry of the Court Order.

50. On 25 January 2024, the Claimant wrote to the Tribunal regarding the Respondent's letter of 19 January 2024, with exhibits C-0702 to C-0705, including the Claimant's response to the Respondent's letter of 19 January 2024. The Respondent replied to the Claimant by a letter dated 26 January 2024, copying the Tribunal.

51. On 2 February 2024, following authorization from the Tribunal, the Claimant filed the Parties' correspondence of 19, 25 and 26 January 2024 as exhibits C-0706 to C-0708.

52. On 9 March 2024, the Respondent filed a Rejoinder on Jurisdiction and the Merits dated 8 March 2024 (the "**Rejoinder**"), with exhibits R-0144 to R-0235 and legal authorities RL-0143 to RL-0200. The pleading was accompanied by twelve witness statements and four expert reports, as follows: (i) Second Witness Statement of Ms Diana Gutiérrez Rizo, dated 8 March 2024 ("**Second Gutiérrez Rizo Statement**"); (ii) Second Witness Statement of Police Commissioner Marvin Castro, dated 8 March 2024 ("**Second**

Castro Statement"); (iii) Second Witness Statement of Police Sub-commissioner William Herrera, dated 8 March 2024 ("**Second Herrera Statement**"); (iv) Second Witness Statement of Mr José Valentín López Blandón, dated 8 March 2024 ("**Second López Blandón Statement**"); (v) Second Witness Statement of Mr Alcides René Moncada Casco, dated 8 March 2024 ("**Second Moncada Casco Statement**"); (vi) Second Witness Statement of Mr Rodolfo José Lacayo Ubau, dated 8 March 2024 ("**Second Lacayo Ubau Statement**"); (vii) Second Witness Statement of Mr Álvaro Méndez Valdivia, dated 8 March 2024 ("**Second Méndez Valdivia Statement**"); (viii) Second Witness Statement of Ms Norma del Socorro González Argüello, dated 8 March 2024 ("**Second González Argüello Statement**"); (ix) Witness Statement of Mr Martín Agenor Rosales Mondragón, dated 8 March 2024 ("**Rosales Mondragón Statement**"); (x) Witness Statement of Mr Vidal de Jesús Huerta Gómez, dated 8 March 2024 ("**Huerta Gómez Statement**"); (xi) Witness Statement of Mr Ramón García Guatemala, dated 8 March 2024 ("**García Guatemala Statement**"); (xii) Witness Statement of Mr Favio Darío Enríquez Gómez, dated 8 March 2024 ("**Enríquez Gómez Statement**"); (xiii) Second Expert Report of Dr Odilo Duarte, dated 8 March 2024 ("**Second Duarte Report**"); (xiv) Second Expert Report of Credibility International on damages, prepared by Timothy H. Hart, CPA, CFE and Kenneth J. Kratovil, ASA, CFE, dated 8 March 2024 ("**Second Credibility International Report**"), with supporting documents CRED-66 to CRED-87; (xv) Expert Report of Dr Byron Israel Sequeira Pérez, dated 8 March 2024 ("**Sequeira Report**"); and (xvi) Expert Report of Professor William W. Burke-White, dated 8 March 2024 ("**Burke-White Report**"), with supporting documents WBW-1 to WBW-37.

53. On 15 March 2024, the United States of America filed a written submission as a non-disputing State Party pursuant to Article 10.20.2 of DR-CAFTA.

54. On 26 March 2024, the Claimant filed an "Investor's Motion on Procedural Issues," seeking relief from the Tribunal concerning alleged procedural anomalies arising from the Respondent's Rejoinder, with legal authorities CL-0350 to CL-0353. By letter of the same date, the Respondent requested the Tribunal to dismiss the Claimant's motion.

55. Also on 26 March 2024, the Parties and the Tribunal were informed that Ms Ana Constanza Conover Blancas had resumed her functions as Secretary of the Tribunal.

56. On 8 April 2024, following invitation from the Tribunal to submit further observations, the Respondent filed a response to the Claimant's motion of 26 March 2024. On 12 April 2024, the Claimant filed a reply to the Respondent's response of 8 April 2024, with legal authorities CL-0354 to CL-0368. On 16 April 2024, the Respondent filed rejoinder observations to the Claimant's reply of 12 April 2024, with exhibits R-0236 to R-0242.

57. On 22 April 2024, the Tribunal issued Procedural Order No. 9, (i) denying the Claimant's motion of 26 March 2024, with the exception of a request from the Claimant to file a responsive submission, together with supporting evidence, in response to the Respondent's exhibit R-0177 and the related argument in the Respondent's Rejoinder; and (ii) instructing the Claimant to file such submission by 6 May 2024.

58. On 26 April 2024, the Parties filed observations on the United States' non-disputing party submission of 15 March 2024. The Claimant's observations were accompanied by exhibits C-0709 to C-0729 and legal authorities CL-0369 to CL-0392.

59. On 6 May 2024, following the Tribunal's authorization in Procedural Order No. 9, the Claimant filed observations on the Respondent's exhibit R-0177 and the related argument in the Respondent's Rejoinder. The Claimant's observations were accompanied by exhibit C-0730.

60. On 10 June 2024, the Tribunal and the Parties held a pre-hearing videoconference to discuss outstanding procedural, administrative and logistical matters in preparation for the hearing. At the pre-hearing conference, the Claimant took the view that, in addition to posting the hearing recordings on the ICSID website, the hearing should be broadcasted in real time so as to meet the transparency requirements under DR-CAFTA. In the Respondent's view, real-time broadcasting was not necessary as the transparency requirements of DR-CAFTA would be met by posting the hearing recordings to the ICSID website after the conclusion of the hearing.

61. Also on 10 June 2024, the Claimant filed rectified legal authorities as CL-0393 to CL-0414.

62. By letter of 11 June 2024, the Tribunal invited each Party to file, by 17 June 2024, a brief submission limited to addressing the question of whether DR-CAFTA required the hearing to be made open to the public in real time, or whether the DR-CAFTA requirements could be satisfied by posting the video recordings of the hearing to the ICSID website after the conclusion of the hearing.

63. On 17 June 2024, the Parties filed their respective submissions in response to the Tribunal's letter of 11 June 2024.

64. On 20 June 2024, the Tribunal issued Procedural Order No. 10, concluding that, based on the ordinary meaning of Article 10.21.2 of DR-CAFTA, live streaming was the appropriate way of ensuring compliance with Article 10.21.2, absent compelling reasons justifying another approach. Accordingly, the Tribunal ordered that the hearing be open to the public via live-streaming.

65. On 24 June 2024, the Tribunal issued Procedural Order No. 11, setting out the procedural rules that the Parties had agreed upon and the Tribunal had determined would govern the conduct of the hearing.

66. On 28 June 2024, the Respondent sought leave from the Tribunal to submit into the record three media reports concerning an award issued the previous day. On 29 June 2024, the Claimant filed observations on the Respondent's request for leave of 28 June 2024. On 30 June 2024, the Tribunal issued its ruling on the Respondent's request of 28 June 2024, noting that the three documents referred to by the Respondent were in the public domain and therefore allowing the Parties to refer to them in their opening statements.

67. A hearing on jurisdiction and merits was held in Washington, D.C. from 1 to 11 July 2024 (the "**Hearing**"). The following individuals attended the Hearing:[2]

Tribunal:	
Dr Veijo Heiskanen	President
Mr Philippe Couvreur	Arbitrator
Ms Lucy Greenwood	Arbitrator
ICSID Secretariat:	
Ms Ana Conover	Secretary of the Tribunal
For the Claimant:	
Counsel	
Prof Barry Appleton	Appleton & Associates International Lawyers LP
Ms Cristina Cardenas	Appleton & Associates International Lawyers LP
Ms Lillian De Pena	Appleton & Associates International Lawyers LP
Mr Edward Mullins	Reed Smith LLP
Mr Alan Bart	Reed Smith LLP
Mr Wesley Butensky	Reed Smith LLP
Mr William Hill	Gunster PA
Party Representative	
Ms Melva Jo Winger de Rondón	Riverside Coffee, LLC – Client Representative
Witnesses	
Ms Melva Jo Winger de Rondón	Riverside Coffee, LLC
Mr Carlos Rondón	Riverside Coffee, LLC
Mr Russell Welty	
Mr Luis Gutiérrez	
Mr Domingo Ferrufino	
Mr Tom Miller	Miller Veneer
Experts	
Mr Renaldy Gutierrez	Gutierrez & Associates
Mr Vimal Kotecha	Richter Inc.
Ms Sonia Kundra	Richter Inc.
For the Respondent:	
Counsel	
Ms Analía González	Baker Hostetler
Mr Marco Molina	Baker Hostetler
Mr Carlos Ramos-Mrosovsky	Baker Hostetler
Ms Nahila Cortes	Baker Hostetler

[2] In addition, several representatives attended the Hearing on behalf of each Party who, by agreement of the Parties, were not to be identified as part of the record.

Mr James J. East	Baker Hostetler
Mr Fabian Zetina	Baker Hostetler
Mr Diego Zuniga	Baker Hostetler
Mr Paul Levine	Baker Hostetler

Party Representative

Mr Hernaldo Chamorro	Nicaragua's Office of the Attorney General

Witnesses

Ms Diana Y. Gutiérrez Rizo	Nicaragua's Office of the Attorney General – Jinotega Department
Mr Marvin A. Castro	Nicaragua's National Police
Mr William R. Herrera	Nicaragua's National Police
Mr José Valentín López Blandón	Farmer / Member of the Municipal Council of San Rafael del Norte, Department of Jinotega
Mr Favio Darío Enríquez Gómez	Ministry of Agriculture and Cattle Raising (MAG)

Experts

Dr Byron I. Sequeira	Sequeira Lawyers and Arbitrators
Mr Timothy Hart	Credibility International
Mr Kenneth Kratovil	Credibility International
Mr Matt Lupo	Credibility International

Court Reporters:

Mr Timoteo Rinaldi, D-R Esteno	Spanish court reporter
Mr Paul Pelissier, D-R Esteno	Spanish court reporter
Ms Regina Spector, D-R Esteno	Spanish court reporter
Ms Laurie Carlisle	English court reporter

Interpreters:
Ms Silvia Colla
Mr Charles Roberts
Mr Daniel Giglio

68. During the Hearing, the following persons were examined:

On behalf of the Claimant:
Ms Melva Jo Winger de Rondón
Mr Domingo Ferrufino
Mr Tom Miller
Mr Carlos Rondón
Mr Luis Gutiérrez
Mr Russell Welty
Mr Renaldy Gutierrez

Mr Vimal Kotecha

On behalf of the Respondent:
Ms Diana Y. Gutiérrez Rizo
Mr Marvin A. Castro
Mr William R. Herrera
Mr José Valentín López Blandón
Mr Favio Darío Enríquez Gómez
Dr Byron I. Sequeira
Mr Timothy Hart
Mr Kenneth Kratovil

69. During the Hearing, on 3 July 2024, the Respondent filed an "Application to Strike Testimony of Domingo Ferrufino," on the basis of the Claimant's alleged failure to previously disclose that Mr Ferrufino was illiterate. The Respondent's application was accompanied by exhibits R-0243 to R-0249 and legal authorities RL-0201 to RL-0210.

70. On 9 July 2024, the Claimant filed an "Opposition to Respondent's Application to Strike Testimony of Domingo Ferrufino," with exhibits C-0731 to C-0735.

71. Also on 9 July 2024, the Claimant filed an application for leave to introduce newly discovered evidence into the arbitration.

72. On 10 July 2024, the Respondent filed a "Reply in Further Support of its Application to Strike Testimony of Domingo Ferrufino" and a "Response in Opposition to Riverside's Application for Leave to Introduce Evidence."

73. On 11 July 2024, the Claimant filed a "Response to Nicaragua's Reply in Further Support of its Application to Strike Testimony of Domingo Ferrufino," with exhibit C-0738.

74. On the same date, the Tribunal decided on the Claimant's request of 9 July 2024, granting the Claimant's request for leave to introduce new evidence. On 11 July 2024, following the Tribunal's authorization, the Claimant introduced the new evidence as exhibits C-0736, C-0737 and C-0739 to C-0741.

75. Also on 11 July 2024, the Tribunal circulated questions to the Parties, specifying that their responses should be incorporated into the Parties' post-hearing submissions.

76. On 12 July 2024, the Claimant filed exhibits C-0742 to C-0745 relating to the mathematical calculations made on 11 July 2024, at the Hearing, during the cross-examination of Messrs Timothy H. Hart and Kenneth J. Kratovil.

77. On 17 July 2024, the Tribunal issued Procedural Order No. 12 on the Respondent's application of 3 July 2024 to strike the testimony of Mr Domingo Ferrufino. The Tribunal ruled as follows:

> *(a) The Witness Statement of Mr. Domingo Ferrufino dated 31 October 2023 and identified as CWS-12 is inadmissible and stricken from the record;*
>
> *(b) The oral evidence of Mr. Domingo Ferrufino given at the Hearing on 2 July 2024 remains in the record;*
>
> *(c) The references to Mr. Domingo Ferrufino's Witness Statement in the Parties' pleadings and oral argument remain in the record, without prejudice to their relevance and persuasiveness; and*
>
> *(d) The Tribunal's decision on costs is reserved.*

78. Also on 17 July 2024, the Tribunal issued directions on the filing of the Parties' post-hearing submissions and costs submissions, as well as on corrections to the Hearing transcripts and any redactions to the Hearing transcripts to exclude protected information.

79. On 22 July 2024, the Respondent filed observations on the evidence filed by the Claimant on 11 July 2024 and requested that the Tribunal disregard the Claimant's new evidence as irrelevant and immaterial. The Respondent's observations were accompanied by exhibits R-0245 to R-0249. On 30 July 2024, the Claimant replied to the Respondent's observations of 22 July 2024, together with exhibits C-0746 to C-0757. On 5 August 2024, the Respondent filed a rejoinder to the Claimant's comments of 30 July 2024.

80. By letter of 6 August 2024, the Tribunal informed the Parties that, as indicated in a previous letter of 23 July 2024, it would rule on the Respondent's request of 22 July 2024 in due course, once it had completed its deliberations and assessed the evidentiary value of the Claimant's evidence filed on 11 July 2024, in light of the evidentiary record as a whole,

including the evidence produced by the Respondent in support of its observations of 22 July 2024.

81. The Parties filed simultaneous Post-Hearing Submissions on 25 October 2024.

82. The Parties filed simultaneous submissions on costs on 8 November 2024.

83. The proceeding was closed on 9 July 2025.

III. FACTUAL BACKGROUND

84. This Section provides a non-exhaustive summary of the factual background of the dispute, focusing on (i) the invasion and occupation of Hacienda Santa Fé and the status of the property prior to its invasion and occupation in June-July 2018; and (ii) the invasion and occupation of Hacienda Santa Fé that took place in June-July 2018 and the subsequent developments, until the commencement of this arbitration. The summary focuses on relevant events and developments that appear to be undisputed; to the extent that the Parties disagree on the events or their characterization, they are identified as allegations.

85. As the summary below shows, there is only limited agreement between the Parties as to how the relevant events and developments should be characterized. Disputed factual issues will be addressed in more detail and, to the extent relevant to the Tribunal's determinations, resolved in the relevant context in Sections V and VI below.

A. THE BACKGROUND OF THE INVASION AND OCCUPATION OF HACIENDA SANTA FÉ

86. The Claimant submits that, starting on 16 June 2018, between 200-300 armed individuals led by paramilitaries invaded the upper part of Hacienda Santa Fé and took possession of the facilities in the area. On 16 July 2018, the invaders occupied the lower part of Hacienda Santa Fé and took possession of the remaining buildings. According to the Claimant, in the course of July and August 2018, the invaders caused extensive damage to the property, resulting in a total destruction of Riverside's avocado and forestry business.[3]

[3] Cl. Mem., paras. 174, 182.

87. The Respondent submits that Nicaragua had no role in the "*undisputedly illegal invasion and occupation of Hacienda Santa Fé,*" except in trying to bring it to an end, avoid unnecessary violence and peacefully relocate the illegal occupants. According to the Respondent, the invasion and occupation of Hacienda Santa Fé was merely the "*latest iteration*" of a land dispute between Inagrosa and Cooperative El Pavón, a community organized by former members of the *Resistencia Nicaragüense*, or the *Contras*, that dates back to the early 1990s.[4]

88. The Respondent explains that, in 1990, President Violeta Barrios de Chamorro promised to give land to members of the *Contras* who had opposed the former Sandinista government in the 1980s in consideration for their demobilization. One of the properties identified by a commission appointed by President Chamorro for use by the former *Contras* was Hacienda Santa Fé, which at the time appeared to be abandoned, subject to compensation or negotiation with the owners.[5] However, instead of negotiating with the private landowner, the former *Contras* "*almost immediately*" illegally occupied and settled on the upper part of Hacienda Santa Fé, which came to be known as "El Pavón." Hundreds of individuals lived in the El Pavón area from 1990 until 2004, establishing in 1995 a farming cooperative, Cooperative El Pavón, and attempted at various times to obtain legal title to the land. According to the Respondent, the applications were rejected because the land was privately owned and the former owners rejected the compensation offered by the government.[6]

89. In or around 2000, Inagrosa, which had purchased the plantation in or around 1997, petitioned the National Police to evict the individuals living in El Pavón. At Inagrosa's request, the National Police evicted most of the illegal occupants from the property and destroyed the structures that had been erected on the property. Given the high number of illegal occupants, Inagrosa had to obtain a court order to execute the evictions. Inagrosa

[4] Resp. CM., paras. 5-7 (Section I), 2 (Section II); Letter from "Cooperativa El Pavón" to the Attorney General of the Republic of Nicaragua, 5 September 2018, at p. 2 (**R-0065**).

[5] Resp. CM., paras. 7-9 (Section II); Agreement of the Regional Agrarian Commission of the Sixth Region, 22 November 1990 (**R-0052**).

[6] Resp. CM., paras. 3, 7-13 (Section II); Resp. Rej., paras. 38-39; Allegations of Police Abuse, *La Prensa*, 8 November 2003 (**R-0093**).

also agreed to give the government time to find another property where the occupants could be settled. Most of the occupants were evicted in 2002. By 2004, the remaining occupants had left the property, which was vacated.[7]

90. The Respondent contends that in June 2017 approximately 170 former members of the Cooperative returned to Hacienda Santa Fé, believing that Inagrosa had "*deserted*" the property. According to the Respondent, it was "*common knowledge*" at the time among the local population that the Roya fungus had wiped out the coffee crop at Hacienda Santa Fé a few years earlier, in 2013, and the subsequent invasion of the property was "*encouraged by Inagrosa's abandonment of Hacienda Santa Fé.*" The Respondent contends that the fact that the occupation started already in 2017 undermines Riverside's theory of the case that the government ordered the invasion of Hacienda Santa Fé in or around April 2018.[8]

91. The Claimant denies that the property was already occupied in 2017. According to the Claimant, third parties could not have settled on the property without the knowledge of Inagrosa's management. The only evidence produced by the Respondent in support of its allegation is a witness statement of Mr José López Blandón, which in the Claimant's view is not reliable, including because Mr López did not participate in the invasion.[9]

B. THE INVASION AND OCCUPATION OF HACIENDA SANTA FÉ AND ITS AFTERMATH

92. It is common ground that the invasion and occupation of Hacienda Santa Fé took place in the context of a widespread civil strife in Nicaragua, which commenced in April 2018 following an announcement by the Nicaraguan government regarding a reform of the

[7] Resp. CM., paras. 12-13 (Section II); Scorched earth in El Pavón, *El Nuevo Diario*, 22 November 2003 (**R-0036**); Cl. Reply, paras. 456-472; Resp. Rej., paras. 39, 99-107; Certificate issued by Nardo Sequeira Báez of the Nicaraguan Institute of Agrarian Reform (INRA) (**R-0053**); Letter from Carlos José Rondón Molina and Melva Jo Winger de Rondón to Marco Centeno Caffaena, General Director of OTR, 11 August 2000 (**R-0177 Tab 8**); Letter from Carlos José Rondón Molina and Melva Jo Winger de Rondón to Marco Centeno Caffarena, General Director of the OTR, dated 8 September 2000 (**R-0177 Tab 9**); Letter from Carlos Rondón Molina, Inagrosa, to Francisco Chavarrría Jr., OTR Delegate of Jinotega, dated 18 September 2001 (**R-0177 Tab 25**); Minutes of the Commission for Agrarian Reform and Agricultural Affairs, 26 November 2003 (**R-0062**).

[8] Resp. CM., paras. 2-3, 17-23 (Section II); Letter from land occupiers to the Attorney General Office in Jinotega dated 28 October 2019 (**R-0094**); Resp. Rej., paras. 40, 109-111.

[9] Cl. Reply, paras. 447-448, 474-479, 486-496.

country's social security system.[10] The Claimant contends that the Nicaraguan government relied during the unrest on non-governmental "*shock troops*" and paramilitary or "*parapolice*" factions, to intervene in and disperse the demonstrations, using "*disproportionate and indiscriminate use of force*." The interventions led to a deterioration of the situation and provoked an increase in the number of demonstrations in the course of April to June 2018.[11]

93. The Claimant refers, in support of its allegations, to a report issued by an Interdisciplinary Group of Independent Experts, established by the Inter-American Commission on Human Rights ("**IACHR**") and mandated to investigate the events. The group confirmed in its report issued in December 2018 (the "**IACHR Report**") that during the period between April and May 2018 the civil strife resulted in at least 109 deaths. In addition, more than 1,400 individuals were injured and some 690 individuals were detained. According to the report, the events were a consequence of "*a policy of repression launched and supported by the State's highest authorities*."[12]

94. The Respondent provides similar figures in relation to the consequences of the unrest, stating that according to official reports the three months of civil strife resulted in 198 deaths, including 22 members of the National Police, 1,240 people injured, including 401 members of the National Police, and in widespread damage to buildings, roads and vehicles. According to the Respondent, in these chaotic circumstances, the invasion of Hacienda Santa Fé was not an isolated incident; similar invasions were taking place in other parts of the country.[13]

95. The Claimant contends that the invasion and occupation of Hacienda Santa Fé was "*part of an agreement"* between the paramilitaries and the Nicaraguan government during the

[10] Cl. Mem., paras. 169, 201-204; Resp. CM., para. 26 (Section II).

[11] Cl. Mem., paras. 112-113; OAS Report on the Violent Events that Took Place in Nicaragua between April 18th and May 30th, Executive Summary, Interdisciplinary Group of Independent Experts, p. 2 (**C-0024-ENG**). *See also* Report of the Group of Human Rights Experts on Nicaragua, UN Document A/HRC/52/63, 2 March 2023, p. 2 (**C-0535-ENG**).

[12] Cl. Mem., paras. 116-122; OAS Report on the Violent Events that Took Place in Nicaragua between April 18th and May 30th, Executive Summary, Interdisciplinary Group of Independent Experts, p. 3 (**C-0024-ENG**).

[13] Resp. CM., para. 30 (Section II); Resp. Rej., paras. 112-113.

unrest. Pursuant to this agreement, the paramilitaries would receive land in exchange for their support of the government in quelling the protests.[14] The Claimant refers, in support, to a report of the Union of Agricultural Producers stating that it had received 66 complaints on land takings, and that as of 4 July 2019, 30 private properties were still occupied in seven departments.[15] The Claimant alleges that the invaders declared openly that they intended to take Hacienda Santa Fé from its owners, and that they were sent "*on behalf of the government*."[16] The Claimant further relies on a report from Police Commissioner Marvin Castro to Commissioner General Francisco Diaz dated 31 July 2018, which in its view shows that the government supported the invasion.[17]

96. The Respondent denies that the invaders were paramilitaries or acting on the instructions of the Nicaraguan government.[18] According to the Respondent, far from assisting the unlawful invasion of Hacienda Santa Fé, the Nicaraguan government opposed the invasion and acted diligently in the circumstances to counteract it, succeeded in two separate occasions in removing the invaders from the property peacefully and without any violent escalation, and prevented future invasion of the property.[19] However, the ongoing civil strife placed a strain on the government's resources that could otherwise have been used to remove the invaders, and the matter was further complicated by the political orientation of the invaders – former *Contras* – which, according to the Respondent, "*made it important to avoid any unnecessary use of force*."[20]

---

[14] Cl. Mem., paras. 127-131. The Claimant relies on the expert evidence of Professor Wolfe to argue that the invasion of Hacienda Santa Fé appears consistent with the pattern of state-directed land invasions in Nicaragua. Cl. Reply, para. 20; Second Wolfe Report, paras. 86, 119.

[15] Cl. Mem., para. 137.

[16] Cl. Mem., paras. 175, 279-288; Civic Alliance for Democracy and Justice, Facebook Post, July 16, 2018 (**C-0035-SPA-ENG**); Cl. Reply, paras. 300-347, 351.

[17] Report from Commissioner Marvin Castro to Francisco Díaz, Deputy Chief of the National Police regarding Invasion of Hacienda Sante Fé, 31 July 2018 (**C-0284-SPA-ENG**) (stating that the invaders have indicated in a "*conversation*" that they had "*communicated with comrade Edwin Castro and that he has mentioned to them to stay in that property since the government is looking for a way to buy it.*"). The Claimant states that Mr Edwin Castro is "*a prominent member of the Nicaraguan Legislative Assembly*" and "*has served since 2007 as the head of the Sandinista (FSLN) caucus in the National Assembly*." Cl. Reply, paras. 321, 325.

[18] Resp. CM., paras.1-2, 24, 57-69 (Section II).

[19] Resp. CM., para. 2 (Section II).

[20] Resp. CM., para. 3 (Section II).

97. The Claimant submits that, in June 2018, Inagrosa's management informed the local police of suspicious activity around its lands in the days before the invasion. The Claimant contends that the police were aware that the invaders "*intended to burn Hacienda Santa Fé*" and advised the workers to leave the plantation. Inagrosa's management also informed Mr Carlos Rondón, Inagrosa's Chief Operating Officer, who was at the time in the United States, of the situation. Mr Rondón instructed Inagrosa's management to notify the National Police, which they did. While the National Police indicated that it was monitoring the situation, they did not take any measures to protect the plantation, but advised Inagrosa management to tell the workers to leave Hacienda Santa Fé. However, the workers remained at the property. The National Police subsequently visited Hacienda Santa Fé and disarmed the security guards.[21] The Respondent contends that this was not to assist the invaders, as the Claimant alleges, but "*to mitigate against the risk of deadly violence*," which could have further inflamed the situation.[22]

98. On 16 June 2018, approximately 200-300 armed invaders occupied the upper part of Hacienda Santa Fé. A month later, on 16 July 2018, a second wave of approximately 60 invaders entered the lower part of Hacienda Santa Fé and took possession of the buildings in the area. According to the Claimant, one of the security guards, Mr Domingo Ferrufino, was assaulted by the invaders when he refused to hand over his shotgun.[23]

99. Having been informed by Inagrosa's management of the first invasion, Mr Rondón called Police Captain William Herrera to "*demand an explanation for the lack of police assistance*." According to the Claimant, Mr Herrera explained that he had orders from Police Commissioner Marvin Castro, the Chief of Police of the Jinotega Department, not to remove the invaders. In August 2018, Ms Norma Herrera, the mayor of the municipality of San Rafael del Norte, twice visited the plantation, together with the National Police, and met with the invaders and, during one of her visits on 6 August 2018, proposed that the municipality would provide housing, electricity and water infrastructure for the benefit of the occupiers. The Claimant alleges that, on 10 August 2018, Mr Rondón wrote to Police

[21] Cl. Mem., paras. 12, 176-177, 206-212, 296; Resp. Rej., para. 130.

[22] Resp. CM., para. 33 (Section II); Resp. Rej., para. 130.

[23] Cl. Mem., paras. 233-234; Cl. Reply, paras. 351-372.

Captain Herrera complaining about the lack of police action, however, there was no response to the letter.[24]

100. The Respondent contends that the National Police could not take immediate action in response to the invasion and occupation of Hacienda Santa Fé as its resources were allocated to containing the widespread civil strife and unrest. Also, according to the Respondent, in late May 2018, President Ortega had ordered police officers to remain in their barracks so that peace talks could continue "*without the police being accused of any escalation*." The order was given during a televised interview and remained in place until July 2018, when the nationwide unrest finally subsided.[25] The Claimant argues, in response, that there is no evidence of such an order, and that the police continued to operate throughout the relevant period and intervened to address illegal encroachments on various private properties elsewhere in Nicaragua.[26]

101. On 9 August 2018, the National Police and the Attorney General's office in Jinotega summoned the leaders of the illegal occupants "*to arrange for their peaceful departure from the property*." On 11 August 2018, Mr Leónidas Centeno, the mayor of Jinotega, and Commissioner Castro met with the invaders at Hacienda Santa Fé and ordered them to leave immediately.[27] It is undisputed that the invaders left the property on the same day.[28] On 14 August 2018, Inagrosa's management was able to return to the property and conduct an inventory of the damaged items and stolen property, together with Police Captain Herrera and a notary public.[29]

---

[24] Cl. Mem., paras. 178-180, 191, 218-221, 256-257, 261; Letter from Carlos Rondón to Police Captain Herrera, 10 August 2018 (**C-0012-SPA**); Cl. Reply, paras. 351, 372-384.

[25] Resp. CM., paras. 25-33 (Section II); Video of Opening of the National Dialogue – President Daniel Ortega speech (**C-0339-SPA**); Resp. Rej., paras. 118-132; Press release No. 25 of the National Police, 27 May 2018 (**R-0180**); Press release No. 26 of the National Police, 28 May 2018 (**R-0181**); Press release of the National Police, "*Citizen Security, a concern for all*", 28 May 2018 (**R-0192**); Carlos Fernando Álvarez, "*How the coup in Nicaragua was endured and thwarted*", El 19 Digital, 30 December 2018, p. 5 (**R-0037**).

[26] Cl. Reply, paras. 34-40, 124-129, 419-424.

[27] Resp. CM., paras. 34-35 (Section II); Resp. Rej., paras. 126-27; Summons served by the Attorney General's Office for Jinotega to the illegal occupants, 9 August 2018 (**R-0049**).

[28] Cl. Mem., para. 192; Resp. CM., para. 35 (Section II); Cl. Reply, para. 386.

[29] Cl. Mem., paras. 193, 266; Inventory Report of Damages and current Assets at Hacienda Santa Fé, 14 August 2018 (**C-0058-SPA**); Resp. CM., para. 3(i) (Section II); Cl. Reply, paras. 389-390.

102. On 17 August 2018, approximately 50 armed invaders returned to Hacienda Santa Fé, and the following day, 18 August 2018, a further approximately 100 invaders entered the property.[30] According to the Claimant, two of the security guards were "*forcibly expelled*" from the property, whereas the Respondent alleges that the invaders were able to return because "*Inagrosa failed to secure the premises*."[31] The Respondent adds that, while Inagrosa "*alerted the Police about this most-recent invasion*," it "*never brought a criminal action against the invaders or sought any other formal assistance from the Government*." According to the Respondent, Inagrosa's management also left the region.[32]

103. The Respondent contends that, in the months following the re-invasion until August 2021, Nicaraguan officials met with the leaders of the Cooperative to negotiate their eviction from the plantation.[33] In January 2019, the officials met with the occupants and ordered them to leave the property, however, while some families left the property, hundreds of occupants refused to leave "*because they had nowhere else to go and because they already planted approximately 350 hectares with crops (corn and beans) that were in the process of being harvested*."[34] In January 2019, the Nicaraguan government formed a commission to deal with the situation. The commission met on 24 January 2019 and issued a resolution recording the agreement between the government and the leaders of the occupants to leave the parts of the property that had not been farmed and the remaining parts once the crops had been harvested.[35] During the following two years, many, but not all, families left the property and were relocated.[36]

[30] Cl. Mem., paras. 194, 267; Resp. CM., para. 36; Cl. Reply, paras. 391-393.

[31] Resp. CM., para. 3(j) (Section II); Cl. Reply, paras. 394-395; Public Instrument No. 131, Affidavit of Domingo German Ferrufino, 19 August 2018 (**C-0211-SPA**); Public Instrument No. 132, Affidavit of Raymundo Palacios Sobalvarro, 19 August 2018 (**C-0214-SPA**).

[32] Resp. CM., para. 37.

[33] Resp. CM., para. 38; Letter from "Cooperativa El Pavón" to the Attorney General of the Republic of Nicaragua, 5 September 2018 (**R-0065**).

[34] Resp. CM., para. 39; Resp. Rej., para. 145.

[35] Resp. CM., paras. 40-42; Minutes of the Committee Meeting held with regard to the Eviction of the Santa Fé El Pavón parcel, 24 January 2019 (**R-0050**); Resp. Rej., para. 145.

[36] Resp. CM., para. 43; Resp. Rej., para. 145.

104. In April 2021, Nicaraguan officials summoned the remaining illegal occupants at a meeting at the Attorney General's office in Managua to expedite the process.[37] A further meeting took place in May 2021 at Hacienda Santa Fé in which the government officials presented relocation options to the illegal occupants and indicated that "*they would face legal consequences if they did not agree to a peaceful and orderly relocation*." As a result of the meeting, the government entered into relocation agreements with most of the occupants and "*almost all of the remaining illegal occupants left Hacienda Santa Fé and were relocated*."[38]

105. On 13 August 2021, the Nicaraguan officials removed the remaining approximately 112 illegal occupants from the property.[39]

106. On 9 September 2021, Nicaragua sent a letter to the Claimant's counsel stating that "*after a considerable and costly effort, Nicaragua ha*[d] *managed to clear* [Hacienda Santa Fé] *of all unauthorized occupants*" and offered the return of the property to Riverside. The letter added that, "[i]*f your clients are in a position to demonstrate their ownership of the property, Nicaragua would be willing to meet with them and establish the conditions for ensuring that the property is properly and securely placed in their hands, as promptly as possible.*"[40] Riverside responded the same day, requesting that Nicaragua "*elaborate*" on the conditions for the return of the property set out in Nicaragua's letter. Riverside added that it was unaware that there had ever been any issues regarding the ownership of Hacienda Santa Fé and noted that the government operated the land title system in the country and would be able to obtain the information.[41]

107. The Respondent contends that Riverside's response suggests that it was not willing to take back the property promptly, which in turn meant that it would remain abandoned for the

---

[37] Resp. CM., para. 44; Summons sent by the Jinotega Departmental Attorney's Office to occupants of Hacienda Santa Fé, 28 April 2021 (**R-0066**).

[38] Resp. CM., paras. 44-45; Resp. Rej., para. 145; Relocation minute between farmers and Jinotega's Attorney General Office, 5 May 2021 (**R-0051**).

[39] Cl. Mem., para. 274; Resp. CM., paras. 3(k), 46 (Section II); Resp. Rej., para. 145.

[40] Resp. CM., para. 48; Cl. Reply, para. 48; Letter from Foley Hoag to Appleton & Associates regarding offer to return Hacienda Sante Fé, 9 September 2021 (**C-0116**).

[41] Resp. CM., para. 49; Cl. Reply, paras. 508-513; Letter from Appleton & Associates to Foley Hoag, 9 September 2021 (**C-0118**).

foreseeable future and susceptible to re-invasion.[42] The Claimant denies that it refused Nicaragua's offer; it merely requested for further details about the "*non-specific conditions*" for return of the property.[43]

108. On 29 September 2021, Nicaragua hired a security company to protect the Hacienda Santa Fé perimeter and provide around-the-clock surveillance of the property against the threat of future invasions. It continues to hold the property for safekeeping for its return to its lawful owners.[44]

109. On 30 November 2021, Nicaragua's Attorney General filed a petition with a local court, the Second Oral Civil District Court of the Department of Jinotega Northern District (the "**Court**"), for an order to appoint a judicial depositary for Hacienda Santa Fé. The petition was granted on 15 December 2021 (the "**Court Order"**).[45] The Claimant contends that it was not notified of the petition, nor was served with the Court Order, which in the Claimant's view amounts to a "*judicial seizure*," in breach of DR-CAFTA.[46]

110. The Claimant contends that during the period 2018-2021 the invaders caused widespread damage to the plantation, including by (i) taking equipment and farm machinery; (ii) looting computers, records and books; (iii) ruining the commercial use and harvest of the avocado trees; (iv) engaging in widespread deforestation and destruction of private forests designated as a wildlife reserve; and (v) redistributing lands to the invaders and their families.[47]

111. The Respondent claims that it has spent NIO 3,567,813.12, or around USD 100,000, plus taxes, in its efforts to secure Hacienda Santa Fé, as Inagrosa has refused to take back its property, despite repeated invitations to do so.[48]

---

[42] Resp. CM., para. 49.

[43] Cl. Reply, para. 51.

[44] Resp. CM., paras. 3(l) (Section II), 50; Resp. Rej., para. 145.

[45] Resp. CM., para. 51; Cl. Reply, para. 498; Application for Precautionary and Urgent Measure to appoint a judicial depositary for Hacienda Santa Fé, 30 November 2021 (**C-0253**); Resp. Rej., para. 145.

[46] Cl. Reply, paras. 41-47, 51-57, 498-506, 587-664.

[47] Cl. Mem., paras. 195-200, 301.

[48] Resp. Rej., para. 145.

IV. THE PARTIES' CLAIMS AND REQUESTS FOR RELIEF

A. THE CLAIMANT'S REQUEST FOR RELIEF

112. In its Memorial, the Claimant requests the following relief:

> "*946) For the reasons set out in this Memorial, without limitation and reserving Riverside's right to supplement this request for relief in accordance with Rule 20 of the ICSID Arbitration Rules, Riverside respectfully requests that the Tribunal grant the following relief for its claims under CAFTA Article 10.16(1).*
>
> *a) A Declaration that Nicaragua has acted inconsistent with its Treaty obligations under CAFTA Articles 10.1, 10.2, 10.3, and 10.5;*
>
> *b) An award for Economic Loss Damages to the Investor for its claims under under* [sic] *Article 10.16 (1)(a) in the amount not less than* ***US$ 644,098,011*** *plus interest from the date of the award at a rate set by the Tribunal;*
>
> *c) An award for Moral Damages to the Investor for its claims under Article 10.16 (1)(a) in the amount of US$ 45 million plus interest from June 16, 2018 at a rate set by the Tribunal.*
>
> *d) Alternatively, or in combination, an award for Economic Loss Damages to the Investment for its claims under Article 10.16(1)(b) in the amount not less than* ***US$ 644,098,011*** *plus interest from the date of the award at a rate set by the Tribunal;*
>
> *e) An award for Moral Damages to the Investment for its claims under Article 10.16(1)(b) in the amount of US$ 45 million plus interest from June 16, 2018 at a rate set by the Tribunal; and*
>
> *f) An award in favor of the Investor on behalf of itself and / or on behalf of its Investment for their costs, disbursements, and expenses incurred in the arbitration for legal representation and assistance, plus interest, and for the costs of the Tribunal.*"

113. In its Reply, the Claimant requests the following relief:[49]

> "*2157) For the reasons set out in this Counter-Memorial on Jurisdiction, without limitation and reserving Riverside's right to supplement this request for relief under Rule 20 of the ICSID Arbitration Rules, Riverside*

[49] Cl. Reply, paras. 2157-2158 (Emphasis in the original omitted).

respectfully requests that the Tribunal dismiss Nicaragua's jurisdictional objections.

2158) For the reasons set out in this Reply Memorial, without limitation and reserving Riverside's right to supplement this request for relief under Rule 20 of the ICSID Arbitration Rules, Riverside respectfully requests that the Tribunal grant the following relief for its claims under CAFTA Article 10.16(1):

a) A Declaration that Nicaragua has acted inconsistent with its Treaty obligations under CAFTA Articles 10.1, 10.2, 10.3, 10.5 and 10.7.

b) An award for Economic Loss Damages to the Investor for its claims under Article 10.16 (1)(a) in the amount not less than US$ 240,995,140 plus interest from the date of the award at a rate set by the Tribunal.

c) An award for Moral Damages to the Investor for its claims under Article 10.16 (1)(a) in the amount of US$ 45 million plus interest from June 16, 2018, at a rate set by the Tribunal.

d) The award is made net of all applicable Nicaraguan taxes.

e) An award that Nicaragua may not tax the award rendered.

f) An award in favor of the Investor on behalf of itself and/or on behalf of its investment on a full indemnity basis for its costs, disbursements, and all expenses incurred in the arbitration for legal representation and assistance, including financing, plus interest, and for the costs of the Tribunal."

114. In its Post-Hearing Submission, the Claimant presented the following summary of its request for relief:[50]

"*267. For these reasons, Riverside respectfully requests that this Tribunal:*

(a) Find that Nicaragua has breached CAFTA Articles 10.2, 10.3, 10.5 and 10.7.

[50] Cl. PHB, para. 267.

(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."

B. THE RESPONDENT'S REQUEST FOR RELIEF

115. In its Counter-Memorial, the Respondent sets out the following prayer for relief:[51]

"*541. For the reasons set out in this Counter-Memorial, the Republic of Nicaragua respectfully requests that the Tribunal:*

a. DECLARE that the claims brought by Riverside Coffee, LLC on behalf of Inagrosa S.A. are inadmissible;

b. DECLARE that even if they were admissible, it has no jurisdiction to hear the claims brought by Riverside Coffee, LLC on behalf of Inagrosa S.A.;

c. DISMISS Claimant's claims brought under Articles 10.3, 10.4, 10.5, and 10.7 of DR-CAFTA as meritless;

d. DISMISS Claimant's request for compensation in its entirety, including its request for moral damages;

e. ORDER Claimant to pay Nicaragua the costs of providing security to preserve the abandoned Hacienda Santa Fé, as well as the amount of outstanding tax debt owed by Inagrosa S.A. or debt with the government of any other nature; and

f. ORDER Claimant to pay all costs and expenses related to this arbitration, including but not limited to the fees and expenses of the Tribunal, the administrative fees and expenses of ICSID, and all costs of Nicaragua's legal representation and expert assistance, plus pre-award and post-award compound interest accrued thereon until the date of payment estimated at a rate determined by the Tribunal.

g. GRANT any other or additional relief as may be appropriate under the circumstances or as may otherwise be just and proper."

[51] Resp. CM., para. 541.

116. In its Rejoinder, the Respondent requests the following relief:[52]

> "*806. For the reasons set out in this Rejoinder, the Republic of Nicaragua respectfully requests that the Tribunal:*
>
> *a. DECLARE that Claimant's claim for damages under DR-CAFTA Article 10.16.1(a) is inadmissible;*
>
> *b. DISMISS Claimant's claims brought under Articles 10.3, 10.4, 10.5, and 10.7 of DR-CAFTA as meritless;*
>
> *c. DISMISS Claimant's request for compensation in its entirety, including its request for moral damages;*
>
> *d. ORDER Claimant to pay Nicaragua the costs of providing security to preserve the abandoned Hacienda Santa Fé, as well as the amount of outstanding tax debt owed by Inagrosa S.A. or debt with the government of any other nature; and*
>
> *e. ORDER Claimant to pay all costs and expenses related to this arbitration, including but not limited to the fees and expenses of the Tribunal, the administrative fees and expenses of ICSID, and all costs of Nicaragua's legal representation and expert assistance, plus pre-award and post-award compound interest accrued thereon until the date of payment estimated at a rate determined by the Tribunal.*
>
> *f. GRANT any other or additional relief as may be appropriate under the circumstances or as may otherwise be just and proper.*"

117. Paragraph 806(c) of the Respondent's Rejoinder includes footnote 1173, which states:

> *In the event the Tribunal does find Nicaragua liable under DR-CAFTA and that Riverside is entitled to damages, Nicaragua requests that the Tribunal award damages according to Riverside's* pro rata *shareholding in Inagrosa of 25.5% at the time of the alleged measures.*

118. In its Post-Hearing Submission, the Respondent refers to the request for relief as set out in its Rejoinder.[53]

[52] Resp. Rej., para. 806.

[53] Resp. PHB, para. 188.

V. JURISDICTION AND ADMISSIBILITY

119. The Claimant raises in its Memorial claims on its own behalf under Article 10.16.1(a), as well as on behalf of Inagrosa under Article 10.16.1(b) of DR-CAFTA.[54] The claims on behalf of Inagrosa were made "*alternatively, or in combination,*" with the Claimant's claims on its own behalf.[55]

120. The Respondent in its Counter-Memorial argues that (i) the Claimant's claims on behalf of Inagrosa under Article 10.16.1(b) are inadmissible because Riverside has failed to comply with the notice requirement under Article 10.16.2 of DR-CAFTA and submit a waiver on behalf of Inagrosa as required by Article 10.18.2(b)(ii) of DR-CAFTA; and that (ii) even if the claims were to be considered admissible, they fall outside the Tribunal's jurisdiction *ratione personae* because Nicaragua never agreed to treat Inagrosa as a national of another Contracting State under Article 25(2)(b) of the ICSID Convention.[56]

121. As noted at paragraph 35 above, on 16 March 2023, shortly after the filing by the Respondent of its Counter-Memorial, the Claimant withdrew its claims on behalf of Inagrosa under Article 10.16.1(b) of DR-CAFTA.

122. The Parties agree that, following the Claimant's withdrawal of its claims on behalf of Inagrosa, the Tribunal need not address the Respondent's preliminary objections.[57] However, as summarized below, the Claimant maintains its claim for "*reflective loss*" under Article 10.16.1(b) of DR-CAFTA, which in the Respondent's view amounts to "*an improper attempt to bring a claim for damages suffered by the local company, Inagrosa, instead of a claim for direct damages suffered by Claimant*."[58] The Respondent therefore maintains its request for relief requesting that the Tribunal "*declare that*

[54] *See* Cl. Mem., paras. 770, 934, and 946(d).
[55] Cl. Mem., para. 946(d).
[56] Resp. CM., paras. 212-262.
[57] Cl. Reply, paras. 2100, 2103; Resp. Rej., para. 29 and section III(A).
[58] Resp. Rej., para. 477.

Claimant's claim for damages under DR-CAFTA Article 10.16.1(a) is inadmissible."[59] This section of the Award deals with this remaining objection to admissibility.

123. The Tribunal summarizes below the Parties' positions on the Respondent's remaining preliminary objection, as set out in their submissions. The summary is not exhaustive, however, when making its determinations, the Tribunal has considered the Parties' submissions in detail, even if not all such detail is specifically mentioned below. This also applies to sections VI and VII below.

A. THE PARTIES' POSITIONS

(1) The Respondent's Position

124. The Respondent sets out its position on the interpretation of Article 10.16.1 of DR-CAFTA in its Counter-Memorial.[60] According to the Respondent, DR-CAFTA offers a claimant two roads to recover damages: "*(a) under Article 10.16.1(a), a claimant can recover compensation for damages it suffered directly, and (b) under Article 10.16.1(b), a claimant can recover compensation for damages suffered by an enterprise organized under the law of the host State that it directly or indirectly owns or controls*."[61] The Respondent argues that there is "*a crucial difference*" between the two mechanisms: under Article 10.16.1(a), a claimant can claim recovery of the direct injury it sustained, whereas Article 10.16.1(b) allows a claimant to recover, on behalf of a local enterprise, the damage that the enterprise sustained.[62]

125. While the Respondent agrees that, the Claimant having withdrawn its claim on behalf of Inagrosa, there are no remaining jurisdictional issues, it contends that the Claimant's claim under Article 10.16.1(a) of DR-CAFTA is inadmissible insofar as the Claimant seeks compensation for the loss or damage sustained by Inagrosa. According to the Respondent, the Claimant misconstrues Article 10.16.1(a): while the provision allows a claimant to submit a claim to arbitration on its own behalf and seek compensation for the loss or

[59] Resp. Rej., para. 806(a).
[60] Resp. CM., paras. 197, 229-237.
[61] Resp. CM., para. 229.
[62] Resp. CM., para. 231.

damage that the claimant itself has sustained, it does not allow a claimant to claim compensation for loss or damage sustained by a local enterprise it owns or controls directly or indirectly. Examples of claims that would be admissible are claims for denial of right to a declared dividend, to vote its shares, to share in the residual assets of the enterprise upon dissolution or claims for damage suffered as a result of the State's action aimed at a claimant's shareholding itself.[63]

126. The Respondent considers that the Claimant must therefore show that the Claimant itself – as opposed to Inagrosa – has suffered direct injury. It is not sufficient for the Claimant to show that Inagrosa has incurred harm. According to the Respondent, "[i]*n this arbitration, Claimant has made no attempt to demonstrate the damages that Riverside sustained directly*," arguably because "[t]*he evidence submitted by Claimant shows that Riverside did not suffer any direct damage as a result of the invasion*." Thus, for example, Riverside's 2018 tax returns, which were prepared in 2019, show a value of USD 2.4 million for Inagrosa, which is an amount that is unchanged from Riverside's 2017 tax returns. Thus, according to the Respondent, Riverside itself did not consider that it had suffered any damage.[64]

127. The Respondent further submits that, contrary to the Claimant's case in the Reply, Riverside cannot claim compensation for "*reflective loss*" or "*indirect*" damage – that is, loss incurred by shareholders indirectly as a result of injury to their company. Such claims are not available under Article 10.16.1(a) of DR-CAFTA. Indeed, according to the Respondent, the distinction between the two sub-sections of Article 10.16.1 of DR-CAFTA has been extensively addressed in arbitral jurisprudence, and arbitral tribunals have pointed to the similarity between the language of Article 10.16.1 and the language of Articles 1116 and 1117 of NAFTA, which contain the same requirements. The Respondent relies, in support of its position, on *Clayton v. Canada*, which specifically held that "*reflective loss was not contemplated under Article 1116* [of NAFTA]."[65]

---

[63] Resp. Rej., paras. 477-481.

[64] Resp. Rej., para. 482.

[65] Resp. Rej., paras. 484-486 (referring to *Clayton/Bilcon v. Canada*, PCA Case No. 2009-04, Award on Damages, 10 January 2019, paras. 371-374, 388 (**RL-0103**)).

128. The Respondent contends that the case relied upon by the Claimant, *Kappes v. Guatemala*, was based on the "*specific facts of that case*," and that the tribunal's analysis has been "*strongly criticized and discouraged by DR-CAFTA and NAFTA tribunals,*" including in the dissenting opinion of Professor Zachary Douglas in the *Kappes* case. The Respondent observes that Article 10.16.1 must be read together with the other DR-CAFTA provisions, including Articles 10.18 and 10.26, which "*collectively establish a sophisticated framework to prevent multiple proceedings, ensure no double recovery, and protect creditors' rights, which could be undermined if controlling shareholders were allowed to pursue reflective loss claims indiscriminately*."[66]

129. In any event, according to the Respondent, the scope of compensation of shareholders is limited to the value of their equity participation in the company. The Claimant does not offer any legal authority in support of its contrary position. In the Respondent's view, the Claimant had two options available to it: (i) bring a claim under Article 10.16.1(a) together with Inagrosa's other shareholders at the relevant time as claimants in this arbitration; or (ii) bring a claim under Article 10.16.1(b) on behalf of Inagrosa, which would have required Riverside to demonstrate that it controlled Inagrosa (which it has been unable to do). The Claimant chose not to exercise either option, including the first one, because Riverside is apparently a mere "*façade*," with the real financial substance residing with its partners who do not wish to expose their own assets to any adverse cost award.[67]

130. The Respondent further submits that Riverside has been unable to show that it controlled Inagrosa at the time of the alleged breaches, in June 2018. According to the Respondent, it is undisputed that at the time Riverside owned only 25.5% of Inagrosa's shares, the other shareholders being Melvin Winger, Carlos Rondón and Ward Nairn, who owned the remaining 25.5%, 25% and 24%, respectively. It follows that the extent of damages Riverside is eligible to recover is limited by its shareholding percentage in Inagrosa, *i.e*. it cannot claim more than 25.5%. Whether or not Riverside "controlled" Inagrosa at the time

[66] Resp. Rej., paras. 487-488.

[67] Resp. Rej., paras. 490-493.

of the alleged breaches is irrelevant and, in any event, according to the Respondent, the Claimant has failed to show that it did.[68]

131. In its Post-Hearing Submission, in response to the Tribunal's question regarding the critical date for the purpose of the Tribunal's jurisdiction, the Respondent submits that since the Claimant submitted its NfA on 19 March 2021, this is the critical date for invoking the Tribunal's jurisdiction, establishing the operative look-back period for purposes of the three-year statute of limitations under Article 10.18 of DR-CAFTA and assessing the date of the Parties' consent to arbitration under Article 10.17 of DR-CAFTA. However, according to the Respondent, this date is to be distinguished for determining other issues, such as jurisdiction *ratione temporis* and damages. The relevant date for these purposes is the date of the alleged breaches.[69]

(2) The Claimant's Position

132. The Claimant submits that, after the withdrawal of its claims under Article 10.16.1(b) of DR-CAFTA, the Respondent's objection to the Tribunal's jurisdiction over these claims is moot and the Respondent's remaining objection "*does not disclose a cognizable jurisdictional issue*."[70]

133. The Claimant rejects the Respondent's assertion that the Claimant cannot seek recovery for loss or damage sustained by Inagrosa beyond the extent of its claimed shareholding in Inagrosa. According to the Claimant, arbitral practice supports is position. Noting that Article 10.16.1(a) and (b) of DR-CAFTA "*is in the same form*" as Articles 1116 and 1117 of NAFTA, the Claimant relies on *Pope & Talbot v. Canada*, which in its view established that shareholders may bring claims under Article 1116 of NAFTA (which corresponds to Article 10.16.1(a) of DR-CAFTA).[71] The Claimant further relies on *Kappes v. Guatemala*, in which the tribunal found that a shareholder's claim for damages for the loss of its investment was admissible under DR-CAFTA because there was "*no textual basis*" in

[68] Resp. Rej., paras. 499-512.

[69] Resp. PHB, paras. 185-187.

[70] Cl. Reply, paras. 2095-2098, 2100-2103 (referring to Letter from Riverside to Tribunal withdrawing DR-CAFTA Art. 10.16(1)(b) claim, 16 March 2023 (**C-0472**)).

[71] Cl. Reply, paras. 2104-2106 (citing *Pope & Talbot v. Canada*, Damages Award, para. 80 (**CL-0014-ENG**)).

either Article 10.16.1(a) or 10.16.1(b) for the respondent's position that the latter must be relied upon where available, "*such that the company 'has to' pursue that path and is prohibited from invoking the former instead*."[72]

134. The Claimant submits that there is no risk of double recovery in the present case since at the time of filing the claim, and of the DR-CAFTA waiver, Riverside owned 95% of the shares in Inagrosa. The remaining 5% of the shares is owned by Carlos Rondón who, however, cannot make a claim under DR-CAFTA in relation to his shareholding "*due to the temporal limitations in that treaty*."[73]

135. The Claimant argues that an investor may bring a claim for *"reflective loss*" if it controls the investment, relying on *Union Fenosa v. Egypt*. According to the Claimant, in the present case, the Respondent has ignored the fact that Riverside controls Inagrosa due to its voting control, financial control and their shared most senior corporate officer, which is proven by the Claimant's evidence, including regulatory documents filed by Riverside with the United States Internal Revenue Service for years before the invasion occurred.[74]

136. In the Claimant's view, an investor may bring a claim under Article 10.16.1(a) of DR-CAFTA to seek recovery for loss and damage to the shareholders which may result from violations of their rights as shareholders. Shareholders may suffer two types of losses: direct loss and indirect, or reflective, loss. According to the Claimant, international investment law allows the filing of arbitration claims for reflective loss, defined as a loss incurred by shareholders indirectly, for a decrease in the value of a shareholding resulting from injury to the company in which the shares are held.[75] In other words, shareholders are allowed under international investment law to bring claims for reflective or indirect

[72] Cl. Reply, para. 2107 (citing *Daniel W. Kappes and Kappes, Cassiday & Associates v. Republic of Guatemala*, ICSID Case No. ARB/18/43, Decision on Respondent's preliminary objections, 13 March 2020, para. 159 (**CL-0258-ENG**)).

[73] Cl. Reply, para. 2108.

[74] Cl. Reply, paras. 2109-2110 (referring to *Union Fenosa Gas, S.A. v. Arab Republic of Egypt,* ICSID Case No. ARB/14/4, Award, 31 August 2018, para. 10.119 (**RL-0089**)).

[75] Cl. Reply, para. 2114.

loss, "*regardless of the claims by the corporation*." The position was confirmed, with respect to DR-CAFTA claims, in *Kappes v. Guatemala*.[76]

137. The Claimant argues, relying on *Kappes v. Guatemala*, that shareholders can bring a claim for loss or damage under Article 10.16.1(a) of DR-CAFTA, acknowledging that "*the burden is on the shareholder to demonstrate that the loss flows to it due to its control, rather than only the investment directly*." In this case, the Claimant has suffered a "*total economic loss of its investment*" in Inagrosa. Since Riverside controlled Inagrosa at the time of the invasion and occupation in June 2018, damage caused to Inagrosa was directly suffered by Riverside. This also applies to the Court Order, which directly named Riverside as a party.[77]

138. The Claimant notes that its ownership of shares in Inagrosa is undisputed by the Respondent and claims that, since it was the controlling shareholder of Inagrosa before and during the invasion and occupation, it may "*bring a claim arising from its control of Inagrosa*." However, while control may be relevant to damages, "*it is not a matter relevant to the jurisdictional competency of this Tribunal*." What matters is that the Claimant has made an "investment" in Nicaragua, which is undisputed.[78]

139. In its Post-Hearing Submission, the Claimant submits that "*Nicaragua acknowledges that Riverside may claim damages if it can prove ownership or control during the breaches*," and argues that the testimony of the Claimant's witnesses during the hearing established Riverside's control over Inagrosa. The drafting of DR-CAFTA also supports the Claimant's position: had the DR-CAFTA drafters intended to limit reflective loss claims under Article 10.16.1(a), "*they would have included such restrictions in the treaty language*." Nicaragua also consistently treated Riverside as Inagrosa's *alter ego*, and Riverside's tax filings confirm its control "*long before the expropriation*." According to

[76] Cl. Reply, paras. 2111-2116.

[77] Cl. Reply, paras. 2117-2119.

[78] Cl. Reply, paras. 2125-2146.

the Claimant, the evidence also demonstrates that Riverside and Inagrosa operated as a single economic entity.[79]

B. THE TRIBUNAL'S ANALYSIS

140. The relevant provisions for the purposes of determining the Respondent's admissibility objection are Article 10.16.1(a) and Article 10.16.1(b) of DR-CAFTA. Article 10.16.1(a) provides:

> ***Article 10.16: Submission of a Claim to Arbitration***
>
> *1. In the event that a disputing party considers that an investment dispute cannot be settled by consultation and negotiation:*
>
> *(a) the claimant, on its own behalf, may submit to arbitration under this Section a claim*
>
> *(i) that the respondent has breached*
>
> *(A) an obligation under Section A,*
>
> *(B) an investment authorization, or*
>
> *(C) an investment agreement;*
>
> *and*
>
> *(ii) that the claimant has incurred loss or damage by reason of, or arising out of, that breach*[.]

141. Article 10.16.1(b) further provides:

> ***Article 10.16: Submission of a Claim to Arbitration***
>
> *1. In the event that a disputing party considers that an investment dispute cannot be settled by consultation and negotiation:* […]

[79] Cl. PHB, paras. 235-236, 245-251.

> *(b) the claimant, on behalf of an enterprise of the respondent that is a juridical person that the claimant owns or controls directly or indirectly, may submit to arbitration under this Section a claim*
>
> *(i) that the respondent has breached*
>
> *(A) an obligation under Section A,*
>
> *(B) an investment authorization, or*
>
> *(C) an investment agreement; and*
>
> *(ii) that the enterprise has incurred loss or damage by reason of, or arising out of, that breach.*

142. The Tribunal recalls that the Claimant has withdrawn its claim under Article 10.16.1(b), which the Respondent has accepted, and accordingly there is no outstanding preliminary objection under Article 10.16.1(b) (or Article 25(2) of the ICSID Convention, as to the nationality of the claim) that the Tribunal must determine.

143. The remaining issue is the Respondent's objection to the Claimant's claim under Article 10.16.1(a) of DR-CAFTA. As summarized above, the Respondent contends that the Claimant cannot claim compensation for "*reflective loss*" or "*indirect*" damage – that is, loss incurred by shareholders as a result of injury to their company. According to the Respondent, such claims are not available under Article 10.16.1(a) of DR-CAFTA.

144. The Tribunal notes that the Respondent characterizes its remaining preliminary objection under Article 10.16.1(a) of DR-CAFTA as an objection to admissibility rather than jurisdiction. Thus, although in its Rejoinder (which was filed after the Claimant's withdrawal of its claims under Article 10.16.1(b) of DR-CAFTA) the Respondent addresses its Article 10.16.1(a) objection under the heading "*jurisdiction*,"[80] the Respondent makes clear elsewhere in the submission that its objection is an objection to admissibility. The Respondent specifically confirms that it "*agrees with Riverside's observation in its Reply that there is no remaining cognizable jurisdictional issue now that*

[80] Resp. Rej., Section III.

Riverside has voluntarily withdrawn claims brought on behalf of Inagrosa," and submits that "*Riverside's claim for damages under DR-CAFTA Article 10.16.1(a) should be inadmissible as an improper attempt to bring a claim for damages suffered by the local company, Inagrosa, instead of a claim for direct damages suffered* [by] *Riverside*."[81] In the amended request for relief in its Rejoinder, the Respondent requests that the Tribunal "*declare that Claimant's claim for damages under DR-CAFTA Article 10.16.1(a) is inadmissible*."[82]

145. As summarized above, the Respondent does not challenge the admissibility of the entirety of the Claimant's Article 10.16.1(a) claim. While the Respondent contends that Riverside cannot claim compensation for reflective or indirect losses, it acknowledges that "*under DR-CAFTA Article 10.16.1(a), Riverside can … seek damages for the direct losses and damages Riverside sustained*."[83] Thus, the Respondent's objection to the admissibility of the Claimant's Article 10.16.1(a) claim, if upheld, would not result in a dismissal of the entirety of the Claimant's claim.

146. Having considered the Parties' submissions and the supporting evidence, the Tribunal notes that, apart from not resulting in a dismissal of the entirety of the Claimant's claims (if upheld), the Respondent's objection to admissibility under Article 10.16.1(a) of DR-CAFTA is closely intertwined with the merits of the Claimant's claims, specifically quantum, as it requires a prior finding by the Tribunal that the Respondent has breached its obligations under DR-CAFTA. The Tribunal therefore considers it appropriate to determine the Respondent's remaining objection together with the merits, specifically quantum, and address it in that context, should the Tribunal find that the Respondent has breached any of its obligations under DR-CAFTA.

[81] Resp. Rej., paras. 29-30. *See also* paras. 476-477, 483.

[82] Resp. Rej., para. 806(a).

[83] Resp. Rej., para. 31. *See also* paras. 490-491.

VI. RESPONDENT'S PRELIMINARY DEFENSES

147. The Claimant submits that the Respondent has breached its obligations under Articles 10.3 (National Treatment), 10.4 (Most-Favored Nation Treatment), 10.5 (Minimum Standard of Treatment) and 10.7 (Expropriation and Compensation) of DR-CAFTA and is liable for its breaches under international law.[84] According to the Claimant, "[t]*he core issue in this international arbitration claim is Nicaragua's liability for the occupation of Hacienda Santa Fé (HSF) commencing in 2018.*"[85]

148. The Respondent contends that the Claimant has failed to prove the "*core factual contention of its case*" that the unlawful invasion and occupation of Hacienda Santa Fé is attributable to the Nicaraguan State under international law.[86] According to the Respondent, the only conduct attributable to the Nicaraguan State is its response to the invasion and occupation of Hacienda Santa Fé, which cannot give rise to international responsibility because Nicaragua has two complete defenses: (i) the Claimant's claims fail under Article 21.2(b) of DR-CAFTA because they seek to hold Nicaragua liable for non-precluded measures that Nicaragua considered necessary for the protection of its essential security interests;[87] and (ii) Article 10.6 of DR-CAFTA establishes a special treaty regime applicable during times of armed conflict and civil strife which limits Nicaragua's international responsibility to discriminatory treatment and, in any event, the Claimant has not proven any discrimination.[88]

149. The Tribunal notes that it is common ground between the Parties that the Respondent's role in the invasion and occupation of Hacienda Santa Fé is the core issue in this case. The Tribunal therefore considers it appropriate to first address the issue of attribution and the Respondent's alleged "complete" defenses under Article 21.2(b) and Article 10.6 of DR-CAFTA. If the Respondent's position on either of these two defenses is upheld in its

[84] *See*, *e.g.*, Cl. Mem., §§ V and VI.A. While the Claimant also mentions in its request for relief claims under Articles 10.1 and 10.2, it has developed them in the body of its submissions. These are considered below in Section VII.A.

[85] Cl. Reply, para. 1.

[86] *See*, *e.g.*, Resp. CM., paras. 264-265.

[87] *See*, *e.g.*, Resp. CM., para. 285 *et seq*.; Resp. Rej., para. 535 *et seq*.

[88] *See*, *e.g.*, Resp. CM., para. 306 *et seq*; Resp. Rej., para. 561 *et seq*.

entirety, the Tribunal need not proceed any further. Accordingly, the approach serves arbitral efficiency.

A. THE ATTRIBUTION DEFENSE

(1) The Parties' Positions

a. The Respondent's Position

150. The Respondent argues that for State responsibility to be established, the investor must prove that the conduct it complains of constitutes a breach of an international obligation and is attributable to the State under international law.[89] The Respondent asserts that, in this case, the Claimant has failed to prove that the measures that the Claimant complains of are attributable to the Nicaraguan State.[90]

151. The Respondent states that the Claimant attempts to attribute the illegal invasion of Hacienda Santa Fé to the Nicaraguan State on the basis of three different principles of customary international law: (i) the invasion was conducted by the State organs themselves; (ii) unnamed government officials directed and organized the invasion in a manner attributable to the State, including by way of supporting and assisting the invaders; and (iii) the State acknowledged and accepted the conduct of the invaders as its own.

152. The Respondent contends that the "*Claimant has failed to overcome its burden of proving that the alleged measures are attributable to the State*."[91] According to the Respondent, the invasion of Hacienda Santa Fé in the summer of 2018, like the earlier incursions in 2017, constituted private conduct and was not directed, instigated or in any way supported or condoned by the State.[92]

153. The Respondent contends that the evidence of Professor Wolfe, the Claimant's expert witness, is not sufficient. While the Claimant alleges that Professor Wolfe concluded that the paramilitaries who invaded Hacienda Santa Fé were operating under the direction and

[89] Resp. CM., fn. 430.
[90] Resp. CM., para. 265.
[91] Resp. CM., para. 264.
[92] Resp. CM., paras. 270-271.

control of the Nicaraguan government, the Respondent contends that Professor Wolfe's report does not support the allegation.[93] Indeed, according to the Respondent, Professor Wolfe's report does not contain a "*single*" mention of Hacienda Santa Fé, the Jinotega region or San Rafael del Norte; he merely discusses Nicaraguan politics, including the existence of "*voluntary police*," in general terms.[94] Professor Wolfe was not present at Hacienda Santa Fé and does not claim to have been.[95] He does not identify who invaded Hacienda Santa Fé in the summer of 2018 or conclude that it was the National Police or the voluntary police.[96] The Respondent concludes that Professor Wolfe's evidence "*is* [not] *inconsistent with the reality that the invaders acted independently of the State and that their leaders were in large part demobilized former fighters from the anti-government side of Nicaragua's decade-long civil war*."[97]

154. Nor does the witness evidence offered by the Claimant establish a State-led conspiracy to invade Hacienda Santa Fé. According to the Respondent, the witness evidence of Luis Gutierrez and Jaime Francisco Henrriquez Cruz (a/k/a "Jaime Vivas") is the "only *evidence Claimant has adduced to attribute the conduct of the illegal occupants to the State*" and is "*equally insufficient to show a State-led conspiracy that Claimant must show in order to prove, firstly, State attribution and, secondly, wrongful State conduct*."[98] The Respondent asserts that the evidence of Messrs Gutierrez and Vivas is "*little more than conclusory, vague statements or outright hearsay*."[99]

155. Similarly, the Respondent maintains that the Claimant's attempt to rely on the alleged speech of Mayor Herrera to the invaders at Hacienda Santa Fé is only based on the evidence of Messrs Gutierrez and Vivas, which is in part hearsay and not credible. Finally,

[93] Resp. CM., paras. 270-273.
[94] Resp. CM., paras. 272-273.
[95] Resp. CM., para. 273.
[96] Resp. CM., para. 273.
[97] Resp. CM., para. 273.
[98] Resp. CM., paras. 274-275 (Emphasis in the original).
[99] Resp. CM., para. 275.

Mr Rondón's evidence does not add anything of substance and is similarly hearsay because he was not in Nicaragua at the time of the invasion.[100]

156. The Respondent submits that, therefore, "*the only conduct attributable to the State in connection with the invasion of Hacienda Santa Fé was the State's* **response** *to the invasion and occupation*."[101]

157. In its Rejoinder, the Respondent contends that the invaders of Hacienda Santa Fé "*were not government mercenaries*" but "*members of a local farming cooperative,*" originating from the resettlement and demobilization of Nicaraguan resistance members after Nicaragua's civil war. While some of the invaders were armed veterans, "*many others were elderly family members, women, and children*," and their aim was not a government-ordered land grab but rather "*to settle and raise families and work the land*," even though the land did not belong to them.[102] Accordingly, the Claimant's case "*most fundamentally fails because the unlawful invasion of Hacienda Santa Fe was the work of non-state actors. Nicaragua neither directed, encouraged, nor adopted the illegal invasion of the Hacienda by armed non-state actors.*"[103]

158. According to the Respondent, the Claimant appears to have recognized in its Reply that "*the only State measures it can conceivably challenge are those that formed Nicaragua's law enforcement response to th*[e] *unlawful invasion*." While the Claimant continues to attribute the invaders' conduct to the State on the basis that the invaders themselves admitted that they were acting in the name of the State, and alleging that State officials, in particular Congressman Edwin Castro, a member of Nicaragua's National Assembly, gave directions to the invaders and encouraged them to continue the invasion, the Respondent contends that the Claimant's arguments do not "*withstand*[] *scrutiny nor provide*[] *a basis for engaging Nicaragua's international responsibility*."[104]

---

[100] Resp. CM., paras. 274-283.

[101] Resp. CM., para. 284 (Emphasis in the original).

[102] Resp. Rej., paras. 2-3.

[103] Resp. Rej., para. 514.

[104] Resp. Rej., paras. 515-517.

159. The Respondent also reiterates its argument that the alleged "*admissions*" of the occupiers do not withstand scrutiny. It relies on Mr Dario Enríquez Gómez' witness statement, who explains that "*he never told Mr. Gutiérrez that Hacienda Santa Fé was being expropriated by the government or that the government was targeting companies with foreign capital*."[105]

160. The Respondent also refutes the Claimant's attempt to rely on a letter of 5 September 2018 sent by the occupiers to the Attorney General of Nicaragua, contending that the content of the document contradicts the Claimant's characterizations.[106] The Respondent argues that, contrary to the Claimant's assertions, the letter "*is in fact anything but an 'admission' of government orders*" but rather "*a petition for the government's support of the illegal occupants' putative claim to Hacienda Santa Fe*."[107] The authors of the letter introduce themselves as members of the former Nicaraguan resistance, now affiliated with the El Pavón Farming and Services Cooperative Association, and claim that the property had been previously granted to them by the Nicaraguan Institute for Agrarian Reform as part of the resettlement of demobilized resistance fighters at the end of Nicaragua's civil war. The Respondent contends that the letter shows the occupiers' attempt to secure government validation after the fact and does not indicate any State direction or control over the occupation. Furthermore, the authors' expression of loyalty to the Sandinista National Liberation Front and the President of Nicaragua must be seen as a profession of political allegiance, not as evidence of State involvement. According to the Respondent, the letter undermines the Claimant's allegations of government involvement and, on the contrary, demonstrates that the invasion of Hacienda Santa Fé cannot be attributed to the Nicaraguan State.[108]

161. The Respondent contends that the Claimant also cannot attribute the invasion to the State on the basis of a report dated 13 July 2018 from Commissioner Marvin Castro to Mr Francisco Diaz, Deputy Chief of the National Police. Contrary to the Claimant's

[105] Resp. Rej., para. 518 (citing at fn. 730 the Enríquez Gómez Statement at para. 14 (**RWS-21**)).

[106] Resp. Rej., paras. 519-525, and fn. 731 (referring to the Letter from "Cooperativa El Pavón" to the Attorney General of the Republic of Nicaragua, 5 September 2018 (**R-0065**)).

[107] Resp. Rej., para. 520.

[108] Resp. Rej., paras. 523-525.

allegations, the report does not show that Congressman Edwin Castro advised the invaders to remain in occupation of Hacienda Santa Fé in hopes that Nicaragua might buy it, and that the State therefore directed or adopted the conduct of the invaders.[109] There is no direct evidence in the report of what Congressman Castro may have said or done. In the Respondent's view, the report merely states that unidentified members of the invaders had told Commissioner Castro that they had communicated with Congressman Castro and that he had mentioned to them "*to stay in th*[e] *property since the government is looking for a way to buy it*." The Respondent considers that this is "*third-hand hearsay*" and not reliable evidence.[110]

162. According to the Respondent, the statements of Congressman Castro in any event cannot be attributed to the State as he is not a "State organ" within the meaning of Article 4 of the International Law Commission's Articles on Responsibility of States for Internationally Wrongful Acts (the "**ILC Articles**").[111] He is merely a member of the National Assembly, and it is the National Assembly, acting as a body pursuant to Nicaragua's Constitution, that is a State organ and not its individual members, whose conduct is not attributable to the State. In support of its position, the Respondent relies on cases such as *Burlington v. Ecuador* and *Lidercon v. Peru*, which confirm that the individual conduct of members of legislative bodies does not engage State responsibility.[112]

b. The Claimant's Position

163. The Claimant contends that Nicaragua is responsible for the actions that resulted in the taking of Hacienda Santa Fé. According to the Claimant, the Nicaraguan police not only failed to take measures to protect the lawful landowner, but "*actively assisted the paramilitaries in the taking of Hacienda Santa Fé*."[113]

---

[109] Resp. Rej., para. 526, referring at fn. 742 to the Report from Commissioner Marvin Castro to Francisco Díaz, Deputy Chief of the National Police regarding Invasion of Hacienda Santa Fé, 31 July 2018 (**C-0284**).

[110] Resp. Rej., para. 527.

[111] International Law Commission, Draft Articles on Responsibility of States for Internationally Wrongful Acts, with commentaries, U.N. International Law Commission, Fifty-third session, A/56/10, 2001 (**CL-0017**).

[112] Resp. Rej., paras. 530-531 (citing *Burlington Resources, Inc. v. Republic of Ecuador*, ICSID Case No. ARB/08/5, Decision on Liability, 14 December 2012 (**RL-0181**) ("***Burlington v. Ecuador***"), para. 305).

[113] Cl. Mem., paras. 123-124.

164. The Claimant contends that the Nicaraguan government's use of land takings as a form of intimidation is not new, and dates back to the 1990s when "*poor farmers and members of Sandinista revolution-era farming cooperatives sought to claim what they thought was their due from the revolution*." In the context of the 2018 social unrest, land occupations were used as a form of payment for the acts of parapolice and paramilitaries, who are "*closely connected to Nicaragua's government, and the government played a significant role in creating, supporting, and directing their conduct*."[114]

165. The Claimant submits that the Respondent's responsibility for the invasion is due to the role of (i) the organs of the Nicaraguan State; as well as (ii) senior government officials who controlled and directed the paramilitaries in Nicaragua. As to the former, the Claimant relies on Article 4 of the ILC Articles, which "*codifies the international law standards for international responsibility for acts taken by members of organs of the State*." According to the Claimant, both the national and voluntary police are an integral part of the executive branch of government and as such organs of the State. Their active engagement in measures to assist the paramilitaries during the invasion establishes the responsibility of the Nicaraguan State for the invasion.[115]

166. The Claimant submits that, since the paramilitaries were voluntary police, it is not necessary to demonstrate control since they are part of the State, as also admitted by the paramilitaries themselves. Mayor Leónidas Centeno and Mayor Norma Herrera were also "*directly involved*" and, according to the Claimant, the former "*sent the paramilitaries to invade Hacienda Santa Fé*," whereas Mayor Herrera gave a speech at Hacienda Santa Fé informing the invaders of her efforts to provide electricity and water, and "*allowing them to build housing on the Hacienda Santa Fé lands*." This establishes Nicaragua's responsibility for the measures taken by the two mayors under Article 8 of the ILC Articles ("Conduct directed or controlled by a State").[116]

[114] Cl. Mem., paras. 125-131.

[115] Cl. Mem., paras. 641-658; First Wolfe Report, paras. 33, 39, 102 (**CES-02**).

[116] Cl. Mem., paras. 659-663.

167. The Claimant submits that Nicaragua's responsibility is also established under Article 8 of the ILC Articles on the basis that the State either instructed, directed or controlled the paramilitaries in connection with the invasion and occupation. The Claimant relies on the evidence of Professor Wolfe and the statements of paramilitaries themselves, as well as the alleged admission of a government official, which the Claimant refers to as "Mr Fabio Enrique Dario," and information provided by anonymous sources. Indeed, according to the Claimant, the invasion of Hacienda Santa Fé "*was not an isolated event but was rather part of a statewide campaign of government oppression*."[117]

168. The Claimant contends that the Nicaraguan government, including President Ortega and other senior members of the government, have admitted the connection between the paramilitaries and the police, stating that the former are "*volunteer police.*" The Nicaraguan State is therefore also responsible for their conduct under Article 11 of the ILC Articles ("Conduct acknowledged and adopted by the State as its own"). The Claimant also relies, in further support, on a report of the Interdisciplinary Group of Independent Experts, which discusses "*how the paramilitaries have been involved in government efforts such as quelling protests and have been recognized by the Government as voluntary police*."[118]

169. In its Reply, the Claimant reiterates its position that Articles 4, 8 and 11 of the ILC Articles are "*applicable in this claim*," however, unlike in its Memorial, the Claimant also invokes Article 7 ("Excess of authority or contravention of instructions").[119] According to the Claimant, the conduct of State organs such as (i) the Nicaraguan police, including Commissioner Marvin Castro and Captain William Herrera; (ii) elected members of the legislative branch of government, the deputies of the National Assembly, the Mayor of Jinotega, Leónidas Centeno, the Mayor of San Rafael del Norte, Norma Herrera; (iii) the executive branch of the government, including the Attorney General; and (iv) the courts, is attributable to the Nicaraguan State, which is therefore responsible for their conduct

[117] Cl. Mem., paras. 664-682.
[118] Cl. Mem., paras. 683-714.
[119] Cl. Reply, para. 1050.

under international law.[120] As detailed in the Memorial, the conduct of the invaders also is, in the Claimant's view, attributable to the State, as are the decisions of the Nicaraguan courts in December 2021, issued at the request of the Attorney General, which resulted in taking of possession by the State of Hacienda Santa Fé.

170. The Claimant further submits that under Article 7 of the ILC Articles, the "*measures at issue need not be* infra vires *of the person's duties for there to be state responsibility if that person is part of a branch of the government*."[121]

(2) The Tribunal's Analysis

a. Applicable Legal Framework

171. For the purposes of attribution, the relevant provision of DR-CAFTA is Article 10.1 ("Scope and Coverage"), which provides, in relevant part, that Chapter Ten ("Investment") "*applies to measures adopted or maintained by a Party relating to: (a) investors of another Party; (b) covered investments …*".

172. Article 10.22 ("Governing Law") further provides, in relevant part, that "[s]*ubject to paragraph 3, when a claim is submitted under Article 10.16.1(a)(i)(A)* [*…*]*, the tribunal shall decide the issues in dispute in accordance with this Agreement and applicable rules of international law*." Article 10.16.1(a)(i)(A) deals with claims by the claimant on its own behalf submitted to arbitration on the basis that the respondent has breached an obligation under Section A ("Investment"), which is the case here.

173. It is common ground between the Parties that the relevant provisions of the ILC Articles qualify as "*applicable rules of international law*" within the meaning of Article 10.22 of DR-CAFTA.[122]

174. The relevant provisions of the ILC Articles are Articles 4, 8 and 11, which provide:[123]

[120] Cl. Reply, para. 1052.

[121] Cl. Reply, paras. 1053-1057.

[122] Cl. Mem., para. 642; Cl. Reply, para. 1059; Resp. CM., paras. 266-269; Resp. Rej., para. 529.

[123] ILC Articles (**CL-0017**).

Article 4. Conduct of organs of a State

1. The conduct of any State organ shall be considered an act of that State under international law, whether the organ exercises legislative, executive, judicial or any other functions, whatever position it holds in the organization of the State, and whatever its character as an organ of the central Government or of a territorial unit of the State.

2. An organ includes any person or entity which has that status in accordance with the internal law of the State.

[…]

Article 8. Conduct directed or controlled by a State

The conduct of a person or group of persons shall be considered an act of a State under international law if the person or group of persons is in fact acting on the instructions of, or under the direction or control of, that State in carrying out the conduct.

[…]

Article 11. Conduct acknowledged and adopted by a State as its own

Conduct which is not attributable to a State under the preceding articles shall nevertheless be considered an act of that State under international law if and to the extent that the State acknowledges and adopts the conduct in question as its own.

175. The Tribunal agrees with the Parties that these rules, which are generally regarded as codifying customary international law, qualify as "*applicable rules of international law*" within the meaning of Article 10.22 of DR-CAFTA.

b. Whether the Respondent's Attribution Defense Succeeds

176. As summarized above in Section III ("Factual Background"), the time period when the invasion and occupation began is in dispute between the Parties. The Respondent alleges that the invasion and occupation of Hacienda Santa Fé is inextricably linked to the settlement of former members of the Nicaraguan resistance and their families in the

northern part of the plantation in the early 1990s, which continued until 2004. According to the Respondent, many of the same individuals who had occupied the property during this period, and who had subsequently been evicted, came back and occupied the northern part of the property in 2017, and then moved in June and July 2018 to the southern part. The Claimant denies that the invasion started already in 2017, relying on the witness evidence of employees of Hacienda Santa Fé.

177. Having considered the Parties' evidence on whether Hacienda Santa Fé was already partially occupied in 2017, the Tribunal finds that this evidence is in part contradictory and at best inconclusive.[124] However, the Tribunal considers that it need not take a view on the issue of which Party's evidence is more credible and reliable on this point. Even assuming there were incursions to Hacienda Santa Fé commencing in the course of 2017, the Claimant does not argue that any such incursions could be attributed to the Nicaraguan State and indeed denies that any such incursions in fact took place.

178. As to the subsequent invasion of Hacienda Santa Fé that took place in June and July 2018, it is established by the evidence and indeed undisputed that this was not an isolated incident. The invasion of Hacienda Santa Fé took place in the context of widespread civil strife in the country, which commenced in the spring of 2018, and similar invasions were taking place elsewhere in the country. The Tribunal must therefore determine, on the basis of the evidence before it, whether the Claimant has established that the invasion and subsequent occupation of Hacienda Santa Fé during this period is properly attributable to the Nicaraguan State.

[124] The Respondent's witness on the issue, Mr José Valentin López Blandón, merely testified at the Hearing that he was invited by "*Wama*" "*to take this property once again*." Mr López Blandón did not participate in the alleged incursion and acknowledged during cross-examination that he may got the date wrong, never visited the area that was allegedly occupied in 2017 and appears to have been confused about the dates. Tr. 8 July 2024, 1291:21-1292:8; 1355:1-21; 1357:1-1360:21; 1363-1364. *See also* Resp. Rej., para. 111. *See also* letter from the Board of Directors of the "Pantasma group" (former demobilized members of the Sandinista Popular Army and the Patriotic Military Service) to the Attorney General's office at Jinotega, 28 October 2019 (**R-0094-ENG**) (stating that they "*have been working these lands* [in the community of Santa Fé, at El Pavón] *for two years*"), which suggests that they had entered the property in 2017.

(i) Whether the individuals who invaded and occupied Hacienda Santa Fé in June-July 2018 qualify as a "State organ" under Article 4 of the ILC Articles

179. As summarized above, the Claimant contends that organs of the Nicaraguan State were directly involved in the invasion and occupation of Hacienda Santa Fé in June-July 2018 and that these measures are attributable to the Nicaraguan State.[125] According to the Claimant, the relevant State organs include:

(a) Police Captain William Herrera and Commissioner Marvin Castro, who allegedly gave an order to not evict the paramilitaries from Hacienda Santa Fé;

(b) Police Inspector Calixto Vargas and other members of the police, who allegedly demanded that the workers at Hacienda Santa Fé hand over their weapons without lawful orders or authorizations;

(c) Mr Cristobal Luque, a voluntary police officer, who tried to disarm the security guards at Hacienda Santa Fé;

(d) Members of the Nicaraguan National Police, and mayor of San Rafael del Norte, Ms Norma Herrera, who escorted a paramilitary leader into Hacienda Santa Fé;

(e) Members of the National Police who escorted Mayor Herrera to Hacienda Santa Fé to give a speech on assisting paramilitaries to live at Hacienda Santa Fé;

(f) The elected members of the legislative branch of government, mayor of Jinotega, Mr Leónidas Centeno, and Mayor Herrera;

(g) The executive branch of government, including the Attorney General; and

(h) The courts.[126]

[125] Cl. Mem., para. 647.

[126] Cl. Mem., para. 648; Cl. Reply, para. 1052.

180. The Tribunal notes that the Respondent does not deny that the National Police, the mayors of Jinotega and San Rafael del Norte, the executive branch of the government, including the Attorney General, and the Nicaraguan courts, qualify as State organs and that their conduct is therefore attributable to the Nicaraguan State under Article 4 of the ILC Articles. Thus these points are undisputed, and the Tribunal agrees with them. However, this does not resolve the question of whether the conduct of these State organs, in connection with the invasion and occupation or thereafter, amounts to a breach of Nicaragua's international obligation under DR-CAFTA. This is a matter for the merits, specifically liability, subject to the Tribunal's determination of the Respondent's other preliminary defenses.

181. In its Memorial, the Claimant also contends that the paramilitaries who led the invasion and occupation of Hacienda Santa Fé qualify as voluntary police and, as such, are "*a part of the executive branch of the State under the internal law of Nicaragua*." Accordingly, in the Claimant's view, their conduct is attributable to the Nicaraguan State under Article 4 of the ILC Articles. The Claimant relies in support of its position in particular on the evidence of its expert witness, Professor Wolfe.[127] While the focus of the Claimants' case appears to have shifted in the course of the arbitration away from the argument, developed in the Memorial, that the invasion was conducted by paramilitaries, acting as a State organ (voluntary police), and instead focused on the State's direction and control over the invaders and its "*complicity*," "*permit*[ing]," "*facilitat*[ion]" and "*inaction*" during the invasion,[128] the Claimant has not formally amended its case and accordingly the Tribunal must consider the Claimant's case in its entirety, as stated in the Memorial and in the subsequent submissions, including at the Hearing.

182. The Respondent contends, specifically in response to Professor Wolfe's evidence, that in his first report Professor Wolfe draws no conclusions with respect to the events at Hacienda Santa Fé, and indeed the report does not contain a single mention of Hacienda Santa Fé, the Jinotega region or San Rafael del Norte. The Respondent further states that Professor Wolfe was not present at Hacienda Santa Fé at the time and does not claim to have been. According to the Respondent, Professor Wolfe's opinions therefore "*are simply not*

[127] Cl. Mem., paras. 650-652.

[128] Cl. PHB, paras. 2-3, 10-11.

competent factual evidence of the specific events giving rise to Riverside's claim."[129] While in his second report Professor Wolfe does suggest that the invaders of Hacienda Santa Fé were affiliated with the Nicaraguan government, the Respondent contends that Professor Wolfe's evidence is nonetheless based on hearsay testimony and that "[t]*here is no indication whatsoever that Prof. Wolfe independently verified the unproven allegations in that testimony (or even tried to verify them)*."[130]

183. The Tribunal notes that, while the Respondent does not challenge Professor Wolfe's evidence regarding the existence and the official status of "voluntary police" in Nicaragua, it contends that Professor Wolfe's report "*does not once presume to identify who invaded Hacienda Santa Fé in the summer of 2018 or conclude that it was the National Police or the voluntary police*." According to the Respondent, Professor Wolfe's evidence is not "*inconsistent with the reality that the invaders acted independently of the State and that their leaders were in large part demobilized former fighters from the anti-government side of Nicaragua's decade-long civil war*."[131]

184. Having considered the evidence before it, including the evidence of Professor Wolfe, the Tribunal accepts that "voluntary police" is a legally regulated form of police force in Nicaragua, forms part of the executive branch and qualifies as a State organ at least in certain circumstances.[132] Whether the individuals who led or participated in the invasion and occupation of Hacienda Santa Fé were part of the voluntary police is another matter. While Professor Wolfe appears to take the view that they were,[133] the Tribunal recalls that Professor Wolfe is not presented by the Claimant as a witness of fact but as an expert witness, "*to provide an expert report addressing the historical circumstances related to the civil disturbances in Nicaragua from April 2018 to date*."[134] Accordingly, Professor Wolfe relies in support of his conclusions on his own research as well as reports, including press reports, and other documents in the public domain. He was not at the property, or

[129] Resp. CM., paras. 272-273.
[130] Resp. Rej., para. 91.
[131] Resp. CM., para. 273.
[132] First Wolfe Report, paras. 32-102 (**CES-02**).
[133] First Wolfe Report, paras. 26-31, 50-56, 60-65, 85-102 (**CES-02**).
[134] First Wolfe Report, para. 2 (**CES-02**).

indeed in Nicaragua, at the relevant time. Consequently, while his evidence may shed light on the political and social context generally prevailing in Nicaragua in the spring and summer of 2018, Professor Wolfe is not in a position to give evidence on the concrete factual issue of whether the invaders who led and were involved in the invasion and occupation of Hacienda Santa Fé in the summer of 2018 were members of the voluntary police and qualify as an organ of the Nicaraguan State under Article 4 of the ILC Articles.

185. The Tribunal therefore finds that the Claimant has not proven that the individuals who invaded and occupied Hacienda Santa Fé in June/July 2018 qualify, individually or as a whole, as an organ of the Nicaraguan State within the meaning of Article 4 of the ILC Articles.

(ii) Whether the invasion and occupation of Hacienda Santa Fé was directed or controlled by the Nicaraguan State

186. As summarized above, the Claimant contends that the conduct of the paramilitaries that led the invasion and occupation of Hacienda Santa Fé was directed and controlled by the Nicaraguan State within the meaning of Article 8 of the ILC Articles.[135] While the Claimant acknowledges that "*it is not enough that the State supported or assisted with the execution of the wrongful action*," it claims that "*the responsibility is shown when the State caused the breach through its own conduct*."[136] What is required is evidence of "*effective control*."[137]

187. According to the Claimant, the evidentiary requirement of effective control is met in this case because:

(a) "*The State planned and selected the paramilitaries targets*;"

[135] As quoted above, Article 8 provides that "[t]*he conduct of a person or group of persons shall be considered an act of a State under international law if the person or group of persons is in fact acting on the instructions of, or under the direction or control of, that State in carrying out the conduct*."

[136] Cl. Mem., para. 666.

[137] Cl. Mem., paras. 673-74 (citing ICJ, *Nicaragua v. United States of America, Military and Paramilitary Activities*, Judgement, 27 June 1986, para. 115 (**CL-0022-ENG**)).

(b) "*The State provided the means to assist the commission of expropriations and other violations*;"

(c) "*The State exercised control through local municipalities and the National Police*;" and

(d) "*The State imposed its will on the paramilitaries*."[138]

188. The Claimant relies, on this issue as well, on the evidence of Professor Wolfe, who concludes in his second report that "[t]*he cumulative weight of the consistency of the extrinsic evidence and the testimonial evidence (along with the social media evidence) consistently supports the links between the Government and the invaders*," and that his assessment of the evidence "*leads to the reasonable conclusion that the occupation was not carried out by opponents of the State but by those controlled by or affiliated with the government of Nicaragua*."[139]

189. The Tribunal has determined above that, while Professor Wolfe's evidence may shed light on the general political and social context prevailing in Nicaragua at the relevant time, he is not in a position to give evidence on concrete factual issues such as whether the invaders were members of the "voluntary police." This determination applies with equal force to the question of whether the individuals who led and were involved in the invasion and occupation of Hacienda Santa Fé in June-July 2018 acted under the direction and control of the Nicaraguan State. The Tribunal therefore is unable to give any weight to Professor Wolfe's evidence on this issue.

190. The Claimant also relies in support of its position on control on the evidence of its witnesses of fact, Messrs Luis Gutierrez and Jaime Vivas. Specifically, the Claimant contends that the evidence of Messrs Gutierrez and Vivas establishes that the invaders themselves admitted their connection to the State, and that Mayor Centeno sent them to invade Hacienda Santa Fé on behalf of the government.[140] The Tribunal notes that the evidence

[138] Cl. Mem., para. 675. *See also* Cl. Reply, paras. 1095-1096.

[139] Second Wolfe Report, paras. 119-120 (**CES-05**).

[140] Cl. Mem., paras. 659-660; *see also* Cl. Reply, paras. 1086, 1096-1100.

of these witnesses is virtually in its entirety based on hearsay, even double hearsay.[141] The same applies to the alleged statement by Mr Favio Darío Enríquez Gómez that Hacienda Santa Fé had been expropriated by the State because its owners were foreigners.[142] Indeed, Mr Enriquez himself denies that he had made such a statement.[143] While there is no formal rule of exclusion of hearsay evidence in international law, such evidence cannot be considered sufficient, absent any supporting documentary or other reliable evidence. Similarly, the fact that one of the Claimant's witnesses of fact (Mr Vivas) states that he saw Mayor Herrera visiting Hacienda Santa Fé under police escort during the occupation, or speaking to the invaders, is in itself not evidence of the Mayor (or indeed of the State) being involved in the occupation. Police Captain (now Deputy Commissioner) William Herrera also denies in his evidence that the police ever escorted Mayor Herrera to Hacienda Santa Fé.[144]

191. The Tribunal notes, in this connection, that the Claimant does not specifically rely, in support of its case on attribution, on the emails exchanged between Luis Gutierrez and Carlos Rondón between 17 June and 21 August 2018. Although these exchanges are contemporaneous, they are brief, most of them consisting only of a few lines, and do not contain any evidence, other than hearsay, to support the Claimant's contention that the invasion was directed and controlled by the State.[145]

192. The Claimant also relies on the letter from the El Pavón Cooperative to the Attorney General of Nicaragua dated 5 September 2018, which allegedly shows that the invaders themselves admitted that they were acting on behalf of the State. The letter states, in relevant part:

> "[T]*he property* [Hacienda Santa Fé] *is possessed and controlled by the members of the former Nicaraguan Resistance affiliated with the* ***EL PAVON*** *Farming and Services Cooperative Association, which was*

[141] First Gutiérrez Statement, paras. 42, 73, 89, 99, 129 (**CWS-02**); Henrriquez Cruz Statement, paras. 16, 35 (**CWS-06**).

[142] Cl. Reply, paras. 371, 1053(f).

[143] Enríquez Gómez Statement, para. 11 (**RWS-21**).

[144] First Herrera Statement, paras. 30-31 (**RWS-03**); Second Herrera Statement, para. 24(f) (**RWS-12**).

[145] Emails exchanged between Luis Gutiérrez and Carlos Rondón between 17 June 2018 and 21 August 2018 (**C-0296**), (**C-0303**), (**C-0340**), (**C-0350**).

> *acknowledged and authorized by the Management of the Labor Department's National Register of Cooperative Associations and Farming Industries as evidenced in Resolution No. 612-17 of 1997* […]. *All of the affiliated members were members of the Former Nicaraguan Resistance, and we are currently members of the Alianza Unidad Nicaragua Triunfa* […]*, which is presided over and led by the Sandinista National Liberation Front (SNLF) and thus we can say that we are directly under the leadership of our comrade the President of the Republic, Commander Daniel Ortega Saavedra and our comrade and Vice-President Rosario Murillo*."[146]

193. The Claimant mischaracterizes the contents of the letter. The letter does not say that the invaders admitted having acted on behalf of the State; it rather makes a request, on behalf of Cooperative El Pavón, which is said to be controlled by former members of the Nicaraguan resistance, for the support of the Nicaraguan government in regularizing their possession of Hacienda Santa Fé. The letter also confirms the support of the Cooperative to the Nicaraguan government. It does not say anything about the circumstances of the invasion or any government support in connection with the invasion.

194. The Claimant further relies on the report from Commissioner Marvin Castro to Mr Francisco Diaz, Deputy Chief of the National Police, dated 31 July 2018, to claim that "*tangible written evidence corroborates that, not only were the invaders directed by the State to invade, but they were also explicitly instructed by State authorities to sustain their occupation*."[147] However, this is not what the letter shows. It rather reports on land invasions in the Department of Jinotega, stating that there had been one, "*located in the Municipality of San Rafael del Norte, El Pavón Community, El Pavón Cooperative owned by citizen Carlos Rondón*." The letter describes the property, including the buildings, those controlling the property prior to its occupation (Mr Gutierrez and the security guards), and explains that the property had been previously, in 1990, taken over by members of the Nicaraguan resistance. The letter goes on to state:

> "*Currently, on* ***June 18, 2018, at about 09:30 am****, the same leadership in addition to some 400 men belonging to former members of the resistance*

[146] Letter from "Cooperativa El Pavón" to the Attorney General of the Republic of Nicaragua, 5 September 2018 (**R-0065-SPA-ENG**) (Emphasis in the original).
[147] Cl. Reply, paras. 81(b), 319 (relying on Report from Commissioner Marvin Castro to Francisco Díaz, Deputy Chief of the National Police regarding the Invasion of Hacienda Sante Fé, 31 July 2018 (**C-0284-SPA-ENG**)).

> *and former members of the army, took this property again carrying* ***shotgun-type firearms, 22 M caliber rifles, pistols and knives****. Stating that they will fight until the right of possession that was taken from them without any judicial order is restored to them again.*
>
> *Don Carlos Rondón has not presented a deed where he is accredited as the owner of said property, likewise the leadership formed by the citizens have presented: legal status of the cooperative, letter to the president of the republic and letter to the PGR* [Attorney General's Office of Nicaragua], *as well as the certificate of property in the name of Mrs. Lorena Rondón, where the agrarian reform recognized the existence of the directive of the El Pavón Cooperative.*
>
> *At the moment none of the parties have presented judgments, resolutions or judicial offices that accredit them as owners. In a conversation that has been had with members of the cooperative, they have indicated that they have communicated with comrade Edwin Castro and that he has mentioned to them to stay in that property since the government is looking for a way to buy it.*"[148]

195. The report does not support the Claimant's allegation that the invaders were "*directed by the State to invade*" and "*explicitly instructed by State authorities to sustain their occupation*." Moreover, while the report does refer to Congressman Edwin Castro, who "*mentioned to them to stay in th*[e] *property since the government is looking for a way to buy it*," this does not show that the invaders were directed by the State to invade the property. While the report does mention that Congressman Castro advised the invaders to stay at the property, Mr Castro is not a "State authority" or a "State organ," as determined above. It also appears from the evidence produced by the Respondent that the invaders may have contacted Congressman Castro because he previously worked with the Foundation of Ex-Combatants of Ward (*Fundación Ex Combatientes de Guerra,* or *FUNDEX*), which was involved with the resettling of the demobilized members of the Nicaraguan resistance.[149]

196. Finally, the Tribunal notes that, while at least some members of Cooperative El Pavón appear to have returned to Hacienda Santa Fé in an effort to enforce the unkept promises of the Chamorro government back in 1990 regarding the acquisition of Hacienda Santa Fé,

[148] Report from Commissioner Marvin Castro to Francisco Díaz, Deputy Chief of the National Police regarding the Invasion of Hacienda Sante Fé, 31 July 2018 (**C-0284-SPA-ENG**) (Emphasis in the original).

[149] Resp. Rej., para. 77 (citing Second López Blandón Statement, para. 39 (**RWS-13**)).

this does not evidence that Hacienda Santa Fé was invaded and occupied in 2018 on behalf of the Nicaraguan State or make the invasion and occupation attributable to the State.[150]

197. In light of the above, the Tribunal rejects the Claimant's argument that the invasion and occupation of Hacienda Santa Fé in June-July 2018 was directed and controlled by the Nicaraguan State within the meaning of Article 8 of the ILC Articles.

(iii) Whether the Nicaraguan State acknowledged and adopted the conduct of the invaders as its own

198. The Claimant also contends that the Nicaraguan State acknowledged and adopted the conduct of the invaders as it own and therefore is responsible for their conduct under international law in accordance with Article 11 of the ILC Articles. According to the Claimant, the Nicaraguan Government, including President Ortega, "*repeatedly has acknowledged and adopted the actions of the paramilitaries*," and that President Ortega, "*as the 'supreme chief' of the National Police, has the power to command and dismiss the police at will*."[151]

199. In support, the Claimant refers to President Ortega's TV interview on Euronews on 30 July 2018, in which the President "*acknowledged a connection between paramilitaries and the State*," and "*admitted that the paramilitaries are volunteer police*."[152] The leaders of the Nicaraguan National Police have similarly admitted in TV interviews that the National Police directs the volunteer police.[153] Furthermore, according to the witness statement of Mr Gutierrez, Mayor Herrera in her speech to the invaders on 6 August 2018 "*promised to assist the paramilitaries to stay at Hacienda Santa Fé*."[154] The Claimant also contends that the actions of Congressman Edwin Castro in July 2018 "*exemplify*

[150] The documentation relating to the settlement of demobilized members of Cooperative El Pavón during the period 1990 to 2002 is compiled in exhibit **R-0177-ENG**.

[151] Cl. Mem., para. 707.

[152] Cl. Mem., para. 708 (referring to Transcript excerpt of Euronews TV, Interview with Nicaragua's President Daniel Ortega on the Country's Deadly Crisis, Uploaded 30 July 2018 [Minutes 8:40-9:37] (**C-0124-ENG)**).

[153] Cl. Mem., paras. 709-710 (referring to Transcript Dagblabet TV, interview to Francisco Díaz, Director General of the Nicaraguan National Police, uploaded 4 February 2019 (**C-0133-SPA-ENG)**).

[154] Cl. Mem., para. 713 (referring to First Gutiérrez Statement, para. 101 (**CWS-02**). Mr Gutierrez in turn relies as the source of his evidence on Mr Vivas; *see* Henrriquez Cruz Statement, para. 49 (**CWS-06**)).

acknowledgment and adoption."[155] Nor did the State "*take any steps* [to] *denounce the occupation*."[156]

200. The Respondent denies that it "*in any way supported or condoned*" the invasion.[157]

201. Having considered the Claimant's argument under Article 11 of the ILC Articles, the Tribunal finds that the evidence is insufficient to support it. President Ortega's statement that paramilitaries are voluntary police, or the statement of the leaders of the National Police to the same effect, do not establish, specifically, that the invasion and occupation of Hacienda Santa Fé was conducted by the voluntary police (as already determined above in Section VI.A(2)(b)(i)). Nor is there sufficient evidence to support the Claimant's allegation that Mayor Herrera's speech to the invaders on 6 August 2018 amounts to an endorsement or adoption of the invasion and occupation. Even assuming that Mr Gutierrez's evidence were not to be rejected as hearsay, it does not contain much detail about the Mayor's speech and, without more, cannot be considered to constitute sufficient evidence of the Mayor's acknowledgement or adoption of the conduct of the invaders on behalf of the State.

202. The Claimant's argument that the Nicaraguan State acknowledged and adopted the conduct of the invaders of Hacienda Santa Fé as its own is therefore rejected.

****

203. While the Tribunal has upheld above the Respondent's attribution defense, the decision does not dispose of the Claimant's claims in their entirety. Specifically, it does not dispose of the Claimant's claims insofar as they relate to the Claimant's allegations that (i) the Nicaraguan State was directly involved in the invasion and occupation of Hacienda Santa Fé (see paragraphs 179-180 above); (ii) the Respondent's response to the invasion and occupation was inadequate and thus in breach of DR-CAFTA; (iii) the Respondent failed to restore the property to Inagrosa and/or the Claimant; and that (iv) the Respondent

[155] Cl. Reply, para. 1112.
[156] Cl. Reply, para. 1113.
[157] Resp. CM., para. 271.

committed further breaches of DR-CAFTA that were not directly related to the invasion and occupation, including by way of the Court Order. Subject to the Tribunal's decisions on the Respondent's other preliminary defenses, these claims remain to be determined.

B. THE NATIONAL SECURITY EXCEPTION

204. The Respondent submits that the self-judging essential security clause at Article 21.2(b) of DR-CAFTA is a "*complete defense*" and "*forecloses any claim related to Nicaragua's response to the occupation of* [Hacienda Santa Fé] *by armed former rebels*." According to the Respondent, Nicaragua's decision to "*permanently resettle the heavily armed invaders through peaceful negotiation rather than force is thus exempt from review*."[158] The Respondent submits that it is not the Tribunal's role to make an independent determination of whether Article 21.2(b) of DR-CAFTA applies because the provision is "*self-judging by design*."[159]

205. The Claimant asserts that the Respondent "*appears to misunderstand the meaning of the Essential Security Provision*." According to the Claimant, it is entitled to a higher standard of protection because (i) the Most-Favored Nation ("**MFN**") clause of DR-CAFTA entitles it to invoke Nicaragua's other investment treaties such as the Nicaragua-Russian Federation and Nicaragua-Switzerland bilateral investment treaties (the "**Russian BIT**" and the "**Swiss BIT**," respectively), which do not contain non-precluded measures clauses; (ii) Article 21.2(b) does not impact the Tribunal's jurisdiction or findings of liability "*but only precludes the Tribunal from ordering Nicaragua to withdraw its measures*;" and (iii) Nicaragua has failed to invoke Article 21.2(b) in good faith as the measures that form the subject of Riverside's claims "*have nothing to do*" with Nicaragua's essential security interests.[160]

[158] Resp. PHB, para. 9.

[159] Resp. PHB, para. 84.

[160] Cl. Reply, para. 1201.

(1) The Parties' Positions

a. The Respondent's Position

(i) Counter-Memorial

206. The Respondent contends that the invasion of Hacienda Santa Fé "*came at an especially sensitive time when Nicaragua was being rocked by months of unrest and political violence that caused hundreds of deaths and widespread property damage*."[161] The State's calibration of its response to the occupation of Hacienda Santa Fé therefore "*implicated Nicaragua's interests in both calming and containing the civil strife that was then rocking the country and maintaining the settlement that ended the civil war*." In the Respondent's view, Nicaragua's response to the invasion and occupation accordingly falls within the scope of DR-CAFTA's non-precluded measures (Article 21.2(b)) and civil strife (Article 10.6) clauses, which "*provide a complete defense against all of Riverside's claims based on measures Nicaragua considered necessary for its essential security interests and took in response to conditions of civil strife*."[162]

207. The Respondent submits that the Claimant's claims fail under Article 21.2(b) of DR-CAFTA "*because they seek to hold Nicaragua liable for non-precluded measures – specifically the measured and de-escalatory strategy that Nicaraguan authorities successfully used to remove the illegal occupants from Hacienda Santa Fé peacefully – that Nicaragua considered necessary for the protection of its own essential security interests*."[163] According to the Respondent, the "*measures taken to protect 'essential security interests' fall outside of the scope of the Treaty, and thus cannot be a basis for international responsibility under the Treaty*."[164] The Respondent alleges that, instead, such measures are considered as non-precluded measures "*that are not internationally wrongful so long as the State considers them necessary to achieve the objectives carved out by Article 21.2(b)*."[165]

---

[161] Resp, CM., para. 31.

[162] Resp. CM., para. 32 (Section I).

[163] Resp. CM., para. 286.

[164] Resp. CM., para. 288.

[165] Resp. CM., para. 288.

208. The Respondent contends that Article 21.2(b) of DR-CAFTA constitutes *lex specialis* that "*limits the applicability of an international treaty with respect to certain types of conduct*" and its effect is to "*preclude*[] *the existence of a violation with respect to any and all substantive treaty provisions*."[166] The hallmark of a self-judging clause is the phrase "*that it considers*," which is present in Article 21.2(b) and makes explicit its self-judging nature. Thus the question of whether Nicaragua's response to the invasion and occupation of Hacienda Santa Fé was necessary to protect its own essential security interests is a matter to be determined by Nicaragua under Article 21.2(b).[167]

209. The Respondent acknowledges that the self-judging nature of Article 21.2(b) "*does not mean that a state's conduct is entirely immunized from a tribunal's review*;" however, such review "*is limited to whether its invocation is consistent with the bounds of 'good faith' as prescribed by Article 26 of the* [Vienna Convention on the Law of Treaties (the "**Vienna Convention**" or the "**VCLT**")]."[168] The Respondent submits that, in order to pass the good faith test, "*the question a tribunal must ask is whether a reasonable person in the State's position could have concluded that there was a threat to national security or public order sufficient to justify the measures taken.*" The Respondent submits that Nicaragua surpasses the good faith test in the present case.[169]

210. The Respondent claims that under Article 21.2(b) of DR-CAFTA, Nicaragua has "*wide discretion to determine the measures it considered necessary to preserve its essential security interests*."[170] While DR-CAFTA does not provide a definition of "essential security interest," a State that is "*in the midst of civil unrest*" has broad discretion to pursue its security needs as it determines necessary in accordance with the self-judging provision of Article 21.2(b).[171]

---

[166] Resp. CM., para. 289 (citing Burke-White and Von Staden, "*Investment Protection in Extraordinary Times*," 48 *Va. J. Int'l. L.* 307 (2008), pp. 322, 331 (**RL-0032**)).

[167] Resp. CM., paras. 289-290.

[168] Resp. CM., para. 293.

[169] Resp. CM., para. 293 (Emphasis in the original omitted).

[170] Resp. CM., para. 295.

[171] Resp. CM., para. 295.

211. The Respondent submits that the relevant essential security interests may be "*external, internal, or even economic*,"[172] and they were implicated by Nicaragua's response to the invasion of Hacienda Santa Fé. First, contemporaneous with the invasion, Nicaragua faced "*an unprecedented period of civil strife,*" and there was nationwide unrest that lasted several months. According to the Respondent, "[t]*he episodes of violence took place from April to July 2018, but the crisis was prolonged through the end of 2018*." As a result of the violence, "*198 people, including 22 police officers, lost their lives; some 1,240 persons were injured; and 401 police officers were injured with firearms*," and the disorder also involved substantial destruction of public and private property, including "*numerous invasions of private land…*".[173]

212. According to the Respondent, the unrest also affected San Rafael del Norte, and the National Police detachment of eight officers "*faced widespread violence from armed groups who blockaded major roads and burned vehicles*."[174]

213. The Respondent submits that in late May 2018, President Ortega, on live television, gave orders for the National Police to remain in their barracks, following negotiations between the government and the civil society. According to the Respondent, the measure was thus taken in respect of an essential security interest of Nicaragua. In the circumstances, to deploy large groups of police to Hacienda Santa Fé or to engage in an armed confrontation with the invaders "*would have been inconsistent with the Government's efforts to resolve the ongoing national crisis in the summer of 2018*."[175]

214. The Respondent stresses that the invasion of Hacienda Santa Fé was "*closely linked to an earlier and far worse conflict*" – the civil war between the government led by Mr Ortega and the *Contras*, which lasted from 1979 to 1990. In 1990, as part of a negotiated peace process, the then-President of Nicaragua, Violeta Barrios de Chamorro, promised land to former *Contras* and their families in exchange for their demobilization. However, in some instances, including in the case of Hacienda Santa Fé, the properties promised to the former

[172] Resp. CM., para. 295.
[173] Resp. CM., para. 297.
[174] Resp. CM., para. 298.
[175] Resp. CM., para. 299.

Contras were privately held, which required the government to find alternative locations for resettlement. Thus, according to the Respondent, since the invasion of Hacienda Santa Fé coincided with the civil unrest that commenced in April 2018 and was led by former *Contras*, it required a "*measured and de-escalatory response* [which] *therefore falls within the non-precluded measures clause of Article 21.2(b) and cannot be a source of liability for Nicaragua under the DR-CAFTA*."[176]

(ii) Rejoinder

215. In its Rejoinder, the Respondent submits that, contrary to what the Claimant argues in its Reply, the MFN clause of DR-CAFTA does not allow the Claimant to circumvent Article 21.2(b). This is the case because Article 21.2(b) itself provides that "[n]*othing* ***in this Agreement*** *shall be construed … to preclude a Party from applying measures that it considers necessary for … the protection of its own essential security interests*."[177] Article 21.2(b) thus extends to every provision of DR-CAFTA, including the MFN clause in Article 10.4. The Respondent also notes that the Claimant "*cannot cite a single legal authority that supports an investor's ability to invoke an MFN provision in order to strike an entire clause in the base treaty*." Moreover, Nicaragua expressly excluded measures related to the "*provision of law enforcement*" from the operation of the MFN clause pursuant to its reservation in Annex II of DR-CAFTA. This also follows from the logic of the two clauses: while Article 10.4 governs the standards of protection available under the DR-CAFTA, Article 21.2(b) is not part the Treaty's investment chapter at all but is part of a separate chapter that identifies "*exceptions*" to the treaty's application.[178]

216. The Respondent also relies upon the evidence of its legal expert, Professor William Burke-White, who in his expert opinion discusses "*the historical context of US-concluded* [non-precluded measures] *clauses and the genesis of the crucial self-judging 'it considers necessary' language included in Article 21.2(b).*"[179] According to the Respondent, as explained by Professor Burke-White, the treaty practice of the United States with regard to

[176] Resp. CM., paras. 300-305.

[177] Resp. Rej., para. 536 (Emphasis in the original).

[178] Resp. Rej., paras. 538-542.

[179] Resp. Rej., para. 544.

non-precluded essential security interests clauses "*changed markedly after the decision of the* [International Court of Justice, or the "**ICJ**"] *in the U.S. v. Nicaragua case*" because the ICJ found that the United States could not invoke the security exception provision in the relevant treaty since it did not contain the critical "*it considers necessary*" language. The Respondent submits that the Tribunal should construe Article 21.2(b) "*in light of this history*."[180]

217. The Respondent further submits that, contrary to the Claimant's argument, Article 21.2(b) does not restate the customary international law defense of necessity but rather defines an exception to the applicability of the DR-CAFTA. According to the Respondent, there would be no need to negotiate and draft an exception to the DR-CAFTA that simply restates customary international law. Relying on the evidence of Professor Burke-White, the Respondent argues that the Tribunal retains a "*residual good faith review*," which "*offers a meaningful – though circumscribed – opportunity to ensure a party has invoked the treaty's* [non-precluded measures] *clause in good faith*."[181] There are two "*prongs*" to the good faith review, the first one being the determination of whether the State that is invoking the clause has acted "*honestly and dealt fairly with its treaty commitments*" and the second one being the determination of whether the State has a reasonable basis for invoking the clause, "*based on its own understanding of the situation it was facing*."[182] According to the Respondent, the civil strife in Nicaragua in 2018 "*imperiled its essential security*" and Nicaragua's "*honesty and fair dealing*" is reflected in the fact that it has never disputed and continues to reaffirm the Claimant's legal ownership of Hacienda Santa Fé.[183]

218. The Respondent disputes the Claimant's argument that Article 21.2(b) only precludes the Tribunal from ordering Nicaragua withdraw its measures and is irrelevant to the question of liability. According to the Respondent, the Claimant's position is contrary to the principle of effective interpretation, which requires that each treaty provision "*should be*

[180] Resp. Rej., paras. 545-547.

[181] Resp. Rej., para. 550.

[182] Resp. Rej., paras. 550-551.

[183] Resp. Rej., para. 551 (quoting Burke-White Report (**RER-06**), paras. 43-48).

read to have effect and not rendered redundant."[184] The Claimant's reading would turn Article 21.2(b) into a "*legal nullity*." The principle of effectiveness thus requires reading Article 21.2(b) to mean that a State cannot be held liable under DR-CAFTA for measures falling with its scope because "*actions covered by a non-precluded measures exception are not breaches of the treaty*."[185] Therefore, in the present case, there cannot be any obligation for Nicaragua to pay compensation because its conduct does not constitute a breach of an international obligation.[186] The Respondent contends that the *Eco Oro* award, on which the Claimant relies, "*made precisely th*[is] *error*," as the environmental exception in the applicable treaty was rendered effectively "*symbolic*" and was not given an effective interpretation. According to the Respondent, *Eco Oro* should therefore be "*regarded as wrongly decided*."[187]

219. In conclusion, the Respondent submits that Article 21.2(b) of DR-CAFTA establishes "*a complete defense to liability and damages,*" precluding liability for Nicaragua's choice of approach to the invasion and occupation of Hacienda Santa Fé.[188]

(iii) Post-Hearing Submission

220. In its Post-Hearing Submission, the Respondent reiterates its position, in particular in light of the recent *Seda v. Colombia* award (which became available during the Hearing and was admitted into the record after the Hearing),[189] regarding (i) the self-judging nature of Article 21.2(b); (ii) the historical context of a national security exception clause; (iii) whether a national security exception clause precludes wrongfulness and liability; (iv) the effect of the MFN clause; (v) whether a national security exception is a "necessity" defense; and (vi) the scope of the good faith review.

---

[184] Resp. Rej., para. 553.

[185] Resp. Rej., para. 554.

[186] Resp. Rej., para. 554 (citing *LG&E Energy Corp., LG&E Capital Corp. and LG&E International Inc. v. Argentine Republic*, ICSID Case No. ARB/02/1, Decision on Liability, 3 October 2006, para. 261 (**RL-0035**)).

[187] Resp. Rej., para. 558.

[188] Resp. Rej., para. 560.

[189] *Angel Samuel Seda et al. v. The Republic of Colombia,* ICSID Case No. ARB/19/6, Award, 27 June 2024, paras. 742-756, 795 (**RL-0219**).

221. The Respondent argues that the *Seda* award accepted that (i) an identically-worded national security exception clause was self-judging; (ii) the historical context and the *travaux préparatoires* of the relevant treaty supported the respondent's position that the terms "*it considers necessary*" evidenced the self-judging nature of the provision; (iii) the provision operated so as to preclude wrongfulness and therefore also the obligation to pay compensation; (iv) the treaty's MFN clause could not operate so as to exclude the effects of the national security exception; (v) the national security exception is not a "*necessity*" defense, which is an affirmative defense and as such not self-judging; and (vi) the only exception to the non-reviewability of a State's invocation of a self-judging national security exception is a "*good faith review*," which is an "*extremely deferential standard*."[190]

222. As to this last point, the Respondent argues that it has proven that it invoked Article 21.2(b) in good faith, and the Claimant has failed to overcome its own burden of proof. The Respondent also contends that it timely raised the essential security defense in its Counter-Memorial. The Respondent notes that Article 21.2(b) "*contains no timing requirement*," which was also the position adopted by the *Seda* tribunal.[191]

b. The Claimant's Position

(i) Reply

223. The Claimant argues that the Respondent "*appears to misunderstand the meaning*" of Article 21.2(b) of DR-CAFTA.

224. The Claimant contests the applicability of the national security exception in this arbitration on three grounds: (i) Riverside is entitled to a higher standard of protection available in other Nicaraguan investment treaties that do not allow Nicaragua to escape liability because of essential security; (ii) the national security exception of DR-CAFTA does not impact the Tribunal's jurisdiction or findings of liability, "*but only precludes the Tribunal from ordering Nicaragua to withdraw its measures (a remedy that has not been sought in this arbitration by Riverside)*;" (iii) Nicaragua has not invoked the national security

[190] Resp. PHB, paras. 86-107.

[191] Resp. PHB, paras. 108-117.

exception in good faith since the measures that are subject to Riverside's claims "*have nothing to do with the essential security interest invoked by Nicaragua;*" and (iv) Nicaragua cannot invoke the national security exception because the relevant measures were not "*necessary*" within the meaning of Article 25 of the ILC Articles.[192]

225. These four arguments are summarized below in turn.

226. First, the Claimant argues that under Article 10.4 of DR-CAFTA, Riverside is entitled to the same level of protection granted to foreign investors and investments under Nicaragua's other investment treaties, such as the Russian BIT.[193] Unlike DR-CAFTA, the Russian BIT does not contain a non-precluded measures clause. Nicaragua thus offers a more favorable treatment to Russian investors and accordingly, under Article 10.4 of DR-CAFTA, the same treatment must be extended to U.S. investors such as the Claimant.[194]

227. Second, the Claimant argues that Article 21.2(b) does not impact the Tribunal's jurisdiction or findings on liability. According to the Claimant, "*nothing in CAFTA Article 21.2(b)'s essential security provision allows Nicaragua to absolve itself of liability for breaching the CAFTA or shield it from paying compensation as a remedy*."[195] Article 21.2(b) merely ensures that Nicaragua can maintain its measures of "*unlawful possession*" of Hacienda Santa Fé, but since the Claimant is not asking for restitution, the provision does not deprive the Tribunal of its jurisdiction and does not absolve Nicaragua of its liability. According to the Respondent, a self-judging provision "*allows a State to determine for itself which measures it requires for a stated goal*," however, since Riverside does not dispute whether Article 21.2(b) is self-judging, the question is "*irrelevant to the analysis of the consequences of invoking Article 21.2(b).*"[196]

228. In support of its position, the Claimant relies on the *Eco Oro v. Colombia* award, which involved an environmental exception in the applicable Free Trade Agreement between

[192] Cl. Reply, paras. 1201-1243.

[193] Agreement between the Government of the Russian Federation and the Government of the Republic of Nicaragua on the Promotion and Reciprocal Protection of Investments, which entered into force on 3 September 2013 (**CL-0033**).

[194] Cl. Reply, paras. 1202-1210.

[195] Cl. Reply, para. 1213.

[196] Cl. Reply, paras. 1213-1216.

Canada and Colombia (the "**Canada-Colombia FTA**"). The tribunal found that Colombia was liable to compensate the claimant for losses suffered as a result of its breaches of the treaty even if it had properly invoked the environmental exception. The Claimant contends that the Respondent's interpretation incorrectly conflates the self-judging nature of Article 21.2(b) with avoiding liability and the Tribunal's review powers. The Claimant's interpretation is therefore to be preferred, also because it is in line with the principle of "*effet utile*," thus ensuring that the provision is given full effect while reducing conflict with the remainder of the Treaty.[197]

229. Third, the Claimant argues that in order to invoke Article 21.2(b) in good faith, Nicaragua must show that there is a "*connection between the measure at issue and the essential security interest advanced as being necessary to protect*."[198] Accordingly, the measures at issue must meet a "*minimum requirement of plausibility in relation to the proffered essential security interests*, i.e. *that they are not implausible as measures protective of these interests*."[199] The Claimant submits that Nicaragua bears the burden of proving that there is such a plausible connection, but has failed to make such a showing.[200]

230. Finally, the Claimant maintains that it is helpful to consider how similar provisions in other treaties have been understood and applied. Thus, for instance, the practice of the World Trade Organization ("**WTO**") under Article XXI of the General Agreement on Tariffs and Trade ("**GATT**"), which contains a similar national security exception, shows that while parties have discretion in determining their essential security interests, this discretion is not unlimited in the sense that the measures must be necessary and genuinely related to the protection of essential security interests.[201] The Claimant further contends that the key determination is the interpretation of the term "*necessary*." According to the Claimant, investment treaty tribunals have assessed the necessity, proportionality and genuineness of

[197] Cl. Reply, paras. 1217-1226 (referring to *Eco Oro Minerals Corp. v. Republic of Colombia*, ICSID Case No. ARB/16/41, Decision on Jurisdiction, Liability and Directions on Quantum, 9 September 2021 (**CL-0225**), paras. 623-699, 743-821, 826-837).

[198] Cl. Reply, para. 1229.

[199] Cl. Reply, para. 1230.

[200] Cl. Reply, paras. 1232-1236.

[201] Cl. Reply, paras. 1237-1243.

the measures in light of the treaty's objectives and principles of international law, and have equated the national security exception with the necessity defense under Article 25 of the ILC Articles.[202]

(ii) Post-Hearing Submission

231. In its Post-Hearing Submission, the Claimant argues that Nicaragua's reliance on the national security exception in Article 21.2(b) of CAFTA "*is a transparent attempt to justify its wrongful actions by invoking national security*." According to the Claimant, the national security exception "*was never intended as a blanket excuse for states to circumvent their international obligations*." The Claimant submits that Nicaragua has failed to identify concrete essential security measures within its pleadings. It only did so belatedly at the Hearing but has failed to demonstrate that the measures it identified were necessary for its essential security interests, taken in good faith and proportionate to the harm caused.[203]

232. The Claimant submits that Article 21.2(b) of CAFTA "*does not grant* carte blanche *to disregard treaty obligations*" and does not strip the Tribunal of jurisdiction. According to the Claimant, before being able to invoke the national security exception as a defense, "*Nicaragua must establish a* prima facie *breach of CAFTA*." Article 21.2(b) must be interpreted in accordance with the rules of treaty interpretation set out in the Vienna Convention. General issues, such as "*societal interests*" that are not "*essential*" or necessary to protect "*essential security*" fail to meet the definition of "*essential security interests*."[204] This is the case here.

233. The Claimant also refers to the practice of GATT/WTO panels to argue that national security exception provisions such as those in Article XXI of the GATT and Article 21.2(b) of CAFTA are not totally self-judging, even if they contain the language of "*it considers necessary*." The term "*considers*" implies "*some deference*," but as the WTO panel in

[202] Cl. Reply, paras. 1238-1240.

[203] Cl. PHB, paras. 42-43.

[204] Cl. PHB, paras. 45-48 (citing *Deutsche Telekom AG v. The Republic of India*, PCA Case No. 2014-10, Interim Award, 13 December 2017, paras. 236-238 (**CL-0224-ENG**)).

Russia – Traffic in Transit held, "*the existence of a genuine national security threat is not subject to such deference and must be objectively proven*."[205] Accordingly, the situation must present a "*genuine and severe threat to the state's security*" and cannot be a "*disguised restriction on international investment obligations*." Once an essential security threat is established, the Tribunal must assess the degree of deference to the State's determination that the measures are necessary, however, good faith is a "*non-negotiable requirement*."[206]

234. The Claimant stresses that there must be a "*balanced approach*" to claims of national security. Such claims must be "*objectively assessed for good faith, proportionality, and genuine necessity.*"[207] The burden is on the party invoking the exception to prove that the invocation was made in good faith. When determining whether Nicaragua has acted in good faith, the Tribunal cannot rely on the evidence of Professor Burke-White on factual matters since, as he himself acknowledges, he is not an expert on Nicaraguan history and politics. According to the Claimant, the evidence before the Tribunal establishes that Nicaragua did not act in good faith. This is supported by the evidence of the Claimant's expert, Professor Wolfe. There is no plausible connection between the invasion of Hacienda Santa Fé and the settlement of hostilities from the 1979 revolution.[208]

235. The Claimant submits that the Respondent has failed to satisfy the threshold for establishing an essential national security interest. In order to be able to invoke Article 21.2(b) in good faith, Nicaragua must show that the measures taken "*directly serve an essential security interest*." The measures therefore must be "*plausible and genuinely connected*" to protecting such interest. According to the Claimant, the Respondent has not met this burden. There is no contemporaneous evidence linking the occupation of Hacienda Santa Fé to any essential security interest, nor did Nicaragua raise the national security exception as a defense "*at the early stages of this dispute, only invoking it later in*

[205] Cl. PHB, para. 50 (citing *Russia – Measures Concerning Traffic in Transit*, Report of the Panel, Document WT/DS512/R, 5 April 2019, paras. 7.101,7.82,7.65-7.77 (**CL-0233-ENG**)).

[206] Cl. PHB, paras. 51-53 (citing *Angel Samuel Seda and others v. Republic of Colombia*, ICSID Case No. ARB/19/6, Award, 27 June 2024, para. 755 (**CL-0423-ENG**)).

[207] Cl. PHB, paras. 54-55.

[208] Cl. PHB, paras. 56-68.

an apparent effort to avoid liability after substantial damage to Riverside's investment had already occurred." The Claimant contends that the *CC/Devas v. India* tribunal rejected India's invocation of an essential security interest in similar circumstances for lack of good faith.[209]

236. The Claimant argues that (i) Nicaragua's failure to provide police protection to Hacienda Santa Fé "*does not meet the high threshold of an 'essential' security event under CAFTA*;" (ii) the Tribunal must assess whether Nicaragua's actions were genuinely necessary for its essential security interests and proportionate to the alleged threat; (iii) only limited deference is provided to States in matters involving essential security interests; and (iv) Nicaragua has invoked essential security interests "*opportunistically*."[210]

237. The Claimant contends that Nicaragua has not provided contemporaneous evidence showing that it considered the 2018 occupation of Hacienda Santa Fé as affecting its essential security interests, and it also raised the defense belatedly, only during the arbitration. The Claimant relies, in support, in a series of investment treaty cases arising out of the Argentine financial crisis such as *CMS v. Argentina*, *Enron v. Argentina*, *Sempra v. Argentina*, *LG&E v. Argentina* and *Continental Casualty v. Argentina*, each of which, in the Claimant's view, scrutinized the plausibility of essential security claims by reviewing the necessity of the measures in question and their connection to national security interests.[211] The Claimant contends that tribunals such as the *LG&E* tribunal have emphasized that "*a state's contribution to the emergency is crucial in assessing the validity of an* [essential security interest] *defense.*"[212] In the present case, Nicaragua exacerbated the situation at Hacienda Santa Fé, which undermines its national security defense. Nicaragua never raised essential security concerns to Riverside throughout the occupation,

[209] Cl. PHB, paras. 69-73.

[210] Cl. PHB, paras. 74-87.

[211] Cl. PHB, paras. 83-84 (referring to *CMS Gas Transmission Company v. Argentine Republic*, ICSID Case No. ARB/01/8, Award, 12 May 2005 (**CL-0053-ENG**); *Enron Corporation Ponderosa Assets, L.P. v. Argentine Republic*, ICSID Case No. ARB/01/3, Award, 22 May 2007 (**CL-0212-ENG**); *Sempra Energy International v. Argentine Republic*, ICSID Case No. ARB/02/16, Award, 28 September 2007 (**CL-0037-ENG**); *LG&E Energy Corp., LG&E Capital Corp. and LG&E International Inc. v. Argentine Republic,* ICSID Case No. ARB/02/1, Decision on Liability, 3 October 2006 (**CL-0116-ENG**); *Continental Casualty Company v. Argentine Republic*, ICSID Case No. ARB/03/9, Award, 5 September 2008 (**RL-0034-ENG**)).

[212] Cl. PHB, para. 86.

and has not identified any credible period during which essential security concerns existed.[213] Nicaragua's invocation of its national security interests defense is "*pretextual*" and an illegitimate attempt to shield its own unlawful conduct.[214]

238. The Claimant contends that the Respondent's national security defense also fails to meet the test of proportionality, which requires balancing of security interests with investor rights. According to the Claimant, proportionality is a general principle of law and has been endorsed by the ICJ as well as investment treaty tribunals. In the present case, the burden is on the Respondent to show that the measures in question are proportionate. The Respondent has failed to discharge its burden.[215]

239. According to the Claimant, Nicaragua has also failed to establish a sufficient nexus, or a rational link, between the harm inflicted on Hacienda Santa Fé and the purported national security interests. The occupation of Hacienda Santa Fé did not present an essential security threat. The events at Hacienda Santa Fé were "*local criminal matters involving trespass, assault, and theft of property*," and did not involve essential security interests of the State. The Claimant relies, in support, on *US – Steel and Aluminum Products* and *Continental Casualty*, which in its view establish that the essential security claims must be "*timely and subject to continuous review*."[216]

240. Finally, the Claimant submits that the preclusion of wrongfulness at the time of the conduct "*does not negate all remedial obligations under the law of state responsibility*." Thus, once the emergency is over, the State must restore the property in question or, if restitution is not possible, provide compensation. Thus, Article 21.2(b) does not exempt Nicaragua from compensating for breaches of the full protection and security ("**FPS**") standard. The Claimant refers, in support, to *Eco Oro v. Colombia*, where the tribunal held that Colombia was liable for compensating the claimant even if it had validly invoked the

[213] Cl. PHB, paras. 87-105.

[214] Cl. PHB, paras. 106-111.

[215] Cl. PHB, paras. 112-120.

[216] Cl. PHB, paras. 121-134 (referring to *United States – Certain Measures on Steel and Aluminum Products,* World Trade Organization Document WT/DS564/R, Report of the Panel, 9 December 2022, paras. 7.140-7.149 (**CL-0424-ENG**); and *Continental Casualty v Argentina*, para. 222 (**RL-0034-ENG)**).

environmental exception. According to the Claimant, Article 27 of the ILC Articles also supports its position, as it makes clear that the invocation of circumstances precluding wrongfulness is without prejudice to the question of compensation for any material loss caused by the act in question.[217]

(2) The Tribunal's Analysis

a. Applicable Legal Standard

241. The provision invoked by the Respondent in support of its national security exception defense, Article 21.2(b) of DR-CAFTA, is part of Chapter Twenty-One ("Exceptions") and not of Chapter Ten ("Investment"). Thus, it applies to the entirety of the Treaty and not only to Chapter Ten. Article 21.2(b) provides:

> ***Article 21.2: Essential Security***
>
> *Nothing in this Agreement shall be construed:*
>
> [...]
>
> *(b) to preclude a Party from applying measures that it considers necessary for the fulfillment of its obligations with respect to the maintenance or restoration of international peace or security, or the protection of its own essential security interests.*[218]

242. Specifically, the Respondent invokes the second part of the exception that deals with measures related to national security interests ("[…] *measures that it considers necessary for* […] *the protection of its own essential security interests*") rather than the first part of the clause, which deals with international security interests ("[…] *measures that it considers necessary for the fulfillment of its obligations with respect to the maintenance or restoration of international peace or security* […]").

[217] Cl. PHB, paras. 135-147.

[218] DR-CAFTA, Article 21.2 (**CL-0001**).

243. As summarized above, the Parties disagree on the interpretation of the provision and on whether it is applicable in the present case in the first place. They also disagree on the effects of the provision, if applicable.

244. It is common ground between the Parties that any disputes relating to the interpretation of the terms of an international treaty such as DR-CAFTA must be resolved in accordance with the rules of treaty interpretation set out in Article 31 (and, if appropriate, Article 32) of the Vienna Convention.

245. Article 31 of the Vienna Convention sets out the "[g]*eneral rule of interpretation*" in the following terms:

> "*1. A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.*
>
> *2. The context for the purpose of the interpretation of a treaty shall comprise, in addition to the text, including its preamble and annexes:*
>
> *(a) any agreement relating to the treaty which was made between all the parties in connection with the conclusion of the treaty;*
>
> *(b) any instrument which was made by one or more parties in connection with the conclusion of the treaty and accepted by the other parties as an instrument related to the treaty.*
>
> *3. There shall be taken into account, together with the context:*
>
> *(a) any subsequent agreement between the parties regarding the interpretation of the treaty or the application of its provisions;*
>
> *(b) any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation;*
>
> *(c) any relevant rules of international law applicable in the relations between the parties.*
>
> *4. A special meaning shall be given to a term if it is established that the parties so intended.*"[219]

[219] Vienna Convention on the Law of Treaties, 1155 U.N.T.S. 331, Article 31 (23 May 1969) (**CL-0121-ENG**).

246. Article 32 ("*Supplementary means of interpretation*") further provides:

> "*Recourse may be had to supplementary means of interpretation, including the preparatory work of the treaty and the circumstances of its conclusion, in order to confirm the meaning resulting from the application of article 31, or to determine the meaning when the interpretation according to article 31: (a) leaves the meaning ambiguous or obscure; or (b) leads to a result which is manifestly absurd or unreasonable.*"[220]

247. As summarized above, the Claimant argues that Article 21.2(b) is not applicable in the present case for three principal reasons: (i) the Claimant is entitled to a higher standard of investment protection because the MFN clause in Article 10.4 of DR-CAFTA entitles it to invoke Nicaragua's other investment treaties such as the Russian BIT and the Swiss BIT which do not contain non-precluded measures clauses; (ii) Article 21.2(b) does not affect the Tribunal's jurisdiction or decisions on liability, "*but only precludes the Tribunal from ordering Nicaragua to withdraw its measures*;" and (iii) Nicaragua has failed to invoke Article 21.2(b) in good faith as the measures that form the subject of Riverside's claims "*have nothing to do*" with Nicaragua's essential security interests.[221] The Claimant also raises a number of subsidiary arguments, as summarized above, which will be addressed below.

248. First, as to the Claimant's MFN argument, when interpreted in accordance with the ordinary meaning of its terms and in its context (Chapter Twenty-One), Article 21.2(b) plainly applies to the entirety of DR-CAFTA; it specifically provides that "[**n**]***othing in this Agreement*** *shall be construed […] to preclude a Party from applying measures that it considers necessary for the fulfillment of its obligations with respect to* […] *the protection of its own essential security interests*." (Emphasis added.) The provision thus constitutes an exception to the State Parties' obligations under DR-CAFTA, including the MFN clause in Article 10.4 of the Treaty. In other words, Article 21.2(b) constitutes a carve-out: DR-CAFTA is not applicable to measures identified in Article 21.2(b). Accordingly, the

[220] Vienna Convention on the Law of Treaties, 1155 U.N.T.S. 331, Article 32 (23 May 1969) (**CL-0121-ENG**).
[221] Cl. Reply, para. 1201.

Claimant's argument that it can invoke the MFN clause in Article 10.4 of DR-CAFTA to exclude the applicability of Article 21.2(b) is rejected.

249. Second, the Claimant argues that Article 21.2(b) does not affect the Tribunal's jurisdiction or decisions on liability, but merely operates so as to preclude the Tribunal from ordering Nicaragua to withdraw its measures. The Tribunal notes that the Claimant relies in support of its position on the recent *Eco Oro* award, which was brought under the Canada-Colombia FTA. However, the *Eco Oro* case did not involve a national security exception but rather a general exception provision (Article 2201(3)) similar to Article 20 of the GATT, except that the provision is more limited in scope than Article 20 of the GATT and only applies to environmental measures. The *Eco Oro* tribunal held that while Article 2201(3) of the Canada-Colombia FTA allowed Colombia to adopt or enforce environmental measures "*without finding itself in breach of the FTA*," it did not operate so as to exclude Colombia's liability to pay compensation to the claimant for losses incurred as a result of Colombia's breach of the Canada-Colombia FTA.[222]

250. The Tribunal does not consider that the *Eco Oro* award is relevant in the present case, which involves a differently worded exception of a different kind. Nor is there anything in the specific language of Article 21.2(b) or elsewhere in DR-CAFTA that would support the Claimant's position and, indeed, the Claimant does not suggest that there is. The Tribunal therefore rejects the Claimant's argument that Article 21.2(b) of the Treaty merely operates so as to limit the Tribunal's authority to order Nicaragua to withdraw the relevant measures, but does not preclude the Tribunal from determining that Nicaragua has breached the DR-CAFTA and order it to pay compensation to the Claimant for the losses incurred.[223]

251. The Tribunal is also unable to agree with the Claimant's related argument that Article 21.2(b) merely incorporates the necessity defense available under customary

[222] *Eco Oro v. Colombia*, ICSID Case No. ARB/16/41, Decision on Jurisdiction, Liability and Directions on Quantum, 9 September 2021, paras. 830, 837 (**CL-0225-ENG**).

[223] The Tribunal notes that the *Seda* tribunal reach a similar conclusion when interpreting a virtually identically worded provision in the US-Colombia Trade Promotion Agreement; *see Angel Samuel Seda et al. v. The Republic of Colombia*, ICSID Case No. ARB/19/6, Award, 27 June 2024, paras. 731-741 (**RL-0219**).

international law and incorporated in Article 25 of the ILC Articles.[224] The necessity defense is a defense aimed at exempting, in certain limited circumstances, the State invoking it from liability, not a treaty-based carve-out from the obligations agreed in a treaty. A similar argument, conflating an essential security exception and the necessity plea was raised and upheld in a number of arbitrations arising out of the Argentine financial crises, however, these awards were subsequently annulled by ICSID *ad hoc* committees on the basis of, *inter alia*, the confusion of the two standards. It suffices to quote the reasoning of the *ad hoc* committee in *CMS v. Argentina* on this point:

> "*Article XI specifies the conditions under which the Treaty may be applied, whereas Article 25* [of the ILC's Articles on State Responsibility] *is drafted in a negative way: it excludes the application of the state of necessity on the merits, unless certain stringent conditions are met. Moreover, Article XI is a threshold requirement: if it applies, the substantive obligations under the Treaty do not apply. By contrast, Article 25 is an excuse which is only relevant once it has been decided that there has otherwise been a breach of those substantive obligations.*"[225]

252. Third, the Claimant argues that Nicaragua has failed to invoke Article 21.2(b) in good faith as the measures that form the subject of Riverside's claims are not related to Nicaragua's essential security interests.

253. It is common ground that the Tribunal has the power to review whether the Respondent has invoked the national security exception in Article 21.2(b) in good faith. However, the Parties disagree as to the scope of the good faith review that the Tribunal may undertake.

254. According to the Respondent, Article 21.2(b) national security exception is "*self-judging*," and therefore, when the provision is invoked in good faith, "*any measures a Respondent State considers necessary for its essential security are 'excluded from the scope of the*

[224] Under Article 25 ("Necessity") of the ILC Articles, "[n]*ecessity may not be invoked by a State as a ground for precluding the wrongfulness of an act not in conformity with an international obligation of that State unless the act: (a) is the only way for the State to safeguard an essential interest against a grave and imminent peril; and (b) does not seriously impair an essential interest of the State or States towards which the obligation exists, or of the international community as a whole.*" (**CL-0017**)

[225] *CMS Gas Transmission Company v. The Argentine Republic*, ICSID Case No. ARB/01/8, Decision of the *Ad hoc* Committee on Argentina's Application for Annulment, 25 September 2007 (cited in *Angel Samuel Seda et al. v. The Republic of Colombia*, ICSID Case No. ARB/19/6, Award, 27 June 2024, para. 678 (**RL-0219**)) (Emphasis omitted).

[treaty's] coverage and [the] Tribunal's inquiry must stop'."[226] According to the Respondent, the hallmark of a self-judging clause is the phrase "*that it considers*," which "*gives 'clear indications [that] the text of the treaty … is self-judging'*."[227] Thus, the question of whether Nicaragua's response to the invasion and occupation of Hacienda Santa Fé was "*necessary*" to protect its own essential security interests is a matter to be determined exclusively by Nicaragua under Article 21.2(b), and not by the Tribunal.[228] In support of its position, the Respondent relies on the recent *Seda v. Colombia* award, which involved an identically worded provision (Article 22.2(b) of the applicable United States-Colombia Trade Promotion Agreement (the "**US – Colombia TPA**")).[229] In *Seda*, the tribunal held that the language of Article 22.2(b), in particular the terms "*it considers*," left "*no doubt that this provision* [was] *self-judging*."[230]

255. The Respondent accepts, however, that the self-judging nature of Article 21.2(b) does not exclude the Tribunal's review, so long as such review is limited to whether Nicaragua has invoked Article 21.2(b) in good faith, as required by Article 26 of the Vienna Convention.[231]

256. As summarized above, the Claimant denies that Article 21.2(b) is self-judging, arguing that the *Seda* case is distinguishable because it involved "*a bona fide delay tied to a complex criminal investigation, and the case involved a 'super' self-judging* [essential security interest] *clause through a treaty footnote*."[232]

257. The Tribunal notes that under Article 21.2(b) of DR-CAFTA each CAFTA Party may apply measures "*that it considers necessary for* […] *the protection of its own essential*

---

[226] Resp. PHB, para. 9 (citing *Angel Samuel Seda et al. v. The Republic of Colombia,* ICSID Case No. ARB/19/6, Award, 27 June 2024, paras. 742-756, 795 (**RL-0219**)).

[227] Resp. PHB, para. 86 (citing *Deutsche Telekom AG v. The Republic of India*, PCA Case No. 2014-10, Interim Award, 13 December 2017, para. 231 (**RL-0211**)).

[228] Resp. CM., paras. 289-290.

[229] A footnote placed at the end of the provision provides: "*For greater certainty, if a Party invokes Article 22.2 in an arbitral proceeding initiated under Chapter Ten (Investment) or Chapter Twenty-One (Dispute Settlement), the tribunal or panel hearing the matter shall find that the exception applies*."

[230] *Angel Samuel Seda et al. v. The Republic of Colombia*, ICSID Case No. ARB/19/6, Award, 27 June 2024, paras. 638, 662 (**RL-0219**).

[231] Resp. CM., para. 293.

[232] Cl. PHB, para. 90.

security interests." In accordance with their ordinary meaning, the terms "*that it considers necessary*" indicate that the determination of whether the measures in question are in fact "*necessary*" is for each State Party to make. Accordingly, an arbitral tribunal constituted under DR-CAFTA cannot second-guess the determination made by a State Party and cannot at a later stage form its own view on whether the measures taken by a State Party were indeed "*necessary*." The provision is thus distinguishable from a similar provision in the Nicaragua-United States Treaty on Friendship, Commerce and Navigation (the "**Nicaragua-United States FCN Treaty**"), addressed in a number of ICJ judgments relied upon by the Claimant in support of its position that Article 21.2(b) is not self-judging. Unlike Article 21.2(b) of DR-CAFTA, Article XXI of the Nicaragua-United States FCN Treaty refers, in objective language, to "*measures … necessary to protect its essential security interests*."[233] The Tribunal notes, in this connection, that the *Seda* tribunal similarly found that the virtually identically-worded essential security provision in the US-Colombia TPA is self-judging.[234]

258. The Tribunal stresses that its determination that Article 21.2(b) of DR-CAFTA is self-judging is limited to the question of whether it is for Nicaragua or the Tribunal to decide whether the measures deemed "*necessary*" by Nicaragua are indeed to be considered "*necessary*" for the purposes of this arbitration; it does not deal with the question of whether the measures in question were taken "*for the protection of* [Nicaragua's own] *essential security interests.*"[235] This is another matter and will be addressed below.

---

[233] The ICJ distinguished between the Article XXI of the FCN Treaty and Article XXI of the GATT in the following terms: "*That the Court has jurisdiction to determine whether measures taken by one of the Parties fall within such an exception, is also clear* a contrario *from the fact that the text of Article XXI of the Treaty does not employ the wording which was already to be found in Article XXI of the General Agreement on Tariffs and Trade. This provision of GATT, contemplating exceptions to the normal implementation of the General Agreement, stipulates that the Agreement is not to be construed to prevent any contracting party from taking any action which it 'considers necessary for the protection of its essential security interests', in such fields as nuclear fission, arms, etc. The 1956 Treaty, on the contrary speaks simply of 'necessary' measures, not of those considered by a party to be such*." *Nicaragua v. United States of America*, Military and Paramilitary Activities in and against Nicaragua, Merits, Judgement, ICJ Reports, 27 June 1986 (**CL-0022**).

[234] *Angel Samuel Seda et al. v. The Republic of Colombia,* ICSID Case No. ARB/19/6, Award, 27 June 2024, para. 638 (**RL-0219**).

[235] A WTO panel took a similar decision in its interpretation of Article XXI of the GATT, which contains a similar national security exception. The panel concluded that "*the ordinary meaning of Article XXI(b)(iii), in its context and in light of the object and purpose of the GATT 1994 and the WTO Agreement more generally, is that the adjectival*

259. The remaining question is therefore the scope of the good faith review to be undertaken by a DR-CAFTA tribunal to determine whether the measures that a party considered "*necessary*" were taken "*for the protection of its own essential security interests."* The Parties have addressed this issue specifically in their post-hearing submissions in response to a question raised by the Tribunal at the end of the Hearing.

260. The Parties disagree on the scope of the good faith review, the Claimant arguing that "[i]*nternational law demands that states invoking* [essential security interests] *do so in good faith, with credible evidence, and in a manner proportionate to the threat*."[236] According to the Claimant, "[e]*stablishing good faith becomes problematic if no rational connection exists between the measures taken and the stated security objective*."[237] The Claimant notes that Nicaragua has not provided contemporaneous evidence that it considered the 2018 occupation of Hacienda Santa Fé to affect its essential security interests. Its invocation was thus "*belated*" and "*an afterthought designed to shield the state from liability*."[238] In conclusion, according to the Claimant, Nicaragua's invocation of Article 21.2(b) lacks "*the necessary connection to any essential security interest*" and was "*neither made in good faith nor proportionate to any genuine threat*."[239]

261. The Respondent argues, in response, that Article 21.2(b) is subject only to a "*light touch*" good faith review, which is an "*extremely deferential standard*." According to the Respondent, it is for the State to determine the scope of its "*own essential security interests*," subject only to the obligation of good faith. The Tribunal's task is therefore limited to "*confirming that the nexus between the challenged measure and the identified*

---

clause 'which it considers' in the chapeau of Article XXI(b) does not qualify the determination of the circumstances in subparagraph (iii). Rather, for action to fall within the scope of Article XXI(b), it must objectively be found to meet the requirements in one of the enumerated subparagraphs of that provision. … It follows from the Panel's interpretation of Article XXI(b), as vesting in panels the power to review whether the requirements of the enumerated subparagraphs are met, rather than leaving it to the unfettered discretion of the invoking Member, that Article XXI(b)(iii) of the GATT 1994 is not totally 'self-judging' in the manner asserted by Russia." *Russia – Measures Concerning Traffic in Transit*, Report of the Panel, Document WT/DS512/R, 5 April 2019, paras. 7.82, 7.101, 7.102, (**CL-0233-ENG**).

[236] Cl. PHB, para. 23.

[237] Cl. PHB, para. 53.

[238] Cl. PHB, para. 83.

[239] Cl. PHB, para. 148.

essential interest satisfies a 'minimum standard of plausibility'."[240] Relying on *Seda*, the Respondent argues that a good faith review does not involve "*any inquiry into whether the State had adopted the best or most effective measures in response to the challenge to an essential security interest*."[241]

262. The Tribunal recalls that good faith is both an element of treaty interpretation and of performance of a treaty. As to the former, under Article 31 of the Vienna Convention, a treaty shall be interpreted "*in good faith*." The requirement of good faith is thus an integral part of the general rule of treaty interpretation and it requires, *inter alia*, that the specific terms of the provision being interpreted be given full effect (*effet utile*). While the Claimant contends that its interpretation of Article 21.2(b) is in line with "*effet utile*," it has not identified any specific terms of the provision that the Respondent's interpretation allegedly fails to give an "*effet utile*."

263. The other element of good faith in the law of treaties is the requirement, reflected in Article 26 ("*Pacta sunt servanda*") of the Vienna Convention, that "[e]*very treaty in force is binding upon the parties to it and must be performed by them in good faith*." There is no dispute between the Parties that the rule reflected in Article 26 of the Vienna Convention, which bears a close connection to the interpretation of a treaty by a State party, cannot be, and has not been, excluded by Article 21.2(b) of the DR-CAFTA.[242] The Tribunal agrees. Indeed, in the absence of any language in Article 21.2(b) to the contrary, Article 10.22 of DR-CAFTA directs that "*the tribunal shall decide the issues in dispute in accordance with this Agreement and applicable rules of international law*."

264. In light of the above, the Tribunal considers that it has the power to determine whether Nicaragua has applied Article 21.2(b) in good faith.

265. The Tribunal notes that the determination of whether the Respondent has invoked Article 21.2(b) in good faith may be approached in procedural terms (*i.e.* by focusing on

[240] Resp. PHB, para. 104 (quoting *Angel Samuel Seda et al. v. The Republic of Colombia,* ICSID Case No. ARB/19/6, Award, 27 June 2024, para. 653 (**RL-0219**).

[241] Resp. PHB, para. 106.

[242] Cl. Reply, para. 1197; Resp. CM., paras. 293, 1334.

when the provision was invoked) or in substantive terms (*i.e.* by focusing on the "reasonableness" or "plausibility" of the invocation) – or indeed both. The Claimant raises both arguments in support of its position. Thus the Claimant argues, on the one hand, that Nicaragua did not invoke Article 21.2(b) in good faith because it did not invoke the provision contemporaneously, when the measures were introduced,[243] pointing out that the *CC/Devas v. India* tribunal rejected a similarly "*opportunistic use*" of a national security exception for lack of good faith.[244] On the other hand, the Claimant argues that any measures taken under Article 21.2(b) must be "*plausible and genuinely connected*" to protecting essential security interests.[245] The Respondent, in turn, adopts a primarily substantive approach and argues that the measures taken pursuant to Article 21.2(b) must be "*reasonable*" or "*plausible*" (within the bounds of a "light-touch" review) in order to meet the requirements of a good faith review.[246]

266. Investment treaty tribunals have adopted diverging approaches to the question of whether a review of an invocation of an essential security exception is a matter of procedure or substance – or indeed both. Thus, the *CC/Devas* tribunal adopted an essentially procedural approach (although it also conducted what may be termed a substantive review):

> "*The Tribunal has no doubt that, if a State properly invokes a national security exception under an investment treaty, it cannot be liable for compensation of damages going forward.* […]
>
> *However, this does not resolve the question as to what happens if a State has engaged in treaty breaches during the period preceding the invocation of national security. In such a case, a State could not, by invoking national security at a certain moment, simply erase the effect of previous wrongful actions.* […]
>
> *It will therefore be for the Tribunal to decide whether, even if national security interests were properly invoked by the Respondent, the*

[243] Cl. PHB, paras. 83-84, 89-90.

[244] Cl. PHB, para. 72 (referring to *CC/Devas (Mauritius) Ltd., Devas Employees Mauritius Private Limited and Telecom Devas Mauritius Limited v Republic of India*, PCA Case No. 2013-09, Award, 25 July 2016, paras. 468-470 (**CL-0223-ENG)**). Art. 11(3) of the applicable treaty provides: "*The provisions of this Agreement shall not in any way limit the right of either Contracting Party to apply prohibitions or restrictions of any kind or take any other action which is directed to the protection of its essential security interests, or to the protection of public health or the prevention of diseases in pests or animals or plants*."

[245] Cl. PHB, paras. 15, 67, 70, 77, 84.

[246] Resp. PHB, paras. 91, 111-113.

> *Respondent breached provisions of the Treaty during the period previous to the invocation of Article 11(3) and, if so, whether damages resulted from such action.*"[247]

267. The *Seda* tribunal recently addressed the standard applicable to the review of a national security exception and adopted what it termed a "*plausibility standard*:"

> "*The Tribunal finds the plausibility standard an appropriate benchmark against which to evaluate the nexus between the measures adopted by the State and the essential security interest sought to be protected under Article 22.2(b) of the TPA. In the Tribunal's view it carries an implication of a 'light-touch' good faith review – not too restrictive as to infringe on the explicit self-judging language of the ESI provision. The Tribunal also considers that the other tests invoked by the Parties* (i.e. bona fide *connection, rational connection,* prima facie *standard) would lead to a very similar, if not identical, scope of review.*"[248]

268. The *Seda* tribunal considered that such a good faith review was "*sufficiently balanced to ensure proper application of Article 22.2(b) of the TPA without infringing on its self-judging nature.*"[249] The tribunal noted that the scope of a good faith standard of review had been "*most notably*" developed by the ICJ in a line of jurisprudence dealing with the exercise by States of their treaty-based discretionary powers,[250] and had also been adopted by investment treaty tribunals.[251]

269. Both Parties have also relied upon the practice of GATT/WTO panels in support of their positions. The Tribunal notes in this connection that, while the security exception in Article XXI of the GATT is more expansive, the core of the provision, insofar as it deals with national security, is virtually identical to Article 21.2(b) of DR-CAFTA; according to Article XXI, "[n]*othing in this Agreement shall be construed* […] *to prevent any*

---

[247] *CC/Devas (Mauritius) Ltd., Devas Employees Mauritius Private Limited and Telecom Devas Mauritius Limited v Republic of India*, PCA Case No. 2013-09, Award, 25 July 2016, paras. 293-295 (**CL-0223-ENG**).

[248] *Angel Samuel Seda et al. v. The Republic of Colombia,* ICSID Case No. ARB/19/6, Award, 27 June 2024, para. 655 (**RL-0219**).

[249] *Angel Samuel Seda et al. v. The Republic of Colombia,* ICSID Case No. ARB/19/6, Award, 27 June 2024, para. 748 (**RL-0219**).

[250] *Angel Samuel Seda et al. v. The Republic of Colombia*, ICSID Case No. ARB/19/6, Award, 27 June 2024, paras. 749-750 (**RL-0219**) (citing *Immunities and Criminal Proceedings (Equatorial Guinea v. France)*, Judgment, 11 December 2020, para. 73, where the Court held that "*where a State possesses a discretionary power under a treaty, such a power must be exercised reasonably and in good faith*") (Emphasis omitted).

[251] *Angel Samuel Seda et al. v. The Republic of Colombia,* ICSID Case No. ARB/19/6, Award, 27 June 2024, paras. 753-754 (**RL-0219**).

contracting party from taking any action which it considers necessary for the protection of its essential security interests."

270. GATT panels have addressed the applicable standard of review in terms similar to those adopted by investment treaty tribunals. Recently, a WTO panel addressed the issue in *Russia – Measures concerning traffic in transit* in the following terms:

> "[I]*t is left, in general, to every Member to define what it considers to be its essential security interests*. […] *However, this does not mean that a Member is free to elevate any concern to that of an 'essential security interest.' Rather, the discretion of a Member to designate particular concerns as 'essential security interests' is limited by its obligation to interpret and apply Article XXI(b)(iii) of the GATT 1994 in good faith. The Panel recalls that the obligation of good faith is a general principle of law and a principle of general international law which underlies all treaties, as codified in Article 31(1)* […] *and Article 26* […]. *The obligation of good faith requires that Members not use the exceptions in Article XXI as a means to circumvent their obligations under the GATT 1994.* […] *It is therefore incumbent on the invoking Member to articulate the essential security interests said to arise from the emergency in international relations sufficiently enough to demonstrate their veracity.* […] *The obligation of good faith, referred to in paragraphs 7.132 and 7.133 above, applies not only to the Member's definition of the essential security interests said to arise from the particular emergency in international relations, but also, and most importantly, to their connection with the measures at issue. Thus, as concerns the application of Article XXI(b)(iii), this obligation is crystallized in demanding that the measures at issue meet a minimum requirement of plausibility in relation to the proffered essential security interests, i.e. that they are not implausible as measures protective of these interests*."[252]

271. In light of these considerations, the Tribunal determines that the standards of review to decide whether a CAFTA Party has invoked Article 21.2(b) in good faith are (i) whether the CAFTA Party in question has invoked the provision in due time, in order to put the other CAFTA Parties and their investors on notice of the non-applicability of DR-CAFTA to such measures; and (ii) whether the measures in question are reasonably or plausibly

[252] *Russia – Measures Concerning Traffic in Transit*, Report of the Panel, WTO, WT/DS512/R, 5 April 2019, paras. 7.131-7.134, 7.138 (**CL-0233-ENG**); *See also Saudi Arabia – Measures concerning the protection of intellectual property rights*, Report of the Panel, WTO, WT/DS567/R, 16 June 2020, para. 7-285 (**CL-0234-ENG**).

related to the alleged essential security interests. The Tribunal will consider the Respondent's invocation of Article 21.2(b) in light of these considerations.

b. Whether the Respondent Invoked Article 21.2(b) in Good Faith

272. The Respondent submits that it has proven that it invoked Article 21.2(b) in good faith, and that the Claimant has not been able to rebut the Respondent's case.[253]

273. The Respondent contends that it was "*neither unreasonable nor implausible for Nicaragua to consider an armed invasion of* [Hacienda Santa Fé] *led by former* Contras *who warned they would 'fight' for the property, to implicate its essential security interests*." According to the Respondent, the measures that it adopted – "*avoid*[ed] *the use of force to remove the[] armed invaders peacefully and permanently from* [Hacienda Santa Fé]." It follows from this that "*all* [the] *measures*" taken by Nicaragua in response to the invasion and occupation fall within the protection of Article 21.2(b), including the decision not to remove forcibly the invaders and to negotiate their peaceful resettlement.[254]

274. Specifically, in its Post-Hearing Submission, the Respondent identified the following measures as being covered by its invocation of Article 21.2(b): [255]

- "***May 2018**: The Shelter Order.*
- ***June 2018 through August 11, 2018**: Peaceful eviction of illegal occupants from HSF, who return shortly afterwards in light of Riverside's inaction.*
- ***August 2018 – January 2019**: Nicaragua opens dialogue with invaders in which State representatives emphasize that the property is privately owned by Inagrosa and the occupation is illegal.*
- ***January 2019**: Government officials meet with invaders, ordering them to leave peacefully, resulting in the voluntary department* [sic] *of some invaders immediately after this meeting.*
- ***January 24, 2019**: Nicaragua forms a 'Commission for the purpose of evicting Finca Santa Fé.' That same day, the Commission and the invaders execute a resolution acknowledging: (i) HSF is privately owned; (ii) its*

[253] Resp. PHB, paras. 108-109.

[254] Resp. PHB, paras. 111-113.

[255] Resp. PHB, para. 113 (footnote omitted). In the Counter-Memorial, the Respondent claims, more broadly, that the relevant measures include "*the measured and the de-escalatory strategy that Nicaraguan authorities successfully used to remove the illegal occupants from Hacienda Santa Fé peacefully*." Resp. CM., para. 286.

occupation is illegal; (iii) the illegal occupants vacate in two phases; and (iv) Nicaragua will relocate them elsewhere.

- ***April 28, 2021****: The Government summons leaders of the families remaining on HSF to a meeting about their relocation. Two days later, a meeting between the Government and representatives of the illegal occupants occurs at the Attorney General's office in Managua regarding removal of the remaining illegal occupants at HSF.*
- ***May 4, 2021****: The Government meets with remaining illegal occupants at HSF, presents relocation options, and orders them to leave immediately. Almost all remaining illegal occupants comply, while 112 illegal occupants (out of over 500 original invaders) remain.*
- ***August 13, 2021****: The Government convenes another meeting at HSF to give remaining illegal occupants a deadline to leave the property.*
- ***August 18, 2021****: Nicaraguan police peacefully evict all remaining illegal occupants*."

275. The Respondent further contends that Article 21.2(b) "*contains no timing requirement, and none should be inferred where Riverside had a full and fair opportunity to address the defense.*" In support of its position the Respondent refers to *Seda v. Colombia*.[256]

276. As summarized above, the Claimant disputes that Nicaragua invoked Article 21.2(b) in good faith, contending that "*no contemporaneous evidence links the occupation of* [Hacienda Santa Fé] *to any essential security interest*." According to the Claimant, "*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*."[257] The Claimant further submits that the Respondent has failed to establish any "*rational link*" between the harm inflicted on Hacienda Santa Fé and its invocation of essential national security interests. Accordingly, in the Claimant's view, the occupation of Hacienda Santa Fé did not present an essential national security threat, and the harm caused to Hacienda Santa Fé was the result of "*ordinary policing failures*."[258]

277. Having considered the Parties' positions and the evidence before it, the Tribunal is satisfied that President Ortega's "*shelter order*" in late May 2018 qualifies as a measure taken to

[256] Resp. PHB, paras. 115-117.

[257] Cl. PHB, paras. 72-74.

[258] Cl. PHB, paras. 121-126.

protect Nicaragua's essential security interests during a nationwide civil strife. There is a reasonable and plausible relation between the shelter order and Nicaragua's national security interest in dealing with the civil strife. The Tribunal is also satisfied that the invasion and occupation of Hacienda Santa Fé took place in connection with the wider social unrest in the country and was not a separate incident. The conclusion is supported by the timing of the invasion as well as documentary evidence on the record.[259]

278. The Tribunal further notes that, although President Ortega – or other Nicaraguan authorities – did not specifically mention Article 21.2(b) at the time the shelter order was issued, the order remained in place for a relatively short period of time, until late July 2018, when according to the Respondent's own submission "*the nationwide unrest finally subsided*" and the shelter order was lifted.[260] In the circumstances, the Tribunal considers that President Ortega's shelter order, announced in a nationally televised interview, provided a sufficient notice of invocation of Nicaragua's essential security interests.

279. By contrast, the Tribunal considers that the Respondent has not established a reasonable or plausible basis to argue that its essential security interests were implicated beyond the end of July 2018; according to the Respondent's own case, the nationwide unrest subsided after this date, although the evidence suggests that the situation remained generally tense until the end of 2018. Accordingly, Nicaragua's national security interests could not have been implicated by any measures that it took specifically in relation to the invasion and occupation of Hacienda Santa Fé after the end of July 2018.

---

[259] *See* Letter from "Cooperativa El Pavón" to the Jinotega Attorney General's Office, 5 June 2018 (**R-0064-ENG**) (requesting the government order that the possession of El Pavón, "*an agricultural service cooperative, be restored to us as rightful owners*, […] *and carry out an inspection IN SITU, as well as issue certificates of title for the Santa Fe land, located in the Rio Grande district, municipality of San Rafael del Norte, Jinotega Department, with a registered area of one thousand eight hundred and sixty-nine blocks and a fraction thereof, in the name of agricultural cooperative El Pavón RL, as a right that we acquired under peace agreements, signed between the government of Nicaragua, through the Ministry of Government, and members of the former Nicaraguan Resistance, as a result of certain agreements signed on November 22, 1990, in the municipality of San Rafael del Norte, Jinotega, as recognized by the Nicaraguan Institute of Agrarian Reform (INRA).*" (Emphasis omitted).

[260] Resp. CM., para. 29 (Section II) (referring to First Herrera Statement, para. 11 (**RWS-03**) (testifying that "[t]he *order to stay in the barracks remained in place until the end of July 2018.*"). *See also* Second Herrera Statement, para. 19 (**RWS-12**); Press Release No. 92 – 2018 of the National Police, 24 July 2018 (**R-0190**).

280. In light of the above, the Tribunal rejects the Respondent's argument that the measures it took after the end of July 2018 in relation to the invasion and occupation of Hacienda Santa Fé qualify as measures taken to protect its national security interests.

C. THE RESPONDENT'S CIVIL STRIFE DEFENSE UNDER ARTICLE 10.6 OF DR-CAFTA

(1) The Parties' Positions

a. The Respondent's Position

281. The Respondent submits that Article 10.6.1 of DR-CAFTA also provides it with a "*complete defense*" to Riverside's claims. According to the Respondent, Article 10.6 establishes a special treaty regime applicable during times of armed conflict or civil strife. The Respondent asserts that Article 10.6.1 applied at the time of the 2018 invasion, which was also a period of nationwide unrest and violence, and that it can be internationally liable for measures related to the invasion of Hacienda Santa Fé only if Riverside can prove that "*the State's response to such conditions compensated or otherwise treated the investments of nationals or investors from third countries more favorably than it did Claimant's investment*."[261]

282. The Respondent contends that Article 10.6 of DR-CAFTA is a *lex specialis* applicable to measures adopted in response to armed conflict or civil strife. Where a treaty contains such a provision, it applies over more general provisions by operation of the principle of *lex specialis derogat legi generali* and provides "*the only source of possible treaty liability in these types of circumstances*." In the present case, this means that compensation is owed only where a State discriminatorily compensates some investors for damage caused but not others. The Respondent relies, in support, on *LESI & Astaldi v. Algeria*.[262]

283. The Respondent submits that Nicaragua's response to the invasion of Hacienda Santa Fé was a "*measure taken in relation to a loss suffered by a foreign investor owing to civil strife*." This is the case, first, because the invasion of Hacienda Santa Fé occurred when

[261] Resp. CM., paras. 306-308.

[262] Resp. CM., paras. 309-315 (referring to *LESI, S.p.A. and Astaldi, S.p.A. v. People's Democratic Republic of Algeria*, ICSID Case No. ARB/05/3, Award, 12 November 2008, paras. 174-177 (**RL-0041**)).

Nicaragua was confronting nationwide unrest and violence, which in the Respondent's view qualifies as a civil strife (a term not defined in DR-CAFTA). It follows that the State's policing decisions, including President Ortega's order for the National Police to remain in the barracks, were taken in response to the civil strife. According to the Respondent, "[a]*bsent a showing that Nicaragua discriminated against Riverside in its response to that strife, no liability under the DR-CAFTA can result*."[263]

284. Second, the Respondent asserts that the land invasions were themselves episodes of civil strife. The former *Contras* who led the invasion were armed, some of them with heavy weapons, also by the Claimant's account, and invaded Hacienda Santa Fé through the use of violence and threatened violence, contrary to Nicaraguan law. Nicaragua's response to the seizure was thus necessarily a measure "*relating to losses suffered by*" Riverside's investment "*owing to armed conflict or civil strife*." Again, absent a showing of discrimination, Nicaragua cannot be held liable. While the Claimant contends that other landowners were treated more favorably, the Respondent argues that the Claimant has not provided any evidence showing that a single other investor was treated more favorably than Inagrosa, or was compensated by the State in respect of similar damage sustained during the period April-August 2018.[264]

285. In its Rejoinder, the Respondent submits that Riverside's attempt to rely on the MFN clause of DR-CAFTA to circumvent Article 10.6 fails. According to the Respondent, the Claimant does not dispute that Nicaragua experienced a civil strife at the time of the invasion, and thus Article 10.6 is applicable. The Respondent also denies that Article 5 of the Russian BIT does not limit the operation of treaty obligations in the event of a civil strife. While the Russian BIT does not specifically mention civil strife, it does refer to "*damages or losses owing to a war, armed conflict, insurrection, revolution, riot, civil disturbance, a state of national emergency or any other similar event*." In the Respondent's view, these terms clearly cover a "*civil strife*."[265]

[263] Resp. CM., paras. 316-318.

[264] Resp. CM., paras. 319-321.

[265] Resp. Rej., paras. 564-568. In its PHB, the Respondent states that the submission "*incorporates its prior submissions regarding DR-CAFTA's civil strife exception in Article 10.6.*" Resp. PHB, fn. 201.

b. The Claimant's Position

286. The Claimant challenges the Respondent's position regarding the "War Losses" clause in Article 10.6 of DR-CAFTA on a number of grounds.

287. The Claimant contends that, while Nicaragua argues that there was a civil strife in Nicaragua in June 2018, it has not established that the harm caused to Hacienda Santa Fé arose from the civil strife. According to the Claimant, "[d]*ue to the application of the Russian BIT*," which does not contain a civil strife provision, Nicaragua had to comply with its treaty obligations during periods of civil strife.[266] Similarly, the Swiss BIT does not contain any derogation from its operation or payment of compensation in the event of a civil strife.[267] Under Article 10.4 of DR-CAFTA, the Claimant is entitled to rely on the Russian and Swiss BITs to obtain MFN treatment.[268]

288. The Claimant also submits that the Respondent misunderstands the meaning of *lex specialis*. The language of Article 10.6 does not have the same wording as the corresponding clause at issue in *LESI v. Algeria*. According to the Claimant, the position that a war losses clause operates as a *lex specialis* has been rejected in cases such as *Strabag v. Libya*, *Way2b v. Libya*, *Cengiz v. Libya*, *Guris v. Libya*, *CMS v. Argentina*, *Suez v. Argentina*, *El Paso v. Argentina* and *Guris v. Syria*. The Respondent's position converts the civil strife clause into a "*broad-based exception from government protections under the CAFTA*."[269]

289. In its Post-Hearing Submission, the Claimant reiterates its position regarding the existence of civil strife, which the Respondent allegedly has failed to establish (indeed claiming that paramilitaries were not involved in the invasion of Hacienda Santa Fé), the *lex specialis* nature of Article 10.6 (which it continues to deny) and the relevance of the case law relied upon by the Respondent.[270]

---

[266] Cl. Reply, para. 1246.

[267] Agreement between the Swiss Confederation and the Republic of Nicaragua on the Promotion and Reciprocal Protection of Investments, which entered into force on 2 May 2000 (**CL-0188**).

[268] Cl. Reply, paras. 1254-1257.

[269] Cl. Reply, paras. 1258-1274.

[270] Cl. PHB, paras. 256-262.

(2) The Tribunal's Analysis

290. The relevant provision relied upon by the Respondent in support of its defense is Article 10.6.1 ("Treatment in Case of Strife") of DR-CAFTA, which provides:

> "***Article 10.6: Treatment in Case of Strife***
>
> *1. Notwithstanding Article 10.13.5(b), each Party shall accord to investors of another Party, and to covered investments, non-discriminatory treatment with respect to measures it adopts or maintains relating to losses suffered by investments in its territory owing to armed conflict or civil strife*."[271]

291. As summarized above, the Parties disagree on the interpretation of the provision.

292. The Tribunal notes at the outset that Article 10.6.1 establishes an investment protection standard applicable to measures taken in the circumstances of an armed conflict or a civil strife "*with respect to measures* [a CAFTA Party] *adopts or maintains relating to losses suffered by investments in its territory*." Thus, unlike Article 21.2(b), Article 10.6.1 does not constitute an exception to the State Parties' obligations under the Treaty and has no effect on the applicability of the Treaty in the circumstances of a civil strife. The provision rather defines the standard applicable in such circumstances insofar as the relevant measures relate to "*losses suffered by investments in its territory*." According to Article 10.6, such measures – including any measures taken to compensate investors for losses suffered – must be non-discriminatory.

293. The Tribunal notes that the Claimant does not allege, and has not raised any claims, on the basis of an alleged discriminatory treatment by Nicaragua as to measures Nicaragua has adopted or maintained relating to "*losses suffered by investments in its territory owing to* [the] *civil strife*" that prevailed in Nicaragua in June-July 2018 or indeed thereafter.

294. In light of the above, the Respondent's Article 10.6 defense is rejected.

---

[271] DR-CAFTA, Article 10.6(1) (**CL-0001**). Neither Party argues that Article 10.13.5(b) is relevant in the context of this case. Article 10.13.5(b) provides that "*Articles 10.3, 10.4, and 10.10 do not apply to: … subsidies or grants provided by a Party, including government-supported loans, guarantees, and insurance*."

VII. THE CLAIMANT'S CLAIMS

A. PRELIMINARY ISSUES

295. The Tribunal notes at the outset that there are discrepancies (i) between the Claimant's various requests for relief, as set out in the Memorial, the Reply and the Post-Hearing Submission, as well as (ii) between the claims set out in the Claimant's requests for relief and the claims set out in the body of its written submissions.

296. Thus, in its Memorial the Claimant requests, *inter alia*, a declaration that "*Nicaragua has acted inconsistent with its Treaty obligations under CAFTA Articles 10.1, 10.2, 10.3, and 10.5*,"[272] whereas in the Reply, the Claimant requests a declaration that "*Nicaragua has acted inconsistent with its Treaty obligations under CAFTA Articles 10.1, 10.2, 10.3, 10.5 and 10.7*."[273] Finally, in its Post-Hearing Submission, the Claimant requests that the Tribunal "[f]*ind that Nicaragua has breached CAFTA Articles 10.2, 10.3, 10.5 and 10.7*."[274] The Claimant thus makes claims for breach of Articles 10.2 ("Relation to other Chapters"), 10.3 ("National Treatment") and 10.5 ("Minimum Standard of Treatment") in each of its three requests for relief, however, the claim for breach of Article 10.1 ("Scope and Coverage") is only included in the request for relief in the Memorial and in the Reply, and not in the Post-Hearing Submission. Finally, the claim for relief for expropriation (Article 10.7 – "Expropriation and Compensation") is not included in the request for relief in the Memorial, however, it is included in both the Reply and the Post-Hearing Submission.

297. The Tribunal notes that the Respondent has not commented on the above discrepancies in its written submissions. However, in its request for relief, as set out both in the Counter-Memorial and in the Rejoinder, the Respondent requests that the Tribunal "*dismiss*

[272] Cl. Mem., para. 946.

[273] Cl. Reply, para. 2158.

[274] Cl. PHB, para. 267.

Claimant's claims brought under Articles 10.3, 10.4, 10.5, and 10.7 of DR-CAFTA as meritless."[275]

298. The Tribunal therefore considers that the Claimant has brought and maintains claims for breach of Article 10.3 ("National Treatment") and Article 10.5 ("Minimum Standard of Treatment"), as these claims are included in each of the three requests for relief and are also developed in the body of the written submissions. The Tribunal further considers that the Claimant has brought and maintains a claim for breach of Article 10.7 ("Expropriation and Compensation") since although this claim is not mentioned in the request for relief in the Memorial, it is included in both the Reply and the Post-Hearing Submission. The requests for relief relating to the alleged breach of Article 10.1 (which is included in the Memorial and the Reply, but not in the Post-Hearing Submission) and Article 10.2 (which is included in each of the three requests for relief) are addressed further below, as they raise other issues. However, none of the three requests for relief includes a claim for breach of Article 10.4 ("Most-Favored Nation Treatment"), although the claim is addressed extensively in the Claimant's written submissions, at least insofar as the Claimant relies on Article 10.4 for the purposes of seeking to import more favorable investment protection standards included in other investment treaties concluded by Nicaragua. In the circumstances, the Tribunal considers that the failure to mention Article 10.4 is not intentional and that the Claimant does intend to raise a claim for breach of the MFN standard, as set out in its written submissions. As noted above, the Respondent has not raised any objections to the Claimant's MFN claim on the basis that it is not mentioned in the Claimant's request for relief.

299. As to the requests for relief relating to the alleged breach of Article 10.1 (which is included in the Memorial and the Reply, but not in the Post-Hearing Submission) and Article 10.2 (which is included in each of the three requests for relief), the Tribunal understands that the request for relief in the Claimant's Post-Hearing Submission is merely a summary of the more comprehensive request for relief set out in the Rejoinder and is not intended to replace it. Accordingly, the Tribunal considers that the Claimant intends to maintain its

[275] Resp. CM., para. 541; Resp. Rej., para. 806.

request for a declaration that the Respondent has breached Article 10.2. However, the Tribunal notes that the Claimant has not stated any claim for an alleged breach of either Article 10.1 or Article 10.2 anywhere in the body of its written submissions; indeed, with the exception of two non-substantive references to Article 10.2 in the Memorial,[276] the two provisions do not appear to have been even mentioned in the Claimant's written submissions. Moreover, neither Article 10.1 nor Article 10.2 contains or refers to any substantive investment protection standards that could serve as a basis of a claim; as noted above, the former provision deals with the "Scope and Coverage" of Section A ("Investment") of Chapter Ten of DR-CAFTA, and the latter provision with the "Relation [of Chapter Ten] to Other Chapters" of DR-CAFTA. In the circumstances, the Claimant's claims relating to an alleged breach of Articles 10.1 and 10.2 of DR-CAFTA, to the extent that they are indeed intended to be made and not included the Claimant's requests for relief by way of an error, are dismissed for failure to state a cognizable claim.

300. In sum, the Tribunal considers that it has properly before it the Claimant's claims under Articles 10.3, 10.4, 10.5 and 10.7 of DR-CAFTA. The Tribunal notes that these are also the claims that the Respondent has defended in its written submissions.

301. In addition to substantive claims under Articles 10.3 (National Treatment), 10.4 (MFN Treatment), 10.5 (Minimum Standard of Treatment) and 10.7 (Expropriation and Compensation) of DR-CAFTA, the Claimant also invokes the MFN provision in Article 10.4 to import more favorable investment protection standards from the Russian and Swiss BITs, including (in the Claimant's view) more favorable fair and equitable treatment ("**FET**"), expropriation and national treatment standards. On this basis, the Claimant raises in its Memorial claims for (i) expropriation as well as for alleged breach of (ii) the FET and the FPS standards (as also included in Article 10.5) and (iii) the national treatment and MFN standards.[277]

[276] Cl. Mem., para. 448.

[277] Cl. Mem., paras. 718-767.

302. In its Reply, under the heading "International Law Issues," the Claimant deals with the legal basis and the facts supporting its claims, under the headings "Most Favored Nation (MFN)," "Full Protection and Security," "Expropriation," "International Law Treatment," "National Treatment" and "MFN Treatment." At paragraph 65 of the Reply, the Claimant states that its submission "*addresses the following four foundational claims that this Tribunal must consider,*" listing (i) expropriation; and alleged breach of (ii) the FET standard; (iii) the FPS standard; and (iv) national treatment and MFN treatment standards.

303. The Respondent denies that it has breached any of the investment protection standards of DR-CAFTA.

304. The Tribunal considers it appropriate to first deal with the Claimant's FPS claim and then the FET and expropriation claims, and address the Claimant's arguments relating to the alleged breach of the MFN and national treatment standards in connection with the FPS, FET and expropriation claims (to the extent the Claimant relies on the MFN and national treatment standards to claim a more favorable level of protection) and, as appropriate, as standalone MFN and national treatment claims.

305. As determined above in Section VI.B(2)(b), the Tribunal will consider the Claimant's claims insofar as they relate to measures adopted or maintained by Nicaragua (within the meaning of Article 10.1 of DR-CAFTA) as of the end of July 2018, when the shelter order was lifted and the provisions of DR-CAFTA relating to investment protection became again applicable. By contrast, the Tribunal will not consider the Claimant's claims or the underlying facts insofar as they arise out of Nicaragua's alleged failure to protect the Claimant's investment prior to end of July 2018, as these claims are excluded under Article 21.2(b) of DR-CAFTA.

B. ALLEGED BREACH OF THE FULL PROTECTION AND SECURITY STANDARD

(1) The Parties' Positions

a. The Claimant's Position

(i) Memorial

306. The Claimant submits that the Respondent has failed to provide full protection and security to the Claimant's investment in Inagrosa.[278] While the Claimant does not always clearly distinguish between the Respondent's measures that allegedly constitute a breach of the FPS standard and those that allegedly breach the FET standard (and indeed suggests that the FPS standard may be considered as an element of the FET standard), the Tribunal will consider the Claimant's allegations broadly and, as appropriate, consider the Claimant's allegations under both standards.

307. The Claimant contends that the Respondent breached the FPS standard by (i) failing to take steps to remove the unlawful occupants; (ii) taking "*positive steps*" to arm and equip the unlawful occupants; and (iii) taking steps to assist the unlawful occupants in the continued occupation of Hacienda Santa Fé.[279] The Claimant also contends that (iv) "[t]*he police continued to act contrary to principle of good faith when on August 4, 2018, they escorted paramilitary Comandante Cinco Estrellas into Hacienda Santa Fé*";[280] and that, (v) on 6 August 2018, the police "*continued to evade their responsibilities when they escorted Mayor Herrera to Hacienda Santa Fé to give a speech to the paramilitaries*."[281]

(ii) Reply

308. In its Reply, the Claimant makes a more comprehensive argument in support of its FPS claim than in the Memorial.

[278] Cl. Mem., para. 754(e).

[279] Cl. Mem., paras. 755(c), (d) and (e) and para. 759.

[280] Cl. Mem., para. 758.

[281] Cl. Mem., para. 759.

309. The Claimant submits that the FPS standard requires a host State "*to exercise reasonable care to protect investments against injury by private parties*."[282] Under the standard, "*the host State is under an obligation to 'take active measures to protect the investment from adverse effects' stemming from private parties or from actions of the Host State and its organs, including armed forces*."[283]

310. According to the Claimant, there is an ambiguity in arbitral jurisprudence as to the relationship between the FET and the FPS standards in terms of whether the FPS standard is a reflection of the FET standard or constitutes an "*independent standard*." However, in the Claimant's view, "*this makes little difference*" in practical terms, and there is a consensus that the FPS standard is not "*absolute*" but "*rather one of due diligence*" and does not imply any strict liability on the part of the host State unless it is directly responsible for the wrongfulness. According to the Claimant, in the circumstances of direct harm, the FET standard "*generally becomes the applicable standard over FPS*."[284]

311. The Claimant contends that the FPS standard concerns "*first and foremost*" the physical protection of protected investors and their investments. Investment treaty tribunals have also applied the standard to address both private violence and violence by State organs.[285]

312. The Claimant submits that CAFTA creates a "*more limited scope to the operation of FPS*" through its terms and Annex 10-B, which "*confirms that the meaning of FPS only extends to that required under customary international law*." According to the Claimant, the "*non-autonomous*" nature of the FPS standard in DR-CAFTA is irrelevant, however, because

[282] Cl. Reply, para. 1279, quoting UNCTAD, Bilateral Investment Treaties in the Mid-1990s (New York: United Nations, 1998) (**CL-0151**).

[283] Cl. Reply, para. 1280, quoting Christoph Schreuer, "*Full Protection and Security*" in Journal of International Dispute Settlement (2010), Vol. 1, No. 2, pp. 353-369 (**CL-0272**).

[284] Cl. Reply, para. 1280.

[285] Cl. Reply, para. 1281 (referring to *Bernhard von Pezold and others v. Republic of Zimbabwe*, ICSID Case No. ARB/10/15, Award, July 28, 2015, paras. 597–599 (**CL-0162-ENG**); *Wena Hotels Ltd v. Arab Republic of Egypt,* ICSID Case No. ARB/98/4, Award, 8 December 2000, para. 896 (**CL-0039-ENG**); *Asian Agricultural Products Ltd. v. Republic of Sri Lanka*, ICSID Case No. ARB/87/3, Final Award, 27 June 1990, paras. 78–86 (**CL-0147-ENG**); *American Manufacturing & Trading, Inc. v. Republic of Zaire*, ICSID Case No. ARB/93/1, Award, 21 February 1997, paras. 6.02–6.11 (**CL-0148-ENG**)).

the Claimant is entitled to invoke the more favorable provision in the Russian BIT through the MFN provision in Article 10.4.[286]

313. The Claimant contends that the FPS provision in Article 2.2 of the Russian BIT, which provides for "*full legal protection*," provides more extensive protection than Article 10.5 of DR-CAFTA.[287] The Claimant relies on *Siemens v. Argentina* to argue that Article 2.2 of the Russian BIT, given its language, refers to security that goes beyond physical protection. Such wider protection includes "*protection for the rule of law and fundamental fairness, and the legitimate expectation of an investor is to be afforded full protection and security in a manner corresponding to this understanding*."[288]

314. The Claimant notes that the Respondent does not dispute that the FPS standard requires the host State to prevent physical harm to individuals and property, but instead "*endeavors to assert its compliance with the obligations*." While the Claimant's argument focuses on the events between June and July 2018, to which, as determined above, DR-CAFTA is largely not applicable in the present case due to the Respondent's invocation of Article 21.2(b), the Claimant also contends that the National Police left the property prematurely after the eviction of the invaders on 11 August 2018, which made it vulnerable to a fresh invasion.[289]

(iii) Post-Hearing Submission

315. In its Post-Hearing Submission, the Claimant submits, relying on the evidence given at the Hearing, that Nicaragua's failure to protect the Claimant's investment was "*deliberate*." Specifically, the Claimant contends that (i) Captain Herrera admitted that he did not verify the removal of the armed invaders when he signed the notarized statement on 11 August 2018, nor followed up to ensure that the property was secured; nor was any handover certificate issued; and (ii) the invaders did not return to the plantation due to

[286] Cl. Reply, paras. 1289-1296.

[287] Cl. Reply, paras. 1297-1301.

[288] Cl. Reply, paras. 1302-1306 (referring to *Siemens A.G. v. Argentine Republic*, ICSID No. ARB/02/8, Award, 6 February 2007, paras. 362-389 (**RL-0105**)). *See also* Cl. Reply, para. 1320 (arguing that "[t]*he augmentation of the CAFTA FPS standard, with the explicit legal protection standard in the Russian BIT, expressly creates protection for the rule of law, procedural fairness, and due process, in addition to those guaranteed by Fair and Equitable Treatment*.").

[289] Cl. Reply, paras. 1321-1360.

Inagrosa's failure to take over the property; the evidence shows that the property was in fact not returned to Riverside in 2018.[290]

316. The Claimant further submits that the measures taken by Nicaragua, including a meeting with the leaders of the unlawful occupants in January 2019 and a witness summons in April 2021, are "*woefully insufficient*" and, taken months or years after the invasion, fail to meet the due diligence standard under international law. The Respondent only cleared Hacienda Santa Fé of invaders in August 2021, although it could have acted years earlier, and therefore allowed the situation to deteriorate. According to the Claimant, Nicaragua's failures amount to a breach of the FPS standard.[291]

317. The Claimant contends that, contrary to the Respondent's case, not all invaders left after the 11 August 2018 meeting, and the police did not check whether they had. Moreover, in April 2021, the Nicaraguan government created a community forest reserve at Hacienda Santa Fé, led by individuals involved in the initial invasion. While on 9 September 2021 the Respondent notified Riverside that the property was free of invaders, it failed to protect Inagrosa management against death threats, and no criminal charges have been filed against any of the leaders of the invasion. In the circumstances, "*the return of* [Hacienda Santa Fé] *was impractical and dangerous*," and therefore not a "*reasonable option*."[292]

b. The Respondent's Position

(i) Counter-Memorial

318. The Respondent submits that the Claimant's FPS claim is without factual or legal merit. The Respondent claims that (i) it has provided Riverside's investment with legal security; (ii) the FPS standard is not an absolute obligation but "*only requires a State to exercise due diligence appropriate in the circumstances*," which Nicaragua did; (iii) Nicaragua adopted measures that were appropriate in light of the available law enforcement resources and "*effectively balanced*" both the protection of Inagrosa's undisputed rights in the property

[290] Cl. PHB, para. 153.

[291] Cl. PHB, paras. 154-157.

[292] Cl. PHB, paras. 180-194 (referring to evidence of Mr and Mrs Rondón (regarding death threats), Tr. Day 2, 305:22-306:19 (Mrs Rondón); 473:24-474:11 (Mr Rondón) and the evidence of Mr Castro (regarding failure to file criminal charges), Tr. Day 5, 1217:2-25).

with the imperative to avoid unnecessary risks of escalated violence and harm to individuals; and (iv) the FPS obligation does not require the State to use force against its own citizens where more peaceful alternatives are available.[293]

319. The Respondent claims that the FPS clause in DR-CAFTA is limited to the rights provided under the minimum standard of treatment of customary international law, and that this standard refers to protection against physical harm to persons and property. According to the Respondent, the evidence shows that it complied with this obligation. The Respondent never legalized or ratified the unlawful land occupations and "*from the very start*" of the invasion of Hacienda Santa Fé, Nicaraguan officials warned the invaders that Hacienda Santa Fé was private property. Nicaragua also acted to remove the invaders from the property and resettled them peacefully, and currently holds Hacienda Santa Fé for the benefit of Inagrosa, pursuant to a court order sought as a protective order by Nicaragua's Attorney General.[294]

320. The Respondent further claims that the FPS standard is an obligation of means, not of result. It does not impose an absolute obligation but "*only requires a State to exercise due diligence appropriate to the circumstances*," citing the *ELSI* case in support.[295] Similarly, the commentary to the ILC Articles observes that obligations of prevention are usually construed as best efforts obligations, requiring States to take all reasonable or necessary measures to prevent a certain event from occurring, but without warranting that the event will not occur.[296] Investment treaty tribunals have adopted the same approach, requiring exercise of due diligence that is reasonable in the circumstances, taking into account the host State's resources.[297] In the present case, the obligation of due diligence "*cannot mean that Nicaragua was obliged to deploy military scale force against its own citizens, some of*

[293] Resp. CM., paras. 359-360.

[294] Resp. CM., paras. 361-362.

[295] Resp. CM., paras. 363-364 (referring to *Elettronica Sicula S.p.A. (ELSI)* (*U.S. v Italy*) [1989] ICJ Rep 15, 20 July 1989, para. 108 (**RL-0057**)).

[296] Resp. CM., para. 364 (referring to ILC Articles, Article 14, Commentary, para. 14 (**CL-0017**)).

[297] Resp. CM., paras. 365-367 (citing *Ronald S. Lauder v. Czech Republic*, UNCITRAL, Final Award, 3 September 2001, para. 308 (**RL-0060**) and *Pantechniki S.A. Contractors & Engineers v. Republic of Albania*, ICSID Case No. ARB/07/21, Award, 30 July 2009, para. 77 (**RL-0051**)).

whom had settled on the property with their families, just to clear the land faster, where more peaceful options were available – and ultimately proved successful."[298]

(ii) Rejoinder

321. In its Rejoinder, the Respondent reiterates its position on the content of the FPS standard and its compliance with the standard as stated in the Counter-Memorial, and responds to the Claimant's submissions as set out in the Reply.

322. The Respondent notes that the Claimant does not dispute that the FPS obligation is an obligation of means, and indeed specifically confirms it, while challenging the adequacy of the Respondent's response. According to the Respondent, the Claimant's proposed deployment of Nicaragua's armed forces against its own population would have been "*exceptionally dangerous*" and put lives at risk, and therefore would not have been appropriate. It is also not what the FPS standard requires.[299]

323. The Respondent recalls that it succeeded in evicting the invaders in less than two months from the occupation, and that it is Inagrosa's failure to secure its property that caused it to be re-invaded. Nonetheless, Nicaragua was able to peacefully remove and relocate the armed invaders in less than three years, by August 2021, which is significantly less than it took Nicaragua to remove the members of the El Pavón community who illegally occupied the same property in 2000 and were eventually evicted in 2004. Nor did Inagrosa initiate judicial proceedings for eviction in 2018, as it had done during the earlier occupation.[300]

324. The Respondent also rejects the Claimant's attempt to import Article 2.2 of the Russian BIT. First, according to the Respondent, it is irrelevant whether Article 10.5 of DR-CAFTA could be modified to include legal protection by importing Article 2.2 of the Russian BIT; the Claimant's FPS claim "*narrowly and exclusively relies upon its unfounded allegations concerning Nicaragua's law enforcement response to Hacienda Santa Fé*." Second, pursuant to Article 10.13, Article 10.4 of DR-CAFTA is inapplicable

[298] Resp. CM., para. 370.

[299] Resp. Rej, paras. 636-641 (referring to *South American Silver Limited v. The Plurinational State of Bolivia*, PCA Case No. 2013-15, Award, 22 November 2018, paras. 691, 698 (**RL-0016**)).

[300] Resp. Rej., paras. 642-651.

to a "*measure with respect to the provision of law enforcement*" pursuant to Nicaragua's express reservation in Annex II of DR-CAFTA. The Respondent also contends that Article 10.4(1) and (2) "*clearly provide*" that the MFN clause only applies to investors and investments in "*like circumstances*." The Claimant has failed to identify a single Russian investor in Nicaragua under "*like circumstances*" and cannot seek to import any provision of the Russian BIT. Nor has the Claimant explained how the provisions it wishes to import from the Russian BIT are more favorable, or the content of those provisions. NAFTA tribunals have rejected similar attempts in similar circumstances.[301]

(iii) Post-Hearing Submission

325. In its Post-Hearing Submission, the Respondent summarizes the position set out previously in its written submissions and at the Hearing, including that the FPS standard does not oblige the State to deploy armed forces against its own civilian population to accommodate impatient investors, especially when peaceful alternatives are available. Nor does the FPS standard invite tribunals to second-guess difficult government decisions and thus embodies a wide margin of appreciation "*for policies consistent with reasonableness in the circumstances*."[302]

326. In the Respondent's view, its response to the occupation was consistent with Article 10.4 of DR-CAFTA. Similar to the circumstances in *Glencore* and *South American Silver*, the situation at Hacienda Santa Fé required dislodging armed ex-*Contras* and their families from terrain that they considered their home. Nicaragua was therefore diligent about taking reasonable steps to secure Riverside's investment "*through a successful program of community engagement and resettlement*." The Respondent requests that the Tribunal also take into account the Claimant's conduct. Beyond a few phone calls, the Claimant "*failed to follow-up or work with Nicaraguan authorities to remove the invaders, instead preferring to bring litigation*." According to the Respondent, "*the Tribunal should not overlook Claimant's manifest disinterest in recovering possession of* [Hacienda Santa Fé]

[301] Resp. Rej., paras. 657-693 (referring to *Chemtura Corporation v. Government of Canada*, PCA Case No. 2008-01, Award, 2 August 2010, para. 236 (**RL-0050**)).

[302] Resp. PHB, paras. 118-122.

and its preference to pretend that measures taken to protect [Hacienda Santa Fé] *are somehow a 'judicial expropriation'*."[303]

(2) The Tribunal's Analysis

a. Applicable Legal Standard

327. The Claimant's claim is based on Article 10.5 ("Minimum Standard of Treatment") of DR-CAFTA, which provides, in relevant part:

> "***Minimum Standard of Treatment***
>
> ***(Article 10.5 shall be interpreted in accordance with Annex 10-B)***
>
> *1. Each Party shall accord to covered investments treatment in accordance with customary international law, including fair and equitable treatment and full protection and security.*
>
> *2. For greater certainty, paragraph 1 prescribes the customary international law minimum standard of treatment of aliens as the minimum standard of treatment to be afforded to covered investments. The concepts of 'fair and equitable treatment' and 'full protection and security' do not require treatment in addition to or beyond that which is required by that standard, and do not create additional substantive rights. The obligation in paragraph 1 to provide:*
>
> […]
>
> *(b) 'full protection and security' requires each Party to provide the level of police protection required under customary international law.*
>
> *3. A determination that there has been a breach of another provision of this Agreement, or of a separate international agreement, does not establish that there has been a breach of this Article.*"

328. According to the chapeau of Article 10.5, the provision "*shall be interpreted in accordance with Annex 10-B*." Annex 10-B ("Customary International Law") provides:

> "*The Parties confirm their shared understanding that 'customary international law' generally and as specifically referenced in Articles 10.5, 10.6, and Annex 10-C results from a general and consistent practice of States that they follow from a sense of legal obligation. With regard to*

[303] Resp. PHB, paras. 129-134.

> *Article 10.5, the customary international law minimum standard of treatment of aliens refers to all customary international law principles that protect the economic rights and interests of aliens*."

329. As noted above, the Claimant claims that it is entitled to more favorable treatment than that provided in Article 10.5 under the MFN clause in Article 10.4 ("Most-Favored-Nation Treatment") of DR-CAFTA, which provides:

> "*1. Each Party shall accord to investors of another Party treatment no less favorable than that it accords, in like circumstances, to investors of any other Party or of any other non-Party with respect to the establishment, acquisition, expansion, management, conduct, operation, and sale or other disposition of investments in its territory.*
>
> *2. Each Party shall accord to covered investments treatment no less favorable than that it accords, in like circumstances, to investments in its territory of investors of any other Party or of any non-Party with respect to the establishment, acquisition, expansion, management, conduct, operation, and sale or other disposition of investments.*"

330. The Claimant invokes, as a more favorable provision applicable to full protection and security, Article 2(2) of the Russian BIT, which provides:

> "*Each Contracting Party shall, in accordance with the legislation of its State, provide full legal protection in the territory of its State to investments of investors and to investors of the State of the other Contracting Party.*"

331. The Claimant submits that the protection provided by the Russian BIT is "*broader than the obligation for full protection and security in CAFTA Article 10.5.*"[304]

332. As summarized above, the Respondent submits that (i) under Article 10.13, Article 10.4 of DR-CAFTA is inapplicable to a "*measure with respect to the provision of law enforcement*" pursuant to Nicaragua's express reservation in Annex II of DR-CAFTA; (ii) the Claimant's invocation of Article 2.2 of the Russian BIT is "*irrelevant*" since its complaints relate to the Respondent's alleged failure to provide physical rather than legal

[304] Cl. Reply, para. 1170. *See also id.*, para. 1175.

protection; and in any event, (iii) the Claimant has not shown that Nicaragua has provided more favorable treatment to Russian investors "*in like circumstances*."

333. The Tribunal notes that, pursuant to Article 10.13.2 of DR-CAFTA, "*Articles 10.3, 10.4, 10.9 and 10.10 do not apply to any measure that a Party adopts or maintains with respect to sectors, subsectors or activities, as set out in its Schedule to Annex II*." As noted by the Respondent, according to Nicaragua's reservation in Annex II of DR-CAFTA, as to the MFN treatment obligation under Article 10.4, "*Nicaragua reserves the right to adopt or maintain any measure with respect to the provision of law enforcement*." However, as noted by the Claimant's counsel at the Hearing, Nicaragua's reservation is specifically limited to the "*social services*" sector, which is not the sector of economy in which the Claimant (or Inagrosa) operates.[305] Accordingly, the Tribunal finds that Nicaragua's reservation is not applicable in the present case.

334. The Tribunal therefore accepts that the Claimant is in principle entitled to claim more favorable treatment than the minimum standard of treatment provided for in Article 10.5 of DR-CAFTA if it can show that Nicaragua provided to the Claimant treatment that was less favorable than the treatment it provided to Russian investors that were in "*like circumstances*" during the relevant period, *i.e.* from late July 2018 until the date of commencement of the present arbitration.

335. The Claimant argues that for the purposes of the MFN treatment, "*all persons possessing private land in the territory of Nicaragua, as well as those seeking protection of private landholdings, are in like circumstances to Inagrosa, the investment of the Investor, Riverside.*" According to the Claimant, Riverside and its investment Inagrosa received less favorable treatment with respect to the establishment, acquisition, expansion, management, conduct, operation, and sale or other disposition of investments than that received by other investments of other parties and non-parties in Nicaragua.[306]

[305] Tr. Day 1, 89:10-90:16.

[306] Cl. Mem., paras. 430-431.

336. However, what matters in this case, for the purposes of determining whether the Claimant is entitled to invoke the MFN clause in Article 10.4 of DR-CAFTA, is not whether there are other landowners in Nicaragua who were, in general terms, "*possessing private land in the territory of Nicaragua*" or "*seeking protection of private landholdings*," but whether there were Russian investors in "*like circumstances*" to the Claimant and/or its investments, and whether they were treated more favorably than the Claimant and/or its investments.

337. While the Claimant has identified Russian investments in Nicaragua,[307] it merely alleges that Russian investors in Nicaragua were in "*like circumstances*" because public security measures by the State for property and persons are provided "*generally to all in the State*."[308] The determination of whether an investor or an investment identified by the Claimant is in "*like circumstances*" is a determination based on facts. Accordingly, the Claimant must show that Russian investors who were in specifically identified "*like circumstances*" were accorded treatment that qualifies as the provision of full protection and security that was more favorable than that provided to the Claimant. The Claimant has not made such a showing.

338. Accordingly, the Claimant's attempt to invoke Article 2.2 of the Russian BIT fails, and the legal standard applicable to the Claimant's FPS claim remains that set out in Article 10.5.2(b) of DR-CAFTA.

339. As to the content of the FPS standard under Article 10.5.2(b) of DR-CAFTA, it is common ground that the standard is one of due diligence and requires the host State to provide the level of police protection that is reasonable in the circumstances. The Tribunal agrees that this is the standard applicable under customary international law, as evidenced by the legal authorities produced by the Parties.[309]

---

[307] Investor's Response to the Non-Disputing Party Submission, paras. 41-46.

[308] Investor's Response to the Non-Disputing Party Submission, para. 40.

[309] *See*, *e.g.*, *Elettronica Sicula S.p.A. (ELSI) (U.S. v Italy)* [1989] ICJ Rep 15, 20 July 1989, para. 108 (holding that "[t]*he reference in Article V to the provision of 'constant protection and security' cannot be construed as the giving of a warranty that property shall never in any circumstances be occupied or disturbed*.") (**RL-0057**); *Ronald S. Lauder v. Czech Republic*, UNCITRAL, Final Award, 3 September 2001, para. 308 ("*The Arbitral Tribunal is of the opinion that the Treaty obliges the Parties to exercise such due diligence in the protection of foreign investment as reasonable*

b. Whether the Respondent Failed to Comply with the Full Protection and Security Standard

340. The Tribunal has determined above that DR-CAFTA is applicable to the Claimant's claims as of the end of July 2018, when Nicaragua lifted the shelter order. Consequently, to the extent that the Claimant claims, in connection with its FPS claim, that the Respondent failed to provide the required level of police protection in response to the invasion and occupation of Hacienda Santa Fé prior to the end of July 2018, DR-CAFTA is not applicable to such claims, by virtue of the Respondent's invocation of Article 21.2(b).

341. As summarized above, in its Memorial the Claimant refers to the following measures adopted or maintained by Nicaragua during the relevant period:[310]

(i) Failure to take steps to remove the unlawful occupants;[311]

(ii) Taking "*positive steps*" to arm and equip the unlawful occupants;[312]

(iii) Taking steps to assist the unlawful occupants in the continued occupation of Hacienda Santa Fé;[313]

(iv) Escorting Comandante Cinco Estrellas into Hacienda Santa Fé;[314] and

under the circumstances.") (**RL-0060**); *See also* ILC Articles, Article 14, Commentary, para. 14, noting, in relation to para. 3 of ILC Article 14, that "[o]*bligations of prevention are usually construed as best efforts obligations, requiring States to take all reasonable or necessary measures to prevent a given event from occurring, but without warranting that the event will not occur*." (**CL-0017**).

[310] Cl. Mem., paras. 755, 758-759. The Claimant makes these factual allegations under the heading of full protection and security, but as noted above, the Claimant appears to take the position that the obligation to provide full protection and security is an element of the obligation to accord fair and equitable treatment. Indeed, although the Claimant lists "*Full protection and security*" as a head of claim under the heading "V. CAFTA TREATY CLAIMS," the subsequent heading "VI. THE FACTS APPLIED TO THE LAW" does not contain a heading for "*Full protection and security*." *See* Cl. Mem., para. 578 ("*The CAFTA Treaty contains an obligation upon Nicaragua to provide fair and equitable treatment as well as full protection and security. These two concepts are mutually dependent and inter-linked*.")

[311] Letter from Mr Rondón to Police Captain William Herrera, 10 August 2018 (**C-0012-SPA**).

[312] First Gutiérrez Statement, para. 129 (**CWS-02**).

[313] First Gutiérrez Statement, paras. 101, 129 (**CWS-02**).

[314] Cl. Mem., para. 755(e); First Gutiérrez Statement, para. 98 (**CWS-02**).

(v) Escorting Mayor Herrera to Hacienda Santa Fé to give a speech to the paramilitaries.[315]

342. In its Reply, the Claimant further contends that in the summer and fall of 2018 the National Police "*did much more in response to other land invasions and injuries to property occurring at the same time*" than they did in relation to Hacienda Santa Fé.[316] In this connection, the Claimant identifies a number of such invasions and comments on how they were addressed by the National Police.[317] These events largely fall within the time period covered by the shelter order and accordingly DR-CAFTA is not applicable to them. To the extent that evictions from such other properties took place later than in the case of Hacienda Santa Fé (which appears to have been the case in many instances),[318] such late evictions do not evidence that Hacienda Santa Fé was accorded inadequate police protection. On the contrary, the invaders of Hacienda Santa Fé were evicted more expeditiously than the invaders of most of the other affected properties.

343. Having considered the evidence, the Tribunal finds that there is no credible support for the Claimant's allegations that Nicaraguan State officials (i) took "*positive steps*" to arm and equip the unlawful occupants; and (ii) assisted the unlawful occupants in the continued occupation of Hacienda Santa Fé; and further, that (iii) the National Police escorted Comandante Cinco Estrellas into Hacienda Santa Fé; and that (iv) the National Police also escorted Mayor Herrera to Hacienda Santa Fé to give a speech to the unlawful occupants. The Claimant relies, in support of these allegations, on the evidence of Mr Gutierrez, which

[315] First Gutiérrez Statement, para. 103 (**CWS-02**).

[316] Cl. Reply, para. 1329.

[317] Cl. Reply, paras. 1328-1360.

[318] Cl. Reply, paras. 1331-1360.

is based entirely on hearsay.[319] As noted above, the latter two allegations are also denied by Police Captain Herrera.[320]

344. Therefore, the sole allegation that remains to be considered is the Claimant's allegation that the Respondent failed to take steps to remove the unlawful occupants (insofar as the allegation relates to the post-end of July 2018 time period). The Tribunal will consider this allegation in light of the evidence relating to the relevant time period.

345. The Tribunal considers that the events listed below, which have been invoked either by the Claimant in support of its FPS claim or by the Respondent in support of its defense, are established, in light of the evidence in the record:

(i) On 11 August 2018, Mayor Leónidas Centeno and Commissioner Marvin Castro met with the invaders at Hacienda Santa Fé and ordered them to vacate the property. The invaders followed the order and left the property.[321]

(ii) On 17 August 2018, a large number of illegal occupants returned to Hacienda Santa Fé. Additional illegal occupants moved to the property the following day, 18 August 2018.[322]

[319] The Claimant relies on Mr Gutierrez' First Witness Statement in support of the first and the second allegation, however, Mr Gutierrez merely refers to a statement of an undisclosed individual. *See* First Gutiérrez Statement, para. 129 (**CWS-02**). While the Claimant also complains, relying on Mr Gutierrez' evidence, that on 4 August 2018, the National Police "*escorted*" paramilitary Comandante Cinco Estrellas into Hacienda Santa Fé, the Tribunal notes that Mr Gutierrez' evidence is based on hearsay, and in any event, he appears to be referring to the visit of Ms Norma Herrera, the Mayor of San Rafael del Norte, and Police Captain Mr William Herrera to Hacienda Santa Fé. *See* First Gutiérrez Statement, para. 98. Mr Gutierrez' evidence that the Nicaraguan authorities, notably Mayor Norma Herrera, assisted the occupiers in the continued occupation of Hacienda Santa Fé, is based solely on hearsay; *See* First Gutiérrez Statement, paras. 101, 129. Similarly, Mr Gutierrez' allegation that the National Police was providing guns to the invaders after their eviction on 11 August 2018 (and apparently after their return to Hacienda Santa Fé on 17-18 August 2018) is based on hearsay. *See* First Gutiérrez Statement, para. 129.

[320] First Herrera Statement, paras. 30-31 (**RWS-03**); Second Herrera Statement, para. 24(f) (**RWS-12**).

[321] Cl. Mem., paras. 192, 262; Cl. Reply, paras. 385-386; Resp. CM., para. 35 (Section II); Resp. Rej., para. 83; First Castro Statement, para. 37 (**RWS-02**); Email from Mr Gutierrez to Mr Rondón, 11 August 2018 (**C-0347**).

[322] Cl. Mem., paras. 194, 267; Cl. Reply, paras. 391-394; Resp. CM., paras. 81, 337, 431, 501; Resp. Rej., para. 69; Email from Mr Gutierrez to Mr Rondón, 17 August 2018 (**C-0349**).

(iii) In January 2019, Mr Leónidas Centeno, the mayor of Jinotega and Mr Juan Bentano, the Attorney General of Jinotega, met with the occupants. Several families voluntarily left the property in the course of January 2019.[323]

(iv) In January 2019, a "*Committee* [...] *with regard to the eviction of the Santa Fé El Pavón parcel*" was formed, composed of Mayor Centeno, Attorney General Bentano and Commissioner Castro; on 24 January 2019, they met with the leaders of the occupants to discuss the vacation of Hacienda Santa Fé. The occupants acknowledged that the property was privately-owned, and it was agreed that they were "*willing to consent*" to the eviction and the delivery of the property in two phases, consisting in the first phase of a prompt delivery of the unharvested land and in the second phase, on 24 April 2019, of the remaining land once the crops had been harvested.[324]

(v) On 28 August 2020, the Claimant sent a Notice of Intent to Nicaragua relating to the present dispute.[325]

(vi) On 19 March 2021, the Claimant filed a Notice of Arbitration with the ICSID Secretariat.

(vii) On 28 April 2021, the Jinotega Department's Attorney-General's Office sent summons to the occupants of Hacienda Santa Fé, inviting them to appear at the offices of the Attorney General on 30 April 2021.[326]

(viii) On 5 May 2021, the State Attorney General's Office met with the occupants of Hacienda Santa Fé. According to the minutes of the meeting, the occupants acknowledged that the property was privately owned and accepted the relocation proposal made by the Attorney General's Office. The occupants also

[323] Cl. PHB, para. 154; Resp. CM., paras. 39, 81, 337; Resp, Rej., para. 145; Resp. PHB, para. 113; First Gutiérrez Rizo Statement, para. 69 (**RWS-01**).

[324] Minutes of the Committee Meeting held with regard to the Eviction of the Santa Fé El Pavón parcel, 24 January 2019 (**R-0050**); First Castro Statement, para. 39 (**RWS-02**).

[325] Notification under CAFTA for Intent to Arbitration, 28 August 2020 (**C-0006**).

[326] Summons sent by the Jinotega Departmental Attorney's Office to occupants of Hacienda Santa Fé, 28 April 2021 (**R-0066**).

agreed "*not to return to the Santa Fé estate nor to take over any other property not assigned by the State of Nicaragua under warning of trespassing*."[327]

(ix) On 14 August 2021, the police evicted the occupiers from Hacienda Sante Fé.[328]

(x) On 9 September 2021, counsel for the Respondent informed the Claimant's counsel that Hacienda Santa Fé was "*in a position to be controlled, managed and developed by its legal owners*."[329]

(xi) On 29 September 2021, the Attorney General's Office entered into an agreement with *Empresa de Servicios de Seguridad Privada* for the provision of 24-hour security services for Hacienda Santa Fé.[330]

(xii) On 30 November 2021, the Attorney General of Nicaragua filed an application for urgent precautionary measures for the appointment of a judicial depositary.[331]

(xiii) On 15 December 2021, a precautionary measure appointing a judicial depositary was adopted by the Second Oral Court of the Civil District Court of Jinotega Northern District.[332]

346. As to item (ii) above, the Claimant further complains that no handover certificate was issued in connection with the 11 August 2018 eviction, and that the police left Hacienda Santa Fé prematurely, which then enabled the illegal occupants to return to the property in approximately a week.[333]

---

[327] Relocation minute between farmers and Jinotega's Attorney General Office, 5 May 2021 (**R-0051**) (Emphasis omitted).

[328] Nicaragua Actual: "*Police Evict Sandinistas who had taken the Santa Fe farm in San Rafael del Norte, Jinotega*", 14 August 2021 (**C-0059**).

[329] Letter from Foley Hoag LLP to Appleton & Associates regarding offer to return Hacienda Sante Fé, 9 September 2021 (**C-0116**).

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

[331] Application for Urgent Precautionary Measures for appointment of judicial depositary, 30 November 2021 (**C-0253**).

[332] Court Order seizing Hacienda Santa Fé issued by the Second Oral Civil District Court of Jinotega Northern District, 15 December 2021 (**C-0251**).

[333] Cl. Reply, paras. 1323, 1382.

347. The Tribunal notes that there is no evidence in the record that a formal handover certificate was required (although such certificates appear to have been issued in the context of many but not all of the other evictions),[334] or that the absence of a handover certificate prevented Inagrosa's management from taking over the property as soon as the illegal occupants were evicted. In any event, as the summary of events at paragraph 345 shows, there is no evidence in the record suggesting that Inagrosa or Riverside made any efforts over a period of more than two years, from 11 August 2018, when the illegal occupants were evicted, to 28 August 2020, when the Claimant sent its Notice of Intent to Nicaragua, to secure return of the property, either by way of requesting that the police take action to evict the illegal occupants or by way of filing a formal complaint with the Nicaraguan authorities, as noted by Attorney General Gutierrez in her report of 25 March 2021.[335]

348. By contrast, in the months following the first eviction of 11 August 2018, the Nicaraguan authorities commenced a process for the eviction of the occupants. In January 2019, Mr Leónidas Centeno, the mayor of Jinotega and Mr Juan Bentano, the Attorney General of Jinotega, met with the occupants. Following the meeting, in the course of January 2019, several families voluntarily left the property. On 19 January 2019, the Nicaraguan authorities convened a committee led by Mayor Centeno, Attorney General Bentano and Commissioner Marvin Castro to deal with the delivery of Hacienda Santa Fé. On 24 January 2019, the committee met with the leaders of the illegal occupants. The resolutions reached at the meeting, as recorded in the minutes, state the following:

> "*1. It is agreed that they acknowledge the property to be private, and they are willing to consent to the eviction and delivery of the estate in two phases, the first one consisting in the prompt delivery of the unharvested land (sown) with corn and bean crops. As a second phase, on April 24, 2019, the area of land covering approximately 500* manzanas *sown with corn and beans will be delivered, once the crops have been harvested.*
>
> *2. The list of all occupants will be submitted before the Nicaraguan Attorney General's Office (PGR), for cleaning and screening, so as to check whether they have obtained benefits. From the list so cleaned, alternatives for resolution will be sought. The referred list will be*

[334] *See* Cl. Reply, fns. 1429-1444.

[335] Report from Attorney General Gutiérrez *re* invasion to Hacienda Sante Fé, 25 March 2021 (**C-0427**).

submitted on Monday, January 28, 2019 [illegible] *Efren Orozco and Omar López.*

3. It is agreed that the Committee will follow up on the resolutions on a monthly basis; to that end, meetings are set to take place on the 2nd Friday every month."[336]

349. It appears that not much further progress was made to evict the occupiers in 2019-2020, and that Nicaragua was prompted to action only after the Claimant had sent its Notice of Intent on 28 August 2020 and filed its NfA on 19 March 2021.[337] Thus, on 28 April 2021, the Attorney-General's Office of the Jinotega Department initiated the process of eviction and summoned the occupants to a meeting, which led, within a relatively short period of time, to the eviction of the occupants on 14 August 2021.

350. In the circumstances, while the Nicaraguan authorities certainly could have taken measures to definitively evict the illegal occupants more promptly, their conduct must be assessed in the context, taking into account (based on the evidence in the record) the complete lack of any action on the part of Inagrosa or the Claimant during a period of some two years, from 17-18 August 2018, when the illegal occupants returned to Hacienda Santa Fé after their eviction on 11 August 2018, to 28 August 2020, when the Claimant issued its Notice of Intent. In the circumstances, and given that the occupants were eventually evicted on 14 August 2021, the Tribunal rejects the Claimant's claim that the Respondent failed to exercise due diligence and provide the level of police protection that was reasonable in the circumstances, as required under Article 10.5.2(b) of DR-CAFTA.

[336] Minutes of the Committee Meeting held with regard to the Eviction of the Santa Fé El Pavón parcel, 24 January 2019 (**R-0050-ENG**).

[337] Notification under CAFTA for Intent to Arbitration, 28 August 2020 (**C-0006**).

C. ALLEGED BREACH OF THE FAIR AND EQUITABLE TREATMENT STANDARD

(1) The Parties' Positions

a. The Claimant's Position

(i) Memorial

351. The Claimant submits that fair and equitable treatment incorporates requirements of fairness, good faith, non-discrimination and due process. According to the Claimant, the FET standard is recognized as part of customary international law, relying on *Merrill & Ring v. Canada*, *Waste Management II v. United States* and *Teco v. Guatemala*.[338]

352. The Claimant acknowledges that, under Article 10.5 of DR-CAFTA, the FET standard is limited, in accordance with Annex 10-B, to "*customary international law principles that protect the economic rights of aliens.*"[339] However, while claiming that it also "*meets the specific definition in the CAFTA*," the Claimant argues that "*due to the operation*" of the MFN obligation in Article 10.4 of DR-CAFTA, the FET standard in Article 10.5 "*has been expanded to the broader and more generous definition under* [the Russian BIT]."[340] As a result, the Tribunal is "*free to follow the approach to fair and equitable treatment followed by hundreds of other international tribunals around the world*."[341] Under this broader approach, the FET standard incorporates the elements of due process, protection against the abuse of rights, the practice under international human rights instruments and protection of legitimate expectations.[342]

353. The Claimant contends that the Respondent has failed to provide the Claimant's investments fair and equitable treatment by (i) failing to act in good faith; (ii) failing to provide due process to Inagrosa; (iii) wrongfully engaging in arbitrary, unfair and

[338] Cl. Mem., paras. 508-513 (referring to *Merrill & Ring Forestry L.P.v. Government of Canada*, UNCITRAL Arbitration, Award, 31 March 2010, para. 210 (**CL-0004-ENG**); *Waste Management, Inc. v. United Mexican States*, ICSID Case No. ARB(AF)/00/3), Award, 30 April 2004 (**CL-0005-ENG**); *Teco Guatemala Holdings LLC v. The Republic of Guatemala*, ICSID Case No. ARB/10/17, Award, 19 December 2013, paras. 454, 711 (**CL-0161-ENG**)).
[339] Cl. Mem., para. 506.
[340] Cl. Mem., paras. 34, 515.
[341] Cl. Mem., para. 517.
[342] Cl. Mem., paras. 518-560.

capricious conduct; and (iv) failing to consider the legitimate expectations of Inagrosa and Riverside.[343]

354. The Claimant claims that Nicaragua took the following measures that harmed Riverside's investment in Inagrosa, in breach of its obligation to provide FET:[344]

i. Engaging in a conspiracy to facilitate and assist the paramilitaries in the seizure of Hacienda Santa Fé and its continued occupation;

ii. Failing to protect the legitimate ownership expectations of foreign investors;

iii. Failing to take steps to remove the unlawful occupants;

iv. Taking positive steps to arm and equip the occupants; and

v. Taking steps to assist the unlawful occupants in the taking and continued occupation of Hacienda Sante Fé.

355. The Claimant submits that the actions and omissions of State officials during the first invasion of Hacienda Santa Fé on 16 June 2018 "*constitute an abuse of rights and a violation of the duty to act in good faith under the obligation of Fair and Equitable Treatment*." Specifically, the Claimant refers to the orders issued by Commissioner Castro not to evict the paramilitaries and to assist in disarming the workers at Hacienda Santa Fé, which in the Claimant's view constitute an abuse of rights and a violation of good faith. Similarly, the volunteer police who assaulted and threatened the security guards abused their power and acted in violation of reasonable conduct. Further, the police continued to act contrary to the principle of good faith "*when on August 4, 2018, they escorted paramilitary Comandante Cinco Estrellas into Hacienda Santa Fé*." On 6 August 2018, the police "*continued to evade their responsibilities when they escorted Mayor Herrera to Hacienda Santa Fé to give a speech to the paramilitaries*." The police also provided weapons to the paramilitaries in order to assist them. In sum, the police have actively

[343] Cl. Mem., para. 754.

[344] Cl. Mem., para. 755.

"*taken steps to reduce the physical protection of the Investor's investments*" and "*failed to treat Hacienda Santa Fé fairly and equitably and have not acted in good faith*."[345]

(ii) Reply

356. In its Reply, the Claimant presents its argument relevant to the FET claim under various headings, including "*Most Favored Nation Treatment*," "*Expropriation*" and "*International Law Treatment*." Under the first heading, the Claimant reiterates its argument in the Memorial that Article 3(1) of the Russian BIT provides a broader (autonomous) definition of FET than that in DR-CAFTA and accordingly "*any restriction of fair and equitable treatment only to 'customary international law' contained in CAFTA Article 10.5 and CAFTA Annex 10-B are inapplicable*."[346]

357. Under the heading "*Expropriation*," the Claimant addresses, *inter alia*, "*Arbitrary and discriminatory treatment, Failure to Provide Due Process and Fair and Equitable Treatment*." However, the Claimant's focus under this sub-heading is on the alleged taking of the Claimant's investment rather than a standalone FET obligation,[347] whereas under a separate sub-heading (but still under the heading "*Expropriation*"), the Claimant also addresses "*Facts Demonstrating a Breach of Fair and Equitable Treatment*." Here, the Claimant argues that Nicaragua has failed to provide Riverside's investments with FET, and raises the same arguments and allegations as in the Memorial, as summarized in paragraphs 353 and 354 above.[348]

358. Under the heading "*International Law Treatment*," the Claimant addresses the FET obligation as a standalone standard of treatment. In response to the Respondent's Counter-Memorial, the Claimant argues that the Respondent "*ignores*" the effect of the Russian BIT upon FET, and accordingly "*there is no need for this Tribunal to entertain Nicaragua's laborious CAFTA-specific FET arguments, as the limitations in the CAFTA simply do not apply*."[349] The Claimant further contends that the Tribunal itself has already concluded in

[345] Cl. Mem., paras. 756-760.
[346] Cl. Reply, paras. 1164-1175.
[347] Cl. Reply, paras. 1508-1515.
[348] Cl. Reply, paras. 1530-1531.
[349] Cl. Reply, paras. 1540-1541.

Procedural Order No. 4 that "*Nicaragua breached due process in handling the Judicial Seizure Order*."[350] According to the Claimant, the Nicaraguan State also failed to "*carry out executive functions*," and the Tribunal has a "*written admission of the occupiers to the Attorney General in September 2018, and the written evidence regarding the measures National Assembly Deputy Edwin Castro took in giving succor to the occupiers and extending the occupation with promises that the government would buy* [Hacienda Santa Fé]."[351]

359. The Claimant submits that Nicaragua's actions after the issuance of the Court Order constitute a violation of the FET, however, its "*principal contention*" is that seeking the Court Order was an "*arbitrary and abusive action*" and thus a breach of the FET standard. The Claimant submits that prior tribunals have found that a gross violation of FET may occur when an investor is denied an opportunity to be heard or is not given notice.[352] The Claimant submits that the Tribunal did not have the opportunity to consider the other elements of abuse of rights, including lack of notice of the application and lack of notice to Inagrosa. The Claimant also contends that Nicaragua's Attorney General "*fabricated evidence*" in support of the Court Order, which could not be challenged because of lack of notice.[353]

360. The Claimant further contends that, in any event, the Respondent's conduct is also in breach of the customary international law FET standard since its actions were "*egregious*."[354]

361. In conclusion, the Claimant lists the Respondent's alleged breaches of the FET standard, with a slight variation:[355]

[350] Cl. Reply, para. 1552.

[351] Cl. Reply, paras. 1553-1556.

[352] Cl. Reply, paras. 1560-1566 (citing *Odyssey Marine Exploration, Inc. v. United Mexican States*, ICSID Case No. UNCT/20/1, Submission of the United States, 2 November 2021, para. 40 (**CL-0244-ENG**)).

[353] Cl. Reply, paras. 1583-1584.

[354] Cl. Reply, paras. 1575, 1607.

[355] Cl. Reply, para. 1608.

i. Facilitating and assisting the occupiers of Hacienda Santa Fé during the seizure and occupation of the property;

ii. Acting with willful neglect of duty in not sharing advance intelligence of threats to Hacienda Santa Fé with Inagrosa;

iii. Engaging in a breach of good faith by not taking executive action to halt the ongoing invasion and subsequent occupation of Hacienda Santa Fé;

iv. Failing to provide due process to Inagrosa and to Riverside before its courts and in this arbitration; and

v. Failing to consider the legitimate expectations of Inagrosa and Riverside.

(iii) Post-Hearing Submission

362. The Claimant does not address its FET claim comprehensively in its Post-Hearing Submission, however, it does repeat its position that the Respondent breached the FET standard by failing to provide police protection to Hacienda Sante Fé, while other investments received such protection. The Claimant relies on Police Captain Herrera's evidence to argue that the failure was "*not incidental but the result of deliberate orders*."[356] The police inaction also violated the FET standard because it "*def*[ied] *Riverside's legitimate expectations that Nicaragua would uphold its legal commitments*."[357]

b. The Respondent's Position

(i) Counter-Memorial

363. The Respondent rejects the Claimant's argument that it may import an autonomous FET standard from the Russian BIT by operation of the Treaty's MFN clause "*for the reasons that the United States and other DR-CAFTA States have repeatedly adduced when interpreting*" the Treaty. The scope of Article 10.5 of DR-CAFTA is limited to the

[356] Cl. PHB, para. 7.

[357] Cl. PHB, para. 10.

minimum standard of treatment afforded to foreigners under customary international law; it does not incorporate fair and equitable treatment as an autonomous standard.[358]

364. However, in the Respondent's view, the Claimant's attempt to incorporate the FET provision of the Russian BIT "*makes little practical difference*" on the facts as Nicaragua's conduct complied fully with either understanding of the FET standard.[359] According to the Respondent, regardless of the differences that may exist between an autonomous FET standard and the minimum standard of treatment under customary international law, the FET standard requires that "*an investor-claimant exceed a very high threshold to show that a State has breached its obligation to accord fair and equitable treatment*."[360]

1. Alleged failure to act in good faith

365. The Respondent denies the Claimant's allegation that the National Police operated in bad faith by colluding with the invaders of Hacienda Santa Fé, disarming the workers and providing protection to Comandante Cinco Estrellas, the leader of the invaders. According to the Respondent, good faith is not part of the FET standard under Article 10.5 of DR-CAFTA;[361] however, even if this were the case, Nicaragua acted in good faith. The invasion did not occur at the instigation or with the encouragement of the State; on the contrary, the Nicaraguan State has always recognized that Hacienda Santa Fé belongs to Inagrosa. The National Police and other State officials acted diligently and ultimately successfully to relocate the invaders, avoid an escalation of violence and restore the property to Inagrosa peacefully, "*with limited resources and in the context of widespread and violent civil strife*."[362]

366. The Respondent submits that, even assuming good faith were part of the FET standard, the tribunal in the *Waste Management II* case explained that showing lack of good faith

[358] Resp. CM., paras. 324-325 and fn. 523.

[359] Resp. CM., para. 325.

[360] Resp. CM., para. 325 (referring to *SunReserve Luxco Holdings S.À.R.L. v. Italy*, SCC Case No. 132/2016, para. 691 (**RL-0049**)) ("*For instance, numerous tribunals have alluded to the FET standard being high, such that only 'manifestly' unfair, unreasonable or inequitable conduct by the host State would create a breach of the FET standard*").

[361] Resp. CM., paras. 327-328; Resp. Rej., para. 594.

[362] Resp. CM., paras. 327-328.

requires two elements that the Claimant has failed to establish, namely that the State acted (i) in an "*unjustified*" manner; and (ii) "*deliberately*" and "*consciously*" destroyed or frustrated the investment.[363] First, the evidence does not support the Claimant's argument that the State helped the invaders to enter the property, provided them with weapons and failed to act to remove them, as confirmed by Commissioner Castro and Deputy Commissioner Herrera in their witness statements. The National Police advised the invaders that Hacienda Santa Fé was privately owned, and the workers of Hacienda Santa Fé were disarmed "*to prevent the invaders from obtaining more weapons, in part for the workers own protection*," and to avoid the escalation of violence. Second, the evidence shows that, "*once the situation calmed*," the State took steps to remove the occupiers from the property peacefully.[364]

367. The Respondent contends that the Claimant ignores the wider context in which the invasion took place, even though this was explained by Deputy Commissioner Herrera to Mr Rondón at the time. The National Police did not have the resources to immediately clear Hacienda Santa Fé, and President Ortega's shelter order prevented them from taking action. Nor did the police arm the invaders, and the Claimant's allegation that it did is not supported by any evidence other than hearsay. The State also worked diligently to achieve a peaceful resolution that would remove the occupants from the property and allow the owners to return to Hacienda Santa Fé, and took a series of steps to that effect. Nicaragua is presently "*safeguarding the property given the sensitivity of the situation and its commitment to its DR-CAFTA obligations*."[365]

2. Alleged denial of due process

368. The Respondent also contends that it has not denied the Claimant due process. According to the Respondent, the Claimant's allegation is "*heavily conclusory*" but appears to consist of two allegations: (i) Nicaragua did not abide by its expropriation law when allegedly

[363] Resp. CM., para. 329 (citing *Waste Management, Inc. v. United Mexican States*, ICSID Case No. ARB(AF)/00/3, Award, 30 April 2004 (**CL-0005**) ("***Waste Management II***"), para. 740); Resp. Rej., para. 597.

[364] Resp. CM., paras. 329-333.

[365] Resp. CM., paras. 334-339.

expropriating Hacienda Santa Fé; and (ii) the "*bare assertion*" that Nicaragua failed to provide due process to Inagrosa.[366]

369. The Claimant's arguments fail because there has been no expropriation. Nor do the facts, as alleged, support the claim that Riverside or Inagrosa was denied due process, as neither Riverside nor Inagrosa "*ever made any effort to avail themselves of remedies available under Nicaraguan law*." Neither Riverside nor Inagrosa made a single formal complaint with the National Police or any other authority. The Nicaraguan judiciary has acted "*solely to protect the rights of Inagrosa*" and recognized its ownership over Hacienda Santa Fé in the sole legal proceeding initiated by the Attorney General.[367]

3. Alleged frustration of legitimate expectations

370. The Respondent claims that legitimate expectations do not form part of the minimum standard of treatment under customary international law as incorporated into Article 10.5 of DR-CAFTA.[368] However, even if legitimate expectations were part of the minimum standard of treatment, the Respondent contends that the Claimant has failed to establish that the relevant expectations (i) were legitimate and reasonable; (ii) were based on conditions offered or commitments assumed by the State; and (iii) were relied upon by the investor when deciding whether to make the investment. The Claimant has failed to establish these elements.[369]

371. The Respondent maintains that the Claimant cannot show that its expectations were legitimate and reasonable since Nicaragua never made any specific commitments or promises to Riverside that would give rise to such expectations.[370] Moreover, to the extent that the FET standard protects expectations, it protects the reasonable expectations of a reasonably informed and diligent investor; international investment law does not excuse an investor from due diligence or allow an investor "*to pretend that the risks of its investment*

[366] Resp. CM., paras. 340-344.
[367] Resp. CM., paras. 341-343.
[368] Resp. CM., para. 346.
[369] Resp. CM., para. 347.
[370] Resp. CM., para. 348.

in a particular jurisdiction do not exist."[371] In this case, the Claimant should have been aware of Nicaragua's complex history, including the armed conflict with the *Resistencia Nicaragüense*.[372] Riverside was also aware that the Hacienda Santa Fé had long been claimed by communities led by demobilized members of *Resistencia Nicaragüense* and had previously been a target of an unlawful invasion.[373]

372. The Respondent contends that Nicaragua has acted in a manner consistent with what the Claimant should have reasonably expected. The State has never challenged Inagrosa's ownership or its right to remove trespassers. On the contrary, Nicaragua has consistently protected Inagrosa's rights "*in a deliberate, de-escalatory and peaceful manner.*" In the context of the civil strife of 2018, Riverside did not have a legitimate expectation that Nicaragua would behave other than it did under the circumstances.[374]

(ii) Rejoinder

373. The Respondent notes that, in its Reply, the Claimant alleges "*the same five separate FET breaches claimed in its Memorial*," one of which relates to an alleged failure to provide full protection and security.[375]

1. Alleged failure to act in good faith

374. The Respondent notes that the Claimant in its Reply repeats much of the same arguments presented in the Memorial, but now also claims, based on alleged new evidence, that Nicaragua acted in bad faith because (i) Deputy Commissioner Herrera allegedly failed to inform Inagrosa of the advance intelligence he had about the invasion of Hacienda Santa Fé; (ii) Congressman Edwin Castro instructed the occupiers to remain at Hacienda Santa Fé in July 2019; (iii) the occupiers in their letter of September 2018 to the Attorney

[371] Resp. CM., para. 349.
[372] Resp. CM., paras. 350-351.
[373] Resp. CM., para. 350.
[374] Resp. CM., paras. 353-356.
[375] Resp. Rej., para. 592.

General admitted having acted on behalf of the State; and (iv) the Attorney General fabricated evidence before the Nicaraguan courts.[376]

375. The Respondent recalls that, in its view, the principle of good faith is not part of the FET standard under Article 10.5 of DR-CAFTA; however, even if this were the case, there is no evidence that the invasion of Hacienda Santa Fé was instigated or encouraged by the State. Instead, Nicaragua acted in good faith when peacefully relocating the unlawful occupiers and recovering Hacienda Santa Fé without violence. The Respondent relies on the *Bayindir v. Pakistan* case to argue that "*the standard for proving bad faith is not only a demanding one, but especially 'if bad faith is to be established on the basis of circumstantial evidence'*."[377] As the tribunal in the *Waste Management II* case determined, two elements must be established to prove a breach of good faith: (i) the State acted in an "*unjustified*" manner; and (ii) the State acted "*deliberately*" and "*consciously*" to destroy or frustrate the investment.[378]

376. Neither of these elements is established in this case. The National Police did not act in an unjustifiable manner, nor deliberately frustrated Riverside's investment. The Respondent has produced extensive witness evidence to show that the State did not instigate or help the invaders to occupy Hacienda Santa Fé in June 2018. The invasion was the result of a long-standing property dispute that began in 1990, as demonstrated by extensive contemporaneous evidence. The evidence also shows that the invasion took place when Nicaragua was experiencing nationwide civil strife and violent unrest. The police in San Rafael del Norte in particular did not have the resources to immediately remove the occupiers from the land peacefully, and they were also confined to barracks as a result of President Ortega's shelter order. Nonetheless, they visited Hacienda Santa Fé to assess the situation and to disarm the security guards, given the circumstances. Once the situation calmed down, the State took effective steps to remove the occupiers peacefully, and the

[376] Resp. Rej., para. 593.

[377] Resp. Rej., para. 596 (citing *Bayındır İnşaat Turizm Ticaret ve Sanayi A.Ş. v. Islamic Republic of Pakistan*, ICSID Case No. ARB/03/29, Award, 27 August 2009, para. 143 (**RL-0065**) ("***Bayindir v. Pakistan***")).

[378] Resp. CM., para. 329 (citing *Waste Management II*, para. 740 (**CL-0005**)); Resp. Rej., para. 597.

property has been free of unlawful occupiers since August 2021 and guarded by a security firm, until Riverside, through Inagrosa, resumes possession.[379]

377. Nor did Deputy Commissioner Herrera have any police intelligence regarding the invasion, which he confirmed in his witness statement. He learned of the invasion for the first time when Mr Gutiérrez visited the police station and told him that "*there were rumors that some individuals were going to take the property*." However, even assuming the police did have an obligation to share such intelligence with private parties under international law – which the Respondent denies – it "*could not be shared when there was none*."[380]

378. The Respondent submits that there is no evidence that Congressman Castro instructed the invaders to remain in occupation in July 2018. The evidence shows, at best, that "*Commissioner Castro reported to his superiors as to what he had been told by unidentified individuals about a conversation that they claimed to have had with Assemblyman Castro*." But even if true, the letter would at most be evidence that the invaders believed that Congressman Castro was trying to help them to recover a portion of Hacienda Santa Fé. This is not surprising, in the context, given the imminent eviction of the invaders and the political influence of Congressman Castro and Mayor Centeno, who was at the time, in 2000-2004, a congressman for the department of Jinotega and a member of the Commission for Agrarian Reform and Agricultural Affairs. In any event, the efforts of the invaders were ultimately unsuccessful as they were evicted.[381]

379. The Respondent argues that, in its Memorial, the Claimant initially based its due process argument on the alleged unlawful expropriation of Hacienda Santa Fé and the failure to ensure due process. However, the Respondent points out that in the Claimant's Reply, the focus shifted to the Court Order obtained by Nicaragua, which aimed to preserve Hacienda Santa Fé for its rightful owners after the peaceful removal of illegal occupiers.[382] The Respondent notes that the Claimant also alleges that there are additional elements of abuse of rights, such as an alleged lack of notice of the application for the Court Order and

[379] Resp. Rej., paras. 598-602.
[380] Resp. Rej., para. 602.
[381] Resp. Rej., paras. 603-604.
[382] Resp. Rej., paras. 607-609.

alleged fabricated evidence by the Attorney General. The Respondent argues that none of these allegations have merit.[383]

380. The occupiers' letter to the Attorney General in September 2018 also does not demonstrate bad faith. The letter, in which the invaders asked the government for a "hearing," record their past affiliation with the Nicaraguan resistance and profess their loyalty to the political party in power; this does not show State responsibility. The effort was also unsuccessful as the government did not support the invaders.[384]

2. Alleged denial of due process

381. The Respondent contends that, in its Reply, the Claimant "*changes its strategy, focusing on the supposed 'Judicial Seizure Order,' as it styles the Protective Order that Nicaragua obtained specifically to preserve Hacienda Santa Fé*."[385]

382. The Respondent also challenges the Claimant's arguments that "*the Tribunal has allegedly already concluded in Procedural Order No. 4 that Nicaragua denied due process in handling the Protective Order*," and that there are additional elements of abuse of rights such as an alleged lack of notice of the application for the Court Order and alleged fabricated evidence by the Attorney General, which could not be challenged because of the lack of right of opposition. According to the Respondent, these allegations are unfounded.[386]

383. The Respondent contends that Article 10.5.2(a) of DR-CAFTA provides that the FET standard "*includes the obligation not to deny justice in criminal, civil, or administrative adjudicatory proceedings in accordance with the principle of due process*[.]" The Respondent acknowledges that failure to provide due process can lead to a violation of the FET standard, however, the threshold that a claimant is required to meet to demonstrate a lack of due process is a demanding one – manifest unfairness or

[383] Resp. Rej., para. 609.
[384] Resp. Rej., para. 606.
[385] Resp. Rej., para. 608.
[386] Resp. Rej., para. 609.

unreasonableness.[387] Also, failure to accord due process can only result in violation of the FET standard if unremedied and if it is of sufficient seriousness. In the present case, Riverside had an opportunity to challenge the Court Order but failed to do so.[388]

384. The Respondent argues that the Court Order has not harmed Riverside or Inagrosa, "*to the extent either is legitimately concerned with being able to develop an investment in Hacienda Santa Fé*." The Court Order was certainly not a "*seizure*" order; it has a temporary effect and was requested to protect the property from future invasions. The Tribunal has already rejected in its Procedural Order No. 4 the argument that the Court Order somehow transferred title over the property to Nicaragua. Mr Renaldy Gutierrez' evidence, on which the Claimant relies to challenge the Tribunal's position, "*grossly omits relevant provisions of Nicaraguan Civil Procedural Code that confirm that the judicial depositary requires judicial authorization to use, dispose, or add any grievances to the property*." Hacienda Santa Fé's entry in the official registry shows Inagrosa as the property's sole owner.[389]

385. The Respondent argues that Nicaragua had no obligation to notify Inagrosa of its application, or to name Inagrosa as a party in the court proceeding that resulted in the Court Order. The Court Order arises from an application that Nicaragua filed to obtain provisional relief in relation to the present arbitration, in which Riverside – and not Inagrosa – is the Claimant. Moreover, under Nicaraguan law, urgent provisional measures are granted on an *ex parte* basis.[390]

386. The Claimant's argument that the Tribunal has already found that Nicaragua has breached its due process obligations under the Treaty is false; the Tribunal "*simply noted that*

[387] Resp. Rej., para. 610 (citing *AES Summit Generation Limited and AES-Tisza Erömü Kft. v. Hungary*, ICSID Case No. ARB/07/22, Award, 23 September 2010, para. 9.3.40 (**RL-0184**)).

[388] Resp. Rej., para. 611-612 (referring to Paulsson J., *Denial of Justice in International Law*, Cambridge University Press, 2005, p. 100 (**CL-0240**); International Law Commission (James Crawford), Second Report on State Responsibility, UN Doc. A/CN.4/498 (1999) at para. 75 ("[…] *an aberrant decision by an official lower in the hierarchy, which is capable of being reconsidered, does not of itself amount to an unlawful act*") (**RL-0187**); *ECE Projektmanagement v. The Czech Republic*, UNCITRAL, PCA Case No. 2010-05, Final Award, 19 September 2013, paras. 4.805, 4.148 (**RL-0186**)).

[389] Resp. Rej., paras. 614-618.

[390] Resp. Rej., paras. 619-621.

Nicaragua's failure to 'formally serve[]' the Protective Order on Claimant 'is not in accordance with due process'." According to the Respondent, this does not amount to a breach of due process as part of the FET standard. While Nicaragua did not serve Inagrosa or Riverside with a copy of the Court Order immediately following its entry in the registry, in accordance with the Nicaraguan Civil Procedural Code, this did not preclude Riverside from challenging the Court Order when it became aware of it. Once it receives notice, an affected party has three days to challenge it. Riverside did not do so, "*whether by negligence … or because the Protective Order does not actually prejudice Riverside in any way*."[391]

387. Finally, the Respondent emphasizes that failure to accord due process can only result in a breach of the FET standard if unremedied and of sufficient seriousness. The Respondent argues that the Claimant had the opportunity to challenge the Court Order but failed to do so. Therefore, any defects in the failure to immediately notify Inagrosa of the Court Order were formal and not substantial and did not deprive Inagrosa of due process in accordance with the FET standard under the Treaty.[392]

3. Alleged frustration of legitimate expectations

388. The Respondent submits that, in its Reply, the Claimant "*only presents a general and circular argument that Nicaragua has failed to protect its legitimate expectations*."[393]

389. According to the Respondent, the Claimant does not establish how Nicaragua's actions frustrated its legitimate expectations, nor responds to any of the arguments presented by Nicaragua in its Counter-Memorial, which the Respondent therefore maintains: (i) "*legitimate expectations*" do not form part of the minimum standard of treatment under customary international law as protected by the FET clause in Article 10.5 of DR-CAFTA; and, (ii) even if this was the case, the Claimant has failed to show that the relevant expectations were legitimate and reasonable, and based on the conditions offered or commitments assumed by the State, and that it relied upon those expectations when making

[391] Resp. Rej., paras. 623-624 (Emphasis omitted).
[392] Resp. Rej., para. 626.
[393] Resp. Rej., para. 627.

its investment. Nicaragua rejects any suggestion that the Claimant could have had a legitimate expectation that Nicaragua would "*immediately employ military force against its own population where less escalatory alternatives were available,*" amid nationwide civil unrest involving a heavily armed group associated with the former Nicaraguan resistance.[394]

(iii) Post-Hearing Submission

390. In its Post-Hearing Submission, the Respondent denies any breach of its obligations under CAFTA-DR, including the obligation to accord FET, but does not engage in any further detail with the Claimant's FET claim, other than to state that the autonomous FET standard (like the FPS standard) "*ultimately turn*[s] *on interrelated factual questions of 'reasonableness'* – [in the case of the FET] *of the investor's expectations* […] – *it would be illogical for the investor's conduct to be relevant to 'reasonableness' under one standard but not the other, especially given the close relationship of the two standards under international investment law*."[395]

(2) The Tribunal's Analysis

a. Applicable Legal Standard

391. The relevant provision of DR-CAFTA for the purposes of the Claimant's FET claim is Article 10.5 ("Minimum Standard of Treatment"), which provides, in relevant part:

> "***Minimum Standard of Treatment***
>
> ***(Article 10.5 shall be interpreted in accordance with Annex 10-B)***
>
> *1. Each Party shall accord to covered investments treatment in accordance with customary international law, including fair and equitable treatment and full protection and security.*
>
> *2. For greater certainty, paragraph 1 prescribes the customary international law minimum standard of treatment of aliens as the minimum standard of treatment to be afforded to covered investments. The concepts of 'fair and equitable treatment' and 'full protection and security' do not require treatment in addition to or beyond that which is required by that*

[394] Resp. Rej., para. 630.

[395] Resp. PHB, paras. 118, 133.

> *standard, and do not create additional substantive rights. The obligation in paragraph 1 to provide:*
>
> *(a) 'fair and equitable treatment' includes the obligation not to deny justice in criminal, civil, or administrative adjudicatory proceedings in accordance with the principle of due process embodied in the principal legal systems of the world;*
>
> […]
>
> *3. A determination that there has been a breach of another provision of this Agreement, or of a separate international agreement, does not establish that there has been a breach of this Article.*"

392. According to the chapeau of Article 10.5, the provision "*shall be interpreted in accordance with Annex 10-B*." Annex 10-B ("Customary International Law") provides:

> "*The Parties confirm their shared understanding that 'customary international law' generally and as specifically referenced in Articles 10.5, 10.6, and Annex 10-C results from a general and consistent practice of States that they follow from a sense of legal obligation. With regard to Article 10.5, the customary international law minimum standard of treatment of aliens refers to all customary international law principles that protect the economic rights and interests of aliens*."

393. As summarized above, the Claimant claims that it is entitled to more favorable treatment than that provided in Article 10.5 under the MFN clause in Article 10.4 ("Most-Favored-Nation Treatment") of DR-CAFTA, as quoted above in paragraph 329, and Article 3.1 of the Russian BIT, which provides:[396]

> "*Each Contracting Party shall provide in the territory of its State fair and equitable treatment for the investments made by investors of the State of the other Contracting Party in respect of management, maintenance, enjoyment, use or disposal of such investments*."

394. The Claimant submits that the Russian BIT provides a "*broader and more generous definition*" of the FET standard than Article 10.5 of DR-CAFTA.[397]

395. The Tribunal has determined above in connection with the Claimant's FPS claim that the Claimant is in principle entitled to invoke a more favorable treatment than that provided

[396] Russian BIT, Art. 3(1) (**CL-0033-ENG**).

[397] Cl. Mem., paras. 34 (Section II), 515.

under the customary international law minimum standard of treatment in accordance with Article 10.5 of DR-CAFTA if it can show that Nicaragua accorded to the Claimant treatment that was less favorable than the treatment it provided to Russian investors that were in "*like circumstances*" during the relevant period, *i.e*. from the end of July 2018 until the present arbitration. The Tribunal determined that the Claimant had not made such a showing. Since the Claimant has not made any attempt to make a separate or different showing than the one rejected as insufficient by the Tribunal in connection with the Claimant's FPS claim, the Claimant's argument that it is entitled in this case to FET that is more favorable than that provided for in Article 10.5.2(a) of DR-CAFTA is also rejected.

b. Whether the Respondent Failed to Comply with the Fair and Equitable Treatment Standard

396. The Tribunal has determined above, when deciding on the Respondent's Article 21.2(b) defense, that the DR-CAFTA is applicable to the Claimant's claims as of the end of July 2018, when Nicaragua lifted the shelter order. Consequently, to the extent that the Claimant claims, in connection with its FET claim, that the Respondent failed to respond prior to the end of July 2018 to the invasion and occupation of Hacienda Santa Fé in a manner required by the FET standard, DR-CAFTA is not applicable to such claims, by virtue of the Respondent's invocation of Article 21.2(b).

397. As summarized above, the Claimant claims that, during the relevant period, the Respondent has breached its FET obligation by:[398]

i. Engaging in breach of good faith by not taking executive action to halt the ongoing invasion and subsequent occupation of Hacienda Santa Fé;

ii. Failing to provide due process to Inagrosa and to Riverside before its courts and in this arbitration; and

iii. Failing to consider the legitimate expectations of Inagrosa and Riverside.

[398] Cl. Reply, para. 1608. *See also* Cl. Mem., para. 754.

398. The Respondent denies that it has breached the minimum standard of treatment under customary international law, or the autonomous FET standard if that were applicable, and argues that neither good faith nor protection of legitimate expectations forms part of the customary international law minimum standard of treatment, which is the applicable legal standard under Article 10.5 of DR-CAFTA. As to due process specifically, the Respondent contends that neither Riverside nor Inagrosa ever made a single formal complaint with the National Police or any other Nicaraguan authority and, accordingly, there could not have been any denial of due process.

399. The Tribunal notes that neither Party has sought to establish, in accordance with the methodology set out in Annex 10-B of DR-CAFTA, the content of the FET component of the customary international law minimum standard of treatment applicable under Article 10.5 of DR-CAFTA. Notably, the Claimant does not argue that the Respondent has committed a denial of justice – the one element specifically mentioned in Article 10.5.2(a) of DR-CAFTA as being included in the customary international law minimum standard of treatment. However, the Claimant appears to acknowledge that a breach of the customary international law standard requires "*egregious*" conduct.[399] The Respondent argues, in this regard, that regardless of the differences that may exist between an autonomous FET standard and the customary international law standard, the FET standard "*requires that an investor-claimant exceed a very high threshold to show that a State has breached its obligation to accord fair and equitable treatment*."[400] More specifically, as noted above, the Respondent contends that neither good faith nor protection of legitimate expectations forms part of the customary international law minimum standard of treatment.[401]

400. In the circumstances, the Tribunal will first consider whether the Claimant has met its own case and established that, during the relevant period, the Respondent (i) failed to act in good faith by not taking executive action to halt the ongoing invasion and subsequent occupation of Hacienda Sante Fé; (ii) failed to provide due process to Inagrosa and to

[399] Cl. Reply, paras. 1575, 1607.

[400] Resp. CM., para. 325.

[401] *See* above paras. 365, 370, 389, 398.

Riverside before its courts and in this arbitration; and (iii) failed to consider the legitimate expectations of Inagrosa and Riverside.

401. As to the Claimant's first allegation that the Respondent failed to act in good faith, the Tribunal notes that, insofar as the Claimant's allegation relates to the period subsequent to the end of July 2018, the Claimant contends, specifically, that (i) the police acted contrary to the principle of good faith when, on 4 August 2018, they escorted Comandante Cinco Estrellas into Hacienda Santa Fé;[402] and, more generally, that (ii) "*Nicaragua engaged in a breach of good faith by not taking executive action to halt the* […] *occupation of* [Hacienda Santa Fé]."[403]

402. The Tribunal recalls that it has rejected above, in connection with the Claimant's FPS claim, the Claimant's allegation relating to "*escorting*" Comandante Cinco Estrellas on the basis that the allegation is unsupported by any evidence.[404] As to the Claimant's allegation that Nicaragua generally acted contrary to good faith by failing to take action to halt the occupation of Hacienda Santa Fé, the Claimant has not provided any concrete evidence to support its allegation. The Tribunal further recalls that it has rejected above, in Section VII.B(2)(b), the Claimant's FPS claim that the Respondent failed to provide the level of police protection required under Article 10.5 of DR-CAFTA. The Claimant's argument that the Respondent failed to act in good faith is therefore rejected.

403. As to the Claimant's allegation that the Respondent failed to accord due process to Inagrosa and to Riverside before its courts and in this arbitration, the Tribunal notes that, insofar as the allegation relates to the period commencing at the end of July 2018, the Claimant merely contends, in its Counter-Memorial, that "*Nicaragua failed to provide due process*."[405] However, in the Reply the Claimant argues, more specifically, that Nicaragua breached due process in connection with the application for, and the issuance on 15 December 2021 by the Second Oral Civil District Court of the Department of Jinotega

[402] Cl. Mem., para. 758.

[403] Cl. Reply, para. 1608(c) (referring to Letter from Carlos J. Rondón to Police Captain William Herrera, 10 August 2018 (**C-0012**)).

[404] *See* para. 343 and n. 319-320 above.

[405] Cl. Mem., para. 754(b).

Northern District, of an order (defined above as the "Court Order") designating the State of Nicaragua as a judicial depositary for Hacienda Sant Fé.[406] According to the Claimant, (i) the Attorney General failed to provide notice of the application to Inagrosa and Riverside, which in the Claimant's view by "*definition*" constitutes a breach of due process;[407] (ii) Inagrosa was not named as a party to the dispute;[408] (iii) a copy of the request letter containing the requested order was not provided to Inagrosa or Riverside;[409] and (iv) the Attorney General relied on "*fabricated evidence*" before the court, incorrectly stating that Riverside's counsel had refused to take possession of the property; in the Claimant's view, this is "*egregious and goes directly to good faith and the rule of law*."[410] The Claimant further contends that, even if the Tribunal were to apply the customary international law minimum standard of treatment, Nicaragua's "*egregious actions*" would constitute a breach of Article 10.5 of DR-CAFTA.[411] The Claimant relies on the Tribunal's Procedural Order No. 4 in support of its allegation, contending that the Tribunal has already determined in Procedural Order No. 4 that Nicaragua breached due process in connection with the application for, and issuance of, the Court Order.[412]

404. As summarized above, the Respondent argues that the Court Order has not harmed Riverside or Inagrosa and was not a "*seizure*" order; it had a temporary effect and was requested to protect the property from future invasions. Pursuant to the Court Order, which was sought by the Attorney General as a protective order, the State currently holds Hacienda Santa Fé for the benefit of Inagrosa. According to the Respondent, the Claimant had the opportunity to challenge the Court Order but failed to do so, and therefore, any defects in the failure to immediately notify Inagrosa of the Court Order were formal and not substantial, and did not deprive Inagrosa or Riverside of the right to due process.

[406] Cl. Reply, paras. 497, 587, 1552-1607.
[407] Cl. Reply, para. 1569.
[408] Cl. Reply, paras. 1571, 1584.
[409] Cl. Reply, para. 593.
[410] Cl. Reply, paras. 594-609, 1586, 1607.
[411] Cl. Reply, para. 1575.
[412] Cl. Reply, paras. 1552, 1558, 1583-1596.

405. The Tribunal recalls that, while it noted in Procedural Order No. 4 that the Court Order was not "*formally served on the Claimant*," and commented that this "*in itself is not in accordance with due process*," the Tribunal's comment was made in the context of addressing the Claimant's request for "*discretionary relief*" to protect the integrity of the present arbitration – a request that the Tribunal ultimately rejected.[413] Thus Procedural Order No. 4 addressed a procedural matter – whether the judicial order "*jeopardized the procedural integrity and the exclusivity*" of the Tribunal's jurisdiction under Article 26 of the ICSID Convention, as alleged by the Claimant – and accordingly the Tribunal could not have made, and did not make, any determinations on the merits of the Claimant's FET or indeed any other claim.

406. The Tribunal further notes that the Attorney General's application was specifically made in the context of the present arbitration and for the purpose of an "*urgent precautionary measure*" – the appointment of a judicial depositary "*for the custody of the property in favor of the company Riverside Coffee L.L.C.*"[414] The Court determined that "*the reasons given by the applicant duly justify the adoption of the measures as a matter of urgency*," granted the application and appointed the State of Nicaragua, represented by the Office of the Attorney General, as the judicial depositary. The Court Order was made for a period of two years from the date of execution.[415]

407. Having considered the evidence before it, and taking into account the purpose of the Court Order, the Tribunal finds that neither the Attorney General's application nor the Court Order itself amounts to a breach of due process or, by extension, to a breach of the Respondent's FET obligation under Article 10.5 of DR-CAFTA. Nor is the Tribunal persuaded that the Court Order is based on fabricated evidence. While it is not entirely accurate to state, as the Attorney General did in the application, that the Claimant in its letter of 9 September 2021 "refused" to take possession of the property due to alleged threats to their safety, the fact remains that the Claimant did not confirm in its letter that it would take possession, instead requesting additional explanations regarding the matters

[413] Procedural Order No. 4, paras. 29, 37, 41.

[414] Application for Judicial Depositary, 30 November 2021 (**C-0253-ENG**).

[415] Court Order, 15 December 2021 (**C-0251-ENG**).

raised in the last paragraph of the Respondent's letter (relating to demonstration of ownership and "*the conditions for ensuring that the property is properly and securely placed in the*[] [Claimant's] *hands, as promptly as possible*").[416] While the Respondent did not respond to the Claimant's request for additional explanations, this did not prevent the Claimant from following up with the Respondent and stating its view on the proposed conditions, requesting the Respondent to lift the Court Order and confirming that it would take possession of the property. Indeed, Inagrosa's ownership is uncontested, as confirmed by the Respondent repeatedly in the course of the proceeding.

408. As to the Claimant's third allegation that the Respondent failed to consider the legitimate expectations of Inagrosa and Riverside, the Tribunal notes that the Claimant's allegation is made in general terms, except to the extent that the Claimant claims that the Nicaraguan police inaction violated the FET standard because it "*def*[ied] *Riverside's legitimate expectations that Nicaragua would uphold its legal commitments*."[417] Moreover, while the Claimant acknowledges that "*legitimate expectations must be known by the investors for there to be an expectation of a particular type of treatment by a party responsible for protecting such an investor under a* [t]*reaty*,"[418] it has not produced any evidence relating to the basis of its alleged expectations, or established that its expectations were legitimate. Nor has the Claimant responded to the Respondent's argument that, in order for its alleged expectations to be legitimate, the Claimant would have to show that such expectations were reasonable and were based on conditions offered or commitments assumed by the Nicaraguan State, and that it relied upon such expectations when making its investment.

409. In the circumstances, the Claimant's argument that the Respondent frustrated its legitimate expectations in respect of its investment fails on the Claimant's own standard and stands to be dismissed. Moreover, in view of its findings above, the Tribunal need not consider whether

[416] Letter from Foley Hoag LLP to Appleton & Associates regarding offer to return Hacienda Sante Fé, 9 September 2021 (**C-0116-ENG**); Letter from Appleton & Associates to Foley Hoag LLP, 9 September 2021 (**C-0118-ENG**).

[417] Cl. PHB, para. 10.

[418] Cl. Mem., para. 543.

good faith, due process or legitimate expectations form part of the customary international law minimum standard of treatment, as an element of fair and equitable treatment.

D. ALLEGED UNLAWFUL EXPROPRIATION

(1) The Parties' Positions

a. The Claimant's Position

(i) Memorial

410. The Claimant submits that, while the Respondent is entitled to expropriate property, it must comply with certain obligations if it does expropriate, including due process and fair and equitable treatment, and provision of fair compensation, in accordance with Article 10.7 of DR-CAFTA. According to the Claimant, Nicaragua has expropriated the Claimant's investment without complying with any of these obligations.[419]

411. The Claimant asserts that Article 4 of the Russian BIT "*provides a broader definition of state obligations upon an expropriation than that in the CAFTA*" and therefore the "*autonomous expropriation treatment obligation must be extended to Riverside*." The Claimant adds that, based on this broader definition, "*any restriction of expropriation treatment only to 'customary international law' as contained in CAFTA Articles 10.7 and 10.5 and CAFTA Annexes 10-B and 10-C is inapplicable, as the autonomous standard must apply*."[420]

412. The Claimant submits that this is a case of "*seizure*" and as such a direct expropriation within the meaning of Annex 10-C of DR-CAFTA. Nicaragua took measures "*severe enough*" to permanently deprive the lawful owners of their property starting on 16 June 2018.[421] The Claimant maintains that for an indirect or a *de facto* expropriation to exist under international law, the "*sole effects*" doctrine must be applied, according to which "[t]*he interference with the right of property is the only criterion for determining if*

[419] Cl. Mem., paras. 455-466.

[420] Cl. Mem., para. 462.

[421] Cl. Mem., paras. 472-473, 488-489.

indirect expropriation has taken place. No other factor is relevant for determining indirect expropriation."[422]

413. More particularly on the facts, the Claimant contends that the invasions led by the paramilitaries, the police and other State officials "*resulted in the outright seizure of Hacienda Santa Fé lands and assets*." The property was looted of items of value, and the avocado crop "*was left in a condition where it was totally lost*." The livestock was taken, as was the valuable farm equipment; the corporate offices were looted, ransacked and the corporate records destroyed. The protected ecological reserve was deforested and destroyed.[423] The Claimant contends that Nicaragua "*admits*" that it has taken total control of Hacienda Santa Fé "*as recently as 2021*" yet it refused to unconditionally return the property to Inagrosa.[424]

414. The Claimant submits that Article 10.7 of DR-CAFTA establishes four requirements for a lawful expropriation: (i) public purpose; (ii) non-discrimination; (iii) payment; and (iv) due process and treatment in accordance with Article 10.5. According to the Claimant, the Respondent has failed to comply with these four requirements.

415. As to public purpose, the Claimant contends that, in light of the evidence, the land was taken primarily "*for political purposes, and not for legitimate public purposes*." There was no process and no official statement about the taking; accordingly, it is for the Respondent to prove the public purpose, which it has failed to do. In deciding on whether or not a public purpose exists, "*the absence of the rule of law is highly relevant in this case*."[425]

416. The Claimant submits that the failure to provide due process and the rule of law are "*part of the obligations owed by Nicaragua under CAFTA Article 10.5's fair and equitable treatment obligation.*" Nicaragua has an expropriation law, and there is an expropriation

[422] Cl. Mem., paras. 474-475.
[423] Cl. Mem., para. 718.
[424] Cl. Mem., para. 719.
[425] Cl. Mem., paras. 727, 733.

process set out in the applicable law that was not followed in this case, even if the legal title to Hacienda Santa Fé remains in the name of Inagrosa.[426]

417. The Respondent has also failed to provide compensation, as required by Article 10.7.1 of DR-CAFTA, and indeed has confirmed that no compensation had been paid for the taking of the property. The paramilitaries have also destroyed all of Hacienda Santa Fé's assets and caused a loss both of Riverside's initial investment in the avocado project and of future projected profits. Riverside has lost the ability to enjoy or control Hacienda Santa Fé since the arrival of the paramilitaries on 16 June 2018.[427]

(ii) Reply

418. In its Reply, the Claimant submits that the expropriation obligation in Article 10.7 of DR-CAFTA has two different components: direct (*de jure*) and indirect (*de facto*) expropriation. The expropriation provision in DR-CAFTA "*is restricted through narrow treaty language, an interpretative annex set out in Annex 10-C, and by a second restricted interpretative Annex 10-B with respect to its CAFTA Article 10.5 component*." However, the Russian BIT, which the Claimant is entitled to invoke by virtue of the MFN provision in Article 10.4, has an "*autonomous*" meaning for expropriation and "*does not have mandatory application of restrictive interpretative annexes.*" There is thus a "*clear disparity*" between the treatment Nicaragua granted to Russian investors in its territory compared to that offered U.S. investors under DR-CAFTA.[428]

419. The Claimant asserts that the Respondent in its Counter-Memorial provided a "*very limited response*" to the Claimant's case as set out in the Memorial and failed to address arguments such as the sole effects doctrine and how the occupation of Hacienda Santa Fé resulted in the economic devastation of Inagrosa's business, simply denying both arguments. Contrary to what the Respondent contends, Hacienda Santa Fé was not an "*abandoned property*" during the June 2018 invasion and subsequent occupation, and the unlawful occupation was not swiftly cleared. The Claimant reiterates its argument that "*there has*

[426] Cl. Mem., paras. 734-739.
[427] Cl. Mem., paras. 740-749.
[428] Cl. Reply, paras. 1421-24.

been a destruction of the Hass avocado trees [and] *the private forest reserve*" as well as "*widespread destruction of the facilities at* [Hacienda Santa Fé]."[429]

420. The Claimant submits that the following measures constituted uncompensated expropriation:[430]

i. The invasion of Hacienda Santa Fé ordered by the government, resulting in the destruction of its economic resources including its Hass avocado plantation, infrastructure, nurseries, equipment, lands, and valuable hardwoods;

ii. The failure of the National Police to provide timely warning and share advance intelligence of the invasion and risks to Inagrosa and its property;

iii. Congressman Edwin Castro's acknowledgment of the invasion and occupation in July 2018, giving rise to State responsibility;

iv. The ongoing occupation ordered by Congressman Edwin Castro or due to the government's failure to protect Hacienda Santa Fé, leading to further destruction;

v. The *de jure* interference with the title over Hacienda Santa Fé through the Court Order;

vi. The *de facto* interference with the control, management and alienation of Hacienda Santa Fé under the Court Order, causing substantial deprivation;

vii. The alleged substantial harm to Riverside resulting from the abuse of rights in the application and the Court Order linked to the 2018 invasion (including failure to provide notice and the inability to challenge evidence brought in the application); and

[429] Cl. Reply, paras. 1432-1439 (footnote omitted).

[430] Cl. Reply, para. 1440.

viii. Nicaragua's alleged lack of an effective legal defense if the Tribunal finds that any of these events occurred.

421. The Claimant contends that the Court Order amounts not only to a breach of the FET standard but also to an expropriation. According to the Claimant, a review of the legal title documents, specifically the 2022 certificate from the property registry, "*clearly confirms that Nicaragua has altered the* de jure *title to* [Hacienda Santa Fé]" by virtue of the Court Order and thus resulted in "*significant deprivation of core property rights*." Inagrosa no longer holds exclusive title to the property, which now "*purports to be jointly owned by INAGROSA and the Republic of Nicaragua*." This is confirmed by the Claimant's legal expert, Mr Renaldy Gutierrez.[431]

422. The Claimant asserts that the Court Order resulted in a significant deprivation of core property rights, which "*on their own constitute a* de facto *expropriation.*" The court proceedings were also "*manifestly abusive*;" even though "*ostensibly initiated to protect property rights*," the judicial process culminated in an "*effective deprivation*" since the State of Nicaragua was designated as the judicial depositary. Neither Inagrosa nor Riverside had any notice of the process.[432]

423. The Claimant submits that under Nicaraguan law an "*intervention*" and "*judicial administration of productive, commercial and industrial assets*" are "*distinct legal principles with disparate effects*." Whereas an intervention allows the intervenor to "*scrutinize all operations executed by the administrator*" and to object to them, in the case of judicial administration the owner's rights to management and control are "*compromised*" as judicial authorization is necessary for the property's disposition or encumbrance. Judicial deposit, on the other hand, means "*transferring possessory rights from the owner to the depositary, who is legally proscribed from utilizing the property*."[433]

[431] Cl. Reply, paras. 1451-1459 (referring to Literal Certificate of Property Hacienda Sante Fé issued by the Jinotega Property Registry, 17 December 2019 (**C-0080-SPA**) and Gutiérrez Report, para. 75 (**CES-06**)).

[432] Cl. Reply, paras. 1459-1465.

[433] Cl. Reply, paras. 1466-1474.

424. According to the Claimant, the Court Order results in a substantial deprivation of Riverside's property rights and thus had an effect equivalent to expropriation. Together with the *de facto* taking of Hacienda Santa Fé on 18 August 2018, it constitutes a "*composite act*" that resulted in an indirect expropriation of Hacienda Santa Fé, as well as a "*creeping expropriation*" of the property. It also "*severely curtails*" Riverside's financial flexibility in relation to Hacienda Santa Fé, including because financial institutions would be "*disinclined to accept the property as collateral*." In this regard, the Claimant relies on the evidence of Ms Melva Jo Winger de Rondón.[434]

425. The Claimant submits that the invasions led by the occupiers, the National Police and other State officials "*resulted in the outright seizure of* [Hacienda Santa Fé]." According to the Claimant, Nicaragua "*admits*" that it has taken control over the property but has refused to return it to Inagrosa unconditionally. The Claimant contends that the property was looted of items of value, including the avocado crop, which was left in a condition where it was lost, the avocado plantation and the contents of the nurseries; valuable farm equipment and infrastructure; corporate offices, which were ransacked and corporate records destroyed; and the protected ecological reserve, which was deforested and destroyed. In view of the better protection available under the Russian BIT, "*it makes no difference whether the expropriation was a direct* (de jure) *or indirect* (de facto) *expropriation*."[435]

426. The expropriation was also unlawful because (i) it was not for a public purpose; (ii) the actions were arbitrary and discriminatory; (iii) there was no due process; and (iv) no compensation was provided. As to purpose, the burden is on the Respondent, which cannot meet it. There was also a failure of due process, as recognized by the Tribunal in Procedural Order No. 4. Nor was Nicaragua's expropriation law followed; no notice was given to Riverside and Inagrosa was not added as a party. The Attorney General also relied upon false evidence in a secret judicial process.[436] In the circumstances, Nicaragua should not be allowed to benefit from its own wrong.[437]

[434] Cl. Reply, paras. 1475-1477, 1495-1496.
[435] Cl. Reply, paras. 1498-1501.
[436] Cl. Reply, paras. 1503-1515.
[437] Cl. Reply, paras. 1516-1520.

(iii) Post-Hearing Submission

427. In its Post-Hearing Submission, the Claimant does not enter into detail of its expropriation claim, other than reiterating the new argument it raised at the Hearing, namely that in 2021 Nicaragua expropriated part of Hacienda Santa Fé to create a "*community forest nursery*."[438]

b. The Respondent's Position

(i) Counter-Memorial

428. The Respondent submits that the Claimant has failed to establish the elements of an unlawful expropriation. According to Article 10.7 of DR-CAFTA, an expropriation is unlawful unless taken (i) for a public purpose; (ii) in a non-discriminatory manner; (iii) on payment of prompt, adequate and effective compensation; and (iv) in accordance with due process of law and Article 10.5.[439]

429. In the present case, there could not have been any expropriation because Nicaragua never took Hacienda Santa Fé in the first place; on the contrary, it has recognized Inagrosa's ownership of the property. Nor has Nicaragua recognized the legality of the invasion and occupation, or "*condoned any effort to regularize the status of illegal occupants on Inagrosa's land*." Nicaragua has held the property in trust for Inagrosa, "*despite Inagrosa's remarkable and continuing refusal to accept back its undisputed property*."[440]

430. The Respondent claims that it is undisputed that Hacienda Santa Fé was invaded, however, the invasion was by private actors and not the State. The Claimant bears the burden of proving State responsibility for the invasion. The burden is particularly high in this case as the Claimant effectively alleges a conspiracy between government and non-governmental actors. To prove a conspiracy, the Claimant must demonstrate "*through clear and convincing evidence that 'different actions pursued on different paths by different*

[438] Cl. PHB, para. 128(c) (referring to "Inafor inaugurates Community Forest Nursery in Jinotega" 1 April 2021 (**C-0736-SPA-ENG**)); and para. 168(e). *See also* Cl. PHB, para. 158.

[439] Resp. CM., para. 372.

[440] Resp. CM., paras. 373-374.

actors are linked together by a common and coordinated purpose'." According to the Respondent, "*Riverside comes nowhere close to meeting this burden*."[441]

431. The Respondent asserts that it is undisputed that Nicaragua has always and at all relevant times recognized Inagrosa as the sole owner of Hacienda Santa Fé. As of 9 September 2021, the Claimant was informed that it could re-take possession of Hacienda Santa Fé, and made aware that "*its apparent abandonment of the property had encouraged the illegal invaders to return*." Despite the Claimant's failure to take possession of the property, Nicaragua "*continues to hold and protect Hacienda Santa Fé for the benefit of Inagrosa – in full recognition of its proprietary interests – free from unlawful, third-party occupants*." There can therefore be no liability for expropriation under Article 10.7 of DR-CAFTA.[442]

(ii) Rejoinder

432. In its Rejoinder, the Respondent contends that the Claimant continues to base its expropriation claim on a false premise: "*that the State* [is] *engaged in a taking at all*."[443] In the Respondent's view, the Claimant effectively concedes, through its other claims, that "*its case is now actually about the State's allegedly deficient law enforcement response at Hacienda Santa Fé*."[444]

433. The Respondent submits that the Claimant in its Reply alleges for the first time that it is entitled to invoke the allegedly more favorable expropriation provisions in the Russian BIT, and that the Court Order "*put in place for the specific purpose of protecting Riverside's investment and Inagrosa's undisputed property, somehow resulted in an additional expropriation of Hacienda Santa Fé, four years after the alleged invasion*."[445]

[441] Resp. CM., paras. 375-378 (citing *The Rompetrol Group N.V. v. Romania*, ICSID Case No. ARB/06/3, Award, 6 May 2013, para. 273 (**RL-0067**)).

[442] Resp. CM., paras. 381-383.

[443] Resp. Rej., para. 573 (Emphasis omitted).

[444] Resp. Rej., para. 573.

[445] Resp. Rej., para. 574 (Emphasis omitted).

434. As to Article 4 of the Russian BIT, the Respondent contends that Riverside fails to explain how the provision confers a different standard of treatment and, "*puzzlingly only applies – albeit sparingly – Article 10.7 of DR-CAFTA as the basis for the alleged expropriation*." According to the Respondent, the standards for expropriation in Article 10.7 of DR-CAFTA and Article 4.1 of the Russian BIT "*are virtually identical and confer the same substantive protection*." The Claimant does not explain how Article 4 of the Russian BIT would be more favorable and argues, without any supporting legal authority, that Article 4 has an "*autonomous meaning*." In the Respondent's view, Annexes 10-B and 10-C for Article 10.7 "*do*[] *not render its expropriation standard less favorable.*"[446]

435. The Respondent argues that, since the Claimant in its Reply tacitly concedes that Nicaragua's alleged wrongdoing relates to its law enforcement response to the invasion of Hacienda Santa Fé, its expropriation claim must fail because the National Police was responding to third-party non-State actors. Nor could the Court Order have resulted in a taking: the property has been rid of invaders, yet Inagrosa and Riverside have repeatedly refused to retake possession. According to the Respondent, "[i]*n attempt to excuse its refusal to re-take possession of its asset, Claimant insists – falsely – that the Protective Order somehow transferred title of Hacienda Santa Fé to the State*." If a complete taking occurred as a result of the June 2018 occupation, which is what the Claimant alleges, the Court Order could not have resulted in a further taking.[447]

436. The evidence of Mr Renaldy Gutierrez, the Claimant's legal expert, to the effect that the certificate dated 24 October 2022 shows that the *de jure* title to Hacienda Santa Fé is no longer exclusively owned by Inagrosa, is also "*baseless.*" The allegation has already been rejected by the Tribunal in Procedural Order No. 4, and indeed by its plain text, the Court Order recognizes Inagrosa as the owner of Hacienda Santa Fé and appoints Nicaragua as the judicial depositary of the property. A judicial depositary cannot exercise its functions without any limitations, and according to Article 380 of the Nicaraguan Civil Procedure Code, applications for urgent provisional relief can be done on an *ex parte* basis. Moreover, although Inagrosa and Riverside were not notified of the application, they could have

[446] Resp. Rej., paras. 575-576.

[447] Resp. Rej., paras. 577-579.

sought to annul the Court Order or to have it vacated, including in February 2024 when it was renewed.[448]

(iii) Post-Hearing Submission

437. In its Post-Hearing Submission, the Respondent claims that the evidence is clear that neither Inagrosa nor Riverside wanted to resume possession of Hacienda Santa Fé, as shown by their refusal to accept Nicaragua's "*repeated and standing invitation to reenter the property*."[449]

438. According to the Respondent, the Hearing confirmed, through the testimony of Ms Diana Gutierrez, the Attorney General, that the application for the Court Order was made to secure and protect Hacienda Santa Fé through the pendency of this arbitration. The Respondent observes that the Claimant relies "*entirely*" on Mr Renaldy Gutierrez' expert evidence that the Court Order resulted in Nicaragua obtaining title over Hacienda Santa Fé. Mr Gutierrez acknowledged, however, that he had not practiced law in Nicaragua for decades, and has never advised any client with respect to judicial depositaries in Nicaragua. Moreover, Mr Gutierrez' evidence was rebutted by Dr Sequeira, the Respondent's legal expert, "*who actually practices law in Nicaragua and has experience interpreting Spanish-language Nicaraguan legal documents*." Dr Sequeira analyzed each of the certificates and confirmed that they "*categorically provide that Inagrosa remains the '100%' owner of* [Hacienda Santa Fé]." He also confirmed that the relevant provisions of the Nicaraguan Civil Procedure Code unambiguously provide that judicial depositaries are "*temporary custodians of an asset and cannot dispose of or use that asset in any way that would cause it harm*." Mr Renaldy Gutierrez, by contrast, could not identify any evidence showing that Nicaragua had benefited from its role as depositary, or any harm suffered by Inagrosa.[450]

[448] Resp. Rej., paras. 580-587.
[449] Resp. PHB, para. 73.
[450] Resp. PHB, paras. 74-82.

(2) The Tribunal's Analysis

a. Applicable Legal Standard

439. The relevant provision of DR-CAFTA as regards expropriation is Article 10.7, which provides:

> "***Article 10.7: Expropriation and Compensation***
> *(Article 10.7 shall be interpreted in accordance with Annexes 10-B and 10-C)*
>
> *1. No Party may expropriate or nationalize a covered investment either directly or indirectly through measures equivalent to expropriation or nationalization ('expropriation'), except:*
>
> *(a) for a public purpose;*
>
> *(b) in a non-discriminatory manner;*
>
> *(c) on payment of prompt, adequate, and effective compensation in accordance with paragraphs 2 through 4; and*
>
> *(d) in accordance with due process of law and Article 10.5.*
>
> *2. Compensation shall:*
>
> *(a) be paid without delay;*
>
> *(b) be equivalent to the fair market value of the expropriated investment immediately before the expropriation took place ('the date of expropriation');*
>
> *(c) not reflect any change in value occurring because the intended expropriation had become known earlier; and*
>
> *(d) be fully realizable and freely transferable.* […]"

440. According to its chapeau, Article 10.7 shall be interpreted accordance with Annexes 10-B and 10-C, which provide:

"***Annex 10-B***
Customary International Law

The Parties confirm their shared understanding that 'customary international law' generally and as specifically referenced in Articles 10.5, 10.6, and Annex 10-C results from a general and consistent practice of States that they follow from a sense of legal obligation. With regard to Article 10.5, the customary international law minimum standard of treatment of aliens refers to all customary international law principles that protect the economic rights and interests of aliens."

"***Annex 10-C***
Expropriation

The Parties confirm their shared understanding that:

1. Article 10.7.1 is intended to reflect customary international law concerning the obligation of States with respect to expropriation.

2. An action or a series of actions by a Party cannot constitute an expropriation unless it interferes with a tangible or intangible property right or property interest in an investment.

3. Article 10.7.1 addresses two situations. The first is direct expropriation, where an investment is nationalized or otherwise directly expropriated through formal transfer of title or outright seizure.

4. The second situation addressed by Article 10.7.1 is indirect expropriation, where an action or series of actions by a Party has an effect equivalent to direct expropriation without formal transfer of title or outright seizure.

a. The determination of whether an action or series of actions by a Party, in a specific fact situation, constitutes an indirect expropriation, requires a case-by-case, fact-based inquiry that considers, among other factors:

(i) the economic impact of the government action, although the fact that an action or series of actions by a Party has an adverse effect on the economic value of an investment, standing alone, does not establish that an indirect expropriation has occurred;

(ii) the extent to which the government action interferes with distinct, reasonable investment-backed expectations; and

(iii) the character of the government action.

b. *Except in rare circumstances, nondiscriminatory regulatory actions by a Party that are designed and applied to protect legitimate public welfare objectives, such as public, health, safety, and the environment, do not constitute indirect expropriations*."

441. As summarized above, the Respondent claims that it can invoke the MFN provision in Article 10.4 of DR-CAFTA to claim more favorable treatment under Article 4 of the Russian BIT. Article 4 of the Russian BIT provides:[451]

> "*1. Investments of investors of the State of one Contracting Party made in the territory of the State of the other Contracting Party and returns of such investors shall not be expropriated, nationalized or subjected to any measures, having effect equivalent to expropriation or nationalization (hereinafter referred to as expropriation) except when such measures are carried out in the public interests and in accordance with the procedure established by the legislation of the State of the latter Contracting Party, when they are not discriminatory and entail payment of prompt, adequate and effective compensation.*
>
> *2. The compensation referred to in paragraph 1 of this Article shall correspond to the fair market value of the expropriated investment calculated on the date immediately preceding the date of expropriation or the date immediately preceding the date when impending expropriation became public knowledge, whichever is the earlier. The compensation shall be paid without delay in freely convertible currency and, subject to Article 6 of the present Agreement, shall be freely transferred from the territory of the State of one of the Contracting Parties to the territory of the State of the other Contracting Party. From the date of expropriation until the date of actual payment of the compensation the amount of the compensation shall be subject to accrued interest at a market-defined commercial rate but no lower than LIBOR rate for six months US dollar credits.*"

442. The Claimant claims that Article 4 of the Russian BIT is more favorable than Article 10.7 of DR-CAFTA because it provides an "*autonomous*" expropriation treatment obligation,

[451] Russian BIT, Article 4 (**CL-0033-ENG**).

and that any restriction of expropriation treatment "*only to 'customary international law'*" in accordance with Annexes 10-B and 10-C of Article 10.7 and 10.5 is "*inapplicable*."[452]

443. The Claimant submits that for the purposes of the MFN treatment, "*all persons possessing private land in the territory of Nicaragua, as well as those seeking protection of private landholdings, are in like circumstances to Inagrosa, the investment of the Investor, Riverside*." According to the Claimant, Riverside and its investment Inagrosa received less favorable treatment with respect to the establishment, acquisition, expansion, management, conduct, operation, and sale or other disposition of investments than that received by other investments of other parties and non-parties to DR-CAFTA in Nicaragua.[453]

444. The Tribunal has determined above, in connection with the Claimant's FPS and FET claims, that the Claimant is in principle entitled to invoke a more favorable treatment than the customary international law minimum standard of treatment provided for in Article 10.5 of DR-CAFTA, but in order to succeed, must be able to show that Nicaragua provided to the Claimant treatment that was less favorable than the treatment it actually provided to Russian investors that were in "*like circumstances*" during the relevant period, *i.e*. from the end of July 2018 until the present arbitration. The Tribunal has also determined that the Claimant had not made such a showing. Since the Claimant has not made any attempt to make any other separate or different showing in connection with its expropriation claim than the one rejected as insufficient by the Tribunal in connection with the Claimant's FPS and FET claims, the legal standard applicable to the Claimant's expropriation claim remains that set out in Article 10.7 of DR-CAFTA.

b. Whether the Claimant's Investment was Unlawfully Expropriated

445. The Tribunal has determined above, when deciding on the Respondent's Article 21.2(b) defense, that the DR-CAFTA is not applicable to the Claimant's claims to the extent that such claims are said to have arisen from the Respondent's insufficient law enforcement efforts during the period from May 2018, when the shelter order was issued, until the end of July 2018, when Nicaragua lifted the shelter order. Accordingly, the Claimant's claim

[452] Cl. Mem., para. 462.

[453] Cl. Mem., paras. 430-431.

that its investment in Nicaragua was expropriated as a result of the State's alleged failure to respond to the invasion and occupation of Hacienda Santa Fé during the period from 16 June until the end of July 2018, is rejected.[454]

446. The Claimant's sole allegations relating to the invasion and occupation of Hacienda Santa Fé that do not fall within the period covered by the shelter order are (i) the allegation, raised in the Memorial, that on 4 August 2018, the National Police, led by Police Captain Herrera, escorted a paramilitary leader to Hacienda Santa Fé, thus using "*their power and authority over the paramilitary to assist and direct the execution of the land taking at Hacienda Santa Fé*;"[455] and (ii) the allegation, also raised in the Memorial, that the municipal authorities aided the taking of Hacienda Santa Fé when on 6 August 2018, "*Mayor Herrera came to Hacienda Santa Fé, escorted by the police, to give a speech to the paramilitaries in which she promised to provide water and electricity to them and stated that they could make plans of projects of what they wanted to do with the lands of Hacienda Santa Fé*."[456]

447. The Tribunal has rejected these allegations for lack of evidence above, in connection with the Claimant's FPS and FET claims.[457] The allegations stand to be rejected, for the same reason, to the extent that the Claimant relies upon them in support of its expropriation claim.

448. It is not entirely clear from the Claimant's submissions whether it also claims that the fresh occupation of Hacienda Santa Fé on 17 August 2018, after the eviction of the occupants a week earlier, was led by paramilitaries acting under the direction and control of the Nicaraguan State and amounted to an expropriation.[458] To the extent that such a claim is made, there no evidence in the record to support the Claimant's allegation. This claim, insofar as it is made and for the avoidance of doubt, is therefore also rejected.

[454] *See* Cl. Mem., paras. 695, 718-721; Cl. Reply, paras. 65(a), 1096-1100, 1440(a) to (d), 1445, 1498-1500.
[455] Cl. Mem., para. 695.
[456] Cl. Mem., para. 696.
[457] *See* paras. 343, 401-402 above.
[458] *See* Cl. Mem., para. 748.

449. The Claimant's remaining claim in relation to expropriation is based on the allegation that the Respondent expropriated the Claimant's investment by the Court Order issued on 14 December 2021. The Tribunal understands that the Claimant makes this claim alternatively, in the event that the Tribunal rejects the Claimant's claim that the expropriation of Hacienda Santa Fé occurred already in the course of June and July 2018, or as a result of the renewed occupation in August 2018. Since the Tribunal has rejected the Claimant's primary claim above, it must consider the alternative claim that the Court Order resulted in expropriation.

450. As summarized above, the Claimant contends that the Court Order resulted in a substantial deprivation of the Claimant's investment and thus amounted to an expropriation as a matter of fact.[459] It is common ground between the Parties that, for an expropriation claim to succeed, an investor must show, on the facts, that it was substantially deprived of its investment.[460] Thus the issue of whether an alleged expropriation is lawful becomes relevant and needs to be determined only if a substantial deprivation has first been established as a matter of fact; if there is no substantial deprivation as a matter of fact, there cannot be expropriation, and still less unlawful expropriation, as a matter of law.

451. The Claimant submits that "*the effect of the Judicial Order was to interfere fundamentally with the attributes of ownership*," and that such interference was "*both* de jure*, with INAGROSA's legal title, and* de facto*, regarding INAGROSA's rights to manage, possess, sell, and hypothecate the property.*"[461] According to the Claimant, "[t]*his substantial deprivation suffered by Riverside had an effect equivalent to expropriation*."[462]

452. The Claimant relies, in support of its argument that it was substantially deprived of its investment in Hacienda Santa Fé, on the Court Order, the Attorney General's application

[459] Cl. Reply, paras. 1443, 1453, 1459-1461, 1476.

[460] Resp. CM., para. 437 (citing *CMS Gas Transmission Company v. Argentine Republic*, ICSID Case No. ARB/01/8, Award, 12 May 2005, para. 262 (**CL-0053**) ("*The essential question is therefore to establish whether the enjoyment of the property has been effectively neutralized. The standard that a number of tribunals have applied in recent cases where indirect expropriation has been contended is that of substantial deprivation*.")).

[461] Cl. Reply, para. 178.

[462] Cl. Reply, para. 182.

for the Court Order, the certificates issued by the property registry after the issuance of the Court Order, as well as the legal expert evidence of Mr Renaldy Gutierrez.[463]

453. As summarized above, the Respondent challenges the Claimant's reading of the Court Order and the supporting evidence, and has produced evidence from its own expert on Nicaraguan law, Dr Byron Sequeira, to rebut the Claimant's case.

454. As noted by both Parties, the Tribunal has in Procedural Order No. 4 considered the effect of the Court Order, in connection with the Claimant's request for a series of orders, including, *inter alia*, to "*disclose all measures contrary to* [the Respondent's] *obligations under ICSID Convention Article 26 that affect the exclusive jurisdiction of this Tribunal*."[464] According to the Claimant's request, addressed in Procedural Order No. 4, the Court Order resulted in a "*judicial seizure*" of Hacienda Santa Fé, was based on materially false presentations and constituted retaliatory action against the Claimant for commencing the arbitration. The Respondent denied the Claimant's allegations, stating that it had not seized the property but had put in place a legal framework consisting of appointing a judicial custodian of the property while the arbitration was pending – a procedure contemplated in Nicaragua's Code of Civil Procedure and aimed at protecting the investor's property from damage by third parties and preserving the *status quo*.[465] Having considered the Parties' positions and the supporting evidence, which included the Court Order, the Tribunal held that it was unable to agree with the Claimant's characterization of the Court Order as a "seizure" order. The Tribunal concluded that, "[o]*n its face, the Court Order is* […] *for the appointment, by way of a provisional measure, of a judicial depositary for the purpose of protecting, and not for the purpose of seizing, Hacienda Santa Fé*."[466] On this and for the other reasons set out in Procedural Order No. 4, the Tribunal dismissed the Claimant's requests.

[463] Court Order, 15 December 2021 (**C-0251-ENG**).

[464] Procedural Order No. 4, para. 17.

[465] Procedural Order No. 4, paras. 2 and 21.

[466] Procedural Order No. 4, para. 33.

455. Since the Tribunal's decision in Procedural Order No. 4 was made for the purpose of determining the Claimant's procedural requests, and not for the purpose of determining the Claimant's expropriation claim, the Tribunal must now determine whether the Court Order resulted in a substantial deprivation of the Claimant's investment, including Hacienda Santa Fé. The Tribunal will not consider again the procedural issue, surrounding the issuance of the Court Order, that it has already addressed and determined above, in connection with the Claimant's FPS and FET claims. In view of the outcome of the Tribunal's determinations, such procedural issues are not relevant to the effect of the Court Order on the Claimant's ownership and control of Hacienda Santa Fé (although they might be relevant, if the Claimant's position on substantial deprivation were upheld, to the legality of the expropriation).

456. The Court itself refers to the Court Order as an order for "*an urgent precautionary measure*" and cites as the applicable legal basis Articles 373, 374 and 380 of the Nicaraguan Civil Procedure Code.[467] On this legal basis, and the supporting factual allegations as set out in the Attorney General's application, the Court decided as follows:[468]

> "*1. Adopts the precautionary measure for the appointment of a judicial depositary that was urgently requested by Mr. Liosber Enoc Guerrero Alfaro,* […] *act[ing] as Assistant Attorney of the Office of the Attorney-General of the Republic, who in turn acts on behalf of the State of Nicaragua.*
>
> *2. Proceeds to appoint the State of Nicaragua as the judicial depositary* [...] *in regard to* […] [t]*he property known as Hacienda Santa Fé* [...]. *The precautionary measure will have a duration of two years counted from the date of its execution, in accordance with the second paragraph of article 387 CPCN.*

[467] Court Order, chapeau and para. 2 (of the Section "Legal Basis") (**C-0251-ENG**). As to the provisions cited, Article 373 deals with jurisdiction over precautionary measures (providing, *inter alia*, that "[i]f *the precautionary measure is requested in relation to arbitration proceedings, jurisdiction shall lie with the court of the place where the arbitral award is to be enforced, or where the measures are to take effect*") (free translation by the Tribunal) and Article 374 ("*Ex officio* examination of jurisdiction"). Article 380 ("Processing and hearing of urgent provisional measures") provides that (i) urgent provisional measures may be adopted *ex parte*; (ii) there is no appeal against the order; and (iii) at the time of execution of the precautionary measure, the affected person "*shall be notified of the order, and provided with a copy of the application so that they may exercise the right to oppose if they so wish*." (**C-0252-SPA**); (**RL-0191-ENG**).

[468] Court Order, paras. 1-5 (**C-0251-ENG**).

3. The present order is sufficient for its practice or execution for which purpose, the executing authority is authorized to use the means that are necessary, including entering the property or movable property when the case justifies it, without incurring in excesses and without causing unnecessary damage.

4. When the precautionary measure is executed, a copy of the request letter is given to the person affected by the measure, so that the person can exercise the right of opposition, if the person so wishes, within the third day counted from the notification, the affected party may propose the evidence that it intends to use to substantiate his opposition.

5. No appeal may be filed against this order in accordance with Article 380 of the CPCN."

457. It is undisputed that the Court Order was renewed in February 2024, after exchange of communications between the Parties, in which the Parties failed to reach an agreement on any of the relevant issues.[469]

458. The Tribunal notes that, on its face, the Court Order is an order for a precautionary measure appointing a judicial depositary for Hacienda Santa Fé for a period of two years. While it specifically authorizes the judicial depositary to use the necessary means, including entering the property when justified, there is nothing in the text of the order that would suggest a transfer of ownership over Hacienda Santa Fé to the Nicaraguan State.

459. Indeed, the Parties' disagreement on the legal effect of the Court Order is not based so much on the text of the Court Order itself but on the circumstances surrounding its issuance, including the property certificates issued subsequent to the issuance of the Court Order. As summarized above, the Parties disagree in particular on whether the certificates show that ownership over Hacienda Santa Fé has in fact been transferred by the Court Order to the State of Nicaragua.

460. Having reviewed the certificates and the evidence of the Parties' legal experts, Mr Gutierrez and Dr Sequeira, it is evident that the certificates continue to record Riverside as the owner of the property. The "*literal certificate*" ("*certificado literal*"), which shows

[469] Judicial file of the application for renewal of the provisional measure by the Attorney General's Office of Nicaragua (**R-0199**); Letter from Baker Hostetler LLP to Appleton & Associates, 19 January 2024 (**R-0219**); Letter from Appleton & Associates to Baker Hostetler LLP, 25 January 2024 (**R-0220**).

the specific entries ("*asientos*") that the interested parties themselves select when procuring the certificate from the registry, produced by the Claimant, shows that the actual owner ("*propietario actual*") is "*Inversiones Agropecuarias S.A.*", *i.e.* Inagrosa, and that Inagrosa's ownership share in terms of percentages is "*100*."[470] However, the section "*Facts of the Selected Entry*" ("*Datos del Asiento Solicitado*") is somewhat ambiguous as it shows both the Republic of Nicaragua and Riverside as the parties to whom the entry "belongs to" ("*pertenece*"), and the certificate itself also does not specify what it is precisely that "belongs to" to these parties. The Parties disagree on this point, the Claimant arguing, based on the evidence of its expert, Mr Renaldy Gutiérrez, that the entry shows that both the Republic of Nicaragua and Riverside are recorded as owners, and the Respondent arguing that the entry "belongs to" "*merely notes that the parties who are relevant to that Order are Nicaragua and Riverside, because they are the parties to the international arbitration that gave rise to the provisional measure* ('medida cautelar')."[471]

461. Having further considered the evidence before it, including the expert evidence that unfolded at the Hearing on this particular issue, the Tribunal finds that, in light of the heading of the relevant section ("Requested Entry Date"), the entry "*belongs to*" does not purport to show the ownership of the property – and indeed the term "*property*" does not appear in the section; it rather identifies the parties to the requested precautionary measure.[472] This reading is supported by the fact that (i) one of the two relevant fields ("*Pertenece A*") refers to "*Riverside Coffee L.L.C.*" and not Inagrosa (which is indicated as the owner in the section above, entitled "*propietario actual*"); as well as the fact that (ii) the data field "originating act" ("*Acto contrato*") in the same section is identified as "*Preventive annotations/Official notice of provisional measures*" ("*Anotaciones Preventivas / Oficio de Medida Cautelar*").[473] The "*literal certificate*" – or indeed the other certificates in the record which make clear that the "actual owner" is Inagrosa –

[470] Literal Certificate of Property Hacienda Sante Fé issued by the Jinotega Public Registry (**C-0268-SPA**); Jinotega Land Registry Related Certificate (**R-0005**).

[471] Resp. Rej., paras. 407-409.

[472] *See* Gutiérrez Report, para. 75 (**CES-06**). *See also* Tr. Day 7, 1544-1546.

[473] *See* Exhibits **C-0268-SPA**, **C-0258-ENG**, **C-0060-SPA**, **R-0005-SPA**, **C-0258-ENG**, **C-0269-SPA**, **C-0050**. *See also* the Sequeira Report, paras. 30.1-30.15 (**RER-05-ENG**).

therefore do not support the Claimant's case that the Court Order transferred the ownership of Hacienda Santa Fé from Inagrosa to the Nicaraguan State.

462. In light of the evidence, the Tribunal therefore determines that the Claimant has not shown that the Court Order has resulted in a substantial deprivation of Hacienda Santa Fé.

463. The Tribunal notes that, in its Post-Hearing Submission, the Claimant also claims that there was a further expropriation in 2021 of part of Hacienda Santa Fé, allegedly for the purposes of creating a "*community forest nursery*."[474] The Claimant suggests that the nursery was named after an "Antonio Rizo," which is the given name of Toño Loco, one of the invaders of Hacienda Santa Fé. This is a novel allegation, raised during the Hearing and, after leave from the Tribunal, submitted into record, and followed by the Respondent's response. Both Parties were allowed to produce evidence in support of their respective positions on the alleged partial expropriation.

464. The Claimant relies in support of its allegation on a news article published on 1 April 2021 by a web-based news service, "*Viva Nicaragua*," reporting that the Nicaraguan National Forestry Institute had inaugurated a community forest nursery "*in the community of Santa Fé, municipality of San Rafael del Nort de Jinotega*."[475] The Claimant also refers to a news article published in "*Havana Times*" on 6 July 2024, reporting on the present arbitration and the creation of a community nursery "*in part of the invaded property*." The "*Havana Times*" report notes the "*Viva Nicaragua*" website as its source.[476] The Claimant further produced a declaration of one of its counsel, Mr William K. Hill, stating that Mr Luis Gutiérrez had presented to him a Facebook video dated 14 May 2024, which featured an individual identified with the name of Alvaro Méndez.[477] According to the statement, Mr Gutiérrez also showed Mr Hill the "*Viva Nicaragua*" article dated 1 April 2021. Mr Hill states that, upon review, he "*recognized Mr. Alvaro Mendez Valdivia* […] *as the same person appearing in both the Facebook video and the Viva Nicaragua April 1, 2021 article*," namely, Alvaro Méndez Valdivia, Jinotega Departmental Delegate of the

[474] Cl. PHB, paras. 128(c), 160(b), 168(e).

[475] *See* "Inafor inaugurates Community Forest Nursery in Jinotega", 1 April 2021 (**C-0736-SPA-ENG**).

[476] *See* "*US Company Battles Nicaragua in Arbitration Tribunal*," Havana Times, 6 July 2024 (**C-0740-ENG**).

[477] Declaration of William K. Hill, 10 July 2024 (**C-0739**).

Nicaraguan National Forestry Institute, or INAFOR. The Claimant claims that Mr Méndez is the same Mr Méndez who is a witness in this arbitration and has submitted witness statements identified as RWS-08 and RWS-17. The Tribunal notes that the Claimant did not call Mr Méndez for examination at the Hearing so he could not be examined on this or any other issue on which he gave evidence.

465. The Respondent argues in its Post-Hearing Submission that there is no proof that the nursery was even at Hacienda Santa Fé or that the Antonio Rizo at issue is "*Toño Loco*."[478] In its observations on the Claimant's new evidence dated 22 July 2024, the Respondent denies the Claimant's allegation, relying, in support, on a "Forest Nursery Inauguration Report" prepared by Mr Méndez. The Respondent contends that the news articles produced by the Claimant (i) do not mention any government recognition or commemoration of "*Comandante Toño Loco*;" (ii) do not refer to Hacienda Santa Fé or any expropriation of Hacienda Santa Fé; and (iii) do not indicate that Mr Méndez attended the alleged inauguration.[479] Specifically, the Respondent denies that the nursery is located in "*Comunidad Santa Fé*" ("Community of Santa Fé") and bears any specific name. Mr Méndez in his report explains that the nursery was located in a nearby community known as "*San José*," located in the municipality of San Rafael del Norte, department of Jinotega, and on a land owned by Mr Domingo del Rosario Díaz. The nursery no longer exists. According to Mr Méndez, media was not present at the event.[480]

466. The Tribunal concludes that the evidence produced by the Claimant does not support its allegations. The Claimant's belated partial expropriation claim is therefore rejected.

[478] Resp. PHB, para. 50.

[479] Resp. Observations, 22 July 2024, para. 4.

[480] Resp. Observations, 22 July 2024, paras. 10-20; Álvaro Méndez Valdivia's Statement on the inauguration of the forest nursery, 22 July 2024 (**R-0245**), pp. 1-2.

E. ALLEGED BREACH OF THE MOST-FAVORED-NATION TREATMENT STANDARD

(1) The Parties' Positions

a. The Claimant's Position

(i) Memorial

467. The Claimant claims that the MFN obligation "*is required to be provided*" to the investments of the nationals or companies of the other CAFTA Parties. Pursuant to the wording of Article 10.4 of DR-CAFTA, the MFN obligation relates to "*the establishment, acquisition, expansion, management, conduct, operation and sale or other disposition of covered investments*."[481] The Claimant recalls that, according to Article 1.2.1 of DR-CAFTA, the MFN treatment is one of the "*principles and rules*" that elaborate the objectives of the Treaty.[482]

468. The Claimant submits that, in the case of investment obligations, the issue of MFN treatment arises when a claimant seeks to rely on a provision of another investment treaty which contains more favorable substantive, "*and most often*," procedural provisions. According to the Claimant, the Respondent violated the MFN obligation in DR-CAFTA when it "*offered better treatment to investors from foreign countries as compared to the treatment provided to the Investment.*" Since the term "*measure*" is defined in Article 2.1 of DR-CAFTA as including "*any law, regulation, procedure, requirement or practice,*" better treatment to Russian investors and their investments in Nicaragua constitutes a "*practice*." In the Claimant's view, an offer to Russian investors under the Russian BIT "*is at the same time a measure capable of consideration by this CAFTA Tribunal*."[483]

469. The Claimant canvasses the case law on MFN provisions other than DR-CAFTA and argues, on the basis of, *inter alia*, the separate opinion of Mr Brower in the *Renta 4 v. Russian Federation* case that "*there are more options available to the American Investor arising from certain obligations in the Nicaraguan-Russian BIT*," meaning that the range

[481] Cl. Mem., para. 396.

[482] Cl. Mem., para. 593.

[483] Cl. Mem., paras. 399-401.

of different options "*constitutes more favourable treatment*."[484] The Claimant further notes that Nicaragua's reservations to DR-CAFTA do not apply to obligations taken after the signing of DR-CAFTA, such as those in the Russian Treaty, which was signed in 2012 and came into force in 2013.[485]

470. The Claimant contends that Nicaragua did not meet its obligation to provide MFN treatment to Riverside and its investments by failing to provide treatment as favorable to Riverside as provided to nationals of third countries, including those of the Russian Federation. Nicaragua provided better treatment to investors and investments in like circumstances from non-CAFTA Parties (i) by offering more favorable expropriation terms than those offered under DR-CAFTA; (ii) by offering broader and more expansive coverage for the national treatment and FET obligation than that offered under DR-CAFTA; and (iii) by offering broader and more expansive scope of coverage "*to those investments covered by the benefits of Treaty Protection*."[486]

471. As to the requirement in Article 10.4 of DR-CAFTA that the investors in question must be in "*like circumstances*," the Claimant claims that "*all persons possessing private land in the territory of Nicaragua, as well as those seeking protection of private landholdings, are in like circumstances to Inagrosa*." The Claimant submits that, since the obligations under the Russian BIT are not limited to "*establishment, acquisition, expansion, management, conduct, operation and sale or other disposition of investments*," as they are under DR-CAFTA, Nicaragua is required to extend the more favorable treatment under the Russian BIT to U.S. investors under DR-CAFTA, to the extent that the treatment provided under the Russian BIT is more favorable.[487]

[484] Cl. Mem., paras. 421-422 (referring to *Renta 4 S.V.S.A, et al. v. The Russian Federation*, SCC Case No. 24/2007, Separate Opinion of Charles N. Brower, at para. 21 (**CLA-0275**)).

[485] Cl. Mem., para. 424.

[486] Cl. Mem., paras. 427-428, 435.

[487] Cl. Mem., paras. 430-432.

472. The Claimant further elaborates on the better treatment available under the Russian BIT in relation to the definition of the investment and national treatment, as set out above in connection with the Tribunal's analysis of the Claimant's FET and expropriation claims.[488]

473. On the facts, the Claimant refers to the evidence of its legal expert, Professor Wolfe, to claim that, as confirmed by Professor Wolfe, "*others in Nicaragua were not subjected to unlawful seizure of their lands*." It follows that more favorable treatment was provided by Nicaragua to investments of parties other than Riverside, in breach of Article 10.4 of DR-CAFTA.[489]

(ii) Reply

474. In the Reply, the Claimant reiterates its position on the interpretation of the MFN clause in Article 10.4 of DR-CAFTA, including that MFN treatment is also an "*interpretive principle and rule*" of DR-CAFTA and as such a "*fundamental principle that is embedded not only in CAFTA Article 10.4, but which has a more structural function within the CAFTA as a whole*." The Claimant also reiterates its position, as set out in the Memorial, regarding the scope of the MFN clause.[490]

475. In the Reply, the Claimant also invokes, alternatively to the Russian BIT, the Swiss BIT, contending that the Swiss BIT does not contain any derogation from the operation of the treaty or the payment of compensation in the event of civil strife such as war or other armed conflict, state of emergency or rebellion. According to the Claimant, the operation of the MFN clause in Article 10.4 of DR-CAFTA "*extinguishes Nicaragua's arguments that the civil strife clause excuses its international law obligations.*"[491]

476. In response to the Respondent's argument in the Counter-Memorial, the Claimant contends that Nicaragua misunderstands the MFN obligation when arguing that it can only apply if Riverside is able to demonstrate Nicaragua's intent to discriminate against Riverside or its

[488] Cl. Mem., paras. 435-454.

[489] Cl. Mem., paras. 761-764.

[490] Cl. Reply, paras. 1117-1125, 1145-1150, 1160-1180.

[491] Cl. Reply, paras. 217-222 (referring to the Agreement between the Swiss Confederation and the Republic of Nicaragua on the Promotion and Reciprocal Protection of Investments (Swiss Treaty), signed 30 November 1998, and entered into force on 2 May 2000 (**CL-0188-ENG**)).

investment based on nationality. Nicaragua's position is "*not reflective*" of the ordinary meaning of the MFN obligation in the Treaty, nor reflects the prevailing view in jurisprudence. The Claimant also challenges the Respondent's position on "*likeness*," arguing that Nicaragua's narrow consideration "*makes no sense.*" In the Claimant's view, "*all those who have land rights are in similar circumstances*."[492]

477. The Claimant claims, based on the evidence of Professor Wolfe, that Riverside received less favorable treatment from the National Police than that provided to other private landowners whose lands had been unlawfully invaded in Nicaragua in 2018 at the Nejapa Country Club in Sabana Grande, Managua. Similarly, Nicaragua provided, in the Claimant's view, better treatment in the summer of 2018 to the investment of Inversiones Nela S.A., incorporated in Costa Rica. The relevant police report indicates that in July 2018, the police took steps to repel the occupation and arrest the invaders of private lands owned by Inversiones Nela S.A., which is more favorable treatment than that provided to Inagrosa at the very same time.[493]

(iii) Post-Hearing Submission

478. In its Post-Hearing Submission, the Claimant contends that during the same period in June and July 2018, the National Police evicted illegal occupiers from eighteen other locations, yet failed to protect Inagrosa. According to the Claimant, such unequal treatment violates the FPS standard and supports Riverside's national treatment and MFN claims.[494]

b. The Respondent's Position

(i) Counter-Memorial

479. The Respondent submits that the Claimant's MFN claim is "*legally meritless and factually unsubstantiated*," for three reasons. First, the Claimant has failed to prove that Nicaragua accorded better treatment to other investors in like circumstances; second, "*any difference that might have existed with respect to the State's response to other land invasions* if any

[492] Cl. Reply, paras. 1126-1141.
[493] Cl. Reply, paras. 1151-1159, 1695-1704.
[494] Cl. PHB, para. 164.

was justified under the unique circumstances surrounding Hacienda Santa Fé's invasion;" and third, DR-CAFTA and international law do not require that, in the context of a civil strife, Riverside should have received better treatment than other investors.[495]

480. According to the Respondent, the MFN standard is a relative standard. It is intended to ensure that foreign investors and their investments are treated no less favorably than those from third-party countries. Comparison is thus "*inherent*" in the analysis. In this context, the standard for a MFN claim includes three elements: (i) other investors or their investments must have been in like circumstances with the Claimant or Inagrosa; (ii) the Claimant or Inagrosa must have received a certain treatment from the State; and (iii) the Claimant or Inagrosa must have been treated less favorably than the comparators in like circumstances. The burden of proving each of these three elements rests with the Claimant, however, according to the Respondent, it has failed to satisfy its burden.[496]

481. As to the first element – like circumstances – the Respondent relies on *Apotex v. United States*, where the tribunal listed the relevant factors to consider, namely whether the comparators (i) are in the same economic or business sector; (ii) compete with the investor or its investment in terms of goods or services; and (iii) are subject to a comparable legal regime or regulatory requirements. According to the Respondent, the Claimant makes the wrong comparison. Ownership or possession of land is an "e*xtremely broad category*" and would only be relevant if the State had actually seized the property. Since the State did not seize the property, the relevant issue is how the State responded to similar land invasions during the 2018 civil strife. This is a fact-intensive inquiry that "*needs to take into account the circumstances of the investors in question*." The one example of an allegedly more favorable treatment referred to by Professor Wolfe is not sufficient as it relies on "*two news articles that contain very limited information*." But even this information shows, according to the Respondent, that the two cases were "*widely*" different and, in any event, that the treatment was not different – the events took place in different parts of the country; the news reports say nothing about when the other invasions started; the reports do not

[495] Resp. CM., para. 386 (Emphasis in the original).
[496] Resp. CM., paras. 387-388.

identify the invaders; and they do not explain the conditions in which the other invasions occurred.[497]

482. As to the second element, according to the Claimant, the relevant treatment consists of measures affecting "*establishment, acquisition, expansion, management, conduct, operation, and sale or other disposition of investments*," and the alleged seizure of Hacienda Santa Fé is a disposition of an investment. However, according to the Respondent, Nicaragua has not interfered with the Claimant's investment in any way. There has not been any seizure, administrative or judicial order or any regulatory measure that would have prevented the Claimant from pursuing its business objectives or interfered with its rights in Hacienda Santa Fé.[498]

483. As to the third element, the Respondent notes that, in the two other cases referred to by Professor Wolfe, the illegal occupants were removed once the situation had eased, and the risk of violence was reduced. The measures were not taken at the height of the widespread unrest and civil strife. According to the Respondent, "[t]*his is consistent with the peaceful and de-escalatory approach that the government took at Hacienda Santa Fé*."[499]

484. The Respondent maintains that, as established by investment treaty tribunals, different treatment does not constitute discriminatory treatment if the investors were in distinct circumstances. In this case, "*factors unique to the situation* [at Hacienda Santa Fé] *made Nicaragua's approach to the unlawful occupation of Hacienda Santa Fé particularly appropriate*." This was the case for a number of reasons: (i) the 2018 unrest was not the sole cause of the occupation of Hacienda Santa Fé since the unlawful occupation of the property started already in 1990; (ii) at the height of the unrest in 2018, President Ortega ordered the police to stay in their stations as a de-escalatory measure; (iii) the invasion of Hacienda Santa Fé was carried out by over 300 people led by heavily armed ex-members of the former Nicaraguan resistance; (iv) Inagrosa's employees could have resorted to

[497] Resp. CM., paras. 389-396.

[498] Resp. CM., para. 397.

[499] Resp. CM., para. 398.

violence as they were also armed; and (v) the National Police had only eight police officers assigned to the municipality where Hacienda Santa Fé is located.[500]

485. Finally, the Respondent contends that in the context of a civil strife, a State cannot be held liable for interference with a foreign investment unless the investor can demonstrate that the State accorded better treatment to its own nationals or foreign investors from third countries. In the present case, it cannot be expected that Nicaragua should have deployed hundreds of police officers to "*forcefully remove the roughly 300 armed invaders that occupied Hacienda Santa Fé in June and July of 2018.*" This is not what DR-CAFTA or customary international law requires, and it would have constituted better treatment than that received by any other foreign or Nicaraguan investor at the time.[501]

(ii) Rejoinder

486. In its Rejoinder, the Respondent contends that in the Reply, the Claimant "*completely reformulated its case as to DR-CAFTA Article*[] […] *10.4 (Most Favored Nation* [Treatment]*)*." According to the Claimant's new theory, Nicaragua would have breached DR-CAFTA "*by providing a more favorable law enforcement response to the unlawful invasions by non-state actors of other Nicaraguan and foreign-owned properties during the period of nationwide civil strife in 2018*." The Respondent maintains, however, that the Claimant's MFN claim fails in light of Nicaragua's express Annex II reservation relating to provision of law enforcement (as summarized above in connection with the Claimant's FPS claim).[502]

487. The Respondent submits that, even assuming the MFN provision in Article 10.4 of DR-CAFTA applied to Nicaragua's law enforcement response, the Claimant's MFN claim would fail. According to the Respondent, the Claimant's allegations are "*wrong as to international law and unsubstantiated on the evidence*." The Claimant has failed to adduce evidence to show "*(i) discrimination vi-à-vis other investors in like circumstances; or*

[500] Resp. CM., paras. 401-407.
[501] Resp. CM., paras. 408-410.
[502] Resp. Rej., paras. 661-664.

(ii) that the alleged differences in treatment were not justified by rational government policies during a dangerous period of civil strife."[503]

488. The Respondent further submits that Riverside "*cannot even show that Nicaragua has in fact accorded Inagrosa discriminatory treatment* in concreto." A party alleging breach of Article 10.4 must show discrimination in like circumstances through a fact specific inquiry. Since MFN treatment is a relative standard, a comparison between investors and their investments is "*inherent in the analysis*."[504]

489. According to the Respondent, the Claimant's argument turns on an artificially limited "likeness" concept, which is based on a comparison of all lawful possessors of private land in Nicaragua. This is too broad and would apply to enterprises in countless sectors. This is fatal to the Claimant's MFN claim. But even assuming the Claimant identified investors in "*like circumstances*" and established nationality-based discrimination *in concreto*, its MFN claim would still fail because, according to the Respondent, it has not demonstrated that the Respondent's measures were "*further to an irrational policy*." International tribunals and legal scholarship have recognized that governments "*cannot be expected to provide equal degrees of protection in every region of the country*."[505]

490. More generally, according to the Respondent, "*tribunals have recognized that their mandate is not to second guess discretionary policy decisions*." In the present case, Riverside ignores the reality that the invasions occurred all over the country, in both cities and rural areas, where authorities faced different levels of violence and had different resources. Therefore, none of the cases referenced by the Claimant are comparable to the invasions taking place in Hacienda Santa Fé. In conclusion, in the Respondent's view, "*Riverside has no evidence that Nicaragua has responded more appropriately to land*

[503] Resp. Rej., para. 670.

[504] Resp. Rej., para. 671.

[505] Resp. Rej., paras. 672-674 (referring to *Louis Dreyfus Armateurs SAS v. Republic of India*, PCA Case No. 2014-26, Final Award, 11 September 2018, para. 382 (**RL-0052**)).

invasions in rural areas that presented comparable dangers; nor that such discrimination was nationality based."[506]

491. The Respondent notes that, in its Reply, the Claimant attempts to import additional provisions from the Swiss BIT, however, according to the Respondent, this contravenes Nicaragua's express reservation under Annex II of DR-CAFTA. In Annex II, Nicaragua listed several non-conforming measures to which the MFN clause in Article 10.4 of DR-CAFTA does not apply, including any measure that accords differential treatment to countries under a bilateral investment agreement in force or signed prior to the date of entry into force of DR-CAFTA. The Swiss BIT was signed in 1998 and entered into force in 2000, *i.e.* six years before the entry into force of DR-CAFTA. The Claimant is therefore barred from invoking the allegedly more favorable provisions in the Swiss BIT relating to civil strife, FET and compensation standards.[507]

492. The Respondent similarly contends that the Claimant cannot rely upon other provisions of the Russian BIT to establish breaches of DR-CAFTA. Article 10.4(1) and (2) of DR-CAFTA "*clearly provide that the MFN clause only applies to investors and investments in 'like circumstances.'*" The Claimant also completely fails to prove the content of the standards it wishes to apply.[508]

493. In conclusion, according to the Respondent, the Claimant "*has failed to show any breach of the DR-CAFTA's* […] *MFN standard*[], *whether as a breach of relative treatment or through a comparator treaty*." Specifically, the Claimant has failed to identify any other national or foreign investors or investments in like circumstances to which the State would have provided better treatment.[509]

[506] Resp. Rej., paras. 676-678.
[507] Resp. Rej., paras. 681-687.
[508] Resp. Rej., paras. 688-693.
[509] Resp. Rej., para. 694.

(iii) Post-Hearing Submission

494. In its Post-Hearing Submission, the Respondent merely restates its position that the Claimant has failed to show any breach of the MFN standard.[510]

(2) The Tribunal's Analysis

495. The Claimant's MFN claim is based on Article 10.4 of the Treaty, which provides:

> "***Most-Favored-Nation Treatment***
>
> *1. Each Party shall accord to investors of another Party treatment no less favorable than that it accords, in like circumstances, to investors of any other Party or of any non-Party with respect to the establishment, acquisition, expansion, management, conduct, operation, and sale or other disposition of investments in its territory.*
>
> *2. Each Party shall accord to covered investments treatment no less favorable than that it accords, in like circumstances, to investments in its territory of investors of any other Party or of any non-Party with respect to the establishment, acquisition, expansion, management, conduct, operation, and sale or other disposition of investments.*"[511]

496. The Tribunal has determined above, in connection with the Respondent's Article 21.2(b) defense, that the DR-CAFTA is not applicable to the Claimant's claims to the extent that such claims are alleged to have arisen from the Respondent's insufficient law enforcement efforts during the period from May 2018, when the shelter order was issued, until the end of July 2018, when it was lifted. Accordingly, to the extent that the Claimant's MFN claim is based on such allegations, the claim stands to be rejected.[512]

497. The Tribunal notes that, as stated, the Claimant's MFN claim relates to the alleged differential treatment between the Claimant and Inagrosa, on the one hand, and investors from third States (specifically the Russian Federation), on the other hand, in connection with the invasion and occupation of Hacienda Santa Fé in June-July 2018.[513] Moreover,

[510] Resp. PHB, paras. 20, 118.

[511] DR-CAFTA, Article 10.4 (**CL-0001**).

[512] *See* Cl. Mem., paras. 695, 718-721; Cl. Reply, paras. 65(a), 1096-1100, 1440(a) to (d), 1445, 1498, 1500.

[513] *See* Cl. Mem., para. 763; Cl. Reply, paras. 1694-1697, 1699-1704; Cl. PHB, paras. 164, 204.

while the Claimant alleges, in general terms, that "[o]*thers possessing or owning land in the territory of Nicaragua were treated more favorably than Inagrosa*,"[514] it has not articulated any alleged differential treatment of third-party investors or investments after the end of July 2018.

498. Accordingly, the Claimant's MFN claim is rejected.

F. ALLEGED BREACH OF THE NATIONAL TREATMENT STANDARD

(1) The Parties' Positions

a. The Claimant's Position

(i) Memorial

499. The Claimant submits that the national treatment provision in Article 10.3 of DR-CAFTA is a "*non-discrimination norm*" and "*prescribes the treatment the CAFTA Parties are to provide to the investors of another Party and their investments*." Article 10.3 obliges the CAFTA Parties to treat investors from other CAFTA Parties and their investments as favorably as they treat domestic investors and their investments "*operating in like circumstances*."[515]

500. The Claimant contends that Nicaragua breached Article 10.3 by treating its investment less favorably than domestic investments in like circumstances. According to the Claimant, the purpose of Article 10.3 is to ensure that investors and the investments from other CAFTA Parties receive treatment "*equivalent to that provided to the most favorably treated Nicaraguan investor or its investment*."[516]

501. The Claimant submits that three elements need to be established to prove a breach of Article 10.3: (i) the foreign investor or investment is in like circumstances with local investors or investments; (ii) the foreign investor or investment is treated less favorably than local investors or investments; and (iii) this differential treatment relates to the

[514] Cl. Mem., para. 761. *See also* Cl. Mem., paras. 430-431.
[515] Cl. Mem., paras. 595-596.
[516] Cl. Mem., paras. 597-599.

establishment, acquisition, expansion, management, conduct, operation and sale or other disposition of investments.[517]

502. The Claimant argues that, similar to the likeness test under Article 10.4, the likeness test under Article 10.3 "*compares, for the purposes of the arbitration, the 'like circumstances' between local Nicaraguan investments and a foreign CAFTA Party investor and its investment*." The circumstances of the foreign and domestic investments need only be "*like*." Accordingly, there may be many differences in circumstances, but once the threshold of likeness is met, a "*comparison of treatment follows*." In the Claimant's view, in the present case, "*all persons possessing private land in the territory of Nicaragua, as well as those seeking protection of private landholdings, are in like circumstances to Inagrosa.*" The Claimant argues, relying on the evidence of Professor Wolfe, that there were privately-owned lands in Nicaragua that were treated more favorably than the lands that were invaded by paramilitaries, such as those owned by Riverside. According to the Claimant, "[t]*he private lands owned by supporters of the FSLN (the Sandinista Party) were not seized by the government or the paramilitaries*." However, they were in like circumstances with Riverside and its investment, Inagrosa.[518]

503. The Claimant submits, relying on *Grand River*, that what matters most in ascertaining whether investors and investments are in like circumstances is "*whether they are governed by the same legal regime.*"[519] According to the Claimant, the "*main influences*" of Article 10.3 of DR-CAFTA are the equivalent provisions in the GATT and the General Agreement on Trade in Services, and therefore must be interpreted and applied in a similar manner.[520]

504. According to the Claimant, in addition to likeness, the second element of Article 10.3 is the requirement to accord a foreign investor and its investment "*treatment no less favorable"* than that provided to domestic investors in like circumstances. The purpose of

[517] Cl. Mem., para. 604.

[518] Cl. Mem., paras. 605-610 (referring to First Wolfe Report at para. 60 (**CES-02**)).

[519] Cl. Mem., para. 611 (referring to *Grand River Enterprises Six Nations, LTD., et al. v. United States of America*, Award, 12 January 2011, para. 167 (**CL-0146-ENG**)).

[520] Cl. Mem., paras. 612-620.

national treatment is therefore to "*provide equality of competitive opportunities,*" which "*allows for different treatment that is not less favorable*." The regulatory process may produce different outcomes, as long as the process demonstrably treats the parties with evenhandedness. Moreover, while difference in nationality is required, there is "*no requirement of intentional nationality-based discrimination*;" actual nationality-based discrimination, *de jure* or *de facto*, is sufficient. Accordingly, where there is a different treatment in like circumstances, "*the burden is on Nicaragua to show that the different treatment was not less favourable or not necessary*."[521]

505. The Claimant submits that Article 10.3 requires that the relevant treatment is with respect to the "*establishment, acquisition, expansion, management, conduct, operation, and sale or other disposition of investments*." The seizure of land is a disposition of investment and also affects the expansion, management, conduct and operation of the investment, and is thus covered by Article 10.3.[522]

506. As to facts, the Claimant submits that others lawfully possessing or owning land in the territory of Nicaragua were treated more favorably than Inagrosa, in breach of Article 10.3. Relying on the evidence of Professor Wolfe, the Claimant argues that "*others in Nicaragua were not subjected to unlawful seizure of their lands*."[523] In the Claimant's view, "*all persons possessing private land in the territory of Nicaragua, as well as those seeking protection of private landholdings, are in like circumstances to Inagrosa*."[524]

(ii) Reply

507. In the Reply, the Claimant restates its position on the content of the national treatment standard under Article 10.3 of DR-CAFTA and comments on the Respondent's position as set out in the Counter-Memorial. The Claimant contends that the Respondent has advanced, *inter alia*, "*an improperly narrow definition of likeness for consideration of like*

[521] Cl. Mem., paras. 621-633 (referring to *Marvin Roy Feldman Karpa v. United Mexican States*, ICSID Case No. ARB(AF)/99/1, Award, 16 December 2022, para. 181 (**CL-0044-ENG**)).

[522] Cl. Mem., paras. 639-640.

[523] Cl. Mem., para. 763 (referring to First Wolfe Report, para. 60 (**CES-02**)).

[524] Cl. Mem., para. 765.

government treatment." All private landowners constitute the relevant class for purposes of comparison.[525]

508. The Claimant also claims that the Respondent has attempted to misdirect the Tribunal as to the identity of the individuals who led the invasion; according to the Claimant, they were all "*supporters of the Nicaraguan government*" – either Sandinista supporters or former members of the Nicaraguan resistance who were in alliance with the Nicaraguan government. According to the Claimant, "*the (now former) Nicaraguan Resistance has not been opposed to the government since 2006*" and was "*in active alliance with the government at the time of the invasion.*"[526]

509. As to the requirement of likeness specifically, the Claimant argues that the circumstances of foreign and domestic investments only need to be "*like*." According to the Claimant, likeness needs to be considered in the circumstances. Where the question of likeness arises in the context of government regulations, it requires the Tribunal to consider all those who are competing for similar regulatory permissions; however, in this case, all lawful possessors of private land in Nicaragua, as well as those seeking protection of private landholdings, are in like circumstances to Inagrosa. The circumstances must be "*like*," not "*identical*." The Claimant submits that Nicaragua proposes a "*constrained definition limited to those receiving preferential treatment linked to private land invasions*."[527]

510. The Claimant submits that the second element, in addition to likeness, is the obligation to accord foreign investor and its investments "*treatment no less favorable*" than that provided to domestic investors. Article 10.3 requires the CAFTA Parties to provide equality of competitive opportunities, which allows for differential treatment that is not less favorable treatment. However, Article 10.3 does not contain a requirement of intentional nationality-based discrimination; actual discrimination based on nationality is sufficient. On the other hand, both *de jure* and *de facto* discrimination are covered.[528]

[525] Cl. Reply, paras. 1610-1616, 1620-1629.
[526] Cl. Reply, paras. 1633-1638.
[527] Cl. Reply, paras. 1639-1646.
[528] Cl. Reply, paras. 1647-1656.

511. Article 10.3 of DR-CAFTA further requires, according to the Claimant, that the relevant treatment must be with respect to the "*establishment, acquisition, expansion, management, conduct, operation, and sale or other disposition of investments*." The seizure of land is a disposition of an investment and as such covered by the provision. In the present case, the Claimant's investment was provided with less favorable treatment than local private landowners who supported the FSLN and President Ortega. Riverside was entitled to receive "*such more favorable treatment.*"[529]

512. The Claimant alleges that the facts demonstrate its claim of national treatment. Nicaragua did not meet its obligation under Article 10.3 to provide treatment as favorable to Riverside as it provided to its own nationals. Specifically, the Claimant argues that Riverside received less favorable treatment from the Nicaraguan national police in 2018 than other private landowners, like those at Nejapa Country Club in Managua, whose lands were unlawfully invaded. The Claimant relies on the evidence of Professor Wolfe, who relies on press reports about police efforts to remove the invaders.[530] While Nicaragua generally dismisses media reports as insufficient, it fails to address the Nejapa incident in its Counter-Memorial. The Claimant contends that, while being ordered to produce police reports, Nicaragua failed to submit any such report on Nejapa.[531]

513. The Claimant further submits that, based on police reports provided by Nicaragua, at least ten local Nicaraguan companies received more favorable treatment than Riverside: (i) Inversiones Españolas S.A.; (ii) Desarollo Xolotlan S.A.; (iii) Mangos Sociedad Anónima (MANGOSA) S.A.; (iv) Melones de Nicaragua S.A. (MELONICSA); (v) Productos Aliados S.A.; (vi) Sociedad Liza Interprise S.A.; (vii) Comercial Mantica S.A.; (viii) Burke Agro Nicaragua S.A.; (ix) Puma Energy Bahamas S.A.; and (x) McDonald's Sistemas de Nicaragua S.A.[532] The Claimant adds that its legal expert

[529] Cl. Reply, paras. 1657-1658.

[530] Cl. Reply, para. 1666 (referring to First Wolfe Report at para. 59 (**CES-02**)). Prof. Wolfe relies upon Wilfredo Miranda Aburto, "*Ortega ordena desalojar a tomatierras*," *Confidencial*, 23 September 2018 **(C-0230-SPA**).

[531] Cl. Reply, paras. 1667-1668.

[532] Cl. Reply, paras. 1669-1671, Chart G.

Mr Renaldy Gutiérrez confirms that each of these entities is a "*valid Nicaraguan corporation*."[533]

514. The Claimant asserts that the police reports also confirm that the Respondent provided more favorable treatment to a number of Nicaraguan nationals listed in Chart H of the Reply.[534]

515. The Claimant also responds to Nicaragua's purported reasons to justify non-compliance with the national treatment obligation: (i) the invasions occurred in diverse regions of Nicaragua; (ii) there is ambiguity concerning the timeline of the illicit activities; (iii) there was failure to identify the invaders, "*drawing a distinction between actions by the Nicaraguan Resistance and other wrongdoers*;" and (iv) there were potentially other "*unspecified*" factors. The Claimant maintains that these purported reasons are insufficient and incoherent.[535]

516. As to the first purported justification, the Claimant argues that the national treatment principle mandates that Nicaragua affords "*treatment equivalent to the most favorable standard of treatment available domestically*" and thus, by arguing that better treatment might be granted in another region of Nicaragua, the Respondent has implicitly acknowledged preferential treatment.[536]

517. As to the second justification, the Claimant states that the police reports provide substantial evidence of when the favorable treatment occurred and contradict Nicaragua's argument about the ambiguity of the timeline. The Claimant contends that the "*likeness*" criterion "*do*[es] *not differentiate based on the historical genesis of the lawless act*." When wrongdoers are involved, both are alike and represent violations of public order and law.[537]

[533] Cl. Reply, para. 1672.
[534] Cl. Reply, para. 1675, Chart H.
[535] Cl. Reply, paras. 1676-1677.
[536] Cl. Reply, para. 1678.
[537] Cl. Reply, para. 1679.

518. As to the third justification, the Claimant claims that Nicaragua's attempt to emphasize "*the unique nature of threats from the Nicaraguan Resistance, is misleading.*"[538] According to the Claimant, the Nicaraguan resistance "*was an essential segment of Nicaragua's governing political alliance,*" and there is therefore no distinction in terms of the "*likeness*" criterion between "*unlawful entities backing the government and those opposing it*," since both violate public order and law. Both categories of wrongdoers should therefore be treated identically in terms of "*likeness*."[539]

519. As to the fourth justification, the Claimant argues that Nicaragua's attempt to rely on the limited number of police assigned to San Rafael del Norte fails because it omits to disclose that there were other police stations in the Jinotega Department.[540] The Claimant further relies on the evidence of Professor Wolfe to argue that protective services in Nicaragua are not limited the National Police but also include the voluntary police, the fire department, physical protection force and armed forces.[541] In any event, the Respondent's argument fails because the National Police did not take any action during the invasion in June and July 2018 to dissuade the occupiers.[542]

(iii) Post-Hearing Submission

520. In its Post-Hearing Submission, the Claimant merely notes that the police's inaction violated its national treatment obligation under DR-CAFTA.[543]

b. The Respondent's Position

(i) Counter-Memorial

521. The Respondent contends that it did not discriminate against Riverside's investment in breach of its national treatment obligation. The Claimant's claim to the contrary is legally meritless and factually unsubstantiated because (i) the Claimant has failed to prove that

[538] Cl. Reply, para. 1680.
[539] Cl. Reply, para. 1682.
[540] Cl. Reply, para. 1683.
[541] Cl. Reply, para. 1684.
[542] Cl. Reply, paras. 1685-1686.
[543] Cl. PHB, para. 10.

Nicaragua accorded better treatment to other investors in like circumstances; (ii) any difference that might have existed with respect to the State's response to the land invasions, if any, was justified under the unique circumstances surrounding the invasion of Hacienda Santa Fé; and (iii) DR-CAFTA and international law do not require that, in the context of civil strife, Riverside should have received better treatment than other investors.

522. Like the MFN treatment standard, the national treatment standard includes three elements: (i) other investors or their investments must have been in like circumstances with the Claimant or Inagrosa; (ii) the Claimant or Inagrosa must have received a certain treatment from the State; and (iii) the Claimant and Inagrosa must have been treated less favorably than the comparators in like circumstances.[544]

523. As to the first element, the Respondent refers to *Apotex v. United States*, in which the tribunal set out a list of factors to consider, namely whether the comparators (i) are in the same economic or business sector; (ii) compete with the investor or its investments in terms of goods or services; and (iii) are subject to a comparable legal regime or regulatory requirements. The Respondent contends that the Claimant makes the wrong comparison when comparing all others lawfully possessing or owning land with Inagrosa. Ownership and possession of land is an "*extremely broad category*;" but even then, "*it would only be relevant if the State had actually seized the property*." In any event, the Claimant would need to prove that the comparator investors are in the same economic sector or compete with the Claimant to meet the standard.[545]

524. In the present case, the State did not seize Hacienda Santa Fé and the conduct of the invaders is not attributable to the Respondent. The relevant issue is therefore whether there was any discrimination in how the State responded to similar private land invasions in 2018. This is a fact-intensive inquiry that must take into account the circumstances of the investors in question. The reference by the Claimant's expert, Professor Wolfe, to one particular instance of alleged better treatment is not sufficient evidence as it relies on news articles that do not allow a proper comparison: (i) the events described in the article

[544] Resp. CM., paras. 387-388.

[545] Resp. CM., paras. 389-390.

occurred in different areas of the country, not just in Jinotega, and the Claimant has not shown that the circumstances or level of violence were the same; (ii) the articles say nothing about when the other invasions started, which is relevant since the communities at El Pavón have been disputing Hacienda Santa Fé since 1990; (iii) the articles do not identify the invaders, which is relevant since the invaders of Hacienda Santa Fé were former members of the Nicaraguan resistance; and (iv) the articles do not explain the conditions in which the other invasions took place.[546]

525. The Respondent submits that the Claimant has not made any analysis of the likeness element, which "*has been one of the main reasons for tribunals to reject these types of claims.*"[547]

526. As to the second element (listed in paragraph 522 above), the Claimant argues that under DR-CAFTA Article 10.3, treatment must relate to the establishment, acquisition, expansion, management, conduct, operation, and sale or other disposition of investment, and that the alleged seizure of Hacienda Santa Fé qualifies as a disposition of an investment. The Respondent denies that it has interfered in any way with the Claimant's investment, alleging there has been no seizure, administrative or judicial order or regulatory measure preventing the Claimant from pursuing business objectives or affecting its rights in Hacienda Santa Fé.[548]

527. As to the third element (listed in paragraph 522 above), the Respondent notes that in the cases referred to by Professor Wolfe, the illegal occupants were removed once the situation had eased and the risk of violence was reduced. According to the Respondent, this is consistent with the peaceful and de-escalatory approach adopted by the government at Hacienda Santa Fé, where the police began to relocate the illegal occupants once the risk of violence was reduced.[549]

[546] Resp. CM., paras. 390-396.
[547] Resp. CM., para. 396.
[548] Resp. CM., para. 397.
[549] Resp. CM., para. 398.

528. The Respondent contends that the Claimant has failed to establish that other investors in like circumstances were treated better. Investment treaty tribunals have taken the view that differential treatment does not constitute discriminatory treatment if the investors were in distinct circumstances. In the present case, even if the Claimant had identified other comparable cases, which it has failed to do, the situation of Hacienda Santa Fé was unique.[550]

529. First, the unrest in 2018 was not the sole cause of the occupation of Hacienda Santa Fé; it had a background in the unlawful occupation of the property which started already in 1990. Moreover, during the 2018 unrest, the National Police adopted a non-interventionist approach, and were ordered to stay in their stations as a de-escalatory measure. The invasion of Hacienda Santa Fé also involved over 300 people, led by heavily armed former members of the Nicaraguan resistance. In the circumstances, it was not excluded that Inagrosa's employees could have resorted to violence, as they had several weapons which they refused to hand over to the police. At the same time, the National Police only had eight police officers assigned to San Rafael del Norte. In the circumstances, the approach adopted and the measures taken by the National Police were "*necessary and reasonable*."[551]

530. Finally, the Respondent contends that in the context of a civil strife, a State cannot be held liable for interference with a foreign investment unless the investor can demonstrate that the State accorded better treatment to its own nationals of foreigners from third countries. According to the Respondent, the position is supported by Article 10.6 of DR-CAFTA and international law. Given the situation in Nicaragua in 2018, international law does not require the State to deploy hundreds of police agents to forcefully remove some 300 invaders from Hacienda Santa Fé. This would have constituted better treatment than that received by other foreign or Nicaraguan investor at the time.[552]

[550] Resp. CM., paras. 400-401.
[551] Resp. CM., paras. 402-407.
[552] Resp. CM., paras. 408-410.

(ii) Rejoinder

531. The Respondent contends that in its Reply, the Claimant "*completely reformulated its case as to DR-CAFTA Article*[]*10.3 (National Treatment)*." According to the Claimant's new theory, Nicaragua would have breached DR-CAFTA "*by providing a more favorable law enforcement response to the unlawful invasion by non-State actors of other Nicaraguan and foreign-owned properties during the period of nationwide civil strife in 2018*." The Respondent maintains, however, that the Claimant's national treatment claim fails in light of Nicaragua's express Annex II reservation relating to provision of law enforcement (as summarized above in connection with the Claimant's FPS claim).[553]

532. The Respondent submits that, even assuming the national treatment provision in Article 10.3 of DR-CAFTA applied to Nicaragua's law enforcement response, the claim would fail. According to the Respondent, the Claimant's allegations are "*wrong as to international law and unsubstantiated on the evidence*." The Claimant has failed to adduce evidence to show "*(i) discrimination vi-à-vis other investors in like circumstances; or (ii) that the alleged differences in treatment were not justified by rational government policies during a dangerous period of civil strife*."[554]

533. The Respondent submits that Riverside "*cannot even show that Nicaragua has in fact accorded Inagrosa discriminatory treatment* in concreto." A party alleging breach of Article 10.3 DR-CAFTA must show discrimination in like circumstances through a fact-specific inquiry. Since national treatment, like MFN treatment, is a relative standard, a comparison between investors and their investments is "*inherent in the analysis*."[555]

534. According to the Respondent, the Claimant's argument turns on an artificially limited "likeness" concept, which is based on a comparison of all lawful possessors of private land in Nicaragua. This is too broad a category and "*would apply to enterprises in countless sectors*." This is fatal to the Claimant's national treatment claim, as it is to its MFN claim. But even assuming the Claimant identified investors in "*like circumstances*" and

[553] Resp. Rej., paras. 661-664.
[554] Resp. Rej., para. 670.
[555] Resp. Rej., para. 671.

established nationality-based discrimination *in concreto*, its national claim would still fail because, according to the Respondent, it has not demonstrated that the Respondent's measures were "*further to an irrational policy*." International tribunals and legal scholarship have recognized that governments "*cannot be expected to provide equal degrees of protection in every region of the country*."[556]

535. More generally, according to the Respondent, "*tribunals have recognized that their mandate is not to second guess discretionary policy decisions*." In the present case, Riverside ignores the reality that the invasions occurred all over the country, in both cities and rural areas, where authorities faced different levels of violence and had different resources. Therefore, none of the cases referenced by the Claimant are comparable to the invasions taking place in Hacienda Santa Fé. In conclusion, in the Respondent's view, "*Riverside has no evidence that Nicaragua responded more appropriately to land invasions in rural areas that presented comparable dangers; nor that such discrimination was nationality based*."[557]

(iii) Post-Hearing Submission

536. In its Post-Hearing Submission, the Respondent merely refers to its earlier submissions regarding the national treatment standard.[558]

(2) The Tribunal's Analysis

537. The Claimant relies in support of its national treatment claim on Article 10.3 of DR-CAFTA, which provides:

"***Article 10.3: National Treatment***

1. Each Party shall accord to investors of another Party treatment no less favorable than that it accords, in like circumstances, to its own investors with respect to the establishment, acquisition, expansion, management,

[556] Resp. Rej., paras. 672-676 (referring to *Louis Dreyfus Armateurs SAS v. Republic of India*, PCA Case No. 2014-26, Final Award, 11 September 2018, para. 382 (**RL-0052**)).

[557] Resp. Rej., paras. 676-678.

[558] Resp. PHB, para. 118.

conduct, operation, and sale or other disposition of investments in its territory.

2. Each Party shall accord to covered investments treatment no less favorable than that it accords, in like circumstances, to investments in its territory of its own investors with respect to the establishment, acquisition, expansion, management, conduct, operation, and sale or other disposition of investments.

3. The treatment to be accorded by a Party under paragraphs 1 and 2 means, with respect to a regional level of government, treatment no less favorable than the most favorable treatment accorded, in like circumstances, by that regional level of government to investors, and to investments of investors, of the Party of which it forms a part."[559]

538. The Tribunal has determined above, in connection with the Respondent's Article 21.2(b) defense, that DR-CAFTA is not applicable to the Claimant's claims to the extent that such claims are alleged to have arisen as a result of Nicaragua's insufficient response to the invasion and occupation of Hacienda Santa Fé during the period from May 2018, when the shelter order was issued, until the end of July 2018, when it was lifted. Accordingly, to the extent that the Claimant's national treatment claim is based on events that took place during this period, the claim stands to be rejected.[560]

539. The Tribunal notes that, while the Claimant alleges, in general terms, that "[o]*thers lawfully possessing or owning land in the territory of Nicaragua were treated more favorably than Inagrosa*,"[561] it has not articulated any alleged differential treatment of Nicaraguan investors that relates to measures adopted or maintained by Nicaragua, within the meaning of Article 10.1 of DR-CAFTA, after end of July 2018. As stated, the Claimant's national treatment claim relates only to the alleged differential treatment between the Claimant and Inagrosa, on the one hand, and domestic Nicaraguan investors, on the other hand, in connection with the invasion and occupation of Hacienda Santa Fé in June-July 2018.[562] As determined above, the DR-CAFTA is not applicable to such claims.

[559] DR-CAFTA, Article 10.3 (**CL-0001**).

[560] *See* Cl. Mem., paras. 695, 718-721; Cl. Reply, paras. 65(a), 1096-1100, 1440(a) to (d), 1445, 1498, 1500.

[561] Cl. Mem., para. 761. *See also* Cl. Mem., paras. 430-431.

[562] *See* Cl. Mem., para. 763; Cl. Reply, paras. 1694-1697, 1699-1704; Cl. PHB, paras. 164, 204.

540. In light of the above, the Claimant's national treatment claim is rejected.

****

541. As determined in this Section VII of the Award, each of the Claimant's claims is rejected on the merits. Accordingly, there is no need to consider the quantum of the Claimant's claims or the Respondent's admissibility objection relating to Article 10.16.1(a) of DR-CAFTA, which the Tribunal in Section V above decided to consider together with the merits of the Claimant's claims, specifically quantum, should it find that the Respondent has breached any of its obligations under DR-CAFTA. In the absence of finding of any breach, the quantum of the Claimant's claims becomes moot.

VIII. COSTS

A. THE PARTIES' SUBMISSIONS

(1) The Claimant's Cost Submission

542. In its submission on costs, the Claimant argues that the Respondent should bear the total arbitration costs incurred by the Claimant, including legal fees and expenses, totaling USD 11,414,843.670. According to the Claimant, the Respondent "*systematically engaged*" in a frivolous process that unduly obstructed the fair and orderly unfolding of the arbitration process. The Tribunal should therefore hold the Respondent responsible for indemnifying the Claimant for the entirety of its costs of the arbitration.[563]

543. The Claimant makes the following claims for legal and other costs (including advances made to ICSID):[564]

Summary Total - Riverside Costs	Amount
A. Legal Representation	$10,043,393.10
B. Experts	$625,297.19
C. Disbursements	$71,153.41

[563] Cl. Cost Submission, paras. 1-4, 22-23.

[564] Cl. Cost Submission, p. 7.

D. Tribunal Costs	$675,000.00
Total	$11,414,843.70

544. The Claimant submits that the total cost is reasonable "*considering the complexity and scope of the issues in the arbitration, the number of witnesses and experts, the two-week in-person witness hearing held in Washington, DC, and the breadth of the differences between the disputing parties*."

545. The Claimant's legal representation costs break down as follows:[565]

Law firm Billings

Appleton	$8,476,197.68
Gunster	$303,310.00
Reed Smith	$1,264,185.50
	$10,043,393.10

546. The Claimant states that it had a contingency fee arrangement with Appleton & Associates International Lawyers LP, as disclosed in the course of the arbitration pursuant to Procedural Order No. 1.

547. The Claimant's expert fees are itemized as follows:[566]

Richter Inc (V. Kotecha)	Damages Expert	$421,855.96
Prof. Justin Wolf	History Expert	$10,750.00
Pfister	Land Appraisal	$10,560.00
Arias	Nicaraguan counsel	$43,831.84
Gutierrez & Associates	Nicaraguan Law expert	$138,299.39
		$625,297.19

548. The Claimant's hearing and other disbursements are itemized as follows:[567]

[565] Cl. Cost Submission, Section II(A), p. 7.

[566] Cl. Cost Submission, para. 31.

[567] Cl. Cost Submission, para. 32.

Notary Fees	$719.55
Transcription- Translation fees	$1,185.56
Bank Charges	$665.00
Printing -8568 copies	$1,289.70
UPS Courier	$817.69
FedEx Courier	$62.90
Gravity Stack - Discovery & IT recovery	$16,245.62
Hyperlinks Bundle Fee	$922.50
RETRIEV-IT - Document Retrieval	$123.20
Government certificate fees	$12.50
Staff overtime meals	$100.00
Witness travel, board & lodging	$14,427.60
Legal team Travel, board & Lodging	$34,581.59
	$71,153.41

549. The Claimant states that it incurred Tribunal and registration fees in the amount of USD 675,000, as follows:[568]

ICSID Registration Fee	$25,000.00
ICSID	$650,000.00
Total Tribunal and ICSID fees	**$675,000.00**

550. The Claimant submits that it should be awarded costs on a full indemnity basis reflecting the Respondent's procedural misconduct, which in the Claimant's view "*systemically evidences an absence of good faith*." According to the Claimant, given the extensive evidence of the Respondent's misconduct, the Tribunal should award costs to the Claimant "*regardless of its ultimate decision on the merits*."[569]

551. The Claimant contends that investment treaty tribunals have responded to procedural misconduct. In the Claimant's view, when a respondent engages in obstructive behavior, "*tribunals must exercise their discretion to impose cost-shifting as a deterrent and to preserve the integrity of the arbitral process*." The Claimant relies in support of its position on *Yukos Universal v. Russian Federation*, *Libananco v. Turkey*, *Campos de Pesé v.*

[568] Cl. Cost Submission, para. 33.

[569] Cl. Cost Submission, para. 34.

Panama and *Caratube v. Kazakhstan*. The Claimant submits that, as established in case law, the Tribunal may allocate the costs between the disputing parties if it determines the allocation to be reasonable, considering all relevant circumstances of the case. In the Claimant's view, in the circumstances of this case, Riverside's request for a cost award based on Nicaragua's "*obstructive tactics*" is reasonable and well-supported by principles of justice and accountability.[570]

552. The Claimant identifies long lists of alleged instances of the Respondent's misconduct, under the following headings: (i) "*Nicaragua's Shameful Conduct Regarding its Offer to Return* [Hacienda Santa Fé];"[571] (ii) "*Nicaragua's Unfair and Non-transparent Judicial Expropriation Proceedings*;"[572] (iii) "*Abusive Invocation of Non-Precluded Measures*;"[573] (iv) "*Misconduct regarding misrepresentation of evidence*;"[574] (v) "*Respondent's Awareness of its Misconduct*;"[575] (vi) "*Abusive Contribution and Mitigation Argument*;"[576] (vii) "*Concealment and Misrepresentation of the Role of Nicaraguan Resistance*;"[577] (viii) "*Jose Lopez's Unreliable Account of the 2003 Eviction*;"[578] (ix) "*Jose Lopez's Unreliable Account of the alleged 2017 invasion*;"[579] (x) "*Shelter Order absence of good faith*;"[580] (xi) "*Nicaragua seeks to rely on its faulty conduct*;"[581] (xii) "*Unfair and Heavy-handed Nicaraguan Government Official Witness Evidence*,"[582] (xiii) "*No Criminal*

[570] Cl. Cost Submission, paras. 34-43 (referring to *Yukos Universal Limited (Isle of Man) v. The Russian Federation,* PCA Case No. 2005-04/AA227, Final Award, 18 July 2014, paras. 794-804 (**CL-0232-ENG**); *Libananco Holdings Co. Limited v. Republic of Turkey*, ICISD Case No. ARB/06/8, Award, 2 September 2011, paras. 557-569 (**CL-0436-ENG**); *Campos de Pesé, S.A. v. Republic of Panama*, ICSID Case No. ARB/20/19, Final Award, 1 March 2024 (**CL-0437-ENG**); *Caratube International Oil Company LLP and Mr. Devincci Salah Hourani v. Republic of Kazakhstan*, ICSID Case No. ARB/13/13, Award, 27 September 2017, paras. 1260-1261 (**RL-0182-ENG**).

[571] Cl. Cost Submission, paras. 44-54.

[572] Cl. Cost Submission, paras. 55-69.

[573] Cl. Cost Submission, paras. 70-73.

[574] Cl. Cost Submission, paras. 74-75.

[575] Cl. Cost Submission, paras. 76-79.

[576] Cl. Cost Submission, paras. 80-85.

[577] Cl. Cost Submission, paras. 86-90.

[578] Cl. Cost Submission, paras. 91-96.

[579] Cl. Cost Submission, paras. 97-99.

[580] Cl. Cost Submission, paras. 100-103.

[581] Cl. Cost Submission, paras. 104-109.

[582] Cl. Cost Submission, paras. 110-113.

Charges for the Death Threats Against Riverside & INAGROSA Management;"[583] (xiv) "*Government Support of the Invaders*;"[584] (xv) "*Withdrawal of Certain Witnesses*;"[585] (xvi) "*Riverside's Discovery of Ex-Parte Seizure Order Against Investor (November-December 2022)*;"[586] and (xvii) "*Nicaragua's valuation approach absence of good faith*."[587]

553. The Claimant contends that its costs should be awarded even in the unlikely event that it does not prevail in the arbitration. According to the Claimant, the Tribunal should limit any cost-shifting measures, "*considering Riverside's unique merits and complex issues, where the decision to arbitrate was reasonable and justified*." The Claimant further submits that the Tribunal should take into account the following events and circumstances: (i) Nicaragua's failure to respond to the Claimant's Notice of Intent; (ii) Nicaragua's request for redaction of protected information was "*an unreasonable procedural step*;" (iii) Riverside's withdrawal of its CAFTA Article 10.16.1(b) claim; (iv) Riverside's motion to dismiss jurisdictional objections; (v) Nicaragua's motion for security for costs, which was denied; (vi) Nicaragua's motion on document production; (vii) the procedure regarding the Court Order; and (viii) Nicaragua's request for an artificial intelligence protocol.[588]

554. In conclusion, the Claimant submits that the Tribunal "*should acknowledge the pervasive nature of Nicaragua's procedural misconduct*," which has "*inflated costs unnecessarily and complicated Riverside's pursuit of justice*." According to the Claimant, the procedural rules of DR-CAFTA and ICSID justify "*the discretionary awarding of costs to Riverside*," including post-award interest on the costs awarded.[589]

[583] Cl. Cost Submission, paras. 114-116.
[584] Cl. Cost Submission, paras. 117-119.
[585] Cl. Cost Submission, paras. 120-124.
[586] Cl. Cost Submission, para. 125.
[587] Cl. Cost Submission, paras. 126-129.
[588] Cl. Cost Submission, paras. 130-146.
[589] Cl. Cost Submission, paras. 147-152.

(2) The Respondent's Cost Submission

555. In its submission on costs, the Respondent requests that the Tribunal order the Claimant to bear all the Respondent's costs and fees of the arbitration under Article 61(2) of the ICSID Convention and ICSID Arbitration Rule 28(1), in an amount no less than USD 8,240,445.86.

556. The Respondent submits that ICSID tribunals have broad discretion under the ICSID Convention, the ICSID Arbitration Rules and DR-CAFTA to allocate legal fees and costs in the absence of an agreement by the parties. According to the Respondent, while tribunals previously followed the "pay your own way" approach, as long as the parties acted in good faith and not in an abusive manner, the prevailing trend is for tribunals to apply the "costs follow the event" approach. However, regardless of the approach adopted, in the Respondent's view, "*the vast majority of tribunals have determined the allocation of costs considering the particular facts* [of] *the case,*" taking into account factors such as "*the relative success of the parties, the reasonableness of the costs, the complexity of the issues, and the parties' conduct during the arbitration process.*" According to the Respondent, this practice is now crystallized in Rule 52.1 of the new ICSID Arbitration Rules.[590]

557. The Respondent contends that the Claimant has needlessly increased the costs of the arbitration, which "*weighs heavily in favor of awarding Nicaragua its full costs and fees*." The Respondent refers to a number of procedural incidents, including the Claimant's (i) failure to disclose that one of its key witnesses was illiterate, despite having submitted an extensive witness statement; (ii) repeated extraordinary and improper applications; (iii) excessive document production requests; (iv) first calling Nicaragua's witnesses to testify and then changing its mind; (v) seeking to hold the hearing in a virtual format; (vi) requesting the Tribunal to cancel the closing arguments at the Hearing; (vii) introducing late and irrelevant evidence; and (viii) filing "*extravagantly long pleadings*." In support of its position, the Respondent relies on the cost decisions in *Border*

[590] Resp. Cost Submission, paras. 12-16 (footnotes omitted).

Timbers v. Zimbabwe, *Plama v. Bulgaria*, *Cementownia v. Turkey*, *Karkey Karadeniz v. Pakistan* and *Burlington v. Ecuador*.[591]

558. The Respondent develops in its submission each of these points in detail, contending that the Claimant's alleged procedural misconduct resulted in an increase of the Respondent's costs of arbitration. The Respondent further submits that, the Claimant having declined the Respondent's repeated invitations to resume possession of Hacienda Santa Fé, it should bear the costs incurred by Nicaragua in securing the property, which as of the date of the Respondent's cost submission amount to NIO 12,602,771.82, equivalent to USD 342,827.40.[592]

559. The Respondent argues that the amount of its costs claim, USD 8,240,445.86, is reasonable, in light of the Claimant's conduct, the amount of compensation requested, the volume of the evidentiary record, the length of the proceeding and the complexity of the disputed issues. The Respondent relies, in support of its position, on *Hulley Enterprises v. Russian Federation*, *Kornikom EOOD v. Serbia* and *Kimberly-Clark v. Venezuela*.[593]

560. The Respondent details its cost claim in the form of the following table:[594]

Item	Amount (US$)
BakerHostetler Fees and Expenses	$6,753,533.46
Expert Fees and Expenses	$494,185

[591] Resp. Cost Submission, paras. 18-28 (referring to *Border Timbers Limited, Timber Products International (Private) Limited, and Hangani Development Co. (Private) Limited v. Republic of Zimbabwe*, ICSID Case No. ARB/10/25, Award, 28 July 2015, para. 1003 (**RL-0108**); *Plama Consortium Limited v. Republic of Bulgaria*, ICSID Case No. ARB/03/24, Award, 27 August 2008, paras. 318, 321, 325.6 (**RL-0225**); *Cementownia "Nowa Huta" S.A. v. Republic of Turkey*, ICSID Case No. ARB(AF)/06/2, Award, 17 September 2009, paras. 158-159 (**CL-0076**); *Karkey Karadeniz Elektrik Uretim A.S. v. Islamic Republic of Pakistan*, ICSID Case No. ARB/13/1, Award, 22 August 2017, paras. 1063-1072 (**RL-0130**); *Burlington Resources, Inc. v. Republic of Ecuador*, ICSID Case No. ARB/08/5, Decision on Reconsideration and Award, 7 February 2017, paras. 620-621 (**CL-0210**)).

[592] Resp. Cost Submission, paras. 29-108.

[593] Resp. Cost Submission, paras. 109-113 (referring to *Hulley Enterprises Limited (Cyprus) v. Russian Federation*, UNCITRAL, PCA Case No 2005-03/AA226, Final Award, 18 July 2014, paras. 1876-1881 (**RL-0232**); *Kornikom EOOD v. Republic of Serbia*, ICSID Case No. ARB/19/12, Award, 20 September 2023, paras. 755-756 (**RL-0230**); *Kimberly-Clark Dutch Holdings, B.V., Kimberly-Clark S.L.U., and Kimberly-Clark BVBA v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB(AF)/18/3, Award, 5 November 2021, para. 253 (**RL-0233**).

[594] Resp. Cost Submission, para. 114.

Arbitration Costs	$649,900
Additional Expenses	$342,827.40
TOTAL FEES & COSTS	**$8,240,445.86**

561. In conclusion, the Respondent requests that the Tribunal:[595]

> "*a. ORDER Riverside to pay the costs of these arbitral proceeding, including the costs of the Tribunal and the legal and other costs incurred by Nicaragua, on a full indemnity basis, in the total amount of $8,240,445.86;*
>
> *b. ORDER interest on any cost awarded to Nicaragua, in the amount to be determined by the Tribunal.*"

B. THE TRIBUNAL'S DECISION

562. The relevant provision for the purposes for determining the Parties' claims for costs is Article 61(2) of the ICSID Convention, which provides:

> "*In the case of arbitration proceedings the Tribunal shall, except as the parties otherwise agree, assess the expenses incurred by the parties in connection with the proceedings, and shall decide how and by whom those expenses, the fees and expenses of the members of the Tribunal and the charges for the use of the facilities of the Centre shall be paid. Such decision shall form part of the award.*"

563. Rule 47(1)(j) of the ICSID Arbitration Rules further provides that the award shall contain, *inter alia*, "*any decision of the Tribunal regarding the cost of the proceeding*."

564. Furthermore, according to Article 10.26.1 of DR-CAFTA, "[a] *tribunal may also award costs and attorney's fees in accordance with this Section and the applicable arbitration rules*."

565. It is common ground, and well established in ICSID arbitration, that Article 61(2) of the ICSID Convention and Rule 47(1)(j) of the ICSID Arbitration Rules provide the Tribunal

[595] Resp. Cost Submission, para. 120.

with broad discretion as to how the costs of the arbitration, including the Parties' legal costs and the fees and expenses of the Tribunal and the ICSID Secretariat, should be apportioned. The Parties further agree that the "costs follow the event" rule governs, in principle, the allocation of costs, while offering widely divergent views on how the rule should be applied, depending on the outcome of the arbitration and the Parties' conduct in the course of the arbitration, as summarized above.

566. The costs of the arbitration, including the fees and expenses of the Tribunal, ICSID's administrative fees and direct expenses, amount to (in USD):

Arbitrators' fees and expenses	
Dr Veijo Heiskanen	USD 327,591.97
Mr Philippe Couvreur	USD 217,620.82
Ms Lucy Greenwood	USD 126,152.95
ICSID's administrative fees	USD 230,000.00
Direct expenses	USD 311,008.09
Total	**USD 1,212,373.83**

567. The above costs have been paid out of the advances made by the Parties in equal parts, except for the lodging fee which was made by the Claimant only. As a result, each Party's share of the costs of arbitration amounts to USD 606,186.91.

568. The Tribunal considers it appropriate that the Parties bear and equally share the fees and expenses of the Members of the Tribunal and ICSID's administrative fees and expenses. These costs arise directly out of the Parties' arbitration agreement and thus constitute costs that the Parties have agreed to bear, before any arbitration proceedings, and thus regardless of the outcome of this case. The remaining balance will be reimbursed to the Parties in proportion to the payments that they advanced to ICSID.

569. As to the Parties' legal and other costs, the Tribunal agrees that these costs should "follow the event" and accordingly their allocation should reflect the relative success of the Parties. The Tribunal notes that, while it rejected one of the Respondent's preliminary defenses on the merits, based on Article 10.6(1) ("Treatment in Case of Strife") of DR-CAFTA, in its

entirety, and rejected the Respondent's Article 21.2(b) defense in part (insofar as it related to the post-July 2018 period), each of the Claimant's claims were rejected on the merits, which thus must be considered the "outcome" of the arbitration and the "event" that the costs should "follow."

570. The Tribunal notes that the legal and other costs claimed by the Respondent are of a similar order of magnitude as those claimed by the Claimant, which the Claimant itself considers to be reasonable (taking into account the Respondent's alleged misconduct). Having considered the relevant factors, including in particular the complexity of the case, the number of issues to be decided and the volume of the evidence, the Tribunal determines that the legal and other costs claimed by the Respondent are reasonable. The Tribunal therefore does not consider it necessary to make any adjustments to the Respondent's cost claims on the basis of their reasonableness.

571. The Tribunal further notes that the Respondent's cost claim includes a claim for the costs incurred by the Respondent in securing Hacienda Santa Fé, which as of the date of the Respondent's cost submission amounted to NIO 12,602,771.82, equivalent to USD 342,827.40. The Tribunal considers that, in view of the outcome of the case, this cost can legitimately be considered part of the costs incurred by the Respondent in defending the Claimant's claims and must be granted as part of the Respondent's costs claim.

572. Accordingly, the Tribunal determines that, in view of the outcome of the proceeding, the Claimant should bear the Respondent's legal and other costs in their entirety (excluding the fees and expenses of the Tribunal and the administrative fees and direct expenses of ICSID), in the amount of USD 8,240,445.86.

573. The Tribunal notes that the Respondent claims interest on any costs awarded to it, "*in the amount to be determined by the Tribunal.*" In the absence of any argument or quantitative evidence to support the Respondent's interest claim, the Tribunal has no basis to grant the claim. Accordingly, the Respondent's claim for interest is rejected.

IX. AWARD

574. For the reasons set out above, the Tribunal determines as follows:

(a) The Tribunal has jurisdiction over the Claimant's claims;

(b) The Claimant's claims are rejected for lack of merit;

(c) The Parties shall bear and equally share the fees and expenses of the Tribunal and the costs of the ICSID facilities;

(d) The Claimant is ordered to pay the costs incurred by the Respondent in connection with this proceeding in the amount of USD 8,240,445.86; and

(e) All other claims and requests for relief are denied.

[Signed]

Mr Philippe Couvreur
Arbitrator

Date: 15 October 2025

Ms Lucy Greenwood
Arbitrator

Date:

Dr Veijo Heiskanen
President of the Tribunal

Date:

[Signed]

Mr Philippe Couvreur
Arbitrator

Date:

Ms Lucy Greenwood
Arbitrator

Date: 15 October 2025

Dr Veijo Heiskanen
President of the Tribunal

Date:

Mr Philippe Couvreur
Arbitrator

Date:

Ms Lucy Greenwood
Arbitrator

Date:

[Signed]

Dr Veijo Heiskanen
President of the Tribunal

Date: 15 October 2025