INTERNATIONAL CENTRE FOR SETTLEMENT OF INVESTMENT DISPUTES

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

ICSID Case No ARB/21/16

RIVERSIDE COFFEE, LLC

INVESTOR

v.

REPUBLIC OF NICARAGUA

RESPONDENT

INVESTOR'S RESPONSE TO RESPONDENT'S APPLICATION FOR SECURITY FOR COSTS

NOVEMBER 10, 2023

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I. OVERVIEW

1) Two years into this Arbitration, on October 4, 2023, Nicaragua filed an application for security for costs (the "Application"). Nicaragua filed its Application conspicuously close to the deadline for Riverside's critical filings — less than a month before Riverside's Reply Memorial on Merits and Counter-Memorial on Jurisdiction due on November 3, 2023, and a mere eight months before the hearing set to commence on July 1, 2024.

2) The legal requirements for granting an award for security for costs are described below. But within the evaluation of an Application for Security for Costs, this Tribunal is required to evaluate the conduct of Nicaragua, the party requesting the award.[1]

3) As part of this evaluative exercise, the Tribunal is invited to examine Nicaragua's Counter-Memorial and Riverside's recent Reply Memorial not to pre-judge the merits, but to evaluate Nicaragua's own conduct, which Nicaragua necessarily puts at issue as part of the requirements of this Application.

4) This Tribunal is invited to consider the extensive nature of the Reply Memorial, necessitated by the need to counter Nicaragua's unfounded and obstructive defense tactics.

  a) Notably, a significant portion of **Nicaragua's witness statements bore no relevance to the issues in dispute**, unnecessarily expanding the scope and complexity of this dispute and imposing extraordinary requirements upon Riverside to carefully address and debunk the onslaught of misguided and unsupported defense contentions. Some of the most egregious of the irrelevancies are thoroughly dissected in Part V of the Reply Memorial and underscored by the Expert Witness Statement of Renaldy J. Gutierrez.

  b) Nicaragua's primary defense narrative was to allege that disruptions at Hacienda Santa Fé ("HSF") were the work of state adversaries or persons who were unconnected to the state. **Nicaragua's defense that the former Nicaraguan Resistance were enemies of the state has been effectively debunked** by the expert analysis of Professor Justin Wolfe from Tulane University and the extensive literature upon which he relies. Professor Wolfe's evidence, grounded in both written allegiance to the Nicaraguan government from Nicaraguan Resistance

[1] Chartered Institute of Arbitrators, International Arbitration Practice Guideline, Applications for Security for Costs (2016), Commentary on Article 4 – Paragraph 1 at p. 10 (**RL-0133-ENG**). The Chartered Institute of Arbitrators indicates that the Tribunal "should consider the conduct of the party applying for security both before and during the course of the arbitration to date and all of the surrounding circumstances in order to determine whether it would be fair to require security."

leaders and law enforcement reports, erodes Nicaragua's portrayal of the intruders as enemies of the state. Professor Wolfe states "the Nicaraguan Resistance was an ally of the Sandinista government in June 2018."[2] Similarly, Prof. Wolfe debunks Nicaragua's contention that that the persons leading the intrusion at HSF were connected to the state.[3] They were acting on behalf of the state, just as Riverside told this Tribunal in its initial Memorial.

c) **There was no order preventing the National Police from protecting HSF in June 2018.** The inconsistencies of Nicaragua's defense extend to the alleged presidential order directing police inaction during the 2018 intrusions, a claim refuted by evidence of police involvement in similar other incidents, as detailed in accompanying police reports, summarized in the Reply Memorial. Such selective enforcement speaks volumes of the unequal treatment and substantiates Riverside's allegations of Full Protection and Security, National Treatment, and Most Favoured Nation Treatment CAFTA breaches.

d) **Nicaragua's own documents evidence that the direct role of government leaders to continue the occupation**. The chief legislator in the National Assembly for the Sandinista government, Congressmen Edwin Castro,[4] met with the intruders in July 2018 instructing them to continue the occupation.[5] He acknowledged the intrusion and

[2] Reply Expert Witness Statement of Prof. Justin Wolfe at ¶114 (**CES-05**).

[3] Reply Expert Witness Statement of Prof. Justin Wolfe at ¶¶116 – 122 (**CES-05**). Prof. Wolfe says in paragraph 119 that "Assessing 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." Not only are these misleading statements redolent in the pleadings and the witness statements of Police Commissioner Castro, Sub-Commissioner Captain Herrera, Jinotega Attorney General Gutierrez, and Jose Lopez, but they continued to be propagated in the proceeding in communications from counsel. Nicaragua again relied on this misstatement on August 7, 2023 , in an email communication from Nicaragua to Riverside, saying, "Throughout this case, your client has insisted that it was expropriated by Nicaragua. As set out in Nicaragua's counter-memorial, however, the reality is that the illegal land invasions at issue were carried out by third parties and met with what Nicaragua considers an appropriate law enforcement response under the circumstances." As demonstrated in the Reply Memorial, both statements were utterly false. See the email from Analia Gonzalez to Barry Appleton regarding the response to the handover of Hacienda Santa Fe on August 3, 2023 (**C-0430-ENG**.)

[4] Edwin Castro was described by Bloomberg as "the chief legislator" in the Nicaraguan for the Sandinista party" government. Bloomberg. "Nicaragua Central Bank head quits amid Alba spat with Ortega" Bloomberg, February 14, 2012 (**C-0677-ENG**). See Department of the US Treasury Press Release, June 9, 2019, Treasury Sanctions Nicaraguan Officials for Supporting Ortega's Efforts supporting Ortega's efforts to Undermine Democracy, Human Rights, and the Economy (**C-0676-ENG**). [5] Report from Commissioner Marvin Castro to Francisco Diaz, Deputy Chief of the National Police, regarding the Invasion of Hacienda Santa Fe, July 31, 2018 (**C-0284-SPA-ENG**). See also Reply Memorial at ¶321(c) and elsewhere.

[5] Report from Commissioner Marvin Castro to Francisco Diaz, Deputy Chief of the National Police, regarding the Invasion of Hacienda Santa Fe, July 31, 2018 (**C-0284-SPA-ENG**). See also Reply Memorial at ¶321(c) and elsewhere.

recognized it, saying that the government would obtain money to purchase the lands for the intruders. Of course, those funds never came, necessitating this arbitration.

5) These are not circumstances of Nicaragua asserting defenses that are just wrong (which these are but those are matters to await the merits), but these are examples where the bona fides of Nicaragua's behaviour in this Arbitration is called into question.

6) The depth and density of Nicaragua's fictitious defenses, which are void of any legal or factual foundation, suggest a strategy aimed not at a fair dispute resolution but at imposing a prohibitive financial burden on Riverside. The pattern of behavior exhibited by Nicaragua in this Arbitration does not reflect the principles of fair play or integrity.

7) **Nicaragua's conduct manifests as a deliberate misuse of the arbitral process**, crafted to delay proceedings, and divert attention with irrelevant and misleading assertions. Nicaragua's approach has imposed significant cost upon Riverside which has been forced to address scores of irrelevant issues and fabricated stories with the sole purpose of excusing Nicaragua from liability.

8) Nicaragua's Application for Security for Costs is as deeply flawed as Nicaragua's conduct in this Arbitration. Turning to the Application itself, Nicaragua's counsel laments the illiquidity of Riverside's assets as a rationale for the Application.[6] Yet, this lack of liquidity is a direct result of Nicaragua's *own* actions — specifically, the freezing and subsequent appropriation of INAGROSA's primary asset, the exceedingly valuable lands at HSF, which, by extension, are Riverside's cornerstone asset.

9) In an unprecedented maneuver, Nicaragua not only has frozen these assets but also has positioned itself as a trustee over them, thereby controlling any hypothecation rights and further exacerbating the conflict of interest inherent in this arbitration given Nicaragua's adverse interest to Riverside.[7]

10) The relief Nicaragua seeks, therefore, emerges as a paradox — seeking to safeguard against a risk of illiquidity that Nicaragua itself has orchestrated through its control over Riverside's principal assets.

11) Further, Nicaragua attempts to justify the necessity of this motion upon purported failings of Riverside to comply with the Tribunal's orders, but as becomes evident, the only failing is the eyesight of Nicaragua's counsel for

[6] Application at ¶47 **(C-0573-ENG)** Nicaragua claims in paragraph 47 that "the documents that Riverside has produced suffice to confirm that Riverside's only noteworthy asset is Inagrosa, which is an illiquid asset incapable of covering short-term debt obligations, such as an adverse award of costs".
[7] Expert Witness Statement of Renaldy J. Gutierrez at ¶ 71(b) (**CES-06**)

demanding production that is outside of the terms of the Tribunal's clear orders (for example see the most egregious example below with respect to Respondent's Document Request 15 where the document requested buttressing Nicaragua's complaint wase denied by the Tribunal).

12) Nicaragua acknowledges that it was aware since June 2022 of Riverside's use of support through a contingent fee arrangement, yet Nicaragua inexplicably waited fifteen months before bringing this Application. Surely, Nicaragua was aware that Riverside's main asset was INAGROSA from the Memorial and Nicaragua knew that it had frozen INAGROSA's main asset, HSF, and had control of its lands, so Nicaragua was aware that the business had no recurring revenue from agriculture or forestry operations as the lands were in Nicaragua's sole and exclusive control. In such circumstances, Nicaragua always was reasonably aware that Riverside's main asset was illiquid, but somehow Nicaragua waited until Riverside's preparations of its Reply Memorial were underway to bring this untimely motion.

13) Given the facts, the Application must be viewed as part of Nicaragua's larger strategy to hinder Riverside's ability to secure bank guarantees against assets that are, ironically, firmly in Nicaragua's grasp due to its own legal machinations.

14) Addressing Nicaragua's suggestion of a 'flight risk', it is patently absurd to consider immovable and highly valuable land as a flight risk, particularly when it remains under the jurisdiction and practical control of Nicaragua itself.

15) Moreover, the current valuation of the lands at HSF stands at $98 million according to the Richter Expert Reply Damages Report.[8] Riverside reports that in 2013 the Latin American Development Bank valued the lands at $22 million and that was before the highly profitable Hass avocados were planted.[9] With such significant value frozen by Nicaragua's own doing, the purported risk presented by Riverside in the event of an adverse costs order is non-existent. In such circumstances, it is impossible for Nicaragua to establish the elements of necessity or urgency. Nicaragua holds assets already well more than the $4 million security for costs award it seeks. (As noted below, Nicaragua's conduct in this Application and in this Arbitration is so problematic, and the Riverside's merits so robust, that the likelihood of Nicaragua ever being awarded costs is negligible).

[8] Richter Expert Reply Damages Report at Chart 5 (**CES-04).**

[9] Witness Statement of Carlos Rondon-Memorial-ENG at ¶42 (**CWS-01**), Witness Statement of Russ Welty – Reply – ENG at ¶ 75 (**CWS-11**).

16) Should the Tribunal grant Nicaragua's Application, it would not only undermine but potentially obliterate Riverside's right to access to justice by obstructing its ability to finance its defense through its principal asset.

17) The evidence of Nicaragua's misconduct is overwhelming, and the October 4, 2023, Application is revealed as nothing but an untimely and meritless tactic — a continuation of Nicaragua's vexatious conduct.

18) Nicaragua's Application appears to have been prompted entirely because Riverside has received third-party funding through a contingency agreement. As noted below, the fact of third-party funding from external funders is not prohibited.[10] In the past, contingency arrangements did not require disclosure, so there are no cases of disclosure of such otherwise privileged arrangements. The existence of a contingency agreement does not indicate that this claim is frivolous or without merit – just the opposite. It means that experienced, qualified counsel believes that the case is so meritorious that counsel is willing to risk their time in the expectation of a significant award. Neither would the situation be any different if Riverside received other forms of Third-Party Funding from an outside funder for the same reason.

19) Considering Nicaragua's behavior in this Arbitration, the Application is an egregious attempt to deplete Riverside's limited resources strategically, coinciding with the critical timing of the Reply Memorial filing.

20) The strategy Nicaragua has employed in this arbitration is one of attrition. Having burdened Riverside with submitting its extensive Reply Memorial, Nicaragua strategically interjects an eleventh-hour motion for security for costs. This tactic seems designed not to engage with substantive issues but to leverage procedural maneuvers to achieve surrender, thus avoiding a direct confrontation with the incriminating evidence of its conduct towards Riverside and its investment.

21) If it really was serious in its Application, the record indicates that Nicaragua had all the necessary information to initiate this Security for Costs Motion at least as early as June 2023, well before Riverside's submission of its Reply Memorial. The Tribunal may reasonably infer that Nicaragua's timing was calculated to deplete Riverside's resources further, and to distract Riverside from fully addressing the slew of spurious allegations Nicaragua levied in the Counter-Memorial, which speaks volumes about the strategic, rather than substantive, nature of Nicaragua's litigation conduct.

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[10] As discussed below, in RSM v St Lucia, exceptional circumstances were not met with just an impecunious claimant or a funded claimant, For exceptional circumstances, there had to be a claimant with a proven history of not complying with orders *RSM Production Corporation v. Saint Lucia* (ICSID Case No. ARB/12/10), Decision on Saint Lucia's Request for Security for Costs, August 13, 2014 at ¶ 86 (**RL-0125-ENG**)

22) It is manifestly evident that **Nicaragua's Application is not only superfluous, given the security it already holds**, but also a calculated litigation ploy to burden Riverside. Such underhanded tactics are inexcusable and provide ample ground for this Tribunal to deny the relief Nicaragua seeks.

23) Riverside trusts the Tribunal will see through the veiled intentions of this Application and ensure justice is served without undue hindrance to Riverside.

A. The Application for Security for Costs

24) Nicaragua requests that this Tribunal impose security for costs upon Riverside in the amount of $4 million dollars by way of a bank guarantee in a form provided by Nicaragua. It seeks this order pursuant to Article 47 of the ICSID Arbitration Rules and Rule 39 of the ICSID Arbitration Rules on provisional measures.[11]

25) The basis for Nicaragua's Application is that it contends the circumstances warrant an order for security for costs. Yet, Nicaragua references the *Eurogas* Tribunal's decision to confirm that security for costs is granted only in exceptional circumstances. Nicaragua stipulates that these exceptional circumstances are the conduct of the claimant (and its counsel) during the arbitration and may compensate for dilatory, abusive, unreasonable, or otherwise irregular behavior aimed at undermining or delaying the proceedings.[12]

26) Nicaragua complains in its Application that Riverside's conduct justifies the $4 million costs order. Nicaragua complains of "uncontemplated and unforeseen" costs due to:

a) the submission of requests and motions,

b) filing a long memorial and document requests, and

c) sending proposals to Respondent's counsel only to later modify them.[13]

[11] While Nicaragua references 53 of the 2022 ICSID Arbitration Rule in its Application, those rules do not apply to this arbitration, which is governed by the 2006 ICSID Arbitration Rules (see ¶¶ 7-9 of **C-573-ENG).**

[12] At footnote 20 of the Application, Nicaragua relies on *EuroGas Inc. and Belmont Resources Inc. v. Slovak Republic*, ICSID Case No. ARB/14/14, Procedural Order No. 3, Decision on the Parties' Request for Provisional Measures, June 23, 2015 at ¶ 121 (**RL-0127-ENG**).

[13] Application at ¶ 26 **(C-0573-ENG).**

27) At no time does Nicaragua accuse Riverside of impecuniosity. Nicaragua refers to the fact that Riverside's reaction to "documents produced" and the fact that Riverside entered an alternative fee arrangement with its counsel[14] (whose existence was subject to timely disclosure).

28) Nicaragua's actions directly resulted in Riverside's significant loss of revenue, unjustly depriving it of millions that were reasonably anticipated. Furthermore, Nicaragua seeks to compound this injury by imposing substantial security for costs, effectively escalating the financial burden on Riverside by adding to the already substantial arbitral fees. This maneuver creates a barrier to justice, setting a precedent that only the most affluent and those who have not been precluded by the State's improper conduct can afford the luxury of recourse to investor-state arbitration. Such a stance not only undermines the equitable principles upon which this forum is predicated but also contravenes the fundamental tenet that access to remedy should not be predicated on wealth or power. This encumbrance to accessing justice is patently wrong and runs counter to the spirit of fairness and equality that is essential to the integrity of international arbitration.

29) Nicaragua then delves into the merits of the claim. It begins its complaints by referring to the length of Riverside's detailed 302-page Memorial. Nicaragua claims that this Memorial is "bereft of evidentiary support." [15]

30) Nicaragua accuses Riverside of overburdening the proceedings with matters it deems irrelevant, including the consideration of the erosion of the rule of law, the end to an independent judiciary and police force, and the prevalence of systemic human rights abuses.[16] Nicaragua primarily avoids any evidence or commentary on such issues. Notwithstanding Nicaragua's alarmingly autocratic leanings and concerning human rights record, Riverside's focus on this Application nevertheless remains on the technical legal merits of its case rather than Nicaragua's political attributes, which are matters highly relevant to the merits. The length of Riverside's response to the Application for Security for costs reflects the volume and nature of the issues Nicaragua raises. Given the highly prejudicial burden that an award for security for costs would place upon Riverside, it must provide a robust counter to Nicaragua's Application. The necessity of this extensive labor directly relates to the Respondent's actions.

31) Nicaragua then complains regarding Riverside's discretionary motion to the Tribunal occasioned by Riverside's discovery of the Judicial Order after the

[14] Application at ¶ 3, ¶27 and ¶51 **(C-0573-ENG).**
[15] Application at ¶ 29 **(C-0573-ENG).**
[16] Much of this information has been submitted through the unrebutted Expert Witness Statement of Professor Justin Wolfe (**CES-02**) and is updated in his Reply Expert Witness Statement (CES-05). The issues with abuse of rights and lack of fair dealing in the legal process are also addressed in the Expert Witness Statement of Renaldy J. Gutierrez (**CES-06).**

filing of the Memorial.[17] Nicaragua alleges that Riverside sat on its hands and then there were two rounds of pleadings ordered by the Tribunal over which Nicaragua apparently objects. [18]

32) Nicaragua claims that Procedural Order No. 4 dismissed everything raised in the motion and that the issues discovered that occasioned the motion would have a material effect on claims raised in the arbitration [19] (the specifics of Procedural Order No. 4 and the reasons why Nicaragua's comments are inaccurate are addressed below.)

33) Finally, Nicaragua objects to certain procedural matters:

a) The first was the reasoned refusal Riverside's counsel provided for its non-consent to a particular variation of Nicaragua's preferred schedule revision.[20]

b) Another was an email sent by Riverside's counsel, after office hours, in response to a proposal from Nicaragua, where Riverside's counsel raised concerns regarding potential confidentiality concerns associated with the production of certain documents.[21] Nicaragua did not complain about the rejection, but about counsel's response during business hours the next day, where counsel, after reviewing the documents, wrote to advise that there was no information that required protection and thus waiving its concern from the previous day.

34) It seems that Nicaragua's complaint, set out in paragraph 36 of the Application, is that Riverside's request resulted in a minor disruption. Nicaragua says that Riverside should not have raised unscheduled requests during the time when Nicaragua was working on its Counter-Memorial.[22] In the words of Nicaragua:

> Claimant's conduct after the filing of its Memorial and during the period when Respondent should have been able to focus on preparing its Counter-Memorial served to disrupt the procedural calendar, delay the orderly resolution of this dispute with unsolicited submissions, and unnecessarily burden the Tribunal with meritless applications. [23]

[17] Application at ¶30 **(C-0573-ENG).**
[18] Application at ¶31 **(C-0573-ENG).**
[19] Application at ¶34 **(C-0573-ENG).**
[20] Application at ¶35 **(C-0573-ENG).**
[21]Application at ¶44 **(C-0573-ENG).**
[22] Application at ¶36 **(C-0573-ENG).**
[23] Application at ¶36 **(C-0573-ENG).**

35) Nicaragua's apparent revenge for minor distraction was to file an Application for Security for Costs on the eve of the filing of the Reply Memorial.

36) In an unrelated complaint, Nicaragua complains that Riverside wrote seeking Nicaragua's consent to narrow the issues in the dispute after the Counter-Memorial was filed by having Nicaragua voluntarily withdraw its remaining jurisdictional challenge considering the utter absence of legal foundation for the remaining issue. [24] Nicaragua refused and subsequently complained that Riverside brought unsolicited motions without advance permission from the Tribunal.[25]

B. Document Production Issues

37) Nicaragua justifies its security for costs application over complaints arising from document production. There are several complaints:

a) First, Nicaragua has a complaint over the length of Riverside's document request and expresses its disapproval over Riverside's interpretation of the facts and its position, which Nicaragua terms "argumentative and distortive." [26]

b) Second, Nicaragua complains about Riverside's objections to certain document requests. [27]

c) Third, Nicaragua complains about the results of document production with respect to four different document requests.[28]

d) Finally, Riverside complains that it did not appreciate Riverside's conceptual request for the preparation of a confidentiality order, and that it did not appreciate the motion brought for the issuance of a particularized confidentiality order.[29]

38) Nicaragua contends that it has a right to costs and that its motion is urgent, necessary, and proportional despite that it waited years to file it.[30]

39) Nicaragua says that the costs should be $4 million, based on an article and the costs it expended in preparing its fictional defenses filed to date.[31]

[24] Application at ¶37 **(C-0573-ENG).**
[25] Application at ¶38 **(C-0573-ENG).**
[26] Application at ¶39 **(C-0573-ENG).**
[27] Application at ¶40 **(C-0573-ENG).**
[28] Application at ¶ 42 **(C-0573-ENG).**
[29] Application at ¶ 44 **(C-0573-ENG).**
[30] Application at ¶¶ 52-55, 56 **(C-0573-ENG).**
[31] Application at ¶ 17 (**C-0573-ENG).**

40) To satisfy Nicaragua, it demands that the Tribunal issue an award for a bank guarantee in a specific form proposed by Nicaragua.[32] However, a review of the draft Nicaragua proposed demonstrates that the guarantee is not suitable for its purpose. If awarded, the form of bank guarantee would be open to abuse. Nicaragua would be able to call upon the guarantee at any time in its exclusive judgement over any matter in Nicaragua's self-judgment constituted an alleged violation of Procedural Order No 2.[33] Procedural Order No. 2 is unrelated to costs. It relates to the schedule of this proceeding. Relying upon Procedural Order No. 2 for the guarantee is the definition of an arbitrary and capricious act. The schedule is logically unconnected to payment of costs. This is logically a non-sequitur.

41) As this Application Response will demonstrate, Nicaragua is already wrong in its accusations of non-compliance under Procedural Order No. 6.

42) A guarantee in the form proposed by Nicaragua is like putting a lit match to a tank of gasoline. There is no control mechanism for this form of relief. That alone must force the Tribunal to disregard Nicaragua's self-serving document that is prone to abuse.

C. Summary of the Law

43) Provisional orders under ICSID Article 47 are discretionary. This Tribunal should not exercise its discretion to impose a security for costs order at this very late date in this arbitration.

44) Nicaragua's motion does not meet the exceedingly high threshold for the granting of an interim measure motion for security for costs as follows:

a) Nicaragua fails to establish exceptional circumstances necessary for making an order for security for costs. Nicaragua cannot meet its burden to prove that a protective measure meets the required tests for necessity, urgency, and proportionality.

b) Granting the Application would severely prejudice Riverside. While the effects of continuing without a costs order would have little material impact on Nicaragua. As a result, the disproportional impacts must be heavily considered by the Tribunal.

c) The motion is untimely, and its making is vexatious. Astonishingly, Nicaragua waited to ambush Riverside in the warning of filing of this Application until less than a month before the filing of the Reply Memorial, and then filed it less than one month before Riverside filed its Reply

[32]Application at ¶ 53 **(C-0573-ENG).**
[33]See Annex A to the Application for the form proposed by Nicaragua.

Memorial. This Application has been heard less than nine months before the hearing of this matter this summer.

45) The alleged harm caused by the lack of payment of an award is speculative and hypothetical. For Nicaragua to demonstrate harm, it must prevail in the arbitration, and the Tribunal must subsequently exercise its discretion in the circumstances to shift costs. By comparison, the harm caused to Riverside if security for costs is ordered is actual and is likely to prevent it from having access to justice.

46) Security for costs is an extraordinary provisional measure. It fundamentally upends the usual relationship of the parties in arbitration. In considering this relief, the Tribunal must carefully weigh the interests of access to justice and the impact of Nicaragua's internationally wrongful actions upon the limited financial resources of Riverside.

47) Nicaragua ignores this overwhelming evidence, and astonishingly, Nicaragua invites the Tribunal to prejudge the merits issues in this arbitration and conclude that Riverside's case is supposedly weak. Of course, it is not.

48) Riverside produced a detailed Reply Memorial refuting Nicaragua's Counter-Memorial and containing direct evidence of Nicaragua's abuse of process, willful blindness of the evidence, and the systemic application of bad faith to Riverside's detriment and its investments. Riverside's Reply Memorial showcases evidence of the utter disregard of the rule of law prevalent in Nicaragua at the time of the harm. Unfortunately, it continues to this day.

49) Riverside asserts that Nicaragua has not accurately represented the events leading up to and following the occupation of HSF. Rather than addressing the core issues, Nicaragua's response focuses on discrediting Riverside's witnesses and presenting insinuations without substantive evidence.

50) Unfortunately, Nicaragua's approach in its Counter-Memorial is to rely upon groundless allegations and smear attacks. This approach is improper, and it needlessly requires the Tribunal to review irrelevant and fruitless avenues of defense untethered from the evidence. Rather than address the facts and law as it is, Nicaragua creates a counter-narrative, mostly designed to reduce its damages. But in so doing, Nicaragua engages in a lack of good faith towards this Tribunal and an abuse of process. Indeed, as discussed below, once the false narrative is stripped away, Nicaragua does not have a plausible defense to this claim.

51) Nicaragua's conduct in this Arbitration is highly relevant to why this Tribunal should not exercise its discretion to award Security for Costs. This information is addressed not to pre-judge the merits, but to address the

conduct issue that must be considered to address this Application. Among conduct evidencing this abusive action is the following:

a) Nicaragua founds its defense on a false theory that the invading occupiers of HSF were opponents of the State when the evidence shows exactly the contrary.

b) Most of Nicaragua's witnesses address entirely groundless regulatory issues that are not relevant and not obstacles. Again, the evidence, including expert evidence brought along with the Reply, confirms exactly the contrary of Nicaragua's contentions.

c) Nicaragua misleads this Tribunal about the conditions in Nicaragua at the time of the invasion and occupation of HSF. Nicaragua relies on a non-existent police sequestration order to justify its manifest failure to protect HSF. Not only is such an order not existent, but the evidence before this Tribunal demonstrates that the National Police were providing protective services to private landowners across Nicaragua and addressing unlawful occupations in the same conditions and at the very same time that Nicaragua claims that it was under a disability that prevented such actions from being extended to Riverside. The only conclusion to be taken from this evidence is that Nicaragua wantonly has misguided the Tribunal.

d) Nicaragua relies on fabricated evidence before this Tribunal and in the local court proceedings it brought in connection with this arbitration. Expert evidence brought with this Reply confirms that these domestic actions were an abuse of rights under local law. The wholesale violation of the rule of law in these actions constitutes a violation of Fair and Equitable Treatment under international law.

52) The Reply Memorial addressed these issues. The gravity of Nicaragua's extensive groundless allegations is highly relevant in evaluating Nicaragua's impropriety in this Application.

53) There are no exceptional circumstances necessary for such a security for costs order to protect a speculative hypothetical future "right" that yet does not exist.

D. Riverside has a credible claim.

54) As this Tribunal will see, the Reply Memorial was lengthy to address the abusive and meritless defence Nicaragua has offered. Just a few highlights of Nicaragua's abusive defense can be gleaned from the following:

a) **More than half of the witnesses filing statements before this Tribunal address matters that Riverside has demonstrated to be entirely irrelevant to the issues before this Tribunal** addressing these irrelevant and highly technical permit and authorizations issues took substantial time and effort –with the result that there were no material permit or authorizations issues involved with this claim. (See Part V of the Reply Memorial and the answer to Question 3 in the Expert Witness Statement of Renaldy J. Gutierrez).

b) **Nicaragua's principal defense to state responsibility is a fiction**. Nicaragua repeatedly claims that the intrusions at HSF were caused by highly dangerous opponents of the state. However, the Reply Expert Statement of Tulane University Professor Justin Wolfe demonstrates that the former Nicaraguan Resistance is an integral ally of the Sandinista government of Nicaragua.[34] He notes that the former Nicaraguan Resistance leaders confirmed their allegiance to the government in writing to the Attorney General of Nicaragua in a document relied upon by Nicaragua in this arbitration.[35] Prof. Wolfe also notes that the National Police identify strong Sandinista government supporters also in the leadership of those leading the intrusion in June and July 2018.[36] Nicaragua has misled the Tribunal throughout its defense in claiming that the intruders were enemies of the state.[37] The evidence in fact demonstrates that these persons were loyal to the state, and firsthand witnesses before this Tribunal testify that the intruders proclaim that they took the acts of seizing the lands at the direction of the government.[38]

c) **Nicaragua has provided wholesale misleading information relating to the situation in June and July 2018**. Nicaragua claimed that the police were ordered to remain in their barracks under a presidential order, and that this was the reason why no protective action took place.[39] However, a careful review of the evidence discloses that not only was there no presidential decree, but the police actively assisted other private landowners in Nicaragua against intrusions in over a dozen instances. These are detailed in police reports Nicaragua provided and the more favorable treatment it provided in the same circumstances at the same time is summarized in charts in Part VII of the Reply Memorial addressing the breach of Full Protection and Security, National Treatment and Most Favoured Nation Treatment.

[34] Expert Statement of Prof. Justin Wolfe – Reply – ENG at ¶ 114 **(CES-05).**
[35] Expert Statement of Prof. Justin Wolfe – Reply – ENG at ¶¶ 57-61 **(CES-05).**
[36] Expert Statement of Prof. Justin Wolfe – Reply – ENG at ¶¶ 62-69.
[37] Counter-Memorial at ¶ 66.
[38] Witness Statement of Luis Gutierrez-Reply-ENG at ¶ 108; Witness Statement of Domingo Ferrufino-Reply-SPA at ¶ 60 **(CWS-12).**
[39] Counter-Memorial at ¶¶ 299, 318, 331.

55) **Undisclosed to this Tribunal, Nicaragua took formal legal title to the lands through its selective administrative implementation of Judicial Order**.[40] Nicaragua took a highly unusual step of appointing itself as trustee over the lands.[41] This is especially problematic as Nicaragua is adverse in interest to the American Investor in this Arbitration and acted without notice to that Investor. As trustee, Nicaragua, controls the rights over the hypothecation over the lands.[42]

56) Riverside provided significant amounts of evidence to support its claims. This includes:

a) Riverside produced admissions from Nicaraguan Government officials that HSF was privately owned.

b) Riverside produced admissions from Nicaraguan Government officials that the National Police had capacity, and a willingness to use that capacity in June and July 2018, to address incursions against private landowners in Nicaragua but that none of these efforts were applied to Riverside's investment at HSF.

c) Riverside addressed Nicaraguan Government documents confirming less favorable treatment being provided to the Investment regarding customs and land use.[43]

d) Nicaragua acknowledged and confirmed the unlawful occupation and gave instructions to continue that occupation in July 2018.[44]

e) Through the expert evidence of Prof. Justin Wolfe, Riverside produced similar fact evidence of state-directed land invasions.[45] Nicaragua never filed any expert evidence to refute that evidence in its Counter-Memorial.

f) Through the expert evidence of Nicaraguan legal expert, Renaldy J. Gutierrez, Riverside produced evidence of systemic arbitrary treatment and denial of justice attacking the overall rule of law. Expert Gutierrez concludes that this was an abuse of rights under the law of Nicaragua,[46] but such measures are also an abuse of rights under international law and thus a violation of the Fair and Equitable

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[40] Expert Statement of Renaldy J. Gutierrez at ¶¶ 76 -79 **(CES-06).**
[41] Expert Statement of Renaldy J. Gutierrez at ¶ 67 **(CES-06).**
[42] Expert Statement of Renaldy J. Gutierrez at ¶ 67 **(CES-06).**
[43] Reply Memorial at Section ¶¶ 1328-1351.
[44] Report from Commissioner Marvin Castro to Francisco Diaz, Deputy Chief of the National Police regarding Invasion of Hacienda Santa Fe, July 31, 2018 **(C-0284-SPA).**
[45] Expert Statement of Prof. Justin Wolfe – Reply – ENG at ¶¶ 78-101.
[46] Reply Expert Statement of Renaldy J. Gutierrez at ¶¶ 106-107 (**CES-06**).

Treatment obligation of the CAFTA Article 10.5.The abuse of rights involved failure to provide notice to Riverside of the Application for the Judicial Order, the inability to challenge the evidence brought in that application that Riverside contends to be fabricated, and the failure to serve Riverside with the Judicial Order.[47] In addition, Expert Renaldy Gutierrez notes that the Attorney General acted arbitrarily and unfairly in appointing itself as the Trustee over HSF rather than appointing a neutral third party in the manner set out in Nicaraguan legal practice.[48] Expert Gutierrez raises serious fairness concerns over the conflict of interest and apparent unfairness of having Nicaragua in charge of Riverside's main asset in the context of an international dispute that precipitated the Judicial Order.[49]

g) Riverside produced evidence of uncompensated takings involving the investment at issue.[50]

h) Riverside produced evidence of extensive business on the part of the investor in INAGROSA and the successful implementation of the Hass avocado business operations with two years of successful cultivation of crops before the incursions started in June 2018. [51]

i) Riverside produced evidence of loss directly resulting from the wrongful actions.[52]

j) Nicaragua relied upon fabricated evidence before its own courts and in this arbitration.

57) Together these actions are egregious, constitute an abuse of process, and are internationally wrongful. Accordingly, there is no support to Nicaragua's contentions that a Security for Costs award is necessary to address the weakness of Riverside's carefully articulated and fully supported arbitration claim.

58) Nicaragua than takes issues with the moral damages Riverside claims in this arbitration. Moral damages are recognized in international law and have been applied by arbitration tribunals for over 100 years. The amount of damages in this claim is significant because the wrongful actions are great. Nicaragua has engaged in a travesty of justice. It knew that Riverside's

[47] Expert Witness Statement of Renaldy J. Gutierrez at ¶ 104 and ¶107. (**CES-06**).
[48] Expert Witness Statement of Renaldy J. Gutierrez at ¶67 (**CES-06**).
[49] Expert Witness Statement of Renaldy J. Gutierrez at ¶ 67 and ¶ 70. Gutierrez at ¶ 67 and ¶ 70 (**CES-06**).
[50] Memorial at ¶¶ 4 (b), 7 (b); Reply Memorial at ¶ 1374 I, 1379 (c).
[51] Reply Memorial at Section ¶ 1.
[52] Reply Memorial at Part IX and Richter Reply Expert Damages Report. (**CES-04**).

Investment, INAGROSA, had lawful possessory rights and in the face of that knowledge, Nicaragua stole the property rights.

59) Nicaragua engaged in a campaign to disparage and demean Riverside's Operating Manager, Melvin Winger, and its corporate management. Melva Jo Winger de Rondón notes in her Reply Witness Statement that:

> 27) My father, Melvin Winger, recently passed away. Melvin Winger had a distinguished career in business and in the community based on his character. He had a stellar reputation. I am troubled by Nicaragua's besmirching of my father's sterling reputation. These smears were taken with complete disregard of the underlying facts.[53]

60) Yet, that alone was not sufficient.

61) Riverside has produced evidence to support these internationally wrongful actions and to establish the harm and suffering caused to Riverside's officers and management. That is discussed in Part IX of the Reply Memorial along with Riverside's arguments regarding non-economic moral damage Riverside suffered.

[53] Reply Witness Statement of Melva Jo Winger de Rondón at ¶ 27 (**CWS-08**).

II. RIVERSIDE HAS ACTED IN GOOD FAITH

62) Part II of this Application Response deals with the myriad factual complaints Nicaragua raises in its Application. Understanding these matters will assist the Tribunal in its significant task, set out in Part III of applying the relevant legal tests for the consideration of an Application for an award of Security for Costs.

63) This section addresses the following:

a) Riverside's compliance with Tribunal Orders.

b) Riverside was the proper claimant in this Arbitration.

c) Riverside's timing regarding its motion on the Judicial Order.

64) Nicaragua contends that Riverside has acted in an absence of good faith in this arbitration.[54] There is not an iota of support for these outrageous statements.

65) Riverside vehemently affirms that it has acted in good faith and has not violated any Tribunal or court orders. The is no factual support for any of Nicaragua's allegations.

A. Riverside Has Followed All Tribunal Orders

66) Riverside has acted in conformity with the Tribunal's orders in a consistent and comprehensive manner. Nicaragua's allegations of behavioral transgressions are patently false and absurd.

67) For example, Riverside has made timely payment of all advance payments the Tribunal has ordered and has complied with all orders. Melva Jo Winger de Rondón notes in her Reply Witness statement that "Riverside has complied with all orders of this Tribunal, paid all amounts on time, and our company has not acted in violation of Tribunal orders."[55]

68) Mrs. Rondón also testifies to Riverside's understanding of its duty to comply with Tribunal orders. She states in her Reply Witness Statement:

> 47) While Riverside does not expect that the Tribunal would award costs against it, if Riverside were unsuccessful, Riverside undoubtedly would continue complying to the best of its ability with all orders issued by the Tribunal in good faith.

[54] Application at ¶40 (**C-0573-ENG).**

[55] Witness Statement of Melva Jo Winger de Rondón- Reply-ENG at ¶44 (**CWS-08**).

48) To be clear, Riverside has not had a record of non-payment of costs awards, has not engaged in behavior in this proceeding that interferes with the efficient and orderly conduct of the proceeding, did not hide, or move assets to avoid exposure to any future costs award, engage in bad faith or improper behavior. [56]

69) As the moving party, Nicaragua has the burden of proof to substantiate these meritless allegations,[57] which can be made only to tarnish the reputation of Riverside, Melvin Winger, Melva Jo Winger de Rondón, and other members of her family.

70) In its Application, Nicaragua makes groundless complaints for which there is no support in logic or fact. Nicaragua absurdly claims that the absence of documents responsive to a document request is an admission that is relevant to support an order for security for costs.[58] Riverside did not produce financial statements as it had no obligation to do under Kansas law.[59] The Tribunal did not so require. Riverside complied completely with the Tribunal's document request.[60]

71) Riverside has not been ruled in non-conformity of any Tribunal order. Yet, Nicaragua contends that it can be prosecutor, judge, and jury in one –and just assert this. To be clear, Riverside has complied with all Tribunal orders, and the Tribunal has never held that Riverside is in breach of its orders.

72) Nicaragua's complaints are baseless. If Nicaragua has an issue with the sufficiency in document production, Nicaragua should have raised that matter on a timely basis to the Tribunal directly in June 2023. Nicaragua once again attempts to be judge and jury. That is unfair and unpermitted.

73) At each occurrence, Riverside fully and faithfully has complied with the orders of the Tribunal. There is absolutely no support for these defamatory statements from Nicaragua.

74) Nicaragua says in paragraph 43 of the Application that Riverside's "deliberate attempt to conceal relevant documents further underscores Claimant's extraordinary conduct as well as the necessity and urgency for ordering security for costs." Nicaragua claims that this supposedly impedes the presentation of its defense and that there will be increased costs to it to "prepare its defense without such documents."[61] In addition, Nicaragua requests additional document production. It states in Paragraph 43 that

[56] Witness Statement of Melva Jo Winger de Rondón- Reply-ENG at ¶¶47 -48 (**CWS-08**).
[57] Valle Verde on the moving party's burden of proof in this Application at ¶ 86 (**CL-0323-ENG**).
[58] Application at ¶50 (**C-0573-ENG).**
[59] Witness Statement of Melva Jo Winger de Rondón- Reply-ENG at ¶56 (**CWS-08**).
[60] Witness Statement of Melva Jo Winger de Rondón- Reply-ENG at ¶44 (**CWS-08**).
[61] Application at ¶43 (**C-0573-ENG).**

"Nicaragua would accordingly welcome an additional order from the Tribunal compelling production for Respondent's Request Nos. 11, 12, 13, and 15." [62]

75) As the following section demonstrates, Riverside fully complied with its document production obligations, and Riverside has demanded the award of security for costs as a sanction regarding Riverside's non-production of documents the Tribunal has **not ordered** for production.

76) Further, Nicaragua now demands new production from the Tribunal through this Application.[63] This is procedurally improper and unfair given that Riverside may not make use of such production at this stage, nor have another round of production against Nicaragua.

77) Nicaragua complains about the lack of production of bank account statements that are fifteen to twenty-four years old. Riverside produced the statements that it had. It cannot produce what it does not have. Further, many of these records were in materials contained on computers INAGROSA owned, which were in premises confiscated by the occupiers on premises Nicaragua now controls.[64] These records, to the extent that they may still exist, are in the possession of Nicaragua and not of Riverside.

78) Nicaragua misrepresents the situation with the financial records of Riverside and INAGROSA. The Reply Witness Statement of Melva Jo Winger de Rondón explains that Riverside did not receive primary documents from INAGROSA produced in Spanish as no one in the Riverside Offices spoke Spanish. Instead, Riverside required regular updates done by phone or in person.[65] All the discussions with Riverside were in English. It should come as no surprise that there are no INAGROSA financial statements produced in Spanish in Riverside's files. As addressed above, Riverside searched its files for all responsive financial records. Riverside produced what it had in its possession.[66]

79) As noted in each of the detailed discussions, Riverside produced all documents in its possession, custody, and control in full with respect to each of the document request complaints raised by Riverside. Yet again, there is simply no support for Nicaragua's Application for security for costs. Nicaragua's document production complaints are summarized in the following chart.

[62] Application at ¶ 43 (**C-0573-ENG).**
[63] Application at ¶ 43 (**C-0573-ENG).**
[64] Witness Statement of Luis Gutierrez-ENG at ¶¶ 294-296 **(CWS-10).**
[65] Witness Statement of Melva Jo Winger de Rondón- Reply-ENG at ¶53 (**CWS-08**).
[66] Witness Statement of Melva Jo Winger de Rondón- Reply-ENG at ¶49 (**CWS-08**).

RDR No.	Content of Request & Decision	Nicaragua's current Complaint
RDR 11	Nicaragua requested "any and all" audited or unaudited financial statements for Riverside from 1999 until March 19, 2021. Tribunal granted the request.	Claimant has not produced *any* audited or unaudited financial statements for Riverside, despite the Tribunal's order to produce Riverside's financial statements from 1999 until March 19, 2021.
RDR 12	Nicaragua requested "any and all" audited or unaudited financial statements for Inagrosa from 1996 until March 19, 2021. Tribunal granted the request.	Claimant produced only unaudited financial statements for Inagrosa from 2010 through 2020, despite the Tribunal's order to produce all audited or unaudited financial statements from 1996 until March 19, 2021. In addition, several of the produced unaudited financial statements appear to be incomplete. The documents produced for fiscal years 2010, 2011, 2012, 2013, are one page balance sheets with accompanying cover letter.
RDR 13	Nicaragua requested "any and all" bank account statements for Riverside from 1999 to March 19, 2021. Tribunal granted the request for 2010 through 2018.	The claimant produced Riverside's bank account statements only for December 2013 through December 2018, despite the Tribunal's order to produce all bank account statements beginning in 2010 through 2018.
RDR 15	Nicaragua requested "any and all income tax returns (federal or state) from Riverside from 1999 to March 19, 2021." The Tribunal granted the request on a narrower request.	The claimant produced Riverside's U.S. tax returns (IRS Form 1065) from 2015 to 2018 but did not produce any Kansas or Colorado state tax returns, despite the Tribunal's order to do so. Riverside's 2018 U.S. tax return is incomplete, as the accompanying statements are omitted from the copy produced.

1. Riverside produced on Document Request 11

80) Nicaragua claims that Riverside is non-compliant with the Tribunal's production order as Riverside did not produce Riverside audited or unaudited financial statements from 1996 to March 19, 2021.

81) Riverside was not required to prepare financial statements under Kansas law.[67]

82) The efforts Riverside undertook are addressed in the Reply Witness Statement of Melva Jo Winger de Rondón. She advises that there was no requirement for a Kansas limited liability company such as Riverside to have audited financial statements.[68] Such unnecessary audited statements are time-consuming of management resources and costly. As there was no requirement for them no audited statements were ever made. Further, Kansas does not require an LLC to keep financial records in a specific manner. [69] All that is required is that accurate information be reported on tax returns.

83) Riverside provided its tax returns pursuant to Respondent's Document Request 15 and those returns had the required financial information. Riverside produced what it had within its care, custody, and control. There is no proper basis for Nicaragua's complaint.

2. Riverside produced on Document Request 12

84) Nicaragua claims that Riverside is non-compliant with the Tribunal's production order as Riverside did not produce INAGROSA audited or unaudited financial statements from 1996 to March 19, 2021.

85) Riverside produced all the INAGROSA financial statements within its possession and control for this period.

86) All INAGROSA financial statements that were available were produced. As Nicaragua is aware, there was no requirement for a private company such as INAGROSA to have audited financial statements. Such audited statements are time-consuming of management resources and costly. As there was no requirement for them, no audited statements, none were ever made.

[67] Witness Statement of Melva Jo Winger de Rondón- Reply-ENG at ¶49 (**CWS-08**).
[68] Witness Statement of Melva Jo Winger de Rondón- Reply-ENG at ¶56 (**CWS-08**).
[69] Reply Witness Statement of Melva Jo Winger de Rondón at ¶56 (**CWS-08**).

87) The company had internal financial records. The primary repository of INAGROSA's financial administration and record keeping was destroyed due to the Invasion and occupation of HSF.[70]

88) However, all records from the internal unaudited financial statements within INAGROSA's care, custody and control were produced.

89) For this arbitration, Riverside had its accountants examine the original documents (which Riverside produced to Nicaragua) and had them create new statements setting out profit and loss annual over the full period (The is summarized in **C-0404** in US dollars and in Nicaraguan Córdobas). Any statements made at the time were not available. This newly created material was produced with the Reply Memorial. There is no basis for Nicaragua's complaint.

3. Riverside produced on Document Request 13

90) Nicaragua claims that Riverside is non-compliant with the Tribunal's production order as Riverside produced only a limited number of bank statements from Riverside over a ten-year period.

91) Riverside produced bank records within its possession and control. [71]

92) Riverside conducted a thorough and diligent search for bank records between 2010 to November 2013. [72]

93) The efforts Riverside undertook are addressed in the Reply Witness Statement of Melva Jo Winger de Rondón. She recounts the efforts Riverside took to find the records, including her personal efforts to contact the bank, of which her father had been Chair of the Board for decades. She met with the bank president, but the bank could not obtain copies of these archival records as they were beyond the bank's document retention period.[73]

94) Riverside fully produced all the bank statements for the ten-year period that were within its possession, custody, and control. It made efforts beyond that required by an ordinary diligent search to obtain copies of documents that were not available to it.

95) As a result, after a diligent search, Riverside was able to produce only the bank statements that it produced to Nicaragua in the document production process. There is no proper basis for Nicaragua's complaint.

[70] Witness Statement of Luis Gutierrez-ENG at ¶¶ 294-296 **(CWS-10).**
[71]. Witness Statement of Melva Jo Winger de Rondón- Reply-ENG at ¶ 64 (**CWS-08**).
[72]. Witness Statement of Melva Jo Winger de Rondón- Reply-ENG at ¶ 64 (**CWS-08**).
[73]. Witness Statement of Melva Jo Winger de Rondón- Reply-ENG at ¶ 62 (**CWS-08**).

4. Riverside produced on Document Request 15

96) Nicaragua claims that Riverside is non-compliant with the Tribunal's production order as Riverside produced US federal tax returns for Riverside only for three years.

97) With respect to Respondent Document Request 15, Nicaragua fails to carefully read the Tribunal's Order in Procedural Order No. 6. For Respondent Document Request 15, the Procedural Order granted the request as narrowed down by Riverside.

98) Riverside proposed a narrower production by limiting RDR 15 as follows:

> For the purpose of narrowing the issues in dispute, the Investor is prepared to offer responsive **US federal income tax documents** for the three years immediately before the June 2018 invasion (2015, 2016 and 2017) subject to the creation of an appropriate Confidentiality Order to protect public dissemination of personal and commercially private information. *(emphasis added)*

99) The Tribunal granted the narrowed proposal from Riverside in its entirety. The Tribunal wrote:

> The request is granted as narrowed down by the Claimant **(covering the period 2015-2017).** *(emphasis added)*

100) Despite the clear terms of the Tribunal order, Nicaragua now claims to justify its Security for Costs Application on the basis that Riverside acted in non-conformity with the Tribunal's order by producing only a 2018 IRS Schedule 1065 rather than the complete 2018 IRS tax form.

101) Yet again, Nicaragua complains about Riverside's actual compliance with the terms of Procedural Order No. 6, rather proving Riverside's supposed non-compliance. The terms of Procedural Order No. 6 did not require any production of US federal income tax documents for 2018. The Tribunal order was only with respect to federal returns in the years 2015, 2016 and 2017. Those were fully produced.

102) Riverside produced Riverside's 2015-2017 US Federal Tax Returns. Riverside produced documents from those tax returns as Nicaragua admits in its Application, so there is no question that Nicaragua received this production.[74]

[74] Respondent Exhibits **R-0111, R-0118, R-0131. R-0132** all came from this production from Riverside.

103) Nicaragua was so eager to castigate Riverside that it failed to even give regard to the terms of the Tribunal's order. In particular:

a) The Tribunal ordered Riverside to produce only certain federal income tax documents which Riverside did.

b) Nicaragua complains over Riverside's alleged failure to produce state and local tax returns, but that part of Nicaragua's Document Request the Tribunal rejected.

c) Nicaragua complains about Riverside's supposed failure to produce Riverside's 2018 federal tax return but again that part of Nicaragua's Document Request that the Tribunal rejected.

104) In fact, with respect to Respondent Document Request 15, Riverside voluntarily overproduced, under the terms of Procedural Order No. 6, Riverside did not have to produce the tax documents unless there was an appropriate Confidentiality Order to protect public dissemination of personal and commercially private information. As noted in this Application, Nicaragua refused to agree to any such Confidentiality Order and the Tribunal issued no Confidentiality Order.[75] Thus, no production under Respondent Document Request 15 was mandated.

105) Notwithstanding that issue, Riverside voluntarily produced documents that complied with the narrowed request.

106) Nicaragua is quick to accuse Riverside of abuse of the tribunal process but it clearly took no care to review matters before making the unsubstantiated accusations going to the conduct and care of Riverside in this Arbitration.

107) This is yet another example of the wasteful and vexatious measures Nicaragua has taken in this arbitration. Its sole purpose can only be to increase the cost and effort upon Riverside to defend against these serious allegations that are wholly without support. It is evident that Riverside met the terms of the Tribunal's order under Respondent Document Request 15. There is no proper basis for Nicaragua's complaint.

5. Riverside complied in good faith on document production.

108) Nicaragua questions Riverside's handling of document production ambiguities, suggesting it as grounds for security for costs.

109) During the document discovery phase, Nicaragua submitted specific requests pertaining to the documents sought. Within these requests,

[75] Application at ¶ 44 **(C-0573-ENG).**

Nicaragua distinctly delineated its inquiry for documents pertaining to a corporate entity named "Inagrosa Agropecuarias S.A." [76]

110) The name of Riverside's controlled foreign subsidiary in Nicaragua was Inversiones Agropecuarias S.A.

111) The difference between the expressly defined entity "Inagrosa Agropecuarias S.A." and the name of Riverside's investment ""Inversiones Agropecuarias S.A" is much more than a typographical error. They are completely different entities.

112) The identity of the full name of the corporation in Nicaragua always has been known to Nicaragua. There was no reasonable excuse for Nicaragua's deficiency in naming the correct entity.

113) The Tribunal has made its views clear in Procedural Order No. 4. To be clear, the issue at hand was not a simple typographical error, such as confusing 'INAGROSA' with 'Inagrosa'. Rather, Nicaragua's request pertained to documents from an entirely separate third-party corporate entity not a party to this claim or an investment of the Investor. The request Nicaragua made was explicit and clearly defined, targeting documentation for a different legal person. This was not a trivial spelling mistake but a request for information related to a completely distinct company.

114) What is important for this Application is the fact that responding accurately to Nicaragua's explicit requests does not constitute an act of bad faith. It is conceivable that Nicaragua's requests were marked by a lack of precision; however, it is the claimant's responsibility, Riverside, to address the inquiries Nicaragua posed, not to conjecture what documents Nicaragua might have intended to request.

115) Nonetheless, demonstrating a commitment to cooperative and transparent proceedings, Riverside proactively provided guidance on where documents pertinent to the correct entity, INAGROSA, could be found, despite the original request being misdirected. Subsequently, the relevant documents were duly produced and delivered on June 9, 2023, several weeks following the initial request. There was no meaningful prejudice to Nicaragua because of the short delay in production.

[76] Procedural Order No. 6 at ¶ 9.

B. Riverside was the proper claimant.

116) Nicaragua contends that Riverside acted improperly. This is not correct.

117) Nicaragua contends that Riverside acted improperly by bringing in the CAFTA claim in the name of Riverside rather than in the name of Melvin and Mona Winger. Nicaragua's argument is a variation of the "treaty shopping" where Nicaragua contends that Melvin Winger (a ninety-two-year-old retired businessperson) and his wife of the same age somehow hid themselves as claimants for Riverside, to make themselves personally exempt from the payment of Nicaragua's costs in this arbitration.

118) A simple review of Riverside's more than twenty-year investment history in INAGROSA quickly exposes the manifest absurdity of Nicaragua's position.

119) Riverside had investments in its own name in INAGROSA since 2003, but it made pre-incorporation investments in the company going back to 1997. [77]

120) Melva Jo Winger de Rondón provided evidence that the primary vehicle for investment in INAGROSA was Riverside.[78] She says:

> 14) The primary vehicle for this investment described above was Riverside. Since 2014, all the focus and commitments have been solely from Riverside rather than from its members.

121) Nicaragua complains that there was a "deliberate strategy of using Riverside's corporate form to shield its partners' underlying assets against a potential costs award."[79]

122) Melva Jo Winger de Rondón answers this point directly:

> 18) Paragraph 48 of its Security for Costs application acknowledges the considerable personal assets of my parents.3 Nicaragua ascribes improper motive by my parents to have Riverside commence the CAFTA claim about the 2018 invasion. According to Nicaragua, each of my ninety-year-plus parents should have issued a personal claim against the Republic of Nicaragua. This is an impractical and ridiculous idea.
>
> 19) There was no deliberate strategy taken by Riverside to substitute the company that controlled INAGROSA for my parents as the claimant in this arbitration.

[77] Witness Statement of Melva Jo Winger de Rondón- Reply-ENG at ¶12 (**CWS-08**).
[78] Witness Statement of Melva Jo Winger de Rondón- Reply-ENG at ¶14 (**CWS-08**).
[79] Application at ¶ 48 **(C-0573-ENG).**

> 20) Further, no improper steps were taken to make the claimant "judgment-proof against a costs award." There was no consideration of security costs when we decided to have Riverside commence the arbitration. Our focus was on the harm done to our company, our sustainable agricultural and forest project, and our employees. [80]

123) The contention that the Wingers unfairly substituted Riverside as the proper Claimant is absurd for other reasons. Mrs. Rondón deals with the issue of her mother's role as follows:

> 23) The invasion occurred in June 2018. At that time in 2018, Mona Winger had no investment in INAGAROSA. Mona Winger could not assert a CAFTA claim at that time. My mother, Mona, had no role in INAGROSA.[81]

124) Mrs. Rondón then dispenses with the suggestion that her then 92-year-old father should have been the Claimant. She states:

> 24) My father's shares in INAGROSA were still held in his name through oversight. They should have been formally transferred to the Kansas revocable trust in 2009. In any event, the shares were controlled by his revocable trust and not him. As the legal representative from Riverside to INAGROSA, I voted my father's shares with Riverside at every meeting, giving Riverside majority voting control of INAGROSA.
>
> 25) Riverside was the natural entity for investing in INAGROSA and the natural and expected entity to bring a CAFTA claim. [82]

125) Mrs. Rondón continues:

> 26) There was nothing improper in any way in Riverside bringing a CAFTA claim against Nicaragua for the loss of INAGROSA's business. INAGROSA was a company controlled by Riverside.[83]

126) Nicaragua's contention does not evidence bad faith or wrongful conduct. This suggestion of impropriety on the party of Melvin Winger, a distinguished business leader and the former Operating Manager of Riverside at the time of the intrusion in 2018, is nothing less than a meritless smear on his character (now that he is unable to defend himself in person) and a painful attack on his family.

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[80] Witness Statement of Melva Jo Winger de Rondón- Reply-ENG at ¶¶18-20 (**CWS-08**).
[81] Witness Statement of Melva Jo Winger de Rondón- Reply-ENG at ¶23 (**CWS-08**).
[82] Witness Statement of Melva Jo Winger de Rondón- Reply-ENG at ¶¶24-25 (**CWS-08**).
[83] Witness Statement of Melva Jo Winger de Rondón- Reply-ENG at ¶-26 (**CWS-08**).

C. Timing of the Knowledge of the Judicial Order

127) In its Application, Nicaragua accuses Riverside of dishonorable conduct, alleging that the company was cognizant of the Judicial Order in July 2022 yet supposedly failing to disclose this act in Riverside's October 2022 Memorial. Instead, Nicaragua claims, Riverside proceeded to lodge a disruptive complaint with the Tribunal in November 2022. Nicaragua posits that such disorderly behavior merits consideration as an exceptional circumstance. Nevertheless, a thorough examination of the record, bolstered by prior submissions to this Tribunal, reveals a marked discrepancy regarding the actual scope and chronology of Riverside's knowledge of the Judicial Order.

128) Riverside furnished a responsive reply pleading concerning the Judicial Order to the Tribunal on December 2, 2022.[84] Riverside submitted a letter from Arias, INAGROSA's local corporate counsel in Managua, reporting on the discovery of the Judicial Order.[85] The local law firm noted that it discovered a mention of an annotation that did not result in knowledge of the Judicial Order. The document received by Arias in July—a Related Certificate—lacked the requisite details to impart an understanding of the Judicial Orders.[86] Such details were exclusive to the updated Literal Certificate, which Arias did not receive at that point.

129) Riverside's actual awareness of the Judicial Order did not transpire until November 2022 [87]

130) On December 22, 2022, Nicaragua presented a rejoinder concerning the Judicial Order. Within this rejoinder, Nicaragua acknowledged the omission of pages in the dossier furnished to Arias's Mr. Ardón. Explicitly, on page 6 of its submission, Nicaragua conveyed an inaccurate portrayal to the Tribunal regarding Riverside's awareness of the knowledge of the Judicial Order, stating:

> After consultation with the Property Registry in Jinotega, Nicaragua's undersigned counsel has been notified that there was a miscommunication when conveying the information requested and that the Related Certificate delivered on July 13, 2022 to Jonathan Josué Ardón Centeno did not attach a copy of the Protective Order.[88]

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[84] Riverside reply submission to the tribunal on Judicial Order, December 2, 2022 (**C-0673-ENG**)

[85] December 1, 2022, Letter from Uriel Balladares to Appleton & Associates International Lawyers at p. 1 (hereinafter "Arias Letter") **(C-0258-ENG).**

[86] Confirmation Receipt, July 13, 2022 (**C-0262-SPA/ENG**).

[87] Arias Letter at page ¶¶ 5-7, 12 **(C-0258-ENG).**

[88] Nicaragua's rejoinder submission on the Judicial Order, December 22, 2022 at page 6 (**C-0674-ENG**).

131) Yet, even with this acknowledgment and lacking any substantiation that Nicaragua apprised Riverside of the Judicial Order, Nicaragua persists in its fallacious narrative of the events.

132) Riverside has proffered firsthand testimonial evidence to confirm the timing of its knowledge of the Judicial Order:

a) The Arias law firm confirmed that Riverside was unaware of the existence of the Judicial Order until November 2022, well after filing the Memorial.[89]

b) Riverside confirmed on December 2, 2022, that it did not have knowledge of the Judicial Order before the filing of its Memorial.[90]

133) Melva Jo Winger de Rondón confirms that Riverside was not aware of the Judicial Order's existence until November 2022, well after filing the Memorial. She addresses this issue head on in her Reply Witness Statement. She testifies:

> 38) Nicaragua brought additional follow-up litigation without our knowledge during this arbitration. We had no knowledge of this Nicaraguan domestic litigation before we filed our Memorial in October 2022. When we did discover that some form of court action had occurred, we immediately wrote to the Tribunal to complain about this situation. We never sat on our hands with knowledge of Nicaragua's secret court actions against our US-based company. As a result of the local action, Nicaragua seized our Nicaraguan land title and effectively froze our ability to use Hacienda Santa Fé as collateral for loans. We had used the lands before, and we likely would have relied upon their value again for financial resources, but this option was not possible for us after the domestic judicial actions in Nicaragua froze our assets.
>
> 39) Between Nicaragua's harm caused by the occupation of Hacienda Santa Fé and the freezing of our ability to obtain loans with Hacienda Santa Fé as collateral, Riverside and INAGROSA are financially challenged. Despite these challenges, Riverside has continued to make all payments ordered by this Tribunal in a timely manner during this arbitration. However, the security for costs amounts would impose severe financial pressure on Riverside.[91]

134) Despite Nicaragua's confirmation that the Judicial Order was not served (a matter that the Tribunal addressed in Procedural Order No. 4) and its

[89] Arias Letter at page ¶¶ 5-7, 12 **(C-0258-ENG).**
[90] Riverside reply submission to the tribunal on Judicial Order, December 2, 2022 (**C-0673-ENG**).
[91] Witness Statement of Melva Jo Winger de Rondón- Reply-ENG at ¶¶-38-39 (**CWS-08**).

knowledge that Riverside did not have information of the Judicial Order before filing its Memorial, Nicaragua now incredibly re-attempts to rely on its own earlier misrepresentation as an ill-chosen foundation for the imposition of security for costs.

135) Despite Nicaragua's affirmation that the Judicial Order had not been duly served—a fact the Tribunal addressed in Procedural Order No. 4—and recognizing that Riverside was bereft of any pre-counter-memorial knowledge of the Judicial Order, Nicaragua yet ventures to leverage its initial misrepresentations as a misguided basis for advocating the imposition of security for costs.

136) Upon gaining awareness, Riverside expeditiously petitioned this Tribunal. Such procedural diligence aligns with appropriate legal conduct and cannot be construed as an extraordinary circumstance warranting a Security for Costs award.

137) Riverside had no way of knowing about the Judicial Order that Nicaragua suppressed from its knowledge, and it immediately brought that information to the Tribunal's attention in its motion.

138) Nicaragua nonetheless asks this Tribunal to prejudge the facts. It is correct that Riverside has raised very troubling issues about the state of corrupt and abusive government officials in Nicaragua. Nicaragua claims that raising these issues is an act of bad faith. That is untrue.

1. Nicaragua misrepresents the Judicial Order

139) Within the rejoinder on the Judicial Order Nicaragua presents, a particular assertion on page 4 stands conspicuously at odds with the facts, as presented to this Tribunal. Nicaragua's statement asserts:

> As an initial matter, the Protective Order is not a violation of Article 26 because it does not confer upon Nicaragua any "remedy." ….. It does not confer title nor ownership of the property to Nicaragua or any benefit whatsoever relating to the property.

140) This assertion is directly controverted by the comprehensive analysis of Nicaraguan legal expert, Renaldy J. Gutierrez, who testifies that the execution of the Judicial Order has, in effect, transferred title to Nicaragua. [92] Moreover, the Judicial Order accorded tangible advantages to Nicaragua by barring INAGROSA from the unencumbered exercise of its proprietary rights, notably in utilizing the property to secure financing or to underpin financial

[92] Expert Statement of Renaldy J. Gutierrez at ¶ 79 (**CES-06).**

sureties as collateral.[93] Nicaragua employs this very impediment opportunistically to undergird its Application, demonstrating that the benefits derived from the Judicial Order indeed do amount to a 'remedy' inconsistent with ICSID Article 26.

141) Riverside was afforded no avenue to contest this contention Nicaragua proffered in its rejoinder as Nicaragua articulated it after Riverside's submission. Nonetheless, Nicaragua proceeds to anchor its argument on this patent misrepresentation before the Tribunal.

[93] Expert Statement of Renaldy J. Gutierrez at ¶¶ 83-84 (**CES-06).**

III. THE APPLICATION FOR SECURITY FOR COSTS

142) Nicaragua seeks an order for security for costs under Article 47 of the ICSID Convention Arbitration Rules. Article 47 of the ICSID Convention and Article 39 of the ICSID Rules provide that a tribunal may “recommend provisional measures which should be taken to preserve the respective rights of either party.”

143) The ICSID Tribunal in *Valle Verde v. Venezuela* considered the powers of the Tribunal to issue a security for cost order. The Tribunal reviewed the case law and identified the existence of three key tests which are consistently reflected in the jurisprudence. They are:

a) the existence of exceptional circumstances,

b) proof of urgency and

c) proof of necessity.

144) The *Valle Verde* Tribunal articulated each element: [94]

> 86. As can be derived from Article 47 of the ICSID Convention and Rule 39(1) of the ICSID Arbitration Rules, an order recommending provisional measures must be motivated by *exceptional circumstances*. Several ICSID tribunals have confirmed that those circumstances have to be such that the applicant cannot await the outcome of the decision on the merits (*urgency*) and that the measures are necessary to protect an existing

[94] *Valle Verde Sociedad Financiera S.L. v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB/12/18, Decision on Provisional Measures, January 25, 2016, at ¶ 86 (**CL-0323-ENG).**

right[95] and to avoid irreparable harm (*necessity*).[96] It is also well-settled that these circumstances must be proven by the requesting party.[97]

145) The *Valle Verde* Tribunal concluded that Venezuela did not meet its burden of proof to establish the existence of exceptional circumstances.[98]

146) Several tribunals have concluded that security for costs is not available in an ICSID arbitration because the expectation of a future costs award is too hypothetical to be considered a "right"."[99]

147) The *Maffezini* Tribunal noted "we are unable to see what present rights are intended to be preserved." [100] The *Vella Verde v. Venezuela* Tribunal

[95] The *Valle Verde Tribunal* (**CL-0323-ENG**) relied (in FN 40) on the following: See, for example, *Tethyan v. Pakistan* (ICSID Case No. ARB/12/1), Decision on Provisional Measures, December 13, 2012, ¶ 118; (**CL-0321-ENG**). *Burimi v. Albania* (ICSID Case No. ARB/11/18), Procedural Order No. 2, May 03, 2012, ¶ 34; (**CL-0294-ENG**) *Perenco v. Ecuador* (ICSID Case No. ARB/08/6), Decision on Provisional Measures, May 08, 2009, ¶ 43; (**CL-0322-ENG**) *Saipem v. Bangladesh* (ICSID Case No. ARB/05/7), Decision on Jurisdiction and Recommendation on Provisional Measures, March 21, 2007, ¶ 174; (**CL-0299-ENG**) *Plama v. Bulgaria* (ICSID Case No. ARB/03/24), Order of the Tribunal on the Claimant's Request for Urgent Provisional Measures, September 06, 2005, ¶ 38; (**CL-0298-ENG**). *Tanzania Electric v. IPTL* (ICSID Case No. ARB/98/8), Decision on the Respondent's Request for Provisional Measures, December 20, 1999, ¶ 18. (**CL-0308-ENG**).

[96]The *Valle Verde Tribunal* (**CL-0323-ENG**) relied (in FN 41) on the following: See, for example, *Occidental v. Ecuador* (ICSID Case No. ARB/06/11), Decision on Provisional Measures, August 17, 2007, ¶¶ 59 and 61 **(CL-0300-ENG);** *Plama v. Bulgaria* (ICSID Case No. ARB/03/24), Order of the Tribunal on the Claimant's Request for Urgent Provisional Measures, September 06, 2005, ¶ 38 (**CL-0298-ENG**).

[97] The *Valle Verde* Tribunal (**CL-0323-ENG**) relied (in FN 42) on the following: See, for example, *Tanzania Electric v. IPTL* (ICSID Case No. ARB/98/8), Decision on Provisional Measures, December 20, 1999, ¶ 18; (**CL-0308-ENG**). *Maffezini v. Spain* (ICSID Case No. ARB/97/7), Decision on Provisional Measures (Procedural Order No. 2), October 28, 1999, ¶ 10. (**CL-0178-ENG**)

[98] *Valle Verde Sociedad Financiera S.L. v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB/12/18, Decision on Provisional Measures, January 25, 2016 at ¶ 87 (**CL-0323-ENG).**

[99] See, e.g., *Emilio Agustín Maffezini v. The Kingdom of Spain* (ICSID Case No. ARB/97/7), Procedural Order No. 2, 8 October 1999, ¶¶ 12-27, (**CL-0178-ENG)** *Lao Holdings N.V. v. Lao People's Democratic Republic* (ICSID Case No. ARB(AF)/12/6), Procedural Order No. 6, 26 June 2018, ¶¶ 34-35, (**CL-0303-ENG)** ; *Eskosol S.p.A. v. Italian Republic* (ICSID Case No. ARB/15/50), Procedural Order No. 3, 13 April 2017, footnote 51, (**CL-0310-ENG)** (*citing RSM Production Corporation v. Saint Lucia* (ICSID Case No. ARB/12/10); Decision on Saint Lucia's Request for Security for Costs (Dissenting Opinion of Judge Edward Nottingham), 13 August 2014 (disagreeing with the majority that a security for costs order "is encompassed within the class of 'provisional measures' which may 'be taken to preserve the rights' of Respondent"); *Grynberg et al v. Grenada* (ICSID Case No. ARB/10/6), Decision on Security for Costs, 14 October 2010, footnote 9 (dissenting opinion) (**CL-0292-ENG**) ("the use of the words 'preserve' and 'preserved' in Article 47 and Rule 39 presupposes that the right to be preserved exists. Because Respondent has no existing right to an ultimate award of costs, the Tribunal is thus without jurisdiction").

[100] *Emilio Agustín Maffezini v. The Kingdom of Spain* (ICSID Case No. ARB/97/7), Procedural Order No. 2, 8 October 1999 at ¶ 15 (**CL-0178-ENG).**

disavowed the tribunal's power to order provisional measures to protect a right that yet does not exist.[101]"

148) This Tribunal need not decide on this point, as Nicaragua's application fails on every other ground.

A. The Exceptional Circumstances Test

149) The legal criteria set forth for Security for Costs are precise, and in this response, Riverside demonstrates that Nicaragua's application does not satisfy these criteria. Tribunals will not grant requests for security for costs unless the moving party proves exceptional circumstances.

150) Nicaragua suggests that there is a jurisprudence constante establishing an alternative view, including a right to security for costs.[102] That is not a fair expression of the law. The test proposed by Nicaragua ignores the settled law. The settled law is discussed in detail in this section of the Application Response.

151) The Tribunal in *Garcia Armas* held that the moving party must demonstrate that:

a) it has a reasonable possibility of prevailing in the case.

b) if the security for costs is not ordered, harm not adequately reparable by an award of damages is likely to result.

c) such harm substantially outweighs the harm such an order would entail for the party against whom the measure is directed if the measure is granted ("Proportionality").

d) the urgency of the measure requested is such that it should be granted.[103]

[101]Valle Verde Sociedad Financiera S.L. v. Bolivarian Republic of Venezuela, ICSID Case No. ARB/12/18, Decision on Provisional Measures, January 25, 2016 ((**CL-0323-ENG**)). L.E. Peterson, "*In New Ruling, BIT Tribunal Holds That Alleged Right to Future Costs-Recovery is Not a Right Capable of Grounding an Interim 'Security for Costs' Request*," Investment Arbitration Reporter, 26 September 2016, (**CL-0319-ENG)**, (reporting on unpublished decision in *Valla Verde Sociedad Financieras S.L. v. Venezuela* (ICSID Case No. ARB/12/18), Procedural Order No. 8, 21 September 2016, reportedly disavowing the tribunal's power to order provisional measures "to protect a right that as of yet does not exist"). The provisional measures award was later published. (**CL-0323-ENG**) Setting that aside, Article 47 of the ICSID Convention does not contain the limitation in Article 26 of the 1976 UNCITRAL Rules that interim measures must be "in relation to the subject-matter of the dispute.

[102] Application at ¶10 **(C-0573-ENG).**

[103] See *Garcia Armas et al. v. Venezuela*, Procedural Order No. 9, Decision on Provisional Measures at ¶191 (**RL-0123-SPA-ENG).**

152) The Tribunal in *Burimi* considered *Garcia Armas*, stating:

> Even if there were more persuasive evidence than that offered by the Respondent concerning claimants' ability or willingness to pay a possible award on costs, the Tribunal would be reluctant to impose on the Claimants what amounts to an additional financial requirement as a condition for the case to proceed. [..][104]

153) This same point in *Burimi* was followed in para. 145 of the *Orlandini* decision.[105]

> Claimant should not be required to pay a fee for the right to submit a claim, claimant's distress was caused by the respondent.[106]

154) *Orlandini* agreed with the tribunal in *Garcia Armas* that the exceptional circumstances test is the appropriate test, but the *Orlandini* Tribunal held differently than *Garcia Armas*. [107] The *Orlandini* Tribunal found that none of the necessary hallmarks of exceptional circumstances were present, namely a record of non-payment, improper behavior, evidence of hiding assets, and other evidence of bad faith.[108] *The Orlandini Tribunal* found that third-party funding and claimant's financial difficulties "typically, not, in and of themselves, constitute a sufficient basis for an order."[109]

155) The *Orlandini* Tribunal balanced different interests, saying that "a Claimant should not be required to pay a 'fee' for right to submit a claim, and a claimant's financial distress may be caused by respondent's actions..."[110] Based on these balancing interests, the exceptional circumstances test, and the factor of urgency, the *Orlandini* Tribunal concluded that it was not persuaded to warrant an order for security for costs.[111]

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[104] *Burimi S.R.L. and Eagle Games SH. A v. Republic of Albania* (ICSID Case No. ARB/11/18), Procedural Order No. 2, 3 May 2012, ¶ 41, (**CL-0294-ENG).**

[105] *Orlandini v. The Plurinational State of Bolivia* (PCA Case No. 2018-39) Decision on the Respondent's Motion for Security for Costs for Termination, Trifurcation, and Security for Costs, July 9, 2019 (**CL-02933-ENG**).

[106] *Orlandini. V. Bolivia,* Decision on the Respondent's Application for Termination, Trifurcation and Security for Costs, July 9, 2019 ¶145 (**CL-0293-ENG)**.

[107] *Orlandini. V. Bolivia*, Decision on the Respondent's Application for Termination, Trifurcation and Security for Costs, July 9, 2019 ¶ 149 (**CL-0293-ENG)**.

[108] *Orlandini. V. Bolivia*, Decision on the Respondent's Application for Termination, Trifurcation and Security for Costs, July 9, 2019 ¶¶ 143 and 146 (**CL-0293-ENG).**

[109] *Orlandini. V. Bolivia*, Decision on the Respondent's Application for Termination, Trifurcation and Security for Costs, July 9, 2019 ¶ 144 (**CL-0293-ENG).**

[110] *Orlandini. V. Bolivia*, Decision on the Respondent's Application for Termination, Trifurcation and Security for Costs, July 9, 2019 ¶ 145 (**CL-0293-ENG).**

[111] *Orlandini. V. Bolivia*, Decision on the Respondent's Application for Termination, Trifurcation and Security for Costs, July 9, 2019 ¶¶ 146-150 (**CL-0293-ENG)**.

156) The *South American Silver* Tribunal found that:

> In relation to the necessity and the urgency of the measure, investment arbitration tribunals considering requests for security for costs have emphasized that they may only exercise this power where there are extreme and exceptional circumstances that prove a high real economic risk for the respondent and/or that there is bad faith on the part from whom the security for costs is requested.[112]

157) The *South American Silver* Tribunal considered the E*uroGas* and *RSM v. Saint Lucia* decisions and then held:

> "it is necessary to prove the exceptional circumstances, and that it had not been proven that the claimant had failed to make the payments in the arbitration or in other arbitrations and noting also that neither the financial difficulties nor the fact of having third- party funding constitutes *per se* exceptional circumstances warranting security for costs." [113]

158) The *South American Silver* Tribunal concluded its review of the facts and caselaw with the following statement:

> There is agreement that the standard to grant the measure is very strict, given that it shall be granted only in case of extreme and exceptional circumstances, for example, when there is evidence of constant abuse or breach that may cause an irreparable harm if the measure is not granted. This element is not proven in this case by Bolivia. There is no action of SAS in this arbitration, nor has it been proven with respect to other arbitrations, that meet this standard."[114]

159) *South American Silver* also noted:

> "In relation to the necessity and the urgency of the measure, investment arbitration tribunals considering requests for security for costs have emphasized that they may only exercise this power where there are **extreme and exceptional circumstances that prove a high real economic risk for the respondent and/or that there is bad faith on the part from whom the security for costs is requested**.[115]

160) The *Eurogas Tribunal* considered the *RSM v. Saint Lucia* decision, noting:

> It is true that in *RSM v. Saint Lucia,* an ICSID tribunal ordered security for costs. However, the underlying facts in that arbitration were rather

[112] *South American Silver v. Bolivia*, Procedural Order No. 10 at ¶ 59 (**CL-0296-ENG)**.
[113] *South American* Silver v. *Bolivia*, Procedural Order No. 10 at ¶ 61 (**CL-0296-ENG).**
[114] *South American Silver* v. *Bolivia*, Procedural Order No. 10 at ¶ 68 (**CL-0296-ENG).**
[115] *South American* Silver v. *Bolivia*, Procedural Order No. 10 at ¶ 59 (**CL-0296-ENG).** (emphasis added)

exceptional since the claimant was not only impecunious and funded by a third party, **but also had a proven history of not complying with cost orders.** As underlined by the arbitral tribunal, these circumstances were considered cumulatively*. (emphasis added).*

Yet, no such exceptional circumstances have been evidenced in the instant case. The Claimants have not defaulted on their payment obligations in the present proceedings or in other arbitration proceedings. The Tribunal is of the view that financial difficulties and third party-funding – which has become a common practice – do not necessarily constitute per se exceptional circumstances justifying that the Respondent be granted an order of security for costs. [116]

161) Similarly, the *South American Silver* Tribunal noted:

Para 83: "Bolivia's mere analysis of SAS' or SASC's balances and other related accounting documents, or t**he mere existence of a third-party funder do not meet the high threshold** set forth by investment tribunals as they do not prove that SAS is in a situation where it does not want to pay, or that it has breached its obligations, or that it has carried out acts from which the Tribunal may clearly and sufficiently conclude that SAS does not have the means to comply with an eventual award on costs." [117]

1. Nicaragua Fails to prove Exceptional Circumstances

162) Tribunals invariably note that an order to pay security for costs is granted only in "exceptional circumstances."[118]

[116] *EuroGas Inc. and Belmont Resources Inc. v. Slovak Republic*, Procedural Order No. 3 – Decision on the Parties' Request for Provisional Measures, 23 June 2015 at ¶¶ 122-123, (emphasis added), (**RL-0127-ENG**).

[117] *South American* Silver v. *Bolivia*, Procedural Order No. 10 at ¶ 83 (**CL-0296-ENG).** (emphasis added)

[118] *See, e.g., Libananco Holdings Co. Limited v. Turkey* (ICSID Case No. ARB/06/8), Decision on Preliminary Issues, 23 June 2008, ¶ 57, (**CL-0295-ENG)** ("[o]nly in the most extreme cases [should] the possibility of granting security for costs be entertained at all;" *South American Silver Limited v. Plurinational State of Bolivia* (UNCITRAL) Procedural Order No. 10, 11 January 2016, ¶¶ 59, 68, (**CL-0296-ENG)** (noting "agreement that the standard to grant the measures is very strict, given that it shall be granted only in case of extreme and exceptional circumstances"); *RSM Production Corporation v. Saint Lucia* (ICSID Case No. ARB/12/10), Decision on Saint Lucia's Request for Security for Costs, 13 August 2014, ¶ 75, (**RL-0125-ENG**) (citing *Phoenix Action, Ltd. v. Czech Republic* (ICSID Case No. ARB/06/5), Decision on Provisional Measures, 6 April 2007, ¶ 32, (**CL-0297-ENG)**; *Plama Consortium Limited v.Republic of Bulgaria* (ICSID Case No. ARB/03/24-, Order of the Tribunal on the Claimant's Request for Urgent Provisional Measures, 6 September 2005, ¶ 38, (**CL-0298-ENG)**; *Saipem S.p.A. v. People's Republic of Bangladesh* (ICSID Case No. ARB/05/7), Decision on Jurisdiction and Recommendation on Provisional Measures, 21 March 2007, ¶ 175, (**CL-0299-ENG)**, *Occidental Petroleum Corporation and Occidental Exploration and Production Company. Republic of Ecuador*

163) Nicaragua claims that its Application demonstrate the elements of necessity, urgency, and proportionality that are requirements for success in such an application.[119]

164) Nicaragua admits that it must show exceptional circumstances.[120] Nicaragua cannot convincingly demonstrate the existence of the required exceptional circumstances justifying the extraordinary award of security for costs.

165) Nicaragua claims that these exceptional circumstances are:

a) failure to comply with Tribunal orders,[121] and

b) that Riverside has acted in bad faith.[122]

166) Neither of these exceptional circumstances occurred.

167) The T*ennant v. Canada* Tribunal set out the standard to be applied as to whether security for costs was appropriate was the following:

> "The Tribunal agrees with the tribunal in *Orlandini v Bolivia* that such exceptional circumstances would include, for instance (i) a claimant's track record of non-payment of costs awards in prior proceedings; (ii) a claimant's improper behaviour in the proceedings at issue, such as conduct that interferes with the efficient and orderly conduct of the proceedings; (iii) evidence of a claimant moving or hiding assets to avoid any potential exposure to a costs award; or (iv) other evidence of a claimant's bad faith or improper behaviour."[123]

168) The exceptional circumstances criteria can be summarized as:

a) a claimant's track record of non-payment of costs awards in prior proceedings.

(ICSID Case No. ARB/06/11), Decision on Provisional Measures, 17 August 2007, ¶ 59 *(***CL-0300-ENG)** *Rachel S. Grynberg, Stephen M. Grynberg, Miriam Z. Grynberg and RSM Production Corporation v. Grenada* (ICSID Case No. ARB/10/6), Decision on Respondent's Motion for Security for Costs for Security for Costs. 14 October 2010 at ¶ 5.17 (**CL-0292-ENG**); *Commerce Group Corp. & San Sebastian Gold Mines, Inc. v. Republic of El Salvador* (ICSID Case No. ARB/09/17), Decision on El Salvador's Motion for Security for Costs for Security for Costs, 20 September 2012, ¶ 44, (**RL-0128-ENG**); *Burimi S.R.L. and Eagle Games SH. A. v. Republic of Albania* (ICSID Case No. ARB/11/18), Procedural Order No. 2, 3 May 2012, ¶ 34, (**CL-0294-ENG)**.

[119] Application at ¶¶ 43, 52-55 **(C-0573-ENG).**

[120] Application at ¶ 21 **(C-0573-ENG).**

[121] Application at ¶ 42 **(C-0573-ENG).**

[122] Application at ¶ 40 **(C-0573-ENG).**

[123] *Tennant Energy v. Canada*, Procedural Order No. 4, ⁋174 (**CL-0301-ENG)**.

b) a claimant's improper behaviour in the proceedings at issue, such as conduct that interferes with the efficient and orderly conduct of the proceedings.

c) evidence of a claimant moving or hiding assets to avoid any potential exposure to a costs award or

d) other evidence of a claimant's bad faith or improper behaviour."[124]

169) As did the *Valle Verde* Tribunal, the *Tennant Energy* Tribunal found that the burden of proof was on the moving party in its *Procedural Order No. 6.*[125]

170) As demonstrated in Section II of this Application Response above, none of the Tennant Energy exceptional circumstances factors are present in the Riverside claim.

a) Riverside had a track record of payment of costs in this proceeding.

b) Riverside did not engage in improper behaviour in the proceedings at issue, such as conduct that interferes with the efficient and orderly conduct of the proceedings.

c) Riverside did not hide or move assets to avoid any potential exposure to a costs award; or

d) There was no other evidence of a Riverside's bad faith or improper behaviour.[126]

171) As the moving party, Nicaragua has the burden of proof. Nicaragua cannot meet this burden. Indeed, the opposite is true.

a) Riverside has complied strictly with all its financial obligations in a timely manner.

b) Riverside has not interfered in the orderly conduct of these proceedings.

c) There has been no hiding of assets, and

d) Nicaragua cannot prove evidence of "improper behavior" or bad faith.

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[124] *Tennant Energy v. Canada*, Procedural Order No. 4, ⁋174 (**CL-0301-ENG)**.
[125] *Tennant Energy v. Government of Canada,* Procedural Order 6, UNCITRAL, PCA Case No. 2018-54 May 6, 2020 at ¶¶23-24 **(CL-0302-ENG).**
[126] Tennant Energy v. Canada, Procedural Order No. 4, ⁋174 (**CL-0301-ENG**).

172) The issue of bad faith is addressed specifically in Section III of this Application Response below. This section specifically reviews the allegations Nicaragua raises and refutes each. No evidence supports Nicaragua's empty allegations that Riverside acted in bad faith. Further, there is no support to the equally fictitious suggestion that Riverside has acted in violation of the Tribunal's orders or that its investments acted in violation of Nicaraguan Court orders. Riverside has acted in full conformity with the Tribunal's orders and has acted entirely in good faith in this arbitration.

173) The "exceptional circumstances" that all other tribunals have required to grant such a request simply are not present here. There is a low likelihood of success for any future motion Nicaragua might make for security for costs. Such a motion would be vexatious and harassing considering the absence of the "*Tennant Energy* circumstances" of exceptional factors and the clear knowledge of the financial harm arising to the Investor because of the Respondent's wrongful actions.

174) Nicaragua's reliance on the *Herzig* decision is misplaced. Although the original *Herzig* majority declined to distinguish its own ICSID case from *Garcia Armas*, Nicaragua fails to mention that the security for costs decision in *Garcia Armas* was adjudicated under both the UNCITRAL and ICSID Additional Facility Rules.[127] In this unusual claim, the Tribunal effectively conflated the standards under the two regimes by agreement of the parties to that arbitration. No such agreement exists here.

175) In *Invesmart v. Czech Republic,* the claimant disputed a tribunal's power to grant security for costs. In that case, the respondent state sought security for its costs from a funded claimant, who objected to the request. The Tribunal rejected that request, affirming "that it did not have authority to make the order sought in the Respondent's application.[128]

176) The rescinded January 2020 *Herzig* decision was decided under a different set of procedural rules and is based on different facts. Indeed, with only a couple decisions on security for costs granting that remedy, the *Herzig* decision falls into a distinct minority of cases awarding security for costs. However still, even the original *Herzig* decision falls within most cases that hold that security for costs may only be required in exceptional circumstances. As with the prior *Garcia Armas* arbitration decision, the original *Herzig* decision simply misapplied the test.

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[127] Dirk Herzig v. Turkmenistan, Decision on the Respondent's Request for Security for Costs and the Claimant's Request for Security for Claim, January 27, 2020, (**RL-0122-ENG**); See also Garcia Armas et al.v. Venezuela, Procedural Order No. 9 Decision on Provisional Measures, (**RL-0123-SPA-ENG**).
[128] Invesmart B.V. v. Czech Republic (UNCITRAL), Award, 26 June 2009 at ¶¶ 23-25 (CL-0305-ENG). This decision was under the UNCITRAL Arbitration Rules, which at that time had different provisions.

177) The Queen Mary Third Party Funding Report identifies that the vast majority of tribunals required proof of abusive conduct before security for costs was ordered. The Report says Tribunals “usually require evidence of abusive conduct or bad faith on the part of the Claimant such as evidence that the Claimant has a track record of deliberately failing to comply with cost awards”[129]

178) Again, Nicaragua has not established that such factors are present.

2. Conduct And Timing Is Relevant

179) Nicaragua contends that conduct is relevant in assessing this Application. It complains that Riverside’s conduct justifies the $4 million cost order due to

a) The submission of requests and motions,

b) filing a long memorial and document requests, and

c) sending proposals to Respondent’s counsel only to later modify them. [130]

180) As this Tribunal has seen, there have been unusual developments in this claim, including the discovery of an entire legal process naming Riverside but in which Riverside was never allowed to participate. The effect of the process was to blemish the title at HSF. In such extraordinary circumstances, there is nothing improper about bringing such matters to the Tribunal. Such motions are part of arbitration and cannot be the foundation for a punitive measure such as a security for costs award.

181) Similarly, Nicaragua complains of the extent of Riverside’s document request. Procedural Order No. 6 shows that Riverside made 107 document requests and Nicaragua itself made [63.] These were extensive document requests thus made on both sides. However, Nicaragua fails to address the context. Riverside’s document requests were necessary because of the loss of INAGROSA’s access to documents in Nicaragua due to the invasion. Riverside did not cause its lack of accessibility to documents but the intruders caused it. Original versions or copies of documents unavailable to Riverside were in the possession, custody, and control of Nicaragua. The fact that Riverside sought more documents than Nicaragua is not a proper foundation for a security for costs award.

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[129] Report of the ICCA-Queen Mary Task Force on Third-Party Funding in International Arbitration, April 2018 at p. 174 (**RL-126-ENG**).
[130] Application at ¶¶ 25,44 **(C-0573-ENG).**

182) Finally, Nicaragua complains over procedural issues exchanged between counsel. Again, such ordinary course matters cannot form a proper basis for a punitive measure such as a security for costs award.

183) Riverside repeatedly encouraged Nicaragua to first have the opportunity to review Riverside's Reply Memorial before bringing its Application, given that the Reply Memorial was so close to being filed and the impact that the Reply Memorial could have on the issues before this Tribunal in this Application. Such an approach was more efficient and engaged in procedural economy. However, Nicaragua filed this Application before it could review Riverside's Reply Memorial. As a result, this Application does not have the benefit of Riverside's filing, including highly relevant materials to the issues of conduct.

184) Nicaragua simply waited in ambush to file this Application after Riverside had expended its resources in filing substantive responses to Nicaragua's contentions.

185) Nicaragua's approach appears tactical, opting to unveil the Application in tandem with Riverside's Reply Memorial. This was an attempt by Nicaragua, a sovereign entity, to exploit the asymmetry in resources to Riverside's detriment. The timing of this Application was calculated to cause maximum prejudice against Riverside to distract it and its counsel from preparing its Rely Memorial.

186) Nicaragua recognized this approach when it wrote to the Tribunal on October 12, 2023, complaining that this Application should not be heard during the leisurely four-month period available to respond to the Reply Memorial. Nicaragua stated:

> Nicaragua submits that it would be unfair and prejudicial to Nicaragua to allow Claimant to postpone briefing on its Application exclusively to a time when Respondent will have had no choice but to have commenced work on its Rejoinder.[131]

187) The irony of the situation is not lost. For Nicaragua, it was fine to bring the Application during the period when Riverside had to file its Reply Memorial to the hundreds of pages of irrelevant and misleading arguments Nicaragua raised, but having to address the Application during Nicaragua's four-month period supposedly was "unfair and prejudicial."[132] This arbitration is scheduled to be heard in eight months. Nicaragua's final responsive pleading

[131] Email from Analia Gonzalez to Tribunal – Reply on scheduling of Security for Costs Motion, October 12, 2023 (**C-0675-ENG**).
[132] Email from Analia Gonzalez to Tribunal – Reply on scheduling of Security for Costs Motion, October 12, 2023 (**C-0675-ENG**).

is due in six months. Nicaragua's delay in making this application adds to the decisive factors supporting the dismissal of Nicaragua's request.

188) The strategy Nicaragua employs in this arbitration appears to be one of attrition. Having burdened Riverside with submitting its Reply Memorial, Nicaragua strategically interjects an eleventh-hour motion for security for costs. This tactic seems designed not to engage with substantive issues but to leverage procedural maneuvers to achieve submission, thus avoiding a direct confrontation with the incriminating evidence of its conduct towards Riverside and its investments.

189) The record indicates that Nicaragua had all the necessary information to initiate this Application as early as June 2023, well before Riverside's submission of its Reply Memorial. The Tribunal may reasonably infer that Nicaragua's timing was calculated to deplete Riverside's resources further, compelling Riverside to address a slew of spurious allegations levied in the Counter-Memorial, which speaks volumes about the strategic, rather than substantive, nature of Nicaragua's litigation conduct.

190) Melva Jo Winger de Rondón addresses this in her Reply Witness Statement:

> 30) Nicaragua has tried to exert crippling financial pressure on our investments in Nicaragua. Nicaragua froze our title in Hacienda Santa Fé. The freeze effectively prevented us from raising funds on that collateral to fund our arbitration.
>
> 31) I believe that Nicaragua is trying another unfair strategy with this application for security for costs.[133]

191) This Tribunal should carefully weigh Nicaragua's conduct in this current application (and this arbitration), considering the history of Nicaragua's behavior when a responding party.

3. Conduct leading to the November 2022 Motion and P.O. No. 4

192) On November 13, 2022, Riverside wrote to the Tribunal seeking discretionary relief concerning the discovery that Nicaragua had taken legal actions before its courts concerning the property at HSF. This discovery occurred after Riverside's October 21, 2022 filing of its Memorial. Riverside's Memorial did not address this significant event as Riverside had not been served with the Judicial Order nor even notified of the application. Riverside only discovered the existence of the order days before its urgent notification to the Tribunal on November 13th.

[133] Witness Statement of Melva Jo Winger de Rondón- Reply-ENG- at ¶¶ 31- 32 (**CWS-08**).

193) Riverside sought discretionary relief from the Tribunal due to its concerns about Nicaragua taking measures before its local courts, which Riverside considered inconsistent with the terms of the ICSID Convention and the orderly operation of this arbitration. The Judicial Order referenced the evidence upon which Nicaragua's Attorney General relied to obtain the Judicial Order, which Riverside considered false. Riverside also had significant concerns considering the use of such fabricated evidence and Nicaragua's failure to apply in advance of the judicial proceeding that Riverside did not have access to the materials put before the local court,

194) When the Tribunal initially considered the application for discretionary relief, it did so without specialized knowledge concerning Nicaraguan law. Now armed with Expert Gutierrez's expert legal analysis, as particularly reflected in his answer to Question 2 within his Expert Witness Statement (**CES-06**), the Tribunal can appreciate a more profound interpretation of the measures Nicaragua enacted. It becomes conspicuously apparent through the expert's discourse that Riverside has been subjected to a flagrant infringement of its rights, especially about its legitimate invocation of protections under the CAFTA framework. [134]

195) In *Procedural Order No. 4*, the Tribunal declined to order discretionary relief. However, the Tribunal found that Nicaragua failed to follow due process by not giving timely notice to Riverside of the Judicial Order, as mandated in the terms of the Judicial Order. In paragraph 37 the Tribunal noted:

> it appears undisputed that the Court Order was not formally served on the Claimant, which is not in accordance with due process.[135]

196) The Tribunal granted permission to Riverside to be able to amend its claims, including those on quantum, in the Reply Memorial [136] The Tribunal did not consider it necessary in the discretionary relief application to rule on the issue of the fabricated evidence. [137]

197) While the Tribunal did not grant the discretionary relief Riverside sought, the Tribunal made a finding of a breach of fair and equitable treatment with respect to Nicaragua's conduct in not giving notice of the Judicial Order and it confirmed Riverside's ability to expand its claims to address the impact of the factual revelations arising in connection with the Judicial Order and its application and implementation.

198) Within the Reply Memorial, Riverside has amended the scope of its claim to include the subsequent conduct of Nicaragua during the pendency of this

[134] Expert Witness Statement of Renaldy J. Gutierrez, Question 2 at ¶ 104 and ¶ 107 **(CES-06).**
[135] Riverside Coffee *Procedural Order No. 4* at ¶ 37.
[136] Riverside Coffee *Procedural Order No. 4* at ¶ 39.
[137] Riverside Coffee *Procedural Order No. 4* at ¶ 34.

arbitration in relation to the subject of this arbitration. That amended scope addresses Nicaragua's failure to:

a) provide fair and equitable treatment to Riverside with respect to the application for the preventative measure, the hearing of the application, the Judicial Order, and the implementation of the Judicial Order.

b) Provide compensation for the *de jure* and *de facto* expropriation of HSF arising from Judicial Order.

199) The testimony provided by Renaldy J. Gutierrez, a Nicaraguan legal expert, is particularly illuminating. In his Expert Witness Statement, Expert Gutierrez articulates numerous egregious due process violations that cumulatively amount to an abuse of process within the context of this arbitration. [138] He delineates the failure of Nicaraguan authorities to adhere to local law in implementing the Judicial Order. [139] Further, Mr. Gutierrez expounds upon the *de jure* alteration of land titles[140] and the *de facto* consequences of such actions, which have severely compromised the fundamental attributes of property ownership. [141]

4. The Original *Herzig* Decision Affirms the Exceptional Circumstances Requirement

200) In any event, in its January 2020 decision, the *Herzig* Tribunal, like all tribunals before it, affirmed that exceptional circumstances are required to order security for costs.[142] While the *Herzig* majority initially relied on the "certainty" that the investor, in that case, could not pay an adverse costs award,[143] this finding is inconsistent with the majority view that impecuniousness alone does not suffice to award security for costs.[144]

201) The 2018 Report of the ICCA-Queen Mary Task Force on Third-Party Funding in International Arbitration, relied upon by Nicaragua in its Application, noted:

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[138] Expert Witness Statement of Renaldy J. Gutierrez, Question 2 at ¶ 104 and ¶ 107 **(CES-06).**
[139] Expert Witness Statement of Renaldy J. Gutierrez, Question 2 at ¶ 104 and ¶ 107 **(CES-06).**
[140] Expert Witness Statement of Renaldy J. Gutierrez Question 2 at ¶¶ 96-98 **(CES-06).**
[141] Expert Witness Statement of Renaldy J. Gutierrez Question 2 at ¶¶ 99-101 **(CES-06).**
[142] *Dirk Herzig v. Turkmenistan*, ICSID Case No. ARB/18/35, Decision on the Respondent's Request for Security for Costs and the Claimant's Request for Security for Claim, January 27, 2020, ¶¶ 53-55, (**RL-0122-ENG**)
[143] *Dirk Herzig v. Turkmenistan,* Decision on Security for Costs, 27 January 2020, ¶¶57-58, (**RL-0122-ENG**).
[144] See *Dirk Herzig v. Turkmenistan*, Decision on Security for, 27 January 2020*,* ¶ 82, (**RL-0122-ENG**). (discussing *RSM v. Lucia* and other cases and observing that extraordinary circumstances "go [] beyond mere uncertainty of a claimant being able to meet an adverse costs award").

it appears that tribunals in ICSID arbitration tend to adopt a stricter test than the claimant's impecuniosity to order security for costs: they usually require evidence of abusive conduct or bad faith on the part of the claimant, such as evidence that the claimant has a track record of deliberately failing to comply with costs awards.[145]

202) Nicaragua's description of the *Herzig* majority's reasoning also omits discussion of the balancing factors it considered. The *Herzig* majority took care to assure itself that the investor could post security at low cost without impeding its access to justice.[146] Nicaragua has not shown such a circumstance here. As a moving party, Nicaragua would have this burden. Of course, as it turned out, the foreign investor was not able to post that security, and thus, the Tribunal rescinded its order.

203) Indeed, the actions Nicaragua took to freeze financial reliance upon HSF through its Judicial Order make it commercially impossible for Riverside to obtain a low-cost bank guarantee, as all the collateral is in the exclusive control of Nicaragua.

204) Moreover, if the foreign investor could not continue its claim due to the security requirement, the *Herzig* majority ruled that the investor could seek reconsideration of its security for costs decision due to a lack of access to justice.[147] As set forth more fully above, that ultimately happened in the rescission of the January 2020 order for security for costs, as no commercially reasonable terms could be established. The reconsideration request also sheds light on the length of time that it takes to obtain a bank guarantee or an alternative such as After the Event ("ATE") insurance. In the *Herzig* case, the administrator could not obtain commercially reasonable terms after months of unsuccessful efforts.[148]

205) The *Herzig* majority accordingly premised its order on ensuring the investor's access to justice. The *Herzig* dissent likewise considered this a "paramount consideration."[149] The ICCA-Queen Mary Task Force echoed this view,

[145] ICCA-Queen Mary Task Force on Third-Party Funding in International Arbitration, April 2018 at p. 174 (**RL-126-ENG**),
[146] *Dirk Herzig v. Turkmenistan*, Decision on the Respondent's Request for Security for Costs and the Claimant's Request for Security for Claim, January 27, 2020, ¶¶ 64-65 (**RL-0122-ENG**).
[147] *Dirk Herzig v. Turkmenistan*, Decision on the Respondent's Request for Security for Costs and the Claimant's Request for Security for Claim, January 27, 2020 at ¶ 65 (**RL-0122-ENG**).
[148] The Dirk Herzig Tribunal's reconsideration of the imposition of Security for costs is discussed in a 2021 article in the ICSID Review. Christina Beharry, Herzig v Turkmenistan Requests for Security for Costs in ICSID Arbitrations Involving Third-Party Funded Insolvent Claimants, ICSID Review - Foreign Investment Law Journal, Volume 36, Issue 1, Winter 2021 14 at p. 17 (July 13, 2021) (**CL-307-ENG**).
[149] *Dirk Herzig v. Turkmenistan*, Decision on Security for, 27 January 2020, ¶¶ 79-82, (**RL-0122-ENG**).

where (as here) the investor's lack of funds could be due to the State's wrongful conduct.[150]

206) Thus, Nicaragua must demonstrate the existence of exceptional circumstances beyond a mere lack of funds to warrant further inquiry into the Claimant's funding terms much less the extraordinary remedy of security for costs. Nicaragua utterly has failed to do so.[151] To the extent that any lack of funds is attributable to Nicaragua (as is the case here), the ICCA-Queen Mary Task Force principles provide that Nicaragua's conduct is secondary to the paramount concern which is Riverside's access to justice.

207) Cognizant that other tribunals have refused to award security for costs based solely upon the Investor's lack of funds and/or the third-party funders' lack of responsibility for adverse costs,[152] Nicaragua points instead to what it contends is behavior showing bad faith, *inter alia*, the way the claim was brought, the volume of the legal submissions, issues with production of banking and financial statements established after the intrusion permanently ceased INAGROSA's operations, and claims for moral damages and among other issues.[153]

208) For example, in its *Procedural Order No. 4*, the T*ennant v. Canada* Tribunal denied the Respondent's Motion for Security for Costs because "exceptional circumstances" were unmet. In doing so, the Tribunal noted in paragraph 174 that the standard to be applied as to whether security for costs was appropriate was the following:

> "The Tribunal agrees with the tribunal in Orlandini v Bolivia that such exceptional circumstances would include, for instance (i) a claimant's track record of non-payment of costs awards in prior proceedings; (ii) a claimant's improper behaviour in the proceedings at issue, such as conduct that interferes with the efficient and orderly conduct of the proceedings; (iii) evidence of a claimant moving or hiding assets to avoid

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[150] *See* Report of the ICCA-Queen Mary Task Force, (**RL-126-ENG)**, p. 174 ("This explains why investment tribunals tend to focus on other considerations, which are not directly related to the merits of the dispute, but nevertheless set a high threshold for a claimant to be subject to a security for costs order in investment arbitration, including for example the requirement that the claimant has exhibited abusive conduct by repeatedly failing to comply with costs orders or deliberately dissipating its assets.").
[151] See Report of the ICCA-Queen Mary Task Force, (**RL-126-ENG**) p. 83 ("There was also general agreement on the Task Force that, absent exceptional circumstances, no other information except the existence and identity of third-party funders was required for the purposes of analyzing conflicts of interest").
[152] *See*, e., *Tennant Energy v. Canada*, *Procedural Order No. 4*, ⁋174, (**CL-0301-ENG)**; *Tennant Energy v. Canada*, *Procedural Order No. 6*, ⁋⁋23-24 (**CL-0302-ENG)**.
[153] Application at ¶ 40 (**C-0573-ENG).**

any potential exposure to a costs award; or (iv) other evidence of a claimant's bad faith or improper behaviour."[154]

209) None of those exceptional circumstances factors exists here. Indeed, the opposite is true – Riverside has complied with all its financial obligations timely, as well as all other orders and procedural directions in this arbitration. Riverside is current on all its financial obligations, and Nicaragua has not provided any evidence of "improper behavior," "hiding assets," or "bad faith."

210) The decisions upon which the *Tennant* Tribunal relied and quoted in its *Procedural Order No.4* support that same conclusion. For example, in paragraph 175 of *Procedural Order No.4*, the *Tennant* Tribunal cited the decision in *RSM v. Saint Lucia*, noting that the:

> "decisive factor for the tribunal to grant the requested security for costs was the fact that the claimant had a proven history of not complying with costs awards rendered against it." [155]

211) The *Tennant* Tribunal also relied in paragraph 176 of *Procedural Order No. 4*, upon *EuroGas v. the Slovak Republic*, noting that the *EuroGas* Tribunal appropriately had "refused to make an order for security for costs as the respondent had failed to establish that the Claimants had defaulted on their payment obligations in the proceedings or other arbitration proceedings."[156]

212) Again, that is not the case here, Riverside never has defaulted on payment to the Tribunal. Indeed, Riverside never has engaged in any of the exceptional circumstances listed in the jurisprudence. There is a very low probability for success for any motion Nicaragua may bring in the future for security for costs, and this factor is relevant to support the Tribunal's dismissal of the document request made at this time.

213) As noted, to ultimately require security here would create an incentive for States to rely on the financial harm created by their own wrongful measures to deny investors access to justice. There is simply no reason by which Nicaragua's request should be granted.

5. Nicaragua problem with showing a plausible defense

214) In paragraph 13 of Nicaragua's Application, based on the awards in *Kazmin* and *RSM v St. Lucia*, Nicaragua contends that a Security for Costs award cannot be issued absent a plausible defense to Riverside's claim. [157] This

[154] *Tennant Energy v. Canada*, Procedural Order No. 4, ⁋174 (**CL-0301-ENG**).
[155] *Tennant Energy v. Canada*, Procedural Order No. 4, ⁋175 (**CL-0301-ENG).**
[156] *Tennant Energy v. Canada*, Procedural Order No. 4, ⁋176 (**CL-0301-ENG).**
[157] Application at ¶ 13 (**C-0573-ENG).**

perspective is fundamentally flawed as it presupposes an assessment of the claim's merits prematurely.

215) However, as evidenced in Riverside's Reply Memorial, Nicaragua has inadvertently furnished evidence indicating breaches of obligations of National Treatment,[158] Most Favored Nation (MFN) Treatment,[159] and Full Protection and Security,[160] even within the framework of its own defensive argument. These inadvertent admissions by Nicaragua squarely align with the category of "no plausible defense."

216) Further to this point, in paragraph 37 of Procedural Order No. 4, this Tribunal has already identified a breach concerning the denial of fairness, which constitutes a violation of the Fair and Equitable Treatment obligation stipulated under Article 10.5 of the CAFTA. In this regard, Nicaragua lacks a "due plausible defense."

217) These considerations precede the need to address the more convoluted aspects of Nicaragua's defense, including the unfounded claim that the former Nicaraguan Resistance in 2018 were state enemies or the reports indicating that Nicaragua's chief government legislator met with occupiers, encouraging their continued presence while seeking government funds for the nationalization of lands belonging to Riverside and INAGROSA. These facets of Nicaragua's defense further weaken its position.

218) Therefore, even without prematurely adjudicating the case's merits (which this Tribunal should not do), the frailty of Nicaragua's defense is evident. The majority, if not the entirety, of Nicaragua's defensive arguments fall into the realm of "no plausible defense," highlighting the strength of Riverside's position in this arbitration dispute.

219) The weakness of Nicaragua's defense is itself a factor mitigating against the Tribunal using its discretion to award Security for Costs in this arbitration.

6. An Award would entail Prejudging Matters In dispute

220) Tribunals will not grant requests for security for costs if it requires them to prejudge the issues in dispute. Indeed, the Tribunal in *Garcia Armas* held that, in laying out the "reasonable possibility of success" standard, that tribunals should not put themselves in a position where they are prejudging disputes:

> [T]he Tribunal will analyze whether . . . there is prima facie a reasonable possibility that a favorable ruling will be issued to Venezuela that includes

[158] Reply at ¶¶ 1661-1675.
[159] Reply at ¶¶ 1145-1159.
[160] Reply at ¶¶ 1321-1327.

> its representation costs . . .. **In doing so, the Tribunal will also analyze whether the determination about the Guarantee can be made without prejudging the dispute**.[161]

221) The *Garcia Armas* Tribunal is not alone on this point. In *South American Silver v. Bolivia*, the Tribunal refused to award security for costs based on jurisdictional issues that were in dispute and set to be briefed in pending submissions "because so doing would imply prejudging Bolivia's jurisdictional objections."[162] Similarly, the Tribunal in *Lao Holdings v. Laos* refused to take a position on Lao's assertion that the investor's claims were wholly without legal basis on the merits because it "consider[ed] it premature to assess the validity of any legal claim asserted at this stage."[163]

222) Like those tribunals and others, the Tribunal in *Orlandini v. Bolivia* also emphasized the inappropriateness of prejudging if the respondent ultimately would prevail and be allocated costs in the final award:

> The Tribunal is reluctant to opine, at this stage of the proceedings, on whether there is a reasonable prospect of an award of costs in favor or against either Party. To the extent that there is a reasonable prospect of an award of costs against the Claimants, there is also a reasonable prospect of an award of costs against the Respondent. Any pronouncement by the Tribunal on the matter at this stage would be premature. Therefore, the Tribunal cannot issue a ruling on the Respondent's application for security for costs based on whether it is reasonable, or not, to expect that there would be an award of costs against the Claimants.[164]

223) The Tribunal in *Maffezini* also expressed concerns about the prejudgment that an order of security for costs would entail. Its on-point analysis of this issue merits a full quotation:

> The Respondent alleges that it may be difficult or impossible for it to obtain reimbursement of its legal costs and expenses if the Claimant does not prevail and if the Tribunal orders the payment of additional costs and expenses to be paid by the Claimant.

[161] *Manuel García Armas et al. v. Venezuela*, Procedural Order No. 9, June 20, 2018 at ¶ 191 (**RL-0123-SPA-ENG)**.
[162] South American *Silver v. Bolivia*, Procedural Order No. 10, January 11, 2016, at ¶ 55 (**CL-0296-ENG**).
[163] *Lao Holdings N.V. and Sanum Investments Limited v. Lao Peoples Democratic Republic* (ICSID Case No. ARB(AF)/16/2 and ADHOC/17/1), Procedural Order No. 6 - Decision on Respondent's Motion for Security for Costs, July 26, 2018, at ¶ 38 (**CL-0303-ENG)**.
[164]. *Orlandini. v. Bolivia*, Decision on the Respondent's Application for Termination, Trifurcation and Security for Costs, July 9, 2019 at ¶ 142 (**CL-0293-ENG).**

> This claim contains several hypothetical situations.
>
> One, whether the Respondent will prevail and two, whether the Tribunal will deem the Claimant's case to be of such nature as to require it to pay the Respondent the costs and expenses it will incur.
>
> Obviously, at this point in the proceedings, the Tribunal is unable to answer either of these two questions. These must remain, at least for the time being, as hypothetical issues concerning future events. While hypothetical issues are stimulating and academically challenging, they are beyond the ken of an arbitral tribunal determining real issues of fact and law.
>
> Respondent alleges that the Claimant's claim is without merit, forcing the Respondent to spend unnecessary money on the costs and expenses incurred in defending against the Claimant's claim.
>
> Expectations of success or failure in an arbitration or judicial case are conjectures. Until this Arbitral Tribunal hands down an award, no one can state with any certainty what its outcome will be. The meritoriousness of the Claimant's case will be decided by the Tribunal based on the law and the evidence presented to it.
>
> A determination at this time that may cast a shadow on either party's ability to present its case is not acceptable. It would be improper for the Tribunal to prejudge the Claimant's case by recommending provisional measures of this nature.[165]

224) Put simply, tribunals must be extremely careful not to prejudge the merits of the dispute before memorials, direct evidence, and documents are presented, and cross-examination is conducted at a final hearing—but that is precisely what Nicaragua would be asking the Tribunal to do in the yet-to-be-filed motion.

225) In short, awarding security for costs would risk prejudging disputed propositions of fact and law before the Tribunal can review the arguments and evidence the parties are scheduled to present in scheduled submissions and at the final hearing. On this basis alone, Nicaragua's request can, and indeed should, be rejected.

B. Lack of Urgency

226) Nicaragua first noted its intention to bring a motion for security for costs as early as our procedural session fifteen months ago in June 2022. However,

[165] *Emilio Agustín Maffezini v. The Kingdom of Spain* (ICSID Case No. ARB/97/7), Procedural Order No. *2*, October 28, 1999, at ¶¶ 15-21 (**CL-0178-ENG)**.

Nicaragua refrained from acting promptly. That delay supports a denial of the motion. It is Nicaragua's burden to establish the existence of urgency.

227) Nicaragua's decision to wait over a year to introduce the Application and its subsequent inactivity even after obtaining relevant documents in May and June, raises genuine concerns about its intentions.

228) In *Orlandini*, the Tribunal found that the moving party seeking the order had to show a change in circumstance that would make an order of security for costs urgent. In *Orlandini*, there was no change and thus there was no urgency. The *Orlandini* Tribunal held:

> 150. Finally, the Tribunal agrees that the urgency of an order of security for costs is a matter to be duly taken into consideration. However, the Tribunal is not persuaded by the Respondent's arguments on urgency. The argument advanced by the Respondent is that it will continue to incur costs and fees, the amounts of which will increase as the proceedings advance. There is not sufficient evidence, however, that the financial situation of the Claimants is such that an order of security for costs is urgent. In particular, there is no evidence that the Claimants may be in a position to provide security for costs today but would lose that ability in the future.[166]

229) Riverside has explained that it has suffered severe financial distress at the hands of Nicaragua's actions; this was directly caused from the taking of HSF and the subsequent confiscation of Riverside's legal title.

230) In this arbitration, there has been no unwillingness on the part of Riverside to pay fees as required. Indeed, Melva Jo Winger de Rondón confirmed in her Reply Witness Statement that Riverside has complied with the orders of this Tribunal, paid all amounts on time, and has not acted in violation of court orders.[167]

231) Further Melva Jo Winger de Rondón states that while Riverside does not expect that the Tribunal would award costs against it if it was unsuccessful, Riverside would certainly continue in its practice of complying with all orders issued by the Tribunal in good faith to the best of its ability.[168]

232) The record is clear. Riverside has been fully compliant, paid on time, and Nicaragua has provided no indication of non-compliance.

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[166] *Orlandini. v. Bolivia*, Decision on the Respondent's Application for Termination, Trifurcation and Security for Costs, July 9, 2019 at ¶ 150 (**CL-0293-ENG)**
[167] Witness Statement of Melva Jo Winger de Rondón- Reply-ENG at ¶46 and ¶48. (**CWS-08**).
[168] Witness Statement of Melva Jo Winger de Rondón- Reply-ENG at ¶47 (**CWS-08**).

C. Necessity

233) Nicaragua must establish that the order for security of costs is necessary. The test for necessity is a high threshold.

234) In the *Nicaragua Military and Paramilitaries* case,[169] the International Court of Justice had to consider the concept of proportionality in the context of the law of war. The Court pointed out that US assistance to the 'contras' as well as the mining of Nicaraguan ports and attacks on ports, oil installations, and more by the US, had been unlawful because there had been no armed attack on the part of Nicaragua against El Salvador. It nonetheless continued to examine whether the US measures would have been deemed necessary and proportionate had they been lawful in the first place on the issue of proportionality, the Court stated the following:

> 237 … Whatever uncertainty may exist as to the exact scale of the aid received by the Salvadorian armed opposition from Nicaragua, it is clear that these latter United States activities in question could not have been proportionate to that aid. Finally, on this point, the Court must also observe that the reaction of the United States in the context of what it regarded as self-defence was continued long after the period in which any presumed armed attack by Nicaragua could reasonably be contemplated.[170]

235) In the Armed Activities in the *Congo* case, the Democratic Republic of Congo (DRC) claimed to have been attacked by Ugandan armed forces in the *Congo* case. Uganda pleaded self-defence against attacks from the Allied Democratic Forces for the Liberation of the Congo. As the Court was not satisfied that any attack had emanated from armed forces of the Congo, it denied Uganda the right of self-defence. In so doing, the International Court had the opportunity of observing that the measures taken would neither seem proportionate nor necessary:

> 147. For all these reasons, the Court finds that the legal and factual circumstances for the exercise of a right of self-defence by Uganda against the DRC were not present. […] The Court cannot fail to observe, however, that the taking of airports and towns many hundreds of kilometers from Uganda's border would not seem proportionate to the series of transborder attacks it claimed had given rise to the right of self-defence, nor to be necessary to that end.[171]

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[169] *Military and Paramilitary Activities in and against Nicaragua* (Nicaragua v. United States of America). Merits, Judgment. I.C.J. Reports 1986, 27 June 1986 (**CL-0022-ENG).**
[170] Nicaragua v. US (ICJ) at ¶ 237 (**CL-0022-ENG**).
[171] Case Concerning Armed Activities on the Territory of the Congo (*Democratic Republic of the Congo v. Uganda),* Merits*,* Judgment of December 19, 2005 at ¶ 147 (**CL-0324-ENG).**

236) In 2003, in the *Oil Platforms* case,[172] the US launched a sequence of military action against Iranian vessels and aircraft. This action was found to be disproportionate to the damage suffered by a US vessel in the Persian Gulf. The ICJ again reaffirmed the requirement of necessity and proportionality. Only an armed attack in the responsibility of a state makes a measure of self-defense necessary, and even then, this measure needs to be proportional to the armed attack in terms of means and timing.

237) Despite the existence of tests for necessity, Nicaragua simply asserts that this application is necessary.[173]

238) Nicaragua says in paragraph 55 of its Application that all it needs to assert (based on the Nord Stream 2 tribunal award) is that Nicaragua could risk not having a "sufficiently reliable guarantee that it would be able to collect on an award". Nicaragua says:

> At present, if the Tribunal were to order an adverse costs award against Riverside, Nicaragua would be an unsecured creditor seeking to enforce that costs award against a judgment-proof limited liability corporation. Under similar circumstances, the Nord Stream 2 tribunal granted security for costs because doing so would not "risk denying Claimant the ability to pursue the arbitration, whereas it would leave the Respondent without sufficiently reliable guarantee that it would be able to collect on an award of costs" and it was therefore "necessary to protect the Respondent's rights".[174]

239) However, Nicaragua completely misunderstands the necessity test. Its argument does not address necessity or the related (but separate) proportionality test.

240) Turning to the first of these two categories, no party has a right to a costs award— a fact numerous tribunals have confirmed.[175] Rather, it is in the discretion of the Tribunal to award costs after it has deliberated and decided on the merits at issue and the evidence presented during the proceedings. Deciding that a right to a costs award exists at this nascent stage of the proceeding would hinge on several "hypothetical situations," the outcome of which the Tribunal does not know (including the result of the proceedings

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[172] *Oil Platforms (Islamic Republic of Iran v. United States of America),* Judgment, I.C.J. Reports 2003, 6 November 2003, at p. 161 (**CL-0311-ENG**).
[173] Application at ¶ 13 **(C-0573-ENG).**
[174] Application at ¶ 55 **(C-0573-ENG).**
[175] See *Alasdair Ross Anderson et al v. Republic of Costa Rica*, ICSID Case No. ARB(AF)/07/03, Decision on Provisional Measures, 5 November 2008 at ¶¶ 21-23, 26-27, (**CL-0312-ENG**): ("the Respondent has only a mere expectation, not a right with respect to an eventual award of costs"); See also *Eskosol SPA in Liquidazione v. Italian Republic*, Procedural Order No. 3 Decision on Respondent's Request for Provisional Measures, 12 April 2017, ¶¶ 33-35 (**CL-0310-ENG**).

and the Tribunal's ultimate decision on costs).[176] As the Tribunal in *Maffezini v. Spain* noted, "[a] determination at this time which may cast a shadow on a party's ability to present its case is not acceptable."[177]

241) Nicaragua has no right to reimbursement for costs.

242) The harm caused by the lack of payment of an award is highly hypothetical. It requires Nicaragua to prevail in the arbitration and the Tribunal to exercise its discretion in the circumstances to shift costs. By comparison, the harm caused to Riverside is actual and is likely to prevent Riverside from having access to justice. There, the award of an order for security for costs can only be granted in truly exceptional cases.

243) Nowhere does Nicaragua establish an urgent need to know that these funds are available urgently now.

244) Nicaragua claims that Riverside does not have liquid assets to pay an award of costs and that this is sufficient to demonstrate necessity.[178] This must be the basis for urgency in this Application, but Nicaragua fails to plead it, and certainly cannot establish it to the standard of proof required of the moving party to this Application.

245) Nicaragua has not demonstrated any financial hardship attributable to the costs of this arbitration. It is notable that Nicaragua retains the representation of external counsel in addition to the resources of its Attorney General's Office, which encompasses a team of salaried staff attorneys. This configuration of legal representation clearly suggests that the burden of arbitration costs does not rise to the level of financial hardship. Moreover, Nicaragua enjoys numerous advantages from its participation in the Central America Free Trade Agreement (CAFTA), which further undercuts any assertion of economic distress caused by its engagement in these proceedings.

246) Nicaragua claims that its proposed order is proportional. Nicaragua relies on *Herzig v. Turkmenistan* for the proposition that a bank guarantee is the least prejudicial approach to the Investor and thus proportional.[179] Nicaragua's reliance is misplaced. Of special note is the fact that the *Herzig* Tribunal rescinded its Security for Costs Order in June 2020.[180] Mr. Herzig asked the Tribunal to reconsider its security for costs decision, saying that the claim could not proceed if Herzig were ordered to pay security for costs. Mr.

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[176] *Maffezini v. Spain* Procedural Order No. 2 at ¶¶ 16-18, (**CL-0178-ENG).**
[177] *Maffezini v. Spain* Procedural Order No. 2 at ¶ 21 (**CL-0178-ENG).**
[178] Application at ¶¶ 3, 27, 47 **(C-0573-ENG).**
[179] Application at ¶ 53 **(C-0573-ENG).**
[180] Nicaragua fails to note that the decision it cites has in fact been rescinded. *See* C. Sanderson, *ICSID Panel Rescinds Security for Costs Order* at p. 3 (**CL-0304-ENG).**

Herzig, the trustee of a bankrupt company, stated that it had been commercially impossible to secure a US$3 million bank guarantee as security. It appears that Nicaragua did not carefully review the jurisprudence to be aware of this significant development when considering the jurisprudence.

247) The Tribunal found it compelling that the main hurdle to Herzig obtaining security was the fact that the insolvency of his company—on whose behalf he was pursuing the arbitration claim—was due to the wrongful conduct of the respondent (Turkmenistan).[181]

248) While the Tribunal expressed no view on whether Herzig is likely to prove his allegations at the merits phase, the majority said that to deny Herzig the opportunity to proceed with his claim would be a denial of justice.[182] [52]

249) The issue of access to justice in the context of third-party funding was considered at the 35th session of the UNCITRAL Working Group III. At the discussions, it was noted that third-party funding could be a useful tool to ensure access to justice, particularly for small-and medium-sized enterprises.[183] This view was reiterated at the 38th session, and the report noted that some suggested that third- party funding should be prohibited. However, it was generally felt that:

> "flexibility should be provided as third-party funding could permit access to justice to those with insufficient resources, particularly SMEs and, in limited instances to States." [184]

250) To ultimately require posting of such advanced security here would create an incentive for States to rely on the financial harm created by their own wrongful measures to deny foreign investors access to justice, and thereby reward their misbehavior. Those entities rendered destitute would have no recourse. Such actions would imperil the rule of law and the overall fairness of the proceedings. The imperative to avoid such perverse incentives underlies the high burden placed on States requesting security for costs and access to the proprietary terms of an investor's funding.

[181] *Dirk Herzig v. Turkmenistan*, Decision on the Respondent's Request for Security for Costs and the Claimant's Request for Security for Claim, January 27, 2020 (**RL-0122-ENG**).
[182] C. Sanderson, *ICSID Panel Rescinds Security for Costs Order* at p. 4, (**CL-0304-ENG).**
[183] Report of Working Group III (Investor-State Dispute Settlement Reform) on the work of its thirty-fifth session, at para. 91 (A/CN.9/935), 14 May 2018, (**CL-0313-ENG).**
[184] Report of Working Group III (Investor-State Dispute Settlement Reform) on the work of its thirty-eighth session, (A/CN.9/1004), October 23, 2019 at ¶ 81 (**CL-0314-ENG).**

251) Nicaragua must demonstrate that irreparable harm will result for a security for costs order to be necessary. Yet, its own words suggest that it cannot meet this burden. Instead, Nicaragua claims:

> On the other hand, while Claimant has made such arrangements to fund its own pursuit of these proceedings, Nicaragua enjoys no such security. At present, if the Tribunal were to order an adverse costs award against Riverside, Nicaragua would be an unsecured creditor seeking to enforce that costs award against a judgment-proof limited liability corporation.[185]

252) Nicaragua intimates that default on payment of costs is probable. The mere possibility that a party "may" not be able to recover a hypothetical award of costs in its favor does not amount to irreparable harm. Otherwise, security for costs would be granted in every proceeding contrary to the extraordinary nature of that relief.

253) Riverside always efficiently has paid costs on time. There is no evidence of the investor hiding assets or acting in bad faith. Melva Jo Winger de Rondón, from Riverside, has given evidence that the company intends to continue to act in compliance with all Tribunal orders.[186]

254) Money damages and the ability to recover funds do not constitute irreparable harm. Nicaragua had to demonstrate that it would suffer harm.

255) As the *Maffezini* tribunal observed, ordering costs simply because the respondent "may" prevail prejudges the case's merits, including a decision on the allocation of costs that should be made only with the full procedural details and final outcome of a case in mind.[187] Put simply, the potential harm Nicaragua invokes, i.e., the prospect of an unpaid costs award, is hypothetical and, in any event, reparable through the courts of enforcement.

256) For instance, the Tribunal in *Burimi v. Albania* held that mere financial difficulties are not sufficient to justify an order for security for costs, noting that it "would be reluctant to impose on the Claimants what amounts to an additional financial requirement as a condition for the case to proceed."[188] That same logic applies here, as there is nothing in the US – Nicaragua bilateral investment treaty requiring a claimant to demonstrate a certain amount of assets, let alone pay such an amount, to be able to bring a claim.

[185] Application at ¶ 52. **(C-0573-ENG)**
[186] Reply Witness Statement of Melva Jo Winger de Rondón at ¶ 39 (**CWS-08**).
[187] *Maffezini v. Spain* Procedural Order No. 2, ¶¶ 15-21 (**CL-0178-ENG**)
[188] *Burimi S.R.L. and Eagle Games SH. A v. Republic of Albania* (ICSID Case No. ARB/11/18), Procedural Order No. 2, May 3, 2012 at ¶ 41 **(CL-0294-ENG).**

257) The Tribunal in *RSM v. Grenada* was of a similar mindset, emphasizing that a claimant's access to justice should not depend on a showing of sufficient financial resources:

> In an ICSID arbitration, it is also doubtful that a showing of an absence of assets alone would provide a sufficient basis for such an order. First, as was pointed out in *Libananco*, it is far from unusual in ICSID proceedings to be faced with a Claimant that is a corporate investment vehicle, with few assets, that was created or adapted specially for the purpose of the investment. Second, as was noted by the Casado Tribunal, it is simply not part of the ICSID dispute resolution system that an investor's claim should be heard only upon the establishment of a sufficient financial standing of the investor to meet a possible costs award. [189]

258) As these and other tribunals have explained, the existence of a special purpose vehicle with insufficient assets to pay a potential costs award does not suffice for security for costs. Indeed, if a state were able to demand security for costs anytime there was a risk that a potential costs award would not be paid, it would frustrate a claimant's access to justice. States could, as Nicaragua did here, undermine the economic value of an investment by blocking its ability to generate cash flow and then demand that the less liquid claimant post multi-million-dollar securities when those actions are tested on the ground that the claimant lacks assets. This would enable states to benefit from their own wrongdoing.

259) Tribunals have held that some further element rendering the situation truly exceptional is needed to award security for costs, such as a serial litigant with a history of unpaid costs awards. As the Tribunal in *EuroGas v. Slovak Republic* explained:

> [T]he underlying facts in [the *RSM v. St. Lucia*] arbitration were rather exceptional since the claimant was not only impecunious and funded by a third party, but also had a proven history of not complying with cost orders. As underlined by the arbitral Tribunal, these circumstances were considered cumulatively. [190]

260) The Tribunal in *Orlandini v. Bolivia* went further, providing a series of examples of exceptional circumstances that might give grounds for an order of security for costs:

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[189] *Rachel S. Grynberg, Stephen M. Grynberg, Miriam Z. Grynberg and RSM Production Corporation v. Grenada* (ICSID Case No. ARB/10/6), Decision on Security for Costs, October 14, 2010 at ¶ 5.19 (**CL-0292-ENG**).

[190] *EuroGas Inc. and Belmont Resources Inc. v. Slovak Republic*, Procedural Order No. 3 – Decision on the Parties' Requests for Provisional Measures, June 23, 2015 at ¶ 122 (**RL-0127-ENG**).

> The Tribunal believes that such factors would include: (i) a claimant's track record of non-payment of costs awards in prior proceedings; (ii) a claimant's improper behavior in the proceedings at issue, such as conduct that interferes with the efficient and orderly conduct of the proceedings; (iii) evidence of a claimant moving or hiding assets to avoid any potential exposure to a costs award; or (iv) other evidence of a claimant's bad faith or improper behavior.[191]

261) In *RSM v St Lucia*, exceptional circumstances could not be established simply with just an impecunious claimant, or a funded claimant, to establish exceptional circumstances, there must be a Claimant with a proven history of not complying with orders.[192]

262) Nicaragua alleges that Riverside has engaged in bad faith but there is no proof of this. The record before this Tribunal, addressed in this response, shows the exact opposite.

263) There is no history of Riverside being a serial litigant, defying court, and tribunal orders, or failing to pay adverse costs awards. Put simply, the exceptional circumstances that tribunals have deemed necessary to grant security for costs do not exist in this arbitration.

1. The Speculative Risk of an Unpaid Costs Award does not Outweigh the Certain Harm of Security For Costs

264) The certain harm to Riverside of granting Nicaragua's request far outweighs the hypothetical cost that Nicaragua "may" suffer if its request is not granted.

265) First, Nicaragua's alleged harm rests on a hypothetical, e.g., that Riverside will not pay an eventual adverse costs award, which itself rests on other hypotheticals, e.g., that Nicaragua will succeed on the merits, receive a favorable costs award, and Riverside will be unwilling or unable to pay that award. The Tribunal cannot give weight to this potential harm and entertain these hypotheticals without prejudging the merits of the case. Nor has Riverside —which has paid its share of the costs in this arbitration and is not accused of any procedural misconduct or bad faith actions here or elsewhere—given the Tribunal any reason to believe it intends to frustrate an adverse costs award.

266) Second, the harm that Riverside will suffer if it must pay security for costs is tangible. As it has limited assets that are unconnected to this litigation,

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[191] *Orlandini v. The Plurinational State of Bolivia* (PCA Case No. 2018-39) Decision on the Respondent's Motion for Security for Costs for Termination, Trifurcation, and Security for Costs, July 9, 2019 at ¶ 143 (**CL-0293).**

[192] *RSM Production Corporation v. Saint Lucia* (ICSID Case No. ARB/12/10), Decision on Saint Lucia's Request for Security for Costs, August 13, 2014 at ¶ 86 (**RL-0125-ENG**).

requiring it to post security for costs would block its access to justice and hinder it from being able to proceed with the arbitration. Even if Riverside could convince a third party to post the required security, that avenue of relief would come at a cost that Riverside could not recover, i.e., a non-refundable fee or some other decreased financial interest in any amounts awarded by the Tribunal. In circumstances like this one, where Nicaragua's actions are responsible for the Riverside's financial position, such a result would be unfair and prejudicial.

267) Third, the 4 million dollars that Nicaragua requests for security for costs is speculative and grossly excessive. As noted above, it would be prejudicial for the Tribunal to assume that Nicaragua will receive any costs, much less 100% of its anticipated costs in arbitration.

268) In summary, the harm of granting Nicaragua's request is real, immediate, and permanent. It would either bar Riverside from being able to bring to its claim or substantially increase the costs of continuing with its claim. At the same time, the harm that Nicaragua alleges it will suffer if its request is not granted is hypothetical and exaggerated. Clearly, the former outweighs the latter.

2. Proportionality

269) The test for proportionality requires this Tribunal to weight the benefits accruing to Nicaragua against the detriment to be suffered by Riverside.

270) The harm caused by the lack of payment of an award is highly hypothetical. For there to be harm, it requires Nicaragua to prevail in the arbitration and for the Tribunal to exercise its discretion in the circumstances to shift costs. By comparison, the harm caused to Riverside is actual, and likely to prevent the Claimant from having access to justice. When considering these competing interests, the harm to the Claimant and to the administration of justice significantly outweighs any risk to Nicaragua.

271) On proportionality, Nicaragua focuses solely on one narrow issue – whether Riverside can pay its lawyer. In paragraph 54 of the Application, Nicaragua says:

> In this case, the potential injustice suffered by Nicaragua far outweighs any burden on Claimant to provide adequate security. As explained above, Claimant is pursuing this claim on a contingency fee arrangement with its counsel, who have presumably has deferred receipt of any legal fees throughout the pendency of this proceeding. Any award of security for costs would thus not affect Riverside's arrangement with its counsel

because Claimant would be able to continue pursuing its claim under the terms of that agreement.[193]

272) In fact, Nicaragua's expression is like the words of Latvia in *Procedural Order No. 6* of the *Kazmin v. Latvia* Tribunal claim, which Nicaragua relies upon in its Application. In fact, the words in *Kazim* more accurately described the factors at issue, but they were curiously omitted from Nicaragua's assertion.

273) There are many different variations of a contingency agreement. Riverside has not produced this privileged document; however, the lack of reliable information has not prevented Nicaragua from giving its own conclusion on the impact of imposing a security for costs order upon Riverside's continuing ability to proceed with this claim.

274) As counsel for Nicaragua is aware, pursuing an arbitration claim involves many costs in addition to the legal costs. These include the payment of tribunal fees, payment of expert fees, travel, and other disbursements.

275) Riverside's principal asset is INAGROSA, which is not generating revenue since the intrusion upon its property destroyed its economic capacity in 2018. Thus, the imposition of a security for costs order directly impacts the financial capacity of Riverside to continue to pay tribunal fees, expert fees, and other disbursements essential for the going forward of this arbitration. This limitation is even more poignant when considered in the light of Nicaragua's actions that prevent Riverside from obtaining finance against the value of the lands at HSF, through Nicaragua's Judicial Order.

276) Carlos Rondón noted the impact in paragraph 137 of his Reply Witness Statement. He testifies:

> 137) INAGROSA previously had put Hacienda Santa Fé up as collateral for loans such as the LAAD loan. The Judicial Order made it impossible to post Hacienda Santa Fé as collateral for any loans[194]

277) Melva Jo Winger de Rondón has addressed the impact of a Security for Costs Order in her Reply Witness Statement. She testifies at paragraph 39 that:

> Between Nicaragua's harm caused by the occupation of Hacienda Santa Fé and the freezing of our ability to obtain loans with Hacienda Santa Fé as collateral, Riverside and INAGROSA are financially challenged. Despite these challenges, Riverside has continued to make all payments ordered by this Tribunal in a timely manner during this arbitration.

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[193] Application at ¶ 54 **(C-0573-ENG).**
[194] Witness Statement of Carlos Rondón – Reply – ENG at ¶¶ 137- 138 (**CWS-09**).

However, the security for costs amounts would impose severe financial pressure on Riverside.

278) Melva Jo Winger de Rondón discusses access to justice at paragraphs 40 and 41 of her Reply Witness Statement:

> As I stated before, Riverside wanted to have its day in court. This is a serious claim supported by serious evidence of abuse of process, lack of Full Protection and Security, unfair treatment, breach of anti-discrimination obligations such as National Treatment and MFN Treatment, and uncompensated taking.
>
> Riverside seeks a fair determination based upon the rule of law for the ongoing harassment and abuse of process undertaken by Nicaragua against our company and its investment. We did this even though Nicaragua's actions had hurt our company's fiscal capacity. [195]

279) Mrs. Rondón addresses the unfair impact upon Riverside's financial resources as a direct result of Nicaragua's actions. She testifies at paragraphs 38 and 39 that:

> …. We never sat on our hands with knowledge of Nicaragua's secret court actions against our US-based company. As a result of the local action, Nicaragua seized our Nicaraguan land title and effectively froze our ability to use Hacienda Santa Fé as collateral for loans. We had used the lands before, and we likely would have relied upon their value again for financial resources, but this option was not possible for us after the domestic judicial actions in Nicaragua froze our assets.
>
> Between Nicaragua's harm caused by the occupation of Hacienda Santa Fé and the freezing of our ability to obtain loans with Hacienda Santa Fé as collateral, Riverside and INAGROSA are financially challenged. Despite these challenges, Riverside has continued to make all payments ordered by this Tribunal in a timely manner during this arbitration. However, the security for costs amounts would impose severe financial pressure on Riverside. [196]

280) Foundationally, Riverside's financial resources have been unfairly handicapped by Nicaragua's implementation of the Judicial Order. Not only does Nicaragua hold Riverside's investment, but its self-appointment of itself as a Trustee gives Riverside and INAGROSA no way to obtain financing from its largest asset, the lands at HSF.

[195] Witness Statement of Melva Jo Winger de Rondón- Reply-ENG at ¶¶ 40-41 (**CWS-08**).
[196] Witness Statement of Melva Jo Winger de Rondón- Reply-ENG at ¶¶ 38-39 (**CWS-08**).

281) Russ Welty is the external CFO of INAGROSA. In his Witness Statement, he confirms that INAGROSA relied upon the lands at HSF as a reservoir of value. Mr. Welty testifies:

> Also, INAGROSA had used the property at Hacienda Santa Fé in Nicaragua as collateral for loans before, and this was an option to obtain finance for INAGROSA's operations. Carlos told me that years ago, the Latin American Development Bank (LAAD), which took the lands at Hacienda Santa Fé as collateral, valued them at not less than $22,000 per hectare (which was a value back in 2013 (which was an amount just under $27 Million). By 2018, the value of Hacienda Santa Fé would have been considerably more valuable due to the successful introduction of commercial quantities of producing long-cycle Hass avocado fruit trees. As the external CFO of INAGROSA, I was able to see additional paths for ongoing solvency during the transition, but these concerns became moot with the large infusion of capital by way of the $16 million investment commitment and the $1.5 million loan interest relief from Riverside. [197]

282) INAGROSA Chief Operating Officer, Carlos Rondón, testifies in his Reply Witness Statement that:

> 138) Freezing the legal title of Hacienda Santa Fé was another unfair and abusive act by Nicaragua to limit Riverside's (and INAGROSA's) financial capacity during the arbitration.
>
> 139) I also note that there is a Security for Costs Application underway brought by Nicaragua. Nicaragua has complained that the assets of Riverside are illiquid, but in this Motion, Nicaragua relies upon the financially limiting effects of its judicial freeze of Riverside's main underlying asset. Nicaragua then claims that it is entitled to have us pay security because Hacienda Santa Fe is an "illiquid asset." Of course, this directly results from Nicaragua's improper and unfair actions. Nicaragua should not be able to profit from its wrongful conduct in this arbitration.
>
> 140) This arbitration tribunal under CAFTA (Central American Free Trade Agreement) is our only opportunity for fair and impartial consideration of our dispute with Nicaragua. It would be deeply unfair if our access to justice were to be prevented on the basis that our company has fewer financial resources available to it than the Republic of Nicaragua.
>
> 141) We have done as much as possible to comply with the terms of the Tribunal orders. We have made all our fee deposits on time and have filed all our materials in a manner consistent with the orders of this Tribunal. We seek to have our day to have our claim heard, but the imposition of

[197] Witness Statement of Russ Welty- Reply-ENG at ¶ 75 (**CWS-11**).

> unnecessary and burdensome costs upon our company would deeply impair our access to justice.[198]

283) Nicaragua's freeze of HSF has a dramatic effect on Riverside's fiscal capacity. A security for costs order when applied on top of this asset freeze would severely affect Riverside's ability to continue with this claim, and thus hinder its access to justice.

284) In its Motion for Security for Costs, Nicaragua merely parrots *Procedural Order No. 6* of the *Kazmin v. Latvia* Tribunal award. [199] However, Nicaragua misunderstands the questions and fails to address those relevant differences between the facts in the *Kazmin* case and the those in the current arbitration.

285) In *Kazmin*, the Tribunal found evidence of offshore investments, complicated corporate structures designed to hide assets and failures to comply with court orders. [200] The *Kazmin* Tribunal also had other doubts that shed a negative light on Kazmin's business practices supported a security for costs award. The *Kazmin* Tribunal noted:

> While the Claimant is correct that these transactions from 2016 do not establish that he is today or tomorrow impecunious or unwilling to honor a potential costs award, they do shed a further negative light on the Claimant's business practices, which justifies the Respondent's concern about its possibilities of recovering costs in the future. [201]

286) By comparison, there is no evidence of hidden assets here. As addressed in detail below, Nicaragua has not demonstrated any non-conformity with court orders by Riverside or its investments. In fact, Riverside has complied throughout this arbitration process with all orders and has paid tribunal funds as ordered in full and on time. Unlike the Kazmin facts, Nicaragua has not alleged that Riverside is hiding its assets or shirking its responsibilities.

287) Further, Mr. Kazmin pleaded that he was not impecunious. The Tribunal doubted Mr. Kazmin's sincerity and determined that the making of the order would not be unduly burdensome considering the evidence of substantial assets controlled by Mr. Kazmin, including his company's listing in the 2010 Forbes list at No 40 in the Ukraine with 5.7 Billion Ukrainian hryvnia (currently worth more than US$ 2 billion). The Tribunal stated Mr. Kazmin was listed as president of KVV MPU.

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[198] Reply Witness Statement of Carlos Rondón at ¶¶138 - 141 (**CWS-09**).
[199] *Kazmin v Latvia, Procedural Order No. 6* (Decision on the Respondent's Application for Security for Costs), at ¶ 61 (**RL-0120-ENG**).
[200] *Kazmin v Latvia,* Procedural Order No. 6, at ¶¶ 56 – 58, (**RL-0120-ENG).**
[201] *Kazmin v Latvia,* Procedural Order No. 6, at ¶ 58 (**RL-0120-ENG)**.

KVV MPU which was in 2010 no. 40 on the Forbes list with an annual revenue of 5.734 Million UAH. [202]

288) Thus, in making its order, the *Kazmin* Tribunal noted:

> The Claimant could have avoided the present order by producing convincing and reliable evidence of its assets; given his failure to do so and even to offer a letter of comfort or other undertaking to pay a potential adverse cost award, the Tribunal had no choice but to order the security, while taking care that its amount is proportional (as explained hereafter), and its format is the least expensive for the Claimant.[203] [68]

289) By comparison, Riverside invested the bulk of its assets in the investment that Nicaragua wrongfully took.[69]

290) Riverside addressed the international law principle that no one should profit from its own wrong (*nullus commodum capere de sua injuria propria*").[204] This principle is essential to consider as the Tribunal assesses Nicaragua's request for discretionary relief. An order upon Riverside to post security for costs in these circumstances would allow Nicaragua to 'profit from its own wrong'. This situation should not be permitted.

291) Additionally, as noted by the claimant in the Herzig case, this Tribunal must avoid creating "a perverse incentive" for States to do the job right to ensure the insolvency of investors and prevent any BIT claims from the outset.[205]

292) The clear detriment to Riverside grossly outweighs any benefit to Nicaragua.

293) The proportionality analysis of Riverside having to pay a 4-million-dollar security for costs order would be significantly more burdensome than a security for costs award for a company with more than $2 billion in assets.

294) Nicaragua also contends that a costs award is not sought to undermine the Claimant's right to bring its claim. Nicaragua states in paragraph 54 of its Application:

> 54. In this case, the potential injustice suffered by Nicaragua far outweighs any burden on Claimant to provide adequate security. As explained above, Claimant is pursuing this claim on a contingency fee arrangement with its counsel, who have presumably has deferred receipt of any legal

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[202] *Kazmin v Latvia*, Procedural Order No. 6 at ¶ 53(iii) (**RL-0120-ENG).**
[203] *Kazmin v Latvia, Procedural Order No. 6* at ¶ 61 (**RL-0120-ENG).**
[204] Reply Memorial at ¶¶1516 – 1520.
[205] *Dirk Herzig v. Turkmenistan*, Decision on the Respondent's Request for Security for Costs and the Claimant's Request for Security for Claim, January 27, 2020, at ¶78 (**RLA-159**) "Such a consequence could, eventually, also set wrong "incentives for States."

fees throughout the pendency of this proceeding. Any award of security for costs would thus not affect Riverside's arrangement with its counsel because Claimant would be able to continue pursuing its claim under the terms of that agreement.[206]

295) As already noted, Nicaragua has no understanding of the particulars of the contingency agreement. Mr. Rondón has testified that the freezing of the land impairs Riverside's ability to continue with the financing of the claim. Certainly, ordering a $4 million cost as an award guarantee would make this situation considerably worse, and put into peril Riverside's access to justice.

296) Nicaragua's request for security for costs award is untimely and vexatious. Even the most cursory review of Nicaragua's request demonstrates that there are no exceptional circumstances sufficient for making such an extraordinary award.

3. Impecuniosity Is Not An Exceptional Circumstance

297) The *Rawat* Tribunal concluded that impecuniosity alone was not an exceptional circumstance. The *Rawat* Tribunal stated:

> We do not find that Rawat's impecuniosity is sufficient to create the exceptional circumstances.[207]

298) The *Dirk Herzig* Tribunal also came to this same conclusion finding that extraordinary circumstances "go beyond mere uncertainty of a claimant being able to meet an adverse costs award."[208]

299) The Report of the ICCA-Queen Mary Task Force on Third-Party Funding in International Arbitration also noted that ICSID Tribunals have required more than impecuniosity to order security for costs. The ICCA-Queen Mary Task Force says:

> it appears that tribunals in ICSID arbitration tend to adopt a stricter test than the claimant's impecuniosity to order security for costs: they usually require evidence of abusive conduct or bad faith on the part of the

[206] Application at ¶ 54 **(C-0573-ENG).**
[207] *Rawat v Mauritius*, Order Regarding Claimant's and Respondent's Request for Interim Measures, 11 January 2007 at ¶ 145 (**CL-0309-ENG).**
[208] *Dirk Herzig v. Turkmenistan*, Decision on the Respondent's Request for Security for Costs and the Claimant's Request for Security for Claim, 27 January 2020, ¶ 82, (**RL-0122-ENG**) (discussing *RSM v. St. Lucia* and other cases).

claimant, such as evidence that the claimant has a track record of deliberately failing to comply with costs awards.[209]

300) In *Commerce Group*,[210] the ICSID Annulment Ad-Hoc Committee considered the issue of a Claimant that had experienced financial difficulties, including having difficulty making its advance deposits to the ICSID. The Ad-Hoc Annulment Committee did not consider this to constitute the type of situation that would merit an award of security for costs. The ICSID Ad Hoc Committee's consideration in full is set out as follows:

> 48. The Applicants are experiencing financial difficulties and this they do not deny. These difficulties did cause them to struggle with meeting the deadline to advance the first payment as requested by the Centre and this in turn led to a stay of the proceedings. In the end, after having been granted an extension, the Applicants paid the first advance payment.
>
> 49. However, without more, it cannot be inferred from these facts that the integrity of the proceeding is endangered.
>
> 50. Further, the advance payments that the Applicants are obligated to make pursuant to Regulation 14 cover the fees and expenses of both the Committee and the Centre. At this stage, the costs of the proceedings are adequately covered.
>
> 51. The Committee also notes the Respondent's arguments that the Applicants are in a difficult financial position and that, if they abandon the proceedings, the Respondent might not be able to recover from the Applicants its legal costs, to which it considers it would be entitled in such circumstances.
>
> 52. At the same time, the Respondent's request, if granted, might seriously affect the Applicants' right to seek annulment of the award. The Committee does not find in the Respondent's arguments which rest on several assumptions - a compelling reason to interfere with Applicants' right to seek annulment of the award.
>
> 53. Overall, the Committee has not been provided with any incontrovertible evidence that the Applicants' conduct threatens the

[209] Report of the ICCA-Queen Mary Task Force on Third-Party Funding in International Arbitration, April 2018 at p. 174 (**RL-126-ENG**).

[210] *Commerce Group Corp. And San Sebastian Gold Mines, Inc. V. Republic Of El Salvador*. Decision On El Salvador's Application for Security for Costs (Annulment Proceeding) (**RL-0128-ENG**).

integrity of the proceedings, that their conduct amounts to abuse or that it is pursued in bad faith.[211]

301) Melva Jo Winger de Rondón notes the strains in her Reply Witness Statement. She testifies:

> 42) The costs of litigating against a sovereign state are considerable. The disbursement costs for expert witnesses, the expenses of a hearing, and the Tribunal costs are considerable.
>
> 43) Nicaragua has taken steps to financially harm Riverside It would be very unfair to be punished again for being a victim of Nicaragua's unfair actions.[212]

302) While Riverside's financial standing has been impacted due to the situation with the occupation of its lands and the destruction of the operations of its Nicaraguan subsidiary, such matters do not justify a security-for-cost order when Riverside has complied with its commitments to date in this arbitration. This is especially true when there is a causal link between illiquidity and the measures at issue (as in this claim).

303) Simply, financial difficulties or impecuniosity is not an exceptional circumstance that should form the basis for an award of security for costs. Justice must be available to the rich and the poor alike. To do otherwise would be to bring the administration of international justice into disrepute.

4. Access To Justice

304) Security for costs raises the issue of access to justice. Justice in international investment arbitration cannot be the exclusive preserve of the rich and powerful. Meritorious claimants should not be denied the opportunity to have their cases heard and their rights adjudicated simply because they are not rich. This is especially true when, as here, Riverside has been rendered severely financially damaged due to the State's unlawful actions.

305) Riverside has made no secret of its financial condition. The Tribunal knows that a security for costs award would place an undue detrimental burden upon Riverside's access to justice in this arbitration.

306) The interests of justice require that this claim be heard. Riverside filed a Reply Memorial filled with the admissions of Nicaraguan government officials confirming their awareness that Nicaragua lawfully owned the full possessory

[211] *Commerce Group Corp. And San Sebastian Gold Mines, Inc. v. Republic of El Salvador,* Decision On El Salvador's Application For Security For Costs (Annulment Proceeding) at ¶¶ 48 – 53 (**RL-0128-ENG**).
[212] Reply Witness Statement of Melva Jo Winger de Rondón at ¶¶42 - 43 (**CWS-08**).

rights at the HSF before the arbitration arose.[213] Riverside pleaded abuse of rights in its submissions[214], and filed expert legal evidence to support the findings of an abuse of process by the state and even an abuse of process by the Courts.[215] Fundamentally Nicaragua had no lawful basis to deprive Riverside's investment of HSF. Nicaragua knew this but acted nonetheless to take away the possession from Riverside to suit its political whims.[216] All this evidence needs to be understood in the context of the pervasive atmosphere of an autocratic Nicaraguan regime.

307) Treaty-violating states, such as Nicaragua, appear to demand that claimants post security for costs upfront—knowing that such large, upfront payments will deter claimants from bringing meritorious claims. Imposing financial hurdles upon claimants, who often are bereft of funds because of the wrongful actions at issue in the claim, is manifestly unfair, impairs access to justice and the efficacy of the investor-state dispute settlement.

308) The ICCA-Queen Mary Task Force echoed this view, where (as here) the Claimant's lack of funds could be related to the State's wrongful conduct.[217]

309) Following this approach, the *Tennant Energy LLC v. Canada* Tribunal concluded in its *Procedural Orders No. 4 & No. 6* that the existence of a funding agreement alone would not be sufficient to grant a motion for security for costs. Instead, the party seeking security for costs would have to show "exceptional circumstances."[218] The *Tennant Energy* Tribunal outlined the standard to be applied as to whether security for costs was appropriate as follows:

> "The Tribunal agrees with the tribunal in *Orlandini v Bolivia* that such exceptional circumstances would include, for instance (i) a claimant's track record of non-payment of costs awards in prior proceedings; (ii) a claimant's improper behaviour in the proceedings at issue, such as conduct that interferes with the efficient and orderly conduct of the proceedings; (iii) evidence of a claimant moving or hiding assets to avoid

[213] Reply Memorial at ¶¶ 322, 512 (d), 1512.
[214] Memorial at ¶¶ 523-530 Michael Byers discusses the elements of abuse of rights in Michael Byers, Abuse of Rights: An Old Principle, a New Age, 47 McGill Law Journal 389-434 (2002), (**CL-320-ENG**). See also Alexandre Kiss, "Abuse of Rights," in Max Plank Encyclopedia of Public International Law, 1992, at ¶¶ 5-6 (**CL-0031-ENG**).
[215] Expert Witness Statement of Renaldy J. Gutierrez at ¶¶ 106-107 **(CES-06).**
[216] Witness Statement of Luis Gutierrez-ENG at ¶ 109 **(CWS-109).**
[217] Report of the ICCA-Queen Mary Task Force, p. 174, (**RL-126-ENG**) ("This explains why investment tribunals tend to focus on other considerations, which are not directly related to the merits of the dispute, but nevertheless set a high threshold for a claimant to be subject to a security for costs order in investment arbitration, including for example the requirement that the claimant has exhibited abusive conduct by repeatedly failing to comply with costs orders or deliberately dissipating its assets.").
[218] *Tennant Energy v. Canada*, Procedural Order 4, ¶¶ 173-174, (**CL-0301-ENG)** *Tennant Energy PO* 6, ¶¶ 23-24 (**CL-0302-ENG).**

any potential exposure to a costs award; or (iv) other evidence of a claimant's bad faith or improper behaviour." [219]

310) The *Tennant Energy* Tribunal relied on the *Orlandini* exceptional circumstances criteria. [220] Those criteria are past non-payment of costs awards, improper behavior in this proceeding that interferes with the efficient and orderly conduct of the proceeding, evidence of the claimant hiding or moving assets to avoid exposure in a costs award, or other evidence of bad faith or improper behavior.

311) None of the elements that the *Tennant Energy* Tribunal noted as being required are present in this case.

D. Practice Guidelines support dismissal of the Application

312) Nicaragua has relied upon the 2016 Chartered Institute's "International Arbitration Practice Guideline on Applications for Security for Costs in its Application. (the "Security for Costs Practice Guideline") [221] However, the content of the Security for Costs Practice Guideline was not applied by Nicaragua.

313) Nicaragua contends in its Application that it relied on Article 4 of the Security for Costs Practice Guideline.[222] Nicaragua says it relied on Article 5.3 of the Chartered Institute of Arbitrators "International Arbitration Practice Guideline on Applications for Security for Costs, (**RL-0133-ENG**). A review of the document demonstrates that there is no Article 5.3. It appears that Nicaragua is relying upon Article 4(1).

314) Article 4 provides:

Article 4 — Is it fair to require security.

1. Before making an order requiring a party to provide security for costs, arbitrators should consider and be satisfied that, in light of all of the surrounding circumstances, it would be fair to make an order requiring one party to provide security for the costs of the other party.

2. In any event, arbitrators should consider whether awarding security would unjustly stifle a legitimate and material claim.

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[219] *Orlandini. v. Bolivia*, Decision on the Respondent's Application for Termination, Trifurcation and Security for Costs, July 9, 2019 at ¶ 150 (**CL-0293-ENG).**

[220] *Tennant Energy v. Canada*, Procedural Order 4, ¶ 174, (**CL-0301-ENG**); Tennant Energy PO 6, ¶¶ 23-24, (**CL-0302-ENG).**

[221] Application at ¶ 23 (**C-0573-ENG).**

[222] Application at ¶ 23 (**C-0573-ENG**).

315) This builds upon the content of Article 1(3), which also, as a general principle, tells the Tribunal to consider "whether it is fair in all of the circumstances to require one party to provide security for the other party's costs (Article 4).

316) Articles 1 and 4 of the Security for Costs Practice Guidelines indicate that the Tribunal should consider the fairness of requiring one party to provide security for costs considering all the circumstances.

317) In the commentary to Article 1, the Chartered Institute discusses in paragraph b the need to balance the interests. That balance must be "just and fair in light of all of the circumstances of the case." This is set out in the commentary as follows:

> **Balancing the parties' conflicting interests**
>
> b) In assessing the merits of the application, arbitrators should balance the right of a party to pursue its claim against the right of an opposing party to recover the costs of a defence that defeats the claim. Therefore, arbitrators should assess the relative merits of all of the arguments for and against the grant of security with a view to reaching a decision that is just and fair in light of all of the circumstances of the case. [223]

318) Article 3(2) provides:

> **Article 3 —Claimant's ability to satisfy an adverse cost award.**
>
> (2) ….. Conversely, if the arbitrators conclude that the claimant has assets that will likely enable the applicant to pursue enforcement of a costs award, and that these assets will be readily accessible to the applicant, then there is no justification for an order for security.

319) In this Application, Riverside has demonstrated that there is significant value to the lands owned by INAGROSA in Nicaragua. The value by any measure is well beyond the amount contemplated as costs by Nicaragua (if it was ever to obtain such an award).

320) To consider Nicaragua's conduct, there is a need to consider the role of Article 4 of the Practice Guideline on Security for Costs. Recourse to this core asset by Riverside for financing was frozen by Nicaragua, and then Nicaragua relied on Riverside's "illiquidity," primarily caused by the freeze as

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[223] Chartered Institute of Arbitrators, International Arbitration Practice Guideline, Applications for Security for Costs (2016), Commentary on Article 1 – Paragraph 1 (b) at p. 4 (**RL-0133-ENG**).

the basis for the security for costs motion.[224] When considering the circumstances, this shameful behavior on the part of Nicaragua must have great weight against awarding security for costs.

321) The impact of the imposition of security Nicaragua contends that its access to justice would be practically prevented due to the imposition of the security for costs demanded by Nicaragua. This has an exceedingly prejudicial effect upon Riverside. At the same time, Nicaragua has no risk of non-payment as the primary asset is in the territory of Nicaragua.

322) Further, the Security for Costs Practice Guideline advises that the Tribunal "should consider the conduct of the party applying for security both before and during the course of the arbitration to date and all of the surrounding circumstances in order to determine whether it would be fair to require security"[225].

323) This Tribunal is required under the Security for Costs Practice Guideline to evaluate Nicaragua's conduct during this arbitration and in the measures giving rise to the claim.

324) Nicaragua had indicated that it would bring a motion for security for costs more than 15 months ago. Given the amount of time, one would have expected that Nicaragua's motion would have been carefully considered and that it would be supported with carefully referenced support. As demonstrated in this Response, Nicaragua does not meet the basic foundational requirements for an award, and it did not carefully consider the materials upon which it relies.

325) As noted, Nicaragua has engaged in an abuse of rights in this claim. It has relied upon misdirection about those responsible for the intrusion at HSF, it has misrepresented the situation with its protective forces and the reasons for their failure to protect Riverside's investment, and Nicaragua has relied on fabricated evidence before this Tribunal. All of these on their own are sufficient to deny granting the relief Nicaragua seeks without even considering the highly prejudicial effect on the access to justice for Riverside.

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[224] Application at ¶47 **(C-0573-ENG)** Nicaragua claims in paragraph 47 that "the documents that Riverside has produced suffice to confirm that Riverside's only noteworthy asset is Inagrosa, which is an illiquid asset incapable of covering short-term debt obligations, such as an adverse award of costs".
[225] Chartered Institute of Arbitrators, International Arbitration Practice Guideline, Applications for Security for Costs (2016), Commentary on Article 4 – Paragraph 1 at p. 10 (**RL-0133-ENG**).

E. Nicaragua's Bank Guarantee is flawed.

326) Nicaragua demands that the Tribunal issue an award for a bank guarantee in a form it proposes in Annex I of its Application. However, the document it files is inadequate for the task.

327) The draft bank guarantee is so defective that it is hard to believe that Nicaragua reviewed the document before presenting it before the Tribunal.

328) A review of Nicaragua's draft demonstrates that the guarantee is not suitable for its purpose. Paragraph 2 of the Bank Guarantee provides:

> 2. At the request of Riverside, we, as Guarantor, hereby undertake to pay to you, the Beneficiary, or your accredited representative on first written demand the sum of [currency][amount in words and figures] or such lesser sum of money as you may by such written demand require to be paid accompanied by your written statement that the Claimant identified above is in breach of its obligations under Procedural Order No. 2 identified in paragraph 1, without the need to specify the respect in which the Claimant is in breach. Such a statement shall be conclusive evidence of your entitlement to payment in the amount demanded, up to the amount of this Guarantee.

329) In the middle of paragraph 2 is the following operative provision. It says the bank will pay Nicaragua a specific amount identified by Nicaragua if Riverside:

> is in breach of its obligations under Procedural Order No. 2, identified in paragraph 1, without the need to specify the respect in which the Claimant is in breach.

330) If awarded this guarantee, Nicaragua could call upon the guarantee at any time in its exclusive judgment over any matter that could, in Nicaragua's self-judgment, constitute a violation of Procedural Order No 2.

331) There is no mention in the guarantee of the subject matter of *Procedural Order No. 2 Procedural Order No. 2* sets out the Tribunal's initial procedural schedule.

332) This bank guarantee is not limited to the issue of security for costs. It can address any of the issues in Procedural Order No. 2

333) There is no protection against the use of this guarantee unfairly. The express terms of Nicaragua's guarantee are self-judging and could be exercised at any time without the approval of the Tribunal to the detriment of Riverside and without notice

334) In every respect, Nicaragua's proposed mechanism for security for costs is defective and unacceptable. From all considerations, this bank guarantee is not a fair option. It must be rejected in its entirety.

IV. CONCLUSION

335) An application for the Security for Costs is often employed by respondents as a strategic move to exert financial pressure on claimants, especially those with limited fiscal resources. If successful, such an application can effectively serve as a form of “economic capital punishment” for the hearing of a claim should the Application be granted, as the imposition of costs often prevents access to justice for claimants who do not have immediately available wealth, despite having a worthy claim.

336) This Application is an egregious attempt to strategically deplete Riverside's limited resources, coinciding with the critical timing of the Reply Memorial filing. As noted above, Nicaragua's strategy in this arbitration is one of attrition. The length of Riverside’s response to the Application for Security for costs reflects the volume and nature of the issues raised by Nicaragua.

337) Having burdened Riverside with submitting its extensive Reply Memorial, Nicaragua strategically interjects an eleventh-hour motion for security for costs.

338) Nicaragua’s approach is needlessly burdensome. It seems designed not to engage with substantive issues but to leverage procedural maneuvers to achieve surrender, thus avoiding a direct confrontation with the incriminating evidence of its conduct. Given the highly prejudicial burden that an award for security for costs would place upon Riverside if ordered, Riverside must provide a robust counter to Nicaragua’s Application. The needless burden and the necessity of this extensive labor directly relate to the Respondent's actions in bringing this needless motion.

339) Nicaragua’s reasons for this request are that Nicaragua requires this extraordinary order because it says that Nicaragua has a right to an award for security for costs, and that it has decided that Riverside is unwilling to satisfy an order for costs made against it if Nicaragua is ultimately successful and awarded costs.

340) Tribunals invariably note that an order to pay security for costs is granted only in “exceptional circumstances.”[226] There is a manifest absence of the

[226] *See, e.g., Libananco Holdings Co. Limited v. Turkiye* (ICSID Case No. ARB/06/8), Decision on Preliminary Issues, June 23, 2008 at ¶ 57 (**CL-0295-ENG)** (“[o]nly in the most extreme cases [should] the possibility of granting security for costs…be entertained at all.” ; *South American Silver Limited v. Plurinational State of Bolivia* (UNCITRAL) Procedural Order No. 10, 11 January 2016, ¶¶ 59, 68, (**CL-0296-ENG)** (noting “agreement that the standard to grant the measures is very strict, given that it shall be granted only in case of extreme and exceptional circumstances”); *RSM Production Corporation v. Saint Lucia* (ICSID Case No. ARB/12/10), Decision on Saint Lucia’s Request for Security for Costs, 13 August 2014, ¶ 75, (**RL-0125-ENG**) (citing *Phoenix Action, Ltd. v. Czech Republic* (ICSID Case No. ARB/06/5),

specified exceptional circumstances required for the success of such an extraordinary motion.

341) As previously elaborated, the plethora of grievances presented by Nicaragua fails to satisfy the criteria for extraordinary circumstances. Most of these allegations contradict the established record and lack a factual foundation. They predominantly constitute baseless objections interspersed with sporadic disparagements directed at Riverside and its legal representatives. It is incumbent upon Nicaragua to substantiate the existence of exceptional circumstances, a burden it has not discharged. Similarly, Nicaragua does not prove the elements of necessity for this award of security for costs remedy.

342) The test for proportionality requires this Tribunal to weigh the benefits accruing to Nicaragua against the detriment to be suffered by Riverside. As discussed herein, the apparent detriment to Riverside grossly outweighs any benefit to Nicaragua. Nicaragua fails to meet its burden of proof under the proportionality test.

343) Nicaragua cannot demonstrate urgency for its application. This is even more astonishing given that Nicaragua never has had any risk of an unsatisfied costs award considering INAGROSA's valuable property at HSF and the fact that Nicaragua covertly took over the exclusive title of HSF from INAGROSA, guaranteeing that Nicaragua has been holding HSF this entire time.

344) Nicaragua provides no basis for this Application. The entire Application is nothing more than an expensive and needless ventilation of Nicaragua's endless perceived grievances from the international arbitration process. Such complaints are not well taken and do not meet the extraordinary circumstances standard that Nicaragua has the burden to establish.

345) Finally, there are compelling reasons why Riverside should not have additional financial hardship imposed upon it that could threaten its ability to

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Decision on Provisional Measures, 6 April 2007 at ¶ 32, (**CL-0297-ENG)**; *Plama Consortium Limited v. Republic of Bulgaria* (ICSID Case No. ARB/03/24-, Order of the Tribunal on the Claimant's Request for Urgent Provisional Measures, 6 September 2005 at ¶ 38, (**CL-0298-ENG)**; *Saipem S.p.A. v. People's Republic of Bangladesh* (ICSID Case No. ARB/05/7), Decision on Jurisdiction and Recommendation on Provisional Measures, 21 March 2007, ¶ 175, (**CL-0299-ENG)**; *Occidental Petroleum Corporation and Occidental Exploration and Production Company v. Republic of Ecuador* (ICSID Case No. ARB/06/11), Decision on Provisional Measures, 17 August 2007 at ¶ 59, (**CL-0300-ENG)**; *Rachel S. Grynberg, Stephen M. Grynberg, Miriam Z. Grynberg and RSM Production Corporation v. Grenada* (ICSID Case No. ARB/10/6), Decision on Respondent's Motion for Security for Costs for Security for Costs. 14 October 2010, ¶ 5.17, (**CL-0292-ENG**) ; *Commerce Group Corp. & San Sebastian Gold Mines, Inc. v. Republic of El Salvador* (ICSID Case No. ARB/09/17), Decision on El Salvador's Motion for Security for Costs for Security for Costs, 20 September 2012, ¶ 44, (**RL-0128-ENG**); *Burimi S.R.L. and Eagle Games SH. A. v. Republic of Albania* (ICSID Case No. ARB/11/18), Procedural Order No. 2, 3 May 2012 at ¶ 34, (**CL-0294-ENG**).

have its case heard. Again, Nicaragua has not discharged its burden of proof in this regard.

346) Accordingly, the Respondent's request for Security for Costs in the Application should be rejected for the following reasons:

a) The Respondent cannot meet the requirements to successfully receive an award of security for costs.

b) The interests of justice and due process mitigate against an award of security for costs.

347) Riverside respectfully requests that the Tribunal grant the following relief.

a) Dismissal of Nicaragua's Application for Security for Costs; and

b) An award in favor of Riverside on a full indemnity basis for its costs, disbursements, and all expenses incurred in the defense of this Application for legal representation and assistance, including financing, plus interest, and costs; and

c) Such other and further remedies that this Tribunal considers appropriate.

Respectfully submitted on behalf of Riverside Coffee, LLC, the Investor, on the 10th day of November 2023.

ALL OF WHICH IS RESPECTFULLY SUBMITTED

Prof. Barry Appleton
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Counsel for Riverside Coffee, LLC.