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 REJOINDER TO RESPONDENT'S APPLICATION FOR SECURITY FOR COSTS

NOVEMBER 24, 2023

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I. OVERVIEW

1) This Rejoinder Application is presented to address the contentions Nicaragua raises in its Reply (the "Application Reply") to Riverside's Response (the "Application Response") to Nicaragua's initial Application for Security for Costs (the "Application"), dated October 4, 2023.

2) In its Application Response, Riverside provided substantial and compelling evidence countering Nicaragua's Application. Riverside demonstrated that Nicaragua failed to establish the requirements for an award of security for costs, including failing to establish exceptional circumstances, urgency, or necessity in its Application and Application Reply.

3) Nicaragua's Application Reply does not effectively counter Riverside's Response arguments. Like its approach in the Counter-Memorial, Nicaragua diverts to irrelevant and unfounded issues while reiterating its claimed entitlements to a remedy in a manner detached from factual, legal, or truthful bases.

4) Nicaragua's call for an extraordinary remedy of security for costs is misguided. It lacks a foundation in procedural rules and contradicts principles of fairness and due process. The evidence before this Tribunal indicates that it is Nicaragua, not Riverside, that has engaged in bad faith and process abuse.

5) Remarkably, Nicaragua's Application Reply offers no substantial rebuttal to the absence of proof for the urgency and the necessity elements required for success in its Application. Nicaragua's oversight of the $98 million valuation of Hacienda Santa Fé (HSF) lands, as per the expert damages evidence of Vimal Kotecha,[1] directly counters Nicaragua's assertion of Riverside's impecuniosity. This omission perpetuates a false narrative upon which Nicaragua repeatedly relies in this Application.[2]

6) **Riverside's Evidence of Nicaraguan Misconduct**: Despite the burden of proof resting on Nicaragua, Riverside convincingly has evidenced Nicaragua's wrongful conduct. Nicaraguan Legal Expert Renaldy J.

[1] Application Response at ¶ 15; See also Richter Expert Reply Damages Report at Chart 5 on page 60 (**CES-04).**

[2] On account of the expropriation commencing with the intrusion on June 16, 2018, under international law, Nicaragua owes Riverside for the fair market value of the expropriated property. However, Nicaragua repeatedly claims that Riverside still retains legal title, and thus, Riverside should have been entitled to the benefits of such title. As discussed below, the title's actual situation is not as attested by Nicaragua. A broad spectrum of interferences constitutes expropriation applicable in this arbitration, especially in light of the operation of the expropriation definition under the Russian Treaty and the CAFTA MFN obligation. (See Memorial at paragraphs 460-463 and 490-503). Nicaragua did not file any defense to such arguments in its Counter-Memorial. Foundational due process does not permit Nicaragua to reargue matters closed in the first round of pleadings.

Gutierrez's unchallenged testimony highlights Nicaragua's wrongful transfer of formal title over HSF and its *de facto* taking of core property rights,[3] which violates both domestic and international law.[4]

1. Inaccuracies with Nicaragua's Application Reply

7) Nicaragua's Application Reply is replete with inaccuracies.

a) **Nicaragua's Misrepresentation of Financial Position**: Nicaragua's claim in paragraph 26, alleging Riverside's financial incapacity without considering Riverside's robust response, is misleading.[5] Contrary to paragraph 27 of Nicaragua's Reply, Riverside has demonstrated the presence of significant assets, including a valuation of HSF lands at $98 million, as per the Richter Expert Reply Damages Report. [6] Further, Riverside's Response, particularly in paragraph 15, clearly evidenced Riverside's substantial assets, including the pre-avocado planting valuation, years before the unlawful intrusion, of at least $22 million by the Latin American Development Bank. [7]

b) Nicaragua's consistent misrepresentation of Riverside's Application Response and other foundational facts in this claim unnecessarily complicated the preparation of Riverside's Reply Memorial, adding unnecessary effort and bulk to this foundational arbitration filing to address the systemic misrepresentations.

c) **Nicaragua's Possession of Sufficient Assets**: Nicaragua's argument for Security for Costs, based on Riverside's lack of liquid assets[8], is unfounded given the high value of Riverside's investments in Nicaragua, currently under Nicaraguan control. Nicaragua already holds assets exceeding the $4 million security for costs it seeks, rendering the risk of nonpayment of an adverse cost award against Riverside negligible.

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[3] Expert Witness Statement of Renaldy J. Gutierrez at ¶¶ 74-79 and ¶¶ 104, 106-107 (**CES-06**).
[4] Expert Witness Statement of Renaldy J. Gutierrez at ¶104; See also Reply Memorial at ¶¶ 46,51,545. In paragraph 46 of its Application Reply, Nicaragua asserts "Nicaragua does not hold title to Hacienda Santa Fé and any suggestion that Nicaragua is adequately secured as a result of its Protective Order is false". As discussed in the Reply Memorial, the title documents reviewed by Legal Expert Gutierrez contradict Nicaragua's statement, and Nicaragua has provided no evidence to rebut the documents from the property registry office. In such circumstances, no weight can be given to Nicaragua's contentions which stand directly in the face of the written government documents.
[5] Application Reply at ¶ 26.
[6] Application Response at ¶ 15. Richter Expert Reply Damages Report at Chart 5 on page 60 (**CES-04).**
[7] Witness Statement of Carlos Rondón-Memorial-ENG at ¶42 (**CWS-01**); Russ Welty corrects the value based on the area of HSF, concluding that the value years before the invasion was $27 million. See Witness Statement of Russ Welty – Reply – ENG at ¶ 75 (**CWS-11**).
[8] Application Reply at ¶ 3.

d) **Nicaragua's Unchallenged Acceptance of Asset Value**: Nicaragua's failure to dispute the evidence of the sufficiency of HSF land value in its Application Reply further undermines the necessity of its Application. This, combined with the significant evidence presented, would reasonably lead to the withdrawal of their Application as being untimely, unnecessary, and non-urgent. However, Nicaragua has "doubled down" with its unjustified Application, raising new unsubstantiated complaints, which only results in further burden upon these proceedings.

e) **Absence of Necessity and Urgency**: Given the proven value of Riverside's assets and the lack of risk of asset movement, the Application lacks both necessity and urgency.

f) **Nicaragua's Failure to Substantiate Claims**: Nicaragua's basis for demonstrating necessity, predicated on an unproven claim of impecuniosity, fails to meet its burden of proof as the applicant.[9] The evidence at hand should have led to a reconsideration and possible withdrawal of Nicaragua's Application. Nicaragua's persistent disregard for the expert valuation evidence of HSF lands signifies the vexatious nature of its Application.

8) **Nicaragua's Role in Riverside's Asset Illiquidity**: The current illiquidity of Riverside's assets is a direct consequence of Nicaragua's actions, including the occupation and legal freezing of HSF lands, denying Riverside any opportunity for representation or notice.

9) Nicaragua's freezing and appropriation of INAGROSA's primary asset, HSF lands, are direct actions that have led to current asset illiquidity. Nicaragua's control over these assets exacerbates the conflict of interest in this Arbitration.[10] Nicaragua laments the illiquidity of Riverside's assets as a rationale for the Application.[11] Yet, this lack of liquidity directly results from Nicaragua's actions.

10) **Paradox in Nicaragua's Relief Seeking**: The relief Nicaragua seeks is paradoxical, aiming to protect against a risk of illiquidity that Nicaragua itself has orchestrated through its control over Riverside's principal assets.

[9] Application Response at ¶¶ 69,171. See *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)**.

[10] Expert Witness Statement of Renaldy J. Gutierrez at ¶¶ 78, 83 (**CES-06**).

[11] 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".

2. Responding to New Arguments Nicaragua raises.

11) Nicaragua now raises new and entirely scurrilous accusations of bad faith and bad conduct by Riverside.

12) **Response to New Accusations:**

a) Nicaragua's claim that Riverside exhibits bad faith is baseless. Riverside has not demonstrated any bad faith or misconduct in this Arbitration. Instead, Nicaragua's accusations seem to be a strategy to shift blame.

b) Nicaragua accuses Riverside of being responsible for the effects of Nicaragua's asset freeze upon HSF.[12] These were actions outside of Riverside's control and all within Nicaragua's control and dominion. Nicaragua caused the illiquidity and then relied upon it for this Application. In any event, Nicaragua's accusations fail to meet the necessity requirements for the relief sought. Nicaragua has not fulfilled its burden of proving these necessities as the moving party.

c) Nicaragua's lack of evidence for exceptional circumstances is apparent. Its failure to substantiate claims of Riverside's non-compliance with Tribunal Orders, as exposed in Riverside's Application Response, [13] has led Nicaragua to introduce new, baseless allegations in its Application Reply. [14]

d) Nicaragua's assertion in paragraph 47 of its Application Reply that Riverside will not comply with Tribunal orders is another stark misrepresentation.[15] Paragraph 67 of Riverside's Application Response, quoting Melva Jo Winger de Rondón, clearly states Riverside's commitment to comply with all Tribunal orders in good faith. [16]

13) **Reaffirmation of Compliance**: Mrs. Rondón's testimony unequivocally states Riverside's intent to comply with Tribunal orders. Mrs. Rondón's testimony is that "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."[17] This counters Nicaragua's unfounded assertion and highlights the lack of credibility in their justifications for the Security for Costs Application.

[12] Application Reply at ¶¶ 4,26.
[13] Application Response at ¶¶ 66-79.
[14] Application Reply at ¶¶ 28-31 and ¶¶ 38-43.
[15] Application Reply at ¶ 47.
[16] Application Response at ¶ 67. Witness Statement of Melva Jo Winger de Rondón – Reply -ENG at ¶44 (**CWS-08**).
[17] Witness Statement of Melva Jo Winger de Rondón – Reply -ENG at ¶ 47 (**CWS-08).**

14) **Refutation of Frivolous Claim Accusation**:

a) Nicaragua's contention that Riverside's claim is frivolous[18] is not only irresponsible but also patently absurd. Riverside's Application Response in Section I.D (paragraphs 49-61) outlines the substantial evidence supporting Riverside's claim.

b) Evidence presented includes differential treatment by Nicaraguan police, breaches of Fair and Equitable Treatment, and admissions of state control over the intruders at HSF.[19] Such evidence firmly contradicts Nicaragua's frivolity claims.

15) **Substantive Nature of Riverside's Claim:** The evidence Riverside presented, including admissions and conduct by Nicaraguan officials, negates any characterization of Riverside's claim as frivolous. Instead, it underscores the claim's substantiveness and validity. This included evidence that:

a) Nicaragua's police provided better treatment in like circumstances to other private landowners suffering intrusions while not providing such treatment to Riverside or its investment sufficient to violate the Full Protection and Security, National Treatment, and MFN Treatment obligations.[20]

b) There also was evidence of breach of Fair and Equitable Treatment, including treatment this Tribunal already concluded by constitutes a breach of due process.[21]

c) Finally, Riverside has demonstrated, from Nicaragua's own evidence, that the intruders admitted that they were under the control and direction of the state in the taking of HSF.[22]

With such substantive evidence, Riverside's fully supported claim is completely meritorious.

16) Nicaragua complains that Riverside has reviewed the substantiveness of its claim in the Application Response in violation of the principle of efficiency.[23]

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[18] Application Reply at ¶ 48.
[19] Reply at ¶¶ 124-129. See also Letter from the El Pavón Cooperative to the Attorney General of the Republic of Nicaragua, September 5, 2018, at p. 2 **(R-0065-SPA-ENG).**
[20] Reply Memorial at ¶¶ 1151, 1324-1325, 1351-1360.
[21] Reply Memorial at ¶¶ 1148, 1465, 1513.
[22] Reply Expert Statement of Prof. Justin Wolfe at ¶¶ 59-61 **(CES-05);** Letter from the El Pavón Cooperative to the Attorney General of the Republic of Nicaragua, September5, 2018, at p. 2 **(R-0065-SPA-ENG).**
[23] Application Reply at ¶ 2.

Here Nicaragua has put the parties' conduct in the arbitration into question through its frivolous Application. Nicaragua has repeatedly characterized Riverside's claim as being unsubstantiated and frivolous.[24] Nicaragua cannot put such matters into question and then blame Riverside for succinctly responding to these important matters in response to the issues raised in the Application.

17) The interests of justice require that this claim be heard and adjudicated on the merits.

a) The evidence in Riverside's Reply Memorial, including admissions by Nicaraguan officials, confirms state-affiliated control over HSF and differential police treatment. The police did not take protective actions for the benefit of Riverside as it provided to others in Nicaragua at the same time and in the same circumstances.[25] This information is vital to understanding the context of Riverside's claim.

b) Prior to the Arbitration, Nicaragua had not asserted legal rights over the title to HSF. [26] Riverside's expert legal evidence shows Nicaragua abused Riverside rights [27], raising serious concerns about the rule of law and the protection of human rights in Nicaragua.[28]

3. Nicaragua failed to establish Exceptional Circumstances

18) In this brief submission, Riverside addresses the errors and omissions of Nicaragua's Application Reply. Riverside proves that Nicaragua failed to meet its burden of proof — to establish it meets the test for "exceptional circumstances." Instead, Nicaragua ignores the plethora of case law on the subject, including the cases upon which it relies in its Application Reply.

19) Nicaragua's Application Reply is bereft of relevant content. Instead, Nicaragua unleashes an improper mix of distraction, personal smears, and denigration of unprecedented levels.[29]

[24] Application Reply at ¶¶ 31, 48.
[25] Reply Memorial at ¶¶ 308, 319; Witness Statement of Luis Gutierrez-Reply-ENG at ¶¶ 152-156 **(CWS-10);** Witness Statement of Domingo Ferrufino-Reply-ENG at ¶¶ 90-94 **(CWS-12).**
[26] Expert Witness Statement of Renaldy J. Gutierrez at ¶¶ 74-75 **(CES-06).**
[27] Expert Witness Statement of Renaldy J. Gutierrez at ¶¶ 102-107 **(CES-06).**
[28] These issues have recently become even more concerning with the abrupt dismissal of the Chief Justice of Nicaragua's Supreme Court and the removal of many of its judicial officers sent to jail without charge. See Wilfredo Miranda, "Rosario Murillo carries out a great purge in Nicaragua's judiciary, dismissing over 900 people". "El Pais, November 16, 2023 (**C-0701-ENG**) and also Frita Ghitis "Nicaragua's Ortega Has Crossed the Line into Dictatorship" World Politics Review", November 9, 2023 (**C-0700-ENG**).
[29] Application Reply at ¶¶ 28-29.

20) Nicaragua foundationally ignores the requirement to meet the burdensome exceptional circumstances test. The threshold that Nicaragua must meet is to demonstrate that there is a proximate nexus between the circumstance, and the need for the extraordinary remedy. Nicaragua simply tries to justify its Application on various, ever-changing circumstances where Nicaragua feels an affront.[30] But the test set out by the jurisprudence is not random circumstances, but **exceptional** circumstances. Nothing asserted by Nicaragua, even if true, could ever meet the exceptional circumstances threshold.[31] This is a difficult threshold to meet because the remedy sought upends the traditional basis of arbitration and puts access to justice at risk. Because of the risk of such impacts, Security for Costs awards are rarely awarded, and the circumstances must be extraordinary. Nicaragua fails to meet that test.

21) As noted in the Application Response, 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 reduces the efficacy of the investor-state dispute settlement.[32]

22) Simply, the fact of financial difficulties, or even impecuniosity itself, is not an exceptional circumstance that justifies an award of security for costs. Neither does a counsel taking a case on a contingency fee basis nor is the receipt of Third-Party Funding in any form. Justice must be available to the rich and the poor alike. To hold otherwise would be to bring the administration of international justice into disrepute.

23) Further, Nicaragua attempts to justify the necessity of this Application upon purported failings of Riverside to comply with the Tribunal's orders, but Nicaragua based the Application on purported failures to produce documents that fell outside of the scope of the Tribunal's explicitly defined production orders.[33] Nicaragua does not acknowledge its error, and instead, it raises new allegations in its Application Reply, absurdly claiming that ordinary course procedural communications constitute impermissible acts.[34] Not only is this improper, but Nicaragua ignores its own actions, which necessitate communications, including but not limited to Nicaragua's decision not to notify Riverside of the Judicial Order when it was ordered in December 2021, leaving it to Riverside to discover the order, nearly one year later in November 2022.

[30] Application Reply at ¶¶ 14-18.
[31] Application Reply at ¶¶ 14-18.
[32] Application Response at ¶ 307.
[33] Application at ¶ 42.
[34] Application Reply at ¶ 9.

24) 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.[35] Indeed, Nicaragua knew that Riverside's main asset was this claim and its interest in INAGROSA from the Memorial. Nicaragua knew that it had frozen INAGROSA's primary asset, HSF, and had control of its lands. Nicaragua was aware that the business had no recurring revenue from agriculture or forestry operations as the lands, at that time, were in Nicaragua's sole and exclusive control. Considering these, Nicaragua was always reasonably aware that Riverside's main asset was illiquid, yet inexplicably, Nicaragua waited until Riverside's Reply Memorial preparations were underway to bring it untimely motion.

25) Nicaragua, yet again, complains about the inevitable consequence of having to review and counter the utterly false and misleading justifications that it makes. Nicaragua complains about the written length it takes to dispel the false arguments it made in this Application and its fictive Counter-Memorial.[36] It is as if, Nicaragua is entitled to express its position fully in hundreds of pages and that Riverside should be restricted in its response. Addressing complete fabrication and character smears takes effort and time.

26) Nicaragua has rid itself of a domestic free press, universities, Catholic clergy, and opposition politicians.[37] Perhaps Nicaragua is no longer accustomed to being challenged when it asserts untruths. But at the ICSID, the rule of law prevails.

27) With Nicaragua's Application for Security for Costs exposed as based on a false narrative, Nicaragua's Reply comes as a last-ditch effort from a failed state on the fast track to defeat under the rule of law.

28) Riverside refuses to engage in a tit-for-tat with Nicaragua on matters irrelevant to this Application. This is an Arbitration governed by international law and not a forum for "trash-talk." However, Riverside asks the Tribunal to take account of Nicaragua's ongoing and systemic lapses of good faith and good conduct when assessing the questions of moral damages and costs in this Arbitration.

[35] Application at ¶ 51.
[36] Reply Application at ¶¶ 17-18.
[37] Expert Statement of Prof. Justin Wolfe – Reply – ENG at ¶¶ 8-28 (**CES-05**); Congressional Research Service, Nicaragua – In Focus, April 5, 2023 at Bates 0010604 (**C-0677-ENG).**

4. Access to Justice Concerns

29) As addressed in Riverside's Application Response, the harm caused to Riverside if security for costs is ordered is actual and could prevent it from accessing this Tribunal's justice.[38]

30) Nicaragua's arguments mean that justice could be available only to those who are independently so wealthy as to not be affected by the devastation caused by the State's violations of international law. This argument offends due process and the rule of law.

31) In its Application Reply, Nicaragua alleges impecuniosity, but it fails to demonstrate that the impecuniosity constitutes an exceptional circumstance.[39] Moreover, Nicaragua failed to address the motion's disproportionality — granting the motion would severely prejudice Riverside. At the same time, continuing without a costs order would have little material impact on Nicaragua, as evidenced by the fact that the case is close to the final hearing, pending Nicaragua's final submission and a hearing on the merits and the fact that it has frozen Riverside's land. Nicaragua simply seeks to delay facing the court.

32) Now, Nicaragua seeks to evade the consequences of its internationally wrongful actions by placing additional financial obstacles in-front-of Riverside to prevent it from having its opportunity to be heard. This Tribunal should reject Nicaragua's Application.

33) As noted in Riverside's Application Response, 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.[40] As part of this evaluative exercise, the Tribunal is invited to examine Nicaragua's Counter-Memorial and Riverside's recent Reply Memorial not to prejudge the merits but to evaluate Nicaragua's conduct, which Nicaragua necessarily puts at issue as part of the requirements of this Application.

34) However, this Tribunal should take note of the needless utilization of resources caused entirely by Nicaragua's shameless conduct.

35) The extensive nature of the Application Response was necessitated by the need to counter Nicaragua's unfounded and obstructive defense tactics.

[38] Application Response at ¶ 45.
[39] Application Reply at ¶ 35.
[40] 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."

These are not circumstances of Nicaragua asserting defenses that were not just simply wrong, but where the bona fides of Nicaragua's behavior in this Arbitration is called into question.

36) The depth and density of Nicaragua's fictitious defenses, 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. Nicaragua's behavior pattern in this Arbitration does not reflect the principles of fair play or integrity. That same behavior has been introduced into this Application by Nicaragua and extended in Nicaragua's shameful Application Reply.

37) As noted in the Application Response, **Nicaragua's conduct manifests as a deliberate misuse of the arbitral process**, strategically designed to prolong proceedings and deflect attention with irrelevant and misleading assertions.[41] Nicaragua's approach has imposed significant costs upon Riverside, which has been forced to address numerous irrelevant issues and fictitious stories to excuse Nicaragua from liability.

38) In light of the circumstances, the Application must be considered as part of Nicaragua's broader strategy aimed at hindering Riverside's ability to secure bank guarantees against assets that are, ironically, firmly in Nicaragua's grasp due to its own legal maneuvering.

A. Nicaragua cannot demonstrate urgency.

39) Nicaragua fails to demonstrate that it meets the urgency and proportionality elements of the exceptional circumstances test. Again, Nicaragua mischievously attempts to substitute more general tests applicable to all interim measures instead of the more specific tests applied by tribunals in the context of an extraordinary security-for-cost applications.

40) Nicaragua says that the matter is urgent because it incurs costs in defending this Arbitration under the CAFTA.[42] Nicaragua is defending a CAFTA treaty because it violated that treaty. The fact that Nicaragua must incur costs to defend its wrongful actions under a process established in an international investment promotion treaty is neither urgent nor a basis for necessity.

41) The *Orlandini* Tribunal rejected the argument that incurring costs during an arbitration meets the urgency criteria. 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.

[41] Application Response at ¶ 7.
[42] Application Reply at ¶¶15- 23.

> 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 insufficient evidence, however, that the financial situation of the Claimants is such that an order of security for costs is urgent. 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.[43]

42) As seen from this citation, *Orlandini* dismisses on its face the argument Nicaragua makes. For this remedy to meet the necessity test, Nicaragua would need to demonstrate how its essential functions of the state would be affected by the costs incurred and how there are no other less burdensome measures that could be taken by the state.

43) By comparison, Riverside has explained that it has suffered severe financial distress at the hands of the actions of Nicaragua directly caused by the taking of HSF.

44) In this Arbitration, there has been no unwillingness or default on the part of Riverside to pay fees as required. Indeed, Melva Jo Winger de Rondón confirmed in her Reply Witness Statement (**CWS-08**), and the record shows that Riverside has complied with the orders of this Tribunal, paid all amounts on time, and has not violated tribunal orders.[44]

45) Further, Melva Jo Winger de Rondón, in her Reply Witness Statement, states that: “While Riverside does not expect that the Tribunal would award costs against Riverside if it were unsuccessful, Riverside certainly would continue in its practice of complying with all orders issued by the Tribunal in good faith to the best of its ability”.[45]

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[43] *The Estate of Julio Miguel Orlandini-Agreda and Compañía Minera Orlandini Ltda. v. The Plurinational State of Bolivia*, PCA Case No. 2018-39, Decision on the Respondent’s Application for Termination, Trifurcation and Security for Costs, July 9, 2019, at ¶150 (**CL-0293-ENG**).

[44] Reply Witness Statement of Melva Jo Winger de Rondón at ¶ 48 (**CWS-08**). She stated: “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””.

[45] Reply Witness Statement of Melva Jo Winger de Rondón at ¶ 47 **(CWS-08**) She stated: “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.”

B. Nicaragua cannot demonstrate Necessity.

46) The *Tennant Energy* Tribunal noted that the burden of proof to establish exceptional circumstances is on the moving party.[46] As the moving party, Nicaragua bears this burden, which it has not discharged.

47) Security for costs is an extraordinary remedy. It imposes elements of execution before judgment. The necessity element of the exceptional circumstances test recognizes that security for costs is unusual and highly prejudicial to a claimant. Nicaragua mischievously attempts to substitute more general tests applicable to all interim measures in place of the more specific tests applied by tribunals in the context of security for costs applications. This is contrary to the very cases upon which it relies.

48) The necessity test, as developed in the jurisprudence, requires more than a potential showing of substantial harm.

49) In addition to showing the existence of a special circumstance, such as non-payment of fees, Nicaragua must demonstrate that irreparable harm will result in substantiating the need for a security for costs order. Yet, its own words suggest that Nicaragua cannot meet this burden. Instead, Nicaragua contended that "an order for security for costs is necessary to protect its right to the reimbursement that it be awarded in this proceeding".[47] There is no support for this contention. The mere suspicion that a party may not recover a hypothetical future award of costs does not meet the irreparable harm or exceptional circumstances standard. Otherwise, security for costs would be granted in nearly every proceeding in which, as here, the state has expropriated Riverside's primary asset, contrary to the extraordinary nature of that relief.

50) In *Gabriel Resources v. Romania*,[48] the ICSID Tribunal reviewed the case law on necessity as follows:

> In *PNG v. Papua New Guinea*, the Tribunal explained that the term irreparable harm when properly understood means no more than the requirement to show a material risk of serious or grave damage to the

[46] *Tennant Energy v. Government of Canada*, Procedural Order No. 6, May 6, 2020, at ¶¶ 23-24 **(CL-302-ENG**). "The burden of proof rests on the Respondent as the Party making, or intending to make, an application for security for costs. The burden is not on the Claimant to prove that it has sufficient funds to meet an adverse costs order … the existence of a funding agreement alone would not be sufficient to grant security for costs. Instead, the Respondent would have to show 'exceptional circumstances.'"
[47] Application at ¶ 13.
[48] *Gabriel Resources Ltd. and Gabriel Resources (Jersey) v. Romania*, ICSID Case No. ARB/15/31, Decision on Claimants' Second Request for Provisional Measures of November, 22 November 2016, (**CL-0346-ENG**).

> requesting party.[49] The proper test should therefore be one of necessity arising from **a material risk of serious or grave damage to the requesting party**. In *City Oriente v. Ecuador*, it was held that the provisional measure is not merely to prevent irreparable harm but where "the harm spared the petitioner by such measures must be significant and that it exceeds greatly the damage caused to the party affected thereby."[50]

51) The *PNG v. New Guinea* ICSID Tribunal identified the need to consider the impact of the proposed measure upon both disputing parties in its test for irreparable harm:

> The assessment of whether the above requirements are satisfied, and in particular whether there is a material risk of serious or irreparable harm, and whether the requested measures are urgent and necessary to prevent that harm from occurring, must be made in light of the circumstances of the case, and particularly the likelihood that the injury will occur during the pendency of the arbitration. As noted above, when assessing whether the requirements of showing serious harm, urgency and necessity are satisfied, the Tribunal should also consider the respective hardships that either party would be subjected to if the provisional measures are granted.[51]

52) Nicaragua's position that there is a potential for substantial harm because Nicaragua has a risk of paying for costs arising from motions from Riverside.[52] This contention simply does not meet the high threshold for the necessity test.

53) 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.[53] Put simply, the potential harm

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[49] *PNG Sustainable Development Program Ltd. v. Independent State of Papua New Guinea*, ICSID Case No. ARB/13/33, Decision on the Claimant's Request for Provisional Measures, January 21, 2015, at ¶ 109 (**CL-0347-ENG**).

[50] *Gabriel Resources Ltd. and Gabriel Resources (Jersey) v. Romania*, ICSID Case No. ARB/15/31, Decision on Claimants' Second Request for Provisional Measures of November, 22 November 2016 at ¶72 (**CL-0346) (**emphasis added)**;** *PNG v. Papua New Guinea*, ICSID Case No. ARB/13/33, Decision on the Claimant's Request for Provisional Measures, 21 January 2015 at ¶ 109 (**CL-0347-ENG**)**;** *City Oriente v. Ecuador,* ICSID Case No. ARB/06/21, Decision on Revocation of Provisional Measures and Other Procedural Matters dated May 13, 2008, ("*City Oriente v. Ecuador*") at ¶72 (**CL-0348-ENG)**.

[51] *PNG Sustainable Development Program Ltd. v. Independent State of Papua New Guinea*, ICSID Case No. ARB/13/33, Decision on the Claimant's Request for Provisional Measures, 21 January 2015 at ¶122 **(CL-0347-ENG).**

[52] Application Reply at ¶23.

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

Nicaragua invokes, *i.e.*, the prospect of an unpaid costs award, is hypothetical and, in any event, reparable through the courts of enforcement.

54) The *Burimi* Tribunal held that mere financial difficulties are insufficient 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."[54] That same logic applies here.

55) The *RSM* Tribunal emphasized that an investor'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, which 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.[55]

56) If a state could demand security for costs anytime there was a risk that a potential costs award would not be paid, it would frustrate investors' access to justice. States could undermine the economic value of an investment by blocking its ability to generate cash flow and then demand that the less liquid investor post multi-million-dollar securities when those actions are tested on the ground that the investor lacks assets. This would enable states to benefit from their wrongdoing.

C. Access to Justice concern is critical.

57) 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.

58) 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.

59) Nicaragua's Application appears to have been prompted entirely because Riverside has received third-party funding through a contingency agreement.

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[54] *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).**

[55] *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).**

As noted below, the fact of third-party funding from external funders is not prohibited, whether via a contingency agreement or funding by a funder.[56] 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 worthy 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.

60) 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.

61) Nicaragua's strategy 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.

62) It is manifestly evident that **Nicaragua's Application not only is redundant, 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.

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

[56] 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**)

II. NICARAGUA HAS IGNORED THE EXCEPTIONAL CIRCUMSTANCES REQUIREMENT

64) Nicaragua fails to explain how it can meet the "exceptional circumstances" requirement but instead simply avoids the case law. To award security for costs, Tribunals have held that an additional element is needed to render the situation truly exceptional, such as a litigant with a history of non-compliance with cost orders. That is glaringly missing here.

65) As the Tribunal in *EuroGas v. Slovak Republic* explained:

> [T]he underlying facts in [the *RSM v. St. Lucia*] arbitration was 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.[57]

66) Further, the Tribunal in *Orlandini v. Bolivia* provided a series of examples of exceptional circumstances that might give rise to an order of security for costs:

> 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.[58]

67) In *RSM v. St Lucia*, exceptional circumstances could not be established merely based on an impecunious or a funded claimant; there must be a claimant with a proven history of non-compliance with orders.[59]

68) Nicaragua relies on the requirements to demonstrate necessity, urgency, and proportionality. Nicaragua cannot demonstrate the presence of these necessary elements, nor can Nicaragua convincingly demonstrate the

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[57] *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 (emphasis added) (**RL-0127-ENG**).

[58] *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, ¶143 (**CL-0293);** *Tennant Energy*, Procedural Order No. 6, at ¶24 (**CL-0302-ENG)**.

[59] *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).**

existence of the required exceptional circumstances justifying the extraordinary award of security for costs.

69) The exceptional circumstances necessity test is tailored to the context of security for costs; Riverside has focused on that test in its pleadings. Nicaragua has failed to establish that its security for costs application meets the requirements of necessity under exceptional circumstances.

70) Since Nicaragua cannot meet the exceptional circumstances test, it misconstrues Riverside's statements before this Tribunal regarding the exceptional circumstances test. In footnote 20 of its Reply Application, Nicaragua states in relation to the jurisprudence produced by Riverside in the Application Response is misstated. Nicaragua incorrectly states:

> Claimant's insistence that each of these examples should be treated as a necessary condition for an order of security for costs would make an order of security for costs functionally impossible: repeat claimants in investor-state disputes are rare and those few that exist tend to be multinational corporations whose ability to satisfy a costs award would rarely be in doubt.[60]

71) But this is not what Riverside stated. Nicaragua misstates Riverside's position, and foundationally misrepresents the jurisprudence constante on Security for Costs.

72) Riverside never stated that an applicant for Security for Costs must demonstrate all the potential "exceptional circumstances" situations to successfully obtain relief. Riverside said that an applicant had to demonstrate the existence of an exceptional circumstance and meet the other requirements, which include showing necessity and urgency. Riverside proved in the Application Response that Nicaragua failed to meet any of these circumstances. That situation was not remedied by Nicaragua's failure to address the issue responsibly in its Application Reply.

73) The *Tennant* Tribunal, citing *Orlandini v. Bolivia*, enumerated four different circumstances that would rise to the level of an "exceptional circumstance".[61] Nonetheless, Nicaragua has failed to meet every single one of these circumstances. Nicaragua cannot show that it meets **any** of the exceptional circumstance situations discussed in *Tennant* or *Orlandini*.

74) Nicaragua continued to misrepresent the jurisprudence constante. In a convoluted and absurd tangent, Nicaragua suggests that the case law

[60] Application Reply at footnote 20 on page 5.
[61] *Tennant Energy v. Canada*, Procedural Order No. 4 at ¶174 (**CL-0301-ENG)**.

dealing with failures to meet Tribunal orders only applies to parties who brought multiple investor-state claims. Nicaragua states:

> repeat claimants in investor-state disputes are rare, and those few that exist tend to be multinational corporations whose ability to satisfy a costs award would rarely be in doubt.[62]

75) Of course, only one of the references to exceptional circumstances has any possible relevance to such an argument. This is the circumstance to demonstrate that "(i) a claimant's track record of non-payment of costs awards in prior proceeding". The reference to prior proceedings does not narrowly mean prior investor-state claims, but a record of non-compliance in any prior litigation matter involving the claimant. The concept is to establish proclivity through an established record of non-compliance with court or tribunal orders. Such a circumstance is not present in Riverside.

76) In a massive leap of logic, Nicaragua wishes that the Tribunal simply ignore the exceptional circumstances test. For Nicaragua, the only relevant circumstance is Nicaragua's contentions of "abusive tactics" and "serious misconduct" on behalf of Riverside.[63]

77) Nicaragua contends that Riverside should not have an opportunity for this Tribunal to hear its case. Nicaragua opposes the motion practice and form of expression of Riverside. Even if Nicaragua's contentions were factual (which they are not), such measures could never constitute exceptional circumstances that would justify a $4 million security for costs order.[64]

78) Under Nicaragua's flawed reasoning, every pleading, submission, or communication by a disputing party would need to the evaluated to see if its content would be "abusive". For example, Riverside's successful opposition to Nicaragua's attempts to keep the identity of alleged wrongdoers in this claim secret would constitute an act of abuse. But merely expressing a contrary view that differs from Nicaragua is not a circumstance of abuse.

79) Nicaragua has been a party to other investment treaty claims. It is aware that motions and submissions are a part of the investment treaty arbitration process under ICSID and CAFTA. If Nicaragua's approach were to be adopted, then the foundational right of a disputing party to have their case fully heard would be unduly truncated. This would result in a situation potentially contrary to ICSID Convention Article 52 due to the protected and

[62] Application Reply at footnote 20 on page 5.
[63] Application Reply at ¶ 13.
[64] Application Reply at ¶ 13.

foundational nature of the rights of allowing the disputing parties to present their case and to be fully heard.

80) In its Reply Application, Nicaragua claims that Riverside has engaged in motion practice during this arbitration and this "keeps unreasonably multiplying Nicaragua's costs".[65] Motion practice is standard in arbitration, and there is nothing that gives rise to exceptional circumstances through recourse to motions. Indeed, Nicaragua relies upon motion practice itself with this tardy Application. Further, procedural issues are commonly the basis of submissions. In this arbitration, the parties recently had to address a procedural submission with respect to the holding of remote hearings. Further, Nicaragua had to deal with such procedural submissions in the recent *Lopez-Goyne Family Trust v. Nicaragua* claim at ICSID, [66]where the CAFTA Tribunal held a remote hearing. Procedural issues arise, and unscheduled submissions are an expected part of that process filing observations and submissions not fixed initially on the procedural schedule are not "abnormal" as colorfully characterized by Nicaragua in its Application Reply.[67] This is the everyday and ordinary arbitration process.

81) Nicaragua's unsubstantiated allegations are aimed at Riverside's right to be heard. Nicaragua repeatedly has complained about the length of Riverside's pleadings when it should focus on its content- its wrongful conduct. Likewise, Nicaragua complains about Riverside's right to bring motions and make submissions. Several Annulment Committees have discussed categories of fundamental procedural rules, which include the right to be heard.[68]

82) Riverside has a right to be heard. Nicaragua's discontent in having its wrongful conduct brought to light does not justify a $4 million security for costs order.

83) Nicaragua says that a default on payment of cost is "likely."[69] Yet, this likelihood is not supported, and the possibility that a party may not be able to recover a hypothetical award of costs in its favor does not amount to irreparable harm (nor exceptional circumstances). Otherwise, security for

[65] Application at ¶ 15.
[66] *The Lopez-Goyne Family Trust and others v. Republic of Nicaragu*a, Procedural Order No. 3, October 22, 2021, ICSID Case No. ARB/17/44 (**CL-0349-ENG).**
[67] Application Reply at ¶ 6.
[68] *Saur International S.A. v. Argentine Republic,* Decision on the Application for Annulment of the Republic of Argentina (ICSID Case No. ARB/04/4) December 19, 2016 at ¶ 182 **(CL-0343-SPA);** *Iberdrola Energia v. Republic of Guatemala,* Decision on the Application for Annulment (ICSID Case No. 09/5) at ¶ 105 (**CL-0342-SPA);** *Lemire v. Ukraine,* Decision on Annulment July 8, 2013 at ¶ 263 referenced in C Schreuer, *Commentary on the ICSID Convention* (Third Edition) Cambridge University Press, Article 52 at ¶ 345 (**CL-0336-ENG).**
[69] Application at ¶ 13.

costs would be granted in nearly every proceeding, contrary to the extraordinary nature of that relief.

B. Access to Justice must not only be for the Rich and Powerful

84) As a general principle of international law, no one is entitled to rely upon their own bad conduct.[70] Nicaragua took steps to financially wipe out Riverside's investments in Nicaragua. It then attempts to remove Riverside's access to justice because Nicaragua is not convinced that Riverside is rich enough to deserve justice. Justice is owed to all – rich or poor.

85) Access to justice concerns arise from security for costs applications. Justice in international investment arbitration cannot be confined to the wealthy 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 acute when, as in the present case, Riverside has been adversely affected because of Nicaragua's unlawful actions.

86) Astonishingly, Nicaragua contends that impecuniosity is transformed into an exceptional circumstance "when combined with third-party funding."[71] Nicaragua's position is absurd. Nicaragua suggests that impecuniosity is fine if the claimant is denied access to justice or if the claimant is not impecunious.

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

88) According to the *Rawat* Tribunal, impecuniosity alone was deemed an exceptional circumstance. The *Rawat* Tribunal stated:

> We do not find that Rawat's impecuniosity is sufficient to create the exceptional circumstances.[72]

89) The *Dirk Herzig* Tribunal arrived at the same conclusion, finding that extraordinary circumstances "go beyond mere uncertainty of a claimant being able to meet an adverse costs award."[73]

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[70] Reply Memorial at ¶ 615, 1516-1520; Bin Cheng, *General Principles* at p. 149 (**CL-0170-ENG**) in this circumstance, he references the *Montijo Case* (1875) 2 Int. Arb. 1421 at 137 on page 149 of his treatise. **(CL-0251-ENG);** *See also* Riverside's Application Response at ¶ 290.
[71] Application Reply at ¶35.
[72] Dawood *Rawat v. Republic of Mauritius*, Order Regarding Claimant's and Respondent's Request for Interim Measures, January 11, 2007, at ¶145 **(CL-0309-ENG)**.
[73] *Dirk Herzig v. Turkmenistan*, Decision on Security for Costs, January 27, 2020 at ¶ 82 **(RL-0122-ENG)** (discussing *RSM v. Lucia* and other cases).

90) Melva Jo Winger de Rondón stated in her Reply Witness Statement that Riverside has complied with Tribunal orders, paid all amounts of time, and complied with all court orders.[74] The record confirms that it is true. Similarly, there is no evidence that Riverside has hidden its assets or acted in nonconformity with the orders of this Tribunal. There is no evidence that Riverside will not comply in the future.

91) Riverside has said that it has limited financial resources. It has been applying those resources to timely payments for advance fee deposits. It has met all those payments on time as ordered throughout this proceeding.

92) Nicaragua has not indicated that Riverside will not comply with Tribunal orders. On the contrary, Melva Jo Winger de Rondón has testified in her Reply Witness Statement that Riverside will continue to do its best to comply with the orders of this Tribunal.[75]

93) Nicaragua does not need security for costs. This Tribunal should protect access to justice and reject Nicaragua's application.

94) The exceptional circumstances that tribunals have deemed necessary to grant security for costs do not exist in this Arbitration. Nicaragua has not been able to meet its burden. The Application must be dismissed.

C. Conduct of Riverside and its counsel

95) Nicaragua alleges that Riverside has engaged in bad faith, but there is no proof of any bad faith.[76] Nicaragua attempts to convert unsubstantiated matters regarding minor procedural issues into significant matters that could justify an order for security for costs.[77] Simply, there are no demonstrable actions Riverside has taken in bad faith.[78]

96) Nicaragua provides no mention in its Reply Application of its foundational complaints in its Application over Riverside's supposed failure to comply with Tribunal orders on document production. Riverside demonstrated that it was fully compliant and that Nicaragua had failed to fairly represent the production and the obligations of the order to this Tribunal.[79] Not only does Nicaragua ignore Riverside's thorough response, but Nicaragua continues with its untimely new document request in Paragraph 49 (d) seeking the

[74] Reply Witness Statement of Melva Jo Winger de Rondón at ¶ 47 (**CWS-08**).
[75] Reply Witness Statement of Melva Jo Winger de Rondón at ¶ 48 (**CWS-08**).
[76] Application Reply at ¶ 3 which states "Riverside and its counsel have also unnecessarily escalated Nicaragua's costs through bad faith argumentation as well as procedural misconduct". See also the Application at ¶¶ 24- 46.
[77] Application Reply at ¶¶ 16-19.
[78] Application Response at ¶172.
[79] Application Response at ¶¶ 37, 66-115.

production of documents not ordered by the Tribunal previously and information that was already ordered but not in Riverside's possession after Riverside's made diligent searches.[80] Indeed, in paragraph 49 of her Reply Witness Statement, Melva Jo Winger de Rondón stated:

> In all respects, Riverside diligently complied with the Tribunal's production orders. Riverside produced all the documents in its possession, other than privileged documents, which were identified in a privilege log."

97) The document production process is discussed in detail in her Reply Witness Statement. After reviewing the process in detail, Mrs. Rondón states in paragraph 70:

> Again, Riverside produced whatever INAGROSA documents that it could locate and always did so to the best of the corporation's ability.

98) Nicaragua has ignored Riverside's detailed response on document production in this Application and the detailed testimony on such matters already before this Tribunal. In such a circumstance, Nicaragua should have modified its relief by removing such a request. Again, this irresponsible conduct is a needless waste of the Tribunal's resources and a matter worthy of consideration in the costs phase.

99) Nicaragua now aggressively suggests that Riverside has acted in bad faith in the following ways.

a) First, by bringing a motion in November 2022 when Nicaragua alleges that Riverside knew of the Judicial Order in July 2022.[81]

b) By alleging that a transaction done by Riverside in 2018, more than two years before this claim was registered with the ICSID, constituted an attempt to "make Riverside Judgment-proof."[82]

c) By allegedly improperly noting that Nicaraguan officials are subject to sanctions that affect their ability to enter the United States.[83]

d) By disclosing its concerns about potential errors in document production and filing an erratum to correct minor irregularities in the comprehensive authorities and document indices in this Arbitration.[84]

[80] Application Response at ¶¶ 80-107.
[81] Application Reply at ¶ 45.
[82] Application Reply at ¶ 41.
[83] Application Reply at footnote 9 on page 3.
[84] Application Reply at ¶ 16 and footnote 33 on page 8.

e) By claiming that Riverside's revised damages demonstrate a lack of proper conduct[85]; and

f) By raising incorrect and irrelevant issues from a non-related NAFTA claim.[86]

These contentions are false and without foundation.

100) Nicaragua's provides a summary dismissal of the substantial evidence presented by Riverside about the timing of Riverside's awareness of the Judicial Order in the Application Response is noteworthy. Riverside, through its local legal Managua counsel at Arias, has provided conclusive evidence of being informed about the court order in November 2022.[87] Furthermore, Melva Jo Winger de Rondón explicitly stated that she was unaware of the Judicial Order prior to the October 2022 filing of the Memorial and that the issue of Riverside's discovery was brought to the Tribunal's attention promptly after Riverside became aware of the Judicial Order. [88]

101) Mrs. Rondón has testified that Riverside cannot use HSF as collateral to raise money because its title has been frozen. [89] This statement does not say at what point Riverside considered obtaining financing. The statement was that the freeze upon the lands had affected Riverside's possibility to raise funds on the value of the lands as collateral as INAGROSA had done previously when it obtained a $1 million loan to build employee housing.

102) Indeed, this Arbitration is costly, and there are many disbursements to finance to carry out the claim and other costs that Riverside would need to address to maintain its business and carry out this Arbitration. There are many reasons Riverside would consider having recourse to finance against the asset value of HSF in 2023. None of these needs support the baseless and contorted interpretation of her testimony currently asserted by Nicaragua in its shameful efforts to justify any part of this meritless Application.

103) Nicaragua's attempt to tarnish the reputable business legacy of the late Melvin Winger is unfounded and misleading. The accusation that Mr. Winger

[85] Application Reply at ¶ 30.
[86] Application Reply at ¶¶ 29-30.
[87] Application Response at ¶¶ 128-129 Letter from Uriel Balladares to Appleton & Associates International Lawyers, December 1, 2022, at p. 1 (**C-0258-ENG**).
[88] Witness Statement of Melva Jo Winger de Rondón. -Reply – ENG at ¶ 38 (**CWS-08**). She states: "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".
[89] Witness Statement of Melva Jo Winger de Rondón – Reply - ENG at ¶ 30. (**CWS-08**). She states, "Nicaragua froze our title in Hacienda Santa Fé. The freeze effectively prevented us from raising funds on that collateral to fund our arbitration.".

extracted $55,000 from Riverside in 2018, allegedly to render the company judgment-proof before its CAFTA claim filing in March 2021, lacks substance and legal relevance.[90] As previously elaborated, Riverside's primary asset was its stake in INAGROSA, underpinned by the value of the HSF lands, estimated at $98 million. The disputed $55,000 transaction, occurring more than a year before the Claim was registered, represents a negligible fraction of the company's worth, less than one-tenth of one percent, making it implausible to suggest any material impact. This is not like the transactions at issue in extraordinary circumstances where most of the company's assets were moved during the arbitration. Here, the majority of Riverside's assets are involved in this arbitration claim and represented by the fair market value of the land and business at HSF, given that the underlying business has been destroyed. The ordinary course transaction, occurring well before the arbitration started, could never meet the exceptional circumstance test.[91]

104) Nicaragua contends that Riverside provided "absurd" information to the Tribunal in an email of October 13, 2023, identifying that government official fact witnesses would be subject to US Sanctions.[92] This is not a misleading statement. This matter has been canvased in detail within Riverside's November 20, 2023 observations on the Remote Hearing and needs not be repeated here in detail.[93] However, US Presidential Proclamation 10309 [94] (discussed in Riverside's Remote Hearing Observations) makes clear that the US suspension of entry visas applies to a broad class of Nicaraguan government officials, which certainly includes a large number, if not all, of the eight government officials who are current fact witnesses for Nicaragua.[95]

105) Again, Nicaragua's personal attacks are made without considering the facts. Astonishingly, Nicaragua appears to feign ignorance of the wide scope of this US Presidential Proclamation. Still, it would be hard to believe that Nicaragua (represented here in this Arbitration by its Attorney General and its US-based counsel) could be unaware of this barrier to entry for its officials. Without any

[90] Application Reply ¶ 41 and footnote 68 on page 17.
[91] **I**n paragraphs 41 and 42 of its Reply Application, Nicaragua strains to compare this situation to the situation in the NordStream 2 claim. *NordStream 2 AG v. The European Union,* UNCITRAL, Procedural Order No. 11, July 14, 2023, ¶ 94 (**RL-0124**). That claim was heard under different procedural rules, and the circumstances involving the application of international sanctions which froze the company's bank accounts and a pending corporate bankruptcy procedure in Switzerland. It appeared possible that the arbitration would not proceed and also that NordStream 2 might become bankrupt. These circumstances are entirely dissimilar in every respect to the facts in the current claim. The NordStream 2 award is unhelpful and irrelevant to the consideration before this Tribunal.
[92] Application Reply at ¶ 7 and footnote 9 referring to an email from Barry Appleton to the Tribunal of October 13, 2023 (**R-0134-ENG**).
[93] Investor's Observations on Remote Hearings at ¶ 68-82.
[94] Proclamation 10309, Suspension of Entry as Immigrants and Nonimmigrants of Persons responsible for Policies or Actions that Threaten Democracy in Nicaragua, Office of the Federal Register, National Archives and Records Administration, November 16, 2021 (**C-0690-ENG**) (Proclamation 10309).
[95] Proclamation 10309 at p. 1 **(C-0690-ENG).**

doubt, Nicaraguan government officials who have already presented evidence before this Tribunal are ineligible for entry to the United States because of US sanctions that are in effect.

106) Nicaragua's assertion that Riverside's approach to document production and authority indices constitutes wrongful conduct amounting to an exceptional circumstance is entirely unfounded and lacks merit.[96] In any complex legal claim involving hundreds of thousands of pages of documents, minor discrepancies are not only likely but expected. Riverside has demonstrated due diligence and responsibility by proactively engaging with opposing counsel to resolve any potential issues related to the non-receipt of documents. Furthermore, Riverside has conscientiously informed the Tribunal of necessary corrections to the authorities and exhibits indices. This proactive approach is intended to avert future complications from perpetuating these minor errors in subsequent submissions or the Tribunal's final order. Such rectifications are proper and not a cause of inefficiency but a reflection of professional responsibility.

107) Riverside's actions in this matter are aligned with best practices in professional legal conduct. They indicate a commitment to transparency and accuracy in the arbitration process. Such responsible behavior, far from being exceptional in a negative sense, should be viewed as constructive and in the best interest of a fair and efficient resolution of the claim. Therefore, these actions by Riverside cannot, under any reasonable interpretation, be construed as a breach of the standard for "exceptional circumstances."

108) In its Reply Memorial, Riverside responsibly adjusted its damages claim downwards.[97] This revision was based on the professional judgment of damages expert, Vimal Kotecha, who decided to incorporate the findings of Nicaragua's avocado expert, Dr. Odilo Duarte.[98] Mr. Kotecha's acceptance of Dr. Duarte's evidence on avocado yields represents a significant step towards narrowing the issues in dispute and exemplifies professional conduct in arbitration proceedings. Having experts agree on positions and the closure of issues in the second round of pleadings is appropriate and professional. This decreases speculation regarding the commodity revenue calculation, with the effect of having more agreement on the reliability of the damages forecast.

109) The decision to align with the opposing expert's findings on avocado yields directly impacts the projected annual revenues of INAGROSA, consequently leading to a lower damages assessment. By incorporating Nicaragua's

[96] Application Reply at ¶ 9.
[97] Reply Memorial at ¶¶ 241, 2086, 2158 (b).
[98] Expert Reply Damages Report at Chart 5 on page 60 (**CES-04).** The Reply Damages reports place a value on the HSF land, before interest, of $97,934,569.

expert testimony on this specific aspect, Riverside significantly reduces the level of speculation involved in the commodity revenue calculation. This approach enhances the overall reliability and credibility of Riverside's damages forecast. Mr. Kotecha's decision, in this regard, should be seen as a mark of professional responsibility and sound judgment. It is difficult to understand how Riverside's actions, aimed at achieving a more accurate and consensual understanding of the damages, could be misconstrued as a breach of the "exceptional circumstances" standard. On the contrary, these actions demonstrate Riverside's commitment to a fair and rational resolution of the dispute.

110) Further, Nicaragua absurdly contends in paragraph 30 of the Application Reply that having points of agreement between the experts "will significantly increase Nicaragua's legal and damages expert fees and costs, as Nicaragua is now forced to address a fundamentally new calculation of damages". This contention is nonsensical. The damages presented by Nicaragua will, in any event, require recalculation for the reasons set out in the Richter Reply Expert Damages Report which demonstrated substantive and widespread errors in Nicaragua's original damages report. Nicaragua will incur the same, or fewer costs, as a result of points of agreement between the experts.

111) Lastly, Nicaragua's effort to impugn Riverside's counsel by referencing a separate and unrelated NAFTA claim settlement is a blatant attempt to distract and mislead.[99] The issue in the NAFTA claim pertained to a global corporation's selection of a subsidiary as a claimant in a regulatory dispute, a matter entirely unrelated to this CAFTA arbitration. Such matters are unrelated to Riverside in any respect. This tactic bears no legal or causal relation to Riverside's longstanding investments in Nicaragua through INAGROSA, which spanned nearly two decades. No issue alleged by Nicaragua here affects Riverside's capacity to assert a claim in this arbitration. Nicaragua introduced these matters as part of a broader strategy to undermine Riverside's position. But this frivolous issue warrants no further comment beyond noting its salience to the upcoming discussion of costs after this claim.

D. Summary of the Law

112) Nicaragua's Application does not meet the exceedingly high threshold for the granting of an award 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

[99] Application Reply at ¶¶ 28-29.

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 cost 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.

113) 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.

114) 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.

115) 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 prejudge the merits but to address the conduct issue that must be considered to manage this Application.

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

E. Nicaragua's Bank Guarantee remains flawed.

117) Nicaragua continues to demand that the Tribunal issue an award for a bank guarantee in a form it proposes in Annex I even though Riverside demonstrated that the document filed In Annex I is hopelessly defective and inadequate for this purpose.

118) The proposed instrument is defective and not fit for its purpose. From all considerations, this bank guarantee is not a fair option. It must be rejected in its entirety.

119) In its Application Reply, Nicaragua proposes a new remedy to request non-parties to the Arbitration provide personal guarantees to Nicaragua.[100] This proposal suffers from the same deficiency as Nicaragua's other proposal.

120) Mrs. Rondón, in paragraph 47 of her Reply Witness statement, confirmed that Riverside had complied with tribunal orders to date and would continue to do so to the best of its ability.[101]

121) As noted above, Nicaragua has taken a form of legal title over the land itself already. There is no need for the order, and there is no urgency given that Nicaragua has this security in its possession. Even if Nicaragua did not have the title, the knowledge of such a valuable asset means that there is no need for a bank guarantee, or any other form of relief. However, given Nicaragua's impediments on title, no bank would issue a guarantee.

122) Nicaragua has introduced additional terms and requirements on the timing and effect of a cost order in Paragraph 49 in the Relief section of its Application Reply. Riverside opposes these provisions which are impractical and unworkable.

123) Further, Riverside opposes the continuation of Nicaragua's demand for a new document request in Paragraph 49 (d) for the reasons discussed in detail above.

124) In the absence of meeting the requirements, there is no benefit to reviewing speculative approaches. Nicaragua cannot meet its burden of proof for an award of security for costs; thus, this discussion of Nicaragua's defective guarantee proposal is moot.

[100] Application Response at ¶ 49 (ii).
[101] Witness Statement of Melva Jo Winger de Rondón Reply- ENG at ¶ 47 **(CWS-08).**

III. CONCLUSION

125) This Application is a blatant effort to strategically exhaust Riverside's scarce resources, which critically coincided with the filing of the Reply Memorial. As previously mentioned, Nicaragua's approach in this Arbitration is attrition. The extent of Riverside's response to the Application for Security for costs is indicative of the quantity and complex nature of the issues raised by Nicaragua.

126) **Nicaragua's Strategic Attempt**: This Application appears to be an attempt to strategically deplete Riverside's limited liquid resources, especially given the critical timing of the Reply Memorial filing. Nicaragua's approach in this Arbitration focused on a strategy of attrition with repeatedly misleading counter-narratives, which has resulted in a disproportionately lengthy response from Riverside, indicative of the complex and voluminous issues raised. Such applications can act as an economic barrier, preventing access to justice for claimants with legitimate claims but without immediate financial means.

127) Nicaragua's tactics are excessively burdensome, seemingly aimed more at procedural maneuvering than substantive engagement. This approach forces Riverside to provide a comprehensive counter to avoid the prejudicial impact of a potential security for-costs award.

128) **Lack of Exceptional Circumstances**: Nicaragua contends its entitlement to security for costs, based on an assumed non-compliance by Riverside with potential future orders. However, tribunals typically reserve such orders for situations with proven "exceptional circumstances"[102], which are notably

[102] *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), 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

absent in this case. Nicaragua's grievances do not constitute the exceptional circumstances required for such an extraordinary motion. Their claims primarily consist of unfounded objections and disparaging remarks, failing to meet the burden of proof for establishing exceptional circumstances or necessity for the award.

129) **Proportionality Test Failure**: The test for proportionality requires balancing the benefits to Nicaragua against the potential detriment to Riverside. The significant harm to Riverside far outweighs any perceived benefit to Nicaragua, demonstrating Nicaragua's failure to meet the proportionality standard.

130) **Absence of Urgency**: Nicaragua cannot demonstrate the urgency of its Application. This is even more astonishing given that Nicaragua has never had any risk of an unsatisfied costs award, considering INAGROSA's valuable property at HSF. The fact that Nicaragua covertly assumed exclusive title over HSF from INAGROSA, ensuring control over this valuable property, further negates any urgent claim.

131) **Expert Evidence on Title Transfer**: Expert Renaldy J. Gutierrez confirmed in his report that Nicaragua legally assumed exclusive title to HSF after the Judicial Order. [103] This evidence is corroborated by official property registry documents. [104]

132) **Contradictory Claims by Nicaragua**: Despite clear expert testimony and evidence from property records, Nicaragua denies holding title to HSF in its Application Reply. In paragraph 46 of its Application Reply, Nicaragua contends that "Nicaragua does not hold title to Hacienda Santa Fé. In the face of government property registry documents and an expert legal opinion, it is insufficient for Nicaragua to issue a denial without evidence. Nicaragua's contradictory claim is in direct opposition to the documented evidence and casts further doubt on Nicaragua's eroding credibility.

133) **Nicaragua's Misrepresentation**: Nicaragua is represented by its Attorney General in this Arbitration. Indeed, if Nicaragua had evidence to support its position that was contrary to the evidence submitted by Expert Gutierrez, Nicaragua would have provided it with its Application Reply. As a result of recent changes on October 31, 2023, the Attorney General is now in

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**).

[103] Expert Statement of Renaldy J. Gutierrez at ¶ 76-79 **(CES-06**).

[104] Expert Statement of Renaldy J. Gutierrez at ¶ 76-79 **(CES-06**) relying on Literal Certificate of Hacienda Santa Fé property title showing an incomplete case file number issued by the Jinotega Property Registry, October 24, 2022 (**C-0268-SPA**).

complete control of the property registry office.[105] Given the recent changes placing the Attorney General in control of the property registry office, if contrary evidence existed, Nicaragua would likely have presented it. The absence of such evidence and the reliance on misrepresentations in their arguments highlight the shortcomings of Nicaragua's position.

134) **Lack of Foundation for Application**: Nicaragua's Application is an extensive airing of grievances without meeting the standard for exceptional circumstances. These complaints do not warrant security for costs.

135) **Unjust Financial Hardship on Riverside**: Imposing additional financial burdens on Riverside could jeopardize its ability to pursue its case, a concern not adequately addressed by Nicaragua.

136) Accordingly, the Respondent's request for Security for Costs in the Application should be rejected as Nicaragua cannot meet the requirements to successfully receive an award of security for costs, and the interests of justice and due process mitigate against an award of security for costs.

137) Nicaragua's Application fails to meet the security for costs award requirements. An order to pay security for costs is granted only in "exceptional circumstances." Nicaragua has not been able to demonstrate the presence of one exceptional circumstance. Further, Nicaragua has not proven urgency or necessity.

1. Security for Costs Requirements Not Met

138) Nicaragua fails to meet the criteria for an award of security for costs.

a) Justice and due process principles argue against such an award.

b) Nicaragua's Application does not satisfy the criteria for an award of security for costs. The absence of demonstrated exceptional circumstances, coupled with a lack of urgency or necessity, leads to the conclusion that the Application should be rejected.

c) Nicaragua's Application for Security for Costs must be dismissed.

[105] On November 1, 2023, the La Prensa newspaper discussed legislative changes to transfer powers from the Supreme Court over the Public Real Estate and Mercantile Registries. See La Prensa. "The transfer of the public registry to the Attorney General's office means that the dictatorship will be able to confiscate directly." (**C-0666-SPA-ENG).**

139) 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 24th day of November 2023.

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Counsel for Riverside Coffee, LLC.