

**INTERNATIONAL CENTRE FOR SETTLEMENT OF INVESTMENT DISPUTES**

**Riverside Coffee, LLC**

**v.**

**Republic of Nicaragua**

**(ICSID Case No. ARB/21/16)**

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**PROCEDURAL ORDER No. 9**

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***Members of the Tribunal***

Dr. Veijo Heiskanen, President of the Tribunal

Mr. Philippe Couvreur, Arbitrator

Ms. Lucy Greenwood, Arbitrator

***Secretary of the Tribunal***

Ms. Ana Constanza Conover Blancas

22 April 2024

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**I. PROCEDURAL BACKGROUND**

1. On 9 March 2024, the Respondent filed its Rejoinder on Jurisdiction and the Merits (the “**Rejoinder**”), accompanied by four expert reports, twelve witness statements and a consolidated index of exhibits and legal authorities.
2. On 26 March 2024, the Claimant filed an “Investor’s Motion on Procedural Issues” (the “**Motion**”), seeking relief from the Tribunal concerning alleged “procedural anomalies” arising from the Respondent’s Rejoinder. The Motion included a request for the Tribunal to suspend the deadline of 5 April 2024 for the Parties to submit comments on the U.S. non-disputing party submission of 15 March 2024 pursuant to CAFTA Article 10.20.2, pending the Tribunal’s decision on the Claimant’s Motion.
3. By letter of the same date, the Respondent requested that the Tribunal strike the Claimant’s Motion, on the basis that there was “nothing improper” about the arguments and the supporting exhibits in the Rejoinder, and that the Claimant could respond to the Respondent’s arguments at the upcoming hearing and in post-hearing submissions (the “**Letter**”).
4. Also on 26 March 2024, the Tribunal acknowledged receipt of the Motion and of the Respondent’s Letter. The Tribunal took note of the Respondent’s initial comments and invited it to respond to the Motion by 5 April 2024, in view of the length of the Claimant’s submission and the impending Easter holiday period. In addition, the Tribunal informed the Parties that the deadline for the Parties’ comments on the U.S. non-disputing party submission was suspended, pending the Tribunal’s decision on the Motion.
5. On 4 April 2024, the Parties informed the Tribunal of their agreement to extend the deadline for the filing of Nicaragua’s response to the Claimant’s Motion to not later than 5 p.m. on 8 April 2024. On 5 April 2024, the Tribunal took note of the Parties’ agreement and granted the requested extension.

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6. On 8 April 2024, the Respondent filed a response to the Motion submitted by the Claimant (the “**Response**”).
7. On 9 April 2024, the Claimant requested leave from the Tribunal to file a responsive filing to the Response on 15 April 2024.
8. On the same date, the Tribunal granted the Claimant’s request and set the time limit for the Claimant to comment on the Respondent’s Response by 12 April 2024. The Tribunal provided an opportunity for the Respondent to comment on the Claimant’s submission by 16 April 2024.
9. In accordance with the timetable adopted by the Tribunal:
  - (a) On 12 April 2024, the Claimant filed its reply to the Respondent’s Response (the “**Motion’s Reply**”); and
  - (b) On 16 April 2024, the Respondent filed its rejoinder to the Claimant’s Reply (the “**Motion’s Rejoinder**”).
10. Having deliberated, the Tribunal issues this procedural order setting out its reasoned decision on the Claimant’s Motion.

## **II. THE PARTIES’ REQUESTS FOR RELIEF**

11. The Claimant requested the following relief in its Motion:<sup>1</sup>

*202) Riverside seeks the following relief:*

*a) An immediate suspension of all deadlines set under the current procedural calendar while considering this motion.*

*b) An order striking from the record the following:*

*i) the Witness Statement of Favio Dario Enriquez Gomez (RWS-21) and all references to this evidence in this arbitration.*

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<sup>1</sup> Motion, ¶¶ 202-204.

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ii) *Video exhibits R-195 and R-231 and all references to this evidence in this arbitration.*

iii) *Photo exhibit R-232 and all references to this evidence in this arbitration.*

iv) *Nicaragua's arguments and evidence that were not addressed in the Counter-Memorial and raised for the first time in the Rejoinder Memorial, including, but not limited to, arguments on hydrology and avocado import regulation, CAFTA Annex II reservations, national treatment, MFN Treatment, CAFTA Article 10.5 and 10.7, non-precluded measures under CAFTA Article 21, the CAFTA War Losses clause in Article 10.6, the application of CAFTA, shareholder reflective loss, and the introduction of new government documents.*

203) *Alternatively, or in combination with the relief requested in paragraph b above, an order that Riverside be granted leave to file a further responsive pleading to permit the consideration of Nicaragua's new arguments and evidence, including leave for Riverside to file responsive evidence on matters raised by Nicaragua for the first time in the Rejoinder. Such leave to include permission to file new evidence, including evidence from experts and witnesses that are responsive to issues raised in the Rejoinder Memorial.*

204) *An order providing a revised procedural calendar issued after consultation with the parties and the Tribunal.*

12. The Claimant updated its request for relief in its Motion's Reply, as follows:<sup>2</sup>

191) *The principles of equality among disputing parties, the principe du contradictoire and equality of arms necessitate a striking order from the Tribunal or alternatively or in combination that Riverside be afforded the opportunity to contest Nicaragua's recurrent instances of inaccuracies, both in its Response to this Urgent Procedural Motion, and in those new arguments added at the last minute in its Rejoinder that addressed issues first raised in Riverside's Memorial.*

192) **Striking of Untimely Arguments and Evidence:** *Riverside urges the Tribunal to strike Nicaragua's untimely defenses and evidence introduced in its Rejoinder Memorial. These were presented at a juncture preventing Riverside from adequately responding, thereby*

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<sup>2</sup> Motion's Reply, ¶¶ 191-201.

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*violating the procedural principle of equality of arms and the right to be heard.*

**193) Permission for Riverside to Present Additional Evidence and Arguments:** *Should the Tribunal decide against the exclusion of Nicaragua’s new material, Riverside seeks permission to file a supplemental responsive pleading. This would allow Riverside to address the new arguments and evidence Nicaragua introduced, ensuring Riverside’s right to a full and fair opportunity to present its case.*

**194)** *As noted above, Riverside will require the opportunity to comment and file additional observations regarding Exhibit R-0177 and upon other topics addressed in this Urgent Procedural Motion.*

**195) Adjustment to Procedural Timelines:** *In light of the late introduction of Nicaragua’s new evidence and arguments, Riverside requests an adjustment to the procedural timelines to afford adequate time for the preparation of any necessary supplemental filings and a thorough and equitable consideration of all arguments and evidence by the Tribunal.*

**196) Unopposed issues** - *This Tribunal should issue an order with respect to all areas where Nicaragua defaulted in this Urgent Procedural Motion by failing to make any objection. They are:*

<b>Argument in Urgent Motion</b>	<b>Absence of opposition</b>	<b>Proposed Remedy</b>
<b>MFN - Motion § III.I</b> (¶¶110 to 131).	<i>1. Nicaragua’s only opposition was with respect to the late addition of an argument regarding the Annex II-Ni-6 social services reservation in Urgent Motion paragraph 62. Nicaragua did not address the additions of new MFN general defenses addressed in the Urgent Motion in paragraph 65 and footnote 28. These expansive and new defense arguments were untimely and addressed issues first raised in the Memorial.</i>	<i>The new defense should be struck or alternatively, Riverside should be granted leave to respond with evidence and argument to the CAFTA Article 10.3 issue (Urgent Motion at ¶¶84, 202-203).</i>

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	<p>2. <i>Nicaragua made no opposition to Riverside’s objection to its assertion of new defenses to the applicability of the Russian Treaty under MFN as noted in Urgent Motion paragraph 94. There was no such defense made in Nicaragua’s defense in the Counter-Memorial. This was an entirely new line of defense.</i></p>	
<p><b>CAFTA Article 10.5</b> -Motion § III.E (¶¶79 -82).</p>	<p><i>Nicaragua made no opposition to Riverside’s objection to its assertion of new Full Protection and security defense regarding police non-performance.</i></p>	<p><i>The new defense should be struck or alternatively, Riverside should be granted leave to respond to the CAFTA Article 10.5 issue (Urgent Motion at ¶¶ 84, 202-203).</i></p>
<p><b>War Losses Clause</b> (Art 10.6) Motion § III.G (¶¶93-98).</p>	<p>1. <i>Nicaragua made no opposition to Riverside’s objection to its assertion of the application of the Annex II-Ni-6 reservation as an operative defense for police non-performance.</i></p> <p>2. <i>Nicaragua made no opposition to Riverside’s objection to its assertion of new defenses to the applicability of the Russian Treaty under MFN as noted in Urgent Motion paragraph 94. There was no such defense made in Nicaragua’s defense in the Counter-Memorial. This was an entirely new line of defense.</i></p>	<p><i>The new defense should be struck or alternatively, Riverside should be granted leave to respond to the CAFTA Article 10.6 issue (Urgent Motion at ¶¶98, 202 and 203).).</i></p>
<p><b>Essential Security Interests</b> (Art 21.1)</p>	<p>1. <i>Nicaragua made no opposition to Riverside’s objection to its assertion of</i></p>	<p><i>Riverside should be granted leave to respond to the CAFTA Article</i></p>

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<p><i>Motion § III.G (¶¶99-109).</i></p>	<p><i>the application of the Annex II-Ni-6 reservation as an operative defense regarding police non-performance.</i></p> <p><i>2. Nicaragua made no opposition to Riverside's objection to its assertion of new defenses to the applicability of the Russian Treaty under MFN as noted in Urgent Motion paragraph 94. There was no such defense made in Nicaragua's defense in the Counter-Memorial. This was an entirely new line of defense.</i></p>	<p><i>21.1 issue as set out in the Urgent Motion in paragraphs 107-109 and 203.</i></p>
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197) As noted in the Urgent Motion, Riverside seeks to strike Nicaragua's arguments and evidence that were unaddressed in the Counter-Memorial and raised for the first time in the Rejoinder Memorial, including, but not limited to, arguments on

- a. Hydrology and avocado import regulation,*
- b. CAFTA Annex II reservations,*
- c. National treatment,*
- d. MFN Treatment,*
- e. CAFTA Articles 10.5 and 10.7,*
- f. Non-Precluded measures under CAFTA Article 21.*
- g. the CAFTA War Losses clause in Article 10.6,*
- h. the application of arguments regarding CAFTA, shareholder reflective loss, and*
- i. the introduction of new government documents.*

198) Alternatively, or in combination with the striking of arguments, Riverside seeks an order that Riverside be granted leave to file a further responsive pleading to permit the consideration of Nicaragua's new arguments and evidence, including leave for Riverside to file responsive evidence on matters raised by Nicaragua for the first time in the Rejoinder. Such leave to include permission to file new evidence, including evidence from experts and witnesses that are responsive to issues raised in the Rejoinder Memorial.

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199) *Riverside also seeks a revision of the procedural schedule to address the matters in this Urgent Motion, and that there be a suspension of all deadlines under the current procedural calendar pending the determination of the revised procedural calendar.*

200) *Nicaragua asserted a demand for costs for this Urgent Motion. As Nicaragua's pre-determined litigation strategy has caused this situation, and there are other delays arising on account of Nicaragua's failure to provide timely production of responsive documents ordered by this Tribunal, costs for this motion, and any costs associated with the modification of the procedural calendar, should be awarded on a full indemnity basis to Riverside.*

201) *In light of the foregoing, Riverside respectfully requests that the Tribunal grant the relief sought in this Motion. Doing so would not only ensure the fairness and equity of these proceedings but would also uphold the integrity of the arbitral process following the principles of international arbitration.*

13. The Respondent requested the following relief in its Response:<sup>3</sup>

*Nicaragua respectfully requests the following:*

- a. An order from the Tribunal dismissing, in its entirety, Claimant's Motion as legally unfounded and untimely;*
- b. An order from the Tribunal setting a deadline for the Parties' responses to the Non-Disputing Party Submission of the United States of America at a date that does not conflict with the existing procedural calendar;*
- c. With the exception of the revised deadline above, an order confirming the deadlines in the current procedural calendar and preserving the July 2024 Hearing dates, as well as all other related deadlines; and*
- d. An order granting Nicaragua the costs it incurred in responding to this unauthorized and frivolous Motion.*

14. The Respondent updated its request for relief in the Motion's Rejoinder, as follows:<sup>4</sup>

*Nicaragua requests the following:*

- a. An order dismissing, in its entirety, Claimant's unsolicited Motion.*
- b. An order dismissing Claimant's motion to compel because it is unsolicited.*

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<sup>3</sup> Response, ¶ 88.

<sup>4</sup> Motion's Rejoinder, ¶ 95.



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- c. An instruction to Claimant and its arbitration counsel that they cannot make further unplanned submissions in this arbitration without first seeking the Tribunal's leave through a request not exceeding three pages in length.*
- d. An order setting a new deadline for the responses to the U.S.'s non-disputing party submission, given that the calendared deadline is no longer feasible due to the latest unsolicited motion by Claimant.*
- e. With the exception of the revised deadline above, an order confirming the deadlines in the current procedural calendar and preserving the July 2024 Hearing dates, as well as all other related deadlines; and*
- f. An order granting Nicaragua the costs it incurred in responding to this unauthorized and frivolous Motion.*

### **III. THE PARTIES' POSITIONS**

15. The Tribunal summarizes below the Parties' positions as set out in their pleadings without attempting to be exhaustive. The Tribunal has considered the Parties' arguments and evidence, including those that are not specifically mentioned in the summary.

#### **A. THE CLAIMANT'S POSITION**

16. In its submissions, the Claimant addresses (i) the Tribunal's authority to rule on the Motion and (ii) procedural fairness arguments in support of the Motion, and then sets out the disputed (iii) new legal arguments and (iv) new factual evidence contained in the Respondent's Rejoinder.

##### ***(i) The Tribunal's Authority to Rule on the Motion***

17. The Claimant submits that the Tribunal is authorized to rule on its Motion on the basis of (a) Article 44 of the ICSID Convention, (b) Rules 19 and 31(3) of the 2006 ICSID Arbitration Rules, and (c) general principles of international law, including fundamental rules of procedure.<sup>5</sup>

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<sup>5</sup> Motion, ¶¶ 28-48, 199.

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18. The Claimant relies, in the first place, upon Article 44 of the ICSID Convention, which provides that, “[i]f any question of procedure arises which is not covered by [the Convention] or the Arbitration Rules or any rules agreed by the parties, the Tribunal shall decide the question.” The Claimant contends that the provision “grants the Tribunal the inherent authority to dismiss claims that are clearly without merit or to take other procedural measures to ensure the efficient conduct of the proceedings.”<sup>6</sup>
19. The Claimant further refers to ICSID Arbitration Rule 19, which provides that “[t]he Tribunal shall make the orders required for the conduct of the proceeding,” and Rule 31(3), which provides that the parties’ reply and rejoinder shall be responsive and “shall contain an admission or denial of the facts stated in the last previous pleading.”<sup>7</sup>
20. The Claimant submits that the Tribunal’s authority to ensure procedural fairness and prevent the abuse of process also derives from general principles of international law, as recognized by international courts and tribunals.<sup>8</sup> In particular, the Tribunal shall ensure that there is no departure from a fundamental rule of procedure, including equal treatment of the parties.<sup>9</sup>
21. In the Claimant’s view, ensuring the equal treatment of the parties entails that “new defenses, arguments, and non-responsive evidence to issues first raised in the Counter-Memorial cannot originate in the Rejoinder Memorial pleading.”<sup>10</sup>

***(ii) Procedural Fairness Arguments in Support of the Motion***

22. The Claimant argues that (a) ICSID claims are governed by fundamental rules of procedure, (b) there is a need to address new evidence and arguments, (c) untimely

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<sup>6</sup> Motion, ¶ 31.

<sup>7</sup> Motion, ¶¶ 33-34.

<sup>8</sup> Motion, ¶ 35.

<sup>9</sup> Motion, ¶¶ 37-48; Motion’s Reply, ¶¶ 29-30.

<sup>10</sup> Motion, ¶ 45.

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arguments ought to be stricken down, *(d)* new opportunities for filing should be allowed, and *(e)* estoppel is a general principle of law applicable in this case.<sup>11</sup>

23. The Claimant notes that Nicaragua undertook to comply with its obligations under the ICSID Convention upon accession to the Convention, including adhering to the fundamental procedural rules established therein.<sup>12</sup> Apart from the principle of equality of arms, parties must have the opportunity to fully present their case.<sup>13</sup> By introducing new issues at the end of the written phase of the arbitration, the Respondent has disrupted such principles, severely disadvantaged the Claimant, in particular considering the proximity of the scheduled hearing, and has undermined the Claimant's opportunity to fully articulate its case before the Tribunal.<sup>14</sup>
24. The Claimant submits that, to the extent that the Tribunal allows the Respondent's new arguments to remain on the record of the case, it should be granted an opportunity to respond to such new arguments by filing new evidence and arguments in the form of a supplemental submission.<sup>15</sup>
25. The Claimant further argues that the new arguments and evidence introduced by the Respondent in its Rejoinder should be stricken on the ground that the Claimant's lack of opportunity to respond to them is unfair, violates due process and is contrary to the principle of timely submission of arguments, which is in turn fundamental to the integrity and fairness of the arbitration.<sup>16</sup> Moreover, a tribunal cannot permit a party to transform the character of the dispute through the introduction of unforeseen arguments.<sup>17</sup>
26. The Claimant relies on the findings of prior tribunals and commentators to assert that, should the Tribunal admit the Respondent's new evidence and arguments, it must be

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<sup>11</sup> Motion's Reply, ¶¶ 21-52.

<sup>12</sup> Motion's Reply, ¶ 21.

<sup>13</sup> Motion's Reply, ¶¶ 27-28.

<sup>14</sup> Motion's Reply, ¶¶ 24-26.

<sup>15</sup> Motion's Reply, ¶¶ 20, 32.

<sup>16</sup> Motion's Reply, ¶¶ 33-36.

<sup>17</sup> Motion's Reply, ¶¶ 39-40.

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granted time and opportunity to review them and adduce responsive evidence and arguments.<sup>18</sup>

27. The Claimant maintains that the “international law principle of estoppel” (which, according to the Claimant, establishes that a party may not rely upon its own inconsistency to the detriment of another) limits what the parties may argue during an arbitration, so that no party may affirm a thing at one time and deny that same thing at another.<sup>19</sup> In this case, such principle “precludes Nicaragua from shifting its justifications and expanding its evidentiary base on continually evolving grounds.”<sup>20</sup>

28. The Claimant contends that its Motion seeks to address a “fundamental challenge” to the procedural integrity and efficiency of the arbitration, and that it should be granted an opportunity to comprehensively review and respond to the Respondent’s new submissions. This is the case, in particular, considering the purpose of second round submissions, fundamental principles of arbitration and the need to protect fundamental rights such as the right to be heard and the equal treatment of parties.<sup>21</sup> The Claimant adds that the Respondent’s strategy was pre-meditated, presents a lack of balance and is unjustifiable.<sup>22</sup>

29. The Claimant summarizes its position as follows:

*“The foundational notion of equality of the parties requires that Riverside be treated fairly. In this circumstance, fairness requires that the Tribunal strike out some statements, while taking remedial action to permit the arbitration to continue while allowing Riverside to file new expert statements from new experts (which it does not yet have), witness and other evidence and to file new responsive argument. The impact of Nicaragua’s actions will be to modify the procedure schedule that is currently before this tribunal.”<sup>23</sup>*

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<sup>18</sup> Motion’s Reply, ¶¶ 41-47.

<sup>19</sup> Motion’s Reply, ¶¶ 48-52.

<sup>20</sup> Motion’s Reply, ¶ 132.

<sup>21</sup> Motion’s Reply, ¶¶ 10-16.

<sup>22</sup> Motion’s Reply, ¶¶ 17-19.

<sup>23</sup> Motion, ¶ 182. On further justifications for granting the Motion see the Motion’s Reply, ¶¶ 186-190.

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***(iii) Alleged New Legal Arguments***

30. According to the Claimant, the Respondent has introduced new legal arguments in its Rejoinder related to (a) the CAFTA Annex II sectoral reservation, (b) expropriation and the judicial order, (c) shareholder reflective loss arguments, and (d) new expert evidence on non-precluded measures. In addition, the Claimant refers to (e) issues omitted by the Respondent in its Response.<sup>24</sup>
31. The Claimant submits that the Respondent introduced for the first time in the Rejoinder defenses related to the national treatment (“NT”) and most-favored-nation (“MFN”) treatment, invoking, in particular, the social service reservation in CAFTA Annex II-Ni-6, allegedly in response to issues raised by the Claimant in its Memorial.<sup>25</sup> According to the Claimant, by raising such new legal defenses in its Rejoinder, the Respondent has engaged in procedural unfairness and caused imbalance, overlooked the need for timely and responsive pleadings, misrepresented the Claimant’s position on police actions and overlooked expert evidence.<sup>26</sup> The Claimant asserts that its Memorial contained detailed allegations and evidence on the issue of discriminatory police action and that this obliged Nicaragua to address such issues in its Counter-Memorial. Accordingly, and in view of relevant precedents, the late introduction of such defense warrants its exclusion.<sup>27</sup>
32. The argument outlined above also applies to the Claimant’s objection to (i) the Respondent’s new legal defense contained in footnote 802 of its Rejoinder against the operation of MFN treatment to affect Article 10.6 of CAFTA;<sup>28</sup> (ii) the MFN reservation regarding the full protection and security obligation in Article 10.5 of CAFTA;<sup>29</sup> (iii) a new legal defense with respect to MFN treatment regarding the NT and MFN treatment obligations in Articles 10.3 and 10.4 of CAFTA;<sup>30</sup> and (iv) a new defense against the

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<sup>24</sup> Motion’s Reply, ¶¶ 53-106.

<sup>25</sup> Motion’s Reply, ¶ 62; Motion, ¶¶ 64-71. On new defenses regarding the national treatment obligation, see also Motion, ¶¶ 123-128.

<sup>26</sup> Motion, ¶ 111; Motion’s Reply, ¶¶ 63-68.

<sup>27</sup> Motion, ¶¶ 71, 130; Motion’s Reply, ¶¶ 69-71.

<sup>28</sup> Motion, ¶¶ 72-78.

<sup>29</sup> Motion, ¶¶ 79-84.

<sup>30</sup> Motion, ¶¶ 85-92.

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operation of MFN treatment to affect the operation of Article 21.2 of CAFTA regarding non-precluded measures with respect to essential security interests.<sup>31</sup>

33. The Claimant contends that, contrary to what the Respondent asserts, it has not abandoned its expropriation arguments concerning actions taken and directed by Nicaragua. In particular, the Claimant maintains that the Respondent is responsible for the expropriatory measures of the occupiers of Hacienda Santa Fé. The Claimant submits that it augmented its argument on this point to account for its discovery of relevant *de jure* measures adopted by the Respondent of which it was previously unaware.<sup>32</sup>
34. The Claimant also objects to the defense raised by the Respondent in the Rejoinder against claims of reflective loss by shareholders under CAFTA. According to the Claimant, this defense is a significant departure from the Respondent’s previously stated position on the matter.<sup>33</sup> The Claimant alleges that it has consistently sought redress for shareholder reflective losses from the outset of the arbitration, as it explicitly claimed entitlement to the entirety of damages arising out of the Respondent’s internationally wrongful acts regarding its control over Inagrosa as early as its Notice of Arbitration and in its Memorial.<sup>34</sup> Accordingly, the Claimant’s withdrawal of its claims under Article 10.16(1)(b) of CAFTA by letter of 16 March 2023 contained no statement to the effect of renouncing claims to damages in connection to the loss of the Inagrosa business.<sup>35</sup> In other words, according to the Claimant. “*Nicaragua engaged in a comprehensive discussion on damages without once contesting the applicability of shareholder reflective loss as a legitimate basis for claims.*”<sup>36</sup>
35. The Claimant further objects to the Respondent’s filing of a new expert report by Prof. William Burke-White regarding non-precluded measures under Article 21.6 of

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<sup>31</sup> Motion, ¶¶ 93-98.

<sup>32</sup> Motion’s Reply, ¶¶ 72-76.

<sup>33</sup> Motion, ¶ 132.

<sup>34</sup> Motion’s Reply, ¶¶ 77-78. See also *id.*, ¶¶ 80 *et seq.*

<sup>35</sup> Motion’s Reply, ¶ 79.

<sup>36</sup> Motion, ¶ 133.

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CAFTA. According to the Claimant, neither Party had previously raised this issue.<sup>37</sup> The Claimant submits that the Respondent's late introduction of an expert witness on international law, which requires detailed examination, potentially extending the hearing duration, puts the Claimant in a disadvantage and runs contrary to the principle of equality of arms.<sup>38</sup> To address the international law issues raised in the Rejoinder, the Claimant seeks leave from the Tribunal to engage an expert witness on international law and submit related additional evidence and legal authorities.<sup>39</sup>

36. Finally, the Claimant argues that Nicaragua has for the first time contested, in the Rejoinder, the Claimant's arguments concerning the following issues: MFN treatment provisions under Article 10.5 of CAFTA regarding full protection and fair and equitable treatment, the war losses clause under Article 10.6 of CAFTA and the essential security interest clause under Article 21.1 of CAFTA.<sup>40</sup> In the Claimant's view, the Respondent's failure to previously counter such arguments precludes it from submitting (new) responses to these issues in the Rejoinder.<sup>41</sup> Accordingly, these new defenses should either be struck from the record or the Claimant should be allowed to respond to them with evidence and argument.<sup>42</sup>

***(iv) Alleged New Factual Evidence***

37. The Claimant opposes the introduction by the Respondent of alleged new factual evidence relating to (a) the Sanabria hydrology report, (b) the Ecuadorian import permission to the U.S., (c) Favio Enriquez' untimely witness evidence and (d) videos and photographs which were not filed based on the Respondent's stated justifications. Finally, the Claimant raises in its Reply a number of outstanding document production issues not raised in the Motion.<sup>43</sup>

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<sup>37</sup> Motion, ¶¶ 99-109.

<sup>38</sup> Motion's Reply, ¶ 104.

<sup>39</sup> Motion, ¶¶ 107-108; Motion's Reply, ¶¶ 105-106.

<sup>40</sup> Motion's Reply, ¶ 58.

<sup>41</sup> Motion's Reply, ¶ 60.

<sup>42</sup> Motion's Reply, ¶ 60.

<sup>43</sup> Motion's Reply, ¶¶ 107-179.

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38. The Claimant disputes the Respondent’s introduction in the Rejoinder of new expert evidence from Dr. Odilo Duarte and new witness statement from Rodolfo Lacayo, allegedly addressing for the first time in the arbitration the Sanabria Hydrology Report, which was filed with the Claimant’s Memorial. According to the Claimant, the evidence is related to Nicaragua’s late introduction of a new defense regarding hydrological resources in its Rejoinder. Since the Respondent took no issue with the conclusions of the Sanabria Hydrology Report in its Counter-Memorial, doing so in the Rejoinder raises procedural propriety concerns and prevents the Claimant from having sufficient time to review them and file responsive comments and evidence in advance of the upcoming hearing.<sup>44</sup>
39. The Claimant opposes Dr. Duarte’s second expert report as it introduces “completely new” expert evidence on regulatory certification in the United States for avocado imports from Ecuador, an issue that had not been previously raised by Dr. Duarte in his first expert report nor by the Respondent in its Counter-Memorial. Accordingly, the Claimant submits that it should be allowed a reasonable opportunity to engage experts to file responsive reports upon review of this new evidence.<sup>45</sup>
40. The Claimant also disputes the Respondent’s filing with its Rejoinder of a witness statement from Mr. Favio Enriquez. According to the Claimant, the Respondent was aware of his evidence, as it mentioned him twice in the Counter-Memorial, but yet failed to produce his testimony at the time.<sup>46</sup> The submission of Mr. Enriquez’s witness statement with the Rejoinder was therefore untimely and the prejudice caused to the Claimant as a result should be addressed by having it struck from the record in its entirety.<sup>47</sup>
41. The Claimant contends that the Respondent’s filing of two drone videos (exhibits R-0195 and R-0231) and 106 photo extracts (exhibit R-0232) in the Rejoinder was untimely, procedurally improper and prejudicial to the Claimant. This evidence should therefore be

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<sup>44</sup> Motion, ¶¶ 14-17, ¶¶ 55-60; Motion’s Reply, ¶¶ 107-116.

<sup>45</sup> Motion, ¶¶ 18, 61-63, 194; Motion’s Reply, ¶¶ 117-125.

<sup>46</sup> Motion, ¶¶ 13, 185; Motion’s Reply, ¶ 127.

<sup>47</sup> Motion, ¶¶ 146-149; Motion’s Reply, ¶¶ 126, 135.



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struck from the record, and the Respondent should not be able to rely on it.<sup>48</sup> The Claimant objects to the admission of this evidence, *inter alia*, on the ground that it is “*not responsive to any ‘live issues’ in the second phase of the pleadings*” and merely constitutes new evidence to which it is unable to respond.<sup>49</sup> Moreover, in the Claimant’s view, the evidence is irrelevant.<sup>50</sup>

42. The Claimant adds that the Respondent’s justification for the video and photos raised in its Response diverts from that provided in the Rejoinder, which is unreasonable and unacceptable by operation of the principle of estoppel.<sup>51</sup> In any event, the Respondent’s new justifications are not credible.<sup>52</sup>

43. Finally, the Claimant refers to outstanding matters of document production, including (a) missing technical maps and survey data held by the Respondent, responsive to the Claimant’s document request No. 76;<sup>53</sup> (b) the Respondent’s late filing of documents from Nicaragua’s Office of Rural Title (“OTR”), including a dossier from the OTR comprising 210 pages denominated as NIC02615, which was submitted by the Respondent a fortnight prior to the filing of its Rejoinder;<sup>54</sup> and (c) the Respondent’s lack of production of Nicaraguan police files regarding daily updates on land seizures.<sup>55</sup> The Claimant considers that it should be allowed to submit additional briefing on these matters as it would otherwise be placed “*at a significant disadvantage in addressing factual and technical assertions raised by Nicaragua in its Rejoinder and supporting materials.*”<sup>56</sup>

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<sup>48</sup> Motion, ¶¶ 159-180, 187.

<sup>49</sup> Motion, ¶¶ 164, 169, 174, 178, 190.

<sup>50</sup> Motion, ¶¶ 175, 178; Motion’s Reply, ¶¶ 136-140.

<sup>51</sup> Motion’s Reply, ¶¶ 141-144.

<sup>52</sup> Motion’s Reply, ¶¶ 146-159.

<sup>53</sup> Motion’s Reply, ¶¶ 163-166.

<sup>54</sup> Motion’s Reply, ¶¶ 167-172. See also Motion, ¶¶ 150-158.

<sup>55</sup> Motion’s Reply, ¶¶ 173-176.

<sup>56</sup> Motion’s Reply, ¶ 179.

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**B. THE RESPONDENT’S POSITION**

44. The Respondent requests that the Tribunal reject the Claimant’s Motion. It submits that there is “nothing improper” regarding the Rejoinder and its accompanying evidence, and that the Claimant has taken issue with arguments appropriately raised in the Rejoinder to which it may in any event respond at the hearing and in any post-hearing submissions.<sup>57</sup>
45. The Respondent maintains that “[t]he only relevant consideration is if the evidence or arguments presented for the first time in the Rejoinder are responsive to the issues raised in Claimant’s Reply Memorial.”<sup>58</sup> Given that each of the matters challenged by the Motion directly relate to issues raised by the Claimant in its Reply, the Motion ought to be dismissed.<sup>59</sup> This is in particular the case given that the Claimant itself has not disputed that the challenged submissions are responsive to the issues in the Reply memorial.<sup>60</sup>
46. In its submissions, the Respondent (i) addresses the authorization to submit new evidence under the applicable rules and (ii) argues that the Claimant’s requested relief should be denied as it would prejudice the Respondent; it also denies that it has introduced (iii) new legal arguments or (iv) new factual evidence in its Rejoinder.

***(i) The Applicable Rules Allow for the Introduction of New Evidence***

47. The Respondent contends that, under section 16.1 of Procedural Order No. 1 (“PO1”), the Respondent is expressly allowed to submit new evidence with its Rejoinder as part of its rebuttal to the Reply. ICSID Arbitration Rule 31(3) similarly allows for a rejoinder to contain “additional facts” deemed necessary to rebut arguments contained in a reply memorial.<sup>61</sup> Similarly, there is no rule preventing the Respondent from developing new arguments or defenses in its rejoinder and the Claimant has cited no legal authority to the

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<sup>57</sup> Letter, p. 1; Motion’s Rejoinder, ¶ 31.

<sup>58</sup> Response, ¶ 4. See also *id.*, ¶ 18.

<sup>59</sup> Response, ¶ 5.

<sup>60</sup> Motion’s Rejoinder, ¶¶ 34-35.

<sup>61</sup> Response, ¶¶ 10-11; Motion’s Rejoinder, ¶ 2.

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contrary.<sup>62</sup> The objective of such rules is to allow a respondent to respond to the claims levied against it and thus ensure that it is afforded due process.<sup>63</sup>

48. The Respondent argues that, in this case, the right to be heard is uncontroversial as both parties had two rounds of pleadings to present their case.<sup>64</sup> Moreover, the Claimant filed a new expert report and two new fact witness statements and new evidentiary documents with its reply submission, to which the Rejoinder responded.<sup>65</sup>
49. In the Respondent's view, the Claimant seeks to depart from established procedural rules insofar as the agreed procedural calendar in the case provides for the Respondent to have the last word in the written phase and considering that PO1 bars the parties from filing a third pleading and from filing new evidence absent "special circumstances" – which are not present in this case.<sup>66</sup>
50. Finally, the Respondent refutes the Claimant's assertion that respondents are precluded from submitting new evidence, defenses or arguments in a rejoinder memorial. According to the Respondent, none of the authorities relied upon by the Claimant in this respect support its supposed rule.<sup>67</sup> Nor could such rule exist as it would completely undermine the equality of arms principle.<sup>68</sup> Similarly, the Respondent alleges that the Claimant's invocation of the principle of estoppel is unavailing as the Claimant could not have reasonably expected the Respondent not to defend itself against the reformulation of the Claimant's case set out for the first time in its Reply.<sup>69</sup>

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<sup>62</sup> Response, ¶¶ 12-13; Motion's Rejoinder, ¶¶ 7-8.

<sup>63</sup> Motion's Rejoinder, ¶ 10.

<sup>64</sup> Response, ¶ 13.

<sup>65</sup> Response, ¶ 14.

<sup>66</sup> Response, ¶¶ 15-17.

<sup>67</sup> Motion's Rejoinder, ¶¶ 5-32.

<sup>68</sup> Motion's Rejoinder, ¶¶ 26-32.

<sup>69</sup> Motion's Rejoinder, ¶ 24. On the Respondent's arguments regarding that the Claimant has allegedly conceded that it reformulated its merits claims see Motion's Rejoinder, ¶¶ 39-43.

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***(ii) The Claimant's Requested Relief Would Prejudice the Respondent***

51. The Respondent submits that the Motion should also be denied on the separate ground that it would be highly prejudicial to Nicaragua.<sup>70</sup>
52. Among other arguments, the Respondent states that, should the challenged portions of the Rejoinder be stricken, the Respondent would be denied its right to respond to the extensive new arguments and evidence submitted by the Claimant in its Reply.<sup>71</sup> Moreover, if the Claimant files a third memorial, the Respondent would be deprived of its procedural right to have the last word on the Claimant's allegations,<sup>72</sup> and a postponement of the upcoming hearing would considerably delay the arbitration and force the Respondent to restart visa applications for its hearing participants.<sup>73</sup>
53. The Respondent highlights that due process has been respected in this case, as evidenced by the fact that the Claimant has already filed numerous pleadings, including several unscheduled submissions, totaling over 1,000 pages before the Tribunal.<sup>74</sup>

***(iii) Alleged New Legal Arguments***

54. As a preliminary matter, the Respondent notes that the Claimant's Reply had nearly 500 pages, entailed a dramatic overhaul of the Claimant's factual and legal theories, and was accompanied by lengthy reports, witness statements and hundreds of exhibits. Accordingly, it should come to no surprise that the Rejoinder contains evidence, defenses and legal arguments not included in the Counter-Memorial.<sup>75</sup>
55. According to the Respondent, the legal arguments in its Rejoinder related to (a) the CAFTA Annex II sectoral reservation, (b) expropriation and the judicial order and (c) non-precluded measures are all responsive to the Claimant's reformulated case as set forth in

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<sup>70</sup> Response, ¶ 78; Motion's Rejoinder, ¶ 78.

<sup>71</sup> Response, ¶ 79.

<sup>72</sup> Response, ¶ 79; Motion's Rejoinder, ¶ 79.

<sup>73</sup> Response, ¶ 80; Motion's Rejoinder, ¶ 81.

<sup>74</sup> Response, ¶¶ 81-83.

<sup>75</sup> Response, ¶ 20.

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its Reply, and (d) it could not have introduced its reflective loss arguments at an earlier time.<sup>76</sup> Lastly, the Respondent addresses the Claimant’s arguments that it omitted certain issues in its Response.

56. The Respondent claims that it invoked Annex II of CAFTA in its Rejoinder in direct response to the Claimant’s new Reply narrative regarding Nicaragua’s alleged deficient law enforcement response to the illegal invasion of Hacienda Santa Fé in comparison with that provided in response to other land invasions, resulting in alleged breaches, *inter alia*, of MFN and NT obligations. In the Rejoinder, the Respondent explained that the Claimant was precluded from alleging substantial breaches of MFN or NT and from importing other treaty provisions when the measures relate to law enforcement because Annex II specifically excludes measures related to the “provision of law enforcement” from MFN and NT.<sup>77</sup> Such defense could not have been pleaded earlier because the Claimant’s arguments on alleged breaches resulting from insufficient law enforcement response were raised for the first time in its Reply.<sup>78</sup>

57. The Respondent further claims that the Claimant fundamentally modified the basis of its expropriation claims from an alleged direct expropriation, as set out in its Memorial, to a so-called “judicial expropriation” in its Reply.<sup>79</sup> Accordingly, the Respondent “*had every right to present new arguments with its Rejoinder Memorial to refute Riverside’s new expropriation claim.*”<sup>80</sup>

58. The Respondent rejects the Claimant’s request to file new expert testimony or additional pleadings in response to Prof. William Burke-White’s expert report on non-precluded measures. The Respondent alleges that it could not have submitted Prof. Burke-White’s report at an earlier time because it is responsive to the nature and extent of Article 21.2(b) objections raised by the Claimant in its Reply. In addition, the Claimant made a deliberate

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<sup>76</sup> Response, ¶¶ 57-77.

<sup>77</sup> Response, ¶¶ 60, 62.

<sup>78</sup> Response, ¶ 64.

<sup>79</sup> Motion’s Rejoinder, ¶ 44.

<sup>80</sup> Motion’s Rejoinder, ¶ 46.

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choice not to file expert testimony with its Reply regarding Article 21.2(b) of CAFTA.<sup>81</sup> In sum, “*Claimant had every opportunity to submit expert testimony with its Reply and Nicaragua should not be penalized for fully substantiating its Article 21.2(b) arguments in its Rejoinder.*”<sup>82</sup>

59. The Respondent similarly argues that it could not have introduced its reflective loss arguments at an earlier time.<sup>83</sup> According to the Respondent, despite the Claimant’s voluntary withdrawal of its CAFTA Article 10.16(1)(b) claim before the filing of its Reply – hence renouncing its ability to seek recovery for damages on behalf of and caused to Inagrosa – , it nevertheless alleged in its Reply that, as a 25.5% shareholder in Inagrosa, it remained entitled to direct and indirect (or reflective) losses.<sup>84</sup> The Claimant explicitly referred to reflective losses in its Reply and, since such pleading was filed, the Respondent had not had an opportunity to comment on the effect of the Claimant’s withdrawal of claims on behalf of Inagrosa.<sup>85</sup>
60. Finally, the Respondent addresses the Claimant’s argument that it has allegedly failed to contest certain legal points regarding MFN treatment, provisions under Article 10.5 of CAFTA regarding full protection and fair and equitable treatment, the war losses clause under Article 10.6 of CAFTA, and the essential security interest clause under Article 21.1 of CAFTA. The Respondent explains that it addressed these sections all at once because the Claimant had “*only challenged Nicaragua’s invocation of its law enforcement reservation in Annex II of DR-CAFTA.*”<sup>86</sup>

***(iv) Alleged New Factual Evidence***

61. Contrary to the Claimant’s position, the Respondent contends that there is nothing improper about (a) the Sanabria hydrology report, (b) expert evidence on the avocado

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<sup>81</sup> Response, ¶¶ 66-69; Motion’s Rejoinder, ¶¶ 52-56.

<sup>82</sup> Response, ¶ 70.

<sup>83</sup> Response, ¶¶ 71-77; Motion’s Rejoinder, ¶¶ 47-51.

<sup>84</sup> Response, ¶ 72; Motion’s Rejoinder, ¶ 48.

<sup>85</sup> Response, ¶¶ 75-77.

<sup>86</sup> Motion’s Rejoinder, ¶ 37 (emphasis in the original).

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import certification process, (c) Favio Enriquez’s witness statement or (d) the disputed videos and photo extracts. The Respondent also rejects the Claimant’s arguments on alleged pending matters on document production.

62. The Respondent argues that the sections in the Rejoinder addressing the Sanabria report are proper.<sup>87</sup> The Respondent rejects the Claimant’s assertion that it waited until its Rejoinder to address the report as it devoted a section in its Counter-Memorial to refute it.<sup>88</sup> Also, the Respondent alleges that it submitted rebuttal testimony from its fact witness, Dr. Rodolfo Jose Lacayo, and avocado expert Dr. Duarte, in order to rebut the Claimant’s new position in the Reply that Inagrosa was favored to obtain a concession to use water resources at Hacienda Santa Fé. Accordingly, there is no basis to strike the testimony of Dr. Lacayo and Dr. Duarte from the record.<sup>89</sup>
63. The Respondent submits that the section in its Rejoinder addressing the time that the U.S. took to import avocados from Ecuador is proper, as is the expert evidence provided on the matter by Dr. Duarte.<sup>90</sup> According to the Respondent, there is no basis to strike such evidence nor to allow additional submissions from the Claimant because that evidence is directly related to an issue raised in the Claimant’s Reply; in particular, it is responsive to the arguments raised in the Reply about the Claimant’s ability to export Nicaraguan avocados to the U.S., which included new witness testimony from Mr. Russell Welty. The Respondent alleges that Dr. Duarte’s testimony was submitted precisely as part of its rebuttal of Mr. Welty’s testimony.<sup>91</sup>
64. The Respondent further claims that there is nothing improper about Mr. Enriquez’s witness statement.<sup>92</sup> There is no rule requiring the Respondent to have submitted such testimony with its Counter-Memorial nor providing that failure to do so would result in a waiver of

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<sup>87</sup> Response, ¶¶ 22-26.

<sup>88</sup> Response, ¶ 23.

<sup>89</sup> Response, ¶¶ 24-26; Motion’s Rejoinder, ¶¶ 62-63.

<sup>90</sup> Response, ¶¶ 27-32.

<sup>91</sup> Response, ¶¶ 30-31; Motion’s Rejoinder, ¶¶ 65-67.

<sup>92</sup> Response, ¶¶ 33-37; Motion’s Rejoinder, ¶¶ 68-72.

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the Respondent's right to submit responsive evidence with its Rejoinder.<sup>93</sup> The Respondent presented Mr. Enriquez's witness statement to rebut explicit allegations made by the Claimant against him in the Reply. As such, there is nothing improper about the Respondent's conduct, and the Respondent had the right to allow Mr. Enriquez to defend himself and "*to clarify the record through direct testimony where Claimant is alleging that Mr. Enriquez said things he did not say.*"<sup>94</sup>

65. As to the disputed videos and photo extracts submitted with the Rejoinder, the Respondent notes that the relevant standard is not whether the Claimant may respond in writing to them but whether the evidence is responsive to issues raised in the Reply, which is the case.<sup>95</sup> In particular, the disputed videos and photos are responsive to allegations made by the Claimant in its Reply about: (a) what the San Rafael del Norte police department should have done when notified about the June 2018 invasion of Hacienda Santa Fé (by showing that the police at that location lacked the resources to mobilize hundreds of invaders);<sup>96</sup> (b) the nature and condition of Hacienda Santa Fé;<sup>97</sup> and (c) the location of the avocado plantation in relation to the water resources at Hacienda Santa Fé.<sup>98</sup>

66. Finally, the Respondent submits that the Claimant's arguments on alleged pending matters on document production are outside the scope of the Motion and are not at a stage for the Tribunal's review considering that the Respondent was yet to respond to Claimant's allegations before it raised the issue in its Motion's Reply. As such, the Respondent declines to address such issues in its briefs responding to the Motion, other than to note that it sent a letter to the Claimant, refuting its allegations, on 16 April 2024.<sup>99</sup>

67. As to the Claimant's objections regarding the Respondent's production of an exhibit from the OTR (identified as R-0177), the Respondent claims that it produced the document to

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<sup>93</sup> Response, ¶ 34.

<sup>94</sup> Response, ¶¶ 36-37.

<sup>95</sup> Response, ¶¶ 38-40.

<sup>96</sup> Response, ¶ 40.

<sup>97</sup> Response, ¶¶ 41-43.

<sup>98</sup> Response, ¶¶ 44-45.

<sup>99</sup> Motion's Rejoinder, ¶¶ 86-87.



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the Claimant as soon as it became available and that the documents contained therein are directly relevant to issues raised by the Claimant in its Reply.<sup>100</sup>

68. The Respondent concludes that the Motion is part of a broader strategy by the Claimant to disrupt the procedural calendar and it requests that the Tribunal order counsel for the Claimant not to submit further unscheduled motions without prior leave from the Tribunal.<sup>101</sup>

#### IV. THE TRIBUNAL'S ANALYSIS

69. There is no dispute between the Parties that the relevant provisions for the purposes of determining the Claimant's Motion are, in particular, Rule 31(3) of the ICSID Arbitration Rules. Rule 31(3) provides:

*A memorial shall contain: a statement of the relevant facts; a statement of law; and the submissions. A counter-memorial, reply or rejoinder shall contain an admission or denial of the facts stated in the last previous pleading; any additional facts, if necessary; observations concerning the statement of law in the last previous pleading; a statement of law in answer thereto; and the submissions.*

70. The provision thus makes clear that a respondent's rejoinder must be responsive to a claimant's previous pleading, and that the respondent is, for the purposes of its response, allowed to produce new evidence ("*any additional facts*") and argument, to the extent such evidence and argument is responsive to the claimant's reply.
71. Rule 31(3) of the ICSID Arbitration Rule is reflected in paragraph 16.1 of PO1, which provides that "[f]urther documentary evidence [in addition to that filed with the Memorial and the Counter-Memorial] *relied upon by the parties in rebuttal shall be submitted with the Reply and Rejoinder.*"
72. The Claimant argues in the Motion that the Respondent's Rejoinder exceeds the permissible scope of ICSID Arbitration Rule 31(3). Consequently, in order to succeed on

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<sup>100</sup> Response, ¶¶ 48-56.

<sup>101</sup> Motion's Rejoinder, ¶¶ 4, 88-95.

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its Motion, the Claimant must show that the Respondent's Rejoinder contains new argument or evidence that is not responsive to the Claimant's Reply. Stated differently, in accordance with Rule 31(3) of the ICSID Arbitration Rules, the Respondent is entitled to raise in its Rejoinder new arguments and produce new evidence, not previously submitted with its Counter-Memorial, if such arguments or evidence are necessary to respond to the case made by the Claimant in the Reply.

73. The applicable standard, stated in these general terms, appears to be undisputed between the Parties.
74. As summarized above, the Claimant requests that certain specific argument and evidence in the Respondent's Rejoinder be stricken from the record or, alternatively, that the Claimant be given an opportunity to submit a response. Each of the Claimant's requests is addressed below in turn.
75. New technical evidence on hydrology. The Claimant argues that it produced the expert hydrology report prepared by Federico Sanabria Martinez with the Memorial, in support of its case that there were enough water resources available at Hacienda Santa Fé for cultivating avocados. However, according to the Claimant, the Respondent did not respond to the Sanabria report in the Counter-Memorial and filed a new expert report, prepared by Dr. Odilo Duarte, only with the Rejoinder; it also produced a new witness statement, by Dr. Rodolfo José Lacayo, in response. The Claimant argues that this evidence goes beyond the permissible scope of rebuttal evidence.
76. The Respondent argues that it replied to Mr. Sanabria's report in the Counter-Memorial in respect of access to water resources and that its expert, Dr. Duarte, addressed the allegations in his first expert report, filed with the Counter-Memorial. However, in its Reply, the Claimant raised for the first time the argument that Inagrosa was favored to obtain a concession to use the water resources at Hacienda Santa Fé. Dr. Duarte replied to this new allegation in his second report, and the Respondent also produced a witness statement from Mr. Lacayo. According to the Respondent, the challenged portions of Dr.

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Lacayo's evidence refute the Claimant's new factual argument, and indeed the Claimant concedes that this evidence was first raised in the Reply.

77. Having considered the Parties' positions and supporting evidence, including the Parties' prior submissions, the Tribunal finds that the Claimant has failed to show that the Respondent's evidence filed with the Rejoinder, including Dr. Duarte's and Dr. Lacayo's evidence, is not responsive to the Claimant's Reply.
78. New technical evidence on avocado regulatory admission. The Claimant argues that the evidence of Dr. Duarte relating to avocado production and the import certification process is new and could have been produced with the Counter-Memorial. Contrary to the Respondent's argument, Mr. Welty's witness statement, which was filed with the Reply, cannot be used as an excuse to produce the new evidence since Mr. Welty did not address the matters raised by Dr. Duarte.
79. The Respondent contends that Dr. Duarte's evidence is directly related to the issues raised by the Claimant in its Reply, with the support of Mr. Welty's witness statement, regarding its ability to export Nicaraguan avocados to the United States. Dr. Duarte refers extensively to Mr. Welty's evidence in his second expert report.
80. Having considered the Parties' positions and supporting evidence, including the Parties' prior submissions, the Tribunal finds that the Claimant has failed to show that the Respondent's evidence filed with the Rejoinder and relating to the avocado regulatory admission, including the evidence of Dr. Duarte, is not responsive to the Claimant's Reply.
81. New and untimely witness statement from Mr. Favio Enriquez. The Claimant argues that the witness statement of Mr. Enriquez should be excluded because the Respondent was aware at the time when it prepared its Counter-Memorial that Mr. Enriquez was "*a person of interest*" and made references to him in the Counter-Memorial.
82. The Respondent contends that it was proper to produce witness evidence from Mr. Enriquez to rebut the Claimant's allegations in the Reply regarding Mr. Enriquez

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specifically, which went beyond what the Claimant had alleged in the Memorial. According to the Respondent, there is no rule requiring a party to produce witness evidence as soon as possible; the Claimant simply does not like that Mr. Enriquez denies in his witness statement the Claimant's hearsay evidence of what he had allegedly stated regarding the events at Hacienda Santa Fé.

83. Having considered the Parties' positions and supporting evidence, including the Parties' prior submissions, the Tribunal finds that the Claimant has failed to show that the Respondent's evidence, including the witness evidence of Mr. Enriquez, is not responsive to the Claimant's Reply.
84. Untimely production of new evidence. The Claimant argues that, on 26 February 2024, a mere fortnight before the Rejoinder was filed, the Respondent disclosed a substantial dossier comprising 210 pages from the OTR, denominated as "NIC02615," purportedly in response to the Claimant's document production request No. 5. The Respondent subsequently presented 105 pages of "NIC02615" as exhibit R-0177. The Claimant complains that it was not able to address this evidence in its Reply, as it was filed only later. The Claimant requests that it be given an opportunity to review and file responsive evidence and argument in response to exhibit R-0177.
85. The Respondent contends that it produced the documents as soon as they became available, after further research. According to the Respondent, the documents are directly relevant to the issues raised in the Reply, in particular regarding the historical dispute between Inagrosa and a local farming cooperative, which resulted in a continuous invasion of Hacienda Santa Fé from 1990 to 2004.
86. The Tribunal notes that the Respondent does not dispute that it produced to the Claimant documents labelled as "NIC02615," which were requested by the Claimant in connection with document production, only on 26 February 2024, after the filing by the Claimant of its Reply, and then submitted a portion of these documents as R-0177 in support of its Rejoinder on 8 March 2024. The Claimant was therefore unable to consider this evidence when preparing its Reply. In the circumstances, the Tribunal finds that the Claimant must

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be provided with an opportunity to respond to the Respondent's case insofar as it is based on these documents, to make any argument it may wish to make, and to produce any evidence it may wish to produce, in response to the Respondent's Exhibit R-0177 and the related argument in the Respondent's Rejoinder. The Claimant's submission shall be strictly limited to this issue and not exceed ten pages, and it shall be filed within two weeks from the date of this Procedural Order No. 9.

87. New and untimely production of videos and photographic evidence. The Claimant argues that exhibits R-195, R-231 (both of which contain video evidence) and R-232 (which contains photo extracts from the videos), which were filed with the Respondent's Rejoinder, are "*untimely and improper*" and not responsive to the Claimant's Reply. According to the Claimant, it raised the issues invoked by the Respondent in support of the production of this evidence in the Memorial, but not in the Reply. The Claimant adds that the new evidence does not address "*any live issue*" in the arbitration.
88. The Respondent claims that the videos and the photographs are responsive to the Reply in various ways, including in terms of issues such as the location and condition of the police station in San Rafael del Norte and the nature and condition of the Hacienda Santa Fé, as well as the location of the avocado plantation in relation to the water resources at Hacienda Santa Fé. More specifically, the Respondent argues that "*Claimant does not dispute that these evidentiary exhibits are responsive to the issues raised in the Reply. Instead, Claimant takes issue with the weight that the Tribunal should give these exhibits, contending that they do not support what Nicaragua argues they support.*"<sup>102</sup>
89. Having considered the Parties' positions and supporting evidence, including the Parties' prior submissions, the Tribunal finds that the Claimant has failed to show that exhibits R-195, R-231 and R-232 are not responsive to the Claimant's Reply.
90. New expert evidence on non-precluded measures for essential security interests. The Claimant argues that the Respondent filed with the Rejoinder an entirely new expert report

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<sup>102</sup> Motion's Rejoinder, ¶ 74.

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from Prof. William Burke-White on the matter of non-precluded measures under Article 21.6 of CAFTA. The Claimant could not have anticipated that the Respondent would produce expert evidence in the second round, adding that expert evidence is not appropriate on a matter such as governing law.

91. The Respondent claims that the expert evidence of Prof. Burke-White is directly responsive to the Claimant's legal argument in the Reply regarding the interpretation of Article 21.6 of CAFTA. The Claimant could have produced expert evidence in support of its position on the issue in the Reply but chose not to do so.
92. The Tribunal notes that the Claimant does not appear to argue that the Respondent's expert evidence is not responsive to the Claimant's legal argument in the Reply. The Claimant's position rather is that it should be given an opportunity to respond to the Respondent's expert evidence as a matter of equality of arms. Having considered the Parties' positions and supporting evidence, including the Parties' prior submissions, the Tribunal rejects the Claimant's argument. The principle of equality of arms does not require that the Claimant be given an opportunity to avail of expert evidence, "*mirroring the opportunity Nicaragua availed.*"<sup>103</sup> The Claimant had the opportunity to produce expert evidence, if it so wished, in support of its Reply. The Claimant will also have an opportunity to cross-examine Prof. Burke-White at the hearing, and to make legal argument in support of its position.
93. New arguments on MFN reservations on (i) law enforcement, (ii) Article 10.6 of CAFTA, (iii) full protection and security, (iv) national treatment and MFN and (v) non-precluded measures. The Claimant makes a series of arguments relating to MFN reservations, arguing that the Respondent did not raise its MFN objections or rely on the Annex II reservations in CAFTA in the Counter-Memorial; it raised these arguments only in the Rejoinder.
94. The Respondent argues, in response, that its legal argument in the Rejoinder is responsive to the Claimant's new case, developed in the Reply, including that the expropriation of

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<sup>103</sup> Reply, ¶ 105.

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Hacienda Santa Fé did not occur by way of illegal invasion but rather through judicial expropriation, and that the police response to the invasion was insufficient. The Annex II argument was raised directly in response to the Claimant’s argument regarding insufficient police response, which was new.

95. Having considered the Parties’ positions and supporting evidence, including the Parties’ prior submissions, the Tribunal finds that the Claimant has failed to show that the Respondent’s arguments in the Rejoinder regarding MFN reservations relating to (i) law enforcement, (ii) Article 10.6 of CAFTA, (iii) full protection and security, (iv) national treatment and MFN and (v) non-precluded measures, are not responsive to the Claimant’s Reply.
96. National treatment and MFN. The Claimant argues that the Respondent has modified its legal argument in the Rejoinder regarding NT and MFN “*by adding new defenses not previously pleaded with its defenses in the Counter-Memorial.*”<sup>104</sup> According to the Claimant, “*Nicaragua’s introduction of a novel legal defense, suggesting that Riverside must demonstrate that Nicaragua’s measures were pursuant to an ‘irrational policy’ to successfully claim a breach of National Treatment or MFN Treatment obligations under CAFTA, marks a significant deviation from the arguments presented in earlier pleadings.*”<sup>105</sup> The Claimant goes on to argue that “[t]his assertion, referenced in paragraph 674 of the Rejoinder Memorial and further detailed in footnote 1003, indicates an expansion of Nicaragua’s defense strategy to encompass public policy considerations—elements not previously engaged within the discourse of this arbitration.”<sup>106</sup>
97. The Respondent notes that the Claimant admits that it reformulated its case in the Reply; accordingly, the Respondent’s legal argument in the Rejoinder is responsive to the Claimant’s new case. The Respondent notes that “[i]n particular, for Riverside’s most-

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<sup>104</sup> Motion, ¶ 110.

<sup>105</sup> Motion, ¶ 125.

<sup>106</sup> Motion, ¶ 125.

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*favored nation ... and national treatment ... arguments [in the Memorial] were supported by mere conclusory statements without any factual support.”*<sup>107</sup>

98. Having considered the Parties’ positions and supporting evidence, including the Parties’ prior submissions, the Tribunal finds that the Claimant has not shown that the Respondent’s legal argument is not responsive to the Claimant’s case as set out in the Reply.
99. New damages defense on shareholder reflective loss. The Claimant argues that the Respondent has introduced a new legal defense not pleaded in the Counter-Memorial regarding shareholders’ reflective loss under the CAFTA, to the effect that a shareholder cannot claim for the loss of a controlled entity. According to the Claimant, its original claim brought was “*for all the damage suffered by Riverside and INAGROSA.*”<sup>108</sup> The Claimant contends that “*Nicaragua’s legal stance in the Counter-Memorial implicitly acknowledged shareholder reflective loss, creating a legitimate expectation (anchored in the general international law principle of estoppel) that no new defenses on this point would be introduced in subsequent pleadings.*”<sup>109</sup>
100. The Respondent argues, in response, that the Claimant initially claimed on behalf of Inagrosa, but then withdrew its claim before the Reply in response to the Respondent’s argument that the Claimant’s attempt to bring claims on behalf of Inagrosa under Article 10.16.1(b) of the CAFTA were outside the Tribunal’s jurisdiction. However, in its Reply, the Claimant alleged that it was entitled to compensation for both direct losses or indirect or reflective losses. The Respondent properly responded to this new allegation in the Rejoinder. According to the Respondent, “*because Claimant maintained in its Reply Memorial (after withdrawing the Inagrosa claims) that it can still seek 100% of the harm*

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<sup>107</sup> Reply, ¶ 59.

<sup>108</sup> Motion, ¶ 144.

<sup>109</sup> Reply, ¶ 95.



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*suffered by Inagrosa, Nicaragua dedicated a section in its Rejoinder Memorial to refuting that point.”<sup>110</sup>*

101. Having considered the Parties’ positions and supporting evidence, including their prior submissions, the Tribunal finds that the Claimant has not shown that the Respondent’s defense, as formulated in the Rejoinder, is not responsive to the Claimant’s case as set out in the Reply.

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102. The Tribunal notes that the Claimant raised a number of new arguments in its Motion’s Reply, relating to outstanding issues of document production. These arguments were not raised in the Claimant’s Motion, and in any event the issues in question do not appear to be ripe for decision as they are still being discussed between the Parties. Accordingly, this Procedural Order No.9 does not address them.

103. Finally, the Tribunal observes that the Claimant will be able to cross-examine the Respondent’s experts and witnesses, including on the evidence referred to in the Claimant’s Motion, and to make argument in response to the Respondent’s case, as set out in the Rejoinder, in its opening statement and in any oral closing statements or post-hearing submissions as directed by the Tribunal in consultation with the Parties.

**V. ORDER**

104. In light of the above, the Tribunal orders as follows:

- (a) The Claimant’s request that the Tribunal strike from the record the Respondent’s argument and evidence referred to in the Claimant’s revised request for relief in paragraphs 191 to 201 of the Claimant’s “Reply on Riverside’s Urgent Rejoinder Procedural Motion” is denied, with the exception of the request referred to in subparagraph 104(b) below;

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<sup>110</sup> Rejoinder, ¶ 49.

**Procedural Order No. 9**

- (b) The Claimant may file a responsive submission, together with supporting evidence, in response to the Respondent's Exhibit R-0177 and the related argument in the Respondent's Rejoinder. The Claimant's submission shall be strictly limited to this issue and shall not exceed ten pages (excluding the supporting evidence). The submission shall be filed by Monday, 6 May 2024;
- (c) The Parties are directed not to make any further unsolicited procedural motions without first seeking leave from the Tribunal; any such request should not exceed three pages and, if the motion is for admission of new evidence, must not attach the evidence which is sought to be introduced into the record;
- (d) All other submissions and requests for relief are denied;
- (e) The Tribunal's decision on costs is reserved; and
- (f) The time limit for the Parties to comment on the United States' non-disputing party submission is fixed for Friday, 26 April 2024. The remaining time limits remain as per the Procedural Calendar Annexed to Procedural Order No. 5.

On behalf of the Tribunal,

[Signed]

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Dr. Veijo Heiskanen  
President of the Tribunal  
Date: 22 April 2024