

INTERNATIONAL CENTRE FOR THE 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 STATEMENT OF COSTS**

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November 8, 2024

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<b>I. OVERVIEW</b>	<b>1</b>
<b>A. Nicaragua's Defense: A Fabric of Omission, Misdirection, and Pretense</b>	<b>2</b>
<b>B. Omission of Key Witnesses</b>	<b>3</b>
<b>C. Misdirection</b>	<b>4</b>
<b>D. Pretense</b>	<b>5</b>
<b>E. Conclusion: A Systemic Pattern of Wrongdoing</b>	<b>6</b>
<b>II. RIVERSIDE'S LEGAL COSTS &amp; LAWYERS' DISBURSEMENTS</b>	<b>7</b>
Overall Summary	7
<b>A. Legal Representation Costs</b>	<b>7</b>
<b>B. Expert Fees</b>	<b>9</b>
<b>C. Hearing and Other Disbursements</b>	<b>10</b>
<b>D. Tribunal Costs</b>	<b>10</b>
<b>III. RIVERSIDE SHOULD BE AWARDED COSTS ON A FULL INDEMNITY BASIS</b>	<b>11</b>
<b>A. Precedent for Cost-Shifting in Cases of Procedural Misconduct</b>	<b>11</b>
1) Yukos Universal Limited (Isle of Man) v. The Russian Federation	11
2) Libananco Holdings Co. Limited v. Republic of Turkey.	11
3) Campos de Pesé, S.A. v. Republic of Panama	12
4) Caratube International Oil Company LLP & Devincci Salah Hourani v. Kazakhstan	12
5) Conclusion on Cost-Shifting in Cases of Procedural Misconduct	12
<b>B. Nicaragua's Shameful Conduct Regarding its Offer to Return HSF</b>	<b>13</b>
1) The September 2021 "Pseudo-Offer" - A Failure to Acknowledge Riverside's Ownership	13
2) Fabrication of a "Rejection" by Riverside	14
3) Misrepresentation of the Offer and Riverside's Response in Procedural Motion	15
<b>C. Nicaragua's Unfair and Non-transparent Judicial Expropriation Proceedings</b>	<b>16</b>
1) Reliance on Fabricated Evidence	17
2) Failure to Provide Notice to Riverside & INAGROSA	18
3) Nicaragua's Shameful Conduct Regarding the Legal Title over HSF	18
<b>D. Abusive Invocation of Non-Precluded Measures</b>	<b>19</b>
<b>E. Misconduct regarding misrepresentation of evidence.</b>	<b>20</b>
<b>F. Respondent's Awareness of its Misconduct</b>	<b>21</b>
<b>G. Abusive Contribution and Mitigation Argument.</b>	<b>22</b>
<b>H. Concealment and Misrepresentation of the Role of the Nicaraguan Resistance</b>	<b>23</b>

<b>I. Jose Lopez’s Unreliable Account of the 2003 Eviction</b>	<b>24</b>
<b>J. Jose Lopez’s Unreliable Account of the alleged 2017 invasion</b>	<b>25</b>
<b>K. Shelter Order absence of good faith</b>	<b>25</b>
<b>L. Nicaragua seeks to rely on its faulty conduct.</b>	<b>26</b>
<b>M. Unfair and Heavy-handed Nicaraguan Government Official Witness Evidence</b>	<b>28</b>
<b>N. No Criminal Charges for the Death Threats Against Riverside &amp; INAGROSA Management</b>	<b>29</b>
<b>O. Government Support of the Invaders</b>	<b>30</b>
<b>P. Withdrawal of Certain Witnesses</b>	<b>31</b>
<b>Q. Riverside’s Discovery of <i>Ex-Parte</i> Seizure Order Against Investor (November-December 2022)</b>	<b>32</b>
<b>R. Nicaragua’s valuation approach absence of good faith</b>	<b>32</b>
<b><i>IV. Costs that would be awarded even in the unlikely event that the Investor Does not prevail</i></b>	<b>33</b>
<b><i>V. CONCLUSIONS</i></b>	<b>36</b>

## I. OVERVIEW

1. Riverside Coffee LLC ("Riverside" or "Investor") submits this Statement of Costs following the Tribunal's guidance from July 17, 2024, and *Procedural Order No. 1*. This submission includes detailed tables and a focused analysis of Nicaragua's conduct throughout this arbitration—conduct directly impacting the Tribunal's discretion on cost apportionment.<sup>1</sup>
2. The Tribunal's discretion under CAFTA Article 10.26(1), ICSID Convention Article 61(2), and Rule 28 of the 2006 ICSID Rules of Procedure for Arbitration Proceedings (ICSID Rules) allows for a careful assessment of Nicaragua's conduct, which has been marred by procedural misconduct, evasion, and a disregard for transparency.
3. Riverside has applied the relevant procedural standards under CAFTA and ICSID and the pertinent jurisprudence on cost apportionment in investment arbitration to substantiate this request.
4. The Statement of Costs addresses the following sections:
  - (a) **Section I:** Overview of Riverside's claim for costs.
  - (b) **Section II:** A summary and detailed table of Riverside's costs, totaling US\$11,414,843.70.
  - (c) **Section III:** An analysis justifying cost-shifting measures based on Nicaragua's systematic pattern of improper, obstructive, and bad-faith behavior, which unnecessarily escalated Riverside's legal expenses.
  - (d) **Section IV:** A request for costs to be awarded even if Riverside does not fully prevail based on Nicaragua's extensive record of procedural misconduct.
5. Under international law, cost recovery is grounded in the principle of *restitutio in integrum*, demanding full reparation for injury caused by internationally wrongful

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<sup>1</sup> Riverside has submitted a small number of new exhibits. As agreed on Day 9 of the Hearing (Transcript 2109:2-8), the disputing parties agreed that no new merits exhibits would be included with the cost submissions. Accordingly, the exhibits provided by Riverside are strictly procedural, addressing only issues relevant to costs, not the substantive merits of this dispute.

acts.<sup>2</sup> This remedy, defined as "reparation for loss suffered;<sup>3</sup> a judicially ascertained compensation for a wrong," covers both direct and indirect damages.<sup>4</sup>

6. CAFTA Article 10.26(1) and the ICSID procedural framework give the Tribunal broad discretion to allocate costs, including legal fees, out-of-pocket expenses, and Tribunal fees, as an ordinary allocative matter—not punitive in nature. This discretion aligns with the established norms of international arbitration, which support cost-shifting where procedural misconduct is evident.<sup>5</sup>
7. Nicaragua's actions throughout this arbitration—outlined with evidence in Riverside's cost submission—demonstrate a systematic pattern of omission, misrepresentation, and delay, all of which have obstructed the fair progression of these proceedings.
8. Riverside's cost submission catalogs Nicaragua's procedural misdeeds as a basis for this Tribunal's discretionary cost award. Riverside has repeatedly raised concerns over Nicaragua's procedural misconduct as an issue in this arbitration, with both Nicaragua having had the opportunity to provide timely responses.
9. Given the cumulative weight of Nicaragua's systemic misconduct, Riverside submits that a full award of costs against Nicaragua is justified and necessary to uphold the integrity of this Tribunal's proceedings.

#### A. Nicaragua's Defense: A Fabric of Omission, Misdirection, and Pretense

10. The Tribunal has discretion in awarding costs. Tribunals can shift costs when a party engages in bad procedural conduct or when the non-prevailing party's position particularly lacks merit. An award of costs can discourage bad behavior in arbitration.<sup>6</sup> Klaus Peter Berger notes that the award of costs is "an important mechanism for the arbitral tribunal to fulfill its responsibility in ensuring efficient and

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<sup>2</sup> James Crawford, *The International Law Commission's Articles on State Responsibility: Introduction, Text and Commentaries* (Cambridge University Press, 2002) at p. 201 (CL-0019-ENG). See also the ICJ in *Gabčíkovo–Nagymaros Project* (Hungary/Slovakia) (Judgment), 1997 at ¶152 (CL-0427-ENG). A useful discussion is set out by Prof. Victor Stoicu, Chapter 7 – Compensation in *Remedies before the International Court of Justice: A Systemic Analysis*. Cambridge University Press; 2021 at p. 110 (CL-0433-ENG).

<sup>3</sup> V. Stoicu, *Remedies*. at p. 110 (CL-0433-ENG). He cites the *Lusitania* Cases (United States/Germany) (1923) RIAA vol 7, 39 p. 33 (CL-0016-ENG).

<sup>4</sup> Stoicu, *Remedies* at p. 113. He states "In this inquiry, there are two types of injuries that are caused to states: i) direct injury and ii) indirect injury. From this perspective, the assessment and interpretation of compensation depends on the kind of injury suffered, in addition to the analysis on material or moral damages." (CL-0433-ENG).

<sup>5</sup> Such an approach to costs is not punitive but an ordinary course allocative matter within the tribunal's broad discretion permitted under the ICSID Rules.

<sup>6</sup> Jeffrey Waincymer, *Procedure and Evidence in International Arbitration* (2012), §15.9.4 at p. 1224 (CL-0434-ENG).

cost-effective proceedings.”<sup>7</sup> Such discretion discourages frivolous claims and equally frivolous defenses, which are manifestations of bad procedural misconduct.

11. Because of the nature of the events at Hacienda Santa Fe (HSF) and Nicaragua's responsive measures, the authoritarian Nicaraguan government of President Daniel Ortega was on trial in this arbitration. There was extensive unrebutted expert evidence of a brutal government crackdown of peaceful anti-government protests in April 2018.
12. Throughout this Arbitration, Nicaragua has employed a defense crafted with deliberate omission, strategic misdirection, and calculated pretense, all seeking to divert the Tribunal's attention from the core issues of responsibility and accountability. This approach underscores conduct issues that have significant cost-shifting ramifications.
13. Indeed, improper procedural conduct may only appear evident in some instances, as it is often cloaked under the guise of a party exercising its legitimate rights. However, procedural misconduct arises when the timing, intent, and manner of exercising such "rights" become abusive and deviate from the established norms and orderly conduct expected in arbitration. This misuse of procedural rights undermines the spirit of fairness and contravenes the fundamental principles governing arbitration, thereby rendering the conduct objectionable and justifying a cost-shifting exercise. This strategy is unmistakably evident in Nicaragua's exclusion of critical witnesses, reliance on misleading narratives, and fabrication of events and evidence. These measures taken by Nicaragua are in direct contravention of its obligations to carry out its CAFTA obligations, including its participation in this arbitration, in good faith. Awarding costs against Nicaragua for its misconduct in this arbitration falls within this Tribunal's discretion and issuing them would further international justice and accountability and the rule of law.

## **B. Omission of Key Witnesses**

14. Nicaragua has needlessly made this arbitration complex and bogged it down with irrelevant considerations. Nicaragua deliberately has withheld crucial witnesses with firsthand knowledge of the invasion and occupation of HSF. Among those absent are individuals like Wama (Adrian Wendell Mairena) and El Chino (Ney Ariel Ortega Kuan), key players directly involved in the occupation whose testimonies could have clarified the true intentions behind the invasion.
15. Despite their direct involvement, high-ranking officials such as Mayor Leonidas Centeno, who initiated the invasion, and Mayor Norma Blandon, who not only met

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<sup>7</sup> Klaus Peter Berger, Cost Sanctions for Delaying Tactics in International Arbitration, in *Finances in International Arbitration: Liber Amicorum Patricia Shaughnessy* 13, 24 (Sherlin Tung et al. eds., 2019) at p. 24 (CL-0435-ENG).

with the invaders but facilitated access to governmental infrastructure for them, were not presented by Nicaragua.<sup>8</sup> Congressman Edwin Castro, who actively encouraged the occupation by assuring invaders of government support to fund the land's acquisition, similarly was omitted.<sup>9</sup> Inspector Calixto Vargas, who assessed HSF on June 17, 2018, could have provided an objective account of any perceived essential security risks to the state from the invasion. However, Nicaragua chose to withhold such direct eye-witness testimony.<sup>10</sup> These omissions reveal a calculated avoidance of critical evidence directly within Nicaragua's control.

16. Nicaragua's witnesses lacked first-hand knowledge of the events at HSF in 2018. They appear to have been selected based on their loyalty to the autocratic Ortega-Murillo regime rather than on the materiality and relevance of their testimony. Jinotega Attorney General Diana Gutierrez was not the Attorney General or involved in the issues at Jinotega in 2018. Mr. Lopez admits that he was not involved in the invasion of HSF in 2018. Police Captain Herrera admitted he was absent at HSF until August 14, 2018.<sup>11</sup> Even Nicaragua's legal expert, Byron Sequeira, failed to disclose his ongoing additional relationships with the autocratic Nicaraguan state.<sup>12</sup>

### C. Misdirection

17. Nicaragua also resorted to misdirection, attempting to recast the invasion as a response to a supposed threat from the "Nicaraguan Resistance." However, as expert Prof. Wolfe demonstrated, this claim is a baseless fiction. Evidence shows that the Nicaraguan Resistance was aligned with the Sandinista Party and part of the governing coalition during the 2018 invasion.<sup>13</sup> José Lopez, a witness Nicaragua presented as a supposed Resistance member, admitted during testimony that he was, in fact, a Sandinista leader before and after the invasion of HSF.<sup>14</sup> He also conceded that the newspaper article supporting his claims about a 2003 eviction contained inaccurate information and that he did not witness any of these events.<sup>15</sup>
18. Similarly, Nicaragua's attempt to link the occupation to the Nicaraguan Revolution of 1979 borders on the absurd. Prof. Wolfe's analysis underscored the need to

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<sup>8</sup> Witness Statement of Luis Gutierrez – Memorial at ¶101 (**CWS-02**); Witness Statement Jaime Henrriquez Cruz -Memorial at ¶43-52 (**CWS-06**); Witness Statement of Luis Gutierrez-Reply at ¶116 (**CWS-10**).

<sup>9</sup> Report from Commissioner Marvin Castro to Francisco Diaz, Deputy Chief of the National Police regarding Invasion of Hacienda Santa Fe, July 31, 2018 (**C-0284-SPA-ENG**).

<sup>10</sup> Transcript 1259:18-1260:15.

<sup>11</sup> Transcript 1269:21-23.

<sup>12</sup> Transcript 1686:11-1687:7; 1689:16-19.

<sup>13</sup> La Prensa, Sandinista National Liberation Front registers Alianza Unida Nicaragua Triunfa with the Supreme Electoral Council, July 26, 2017 (**C-0500-SPA**); See also **CES-05** at ¶54.

<sup>14</sup> Transcript 1301:18-1302:11.

<sup>15</sup> Transcript 1340:23-1341:14; 142:18-1343:9; 1344:17-20.

scrutinize Nicaragua's historical narratives, which, in this instance, are nothing more than unsupported conjectures.

19. Nicaragua's motion for security for costs epitomizes this pattern of misdirection. While alleging that Riverside lacked the financial resources to bear arbitration costs, it omitted the critical fact that it had seized INAGROSA's exclusive legal title over HSF, which was Riverside's primary asset, thereby creating the financial non-liquidity that Nicaragua relied upon as grounds for its security of costs motion.

#### D. Pretense

20. After Riverside notified Nicaragua of the investment dispute in 2020,<sup>16</sup> Nicaragua's actions further underscored a strategy of pretense and fabrication aimed at mitigating its liability in this Arbitration. This strategy manifested in several critical ways:
  - (a) Nicaragua's alleged "offer" to return HSF in 2021 without offering to compensate for any loss or its destruction was nothing more than a hollow gesture with no clear conditions or *bona fide* intent. Riverside's response sought clarity and requested further information, hardly constituting a refusal.
  - (b) In September 2021, Nicaragua manufactured evidence of a supposed "refusal" by Riverside, a fabrication that it presented to its domestic courts and this Tribunal.
  - (c) The claim that HSF was returned to Riverside between August 11 and August 17, 2018, is equally without basis. Testimony from Riverside's witnesses demonstrates the falsity of Nicaragua's claim.<sup>17</sup> Police Captain Herrera, who signed a notarized inventory on August 14, 2018, failed to verify whether the occupiers had left.<sup>18</sup> This narrative, therefore, amounts to a transparent fiction.
  - (d) Nicaragua's claims of regulatory inadequacies were contrived post-arbitration. These allegations were never raised before the dispute or substantiated. Indeed, Attorney Renaldy Gutierrez's expert report confirmed that these regulatory claims lacked merit.<sup>19</sup> This tactic burdened Riverside and the Tribunal with unnecessary and baseless defenses.

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<sup>16</sup> Notification under the CAFTA for Intent to Arbitration, August 28, 2020 (C-0006-ENG).

<sup>17</sup> Transcript 561:24-562:18; 693:25-694:5; 736:4-737:2.

<sup>18</sup> Transcript 1274:11-23.

<sup>19</sup> CES-06 at ¶¶17(c), 108-188.



(e) Similarly, Nicaragua's unfounded allegations regarding unpaid taxes were contradicted by Riverside's submission of official government documents from 2019, which confirmed its tax compliance.<sup>20</sup>

21. Nicaragua's invocation of CAFTA's Essential Security Interest (ESI) exception was an apparent pretext, lacking a necessary foundation in good faith. Rather than a genuine claim of essential security, this invocation was a calculated maneuver to evade responsibility for its internationally wrongful conduct in this arbitration. As extensively argued in Riverside's Post-Hearing Brief, Nicaragua's delayed assertion of ESI reveals its pretextual nature, suggesting that the government did not consider the events at the HSF facility as essential security during the invasion. Nicaragua did not invoke ESI promptly. Still, this conclusion of a lack of good faith is further reinforced by the absence of contemporaneous governmental communications that would indicate any essential security concern related to HSF in 2018 or subsequently.<sup>21</sup> The issue could not meet the objective and reasonable threshold of being an essential security concern. Nicaragua has not discharged its obligation to demonstrate proportionality in the invocation of ESI. This is another example of Nicaragua's misdirection, resulting in a significant added burden and cost for Riverside.

### **E. Conclusion: A Systemic Pattern of Wrongdoing**

22. Nicaragua's omissions, misdirection, and pretenses form a pattern of composite acts that underscore its disregard for legal obligations and fair process. The record demonstrates Nicaragua's record of using pretense and other inappropriate procedural and substantive conduct in this arbitration. Overall, Nicaragua systemically engaged in a frivolous process that unduly obstructed the fair and orderly unfolding of the arbitration process. Such systemic misconduct compels the Tribunal to hold Nicaragua fully responsible for indemnifying Riverside for the costs of this Arbitration. Considering this evidence, Nicaragua's responsibility for Riverside's full indemnity is manifest and just.
23. This Tribunal has a duty to preserve the integrity of the arbitration process by signaling that systemic bad procedural conduct will neither be tolerated nor rewarded. Thus, Nicaragua must be held fully responsible for indemnifying Riverside for the arbitration costs incurred, ensuring Riverside receives complete reparative justice in line with international principles.

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<sup>20</sup> Tax Solvency Certificate issued by the Ministry of Treasury and Public Credit of Nicaragua to INAGROSA, October 17, 2019 (C-0468-SPA).

<sup>21</sup> Transcript 1073:6-1074:20.

## II. RIVERSIDE’S LEGAL COSTS & LAWYERS’ DISBURSEMENTS

### Overall Summary

Summary Total - Riverside Costs	Amount
A. Legal Representation	\$10,043,393.10
B. Experts	\$625,297.19
C. Disbursements	\$71,153.41
D. Tribunal Costs	675,000.00
<b>Total</b>	<b>\$11,414,843.70</b>

24. The total cost is reasonable considering the complexity and scope of the issues in the arbitration, the number of witnesses and experts, the two-week in-person witness hearing held in Washington, DC, and the breadth of the differences between the disputing parties.
25. Riverside notes that this arbitration followed environmental sustainability approaches, such as reducing needless document printing and carbon-intensive transportation of paper-based pleadings and authorities. Following such best practices resulted in environmental sustainability and cost savings in the arbitration process.

### A. Legal Representation Costs

- (a) APPLETON provided the Investor with nearly 12,000 hours of legal services for **US\$ 8,476,197.68**.
- (b) GUNSTER PA provided the Investor with 313 hours of legal services, totaling **US\$ 303,310**.
- (c) REED SMITH provided over 1991 hours of legal services to the Investor for **US\$ 1,264,185.50**. Total legal representation costs were:

#### Law firm Billings

Appleton	\$8,476,197.68
Gunster	\$303,310.00
Reed Smith	\$1,264,185.50
	<b>\$10,043,393.10</b>

26. Appleton & Associates International Lawyers had the following staff working on the file for 11,976.46 hours for a total amount of US\$8,476,197.68.

**Appleton & Associates International Lawyers**

Name	Hours
Barry Appleton	4673.83
Lillian De Pena	5123.59
Cristina Cardenas	501.51
Aidan Seymour-Butler	293.5
Nabeela Latif	276
Joseph Garvey	251
Gabriel Marshall	217.87
Magaly Bianchini	184
Nicolle Lafosse	140.55
Joanne Sandrin	122
Abby Cannon	100.71
Nathan McCray	55.4
Sean Stephenson	16.3
Mel Schwing	12.1
Justin Giovannetti	8.1
Total hours	11,976.46

27. Riverside disclosed a contingency fee arrangement with Appleton & Associates International Lawyers LP. This contingency fee arrangement, covered by the mandatory disclosure terms of *Procedural Order No. 1*, permitted access to justice for Riverside when its underlying sole investment in Nicaragua had been destroyed due to the seizure and its exclusive legal title improperly taken by the state. Appleton & Associates International Lawyers LP maintained time dockets over the nearly 12,000 hours it billed, applying its standard hourly billing rates.
28. Gunster, PA, had William Hill and Aisha Jehaludi work for 313 hours at standard hourly rates.

29. Reed Smith had the following staff working on the file for a total of 1,991 hours for a total of \$1,264,185.50 at its standard rates.

<b>Reed Smith LLP</b>	
<b>Name</b>	<b>Hours</b>
Mullins, Edward M.	453.1
Bart, Alan D.	293
Ahuja, Niyati	25.9
Avila, Daniel	2.1
Avitia Anthony	1.1
Bergmann Johansen, Stephan	2.1
Butensky, Wesley A.	12.2
Caputo, Ava S.	42.7
Cardenas, M. Cristina	323.7
Cardona, Latasha M.	162.3
Fraser, John D.	1.8
Gonzalez, Jorge M.	152.9
Hammond, Alexis D.	19.1
Hansson Leigh	1.3
Hendricks, John M.	0.6
Hernandez, Kevin	126.5
Janicki, Magda L.	9.6
Kosnitzky, Zachary J.	16.9
Martinez, Thayane M.	47.3
McCloskey Kyle	180.5
Mosquera, Rebeca E.	87.1
Nomura Holly	0.8
Ulseth, Ana R.	27.5
Wright Karen	1
<b>Total Hours</b>	<b>1991.1</b>

**B. Expert Fees**

30. The experts and supporting professionals invoiced **US\$625,297.19**:
- (a) Vimal Kotecha, valuation expert, invoiced **US\$421,855.96**.
  - (b) Renaldy Gutierrez, Nicaraguan Law Expert, invoiced **US\$138,299.39**.
  - (c) Prof. Justin Wolfe, Nicaraguan History and Political Economy Expert, invoiced **US\$10,750.00**.
  - (d) Carlos Pfister, agricultural land value expert, invoiced **US\$10,560.00**.
  - (e) Arias law firm provided domestic legal advice for **US\$43,831.84**.

31. The following table summarizes these disbursements.

Richter Inc (V, Kotecha)	Damages Expert	\$421,855.96
Prof. Justin Wolf	History Expert	\$10,750.00
Pfister	Land Appraisal	\$10,560.00
Arias	Nicaraguan counsel	\$43,831.84
Gutierrez & Associates	Nicaraguan Law expert	\$138,299.39
		<b>\$625,297.19</b>

### C. Hearing and Other Disbursements

32. Riverside incurred other disbursement costs as follows:

Notary Fees	\$719.55
Transcription- Translation fees	\$1,185.56
Bank Charges	\$665.00
Printing -8568 copies	\$1,289.70
UPS Courier	\$817.69
FedEx Courier	\$62.90
Gravity Stack - Discovery & IT recovery	\$16,245.62
Hyperlinks Bundle Fee	\$922.50
RETRIEV-IT - Document	
Retrieval	\$123.20
Government certificate fees	\$12.50
Staff overtime meals	\$100.00
Witness travel, board & lodging	\$14,427.60
Legal team Travel, board & Lodging	\$34,581.59
	\$71,153.41

### D. Tribunal Costs

33. Riverside incurred Tribunal and arbitration institutional costs in the amount of US\$675,000.

ICSID Registration Fee	\$25,000.00
ICSID	\$650,000.00
<b>Total Tribunal and ICSID fees</b>	<b>\$675,000.00</b>

### III. RIVERSIDE SHOULD BE AWARDED COSTS ON A FULL INDEMNITY BASIS

34. Nicaragua's procedural misconduct systemically evidences an absence of good faith. This is beyond behavior that "raises eyebrows." The evidence discussed below demonstrates Nicaragua's abuse of process, pretense, and wanton recklessness with the truth. Given Nicaragua's extensive evidence of misconduct, this Tribunal should award costs to Riverside, regardless of its ultimate decision on the merits. Riverside requests these costs on a full indemnification basis.
35. Riverside emphasizes that, in contrast, it conducted itself in good faith throughout this Arbitration. Riverside adhered to all Tribunal orders and promptly complied with its directions, including payment.

#### A. Precedent for Cost-Shifting in Cases of Procedural Misconduct

36. Investor-state tribunals have responded to procedural misconduct. These decisions illuminate a broader trend in international arbitration. When respondents engage in obstructive behavior, tribunals must exercise their discretion to impose cost-shifting as a deterrent and to preserve the integrity of the arbitral process. This is to prevent frivolous claims and defenses.

##### 1) Yukos Universal Limited (Isle of Man) v. The Russian Federation

37. The *Yuko's* tribunal faced evidence of a systematic campaign of harassment by the Russian Federation, which included initiating multiple domestic legal proceedings against Yukos and its executives and using state sovereign prerogatives to exert direct pressure on the company.<sup>22</sup> The Tribunal found that Russia's conduct constituted procedural harassment intended to disrupt Yukos's operations and to intimidate its executives and key witnesses.<sup>23</sup> This behavior extended beyond the arbitration's bounds, as Russia manipulated its legal and administrative powers to disadvantage the claimant.<sup>24</sup> The Tribunal imposed costs on the Russian Federation, underscoring that state actors should not use their sovereign powers to obstruct arbitration proceedings.<sup>25</sup>

##### 2) Libananco Holdings Co. Limited v. Republic of Turkey.

38. In *Libananco*, the tribunal found that Turkey engaged in tactics that were intended to disrupt the arbitration process.<sup>26</sup> These tactics included the seizure of documents

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<sup>22</sup> *Yukos Universal Limited (Isle of Man) v. The Russian Federation*, PCA Case No. 2005-04/AA227, Final Award, July 18, 2014, at ¶¶ 794-804 (CL-0232-ENG).

<sup>23</sup> *Yukos v. Russia*, at ¶ 804 (CL-0232-ENG).

<sup>24</sup> *Yukos v. Russia*, at ¶ 811 (CL-0232-ENG).

<sup>25</sup> *Yukos v. Russia*, at ¶ 1869 (CL-0232-ENG).

<sup>26</sup> *Libananco Holdings Co. v. Republic of Turkey*, award, ICISD Case No. ARB/06/8, Award, September 2, 2011 at ¶¶ 557-569 (CL-0436-ENG).

and the initiation of criminal proceedings against crucial witnesses.<sup>27</sup> The tribunal noted that these actions were designed to intimidate and obstruct the claimant's ability to present its case. Although the tribunal did not dismiss Turkey's case entirely due to misconduct, it ordered Turkey to pay a significant portion of the claimant's costs.<sup>28</sup> The tribunal condemned Turkey's behavior, emphasizing that surveillance on legal communications violated procedural fairness and the claimant's rights.<sup>29</sup>

### 3) Campos de Pesé, S.A. v. Republic of Panama

39. The *Campos de Pesé* Tribunal found that that the procedural misconduct of Campos de Pesé merited specific comment. The ICSID Tribunal awarded all costs against the Claimant even though it has succeeded in the jurisdictional phase.<sup>30</sup> The Tribunal noted the "Claimant's procedural conduct, and, in particular, its multiple measures which have seriously impaired the smooth and expedited development of this proceeding."<sup>31</sup>

### 4) Caratube International Oil Company LLP & Devincci Salah Hourani v. Kazakhstan

40. The *Caratube* Tribunal found that Kazakhstan engaged in actions intended to disrupt the arbitration process. Kazakhstan was found to have obtained the claimants' privileged and confidential information, likely through government surveillance and seizure.<sup>32</sup> The tribunal penalized Kazakhstan by requiring it to pay a larger share of the costs.<sup>33</sup> It emphasized that such conduct was unacceptable and detracted from the fairness of the proceedings.<sup>34</sup>

### 5) Conclusion on Cost-Shifting in Cases of Procedural Misconduct

41. The Tribunal may allocate the costs between the disputing parties if it determines the allocation to be reasonable, considering all relevant circumstances of the case.

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<sup>27</sup> *Libananco v. Turkey* at ¶¶ 557-569 (CL-0436-ENG).

<sup>28</sup> *Libananco v. Turkey* at ¶¶ 557-569 (CL-0436-ENG).

<sup>29</sup> *Libananco v. Turkey* at ¶¶ 557-569 (CL-0436-ENG).

<sup>30</sup> *Campos de Pesé, S.A. v. Republic of Panama*, ICSID Case No. ARB/20/19, Final Award, March 1, 2024 (CL-0437-ENG).

<sup>31</sup> *Campos de Pesé, S.A. v. Republic of Panama*, ICSID Case No. ARB/20/19, Final Award, March 1, 2024 at ¶232 (CL-0437-ENG).

<sup>32</sup> *Caratube International Oil Company LLP and Mr. Devincci Salah Hourani v. Republic of Kazakhstan*, ICSID Case No. ARB/13/13, Award, September 27, 2017 at ¶¶1260-1261 (RL-0182-ENG).

<sup>33</sup> *Caratube v. Kazakhstan* at ¶¶1260-1261 (RL-0182-ENG).

<sup>34</sup> *Caratube v. Kazakhstan* at ¶¶1260-1261 (RL-0182-ENG).

The investment treaty cases above demonstrate that arbitral tribunals have condemned procedural misconduct when used to disrupt, delay, or otherwise obstruct arbitration proceedings.

42. Indeed, the CAFTA instituted an expedited preliminary question procedure for mandatory initial tribunal review of objections against frivolous claims (under CAFTA Article 10.20(4)). These approaches to address procedural misconduct during the arbitration fit hand in glove with cost-shifting against procedural misconduct. These best practices are part of intensive current discussions before UNCITRAL Working Group III to address costs in investor-state arbitration. By shifting costs to the party engaging in such procedural wrongful behavior, these tribunals have sent a resounding message: the arbitral process must remain fair, transparent, and free from intimidation or manipulation.
43. Considering this established discretionary jurisprudence, Riverside's request for a cost award based on Nicaragua's obstructive tactics is reasonable and well-supported by the principles of justice and accountability upheld in international arbitration. An award of costs in this context would further reinforce the integrity of this tribunal's proceedings and set a precedent discouraging similar misconduct in future cases.

## **B. Nicaragua's Shameful Conduct Regarding its Offer to Return HSF**

44. While Nicaragua acknowledges that it was aware of INAGROSA's private ownership of HSF.<sup>35</sup> This admission exposes the pretense behind Nicaragua's invocation of ESI.<sup>36</sup> Nicaragua's conduct throughout this arbitration reveals that its claim to invoke ESI was a mere pretext intended to obscure the unlawful nature of its actions against Riverside's investment.

### **1) The September 2021 "Pseudo-Offer" - A Failure to Acknowledge Riverside's Ownership**

45. In September 2021, Nicaragua issued a letter to Riverside, offering a conditional process for the return of HSF, contingent on Riverside meeting certain vague, unspecified conditions.<sup>37</sup>
46. Notably, Nicaragua demanded that Riverside "prove" its ownership of HSF<sup>38</sup>—a requirement rendered unnecessary because Riverside had already submitted

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<sup>35</sup> RER-06 at ¶47.

<sup>36</sup> RER-06 at ¶47.

<sup>37</sup> Letter from Foley Hoag LLP to Appleton & Associates regarding offer to return Hacienda Santa Fe, September 9, 2021 (C-0116-ENG).

<sup>38</sup> Letter from Foley Hoag LLP to Appleton & Associates regarding offer to return Hacienda Santa Fe, September 9, 2021 (C-0116-ENG).



evidence of ownership<sup>39</sup> in its Notice of Arbitration (NOA) six months prior.<sup>40</sup> Moreover, as the governing authority, Nicaragua had constant, unrestricted access to property registry records that confirmed Riverside's ownership.

47. This demand for proof directly contradicts Nicaragua's repeated assertion that it recognized Riverside's ownership of HSF.<sup>41</sup> Had Nicaragua genuinely accepted Riverside's ownership, it would have had no reason to impose this unnecessary condition. The so-called "offer" was not a genuine gesture but rather a calculated maneuver to obscure Nicaragua's liability. This pseudo-offer was a belated tactic, conceived by Nicaragua's legal team to limit the state's exposure to damages for its unlawful expropriation and failure to protect Riverside's investment.

## 2) Fabrication of a "Rejection" by Riverside

48. Riverside has consistently shown that it did not reject Nicaragua's September 2021 offer.<sup>42</sup> Riverside responded promptly,<sup>43</sup> seeking clarification on the vague terms of the offer, showing its willingness to engage constructively. In its Counter-Memorial, Nicaragua itself admitted that Riverside did not reject the offer, stating instead that "noticeably missing from Riverside's response was any indication that Riverside or INAGROSA was willing to take back the property promptly."<sup>44</sup> This statement affirms that Riverside's request for clarification was not a refusal.
49. Nevertheless, Nicaragua presented a fabricated version of events before its own courts, falsely claiming that Riverside had expressly refused to accept HSF and that it cited security concerns and a refusal to travel as the basis for not returning to the property.<sup>45</sup> In fact, Nicaragua's Attorney General submitted this claim without evidence, and Jinotega Attorney General Diana Gutierrez admitted under cross-examination that the court did not request any verification of this assertion.<sup>46</sup>
50. Nicaragua perpetuated this falsehood in its Rejoinder before this Tribunal, reiterating that Riverside had allegedly rejected the September 2021 offer over safety concerns.<sup>47</sup> Yet, Riverside's counsel filed the relevant call records from September

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<sup>39</sup> Riverside filed the Public Auction Certificate No. 43 dated December 15, 1997 (**C-0042-SPA**) with the Notice of Arbitration on March 19, 2021.

<sup>40</sup> For clarity. The "pseudo-offer" refers to the offer to return Hacienda Santa Fe on September 9, 2021 (**C-0116-ENG**).

<sup>41</sup> Transcript 159:3-10.

<sup>42</sup> Riverside's Post-Hearing Brief at ¶¶19, 21, 73, 103 (e); Reply at ¶¶566-568; Investor's letter to the Tribunal regarding Discovery of *ex parte* Seizure Order at ¶¶46-59 (**C-0256-ENG**); Cellular Phone Call Record of Barry Appleton – showing calls from September 9, 2021 (**C-0273-ENG**).

<sup>43</sup> Letter from Appleton & Associates to Foley Hoag LLP – September 9, 2021 (**C-0118-ENG**).

<sup>44</sup> Counter-Memorial at ¶49.

<sup>45</sup> Application, Fact IV, at pp. 4-5 (**C-0253-SPA-ENG**).

<sup>46</sup> Transcript 1090:12-16.

<sup>47</sup> Rejoinder at ¶431.

9, 2021, which contain no evidence of such a conversation.<sup>48</sup> Nicaragua's reliance on fabricated evidence in this arbitration constitutes serious procedural misconduct and underscores its lack of good faith.

51. Nicaragua nullified its own September 9, 2021, communication by failing to follow up on Riverside's response.

(a) During her testimony, Jinotega Attorney General Diana Gutierrez was unable to provide any evidence of a rejection by Riverside that could substantiate Nicaragua's claims before this Tribunal or its local courts or justify the Judicial Order's issuance.<sup>49</sup>

(b) Nicaragua's damages report used the September 9, 2021 date as the so-called "maintenance request date" and asserted that Riverside "failed" to maintain HSF.<sup>50</sup> Yet, under questioning, Mr. Kratovil admitted that this date was subjectively selected without direction from Nicaragua.<sup>51</sup> When taken through the correspondence, he could not identify any evidence of Riverside's alleged rejection in September 2021,<sup>52</sup> undermining Nicaragua's entire narrative.

### 3) Misrepresentation of the Offer and Riverside's Response in Procedural Motion

52. The September 2021 *pseudo-offer* was neither rejected nor clarified, and Nicaragua's counsel sent only a general, non-specific letter to gauge Riverside's interest in a potential return.<sup>53</sup> Riverside responded immediately, requesting clarity on the terms, and demonstrated a positive interest. However, Nicaragua failed to transform this preliminary outreach into a binding offer.<sup>54</sup>

53. Nicaragua had every opportunity to issue a legitimate, detailed offer of return at that time but failed to do so. As the record demonstrates, Nicaragua could not return all of HSF to Riverside in September 2021 due to the establishment of a park reserve—the Toño Loco Memorial Forest Nursery—on part of the land.<sup>55</sup> Nicaragua's supposed offer was thus an empty pretense with no substantive basis, serving only as a façade before the Tribunal.

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<sup>48</sup> Cellular Phone Call Record of Barry Appleton – showing calls from September 9, 2021 (C-0273-ENG).

<sup>49</sup> Transcript 1082:15-21.

<sup>50</sup> RER-02 at ¶124; RER-04 at ¶136.

<sup>51</sup> Transcript 2077:3-10.

<sup>52</sup> Transcript 2044:11-2054:2; 2063:23-2064:9 (Referenced in the Protected Transcript).

<sup>53</sup> Letter from Foley Hoag LLP to Appleton & Associates regarding the offer to return Hacienda Santa Fe, September 9, 2021 (C-0116-ENG).

<sup>54</sup> Letter from Appleton & Associates to Foley Hoag LLP – September 9, 2021 (C-0118-ENG).

<sup>55</sup> Viva Nicaragua, INAFOR inaugurates community forest nursery in Jinotega, April 1, 2021 (C-0736-SPA-ENG).

54. By mischaracterizing Riverside's request for clarification as a rejection, Nicaragua breached its duty of good faith in this arbitration. This misrepresentation was then compounded in submissions to the Tribunal concerning the Judicial Order, leading to *Procedural Order No. 4*, where Nicaragua distorted the nature of the exchange, falsely portraying Riverside's engagement as a "rejection."<sup>56</sup> Such misrepresentations constitute a grave breach of ethical standards and justify significant cost implications against Nicaragua for procedural misconduct.

### **C. Nicaragua's Unfair and Non-transparent Judicial Expropriation Proceedings**

55. Nicaragua's domestic legal proceedings to judicially expropriate HSF were unnecessary. Nicaragua took steps to aggravate or extend the dispute before the Tribunal, making it more difficult to resolve.
56. These proceedings were time-consuming and wasteful. Expert Renaldy Gutierrez testified that Nicaragua could have taken steps to protect HSF, including posting private guards at HSF without the need to embark on a judicial process. The testimony merits citation:

**MS. GREENWOOD:** .... help me understand what the State can do without the judicial order. So can the State put security guards in in the absence of the judicial order?

**MR. GUTIÉRREZ:** The State has all the power it has under the constitution and also the obligation to protect individuals that are being dispossessed of their property.<sup>57</sup> [...]

**MS. GREENWOOD:** Sorry. I'm really talking about, separate from the police, we know that there was -- I think a private security firm was hired. In your opinion, can the State do that without a judicial order of the type we're discussing?

**MR. GUTIÉRREZ:** In the exercise of its police power to protect life or property, the State could avail itself of any means that they can find.

**MS. GREENWOOD:** Including, in your view, putting a private security firm onto the site?

**MR. GUTIÉRREZ:** It could be. Whatever they feel necessary to comply with their duties.<sup>58</sup>

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<sup>56</sup> Rejoinder at ¶455; Counter-Memorial at ¶49.

<sup>57</sup> Transcript 1466:4-11.

<sup>58</sup> Transcript 1466:14-25.

57. Expert Renaldy Gutierrez also identified numerous due process and fairness issues concerning the Judicial Order. For example, Expert Renaldy Gutierrez indicated the following:
- a) Nicaragua's failure to serve Riverside and INAGROSA with the 2021 Judicial Order effectively prevented Riverside from challenging it, as Riverside had no knowledge of it despite the terms of the Judicial Order requiring Nicaragua to serve
  - b) The failure to name the correct party to the judicial proceedings constitutes a breach of foundational fairness and due process.<sup>59</sup>
  - c) The Attorney General Office of Nicaragua's decision to proceed on a "urgency" basis, without providing any explanation on the "urgent" nature of the application, to proceed on an *ex-parte* basis and thus depriving INAGROSA of notice. The Nicaraguan court blindly accepted this procedural request and did not provide any explanation on why Nicaragua was allowed to proceed on an *ex-parte* basis, contrary to what Nicaraguan law requires.<sup>60</sup>

### 1) Reliance on Fabricated Evidence

58. As mentioned above, Nicaragua repeatedly has relied on the false claim that Riverside refused Nicaragua's offer to return HSF both before its courts and before this Tribunal. At the hearing, Jinotega Attorney General Diana Gutierrez admitted that there was no support for the allegation that Riverside refused Nicaragua's offer to return HSF.<sup>61</sup> This alleged rejection was entirely false and fabricated by Nicaragua to support its judicial seizure of HSF.
59. The fabrication of evidence by government institutions in Nicaragua to achieve its aims is not something new. As noted by Prof. Wolfe, the Group of Human Rights Experts on Nicaragua (GHREN) found foundational abuses of due process and fairness by the state through a "concerted and systematic manner" by the government institutions such as the Prosecutor's Office and the Judiciary, including the reliance on fabricated evidence or the interpretation of legislation.<sup>62</sup>

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<sup>59</sup> **CES-06** at ¶¶90-93.

<sup>60</sup> Transcript 1455:8-1459:22; 1460:19-1463:22.

<sup>61</sup> Transcript 1079:7-25; 1080:1-2.

<sup>62</sup> **CES-05** at ¶14; See also Report of the Group of Human Rights Experts on Nicaragua (March 2, 2023). UN Document A/HRC/52/63 at ¶114 (**C-0535-ENG**).

## 2) Failure to Provide Notice to Riverside & INAGROSA

60. Nicaragua failed to notify Riverside and INAGROSA of the 2021 Judicial Order. From the testimony at the hearing, Nicaragua never intended to notify Riverside and INAGROSA of the 2021 Judicial Order.
61. At the hearing, Jinotega Attorney General Diana Gutierrez admitted that the Office of the Attorney General of Nicaragua provided domicile addresses for serving notice to Riverside and Riverside's counsel directly to the Office of the Attorney General of Jinotega. She further admitted that her office made no effort to verify the accuracy of these addresses.<sup>63</sup> Jinotega Attorney General Gutierrez also conceded that she was unaware of any attempts to serve notice through the Hague Convention.<sup>64</sup>
62. In his testimony, Dr. Sequeira also admitted that neither Riverside nor INAGROSA was notified of the 2021 Judicial Order.<sup>65</sup>
63. Nicaragua not only withheld the existence of the 2021 Judicial Order from Riverside but also concealed it from this Tribunal by failing to disclose it during the June 22, 2022, procedural meeting.
64. In *Procedural Order No. 4*, the Tribunal aptly determined that the Judicial Order was not formally served on Riverside, constituting a failure to follow due process.<sup>66</sup>

## 3) Nicaragua's Shameful Conduct Regarding the Legal Title over HSF

65. Nicaragua undertook domestic legal actions that stripped INAGROSA of its exclusive legal title over HSF, granting the Republic of Nicaragua a shared legal title over the property at HSF instead.<sup>67</sup>
66. In his testimony, Expert Renaldy Gutierrez expounded on the *de jure* and *de facto* effects of the Judicial Order.<sup>68</sup> Expert Gutierrez explained that the *de facto* effect of the Judicial Order was to deprive INAGROSA of its exclusive rights to the property as owner, including possession and control, and severely affect Riverside's ability to use HSF as collateral in financial instruments.<sup>69</sup> The *de jure* effect of the Judicial Order created confusion on title by adding Nicaragua as a co-owner of HSF.<sup>70</sup>
67. Expert Renaldy Gutierrez had extensive experience as a lawyer for banks in Nicaragua and as a professor of commercial law.<sup>71</sup> He testified that taking co-extensive title effectively ended Riverside's ability to sell or raise money on the lands

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<sup>63</sup> Transcript 1095:7-1096:16.

<sup>64</sup> Transcript 1096:25-1097:3.

<sup>65</sup> Transcript 1691:12-25; 1692-1693:1-2.

<sup>66</sup> Procedural Order No. 4 at ¶37.

<sup>67</sup> **CES-06** at ¶¶74-79.

<sup>68</sup> Transcript 1426:8-1427:1; 1631:12-1632:6.

<sup>69</sup> Transcript 1426:8-1427:1; 1541:5-1542:3; 1631:12-1632:7

<sup>70</sup> Transcript 1426:8-1427:1.

<sup>71</sup> **CES-06** at ¶11.

at HSF without obtaining the permission of Nicaragua, its opponent in this arbitration.<sup>72</sup> Riverside's management noted that the effect of the cloud on title caused by Nicaragua's actions made it impossible for Riverside to rely upon HSF as collateral to finance this arbitration.<sup>73</sup> Nicaragua's procedural misconduct regarding the title resulted in increased financial stress for Riverside, and the lack of access to HSF as collateral increased financing costs.

68. Moreover, nothing prevented Nicaragua from relinquishing its claimed interest in the legal title of HSF, which it acknowledges as belonging solely to the rightful owner. This was always available to Nicaragua. However, Nicaragua failed to take this good-faith step.
69. Nicaragua failed to fulfill its duty of candor and good faith to this Tribunal regarding this legal instrument.

#### **D. Abusive Invocation of Non-Precluded Measures**

70. Nicaragua's reliance on the CAFTA §21.2 Essential Security Interest exception was merely a pretext and lacked good faith. This invocation was another element of Nicaragua's systemic and calculated misconduct to reduce its liability for its internationally wrongful conduct in this arbitration.
71. As noted in detail in the Post-Hearing Brief, Nicaragua failed to act in good faith when it invoked ESI.<sup>74</sup> The Essential Security Measures (ESM) Nicaragua took could not be covered within the meaning of ESI as they were not essential but addressed an ordinary police action, albeit with a complete abdication of the same. As noted in the Post-Hearing Brief, the ESM was not taken in good faith, and the evidence Riverside identified during the hearing confirmed that the ESM was not invoked concerning ESI at the time in good faith or later. They were all a form of pretext on Nicaragua's part.
72. The delayed invocation indicates that ESI was used as a pretext rather than in good faith. The absence of any communications within the government at the time of the invasion suggests that the activity at HSF had a plausible nexus to essential security, which is especially concerning.<sup>75</sup> Again, Nicaragua had provided no evidence to demonstrate that the government viewed the situation at HSF as

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<sup>72</sup> Transcript 1631:12-22.

<sup>73</sup> Second Witness Statement of Melva Jo Winger de Rondon at ¶30 and ¶¶38-39 (**CWS-08-ENG**) at ¶38, Mrs. Rondon states: "As a result of the local action, Nicaragua seized our Nicaraguan land title and effectively froze our ability to use Hacienda Santa Fé as collateral for loans. We had used the lands before, and we likely would have relied upon their value again for financial resources, but this option was not possible for us after the domestic judicial actions in Nicaragua froze our assets."

<sup>74</sup> Riverside's Post-Hearing Brief at ¶¶95, 103.

<sup>75</sup> Transcript 1073:10-1075:10.

involving any essential security level of concern in 2018 when the invasion occurred or afterward.

73. Nicaragua's pattern of misdirection extends into its Post-Hearing Brief, where, in paragraph 10, Nicaragua mischaracterizes Riverside's position by suggesting that Nicaragua could not have violated the FPS standard because Riverside allegedly demanded military intervention to remove the armed invaders. This portrayal is an overt distortion. Riverside sought police protection in 2018, a response that Nicaragua routinely provided to other private landowners facing similar land invasions.<sup>76</sup> Notably, Nicaragua eventually had to deploy riot police in August 2021 to clear the armed occupiers from HSF, further underscoring the gravity of its initial inaction.<sup>77</sup> Nicaragua's repeated misrepresentation illustrates a continued disregard for truth and transparency in these proceedings, justifying the imposition of cost sanctions as a deterrent against such conduct.

#### **E. Misconduct regarding misrepresentation of evidence.**

74. Nicaragua has persistently leveled inaccurate allegations of improper reliance on evidence by Riverside. When viewed in aggregate, these accusations reveal a pattern of procedural misconduct by Nicaragua.
- (a) In its unsuccessful Security for Costs motion, Nicaragua introduced a sub-motion alleging that Riverside had failed to produce certain documents. Nicaragua even enumerated specific documents purportedly withheld.<sup>78</sup> Riverside, however, promptly demonstrated that all such documents were either duly produced or not ordered for production by the Tribunal.<sup>79</sup> This sub-motion exemplifies reckless conduct on Nicaragua's part; a minimal degree of due diligence would have shown the baselessness of such a claim.
  - (b) Nicaragua has also criticized Riverside for producing documents later uncovered in mislabeled archival boxes held by third-party accountants and previously unknown to exist.<sup>80</sup> Riverside's management provided detailed testimony that its original files and records in Nicaragua had been looted from the Casa Hacienda at HSF and its emails had been hacked,

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<sup>76</sup> Riverside's Post Hearing Brief at ¶¶177-179; See also Reply at ¶¶128,1321-1360; Report from Commissioner Major Cruz Sevilla to Commissioner Francisco Diaz re: Land invasions complaints and requests for Police Amparo, July 31, 2018 (C-0326-SPA).

<sup>77</sup> Nicaragua Actual, "Police evicts Sandinistas from Hacienda Santa Fe", August 14, 2021 (C-0059-SPA).

<sup>78</sup> Nicaragua's Security for Costs Motion, October 4, 2023 at ¶42.

<sup>79</sup> Riverside's Response to Respondent's Application for Security for Costs, November 10, 2023 at ¶¶62-115.

<sup>80</sup> Transcript 256:9-24; 588:1-11.

rendering access impossible even with expert IT support.<sup>81</sup> Riverside acted diligently to produce all documents in its possession. Nonetheless, Nicaragua wrongfully attributed misconduct to Riverside because these documents were produced in time for Riverside's second round of pleadings.<sup>82</sup>

(c) Nicaragua has repeatedly leveled sweeping accusations of unsupported hearsay against testimonial evidence from Riverside, even when witnesses testified based on direct knowledge from their standard business functions.<sup>83</sup> These accusations lack good faith. Nicaragua has relied on similar evidence from officials reporting in their ordinary duties, such as Commissioner Castro's report to Deputy National Police Chief Diaz,<sup>84</sup> or the oral reports referenced by Attorney General Gutierrez in her testimony.<sup>85</sup> This inconsistent stance—condemning Riverside's business-related testimony as hearsay while simultaneously relying on its own—reveals a lack of candor and underscores a further pattern of procedural misconduct before this Tribunal.

75. Nicaragua's handling of these evidentiary matters illustrates a pattern of misrepresentation and an absence of candor. These repeated, unsubstantiated attacks have needlessly complicated the document production process and taken together, constitute a demonstrable form of procedural misconduct before this Tribunal.

#### **F. Respondent's Awareness of its Misconduct**

76. The highest levels of the Nicaraguan government were fully aware of the invasion and destruction of HSF yet chose not to take any action to prevent further damage.

77. Edwin Castro, a prominent member of the Nicaraguan Legislative Assembly and the Sandinista National Council, met with the invaders at HSF. During the meeting, Sandinista Congressman Castro expressed support for their continued unlawful occupation of HSF, stating that the government was "looking for a way to buy it."<sup>86</sup>

78. Police Commissioner Marvin Castro informed Deputy National Police Chief that Sandinista Congressman Edwin Castro had met with the HSF invaders and

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<sup>81</sup> Transcript 588:1-11; 589:8-589:3; Witness Statement of Melva Jo Winger de Rondon-Reply at ¶¶49-75 (CWS-08).

<sup>82</sup> Transcript 256:9-24.

<sup>83</sup> Counter-Memorial ¶¶70-78,277-278,280, 282-283,336,429; Rejoinder at ¶¶46-59; Nicaragua's Post Hearing Brief at ¶¶13,44-45.

<sup>84</sup> Transcript 1193:14-21.

<sup>85</sup> Transcript 1139:6:15.

<sup>86</sup> Report from Commissioner Marvin Castro to Francisco Diaz, Deputy Chief of the National Police regarding Invasion of Hacienda Santa Fe, July 31, 2018 (C-0284-SPA-ENG).



instructed them to stay on site.<sup>87</sup> Notably, Police Commissioner Castro's report did not refer to any national security threat posed by the occupiers.

79. The Attorney General's Office of Nicaragua was fully aware of the extent and implications of the HSF invasion. During the hearing, Jinotega Attorney General Diana Gutierrez admitted that the Attorney General Office of Nicaragua had issued directives to the Jinotega office regarding actions related to the HSF invasion.<sup>88</sup>

### **G. Abusive Contribution and Mitigation Argument.**

80. In its pleadings, Nicaragua argued that any damages awarded must be reduced because INAGROSA contributed to the damages.<sup>89</sup>
81. At the hearing, Police Captain William Herrera admitted that the police only confiscated the weapons from HSF's security guards,<sup>90</sup> leaving them defenseless against hundreds of armed invaders.
82. Police Captain Herrera also admitted that Police Inspector Calixto Herrera never advised INAGROSA's security guards during the invasion that the company should hire additional guards to protect HSF.<sup>91</sup>
83. In addition, Nicaragua argued that Riverside failed to mitigate its damages following the invasion of HSF,<sup>92</sup> claiming that "Claimant failed to mitigate its damages when it chose to let Hacienda Santa Fe sit in complete abandonment and refused to re-take possession when Nicaragua offered it in September 2021."<sup>93</sup>
84. Riverside never refused Nicaragua's 2021 offer to return HSF. Nicaragua fabricated this alleged refusal to support its judicial application to take HSF's legal title. At the hearing, Jinotega Attorney General Diana Gutierrez admitted there was no evidence to support the allegation that Riverside refused Nicaragua's offer.<sup>94</sup>
85. As of the hearing date, no charges had been filed against the leaders of the invasion for their illegal actions and death threats against INAGROSA's management. Police Commissioner Marvin Castro admitted at the hearing that no charges had been brought against the invaders.<sup>95</sup>

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<sup>87</sup> Report from Commissioner Marvin Castro to Francisco Diaz, Deputy Chief of the National Police regarding the Invasion of Hacienda Santa Fe, July 31, 2018 (**C-0284-SPA-ENG**).

<sup>88</sup> Transcript 1060:20-1061:10.

<sup>89</sup> Rejoinder ¶¶780-785; Counter-Memorial at ¶¶494-502.

<sup>90</sup> Transcript 1241:9-1242:10.

<sup>91</sup> Transcript 1263: 9-17.

<sup>92</sup> Rejoinder at ¶¶780-785; CM at ¶¶503-507.

<sup>93</sup> Rejoinder at ¶784.

<sup>94</sup> Transcript 1079:7-25; 1080:1-2.

<sup>95</sup> Transcript 1216:20-1217:25.

## H. Concealment and Misrepresentation of the Role of the Nicaraguan Resistance

86. Nicaragua's central defense regarding attribution claimed that the individuals occupying HSF were merely "local farmers and members of a cooperative with no affiliation to the Government."<sup>96</sup> In its pleadings, Nicaragua persistently mischaracterized the Nicaraguan Resistance as a political opponent that was violent and had an "anti-government agenda."
87. However, in his expert report, Prof. Justin Wolfe explained that the Nicaraguan Resistance had been allied politically with the Sandinista National Liberation Front (SNLF) since 2006.<sup>97</sup> Rather than acting as opponents, the Nicaraguan Resistance Party operates under the leadership of Sandinista President Daniel Ortega and Vice President Rosario Murillo.<sup>98</sup> This alignment is further evidenced by communications from the invasion leaders directed to the Nicaraguan Attorney General's Office.<sup>99</sup>
88. At the hearing, Jose Lopez confirmed that he joined the SNLF in 2006 due to this alliance between the Nicaraguan Resistance and the SNLF. Mr. Lopez testified that he was a member of the Nicaraguan Resistance. Still, on each of the three occasions, he was elected as a local municipal council member, whether alternate or regular, for the San Rafael del Norte Municipality, which was under the banner of the Sandinista Party (SNLF).<sup>100</sup>
89. Nicaragua misled both the Tribunal and Riverside regarding the nature of its defense, maintaining a fictitious narrative about the dangerous Nicaraguan Resistance in 2018 until Riverside's expert Prof. Wolfe exposed Nicaragua's misrepresentations.<sup>101</sup> Only then did Nicaragua begin to step back from this fabrication. Compounding this misdirection, Nicaragua failed to address in good faith the prominent role of Sandinista leadership among the invaders—figures such as Wama, El Chino, and Comandante Toño Loco—despite Wama and El Chino being available for testimony yet conspicuously absent. Nicaragua's tactic of obfuscation forced Riverside to expend substantial time and resources countering this illusory and deceptive defense, needlessly escalating both costs and efforts in these proceedings.
90. Finally, Nicaragua's decision to raise completely new defenses not raised previously and bring in witnesses and experts in the second round that were available to it in

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<sup>96</sup> Counter-Memorial at ¶30.

<sup>97</sup> Counter-Memorial at ¶2 (p.15), ¶3 (p.17), ¶26 (p.28); See also **CES-05** at ¶¶29-36.

<sup>98</sup> **CES-05** at ¶¶52-56.

<sup>99</sup> Letter from the El Pavón Cooperative to the Jinotega Attorney General's Office June 5, 2018 (**R-0064-SPA-ENG**); 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**).

<sup>100</sup> Transcript 1301:18-1302:11.

<sup>101</sup> **CES-05** at ¶¶29-36, 52-56.

the first round of pleading demonstrates procedural misconduct.<sup>102</sup> The Tribunal has already received pleadings on the significant prejudice caused to Riverside because of these matters and these are properly matters to consider in awarding costs in any event against Nicaragua.<sup>103</sup>

### **I. Jose Lopez's Unreliable Account of the 2003 Eviction**

91. Nicaragua's defense relies heavily on the testimony of Jose Lopez, the former President of the El Pavon Cooperative, to substantiate its unfounded narrative of a continuous invasion of HSF. As part of this, Nicaragua introduced a news article from *El Nuevo Diario*, in which Mr. Lopez recounts his version of the 2003 eviction.<sup>104</sup>
92. Yet, Mr. Lopez's account crumbled under cross-examination, exposing crucial omissions and contradictions regarding the 2003-2004 eviction. Notably, at the hearing, he admitted he was not present during the 2003 eviction<sup>105</sup>—a pivotal fact he omitted in both of his witness statements submitted to this Tribunal, thereby calling into question the reliability of his testimony.
93. In his first witness statement, Mr. Lopez asserted, "The Rondón family committed to pay for all that, in exchange for the property, but they never did." However, during the hearing, he conceded that he could not confirm whether compensation was paid, as he was absent from these events.<sup>106</sup>
94. Initially, Mr. Lopez claimed, "The security guards of Hacienda Santa Fé moved from the lower part towards El Pavón to tear down the houses; some were burnt, and the crops were destroyed."<sup>107</sup> Yet, he later admitted he had only been told by others that the police participated in the destruction.<sup>108</sup> Mr. Lopez did not know if this evidence in his testimony was truthful.
95. Mr. Lopez further testified that photographs in the *El Nuevo Diario* article depicted alleged destruction by HSF guards. However, he later conceded that the house of Dionisio Rugama, shown in these images, was outside HSF boundaries.<sup>109</sup> He also

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<sup>102</sup> Riverside Response on witness cross-examination and the hearing, May 13, 2024, at ¶¶6-12 (**C-0762-ENG**); Expert Report-Dr. B. Sequeira (**RER-05**); Expert Report-Prof. W. Burke-White (**RER-06**); Witness Statement of M. Rosales (**RWS-18**); Witness Statement of Favio Dario Enriquez Gomez (**RWS-21**).

<sup>103</sup> Investor's Motion on Procedural issues March 26, 2024 at ¶¶150-113, 129-131, 132-180; Reply on Riverside Urgent Rejoinder Procedural Motion, April 12, 2024 at ¶¶53-159.

<sup>104</sup> Francisco Mendoza, Scorched Land in El Pavón, *El Nuevo Diario*, November 22, 2003 (**R-0036-SPA-ENG**).

<sup>105</sup> Transcript 1336:22-1337:2; 1340:9-14.

<sup>106</sup> Transcript 1340:23-1341:14; 1342:18-1343:9; 1344:17-20.

<sup>107</sup> Witness Statement of José V. López-Counter-Memorial at ¶14 (**RWS-04**).

<sup>108</sup> Transcript 1341:25-1342:17.

<sup>109</sup> Transcript 1344:1-10.

claimed the article showed a burned school but soon retracted, admitting it merely showed the “area” where it had once been.<sup>110</sup>

96. Despite the severe discrediting of Mr. Lopez's testimony, Nicaragua continued to rely on his account and the *El Nuevo Diario* article in its Post-Hearing Brief.<sup>111</sup> When questioned about the article's accuracy, Mr. Lopez's response—“Could be”<sup>112</sup> — further underscored his testimony's unreliability. The Tribunal should carefully consider these profound omissions and inconsistencies as the absence of diligence and candor on the part of Nicaragua regarding the discredited testimony of Mr. Lopez goes to the issue of procedural misconduct.

#### **J. Jose Lopez's Unreliable Account of the alleged 2017 invasion**

97. Nicaragua had every opportunity to present Wama (Adrian Wendell Mairena), the alleged leader of the 2017 invasion of HSF, directly before this Tribunal. Police Commissioner Castro's profile of Wama contains his contact information and indicates that he was not incarcerated as of 2022.<sup>113</sup> Nothing prevented Nicaragua from presenting Wama's direct testimony.
98. Instead, Nicaragua chose to rely on hearsay through an elected Sandinista municipal politician, Jose Lopez, who based his account of the alleged 2017 invasion solely on one conversation with Wama.<sup>114</sup> No supporting evidence—such as texts, police reports, or satellite images—was presented to substantiate this supposed invasion, which multiple firsthand Riverside witnesses denied.<sup>115</sup> During the hearing, Mr. Lopez admitted he neither visited the alleged invaded area nor reported the supposed crime of trespassing to the police.<sup>116</sup>
99. Even if the alleged 2017 invasion were genuine—which Riverside categorically denies—the fact that Mr. Lopez neglected to report it as a crime underscores the unreliability of Nicaragua's evidence. This continued reliance on unsubstantiated testimony exemplifies Nicaragua's procedural misconduct before this Tribunal.

#### **K. Shelter Order absence of good faith**

100. To this day, Nicaragua has been unable to produce the Shelter Order. Nicaragua filed a video showing President Ortega ordering the National Police not to shoot

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<sup>110</sup> Transcript 1337:11-1338:9.14-16

<sup>111</sup> Nicaragua's Post-Hearing Brief at ¶¶5.

<sup>112</sup> Transcript 1345:5-8.

<sup>113</sup> Characterization of Mr. Adrian Wendell Mairena Arauz, Jinotega National Police, 2022 (**R-0039-SPA-ENG**).

<sup>114</sup> Transcript 1358:15-17.

<sup>115</sup> Transcript 1358:1-14.

<sup>116</sup> Transcript 1357:23-25; 1360:2-6.

protesters, nothing more than that.<sup>117</sup> That is not an order that the police do not carry out their duties and shelter in place. Conveniently, Nicaragua also cannot produce any document terminating the effect of the phantom order. Since there is no written order, the content of this alleged presidential order, beginning and end, is unestablished.

101. The Interdisciplinary Group of Independent Experts (GIEI) from the Organization of American States (OAS) confirmed that no formal 'shelter order' was in effect in June 2018. As noted by the GIEI, the Catholic Church—a key participant in the National Dialogue—stated that no shelter order was in place after May 2018.<sup>118</sup> One of the two parties to the "National Dialogue" social contract publicly declared no agreement was in force **after** May 30, 2018.
102. At the hearing, Police Captain William Herrera and Commissioner Marvin Castro admitted that no written presidential order existed.<sup>119</sup> In light of the statements from the Catholic Church leadership that there was no agreement after May 30, 2018, the absence of any written orders confirming a policy of national police restraint, and the actual evidence of police measures to the contrary, Nicaragua's assertions of such an order can only be viewed as a pretext and a form of bad procedural conduct.
103. Nicaragua claimed that the Shelter Order was nationwide.<sup>120</sup> To support this claim, Nicaragua filed several police press statements.<sup>121</sup> At the hearing, Police Commissioner Castro admitted that none of the police press statements mentioned the San Rafael del Norte Municipality.<sup>122</sup> Further, Police Commissioner Marvin Castro admitted that in the video, President Ortega only talked about the police in Masaya remaining in their barracks.<sup>123</sup>

#### **L. Nicaragua seeks to rely on its faulty conduct.**

104. Throughout this arbitration, Nicaragua has improperly sought to benefit from its own wrongful conduct, violating the foundational principle of *nullus commodum capere potest de sua injuria propria*—that no one should be permitted to profit from their

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<sup>117</sup> Video of Opening of the National Dialogue- President Daniel Ortega speech **(C-0339-SPA)**.

<sup>118</sup> Interdisciplinary Group of Independent Experts, Nicaragua "Report on Violent Events That Took Place between April 18th and May 30th, 2018" at Bates 0001111 **(C-0131-ENG)**.

<sup>119</sup> Transcript 1251:13-15; 1200:9-11.

<sup>120</sup> Transcript 1999:21-24.

<sup>121</sup> National Police press release No. 25-2018, May 27, 2018 **(R-0180-SPA)**; National Police press release No. 26-2018, May 28, 2018 **(R-0181-SPA)**; National Police press release No. 47-2018, June 9, 2018 **(R-0183-SPA)**; National Police press release No. 49-2018, June 10, 2018 **(R-0184-SPA)**; National Police press release No. 56-2018, June 12, 2018, **(R-0185-SPA)**; National Police press release No. 67-2018, June 17, 2018 **(R-0188-SPA)**; National Police press release No. 68-2018, June 18, 2018 **(R-0189-SPA)**; National Police press release No. 92-2018, July 24, 2018 **(R-0190-SPA)** and National Police press release No. 112-2018, September 16, 2018 **(R-0191-SPA)**.

<sup>122</sup> Transcript 1206:19-22.

<sup>123</sup> Transcript 1998:22-25.

own wrongdoing. As Prof. Bin Cheng affirms, this principle is well-established in international law.<sup>124</sup> By attempting to exploit its own misdeeds, Nicaragua has engaged in procedural misconduct that warrants an award of costs against it.

105. Nicaragua provided no credible evidence of the alleged “*coup d’état*.” Its sole evidence is *National Report No. 5*, which Nicaragua sent to the United Nations Human Rights Council.<sup>125</sup> Independent UN experts, as cited by Prof. Wolfe, have concluded that the peaceful protests regarding social security reforms in April 2018 were not part of a coup attempt.<sup>126</sup> Nicaragua’s unsubstantiated assertions, contradicted by numerous independent expert factfinders and governments, therefore lack both factual and legal foundation.
106. Nonetheless, Nicaragua has used this purported “*coup d’état*” as a pretext to justify its delayed invocation of ESI.<sup>127</sup> Furthermore, Prof. Burke-White, who openly admitted his lack of expertise in Nicaraguan politics and society, uncritically adopts Nicaragua’s narrative while disregarding the substantial evidence that contradicts his conclusions regarding Nicaragua’s alleged good-faith invocation of ESI.<sup>128</sup>
107. The Nicaraguan Attorney General’s Office acted “urgently” under domestic law, which allowed it to proceed *ex parte*. However, while Nicaragua was ordered to serve the Judicial Order, it failed to comply without any explanation or justification for this foundational breach of due process and fairness. Nicaragua had many opportunities to notify this Tribunal and Riverside of the existence of the Judicial Order. Instead, at the June 2021 procedural meeting, Nicaragua chose silence. Later, Nicaragua contends that Riverside should have known about the suppressed and unserved Judicial Order by November 2022 and could have requested that Nicaraguan courts lift the precautionary measure.<sup>129</sup> Such arguments disregard Nicaragua’s obligations of transparency and candor in these proceedings.
108. The Judicial Order does not mandate Nicaragua to incur costs for security at HSF; instead, this was a discretionary action by the Attorney General’s Office. Nicaragua’s constitutional and legal duty is to protect private property. It cannot seek a set-off against any damages awarded to Riverside for its voluntary decision to hire security services to carry out its ordinary legal duties.
109. Throughout these proceedings, Nicaragua has persistently alleged that Riverside contributed to its own harm by failing to secure HSF.<sup>130</sup> Yet, Nicaragua encouraged

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<sup>124</sup> Bin Cheng, *General Principles* at p.150 (CL-0028-ENG).

<sup>125</sup> Nicaraguan National Report submitted in accordance with paragraph 5 of the Annex to Human Rights Council resolution 16/21, January 28, 2019, pp. 3-4 (R-0019).

<sup>126</sup> Reply Expert Statement of Prof. Justin Wolfe at ¶¶ 73-77 (CES-05).

<sup>127</sup> RER-06 at ¶¶42.

<sup>128</sup> RER-06 at ¶¶6,41.

<sup>129</sup> Nicaragua’s Post-Hearing Brief at ¶12.

<sup>130</sup> Counter-Memorial at ¶501; Rejoinder at ¶783.

the invaders to continue their HSF occupation.<sup>131</sup> This contradictory stance, alongside its attempts to shift responsibility onto Riverside, underscores a pattern of misconduct and a disregard for fundamental principles of justice and fairness before this Tribunal.

### **M. Unfair and Heavy-handed Nicaraguan Government Official Witness Evidence**

110. Nicaraguan government officials repeatedly acted arbitrarily and capriciously, obstructing Riverside's ability to conduct its business despite Riverside's successful operations in Nicaragua for over twenty years. Government regulators frequently inspected HSF over the years without identifying any infractions or raising concerns.
111. In its defense, Nicaragua presented six government officials who submitted ten witness statements, each requiring Riverside's detailed review, analysis, and response. Independent legal expert Renaldy Gutierrez conducted a comprehensive review of these statements and found no substantive regulatory issues or inconsistencies; any issues cited by officials were de minimis at most.<sup>132</sup>
112. Nicaragua could have presented its regulatory arguments through an expert report from its legal expert, Dr. Byron Sequeira, or other legal professionals capable of constructively addressing Mr. Renaldy Gutierrez's expert findings. Yet, Nicaragua chose not to do so, thereby increasing the complexity and burden of Riverside's response and significantly complicating the burden upon this tribunal. This omission reflects, at best, wanton recklessness and, taken cumulatively, suggests a pattern of abuse of process that merits consideration in assessing costs.
113. As articulated in Riverside's Post-Hearing Brief and supported by expert testimony from Prof. Wolfe, Nicaragua functions as an autocratic state under the Ortega-Murillo regime.<sup>133</sup> In light of Nicaragua's obstructive conduct, Nicaragua should bear all costs incurred by Riverside in reviewing and defending against these unfounded regulatory claims. Furthermore, Riverside should not be assessed any costs related to calling or withdrawing Nicaraguan witnesses connected with these issues, given the deceptive and systematic nature of Nicaragua's conduct throughout these proceedings.

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<sup>131</sup> Report from Commissioner Marvin Castro to Francisco Diaz, Deputy Chief of the National Police regarding Invasion of Hacienda Santa Fe, July 31, 2018 (C-0284-SPA-ENG).

<sup>132</sup> CES-06 at ¶¶182-188.

<sup>133</sup> CES-05 at ¶¶110; Riverside's Post-Hearing Brief at ¶¶4-5; Paul Reichler Resignation Letter dated March 2, 2022 at p.3 (C-0671-ENG).

## **N. No Criminal Charges for the Death Threats Against Riverside & INAGROSA Management**

114. Riverside and INAGROSA Management received numerous death threats from the invaders; however, Nicaragua did nothing to investigate and prosecute those responsible for these threats against Riverside and INAGROSA. Police Commissioner Marvin Castro documented profiles of the invaders, noting their criminal backgrounds and violent actions.<sup>134</sup> At the hearing, Police Commissioner Marvin Castro admitted that none of the invaders had been charged with any offenses.<sup>135</sup>
115. While Nicaragua has made repeated offers to return HSF, none have included any government actions addressing the highly credible death threats faced by Riverside and INAGROSA Management. Police Commissioner Marvin Castro's testimony at the hearing underscored that the government had taken no meaningful steps to address these threats. The ongoing death threats made it impossible for Riverside and INAGROSA Management to return safely and operate HSF for Riverside.
- (a) During the hearing, Luis Gutierrez vividly described the trauma that he and his family endured from these death threats. He recounted how Toño Loco threatened to **"riddle the little agronomist's chest with bullets from Santa Fé,"** a threat made shortly before Toño Loco was killed in December 2018.<sup>136</sup> Mr. Gutierrez also recalled subsequent threats, including one in June 2019 when another paramilitary warned him, **"there's no more rabies if the dog is killed,"** an explicit threat to his life.<sup>137</sup>
  - (b) Jaime Vivas, a field operations supervisor at HSF, was similarly targeted. At the hearing, Luis Gutierrez testified that on the day they conducted the inventory of damages at HSF, he found a note in Mr. Vivas' room reading, **"we are going to come back and we're going to cut off your head for being a snitch- you, the administrator, and the owner."**<sup>138</sup>
  - (c) Carlos Rondon, referenced as the "owner" in this note, was also subject to violent death threats.<sup>139</sup> Comandante Gorgojo told Luis Gutierrez that both

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<sup>134</sup> Characterization of Mr. Ney Ariel Ortega Kuan, Jinotega National Police, 2022 (R-0044-SPA-ENG).  
Characterization of Mr. Haniel Samuel Rizo Torrez, Jinotega National Police, 2022 (R-0045-SPA-ENG).

<sup>135</sup> Transcript 1216:20-1217:25.

<sup>136</sup> Transcript 878:8-879:5.

<sup>137</sup> Transcript 878:8-879:5.

<sup>138</sup> Transcript 876:11-19.

<sup>139</sup> Transcript 557:7-14.



he and Mr. Rondon were “dead men.”<sup>140</sup> In his testimony, Mr. Rondon described the lasting effects of these threats,<sup>141</sup> as did Mrs. Melva Jo Winger de Rondon, who gave a detailed account of the horrific experiences she and her family endured due to the HSF invasion. In her words, “***My husband was threatened with his life.***”<sup>142</sup>

- (d) Domingo Ferrufino, an HSF security guard and key eyewitness, described the numerous threats of violence and death as well the savage beating he was subjected to by armed invaders—a beating so severe that he still suffers from the injuries.<sup>143</sup> Evidence of the credibility of these threats includes the brutal beating of this elderly man by a group of 25 armed invaders wielding a rocket mortar and farming equipment.<sup>144</sup> Approximately a month later, Cinco Estrellas told Mr. Ferrufino, upon his return to HSF, that he had to leave or otherwise he would be killed to eliminate any witnesses.<sup>145</sup>

116. At no point did Nicaragua take steps to protect Riverside or INAGROSA's Management from the intimidation and threats of serious physical harm. These threats of severe physical injury to management continue to this day. This failure is highly relevant to assessing Nicaragua's conduct during this arbitration and what Nicaragua has claimed is its international law duty to protect foreign investors and its investments in Nicaragua.

### **O. Government Support of the Invaders**

117. Nicaragua's denial that INAFOR established the Antonio Rizo Community Nursery within HSF reveals a manifest disregard for the facts. This misrepresentation forced Riverside to engage in unnecessary rounds of submissions, further complicating the proceedings.
118. Nicaragua argued that the Viva Nicaragua article reporting on the inauguration of the Antonio Rizo Community Nursery was “incorrect and unverified.”<sup>146</sup> Yet it is significant to note that *Viva Nicaragua* is under the direct control of the Ortega-Murillo family, and Nicaragua no longer maintains an independent press. Three of Daniel Ortega and Rosario Murillo's children—Maurice, Camila, and Luciana Ortega Murillo—have served as directors of *Viva Nicaragua*.<sup>147</sup> Camila Ortega Murillo led

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<sup>140</sup> Witness Statement of Carlos Rondon – Memorial at ¶81 (CWS-01).

<sup>141</sup> Transcript 473:24-474:17.

<sup>142</sup> Transcript 305:22-306:19

<sup>143</sup> Transcript 356:4-14; 356:25-357:4; 432:11-433:25.

<sup>144</sup> Transcript 387:21-386:12.

<sup>145</sup> Transcript 358:22-359:9; 385:6-16.

<sup>146</sup> Nicaragua's Observations on Claimant's New Evidence, July 22, 2024 at ¶12.

<sup>147</sup> El Pais, Nicaragua's political dynasty: heirs in a golden cage April 2021 (C-0752-SPA-ENG).

*Viva Nicaragua Canal 13* from 2012 until April 2024,<sup>148</sup> underscoring the channel's alignment with the state. When the autocratic nature of Nicaragua is understood, these arguments raised by Nicaragua disclose misrepresentation and a lack of candor and transparency, which speak to its procedural misconduct.

119. Mr. Mendez claimed that the INAFOR database had allegedly placed the community nursery in the San Jose Community.<sup>149</sup> However, despite access to this evidence, he chose not to present it to the Tribunal. Mr. Mendez's statement is unsupported. This omission raises fundamental questions about the credibility of his testimony and Nicaragua's conduct in these arbitration proceedings.

## **P. Withdrawal of Certain Witnesses**

120. Riverside adhered in good faith to the procedural calendar when calling witnesses and experts for cross-examination and making proactive notifications in good faith.
121. On May 10, 2024, Riverside called eleven witnesses and four experts for the July 2024 hearing.<sup>150</sup> Riverside noted that the Tribunal's forthcoming decision concerning the scope of the factual and expert direct testimony would impact the number of witnesses it would need to call.<sup>151</sup> This issue, however, remained unresolved until the Tribunal addressed it at the pre-hearing conference. In the meantime, Riverside diligently advised Nicaragua not to incur non-refundable travel expenses for certain witnesses.<sup>152</sup>
122. Following the pre-hearing conference on June 11, 2024, Riverside notified Nicaragua that it had excused six government regulatory witnesses from attendance.<sup>153</sup>
123. Nicaragua suffered no prejudice from the withdrawal of five fact witnesses and two experts. Specifically, in the case of Prof. Burke-White, Nicaragua had indicated that he had prior professional commitments and would only have been available on July 11 or 12, 2024.<sup>154</sup>

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<sup>148</sup> Camila Ortega Murillo and William Grisby are no longer directors of Channel 13 and La Primerisimo, according to government source April 26, 2024 **(C-0753-SPA-ENG)**.

<sup>149</sup> Report on the inauguration of the forest nursery, July 22, 2024 **(R-0245-SPA-ENG)**.

<sup>150</sup> Email from Barry Appleton to the Tribunal regarding identification of witnesses and experts for cross-examination, May 10, 2024 **(C-0759-ENG)**.

<sup>151</sup> Email exchange between Barry Appleton and Analia Gonzalez regarding witness notification May 14, 2024 **(C-0761-ENG)**; Riverside Response on witness cross-examination and the hearing, May 13, 2024, **(C-0762-ENG)**.

<sup>152</sup> Email from Barry Appleton to the Tribunal regarding identification of witnesses and experts for cross-examination, May 10, 2024 **(C-0759-ENG)**.

<sup>153</sup> Email exchange between Barry Appleton and Analia Gonzalez regarding the release of fact witnesses, June 11, 2024 **(C-0763-ENG)**.

<sup>154</sup> Email from Analia Gonzalez to Tribunal regarding the pre-hearing conference list of participants, May 23, 2024 **(C-0760-ENG)**.

124. Riverside should not face adverse costs for withdrawing certain witnesses. Riverside acted responsibly and professionally, remaining mindful of the time constraints and adjusting its witness list accordingly.

### **Q. Riverside's Discovery of *Ex-Parte* Seizure Order Against Investor (November-December 2022)**

125. Nicaragua's conduct surrounding this issue amounted to procedural misconduct, creating unnecessary disputes through misrepresenting Riverside's position. These actions, undertaken with dishonest intent, led to unjustifiable delays and increased costs. As a result, Riverside should be fully indemnified for its legal expenses associated with this issue.

### **R. Nicaragua's valuation approach absence of good faith**

126. As outlined in Riverside's Post-Hearing Brief, the valuation analysis presented by Nicaragua's experts, Messrs. Hart, and Kratovil, was both distorted and artificially reduced. Their approach lacked balance and independence, failing to reflect HSF's actual market value. This manipulation included:

(a) Limiting valuation scenarios only to the planted land's market value, while using outdated "book value" for unplanted land.<sup>155</sup>

(b) Improperly categorizing unplanted land as infrastructure without clearly delineating asset classes.<sup>156</sup> By failing to provide a detailed breakdown of each asset class's contribution and relying on obsolete book values, their approach yields an artificially low valuation that misrepresents HSF's true worth.

127. The real estate valuation provided by Nicaragua's experts is critically flawed due to two significant issues: reliance on non-comparable data and inconsistent valuation metrics. Mr. Kratovil admitted to using data from properties that were not directly comparable to HSF,<sup>157</sup> introducing uncertainty and undermining the credibility of his findings.

128. Additionally, Mr. Hart's assumption that third-party investors declined to participate in Riverside's project due to alleged deficiencies is highly speculative.<sup>158</sup> He acknowledged that he conducted no independent investigation or consulted any potential investors.<sup>159</sup> Without empirical evidence or supporting testimony, his

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<sup>155</sup> Transcript 2101:9-2105:24.

<sup>156</sup> Riverside's Post-Hearing Brief at ¶¶211-212.

<sup>157</sup> Transcript 2021:11-2030:11 (Referenced in the Protected Transcript).

<sup>158</sup> Transcript: 2007:1-2008:16 (Referenced in the Protected Transcript).

<sup>159</sup> Transcript: 2007:1-2008:16 (Referenced in the Protected Transcript).

conclusions are unfounded and cannot serve as credible expert testimony. These errors reach a level of conduct that borders on misconduct.

129. A further issue of concern is Messrs. Hart and Kratovil's unwillingness to engage in constructive discussions with other experts to reach a balanced approach. This failure contrasts sharply with Riverside's expert, Vimal Kotecha, who demonstrated a commitment to collaboration by incorporating suggestions from Nicaragua's experts (damages and avocado production) where appropriate to streamline areas of dispute. This deliberate failure to achieve consensus further distorts the valuation of HSF, underscoring a lack of good faith in Nicaragua's approach. Nicaragua's experts all appeared to be advocates for Nicaragua rather than independent experts. Cooperation and professional respect from Nicaragua's experts would have reduced the scope of the issues in dispute and the amount of pleading and expert costs.

#### **IV. COSTS THAT WOULD BE AWARDED EVEN IN THE UNLIKELY EVENT THAT THE INVESTOR DOES NOT PREVAIL**

130. **Part IV** addresses the costs Nicaragua should bear concerning the Investor's claims. This Tribunal should limit any cost-shifting measures, considering Riverside's unique merits and complex issues, where the decision to arbitrate was reasonable and justified. If the Investor fails in certain parts of its claim due to the circumstances, Riverside should not be ordered to cover Nicaragua's reasonable legal fees and other costs incurred by the Respondent.
131. In the unlikely event of an unfavorable outcome for the Investor—though such an outcome is highly improbable given the equities and the strength of Riverside's case.
132. **Arbitration Filing and Pre-Tribunal Constitution Conduct:** Riverside provided its notice of intent on August 28, 2020, as required by CAFTA,<sup>160</sup> and immediately offered to engage in good-faith consultations, as CAFTA required. Nicaragua, however, failed to respond throughout the CAFTA-mandated consultation period.
133. **Nicaragua's Motion for Redaction of Protected Information (July 20, 2022):** Riverside respectfully seeks reimbursement of costs incurred in response to this motion. Nicaragua's request for redaction was an unreasonable procedural step, rejected by the Tribunal, and caused Riverside to incur unnecessary legal expenses. The Tribunal should allocate costs in favor of Riverside, which defended its position both reasonably and successfully.
134. **Nicaragua's Counter-Memorial Extension Request (December 29, 2022 – January 6, 2023):** This was an ordinary procedural request without significant impact on the arbitration's conduct, and Riverside does not seek cost allocation for this event.

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<sup>160</sup> Notification under the CAFTA for Intent to Arbitration, August 28, 2020 (C-0006-ENG).

135. **Riverside's Withdrawal of CAFTA Article 10.16(1)(b) Claim (March 16-17, 2023):** Riverside voluntarily withdrew this specific claim shortly after receiving Nicaragua's objection. This change did not affect Riverside's direct claim or the costs it seeks. Therefore, both parties should bear their costs regarding this minor procedural adjustment.
136. **Riverside's Motion to Dismiss Jurisdictional Objections (March 16-17, 2023):** Although the Tribunal denied this motion, Nicaragua later removed its jurisdictional objections in its final pleading. Considering this reversal, it is appropriate for the Tribunal to allocate costs to Nicaragua for unnecessarily prolonging the jurisdictional challenge without substantive grounds.
137. **Nicaragua's Motion for Security for Costs (October 5, 2023 – November 24, 2023):** Nicaragua's motion was abusive and vexatious, designed to hinder Riverside's pursuit of its claim despite Nicaragua's actions—such as freezing INAGROSA's property—being the source of Riverside's financial difficulties. Due to the frivolous nature of Nicaragua's application, full costs should be awarded to Riverside.
138. **Nicaragua's Motion on Document Production (October 2023 – February 2024):** Nicaragua's motions related to document production were unwarranted and caused unnecessary delays and legal expenses. These costs should be allocated to Riverside, as the motion lacked any merit.
139. **Judicial Order Status (January-February 2024):** This procedure required substantial legal resources, warranting a partial allocation of costs in favor of Riverside.
140. **Nicaragua's request for an Artificial Intelligence (AI) protocol (May 2024):** In May 2024, Nicaragua submitted a motion to impose an Artificial Intelligence (AI) protocol intended to restrict counsel's use of AI throughout this Arbitration entirely.<sup>161</sup> This motion was neither constructive nor meritorious. Indeed, it appeared designed to create unnecessary burdens for the Investor and the Tribunal, imposing significant burdens on the eve of the hearing upon Riverside, rather than to enhance procedural fairness. Nicaragua's proposal sought an absolute prohibition on any use of AI by counsel, but it was conceptually and structurally flawed. For example, Nicaragua failed even to define what the term "AI" meant within the scope of its proposal despite its desire to prohibit it.<sup>162</sup> Moreover, the protocol would have required disclosure of any AI use in preparing submissions—a standard neither

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<sup>161</sup> Email exchange between counsel regarding AI motion, May 2-9, 2024.

<sup>162</sup> Draft Procedural Order No. 10 at ¶¶49-50 (Part K), June 3, 2024 (C-0764-ENG).

practicable nor justified in a time when AI enhancements are ubiquitous in standard word processing and grammar-checking applications.<sup>163</sup>

141. Strikingly, Nicaragua's proposal neglected to consider AI use by the Tribunal or the parties, focusing solely on restricting counsel's access to these basic tools<sup>164</sup> This glaring omission revealed the lack of balance and coherence in Nicaragua's approach.
142. Further, Nicaragua's motion disregarded relevant and evolving guidance on AI in arbitration provided by respected institutions, such as the American Arbitration Association—International Centre for Dispute Resolution,<sup>165</sup> the Chartered Institute of Arbitrators,<sup>166</sup> and the recent discussions by the International Law Section of the American Bar Association.<sup>167</sup> These bodies, all with significant expertise, have avoided such sweeping restrictions, instead favoring flexible, carefully considered approaches.
143. Nicaragua's counsel, Baker Hostetler, did not disclose its own AI usage in this arbitration, despite the firm's well-documented involvement in AI development within its legal practice. This omission suggests a double standard, as Nicaragua's motion sought to hold Riverside's counsel to a rule Nicaragua itself had not followed.
144. Riverside opposed this proposal, contending that, given the advanced stage of proceedings, such a protocol was untimely and inappropriate. Moreover, a properly framed AI protocol would require substantial discussion and consideration of current guidance from established arbitration bodies. Existing scholarship and institutional perspectives do not support the restrictive measures Nicaragua proposed.
145. Nicaragua's proposal also sought to accentuate the inherent power imbalance between a sovereign state with expansive resources and a business hindered by measures central to this dispute. This approach underscored critical concerns around access to justice and equality of arms, illustrating the unfairness of Nicaragua's position.
146. The Tribunal sided with Riverside and declined to address AI in *Procedural Order No. 10*.<sup>168</sup> Considering the lack of merit, untimely nature, and undue burden of this

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<sup>163</sup> Draft Procedural Order No. 10 at ¶¶49-50 (Part K), June 3, 2024 (C-0764-ENG).

<sup>164</sup> Draft Procedural Order No. 10 at ¶¶49-50 (Part K), June 3, 2024 (C-0764-ENG).

<sup>165</sup> AAA-ICDR Arbitrator Guidance on the Use of Generative AI, 2023 (C-0766-ENG).

<sup>166</sup> Chartered Institute of Arbitrators, CI Arb Framework Guideline on the Use of Technology in International Arbitration 2021 <https://www.ciarb.org/media/izef4z3c/15-framework-guideline-on-the-use-of-technology-in-international-arbitration.pdf>

<sup>167</sup> ABA International Law Section Midyear Meeting, Washington DC, Slides - The Use and Misuse of AI in Dispute Resolution, May 10, 2024 (C-0765-ENG).

<sup>168</sup> Letter from the Tribunal to Counsel regarding hearing instructions, June 11, 2024 at p. 2 (C-0758-ENG).

ill-conceived application, costs associated with this motion should be allocated in favor of Riverside.

## V. CONCLUSIONS

147. Based on the foregoing, this Tribunal should acknowledge the pervasive nature of Nicaragua's procedural misconduct, which has subverted the core tenets of fairness and transparency in international arbitration. Such conduct has inflated costs unnecessarily and complicated Riverside's pursuit of justice.
148. In Reply Memorial paragraph 2158(f), Riverside sought "An award in favor of the Investor on behalf of itself and/or on behalf of its investment on a full indemnity basis for its costs, disbursements, and all expenses incurred in the arbitration for legal representation and assistance, including financing, plus interest, and for the costs of the Tribunal."
149. Under CAFTA and ICSID, procedural rules support the discretionary awarding of costs to Riverside, which is to be compensated fully for the costs incurred as a direct result of Nicaragua's deliberate obstructionism and failure to engage in good faith. Nicaragua's behavior—ranging from the exclusion of essential witnesses to the reliance on fabricated evidence—demands a full indemnity of Riverside's costs to counterbalance the undue burden borne by the Investor.
150. As Section II of this Cost Submission notes, Riverside seeks costs, including legal representation, experts' fees, tribunal costs, and other disbursements totaling US\$11,414,843.70.
151. Riverside respectfully requests that the Tribunal grant post-award interest on the costs awarded to ensure Riverside's full reparation and interest on a pre-award basis for Tribunal costs advanced in this arbitration, especially considering Nicaragua's improper conduct that made collateralization of HSF to finance this arbitration unfeasible.
152. This Tribunal is responsible for safeguarding the integrity of the arbitral process by confirming that persistent misconduct will not be tolerated or rewarded. By holding Nicaragua fully liable for Riverside's arbitration costs, the Tribunal must carry out its duty to reinforce essential principles of international justice and accountability, setting a precedent against procedural abuse.

Submitted this 8<sup>th</sup> day of November 2024 on behalf of Riverside Coffee, LLC.

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