

IN THE ARBITRATION UNDER THE TREATY BETWEEN
THE UNITED STATES OF AMERICA AND THE REPUBLIC OF ECUADOR
CONCERNING THE ENCOURAGEMENT AND RECIPROCAL PROTECTION
OF INVESTMENTS AND THE UNCITRAL ARBITRATION RULES (1976)
BETWEEN

MERCK SHARP & DOHME (I.A.) CORP.,

Claimant,

-and-

THE REPUBLIC OF ECUADOR,

Respondent.

PCA Case No. 2012-10

**RESPONDENT'S SUBMISSION REGARDING THE
4 AUGUST 2016 NCJ JUDGMENT**

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I. INTRODUCTION

1. In its letters dated 9 and 18 August 2016, the Tribunal invited the Parties to submit their comments on the implications of the August 2016 judgment of the National Court of Justice (NCJ) in submission in these arbitral proceedings. In response thereto, Respondent the Republic of Ecuador respectfully submits the following comments.

2. *First*, the decision of Claimant Merck Sharp & Dohme (I.A.) Corp. (“Claimant,” “Merck” or “MSDIA”) to forego the challenge of the 4 August 2016 NCJ judgment in an Extraordinary Protection Action (EPA) before Ecuador’s Constitutional Court means that it has now *conclusively* failed to exhaust the available and effective local remedies in Ecuador. In addition to the reasons identified in Ecuador’s prior submissions in this Arbitration, it is now even more clear that (a) had Claimant filed an EPA against the August 2016 judgment, it could have sought and obtained from the Ecuadorian courts the return of any amounts paid in satisfaction thereof, and (b) Claimant could have avoided making even that interim payment, since it now admits that it is perfectly possible and indeed “common practice” to seek the suspension of the enforcement of a judgment challenged in an EPA during the pendency of proceedings before the Constitutional Court.

3. *Second*, even if Claimant’s claims could survive its latest fatal failure to exhaust remedies available to it in the Ecuadorian judicial system, those claims, regardless of the treaty rubric, including Article II(7), under which they are brought, still should be dismissed for lack of merit. The NCJ’s August 2016 decision represents the third time that the NCJ has rejected the first instance court’s and Court of Appeals’ application of anti-trust liability to Merck and the third time that it has found Merck liable for tortious conduct under Articles 2214 and 2229 of the Ecuador Civil Code. With respect to the NCJ’s August 2016 decision as such, Merck has only a handful of criticisms. Each of them grossly misrepresents the decision, and all were manufactured to force-fit the decision into the Tribunal’s March 2016 Decision on Interim Measures and, thereby, dodge (yet again) having to explain to the Tribunal why it would allow its *own* business operations in Ecuador (not those of a subsidiary) to be “destroyed,” even though it could easily satisfy the net \$34 million judgment from, at last count, its \$1.13 billion in net assets and \$600 million in annual revenues.

4. But even analyzed separately from Merck's interim measures efforts, its criticisms of the August 2016 NCJ decision do not withstand scrutiny. As with its past misrepresentations of NCJ procedure, Merck's assertion that the decision upheld the Court of Appeals' anti-trust judgment because the NCJ accepted only two of its cassation grounds ignores the procedural fact that the NCJ's acceptance of *any* of Merck's cassation grounds wiped out the Court of Appeals' judgment in its entirety. And once it annulled the Court of Appeals' judgment, the NCJ went on to render a wholly new decision that rejected the application of anti-trust law—which, Merck has repeatedly argued, was the exclusive basis of the Court of Appeals' judgment. Contrary to Merck's assertions, the August 2016 NCJ decision did not uphold the Court of Appeals' judgment in *any* respect.

5. Merck's claim that the NCJ did not conduct an independent review of the evidence is contradicted by the face of the decision itself and therefore fares no better. In more than nine pages, the NCJ lays out the evidence submitted by both parties and reviews, analyzes and weighs it, specifying the evidence that led it to conclude that, when after almost a year of negotiations Merck belatedly conditioned the sale of its plant on Propfar's agreement not to manufacture a long list of pharmaceuticals, Merck committed an extra-contractual, unintentional tort in violation of Articles 2214 and 2229 of the Civil Code. That Merck does not believe its own "no independent review of the evidence" argument is only underscored by the fact that it did not seek recourse to the Constitutional Court to cure what—if it had occurred—would have been an egregious constitutional violation.

6. Merck's attack on the NCJ's use of what it characterizes as the "blatantly irrational and likely corrupt" Cabrera report is equally baseless. Merck has made no showing of *any* corruption regarding the report. Moreover, Mr. Cabrera was appointed using an independent mechanism that Merck itself endorsed and to which it never objected. Any flaws in the Court of Appeals' reliance on the Cabrera report were corrected by the NCJ, which—unlike the Court of Appeals—applied an Ecuadorian statute to reduce the lost profits calculated in the report by 80%, a factor more generous than the 75% reduction that Merck had sought below and in its cassation petition.

7. Merck's final argument—that the NCJ Associate Judges who rendered the August 2016 decision committed the above "errors" on which Merck relies because they felt

“threatened” by the reference to criminal sanctions in the Constitutional Court’s January 2016 decision—wholly fails. Besides the fact that the Constitutional Court frequently refers in its decisions to the criminal sanctions on government officials provided for in Article 86(4) of the Ecuador Constitution, in their August 2016 decision the NCJ Associate Judges expressed only defiance of any attempt by another judicial body to control them.

8. **Third**, Claimant’s characterization of the Constitutional Court’s January 2016 judgment annulling the November 2014 judgment of the NCJ as a denial of justice is similarly unwarranted. The Constitutional Court did not overstep its jurisdiction by “directing” the NCJ on how to decide Prophar’s and MSDIA’s cassation petitions. Nor of course did it direct the NCJ on how to decide the case upon cassation of the Court of Appeals’ judgment. (In fact, on Claimant’s own argument, the Constitutional Court could not have directed the NCJ on how to decide as an instance court, because the confirmation of the Court of Appeals’ judgment, which Claimant alleged as the directed result, could not have been brought about by anything less than the dismissal of the parties’ cassation petitions; in that event, the NCJ would not have entered into its function as an instance court in the first place.) Having failed to impugn the Constitutional Court’s decision on other grounds, Claimant’s attack is meritless.

9. **Fourth**, assuming *quod non* that the Ecuadorian legal system denied Claimant justice in breach of the Treaty, Claimant is not automatically entitled to the full amount of the 4 August 2016 NCJ judgment. Claimant has made no showing that, under no reasonable consideration of the facts of the underlying dispute, in light of the applicable principles of Ecuadorian law, was a finding of Merck’s liability *not* juridically possible. Nor has Merck provided an alternative assessment and calculation of Prophar’s damages in the event it were found liable to Prophar. Accordingly, to the extent that Merck is claiming as damages the full amount of the 4 August 2016 NCJ judgment, it is so claiming in breach of established principles of international law, which posit that an award of damages cannot put a claimant in a position that is *better* than the one it would have been in “but for” the acts ostensibly giving rise to State responsibility.

10. In all other respects, Ecuador continues to rely on its prior submissions in this arbitration and reiterates its request that Merck’s claims be dismissed in their entirety and

that Ecuador be awarded all of its costs and attorney fees, together with interest thereon.¹ Respondent expressly reserves its right to supplement the above requests and to make additional written submissions to address any new or amplified arguments that Merck may make in its 26 September 2016 submission.

¹ All of the arguments herein also apply with equal force to Claimant's claim under any other provision of the Treaty, including its Article II(7).

II. CLAIMANT’S CLAIMS LACK MERIT, ARE INADMISSIBLE, AND ARE NOT WITHIN THE TRIBUNAL’S JURISDICTION BECAUSE CLAIMANT FAILED TO EXHAUST AVAILABLE AND EFFECTIVE LOCAL REMEDIES IN ECUADOR

11. In its written pleadings and at the London Hearing, Ecuador showed that the Extraordinary Protection Action (“EPA”) is a remedy that Claimant could and should have resorted to before asserting its denial of justice claims under the BIT.² In particular, and despite Claimant’s pretensions to the contrary:

- International law does not limit the duty to exhaust to remedies “in the ‘straight line’”;³ rather, international law requires that all available and effective remedies be pursued, and there is no principled reason why constitutional appeals (such as the EPA) *per se* should be excluded from the notion of exhaustible remedies.⁴

² Claimant accepts that in order to establish Ecuador’s liability for a denial of justice, it “must have exhausted ‘reasonably available’ local remedies [...] ‘to correct the challenged action.’” Claimant’s Memorial (2 Oct. 2013), ¶ 375 (hereinafter “Claimant’s Memorial”); Hearing on the Merits, Transcript, Day 1 (16 Mar. 2015), p. 202:17-23 (Kent).

As explained by Prof. Guerrero, the purpose of the EPA is “the protection of fundamental rights which have been infringed upon by a judgment, final decree or resolution having the force of a judgment.” First Expert Report on Ecuadorian Law of Juan Francisco Guerrero del Pozo (25 Feb. 2014), ¶ 10 (hereinafter “First Guerrero Expert Report (25 Feb. 2014)”). Indeed, the EPA is “an apt mechanism afforded by the Ecuadorian legal system for redressing any constitutional rights which have been violated via a judicial decision.” *Id.*, ¶ 14. *See also* MSDIA’s submission to the Constitutional Court (received by the Court on 3 Apr. 2013), ¶¶ 55, 58, 63, 81 (R-117) (admitting the “judicial nature” of the constitutional petition, its intended by the legislator use “to guarantee due process,” and the fact that reparations of a constitutional nature may include “both monetary and moral obligations”). Claimant has not contested that all of its allegations of mistreatment at the hands of Ecuador’s judiciary could have served as the foundation for an EPA. *See* Ecuador’s Corrected Counter-Memorial (27 Feb. 2014), ¶ 188, fn. 285 (hereinafter “Ecuador’s Counter-Memorial”); First Guerrero Expert Report (25 Feb. 2014), ¶¶ 15-17, 75; Ecuador’s Rejoinder (20 Feb. 2015), fn. 306 (hereinafter “Ecuador’s Rejoinder”); Second Expert Report on Ecuadorian Law of Juan Francisco Guerrero del Pozo (18 Feb. 2015), fn. 18 (hereinafter “Second Guerrero Expert Report (18 Feb. 2015)”); Hearing on the Merits, Transcript, Day 2 (17 Mar. 2015), p. 61:3-9 (Salonidis).

³ Claimant’s Memorial, fn. 678.

⁴ Ecuador’s Counter-Memorial, ¶¶ 192-205; Ecuador’s Rejoinder, ¶¶ 230-239; *see also* First Expert Report of Prof. Lucius Cafilisch (24 Feb. 2014), ¶ 18 (hereinafter “First Cafilisch Expert Report”); First Expert Report of Prof. C.F. Amerasinghe (24 Feb. 2014), ¶ 15 (hereinafter “First Amerasinghe Expert Report”); Second Expert Report of Prof. Lucius Cafilisch (16 Feb. 2015), ¶ 11 (hereinafter “Second Cafilisch Expert Report”) (“the intervention of the Ecuadorian Constitutional Court could have fully repaired any procedural or substantive injustice allegedly suffered by the Claimant. *In these circumstances, the expression ‘indirect remedy’ used by the Claimant is entirely inappropriate.*”) (emphasis added); Second Expert Report of Prof. C.F. Amerasinghe (10 Feb. 2015), ¶¶ 15, 17, 28 (hereinafter “Second Amerasinghe Expert Report”); Hearing on the Merits, Transcript, Day 2 (17 Mar. 2015), pp. 63:14 – 69:22 (Salonidis).

- In order to establish Ecuador’s international responsibility for judicial action in breach of the Treaty, Claimant must meet the *same* requirement of exhaustion of local remedies, regardless of the treaty standard invoked by Claimant.⁵
- The EPA was reasonably available to Claimant because (a) the threshold for its admission by the Constitutional Court is low (in other words, the procedural and material requirements for the admissibility of an EPA can be easily met, and could very well have been met in the present circumstances),⁶ and (b) even if the EPA as such does not suspend the enforcement of the impugned judgment during the Constitutional Court proceedings,⁷ the magnitude of harm incurred or likely to be incurred by Claimant did not so burden it as to impede its ability to seek further redress.⁸ More importantly, however, nothing prevented Claimant from invoking the EPA as grounds of suspension of enforcement of the judgment before the enforcing court.⁹
- The EPA was capable of affording Claimant effective redress because the Constitutional Court, as part of its power to provide “full reparation” of harm incurred as a result of a constitutional violation,¹⁰ could have (a) annulled not only the impugned NCJ judgment,¹¹ but also, depending on the nature of the

⁵ Ecuador’s Counter-Memorial, ¶¶ 235-244. The same holds true in respect of the “effective means” provision of the Treaty. Treaty between the United States of America and the Republic of Ecuador Concerning the Encouragement and Reciprocal Protection of Investment, Art. II(7) (C-1). As Ecuador showed in its written pleadings and at the Hearing on the Merits, Article II(7) reflects the customary international law standard of denial of justice, and does not impose a “qualified” requirement to exhaust local remedies as the tribunal in *Chevron v. Ecuador* erroneously concluded. See Ecuador’s Counter-Memorial, ¶¶ 245-262; Ecuador’s Rejoinder, ¶¶ 242-284; Hearing on the Merits, Transcript, Day 2 (17 Mar. 2015), pp. 88:10 – 96:24 (Salonidis).

⁶ Ecuador’s Counter-Memorial, ¶¶ 209-210; First Guerrero Expert Report (25 Feb. 2014), ¶¶ 18-19, 27-33, 76; First Cafilisch Expert Report, ¶ 26 (“Claimant’s petition could very well have been admitted; *and if it had not been, exhaustion would have been achieved by the Court’s decision not to take on the case.*”) (emphasis added). See also *Apotex Inc. v. The Government of the United States of America*, UNCITRAL (NAFTA), Award on Jurisdiction and Admissibility (14 Jun. 2013) (Landau, Smith, Davidson), ¶ 289 (RLA-122) (“the consequence of Apotex’s submission as to its chances of success before the U.S. Supreme Court (based in part on the small number of cases that this Court entertains each year) would be, in effect, to write the U.S. Supreme Court out of the exhaustion of remedies rule in almost all cases. This cannot be correct.”). See further Hearing on the Merits, Transcript, Day 2 (17 Mar. 2015), pp. 69:24, 70:6 (Salonidis).

⁷ Organic Law of Jurisdictional and Constitutional Guarantees (22 Oct. 2009), Art. 27 (RLA-174).

⁸ Ecuador’s Counter-Memorial, ¶¶ 228-232. Indeed, Claimant casts doubt on the availability of the EPA as a matter of international law only “in the event that the NCJ affirms the court of appeals’ \$150 million judgment against MSDIA [...]” Claimant’s Reply Memorial (8 Aug. 2014), fn. 496 (hereinafter “Claimant’s Reply”).

⁹ Hearing on Merits, Transcript, Day 4 (19 Mar. 2015), p. 140:6-141:4 (Guerrero).

¹⁰ Under Article 18 of the Organic Law on Jurisdictional Guarantees and Constitutional Control, which governs EPA proceedings before the Constitutional Court, “full reparation” aims to ensure “that the person or persons who are the holders of the breached right enjoy the right in the most adequate manner possible, and that their situation prior to the breach is restored.” Organic Law of Jurisdictional and Constitutional Guarantees (22 Oct. 2009), Art. 18 (RLA-174). See further, Second Guerrero Expert Report (18 Feb. 2015), ¶¶ 5-12.

¹¹ Ecuador’s Counter-Memorial, ¶ 221; First Guerrero Expert Report (25 Feb. 2014), ¶¶ 37-40.

violation, the judgments of the courts below,¹² and (b) ordered restitution of any payments made if, in the interim, the impugned judgment had been enforced.¹³ Even if the Constitutional Court merely annulled the impugned judgment, however, and even if the effectiveness of the EPA were inextricably linked with the immediate return of any payments made in the interim pursuant to the annulled judgment, which Ecuador denies, such annulment would have automatically entitled Claimant to recover any damages caused by the enforcement of the annulled judgment in the interim through either an order by the court that enforced the annulled judgment¹⁴ or an action for unjust enrichment.¹⁵

- In light of the above, Claimant cannot establish that the EPA would have been an “obviously futile” remedy.¹⁶ Indeed, Claimant’s inability to establish that the EPA would be “obvious futile” is exacerbated by the fact that per his own admission, Prof. Oyarte, Claimant’s expert on the issue of the EPA, “would never dare provide an answer in connection with a matter that has nothing to do with

¹² Hearing on the Merits, Transcript, Day 2 (17 Mar. 2015), pp. 83:6-84:5 (Salonidis); Hearing on the Merits, Transcript, Day 4 (19 Mar. 2015), pp. 146:20-24, 147:22 – 148:8 (Guerrero) (“there are certain grounds that bring the process to the situation of a house of cards: if it falls, the entire process falls down. This means that depending on the ground alleged, [an EPA] may bring about the nullity of the whole process.”). Claimant’s expert on Constitutional law, Prof. Oyarte, agrees. *See* Hearing on the Merits, Transcript, Day 3 (18 Mar. 2015), p. 92:17-24 (Wray & Oyarte) (“Q. Consequently, if Merck at the time had submitted an EPA alleging that its constitutional right to be heard by a competent judge was violated, and the Constitutional Court accepted that allegation, then it would have declared the nullity of the whole process and not only of the cassation ruling, correct? A. If that was the request, *all of the ruling had been (sic) vacated.*”) (emphasis added).

¹³ Ecuador’s Rejoinder, ¶¶ 202-207; Second Guerrero Expert Report (18 Feb. 2015), ¶¶ 23-32, 43; Hearing on the Merits, Transcript, Day 2 (17 Mar. 2015), pp. 78:12 – 80:25 (Salonidis); Hearing on the Merits, Transcript, Day 4 (19 Mar. 2015), pp. 136:11-21, 137-139 (President Berman & Guerrero), 157:8-22, 158:23 – 159:2 (Guerrero). “Full reparation” within the meaning of the Organic Law of Jurisdictional and Constitutional Guarantees includes *financial* compensation for “the loss or detriment to [the income of] those affected parties, the costs incurred due to the facts and the pecuniary consequences that have a causal link to the facts of the case.” Organic Law of Jurisdictional and Constitutional Guarantees (22 Oct. 2009), Art. 18 (RLA-174).

¹⁴ First Guerrero Expert Report (25 Feb. 2014), ¶ 43; Ecuador’s Rejoinder, ¶¶ 208-212; Second Guerrero Expert Report (18 Feb. 2015), ¶¶ 15-18; Hearing on the Merits, Transcript, Day 2 (17 Mar. 2015), pp. 80:18 – 82:5 (Salonidis); Hearing Transcript, Day 4 (19 Mar. 2015), pp. 142:4-15, 178:8-22 (Guerrero).

¹⁵ Ecuador’s Counter-Memorial, ¶¶ 225-22; First Guerrero Expert Report (25 Feb. 2014), ¶ 43; Ecuador’s Rejoinder, ¶¶ 215-219, 221-222; Second Guerrero Expert Report (18 Feb. 2015), ¶¶ 48-59; Hearing on the Merits, Transcript, Day 2 (17 Mar. 2015), pp. 84:17- 85:1-21 (Salonidis); Hearing on the Merits, Transcript, Day 4 (19 Mar. 2015), pp. 142:16 – 143:1 (Guerrero).

¹⁶ *Philip Morris Brands Sàrl, Philip Morris Products S.A. and Abal Hermanos S.A. v. Oriental Republic of Uruguay*, ICSID Case No. ARB/10/7, Award (8 July 2016) (Bernardini, Born, Crawford), ¶ 503 (RLA-214) (“It is for the Claimants to show that [exhaustion of local remedies] has been met or that no remedy was available giving an ‘effective and sufficient means of redress’ or that, if available, it was ‘*obviously futile.*’”) (emphasis added); *Apotex v. U.S.A.*, Award on Jurisdiction and Admissibility (14 Jun. 2013), ¶ 279 (RLA-122). *See also* Ecuador’s Counter-Memorial, ¶ 219, fn. 343; First Amerasinghe Expert Report, ¶¶ 20-24; Ecuador’s Rejoinder, ¶¶ 184-192; Hearing on the Merits, Transcript, Day 2 (17 Mar. 2015), pp. 70:18 – 74:25 (Salonidis).

constitutional law,”¹⁷ such as a litigant’s right to seek restitution of moneys paid pursuant to an annulled judicial ruling under Ecuadorian procedural and civil law.

- There is not even a shred of evidence sustaining Claimant’s allegation that recourse to the EPA would have been futile because the Ecuadorian judiciary, as a general matter and in particular with regard to the proceedings in Prophar/MSDIA litigation, is afflicted by corruption and bias.¹⁸ Nor can Claimant sustain such an allegation based on the actual judgments and procedure of the Constitutional Court in the Prophar/MSDIA litigation.¹⁹

12. Claimant’s decision to forego an EPA against the 4 August 2016 NCJ judgment means that it has now *conclusively* failed to exhaust available and effective local remedies in Ecuador.²⁰ In addition to the foregoing reasons, this is because, first, it has by now become obvious that had Claimant filed an EPA, it could have sought and obtained from Ecuadorian courts the return of any amounts paid in satisfaction of the impugned judgment, and, second, Claimant could have *avoided making even that interim payment, since it now admits that it is perfectly possible and indeed “common practice” to seek the suspension of the enforcement of the impugned NCJ judgment pending the resolution of an EPA.*

¹⁷ Hearing on the Merits, Transcript, Day 3 (18 Mar. 2015), p. 97:1-12 (Oyarte).

¹⁸ Ecuador’s Rejoinder, ¶¶ 220, 226-229.

¹⁹ Ecuador’s Rejoinder, ¶¶ 440-471; Second Guerrero Expert Report (18 Feb. 2015), ¶¶ 66-82; *infra*, Section IV. It is noteworthy that Claimant’s expert on constitutional law, Prof. Oyarte, made no suggestion in his reports or at the London Hearing that the proceedings in Ecuador’s Constitutional Court were tainted by corruption in any way or form.

²⁰ Throughout these proceedings Claimant sought to make much out of the fact that due to the Constitutional configuration of the Ecuadorian legal system, it cannot be excluded that in some cases more than one EPA may be admitted. However, Claimant characterization of its circumstance as “endless loop” of “judgment, enforcement, and vacatur” (e.g., Letter from Claimant to the Tribunal (1 July 2015), p. 3) is false. The possibility of successive resort to the Constitutional Court is an ordinary feature of the system and not a phenomenon limited to the Prophar/MSDIA litigation. *See* Hearing on the Merits, Transcript, Day 4 (19 Mar. 2015), pp. 165:21 – 166:5 (Guerrero); Second Supplemental Declaration on Ecuadorian Law of Juan Francisco Guerrero del Pozo (25 Feb. 2016), fn. 15 (hereinafter “Second Supplemental Declaration of Guerrero (25 Feb. 2016)”) (referring to two other cases in which more than one EPA had been admitted, reproduced as Annex 2 to Prof. Guerrero’s report). In any event, Claimant’s argument has not only been overtaken by events (due to the fact that the parties failed to submit an EPA in time, the 4 August 2016 decision of the NCJ is considered the final pronouncement of the Ecuadorian legal system in the Prophar/MSDIA litigation), it is also wrong as a matter of law. As recently stressed by the tribunal in *Philip Morris v. Uruguay*, “[a]rbitral tribunals should not act as courts of appeal to find a denial of justice, *still less as bodies charged with improving the judicial architecture of the State.*” *Philip Morris v. Uruguay*, Award (8 July 2016), ¶ 528 (emphasis added) (RLA-214). In other words, the fact that as a result of its particular features, the normal operation of the Ecuadorian legal system has resulted in two EPAs and three NCJ judgments in the Prophar/MSDIA litigation does not constitute, in itself, a denial of justice.

A. Under Ecuadorian Law, The Successful EPA Party Has An Enforceable Right To The Refund Of Payments Made In Execution Of The Impugned And Ultimately Overturned Judgment

13. In its letter of 12 June 2015, Ecuador brought to the attention of the Tribunal another Ecuadorian court decision confirming that had Claimant filed an EPA, it could have achieved the refund of any payments made pursuant to the NCJ judgments through an order of the enforcing court. This is the decision of the Ecuadorian Misdemeanors Court in the *SAMPER* case, in which the court ordered reimbursement of a payment made by SAMPER to partially satisfy a judgment that was subsequently vacated by the Constitutional Court.²¹ The facts of that case and findings of the Constitutional Court and of the Misdemeanors Court are described in Ecuador's letter²² and need not be repeated here.

14. In its responsive letter of 1 July 2015, Claimant offered no argument against the precedential value of this decision, which, added to the *EMASEO* case discussed at length during the London Hearing,²³ further underscores the effectiveness of the EPA as a legal

²¹ Sentence No. 1751-2013-0917 (5 June 2015) (R-210); Sentence No. 152-15-SEP-CC issued in Case No. 0709-14-EP (R-209).

²² Letter from Ecuador to the Tribunal (12 June 2015), p. 6.

²³ As Ecuador explained in its pleadings, the *EMASEO* case shows that even when the Constitutional Court does not order the refund of payments made pursuant to an annulled judgment, the EPA plaintiff may request the court that enforced the annulled judgment to order its counterparty in the underlying litigation to refund the payments made to it. Ecuador's Rejoinder, ¶¶ 211-212 (discussing Sentence issued in Case No. 631-2006 (13 Mar. 2014) (FG-45)); *see also* Second Guerrero Expert Report (18 Feb. 2015), ¶¶ 15-18; Hearing on the Merits, Transcript, Day 2 (17 Mar. 2015), pp. 80:18 – 82:1-5 (Salonidis); Hearing on the Merits, Transcript, Day 4 (19 Mar. 2015), pp. 142:4-15, 178:8-22 (Guerrero). At the Hearing, Claimant introduced a subsequent order of the Fifth Court for Labor Matters of Pichincha, the court issuing the original order ordering the refund of the payment made pursuant to the annulled judgment in the *EMASEO* case, stating that it lacked jurisdiction to order the attachment that EMASEO had requested. Hearing on the Merits, Transcript, Day 3 (18 Mar. 2015), pp. 132:23 – 136:23 (Oyarte) (discussing Exhibit C-296). However, the court's decision was based on jurisdictional considerations *not applicable in MSDIA's case*. This is because the Constitutional Court annulled, not only the judgment of the Labor Division of the NCJ, but also the judgments of the labor courts below as the matter was improperly submitted to their jurisdiction. As a result, the enforcing court's *jurisdiction* in the matter was exhausted with the issuance of the order for refund and did not extend to "entertain[ing] a *new claim* for collection or restitution of the moneys." Order of the Fifth Court for Labor Matters of Pichincha (16 Mar. 2015), p. 23 [PDF] (emphasis added) (C-296). This of course does not mean that EMASEO ceased to have an enforceable right to the refund of the payment made in execution of the annulled judgment of the Labor Division of the NCJ. Nor does it mean that Claimant would not have had such a right had it challenged itself the 4 August 2016 NCJ Judgment before the Constitutional Court. *See also* Hearing on the Merits, Transcript, Day 3 (18 Mar. 2015), p. 140:7-13 (Wray & Oyarte) ("Q. Just to conclude, the problem then has to do with the lack of jurisdiction of this court. What makes this procedure unviable is that the judge lacks jurisdiction and the whole thing was annulled because of the lack of jurisdiction of the court? A. *In this specific case, yes.*") (emphasis added).

remedy. Instead, Claimant resorted to groundless and reckless insinuations of “apparent coordination of the filings” in the *EMASEO* and *SAMPER* cases with the proceedings of this arbitration,²⁴ and questioned “the reliability of [the *SAMPER* case] as authority of Ecuadorian law or procedure” due to the fact that Prof. Guerrero served as counsel to *SAMPER*.²⁵ This is rich coming from Claimant who sought to undermine Ecuador’s arguments on the effectiveness of the EPA by relying on a decision rendered on “the same day the hearing in this arbitration began,”²⁶ and introduced to the record a few hours before the cross-examination of its expert on the issue, who happened to “talk[] to the paralegal in the case and asked for copies”²⁷ before the issuance of that decision.

15. By weaving such conspiracy theories, implicating the Office of the Attorney General of Ecuador, unrelated public entities, and respected academics and practitioners, Claimant’s 1 July 2015 letter quite obviously served as fig leaf to cover for its inability to question this jurisprudential development and its own purposeful concealment from the Tribunal of important developments in the *Prophar/MSDIA* litigation.²⁸ In any event, Claimant’s scurrilous allegations were refuted in Prof. Guerrero’s affidavit of 9 July 2015, which invited Claimant to reflect on the more mundane, but nonetheless true origins of the *SAMPER* decision:

I have always maintained that in the event that a judgment that
was enforced while an extraordinary protection action is

²⁴ Indeed, Claimant’s efforts to show patterns in the dates of various developments in these cases and the arbitration bring to mind conspiracy theory aficionados looking for patterns in the Great Pyramid of Giza.

²⁵ Letter from Claimant to the Tribunal (1 July 2015), pp. 7-10.

²⁶ *Id.*, p. 8.

²⁷ Hearing on the Merits, Transcript, Day 3 (18 Mar. 2015), p. 73:8-9 (Oyarte).

²⁸ For example, while Claimant was contending before the Tribunal that it had no remedy to recoup the amount of the September 2012 NCJ judgment (in its Supplemental Reply, at the London Hearing on Merits, and in its Letter to the Tribunal of 14 May 2015), it had in fact sought and achieved that very same result unbeknownst to the Tribunal. *See* Letter from Ecuador to the Tribunal (12 June 2015), pp. 3-5. Despite its mantra of being committed to updating the Tribunal with further developments in the *Prophar/MSDIA* litigation “as they occur” (e.g., Letter from Claimant to the Tribunal (12 Sept. 2016), p. 2), Claimant again failed to report *Prophar*’s acknowledgement in a petition to the enforcing court that the amounts already paid by Claimant must be offset against the amount of the 4 August 2016 Judgment. *Prophar*’s Petition to the Judge of the Quito Civil Judicial Unit, *Prophar v. MSDIA* (16 Sept. 2016), p. 3 (R-226) (“I respectfully request an enforcement order to be issued for the amount of thirty four million two hundred and forty-three thousand ninety nine United States Dollars and eighty-nine cents (USD. 34,243,099.89), given that the values previously paid by the defendant to my client must be taken into account for purposes of the execution of the judgment.”).

underway is subsequently vacated, the trial court judge that enforced the judgment in question is competent and has all constitutional and legal authority to vacate and reverse any and all enforcement actions taken in the proceedings. I have maintained this position in my teaching and both in my report submitted in February 2014 and in my report submitted in February 2015. I also maintained this position in my oral testimony before the Tribunal at the London hearing.

Given my personal conviction regarding the competence of the enforcing trial court to order the refund of payments made pursuant to a vacated judgment in an extraordinary protection action, and in light of the aforementioned Constitutional Court judgment, I advised my client to ask the First Judicial Unit for Contraventions of Quito to order the immediate refund of the fine paid in execution of a judgment that was subsequently vacated by the Constitutional Court. SAMPER's motion was granted in a ruling made on 5 June 2015 at 4:27 p.m.²⁹

16. Claimant's only other argument was that the *SAMPER* decision was rendered well after the September 2012 decision of the NCJ, and that, at that time, "there was no authority—either statutory or as a result of prior case law—that authorized or even suggested the possibility that the trial courts could return amounts that had been paid in satisfaction of judgments that were subsequently annulled by the Constitutional Court."³⁰ But even if there was any merit in that excuse—and there is not since the option was always available to Claimant to attempt³¹—it obviously does not apply in the case of the 4 August 2016 NCJ judgment. By the time of that decision, and as shown above, there *was* authority not just suggesting but *unequivocally authorizing* trial courts to return amounts paid in satisfaction of

²⁹ Affidavit of Prof. Juan Francisco Guerrero del Pozo (9 July 2015), accompanying Ecuador's letter to the Tribunal of the same date, ¶¶ 29-30.

³⁰ Letter from Claimant to the Tribunal (1 July 2015), p. 7.

³¹ Of course, the general principle under Ecuadorian law that any payment made without due cause may be recovered was affirmed even during the Hearing by Claimant's expert Prof. Páez. *See* Hearing on the Merits, Transcript, Day 3 (18 Mar. 2015), pp. 160:15 – 161:4 (Wray & Páez) ("Q: There is an issue that we have been trying to clarify and that I am going to put to you. This is a general issue and it has to do with procedural law and with civil law. There are a number of circumstances that under Ecuadorian law may bring about a case where an individual makes a payment under an order given by a court through a ruling, but then that ruling is vacated. A: Yes, I understand. Q: Would you say that the payor acquires the right to claim the reimbursement of the payment made? A: *Yes, under the principle of the fact that any payment made without cause may be recovered because otherwise a fundamental economic harm would be done to that person.*") (emphasis added).

judgments annulled by the Constitutional Court. And yet, Claimant chose to not put this mechanism into use. As a result, it has failed to exhaust an effective remedy against the 4 August NCJ judgment, which is fatal to its claims before the Tribunal.

B. Under Ecuadorian Law, The Party Filing An EPA Has The Right To Seek Suspension Of The Enforcement Of The Impugned Judgment During The Pendency Of The EPA

17. A central element of Claimant’s case against the effectiveness of the EPA has been that the remedy could not have suspended the enforcement of impugned judgment and therefore a potential annulment could not have forestalled the alleged harm caused by the enforcement of the judgment in the interim.³² Ecuador disagreed, and as Prof. Guerrero testified at the Hearing, despite the fact that under Article 27 of the Organic Law on Jurisdictional Guarantees and Constitutional Control the filing of the EPA as such does not suspend the enforcement of the impugned judgment,³³

whenever an EPA is proposed, it is quite common to tell the judge who is in charge of enforcing the decision challenged through the EPA to say that that EPA has been brought up, that there is an outstanding issue that has to be ruled on by the Constitutional Court, and that the enforcement may lead to damages that might be difficult to repair. [...] According to Ecuadorian practice, daily Ecuadorian practice, we have seen that in many instances, I can think of five cases from my own practice when judges, when faced with the brief by one of the parties saying that there is one of these actions, an EPA has been brought forward, they are not waiting for the enforcement *and they are waiting for the Constitutional Court to rule, and only then it is enforced* [...].”³⁴

18. Prof. Guerrero’s testimony was uncontested by Claimant’s expert Prof. Oyarte. Furthermore, a more recent event affirmatively confirms the validity of Prof. Guerrero’s point.

³² Claimant’s Reply, ¶¶ 433-435; Hearing on the Merits, Transcript, Day 1 (16 Mar. 2015), p. 204:18-24 (Kent).

³³ Organic Law of Jurisdictional and Constitutional Guarantees (22 Oct. 2009), Art. 27 (RLA-174).

³⁴ Hearing on the Merits, Transcript, Day 4 (19 Mar. 2015), p. 140:6-25 (Guerrero) (emphasis added). *See also id.*, pp. 141:1 – 142:3.

19. Now Claimant itself has expressly relied on this testimony in order to argue in its 12 September 2016 letter to the Tribunal that, despite the absence of formal mechanisms to suspend the enforcement of an Ecuadorian court judgment, it is a “quite common” for Ecuadorian courts, when asked, to “do *just that* in order to avoid irreparable harm.”³⁵ In its letter to counsel for Respondent, referenced in the aforementioned letter to the Tribunal, Claimant further argued that “as a matter of Ecuadorian law, there is nothing preventing the first instance court from suspending the enforcement of the NCJ’s judgment pending delivery of the Tribunal’s Final Award.”³⁶ This was because

[a]ccording to Ecuador’s own Constitutional law expert, Professor Guerrero del Pozo, it is common practice for an Ecuadorian court to suspend the enforcement of a final judgment when “enforcement may lead to damages that might be difficult to repair.” Professor Guerrero del Pozo *recognized* that while Ecuadorian law does not provide a formal “mechanism to suspend the enforcement” of a final judgment pending decision of an EPA, “*a*ccording to Ecuadorian practice, daily Ecuadorian practice, we have seen that in many instances.” Professor Guerrero del Pozo further testified that he personally knew of several cases where a court had been notified of a pending [EPA] and the court had not enforced the judgment until the [EPA] was resolved. There is no reason why the same logic would not apply here. If, as Professor Guerrero del Pozo has testified, a trial judge may stay his hand while an [EPA] is pending despite the absence of formal law to that effect, it may stay its hand in these circumstances.³⁷

20. The implications of this statement are truly damning for Claimant. This statement leaves no doubt that, had Claimant sought an EPA, it could have achieved the annulment of the impugned NCJ judgment *and* avoided any financial harm in the interim as a result of the suspension of the enforcement of the impugned judgment. All it had to do was file an EPA against the NCJ judgment and then ask the enforcing court to suspend the judgment’s

³⁵ Letter from Claimant to the Tribunal (12 Sept. 2016), p. 2 (emphasis added), fn. 1 (citing to Hearing on the Merits, Transcript, Day 4 (19 Mar. 2015), p. 140:1-22 (Guerrero)).

³⁶ Letter from Mr. David Ogden (Counsel for MSDIA) to Mr. Clodfelter (Counsel for the Republic of Ecuador) (9 Sept. 2016), p. 2 (R-224).

³⁷ *Id.*, pp. 2-3 (emphasis added). As the Tribunal is aware, the enforcing court in the Prophar/MSDIA did stay in its hand pending the issuance of the Tribunal’s Final Award. *See* Trial Court Order, *NIFA v. MSDIA*, (16 Sept. 2016) (R-227).

enforcement because it could lead to damages “that might be difficult to repair.”³⁸ As testified by Prof. Guerrero, and as now finally recognized by Claimant, suspending the enforcement of a final judgment challenged in an EPA in these circumstances is “common practice for an Ecuadorian court.”³⁹

21. In sum, the EPA was reasonably available to Claimant and capable of affording it effective redress. *First*, the threshold for its admissibility is low, and Claimant could in any event have easily met it. *Second*, Claimant could have sought, and obtained a stay in the enforcement of the impugned NCJ judgment and thereby avoid having to pay that judgment pending the resolution of its EPA. *Third*, pursuant to its power to provide “full reparation” of any harm incurred as a result of a constitutional violation, the Constitutional Court could have (a) annulled not only the impugned NCJ judgment, but also, depending on the nature of the violation, the judgments of the courts below, and (b) ordered restitution of any payments made if, in the interim, the enforcement of the impugned judgment had not been suspended. *Fourth*, in the event that the Constitutional Court merely annulled the impugned judgment without awarding itself restitution, and even if the effectiveness of the EPA were inextricably linked with the immediate return of any payments made in the interim pursuant to the annulled judgment, a successful EPA would have automatically entitled Claimant to recover any damages caused by the enforcement of the annulled judgment. *Fifth*, Claimant could recover such damages either from the court that enforced the annulled judgment or through an action for unjust enrichment. *Sixth*, the independence and impartiality of the Constitutional Court as a forum are unquestionable.

22. For the foregoing reasons, detailed in Ecuador’s pleadings and at the London Hearing, Claimant’s failure to challenge the 4 August 2016 NCJ judgment through an EPA means that there is no merit to its claims of breach of the BIT.⁴⁰

³⁸ Letter from Mr. Ogden to Mr. Clodfelter (9 Sept. 2016), p. 2 (R-224).

³⁹ *Id.*

⁴⁰ In light of the established principle of international law positing that the relevant date for purposes of jurisdiction is the date of institution of proceedings and because the international delict of a denial of justice has not been consummated before the claimant has exhausted local remedies, Claimant’s failure also has serious

III. EVEN IF MERCK HAD EXHAUSTED ALL AVAILABLE LOCAL REMEDIES, THE CLAIMS SHOULD BE DISMISSED ON THE MERITS BECAUSE MERCK CANNOT PROVE THAT IT SUFFERED A DENIAL OF JUSTICE OR OTHER VIOLATION OF THE TREATY

A. Merck Has Not Demonstrated, And Cannot Demonstrate, By Clear And Convincing Evidence That It Meets The High Thresholds Required Of Denial Of Justice Claims On Substantive Or Procedural Grounds

23. In addition to Merck's wholesale failure throughout the *NIFA v. MSDIA* proceedings to exhaust available and effective local remedies before pursuing this international arbitration, it has not met, and cannot meet, its burden to prove by "clear and convincing evidence" that the August 2016 NCJ Decision either substantively or procedurally denied it justice. Accordingly, Merck's claims lack merit and must be dismissed.

24. In its submissions to the Tribunal since the Constitutional Court's January 2016 remand of the *NIFA v. MSDIA* case to the NCJ, Merck has presented serial gross mischaracterizations of how the NCJ would, and did, decide whether it is liable to Prophar for its conduct leading to the termination of the parties' negotiations for Prophar's purchase of Merck's plant. After the January 2016 Constitutional Court decision, Merck argued that the decision "gave directions to the NCJ [...] that it should uphold the court of appeals' findings" that Merck was liable to Prophar on antitrust grounds;⁴¹ that the decision forbade the NCJ "to consider the evidence independent[]" of the court of appeals' assessment of it;⁴² and that it "direct[ed] the NCJ to decide Prophar's cassation petition" in order to increase the Court of Appeals' damages award to more "[s]ufficiently compensate Prophar," by awarding it "\$200 million or more (including the ludicrous \$642 million in damages 'to the Ecuadorian people' asserted by the Cabrera report)."⁴³

implications for the jurisdiction of the Tribunal and the admissibility of its claims, and also constitutes an abuse of process. *See* Ecuador's Counter-Memorial, ¶¶ 263-269. *See further Philip Morris v. Uruguay*, Award (8 July 2016) (RLA-214), ¶ 499 ("A denial of justice claim may be asserted *only after* all available means offered by the State's judiciary to redress the denial of justice have been exhausted") (emphasis added), ¶ 503 ("[exhaustion of local remedies] is a condition that has to be satisfied *prior* to asserting a denial of justice claim") (emphasis added).

⁴¹ Letter from Claimant to the Tribunal (5 Feb. 2016), p. 5.

⁴² Letter from Claimant to the Tribunal (23 Feb. 2016), p. 4.

⁴³ Letter from Claimant to the Tribunal (5 Feb. 2016), pp. 6-7.

25. None of those things happened, of course. (This is because the January 2016 Constitutional Court decision did not call for any of those conclusions, and for that and other reasons it also cannot constitute a denial of justice, as demonstrated later in this memorial). Instead, the NCJ denied Prophar’s cassation petition;⁴⁴ granted Merck’s cassation petition;⁴⁵ and proceeded to “take[] the place of the lower court”⁴⁶ to decide the case anew on the basis of the allegations in the complaint,⁴⁷ the defenses Merck raised in its answer,⁴⁸ an independent examination of the evidence⁴⁹ and the principles of “a comparison of the [complaint and answer], based on fairness, the reality of the facts, the principles of law and the legal system.”⁵⁰ Based on that analysis, the NCJ issued a new decision, finding Merck liable not on the anti-trust grounds held by the first instance court and the Court of Appeals, but for the unintentional tort of imposing on Prophar—after almost a year of negotiations and agreement on the price for Prophar’s purchase of the plant—the new condition that Prophar agree not to manufacture a long list of generic drugs that Merck sold in Ecuador.⁵¹ The NCJ’s decision—like its September 2012 and November 2014 decisions—is based upon tortious conduct that violated Articles 2214 and 2229 of the Ecuador Civil Code.⁵²

26. On the issue of damages, the NCJ examined the procedure under which Mr. Cabrera had been appointed during the Court of Appeals proceedings, found that procedure to have been proper, and also observed that the Cabrera report was the only evidence on the record that made any determination of the quantum of damages suffered by Prophar.⁵³ The NCJ also

⁴⁴ Judgment, *Prophar v. MSDIA*, National Court of Justice (4 Aug. 2016), pp. 6-7 (R-223).

⁴⁵ *Id.*, § 6.2.1, pp. 16-17, § 6.5.2, pp. 21-22. The NCJ granted Merck’s cassation petition on the first and fifth grounds provided for in Article 3 of the Cassation Law.

⁴⁶ *Id.*, p. 22.

⁴⁷ *Id.*, pp. 22-24.

⁴⁸ *Id.*, pp. 24-27.

⁴⁹ *Id.*, *Considerando* One through Nine, pp. 27-34.

⁵⁰ *Id.*, p. 27.

⁵¹ *Id.*, pp. 32-34.

⁵² *Id.*, p. 32. As discussed in the text below, Prophar’s complaint cited (among other grounds for its claims) Articles 2241 and 2256 of the Civil Code. NIFA’s Complaint, *NIFA v. MSDIA*, Trial Court (16 Dec. 2003), p. 10 [PDF], paragraph entitled “Suit” (C-10). The Tribunal will recall that those Articles were renumbered, subsequent to Prophar’s 2003 filing of its complaint, as Articles 2214 and 2229, respectively.

⁵³ Judgment, *Prophar v. MSDIA*, National Court of Justice (4 Aug. 2016), pp. 35-36 (R-223).

found that, although the Cabrera report had been “evaluated and admitted” and deemed admissible by the Court of Appeals (“*calificado*” in the original Spanish),⁵⁴ that did “not impede [the NCJ from] reviewing it” it as Merck, in its cassation petition, had requested “pursuant to the first ground [for cassation] found in Article 3 of the Cassation Law.”⁵⁵ That review resulted in the NCJ’s correction of “the error committed by the Court of Appeals, in relation to the exaggerated amount of compensation it ordered.”⁵⁶ Specifically, the NCJ reduced the \$204 million in lost profits calculated in the Cabrera report by 80%, a factor more generous than the 75% reduction that Merck had requested, for a total damages award (including \$50,000 in actual damages) of \$41,966,571.60.⁵⁷

27. In order to contort the August 2016 NCJ judgment to fit into the Tribunal’s March 2016 Decision on Interim Measures and set the stage to argue (again) that the NCJ had denied it justice, Merck has thus far advanced four attacks on the August 2016 NCJ Decision, as an “affirm[ation]” of the Court of Appeals’ judgment “in most materials respects.”⁵⁸ First, it argues that the NCJ “affirm[ed] [the] liability holding [of the Court of Appeals]” by

⁵⁴ *Id.*, p. 66 of the original Spanish, 37 of Claimant’s English translation (translation by Counsel for the Republic of Ecuador: “The expert report is the peak piece of evidence to which the proven facts leading to the determination of pre-contractual liability, extra-contractual liability, arising out from the facts as set out in the complaint can be added. It has been *qualified*, that is, evaluated and admitted, by the instance judges, and it is not feasible to qualify it again at this time, though this does not impede reviewing it in light of the challenge issued by Merck Sharp & Dohme on page 177 of the text of the petition pursuant to ground one found in Article 3 of the Cassation Law, which states the following: [...]” (emphasis added). Original Spanish text: “El informe pericial que ha sido la pieza culmen a la que suman los hechos probados, que conducen al establecimiento de la responsabilidad precontractual, extracontractual proveniente de los hechos propios de la demanda, ya ha sido *calificado* por los jueces de instancia, vale decir, valorado y aceptado por ellos, sin que sea factible en este momento volverlo a calificar, lo que no impide su revisión, en virtud de la impugnación que profiere Merck Shapr [sic] & Dohme, en la página 177 del texto del recurso, dentro de la causal primera del Art. 3 de la Ley de Casación, en cuanto puntualmente expresa: [...]” (emphasis added)).

⁵⁵ *Id.*

⁵⁶ *Id.*

⁵⁷ *Id.*, pp. 37-38. The NCJ appears to have based its allowance of only 20% of the damages calculated in the Cabrera report upon the profit limitation rule in Article 4 of the Law on the Production, Importation, Commercialization and Dispensing of Generic Medications for Human Use, which provides that “[t]he profit margin for the manufacturer or importer [of generic medications] shall not exceed twenty percent (20%) [...]” *Id.*, p. 37. Merck, on the other hand, had argued that any damage award to Prophar should be limited to 25% of lost profits, based upon the same limitation rule’s provision that profits on generic medications be limited to 25%. See MSDIA’s Brief, *Prophar v. MSDIA*, National Court of Justice (24 Mar. 2016), ¶ 94 (R-222); MSDIA’s Cassation Petition, *NIFA v. MSDIA*, Court of Appeals (13 Oct. 2011), ¶ 154, fn. 46 (C-198).

⁵⁸ Letter from Claimant to the Tribunal (10 Aug. 2016), p. 1.

“reject[ing] MSDIA’s grounds for cassation challenging [it].”⁵⁹ Second, it argues that the NCJ “did not independently assess the evidence in the record but instead wholly accepted the evidentiary findings of the court of appeals.”⁶⁰ Third, it asserts that the NCJ was “not permitted to second-guess the court of appeals’ decision to [...] credit [the Cabrera] report” and “adopted Mr. Cabrera’s conclusions, thereby reinstating the manifest injustice resulting from the court of appeals’ reliance on the Cabrera report.”⁶¹ Finally, Merck insinuates that “threats” of criminal sanctions on the NCJ Associate Judges in the January 2016 Constitutional Court decision had some unspecified “desired effect on the judges of the NCJ, prompting them (in further violation of MSDIA’s rights to due process) to place their own personal interests in avoiding such penalties ahead of those of the litigants in the case.”⁶²

28. Merck’s allegations concerning the NCJ’s August 2016 decision are as false and misleading as were its allegations concerning the NCJ’s September 2012 and November 2014 decisions. Due to the simultaneous filings concerning the August 2016 NCJ Decision ordered by the Tribunal, it is impossible for Ecuador to know whether, in its 26 September submission, Merck will add to or amplify the four mischaracterizations of the decision that it has already put forth.⁶³ But regardless of what arguments Merck advances, this Tribunal must again refuse to take up Merck’s invitation to act as a supranational appellate court to review the procedural or substantive rulings of the NCJ, Ecuador’s highest civil law court.

29. In Section VI(B)(2) of its Counter-Memorial and Sections V(B)(1) and V(C)(1) of its Reply and at the March 2015 hearing, Ecuador has already demonstrated the indisputable rule that “an international tribunal is not an appellate body and its function is not to correct errors of domestic procedural or substantive law which may have been committed by the

⁵⁹ *Id.*, p. 1-2.

⁶⁰ *Id.*, p. 3.

⁶¹ *Id.*, p. 4.

⁶² *Id.*, p. 6.

⁶³ As indicated in the elsewhere in this submission, Ecuador reserves its right to make further written submissions to the Tribunal prior to any further hearing, to address any new or amplified arguments that Merck may advance in its 26 September 2016 submission.

national courts.”⁶⁴ This principle received its most recent authoritative confirmation in the decision of the ICSID tribunal in *Philip Morris and Others v. Oriental Republic of Uruguay*, in which the tribunal, comprised of Prof. Piero Bernardini, Prof. James Crawford, and Mr. Gary Born, rejected claimant’s denial of justice claims in part because “arbitral tribunals should not act as courts of appeal to find a denial of justice, still less as bodies charged with improving the judicial architecture of the State.”⁶⁵

30. The NCJ’s determinations on Propfar’s and Merck’s cassation petitions, its assessments of the parties’ evidence and the Cabrera report, and its application of the substantive and procedural law of Ecuador to Propfar’s claims, Merck’s defenses, and the evidence are plainly not subject to this Tribunal’s readjudication. As noted in Ecuador’s previous pleadings and undisputed by Merck, this Tribunal is limited to determining, “*ex facie* or on closer examination”⁶⁶ and “in the light of all the available facts,” whether it is “shock[ed], or [...] surprise[d] [...], on reflection,” such that it has “justified concerns as to the judicial propriety of the outcome” and “can conclude [...] that the [...] decision was clearly improper and discreditable,”⁶⁷ “outrageously wrong” and “so void of reason that [it]

⁶⁴ *Liman Caspian Oil BV and NCL Dutch Investment BV v. Republic of Kazakhstan*, ICSID Case No. ARB/07/14, Award (22 June 2010) (Böckstiegel, Hobér, Crawford), ¶ 274 (RLA-181) (“The Tribunal emphasizes that an international arbitration tribunal is not an appellate body and its function is not to correct errors of domestic procedural or substantive law which may have been committed by the national courts. The Tribunal stresses that the threshold of the international delict of denial of justice is high and goes *far beyond* the mere misapplication of domestic law”) (emphasis added).

⁶⁵ *Philip Morris and Others v. Oriental Republic of Uruguay*, ICSID Case No. ARB/10/7, Award (8 July 2016) (Bernardini, Crawford, Born), ¶ 528 (RLA-214) (citing *Mondev International Ltd. v. United States of America*, ICSID Case No. ARB(AF)/99/2, Award (11 Oct. 2002) (Stephen, Crawford, Schwebel), ¶ 126 (RLA-54)). See also *Mr. Franck Charles Arif v. Republic of Moldova*, ICSID Case No. ARB/11/23, Award (8 Apr. 2013) (Cremades, Hanotiau, Knieper), ¶ 485 (“The Tribunal is not in a position and has no competence to retrace and reappraise the factual evidence”) (RLA-120).

⁶⁶ *Waste Management Inc. v. United Mexican States*, ICSID Case No. ARB(AF)/00/3, Award (30 Apr. 2004) (Crawford, Civiletti, Magallón Gómez), ¶ 130 (RLA-63).

⁶⁷ *Mondev v. U.S.A.*, Award (11 Oct. 2002), ¶ 127 (RLA-54).

breathe[s] bad faith,”⁶⁸ a “clear and malicious misapplication of the law,”⁶⁹ or without “reasonable objective foundation” and “outside the spectrum of the juridically possible.”⁷⁰

31. Merck has never disputed that this Tribunal is prohibited from substituting its own application and interpretation of the substantive and procedural law or the evidence involved in the August 2016 NCJ Decision, or any other NCJ, Constitutional Court or lower court decision in its dispute with Prophar, and it has never disputed that the above criteria represent the stringent test that it must meet in order to succeed on its denial of justice claims. But—as it has done with its scattershot attacks on every one of the Ecuadorian court decisions involved in its dispute with Prophar—Merck’s request is precisely that this Tribunal conduct a substantive review of the August 2016 NCJ Decision and substitute its own judgment on how it “should have been” decided. As demonstrated below, Merck has not carried, and cannot carry, its elevated burden to demonstrate by the required clear and convincing evidence⁷¹ that any of its complaints about the August 2016 NCJ Decision constituted a denial of justice.⁷²

⁶⁸ *Mr. Franck Charles Arif v. Republic of Moldova*, ICSID Case No. ARB/11/23, Award (8 Apr. 2013) (Cremades, Hanotiau, Knieper), ¶¶ 445, 482 (RLA-120).

⁶⁹ *Robert Azinian, Kenneth Davitian, and Ellen Baca v. The United Mexican States*, ICSID Case No. ARB(AF)/97/2, Award (1 Nov. 1999) (Paulsson, Civiletti, von Wobeser), ¶ 103 (CLM-36).

⁷⁰ *Chevron Corporation (USA) and Texaco Petroleum Company (USA) v. The Republic of Ecuador*, PCA Case No. 34877, UNCITRAL, Partial Award on the Merits (30 Mar. 2010) (Böckstiegel, Brower, van den Berg), ¶ 198 (CLM-111) (*citing* the Opinion of Jan Paulsson submitted in that case).

⁷¹ *Philip Morris v. of Uruguay*, Award (8 July 2016), ¶ 499 (RLA-214) (“An *elevated standard of proof* is required for finding a denial of justice due to the gravity of a charge which condemns the State’s judicial system as such.”) (emphasis added); *id.*, ¶ 500 (for a denial of justice to exist under international law, there must be “*clear evidence of ... an outrageous failure of the judicial system*’ [...] or that ‘the impugned decision was *clearly improper and discreditable*”) (additional emphasis added) (citing and quoting *Mondev v. U.S.A.*, Award (11 Oct. 2002), ¶ 127 (RLA-54)). *See also*, Ecuador’s Counter-Memorial, ¶ 276 and cases and authorities cited therein.

⁷² As noted earlier in this submission, Ecuador’s arguments concerning Merck’s denial of justice claims apply equally to its claims under any other provision of the Treaty, including the effective means provisions of Treaty Article II(7).

B. Merck Has Failed To Demonstrate That The August 2016 NCJ Decision Was Improper, Much Less “So Outrageous As To Be Inexplicable Otherwise Than As” Arbitrary Or Grossly Incompetent, “Juridically Impossible,” Or “A Shock To A Sense Of Judicial Propriety”

1. The NCJ Did Not Affirm The Court Of Appeals’ Decision But Instead Annulled And Wholly Replaced It With A New Decision On Entirely Different Grounds

32. Merck’s first attack on the August 2016 NCJ Decision posits that the decision “upheld the court of appeals’ decision in substantial part” because, in its cassation analysis, the NCJ “expressly rejected MSDIA’s grounds for cassation challenging the court of appeals’ liability holding thereby affirming that liability holding.”⁷³ Merck also refers to the phrase “partially sets aside said judgment” at the conclusion of the NCJ’s cassation analysis as further supposed indicia that the August 2016 NCJ Decision left the Court of Appeals’ judgment intact.⁷⁴

33. Merck advanced those arguments, of course, in order to try to fit the NCJ decision into the Tribunal’s March 2016 Decision on Interim Measures and, thereby, avoid having to justify to the Tribunal why, as the exact same company that is both Claimant here and the defendant/judgment debtor in the *NIFA v. MSDIA* litigation, it could not easily satisfy the net \$34 million damage award from its last-reported \$1.13 billion in net current assets and \$600 million in annual sales and, thus, itself prevent the alleged “destruction” of its operations in Ecuador. But to the extent that Merck also might mean that the August 2016 NCJ Decision’s alleged “affirmance” of the Court of Appeals’ judgment constituted a denial of justice, it is categorically wrong, as demonstrated by the face of the judgment itself and Merck’s own admissions both in this arbitration and in the *NIFA v. MSDIA* litigation.

34. First, Merck wholly mischaracterizes NCJ procedure in asserting that the NCJ’s cassation, or annulment, of the Court of Appeals’ judgment on only two of the grounds argued in its cassation petition somehow restricted how the NCJ decided the case once it had granted cassation. As both Merck and Ecuador have explained at length in their previous submissions to the Tribunal and (as to Merck) in the Ecuador courts, NCJ procedure consists

⁷³ Letter from Claimant to the Tribunal (10 Aug. 2016), pp. 2-3.

⁷⁴ *Id.*, p. 3.

of two distinct phases: the cassation phase, in which the NCJ analyzes whether there are defects in the lower court judgment at issue; and—if the NCJ finds one or more defects in the decision and it annuls the decision—a second phase in which the NCJ sits as an ordinary court and redecides the case in its entirety on the basis of the allegations in the plaintiff’s complaint, the defendant’s answer, and the evidence developed in the case.⁷⁵ As Merck’s witness Prof. Páez explained in support of Merck’s Reply, once the NCJ annuls the “challenged decision [in the cassation phase], the court of cassation must [...] issue a replacement decision.”⁷⁶ Prof. Páez goes on to explain that if “the NCJ sets aside the challenged judgment [...], the NCJ must issue a new judgment or order” to replace the one it has annulled.⁷⁷

35. In its submissions to the Ecuador Constitutional Court during Prophar’s first EPA action, Merck itself foreshadowed its expert witness Prof. Páez’s testimony. There, in the context of Prophar’s EPA action against the NCJ’s September 2012 decision, Merck described in detail both the cassation phase of NCJ procedure and, once cassation is granted, the role of the NCJ to issue a wholly new decision in the same manner as a trial court.⁷⁸ According to Merck, the cassation phase is “not a recourse intended to decide between the positions of the parties,”⁷⁹ but, if the NCJ does cassate a lower court decision, “it will accept the respective decision or order for review *and will issue its own decision in place of the reviewed decision [...] as an ordinary court.*”⁸⁰ And as Merck went on to explain to the Constitutional Court, the NCJ’s role as an ordinary court, once it has “overturned the appellate court’s decision,” is to “analyze[] the evidence, summarizing the relevant legal concepts and explaining them with doctrine and relating them to the norms to which the

⁷⁵ See, e.g., Ecuador’s Rejoinder, ¶¶ 483-490; Claimant’s Reply, ¶ 402; Expert Opinion of Carlos Humberto Páez Fuentes (1 Oct. 2013) (“Páez Fuentes Expert Opinion”), ¶¶ 8, 17-18; First Aguirre Expert Opinion, ¶ 6.1; Second Aguirre Expert Opinion, ¶¶ 4.2-4.9.

⁷⁶ Páez Fuentes Expert Opinion, ¶ 8.

⁷⁷ *Id.*, ¶¶ 17-18.

⁷⁸ MSDIA submission to the Constitutional Court (received by the Court on 3 Apr. 2013), ¶¶ 120-121, 137-142, 172 (R-117).

⁷⁹ *Id.*, ¶ 142 (emphasis added).

⁸⁰ *Id.*, ¶ 120 (emphasis added).

claimant referred in its complaint.”⁸¹ In short, there is no link whatsoever between the grounds on which the NCJ has cassated a case and the court’s subsequent plenary power and duty to issue a new judgment as the equivalent of a trial court.

36. Ecuador’s expert witness Prof. Aguirre confirmed Merck’s and Prof. Páez’s assertions. He testified that, although under the “dispositive” principle the NCJ may not cassate a case on any ground other than one provided for in Article 3 of the Cassation Law and raised by a party in its cassation petition:

[The NCJ is not prevented], once cassation is admitted, and when [the NCJ] has become a trial court, from considering and ruling *on all aspects which are the subject of the Litis*, whether or not they were alleged as grounds for the appeal.

It is precisely for this reason that, once cassation is sustained [...], the NCJ proceed[s] to become a “Trial Court” and to make a decision based on the grounds of NIFA’s complaint and the MERCK’s defenses, as well as on the evidence presented, in the same manner as it would be handled by any trial court. The dispositive principle is no longer applicable to this phase because the NCJ, in its new role [...] pursuant to Article 16 of the Cassation Law [...] is no longer limited by the allegations brought by the parties on appeal, and has instead, broad assessment powers. The grounds of NIFA’s complaint are essentially that there was an improper conduct during the negotiations with MERCK, the latter having denied these events and giving rise to the litigation. Therefore, this is what must be evaluated and decided in the second phase of cassation [...].⁸²

37. As a legal matter, then, the fact that the NCJ cassated the Court of Appeals’ judgment on only two of the grounds that Merck had argued in its cassation petition placed no limitation whatsoever on how the NCJ, sitting as the equivalent of a trial court, could (and did) decide the case, and far from “affirm[ing] the court of appeals judgment...in most materials respects” or only “partially set[ting] it aside,” the NCJ’s cassation of that judgment wiped it out completely. Once it had annulled the Court of Appeals’ judgment, the NCJ’s

⁸¹ *Id.*, ¶ 172 (emphasis added).

⁸² Second Aguirre Expert Opinion, ¶ 4.8-4.9.

legal obligation became to apply its “broad assessment powers” to redecide the case on first principles, i.e., the complaint, defenses, and the evidence developed in the courts below.

38. And that is precisely what the NCJ did in its August 2016 decision. As Merck has repeatedly argued in this arbitration and the Tribunal will recall, the Court of Appeals had held Merck liable “*exclusively* on antitrust grounds.”⁸³ After the NCJ’s nine and a half page examination of the allegations of Prophar’s complaint, the defenses that Merck had raised to it, and the evidence of the parties’ negotiations and the reason they had ended,⁸⁴ the Court addressed whether, when applied to those elements, Merck was liable to Prophar under Ecuadorian law. In so doing, the NCJ “distinguish[ed]” from Prophar’s claims and Merck’s defenses “the categories of free competition and monopolistic practices, which belong to the realm of Competition Law,” and declined to apply antitrust law to those claims and defenses.⁸⁵ Instead, as it had in both its September 2012 and November 2014 decisions, the NCJ found Merck liable in tort for a violation of Articles 2214 and 2229 of the Civil Code.⁸⁶ In so doing, the NCJ examined the elements of torts for extra-contractual liability, applied them to the evidence of Merck’s conduct in January 2003, in light of the parties’ course of negotiations, and found Merck liable for an unintentional (i.e., negligent) tort due to its “unilateral attitude [...] in refusing to complete the sale [of the plant] on the pretext of the [prohibition of] the production of [generic] pharmaceutical products that [...] was not in [its] interest to allow to be sold” and “[h]arm [...] in the form of disturbance unilaterally imposed

⁸³ Claimant’s Memorial, ¶ 139 (emphasis added); *see also id.*, ¶¶ 10, 137, 142, 243 314, 349, 385 (“[a violation of antitrust law] was *the only legal basis* for the court of appeals’ judgment” (emphasis added)); Claimant’s Reply, ¶ 4 (“[the judgments issued against MSDIA by the trial court and the court of appeals] imposed liability against MSDIA for purported antitrust violations”); *id.*, ¶¶ 23, 291, 326 (“the two lower courts found MSDIA liable *only on antitrust*”) (emphasis added); *id.*, ¶¶ 333, 503, 537.

⁸⁴ Judgment, *Prophar v. MSDIA*, National Court of Justice (4 Aug. 2016), pp. 22-31 (R-223).

⁸⁵ *Id.*, p. 32.

⁸⁶ *Id.* Civil Code Articles 2214 and 2229 provide, respectively, that “[w]hoever has committed an infraction or tort that has caused damage to another, is liable for compensation; without prejudice to such penalties as are imposed upon it by the law for infractions or tort” and “[a]s a general rule, restitution must be made for any damage that can be attributed to malice or negligence by another person.” Ecuador Civil Code, Art. 2214 (CLM-189); Ecuador Civil Code, Art. 2229 (CLM-395).

by [Merck] upon [Prophar], which blocked [Prophar's] development of its growth plan [...].”⁸⁷

39. In light of the foregoing, it is clear that the NCJ’s statement that it was “partially set[ting] aside” the Court of Appeals’ judgment⁸⁸ refers only to the fact that it had granted Merck’s *cassation petition* on only some of the grounds advanced in it.⁸⁹ That statement has nothing to do with the legal implications of the NCJ decision, which—as is obvious from its face—is a wholly new, materially distinct adjudication of the merits of the *NIFA v. MSDIA* dispute and the damages flowing from it. Merck’s argument that the NCJ “affirmed” the Court of Appeals’ judgment by “expressly reject[ing] MSDIA’s grounds for cassation challenging the court of appeals’ liability holding” is baseless and could not serve to demonstrate a denial of justice.

2. Contrary To Merck’s Misrepresentation, The NCJ Conducted An Independent Review And Analysis Of The Evidence And Drew Conclusions From It That The NCJ Subjected To The Legal Rules It Found Applicable

40. Merck’s second attack on the August 2016 NCJ Decision asserts that the decision “upheld the court of appeals’ decision in substantial part” because the NCJ “did not independently assess the evidence in the record but instead wholly accepted the evidentiary findings of the court of appeals.”⁹⁰ In support of that assertion, Merck seizes on a passage

⁸⁷ Judgment, *Prophar v. MSDIA*, National Court of Justice (4 Aug. 2016), p. 32 (R-223); *see also, id.*, pp. 33-34, for the NCJ’s further analysis of the evidence and legal principles which supported the Court’s conclusion of Merck’s liability to Prophar. Thus far, Merck has not argued—as it did with regard to the September 2012 and November 2014 NCJ decisions—that it had “no notice” that, in the new NCJ proceedings, it might be held liable under Articles 2214 and 2229 of the Civil Code. Ecuador reserves its right to address in a written submission any such arguments that Merck may raise. But for purposes here, any such arguments would fail for the same reasons that Merck’s earlier arguments to that effect fail, as it has been on notice of potential liability under those Articles, and defended against it, since Prophar first cited Articles 2214 and 2229 in its complaint. *See* NIFA’s Complaint, *NIFA v. MSDIA*, Trial Court (16 Dec. 2003), p. 9, paragraph entitled “Suit” (C-10).

⁸⁸ Judgment, *Prophar v. MSDIA*, National Court of Justice (4 Aug. 2016), p. 22 (R-223).

⁸⁹ *See also*, Judgment, *Prophar v. MSDIA*, National Court of Justice (4 Aug. 2016), p. 17 (R-223), in which—in granting Merck’s cassation petition based on one of its arguments under the first ground provided for in Article 3 of the Cassation Law—the NCJ states that the “challenged judgment” (not only a part of it) must be “set aside.”

⁹⁰ Letter from Claimant to the Tribunal (10 Aug. 2016), p. 3; *see also* Letter from Claimant to the Tribunal (15 Aug. 2016), fn. 5 (“[w]hile the [NCJ decision] recites and discusses the factual evidence, it is obvious from the text of the judgment that the NCJ did not make an independent assessment of that evidence”).

from the decision to the effect that the NCJ would “refrain[] from weighing any evidence or determining any of the facts of the trial and appeal.”⁹¹ Therefore, according to Merck, “[t]he NCJ’s adoption of the court of appeals’ evidentiary findings re-imposes the fundamental violations of MSDIA’s rights by the court of appeals, and in fact exacerbates those violations.”⁹²

41. This argument is wholly specious for multiple reasons. Most obviously, if Merck really believed that the NCJ decision involved “fundamental violations of [its] rights,” it would have sought recourse to the Constitutional Court for a violation of its due process rights.⁹³ Of course, Merck has not done so, as it did not do with regard to any of its myriad of other assertions of the NCJ’s violations of its due process and other constitutional rights. Merck’s decision to forego, once again, an extraordinary protection action as to the August 2016 NCJ Decision serves to demonstrate that it does not believe that the NCJ relied on the Court of Appeals’ evidentiary findings and did not conduct its own independent assessment.

42. One look at the NCJ decision also belies Merck’s assertions. First of all, the NCJ’s statement on which Merck relies—that the Court would “refrain[] from weighing any evidence or determining any of the facts of the trial and appeal”—is a mere recitation of the language of Article 16 of the Cassation Law, under which the NCJ is to issue its replacement judgment “on the substance of the facts established in the” annulled lower court decision. That Article 16 provision did not prevent the NCJ from evaluating the evidence in either its September 2012 or its November 2014 decision, and it did not prevent it from doing so in its August 2016 decision. Moreover, the NCJ immediately followed the statement on which Merck relies with the dictate that can only be interpreted to mean that the NCJ deemed itself required to assess the evidence:

[t]he facts are as stated in the complaint, it is its private interest as a truth *that must be proved by the party that presents it*, they are its credits; to discredit them *is the job of the defendant*, and *the judge extracts the element of his decision from a*

⁹¹ Letter from Claimant to the Tribunal (10 Aug. 2016), p. 3, fn. 10, referencing p. 27 of the August 2016 NCJ Decision (R-227).

⁹² Letter from Claimant to the Tribunal (10 Aug. 2016), p. 4.

⁹³ See First Guerrero Expert Report (25 Feb. 2014), ¶ 17(c).

*comparison of the two, based on fairness, the reality of the facts, the principles of law and the legal system.*⁹⁴

43. And assessing and evaluating the evidence is exactly the task that the NCJ thereafter undertook. In a six-page analysis spanning pages 27 through 31 and continued on pages 32 through 34 of its August 2016 Decision, the NCJ laid out the evidence that had been submitted by *both* parties, and it analyzed throughout what the evidence showed. On that basis, the NCJ reached the factual conclusions necessary for it—sitting as the equivalent of a trial court—to decide the case, among other things that the evidence “reveal[ed] concurrence [...] with regard to [...] important facts” regarding the parties’ course of negotiations and their late-2002 meeting of the minds on the terms of Merck’s sale of its plant to Prophar;⁹⁵ “describe[d] a new phase in the parties’ relationship” beginning in December 2002;⁹⁶ and demonstrated that, after “a nearly one year period” of negotiations and the parties’ agreement on the sale terms, in January 2003 Merck conditioned the sale of the plant on Prophar’s agreement not to manufacture a long list of generic pharmaceuticals in a “deliberate, conscious choice” that “prioritized Merck’s interest in limiting [Prophar’s] production of pharmaceutical products, without any legal basis.”⁹⁷

44. In addition, despite its statement that “the dispute between the parties cannot lead [it] to weigh evidence,”⁹⁸ the NCJ proceeded to do precisely that. It based its findings of facts “on the copious documentation exchanged via email between the parties” because the Court “considered [them] authentic and [to] have probative force in the proceedings;” it analyzed other documents, ultimately rejecting them as having no bearing on the negotiations between the parties; and it found the probative value of testimony lacking because it was “mostly procured from persons involved in the negotiation process, having held positions or engagements with [Merck], at various levels and at various times.”⁹⁹

⁹⁴ Judgment, *Prophar v. MSDIA*, National Court of Justice (4 Aug. 2016), p. 27 (R-223).

⁹⁵ *Id.*, p. 30-31.

⁹⁶ *Id.*, p. 30; *see also id.*, pp. 33-34.

⁹⁷ *Id.*, pp. 32-33.

⁹⁸ *Id.*, p. 34.

⁹⁹ *Id.*

45. It was on the basis of all of the above analysis and weighing of the evidence—and numerous other examples in the August 2016 decision—that the NCJ concluded that, through its actions in January 2003, Merck committed an unintentional tort that violated Articles 2214 and 2229 of the Civil Code and required that it compensate Prophar.¹⁰⁰

46. As demonstrated by the foregoing, Merck’s suggestion that the NCJ failed to independently review the evidence in the case “but instead wholly accepted the evidentiary finding of the court of appeals”¹⁰¹ is revealed for what it is: a wholesale falsehood, promulgated by Merck on this Tribunal because—despite the fact that five Ecuadorian courts and eleven Ecuadorian judges have found its January 2003 conduct toward Prophar to have been illicit—it will go to any lengths to lay its accountability for that conduct at Ecuador’s door. As demonstrated immediately below, the same is true of Merck’s misrepresentation of the NCJ’s treatment of the Cabrera report. The Tribunal should not countenance such tactics and should outright dismiss Merck’s allegations of “manifest injustice” and “fundamental violations of” Merck’s “rights.”¹⁰²

3. The NCJ’s Treatment Of And Meaningful Departure From Mr. Cabrera’s Calculations In Its Determination Of Damages Was Not Irrational, Arbitrary Or Grossly Incompetent

47. Claimant has alleged that “the NCJ’s 4 August 2016 Judgment relied exclusively on the *blatantly irrational* and *likely corrupt* expert report of Mr. Cristian Cabrera.”¹⁰³ But aside from its innuendos, Claimant has made no showing of any corruption in connection with the appointment or work of Mr. Cabrera. Yet it continues to recklessly suggest that his report was “likely corrupt.” Claimant’s real grievance is that, unlike De León, the other court appointed expert that had been asked to do so, Mr. Cabrera did not abstain from calculating damages. Claimant has expended significant effort trying to impugn Cabrera’s report and the

¹⁰⁰ *Id.*, pp. 32-34.

¹⁰¹ Letter from Claimant to the Tribunal (10 Aug. 2016), p. 3; *see also* Letter from Claimant to the Tribunal (15 Aug. 2016), fn. 5 (“[w]hile the [NCJ decision] recites and discusses the factual evidence, it is obvious from the text of the judgment that the NCJ did not make an independent assessment of that evidence”).

¹⁰² Letter from Claimant to the Tribunal (10 Aug. 2016), p. 4.

¹⁰³ Letter from Claimant to the Tribunal (10 Aug. 2016), p. 4 (emphasis added).

NCJ's consideration of it. But none of Claimant's arguments are borne out by the record of the *Prophar/MSDIA* litigation or any evidence presented in this arbitration.

48. As explained below, having found Merck liable, the NCJ had a duty to calculate the damages. It did so on the basis of the only court-appointed expert report on damages in the record. Claimant has not produced a shred of evidence that there was any ground upon which the NCJ could doubt the propriety of Mr. Cabrera's appointment as a damages expert: Mr. Cabrera was appointed in accordance with the mechanism proposed and endorsed by Claimant; this mechanism was independent of the Court of Appeals and the parties; and importantly, Claimant never objected to the manner in which Mr. Cabrera was appointed. Additionally, Claimant has failed to show that there was any basis for the NCJ to doubt Mr. Cabrera's qualifications as a damages expert. Finally, having found that the Cabrera report was properly qualified as an expert report, the NCJ proceeded to rely on it as a starting point for the determination of damages. There is no basis for this Tribunal to determine that the NCJ's reliance on Mr. Cabrera's report—and what Claimants itself has described as a “meaningful departure”¹⁰⁴ from the Court of Appeals' decision in reducing the quantum of damages by 80%—produced an “outrageous failure” in the Ecuadorian court's adjudication of the case.¹⁰⁵

a. Having Found Liability, The NCJ Had A Duty To Calculate Damages

49. Once the NCJ had found Claimant liable for a tort under Articles 2214 and 2229 of the Ecuador Civil Code that caused harm to Prophar, it was legally incumbent upon it to award damages, including any lost profits. Article 279 of the Ecuadorian Code of Civil Procedure provides:

Whenever a judgment is entered against a party ordering payment of proceeds, interest, damages and lost profits, the amount to be paid shall therein be determined, and if that is not

¹⁰⁴ Letter from Claimant to the Tribunal (15 Aug. 2016), p. 3.

¹⁰⁵ See *Philip Morris v. Uruguay*, Award (8 July 2016), ¶ 500 (RLA-214).

be possible, the bases for its calculation and the method to verify it shall be set forth.¹⁰⁶

50. Moreover, the NCJ's determination of damages had to be made on the basis of evidence, including expert reports, already in the record.¹⁰⁷ As stated by Prof. Guerrero del Pozo, "Ecuadorian law does not recognize the validity of evidence introduced during the proceedings of a cassation appeal."¹⁰⁸

51. The fact is that Mr. Cabrera's report was the only report of a court-appointed expert in the record, and the only report by anyone, who set forth an analysis of the quantum of lost profit damages. It can be of no surprise that the NCJ considered the Cabrera report as it proceeded to determine the quantum of damages based on the evidence in the record. Thus, absent a showing before the NCJ of some impropriety in connection with its genesis, which, as discussed below, has not been shown to have occurred, it would not have been possible for the NCJ to disregard it, as Claimant suggests.

52. In short, the NCJ judges cannot admit new evidence from the parties, and, in this case, relied on—and adjusted significantly—the computations of the only court-appointment expert on damages.

¹⁰⁶ Ecuadorian Code of Civil Procedure (24 Nov. 2011), Art. 279 (RLA-107)(ter). The August 2016 judgment of the NCJ explained the application of this provision in the appellate proceedings as follows: The fact is that the court of appeals cannot be challenged based on the so-often-mentioned appointment of the expert and the decision it reached based on said expert report, making use of the authority to weigh evidence granted to it by the law, as we have extensively discussed above; rather if the appeals court judges determined that harm did occur, the judgment should state the amount of compensation payable, as provided by Article 279 of the Code of Civil Procedure in effect at the time this case was processed. Judgment, *Prophar v. MSDIA*, National Court of Justice (4 Aug. 2016), p. 36 (R-223).

This in turn requires determination of actual damages and lost profits pursuant to Article 1572 of the Civil Code. *See* Ecuadorian Civil Code (2005), Art. 1572 (CLM-438) ("The indemnification of damages is composed of actual damage and lost profits, whether they originate from non-fulfilment, imperfect fulfilment, or late fulfilment of an obligation.") Claimant's own expert in this arbitration. Dr. Correa stated that this provision "says that lost profits and actual damages *have to be* compensated." Hearing on the Merits, Transcript, Day 3 (17 Mar. 2015), p. 14:19-20 (Correa) (emphasis added).

¹⁰⁷ Ecuador's Rejoinder, ¶ 457. Article 15 of the Law on Cassation provides: "[n]o evidence may be requested or ordered, nor may any motion be admitted, during the conduct of a cassation appeal." Decision of the Ecuadorian Constitutional Court (12 Feb. 2014), p. 18 (C-285).

¹⁰⁸ Second Guerrero Expert Report (18 Feb. 2015), ¶ 68. Claimant's own expert, Prof. Páez, has testified that Article 15 of the Cassation Law "prohibits [the NCJ] from accepting new evidence or addressing any collateral issues." Expert Opinion of Carlos Humberto Páez Fuentes (1 Oct. 2013), ¶ 21 (hereinafter "Páez Fuentes Expert Opinion").

b. Claimant Has Not Shown That There Was Any Basis Upon Which The NCJ Could Doubt The Propriety Of Mr. Cabrera's Appointment As A Damages Expert

53. Ecuador has previously argued that Claimant has failed in its extended effort to conjure up irregularity and impropriety in Mr. Cabrera's appointment as an expert.¹⁰⁹ As a result, there was no demonstrated basis whatsoever for the NCJ to disregard Mr. Cabrera's report.

i. The Court Appointed Mr. Cabrera In Accordance With The Mechanism Requested By Claimant

54. As detailed in Ecuador's pleadings, both Prophar and Claimant requested that the Court appoint experts on damages. Claimant has no complaint that the Court appointed Dr. De León based on the list of candidates suggested by the Ecuadorian Competition Authority, to opine on whether Merck had violated anti-trust laws, at the request of Merck,¹¹⁰ and on the question of resulting damages, at the request of Prophar.¹¹¹ Nor did Claimant initially complain about Mr. Cabrera's appointment following the same process as Mr. De León's. Indeed, Mr. Cabrera was appointed in response to a request by Claimant and according to a procedure requested by Claimant.¹¹²

55. Claimant first suggested that the Court obtain the list of suitable candidates from the Association of Private Banks.¹¹³ The Court acceded to this request. Because the Association of Private Banks did not send any names, Claimant then suggested that the Court seek the names from the College of Accountants.¹¹⁴ The Court again acceded to Claimant's request and issued an order asking the College of Accounts of Pinchincha to provide a list of

¹⁰⁹ Ecuador's Rejoinder, ¶¶ 528-553; Ecuador's Counter-Memorial, ¶¶ 460-482; Hearing on the Merits, Transcript, Day 2 (17 Mar. 2015), 12:12 – 14:4.

¹¹⁰ Claimant's Memorial, ¶¶ 86-87.

¹¹¹ *Id.*, ¶ 103 (citing Report of Ignacio De León, *NIFA v. MSDIA*, Court of Appeals (17 Feb. 2010), p. 98 (C-24)); *see also* MSDIA's Petition, *NIFA v. MSDIA*, Court of Appeals (13 May 2011), pp. 1-3 (C-40).

¹¹² Court Order, *NIFA v. MSDIA*, Court of Appeals (3 Feb. 2010) (C-254). Expert Report of Dr. Jaime Ortega (7 Aug. 2014), ¶ 43(d) (hereinafter "Ortega Expert Report (7 Aug. 2014)").

¹¹³ MSDIA's Brief, *NIFA v. MSDIA*, Court of Appeals (10 June 2009), p. 3 (C-185).

¹¹⁴ MSDIA Petition, *NIFA v. MSDIA*, Court of Appeals (5 Jan. 2010) (R-81).

candidates to serve as damages experts.¹¹⁵ The College of Accountants recommended three, including Mr. Cabrera being as first on the list.¹¹⁶ Indisputably, Mr. Cabrera was initially appointed in response to Merck's request and according to the process proposed and endorsed by Merck.¹¹⁷

56. Later, however, Claimant waived its request to have Mr. Cabrera submit a report on damages because it was satisfied with the results of the report submitted by Mr. De León,¹¹⁸ who had concluded that Merck was not liable and therefore refrained from calculating damages.¹¹⁹ Again, the court acceded to MSDIA's request.¹²⁰

57. Prophar sought to have another expert opine on the appropriate quantum of damages, which remained unaddressed. The Court re-appointed Mr. Cabrera, who was already familiar with the case, had been recommended by the College of Accountants, and had been previously approved by both parties.¹²¹ Given the Court's wide discretionary powers in these matters, this appointment was far from aberrational or improper.¹²²

¹¹⁵ Letter from the President of the Pichincha School of Public Accountants to Court of Appeals, *MSDIA v. NIFA*, Court of Appeals (1 Feb. 2010) (R-85).

¹¹⁶ *Id.*

¹¹⁷ Court Order, *NIFA v. MSDIA*, Court of Appeals (3 Feb. 2010) (C-254). Ortega Expert Report (7 Aug. 2014), ¶ 43(d). When Mr. Cabrera was first appointed at Merck's request, he was already registered as an expert with the Judiciary Council. *See* Memorandum from Wilson Rosero Gómez (Chief of Staff), to Iván Escandón (Provincial Director of the Council of the Judiciary for Pichincha) (31 May 2012), p. 2 (C-63). Cabrera's expert accreditation was done pursuant to Resolution 42-09 of July 15, 2009, issued by the Plenary of the Judicial Council and published in Official Registry 21 of September 8, 2009.

¹¹⁸ MSDIA Petition, *NIFA v. MSDIA*, Court of Appeals (16 Apr. 2010) (C-26).

¹¹⁹ Ecuador's Rejoinder, ¶ 530.

¹²⁰ Order, *NIFA v. MSDIA*, Court of Appeals (26 Apr. 2010) (C-256); Electronic Docket, Case No. 2008-0421, *NIFA v. MSDIA*, Provincial Court of Justice of Pichincha, First Civil and Commercial Chamber (Second Instance Court), Entry 200 (R-122) (General Order 26 April 2010, "Cristian Augusta Cabrera Fonseca as an expert witness is set aside.") It should be noted that Mr. Cabrera was set aside at Merck's request in April 2010, despite the fact that the court had already seen Dr. De Leon's damages report finding no grounds for damages in NIFA's favor.

¹²¹ NIFA Petition, *MSDIA v. NIFA*, Court of Appeals (5 May 2011) (C-39). *See also* Electronic Docket, Case No. 2008-0421, *NIFA v. MSDIA*, Provincial Court of Justice of Pichincha, First Civil and Commercial Chamber (Second Instance Court), Entry 344 (R-122) (Ordering Proceedings 10 May 2011).

¹²² *Cf. Perenco Ecuador Ltd. v. Republic of Ecuador*, ICSID Case No. ARB/08/6, Interim Decision on the Environmental Counterclaim (11 Aug. 2015) (Tomka, Kaplan, Thomas), ¶¶ 587-588 (RLA-222), where the tribunal was not content to issue a final determination on the extent of the claimant's liability on the basis of the expert reports submitted by the parties and stated that it "intend[ed] to appoint its own independent environmental expert."

ii. **The Mechanism Used To Reappoint Mr. Cabrera Was Independent Of The Court And The Parties**

58. The process used to appoint Mr. De León and Mr. Cabrera was fundamentally the same. In its Memorial, Claimant acknowledges and describes this process as a proper procedure for the appointment of experts in Ecuadorian courts:

Under the rules of Ecuadorian procedure, a court may appoint experts to opine on specified issues at the request of a party. Generally, where possible, these court-appointed individuals have been “accredited” as experts in the relevant subject matter by the regional office of Ecuador’s Council of the Judiciary. If a party requests that the court appoint an expert in a subject matter for which there are no accredited experts, the court may seek recommendations from other bodies, such as a relevant Ecuadorian government ministry or trade association.¹²³

59. Claimant’s recognition of the proper appointment and use of experts is critical and stands in contrast to its arguments about the appointment of Mr. Cabrera.

60. Cabrera’s appointment was independent of the Court because his name was suggested by the College of Accountants through the mechanism proposed by Claimant. It was also independent of both parties to the litigation: Merck has never claimed that either party had any influence on the College’s suggestions. Thus, not only was the process standard as acknowledged by Claimant, it was also independent from the Court and the parties involved. This belies Claimant’s innuendo that it was “likely corrupt.”

iii. **Claimant Never Objected To The Manner By Which Mr. Cabrera Was Appointed**

61. At the time when Mr. Cabrera was initially appointed as an expert by the Court, Claimant raised no concerns with his appointment. Even when Mr. Cabrera was later reappointed, Claimant did not object to the manner by which his name was recommended.

62. Claimant has, however, complained about the “grounds” cited by the Court of Appeals for its reappointment of Mr. Cabrera, suggesting that the Court “changed [its] justification.”¹²⁴ Ecuador’s Rejoinder explains that contrary to Claimant’s allegations, there

¹²³ Claimant’s Memorial, ¶ 85.

¹²⁴ See Ortega Expert Report (7 Aug. 2014), ¶ 43(p).

was no “change” in the grounds for the appointment of Mr. Cabrera, let alone manipulation of the rules by the Court.¹²⁵ As the Court later clarified and corrected its previous misstatements,¹²⁶ its appointment of Mr. Cabrera was made in exercise of its discretionary power to appoint experts to assist the court, because Dr. De Leon “did not fulfill the objective of the expert review for which he was appointed.”¹²⁷ This process is not foreign to most civil law systems.¹²⁸

63. That the Court may have misstated the grounds for Cabrera’s appointment in one of its numerous orders in this highly complex voluminous litigation is not shocking.¹²⁹ Nor did this misstatement, later corrected, make any difference. As emphasized by the NCJ in its 4 August judgment, there was nothing improper about the Court’s exercise of its power to appoint an expert to opine on damages.¹³⁰ The NCJ explained the Court of Appeal’s reference to Article 262 of the Code of Civil Procedure, which provides that in the event a judge does not find an expert’s report to be sufficiently clear, he may appoint another expert report—was simply an example of this power:

The inclusion of Article 262 was not precisely due to the fact that the Court of Appeals chose to appoint an expert *sua sponte*, but rather it provides further grounds and more support for the decision to appoint the expert based on the plaintiff’s request for evidence, and with regard to the search for the truth in a proceeding, it could have been done “even *sua sponte*,”

¹²⁵ Ecuador’s Rejoinder, ¶¶ 533 *et seq.*

¹²⁶ *Id.*, ¶ 534.

¹²⁷ Court Order, *NIFA v. MSDIA*, Court of Appeals (10 May 2011) (C-39) (“while the expert Ignacio de Leon submitted his report, listed on page 9247, he did not fulfill the plaintiff’s request, but rather states that he answers a question, meaning he did not fulfill the objective of the expert review for which he was appointed. Therefore, and having been a legitimate request, and since it was ordered in paragraph j). of court order of Friday, June 5, 2009 at 5:18 p.m., *the Chamber appoints Mr. Cristian Augusto Cabrera Fonseca [...]*”).

¹²⁸ For example, in Germany and France, the court appoints experts to assist in its fact finding. See e.g., German Code of Civil Procedure (10 Oct. 2013), Section 404 (Selection of the expert), *available at* http://www.gesetze-im-internet.de/englisch_zpo/englisch_zpo.html#p1642. See generally B. Turner, *Expert Evidence in France, Germany, Italy, Spain and the Netherlands* (Sept. 2009) (R-217).

¹²⁹ Ecuador’s Rejoinder, ¶¶ 541-542.

¹³⁰ See Judgment, *Prophar v. MSDIA*, National Court of Justice (4 Aug. 2016), p. 35 (R-223).

and was even in response to a request made in timely manner.¹³¹

64. Thus, Claimant has failed to show any irregularity in Mr. Cabrera's reappointment either to this Tribunal or to the NCJ. The NCJ's reliance upon the report resulting from this re-appointment cannot for this reason be impugned.

c. Claimant Has Not Shown That There Was Any Basis Upon Which the NCJ Could Doubt Mr. Cabrera's Qualifications As A Damages Expert

65. Nor has Claimant shown that there is any basis for doubting that the College of Accountants considered Mr. Cabrera to be properly qualified for the task for which it was requested to recommend experts. At the time of his appointment, neither the Court nor the parties were preoccupied with his accreditation by the Judiciary Council, because such accreditation is simply not a prerequisite to being a court-appointed expert.¹³² At the time when Mr. Cabrera submitted his report, he was actually accredited by the Judiciary Council as an expert in the "calculation of damages and injury, consequential damages and lost profits, accounting, finances and taxation."¹³³ But this is not why he was appointed.

66. While Claimant objected to the grounds on which Mr. Cabrera's was reappointed,¹³⁴ it did not attack Mr. Cabrera's credentials until after he issued his report on 21 June 2011.¹³⁵ In its 15 July 2011 brief, Claimant argued that Mr. Cabrera "only has the credentials necessary to be considered an expert in accounting and auditing," without any explanation as to why he was thus unqualified to performing the task assigned by the Court.¹³⁶

67. Indeed, Claimant did not raise any question with the College of Accountants about the basis for their assessment that Mr. Cabrera possessed the necessary qualifications to

¹³¹ *Id.*, p. 35-36.

¹³² Claimant's Memorial, ¶ 85.

¹³³ Certificate of Accreditation as an Expert No. 268, issued to Mr. Cabrera Fonseca Cristian Augusto (25 Jan. 2011) (R-218).

¹³⁴ MSDIA's Petition, *NIFA v. MSDIA*, Court of Appeals (13 May 2011) (C-40).

¹³⁵ Report of Cristian Augusto Cabrera Fonseca, *NIFA v. MSDIA*, Court of Appeals (21 June 2011) (C-42).

¹³⁶ MSDIA Petition, *NIFA v. MSDIA*, Court of Appeals (15 July 2011), p. 8 (C-267).

perform the task as described by the Court. And no explanation for failing to do so has ever been offered by Claimant.

68. Of course, as is well known now, Claimant's local counsel did complain to the Provincial Office of the Judiciary Counsel objecting to *its* accreditation of Mr. Cabrera, even though such Judiciary Counsel credentials were not implicated in any way in Mr. Cabrera's appointment. Indeed, the report of the Provincial Director of Pichincha concerning the accreditation of Mr. Cabrera was notified to Mr. Alejandro Ponce.¹³⁷ Moreover, and curiously, Mr. Marcelo Santamaria Martinez, Claimant's second local counsel, was present on the subsequent phone call made by the Judiciary Counsel to Mr. Cabrera to inform the latter that his credentials were changed to "accounting and auditing".¹³⁸ In its report of January 2012, the Provincial Director of Pichincha concluded that Mr. Cabrera had sufficient credentials to serve as an expert in "accounting and auditing" only, and not in damages.¹³⁹ Subsequently, the National Judiciary Council's renewal of his certification was corrected to be for accounting and auditing only.

69. But, the fact that Mr. Cabrera's Judiciary Counsel accreditation was later limited to accounting and auditing does not establish that he lacked the qualifications to perform the task and certainly does not even suggest an impropriety in the College of Accountants' determination that he was.

70. Indeed, Claimant has provided no evidence that Mr. Cabrera lacked adequate qualifications: He was an accountant with a degree considered relevant for expertise on damages,¹⁴⁰ and came recommended by the National College of Accountants. Importantly, in *none of the reports submitted by Claimant* to critique Mr. Cabrera's report did any of Claimant's own "experts" question the adequacy of Mr. Cabrera's qualifications. And

¹³⁷ See Report of Iván Escandón, Provincial Director of the Council of the Judiciary for Pichincha (26 Jan. 2012) (C-58).

¹³⁸ Memorandum from Wilson Rosero Gómez, Chief of Staff, to Iván Escandón, Provincial Director of the Council of the Judiciary for Pichincha (31 May 2012) (C-63).

¹³⁹ See Report of Iván Escandón, Provincial Director of the Council of the Judiciary for Pichincha (26 Jan. 2012) (C-58).

¹⁴⁰ See *id.*

Claimant itself acknowledged that accreditation was not a requirement to his appointment as an expert in damages.¹⁴¹

71. Ironically, in support of its critique of Mr. Cabrera’s report, Merck submitted two sworn affidavits of Walter Spurrier Baquerizo and Alberto Acosta Burneo “attesting to the errors of [Mr. Cabrera’s] expert review.”¹⁴² But neither of these gentlemen have themselves ever been accredited by the Judiciary Council as experts in any field.¹⁴³

72. Even more telling, while Mr. Carlos Montañez, whose report was introduced in the litigation by Claimant to identify “essential errors” in Mr. Cabrera’s report, did have a Judiciary Counsel accreditation, it was limited to “accounting and auditing,” the same limitation to Mr. Cabrera’s accreditation that Claimant sought to bring about after his report was issued. Mr. Montañez’s application for accreditation shows that he neither sought nor demonstrated any other basis for qualification as a damages/lost profits expert.¹⁴⁴ Thus, Claimant’s own “expert” Mr. Montañez did not have superior background or accreditation to claim greater credibility than Mr. Cabrera. And yet Claimant vouched before the court and this Tribunal that they could rely upon him as qualified to address lost profits damages. In the circumstances, there can be no question that the NCJ was justified in accepting the equivalent qualifications of Mr. Cabrera.¹⁴⁵

¹⁴¹ Claimant’s Memorial, ¶¶ 85-87.

¹⁴² MSDIA Brief, *NIFA v. MSDIA*, Court of Appeals (15 July 2011), p. 31 (C-267).

¹⁴³ See Letter from Connie Frias Mendoza (Council of the Judiciary), to Dr. Blanca Gomez de la Torre (Office of the Attorney General) (R-228) (“Regarding Mr. Walter Spurrier and Mr. Alberto Acosta, there is no record in the database of experts qualified by the Council of the Judiciary.”); See Letter No. CJ-DP09-JAU-160-2016-O (14 Sept. 2016) from Mr. Julio Aguayo Urgiles (Guayas Provincial Director, Counsel of the Judiciary), to Dr. Aida Garcia Berni (Deputy Director of the National Experts System, Counsel of the Judiciary) and attachments (20 Sept. 2016), at Memorandum No. CJ-DP09-COA-128-2016-MLG (14 Sept. 2016) (R-225).

¹⁴⁴ See Letter No. CJ-DP09-JAU-160-2016-O (14 Sept. 2016) from Mr. Julio Aguayo Urgiles (Guayas Provincial Director, Counsel of the Judiciary), to Dr. Aida Garcia Berni (Deputy Director of the National Experts System, Counsel of the Judiciary) and attachments (20 Sept. 2016), at Memorandum No. CJ-DP09-COA-128-2016-MLG (14 Sept. 2016) (R-225). (“His last accreditation being dated November 24, 2015, valid through November 24, 2017, ACCOUNTING AND AUDITING specialty, Public Accountant [...]”); see also attachments.

¹⁴⁵ The expediency of Merck’s argument that Mr. Cabrera’s accreditation raised concerns (despite it being completely irrelevant to his appointment) is underlined by the fact that Mr. De León’s appointment was not founded on his accreditation with the Judiciary Council or specific expertise in damages either. Yet, Merck has been vigorously endorsing Mr. De León’s report both on antitrust issues and on finding no damages.

73. In sum, Claimant has not shown that there was any basis upon which the NCJ could doubt Mr. Cabrera’s qualifications as a damages expert.

d. The Court’s Treatment Of The Cabrera Report Was Appropriate

74. Notwithstanding the Claimant’s assertion to the contrary,¹⁴⁶ the NCJ did undertake its own assessment of the Cabrera report, the only court-appointed expert report computing damages, in carrying out its responsibilities.¹⁴⁷ This is evident from the NCJ’s description of the basis for its consideration, including that: the report “establishe[d] the method to be used in calculating the compensation, based on the Good Manufacturing Practice Regulations for the Pharmaceutical Industry,” and evidence in the record;¹⁴⁸ “[a]mong the most important aspects the expert report took into account: direct production costs, raw materials, labor, indirect manufacturing costs, working capital, point of equilibrium, and inflation index provided by the INEC”¹⁴⁹; as to the calculations of sales projections, “the expert report took into account the IMS Health Database, a global provider of pharmaceutical and health care industry marker intelligence.”¹⁵⁰ With respect to the “lost profits” and the 15-year timeframe, the NCJ underlined that they were calculated “due to the fact that the plaintiff has been unable to enter the national market,” after the breakdown of the negotiation with Merck.¹⁵¹ It further explained that Mr. Cabrera deducted from the projected sales the projected production costs, yielding the total lost profits to be USD 204 million. The NCJ thus went through the process of its own appreciation of Mr. Cabrera’s report.

75. The NCJ stated that “[t]he expert report is the peak piece of evidence to which the proven facts leading to the determination of pre-contractual liability, extra-contractual liability, arising out from the facts as set out in the complaint can be added. It has been

¹⁴⁶ Letter from Claimant to the Tribunal (10 Aug. 2016), p. 4.

¹⁴⁷ As established in Ecuador’s earlier submissions and undisputed by Merck, the National Court of Justice cannot admit new evidence from the parties, but will independently assess the evidence in the record. *See* Ecuador’s Rejoinder, ¶ 457. The NCJ exercises discretion in evaluating all the evidence in the record, including court-appointed expert reports. *See id.*, ¶¶ 404-411.

¹⁴⁸ Judgment, *Prophar v. MSDIA*, National Court of Justice (4 Aug. 2016), p. 36 (R-223).

¹⁴⁹ *Id.*

¹⁵⁰ *Id.*

¹⁵¹ *Id.*

qualified, that is, evaluated and admitted, by the instance judges, and it is not feasible to qualify it again at this time, though this does not impede reviewing it in light of the challenge issued by Merck Sharp & Dohme on page 177 of the text of the petition pursuant to ground one found in Article 3 of the Cassation Law [...].”¹⁵²

76. The NCJ also took note of the declarations of Mr. Montañez, Mr. Spurrier and Mr. Acosta, hired and instructed by Merck to criticize Mr. Cabrera’s report, also in the record.¹⁵³ But none of these individuals were appointed by the court, and as such, they could not be considered as “experts” (*peritos*),¹⁵⁴ and consequently, their affidavits could not be considered or treated by the Court as “expert reports.”¹⁵⁵

77. In short, Mr. Cabrera’s report was the only court-appointed expert report in the record on the issues of damages; it was therefore the most powerful evidence in the record on this issue. In contrast, the declarations of Mr. Mr. Montañez, Mr. Spurrier and Mr. Acosta were

¹⁵² *Id.*, p. 37 (Translation by Counsel for the Republic of Ecuador). Claimant’s English translation of this part of the decision mistranslates “volverlo a calificar” as “reassess” in the phrase “*sin que sea factible en este momento volverlo a calificar.*” The difference is important because the Claimant’s translation “it is not feasible at this time to reassess it” incorrectly implies that the NCJ had no power or refused to assess the report independently. With this translational sleight of hand, Merck seeks to advance its argument that the NCJ did not assess the report on its own. This distortion is also belied by the NCJ’s emphasis that the fact that the expert report was properly admitted did not “impede reviewing it in light of” Merck’s challenge of the report on the basis that the lost profits should have been limited to 20%. *Id.*

¹⁵³ *Id.*, p. 30.

¹⁵⁴ In Ecuadorian procedure, the parties cannot present their own “experts” to the court. According to the Code of Civil Procedure in force at that time, if a party wished to have an expert on a matter, it would have to ask the court to make the appointment (which was done in this case by Merck and Prophar); the court can also appoint experts *ex officio*. See Ecuadorian Code of Civil Procedure (24 Nov. 2011), Arts. 252, 253, 254 (RLA-107(ter)). The appointed person then has to be sworn in by the Court (See *id.*, Art. 256) and only after that he becomes an expert (“*perito*”) authorized to submit an expert report in the case (See *id.*, Arts. 253, 256). The activities of the *perito* are under the control of the court, not of the party, and the report is to be submitted to the court—not to the party—within the time frame determined by the court (Art. 254).

¹⁵⁵ This, again, is not foreign to other civil law jurisdictions. For instance, in Germany, in civil proceedings, the court appoints the “experts” to assist the court, but the parties can submit their own expert evidence. Court-appointed expert’s report is one of the forms of written evidence admissible under the German Civil Code, and is deemed to be the most powerful form of civil evidence. In contrast, a private expert report is documentary evidence only and “may be admitted as expert evidence only in exceptional circumstances and only with the consent of both parties.” See European Judicial Network in Civil and Commercial Matters, Taking Evidence - Germany, Section 2.4, available at https://e-justice.europa.eu/content_taking_of_evidence-76-de-maximizeMS_EJN-en.do?member=1 (citing German Code of Civil Procedure (10 Oct. 2013), Sections 402-414, available at http://www.gesetze-im-internet.de/englisch_zpo/englisch_zpo.html#p1642 (R-219)).

produced by Merck, and did not have the same weight as Mr. Cabrera’s expert report.¹⁵⁶ In this regard, the Tribunal’s role is not to question the architecture of the Ecuadorian judicial system.¹⁵⁷ Nor is the Tribunal in a position or has “competence to retrace and reappraise” the evidence relied on by the NCJ for its determination of the damages.¹⁵⁸

78. Moreover, contrary to Claimant’s contention that the NCJ “adopted Mr. Cabrera’s conclusions, thereby reinstating the manifest injustice resulting from the court of appeals’ reliance on the Cabrera report,”¹⁵⁹ the NCJ did not accept the Cabrera calculations wholesale. First, like the prior NCJ decision,¹⁶⁰ the August 2016 judgment did not take into account Cabrera’s computation of damages to the Ecuadorian people because they were not warranted in this case.¹⁶¹ Second, while the NCJ underlined that Cabrera’s report was “a fundamental piece of evidence, [and] there [was] no reasonable justification for reducing the amount” computed by Cabrera,” it did find that Cabrera’s computations contained an error due to his failure to apply Law No. 2000-12,¹⁶² which fixed upper thresholds for profits in the pharmaceutical industry. The NCJ proceeded to correct Mr. Cabrera’s computations and limited the amount of lost profits awardable to Prophar to 20% of the amount of lost profits computed by Cabrera (i.e., USD 204,150,990.46), calculating it to be USD 41,916,571.60 plus actual damages incurred by Prophar in connection with the failed negotiations, which according to Cabrera’s report totaled USD 50,000.

¹⁵⁶ Moreover, Mr. Montañez’s report on its face was no more reliable than Mr. Cabrera’s. In the very report that Merck submitted to the Court of Appeal, there is an inadvertently left an incomplete comment on the margin, stating “Discrepancies with respect to the data in Spurrier. Necessary to confront because [...]” When comparing the numbers Mr. Montañez claims PROPHAR reported to the Ecuadorian tax authorities with the numbers reported in Spurrier for the same years, there are indeed significant discrepancies. *Compare* Report of Carlos Montañez Vásquez, *NIFA v. MSDIA*, Court of Appeals (15 July 2011), p. 18 (Spanish) (C-44) with Report of Walter Spurrier Baquerizo, *NIFA v. MSDIA*, Court of Appeals, p. 18 (C-21) (English). Thus, even if Mr. Montañez’s report could be treated as a court-appointed expert report, it raised doubts as to its reliability.

¹⁵⁷ See *Philip Morris v. Uruguay*, Award (8 July 2016), ¶ 528 (RLA-214) (“[A]rbitral tribunals should not act as courts of appeal to find a denial of justice, still less as bodies charged with improving the judicial architecture of the State.”).

¹⁵⁸ See *Mr. Franck Charles Arif v. Republic of Moldova*, ICSID Case No. ARB/11/23, Award, ¶ 485 (8 Apr. 2013) (Cremades, Hanotiau, Knieper) (RLA-120).

¹⁵⁹ Letter from Claimant to the Tribunal (10 Aug. 2016), p. 4.

¹⁶⁰ NCJ Decision, *Prophar v. MSDIA*, National Court of Justice (10 Nov. 2014), p. 88 (R-194).

¹⁶¹ See Judgment, *Prophar v. MSDIA*, National Court of Justice (4 Aug. 2016), p. 37-38 (R-223).

¹⁶² *Id.*, p. 37.

79. Indeed, Claimant fails to mention that it actually sought a 75% percent reduction of the damages, arguing that the applicable cap was 25%.¹⁶³ But the NCJ applied the legally correct percentage of 20%, considering that Prophar was a manufacturer, not a seller. Claimant does not recognize that by applying the right percentage, the NCJ saved it as much as USD 10 million. Claimant did, however, recognize that this adjustment was a “meaningful departure” from the Court of Appeals’ computation of damages.¹⁶⁴

80. In short, the NCJ treatment of the Cabrera report was measured and critical. Nothing in that treatment can properly be said to have been arbitrary or outrageous.

e. Conclusion

81. For a denial of justice to exist under international law, there must be “*clear evidence* of ... an *outrageous* failure of the judicial system.”¹⁶⁵ The court’s reliance on the only court-appointed expert report on damages does not rise to the level of an “outrageous failure of the judicial system.” As shown above, there was nothing irregular, let alone corrupt, in the process leading to Mr. Cabrera’s appointment. As to his qualifications, Claimant has been unable to show that his accreditation by the Judiciary Council was relevant for his appointment (even though he was accredited at the time he delivered his report). Moreover, none of Claimant’s “experts” possessed higher qualifications or accreditation. The NCJ reviewed Mr. Cabrera’s report and corrected what it found to be an error in the applicable percentage for the profit margin.

82. “An *elevated standard of proof* is required for finding a denial of justice due to the gravity of a charge which condemns the State’s judicial system as such.”¹⁶⁶ Claimant has not put forth the kind of evidence that would be required to show that the State’s judicial system committed an “outrageous” failure by relying—and correcting—an expert report issued by a court-appointed damages expert. The NCJ’s corrected appreciation of damages simply does not rise to the level of “outrageous failure”; nor does it shock “a sense of judicial propriety”.

¹⁶³ See MSDIA’s Cassation Petition, *NIFA v. MSDIA*, Court of Appeals, ¶ 150, fn. 46 (C-198).

¹⁶⁴ Letter from Claimant to the Tribunal (15 Aug. 2016), p. 3.

¹⁶⁵ *Philip Morris v. Uruguay*, Award (8 July 2016), ¶ 500 (RLA-214) (emphasis added).

¹⁶⁶ *Id.*, ¶ 499 (emphasis added).

4. Merck's Has Not Alleged That The August 2016 NCJ Decision Was Tainted By Corruption Or Bias, And Its Vague Insinuations That The NCJ Judges Were Somehow Intimidated By "Threats" Of Sanctions Cannot Serve To Demonstrate A Denial Of Justice

83. Merck's final salvo against the August 2016 NCJ Decision in its August letters to the Tribunal can be disposed of with dispatch. Merck asserts that the January 2016 Constitutional Court decision's "threats" of criminal sanctions on the NCJ Associate Judges under Article 86(4) of the Ecuador Constitution had some "desired effect" on them, "prompting them (in further violation of MSDIA's rights to due process) to place their own personal interests in avoiding such penalties ahead of those of the litigants in the case."¹⁶⁷ Merck presumably means that the NCJ Associate Judges were intimidated by the Constitutional Court and, therefore, committed the other alleged errors on which Merck relies, i.e., that the NCJ decision "affirms the court of appeals judgment [...] in most material respects" because it "rejected MSDIA's grounds for cassation challenging [it],"¹⁶⁸ "did not independently assess the evidence in the record but instead wholly accepted the evidentiary findings of the court of appeals"¹⁶⁹ and did not "second-guess the court of appeals' decision to [...] credit [the Cabrera] report."¹⁷⁰

84. In fact, the record shows directly the opposite, on three fundamental scores. First, as Ecuador has already demonstrated, there is nothing unusual about the Constitutional Court's reference to Article 86(4) of the Ecuador Constitution. As Ecuador's expert Professor Juan Francisco Guerrero del Pozo has testified, the purpose of that provision is to ensure the constitutional right to the effective judicial protection of persons in Ecuador, and it is frequently cited by the Constitutional Court in its decisions.¹⁷¹ In addition, that instruction is unexceptional under Ecuadorian law, which provides that determining the scope of court judgments requires considering both their operative part and reasoning, a principle that has been consistently applied in the jurisprudence of the Constitutional Court and would apply

¹⁶⁷ *Id.*, p. 6.

¹⁶⁸ *Id.*, p. 1-2.

¹⁶⁹ *Id.*, p. 3.

¹⁷⁰ *Id.*, p. 4.

¹⁷¹ First Supplemental Declaration of Guerrero (15 Feb. 2016), ¶¶ 41, 43.

even if the Constitutional Court had not expressly referred to it.¹⁷² Thus, it is highly unlikely that the NCJ Associate Judges would have taken the Constitutional Court's reference to Article 86(4) of the Constitution as an instruction on how they were to decide the case or have felt "threatened" by it.

85. Second, the NCJ Associate Judges words bear out that, in fact, they did not take the Constitutional Court's citation of Constitution Article 86(4) as a "threat." The only context in which, in their August 2016 decision, the Associate Judges deal with the Constitutional Court's reference to that provision concerns the Attorney General's notification to them of the text of the "Orders" in this Tribunal's March 2016 Decision on Interim Measures.¹⁷³ There, the Associate Judges take the unequivocal position that, in "the exercise of their judicial authority" to decide Prophar's and Merck's appeals, they are "subject only to the Constitution, international human rights instruments and the law;" that "no government official *that is part of the Judicial Branch itself* can interfere with the jurisdiction of" any other judicial branch official; and that in exercising their authority "they shall be independent *even with regard to other Judicial Branch bodies.*"¹⁷⁴ Far from intimidation, the NCJ Associate Judges' statements demonstrate outright defiance of the Constitutional Court's reference to Article 86, paragraph 4 of the Constitution.

86. Finally, as already demonstrated, the Constitutional Court's reference to Article 86(4) of the Constitution had none of the effects on the NCJ Associate Judges that Merck has insinuated. It did not keep them from annulling the Court of Appeals' decision in its entirety. It did not chill their independent analysis and weighing of the evidence to render a new judgment, holding Merck liable to Prophar not on antitrust grounds but wholly on grounds of an unintentional tort based upon Articles 2214 and 2229 of the Ecuador Civil Code. And it did not keep the NCJ Associate Judges from evaluating the Cabrera report and, in a move that exceeded Merck's request in its cassation petition for a 75% reduction in lost profits, reducing the lost profits calculated in that report by 80%.

¹⁷² *Id.*, ¶¶ 35-38 and the provisions of Ecuador law cited therein.

¹⁷³ See Judgment, *Prophar v. MSDIA*, National Court of Justice (4 Aug. 2016), pp. 3-4 (R-223).

¹⁷⁴ *Id.*, pp. 4 (emphasis added).

87. Merck has not alleged any corruption whatsoever on the part of any of the NCJ Associate Judges who rendered the August 2016 NCJ Decision, and its efforts to imply that they were somehow intimidated into “violat[ing] [its] rights to due process”¹⁷⁵ fails.

88. In sum, to the extent that Merck intends its alleged defects in the August 2016 NCJ Decision to have constituted a denial of justice or other breach of the Ecuador-U.S. BIT, those claims should be dismissed for lack of merit.

IV. THE CONSTITUTIONAL COURT’S 20 JANUARY 2016 DECISION DID NOT DENY JUSTICE TO MERCK

A. The Constitutional Court’s Admission Of Propfar’s Second EPA Was Not A Denial Of Justice

89. In its letter of 14 May 2015, Claimant argued that the Constitutional Court’s admission of Propfar’s second EPA was unfounded because the Constitutional Court failed to identify the “grave violation of [Propfar’s] constitutional rights required for admission under Ecuadorian law.”¹⁷⁶ On that basis, Claimant argued that the admission of Propfar’s second EPA “confirm[s] Ecuador’s inability or unwillingness to afford impartial justice and its failure to provide effective means for MSDIA to assert its legal rights.”¹⁷⁷

90. What Claimant failed to inform the Tribunal, however, is that—despite the fact that Claimant filed objections to the admissibility of Propfar’s first EPA—it did not contest whether the Constitutional Court should admit Propfar’s second EPA.¹⁷⁸ Claimant had the opportunity to do so, as it received timely notice that Propfar was filing an EPA.¹⁷⁹ Once again, however, Claimant failed to exercise its rights in the Ecuadorian legal and judicial system.

¹⁷⁵ Letter from Claimant to the Tribunal (10 Aug. 2016), p. 6.

¹⁷⁶ Letter from Claimant to the Tribunal (14 May 2015), p. 2.

¹⁷⁷ *Id.*

¹⁷⁸ Professor Oyarte admitted at the March 2015 London hearing that a party opposing an EPA can “present allegations [of inadmissibility] and the court shall accept them based on Article 2 of the Organic Law [.]” Hearing on the Merits, Transcript, Day 3 (18 Mar. 2015), p. 81 (Oyarte).

¹⁷⁹ Order of the National Court of Justice (14 Jan. 2015) (R-205).

91. In addition, contrary to what Claimant has suggested, the threshold for admissibility of an EPA is low under Ecuadorian law. As the Constitutional Court has explained, a decision *not* to admit an EPA “is an exceptional matter, that is, it should only happen when it is impossible for the judge to correct the minimum content requirements of the complaint.”¹⁸⁰ And as further explained by Ecuador’s Constitutional Law expert Professor Juan Francisco Guerrero, the decision whether to admit an EPA complaint is a technical one, in which the Constitutional Court only verifies whether the complaint meets the requirements of Article 62 of the Organic Law of Jurisdictional Guarantees.¹⁸¹ The admissibility proceeding does not involve an analysis or ruling by the Constitutional Court as to the existence of a violation of a fundamental right, and “[i]n admission applies when the complaint or request fails to meet the pre-requisites required by Article 62 and that failure cannot be remedied.”¹⁸² Professor Guerrero and Claimant’s witness Professor Oyarte agree on this point.¹⁸³ The threshold for admissibility is therefore only that an EPA *prima facie* states a constitutional violation.

92. Claimant’s characterization of the Constitutional Court’s admission of Prophar’s second EPA as “yet another vehicle for denials of justice” seems to be based on its assertion that the Constitutional Court “simply assert[ed] that [Prophar] had alleged a colorable constitutional claim without even purporting to identify the ‘grave violation’ of [Prophar’s] constitutional rights’ required for admission under Ecuadorian law.”¹⁸⁴ Prophar asserted in its second EPA, however, that the impugned NCJ judgment “lack[ed] due legal reasoning, on the basis that it lack[ed] common sense because the appropriate connection between the legal rule invoked, the factual background recorded in the case, and the adaptation of said factual

¹⁸⁰ Constitutional Court Sentence No. 102-13-SEP-CC issued in Case No. 0380-10-EP, published in Official Gazette No. 152 of 27 December 2013 (FG-55(bis)).

¹⁸¹ First Expert Report on Ecuadorian Law of Juan Francisco Guerrero del Pozo (25 Feb. 2014) (“First Guerrero Expert Report (25 Feb. 2014)”), ¶¶ 27-28.

¹⁸² First Guerrero Expert Report (25 Feb. 2014), ¶ 27 (quoting Art. 12, second subsection of the Rules for Substantiating Jurisdiction Proceedings of the Constitutional Court).

¹⁸³ *Id.*; Hearing on the Merits, Transcript, Day 3 (18 Mar. 2015), p. 123:21-24 (Oyarte) (“Q: [] is the admissions division being asked to rule on the pertinence of the argument? Is it being asked rather to verify this argument? A: Yes, without taking into account the facts”) (emphasis added).

¹⁸⁴ Letter from Claimant to the Tribunal (14 May 2015), p. 2.

background to the legal rule is missing.”¹⁸⁵ There is no basis for this Tribunal to conclude that this allegation does not meet the admissibility requirements of Article 62 of the Organic Law of Jurisdictional Guarantees.¹⁸⁶ As Claimant’s Constitutional Law expert Prof. Oyarte testified at the London Hearing, an EPA challenging a ruling for failing to express reasons would, in principle, be admissible.¹⁸⁷

93. Finally, as Ecuador has explained in past written submissions, the admission of Prophar’s EPA was without prejudice to the Constitutional Court’s adjudication of the EPA’s merits.¹⁸⁸ Indeed, in its admission decision, the Constitutional Court stated that the admission of Prophar’s EPA may not be “construed as a decision on the merits of [Prophar’s] claims.”¹⁸⁹ Thus, the admission of the EPA was not indicative of the outcome of Prophar’s action,¹⁹⁰ and it does not demonstrate a denial of justice or any other unfairness to Claimant.

B. The Constitutional Court’s 20 January 2016 Decision Was Not Irrational Or Unjustified

94. Under Ecuadorian law, in ruling on an EPA complaint, the Constitutional Court’s jurisdiction is limited to “establishing whether there have been violations to constitutional rights during the course of the proceedings.”¹⁹¹ Thus, the Constitutional Court does not have jurisdiction to rule on the merits of the underlying dispute.¹⁹²

¹⁸⁵ Decision by the Admissions Division, *Prophar v. MSD*, Constitutional Court, Case No. 0542-15-EP (28 Apr. 2015), p. 3 (R-220).

¹⁸⁶ *See* First Guerrero Expert Report (25 Feb. 2014), ¶ 25, setting forth the text of Article 62 of the Organic Law.

¹⁸⁷ Hearing on the Merits, Transcript, Day 3 (18 Mar. 2015), p. 114:13-25, 115:1-23 (Wray, Oyarte) (“Q: The idea is that the ruling does not explain the grounds for liability, so therefore there would be a defect there, a defect because of lack of reasoning in the ruling. Would an EPA be possible or admissible? A. *Yes, if the other requirements are also met.* It is complicated because oftentimes we would like to put things in black and white, and you say if this happens this other thing happens, but—yes, well, if I only look at the detail and I forget about all the other requirements, I can say yes, in connection with the EPA, yes, this can happen”) (emphasis added).

¹⁸⁸ First Guerrero Expert Report (25 Feb. 2014), ¶ 27.

¹⁸⁹ Decision by the Admissions Division, *Prophar v. MSD*, Constitutional Court, Case No. 0542-15-EP (28 Apr. 2015), p. 4 (R-220).

¹⁹⁰ First Guerrero Expert Report (25 Feb. 2014), ¶¶ 27-28.

¹⁹¹ First Supplemental Declaration of Guerrero (15 Feb. 2016), ¶ 3.

¹⁹² *Id.*, ¶ 2.

95. According to Claimant, the Constitutional Court’s 20 January 2016 decision denied it justice because the Court overstepped its jurisdiction by directing the NCJ on how to decide the case.¹⁹³ According to Claimant, the Constitutional Court “evaluated the evidence, issued factual and legal determinations, and directed the NCJ judges how to decide the case, threatening them with loss of their jobs and personal civil and criminal liability if they did not comply.”¹⁹⁴ However, as shown in Respondent’s letter to the Tribunal of 18 February 2016,¹⁹⁵ as well as the two supplemental reports of Prof. Guerrero,¹⁹⁶ Claimant’s sweeping assertions are a gross distortion of the actual text of the Constitutional Court’s decision.

96. As an initial matter, the Court was clear that it was precluded from weighing the evidence in the case and that its authority was limited to deciding whether the challenged November 2014 NCJ judgment breached any of Prophar’s constitutional guarantees.¹⁹⁷ And the latter is exactly what the Constitutional Court did. It annulled the NCJ judgment because it deemed that judgment not to have been properly reasoned as required by the constitutional guarantees of due process, legal security and effective judicial protection.¹⁹⁸ Contrary to what Claimant suggests, there is no indication in the Constitutional Court’s decision that it evaluated *any* evidence in the *NIFA v. MSDIA* litigation; Claimant’s cites no example of its having done so; and the Constitutional Court left it entirely to the NCJ to determine the outcome of its new decision.

97. Having failed to impugn the decision of the Constitutional Court on other grounds, Claimant does not even come close to its burden when alleging that the Constitutional Court’s decision of January 2016 denied Claimant justice in violation of the BIT.

¹⁹³ Letter from Claimant to the Tribunal (5 Feb. 2016), p. 10.

¹⁹⁴ *Id.*

¹⁹⁵ Letter from Ecuador to the Tribunal (18 Feb. 2016).

¹⁹⁶ First Supplemental Declaration of Guerrero (15 Feb. 2016) ¶¶ 8-12; Second Supplemental Declaration of Guerrero (25 Feb. 2016) ¶¶ 52-56.

¹⁹⁷ Decision, *Prophar v. NCJ*, Constitutional Court (20 Jan. 2016), p. 9 (R-221); Second Supplemental Declaration of Guerrero (25 Feb. 2016), ¶¶ 4-5.

¹⁹⁸ Decision, *Prophar v. NCJ*, Constitutional Court (20 Jan. 2016), pp.15-16, 24 (R-221); First Supplemental Declaration of Guerrero (15 Feb. 2016), ¶¶ 6, 10.

1. The Constitutional Court’s Decision Cannot Be Faulted For Holding That The NCJ’s Analysis Was Incomplete

98. Claimant argues that the Constitutional Court “criticized the NCJ’s findings on liability,” allegedly “signal[ing] to the NCJ that it should uphold the court of appeals’ finding [on liability].”¹⁹⁹ Claimant’s argument misrepresents the Constitutional Court’s decision in that regard, on all fronts. First, while the Constitutional Court considered the NCJ’s analysis to be “illogical,” this was because it was “incomplete,” *i.e.*, because it “fail[ed] to employ judicial, factual and evaluative premises.”²⁰⁰ Second, contrary to Claimant’s assertion, the Court’s criticisms of the completeness and logic of the NCJ decision only applied to the cassation phase, and *not* to the NCJ’s determination of whether Claimant was liable to Prophar. Thus, the only “signal” that the Constitutional Court gave to the NCJ was to carry out a more complete analysis of the parties’ *cassation* grounds, not how to decide those grounds, much less how to decide whether Merck was liable to Prophar.²⁰¹ Indeed, as Ecuador’s Constitutional Law expert explains, the Constitutional Court’s vacatur of the NCJ’s judgment left the new NCJ panel with multiple ways in which it could decide the case: reject both cassation petitions; accept both cassation petitions; accept one cassation petition but not the other; and if either or both of the cassation petitions were accepted, either send the case back to the lower court, itself adjudicate that Claimant had not committed an illicit act, or itself find that Claimant had committed an illicit act and award damages.²⁰²

2. The Constitutional Court’s Decision Cannot Be Impugned For Holding That The NCJ’s Assessment Of Prophar’s Damages Was Insufficient

99. The same applies to the Constitutional Court’s findings regarding the NCJ’s damages analysis. Claimant has argued elsewhere that the Constitutional Court “direct[ed] the NCJ to

¹⁹⁹ Letter from Claimant to the Tribunal (5 Feb. 2016), p. 5.

²⁰⁰ Decision, *Prophar v. NCJ*, Constitutional Court (20 Jan. 2016), p. 21 (R-221).

²⁰¹ Indeed, Claimant’s argument suffers from an inherent contradiction. The Constitutional Court could not have directed the NCJ to affirm the court of appeals’ decision and on how to decide on MSDIA’s liability. This is because the confirmation of the court of appeals’ judgment could not have been brought about by anything less than the dismissal of the parties’ cassation petitions. Accordingly, the NCJ would not have entered into its function as an instance court in the first place.

²⁰² First Supplemental Declaration of Guerrero (15 Feb. 2016), ¶¶ 10-12.

award damages in accordance with [its] reasoning that the NCJ should have given weight to the Cabrera report and should have awarded damages over a fifteen year period using the data and projections endorsed by Mr. Cabrera.”²⁰³

100. But MSDIA misrepresents what the Constitutional Court actually said. The Court did not say that the NCJ should adopt the Cabrera report; it merely stated that there are “elements present in the case file that should have been taken into account when making a logical assessment,” which the NCJ “disregard[ed] without analysis.”²⁰⁴ This finding, therefore, did not foreclose the NCJ’s discretion to reject any or all the elements of the Cabrera report after an adequate analysis of it. Similarly, the Constitutional Court did not say that the NCJ should award damages over the entire fifteen-year period covered in Mr. Cabrera’s report; it merely stated that the NCJ’s explanation for choosing a [one-year] period for assessing damages was “insufficient.”²⁰⁵

101. Based on his analysis of the Constitutional Court’s decision, Respondent’s expert on Constitutional Law, Dr. Guerrero, affirmed that it was feasible that the NCJ “rejects in total or in part the Cabrera report, provided that the decision was well-reasoned.”²⁰⁶ And indeed, although it ultimately awarded damages to Prophar over a fifteen-year period as indicated in Cabrera’s report, the NCJ held that it was unreasonable for “compensation [to] merely be based on the calculation of lost profits alone.”²⁰⁷ Accordingly, and based on MSDIA’s cassation petition, the NCJ reduced Prophar’s damages from US\$204 million to US\$41.9 million by applying a maximum profit margin of 20% under Article 4 of the Law on the Production, Import, Commercialization, and Sale of Generic Medicines for Use in Humans.²⁰⁸

²⁰³ Letter from Claimant to the Tribunal (5 Feb. 2016), p. 6.

²⁰⁴ Decision, *Prophar v. NCJ*, Constitutional Court (20 Jan. 2016), p. 16 (R-221); First Supplemental Declaration of Guerrero (15 Feb. 2016), ¶ 16.

²⁰⁵ Decision, *Prophar v. NCJ*, Constitutional Court (20 Jan. 2016), p. 16 (R-221).

²⁰⁶ First Supplemental Declaration of Guerrero (15 Feb. 2016), ¶ 17.

²⁰⁷ Judgment, *Prophar v. MSDIA*, National Court of Justice (4 Aug. 2016), p. 37 (R-223).

²⁰⁸ *Id.*

102. In sum, other than requiring the NCJ to consider the cassation petitions of both parties *de novo*,²⁰⁹ nothing in the Constitutional Court’s decision of January 2016 can be taken to have “signaled” to the NCJ how to decide on Prophar’s damages in the event that MSDIA was found liable.

3. The Constitutional Court Did Not Otherwise Direct The NCJ On How To Decide The Case

103. Claimant has pointed to several other “signals” in the Court’s decision that purportedly directed the NCJ how to decide the case. These too exist only in its imagination.

104. *First*, Claimant alleges that the Constitutional Court’s determination that the NCJ breached Prophar’s constitutional rights by failing to consider its cassation petition “signal[s] to the NCJ that the award of \$150 million against MSDIA should be reexamined on the basis that it might insufficiently compensate PROPHAR.”²¹⁰ Claimant once again distorts the text of the Constitutional Court’s judgment. As Professor Guerrero explains, the Constitutional Court required the NCJ to rule on both parties’ cassation petitions “in order to ensure due process and the constitutionally protected dispositive principle.”²¹¹ This only means that the NCJ had to “address—not necessarily accept—the arguments put forward by both parties and to reason its judgment properly.”²¹² And that it did, as the outcome of the August 2016 NCJ judgment makes clear.²¹³

105. *Second*, Claimant suggests that the Constitutional Court’s reference to Article 86(4)²¹⁴ of the Ecuadorian Constitution was meant to be a “threat to the judges of the NCJ that they will be exposed to personal liability if they fail to follow the Constitutional Court’s directions.”²¹⁵ To Claimant, this was a clear warning that the NCJ judges were at serious risk

²⁰⁹ First Supplemental Declaration of Guerrero (15 Feb. 2016), ¶ 20.

²¹⁰ Letter from Claimant to the Tribunal (5 Feb. 2016), pp. 6-7.

²¹¹ First Supplemental Declaration of Guerrero (15 Feb. 2016), ¶ 24.

²¹² *Id.*

²¹³ Judgment, *Prophar v. MSDIA*, National Court of Justice (4 Aug. 2016), p. 5 (R-223).

²¹⁴ Decision, *Prophar v. NCJ*, Constitutional Court (20 Jan. 2016), p. 24 (R-221).

²¹⁵ Letter from Claimant to the Tribunal (5 Feb. 2016), p. 8.

if they did not affirm the court of appeals' judgment.²¹⁶ If this were true, one would expect that the NCJ judges who issued the August 2016 judgment would have lost their jobs by now. But that has not occurred, and will certainly not occur because it is not true. As Professor Guerrero explains, the Court's reference to Article 86(4) of the Constitutional was unsurprising given that this was the second time that the Constitutional Court had found a violation of one of the parties' constitutional rights in the same case.²¹⁷ In these circumstances, it is not extraordinary or unusual that the Court included a reference to that provision in its judgment.²¹⁸

106. *Third*, MSDIA contends that the Constitutional Court's decision to remand the case to the NCJ's Associate Judges rather than the Civil and Commercial Chamber Judges is "highly unusual, and it is further evidence that the Court is seeking to engineer a different outcome []." ²¹⁹ The truth is more mundane. As Professor Guerrero explains in his report, the Constitutional Court remanded the case to the Associate Judges because the November 2014 NCJ decision was signed by two out of the three ordinary judges currently serving on the NCJ's Civil and Commercial Chamber. It was therefore normal, and consistent with the Constitutional Court's mandate, for it to ensure the parties' right to an independent and impartial tribunal by referring the case to equally competent Judges who had not participated in the previous NCJ proceedings.²²⁰ Unsurprisingly, Claimant's expert, Dr. Oyarte, did not contest this point in his own report.²²¹

107. In light of the foregoing, the Constitutional Court's decision of January 2016 did not direct the NCJ to decide the parties' cassation petitions in any way. Nor was it irrational or unjustified under Ecuadorian law. Therefore, it did not deny justice to Claimant in breach of the provisions of the Ecuador-U.S. BIT.

²¹⁶ *Id.*

²¹⁷ First Supplemental Declaration of Guerrero (15 Feb. 2016), ¶ 42.

²¹⁸ Second Supplemental Declaration of Guerrero (25 Feb. 2016), ¶¶ 29-34.

²¹⁹ Letter from Claimant to the Tribunal (5 Feb. 2016), p. 7.

²²⁰ First Supplemental Declaration of Guerrero (15 Feb. 2016), ¶¶ 30-33.

²²¹ Third Oyarte Expert Opinion [Second Interim Measures].

V. EVEN IF CLAIMANT HAD ESTABLISHED A DENIAL JUSTICE, IT WOULD NOT HAVE BEEN ENTITLED TO THE FULL AMOUNT OF THE 4 AUGUST 2016 JUDGMENT OF THE NCJ

108. Assuming *quod non* that the Ecuadorian legal system denied Claimant justice in breach of the Treaty, the task of this Tribunal would be to restore the *status quo ante*. In the words of the International Court of Justice, this means “reestablish[ing] the situation which would, in all probability, have existed if [the internationally wrongful acts] had not been committed.”²²² In so doing, it is trite that the Tribunal cannot put Claimant in a position that is *better* than the one it would have been in “but for” the acts ostensibly giving rise to Ecuador’s international responsibility. Were the Tribunal to do that, it would be overcompensating Claimant, which is in breach of the principle of international law against overcompensation.²²³

109. For Claimant, restoration of the *status quo ante* presumably means an automatic entitlement to the full amount of the 4 August 2016 judgment. Claimant therefore believes that “but for” the putative denial of justice, it would have prevailed on the merits of the underlying litigation. Without making any serious attempt at proving the likelihood of its success before the Ecuadorian courts, however, Claimant cannot establish the requisite causal link between the alleged denial of justice and the damages it seeks. Accordingly, this head of damages must also fail.²²⁴

²²² *Case Concerning the Factory at Chorzów (Germany v. Poland)*, Judgment (13 Sept. 1928), P.C.I.J. Series A, No. 17, p. 47 (RLA-135).

²²³ *Víctor Pey Casado and Foundation “Presidente Allende” v. Republic of Chile*, ICSID Case No. ARB/98/2, Decision on the Application for Annulment of the Republic of Chile (18 Dec. 2012) (Fortier, Bernardini, El-Kosheri), ¶ 269 (CLM-140).

²²⁴ Claimant also claims as damages in this arbitration *all* legal fees and costs incurred by it in connection with the Prophar/MSDIA litigation in Ecuadorian courts. Claimant’s Supplemental Submission on Quantum (19 Apr. 2016), pp. 1-2. However, Claimant has failed to this day to provide adequate documentary support for the amounts it claims. *See* Respondent’s Counter-Memorial, ¶¶ 516-520; Respondent’s Rejoinder, ¶¶ 662-668. In its Reply, for example, Claimant produced invoices purportedly showing the fees and costs MSDIA paid to legal counsel for services related to the domestic litigation. However, Claimant redacted the supporting description of the work performed on the grounds that this information was “legally privileged and reflects MSDIA’s confidential litigation strategy.” Claimant’s Reply, ¶¶ 788-791, fn. 960. Claimant’s failure to support its damages claim made it impossible for Respondent to “review, verify and challenge Claimant’s calculations.” Respondent’s Rejoinder, ¶ 669. Without providing the full set of invoices upon which it so heavily relies for this head of damages, Claimant also cannot demonstrate how the alleged “loss” is causally connected to the alleged breaches of the BIT. Respondent’s Rejoinder, ¶¶ 673-678. Claimant had another opportunity to

110. Indeed, Claimant’s damages claim is entirely speculative insofar as it is premised on the assumption that “but-for” the alleged denial of justice, it would have prevailed in the underlying litigation. There is no basis for such an assumption. There is no reason to conclude that Claimant would have succeeded in prevailing over Prophar absent the circumstances about which it complains. Therefore, the damages sought are both unproven and un-provable.

111. The recent *PMI v. Uruguay* award is directly on point. There, the claimants claimed damages “as if they had won” their challenges against the administrative measures in question. Uruguay objected to this claim arguing, as Ecuador is arguing here, that such a claim was speculative. Although the tribunal did not squarely address the issue of damages because it found the claimants’ claims of denial of justice unmeritorious, it quite explicitly agreed with Uruguay. It affirmed that “the question of what a BIT-compliant domestic court would have decided is an appropriate factor (*and may be highly relevant*) for the damages assessment.”²²⁵ In a similar vein, it dismissed the notion that “compensation [for a denial of justice] is to be entirely de-linked from the question of the merits [of the underlying litigation].”²²⁶ Discussing the *Roberts*²²⁷ and *Chattin*²²⁸ cases where claimants were awarded compensation by the U.S.-Mexico Claims Commission for a denial of justice even though the local court “could (and probably would) still have reached the same result absent the impropriety,”²²⁹ it then held as follows:

adequately prove its alleged “loss” under this head of damage in its Supplemental Submission on Quantum of 19 April 2016, but it simply updated the figure to US\$6,895,988.66 to account for additional fees paid to Quevedo & Ponce, MSDIA’s local counsel. *See* Claimant’s Supplemental Submission on Quantum (19 April 2016), pp.1-3. The relevant invoices were as incomplete as Claimant’s other related evidence submitted in prior pleadings. *See* Invoices from 2014 to 2016 from Quevedo & Ponce for services rendered in *Prophar v. MSDIA litigation* (C-298). As a result of Claimant’s failure to produce the evidence supporting the alleged legal fees and costs it paid in the Prophar/MSIDA litigation, the Tribunal must strike out this head of Merck’s damages claim.

²²⁵ *Philip Morris and others v. Oriental Republic of Uruguay*, ICSID Case No. ARB/10/7, Award (8 July 2016) (Bernardini, Crawford, Born) (“*Philip Morris v. Uruguay*, Award (2016)”), ¶ 575 (RLA-214) (emphasis added).

²²⁶ *Id.*, fn. 838.

²²⁷ *Harry Roberts (U.S.A.) v. United Mexican States*, Award (2 Nov. 1926), IV UNRIAA, pp. 77-81 (RLA-216).

²²⁸ *B.E. Chattin (U.S.A.) v. United Mexican States*, Award (23 July 1927), IV UNRIAA, pp. 282-312 (CLM-120).

²²⁹ *Philip Morris v. Uruguay*, Award (2016), ¶ 575 (RLA-214).

In those cases, the defendants were not compensated as if they were not guilty (i.e. had been acquitted); instead, the tribunals calculated compensation for the long period of imprisonment without trial that gave rise to an award of indemnity under international law. In other words, the tribunals awarded compensation for the procedural impropriety itself, calculating damages based on the cost of the improper restriction to liberty, in a particular criminal context not applicable here. *On such a principle, the Claimants here might be entitled to all or some of Abal's costs in taking the TCA case, but it is difficult to understand how they could be entitled to claim full damages as if they had won that case.*²³⁰

112. In a like vein, the European Court of Human Rights has consistently disposed claims of compensation in relation to violations of the fair trial guarantees under Article 6 of the Convention by refusing to “speculate” as to whether the applicant would have succeeded in challenging the measures had the violation of the fair trial guarantees not occurred.²³¹

113. Claimant’s expert Prof. Paulsson has offered similar views in his treatise DENIAL OF JUSTICE IN INTERNATIONAL LAW:

It seems difficult to justify the conclusion that the prejudice to a claimant who was prevented from having his grievance heard should be deemed equal to whatever relief he had initially seen

²³⁰ *Id.*, fn. 838 (emphasis added). The problem for Claimant here, of course, is that, as shown above, it has not even proven this entitlement to the costs in the underlying litigation.

²³¹ See e.g. *Case of Tre Traktörer Aktiebolag v. Sweden*, ECH Application No. 10873/84, Judgment (7 July 1989), ¶ 66 (RLA-217) (noting that the revocation of the applicant’s licence for serving alcoholic beverages “admittedly had adverse effects on the goodwill and the value” of the applicant’s restaurant, but concluding that it “cannot speculate as to what the result of the proceedings might have been if the applicant company had been able to bring this question before a court”); *Case of Fredin v. Sweden (No. 1)*, ECH Application No. 12033/86, Judgment (18 Feb. 1991), ¶ 65 (RLA-218) (refusing to award compensation for the economic losses that applicants alleged had resulted from the revocation of their permit for the extraction of gravel by considering that “[although] the revocation of the permit caused the applicants considerable losses, [...] the Court cannot speculate as to what result they would have achieved had they been able to bring their case before a court”); *Case of Credit and Industrial Bank v. The Czech Republic*, ECH Application No. 29010/95, Judgment (21 Oct. 2003), ¶¶ 87-88 (RLA-219) (refusing to award compensation by holding that “[w]hile the placing of the applicant bank in compulsory administration might well have had adverse financial consequences for the bank, the Court cannot speculate as to what the result of proceedings might have been if the applicant bank had been able to bring the imposition of this measure before a court with full jurisdiction”); *Case of Capital Bank AD v. Bulgaria*, ECH Application No. 49429/99, Judgment (24 Feb. 2006), ¶ 144 (RLA-220) (similarly refusing to award compensation on the ground that “[w]hile the withdrawal of its licence and the order for its winding-up might well have had adverse financial consequences for the bank, the Court cannot speculate as to what the eventual result might have been if it had been able to challenge the imposition of those measures in administrative or judicial proceedings”).

fit to ask. *In establishing an amount so that it corresponds to what the international tribunal feels was the true loss, it may be necessary to evaluate probabilities of the outcome if the local system had proceeded in accordance with its laws but without violating international law.* The notion that no international wrong must go unpunished is arguably inconsistent with Chorzów if its consequence is that it leads to recovery even in the absence of demonstrable prejudice.²³²

114. Professors Wälde and Sabahi also write that a denial of justice claim should not lead to an award “as if the investor had prevailed in the incriminated litigation” because that would contravene the established prohibition against overcompensation in international law.²³³ Indeed, “[i]f a denial of justice claim would result in compensation equal to the claim, *then the investor would in effect swap a risky litigation claim against certain, risk-free income.*”²³⁴

115. In sum, by seeking the full amount of the 4 August 2016 NCJ judgment, Claimant is assuming that it would have prevailed over Prophar’s claims in the underlying litigation had its alleged breach of the Treaty not occurred. However, no reasonable consideration of the facts of the underlying dispute in light of the applicable principles of Ecuadorian law could possibly lead to a conclusion that a finding of MSDIA’s liability was *not* juridically possible. Moreover, at no time in the Prophar/MSDIA litigation or in these arbitral proceedings did Claimant provide an alternative assessment and calculation of Prophar’s damages in the event liability was found. As a result, and to the extent that Claimant is seeking the full amount of the 4 August 2016 NCJ judgment, in the absence of any basis of an alternative juridically possible damages calculation, this Tribunal should dismiss this head of damages as unproven.

²³² J. Paulsson, DENIAL OF JUSTICE IN INTERNATIONAL LAW 227 (RLA-68(ter)) (emphasis added).

²³³ T. Wälde & B. Sabahi, *Compensation, Damages and Valuation in International Investment Law*, TRANSNATIONAL DISPUTE MANAGEMENT, Vol. 4, No. 6 (Nov. 2007), p. 31 (RLA-221).

²³⁴ *Id.* (emphasis added).

VI. REQUEST FOR RELIEF

116. For the foregoing reasons, the Respondent, Republic of Ecuador, hereby respectfully requests that the Tribunal render an award in its favor:

- dismissing all of Claimant's claims under the BIT as outside of the Tribunal's jurisdiction, inadmissible and/or constituting an abuse of the arbitral process, or in the alternative, for lack of any merit;
- denying in full each and every item of relief sought by Merck;
- awarding the Respondent all of its costs and expenses in this arbitration proceeding, including the fees and expenses of the Tribunal and the cost of the Republic's legal representation, plus pre-award and post-award interest thereon; and
- granting any other or additional relief as may be appropriate under the circumstances or as may otherwise be just and proper.

117. Respondent expressly reserves its right to supplement the above requests.

Respectfully submitted,

Dra. Blanca Gómez de la Torre



Procurador General del Estado
Republic of Ecuador

Mark A. Clodfelter



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