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

OPPOSITION OF RESPONDENT REPUBLIC OF ECUADOR TO CLAIMANT'S REQUEST FOR INTERIM MEASURES

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I. INTRODUCTION

1. Claimant has brought this arbitration in an attempt to use the Tribunal to interfere in ongoing private litigation in Ecuador, to which Ecuador is not, and has never been, a party. But, as abusive as that attempt may be, it is surpassed in vexatiousness by Claimant's Request of Interim Measures. In that Request, the Tribunal is asked to order Ecuador to prevent the enforcement of a court decision, obtained in the course of that private litigation, which is, at this very moment, under review in Ecuador's highest civil law court. What is even more astonishing is that, despite pressing its appeal before the National Court of Justice of Ecuador with vigor and, by all appearances, earnestness, Claimant asserts that the interim measures requested are "necessary" without the slightest acknowledgment that the outcome of that appeal is unknowable and may indeed emerge in Claimant's favor.[1] In the meantime of course, Claimant is free of any risk that the lower court's judgment will be enforced against it because the National Court has stayed enforcement upon Claimant's payment of a negligible bond.

2. In effect, Claimant's position is, "we don't know if we will ever need them, but grant us interim measures now and we will hold them in reserve just in case they have some future application." This, of course, is an outrageous call upon the Tribunal's authority. But for present purposes it is enough to show that Claimant's Request suffers fatal flaws, both factual and legal.

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[1] The grounds invoked by Claimant in its appeal overlap almost completely with the charges that it makes in its Notice of Arbitration and in its Request for Interim Measures. Because these matters are properly before the Ecuadorian courts, Respondent does not respond to them in detail in this submission. However, Respondent wishes to record its clear position that it does not consider that the charges made could, in any event, amount to a denial of justice or violate the Treaty.

3. As a matter of law, the "right" that Claimant seeks to preserve by means of the requested interim measures is non-existent. There is no right to be protected against a denial of justice absent a final action of a State's judicial system as a whole. Accordingly, until all available judicial remedies in the Ecuadorian legal order have been exhausted, Claimant has no right that may be protected by way of interim measures.

4. And it may well be that Claimant will never accrue such a right. Claimant's unstated assumption of fact that Ecuador's court system will decide in any way perceived by Claimant as adverse to its interest is pure speculation. Interim measures cannot be based on mere speculation.

5. Compounding the thinness of Claimant's premises is the enormity of what it seeks. Even in ordinary circumstances, interim measures are, as one UNCITRAL tribunal recently pointed out, "extraordinary measures not to be granted lightly."[2] But what Claimant seeks in this case are measures calling for interference in normal judicial procedures, affecting rights of third parties not privy to this arbitration, in contravention of constitutional and other legal principles: indeed interference that in other circumstances would itself constitute a denial of justice. The premises of Claimant's request are simply too meager to warrant the magnitude of the measures it seeks.

6. As a legal matter, interim measures may be granted only upon a showing that they are actually necessary, as required by UNCITRAL Article 26. And, as international jurisprudence

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[2] *Sergei Paushok, CJSC Golden East Company and CJSC Vostokneftegaz Company v. Government of Mongolia*, UNCITRAL (Russia-Mongolia BIT), Order on Interim Measures (2 Sept. 2008) (Lalonde, Stern, Grigera Naón), ¶ 39 (CLM-12) ("*Paushok*").

has developed the elements of the concept of necessity, an applicant has the burden of showing each of the following:

- That there is a right capable of being protected;
- That, *prima facie*, the tribunal enjoys jurisdiction over the claims and there is likelihood that Claimant will prevail on its underlying claim;
- That the need for the measures is urgent and imminent and not uncertain;
- That the threatened harm is irreparable and not remediable by monetary compensation; and
- That grounds in addition to mere aggravation of the dispute are established.

7. Viewed in light of these standards, Claimant's Request must not be granted for each of the following reasons:

8. ***First***: because only the final action of Ecuador's court system can give rise to its responsibility under the Treaty and customary international law for denial of justice, and no such final action has yet occurred, Claimant has no right the protection of which necessitates the indication of interim measures – and, indeed, it may never have. Even when the National Court renders its decision – and that is likely still months away – Claimant has available appellate rights within Ecuador, which it must exercise before raising a claim under the Treaty. For the same reason, in the absence of a ripe claim of right, Claimant cannot establish a likelihood of success on the merits of its "claim," or the Tribunal's *prima facie* jurisdiction.

9. ***Second***: Claimant cannot establish the Tribunal's *prima facie* jurisdiction on account of other grounds as well. Claimant has failed to establish the existence of a protected investment

under the BIT. Claimant was also precluded from choosing to consent to arbitration under the UNCITRAL Arbitration Rules under Article VI(3)(iii) of the Treaty. Both these grounds independently show Claimant's failure to establish the Tribunal's *prima facie* jurisdiction.[3]

10. ***Third***: Claimant has failed to demonstrate a certain and imminent harmful action to its alleged right since the issuance of the National Court's decision is neither predictable in content nor certain in time. But even if the National Court's decision were imminent, and assuming that it results in an outcome adverse to Claimant, its enforcement would not be imminent under the established procedures of Ecuadorian law. Simply put, there is no urgency here.

11. ***Fourth***: Claimant is not entitled to the requested interim measures because they are not necessary to prevent irreparable harm. Claimant has failed to show that, absent the interim measures, it would itself suffer any significant harm as a result of either the issuance of an adverse decision by the National Court or even the enforcement of any surviving monetary judgment. Moreover, any such harm would be fully reparable by the award of monetary compensation in case it succeeds on the merits of its case.

12. ***Fifth***: the measures requested by Claimant are so intrusive and over-reaching that they would disproportionately prejudice Ecuador by forcing it to act in contravention of its own Constitution and obligations incurred under international instruments for the protection of human rights, and to the possible prejudice of third-party rights, thereby resulting in its liability under both domestic law and international law. And this all to the benefit of a single private litigant.

[3] Because Respondent is not yet called upon to delineate its jurisdictional objections, it reserves the right to augment and supplement the jurisdictional objections it discusses in this submission.

13. ***Finally*:** absent other grounds, the mere possibility of aggravation of the dispute is insufficient to warrant interim measures.

14. For each of these reasons, as more fully explained below, Ecuador respectfully submits that Claimant's Request for Interim Measures must be dismissed in its entirety. It goes without saying that Ecuador expressly reserves all defenses to this arbitration, including merits and jurisdictional defenses. Nor does Ecuador waive any of such defenses by submission of this Response.

II. CLAIMANT'S REQUEST FOR INTERIM MEASURES MUST BE DENIED BECAUSE THE CLAIM IS NOT BASED ON ANY FINAL ACTION OF ECUADOR'S JUDICIAL SYSTEM AS A WHOLE AND THUS THERE EXISTS NO RIGHT TO BE PROTECTED AND NO *PRIMA FACIE* CASE ON THE MERITS.

15. In its Request, Claimant asserts that interim measures are "necessary in respect of the subject matter of the dispute before this Tribunal, specifically MSDIA's rights, under the Ecuador-U.S. BIT to be treated fairly and equitably by Ecuador's courts and not to be subjected by them to a denial of justice."[4] But it is uncontested that the proceedings that are the basis of the claim are not even concluded as yet. Claimant's appeal of the US$150 million judgment of the Ecuador court of appeals to Ecuador's National Court of Justice is still pending; Claimant has advanced multiple procedural, evidentiary and substantive grounds for reversal of that judgment, such that the ultimate decision of the National Court of Justice is now unknowable; and even if the court of appeals' judgment were upheld in some significant manner by the National Court of Justice, Claimant enjoys further remedies under Ecuadorian law to rectify any of the defects it asserts undermine the judgment.

16. Under international law, Claimant cannot establish a violation of the Treaty based upon the actions of Ecuador's judiciary unless they are the final actions of the judicial system as a whole. It is a fundamental principle of international law that only the highest court to which a case is appealable may give rise to State responsibility, and actions by a State's lower courts, which -- however allegedly egregious -- remain subject to correction by a court of last resort, do not constitute the type of final acts that are sufficiently definite to implicate the international responsibility of a State.

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[4] Claimant's Request for Interim Measures, ¶ 29 ("Claimant's Request"); *see also, e.g., id.*, ¶¶ 11, 12, 27, 166.

17. Because the actions of which Claimant complains do not constitute final actions of Ecuador's judicial system as a whole, they cannot be the basis of any violation of the Treaty. As a result, Claimant cannot establish that interim measures are necessary, as required by UNCITRAL Article 26, for two independent reasons.

18. First, it is clearly established that, in order for an interim measure to be "necessary," the party requesting the measure must show that it has a right capable of being protected by the tribunal and that the requested measure is urgently needed in order to prevent irreparable prejudice or harm to that right. As with all of the elements that Claimant must prove to obtain interim measures, Claimant bears the burden to prove that it has a right to be protected on an urgent basis to prevent irreparable harm.[5] Because the judicial measures Claimant alleges to be defective are not the final actions of the Ecuadorian court system as a whole, there can be no right to be protected, and Claimant cannot meet its burden of proof.

19. Second, in order for an interim measure to be "necessary," a claimant must demonstrate a likelihood of success on the merits of its underlying claim, including the merits of its invocation of jurisdiction and the merits of its assertion of liability. But because the claims here are not based on final action of the court system as a whole, Claimant cannot support jurisdiction in this case since it can neither establish that its claim is sufficiently ripe to constitute an "investment dispute" within the scope of the Treaty's investor-State disputes clause nor show that it has met

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[5] *Paushok*, ¶ 40 (CLM-12) ("In requests for interim measures, it is incumbent upon [the applicant] to demonstrate that their request is meeting [sic] the standards internationally recognized as pre-conditions for such measures"); *see also Emilio Agustín Maffezini v. Kingdom of Spain*, ICSID Case No. ARB/97/7, Procedural Order No. 2 (28 Oct. 1999) (Orrego Vicuña, Buergenthal, Wolf), ¶ 10 (RLM-21) ("*Maffezini*") ("There is no doubt that the applicant, in this case the Respondent, has the burden to demonstrate why the Tribunal should grant its application [for provisional measures]"); *Occidental Petroleum Corporation and Occidental Exploration and Production Company v. Republic of Ecuador*, ICSID Case No. ARB/06/11, Decision on Provisional Measures (17 Aug. 2007) (Fortier, Stern, Williams), ¶ 90 (RLM-45) ("*Occidental Petroleum*") ("The burden rested on the Claimants [the applicant for provisional measures] to make out their case of urgent necessity").

the prerequisites to the invocation of that clause. For the same reason, Claimant cannot establish Ecuador is responsible for a violation of the Treaty.

20. Thus, the lack of "finality" of the actions complained of are fatal to Claimant's Request, and it is not eligible for the interim measures of protection it seeks.

A. Only The Final Actions Of A Court System As A Whole Can Give Rise To State Responsibility For Denial of Justice.

21. The decisions of international arbitral tribunals have consistently found that claims for denial of justice by municipal courts, both those founded on customary international law and investment treaty protections, cannot establish a violation of the Treaty unless they are based on the final actions of a State's judicial system as a whole, that is, after the exhaustion of all recourse available within that judicial system. This reflects long-standing consensus among jurists and commentators alike that State responsibility for denial of justice arises only after the State's entire legal system has had an opportunity to correct the defects alleged to deny justice.[6]

22. This has been the position of Claimant's own government since at latest 1848, when U.S. Secretary of State Marcy stated that "the state is not responsible for the mistakes or errors of its courts...when the decision has not been appealed to the court of last resort."[7] As early as 1915, Edwin Borchard stated in his seminal treatise, "[i]t is a fundmental principal that [with respect to

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[6] *See, e.g.*, *Pantechniki S.A. Contractors & Engineers v. Republic of Albania*, ICSID Case No. ARB/07/21, Award (30 July 2009) (Paulsson), ¶¶ 93, 96 (RLM-47) (claimant's allegations that the Albanian courts had thus far "denied in a most unlawful and absurd manner to look into its case in an independent, objective and legally sound way" need not be examined, because "[d]enial of justice does not arise until a reasonable opportunity to correct aberrant judicial conduct has been given *to the system as a whole*") (emphasis added); *Ambatielos Claim (Greece v. UK)*, Award (6 Mar. 1956), XII UNRIAA 83, pp. 118-122 (RLM-6) (A "defendant State has the right to demand that full advantage shall have been taken of all local remedies before the matters in dispute are taken up on the international level by the State of which the persons alleged to have been injured are nationals;" Greek national whose claim Greece espoused had not, *inter alia*, exhausted his appeals in the English court and had not shown that it would have been obviously futile to do so, and therefore Greece had no valid claim against the United Kingdom).

[7] Letter from Mr. Marcy, U.S. Sec. of State, to Chevalier Bertinatti, Sardinian Minister (1 Dec. 1856), *reprinted in* 6 MOORE'S INT'L DIGEST 748 (RLM-36).

acts of the judiciary]...only the highest court to which a case is appealable may be considered an authority involving the responsibility of a state."[8] This rule has continued unchanged to the present, and has become firmly-rooted in international investment arbitration jurisprudence.

23. This principle received its most authoritative modern confirmation in the award of the tribunal in *The Loewen Group and Raymond L. Loewen v. United States of America* ("*Loewen*"). In that case, the Canadian investor claimant sought to hold the United States liable for denial of justice claims based upon investment guarantee provisions of the North American Free Trade Agreement ("NAFTA") virtually identical to those in the Ecuador-U.S. Bilateral Investment Treaty on which Claimant here bases its claims.[9] The claimant based its claims on the conduct of a Mississippi court that presided over a trial that resulted in a US$500,000,000 verdict against the investor.[10] Although the tribunal in *Loewen* found that "the whole trial and resultant verdict" "were clearly improper and discreditable and [could not] be squared with minimum standards of international law and fair and equitable treatment," it rejected the claim after examining whether the claimant had taken all reasonably available steps in the judicial process to overturn the verdict and resulting judgment.[11] At the outset of its analysis, the tribunal noted that it was

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[8] E. M. Borchard, THE DIPLOMATIC PROTECTION OF CITIZENS ABROAD (1915), p. 198 (RLM-20); *see also* E. M. Borchard, *"Responsibility of States" at the Hague Codification Conference*, 24 AM. J. INT'L L. 517 (1930), p. 532 (RLM-19) ("Borchard, *Responsibility of States*") ("[J]udicial action is a single action from beginning to end, and...it cannot be said that the State has spoken finally until all appeals have been exhausted") (citing Belgian delegate); *see also* Case of Christo G. Pirocaco, American-Turkish Claims Commission, Nielsen's Opinions and Reports, 587, 599 (as cited in A. V. Freeman, THE INTERNATIONAL RESPONSIBILITY OF STATES FOR DENIAL OF JUSTICE (1970), p. 415 (RLM-2) ("Freeman") ("As a general rule, a denial of justice resulting from improper action of judicial authorities can be predicated only on a decision of a court of last resort").

[9] *Loewen Group, Inc. and Raymond L. Loewen v. United States*, ICSID Case No. ARB(AF)/98/3, Award (26 June 2003) (Mason, Mikva, Mustill), ¶ 3 (RLM-37) ("*Loewen*"). The *Loewen* claimant alleged that the Mississippi state court's actions constituted violations of NAFTA's guarantees of fair and equitable treatment (Article 1105(1)) and national treatment (Article 1102), and its prohibitions on illegal expropriation (Article 1110).

[10] *Id.*, ¶¶ 39-40.

[11] *Id.*, ¶ 137; *see also* ¶¶ 142-157, 165-171, 207-217.

aware of no instance "in which an international tribunal has held a State responsible for a breach of international law constituted by a lower court decision when there was available an effective and adequate appeal within the State's legal system." It went on to state:

> [t]he purpose of the requirement that a decision of a lower court be challenged through the judicial process before the State is responsible for a breach of international law constituted by judicial decision is to afford the State the opportunity of redressing through its legal system the inchoate breach of international law occasioned by the lower court decision...[12]

24. The tribunal concluded that claimant had not presented any evidence justifying its decision to forego post-trial judicial proceedings that were available to it, and that, therefore, claimant had failed to sustain its burden of proving that it had a justifiable excuse for not pursuing judicial relief.[13] In the Conclusion to its decision, the tribunal observed that it had found:

> ...nothing in NAFTA to justify the exercise by this Tribunal of an appellate function parallel to that which belongs to the courts of the host nation. In the last resort, a failure by that nation to provide adequate means of remedy may amount to an international wrong but only in the last resort....[14]

25. Investment arbitration tribunals since *Loewen* have consistently reached the same conclusions. In *Jan de Nul NV and Dredging International NV v. Arab Republic of Egypt*, the ICSID Tribunal rejected the claimants' arguments that an unjust judgment of a lower Egyptian court constituted a denial of justice and, thus, a violation of fair and equitable treatment guarantees under the Belgo-Luxembourg/Egypt bilateral investment treaty. The tribunal, citing Loewen, concluded that Egypt "must be put in a position to redress the wrongdoings of its

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12 *Id.*, ¶¶ 154, 156.

13 *Id.*, ¶¶ 215-217.

14 *Id.*, ¶ 242.

judiciary. In other words, it cannot be held liable unless 'the system as a whole has been tested and the initial delict remained uncorrected.'"[15]

26. In *Toto Construzioni Generali S.p.A. v. Republic of Lebanon*, the ICSID tribunal considered whether the investor claimant's allegations of a more than six-year delay in the Lebanese Conseil d'Etat's adjudication of two commercial lawsuits filed by claimant constituted a denial of justice under the unfair and inequitable treatment provisions of the Italy-Lebanon bilateral investment treaty. The Tribunal agreed with the customary international law principle that "a state can only be held liable for denial of justice when it has not remedied this denial domestically" on the basis of a claimant's exhaustion of its local remedies.[16] The Tribunal went on to find that claimant had not presented evidence sufficient to meet its burden to demonstrate *prima facie* jurisdiction over its unfair and inequitable treatment claims based on denial of justice and dismissed those claims for lack of jurisdiction.[17]

27. In *Alps Finance and Trade AG v. Slovak Republic*, the UNCITRAL tribunal considered a Swiss investor's claim that the Slovak Republic was responsible for a wrongly-decided judgment of a lower Slovakian court and had thereby breached its treaty obligations to, inter alia, accord fair and equitable treatment to the claimant's investment. Rejecting claimant's "assumption that the present Tribunal would have the authority to correct or cure an error in law possibly made by a Slovak court" in the same manner that a Slovak appeals court could do and claimant's

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[15] *Jan de Nul N.V. and Dredging International N.V. v. Arab Republic of Egypt*, ICSID Case No. ARB/04/13, Award (6 Nov. 2008) (Kaufmann-Kohler, Mayer, Stern), ¶ 258 (RLM-32) (in addition to *Loewen*, citing Jan Paulsson, *Denial of Justice in International Law* (2005), Cambridge, p. 125) (emphasis in original).

[16] *Toto Costruzioni Generali S.p.A. v. Republic of Lebanon*, ICSID Case No. ARB/07/12, Decision on Jurisdiction (11 Sept. 2009), ¶ 164 (van Houtte, Feliciani, Moghaizel) (RLM-63) (quoting Jan Paulsson, *Denial of Justice in International Arbitration* (2007), pp. 245-246).

[17] *Id.*, ¶ 165-168 and Decision ¶ 6(c) (RLM-63).

assumption that the Slovak Republic was "automatically responsible in international law if one of its courts has made a decision which is (possibly) wrong under municipal law," the tribunal concluded that "[w]hat international law prohibits is not a possible error in law, but *a system of justice* which falls below a minimum standard so as to lead to an inevitable denial of justice."[18] The Tribunal went on to find that claimant had appeals available to it, to attempt to obtain revision of the lower court judgment that it considered prejudicial to its interests, and that non-exhaustion of those remedies was "*per se* sufficient to exclude [the Slovak Republic's] responsibility in international law for actions or omissions of its judiciary."[19] Accordingly, the tribunal concluded that claimant could not have met the *prima facie* test of a plausible treaty claim even if the tribunal had retained jurisdiction over the case.[20]

28. The correctness of these applications of the principal of finality has found almost universal support among modern commentators. Andrew Newcombe and Luis Paradell, in their 2009 treatise on the standards for treatment in investor/State law and practice, write:

> There must be exhaustion of local remedies […] to claim denial of justice. Denial of justice arises where a national legal *system* fails to provide justice – not where there is a single procedural irregularity or misapplication of the law at some level of the judicial system. States have an obligation to create a system of justice that allows errors in the administration of justice to be corrected. Since *a denial of justice occurs only where there is no reasonably available national mechanism to correct the challenged action, the exhaustion of local remedies becomes an inherent and material element of every denial of justice claim*.[21]

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[18] *Alps Finance and Trade AG v. Slovak Republic*, UNCITRAL (Slovak-Swiss BIT), Award (5 Mar. 2011) (Crivellaro, Stuber, Klein), ¶¶ 249-250 (RLM-5) ("*Alps Finance*") (emphasis added).

[19] *Id.*, ¶ 251.

[20] *Id.*, ¶ 252.

[21] A. Newcombe & L. Paradell, LAW AND PRACTICE OF INVESTMENT TREATIES: STANDARD OF TREATMENT (2009), § 6.6 (RLM-1) (emphasis added).

29. Jan Paulsson, in his 2005 commentary on denial of justice in international law, agrees and explains the considerations behind this rule:

> States are held to an obligation to provide a fair and efficient system of justice, not to an undertaking that there will never be an instance of judicial misconduct.
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> . . .
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> Perhaps the strongest argument for this special treatment of claims of denial of justice is that it avoids interference with the fundamental principle that states should to the greatest extent possible be free to organise their national legal systems as they see fit. Conscious of the public demand for greater speed, they may wish to provide for a great number of local courts even if they do not have the resources to staff them with the highest-quality jurists. They may institute accelerated procedures on the understanding that most litigants prefer rough justice now to perfect justice in their dotage. They may allow lay volunteers to sit on commercial tribunals of first instance. The state can make such compromises because of its confidence in its appellate mechanisms. If aliens are allowed to bypass those mechanisms and bring international claims for denial of justice on the basis of alleged wrongdoing by the justice of the peace of any neighborhood, international law would find itself intruding intolerably into internal affairs. *For a foreigner's international grievance to proceed as a claim of denial of justice, the national system must have been tested. Its perceived failings cannot constitute an international wrong unless it has been given a chance to correct itself.*
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> . . .
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> The very definition of denial of justice encompasses the notion of exhaustion of local remedies. There can be no denial of justice before exhaustion.
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> . . .
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> National responsibility for denial of justice occurs only when the system *as a whole* has been tested and the initial delict has remained uncorrected. [22]

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[22] J. Paulsson, DENIAL OF JUSTICE IN INTERNATIONAL LAW (2005), pp. 108, 125 (RLM-30) ("Paulsson"). (emphasis added). *See also* Freeman, pp. 311-12 (RLM-2). ("[R]esponsibility is engaged as the result of a definitive judicial decision by a court of last resort which violates an international obligation of the State"); Borchard,

30. Leading practitioners of investment arbitration have also concluded that the rule requiring exhaustion of a State's judicial system is firmly established in international law. For example, Louis Christophe Delanoy and Tim Porterwood, in an influential article, conclude that "[t]he principle under which a State will be held internationally liable based on a given judicial decision presupposes that such decision is definitive, or more precisely not open to any actually existing and effective recourse, [and] may be considered firmly established in international law."[23] And Mathieu Raux, a regular French observer of international investment arbitration, writes that "[a] consistent and predictable answer has emerged from the arbitral precedents: a finding of denial of justice presupposes that the investor has first exhausted all reasonable internal recourse avenues available to it before it can hope to gain relief from an arbitral tribunal constituted under a treaty for the promotion and protection of investments."[24]

31. As the foregoing arbitral decisions and authorities demonstrate, an investor cannot accrue claims based on denial of justice in violation of an investment protection treaty, and a State

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Responsibility of States, at 532-33 (RLM-19) ("[J]udicial action is a single action from beginning to end, and […] it cannot be said that the State has spoken finally until all appeals have been exhausted"); F. K. Nielsen, INTERNATIONAL LAW APPLIED TO RECLAMATIONS (1933), p. 28 (RLM-23) ("[A] denial of justice resulting from improper action of judicial authorities can be predicated only on a decision of a court of last resort. A litigant must exhaust his remedies, before it can be said that he has had that final judicial determination of his cause which the law affords").

[23] L. C. Delanoy & T. Portwood, *La responsabilité de l'État pour déni de justice dans l'arbitrage d'investissement*, 2005(3) REVUE DE L'ARBITRAGE 633, ¶ 26 (RLM-34) (free translation) ("Le principe selon lequel la responsabilité international de l'État du chef d'une décision de justice donnée, suppose que cette décision soit définitive, ou plus exactement non susceptible de recours effectifs et efficaces, peut être considéré comme solidement établi en droit international.").

[24] M. Raux, *Déni de justice*, 2009(4) CAHIERS DE L'ARBITRAGE 54, ¶ 9 (RLM-38) (free translation) ("Emerge ainsi de la jurisprudence arbitrale une solution constante et prévisible: l'existence d'un déni de justice suppose que l'investisseur ait épuisé les voies de recours internes raisonnables dont il disposait pour espérer obtenir gain de cause devant un tribunal arbitral constitué en application d'un traité de promotion et de protection des investissements.") (citing *Pantechniki SA Contractors & Engineers v. Albania*, *Jan de Nul NV & Dredging International NV v. Egypt*, *Chevron Corporation & Texaco Petroleum Corporation v. Ecuador* and *Toto Costruzioni Generali S.p.A. v. Lebanon*).

cannot accrue corresponding liability, except on the basis of final action by the State's judicial system as a whole.

B. Because Only The Final Actions Of A Court System As A Whole Can Give Rise To State Responsibility For Denial Of Justice, Claimant Has No Right That Necessitates Interim Measures.

1. Interim measures can be considered as necessary only when a right exists that requires protection.

32. UNCITRAL tribunals adjudicating requests for interim measures, as well as the commentators on the UNCITRAL Rules, have unequivocally established that, in order for an interim measure to be "necessary," the party requesting the measure must show that it has a *right* capable of being protected by the tribunal and that the requested measure is urgently needed in order to prevent irreparable prejudice or harm to that right. As the Iran-United States Claims Tribunal concluded in *Iran v. United States, Case A24*:

> In paragraph 20 of its 1993 Decision [on Iran's request for interim measures], the Tribunal noted that, "under Tribunal precedent, interim relief can be granted only if it is necessary to protect a party from irreparable harm or to avoid prejudice to the jurisdiction of this Tribunal."
>
> Thus, the Tribunal shall have the power to indicate provisional measures if it considers that they should be taken in order
>
> -- ***to conserve the respective rights of the parties, and in particular, to protect a party from irreparable harm***; or
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> -- to ensure full effectiveness of the Tribunal's jurisdiction and authority, and in particular, to avoid prejudice to its jurisdiction.[25]

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[25] *The Islamic Republic of Iran v. The United States of America*, Case No: A24, Dec. 125-A15-A24-FT (11 Oct. 1996), *reprinted in* 32 Iran-U.S. Cl. Trib. Rep. 115, ¶¶ 17-18 (RLM-61) (*Iran v. U.S.*, Case No. A24) (emphasis added); *see also E-Systems, Inc. and The Islamic Republic of Iran*, Interim Award No. ITM 13-388-FT (4 Feb. 1983), *reprinted in* 2 Iran-U.S. Cl. Trib. Rep. 51, 57 (RLM-22) (Full Tribunal) (in adjudicating an interim measures request, the "Tribunal has an inherent power to issue such orders as may be necessary ***to conserve the respective rights of the Parties*** and to ensure that [its] jurisdiction and authority are made fully effective"); *EnCana Corporation v. Republic of Ecuador*, LCIA Case No. UN 3481, Interim Award (31 Jan. 2004) (Crawford, Grigera Naón, Barrera Sweeney) (CLM-10), ¶ 17 ("*EnCana*")(applying Article 26 of the UNCITRAL Arbitration Rules to

33. As one noted commentary, relied upon repeatedly by Claimant in its Request, observes: "Both the purpose of Article 26(1) and the language employed therein suggest that necessity should be assessed against the ***basic function of interim measures, which is to preserve the rights of the arbitrating parties....***These considerations give rise to the requirement, restated by the Iran-US Claims Tribunal in several cases, that interim measures can be sought only in order to prevent *irreparable* prejudice or harm ***to the rights of a party***."[26]

34. UNCITRAL precedent establishing that an interim measure is "necessary" only where required to prevent irreparable harm to rights of the applicant is consistent with international jurisprudence on interim, or provisional, measures as a whole. For example, the same requirement exists for the indication of provisional measures under Article 41 of the Statute of the International Court of Justice, as expressed *inter alia* in *Certain Criminal Proceedings in France* (Republic of the Congo v. France): "[t]he power of the Court to indicate provisional measures to maintain the respective rights of the parties is to be exercised only if there is an urgent need to prevent irreparable prejudice to *the rights that are the subject of the dispute* before the Court has had an opportunity to render its decision."[27] The identical standard applies to applications for provisional measures under Article 47 of the Convention on the Settlement of Investment Disputes between States and Nationals of Other States (the "ICSID Convention") and Arbitration Rule 39 of the International Centre for Settlement of Investment Disputes ("ICSID"). As the ICSID tribunal concluded in *Tokios Tokelés v. Ukraine*:

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deny the request for interim measures because they were not necessary "to protect the rights at stake in [the] arbitration from irreparable harm").

[26] D. Caron, et. al., THE UNCITRAL ARBITRATION RULES: A COMMENTARY (2006), p. 536 (RLM-16) ("Caron") (emphasis added in part).

[27] *Certain Criminal Proceedings in France (Republic of the Congo v. France)*, Order on Provisional Measures (17 June 2003), I.C.J. Reports 2003 (RLM-13), 129, ¶ 22 (emphasis added).

> The circumstances under which provisional measures are required under Article 47 [of the ICSID Convention] are those in which the measures are necessary ***to preserve a party's rights*** and that need is urgent. The international jurisprudence on provisional measures indicates that a provisional measure is necessary where the acts of a party "are capable of causing or of threating irreparable prejudice ***to the rights invoked***." A measure is urgent where "action ***prejudicial to the rights*** of either party is likely to be taken before such final decision is taken."[28]

According to Schreuer, the leading commentator on the ICSID Convention and ICSID arbitration, Article 47 of the ICSID Convention is "an expression of the principle that in the course of litigation the parties must refrain from taking steps that might affect ***the rights of the other side which are the object of the proceedings on the merits***."[29]

35. The failure of an interim measures applicant to establish that it has a right capable of being protected by the tribunal will be fatal to its request for interim measures. For example, in *Occidental Petroleum Corporation and Occidental Exploration and Production Company v. Republic of Ecuador* ("*Occidental*"), the claimants based their application for provisional measures on a claimed right of restitution in kind, or specific performance, by the tribunal's reinstatement of their contracts for operation of an oil concession that Ecuador had terminated and, thereby, restoration of the claimants to the concession's operation.[30] In order to protect that claimed right by ensuring that the concession was properly operated while the arbitration was pending, claimants asked the tribunal to order Ecuador, *inter alia*, to make annual expenditures

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[28] *Tokios Tokelés v. Ukraine*, ICSID Case No. ARB/02/18, Procedural Order No. 3 (18 Jan. 2005) (Mustill, Bernardini, Price) (RLM-62) ("*Tokios Tokelés*") , ¶ 8 (emphasis added) (quoting *Aegean Sea Continental Shelf Case (Greece v. Turkey)*, Order on Provisional Measures(11 Sept. 1976) Separate Opinion of President Jiménez de Aréchaga) I.C.J. Reports 1976 (RLM-4) ("*Aegean Sea, Jiménez de Aréchaga Opinion*"), and *Passage Through the Great Belt (Finland v. Denmark)*, Order on Provisional Measures(29 July 1991) (CLM-20), at ¶ 23) ("*Great Belt Case*").

[29] C. Schreuer, THE ICSID CONVENTION: A COMMENTARY, p. 777 (2001) (emphasis added) (RLM-68).

[30] *Occidental Petroleum*, ¶ 66 (RLM-45).

on the concession; to establish, jointly with the claimants, a supervisory board that would oversee the concession, subject to claimants' veto power; and to refrain from contracting with third parties for operation of the concession.[31]

36. In analyzing the claimed right to specific performance on which the provisional measures request was based, the tribunal in *Occidental* found that the existence of a "right" to specific performance was contingent upon whether it was possible to restore claimants to the oil concession. The Tribunal concluded that it was not, because claimants had not established a right to specific performance where a sovereign State had terminated a natural resources concession and that, for purposes of its provisional measures ruling, "no such right exists."[32] On that basis (and others), the tribunal denied Occidental's request for provisional measures.[33]

37. Claimant's Request here suffers from the same dispositive defect as the provisional measures application in *Occidental*, because as demonstrated below, Claimant has not stated, and cannot state, a right that this Tribunal is capable of protecting.

2. Because it does not allege a final action of Ecuador's court system as a whole, Claimant cannot demonstrate that a right exists necessitating interim measures.

38. Claimant's Notice of Arbitration and its Request for Interim Measures are all entirely based upon a claimed "right" not to be denied justice by the Ecuadorian courts, and no other.[34]

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[31] *Id.*, ¶ 26.

[32] *Id.*, ¶ 86.

[33] *Id.*, ¶ 101.

[34] *See, e.g.,* Notice of Arbitration (29 Nov. 2011) ("Notice of Arbitration"), ¶¶ 3, 12, 149-152, 157-159; Claimant's Request, ¶¶ 29, 11, 12, 27, 166. Although Claimant attempts to bring its complaints against Respondent under various provisions of the Ecuador-U.S. Bilateral Investment Treaty, specifically its Articles II(1), II(3)(a), II(3)(b), and II(7), in reality they constitute a single claim. Everything Claimant has pleaded in this arbitration -- in its Notice of Arbitration and its Request for Interim Measures -- confirms that its claims specific to the treaty standards are identical to their core denial of justice claim. For instance, Claimant alleges in its Notice of

All of the remedies it seeks are based upon an alleged denial of justice and a "right" to relief from it. The Notice of Arbitration asks that the Tribunal issue an award "[d]eclaring that the actions of the Ecuadorian courts in connection with the NIFA judgment breached Ecuador's obligations under the Ecuador-United States BIT" and "[d]irecting Ecuador -- including specifically its courts, its executive branch, and its national police -- to take all steps within its power to prevent enforcement of the NIFA judgment both within and outside of Ecuador."[35] The specific measures that Claimant demands in its Request for Interim Measures are all for the purpose of preserving that same "right" not to be denied justice, *e.g.*, Claimant demands that the Tribunal order "Ecuador to take any and all available steps to prevent enforcement of any judgment in the NIFA litigation against MSDIA;" "to refrain from any action, including by its courts and executive, to enforce any judgment in the NIFA litigation against MSDIA or its assets;" and "to make a written representation to any court in which NIFA attempts to enforce

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Arbitration that "[t]he Ecuadorian proceedings amounted to a denial of justice, which violated Ecuador's obligations under the Treaty." Notice of Arbitration, ¶ 158. Claimant reiterates that statement in its Request for Interim Measures, *e.g.*, at ¶ 165. It follows, then, that if Claimant's denial of justice claim fails on account of lack of judicial finality, its other specific-standard claims must fail as well. *See Loewen*, ¶ 156 (RLM-37) ("The requirement [that a decision of a lower court be challenged through the judicial process before the State is responsible for a breach of international law] has application to breaches" based upon provisions of the North American Free Trade Agreement providing for fair and equitable treatment, national treatment, and expropriation); *Mondev International Ltd. v. United States of America*, ICSID Case No. ARB(AF)/99/9, Award (11 Oct. 2002) (Stephen, Crawford, Schwebel), ¶ 127 (RLM-41). ("the question is whether, at an international level and having regard to generally accepted standards of the administration of justice, a tribunal can conclude in the light of all the facts that the impugned decision was clearly improper and discreditable, with the result that the investment has been subjected to 'unfair and inequitable treatment'"); *Duke Energy Electroquil Partners & Electroquil, S.A. v. Republic of Ecuador*, ICSID Case No. ARB/04/19, Award (18 Aug. 2008) (Kaufmann-Kohler, Gómez Pinzón, van den Berg), ¶ 396-404 (RLM-18) (where investor claimants failed to pursue judicial remedies for annulment of locally-rendered arbitral, Ecuador held not liable under Article II(7) of the Ecuador-U.S. Bilateral Investment Treaty).

[35] Notice of Arbitration, ¶ 160(a) and (b). Claimant has also asked the Tribunal to "[o]rder Ecuador to refrain from taking any action that would aggravate or exacerbate the dispute, threaten the integrity of these arbitral proceedings or frustrate the effectiveness of any award from this Tribunal." Claimant's Request, ¶ 166(d). However, as discussed below, under international jurisprudence, interim measures cannot be granted on the basis of non-aggravation alone, *i.e.*, in the absence of a right to be protected and an urgent need to prevent irreparable harm to that right. In addition, with regard to all three of the measures in ¶ 166(d) of the Request, Claimant has not identified any way in which Respondent is "aggravating the dispute," or "threatening the integrity of these arbitral proceedings" or "frustrating the effectiveness of any award from this Tribunal."

any judgment in the NIFA litigation, stating that the judgment is not enforceable pending the outcome of this Arbitration."[36]

39. Claimant has no present "right" based on a "denial of justice" claim -- and, therefore, it cannot show that the type of interim measures it asks this Tribunal to issue are "necessary" -- because, as shown above, under the firmly-settled principles of international law, Respondent cannot incur responsibility for a "denial of justice" claim until there is a final action by Ecuador's judicial system as a whole. Claimant's claims -- all of which are based upon "denial of justice" -- are not justiciable because remedies available under the Ecuadorian judicial system to correct any alleged error underlying the lower court judgments have not yet been exhausted.

40. In short, the "right" on which Claimant founds its Request for Interim Measures does not exist. And although Claimant's entire Request for Interim Measures is intended to create the impression that the National Court of Justice will rule against it, there is no basis for such a conclusion. The only conclusion that can be reached at this point is that Claimant may *never* have a "right" to its requested interim measures. A review of Claimant's pending appeal makes that plain.

41. After the court of appeals issued its September 23, 2011 judgment upholding the lower court's decision in NIFA's favor, but in the reduced amount of $150 million, Claimant filed a motion with the court of appeals seeking an appeal (cassation) to the National Court of Justice. The court of appeals set the amount of a bond that Claimant could post in order to suspend execution of its judgment in the amount of $23,500, or 0.0157% of its judgment in the case, and Claimant posted the bond. On October 25, 2011, the court of appeals referred the case to the

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[36] Claimant's Request, ¶ 166 (a) - (c).

National Court.[37] As Respondent's Ecuadorian law expert, Dr. Luis Alberto Moscoso Serrano, explains, the bond prevents enforcement of the court of appeals' judgment while Claimant's appeal to the National Court of Justice is pending.[38]

42. Based on his review of the records of the National Court of Justice and as set forth in greater detail below, Dr. Moscoso Serrano explains that Claimant has lodged four jurisdictional and procedural grounds, as well as multiple challenges based upon undue application, lack of application and erroneous interpretation of rules of substantive law and evidentiary rules, any one of which could result in nullification of the court of appeals' judgment in its entirety. In addition, even if the National Court were to reject all of Claimant's grounds for appeal and uphold the court of appeals' judgment, it could reduce the amount of damages for which Claimant would be liable to NIFA.[39]

43. Furthermore, because Claimant's pending appeal alleges that its due process rights and its right to defend itself were violated during the lower court proceedings, the Ecuadorian legal system, pursuant to Article 437 of the Ecuadorian Constitution, affords Claimant a further right of appeal (cassation) to the Constitutional Court in the event the National Court of Justice were to rule against it.[40] The purpose of this type of appeal is to "protect constitutional rights and due process in judgments, final decisions and resolutions with the force of judgments, in which rights that are recognized in the Constitution have been violated by action or omission."[41] Claimant

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37 *Id.*, ¶¶ 155-156, and Exhibits C-51 and C-52.

38 Expert Opinion on Ecuadorian Law of Luis Alberto Moscoso Serrano ("Moscoso Legal Opinion"), ¶ 5.

39 Id., ¶¶ 9-12.

40 *Id.*, ¶ 14.

41 *Id.*, ¶ 15.

can avail itself of recourse to the Constitutional Court, which is the final authority on issues of constitutional law, and, as Dr. Moscoso Serrano explains, "[i]f, after examining the case the Constitutional Court were to consider that the judgment of the National Court is in violation of the Constitution, it could dismiss the judgment."[42]

44. Not only has there been no final action by the Ecuadorian judicial system, which could accord to Claimant a choate "right" based on "denial of justice" claims against Respondent, but whether Claimant will *ever* have such a claim is unknown and unknowable at this point. To be sure, limited exceptions to the finality principle have been recognized for "obvious futility" of pursuing additional local remedies and "manifest ineffectiveness" of the judicial system. However, as demonstrated by the Notice of Arbitration and Request for Interim Measures themselves, Claimant has not alleged any facts that would support, and has not even asserted, either of these exceptions. On the contrary, Claimant's submissions show that it has pursued, and is continuing to pursue, all available appeals in the Ecuadorian judicial system and that the National Court of Justice has been addressing Claimant's appeal.

45. Because only judgments rendered by a country's highest available court are final and, therefore, capable of creating responsibility for a "denial of justice" under international law, Claimant has no "right" that it is "necessary" to protect. This is fatal to its Request for Interim Measures and, for this reason alone, Claimant's Request must be denied.

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[42] *Id.*, ¶ 17.

C. Because Only The Final Actions Of A Court System As A Whole Can Give Rise To State Responsibility For Denial Of Justice, Claimant Cannot Establish A Likelihood Of Success On The Merits Of Its Case On Liability And Jurisdiction.

46. A party requesting interim measures must demonstrate a *prima facie* case on the merits of its case (or, according to other formulations in practice, a reasonable probability of prevailing on its case).[43] Under this standard, a tribunal must consider the *prima facie* strength of the parties' respective claims and defenses in regard to both jurisdiction and liability; it will order the interim measures requested by the applicant only if it succeeds in showing the likelihood of its establishing the tribunal's jurisdiction and its prevailing on the underlying claim. As will be shown below, Claimant's efforts stumble in the absence of a final action of Ecuador's court system which makes it impossible to establish a likelihood of success on jurisdiction and liability (or make out a *prima facie* case of jurisdiction or liability).

1. Because the Claims are not based upon final actions of Ecuador's judicial system as a whole, Claimant cannot establish Ecuador's liability for any breach of the Treaty.

47. As explained above, Claimant has no right to be protected by the indication of interim measures because its claims under the Treaty are not based on any final action of Ecuador's judicial system. For the same reason, Claimant cannot prevail on the merits of its claim.

48. The *Alps Finance v. Slovak Republic* case is instructive in this respect. The UNCITRAL tribunal in that case stated that:

> The *prima facie* standard is meant to determine whether the claims are sufficiently plausible under the BIT. In other words, the

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[43] *Chevron Corporation and Texaco Petroleum Company v. The Republic of Ecuador*, PCA Case No. 2009-23, Third Interim Award on Jurisdiction and Admissibility (27 Feb. 2012) (Veeder, Grigera-Naón, Lowe), ¶ 4.8 (RLM-14); *CEMEX Caracas Investments B.V. and CEMEX Caracas II Investments B.V. v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB/08/15, Decision on Provisional Measures (3 Mar. 2010) (Guillaume, Abi-Saab, von Mehren), ¶¶ 68-69 (CLM-4). ("*Cemex*"). *See also* G. Born, INTERNATIONAL COMMERCIAL ABITRATION, vol. II (2009), p. 1989 and jurisprudence cited therein (RLM-26).

> Tribunal should be satisfied that, if the facts or contentions alleged by the Claimant are ultimately proven true, they would be capable of constituting a violation of the BIT.[44]

49. The tribunal pointed out that the claimant's allegations of breach of the applicable bilateral investment treaty, much like the allegations made by Claimant in the present case, were "in several respects … based on the assumption *that* the present [t]ribunal would have the authority to correct or cure an error in law possibly made by a Slovak court as an appeal court, would do."[45] For the tribunal, "[t]his is sufficient to conclude that the Claimant's claims are far from meeting the *prima facie* plausibility test," since:

> What international law prohibits is not a possible error in law, but a system of justice which falls below a minimum standard so as to lead to an inevitable denial of justice. However, the Claimant did not dare to assert that the Slovak judicial system belongs to such a category, which would be obviously unsustainable. And it was also scarcely convincing when it criticized the judicial decisions as wrong in municipal law.[46]

50. The tribunal also pointed out that other remedies were still available to the claimant in Slovak law in order to try to obtain revision of the judgment that it considered prejudicial to its interest, thereby confirming that "the non-exhaustion of local remedies is *per se* sufficient to exclude the States' responsibility in international law for actions or omissions of its judiciary."[47] These considerations led the tribunal to conclude that "the *prima facie* test of a plausible treaty-claim is far from met."[48]

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[44] *Alps Finance*, ¶ 248 (RLM-5).

[45] *Id.* ¶ 249 (adding: "In other words, the Claimant seems to assume that international law prohibits "wrong" judiciary decisions as such and that the State becomes automatically responsible in international law if one of its courts has made a decision which is (possibly) wrong under municipal law.").

[46] *Id.* ¶ 250.

[47] *Id.* ¶ 251.

[48] *Id.* ¶ 252.

51. The same considerations apply here: Claimant is unable to meet the *prima facie* test of a plausible treaty claim. Being unable to do so, or otherwise show the likelihood of success on the merits, claimant cannot prevail on its Request.

2. Because the claims are not based upon final actions of Ecuador's judicial system as a whole, Claimant cannot establish jurisdiction.

52. As shown above, it is established, and Claimant agrees,[49] that before interim measures of protection can be granted under Article 26 of the UNCITRAL Rules, the applicant is required to establish that the Tribunal has *prima facie* jurisdiction over the dispute.[50] But because the actions of which Claimant complaints do not constitute final actions of Ecuador's judicial system as a whole, they cannot be the basis of any "investment dispute" under the Treaty.

53. Article VI of the Treaty serves as the foundation for the Tribunal's jurisdiction, and hence, before the Tribunal can grant interim measures, it must determine that Claimant enjoys a likelihood of success in establishing that the requirements of Article VI have been met,[51] and that there is a *prima facie* basis for jurisdiction. These requirements include: (a) that an "investment dispute" within the meaning of Article VI(1) exists, and (b) that Claimant has complied with the prerequisites to arbitration referred to in paragraphs 2 and 3 of Article VI. As will be shown below, Claimant has failed to satisfy both these requirements.[52]

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[49] Claimant's Request, ¶¶ 31-40.

[50] *See*, *e.g.*, *Paushok*, ¶¶ 44, 48 (CLM-12). It is incontrovertible that the burden of proof of the Tribunal's *prima facie* jurisdiction falls upon the party seeking the interim measures. *See Id.*, ¶ 40.

[51] As rightly summarized by the tribunal in *ICS v. Argentina*: "[a]t the time of commencing dispute resolution under the treaty, the investor can only accept or decline the offer to arbitrate, but cannot vary its terms…. [T]he investment treaty presents a 'take it or leave it' situation…." *ICS Inspection and Control Services Ltd. v. Argentine Republic*, PCA Case No. 2010-9, UNCITRAL, Award on Jurisdiction (10 Feb. 2012) (Dupuy, Torres Bernárdez, Lalonde), ¶ 272 (RLM-28).

[52] Further grounds establishing Claimant's failure to meet the *prima facie* jurisdiction standard are set out in the next section of Ecuador's Opposition.

a. There is no "investment dispute" ripe for arbitration under the Treaty.

54. The Tribunal's jurisdiction is premised entirely upon the existence of an "investment dispute." This is clear from Article VI of the Treaty, which provides in pertinent part:

> 1. For purposes of this Article, an investment dispute is a dispute between a Party and a national or company of the other Party arising out of or relating to (a) an investment agreement between that Party and such national or company; (b) an investment authorization granted by that Party's foreign investment authority to such national or company; or (c) *an alleged breach of any right conferred or created by this Treaty with respect to an investment*. (emphasis added)

55. In order to determine that an "investment dispute" exists in the sense described in Article VI, the Tribunal must ascertain whether the facts, as alleged by Claimant, are capable of establishing a breach of a right conferred or created by the Treaty with respect to Claimant's alleged investment. For these purposes, the mere assertion of an applicant for interim measures are not sufficient, and a tribunal must undertake an objective determination. As stated by the ICJ in its Judgment on Yugoslavia's Request for Provisional Measures in the *Legality of the Use of Force* case, partially based on Article IX of the 1948 Genocide Convention:[53]

> … in order to determine, even *prima facie*, whether a dispute within the meaning of Article IX of the Genocide Convention exists, the Court cannot limit itself to noting that one of the Parties maintains that the Convention applies, while the other denies it; … in the present case the Court must ascertain whether the breaches of the Convention alleged by Yugoslavia are *capable of falling within the provisions of that instrument* and whether as a consequence, the dispute is one which the Court has jurisdiction *ratione materiae* to entertain pursuant to Article IX.[54]

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[53] Article IX of the Genocide Convention submits to the jurisdiction of the ICJ disputes relating to the interpretation, application or fulfillment of the Convention, including those relating to the responsibility of a State for genocide or any of the other acts punishable under the Convention.

[54] *Legality of Use of Force* (Yugoslavia v. Belgium), Provisional Measures, Order of Jun. 2 1999, 1999 I.C.J. Rep., ¶ 38 (RLM-65) (also quoting *Oil Platforms Case (Islamic Republic of Iran v. United States of America)*, Judgment, 1996 ICJ Reports 803, p. 810 (¶ 16)) (emphasis added).

56. The Court held that it was not in a position to find, at the stage of provisional measures, that the acts imputed by Yugoslavia to Belgium were capable of coming within the provisions of the Genocide Convention; consequently, Article IX of the Convention could not constitute a basis on which the jurisdiction of the Court to indicate provisional measures could prima facie be founded.[55]

57. That the *prima facie* jurisdiction test requires an objective determination by the tribunal was also intimated by the ICSID tribunal in the *Pan American v. Argentina* case:

> a claimant should demonstrate that *prima facie* its claims fall under the relevant provisions of the BIT for the purposes of jurisdiction of the Centre and competence of the tribunal (but not whether the claims are well founded). In that respect, labelling is not enough. For, if everything were to depend on characterisations made by a claimant alone, the inquiry to jurisdiction and competence would be reduced to naught, and tribunals would be bereft of the *compétence de la compétence* enjoyed by them under Article 41(1) of the ICSID Convention.[56]

58. The tribunal further explained that the *prima facie* test means that the claims made must be taken as they are, since in that phase of the proceedings, its only task was to determine whether, as formulated, they fit into the jurisdictional parameters set out by the relevant treaty instrument or instruments. However, the question remained:

> whether the Claimants' claims, if well founded, a matter to be examined at the following stage, *may denote violations of the BIT* and therefore fall within the Centre's jurisdiction and this Tribunal's competence under the relevant provisions of the BIT and Article 25 of the ICSID Convention.[57]

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[55] *Id.* p. 138 (¶ 41).

[56] *Pan American Energy LLC and BP Argentina Exploration Company v. The Argentine Republic*, ICSID Case No. ARB/03/13, Decision on Preliminary Objections (27 July 2006) (Caflisch, Stern, van den Berg), ¶ 50 (RLM-46).

[57] *Id.* ¶ 51 (emphasis added). *See also Cemex*, ¶¶ 69-70 (CLM-4).

59. In *UPS v. Canada*, the UNCITRAL tribunal agreed that a claimant's assertion that a dispute is within the tribunal's jurisdiction is not conclusive: "[i]t is the Tribunal that must decide."[58] The tribunal also noted the *parties'* agreement as regards the applicable standard as follows:

> [The tribunal] must conduct a *prima facie* analysis of the NAFTA obligations, which UPS seeks to invoke, and determine whether the facts alleged are capable of constituting a violation of these obligations.[59]

60. Accordingly:

> the Tribunal's task is to discover the meaning and particularly the scope of the provisions which UPS invoked as conferring jurisdiction. *Do the facts as alleged by UPS fall within those provisions: are the facts capable, once proved, of constituting breaches of the obligations they state?*[60]

61. This is plainly not the case here. Since there is no investment agreement between Ecuador and Claimant, nor any investment authorization granted by Ecuador to Claimant, Claimant must establish that the dispute it alleges to exist "arises out of or relates to … an alleged breach of a *right* conferred or created by [the] Treaty with respect to its alleged investment."[61] As explained above, although Claimant attempts to bring complaints under various provisions of the Treaty, in reality they constitute a single claim: that the proceedings before the two lower Ecuadorian courts amounted to a denial of justice, which violated Ecuador's obligations under the Treaty.

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[58] *United Parcel Service of America Inc. v. Government of Canada*, UNCITRAL, Award on Jurisdiction (22 Nov. 2002) (Keith, Cass, Fortier), ¶ 34 (RLM-64).

[59] *Id.* ¶ 33.

[60] *Id.* ¶ 37 (emphasis added).

[61] Treaty, Article VI(1).

62. However, as explained above, Claimant's right to be protected against a denial of justice requires a final action of Ecuador's judicial system as a whole that fails to correct errors in the administration of justice, an event that has not yet occurred here. A wrong or a breach actionable under the rubric of "denial of justice" does not arise until "reasonable attempts have been made to secure the remedies available within that system."[62] As noted by Paulsson, the requirement of exhaustion of available and effective local remedies is "indispensable; the claim simply cannot be said to exist until the self-correcting features of the national system have failed."[63]

63. It follows that for the same reasons that Claimant has no right capable of being protected by the indication of interim measures, it has no right that could have possibly been infringed by Ecuador and thereby have led to the creation of an actionable "investment dispute" under the Treaty. The Tribunal cannot but decide that Claimant has not established a *prima facie* case of denial of justice justifying the requested interim measures.

b. In the absence of an "investment dispute" ripe for arbitration, Claimant cannot have given notice of a dispute, waited six months after it arose or attempted its amicable resolution, as required by Articles VI(2) and (3)(a) of the Treaty.

64. Article VI(2) of the Treaty provides in pertinent part:

> In the event of an investment dispute, the parties to the dispute *should initially seek a resolution through consultation and negotiation*. If the dispute cannot be settled amicably, the national or company concerned may choose to submit the dispute, under one of the following alternatives, for resolution … (emphasis added)

65. Article VI (3)(a) provides in pertinent part:

> Provided that the national or company concerned has not submitted the dispute for resolution under paragraph 2 (a) or (b) *and that six*

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62 See Paulsson, p. 130 (RLM-30) (emphasis added).

63 *Id*.

> *months have elapsed from the date on which the dispute arose*, the national or company concerned may choose to consent in writing to the submission of the dispute for settlement by binding arbitration … (emphasis added)

66. These provisions set forth three prerequisites to the initiation of arbitration. First, a claimant must wait at least six months after the investment dispute arose before commencing arbitration. Second, this six month period can itself begin only after claimant gives the State involved notice of the dispute. Finally, the claimant must make real efforts to settle the dispute amicably. Although Claimant purports to have achieved each of these milestones, none of its actions were of any effect in the absence of something that constitutes an investment dispute, which, as seen above, cannot be premised upon judicial action that is not the action of the Ecuadorian judicial system as a whole.

67. The tribunal in *Burlington v. Ecuador* affirmed that the requirements established in these provisions are intended to accord to the host State the right to be informed about the dispute at least six months before it is submitted to arbitration.[64] The purpose of this right is to grant the host State an opportunity to redress the problem before its submission to arbitration.[65] Because in that case Ecuador had only been informed of the dispute with the submission of the dispute to arbitration, it was deprived of the opportunity, accorded by the Treaty, to redress it.[66] For the tribunal, this factor was sufficient to defeat its jurisdiction.[67]

68. Similarly, in Murphy v. Ecuador the tribunal explained that the notice and negotiation requirements of the Treaty are not inconsequential procedural requirements but rather key

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[64] *Burlington Resources Inc. v. Republic of Ecuador*, ICSID Case No. ARB/08/5, Decision on Jurisdiction (2 June 2010) (Kaufmann-Kohler, Stern, Orrego Vicuña), ¶ 315 (RLM-12).

[65] *Id.*

[66] *Id.*

[67] *Id.*

components of the legal framework established in the Treaty, which aim at allowing the parties to attempt to amicably settle the disputes that might arise resulting of the investment made by a person or company of the Contracting Party in the territory of the another State.[68] The tribunal accepted that the six-month waiting period required by Article VI(3)(a) constitutes a mandatory requirement, and that the failure to abide by such requirement would divest it of jurisdiction over the dispute.[69]

69. Since, at the time Claimant itself alleges that the dispute arose,[70] there was no ripe "investment dispute" under the Treaty,[71] and the issues in dispute were still properly before the Ecuadorian courts, Ecuador never had a real opportunity to redress any conduct capable of constituting a Treaty breach before submission of the claims to arbitration. Giving notice of a mere contingent claim cannot satisfy these essential prerequisites to arbitration under Article VI of the Treaty. Because Claimant has failed to meet these prerequisites, it is not able to demonstrate that the Tribunal has jurisdiction, even on *a prima facie* basis, and its Request must be denied.

D. There Is No Precedent For This Tribunal To Disregard The Requirement Of Finality By Granting The Interim Measures Sought By Claimant.

70. Claimant cites three cases for the proposition that "[arbitral] tribunals have...issued interim measures of protection restraining state action to enforce a disputed court judgment,

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[68] *Murphy Exploration and Prod. Co. Int'l v. Republic of Ecuador*, ICSID Case No. ARB/08/4, Award on Jurisdiction (15 Dec. 2010) (Oreamuno Blanco, Grigera Naón, Vinuesa), ¶ 151 (RLM-42).

[69] *Id.*, ¶ 156.

[70] Claimant's Request, ¶ 40 ("And more than six months has elapsed since this dispute arose in December 2007 … MSDIA notified Ecuador of the dispute in accordance with the provisions of the Treaty on June 8, 2009.").

[71] Claimant's Notice of Arbitration is dated November 29, 2011. Per Claimant's admission, its action in the National Court of Justice is currently pending.

where doing so would cause serious or irreparable harm to the business of the investor."[72] None of those cases serves to overcome the fact that, under international jurisprudence, Claimant currently has no "right" to interim measures, and cannot sustain its burden to show likelihood of success on the merits and a *prima facie* case on jurisdiction, on the basis of the conduct of the two lower court proceedings or either of those courts' judgments. And it should go without saying that it certainly has no "right" on the basis of an as-yet undelivered judgment of the National Court of Justice. In fact, there is no precedent, and Claimant cites none, for an international arbitral or other tribunal to adjudicate denial of justice claims in the absence of a final action from the State's judicial system as a whole.

71. The first two cases on which Claimant relies -- *Bayindir Insaat Turizm Ticaret Ve Sanayi A.S. v. Islamic Republic of Pakistan* ("*Bayindir*")[73] and *The Electricity Company of Sofia-Belgium v. Bulgaria* ("*Electricity Company of Sofia"*) -- did not involve claims of denial of justice, and neither resulted in interim measures "restraining state action to enforce judicial orders" in cases in which the State was not involved as a party. *Bayindir* involved a dispute between the Turkish investor, Bayindir, and Pakistan over the cancellation of a road construction contract between Bayindir and the National Highway Authority of Pakistan ("NPA"), a corporation controlled by the Government of Pakistan. Bayindir had provided Mobilisation Advance Guarantees to NPA at the outset of the construction project. After NPA cancelled the contract, due to Bayindir's failure to meet deadlines, NPA sought to redeem the Mobilisation

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[72] Claimant's Request, ¶ 54.

[73] *Id.*, ¶ 55.

Advance Guarantees, and it eventually obtained a judgment from the courts of Turkey (where the Guarantees had been issued) allowing it to do so.[74]

72. On Bayindir's request for interim measures, the ICSID tribunal issued a procedural order recommending that Pakistan ensure that NPA -- which Pakistan controlled -- not enforce the Turkish court judgment allowing it to redeem the Mobilisation Advance Guarantees, pending the outcome of the Bayindir/Pakistan arbitration.[75] In addition to the fact that neither denial of justice claims nor the finality of the Turkish court judgment was before the *Bayindir* tribunal, Bayindir did not ask that Pakistan be ordered, and Pakistan was not ordered by the tribunal, to interfere with the Pakistani courts, as Claimant demands here; and it was Pakistan's own instrumentality, NPA, and not -- as here -- an independent private third party, that Pakistan was expected to constrain from enforcing the Turkish court judgment.

73. *The Electricity Company of Sofia* is of no more help to Claimant than *Bayindir*. There, Belgium instituted espousal proceedings before the Permanent Court of International Justice ("PCIJ") against Bulgaria after the Municipality of Sofia, a political subdivision of Bulgaria itself, instituted a Bulgarian court action against the Belgian company Electricity Company of Sofia. After World War II broke out and Bulgaria ceased to participate in the case, Belgium filed a request for interim measures, asking the PCIJ to order "that the new proceedings in the Bulgarian courts shall be suspended until the [PCIJ] has delivered judgment on the merits."[76]

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[74] *Bayindir Insaat Turizm Ticaret Ve Sanayi A.S. v. Islamic Republic of Pakistan*, ICSID Case No. ARB/03/29, Award (27 Aug. 2009) (Kaufmann-Kohler, Berman, Böckstiegel), ¶¶ 8-66 (RLM-11).

[75] *Id.*, ¶¶ 9, 52-59.

[76] *Electricity Company of Sofia and Bulgaria (Belgium v. Bulgaria)*, 1939, P.C.I.J. Series A/B, No. 79, p. 196 (CLM-18).

74. Instead of issuing the order specific to the Bulgarian court proceedings that Belgium had requested, however, the PCIJ ordered generally that "pending the final judgment...the State of Bulgaria should ensure that no step of any kind is taken capable of prejudicing the rights claimed by the Belgian Government or of aggravating or extending the dispute submitted to the [PCIJ]."[77] To the extent that the PCIJ's interim measure order was intended to prevent further proceedings in the Municipality of Sofia's lawsuit against the Electricity Company of Sofia, it was left to Bulgaria itself to determine how it would deal with its political subdivision, as plaintiff in the case, to effect that. There is no comparison between the PCIJ's order and the orders that Claimant asks this Tribunal to issue here, directing Ecuador to interfere with the independent functioning of its judiciary and foreclosing the rights of a private third party plaintiff.[78]

75. Claimant places its greatest reliance on the January and February 2012 interim measures orders in *Chevron Corporation and Texaco Petroleum Company v. The Republic of Ecuador* ("*Chevron III*"), which it inaccurately characterizes as similar to the present case in that it "involves a large judgment resulting from a denial of justice."[79] The issues in the case go far beyond those of denial of justice and instead are based primarily upon claims by Chevron that a 1998 settlement agreement between it and Ecuador is res judicata with respect to the issue of Chevron's liability. Claimant's own submission shows that Chevron did not assert a denial of justice claim until March 20, 2012, more than a month after the last of the tribunal's two interim

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77 *Id*., p. 199.

78 *See* Claimant's Request, ¶ 166(a) - (c).

79 *Id.*, ¶ 62.

measures orders.[80] In addition, for the very reason that the claims regarded the effect and meaning of a settlement agreement, and not merely the decision of a local court, the Chevron tribunal was not presented with arguments that the judgment in favor of the Lago Agrio plaintiffs was not a final judgment of the Ecuadorian courts.

76. Moreover, the amount of the Lago Agrio judgment far exceeds that at issue here; its total of $18 billion is over 100 times the size of the court of appeals' judgment that Claimant is now appealing. Significantly, *Chevron* also involved allegations by claimant, which are untrue, there that the Government of Ecuador had improperly extended support to the Lago Agrio plaintiffs and interfered with the court proceedings, which are untrue, whereas Claimant here has made no allegations of any interference by the Government with regard to NIFA's case against it, a fact that Claimant's counsel acknowledged during the parties' initial conference call with the Tribunal on May 29, 2012.

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* *

77. In summary, because the actions on which Claimant's claim of denial of justice is based are not those of the Ecuadorian judicial system as a whole, it has no "right" capable of being protected by this Tribunal, and it therefore cannot show that the interim measures it seeks are "necessary," as required under Article 26 of the UNCITRAL Arbitration Rules. For the same reason, Claimant has no plausible basis for any claim based on the Treaty, and therefore it cannot possibly meet the *prima facie* test for establishing Ecuador's liability for any Treaty breach. Nor can it establish *prima facie* jurisdiction, because -- in the absence of a final action by the Ecuadorian judicial system as a whole -- there is no "investment dispute" under Article VI(1) of

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[80] *See Id.*, footnote 50.

the Treaty. Nor could Claimant ever have given Ecuador the notice of an "investment dispute" required by Article VI(3)(a) or complied with the six-month period that must pass before it could commence an arbitration under Article VI(2) of the Treaty. For any one of these reasons, Claimant's Request must be denied.

III. CLAIMANT HAS FAILED TO ESTABLISH THE TRIBUNAL'S *PRIMA FACIE* JURISDICTION OVER ITS REQUEST.

78. As stated in the previous section, before an international court or tribunal grants interim measures of protection it must first determine whether the applicant can show a likelihood of success in establishing the tribunal's jurisdiction over the dispute, in their words, to establish such jurisdiction *prima facie*.[81] The same consideration applies to interim measures under Article 26 of the UNCITRAL Rules. Indeed, Claimant has not disputed, nor can it dispute, that it has to satisfy the mandatory preconditions of Article VI for establishing the Tribunal's *prima facie* jurisdiction.[82]

79. The previous section showed why Claimant cannot show a likelihood of success on jurisdiction due to the absence of final action of the court system preventing it from (a) stating an "investment dispute" within the meaning of Article VI(1); and (b) complying with the prerequisites of Article VI(2) and (3)(a). But Claimant's claim suffers from other jurisdictional defects as well, and Claimant cannot succeed in overcoming them. The following sections address in turn Claimant's failure to satisfy the remaining requirements of Article VI, namely, its inability to establish the existence of (a) an "investment" (with respect to which Claimant must allege a breach of any right conferred or created by the Treaty, pursuant to the first paragraph of Article VI); and (b) a valid consent in writing to UNCITRAL Arbitration, pursuant to Article

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81 *See also Quiborax S.A., Non Metallic Minerals S.A. and Allan Fosk Kaplún v. Plurinational State of Bolivia*, ICSID Case No. ARB/06/2, Decision on Provisional Measures (26 Feb. 2012) (Kaufmann-Kohler, Lalonde, Stern), ¶ 108 (RLM-52) ("[i[t] is undisputed by the Parties that the Arbitral Tribunal has the power to order provisional measures prior to ruling on its jurisdiction. The Tribunal will not exercise such power, however, unless there is a *prima facie* basis for jurisdiction.") (emphasis added).

82 Claimant's Request, ¶¶ 32-40.

VI(3)(a). As shown below, Claimant's failure to adhere to these requirements, even on a prima facie basis, is glaring.[83]

A. Claimant Has Failed To Establish The Existence Of A Protected Investment.

80. Article VI(1) of the Treaty provides in pertinent part:

> For purposes of this Article, an investment dispute is a dispute between a Party and a national or company of the other Party arising out of or relating to … (c) an alleged breach of any right conferred or created by this Treaty with respect to an *investment*. (emphasis added)
>
> In turn, "investment" is defined in I(1)(a), which reads as follows:
>
> For the purposes of this Treaty,
>
> (a) "investment" means every kind of investment in the territory of one Party owned or controlled directly or indirectly by nationals or companies of the other Party, such as equity, debt, and service and investment contracts; and includes:
>
> (i) tangible and intangible property, including rights, such as mortgages, liens and pledges;
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> (ii) a company or shares of stock or other interests in a company or interests in the assets thereof;
>
> (iii) a claim to money or a claim to performance having economic value, and associated with an investment;
>
> (iv) intellectual property which includes, inter alia, rights relating to: literary and artistic works, including sound recordings; inventions in all fields of human endeavor; industrial designs; semiconductor mask works; trade secrets, know-how, and confidential business information; and trademarks, service marks, and trade names; and

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[83] Ecuador reserves its right to supplement these submissions, as well as raise further objections to the Tribunal's jurisdiction, at the appropriate stage of the proceedings. For the purposes of this submission, and for the reasons that follow, Ecuador submits that Claimant has failed to demonstrate, even on a *prima facie* basis, that the Tribunal is with jurisdiction over the alleged dispute. The Tribunal's disposition of Ecuador's submissions to that effect is without prejudice to the jurisdictional objections that Ecuador will raise at the appropriate stage of the proceedings. *See*, e.g., *Anglo Iranian Oil Co. Case (United Kingdom v. Iran)*, Judgment (22 July 1952), I.C.J. Reports 1952, pp. 102, 114 (RLM-9).

> (v) any right conferred by law or contract, and any license and permits pursuant to law. (emphasis added)

81. The definition of "investment" in Article I(1)(a) appears somewhat circular ('"investment' means every kind of investment …"). Nonetheless, the wording of the provision reflects a conscious choice on the part of the Parties. As a leading commentator on the U.S. model BIT program states:

> U.S. negotiators …wished to make clear that an asset would be covered by the definition only if it had the character of an investment. Accordingly, Article I(c) of the 1983 model … defines investment as "every kind of investment." *In effect, the treaty applies to all investment and to nothing more and nothing less*. Despite its circularity, this phrase was thought to convey the flexibility that BIT drafters wanted to incorporate into the definition.[84]

82. Recent investor/State arbitral jurisprudence shows that the concept of "investment" has an objective meaning in itself, whether as mentioned in the ICSID Convention or as defined in BITs. In *Romak v. Uzbekistan*, the UNCITRAL tribunal stressed that "[t]here is no basis to suppose that the word [investment] *has a different meaning in the context of the ICSID Convention than it bears in relation to the BIT*."[85] It concluded that "investment" under the applicable BIT had an inherent meaning (irrespective of whether the investor resorts to ICSID or UNCITRAL arbitral proceedings) requiring (a) a certain contribution; (b) that extends over a certain period of time and; (c) involves some risk.[86] It was comforted in this analysis by the

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[84] K. Vandevelde, U.S. INTERNATIONAL INVESTMENT AGREEMENTS (2009), pp. 114-115 (RLM-33) (emphasis added). The Treaty is based on the 1992 model BIT, which left the essential definition of investment in the 1983 model unchanged. *Id*. pp. 102, 118-120.

[85] *Romak S.A. v. The Republic of Uzbekistan*, PCA Case No. AA280, UNCITRAL, Award (26 Nov. 2009) (Mantilla-Serrano, Rubins, Molfessis), ¶ 194 (RLM-54) (emphasis added) ("*Romak*"). The tribunal added that "it would be unreasonable to conclude that the Contracting Parties contemplated a definition of the term "investments" which would effectively exclude recourse to the ICSID Convention and therefore render meaningless – or without *effet utile* – the provision granting the investor a choice between ICSID or UNCITRAL Arbitration." *Id*. ¶ 195.

[86] *Id*. ¶ 207 (adding "[i]f an asset does not correspond to the inherent definition of "investment," the fact that it falls within one of the categories listed in [the BIT] does not transform it into an "investment.").

reasoning adopted by other arbitral tribunals, "which consistently incorporates contribution, duration and risk as hallmarks of an 'investment.'"[87]

83. The tribunal eventually found that Romak did not own an "investment" within the meaning of the applicable BIT, since its alleged rights were "embodied in and arise out of a sales contract, a one-off commercial transaction pursuant to which Romak undertook to deliver wheat against a price to be paid by the Uzbek parties."[88]

84. In *Alps Finance and Trade AG v. Slovak Republic*, another tribunal operating under the UNCITRAL Rules also noted that the multitude of bilateral and multilateral investment treaties, although containing varying definitions of investment, "explicitly or implicitly" refer to an "objective" definition given by international law, "as applied by other treaty-based tribunals."[89] The BIT in question, just like the Treaty:

> [a]lso provides for an alternative dispute mechanism … allowing the investor to also opt for submitting the dispute to ICSID arbitration … This means that, although the BIT gives a broad "investment" definition, the two Contracting States must have inevitably intended to refer to what constitutes "investment" under the ICSID Convention as concretely applied in the relevant case-law.[90]

85. The tribunal further stated that the definition of investment in a given investment treaty "is not an entirely self-standing concept,"[91] and that an investment must not merely conform to such definition, but should also satisfy "necessary conditions or characteristics" of an investment, which include (a) a capital contribution to the host State by the private contracting

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[87] *Id.*

[88] *Id.* ¶ 242.

[89] *Alps Finance*, ¶ 239 (RLM-5).

[90] *Id.*, ¶ 239 (emphasis added).

[91] *Id.* ¶ 240.

party; (b) a significant duration over which the project is implemented; and (c) sharing of operational risks inherent to the contribution together with long-term commitments.[92] The tribunal concluded that the claimant had not "invested" in the Slovak Republic in the meaning of the BIT and under the objective definition of "investment."[93]

86. In the circumstances of the present case, Claimant has made no effort to establish that, at the time it alleges its dispute arose, it had anything in the territory of Ecuador that could be considered an "investment" within the meaning of Article I(1)(a) of the Treaty, that is, that meets the requirement of "a contribution that extends over a certain period of time and that involves some risk."[94] Claimant has thus utterly failed to establish the existence of an investment during the time at which it claims acts committed by Ecuador breached the Treaty.

87. In its Notice of Dispute, for instance, Claimant merely states that "MSDIA's assets in Ecuador, including but not limited to its Ecuadorian branch headquartered in Quito, constitute [protected] investments."[95] It explains that "MSDIA has done business in Ecuador for more than 30 years, making many essential pharmaceutical products available," and that until 2003, it owned a manufacturing and packaging unit located in the Chillos Valley near Quito.[96] In its Request for Arbitration, Claimant does not even attempt to show that it owns or controls a protected investment in Ecuador.[97] It is only in the Request for Interim Measures that Claimant

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[92] *Id.* ¶ 241.

[93] *Id.* ¶¶ 238, 247.

[94] *Romak*, ¶ 207 (RLM-54).

[95] Notice of Dispute (8 June 2009), p. 2 ("Notice of Dispute").

[96] *Id.*

[97] Although Claimant addresses the other preconditions to the Tribunal's jurisdiction, it remains conspicuously silent as regards the existence of a protected investment other than reproducing the relevant provision of the Treaty. *See* Notice of Arbitration, ¶¶ 20-25 and footnote 8.

reveals its hand, albeit again cautiously. There, Claimant alleges that its business distributing and selling essential pharmaceutical products in Ecuador, through a branch located in Ecuador, "plainly constitutes an investment for purposes of Article I(1)(a)."[98] Claimant also refers to the manufacturing and packaging unit that it owned until 2003, which also, in its view, "plainly qualifies as an "investment" under Article I(1)(a)."[99]

88. These arguments, however, are not sufficient to discharge Claimant's burden to establish the existence of a protected investment under the Treaty, even on a *prima facie* basis. First, the sale and distribution of pharmaceutical products are ordinary trade transactions, which are not protected under the Treaty. The Letter by which the U.S. Government submitted the Treaty to the U.S. Senate for ratification confirms that protected investments under Article I(1)(a) do not include "claims arising solely from trade transactions:"

> The definition provides a non-exclusive list of assets, claims and rights that constitute investment … The requirement that a "claim to money" be associated with an investment *excludes claims arising solely from trade transactions, such as a simple movement of goods across a border*, from being considered investments covered by the Treaty.[100]

89. Second, the mere transfer of title over goods in exchange for full payment is not considered a "contribution" for purposes of the existence of an investment protected under a BIT.[101]

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[98] Claimant's Request, ¶ 35.

[99] *Id.* ¶ 36.

[100] Department of State, Letter of Submittal for U.S.-Ecuador Treaty Concerning the Encouragement and Reciprocal Protection of Investment, *reprinted in* SENATE TREATY DOC. NO. 103-15 (1993), p. 7 (RLM-17) ("Dept. of State Letter of Submittal for U.S.-Ecuador BIT").

[101] *Romak*, ¶ 222 (RLM-54).

90. Third, the fact that MSDIA's "business" is conducted through a local branch, which has no independent legal personality in Ecuadorian law,[102] shows that Claimant has undertaken no risk in this endeavor. As stated by the tribunal in *Romak*:

> All economic activity entails a certain degree of risk. As such, all contracts – including contracts that do not constitute an investment – carry the risk of non-performance. However, this kind of risk is pure commercial, counterparty risk, or, otherwise stated, the risk of doing business generally. It is therefore not an element that is useful for the purpose of distinguishing between an investment and a commercial transaction … An "investment risk" entails a different kind of *alea*, a situation in which the investor cannot be sure of a return on his investment, and may not know the amount he will end up spending, even if all relevant counterparties discharge their contractual obligations. Where there is "risk" of this sort, the investor simply cannot predict the outcome of the transaction.

Romak, ¶¶ 229-30 (RLM-54).

91. Finally, Claimant did not own the manufacturing and packaging plant during the time at which Claimant claims the acts constituting a breach of the Treaty were allegedly committed by Ecuador.[103] Claimant sold the plant to Ecuaquimica in July 2003,[104] whereas the decision of the Ecuadorian District Court, which Claimant alleges gave rise to the existence of an investment dispute under the Treaty,[105] was rendered on December 17, 2003. Thus, on December 17, 2003, Claimant retained no subsisting interest in an "investment" in Ecuador.

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[102] *See* Canan Witness Statement, ¶ 5 fn. 1 (stating that "I use "MSDIA" as a shorthand reference to MSDIA's branch office in Ecuador. The branch is part of MSDIA and is not a separate corporate entity."). It follows that MSDIA Ecuador is not a "company" for purposes of Article I(1)(a)(ii).

[103] *Libananco Holdings Co. Ltd v. Turkey*, ICSID Case No. ARB/06/8, Final Award (2 Sept. 2011) (Hwang, Alvarez, Berman), ¶ 128 (RLM-66).

[104] Notice of Arbitration, ¶ 39.

[105] Claimant's Request, ¶ 12.

92. In sum, Claimant cannot establish the existence of a protected investment under the Treaty, thereby failing to meet the *prima facie* jurisdiction standard. Consequently, its Request for Interim Measures must be denied.

B. Claimant's Initiation Of This Arbitration Contravenes Article VI

93. Article VI(3)(a) provides in pertinent part:

> … the national or company concerned may choose to consent in writing to the submission of the dispute for settlement by binding arbitration: (i) to the International Centre for the Settlement of Investment Disputes ("Centre") established by the Convention on the Settlement of Investment Disputes between States and Nationals of other States, done at Washington, March 18, 1965 ("ICSID convention"), provided that the Party is a party to such Convention; or (ii) to the Additional Facility of the Centre, if the Centre is not available; or (iii) in accordance with the Arbitration Rules of the United Nations Commission on International Trade Law (UNCITRAL), or (iv) to any other arbitration institution, or in accordance with any other arbitration rules, as may be mutually agreed between the parties to the dispute.

94. The U.S. Submittal Letter confirms that the investor may make an "exclusive and irrevocable choice to employ one of the several arbitration procedures outlined in the Treaty." It specifies that the investor "may choose between the International Center for the Settlement of Investment Disputes (ICSID) (if the host country has joined the Centre -- otherwise the ICSID Additional Facility is available) and *ad hoc* arbitration using the Arbitration Rules of the United Nations Commission on International Trade Law (UNCITRAL)."[106]

95. Article VI(3)(b) provides that "[o]nce the national or company has so consented [*i.e.*, pursuant to Article VI(3)(a)], either party to the dispute may initiate arbitration in accordance with the choice so specified in the consent." In a similar vein, Article VI(4) states in pertinent

[106] Dept. of State Letter of Submittal for U.S.-Ecuador BIT, p. 7 (RLM-17).

part that "[e]ach Party hereby consents to the submission of any investment dispute for settlement by binding arbitration in accordance with the choice specified in the written consent of the national or company under paragraph 3 …"

96. In light of these provisions, it is evident that the Treaty contemplates that Claimant makes a single, definitive and exclusive selection of arbitral forum. This is clear from the terms of Article VI(3)(a), in particular the use of the disjunctive clause "or" accompanying the various listed alternatives. It is confirmed by the explanations in the U.S. Transmittal Letter, which state that the investor must make an "exclusive and irrevocable choice to employ *one* of the several arbitration procedures outlined in the Treaty." Moreover, Article VI(3)(b) and (4) clearly contemplate a single choice, referring to "the choice specified in the consent" rather than choices.

97. By its letter of June 8, 2009, Claimant accepted the offer made by Ecuador in the Treaty and chose to consent in writing to the submission of the dispute for settlement by binding arbitration under the ICSID Convention.[107] In accordance with Article 25 (1) of the ICSID Convention, "[w]hen the parties have given their consent, no party may withdraw its consent unilaterally."[108] Hence, Claimant's reservation "at any time to select any form of arbitration set forth under Article VI(3)(a)"[109] is ineffective, both on account of the Treaty, which requires investors to make a choice to employ one of the several arbitration procedures outlined in Article VI(3)(a),[110] as well as a result of the ICSID Convention. Thus, from the date of its letter

[107] Notice of Dispute, pp. 1-2.

[108] ICSID Convention, Article 25.

[109] Notice of Dispute, p. 2.

[110] Dept. of State Letter of Submittal for U.S.-Ecuador BIT, p. 7 (RLM-17).

choosing to consent to arbitration under Article VI(3)(i) of the Treaty (ICSID Convention), Claimant was precluded from choosing to consent to arbitration under Article VI(3)(iii) of the Treaty (UNCITRAL Arbitration Rules).[111]

98. Finally, even if Claimant could reserve a right that it plainly does not have, the Treaty requires that it consent in writing to UNCITRAL arbitration prior to and separately from the submission of the alleged dispute to this arbitration. This is clear from the terms of Article VI(3), which establish the need for the investor to consent in writing, and only then to initiate arbitration in accordance with the choice so specified in its written consent. In order to pursue UNCITRAL proceedings, Claimant must have submitted a fresh consent, selecting UNCITRAL arbitration, even assuming, *vel non*, that Claimant has the right to backtrack from its initial choice of ICSID arbitration. Its failure to do is a further reason why it cannot establish, even *prima facie*, jurisdiction of the Tribunal sufficient to grant its Request for Interim Measures.

[111] Notice of Arbitration, ¶ 23.

IV. CLAIMANT'S REQUEST FOR INTERIM MEASURES MUST BE DENIED BECAUSE IT HAS FAILED TO DEMONSTRATE URGENCY.

99. Claimant alleges that the decision of the National Court of Justice "will trigger immediate and irreversible harm to MSDIA," that the National Court's decision may be issued "at any time," and that enforcement of that decision will be "swift," in "less than a month."[112] Although in reality Claimant has no idea how the National Court may rule on its appeal, it asserts two actions as the basis for urgency: the issuance of the decision of the National Court (linking it to allegations of irreparable harm before the enforcement of the judgment) and its subsequent enforcement (linking it to allegations of irreparable harm arising from enforcement).

100. Contrary to Claimant's arguments, the urgency requirement is not met in this case. Neither the entry of the National Court's decision, nor the enforcement of any judgment is imminent. *First*, urgency exists only when a threat of irreparable harm is immediate and not, as Claimant incorrectly suggests, when such harm is possible at an undetermined time prior to a final award. *Second*, the National Court's decision is uncertain in content as well as in the timing of its issuance. *Third*, even if an adverse decision of the National Court were to be issued at a future date, actual enforcement of any judgment would occur no earlier than approximately six months after the decision's issuance. Claimant's allegations of imminent harm are incorrect as a matter of Ecuadorian procedural law and practice, and Claimant's application must be denied for lack of urgency.

[112] Claimant's Request, ¶ 3.

A. The Urgency Requirement Under UNCITRAL Article 26 Requires That The Alleged Harmful Action Be Certain And Imminent From The Perspective Of The Present.

101. Article 26 of the UNCITRAL Arbitration Rules contemplates that "the party requesting the measure is facing harm to rights it is pursuing in the arbitration and that the harm is *so imminent* that it cannot await the tribunal's final decision on the merits."[113] Claimant admits that the threat of irreparable harm must be urgent.[114] However, it assumes that urgency is met so long as there is a possibility that the harmful action – in this case, a decision of the National Court of Justice adverse to it, followed by its execution – may arise at any time prior to a final award in the case. But urgency must be assessed from the present perspective and not just in relation to the future date of a final award.[115]

102. ICJ jurisprudence establishes that the urgency requirement of interim measures must be analyzed as an issue of fact in determining the *immediate* potential of an allegedly harmful action. Neither the ICJ Statute nor the ICJ Rules explicitly state that the indication of provisional measures may be requested only in cases of urgency, but the underlying presumption of those

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[113] S. Baker & M. Davis, THE UNCITRAL ARBITRATION RULES IN PRACTICE: THE EXPERIENCE OF THE IRAN-UNITED STATES CLAIMS TRIBUNAL (1992), p. 139 (RLM-55) (emphasis added). *See EnCana*, ¶ 13 (CLM-10) ("[T]he measure sought must be urgent"); *Paushok*, ¶ 39 (CLM-12) ("Tribunal still has to deem those measures urgent and necessary to avoid 'irreparable' harm and not only convenient or appropriate").

[114] Claimant's Request, ¶ 71.

[115] *See, e.g., Bendone-Derossi Int'l v. Iran*, Case No. 375, Chamber One, Award No. ITM 40-375-1 (7 June 1984), *reprinted in* 6 Iran-U.S. Cl. Trib. Rep. 130 (RLM-67) (denying the respondent Iran's request for interim measures based on arguments that the claimant had sought to enforce an ICC award by obtaining an attachment order from the German courts, where "the attachment of assets referred to by the Respondent was in effect for nearly ten months before the Respondent filed its Petition. The Claimant is unaware, and the Respondent has not alleged, that any action with regard to the execution of the attachment is imminent").

rules has been that they may be invoked only in cases of urgency.[116] According to the ICJ, the term "require" implies circumstances of a compelling character – closer to the notion of necessity, the term that appears in Article 26 of the UNCITRAL Arbitration Rules.[117] When considering whether the circumstances of a case warrant provisional measures, the ICJ considers whether the alleged harm is imminent.[118] The Court has indicated provisional measures in situations of immediate threat of irreparable harm, for example, when it found an immediate possibility of a further atmospheric nuclear test being carried out by France that would cause radioactive fallout,[119] when it considered armed conflicts that were creating risks of irreparable prejudice to persons or properties at the time of the application for interim measures,[120] and in cases of imminent execution of individuals condemned to death.[121] As succinctly explained by one author, the ICJ has granted provisional measures in cases "[a]s a matter of fact, . . . on the basis of events which were certain (since they already had taken place) or on the basis of events

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[116] S. Rosenne, PROVISIONAL MEASURES IN INTERNATIONAL LAW (2005), p. 134 (RLM-56). Article 41 of the Statute of the International Court of Justice provides that the Court may indicate provisional measures "if it considers that circumstances so require." Statute of the International Court of Justice, Art. 41.

[117] *Id.*, p. 138. The ICJ has consistently held that interim protection by nature requires urgent treatment; "consequently, . . .a request lacking that quality is not one for such measures in the meaning of the Statutes and Rules." *Id.*, p. 113.

[118] The ICJ has confirmed the requirement of "imminence" as the standard for urgency in numerous cases. *See e.g.*, *Pulp Mills on the River Uruguay (Argentina v. Uruguay)*, Order on Provisional Measures (23 Jan. 2007), I.C.J. Reports 2007, ¶¶ 32, 42 (RLM-51) ("*Pulp Mills Case*"); *Interhandel Case (Switzerland v. United States)*, Order on Provisional Measures (24 Oct. 1957), I.C.J. Reports 1957, p. 110. (RLM-29) ("*Interhandel Case*").

[119] *Nuclear Test Case (Australia v. France)*, Order on Provisional Measures (22 June 1973), I.C.J. Reports 1973, p. 99 (RLM-43); *Nuclear Tests (New Zealand v. France)*, Order on Provisional Measures (22 June 1973), I.C.J. Reports 1973, p. 135 (RLM-44) ("*Nuclear Tests (New Zealand v. France)*").

[120] *Frontier Dispute (Burkina-Faso v. Republic of Mali)*, Order on Provisional Measures (10 Jan. 1986), ICJ Reports 1986, ¶ 21 (RLM-25); *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Yugoslavia (Serbia and Montenegro)*, Order on Provisional Measures (8 Apr. 1993), I.C.J. Reports 1993, ¶ 45 (RLM-10); *Land and Maritime Boundary (Cameroon v. Nigeria)*, Order on Provisional Measures (15 Mar. 1996), I.C.J. Reports 1996, ¶ 38 (RLM-35).

[121] *LaGrand (Germany v. United States of America)*, Order on Provisional Measures (3 Mar. 1999), I.C.J. Reports 1999, ¶ 24 (CLM-19).

the occurrence of which in the near future could be regarded as certain unless prevented by some diplomatic or judicial action."[122]

103. Investor-State tribunals under both the UNCITRAL and ICSID rules have invariably found urgency only in cases of an immediate and real threat of harm, not an uncertain one.[123] In *Perenco v. Ecuador*, *City Oriente v. Ecuador*, and *Burlington v. Ecuador* – all relied on by Claimant – the tribunals were faced with PetroEcuador's demand for immediate payment of levies and imminent seizure of assets under Law 42, and in two of these cases the payments were due within a few days.[124] In Perenco, the tribunal stressed that "[p]rovisional measures may only be granted where they are urgent, because they cannot be necessary if, for the time being, there is no demonstrable need for them."[125]

104. In all of these cases, the urgency requirement was satisfied only by immediacy at the time of the filing for the application.[126] As discussed below, Claimant's request fails to demonstrate

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[122] J. Sztucki, INTERIM MEASURES IN THE HAGUE COURT (1983), p. 105 (internal citations omitted) (RLM-31).

[123] *See Paushok*, ¶ 45 (CLM-12); *EnCana*, ¶¶ 13-14 (CLM-10); *Cemex*, ¶¶ 26-29 (CLM-4); *Phoenix Action, Ltd. v. Czech Republic*, ICSID Case No. ARB/06/5, Decision on Provisional Measures, 6 April 2007, ¶ 32 (RLM-48).

[124] *See Perenco Ecuador Limited v. Republic of Ecuador and Empresa Estatal Petróleos del Ecuador*, ICSID Case No. ARB/08/6, Decision on Provisional Measures (May 8, 2009), ¶ 46 (CLM-13) ("*Perenco*") ("On the material currently before the Tribunal, it seems clear that, as matters now stand, and in the absence of provisional measures, Perenco *faces the imminent seizure of its assets in Ecuador* . . . unless it pays that sum within a very few days" (emphasis added)); *Burlington Resources Inc. v. Republic of Ecuador*, ICSID Case No. ARB/08/5, Procedural Order No. 1, ¶ 74 (CLM-3) ("*Burlington Resources* (2009)") ("The urgency [linked to the imminent coercive payment procedure] lies elsewhere and is closely linked to the non-aggravation of the dispute discussed in the preceding section, to which the Tribunal refers"); *City Oriente Limited v. The Republic of Ecuador*, ICSID Case No. ARB/06/21, Decision on Provisional Measures, November 19, 2007, Decision on Provisional Measures (Nov. 19, 2007), ¶ 69 (CLM-7) ("*City Oriente Ltd.* (2007)") ("The letter which Petroecuador attached to its latest invoice differs from all previous letters, as it includes a demand for payment "*notwithstanding any pending proceeding.*" . . . In the Tribunal's opinion, the passing of the provisional measures is indeed urgent, precisely to keep the enforced collection or termination proceedings from being started. . . .")

[125] *Perenco*, ¶ 43 (CLM-13).

[126] *See, e.g.*, *Occidental Petroleum*, ¶ 87 (RLM-45) ("An order for provisional measures will only be made where such measures are found to be necessary and urgent in order to avoid imminent and irreparable harm. The Tribunal

the required imminence, because it is based on incorrect representations of both Claimant's cassation application currently pending before the National Court of Justice and applicable Ecuadorian laws and procedures relating to the execution of judgments.

B. Issuance Of The National Court's Decision Is Neither Predictable In Content Nor Certain In Time.

104(a). Claimant seeks that this Tribunal "[o]rder Ecuador to take any and all available steps to prevent enforcement of any judgment in the NIFA litigation against MSDIA."[127] But Claimant has failed to show either that the decision of the National Court of Justice will be adverse to it or that, if it were, the execution of the judgment would follow quickly thereafter.

104(b). First, while Claimant proceeds on the unexplained assumption that the National Court of Justice will uphold a substantial monetary judgment against it, when in fact the outcome of the National Court's decision in this case is an entirely open question. But, as explained by Respondent's expert on Ecuadorian law, Dr. Moscoso Serrano, given the nature of the Claimant's appeal, it is "impossible to anticipate or predict . . . the content of the National Court's decision."[128] Claimant's appeal before the National Court is based on two different sets of grounds: violations of procedural and due process rules and violations of substantive law (i.e., arguing that the court of first instance exercised improper jurisdiction over NIFA's anti-trust claims). In light of these two grounds, Dr. Moscoso Serrano concludes that there are at least as

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is convinced by the evidence that even if the right to specific performance had existed, there *is no imminent plan on the part of the Ecuadorian Government to hand over Block 15 and hence no risk of irreparable harm*" (emphasis added)).

[127] Claimant's Request, ¶ 166.

[128] Statement on Ecuadorian Law of Luis Alberto Moscoso Serrano (24 July 2012) ("Moscoso Legal Opinion"), ¶ 7.

many as *nine eventualities* for the National Court's decision, only one of which is affirmation of the Court of Appeal's decision, which he outlines as follows:

> "[1] Acceptance by the Court of the causes for cassation on the procedural grounds alleged by MSDIA would have the following results, any one of which would mean that the judgment would ***no longer exist and there would be no enforcement***:
>
> a. The first issue which would be examined by the National Court by virtue of the appeal in cassation is whether a jurisdictional problem does indeed exist, such that , the claim filed by NIFA should not have been heard and resolved by the Civil Case Judge, but rather by the Court for Administrative Contentious Matters, as asserted by MSDIA. If this allegation were accepted, there would be no judgment against MSDIA that could be enforced, since the case would have to be resubmitted before the competent Court (assuming NIFA chose to refile the case).
>
> b. The judgment would also be invalidated if the National Court accepts MSDIA's allegation related to the omission made by the Provincial Court, which did not ask for the opinion of the Court of Justice of the Andean Community before issuing its judgment as required by the Andean Community regulations. If this allegation is upheld, the entire case will be dismissed, and there will be no enforceable judgment.
>
> c. If the Court finds constitutional violations affecting due process or impairing MSDIA's ability to defend its rights, the National Court will also dismiss the case without prejudice. Consequently, if MSDIA's allegations of constitutional violations are accepted by the National Court, there would be no judgment against MSDIA that could be enforced.
>
> d. Violation of procedural rules or failure to observe them during the administration of the case gives rise to the dismissal of the judgment and remand of the case to the lower court. The lower court would have to recommence the proceedings from the time of the violation of the procedural rules. Consequently, again, there would be no judgment that could be enforced until the lower court were to issue a new judgment and this judgment became final.
>
> [2] Besides the above mentioned procedural grounds, MSDIA has also requested cassation based on challenges of undue application, lack of application and erroneous interpretation of rules of

> substantive or material law, including mandatory judicial precedents, and rules of assessing evidence. If any of these numerous challenges is accepted by the National Court there would be reason to modify or overturn the appealed judgment, and the same National Court will issue another decision correcting the errors incurred by the lower Court. If this is the case, the final judgment would be favorable to MSDIA and there would be no basis for an enforcement action against MSDIA.
>
> [3] The National Court may also simply modify the judgment in whole or in part, in which case it would make the changes that it finds necessary. The Court may certainly also change the amount that has been ordered to be paid by MSDIA to NIFA, and even establish criteria so that the amount would be calculated in a further summary proceeding before the same judge who heard the cause in trial court. Only after that summary proceeding has been concluded would there be an enforceable judgment."[129]

105. Dr. Moscoso Serrano concludes that "[a]s a consequence of the foregoing, having examined the current status of the case, it is impossible to conclude that enforcement of a judgment against Claimant will ever occur."[130] In other words, each of these eventualities is conceivable, and all are based on Ecuadorian law and procedures. None of them is any more certain than any other. The multiplicity of alternative outcomes in itself underscores the uncertain nature of the "imminent irreparable harm" Claimant alleges. Uncertain outcomes are akin to uncertain courses of action, which have been rejected in the past by investor-State tribunals for lack of urgency.[131] Enforcement could take place only if the National Court were to reject Claimant's grounds for appeal in cassation entirely – only one of multiple possibilities.[132]

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[129] Moscoso Legal Opinion, ¶¶ 10-12 (internal citations omitted) (emphasis added).

[130] *Id.*, ¶ 13.

[131] *See, e.g., Occidental Petroleum*, ¶¶ 86-91 (RLM-45) (denying interim relief because the claimant failed to establish urgency: "Specifically, the claimant did not "know what course of action Ecuador intends to take with respect to the future operator of Block 15"); *Interhandel Case*, p. 106 (finding that the sale of shares that the applicant sought to enjoin was not certain because it was "*conditional upon a judicial decision rejecting the claims of Interhandel.*") (RLM-29)

[132] Moscoso Legal Opinion, ¶¶ 10-12.

Under the majority of the other possible outcomes, no judgment subject to execution against Claimant would exist.

106. Moreover, even if the National Court renders a decision affirming the lower courts' findings, and rejecting Claimant's due process claims, the decision would still not be final; Claimant would still be able to appeal to the Constitutional Court of Ecuador, according to its rights under Ecuadorian law.[133] As discussed earlier, Claimant could challenge an adverse decision of the National Court under Article 437 of the Ecuadorian Constitution through an extraordinary action for protection before the Constitutional Court, the final authority on constitutional law issues.[134]

107. Second, issuance of a decision by the National Court of Justice cannot be considered as imminent. As discussed above, Claimant, the only defendant in the NIFA litigation, appealed the judgment of the Court of Appeals issued on September 23, 2011, in the amount of $150 million, to the National Court of Justice, which admitted the Claimant's cassation application on November 10, 2011. Dr. Moscoso Serrano considers as "unrealistic Mr. Ortega Trujillo's assessment that the National Court could decide the case 'at any moment,' if that expression is intended to suggest that the decision would be imminent or could be produced in a matter of days from now."[135] Dr. Moscoso Serrano explains that once it admits an application for cassation, the National Court has a statutorily-prescribed timeframe of 270 business days to adjudicate

[133] *Id.*, ¶¶ 14-17.

[134] *Id.*

[135] *Id.*, ¶ 8.

Claimant's appeal.[136] He explains that, because the National Court is facing a delay in the resolution of its cases, the most likely scenario is that the entire allotted 270 business days will be required to decide the appeal.[137] Dr. Moscoso Serrano explains that "Article 17 of the Law of Cassation does not expressly state *when this period begins to run*; however, the law could be interpreted to mean that the period does not begin to run until the proceeding has ended, that is, after the judicial hearing which in this case was held on December 26, 2011. In that case, the period within which to issue a decision would end on January 11, 2013. Alternatively, the period could be understood to begin to run upon the expiration of the deadline to answer the counterparties' allegations, which in this case was on November 24, 2011. In that case, the period within which to issue a decision would end on December 17, 2012."[138]

108. In addition, as a result of a backlog of civil cases accumulated from prior years, amounting to approximately 1,400 pending cases,[139] the National Court may not be able to render its decision within the timeframe of 270 business days.[140] While the case is pending before the National Court, the court of appeals' judgment is not enforceable, because Claimant has posted a bond, which stays enforcement during the appellate review.[141] Until the National Court issues its decision, there is no ruling to be enforced.

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[136] *Id.*

[137] *Id.*

[138] *Id.* (emphasis added).

[139] *Id.*

[140] *Id.*

[141] *Id.*, ¶ 5.

109. Thus, the National Court's decision is neither imminent nor certain. The general uncertainty of a resolution of pending judicial proceedings was considered by the ICJ in the *Interhandel* Case. There, Switzerland asked the Court to indicate a measure requesting the Government of the United States to take no steps to dispose of shares that Switzerland claimed to be the property of Swiss nationals.[142] The Court declined to indicate the requested measures, finding that sale of the shares was not imminent. The Court held that "according to the law of the United States, the sale of those shares can only be effected after termination of a judicial proceeding which is *at present pending in that country* in respect of which there is *no indication as to its speedy conclusion, and whereas such a sale is therefore conditional upon a judicial decision rejecting the claims of Interhandel.*"[143] Consequently, the uncertainty of both the timing and content of a judicial ruling demonstrates that the urgency requirement for obtaining provisional measures had not been met.

C. Enforcement Of A Future Judgment Adverse To Claimant, If One Ever Exists, Will Not Be Swift As A Matter Of Ecuadorian Civil Procedure Rules.

110. Even if a decision of the National Court adverse to Claimant were imminent, the execution of any surviving monetary judgment would likely take many additional months and would not, as Claimant has alleged, be "swift," or take "less than a month."[144] As explained by Dr. Moscoso Serrano, any judgment of the National Court would not be immediately enforceable.[145] As even Claimant's own expert acknowledges, there are multiple stages in the

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[142] *Interhandel Case,* p. 106 (RLM-29)

[143] *Id.*, pp. 110, 112 (emphasis added).

[144] *See* Claimant's Request, ¶ 3.

[145] Moscoso Legal Opinion, ¶¶ 18-29.

enforcement process. But contrary to Claimant and its expert, these stages would consume at least approximately six months.

111. First, if the National Court affirms the court of appeals' decision or modifies it, Claimant may request clarifications or explanations of the judgment within three days.[146] Dr. Moscoso Serrano explains that this "mechanism [is] regularly employed by litigants to delay enforcement because prior to deciding the request for clarification or decision on a matter not yet decided, the Court must hear the other party and afford it a period of time to explain its point of view."[147] The process of clarification and explanation of the decision involves a hearing at the request of a party, which takes as long as two weeks to complete; only after the hearing, would the National Court "issue its decision with respect to the request for clarification or for deciding additional matters. It is only three days after this last decision that the judgment would become enforceable."[148]

112. After this process, the National Court is required to send the entire record of the case to the court of appeals (the Provincial Court).[149] Once it receives the case file with the certified copy of the final judgment, the Secretary of the Provincial Court must verify that the file is complete. Although this is an administrative task, the file in the NIFA/MSDIA case is voluminous, and verification would take "several days since it is necessary to verify that no page

[146] *Id.*, ¶ 19.

[147] *Id.*

[148] *Id.*

[149] *Id.*, ¶ 20.

is missing from the 18,000-plus pages of the file."[150] The court of appeals, in turn, is required then to send the docket to the court of first instance.[151] Once the court of first instance receives the case file, it must in turn verify that it is complete – a process that takes several additional days.[152]

113. Three days after being notified, the judgment-creditor "should request that an expert appointed by the judge estimate the value of the interest and costs of the proceeding, since in this case the first instance judge included in his judgment the payment of interest and court costs."[153] Dr. Moscoso Serrano explains – and Prof. Trujillo failed to address in his opinion – that, prior to granting the "order for enforcement", the court must recalculate the interest on the judgment and calculate the court fees. That process can be lengthy because it involves both expert reports to assist the court in the calculation and the participation of both parties to the litigation.[154] For example, Dr. Moscoso Serrano explains that "[t]he expert for the payment of interest as well as the official designated to calculate costs may request expansions of the periods to deliver their reports."[155] Dr. Moscoso Serrano concludes that "[o]nly after complying with all of these steps may the creditor request that an 'order for enforcement' be issued, i.e. the order from the judge so that payment or relinquishing of assets may be made by the judgment debtor."[156]

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[150] *Id.*, ¶ 21.

[151] *Id.*

[152] *Id.*, ¶ 22.

[153] *Id.*

[154] *Id.*, ¶¶ 22-27.

[155] *Id.*, ¶ 24.

[156] *Id.*, ¶ 27.

114. Dr. Moscoso Serrano's conclusions wholly undermine Claimant's assertion of imminence. Dr. Moscoso Serrano explains that, based on his experience working as a judge, he "do[es] not know of a single case in which all of these steps have been complied with in the extremely short period of time estimated by Mr. Ortego Trujillo."[157] Based on his experience as a judge and as a litigating attorney, Dr. Moscoso Serrano "estimate[s] that the enforcement of a judgment such as the one that has been the subject of the cassation filed by MSDIA would begin no earlier than approximately six months after the judgment of cassation is issued."[158]

115. At the point at which enforcement could begin, Claimant may choose to pay the judgment in full – a completely feasible option in view of Claimant's financial situation, as discussed below. The judgment creditor may seek to attach Claimant's assets in Ecuador (or elsewhere) only if a judgment debtor does not pay the judgment. But even actual enforcement is not a swift or simple procedure. The judgment-creditor would have to follow a procedure for identification of the assets to be seized and obtain the court's permission for their seizure.

116. Thus, even if the National Court issues an adverse decision, the file has made its way to the court of first instance, and the judgment enforcement process is commenced, a number of steps still must be taken before an adverse judgment is actually enforced.[159] This is a fact that

[157] *Id.*, ¶ 28.

[158] *Id.*, ¶ 29.

[159] *Cf. Perenco, Burlington, Paushok.*

could not have escaped the Claimant as evidenced by its delay in making its request for interim measures after its appeal was admitted by the National Court in November of last year.[160]

117. The lack of immediacy in Claimant's case is also evidenced by comparing it with the cases it relied upon in its request. As discussed earlier, in *Perenco v. Ecuador*, *City Oriente v. Ecuador*, and *Burlington v. Ecuador*, the tribunals were faced with PetroEcuador's demand for *immediate* payment of Law 42 levies and imminent seizure of the assets -- literally *within a few days*. Notably, in none of these cases was the collection of levies and taxes subject to a pending appeal, as is the judgment in this case. In *Perenco*, the tribunal stressed that "[p]rovisional measures may only be granted where they are urgent, because they cannot be necessary if, for the time being, there is no demonstrable need for them."[161] Claimant's request lacks this urgency.

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118. In conclusion, the threatened irreparable harm must be imminent, and not a mere possibility, in order to justify the issuance of interim measures. Claimant's Request must be rejected for lack of urgency because whether the National Court will issue a decision adverse to it is unknowable and because any such decision is not imminent and actual execution is even less so.

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[160] In *Tokios Tokelés v. Ukraine*, the ICSID tribunal found that provisional measures were unwarranted with respect to the criminal proceedings sought to be enjoined, partially because the request was not urgent on its face: the criminal proceedings were initiated 18 months ago. *Tokios Tokelés*, ¶ 13 (RLM-62).

[161] *Perenco*, ¶ 43 (CLM-13).

V. CLAIMANT IS NOT ENTITLED TO THE PROVISIONAL MEASURES IT HAS REQUESTED BECAUSE THEY ARE NOT NECESSARY TO PREVENT IRREPARABLE HARM TO THE CLAIMANT OR ITS RIGHTS IN THIS DISPUTE.

119. Claimant's request for provisional measures – in particular, its broad request for the prevention of enforcement of "any judgment in the NIFA litigation against MSDIA" – must be denied because Claimant fails to show that the alleged harm is irreparable or not capable of being remedied by monetary compensation.

120. *First*, it is incumbent on the Claimant to establish that its rights would be irreparably prejudiced and, in particular, that it would suffer irreparable harm, absent the interim measures requested. Provisional measures under Article 26 of the UNCITRAL Arbitration Rules are necessary only if the claimant will be so prejudiced by the alleged harm that it will not be possible to make its loss whole by monetary compensation of the final award.

121. *Second*, Claimant has failed to discharge its burden of establishing that it would suffer irreparable harm in the absence of interim measures. It has failed to proffer any evidence that MSDIA itself would suffer irreparable harm due either to the issuance of an adverse decision by the National Court or enforcement of an adverse judgment.

122. *Third*, even if harm to Claimant's activities in Ecuador were sufficient to meet the irreparable harm test, which it is not, Claimant provides only speculative evidence that its business in Ecuador would be destroyed as a result of either the issuance of an adverse judgment or its enforcement. No international tribunal has ever granted interim measures in these circumstances.

123. *Fourth*, Claimant fails to show that as a matter of law, monetary compensation could not make it whole for the injury that it would allegedly suffer if the judgment is enforced.

124. *Fifth*, not a single authority cited by Claimant displaces the general rule that preliminary measures are not necessary where the alleged prejudice can be compensated by awarding damages or excepts its application to the Claimant's case. Not a single authority supports granting of interim relief in the circumstances of this case.

A. Claimant Must Demonstrate Real Harm To Itself Not Remediable By Monetary Compensation In The Absence Of Interim Measures.

125. Article 26 of the UNCITRAL Arbitration Rules grants an arbitral tribunal the power to issue "interim measures," which it deems "*necessary* in respect of the subject-matter of the dispute."[162] The arbitral tribunals have invariably found that implicit in the necessity requirement of Article 26 is the notion that the party requesting the measures is facing irreparable harm in the absence of such measures.[163] The Iran-U.S. Claims Tribunal, the most experienced forum in which the UNCITRAL Rules were applied, held that the interim measures are *necessary* "***to conserve the respective rights of the parties, and in particular, to protect a party from irreparable harm***."[164] This approach is in line with the ICJ jurisprudence.[165]

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[162] As legal commentators explain, "the Rules provide that interim measures should be *necessary* – not just 'desirable' or 'recommendable.'" Caron, p. 536 (RLM-16).

[163] *See, e.g., The Islamic Republic of Iran v. The United States of America*, Case No: A4/A7/A15, Decision No. Dec 129-A4/A7/A15-FT (June 23, 1997), *reprinted in* 33 Iran-U.S. Cl. Trib. Rep. 362, ¶ 10 (RLM-60) ("Under Tribunal precedent, 'interim relief can be granted only if it is necessary to ***protect a party from irreparable harm*** or to avoid prejudice to the jurisdiction of the Tribunal.'"); *EnCana*, ¶ 17 (CLM-10) (applying Article 26 of the UNCITRAL Arbitration Rules to deny the request for interim measures because they were not necessary "to protect the rights at stake in [the] arbitration from irreparable harm."); Caron, p. 536 (RLM-16).

[164] *Iran v. U.S.*, Case No. A24, ¶ 18 (RLM-61). *See The Islamic Republic of Iran and The United States of America*, Decision No. DEC 85-B1-FT (18 May 1989), *reprinted in* 22 Iran-U.S. Cl. Trib. Rep. 105, ¶ 10 (RLM-58) (citing *Boeing Company, et al. and Government of the Islamic Republic of Iran,* Interim Award No. ITM 34-222-1, p. 4 (17

126. Claimant correctly recognizes that the "purpose of interim measures is to 'prevent irreparable prejudice or harm to the rights of a party.'"[166] However, as discussed earlier, Claimant has not discharged its burden of establishing that there is a right to be preserved and that provisional measures are urgently needed to avert irreparable prejudice to that right. However, assuming *arguendo* that the measures requested are necessary to preserve Claimant's rights, the Tribunal must still evaluate Claimant's allegation that "[a]bsent the Interim Measures sought in this application, the decision of the National Court of Justice will trigger immediate and irreversible harm to MSDIA."[167]

127. Claimant recognizes that a party seeking interim measures of protection must meet the requirement "that the requested measures are *necessary* to prevent a threat of substantial or irreparable harm or prejudice" to the Claimant.[168] However, it fails altogether to discuss the application of the well-settled rule that provisional measures under Article 26 of the UNCITRAL Arbitration Rules are necessary only if the claimant will be so prejudiced by irreparable harm in the absence of such measures that it will not be possible to make its loss whole by monetary compensation of the final award.

Feb. 1984)) ("Under Tribunal precedent, such interim relief can be granted only if it is '***necessary either to protect a party from irreparable harm or to avoid prejudice to the jurisdiction of this Tribunal***.'") (emphasis added).

[165] In the *Anglo-Iranian Oil Co. Case*, the International Court of Justice issued an order indicating provisional measures and laid down, inter alia, the principle that the object of interim protection is "to preserve the respective rights of the Parties pending the decision of the Court." *Anglo Iranian Oil Co. Case (United Kingdom v. Iran)*, Order on Provisional Measures (5 July 1951), I.C.J. Reports 1951, p. 93 (RLM-8). *See also Fisheries Jurisdiction Case (United Kingdom v. Iceland)*,Order on Provisional Measures (17 Aug. 1972), I.C.J. Reports 1972, p. 16 (RLM-24) (holding that "the right of the Court to indicate provisional measures ... presupposes that irreparable prejudice should not be caused to rights which are the subject of dispute").

[166] Claimant's Request, ¶ 42 (internal citation omitted).

[167] *Id.*, ¶ 3.

[168] *Id.*, ¶ 41 (emphasis added).

128. With respect to what constitutes "irreparable harm," the Iran-US Claims Tribunal has stated unequivocally that the "injury that can be made whole by monetary relief does not constitute irreparable harm."[169] More recently, an UNCITRAL tribunal applied the irreparable harm test in *EnCana v. Ecuador*, where the claimant sought provisional measures to prevent freezing of assets of its subsidiaries by the Ecuadorian tax authorities within the framework of Ecuadorian law in order to recover back monies wrongly paid out to the claimant as VAT refunds.[170] The tribunal reasoned:

> The question whether the amounts are actually due is not prejudged by the measures themselves, and would not be prejudged by the return of the amounts refunded. Eventually, if jurisdiction is upheld, ***it would be open to this Tribunal to provide redress to the Claimant for any losses suffered by enforcement action*** taken in breach of the BIT, including by payment of interest on sums refunded. In these circumstances there is no necessity to order the withdrawal of IRS's measures against AEC in order to protect the rights at stake in this arbitration from irreparable harm.[171]

129. This general rule of monetary harm reflects the well-settled rule of international law.[172] In the words of a former President of the ICJ, Jumeney de Aréchaga:

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[169] *See The Islamic Republic of Iran v. The United States of America*, Iran-U.S. Claims Tribunal, Cases Nos. A15(IV) and A24, Decision No. Dec 116-A15(IC) & A24-FT (18 May 1993), *reprinted in* 29 Iran-U.S. Cl. Trib. Rep. 214, ¶ 21 (RLM-59) ("*Iran v. U.S.*, Cases Nos. A15(IV) and A24") ("The Tribunal is not satisfied that Iran has discharged its burden to show that it risks irreparable harm if its Request is not granted. Should the Tribunal eventually determine in Case No. A24 that the United States has not complied with its obligations under the Algiers Declarations by allowing the Foremost/OPIC lawsuit to proceed in the United States, the ***Tribunal can compensate Iran for any damages that the Tribunal finds Iran has sustained by awarding an adequate monetary relief***. The Tribunal has previously held that '***injury that can be made whole by monetary relief does not constitute irreparable harm***.'" (emphasis added)).

[170] *EnCana*, ¶¶ 6, 14-19 (CLM-10).

[171] *Id.*, ¶ 17 (emphasis added).

[172] Provisional measures in international law have always been linked to urgency and irreparable harm. The notions of necessity and urgency with respect to interim measures under international law have been crystallized by the International Court of Justice (ICJ) in its decisions. *See e.g.*, *Pulp Mills Case*, ¶ 32 (RLM-51); *Interhandel Case*, p. 110 (RLM-29).

> According to general principles of law recognized in municipal systems, and to the well-established jurisprudence of this Court, the essential justification for the impatience of a tribunal in granting relief before it has reached a final decision on its competence and on the merits is that the action of one party *"pendente lite"* causes or threatens a damage to the rights of the other, of such a nature ***that it would not be possible fully to restore those rights, or remedy the infringement thereof***, simply by a judgment in its favour. [173]

130. This rule has been also followed by ICSID tribunals.[174] In *Plama Consortium v. Bulgaria*, the claimant sought to enjoin several proceedings, including certain bankruptcy court proceedings instituted against it by two creditors in which the court issued a decree declaring the claimant bankrupt; the actions of Bulgaria's Agency for State Receivables ("ASR") that commenced collection of the claimant's public debts; and the enforcement of a decision of the Bulgarian Commission on Protection of Competition ("CPC") that the claimant was a beneficiary of an illegal state subsidy, ordering it to reimburse certain amounts. [175] At the time when the claimant sought interim measures, it had appealed the CPC's administrative decision, which was not suspended; similarly, its bankruptcy proceedings and collection of debts were ongoing.[176] Despite the alleged immediacy of the actions complained of by the claimant, the

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[173] *Aegean Sea, Jiménez de Aréchaga Opinion*, p. 11 (RLM-4) ("In the present case the Court has found that interim measures were not required in view of two circumstances: *the existence of appropriate means of reparation or satisfaction*, with respect to the first Greek complaint, and the action taken by the Security Council, with respect to military actions or steps which might extend or aggravate the dispute." (emphasis added)).

[174] *See, e.g., Helnan International Hotels A/S v. Arab Republic of Egypt*, ICSID Case No. ARB/05/19, Decision on Provisional Measures (17 May 2006) (Derains, Dolzer, Lee), ¶ 34 (RLM-27) ("The Arbitral Tribunal is not convinced at this stage that such is the case and that monetary compensation, if deserved, would not be appropriate."); *Occidental Petroleum*, ¶ 92 (RLM-45) (rejecting the measures finding that "[a]ny prejudice suffered as a result of the termination of the Block 15 contracts, if subsequently found illegal by the tribunal, *can readily be compensated by a monetary award*.") (emphasis added); *CEMEX*, ¶ 56 (CLM-4) ("[T]he Tribunal sees no reason not to retain the generally accepted standard of "irreparable harm" as criterion for the "necessity" required by Article 47 of the ICSID Convention").

[175] *Plama Consortium Limited v. Bulgaria*, ICSID Case No. ARB/03/24, Order on Provisional Measures (6 Sept. 2005) (Salans, van den Berg, Veeder), ¶¶ 2-3, 27 (RLM-49) ("*Plama Consortium*").

[176] *Id.*

tribunal found that the interim measures were not warranted because the claimant's request failed to establish irreparable harm:

> What Claimant is seeking in this arbitration are monetary damages for breaches of Respondent's obligations under the Energy Charter Treaty. Whatever the outcome of the bankruptcy proceedings or the ASR or CPC proceedings in Bulgaria is, ***Claimant's right to pursue its claims for damages*** in this arbitration and the Arbitral Tribunal's ability to decide these claims ***will not be affected.*** The Tribunal accepts Respondent's argument that ***harm is not irreparable if it can be compensated for by damages***, which is the case in the present arbitration and which, moreover, is the only remedy Claimant seeks.[177]

131. The tribunals have also recognized the principle that "even the possible aggravation of a debt of a claimant did not . . . open the door to interim measures when . . . the damages suffered could be the subject of monetary compensation, on the basis that no irreparable harm would have been caused."[178]

132. It bears repeating that it is incumbent on the applicant to demonstrate that it will suffer irreparable harm.[179] Claimant's request may not be based on hypothetical situations. Tribunals have not granted requests for interim measures where allegations of harm were based on mere speculation.[180]

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[177] *Id.* ¶ 46 (emphasis added).

[178] *Paushok*, ¶ 62 (CLM-12) (citing *City Oriente v. Ecuador*, ¶ 64 (stating the principle that *"a possible aggravation of a debt does not generally warrant the ordering of provisional measures.*")) (emphasis added).

[179] *See, e.g., Occidental Petroleum*, ¶ 90 (RLM-45); *Maffezini*, ¶ 10 (RLM-21) ("There is no doubt that the applicant, in this case the Respondent, has the burden to demonstrate why the Tribunal should grant its application."); *Paushok*, ¶ 40 (CLM-12) ("In requests for interim measures, it is incumbent upon Claimants to demonstrate that their request is meeting the standards internationally recognized as pre-conditions for such measures.").

[180] In *Occidental v. Ecuador*, the tribunal noted "the Claimants are seeking a provisional measure in order to prevent an action which they are not even sure is being planned. This is not the purpose of a provisional measure. Provisional measures are not meant to protect against any *potential or hypothetical harm* susceptible to result from uncertain actions. Rather, they are meant to protect the requesting party from imminent harm." *Occidental Petroleum*, ¶ 89 (RLM-45).

133. The ICJ's decision in *Passage through the Great Belt* is illustrative on this point. In that case, Finland sought provisional measures to prevent the construction of a bridge which it claimed would prevent certain of its vessels pass through the Great Belt; moreover, Finland claimed "not only that continuation of the Danish project as planned will cause irreparable damage . . . but that the project is already causing such damage to tangible economic interests inasmuch as Finnish shipyards can no longer fully participate in tenders regarding vessels," – that is, even prior to the project's completion.[181] Presented with Finland's allegations that the construction of the bridge was "already causing such damage to tangible economic interests" and "that the existence of the bridge project in its present form is having and will continue to have a negative effect on the behaviour of potential customers of those shipyards",[182] the ICJ found that interim measures were not warranted because "evidence has not been adduced" that any of signs of these alleged effects had occurred.[183] Similarly, in other cases, the ICJ considered concrete objective evidence of alleged harm, not speculative statements of the interested parties.[184]

134. In short, in order to obtain interim measures, the Claimant carries the burden of showing that it suffered harm that cannot be readily compensated by an award of damages.

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[181] *Great Belt Case*, ¶ 28 (CLM-20).

[182] *Id.*, ¶ 28.

[183] *Id.*, ¶ 29 (no evidence that "any invitations to tender for drill ships and oil rigs which would require passage out of the Baltic after 1994, nor has it been shown that the decline in orders to the Finnish shipyards for the construction of drill ships and oil rigs is attributable to the existence of the Great Belt project.").

[184] *See e.g., Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America)*, Order on Provisional Measures (10 May 1984), I.C.J. Reports 1984, ¶ 29 (RLM-40) (citing various sources of evidence, including U.S. legislative measures, statements to the press, newspaper reports and reviews in the United States and sworn affidavits by the Nicaraguan Foreign Minister and Vice Minister, not seriously contested by the United States and deciding to indicate interim measures asking the United States to immediately cease and refrain from any actions challenged by Nicaragua); *Nuclear Tests (New Zealand v. France)*, ¶ 30 (RLM-44) (The Court observed that the evidence of irreparable harm was based on the Reports of the United Nations Scientific Committee on the Effects of Atomic Radiation between 1958 and 1972.).

B. Claimant Has Failed To Show That, Absent The Interim Measures, It Would Suffer Significant Harm As A Result Of Either The Issuance Of An Adverse Decision By The National Court Or Enforcement Of A Negative Judgment.

135. Claimant's Request is devoid of reliable evidence establishing, as Claimant must, that MSDIA would itself suffer irreparable harm in either of the events of an adverse decision by the National Court or by actual execution of a surviving adverse judgment. Indeed, Claimant's sole source of evidence – the witness statement of its President, Mr. Jean Marie Canan – is self-serving, purely speculative and uncorroborated. As such, Claimant has failed to meet this essential test for interim measures.

136. It must be stated at the outset, that Claimant, while acknowledging that it has to demonstrate irreparable harm to itself, discusses the potential effects of the negative judgment solely with respect to a fraction of its business operations. Claimant's discussion of irreparable harm focuses on how the issuance of an adverse decision and its enforcement would affect the so-called "MSDIA Ecuador" – a branch office of MSDIA in Ecuador through which Claimant conducts its business operations in Ecuador, which is not a separate legal entity and which represents only a *small fraction* of Claimant's assets and operations. After having listed Claimant's tangible assets in Ecuador, Claimant alleges that "[b]ecause MSDIA's Ecuador branch does not have cash or other liquid assets sufficient to satisfy the judgment, the judgment-creditor would have to ask the Ecuadorian courts to order the seizure of MSDIA's assets in Ecuador."[185] This, Claimant alleges, would have "*irreparable effects*" on MSDIA.[186]

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[185] Claimant's Request, ¶ 65.

[186] *Id.*, ¶ 66 (emphasis added).

137. The Claimant bears the burden of establishing that it will suffer irreparable harm in the absence of the provisional measures it seeks.[187] In this case, Claimant submitted as its principal evidence the testimony of Mr. Canan, the President of MSDIA. Only limited value can be attached to such a stand-alone testimony of an interested party, uncorroborated by objective evidence.[188] Moreover, Mr. Canan's testimony is limited to the discussion of the effects that the issuance of an adverse National Court decision or the execution of any surviving adverse judgment against Claimant's assets in Ecuador would have on "MSDIA Ecuador."[189] This, even though, as Mr. Canan acknowledges in a footnote of his witness statement, that the Ecuadorian branch is not in fact a legal entity, separate from Claimant.[190] Despite this disclaimer, Mr. Canan nonetheless attempts to ascribe effects to "MSDIA Ecuador" as if it were a separate legal entity and dedicates his entire testimony to the effects of the alleged harm on this fictional entity.[191]

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[187] *See, e.g., Iran v. U.S.*, Cases Nos. A15(IV) and A24, ¶ 21 (RLM-59) ("The Tribunal is not satisfied that Iran has *discharged its burden to show that it risks irreparable harm* if its Request is not granted. (emphasis added)).

[188] *See Paushok*, ¶ 42(CLM-12) (stating that "[i]n many cases, a statement by one of the parties may be of great importance in the analysis of the facts and it is up ***to the tribunal in each case to attach to such a statement the credibility and relevancy it considers appropriate***." (emphasis added)).

[189] *See* Canan Witness Statement, ¶¶ 6-9, 18-22.

[190] *See id.*, ¶ 5, n. 1 (stating that "I use 'MSDIA' as a shorthand reference to MSDIA's branch office in Ecuador. The branch is part of MSDIA and ***is not a separate corporate entity***." (emphasis added)).

[191] *See id.*, ¶¶ 18-22. *See, e.g., id*, ¶ 20 ("If ***MSDIA Ecuador's*** cash and accounts receivable were seized, ***MSDIA Ecuador*** would not be able to pay its employees." (emphasis added)); *id.*, ¶ 21 ("If employees and business partners perceive that such an adverse judgment would bring about the imminent destruction of ***MSDIA Ecuador***, ***MSDIA Ecuador's*** employees *likely would begin to seek employment with other companies* . . . similarly, *MSDIA Ecuador*'s ability to conduct business in Ecuador would be jeopardized as distributors, wholesalers, creditors and other parties in Ecuador who supply services or rely on MSDIA Ecuador's business likely would take immediate steps to insulate their own businesses from the substantial risks associated with continuing to rely on ***MSDIA Ecuador***." (emphasis added)).

Not a single mention is made of how and to what extent the issuance of an adverse judgment or its enforcement would impact Claimant.[192]

138. Indeed, Mr. Canan avoids altogether revealing any information about Claimant's own financial wherewithal. Mr. Canan says nothing about MSDIA's ability to satisfy the $150 million judgment against it in the NIFA litigation, even if that judgment did survive review in the Ecuadorian courts. No evidence is proffered or discussion made of the Claimant's financial situation and the net book value of its entire business. Therefore, Claimant's argument that it would suffer irreparable harm fails for lack of any evidence.

139. Respondent's financial expert, Mr. Timothy H. Hart, analyzed the entire financial situation of MSDIA, based on the documents available to him. He observes that Claimant is a large company that operates in fourteen countries, including Ecuador, through ten branch offices and seven subsidiaries (one of which also operates a branch); its world-wide sales reach on average $600,000,000 per year.[193] Mr. Hart observes that the value of Claimant's net current assets, $1.13 billion, far exceeds the highest judgment that can be issued against Claimant in the NIFA litigation.[194] It is a company that has enjoyed a rapid growth: Claimant's income statements also show that its business is growing at a very strong rate. In the last five years, sales grew 33.9% from $474 million in 2007 to $635 million in 2011.[195] Its current assets grew 63% from $739,445,360 as of December 31, 2007 to $1,202,823,487 as of December 31,

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[192] *Id.*, ¶ 19 ("MSDIA's only assets in Ecuador are those of its branch office MSDIA Ecuador, which MSDIA Ecuador uses in its ongoing business.").

[193] Expert Report of Timothy H. Hart, (24 July 2012) ("Hart Expert Report"), ¶¶ 13, 29.

[194] *Id.*, ¶ 25.

[195] *Id.*, ¶ 29.

2011.[196] In light of Mr. Canan's statement that MSDIA's Ecuadorian branch has approximately $27 million in annual sales,[197] this amount constitutes only 4.25% of MSDIA's total annual sales of $ 635,939,889 in 2011. Furthermore, Claimant holds $41,084,085 in cash. This is 41 times more than what Mr. Canan states the branch holds in its accounts in Ecuador.[198] And it is normal for a company like MSDIA, which chiefly distributes and sells its parent company's products in emerging markets, not to hold its assets in cash.[199] Mr. Hart explains that "[b]usinesses generally utilize their assets in ways that produce the best and highest returns for the business. Cash is a primary asset of a business and is best used for growth. Thus, it is not surprising that MSDIA does not have $150 million in excess cash sitting in the bank."[200]

140. Importantly, Claimant is financially capable of paying the $150 million judgment without disruption to its business operations or significant impact on its net current assets of $1.13 billion. Mr. Hart concludes that "[i]t is easy to see that MSDIA has the ability to pay the judgment from its cash and accounts receivable alone as they have $41 million in cash and their current accounts receivable, if collected evenly each month in 2012, would generate $80 million each month while if their current liabilities were paid evenly each month they would owe just $6 million each month to their creditors. So, MSDIA's accounts receivable alone (not even counting its inventory and prepayments received) will generate on average a net of $74 million

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[196] *Id.*, ¶ 23.

[197] Canan Witness Statement, ¶ 19 (approximately $1 million).

[198] *See Id.*, ¶ 19.

[199] Hart Expert Report, ¶ 24.

[200] *Id.*

per month.[201] Based on Claimant's cash reserves and the accounts receivable (not counting inventory and prepaid amounts that it holds), Claimant can satisfy the judgment in just under one and a half months.[202]

141. There can be no doubt, based on its balance sheets for the past five years, that Claimant has the financial wherewithal to pay even the worst-case judgment that can possibly be issued against it in the NIFA litigation. Mr. Hart concludes that in "[his] opinion, satisfying the judgment through the use of current assets will have minimal impact on MSDIA's short term operations and in no way would destroy MSDIA's business in Ecuador or significantly affect MSDIA's business as a whole."[203]

142. In short, while Claimant's request hinges on its allegation that it, MSDIA, will suffer irreparable harm,[204] Claimant adduced no evidence that it as a whole would suffer any harm as a result of either the issuance of an adverse decision by the National Court or the execution of a negative judgment. Rather, Claimant focuses on the "irreparable effects" that the threat of enforcement and the enforcement itself of the judgment would have on its branch in Ecuador – a small fraction of its worldwide business operations and revenues. But, as discussed next, even Claimant's allegations of "irreparable effects" on its Ecuadorian branch are unsupported by sufficient evidence.

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[201] *Id.*, ¶ 25.

[202] *Id.*.

[203] *Id.*.

[204] As to MSDIA's concern that not only its assets would be hurt but the Ecuadorian people would be hurt, this concern is irrelevant for the purposes of Claimant's request. Notably, MSDIA's sales of "essential pharmaceutical products" constitutes only 2.52 % of the Ecuadorian market. Canan Witness Statement, ¶ 8. Surely, the impact of any disruption of MSDIA's supply of drugs on the market, if any, would be *de minimis*.

C. Claimant Has Failed To Show Even That Its Business In Ecuador Would Suffer Irreparable Harm As A Result Of Either The Issuance Of An Adverse Decision By The National Court Or Enforcement Of A Negative Judgment.

143. Claimant also implies, although it does not argue, that showing irreparable harm to its Ecuadorian operations will suffice to meet the test for interim measures, even if it does not itself face irreparable harm. But this argument is unavailing. Even if MSDIA's business activities in Ecuador could be considered an "investment" protected by the Treaty, which, as explained earlier Claimant has failed to demonstrate, irreparable harm to the small segment of its overall business represented by its Ecuadorian operations cannot constitute irreparable harm to MSDIA itself. In any event, Claimant's allegations of irreparable harm to its branch in Ecuador fail for lack of sufficient evidence.

144. First, Claimant's allegation that it would suffer any harm due to the entry of an adverse decision by the National Court and the threat of its enforcement is entirely speculative in nature. No tribunal has accepted merely speculative statements as sufficient to support interim measures. Second, the allegation that Claimant's business in Ecuador would be irreparably harmed as a result of the enforcement of a negative judgment is unsupported by evidence because, as established by Respondent's financial expert, Claimant has the financial wherewithal to satisfy the most negative judgment in the NIFA litigation of $150 million; it would only be due to its own voluntary decision not to satisfy an adverse judgment that Claimant would cause the assets of its branch in Ecuador be seized by the judgment-creditor.

a. Claimant fails to show that irreparable harm to its business in Ecuador would be caused by the issuance of an adverse judgment and threat of its enforcement.

145. Claimant's allegation that the issuance of an adverse decision by the National Court, and the *threat* of its enforcement purportedly resulting therefrom, would *per se* cause irreparable

harm to its Ecuadorian operations must be dismissed outright.[205] This allegation is solely based on the mere speculation that "[i]f employees and business partners perceive that MSDIA will be put out of business in Ecuador by the judgment, they will act to protect their own interests."[206]

146. The value of Claimant's only source of evidence in support of this argument – the witness statement of Mr. Canan – is undermined by his own admission that he is merely speculating on the subject of how the threat of enforcement might affect Claimant's business operations in Ecuador.[207] Notably, Mr. Canan does not testify that even one employee has actually left MSDIA, or even threatened to leave. Nor does he state that any landlord has threatened to terminate any leasehold with MSDIA. Nor does he testify that any of MSDIA's distributors, wholesalers, creditors or any other parties have begun to insulate their operations from Claimant.

147. The first adverse judgment against MSDIA was issued in December 17, 2007 – almost five years ago. The Court of Appeals issued the reduced judgment on September 23, 2011 – ten months ago. It is remarkable indeed that, if any of the dire consequences speculated upon by Mr. Canan were real, they have not occurred at all during the period since the 2007 ruling. Such a conclusion would attribute to MSDIA's local employees, landlords, customers, creditors and

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[205] Claimant alleges that "[o]nce an adverse decision issues from the National Court of Justice, *even before* MSDIA's assets are seized to satisfy such a judgment, MSDIA will suffer irreparable injury." Claimant's Request, ¶ 63.

[206] *Id.* (emphasis added).

[207] Canan Witness Statement, ¶ 21 ("If employees and business partners perceive that such an adverse judgment would bring about the imminent destruction of MSDIA Ecuador, MSDIA Ecuador's employees *likely would begin to seek employment with other companies* . . . similarly, MSDIA Ecuador's ability to conduct business in Ecuador would be jeopardized as distributors, wholesalers, creditors and other parties in Ecuador who supply services or rely on MSDIA Ecuador's business likely would take immediate steps to insulate their own businesses from the substantial risks associated with continuing to rely on MSDIA Ecuador." (emphasis added)).

other parties the ability to distinguish the threat posed by a trial court judgment and an appellate court review, an unlikely circumstance. To the contrary, as demonstrated by Mr. Canan, Claimant's business operations in Ecuador have continued in their normal course.[208] MSDIA's income statements show that its business has been growing at a very strong rate.[209]

148. Aside from Mr. Canan's self-interested speculations, nothing, not a scintilla of evidence has been presented by Claimant that gives any sign of alleged harm related to the threat of enforcement, even though the *threat* of enforcement that Claimant alleges will cause disruption to Claimant's business operations has existed for the entire four years and seven months since the first instance court decision.

149. Mr. Hart concludes that "[t]he existence of a judgment against MSDIA has been known since 2007, and if any employees, distributors or landlords were inclined to stop doing business with MSDIA, then evidence should already exist supporting this supposition."[210] Furthermore, he does not "see how the National Court of Justice upholding the judgment would change this."[211] Mr. Hart explains that employees and distributors would normally not abandon a company facing a judgment that it can afford to satisfy especially in view of Merck's "strong brand name recognition" and commitment to continuing its long-term operations in Ecuador.[212]

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[208] *Id.*, ¶¶ 8-9.

[209] Hart Expert Report, ¶ 29.

[210] *Id.*, ¶ 19.

[211] *Id.*

[212] *Id.*

150. In addition, Mr. Hart concludes that Claimant's distributors and wholesalers would not stop doing business with MSDIA if the judgment against MSDIA is affirmed.[213] MSDIA provides Merck-brand medicines in Ecuador to purchasers, including distributors, wholesalers, pharmacies, hospitals, doctors, patients and the Ecuadorian government.[214] Mr. Hart explains that "[t]he products which MSDIA sells to customers are provided on credit, meaning that the customer receives the product and is required to pay MSDIA sometime in the future," which is reflected as Account Receivable on the books and records of MSDIA.[215] Mr. Hart explains that "[m]ost businesses operate in this manner and it does not seem reasonable that customers would stop doing business with MSDIA, as it is the customers who are receiving the credit. Logically, for MSDIA to be correct on this point it would mean that the customers were taking a risk by providing credit to MSDIA which, of course, is not the case."[216] Claimant itself acknowledges that it would still have its goodwill, good name and relationships.[217]

151. In short, while Mr. Canan's testimony may, viewed generously, reflect his worries, there is absolutely nothing in the record to substantiate them.

b. No irreparable harm to claimant's business in Ecuador can be caused by the enforcement of the most negative judgment possible in the NIFA litigation.

151(a). Claimant argues that because the $150 million judgment of the Court of Appeals – which may be reversed, modified, annulled or affirmed by the National Court of Justice – "far exceeds

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[213] *Id.*, ¶ 17.

[214] *Id.* (citing Canan Witness Statement, pp. 2-3 at ¶ 8).

[215] *Id.*

[216] *Id.*

[217] Claimant's Request, ¶ 65.

the value of *MSDIA's business in Ecuador*, shortly after an adverse National Court of Justice ruling that business therefore will very likely be completely destroyed."[218]

152. Aside from Mr. Canan's self-interested witness statement, Claimant adduced no other evidence that its Ecuadorian operations would suffer irreparable harm in the event of a future enforcement of the judgment. As noted earlier, Mr. Canan's self-interested testimony is undermined by the lack of any corroborative evidence.

153. First, his speculation about the alleged harm – if the tangible assets of the Claimant's branch in Ecuador are seized (cash and accounts receivables), "MSDIA would not be able to pay its suppliers" and "the businesses with which it trades" [219] – is based on the presumption that Claimant would not satisfy the judgment in order to preserve its business operations in Ecuador. But as shown by Mr. Hart, Claimant has the wherewithal to satisfy the judgment and, unless it voluntarily chooses to shut down those operations, it would be reasonable for Claimant to do so. This conclusion is based on the Claimant's balance sheets, not speculation. In contrast, Mr. Canan's testimony is purely hypothetical because it *presumes* without explanation that Claimant would not satisfy the judgment despite being able to do so.[220]

154. Second, the credibility of Claimant's presumption that it would let judgment-creditors seize its assets in Ecuador must be taken with a grain of salt. Respondent's financial expert, Mr. Hart, explains that letting the assets to be seized would not be the most reasonable or sound

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[218] *Id.*, ¶ 3 (emphasis added).

[219] Canan Witness Statement, ¶ 20.

[220] *See Occidental Petroleum*, ¶ 90 (RLM-45) ("In the view of the Tribunal, the harm that the Claimants seek to be protected against is even more hypothetical today given the Ecuadorian Government's repeated assertions at the hearing that no imminent project exists to hand over Block 15 to a third company."); *Maffezini*, ¶¶ 16-21 (RLM-21) (applying the ICSID Rules, found that the claimant's request was improperly based on hypothetical situations).

solution for a company that seeks to further develop its operations in emerging markets and would not be adopted by Claimant.[221] Mr. Hart concludes that given MSDIA's and its parent company's objective of developing its operations in Ecuador, as one of the emerging markets where its business is burgeoning, "it does not seem reasonable that Merck and MSDIA would simply choose themselves to allow the potential negative developments to occur as this would be contradictory to what Merck has stated in its annual report and contradictory to the company's past actions."[222] No reasonable company with operations like Claimant's would allow its assets to be seized where it can afford satisfying the judgment and seamlessly continuing its business operations.[223] Indeed, if one has an affordable cure for an infected wound, would a reasonable person risk the infection cascade into sepsis? Even if the Claimant might have to tap into its capital to pay off the ultimate judgment, it would do so in order to continue its business operations, which will ultimately preserve its business in Ecuador.[224]

155. Indeed, MSDIA does not manufacture its products in Ecuador; it has no manufacturing facilities there. It has a local office through which it carries out its business operations, namely, the sales of pharmaceutical products manufactured by its parent company, Merck. But Claimant

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[221] Hart Expert Report, ¶¶ 14-15, 19.

[222] *Id.*, ¶ 19.

[223] *See Id.*, ¶ 27.

[224] The tribunal in *Occidental Petroleum* noted that the purpose of Claimant's request was "not to avoid aggravation of the dispute *per se*, but rather aggravation of the monetary damages resulting from an already existing dispute." It was clear that the Claimants, at the provisional measures stage, were merely seeking to reduce the amount of money they will request as damages at the conclusion of these proceedings. Claimants admitted that the provisional measure was requested because the existing situation "unnecessarily cause[d] Claimants prospectively to incur additional but avoidable damages" and was "required to reduce an ever-increasing form of damages." Since the measure requested for was not directed at the non-aggravation of the dispute, but merely at the non-increase of alleged damages, the Tribunal held that it was not a provisional measure that the Tribunal could order. *Occidental Petroleum*, ¶ 98 (RLM-45).

has furnished no evidence that these operations would have to cease if it were to satisfy the judgment, and that MSDIA's business in Ecuador would be irremediably destroyed as a result. Aside from Mr. Canan's self-interested witness statement, Claimant adduced no other evidence that its Ecuadorian operations, let alone MSDIA itself, would suffer irreparable harm in the event of a future enforcement of the judgment.

156. Even if the most negative judgment possible were issued by the National Court, Respondent's expert, Mr. Hart, shows that the Claimant's operation in Ecuador would not be driven to destruction.[225] As already discussed, Mr. Hart, having reviewed Mr. Canan's witness statement and MSDIA's income statements and balance sheets for the period 2007 - 2011, which were produced by MSDIA in response to Ecuador's request, concludes that MSDIA has the necessary wherewithal to satisfy the highest possible judgment in the NIFA litigation "*in just less than one and a half months*" and continue seamlessly its business operations in Ecuador.[226] This conclusion is based on the balance sheets produced by Claimant that indicate that Claimant disposes of $1.2 billion in current assets, including $41 million of cash, $959 million of accounts receivable, $59 million of inventory and prepaid inventory of $143 million.[227] Claimant's current liabilities amount to $72 million, leaving Claimant with $1.13 billion in net current assets. Based on these figures, Claimant's dire picture of "destruction" in the face of a potential $150 million judgment is simply incredible.

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[225] Hart Expert Report, ¶ 25.

[226] *Id.* (emphasis added).

[227] *Id.*

157. In addition to using its own assets, Claimant has two other viable options for the payment of an adverse judgment. First, Mr. Hart concludes that MSDIA benefits from intercompany accounting, reflecting intercompany transactions between the Claimant and its parent, Merck. Mr. Hart explains that "[l]arge companies, such as Merck, typically have general terms for its intercompany transactions with subsidiaries. In other words, when cash is available, it is used to reduce the intercompany payable from the subsidiary (MSDIA) to the parent (Merck)." [228] Mr. Hart concludes that "it would be normal for Merck to extend its intercompany financing so that MSDIA could use its current income to pay the judgment."[229] MSDIA would then use its future revenues to pay its intercompany accounts payable.[230] This should not be a problem for a company, like Claimant, that has been and continues to grow at a robust annual rate of 8%.[231]

158. But even if MSDIA were to decide not to utilize intercompany accounts to satisfy the judgment against MSDIA, it would, as an alternative, be reasonable and customary to set up a loan structure whereby Merck would lend to MSDIA the required amount. It would be normal for the parent company, Merck, and in its best interests, given the role played by MSDIA in its overall business, to lend its financial assistance without hesitation and provide MSDIA with the necessary resources.[232] As explained by Mr. Hart, it is unlikely that MSDIA would give up its presence in Ecuador so easily, given the parent company's objective to remain committed to its

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[228] *Id.*, ¶ 27.

[229] *Id.* ("For example, in 2012 instead of MSDIA using $150 million of its cash receipts to pay Merck for part of the $1.4 billion intercompany accounts payable, MSDIA uses the $150 million to pay the judgment.").

[230] *Id.*

[231] *Id.*, ¶ 35.

[232] *Id.*, ¶ 28.

operations in the emerging markets, which it does *inter alia* through Claimant.[233] This solution would be non-destructive for MSDIA and easily realizable. Mr. Hart, having reviewed MSDIA's historical income statements, concludes that Claimant could pay back the loan proceeds to Merck through future income within five years.[234] All of the foregoing options are feasible without significantly affecting Claimant or its operations in Ecuador.[235] In fact, given the financial health of Claimant, any independent financial institution would lend MSDIA a loan easily obtaining security against its $1.2 billion assets.[236]

159. Finally, Mr. Hart explains that "[e]ven if it were true that the operations of the current MSDIA branch office in Ecuador as it exists today would be destroyed, [i.e., lose its tangible assets as a result of enforcement] there is no reason that MSDIA could not do business in Ecuador using a different entity or business model as it is common practice for businesses to use third party distributors to sell their products."[237]

160. In conclusion, in the event that the National Court of Justice were to render its decision in the near future – something that has not been, and cannot be, established – Claimant cannot demonstrate irreparable harm to its Ecuadorian operations, even if doing so were sufficient to meet the tests for the granting of interim measures.

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[233] *Id.*, ¶ 15.

[234] *Id.*, ¶ 36.

[235] *Id.*, ¶¶ 27, 41.

[236] *See* Hart Expert Report, ¶ 39.

[237] *Id.*, ¶ 18.

D. Claimant Fails To Show Why Monetary Compensation Would Not Make It Whole If It Succeeds On The Merit.s

161. Whatever economic injury Claimant might suffer as a result of the enforcement of the NIFA judgment can be compensated by a monetary award by this Tribunal should Claimant ultimately prevail on its claim. This is itself requires that Claimant's Request for Interim Measures be denied.

162. As discussed above, it is axiomatic that injury is not irreparable if the injured party can be made whole by money damages. Claimant's right to pursue its claims for damages in this arbitration and the Tribunal's ability to decide these claims will not be affected if its Request is denied. Claimant's case is similar to *Plama*, where the claimant sought to enjoin various court and administrative proceedings, and the tribunal concluded that whatever the outcome of the these proceedings, the "[c]laimant's right to pursue its claims for damages in this arbitration and the Arbitral Tribunal's ability to decide these claims will not be affected."[238]

163. The remedy specified by Claimant in its Notice of Arbitration further underlines the purely economic nature of Claimant's alleged injury. There, Claimant states that it seeks, alternatively, the prevention of "enforcement of the NIFA judgment" or monetary compensation "indemnify[ing] and hold[ing] harmless the Claimant against any and all damages resulting from enforcement of the NIFA judgment, including the value of any assets paid, seized, forfeited, or otherwise foregone in connection with the enforcement of the NIFA judgment."[239] The Notice of Arbitration must, therefore, be seen as an admission that Claimant can, in fact, be made whole

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[238] *Plama Consortium*, ¶ 46 (RLM-49) (emphasis added).

[239] Notice of Arbitration, Relief Sought, ¶ 160.

by monetary compensation. In light of this, Claimant cannot, as a matter of law, sustain its burden of showing irreparable injury.

E. None Of The Cases Relied On By Claimant Support Its Claim For The Extraordinary Relief it Seeks.

164. None of the legal authorities cited by the Claimant in support of its assertion of irreparable harm supplant the general rule that an "***injury that can be made whole by monetary relief does not constitute irreparable harm***."[240] Claimant's entire case for interim measures is an attempt to assimilate its circumstances a "total loss of business" scenario in order to "fit" into the unique patterns of circumstances found in the cases it cites. However, the exceptional cases cited by the Claimant are unavailing for all of the following reasons.

165. First, the factual circumstances in the cases that Claimant relies on and in which the interim measures were awarded, were strikingly different. In *Perenco v. Ecuador*, *City Oriente v. Ecuador* and *Burlington v. Ecuador*, the claimants sought as their requested relief specific performance or reinstatement of their respective participation contracts, and the tribunals accepted their arguments that in the absence of interim measures requested their protected rights related to the specific performance would be affected.[241] In *City Oriente,* for example, the tribunal expressly distinguished its case from investment cases where the sole relief was

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[240] *See Iran v. U.S.*, Cases Nos. A15(IV) and A24, ¶ 21 (emphasis added) (RLM-59).

[241] *See Perenco*, ¶ 46 (CLM-13) (the tribunal noting that Perenco's relief sough included request for full reinstatement of its rights under the Participation Contracts according to their terms); *Burlington Resources* (2009), ¶¶ 16, 31 70 (CLM-3) (holding that "whether specific performance is impossible or disproportionate is a question to be dealt with at the merits stage"); *City Oriente Ltd.* (2007), ¶¶ 45, 81 (CLM-7) ("Weighing and analyzing the evidence offered by the parties so far, and without advancing a decision on the merits, the Arbitral Tribunal does not discard the conclusion that under Ecuadorian Law a contractor may demand that the public entity it contracted with be ordered to fulfill its commitments.").

damages, stating that City Oriente was seeking contract performance.[242] It must be noted, however, that when City Oriente made its request for interim measures, it did not claim irreparable harm to itself; rather its request was based on urgency and preservation of its rights.[243] The tribunals in two other cases sought to preserve the claimants' rights to specific performance of their contracts, which would be irreversibly ruined if their investments were crippled or destroyed.[244]

166. In *Burlington*, the tribunal recognized "at least prima facie, a right to specific performance could exist in the present situation"; then, considering whether the applicant would suffer harm or prejudice, it found that despite the respondent's objection that the effect of the seizures of oil was economically neutral for the claimant, which it found to be correct, "the risk of further deterioration of the [contractual] relationship possibly ending with the destruction of the investment would still exist."[245] In *Perenco*, the tribunal was of the view that, if the claimant were compelled to pay the amounts due under Law 42 (which were ongoing in nature), its

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[242] *City Oriente Ltd.* (2007), ¶ 92 (CLM-7).

[243] *Id.*, ¶ 54. The respondent subsequently sought revocation of the interim measures issued by the tribunal on the basis that "first, that the Provisional Measures seek to protect an inexistent right; second, that they are not necessary to prevent irreparable harm; and finally, that the decision on provisional measures entails a ruling on the merits." *City Oriente Limited v. Republic of Ecuador*, ICSID Case No. ARB/06/21, Decision on Revocation of Provisional Measures (13 May 2008) (Fernández-Armesto, Grigera Naón, Thomas), ¶ 19 (CLM-8). The tribunal summarily disposed of the irreparable harm requirement under Article 47 of the ICSID Convention. *Id.*, ¶ 70 ("Tribunal has verified that neither Article 47 of the Convention nor Rule 39 of the Arbitration Rules require that provisional measures be ordered only as a means to prevent irreparable harm. The only requirement arising from the wording of Rule 39 is the traditional urgency requirement; this requirement was analyzed by the Arbitral Tribunal in paragraphs 67 *et seq.* of the Decision dated November 19, 2007, and the Tribunal concluded that it has effectively been fulfilled.").

[244] In *Perenco*, taking into account that Perenco "specified restitution [i.e. reinstatement of the Participation Contract with Ecuador] as a form of relief request" and not to "derogate from those Contracts", the tribunal concluded that "the seizure of Perenco's assets . . . would seriously ***aggravate the dispute between the parties*** and jeopardise the ability of Perenco to explore for and produce oil in Blocks 7 and 21 pursuant to the Participation Contracts." *Perenco*, ¶¶ 46-48 (CLM-13) (emphasis added).

[245] *Burlington Resources* (2009), ¶¶ 71, 84 (CLM-3).

business in Ecuador would be effectively brought to an end, and such injury could not be adequately compensated by an award of damages should its claim be ultimately upheld: "It is realistic, in the Tribunal's judgment, to apprehend that Perenco's business in Ecuador would be crippled, if not destroyed."[246]

167. Thus, the likely destruction of the claimants' business was considered by the tribunals through the prism of the claimants' request for specific performance and the contractual relationships at issue, neither of which circumstance is present in this case. Importantly, in *Perenco* and *Burlington*, the claimants still had to put the amounts it owed under Law 42 in escrow accounts, which further underlines that the real objective in granting the interim measures was to preserve contractual relationships between the parties based on the claimants request for specific performance.[247] These factual and legal differences alone are enough to dismiss any relevance of these cases to the Claimant's situation.

168. Second, the financial burdens pending in these cases – taxes and other levies – were being sought directly by the State party to the arbitration. Here, Ecuador is not in any way a "beneficiary" of the judgment issued by the Ecuadorian courts: a third private party, not privy to the present proceedings, is the sole beneficiary of the judgment. Moreover, as stressed by the tribunal in *Burlington*, the ongoing nature of the financial obligations there, – monthly payments due under the Law 42 payments – imposed a different kind of burden than does a one-time payment like the one required to satisfy a judgment:

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[246] *Perenco*, ¶¶ 46, 53 (CLM-13).

[247] *Id.*, ¶ 63 ("[T]he tribunal considers that Respondents should enjoy a measure of security in relation *to sums accruing due to them from Perenco* (not the Consortium) under Law 42 from the date of this Decision forward until such later decision." (emphasis added); *Burlington Resources* (2009), ¶¶ 87-88 (CLM-3) (noting that this would be "a balanced solution likely to preserve each Party's rights.").

> The risk here is the destruction of an ***ongoing investment*** and of its revenue-producing potential which benefits both the investor and the State. Indeed, if the investor must continue to finance operation expenses while making losses, from a business point of view it is likely that it will reduce its investment and maintenance costs to a minimum and thus its output and the shared revenues. There is also an obvious economic risk that it will cease operating altogether. While profit sharing may be legitimate, expecting that a foreign investor will ***continue to operate a loss making investment over years*** is unreasonable as a matter of practice. Contrary to the Respondents' assertion pursuant to which the protection would be granted against the investor's own act of "walking away", the Tribunal considers that the project and its economic standing is at risk regardless of the conduct of the investor.[248]

169. Only one case cited by Claimant in the category "cases restraining states from enforcing disputed legislative measures," *Paushok*, did not involve specific performance.[249] The claimant in *Paushok* only sought damages, and the tribunal, applying a different test of "substantial harm," found that the payment of the disputed windfall profit taxes owed by the claimants' subsidiary GEM would lead to the company's bankruptcy. "From the evidence submitted by the Parties and taking into account the very specific features of this case", the tribunal found that:

> Respondent claims that over US$41 million is currently owed by GEM, under the [windfall profit tax] WPT Law. It appears from the financial statements and taxation reports submitted to the Tribunal that GEM could not proceed to the immediate payment of this total sum out of its own resources. The only alternatives would be either *loans from financial institutions or a large equity infusion by shareholders*. It has been established to the satisfaction of the Tribunal that, in *the current fiscal conditions, no financial institution would consider lending such an amount of money to GEM*. And, assuming that Respondent is right in stating that GEM's *net book value assets are worth less than 50% of the amount of WPT owing* and the possibility that the Mongolian Parliament would again refuse to amend the WPT Law, it would be very presumptuous for any investor to make additional equity

[248] *Burlington Resources* (2009), ¶ 83 (CLM-3) (emphasis added).

[249] *Paushok* (CLM-12).

> investment in that company. The likelihood of GEM's bankruptcy in such a context *therefore becomes very real*.[250]

170. In addition, GEM would lose its licenses as a result of not being able to pay WPT.[251]

171. *Paushok* is ultimately inapposite here for the following decisive reason: The tribunal in *Paushok* attached "significant importance to the specific features surrounding this particular request which differentiate[d] it from other awards," including the fact that the respondent State, "while not admitting to any illegality in the measures . . . challenged in this case, has recognized . . . that the WPT Law was not achieving its objectives and should be replaced by a less severe taxation regime."[252] In fact, the tribunal had noted that "[e]vidence in that regard can be seen from the written undertaking given by the State Secretary of the Minister of Justice and Home Affairs . . . that no seizure of or lien on GEM's assets would take place in connection with this dispute until a final award has been rendered in the present case."[253] The tribunal's decision was therefore a formalization of that commitment:

> While it is true that Claimants ***would still have a recourse in damages*** and that other arbitral tribunals have indicated that debt aggravation was not sufficient to award interim measures, the unique circumstances of this case justify a different conclusion. In particular, ***while not putting in doubt the value of the undertaking of Respondent not to seize or put a lien on GEM's assets***, the Tribunal believes that ***it is preferable to formalize that commitment*** into an interim measures order.[254]

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[250] *Id.*, ¶ 61 (emphasis added).

[251] *Id.*

[252] *Id.*, ¶ 43. At the time of the request for provisional measures, the Government of Mongolia had actually already proposed a new law to the Parliament reducing very substantially the tax rates established under the WPT Law. *Id.*, ¶ 58.

[253] *Id.*, ¶ 43.

[254] *Id.*, ¶ 78 (emphasis added). The *Paushok* tribunal stated that the notion of "irreparable harm" in international law has a "flexible meaning." It thus referred to Article 17A of the UNCITRAL Model Law which only requires that harm not adequately reparable by an award of damages is likely to result if the measures are not ordered.

172. No such special circumstance exists in this case.

173. Finally, even if Claimant's Request fell within the category of exceptional circumstances acknowledged by the Paushok tribunal, and the Tribunal were to apply the "substantial harm" test used there, Claimant would have to discharge its burden of establishing that it would suffer at least the level of harm that the claimant did in *Paushok* – the only case where the tribunal granted interim relief and where the dispute was not based on the request for specific performance of a contract. However, Claimant cannot show an impact to its Ecuadorian operations equivalent to the insolvency faced the separate local subsidiary in *Paushok.*

174. In short, the cases cited by the Claimant represent narrow, and inapposite, circumstances where the general rule of monetary compensation was relaxed by the tribunals to grant provisional measures even though monetary damages would have sufficed. All involved imminent harm to the applicant because the tribunal's power to award the requested specific performance was jeopardized or a legally separate subsidiary's insolvency was at stake threatening total destruction of the claimant's investment. None of the unique circumstances dispositive to the outcomes of those cases is present in this case. No authority supports the granting of interim measures in circumstances like those asserted in Claimant's Request, where the injuries alleged are easily compensable by a monetary award.

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175. In sum, Claimant has failed to demonstrate that "irreversible harm to MSDIA" can occur either as a result of the issuance of an adverse judgment of the National Court or its enforcement. Furthermore, its speculations and worries about devastating effects of an adverse judgment on its

business operations in Ecuador are insufficient to discharge its burden to establish that it would suffer any real harm, let alone irreparable or irreversible harm. As a matter of law, Claimant has failed to show why monetary compensation would not make it whole if it were to succeed on the merits. On this basis alone, the Claimant's Request must be denied.

VI. GRANTING THE INTERIM MEASURES REQUESTED BY CLAIMANT WOULD IMPOSE A DISPROPORTIONATE BURDEN ON RESPONDENT.

176. Claimant is seeking from the Tribunal an interim measures order "restrain[ing] state action allowing the seizure of MSDIA's assets."[255] According to Claimant, the requested interim measures "would impose no burden on Ecuador," since "Ecuador itself has no direct interest in [the] judgment, or in the payment of that judgment."[256] Claimant's assertion, however, is uninformed and in shocking disregard of the fundamental requirements of legality in constitutional systems. It utterly fails to take into consideration legal constraints on the relationship of an independent judiciary to the other components of a State.

In fact, the requested measures would place an enormous burden on Ecuador far out of proportion to any benefit they would bestow on a single litigant in a private litigation where the State is not even a party. The interim measures Claimant requests would require Ecuador to act in a way that contravenes its Constitution and laws, to the prejudice of the civil rights of litigants in the Ecuadorian courts. Moreover, they would call into question Ecuador's compliance with international instruments for the protection of human rights, thereby exposing it to liability under international law.

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255 Claimant's Request, ¶¶ 87, 166 ("a. Order Ecuador to take any and all available steps to prevent enforcement of any judgment in the NIFA litigation against MSDIA; b. Order Ecuador to refrain from any action, including by courts and executive, to enforce any judgment in the NIFA litigation against MSDIA or its assets; c. Order Ecuador to make a written representation to any court in which NIFA attempts to enforce any judgment in the NIFA litigation, stating that the judgment is not enforceable pending the outcome of this arbitration …").

256 *Id.*, ¶ 83.

A. Under International Law, Interim Measures May Not Be Ordered Where Their Imposition Would Disproportionately Burden The Other Party.

177. Under international law and jurisprudence, interim measures may not be ordered where their imposition would disproportionately burden the other party.[257] As stated by the Belgo-Bulgarian Mixed Arbitral Tribunal in the *Electricity Company of Sofia* case, international courts and tribunals, when indicating interim measures of protection, will observe:

> a principle which, although it may not have been included in the rules of procedure, is not any the less worthy of consideration, namely, the principle that the possible injury that may be caused by the proposed interim measures of protection must not be out of proportion with the advantage which the claimant hopes to derive from them.[258]

178. In a similar vein, the Court of Justice of the European Union rejected a request for interim measures since "so far-reaching an interim measure" was regarded as disproportionate to "only a relatively small benefit to the applicant."[259]

179. Investment treaty tribunals also have been attentive to the burden resulting from the imposition of interim measures on one of the litigating parties. In *Occidental v. Ecuador*, for example, the provisional measures requested by the claimant in that case included its reinstatement in its concessionary rights.[260] The tribunal noted that "[s]pecific performance, even if possible, will nevertheless be refused if it imposes *too heavy a burden* on the party

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[257] *See* A. Yesilirmak, PROVISIONAL MEASURES IN INTERNATIONAL COMMERCIAL ARBITRATION (2005), p. 181 (RLM-3) (noting: "[a]n arbitral tribunal should take into account the effect of granting any interim measure on the arbitrating parties' rights. As such, the possible injury caused by the requested interim measure must not be out of proportion with the advantage which the claimant hopes to derive from it.").

[258] *Electricity Company of Sofia and Bulgaria v. The Municipality of Sofia and the Bulgarian State*, Decisions of the Belgo-Bulgarian Mixed Arbitral Tribunal, vol. II, pp. 926-7, *cited in* J. Sztucki, INTERIM MEASURES IN THE HAGUE COURT (1983), p. 124 (RLM-31).

[259] *Plaumann & Co. v. European Commission*, Case C-25/62, Judgment (12 Dec. 1962), 1963 ECR 126, p. 128 (RLM-50).

[260] *Occidental Petroleum*, ¶ 4 (RLM-45)."

against whom it is directed."[261] The tribunal denied granting the requested provisional measures.[262] In *Railroad Development v. Guatemala*, the claimant requested that certain classes of documents be preserved. The tribunal considered, *inter alia*, that granting the request "would place an unfair burden on the Government because of its excessive breadth," and dismissed the claimant's application for provisional measures on that basis.[263]

180. Similarly, although not expressly provided for in Article 26 of the UNCITRAL Arbitration Rules,[264] proportionality is one of the "internationally recognized" standards that have to be satisfied by the applicant before an UNCITRAL tribunal issues an order of interim measures.[265] According to the UNCITRAL tribunal in *Paushok v. Mongolia*, a tribunal faced with a request for interim measures "is called upon to weigh the balance of inconvenience in the imposition of interim measures upon the parties."[266]

B. Compliance With The Requested Interim Measures Would Contravene The Ecuadorian Constitution Which Guarantees The Independence Of The Judiciary And Private Litigants' Right To Enforcement Of Court Decisions.

181. Compliance with the interim measures Claimant requests would contravene Ecuador's Constitution and violate the rights under *law* of litigants in the Ecuadorian courts, thereby exposing Ecuador to liability under its domestic law. As a result, the requested interim measures

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261 *Id.* ¶ 82 (emphasis added).

262 *Id.* ¶ 86.

263 *Railroad Development Corporation v. Republic of Guatemala*, ICSID Case No. ARB/07/23, Decision on Provisional Measures (15 Oct. 2008) (Rigo Sureda, Eizenstat, Crawford), ¶¶ 35-36 (RLM-53).

264 *But see* Article 26(3)(a) of the 2010 UNCITRAL Arbitration Rules, under which the party requesting an interim measure is required to satisfy that the threatened harm "substantially outweighs the harm that is likely to result to the party against whom the measure is directed if the measure is granted."

265 *Paushok*, ¶ 45 (CLM-12).

266 *Id.*, ¶ 79.

would impose a burden on Ecuador grossly disproportionate to any benefit to be gained by Claimant.

182. In particular, any recommendation by the Tribunal that the Ecuadorian executive[267] interfere with the enforcement of a court decision would contravene the doctrine of separation of powers,[268] and the independence of the Ecuadorian judiciary, both principles explicitly enshrined in the Ecuadorian Constitution.[269] The Attorney General's office, the sole and exclusive authority with the power to intervene in a legal process on behalf of the State, does not have the power to interfere in judicial proceedings to which the State is not a party; neither can he interfere in a private dispute to advocate the legal interest of a private party, nor make *amicus* legal or factual representations in the context of the Claimant's case before the Ecuadorian courts, in the absence of a legal interest in the underlying dispute.

183. It follows that recommendations by the Tribunal that the Attorney General must act in a way that contravenes the above legal framework would breach the principle of the independence of the judiciary, as well as the principle of legality, which requires that every State agent act in accordance with the powers expressly vested in them by the Constitution and the law.[270] State

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[267] The Tribunal's Award or Order on Claimant's application for provisional measures is not self-executing in the Ecuadorian legal order and would thus require independent executive action in order to produce legal effects, considering that Ecuador is not a party in the NIFA litigation.

[268] Constitution of the Republic of Ecuador (20 Oct. 2008), art. 225 (RLM-15) ("Ecuadorian Constitution").

[269] *Id.*, art. 168.

[270] Article 226 of the Ecuadorian Constitution provides: "Institutions of the State, its agencies, departments, public servants and persons acting in the exercise of a State power shall exercise only the powers and competences vested with them by the Constitution and the law."

officials who interfere with the independence of the judiciary would also incur administrative, civil, and criminal liabilities.[271]

184. Compliance with the Tribunal's granting of the requested interim measures could also infringe private litigants' right to enforcement of court decisions, a right that is constitutionally enshrined (and protected against any undue interference by the Government of Ecuador). Article 75 of the Ecuadorian Constitution establishes the right of all persons under Ecuadorian jurisdiction to due process of law. The essential right to effective judicial protection, according to the jurisprudence of the Ecuadorian Constitutional Court, as Professor Guerrero states in his legal opinion, includes a right to the enforceability of court decisions.[272]

C. The Requested Interim Measures Would Call Into Question Ecuador's Compliance With Its International Obligations.

185. Private litigants' right to enforcement of court decisions is also protected under Article 8[273] of the Inter-American Convention on Human Rights ("ACHR" or "Convention"),[274] which is directly applicable in the Ecuadorian legal order and prevails over any contrary law, including the Ecuadorian Constitution.[275] In a recent decision against the Ecuadorian Government, the Inter-American Court held that:

> the principle of effective judicial protection requires that the implementation procedures be accessible to the parties, without hindrance or undue delay in order to quickly, simply, and comprehensively satisfy their purpose. Additionally, the provisions

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271 Ecuadorian Constitution, art. 168 (RLM-15).

272 Guerrero Legal Opinion, ¶¶ 17-18.

273 Article 8 ACHR reads in pertinent part: "[e]very person has the right to a hearing, with due guarantees and within a reasonable time, by a competent, independent, and impartial tribunal, previously established by law, … for the determination of his rights and obligations of a civil, labor, fiscal, or any other nature." (RLM-7).

274 Ecuador has ratified the ACHR on August 12, 1977.

275 *See* Guerrero Legal Opinion, ¶ 15 and Ecuadorian Constitution, arts. 424 and 426 (RLM-15).

> governing the independence of the judicial order must be made in an appropriate way so as to ensure the timely execution of the judgments without any interference by other branches of government and guarantee the binding and obligatory nature of the decisions of last resort. The Court considers that in a system based on the principle of rule of law, all public authorities, within the framework of their jurisdiction, must head to the judicial decisions and push forward the execution of these decisions without hindering the purpose and scope of the decision or unduly delaying its implementation.[276]

186. The denial or hindering of enforcement of court decisions in breach of private litigants' rights under the American Convention is actionable under the Ecuadorian Constitution. As Professor Guerrero states in its Legal Opinion:

> Article 25 of the Inter-American Convention on Rights[277] … acknowledge[s] that all persons have the right to a simple and quick appeal against acts that violate their fundamental rights, even when such a violation is committed by persons who are acting in exercise of their official responsibilities … In accordance with precisely with the obligation imposed on the Ecuadorian State through the aforementioned international rules, Article 88 of the Ecuadorian Constitution contemplates as one of the constitutional judicial guarantees [the right to] protective action which can be interposed when, among other instances, there is a violation of constitutional rights through an action or omission of a non-judicial public authority, which consists of all the institutions and bodies that make up the Executive Branch and the Office of the Attorney General.[278]

187. It follows that:

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[276] *Mejia Idrovo v. Ecuador*, IACHR, Preliminary Objections, Merits, Reparations and Costs (5 Jul. 2011), ¶ 106 (RLM-39) (footnotes omitted).

[277] Article 25 ACHR provides in pertinent part: "1. Everyone has the right to simple and prompt recourse, or any other effective recourse, to a competent court or tribunal for protection against acts that violate his fundamental rights recognized by the constitution or laws of the state concerned or by this Convention, even though such violation may have been committed by persons acting in the course of their official duties. 2. The States Parties undertake: … c. to ensure that the competent authorities shall enforce such remedies when granted." ACHR (RLM-7).

[278] Guerrero Legal Opinion, ¶¶ 28-29 (footnotes omitted).

> In the event that the State, through the Executive Branch or the Office of the Attorney General, issues any type of ruling for the purpose of suspending the enforcement of a judicial ruling, [NIFA] would have the right to appear before the Judiciary and present a protection action against the authority that ordered the suspension, in order to declare said order a violation of its fundamental rights and, specifically, a violation of its right to effective judicial protection, as a result of denying it the possibility of enforcing a jurisdictional decision …[279]

188. In light of this, the Tribunal will instantly appreciate the far-reaching nature of Claimant's request. International tribunals have generally recognized jurisdictional limitations when the requested interim measures interfered with domestic due process; as stated by the tribunal in *SGS v. Pakistan*: "[w]e cannot enjoin a State from conducting the normal processes of criminal, administrative and civil justice within its own territory. We cannot, therefore, purport to restrain the ordinary exercise of these processes."[280] Were it to grant Claimant's far-reaching request, the Tribunal would indeed be interfering with the ordinary exercise of civil justice in Ecuador, well beyond the context of the enforcement of any judgment favorable to NIFA that might be rendered in the litigation against Claimant. Were Ecuador to comply with such request, it would act inconsistently with its obligations under international instruments for the protection of human rights, thereby exposing it to liability under international law as well.[281]

D. Claimant's Efforts To Minimize The Burden On Ecuador Are Unavailing.

189. Claimant seeks support for its proposition that "staying enforcement of the disputed judgment would not violate the independence of Ecuador's judiciary or Ecuador's sovereignty"

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279 *Id.* ¶ 30 (footnotes omitted).

280 *SGS Société Générale de Surveillance S.A. v. Islamic Republic of Pakistan*, ICSID Case No. ARB/01/13, Procedural Order No. 2 (16 Oct. 2002) (Feliciano, Thomas, Faurès), p. 301 (RLM-57).

281 Compliance with the interim measures requested by Claimant could also be actionable under the ACHR dispute settlement system, with a ruling against the Ecuadorian Government very likely, based on the case law under the Convention. Guerrero Legal Opinion, ¶ 31.

from the *Chevron* tribunal's recent award of interim measures. However, the *Chevron* tribunal's award signals an unprecedented intrusion into a State's sovereignty and jurisdiction which must not be repeated by this Tribunal. It may be that the particular circumstances of *Chevron* case, which are very different than those in the present case, led the tribunal there into over-stepping the proper limits on interim measures. For example, the amount of the *Lago Agrio* judgment ($18 bn) surpasses by far the amount of the judgment in favor of NIFA ($150 mil), both in absolute amount and in relation to the resources of the party affected. Moreover, Chevron alleges, erroneously and baselessly in Ecuador's contention, that the Government of Ecuador had improperly extended substantial support to the *Lago Agrio* plaintiffs. Quite apart from the lack of merit of Chevron's allegation, here, Claimant has not even made, and could not possibly have made, an allegation that there has been any interference by the Ecuadorian executive in its private dispute with NIFA.

190. Claimant also alleges that the requested measures would actually benefit Ecuador, since (a) Ecuador would be spared from compensating MSDIA for its damages, should it prevail in the arbitration; and (b) an interim measures order would benefit Ecuador because it would allow MSDIA to continue distributing essential medications to Ecuadorian citizens.[282] Much like Claimant's other assertions, these arguments are not credible and do not detract from the conclusion that the requested measures would result in harm to Ecuador that is disproportionate to Claimant's benefit.

191. For its first proposition, Claimant appears to rely on the *Paushok* and *Burlington* cases. However, its reliance is inapposite. In Paushok, the tribunal paid significant attention to the fact

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[282] *Id.*, ¶ 86.

that Mongolia had recognized the shortcomings of the challenged law and that it had to be replaced.[283] In addition, as the tribunal noted, "[Mongolia] appears to wish GEM *to continue its operations in Mongolia*."[284] For the tribunal, these "specific features surrounding this particular request … differentiate it from other awards referred to by the Parties."[285] These features of the *Paushok* case are plainly not met here, as Claimant has no view on the merits of the NIFA litigation against Claimant. Moreover, even if enforcement of the judgment against Claimant would affect its current sales configuration in Ecuador, shown earlier not to be the case, Ecuador's general interest in the availability of medicines and vaccines in the Ecuadorian market would be fully satisfied by direct importation or substitute sales. The indirectly owned company at issue in *Paushok* was the "second largest gold producer" in Mongolia; in these circumstances, and in light of Mongolia's wish that the company continue its operations, the tribunal presumed that it would be in Mongolia's interest that it continue these.[286] On the other hand, Claimant here has a mere 2.52% market share of Ecuador's pharmaceuticals market.[287] Finally, of course, the benefit to Mongolia seen by the *Paushok* tribunal was not outweighed, as here, by the implacable burden of violating the constitutionally and internationally protected independence of the judiciary and private litigants' due process rights.

192. Claimant also quotes the *Burlington* tribunal out of context. In *Burlington*, the Republic of Ecuador was itself a party with the claimants to two production-sharing agreements for the exploration and exploitation of oil fields in the Amazon region, with great revenue potential for

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283 *Paushok*, ¶ 82 (CLM-12).

284 *Id.*, ¶ 43 (emphasis added).

285 *Id.*

286 *Id.*, ¶ 83.

287 Canan Statement, ¶ 8.

Ecuador. The tribunal thus considered that what was at risk in the circumstances prevailing at the time of claimant's application for provisional measures was "the destruction of an ongoing investment and of its revenue-producing potential which benefits both the investor and the State."[288] Here, Ecuador has not entered into any similar arrangement and receives no direct revenue from Claimant's activities. Finally, of course, like *Paushok*, the *Burlington* tribunal was not asked to issue measures violating judicial independence and private litigants' due process rights.

193. More importantly, as explained above, the facts as alleged by Claimant do not support its claims under the Treaty. Not only has Claimant utterly failed to sustain its burden to show likelihood of success on the merits, it currently has no rights and, therefore, no arbitrable claims whatsoever under the Ecuador-U.S. Bilateral Investment Treaty (indeed, it may never have any at all). Hence, considerations of "minimizing damages" should not feature in the Tribunal's considerations.

194. Claimant finally argues that a provisional measures order would benefit Ecuador because it would allow MSDIA to continue distributing essential medications to the Ecuadorian population. This is a preposterous argument. First, as established in Mr. Hart's Expert Report, Claimant has the financial wherewithal to satisfy the NIFA judgment, should it be adverse to it,[289] without this affecting its continued business in Ecuador. Second, Ecuador fails to see any reason why Claimant's distributors and wholesalers would stop doing business with Claimant in the event that a judgment that is adverse to Claimant's interests is confirmed, and Claimant itself

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[288] *Burlington Resources* (2009), ¶ 83 (CLM-3).

[289] Hart Expert Report, ¶ 27

offers none.[290] Third, MSDIA's indirect corporate parent, Merck, the pharmaceutical products of which MSDIA imports and distributes in Ecuador, could very well import, distribute and market its medicines in Ecuador through other avenues without any risk of interruption in their availability to Ecuadorian patients.

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195. In sum, Claimant's request is broad, radical and in no way comports with the requirement of proportionality – considering also that, even if Ecuador is found liable under the Treaty, Claimant's harm is fully reparable by the award of monetary damages. Granting Claimant's request in these circumstances would put Ecuador in an impossible situation: to comply and risk breaching its own Constitution and laws, as well as its international obligations under international instruments for the protection of human rights; or not to comply, and risk failing to adhere to its duty to arbitrate in good faith. Neither the letter nor the spirit of the Treaty or the UNCITRAL Arbitration Rules provide a legal basis or justification for interim measures of such extent, effectively calling the Republic to rewrite its own laws or act in disregard of such laws and its obligations under other international treaties. In these circumstances, Claimant's request must be denied in its entirety.

[290] Hart Expert Report, ¶ 17 Indeed, as testified by Mr. Canan, Claimant's operations in Ecuador have continued in their normal course regardless of the NIFA litigation. Canan Statement, ¶¶ 8-9.

VII. CLAIMANT HAS NO FREE-STANDING RIGHT TO NON-AGGRAVATION OF THE DISPUTE.

196. In passing, Claimant also requests that the Tribunal order Ecuador "to refrain from taking any action that would aggravate or exacerbate the dispute, threaten the integrity of these arbitral proceedings or frustrate the effectiveness of any award from this Tribunal."[291] But Claimant has failed to demonstrate that any such order is necessary or appropriate under UNCITRAL Article 26.

197. First, Claimant does not specify any actions that might be taken by Ecuador, beyond those described in its other requests [292] that would aggravate or exacerbate the dispute, threaten the integrity of the arbitral proceedings or frustrate the effectiveness of the Tribunal's award. And this is with good reason, since there are none. Claimant's empty request in this respect lacks any showing that the requested measure is necessary, a shortcoming fatal to its request.

198. Second, and in any event, since, as explained above, Claimant has failed to meet the UNCITRAL Article 26 requirements for the other interim measures it requests, its request for non-aggravation interim measures must fail as well.

199. The question whether an international court or tribunal has the power to indicate interim measures directed against a party which risks aggravating the dispute but whose conduct is not such as to cause an imminent risk of irreparable harm to the rights of the other party has been answered authoritatively by the ICJ in the negative. In the *Pulp Mills* case, Uruguay requested that Argentina, *inter alia*, abstain from any dispute that might aggravate, extend or make more

[291] Claimant's Request, ¶ 166(d).

[292] *Id.*, ¶ 166(a)-(c).

difficult the settlement of the dispute.[293] Uruguay observed in this regard that "a party to litigation before the Court, even one that has lost a provisional measures application, has a duty to respect the decision of the Court and to refrain from taking or permitting measures which are calculated to undermine the due administration of justice."[294] Uruguay also claimed that the Court could order provisional measures in order to prevent aggravation of the dispute even where it had found that there was no threat of irreparable damage to the rights in dispute.[295]

200. The Court recalled that it "has on several occasions issued provisional measures directing the parties not to take any actions which could aggravate or extend the dispute or render more difficult its settlement."[296] It also observed that "in those cases provisional measures other than measures directing the parties not to take actions to aggravate or extend the dispute or to render more difficult its settlement were also indicated."[297] Having already found, however, that there was no imminent risk of irreparable prejudice to the rights of Uruguay in dispute before it, the Court held that non-aggravation measures were not justified in the absence of the conditions to indicate the first provisional measure requested by Uruguay (namely, that Argentina should take all reasonable and appropriate steps at its disposal to prevent or end the interruption of transit between the two countries).[298] The Court thereby confirmed that non-aggravation provisional measures are merely ancillary to measures requiring a finding of urgency and irreparable prejudice, and are not free-standing.

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[293] *Pulp Mills Case*, ¶ 44(RLM-51).

[294] *Id*., ¶ 45.

[295] *Id*.

[296] *Id*., ¶ 49.

[297] *Id*.

[298] *Id*., ¶¶ 50-51.

201. The ICJ's decision was echoed in the tribunal's decision on provisional measures in *CEMEX v. Venezuela*.[299] In that case, much like in the present one, claimants asked the tribunal, in general terms and without any specification, "to enjoin Venezuela from taking any action further prejudicing, aggravating the dispute before this Tribunal, or rendering this dispute more difficult of solution."[300] For the tribunal, this request raised the question:

> whether, under Article 47 of the ICSID Convention, a tribunal has an independent power to recommend provisional measures relating to a dispute. In other words, when, in the opinion of a Tribunal, there is no urgency or necessity to adopt provisional measures directed at the preservation of the rights of the parties, is it still possible for it to recommend other provisional measures in order to avoid the aggravation or extension of the dispute?[301]

202. Noting with approval the ICJ's Judgment on Provisional Measures in the *Pulp Mills* case,[302] the tribunal decided that there was no reason to take a different position:

> [The Tribunal] recalls that Article 47 of the ICSID Convention does give ICSID Arbitral Tribunals power to recommend measures directed at the preservation of the rights of the parties. In exercising this power, ICSID Tribunals may recommend measures in order to avoid the aggravation or extension of the dispute. *But those "non-aggravation" measures are ancillary measures which cannot be recommended in the absence of measures of a purely protective or preservative kind*.[303]

203. The tribunal thus dismissed the claimants' request.

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[299] *Cemex* (CLM-4).

[300] *Id.*, ¶ 62.

[301] *Id.*, ¶ 63.

[302] *Id.*, ¶ 64.

[303] *Id.*, ¶ 65 (emphasis added).

204. In sum, since the so-called principle of non-aggravation cannot supplant the requirements of Article 26 of the UNCITRAL Rules, Claimant's request must, like its other requests, be dismissed in its entirety.

VIII. CONCLUSION

For the foregoing reasons, Claimant's Request for Interim Measures must be denied in its entirety.

Respectfully submitted,

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