IN THE MATTER OF AN AD HOC ARBITRATION

UNDER THE UNCITRAL ARBITRATION RULES
PCA CASE NO. 2012-10

MERCK SHARP & DOHME (I.A.) LLC.

Claimant

versus

THE REPUBLIC OF ECUADOR

Respondent

CLAIMANT'S SUBMISSION REGARDING THE 4 AUGUST 2016 NCJ JUDGMENT

26 September 2016

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I. INTRODUCTION

1. Pursuant to the Tribunal's letter to the parties dated 24 August 2016, Claimant, Merck Sharp & Dohme (I.A.) LLC ("MSDIA") herein addresses the 4 August 2016 judgment of Ecuador's National Court of Justice ("NCJ") in the *NIFA v. MSDIA* litigation. This Submission is accompanied by one volume of fact exhibits and one volume of legal authorities.

2. For almost 13 years, MSDIA has been compelled to defend itself in Ecuador's courts, repeatedly incurring seven- and now eight-figure U.S. dollar judgments from Ecuador's NCJ lacking any coherent factual or legal basis, each successive judgment deemed final and enforceable and each arising out of the same complaint concerning a failed negotiation about a small manufacturing facility valued by the parties at only $1.5 million.

3. Ecuador's courts at every level, from first instance to the National Court of Justice and Ecuador's specialized Constitutional Court, have issued irrational, baseless, and obviously biased decisions in favor of NIFA, without respect for the factual record, elementary logic, or Ecuadorian law. Judgments have been issued against MSDIA under four different legal theories, none of which was previously recognized under Ecuadorian law, three of which were either not advanced or disavowed by the plaintiff in the case. MSDIA has now been found liable in "final" judgments issued by three different panels of NCJ judges, in every case under legal theories never argued by the plaintiff. Ecuador's courts have ordered MSDIA to pay ever-escalating damages for the same conduct, in judgments first enforced against MSDIA and then vacated at the plaintiff's request, culminating in the $41.9 million August 2016 NCJ Judgment. This last judgment was expressly based on obviously unfair and biased factual findings made by the court of appeals and the expert report of Mr. Cristian Cabrera, a report so obviously irrational that even the prior two NCJ panels had rejected its conclusions out of hand, and so preposterous that Ecuador has never even attempted to defend it in this arbitration.

4. In short, the *NIFA v. MSDIA* litigation has been a long series of extraordinary miscarriages of justice. There can be no doubt that the Ecuadorian judicial system as a whole has failed to provide MSDIA with the basic protections of due process, and has failed to afford MSDIA with effective means of asserting claims and enforcing rights. The recent August 2016 NCJ Judgment and the 20 January 2016 Constitutional Court Decision that dictated its terms continue and intensify the same patterns of abuse of MSDIA and its legal rights at the hands of Ecuadorian courts that have persisted without respite since 2003. For the reasons set forth below, these 2016 rulings, like those that came before, deny justice to MSDIA and violate Ecuador's obligations under the Ecuador-United States Bilateral Investment Treaty (the "Treaty").

5. It now appears that NIFA has not filed another Extraordinary Action for Protection in Ecuador's Constitutional Court challenging the 4 August 2016 NCJ Judgment, and the deadline for doing so has now expired. It is possible, therefore, that the August 2016 NCJ Judgment may

be the last "final judgment" in the long-running *NIFA v. MSDIA* litigation.[1] That does not mean, however, that $42 million is a ceiling on the new injuries that MSDIA faces.

6. As the Tribunal is aware, on 16 September 2016, the Ecuadorian court of first instance with jurisdiction to enforce the August 2016 NCJ Judgment issued an order suspending enforcement proceedings in compliance with this Tribunal's Second Order on Interim Measures. As of today, that suspension remains in place. If it were lifted, however, either by the court of first instance on motion for reconsideration or revocation filed by NIFA or by a superior Ecuadorian court acting at NIFA's urging, NIFA could immediately enforce the NCJ's $42 million judgment. Such enforcement would destroy MSDIA's investment in Ecuador. MSDIA would lose its ongoing business, including its assets and expectation of future profits, and because its assets in Ecuador are valued at far less than $42 million, it would also face potential enforcement against assets outside Ecuador.

7. Thus, it is possible that MSDIA's business in Ecuador might be destroyed through enforcement of the judgment, occasioning loss of all assets in the country and loss of future profits, and MSDIA could also suffer litigation costs and potential judgments enforcing any unsatisfied portion of the judgment in other countries. Those damages would be very substantial and would flow directly from the denials of justice at issue.

8. International law provides that MSDIA is entitled to full reparation of the damage caused by Ecuador's breaches of the Treaty. Those breaches have imposed on MSDIA more than $7.7 million in judgments already paid to NIFA, nearly $7 million in legal fees and costs defending the Ecuadorian proceedings that have resulted in those denials of justice, and other, unquantified damages to its reputation and goodwill, and now a new $42 million liability (Ecuador's courts have not yet determined whether that includes or is additional to the $7.7 million in liability imposed by the prior NCJ judgments, which were also denials of justice), and risk of loss of its ongoing Ecuadorian business.

9. For the reasons set forth below, the remedy that would restore MSDIA most closely to the position it would have been in absent Ecuador's breaches, is an order directing Ecuador immediately to satisfy in full MSDIA's purported obligations under the August 2016 NCJ Judgment, as well as compensation for MSDIA's prior payments in satisfaction of prior judgments, its legal fees and costs defending the Ecuadorian litigation, and other losses.

10. That remedy is needed because, unfortunately, Ecuador's position in this arbitration has left no doubt that Ecuador will not respect an award directing nullification of the judgments of its courts that have denied justice to MSDIA. An award declaring those judgments to be null and void would therefore be an empty remedy that would leave MSDIA exposed to enforcement of those judgments in Ecuador (and perhaps elsewhere). So long as those judgments remained un-nullified and unsatisfied, they could be enforced against MSDIA's assets in Ecuador and beyond.

[1] That NIFA appears not to have filed an EAP seeking to vacate the August 2016 NCJ Judgment does not mean that the litigation in Ecuador has come to an end. It is possible, for example, that NIFA may appeal the order of the first instance court staying the enforcement of the August 2016 NCJ Judgment, up to and including filing an EAP in the Constitutional Court alleging that the order granting a stay violated its constitutional rights.

11. If, on the other hand, Ecuador were directed to fully satisfy the judgment in a timely fashion so as to avoid any risk of seizure of MSDIA's assets, and if it complied prior to any judicial order mandating execution of the judgment against MSDIA's Ecuadorian assets, this would bring the *NIFA v. MSDIA* proceedings to an end and permit this Tribunal to put MSDIA in the same position it would have been in absent Ecuador's breaches of the Treaty.

12. MSDIA therefore respectfully requests that the Tribunal issue a Partial Final Award as soon as reasonably possible declaring that the Tribunal has jurisdiction and that Ecuador has breached the Treaty, and awarding MSDIA $41,966,571.60. The Tribunal has before it all of the evidence and submissions from the parties necessary to support a Partial Final Award on these terms. Moreover, an award on these terms, if complied with by Ecuador, would avoid the loss of MSDIA's business in Ecuador (and consequently, another phase of this arbitration to decide MSDIA's claim for damages resulting from the destruction of its business).

13. A Partial Final Award on these terms would not address all of MSDIA's claims, MSDIA's remaining claims (including its claim to recover the costs incurred in defending the *NIFA v. MSDIA* litigation and its other prior losses) should be deferred to a further phase of the arbitration, in which MSDIA can submit additional, updated evidence of quantum (including with respect to a claim for damages resulting from the destruction of its business in Ecuador, if necessary)

II. THE 4 AUGUST 2016 NCJ JUDGMENT AND OTHER PERTINENT FACTUAL DEVELOPMENTS SINCE THE MARCH 2015 HEARING

14. MSDIA has described the history of the *NIFA v. MSDIA* litigation in its pre-hearing memorials[2] and during the March 2015 hearing in London. That history is not repeated here. The discussion below describes factual developments since the March 2015 hearing, beginning with the Constitutional Court proceedings on NIFA's second "Extraordinary Action for Protection" ("EAP") that were already underway at that time; and continuing with the January 2016 Constitutional Court decision that dictated the outcome when the case was returned to the NCJ (and prompted this Tribunal's first order of interim measures); the August 2016 NCJ judgment itself; and events in Ecuador since the issuance of that judgment.

A. The Constitutional Court Proceedings and Ruling on NIFA's Second Extraordinary Action for Protection

15. On 9 January 2015, NIFA filed its second EAP in Ecuador's Constitutional Court. As MSDIA advised the Tribunal, that action was pending in the Constitutional Court at the time of the March 2015 merits hearing in this arbitration.

16. NIFA argued that the 10 November 2014 NCJ judgment, which had awarded NIFA $7,723,471.81, was arbitrary and violated NIFA's constitutional rights to due process, effective legal protection and legal certainty.[3] NIFA requested that the Constitutional Court annul the

[2] *See generally* MSDIA's Memorial, at paras. 37-160; MSDIA's Reply, at paras. 475-493; MSDIA's Supplemental Reply, at paras. 7-22.

[3] Exhibit C-299, NIFA's Extraordinary Action for Protection, Constitutional Court, dated 9 January 2015.

NCJ judgment, reinstate the $150 million court of appeals judgment, and return the case to the NCJ for another (third) final judgment. NIFA had sought and obtained just such relief in its first EAP, which had challenged the September 2012 NCJ judgment awarding NIFA $1,570,000.

17. Less than two months after the London hearing, on 28 April 2015, a three judge panel of the Constitutional Court admitted NIFA's EAP for consideration by the full Constitutional Court on the merits.[4]

18. Nevertheless, on 6 July 2015, the Ecuadorian court of first instance granted NIFA's request to enforce the November 2014 NCJ judgment.[5] On 9 July 2015, in order to avert the seizure of its assets, MSDIA complied with that order and satisfied the judgment.[6]

19. On 14 January 2016, at the request of MSDIA and Ecuador's Attorney General, the Constitutional Court held an oral hearing on NIFA's second EAP.[7] At the hearing, counsel for MSDIA and NIFA and a representative from the Attorney General's office made oral submissions.

20. Six days later, on 20 January 2016, Ecuador's Constitutional Court issued its decision: it granted NIFA's EAP, annulled the November 2014 NCJ decision (which MSDIA had already paid), reinstated the court of appeals $150 million judgment, and returned the case to the NCJ.[8] The Constitutional Court expressly directed that the case should now be decided on the merits not by the regular judges of the NCJ but instead by the "alternate judges" whose function generally is limited to deciding which petitions for cassation will be decided by the NCJ on the merits.[9]

21. The Constitutional Court decision accomplishing these results was highly unusual and constituted an improper attempt to compel the NCJ to issue a new and far larger judgment against MSDIA. Among other things, the Constitutional Court:

a. concluded implausibly that the November 2014 NCJ decision awarding NIFA $7.7 million had violated NIFA's rights;

b. improperly directed the NCJ to accept the deeply flawed and obviously irrational evidentiary findings of the court of appeals;

[4] Exhibit C-300, Constitutional Court's Order Admitting NIFA's EAP, dated 28 April 2015.
[5] That order directed MSDIA to pay NIFA $6,153,461.81, equivalent to the $7,723,471.81 judgment offset by the $1,570,000 MSDIA had already paid in satisfaction of the 21 September 2012 NCJ judgment. On 30 June 2015, the trial court had first directed MSDIA to pay the full $7,723,471.81, before reversing course later the same day. *See* MSDIA's Letter to the Tribunal, dated 1 July 2015, at p. 5.
[6] *See* Exhibit C-297, MSDIA Brief, dated 9 July 2015, and attached acknowledgment of payment of the Court. MSDIA revised its claim for relief in the arbitration to account for this additional payment to NIFA of $6,153,461.81 in its Supplemental Submission on Quantum dated 19 April 2016.
[7] *See* Exhibit C-301, Constitutional Court Order, dated 5 January 2016.
[8] Exhibit C-302, Constitutional Court Decision, dated 20 January 2016.
[9] Exhibit C-302, Constitutional Court Decision, dated 20 January 2016, at p. 24.

c. exceeded its authority by making factual findings of its own, including finding that the absurd conclusions in the Cabrera expert report constituted valid and conclusive evidence of NIFA's damages that the NCJ was required to accept;

d. directed the "alternate judges" to decide the case in accordance not only with the holdings of the Constitutional Court, but also in accordance with its reasoning; and

e. threatened the panel of alternate judges with severe sanctions should they fail to do so.

22. These aspects of the Constitutional Court's decision are discussed below.

1. The Constitutional Court Found the NCJ Violated NIFA's Constitutional Rights

23. The Constitutional Court held that the NCJ had violated NIFA's constitutional rights in its November 2014 judgment by independently evaluating the evidence in the record in reaching its judgment in favor of NIFA. The Constitutional Court held that the NCJ was not permitted to do so, and instead was required to accept the factual findings of the court of appeals. Specifically, the Constitutional Court held:

> "[T]his Court must point out that … the ability to weigh evidence is the exclusive competence of instance judges, not of national [NCJ] judges, because, if they were to do so, they would attempt against the principle of internal independence. …. If the cassation appellant seeks to have the evidence reviewed, the national judges are forbidden from undertaking such task…."[10]

24. This holding is contrary to Ecuadorian law, prior Constitutional Court rulings, and longstanding NCJ practice. As the experts in this arbitration (including those offered by Ecuador) have unanimously opined, after the NCJ vacates a lower court decision it has the power and duty under Ecuadorian law independently to assess the facts in the record as if it were a court of instance.[11] Indeed, although the NCJ in its first ($1.57 million) judgment in this case had proceeded in this respect in exactly the way it did in its second ($7.7 million) judgment, the Constitutional Court on NIFA's first EAP had not found fault with the NCJ's independent fact-finding but instead rested its rejection of the NCJ's judgment on a technical evidentiary issue.[12]

25. The Constitutional Court further found that the NCJ's analysis in rejecting the court of appeals' liability and damages holdings "fail[ed] to employ judicial, factual and evaluative premises," and that this "incomplete analysis" rendered the NCJ's judgment "illogical."[13] With

[10] Exhibit C-302, Constitutional Court Decision, dated 20 January 2016, at p. 13.
[11] *See* Paez Expert Report, dated 1 October 2013, at paras. 19-21 (explaining the Court's role when issuing a new decision on the merits); Aguirre Expert Report, dated 25 February 2014, at para. 6.1 (Ecuador's expert explaining the Court assumes "the role of the court of first instance and adjudicate[s] the case…").
[12] *See* Exhibit C-285, Constitutional Court Decision, 12 March 2012, at pp. 19-21.
[13] Exhibit C-302, Constitutional Court Decision, dated 20 January 2016, at pp. 21-22. The NCJ had determined that the court of appeals' liability holding, which was based on an antitrust theory, suffered from "defective substantiation." Exhibit C-293, NCJ Judgment, *NIFA v. MSDIA*, dated 10 November 2014, at p. 25. The NCJ

respect to the NCJ's award of damages in the amount of $7.7 million, the Constitutional Court found that the NCJ had failed to provide an "adequate basis" for its damages award, thus violating NIFA's "right to judicial security."[14] (Again, the Constitutional Court on its review of the first NCJ judgment in this case had not found similar fault with the NCJ's complete rejection of the same court of appeals' holdings.[15])

2. The Constitutional Court Directed the "Alternate Judges" to Adopt the Factual Findings of the Court of Appeals and Exceeded Its Authority By Making Factual Findings of Its Own

26. Having found that the NCJ's November 2014 decision had wrongly considered and weighed the evidence in the record, the Constitutional Court expressly directed the panel of alternate judges to whom the case was returned for a new decision not to do the same. The Constitutional Court declared that the panel of alternate judges did not have authority to review the factual findings made by the court of appeals, and that the NCJ's new judgment must be "based on the merits of the facts established in the [court of appeals] decision."[16] Of course, two entirely different panels of the NCJ on their prior review of the case had rejected precisely those court of appeals' findings as irrational. The Constitutional Court was determined to prevent that from happening again.

27. Notwithstanding its finding that only the court of appeals had the authority to consider and weigh evidence, the Constitutional Court itself considered the evidentiary record on damages and endorsed the conclusions of the expert report of Mr. Christian Cabrera, whose facially absurd report had concluded that NIFA (which in 2002 earned a profit of $2,164 from $2.4 million in total sales[17]) had suffered damages of $204 million[18] from its inability to acquire an aged $1.5 million manufacturing plant, and that there were additional damages to "the Ecuadorian people" resulting from this small failed transaction in the amount of more than $642 million.[19]

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correctly observed that at the time of NIFA's complaint there was no antitrust law in effect in Ecuador, *id.* at p. 40, and had found that the court of appeals in its judgment used "obscure, imprecise phrases, and confus[ed] concepts and application of rules with regards to matters such as free competition," *id*. at p. 25. Rather than dismiss NIFA's action on the basis that NIFA's claim rested solely on an antitrust theory, however, the NCJ continued to impose liability under a theory of pre-contractual liability. As MSDIA has explained, that theory had never been advanced by the plaintiff, and is not recognized under Ecuadorian law. *See* MSDIA's Supplemental Reply, at paras. 38-57.

[14] Exhibit C-302, Constitutional Court Decision, dated 20 January 2016, at p. 15. MSDIA established in its January 2015 Supplemental Reply that there was no legitimate basis for holding MSDIA liable for $7.7 million. But the fundamental errors and basic irrationality of the NCJ's damages award worked to NIFA's advantage, not its detriment, resulting in an enormous damages award without any basis in reality.

[15] *See* Exhibit C-285, Constitutional Court Decision, 12 March 2012, at p. 15-18; *see also* MSDIA's Reply at paras. 483-493 (discussing the narrow grounds on which the first Constitutional Court Decision rested).

[16] Exhibit C-302, Constitutional Court Decision, dated 20 January 2016, at p. 10.

[17] Exhibit C-20, Report of Rolf Stern, *NIFA v. MSDIA*, dated 28 May 2009, at p. 4.

[18] Exhibit C-42, Report of Cristian Agusto Cabrera Fonseca, *NIFA v. MSDIA*, Court of Appeals, dated 21 June 2011, at p. 22.

[19] Exhibit C-42, Report of Cristian Agusto Cabrera Fonseca, *NIFA v. MSDIA*, Court of Appeals, dated 21 June 2011, at pp. 22-23, 30.

28. In the court of appeals, MSDIA made timely, repeated objections to Mr. Cabrera's improper appointment,[20] his lack of credentials to serve as an expert in damages,[21] and the complete baselessness of his methodology and conclusions.[22] As MSDIA has demonstrated in prior submissions, among other things:

a. Mr. Cabrera's appointment as an expert was improper under Ecuadorian law, and after MSDIA objected, the court of appeals issued a series of orders changing its rationale for his appointment, improperly seeking to shield the Cabrera report from challenge by MSDIA.[23]

b. In his report, Mr. Cabrera failed to identify any illegal act committed by MSDIA that had harmed NIFA, rendering it impossible to discern the causal basis for his calculations.[24]

c. Mr. Cabrera included in his calculation of NIFA's "lost sales" sales that, according to the very source on which he purported to rely, NIFA ***had actually made*** between 2003 and 2008.[25] In other words, Mr. Cabrera contended that MSDIA should pay NIFA the value of revenues NIFA had actually already received.

d. Mr. Cabrera purported to calculate alleged damages to NIFA over an arbitrarily defined 15-year period ending in 2018, without providing any explanation or basis in fact as to how the unavailability of a single piece of property could possibly impose injury for such a long duration.[26] This of course was particularly indefensible given that NIFA learned it would not acquire the manufacturing plant less than a year after it began to consider acquiring it, and itself had said its inability to acquire the plant had delayed its expansion plans by only one year.[27]

[20] *See, e.g.*, Exhibit C-38, MSDIA Petition submitted to the Court of Appeals, *NIFA v. MSDIA*, 28 April 2011, at paras. 11-17 (objecting to Mr. Cabrera's appointment as an "essential error" expert was untimely); Exhibit C-40, MSDIA Petition submitted to Court of Appeals, *NIFA v. MSDIA*, 13 May 2011 (further objections to Mr. Cabrera's appointment).
[21] Exhibit C-267, MSDIA Petition, *NIFA v. MSDIA*, Court of Appeals, 15 July 2011 at paras. 7-16
[22] Exhibit C-267, MSDIA Petition, *NIFA v. MSDIA*, Court of Appeals, 15 July 2011 at paras. 1-6, 17-27
[23] *See* MSDIA's Reply, at paras. 573-591.
[24] Ponce Martínez Witness Statement, at para. 43.
[25] Exhibit C-44, Report of Carlos Montañez Vásquez,, Court of Appeals, dated 15 July 2011, at 15-16.
[26] MSDIA's Reply at paras. 560(c); Exhibit C-44, Report of Carlos Montañez Vásquez, *NIFA v. MSDIA*, Court of Appeals, dated 15 July 2011, at 11 (noting that "[Mr. Cabrera] does not list the technical reasons why he believes that fifteen years is a reasonable time to establish a sales forecast, when the usual practice is to do a five-year projection"); Ponce Martínez Witness Statement at para. 43.
[27] Exhibit C-10, NIFA's Complaint, NIFA v. MSDIA, Trial Court, 16 December 2003, at pp. 2-6 (explaining that the negotiation ran, at most, from February 2002 to January 2003); *id*. at p. 8 ("The fraud perpetrated intentionally by Merck Sharp & Dohme (Inter American) Corporation caused my client to suffer a year of delays in expanding its industrial plant or constructing or acquiring a new one.")

e. Mr. Cabrera refused without explanation to account for the various alternatives available to NIFA in the immediate aftermath of the failed negotiation with MSDIA, whereby NIFA could have—and indeed, did—expand its production capacity.[28]

f. Mr. Cabrera was entirely unqualified to opine on damages, and Ecuador's Council of the Judiciary later concluded that he never should have been accredited as an expert, finding that he "has not substantiated with any documentation, knowledge or experience his expertise with calculation of damages, consequential damage, lost profits or taxation,"[29] and opining that "[i]t is not clear why he claimed to be an expert."[30]

29. Without addressing any of MSDIA's objections, and without any explanation, the court of appeals awarded damages of $150 million in favor of NIFA, finding the Cabrera report to be "properly grounded."[31]

30. MSDIA presented its objections to Mr. Cabrera's appointment, credentials, and analysis in its submissions before each of the three panels of NCJ judges that have issued judgments in the case.[32] As noted above, in each of its first two decisions, the NCJ specifically rejected Mr. Cabrera's conclusions, finding in September 2012 that Mr. Cabrera's calculations were "lacking all proportion,"[33] and concluding in November 2014 that the Cabrera report was "irrational and illogical."[34]

31. The Constitutional Court flatly ignored MSDIA's objections to Mr. Cabrera's evidence and the conclusions of the prior two NCJ panels. Instead, the Constitutional Court made its own assessment of the Cabrera report:

> "[Cabrera's] report makes a determination about the losses suffered by the plaintiff based on real data and data projecting sales growth over fifteen years, that is, until the year 2018. Without giving a clear and adequate explanation in the

[28] *See* MSDIA's Memorial, at para. 78; Exhibit C-23, Report of Manuel J. Silva Vásconez, *NIFA v. MSDIA*, Court of Appeals, dated 23 December 2009. Among the other errors in his report, Mr. Cabrera estimated NIFA's profit margin during that period at nearly 50%, which far exceeds the 20% maximum profit margin on generic pharmaceutical products that was permitted under Ecuadorian law. MSDIA's Reply at paras. 560(c); Ponce Martínez First Witness Statement at para. 43; Exhibit C-44, Report of Carlos Montañez Vásquez, submitted to the Court of Appeals, NIFA v. MSDIA, 15 July 2011 at p. 24.

[29] Exhibit C-58, Report of Iván Escandón, Provincial Director of the Council of the Judiciary for Pichincha, dated 26 January 2012, at p. 2.

[30] Exhibit C-58, Report of Iván Escandón, Provincial Director of the Council of the Judiciary for Pichincha, dated 26 January 2012, at p. 2.

[31] Exhibit C-4, Court of Appeals Judgment, *NIFA v. MSDIA*, dated 23 September 2011, at pp. 14-15.

[32] *See* Exhibit C-198, MSDIA's Cassation Petition, *NIFA v. MSDIA*, dated 13 October 2011, at paras. 23, 75, 154; Exhibit C-292, MSDIA Petition to the NCJ, dated 29 April 2014, *NIFA v. MSDIA*, at paras. 65-67*;* Exhibit C-303, MSDIA Petition to the NCJ, dated 24 March 2016, *NIFA v. MSDIA*, at paras. 23-29.

[33] Exhibit C-203, NCJ Judgment, *NIFA v. MSDIA*, dated 21 September 2012, at § 16.2.

[34] Exhibit C-293, NCJ Judgment, *NIFA v. MSDIA*, dated 10 November 2014, at p. 80. As MSDIA demonstrated at the March 2015 hearing in London, Ecuador's Council of the Judiciary designated Mr. Cabrera as an expert under highly questionable circumstances and his credentials were so lacking that the Council of the Judiciary subsequently determined that he should never have been designated an expert in the first place. *See* Day 1 Merits Hearing Full Transcript, at 86:9-87:13.

> appealed judgment, the [NCJ] judges [in their prior ruling] do not apply the statute requiring that the compensation be adequate to the damages, that is, that make the victim whole. It is strange how arbitrary the national judges' reasoning is, given that in their determination of the amount of compensation [the respondent] is ordered to pay, they only consider the year 2003 and disregard the damages suffered by the respondent [sic] in the years following 2003."[35]

32. The Constitutional Court thus accepted Mr. Cabrera's opinion that NIFA had suffered damages and that those damages continued past the year 2003.[36] The Constitutional Court therefore held that the NCJ's decision to limit NIFA's damages to losses purportedly incurred in 2003 "lacks sufficient factual support,"[37] and that "there is no element in the proceedings that would impugn the fact that [NIFA] has suffered effects over time as a result of the tort committed by [MSDIA]."[38]

33. In so finding, the Constitutional Court ignored the overwhelming evidence in the record establishing, in direct contravention of Mr. Cabrera's report, that NIFA suffered at most, *de minimis* damages.[39]

3. The Constitutional Court Directed the "Alternate Judges" to Decide the Case in Accordance with the Constitutional Court's Holdings and Reasoning and Threatened Them With Sanctions If They Failed to Do So

34. The Constitutional Court ordered the panel of alternate judges to whom it was returning the case to issue a new decision "in accordance with … [a] comprehensive application of this Constitutional decision, that is, considering the decisum or resolution as well as the central arguments that formed the basis of the decision and constitute the rationale; under warning that the provisions of Article 86 number 4 of the Constitution of the Republic will be enforced if they do not do so."[40]

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[35] Exhibit C-302, Constitutional Court Decision, dated 20 January 2016, at p. 16.

[36] Exhibit C-302, Constitutional Court Decision, dated 20 January 2016, at p. 15. The Constitutional Court states several times its finding that NIFA suffered greater damages than awarded by the NCJ. Thus, the Constitutional Court asserts that the NCJ judgment "solely evaluates the damages suffered by the company [NIFA] during 2003, and disregards the valuation of the damages that the company must have endured in subsequent years." *Id*. at 16. The Constitutional Court then finds that the NCJ ignored "elements present in the case file that should have been taken into account" and that these "elements point out that the damaging effects of the illicit act continued throughout subsequent years." *Id*.

[37] Exhibit C-302, Constitutional Court Decision, dated 20 January 2016, at p. 15.

[38] Exhibit C-302, Constitutional Court Decision, 20 January 2016, at p. 15.

[39] Exhibit C-267, MSDIA Petition, *NIFA v. MSDIA*, Court of Appeals, dated 15 July 2011 at paras. 19-26; Exhibit C-294, MSDIA Petition to the NCJ, *NIFA v. MSDIA*, dated 13 November 2014 (describing the evidence of damages). Notably, the Constitutional Court did not even consider the expert report submitted by Dr. Ignacio de León, which concluded that NIFA had suffered ***no*** damages as a result of the failed transaction. *See* Exhibit C-24, Report of Ignacio De León, *NIFA v. MSDIA*, Court of Appeals, dated 12 February 2010, at pp. 47-49, 98.

[40] Exhibit C-302, Constitutional Court Decision, dated 20 January 2016, at p. 24.

35. Article 86(4) provides that a public official who does not comply with the ruling of an Ecuadorian court may be removed from office and face criminal and civil liability.[41] The Constitutional Court emphasized that these severe personal consequences would result if the alternate judges failed to comply not only with the Constitutional Court's holding, but also with the "central arguments that formed the basis of the [Constitutional Court's] decision and constitute the rationale."[42] As discussed below, this threat was highly unusual.[43]

B. The August 2016 NCJ Judgment Awarding Damages of $41,966,571.60

36. As directed by the Constitutional Court, on return to the NCJ, the case was considered not by the regular judges of the NCJ but instead by the "alternate judges." On 4 August 2016, the alternate judges issued a third "final" decision in the *NIFA v. MSDIA* litigation. In this judgment, they awarded damages in favor of NIFA in the amount of $41,966,571.60.

37. The August 2016 NCJ Judgment partially granted two grounds of cassation advanced by MSDIA: (i) that the court of appeals in a narrow respect had failed properly to apply applicable law,[44] and (ii) that as a result the court of appeals' calculation of damages lacked a basis in law or in evidence.[45] The sole basis for these conclusions was a legal error: the court of appeals had neglected to apply an Ecuadorian law setting the maximum profit margin for generic drugs at 20% of the final price.[46] In all other respects, the NCJ rejected MSDIA's cassation petition. Based on these two partial grants of cassation, the NCJ "partially set[] aside [the court of appeals] judgment."[47]

38. The alternate NCJ judges then proceeded to "render a judgment on the merits of the facts established in the [court of appeals] judgment."[48] Consistent with the Constitutional Court's dictate that "the ability to weigh evidence is the exclusive competence of instance judges, not of national judges,"[49] the NCJ did not independently evaluate the evidence in the record but instead accepted as true the evidentiary findings of the court of appeals.

39. The NCJ specifically declared that it was "refraining from weighing any evidence or determining any of the facts of the trial and appeal,"[50] and later reiterated that "the dispute

[41] Exhibit CLM-184, Article 86(4), 2008 Constitution of Ecuador. This article provides, in part: "If the sentence or ruling is not complied with by the public servants, the judge shall order their dismissal from their job or employment, without detriment to the civil or criminal liabilities that might be applicable."
[42] Exhibit C-302, Constitutional Court Decision, dated 20 January 2016, at p. 24, para. 3.3.
[43] *See below* at paras. 72-77.
[44] *See* Exhibit C-304, NCJ Judgment, *NIFA v. MSDIA*, dated 4 August 2016, at pp. 16-17 (Section 6.2.1) (setting aside the court of appeals decision only as to "how or in what way the damage was done and the manner or method used to calculate it").
[45] Exhibit C-304, NCJ Judgment, *NIFA v. MSDIA*, dated 4 August 2016, at p. 21 (Section 6.5.2).
[46] Exhibit C-304, NCJ Judgment, *NIFA v. MSDIA*, dated 4 August 2016, at p. 21 (Section 6.5.2).
[47] Exhibit C-304, NCJ Judgment, *NIFA v. MSDIA*, dated 4 August 2016, at p. 22.
[48] *See* Exhibit C-304, NCJ Judgment, *NIFA v. MSDIA*, dated 4 August 2016, at p. 22.
[49] Exhibit C-302, Constitutional Court Decision, dated 20 January 2016, at p. 13.
[50] Exhibit C-304, NCJ Judgment, *NIFA v. MSDIA*, dated 4 August 2016, at p. 27.

between the parties cannot lead this court to weigh evidence."[51] Consistent with these assertions, nowhere does the NCJ judgment depart from the evidentiary findings of the court of appeals.[52]

40. As to liability, the NCJ expressly rejected MSDIA's grounds for cassation challenging the court of appeals' reliance on an antitrust theory of liability, grounds that had been accepted by both prior NCJ decisions.[53] As MSDIA has explained in its prior submissions to this Tribunal, the court of appeals held MSDIA liable under an antitrust theory based on Article 244 of Ecuador's 1998 Constitution. As MSDIA has also previously explained, Article 244 of the 1998 Constitution did not create legal obligations, but instead set forth the state's obligation to pass specific laws regulating free competition.[54]

41. As noted, both prior NCJ panels had rejected the court of appeals' liability holding, the first time because NIFA had failed to establish the factual basis for antitrust liability,[55] and the second time because at the time of NIFA's complaint there was no antitrust law in effect in Ecuador.[56] In contrast, by rejecting MSDIA's cassation arguments challenging the court of appeals' liability holding, the third NCJ panel implicitly accepted the court of appeals' liability holding.

42. Ecuador argues that the NCJ in fact adopted a different ground for liability, based on a theory of pre-contractual liability,[57] but Ecuador does not offer any explanation of the NCJ's rejection of MSDIA's cassation grounds challenging the liability determination. In any event, in the part of the judgment Ecuador now seeks to rely on, the NCJ explained that antitrust principles remained relevant to its decision because its pre-contractual liability theory was

[51] Exhibit C-304, NCJ Judgment, *NIFA v. MSDIA*, dated 4 August 2016, at p. 34.
[52] As discussed in MSDIA's prior submissions, the court of appeals made its evidentiary findings, to which the Constitutional Court had mandated deference, having expressly stated that it was ignoring all of the evidence that had been submitted by MSDIA throughout the proceedings. *See, e.g.*, MSDIA's Reply, at paras. 641-650; Exhibit C-4, Court of Appeals Judgment, *NIFA v. MSDIA*, dated 23 September 2011, at pp. 15-16 (finding that MSDIA had "expressly waived the evidence aiming to dispel the grounds of the verdict in first instance.").
[53] *See* Exhibit C-304, NCJ Judgment, *NIFA v. MSDIA*, dated 4 August 2016, at p. 21 (Section 6.5.1) (rejecting MSDIA's arguments, made in paragraphs 134 to 183 of MSDIA's cassation petition, that "[t]he judgment … failed to apply certain legal rules, improperly applied other legal rules and erroneously interpreted other legal rules, based on which .. it must be set aside"); Exhibit C-198, MSDIA's Cassation Petition, *NIFA v. MSDIA*, dated 13 October 2011, at paras. 167-183 (setting forth MSDIA's argument that the court of appeals' application of antitrust liability was improper). As noted above, the NCJ's cassation of the court of appeals judgment was limited to the court of appeals' calculation of damages. *See* Exhibit C-304, NCJ Judgment, *NIFA v. MSDIA*, dated 4 August 2016, at pp. 16-17, 21-22.
[54] *See* MSDIA's Memorial, at paras. 40-42; MSDIA's Reply, at paras. 515-522.
[55] Exhibit C-203, NCJ Judgment, *NIFA v. MSDIA*, dated 21 September 2012, at §6.1.1
[56] Exhibit C-293, NCJ Judgment, *NIFA v. MSDIA*, dated 10 November 2014, at p. 40. As MSDIA has explained in detail, the two prior NCJ panels then proceeded to hold MSDIA liable under theories of unfair competition and pre-contractual liability, neither of which the plaintiff had ever argued, and neither of which existed in Ecuador at the time. *See* MSDIA's Memorial, at paras. 291-294; MSDIA's Reply, at paras. 322-389; MSDIA's Supplemental Reply, at paras. 38-57.
[57] Ecuador's Letter to the Tribunal, dated 13 August 2016, at p. 2 ("It may be recalled that the Court of Appeals had held MSDIA liable '***exclusively*** on antitrust grounds.' Although the NCJ also found MSDIA liable, it did so for the commission of an unintentional tort, not on antitrust grounds.").

"underscore[d]" by the principles set forth in Article 244 of Ecuador's 1998 Constitution.[58] Moreover, as discussed below, the theory of pre-contractual liability discussed by the NCJ was never argued by NIFA in the underlying litigation and was different than the theory of pre-contractual liability adopted by the prior NCJ panel in an earlier judgment.[59]

43. In assessing the damages to be awarded, the NCJ followed the dictate of the Constitutional Court and relied exclusively on the Cabrera report, accepting that it had no power to assess it:[60]

> "The [Cabrera] expert report [] has been a keystone piece of evidence to which all other proven facts are added [and] … ***has already been assessed, meaning it has been weighed and accepted, by the lower court judges, and it is not feasible at this time to reassess it***."[61]

44. The NCJ therefore accepted Mr. Cabrera's calculations of NIFA's lost profits. To calculate its damages award, the NCJ adopted Mr. Cabrera's opinion that NIFA (a company that in 2002 earned a profit of $2,164 from $2.4 million in total sales[62]) had incurred "lost sales" of US $413 million between 2003 and 2018, and that the costs of those sales would have been $209,582,858. The NCJ then applied the 20% legal maximum profit margin to Mr. Cabrera's costs figure, which yielded the NCJ's calculation of $41,966,571.60 in so-called "lost profits." [63] To that finding, the NCJ added Mr. Cabrera's finding that NIFA suffered "consequential damages" of $50,000 in the form of out-of-pocket costs, yielding total damages of $41,966,571.60.

C. Events in Ecuador's Courts Following the August 2016 NCJ Judgment

45. So far as MSDIA is aware, NIFA has not filed an EAP to challenge the third NCJ judgment in the Constitutional Court.

46. During the week of 15 August 2016, the NCJ initiated the process of returning the case file to the lower courts for enforcement proceedings. On 5 September 2016, the court of first

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[58] Exhibit C-304, NCJ Judgment, *NIFA v. MSDIA*, dated 4 August 2016, at pp. 31-32 ("The reference to Article 244, paragraphs 1 and 3 of the Constitution of 1998 does not mean that the lawsuit hinges on matters of free competition, now developed in specific laws, - but rather that serves to underscore the unilateral attitude of the defendant, in refusing to complete the sale on the pretext of the production of pharmaceutical products that it was not in the seller's interest to allow to be sold, as an element of the conduct penalized by Articles 2214 and 2229 of the Civil Code.").

[59] *See below* at paras. 105-108.

[60] Exhibit C-304, NCJ Judgment, *NIFA v. MSDIA*, dated 4 August 2016, at pp. 35-38.

[61] Exhibit C-304, NCJ Judgment, *NIFA v. MSDIA*, dated 4 August 2016, at p. 37.

[62] Exhibit C-20, Report of Rolf Stern, *NIFA v. MSDIA*, at p. 4.

[63] As MSDIA has explained in prior submissions, the serious defects in the Cabrera report go far beyond Mr. Cabrera's failure to apply the Ecuadorian law on maximum pharmaceutical profit margins. Among other things, Mr. Cabrera included in his calculation of "lost sales" sales that NIFA had actually made between 2003 and 2008, and he purported to calculate alleged damages to NIFA over an arbitrarily defined 15-year period without providing any explanation or basis in fact as to how the unavailability of a single piece of property could possibly impose injury for such a long duration. *See generally* MSDIA's Memorial, at paras. 107-109; MSDIA's Reply, at para. 650(c).

instance issued a decree notifying the parties that the case record had arrived there and that it was assuming jurisdiction.[64]

47. On 7 September 2016, in compliance with this Tribunal's Second Order on Interim Measures, Ecuador's Attorney General notified the court of first instance of that Order.[65] On that same day, the court of first instance served the Attorney General's submission on the parties in the litigation.[66]

48. During the week of 5 September 2016, MSDIA filed petitions urging the first instance court to comply with the Tribunal's Second Order on Interim Measures and to suspend enforcement of the NCJ's judgment.[67] Meanwhile, NIFA filed a motion requesting an order directing MSDIA to satisfy the judgment.[68]

49. On 16 September 2016, the first instance court issued an order implementing the Tribunal's Second Order on Interim Measures and suspending enforcement of the August 2016 NCJ Judgment pending the issuance of this Tribunal's Final Award and denying NIFA's request for enforcement.[69]

III. THE JANUARY 2016 DECISION OF ECUADOR'S CONSTITUTIONAL COURT AND THE AUGUST 2016 DECISION OF ECUADOR'S NCJ IMPOSED ADDITIONAL DENIALS OF JUSTICE

A. Applicable Legal Standards for Denial of Justice under International Law

50. MSDIA has described in prior written submissions the principles and legal standards that address denial of justice under international law.[70] As Professor Jan Paulsson explained in his First Expert Report, "[t]he basic premise of the rule of denial of justice is that a state incurs international responsibility if it administers its laws to aliens in a fundamentally unfair manner."[71] Conduct that is "'manifestly unjust or violative of due process or similarly offensive'" constitutes a denial of justice.[72] Ecuador accepts that the Treaty includes obligations not to deny justice under the fair and equitable treatment provision of Article II(3)(a).[73]

51. Circumstances giving rise to liability for denial of justice include, for example, "unreasonable delay[s], politically dictated judgments, corruption, intimidation, fundamental

[64] Exhibit C-305, Order of the Court of First Instance, dated 5 September 2016.
[65] Exhibit C-306, Letter from the Attorney General to the Provincial Court of First Instance, dated 7 September 2016.
[66] Exhibit C-307, Order of the Court of First Instance, dated 7 September 2016.
[67] *See* MSDIA Letter to the Tribunal, dated 12 September 2016, with attachments.
[68] *See* MSDIA Letter to the Tribunal, dated 12 September 2016, with attachments.
[69] Exhibit C-308, Order of the Court of First Instance, dated 16 September 2016.
[70] *See generally*, MSDIA's Memorial, at paras. 242-309; MSDIA's Reply, at paras. 295-314.
[71] Paulsson Expert Report, dated 8 August 2014, at para. 20.
[72] Exhibit CLM-182, D. Wallace Jr., "*Fair and Equitable Treatment and Denial of Justice: Loewen v. U.S. and Chattin v. Mexico*," in INTERNATIONAL INVESTMENT LAW AND ARBITRATION: LEADING CASES FROM THE ICSID, NAFTA BILATERAL TREATIES AND CUSTOMARY INTERNATIONAL LAW (Weiler, ed.) (2005), at p. 680.
[73] *See* Ecuador's Counter-Memorial, at paras. 390-395.

breaches of due process, and decisions so outrageous as to be inexplicable otherwise than as expressions of arbitrariness or gross incompetence."[74] Similarly, a denial of justice may be evident from a court's "[g]ross incompetence" in reaching a decision that "no competent judge could reasonably have made."[75] "Surprising departures from settled patterns of reasoning or outcomes, or the sudden emergence of a full-blown rule where none had existed, must be viewed with the greatest scepticism if their effect is to disadvantage a foreigner."[76] In such cases, "the proof of the failed process is that the substance of a decision is so egregiously wrong that no honest or competent court could possibly have given it."[77]

B. The January 2016 Constitutional Court Decision Is a Denial of Justice

52. In its decision of 20 January 2016, the Constitutional Court manifestly exceeded its authority by making determinations about the merits of the underlying dispute, directed the NCJ to accept the biased evidentiary findings of the court of appeals, including the absurd Cabrera expert report on damages, and sought to ensure the adherence of the NCJ judges to its dictates (depriving them of judicial independence and impartiality) by threatening them with personal liability. In each of these respects, the Constitutional Court effectively directed the NCJ to issue a large award of damages in favor of NIFA.

53. Each of these actions represented "[s]urprising departures from settled" Constitutional Court practice, and were plainly intended to bring about a predetermined result, namely a large damages award in favor of NIFA.[78] The Constitutional Court decision is a "fundamental breach[] of due process," and a "decision[] so outrageous as to be inexplicable otherwise than as [an] expression[] of arbitrariness or gross incompetence."[79] Simply put, the Constitutional Court decision "is so egregiously wrong that no honest or competent court could possibly have given it."[80]

1. <u>Ecuador's Constitutional Court Irrationally Adopted and Endorsed the Evidentiary Findings of the Court of Appeals, Including Mr. Cabrera's Irrational "Expert" Report on Damages</u>

[74] Exhibit CLM-174, J. Paulsson, DENIAL OF JUSTICE IN INTERNATIONAL LAW (2005), at p. 205 (italics omitted).
[75] Exhibit CLM-174, J. Paulsson, DENIAL OF JUSTICE IN INTERNATIONAL LAW (2005), at p. 200 (internal citations omitted).
[76] Exhibit CLM-174, J. Paulsson, DENIAL OF JUSTICE IN INTERNATIONAL LAW (2005), at pp. 199-200. *See also* Exhibit CLM-137, *Occidental Exploration and Production Company v. Republic of Ecuador*, LCIA Case No. UN 3467, Final Award, dated 1 July 2004, at paras. 184-187.
[77] Exhibit CLM-174, J. Paulsson, DENIAL OF JUSTICE IN INTERNATIONAL LAW (2005), at 98. *See also* Exhibit CLM-141, *RosInvestCo UK Ltd. v. Russian Federation*, SCC Case No. V079/2005, Final Award, dated 12 September 2010, at para. 279 ("The substantive outcome of a case can be relevant as an indication of lack of due process and thus can be considered as an element to prove denial of justice.").
[78] Exhibit CLM-174, J. Paulsson, DENIAL OF JUSTICE IN INTERNATIONAL LAW (2005), at pp. 199-200. *See also* Exhibit CLM-137, *Occidental Exploration and Production Company v. Republic of Ecuador*, LCIA Case No. UN 3467, Final Award, dated 1 July 2004, at paras. 184-187.
[79] Exhibit CLM-174, J. Paulsson, DENIAL OF JUSTICE IN INTERNATIONAL LAW (2005), at p. 205.
[80] Exhibit CLM-174, J. Paulsson, DENIAL OF JUSTICE IN INTERNATIONAL LAW (2005), at p. 98.

54. ***First***, the Constitutional Court adopted and endorsed the deeply flawed evidentiary findings of the court of appeals, including Mr. Cabrera's indefensible damages report.

55. The Court held that, as a matter of Ecuadorian law, the NCJ's independent review of the evidence in its November 2014 judgment violated NIFA's constitutional rights, because only lower court judges can make evidentiary findings.[81]

56. As MSDIA has established in prior submissions, the court of appeals made its evidentiary findings after stating it would not consider any of the evidence introduced by MSDIA.[82] By prohibiting the NCJ from making its own assessment of the evidence, the Constitutional Court mandated that MSDIA's evidence would play no part in the NCJ's decision-making. This is a clear violation of the most basic notions of due process.

57. Moreover, the Constitutional Court criticized the NCJ's prior judgment, in particular, for failing to adopt the findings in the expert report on damages offered by Mr. Cabrera.[83]

58. The Constitutional Court's consideration of the Cabrera report went well beyond simply commenting on what the court of appeals had concluded about it. Rather, the Constitutional Court endorsed the conclusions of the Cabrera report, holding that it was "arbitrary" for the NCJ to disregard Mr. Cabrera's conclusion that NIFA had suffered damages in the years following 2003. The Constitutional Court's decision necessarily rested on its conclusion that NIFA had in fact suffered damages and that those damages persisted for many years, as Mr. Cabrera had concluded.

59. The Constitutional Court also endorsed the court of appeals' rejection of any other evidence in the record contradicting the Cabrera report. The Court held that "there is no element in the proceedings that would impugn the fact that [NIFA] has suffered effects over time as a result of the tort committed by [MSDIA],"[84] and that the second NCJ panel's decision to limit NIFA's damages to 2003 "lacks sufficient factual support."[85] In so finding, the Constitutional Court endorsed the court of appeals' rejection of the vast evidence in the record that stands in direct contravention of Mr. Cabrera's report.[86]

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[81] *See above* at paras. 23-25.
[82] *See*, *e.g.*, MSDIA's Reply, at paras. 641-650.
[83] *See above* at paras. 26-32.
[84] Exhibit C-302, Constitutional Court Decision, dated 20 January 2016, at p. 15.
[85] Exhibit C-302, Constitutional Court Decision, dated 20 January. 2016, at p. 15.
[86] For example, as noted below, Dr. Ignacio De Leon, the first expert appointed by the court of appeals to assess damages, concluded that NIFA in fact suffered no damages. Exhibit C-24, Report of Ignacio De León, *NIFA v. MSDIA*, Court of Appeals, dated 12 February 2010, at pp. 47-49, 98. Three different experts offered by MSDIA similarly concluded that NIFA had in fact suffered no damages. *See* Exhibit C-44, Report of Carlos Montafiez Vasquez, submitted to the Court of Appeals, *NIFA v. MSDIA*, dated 15 July 2011 at p. 2; Exhibit C-20, Report of Rolf Stem, *NIFA v. MSDIA*, Court of Appeals, dated 4 June 2009, at 1; Exhibit C-21, Report of Walter Spurrier Baquerizo, *NIFA v. MSDIA*, Court of Appeals, dated 4 June 2009, at 3. Numerous other factory sites were available and suitable to accommodate NIFA's expansion plans. *See, e.g.*, MSDIA's Memorial at paras. 78, 101; Day 1 Merits Hearing Full Transcript, at 75:5-18; and NIFA itself had said that the negotiations delayed its expansion plans by only one year. Exhibit C-10, NIFA's Complaint, *NIFA v. MSDIA*, Trial Court, dated 16 December 2003, at p. 8.

60. The Constitutional Court's insistence that the Cabrera report was valid, reliable evidence of damages was entirely unreasonable and unjust. By relying on an evidentiary record that was deeply marred by bias, apparent corruption, and repeated, clear violations of MSDIA's due process rights, the Constitutional Court not only failed to remedy the violations of MSDIA's rights by the court of appeals, but further violated those rights by embracing the court of appeals' evidentiary findings and mandating that they drive a new judgment against MSDIA, imposing still higher monetary damages. These rulings constituted a new denial of justice.

2. Ecuador's Constitutional Court Directed the NCJ To Accept and Rely on the Evidentiary Findings of the Court of Appeals

61. The Constitutional Court not only embraced the court of appeals' evidentiary findings in its own decision, but also directed the "alternate" NCJ judges to do the same in their new judgment.

62. As noted above, in its decision (and notwithstanding its own review of the evidence), the Constitutional Court expressly ruled that the NCJ judges were precluded from making any independent assessment of the evidence.[87]

63. The Constitutional Court's direction to the new panel of NCJ judges was clear: they were "forbidden" from making any assessment of the evidence in the record, including whether to give weight to the report on damages submitted by Mr. Cabrera.[88]

64. The Constitutional Court's holding that "the ability to weigh evidence is the exclusive competence of instance judges, not national judges"[89] is contrary to established principles of Ecuadorian law and was a "surprising departure" from prior Constitutional Court practice. The stark departure from law and normal practice is manifest in the record of this arbitration; Ecuador and its legal experts have repeatedly expressed the opposite view.

65. Thus, Ecuador has conceded in this arbitration that after the NCJ vacates a decision from a lower court, it has the power to undertake an independent assessment of the evidence as if it were a court of instance.[90] Indeed, Ecuador has advanced precisely that proposition in support of its otherwise unavailing argument that by conducting an independent assessment of the evidence, both the September 2012 and November 2014 NCJ judgments had cured any errors committed by the court of appeals.[91]

66. The Constitutional Court's holding that the NCJ may not review the court of appeals' evidentiary findings is also inconsistent with its own decision granting NIFA's first EAP in the

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[87] *See above* at paras. 23-25.
[88] Exhibit C-302, Constitutional Court Decision, dated 20 January 2016, at p. 13 ("If the cassation appellant seeks to have the evidence reviewed, ***the national judges are forbidden from undertaking such task***…") (emphasis added).
[89] Exhibit C-302, Constitutional Court Decision, dated 20 January 2016, at p. 13.
[90] *See, e.g.*, Ecuador Rejoinder at paras. 494, 496.
[91] *See, e.g.*, Ecuador Rejoinder at para. 569 (arguing that "even if the judgment of the Court of Appeals had violated Article 115 of the Code of Civil Procedure" regarding consideration of evidence, "this defect was cured by the November 2014 NCJ decision. In fact, this decision listed … all the evidence it considered and how it evaluated it.").

NIFA v. MSDIA litigation. There, the Constitutional Court cited with approval a decision of the Supreme Court of Justice (the predecessor court to the NCJ) stating that a court of cassation may independently assess the evidence after vacating a decision:

> "There are many cases where it has been decided that the cassation court, acting as a trial court, is authorized to review the proceeding in integrum and, if based on such analysis, it concludes that the facts set forth in the repealed resolution are not consistent with the procedural reality (…) it shall proceed to first establish the facts to then subsume them under the corresponding rule, and thus issue a ruling that is consistent with the procedural truth."[92]

67. Ecuador and its experts have affirmed this principle repeatedly. In its Rejoinder, Ecuador observed that the Constitutional Court "specifically determined that the NCJ [in its September 2012 judgment] acted as a trial court after its cassation of the Court of Appeal's judgment."[93] Similarly, Ecuador's cassation law expert Professor Aguirre explained that "once cassation is sustained … the NCJ proceeded to become a "Trial Court" and to make a decision based on the grounds of [NIFA's] complaint and [MSDIA's] defenses, as well as on the evidence presented, in the same manner as it would be handled by any trial court."[94]

68. Moreover, the Constitutional Court's direction to the NCJ judges that they were "forbidden" to undertake a review of the evidence far exceeded the authority of the Constitutional Court. Ecuador and its experts have repeatedly maintained that the Constitutional Court is not permitted to dictate outcomes to the NCJ and cannot itself make determinations on the merits.

69. For example, Ecuador's Constitutional law expert, Dr. Guerrero del Pozo, testified at the March 2015 hearing that the Constitutional Court "is not permitted given the nature of [an] extraordinary protection action" to indicate "how the judges of the National Court of Justice should decide in the case."[95] With respect to the Cabrera report in particular, Ecuador's counsel asserted that the Constitutional Court in its first decision "could not have directed the NCJ to ignore or not to ignore Mr. Cabrera's report in any way without exceeding its authority under Ecuador's Constitution."[96]

70. MSDIA's constitutional law expert, Dr. Rafael Oyarte, agreed with this assessment. He explained that, "[i]n keeping with this limited function, under no circumstances can the Constitutional Court order or instruct the NCJ how to decide a case. As the Constitutional Court

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[92] Exhibit C-285, Constitutional Court Decision, dated 12 March 2012, at pp. 15-18; *see also* MSDIA's Reply at paras. 483-493.

[93] Ecuador's Rejoinder at para. 474 (noting that the Constitutional Court "specifically determined that the NCJ acted as a trial court after its cassation of the Court of Appeal's judgment"); *see also id.* at para 494 (explaining that "once the NCJ had determined that the Court of Appeals' 23 September 2011 decision must be cassated [it was permitted to] do so in the same manner as a court of first instance … that second phase is governed by Article 16 of the Cassation Law, and it involves the NCJ's independent analysis of the evidence from the lower court proceedings.").

[94] Aguirre Expert Opinion, dated 16 February 2015, at para. 4.9. See also Paez Expert Report, dated 1 October 2013, at paras. 19-20.

[95] Guerrero del Pozo Expert Report, dated 18 February 2015, at para. 94.

[96] Day 2 Merits Hearing Full Transcript, at 191:7-11.

itself has said, this would mean not only exercising jurisdictional authority that it does not have, but it would violate the principle of judicial independence."[97] According to Dr. Oyarte, "[t]he Constitutional Court does not analyze the facts of a case, does not evaluate evidence and does not interpret the law, nor does it apply the law to the facts of the case."[98]

71. Thus, the parties here have agreed on very little but they did agree on this: the NCJ may assess evidence and the Constitutional Court may not dictate results. Yet Ecuador's Constitutional Court here contradicted both basic principles. The Court's striking departure from settled law and practice and from the Court's own prior decisions in the same case was transparently intended to ensure that the NCJ issued a large judgment in favor of NIFA, based on the biased and probably corrupt evidentiary findings and "expert" evidence in the court of appeals. Having failed in its prior EAP ruling in this matter to secure a sufficiently large result, the Constitutional Court departed from all semblance of application of legal principle to dictate an enormous judgment. On any view, that is a flagrant violation of due process and departure from the rule of law.

3. Ecuador's Constitutional Court Threatened the NCJ Judges with Severe Personal Sanctions for Failure to Follow its Improper Directives

72. Lamentably, the Constitutional Court went even further to ensure that its dictates were followed by the NCJ panel of "alternate judges." In addition to expressly directing them to follow the evidentiary findings of the court of appeals, including the Cabrera report, the Constitutional Court sought to guarantee that the NCJ judges would comply with its directives by threatening them with loss of their jobs and other severe personal consequences if they did not comply.

73. Specifically, the Court threatened the NCJ alternate judges that they would be subjected to civil and criminal penalties under Article 86 of the Constitution unless their decision was a "comprehensive application of this Constitutional decision, that is, considering the decisum or resolution ***as well as the central arguments that formed the basis of the decision and constitute the rationale…***"[99] In other words, unless the NCJ adopted the same views as the Constitutional Court regarding the court of appeals' factual findings and the Cabrera Report, the alternate judges would be subjected to severe legal consequences.

74. MSDIA's expert, Dr. Oyarte, explained in his February 2016 opinion submitted with MSDIA's application for interim measures that the Constitutional Court's invocation of Article 86(4) in this context can only be viewed as a threat.[100] As a matter of law, the Constitutional Court can impose a sanction under Article 86(4) only ***after*** it has found that a public official has violated a Constitutional Court decision, and it typically makes such a finding in the context of deciding an action of non-compliance. Here, there had been no action for non-compliance; indeed, the judges to whom the Constitutional Court directed its warning did not render the November 2014 NCJ judgment and had not even yet taken jurisdiction over the case.

[97] Oyarte Expert Report, dated 7 August 2014, at para. 11.
[98] Oyarte Expert Report, dated 7 August 2014, at para. 12.
[99] Exhibit C-302, Constitutional Court Decision, dated 20 January 2016, at p. 24.
[100] Oyarte Expert Report, dated 23 February 2016, at para. 26.

75. As noted below, the NCJ alternate judges clearly understood this statement as a threat. In their August 2016 judgment, the NCJ judges observed that "the highest Constitutional Tribunal of Justice, in this case***, threatens*** sanctions in the event Article 68 [sic], paragraph 4 of the Constitution of the Republic of Ecuador is not observed."[101] In recognizing that threat, the NCJ effectively acknowledged that it could not act as an independent and impartial court; instead, the NCJ judges were constrained by their own personal interest in avoiding sanctions to render their decision precisely as dictated by the Constitutional Court.[102]

76. It is a basic tenet of due process that the judges charged with rendering a final, enforceable judgment should carry out their judicial function without being influenced by having a personal stake in the outcome. Just as a judge being remunerated for rendering a particular judgment violates the litigants' due process rights, so too a judge being threatened with criminal sanction, or a loss of employment or income or other personal consequence for failing to issue that same decision equally violates fundamental due process guarantees.[103]

77. By threatening the NCJ alternate judges with personal civil and criminal liability for non-compliance, the Constitutional Court was ensuring that the outcome it had dictated – a large damages award in favor of NIFA – would come to pass. This attempt to secure a particular outcome in favor of NIFA, without regard to the NCJ's obligations to respect due process and the rule of law, is a further denial of justice for which Ecuador is liable under the Treaty.

C. The August 2016 NCJ Judgment Is a Further Denial of Justice

78. Not surprisingly, the NCJ panel of "alternate judges," having been told by the Constitutional Court what to decide and having been threatened with sanctions for not complying, did precisely what the Constitutional Court had instructed: it accepted uncritically

[101] Exhibit C-304, NCJ Judgment, *NIFA v. MSDIA*, dated 4 August 2016, at p. 4.
[102] Exhibit C-302, Constitutional Court Decision, dated 20 January 2016, at p. 24.
[103] A right to an impartial and independent court is a fundamental tenet of international law. *See generally*, Exhibit CLM-167, G. Jaenicke, "Judicial Protection of the Individual within the System of International Law," in Judicial Protection Against the Executive (1971), at 303-304 ("[T]he emphasis of the alien's right to judicial protection is placed on the institutional and organizational aspect of the remedies: ***on the independence and impartiality of the judges***, on the granting of an adequate hearing, on the opportunity to furnish evidence, on provisions against a delay in proceedings, etc.") (emphasis added). *See also*, Exhibit CLM-158, Application for Review of Judgment No. 158 of the United Nations Administrative Tribunal, Advisory Opinion, dated 12 July 1973, 1973 I.C.J. Reports 166, at para. 92 ("[C]ertain elements of the right to a fair hearing are well recognized and provide criteria helpful in identifying fundamental errors in procedure which have occasioned a failure of justice: for instance, ***the right to an independent and impartial tribunal established by law***; the right to have the case heard and determined within a reasonable time; the right to a reasonable opportunity to present the case to the tribunal and to comment upon the opponent's case; the right to equality in the proceedings vis-à-vis the opponent; and the right to a reasoned decision") (emphasis added). Judge Tanaka of the International Court of Justice has recognized that a decision issued by a court subject to a threat is a denial of justice. *See* Exhibit RLA-24, *Barcelona Traction, Light & Power Co. (Belg. v. Spain)*, 1970 I.C.J. 3, 160, P 158 (Feb. 3) (separate opinion of Judge Tanaka). ("[I]t remains to examine whether behind the alleged errors and irregularities of the Spanish judiciary some grave circumstances do not exist which may justify the charge of a denial of justice. ***Conspicuous examples thereof would be*** 'corruption, ***threats***, unwarrantable delay, flagrant abuse of judicial procedure, a judgment dictated by the executive, or so manifestly unjust that no court which was both competent and honest could have given it.'") (emphasis added).

the factual findings of the court of appeals and issued a far larger damages award against MSDIA.

79. Two prior panels of NCJ judges had rejected the Cabrera report, but the third panel, made up of alternate judges acting pursuant to the Constitutional Court's unprecedented dictates, adopted the evidentiary findings of the court of appeals, embraced the conclusions of the Cabrera report (adjusting Mr. Cabrera's bottom line based only on a legal error), and awarded damages to NIFA of $41,966,571.60. In doing so, they relied uncritically on the deeply flawed factual and liability findings of the court of appeals, including evidentiary rulings and evidence marred by bias, evident corruption, and blatant disregard of due process. The August 2016 NCJ Judgment thus "doubled down" on prior denials of justice and compounded them, and thereby itself constitutes a further denial of justice that imposes new and very substantial harms on MSDIA.

1. The August 2016 NCJ Judgment is Based on the Deeply Flawed Evidentiary Findings of the Court of Appeals

80. The NCJ's uncritical acceptance of the evidentiary findings of the court of appeals, which MSDIA has established were marred by bias, apparent corruption, and violation of the most basic notions of due process, is itself a denial of justice. As Professor Paulsson explains in his Expert Report:

> "If the final court bases its own decision on a factual record that was tainted by a denial of justice in the lower court proceedings, the decision of the final court naturally is infected by it and therefore is necessarily inconsistent with minimum standards of due process."[104]

81. Ecuador argues that the NCJ did not adopt the flawed evidentiary findings of the court of appeals, but the judgment itself demonstrates the opposite. At the outset of its decision, the NCJ stated that it was "refraining from weighing any evidence or determining any of the facts of the trial and appeal."[105] Later in the judgment, it reiterated that "the dispute between the parties cannot lead this court to weigh evidence."[106] Similarly, with respect to the Cabrera report—the only evidence the court of appeals cited in support of its $150 million damages award—the NCJ asserted that the report was a "keystone piece of evidence" that "has already been assessed, meaning it has been weighed and accepted, by the lower court judges, and it is not feasible at this time to reassess it."[107]

82. Ecuador has attempted to read these unambiguous statements out of the NCJ's judgment. Ecuador argues that despite the NCJ's own affirmation that it was accepting and relying on the court of appeals' findings, this Tribunal should find that, to the contrary, the NCJ in fact independently evaluated the evidence in the record. In support of this contention, Ecuador has

[104] Paulsson Expert Report, dated 2 October 2013, at para. 17(b). As Professor Paulsson explains, the NCJ's reliance on the lower courts' factual findings constitutes conduct that is "defect[ive]" as a matter of international law. *See id.* at para. 48.
[105] Exhibit C-304, NCJ Judgment, *NIFA v. MSDIA*, dated 4 August 2016, at p. 27.
[106] Exhibit C-304, NCJ Judgment, *NIFA v. MSDIA*, dated 4 August 2016, at p. 34.
[107] Exhibit C-304, NCJ Judgment, *NIFA v. MSDIA*, dated 4 August 2016, at p. 37.

pointed to places in the NCJ judgment where the NCJ refers to various items of evidence in the record.[108] Contrary to Ecuador's argument, these pro forma references to the evidence submitted by MSDIA do not suggest that the NCJ independently weighed the evidence. Ecuador has not identified a single aspect of the NCJ decision that departs from the evidentiary findings of the court of appeals.

83. In accepting the court of appeals' evidentiary findings, the NCJ adopted and condoned one of the most fundamental denials of due process by the court of appeals. As MSDIA has explained in prior submissions, the court of appeals made its evidentiary findings ***without any consideration of the evidence introduced by MSDIA in the second instance proceedings***, having asserted (without any basis) that MSDIA had waived its reliance on all of the evidence it had submitted in the court of appeals proceedings.[109] The court of appeals therefore considered only the evidence submitted by NIFA.

84. Ecuador has made various unconvincing efforts to argue that the court of appeals did not mean what it said when it deemed MSDIA's evidence waived. But Ecuador has not identified a single place in the court of appeals' judgment where the court of appeals referenced any evidence introduced into the record by MSDIA.

85. This resulted in an entirely distorted and one-sided analysis of the factual record by the court of appeals that violated the most basic principles of due process. Not surprisingly, Ecuador has largely declined to defend the court of appeals decision.

86. By adopting those same tainted factual findings, the August 2016 NCJ Judgment confirms the fundamental violations of MSDIA's rights by the court of appeals, and is itself a denial of justice. The NCJ's pro forma references to the evidence submitted by MSDIA in the court of appeals do not indicate that the NCJ itself considered that evidence. Consistent with the NCJ's own admission that it was not reassessing the evidence, the NCJ never credits any of MSDIA's evidence or gives it any weight whatsoever in its decision.

87. The starkest example of the prejudice this imposed on MSDIA can be seen in the NCJ's treatment of the Cabrera report on damages. As noted above, and in MSDIA's prior submissions, the Cabrera report reaches absurd, unsupportable conclusions based on dubious data, irrational jumps of illogic, and unsupportable assumptions.[110] Moreover, Mr. Cabrera was appointed under circumstances strongly suggestive of impropriety[111] and was certainly utterly unqualified to serve as an expert in damages. After it was too late to be of assistance to MSDIA, Ecuador's own Council of the Judiciary ultimately revoked Mr. Cabrera's credentials as an expert, concluding that he "has not substantiated with any documentation, knowledge or

[108] *See* Ecuador's letter to the Tribunal, dated 13 August 2016, at p. 3.
[109] Exhibit C-4, Court of Appeals Judgment, *NIFA v. MSDIA*, dated 23 September 2011, at pp. 15-16; s*ee generally* MSDIA's Memorial at paras. 121-123; MSDIA's Reply at paras. 641-650.
[110] *See, e.g.*, Day 1 Merits Hearing Full Transcript, , at 86:1-92:14; MSDIA's Memorial at paras. 103-15; 111-117; MSDIA's Reply at paras. 560(c).
[111] MSDIA's Reply at paras. 573-591.

experience his expertise with calculation of damages, consequential damage, lost profits or taxation,"[112] and even more starkly that "[i]t is not clear why he claimed to be an expert."[113]

88. The court of appeals adopted Mr. Cabrera's preposterous findings, asserting without any explanation whatsoever that the report was "properly grounded."[114] Ecuador has never defended the court of appeals judgment in this arbitration; nor has Ecuador ever defended the integrity of Mr. Cabrera's report.

89. And indeed, even the first two NCJ panels (which issued judgments in favor of NIFA that for other reasons constituted denials of justice) were compelled to acknowledge that Mr. Cabrera's damages evidence was "lacking all proportion"[115] and was "irrational and illogical."[116] Those panels rejected Mr. Cabrera's report on that basis.

90. Ecuador's only response to the profoundly disturbing Cabrera report and Mr. Cabrera's utter lack of qualifications has been to say these issues became irrelevant when the Cabrera report was rejected by the prior NCJ decisions.[117] Thus, for example, Ecuador's counsel stated at the March 2015 hearing that "the Cabrera report, which has been the biggest target of Merck's complaints, was completely rejected by the NCJ, in NCJ 1, completely rejected."[118] Similarly Ecuador's counsel argued that the prior ruling of "the NCJ wiped out any alleged vestiges of bias or impropriety reflected in the damages originally imposed by the lower courts."[119]

91. In sorry contrast, the NCJ panel of alternate judges in the third "final" ruling of the NCJ followed the dictates of the Constitutional Court and took the Cabrera report at face value, and relied on it in awarding damages, simply because the court of appeals had done so. The NCJ explained in its judgment that it could not "reassess" the Cabrera report, because that assessment had already been done by the court of appeals:

> "The [Cabrera] expert report [] has been a keystone piece of evidence to which all other proven facts are added [and] … has already been assessed, meaning it has

[112] Exhibit C-58, Report of Iván Escandón, Provincial Director of the Council of the Judiciary for Pichincha, dated 26 January 2012, at p. 2.
[113] Exhibit C-58, Report of Iván Escandón, Provincial Director of the Council of the Judiciary for Pichincha, dated 26 January 2012, at p. 2.
[114] Exhibit C-4, Court of Appeals Judgment, *NIFA v. MSDIA*, dated 23 September 2011, at pp. 14-15.
[115] Exhibit C-203, NCJ Judgment, *NIFA v. MSDIA*, dated 21 September 2012 at §16.2.
[116] Exhibit C-293, NCJ Judgment, *NIFA v. MSDIA*, dated 10 November 2014, at p. 79.
[117] At the 21 August 2016 telephonic hearing on interim measures, Ecuador suggested that the Cabrera report was based on pharmaceutical market data that MSDIA placed into the record. This is false. Indeed, the data on which Mr. Cabrera based his sales forecast came from uncertified data supposedly provided by the company IMS and introduced into the record by NIFA. One of MSDIA's principal objections to the NIFA IMS data was that it could not be reconciled with the certified data IMS had provided to MSDIA. *See* MSDIA's Memorial at paras. 81-84. In effect, compared to NIFA's own tax filings and certified data provided by IMS to MSDIA, the uncertified NIFA IMS data improperly inflated NIFA's market shares and therefore IMS's calculations of NIFA's potential future sales. *Id*.
[118] Day 2 Merits Hearing Full Transcript, at 219:6-9.
[119] Ecuador's Rejoinder, paras. 442-443.

been weighed and accepted, by the lower court judges, and it is not feasible at this time to reassess it."[120]

92. As discussed above, the NCJ having accepted Mr. Cabrera's factual conclusions simply applied to them an Ecuadorian law that caps the maximum profit margin for pharmaceutical products.[121] It accepted his absurd sales and cost figures, then awarded 20% of the costs he had postulated. The resulting $41.9 million award of damages in favor of NIFA is otherwise just as "irrational and illogical"[122] (in the words of the prior NCJ panels) as the Cabrera report on which it is based. Simply put, no honest or competent court could have accepted the Cabrera report as valid evidence of damages.

93. At the 21 August 2016 telephonic hearing on interim measures, Ecuador's counsel suggested that MSDIA had failed to raise its objections to the Cabrera report in Ecuador's courts during the *NIFA v. MSDIA* litigation. Nothing could be further from the truth. In fact, MSDIA made vigorous, sustained objections to the Cabrera report both in the court of appeals proceedings and before all three panels of the NCJ.

94. For example, immediately after Mr. Cabrera filed his report, MSDIA filed a timely petition charging that Mr. Cabrera had committed "essential error" (a basis in Ecuadorian procedural law for challenging the evidence of court appointed experts). MSDIA described the fundamental errors in the Cabrera report, identifying the overwhelming evidence in the record demonstrating that NIFA had suffered no damages, all of which was ignored by Mr. Cabrera, and submitting the report of a well-qualified damages expert (Mr. Carlos Montañez Vásquez) who concluded that there was no conceivable basis for Mr. Cabrera's calculations.[123] The court of appeals rejected MSDIA's petition and refused to consider the report of Mr. Montañez.[124]

[120] Exhibit C-304, NCJ Judgment, *NIFA v. MSDIA*, dated 4 August 2016, at p. 37.

[121] Mr. Cabrera's $209 million "costs" calculation is just as groundless as every other calculation in the Cabrera report, because Mr. Cabrera's costs calculation is largely a direct function of his calculation of lost sales. The cost calculation is driven primarily by Mr. Cabrera's estimates for the cost of materials associated with NIFA's forecasted future production, which Mr. Cabrera assumed would skyrocket in pace with his absurd calculation of NIFA's future lost sales. *See* Exhibit C-42, Report of Cristian Agusto Cabrera Fonseca, *NIFA v. MSDIA*, Court of Appeals, dated 21 June 2011, at pp. 18-21. In other words, the specific calculation in Mr. Cabrera's report from which the NCJ's $41.9 million judgment derives is based on the same indefensible methodology as the rest of his report.

[122] Exhibit C-293, NCJ Judgment, *NIFA v. MSDIA*, dated 10 November 2014, at p. 79.

[123] Exhibit C-267, MSDIA Petition, *NIFA v. MSDIA*, Court of Appeals, dated 15 July 2011; Exhibit C-44, Report of Carlos Montañez Vásquez, *NIFA v. MSDIA*, Court of Appeals, dated 15 July 2011, at pp. 2, 26.

[124] Exhibit C-45, Court of Appeals Order, *NIFA v. MSDIA*, dated 19 July 2011 (rejecting MSDIA's essential error petition regarding Mr. Cabrera's report); Exhibit C-46, Court of Appeals Order, *NIFA v. MSDIA* 1 August 2011 (rejecting MSDIA's request for reconsideration of its 19 July 2011 Order, on the ground that Mr. Cabrera was an essential error expert, reasoning that "there i[s] no procedural formula to prove essential error regarding another essential error"). As Dr. Ponce Martínez explains, the court of appeal's stated reasoning for rejecting MSDIA's essential error petition could not be reconciled, as a matter of Ecuadorian procedure, with the court's order appointing Mr. Cabrera or the court's reliance on Mr. Cabrera's report in its judgment. *See* Ponce Martínez Witness Statement dated 2 October 2013, at para. 44 (concluding that "The Court's actions … were contrary to law, and in my view, were clearly intended to benefit NIFA.").

Having done so, the court of appeals relied explicitly on the Cabrera report in its judgment, rejecting MSDIA's challenge and finding the report "properly grounded."[125]

95. Thereafter, MSDIA pressed its objections to the Cabrera report at every opportunity. Most recently, after the case was returned to the NCJ (for the third time) after the Constitutional Court's January 2016 decision, MSDIA filed a lengthy brief in which it described for the new NCJ panel—as it had done for the prior two panels—the many ways in which the Cabrera report was fundamentally irrational and could not be squared with the evidence in the record.[126] No coherent response to these arguments has ever been offered by NIFA or by Ecuador. Yet in its 4 August 2016 decision, the NCJ accepted the Cabrera report without considering any of MSDIA's arguments.

96. And of course, Ecuador is well aware of other efforts by MSDIA to alert Ecuador's courts to Mr. Cabrera's lack of credentials to serve as an expert in damages. MSDIA alerted the first panel of NCJ judges of an official memorandum issued by the Ecuadorian Council of the Judiciary in May 2012, relating to the revocation of Mr. Cabrera's accreditation as an expert witness. The NCJ subsequently referred to the memorandum in its September 2012 decision, and – remarkably – the fact that the first NCJ panel was aware of this fundamental truth about the speciousness of the evidence relied upon by the court of appeals became the sole ground on which the Constitutional Court annulled the NCJ's September 2012 judgment (in the amount of $1.57 million).[127]

2. The August 2016 NCJ Judgment Upholds the Court of Appeals' Liability Decision on the Basis of Legal Theories that Do Not Exist in Ecuador and Which NIFA Never Argued

97. The August 2016 NCJ Judgment also denies justice to MSDIA by upholding the court of appeals' liability determination. As MSDIA has established in prior submissions, the invention of a new theory of liability that was not relied on by the plaintiff in the underlying litigation is a denial of justice.[128]

98. As explained above, the NCJ accepted only one narrow aspect of MSDIA's cassation petition, concerning the failure to apply a law relevant to the calculation of damages.[129] On this basis, it decided to "partially set[] aside said judgment."[130] The NCJ rejected every other ground

[125] Exhibit C-4, Court of Appeals Judgment, *NIFA v. MSDIA*, dated 23 September 2011, at pp. 14-15.
[126] Exhibit C-303, MSDIA Petition to the NCJ, *NIFA v. MSDIA*, dated 24 March 2016, at paras. 23-29.
[127] Exhibit C-285, Constitutional Court Decision, dated 12 March 2014, at pp. 15-18.
[128] MSDIA's Reply at paras. 322-334; *see also* MSDIA's Supplemental Reply at paras. 38-45.
[129] Exhibit C-304, NCJ Judgment, *NIFA v. MSDIA*, dated 4 August 2016, at p. 16-17 (Section 6.2.1), 21 (Section 6.5.2).
[130] Exhibit C-304, NCJ Judgment, *NIFA v. MSDIA*, dated 4 August 2016, at p. 22.

for cassation advanced by MSDIA, including MSDIA's cassation arguments challenging the court of appeals' antitrust liability holding.[131]

99. As MSDIA has established in its prior submissions, the court of appeals judgment imposed liability for an antitrust violation, which was the basis on which NIFA had advanced its claims in the litigation.[132] The court of appeals' liability determination was rejected by the first two NCJ panels, once for insufficient evidence of any antitrust violation[133] and once because there was no antitrust law in Ecuador at the time of NIFA's complaint.[134] The third NCJ panel, in contrast, rejected MSDIA's cassation petition with respect to the legal basis for liability, thereby impliedly affirming the antitrust ground relied on by the court of appeals.

100. Nevertheless, incongruously, despite having rejected MSDIA's cassation arguments, the August 2016 NCJ Judgment includes a discussion on liability,[135] in which the NCJ suggested that MSDIA was liable under a theory of pre-contractual liability, based on the general tort provisions of Articles 2214 and 2229 of Ecuador's Civil Code, "underscore[d]" by principles of antitrust law.[136] This new theory of pre-contractual liability—which differs from the theory of pre-contractual liability adopted in the November 2014 NCJ judgment[137] and thus constitutes a ***fourth*** distinct theory of liability resorted to by Ecuador's courts in this case—had never before been pled or considered in the *NIFA v. MSDIA* litigation.

101. The NCJ's liability holding is a denial of justice because pre-contractual liability is not recognized under Ecuadorian law, and because the NCJ (for a third time) held MSDIA liable under a legal theory that had never been advanced in the litigation.

102. MSDIA established in its Supplemental Reply and at the March 2015 merits hearing that pre-contractual liability is not recognized in Ecuadorian law.[138] As MSDIA's expert, Professor Correa, explained in his first expert report, Ecuadorian law strongly protects the freedom to contract and allows parties to terminate contractual negotiations at any time for any reason without incurring liability, except in a few narrow circumstances that are not applicable in this case.[139] He explained that Ecuadorian law therefore does not recognize a general concept of pre-contractual liability.

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[131] *See, e.g.* Exhibit C-304, NCJ Judgment, *NIFA v. MSDIA*, dated 4 August 2016, at p. 21 (Section 6.5.1) (rejecting MSDIA's arguments, made in paragraphs 134 to 183 of MSDIA's cassation petition, that "[t]he judgment … failed to apply certain legal rules, improperly applied other legal rules and erroneously interpreted other legal rules, based on which .. it must be set aside"); Exhibit C-198, MSDIA's Cassation Petition, NIFA v. MSDIA, dated 13 October 2011, at paras. 167-183 (setting forth MSDIA's argument that the court of appeals' application of antitrust liability was improper).

[132] *See* MSDIA's Reply, at paras. 317, 513-542; MSDIA's Supplemental Reply at para. 42.

[133] Exhibit C-203, NCJ Judgment, *NIFA v. MSDIA*, dated 21 September 2012, at §§ 9.1-9.2.2.

[134] Exhibit C-293, NCJ Judgment, *NIFA v. MSDIA*, dated 10 November 2014, at p. 40.

[135] Exhibit C-304, NCJ Judgment, *NIFA v. MSDIA*, dated 4 August 2016, at pp 30-33.

[136] Exhibit C-304, NCJ Judgment, *NIFA v. MSDIA*, dated 4 August 2016, at pp. 31-32.

[137] In contrast to the 10 November 2014 NCJ Judgment, which was a denial of justice for the reasons outlined in MSDIA's Supplemental Reply, the 4 August 2016 judgment does not rely on Articles 721 and 1562 of the Civil Code in finding MSDIA liable for pre-contractual liability.

[138] MSDIA's Supplemental Reply at paras. 46-48; Day 5 Merits Hearing Full Transcript, at 20:8-11.

[139] Correa Expert Report, dated 8 August 2014, at paras. 6-8.

103. At the merits hearing, Ecuador's own expert, Professor Parraguez, confirmed that there is no statute in Ecuador establishing pre-contractual liability and that no case has ever imposed liability on that basis.[140]

104. Thus, not surprisingly, the August 2016 NCJ judgment—like the 10 November 2014 judgment before it—failed to identify a ***single decision or legal provision*** recognizing pre-contractual liability, or otherwise supporting a finding that a party can be held liable for walking away from pre-contractual negotiations.

105. In addition, the August 2016 NCJ judgment violates Ecuadorian law because it holds MSDIA liable under a theory that was never advanced by NIFA. The August 2016 NCJ Judgment recognized that "[b]ased on the principle of congruence, ***all judges and tribunals must rule solely on the claim and the answer thereto***, without going beyond the boundaries so imposed, and set forth above."

106. NIFA's complaint did not advance a claim under a theory of pre-contractual liability, and NIFA never relied on pre-contractual liability during the proceedings. In fact, as MSDIA has explained, NIFA consistently affirmed that "[s]ince its very beginning, it was a claim for ***acts contrary to competition***."[141] Ecuador's own expert, Professor Aguirre, conceded at the merits hearing that NIFA insisted that its claim was grounded only in antitrust law, and it never asserted or relied on any other legal theory, including pre-contractual liability.[142] Likewise, neither MSDIA nor NIFA requested in their cassation petitions that the NCJ rule on a claim for pre-contractual liability.

107. The NCJ understood that NIFA had based its claim on antitrust principles under Article 244, numeral 3, of the 1998 Constitution (which, as MSDIA has established, does not provide a basis for liability[143]), and that the court of appeals had held MSDIA liable on that basis. Nevertheless, the NCJ sought to re-characterize NIFA's complaint, holding (without any citation to legal authority) that NIFA's citation to Article 244, numeral 3, of the Constitution "***does not mean that the lawsuit hinges on matters of free competition***, now developed in specific laws, - but rather [] ***serves to underscore the unilateral attitude of the defendant….***"[144]

108. This effort to engineer a new argument to support the imposition of liability, going beyond the plaintiff's own complaint and beyond the bounds of the applicable law, is precisely the sort of results-oriented decision making that constitutes a denial of justice. The NCJ's effort to support a finding of liability was a "[s]urprising departure[] from settled patterns of reasoning

[140] Day 4 Merits Hearing Full Transcript, at 36:20-38:11, 67:12-20.
[141] Exhibit C-201, Transcript of Hearing, *NIFA v. MSDIA*, NCJ, recorded by the defendant, December 26, 2011, at p.1 (emphasis added). *See also* Exhibit C-200, NIFA's Brief of 17 November 2011, *NIFA v. MSDIA*, NCJ, at para. 12; Exhibit C-240, NIFA's Brief, *NIFA v. MSDIA*, Trial Court, dated 20 April 2007, at Numeral V; Exhibit C-157, NIFA's Brief, *NIFA v. MSDIA*, Court of Appeals, dated 9 October 2008 at p. 2; Exhibit C-164, NIFA's Brief, *NIFA v. MSDIA*, Court of Appeals, dated 23 January 2009, at p. 2; Exhibit C-238, NIFA's Brief, *NIFA v. MSDIA*, Trial Court, dated 18 October 2006 at Numeral VIII.
[142] Day 4 Merits Hearing Full Transcript, at 129:19-24.
[143] *See* MSDIA's Reply, at paras. 366-369, 515-516.
[144] Exhibit C-304, NCJ Judgment, *NIFA v. MSDIA*, dated 4 August 2016, at p. 32.

or outcomes," and "must be viewed with the greatest scepticism [where its] effect is to disadvantage a foreigner."[145]

3. The NCJ's $41.9 Million Damages Award Shocks the Conscience and is Contrary to the Overwhelming Weight of the Evidence

109. In addition, it is plain that the NCJ's imposition of nearly $42 million in damages against MSDIA for the failure of a $1.5 million real estate transaction is a "decision[] so outrageous as to be inexplicable otherwise than as [an] expression[] of arbitrariness or gross incompetence."[146] In short, "no competent judge could reasonably have" awarded NIFA damages in any amount even approaching that magnitude.[147] The NCJ's damages award, on its face, is therefore a denial of justice.

110. MSDIA has demonstrated repeatedly in this arbitration that no competent court could have awarded NIFA $41.9 million as lost profits resulting from its failure to acquire a small, aging factory that MSDIA eventually sold for less than $1 million.[148] As MSDIA has established, no evidence in the record even remotely supports the NCJ's $41,966,571.60 damages award (or for that matter the $7.7 million damages award issued by the NCJ in its second "final" ruling).

111. The original court-appointed damages expert in the court of appeals, the highly respected Venezuelan economist and lawyer Dr. Ignacio de Leon, assessed NIFA's claims and concluded that NIFA had suffered no damages whatever,[149] and had failed to support its allegations regarding lost profits, which were at best wholly speculative.[150]

112. Three different experts offered by MSDIA similarly concluded that NIFA had in fact suffered no damages,[151] including Mr. Carlos Montañez Vásquez, who concluded that there was ***no conceivable basis for Mr. Cabrera's calculation of NIFA's supposed lost profits*** or harm to the Ecuadorian people, and who concluded that the only conceivable basis for damages was NIFA's claim of alleged consequential damages of $50,000.[152]

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[145] Exhibit CLM-174, J. Paulsson, DENIAL OF JUSTICE IN INTERNATIONAL LAW (2005), at pp. 199- 200. *See also* Exhibit CLM-137, *Occidental Exploration and Production Company v. Republic of Ecuador*, LCIA Case No. UN 3467, Final Award, dated 1 July 2004, at paras. 184-187.
[146] Exhibit CLM-174, J. Paulsson, DENIAL OF JUSTICE IN INTERNATIONAL LAW (2005), at p. 205.
[147] Exhibit CLM-174, J. Paulsson, DENIAL OF JUSTICE IN INTERNATIONAL LAW (2005), at p. 200.
[148] Exhibit C-11, Report of Omar Herrera R., *NIFA v. MSDIA*, Trial Court, dated 25 October 2004, at p. 4. MSDIA executed the sales deed for the plant with an affiliate of Ecuaquímica. MSDIA sold the equipment separately to other parties. *Id*. At pp. 2-3. *See also* Exhibit C-191, Testimony of Richard Trent, *NIFA v. MSDIA*, Court of Appeals, dated 16 April 2010, at pp. 1-2 (in response to Questions 24, 25, and 27).
[149] Exhibit C-24, Report of Ignacio De León, *NIFA v. MSDIA*, Court of Appeals, dated 12 February 2010, at 98.
[150] Exhibit C-24, Report of Ignacio De León, *NIFA v. MSDIA*, Court of Appeals, dated 12 February 2010, at 47-49.
[151] Exhibit C-44, Report of Carlos Montafiez Vasquez, submitted to the Court of Appeals, *NIFA v. MSDIA*, 15 July 2011 at p. 2; Exhibit C-20, Report of Rolf Stem, *NIFA v. MSDIA*, Court of Appeals, dated 4 June 2009, at p. 1; Exhibit C-21, Report of Walter Spurrier Baquerizo, *NIFA v. MSDIA*, Court of Appeals, dated 4 June 2009, at pp. 3-4.
[152] Exhibit C-44, Report of Carlos Montañez Vásquez, submitted to the Court of Appeals, *NIFA v. MSDIA*, dated 15 July 2011, at pp. 2, 26.

113. Moreover, the unrebutted evidence in the record demonstrated that, contrary to NIFA's claim in the litigation that there was no other real estate in the Quito region suitable for a new plant, numerous other factory sites were available and suitable to accommodate NIFA's expansion plans, including land NIFA already owned in 2003 near the MSDIA plant, on which it could have built and operated a pharmaceutical manufacturing facility more than three times the size of MSDIA's plant.[153] Moreover, NIFA expanded its own existing production facility dramatically after the negotiations with MSDIA failed.[154] The court of appeals' first expert in real estate, Mr. Manuel Silva, confirmed the availability of these substitute properties, which established conclusively that NIFA could not have suffered significant injury from the failure of its attempted acquisition of MSDIA's plant.[155]

114. MSDIA also established that according to NIFA's own tax filings in the record, NIFA's actual profit margin in 2003 was only 0.7%,[156] and its average profit margin between 2000 and 2006 was about 2.2%.[157] Given this evidence, which NIFA did not dispute, the NCJ's unexplained and unsupported assumption that NIFA would achieve the 20% maximum profit margin allowable by law in every year between 2003 and 2018 was itself a shocking departure from the record—leaving aside Mr. Cabrera's absurd calculations about the volume of sales to which that 20% rate of return was applied.

115. Indeed, the NCJ's blind acceptance of Mr. Cabrera's finding that NIFA suffered damages over a 15 year period was flatly contradicted by NIFA's ***own complaint***, in which it asserted that the negotiations delayed its expansion plans by only one year.[158]

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[153] Exhibit C-169, Testimony of Norman Xavier Espinel Vargas, *NIFA v. MSDIA*, Court of Appeals, dated 26 May 2009, at pp. 2-4. Indeed, as Mr. Espinel testified, NIFA already was permitted under applicable zoning laws to construct such a facility. Rather than do so, NIFA sold the lot in May 2003. *Id.* at pp. 2-3.

[154] Exhibit C-169, Testimony of Norman Xavier Espinel Vargas, *NIFA v. MSDIA*, Court of Appeals, dated 26 May 2009, at pp. 2-4.

[155] Exhibit C-23, Report of Manuel J. Silva Vásconez, *NIFA v. MSDIA*, Court of Appeals, dated 23 December 2009. Among Mr. Silva's findings were his conclusions that (a) there were a number of existing, available, and properly zoned industrial plants, other structures, and vacant lots on which NIFA could have constructed a new facility after it ended the negotiations with MSDIA in January 2003; (b) at least one other pharmaceutical plant was on the market in 2003 (owned by the Ecuadorian pharmaceutical company Albanova), and another facility available at the time was subsequently purchased by Pfizer and converted into a pharmaceutical manufacturing facility; (c) NIFA owned a vacant lot near the MSDIA plant, which it sold to another Ecuadorian company in May 2003, on which it had been permitted under the applicable zoning laws to build and operate a pharmaceutical manufacturing facility more than three times the size of MSDIA's plant; and (d) NIFA had been free to expand its existing facility after the negotiations, and had in fact done so. It obtained a regularization permit in 2005 for 1,057 square meters of construction and obtained another permit for an additional 300 square meters' expansion in 2008. Under applicable zoning laws in place in 2003, NIFA was free to build up to 29,000 square meters on its lot, which would have resulted in a facility far larger than the Chillos Valley plant.

[156] Exhibit C-267, MSDIA Petition, *NIFA v. MSDIA*, Court of Appeals, dated 15 July 2011 at para. 61.

[157] Exhibit C-267, MSDIA Petition, *NIFA v. MSDIA*, Court of Appeals, dated 15 July 2011 at para. 61 ("As summarized by economist [and MSDIA expert] Walter Spurrier, according to tax returns filed before the SRI, Nifa's net profits over sales from 2000 to 2006 were as follows: 2000: 2.7%, 2001: 0.0%; 2002: 0.1%; 2003: 0.7%; 2004: 4.6%; 2005: 3.6%; and 2006: 3.9%.").

[158] Exhibit C-10, NIFA's Complaint, *NIFA v. MSDIA*, Trial Court, 16 December 2003, at p. 8 ("[MSDIA] caused my client to suffer a year of delays in expanding its industrial plant or constructing or acquiring a new one.")

116. And of course, NIFA offered no evidence demonstrating it suffered a harm even remotely approaching $42 million. NIFA's most wildly optimistic evidence in support of its damages claim was a so-called "business plan" dated October 2002, which NIFA submitted in the first instance proceedings.[159] NIFA purportedly prepared the "business plan" for the purpose of securing financing for the purchase of MSDIA's plant. As such it purported to demonstrate NIFA's expected growth for the years 2003-2012 following the acquisition.[160]

117. As MSDIA has demonstrated in past submissions, NIFA's "business plan" was based on unrealistic and implausible assumptions (stated optimistically for the purpose of securing financing),[161] and Ecuador has never defended it. Among other things, the business plan assumed that NIFA would enjoy significant sales of Rofecoxib, the sale of which would have violated MSDIA's intellectual property rights.[162] It also assumed NIFA would achieve a profit margin in excess of the maximum profit allowed under Ecuadorian law, the very error the latest NCJ panel recognized.[163] Indeed, an expert who analyzed the business plan on behalf of MSDIA in the court of appeals concluded that after correcting for the unrealistic assumptions in the plan, NIFA's analysis indicated that it would have ***lost*** money on the purchase of MSDIA's small facility.[164]

118. But even accepting the sales figures in the business plan at face value, applying NIFA's 2003 profit margin to the sales projected in the plan between 2003 and 2012 yields a total profit over the 10-year period of less than $1.5 million. Even applying NIFA's average profit margin over the 2000-2006 period of 2.2% to the total sales forecasted in its business plan yields a total profit of approximately $4.3 million over the same period.[165] Taking into account NIFA's own claim that its expansion was delayed by only a single year[166] would yield a damages calculation very close to zero.

119. Given NIFA's own admission that it suffered only a year of delay in expanding its production, the overwhelming evidence in the record that it suffered, at most, *de minimis* damages, and the facial absurdity of the Cabrera report (and his obvious lack of credentials to provide it), no honest, competent court would have awarded NIFA $41.9 million on the basis of the Cabrera report.

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[159] Exhibit C-136, NIFA's Business Plan, at section II; Exhibit C-137, NIFA's Business Plan, at section IV; Exhibit C-21, Report of Walter Spurrier Baquerizo, *NIFA v. MSDIA*, Court of Appeals, dated 4 June 2009, at pp. 8-11 (summarizing the business plan).

[160] Exhibit C-136, NIFA's Business Plan, at section II; Exhibit C-137, NIFA's Business Plan, at section IV; Exhibit C-21, Report of Walter Spurrier Baquerizo, *NIFA v. MSDIA*, Court of Appeals, dated 4 June 2009, at pp. 1-3, 8-11.

[161] *See, e.g.*, MSDIA Memorial at paras. 51-52; Report of Walter Spurrier Baquerizo, *NIFA v. MSDIA*, Court of Appeals, dated 4 June 2009, at pp. 8-11.

[162] Exhibit C-136, NIFA's Business Plan, at section II.

[163] Exhibit C-21, Report of Walter Spurrier Baquerizo, *NIFA v. MSDIA*, Court of Appeals, dated 4 June 2009, at pp. 3-4; Exhibit C-44, Report of Carlos Montañez Vásquez, *NIFA v. MSDIA*, Court of Appeals, dated 15 July 2011, at p. 24.

[164] Exhibit C-21, Report of Walter Spurrier Baquerizo, *NIFA v. MSDIA*, Court of Appeals, dated 4 June 2009, at pp. 3-4.

[165] Exhibit C-21, Report of Walter Spurrier Baquerizo, *NIFA v. MSDIA*, Court of Appeals, dated 4 June 2009, at p. 22 (showing the total sales forecast in the business plan).

[166] Exhibit C-10, NIFA's Complaint, *NIFA v. MSDIA*, Trial Court, dated 16 December 2003, at p. 8.

120. MSDIA placed this evidence before the NCJ,[167] as it had done for each of the prior two NCJ panels, but the panel of NCJ alternate judges ignored each of these facts and instead relied solely on the discredited Cabrera report, while admittedly making no independent assessment of the reliability of that evidence.[168] The NCJ's award of damages against this factual background is truly shocking and, on its face, is a denial of justice.

IV. ECUADOR HAS FAILED TO PROVIDE EFFECTIVE MEANS OF ASSERTING CLAIMS AND ENFORCING RIGHTS

121. The January 2016 Constitutional Court decision and August 2016 NCJ judgment also further confirm that Ecuador has violated its separate obligation under Article II(7) of the Treaty to "provide effective means of asserting claims and enforcing rights with respect to investment."

122. As MSDIA has established in prior submissions, the tribunals in *Chevron v. Ecuador* and *White Industries v. India* each held that this requirement constitutes an "independent, specific treaty obligation . . . and not a mere restatement of the [customary international] law on denial of justice."[169] Those tribunals also concluded that the "effective means" requirement is subject to a lower threshold for establishing a breach than denial of justice,[170] and that it "requires both that the host State establish a proper system of laws and institutions and that those systems work effectively in any given case."[171]

123. In this case, Ecuador's legal system has not worked effectively to provide MSDIA an adequate means of protecting its rights in the Ecuadorian courts. The Ecuadorian legal system has produced a series of irrational and unfair results through a process that failed to afford basic due process protections. It has issued multiple, enforceable judgments against MSDIA imposing ever increasing amounts of liability for exactly the same conduct. It has allowed NIFA to enforce decisions of Ecuador's highest civil court against MSDIA while also allowing NIFA to

[167] Exhibit C-303, MSDIA Petition to the NCJ, dated 24 March 2016, *NIFA v. MSDIA*, at paras. 23-40.
[168] When the case was returned to the NCJ for a third decision, MSDIA filed a lengthy merits brief in which it described for the new NCJ panel—as it had done for the prior two panels—the many ways in which the Cabrera report was fundamentally absurd and could not be squared with the evidence in the record. MSDIA further explained to the NCJ that Mr. Cabrera lacked the qualifications necessary to serve as an expert in damages. Exhibit C-303, MSDIA Petition to the NCJ, dated 24 March 2016, *NIFA v. MSDIA*, at paras. 23-29.
[169] Exhibit CLM-111, *Chevron Corp. & Texaco Petroleum Co. v. Republic of Ecuador (Chevron I)*, PCA Case No. 2007-2 (UNCITRAL), Partial Award on the Merits, dated 30 March 2010, at para. 242. Exhibit CLM-114, *White Industries Australia Ltd. v. Republic of India*, UNCITRAL, Award, dated 30 November 2011, at para. 11.3.2(a), 11.3.3 (quoting *Chevron I*). *See also* Paulsson Expert Report, dated 2 October 2013,, at para. 33 ("Article II(7) is an example of a treaty provision which may create state responsibility for acts of the judiciary without applying the test for denial of justice under customary international law.").
[170] Exhibit CLM-111, *Chevron Corp. & Texaco Petroleum Co. v. Republic of Ecuador (Chevron I)*, PCA Case No. 2007-2 (UNCITRAL), Partial Award on the Merits, dated 30 March 2010, at para. 244. Exhibit CLM-114, *White Industries Australia Ltd. v. Republic of India*, UNCITRAL, Award, dated 30 November 2011, at para. 11.3.2(a) (quoting *Chevron I*). *See also* Paulsson Expert Report, dated 2 October 2013, at para. 31 (noting that the *Chevron* and *White Industries* tribunals "held that Article II(7) imposed a broader obligation on states than the rules of customary international law concerning denial of justice.").
[171] Exhibit CLM-114, *White Industries Australia Ltd. v. Republic of India*, UNCITRAL, Award, dated 30 November 2011, at para. 11.3.2(a)-(b).

challenge the very same decisions at the same time.[172] And its courts have issued decisions against MSDIA motivated not by the rule of law, but by bias and apparent corruption, aimed at securing a predetermined result, namely a large damages award in favor of the Ecuadorian plaintiff.

124. These thirteen years of litigation in a case involving a potential $1.5 million factory sale have been an extraordinary miscarriage of justice. There is no doubt that the Ecuadorian judicial system as a whole has failed (the touchstone for a denial of justice). MSDIA has been denied effective means of asserting its defenses and protecting its rights in Ecuador's courts, in violation of Article II(7) of the Treaty.

V. MSDIA HAD NO EFFECTIVE REMEDY AVAILABLE IN ECUADOR FOR CHALLENGING THE NCJ'S 4 AUGUST 2016 DECISION

125. Ecuador has previously argued that MSDIA did not fully exhaust its remedies in Ecuador with respect to the two prior decisions of the NCJ, because it did not file Extraordinary Actions for Protection in the Constitutional Court seeking to set those decisions aside.[173] This is legally wrong, as MSDIA has previously explained, because decisions of the NCJ are final decisions of the Ecuadorian court system that are immediately enforceable.[174] Moreover, filing an EAP cannot stay enforcement of the NCJ's decision, and the Constitutional Court cannot compensate a successful party for the amounts it has already paid in satisfaction of an NCJ judgment.[175]

126. Filing an EAP to challenge the August 2016 NCJ Judgment therefore would not have protected MSDIA from enforcement of that decision. Instead, filing an EAP would do nothing more than expose MSDIA to yet further liability, if (as happened in response to NIFA's earlier EAPs) the Constitutional Court vacated the NCJ decision and sent the case back to the NCJ for further proceedings. Given that reality, filing an EAP in the Constitutional Court would not have provided an effective remedy for the denial of justice imposed by the NCJ.

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[172] Ecuador contends that the *Chevron* and *White Industries* tribunals are both wrong because Article II(7) "merely incorporates guarantees against denial of justice already … incorporated in the Treaty through Article II(3)(a)." According to Ecuador, Article II(7) cannot be breached unless a denial of justice is established. For reasons set forth in MSDIA's written submissions, Ecuador's argument is incorrect because it is inconsistent with the text of the U.S.-Ecuador BIT and with the applicable rules of treaty interpretation. *See* MSDIA's Memorial, at paras. 394-408; MSDIA's Reply, at paras. 737-773. The language of Article II(7) is entirely different from the language of Article II(3)(a), and those differences must be given meaning under applicable principles of treaty interpretation. Ratner Expert Report, dated 1 August 2014, at para. 21. Moreover, the principle of *effet utile* forbids Ecuador's interpretation of Article II(7) as merely superfluous of the customary international law standard for denial of justice, which is already incorporated in Article II(3)(a). *See* MSDIA's Reply, at paras. 744-745 (citing Ratner Expert Report, dated 1 August 2014, at paras. 21-22 (explaining that differences in language between treaty provisions must be assumed to have meaning in keeping with the VCLT's rules of treaty interpretation)). Of course, MSDIA contends that the standards for establishing a denial of justice are also clearly met here. But, as Professor Paulsson explains, Article II(7) provides a distinct and independent source of Ecuador's obligations under the Treaty, under which MSDIA is entitled to relief. Paulsson Expert Report, dated 2 October 2013, at paras. 31-32.

[173] *See, e.g.*, Ecuador's Counter-Memorial at paras. 182-270.

[174] *See* MSDIA's Reply, at paras. 419-425.

[175] *See* MSDIA's Reply, at paras. 431-446.

127. Because MSDIA has no further recourse in Ecuador that could provide an effective remedy for the denial of justice by the NCJ, MSDIA has exhausted its remedies in Ecuador.[176]

VI. MSDIA IS ENTITLED TO FULL REPARATION

128. At the time of the oral merits hearing in March 2015, there was considerable uncertainty about when and how the *NIFA v. MSDIA* litigation in Ecuador would ever be brought to an end. At that time, MSDIA had already been subjected to two final judgments of Ecuador's highest civil court, and NIFA had filed yet another Extraordinary Action for Protection asking Ecuador's Constitutional Court to set aside the second NCJ judgment (as it had earlier set aside the first) in an effort to obtain further, even higher monetary judgments against MSDIA. MSDIA's request for relief therefore sought not only compensation for the amounts MSDIA had already paid to NIFA and the legal fees it had incurred in the Ecuadorian proceedings, but also permanent injunctive relief to protect MSDIA from further harm and indemnification against any further losses incurred as a result of the ongoing proceedings in Ecuador.

129. Following the August 2016 NCJ Judgment, MSDIA faces a different factual situation. It appears that NIFA has not filed another EAP challenging the August 2016 NCJ Judgment and the deadline for doing so has now expired. It is possible therefore that the August 2016 NCJ Judgment may in fact be the last "final judgment" in the long-running *NIFA v. MSDIA* litigation. Unfortunately, that does not mean that the harm to MSDIA from Ecuador's treaty violations has come to an end.

130. MSDIA has thus far paid $7.7 million to NIFA. It now faces a new judgment based on the same claims of nearly $42 million. MSDIA's assets in Ecuador are worth far less than $42 million, and MSDIA therefore faces the destruction of its business in Ecuador if the $42 million judgment is enforced against its assets. When MSDIA's bank accounts, inventory, equipment, and accounts receivable are seized, it will be unable to pay its employees, sell product, or otherwise operate. Any funds or products sent into the country would be subject to seizure.

131. As noted above, the Ecuadorian court of first instance charged with enforcing the August 2016 NCJ Judgment has suspended enforcement proceedings in compliance with this Tribunal's Order granting interim measures of protection. However, if that suspension is lifted, either by the court of first instance or by another Ecuadorian court pursuant to an appeal or constitutional challenge by NIFA, or if it expires without replacement by similar or other sufficient relief at the issuance of this Tribunal's Final Award, NIFA could immediately seek to enforce the NCJ's $42 million judgment against MSDIA, thereby destroying MSDIA's investment in Ecuador. In consequence, MSDIA would lose its ongoing business, including existing assets and expectation of future profits, and would face in addition potential enforcement against assets outside Ecuador of the large unsatisfied portion of the $42 million judgment.

132. Given these difficulties – and Ecuador's almost certain unwillingness to comply with an award nullifying the judgment – as discussed further below, the remedy that would put MSDIA in the position nearest to what it would have been in absent Ecuador's breaches of the Treaty

[176] *See* MSDIA's Reply, at paras. 419-471.

would be timely satisfaction by Ecuador of the August 2016 NCJ Judgment. While nullification may be a more commonly cited remedy for denial of justice, in this case, Ecuador has adopted positions that strongly indicate that it would not respect an award directing nullification. Nullification would therefore be an empty remedy that would leave MSDIA exposed to further proceedings in the same Ecuadorian courts that have repeatedly denied it justice, to seizure of its assets and destruction of its business, and to efforts to enforce unsatisfied portions of the judgment in the courts of other countries. On the other hand, if Ecuador were directed to fully satisfy the judgment, and if Ecuador were to do so in a timely fashion to avoid any risk of seizure of MSDIA's assets, this would bring the *NIFA v. MSDIA* proceedings to an end and would eliminate the risks to MSDIA's assets both inside and outside of Ecuador.

133. Given MSDIA's precarious position in Ecuador at present – where a lower court has honored the Tribunal's interim measures Order and suspended enforcement of the August 2016 NCJ Judgment, but where that suspension itself is likely to be challenged by NIFA in the very same courts that have repeatedly denied justice to MSDIA – MSDIA respectfully requests a Partial Final Award on jurisdiction and liability, awarding MSDIA the full amount of the August 2016 NCJ Judgment, as soon as reasonably possible. MSDIA also requests that the Tribunal then establish a procedure for allowing full consideration of the quantum of MSDIA's other heads of claim, which requires updating and which may depend, in part, on the outcome of the Partial Final Award and Ecuador's compliance with it.

A. MSDIA Is Entitled to Full Reparation

134. A party harmed by a violation of international law is entitled to full reparation, in other words to a remedy that puts the party in the position it would have been in absent the violation. This was the holding of the Permanent Court of International Justice in the *Chorzów Factory* case.[177] This principle is well established, and Ecuador has not disputed its applicability here.

135. The International Law Commission's Draft Articles on State Responsibility establish that restitution is a preferred remedy. Specifically, Article 35 provides:

> "A State responsible for an internationally wrongful act is under an obligation to make restitution, that is, to re-establish the situation which existed before the wrongful act was committed, provided and to the extent that restitution:
>
> (a) is not materially impossible;
>
> (b) does not involve a burden out of all proportion to the benefit deriving from restitution instead of compensation."[178]

[177] Exhibit CLM-152, *Case Concerning the Factory at Chorzów (Ger. v. Pol.)*, Judgment on the Merits, 1928 P.C.I.J. (ser. A) No. 17, at 47 (Sept. 13) ("[R]eparation must, as far as possible, wipe out all the consequences of the illegal act and reestablish the situation which would, in all probability, have existed if that act had not been committed."). *See also* Ecuador's Counter-Memorial, at paras. 523-524 (referencing the *Chorzów Factory* case).
[178] Exhibit CLM-330, International Law Commission, Draft Articles on Responsibility of States for Internationally Wrongful Acts [hereinafter ILC Draft Articles], art. 35 (2001). With respect to the limitations on the obligation to provide restitution (material impossibility and lack of proportionality), the commentary makes clear that "restitution

Where restitution is not possible, or where it does not fully redress the harms suffered, compensation is also appropriate. Art 34 of the ILC Draft Articles provides that "full reparation for an injury caused by the internationally wrongful act shall take the form of restitution, compensation and satisfaction, either singly or in combination." Where restitution is impossible, a tribunal must order ***full compensation*** instead.[179] Investor-state tribunals, including tribunals applying the Ecuador-U.S. BIT, have consistently confirmed this principle.[180]

B. A Remedy Annulling the Ecuadorian Judgments and Precluding Further Litigation Would Not Afford MSDIA Effective Relief

136. Where the international wrong in question is a denial of justice that has resulted in an unlawful judgment, restitution can often be achieved by annulling the judgment (although full reparation may require further monetary compensation). This is expressly contemplated by the ILC Draft Articles: the commentary to Article 35 states that "[r]estitution may take the form of material restoration or return of territory, persons or property, ***or the reversal of some juridical act***, or some combination of them."[181] The commentary continues:

> "The term 'juridical restitution' is sometimes used where restitution requires or involves the modification of a legal situation either within the legal system of the responsible State or in its legal relations with the injured State. Such cases include the revocation, annulment or amendment of a constitutional or legislative provision enacted in violation of a rule of international law, ***the rescinding or reconsideration of an administrative or judicial measure unlawfully adopted in respect of the person or property of a foreigner*** or a requirement that steps be taken (to the extent allowed by international law) for the termination of a treaty."[182]

137. In this case, however, there in an unacceptable risk that an award directing annulment of the judgments in the *NIFA v. MSDIA* litigation would not provide restitution to MSDIA.

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is not impossible merely on grounds of legal or practical difficulties, even though the responsible State may have to make special efforts to overcome these." *Id.*, comment 8. Moreover, "[u]nder article 32 the wrongdoing State may not invoke the provisions of its internal law as justification for the failure to provide full reparation, and the mere fact of political or administrative obstacles to restitution does not amount to impossibility." *Id.* Finally, the proportionality exception to restitution "applies only where there is a grave disproportionality between the burden which restitution would impose on the responsible State and the benefit which would be gained, either by the injured State or by any victim of the breach." *Id.*, comment 11.

[179] *See* Exhibit RLA-57, *AIG Capital Partners, Inc. and CJSC Tema Real Estate Company v. Republic of Kazakhstan*, ICSID Case No. ARB/01/6, Award, 7 October 2003, para. 12.1; Exhibit CLM-330, ILC Draft Articles, Art. 36 (1) ("The State responsible for an internationally wrongful act is under an obligation to compensate for the damage caused thereby, insofar as such damage is not made good by restitution.").

[180] *See e.g.*, Exhibit CLM-451, *Murphy Exploration and Production Company International v. Republic of Ecuador [II]*, PCA Case No. 2012-16 (formerly AA 434), Partial Final Award, 6 May 2016, paras. 424-425; Exhibit RLA-83, *Duke Energy Electroquil Partners and Electroquil S.A. v. Republic of Ecuador*, ICSID Case No. ARB/04/19, Award, 18 August 2008, paras. 467-468; Exhibit CLM-452, *Occidental Petroleum Corporation and Occidental Exploration and Production Company v. Republic of Ecuador*, ICSID Case No. ARB/06/11, Award, 5 October 2012, at paras. 792-797; Exhibit CLM-453, *BG Group Plc. v. Republic of Argentina*, UNCITRAL, Award, 24 December 2007, paras. 426-431.

[181] Exhibit CLM-330, ILC Draft Articles, art. 35, comment 5 (emphasis added).

[182] Exhibit CLM-330, ILC Draft Articles, art. 35, comment 5 (footnotes omitted and emphasis added).

138. Ecuador has stated repeatedly and emphatically in its submissions in response to MSDIA's request for interim measures of protection that Ecuador is legally prohibited from ensuring that the directions of this Tribunal are given effect, if those directions require Ecuador's courts to act or refrain from acting. For example, in a letter to MSDIA's counsel dated 19 September 2016, Ecuador took the position that it was constrained by Ecuador's own domestic law in its ability to give effect to this Tribunal's orders and awards. Although the extract below is long, it is important to fully appreciate Ecuador's position, in its own words, in this respect:

> "Nor, of course, can the Attorney General seek to compel the court to stay enforcement; ***unlike MSDIA, which is party to the case, the Republic of Ecuador is not. Acting in the manner requested would be in breach of the principle of external independence of the Ecuadorian judiciary enshrined in Article 168 of the Ecuadorian Constitution***. Contrary to what your letter suggests, as set forth in Article 8(3) of Organic Code of the Judiciary this prohibits not only "interference with the decision-making of Ecuador's courts," but also interference "with the exercise of duties and authorities of the Judiciary," which includes duties and authorities with respect to the enforcement of judgments. Acting in contravention of this principle entails the possible imposition of administrative, civil, and criminal liability sanctions.
>
> ***Because the matter involves the rights of a third-party, who is not a party to the arbitration, such action would also be in breach of the constitutional principle of effective judicial protection***, of which the right without interference to enforcement of an otherwise enforceable judgment constitutes an integral part, as has been held by the Inter-American Court of Human Rights. Such action would incur liability under the Constitution, which prohibits as unconstitutional "any action or omission […] intended to diminish, obstruct or unjustifiably nullify the exercise of a person's rights."
>
> None of the arguments you offer in your letter indicates otherwise. First, you argue that "a stay of enforcement would be a temporary measure, and therefore would not interfere with the decision-making of Ecuador's courts." ***However, the nature of the Tribunal's Order (temporary, as opposed to permanent) makes no difference to the legal impossibility of the task you ask of the Office of the Attorney General***. The temporary nature of the Order may, of course, be taken into account by the court called upon to enforce the NCJ judgment, in the same way that the Order itself may be taken into account as a result of the Attorney General's 7 September letter. But for the reasons explained above, the Attorney General can neither advise the court, nor compel it, to refrain from enforcing the NCJ Judgment on the grounds that the Tribunal's Order is "temporary."
>
> Second, ***you argue that "the obligation of Ecuador's courts to comply with the Order attaches irrespective of any contrary provision of Ecuadorian domestic law." If you seek to base this obligation on the fact that Ecuadorian courts are organs of the Ecuadorian State and are consequently bound by the obligations it undertakes on the international plane, with respect, your assertion misses the point. You seek to effectuate the Tribunal's order in the Ecuadorian legal order, and there the matter depends, in principle, on the applicability of rules of normative hierarchy in the***

Ecuadorian legal order. As Respondent explained during the 22 August telephonic hearing (and elsewhere), any obligations arising from the Order are not hierarchically superior to the provisions of the Constitution and of international human rights instruments ratified by Ecuador."[183]

139. Ecuador has thus made it clear that it does not accept that its courts are bound to comply with the directions issued by this Tribunal; that it regards Ecuadorian domestic law as a justification for refusing to comply with those directions; and that in any event the Executive Branch has no role nor responsibility in guiding the Judicial Branch's actions.

140. Given Ecuador's stated positions – the core of which are flatly contrary to basic principles of international law – if this Tribunal were to issue a Final Award directing the nullification of the judgments in the *NIFA v. MSDIA* litigation and the termination of any further proceedings in that litigation, it is plain that Ecuador would not regard itself as obligated to give effect to the Tribunal's Award. Where Ecuador has all but said it will not comply with an award directing nullification, issuing an empty remedy cannot constitute full reparation of the harm to MSDIA resulting from the denials of justice in Ecuador's courts.

C. Ecuador Should Therefore Be Directed to Satisfy the August 2016 NCJ Judgment By Paying the Amount of that Judgment to MSDIA

141. Given Ecuador's stated positions in this arbitration, the only plausible way to fully remedy the denials of justice in Ecuador's courts and restore MSDIA to the position it would have been in absent Ecuador's breaches is to direct Ecuador to satisfy the judgment (as well as to pay MSDIA's other damages, such as MSDIA's prior payments to NIFA and its attorney's fees and the like). If NIFA is timely paid the full amount of the judgment in its favor, MSDIA will face no further liability in the *NIFA v. MSDIA* litigation (inside or outside of Ecuador), and the litigation will finally be brought to an end. If concluded prior to any effort to execute against MSDIA's assets, MSDIA's business in Ecuador would survive. MSDIA would be in the same position it would have been in had the denials of justice in Ecuador's courts never occurred.

142. Ecuador can satisfy the judgment in one of two ways:

a. First, Ecuador could satisfy the judgment by paying MSDIA the full amount of the August 2016 NCJ Judgment, $41,966,571.60. If the court of first instance allows an offset for the amounts previously paid to NIFA, those amounts would not separately be owed to MSDIA, but if the court of first instance did not allow an offset and directed MSDIA to pay NIFA the entire $41,966,571.60, to effect full reparation, Ecuador would also need to pay MSDIA the amounts MSDIA previously paid in satisfaction of the judgments in the *NIFA v. MSDIA* litigation, in the amount of $7,723,471.81, as well as its other monetary damages, which are discussed below.

b. Second, as an alternative, if Ecuador has any objection to paying MSDIA the amount of the judgment, Ecuador can satisfy the judgment by paying NIFA directly or by

[183] Exhibit C-309, Ecuador's letter to MSDIA, dated 19 September 2016.

paying the amount owed to NIFA into an escrow account. Under this approach, to effect full reparation, Ecuador would also need to pay MSDIA the amounts MSDIA previously paid in satisfaction of the judgments in the *NIFA v. MSDIA* litigation, in the amount of $7,723,471.81, as well as its other monetary damages, which are discussed below.

143. An award directing Ecuador to pay the August 2016 NCJ Judgment is also the appropriate remedy for Ecuador's failure to provide MSDIA with effective means to assert claims and enforce rights with respect to its investment. MSDIA is entitled to a procedure that results in the timely rejection of unmeritorious claims against it. So long as the Ecuadorian courts continue to have a role, as they would if the remedy was nullification of the judgments in the *NIFA v. MSDIA* litigation, MSDIA will continue to be at the mercy of the same court system that has failed to provide it an effective means of protecting its rights.

144. Even if a court of first instance nullified the August 2016 NCJ Judgment in response to an award by this Tribunal (and all prior judgments, so that the nullification of the August 2016 NCJ Judgment did not reinstate the prior judgments), that nullification decision could be appealed to the court of appeals, the NCJ, and ultimately to the Constitutional Court. Allowing the very same Ecuadorian courts that have repeatedly denied justice to MSDIA to decide whether to give effect to an award directing nullification cannot fully repair the harm suffered by Ecuador's failure to provide MSDIA effective means of defending itself in the Ecuadorian courts. The only plausible remedy that would ensure this cycle is brought to a close would be directing Ecuador to pay the August 2016 NCJ Judgment in full. It would also obviate any concerns Ecuador may have about respect for the independence of the judiciary and the balance of national and international law. A simple monetary payment would effectuate both domestic and international law requirements.

D. In Addition, MSDIA Is Entitled to Compensation for Its Other Losses

145. Full reparation requires erasing all of the effects of a violation of international law. Eliminating MSDIA's liability to NIFA and bringing the *NIFA v. MSDIA* litigation to a close are necessary, but not sufficient, to put MSDIA in the same position it would have been in absent Ecuador's breach.

146. MSDIA's request for relief recites several other categories of losses for which MSDIA is entitled to compensation.

147. *First*, MSDIA is entitled to recover its legal fees and costs in defending the *NIFA v. MSDIA* litigation for more than a decade in Ecuador's courts, through multiple rounds of proceedings, each resulting in yet additional denials of justice. MSDIA established its entitlement to recover its legal fees and costs in the Ecuadorian proceedings in its Memorial and Reply,[184] and it does not repeat those arguments here. Since MSDIA provided updated costs figures on 19 April 2016 (in the amount of $6,895,988.66), it has continued to incur legal fees and costs in Ecuador.

[184] *See* MSDIA's Memorial, at paras. 412-413; MSDIA's Reply, at paras. 783-791.

148. *Second*, MSDIA is entitled to recover any damages resulting from enforcement of the August 2016 NCJ Judgment against MSDIA, including the value of any assets paid, seized, forfeited, or otherwise foregone in connection with the enforcement of the NIFA judgment and any other damages to the Claimant's business both inside and outside of Ecuador, including lost profits. Although enforcement of the August 2016 NCJ Judgment is currently suspended, NIFA is almost certain to challenge that suspension in the Ecuadorian courts, and there is still a significant risk of efforts by NIFA to enforce the judgment against MSDIA's assets. If the judgment is enforced against its assets, MSDIA's business in Ecuador will be destroyed, and MSDIA will have lost the value of that business (i.e., the present value of the expected future cash flows of that business).

149. *Third*, MSDIA is entitled to recover moral damages to compensate MSDIA for the non-pecuniary harm it has incurred as a result of Ecuador's breaches, including damage to MSDIA's reputation and goodwill, both inside and outside of Ecuador. MSDIA has not yet attempted to put a specific sum on this category of losses, which will certainly increase if the August 2016 NCJ Judgment is enforced against MSDIA's assets in Ecuador.

150. *Fourth*, MSDIA is entitled to recover pre-award and post-award interest on all sums due from Ecuador. The amount of interest has not yet been quantified.

151. *Finally*, MSDIA is entitled to an award directing that Ecuador is obligated to ensure, by means of its own choosing, that no proceedings or actions directed towards the enforcement of any judgments in the *NIFA v. MSDIA* litigation occur, both within and outside of Ecuador, until Ecuador satisfies the August 2016 NCJ Judgment (following which, of course, there will be no need for any such enforcement proceedings).

E. In the Light of the Changed Factual Circumstances and the Passage of Time, MSDIA Requests that the Tribunal Establish a Procedure for Further Proceedings on Quantum

152. Although the Tribunal's interim measures of protection have succeeded in maintaining the status quo for the time being, MSDIA remains in a precarious position in Ecuador. NIFA is highly likely to challenge the decision of the court of first instance to suspend enforcement proceedings, and that decision could ultimately end up before the same Constitutional Court that has repeatedly issued decisions highly favorable to NIFA.

153. MSDIA therefore respectfully requests that the Tribunal issue a Partial Final Award as soon as reasonably possible, addressing jurisdiction and liability, and directing Ecuador to satisfy the $41.9 million August 2016 NCJ Judgment, but leaving all other issues of quantum to another phase of the arbitration.[185] MSDIA submits that it is appropriate for the Tribunal's Partial Final Award to address not only whether Ecuador has violated international law, but, if it finds that Ecuador has denied justice to MSDIA, also to direct Ecuador to remedy that violation (in part) by satisfying the judgment, thus bringing the *NIFA v. MSDIA* litigation to a close.

[185] The possibility of separate proceedings on quantum was raised previously during the pre-hearing conference and again during the oral hearing. *See* Day 4 Merits Hearing Full Transcript, at 186:13-187:1.

154. Following the Partial Final Award, the Tribunal can then establish further procedures for updating and establishing the quantum of MSDIA's other heads of claim. Deferring these issues to a later stage of the proceedings would ensure that the parties have sufficient time to submit and evaluate the relevant evidence without delaying the Tribunal's award on liability.

155. Moreover, if Ecuador were ordered to pay the NCJ's August 2016 NCJ Judgment and did so, the Tribunal and the parties would then know whether the court of first instance had allowed set off of the amounts previously paid by MSDIA and whether there are going to be enforcement proceedings against MSDIA's assets in Ecuador. Proceeding in this way would provide important information to guide the Tribunal's quantum award (*e.g.*, by establishing whether the $41.9 million August 2016 NCJ Judgment includes or is additional to the $7.7 million already paid to NIFA by MSDIA). It would also potentially avoid the need for evidence regarding the value of MSDIA's business in Ecuador as a going concern (which would not be necessary if the business is not destroyed because the August 2016 NCJ Judgment was paid in full).

VII. REQUEST FOR RELIEF

156. As set forth in MSDIA's prior submissions, and for the reasons outlined above, MSDIA respectfully requests that the Tribunal issue a Partial Final Award:

a. Declaring that the actions of the Ecuadorian courts in connection with the *NIFA v. MSDIA* litigation breached Ecuador's obligations under the U.S.-Ecuador BIT;

b. Directing Ecuador, at its election, to do one of the following, within 30 days from issuance of its Award:

i. To pay MSDIA the amount of the August 2016 NCJ Judgment in the *NIFA v. MSDIA* litigation, in the amount of $41,966,571.60;

or

ii. To pay the amount of the August 2016 NCJ Judgment in the *NIFA v. MSDIA* litigation directly to NIFA or into an escrow account to be paid to NIFA.

c. Directing Ecuador to ensure, by means of its own choosing, that no proceedings or actions directed towards the enforcement of any judgments in the *NIFA v. MSDIA* litigation occur, both within and outside of Ecuador, prior to Ecuador's fulfilment of its obligations under point (b) above.

157. MSDIA further requests that the Tribunal separately establish a procedure for determining the quantum of MSDIA's other heads of claim, and to issue a subsequent Final Award as follows:

a. Directing Ecuador to pay MSDIA the amounts MSDIA paid in satisfaction of the judgments in the *NIFA v. MSDIA* litigation in the amount of $7,723,471.81, insofar as those amounts were not fully compensated to MSDIA through payment of the amount in paragraph (b) above;

b. Directing Ecuador to pay any damages resulting from enforcement of the August 2016 NCJ Judgment against MSDIA, including the value of any assets paid, seized, forfeited, or otherwise foregone in connection with the enforcement of the NIFA judgment and any other damages to the Claimant's business both inside and outside of Ecuador, including lost profits;

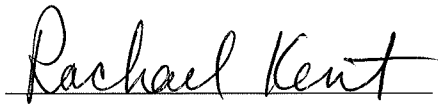
c. Directing Ecuador to pay MSDIA the amount it incurred in legal fees defending the *NIFA v. MSDIA* litigation, provisionally quantified at $6,895,988.66;

d. Directing Ecuador to pay pre-award and post-award interest on all sums due;

e. Awarding such additional and other relief as may be necessary and just, including without limitation, moral damages to compensate MSDIA for the non-pecuniary harm it has incurred as a result of Ecuador's breaches; and

f. Directing Ecuador to pay MSDIA's costs in the arbitration, including its share of the arbitration costs and its legal fees and costs.

Respectfully submitted,



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