IN THE MATTER OF AN AD HOC ARBITRATION

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

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

Claimant

versus

THE REPUBLIC OF ECUADOR

Respondent

CLAIMANT'S SUPPLEMENTAL REPLY MEMORIAL

16 January 2015

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I. INTRODUCTION

1. The Claimant, Merck Sharp & Dohme (I.A.) Corp. ("MSDIA"), submits this Supplemental Reply Memorial in accordance with the parties' agreement of 31 December 2014 and the Tribunal's letter of 5 January 2015. This Supplemental Reply Memorial addresses the decision of Ecuador's National Court of Justice ("NCJ") of 10 November 2014, which was issued subsequent to MSDIA's Reply Memorial dated 8 August 2014.

2. As discussed below, the November 2014 judgment of the NCJ does not remedy the damages incurred by MSDIA in connection with the prior denials of justice by the Ecuadorian courts, and MSDIA maintains the claims it has advanced in its Memorial and Reply Memorial in this arbitration.

3. Instead, as discussed below, the November 2014 NCJ judgment is yet another denial of justice, furthering the pattern of egregious mistreatment of MSDIA by the Ecuadorian courts, and it has imposed substantial additional harm to MSDIA. Specifically, the November 2014 NCJ judgment imposes liability on MSDIA, this time in the amount of $7.7 million, for the ***same*** allegations as to which MSDIA was already found liable ***and paid*** a $1.57 million judgment against it issued by the NCJ in September 2012. The November 2014 NCJ judgment, like the prior judgment it replaces, is based on a new theory of liability that was not relied on by the plaintiff in the underlying litigation and that is not even recognized in Ecuadorian law. The new judgment does not recognize any offset or credit for the prior, fully enforced, NCJ judgment.

4. Furthermore, the November 2014 NCJ judgment bases its calculation of damages on blatant errors, including conflating lost ***profits*** with lost ***sales*** (and ignoring the plaintiff's historically low profit margin on its sales) and including as "lost profits" revenues received by the plaintiff for sales it ***actually made***. These errors were brought to the attention of the NCJ, which had the opportunity and the legal authority to correct them. The NCJ refused to correct these undeniable mistakes, however. Without even trying to defend its decision or offer an explanation for these blatant errors, the NCJ elected to uphold the preordained result of its November 2014 judgment without any regard for the due process rights of MSDIA or the rule of law.

5. Like the already enforced 2012 $1.57 million NCJ judgment, this 2014 $7.7 million NCJ judgment on the same facts is final and immediately enforceable against MSDIA's assets under Ecuadorian law and procedure. Remand to Ecuador's lower courts for that purpose is imminent.

6. Yet, alarmingly, it is clear that this second final award may well not be the last. As it did in 2012 following the first NCJ judgment, on 9 January 2015 NIFA filed a Constitutional Court challenge to this second NCJ judgment in its favor. In the prior Constitutional Court challenge, Ecuador's courts permitted NIFA to enforce the $1.57 million award in the lower courts at the same time they allowed NIFA to successfully challenge that award in the Constitutional Court. Given Ecuador's courts' consistent history of indefensible and apparently improperly motivated rulings adverse to MSDIA, including specifically prior rulings by the Constitutional Court, there is a significant prospect that this second final judgment will be enforced, followed by another vacatur, followed by another remand to the NCJ, followed by another multiplicitous and yet higher judgment that denies justice to MSDIA. Indeed, there is no obvious stopping point for

this arbitrary spiral of injustice, particularly given the Ecuadorian judiciary's long and sorry track record in this case.

7. MSDIA is entitled to recover its damages in connection with the November 2014 judgment of the NCJ. MSDIA has included an amended request for relief in this Supplemental Reply Memorial, seeking those additional damages, as well as the prior unremedied damages set out in its prior submissions. MSDIA also seeks appropriate relief halting the ongoing cycle of denials of justice based on this small, now more-than-a-decade-old, business dispute.

8. This Supplemental Reply Memorial is accompanied by one supplemental expert report from Professor Francisco Correa, and one volume of fact exhibits and one volume of legal authorities.

II. SUPPLEMENTAL FACTUAL BACKGROUND

9. As MSDIA has set out in its prior submissions in this arbitration, MSDIA has been subjected to a denial of justice at every level of Ecuador's courts during more than ten years of litigation in the *NIFA v. MSDIA* case.

10. In the lower courts, MSDIA was subjected to proceedings marked by bias and repeated violations of MSDIA's procedural due process rights, resulting in manifestly irrational and corrupt judgments against MSDIA in the amount of $200 million and $150 million.[1] Those judgments were so manifestly unfair and irrational that no honest, competent court could have reached them.[2]

11. On appeal, a three-judge panel of the Civil Chamber of the NCJ, Ecuador's highest court, vacated the court of appeals damages award of $150 million, recognizing that the court of appeals' decision was manifestly irrational and legally unsupportable.[3] That first judgment of the NCJ was issued on 21 September 2012—less than two weeks after this Tribunal's hearing in The Hague on MSDIA's Request for Interim Measures.

12. MSDIA's Memorial and Reply Memorial explained that, although the NCJ decision reduced the amount of the judgment to $1.57 million, and therefore reduced the damages to be imposed upon MSDIA, it did not remedy the underlying denial of justice. Indeed, the NCJ decision was ***itself*** a denial of justice, imposing liability on MSDIA on the basis of an entirely different legal theory than that relied on by the lower courts and as to which MSDIA had not had notice or an opportunity to be heard.[4]

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[1] *See* MSDIA Memorial, at paras. 44-61, 118-126.

[2] Among other things, the court of appeals held MSDIA liable for an antitrust violation—despite the fact that Ecuador had no antitrust law (MSDIA Memorial, at paras. 42-43, 118), and despite the complete absence of factual support for such a finding (MSDIA Memorial, at paras. 124-125), and found that the Ecuadorian plaintiff, NIFA, had suffered lost profit damages of ***$150 million*** arising out of a failed ***$1.5 million*** real estate transaction (MSDIA Memorial, at para. 126). The trial court had likewise issued a judgment apparently based on antitrust principles against MSDIA for $200 million based on the same failed real estate transaction (MSDIA Memorial, at para. 56).

[3] *See* MSDIA Memorial, at paras. 142-144.

[4] *See* MSDIA Memorial, at paras. 146-152.

13. The September 2012 NCJ decision was final and enforceable as a matter of Ecuadorian law.[5] On 29 November 2012, MSDIA paid the $1.57 million judgment against it under compulsion by the Ecuadorian courts.[6]

14. At the same time the Ecuadorian plaintiff in the *NIFA v. MSDIA* case sought enforcement of the $1.57 million judgment against MSDIA, it also initiated a new action in Ecuador's Constitutional Court, seeking annulment of the NCJ's decision on the basis that the NCJ had violated NIFA's constitutional rights by reducing the damages award from $150 million to $1.57 million. On 12 March 2014, the Constitutional Court accepted NIFA's claims, vacating the September 2012 NCJ decision, reinstating the court of appeals' $150 million judgment against MSDIA, reviving the *NIFA v. MSDIA* litigation, and directing that the case be decided by a new panel of NCJ judges.[7] The Constitutional Court did not order the repayment to MSDIA of the $1.57 million that MSDIA had already paid in satisfaction of the now-annulled September 2012 NCJ judgment.

15. On 10 November 2014, pursuant to remand from the Constitutional Court, a second panel of NCJ judges issued a new decision, which vacated (for the second time) the court of appeals' $150 million judgment and again awarded damages in favor of NIFA, this time in the amount of $7,723,471.81.[8] The new panel of NCJ judges again rejected the court of appeals' reliance on antitrust law—the only legal basis advanced by NIFA in support of its claims[9]—conceding the obvious proposition that there was no antitrust law in effect in Ecuador at the time of the litigation.[10] The new NCJ panel further rejected unfair competition as a basis for liability, which the first NCJ panel had relied on, also conceding that the unfair competition law in place in Ecuador at the time did not reach the conduct alleged by NIFA.[11] The deficiencies of the prior rationales had been clearly set forth in MSDIA's submissions in this arbitration.

16. Despite rejecting both prior theories on which Ecuador's courts had previously predicated liability in this case, as discussed in Section III(A) below, the new November 2014 NCJ judgment nevertheless imposed liability on MSDIA on yet another entirely new legal basis, this time so-called "pre-contractual liability."[12] As with the first NCJ decision, which adopted a new legal theory (unfair competition) that had not been asserted by the plaintiff or briefed by the parties, the new NCJ November 2014 judgment also rests on a legal theory that was not relied on by the plaintiff and as to which MSDIA was not given proper notice and an opportunity to be heard. And as with the prior NCJ decision (and the decisions of the lower courts as well), the new NCJ judgment holds MSDIA liable on yet a third legal basis that does not exist in Ecuadorian law.

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[5] *See* MSDIA Memorial, at paras. 154-156.
[6] *See* MSDIA Memorial, at para. 156.
[7] As MSDIA explained in its Reply, the Constitutional Court's decision was manifestly irrational, and resulted, absurdly, in the revival of the $150 million court of appeals judgment. *See* MSDIA Reply, at paras. 475-493. Moreover, despite ordering the vacatur of the NCJ's September 2012 judgment, the Constitutional Court's decision did not order the return of the funds that MSDIA had paid to NIFA pursuant to the judgment. *See* MSDIA Reply, at para. 478.
[8] Exhibit C-293, NCJ Judgment, *NIFA v. MSDIA*, dated 10 November 2014, at p. 83.
[9] *See* MSDIA Memorial, at paras. 69-75; Witness Statement of Alejandro Ponce Martínez, at paras. 15-18.
[10] Exhibit C-293, NCJ Judgment, *NIFA v. MSDIA*, dated 10 November 2014, at p. 40.
[11] Exhibit C-293, NCJ Judgment, *NIFA v. MSDIA*, dated 10 November 2014, at p. 41.
[12] Exhibit C-293, NCJ Judgment, *NIFA v. MSDIA*, dated 10 November 2014, at pp. 76-82.

17. Moreover, as discussed in Section III(B) below, the NCJ's $7.7 million damages award is wholly irrational and expressly contrary to the evidence in the record. Among other things:

a. The NCJ purported to award NIFA $6.1 million in supposed "lost profits," but included in this amount $4.1 million in gross sales revenues from ***sales that NIFA actually made***, and thus obviously were not lost.

b. The NCJ awarded as "lost ***profits***" the entire amount of NIFA's alleged ***gross*** lost ***sales*** revenues ($4.1 million of which, as noted above, were ***not*** lost), without recognizing that gross sales revenues and profits are completely different, as costs must be deducted from gross revenues to yield profits, and without regard to NIFA's historically low profit margin on its sales.

c. Moreover, beyond these obvious and blatant errors, the NCJ awarded NIFA an ***additional*** $1.5 million in damages based on the price the parties agreed NIFA would pay MSDIA for the sale of MSDIA's factory. This portion of the award also makes no sense, because NIFA never paid a penny to MSDIA (or anyone else) for the plant. There is therefore no conceivable basis on which the purchase price for the plant – which was never paid by NIFA – could be said to constitute damages incurred by NIFA.

18. On 13 November 2014, MSDIA filed a petition with the NCJ requesting clarification of the judgment, and requesting the correction of the court's errors in calculating the damages award.[13] Among other things, MSDIA explained that the court's purported "lost profits" calculation included revenues from sales that NIFA had actually made and failed to distinguish between lost sales and lost profits. MSDIA further requested that the court clarify its reason for awarding NIFA the proposed sales price of the plant, in light of the uncontested fact that NIFA never paid that amount.[14]

19. On 10 December 2014, the NCJ rejected MSDIA's 13 November 2014 petition in full, declining to correct or even acknowledge the errors in its damages calculation or explain the basis for the damages award.[15]

20. Like the now-vacated September 2012 NCJ judgment, the November 2014 NCJ decision is a final, binding, and enforceable decision of Ecuador's highest court.[16] MSDIA therefore faces the imminent enforcement of a $7.7 million judgment against it in the same case and on the basis of the same allegations as to which it previously paid a $1.57 million judgment. The November 2014 NCJ judgment did not credit MSDIA for the amount it had already paid to the plaintiff or otherwise compensate MSDIA for its payment of the prior judgment.

21. But, alarmingly, as explained above, this second final judgment of the NCJ is not the end of the story. Despite having paid one judgment and facing imminent enforcement of a second,

[13] Exhibit C-294, MSDIA Petition to the NCJ, *NIFA v. MSDIA*, dated 13 November 2014.
[14] Exhibit C-294, MSDIA Petition to the NCJ, *NIFA v. MSDIA*, dated 13 November 2014.
[15] Exhibit C-295, NCJ Judgment, *NIFA v. MSDIA*, dated 10 December 2014.
[16] *See* MSDIA Memorial, at paras. 154-156; Second Expert Report of Dr. Jaime Ortega Trujillo, dated 3 August 2012, at paras. 8, 11.

larger judgment on the same facts, MSDIA now faces yet further, additional judgments of liability against it in the same case.

22. For the reasons set forth below and in MSDIA's prior submissions, MSDIA is entitled to an award from this Tribunal compensating it for all the damage it has suffered through the multiple denials of justice in the extended litigation in the *NIFA v. MSDIA* case. MSDIA also asks the Tribunal to issue such other and further relief as is appropriate and necessary to put an end to this otherwise apparently perpetual cycle of iterative denials of justice predicated on the same small business dispute.

III. THE NOVEMBER 2014 NCJ JUDGMENT DOES NOT REMEDY THE DENIAL OF JUSTICE RESULTING FROM THE PRIOR, $1.57 MILLION NCJ JUDGMENT

23. As set forth in MSDIA's Memorial and Reply Memorial, the September 2012 NCJ decision ordering MSDIA to pay NIFA $1.57 million in damages was final and enforceable as a matter of Ecuadorian law.[17] MSDIA was compelled by an Ecuadorian trial court to pay the judgment on 29 November 2012.[18]

24. When the Constitutional Court vacated the September 2012 NCJ judgment,[19] it did not order the return of the $1.57 million MSDIA had paid to NIFA or direct the NCJ to take into account the amount MSDIA had already paid in its subsequent decision.[20] Nor did it account for the many millions of dollars in legal fees expended by MSDIA over the course of more than a decade of defending itself against NIFA's frivolous claims at every level of the Ecuadorian courts.

25. Thus, not only did the Constitutional Court's decision not cure the denial of justice to MSDIA from the first NCJ decision or remedy the harm caused by that denial of justice, the ruling exposed MSDIA to further liability for the same alleged conduct as to which it had already been held liable and been compelled to pay damages.[21]

26. This is precisely what happened when a new panel of NCJ judges issued another final decision against MSDIA on 10 November 2014. As it had in the Constitutional Court, MSDIA informed the new panel of NCJ judges that it had already paid a final judgment of $1.57 million

[17] *See* MSDIA Memorial, at para. 154.
[18] *See* MSDIA Memorial, at para. 156.
[19] Exhibit C-285, Ruling of the Constitutional Court, dated 12 March 2014.
[20] The Constitutional Court was well aware that MSDIA had already paid the $1.57 million NCJ judgment to NIFA. In a submission to the Constitutional Court, MSDIA had explained that: "On November 28, 2012, the Second Civil Judge of Pichincha, in response to [NIFA's] petition … ordered MSD to pay within 24 hours the sum of one million, five hundred and seventy thousand U.S. dollars (US$1,570,000), or to remit assets in equal value. … Within the allotted time frame, … [MSDIA] deposited the amount ordered [by the NCJ] to be paid in damages. … This amount—that is, US$1,570,000—was turned over in its entirety and in full satisfaction of the order to Miguel García Costa, in his capacity as legal representative of [NIFA] on December 18, 2012." Exhibit R-117, MSDIA submission to the Constitutional Court dated 3 Apr. 2013, at paras. 5-6.
[21] MSDIA Reply, at paras. 492-493.

in the same case.[22] But like the Constitutional Court judges, the new panel of NCJ judges also did not restore to MSDIA the amount it had already paid or offset it against the amounts imposed as damages in their new judgment against MSDIA.[23]

27. Ecuador argues that the first NCJ judgment against MSDIA of $1.57 million has been "set aside" and therefore cannot amount to a denial of justice.[24] Ecuador argues that the effect of the Constitutional Court decision is to vacate the NCJ judgment, and "the procedural acts and all other rulings issued as a consequence thereof," so that not only the judgment itself but also the order enforcing the judgment are null and void and therefore cannot result in liability for Ecuador.[25] This argument ignores reality.

28. Regardless of the fact that it was subsequently annulled, the September 2012 NCJ judgment did exist in November 2012 when it was enforced, and it was the basis on which Ecuador's courts compelled MSDIA to pay $1.57 million. No Ecuadorian court has ordered that amount to be returned to MSDIA, including the Constitutional Court or the NCJ in its November 2014 judgment, and it remains un-remedied injury that resulted from a completed denial of justice. Ecuador has not erased the fact of the damage to MSDIA; it therefore cannot erase its legal liability merely by annulling the judgment and replacing it with another. Indeed, the NCJ's subsequent disavowal of the legal basis on which it imposed the harm, without remedying it in any way, only intensifies and provides new grounds for the denial of justice.

29. Ecuador argues that MSDIA cannot complain about the failure of Ecuador's courts to order the restitution of the $1.57 million in damages MSDIA paid pursuant to the September 2012 NCJ judgment, because MSDIA did not formally request the repayment of that amount in the proceedings before the Constitutional Court or in the NCJ on remand from the Constitutional Court.[26] Ecuador's argument ignores both the facts and Ecuadorian civil procedure.

30. First, as noted above, MSDIA made clear to both the Constitutional Court and the second panel of NCJ judges that it had paid the September 2012 NCJ judgment.[27] Had they possessed the power and inclination to account for the amounts paid by MSDIA in satisfaction of the first NCJ judgment, both courts were fully on notice that MSDIA had paid $1.57 million to NIFA.

31. Second, as MSDIA's expert in Constitutional law, Professor Rafael Oyarte, explained in his second expert report, the Constitutional Court did not have the legal authority to order restitution of the amounts paid by MSDIA in satisfaction of the NCJ's first final judgment.[28] Consistent with Professor Oyarte's conclusions, Ecuador's expert did not suggest that MSDIA could have sought repayment of the amounts it paid to NIFA from either the Constitutional Court or the NCJ (in remand proceedings). Rather, Ecuador's expert argues that in the event that the

[22] Exhibit C-292, MSDIA submission to the NCJ, *NIFA v. MSDIA*, dated 29 April 2014, at para. 11 ("despite its disagreement with the [NCJ's] decision, [MSDIA] complied with the [September 2012 NCJ] order ***and has paid this award***.").
[23] Exhibit C-293, NCJ Judgment, *NIFA v. MSDIA*, dated 10 November 2014, at pp. 79-83.
[24] *See* Ecuador letter to the Tribunal, dated 5 January 2015, at p. 3.
[25] *See* Ecuador letter to the Tribunal, dated 5 January 2015, at pp. 2-3.
[26] *See* Ecuador letter to the Tribunal dated 5 January 2015, at pp. 2-3.
[27] *See* Exhibit R-117, MSDIA submission to the Constitutional Court dated 3 Apr. 2013, at paras. 5-6; Exhibit C-292, MSDIA submission to the NCJ, *NIFA v. MSDIA*, dated 29 April 2014, at para. 11.
[28] Second Expert Report of Oyarte, at paras 18-21.

Constitutional Court did not order the repayment of those damages (as it did not) the only means available to MSDIA to seek restitution is the initiation of a separate civil action in Ecuadorian court against NIFA on a theory of "payment without cause."[29]

32. As set out in MSDIA's prior submissions, MSDIA is not required to start new civil proceedings against the Ecuadorian plaintiff in order to exhaust its remedies before pursuing international law claims for denial of justice. Particularly given the utter failure of Ecuador's courts to render justice to MSDIA at any time and at any level in this litigation, recourse to this collateral route suggested by Ecuador would represent simply another waste of time and resources and afford new opportunities for denials of justice.

33. Third, the second NCJ panel could not have considered MSDIA's prior $1.57 million payment to NIFA pursuant to the first NCJ decision because, as both Ecuador and its constitutional law expert have explained, the effect of the Constitutional Court's decision under Ecuadorian law was to render the NCJ decision null, as if it never happened.[30] As Ecuador's expert explained, the NCJ was required to restart the process at the point in time where the parties had filed their cassation petitions (but before the first NCJ judgment had occurred).[31] The NCJ was then required to decide whether to annul the court of appeals judgment based solely on the grounds set forth in the Cassation law as articulated by the parties in their cassation petitions.[32] It therefore could not have considered MSDIA's payment of the $1.57 million awarded by the prior, now-annulled NCJ decision. Again, Ecuador's own constitutional law expert does not suggest otherwise.[33]

34. In short, the November 2014 NCJ judgment does not remedy the damages incurred by MSDIA in connection with the prior denials of justice by the Ecuadorian courts. MSDIA therefore maintains the claims set forth in its Memorial and Reply Memorial.

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[29] Expert Report of Guerrero del Pozo, at para. 43. As Professor Oyarte explains, however, a separate civil action against NIFA, in which MSDIA could theoretically have sought repayment of the $1.57 million judgment under a payment without cause, or unjust enrichment theory, would have been subject to NIFA's legal defenses and its outcome thus would have been uncertain and would have taken years to resolve. Second Expert Report of Oyarte, at para. 23. As Professor Paulsson explains, any such proceeding would be ineffective because "Ecuador does not adequately remedy its denial of justice by starting MSDIA on a chase after NIFA for a portion of the damages wrought." Second Expert Report of Paulsson, at paras. 16-17.

[30] Ecuador letter to the Tribunal dated 5 January 2015, at p. 2; Expert report of Guerrero del Pozo, at para 37.

[31] Expert report of Guerrero del Pozo, at para 37 ("the Constitutional Court must declare the nullity from the time that violation of constitutional right occurred and remand the process to the competent jurisdictional body to again substantiate the case and issue a new decision); Second expert report of Oyarte, at para. 15.

[32] Expert report of Paez, at paras. 12-14. These grounds relate to whether the Court of Appeals decision misapplied substantive or procedural law and met other legal requirements. *Id*.

[33] Expert report of Guerrero del Pozo, at para 43. Ecuador has further argued that MSDIA should have requested in its post-judgment petition for clarification that the NCJ "clarify" its judgment to account for the $1.57 million MSDIA had already paid. *See* Ecuador letter to the Tribunal dated 5 January 2015, at p 2. But for the same reason, that the NCJ could not legally take account of the since-nullified decision, there was no basis by which MSDIA could urge the NCJ to account for the payment after its judgment had issued. In any event, even if Ecuador's courts offset the $1.57 million from the new $7.7 million award, that would not make MSDIA whole because as MSDIA explained in its past submission, MSDIA would still be entitled to the legal fees in connection with the ongoing defense of an objectively frivolous lawsuit.

IV. THE NEW NOVEMBER 2014 NCJ DECISION IS A FURTHER DENIAL OF JUSTICE BY THE ECUADORIAN COURTS

35. The November 2014 NCJ decision is yet another denial of justice to MSDIA. It imposes liability on MSDIA, for the same allegations as to which MSDIA was already found liable and paid a $1.57 million judgment against it. Like the prior NCJ judgment, it is based on a new theory of liability that was not relied on by the plaintiff in the underlying litigation. Like each of the two theories under which MSDIA had been previously held liable, this new theory—so-called pre-contractual liability—is not recognized in Ecuadorian law.

36. Moreover, the NCJ's decision to award NIFA $7.7 million in damages is based on blatant errors and is contrary to the evidentiary record. First, it purports to award NIFA "lost profits" damages despite the fact that in countries that recognize pre-contractual liability, lost profits are not cognizable under that theory. Second, even if lost profits were an appropriate measure of damages, the NCJ's purported calculation of lost profits included $4.1 million in revenues received by the plaintiff for sales it ***actually made***, and awarded gross revenues while claiming to award ***lost profits***. Third, the NCJ awarded an additional $1.5 million in damages based on the price the parties agreed NIFA would pay MSDIA for the sale of MSDIA's factory, despite the uncontested fact that NIFA never paid anything for the plant and thus never suffered any conceivable injury based on the agreed sale price. Finally, even the $50,000 in "consequential damages" awarded by the NCJ were not substantiated with any evidence in the record.

37. MSDIA brought these errors to the attention of the NCJ in a post-judgment motion. Without even trying to defend its decision, however, the NCJ refused to acknowledge or correct these obvious errors.

A. The November 2014 NCJ Decision Imposes Liability on MSDIA on the Basis of a Legal Theory as to which MSDIA Lacked Proper Notice

38. As discussed in MSDIA's Memorial and Reply Memorial, due process requires that a litigant be given notice and an opportunity to be heard with respect to every potential basis for a national court's decision.[34]

39. MSDIA was denied this fundamental due process right by the NCJ's decision of 21 September 2012, which held that MSDIA was liable to NIFA under a theory of unfair competition.[35] As set out in MSDIA's Memorial and Reply Memorial, NIFA had never argued or relied on unfair competition as the basis for its claims, and MSDIA lacked notice and an opportunity to be heard with respect to that legal ground.

40. In its new November 2014 judgment, the NCJ abandoned its prior reliance on unfair competition and instead imposed liability on MSDIA on a different legal theory: pre-contractual liability. Notably, this is the third different legal theory invoked by the Ecuadorian courts as the basis for imposing a judgment against MSDIA.

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[34] MSDIA Reply, at paras. 322-325; MSDIA Memorial, at p. 88, heading (a). *See also id*. at paras. 295-309. *See also* Exhibit CLM-173, D.P. O'Connell, INTERNATIONAL LAW (1965), at 1027 (explaining that a foreign defendant is entitled to be "***fully informed***" of the claims brought against it) (emphasis added).

[35] MSDIA Reply, at paras. 322-389; MSDIA Memorial, at paras. 291-374.

41. Just as the NCJ's reliance on unfair competition denied justice to MSDIA, so too the NCJ's reliance on pre-contractual liability is a denial of MSDIA's fundamental due process right to notice and an opportunity to be heard. First, NIFA never relied on pre-contractual liability as the basis for its claim and did not invoke the statutes that the NCJ relied on as the basis for its judgment. Second, MSDIA could not have anticipated that it could be held liable under the statutes relied on by the NCJ, because those statutes manifestly cannot form the basis of a claim for pre-contractual liability; in fact, pre-contractual liability has never been a recognized basis for liability in Ecuador. Finally, because neither party requested the NCJ to rule on the merits of a claim for pre-contractual liability, the NCJ was procedurally barred from doing so, and MSDIA therefore had no notice that it could be held liable on that basis.

1. NIFA Did Not Rely on Pre-Contractual Liability as the Basis of its Claim and Did Not Invoke the Statutory Provisions Relied on by the NCJ

42. As discussed in MSDIA's prior submissions, the ***only*** claim that NIFA advanced and relied on in the *NIFA v MSDIA* litigation was that MSDIA had committed an antitrust violation.[36] NIFA stated on multiple occasions that "[s]ince its very beginning, it was a claim for ***acts contrary to competition***."[37] NIFA insisted that its claim was grounded only in antitrust law, and it never asserted or relied on any other legal theory, including either of the entirely different legal theories of unfair competition or pre-contractual liability.[38]

43. Given that NIFA never asserted pre-contractual liability as a potential basis for its claim, MSDIA was not on notice that it could be found liable on that ground.

44. Moreover, NIFA never invoked the statutory provisions under which the NCJ held MSDIA liable. The NCJ held that articles 721 and 1562 of the Civil Code create an obligation to act in good faith during contract negotiations, and that MSDIA incurred pre-contractual tort liability by violating this obligation.[39]

45. In the more than 11 years of proceedings in the *NIFA v. MSDIA* litigation, however, NIFA never once cited either Article 721 or 1562. MSDIA therefore was not on notice that it could potentially be held liable under either provision. As a consequence, MSDIA was deprived of an opportunity to be heard on the question of whether those statutes actually create a basis for imposing pre-contractual liability and whether MSDIA's conduct violated any obligations

[36] MSDIA Reply, at para. 317.
[37] 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 of 20 April 2007, *NIFA v. MSDIA*, Trial Court, at Numeral V; Exhibit C-157, NIFA's Brief of 9 October 2008, Court of Appeals, at p. 2; Exhibit C-164, NIFA's Brief of 23 January 2009, *NIFA v. MSDIA*, Court of Appeals, at p. 2; Exhibit C-238, NIFA's Brief of 18 October 2006, *NIFA v. MSDIA*, Trial Court, at Numeral VIII.
[38] Witness Statement of Alejandro Ponce Martínez, dated 2 October 2013, at paras. 15-19 (explaining NIFA's insistence that it was alleging a claim solely based on antitrust violations).
[39] Exhibit C-293, NCJ Judgment, *NIFA v. MSDIA*, dated 10 November 2014, at p. 75 ("During their entire course, the negotiations had an appearance of unreal progress, which was fostered by the defendant. Of course, that behavior is punishable *under the broad scope of torts* (article 2214 Civil Code), which is fully defined in our civil laws, ***because it violates the obligation to conduct oneself in good faith (articles 721 and 1562 Civil Code)***.") (emphasis added).

created by those statutes. The NCJ's imposition of liability on a legal ground that was not invoked by the plaintiff and as to which MSDIA was not given an opportunity to be heard is a denial of justice.

2. Ecuadorian Law Does Not Recognize the Doctrine of Pre-contractual Liability

46. In addition, MSDIA could not have been on notice that a judgment could be entered against it on the basis of pre-contractual liability because pre-contractual liability is not recognized under Ecuadorian law.

47. 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 here.[40]

48. Not surprisingly, the NCJ was unable to point to a ***single prior decision*** from the Ecuadorian courts ***or a single*** commentary on Ecuadorian law recognizing pre-contractual liability.[41]

49. In its justification for imposing pre-contractual liability, the NCJ cited two statutory provisions that NIFA had never invoked or even cited: Articles 1562 and 721 of the Civil Code. Neither provides a basis for pre-contractual liability, or any other type of liability that could apply here.

50. Article 1562 states:

> "Contracts ***must be executed in good faith***, and, therefore, their obligation is not only to what is expressed in them but also to everything that emanates precisely from the nature of the obligation, or that, by law or custom, corresponds to it."[42]

51. Ecuador has submitted and relied on expert evidence in this arbitration that acknowledges that this provision has nothing to do with pre-contractual liability. Indeed, as Ecuador's own expert, Mr. Parraguez, stated, Article 1562 "refers to good faith ***only in the context of the execution*** of the contract," and "***omi[ts]…reference to the stage prior to the execution*** of such contract."[43] MSDIA could not be held liable in connection with the performance or "***execution***" of any contract with NIFA, because it is undisputed that the parties ***never entered into any contract*** for the sale of MSDIA's plant.

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[40] Expert Report of Correa, at para. 6.
[41] Second Expert Report of Correa, at para. 8.
[42] Exhibit CLM-395, Ecuador Civil Code (2005), excerpt.
[43] Expert Report of Parraguez, at para. 31. *See also* Second Expert Report of Correa, at para. 6. Dr. Parraguez argues that pre-contractual liability is possible under Ecuadorian law, but he cites an entirely different statutory provision, arguing that pre-contractual liability can be "***inferred***" from Article 144 of the Commercial Code. Expert Report of Parraguez, at p.12 (Conclusions). As set out in MSDIA's Reply Memorial, NIFA did not invoke Article 144 in the underlying litigation, and Article 144 does not apply to the *NIFA v. MSDIA* dispute because it only applies to contracts for the sale of commercial goods. Expert Report of Correa, at para. 9; MSDIA Reply, at para. 379.

52. Nor does Article 721 provide a basis for pre-contractual liability. As Professor Correa explains in his supplemental expert report, Article 721 establishes the legal consequence of a transferee's subjective belief that it is obtaining good title in a property transaction.[44] Specifically, Article 721 states:

> "***Good faith is an awareness of having acquired ownership*** over the thing through legitimate means, without fraud or any other defect.
>
> Thus, ***in property title transfers***, good faith implies a belief that the thing was received from someone who had ***sufficient authority to transfer*** it and that the act or contract was entered into without fraud or any other defect.
>
> A justified mistake of fact does not preclude the existence of good faith.
>
> However, a mistake of law results in an irrefutable presumption of bad faith."[45]

53. As with Article 1562, the text of Article 721 contains no reference—explicit or implicit—to a seller's liability for conduct in the negotiation of an unconsummated contract.[46] Because no contract ever was formed, Article 721 is not applicable to the contractual negotiations between MSDIA and NIFA, and MSDIA could not have known that it could be held liable to NIFA under that provision.

54. If NIFA had asserted a claim for pre-contractual liability or had invoked Articles 1562 and 721 of the Civil Code in the underlying *NIFA v. MSDIA* litigation, MSDIA would have been able to establish that Ecuadorian law does not recognize the doctrine of pre-contractual liability and that neither statute creates any obligations with respect to the negotiation of real estate contracts. Because MSDIA was provided with no such notice, however, it had no opportunity to be heard with respect to its defenses against the imposition of liability on that basis.

3. The "Dispositive Principle" of Ecuadorian Law Precluded the NCJ from Issuing a Decision on the basis of Pre-Contractual Liability

55. MSDIA's expert on Ecuador's Cassation Law, Dr. Páez Fuentes, explained in his expert report that Ecuador's Cassation Law and the "dispositive principle" limit the jurisdiction of the NCJ to ruling on causes of action established by Article 3 of the Cassation Law and the errors alleged by the parties in their respective Cassation Petitions.[47] As the Supreme Court of Justice (now the NCJ) has stated, "by virtue of the dispositive principle, [the court of cassation] cannot rule on any other matter than the one stated in the petition that has been filed, nor can it grant any

[44] Second Expert Report of Correa, at para. 7.
[45] Exhibit CLM-433, Ecuador Civil Code (2005), Article 721.
[46] Second Expert Report of Correa, at para. 7.
[47] Expert Report of Paez, at paras. 18, 22.

remedy in excess of that requested in the same."[48] In other words, the NCJ's jurisdiction is limited to addressing the specific grounds for cassation put to it by the parties.

56. In this case, neither MSDIA nor NIFA requested in their cassation petitions that the NCJ rule on a claim for pre-contractual liability. NIFA's petition was consistent with its position that MSDIA had committed an antitrust violation and did not refer to pre-contractual liability, or to any obligation purportedly created by Articles 1562 and 721 of the Civil Code. MSDIA's petition also focused on NIFA's alleged antitrust claim. MSDIA's petition mentioned pre-contractual liability only in passing, noting that the court-appointed expert on damages, Dr. Ignacio De Leon, had found that there was no basis for the imposition of damages either on the basis of antitrust law or on the basis of pre-contractual liability, if such doctrine had been available in Ecuador.[49]

57. Because neither party requested the NCJ to rule on a claim for pre-contractual liability, the NCJ did not have jurisdiction to do so. MSDIA therefore had no notice that the NCJ could do so, and consequently, no notice or opportunity to be heard with respect to that legal ground.

* * * * *

58. In sum, like the September 2012 NCJ judgment before it, the November 2014 NCJ judgment denied justice to MSDIA by imposing liability on a ground that was not relied on by the plaintiff and as to which MSDIA lacked proper notice and an opportunity to be heard.

B. The NCJ's Award of Damages Is Manifestly Irrational in Many Ways and Could Not Have Issued from Any Honest, Competent Court

59. The NCJ's November 2014 judgment denied justice to MSDIA for an additional, independent reason. The NCJ's award of damages to NIFA in the amount of $7,723,471.81 is so irrational and so expressly contrary to the evidence in the record that it could not have emanated from any honest, competent court.

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[48] Exhibit CLM-197, Supreme Court of Justice, First civil and Commercial Division, July 26, 1996, Gerente de la Cooperativa de Educadores de El Oro v. Rebeca Minuche, Official Register No. 31 of September 23, 1996, p. 10-11 ("[the court of cassation] is limited EXCLUSIVELY to examining the charges made against the challenged ruling, and, should it find them to be valid, vacate said decision, ***without being authorized to do any more than what was requested at the time the petition was filed***" (emphasis added)).

[49] Exhibit C-198, MSDIA's Cassation Petition, dated 13 October 2011, *NIFA v. MSDIA*, at para. 119. In response to NIFA's request that Dr. De Leon assess the damages that it had suffered, he addressed the question broadly, examining whether MSDIA caused damages to NIFA under either a theory of antitrust liability or based on pre-contractual liability. Exhibit C-24, Report of Ignacio De León, *NIFA v. MSDIA*, Court of Appeals, dated 12 February 2010, at p. 98. In response to a request for clarification by MSDIA, Dr. De Leon acknowledged that there was no doctrine of pre-contractual liability in Ecuador. *See* C-284, Supplemental Report of Ignacio de Leon, dated 20 July 2010, *NIFA v. MSDIA*, at pp. 19-20.

In its cassation petition, MSDIA argued that the court of appeals erroneously failed to take into account Dr. De Leon's conclusion that NIFA had failed to establish any basis for damages. Exhibit C-198, MSDIA's Cassation Petition, *NIFA v. MSDIA*, Court of Appeal, dated 13 October 2011, at paras. 119-120. In that context, MSDIA reproduced a long block quote from Dr. De Leon's report, which, among several other damages issues, discussed damages based on pre-contractual liability. *Id*. For the avoidance of doubt, MSDIA also made clear, in a supplemental submission to the NCJ after the case was returned there from the Constitutional Court, that "[i]n Ecuador, the Law does not recognize pre-contractual liability." Exhibit C-292, MSDIA submission to the NCJ, *NIFA v. MSDIA*, dated 29 April 2014, at para. 50.

60. The NCJ's award of damages includes three subparts:

a. "Lost profits" for sales NIFA purportedly would have made in 2003 if it had purchased MSDIA's plant, in the amount of $6,173,471.81;[50]

b. The purchase price agreed by NIFA and MSDIA for MSDIA's plant, in the amount of $1,500,000;[51] and

c. "Consequential damages" of $50,000, consisting of the costs supposedly incurred by NIFA during the negotiation for MSDIA's plant.[52]

61. As discussed below, the NCJ's damages award is so manifestly irrational that it is evidence that the NCJ was guided neither by legal principles nor evidence. The only possible explanation is that the NCJ's award, like the absurd lower court judgments awarding NIFA damages of $200 million and $150 million, is a transparent effort to justify a preordained result, likely for entirely improper reasons, without regard to the facts or law.

1. <u>In Jurisdictions that Recognize a Doctrine of Pre-Contractual Liability (Unlike Ecuador), Lost Profits Are Not Recoverable as a Consequence of Pre-contractual Liability</u>

62. As explained in Part III(A) above, there is no basis for pre-contractual liability in Ecuadorian law. But even in countries where pre-contractual liability is recognized as a basis for liability, it is well established that a party cannot recover "lost profits" it would have earned from the contemplated transaction as damages for the other party's fault in pre-contractual negotiations. Rather, the damages recoverable under the doctrine of pre-contractual liability are generally limited to out-of-pocket costs and expenses incurred during a negotiation.

63. The NCJ completely disregarded this settled principle in awarding purported "lost profits" as a result of NIFA's failure to acquire MSDIA's manufacturing plant. The authorities relied on by the NCJ, however, recognize this limitation on the damages recoverable under a pre-contractual liability theory. For example, the commentator Jorge Oviedo Alban, to whom the NCJ cites repeatedly,[53] explains:

> "Generally it is affirmed that the damages available in the pre-contractual phase compensate negative interest, rather than positive interest, which is recognized in the failure to perform contracts…. The protected interest … is not the benefit that the contract would have provided the claimant had it been executed …, but rather the

[50] Exhibit C-293, NCJ Judgment, *NIFA v. MSDIA*, dated 10 November 2014, at p. 81-83.
[51] Exhibit C-293, NCJ Judgment, *NIFA v. MSDIA*, dated 10 November 2014, at p. 83-84.
[52] Exhibit C-293, NCJ Judgment, *NIFA v. MSDIA*, dated 10 November 2014, at p. 80-81.
[53] *See, e.g.*, Exhibit C-293, NCJ Judgment, *NIFA v. MSDIA*, dated 10 November 2014, at pp. 42, 43, 47, 48 (citing approvingly to Oviedo).

damages resulting from the bad act, such as the costs of negotiation and those that derive from the trust created in the counterparty and violated in bad faith by the defendant."[54]

64. The court-appointed expert on damages in the court of appeals proceedings in the *NIFA v. MSDIA* litigation, Dr. Ignacio De Leon, similarly confirmed that "lost profits" are not recoverable under a pre-contractual liability theory. Before he ultimately concluded that pre-contractual liability was not available in Ecuador,[55] Dr. De Leon considered a number of potential alternative grounds for damages and explained that "pre-contractual liability does not involve the recovery of all the contractual damages suffered by the other party, but rather only those included in the so-called 'negative interest'–id quod interest contractum initium non fuisse. …"[56]

65. In this arbitration, the principal commentary cited by Ecuador's own expert on pre-contractual liability, Dr. Parraguez, also confirms this limitation on recoverable damages. The commentary on which Dr. Parraguez relies explains that "on its own, withdrawing from negotiations, justified or not, cannot prejudice the other party (even if it prevents it from obtaining a benefit that the contract would have provided. ***Because [not] obtaining that benefit is not a harm that is relevant in this context***)."[57]

66. Thus, even if pre-contractual liability were recognized as a basis of liability in Ecuador – which it was not – and even if MSDIA's conduct gave rise to such liability – which it did not – the only part of the damages awarded by the NCJ that would arguably be recoverable under that theory is the $50,000 in costs supposedly incurred by NIFA during the negotiation for MSDIA's plant.[58] The NCJ has provided no justification for awarding NIFA an additional $7,673,471.81 in

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[54] Exhibit CLM-435, Jorge Oviedo Albán, LA FORMACIÓN DEL CONTRATO: TRATOS PRELIMINARES, OFERTA, ACEPTACIÓN (2008), p. 31. Similarly, Jorge Mosset Iturrapse, another authority on whom the NCJ relied, has explained

> "It is seen as 'the normal and foreseeable consequence' only the reparation of 'negative interest' in the realm of assets; this 'negative interest' or of trust covers everything the creditor would have had – as part of his assets – if he had not confided in the preliminary negotiations, later frustrated; this negative interest is usually though equivalent to 'damnum emergens,' a reduction in assets; the reason seems evident, at least as a rule: there not existing a deal validly perfected, there cannot be a 'breach' which frustrates the expectation of profit, the positive interest or performance interest."

Exhibit CLM-434, Jorge Mosset Iturrapse, RESPONSABILIDAD PRECONTRACTUAL (2006), p. 293.

[55] *See* C-284, Supplemental Report of Ignacio De Leon, dated 20 July 2010, NIFA v. MSDIA, at p. 19 ("MSD requests an additional clarification on whether there is in Ecuador an explicit and concrete norm that establishes liability derived from culpa in contrahendo in the phase prior to the formalization of a contract, as does exist in other legal systems indicated in the expert report. The response is no.").

[56] Exhibit C-24, Report of Ignacio De León, *NIFA v. MSDIA*, Court of Appeals, dated 12 February 2010, at p. 49 (internal citations and quotations omitted). Dr. De Leon concluded that NIFA had failed to establish that it had suffered any damages under any theory of liability because it had not demonstrated sufficient evidence of lost profits or that it forwent opportunities to contract with others, and that it had failed to substantiate any costs incurred during the negotiation. *Id.* As Dr. De Leon also acknowledged, and as MSDIA has explained in its prior submissions, there was overwhelming and uncontroverted evidence in the record that NIFA had available to it numerous alternatives by which it could have expanded its production capacity, both during and after its negotiations with MSDIA. MSDIA Memorial, at paras. 78, 99-101; MSDIA Reply, at para. 558.

[57] Expert Report of Correa, at para. 28 (quoting CLM-289, Manuel Albaladejo, CIVIL LAW II: LAW OF OBLIGATIONS (*DERECHO CIVIL II, DERECHO DE OBLIGACIONES*), Edisofer SL, 13th Ed. Madrid, 2008, p. 378).

[58] As explained in Part III.B.5 below, however, NIFA never offered any evidence to substantiate even those costs.

damages that its own legal authorities regard as unavailable in a judgment based on pre-contractual liability.

2. The NCJ Included as Purported "Lost Profits" Sales that NIFA Actually Made and For Which It Actually Received Revenues

67. Even if "lost profits" were recoverable under the doctrine of pre-contractual liability, the NCJ's purported calculation of "lost profits" is manifestly irrational and contrary to the record evidence.

68. The NCJ awarded NIFA $6,173,471.81 in "lost profits," relying on figures taken from the expert report of Mr. Cristian Cabrera. As set forth in MSDIA's prior submissions, Mr. Cabrera's report contained a variety of blatant conceptual, legal and factual errors,[59] and the Ecuadorian government subsequently determined that Mr. Cabrera lacked the basic credentials to serve as an expert in damages and never should have been accredited as such.[60] In both the September 2012 judgment, and in the November 2014 judgment, the NCJ acknowledged the absurdity of Mr. Cabrera's report.[61] In the November 2014 judgment, the NCJ expressly characterized Mr. Cabrera's damages calculation as "irrational and illogical."[62] The circumstances of his appointment, like his performance, strongly suggest that he had improper motivations for reaching his conclusions.[63]

69. Nevertheless, the NCJ adopted figures from Mr. Cabrera's report as the basis for its award of lost profits damages to NIFA.[64] Specifically, the NCJ awarded NIFA $4,133,833.24 in connection with what Mr. Cabrera concluded were lost sales of NIFA's existing products in 2003, and $2,039,638.57 for lost sales of new products that NIFA purportedly could have introduced in 2003.

70. The factual record before the NCJ established that the $4,133,833.24 that the NCJ awarded to NIFA as lost profits for sales of existing products NIFA supposedly was unable to make in 2003 in fact is the amount of gross revenues NIFA actually realized from sales of its existing products in 2003. The revenue that NIFA received in 2003 is not ***"lost"*** profits, because those revenues (even if they were profits) were realized, not lost.

71. Mr. Cabrera found this number – $4,133,833.24 – in a spreadsheet that was submitted as evidence by NIFA in June 2009, during the court of appeals proceedings. The spreadsheet was

[59] *See* MSDIA Memorial, at paras. 106-110.
[60] *See* MSDIA Memorial, at paras. 111-117.
[61] Exhibit C-203, NCJ Judgment, *NIFA v. MSDIA*, dated 21 September 2012, at Section 16.2. In the November 2014 judgment, the second panel of NCJ judges rejected the court of appeals' damages award out of hand without discussion.
[62] Exhibit C-293, NCJ Judgment, *NIFA v. MSDIA*, dated 10 November 2014, at p. 80.
[63] *See* MSDIA Memorial, at paras. 111-113.
[64] Exhibit C-293, NCJ Judgment, *NIFA v. MSDIA*, dated 10 November 2014, at pp. 80-81.

prepared by the market research and data company, IMS Ecuador, at NIFA's request.[65] The spreadsheet reported NIFA's actual sales for the years 2003 to 2008 for the products that NIFA was actually selling in those years.[66] In the explanation of the methodology presented along with the report, IMS stated that these actual sales figures had been presented to IMS by NIFA.[67] The spreadsheet reported that NIFA's actual sales in 2003 were $4,133,833.24.[68] (The spreadsheet also reported that if NIFA had begun selling new products for each and every product registration in held in 2003, it could have achieved additional sales of new products in the amount of $2,039,638.57.[69])

72. The NCJ's inclusion of the gross revenues NIFA earned from its ***actual*** sales in 2003 in its calculation of NIFA's purported lost profits was not an innocent mistake. MSDIA had specifically and expressly alerted the NCJ to the fact that the figures in the IMS spreadsheet represented NIFA's actual sales in 2003 and were not a projection of NIFA's lost sales.

73. In his report to the court of appeals, Mr. Cabrera had wrongly identified NIFA's actual sales as lost sales attributable to NIFA's failure to acquire MSDIA's manufacturing facility.[70] MSDIA immediately identified the error in a submission to the court of appeals, explaining that Mr. Cabrera had included in his calculation of purported lost sales amounts that the IMS spreadsheet had identified as ***actual*** sales. MSDIA made clear that:

> "when calculating the projection of lost sales that [Mr. Cabrera] claims to exist, he deems that part of the losses would be the amounts that NIFA actually received from sales between [2003] and 2008, according to the information provided to [IMS] by NIFA. It is evident and clear that the losses cannot include the amount from sales that NIFA

[65] This purported "IMS report" consisted of a Microsoft Excel file containing various tables, and a second Excel file, which included a short explanation of the report's methodology. Exhibit C-289, NIFA IMS Report; Exhibit C-290, NIFA IMS Report Methodology. NIFA submitted both of those files electronically on CD in June 2009, along with a one-page cover letter signed by an official at IMS Ecuador. Exhibit C-291, NIFA IMS Report Cover Letter from Ivan Ponce, IMS-Ecuador.

[66] Exhibit C-290, NIFA IMS Report Methodology. IMS used the reported actual sales from 2003-2008 as the basis for projecting NIFA's sales into the future. Like the Cabrera report, the NIFA IMS report was fundamentally flawed in a number of important respects. MSDIA's various objections to it are described in detail in earlier submissions, and will not be repeated here. *See* MSDIA Memorial, at paras. 81-83.

[67] Exhibit C-290, NIFA IMS Report Methodology; *see also* Exhibit C-291, NIFA IMS Report Cover Letter from Ivan Ponce, IMS-Ecuador.

[68] Exhibit C-290, NIFA IMS Report Methodology; Exhibit C-289, NIFA IMS Report at Table 1. Specifically, the NIFA IMS report identifies the $4,133,833.24 figure as the "2003 sales" figure in a table titled "***Current NIFA Products***" in the report's table of contents. Exhibit C-289, NIFA IMS Report at Table of Contents; Exhibit C-289, NIFA IMS Report at Table 1. The heading of the table itself is "Sales and Projections."[68] Exhibit C-289, NIFA IMS Report at Table 1. Critically, the report ***does not even purport to calculate "lost sales"*** for those ***"current NIFA products."***

[69] *See* Exhibit C-289, NIFA IMS Report at Table 5; *see also* Exhibit C-182, NIFA's First Petition of 5 June 2009, *NIFA v. MSDIA*, Court of Appeals, at pp. 3-4 (describing the report's findings as a calculating of "lost sales during the 2003 – 2008 period due to a lack of an adequate industrial plant, ***taking into account the products that have not been sold***") (emphasis added). Notably, the IMS report did not conclude that NIFA could have produced these new products ***if it had acquired MSDIA's plant in 2003***—indeed, the IMS report does not mention MSDIA's plant, much less purport to evaluate its production capacity.

[70] Exhibit C-42, Report of Cristian Agusto Cabrera Fonseca, submitted to Court of Appeals, *NIFA v. MSDIA*, dated 21 June 2011, at p. 17.

> received. However, to the expert, such amounts constitute lost sales. An income received is never – under any circumstances – a loss or damage."[71]

74. The court of appeals disregarded MSDIA's objection, citing approvingly to Mr. Cabrera's report in awarding NIFA $150 million in damages.[72]

75. Because the court of appeals had expressly relied on Mr. Cabrera's report, MSDIA also pointed out to the NCJ Mr. Cabrera's error in treating actual sales as lost sales. In its Cassation Petition, MSDIA explained that Mr. Cabrera's "arbitrariness went as far as to consider as part of lost profit the amount of sales earned by NIFA from 2003 to 2008."[73]

76. After the first NCJ decision was vacated and the case was returned from the Constitutional Court to a new NCJ panel, although both of its prior explanations were already in the record, MSDIA yet again specifically and expressly alerted the second panel of NCJ judges to Mr. Cabrera's error, explaining again that:

> "in an absurd manner, Cabrera included in his calculation of damages the amount received by NIFA for its sales from 2003 to 2008, which is completely illogical because, if NIFA actually received those amounts, they could not be included in the calculation of the alleged damages caused by MSD."[74]

77. In the face of these repeated observations by MSDIA, ***NIFA never disputed that the $4,133,833.24 figure reported in the IMS spreadsheet (and in Mr. Cabrera's report) represented its actual sales in 2003.***

78. Nevertheless, in its new decision, the NCJ adopted Mr. Cabrera's figures, finding that NIFA had lost sales of $4,133,833.24 in 2003, when these in fact were NIFA's ***actual*** sales in that year.[75] No honest and competent court could have calculated "lost profits" on the basis of sales revenues that were actually received for actual sales in that year, particularly when that distinction was expressly brought to its attention and when it was specifically pointed to the relevant evidence in the record, and when the plaintiff never disputed the obvious proposition. The inescapable conclusion is that the NCJ was unconcerned with calculating any real measure of damages to NIFA, but rather was simply seeking to justify a predetermined outcome.

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[71] Exhibit C-267, MSDIA Brief submitted to Court of Appeals, *NIFA v. MSDIA*, 15 July 2011, at pp. 9-10. Notably, even Mr. Cabrera did not treat either figure as representing lost profits, as opposed to lost sales. Exhibit C-42, Report of Cristian Agusto Cabrera Fonseca, submitted to Court of Appeals, *NIFA v. MSDIA*, at pp. 21-23 (calculating purported lost profits attributable to the lost sales already estimated).

[72] Exhibit C-4, Judgment of the Provincial Court of Justice of Pichincha for Commercial and Civil Matters ("Court of Appeals"), *NIFA v. MSDIA*, 23 Sept. 2011, at SIXTEENTH, pp. 14-15.

[73] Exhibit C-198, MSDIA's Cassation Petition, *NIFA v. MSDIA*, Court of Appeal, dated 13 October 2011, at para. 154.

[74] Exhibit C-292, MSDIA's Brief of 29 April 2014, *NIFA v. MSDIA*, NCJ, at para. 66.

[75] As discussed below, the NCJ also failed to distinguish between profits and sales, awarding NIFA lost profits damages for 100% of NIFA's purported lost sales.

3. The NCJ Awarded as "Lost Profits" the Entire Amount of Sales Revenue that NIFA Purportedly Lost without Considering that Profits Are Necessarily Lower than Sales

79. The NCJ's calculation of NIFA's purported "lost profits" was also manifestly irrational because the NCJ failed to draw any distinction between "lost sales" and "lost profits." The NCJ found (wrongly) that if NIFA had been able to buy MSDIA's manufacturing plant, it could have made additional sales of $6,173,471.81 (which, as discussed above, included $4,133,833.24 in NIFA's actual sales in 2003 and $2,039,638.57 in sales NIFA purportedly could have made by introducing new products). The NCJ then held that this entire amount of purported lost sales should be awarded to NIFA as lost profits damages. This is absurd.

80. It is a very elementary matter that "profits" are calculated by subtracting from revenues the costs necessary to achieve those revenues. NIFA claimed that because it was unable to buy MSDIA's plant, it was unable to expand production to introduce certain new products. Even if it were true that NIFA was unable to introduce new products, NIFA's lost profits would not be equivalent to the revenues it would have earned from those sales. NIFA's lost profits would have to account for the savings in additional costs NIFA made by not undertaking that additional production.

81. The NCJ clearly understood that the figures it adopted from Mr. Cabrera's report (*i.e.*, $4,133,833.24 and $2,039,638.57) represented purported lost gross sales revenues.[76] In its judgment, the NCJ refers to those figures as "***sales amounts*** … in the year 2003."[77] Nevertheless, without explanation, the court held that this entire amount of purported lost gross sales revenues should be awarded to NIFA as lost profits:

> "With respect to numbers 3 and 4 [$4,133,833.24 and $2,039,638.57], this Court of Cassation is taking into account only these items…. In order to establish the lost profits, it is sufficient [to consider] the amounts that PROPHAR S.A. (formerly NIFA S.A.) failed to earn for the year 2003 in which the negotiations were terminated …"[78]

82. The NCJ's award of the entire amount of NIFA's purported lost gross sales revenues as lost profits is obviously wrong and irrational. No honest and competent court responsible for the resolution of civil and commercial disputes would fail to appreciate that distinction – much less the highest court in the State responsible for the resolution of such disputes. Moreover, the fact

[76] Of course, as discussed above, the larger figure of the two actually represented NIFA's ***realized*** gross sales revenues.

[77] Exhibit C-293, NCJ Judgment, *NIFA v. MSDIA*, dated 10 November 2014, at pp. 80-81. The figures appear in the Cabrera report in a table titled "***Sales*** Amounts," in a sub-section of the report titled "***sales values*** calculations and projections." Exhibit C-42, Report of Cristian Agusto Cabrera Fonseca, submitted to Court of Appeals, *NIFA v. MSDIA*, at p. 17. Within that table, the $4,133,833.24 value is described as "Total Amount Current Products" and the $2,039,638.57 value is described as "Total Amount New Products." As noted above, the figures were also identified as sales values in the IMS report, which did not even purport to calculate lost profits.

[78] Exhibit C-293, NCJ Judgment, *NIFA v. MSDIA*, dated 10 November 2014, at p. 81.

that lost sales should not be treated as lost profits was explained clearly in the record before them.[79]

83. Because NIFA's historical profit margins were extraordinarily low, the impact of the court's error on its damages award was enormous. As MSDIA and the expert witnesses explained repeatedly to Ecuador's courts—including the NCJ—***NIFA's actual profit margin*** in 2003 (the year for which the NCJ purported to calculate damages) was ***only 0.9% of its total sales***.[80] Even over the period 2003-2006, NIFA's average profit margin was just 3.9%.[81] Indeed, the maximum profit margin permitted by law for pharmaceutical products in Ecuador in 2003 was 20%.[82]

84. Ignoring this evidence of NIFA's own profit margins and ignoring even the maximum profit margin allowed by law on pharmaceutical products in Ecuador, the NCJ awarded NIFA ***a 100% profit margin*** on its purported lost gross sales revenues. This too was not an innocent mistake. Rather, it is further confirmation that the NCJ's damages award was not motivated by an honest effort to calculate NIFA's actual losses in accordance with the evidence and applicable principles of law. It is a transparent effort to create a legal justification for a predetermined decision to award a certain amount of money to NIFA.

4. The NCJ Awarded NIFA Damages in the Amount of the Purchase Price for the Plant, Notwithstanding that NIFA Never Purchased the Plant and Never Paid that Purchase Price to MSDIA

85. The NCJ also awarded damages to NIFA in the amount of $1.5 million, which was the sales price agreed on by MSDIA and NIFA for MSDIA's manufacturing plant before the parties' negotiations broke down. The court's inclusion of this further amount of damages defies reason.

86. Put simply, once again, there can be no legitimate explanation for awarding NIFA the purchase price of the MSDIA plant as damages, because NIFA never paid a penny of it. The NCJ acknowledged that the parties had never finalized the sale.[83] No evidence in the record suggested that NIFA had paid for the plaint – and it certainly did not. A sales price that NIFA never paid to MSDIA cannot, on any rational legal theory, be viewed as causing damage to NIFA. Indeed, as one expert in the court of appeals noted, in calculating damages, one arguably should ***deduct*** the sales price of the plant from any damages awarded to NIFA, because if NIFA

[79] *See, e.g.*, Exhibit C-21, Report of Walter Spurrier Baquerizo, *NIFA v. MSDIA*, Court of Appeals, dated 4 June 2009, at p. 5 n.4; Exhibit C-294, MSDIA Petition to the NCJ dated 13 November 2014, *NIFA v. MSDIA*.
[80] Exhibit C-21, Report of Walter Spurrier Baquerizo, submitted to the Court of Appeals, *NIFA v. MSDIA*, 4 June 2009, at p. 22 (English translation at p. 19) (calculating NIFA's annual profit margin based on NIFA tax returns introduced into the Ecuadorian court record).
[81] Exhibit C-21, Report of Walter Spurrier Baquerizo, submitted to the Court of Appeals, *NIFA v. MSDIA*, 4 June 2009, at p. 22.
[82] Witness Statement of Alejandro Ponce Martínez, 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. 25 (English translation at p. 21).
[83] Exhibit C-293, NCJ Judgment, *NIFA v. MSDIA*, dated 10 November 2014, at p. 75.

had acquired MSDIA's plant, it would have had to pay MSDIA that amount.[84] NIFA never argued it was entitled to damages in the amount of the proposed purchase price, and not even Mr. Cabrera included it as a measure of damages in his report.

87. Not surprisingly, the NCJ offered no coherent explanation for awarding NIFA the purchase price of the plant as damages, proceeding as if oblivious to the obvious irrationality of doing so.[85]

5. The NCJ's Award of Consequential Damages was Unsupported by Evidence in the Record

88. The NCJ also awarded NIFA $50,000 in "consequential damages." That amount was described as the costs supposedly incurred by NIFA in obtaining financing for MSDIA's plant during the negotiations.

89. Even this relatively small portion of the NCJ's damages award was unsupported by the evidence in the record. As MSDIA explained to the court of appeals, NIFA did not include these alleged costs in its complaint, and it never submitted any evidence that it actually spent $50,000 in financing costs for a loan for the purchase of the plant.[86] In fact, NIFA had asserted in the trial court that it never obtained the financing it had secured for the plant.[87] As a result, the NCJ did not properly substantiate even this tiny fraction of the total award by reference to actual evidence in the record.

6. The NCJ Refused to Correct the Blatant Errors in Its Damages Award

90. Moreover, when the NCJ was given an opportunity to correct these blatant errors in its award, it chose to do nothing.

91. On 13 November 2014, MSDIA filed a post-judgment petition with the NCJ, requesting clarification of the NCJ's judgment, and further requesting correction of errors in the court's damages calculation.[88] Among other things, MSDIA alerted the court to its mistakes in

[84] Exhibit C-21, Report of Walter Spurrier Baquerizo, *NIFA v. MSDIA*, Court of Appeals, dated 4 June 2009, at p. 4 (concluding that "the additional cost of purchasing the plant could have adversely affected NIFA S.A.'s performance, keeping in mind that NIFA S.A. had estimated a scale of production that was beyond the realities of the Ecuadorian market."**)**

[85] Exhibit C-293, NCJ Judgment, *NIFA v. MSDIA*, dated 10 November 2014, at pp. 83-84 ("The deed is not erased, it had already been executed, it was accomplished; with the compensation, an economic retribution equivalent to the harm produced is delivered. The compensation, then, is pecuniary in character, like a situation equivalent to the economic value of the asset that has been compromised with the harm. A characteristic of this form of reparation is rooted in the fact that it is a service rendered equivalent to the value of the object that has been harmed.").

[86] Exhibit C-267, MSDIA Brief submitted to Court of Appeals, *NIFA v. MSDIA*, 15 July 2011, at p. 30. According to the judgment, the NCJ's source for these figures, like the purported "lost profits" figures discussed above, was the discredited Cabrera expert report. Exhibit C-293, NCJ Judgment, *NIFA v. MSDIA*, dated 10 November 2014, at pp. 80-81. Mr. Cabrera, in turn, cites to a contract between NIFA and Consorcio Financiero San Nicolás for a loan, which called for NIFA to pay the above-referenced amounts. Exhibit C-42, Report of Cristian Agusto Cabrera Fonseca, submitted to Court of Appeals, *NIFA v. MSDIA*, at pp. 23-25. But NIFA did not mention those costs in its complaint, and it never offered any evidence that it actually paid them.

[87] Exhibit C-238, NIFA's Brief of 18 October 2006, *NIFA v. MSDIA*, Trial Court, at p. 7.

[88] Exhibit C-294, MSDIA Petition to the NCJ, dated 13 November 2014, *NIFA v. MSDIA*.

conflating purported lost sales with lost profits, and its erroneous inclusion of NIFA's actual 2003 sales in its lost profits calculation.[89] MSDIA further reminded the court of NIFA's historical profit margins, as established in the record, and requested that the court correct its calculation of lost profits.[90] MSDIA further requested that the court clarify the reason for its inclusion of the proposed sales price of the plant in its damages award, given that "said amount does not correspond to loss of profits or to actual damage, especially when said amount was never delivered by NIFA to [MSDIA]."[91]

92. On 10 December 2014, the NCJ issued an order rejecting MSDIA's petition in full and affirming its judgment.

93. An honest and competent court operating under the rule of law could not have reviewed the evidence of these fatal flaws in its award without taking steps to correct them. But when the NCJ was given that opportunity, it refused to make any corrections. The NCJ's refusal to change course, even when incontrovertible evidence of gross errors was put before it, confirms that its judgment was not the product of a well-intentioned court trying to dispense justice in accordance with the rule of law but rather was motivated by a desire to concoct a justification for a predetermined result.

V. THE NOVEMBER 2014 NCJ DECISION FURTHER CONFIRMS THAT THE ECUADORIAN COURTS ARE INCAPABLE OF PROVIDING JUSTICE TO MSDIA

94. Even before the NCJ's November 2014 judgment, it was clear that Ecuador's courts are fundamentally incapable of providing justice to MSDIA in the *NIFA v. MSDIA* case. Through more than a decade of litigation, at every level of Ecuador's judicial system, MSDIA has been subjected to proceedings that fail to provide MSDIA with basic due process and to decisions that are not a product of the rule of law.

95. The NCJ's November 2014 judgment is more of the same. That decision confirms what the prior decisions of the trial court, court of appeals, and NCJ had already established: that in the *NIFA v. MSDIA* litigation, the Ecuadorian courts are incapable of rendering a decision that applies the applicable principles of law to the factual record in an impartial manner; that they are irretrievably biased against MSDIA; and that corruption or some other form of improper influence is almost certainly at work.

96. Ecuador has argued that MSDIA has not fully exhausted its remedies in Ecuador for challenging the decisions of the NCJ, and that its claims in this arbitration are therefore premature.[92] This is legally wrong, as MSDIA has previously explained, because the decisions of the NCJ are final decisions of the Ecuadorian court system, and those decisions are

[89] Exhibit C-294, MSDIA Petition to the NCJ, dated 13 November 2014, *NIFA v. MSDIA*, at para. 11.
[90] Exhibit C-294, MSDIA Petition to the NCJ, dated 13 November 2014, *NIFA v. MSDIA*, at paras. 12-19.
[91] Exhibit C-294, MSDIA Petition to the NCJ, dated 13 November 2014, *NIFA v. MSDIA*, at para. 10.
[92] *See* Ecuador's Counter-Memorial, at paras. 182-270.

immediately enforceable against MSDIA, and indeed have been and imminently will be enforced.[93]

97. Ecuador's exhaustion argument is also wrong because the record of the proceedings in the *NIFA v. MSDIA* litigation demonstrates that it would be futile for MSDIA to pursue any further proceedings in Ecuador.

98. The record leaves no doubt: the Ecuadorian courts, at every level, will find in favor of NIFA and impose liability on MSDIA, regardless of the facts in the record and the relevant principles of Ecuadorian law. The courts have done so now on the basis of three different legal theories (antitrust, unfair competition, and pre-contractual liability), none of which is even recognized under Ecuadorian law, and two of which were never relied on by the plaintiff in those proceedings. They have repeatedly imposed irrational and indefensible damages awards far exceeding any possible impact of a failed $1.5 million factory sale. The extent to which the courts have gone to manufacture a legal basis for their predetermined outcome is remarkable, as is the utterly implausible bases upon which they heap huge damages on MSDIA based on a small business dispute. There seems little doubt that they will continue to impose and increase liability on MSDIA through further rounds of final judgments, unless this Tribunal acts now.

99. Indeed, even after the NCJ's second final award in the *NIFA v. MSDIA* proceedings, the Ecuadorian legal system cannot guarantee MSDIA that this is the end. NIFA has filed a new Extraordinary Action for Protection, seeking to vacate the NCJ's November 2014 judgment. As it has done before, NIFA will likely seek enforcement of the $7.7 million NCJ judgment while at the same time seeking to vacate that judgment so that it can return to the NCJ for yet another attempt at reinstating the $150 million judgment that Ecuador's own courts have recognized as "illogical" and "lack[ing] all proportion."[94]

100. The Ecuadorian courts have proven themselves to be incapable of ending this cycle of mistreatment of MSDIA. Under principles of international law and under the U.S.-Ecuador BIT, this Tribunal has both the authority and the power to do what the Ecuadorian courts cannot, namely provide justice to MSDIA by bringing this cycle to an end and awarding MSDIA damages to compensate it for Ecuador's violations of international law. MSDIA respectfully requests that it do so.

VI. REQUEST FOR RELIEF

101. As set forth in MSDIA's Memorials and Notice of Arbitration, and for the reasons outlined above, MSDIA respectfully requests an 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 that Ecuador pay MSDIA $1,570,000 in compensation for MSDIA's payment of the judgment issued by the National Court of Justice on 21 September 2012;

[93] *See* MSDIA Memorial, at paras. 419-425.
[94] Exhibit C-203, NCJ Judgment, *NIFA v. MSDIA*, dated 21 September 2012, at pp. 38-41.

c. Directing that Ecuador pay MSDIA $7,723,471.81 in compensation for the judgment issued by the National Court of Justice on 10 November 2014;

d. Directing Ecuador to pay all costs and attorneys' fees incurred by MSDIA in defending the *NIFA v. MSDIA* litigation, provisionally quantified in the amount of $6,565,768.66[95];

e. Directing Ecuador—including specifically its courts, its executive branch, and its national police—to take all steps within its power to prevent enforcement of any future judgment against MSDIA in the *NIFA v. MSDIA* case, both within and outside of Ecuador;

f. Directing that Ecuador indemnify and hold harmless the Claimant against any and all damages resulting from enforcement of any future judgment against MSDIA in the *NIFA v. MSDIA* case, 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;

g. Directing Ecuador to pay the Claimant damages for its legal costs in resisting enforcement of any future judgment against MSDIA in the *NIFA v. MSDIA* case, within and outside of Ecuador;

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

i. Directing Ecuador to pay the Claimant all costs and attorneys' fees incurred in connection with this arbitration; and

j. Such additional and other relief as may be just and necessary to halt the ongoing cycle of denials of justice, including, without limitation, 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.

[95] This figure was quantified as of 26 June 2014. MSDIA reserves its right to update this figure at the time of the merits hearing for purposes of the Tribunal's final award.

Respectfully submitted,

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