

10 August 2016

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Re: **MERCK SHARP & DOHME (I.A.) CORP.(U.S.A.) v. THE REPUBLIC OF ECUADOR**  
(PCA CASE NO. 2012-10)

Dear Sirs:

We are writing to provide an English translation of the National Court of Justice judgment dated 4 August 2016 in the *Prophar v. MSDIA* litigation, the third sequential award against MSDIA based on the same facts, which awards damages against MSDIA in the amount of \$41,966,571.60.<sup>1</sup>

As we explain below, the NCJ's 4 August 2016 Judgment affirms the court of appeals judgment (which had awarded \$150 million against MSDIA) in most material respects, modifying only the damages award to impose a portion of the damages the court of appeals awarded. It therefore falls squarely within the terms of the Tribunal's Decision on Interim Measures dated 7 March 2016 (the "Decision"), terms that require Ecuador to ensure that such an award is not enforced against MSDIA. The NCJ's 4 August 2016 Judgment appears to recognize that carrying out the NCJ's judgment is not permitted by this Tribunal's Decision, but expressly rejects this Tribunal's Decision, and directs that Ecuador's lower courts must disregard it as well. There is thus a clear and immediate risk that Ecuador's courts will proceed with enforcement of the NCJ's 4 August 2016 Judgment, in direct contravention of the Tribunal's Decision. This threatens the imminent

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<sup>1</sup> As the Tribunal is aware, despite profound reasons to object to the integrity of the NCJ's prior final judgments in this matter, imposing awards of \$1.57 million and \$7.723 million, upon orders from Ecuadorian courts compelling MSDIA to pay a total of \$7.723 million. Ecuador allowed the enforcement of those prior "final" awards despite allowing the Ecuadorian plaintiff in the case, Prophar, to appeal the reduction of its damages to the Constitutional Court, and despite the Constitutional Court now twice vacating those fully enforced decisions to allow the imposition of still higher judgments.

10 August 2016

Page 2

destruction of MSDIA's business in Ecuador, an irreparable injury to the company, and the supply of MSDIA's life-enhancing and life-saving medicines<sup>2</sup> to Ecuadorian citizens.<sup>3</sup>

To date, so far as MSDIA is aware, Ecuador has done nothing to comply with the Tribunal's Decision other than notifying its courts of that Decision. This is plainly not sufficient, as the NCJ's defiant ruling makes very clear. In light of the NCJ's 4 August 2016 Judgment, Ecuador must immediately do more to satisfy its obligations under the Tribunal's Decision (not only through its courts, but also through its executive branch). Thus, for the reasons set forth below, as urgent interim steps, MSDIA respectfully requests that the Tribunal:

- (1) confirm that its Decision applies to the NCJ's 4 August 2016 Judgment, and therefore that Ecuador is obligated to "ensure, by means of its own choosing, that all further proceedings and actions directed towards the enforcement of the [NCJ's 4 August 2016 Judgment] are suspended pending delivery by the Tribunal of its final Award"; and
- (2) direct Ecuador to inform the Tribunal no later than Monday, August 15, 2016, of the specific steps it has undertaken and will undertake to ensure compliance with the Tribunal's Decision, as directed by the terms of that Decision.

**A. *The NCJ's 4 August 2016 Judgment Falls Within the Tribunal's Decision***

In its 7 March 2016 Decision, the Tribunal ordered, in relevant part, that "in the event of a Judgment by the National Court of Justice reinstating in whole or in part the judgments of the trial court or the court of appeals in the litigation by Prophar against MSDIA ... Ecuador shall forthwith ensure, by means of its own choosing, that all further proceedings and actions directed towards the enforcement of the judgments mentioned above are suspended pending delivery by the Tribunal of its final Award, and shall inform the Tribunal of the action that has been taken to that effect."<sup>4</sup>

The NCJ's 4 August 2016 Judgment falls squarely within the terms of the Tribunal's Decision. The NCJ upheld the court of appeals' decision in substantial part. It expressly rejected MSDIA's grounds for cassation challenging the court of appeals' liability holding thereby affirming that

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<sup>2</sup> A significant number of the products MSDIA-Ecuador imports and distributes in Ecuador are listed on the World Health Organization's Model List of Essential Medicines. See Witness Statement of Jean Marie Canan, dated 8 June 2012, at para. 10. Enforcement of the NCJ's third successive irrational judgment in Ecuador would threaten the supply of those MSDIA medicines and vaccines to patients in Ecuador. See, e.g., MSDIA Reply in Support of Interim Measures, dated 5 Aug. 2012, at paras. 163-166.

<sup>3</sup> As MSDIA has demonstrated previously, no rational actor would pay so large a judgment in this case. As MSDIA has also shown, the destruction of a business constitutes irreparable injury against which preventative measures are appropriate. See MSDIA Reply in Support of Interim Measures, dated 5 Aug. 2012, at paras. 123-135.

<sup>4</sup> Decision on Interim Measures dated 7 Mar. 2016, at p. 26.

10 August 2016

Page 3

liability holding;<sup>5</sup> it expressly adopted the court of appeals' assessment of the evidence regarding liability and damages;<sup>6</sup> and it expressly rejected numerous grounds for cassation that would have vacated the decision in its entirety that had been advanced by MSDIA.<sup>7</sup> In its own words, the NCJ ruling "partially set[ ] aside" the court of appeals judgment only as to the ultimate amount of monetary damages, finding that the court of appeals erred in failing to apply an Ecuadorian law restricting Prophar's profit margin to a maximum of 20% in calculating its award of damages.<sup>8</sup> Accordingly, after accepting the court of appeals' liability finding and its calculation of damages, the NCJ reduced the damages according to that 20% limitation.<sup>9</sup> The NCJ's 4 August 2016 Judgment therefore reinstates the court of appeals' judgment in large part, and is expressly within the scope of the Tribunal's Decision.

Notably, in its 4 August 2016 Judgment, the NCJ did not independently assess the evidence in the record but instead wholly accepted the evidentiary findings of the court of appeals.<sup>10</sup> Precisely this, of course, had been mandated by the Constitutional Court in its 20 January 2016 decision.<sup>11</sup> As MSDIA has explained in detail in prior submissions and as the Tribunal by now is well aware, the evidentiary findings of the court of appeals were based on a flawed evidentiary process that was highly prejudicial to MSDIA. Among other things, the court of appeals made its evidentiary findings without any consideration of the evidence introduced by MSDIA in second instance proceedings, having found without basis that MSDIA had waived its reliance on all of the evidence it had submitted in the court of appeals proceedings.<sup>12</sup> So flawed are those

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<sup>5</sup> The NCJ expressly rejected the cassation ground in which MSDIA challenged the court of appeals' liability holding. See National Court of Justice Judgment, *NIFA v. MSDIA*, dated 4 Aug. 2016, at p. 21 (Section 6.5.1) (English translation) (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 National Court of Justice Judgment, *NIFA v. MSDIA*, dated 4 Aug. 2016, at pp. 16-17, 21-22.

<sup>6</sup> National Court of Justice Judgment, *NIFA v. MSDIA*, dated 4 Aug. 2016, at p. 27 (English translation) (explaining that in issuing its decision the NCJ is "refraining from weighing any evidence or determining any of the facts of the trial and appeal"); *id.* at p. 34 (finding that "the dispute between the parties cannot lead this court to weigh evidence"); *id.* at 37 (explaining that "The [Cabrera] expert report ... 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.").

<sup>7</sup> National Court of Justice Judgment, *NIFA v. MSDIA*, dated 4 Aug. 2016, at pp. 6-22 (English translation).

<sup>8</sup> National Court of Justice Judgment, *NIFA v. MSDIA*, dated 4 Aug. 2016, at pp. 22, 37-38 (English translation).

<sup>9</sup> National Court of Justice Judgment, *NIFA v. MSDIA*, dated 4 Aug. 2016, at pp. 37-38 (English translation).

<sup>10</sup> National Court of Justice Judgment, *NIFA v. MSDIA*, dated 4 Aug. 2016, at p. 27 (explaining that the NCJ is "refraining from weighing any evidence or determining any of the facts of the trial and appeal"). MSDIA's letters dated 5 February 2016 and 23 February 2016 describe the highly-unusual directives made to the NCJ by the Constitutional Court in its decision dated 20 January 2016. Among other things, the Constitutional Court directed that "the ability to weigh evidence is the exclusive competence of instance judges, not of national judges ... If the cassation appellant seeks to have the evidence reviewed, the national judges are forbidden from undertaking such task." Constitutional Court Decision dated 20 Jan. 2016, at p. 13. As MSDIA's February 2016 letters make clear, this directive was highly irregular, and inconsistent with Ecuadorian law and past Constitutional Court practice. See, e.g., MSDIA letter dated 23 Feb. 2016, at pp. 7-9.

<sup>11</sup> MSDIA letter dated 23 Feb. 2016, at p. 4.

<sup>12</sup> See generally MSDIA Memorial at paras. 121-123; MSDIA Reply at paras. 641-650.

10 August 2016

Page 4

findings that, remarkably, Ecuador made no effort whatsoever to defend them in the March 2015 evidentiary hearing in this matter in London. The NCJ's adoption of the court of appeals' evidentiary findings re-imposes the fundamental violations of MSDIA's rights by the court of appeals, and in fact exacerbates those violations.

In addition, the NCJ's 4 August 2016 Judgment relied exclusively on the blatantly irrational and likely corrupt expert report of Mr. Cristian Cabrera.<sup>13</sup> This too had been mandated by the Constitutional Court.<sup>14</sup> The NCJ's 4 August 2016 Judgment expressly states that the NCJ is not permitted to second-guess the court of appeals' decision to appoint Mr. Cabrera and credit his report, holding that:

“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.”<sup>15</sup>

The Cabrera report is so obviously lacking in integrity and rationality that, in its two prior judgments (which themselves imposed denials of justice for other reasons), the NCJ had dismissed Mr. Cabrera's damages calculation as “lacking all proportion”<sup>16</sup> and “irrational and illogical.”<sup>17</sup> Again, in the March 2015 hearing, Ecuador made no effort whatsoever to defend Mr. Cabrera's reasoning or his (obviously non-existent) qualifications to opine.<sup>18</sup> Nevertheless, following the dictates of the Constitutional Court, the NCJ's 4 August 2016 Judgment adopted Mr. Cabrera's conclusions, thereby reinstating the manifest injustice resulting from the court of appeals' reliance on the Cabrera report.<sup>19</sup>

<sup>13</sup> National Court of Justice Judgment, *NIFA v. MSDIA*, dated 4 Aug. 2016, at pp. 35-38 (English translation).

<sup>14</sup> See, e.g., MSDIA letter dated 23 Feb. 2016, at pp. 4-5.

<sup>15</sup> National Court of Justice Judgment, *NIFA v. MSDIA*, dated 4 Aug. 2016, at p. 37 (English translation). The NCJ determined that it was, however, permitted to amend Mr. Cabrera's conclusion that MSDIA suffered \$204,150,990.46 in “lost profit” damages over the 15-year period between 2003 and 2018 to account for the fact that Ecuadorian law limited Prophar's profit margin to 20%. The NCJ applied this 20% cap to the lost profits Mr. Cabrera had calculated, awarding \$41,91,571.60 for “lost profits” supposedly caused by MSDIA. To that figure, the NCJ added \$50,000 in so-called consequential damages, representing alleged out-of-pocket expenses identified by Mr. Cabrera as having been incurred by Prophar during the negotiation for the sale of MSDIA's plant. Thus, like the court of appeals, the NCJ based its damages award entirely on the Cabrera report. *Id.* at pp. 37-38.

<sup>16</sup> Exhibit C-203, NCJ Judgment, *NIFA v. MSDIA*, 21 Sept. 2012 at section 16.2.

<sup>17</sup> Exhibit C-293, NCJ Judgment, *NIFA v. MSDIA*, 10 Nov. 2014, at p. 79.

<sup>18</sup> Rather than defend the Cabrera report, Ecuador has argued that it is irrelevant because it was rejected by the prior NCJ decisions. 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.” Day 2, Merits Hearing Full Transcript, at 219:6-9.

<sup>19</sup> 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 Prophar 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.

10 August 2016

Page 5

The Tribunal's 7 March 2016 Decision was intended to prevent enforcement of a judgment against MSDIA that perpetuated the effects of the trial court and court of appeals judgments that are at issue in this arbitration. The NCJ's 4 August 2016 Decision adopts the preposterous evidentiary findings of the lower courts, including their reliance on the manifestly absurd Cabrera report, a report so indefensible that the NCJ itself had previously rejected it as facially flawed on two occasions. The NCJ's 4 August 2016 Decision plainly falls within the scope of the interim measures of protection ordered in the Tribunal's Decision.

***B. The NCJ's 4 August 2016 Decision Expressly Rejects the Tribunal's Decision on Interim Measures***

The NCJ's 4 August 2016 Judgment falls within the scope of the Tribunal's Decision, and thus Ecuador must take active steps to comply with the Decision. If it fails to do so and that decision is enforced against MSDIA's assets, MSDIA's business in Ecuador will be destroyed.

In its 4 August 2016 Decision, the NCJ expressly considered and rejected the application of the Tribunal's Decision on Interim Measures. While acknowledging the existence of the Tribunal's Decision, the NCJ held that "international protection is subsidiary" to the internal functioning of Ecuador's courts, and that Ecuador's national courts must operate unencumbered by international law.<sup>20</sup> Thus, the NCJ's 4 August 2016 Judgment held:

"In this context, the interference of the Arbitration Tribunal in the affairs of the National Court of Justice is in violation of Rule No. 1 of Article 168 [of Ecuador's Constitution], which establishes that Courts shall have internal and external autonomy: external autonomy because no government official from any other branch of Government or other judicial body can interfere in the administration of justice; and internal autonomy because no government official that is part of the Judicial Branch itself can interfere with the jurisdiction of the others, as provided by Article 8, paragraph one of the Organic Code of the Judiciary when it states that "In the exercise of their jurisdictional authority, Judges shall be subject only to the Constitution, international human rights instruments and the law. In exercising said authority, they shall be independent even with regard to other Judicial Branch bodies..." more so when 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."<sup>21</sup>

The NCJ's express rejection of this Tribunal's Decision as "interference" in national court procedures that it says are autonomous from the constraints of international law is alarming, all the more so because the inescapable implication of these assertions is that they apply equally to

<sup>20</sup> National Court of Justice Judgment, *NIFA v. MSDIA*, dated 4 Aug. 2016, at p. 4 (English translation).

<sup>21</sup> National Court of Justice Judgment, *NIFA v. MSDIA*, dated 4 Aug. 2016, at p. 4 (English translation).

10 August 2016

Page 6

Ecuador's lower courts, which will be responsible for ordering enforcement of the NCJ's 4 August 2016 Judgment, and which obviously are subordinate to the NCJ in Ecuador's legal system and thus, presumably, bound by its dictates. The NCJ's ruling thus can only be understood as stating that the lower courts, too, must disregard the Tribunal's Decision and enforce this unjust and destructive judgment.

Moreover, the NCJ expressly invokes the Constitutional Court's threat of criminal sanctions against any judge who does not comply with the Constitutional Court's dictates, citing the fact that "the 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" as further reason why it has disregarded this Tribunal's Decision.<sup>22</sup> That profoundly troubling passage, too, confirms that the Constitutional Court's threats had their desired effect on the judges of the NCJ, prompting them (in further violation of MSDIA's rights to due process) to place their own personal interests in avoiding such penalties ahead of those of the litigants in the case, suggesting that they very likely will have the same effect on the lower court judges who will be charged with enforcement proceedings.

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For all of these reasons, MSDIA therefore requests urgently that the Tribunal issue a new decision confirming that the interim measures of protection that it granted previously apply to the NCJ's 4 August 2016 Judgment and directing Ecuador to inform the Tribunal of the steps it will take to ensure that each of the branches of the Ecuadorian government honor and comply with the Tribunal's Decision. Specifically, MSDIA requests that the Tribunal:

- (1) confirm that its Decision applies to the NCJ's 4 August 2016 Judgment, and therefore that Ecuador is obligated to "ensure, by means of its own choosing, that all further proceedings and actions directed towards the enforcement of the [NCJ's 4 August 2016 Judgment] are suspended pending delivery by the Tribunal of its final Award"; and
- (2) direct Ecuador to inform the Tribunal of the specific steps it has undertaken and will undertake to ensure compliance with the Tribunal's Decision, as directed by the terms of that Decision.

Given the immediacy of likely enforcement proceedings in Ecuador, it is urgent that these steps be taken right away, and thus we ask that the Tribunal direct Ecuador to inform the Tribunal of the steps it has taken and will take no later than Monday, 15 August 2016. If Ecuador does not

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<sup>22</sup> National Court of Justice Judgment, *NIFA v. MSDIA*, dated 4 Aug. 2016, at p. 4 (English translation). The NCJ intended to reference Article 86(4) of the Constitution, which the Constitutional Court expressly invoked in its 20 January 2016 decision in directing the NCJ to comply with its ruling. See MSDIA letters dated 5 Feb. 2016 at p. 4. That provision 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."

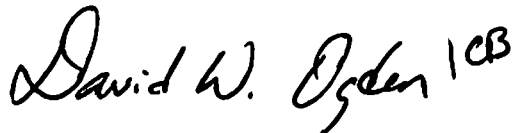
10 August 2016

Page 7

provide confirmation that it is taking steps sufficient to prevent enforcement of the NCJ's 4 August 2016 Judgment, MSDIA reserves its right to request that the Tribunal vary its Decision to impose additional interim measures of protection that will safeguard MSDIA's business in Ecuador pending the final Award in this arbitration.

MSDIA further reserves the right to request an opportunity to make additional observations on the substance of the NCJ's 4 August 2016 Judgment, which it has had only since Friday, 5 August. The financial implications of the decision, and any enforcement proceedings Ecuador permits pursuant to it, are still unfolding. We also note that as of now, MSDIA does not know whether the NCJ's 4 August 2016 Judgment will represent the end of the *Prophar v. MSDIA* litigation. Under Ecuadorian procedural law, if Prophar were to file yet a third "Extraordinary Action for Protection" in Ecuador's Constitutional Court—a path it has successfully followed on two prior occasions despite also successfully obtaining enforcement of the judgment it was simultaneously challenging, Prophar would do so within 20 court days of the issuance of the NCJ decision, which falls on or about 7 September 2016. MSDIA will report to the Tribunal on any developments as soon as they occur.

Sincerely yours,

A handwritten signature in black ink that reads "David W. Ogden" followed by a stylized monogram "CB".

David W. Ogden

cc: Mr. Martin Doe  
Ms. Amal Clooney  
Mr. Mark Clodfelter  
Ms. Janis Brennan  
Ms. Diana Tsutieva  
Mr. Ronald Goodman  
Mr. Alberto Wray  
Mr. Constantinos Salonidis  
Dr. Diego Garcia Carrion  
Dra. Blanca Gómez de la Torre  
Dra. Christel Gaibor  
Ab. Diana Terán