WILMERHALE

David W. Ogden

+1 202 663 6440(t)
+1 202 663 6363(f)
david.ogden@wilmerhale.com

November 29, 2011

Dr. Diego García Carrión
Attorney General of Ecuador
Robles 731 y Av. Amazonas
Quito, Ecuador

Dr. Francisco Grijalva Muñoz
National Director of International Affairs and Arbitration
Robles 731 y Av. Amazonas
Quito, Ecuador

Re: Merck Sharp & Dohme (I.A.) Corp. v. Republic of Ecuador

Dear Sirs:

Enclosed please find a Notice of Arbitration submitted on behalf of Merck Sharp & Dohme (I.A.) Corporation. Please feel free to contact me if you would like to discuss this matter. Thank you very much.

Respectfully,

David W. Ogden

Enclosures

IN THE MATTER OF AN AD HOC ARBITRATION UNDER THE UNCITRAL ARBITRATION RULES

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

Claimant

versus

THE REPUBLIC OF ECUADOR

Respondent

NOTICE OF ARBITRATION

November 29, 2011

1. This Notice of Arbitration is submitted on behalf of Merck Sharp & Dohme (I.A.) Corp. against the Republic of Ecuador, under Article VI of the Treaty between the United States of America and the Republic of Ecuador Concerning the Encouragement and Reciprocal Protection of Investment, which was signed in Washington, D.C. on August 27, 1993 and which entered into force on May 11, 1997 (the "Ecuador-United States BIT" or "Treaty") and in accordance with the Arbitration Rules of the United Nations Commission on International Trade Law ("UNCITRAL").

I. INTRODUCTION

2. The Claimant, Merck Sharp & Dohme (I.A.) Corp. ("MSDIA"), is initiating this arbitration against the Republic of Ecuador to obtain relief under the Ecuador-United States BIT for Ecuador's flagrant and continuing breaches of its obligations under that Treaty.

3. This dispute arises out of litigation in the Ecuadorian courts that has resulted in a clear miscarriage of justice.

4. In early 2003, MSDIA decided not to sell a small manufacturing plant in Ecuador to one Ecuadorian company, and shortly thereafter sold it to another Ecuadorian concern for less than $1 million. The unsuccessful bidder, Nueva Industria Farmaceutica Asociada, S.A. ("NIFA"), a small generic pharmaceutical manufacturer, then sued MSDIA in Ecuador's civil courts.

5. On December 17, 2007, an Ecuadorian court of first instance issued a manifestly unjust and irrational judgment against MSDIA, and awarded $200 million in damages for profits the plaintiff purportedly would have earned if MSDIA had chosen to sell the small plant to it, rather than to the other bidder. On September 23, 2011, an Ecuadorian court of appeals issued a further manifestly unjust and irrational decision, ratifying and amending the trial court's judgment and awarding to the Ecuadorian plaintiff firm $150 million in supposed lost-profits damages against MSDIA.

6. There was no rational basis for the Ecuadorian courts' finding of liability. The judgments were based on a purported antitrust theory, despite the facts that Ecuador had no antitrust law at the time of the sale and that MSDIA's conduct violated no conceivable antitrust principles.

7. There was also no rational basis for the Ecuadorian courts' damages awards.

   a. The trial court's award of $200 million for lost profits:

      i. was almost *100,000 times* the plaintiff's total annual 2002 profits of $2,165;

      ii. was *more than 133 times* the parties' valuation of the plant, as reflected in a proposed purchase price of $1.5 million;

      iii. was nearly *10 times* the *total sales* of the entire Ecuadorian generic pharmaceutical market in 2002, $20.4 million (the total *profits* earned by all generic pharmaceutical manufacturers on those sales would have been a fraction of that amount); and

iv. exceeded by *more than $187 million* the profits the plaintiff *itself* had projected it would earn from use of the plant in submissions to the court of first instance.

b. The court of appeals' award of $150 million:

i. was *70,000* times the plaintiff's annual profits of $2,165;

ii. was *100* times the proposed purchase price;

iii. was more than *7 times* the *total sales* of the entire Ecuadorian generic pharmaceutical market in 2002 (and therefore a much greater multiple of that industry's total profits); and

iv. exceeded by *$149 million* the damages suggested by the evidence of harm the plaintiff *itself* submitted in that court.

8. Numerous aspects of the underlying litigation evidence the manifest bias and partiality of the Ecuadorian courts in this case. For example, at key points in the proceedings, in violation of Ecuadorian law and practice and contrary to basic requirements of due process, Ecuador's courts denied MSDIA fair notice of their rulings and key procedural steps in the case. Further, without a rational basis, the courts dismissed the well-reasoned conclusions of neutral, internationally respected and highly credentialed court-appointed experts—who concluded that there was no basis for liability or damages in this case—and instead adopted the unreasoned and facially implausible conclusions of uncredentialed and partial "experts" who were improperly appointed under suspicious circumstances.

9. Moreover, the substance of the judgments themselves confirms the manifest injustice of the underlying litigation. Simply put, no rational, competent and unbiased tribunal, applying minimum standards of due process, could have reached the result that the Ecuadorian courts did here.

10. The gross injustices in this case arose from broader abuses in the Ecuadorian judicial system. As discussed below, external observers have reported that "the Ecuadorian ... courts are often susceptible to outside pressure and bribes"[1] and "Ecuadorian courts ... are perceived as corrupt, ineffective, and protective of those in power."[2] They have also noted that "neither legislative oversight nor internal judicial branch mechanisms have shown a consistent capacity to investigate effectively and discipline allegedly corrupt judges."[3]

11. Ecuador itself has recognized the failings of its judicial system. Only weeks after the court of appeals' ruling here, President Correa declared that "[w]e have a concrete problem no

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[1] U.S. Department of State, 2009 Investment Climate Statement – Ecuador, http://www.state.gov/e/eeb/rls/othr/ics/2009/117668.htm.

[2] U.S. Department of State, 2011 Investment Climate Statement – Ecuador, http://www.state.gov/e/eeb/rls/othr/ics/2011/157270.htm.

[3] U.S. Department of State, 2011 Investment Climate Statement – Ecuador, http://www.state.gov/e/eeb/rls/othr/ics/2011/157270.htm.

one doubts, a totally inefficient and corrupt judicial system that is falling in pieces."[4] In 2009, the President of the Civil Criminal Commission of the Ecuadorian National Assembly stated that "[o]ur system of justice has completely collapsed."[5]

12. The proceedings and rulings of the Ecuadorian courts in this case are flagrant breaches of Ecuador's obligations under the Ecuador-United States BIT, including, among other commitments, Ecuador's obligations a) to accord MSDIA's investment fair and equitable treatment, full protection and security, and treatment no less than that required by international law, including, among other things, by not denying justice to MSDIA in its courts; b) not to impair MSDIA's investment by arbitrary or discriminatory measures; and c) to provide MSDIA effective means of asserting claims and enforcing rights with respect to its investment. Ecuador is responsible for the damages resulting from these breaches, and MSDIA asks this Tribunal to require Ecuador to indemnify and hold harmless MSDIA against any losses caused by the enforcement of the judgment against it and to afford the other measures of relief set out below.

13. MSDIA reserves the right to supplement the allegations and claims set out in this Notice of Arbitration, and in particular, it reserves the right to submit a Statement of Claim at a subsequent stage of these proceedings, to be determined by the Arbitral Tribunal in the Procedural Timetable for this arbitration.

14. MSDIA intends to seek interim measures of relief protecting its assets from state action during the pendency of these proceedings, and will be submitting an application for interim measures.

II. NAMES AND ADDRESSES OF THE PARTIES

15. The Claimant, Merck Sharp & Dohme (I.A.) Corp. ("MSDIA"), is a company constituted under the laws of the state of Delaware, in the United States of America.[6] Its registered address is Corporation Trust Company, Corporation Trust Center, 1209 Orange Street, Wilmington, Delaware 19801, United States of America.

16. MSDIA is represented in this arbitration by:

Gary B. Born
Wilmer Cutler Pickering Hale and Dorr LLP
49 Park Lane
London W1K 1PS
United Kingdom
Tel: +44 20 7872 1000
Fax: +44 20 7839 3537
E-mail: gary.born@wilmerhale.com

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[4] *Presidente Correa. Querian desprestigiar al Gobierno y no pudieron (President Correa. they wanted to disparage the government and they could not)*, OPINIÓN, Nov. 13, 2011, http://www.diariopinion.com/primeraPlana/verArticulo.php?id=812332 ("Tenemos un problema concreto, que nadie lo duda, un sistema de justicia totalmente ineficiente y corrupto que se cae a pedazos ...").

[5] *Justicia colapsada (Justice collapsed)*, LA HORA, Apr. 16, 2009.

[6] MSDIA was formerly known as Merck Sharp & Dohme (Inter American) Corporation.

David W. Ogden
Rachael D. Kent
Wilmer Cutler Pickering Hale and Dorr LLP
1875 Pennsylvania Ave., NW
Washington, DC 20006
Tel: +1 202 663 6000
Fax: +1 202 663 6363
E-mail: david.ogden@wilmerhale.com; rachael.kent@wilmerhale.com

All communications to MSDIA in this arbitration should be sent to Wilmer Cutler Pickering Hale and Dorr LLP at the addresses above.

17. The Respondent in this arbitration is the Republic of Ecuador ("Ecuador"). The Respondent is represented by:

Dr. Diego García Carrión
Attorney General of Ecuador
Robles 731 y Av. Amazonas
Quito, Ecuador
Tel: (593-2) 256-2080
Fax: (593-2) 223-7572

Dr. Francisco Grijalva Muñoz
National Director of International Affairs and Arbitration
Robles 731 y Av. Amazonas
Quito, Ecuador
Tel: (593-2) 290-7768
Fax: (593-2) 223-7572

III. THE ECUADOR-UNITED STATES BILATERAL INVESTMENT TREATY AND THE ARBITRATION AGREEMENT

18. In 1993, the Republic of Ecuador and the United States signed the Treaty between the United States of America and the Republic of Ecuador Concerning the Encouragement and Reciprocal Protection of Investment. The Treaty entered into force on May 11, 1997.[7]

19. The parties' intentions in signing the Treaty, as recorded in its Preamble, were "to promote greater economic cooperation between them, with respect to investment by nationals and companies of one Party in the territory of the other Party," to "stimulate the flow of private capital and the economic development of the Parties," and to encourage "the reciprocal protection of investment." The Preamble also recognizes "that fair and equitable treatment of investment is desirable in order to maintain a stable framework for investment and maximize effective utilization of economic resources." Thus, the protections set forth in the Treaty were

[7] The Ecuador-United States BIT is attached hereto as Exhibit C-1.

specifically intended to provide security to private investors in the United States in order to encourage them to make direct investments of capital in Ecuador (and vice versa).

20. Article VI(2) of the Ecuador-United States BIT provides that "[i]n the event of an investment dispute, the parties to the dispute should initially seek a resolution through consultation and negotiation. If the dispute cannot be settled amicably, the national or company concerned may choose to submit the dispute, under one of the following alternatives, for resolution: (a) to the courts or administrative tribunals of the Party that is a party to the dispute; or (b) in accordance with any applicable, previously agreed dispute-settlement procedures; or (c) in accordance with the terms of paragraph 3."[8]

21. Under Article VI(3)(a) of the Treaty, "[p]rovided that the national or company concerned has not submitted the dispute for resolution under paragraph (2)(a) or (b) and that six months have elapsed from the date on which the dispute arose, the national or company concerned may choose to consent in writing to the submission of the dispute for settlement by binding arbitration ... in accordance with the Arbitration Rules of the United Nations Commission on International Trade Law (UNCITRAL)."

22. MSDIA notified Ecuador of the existence of an investment dispute in a letter to Dr. Diego García Carrión, the Attorney General of Ecuador, dated June 8, 2009.[9] In that letter, MSDIA notified Ecuador of its claims under the Treaty and requested an opportunity to consult with the Government of Ecuador to seek a resolution of the dispute through amicable means.

23. More than six months have passed since the date of MSDIA's letter; the parties have not been able to resolve the dispute amicably; and MSDIA has not submitted its dispute with Ecuador to the courts or administrative tribunals of Ecuador or in accordance with any other dispute-settlement procedures. MSDIA therefore elects to consent to the submission of the dispute for settlement by binding arbitration in accordance with the Arbitration Rules of the United Nations Commission on International Trade Law (UNCITRAL).

24. Article VI(4) of the Treaty provides that "[e]ach Party hereby consents to the submission of any investment dispute for settlement by binding arbitration in accordance with the choice specified in the written consent of the national or company under paragraph 3. Such consent, together with the written consent of the national or company when given under paragraph 3 shall satisfy the requirement for ... an 'agreement in writing' for purposes of Article II of the New York Convention." Ecuador's consent in Article VI(4) of the Treaty, together with MSDIA's consent in this Notice of Arbitration, constitutes a binding agreement to arbitrate this dispute.

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[8] Article VI(1) of the Treaty defines "investment dispute" as "a dispute between a Party and a national or company of the other Party arising out of or relating to ... (c) an alleged broach of any right conferred or created by this Treaty with respect to an investment." Article I(1)(a) defines "investment" as "every kind of investment in the territory of one Party owned or controlled directly or indirectly by nationals or companies of the other Party, such as equity, debt, and service and investment contracts; and includes: (i) tangible and intangible property, including rights, such as mortgages, liens, and pledges; (ii) a company or shares of stock or other interests in a company or interests in the assets thereof; (iii) a claim to money or a claim to performance having economic value, and associated with an investment; (iv) intellectual property...; and (v) any right conferred by law or contract, and any license and permits pursuant to law."

[9] June 8, 2009 Letter to Dr. Diego García Carrión, Procurador del Estado de la Republica del Ecuador, from Ethan G. Shenkman and Howard M. Shapiro, Attorneys for MSDIA, attached hereto as Exhibit C-2.

25. Article VI(3)(b) of the Treaty provides that "[o]nce the national or company has so consented, either party to the dispute may initiate arbitration in accordance with the choice so specified in the consent." MSDIA submits this Notice of Arbitration in order to initiate arbitration in accordance with Article VI(3)(b) of the Treaty.

IV. NATURE AND CIRCUMSTANCES OF THE DISPUTE

A. MSDIA's Chillos Valley Plant

26. For nearly 40 years, MSDIA has done business in Ecuador and made available essential pharmaceutical products to the Ecuadorian people. In doing so, MSDIA has contributed substantially to the public health and welfare of Ecuador and its population.

27. In November 1973, MSDIA purchased 17,982 square meters of land in the Chillos Valley, about 15 kilometers from the center of the city of Quito, for a manufacturing facility. In 1974, MSDIA constructed a small plant on the land, which included production and warehousing areas. Operations at the plant began in 1975.

28. For the next 30 years, MSDIA operated the facility for the manufacture of pharmaceutical products. As of early 2002, MSDIA had approximately 80 employees at the facility.

29. In late 2001, MSDIA made a business decision to consolidate its manufacturing operations in Latin America. As part of that effort, MSDIA reviewed its manufacturing operations in Ecuador and concluded that its production should be transferred to MSDIA plants in other countries. MSDIA therefore decided to sell the Chillos Valley plant, together with its equipment if possible.

B. Sale of MSDIA's Chillos Valley Plant

30. In early 2002, MSDIA took initial steps to market and sell the Chillos Valley plant. It engaged Staubach Tie Leung Spanish Americas & Caribbean Inc. ("Staubach"), the Panama branch of a leading global real estate broker, to appraise the plant and promote the sale.

31. Beginning in February 2002, MSDIA and Staubach sent notices to more than 100 companies, including companies in Latin America, Europe, North America, and Asia. A number of companies expressed interest in the plant, and several potential purchasers visited the plant and placed bids.

32. One of those companies was NIFA, a small Ecuadorian pharmaceutical manufacturer that sold over-the-counter and generic prescription drugs.[10] NIFA had a very small share of the overall Ecuadorian pharmaceutical market, with its product sales accounting for between 0.12% and 0.14% of the total Ecuadorian pharmaceutical market between 2002 and 2004, and its generic product sales accounting for an average of only 2.7% of the generic pharmaceutical

[10] NIFA became "PROPHAR S.A." in August 2010.

market during that period. NIFA's total sales in 2002 were only $2.4 million, and its profits on those sales were just $2,165.[11]

33. NIFA expressed an interest in acquiring the Chillos Valley plant and some of its equipment, and MSDIA entered into negotiations with NIFA. In May 2002, MSDIA and NIFA executed a confidentiality agreement under which they agreed to keep confidential any business information exchanged during the process.[12] In that confidentiality agreement, NIFA and MSDIA agreed that "[n]othing contained in this Agreement or in any discussions undertaken or disclosures made pursuant hereto shall be deemed a commitment by [NIFA], on the one hand, or MSD[IA], on the other hand, to engage in any business relationship, contract or future dealing with each other."

34. Throughout the subsequent negotiations, NIFA expressed reservations about the MSDIA plant, complaining on numerous occasions that it was outdated, not suitable to NIFA's needs, and would require a complete overhaul. NIFA also repeatedly told MSDIA that it was considering other options for expanding its business, including building its own plant. For example, at one point, NIFA halted the negotiations, informing MSDIA that it had decided not to purchase the plant because it had concluded that constructing its own facility would be less expensive than performing the necessary upgrades on the MSDIA plant. At another point, NIFA informed MSDIA that it was in discussions with Albanova, another Ecuadorian pharmaceutical company, for the purchase of that company's plant.

35. On November 20, 2002, MSDIA and NIFA met at Staubach's offices in Panama. The parties discussed terms of a proposed sale, including price, tax obligations, and method of payment.[13] Subject to reaching a final agreement on all terms, the parties agreed in principle on a purchase price of $1.5 million. On the same day, MSDIA memorialized the terms discussed at the Panama meeting in a letter transmitted electronically, and NIFA approved the letter via email on November 26, 2002. The letter made clear it was neither a letter of intent nor a contract, stating that "[t]his letter is not binding the parties to any of the above until a letter of intent or a contract is signed."

36. Less than one week after the Panama City meeting, MSDIA discovered that, even while negotiating for the purchase of MSDIA's plant, NIFA had applied for and obtained certain registrations from the Ecuadorian Ministry of Health to produce the drug Rofecoxib, a patented drug that MSDIA had an exclusive right to market in Ecuador. Rofecoxib, which was sold in Ecuador under the trademark "Vioxx," was MSDIA's most valuable patent in Ecuador at the time.

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[11] Data on NIFA's profits and sales were derived from NIFA tax returns introduced into the Ecuadorian court record. Information on NIFA's market share was calculated from certified data compiled by the market research and data company, IMS Ecuador S.A., and introduced into the court record.

[12] Pursuant to this confidentiality agreement, MSDIA provided NIFA with extensive information regarding the plant, equipment and the configuration of MSDIA's operations. Also pursuant to that agreement, NIFA later provided a "business plan" to Staubach, so that Staubach could undertake to assist NIFA in obtaining financing for its purchase of the MSDIA plant.

[13] NIFA had not secured financing to purchase the facility at the time of the November 20, 2002 meeting. As a result, Staubach subsequently identified a source of financing, which the parties believed would be available to NIFA by March 2003.

37. NIFA's actions indicated that it planned to manufacture Rofecoxib in violation of MSDIA's exclusive rights, which had the potential to cause substantial damages to MSDIA's business in Ecuador. Moreover, NIFA's apparent plans to violate Merck's intellectual property rights with respect to Rofecoxib gave rise to a more general concern about other ways in which NIFA's business practices might harm MSDIA's business. MSDIA was concerned that, if NIFA acquired the MSDIA plant and equipment, NIFA might manufacture and market other products produced by MSDIA in a way that could confuse consumers as to their true origin.

38. MSDIA explained these concerns to NIFA. The parties met at MSDIA's offices in Quito on January 22, 2003. At that meeting, MSDIA proposed to address its concerns by proceeding with the proposed sale if NIFA agreed that it would not produce copies of MSDIA's products at the plant for five years after the sale. After some preliminary discussions on MSDIA's proposal, NIFA walked out of the meeting and terminated the negotiations. MSDIA then decided to seek a different purchaser for the plant.

39. MSDIA subsequently began negotiations with Ecuaquimica, an Ecuadorian company active in the pharmaceutical sector. In July 2003, MSDIA sold the plant (without the equipment) to Ecuaquimica for $830,000.[14]

C. Proceedings in the Second Court for Civil Affairs of Pichincha

40. In December 2003, NIFA filed a complaint in the Juzgado Segundo de lo Civil de Pichincha (Second Court for Civil Affairs of Pichincha), an Ecuadorian court of first instance, seeking $200 million in damages from MSDIA.

1. NIFA's Claims

41. Without any basis in fact, NIFA alleged that MSDIA had engaged in a "scheme" intended to eliminate NIFA as a competitor; that MSDIA had never intended to sell NIFA its plant, but instead had used the transaction as a pretence to obtain NIFA's confidential business plans and prevent NIFA from exploring other potential facilities; and that MSDIA then introduced new and unacceptable terms into the negotiations, destroying NIFA's hope to grow its business.

42. NIFA's complaint did not clearly state the legal basis upon which NIFA was allegedly entitled to recover damages. Over the course of the proceedings, NIFA explained that it was claiming some sort of antitrust violation, apparently on the theory that MSDIA had used an allegedly dominant market position to prevent NIFA from introducing new products into the pharmaceutical market.

43. This notion had no support either in the facts of this case or in the law of Ecuador. At both the time of the events at issue and at the time of NIFA's 2003 court filing, Ecuador had not

[14] MSDIA executed the sales deed for the plant with an affiliate of Ecuaquimica. Because Ecuaquimica did not want it, MSDIA sold the equipment separately to other parties.

adopted any antitrust laws.[15] Moreover, even if Ecuadorian law had included a substantive competition law and had recognized antitrust claims at the relevant times (which it did not), NIFA's antitrust theory had no basis whatever in the objective facts. MSDIA did not and does not have a dominant position in the Ecuadorian pharmaceutical market; in fact, in 2002 it had only a 3% market share. At least seven other companies had an equal or larger share of the market.[16]

44. Moreover, NIFA also had a small position in the Ecuadorian pharmaceutical market, with market share of only 0.12% and profits of only $2,165 in 2002. Apart from exploitation of product confusion issues, had NIFA operated the plant, NIFA would not have presented any sort of threat to MSDIA. MSDIA therefore had neither the means nor any reason to erect barriers to NIFA's expansion of its business. It is noteworthy that, when MSDIA's discussions with NIFA foundered, MSDIA sold its plant to another Ecuadorian company active in the pharmaceutical sector.

45. Nor could NIFA explain why MSDIA's decision to sell its plant to another company had caused NIFA any significant harm. After the negotiations for MSDIA's plant ended, NIFA remained free to build its own manufacturing facility, to expand its own existing facilities or to purchase another facility—in each case, an option that it had made clear during the negotiations that it was seriously considering. And NIFA remained free both throughout and after the negotiations to pursue other options as well.

46. Finally, NIFA's alleged damages of $200 million were entirely fantastic. NIFA's net profit in 2002 was only $2,165. NIFA offered no explanation how lost profits from the failed transaction could possibly amount to $200 million—*nearly 100,000 times NIFA's annual profits in 2002 and more than 133 times what it had been willing to pay for the plant.*

2. Proceedings before Judge Juan Toscano Garzón

47. NIFA's complaint was assigned to Judge Juan Toscano Garzón, who presided over the entire evidentiary phase of the trial. Between mid-2004 and mid-2006, Judge Toscano oversaw the compilation of a voluminous evidentiary record. That record included detailed public filings and data on the Ecuadorian pharmaceutical market and on NIFA's and MSDIA's financial performance, as well as hundreds of documents generated during the parties' negotiations in

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[15] The Republic of Ecuador has repeatedly affirmed that it did not have any antitrust norm or antitrust regulation at the time of the relevant events, and its courts' rulings to the contrary are plainly unjust and irrational, and violate fundamental principles of due process. In March 2005, the Andean Commission adopted Andean Decision No. 608, by its own terms a regional competition standard that applied only to conduct having effects in more than one Andean Community member state. In the Decision, the Andean Commission expressly recognized that Ecuador had no internal antitrust law at the time. In March 2009, in Executive Decree No. 1614, President Correa expressly declared that "Ecuador did not have an internal economic competition norm on the date that Decision 608 was enacted" (*i.e.*, March 2005), and had not yet enacted an internal antitrust law as of the date of Executive Decree No. 1614. Indeed, it was not until 2011 that Ecuador adopted an internal antitrust law of its own. Organic Law of the Regulation and Control of the Power of the Market, Official Register Supplement No. 555 (October 13, 2011).

[16] The Ecuadorian pharmaceutical market was highly competitive. In 2003, the top 20 companies all had market shares between 2% and 6%.

2003. Judge Toscano also conducted several judicial inspections, appointed six experts (several of whom filed multiple reports), and admitted testimony of two former Staubach employees.

48. NIFA offered no evidence that supported its claim that MSDIA had committed an antitrust violation, and the only evidence NIFA offered to support the extent of its alleged harm was a "business plan," prepared by NIFA in October 2002 for the purpose of securing financing for the purchase. NIFA's "business plan" forecast the total aggregate profit NIFA could earn from MSDIA's plant between 2003 and 2012 at $12.9 million—less than $1.3 million per year.

49. Moreover, NIFA's "plan" was built on plainly unrealistic assumptions, including that NIFA would enjoy significant sales of Rofecoxib, which would have violated MSDIA's intellectual property rights, and would achieve a profit margin in excess of the 25% maximum profit allowed under Ecuadorian laws that regulate the price of medicines.[17] But even NIFA's own overly optimistic plan—which constituted its primary evidence of damages—fell more than $187 million short of the $200 million in lost profits it claimed.

50. The trial court committed a number of procedural irregularities and violations of Ecuadorian law during the evidentiary phase of the proceedings. Among other things, Judge Toscano admitted evidence offered by NIFA under clearly improper circumstances and failed to rule at all on several legitimate motions and defenses raised by MSDIA during the proceedings.

51. For example, NIFA introduced the testimony of just one witness, a former Staubach employee who was involved in the early stages of the negotiations between the parties. On Friday, June 25, 2004, NIFA filed a written petition with the court, five minutes before the close of the court day, at 4:55 p.m., asking for the first time for the witness' testimony. Twenty-five minutes later, at 5:20 p.m., after the close of the court day, the court granted the petition and ordered that her testimony be taken at 8:00 a.m. on Monday, June 28. MSDIA's counsel did not receive notice of her testimony until after her testimony commenced, and were not present to observe her testimony or to put questions to her in cross-examination.

52. The next day, MSDIA's counsel objected to the testimony of NIFA's witness, petitioned for the court to permit MSDIA to cross-examine the witness, and introduced 12 written questions for that purpose. On August 18, 2005 (more than one year after the witness initially testified), the court issued a decree announcing that the witness' cross-examination should take place on any day beginning August 29, 2005 or thereafter. MSDIA submitted a petition requesting that the court set a specific date and time for the testimony, so that counsel for MSDIA could appear and confront the witness, and submitted 18 additional cross-examination questions. But on August 29, 2005, without additional notice to MSDIA's counsel, while MSDIA's petition that the court set a time for the testimony remained pending, the court took the witness' testimony. MSDIA's counsel were not present. The court put MSDIA's original 12 questions to the witness, but did not ask the additional 18 questions MSDIA had submitted with its petition.

[17] Article 3 of the Law on Production, Import, Marketing and Sales of Generic Drugs for Human Use, Official Registry Number 59, April 17, 2000 and Article 2 of the Rules of the National Council on Pricing and Price Review of Drugs for Human Use, Official Registry Number 84, May 24, 2000 set the prices of generic drugs sold in Ecuador so as to provide a maximum profit margin of 25%.

53. The court's decision to allow NIFA's only witness to testify on two separate occasions without prior notice to MSDIA of the time and place was highly irregular, deprived MSDIA of an opportunity to appear for the testimony or cross-examine the witness, and is evidence of the court's bias against MSDIA and partiality towards the Ecuadorian plaintiff.[18]

3. Proceedings before Judge Victoria Flordelina de Lourdes Chang Huang Castillo

54. On September 17, 2007, more than one year after the close of the evidentiary phase of the trial, Judge Toscano was elevated to the court of appeals, and Judge Victoria Flordelina de Lourdes Chang Huang Castillo was assigned to replace Judge Toscano as the presiding judge.

55. The case files resided in the court's archives, and Temporary Judge Chang-Huang took no action on the case for three months after her appointment. Then, on Wednesday, December 12, 2007, court records show that the trial record of more than 6,000 pages was transmitted to her office for the first time. Court records also reveal that she "took cognizance" of the matter (a step under Ecuadorian civil procedure by which the judge formally takes jurisdiction) five days later, on December 17, 2007, at 2:06 p.m.

56. Less than three and a half hours later, at 5:30 p.m. on December 17, Temporary Judge Chang-Huang issued a 15-page decision in favor of NIFA awarding it the entire $200 million in damages that it had claimed.[19] In the 204 minutes from the time she took cognizance of the case until she issued her decision, it was obviously impossible for Temporary Judge Chang-Huang meaningfully to review the voluminous record or consider and compose the 15-page judgment.

57. Indeed, Temporary Judge Chang-Huang's written decision demonstrated that she was unfamiliar with the record. Her decision adopted wholesale NIFA's unsupported allegations as if they had been proven and entirely ignored the contrary evidence submitted by MSDIA. The decision consisted largely of a verbatim recitation of NIFA's complaint—with no acknowledgment that it was doing so—including a number of identical typographical and grammatical errors.[20]

58. Two linguistics experts have compared a number of other judgments issued by Temporary Judge Chang-Huang to the NIFA decision. Those experts have concluded, based on various indicia including grammar and style, that the *NIFA* decision was likely authored by someone other than Temporary Judge Chang-Huang. As noted in Section V below, the United States Department of State has acknowledged that there have been numerous media reports in

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[18] It is notable that these proceedings were under the direction of the original trial court judge, Judge Toscano. When Judge Toscano was later elevated to the court of appeals, he nominated NIFA's trial counsel in this matter, Juan Carlos Andrade, as his "alternate" judge for cases in which he would be recused.

[19] The Ecuadorian first instance court decision is attached hereto as Exhibit C-3.

[20] For example, both NIFA's complaint and Judge Chang-Huang's decision contain the phrase "... por lo cual se encutra en el domino público, lo que equivale ...." The word "domino" means "dominate," and is plainly a typographical error. The correct word in this phrase would be "dominio," meaning "domain." With the correction, the phrase reads "...that is why it is in the public domain, which is equivalent...." In the original text of both the complaint and the decision, the phrase reads "that is why it is in the public dominate, which is equivalent." The fact that Judge Chang-Huang's decision contains this nonsensical phrase strongly suggests that she neither drafted nor meaningfully reviewed the text of her decision. There are other, similar examples in the two documents.

Ecuador "on the susceptibility of ... judges parcelling out cases to outside lawyers, who wrote the judicial sentences and sent them back to the presiding judge for signature."[21] In this case, circumstances suggest the decision likely was at least in part the work product of plaintiff's counsel.

59. Temporary Judge Chang-Huang's decision also referred to antitrust theories that had no basis in Ecuadorian law or in the evidence. As set forth above, Ecuador had not adopted *any* antitrust law at the time of the court's judgment. In these circumstances, no unbiased and impartial court, ruling in 2007 and addressing events that occurred in 2002 and 2003, could have upheld a claim based on purported antitrust theories. [22]

60. Moreover, even if Ecuadorian law *had* recognized antitrust claims at that time, which it did not, Temporary Judge Chang-Huang's decision did not explain how MSDIA could have violated any conceivable antitrust principle. The court's suggestion that MSDIA had market power to exclude NIFA's products from the Ecuadorian pharmaceutical market was demonstrably false. As noted above, MSDIA had a market share of barely 3% in 2002. That same year, there were seven participants with market shares equal to or larger than MSDIA. Moreover, the Ecuadorian pharmaceutical market was very competitive. No participant held more than a 6% market share in 2002 or 2003.

61. Moreover, even if MSDIA had in fact possessed dominant market power—which it did not—MSDIA had not prevented NIFA from doing anything that NIFA had any right to do. Although MSDIA had sold its plant to another Ecuadorian company, rather than to NIFA, MSDIA had not prevented NIFA from expanding its business, introducing new products to the market, buying other facilities or building its own facilities. And antitrust principles could not have imposed any obligation on MSDIA to sell its plant at all, much less to NIFA rather than another Ecuadorian company.

62. The first instance court accepted as if it were fact NIFA's allegation that there were no alternative means of expansion available to NIFA, other than MSDIA's small plant. This conclusion was unsupported and flatly contradicted by the evidence in the record. That evidence

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[21] U.S. Department of State, 2010 Country Report on Human Rights Practices – Ecuador, Apr. 8, 2011, at 9, http://www.state.gov/documents/organization/160163.pdf. After Temporary Judge Chang-Huang issued the judgment in December 2007, MSDIA discovered that at least four administrative complaints were filed against her in connection with her conduct during the first three months on the bench alone. She was removed from the Court for Civil Affairs on July 7, 2010. On March 10, 2011 Ms. Chang-Huang testified before a Committee of Ecuador's National Assembly in proceedings related to allegations of corruption against members of the Council of the Judiciary. Ms. Chang-Huang testified that as a judge she had been pressured by then-Council president Benjamin Cevallos and member Luis Germán Vásquez Galarza, and that in one unnamed case, she was offered (and claimed she rejected) a bribe of $2 million. She refused to discuss the *NIFA* case. *See* Testimony of Chang-Huang before the Auditing Commission of the Ecuador National Assembly (March 10, 2011).

[22] In her decision, Temporary Judge Chang-Huang also referred to the doctrine of *culpa in contrahendo* – a cause of action for "fault in contracting" not recognized in Ecuador. In national legal systems that recognize *culpa in contrahendo*, (such as Bolivia, Italy and Germany), it is set forth in explicit legal provisions. *See, e.g.*, Article 1337 of the Italian Civil Code, Articles 122, 179, 307 and 309 of the German Civil Code and Article 465 of the Bolivian Civil Code. By contrast, Ecuadorian law regulates contractual negotiations in articles 1453 and 2184 of the Civil Code, and these articles do not recognize *culpa in contrahendo*. NIFA did not invoke *culpa in contrahendo* in its complaint and had offered no evidence to support such a claim. As noted below, even the court of appeals – which otherwise ruled across the board in NIFA's favor – did not rely upon this theory.

showed that NIFA had been in parallel negotiations for other potential manufacturing space at the same time it was negotiating with MSDIA and that NIFA had also considered expanding its existing facility or building a new facility on open land instead of purchasing an existing one. Indeed, even NIFA's own (and only) witness testified during the first instance court proceedings that there were three other pharmaceutical manufacturing facilities available for sale at the same time as the MSDIA plant. Temporary Judge Chang-Huang ignored all of this evidence.

63. Temporary Judge Chang-Huang also failed to undertake any analysis whether NIFA had suffered damages or the magnitude of those damages. Her decision simply awarded $200 million—the amount NIFA had claimed in its complaint—by fiat. Her decision cited NIFA's October 2002 business plan in support of the damages award (without addressing the shortcomings of that document), but did not attempt to explain how a business plan valuing the acquisition to NIFA at *$12.9 million* over the 10 succeeding years—even if credited—could justify *$200 million* in damages. And of course, it cannot justify such an award. The award exceeds the only evidence of damage that NIFA itself offered by *more than $187 million.*

64. Nor could NIFA's business plan reasonably be credited. As noted above, NIFA's net profit in 2002 was $2,165.[23] In 2002, the *entire Ecuadorian market for generic pharmaceuticals*, of which NIFA had only a small market share, totalled only $20.4 million in *sales*.[24] There is no basis in reason for Temporary Judge Chang-Huang's entirely unexplained holding that the damages resulting from the failed negotiations were (i) nearly *100,000 times* NIFA's own annual profits in 2002, (ii) *133 times* the proposed purchase price of the facility ($1.5 million), (iii) and *10 times* the size of the *entire* Ecuadorian generics market—in *gross sales*—that year.

65. MSDIA was not given proper notice of Temporary Judge Chang-Huang's decision. The decision was issued at 5:30 p.m. on December 17, 2007. Under Ecuadorian procedural law and regular court practice, a hard copy notice of a judgment is placed in a mailbox at the court for the law firm that is on record as counsel in the proceedings.[25] Inexplicably, a notice of Temporary Judge Chang-Huang's judgment was never placed in the mailbox of MSDIA's counsel.

66. Under Ecuadorian procedural law and regular court practice, a copy of the full judgment is also sent electronically to counsel of record. When the court transmitted the judgment electronically to MSDIA's counsel on the day the judgment was issued, however, the text of the decision was truncated, and it did not include the section of the judgment that included, among other critical items, the court's award of damages. Thus, someone reviewing the judgment sent electronically by the court would know that it addressed liability but not that it included an award of $200 million in damages.

67. Ecuadorian procedural law requires a party to file notice of appeal of an adverse judgment within just *three days* of notice of the decision.[26] If a party does not file notice of appeal within three days, it will have waived its appeal. The court's inexplicable failure to place notice of the judgment in MSDIA's counsel's mailbox at the court and its omission of the

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[23] NIFA's average net profit over the years 2001 to 2003 was approximately $8,400.

[24] According to market data compiled by IMS Ecuador S.A., and introduced into the Ecuadorian court record, NIFA had a market share of 2.4% of the generics market in 2002.

[25] Ecuadorian Code of Civil Procedure Article 75.

[26] Ecuadorian Code of Civil Procedure Article 324.

amount of damages awarded in the incomplete copy transmitted electronically appear to have been calculated to prevent MSDIA from exercising its right to appeal.

D. Proceedings in the Provincial Court of Justice of Pichincha for Commercial and Civil Matters

68. Despite the court's failure properly to notify MSDIA of the decision, MSDIA was able to file a timely appeal to the Provincial Court of Justice of Pichincha for Commercial and Civil Matters (the "court of appeals"). On July 7, 2008, the case was assigned to the First Chamber of that Court before judges Alberto Palacios, Beatriz Suárez and Juan Toscano Garzón.[27]

1. Notice of Court Taking Possession of the Case

69. The court of appeals formally took possession of the case on July 15. Under Ecuadorian procedural law, once the court of appeals has taken possession, the appellant has ten business days to file its "Fundamentation of Appeal," or opening appeal brief.[28] If a party fails to file its Fundamentation within that ten day window, it will have waived its right to appeal.[29]

70. Although the court of appeals formally took possession of the case on July 15, MSDIA was not properly notified that this had occurred. In fact, MSDIA did not learn until the late afternoon of July 29, the last day of the ten-day period, that the court had taken possession of the case. MSDIA was nevertheless able to file its already extant draft of its Fundamentation just minutes before the deadline expired. Again, the court's failure to notify MSDIA that it had taken possession of the case appears to have been calculated to prevent MSDIA from exercising its right to appeal.

2. The Evidence in the Court of Appeals

71. In the court of appeals proceedings, NIFA based its case entirely on an alleged antitrust violation, arguing that MSDIA had "abused" a "dominant position" in order to prevent NIFA from entering some unspecified market or markets. NIFA further argued that MSDIA should be held liable under antitrust principles despite the fact that there had been no antitrust law in effect in Ecuador in 2002 and 2003, or for many years thereafter.

72. As was the case in the first instance court, NIFA again failed to provide any support for its case. NIFA offered no witnesses in the court of appeals proceedings, either on the failed negotiations or on its alleged damages. The only supplementary "evidence" of damages NIFA offered was a document purportedly prepared by a market research and data company, IMS Ecuador S.A. This purported "IMS report" consisted of a Microsoft Excel spreadsheet that was submitted electronically on CD, accompanied by a one-page cover letter purportedly signed by an IMS Ecuador employee. NIFA filed the IMS report at 5:00 p.m. on the last day of the evidence period set by the court for submitting evidence.

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[27] Judge Toscano was the same judge who had handled the proceedings in the trial court from 2003 through 2007, when he was replaced by Judge Chang-Huang. Judge Toscano participated in the first year of the court of appeals proceedings, then recused himself and was replaced by Permanent Assistant Judge Marco Callejo Jijón in June 2009.

[28] Ecuadorian Code of Civil Procedure Article 408.

[29] Ecuadorian Code of Civil Procedure Article 408.

73. MSDIA objected to both the admissibility and the substance of the "IMS report." Among other things, MSDIA objected that IMS had previously supplied certified market data to MSDIA, which MSDIA had submitted as evidence to the court of appeals. The "IMS report" submitted by NIFA used data that was not certified by IMS, and that was inconsistent with the certified data that had been supplied by IMS and was in the court record. MSDIA also demonstrated that the "IMS report" contained historical sales figures for NIFA that were inconsistent with disclosures NIFA had made in its tax filings with the Ecuadorian government. In addition, the "IMS report" included as "lost sales" projected sales of Rofecoxib by NIFA, which would have violated MSDIA's intellectual property rights. In each case, the impact of these data inconsistencies was to increase the supposed "lost sales" suffered by NIFA.

74. MSDIA asked the court to permit it to take the testimony of the IMS Ecuador employee over whose signature the report was purportedly submitted. The court of appeals rejected MSDIA's request on the basis that no witness testimony would be heard after 5:00 p.m. on the last day of the evidentiary period—i.e., the precise time at which NIFA had submitted the "IMS report." MSDIA was therefore denied any opportunity to challenge this evidence—e.g., whether it was what it purported to be or any of its contents. The court declared that the report was appropriately placed into the record and never addressed the remainder of MSDIA's objections. Eventually, the court relied on the purported "IMS report," which it had insulated from all challenge, in its decision to award damages of $150 million.

75. Even taking the "IMS report" at face value, however, that "report" did not support NIFA's claims. The "IMS report" purported to calculate NIFA's "lost *sales*" at $28 million. It did not purport to calculate NIFA's purported lost *profits*. At NIFA's historical average profit margin (between 2003 and 2006) of 3.2%, however, lost *sales* of $28 million would translate to lost *profits* of less than *$1 million*. NIFA offered no other evidence to support its claim of lost profits.

76. NIFA alleged, without support, that it had no alternative options to expand its operations after the negotiations with MSDIA ended. But MSDIA demonstrated through documents and testimony that NIFA had been free to expand its existing facility, and was otherwise free to acquire one of the many manufacturing facilities available for sale at the time, or to construct a new facility on one of the dozens of available and properly-zoned parcels of land in the Quito area.

77. MSDIA offered expert evidence from a number of well-qualified experts, including an expert on antitrust law, and two experts on damages. As to antitrust law and principles, MSDIA introduced a written expert opinion prepared by Dr. Luis Jose Diez Canseco Núñez. Dr. Diez Canseco is a distinguished Peruvian attorney and an internationally-recognized expert in Latin American competition law. Dr. Diez Canseco had worked for the U.N. Conference on Trade and Development, the World Intellectual Property Organization, and the Andean Community General Secretariat. He had served as a consultant on competition and related issues to various South American and European countries, the World Bank, the Inter American Development Bank and USAID.

78. Dr. Diez Canseco explained that Ecuadorian law did not include antitrust principles and thus could not provide a basis for liability in this case. Moreover, on the basis of a close review

of the record, he concluded that even if an antitrust law had been in place in Ecuador, MSDIA did not hold a dominant position in any conceivably relevant market and had not engaged in anti-competitive conduct that could serve as a basis for liability.

79. MSDIA also introduced written opinions from two independent, leading and highly-respected Ecuadorian experts in damages, Rolf Stern and Walter Spurrier Baquerizo. Each of them concluded that NIFA had demonstrated no harm from its failure to acquire the plant and as a result was entitled to no damages.

3. Court-Appointed Experts

80. Under the rules of Ecuadorian procedure, at the request of a party, the courts may appoint "court-appointed" experts to opine on specified issues. Whenever possible, the courts appoint individuals that have been "accredited" as experts in the relevant subject matter by the regional office of the Council of the Judiciary.[30] Where a party has requested that the court appoint an expert in a subject matter for which there are no accredited experts, the court may seek recommendations from other bodies, such as a relevant Ecuadorian government ministry or trade association.

81. MSDIA requested that the court of appeals appoint an expert in antitrust law, two experts in damages, and an expert in real estate. NIFA separately requested that the court of appeals appoint an expert in damages.

Court-Appointed Real-Estate Expert – Manuel Silva

82. The court of appeals granted MSDIA's request to appoint an expert in real estate, in June 2009, naming a well-respected Quito-area real estate broker, Manuel Silva, to examine the real estate evidence already introduced into the record by MSDIA and provide an independent expert report.

83. On December 23, 2009, Mr. Silva filed his expert report with the court of appeals. He concluded that NIFA had had available to it a number of alternatives, other than MSDIA's Chillos Valley plant, if it had wished to expand its business. In fact, he found that NIFA had succeeded in expanding its own existing facility after the termination of the negotiations with MSDIA (one of the alternatives it had been considering during the negotiations). Thus, without the factory, NIFA had been able to take advantage of opportunities for expansion presented by

[30] Ecuadorian Code of Civil Procedure Article 252. The Council of the Judiciary was dissolved in July 2011 and replaced by a three-person "Transitional Judiciary Council," which was established via popular referendum in May 2011. The Transitional Judiciary Council assumed all duties of the Council of the Judiciary, including the power to replace all sitting judges in Ecuador. Executive Decree No. 872 (September 6, 2011) (declaring judicial emergency in Ecuador). Shortly after its establishment, the Transitional Judiciary Council announced a process by which it intended to select new judges for every court in the country, beginning with the National Court of Justice. On September 20, 2011, it established January 20, 2012, as the date a new National Court of Justice, with new membership that is yet to be announced, will be in place. *Proceso Para Elegir a Los 21 Jueces Nacionales Desde Próxima Semana,* El Universo (September 20, 2011), http://www.eluniverso.com/2011/08/20/1/1355/proceso-elegir-21-jueces-nacionales-desde-proxima-semana.html ("Tal como estaba previsto, el Consejo de la Judicatura Transitorio (CJT) convocará al concurso público para reestructurar la Corte Nacional de Justicia (CNJ) en el transcurso de la próxima semana. Se prevé que lo haga el lunes 22. Según el organismo, la nueva Corte empezará a funcionar en enero del 2012.")

the market. Moreover, NIFA had been free under applicable zoning regulations to expand its facility further.

84. Mr. Silva also found that there had been on the market and available to NIFA for purchase many properly-zoned industrial plants and other structures suitable for pharmaceutical manufacturing. Among other things, at least one other pharmaceutical plant (owned by the Ecuadorian pharmaceutical company Albanova) was on the market at the time, while another facility available at the time was subsequently purchased by Pfizer and converted into a pharmaceutical manufacturing facility. Mr. Silva also pointed out that NIFA itself owned unimproved property in 2003—which it sold to another Ecuadorian company four months after the end of its negotiations with MSDIA—on which it had been free under applicable zoning rules to construct a new facility.

Court-Appointed Antitrust and Damages Expert – Dr. Ignacio De Leon

85. The court of appeals also granted MSDIA's request to appoint an expert in antitrust law. There were no accredited experts in antitrust law on the Council of the Judiciary registry, presumably because Ecuador had no antitrust law, and so the court requested recommendations for such an expert from the Ecuadorian Competition Authority (which had been established in March 2009). The Competition Authority provided three names to the court of appeals, one of whom was the internationally-renowned Venezuelan competition lawyer, Dr. Ignacio De Leon. Dr. De Leon is a prominent expert in Latin American competition law, having served previously as head of the Venezuelan Competition Authority. More recently, he has provided consulting services on competition policy to organizations such as the World Bank, UNCTAD, the Andean Community and USAID.

86. On July 2, 2009, the court of appeals appointed Dr. De Leon as an expert on competition matters. At the same time, in response to NIFA's request for a damages expert, the court of appeals also appointed Dr. De Leon to serve as a damages expert. Neither party objected to Dr. De Leon's appointment to serve in either or both of those two capacities.

87. On February 17, 2010, Dr. De Leon filed his expert report. He concluded that NIFA's antitrust claims failed entirely for several independent reasons. First, he concluded that there were no applicable legal standards in place governing free competition in Ecuador in 2002 or 2003. NIFA had argued that the Ecuadorian Constitution established a legal or regulatory framework governing anticompetitive practices even in the absence of express statutory implementation, and the first instance court had appeared to adopt the same theory. Dr. De Leon found there was no legal support for that proposition. He concluded that the pertinent constitutional provision is merely programmatic and declaratory, that its application is expressly conditioned upon the future enactment of a law that would regulate practices contrary to free competition, and that as of 2002-2003 no such law had been enacted.

88. In fact, in 2002, the National Congress of Ecuador approved a bill intended to establish legal norms for free competition, but that bill was later vetoed by the President. As discussed above, it was not until Executive Decree No. 1614 of March 14, 2009 that an internal regulatory framework for free competition came into effect. These governmental actions would have been superfluous had a legal framework prohibiting anticompetitive conduct already been in place.

Dr. De Leon observed that these actions of the Ecuadorian government affirmed that there were no statutory or regulatory prohibitions against anticompetitive practices at the time of the parties' negotiations over sale of the plant.

89. Dr. De Leon then considered whether MSDIA could have been held liable if, contrary to fact, a prohibition against anticompetitive acts had been in effect in Ecuador. Dr. De Leon concluded that MSDIA's actions did not violate any accepted legal norm of competition law. Among other things, he concluded that (i) MSDIA did not hold a dominant position in the real estate or pharmaceutical markets, (ii) MSDIA's plant was not, as NIFA had suggested, an "essential facility," and (iii) even if MSDIA had held a dominant position in a relevant market, which it did not, MSDIA had not committed any act that could be viewed as abusing such a position.

90. Finally, as the court's appointed damages expert, Dr. De Leon concluded that NIFA had failed to demonstrate any harm, had failed to identify any illegal act that could have caused damage, and had failed to support its allegations regarding lost profits, which were at best wholly speculative.

91. Thus, the two independent, well-qualified experts appointed by the court (Mr. Silva and Dr. De Leon) had comprehensively analyzed the evidence and, based upon clear and cogent reasoning, had concluded that NIFA's claims were without foundation. These impartial, expert analyses should have conclusively resolved the dispute and resulted in the reversal of the first instance court decision and dismissal of NIFA's complaint. As of April 2010, there was every reason, based on the record, to expect that the court would do just that.

4. NIFA's Essential Error Petitions and the Court's Inexplicable Appointment of Additional Experts

92. Under Ecuadorian procedure, a party may challenge the opinion of a court-appointed expert by filing a petition, supported by evidence, asserting that the expert has committed "essential error." At the request of the petitioning party, the court may open a limited evidence period, during which it will accept evidence from the parties regarding the alleged "essential error." During this evidence period, the court can appoint an expert with a limited mandate to review the report of the original expert and opine whether it contains an "essential error." If, with the benefit of such evidence, the court concludes that the expert in fact committed "essential error," then the court may appoint a second expert in the same subject matter.[31]

93. In the months after Mr. Silva and Dr. De Leon filed their reports, NIFA filed unsupported petitions challenging those reports for essential error. And beginning in the summer of 2010, without identifying any evidence that could support a finding that Dr. De Leon and Mr. Silva committed essential error, the court of appeals improperly appointed additional experts in real estate, antitrust law and damages.

94. None of the new experts should have been appointed. Unlike Dr. De Leon, the new court-appointed experts in antitrust law and damages lacked basic credentials and rudimentary expertise in their respective fields. All three of the newly-appointed experts rejected the expert

[31] Ecuadorian Code of Civil Procedure Article 258.

evidence that had been submitted by the original court-appointed experts and submitted reports, with no apparent basis in fact or law, that were entirely favorable to NIFA.

Second Court-Appointed Real Estate Expert – Marco Yerovi

95. On February 8, 2010, NIFA filed a petition alleging that Mr. Silva had committed "essential error" and requesting that the court appoint a new expert to review Mr. Silva's report. NIFA failed to offer any factual basis for its charge. Nevertheless, on October 26, 2010, the court appointed Marco Yerovi as an expert on real estate matters to review the report of Mr. Silva.

96. On December 20, 2010, Mr. Yerovi submitted an expert report. Mr. Yerovi's report did not conclude that Mr. Silva had committed essential error. He did not challenge the basic, undeniable facts that NIFA had expanded its existing facility after the negotiations with MSDIA ended, and that alternatives to the MSDIA plant, identified by Mr. Silva, were readily available to NIFA in 2003 and thereafter. He agreed that the alternative manufacturing plants identified by Mr. Silva were available to NIFA in 2002 and 2003 and were zoned for pharmaceutical manufacturing.

97. Mr. Yerovi asserted, however, that none of those facilities was being used for pharmaceutical manufacturing. This was irrelevant, since such facilities could with some additional investment be adapted to that function. It was also contrary to the evidence in the record. Among other things, documentary evidence demonstrated that a manufacturing facility owned by the Ecuadorian pharmaceutical company Albanova was available for sale during 2002 and 2003, and NIFA's only witness in the proceedings (a Staubach employee) had testified that *three* other pharmaceutical facilities in the Quito area were on the market at the same time. MSDIA alerted Mr. Yerovi to documentary evidence that directly refuted his conclusions, and submitted a petition requesting that he clarify his report accordingly, but Mr. Yerovi refused to consider that evidence or revise his report.

Second Court-Appointed Antitrust Expert – Carlos Guerra

98. Shortly after Dr. De Leon filed his expert report, Dr. Carlos Guerra, an Ecuadorian intellectual property lawyer, filed an application with the Council of the Judiciary to be accredited as an antitrust expert. *Dr. Guerra's application reflected no prior experience or training in competition law whatsoever.* His application (which included details such as having completed a single-day seminar in import-export law) included no relevant education or experience in the subject matter for which Dr. Guerra sought to be accredited—antitrust. The application did not explain what factors had moved Dr. Guerra, despite his lack of credentials, to seek this particular accreditation at that particular time. *Despite Dr. Guerra's complete lack of qualifications, the Council of the Judiciary approved his application on the very day it was submitted, April 5, 2010.*

99. On May 11, 2010, NIFA filed an "essential error" petition requesting the appointment of an additional antitrust expert to review Dr. De Leon's report. NIFA offered no support at all for its request.

100. On December 10, 2010, despite NIFA's failure to offer any evidence or basis for doing so, the court of appeals appointed Dr. Guerra, who at that time remained the only person accredited as an antitrust expert by the Council of the Judiciary, to review Dr. De Leon's antitrust analysis.

101. On February 14, 2011, Dr. Guerra submitted a report concluding that Dr. De Leon had committed essential error and that MSDIA could be held liable under antitrust principles. His report was fraught with plagiarized text, obvious analytical errors, mistakes of Ecuadorian law and misstatements and misapplications of broadly accepted antitrust principles.

102. Among other things, Dr. Guerra concluded that MSDIA's plant had constituted an "essential facility," a finding with no support in antitrust law. In order for a resource to qualify as an "essential facility" as the concept is recognized in antitrust law, a facility must be controlled by a monopolist, it must constitute an input without which other firms cannot compete with the monopolist, and its reproduction must be impracticable for technical or financial reasons.[32] Moreover, the remedy where a facility is found to be "essential" under the doctrine is typically shared use of the essential resource in exchange for a reasonable royalty. Thus, the concept is most commonly associated with shared access to utility lines owned by a single enterprise.[33] To apply the concept to a single manufacturing facility used by a single company in a multi-company market is absurd on its face.

103. Dr. Guerra plagiarized extensively—and misleadingly—from existing antitrust works, without attribution. Among others, Dr. Guerra plagiarized the work of an Argentinean economist and competition expert, Dr. Diego Petrecolla. The Ecuadorian Competition Authority had recommended Dr. Petrecolla, along with Dr. De Leon, to the court of appeals as a potential court appointed competition law expert.[34]

104. After Dr. Guerra submitted his report, MSDIA requested that Dr. Petrecolla review the reports submitted by Dr. De Leon and Dr. Guerra and prepare his own report, comparing the work of the two court-appointed experts and commenting on the issues of antitrust law presented in the case. MSDIA believed Dr. Petrecolla was well suited to this task because the Competition Authority had previously identified him as a leading antitrust expert when the court of appeals had asked for recommendations.

105. On March 11, 2011, Dr. Petrecolla's report was submitted to the court of appeals. Dr. Petrecolla's analysis revealed that Dr. Guerra had extensively plagiarised Dr. Petrecolla's work,

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[32] *See, e.g.* Abbott B. Lipsky Jr. y J. Gregory Sidak, *Essential Facilities*, in: Ius et Veritas. Year XIV, Number 27. Lima, December 2003, p. 143 et seq; Pitofsky, Patterson and Hooks, The Essential Facilities Doctrine under United States Antitrust Law, 70 Antitrust L.J. 443 at 448-450 (2002) (collecting cases and noting that "[t]his test for antitrust liability has been adopted by virtually every court to consider an 'essential facilities' claim").

[33] *See, e.g., MCI Communications v. American Tel. & Tel. Co.*, 708 F.2d 1081, 1132-33 (7th Cir. 1983) (requiring a telecommunications provider to provide access to the local service network, over which it held a monopoly, to competitors in long-distance services).

[34] Dr. Petrecolla has served as the Chief Economist for Argentina's National Competition Commission and as Director of the Center for Regulatory Studies of the World Bank Institute. In addition, he has advised the governments of El Salvador, Costa Rica, Uruguay and Ecuador on competition issues, and has served as a consultant on competition and utility regulation to the World Bank, Inter-American Development Bank and United Nations Conference on Trade and Development.

explained that Dr. Guerra had misused and misapplied that work, explained that Dr. Guerra's analysis and conclusions were wholly unfounded, and explained that Dr. De Leon's conclusions in contrast had reflected sound antitrust analysis and were entirely correct.

106. Thus, by the close of evidence in the court of appeals, NIFA had affirmed that its case was based entirely on antitrust law, and the court record contained four expert reports on that topic. Three of the reports had been prepared by internationally recognized competition lawyers and economists: the court-appointed Dr. De Leon; the Competition Authority-recommended Dr. Petrecolla; and the similarly highly-credentialed Dr. Diez Canseco. Each of them had explained that there was no conceivable basis for antitrust liability on the facts and law of this matter. The court of appeals never held that its own original court-appointed expert, Dr. De Leon, had committed essential error. It never issued a decree rejecting the reports of any of these experts.

107. Only one report—the report submitted by Dr. Guerra, a lawyer with no expertise, qualifications or apparent experience in antitrust law, who had been accredited as an antitrust "expert" while the case was pending under highly suspicious circumstances, and who had plagiarised much of his analysis and misapplied what he plagiarized—had asserted that MSDIA could be held liable for antitrust violations. Dr. Guerra's report was based on manifest misapplication of antitrust principles, and had there been any doubt about this proposition, Dr. Petrecolla explained it very clearly to the court of appeals.

Second Court-Appointed Damages Expert – Cristian Cabrera

108. NIFA did not submit an essential error petition challenging Dr. De Leon's conclusions on damages. Under Ecuadorian procedure, this would be the only basis on which the court could appoint another damages expert.

109. Nevertheless, after the time periods for seeking the appointment of experts or filing an essential error petition had passed, on November 5, 2010, NIFA requested that the court of appeals appoint an additional damages expert. NIFA made another request to the court to appoint an expert on damages on April 8, 2011. The court granted NIFA's request on April 25, 2011, and appointed an Ecuadorian accountant, Mr. Cristian Cabrera, to review Dr. De Leon's damages analysis for essential error. *Notably, as with Dr. Guerra's appointment as an antitrust expert, Mr. Cabrera's application for accreditation as a damages expert demonstrated no prior experience in the relevant field of damages and lost profits analysis.*

110. Mr. Cabrera was appointed over MSDIA's objection that NIFA's request was untimely because NIFA had never filed an essential error petition with respect to Dr. De Leon's damages analysis. MSDIA asked the court to revoke Mr. Cabrera's appointment.

111. On May 10, 2011, seemingly agreeing with MSDIA's point, the court revoked Mr. Cabrera's appointment as an essential error expert to review Dr. De Leon's report. In the same decree, however, the court reappointed Mr. Cabrera as a substantive damages expert to issue a new report evaluating NIFA's damages.[35] The court claimed to appoint Mr. Cabrera in connection with the request for the appointment of a damages expert NIFA had made during the evidentiary phase of the proceeding almost two years earlier, on June 5, 2009. This request had

[35] Court of appeals decree dated May 10, 2011.

been granted when the court appointed Dr. De Leon. The court did not explain why it was appointing a substantive damages expert to issue a new report almost two years after the end of the evidentiary phase of the case, in response to a motion that already had been granted and fulfilled two years earlier.

112. On June 21, 2011, Mr. Cabrera submitted a report finding that NIFA was entitled to *$204 million* in damages for lost profits, and that separate damages against MSDIA should be awarded to the "Ecuadorian people" in the amount of more than *$642 million*.

113. Mr. Cabrera's damages analysis was largely unexplained, divorced from any accepted methodology for calculating lost profits, and in large part impossible to comprehend. As MSDIA demonstrated in submissions to the court of appeals, Mr. Cabrera failed to identify any illegal act committed by MSDIA that had harmed NIFA, and thus it was difficult to discern the source of damages he purported to identify. He relied on flawed and unexplained data in the purported "IMS report" submitted by NIFA, and ignored the certified IMS market data introduced into the record by MSDIA.

114. Mr. Cabrera included in his calculation of "lost sales" the sales that, according to NIFA's own "IMS report" on which Mr. Cabrera purported to rely, NIFA *actually made* between 2003 and 2008. In other words, incredibly, Mr. Cabrera opined that NIFA's damages should include amounts NIFA had in fact received from the sales it had actually made.

115. Mr. Cabrera purported to calculate alleged damages to NIFA over an arbitrarily defined 15 year period ending in 2018, and he estimated NIFA's profit margin during that period at nearly 50%—a profit margin more than *15 times higher* than NIFA's historical margin, and far exceeding the 25% maximum profit margin on generic pharmaceutical products that was permitted under Ecuadorian law, which regulates the price of medicines.[36]

116. Mr. Cabrera's suggestion of an award to the "Ecuadorian people" over and above the supposed harm to NIFA had no purported basis in fact, analysis, or law. Indeed, the lack of integrity of a supposed expert opinion that a failed real estate sale for a plant that sold for less than $1 million resulted in damages of *$204 million* to a disappointed would-be purchaser and *$642 million* to the Ecuadorian people speaks for itself.

117. On July 15, 2011, MSDIA filed a petition charging Mr. Cabrera with essential error and providing a detailed basis for the charge, including the report of another damages expert (Mr. Carlos Montañez Vásquez) who concluded that there was no conceivable basis for Mr. Cabrera's calculation of lost profits or harm to the Ecuadorian people. The court of appeals refused even to consider the issue on the basis that Mr. Cabrera was an essential error expert and therefore was not subject to a finding of essential error.

118. The court of appeals' purported ground for denying MSDIA the opportunity to challenge Mr. Cabrera's implausible report was inconsistent with the court's prior revocation of Mr. Cabrera's appointment as an expert considering essential error and its later appointment of Mr.

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[36] *See* Article 3 of the Law on Production, Import, Marketing and Sales of Generic Drugs for Human Use, Official Registry Number 59, April 17, 2000; Article 2 of the Rules of the National Council on Pricing and Price Review of Drugs for Human Use, Official Registry Number 84, May 24, 2000.

Cabrera as a substantive damages expert pursuant to NIFA's June 2009 request. (See paragraph 111, supra.) Under the reasoning of the court's prior rulings, Mr. Cabrera should have been subject to scrutiny for essential error just as Dr. De Leon—appointed in response to the same request two years earlier—had been. The court of appeals' ruling denying MSDIA the opportunity to challenge Mr. Cabrera's opinion again revealed its clear lack of impartiality in this case.

119. Thus, the court of appeals had received expert reports from qualified and independent court-appointed experts (Mr. Silva and Dr. De Leon) who concluded, based on careful analysis, that NIFA could not establish liability or damages. Yet the court of appeals appointed an entirely new set of experts, two of whom (Dr. Guerra and Mr. Cabrera) lacked any pertinent credentials or expertise, under unusual and procedurally improper circumstances, who submitted reports that were inconsistent with the evidence and the law and were entirely favorable to NIFA. And having given NIFA multiple opportunities to challenge the evidence submitted by Mr. Silva and Dr. De Leon, and appointing new experts without any evidentiary justification, the court of appeals denied MSDIA the same opportunity to challenge the new opinions favorable to NIFA, despite a procedurally appropriate and timely motion and an abundant showing that those opinions were deeply flawed.

5. The Decision of the Court of Appeals

120. Late in the evening on Friday, September 23, 2011, nearly four years after the case had been referred to the court of appeals, that court unexpectedly issued a 15-page decree denying a pending procedural motion submitted by MSDIA, upholding the decision of the first instance court, and awarding NIFA $150 million in damages.[37]

121. The court of appeals' decision to resolve a pending procedural motion in the same decree in which it issued its judgment was highly unusual and highly prejudicial to MSDIA. The usual practice requires the court to decide a pending procedural motion separately and previously, affording the parties a final opportunity then to brief and argue the merits of the case after the procedural motion is resolved but before the court decides the case. By unexpectedly deciding the preliminary procedural motion together with its final decision on the merits, the court of appeals prevented MSDIA from submitting a brief or requesting a hearing with regard to the final outcome.

122. Thus, acting without final briefing or argument on the merits of the case, the court of appeals rejected the opinion of its first appointed expert on antitrust and damages, and the two additional internationally recognized antitrust experts who agreed with him, and instead adopted the antitrust conclusions of Dr. Guerra, a lawyer with no expertise in antitrust law who was appointed under suspicious circumstances. The court adopted Dr. Guerra's misguided assertion that MSDIA's small manufacturing plant had been an "essential facility" and that MSDIA had therefore been under an obligation to sell the facility to NIFA.[38] The court pointed to virtually

[37] The court of appeals decision, issued by First Chamber of the Provincial Court of Justice of Pichincha for Commercial and Civil Matters on September 23, 2011, is attached hereto as Exhibit C-4.

[38] It is notable that Ecuaquimica intended to use the factory as a warehouse, not for manufacturing, calling into still more question its supposed "essentiality" as a manufacturing plant.

no evidence in support of its decision. It cited no legal authorities that remotely suggested such a result.

123. The court also ignored the overwhelming and uncontroverted evidence in the record, including the opinion of the court-appointed expert in real estate, Mr. Silva, that NIFA had always been free to expand its existing facility or acquire or construct a new plant after the failed negotiations with MSDIA. In light of this evidence, there could be no causal connection between NIFA's failed purchase of MSDIA's plant and its alleged failure to expand its production with resulting lost profits.

124. The court of appeals also did not provide any support for the quantification of its enormous $150 million damages award. The only evidence the court cited in support of its award was the damages report submitted by Mr. Cabrera (which had found that NIFA should receive $204 million, with another $642 million for the Ecuadorian people). The court did not acknowledge or even address the many flaws in the Cabrera report identified by MSDIA, did not address the absence of evidence of causation, and failed to provide any rationale whatsoever for calculating damages as $150 million, a number that had not been suggested in the record by the first instance court, NIFA, Mr. Cabrera, or anyone else.

125. The first six pages of the court of appeals decision was adopted nearly verbatim (but without attribution or acknowledgement) from Temporary Judge Chang-Huang's decision in the court of first instance. Thus, the court of appeals necessarily ignored all of the evidence and arguments presented by MSDIA in the nearly four years of proceedings in the court of appeals. As noted above, the first instance decision had itself been adopted nearly verbatim (but without attribution or acknowledgement) from NIFA's complaint. The court of appeals decision did little more than correct the typographical errors in the first instance decision that had originated in NIFA's complaint.

126. The court of appeals sought to justify its failure to address the evidence submitted by MSDIA by asserting in its decision that MSDIA had "expressly waived the evidence aiming to dispel the grounds of the verdict in the first instance." Thus, apparently, the court of appeals declared itself entitled to look only to the evidence submitted by the plaintiff (which, as noted, itself did not support the judgment).

127. In support of this bizarre claim that MSDIA had "waived" all of the evidence it had submitted—including the testimony of 10 fact witnesses, a half-dozen expert reports and hundreds of pages of documents—the court of appeals cited to a petition that MSDIA had filed on April 16, 2010, in which MSDIA withdrew its request for the appointment of an additional damages expert to independently examine one of the expert reports on damages submitted by MSDIA. Far from "waiv[ing] the evidence aiming to dispel the grounds" for the trial court's verdict, MSDIA's petition unambiguously made clear that it was relying on the evidence *already in the record*, which entirely refuted the trial court's verdict:

> "Doctor Ignacio De León, the expert appointed by this Chamber, upon the request of the Plaintiff, to render his opinion on the existence of damages, as claimed by the Plaintiff, NIFA S.A., has determined, in his report served on the parties on April 12, that there exists no basis for damages in this case and that MSD did not

> cause any harm to NIFA S.A. and that, therefore, such company was not affected by any act of, or event related to, MSD. ... Consequently, since the expert designated at the plaintiff's request, Doctor Ignacio De León, has unequivocally expressed his conclusions with respect to damages, it is not necessary that the expert appointed upon request of MSD ... submit a report."[39]

MSDIA "reserve[d] the right to present its observations and comments as appropriate with respect to the report of Doctor Ignacio De León, within the term granted for this purpose."[40]

128. On its face, therefore, the petition cited by the court of appeals to support its assertion that MSDIA "waived" its reliance on all of the evidence it had submitted to the court unambiguously related only to the appointment of a single expert. MSDIA's petition in no way "waived" MSDIA's reliance on the evidence in the record or its contention that the trial court's verdict was unsupported by the evidence.

129. The court of appeals' claim that MSDIA had waived the evidence in its defense, after eight years of litigation, for no reason whatsoever, is absurd on its face, is contrary to the plain language of the petition the court relied upon, and is further clear evidence of the panel's bias and lack of competence.

E. MSDIA's Notice of Dispute and Efforts to Engage in Amicable Discussions

130. In June 2009, MSDIA sent a letter through its counsel to the Ecuadorian Attorney General, Dr. Diego García Carrión, notifying Ecuador of an investment dispute in accordance with the Ecuador-United States BIT. MSDIA asserted that through the actions of its courts, Ecuador had violated MSDIA's rights under the Treaty, including by failing to provide fair and equitable treatment and by subjecting MSDIA to a denial of justice. MSDIA requested consultations with the Government of Ecuador to seek an amicable resolution of the dispute.

131. In September 2009, counsel for MSDIA met with the Attorney General and articulated MSDIA's concern that the ongoing proceedings amounted to a denial of justice. After the meeting, the Attorney General requested the case files from the court of appeals.

132. In January 2010, after the Attorney General had contacted the court of appeals to request the case files, NIFA's general manager, Mr. Miguel García Costa, filed a criminal complaint in the Pichincha Provincial Prosecution Office against MSDIA's U.S.-based attorneys over whose signature the notice letter was transmitted, two partners at Wilmer Cutler Pickering Hale and Dorr LLP. After filing his initial complaint, Mr. García offered no evidence whatsoever in support of his allegations.

133. Nevertheless, the Prosecution Office opened two criminal investigations into the allegations. The first criminal investigation of MSDIA's attorneys' act of giving notice under the BIT was into the alleged crime of "ideological forgery." It was conducted by the Crimes against Public Faith Unit of the Prosecution Office. The "ideological forgery" charge continued

[39] MSDIA Petition dated April 16, 2010.
[40] MSDIA Petition dated April 16, 2010.

to be pending for a year, and was finally dismissed only in January 2011 after a prosecutor stated that there was no evidence supporting the charge.

134. The second criminal investigation of MSDIA's attorneys for giving notice under the BIT was into the alleged crime of "improper influence on judicial proceedings." In March 2011, the prosecutor conducting the "improper influence" investigation also recommended dismissal, also citing a lack of evidence that any crime had been committed. The recommendation was referred to Judge Elsa Sanchez de Melo on the Criminal Court for Pichincha, who at that stage had the option of affirming the dismissal or referring the investigation to a more senior prosecutor.

135. In response to the prosecutor's recommendation of dismissal, Mr. García filed a brief with Judge Sanchez de Melo, providing no evidence but characterizing the recommendation as part of a "recurring attempt by the transnationals to always mock not only our sovereignty but also those who like Your Authority constitute the administrators of justice." Mr. García requested that the judge "den[y] such an absurd plan by those who try to mislead the administrators of justice, ... reject the Prosecutor's Office dismissal request [and] avoid[] within this context, being once again ... the laughing-stock of the transnational companies like [MSDIA]." The submission was devoid of legal substance.

136. Nevertheless, rather than accept the recommended dismissal, in June 2011 Judge Sanchez kept the charges active by returning the investigation for further review by another prosecutor, citing only Mr. García's brief in support of the remand. On September 14, 2011, after conducting an independent review of the case file, the Provincial Prosecutor transmitted an opinion to Judge Sanchez de Melo affirming the initial prosecutor's earlier recommendation that the criminal investigation be dismissed. In support of his decision, the Prosecutor explained that "during the year that has elapsed ... the investigations carried out have not gathered enough evidence that would allow to deduce an accusation." The following day, Judge Sanchez de Melo finally issued a decree acknowledging receipt of the Prosecutor's opinion and, as she was procedurally required to do, dismissing Mr. García's complaint.

137. The court of appeals' decision in the *NIFA v. MSDIA* appeal was issued eight days later.

138. Due to the actions of Ecuadorian officials and judges, these baseless, retaliatory criminal complaints against MSDIA's non-Ecuadorian counsel—founded solely on MSDIA's exercising its rights and fulfilling the requirements under the BIT—remained pending and exercised their chilling effect from the time they were filed for well over a year, until the court of appeals process finally ended.

139. The United States Department of State has issued country reports on Ecuador that warn that criminal process against foreign company officials commonly has been used there as a tool for coercion in connection with commercial litigation.[41] The criminal investigation of MSDIA's counsel appears to have been calculated to deter MSDIA from pursuing its rights under the BIT in connection with the NIFA litigation.

[41] U.S. Department of State, 2011 Investment Climate Statement – Ecuador, http://www.state.gov/e/eeb/rls/othr/ics/2011/157270.htm.

V. THE ECUADORIAN JUDICIARY IS VULNERABLE TO CORRUPTION AND OUTSIDE INTERFERENCE

140. It is well documented that judicial proceedings in Ecuador frequently are marred by corruption and improper outside influences, which results in judgments inconsistent with the facts, the law, and basic justice.

141. The U.S. Department of State has consistently warned about arbitrariness and corruption in the Ecuadorian judiciary. Recent State Department reports note that:[42]

- "The Ecuadorian judicial system is hampered by processing delays, unpredictable judgments in civil and commercial cases, inconsistent rulings, and limited access to the courts.... The courts are often susceptible to outside pressure and bribes. Neither congressional oversight nor internal branch mechanisms have shown a consistent capacity to effectively investigate and discipline corrupt judges."[43]

- "While the constitution provides for an independent judiciary, in practice the judiciary was at times susceptible to outside pressure and corruption. The media reported extensively on the susceptibility of the judiciary to bribes for favorable decisions and resolution of legal cases and on judges parcelling out cases to outside lawyers, who wrote the judicial sentences and sent them back to the presiding judge for signature."[44]

- "Corruption is a serious problem in Ecuador."[45]

142. Non-governmental organizations have also reported on corruption in Ecuador. Transparency International consistently ranks Ecuador near the bottom for corruption among countries it surveys in the region. In the Western Hemisphere, only Venezuela, Paraguay, Honduras and Haiti received lower scores than Ecuador.[46]

143. The Inter-American Commission on Human Rights reports that "[b]earing in mind that a basic condition to guarantee an effective Judiciary is broad access to prompt and effective justice, the Commission has received numerous reports alleging corrupt practices on the part of

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[42] The U.S. Department of State has made similar statements in every Investment Climate Statement since 2009 and every Country Report on Human Rights Practices since 2005. These annual reports can be found on the Department of State's website. *See* http://www.state.gov/g/drl/rls/hrrpt/index.htm *and* http://www.state.gov/e/eeb/rls/othr/ics/index.htm.

[43] U.S. Department of State, 2011 Investment Climate Statement – Ecuador, http://www.state.gov/e/eeb/rls/othr/ics/2011/157270.htm.

[44] U.S. Department of State, 2010 Country Report on Human Rights Practices – Ecuador, Apr. 8, 2011, at 9, http://www.state.gov/documents/organization/160163.pdf.

[45] U.S. Department of State, 2011 Investment Climate Statement – Ecuador, http://www.state.gov/e/eeb/rls/othr/ics/2011/157270.htm.

[46] Transparency International, Corruption Perceptions Index 2010 Results, http://www.transparency.org/policy_research/surveys_indices/cpi/2010/results.

judicial officers. These practices range from demanding payments from litigants to accelerate the processing of the cases to giving bribes to influence Supreme Court justices' decisions."[47]

144. These reports are borne out by specific examples cited in the press and in other public reports. For example, the U.S. Department of State reported that in 2006, three judges were removed from the Supreme Court due to allegations (by a former congressman) that they requested a $500,000 bribe to issue a favorable ruling.[48] A leading Ecuadorian newspaper reported that from 2006 to 2009, over one-third of Ecuadorian judges were sanctioned for corruption or other impropriety.[49] And in 2007, the Ecuadorian Civic Committee against Corruption released 197 videos showing administrative personnel within the judiciary improperly receiving money for services.[50]

145. Even Ecuador's own government recognizes the failings of the Ecuadorian judiciary. In 2009, the President of the Civil Criminal Commission of the Ecuadorian National Assembly stated, simply, "[o]ur system of justice has completely collapsed."[51]

146. President Correa himself has echoed this assessment. He has commented publicly that Ecuador needs to purge the judicial system of "corrupt and negligent judges."[52] Shortly after the court of appeals decision here, he stated: "We have a concrete problem no one doubts, a totally inefficient and corrupt judicial system that is falling in pieces."[53] And, commenting on judicial

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[47] Annual Report of the Inter-American Commission on Human Rights (2005), Chapter IV – Ecuador, para. 170, Feb. 27, 2006, http://www.cidh.oas.org/annualrep/2005eng/chap.4b.htm.

[48] U.S. Department of State, 2006 Country Reports on Human Rights Practices - Ecuador, Mar. 6, 2007, http://www.state.gov/g/drl/rls/hrrpt/2006/78890.htm.

[49] *Deficiencias en control a jueces se reconoce en CJ (CJ acknowledges deficiencies in judge oversight)*, EL UNIVERSO, June 22, 2009, http://www.eluniverso.com/2009/06/22/1/1355/47742BFF4462458C8DAAB69D7D690F67.html ("Estadísticas de ese organismo dan cuenta de que en los últimos tres años y medio los funcionarios destituidos llegaron a 375, cifra que demuestra el alto índice de anomalías que se cometen en la Función Judicial, integrada por 4.461 personas. En ese lapso, también ocho funcionarios fueron removidos, 123 suspendidos, 618 multados y 479 amonestados.")

[50] Freedom House, Countries at the Crossroads 2007, Country Report – Ecuador, at 19, http://www.freedomhouse.org/uploads/ccr/country-7169-8.pdf; *Nada concreto sobre "videojudiciales," (Nothing concrete regarding the "judicial videos")*, ECUADOR INMEDIATO, Feb. 22, 2007, http://www.ecuadorinmediato.com/Noticias/news_user_view/la_hora_quito_nada_concreto_sobre_videojudiciales--49435.

[51] *Justicia colapsada (Justice collapsed)*, LA HORA, Apr. 16, 2009.

[52] *Consejo de Transición de la Judicatura no se instaló (The transitional council was not installed)*, EL UNIVERSO, Jul. 22, 2011, http://www.eluniverso.com/2011/07/22/1/1355/consejo-transicion-judicatura-instalo.html ("El presidente Rafael Correa propuso reformar la justicia vía referéndum, invocando la necesidad de purgar el sector de "jueces corruptos y negligentes" para combatir la inseguridad.")

[53] *Presidente Correa. Querian desprestigiar al Gobierno y no pudieron (President Correa. they wanted to disparage the government and they could not)*, OPINIÓN, Nov. 13, 2011, http://www.diariopinion.com/primeraPlana/verArticulo.php?id=812332 (""Tenemos un problema concreto, que nadie lo duda, un sistema de justicia totalmente ineficiente y corrupto que se cae a pedazos ..."); *Correa reitera que meterá manos en la Corte y su campaña por el Sí (Correa reiterates that he will lay hands on the Court and his campaign for Yes)*, EL UNIVERSO, Jan. 26, 2011, http://www.eluniverso.com/2011/01/26/1/1355/correa-reitera-metera-manos-corte-campana.html.

reform efforts, he has said "[f]or the three-member council to restructure the barbarity that is our justice system is an enormous challenge."[54]

VI. THE ACTIONS OF THE ECUADORIAN COURTS BREACHED ECUADOR'S OBLIGATIONS UNDER THE ECUADOR – UNITED STATES BIT

147. As a United States company investing in Ecuador, MSDIA was entitled to the protections promised by Ecuador in the Ecuador-United States BIT. Among other obligations, Ecuador assumed an obligation to provide foreign investors with access to a judicial process in which they would be treated fairly and through which they would have a meaningful ability to present claims and defenses to an impartial decision-maker. As explained above, Ecuador entirely failed to meet this obligation.

148. Instead, the decisions of the Ecuadorian courts were manifestly unjust and were the product of gross deficiency in the administration of justice. The Ecuadorian courts were biased and partial in favor of the Ecuadorian plaintiff, as evidenced by a number of improper procedural decisions and failures to provide MSDIA with the guarantees of due process.

149. Specifically, Ecuador's courts denied MSDIA fair notice of critical rulings and proceedings throughout the case, in violation of Ecuadorian law and practice and contrary to the minimum requirements of due process, demonstrating their bias and predisposition to rule against and disadvantage MSDIA. For example:

- The trial court took the testimony of NIFA's only fact witness without giving MSDIA proper notice or an opportunity to attend. The court later took additional testimony from the same witness, ostensibly in response to MSDIA's request to cross-examine her, but again provided MSDIA's counsel with no prior notice or opportunity to attend.

- When the trial court issued its judgment on December 17, 2007, it failed entirely to provide notice in the manner required by Ecuadorian procedural law and instead served on MSDIA only an improperly truncated electronic version of the judgment that omitted the portion awarding $200 million in damages. The court's insufficient notice appears to have been intended to prevent MSDIA from exercising its right to appeal within the 3-day period allowed under Ecuadorian procedure.

- When the court of appeals took possession of the appeal on July 15, 2008, which triggered a 10-day period of time within which MSDIA had to submit its "Fundamentation of Appeal," the court did not provide notice to MSDIA. MSDIA discovered that the court had taken possession of the appeal only minutes before the expiration of the 10-day deadline. If MSDIA had missed the deadline, it would have been precluded from appealing the trial court judgment. Again, the court's failure to

[54] *Correa anticipa que no podrá cambiar totalmente a la justicia* (*Correa anticipates that he will not be able to completely change justice)*, EL UNIVERSO, Feb. 11, 2011, http://www.eluniverso.com/2011/02/23/1/1355/correa-anticipa-podra-cambiar-totalmente-justicia.html ("Tener 18 meses un consejo tripartito para reestructurar esa barbaridad que es el sistema de justicia es un desafío enorme.").

notify MSDIA appears to have been intended to cause MSDIA to forfeit its right to appeal the $200 million trial court judgment.

- When the court of appeals issued its $150 million judgment against MSDIA on September 23, 2011, it did so while simultaneously deciding pending procedural motions. As a result, MSDIA was denied the ability to file its final brief—which it already had prepared and was waiting to file—or to request an oral hearing on the merits. This action appears calculated to deny, and in fact did deny, MSDIA the opportunity to present its final arguments on the matter.

150. The bias and partiality of the trial court proceedings are further evidenced by the conduct of Temporary Judge Chang-Huang, who replaced the original judge after the close of the evidentiary period when the case was ready for decision. Judge Chang-Huang issued her decision—on a four year litigation with a 6,000 page record—three and a half hours after taking cognizance of the case. Her decision was largely a repetition of the plaintiff's complaint, her damages award simply adopted the plaintiff's demand, and the circumstances strongly suggest her decision was at least in large part the work product of the plaintiff's counsel.

151. The court of appeals proceedings also evidenced manifest bias and partiality in favor of the Ecuadorian plaintiff. For example, the court's decision addressed the evidence submitted by the Ecuadorian plaintiff, but ignored completely the evidence submitted by MSDIA, with no legal basis and on plainly pretextual grounds, falsely claiming that MSDIA had waived its evidentiary grounds for challenging the trial court's judgment.

152. In addition, without a rational basis, the court of appeals dismissed the well-reasoned conclusions of internationally respected and highly credentialed court-appointed experts—who concluded that there was no basis for liability or damages in this case. Then, without legal justification under Ecuadorian law and procedure, the court appointed additional "experts," who lacked relevant credentials or expertise, and who submitted unreasoned and unsupported reports that were entirely favorable to the Ecuadorian plaintiff.

153. The court adopted the conclusions of these additional experts without analysis and without addressing the evidence of the court-appointed experts who had concluded that there was no basis for liability or damages. These actions again showed the court's predisposition to rule against MSDIA and in favor of the Ecuadorian plaintiff regardless of the facts and law. For example:

- The court of appeals rejected the well reasoned opinion of its original court-appointed antitrust expert, Dr. Ignacio De Leon, despite the fact that it had appointed Dr. De Leon at the recommendation of Ecuador's Competition Authority, despite Dr. De Leon's unimpeachable credentials, and despite the fact that NIFA offered no basis to reject Dr. De Leon's conclusions. Instead, the court of appeals adopted the findings of a later appointed "expert" (Dr. Guerra) who had no training or experience in competition law, who had been certified under highly questionable circumstances shortly after Dr. De Leon submitted his report, whose analysis was largely plagiarized and lacked any grounding in the principles of competition law, and whose analysis had been conclusively impeached by the expert report of another South American

competition expert, who also had been recommended by Ecuador's Competition Authority—Dr. Diego Petrecolla.

- The court of appeals rejected the well reasoned opinion of its original court-appointed real estate expert, Mr. Manuel Silva, despite the fact that Mr. Silva clearly established that NIFA had multiple available alternatives to MSDIA's small factory, and thus could not have suffered injury from the failure of its attempted acquisition, and despite the fact that Mr. Silva's key findings were unchallenged. Instead, the court of appeals relied upon certain findings in the report of a later appointed expert (Mr. Yerovi) that were more favorable to NIFA, while ignoring the findings in his report that agreed with Mr. Silva's report.

- The court of appeals rejected Dr. De Leon's well reasoned opinion that NIFA had suffered no damages from the failed acquisition, despite Dr. De Leon's credentials and the fact that NIFA never alleged that he had committed "essential error" in his damages analysis. Instead, based on changing and inconsistent explanations, the court appointed and relied upon another so-called "expert" (Mr. Cabrera), despite his utter lack of relevant qualifications and the patent absurdity of his conclusions. In doing so, the court of appeals denied one MSDIA motion to disqualify Mr. Cabrera on the purported ground that Mr. Cabrera was not an essential error expert, but was instead a merits expert on damages; and then denied another MSDIA motion to challenge Mr. Cabrera's merits opinion for essential error (as NIFA had been permitted to challenge multiple experts' opinions) on the flatly contradictory purported ground that Mr. Cabrera was only an essential error expert, not a merits expert on damages. This contradictory, "Catch 22"-type reasoning is also strongly indicative of bias.

154. In addition, the Ecuadorian courts' judgment was arbitrary, manifestly contrary to the law, and constituted a miscarriage of justice, because at the time of the sale and the judgment, Ecuador did not have an antitrust law and had not adopted or announced the substantive rules of competition that the courts purported to apply here. Moreover, the courts' willingness to fabricate a supposed basis to create an antitrust cause of action demonstrated their predisposition and bias in this case.

155. The courts' liability ruling was also manifestly contrary to the evidence and revealed their bias and predisposition because, contrary to their purported finding, MSDIA plainly did not have a dominant position in the Ecuadorian pharmaceutical or real estate market; could not, under any set of antitrust principles, have had an obligation to sell its facility to NIFA; and had not prevented NIFA from expanding its facilities or production capacity, because, among other things, there were numerous alternative facilities available to NIFA. No rational, competent and unbiased court could have concluded that MSDIA's actions violated principles of competition law.

156. Finally, the massive damages awarded by the courts for lost profits leaves no doubt as to the impropriety of the proceedings and the manifest injustice of the result. Both the trial court and the court of appeals confirmed their bias and predisposition to rule against MSDIA and in favor of NIFA by awarding *$200 million* and *$150 million*, respectively, for lost profits. No

rational, competent, unbiased court could have awarded damages in such an amount, as is evident from the following uncontrovertable facts, among others:

- NIFA's annual profits in 2002 were a mere *$2,165.* It is entirely implausible that, with the addition of a small factory it valued at $1.5 million, NIFA could have earned 100,000 (the trial court), or 70,000 (the court of appeals), times that amount. And yet, this is precisely the premise of the damages award against MSDIA.

- The price offered by NIFA and agreed upon by MSDIA for the plant and equipment was only *$1.5 million.* No facility capable of producing $150 million in additional *profits* could possibly have been valued at only $1.5 million. If the plant was capable of producing $150 million in additional profits—for NIFA, MSDIA, or anyone else—its sale price plainly would have been many times higher particularly if, as NIFA has claimed, there were no other means in the Ecuadorian market to capture such enormous profits.

- The entire generic pharmaceutical market in Ecuador had *sales* (let alone profits) of only $20.4 million in 2002. Profits would have been a small percentage of that gross sales figure. No rational, competent and unbiased court could suppose that a company like NIFA, with only a tiny share of the market, could have earned *profits ten times as much as the gross sales of its entire market*, simply by acquiring a small new factory.

- NIFA's primary evidentiary support for its damages claim in the trial court was a "business plan" (implausibly) claiming the factory was worth $12.9 million in profits to NIFA over ten years. No rational, competent and unbiased court, considering that evidentiary support, could have awarded $200 million in damages, at least *$187 million* more than NIFA's own evidence could support.

- NIFA's sole additional evidentiary support for its damages claim in the court of appeals (apart from Mr. Cabrera's incoherent "expert report"), was the so-called "IMS report" that (implausibly) concluded that NIFA had $28 million in lost sales. At NIFA's historic profit margin, this would result in less than $1 million in lost profits. No rational, competent and unbiased court, considering that sole evidentiary support, could have awarded NIFA $150 million in damages, at least *$149 million* more than NIFA's own evidentiary submission could support.

157. For all of these reasons, and more, MSDIA was not treated fairly or equitably by the Ecuadorian courts; its investment was not accorded full protection and security; its investment was impaired through arbitrary and discriminatory measures; and its treatment in the Ecuadorian courts was less than that required by international law. In addition, MSDIA was not provided with effective means of asserting claims and enforcing rights through the Ecuadorian courts. Instead, MSDIA was subjected to an unfair and one-sided judicial process that prejudiced its rights and prevented it from having its defenses fully presented and evaluated in accordance with the rule of law.

158. The Ecuadorian proceedings amounted to a denial of justice, which violated Ecuador's obligations under the Treaty. Simply put, no fair and competent system of justice could lead to the result reached by the Ecuadorian courts here.

159. Ecuador's actions breached its obligations under the Ecuador-United States BIT, including its obligations:

a. To permit and treat investments, and activities associated therewith, on a basis no less favorable than that accorded in like situations to investments or associated activities of its own nationals or companies, or of nationals or companies of any third party, whichever is the most favorable (Article II(1));

b. To accord investments fair and equitable treatment, full protection and security, and treatment no less than that required by international law (Article II(3)(a));

c. Not to impair by arbitrary or discriminatory measures the management, operation, maintenance, use, enjoyment, acquisition, expansion, or disposal of investments (Article II(3)(b)); and

d. To provide effective means of asserting claims and enforcing rights with respect to investments (Article II(7)).

VII. RELIEF SOUGHT

160. For the reasons outlined above, MSDIA requests an award:

a. Declaring that the actions of the Ecuadorian courts in connection with the NIFA judgment breached Ecuador's obligations under the Ecuador-United States BIT;

b. Directing Ecuador—including specifically its courts, its executive branch, and its national police—to take all steps within its power to prevent enforcement of the NIFA judgment both within and outside of Ecuador;

c. Directing that Ecuador indemnify and hold harmless the Claimant against any and all damages resulting from enforcement of the NIFA judgment, including the value of any assets paid, seized, forfeited, or otherwise foregone in connection with the enforcement of the NIFA judgment and any other damages to the Claimant's business both inside and outside of Ecuador, including lost profits;

d. Directing Ecuador to pay the Claimant damages for its legal costs in resisting enforcement of the NIFA judgment within and outside of Ecuador;

e. Directing Ecuador to pay the Claimant all costs associated with this arbitration, including attorneys' fees;

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

g. Such additional and other relief as may be just, including, without limitation, moral damages to the Claimant to compensate for the non-pecuniary harm it has incurred as a result of Ecuador's breaches including damage to the Claimant's reputation and goodwill, both inside and outside of Ecuador.

161. The Claimant reserves the right to amend and supplement its claims and its request for relief as appropriate during the course of the arbitration.

VIII. PROPOSALS REGARDING THE NUMBER OF ARBITRATORS AND APPOINTING AUTHORITY AND MSDIA'S APPOINTMENT OF AN ARBITRATOR

162. The Claimant proposes that this dispute be adjudicated by a panel of three arbitrators appointed pursuant to the UNCITRAL Arbitration Rules.

163. The Claimant hereby appoints Judge Stephen M. Schwebel as arbitrator. Judge Schwebel's contact details are as follows:

Judge Stephen M. Schwebel

1501 K Street, N.W., Suite 410
Washington, D.C. 20005
USA
Telephone: +1 202 736 8328
Facsimile: +1 202 736 8709

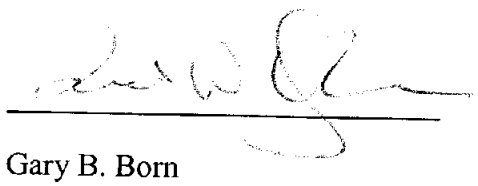
Essex Court Chambers
24 Lincoln Inn's Fields
London WC2 A36D
United Kingdom
Telephone: + 44 20 7813 8000
Facsimile: +44 20 7813 8080

E-mail: judgeschwebel@aol.com

Judge Schwebel is independent of the Claimant and impartial.

164. The Claimant also proposes that the parties mutually designate the Secretary General of the Permanent Court of Arbitration at The Hague as the appointing authority empowered to act under the UNCITRAL Arbitration Rules in the event an appointing authority is required.

Respectfully submitted,



Gary B. Born
Wilmer Cutler Pickering Hale and Dorr LLP
49 Park Lane
London W1K 1PS
United Kingdom
Tel: +44 20 7872 1000
Fax: +44 20 7839 3537

David W. Ogden
Rachael D. Kent
Wilmer Cutler Pickering Hale and Dorr LLP
1875 Pennsylvania Avenue, NW
Washington, DC 20006
USA
Tel: +1 202 663 6000
Fax: +1 202 663 6363

Dated: November 29, 2011