

IN THE ARBITRATION UNDER THE TREATY BETWEEN  
THE UNITED STATES OF AMERICA AND THE REPUBLIC OF ECUADOR  
CONCERNING THE ENCOURAGEMENT AND RECIPROCAL PROTECTION  
OF INVESTMENTS AND THE UNCITRAL ARBITRATION RULES (1976)  
BETWEEN

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

*Claimant,*

*-and-*

THE REPUBLIC OF ECUADOR,

*Respondent.*

PCA Case No. 2012-10

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## I. INTRODUCTION

1. The Respondent, Republic of Ecuador, respectfully submits this Counter-Memorial in response to the Memorial presented by Claimant, Merck Sharp & Dohme (I.A.) Corp. (“Merck” or “MSDIA”) on 2 October 2013.

2. The story told in Merck’s Memorial is a harrowing one. It voices the plight of a foreign litigant navigating a systemically corrupt court system; confronted on all sides by a vast conspiracy of corrupt bodies, judges and officials; beset at every turn and in every instance by irregularities and schemes designed to deny it its rights; and wrongfully facing liability for conduct that it defends, not as innocent, but simply as falling in a lacuna of Ecuadorian law.

3. The difficulty is that, in every respect, this is a false narrative. Not only has Merck utterly failed to come up with *any* proof of *any* corruption in the *NIFA v. MSDIA* litigation, but, upon close scrutiny, its entire circumstantial showing evaporates. What it attempts to portray as a system so corrupt that any particular case may be presumed to involve corruption, appears, upon examination of Merck’s own evidence, to be a system struggling with issues common to many judicial systems in developing countries, but whose civil and administrative courts are, according to Merck’s own authority, “generally considered independent and impartial.”<sup>1</sup>

4. What Merck casts as irregularities in the proceedings are shown, when the actual record is studied, to be either normal procedures, many conducted at Merck’s own behest, or difficulties of Merck’s own making or that Merck could have avoided had it acted with normal diligence.

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<sup>1</sup> U.S. Department of State, 2012 Country Report on Human Rights Practices: Ecuador, at 10 (C-214).

5. And Merck's attempt to pretend that Ecuadorian law gives unbridled license to unfair competition practices not only subverts the role of national courts in declaring, and yes, even developing, the principles of local law in an ever-changing economic environment, but it actually ignores long established principles of Ecuadorian law as well as precedents in their application in previous Ecuadorian court decisions.

6. Merck is, of course, aware of these deficiencies in its case. To overcome them, Merck's aim is to present a voluminous barrage of accusations in hopes that they will leave an indelible impression in the Tribunal members' minds that will survive the refutation of particle accusations. Some of these accusations are the normal complaints of a losing party; every attorney for an unsuccessful litigant can muster a myriad of reasons why his or her client was wronged by the court, or, in other words, was denied justice.

7. Unfortunately, however, most of Merck accusations are clearly artificial concoctions designed to make quite unimpeachable events seem sinister to this Tribunal. What Merck has done is to revisit every procedural turn in the case and figure out a way to portray it as nefarious. But to do this, Merck has had to omit essential facts which contradict its points and to grossly distort the record in the case.

8. Examples abound, and are presented in detail in the later sections of this Counter-Memorial. But, here, a sampling. With respect to the first instance proceedings, Merck relies heavily on its claim that the testimony against it by a key fact witness, a senior employee of the Panamanian real estate broker it hired to sell its manufacturing plant, was tainted by procedural irregularities. But the record shows that Merck had a full, and even an extra, opportunity to present questions for this witness, that it received all legally required notices of her



examinations, and that it freely presented her co-employees as witnesses in an effort to rebut her testimony. Another example: Merck claims that the final judgment was not properly served upon it in a scheme to cause it to miss the deadline for filing an appeal, even though the timely email notice that Merck admits receiving clearly noticed that a judgment had been rendered; the failure of Merck's counsel to follow up on this notice created what was at the end a minor difficulty.

9. With respect to the second instance proceedings, Merck spends a great deal of space trying to show that the court appointed unqualified experts and then wrongfully relied upon their reports to arrive at an exorbitant damages amount. That damages amount was indeed later found to be exorbitant and was reduced by 99%. But what is more important here is that Merck failed to inform the Tribunal that each of the experts it now complains about was appointed after a request made by Merck, and in accordance with the methodology of appointment suggested by Merck.

10. With respect to the judgment of the National Court of Justice ("NCJ"), Merck has much less to say. This is primarily because the judgment of the Court represents a major victory for Merck. As a result of that judgment, as just noted, Merck's liability was reduced by 99%. In these circumstances, Merck's challenge has been how to pocket its victory while at the same time maintaining that the National Court of Justice's judgment merely perpetuated the denial of justice it allegedly suffered in the lower courts. Merck had to stretch mightily in order to cast aspersions on that judgment. It began by asserting that the temporary judges of that Court scheduled the case for an early hearing in a scheme to render a judgment against Merck before the new, permanent members of the renovated National Court of Justice took office. There are many discrepancies in that story, but suffice it to note here something that Merck completely

failed to impart to the Tribunal: that hearing, and the rescheduled hearing, were ordered in the normal course in response to requests for hearing and re-scheduling filed *by Merck itself*.

11. Merck also attempts to depict the contents of the NCJ judgment as based on wrongful fact-finding and an invented theory of law. As shown below, these charges are demonstrably false. But the best rebuttal to these charges may be found in Merck's own pleadings before the Constitutional Court of Ecuador in responding to the Ecuadorean litigant's petition for extraordinary protection. In those submissions, Merck itself rebuts each and every accusation it now makes against the NCJ's judgment. We comment to the Tribunal to read Merck's entire submissions in defense of the NCJ judgment included herewith as Section VI(B).

12. We have seen this behavior before, in connection with Merck's request for interim measures. The Tribunal will recall that, at the same time that Merck was representing to this Tribunal that it was almost certainly going to lose its case before the NCJ, its local managers were certifying under penalty of law to the Ecuadorian Government, and to its own U.S. executives, that it fully expected to win before the NCJ.

13. Here, at the same time that Merck is defending the NCJ process and judgment as valid and proper, it is claiming otherwise before this Tribunal.

14. As it happens, the Tribunal need not wade into the details as it would otherwise be duty bound to do in order to assess Merck's allegations. This is because this case may be disposed with on any one, or more, of three different grounds. Those grounds are set forth in the section immediately following the presentation of the Factual Background. Each of them completely dispenses with Merck's assertion of jurisdiction.

15. *First*, for whatever reason, Merck acted early on to deny this UNCITRAL arbitral tribunal jurisdiction when it definitively consented, instead, to ICSID arbitration in 2009. Under Article VI(3)(a) of the Treaty between the United States of America and the Republic of Ecuador Concerning the Encouragement and Reciprocal Protection of Investment (“Treaty” or “BIT”), once consent to ICSID is given, the dispute may not be arbitrated before any other forum. This analysis is supported by the Expert Opinion of Professor Kenneth Vandeveld, the world’s leading expert on U.S. BITs, as Claimant itself admits, and the only scholarly authority cited by Merck itself.

16. *Second*, upon the sale of its manufacturing plant in 2003, Merck lost the one manifestation it had of an investment in Ecuador, and has since conducted mere trading activities through a branch. Neither the branch nor Merck’s trading activities in themselves constitute an investment within the meaning of the BIT. This is supported by the Expert Opinion of Professor Roberto Salgado Valdez, who testifies on the Ecuadorian legal principles according to which Merck’s branch does not constitute a company within the meaning of the BIT. Therefore, this dispute, arising as it did years after the sale of the plant, does not relate to rights with respect to an investment in Ecuador; this also eliminates the claims on the merits since they are all premised on provisions of the BIT that only protect “investments,” as opposed to U.S. businesses in general.

17. *Third*, and fundamentally, Merck’s invocation of the BIT’s arbitration procedures was abusively premature. As Merck concedes, there can be no claim of denial of justice absent the exhaustion of available and effective remedies. As shown below, Merck could readily have sought to take its complaints about treatment in the civil courts to the Constitutional Court of Ecuador, as Prophar has done, to seek the annulment of the NCJ judgment. This is supported by

the Expert Opinion of Professor Juan Francisco Guerrero del Pozo, who demonstrates how the remedies available in the Constitutional Court could have been effective in remedying Merck's complaints. It is also supported by the Expert Opinion of two leading authorities on public international law, and on the question of exhaustion of local remedies in particular, Professors Lucius Caflisch and C. F. Amerasinghe. Both confirm that constitutional court remedies are *per se* among those that must normally be exhausted and that the kinds of remedies available in Ecuador's Constitutional Court would have met the applicable tests for availability and effectiveness. Having failed to exhaust its remedies, Merck may not call upon this Tribunal to provide the redress that it should have sought within Ecuador's judicial system as a whole. This deficiency in Merck's claim defeats them on the merits, but also renders them inadmissible and outside of the Tribunal's jurisdiction.

18. Should, however, this Tribunal proceed to the merits of Merck's claims, this Counter-Memorial next shows why Merck has utterly failed to demonstrate a denial of justice, even if it were considered to have exhausted its remedies. First, the NCJ decision, and the process leading to it, have not been shown to suffer the defects Merck here invokes (although elsewhere rejects) and cured whatever defects may have been in the lower court proceedings. This is supported by the Expert Opinion of Professor Luis Sergio Parraguez Ruiz, who explains that the NCJ decision is based upon established tenets of Ecuadorian law. It is further supported by the Expert Opinion of Professor Carlos Molina Sandoval, who puts these principles in the context of unfair competition law as it has evolved in the Latin American region. It is also supported by the Expert Opinion of Professor Álvaro José Pólit García, who explains judicial jurisdiction over claims based on acts of unfair competition. Finally, it is supported by the Expert Opinion of Professor Javier Aguirre Valdez, whose discussion of Ecuadorian court procedures and practices

allows the process of the NCJ to be accurately assessed. Moreover, this section of the Counter-Memorial shows how Merck's charges against the lower courts are invalid and woefully insufficient to meet the applicable standards for a denial of justice and exposes the thin reed that is Merck's assertion of "indicia of corruption."

19. In defending against Merck's denial of justice claims in this arbitration, Ecuador is not seeking to take any position that would affect the Ecuadorian courts' independent adjudication of what is an ongoing litigation between two private parties. It is not a question of whether the NCJ decision is "correct" or whether there may be other possible outcomes in an adjudication of the *NIFA v. MSDIA* litigation. That is a matter for the Ecuadorian judicial system. What is relevant here is whether the NCJ decision was judicially possible, and Merck has failed to demonstrate that it is not.

20. Penultimately, this Counter-Memorial shows how Merck attempts effectively to bifurcate these proceedings in a manner that would allow it to submit its evidence of the additional expenses in the court litigation at a later date, after the time set for this defense by Ecuador, and in violation of the Tribunal's scheduling orders. This attempt is inadmissible. Moreover, it demonstrates why, contrary to Merck's unsupported contentions, this case, even if it were meritorious, does not include circumstances warranting moral damages by any standard of law.

21. In its final section, this Counter-Memorial will request that Merck's claims be dismissed in their entirety and that the Respondent be awarded all of its costs and attorneys fees, together with interest thereon.

## **II. STATEMENT OF FACTS**

22. Merck's effort to distort the record of the proceedings begins with its statement of facts. Many of Merck's misrepresentations, misleading characterizations and omissions are directly related to the arguments and are dealt with in detail in the section that follow. However, it is necessary here to present the history of the underlying dispute in an overview that accurately portrays how events unfolded and, in particular, how the Ecuadorian judicial proceedings afforded Merck a full opportunity to present its evidence and arguments in defense of its conduct and in the assertion of its rights.

### **A. Sale Of Merck's Chillos Valley Plant**

23. To begin with, Merck's portrayal of its negotiations with NIFA is incomplete and one-sided. In contrast, the evidence submitted in the domestic court proceedings depicts a different story, one that puts Merck's conduct in a light much less favorable than Merck would like this Tribunal to see.

24. In late 2001, Merck made a "business decision to consolidate its manufacturing operations in Latin America . . . [and] to sell the Chillos Valley plant, together with its equipment."<sup>2</sup> The Chillos Valley plant was Merck's only facility in Ecuador, which from 1975 until its sale in July 2003, was used for finishing and packaging of Merck's drugs.<sup>3</sup>

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<sup>2</sup> Claimant's Memorial, ¶ 26.

<sup>3</sup> *Id.*, ¶ 25.

25. Nueva Industria Farmaceutica Asociada, S.A. (“NIFA”),<sup>4</sup> an Ecuadorian pharmaceutical manufacturer, was among “a number of companies [that] expressed interest in the plant” in February 2002.<sup>5</sup> Until that time, NIFA had planned to significantly expand its production and sales volume by constructing a new manufacturing facility; it put a halt to these plans as the prospect held out by Merck for acquiring Merck’s Chillos Valley plant developed.<sup>6</sup> In connection with their negotiations for the sale and acquisition of the Chillos Valley plant, Merck and NIFA concluded a confidentiality agreement in May 2002.<sup>7</sup> As Merck had entered into discussions with a number of potential buyers,<sup>8</sup> it engaged the services of a real estate broker, Staubach Tie Leung Spanish Americas & Caribbean Inc. (“Staubach”) “to appraise the plant and promote the sale.”<sup>9</sup>

26. Merck’s account with Staubach was managed by Mrs. Anne Usher de Ranson, a shareholder of Staubach and its Executive Vice-President in charge of client relations.<sup>10</sup> For the first several months, until May 2002, Mrs. Usher de Ranson was directly involved with Merck’s negotiators in discussions with NIFA. Later, at Merck’s request, a junior member of Staubach,

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<sup>4</sup> In October 2009, NIFA was merged with and into Prophar S.A. In this Counter-Memorial, Ecuador will refer to the company interchangeably as “NIFA” or “Prophar” as appropriate chronologically.

<sup>5</sup> Letter from Ana Barahona (NIFA) to Merck (25 Feb. 2002) (R-2).

<sup>6</sup> NIFA’s Complaint, *NIFA v. MSDIA*, Trial Court (16 Dec. 2003), p. 4 (C-10).

<sup>7</sup> Confidentiality Agreement Between NIFA S.A. and MSDIA (14 May 2002) (C-125).

<sup>8</sup> See e.g., Testimony of Anne Kareen Ranson [a/k/a Anne Usher de Ranson], *NIFA v. MSDIA*, Trial Court, dated 28 June 2004 (in response to Question 7) (C-144).

<sup>9</sup> Claimant’s Memorial, ¶ 27.

<sup>10</sup> Testimony of Anne Kareen Ranson [a/k/a Anne Usher de Ranson], *NIFA v. MSDIA*, Trial Court, dated 28 June 2004 (in response to Questions 2 and 3) (C-144); Testimony of Anne Karsen Ranson [a/k/a Anne Usher de Ranson], *NIFA v. MSDIA*, Trial Court, dated 29 August 2005 (in response to Question 1) (C-149).

Mr. Egardo Jaen, became Merck's direct contact.<sup>11</sup> Thereafter, Mrs. Usher de Ranson remained involved as the Merck's account manager at Staubach, and in this capacity was apprised of the ongoing discussions between the parties, copied on electronic communications, and participated in weekly meetings regarding Merck's sale of the Chillos Valley plant.<sup>12</sup>

27. Merck's negotiations team included Mr. Jacob Harel, Merck's senior production director in Ecuador, and Mrs. Doris Pienknagura, the plant operations manager.<sup>13</sup>

28. Staubach's due diligence for Merck regarding NIFA began "unofficially" in June 2002. The Staubach employee charged with due diligence indicated that finding information about NIFA "[would] take some time."<sup>14</sup> It determined that NIFA "[was] a laboratory with very good market penetration with a very well-known consumer product that has a long history. They are currently going through some reengineering and organizational culture changes."<sup>15</sup>

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<sup>11</sup> Exhibit C-149, Testimony of Anne Karsen Renson [a/k/a Anne Usher de Ranson], *NIFA v. MSDIA*, Trial Court, dated 29 August 2005, p. 3 (in response to Question 3); See Exhibit C-151, Testimony of Edgardo Jaén, *NIFA v. MSDIA*, Trial Court, dated 18 October 2005, at 1 (in response to Question 1).

<sup>12</sup> Exhibit C-151, Testimony of Edgardo Jaén, *NIFA v. MSDIA*, Trial Court, dated 18 October 2005, pp. 7-8 (in response to Question 20) ("Mrs. Anne Usher de Ranson, who was my direct superior as Staubach, was aware of the progress made since this information was available in the weekly progress reports and the witten [sic] and electronic communication exchanged through Staubach between interested parties and Merck."); *id.* (in response to question 22); *id.*, p. 11 (in response to cross-Question from NIFA) ("Mrs. Anne Usher de Ranson had full access to the hard copies of all documents concerning projects that were carried out through the Panama office, including the promotion of the sale of MSD's plain in Ecuador."); Exhibit C-149, Testimony of Anne Karsen Renson [a/k/a Anne Usher de Ranson], *NIFA v. MSDIA*, Trial Court, dated 29 August 2005, p. 2 (in response to Question 8).

<sup>13</sup> Exhibit C-149, Testimony of Anne Karsen Renson [a/k/a Anne Usher de Ranson], *NIFA v. MSDIA*, Trial Court, dated 29 August 2005 (in response to Question 3).

<sup>14</sup> Exhibit C-129, Email chain involving María Fernanda Andrade (Staubach) and Edgardo Jaén (Staubach) et al., dated 12 July 2002.

<sup>15</sup> Exhibit C-129, Email chain involving María Fernanda Andrade (Staubach) and Edgardo Jaén (Staubach) et al., dated 12 July 2002. Later, after its meeting with the NIFA representatives, Mr. Harel wrote in a memo to the MSDIA/Staubach negotiation team that NIFA was a small company which "ha[d] no major liabilities and that the company [was] in expansion mode." Letter from Jacob Harel (Merck) (12 July 2002) (R-3).



29. After the parties' negotiation had gone on for seven months, in September 2002 NIFA presented its "best and final offer" for the plant.<sup>16</sup> The parties agreed to meet in the Panama City on 20 November 2002 to discuss the final details of the transaction.<sup>17</sup> During this meeting, the parties "agreed in principle on a purchase price of [US]\$1.5 million."<sup>18</sup> Also during the course of this meeting, pursuant to the Confidentiality Agreement, Staubach obtained NIFA's "business plan,"<sup>19</sup> an extremely valuable document in the hands of a competitor.

30. However, two months later, the negotiations deadlocked, when Mr. Harel proposed at the eleventh hour the inclusion in the sale agreement of a non-compete clause prohibiting NIFA from manufacturing "copies of MSDIA's products at the plant" for a period of 5 years.<sup>20</sup>

31. Merck stated in its Memorial that this non-compete clause was introduced in response to Merck's discovery, shortly after the Panama City meeting, that:

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

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Email from Miguel Angel Garcia (NIFA) to Edgar Jaén (Staubach) (26 Sept. 2002) (R-4); *see also* Exhibit C-189, Testimony of Ernesta Bello Tuñas, *NIFA v. MSDIA*, Court of Appeals, dated 25 January 2010, at p. 5 (in response to Question 15).

<sup>17</sup> Exhibit C-5, Summary of Meeting Between MSDIA and NIFA, dated 20 November 20.

<sup>18</sup> Claimant's Memorial, ¶ 32. NIFA confirmed its agreement with those principal terms on 26 November 2002. Exhibit C-6, Email from NIFA General Manager Miguel García to Edgardo Jaén (Staubach), dated 25 November 2002 (indicating García's approval of the minutes).

<sup>19</sup> Claimant's Memorial, fn. 30; Exhibit C-151, Testimony of Edgardo Jaén, *NIFA v. MSDIA*, Trial Court, dated 18 October 2005, at 11 (in response to Questions 14 and 15).

<sup>20</sup> Claimant's Memorial, ¶ 35.

trademark “Vioxx,” was MSDIA’s most valuable patent in Ecuador at the time.<sup>21</sup>

32. Merck explains that this “indicated that [NIFA] planned to manufacture Rofecoxib in violation of Merck’s exclusive rights, which *could cause substantial damages to MSDIA’s business in Ecuador.*”<sup>22</sup> In fact, it was explained later that NIFA’s application to register was the result of incorrect information provided to it by the Ecuadorian Institute of Intellectual Property employees.<sup>23</sup>

33. However, Merck’s proposed non-compete clause was not limited to Vioxx. Nor was it limited to the production of the drugs patented by Merck. The non-compete clause was intended to cover *all* of Merck’s medicines sold in Ecuador, including those to which it did not enjoy not patent rights.<sup>24</sup> In fact, in an internal email to the negotiation team, Mr. Harel expressly recognized that:

Mr. Garcia confirmed that *he will not copy Vioxx or other patent protected products. He is not willing to commit to refrain from manufacturing of non patent protected products.*<sup>25</sup>

He also described Merck’s objective for the upcoming meeting with Mr. Garcia:

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<sup>21</sup> *Id.*, ¶ 33. On 30 September 2004, Merck announced a voluntary worldwide withdrawal of *Vioxx*. Form 10-K - United States Securities and Exchange Commission (11 Mar. 2005) (R-36). The Company’s decision, which was effective immediately, was based on three-year data from a clinical trial. *Id.*

<sup>22</sup> Claimant’s Memorial, ¶ 34 (emphasis added). It also raised overall concerns that “NIFA might manufacture and market copies of other products produced by MSDIA in a way that could confuse customers as to their true origin.” *Id.*

<sup>23</sup> Email from Miguel Garcia (NIFA) to Doris Pienknagura (Merck) (17 Dec. 2002) (R-6).

<sup>24</sup> Email from Jacob Harel (Merck) on January 15, 2003 to Merck’s negotiation team (R-11). *See also* Exhibit C-151, Testimony of Edgardo Jaén, *NIFA v. MSDIA*, Trial Court, dated 18 October 2005 (in response to Question 18) (“I insist that I was informed about these events over the telephone by Jacob Harel in January 2003 and that NIFA was asked to commit to refraining from manufacturing Merck products during a five year term, computed as from the purchase of the plant.”)

<sup>25</sup> Email from Jacob Harel (Merck) on January 15, 2003 to Merck’s negotiation team (R-11) (emphasis added).

A meeting with Mr. Garcia is scheduled for next week. The objective is to negotiate a commitment that NIFA will not manufacture copies of MSD products for a period of 3-5 years.<sup>26</sup>

However, because this would raise legality issues under Ecuadorian law, Mr. Harel also stated the need for Ecuadorian counsel on antitrust law.<sup>27</sup>

34. During their last meeting on 22 January 2003, Merck indicated to NIFA “that it would proceed with the proposed sale if NIFA agreed that for five years after the sale it would not produce copies of MSDIA’s products at the plant.”<sup>28</sup> According to Doris Pienknagura, the plant operations manager who, along with Mr. Harel, attended the meeting with NIFA:

The meeting of January 22 had two parts: first, in the morning we began by discussing several topics that merited an agreement and then we started to talk about the issue of the copies. Then, Mr. García said he was not familiar with the list of products that MERCK sold in Ecuador, so we proceeded to give him a copy - attachment [sic] one<sup>29</sup> – that included a listing of all sixty-six products that MSD sold at the time, with its brand name, generic and presentation. [...] At that point the meeting was interrupted and Mr. García said he’d come back in the afternoon with a list of their manufacturing plan, and so he did; he came back with a list of products that appear in attachment two,<sup>30</sup> on which we made a few notes.<sup>31</sup>

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<sup>26</sup> *Id.*

<sup>27</sup> *Id.* (“Legal will research the following: 1. How do we position such a request with the current Anti trust [sic] regulations in Ecuador. 2. If a commitment is given - how do we enforce it.”).

<sup>28</sup> Claimant’s Memorial, ¶ 35. *See also* Exhibit C-173, Testimony of Doris Pienknagura, *NIFA v. MSDIA*, Court of Appeals, dated 4 June 2009 (in response to Question 20); Email from Miguel Garcia (NIFA) to Anne Usher de Ranson (Staubach) (22 January 2003) (R-15).

<sup>29</sup> Annex 1 (Doris Pienknagura) (1 Jan. 2003) (R-7) (listing 66 products sold by Merck in Ecuador, including their commercial brand names, generic names, and presentation).

<sup>30</sup> Annex 2 (Doris Pienknagura) (R-124) (listing 53 products).

<sup>31</sup> Exhibit C-173, Testimony of Doris Pienknagura, *NIFA v. MSDIA*, Court of Appeals, dated 4 June 2009 (in response to Question 21).

35. Ms. Pienknagura explained that the reason the negotiations ended abruptly was because “Mr. Garcia said that NIFA refused to cave at that point because those products were — by law — part of the basic drug chart and couldn’t accept a limitation for their sale.”<sup>32</sup> It was also Mr. Garcia’s contemporaneous understanding that Merck sought to impose an all-inclusive non-compete, expressly covering products that were not protected by Merck’s patents.<sup>33</sup>

36. The foregoing documents, later marshalled as evidence in the Ecuadorian courts by the parties, demonstrate that Merck’s proposal sought not only to prohibit NIFA from manufacturing Merck’s patented products, but also to restrict NIFA’s right to manufacture and market products, which were not protected by patents in Ecuador and which were freely produced by NIFA’s competitors. NIFA had confirmed that it would not violate Merck’s patent rights and agreed not to manufacture products in the second group for two years.<sup>34</sup> But Mr. Jacob Harel’s position was unwavering.<sup>35</sup> The negotiations reached a deadlock because NIFA did not agree to renounce its business plan linked to the acquisition of the plant.<sup>36</sup>

37. Also conveniently omitted from the Merck’s Memorial is the fact that NIFA’s commitment not to produce Rofecoxib or any other patented drugs was already stated *in writing prior* to the 22 January 2003 meeting and did not require further negotiation.<sup>37</sup> Upon Merck’s

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<sup>32</sup> *Id.* (in response to Question 22).

<sup>33</sup> Email from Miguel Garcia (NIFA) to Anne Usher de Ranson (Staubach) (22 January 2003) (R-15).

<sup>34</sup> *Id.*

<sup>35</sup> *Id.*

<sup>36</sup> *See id.*

<sup>37</sup> According to Mr. Harel, “Mr. Garcia confirmed that he will not copy Vioxx or other patent protected products. He is not willing to commit to refrain from manufacturing of non patent protected products.” Email from Jacob Harel (Merck) on January 15, 2003 to Merck’s negotiation team (R-11).

discovery that NIFA had obtained certain registrations from the Ecuadorian Ministry of Health to produce Rofecoxib, Merck's legal counsel, Mr. Alejandro Ponce Martinez, sent a cease and desist request to NIFA, warning against the production of Rofecoxib.<sup>38</sup> As testified by Merck's employee, on 3 January 2003 Merck received a signed letter from NIFA that it would not copy Rofecoxib.<sup>39</sup>

38. Consequently, after 3 January 2003, Merck's concern about NIFA copying Rofecoxib had become a non-issue. Nevertheless, in the final stages of the negotiation, when all the terms and conditions for the sale had already been discussed by the parties, Merck continued to advance its demand that NIFA sign on to a non-compete clause as a condition for the sale.<sup>40</sup>

39. Merck's motive for such insistence emerges from the court records. As it was negotiating with NIFA, Merck simultaneously was considering an alternative buyer and, as late as in January 2003 — i.e., 11 months after the negotiations with NIFA had commenced — conducted a study of the relative advantages of one over the other. This study assessed the overall impact of NIFA's expansion on Merck's sales of drugs in Ecuador, taking into account

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<sup>38</sup> Exhibit C-138, Letter from Alejandro Ponce Martínez to Miguel García, dated 2 December 2002. In addition, on 16 December 2002, Doris Pienknagura sent an email to NIFA inquiring about NIFA's plans with respect to Rofecoxib. Email from Doris Pienknagura (Staubach) to Miguel Garcia (Nifa) (16 Dec. 2002) (R-5). The following day, Mr. Garcia responded in writing that NIFA had no intention to produce Rofecoxib or infringe any other of Merck's patent rights. Email from Miguel Garcia (NIFA) to Doris Pienknagura (Merck) (17 Dec. 2002) (R-6). NIFA explained that it had sought and obtained the registration to manufacture and market Rofecoxib products after the Ecuadorian Institute of Intellectual Property had told NIFA that Rofecoxib was not protected by any patent in Ecuador. Later, NIFA found out that the Ecuadorian Institute of Intellectual Property had made a mistake because Rofecoxib was protected by a patent. When it learned of this mistake, NIFA suspended its plans to manufacture and market Rofecoxib products. *Id.*

<sup>39</sup> Exhibit C-173, Testimony of Doris Pienknagura, *NIFA v. MSDIA*, Court of Appeals, dated 4 June 2009 (in response to Questions 16 and 17). *See also* Email from Doris Pienknagura (Merck) to Miguel Garcia (NIFA) (9 Jan. 2003) (R-8).

<sup>40</sup> Email from Doris Pienknagura (Merck) to Miguel Garcia (Nifa) (10 Jan. 2003) (R-9).

the cost of permitting NIFA to increase its production of generics. It determined that NIFA's production of Merck's drugs would cost Merck approximately US \$4,100,000 during the 2003-2008 period.<sup>41</sup> Based on these figures, selling the plant to another company (i.e., Ecuaquimica<sup>42</sup>) at half the price that would use the plant solely for warehousing and offices "could be the best option."<sup>43</sup> Based on this cost-benefit analysis, the preference for Ecuaquimica was evident to Merck.<sup>44</sup>

40. In its Memorial, Merck states that the Chillos Valley plant was ultimately sold in July 2003 to Ecuaquímica, another pharmaceutical company, for just over half the price that had been agreed with NIFA.<sup>45</sup> It fails to mention, however, that Ecuaquímica did not intend to use the plant to produce competing products, but rather acquired the plant only for its use as a warehouse.<sup>46</sup>

41. Merck stated in the Memorial that NIFA's general manager, Mr. Garcia, terminated the negotiations after both parties could not agree on the scope of the non-compete clause.<sup>47</sup> To the contrary, several communications between NIFA and Merck after the meeting of 22 January

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<sup>41</sup> Email from Jacob Harel (Merck) on January 15, 2003 to Merck's negotiation team (R-11); Email from Luis Eduardo Ortiz (Merck) to Jacob Harel (Merck) (14 Jan. 2003) (R-10) ("Subject: COPIES ANALYSIS (Draft)").

<sup>42</sup> Ecuaquimica was one of the companies Merck negotiated with even prior to its work with Staubach. Exhibit C-144, Testimony of Anne Kareen Ranson [a/k/a Anne Usher de Ranson], *NIFA v. MSDIA*, Trial Court, dated 28 June 2004, at p. 8 (in response to Question 9). After ending the negotiations with NIFA, Merck resumed talks with Ecuaquimica. Exhibit C-173, Testimony of Doris Pienknagura, *NIFA v. MSDIA*, Court of Appeals, dated 4 June 2009, at 1 (in response to Question 2).

<sup>43</sup> Email from Luis Eduardo Ortiz (Merck) to Jacob Harel (Merck) (14 Jan. 2003) (R-10).

<sup>44</sup> Email from Jacob Harel (Merck) on January 15, 2003 to Merck's negotiation team (R-10).

<sup>45</sup> Claimant's Memorial, ¶ 36.

<sup>46</sup> Email from Jacob Harel (Merck) on January 15, 2003 to Merck's negotiation team (R-11).

<sup>47</sup> Claimant's Memorial, ¶ 35.

2003 suggest that Mr. Miguel Garcia was open to resolving their differences. However, Mr. Harel showed no interest and hastily closed the door to any further discussions with NIFA.<sup>48</sup>

42. Following the failed negotiations, NIFA brought an ordinary civil lawsuit against Merck in Ecuadorian courts, for the harm it suffered as a result of Merck's conduct.

## **B. The *NIFA v. Merck* Litigation**

43. The *NIFA v. Merck* lawsuit was filed by NIFA in the Second Court for Civil Affairs of Pichincha, the first instance court, and proceeded upon Merck's appeal to the Provincial Court of Justice for Commercial and Civil Matters, the second instance court, and was the subject of cassation before the National Court of Justice ("NCJ"). Contrary to Merck's allegations, the records of all three of these court proceedings show that both litigants were accorded a fair process at each level.

### **1. The First Instance Court Proceedings**

44. On 20 November 2003, NIFA filed a complaint against Merck in the Second Court for Civil Affairs of Pichincha, a first instance court with general civil law jurisdiction (the "first instance court" or "trial court").<sup>49</sup> NIFA alleged that it entered into negotiations with Merck for the sale of the Chillos Valley plant, which "were drawn out for almost a year, during which time [NIFA] believed — mistakenly — that [it was] dealing with a serious offer made by a

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<sup>48</sup> See Letter from Jacob Harel (Merck) to Miguel Garcia (NIFA) (29 Jan. 2003) (R-17). In contrast, Mr. Garcia communicated openness and continued interest. See Fax from Miguel Garcia (NIFA) to Jacob Harel (Merck) (31 Jan. 31) (R-18). Because of Mr. Harel's refusal to continue the negotiations, NIFA sent two letters in February 2003 to Raymond V. Gilmartin, Merck & Co's President and CEO. In these letters, NIFA described the circumstances that led to the termination of the negotiations and sought an explanation from Mr. Gilmartin. These complaints were left unanswered. Facsimile from Miguel Garcia (NIFA) to Raymond Gilmartin (Merck) (10 Feb. 2003) (R-20); Facsimile from Miguel Garcia (NIFA) to Raymond Gilmartin (Merck) (14 Feb. 2003) (R-21).

<sup>49</sup> Exhibit C-10, NIFA's Complaint, *NIFA v. MSDIA*, Trial Court, dated 16 December 2003.

respectable company,” until January 2003, when Merck’s employee, Doris Pienknagura, informed NIFA’s attorney of Merck’s intention to impose a non-compete clause prohibiting NIFA from producing various generic medications.<sup>50</sup> NIFA alleged damages for Merck’s strategy to delay NIFA’s “entry into the generic products market,”<sup>51</sup> “that [came] to two hundred million dollars (\$200,000,000.00) . . . because of the fraudulent acts that caused my client to suffer serious damages.”<sup>52</sup>

45. In support, NIFA’s complaint expressly relied on a number of provisions in the Constitution,<sup>53</sup> the Civil Code,<sup>54</sup> and the Civil Procedure Code.<sup>55</sup> Indeed, in one of its submissions to the trial court, Merck recognized that:

The pretension of Claimant [NIFA] in this action consists in the payment of damages resulting from a tort, that is an *intentional wrongful act which has damaged Claimant* [NIFA], because [Merck], according to Claimant [NIFA], acted in bad faith and committed a fraud in the course of the negotiations to sell its industrial plant.<sup>56</sup>

46. The proceedings before the first instance court were extensive, including parties’ written pleadings, a ten-day evidentiary period, various motions by the parties to exclude each other’s evidence, expert reports, and oral hearings. The entire record amounted to no less than six

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<sup>50</sup> *Id.*, pp. 7, 9.

<sup>51</sup> *Id.*, p. 8.

<sup>52</sup> *Id.*

<sup>53</sup> Ecuadorian Constitution, Article 18, Article 23 numbers 16 and 18, Article 244 numbers 1 and 3, Article 272 and Article 273.

<sup>54</sup> Civil Code, Articles 18, 29, 2241, 2256, 2259, 2260.

<sup>55</sup> Code of Civil Procedure, Articles 63 and 404 *et seq.*

<sup>56</sup> Merck Submission, *MSDIA v. NIFA*, Trial Court (9 May 2005) (R-40).



thousand pages. To show the breadth the first instance proceedings, Ecuador refers the Tribunal to the electronic docket of the case available from the Pichincha Court’s website.<sup>57</sup> While it does not detail all the documents and exhibits submitted in the case, it gives a sense of the breadth and serious nature of the proceedings, bearing the hallmarks of an ordinary civil court case.<sup>58</sup>

47. The electronic docket shows that NIFA’s complaint was randomly assigned, through the judiciary lottery system, to Judge Juan Toscano Garzón (“Judge Toscano”).<sup>59</sup> After according the claimant a statutory right to complement and amend its complaint, the first instance court notified the defendant Merck and ordered it to answer the complaint within fifteen days.<sup>60</sup>

48. Following the parties’ submission of briefs, the trial court commenced a ten-day evidentiary period.<sup>61</sup> During this evidentiary period, both parties enjoyed an opportunity to submit all documents it wished to put into evidence, including various emails relating to the negotiations over the sale of the plant.<sup>62</sup> Both litigants requested depositions of their respective

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<sup>57</sup> Electronic Docket, Case No. 2003-1022, *NIFA v. MSDIA*, Second Court for Civil Affairs of Pichincha (First Instance Court) (R-121), available at <http://www.funcionjudicial-pichincha.gob.ec/index.php/consulta-de-procesos>.

<sup>58</sup> *Id.*

<sup>59</sup> *Id.*

<sup>60</sup> Code of Civil Procedure, Article 397 (RLA-107). The first instance court asked Merck to submit an additional answer or counter-claim in response to NIFA’s amended complaint. Electronic Docket, Case No. 2003-1022, *NIFA v. MSDIA*, Second Court for Civil Affairs of Pichincha (First Instance Court) (R-121), Entries 4-8.

<sup>61</sup> *Id.*

<sup>62</sup> MSDIA Submission, *MSDIA v. NIFA*, Trial Court (24 June 2004) (R-22).

factual witnesses. NIFA requested the deposition of Mrs. Usher de Ranson.<sup>63</sup> Merck requested the deposition of Mr. Edgardo Jaen.<sup>64</sup>

49. As is typical in first instance proceedings, on 29 June 2004, the court ordered several judicial inspections, including a judicial inspection of NIFA's plant,<sup>65</sup> a judicial inspection at Merck's offices to evaluate, *inter alia*, operational and maintenance costs at the Chillos Valley plant;<sup>66</sup> and a judicial inspection of NIFA's accounting.<sup>67</sup>

50. The proceedings also involved a number of experts designated by the trial court:

- Gustavo Rojas, who submitted an expert report,<sup>68</sup> as well as a supplemental report based on Merck's observations,<sup>69</sup> on NIFA's accounting;
- Luis Tapia Arroyo, who submitted one expert report<sup>70</sup> and a supplemental report at Merck's request<sup>71</sup> on Merck's operations and maintenance costs relating to the Chillos Valley Plant;

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<sup>63</sup> See Exhibit C-143, Trial Court Order of 25 June 2004, *NIFA v. MSDIA*.

<sup>64</sup> Electronic Docket, Case No. 2003-1022, *NIFA v. MSDIA*, Second Court for Civil Affairs of Pichincha (First Instance Court) (R-121), Entry 35.

<sup>65</sup> NIFA Submission, *NIFA v. MSDIA*, Trial Court (29 June 2004) (R-24). Thus, on 24 August 2004, Judge Toscano conducted a judicial inspection at NIFA's laboratory to verify its capacity to manufacture pharmaceuticals. Judicial Inspection( at NIFA'S plant) (24 Aug. 2004) (R-33).

<sup>66</sup> Judicial Inspection at (MSDIA's plant) (6 Sept. 2004) (R-34).

<sup>67</sup> Judicial Inspection (at MSDIA's plant) (12 May 2005) (R-41).

<sup>68</sup> Court Order, *MSDIA v. NIFA*, Trial Court (notifying the parties of Mr. Gustavo Rojas' Report) (2 Feb. 2006) (R-53).

<sup>69</sup> Electronic Docket, Case No. 2003-1022, *NIFA v. MSDIA*, Second Court for Civil Affairs of Pichincha (First Instance Court) (R-121), Entry 122.

<sup>70</sup> *Id.*, Entry 82.

- Omar Herrera, who submitted an expert report on Merck’s accounting<sup>72</sup>; and
- Angel Calapaqui, who submitted an expert report on NIFA’s plant.<sup>73</sup>

Merck exercised its right to submit observations and object to the reports submitted by the court-appointed experts, arguing that they were irrelevant in determining whether NIFA had suffered any harm as a result of the failed negotiations.<sup>74</sup> Moreover, the court directed the experts to submit supplemental reports as Merck requested.<sup>75</sup> Thus, it is incontestable that the parties’ respective positions and evidence received a full airing and that each had its “day in court.”

51. Merck claims to have found some needles in the haystack of the record to allege that it was not notified in advance of two orders pertaining to the deposition of NIFA’s fact witness, Mrs. Usher de Ranson, and that it was not properly notified of the final judgment issued by the first instance court. As demonstrated below, these allegations are not only gross exaggerations of what had actually happened but a dissimulation of the role of Merck’s own counsel.<sup>76</sup>

52. After about three and a half years, after completion of the evidentiary phase and when the case was ready for a decision, Judge Toscano was elevated to the Provincial Court of Justice for Commercial and Civil Matters. As a result, a new judge, Temporary Judge Chang Huang, was assigned to replace him, also through the judicial lottery.<sup>77</sup> After having an opportunity to study

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<sup>71</sup> *Id.*, Entry 94.

<sup>72</sup> Omar Herrera’s Expert Report, *MSDIA v. NIFA*, Trial Court (18 May 2005) (R-42).

<sup>73</sup> Angel Calapaqui’s Expert Report, *MSDIA v. NIFA*, Trial Court (10 Jan. 2005) (R-35).

<sup>74</sup> Electronic Docket, Case No. 2003-1022, *NIFA v. MSDIA*, Second Court for Civil Affairs of Pichincha (First Instance Court), Entry 82.

<sup>75</sup> *Id.*, Entry 88.

<sup>76</sup> *See infra* Section VI(C)(1)(a).

<sup>77</sup> The judicial lottery system of assigning judges and rotation of judges is to ensure against biased proceedings.

the case during a three-month period, Temporary Judge Chang Huang issued a judgment in the case, on 17 December 2007, in favor of NIFA. The judgment declared Merck's practices and acts during the negotiations with NIFA to be illegal under Article 244 of the Ecuadorian Constitution<sup>78</sup> and tortious, notably under Articles 2214, 2216, and 2229 of the Ecuadorian Civil Code.<sup>79</sup> While the trial court held that Merck was not obliged to sell the plant to NIFA, it recognized that the parties were required to negotiate in good faith. It found that Merck's lack of transparency in its dealings with NIFA was abusive and wrongful under Ecuadorian tort law.<sup>80</sup>

## 2. The Court of Appeals Proceedings

53. Merck's appeal of the trial court's judgment was assigned to the First Chamber of the Provincial Court of Justice for Commercial and Civil Matters, the second instance court

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<sup>78</sup> The trial court held that it was its duty to penalize acts that violated this provision of the Constitution:

Numeral 3 of article 244 of the Political Constitution of the Republic, imposes on the State, the obligation to penalize all practices of monopoly and others that impede or distort free competition. The constitutional regulation declares the illegality of all of those practices that affect or distort competition, even more so if these arise from a company with large economic power that could impose monopoly power. The constitutional regulation classifies the anti-competition practices as illegal, whereby it is the duty of the judge to penalize within the framework of the law, the commission of said practices.

Exhibit C-3, Trial Court Opinion, *NIFA v. MSDIA*, dated 17 December 2007.

<sup>79</sup> The trial court reasoned:

In order for a wrongdoing to be civilly punished and for the obligation to repair the damage to be imposed on the author, a culpable, illegal and punishable action must exist. Article 2229 of the Civil Code establishes that, as a general rule, all damages that can be attributed to malice or negligence of another person shall be repaired by that person. This regulation is in line with that established in article 2214 of the Civil Code that states that whoever has committed a wrongdoing or negligence is obligated to provide indemnity. The cited legal regulations punish the commission of civil wrongdoings and impose the obligation to repair the damage caused, through the payment to the corresponding party, of an indemnity. It then complies with the presumed classification established in the Constitution of the Republic.

*Id.*, p. 14.

<sup>80</sup> *Id.*, p. 12. *See also id.*, pp. 9-11.

(hereinafter the “second instance court” or “court of appeals”).<sup>81</sup> An appellate panel was thereupon constituted, composed of three judges assigned randomly through the judicial lottery. These included Judges Alberto Palacios and Beatriz Suárez. They also included Judge Toscano, who had earlier been the judge assigned to the case in the first instance proceeding before his elevation to the appellate court. However, just two weeks after the court of appeals received the case file, Judge Toscano recused himself, *sua sponte*, from hearing or deciding the case for the very reason that he had participated in the lower court proceedings, and the additional reason that his substitute judge<sup>82</sup> (a part time position) was also NIFA’s attorney at the trial level.<sup>83</sup> His wish to be recused was eventually upheld and he was replaced on the panel by another judge.<sup>84</sup>

54. At the request of both parties, the court of appeals declared an evidentiary period.<sup>85</sup> As the appellant in the case with the burden of showing that the lower court’s decision was erroneous, Merck introduced new evidence, in addition to the evidence it had produced before the lower court.<sup>86</sup>

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<sup>81</sup> Electronic Docket, Case No. 2008-0421, *NIFA v. MSDIA*, Provincial Court of Justice of Pichincha, First Civil and Commercial Chamber (Second Instance Court) (R-122).

<sup>82</sup> In relevant time, the courts would designate substitute judges at the suggestion of the permanent judges. Substitute judges would serve only when the judge was unavailable to perform his or her functions. Today, substitute judges are permanent judges that rotate.

<sup>83</sup> Judge Juan Toscano’s Excuse, Court of Appeals, 29 July 2008 (R-65).

<sup>84</sup> See Exhibit C-186, Court of Appeals Order of 23 June 2009, *NIFA v. MSDIA* (ordering Judge Toscano Garzón’s recusal and replacing him with Permanent Assistant Judge Marco Vallejo Jijón).

<sup>85</sup> R Electronic Docket, Case No. 2008-0421, *NIFA v. MSDIA*, Provincial Court of Justice of Pichincha, First Civil and Commercial Chamber (Second Instance Court) (R-122), Entry 22.

<sup>86</sup> See Claimant’s Memorial, ¶ 78.

55. NIFA, on the other hand, as the party that prevailed below, expressly asked the court to rely on NIFA's evidence from below, including its pleadings.<sup>87</sup> NIFA thus relied by reference on the same evidence before the court of appeals as it had before the first instance court. Moreover, NIFA cross-examined most of the witnesses introduced by Merck, including Hans Forrer Ruegg,<sup>88</sup> Maria Fabiana Lacerca,<sup>89</sup> Luis Ortiz Monasterio,<sup>90</sup> Richard Trent,<sup>91</sup> Doris Pienknagura,<sup>92</sup> and Jacob Harel.<sup>93</sup> NIFA's cross-examination of these witnesses elicited evidence regarding the negotiations between the litigants.<sup>94</sup>

56. Thus, both sides had full opportunity to submit new evidence as well as to rely on their evidence in the first instance proceedings. Both had the opportunity to utilize compulsory process for obtaining witnesses and evidence. Both had a full opportunity to review the substance and source of any evidence against it and to contest its validity.<sup>95</sup>

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<sup>87</sup> Exhibit C-182, p. 1.

<sup>88</sup> NIFA Petition, Interrogatory for Hans Forrer Ruegg, *MSDIA v. NIFA* (Court of Appeals) (5 June 2009) (R-75).

<sup>89</sup> NIFA Petition, Interrogatory for Fabiana Lacerca, *MSDIA v. NIFA*, Court of Appeals (5 June 2009) (R-76).

<sup>90</sup> NIFA Petition, Interrogatory for Luis Ortiz Monasterio, *NIFA v. MSDIA*, Court of Appeals (5 June 2009) (R-77).

<sup>91</sup> NIFA Petition, Interrogatory for Richard Trent, *NIFA v. MSDIA*, Court of Appeals (5 June 2009) (R-78).

<sup>92</sup> Exhibit C-173, Testimony of Doris Pienknagura, *NIFA v. MSDIA*, Court of Appeals, dated 4 June 2009, at 9

<sup>93</sup> NIFA Petition, Interrogatory for Jacob Harel Interrogatory, *NIFA v. MSDIA*, Court of Appeals (June 5 2009) (R-79).

<sup>94</sup> *See, e.g.*, Exhibit C-173, Testimony of Doris Pienknagura, *NIFA v. MSDIA*, Court of Appeals, dated 4 June 2009, at 10, 11 (response to questions nineteen and twenty four).

<sup>95</sup> Judicial Inspection, *MSDIA v. NIFA*, Court of Appeals (10 Jan. 2010) (R-83). *See also* Court Order, *MSDIA v. NIFA*, Court of Appeals (5 June 2009) (R-80) (admitting and authorizing the taking of evidence proffered and requested by MSDIA, including, documentary evidence, appointment of experts, witness testimony abroad).

57. However, Merck accuses the second instance court of “improper” and “irregular” appointment of three experts — Mr. Cristian Augusto Cabrera Fonseca, Dr. Carlos Guerra Roman, and Mr. Marco V. Yerovi Jaramillo — whose reports were unfavorable to Merck.<sup>96</sup> As will be demonstrated below,<sup>97</sup> the record shows that there was nothing “irregular” or “improper” about their appointments.

58. The court of appeals initially appointed two experts to address three relevant subjects: antitrust law, damages, and real estate. It appointed Dr. De León to opine on antitrust law, at the request of Merck,<sup>98</sup> and on damages, at the request of NIFA.<sup>99</sup> As Merck states in its Memorial, the court of appeals requested from the Ecuadorian Competition Authority a list of candidates on antitrust law.<sup>100</sup> Based on the Competition Authority’s recommendation, the court appointed Dr. De León to serve “jointly as its expert on damages as well as on antitrust liability.”<sup>101</sup>

59. Mr. Cabrera was appointed as a second expert on damages at Merck’s request,<sup>102</sup> and according to the method suggested by Merck,<sup>103</sup> by order dated 3 February 2010.<sup>104</sup> However,

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<sup>96</sup> Claimant’s Memorial , ¶ 271(e).

<sup>97</sup> See *infra* Section VI(C)(2)(d).

<sup>98</sup> Exhibit C-40, MSDIA’s Petition of 13 May 2011, *NIFA v. MSDIA*, Court of Appeals, pp. 1-3.

<sup>99</sup> NIFA’s First Petition of 5 June 2009, *NIFA v. MSDIA*, Court of Appeals, pp. 4-5 (C-182).

<sup>100</sup> Claimant’s Memorial, ¶ 87.

<sup>101</sup> *Id.* ¶ 103. Electronic Docket, Case No. 2008-0421, *NIFA v. MSDIA*, Provincial Court of Justice of Pichincha, First Civil and Commercial Chamber (Second Instance Court) (R-122), Entry 108 (Appointment of Expert Witness, 27 July 2009).

<sup>102</sup> MSDIA Petition, *NIFA v. MSDIA*, Court of Appeals (5 June 2009) (R-72).

<sup>103</sup> MSDIA Petition, *NIFA v. MSDIA*, Court of Appeals (5 Jan. 2010) (R-81).

<sup>104</sup> Letter from the President of the Pichincha School of Public Accountants to Court of Appeals, *MSDIA v. NIFA*, Court of Appeals (1 Feb. 2010) (R-85); Court of Appeals Order, *NIFA v. MSDIA* (3 Feb. 2010) (R-86).

shortly thereafter, Dr. De León submitted his expert report dated 12 February 2010. This report stated that there were no grounds for NIFA's damages. Wishing to rely on this report and preclude any other opinion on damages, Merck "waive[d] its request for the expert Cristian Cabrera, whereby, accepting that waiver, the designation and the order that he present a report regarding the requested subjects will be left without effect."<sup>105</sup> Again, the court acceded to MSDIA's request, although it could maintain Mr. Cabrera as an independent, court-appointed expert.<sup>106</sup>

60. Understandably, NIFA sought another expert on damages.<sup>107</sup> In response, by order dated 10 May 2011, the court re-appointed Mr. Cabrera, who was already familiar with the case, had been recommended by the College of Accountants, and had been previously approved by both parties.<sup>108</sup> Merck did not object to Mr. Cabrera's credentials after he had been re-designated.

61. The court appointed Dr. Guerra as an additional expert on the subject of antitrust law, in response to NIFA's request to appoint an expert in antitrust law to challenge the findings of Dr. De León and in response to Merck's request for another expert to opine on Dr. De León's alleged

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<sup>105</sup> Exhibit C-26.

<sup>106</sup> Court of Appeals Order, *NIFA v. MSDIA* (26 Apr. 2010); Electronic Docket, Case No. 2008-0421, *NIFA v. MSDIA*, Provincial Court of Justice of Pichincha, First Civil and Commercial Chamber (Second Instance Court) (R-122), Entry 200 (General Order 26 April 2010, "Cristian Augusta Cabrera Fonseca as an expert is set aside.") It should be noted that Mr. Cabrera was set aside at Merck's request in April 2010, despite the fact that the court had already seen Dr. De León's damages report finding no grounds for damages in NIFA's favor.

<sup>107</sup> NIFA Petition, *MSDIA v. NIFA*, Court of Appeals (5 May 2011) (R-110).

<sup>108</sup> Exhibit C-39, NIFA Petition, *MSDIA v. NIFA*, Court of Appeals (5 May 2011). *See also* Electronic Docket, Case No. 2008-0421, *NIFA v. MSDIA*, Provincial Court of Justice of Pichincha, First Civil and Commercial Chamber (Second Instance Court) (R-122), Entry 344 (Ordering Proceedings 10 May 2011) ("The experts, although they are auxiliary elements for the Judge, are not necessarily mandatory, once the judge has formed his or her opinion.")



essential error.<sup>109</sup> Merck itself specifically suggested the method for his appointment, requesting the court to ask the competent authority, the Council of the Judiciary, to recommend a list of qualified experts to review Dr. De León's report<sup>110</sup> to determine if he had committed fundamental errors.<sup>111</sup> The court followed this selection process, forwarding the request to the Judiciary Council of Pichincha.<sup>112</sup> The Judiciary Council of Pichincha responded by directing the court to the publicly accessible list of accredited experts available on its website.<sup>113</sup> Consistent with normal practice, by order dated 8 December 2010, the second instance appointed Dr. Guerra from the list recommended by the Judiciary Council of Pichincha.<sup>114</sup>

62. The appointment of two real estate experts similarly followed the normal procedure, at the behest of the litigants. First, at Merck's request, the court appointed Mr. Manuel Silva.<sup>115</sup> After Mr. Silva had issued his report,<sup>116</sup> NIFA requested appointment of a new expert.<sup>117</sup> Merck made no objection to the appointment of a new expert in real estate. It did, however, object to the *scope* of the newly appointed expert's opinion, but only because it sought to prevent the

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<sup>109</sup> Exhibit C-29; NIFA Petition, *NIFA v. MSDIA*, Court of Appeals (12 Nov. 2010) (R-99) ("Both parties have requested that you appoint experts with knowledge in Antitrust Law and Antitrust Law [sic] and damages in order to clarify the truth and determine whether the argument filed by Ignacio de León reflects the truth.")

<sup>110</sup> Exhibit C-24, Report of Ignacio De León, *NIFA v. MSDIA*, Court of Appeals, dated 12 February 2010.

<sup>111</sup> MSDIA Petition, *NIFA v. MSDIA*, Court of Appeals, ( 29 Oct. 2010) (R-98).

<sup>112</sup> Letter from Court of Appeals to Judiciary Council of Pichincha, *NIFA v. MSDIA*, (26 Nov. 2010) (R-100).

<sup>113</sup> Letter from Provincial Direction of Pichincha to the Court of Appeals, *MSDIA v. NIFA* (30 Nov. 2010) (R-101).

<sup>114</sup> List of accredited experts by the Judiciary Council of Pichincha (30 Nov. 2010) (R-102).

<sup>115</sup> Electronic Docket, Case No. 2008-0421, *NIFA v. MSDIA*, Provincial Court of Justice of Pichincha, First Civil and Commercial Chamber (Second Instance Court), Entry 43 (R-122).

<sup>116</sup> Exhibit C-23, Report of Manuel J. Silva Vásconez, *NIFA v. MSDIA*, Court of Appeals, dated 23 December 2009.

<sup>117</sup> NIFA Petition, *MSDIA v. NIFA*, Court of Appeals (18 June 2010) (R-90).

expert from addressing the issues raised by NIFA.<sup>118</sup> Moreover, Merck itself asked for another expert to supplement Mr. Silva's report.<sup>119</sup> Thus, at the request of *both* parties, the court appointed Mr. Yerovi, who was selected from the list of experts sent by the Provincial Department of the Judicial Council at the request of the court.<sup>120</sup> Merck did not object to his specific appointment or credentials. It merely reserved the right to question Mr. Yerovi orally.<sup>121</sup>

63. In addition to the experts discussed by Merck in its Memorial, the court of appeals also appointed the following experts:

- Engineer Alfredo Calderón Serrano, appointed at NIFA's request, to review email exchanges among Merck personnel involved in the negotiations;<sup>122</sup>
- Martha Piedad Lincango Flores, appointed to assess NIFA's plant capacity for production of pharmaceuticals (in connection with a judicial inspection);<sup>123</sup> and
- Dr. José Carlos García Cevallos, appointed to opine on whether the market for generic drugs was a regulated market in Ecuador.<sup>124</sup>

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<sup>118</sup> Exhibit C-30, Report of Marco V. Yerovi Jaramillo, *NIFA v. MSDIA*, Court of Appeals, dated 20 December 2010.

<sup>119</sup> MSDIA Request, *NIFA v. MSDIA*, Court of Appeals (31 Jan. 2011) (R-105).

<sup>120</sup> MSDIA Request, *NIFA v. MSDIA*, Court of Appeals (30 Sept. 2010) (R-92); Exhibit C-28, Court of Appeals Order of 26 October 2010, *NIFA v. MSDIA*.

<sup>121</sup> MSDIA Petition, *MSDIA v. NIFA*, Court of Appeals (27 Oct. 2010) (R-97).

<sup>122</sup> *See also* Electronic Docket, Case No. 2008-0421, *NIFA v. MSDIA*, Provincial Court of Justice of Pichincha, First Civil and Commercial Chamber (Second Instance Court), Entry 159 (Judicial Proceedings Ordered 25 January 2010) (R-122).

<sup>123</sup> *See id.*, Entry 117.

<sup>124</sup> *See id.*, Entry 303.

64. Upon the completion of the evidentiary phase, submission of various expert reports and written pleadings, the court of appeals issued its final judgment on 23 September 2011.<sup>125</sup> The court found Merck's conduct tortious, holding that the provisions of the Civil Code were sufficiently broad and covered every type of illicit civil act, including practices contrary to free competition.<sup>126</sup> The court of appeals reduced the amount of damages to US \$150 million.<sup>127</sup>

65. Merck alleges that the court of appeals' judgment shows that the court deemed that Merck waived its evidence. As discussed below, this is not correct. The judgment itself was clear, stating that the only evidence it deemed waived by Merck was the evidence that Merck itself sought to exclude: "for the record, the defendant in this instance expressly waived the evidence aiming to dispel the grounds of the verdict in the first instance, *as appears on page 9940* of the court orders."<sup>128</sup> Page 9940 of the record contains Merck's waiver of its right to appoint an expert to determine whether NIFA had suffered damages arising from the failed negotiations,<sup>129</sup> made by Merck when Dr. De León issued a report favorable to it. Clearly, the sentence in the judgment cited by Merck simply notes by reference the single respect in which Merck expressly waived its rights.

66. The court of appeals did not consider Merck's other evidence waived. The court's primary function was to review the decision below. It therefore considered the record of the trial

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<sup>125</sup> Exhibit C-4, Court of Appeals Judgment, *NIFA v. MSDIA*, dated 23 September 2011.

<sup>126</sup> *Id.*, Seventh Recital.

<sup>127</sup> *Id.*, p. 16.

<sup>128</sup> *Id.*, p. 15 (emphasis added).

<sup>129</sup> Exhibit C-26, MSDIA's Petition of 16 April 2010, *NIFA v. MSDIA*, Court of Appeals.

court proceedings in addition to any new evidence submitted by both parties at the appellate level.<sup>130</sup> Furthermore, the judgment expressly reflected the court’s consideration of the experts relied on by Merck. Thus, the court rejected Merck’s justification for the imposition of the non-compete clause based on the defense that NIFA violated Merck’s intellectual property. It found no evidence of such violation. For this reason, the second instance court did not agree with Dr. De Leon’s opinion, one favored by Merck, because it “echoed” Merck’s defense rejected by the court.<sup>131</sup> Similarly, the court provided its reasoning for favoring Mr. Jaramillo’s expert report over Mr. Manuel Silva’s, Merck’s favored expert.<sup>132</sup>

67. Merck’s further allegations about the irregularity of the judgment are also dispelled below.<sup>133</sup>

68. On 13 October 2011, both NIFA and Merck filed their cassation petitions seeking review of the court of appeals’ judgment by Ecuador’s National Court of Justice (NCJ).<sup>134</sup> The court of

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<sup>130</sup> Aguirre Opinion, ¶ 5.4. *See also* Aguirre Opinion, ¶¶ 5.5-5.7, 7.2.

<sup>131</sup> Exhibit C-4, Court of Appeals Judgment, *NIFA v. MSDIA*, dated 23 September 2011, Thirteenth Recital, p. 13.

<sup>132</sup> The court reasoned:

The case file shows that during the years 2002 and 2003 there were a number of industrial facilities for sale or lease, so the defendant argues that the plaintiff might well have opted for any of them or for expanding their plant. However, during the evidentiary period two expert reviews were performed to determine the availability of suitable plants for the pharmaceutical industry in the city of Quito. The first one (expert Manuel Silva) describes the plants and buildings, but does not specify whether they are suitable for the pharmaceutical industry and its compliance with the rules of Good Manufacturing Practices, while the second one (Marco Yerovi Jaramillo) makes clear that although there were several industrial plants, these were not suitable for the pharmaceutical industry. It is important to determine this fact, since it can be concluded that the industrial plant that was owned by the defendant became a unique asset at the time, since there were no other industrial plants in the area of the city of Quito and its area of influence that meet the technical characteristics necessary for a sensitive industry as is the pharmaceutical industry. . . . Exhibit C-4, Court of Appeals Judgment, *NIFA v. MSDIA*, dated 23 September 2011, Thirteenth Recital, pp. 11-12.

<sup>133</sup> *See infra* Section VI(C)(2)(f).

<sup>134</sup> Exhibit C-198, MSDIA’s Cassation Petition, *NIFA v. MSDIA*, Court of Appeal, dated 13 October 2011; Exhibit C-199, NIFA’s Cassation Petition, *NIFA v. MSDIA*, dated 13 October 2011.

appeals declared both petitions to be in conformity with the cassation petition requirements on 24 October 2011. In the same order, the court of appeals set US \$23,500 as the amount of the bond necessary to stay enforcement,<sup>135</sup> which Merck promptly paid. By order dated 25 October 2011, the court of appeals admitted the parties' cassation petitions, suspended the execution of the judgment entered by it, and referred the case to the NCJ.<sup>136</sup>

### 3. The Cassation Proceedings

69. The National Court of Justice admitted the appeals on 11 November 2011. On 18 November 2011, Merck asked the NCJ to set a date and time for the oral hearing.<sup>137</sup> In response to Merck's request, on 29 November 2011, the NCJ scheduled the oral hearing for 12 December 2011.<sup>138</sup> Merck, however, requested to continue the hearing at a later date, stating that it needed more time to prepare for an oral hearing, but without specifying any specific timeframe.<sup>139</sup> The NCJ acceded to this request and rescheduled the hearing at the end of the month, 26 December 2011.<sup>140</sup> Merck did not seek further rescheduling. As stated in its Memorial, the oral hearing took place as scheduled on 26 December, and Merck's counsel attended the hearing and argued

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<sup>135</sup> Exhibit C-53, Court of Appeals Order of 25 October 2011, *NIFA v. MSDIA*.

<sup>136</sup> Exhibit C-51, Court of Appeals Order of 24 October 2011, *NIFA v. MSDIA*.

<sup>137</sup> Merck's Request for Oral Hearing, *NIFA v. MSDIA*, NCJ (18 Nov. 2011) (R-128).

<sup>138</sup> Exhibit C-55, NCJ Order of 29 November 2011, *NIFA v. MSDIA*, at 1 (“[S]et the Court Hearing ... for Monday, December 12, 2011, at 15:00 hours ....”).

<sup>139</sup> Exhibit C-56, MSDIA Petition of 7 December 2011, *NIFA v. MSDIA*, NCJ (7 Dec. 2011).

<sup>140</sup> Exhibit C-57, National Court of Justice Order of 8 December 2011, *NIFA v. MSDIA* (8 Dec. 2011).

Merck's case.<sup>141</sup> Furthermore, Merck's counsel submitted a post-hearing brief, reserving its right to file further claims, in addition to the matters expressed orally at the hearing.<sup>142</sup>

70. As had been long provided for in the law as part of the implementation of Ecuador's new Constitution of 2008, in January 2012, the judges on the National Court of Justice were replaced. On or about 26 March 2012, three of the new judges assigned to the Civil Chamber of the NCJ were selected to preside over the *NIFA v. MSDIA* case. They took over the case on 20 May 2012.<sup>143</sup>

71. On 21 September 2012, the NCJ issued its final judgment on the parties' appeals. The following summarizes the decision of the National Court of Justice:

72. After setting forth the causes of action in Prophar's and Merck's respective appeals, the National Court undertook to conduct a *de novo* review of whether the lower courts had applied the correct legal standards to the case and, if they had not, they were to remedy any errors in those courts' decisions by applying the correct legal standards, in light of the evidentiary record below.

73. The National Court first analyzed Merck's arguments that the lower courts' decisions should be annulled on jurisdictional and procedural grounds. Based on that analysis, the National Court concluded that nullification of the lower courts' decisions was not justified because no alleged procedural violations of due process had affected a final decision in the case

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<sup>141</sup> Claimant's Memorial, fn. 245. See also Ponce Martínez Witness Statement at para. 60.

<sup>142</sup> Merck's Submission to the NCJ (27 Dec. 2011) (R-129).

<sup>143</sup> Exhibit C-62, NCJ Order of 30 May 2012, *NIFA v. MSDIA* ("tak[ing] over" case between NIFA and MSDIA pursuant to "appoint[ment] by the Transitional Judicial Council, through Resolution 4-2012 of January 25, 2012.>").

and Merck had received ample opportunity to defend itself in the lower court proceedings. Among its findings in this regard, the National Court: (1) rejected Merck's argument that the trial court should have referred the case to the Andean Community Court of Justice, because the case was not covered by Andean Community legislation and because consultation with the Andean Community Court of Justice is obligatory only when, unlike the situation here, a party has no recourse under an Andean Community member country's internal law; (2) rejected Merck's argument that the trial court should have stayed the proceedings and consulted with the Constitutional Court pursuant to Article 428 of the Ecuador Constitution, because the question under that provision of whether consultations with the Constitutional Court are necessary is within the exclusive discretion of the trial court; and (3) rejected Merck's jurisdictional argument that the case was governed by procedures under the Law on Intellectual Property since Propfar's complaint was not based on intellectual property law but on articles of the Civil Code together with the Constitution.

74. The National Court then proceeded to examine the contents of the lower courts' decisions on the merits of the case. In twenty-six pages of analysis, the National Court found that the Court of Appeals' interpretation of the applicable legislation and its application to the facts of the case was erroneous, because it mixed and confused legislation related to free market principles of antitrust law with civil law provisions sanctioning the tort of unfair conduct by one marketplace competitor against another. In one of its conclusions in this regard, the National Court observed:

The basic problem with the challenged judgment is that it attempts to transform, and indeed does so, a problem whose origin is manifestly civil and of unfair competition, to one that is an exclusive matter of Antitrust Law; that is, from a conflict that can only affect the companies PROPHAR S.A. and MERCK

Corporation, a strange conceptual leap is made to try to convert it into a problem about the consumers and users of pharmaceutical products in general, or what is worse, of an alleged relevant market for industrial plants.<sup>144</sup>

75. The National Court determined that, although antitrust law principles did not apply to Propfar's claims against Merck, the civil law governing the tort of unfair competition did apply, and analyzed whether Merck's refusal to sell its pharmaceutical plant to Propfar without a non-compete clause constituted such a tort. The National Court found that, after ten months of negotiations with Propfar for the plant's sale in which Merck did not raise any restrictions on what Propfar could manufacture, Merck had conditioned the sale on Propfar's agreement not to produce (among other drugs) generic drugs that would compete with generics Merck was selling in Ecuador. The National Court concluded that Merck's introduction of this extraneous condition constituted a practice that prevents and distorts competition, giving rise to a civil tort for which Merck is liable for damages to Propfar under Article 244(3) of the Ecuador Constitution and Articles 2214 and 2229 of the Civil Code.

76. The National Court then analyzed whether the Court of Appeals' US \$150,000,000 damage award against Merck was appropriate and found that, as Merck had argued, "that amount lacks all proportion" given that the tort concerned an act of unfair competition by one competitor against another. It also agreed with Merck's argument that the testimony of expert witness Augusto Cabrera Fonseca, on which the lower court based its damage award, should be rejected. After citing additional reasons why the \$150,000,000 damage award was disproportionate and based on erroneous assumptions, the National Court found that the proper period for determining Propfar's losses is two years, instead of the 15 years utilized by the lower courts, given that

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<sup>144</sup> Exhibit C-203, ¶ 9.1 (internal emphasis omitted)



Prophar's complaint identified two years as the period for which its expansion plans were delayed due to Merck's refusal to sell. It also examined legal doctrine on "lost opportunities" and observed that the doctrine was applicable to Prophar, given its increasing total sales and its net profits during the years surrounding the parties' negotiations and Merck's ultimate refusal to sell the plant to it.

77. The National Court concluded by awarding Prophar damages in the amount of US \$1.57 million, taking into account the following factors:

- The two-year period for which Prophar alleged its expansion plans had been delayed;
- Prophar's last offer of \$1.5 million as the purchase price for the plant; and
- Merck's position that the maximum loss that it could have caused Prophar was US \$820,000 per year.

78. After the NCJ judgment was served on the parties on 24 September 2012, both Merck and NIFA submitted their clarification requests.<sup>145</sup> The NCJ issued its clarification decree on 22 October 2012,<sup>146</sup> after which the NCJ's jurisdiction over the matter came to an end. The NCJ judgment was remanded to the trial court for execution.<sup>147</sup> As indicated by Merck in its Memorial, Merck satisfied the judgment and paid the US \$1.57 million NCJ judgment in full, on 29 November 2012.<sup>148</sup>

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<sup>145</sup> See Exhibit C-204, NCJ Order of 22 October 2012, *NIFA v. MSDIA*. Merck's Clarification of the NCJ Judgment (27 Sept. 2012) (R-130).

<sup>146</sup> Exhibit C-204, NCJ Order of 22 October 2012, *NIFA v. MSDIA*.

<sup>147</sup> See Exhibit C-207, Trial Court Order of 28 November 2012, *NIFA v. MSDIA*, p. 1.

<sup>148</sup> Claimant's Memorial, ¶ 156. See Exhibit C-208, MSDIA's Submission of Payment, *NIFA v. MSDIA*, Trial Court, dated 29 November 2012, at 1; Exhibit C-209, Trial Court Order of 29 November 2012, *NIFA v. MSDIA*.

#### 4. NIFA's Action Before Ecuador's Constitutional Court

79. On 19 November 2012, after the NCJ judgment had been remanded for execution to the lower court, Prophar filed an “extraordinary action for protection” in Ecuador’s Constitutional Court.<sup>149</sup> However, Merck, which enjoyed the same opportunity to pursue Constitutional Court remedies for, *inter alia*, violations of its due process rights, chose to forgo that opportunity.

80. However, Merck was an extremely active participant in Prophar’s constitutional case, petitioned the Constitutional Court to dismiss Prophar’s constitutional action through its submission dated 9 January 2013,<sup>150</sup> filing multiple briefs and requesting<sup>151</sup> and participating in an oral hearing that took place on 30 April 2013.<sup>152</sup> As an interested party, Merck has vigorously opposed Prophar’s constitutional action, arguing against its merits through a series of extensive written submissions.<sup>153</sup> Throughout its participation, and although it noted its disagreement with the NCJ, Merck vigorously defended the validity and propriety of the NCJ decision, the very decision that it impugns in this arbitration as the primary vehicle for the denial of justice it claims to have suffered.

81. The Constitutional Court has not yet released its decision on Prophar’s constitutional action.

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<sup>149</sup> Exhibit C-205, NIFA’s Extraordinary Action for Protection, Constitutional Court, dated 19 November 2012.

<sup>150</sup> MSDIA submission to the Constitutional Court (received by the Court on 9 Jan. 2013) (R-116).

<sup>151</sup> MSDIA submission to the Constitutional Court (received by the Court on 20 Jan. 2013) (R-131); MSDIA submission to the Constitutional Court (received by the Court on 13 Feb. 2013) (R-132).

<sup>152</sup> MSDIA submission to the Constitutional Court (received by the Court on 30 Apr. 2013) (R-118); MSDIA submission to the Constitutional Court (received by the Court on 13 Sept. 2013) (R-120), p. 1.

<sup>153</sup> MSDIA submission to the Constitutional Court (received by the Court on 3 Apr. 2013) (R-117); MSDIA submission to the Constitutional Court (received by the Court on 30 Apr. 2013) (R-118); MSDIA submission to the Constitutional Court (received by the Court on 13 Sept. 2013) (R-120)

## 5. Merck's Initiation of the Present Arbitration

82. While its case was pending before the court of appeals, and long before its judgment of 23 September 2011, Merck gave notice of an “investment dispute” under the Ecuador-U.S. BIT with its letter dated 8 June 2009. By action of said letter, Merck also purported to accept the offer made by Ecuador to submit investment disputes for settlement by binding arbitration before the International Centre for the Settlement of Investment Disputes.<sup>154</sup> On 29 November 2011, Merck submitted a notice for arbitration, in accordance with the UNCITRAL Arbitration Rules.<sup>155</sup> On 12 June 2012, Merck filed an application requesting the provision of interim measures by the Tribunal.<sup>156</sup> The Parties exchanged two rounds of written pleadings, which followed by a hearing on 4-5 September 2012. By request dated 11 March 2013, Merck withdrew its Request for Interim Measures.<sup>157</sup> On 2 October 2013, Merck submitted its Memorial on the Merits and Jurisdiction.

### **III. THIS UNCITRAL TRIBUNAL LACKS JURISDICTION BECAUSE MERCK ELECTED EXCLUSIVELY AND IRREVOCABLY TO SEEK RESOLUTION OF THE DISPUTE IN ICSID**

#### **A. Introduction**

83. The right of a foreign investor to invoke international arbitration directly against a sovereign State is an extraordinary concession of sovereignty and an exception to the general unavailability of compulsory dispute resolution procedures at the international level. Not surprisingly, a dispensation this important and far reaching is granted only under carefully

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<sup>154</sup> Notice of Dispute, C-2, pp. 1-2.

<sup>155</sup> Claimant's Request for Arbitration, dated 29 Nov. 2011, ¶ 1.

<sup>156</sup> Claimant's Request for Interim Measures, dated 12 June 2012.

<sup>157</sup> Claimant's Letter dated 11 March 2013, p. 1.

delimited circumstances. The legal effects of such a dispensation cannot be compared to or confused with the much more open-ended consent to arbitration found in commercial contracts, where the private parties involved merely substitute arbitration for the ordinary judicial processes to which they would otherwise be subject. A treaty provision for arbitration is not merely trading one process for another; absent an express consent to jurisdiction, a State's performance of Treaty obligations cannot be enforced at the international level. And because it is so extraordinary, the right to compel a State into binding arbitration is a precious one, not to be exercised casually or recklessly, lest it be squandered.

84. This is precisely the case with respect to the right extended by the United States and Ecuador to each other's nationals to submit to a particular arbitral mechanism claims for alleged violations of the Treaty: such a right is a limited one, and of limited availability. Article VI(3) affords investors one, and only one, choice of arbitral mechanism to which to submit their claims for violations of the Treaty. Once such a choice is made, it becomes exclusive and irrevocable: investors cannot later change their mind and make a second choice to consent to a different arbitration procedure. They are left to exhaust whatever possibilities that choice affords to them.

85. Merck made such a choice with its Notice of Dispute dated 8 June 2009, when it consented to arbitration under the ICSID Convention, one of the four alternative choices made available under Article VI(3)(a) of the Treaty.<sup>158</sup> It could, instead, have chosen to consent to arbitration in accordance with the UNCITRAL Rules, one of the other alternative choices possible under Article VI(3)(a), but it did not. Having first chosen arbitration under the auspices

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<sup>158</sup> Letter to Dr. Diego García Carrión, Procurador del Estado de la República del Ecuador, from Ethan G. Shenkman and Howard M. Shapiro, Attorneys for MSDIA (8 June 2009) (C-2).

of the ICSID Convention, it has to live with that choice, however that choice plays out; it may not choose later to consent to arbitration under the UNCITRAL Rules.

86. Perhaps realizing that it does not have a legal leg to stand on, Merck makes an “equitable” argument in an effort to impress upon the Tribunal that it would somehow be “manifestly” unfair if it were not permitted under the terms of Article VI(3)(a) a second choice of forum for the arbitration of its claims.<sup>159</sup> The first answer to this is, of course, that the Tribunal’s duty is to determine what the Treaty provides, not whether the Treaty is fair. In the absence of the parties’ clear and explicit authorization to decide *ex aequo et bono*, a tribunal cannot refashion a result clearly prescribed by a rule of international law in the name of equity or fairness.<sup>160</sup> This Tribunal has an obligation to respect the agreement of the Parties to the Treaty and enforce the conditions to jurisdiction contemplated by the BIT.

87. Second, the Treaty result prescribed by Article VI(3)(a) cannot be considered either as fair or unfair when assessed in light of the default position of international law. That position is that private persons have no *a priori* right of arbitration against a sovereign State. As the tribunal in *ICS v. Argentina* pointed out, “[w]hereas the inherent jurisdiction or hermetic division of competence over claims before general courts is a common feature of municipal judicial systems, the default position under public international law is the absence of a forum before which to present claims.”<sup>161</sup>

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<sup>159</sup> Claimant’s Memorial, ¶ 240.

<sup>160</sup> *Case Concerning Maritime Delimitation in the Area between Greenland and Jan Mayen (Denmark v. Norway)*, Judgment (14 June 1993), Separate Opinion of Judge Weeramantry, I.C.J. Reports 1993, ¶ 60 (RLA-37).

<sup>161</sup> *ICS Inspection and Control Services Ltd. v. Argentine Republic*, PCA Case No. 2010-9, UNCITRAL, Award on Jurisdiction (10 Feb. 2012) (Dupuy, Torres Bernárdez, Lalonde), ¶ 281 (RLA-113).

88. Third, there is nothing unfair or inequitable in this result. Merck may attempt to pursue its claims before ICSID if it wishes to do so. After all, as Merck put it in its Notice of Dispute, its letter

serves to perfect “consent to the jurisdiction of the Centre” for purposes of Article 72 of the ICSID Convention, *thereby preserving MSDIA’s rights should the Republic of Ecuador decide to denounce the ICSID Convention pursuant to Article 71.*<sup>162</sup>

89. In light of the foregoing, and as will further be shown below, Merck’s original choice of consent under the terms of Article VI(3)(a) of the BIT to ICSID arbitration precludes it from now validly consenting to UNCITRAL arbitration. For this reason, this Tribunal lacks jurisdiction over Merck’s claims.

**B. The Terms Of Article VI(3)(a) Preclude Merck From Initiating UNCITRAL Arbitration After Having Previously Initiated ICSID Arbitration**

90. The terms of Article VI(3)(a) call for only one interpretation – while the investor has indeed “complete control” over “which arbitral mechanism shall be utilized if more than one is available,”<sup>163</sup> such complete control is subject to the terms of the Treaty, namely that *the investor may only choose one such mechanism.*<sup>164</sup> Once an investor has made its choice, it will have exhausted, to the fullest extent possible, the opportunities for international arbitration afforded by the BIT. From that point on, the investor is left to exploit the terms of the chosen mechanism as far as they will take it.

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<sup>162</sup> Letter to Dr. Diego García Carrión, Procurador del Estado de la República del Ecuador, from Ethan G. Shenkman and Howard M. Shapiro, Attorneys for MSDIA (8 June 2009), p. 2 (C-2) (emphasis added).

<sup>163</sup> K. Vandeveld, *BILATERAL INVESTMENT TREATIES: HISTORY, POLICY, AND INTERPRETATION* (2010), p. 437, (CLM-109). At paragraph 238 of its Memorial, Merck quotes Prof. Vandeveld’s statement selectively: the clause “if more than one [arbitral mechanism] is available” is omitted.

<sup>164</sup> Expert Opinion by Prof. Kenneth Vandeveld, ¶ 43 (“[the 1982 U.S. model BIT] made clear that the choice of forum was to be within the investor’s control, *within the terms of the BIT.*” (emphasis added).

91. Just as the terms of Article VI(2) provide for an exclusive and irrevocable choice (between local courts “or” previously agreed procedures “or” international arbitration pursuant to Article VI(3)(a)), so too do the terms of Article VI(3)(a) provide an exclusive and irrevocable choice (between ICSID “or” ICSID Additional Facility “or” UNCITRAL “or” other mutually-agreed arbitration institution).

92. Article VI(2) and Article VI(3)(a) thus operate in exactly the same way. The exclusive and irrevocable nature of the choices under Article VI(2) and Article VI(3)(a) is indisputable from the operative use of the term “or” common to both of these provisions. This is true according to the term’s normal usage, as attested to by grammar authorities. But it is also true according to the specific intent of the State Parties.

93. And the secondary authorities who address the issue are unanimous in their support of the fork-in-the-road effect of provisions such as Article VI(3)(a). These include Prof. Kenneth Vandeveld, whom Merck admits as the “leading commentator” on U.S. BITs,<sup>165</sup> who supplements his monumental writings that already support Ecuador’s interpretation with his written Expert Opinion. In that Opinion, Prof. Vandeveld explains in detail the parties’ intention that Article VI(3)(a) operate as a fork and the policy behind that intention.

94. The context provided by other provisions of BIT further establishes that under Article VI(3)(a), the State Parties consented to arbitrate in accordance with only one choice of arbitral mechanism by the investor. In addition, as Prof. Vandeveld points out, not only does this interpretation completely fulfill the BIT’s object and purpose in this regard, any other interpretation would actually conflict with that object and purpose.

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<sup>165</sup> Claimant’s Memorial, ¶ 238.

## 1. Ordinary Meaning Of The Terms Of Article VI(3)(a)

95. The “ordinary meaning” of the terms of the provision under interpretation is the natural point of departure.<sup>166</sup> When confirmed or not contradicted by the other elements of interpretation in Article 31, the “ordinary meaning” becomes determinative.<sup>167</sup> As will be shown below, the ordinary meaning of the terms of Article VI(3)(a) establishes that an investor’s choice of consent to an arbitral procedure under that provision is exclusive and irrevocable.

96. Article VI of the Treaty provides in pertinent part (emphasis added):

2. In the event of an investment dispute ... 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.

3. (a) ... the national or company concerned may choose to consent in writing to the submission of the dispute for settlement by binding arbitration:

(i) to the International Centre for the Settlement of Investment Disputes ("Centre") ... provided that the Party is a party to such Convention; *or*

(ii) to the Additional Facility of the Centre, if the Centre is not available; *or*

(iii) in accordance with the Arbitration Rules of the United Nations Commission on International Trade Law (UNCITRAL), *or*

(iv) to any other arbitration institution, or in accordance with any other arbitration rules, as may be mutually agreed between the parties to the dispute.

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<sup>166</sup> *Yukos Universal Limited (Isle of Man) v. The Russian Federation*, PCA Case No. AA 227, UNCITRAL, Interim Award on Jurisdiction and Admissibility (30 Nov. 2009) (Fortier, Poncet, Schwebel), ¶ 411 (RLA-98) (“according to Article 31 of the [Vienna Convention], a treaty must be interpreted first on the basis of its plain language.”).

<sup>167</sup> R. Gardiner, *TREATY INTERPRETATION* (2008), p. 166 (RLA-80).



97. Paragraph 2 sets forth the investor’s range of choices of dispute settlement. The provision establishes that the investor must choose to submit the dispute for resolution to applicable procedures previously agreed upon *or* to local courts or administrative tribunals of the host country *or* to arbitration in accordance with the terms of paragraph 3. This provision operates as a “fork-in-the-road” rule, positing, in the words of the tribunal in *M.C.I. Power v. Ecuador*, that “once the choice has been made there is no possibility of resorting to any other option.”<sup>168</sup>

98. In case Merck chooses to pursue the latter option under paragraph 2(c), paragraph 3 sets forth the investor’s range of choices of arbitral fora. In particular, the investor may choose ICSID *or* the ICSID Additional Facility *or* UNCITRAL *or* any other arbitration institution as may be mutually agreed.

99. The use of the disjunctive term “or” in reference to choosing among arbitral options - exactly like the same term is used in paragraph 2 to indicate the choice among the alternatives listed therein - signifies that paragraph 3 must operate in exactly the same manner as paragraph 2 to preclude subsequent choices of consent as far as the same investment dispute is concerned.

100. The fact that Article VI(3)(a) does not contain the formulation “under one of the following alternatives” that appears in Article VI(2) does not detract from this conclusion. As will be shown in the next section, the phrase “under one of the following alternatives” is not what establishes Article VI(2) as a fork in the road, since it in fact only serves to clarify the meaning of that provision. Indeed what gives Article VI(2) its fork-in-the-road effect is the use

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<sup>168</sup> See, e.g., *M.C.I. Power Group L.C. and New Turbine, Inc. v. Republic of Ecuador*, ICSID Case No. ARB/03/6, Award (31 Jul. 2007) (Vinuesa, Greenberg, Irrázabal), ¶ 181 (CLM-66) (interpreting Article VI(2) of the Ecuador-U.S. BIT).

of the term “or” in reference to the choice to be made, and because there can be no dispute that Article VI(2) is a true fork, the use of the term “or” in connection with the choice to be made under Article VI(3)(a) must have that same effect.

101. Ecuador’s interpretation of “or” in that sense finds support in several grammatical authorities. The *Cambridge Grammar of the English Language*, considered to be “the most recent attempt at a comprehensive descriptive grammar of English,” and “a more detailed analysis of *or* than can be found in the literature on legal drafting,”<sup>169</sup> states that “or” is typically used when the drafter of a legal document “wants to convey that only one of the propositions is correct—in effect, wants the *or* to be exclusive.”<sup>170</sup> Black’s Law Dictionary similarly defines “or” as a “disjunctive particle used to express an alternative or to give a choice of *one* among two or more things.”<sup>171</sup>

102. This understanding is further supported by scholarship in legal linguistics. In their article *Revisiting the Ambiguity of “And” and “Or” in Legal Drafting*, Professor Adams and Kaye conclude that for the purposes of legal drafting “*or* serves to distinguish alternatives, and it is untenable to seek to attribute, across the board, an inclusive meaning to *or*.”<sup>172</sup>

103. Finally, reading “or” in context with the verb “choose” confirms that “or” is used in Article VI(3)(a) in a disjunctive function, to denote, in other words, a choice, as it does in the context of Article VI(2).

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<sup>169</sup> K. Adams & A. Kaye, *Revisiting the Ambiguity of “And” and “Or” in Legal Drafting*, 80(4) ST. JOHN’S L. R. 1167, 1180 (2006) (RLA-77).

<sup>170</sup> *Id.*, p. 1181 (emphasis added).

<sup>171</sup> Nolan and Nolan-Haley, eds., BLACK’S LAW DICTIONARY (6<sup>th</sup> ed., 1990), p. 1095 (emphasis added) (RLA-29).

<sup>172</sup> K. Adams & A. Kaye, *Revisiting the Ambiguity of “And” and “Or” in Legal Drafting*, 80(4) ST. JOHN’S L. R. 1167, 1183 (2006) (RLA-77).

**2. The Absence In Article VI(3)(a) Of A Phrase Like “Under One Of The Following Alternatives” Does Not Negate The Provision’s Effect As A Fork In The Road**

104. The United States-Ecuador Treaty is based on the 1992 U.S. Model BIT.<sup>173</sup> Article VI(2) of the Model BIT provides in pertinent part:

If the dispute cannot be settled amicably, the national or company concerned may choose to submit the dispute 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.<sup>174</sup>

105. It can be immediately observed that the phrase “under one of the following alternatives” does not appear at all in this provision. Nonetheless, that provision, incorporated *verbatim* in seven BITs signed by the United States, was indisputably intended to operate as a fork-in-the-road, as illustrated in the chart in Table 1 below. The left-hand column shows the language of Article VI(2) of each of the following U.S. BITs: U.S.-Armenia BIT,<sup>175</sup> the U.S.-Kazakhstan BIT,<sup>176</sup> the U.S.-Kyrgyzstan BIT,<sup>177</sup> the U.S.-Moldova BIT,<sup>178</sup> the U.S.-Jamaica BIT,<sup>179</sup> the U.S.-Estonia BIT<sup>180</sup> and the U.S.-Ukraine BIT.<sup>181</sup> As can be seen, that language is identical to that of

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<sup>173</sup> K. Vandevelde, U.S. INTERNATIONAL INVESTMENT AGREEMENTS (2009), p. 644 (RLA-85). *See also* Expert Opinion of Prof. Vandevelde, ¶ 47.

<sup>174</sup> The 1992 U.S. Model BIT (Art. VI(2)) *reprinted in* U.S INTERNATIONAL INVESTMENT AGREEMENTS 810 (K. Vandevelde, 2009), p. 813 (RLA-31) (emphasis added).

<sup>175</sup> U.S.-Armenia BIT, signed 23 Sept. 1992; EIF 29 Mar. 1996 (RLA-33).

<sup>176</sup> U.S.-Kazakhstan BIT, signed 19 May. 1992; EIF 12 Jan. 1994 (RLA-32).

<sup>177</sup> U.S.-Kyrgyzstan BIT, signed 19 Jan. 1993; EIF 12 Jan. 1994 (RLA-35).

<sup>178</sup> U.S.-Moldova BIT, signed 21 Apr. 1993; EIF 25 Nov. 1994 (RLA-36).

<sup>179</sup> U.S.-Jamaica BIT, signed 4 Feb. 1994; EIF 7 Mar. 1997 (RLA-43).

<sup>180</sup> U.S.-Estonia BIT, signed 19 Apr. 1994; EIF 16 Feb. 1997 (RLA-45).

Article VI(2) of the 1992 Model BIT. The right-hand column shows excerpts from the Letters of Submittal from the U.S. Department of State to the Committee of Foreign Relations of the U.S. Senate of each of these BITs:

**Table 1**

<p><b>Article VI(2) of U.S.-Armenia BIT, Article VI(2) of U.S.-Kazakhstan BIT, Article VI(2) of U.S.-Kyrgyzstan BIT, Article VI(2) of U.S.-Moldova BIT, Article VI(2) of U.S.-Jamaica BIT, Article VI(2) of U.S.-Estonia and Article VI(2) of U.S.-Ukraine BIT:</b></p> <p>If the dispute cannot be settled amicably, the national or company concerned may choose to submit the dispute for resolution:</p> <p>(a) to the courts or administrative tribunals of the Party that in a Party to the dispute; <i>or</i></p> <p>(b) in accordance with any applicable, previously agreed dispute-settlement procedures; <i>or</i></p> <p>(c) in accordance with the terms of paragraph 3.</p>	<p><b>Letters of Submittal of U.S.-Armenia BIT, U.S.-Kazakhstan BIT, U.S.-Kyrgyzstan BIT and U.S.-Moldova BIT:<sup>182</sup></b></p> <p>Should such consultations fail, paragraphs 2 and 3 set forth the investor's range of choices of dispute settlement. The investor may make <i>an exclusive and irrevocable choice</i> to: (1) employ one of the several arbitration procedures outlined in the Treaty; (2) submit the dispute to procedures previously agreed upon by the investor and the host country government in an investment agreement or otherwise; or (3) submit the dispute to the local courts or administrative tribunals of the host country.</p> <p><b>Letters of Submittal of U.S.-Jamaica BIT; U.S.-Estonia BIT and U.S.-Ukraine BIT:<sup>183</sup></b></p> <p>Paragraph 2 permits the investor to make <i>an exclusive and irrevocable choice</i> to: (1) employ one of the several arbitration procedures outlined in the Treaty; (2) submit the dispute to procedures previously agreed upon by the investor and the host country government in an investment agreement or otherwise; or (3) submit the dispute to the local courts or administrative tribunals of the host country.</p>
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<sup>181</sup> U.S.-Ukraine BIT, signed 4 Mar. 1994; EIF 16 Nov. 1996 (RLA-44).

<sup>182</sup> Letter of Submittal of U.S.-Armenia BIT (7 Sept. 1993) (RLA-38); Letter of Submittal of U.S.-Kazakhstan BIT (7 Sept. 1993) (RLA-39); Letter of Submittal of U.S.-Kyrgyzstan BIT (7 Sept. 1993) (RLA-40); Letter of Submittal of U.S.-Moldova BIT (7 Sept. 1993) (RLA-41).

<sup>183</sup> Letter of Submittal of U.S.-Jamaica BIT (21 Sept. 1994) (RLA-47); Letter of Submittal of U.S.-Estonia BIT (7 Sept. 1994) (RLA-46); Letter of Submittal of U.S.-Ukraine BIT (27 Sept. 1994) (RLA-48).

106. In every instance, the respective U.S. Letter of Submittal characterized the investor's choice under Article VI(2) (and, as discussed more below, Article VI(3)) as "exclusive and irrevocable" despite the absence of the phrase "under one of the following alternatives" that appears in Article VI(2) of the Ecuador-U.S. BIT. Several tribunals interpreting this unadorned language of the 1992 model BIT have accepted this "exclusive and irrevocable" effect of the investor's choice under Article VI(2).<sup>184</sup> This conclusively demonstrates that the phrase "under one of the following alternatives" is not the source of the fork effect of Article VI(2) of the 1992 Model BIT or of any of the seven BITs entered into by the U.S. using the 1992 Model BIT language verbatim. That effect – that is, the "alternative and mutually exclusive character" – of the investor's choice under Article VI(2) of the 1992 Model BIT and these seven BITs derives solely from the use of the term "or."

107. In fact, the very Letter of Submittal of the Ecuador-U.S. BIT points out that the relevant phrase simply "reiterat[es]" what the prototype language already provides, namely "that the investor may choose among ... three alternatives." Moreover, it stresses that "[t]his addition *does not alter the operation of this provision.*"<sup>185</sup> Thus the fork effect imported into the Ecuador-U.S. BIT derives from the unadorned language of 1992 Model BIT Article VI(2) and not from the added phrase.

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<sup>184</sup> See, e.g., *Compañía de Aguas del Aconquija S.A. and Vivendi Universal (formerly Compagnie Générale des Eaux) v. Argentine Republic*, ICSID Case No. ARB/97/3, Decision on Annulment (3 Jul. 2002) (Fortier, Crawford, Fernandez Rozas), ¶ 55 (RLA-52) ("[i]n the Committee's view, a claim by CAA against the Province of Tucumán for breach of the Concession Contract, brought before the contentious administrative courts of Tucumán, would *prima facie* fall within Article 8(2) and constitute a "final" choice of forum and jurisdiction, if that claim was coextensive with a dispute relating to investments made under the BIT.") (emphasis added); *CMS Gas Transmission Company v. The Republic of Argentina*, ICSID Case No. ARB/01/8, Decision on Jurisdiction (17 Jul. 2003) (Orrego Vicuña, Lalonde, Rezek), ¶ 81 (RLA-56) ("Had the Claimant renounced recourse to arbitration, for example by resorting to the courts of Argentina, this would have been a *binding selection under the BIT.*" (emphasis added).

<sup>185</sup> Department of State, Letter of Submittal for U.S.-Ecuador Treaty Concerning the Encouragement and Reciprocal Protection of Investment ("Ecuador BIT Letter of Submittal"), reprinted in S.TREATY DOC. NO. 103-15 (1993) (RLA-34) (emphasis added).

108. This is further confirmed in Prof. Vandevelde’s treatise on U.S. International Investment Agreements, according to which the addition of this phrase in the Ecuador-U.S. BIT:

was intended to make clear that the investor may choose only one of the alternatives, which is the intent of the 1992 model, and thus *the addition of the phrase does not change the substance of the provision.*<sup>186</sup>

109. Prof Vandevelde expands on this explanation in his Opinion where he says that, when that phrase was added to Article VI(2) in the 1994 U.S. Model BIT, it was done “to make its meaning even clearer” and to:

*emphasize the exclusivity and irrevocability of the election among local remedies, previously agreed procedures and investor-state arbitration and NOT to indicate, by any kind of negative implication, that the choice among methods of investor-state arbitration under the BIT was not exclusive and irrevocable. In other words, the additional language was intended to reinforce the U.S. policy of avoiding multiplicity of proceedings, not to subvert it.*<sup>187</sup>

110. Moreover, the phrase was not added to Article VI(3)(a) of the 1994 Model to similarly emphasize its exclusive and irrevocable nature, because:

No [ ] ambiguities [ ] had ever existed with respect to whether the investor could consent to more than one investor-state arbitral forum. Therefore, *no clarifying language with respect to the exclusivity and irrevocability of the choice of consent among different forms of investor-state arbitration under the BIT was necessary.*<sup>188</sup>

111. Thus, the phrase “under one of the following alternatives” in Article VI(2) was added deliberately *only to confirm* the “alternative and mutually exclusive character of Article VI(2)”

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<sup>186</sup> K. Vandevelde, U.S. INTERNATIONAL INVESTMENT AGREEMENTS (2009), p. 644 (RLA-85) (emphasis added).

<sup>187</sup> Expert Report by Prof. Vandevelde, ¶ 57 (emphasis added).

<sup>188</sup> Expert Report by Prof. Vandevelde, ¶ 58 (emphasis added).

of the 1992 Model BIT language,<sup>189</sup> in which the only word grammatically capable of reflecting the State Parties' intention that the investor's choice operate as a fork in the road is the term "or." The phrase, debuting in the Ecuador-U.S. BIT and subsequently appearing in the 1994 Model BIT, was intended merely to highlight the exclusivity and irrevocability of the investor's election under Article VI(2), and not to indicate, as Prof. Vandeveldel states, "by any kind of negative implication, that the choice among methods of investor-state arbitration under the BIT was not exclusive and irrevocable."<sup>190</sup>

112. Therefore, just as the use of the disjunctive "or" is what gives Article VI(2) of the Ecuador-U.S. BIT the effect of a fork in the road, and not the phrase "under one of the following alternatives," so is the use of the disjunctive "or" what gives Article VI(3)(a) of the Ecuador-U.S. BIT the effect of a fork in the road, despite the absence of the phrase or similar language. This is illustrated in the following chart that compares the terms of Article VI(3)(a) with those of Article VI(2) with the phrase "under one of the following alternatives," now shown to be superfluous, stricken out:

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<sup>189</sup> It is commonplace in international law that terms in a treaty provision may serve a precautionary clarification. See *Siemens A.G. v. The Argentine Republic*, ICSID Case No. ARB/02/8, Decision on Jurisdiction (3 Aug. 2004), ¶ 90 (RLA-65) ("The Tribunal considers that the parties to a treaty are not precluded from placing emphasis on certain matters *ex abundante cautela*.").

<sup>190</sup> Vandeveldel Opinion, ¶ 57.

Table 2

Article VI(2) of the Ecuador-U.S. BIT	Article VI(3)(a) of the Ecuador-U.S. BIT
<p>If the dispute cannot be settled amicably, the national or company concerned <i>may choose</i> to submit the dispute, <del>under one of the following alternatives</del>, for resolution:</p> <p>(a) to the courts or administrative tribunals of the Party that is a party to the dispute; <i>or</i></p> <p>(b) in accordance with any applicable, previously agreed dispute-settlement procedures; <i>or</i></p> <p>(c) in accordance with the terms of paragraph 3.</p>	<p>Provided 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 <i>may choose</i> to consent in writing to the submission of the dispute for settlement by binding arbitration:</p> <p>(i) to the International Centre for the Settlement of Investment Disputes (“Centre”) established by the Convention on the Settlement of Investment Disputes between States and Nationals of other States, done at Washington, March 18, 1965 (ICSID convention”), provided that the Party is a party to such Convention; <i>or</i></p> <p>(ii) to the Additional Facility of the Centre, if the Centre is not available; <i>or</i></p> <p>(iii) in accordance with the Arbitration Rules of the United Nations Commission on International Trade Law (UNCITRAL), <i>or</i></p> <p>(iv) to any other arbitration institution, or in accordance with any other arbitration rules, as may be mutually agreed between the parties to the dispute.</p>

113. As can be seen, the language structure from which Article VI(2) derives its fork effect – “*may choose (a) or (b) or (c)*” – is exactly mirrored in the structure of Article VI(3)(a) – “*may choose (i) or (ii) or (iii) or (iv)*.” Their operative language is identical and therefore their effects are the same: to create a fork in the road.

114. There is, however, further evidence that the terms of Article VI(3)(a) are intended to extend an exclusive and irrevocable choice even without the presence of language like the phrase “under one of the following alternatives.”



115. Article VI(3)(a) of the Ecuador-U.S. BIT adopts *verbatim* the language of Article VI(3)(a) of the 1992 U.S. Model BIT, as can be seen in the following chart:

Table 3

Article VI(3)(a) of the 1992 U.S. Model BIT	Article VI(3)(a) of the Ecuador-U.S. BIT
<p>Provided 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 <i>may choose</i> to consent in writing to the submission of the dispute for settlement by binding arbitration:</p> <p>(i) to the International Centre for the Settlement of Investment Disputes (“Centre”) established by the Convention on the Settlement of Investment Disputes between States and Nationals of other States, done at Washington, March 18, 1965 (ICSID convention”), provided that the Party is a party to such Convention; <i>or</i></p> <p>(ii) to the Additional Facility of the Centre, if the Centre is not available; <i>or</i></p> <p>(iii) in accordance with the Arbitration Rules of the United Nations Commission on International Trade Law (UNCITRAL), <i>or</i></p> <p>(iv) to any other arbitration institution, or in accordance with any other arbitration rules, as may be mutually agreed between the parties to the dispute.</p>	<p>Provided 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 <i>may choose</i> to consent in writing to the submission of the dispute for settlement by binding arbitration:</p> <p>(i) to the International Centre for the Settlement of Investment Disputes (“Centre”) established by the Convention on the Settlement of Investment Disputes between States and Nationals of other States, done at Washington, March 18, 1965 (ICSID convention”), provided that the Party is a party to such Convention; <i>or</i></p> <p>(ii) to the Additional Facility of the Centre, if the Centre is not available; <i>or</i></p> <p>(iii) in accordance with the Arbitration Rules of the United Nations Commission on International Trade Law (UNCITRAL), <i>or</i></p> <p>(iv) to any other arbitration institution, or in accordance with any other arbitration rules, as may be mutually agreed between the parties to the dispute.</p>

116. Article VI(3)(a) of the 1992 Model BIT, like Article VI(2) of the Model, does not contain the phrase “under one of the following alternatives.” Yet this does not mean that Article VI(3)(a) of the Model was not intended to operate as a fork. As Prof. Vandeveld states, the available arbitral fora are alternatives as indicated by “linking them, as in Article VI(2), with the

disjunctive word ‘or.’”<sup>191</sup> Hence, although the 1992 Model increased the number of investor-state arbitration fora available to an investor, “this was not intended to alter the policy under which the investor would utilize only one, to the exclusion of others.”<sup>192</sup> It cannot be doubted that the same language in Article VI(3)(a) of the Ecuador-U.S. BIT is also intended to operate as a fork.

117. This finds further support in the experience of other BITs entered into with the language of Article VI(3)(a) of the 1992 Model BIT. The U.S.-Armenia BIT,<sup>193</sup> the U.S.-Kazakhstan BIT,<sup>194</sup> the U.S.-Kyrgyzstan BIT<sup>195</sup> and the U.S.-Moldova BIT<sup>196</sup> all adopted *verbatim* the wording of Article VI(3)(a) in the 1992 Model BIT. As can be seen from the following chart, the Letters of Submittal related to these BITs uniformly state that “paragraphs 2 *and* 3 set forth the investor’s range of choices of, dispute settlement. The investor may make *an exclusive and irrevocable choice* to: (1) employ *one of the several arbitration procedures* outlined in the Treaty.” In so stating, the Letters of Submittal make clear that the choices allowed by those BITs, and which are thus considered to be “*exclusive and irrevocable*,” include the choice of arbitration procedure:

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<sup>191</sup> Vandevelde Opinion, ¶ 53.

<sup>192</sup> Vandevelde Opinion, ¶ 53.

<sup>193</sup> U.S.-Armenia BIT, signed 23 Sept. 1992; EIF 29 Mar. 1996 (RLA-33).

<sup>194</sup> U.S.-Kazakhstan BIT, signed 19 May. 1992; EIF 12 Jan. 1994 (RLA-32).

<sup>195</sup> U.S.-Kyrgyzstan BIT, signed 19 Jan. 1993; EIF 12 Jan. 1994 (RLA-35).

<sup>196</sup> U.S.-Moldova BIT, signed 21 Apr. 1993; EIF 25 Nov. 1994 (RLA-36).

Table 4

<p><b>Article VI(3)(a) of U.S.-Armenia BIT, Article VI(3)(a) of U.S.-Kazakhstan BIT, Article VI(3)(a) of U.S.-Kyrgyzstan BIT and Article VI(3)(a) U.S.-Moldova BIT</b></p> <p>Provided 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 <i>may choose</i> to consent in writing to the submission of the dispute for settlement by binding arbitration:</p> <p>(i) to the International Centre for the Settlement of Investment Disputes (“Centre”) established by the Convention on the Settlement of Investment Disputes between States and Nationals of other States, done at Washington, March 18, 1965 (ICSID convention”), provided that the Party is a party to such Convention; <i>or</i></p> <p>(ii) to the Additional Facility of the Centre, if the Centre is not available; <i>or</i></p> <p>(iii) in accordance with the Arbitration Rules of the United Nations Commission on International Trade Law (UNCITRAL), <i>or</i></p> <p>(iv) to any other arbitration institution, or in accordance with any other arbitration rules, as may be mutually agreed between the parties to the dispute.</p>	<p><b>Letters of Submittal of U.S.-Armenia BIT, U.S.-Kazakhstan BIT, U.S.-Kyrgyzstan BIT and U.S.-Moldova BIT:</b><sup>197</sup></p> <p>Should such consultations fail, paragraphs 2 <i>and</i> 3 set forth the investor’s range of choices of dispute settlement. The investor may make <i>an exclusive and irrevocable choice</i> to: (1) employ one of the several arbitration procedures outlined in the Treaty; (2) submit the dispute to procedures previously agreed upon by the investor and the host country government in an investment agreement or otherwise; or (3) submit the dispute to the local courts or administrative tribunals of the host country.</p>
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118. This is no less true in regard to the Ecuador-U.S. BIT. Like the Letters of Submittal regarding these other BITs, the Letter of Submittal of the Ecuador-US BIT also states that “paragraphs 2 *and* 3 set forth the investor’s range of choices of, dispute settlement. The investor

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<sup>197</sup> Letter of Submittal of U.S.-Armenia BIT (7 Sept. 1993) (RLA-38); Letter of Submittal of U.S.-Kazakhstan BIT (7 Sept. 1993) (RLA-39); Letter of Submittal of U.S.-Kyrgyzstan BIT (7 Sept. 1993) (RLA-40); Letter of Submittal of U.S.-Moldova BIT (7 Sept. 1993) (RLA-41).

may make *an exclusive and irrevocable choice* to: (1) employ *one of the several arbitration procedures* outlined in the Treaty.”<sup>198</sup>

Table 5

Article VI(3)(a) of the Ecuador-U.S. BIT	Letter of Submittal of Ecuador-U.S. BIT:
<p>Provided 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 <i>may choose</i> to consent in writing to the submission of the dispute for settlement by binding arbitration:</p> <p>(i) to the International Centre for the Settlement of Investment Disputes (“Centre”) established by the Convention on the Settlement of Investment Disputes between States and Nationals of other States, done at Washington, March 18, 1965 (ICSID convention”), provided that the Party is a party to such Convention; <i>or</i></p> <p>(ii) to the Additional Facility of the Centre, if the Centre is not available; <i>or</i></p> <p>(iii) in accordance with the Arbitration Rules of the United Nations Commission on International Trade Law (UNCITRAL), <i>or</i></p> <p>(iv) to any other arbitration institution, or in accordance with any other arbitration rules, as may be mutually agreed between the parties to the dispute.</p>	<p>Should such consultations fail, paragraphs 2 <i>and</i> 3 set forth the investor’s range of choices of dispute settlement. The investor may make <i>an exclusive and irrevocable choice</i> to: (1) employ <i>one of the several arbitration procedures</i> outlined in the Treaty; (2) submit the dispute to procedures previously agreed upon by the investment and the host country government in an investment agreement or otherwise; or (3) submits the dispute to the local courts or administrative tribunals of the host country.</p>

119. Prof. Vandeveldel states in his Opinion that, under the 1992 Model BIT and all BITs based on such model, “once an investor consents to the submission of a dispute to investor-state arbitration in accordance with the consent of a BIT party set forth in the BIT, investor-state

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<sup>198</sup> Department of State, Letter of Submittal for U.S.-Ecuador Treaty Concerning the Encouragement and Reciprocal Protection of Investment (“Ecuador BIT Letter of Submittal”) *reprinted in* S.TREATY DOC. NO. 103-15 (1993) (RLA-34) (emphasis added).

arbitration under any other forum is no longer available. The choice is exclusive and irrevocable.”<sup>199</sup> Prof. Vandeveldel further states that a contrary reading of Article VI(3)(a) would subvert the long-standing US policy of avoiding multiple proceedings underlying the election of remedies provisions in US BITs:

To have allowed the investor to submit the dispute to both ICSID and *ad hoc* tribunal under the UNCITRAL rules, either simultaneously or consecutively [...] would have meant that, for the first time in U.S. BIT practice, the BIT potentially would have multiplied the number of fora to which the investor could submit a dispute. [...] To have allowed the investor to submit the dispute to more than one form of investor-state arbitration would have meant that, for the first time, the BIT would have authorized multiple investor-state arbitral proceedings in lieu of other remedies. Such a result would have been inconsistent with the U.S. policy of avoiding multiple proceedings.

It would have been ironic and, perhaps more to the point, unbelievably incoherent, for the United States, at exactly the moment when it was placing increased emphasis on avoiding multiplicity of proceedings by, for the first time, making the choice among the three alternatives in Article VI(2) – local remedies, previously agreed procedures and investor-state arbitration – explicitly exclusive and irrevocable, to decide simultaneously for the first time to allow the investor to submit a dispute to more than one investor-state arbitral forum.<sup>200</sup>

120. Subsequent elaborations of the U.S. Model BIT confirm this reading of Article VI(3)(a) of the Ecuador-U.S. BIT.<sup>201</sup> Professor Reinisch and Loretta Malintoppi write with respect to the similarly worded Article 24(3) of the 2004 U.S. Model BIT:<sup>202</sup>

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<sup>199</sup> Vandeveldel Opinion, ¶ 60 (emphasis added).

<sup>200</sup> *Id.*, ¶¶ 55-56.

<sup>201</sup> Arbitral tribunals have stressed that an updated model BIT may be relevant to the interpretation of investment treaties based on previous model BITs. See *Suez, Sociedad General de Aguas de Barcelona, S.A. & Vivendi Universal, S.A. v. Argentine Republic*, ICSID Case No. ARB/03/19, Award on Jurisdiction (3 Aug. 2006) (Salacuse, Kaufmann-Kohler; Nikken), ¶ 58 (RLA-75); *El Paso Energy International Company v. The Argentine Republic*, ICSID Case No. ARB/03/15, Award on Jurisdiction (27 Apr. 2006) (Caflisch, Stern, Bernardini), ¶ 80 (CLM-9).

<sup>202</sup> That provision reads:

The wide range of different dispute settlement methods is reflected in the so-called multi-tiered dispute settlement clauses, that is, provisions that refer to ICSID as only one of several dispute resolution possibilities [...]. This is the case with the most recent model BIT adopted by the USA which provides for a period of six months before a claim can be submitted to arbitration and states that the claimant can submit its claim to arbitration under the ICSID Convention or under the UNCITRAL Arbitration Rules or to any other institution, provided that both parties agree [...]. In this kind of provision, *when a dispute settlement forum is selected, this choice is made to the exclusion of any other (electa una via, non datur recursus ad alteram)*.<sup>203</sup>

121. The Latin maxim Reinisch and Malintoppi use to describe the operation of Article 24(3) of the 2004 U.S. Model BIT shows that the provision is a fork in the road type of clause despite the absence of the phrase “under one of the following alternatives.” It is clear that, textually, this fork-in-the-road effect is owed to “or.”

122. In sum, all the available evidence confirms that because of their common language structure Article VI(2) and (3)(a) of the Ecuador-U.S. BIT operate in exactly the same manner to provide an investor with a single exclusive and irrevocable choice among alternatives. The

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Provided that six months have elapsed since the events giving rise to the claim, a claimant may submit a claim referred to in paragraph 1:

(a) under the ICSID Convention and the ICSID Rules of Procedure for Arbitration Proceedings, provided that both the respondent and the non-disputing Party are parties to the ICSID Convention;

(b) under the ICSID Additional Facility Rules, provided that either the respondent or the non-disputing Party is a party to the ICSID Convention;

(c) under the UNCITRAL Arbitration Rules; *or*

(d) if the claimant and respondent agree, to any other arbitration institution or under any other arbitration rules.

2004 U.S. model BIT, Article 24(3) (emphasis added), (RLA-60).

<sup>203</sup> A. Reinisch & L. Malintoppi, *Methods of Dispute Resolution*, in THE OXFORD HANDBOOK OF INTERNATIONAL INVESTMENT LAW 691 (Muchlinski *et al.*, eds., 2008), pp. 692-93 (RLA-81) (internal citations omitted) (emphasis added). The principle of *electa una via* means that “when one way has been chosen, no recourse is given to another.” See Garner, ed., BLACK’S LAW DICTIONARY (9<sup>th</sup> ed., 2009), p. 1828 (RLA-86).

phrase “under one of the following alternatives” in Article VI(2) acts as a precautionary clarification and hence its absence in Article VI(3)(a) is irrelevant.

### 3. The Context Of Article VI(3)(a)

123. Words or sentences found in close proximity to the terms under interpretation - for example, in other paragraphs within the article in which those terms are found - fall within the notion of “context.”<sup>204</sup>

124. Article VI(3)(b) provides that once the national or company concerned has consented to one of the alternative arbitration procedures, either party to the dispute may initiate arbitration in accordance with *the choice* so specified in the consent. In addition, Article VI(4) stipulates each State Party’s consent 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.” Both Article VI(3)(b) and (4) contemplate *one* choice, the creation of *one* consensual bond between the claimant investor and the host State.<sup>205</sup>

125. It follows that nothing in the text of Article VI suggests that the investor’s choice of consent to one of the alternative arbitration procedures in paragraph 3 may encompass more than one choice.

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<sup>204</sup> See *Empresas Lucchetti, S.A. and Lucchetti Peru, S.A. v. The Republic of Peru*, ICSID Case No. ARB/03/4 (formerly *Industria Nacional de Alimentos, A.S. and Indalsa Perú S.A. v. The Republic of Peru*), Decision on Annulment (5 Sep. 2007) (Danelius, Berman, Giardina), ¶ 80 (RLA-79) (holding that the second sentence of the Peru-Chile BIT “must be read in its context, i.e. together with the first sentence of the same article.”); *Plama Consortium Limited v. Republic of Bulgaria*, ICSID Case No. ARB/03/24, Decision on Jurisdiction (8 Feb. 2005) (Salans, van den Berg, Veeder), ¶ 30 (RLA-69). See also *Case of the Free Zones of Upper Savoy and the District of Gex*, Judgment, 7 June 1932, PCIJ Series A/B, No. 46, p. 140 (RLA-15) (“Moreover, it must not be overlooked that Article 435, both by reason of its position in the Treaty of Versailles and of its origin, forms a complete whole: it would therefore be impossible to interpret the second paragraph without regard to the first paragraph.”).

<sup>205</sup> Expert Opinion by Prof. Vandeveldel Opinion, ¶ 54.

#### 4. Object And Purpose Of Article VI(3)(A) And Of The BIT As A Whole

126. The singular, exclusive and irrevocable nature of the choice of consent to an international arbitration procedure provided under the terms of Article VI(3)(a) is entirely consistent with the object and purpose of Article VI.<sup>206</sup> As explained by Prof. Vandeveld, Article VI(3)(a) is an election of remedies provision. Such provisions have been a consistent trait of U.S. investment treaty practice, intended to avoid the multiplicity of proceedings.<sup>207</sup> Ecuador's interpretation of Article VI(3)(a) as extending a single choice of consent to one of the listed arbitration alternatives is thus entirely consistent with the U.S. intent to avoid multiple proceedings with respect to the same investment dispute.

127. Moreover, Ecuador's interpretation is entirely consistent with the object and purpose of the BIT as a whole, as reflected in its preambular language.<sup>208</sup> The preamble of the Ecuador-US BIT refers to the desire of the Parties 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." It acknowledges the Parties': (i) mutual recognition that "agreement upon the treatment to be accorded such investment will stimulate the flow of private capital and the economic development of the Parties;" (ii) agreement that "fair and equitable treatment of investment is

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<sup>206</sup> Many tribunals have placed considerable emphasis on the object and purpose not only of the treaty as a whole but of the specific provision under interpretation. *See, e.g., Bayindir Insaat Turizm Ticaret Ve Sanayi A.Ş. v. Islamic Republic of Pakistan*, ICSID Case No. ARB/03/29, Decision on Jurisdiction (14 Nov. 2005) (Kaufmann-Kohler, Berman, Böckstiegel), ¶ 96 (CLM-1); *SGS Société Générale de Surveillance S.A. v. Islamic Republic of Pakistan*, ICSID Case No. ARB/01/13, Decision of the Tribunal on Objections to Jurisdiction (6 Aug. 2003) (Feliciano, Faurès, Thomas), ¶ 164 (CLM-76).

<sup>207</sup> Expert Report by Prof. Vandeveld, ¶¶ 36-50.

<sup>208</sup> The preamble of a treaty typically serves as an important objective indicator of its "object and purpose." *See, e.g., Tokios Tokelés v. Ukraine*, ICSID Case No. ARB/02/18, Decision on Jurisdiction (29 Apr. 2004) (Weil, Bernardini, Price), ¶ 31 (CLM-81); *Aguas del Tunari, S.A. v. Republic of Bolivia*, ICSID Case No. ARB/02/3, Decision on Respondent's Objections to Jurisdiction (21 Oct. 2005) (Caron, Alberro-Semerena, Alvarez), ¶ 241 (RLA-70).



desirable in order to maintain a stable framework for investment and maximum effective utilization of economic resource;” and (iii) recognition that “the development of economic and business ties can contribute to the well-being of workers in both Parties and promote respect for internationally recognized worker rights.” This language is essentially similar to that of the Netherlands-Czech Republic BIT, which was analyzed by the tribunal in *Saluka v. Czech Republic* to require a balanced approach to the interpretation of BIT provisions:

The protection of foreign investments is not the sole aim of the Treaty, but rather a necessary element alongside the overall aim of encouraging foreign investment and extending and intensifying the parties’ economic relations. That in turn calls for a balanced approach to the interpretation of the Treaty’s substantive provisions for the protection of investments, since *an interpretation which exaggerates the protection to be accorded to foreign investments may serve to dissuade host States from admitting foreign investments and so undermine the overall aim of extending and intensifying the parties’ mutual economic relations.*<sup>209</sup>

128. Limiting the exclusivity and irrevocability of choice of dispute settlement procedures only to those listed in Article VI(2) would exaggerate the protection accorded to investors opting for international arbitration, to the detriment of those opting for local courts. It cannot be denied that such a result is hardly conducive to the promotion of “greater economic cooperation between the parties,” which necessarily implies mutual trust in the other Party’s legal system, as well as to the economic development of the Parties, which cannot be divorced from the development of their respecting legal systems.

129. Finally, assuming that the Treaty’s object and purpose is limited to protecting investments, which it is not, it is protection of “investments” in accordance with the agreed

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<sup>209</sup> *Saluka Investments BV (The Netherlands) v. The Czech Republic*, UNCITRAL, Partial Award (17 Mar. 2006) (Watts, Fortier, Behrens), ¶ 300 (CLM-144) (emphasis added).

terms. That Merck cannot have as many bites at the apple as it wishes is not somehow inherently inconsistent with a treaty that is designed to protect investment, *if this is what the Parties have contracted for*. As stated by the tribunal in *Austrian Airlines*, responding to the claimant investor's argument that "a clause which provides for arbitration over the amount of compensation only is not in conformity with the object and purpose of a BIT, which is *inter alia* the protection of foreign investors:"<sup>210</sup>

In assessing the scope of Article 8 of the Treaty in light of the Treaty's object and purpose, the Tribunal cannot ignore the investment protection regime set up by the Contracting States. [...] The observation that they did not provide for arbitration on every aspect of all treaty breaches cannot be deemed to be contrary to the Treaty's object and purpose of protecting investment. *It all depends on the protection contracted for [ ]*<sup>211</sup>

130. The tribunal in *Daimler v. Argentina* similarly emphasized that

as international treaties, BITs constitute an exercise of sovereignty by which States strike a delicate balance among their various internal policy considerations. For this reason, the Tribunal must take care not to allow any presuppositions concerning the types of international law mechanisms (including dispute resolution clauses) that may best protect and promote investment to carry it beyond the bounds of the framework agreed upon by the contracting state parties. *It is for States to decide how best to protect and promote investment. The texts of the treaties they conclude are the definitive guide as to how they have chosen to do so.*

In interpreting dispute resolution provisions in BITs – just as with any other treaty provision – the ultimate goal is to determine what the contracting parties actually consented to. Thus, the fact that dispute resolution clauses should be construed neither liberally nor restrictively *does not authorize international tribunals to interpret*

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<sup>210</sup> *Austrian Airlines v. The Slovak Republic*, UNCITRAL, Final Award (9 Oct. 2009) (Kaufmann-Kohler, Brower, Trapl), ¶ 101 (RLA-96).

<sup>211</sup> *Austrian Airlines v. The Slovak Republic*, UNCITRAL, Final Award (9 Oct. 2009) (Kaufmann-Kohler, Brower, Trapl), ¶ 103 (RLA-96) (emphasis added).

*such clauses in a manner which exceeds the consent of the contracting parties as expressed in the text. To go beyond those bounds would be to act ultra vires.*<sup>212</sup>

131. It follows that if the actual text of Article VI(3)(a) prescribes a single, exclusive, and irrevocable choice of consent to an international arbitration procedure, as Ecuador argues, such prescription cannot be displaced by subjective interpretations of the Treaty's object and purpose.<sup>213</sup>

## **5. Other Relevant Rules Of International Law Applicable In The Relations Between The Parties To The BIT**

132. A proper interpretation of Article VI must also take into account "any relevant rules of international law applicable in the relations between the parties," as required by Article 31(3)(c) of the Vienna Convention.

133. One such rule is the fundamental principle of international law according to which international courts and tribunals can only exercise jurisdiction over a State on the basis of its consent. As noted by the Permanent Court of International Justice, "[i]t is well established in international law that no State can, without its consent, be compelled to submit its disputes ... either to mediation or to arbitration, or to any other kind of pacific settlement."<sup>214</sup>

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<sup>212</sup> *Daimler Financial Services AG v. Argentine Republic*, ICSID Case No. ARB/05/1, Award (22 Aug. 2012) (Dupuy, Brower, Bello Janeiro), ¶¶ 164, 172 (RLA-116) (emphasis added) (internal citations omitted).

<sup>213</sup> See *Fraport AG Frankfurt Airport Services Worldwide v. Republic of the Philippines*, ICSID Case No. ARB/03/25, Award (16 Aug. 2007) (Fortier, Cremades, Reisman), ¶ 340 (RLA-78) ("while a treaty should be interpreted in the light of its objects and purposes, it would be a violation of all the canons of interpretation to pretend to use its objects and purposes, which are, by their nature, a deduction on the part of the interpreter, to nullify four explicit provisions.").

<sup>214</sup> *Case Concerning Status of Eastern Carelia*, Advisory Opinion, 23 July 1923, PCIJ Series B, No. 5, p. 27 (RLA-6).

134. A corollary of that principle is that a State’s consent to arbitration “shall not be presumed in the face of ambiguity.”<sup>215</sup> As a consequence, “where a claimant fails to prove consent with sufficient certainty, jurisdiction will be declined.”<sup>216</sup>

135. To be sure, Ecuador is not advocating the relevance of the so-called principle of restrictive interpretation in this proceeding. The customary law interpretive principles of the Vienna Convention apply uniformly to all treaty clauses. Nonetheless, within the Convention’s interpretive prescriptions, it is not possible to presume that consent has been given by a State.

As stated by the tribunal in *Daimler v. Argentina*:

[it] is not permissible [] to presume a state’s consent by reason of the state’s failure to proactively disavow the tribunal’s jurisdiction. Non-consent is the default rule; consent is the exception. Establishing consent therefore requires affirmative evidence. But the impossibility of basing a state’s consent on a mere presumption should not be taken as a “strict” or “restrictive” approach in terms of interpretation of dispute resolution clauses. It is simply the result of respect for the rule according to which state consent is the incontrovertible requisite for any kind of international settlement procedure ... *What is true of the very existence of consent to have recourse to a specific international dispute resolution mechanism is also true as far as the scope of this consent is concerned.*<sup>217</sup>

136. It follows that the principle of State consent mandates that Merck must affirmatively establish that Ecuador’s consent under Article VI extends to this proceeding: jurisdiction cannot be presumed.

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<sup>215</sup> *ICS v. Argentina*, ¶ 280 (RLA-113). See also *Wintershall Aktiengesellschaft v. Argentine Republic*, ICSID Case No. ARB/04/14, Award (8 Dec. 2008) (Nairman, Torres Bernárdez, Bernardini), ¶ 160(3) (RLA-90) (“... it is a general principle of international law that international courts and tribunals can exercise jurisdiction over a State only with its consent. The principle is often described as a corollary to the sovereignty and independence of the State. A presumed consent is not regarded as sufficient, because any restriction upon the independence of a State (not agreed to) cannot be presumed by courts ...”) (emphasis in the original).

<sup>216</sup> *Id.*, ¶ 280.

<sup>217</sup> *Daimler v. Argentina*, ¶ 175 (RLA-116) (emphasis added).

## 6. Conclusion

137. The above, including the text of Article VI(3)(a), in its immediate context, in light of the object and purpose of the Treaty, and taking into account other relevant rules of international law, all support Ecuador's conclusion that Article VI(3)(a) mandates a single, exclusive and irrevocable, choice of consent to an arbitration procedure.<sup>218</sup>

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<sup>218</sup> The interpretation of Article VI(3)(a) of the Ecuador-U.S. BIT was also at issue in the *Murphy Exploration & Production Company – International v. Republic of Ecuador* (UNCITRAL, PCA Case No. AA434). As reported in the International Arbitration Reporter (*UNCITRAL tribunal rejects jurisdictional objection relating to earlier ICSID claim in Ecuador windfall levy dispute*, 20 Jan. 2014 (RLA-129)), the majority held that there is no explicit limitation to the investor's right of consent to the arbitration procedures listed in Article VI(3)(a) and that Ecuador failed to establish that such limitation otherwise exists. Prof. Abi-Saab disagreed with the majority, criticizing the majority for taking liberties with the interpretation of the terms of Article VI(3)(a). The tribunal's award and Prof. Abi-Saab's dissenting opinion are subject to confidentiality arrangements and remain not publicly available. Ecuador disagrees with the disposition of the majority in the *Murphy v. Ecuador* case and has reserved its right to challenge the award in Dutch courts (The Hague being the place of arbitration in that case as well). In any event, the present Tribunal is not bound by the decision of the *Murphy* tribunal. As pointed out by the tribunal in *Romak v. Uzbekistan*:

With respect to arbitral awards, this Arbitral Tribunal considers that *it is not bound to follow or to cite previous arbitral decisions as authority for its reasoning or conclusions*. Even presuming that relevant principles could be distilled from prior arbitral awards (which has proven difficult with respect of many of the decisions cited by the Parties in these proceedings), *they cannot be deemed to constitute the expression of a general consensus of the international community, and much less a formal source of international law*. Arbitral awards remain *mere sources of inspiration, comfort or reference to arbitrators*.

Ultimately, the Arbitral Tribunal has not been entrusted, by the Parties or otherwise, with a mission to ensure the coherence or development of "arbitral jurisprudence." *The Arbitral Tribunal's mission is more mundane, but no less important: to resolve the present dispute between the Parties in a reasoned and persuasive manner, irrespective of the unintended consequences that this Arbitral Tribunal's analysis might have on future disputes in general*. It is for the legal doctrine as reflected in articles and books, and not for arbitrators in their awards, to set forth, promote or criticize general views regarding trends in, and the desired evolution of, investment law. This is not to say that the Arbitral Tribunal will simply ignore awards rendered by distinguished arbitrators. *The Arbitral Tribunal may and will examine them, not for the purposes of extracting from them rules of law, but as a means to provide context to the Parties' allegations and arguments, and as to explain succinctly the Arbitral Tribunal's own reasoning*.

*Romak S.A. v. The Republic of Uzbekistan*, UNCITRAL, PCA Case No. AA280, Award (26 Nov. 2009), ¶¶ 170-171 (RLA-97) (footnotes omitted) (emphasis added).

**C. Before Initiating This UNCITRAL Rules Arbitration, Merck Definitely Consented To The Arbitration Of This Dispute Under The ICSID Convention**

**1. Merck Exercised Its Right Under Article VI(3)(A) In Favor Of ICSID Arbitration**

138. By its letter of 8 June 2009, Merck chose to consent in writing to the submission of the dispute for settlement by binding arbitration under the ICSID Convention:

*By action of this letter, MSDIA hereby accepts the offer made by the Republic of Ecuador to submit investment disputes for settlement by binding arbitration before the International Centre for the Settlement of Investment Disputes (“ICSID”), pursuant to Article VI of the BIT and Article 25 of the Convention on the Settlement of Investment Disputes Between States and Nationals of Other States (“ICSID Convention”). This letter serves to perfect “consent to the jurisdiction of the Centre” for purposes of Article 72 of the ICSID Convention, thereby preserving MSDIA’s rights should the Republic of Ecuador decide to denounce the ICSID Convention pursuant to Article 71.<sup>219</sup>*

139. Merck’s letter represents a definitive “choice to consent” to ICSID arbitration, with a clear intent to “lock in” the Republic to that choice. Hence the references to Articles 25<sup>220</sup> and 72<sup>221</sup> of the ICSID Convention, according to which once the parties to an ICSID arbitration have given their consent, no party may withdraw its consent unilaterally, through the denunciation of the Convention or otherwise.

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<sup>219</sup> Notice of Dispute, pp. 1-2 (emphasis added) (C-2).

<sup>220</sup> The provision reads in pertinent part: “When the parties have given their consent, no party may withdraw its consent unilaterally.”

<sup>221</sup> The provision reads: “Notice by a Contracting State pursuant to Articles 70 or 71 shall not affect the rights or obligations under this Convention of that State or of any of its constituent subdivisions or agencies or of any national of that State arising out of consent to the jurisdiction of the Centre given by one of them before such notice was received by the depositary.” Article 72 is considered to constitute a special application of the principle of irrevocability enshrined in Article 25(1). See C. Schreuer, et al., *THE ICSID CONVENTION: A COMMENTARY* 1285 (Cambridge U. Press, 2d ed. (2009)), ¶ 2 (RLA-87).

140. Prof. Vandeveldel confirms that “[t]he June 8, 2009, letter [ ] constitutes an explicit choice by MSDIA to consent to arbitration before the Centre.”<sup>222</sup> Such choice of consent being “exclusive and irrevocable,” Merck “may not choose to consent to submission of the same dispute to arbitration in any other forum.”<sup>223</sup>

141. By action of its Notice of Dispute dated June 8, 2009 Merck has therefore exhausted its right under Article VI(3)(a). It follows that Merck was precluded from choosing to consent to arbitration under the UNCITRAL Arbitration Rules with its Notice of Arbitration.

**2. Merck’s Consent Was No Less Effective Because It Was Accompanied By “A Reservation Of Rights”**

142. Merck’s choice of consent to ICSID arbitration under the terms of Article VI(3)(a) of the BIT was accompanied by the following statement:

Notwithstanding and without prejudice to MSDIA’s right to initiate ICSID arbitration at some future date, MSDIA reserves its right at any time to select any form of arbitration set forth under Article VI(3)(a) of the BIT.<sup>224</sup>

143. As explained above, the investor’s choice of consent under Article VI(3)(a) is exclusive and irrevocable. Thus, once it chose to consent to ICSID arbitration, Merck exhausted, to the fullest extent possible, the opportunities for international arbitration afforded by the BIT. Therefore, as Prof. Vandeveldel states, “MSDIA was attempting to reserve a right that, as a result

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<sup>222</sup> Expert Report by Prof. Vandeveldel, ¶ 66.

<sup>223</sup> Expert Report by Prof. Vandeveldel, ¶ 66.

<sup>224</sup> Notice of Dispute, p. 2, (C-2).

of the June 8, 2009, letter, it no longer possessed.”<sup>225</sup> Furthermore, according to Prof. Vandeveldel:

It appears that MSDIA mistakenly believed that its choice was not exclusive and irrevocable and, on the basis of that mistaken belief, sought to reserve a right to consent to a different forum – *a right that, in actuality, it did not have.*<sup>226</sup>

144. Nor was the “reservation of rights” a condition on or a term of Merck’s choice of consent to ICSID so that it somehow brought about the “invalidity *ab initio*” of this choice of consent.<sup>227</sup> But more importantly, Merck’s argument is inconsistent with the text and the spirit of Merck’s letter, as Prof. Vandeveldel explains in his expert opinion.

145. *First*, the reservation of rights language “does not, by its express terms, purport to impose any condition on MSDIA’s choice of consent.”<sup>228</sup> This is even clearer when the statement is read in context: in describing the factual background to Merck’s alleged investment dispute with Ecuador, the letter states that “these facts give rise to a claim that Ecuador has consented to resolve through ICSID.”<sup>229</sup> According to Prof. Vandeveldel, “[t]he letter describes the consent as an accomplished fact.”<sup>230</sup>

146. *Second*, reading the “reservation of rights” as condition on Merck’s choice of consent to ICSID arbitration runs contrary to the letter’s stated intent to lock-in Ecuador’s offer of consent to ICSID arbitration.

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<sup>225</sup> Expert Report by Prof. Vandeveldel, ¶ 68.

<sup>226</sup> Expert Report by Prof. Vandeveldel, ¶ 68 (emphasis added).

<sup>227</sup> Claimant’s Memorial, ¶ 239.

<sup>228</sup> Expert Report by Prof. Vandeveldel, ¶ 69.

<sup>229</sup> Notice of Dispute, p. 2, (C-2).

<sup>230</sup> Expert Report by Prof. Vandeveldel, ¶ 69.



147. *Third*, the letter states that Merck “accepts” Ecuador’s offer to arbitration. However, “an acceptance of an offer by definition does not add new terms or conditions to the offer.”<sup>231</sup> Prof. Vandeveldel goes on to state that “[t]o add new terms conditions would convert the acceptance to a *counter-offer*. If MSDIA was accepting Ecuador’s offer, then it necessarily was not making a counter-offer with additional terms and conditions.”<sup>232</sup>

148. For all the foregoing reasons, Merck’s “reservation of rights” was not a condition on nor formed part of Merck’s choice of consent to ICSID. Rather, the reservation represents an effort to preserve an opportunity to change Merck’s choice of consent. The reservation, however, cannot change the character of the first action as a “choice,” of which, as explained above, Merck gets one.

#### **D. Conclusion**

149. These UNCITRAL Rules proceedings under the Ecuador-U.S. BIT lack Ecuador’s consent, which is the cornerstone of this Tribunal’s authority. Article VI of the Treaty holds a general standing offer of Ecuador to settle investment disputes with U.S. investors through several methods of dispute settlement. It is clear from the terms of Article VI that, in order to refer an investment dispute for settlement, an investor has to make a choice among the different alternative methods available. Each alternative has its own relative advantages and disadvantages. Thus, an investor is required to evaluate its options and make an “exclusive and irrevocable choice.” What is not permissible is for the investor to make more than one choice; or make one choice and reserve its rights to resort to a second at its whim. Once a choice is made

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<sup>231</sup> Expert Report by Prof. Vandeveldel, ¶ 69.

<sup>232</sup> Expert Report by Prof. Vandeveldel, ¶ 69 (emphasis in the original text).

an investor has to live with that. With its Notice of Dispute dated 8 June 2009, Merck made its choice in favor of ICSID arbitration. As a result, Ecuador respectfully requests that the Tribunal render an award in favor of Ecuador and against Merck, dismissing Merck’s claims for lack of jurisdiction in their entirety.

#### **IV. THE TRIBUNAL LACKS JURISDICTION AND THE CLAIMS LACK MERIT BECAUSE THE DISPUTE IS NOT ONE THAT ARISES OUT OF OR RELATES TO RIGHTS WITH RESPECT TO AN INVESTMENT**

##### **A. Introduction**

150. Under Article VI of the Ecuador-United States BIT, international arbitration as a dispute resolution modality is available only with respect to “investment disputes,” as defined in Article VI(1).<sup>233</sup>

151. Merck asserts that the dispute at issue is an “investment dispute” within the meaning of the BIT because it is a dispute “arising out of or relating to ... an alleged breach of ... *rights[s]* conferred or created by this Treaty *with respect to an investment*,” as provided in Article VI(1)(c) (emphasis added).<sup>234</sup>

152. However, as shown below, none of the Treaty rights that Merck asserts were breached are “*rights ... with respect to an investment*,” within the meaning of the BIT. Pursuant to Article I(1) of the BIT, “For the purposes of this Treaty ... “investment” means every kind of investment in the territory of one Party owned or controlled directly or indirectly by nationals or companies

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<sup>233</sup> Article VI(1) reads: “For purposes of this Article, an investment dispute is a dispute between a Party and a national or company of the other Party arising out of or relating to (a) an investment agreement between that Party and such national or company; (b) an investment authorization granted by that Party’s foreign investment authority to such national or company; or (c) an alleged broach of any right conferred or created by this Treaty with respect to an investment.”

<sup>234</sup> Claimant’s Memorial, ¶ 199.

of the other Party.” As Professor Vandeveldel—the leading commentator on the U.S. model BIT program and Ecuador’s expert in this arbitration—has written, the provision reflects the conscious intent of U.S. negotiators that an asset “would be covered by the definition only if it had the character of an investment.”<sup>235</sup>

153. The Treaty rights that Merck asserts were breached in the context of the underlying litigation are rights with respect to Merck itself—namely, that it “be treated fairly and equitably by Ecuador’s courts and not to be subjected by them to a denial of justice”<sup>236</sup>—and not with respect to any investment in Ecuador owned or controlled by Merck. This is so because the subject matter of the litigation commenced by Propfar/NIFA is Merck’s own conduct and the rights it asserts in this arbitration concern how Merck itself has been treated with respect to the adjudication of that conduct. The litigation does not involve any rights of Merck in any assets it owns or controls in Ecuador.

154. Merck attempts to go around this fact in two ways. First, Merck suggests that the conduct of its business activities through its branch in Ecuador is sufficient to qualify it for Treaty protection,<sup>237</sup> and that its business in Ecuador is of itself an investment.<sup>238</sup> Second, it argues that its former investment in the manufacturing plant that NIFA had sought to purchase constitutes a continuing investment in Ecuador even though Merck had sold the plant to a third party in July 2003.

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<sup>235</sup> K. Vandeveldel, U.S. INTERNATIONAL INVESTMENT AGREEMENTS (2009), pp. 114-115 (RLA-85) (emphasis added).

<sup>236</sup> Claimant’s Request for Interim Measures, ¶ 29.

<sup>237</sup> Claimant’s Memorial, ¶¶ 212-213.

<sup>238</sup> Claimant’s Memorial, ¶¶ 205-211, 214-219.

155. Neither of these arguments establishes a fresh investment that would advance the purposes of the BIT. Accordingly, the dispute with respect to which Merck initiated the present arbitration is not an “investment dispute” within the meaning of the BIT, and this Tribunal lacks jurisdiction.

**B. Merck’s Conduct Of Trading And Distribution Activities Through A Branch In Ecuador Does Not Constitute An “Investment” Within The Meaning Of The BIT.**

156. Merck appears to cling to the argument made in connection with its Request of Interim Measures that its branch in Ecuador in itself constitutes an investment. It argues that “[t]here is nothing in the Treaty’s definition of investment that limits investments to a particular corporate form or that precludes a branch from qualifying as an investment under the Treaty.”<sup>239</sup> To this effect, Merck cites to Prof. Vandeveld’s commentary on U.S. international investment agreements and the award of the tribunal in the *M.C. I. Power Group v. Ecuador* case under the Ecuador-United States BIT.<sup>240</sup> However, a closer look reveals that Merck’s reliance on these authorities is misleading.

157. In *M.C.I Power v. Ecuador*, the claimants argued that as U.S. legal entities they owned and controlled another U.S. corporation, Seacoast, which, in turn, “invested in Ecuador through a branch operation.”<sup>241</sup> The claimants further alleged that the branch had “carried on the business of acquiring, assembling and installing two electricity generating plants and selling their power

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<sup>239</sup> Claimant’s Memorial, ¶ 212.

<sup>240</sup> Claimant’s Memorial, ¶ 213.

<sup>241</sup> *M.C.I. Power Group L.C. & New Turbine, Inc. v. Republic of Ecuador*, ICSID Case No. ARB/03/6, Award (31 July 2007), ¶ 39 (CLM-66).

to INECEL, an Ecuadorian state-owned entity.”<sup>242</sup> After these operations were completed and the power generating assets sold, Seacoast “continued to hold and manage its accounts receivable and other contractual rights against INECEL.”<sup>243</sup> Thus, for the claimants in the *M.C.I.* case, “the Seacoast branch in Ecuador *and its intangible assets* qualif[ied] as investments under the broad definition of “investments” in the BIT.”<sup>244</sup>

158. The tribunal was clear: it was the “rights and interests alleged by claimants to have subsided as a consequence of the Seacoast project ... such as the intangible assets of accounts receivable, the existence of an operating permit ... [that] would fit th[e] definition” of a protected investment.<sup>245</sup> Not the Seacoast Branch in Ecuador *as such*.

159. The *M.C.I.* tribunal’s holding is, of course, entirely consistent with other jurisprudence on the issue. Both *Murphy v. Ecuador* and *Middle East Cement v. Egypt*—cases cited by Merck in its Reply at the Interim Measures phase of the case but now apparently abandoned<sup>246</sup>—stand for the proposition that what determines whether an “investment” qualifying for protection under a BIT exists is the nature of the activities undertaken by the branch as well as property and contractual rights held through the branch, not the fact of the existence of a branch.<sup>247</sup>

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<sup>242</sup> *Id.* (CLM-66).

<sup>243</sup> *Id.* (CLM-66).

<sup>244</sup> *M.C.I. Power Group L.C. & New Turbine, Inc. v. Republic of Ecuador*, ICSID Case No. ARB/03/6, Award (31 July 2007), ¶ 147 (CLM-66) (emphasis added).

<sup>245</sup> *M.C.I. Power Group L.C. & New Turbine, Inc. v. Republic of Ecuador*, ICSID Case No. ARB/03/6, Award (31 July 2007), ¶ 164 (CLM-66).

<sup>246</sup> Claimant’s Reply to Ecuador’s Opposition to Its Request for Interim Measures, ¶ 81 fn. 120.

<sup>247</sup> *See further* Ecuador’s Rejoinder in Opposition to Claimant’s Request for Interim Measures, ¶¶ 119-120.

160. Merck’s reliance on Prof. Vandeveldel’s treatise is equally unavailing. In the passage cited by Merck, Prof. Vandeveldel discusses the inclusion under the 1994 U.S. model BIT of “branch” into the list of entities falling within the definition of “company” and the implications thereof for the definition of “investment” and “investor” under the model BIT. This discussion is plainly irrelevant in the present context, because the definition of “company” in the Ecuador-U.S. BIT does not list “branch” within the entities qualifying for “company” status. Article 1(b) defines “company” of a Party as:

*any kind of corporation, company, association, partnership, or other organization, legally constituted under the laws and regulations of a Party or a political subdivision thereof whether or not organized for pecuniary gain, or privately or governmentally owned or controlled.*<sup>248</sup>

161. In fact, this definition plainly does not include the establishment of a branch in Ecuador, because, as attested to by Respondent’s expert, Prof. Roberto Salgado Valdez, under the laws and regulations of Ecuador the term “legally constituted” refers to the formation of a legal person with *independent* legal personality and the establishment of a branch of a foreign company does not amount to constituting a new legal person independent of the legal personality of its foreign parent company.<sup>249</sup>

162. In any event, Prof. Vandeveldel considers that a branch, even one that is not separately constituted and hence not a “company” under the terms of the 1994 model BIT, “*may*” fall

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<sup>248</sup> Ecuador-U.S. BIT, Article 1(b) (emphasis added).

<sup>249</sup> Expert Report of Prof. Roberto Salgado Valdez, pp. 6-7. *See also* Canan Witness Statement, ¶ 5 fn. 1 (stating that “I use “MSDIA” as a shorthand reference to MSDIA’s branch office in Ecuador. The branch is part of MSDIA and is not a separate corporate entity.”).

within the definition of “investment” under the model BIT.<sup>250</sup> In this regard, Prof. Vandeveldel’s view is entirely consistent with the jurisprudence discussed above: depending on the nature of the activities undertaken by the branch as well as any property and contractual rights held through it, a branch may indeed fall within the definition of “investment” in the Ecuador-United States BIT.

163. Thus, operating a branch office within the territory of Ecuador, by itself, cannot be considered an investment qualifying Merck for protection under the BIT. This is particularly so when the branch’s purpose is to conduct cross-border trading transactions.

164. Merck also argues that its “business” in Ecuador constitutes an investment in Ecuador within the meaning of the BIT and the definition of “investment” in general international law.<sup>251</sup> Merck does not define in what respect its “business” is anything other than the conduct of sales operations in Ecuador. This amorphous concept of “business” does not qualify as an investment within the meaning of the Treaty, for the following three reasons.

165. *First*, Merck fails to establish that it has made any contribution in the territory of Ecuador.<sup>252</sup> After three rounds of argument, Merck continues to rely exclusively on the witness

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<sup>250</sup> K. Vandeveldel, U.S. INTERNATIONAL INVESTMENT AGREEMENTS (2009), p. 122 (CLM-105).

<sup>251</sup> Claimant’s Memorial, ¶¶ 205-211, 214-219. The Parties are in agreement that contribution of capital; the duration of the investment, and risk to the investor are typical hallmarks of an “investment” and constitute the essence of the objective definition of investment reached by several investment treaty tribunals. *See* Claimant’s Memorial, ¶ 207 and fn. 370. *See also* Ecuador’s Opposition to Claimant’s Request for Interim Measures, ¶¶ 82-85; Ecuador’s Rejoinder in Opposition to Claimant’s Request for Interim Measures, ¶¶ 99-104.

<sup>252</sup> *See, e.g., Saipem S.p.A. v. The People’s Republic of Bangladesh*, ICSID Case No. ARB/05/07 (Bangladesh/Italy BIT), Decision on Jurisdiction, Mar. 21, 2007 (Kaufmann-Kohler, P., Schreuer, Otton) (“*Saipem v. Bangladesh*”), ¶ 101 (CLM-15) (noting the company’s significant contribution in terms of both technical and human resources); *Patrick Mitchell v. Democratic Republic of the Congo*, ICSID Case No. ARB/99/7 (US/DRC BIT), Decision on the Application for Annulment of the Award (1 Nov. 2006) (Dimolitsa, P.; Dossou; Giardina), ¶ 27 (emphasis added) (RLA-76) (“*Patrick Mitchell (Annulment)*”) (noting the commitment may be financial or through know-how); *Jan*

statements of its President and Director Mr. Jean Marie Canan,<sup>253</sup> having produced no documentary evidence substantiating its claims to contribution “in the territory” of Ecuador.<sup>254</sup>

166. Moreover, as Ecuador explained in its Rejoinder in the Interim Measures phase of the case,<sup>255</sup> Merck cannot show that it has made any substantial contribution in the territory of Ecuador because of the purely commercial nature of its operations (importation, sale and distribution of pharmaceutical products) since the disposal of the Chillos Valley Plant in 2003. The letter by which the U.S. Government submitted the Treaty to the U.S. Senate for ratification confirms that protected investments under Article I(1)(a) do not include “claims arising solely from trade transactions:”

*The definition provides a non-exclusive list of assets, claims and rights that constitute investment ... The requirement that a “claim to money” be associated with an investment excludes claims arising solely from trade transactions, such as a simple movement*

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*de Nul N.V. and Dredging International N.V. v. Arab Republic of Egypt*, ICSID Case No. ARB/04/13, Decision on Jurisdiction (16 Jun. 2006) (RLA-72 ) (finding claimant’s significant contribution based on the amount of work with the dredging operation in the Suez Canal and the compensation claimant received); *Bayindir Insaat Turizm Ticaret Ve Sanayi A.S. v. Islamic Republic of Pakistan*, ICSID Case No. ARB/03/29, Decision on Jurisdiction (14 Nov. 2005), ¶ 131 (CLM-1) (emphasizing that Bayindir made a significant contribution both in terms of know-how, equipment, personnel and financial terms).

<sup>253</sup> See First Witness Statement of Jean Marie Canan, ¶ 9; Second Witness Statement of Jean Marie Canan, ¶ 4; Third Witness Statement of Jean Marie Canan, ¶¶ 9-11, 20.

<sup>254</sup> Claimant’s standing to claim under the Ecuador-United States BIT depends on its ability to establish, conclusively, as jurisdiction demands, that it has an investment in the territory of Ecuador. See, e.g., *Abaclat and Others (Case formerly known as Giovanna a Beccara and Others) v. Argentine Republic*, ICSID Case No. ARB/07/5 (Italy/Argentina BIT), Decision on Jurisdiction and Admissibility (4 Aug. 2011) (Tercier, Abi-Saab, van den Berg), ¶ 678 (holding that “[i]t is Claimants who bear the burden to prove that *all* conditions for the Tribunal’s jurisdiction and for the granting of the substantive claims are met”) (RLA-106) (emphasis added); *Apotex Inc. v. The Government of the United States of America*, UNCITRAL, Award on Jurisdiction and Admissibility (14 Jun. 2013), ¶ 150 (“Apotex (as Claimant) bears the burden of proof with respect to the factual elements necessary to establish the Tribunal’s jurisdiction in this regard.”) (RLA-122).

<sup>255</sup> Ecuador’s Rejoinder in Opposition to Claimant’s Request for Interim Measures, ¶¶ 108-110.



*of goods across a border, from being considered investments covered by the Treaty.*<sup>256</sup>

167. Indeed, the mere transfer of title for goods in exchange for full payment is not considered a “contribution” for purposes of the existence of an investment protected under a BIT.<sup>257</sup> The same applies to the ordinary conduct of a business for the import and sale of goods.<sup>258</sup>

168. Moreover, inventory, accounts receivable, certain fixed assets (vehicles, computers and office equipment), employment contracts, distribution and warehousing contracts all are either clearly ancillary to Merck’s cross-border trade of pharmaceutical products and hence fail to qualify themselves as investment or change the inherent nature of Merck’s activities,<sup>259</sup> or are simple commercial contracts for the sale of services that too cannot be considered as “investments” qualifying for protection under the BIT.<sup>260</sup>

169. Finally, Merck’s alleged investment “in order to obtain and maintain various registrations and marketing authorizations [and] to maintain regulatory compliance”<sup>261</sup> also does not meet the

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<sup>256</sup> Department of State, Letter of Submittal for U.S.-Ecuador Treaty Concerning the Encouragement and Reciprocal Protection of Investment, *reprinted in* SENATE TREATY DOC. NO. 103-15 (1993), p. 4 (RLA-34) (emphasis added).

<sup>257</sup> *Romak S.A. v. The Republic of Uzbekistan*, PCA Case No. AA280, UNCITRAL, Award (26 Nov. 2009) (Mantilla-Serrano, Rubins, Molfessis), ¶ 222 (RLA-97).

<sup>258</sup> *Apotex Inc. v. The Government of the United States of America*, UNCITRAL, Award on Jurisdiction and Admissibility (14 Jun. 2013), ¶ 235 (RLA-122) (“[i]n the Tribunal’s considered view, this is inadequate to meet the requirements of NAFTA Article 1139. The “interests” so identified amount to no more than the ordinary conduct of a business for the export and sale of goods.”).

<sup>259</sup> *See Joy Mining Machinery v. Egypt*, ICSID Case No. ARB/03/11, Award on Jurisdiction (6 Aug. 2004) (Orrego Vicuña, Weeramantry, Craig), ¶ 55 (RLA-66); *Grand River Enterprises Six Nations, Ltd., et al. v. United States of America*, UNCITRAL, Award (12 Jan. 2011), ¶ 85 (RLA-103) (finding that the appointment of a separate company to distribute the claimants’ products did not transform the distributor into an “investment” under NAFTA.”).

<sup>260</sup> *Apotex Inc. v. The Government of the United States of America*, UNCITRAL, Award on Jurisdiction and Admissibility (14 Jun. 2013), ¶ 236 (RLA-122).

<sup>261</sup> Claimant’s Memorial, ¶ 210.

Treaty requirement insofar as Merck would never have incurred these expenses if it had not been required to do so under Ecuadorean regulatory requirements.<sup>262</sup> Additionally, such expenses are incidental to Merck’s commercial activities, which constitutes an independent reason why they cannot qualify as “investment” within the meaning of the Treaty.<sup>263</sup>

170. *Second*, Merck considers that it satisfies the duration requirement because it “first invested in Ecuador in 1973 and remains invested in the country nearly forty years later.”<sup>264</sup> However, amalgamating all of MSDIA’s activities carried out in the span of 40 years distorts the reality of its business activities in Ecuador by encompassing the period when it operated the Chillos Valley Plant. While it may be true that MSDIA had an investment in Ecuador before 2003, following the sale and disposal of the plant and equipment in July 2003, MSDIA ceased to have any proprietary or contractual rights associated with an investment. It made a business decision to terminate its “investment” and continue its operations in Ecuador on a purely commercial basis.

171. *Third*, Merck fails to show something more than a “pure commercial, counterparty risk, or, otherwise stated, the risk of doing business generally.”<sup>265</sup> In the words of the tribunal in *Romak v. Uzbekistan*, an “investment risk” entails “a different kind of *alea*, a situation in which

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<sup>262</sup> See *Apotex Inc. v. The Government of the United States of America*, UNCITRAL, Award on Jurisdiction and Admissibility (14 Jun. 2013), ¶ 183 (RLA-122).

<sup>263</sup> *Grand River Enterprises Six Nations, Ltd., et al. v. United States of America*, UNCITRAL, Award (12 Jan. 2011), ¶ 115 (RLA-103).

<sup>264</sup> Claimant’s Memorial, ¶ 215.

<sup>265</sup> *Romak S.A. v. The Republic of Uzbekistan*, PCA Case No. AA280, UNCITRAL, Award (26 Nov. 2009) (Mantilla-Serrano, Rubins, Molfessis), ¶ 229 (RLA-97).

the investor cannot be sure of a return on his investment, and may not know the amount he will end up spending, even if all relevant counterparties discharge their contractual obligations.”<sup>266</sup>

172. Merck alleges that it meets the requirement of “investment risk” because, according to Mr. Canan, “MSDIA made the choice to invest in Ecuador knowing that the Ecuadorian pharmaceutical market was competitive and that there was a risk that its business would not succeed,” and that it “had no guarantee that its significant investments in Ecuador would result in a successful business.”<sup>267</sup>

173. However, risks associated with purely cross-border trading activities in a competitive market are normal business risks, distinguishable from “investment risks.” Merck therefore fails to meet the risk requirement because its risk is no other than the general risk inherent to commercial transactions.

174. In conclusion, MSDIA’s “ongoing business” of selling and distributing its products on a cross-border basis to private distributors in Ecuador does not constitute an investment because by its very nature it involves ordinary “trading transactions.” It therefore fails to qualify for protection under the terms of the Ecuador-United States BIT.

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<sup>266</sup> *Id.*, ¶ 230 (RLA-97).

<sup>267</sup> Third Witness Statement of Jean Marie Canan, ¶ 12.

**C. The Chillos Valley Plant Does Not Constitute a Continuing Investment In Ecuador**

175. Merck finally argues that the plant it formerly owned is an “investment” within the meaning of the BIT because its claims relate to the “disposal” of said Plant in 2003.<sup>268</sup> But this argument also fails.

176. *First*, the underlying litigation has nothing to do with the disposal of the Plant as effectuated by Merck. The nature of the Ecuadorean party’s complaint was that Merck had engaged into a violation of competition rules by never intending to sell the plant to it, but instead using the negotiation as a tactic to prevent it from expanding into the generics market in Ecuador. In other words, no rights with respect to the disposal of the Chillos Valley Plant were at issue in the underlying litigation. Accordingly, at the time of the decision of the Ecuadorian court of first instance, which Merck alleges gave rise to the existence of an investment dispute under the Treaty<sup>269</sup> (17 December 2003), Claimant did not own the Plant, having sold it to Ecuaquimica in July 2003.<sup>270</sup> At that date, the ultimate disposal of Merck’s investment had been completed; its investment had been “wound up.”<sup>271</sup>

177. *Second*, a closer examination of the *Mondev* and *Chevron I* and *II* cases, which Merck cites in support of its argument,<sup>272</sup> reveals that the lifespan theory simply does not apply here. In

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<sup>268</sup> Claimant’s Memorial, ¶¶ 220-225.

<sup>269</sup> Claimant’s Request for Arbitration, ¶ 12.

<sup>270</sup> Claimant’s Memorial, ¶ 36.

<sup>271</sup> *Chevron Corp. (U.S.A.) & Texaco Petroleum Co. (U.S.A.) v. Republic of Ecuador (Chevron I)*, PCA Case No. 2007-2 (UNCITRAL), Interim Award (1 Dec. 2008), ¶ 183 (CLM-44).

<sup>272</sup> Memorial, ¶¶ 221-224.

those cases, the tribunals were willing to accept that, under this theory, three kinds of activities might be protected: (a) ongoing claims for money arising *directly* out of activities undertaken pursuant to concession agreements constituting the original investment;<sup>273</sup> (b) *claims to money* for breach and wrongful interference with a contract, leading to the destruction of the underlying investment;<sup>274</sup> and (c) litigation whose “*principal subject-matter*” addresses the *investor’s activities under its original investment*.<sup>275</sup>

178. It is clear that none of these circumstances apply to the underlying litigation. Merck is not asserting claims for money arising directly out of its activities undertaken pursuant to its ownership of the Chillos Valley plant; Merck is not asserting claims to money for breach and/or wrongful interference with its investment in the form of the Chillos Valley plant; and the underlying litigation’s “principal subject matter” has no relationship whatsoever with Merck’s investment activities in Ecuador. (Indeed, the underlying NIFA litigation arose out of “abuse of rights,” “deceit,” and “malicious act” by MSDIA allegedly aimed to implement a strategy by Merck to delay NIFA’s entry in to the generic products market in Ecuador.)<sup>276</sup>

179. Additionally, the concerns motivating the original articulation in *Mondev* of the “lifespan” theory do not apply here. There, the tribunal was concerned with a situation where an

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<sup>273</sup> *Chevron I*, ¶ 184 (“Thus, the Claimants’ investments have not ceased to exist: their lawsuits continued their original investment through the entry into force of the BIT and to the date of commencement of this arbitration.”) (CLM-44).

<sup>274</sup> *Mondev International Ltd. v. United States of America*, ICSID Case No. ARB (AF)/99/2. Award (11 Oct. 2007), ¶ 77 (RLA-54).

<sup>275</sup> *Chevron Corporation and Texaco Petroleum Corporation (U.S.A.) v. Republic of Ecuador (II)*, PCA Case No. 2009-23, Third Interim Award on Jurisdiction and Admissibility (27 Feb. 2012), ¶ 4.17 (CLM-108).

<sup>276</sup> *NIFA v. MSDIA*, Provincial Court of Justice of Pichincha for Commercial and Civil Matters, Judgment (23 Sept. 2011) (C-4).

investor had an investment expropriated or destroyed by a respondent state. That is simply not the case here, however, where Merck disposed of its rights well before the underlying litigation began.

180. Whatever the outer limits of the “lifespan” theory of investments might be, surely it cannot extend to this case, where an investment has already been disposed of and “wound up;” and where the Merck does not seek to protect rights or assert claims arising from the former investment. It follows that the underlying litigation does not involve Merck’s former investment. Absent any rights with respect to an investment, the dispute raised in this arbitration is not within this Tribunal’s jurisdiction.

#### **D. Conclusion**

181. In sum, Merck fails to establish that the dispute is one that arises out of or relates to rights under the Treaty with respect to an “investment,” as Article VI(1)(c) requires. As a consequence, the Tribunal lacks jurisdiction over Merck’s claims. Additionally, Merck’s failure to establish the existence of a qualifying investment also defeats its claims on the merits since all of the provisions of the Ecuador-United States BIT it contends have been violated relate exclusively to investments.<sup>277</sup>

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<sup>277</sup> Claimant asserts violations of Articles II(3)(a) (“[i]nvestment shall at all times be accorded fair and equitable treatment,” “shall enjoy full protection and security and shall in no case be accorded treatment less than that required by international law” Claimant’s Memorial, ¶¶ 255, 380 (emphasis added)); II(3)(b) (“[n]either Party shall in any way impair by arbitrary or discriminatory measures the management, operation, maintenance, use, enjoyment, acquisition, expansion, or disposal of *investments*” *id.*, ¶ 383 (emphasis added)) and; II(7) (“[e]ach Party shall provide effective means of asserting claims and enforcing rights with respect to *investment*, investment agreements, and investment authorizations” *id.*, ¶ 395(emphasis added)).

**V. MERCK’S CLAIMS LACK MERIT, ARE INADMISSIBLE AND ARE NOT WITHIN THE TRIBUNAL’S JURISDICTION BECAUSE THEY ARE NOT BASED ON A FINAL ACTION OF ECUADOR’S JUDICIAL SYSTEM AS A WHOLE**

**A. Introduction**

182. This is not a textbook case of denial of justice. Rather, it is a textbook case of an investor attempting to invoke treaty arbitration and constitute a stand-by arbitral tribunal in case it faces, at some *future* time, a *future* denial of justice in breach of the Treaty. But this is not the proper function of the investor-State dispute provisions of investment treaties.<sup>278</sup> Nor is such an action a proper demand upon Ecuador’s offer to arbitrate alleged violations of the Ecuador-United States BIT.

183. International law ensures that such abuses do not stand. In its hastiness to convert its domestic dispute with a local competitor into an international dispute over Ecuador’s obligations under the Ecuador-U.S. BIT, Merck failed to comply with its fundamental duty to exhaust local remedies before asserting its denial of justice claims at the international level. This failure to comply continues even now. As established in this Section, Ecuador’s Constitutional Court was a reasonably available and effective remedy that Merck should have pursued. Instead, after the favorable outcome in Ecuador’s National Court of Justice, Merck chose deliberately to forego its options under Ecuadorean law. Describing the notion underlying the rule of exhaustion of local remedies, the International Law Commission stated that “the claimant must show that he wants

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<sup>278</sup> *Emilio Agustín Maffezini v. The Kingdom of Spain*, ICSID Case No. ARB/97/7, Award (13 Nov. 2000), ¶ 64 (RLA-49) (“Bilateral Investment Treaties are not insurance policies against bad business judgments.”); *MTD Equity Sdn. Bhd. and MTD Chile S.A. v. Chile* (ICSID Case No ARB/01/7), Award (25 May 2004), ¶ 178 (RLA-64) (“BITs are not an insurance against business risk and the Tribunal considers that the Claimants should bear the consequences of their own actions as experienced businessmen.”).

to win the case.”<sup>279</sup> Given its decision to forego available options, Merck is in no position to make that showing and this is fatal to the merits of its claims and this Tribunal’s jurisdiction.

184. Absent Merck’s exhaustion of reasonably available and effective local remedies, there can be no liability for a denial of justice under the Treaty, regardless of which treaty provision Merck asserts was violated thereby. Moreover, because they are premature, Merck’s claims are inadmissible. Finally, Merck’s failure to exhaust local remedies deprives the Tribunal of jurisdiction: an actionable “investment dispute” within the meaning of Article VI of the BIT has never existed and Merck, as a consequence, has failed to comply with the jurisdictional prerequisites of Article VI.

**B. Claimant Failed To Exhaust All Available And Effective Remedies In The Ecuadorean Legal System**

**1. A State May Not Be Held Responsible For A Denial Of Justice Before Local Remedies Have Been Exhausted**

185. Merck accepts that in order to establish Ecuador’s liability for a denial of justice, it “must have exhausted “reasonably available” local remedies ... to “correct the challenged action.”<sup>280</sup> Merck’s expert, Prof. Paulsson, concurs.<sup>281</sup> As he has written in previous works reflecting on significant international legal authority: “the very definition of the delict of denial of justice

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<sup>279</sup> Report of the International Law Commission on the work of its 29<sup>th</sup> Sess., Doc. A/32/10, [1977 II/2] Y. B. INT’L L. COMM. 31, U.N. Doc. A/CN.4/SER. A/1977 Add. I (Part 2), at 47 (RLA-27).

<sup>280</sup> Claimant’s Memorial, ¶ 375.

<sup>281</sup> Prof. Paulsson’s Expert Opinion, ¶¶ 53-54.



encompasses the notion of exhaustion of local remedies. *There can be no denial before exhaustion.*”<sup>282</sup>

186. Ecuador concurs with these statements of legal principle.<sup>283</sup> Indeed, as noted by the tribunal in *Loewen v. USA*, there has been no instance in which “an international tribunal has held a State responsible for a breach of international law constituted by a lower court decision where there was available an effective and adequate appeal within the State’s legal system.”<sup>284</sup>

187. The Parties disagree, however, as to whether Merck has complied with its duty to exhaust the remedies available to it in the Ecuadorean legal system.

188. It is Ecuador’s case that Merck’s allegations of mistreatment at the hands of Ecuador’s judiciary and in particular the NCJ could have served as the foundation for an extraordinary

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<sup>282</sup> J. Paulsson, DENIAL OF JUSTICE IN INTERNATIONAL LAW (2005), p. 111 (RLA-68) (emphasis added). *See also id.*, p. 100 (“[i]nternational law attaches state responsibility for judicial action *only if it is shown that there was no reasonably available national mechanism to correct the challenged action*”) (emphasis added). Although they serve different purposes, the principle of judicial finality and the exhaustion of local remedies rule of admissibility of international claims are “similar in content.” *Loewen Group, Inc. and Raymond L. Loewen v. United States of America*, ICSID Case No. ARB(AF)/98/3, Award (26 Jun. 2003), ¶ 159 (RLA-55). *See also* Expert Report of Prof. Caflich, ¶ 10 (discussing the International Law Commission’s Draft Articles on Diplomatic Protection and concluding that the Commission “did not question that exhaustion as a substantive condition for a denial of justice is subject to the same requirements as those pertaining to exhaustion as a procedural condition for the admissibility of claims of diplomatic protection.”).

<sup>283</sup> *See also* Expert Report of Prof. Caflich, ¶ 8 (“the establishment of international responsibility for a denial of justice requires that the claimant party must have exhausted reasonably available and effective local remedies.”); Expert Report of Prof. Amerasinghe, ¶ 8 (“[u]nder the system of the Bilateral Investment Treaty between the USA and Ecuador ... it is not in dispute that in cases of alleged denial of justice by the courts of either party, local remedies must be exhausted in order to establish liability for a denial of justice.”).

<sup>284</sup> *Loewen Group, Inc. and Raymond L. Loewen v. United States of America*, ICSID Case No. ARB(AF)/98/3, Award (26 Jun. 2003), ¶ 154 (RLA-55). *See further* *Alps Finance and Trade AG v. The Slovak Republic*, UNCITRAL, Award (5 Mar. 2011), ¶ 251 (RLA-105) (“[i]n addition, the Respondent has convincingly objected that other remedies were still available to the Claimant in internal law in order to try to obtain revision of the judgment that it considered prejudicial to its interest. *The non-exhaustion of local remedies is per se sufficient to exclude the State’s responsibility in international law for actions or omissions of its judiciary.*”) (emphasis added); *Toto Costruzioni Generali S.p.A. v. The Republic of Lebanon*, ICSID Case No. ARB/07/12, Decision on Jurisdiction (11 Sept. 2009), ¶ 164 (RLA-95) (“[a] state can only be held liable for denial of justice when it has not remedied this denial domestically.”).

action for protection (“constitutional petition”).<sup>285</sup> Therefore Merck could have had recourse to Ecuador’s Constitutional Court, utilizing to this effect Articles 94 and 437 of the Ecuadorean

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<sup>285</sup> See Expert Report of Prof. Guerrero, ¶¶ 15-16, 75. Prof. Guerrero identifies the constitutional grounds implicated by Claimant’s arguments concerning the alleged flaws of the NCJ’s judgment, if proven true:

- a. Paragraphs 11, 13(a), 147, 331, 332 and 356 in MSDIA’s Memorial note that the contentious administrative jurisdiction has exclusive power to hear the controversies related to “unfair competition” and that, consequently, the Civil and Commercial Chamber of the National Court of Justice lacked jurisdiction to issue the decision in this proceeding. If this fact referred to in MSDIA’s Memorial, is proven true, it would have given rise to a violation of the right to be heard by a competent judge, as provided in Art. 76, numeral 7, letter k) of the Constitution – a violation which served as the basis for admission by the Constitutional Court of the Extraordinary Protective Actions under Judgment No. 192 – 10 - SEP - CC, issued in Proceeding No. 1225-11-EP and Judgment No. 022-10-SEP-CC issued in Proceeding No. 0049-09-EP, and thus declaring the flawed decisions null and void.
- b. Paragraphs 12-14, 280 and 291-374 in the Memorial argue that MSDIA was restricted from the possibility of being heard, and filing its claims before the National Court of Justice, which, if true would translate into a violation of the guarantee of the right to defense, provided by Art. 76, numeral 7, letter c) of the Constitution as well as the right to legal security, provided by Art. 82 of the Constitution. This violation of these rights has served as the basis for admission by the Constitutional Court via Judgment No. 024-09-SEP-CC, of the extraordinary protective action in Proceeding No. 0009-09-EP, via Judgment No. 003-10-SEP-CC, of the extraordinary protective action in Proceeding No. 0290-09 EP; and, via Judgment No. 016-12-SEP-ECC, of the extraordinary protective action in Proceeding No. 0998-11-EP.
- c. In paragraphs 150,151 and 278-290 in the Memorial, MSDIA specifically claims violations to due process given that in issuing the judgment, the National Court of Justice may have failed to evaluate the evidence introduced by the parties, admitting the valuation of evidence made in the first and second instances without taking into account the MSDIA’s evidence introduced during the process. If true, the implication of this claim would be that the Civil and Commercial Chamber of the National Court of Justice failed to fulfill its obligation of justifying its decisions given that, as the Constitutional Court noted in Judgment No. 138-12-SEP-CC issued in respect of extraordinary protective action No. 0847-11-EP, the absence of adequate reflection and analysis of an evidentiary element in the settlement of a dispute constitutes a violation of the right provided in Art. 76, numeral 7, letter l) of the Constitution, thereby affecting the validity of the decision wherein this analysis was omitted.
- d. Paragraphs 146, 148, 274(a), 355-360 in the Memorial, claim that MSDIA was penalized for allegedly violating the Defense of Competition Act, even though there was no body of law in Ecuador at the time regulating this institution. If this claim were proven true, it would translate into a purported violation of the right to due process, and most particularly, of the guarantee provided under Art. 76, numeral 3 of the Constitution, which served as a basis for the Constitutional Court invalidating the flawed decision in Judgment No. 037-13-SEP-CC in Proceeding Case No. 1747-11-EP.

These grounds could serve “as sufficient basis for filing an extraordinary protective action against [the NCJ’s] decision.” See Expert Report of Prof. Guerrero, ¶ 17 (a)-(d) (footnotes omitted).

Constitution.<sup>286</sup> The purpose of this type of appeal is, as explained by Prof. Guerrero, one of the most prominent Ecuadorean constitutional law jurists, “the protection of fundamental rights which have been infringed upon by a judgment, final decree or resolution having the force of a judgment.”<sup>287</sup> Since Merck failed to have recourse to such remedy, it cannot be said that it has complied with its duty to exhaust all available and effective remedies in the Ecuadorean legal system.

189. During the interim measures phase of these proceedings, Merck argued that recourse to the Constitutional Court would not have been an available and effective remedy because (a) review by the Constitutional Court is “discretionary, and that court does not hear the majority of the cases that are appealed to it” and; (b) even if the Constitutional Court accepted an appeal in this case, the Constitutional Court proceedings would not suspend enforcement of the judgment during those proceedings.<sup>288</sup>

190. In its Memorial, Merck has modified its submissions. It now argues that it has complied with its duty to exhaust local remedies, not because the Constitutional Court is an unavailable or ineffective remedy, but because the judgment rendered “against it” by the NCJ is “final and unappealable” and has been paid by it.<sup>289</sup> Merck further argues that “[w]hether MSDIA arguably

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<sup>286</sup> Prof. Moscoso’s First Expert Report, ¶ 14; Expert Report of Prof. Guerrero, ¶ 20.

<sup>287</sup> Expert Report of Prof. Guerrero, ¶ 10; Prof. Moscoso’s First Expert Report, ¶ 15.

<sup>288</sup> Claimant’s Reply to Ecuador’s Opposition to Claimant’s Request for Interim Measures, dated 5 Aug. 2012, ¶ 193. *See also id.*, fn. 457. Claimant also argued that as a general matter Ecuadorean legal remedies are “futile and ineffective.” *Id.*, ¶ 34. Claimant has not returned to these arguments in connection with its alleged exemption from the duty to have recourse to the Constitutional Court. In any event, as Prof. Amerasinghe notes in his Expert Report, the alleged evidence of absence of due process and corruption have “no bearing on the practices of the Constitutional Court,” and “[w]hat is relevant to the issue of exhaustion of local remedies is whether corruption in the Constitutional Court would make the Claimant’s resort to that Court “obviously futile.”” This is for Claimant to prove. Expert Report of Prof. Amerasinghe, ¶¶ 32-33.

<sup>289</sup> Claimant’s Memorial, ¶ 377; Prof. Paulsson’s Expert Opinion, ¶ 56.

could have initiated a collateral attack against the NCJ judgment before Ecuador’s Constitutional Court is immaterial to the question of exhaustion.”<sup>290</sup> This is despite the fact that, in its submissions in connection with Prophar’s petition to Ecuador’s Constitutional Court, it has admitted the judicial nature of the constitutional petition and its principled availability and effectiveness.<sup>291</sup> Merck finally submits that “under customary international law, a claimant need only exhaust local remedies in the “*straight line*” from a State’s first-instance civil court to its court of cassation, without regard to other ‘oblique’ or ‘indirect’ challenges, such as an action in the Constitutional Court.”<sup>292</sup> Merck substantiates this sweepingly categorical statement by reference to Prof. Paulsson’s opinion and an arbitral award in which he sat as sole arbitrator.

191. Ultimately, Merck’s arguments at the interim measures phase of the proceedings, as well as its newly-concocted “straight line” argument, are unavailing. Constitutional appeals are *per se* within the concept of remedies to be exhausted. Moreover, Ecuador’s Constitutional Court was reasonably available to Merck and capable of affording it effective relief. For these reasons, Merck may not be allowed to assert denial of justice claims before this Tribunal.

**2. Constitutional Appeals Are *Per Se* Within The Concept Of Remedies To Be Exhausted, Provided That They Afford A Reasonable Available And Effective Remedy**

192. Merck’s assessment of customary international law on the scope of its duty to exhaust local remedies is plainly wrong. International law does not distinguish between “direct or

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<sup>290</sup> Claimant’s Memorial, fn. 678.

<sup>291</sup> MSDIA submission to the Constitutional Court (received by the Court on 3 Apr. 2013), ¶¶ 55, 58, 81 (R-117) (admitting the “judicial nature” of the constitutional petition, its intended by the legislator use “to guarantee due process,” and the fact that reparations of a constitutional nature may include “both monetary and moral obligations”).

<sup>292</sup> Claimant’s Memorial, fn. 678 (emphasis in the original).

indirect,” “oblique or less oblique” remedies, as Merck wants to have it. Nor does international law limit the duty to exhaust to remedies “in the straight line.” Rather, international law requires that a claimant must have recourse to the court of “last resort” that is “reasonably available” to it in light of its situation<sup>293</sup> and is capable of providing redress.<sup>294</sup> This is the principle consistently reflected in decisions and awards of international courts and tribunals, notable codifications of customary international law and the opinions of distinguished commentators.

193. For example, the U.S.-Venezuela Claims Commission in the *Corwin v. Venezuela* case considered “well settled” in international law that “in ... judicial sentences generally where appeals are reasonably attainable ... a state’s liability begins only when the court of *last resort*, *accessible by reasonable means*, has acted on it.”<sup>295</sup> Similarly, according to the tribunal in *ATA Construction v. Jordan*, “a denial of justice occasioned by judicial action occurs when the *final judicial instance, which is plausibly available*, has rendered its decision.”<sup>296</sup>

194. Commentators have also stressed that State responsibility for a denial of justice is triggered only as a result of “a definitive judicial decision by a court of *last resort*,”<sup>297</sup> that is “only the *highest court to which a case is appealable*” that “may be considered an authority

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<sup>293</sup> *Loewen Group, Inc. and Raymond L. Loewen v. United States of America*, ICSID Case No. ARB(AF)/98/3, Award (26 Jun. 2003), ¶ 169 (RLA-55).

<sup>294</sup> *The Ambatielos Claim (Greece v. United Kingdom)*, UNRIAA vol. XII, pp. 83-152, at 119 (RLA-21).

<sup>295</sup> *Case of Amos B. Corwin v. Venezuela (the schooner Mechanic case)*, UNRIAA vol. XXIX, pp. 260-269, at 268 (RLA-111) (emphasis added).

<sup>296</sup> *ATA Construction, Industrial and Trading Company v. The Hashemite Kingdom of Jordan*, ICSID Case No. ARB/08/2, Award (18 May 2010), ¶ 107 (emphasis added) (CLM-34).

<sup>297</sup> A. Freeman, *THE INTERNATIONAL RESPONSIBILITY OF STATES FOR DENIAL OF JUSTICE* (1938), pp. 311-312 (RLA-18) (emphasis added). See also F. K. Nielsen, *INTERNATIONAL LAW APPLIED TO RECLAMATIONS* (1933), at 28 (RLA-17) (a denial of justice “can be predicated only on a decision of a court of *last resort*. A litigant must exhaust his remedies, before it can be said that he has had that final judicial determination of his cause which the law affords.”) (emphasis added).

involving the responsibility of the state;”<sup>298</sup> and that since “[j]udicial action is a single action from beginning to end,” “it cannot be said that the State has spoken finally *until all appeals have been exhausted*.”<sup>299</sup> As Prof. Amerasinghe writes: “from the point of view of the rule of exhaustion of local remedies *per se*, the requirement is clear that an alien or individual needs and is required only to resort to the *higher or last court from which he could have obtained an effective remedy*.”<sup>300</sup>

195. The principle is a natural corollary of the systemic element of denial of justice. As the *Loewen* tribunal held, the requirement of exhaustion of local remedies purports to “afford the State the opportunity of redressing through its *legal system* the inchoate breach of international law occasioned by the lower court decision.”<sup>301</sup> To this end, “[i]t is the *whole system of legal protection*, as provided by municipal law, which must have been put to the test.”<sup>302</sup> As the *Apotex v. USA* tribunal pointed out, “a claimant cannot raise a claim that a judicial act constitutes a breach of international law, without first proceeding through the *judicial system* that it purports to challenge, and thereby allowing the *system* an opportunity to correct itself.”<sup>303</sup>

In this regard, according to Judge Greenwood:

the decision of a national court, however badly flawed, will not amount to a denial of justice engaging the international responsibility of the State unless the system of appeals and other

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<sup>298</sup> E. M. Borchard, *THE DIPLOMATIC PROTECTION OF CITIZENS ABROAD* (1919), at 198 (RLA-5) (emphasis added).

<sup>299</sup> E. M. Borchard, *Responsibility of States at the Hague Codification Conference*, 24 *AJIL* 517 (1930), at 532 (RLA-10) (emphasis added).

<sup>300</sup> C. Amerasinghe, *LOCAL REMEDIES IN INTERNATIONAL LAW* (2nd ed., 2004), p. 199 (RLA-61) (emphasis added).

<sup>301</sup> *Loewen Group, Inc. and Raymond L. Loewen v. United States of America*, ICSID Case No. ARB(AF)/98/3, Award (26 Jun. 2003), ¶ 156 (RLA-55) (emphasis added).

<sup>302</sup> *The Ambatielos Claim (Greece v. United Kingdom)*, UNRIAA vol. XII, pp. 83-152, at 120 (RLA-21) (emphasis added).

<sup>303</sup> *Apotex Inc. v. The Government of the United States of America*, UNCITRAL, Award on Jurisdiction and Admissibility (14 Jun. 2013), ¶ 282 (RLA-122) (emphasis added).

challenges which exists in that State either does not correct the deficiencies of the lower court's decision or is such that it does not afford a prospect of correcting those deficiencies which is reasonably available to the alien who has suffered from that decision.<sup>304</sup>

196. In its treatise on denial of justice in international law, Prof. Paulsson similarly writes that “States are held to an obligation to provide a fair and efficient *system* of justice, not to an undertaking that there will never be an instance of judicial misconduct.”<sup>305</sup> Accordingly, “[n]ational responsibility for denial of justice occurs *only when the system as a whole has been tested* and the initial delict has remained uncorrected.”<sup>306</sup>

197. In the same context, Article 14.2 of the International Law Commission's Draft Articles on Diplomatic Protection, an article that is reflective of customary international law,<sup>307</sup> defines local remedies as being

legal remedies which are open to the injured person before the judicial or administrative courts or bodies, whether ordinary or special, of the State alleged to be responsible for causing the injury.<sup>308</sup>

198. Therefore the conclusion must be that when the host State's legal system includes a constitutional appeal, claimants must pursue this remedy. After all, in legal systems adopting the model of constitutional justice, the country's constitutional court *is* the hierarchically superior

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<sup>304</sup> Sir C. Greenwood, *State Responsibility for the Decisions of National Courts* [in:] M. Fitzmaurice & D. Sarooshi (eds), *ISSUES OF STATE RESPONSIBILITY BEFORE INTERNATIONAL JUDICIAL INSTITUTIONS* 61 (2004), at 68 (RLA-62) (emphasis added). See also D. R. Mummery, *The Content of the Duty to Exhaust Local Judicial Remedies*, 58 AJIL 389 (1964), at 413 (RLA-22) (denial of justice involves “measuring the respondent State's *system* of justice against an international standard.”) (emphasis added).

<sup>305</sup> J. Paulsson, *DENIAL OF JUSTICE IN INTERNATIONAL LAW* (2005), p. 100 (RLA-68) (emphasis in the original).

<sup>306</sup> J. Paulsson, *DENIAL OF JUSTICE IN INTERNATIONAL LAW* (2005), p. 125 (RLA-68) (emphasis added).

<sup>307</sup> Expert Report of Prof. Caflisch, ¶ 12.

<sup>308</sup> ILC Draft Articles on Diplomatic Protection, article 14.2 (CLM-110). See also Expert Report of Prof. Amerasinghe, ¶ 11 (“it has been usual to consider remedies available through special courts, provided they were legally constituted, in the concept of “judicial remedies.””).

court<sup>309</sup> (and therefore the court of last resort, as the case may be). Constitutional appeals are thus *per se* included in the remedies to be exhausted, unless they do not afford a claimant, in the circumstances of the case, a reasonably available and effective remedy.

199. Prof. Paulsson’s reference as sole arbitrator in *Pantechniki v. Albania* to “oblique or indirect applications to parallel jurisdictions” does not detract from the foregoing. Prof. Paulsson’s statement reads in its entirety:

oblique or indirect applications to parallel jurisdictions (e.g. an administrative appeal to remove a foot-dragging judge) may similarly be held unnecessary. Such determinations must be made on a case-by-case basis.<sup>310</sup>

200. Such remedies “may ... be held unnecessary” not because of any *per se* exclusions<sup>311</sup> but because in the circumstances of the case (“on a case-by-case basis”) such remedies may not be reasonably available and/or provide a claimant adequate and effective relief.

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<sup>309</sup> As Claimant has admitted in the context of the proceedings before Ecuador’s Constitutional Court regarding PROPHAR’s constitutional petition. See MSDIA submission to the Constitutional Court (received by the Court on 3 Apr. 2013), ¶ 58 (R-117) (citing with approval the academic view that “the supremacy of the Constitutional Court over the National Court of Justice must be defined as natural”).

<sup>310</sup> *Pantechniki S.A. Contractors & Engineers (Greece) v. The Republic of Albania*, ICSID Case No. ARB/07/21, Award (30 Jul. 2009), ¶ 96 (RLA-94) (emphasis added).

<sup>311</sup> To the extent that Prof. Paulsson’s statement implies the validity of *per se* exclusions, it is plainly wrong. The exhaustion rule requires, for example, the use of the procedural facilities which municipal law makes available to litigants, to the extent that they are “essential to establish the claimant’s case before the municipal courts” (*The Ambatielos Claim (Greece v. United Kingdom)*, UNRIAA vol. XII, pp. 83-152, at 119(RLA-21)), regardless of whether they are “oblique or indirect.” Moreover, the tribunal in *Loewen v. USA* clearly contemplated recourse to parallel jurisdictions, *i.e.*, proceedings pursuant to Chapter Eleven of the U.S. Bankruptcy Code. As the tribunal pointed out:

Filing under Chapter Eleven of the Bankruptcy Code would have resulted in a stay of execution. In this respect, Chapter Eleven would have enabled Loewen’s appeal to proceed without generating all the consequences that would have flowed from execution ... The question then is whether, in these circumstances, the need to pursue local remedies extends to requiring a claimant to file under Chapter Eleven in order to ensure that a right of appeal remains effective and reasonably available. *No doubt there are some situations in which it would be reasonable to expect an impecunious claimant to file under Chapter Eleven in order to exercise an available right of appeal.*



201. Consistent with the foregoing, international courts and tribunals have regularly considered constitutional and other extraordinary remedies in connection with the rule of exhaustion of local remedies, often dismissing claims for failure to seek recourse to such procedure.<sup>312</sup>

202. In his Expert Report, Prof. Caflisch, former Judge of the European Court of Human Rights (ECtHR), refers to the consistent case-law of the Court, establishing beyond contention that the obligation to exhaust includes “a duty to bring the matter before constitutional courts as long as the latter’s action will be effective, *i.e.* capable of bringing relief to individual claimants.”<sup>313</sup>

203. In a like vein, after a comprehensive survey of the jurisprudence under the European Convention of Human Rights, Prof. Amerasinghe states in his seminal monograph on exhaustion of local remedies in international law (which he supplements with his written Expert Opinion in the present case) that the extraordinary nature of constitutional remedies “does not affect the requirement of exhaustion” because “the answer to the question of whether the remedy should

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*Loewen Group, Inc. and Raymond L. Loewen v. United States of America*, ICSID Case No. ARB(AF)/98/3, Award (26 Jun. 2003), ¶ 209 (RLA-55) (emphasis added).

<sup>312</sup> See C. Amerasinghe, *LOCAL REMEDIES IN INTERNATIONAL LAW* (2nd ed., 2004), pp. 183-189 (RLA-61). In the *Case of the Pacific Mail Steamship Company v. Colombia*, for example, the claimant’s failure to seek a declaration of unconstitutionality of the challenged law was fatal to its claims before the US-Colombia Claims Commission for failure to exhaust local remedies. The Commission held that the absence of any proceeding before a court vested with power to declare the challenged law as unconstitutional constituted “a serious objection to this claim,” since “it is an admitted principle of international law ... that parties who are aggrieved by the unlawful acts of a public authority are bound to exhaust every legal means given by the constitution of the country to have the illegality declared and the acts overruled.” *Case of the Pacific Mail Steamship Company v. Colombia (Capitation Tax Case)*, decision of the Umpire, Mr. Frederick W. A. Bruce, dated 8 Aug. 1865, UNRIAA vol. XXIX, pp. 117-120, at 118 (RLA-1).

<sup>313</sup> Expert Report of Prof. Caflisch, ¶ 18 (discussing *Sürmeli v. Germany*, ECHR (Grand Chamber) Application No. 75529/01, Judgment (8 June 2006)).

have been exhausted depend[s] entirely on whether the remedy was adequate and effective.”<sup>314</sup>

Accordingly:

constitutional appeals are per se within the concept of remedies to be exhausted, although in given circumstances they may not be subject to exhaustion for other reasons.<sup>315</sup>

204. And as recalled by the Human Rights Committee:

in addition to ordinary judicial and administrative appeals, authors must also avail themselves of all other judicial remedies, including constitutional complaints, to meet the requirement of exhaustion of all available domestic remedies, insofar as such remedies appear to be effective in the given case and are de facto available to an author.<sup>316</sup>

205. The fact that a constitutional appeal is initiated against the “judge, tribunal or court that issued the challenged decision” and not against the other litigant, and the fact that it “brings about a new, independent proceeding, and is not a stage of earlier proceedings,” as stated in the opinion of Prof. Oyarte’s submitted by Merck,<sup>317</sup> are plainly irrelevant and do not affect the nature of the Constitutional Court as a remedy that must be considered in connection with the rule of exhaustion of local remedies. As Prof. Guerrero explains, the constitutional appeal is “entirely effective in cases where a natural or legal person believes his or her constitutionally enshrined rights to have been violated.”<sup>318</sup> As such, “the extraordinary protective action is an apt

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<sup>314</sup> C. Amerasinghe, *LOCAL REMEDIES IN INTERNATIONAL LAW* (2nd ed., 2004), p. 313 (RLA-61).

<sup>315</sup> C. Amerasinghe, *LOCAL REMEDIES IN INTERNATIONAL LAW* (2nd ed., 2004), p. 316 (RLA-61) (emphasis added); Expert Report of Prof. Amerasinghe, ¶ 15.

<sup>316</sup> Human Rights Committee, Communication No. 1403/2005, *Gilberg v. Germany*, Views adopted 25 Jul. 2006, ¶ 6.5 (RLA-74) (citing Communication No. 1003/2001, *P.L. v. Germany*, Views adopted on 22 Oct. 2003, ¶ 6.5) (emphasis added); Communication No. 1188/2003, *Riedl-Riedenstein et al. v. Germany*, Views adopted 2 Nov. 2004, ¶ 7.2 (RLA-67).

<sup>317</sup> Expert Opinion of Prof. Oyarte, ¶¶ 35, 37.

<sup>318</sup> Expert Report of Prof. Guerrero, ¶ 12. *See also id.*, ¶ 13: “[t]he extraordinary protective action specifically seeks ... redress for such violations of rights as may arise in a judicial proceeding where the ordinary jurisdiction remedies

mechanism afforded by the Ecuadorian legal system for redressing any constitutional rights which have been violated via a judicial decision.”<sup>319</sup> Recourse to the Constitutional Court was indeed reasonably available to Merck and capable of affording to it effective relief. These are the only conditions that international law attaches to the question as to what extent local remedies must be pursued and Ecuador’s Constitutional Court satisfies them easily in the present circumstances.

### **3. Recourse To The Constitutional Court Was Reasonably Available To Claimant**

206. Under international law, a remedy is considered “reasonably available” if it can be pursued by the clamant without difficulties or impediments, in the circumstances of the particular case. As pointed out by the *Loewen* tribunal, “[a]vailability is not a standard to be determined or applied in the abstract;” rather, a remedy must be “reasonably available to the complainant in the light of its situation, including its financial and economic circumstances as a foreign investor, as they are affected by any conditions relating to the exercise of any local remedy.”<sup>320</sup> Consequently, “[i]f a State attaches conditions to a right of appeal which render exercise of the right impractical” or “if a State burdens the exercise of the right directly or indirectly so as to

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available under the legal system fail to provide redress for such violation or where ordinary jurisdiction remedies through which redress may be obtained, are no longer available.” (footnotes omitted). Moreover, as admitted by Prof. Oyarte, the opposing party to the main proceeding may intervene as a third party. Expert Opinion by Prof. Oyarte, fn. 9. In fact, Claimant intervened in the Constitutional Court proceedings initiated by Prophar, filing a very substantial 107-pages long brief. MSDIA submission to the Constitutional Court (received by the Court on 3 Apr. 2013) (R-117).

<sup>319</sup> Expert Report of Prof. Guerrero, ¶ 14. See also *id.*, ¶ 74.

<sup>320</sup> *Loewen Group, Inc. and Raymond L. Loewen v. United States of America*, ICSID Case No. ARB(AF)/98/3, Award (26 Jun. 2003), ¶ 169 (RLA-55).

expose the complainant to severe financial consequences,” the remedy in question would be neither available nor effective.<sup>321</sup>

207. During the interim measures phase of these proceedings, as noted earlier, Merck disputed the availability of the constitutional appeal on two grounds: (a) that review by the Constitutional Court is “discretionary, and that court does not hear the majority of the cases that are appealed to it;” and (b) that even if the Constitutional Court accepted an appeal in this case, the Constitutional Court proceedings would not suspend enforcement of the judgment during those proceedings.<sup>322</sup>

208. Merck is unable to continue its reliance on these contentions because its expert, Prof. Paulsson, assumes for purposes of his opinion that recourse to Ecuador’s Constitutional Court “was available.”<sup>323</sup> Nonetheless, out of abundance of caution, Ecuador establishes in the following paragraphs the reasonable availability of constitutional appeals in the Ecuadorean legal system.

209. As Prof. Guerrero explains, a constitutional petition is filed before the judicial authority of final instance, *i.e.*, the NCJ, which, after verifying that the procedural requirements for the initiation of proceedings have been met, transmits the action to the Constitutional Court.<sup>324</sup> The

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<sup>321</sup> *Loewen Group, Inc. and Raymond L. Loewen v. United States of America*, ICSID Case No. ARB(AF)/98/3, Award (26 Jun. 2003), ¶ 170 (RLA-55) (emphasis added).

<sup>322</sup> Claimant’s Reply to Ecuador’s Opposition to Claimant’s Request for Interim Measures, dated 5 Aug. 2012, ¶ 193.

<sup>323</sup> Expert Opinion of Prof. Paulsson, ¶ 56.

<sup>324</sup> These requirements are set forth in Article 61 of the Organic Law of Jurisdictional Guarantees and Constitutional Control and include the following:

Art. 61. – Requirements. – The complaint must contain: ... 3. Proof of all ordinary and special remedies having been exhausted, unless these are ineffective or inadequate or the failure to file these remedies is not attributable to negligence on the part of the party whose

Constitutional Court then examines whether the action meets the material requirements for the admission of the action.<sup>325</sup> As Prof. Guerrero opines, “[n]one of these Admissibility prerequisites involves an analysis or ruling by the Admissions Chamber of the Constitutional Court, as to the existence or lack thereof of a violation of fundamental rights, but rather, a preliminary verification that exclusively pertains to the content of the complaint, and the discussions therein contained ...”<sup>326</sup> It follows that “the admission of an extraordinary protective action is not a discretionary act ... but an act regulated by the Organic Law of Jurisdictional Guarantees and

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constitutional right was violated. 4. Designation of the judiciary, chamber or tribunal issuing the decision violating a constitutional right. 5. Specific identification of the constitutional right violated by the judicial decision ...

There can be no question that such formal requirements would have been met in the circumstances of the present case. *First*, the NCJ’s judgment, is by definition a judicial act. *Second*, it was not subject to any further ordinary appeal. *Third*, the act in question was rendered allegedly in violation of constitutional norms and principles. Expert Report of Prof. Guerrero, ¶¶ 18-19, 33.

<sup>325</sup> Such requirements include the following:

1. That there is a clear argument concerning the violated right, and the direct and immediate relationship, either by action or omission, on the part of the judicial authority, regardless of the facts giving rise to the proceeding;
2. That the appellant justify with arguments, the constitutional relevance of the legal problem and the claim;
3. That the basis for the action does not exhaust itself solely in considering whether the judgment is unfair or wrong;
4. That the basis for the action does not rely on the failure of the law to be applied or the wrong application thereof;
5. That the basis for the action is not in reference to the judge’s assessment of the evidence;
- [ ]
8. That the granting of an extraordinary protective action may allow the resolution of the serious violation of rights, the establishment of judicial precedents, the reversal of the failure to observe precedents provided by the Constitutional Court, and the issuance of ruling on matters of national relevance and significance.

Article 62 of Ecuador’s Organic Law of Judicial Guarantees and Constitutional Control, reproduced at Expert Report of Prof. Guerrero, ¶ 25.

<sup>326</sup> Expert Report of Prof. Guerrero, ¶ 27. *See also id.*, ¶ 28 (“[t]he Admissions Chamber, must, therefore, verify whether or not the complaint has met the requirements under Art. 62 of the Organic Law of Jurisdictional Guarantees and Constitutional Control, and its analysis must not carry over into the proceedings of the jurisdictional decision contested by the extraordinary protective action.”).

Constitutional Control, in respect of which, if the complaint that is filed fulfills all the admissibility pre-requisites, the Admissions Chamber must admit it.”<sup>327</sup>

210. In light of the circumstances of this case, and the jurisprudence of the Constitutional Court,<sup>328</sup> Prof. Guerrero has no difficulty concluding that Merck’s constitutional petition could have been admitted by the Constitutional Court.<sup>329</sup>

211. In any event, the prospects of admission of appeals in Ecuador’s Constitutional Court are no less than the prospects of success of a petition for *certiorari* before the U.S. Supreme Court. In *Loewen*, the tribunal did not dispute that the *certiorari* petition could be “reasonably available” to grant effective relief and in fact held that the claimant’s failure to pursue its options at the Supreme Court was sufficient to defeat the merit of its claims for violation of customary international law and NAFTA.<sup>330</sup>

212. In *Apotex v. USA*, the tribunal likewise held that “even if the chance of the U.S. Supreme Court agreeing to hear Apotex’s case was remote, the availability of a remedy [in the form of a petition for *certiorari*] was certain.”<sup>331</sup> Apotex had argued that since the chances of a successful

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<sup>327</sup> Expert Report of Prof. Guerrero, ¶ 29.

<sup>328</sup> See Expert Report by Prof. Guerrero, ¶ 17 (citing jurisprudence of the Constitutional Court supporting the validity of the legal bases of Claimant’s complaints against the procedure followed by the NCJ in rendering its judgment, if proven true).

<sup>329</sup> Expert Report by Prof. Guerrero, ¶¶ 30-31, 76.

<sup>330</sup> *Loewen Group, Inc. and Raymond L. Loewen v. United States of America*, ICSID Case No. ARB(AF)/98/3, Award (26 Jun. 2003), ¶¶ 210-217 (RLA-55).

<sup>331</sup> *Apotex Inc. v. The Government of the United States of America*, UNCITRAL, Award on Jurisdiction and Admissibility (14 Jun. 2013), ¶ 287 (RLA-122).

outcome were “unrealistic,” a petition to the U.S. Supreme Court was “objectively futile.”<sup>332</sup>

The tribunal dismissed the argument, emphasizing on the implications of Apotex’s position:

In effect, the Tribunal is being asked to determine the likelihood of a successful result before the U.S. Supreme Court – which the Tribunal does not consider is its proper task, or indeed the correct enquiry ... the consequence of Apotex’s submission as to its chances of success before the U.S. Supreme Court (based in part on the small number of cases that this Court entertains each year) would be, in effect, to write the U.S. Supreme Court out of the exhaustion of remedies rule in almost all cases. This cannot be correct.<sup>333</sup>

213. Considering the significantly higher prospects of admission of constitutional petitions in Ecuador, the same legal conclusion is warranted here.

214. In sum, as Prof. Caflisch opines:

Claimant’s petition could very well have been admitted; and if it had not been, exhaustion would have been achieved by the Court’s decision not to take on the case.<sup>334</sup>

215. Merck’s second challenge to the availability of the Constitutional Court focuses on the absence of suspension of enforcement of the challenged judgment during the pendency of the proceedings. In *Loewen*, a case cited by Merck in support of its argument,<sup>335</sup> the tribunal held

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<sup>332</sup> *Apotex Inc. v. The Government of the United States of America*, UNCITRAL, Award on Jurisdiction and Admissibility (14 Jun. 2013), ¶ 288 (RLA-122).

<sup>333</sup> *Apotex Inc. v. The Government of the United States of America*, UNCITRAL, Award on Jurisdiction and Admissibility (14 Jun. 2013), ¶¶ 288-289 (RLA-122) (emphasis added).

<sup>334</sup> Expert Report of Prof. Caflisch, ¶ 26 (emphasis added).

<sup>335</sup> Claimant’s Reply to Ecuador’s Opposition to Claimant’s Request for Interim Measures, dated 5 Aug. 2012, fn. 457.

that if an appeal would not eliminate the risk of immediate execution against the losing party's assets, it would not be a "reasonably available" remedy.<sup>336</sup>

216. But *Loewen* was a very different case from the present one. In *Loewen*, the amount under risk of immediate execution was \$500 million and the appellate bond requirement set at \$625 million. By contrast, the NCJ's judgment ordered the payment of a mere \$1.57 million, an amount well within the financial capabilities of Merck. As Ecuador demonstrated in its Opposition to Claimant's Request for Interim Measures, based on Merck's own financial statements, Merck could have paid the entire \$150 million lower court judgment - within as little as a month and a half, and with no adverse impact on it - from its current \$1.2 billion in assets and over \$636 million in annual revenues.<sup>337</sup> It thus follows that Merck's payment of a \$1.57 million judgment, which is 0.13% of its assets and 0.25% of its annual revenues, would cause it no appreciable harm whatsoever.

217. The financial ramifications of the threat of enforcement in the present case were thus far lower than those at play in *Loewen*. *Loewen* is therefore to no avail for Merck.<sup>338</sup>

218. In sum, there can be no dispute that the Constitutional Court was "reasonably available" to Merck. And as the next section shows, Ecuador's Constitutional Court was also capable of granting it effective relief.

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<sup>336</sup> *Loewen Group, Inc. and Raymond L. Loewen v. United States of America*, ICSID Case No. ARB(AF)/98/3, Award (26 Jun. 2003), ¶ 208 (RLA-55).

<sup>337</sup> Ecuador's Opposition to Claimant's Request for Interim Measures, dated 24 Jul. 2012, ¶¶ 156-158.

<sup>338</sup> See also Expert Report of Prof. Caflisch, ¶ 27.



#### 4. Recourse To The Constitutional Court Would Have Been Capable Of Affording Claimant Effective Redress

219. Local remedies must not only be reasonably available, they must also be capable of providing to a claimant effective and adequate redress in relation to the particular situation at hand.<sup>339</sup> The test of ineffectiveness of local remedies is one of *obvious* futility.<sup>340</sup> According to Prof. Amerasinghe, “[t]he test of obvious futility clearly requires more than the probability of failure or the improbability of success, but perhaps less than the absolute certainty of failure. The test may be said to require evidence from which it could reasonably be concluded that the remedy would be ineffective.”<sup>341</sup> As observed by the tribunal in *Apotex v. USA*, this threshold is a “high one.”<sup>342</sup>

Because each judicial system must be allowed to correct itself, the “obvious finality” exception must be construed narrowly. It

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<sup>339</sup> *The Ambatielos Claim (Greece v. United Kingdom)*, UNRIAA vol. XII, pp. 83-152, at 119 (RLA-21) (“[r]emedies which could not rectify the situation cannot be relied upon by the defendant State as precluding an international action.”);

<sup>340</sup> *The Finnish Ships Arbitration Award*, 9 May 1934, UNRIAA vol. III, pp. 1479-1550, at 1505 (CLM-51) (“the local remedy shall be considered to be ineffective only where recourse is *obviously futile*”) (emphasis added). See also *The Ambatielos Claim (Greece v. United Kingdom)*, UNRIAA vol. XII, pp. 83-152, at 119 (RLA-21) (“[t]he views expressed by writers and in judicial precedents, however, coincide in that the existence of remedies which are *obviously ineffective* is held not to be sufficient to justify the application of the rule.”) (emphasis added); *Apotex Inc. v. The Government of the United States of America*, UNCITRAL, Award on Jurisdiction and Admissibility (14 Jun. 2013), ¶ 268 (RLA-122) (“[t]he key issue is therefore the basis upon which Apotex elected not to exhaust all available remedies, and whether such remedies were (according to the Parties’ common test) “*obviously futile*.”) (emphasis in the original); Expert Report of Prof. Amerasinghe, ¶¶ 20-24 (concluding that “[i]n the law the principle that local remedies need not be exhausted where they are “obviously futile” is established.”). The International Law Commission’s Draft Articles on Diplomatic Protection adopt the standard of “no reasonable prospect of success.” ILC Draft Articles on Diplomatic Protection, article 15(a) (CLM-110). According to Prof. Caflisch, this standard requires

to show that the prospects of obtaining relief are dim and that further appeals would be difficult or costly. For the ILC, the test is not whether a successful outcome is possible or likely, but whether the respondent State's legal system is "reasonably capable" of procuring effective relief in the context of local law and of the existing circumstances ...

Expert Report of Prof. Caflisch, ¶ 17.

<sup>341</sup> Expert Report of Prof. Amerasinghe, ¶ 23.

<sup>342</sup> *Apotex Inc. v. The Government of the United States of America*, UNCITRAL, Award on Jurisdiction and Admissibility (14 Jun. 2013), ¶ 279 (RLA-122).

requires an actual unavailability of recourse, or recourse that is proven to be “manifestly ineffective” – which, in turn, requires more than one side simply proffering its best estimate or prediction as to its likely prospects of success, if available recourse had been pursued.

It is not enough, therefore, to allege the “absence of a reasonable prospect of success or the improbability of success, which are both less strict tests.” In the (frequently quoted) words of Professor Borchard, a claimant is not: “relieved from exhausting his local remedies by alleging ... a pretended impossibility or uselessness of action before the local courts.”<sup>343</sup>

220. Whereas it is Ecuador that must prove that constitutional appeal is reasonably available, it falls upon Merck to establish the ineffectiveness of the constitutional appeal,<sup>344</sup> and it has manifestly failed to do so. Again, out of abundance of caution, Ecuador demonstrates here that recourse to the Constitutional Court would have been capable of providing Merck with adequate and effective relief.

221. As shown in Prof. Guerrero’s expert opinion, if Merck’s allegations were proven true, the Constitutional Court could have found that the judgment of the NCJ was rendered in breach of several provisions of the Ecuadorean Constitution.<sup>345</sup> As a result, the Constitutional Court could have annulled the judgment.<sup>346</sup>

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<sup>343</sup> *Apotex Inc. v. The Government of the United States of America*, UNCITRAL, Award on Jurisdiction and Admissibility (14 Jun. 2013), ¶¶ 284-285 (RLA-122) (footnotes omitted). See also *Duke Energy Electroquil Partners & Electroquil S.A. v. Republic of Ecuador*, ICSID Case No. ARB/04/19, Award (18 Aug. 2008), ¶ 401 (RLA-83) (“*lack of clarity is not sufficient to demonstrate that a remedy is futile.*”) (emphasis added); C. Amerasinghe, *LOCAL REMEDIES IN INTERNATIONAL LAW* (2nd ed., 2004), p. 209 (RLA-61) (“the inadequacy of the remedy for the specific object must be proven *beyond reasonable doubt.*”) (emphasis added).

<sup>344</sup> Expert Report of Prof. Amerasinghe, ¶¶ 30-31.

<sup>345</sup> Expert Report by Prof. Guerrero, ¶ 17.

<sup>346</sup> Expert Report of Prof. Guerrero, ¶ 37, 78.

222. Two further consequences would have automatically ensued, consistent with the notion of comprehensive redress of breaches of constitutional rights, the ultimate purpose of the constitutional petition under Ecuadorean law.<sup>347</sup>

223. *First*, upon annulment, the Constitutional Court would remand the case to the NCJ.<sup>348</sup> In such event, the judicial process would re-open and the NCJ would be asked to issue a new judgment “without incurring in the eventual flaws detected by the Constitutional Court and that underpinned the acceptance of the extraordinary protective action complaint.”<sup>349</sup>

224. In similar circumstances, international courts and tribunals have denied exhaustion of local remedies. Thus, the fact that the U.S. Supreme Court granted a writ of *certiorari*, reversed the judgment of a U.S. court of appeal dismissing Interhandel’s suit and remanded the case back to a U.S. district court during the pendency of the proceedings before the International Court of Justice (ICJ), was deemed by the Court fatal to the admissibility of Switzerland’s claims. The ICJ held that “[i]t was thenceforth open to Interhandel to avail itself again of the remedies available to it under the Trading with the Enemy Act, and to seek the restitution of its shares by proceedings in the United States courts.”<sup>350</sup> In *Pantechniki v. Albania*, Merck’s expert Prof. Paulsson, serving as sole arbitrator, resisted the claimant investor’s attempt to escape its duty to appeal to Albania’s Supreme Court by arguing, *inter alia*, that all that the Supreme Court could

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<sup>347</sup> Expert Report of Prof. Guerrero, ¶ 34.

<sup>348</sup> Expert Report by Prof. Guerrero, ¶ 37.

<sup>349</sup> Expert Report by Prof. Guerrero, ¶ 40.

<sup>350</sup> *Interhandel (Switzerland v. USA), Preliminary Objections*, I.C.J. Rep 1959, p. 6, at 26-27 (CLM-156).

do was to perpetuate its “legal marathon” in the Albanian legal system.<sup>351</sup> Prof. Paulsson was categorical:

Nor can I accept that continuation of the process was bound to be an exercise in futility because the Supreme Court (acting as a Court of Cassation rather than appeal) could do no more than to send the case back to the appellate level with the inevitable result of another bad decision.<sup>352</sup>

225. Second, because the annulled decision would be a legal nullity, any payment rendered in connection with its satisfaction would be recoverable by Merck.<sup>353</sup> Prof. Moscoso explained in the interim measures phase of these proceedings, undisputed by Merck and its experts, as follows:

If, after examining the case the Constitutional Court were to consider that the judgment of the National Court is in violation of the Constitution, it could vacate the judgment. If this were to occur ... MSDIA would be entitled to have its rights restored, and be indemnified for any damages which may have been caused by any undue enforcement.<sup>354</sup>

226. Prof. Guerrero concurs:

Since nullity produces an effect where things are required to return to the state in which they were in prior to the occurrence of the flawed act, in a manner consistent with the right to comprehensive redress, if any payments have been made by virtue of the judicial decision having been declared invalid by the Constitutional Court, one of the following scenarios would be feasible. 1). The trial judge assigned to enforce the judicial decision of the Constitutional Court can order the measures of enforcement necessary for the

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<sup>351</sup> *Pantechniki S.A. Contractors & Engineers (Greece) v. The Republic of Albania*, ICSID Case No. ARB/07/21, Award (30 Jul. 2009), ¶ 101 (RLA-94).

<sup>352</sup> *Pantechniki S.A. Contractors & Engineers (Greece) v. The Republic of Albania*, ICSID Case No. ARB/07/21, Award (30 Jul. 2009), ¶ 102 (RLA-94) (emphasis added).

<sup>353</sup> Expert Report by Prof. Guerrero, ¶¶ 28-29.

<sup>354</sup> First Expert Report by Prof. Moscoso, ¶ 17.

restitution of such payments, or, 2). In the event that the Constitutional Court has not ordered restitution to be paid, "payment without cause" would be set up by virtue of which, the person who made the payments would be afforded an expedited ordinary civil action in which to seek refund for payment from the recipient party.<sup>355</sup>

227. In conclusion, recourse to Ecuador's Constitutional Court would be capable of providing to Merck effective and adequate redress.<sup>356</sup> The Constitutional Court could have annulled the judgment, thereby automatically creating a ground of recovery of the amount paid for its satisfaction. The Constitutional Court could also, upon annulment, have remanded the case back to the NCJ. In any event, Merck fails to establish that recourse to the Constitutional Court would be obviously futile (or, adopting the formulation of the ILC,<sup>357</sup> that recourse to the Constitutional Court would provide "no reasonable possibility" of effective redress).

**5. The Enforceability And Satisfaction Of The NCJ's Judgment Does Not Relieve Claimant From Its Duty To Exhaust Reasonably Available And Effective Remedies**

228. Finally, the fact that the NCJ's judgment became enforceable and that Merck satisfied the judgment does not excuse Merck from the duty to exhaust reasonably available local remedies that could be effective in nullifying that judgment and in entitling it to recover its payment in satisfaction.

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<sup>355</sup> Expert Report of Prof. Guerrero, ¶ 43 (footnotes omitted). See also *id.*, ¶¶ 79-80.

<sup>356</sup> See also Expert Report of Prof. Caflisch, ¶ 24 ("in these circumstances, I have no hesitation in concluding that recourse to the extraordinary protective action procedure before the Ecuadorean Constitutional Court would in principle have constituted an available and effective remedy within the meaning discussed in the previous section of my Opinion."); Expert Report of Prof. Amerasinghe, ¶ 29 ("[i]n these circumstances, the Ecuadorean Constitutional Court would not only be an available legal remedy, it would also be effective and thus it had to be resorted to in connection with Claimant's duty to exhaust local remedies before asserting a denial of justice under international law and the provisions of the United States-Ecuador BIT.").

<sup>357</sup> It is to be noted that the ILC did point to other possible controlling tests such as "obvious futility." See Expert Report of Prof. Caflisch, ¶ 16.

229. Enforceability, and ensuing satisfaction of the impugned judgment, is of course not different than other harms that a claimant might suffer in the course of exhausting remedies (e.g., legal costs, interim compliance with an injunction, unremedied interim financial loss). These harms are not sufficient in themselves to excuse non-compliance with the duty to exhaust. In *Interhandel*, for example, the interim loss suffered by Interhandel due to the divestment of its shares, which was left unredressed during its applications for restitution in the U.S. courts, had no bearing on the ICJ's conclusions regarding the extent to which Interhandel had to pursue local remedies in the U.S. For the ICJ, it was relevant that it remained available to Interhandel "to seek the restitution of its shares by proceedings in the United States courts," which were designed to obtain the result sought by Switzerland before the Court, *i.e.*, "the restitution of the assets of Interhandel vested in the United States."<sup>358</sup>

230. Indeed the very requirement that international law imposes on the extent to which local remedies have to be pursued and that those local remedies be capable of providing to a claimant effective and adequate *redress*, presupposes the existence or incurrence of harm in the interim.

231. It is only when the magnitude of the harms incurred by a claimant during its proceeding through the host State's judicial system would so burden it as to impede its ability to seek further redress that such claimant could be relieved from its duty to exhaust local remedies. As emphasized by the *Loewen* tribunal, a remedy must be "reasonably available to the complainant

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<sup>358</sup> *Interhandel (Switzerland v. USA), Preliminary Objections*, I.C.J. Rep 1959, p. 6, at 27 (CLM-156).

in the light of its situation, including its financial and economic circumstances as a foreign investor, as they are affected by any conditions relating to the exercise of any local remedy.”<sup>359</sup>

232. The financial implications of enforcement of the \$500 million judgment in *Loewen* were precisely the kind of “financial and economic circumstances” that made direct appeal under a \$650 million bond requirement ineffective in the view of the tribunal there. No such circumstances are present here, where payment of the \$1.57 million judgment in no way impaired either Merck’s access to, or the full effectiveness of, the remedies offered by the Constitutional Court. That judgment amount was negligible in relation to the financial capabilities of Merck.<sup>360</sup>

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<sup>359</sup> *Loewen Group, Inc. and Raymond L. Loewen v. United States of America*, ICSID Case No. ARB(AF)/98/3, Award (26 Jun. 2003), ¶ 169 (RLA-55).

<sup>360</sup> Claimant’s own theory of when it *should pay* a judgment supports the conclusion that the payment of the NCJ’s judgment was well within its financial capabilities and moreover, under the formula advanced by Claimant’s financial expert in the interim measures phase of these proceedings, “value creating” for Claimant and its business. In the interim measures phase of the case, Claimant advanced two propositions for why it *should not have to pay* a judgment of up to the full \$150,000,000. Claimant first proposition was based on the testimony of its financial expert Mr. Calvert and its President Mr. Canan, from which Claimant argued that it would be “rational” to pay a judgment -- and, therefore, it would pay a judgment -- only if the value of the assets it would preserve by paying it exceeds the amount of the judgment. According to Claimant’s President, it would not be rational to pay a \$150,000,000 judgment, because that amount “vastly exceeds” its Ecuador operation’s \$27 million in annual sales and \$15.3 million in assets as of year-end 2011. Second Witness Statement by Mr. J. M. Canan, ¶ 8. Claimant’s financial expert Mr. Calvert reduced this to a “simple formula” that he represented as “used in corporate finance to demonstrate whether it would be rational to pay a sum of money in order to acquire or retain an asset:”  $V - P = VC$  where “V” is the value of the asset (*i.e.*, Claimant’s assets and revenues in Ecuador, namely \$27 million in annual sales and total assets of \$15.6 million (Second Witness Statement by Mr. J. M. Canan, ¶¶ 6-7)), “P” is the price that a buyer must pay to obtain or retain the asset (*i.e.*, the amount of the NCJ judgment against Claimant, namely \$1.57 million), and “VC” is the difference between the value “V” of the asset to the buyer and the price “P” that the buyer must pay for it. Expert Report by R. Brian Calvert, ¶¶ 16-17. According to Mr. Calvert, if “VC” is a positive number, then “the transaction would be value creating and consistent with rational economic behavior.” *Id.*, ¶ 18. Applying Mr. Calvert’s formula to either of the above values for “V” yields a positive “VC”, as follows:

$$\$27,000,000 - \$1,570,000 = \$25,430,000 \text{ or}$$

$$\$15,300,000 - \$1,570,000 = \$13,730,000$$

Both of these calculations are in accord with the circumstances in which -- according to Claimant -- it would pay a judgment against it, as under both, payment would be “value creating and consistent with rational economic behavior” and is, therefore, warranted in order to retain Claimant’s assets in Ecuador. It is perhaps for this reason that, as shown below, Claimant has so vociferously defended the NCJ’s judgment before the Constitutional Court.

233. In sum, the satisfaction of the NCJ's judgment did not relieve Merck from its duty to exhaust reasonably available and effective local remedies, since the payment did not burden it so much as to impede its ability to seek recourse to Ecuador's Constitutional Court.

## 6. Conclusion

234. Since constitutional appeals are *per se* within the concept of remedies to be exhausted, the possibility of appeal to Ecuador's Constitutional Court must be considered when evaluating the application of the rule of exhaustion of local remedies here. In the present circumstances, such an appeal was reasonably available to Merck and would have afforded to it effective relief. Merck's payment of the NCJ's judgment did not relieve it from the duty to have had recourse to Ecuador's Constitutional Court. These conclusions find further confirmation in the expert reports prepared by two of the most renowned experts on the question of exhaustion of local remedies: Professors Caflisch and Amerasinghe.<sup>361</sup>

### C. Exhaustion Of Available And Effective Local Remedies Is Mandatory For All Claimant's Treaty Claims

235. No matter which provision Merck invokes, in order to establish Ecuador's responsibility for judicial action, Merck must meet the *same* requirement of exhaustion of local remedies.<sup>362</sup>

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Notably, Prof. Paulsson's does not explain how payment of that judgment, in light of the financial and economic circumstances of Claimant, would render as such recourse to the Ecuador's Constitutional unreasonable and/or ineffective. See Expert Opinion by Prof. Paulsson, ¶ 56.

<sup>361</sup> Expert Report of Prof. Caflisch, ¶ 30; Expert Report of Prof. Amerasinghe, ¶ 34.

<sup>362</sup> Claimant has cited no other State measures, nor made other factual arguments, that would change the character of the State conduct complained of to anything other than a denial of justice. In similar circumstances, tribunals have expounded a doctrine of *subsumed claims*. See, e.g., *Malicorp Ltd v. The Arab Republic of Egypt*, ICSID Case No. ARB/08/18, Award (7 Feb. 2011) (Tercier, Baptista, Tschanz), ¶ 124 (RLA-104) (“[w]hen an investor bases its action principally on the fact that it has been the victim of an expropriation, that measure necessarily implies treatment that was, precisely, neither fair nor equitable. *In order to rely on both provisions, the investor must be able to establish that it has also been the victim of other measures, different from expropriation.* This condition has not been fulfilled in the present case since the Claimant's sole but essential complaint concerns the rescission of the



Merck's failure to exhaust local remedies thus carries the same significance for all its claims under the Treaty.

236. Several tribunals have stressed that the requirement of exhaustion of local remedies permeates claims of judicial misconduct arising under BITs.

237. In *Loewen*, the tribunal expressly held that the requirement of judicial finality "has application to breaches of Articles 1102 [national treatment] and 1110 [expropriation] as well as Article 1105 [minimum standard of treatment, including fair and equitable treatment and full protection and security] [of NAFTA]." <sup>363</sup>

238. In *Jan de Nul v. Egypt*, the claimant investor attempted to bypass the requirement for exhaustion of local remedies by alleging that "an unjust judgment of a lower court may *per se* constitute unfair and inequitable treatment and, therefore, denial of justice without any prior conditions being met." <sup>364</sup> The tribunal rejected this argument, finding that:

the respondent State must be put in a position to redress the wrongdoings of its judiciary. In other words, it cannot be held liable unless "the system as a whole has been tested and the initial delict remained uncorrected". An exception to this rule may be

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Contract. Nowhere in its pleadings does it explain in what way it was also the victim of unfair or inequitable treatment, *giving rise to additional consequences.*") (emphasis added) (RLM-101). Similarly, the tribunal in *Azinian v. Mexico*, chaired by Prof. Paulsson, considered that the claimant investor's complaint under Article 1105 NAFTA was nothing "but a paraphrase of a complaint more specifically covered by Article 1110," and held that "under the circumstances of this case if there was no violation of Article 1110, there was none of Article 1105 either." *Robert Azinian, Kenneth Davitian, & Ellen Baca v. The United Mexican States*, ICSID Case No. ARB (AF)/97/2, Award (1 Nov. 1999), ¶ 92 (CLM-36).

<sup>363</sup> *Loewen Group, Inc. and Raymond L. Loewen v. United States of America*, ICSID Case No. ARB(AF)/98/3, Award (26 Jun. 2003), ¶ 156 (RLA-55).

<sup>364</sup> *Jan de Nul N.V. and Dredging International N.V. v. Arab Republic of Egypt*, ICSID Case No. ARB/04/13, Award (6 Nov. 2008), ¶¶ 189, 259 (RLA-84).

made when there is no effective remedy or “no reasonable prospect of success“, which was not argued by the Claimants.<sup>365</sup>

239. Holding otherwise “would allow to circumvent the standards of denial of justice.”<sup>366</sup>

240. In *Toto v. Lebanon*, because claimant had failed to make use of local remedies to shorten procedural delays, the tribunal held that it had no *prima facie* jurisdiction to entertain its claim of denial of justice under the FET provision of the relevant BIT.<sup>367</sup>

241. In *Oostergetel v. Slovakia*, the tribunal readily accepted that denial of justice falls within the FET standard of the applicable BIT. As a consequence, the claimant investor’s allegations of denial of justice were analyzed under the rubric of exhaustion of local remedies, “which applies to both substantive and procedural denial of justice.”<sup>368</sup>

242. In *Iberdrola v. Guatemala*, the tribunal stressed that the fact that the applicable BIT included the obligation to provide fair and equitable treatment “does not mean, per se, as Iberdrola argued, that the standard of denial of justice of the Treaty is broader than that of customary international law.”<sup>369</sup>

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<sup>365</sup> *Jan de Nul N.V. and Dredging International N.V. v. Arab Republic of Egypt*, ICSID Case No. ARB/04/13, Award (6 Nov. 2008), ¶ 258 (RLA-84) (emphasis in the original text).

<sup>366</sup> *Jan de Nul N.V. and Dredging International N.V. v. Arab Republic of Egypt*, ICSID Case No. ARB/04/13, Award (6 Nov. 2008), ¶ 191 (RLA-84).

<sup>367</sup> *Toto Costruzioni Generali S.p.A. v. The Republic of Lebanon*, ICSID Case No. ARB/07/12, Decision on Jurisdiction (11 Sept. 2009), ¶¶ 167-168 (RLA-95).

<sup>368</sup> *Jan Oostergetel and Theodora Laurentius v. The Slovak Republic*, UNCITRAL, Final Award (23 Apr. 2012), ¶¶ 272, 275, 298 (CLM-146).

<sup>369</sup> *Iberdrola Energía S.A. v. Republic of Guatemala*, ICSID Case No. ARB/09/5, Award (17 Aug. 2012), ¶ 427 (RLA-115)(emphasis added).

243. In *Arif v. Moldova*, the tribunal stressed that the responsibility of States not to breach the fair and equitable treatment standard through a denial of justice is engaged “*if and when the judiciary has rendered final and binding decisions.*”<sup>370</sup> This meant that:

As long as such decisions are not final and binding and can be corrected by the internal mechanisms of appeal, they do not deny justice. In other words, as long as the judicial system is not tested as a whole, the fair and equitable treatment standard is not violated via a denial of justice. The State does not mistreat a foreign investor unfairly and inequitably by a denial of justice through an appealable decision of a first instance court, but only through the final product of its administration of justice which the investor cannot escape. The State is not responsible for the wrongdoings of an individual judge as long as it provides readily accessible mechanisms which are capable of neutralizing such judge.<sup>371</sup>

244. Finally, in *Saluka v. Czech Republic*, the claimant complained that a police search of offices and seizure of documents was illegal, violated privacy rights and breached the Czech Republic’s full protection and security obligation under the Netherlands-Slovak Republic BIT. The tribunal rejected the claim on the basis that there had been a successful petition to the Czech Constitutional Court,<sup>372</sup> thereby implicitly accepting that where there is an allegation of a breach of the full protection and security standard due to deficiencies in the administration of justice, the delict in question is in essence a denial of justice and therefore is subject to the requirement to exhaust local remedies.

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<sup>370</sup> *Mr. Franck Charles Arif v. Republic of Moldova*, ICSID Case No. ARB/11/23, Award (8 Apr. 2013), ¶ 442 (RLA-120)(emphasis added).

<sup>371</sup> *Mr. Franck Charles Arif v. Republic of Moldova*, ICSID Case No. ARB/11/23, Award (8 Apr. 2013), ¶ 443 (RLA-120) (emphasis added).

<sup>372</sup> *Saluka Investments B.V. v. The Czech Republic*, UNCITRAL, Partial Award (7 Sept. 2006), ¶ 493 (CLM-144).

245. Merck attempts to escape the exhaustion requirement by relying on the construction of Article II(7) of the BIT<sup>373</sup> by the tribunal in *Chevron v. Ecuador* (“*Chevron I*”).<sup>374</sup> This attempt is unavailing. Article II(7) reflects the customary international law standard of denial of justice, and the concomitant duty to exhaust local remedies compliance with which consummates the delict, and nothing more, or less.

246. The *Chevron I* tribunal noted that the obligation created by Article II(7) overlaps “significantly” with the prohibition of denial of justice under customary international law. It also agreed with the *Duke Energy v. Ecuador* tribunal, which had earlier interpreted and applied the provision, concluding that Article II(7), ‘to some extent, “seeks to implement and form part of the more general guarantee against denial of justice.”<sup>375</sup> However, it went on to interpret Article II(7) as “an independent, specific treaty obligation” because it “does not make any explicit reference to denial of justice or customary international law.”<sup>376</sup> Therefore, Article II(7) constitutes a “*lex specialis*” and not merely restatement of the law on denial of justice because the latter intent “could have been easily expressed through the inclusion of explicit language to that effect or by using language corresponding to the prevailing standard for denial of justice at the time of drafting.”<sup>377</sup> The implications of those findings, so crucial for the tribunal’s finding of Ecuador’s liability in that case, were twofold: *first*, “that a distinct and potentially less-

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<sup>373</sup> The provision reads: “Each Party shall provide effective means of asserting claims and enforcing rights with respect to investment, investment agreements, and investment authorizations.”

<sup>374</sup> Claimant’s Memorial, ¶¶ 395-400.

<sup>375</sup> *Chevron Corporation (USA) and Texaco Petroleum Company (USA) v. The Republic of Ecuador*, PCA Case No. 34877 (UNCITRAL), Partial Award on the Merits (30 Mar. 2010), ¶ 242 (CLM-111) (emphasis added).

<sup>376</sup> *Chevron Corporation (USA) and Texaco Petroleum Company (USA) v. The Republic of Ecuador*, PCA Case No. 34877 (UNCITRAL), Partial Award on the Merits (30 Mar. 2010), ¶ 242 (CLM-111).

<sup>377</sup> *Chevron Corporation (USA) and Texaco Petroleum Company (USA) v. The Republic of Ecuador*, PCA Case No. 34877 (UNCITRAL), Partial Award on the Merits (30 Mar. 2010), ¶ 242 (CLM-111).

demanding test is applicable under this provision as compared to denial of justice under customary international law”<sup>378</sup> and; *second*, claimants did not have to prove a “strict” exhaustion of local remedies in order for the tribunal to find a breach of Article II(7).<sup>379</sup> The tribunal’s conclusions were subsequently relied upon by the tribunal in *White Industries v. India*.<sup>380</sup>

247. These conclusions, however, cannot be reconciled with the construction of the provision under a proper application of the principles of treaty interpretation that take into account the fundamental objectives underlying the U.S. BIT program, from which the Ecuador-U.S. BIT originates.

248. Bilateral investment treaties concluded by the United States rarely deviate substantially from the U.S. Model BIT in force at the time of the treaty’s conclusion.<sup>381</sup> The Ecuador-U.S. BIT is no exception: it is nearly an exact copy of the 1992 U.S. Model BIT.<sup>382</sup> The intentions of the U.S. drafters of the Treaty are therefore relevant to the interpretation of Article II(7).

249. As Prof. Kenneth Vandeveld, one of the principal architects in the United States’ BIT program, has observed: “[t]he primary United States’ interest in concluding BITs was to protect

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<sup>378</sup> *Chevron Corporation (USA) and Texaco Petroleum Company (USA) v. The Republic of Ecuador*, PCA Case No. 34877 (UNCITRAL), Partial Award on the Merits (30 Mar. 2010), ¶ 244 (CLM-111).

<sup>379</sup> *Chevron Corporation (USA) and Texaco Petroleum Company (USA) v. The Republic of Ecuador*, PCA Case No. 34877 (UNCITRAL), Partial Award on the Merits (30 Mar. 2010), ¶ 268 (CLM-111).

<sup>380</sup> *White Industries Australia Limited v. The Republic of India*, UNCITRAL, Final Award (30 Nov. 2011), ¶ 11.3.2 (CLM-114).

<sup>381</sup> K. Vandeveld, U.S. INTERNATIONAL INVESTMENT AGREEMENTS (2009), pp. 108-109 (RLA-85) (explaining that the U.S. was particularly reluctant to deviate from its Model BITs).

<sup>382</sup> The differences between the 1992 U.S. Model BIT and the Ecuador-U.S. BIT are inconsequential: (a) Articles I(f) and (g) are added; (b) Article II(2) is added; and (c) minor clarifying changes to the text of Article VI, paragraph 2 were made.

existing investment while reaffirming the United States understanding of traditional international law on foreign investment.”<sup>383</sup> Consequently, “[U.S.] BITs rely on international law to fill gaps and establish minimum standards of treatment, thereby protecting against misinterpretations of the negotiated BIT texts.”<sup>384</sup>

250. Prof. Jose Alvarez, another former U.S. BIT negotiator, likewise observes that U.S. BITs are intended to affirm the protections accorded to foreign investors under customary international law. He writes: “[t]he modern wave of BITs arrived when countries like the United States” concluded BITs that are “intended precisely to *affirm* the traditional rules of state responsibility to aliens ...”<sup>385</sup> As a result, “[s]uch clauses” are properly interpreted as “efforts to *include customary protections as part of a BIT’s protections*” rather than to “exclude these ordinarily applicable general legal rules, as does *lex specialis*.”<sup>386</sup>

251. This interpretation, Prof. Alvarez emphasizes, accords with the

announced intentions of the U.S. BIT program (and presumably the programs of other capital-exporting states that now widely imitate the provisions of U.S. BITs). U.S. BIT negotiators have affirmed in scholarly commentaries, in testimony before Congress, and most importantly in the course of BIT negotiations that these treaties sought to re-affirm, not derogate from, relevant customary law.<sup>387</sup>

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<sup>383</sup> K. Vandevelde, *The Bilateral Investment Treaty Program of the United States*, p. 212 (RLA-28).

<sup>384</sup> K. Vandevelde, *The Bilateral Investment Treaty Program of the United States*, p. 222 (RLA-28).

<sup>385</sup> José E. Alvarez, *A BIT on Custom*, 42 N.Y.U. J. INT’L L. & POL. 17 (2009), p. 40 (RLA-88) (emphasis added).

<sup>386</sup> José E. Alvarez, *A BIT on Custom*, 42 N.Y.U. J. INT’L L. & POL. 17 (2009), pp. 33-34 (RLA-88) (emphasis added).

<sup>387</sup> José E. Alvarez, *A BIT on Custom*, 42 N.Y.U. J. INT’L L. & POL. 17 (2009), pp. 33-34 (RLA-88) (emphasis added).

252. Contemporary iterations of the U.S. Model BIT recognize this connection with customary international law.<sup>388</sup> Article 5 of the 2004 and 2012 Models, titled “Minimum Standard of Treatment,” provides that each Party shall accord to covered investments “treatment in accordance with customary international law,” and further explains that the treatment envisaged is that prescribed by the customary international minimum standard of treatment.<sup>389</sup> Article 6 on expropriation is similarly “intended to reflect customary international law concerning the obligation of States with respect to expropriation.”<sup>390</sup>

253. Article II(7) itself has been explicitly acknowledged as reflecting customary international law by several participants in the U.S. BIT program. Professor Alvarez observes, for example,

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<sup>388</sup> Moreover, in regard to Article 1105 NAFTA, the U.S. has explicitly stated it was the Contracting Parties’ intention to incorporate only customary international law obligations in respect of the minimum standard of treatment of aliens. *Notes of Interpretation of Certain Chapter 11 Provisions*, NAFTA Free Trade Commission (31 Jul. 2001) (RLA-50). The United States has also made clear that this understanding reflects the NAFTA Parties’ original intention. See Supplemental Post-Hearing Submission of the United States on Article 1105 (1 Aug. 2002), in *ADF Group Inc. v. United States of America*, ICSID Case No. ARB(AF)/00/1, p. 3 (RLA-53) (“[t]he Free Trade Commission’s interpretation] does not change the meaning of Article 1105(1) – it merely clarifies the meaning that the Article has always had.”). In *ADF Group, Inc. v. United States*, the United States further stated that its “understanding of the BITs it negotiated is the *same* as the understanding of NAFTA Article 1105(1), namely that they provide for “a minimum absolute standard of treatment, based on long-standing principles of customary international law.” Post-Hearing Submission of Respondent United States of America on Article 1105(1) (27 Jun. 2002), in *ADF Group Inc. v. United States of America*, ICSID Case No. ARB(AF)/00/1, p. 17 (RLA-51) (emphasis added). Based on these representations, the *ADF* tribunal rejected the argument that U.S. BITs’ provisions relating to fair and equitable treatment do not incorporate customary international law, ruling that:

[a]lthough there are textual differences between NAFTA Article 1105(1) on the one hand, and Article II(3)(a) and (b) of the U.S.-Albania and the U.S.-Estonia treaties on the other hand, the Respondent argues vigorously that the two treaties have much the same effect as Article 1105(1) of NAFTA as construed in the FTC Interpretation of 31 July 2001. The two bilateral treaties project, according to the U.S. Department of State letters transmitting them to the U.S. Senate, a ‘minimum standard of treatment’ that is ‘based on customary international law (in the case of the U.S.-Estonia treaty)’ or ‘based on standards found in customary international law (in the case of the U.S.-Albania treaty).’ The intent of one of the two State Parties to the two treaties is clearly relevant, and it does not appear necessary to engage in rigorous interpretive analysis.

*ADF Group Inc. v. United States of America*, ICSID Case No. ARB(AF)/00/1, Award (9 Jan. 2003), ¶ 195 (CLM-116).

<sup>389</sup> U.S. Model BIT (2004), art. 5 (RLA-60); U.S. Model BIT (2012), art. 5 (RLA-112).

<sup>390</sup> U.S. Model BIT (2004), annex B (RLA-60); U.S. Model BIT (2012), annex B (RLA-112).

that “[t]here are many ... provisions in [U.S. BITs] that explicitly or implicitly rely on general international law or reflect an intent by their drafters to affirm traditional principles of state responsibility to aliens.”<sup>391</sup> In these provisions, he includes Article II(7), which he views as one of the BIT’s “*open-ended invitations to deploy relevant customary international law ...*”<sup>392</sup>

254. Significantly, commenting on the deletion of Article II(7) from the 2004 Model BIT, Prof. Vandeveldel writes that the provision was deleted precisely because U.S. drafters believed that “the customary international law principle prohibiting denial of justice provides adequate protection and that a separate treaty obligation was unnecessary.”<sup>393</sup> This clearly evidences that the provision was never intended to impose more stringent obligations than those applicable pursuant to customary international law.<sup>394</sup> Yet the *Chevron I* tribunal somehow saw this fact as confirming the *lex specialis* nature of Article II(7).<sup>395</sup> However, if this were the case, the U.S. drafters would have had ample reason to *maintain* the provision in light of the additional, more stringent obligations it allegedly entails, rather than delete it altogether as redundant.

255. Nothing reflects better the intentions of the Parties, however, than the actual terms of Article II(7).<sup>396</sup> These terms on their face codify the long-established customary international law

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<sup>391</sup> José E. Alvarez, *A BIT on Custom*, 42 N.Y.U. J. INT’L L. & POL. 17 (2009), pp. 31-32 (RLA-88).

<sup>392</sup> *Id.* (emphasis added).

<sup>393</sup> K. Vandeveldel, U.S. INTERNATIONAL INVESTMENT AGREEMENTS (2009), p. 415 (RLA-85). The 2012 U.S. Model BIT similarly does not contain an “effective means” provision.

<sup>394</sup> An updated Model BIT may be relevant to interpretation of investment treaties based on previous Model BITs. See *Suez, Sociedad General de Aguas de Barcelona, S.A. & Vivendi Universal, S.A. v. Argentine Republic*, ICSID Case No. ARB/03/19, Award on Jurisdiction (3 Aug. 2006), ¶ 58 (RLA-75) (noting with respect to subsequent BIT practice of the United Kingdom that “[t]he inference to be drawn from this language is that this new paragraph, by its terms, is intended to clarify what had been the United Kingdom’s pre-existing intention in negotiating its BITs”).

<sup>395</sup> *Chevron Corporation (USA) and Texaco Petroleum Company (USA) v. The Republic of Ecuador*, PCA Case No. 34877 (UNCITRAL), Partial Award on the Merits (30 Mar. 2010), ¶ 243 (CLM-108).

<sup>396</sup> Report of the International Law Commission on the work of its eighteenth session – Part II (“ILC Commentary”), U.N. Doc. A/63909/Rev. 1 (1966), 2 Y.B. INT’L L. COMM’N 172, 220 (¶ 11) (RLA-23). See also *Case Concerning*



principle under the rubric of the international minimum standard requiring that States provide an effective framework or system enabling foreign investors to assert claims and enforce their rights.<sup>397</sup> The following chart illustrates the equivalence between the various formulations of

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*the Territorial Dispute (Libyan Arab Jamahiriya/ Chad)*, Judgment, 3 Feb. 1994, ICJ Rep. 1994, ¶ 41 (RLA-42) (“[i]nterpretation must be based above all upon the text of the treaty.”).

<sup>397</sup> For example, the 1926 Report of the Committee of Experts for the Progressive Codification of International Law (prepared under the auspices of the League of Nations) provides that a State’s duty to protect foreign nationals within its territory includes the obligation to provide “*the necessary means for defending their rights.*” Questionnaire No. 4 on “Responsibility of States for Damage Done in their Territories to the Person or Property of Foreigners” adopted by the League of Nations Committee of Experts for the Progressive Codification of International Law at its Second Session, held in Geneva, 1926, Report of the Sub-Committee, reproduced in A. Freeman, *THE INTERNATIONAL RESPONSIBILITY OF STATES FOR DENIAL OF JUSTICE* (1932), pp. 629-633, at 632 (RLA-14) (emphasis added). The Institut de Droit International described essentially the same obligation in its 1927 resolution on the International Responsibility of States for Injuries on their Territory to the Person or Property of Foreigners, according to which a denial of justice may occur where (i) tribunals that are necessary to assure protection do not exist or do not function; (ii) such tribunals are not accessible to foreigners; or (iii) those tribunals do not offer guarantees that are indispensable for the proper administration of justice. *Institut de droit international, Resolution on the International Responsibility of States for Injuries on their Territory to the Person or Property of Foreigners*, reproduced in YILC, vol. II, 1956, article V (RLA-20). The 1929 Harvard Law School draft codification of international law relating to the treatment of foreigners provides that foreign nationals must have “*effective means of redress for injuries,*” and that these means of redress must “measure up to the standard required by international law.” *Law of Responsibility of States for Damages Done in Their Territory to the Person or Property of Foreigners*, reproduced in 23 AJIL SPECIAL SUPPLEMENT (1929), p. 147-8 (RLA-9) (emphasis added). In connection with discussions regarding state responsibility arising from the administration of justice, the British delegate at the 1930 Hague Conference for the Codification of International Law proposed the inclusion of the following text: “A State is responsible for damage suffered by a foreigner as the result of the fact that by reason of defects in its laws of procedure,” including where “[h]e is not afforded in the courts a reasonable means of enforcing his rights, or is afforded means of redress less adequate than those afforded to nationals.” Acts of the Conference for the Codification of International Law, held at The Hague from March 13<sup>th</sup> to April 12<sup>th</sup>, 1930, Minutes of the Third Committee, 9<sup>th</sup> meeting, Consideration of Bases of Discussion Nos. 5 and 6, reprinted in A. Freeman, *THE INTERNATIONAL RESPONSIBILITY OF STATES FOR DENIAL OF JUSTICE* (1932), pp. 658 *et seq.*, at 664 (RLA-11) (per Mr. Becket (Great Britain)) (emphasis added). This proposal, the British delegate explained, addresses the customary international law obligation “*to provide means for the protection and enforcement of rights, to provide a law of procedure and tribunals which come up to that very general - indeed, not very exacting - international standard of justice and efficiency.*” *Id.* p. 665 (emphasis added). Although the British proposal ultimately was not adopted because the drafters decided to address state responsibility for legislative and executive acts elsewhere (see *id.* p. 707 (Germany, Proposal Regarding Bases of Discussion Nos. 5 and 6, circulated to the Members of the Committee on Mar. 29, 1930) the accuracy of the British delegation’s description of customary international law on this point was not disputed.

Distinguished academic commentators have also stated that long-established customary international law imposes the obligation to set up effective means for the judicial protection of foreign nationals. As Freeman wrote: “every State is duly bound to possess a judicial organization guaranteeing that lawsuits will be impartially and competently adjudicated.” In particular, “[t]he procedural apparatus which is set up must ... provide the alien ... *with effective means for the pursuit of his right.*” A. Freeman, *THE INTERNATIONAL RESPONSIBILITY OF STATES FOR DENIAL OF JUSTICE* (1938), p. 135 (RLA-18).

customary international law on the issue, as evidenced in codification efforts and the writings of distinguished commentators, and Article II(7):

Customary International Law	Article II(7) of Ecuador-U.S. BIT
<p>A State's duty to protect foreign nationals within its territory includes the obligation to provide "the <i>necessary means</i> for defending their rights"</p> <p>Questionnaire No. 4 on Responsibility of States for Damage Done in their Territories to the Person or Property of Foreigners (1926)</p>	<p>Each Party shall provide <i>effective means</i> of asserting claims and enforcing rights with respect to investment, investment agreements, and investment authorizations</p>
<p>Foreign nationals must have "<i>effective means</i> of redress for injuries"</p> <p>Harvard Law School, Law of Responsibility of States for Damages Done in Their Territory to the Person or Property of Foreigners (1929)</p>	
<p>States' obligation to provide "means for the protection and enforcement of rights ... <i>which come up to [the] international standard of justice and efficiency</i>"</p> <p>Acts of the Conference for the Codification of International Law (1930), p. 665.</p>	
<p>The procedural apparatus which States are obliged to set up must "provide the alien ... with <i>effective means</i> for the pursuit of his right"</p> <p>Alwyn V. Freeman, THE INTERNATIONAL RESPONSIBILITY OF STATES FOR DENIAL OF JUSTICE (1938), p. 135</p>	

256. Article II(7) cannot be interpreted in disregard of this coterminous obligation under customary international law. In cases where tribunals were confronted with treaty definitions so patently adopted from formulations widely employed in customary international law, they have turned to the general authorities to interpret their meaning.<sup>398</sup>

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<sup>398</sup> See *Asian Agricultural Products Ltd v. Republic of Sri Lanka*, ICSID Case No. ARB/87/3, Award (27 Jun. 1990) (RLA-30) (standard of full protection and security); *Saluka Investments BV (the Netherlands) v. Czech Republic*, UNCITRAL, Partial Award (17 Mar. 2006) (Watts, Fortier, Behrens), ¶ 254 (RLA-71) (when interpreting the Treaty's expropriation provision, "account has to be taken of relevant rules of general customary international law."); *SD Myers Inc. v. Government of Canada*, UNCITRAL, First Partial Award (13 Nov. 2000), ¶ 280 (CLM-143) ("[t]he term "expropriation" in Article 1110 must be interpreted in light of the whole body of state practice,

257. Moreover, according to the principle specifically approved as part of a general approach to interpretation of bilateral investment treaties by the tribunal in the very first ICSID treaty arbitration,<sup>399</sup> and proven to be of dispositive significance in the circumstances of that case,<sup>400</sup> the Contracting States to the Ecuador-U.S. BIT are taken “to refer to general principles of international law for all questions which the treaty does not itself resolve in express terms and in a different way.” As the above chart shows, Article II(7) clearly does not resolve the matter “in a different way.” It follows that the Parties must be taken to have referred to the general customary international law on the matter.

258. Hence, the *Chevron I* tribunal’s interpretation of Article II(7) as *lex specialis* because it “does not make any explicit reference to denial of justice or customary international law,”<sup>401</sup> not only is inconsistent with the U.S. treaty-making practice discussed above, it is also based on a fundamental misunderstanding of relevant customary international law and its significance in the interpretation of the BIT provisions.

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treaties and judicial interpretations of that term in international law cases.”); *Generation Ukraine Inc. v. Ukraine*, ICSID Case No. ARB/00/9, Award (16 Sep. 2003), ¶ 11. 3 (CLM-11) (“[i]t is plain that several of the BIT standards, and the prohibition against expropriation in particular, are simply a conventional codification of standards that have long existed under customary international law”); *Fireman's Fund Insurance Company v. United Mexican States*, ICSID Case No. ARB(AF)/02/01, Award [redacted version] (14 Jul. 2006), ¶ 176 (RLA-73); *Accession Mezzanine Capital L.P. and Danubius Kereskedőház Vagyonkezelő Zrt. v. Hungary*, ICSID Case No. ARB/12/3, Decision on Respondent’s Objection under Arbitration Rule 41(5) (16 Jan. 2013) (“*Accession Mezzanine et al v. Hungary*”), ¶ 67 (RLA-119); *Glamis Gold, Ltd. v. The United States of America*, UNCITRAL, Award (8 Jun. 2009), ¶ 354 (RLA-93); *AIG Capital Partners, Inc. and CJSC Tema Real Estate Company v. Republic of Kazakhstan*, ICSID Case No. ARB/01/6, Award (7 Oct. 2003), ¶ 10.3.1 (RLA-57).

<sup>399</sup> *Asian Agricultural Products Ltd v. Republic of Sri Lanka*, ICSID Case No. ARB/87/3, Award (27 Jun. 1990), ¶ 40 (Rule D) (RLA-30).

<sup>400</sup> *Asian Agricultural Products Ltd v. Republic of Sri Lanka*, ICSID Case No. ARB/87/3, Award (27 Jun. 1990), ¶ 52 (RLA-30).

<sup>401</sup> *Chevron Corporation (USA) and Texaco Petroleum Company (USA) v. The Republic of Ecuador*, PCA Case No. 34877 (UNCITRAL), Partial Award on the Merits (30 Mar. 2010), ¶ 242 (CLM-111).

259. In light of the considerable body of evidence discussed above, had the Parties intended to establish a *lex specialis* that derogated from their obligations under customary international law, they would have expressly provided so. Absent evidence of such intent, even if Article II(7) were to be considered as *lex specialis* in the sense of particularization of the customary international law obligation to provide “effective means” in the relations of the Parties, its terms must continue to receive “operational guidance” from customary law and must be read consistent with it.<sup>402</sup> In its Memorial, Merck chose to remain silent vis-à-vis these mistaken assumptions and erroneous interpretive methodologies of the *Chevron I* award, which Ecuador pointed out in its Rejoinder in the interim measures phase of this proceeding.<sup>403</sup> Its silence is telling.

260. In any event, even if the *Chevron I* tribunal were correct in its construction of Article II(7), *quod non*, Merck still cannot bypass the exhaustion requirement. The *Chevron I* tribunal did not dispute that even under its view of Article II(7) as *lex specialis*, “[t]he Claimants must ... have *adequately utilized* the means made available to them to assert claims and enforce rights in Ecuador in order to prove a breach of the BIT.”<sup>404</sup> The tribunal stressed that “a claimant is required to make use of all remedies that are available and might have rectified the wrong

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<sup>402</sup> According to Judge Bruno Simma, where an applicable rule of customary law is highly relevant, it provides “operational guidance” for interpreting a treaty provision. See B. Simma & T. Kill, *Harmonizing Investment Protection and International Human Rights: First Steps Towards a Methodology* [in:] INTERNATIONAL INVESTMENT LAW FOR THE 21ST CENTURY: ESSAYS IN HONOUR OF CHRISTOPH SCHREUER 678 (C. Binder *et. al.* edition, 2009), p. 696 (RLA-89).

<sup>403</sup> Ecuador’s Rejoinder to Claimant’s Request for Interim Measures, dated 17 Aug. 2012, ¶¶ 4-11.

<sup>404</sup> *Chevron Corporation (USA) and Texaco Petroleum Company (USA) v. The Republic of Ecuador*, PCA Case No. 34877 (UNCITRAL), Partial Award on the Merits (30 Mar. 2010), ¶ 268 (CLM-111) (emphasis added). Similarly, the *Duke Energy* tribunal did not dispute that a claim for breach of Article II(7) requires a showing that the claimant has exhausted all available and effective remedies. *Duke Energy Electroquil Partners & Electroquil S.A. v. Republic of Ecuador*, ICSID Case No. ARB/04/19, Award (18 Aug. 2008), ¶ 402 (RLA-83).

complained of,”<sup>405</sup> and that a “high likelihood of success of these remedies is not required in order to expect a claimant to attempt them.”<sup>406</sup> More importantly, the tribunal emphasized that the failure to use means available in the Ecuadorian legal system could preclude recovery if it prevented a proper assessment of the “effectiveness” of the system.<sup>407</sup> The tribunal eventually found Ecuador liable even though the claimants had not used certain collateral procedural mechanisms available to them, since it was not convinced that any of these procedures could have rectified the alleged delay.<sup>408</sup>

261. Merck’s case of breach of Article II(7) fails to meet even this “qualified exhaustion” requirement. Even under the *Chevron I* tribunal’s test, Merck’s appeal to the Constitutional Court would have constituted a remedy “that [is] available and might have rectified the wrong complained of.”

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<sup>405</sup> *Chevron Corporation (USA) and Texaco Petroleum Company (USA) v. The Republic of Ecuador*, PCA Case No. 34877 (UNCITRAL), Partial Award on the Merits (30 Mar. 2010), ¶ 326 (CLM-111).

<sup>406</sup> *Chevron Corporation (USA) and Texaco Petroleum Company (USA) v. The Republic of Ecuador*, PCA Case No. 34877 (UNCITRAL), Partial Award on the Merits (30 Mar. 2010), ¶ 326 (CLM-111).

<sup>407</sup> *Chevron Corporation (USA) and Texaco Petroleum Company (USA) v. The Republic of Ecuador*, PCA Case No. 34877 (UNCITRAL), Partial Award on the Merits (30 Mar. 2010), ¶ 324 (CLM-111).

<sup>408</sup> *Chevron Corporation (USA) and Texaco Petroleum Company (USA) v. The Republic of Ecuador*, PCA Case No. 34877 (UNCITRAL), Partial Award on the Merits (30 Mar. 2010), ¶¶ 330-331 (CLM-111). By contrast, the fact that it was “unclear” whether the further pursuit of local remedies would allow for the relief sought was deemed by the *Duke Energy* tribunal insufficient to excuse the claimants in that from their duty of exhaustion. *Duke Energy Electroquil Partners & Electroquil S.A. v. Republic of Ecuador*, ICSID Case No. ARB/04/19, Award (18 Aug. 2008), ¶ 401 (RLA-83) (“[i]t is unclear from the record, however, whether Ecuadorian courts would assimilate an erroneous decision dismissing jurisdiction to an excess of power, as would be for instance the case under Art. 52(1)(b) of the ICSID Convention. Yet, *lack of clarity it is not sufficient to demonstrate that a remedy is futile.*”) (emphasis added). However, It may be that the *Chevron I* tribunal considered the case of delay a special situation which warranted a more relaxed approach to the requirement of exhaustion. *Chevron Corporation (USA) and Texaco Petroleum Company (USA) v. The Republic of Ecuador*, PCA Case No. 34877 (UNCITRAL), Partial Award on the Merits (30 Mar. 2010), ¶ 321 (CLM-111) (“specific considerations become relevant to examine whether and how the non-exhaustion of local remedies can be raised and applied in cases where the delay of the domestic courts in deciding a case is the breach, because it is the domestic courts themselves that cause the non-exhaustion of the local remedies.”).

262. In sum, all of Merck's claims under the Treaty are subject to the requirement that Merck exhausted the available and effective local remedies in the Ecuadorean legal system. Merck's failure to exhaust such remedies, as established in the previous section, entails that all its claims under the Treaty must be dismissed.

#### **D. Claimant's Failure To Exhaust Local Remedies Deprives The Tribunal Of Jurisdiction**

263. Merck's failure to exhaust local remedies in Ecuador not only deprives its Treaty claims of any merit, it is also fatal to the Tribunal's jurisdiction. State responsibility for denial of justice arises only after the fruitless resort to local remedies.<sup>409</sup> In other words, international law has not been violated at the time of the initial injury to the alien, but only after local remedies have been exhausted. As long as the individual has not exhausted local remedies, the international wrongful act does in fact not yet exist or has at least not been completed.

264. It follows that Merck's non-compliance with the requirement to exhaust local remedies entails its failure to state an "investment dispute" within the meaning of Article VI of the BIT and, in turn, its non-compliance with the jurisdictional prerequisites of Article VI.<sup>410</sup> For these reasons, the Tribunal has no jurisdiction over its claims.

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<sup>409</sup> Claimant's expert, Prof. Paulsson, in effect concedes this point when he writes that "[b]efore an international tribunal may find a denial of justice to have occurred, the domestic legal system as a whole must have been put to the test and, as a system, have failed to meet the standard required by international law." Expert Report of Prof. Paulsson, ¶ 53 (emphasis added).

<sup>410</sup> Ecuador's Rejoinder to Claimant's Request for Interim Measures, dated 17 Aug. 2012, ¶¶ 81-88. See also Expert Report of Prof. Caflisch, fn. 1 ("Claimant's ability to establish that it has complied with its duty to exhaust local remedies in Ecuador also affects the question of whether an "investment dispute" exists within the meaning of Article VI of the Treaty.").

265. For the same reasons, Merck’s claims are not ripe and are therefore inadmissible.<sup>411</sup>

266. In addition, because Merck cannot establish a treaty violation due to its failure to exhaust remedies, its claims lack merit.

267. Finally, as Ecuador pointed out in the Interim Measures phase of these proceedings,<sup>412</sup> Merck’s bringing of this arbitration in flagrant disregard of its prior duty to exhaust available and effective local remedies, in effect an effort to create a “stand-by” tribunal to monitor the developments in the underlying litigation, constitutes an abuse of process that fully warrants the exercise of the Tribunal’s inherent powers to dismiss jurisdiction over Merck’s claims on grounds of abuse of process.<sup>413</sup>

268. The substantive scope of international courts and tribunals’ inherent power to sanction abuses of the arbitral process may vary, depending on the exigencies of international adjudication and the parties’ procedural conduct.<sup>414</sup> But it certainly includes the power to dismiss jurisdiction over claims.<sup>415</sup>

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<sup>411</sup> See V. Heiskanen, *Ménage à trois? Jurisdiction, Admissibility and Competence in Investment Treaty Arbitration*, ICSID Review (2013), pp. 1-16, at 8 (RLA-130) (“[a] typical example of a claim that may be found inadmissible *ratione temporis* is where a claimant has failed to exhaust local remedies. Such a claim is not yet ripe for international jurisdiction; it remains a local or a *domestic* claim so long as there are still local remedies available.”).

<sup>412</sup> Ecuador’s Rejoinder to Claimant’s Request for Interim Measures, dated 17 Aug. 2012, ¶¶ 80, 83.

<sup>413</sup> See, e.g., *EDF (Services) Limited v. Romania*, ICSID Case No. ARB/05/13, Procedural Order No. 2 (30 May 2008), ¶ 46 (RLA-82) (“It is part of the inherent procedural powers of an arbitral tribunal, be it acting within the framework of an international commercial arbitration or of an investment treaty arbitration under the ICSID Convention, to ensure that the proper functioning of the dispute settlement process is safeguarded.”).

<sup>414</sup> *Mobil Corporation and others v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB/07/27, Decision on Jurisdiction (10 June 2010), ¶ 177 (RLA-99) (“abuse of right is to be determined in each case, taking into account all the circumstances of the case.”).

<sup>415</sup> *Phoenix Action, Ltd v. the Czech Republic*, ICSID Case No. ARB/06/5, Decision on Jurisdiction, (15 Apr. 2009), ¶¶ 143-144 (RLA-92); *ST-AD GmbH (Germany) v. The Republic of Bulgaria*, UNCITRAL, Award on Jurisdiction (18 Jul. 2013), ¶¶ 423 (RLA-124); *Lao Holdings N.V. v. The Lao People’s Democratic Republic*, ICSID Case No. ARB(AF)/12/6, Decision on Jurisdiction (21 Feb. 2014), ¶ 81 (RLA-126).

269. In the present case, Merck gave notice of an “investment dispute” while the underlying case was pending before an Ecuadorean court of appeals; and initiated the arbitration immediately after the rendering of the court of appeals’ judgment while review by the NCJ was underway. Merck’s maneuvers and unfair behavior in these proceedings causes prejudice to Ecuador, which has been compelled to defend against premature claims for almost three years now, with all the consequences that are involved, especially in relation to costs. For these reasons, Ecuador submits that doctrine of abuse of process constitutes an independent ground for dismissing Merck’s claims for lack of jurisdiction.

**E. Conclusion: As A Result Of Claimant’s Failure To Exhaust Local Remedies, Its Claims Must Be Dismissed**

270. As stressed by the tribunal in *Amtó v. Ukraine*, “[t]he investor that fails to exercise his rights within a legal system, or exercises its rights unwisely, cannot pass his own responsibility for the outcome to the administration of justice, and from there to the host State in international law.”<sup>416</sup> Merck’s failure to comply with its fundamental duty to exhaust all available and effective remedies in the Ecuadorean legal system before asserting its denial of justice claims at the international level cannot be passed on to Ecuador. As a consequence, Merck’s failure to meet the judicial finality requirement proves fatal to its claims, which must be dismissed in their entirety.

**VI. EVEN IF THE NCJ JUDGMENT CONSTITUTED THE FINAL PRODUCT OF THE ECUADORIAN JUDICIAL SYSTEM, THE CLAIMS SHOULD BE DISMISSED ON THE MERITS BECAUSE MERCK HAS FAILED TO PROVE THAT IT SUFFERED A DENIAL OF JUSTICE OR OTHER VIOLATION OF THE TREATY**

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<sup>416</sup> *Limited Liability Company Amtó v. Ukraine*, SCC Case No. 080/2005, Final Award (26 Mar. 2008), ¶ 76 (CLM-112).



## A. Introduction

271. In addition to Merck's failure to exhaust available and effective local remedies in the Ecuadorian judiciary before pressing its denial of justice claims at the international level, neither the proceedings before the NCJ nor the NCJ decision itself resulting from said proceedings constitutes a denial of justice or other violation of the Treaty. As a consequence, Merck's claims must be dismissed for lack of merit.

272. As will be shown below, Merck has vociferously defended in its submissions to the Constitutional Court the NCJ's judgment as "well-founded" and as based on the NCJ's independent review of the evidence on the record. These admissions aside, however, the conduct of the Ecuadorian judiciary in question plainly does not meet the standards applicable under international law for a denial of justice.

273. These standards are perhaps best captured in an oft-cited statement of the tribunal in *Mondev v. United States*, building upon the statement of the International Court of Justice in the *ELSI* case:<sup>417</sup>

The test is not whether a particular result is surprising, but whether the shock or surprise occasioned to an impartial tribunal leads, on reflection, to justified concerns as to the judicial propriety of the outcome, bearing in mind on the one hand that international tribunals are not courts of appeal, and on the other hand that Chapter 11 of NAFTA (like other treaties for the protection of investments) is intended to provide a real measure of protection. In the end the question is whether, at an international level and having regard to generally accepted standards of the administration of justice, a tribunal can conclude in the light of all the available facts that the impugned decision was *clearly* improper and discreditable, with the result that the investment has been subjected to unfair and

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<sup>417</sup> *Case Concerning Elettronica Sicula S.p.A. (ELSI) (United States of America v. Italy)*, Judgment (20 Jul. 1989), I.C.J. Reports 1989, p. 15 at p. 76 (¶ 128) ("[a]rbitrariness is not so much something opposed to a rule of law, as something opposed to the rule of law... It is a wilful disregard of due process of law, an act which shocks, or at least surprises, a sense of juridical propriety.") (CLM-155).

inequitable treatment. This is admittedly a somewhat open-ended standard, but it may be that in practice no more precise formula can be offered to cover the range of possibilities.<sup>418</sup>

274. Along the same lines, the tribunal in *RosInvestCo* pointed out that the “threshold of the international delict of denial of justice is *high* and goes far beyond the mere misapplication of domestic law.”<sup>419</sup> Merck’s expert in this arbitration, Prof. Paulsson, acting as sole arbitrator in *Pantechniki v. Albania*, similarly held that:

The general rule is that ‘mere error in the interpretation of the national law does not *per se* involve responsibility.’ Wrongful application of the law may nonetheless provide ‘elements of proof of a denial of justice.’ *But that requires an extreme test: the error must be of a kind that no ‘competent judge could reasonably have made.’*” Such a finding would mean that the state had not provided even a minimally adequate justice system.<sup>420</sup>

275. In a like vein, the tribunal in *Arif v. Moldova* pointed out that a State can be held responsible for a denial of justice “if and when the judiciary breached the standard by

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<sup>418</sup> *Mondev International Ltd. v. United States of America*, ICSID Case No. ARB(AF)/99/2, Award (11 Oct. 2002) (Stephen, Crawford, Schwebel), ¶ 127 (RLA-54) (emphasis added) (footnotes omitted). This statement has been cited with approval in *The Loewen Group, Inc. and Raymond L. Loewen v. United States of America*, ICSID Case No. ARB(AF)/98/3, Award (26 Jun. 2003) (Mason, Mikva, Mustill), ¶ 133 (RLA-55); *Jan de Nul N.V. and Dredging International N.V. v. Arab Republic of Egypt*, ICSID Case No. ARB/04/13, Award (6 Nov. 2008) (Kaufmann-Kohler, Mayer, Stern), ¶ 193 (RLA-84); *RosInvestCo UK Ltd. v. The Russian Federation*, SCC Arbitration V (079/2005), Final Award (12 Sep. 2010) (Böckstiegel, Steyn, Berman), ¶ 276-277 (CLM-141); *Sergei Paushok, CJSC Golden East Company and CJSC Vostokneftegaz Company v. The Government of Mongolia*, UNCITRAL (Mongolia-Russian Federation BIT), Award on Jurisdiction and Liability (28 Apr. 2011) (Lalonde, Grigera Naón, Stern), ¶¶ 625-626, 628 (RLA-131).

<sup>419</sup> *RosInvestCo UK Ltd.*, ¶ 275 (CLM-141) (emphasis added). See also *Iberdrola Energía S.A. v. Republic of Guatemala*, ICSID Case No. ARB/09/5, Award (17 Aug. 2012) (Zuleta, Oreamuno, Derains), ¶¶ 491-492 (RLA-115) (emphasis added).

<sup>420</sup> *Pantechniki S.A. Contractors & Engineers (Greece) v. The Republic of Albania*, ICSID Case No. ARB/07/21, Award (30 Jul. 2009) (Paulsson, sole arbitrator), ¶ 94 (RLA-94) (second emphasis added). In his monograph on denial of justice in international law, Prof. Paulsson has referred to the “[t]he modern consensus ... to the effect that the factual circumstances must be *egregious* if state responsibility is to arise on the grounds of denial of justice.” J. Paulsson, DENIAL OF JUSTICE IN INTERNATIONAL LAW (2005), p. 60 (RLA-68) (emphasis added).

*fundamentally* unfair proceedings and *outrageously* wrong, final and binding decisions.”<sup>421</sup> In *Oostergetel v. Slovakia*, the tribunal finally stressed that:

a claim for denial of justice under international law is a *demanding* one. To meet the applicable test, it will not be enough to claim that municipal law has been breached, that the decision of a national court is erroneous, that a judicial procedure was incompetently conducted, or that the actions of the judge in question were probably motivated by corruption. A denial of justice implies the failure of a national system as a whole to satisfy minimum standards.<sup>422</sup>

276. In order to succeed in its claims for a denial of justice, Merck must prove that the Ecuadorian court system “*fundamentally* failed.”<sup>423</sup> Given the gravity of such an allegation, the applicable evidentiary burden is elevated. Indeed arbitral tribunals and commissions have held that only *clear* and *convincing* evidence will suffice to meet the claimant’s burden of showing that a national judiciary has conducted itself in so egregious a manner as to warrant a finding of a denial of justice.<sup>424</sup> In the words of Prof. Greenwood, “[o]nly if there is *clear evidence* of discrimination against a foreign litigant or an outrageous failure of the judicial system is there a denial of justice in international law.”<sup>425</sup>

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<sup>421</sup> *Mr. Franck Charles Arif v. Republic of Moldova*, ICSID Case No. ARB/11/23, Award (8 Apr. 2013) (Cremades, Hanotiau, Knieper), ¶ 445 (RLA-120) (emphasis added).

<sup>422</sup> *Jan Oostergetel and Theodora Laurentius v. The Slovak Republic*, UNCITRAL (Netherlands-Slovak Republic BIT), Final Award (23 Apr. 2012) (Kaufmann-Kohler, Wladimiroff, Trapl), ¶ 273 (CLM-146).

<sup>423</sup> *RosInvestCo UK Ltd.*, ¶ 279 (CLM-141) (emphasis added).

<sup>424</sup> *United States of America (B. E. Chattin) v. United Mexican States*, United States-United Mexican States Claims Commission, Arbitral Award (23 Jul. 1927), 4 U.N.R.I.A.A. 282, 288 (stating that “*convincing* evidence is necessary to fasten liability” for denial of justice) (CLM-120) (emphasis added); *Great Britain (El Oro Mining and Railway Co. (Ltd.)) v. United Mexican States*, Decision No. 55 (18 Jun. 1931), 5 U.N.R.I.A.A. 191, 198 (“[i]t is obvious that such a grave reproach can only be directed against a judicial authority upon evidence of the *most convincing* nature.”) (RLA-12) (emphasis added).

<sup>425</sup> C. Greenwood, *State Responsibility for the Decisions of National Courts* [in:] ISSUES OF STATE RESPONSIBILITY BEFORE INTERNATIONAL JUDICIAL INSTITUTIONS 58 (M. Fitzmaurice et al eds., 2004) (RLA-62) (emphasis added).

277. Allegations of systemic corruption are subject to an even more demanding standard of proof. In a recent award, the tribunal in *Vanessa Ventures v. Venezuela* set the related standards with respect to allegations of a lack of independence and impartiality of the State’s judiciary:

Allegations of a lack of independence and impartiality are more difficult to deal with ... Such allegations would, if proven, constitute very serious violations of the State’s treaty obligations. *But they must be properly proved; and the proof must, at least ordinarily, relate to the specific cases in which the impropriety is alleged to have occurred. Inferences of a serious and endemic lack of independence and impartiality in the judiciary, drawn from an examination of other cases or from anecdotal or circumstantial evidence, will not ordinarily suffice to prove an allegation of impropriety in a particular case.*<sup>426</sup>

278. Similarly, in *Oostergetel v. Slovakia*, the tribunal was adamant:

Mere suggestions of illegitimate conduct, general allegations of corruption and shortcomings of a judicial system do not constitute evidence of a treaty breach or a violation of international law ... *The burden of proof cannot be simply shifted by attempting to create a general presumption of corruption in a given State.*<sup>427</sup>

279. In sum, Merck bears the burden of establishing that the NCJ’s judgment is the product of *fundamentally* unfair proceedings and is *outrageously* wrong, with the result that its alleged investment has been subjected to a denial of justice. To this effect, it would not be sufficient that the NCJ merely misapplied Ecuadorian law; the error must be, in the words of its own expert, of a kind that “no ‘*competent judge could reasonably have made.*” In this connection, Claimant must furnish *clear* and *convincing* evidence relating specifically to the proceedings at issue; general allegations of systemic corruption cannot be used to shift this burden of proof. The following sections establish Merck’s failure in all the aforementioned respects.

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<sup>426</sup> *Vanessa Ventures Ltd. v. The Bolivarian Republic of Venezuela*, ICSID Case No. ARB(AF)/04/6, Award (16 Jan. 2013) (Lowe, Brower, Stern), ¶ 228 (RLA-118) (emphasis added).

<sup>427</sup> *Jan Oostergetel and Theodora Laurentius*, ¶ 296 (CLM-146) (emphasis added).

**B. Merck Has Not Demonstrated That The NCJ Judgment Denied It Justice Or That It Failed To Cure Any Alleged Defects In the Lower Court Proceedings**

**1. Merck Has Admitted That It Considers The NCJ's Damages Calculation To Be Reasoned and Reasonable**

280. The principal basis for Merck's cassation petition before the NCJ was what it contends to be the exorbitant damages awarded by the second instance court. In this light, the decision of the NCJ represents an overwhelming victory for Merck. Despite its efforts to impugn that decision, this essential fact is inescapable and completely vitiates any suggestion that the decision constitutes a denial of justice. With the exception of a parenthetical reference that the amount of the NCJ's \$1.57 million judgment against it exceeded the \$1.5 million agreed sales price for Merck's plant and Propfar's 2002 annual profit, Merck's more than 150 paragraphs criticizing the NCJ's judgment are devoid of any objection to the amount of the judgment or the manner in which the NCJ calculated it.<sup>428</sup>

281. In its submissions to the Constitutional Court opposing Propfar's extraordinary protection action, Merck was unequivocal that both the \$1.57 million amount and its calculation are free from bias, based on reason, supported by evidence and the law, and cured the lower courts' allegedly defective damage awards. To quote just one of Merck's statements defending the NCJ's damage award:

In fact, the amount of damages established by the Chamber of the National Court of Justice *was adequately reasoned*, as the amount of compensation was based, **in accordance with recital 16 of the judgment**: on the amount of the failed sale negotiation for the industrial plant with a final offer of \$1,500,000, the amount that the Organic Law of Regulation, Control and Market Power reach, and the temporary 2-year parameter referenced by [PROPHAR's] complaint. The National Court of Justice *acted within the*

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<sup>428</sup> See, e.g., Claimant's Memorial, ¶¶ 9-14, 127-156, 278-374.

*parameters of the Constitution and the Law*, if anything, exceeding itself to favor the interests of PROPHAR, that never had the right to any compensation whatsoever....<sup>429</sup>

282. Elsewhere in its Constitutional Court submissions, Merck applauds the NCJ's judgment as "a supported calculation"<sup>430</sup> based upon "an extensive analysis"<sup>431</sup> by the NCJ "in accordance with its competency" and "as per their authority,"<sup>432</sup> to arrive at "a logical conclusion with respect to the appraisal of harm suffered by Prophar,"<sup>433</sup> a "proportional and reasonable indemnification" of Prophar,<sup>434</sup> and "a well-founded decision...determining an indemnification amount of US\$1,570,000."<sup>435</sup> As Merck explains with approval of the NCJ's methodology, the damage amount "corrected"<sup>436</sup> the lower courts' damage award and was based upon the average of the financial parameters of (a) Prophar's last offer of \$1.5 million for Merck's plant and (b) \$1,640,000, the latter calculated on the basis of Merck's own calculation, in evidence in the lower court proceedings, that it would lose \$820,000 per year in generic product sales if it had to compete with Prophar.<sup>437</sup> According to Merck, this calculation was "within the doctrinal

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<sup>429</sup> MSDIA submission to the Constitutional Court (received by the Court on 13 Sep. 2013), ¶ 4 (italics added; bold in original) (R-120).

<sup>430</sup> MSDIA submission to the Constitutional Court (received by the Court on 3 Apr. 2013), ¶ 18 (R-117).

<sup>431</sup> MSDIA submission to the Constitutional Court (received by the Court on 9 Jan. 2013), ¶ 8 (R-116).

<sup>432</sup> MSDIA submission to the Constitutional Court (received by the Court on 3 Apr. 2013), ¶¶ 81, 95 (R-117).

<sup>433</sup> *Id.*, ¶ 205 (R-117).

<sup>434</sup> *Id.*, ¶ 82 (R-117).

<sup>435</sup> *Id.*, ¶ 99 (R-117).

<sup>436</sup> *Id.*, ¶ 241 (R-117).

<sup>437</sup> *Id.*, ¶¶ 191-92 (R-117); *see also* NCJ Decision, *NIFA v. MSDIA* (21 Sep. 2012) ("NCJ Decision"), ¶¶ 16.9 - 16.10.1, 16.15 (C-203).

framework of unfair competition and articles 2214 and 2229 of the Civil Code, for civil tort,”<sup>438</sup> and did not demonstrate bias on the part of the NCJ.<sup>439</sup>

283. To be sure, Merck – like any disgruntled litigant -- believes that it should not have been held liable to Prophar in any amount. However, before the Constitutional Court, it not only demonstrated that it has no quarrel with the amount in which it was held liable or how the NCJ calculated it, but also that it approves of both. This is not surprising. The judgment amount was approximately 1% of the Court of Appeals’ \$150 million judgment; it was a negligible sum in relation to the financial capabilities of Merck to pay it. Indeed, based upon the testimony of Merck’s President and its financial expert during the interim measures proceeding, Merck’s payment of the judgment was “value creating” for its business.

284. Moreover, in determining the basis for the calculation of damages, the NCJ agreed with Merck’s assertion that the Court of Appeals should not have based its assessment of a \$150 million damage amount on the expert report of Cristian Cabrera, which in its cassation petition to the NCJ, Merck had characterized as arbitrary and illegal.<sup>440</sup> Citing Merck’s argument against Dr. Cabrera and his report,<sup>441</sup> the NCJ rejected the report’s damage calculation, on the grounds that it was based upon “a parameter that [has] nothing to do with Prophar nor with MERCK,” but rather on an analysis of the market for generic pharmaceuticals related to the

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<sup>438</sup> MSDIA submission to the Constitutional Court (received by the Court on 3 Apr. 2013), ¶ 194 (R-117).

<sup>439</sup> MSDIA submission to the Constitutional Court (received by the Court on 30 Apr. 2013), p. 6 (R-118).

<sup>440</sup> MSDIA’s Cassation Petition, *NIFA v. MSDIA*, Court of Appeals (13 Oct. 2011) (“MSDIA Cassation Petition”), ¶ 154 (C-198).

<sup>441</sup> NCJ Decision, ¶ 16.4 (*quoting* MSDIA’s Cassation Petition, ¶ 154) (C-203).

antitrust law basis of the Court of Appeals' decision that – again agreeing with Merck – the NCJ had rejected earlier in its decision.<sup>442</sup>

285. It is plain that neither the NCJ's calculation of its damage award against Merck nor the amount of the award constitutes a denial of justice. Indeed, according to Merck's own statements, they are reasoned, factually and legally well-supported, judicially competent determinations and, therefore, they are precisely the opposite of a denial of justice.

286. The same is true of the aspects of the NCJ's decision that Merck does impugn because, as demonstrated below, none of them constitutes a denial of justice.

**2. Merck Has Failed To Demonstrate That The NCJ's Construction of "Unfair Competition" under Ecuadorian Law Was Improper.**

**a. The NCJ's construction of "unfair competition" under Ecuadorian law cannot be questioned by this Tribunal as a valid statement of Ecuadorian law.**

287. A cornerstone of Merck's denial of justice argument is that the NCJ's construction of Ecuadorian law, to hold Merck liable for the tort of unfair competition, was a "newly-minted liability theory" which the NCJ impermissibly "rested solely upon a constitutional provision" – Article 244(3) of the Ecuador Political Constitution of 1998 – "that never before had been interpreted to address matters of 'unfair competition.'"<sup>443</sup> According to Merck, the NCJ decision "constructed a new and entirely different legal basis for liability" and "rewrote Ecuadorian law

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<sup>442</sup> *Id.*, ¶¶ 16.4, 16.6 (C-203).

<sup>443</sup> Claimant's Memorial, ¶¶ 12, 13(c).



on unfair competition to achieve an outcome in favor of NIFA.”<sup>444</sup> In support of its claims that the NCJ misapplied Ecuadorian law, Merck has submitted opinions from three Ecuadorian lawyers, giving their views on how, in its decision, the NCJ failed properly to interpret and apply Ecuador law and evaluate the evidence, and how it *should have* done so. Merck has also submitted the opinion of a denial of justice expert, Professor Jan Paulsson, in which – based wholly upon facts and legal propositions that Merck “asked [him] to assume” – he concludes that the NCJ decision constituted a denial of justice because (among other reasons) it is based “on a legal theory...that had no basis in Ecuadorian law” which “the NCJ chose...to invent.”<sup>445</sup>

288. These allegations are false and represent a gross distortion of the NCJ’s decision under Ecuadorian law. But, as an initial matter, the determination of Ecuadorian law by the highest civil law court is exclusively within the province of the Ecuadorian judicial system. In essence, Merck is inviting this Tribunal to sit as a supranational appellate court for the review of the NCJ’s decision. This Tribunal may not accept that invitation, however, because -- as Merck’s own denial of justice expert witness has bluntly stated elsewhere -- “the objective of the international tribunal is *never* to conduct a substantive review” of a national court’s decision.<sup>446</sup> Firmly-established principles of international law, as well as the Ecuadorian judiciary’s authority under Ecuadorian law, dictate this rule.

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<sup>444</sup> *Id.*, ¶¶ 146, 387.

<sup>445</sup> Opinion of Jan Paulsson (2 Oct. 2013), ¶¶ 15, 17(a).

<sup>446</sup> J. Paulsson, at 84 (RLA-68) (emphasis in original).

289. First, under international law, a State may establish any form for its system of justice and the manner in which domestic rules of law are instituted, interpreted and applied.<sup>447</sup> In the words of the *Cotesworth & Powell* tribunal:

No demand can be founded, as a rule, upon mere objectionable *forms* of procedure or the *mode* of administering justice in the courts of a country, because strangers are presumed to consider these before entering into transactions therein.<sup>448</sup>

290. Because an allegation of denial of justice is an extreme one, implying a moral condemnation of the national judiciary,<sup>449</sup> an international tribunal will substitute its judgment for that of a national court in only the rarest of circumstances. “[I]t is a matter of the greatest political and international delicacy for one country to disacknowledge the judicial decision of a

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<sup>447</sup> 1 Charles Cheney Hyde, *INTERNATIONAL LAW CHIEFLY AS INTERPRETED AND APPLIED BY THE UNITED STATES* (1945), § 219 at p. 729 (“Save for the general obligation to conform to the practices of civilization, a State is unfettered in its choice of forms of procedure or in the adoption of a particular code”) (RLA-19); Alwyn V. Freeman, *International Responsibility of States for Denial of Justice* 404 (1970), at 78-79 (“In fulfilling [the requirement to provide an adequate judicial protection for the rights of aliens] each State enjoys a plenary margin of liberty. The organization of its courts, the procedure to be followed, the kind of remedies instituted, the laws themselves, are left to the State’s own discretion”) (RLA-18).

<sup>448</sup> *Cotesworth & Powell (Great Britain v. Colombia)*, Award (Aug. 1875), reprinted in 2 MOORE *INTERNATIONAL ARBITRATION* 2050, 2083 (1898) (emphasis in original) (CLM-121); see also *United States v. Egypt (Salem)*, Award (8 Jun. 1932) 2 U.N.R.I.A.A. 1161, 1202 (“[I]nternational law has from the beginning conceived under the notion of ‘denial of justice’...only exorbitant cases of judicial injustice....As a rule, a foreigner must acknowledge as applicable to himself the kind of justice instituted in the country in which he did choose his residence including all deficiencies of such jurisdiction, imperfect as it is like every other human work”) (RLA-16); 1 Charles Cheney Hyde, *INTERNATIONAL LAW CHIEFLY AS INTERPRETED AND APPLIED BY THE UNITED STATES* (1945), § 219 at pp. 729-30 (“When the nationals of one State enter the territory of another State, whether for business or pleasure, they subject themselves to the laws of the latter State and although those laws and the rules of procedure in the courts may be wholly different from those which obtain in their home State, so long as such laws and rules are not below the standard generally obtaining in well-ordered States and are administered fairly and impartially, neither the aliens nor their governments have a right to complain”) (internal quotation omitted) (RLA-19).

<sup>449</sup> See *Case Concerning The Barcelona Traction, Light and Power Company, Limited (Belgium v. Spain)* New Application, Second Phase, Judgment (5 Feb. 1970), I.C.J. Reports 1970, p. 3, *Separate Opinion of Judge Tanaka*, p. 114, at 160 (“[i]t is an extremely serious matter to make a charge of a denial of justice vis-a-vis a State. It involves not only the imputation of a lower international standard to the judiciary of the State concerned but a moral condemnation of that judiciary. As a result, the allegation of a denial of justice is considered to be a grave charge which States are not inclined to make if some other formulation is possible”) (RLA-24).

court of another country...,”<sup>450</sup> and “the rule that those who resort to foreign countries are bound to submit to the local law as expounded by the judicial tribunals is disregarded only under exceptional circumstances.”<sup>451</sup>

291. This principal received its most recent authoritative confirmation in the International Court of Justice’s judgment on the merits in *Ahmadou Sadio Diallo (Republic of Guinea v. Democratic Republic of the Congo)*:

[I]t is for each State, in the first instance, to interpret its own domestic law. The Court does not, in principle, have the power to substitute its own interpretation for that of the national authorities, especially when that interpretation is given by the highest national courts (see, for this latter case, *Serbian Loans, Judgment No. 14, 1929, P.C.I.J., Series A, No. 20, p. 46* and *Brazilian Loans, Judgment No. 15, 1929, P.C.I.J., Series A, No. 21, p. 124*). Exceptionally, where a State puts forward a manifestly incorrect interpretation of its domestic law, particularly for the purpose of gaining an advantage in a pending case, it is for the Court to adopt what it finds to be the proper interpretation.<sup>452</sup>

On the basis of this principle, the Court declined to conduct its own interpretation of the expulsion decree at issue, deciding that:

[A]lthough it might be possible in theory to discuss the validity of [the Democratic Republic of the Congo’s interpretation of a provision of its Constitution and its application to the domestic law at issue], it is certainly not for the Court to adopt a different interpretation of Congolese domestic law for the purposes of the decision of this case. It therefore cannot be concluded that the [expulsion] decree...was not issued ‘in accordance with law’ ....<sup>453</sup>

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<sup>450</sup> *Garrison’s Case (U.S. v. Mexico, Award (7 Nov. 1871), reprinted in 3 MOORE INTERNATIONAL ARBITRATION 1073, 3129 (RLA-2).*

<sup>451</sup> Harvard Research Draft in International Law, *Responsibility of States for Damage Done in Their Territory to the Person or Property of Foreigners* (Sp. Supp. 1929), at 179 (RLA-9).

<sup>452</sup> *Case Concerning Ahmadou Sadio Diallo (Republic of Guinea v. Democratic Republic of the Congo)*, Judgment (30 Nov. 2010), I.C.J. Reports (2010), p. 639 at ¶ 70 (RLA-100).

<sup>453</sup> *Id.*, p. 639 at ¶ 71 (RLA-100).

292. Investment arbitration tribunals have placed the same prohibitions on the review of the correctness of national courts' interpretation and application of domestic law. In *Mondev International Ltd. V. United States of America*, discussed earlier, the Canadian investor sought to hold the United States liable for denial of justice claims based upon investment guarantee provisions of the North American Free Trade Agreement ("NAFTA") virtually identical to those in the Ecuador-U.S. Bilateral Investment Treaty on which Merck here bases its claims. The claimant argued that the decision of the Massachusetts Supreme Judicial Court ("SJC"), upholding a trial court's judgment (notwithstanding a jury verdict) finding a Boston city authority immune from liability to claimant for interference with contractual relations, constituted a denial of justice because it was "a 'significant and serious departure' from [the SJC's] previous jurisprudence" and because the SJC had "completely failed to consider whether it should apply the rules it articulated retrospectively to [its] claims" and "should have remanded questions of fact to the jury."<sup>454</sup>

293. As the first consideration in its often-cited articulation of the standard applicable to claims of denial of justice, the *Mondev* tribunal noted:

[I]t is not the function of NAFTA tribunals to act as courts of appeal. As a NAFTA tribunal pointed out in *Azinian v. United Mexican States*:

The possibility of holding a State internationally liable for judicial decisions does not, however, entitle a claimant to seek international review of the national court decisions as though the international jurisdiction seised has plenary

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<sup>454</sup> *Mondev International Ltd.*, ¶¶ 131, 135, 137 (RLA-54).

appellate jurisdiction. This is not true generally,  
and it is not true for NAFTA.<sup>455</sup>

294. The tribunal went on to include within its formulation of the standard of denial of justice a caution that tribunals must “bear[] in mind...that [they] are not courts of appeal” when seeking to adjudicate the “real measure[s] of protection” intended to be provided by NAFTA and other investment protection treaties.<sup>456</sup> Applying this principle, the tribunal declined claimant’s request that it re-adjudicate the SJC’s application of both substantive and procedural Massachusetts law to claimant’s underlying dispute with city authorities, observing that the issues adjudicated by the SJC were ones “which all legal systems have to face” and that “[o]n the approach adopted by *Mondev*, NAFTA tribunals would turn into courts of appeal, which is not their role.”<sup>457</sup>

295. Investment arbitration tribunals since *Mondev* and *Azinian* have consistently adopted the same rule and, where urged by claimants to engage in the re-adjudication of national courts’ construction and application of domestic law, have refused to do so.<sup>458</sup> As just one recent affirmation of this rule, the tribunal in *Mr. Franck Charles Arif v. Republic of Moldova* stated:

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<sup>455</sup> *Mondev International Ltd.*, ¶ 126 (quoting *Robert Azinian, Kenneth Davitian, and Ellen Baca v. The United Mexican States*, ICSID Case No. ARB(AF)/97/2, Award (1 November 1999), ¶ 99) (RLA-54).

<sup>456</sup> *Mondev International Ltd.*, ¶ 127 (RLA-54).

<sup>457</sup> *Mondev International Ltd.*, ¶ 136 (RLA-54); see also *id.*, ¶¶ 133-140.

<sup>458</sup> See, e.g., *The Loewen Group, Inc. and Raymond L. Loewen*, ¶ 134 (“Whether the conduct of a trial amounted to a breach of municipal law as well as international law is not for us to determine. A NAFTA claim cannot be converted into an appeal against the decisions of municipal law.”) (RLA-55); *RosInvestCo UK Ltd.*, ¶ 275 (“The Tribunal emphasises again that an international arbitration tribunal, and also this Tribunal dealing with alleged breaches of the [UK/USSR bilateral investment treaty], is not an appellate body and its function is not to correct errors of domestic procedural or substantive law which may have been committed by the national courts.”) (CLM-141); *Jan Oostergetel and Theodora Laurentius*, ¶¶ 291, 299 (“[T]he task of the Tribunal is to determine if the outcome of the bankruptcy proceedings is discreditable and offensive to judicial propriety. This high threshold reflects the demanding nature of a claim for a denial of justice in international law. It is indeed common ground that the role of an investment tribunal is not to serve as a court of appeal for national court decisions....The BIT does not grant protection for mere breaches of local procedural law nor does it open an extraordinary appeal from the decisions of municipal courts.”) (CLM-146); *Apotex Inc. v. The Government of the United States of America*,

[I]nternational tribunals must refrain from playing the role of ultimate appellate courts. They cannot substitute their own application and interpretation of national law to the application by national courts. It would blur the necessary distinction between the hierarchy of instances within the national judiciary and the role of international tribunals if “[a] simple difference of opinion on the part of the international tribunal is enough” to allow a finding that a national court has violated international law. [footnote omitted] The opinion of an international tribunal that it has a better understanding of national law than the national court and that the national court is in error, is not enough. In fact -- as Claimant formulated -- arbitral tribunals cannot “*put themselves in the shoes of international appellate courts*”. [footnote omitted]<sup>459</sup>

296. While the tribunal went on to review Arif’s claimed defects in the proceedings to determine if they constituted “fundamentally unfair proceedings” or “outrageously wrong, final and binding decisions,” in doing so it invariably declined to “sit as a court of appeal over decisions of the Moldovan judiciary” because to do so “would amount to a revision of the merits,” exercises in which the tribunal had “no competence.”<sup>460</sup>

297. International law’s requirement that the Tribunal abjure re-adjudication of the NCJ’s determination of Ecuadorian law is only re-enforced by the role of the NCJ and its decisions under Ecuadorian law. As Ecuador’s expert on Ecuador procedural law, Javier Aguirre Valdez, explains:

The National Court of Justice is the highest court in Ecuador and one of its duties is to hear petitions for writs of cassation on all

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UNCITRAL (NAFTA), Award on Jurisdiction and Admissibility (14 Jun. 2013) (Landau, Smith, Davidson), ¶ 278 (“[A]s a general proposition, it is not the proper role of an international tribunal established under NAFTA Chapter Eleven to substitute itself for the U.S. Supreme Court, or to act as a supranational appellate court.”) (RLA-122); *Waste Management, Inc. v. United Mexican States*, ICSID Case No. ARB(AF)/00/3, Award (30 Apr. 2004) (Crawford, Civiletti, Magallón Gómez), ¶ 129 (“Turning to the actual reasons given by the federal courts, the Tribunal would observe that it is not a further court of appeal, nor is Chapter 11 of NAFTA a novel form of *amparo* in respect of the decisions of the federal courts of NAFTA parties.”) (RLA-63).

<sup>459</sup> *Mr. Franck Charles Arif*, ¶ 441 (citing J. Paulsson, DENIAL OF JUSTICE IN INTERNATIONAL LAW (2005), at p. 72) (RLA-120) (italics in original).

<sup>460</sup> See, e.g., *Mr. Franck Charles Arif*, ¶¶ 453, 463, 481, 485, 489 (RLA-120).

subjects. As the Cassation Court, it has the authority to interpret the law and fill legal lacunae if it finds there is no specific provision for the case in the law. The Court's interpretation and application of the law is binding in the matter in question. Moreover, if the same criteria for a decision are reiterated in cassation on more than three occasions, if approved by the full Court, it constitutes a binding precedent for other judges and courts, which means that its interpretation of the law has, in these cases, the same force as a legislative act and may only be modified by the passage of a law.<sup>461</sup>

298. It will be evident from the foregoing that the views of Merck's three Ecuadorian law experts, and Merck's arguments based on them, to the effect that the NCJ's decision failed properly to apply, or should have otherwise interpreted, Ecuadorian law, are irrelevant.<sup>462</sup> Moreover, in light of these principles, Professor Paulsson's reliance upon an assumption that the NCJ "invented" a legal theory is wholly misplaced (quite apart from being erroneous, as shown below); courts everywhere have a "law creating" function, introducing new principles as the law evolves to address new circumstances.<sup>463</sup>

299. Thus, the NCJ's determination of the construction of "unfair competition," and its application to the conduct of Merck towards Prophar, under Ecuadorian law, and as such, is not subject to re-adjudication by this Tribunal. What is relevant to this Tribunal's determination is whether, "ex facie or on closer examination"<sup>464</sup> and "in light of all the available facts," it is "shock[ed] or surprise[d]...., on reflection," such that it has "justified concerns as to the judicial

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<sup>461</sup> Expert Opinion of Javier Aguirre Valdez, ¶6.2.

<sup>462</sup> See, e.g., Expert Opinion of Manuel Fernández de Córdoba, ¶¶ 6(g) and (h), 35-37, 50-54; Expert Opinion of Rafael Oyarte Martínez, ¶¶ 7-9, 26-33; Expert Opinion of Carlos Humberto Páez Fuentes, ¶¶ 5-7, 22-40.

<sup>463</sup> Expert Opinion of Jan Paulsson, ¶¶ 2, 15, 17(a); Claimant's Memorial, ¶¶ 244, 269(b). In addition to the fact that his opinion is based only on assumptions provided by Claimant, Professor Paulsson does not list the opinions of Claimant's three Ecuadorian law experts or any Ecuadorian legal materials (other than the text of Article 244(3) of the Ecuador Political Constitution of 1998) among the materials that he reviewed in preparing his opinion. See Expert Opinion of Jan Paulsson, ¶ 3.

<sup>464</sup> *Waste Management, Inc.*, ¶ 130 (RLA-63).

propriety of the outcome” and “can conclude...that the... decision was clearly improper and discreditable,”<sup>465</sup> “outrageously wrong” and “so devoid of reason that [it] breathe[s] bad faith,”<sup>466</sup> a “clear and malicious misapplication of the law,”<sup>467</sup> or without “reasonable objective foundation” and “outside the spectrum of the juridically possible.”<sup>468</sup> As demonstrated below, none of these criteria even remotely applies to the NCJ’s decision.

**b. Merck Has Failed To Demonstrate That The NCJ Judgment Was Improper, Much Less A “Clear And Malicious Misapplication Of The Law,” “Juridically Impossible” Or “Offends A Sense Of Judicial Propriety.”**

300. A national court’s misapplication of domestic law or erroneous factual findings in themselves will not give rise to claims for a denial of justice under international law.<sup>469</sup> Applying this principle, investment arbitration tribunals have consistently refused to find a denial of justice on the basis of an erroneous or mistaken judicial decision.<sup>470</sup> Merck’s expert Prof.

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<sup>465</sup> *Mondev International Ltd.*, ¶ 127 (RLA-54).

<sup>466</sup> *Mr. Franck Charles Arif*, ¶ 445, 482 (RLA-120).

<sup>467</sup> *Robert Azinian, Kenneth Davitian, and Ellen Baca v. The United Mexican States*, ICSID Case No. ARB(AF)/97/2, Award (1 Nov. 1999) (Paulsson, Civiletti, von Wobeser), ¶ 103 (CLM-36).

<sup>468</sup> *Chevron Corporation (USA) and Texaco Petroleum Company (USA) v. The Republic of Ecuador*, UNCITRAL, PCA Case No. 34877, Partial Award on the Merits (20 Mar. 2010) (Böckstiegel, Brower, van den Berg), ¶ 198 (citing the Opinion of Jan Paulsson *submitted in the case*) (CLM-111).

<sup>469</sup> *ELSI (United States of America v. Italy)*, Judgment (20 Jul. 1989), at ¶ 124 (“[I]t must be borne in mind that the fact that an act of a public authority may have been unlawful in municipal law does not necessarily mean that that act was unlawful in international law, as a breach of treaty or otherwise”) (CLM-155); C. De Visscher, *Le Déni de Justice en Droit International*, 54 *Recueil des Cours* 370 (1935), p. 376 (“The mere violation of internal law may never justify an international claim based on denial of justice”) (CLM-161).

<sup>470</sup> See, e.g., *The Loewen Group, Inc. and Raymond L. Loewen*, ¶ 189 (rejecting claims that the Mississippi court’s refusal to relax bonding requirements constituted a denial of justice and thereby violated NAFTA Article 1105 because “[i]t was at worst an erroneous or mistaken decision.”) (RLA-55); *Jan Oostergetel and Theodora Laurentius*, ¶ 299 (“The BIT does not grant protection for mere breaches of local procedural law....”) (CLM-146); *RosInvestCo UK Ltd.*, ¶275 (“The Tribunal stresses that the threshold of the international delit of denial of justice is high and goes far beyond the mere misapplication of domestic law”) (CLM-141).



Paulsson, in his 2005 treatise on denial of justice in international law, explains the operation of the principle:

The erroneous application of national law cannot in itself, be an international denial of justice. Unless somehow qualified by international law, rights created under national law are limited by national law, including the principle that by operation of the fundamental rule of *res judicata* a determination by a court of final appeal is definitive. So even if an instance of municipal *mal jugé* is given weight by international adjudicators when determining that there has been a denial of justice, on the footing that rights created under national law have been so blatantly disregarded as to compel conviction with respect to violation of international standards proscribing discrimination, bias, undue influence, or the like, it remains the case that the international wrong is not the misapplication of national law.

....

....Numerous international awards demonstrate that the most perplexing and unconvincing national judgments are upheld on the grounds that international law does not overturn determinations of national judiciaries with respect to their own law. To insist that there is a *substantive* denial of justice reserved for ‘grossly’ unconvincing determinations is to create an unworkable distinction. If a judgment is *grossly* unjust, it is because the victim has not been afforded fair treatment. That is the basis for responsibility, not the misapplication of national law in itself.

....

The fact that the international tribunal seized of the matter may believe it would have applied national law differently -- ‘mere error’ -- is in and of itself of no moment....<sup>471</sup>

301. As indicated by Professor Paulsson, something more than a national court’s misapplication of domestic law or erroneous factual finding, such as discrimination, bias, undue influence or other “unfair treatment,” is required in order for a claim for denial of justice to arise

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<sup>471</sup> J. Paulsson, at pp. 81, 82, 87 (RLA-68) (italics in original).

under international law. Judge Fitzmaurice also held this view, identifying the type of elements that must also be present in order for a denial of justice to be found:

[T]he rule may be stated that the merely erroneous or unjust decision of a court, even though it may involve what amounts to a miscarriage of justice, is not a denial of justice, and, moreover, does not involve the responsibility of the state. To involve the responsibility of the state the element of bad faith must be present, and it must be clear that the court was actuated by bias, by fraud, or by external pressure, or was not impartial, or the judgment must be such as no court which was both honest and competent could have delivered.<sup>472</sup>

Judge Tanaka, in his separate opinion in the *Barcelona Traction* case, confirms this view:

[I]t remains to examine whether behind the alleged errors and irregularities of the Spanish judiciary some grave circumstances do not exist which may justify the charge of a denial of justice. Conspicuous examples thereof would be ‘corruption, threats, unwarrantable delay, flagrant abuse of judicial procedure, a judgment dictated by the executive, or so manifestly unjust that no court which was both competent and honest could have given it’....We may sum up these circumstances under the single head of bad faith’.<sup>473</sup>

302. Although some investment tribunals have recognized the possibility that a municipal court judgment’s misapplication of domestic law could serve as evidence of a denial of justice, in combination with other proof of unfair treatment such as a lack of due process,<sup>474</sup> the instance in which a misapplication of law may properly be considered as an element is extremely narrow.

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<sup>472</sup> Gerald G. Fitzmaurice, *The Meaning of the Term Denial of Justice*, 13 BRIT. Y. B. INT’L L. 93, at pp. 110-11 (1932) (RLA-13).

<sup>473</sup> *Case Concerning The Barcelona Traction*, Judgment (5 Feb. 1970), *Separate Opinion of Judge Tanaka*, at 160, ¶ 158 (RLA-24).

<sup>474</sup> See, e.g., *RosInvestCo UK Ltd.*, ¶ 279 (“...the Respondent can only be held liable for denial of justice by the Russian courts if the Claimants are able to prove that the court system fundamentally failed. Such failure is mainly to be adopted in cases of major procedural errors such as lack of due process. The substantive outcome of a case can be relevant as an indication of lack of due process and thus can be considered as an element to prove denial of justice.”) (CLM-141).

As the tribunal in *Pantechniki S.A. Contractors & Engineers (Greece) v. The Republic of Albania* observed:

The general rule is that ‘mere error in the interpretation of the national law does not *per se* involve responsibility.’ Wrongful application of the law may nonetheless provide ‘elements of proof of a denial of justice.’ But that requires an *extreme test: the error must be of a kind which no ‘competent judge could reasonably have made....’*<sup>475</sup>

“The test is whether ‘there is no reasonable objective foundation for the substantive outcome of the decision’” such that it “falls ‘outside the spectrum of the juridically possible.’”<sup>476</sup>

**i. Merck has elsewhere conceded that the legal basis for the NCJ’s decision is “well-founded.”**

303. Merck has failed to meet the “extreme test,”<sup>477</sup> the “high” threshold,<sup>478</sup> necessary to demonstrate that the NCJ’s decision was in substance “juridically impossible”<sup>479</sup> or one that no “competent judge could reasonably have made.”<sup>480</sup> Merck attacks the substance of the NCJ decision on two grounds, both of which center on the NCJ’s construction and application of Article 244(3) of the 1998 Political Constitution of Ecuador (“Article 244(3)”) to Prophar’s claims: First, Merck argues that “the theory of unfair competition applied by the NCJ was

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<sup>475</sup> *Pantechniki S.A. Contractors & Engineers (Greece)*, ¶ 94 (emphasis added in the final sentence) (citing and quoting Gerald G. Fitzmaurice, *The Meaning of the Term Denial of Justice*, 13 BRIT. Y. B. INT’L L. 93 at p. 114 (1932)) (RLA-94).

<sup>476</sup> *Chevron Corporation (USA) and Texaco Petroleum Company (USA)*, ¶ 198 (citing the Opinion of Jan Paulsson submitted in the case) (CLM-111).

<sup>477</sup> *Pantechniki S.A. Contractors & Engineers (Greece)*, ¶ 94 (RLA-94).

<sup>478</sup> *RosInvestCo UK Ltd.*, ¶ 275 (CLM-141).

<sup>479</sup> Paraphrasing Opinion of Jan Paulsson, submitted and quoted in *Chevron Corporation (USA) and Texaco Petroleum Company (USA)*, ¶ 198 (CLM-111).

<sup>480</sup> *Pantechniki S.A. Contractors & Engineers (Greece)*, ¶ 94 (RLA-94).

entirely unprecedented as a matter of Ecuadorian law”<sup>481</sup> and a “newly-minted liability theory”<sup>482</sup> “of [the NCJ’s] own invention”<sup>483</sup> that “rested solely upon [Article 244(3)] that never before had been interpreted to address matters of ‘unfair competition.’”<sup>484</sup>

304. Second, Merck implies that, once the NCJ had concluded that Propfar’s claim was one for unfair competition, and not the anti-trust or “free competition” theories to which Propfar had switched to argue its case, the NCJ should have also concluded that that claim was governed by the Law on Intellectual Property (“LIP”) and should have been heard in the Contentious Administrative Courts, instead of the civil courts in which the case had proceeded thus far.<sup>485</sup>

305. Neither of these grounds makes out a case that the substance of the NCJ’s decision was improper or that it constitutes a denial of justice. Perhaps the most telling proof of this is the act that Merck failed to pursue review of the decision by the Constitutional Court. As pointed out by Ecuador’s expert Dr. Guerrero and discussed in Section V above, if Merck really believed that the decision contained the flaws concerning Article 244(3) identified in Merck’s Memorial, it

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<sup>481</sup> Claimant’s Memorial, ¶ 352.

<sup>482</sup> *Id.*, ¶ 12.

<sup>483</sup> *Id.*, ¶ 292.

<sup>484</sup> *Id.*, ¶¶ 13(c), 310-315.

<sup>485</sup> *Id.*, ¶¶ 327-333. All but one of Merck’s other arguments that it was denied justice by the NCJ rest upon the above two propositions, *i.e.*, it had no notice that the NCJ might apply Article 244(3) to the case to decide Propfar’s claims on the basis of unfair competition law instead of the anti-trust theories to which Propfar had switched after it filed its complaint. Therefore, Merck argues, the NCJ decision inappropriately “rested on a legal ground that was entirely different from the ground relied on by the court of appeals” and deprived it of an opportunity to argue against liability or the NCJ’s authority to decide the case on the basis of unfair competition law, or to present evidence relevant to an unfair competition claim. These arguments will be dealt with in Section VI.(2)(d) below, and as demonstrated there, they are all based on misrepresentations of Merck’s conduct during its litigation with Propfar and the procedural rules applicable to the litigation, and therefore are all meritless.

could have filed an extraordinary protection action of its own with the Constitutional Court.<sup>486</sup> The fact that it did not, at the same time it was continuing to pursue this arbitration, is in stark contradiction to its arguments now that the NCJ decision was legally baseless and operated to deprive it of an opportunity to defend itself.

306. Merck's contention that the NCJ's application of Article 244(3) constituted a denial of justice is also unfounded because it is expressly contradicted by Merck's own statements during the proceedings on Prophar's extraordinary protection action in the Constitutional Court. There, as part of a multi-submission opposition to Prophar's action, Merck argued that the *entirety* of the NCJ's decision, including its finding of liability on unfair competition grounds and award of damages to Prophar, was competently rendered, "well-founded," and "reasoned." In just some of Merck's words acknowledging the judicial propriety and legitimate foundation of the decision:

The Cassation Court, in its *well-founded* decision, provided a 47-page analysis of its reasons for accepting the cassation action and determining an indemnification amount of US\$1,570,000....<sup>487</sup>

....

The cassation decision does not violate Prophar's rights. After overturning the appellate court's decision, the court analyzed the evidence, summarizing the relevant legal concepts and explaining them with doctrine and relating them to the norms to which the claimant referred in its complaint. Therefore Prophar may not allege that the focus of the National Court of Justice is not consistent with the merits of the proceeding, including the facts discussed in the decision, as the resolution of the case is explained in accordance with the legal principles that the claimant invoked in its complaint. The decision establishes that these principles are

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<sup>486</sup> Expert Opinion of Juan Francisco Guerrero del Pozo, ¶ 17(a), (b), (c) and (d).

<sup>487</sup> MSDIA submission to the Constitutional Court (received by the Court on 3 Apr. 2013), ¶ 99 (R-117) (emphasis added).

within the doctrinal framework of unlawful competition and rules that, in the judges' opinion, MSD's conduct constituted a quasi-unlawful act in accordance with articles 2214 and 2229 of the Civil Code. The cassation decision explains the differences between Competition Defense Law and unlawful competition and relates these two separate concepts to the evidence and facts of the case.<sup>488</sup>

307. Elsewhere in its submissions, Merck takes the Constitutional Court through a point-by-point analysis of the legal reasoning of the NCJ decision, indicating that it was based upon recognized Ecuadorian legal principles, *e.g.*, that the NCJ “affirmed that Prophar’s claim fell within the framework of unfair competition and that unlawful competition is typified as a quasi-unlawful civil act,”<sup>489</sup> which the NCJ applied to find Merck liable to compensate Prophar for a practice of disorganizing a competitor by a refusal sell its plant to Prophar “within the doctrinal framework of unfair competition and articles 2214 and 2229 of the Civil Code, for civil tort.”<sup>490</sup> In yet another exegesis on the propriety of the manner in which the NCJ decided the parties’ cassation petitions, Merck argued that the NCJ applied a proper cassation technique, under which it first decided whether the Court of Appeals had correctly applied the law to the cause of action stated in Prophar’s complaint; determined that the Court of Appeals had not and that, as a matter of law, Prophar’s claim was one for unfair competition. Merck goes on to explain that the NCJ, properly acting as a court of first instance, then conducted a *de novo* review of the evidence from the lower court proceedings to conclude that Merck had committed an act of unfair competition for which it was liable to compensate Prophar.<sup>491</sup> Merck also quotes to the

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<sup>488</sup> MSDIA submission to the Constitutional Court (received by the Court on 3 Apr. 2013), ¶ 172 (R-117) (emphasis added; emphasis in original omitted).

<sup>489</sup> MSDIA submission to the Constitutional Court (received by the Court on 3 Apr. 2013), ¶¶ 174-185 (R-117).

<sup>490</sup> *Id.*, ¶ 194 (R-117).

<sup>491</sup> *Id.*, ¶¶ 120-154 (R-117).

Constitutional Court from Ecuadorian President Correa’s speech given on the appointment of the new NCJ judges in January 2012 (including the judges who issued the NCJ decision at issue here), and then comments that the NCJ decision “is aligned with” the principles of judicial justice and legitimacy enunciated by the President.

308. There is no criticism of the NCJ’s construction or application of Article 244(3) – and barely any mention of it at all <sup>492</sup> – in Merck’s submissions to the Constitutional Court. Of course, cognizant that those submissions might reach the eyes of this Tribunal, Merck was careful in them to point out periodically that it does not agree with the outcome of the NCJ decision and that there was “no support or evidence to declare liability against” it. But those caveats do not undermine the fact that Merck believes that the decision was based upon “well-founded” Ecuadorian law principles, that it is a reasoned analysis and application of those principles, and that the NCJ acted in a judicially competent manner in rendering it.

309. As a consequence of the above, Merck cannot be allowed to maintain before this Tribunal that the NCJ decision was baseless, unprecedented, invented or erroneous with regard to its construction and application of Article 244(3). Merck’s arguments about that provision are manufactured for purposes of this arbitration only, and as demonstrated below, the same is true of its denial of justice claims that are based upon its assertion that it had “no notice” that the NCJ might apply Article 244(3) to find it liable for unfair competition.

310. For the sake of completeness only, the following paragraphs deal with Merck’s arguments regarding that the NCJ’s construction and application of Article 244(3) constituted a denial of justice. Even if -- in light of its statements in Prophar’s Constitutional Court proceedings -- Merck could maintain its arguments against the legal basis of the NCJ decision,

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<sup>492</sup> See, e.g., *id.*, ¶ 184 (R-117).

those arguments utterly fail. As with its denial of justice claims that it had “no notice” that it might be held liable on ground of unfair competition, Merck’s argument that the NCJ’s construction and application of Article 224(3) itself constituted a denial of justice is an artifice. Moreover, to the extent that the NCJ determined that Article 244(3) properly formed one basis for its finding that Merck was liable to Prophar for unfair competition, that determination was, whether correct or not, both justifiable and well within the NCJ’s judicial authority, as was the NCJ’s determination that Prophar’s claims were not governed by the LIP.

**ii. The NCJ’s construction and application of Article 244(3) and its determination that the Law on Intellectual Property did not apply to PROPHAR’s claims were well within the “spectrum of the juridically possible” and the NCJ’s authority to interpret and apply Ecuadorian law.**

311. Merck’s assertion that the NCJ finding that it had engaged in unfair competition was based “solely” on Article 244(3), to “invent” “a newly-minted liability theory,” is patently false. The decision does not base liability upon the provisions of Article 244(3) of the 1998 Constitution, standing alone,<sup>493</sup> but rather upon Articles 2214 and 2229 of the Ecuadorian Civil Code read in conjunction with Article 244(3) of the 1998 Constitution. The court could not have been more explicit that it also found Merck had committed an act of unfair competition, and was therefore liable to compensate Prophar, on the basis of Articles 2214 and 2229 of the Ecuadorian Civil Code,<sup>494</sup> which Prophar’s complaint cited -- along with Article 244(3) and

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<sup>493</sup> Article 244(3) of the Political Constitution of Ecuador of 1998 provides: “Within the market-based socioeconomic system the State shall...3. Promote the development of competitive activities and markets. Foster free competition and penalize, in accordance with the law, monopolistic practices and others that impede and distort competition.” Constitution of the Republic of Ecuador (1998), Art. 244(3) (CLM-183).

<sup>494</sup> Article 2214 of the Ecuador Civil Code states: “whoever has committed a civil offense or tort that has caused damage to another, is liable for compensation; without prejudice to such penalties as are imposed upon it by the law for the civil offense or tort.” Article 2229, paragraph 1 provides: “1: “As a general rule all damage that might be



numerous other provisions of Ecuadorian law -- as the legal basis for its lawsuit against Merck.<sup>495</sup> As even the most casual reading of the decision shows, the NCJ either explicitly or by cross-reference cited both of those Civil Code provisions (along with Article 244(3)) in the three clauses in which it expressly held that Merck had committed the tort of unfair competition and set the amount of indemnification for which it was liable to Prophar.<sup>496</sup> The court also discussed the interpretation of Articles 2214 and 2229, and their application to Prophar's claims, in multiple other clauses of its decision.<sup>497</sup>

312. There is a good reason why -- except in two truncated quotes from the NCJ decision -- Merck's Memorial avoids any mention that Civil Code Articles 2214 and 2229 were a basis for the NCJ decision. Those provisions, and the norms of Ecuadorian law related to them, provide firmly-established, long-standing bases for a finding of liability for conduct that constitutes unfair competition. Contrary to Merck's assertions and its denial of justice expert's conclusions based on them, whether correct or not, the NCJ decision does not represent "the sudden emergence of a full-blown rule where none had existed"<sup>498</sup> or a "newly minted theory of

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attributed to malice or negligence by another person must be remedied by him..." Ecuador Civil Code (2005), Art. 2214.

<sup>495</sup> NIFA's Complaint, *NIFA v. MSDIA*, Trial Court (16 Dec. 2003), "Suit," p. 9 (C-10).

<sup>496</sup> See NCJ Decision, ¶ Fifteenth ("...MERCK unquestionably committed "*other practices that prevent and distort*" competition, as explained in paragraph 8.1 and others, which affected a negotiation of a civil nature, giving rise to the occurrence of a tort, pursuant to Article 244, number 3, of the Political Constitution of 1998 then in effect, and Articles 2214 and 2229, first paragraph of the Civil Code"); NCJ Decision, Clause 16.14 (Claimant "engaged in practices that prevented or distorted competition to the detriment of PROPHAR...as indicated especially in point 8.1 [in which the court analyzed Constitution Article 244(3)] and the fourteenth and fifteenth clauses [in which the court relied upon Article 244(3) and Civil Code Articles 2214 and 2229] of this judgment"); NCJ Decision, p. 46, Resolution B (Claimant "is ordered to indemnify PROPHAR...for damages and losses pursuant to Articles 244, number 3, of the Political Constitution of 1998, and Articles 2214 and 2229 of the Civil Code...."). NCJ Decision (C-203).

<sup>497</sup> See, e.g., *id.*, Clauses 2.2, 4.5, 7.1.1, 7.3, and Twelfth (C-203).

<sup>498</sup> Claimant's Memorial, ¶ 264 (*citing and quoting* J. Paulsson, *DENIAL OF JUSTICE IN INTERNATIONAL LAW* (2005), at p. 200).

liability.”<sup>499</sup> The tortious nature of acts of unfair competition, and civil liability for them under civil codes and doctrine, are fixtures of the law prevailing throughout Latin America in general and Ecuador in particular. As explained by Álvaro José Pólit García, an expert in Unfair Competition in Ecuador:

Under Ecuadorian law, conduct constituting unfair competition is conduct contrary to honest practices and customs in commercial or economic trade; as such, such acts cause harm to another entity that is a competitor in a specific market. The types of conduct constituting unfair competition would constitute civil unlawful acts, pursuant to the provisions of the Ecuadorian Civil Code (current, arts. 2214 to 2230).<sup>500</sup>

313. As long ago as 1997 -- six years before Prophar filed its complaint and 15 years before the NCJ decision -- the predecessor court to the NCJ, the Supreme Court of Justice of Ecuador, “articulated a broad sense of unfair competition, describing it as an unlawful civil act” under Articles 2214 and 2229.<sup>501</sup> There, the court observed that “[t]he prohibition against ‘unlawful competition,’ a broad and generic concept that covers the specific varieties of unfair or prohibited competition, as resolved by doctrine and case law, is framed within tort or criminal liability”<sup>502</sup> Applying these principles and Articles 2214 and 2229 of the Civil Code, the court went on to hold two former officers of an Ecuadorian company civilly liable for acts of unfair competition for inducing customers away from the company to do business with a new company that they had formed. The court found that the former officers’ “resignation from their positions at [the company] does not exempt, eliminate or attenuate [their] liabilities,

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<sup>499</sup> *Id.*, ¶ 12.

<sup>500</sup> Expert Opinion of Álvaro José Pólit García, ¶ 7.

<sup>501</sup> *Id.*, ¶¶ 8-12 (*discussing* Case No. 437, published in Official Register #78 (3 June 1997)).

<sup>502</sup> *Id.*, ¶ 9 (*quoting from* Case No. 437, published in Official Register #78 (3 June 1997)).

because their use of all means to disorganize the company and take over its suppliers” resulted in damage to their former employer, “caused by their unlawful, prohibited or unfair competition.”<sup>503</sup> As Dr. Álvaro José Pólit García explains:

[This case] recognized the existence of unfair competition as a prohibited practice, under civil law, and as a subject independent from and much broader than intellectual or industrial property. It determined, categorically, that acts that negatively affect, or “disorganize,” a competitor could be unfair, and therefore unlawful and punishable, under civil law, when actions are inconsistent with commercial practice and custom or otherwise constitute acts that “disorganize” a competitor. This conclusion is congruent with the theory and scope of unfair competition conceived by doctrine and case law in other countries.<sup>504</sup>

314. Dr. Luis Sergio Parraguez Ruiz, an expert in Ecuadorian tort law, confirms that “the law of damages [at the time the dispute between Prophar and Merck arose]..., including arts. 2214 and 2229 of the Civil Code, were --and still are-- a sufficient basis for” liability for unfair competition.<sup>505</sup> Dr. Parraguez explains that conduct such as that alleged to have been engaged in by Merck may give rise to liability under principles of pre-contractual liability that are well-established in Ecuadorian law and are sanctionable as acts of unfair competition under Articles 2214 and 2229 of the Civil Code.<sup>506</sup> Also according to Dr. Parraguez:

First. - Although there is no explicit standard referring to pre-contractual liability, the doctrine of pre-contractual liability fits in the Ecuadorian legal framework, not only because this has been established by doctrine and jurisprudence, but also because it can be clearly inferred from article 144 of the Commercial Code.

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<sup>503</sup> *Id.*, ¶ 10 (quoting from Case No. 437, published in Official Register #78 (June 1997)).

<sup>504</sup> *Id.*, ¶ 12.

<sup>505</sup> Expert Opinion of Dr. Luis Sergio Parraguez Ruiz, ¶ 42.

<sup>506</sup> *Id.*, ¶¶ 42, 45.

Second. - An unjustified retraction of a contractual offer, as well as the termination of preliminary negotiations, constitute forms of illicit conduct that give rise to pre-contractual liability, and should be sanctioned under tort law, expedited for the indemnification of damages caused to the victim.

Third. - The practices that are typically identified as "unfair competition" are codified and sanctioned within that framework when they infringe upon the general interests of society, which is the legal interest at issue in such situations; and fall under the general framework of extra-contractual liability at common law, based on the principle of *neminem laedere*, when the interest at issue is restitution of an individual for damages.<sup>507</sup>

315. Dr. Pólit's and Dr. Parraguez's opinions are shared by Dr. Carlos A. Molina Sandoval, an expert in the development and application of competition law, including unfair competition law, throughout Latin America. As Dr. Molina explains "[u]nfair competition consists of conduct universally condemned by most jurisdictions in order to prevent the use of *means considered as unfair* in the competitive environment," and in Ecuador, "arts. 2214 and 2229, Civ. Code also play a major role, as they contemplate holding the competitor [who engages in unfair competition] accountable."<sup>508</sup> Dr. Molina goes on to conclude that liability under the Ecuadorian Civil Code, specifically Article 2214, establishes a basis for liability for unfair competition in Ecuador:

The legal system in Ecuador, prior to the [2011 enactment of the Organic Law of Regulation and Control of Market Power] relied on a self-sufficient body of law that effectively "prohibited" acts of unfair competition, with a legal criterion that is very similar to that of the main Latin American countries. The appropriate integration of the Ecuadorian legal framework (along with constitutional and private law norms) supports the principle of free competition that is protected by most of the world's legal systems on unfair competition. Moreover, in Ecuador (as in Argentina), the liability

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<sup>507</sup> *Id.*, § VIII (Conclusions).

<sup>508</sup> Expert Opinion of Dr. Carlos A. Molina Sandoval, §§ 3.1 (¶ 25), 5.3 (¶ 108) (emphasis in original).

regime is decided by general rules in the civil code. For example, Arts. 2214, Ecuadorian Civ. Cod. (like 1109, Argentinian Civ. Cod.) establishes the same principles and has been the regulatory basis for justifying the liability of anyone who acts with malice or negligence that affects competition.<sup>509</sup>

316. The legal system outside of Ecuador and other Latin American countries similarly base liability for the tort of unfair competition on code provisions such as Articles 2214 and 2229 of the Ecuador Civil Code, or in countries that are not code-based, on judicial decisions rendered under the common law. For example, under French law, actions based on unfair competition (*la concurrence déloyale*) are tort actions within the realm of the civil law's responsibility for wrongs committed towards another. Liability and the recovery of damages is based on the basic provision of French Civil Code Article 1382, which provides -- in almost identical language to that of Articles 2214 and 2229 of the Ecuador Civil Code -- that "[a]ny act of a person which causes damage to another makes him by whose fault the damage occurred liable to make reparation for the damage." French unfair competition law includes the same concept that the NCJ identified as Merck's tortious conduct, i.e., "disorganization" of a competitor through acts that impact the competitor's normal functioning, including its production capabilities.<sup>510</sup>

317. In the United States, the tort of unfair competition developed as a common law cause of action, based on equitable principles and covering a wide range of harmful conduct toward a competitor that steps over the line of acceptable commercial behavior.<sup>511</sup> Although common law

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<sup>509</sup> *Id.*, § V, (¶ 118(iii) (Conclusions)).

<sup>510</sup> *JurisClasseur*, Fasc. 132-10: Right to Damages - Unfair Competition or Parasitism - General Theory (last updated 15 Nov. 2013); *JurisClasseur*, Fasc. 132-20: Right to Damages - Unfair Competition - Practical Application: Denigration and Disorganization (last updated 15 Nov. 2013, Section II - Disorganization (RLA-132)).

<sup>511</sup> See, e.g., *C.C. Boggs v. Duncan-Schell Furniture Co. and H. C. Duncan*, 163 Iowa 106 (1913) (holding a furniture store owner liable for engaging in dishonest competition by advertising sewing machines in the plaintiff's traditional market at prices significantly below those offered by the plaintiff) (RLA-4); *James Colles, Jr. v. The Trow City Directory Co., et al.*, 11 Hun. 397 (New York Supreme Court 1877) (holding a seller of directories liable

prohibitions on unfair competition were later codified in federal and state statutes, the common law tort of unfair competition continues as a distinct cause of action under the law of most states of the United States.

318. It will be evident from the foregoing that Articles 2214 and 2229 of the Ecuadorian Civil Code alone provided a basis for the NCJ to find Merck liable for the tort of unfair competition against Propfar, and for that reason alone, the NCJ decision cannot be said to be “judicially impossible” or one that “no competent judge could reasonably have made.” The same is true of the NCJ’s election to construe and apply these provisions in conjunction with Article 244(3) of the 1998 Constitution as a basis for Merck’s liability for unfair competition and obligation to compensate Propfar, for three independent reasons.

319. First, citing Article 244(3) as a basis for its decision did not “invent” “a newly-minted liability theory,” as Merck and its experts would have this Tribunal believe. As demonstrated above, liability for acts of unfair competition was already well-established under Ecuadorian law, at the time the *NIFA v. MISDIA* litigation began, including under Articles 2214 and 2229 and -- under the facts specific to that litigation -- doctrine on pre-contractual liability. Therefore, as an empirical matter, the NCJ determination that Article 244(3) also provided a basis for liability for acts of unfair competition did not “invent” anything.

320. Second, as already discussed in Section VI(B)(2)(b) above, it is for the NCJ to interpret and apply the law of Ecuador in an evolutionary way, and Merck’s and its experts’ criticism that the NCJ’s interpretation and application of Article 244(3) as “not recognized in Ecuadorian

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for unfair competition for paying the competitor plaintiff’s creditors to sue on debt owed by the plaintiff, ruining the plaintiff’s credit and ability to print its directories) (RLA-3).

law”<sup>512</sup> is irrelevant. As also already discussed, it is not the role of this Tribunal to act as an appellate court to re-adjudicate the NCJ’s determination that, as a matter of law, Article 244(3) provides a basis for private liability for unfair competition.<sup>513</sup>

321. Third, even if this Tribunal were to undertake its own adjudication of the judicial propriety of the NCJ’s reliance on Article 244(3) as a basis for its decision, that basis is “judicially possible” and one that a “competent judge could reasonably have made.” As Dr. Juan Francisco Guerrero del Pozo, an expert in Constitutional Law, explains, authorities on competition law have concluded that the doctrine of competition is composed of two branches, i.e., free competition (i.e., anti-trust) and unfair competition (involving relationships between participants in the market), both of which “constitute a constitutional principle” that is subject to legal protection and are part of “a broader right, the right to freedom of enterprise.”<sup>514</sup> With those principles in mind, Dr. Guerrero analyzes the language of Article 244(3) under traditional standard rules of interpretation enshrined in Ecuadorian law, and on that basis concludes that the language of the Article itself and other provisions of the 1998 Constitution that ensure “the right to freedom of enterprise” are intended to protect competition, not just “free competition.”<sup>515</sup> Based upon an analysis of the first provision of the chapter of the 1998 Constitution that includes Article 244(3), Dr. Guerrero concludes that it “not only implies a series of direct obligations of the State as participant in [the] economy, but also implicitly, that all persons are prohibited from incurring in any kind of practice that involves violating these principles or the arbitrary

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<sup>512</sup> Claimant’s Memorial, ¶ 358; Expert Report of Dr. Manuel Fernández de Córdoba, ¶¶ 35-36.

<sup>513</sup> See Section VI.(2)(b).

<sup>514</sup> Expert Opinion of Dr. Juan Francisco Guerrero del Pozo, ¶¶ 49-53.

<sup>515</sup> *Id.*, ¶¶ 55-63.

restriction of rights or opportunities of others.”<sup>516</sup> On the basis of this and other conclusions, Dr. Guerrero concludes:

... Art. 244, numeral 3 of the 1998 Constitution protects free competition, including both free competition as well as the proscription of any unfair practices of any kind, rendering any and all expressions of unfair competition from a private party an act that is contrary to legality...

...I share the opinion provided by the Civil and Commercial Chamber of the National Court of Justice in its ruling issued on September 21, 2012 in the sense of Art. 244, numeral 3 of the 1998 Constitution implying anti-juridicity in unfair competition practices....<sup>517</sup>

322. In light of the foregoing, there can be no doubt that the NCJ’s construction and application of Article 244(2) to the adjudication of Prophars claims was “judicially possible,” competent and well-within “the interstitial scope of law-making exercised by courts” in other jurisdictions.

323. Only a brief response is required to dispense with Merck’s remaining fault-finding with the NCJ decision, *i.e.*, that the NCJ should have found that Prophar’s claims were governed by the LIP and that, therefore, they should have proceeded in the Contentious Administrative Courts instead of the ordinary civil courts.

324. The principles discussed above apply equally to this argument, and particularly so, because the NCJ was well-within its authority to determine its own jurisdiction to hear Prophar’s claims by determining whether they were subject to the LIP. Here, the NCJ determined that the parties’ dispute did not concern intellectual property rights, but was rather one concerning Merck’s introduction of a condition on the sale of its plant late in the

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<sup>516</sup> *Id.*, ¶ 66.

<sup>517</sup> *Id.*, ¶¶ 68, 73.



negotiation process and, therefore, were not covered by the LIP.<sup>518</sup> That determination is not open to question by this Tribunal.

325. In any event, however, precedents of the NCJ's predecessor, the Supreme Court of Justice, support the NCJ's determination that it had jurisdiction to decide the cassation appeals before it was correct. Dr. Pólit explains that, although the broad definition of "unfair competition" in the LIP required the Ecuadorian courts to determine whether, pursuant to the LIP, the Contentious Administrative Courts had jurisdiction over all unfair competition claims or only those related to intellectual property rights, that issue had already been resolved in a series of Supreme Court decisions since the LIP's enactment in 1998.<sup>519</sup> As Dr. Álvaro José Pólit García, an expert in competition law, explains:

These cases clarified the meaning and reach of the Intellectual Property Law with respect to Ecuadorian tribunals' competence to hear cases of unfair competition. The [Supreme Court of Justice, the predecessor to the National Court of Justice] confirmed the existence of the tort of unfair competition, both conduct related to intellectual property and other conduct that is not related to intellectual property, and the court divided jurisdiction, such that the Contentious Administrative Courts have jurisdiction over the former, and the ordinary civil courts have jurisdiction over the latter.

326. Merck has never claimed that its dispute with Prophar involved intellectual property rights; instead, it has argued that *all* claims for unfair competition are covered by the LIP and must be heard by the Contentious Administrative Courts, and not the ordinary civil courts. That Merck chose to focus on that argument, instead of arguing that its conduct did not constitute unfair competition, was a matter of litigation strategy. As the tribunal held in *Bosh*

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<sup>518</sup> NCJ Decision, ¶ Fifteenth (C-203).

<sup>519</sup> Expert Opinion of Expert Opinion of Álvaro José Pólit García, ¶ 30.

*International, Inc. v. Ukraine*, a party that “made a conscious decision election not to raise non-jurisdictional defences” in the national courts is “bound by [its] litigation strategy and its consequences,” and “having elected to proceed in that way... cannot...contest the result.”<sup>520</sup> The same principles apply to Merck’s challenge of the NCJ’s determination that the civil courts (including the civil chamber of the NCJ that issued the decision at issue here) had jurisdiction over Prophar’s claims.

**c. Merck has not directly alleged and has failed to prove its indirect insinuations that the NCJ judgment was tainted by corruption or bias.**

327. A later subsection of this Counter-Memorial will discuss the fact that Merck has utterly failed to produce any proof whatsoever that the lower court proceedings were tainted by corruption and that Merck’s so-called “indicia of corruption” are wholly unsupported by its attempt to build a circumstantial case to that effect. What is significant here is that Merck does not even make a direct allegation that the NCJ decision was the result of corruption or bias. Indeed, not only does Merck refrain from making express allegations of corruption or bias on the part of the judges who took part in that decision, it vigorously defended their integrity in its submissions to the Constitutional Court in connection with Prophar’s action for extraordinary protection. Of course, Merck could hardly make such an accusation in light of the fact that the NCJ decision represents a significant victory for Merck.<sup>521</sup>

328. These facts alone should eliminate altogether any question that Merck suffered from a denial of justice. Nonetheless, Merck attempts to impugn the integrity of the NCJ process, and

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<sup>520</sup> *Bosh International, Inc. and B & P Ltd Foreign Investment Enterprise v. Ukraine*, ICSID Case No. ARB/08/11, Award (25 Oct. 2012) (Griffith, Sands, McRae), ¶ 284 (RLA-117).

<sup>521</sup> MSDIA submission to the Constitutional Court (received by the Court on 13 Sep. 2013), ¶ 10 (R-120).

thus the NCJ decision, in two ways. First, Merck charges that the initial scheduling of the case for hearing by the holdover judges from the old court “apparently” with the aim of expediting it “to enable them to issue a decision prior to their departure,”<sup>522</sup> which “may have been the result” of, or “likely” or “apparently” involved, corruption. Second, Merck attempts to raise general suspicions of corruption in Ecuador’s judicial system, implying that no decision emanating from that system. Presumably a judgment including the NCJ decision, can be other than the result of corruption, relieving Merck of the burden of having to produce actual evidence. But neither of these arguments withstands scrutiny.

**i. Merck fails to demonstrate the Court’s initial scheduling of the case for hearing was done for corrupt purposes.**

329. Merck’s fails to demonstrate the Court’s initial scheduling of the case for hearing was done for corrupt purposes.

330. Merck’s charge that the Court’s initial scheduling of the case for hearing was done for corrupt purposes is not only unsupported, it is based upon a gross distortion of the record. First, of course, is the fact that the holdover judges in charge of the case before January 2012 did not in fact render a decision in the case, although they had time to do so. Merck merely says that it has no explanation for this fact,<sup>523</sup> completely avoiding the most obvious explanation, which they had no such purpose in mind.

331. But this obvious answer is actually corroborated by the process leading to the scheduling decisions to begin with. Merck’s story implies that the judges scheduled the hearing *in proprio motu*. But this is misleading in the extreme. What Merck fails to tell this Tribunal is that the

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<sup>522</sup> Claimant’s Memorial, ¶ 129.

<sup>523</sup> *Id.*, ¶ 133.

court fixed the initial date in response to a request for hearing *made by Merck itself!* Moreover, did so having to know that, in accordance with practice, it would not have been surprising at all that the hearing would be scheduled to be held within two or three weeks of its request, even if a Monday was the only day of the week available for doing so.<sup>524</sup>

332. Merck's and Propfar's cassation petitions were both formally admitted by the NCJ on November 11, 2011, with what Merck describes as "unprecedented" speed, purportedly leading it to conclude that the admission timing "may have been the result of corrupt acts" by the NCJ judges who, Claimant knew, would leave office at the end of January 2012.<sup>525</sup> Yet, on November 18, 2011, almost immediately after it supposedly had concluded that those judges "may be corrupt," it wrote to the NCJ, asking that those same, soon to depart judges "schedule a date and time" for an oral hearing before them.<sup>526</sup> In response to Claimant's request, the NCJ scheduled the oral hearing for December 12, 2011.<sup>527</sup>

333. Merck omits to mention in its Memorial that the NCJ's scheduling of an oral hearing "just eighteen days after admitting" the case was in direct response to its own request for a hearing.<sup>528</sup> The question is *why* it omitted such an obviously pertinent fact. The answer to that question must be that it knew that the facts contradicted the misleading story it wished to tell to this Tribunal.

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<sup>524</sup> Expert Opinion of Javier Aguirre Valdez, fn. 9.

<sup>525</sup> Claimant's Memorial, ¶ 128.

<sup>526</sup> MSDIA submission to the Constitutional Court (received by the Court on 11 Nov. 2011) (R-115).

<sup>527</sup> National Court of Justice Order in *NIFA v. MSDIA* (29 Nov. 2011) (C-55).

<sup>528</sup> See Memorial, ¶¶ 129-130.

334. Claimant's efforts to cast the NCJ's rescheduling of the oral hearing in the case for December 26, 2011 is similarity misleading. That date was set in response to Merck's letter that stated that it could not be ready for an oral hearing by December 12, 2011.<sup>529</sup> In other words, Merck attempts to characterize the Court's granting of its own request as a corrupt decision, which is absurd. Moreover, while Merck characterizes as "remarkable" the Court's chose a date two weeks later, December 26, for the rescheduled date, Merck had not asked for a longer period of delay (for example, a date after the new NCJ judges took office) and had to expect that, again in accordance with practice, the re-scheduled date would fall on an early date not already booked for Court business.<sup>530</sup> It is of course not at all surprising that the day after Christmas might be a day when there was no competing business scheduled. Nor is it at all relevant that that the date was one that "made it impossible for MSDIA's corporate representatives to attend."<sup>531</sup> Merck does not allege that it requested a date on which they could attend. Nor does Merck cite any authority for the proposition that a foreign company is entitled to hearing dates on day when its foreign managers can attend, especially since, presumably, Merck's local managers were able to attend.

335. In fact there is nothing in the record to suggest that Merck complained about the re-scheduled date for any reason or that it attempted to defer the hearing further until after January 2012, when the "apparently" corrupt judges would no longer be sitting and, therefore, would not be in charge of deciding Claimant's and Prophar's cassation appeals. Indeed, the record of the NCJ proceedings shows that Merck did not respond at all to the NCJ's notice of the new date.

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<sup>529</sup> MSDIA Petition to the NCJ in *NIFA v. MSDIA* (7 Dec. 2011) (C-56); National Court of Justice Order in *NIFA v. MSDIA* (8 Dec. 2011) (C-57).

<sup>530</sup> Expert Opinion of Javier Aguirre Valdez, fn 9.

<sup>531</sup> Claimant's Memorial, ¶ 132.

336. Finally, it is important to note that the “remarkable” timing of the hearing did not prejudice Merck’s right to present its case at all. As Claimant admits, its counsel *did* attend and present oral argument before the court.<sup>532</sup>

337. In short, Merck has failed to show any irregularity whatsoever in connection with the courts’ scheduling of the cassation hearings.

**ii. Claimant’s attack on Ecuador’s judicial system as a whole is unreliable and misleading.**

338. Claimant attempts to base its insinuation of corruption and other impropriety in the *NIFA v. MSDIA* litigation on general suspicions of corruption in Ecuador’s judicial system also fails. Merck relies on reports prepared by non-governmental organizations giving Ecuador a low ranking in *perceptions* of corruption and judicial performance. It also invokes reports by the U.S. Department of State, as well as statements by Ecuadorian officials reported in the press and that Claimant quotes out of context, all in an effort to show that Ecuador’s system of justice is widely seen as “corrupt, inefficient, and lacking in independence and due process.”<sup>533</sup> All of Claimant’s attempts to discredit Ecuador’s judiciary fail and cannot substitute in any event for the absence of proof regarding the specific case at hand.

339. Claimant bears a heavy burden of proof in this respect, and it has utterly failed to meet it. Instead, Claimant expects this Tribunal to infer that the NCJ decision was tainted by corruption by introducing as evidence reports based only on general perceptions about Ecuador’s courts and mischaracterizations of statements by Ecuadorian officials contained in second-hand press reports. But as stated by Judge Higgins in the *Oil Platforms* case, “the graver the charge the

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<sup>532</sup> Witness Statement of Alejandro Ponce Martinez, ¶ 60.

<sup>533</sup> Claimant’s Memorial, ¶ 161.

more confidence must there be in the evidence relied on.”<sup>534</sup> As will be shown below, Claimant’s evidence is not only unreliable, but it is also irrelevant because Claimant does not explain how the findings of these reports, or statements extracted from the press, have any direct or indirect bearing on the underlying case in this arbitration. Arbitral tribunals have refused to consider general allegations of State corruption and misconduct for the same reasons.<sup>535</sup>

**(a) The reports by non-governmental organizations that Claimant cites are unreliable because they are based merely upon generalized perceptions.**

340. Claimant cites the World Justice Project (WJP) Rule of Law Index 2012-2013, in which Ecuador’s civil justice ranks 85 out of 97 countries.<sup>536</sup> Examination of the methodology of this report reveals that its findings are inconclusive, and according to the authors themselves, it does not provide a full diagnosis of the countries assessed.<sup>537</sup>

341. The Rule of Law Index Scores are built from two data sources: 1) a general population poll (GPP); and 2) qualified respondents’ questionnaires (QRQ).<sup>538</sup> The GPP consists mostly of

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<sup>534</sup> *Case Concerning Oil Platforms (Islamic Republic of Iran v. United States of America)*, Judgment (6 Nov. 2003), I.C.J. Reports 2003, p. 161, *Separate Opinion of Judge Higgins*, p. 225, at p. 234 (¶ 33) (RLA-58).

<sup>535</sup> *Jan Oostergetel and Theodora Laurentius*, ¶ 296 (CLM-146); *see also Vanessa Ventures Ltd.*, ¶ 228 (allegations of a lack of independence and impartiality “must be properly proved; and the proof must, at least ordinarily, relate to the specific cases in which the impropriety is alleged to have occurred. Inferences of a serious and endemic lack of independence and impartiality in the judiciary, drawn from an examination of other cases or from anecdotal or circumstantial evidence, will not ordinarily suffice to prove an allegation of impropriety in a particular case.”) (RLA-118).

<sup>536</sup> Claimant’s Memorial, ¶ 162.

<sup>537</sup> J. Botero & A. Ponce, *Measuring the Rule of Law*, World Justice Project (2011), p. 26 (RLA-102) (*available at*: [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=1966257](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1966257)).

<sup>538</sup> *Id.*

perception-based questions addressed to lay people,<sup>539</sup> and the questions concern perceptions of corruption and the interviewee's dealings with the government, the police, or the courts.<sup>540</sup>

342. Almost all questions about the judiciary ask for the opinion of the respondents, and therefore, yield subjective answers. For instance, question 8 of the GPP states: "In your *opinion*, most judges decide cases according to: What the Government tells them to do; What powerful private interests tells them to do; What the law says; [does not know]; [does not answer]."<sup>541</sup> Putting aside the fact that it is unlikely that lay people know "what the law says" and, therefore, are unlikely to provide informed answers, the questions necessarily entail subjective assessments of the issues.

343. Question 18 of the GPP further underscores the lack of confidence that its findings instill. That question states: "Corruption exists in all countries and societies in some form or the other. How many of the following people in [COUNTRY] *do you think* are involved in corrupt practices?" and it provides choices of "Officers working in the national government; Officers working in the local government; Members of Parliament/Congress; Judges and Magistrates; The police."<sup>542</sup> Because this question requires a subjective assessment of an issue that, by its nature, is difficult to prove, whatever answer the respondents provide are subject to speculation and rumor.

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<sup>539</sup> *Id.*

<sup>540</sup> *Id.*

<sup>541</sup> See, *The World Justice Project: General Population - Opinion Poll* (2012), Question 8 (RLA-108) (emphasis added) (available at: <http://worldjusticeproject.org/questionnaires>).

<sup>542</sup> *Id.* (emphasis added).



344. The second element of the Rule of Law index scores, the QRQ, is also based upon opinion, in this case those of “local experts.”<sup>543</sup> In the case of Ecuador, the opinions of 20 to 25 “experts” were sought, through interviews.<sup>544</sup> Beyond the question of whether the answers of that number of “experts” are representative of anything about the Ecuadorian judiciary, the WJP’s own assessment of its Rule of Law Index calls its reliability into question. During the official launch of the 2012-2013 Index, the CEO of WJP asked the authors of the report about the strength of their methodology and findings; one minimized the project as consisting merely “the beginning of an effort to try to maintain and produce reliable data...”<sup>545</sup> Thus, the WPJ Rule of Law Index cannot serve as evidence Ecuador’s system of justice is corrupt or lacking in due process.

345. Claimant also invokes the Global Competitiveness Report of the World Economic Forum to question the honesty, efficiency, and independence of Ecuador’s courts.<sup>546</sup> As with the other reports cited by Claimant in its Memorial, its findings are unreliable and, particularly in this case, irrelevant. The three indicators that Claimant cites – judicial independence,<sup>547</sup> efficiency of the legal framework in settling disputes,<sup>548</sup> and corruption<sup>549</sup> – are derived from the “Executive

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<sup>543</sup> J. Botero & A. Ponce, *Measuring the Rule of Law*, World Justice Project (2011) (RLA-102) (*available at*: [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=1966257](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1966257)).

<sup>544</sup> *See*, List of Ecuadorian Experts Who Answered the Qualified Respondent’s Questionnaire (QRQ), World Justice Project (undated) (RLA-127) (*available at*: <http://worldjusticeproject.org/contributing-experts/country>).

<sup>545</sup> *See*, Rule of Law Index 2012-2013 Launch Video, World Justice Project (undated), at 1h36 mins (RLA-128) (*available at*: <http://www.youtube.com/watch?v=BFu4dseulqE>) (emphasis added).

<sup>546</sup> Claimant’s Memorial, ¶ 163.

<sup>547</sup> *See*, *The Global Competitiveness Report 2012-2013*, World Economic Forum (2012), at p. 393 (RLA-109) (*available at*: [http://www3.weforum.org/docs/WEF\\_GlobalCompetitivenessReport\\_2012-13.pdf](http://www3.weforum.org/docs/WEF_GlobalCompetitivenessReport_2012-13.pdf)).

<sup>548</sup> *See, id.*, at p. 397 (RLA-109).

<sup>549</sup> *See, id.*, at p. 392 (RLA-109).

Opinion Survey,”<sup>550</sup> which in turn consists of a list of questions sent to business leaders in each country. The “Executive Opinion Survey” purports to capture the insight of a selected group of executives into their business operating environment, in the case of Ecuador, 134 such executives.<sup>551</sup> There is no indication whether any of the executives surveyed have any experience or knowledge of the issues on which they were questioned,<sup>552</sup> and, thus, their “opinions” cannot be treated as “evidence” of the general state of Ecuador’s system of justice.

346. Claimant also relies on Transparency International’s 2012 Corruption Perception Index (CPI),<sup>553</sup> but it offers no explanation of that report’s methodology or reliability, for obvious reasons. The CPI is only a *compilation of a survey of other surveys* that purports to capture “the perceptions of the extent of corruption in the public sector, from the perspective of business people and country experts.”<sup>554</sup> In addition to the CPL’s facial unreliability as a mere repackaging of perceptions, commentators have questioned whether the CPL has any value. For example, in a *Foreign Policy* article entitled “Corrupting Measures,” Alex Cobham, a fellow at the Center for Global Development, suggests that the CPI is useless because, rather than providing evidence of

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<sup>550</sup> See, *id.*, at p. 77 (“The Executive Opinion Survey remains the largest poll of its kind, collecting this year the insight of more than 14,000 executives into their business operating environment.”) (RLA-109).

<sup>551</sup> See, *id.*, at p. 72 (RLA-109).

<sup>552</sup> With respect to the independence of the judiciary, for example, the executives were asked: “To what extent is the judiciary in your country independent from influences of members of government, citizens, or firms?” The respondents answer on a scale of 1 (heavily influenced) to 7 (entirely independent). *Id.*, at p. 393.

<sup>553</sup> Claimant’s Memorial, ¶ 164.

<sup>554</sup> *Corruption Perceptions Index 2012: Frequently Asked Questions*, Transparency International, p. 4 (RLA-110) (available at: [http://www.transparency.org/cpi2012/in\\_detail#myAnchor1](http://www.transparency.org/cpi2012/in_detail#myAnchor1)).

actual corruption, it conveys an “powerful and misleading elite bias” that distorts perceptions on the issues addressed in it.<sup>555</sup>

347. Finally, Claimant quotes an unfavorable statement on Ecuador’s judiciary from the Human Rights Watch (HRW) World Report 2013, suggesting --without reference to any supporting evidence-- that “[c]orruption, inefficiency, and political influence have plagued Ecuador’s judiciary for years.”<sup>556</sup> Again, Claimant neither explains the methodology employed by HRW, or whether there was any methodology at all. As with all of the reports on which it relies, Claimant does not explain how generalizations about Ecuador’s judiciary relate to its denial of justice claim in this arbitration.

(b) **Claimant’s reliance on U.S. Department of State reports is misplaced and selective.**

348. Claimant’s reliance on the generalized criticisms of Ecuador’s system of justice voiced in certain reports by the U.S. Department of State is problematic on several counts. The cases on which the State Department relies to characterize Ecuador’s judiciary as lacking in independence refer to criminal cases or instances in which the State has been a party in the proceedings,<sup>557</sup> none of which even resembles the kind of controversy that gave rise to this arbitration. In addition, Claimant fails to mention that the same report states, in its section titled “Civil Judicial Procedures and Remedies” that civil and administrative courts “[are] generally considered

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<sup>555</sup> C. Provost, “Is Transparency International’s measure of corruption still valid?,” *The Guardian* (3 Dec. 2003) (RLA-59) (available at: <http://www.theguardian.com/global-development/poverty-matters/2013/dec/03/transparency-international-measure-corruption-valid>).

<sup>556</sup> Claimant’s Memorial, ¶ 165.

<sup>557</sup> U.S. Department of State, Country Report on Human Rights Practices: Ecuador (2012), at 9 (C-214).

independent and impartial.”<sup>558</sup> In other words, instead of demonstrating corruption, the report validates the ordinary lack of corruption of the civil courts like the NCJ.

349. In addition to the Human Rights Country Report of 2012, Claimant also cites the State Department’s 2013 Investment Climate Statement. This report has no evidentiary weight because it consists of unsupported generalizations about the investment climate within Ecuador.

350. Finally, it is common knowledge that the country reports prepared by the U.S. Department of State contain largely similar statements from year to year, which suggests that they are not very responsive or reflective of improvements or reforms. Furthermore, the U.S. Department of State’s reports naturally reflect the views of the U.S. Government whose relations with Ecuador are generally perceived to be strained. Thus, neither the Country Report nor the Investment Climate Statement can be deemed as actual evidence of systemic corruption.

(c) **Rather than discrediting Ecuador’s courts, the press articles cited by Claimant reflect the strengths of the judiciary’s check and balances and the measures taken by the Government to improve the system.**

351. Claimant also attempts to exploit newspaper snippets<sup>559</sup> in order to paint a distorted picture of judicial reforms in Ecuador that, in reality, have been widely applauded by international organizations and Claimant itself.<sup>560</sup> While the allegations of corruption contained in such press reports are not trivial, Claimant fails to appreciate the obvious fact emerging from these press reports: that Ecuador has taken effective steps to make its judiciary more transparent and efficient by sanctioning judges for corruption and impropriety.

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<sup>558</sup> U.S. Department of State, Country Report on Human Rights Practices: Ecuador (2012), at 10 (C-214).

<sup>559</sup> Claimant’s Memorial, ¶ 169.

<sup>560</sup> See Notice of Dispute (8 Jun. 2009), p. 1 (“applauding President Correa’s ‘deep commitment to addressing problems with judicial corruption.’”).

352. Claimant cites to a statement by a former president of the Supreme Court, Judge Mera, who allegedly stated in the aftermath of the formation of the Constituent Assembly in 2007 that “the judicial and constitutional reality in our country is a partial reality; we are not fully living in a state of law.”<sup>561</sup> However, Claimant grossly misrepresents this statement. The target of Judge Mera’s criticism was not corruption in the judiciary, but rather a decision of the Constituent Assembly to cap public sector salaries (thereby affecting the salaries of the 31 Supreme Court Judges). At the same time, he is reported to have “acknowledged the full authority of the Constituent Assembly, since they were granted this authority by the voters, and he noted that this is a matter of law.”<sup>562</sup>

353. Claimant similarly misrepresents the 2009 statement by the Chairman of the Civil and Criminal Commission of Ecuador’s National Assembly.<sup>563</sup> Ms. Romo’s statement that “[Ecuador’s] system of justice has completely collapsed” was made in the context of her discussion of the role of other institutions in the administration of justice. She emphasized that “[t]o administer justice, we need the Prosecutor, the Attorney General, the ombudsman’s office and a coherent and ordered judiciary all to work together ... a system of justice where there is a large imbalance between these parts is of no use to the country.”<sup>564</sup> This observation does not suggest any lack of integrity among Ecuador’s judges and is of no relevance whatsoever to Claimant’s underlying case. Notably, Jose Vicente Troya also commented with approval on the new Ecuadorian Constitution, pointing out that “with the promulgation of the new norms the

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<sup>561</sup> Claimant’s Memorial, ¶ 173.

<sup>562</sup> “Gómez Mera: ‘The Country Is Not Living Under the Rule of Law,’” *El Universo* (1 Feb. 2008) (C-81) (emphasis added).

<sup>563</sup> Claimant’s Memorial, ¶ 171.

<sup>564</sup> “Justice at a Standstill,” *La Hora* (16 Apr. 2009), at p. 1 (C-91).

judicial branch did not suffer from any reduction in its function or responsibilities nor was it relegated to the background,” and that “in the new model there is a clear separation, where the Judicial Branch is autonomous in relation to the other functions of the State and the judges of these entities.”<sup>565</sup>

354. Finally, Claimant’s reliance on President Correa’s apparent assessment of Ecuador’s Judiciary as “corrupt,” “falling in pieces” and a “barbarity,”<sup>566</sup> has no relationship to Claimant’s allegations of mistreatment in Ecuador’s courts. President Correa’s statement of January 25, 2011,<sup>567</sup> in which he was critical of the Ecuadorian courts, was made in the context of seeking public support for a referendum that aimed to reform the Ecuadorian Judiciary. He identified the problems of the Judiciary in his efforts to garner public support for these reforms. Clearly, this was a political statement.

355. On the other hand, President Correa’s statement, reported on February 23, 2011, regarding the “barbarity that is our judicial system”<sup>568</sup> was made to emphasize the huge challenges that were being faced by Ecuador in its effort to complete the judicial reforms in an efficient manner. Claimant also cites the declaration by President Correa, by which he declared a judicial emergency in Ecuador, “just weeks before the court of appeals decision in the NIFA

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<sup>565</sup> *Id.*

<sup>566</sup> Claimant’s Memorial, ¶ 172.

<sup>567</sup> “Correa Reiterates That He Will Lay Hands on the Court and His Campaign for Yes,” *El Universo* (26 Jan. 2011) (C-100).

<sup>568</sup> “Correa Anticipates That He Will Not Be Able to Completely Change Justice,” *El Universo* (11 Feb. 2011) (“Tener 18 meses un consejo tripartito para reestructurar esa barbaridad que es el sistema de justicia es un desafío enorme” / “Having a tri-partite council for 18 months to restructure the barbarity that is our judicial system is an enormous challenge”) (C-101).

case,” as Claimant stresses in dramatic tones.<sup>569</sup> This is another instance of Claimant’s liberties with evidence. President Correa declared the state of judicial emergency acting upon a recommendation by the President of the Transitional Judicial Council, not because of corruption concerns, but because of administrative shortcomings.<sup>570</sup> The main reasons for President Correa’s declaration were the failure to take into account technological developments that could facilitate the administration of justice, the lack of coordination between the various agencies and institutions involved in the administration of justice and, more importantly, the delays in the resolution of cases. These reasons have nothing to do with the procedural irregularities alleged by Claimant in its underlying case. Indeed, Claimant appears to take issue with the timely resolution of its case, rather than its delay.<sup>571</sup>

(d) **Investment arbitration tribunals have rejected the type of generalized “evidence” of corruption and lack of independence in the judiciary on which Claimant relies.**

356. Claimant has failed to produce any probative or relevant evidence that the *NIFA v. MSDIA* litigation was tainted by judicial misconduct. Instead, as discussed above, it relies solely

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<sup>569</sup> Claimant’s Memorial, ¶ 172.

<sup>570</sup> Executive Decree No. 872 (5 Sep. 2011), at p. 4 (“[the Judicial Branch] (i) does not have appropriate information systems that allow reliable information to be generated for institutional strategic planning; ii) the modernization processes have not been sustained and therefore the expected results have not been achieved; iii) the functional organic structures are not in keeping with citizens’ requirements of the Judicial Branch; iv) judicial proceedings have not taken technological development into account and they have not improved the stages, phases, and steps thereof, which has conspired with a lack of opportunity in the administration of justice; v) the incorporation of technology into both judicial and institutional processes is of vital importance to eradicate the accumulation of cases as well as the inaction of the administrative bodies which have conspired against the right of the citizens to the efficient and timely administration of justice; vi) there is no adequate coordination among the different institutions of the Judicial Branch and between it with the agencies involved in the justice and citizen safety system; vii) the annual increase in cases that must be heard and serviced by the Judicial Branch in 2008 was greater than forty percent (40%) with respect to 2002; viii) the decrease in the resolution of claims in the best of cases was only seventy percent (70%) of resolutions forecast in the last year to be complied with; ix) all of the conditions indicated above have led to the clogging of approximately one million two hundred and fifteen thousand cases that must be heard.”) (C-48).

<sup>571</sup> Claimant’s Memorial, ¶¶ 127-134.

on generalized perceptions of corruption in Ecuador's judiciary and mischaracterizations of the statements of Ecuadorian officials, none of which have anything to do with Claimant's allegations and innuendos concerning corruption in the *NIFA v. MSDIA* litigation.

357. Faced with similar evidence, investment arbitration tribunals have rejected it as relevant to a claimant's heavy burden to prove allegations of judicial and other corruption. The tribunal's holding in that regard in *Oostergetel v. The Slovak Republic* is instructive. There, claimant sought to sustain denial of justice claims based, in part, upon allegations of corruption in underlying bankruptcy proceedings, supported only by generalized statements of corruption in the Slovak judiciary. The tribunal held:

In light of these statements, it is clear that a claim for denial of justice must fail. The Claimants failed to provide sufficient proof of the alleged missteps of the bankruptcy proceedings. As regards a claim for a substantial denial of justice, mere suggestions of illegitimate conduct, general allegations of corruption and shortcomings of a judicial system do not constitute evidence of a treaty breach or a violation of international law. Neither did the Claimants explain the causal link between the alleged conduct by the relevant actors and the alleged damage. The burden of proof cannot be simply shifted by attempting to create a general presumption of corruption in a given State.<sup>572</sup>

358. In addition, Claimant does not mention other cases in which Ecuador's courts ruled in its favor. In a case that resembles the type of conduct for which Claimant was sued by NIFA, the Second Chamber of the Administrative Tribunal of Pichincha dismissed a complaint of commercial espionage brought in 2003 against Claimant by a competitor pharmaceutical

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<sup>572</sup> *Jan Oostergetel and Theodora Laurentius*, ¶ 296 (CLM-146); see also *Vannessa Ventures Ltd.*, ¶ 228 (allegations of a lack of independence and impartiality “must be properly proved; and the proof must, at least ordinarily, relate to the specific cases in which the impropriety is alleged to have occurred. Inferences of a serious and endemic lack of independence and impartiality in the judiciary, drawn from an examination of other cases or from anecdotal or circumstantial evidence, will not ordinarily suffice to prove an allegation of impropriety in a particular case.”) (RLA-118).



company, Pharmabrand.<sup>573</sup> In addition to complaining of Claimant's abusive exercise of rights under principles of civil law, Pharmabrand alleged that Claimant had improperly obtained information about its and others' products in order to restrict competition. The court held that there was not sufficient evidence against Claimant, and dismissed the case. Pharmabrand filed a cassation petition and the case is currently on appeal, but it is doubtful that Claimant would be heard to complain that it did not receive justice from the Administrative Tribunal of Pichincha.

**d. Merck enjoyed a full and fair opportunity to present its case before the NCJ, and none of the procedural defects alleged by Merck constitutes a denial of justice**

359. Merck's assertions concerning procedural defects in the NCJ decision are all premised on the same types of misrepresentations that, as demonstrated above, pervade its argument that the NCJ misapplied the law in reaching its decision. Based on these misrepresentations, Merck mounts two attacks: First, it claims that the NCJ "relied on" "tainted" factual findings of the Court of Appeals and did not conduct an independent review of the evidence. This claim is based upon mischaracterizations of the text of the NCJ decision, the evidence on which it relies, and the conclusory testimony of one of its experts. It is also directly contrary to Merck's own vigorous argument in the Constitutional Court proceedings that the NCJ did in fact make an independent evaluation of the evidence in reaching its decision.

360. Second, Merck claims that it had "no notice" that the NCJ might conclude, "solely" on the basis of a legal theory it "invented" by applying Article 244(3) of the 1998 Constitution, that Propfar's cause of action was one for an act of unfair competition, instead of an antitrust violation. Therefore, it argues, the NCJ violated its due process rights because it never had an

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<sup>573</sup> Electronic Docket, Case No. 2003-9911, *PHARMABRAND v. MERCK*, Second Contentious Chamber, Entry 1 (R-126).

opportunity to present evidence or argue that it did not engage in unfair competition. This argument is also founded on its mischaracterizations of the basis of the NCJ decision, coupled with erroneous assertions about Ecuadorian procedural law. It also contradicts its own consistent positions and statements during both the *NIFA v. MSDIA* litigation and in this arbitration. As a result, its “no notice” argument does not withstand scrutiny, and Merck has failed entirely to carry its elevated burden to prove the irregularities it alleges.

**i. Merck has conceded that the NCJ conducted a *de novo* review of the evidence, and there is no indication that the NCJ decision was based on “tainted” evidence.**

361. Merck asserts that “the NCJ failed to independently evaluate the evidentiary record or to subject the court of appeals’ factual findings to any scrutiny in reaching its holding that MSDIA was liable for unfair competition.”<sup>574</sup> In support of this proposition, Merck states that “the NCJ relied on the court of appeals’ recitation of the parties’ contentions and the court of appeals’ factual findings regarding MSDIA’s conduct,” and it points to Clause Eleventh of the NCJ decision in support of that contention.<sup>575</sup> In testimony contingent on whether “the facts alleged by MSDIA are true,” Professor Paulsson concludes that the “NCJ compounded [the lower courts’] denial of justice by basing its own decision on the tainted evidentiary record of the lower court proceedings.....” and thereby denied justice to Merck.<sup>576</sup> Merck’s expert Dr. Páez testifies that he could find “no evidence that the NCJ made an independent evaluation of the evidence in considering MSDIA’s liability for acts of unfair competition.”<sup>577</sup>

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<sup>574</sup> Claimant’s Memorial, ¶ 287 (emphasis omitted) (citing Expert Report of Professor Páez, ¶ 36).

<sup>575</sup> *Id.*, ¶286.

<sup>576</sup> Expert Opinion of Jan Paulsson, ¶15.

<sup>577</sup> Claimant’s Memorial, ¶287 (quoting Expert Report of Professor Páez, ¶ 36).

362. This argument is wholly specious for multiple reasons, the most glaring of which – once again – is that, if Merck really believed that the NCJ based its decision on a “tainted evidentiary record,” it would have sought recourse to the Constitutional Court for a violation of its due process rights,<sup>578</sup> which, of course, it has not done. Merck’s decision to forego an extraordinary protective action only serves to demonstrate that it does not believe that the NCJ simply relied on the facts found by the Court of Appeals.

363. Merck’s own statements in the Constitutional Court corroborate that it does not believe that the NCJ rendered its decision without reviewing the evidentiary record. There, Merck actually argued in its submissions that the NCJ *did* review the evidence once it cassated the case by accepting two of Merck’s five grounds for annulment of the decision, annulled the Court of Appeals’ decision, and then sat as a court of instance (*i.e.*, trial court) to decide the case on the basis of Prophar’s original complaint, Merck’s answer to it, and a *de novo* review of the evidentiary record.<sup>579</sup> The following excerpts from Merck’s submissions show that it fully considered that the NCJ applied the proper procedure and performed an independent evaluation of the evidence:

[The NCJ] did not review evidence while acting as a cassation court, however, *it did review evidence* once the cassation had been admitted, which imposed the obligation to act as a court in that instance, and therefore proceed to review the evidence.<sup>580</sup>

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<sup>578</sup> Expert Opinion of Juan Francisco Guerrero del Pozo, ¶ 17(c).

<sup>579</sup> The NCJ summarized the “correct cassation technique” in Clause 3.1 of its decision. *See* NCJ Decision, *NIFA v. MSDIA* (21 Sep. 2012), Clause 3.1 (C-203). Merck also provided a useful description of the initial stages of cassation procedure in ¶¶137-142 of its submission to the Constitution Court dated “received” April 3, 2013. MSDIA submission to the Constitutional Court (received by the Court on 3 Apr. 2013), ¶ 137-142 (R-117).

<sup>580</sup> MSDIA submission to the Constitutional Court (received by the Court on 3 Apr. 2013), ¶ 37 (R-117) (emphasis added).

The [NCJ's decision to cassate the case and annul the Court of Appeals' decision] does not violate Prophar's rights. After overturning the appellate court's decision, *the court analyzed the evidence*, summarizing the relevant legal concepts and explaining them with doctrine and relating them to the norms to which the claimant referred in its complaint. Therefore, Prophar may not allege that the focus of the National Court of Justice is not consistent with the merits of the proceeding, *including the facts discussed in the decision*, as the resolution of the case is explained *in accordance with the legal principles that the claimant invoked in its complaint.*<sup>581</sup>

....

It is therefore evident that PROPHAR refers to *the appreciation of evidence, which the [NCJ] legitimately performed within its competence.*<sup>582</sup>

...the National Court of Justice, by accepting MSD's cassation recourse, did not violate Prophar's constitutional rights *in appreciating the evidence*, as Article 16 of the Cassation Law establishes that: 'If the Supreme Court of Justice finds that the recourse should be admitted, it will cassate the judgment or writ at issue and issue the corresponding writ or judgment in its place, and on the merits of the facts established in the judgment or writ,' in other words, the respective Specialized Chamber of the National Court, if, based on the control of legality that it performs on a judgment, finds that it conflicts with the legal framework and decides to issue a cassation, that is, annul the judgment, it must issue, in the Court's opinion, "the corresponding writ or judgment in its place;" turning temporarily into a trial court. *Thus, the National Court has competence to appraise the evidence in the process*, in the cases where the evaluation of the judgment leads it to a conclusion that said judgment must be subject to cassation, as it is its duty to fill the void that is left by the annulment of the judgment. *This is precisely the focus adopted by the National Court in this case, and although MSD does not agree with the decision of the Court to declare MSD liable for any amount of damages, there is no basis whatsoever to conclude that the*

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<sup>581</sup> *Id.*, ¶ 172 (R-117) (emphasis added).

<sup>582</sup> MSDIA submission to the Constitutional Court (received by the Court on 9 Jan. 2013), ¶ 36 (R-116) (emphasis added).

*National Court's analysis of the evidence could have violated Prophar's constitutional rights.*<sup>583</sup>

364. These admissions alone are sufficient to show that Merck's argument that the NCJ did not independently review the evidence is meritless. Indeed, it is shocking that Merck maintains its argument here when it took the completely opposite position before the Constitutional Court. But for the sake of completeness, a review of the NCJ decision itself also show that Merck's assertions here are false.

365. Merck's assertion that Clause Eleventh of the NCJ decision somehow shows that the NCJ did not itself review the evidence is yet another attempted sleight of hand. While it is true that Clause Eleventh of the NCJ decision begins with the statement that "the following facts can be found in the challenged judgment," Clauses 11.1 through 11.6 are a summary of the allegations in Prophar's complaint, and Clause 11.7 is a summary of the defenses (or "exceptions") that, in its answer, Merck lodged to the complaint. A comparison between Clause Eleventh, on the one hand, and the text of Prophar's complaint and Merck's answer, on the other,<sup>584</sup> makes that clear. And as is evident from that comparison, the recitation in Clause Eleventh is an accurate summary of the parties' respective claims and defenses.

366. By linking its statement that "the NCJ relied on the court of appeals' recitation of the parties' contentions" to Clause Eleventh of the NCJ decision,<sup>585</sup> Merck admits that that Clause is no more than a summary of Prophar's complaint and Merck's answer. Here again, by burying that statement within its argument that the NCJ did not conduct an independent review of the

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<sup>583</sup> MSDIA submission to the Constitutional Court (received by the Court on 13 Sep. 2013), ¶ 9 (R-120) (emphasis added; emphasis in original omitted).

<sup>584</sup> See NIFA's Complaint, *NIFA v. MSDIA*, Trial Court (C-10); MSDIA's Answer, *NIFA v. MSDIA*, Trial Court, p. 12, II (Exceptions) (C-140).

<sup>585</sup> Claimant's Memorial, ¶ 286.

evidentiary record, Merck seeks to create the impression that there is something amiss with the NCJ's repetition of the court of appeals' summary, when there is not.

367. That, in Clause Eleventh, the NCJ reiterated an accurate summary of the complaint and answer from the Court of Appeals' decision makes no difference, because it has nothing to do with whether the NCJ "relied on...the court of appeals' factual findings" to reach its decision that Merck had engaged in unfair competition for which it was obligated to compensate Prophar. Merck does not identify what evidence was on the record and relevant to the NCJ's determination that it thinks it should have reviewed in order to reach that determination. Instead, it relies only on Dr. Páez's conclusory testimony that he could find "no evidence that the NCJ made an independent evaluation of the evidence in considering MSDIA's liability for acts of unfair competition."<sup>586</sup>

368. The NCJ decision shows exactly the opposite, however. In Clause Fifteenth of the decision, the NCJ stated both its finding that Merck had engaged in unfair competition and the basis for that finding:

**This Court of Cassation has it clear that within the proceeding the consideration with respect to the discussion cited in the above point [Fourteenth], which occurred between MERCK and PROPHAR in relation to the patent, registration, and use of the drug "Roficoxib" beginning in December 16, 2002, is not relevant because the parties would have to dispute that situation principally within the scope of Intellectual Property Law, but unquestionably Merck brought this matter up within a negotiation that had nothing to do with specific drugs, nor their use or sale, but rather it used that argument regarding its patent on Roficoxib, to block condition, and ultimately to nullify a negotiation that had been taking place since February 2002; MERCK sought to condition the negotiation of its industrial plant, which had already been taking place for 10 months prior to that date, on a[n] issue that had nothing to do**

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<sup>586</sup> Claimant's Memorial, ¶ 287 (quoting Expert Report of Professor Páez, ¶ 36).

**with it.** In view of the accession by PROPHAR to stop selling the drug Roficoxib temporarily, MERCK immediately tried to further pressure PROPHAR so that it also not produce and sell, not only the oft-cited drug, but also other generic drugs. **With this position, MERCK unquestionably committed “other practices that present and distort” competition, as explained in paragraph 8.1 and others, which affected a negotiation of a civil matter, giving rise to the occurrence of a tort, pursuant to Article 244, number 3, of the Political Constitution of 1998 then in effect, and Articles 2214 and 2229, first paragraph, of the Civil Code, with the corresponding damages and injuries to be compensated to PROPHAR (formerly Nifa S.A.) within what legal doctrine knows as a competitor’s acts of disruption, because of the refusal to sell, in the Law of Unfair Competition.**<sup>587</sup>

369. When read in the context of the entirety of the NCJ decision, the NCJ’s determination in Clause Fifteenth establishes two certainties: First, the NCJ did not rely on *any* factual findings -- so-called “tainted” ones or otherwise -- by the Court of Appeals, because once the NCJ had determined that Propfar’s action did not concern anti-trust law (but was “rather a tort case...within the Law of Unfair Competition,”)<sup>588</sup> any evidence concerning whether Merck had, or had not, engaged in anti-trust conduct became wholly irrelevant to the NCJ’s determination of Propfar’s unfair competition claim.

370. Second, the text of Clause Fifteenth makes clear that, once the NCJ had determined that Propfar’s claims concerned unfair competition, its focus became whether the evidence showed that the events surrounding the parties negotiations and Merck’s introduction, after “10 months” of negotiations, of a condition to the sale of its plant on Propfar’s agreement “not [to] produce and sell...generic drugs”<sup>589</sup> constituted an act of unfair competition. A review of the evidentiary

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<sup>587</sup> NCJ Decision, Clause Fifteenth (C-203) (emphasis in original); *see also id.*, Clause 16.14.

<sup>588</sup> NCJ Decision, Clause Fourteenth (C-203).

<sup>589</sup> NCJ Decision, Clause Fifteenth (C-203).

record from the lower court proceedings shows that there was abundant evidence concerning Merck's introduction of that condition, and Merck has not identified any of that evidence as "tainted" here.

371. That evidence includes a list of sixty-six generic drugs that Doris Pienknagura, a member of Merck's team for its negotiations with Prophar for the plant's sale, attached to her testimony and identified as the generic drugs that Merck presented to Prophar in January 2003 with the requirement that, in order to conclude a final agreement, Prophar must agree not to manufacture and sell for the first five years (or some other negotiated period) after it would have acquired the plant.<sup>590</sup> The evidentiary record also included an analysis performed by Merck in January 2003 of the revenues it would lose if Prophar were to manufacture and sell four of the generic drugs that are on the list of sixty-six generic drugs attached to Ms. Pienknagura's testimony, attached to a January 16, 2003 e-mail in which Merck discussed the cost/benefit of selling the plant to Prophar with and without the restrictions on its manufacture of competing generic drugs.<sup>591</sup>

372. In another e-mail dated January 15, 2003, Jacob Harel, head of Merck's negotiating team stated that "a financial analysis conducted by MSD Ecuador estimates the loss of income [if Prophar did not agree to restrictions on its manufacture of "copies of MSD products"] during the period 2003-2208 [sic] at \$4.1 millions," and queried "[h]ow do we position such a request [to Prophar] with the current Antitrust requirement in Ecuador."<sup>592</sup> That e-mail also compared the

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<sup>590</sup> Testimony of Doris Pienknagura, *NIFA v. MSDIA*, Court of Appeals (4 Jun. 2009), Twenty-One (C-173); List of 66 Products (Doris Pienknagura Annex 1) (R-7) and NIFA S.A.'s Business Plan Listing 53 Products (Doris Pienknagura Annex 2) (R-124).

<sup>591</sup> Email from Luis Eduardo Ortiz (Merck) to Jacob Harel (Merck) (14 Jan. 2003) (R-10).

<sup>592</sup> Email from Jacob Harel to Federico E. C. Wintour and others (15 Jan. 2003) (R-11).



cost-benefit of selling the plant to Prophar if it did not agree not to manufacture and sell the specified drugs for five years with selling to another potential purchaser of the plant.

373. It is evident from Clause 16.9 of the NCJ decision that, at a minimum, the court reviewed Mr. Harel's January 15, 2003 e-mail, discussed above, in setting the outside parameter of \$1,640,000 for the calculation of its damage award to Prophar, because in that Clause the court stated that "MERCK itself quantified the losses that might be caused to it by competition with [Prophar] during the 2003-2008 period in the amount of US\$ four million one hundred thousand dollars (approximately US\$ eight hundred and twenty thousand dollars per year)."<sup>593</sup> It is also clear from the Court's analysis that it also reviewed the other evidence discussed above, as well as other evidence of the parties negotiations between early 2002 and their termination in January 2003.<sup>594</sup> Certainly, other than Dr. Páez conclusory testimony, Merck has not offered any evidence to the contrary.

374. In sum, Merck has utterly failed to establish that the NCJ did not conduct its own review of the evidence or that it relied, in any way, on the Court of Appeals' factual findings, and on the contrary, the NCJ decision conclusively establishes that its findings were based upon its own review of the evidence rather than the lower court's factual findings. Accordingly, it is plain that, because it is based on "assumed facts" demonstrated above as *not* true, Professor Paulsson's conclusion that the NCJ "based its own decision on the tainted evidentiary record" is of no weight, as are Merck's assertions that are based on it.

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<sup>593</sup> NCJ Decision, Clause 16.9 (C-203). The court went on to set the \$1,640,000 outside financial parameter by multiplying \$820,000 by the two years that Prophar had admitted in its complaint that its expansion plans were delayed due to the failed negotiations for Merck's plant.

<sup>594</sup> Swiss Supreme Court, Case No. 4A\_95/2013, Judgment (27 June 2013) (RLA-123) ("[t]here is neither a violation of the right to be heard, nor a denial of right in the fact that [after hearing witness testimony, the tribunal] no longer expressly addressed the witness statements...but found generally that the other evidence...could not change the results of the evidence.").

**ii. Merck has maintained throughout this litigation that Propfar’s claim is for unfair competition, and it had a full and fair opportunity to present evidence and arguments in that regard**

375. Merck founds its final argument that the NCJ denied it justice through procedural errors on its assertion -- shown to be patently wrong in Section VI(B)(2)(b) above -- that the NCJ based its decision “solely” on “a newly-minted liability theory” of unfair competition under Article 244(3) of the 1998 Constitution that Merck “could not have anticipated.”<sup>595</sup> As a result, Merck argues, “the NCJ failed to provide [it] with any notice, let alone meaningful notice and an opportunity to be heard, that it could be found liable for unfair competition in the proceedings before that court”<sup>596</sup> and, thereby, deprived it of an opportunity to present evidence and arguments that it was not liable for unfair competition. Moreover, according to Merck, Ecuadorian law “prohibited the NCJ” from deciding the case on unfair competition grounds, because it “can only issue a decision based on the specific claim before it,” as set forth in the parties cassation petitions.<sup>597</sup> Thus, because Propfar argued in the Court of Appeals and NCJ proceedings that its claim was based on antitrust, and not unfair competition, and the Court of Appeals’ decision found Merck liable for antitrust violations, the NCJ inappropriately decided the case on unfair competition grounds.<sup>598</sup>

376. Merck’s argument that it had “no notice” that it might be held liable to Propfar on unfair competition grounds can be disposed of with dispatch. First, as demonstrated in Section

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<sup>595</sup> Claimant’s Memorial, ¶¶ 12, 13(c), 347 (*quoting* Expert Report of Professor Oyarte, ¶ 33).

<sup>596</sup> Claimant’s Memorial, ¶ 334 (emphasis omitted).

<sup>597</sup> Claimant’s Memorial, ¶¶ 346-348 (*citing* Expert Report of Professor Oyarte, ¶ 33, and Expert Report of Professor Páez, ¶¶ 12-14).

<sup>598</sup> Claimant’s Memorial, ¶¶ 339-351.

IV(B)(2)(b) above, Merck's assertion that Article 244(3) of the 1998 Constitution formed the "sole" ground for the NCJ decision is an outright falsehood. As Merck knows but has tried to hide from this Tribunal, the NCJ decision was also founded on Articles 2214 and 2229 of the Ecuadorian Civil Code, which (along with Article 244(3) and numerous other provisions of Ecuadorian law) were cited by Propfar as grounds for its cause of action in its complaint, and Articles 2214 and 2229 have long been held to provide the legal predicate for claims for unfair competition. The fact that it could be held liable for unfair competition on the basis of Propfar's complaint, then, could not have come as a surprise to Merck.

377. Second, Merck itself proves that both its "no notice" argument and its argument that it was deprived of an opportunity to defend itself from unfair competition claims are untrue. Both in this arbitration and throughout its litigation with Propfar, Merck has consistently taken the position that Propfar's complaint that "sounded in unfair competition."<sup>599</sup> In its answer to Propfar's complaint, Merck made a blanket denial that "the provisions of Articles 2241 [now in the renumbered Civil Code, Article 2214] *et seq.* of the Civil Code are applicable to this case,"<sup>600</sup> without stating why it took that position. The litigation strategy that Merck pursued, however, was not to contest Propfar's claim -- which Merck insisted to be one of unfair competition, not antitrust -- on the merits. Instead, it relied on jurisdictional arguments that, even though it did not concern intellectual property rights, Propfar's claim was subject to the Law on Intellectual Property (LIP) and therefore should be heard in the Contentious Administrative Courts provided for in the LIP instead of the ordinary civil courts in which Propfar's case was proceeding.

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<sup>599</sup> Claimant's Memorial, ¶136(b)

<sup>600</sup> MSDIA's Answer, *NIFA v. MSDIA*, Trial Court (23 Jan. 2004), p. 12, II (Exceptions), ¶ 5 (C-140).

378. To the extent that Merck may have relied on jurisdictional arguments alone to contest what it has identified all along as an unfair competition claim, and may not have taken the opportunity to submit evidence or arguments during the lower court proceedings that it had not engaged in unfair competition, that litigation strategy is Merck's responsibility. The same is true to the extent that, in response to Propfar's choice to argue its case on antitrust grounds, Merck may have chosen to respond only to those arguments, and forego submitting evidence and arguments to defend the merits of an unfair competition claim. These choices were important, because as Merck's own expert Dr. Páez testifies, "even though the NCJ may act as a 'Court of Instance' [*i.e.*, a trial court] when it issues a new judgment on the merits [after it has cassated the case and annulled the decision that is being appealed], Article 15 of the Cassation Law prohibits it from accepting new evidence...."<sup>601</sup> Ecuador's expert Dr. Aguirre confirms that restriction.<sup>602</sup> Thus, Merck was responsible for making, in the lower courts, whatever record it might have thought it would ultimately need to defend itself if its litigation with Propfar were ultimately to be heard by the NCJ.

379. Merck has not argued in this arbitration that it was impeded in any way in the lower court proceedings from submitting any evidence or arguments concerning whether it had engaged in unfair competition with regard to Propfar. It simply indicates that it chose not to because it followed Propfar's antitrust litigation strategy. As a result, Merck cannot now complain that it

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<sup>601</sup> Expert Opinion of Professor Páez, ¶ 21.

<sup>602</sup> Aguirre Opinion, ¶ 6.1.

did not have a full and fair opportunity to defend itself against an unfair competition claim, and it certainly cannot lay its litigation strategy choices at Ecuador's feet.<sup>603</sup>

380. Claimant's final argument -- that, because Propfar had argued antitrust theories in the Court of Appeals and NCJ proceedings, not unfair competition, and the Court of Appeals' decision found Merck liable for antitrust violations, the NCJ improperly decided the case on antitrust grounds -- is wrong in Ecuadorian procedural law and hides the true nature of what Merck argued to the NCJ in its cassation appeal. As Dr. Aguirre explains:

Note that one of the grounds for [Merck's] cassation petition was an alleged lack of procedural consistency because the [Court of Appeals] Judge had departed from the subject matter of the litigation. In addition to procedural nullity because the case involved claims of unfair competition and, for this reason, the civil courts lacked jurisdiction. Therefore, the claim MERCK makes in its [Memorial] that it had "*not had an opportunity to be heard, that it could be held liable for unfair competition in the proceedings before [the NCJ]*" is quite surprising since its own cassation petition states that disputes involving unfair competition ought to have been processed by the administrative courts rather than the civil courts. This was therefore one of the issues of which MERCK itself informed the NCJ as an element to be taken into account in its analysis and decision.<sup>604</sup>

381. Merck's own cassation petition confirms Dr. Aguirre's opinion. In it, as its basis of review under the fourth ground for cassation provided for in Article 3 of the Cassation Law, Merck argued that the Court of Appeals' judgment should be nullified because it decided Propfar's claim on antitrust grounds, when the complaint should have been decided on unfair competition grounds:

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<sup>603</sup> *Bosh International, Inc. and B & P Ltd Foreign Investment Enterprise v. Ukraine*, ICSID Case No. ARB/08/11, Award (25 Oct. 2012) (Griffith, Sands, McRae), ¶ 284 (a party that "made a conscious decision election not to raise non-jurisdictional defenses in the national courts is "bound by [its] litigation strategy and its consequences," and "having elected to proceed in that way... cannot...contest the result.") (RLA-117).

<sup>604</sup> Aguirre Opinion, ¶ 6.4 (emphasis in original).

The verdict [of the Court of Appeals] stated that MSD had a dominant position in the industrial plant market and that it abused it. The complaint was not based on this. *The complaint was based on alleged acts of unfair competition.* The verdict states that the MSD's industrial plant was the only viable alternative. The complaint was not based on this, but rather on deceitful and fraudulent acts by MSD that prevented the plaintiff from acquiring the plant. The claim is based on (the allegation) that MSD ended the negotiation. The response alleges that it was NIFA who willingly ended the negotiations. The verdict does not rule on this. Therefore, the verdict contains decisions on matters that were not part of the litigation, and there is no resolution on several issues that were the subject of the litigation. The verdict also rules on an indemnity calculated over 15 years, while the lawsuit mentions a two year production delay.<sup>605</sup>

382. The above ground for cassation was one of the two on which the NCJ accepted Merck's cassation appeal and reached the same conclusion that Merck had urged in its cassation petition, *i.e.*, that Prophar's claim -- in Merck's words in this arbitration -- "sounded in unfair competition" and not in antitrust.<sup>606</sup> On that basis, the NCJ nullified the Court of Appeals judgment, and as discussed in the previous subsection, then was required to sit as a court of instance and decide the case on the basis of Prophar's complaint, Merck's answer, and the evidentiary record.<sup>607</sup> Merck cannot be heard to claim here that the NCJ denied it justice by doing exactly what Merck argued should have been done by the lower courts in the *NIFA v. MSDIA* litigation, *i.e.*, decide the case on the basis of unfair competition law.

383. As demonstrated by the foregoing, Merck has wholly failed to meet its burden to demonstrate that the NCJ gave it "no notice" that it might decide the case on the basis of unfair competition law, or that the court denied it an opportunity to present evidence and arguments on

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<sup>605</sup> MSDIA's Cassation Petition, ¶ 39 (C-198).

<sup>606</sup> NCJ Decision, Clauses Tenth (C-203); *see also id.* Clauses 2.3.4 and 5.2.

<sup>607</sup> *See* Section VI.(B)(2)(d)(i) above; *see also* Aguirre Opinion, ¶ 6.1.

unfair competition, or that Merck had not presented grounds on which the NCJ could, in fact, apply unfair competition law to the parties pleadings and interpret the facts in that light. As will be obvious, there is no basis for Professor Paulsson's conclusion that the NCJ denied Merck justice by "chos[ing] to act as a court of first instance...and uphold a cause of action which had never been pleaded, evidently without any legal authority to do so,"<sup>608</sup> because that conclusion is wrong both as to the procedure that the NCJ was required to follow and as to the issue that Merck itself asked the NCJ to decide.

### **3. The NCJ Judgment Cured Any Alleged Defects in the Lower Court Proceedings**

384. From the foregoing, it will be evident that the NCJ decision rectified each of the faults that Claimant alleges occurred in the *NIFA v. MSDIA* proceedings in the lower courts. The chief support for that conclusion comes from Merck itself, which has defended the decision before the Constitutional Court as "well-founded," "reasoned" and based on the NCJ's independent review of the evidence. It took no action itself to seek a remedy from the Constitutional Court of any of the criticisms of the decision that it advances in this arbitration, even though those criticisms would have provided grounds for it to do so.

385. The NCJ decision, and the procedural manner in which it was rendered, also demonstrate that each of Merck's complaints regarding the lower court proceedings have been fully addressed. First, Merck's principle motivation in seeking review in the NCJ was the \$150 million amount of the Court of Appeals' judgment. The NCJ reduced that judgment by 99%, and in the course of doing so rejected the testimony of the expert witness in the Court of Appeals to

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<sup>608</sup> Expert Opinion of Jan Paulsson, ¶ 17(a).

whose damage calculation Merck objected. Instead, the NCJ performed a damage calculation that is set forth transparently in its decision and of which Merck clearly approves.

386. The legal basis of the NCJ decision also clearly addressed, analyzed and ultimately rejected the antitrust basis of the Court of Appeals decision to which Merck objected as unsupported, and the NCJ did so on the basis of two grounds raised by Merck in its cassation petition. The unfair competition ground on which the NCJ, properly sitting as a court of instance after nullifying the Court of Appeals' judgment, is one that Merck itself had argued to be applicable to its case in its cassation petition. In addition, whether correct or not the decision is based upon principles that are well-established in Ecuadorian law, as Articles 2214 and 2229 of the Ecuadorian Civil Code have long provided a legal predicate for unfair competition, including in the context of pre-contractual liability. And although the NCJ also applied Article 244(3) of the 1998 Constitution as a ground for holding Merck liable to Prophar, its application in that respect was well within the judicial authority and duty of the NCJ.

387. In hearing and rendering its decision in the *NIFA v. MSDIA* litigation, Merck opined before the Constitutional Court that the NCJ also employed correct procedure. Once it accepted two of Merck's cassation grounds and nullified the Court of Appeals judgment, the NCJ was required to carry out a *de novo* review of the evidence, and evidence on the record, when compared with the outcome of the decision, indicates that the NCJ did conduct that review.

388. Finally, unlike its conclusions about certain lower court judges, Merck has made no direct allegations of corruption or bias on the part of any of the NCJ judges who rendered the decision, and there is no evidence that corruption or bias played any role in the decision.

389. Based upon the foregoing and the other points set out above, the NCJ decision remedied each defect in the lower court proceedings that Merck has alleged to be a denial of justice.



Therefore, even under Merck’s theory that the NCJ decision is a final award of the Ecuadorian judicial system, Merck’s denial of justice claim must fail.

#### **4. The NCJ Judgment Disposes of All of Merck’s Treaty Claims**

390. Even if Merck’s rights at issue are rights with respect to an “investment” qualifying for protection under the BIT, and even if Merck can be said to have complied with its duty to exhaust local remedies before asserting allegations of denial of justice at the international level, the arguments above are dispositive of the merits of Merck’s claims of denial of justice in violation of the standard of fair and equitable treatment of Article II(3)(a) of the Ecuador-U.S. BIT.

391. The same reasons, however, command the dismissal of Merck’s additional claims of breach of the obligations of Ecuador under Article II(3)(a) to provide “full protection and security” to its alleged investment;<sup>609</sup> under Article II(3)(b) not to impair MSDIA’s “investment” by arbitrary or discriminatory measures; and under Article II(7) to provide effective means for MSDIA to assert claims and enforce rights with respect to its “investment.”

392. To begin with, it cannot be denied that Merck’s allegation of breach of the full protection and security standard has the same factual basis as its denial of justice claims.<sup>610</sup> In *Oostergetel v. Slovakia*, the fact that there was no denial of justice in the case made “unnecessary to analyze these allegations again separately under [the full protection and security standard]. In other words, the conclusions reached with respect to the conduct of the Judiciary ... in connection with

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<sup>609</sup> Claimant’s Memorial, ¶¶ 380-382.

<sup>610</sup> Claimant’s Memorial, ¶ 382 (“[f]or all the reasons discussed in Section IV above regarding denial of justice, Ecuador has also failed to provide MSDIA’s investment full protection and security ...”) (emphasis added).

the breach of FET, *equally appl[ied] ...*”<sup>611</sup> The same result must be obtained here: because Merck’s allegation of denial of justice lacks merit, its allegation of breach of the full protection and security standard must also fail.

393. Similarly, it cannot be denied that Merck’s allegation of breach of Ecuador’s obligation not to impair MSDIA’s “investment” by arbitrary measures has the same factual basis as its denial of justice claims.<sup>612</sup> As a consequence, lack of merit of the latter entails the lack of merit of the former. Moreover, both standards share the same threshold of arbitrariness: the definition set out in the *ELSI* case.<sup>613</sup> If, as shown above, the conduct of the Ecuadorian judiciary fails to cross the requisite threshold for a denial of justice to occur, the conclusion must be that the same conduct cannot possibly implicate Ecuador’s State responsibility for breach of its obligation not to impair MSDIA’s “investment” by arbitrary measures.

394. Merck’s allegation of discrimination in breach of Article II(3)(b) does not fare better.<sup>614</sup> The facts as shown above do not permit any inference of bias and prejudice on the basis of Merck’s U.S. nationality. Moreover, Merck has made no attempt at all to show that the treatment it received was discriminatory by any standard, and in the absence of any evidence

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<sup>611</sup> *Jan Oostergetel and Theodora Laurentius*, ¶ 308 (CLM-146).

<sup>612</sup> Claimant’s Memorial, ¶ 384 (“[f]or many of the same reasons the judgments of the Ecuadorian courts are a denial of justice, they are also arbitrary within the meaning of Article II(3)(b).”) (emphasis added).

<sup>613</sup> *Mondev International Ltd.*, ¶ 127 (“[i]n the *ELSI* case, a Chamber of the Court described as arbitrary conduct that which displays “a wilful disregard of due process of law, ... which shocks, or at least surprises, a sense of judicial propriety”. It is true that the question there was whether certain administrative conduct was “arbitrary”, contrary to the provisions of an FCN treaty. Nonetheless (and without otherwise commenting on the soundness of the decision itself) *the Tribunal regards the Chamber’s criterion as useful also in the context of denial of justice, and it has been applied in that context*, as the Claimant pointed out.”) (RLA-54) (emphasis added). *See also RosInvestCo UK Ltd.*, ¶ 276 (CLM-141).

<sup>614</sup> Claimant’s Memorial, ¶¶ 390-392.

whatsoever of bias and prejudice against it, Merck fails to identify different treatment of similarly situated investments.<sup>615</sup>

395. Merck's allegation of Article II(7) can easily be dispensed with. As shown above,<sup>616</sup> Article II(7) merely incorporates guarantees against denial of justice already available under customary international law. For this reason, Merck's failure to establish a denial of justice under Article VI(3)(a) and customary international law entails its failure to establish a breach of Article II(7) of the Treaty.

396. In sum, for the reasons identified above, all of Merck's claims of breach of the provisions of the Ecuador-U.S. BIT fail for lack of merit.

**C. In Any Event, Merck Has Falsely Portrayed the Lower Court Proceedings and Failed to Demonstrate Irregularities That Amount to a Denial of Justice**

397. Not only did the NCJ decision cure any defects in the proceedings below, Merck's depiction of those alleged defects grossly distorts the record of what really happened and omits elementary facts which belie its allegations. Merck's strategy is clear: to present broadside of charges so numerous that the very volume of allegations will overshadow the shortcomings of the particular charges. In light of the NCJ decision, it is unnecessary for this tribunal to wade into the dozens of Merck's misstatements and omissions in order to reject its claims as lacking merit. Nonetheless, Respondent shows below how, in any event, Merck has utterly failed in these arbitral proceedings to demonstrate that it faced irregularities amounting to a denial of justice.

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<sup>615</sup> *The Loewen Group, Inc. and Raymond L. Loewen*, ¶ 154 (RLA-55).

<sup>616</sup> *See* Section V(C).

## **1. The Trial Court Proceedings**

398. Merck contends that the Second Court for Civil Affairs of Pichincha (the trial court) denied justice to Merck by “repeatedly and egregiously violating” its due process rights.<sup>617</sup> Merck’s attacks on the first instance proceedings can be grouped into two main categories of alleged procedural flaws: those alleged to have occurred before Judge Toscano Garzón and those alleged to involve Temporary Judge Chang-Huang Castillo, who eventually rendered the first instance judgment. To be sure, the conclusions of that judgment were later found to be erroneous by the NCJ. But, as discussed below, Merck’s allegations of procedural irregularities are either grossly exaggerated or completely unsupported by evidence, and appear frequently to be designed to take advantage of the Tribunal’s unfamiliarity with the idiosyncrasies of the Ecuadorian legal system. Assessed in accordance with the Ecuadorian rules of civil procedure and applicable court practices, Merck’s allegations fall far short of demonstrating it suffered unfairness in the proceedings. Moreover, numerous aspects of the proceedings before the trial court *not* mentioned by Merck demonstrate that both litigants were accorded a fair process.

### **a. Proceedings Before Judge Toscano Garzón**

399. Merck’s accusations against how Judge Toscano Garzón conducted the proceedings revolve around the handling of NIFA’s fact witness, Mrs. Usher de Ranson. This is not surprising since Mrs. Usher de Ranson’s first-hand testimony as part of Merck’s realty sales team during the negotiations with NIFA is extremely damaging to Merck’s case. Merck alleges that Mrs. Usher de Ranson was examined twice outside the presence of Merck, without giving

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<sup>617</sup> Claimant’s Memorial, ¶ 266.

advance notice to Merck and without addressing many of Merck's written questions for the witness.<sup>618</sup>

400. This is not only a gross exaggeration of what had actually happened but a dissimulation of the role of Merck's own counsel. As described below, proper notices were given in both instances; on both occasions, Merck's lawyers did have an opportunity to submit in advance questions to be put to the witness and to attend the deposition sessions.

401. At the outset, it must be recalled that the Ecuadorian legal system is a civil law system and, as in many civil law systems, the conduct of a trial is largely in the hands of the judge. For example, the judge has traditionally assumed the dominant role in questioning witnesses. The parties and their legal counsel do not question witnesses orally,<sup>619</sup> but rather submit written questions based on which the court conducts witness deposition. In this, the Ecuadorian legal system differs from common law jurisdictions, but this difference cannot be considered in any respect less fair. The means by which different systems afford justice to litigants vary and notions of due process respected by different systems of law, such as *audi alteram partem*, are subject to different rules, as Claimant's counsel has observed elsewhere.<sup>620</sup>

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<sup>618</sup> See *id.*, ¶ 271(a) (“the trial court scheduled the testimony of NIFA’s only fact witness *without providing MSDIA with meaningful notice or the opportunity to attend the examination.*”).

<sup>619</sup> Since the 2008 Constitution came into force, some judges have allowed counsel to conduct cross-examination in the presence of the judge. However, this is a minority practice, and the Code of Civil Procedure has not been yet amended to this effect. The National Assembly is currently considering amendments to the Code of Civil Procedure.

<sup>620</sup> “Civil law jurisdictions also did not generally permit either direct examination or cross-examination of witnesses. Indeed, witness testimony was (and remains) comparatively unusual in many civil law proceedings: ‘the idea of a witness being presented by the lawyer for a party in the question-and-answer format of common law direct examination is vaguely distasteful to page civil lawyers.’ More generally, evidence-taking in civil law jurisdictions is largely controlled by the court, and the parties have virtually no right to demand relevant materials from one another or from witnesses; equally, civil law courts seldom ordered (or order) parties to produce materials that they had not voluntarily proffered as evidence.” G. Born, *INTERNATIONAL ARBITRATION: CASES AND MATERIALS*, pp. 758-759 (2011) (RLA-101) (emphasis added, citation omitted).

402. NIFA's initial request to depose Ms. Usher de Ranson was made during the ten-day evidentiary period. NIFA petitioned to have Mrs. Usher de Ranson examined on short notice because she was a non-resident witness who was present in Ecuador only briefly. Given her brief availability, the court granted NIFA's petition promptly.<sup>621</sup> The court's clerk notified the order to the attorney mailboxes of both parties' counsel at 5:20 PM on 25 June 2004.<sup>622</sup> Under Ecuadorian law, the court clerk's certification -- unless contradicted by compelling evidence -- constitutes objective conclusive evidence that the orders were notified to the respective counsel.<sup>623</sup> Thus, at 5:20 PM on 25 June 2004, both counsel, NIFA's and Merck's, received the *same* notification of the order.<sup>624</sup>

403. In accordance with best Ecuadorian court practices, diligent trial attorneys check their court mailboxes at least three times a day, including at the end of the day, especially during the active stages of a case, such as evidentiary periods, when new developments can occur on hourly basis.<sup>625</sup> Furthermore, attorney mailboxes are accessible between the hours of 8 AM to 6:30 PM.

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<sup>621</sup> See Trial Court Order of 25 June 2004, *NIFA v. MSDIA* (C-143).

<sup>622</sup> *Id.*, p. 4. The certification by the court clerk is affixed following the judgment and states:

*In Quito, on June 25, 2004 at 5:20 PM, I notified the foregoing decision to the LEGAL REPRESENTATIVE OF NUEVA INDUSTRIA FARMACÉUTICA ASOCIADA S.A. (NIFA S.A.) in judicial box No. 809 of ANDRADE DÁVILA JUAN CARLOS, ESQ., MERKSHARP DOHME (INTER AMERICAN), ORTIZ MONASTERIO LUIS EDUARDO, WINTOUR ENRIQUE CARLOS FEDERICO, in judicial box No. 572 of PONCE PALACIOS LUIS, ESQ.*

*– I so attest.*

*[Illegible signature]*

*Id.*

<sup>623</sup> Aguirre Opinion, ¶ 7.7.4.

<sup>624</sup> Trial Court Order of 25 June 2004, *NIFA v. MSDIA*, p. 4 (C-143).

<sup>625</sup> See Aguirre Opinion, ¶ 7.7.4, fn. 34.

Merck's counsel would be expected to have checked the mailbox at the end of the day on Friday, June 25, and would have retrieved the notice placed there at 5:20 PM.

404. Indeed, contrary to its allegation before this Tribunal,<sup>626</sup> Merck's counsel acknowledged in a later submission to the trial court, that "I was served with [the 25 June 2004 notice] *at 6:00 p.m. of the same day.*"<sup>627</sup> Mr. Ponce thus admitted that he was properly served one business day before Mrs. Usher de Ranson's questioning. This admission belies his statement to this Tribunal that he did not receive the notice "until after her testimony had ended" and that "[they were] therefore not able to be present to observe her testimony, and [they] had no opportunity to put questions to her in cross-examination."<sup>628</sup>

405. Mrs. Usher de Ranson was deposed the next business day following the notice, on 28 June 2004.<sup>629</sup> According to Dr. Alejandro Ponce Martinez, in principle, there was nothing unusual in scheduling the deposition the next business day.<sup>630</sup> More importantly, despite counsel's failure to attend her deposition or to submit interrogatories before her testimony was taken, there was no harm to Merck since the court granted Merck's subsequent petition that a second deposition of Mrs. Usher de Ranson be held. That petition, filed the next day on 29 June 2004, was accompanied by written interrogatories to be put to Mrs. Usher de Ranson that Merck

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<sup>626</sup> Ponce Statement, ¶ 11 ("Because we did not have access to our judicial mailbox until after 8h00 (8:00a.m.) on Monday, June 28, we did not receive notice of Mrs. Usher de Ranson's scheduled examination until after her testimony had ended.").

<sup>627</sup> MSDIA Petition, *NIFA v. MSDIA*, Trial Court (30 Aug. 2005), p. 1 (R-46) (emphasis added).

<sup>628</sup> Ponce Statement, ¶ 11.

<sup>629</sup> Testimony of Anne Kareen Ranson [a/k/a Anne Usher de Ranson], *NIFA v. MSDIA*, Trial Court (28 June 2004) (C-144).

<sup>630</sup> Ponce Statement, ¶ 11 ("It should be noted that, *in my long experience*, the period to start to take the testimony is normally fixed at the earliest at 14h00 (2:00 p.m.) of the next working day. . . ." (emphasis added)).

could have submitted before her deposition, but failed to do.<sup>631</sup> The petition requested that the interrogatories be put to Mrs. Usher de Ranson's at the Consulate of Ecuador in Panama, where she resided.<sup>632</sup>

406. Notably, and contrary to Merck's statement to this Tribunal, Merck's petition did not "object to Ms. Usher de Ranson's testimony due to the lack of notice."<sup>633</sup>

407. As Merck's lawyer in the case acknowledges, Judge Toscano granted this request<sup>634</sup> and resolution of the case awaited Mrs. Usher de Ranson's further testimony.

408. A year passed after Mrs. Usher de Ranson's initial deposition, and even though the parties planned to have her questioned through the Ecuadorian Consulate in Panama for months, Merck did not submit any additional questions to be put to her during her second deposition.

409. At the end of that year, the court was informed by NIFA that Mrs. Usher de Ranson was in Quito again. Judge Toscano agreed to question the witness with Merck's questions during her

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<sup>631</sup> MSDIA's Petition of 29 June 2004, *NIFA v. MSDIA*, Trial Court (C-145) ("Article 24, numeral 15 of the Political Constitution of the Nation establishes, as a guarantee of due process, that in any type of proceedings, the witnesses shall be required to appear before the judge and answer the corresponding interrogatory. Based on this constitutional provision, we request that through the Ministry of Foreign Affairs and through diplomatic means, you appeal to the consul of Ecuador in Panama City, so that he will re-examine Ms. Anne Kareen Ranson, regarding the following..."). In a separate motion submitted on the same date, Merck sought to disqualify Usher de Ranson's testimony alleging that she did not have personal knowledge of the relevant facts because she was removed from Merck's real estate broker negotiation's team. See MSDIA Request, *NIFA v. MSDIA*, Trial Court (29 June 2004) (R-23). On June 30, 2004, at 8:32 am, the court admitted all the evidence proposed by the parties. In this order, Judge Toscano took notice of Merck's disqualification of Mrs. Usher de Ranson. Under Ecuadorian law, the judge takes notice of the disqualification of a witness and decides whether or not the disqualification has merit at the time the judgment is issued. See Court of Appeals Order, *NIFA v. MSDIA* (30 June 2004) (R-28).

<sup>632</sup> MSDIA's Petition of 29 June 2004, *NIFA v. MSDIA*, Trial Court (C-145).

<sup>633</sup> Claimant's Memorial, ¶ 48 (citing MSDIA's Petition of 29 June 2004, *NIFA v. MSDIA*, Trial Court (C-145))

<sup>634</sup> Ponce Statement, ¶ 12.



stay.<sup>635</sup> Merck's questions were posed verbatim to and answered by Mrs. Usher de Ranson on 29 August 2005.<sup>636</sup>

410. Thus, Merck's allegations that it was not notified of Mrs. Usher de Ranson's initial testimony, was prevented from attending and did not have an opportunity to have her cross-examined are not supported by the evidence in this arbitration. Not only, as counsel himself acknowledged, was Merck properly served with notice, but it could have submitted written questions for her in advance. Merck's counsel also could have attended her testimony, had that notice been diligently followed-up.

411. Moreover, Merck suffered no prejudice in any event. As noted above, there is no right to directly confront the witness in Ecuador on cross-examination, and thus the fact that counsel failed to attend was superfluous.<sup>637</sup> Notices of deposition are given to afford the opposing party opportunity to submit their questions in writing to the judge,<sup>638</sup> and all questions timely

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<sup>635</sup> NIFA did not submit any additional questions since her first deposition.

<sup>636</sup>Testimony of Anne Karsen Renson [a/k/a Anne Usher de Ranson], *NIFA v. MSDIA*, Trial Court (29 Aug. 2005), p. 1 (C-149) ("In Quito, on August 29, 2005 at 14:20, Mrs. Anne Karsen Renson appeared before the undersigned, Juan Toscano Garzón, Atty., Judge of the Second Civil Court of Pichincha in order to render her deposition and answer the questions posed by the defendant.")

<sup>637</sup> Aguirre Opinion, ¶ 7.7.3.

<sup>638</sup> Aguirre Opinion, ¶ 7.7.3. According to Article 219 of the Ecuadorian Civil Procedure Code (RLA-107):

If a party needs to examine a witness, that party must submit to the judge the list of witnesses that will testify, as well as the questionnaire that will be the basis for their examination.

The judge will order that the request (to depose a witness) be transmitted to the other party, so to allow this other party to ask that the witnesses also testify about other facts, which will be raised in a questionnaire.

The judge will determine, in light of the complaint, the answer to the complaint and the background of the process, which questions the witness must answer from those posed by each party; and the judge is entitled to make any inquiries or formulate any questions taking into account the characteristics of the witness, and asking such questions as the witness answers them, according to the intellectual capacity of the witness.

[...]

The judge will indicate the date and time to start the deposition. This will be notified to the parties, so they can attend the proceeding.

submitted by Merck were put to the witness by Judge Toscano. Merck received a full transcript of the testimony and subsequently submitted cross-examination questions based thereon, all of which were put to the witness by Judge Toscano at the second deposition conducted at Merck's own request. Moreover, Merck was able to have another employee of its realty sales agent testify in rebuttal to Mrs. Usher de Ranson.<sup>639</sup>

412. But Merck seeks to discredit the second deposition of Mrs. Usher de Ranson as well. Merck alleges that it was not properly notified of her second deposition and that the judge failed to put to the witness the additional written questions Merck had submitted for this purpose. Neither of these allegations is supported by the evidence in this case.

413. The court's second deposition order, issued on *Thursday, 25 August 2005*, stated that Mrs. Usher de Ranson would be deposed "starting from [*Monday*] August 29 starting from 9am."<sup>640</sup> The court's order was notified to the attorneys of record at 4:49 PM on 25 August 2005.<sup>641</sup> Once again, in accordance with practice, it would be expected that counsel would have checked his court mailbox at the end of the business day and would have retrieved the notice in time to attend the deposition and in time to submit any further questions. Mr. Ponce's statement

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<sup>639</sup> See Testimony of Edgardo Jaén, *NIFA v. MSDIA*, Trial Court (18 Oct.2005) (C-151).

<sup>640</sup> Trial Court Order of 25 August 2005, *NIFA v. MSDIA*, p. 1 (C-147).

<sup>641</sup> *Id.* The certification of notification was signed by the court's clerk:

In Quito, on August 25, 2005, at 4:49 PM, I notified the foregoing decision to the LEGAL REPRESENTATIVE OF NUEVA INDUSTRIA FARMACÉUTICA ASOCIADA S.A. (NIFA S.A.) in judicial box No. 899 of ANDRADE DÁVILA JUAN CARLOS, ESQ., MERKSHARP DOHME (INTER AMERICAN), ORTIZ MONASTERIO LUIS EDUARDO, WINTOUR ENRIQUE CARLOS FEDERICO, in judicial box No. 572 of PONCE PALACIOS LUIS, ESQ.

– I so attest.

[Illegible signature]

Senior Clerk.

*Id.* See Aguirre Opinion, ¶ 7.7.4.

that they were “not provided with notice of the hearing” is not sustained by the related evidence.<sup>642</sup>

414. Mrs. Usher de Ranson was deposed on 29 August 2005 at 14h20.<sup>643</sup> Merck’s counsel had the entire business day on Friday, 26 August, and the entire morning on Monday, 29 August, to ascertain that her deposition would be held that day. In fact, Dr. Alejandro Ponce Martinez does not deny that he knew about the time of her deposition. He affirms that “when we learned about the presence of Mrs. Usher de Ranson, we searched for the place where the testimony was being taken and did not find it.”<sup>644</sup> Dr. Alejandro Ponce Martinez’s statement that they could not find the place of her deposition is contradicted by NIFA’s counsel, who affirmed it took place at the hearing room.<sup>645</sup>

415. As to the additional questions submitted by Merck’s counsel a year later after its initial set of questions,<sup>646</sup> Merck submitted them in the morning of 29 August, at 8:43 AM, knowing well that her deposition could start as early as 9 AM the same day.<sup>647</sup> The court did not accept the new questions because they were submitted too late<sup>648</sup>, more than a year after the evidentiary

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<sup>642</sup> Ponce Statement, ¶ 12.

<sup>643</sup> Testimony of Anne Karsen Renson [a/k/a Anne Usher de Ranson], *NIFA v. MSDIA*, Trial Court (29 Aug. 2005) p. 1 (C-149) (“In Quito, on August 29, 2005 at 14:20, Mrs. Anne Karsen Renson appeared before the undersigned, Juan Toscano Garzón, Atty., Judge of the Second Civil Court of Pichincha in order to render her deposition and answer the questions posed by the defendant.”).

<sup>644</sup> Ponce Statement, ¶ 13.

<sup>645</sup> NIFA Submission, *NIFA v. MSDIA*, Trial Court (6 Sept. 2005) (R-49).

<sup>646</sup> Merck’s counsel had an entire year to submit its supplemental questions because her deposition in Panama was approved by the judge. Moreover, Merck’s counsel had known about Mrs. Usher de Ranson’s initial responses to NIFA’s interrogatories for over a year. See Testimony of Anne Kareen Ranson [a/k/a Anne Usher de Ranson], *NIFA v. MSDIA*, Trial Court, (28 June 2004) (C-144).

<sup>647</sup> MSDIA’s Petition of 25 August 2005, *NIFA v. MSDIA*, Trial Court (R-45).

<sup>648</sup> Trial Court Order (1 Sept. 2005) (R-48).

period had ended.<sup>649</sup> The only reason Mrs. Usher de Ranson's testimony was taken this late in the proceedings was to satisfy Merck's right to present its original interrogatory. But Merck was not entitled to produce a new set of questions. This attempt to introduce new questions was abusive under Ecuadorian law. There is no evidence in the record that Merck appealed or objected to the trial court's decision not to admit its new questions for Anne Usher de Ranson.

416. The following business day, 30 August, Merck's counsel requested that Mrs. Usher de Ranson's testimony be nullified on the basis of Merck's absence from the deposition and the Court's failure to pose Merck's new questions.<sup>650</sup> NIFA's counsel objected to the petition, certifying that the deposition was taken on the date ordered by the court, in the hearing room.<sup>651</sup> The court subsequently denied Merck's petition to nullify Mrs. Usher de Ranson's testimony.<sup>652</sup>

417. Indeed, this was the fourth attempt by Merck to exclude Mrs. Usher de Ranson's evidence underscoring the extent to which it was harmful to Merck's case. Following her initial deposition at NIFA's request, Merck resorted to a number of procedural devices to exclude Mrs. Usher de Ranson's testimony, starting with its request that her testimony was irrelevant,<sup>653</sup> followed with another request to nullify her testimony due to non-presence of Merck's counsel at

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<sup>649</sup> MSDIA's Petition of 25 August 2005, *NIFA v. MSDIA*, Trial Court (C-146). The Trial Court ordered the opening of the evidentiary phase on 15 June 2004. See Electronic Docket, Case No. 2003-1022, *NIFA v. MSDIA*, Second Court for Civil Affairs of Pichincha (First Instance Court), Entry 19 (R-121).

<sup>650</sup> MSDIA also complained that the deposition was done secretly at an unusual place. See MSDIA Petition (30 Aug. 2005) (R-46).

<sup>651</sup> NIFA Submission, *NIFA v. MSDIA*, Trial Court (6 Sept. 2005) (R-49).

<sup>652</sup> Trial Court Order, *NIFA v. MSDIA* (23 Sep. 2005) (R-50).

<sup>653</sup> MSDIA Request, *NIFA v. MSDIA*, Trial Court (29 June 2004) (R-23).

her deposition,<sup>654</sup> and an objection to the documents provided by Mrs. Usher de Ranson.<sup>655</sup> But none of these petitions had merit under Ecuadorian law.

418. In short, there was nothing “highly unusual and contrary to normal court procedures”<sup>656</sup> in handling the testimony of Mrs. Usher de Ranson. In particular, the court was not “deliberately shielding NIFA’s witness from cross-examination.”<sup>657</sup> In fact, as Dr. Alejandro Ponce Martinez himself admits, the trial court issued the order to have the deposition take place in Panama. It also issued the order to have her deposed when she was next in Ecuador. The only purpose of having her appear in court the second time was to question her with Merck’s interrogatories. It is clear that Merck’s complaints about the handling of Mrs. Usher de Ranson’s testimony are after-the-fact, artificial concoctions rather than serious charges of irregularity. This is demonstrated starkly by the fact that Merck itself did not see the alleged irregularities as due process violations sufficient to warrant inclusion in its appeal of the first instance judgment. Merck’s notice of dispute of 8 June 2009, which was submitted after the trial court judgment was issued on 17 December 2007, did not allege any problems with notices.<sup>658</sup> Nor did Merck’s nullity petition before the court of appeals invoke alleged irregularities with respect to the notices. If the notices

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<sup>654</sup> MSDIA Petition, *NIFA v. MSDIA*, Trial Court (30 Aug. 2005) (R-46).

<sup>655</sup> MSDIA Submission, *NIFA v. MSDIA*, Trial Court (1 Sept. 2005) (R-47). Merck’s counsel even resorted to appealing Judge Toscano’s decision not to annul her testimony. *See* MSDIA Appeal against writ, *NIFA v. MSDIA*, Trial Court (28 Sept 2005) (R-51). When the court rejected the appeal, Merck’s counsel submitted another form of appeal (“recurso de hecho”). *See also* MSDIA Factual Appeal, *NIFA v. MSDIA*, Trial Court (6 Oct. 2005) (R-52). Both recourses were rejected by Judge Toscano due to lack of merit. Under Ecuadorian civil procedure, such decisions are not appealable before the trial court; they can become grounds for nullity petition of the final judgment of the court.

<sup>656</sup> Ponce Statement, ¶ 14.

<sup>657</sup> *Id.*

<sup>658</sup> MSDIA’s Notice of Dispute (8 June 2009).

were so “grave” that they deprived Merck of due process, they could, and would, have been brought as basis for nullity of the trial court’s decision.<sup>659</sup> They were not.

419. This contrasts with the overwhelming effect of the entire record that shows that the proceedings were conducted by Judge Toscano even handedly, affording both litigants equal treatment. Nothing in the record of the proceeding as a whole has been shown here to indicate “repeated deprivations of MSDIA’s basic due process rights” and “baseless and one-sided procedural rulings.”<sup>660</sup>

420. To the contrary, the trial court record contains a number of examples, where Judge Toscano granted Merck’s requests and petitions:

- The court allowed the deposition of Merck’s factual witness, Mr. Edgardo Jaen,<sup>661</sup> which was intended to rebut the testimony of Mrs. Usher de Ranson. Since Mr. Jaen was also a non-resident, Judge Toscano granted Merck’s request to have him deposed at the Consulate of Ecuador in Panama. On 18 October 2005, the Consulate of Ecuador in Panama took the deposition of Edgardo Jaen.<sup>662</sup>
- Following the evidentiary phase, on 28 March 2006, Merck submitted to the court an oath by Alejandro Yorovi, who purportedly had personal knowledge of relevant facts relating to the dispute between Merck and NIFA.<sup>663</sup> Despite

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<sup>659</sup> Ecuadorian Code of Civil Procedure (2011) (RLA-107) (“Art. 344.- Without prejudice to the provisions in article 1014, the process is null, in whole or in part, only when one of the substantial formalities established in this Code has been omitted. Art. 345. - The omission of any of the substantial formalities established in this paragraph, or the violation of the process described in article 1014 could be used as the basis for filing an appeal. Art. 346 - The following are substantial formalities common to all cases and instances...4) Notification of the complaint served on the respondent or the person legally representing him”).

<sup>660</sup> Cf. Claimant’s Memorial, ¶ 270.

<sup>661</sup> Electronic Docket, Case No. 2003-1022, *NIFA v. MSDIA*, Second Court for Civil Affairs of Pichincha (First Instance Court), Entry 35 (R-121).

<sup>662</sup> Testimony of Edgardo Jaén, *NIFA v. MSDIA*, Trial Court, dated 18 October 2005 (C-151).

<sup>663</sup> MSDIA Petition, *NIFA v. MSDIA*, Trial Court (28 Mar 2006) (R-55).

NIFA's objection to the admission of Mr. Alejandro Yerovi's oath<sup>664</sup>, the court accepted Mr. his oath and rejected NIFA's objection.<sup>665</sup>

- In response to Merck's request to send an order to the Superintendent of Companies to produce certified copies of NIFA's balance sheets since NIFA was incorporated as a company, the trial court requested the Superintendent of Companies to submit information about NIFA as requested by Merck.<sup>666</sup>
- In response to Merck's request that the court send an order to the tax authorities to produce NIFA's tax filings in 2002 and 2003, the court requested the tax authorities to submit the information about NIFA requested by Merck.<sup>667</sup>

421. In addition, other instances in the record show that the trial court (Judge Toscano) was not biased in favor of NIFA as suggested by Merck. In its order of 25 April 2005, without prejudice, *ex officio* and under Art. 46(c) of the Arbitration and Mediation Act, Judge Toscano invited the parties to go into a mediation hearing at the Center of Mediation of the Superior Court of Justice of Quito.<sup>668</sup> NIFA responded that it was not in agreement "that this current matter should be referred to the Mediation Center of the Superior Court of Justice of Quito, given that the defendant company has never shown signs that it wants to resolve the litigation...."<sup>669</sup> Dr. Alejandro Ponce Martinez, Merck's attorney, on the other hand, expressed that it was agreeable to hold the mediation hearing.<sup>670</sup> Absent the parties' mutual agreement, Judge Toscano was unable to refer the case to mediation.

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<sup>664</sup> MSDIA Submission, *NIFA v. MSDIA*, Trial Court (16 June 2006) (R-57).

<sup>665</sup> Court Order, *MSDIA v. NIFA*, Trial Court Trial (11 Jul. 2006) (R-59).

<sup>666</sup> Letter from Trial Court to Superintendent of Companies (20 Aug. 2004) (R-31).

<sup>667</sup> Letter from Trial Court to Director General of Internal Revenue Services (20 Aug. 2004) (R-32).

<sup>668</sup> Electronic Docket, Case No. 2003-1022, *NIFA v. MSDIA*, Second Court for Civil Affairs of Pichincha (First Instance Court), Entry 82 (R-121).

<sup>669</sup> MSDIA Petition, *NIFA v. MSDIA*, Trial Court (26 Apr. 2005) (R-38).

<sup>670</sup> MSDIA Petition, *NIFA v. MSDIA*, Trial Court (28 Apr. 2005) (R-39).

422. The foregoing examples show that the principle of contradiction was observed during the proceedings. The principle of contradiction grants each party the possibility to express an opinion on the statements of its adversary, to examine and discuss its adversary's evidence and to refute it by its own evidence.<sup>671</sup> Merck was able to avail itself of this right.

**b. Proceedings Before Temporary Judge Chang-Huang Castillo**

423. The second category of charges relates to Merck's attempt to impugn the process by which the first instance judgment was eventually rendered by Temporary Judge Chang-Huang.

Merck alleges the following procedural flaws:

- a) that she did not take any action on the case until she took cognizance of the case at 2:06PM on 17 December 2007, the date when she issued the judgment;<sup>672</sup>
- b) that the circumstances indicated that the judgment was not the product of Judge Chang Huang's own work;
- c) that Judge Chang-Huang has admitted that the judgment resulted for improper influence, and

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<sup>671</sup> The principle of contradiction falls within the principle *audi alteram partem* recognized by the International Court of Justice in the *Nuclear Tests* case, referring to the non-appearance of France. The ICJ held that the principle is not absolute:

Although as a judicial body the Court is conscious of the importance of the principle expressed in the maxim *audi alteram partem*, it does not consider that this principle precludes the Court from taking account of statements made subsequently to the oral proceedings, and which merely supplement and reinforce matters already discussed in the course of the proceedings, statements with which the Applicant must be familiar. Thus, the Applicant, having commented on the statements of the French authorities, both that made prior to the oral proceedings and those made subsequently, could reasonably expect that the Court would deal with the matter and come to its own conclusion on the meaning and effect of those statements. The Court, having taken note of the Applicant's comments, and feeling no obligation to consult the Parties on the basis for its decision finds that the reopening of the oral proceedings would serve no useful purpose.

*Nuclear Tests (Australia v. France), Judgment, I.C.J. Reports 1974, p. 253, p. 265 (RLA-26).*

<sup>672</sup> Memorial, ¶ 54.



d) that Merck was given notice of the judgment in a manner contrary to general court practice and calculated to cause Merck to miss the window for filing an appeal.

424. None of these accusations is borne out by the evidence submitted and are contradicted by the record of the case, relevant court practice, and the evidence produced by Merck and Judge Chang Huang in the proceedings instituted against her by Merck.<sup>673</sup>

425. First, Merck proffers no evidence –that the case file was not reviewed by the judge during the three months after her appointment and before she issued the judgment. Temporary Judge Chang Huang testified that she studied her cases, including the *NIFA v. Merck* case, incrementally over a period of time; she expressly denied allotting a few days, let alone few hours, to the resolution of this case.<sup>674</sup>

426. Merck also finds fault with the fact that the “[c]ourt records further reveal that she took her first action in the case—‘taking cognizance’ of the matter, a step under Ecuadorian civil procedure by which the judge formally takes jurisdiction—on 17 December 2007, at 2:06 p.m.,”<sup>675</sup> insinuating that this means that in “less than three and a half hours . . . Judge Chang-

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<sup>673</sup> On April 21, 2009, Merck filed claims for damages against Victoria Flordelina Chang-Huang Castillo de Rodriguez (Temporary Judge) and Ricardo Javier Lopez Arauz (Judicial Assistant 1 of the Juzgado Segundo de lo Civil de Pichincha) because of the additional attorney’s fees spent to retain new counsel to address the improper judgment reached through judicial misconduct (Case No. 2009-0477). Merck sought as relief compensation for the resulting damages, which was the cost of the additional attorney’s fees. *See generally* Electronic Docket, Case No. 2009-0477, *MSDIA v. Chang Huang*, Twelfth Court for Civil Affairs of Pichincha (First Instance Court) (R-125).

The Twelfth Court for Civil Affairs of Pichincha (trial court) denied Merck’s allegations against Judge Chang Huang in a judgment of 28 June 2010. *See Id.* Merck appealed this judgment on June 30, 2010. The case is currently *sub judice* before the court of appeals. *See generally* Electronic Docket, Case No. 2010-1037, *MSDIA v. Chang Huang*, Provincial Court of Justice of Pichincha, First Civil and Commercial Chamber (Second Instance Court) (R-123).

<sup>674</sup> Witness Statement of Victoria Chang-Huang Castillo, *MSDIA v. Chang Huang*, Twelfth Court for Civil Affairs of Pichincha (First Instance Court) (13 Jan 2009) (in response to questions 48, 50, 51, 59, 71, 77, and 104) (R-69).

<sup>675</sup> Memorial, ¶ 54.

Huang issued a 15-page decision resolving liability and damages entirely in favor of NIFA.”<sup>676</sup> But this conduct does not follow from its premise in light of ordinary court practices. Taking cognizance of a case is not a pre-condition to a judge’s review of the record.<sup>677</sup> Nor is it indicative of when the judge began to work on the judgment.<sup>678</sup> The act of taking cognizance is a formal procedural step, which must be noted before a judge issues an order or judgment in a case.<sup>679</sup> Thus, the time a judge takes cognizance of the case has nothing to do with the time it took to prepare the judgment or review the case file. It does, however, reflect the time when the judge is ready to publish her decision. Usually, this step is noted at the beginning of the judgment.<sup>680</sup> That is precisely what the Temporary Judge Chang Huang did in the trial court judgment.<sup>681</sup>

427. Moreover, Merck’s insinuation ignores the procedural posture of the case resulting from the fact that Judge Chang Huang replaced the previous judge and had to resume the case where it was left. In Ecuador, judicial work on cases is iterative; as cases are passed on to successive judges, each builds upon the work of the earlier judge(s), which is not indicated in the court file. Thus, it is common for a succeeding judge’s work to approach completion long before formally accessing the court file or formally taking cognizance of a case.<sup>682</sup>

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<sup>676</sup> *Id.*

<sup>677</sup> Aguirre Opinion, ¶ 7.7.6.

<sup>678</sup> *Id.*

<sup>679</sup> As a general rule, the judges take cognizance of the case only after studying the record to ensure that no conflict of interest arises.

<sup>680</sup> See also NCJ Judgment, *NIFA v. MSDIA*, p. 1 (C-203) (“we take over cognizance of this case pursuant to Articles 183 and 190 of the Organic Code of the Judiciary and Article 1 of the Law of Cassation.”)

<sup>681</sup> Trial Court Judgment, *NIFA v. MSDIA*, dated 17 December 2007 (C-3).

<sup>682</sup> See Aguirre Opinion, ¶ 7.7.6.

428. In short, Merck has not shown any irregularity with respect to the time devoted by the Temporary Judge Chang Huang to preparing of the judgment.

429. Nor does Merck's evidence demonstrate any irregularity with respect to the drafting of the judgment. It is irrelevant that Judge Chang Huang did not personally write the entire judgment. As Judge Chang Huang herself has testified, the sections of the judgments she rendered setting out the procedural history and recitation of the parties' allegations are generally drafted by her assistants.<sup>683</sup> This is hardly an unusual judicial practice, and is certainly common in the courts of Merck's own country.

430. Moreover, the similarities in language between the factual allegations in NIFA's complaint and the trial court judgment's recitation of NIFA's allegations are unsurprising and entirely unremarkable given that the recitation of the factual allegations is expressly attributed to the plaintiff's representative: the first 8 pages of the judgment (the first 8 pages of Merck's English translation) all follow the prefatory words, "He states: ..."<sup>684</sup> This preface clearly signals that the judgment recites the factual allegations made by the plaintiff NIFA *verbatim*. It is noteworthy, although omitted by Merck, that the judgment also cites *verbatim* the defenses raised *by Merck*.<sup>685</sup> There is nothing unusual about this practice of drafting the judgment by express incorporation of the parties' respective allegations. As Judge Chang Huang testified,

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<sup>683</sup> Witness Statement of Victoria Chang-Huang Castillo, *MSDIA v. Chang Huang*, Twelfth Court for Civil Affairs of Pichincha (First Instance Court) (13 Jan 2009) (in response to questions 48, 50, 51, 59, 71, 77 and 104) (R-69).

<sup>684</sup> Trial Court Judgment, *NIFA v. MSDIA*, dated 17 December 2007, p. 1 (C-3) ("He states: a) That Nueva Industria Farmacéutica Asociada S.A. (NIFA S.A.) is an Ecuadoran pharmaceuticals company that has been producing and marketing medicine in the domestic market for the last twenty-eight years...")

<sup>685</sup> Trial Court Judgment, *NIFA v. MSDIA*, dated 17 December 2007, p. 8 (C-3), ("[T]he defendant company appears at trial and proposes the following exceptions: 1) Denies that some of the points of fact of the case are true, especially the statement that Merck Sharp & Dohme (Inter American) Corporation was the one that terminated the negotiations that were taking place, because it was the plaintiff that decided to suspend and terminate all negotiations....")

she drafted the reasoning and *disposif* of the judgment.<sup>686</sup> Thus, Merck's evidence does not demonstrate any irregularity with respect to authorship of the judgment.

431. Merck's effort to show that the judgment was the result of improper influence is equally unsubstantiated. Merck seeks to impugn the trial court judgment by alleging that the Temporary Judge Chang Huang herself admitted in two alleged private conversations that the judgment was the result of improper influence. But this effort suffers from five infirmities: There is no direct evidence of improper influence. Judge Chang Huang herself has denied both the fact of the alleged conversations and that improper influence was brought to bear. A court convened at Merck's behest to adjudicate these allegations has rejected them. The two conversations in which the alleged admissions were supposedly made are based solely upon the statements of interested persons related to Merck in less than credible circumstances. And the two stories that were supposedly told by Judge Chang Huang completely contradict each other.

432. In Merck's Reply in the interim measures proceedings, Merck relied on the statements allegedly made by Temporary Judge Chang Huang to the two clients of Mr. Marcelo Santamaria Martinez, one of Merck's counsel in the *NIFA* litigation, when they accompanied him to the court and met with Judge Chang Huang in September 2008.<sup>687</sup> But even a cursory examination of those statements shows that those witnesses did not testify that she admitted any wrongdoing in the *NIFA* litigation. As Ecuador pointed out in its Rejoinder (on the interim measures), Merck supplied "[t]wo witness statements, with obvious self-serving content that were largely dictated

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<sup>686</sup> Witness Statement of Victoria Chang-Huang Castillo, *MSDIA v. Chang Huang*, Twelfth Court for Civil Affairs of Pichincha (First Instance Court) (13 Jan 2009) (in response to questions 48, 50, 51, 59, 71, 77 and 104) (R-69).

<sup>687</sup> See Testimony of Jorge Antonio Pinos Pérez, *MSDIA v. Chang-Huang* (4 Dec. 2008) (C-88); see Testimony of María Cristina Ponce Villacís, *MSDIA v. Chang-Huang* (C-89).

by its local counsel.<sup>688</sup> What is more interesting, however, is that Merck submitted these witness statements in its complaint against Judge Chang Huang before the Twelfth Civil Court of Pichincha. Merck has not deemed pertinent to produce the decision rendered in its case.”<sup>689</sup> In its judgment, the Ecuadorian court dismissed the testimony of the witnesses as required by Art. 216 (6) of the Code of Civil Procedure, stating that the witnesses in question had a “dependent relationship” with the law firm of Quevedo & Ponce (local counsel for Merck), and were therefore not impartial.<sup>690</sup>

433. But Merck continues to rely on these statements.<sup>691</sup> Moreover, it has produced a completely new statement by Mr. Santamaria, who allegedly had a completely different conversation with Judge Chang Huang on 9 March 2012.<sup>692</sup> Mr. Santamaria states that during this conversation, Judge Chang Huang conveniently “confirmed that serious improprieties had occurred in connection with the issuance of the first instance judgment.”<sup>693</sup> What did former Judge Chang Huang allegedly state? That “*it was a dirty trick that was played on me by those wretched drunken scoundrels Juan [Toscano] and Ricardo López [court’s assistant], because I*

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<sup>688</sup> Testimony of Jorge Pinos, *MSDIA v. Chang-Huang*, Second Court for Civil Affairs of Pichincha (4 Dec. 2008) (C-88); *see* Testimony of Maria Cristina Ponce, *MSDIA v. Chang-Huang*, Second Court for Civil Affairs of Pichincha (4 Dec. 2008) (C-89).

<sup>689</sup> Ecuador’s Rejoinder, ¶ 40. *See* Electronic Docket, Case No. 2009-0477, *MSDIA v. Chang Huang*, Twelfth Court for Civil Affairs of Pichincha (First Instance Court), Entry 26 (R-125).

<sup>690</sup> Electronic Docket, Case No. 2009-0477, *MSDIA v. Chang Huang*, Twelfth Court for Civil Affairs of Pichincha (First Instance Court), Entry 26, p. 11 (R-125). The two witnesses accompanied Merck’s local counsel to request a decision on a divorce by mutual consent. Under Article 216 of the Code of Civil Procedure, dependent witnesses are not considered to be suitable witnesses. *See* Code of Civil Procedure (RLA-107).

<sup>691</sup> Claimant’s Memorial, ¶ 189; Ponce Statement, ¶ 23.

<sup>692</sup> Merck filed its application for interim measures on 12 June 2012.

<sup>693</sup> Ponce Statement, ¶ 24; Santamaría Martínez Witness Statement, ¶ 3.

*was new on the court* [Second Court for Civil Cases of Pichincha].”<sup>694</sup> She also allegedly stated that “she did not get a single cent for that ruling.”<sup>695</sup>

434. Mr. Santamaria claims to have recorded this conversation “a few months later.”<sup>696</sup> Yet he also avers that his recording is “literal.”<sup>697</sup> The ability to recall months later a conversation in such vivid detail is rare and fallibility with respect to such recollections is common. What is even more curious is that Merck made no mention whatsoever of this critical encounter in Merck’s interim measures pleadings, all of which post-dated the alleged encounter.

435. In addition to being the hearsay relayed by Merck’s own attorney or witnesses who had a dependent relationship with the attorney, the statements are unreliable for other cogent reasons. Merck itself recognizes that they are “conflicting.”<sup>698</sup> And for obvious reasons. According to the most recent hearsay, Mr. Santamaria claims that Judge Chang Huang told him that “it was a *dirty trick*” played by Judge Toscano and his assistant Lopez.<sup>699</sup> He relays that Judge Chang Huang told him that Mr. López obtained her signature without her realizing what she was signing.<sup>700</sup> Yet, in the prior statements relayed by the two witnesses, who in 2008 accompanied Mr. Santamaria to Judge Chang Huang’s chambers on a different matter, Judge Chang Huang allegedly stated that “everyone wanted to meddle with her decision and how she was being

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<sup>694</sup> Santamaría Martínez Witness Statement, attached report, ¶ 2.

<sup>695</sup> *Id.*

<sup>696</sup> *Id.*, ¶ 3.

<sup>697</sup> *Id.*

<sup>698</sup> Claimant’s Memorial, ¶ 189.

<sup>699</sup> *See* Santamaría Martínez Witness Statement, and attached report, ¶ 2.

<sup>700</sup> *See* Santamaría Martínez Witness Statement, and attached report, ¶ 2; Ponce Statement, ¶¶ 24-25.

pressured.”<sup>701</sup> The same witness also stated that Judge Chang Huang “did not specify what kind of pressure” was allegedly exerted on her.<sup>702</sup> This is hardly reliable evidence of irregularity.

436. In her own testimony submitted before the court in the *Merck v. Chang Huang* proceedings, Judge Chang Huang stated nothing about being generally “pressured” or “tricked” into issuing her judgments. To the contrary, she affirmed that she drafted the dispositive section of the judgment and repeatedly denied that other people (outsiders) wanted to interfere or interfered with her decision.<sup>703</sup> She also specifically denied knowing or remembering Mr. Santamaria, let alone having a conversation with him about the NIFA case.<sup>704</sup>

437. In short, Merck has not demonstrated, much less with the clear and convincing evidence necessary, any improper influence on the first instance judgment.

438. Finally, Merck’s story that it was notified of the court’s judgment improperly and in a manner intended to cause Merck to miss the appeal period is also full of holes. The trial court judgment contains at the bottom of its first page a certification by the court’s clerk that the judgment was notified to the parties at 5:30PM on 17 December 2007.<sup>705</sup> In addition, the

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<sup>701</sup> Testimony of Jorge Antonio Pinos Pérez, *MSDIA v. Chang-Huang*, dated 4 December 2008, p. 2 (C-88) (in response to Question 9). See also Exhibit C-89, Testimony of María Cristina Ponce Villacís, *MSDIA v. Chang-Huang*, dated 4 December 2008, p. 2 (in response to Question 9 (different response)).

<sup>702</sup> Exhibit C-88, Testimony of Jorge Antonio Pinos Pérez, *MSDIA v. Chang-Huang*, dated 4 December 2008, p. 2 (in response to Question 13 (“Witness please state if, on said occasion, Dr. Victoria Chang-Huang de Rodríguez also expressed that when first took office, she was pressured. ANSWER: Yes, she said she was pressured and yet didn’t specify what kind of pressure.”))

<sup>703</sup> Witness Statement of Victoria Chang-Huang Castillo, *MSDIA v. Chang Huang*, Twelfth Court for Civil Affairs of Pichincha (First Instance Court) (13 Jan. 2009) (R-69) (in response to Questions 59, 60).

<sup>704</sup> *Id.* (in response to Questions 53, 58).

<sup>705</sup> Exhibit C-3 (“In Quito, on 17 December two thousand seven, at 17 hours and thirty minutes, I noticed the foregoing judgment: to THE LEGAL REPRESENTATIVE OF NUEVA INDUSTRIA FARMACEUTICA ASOCIADA S.A. (NIFA S.A.) in box No. 809 of Dr. ANDRADE DAVILA JUAN CARLOS ORTIZ MONASTERIO LUIS EDUARDO. MERKSHARP DOHME (INTER AMERICAN). WINTOUR ENRIQUE CARLOS FEDERICO in box No. 572 of Dr. PONCE PALACIO LUIS. I certify.”)

evidence that Merck's counsel was physically notified of the judgment is found in the court's daily bulletin listing all the notifications delivered by the court.<sup>706</sup> As stated earlier, unless rebutted by compelling evidence, the court clerk's certification, constitutes definitive evidence that the judgment was notified to the parties' counsel as stated therein.<sup>707</sup> Both of the documents certifying notification were relied on by the Provincial Court of Justice of Pichincha in the *Merck v. Chang Huang* proceedings to conclude that the judgment was physically delivered to the two attorneys' judicial mailboxes as indicated therein.<sup>708</sup>

439. But even if the judgment delivered to the two attorneys' judicial mailboxes somehow disappeared, by Merck's own admission it received an email from the court, which is normal practice, purporting to attach a communication from the court and actually attaching an electronic copy of at least a major portion of the judgment. This email notification with the attachment was sent to the email address of Dr. Luis Ponce Palacios, one of Merck's local attorneys at Quevedo & Ponce (and a colleague of Dr. Alejandro Ponce Martinez).

440. Mr. Luis Ponce testified that the document attached to the email was incomplete; but he does not testify that the attachment could not be discerned as a judgment or that there was on his part any confusion that what he received was a judgment, and not a simple order or notice.<sup>709</sup> Nor could there have been. The incomplete version of the judgment allegedly received by Mr. Ponce contained all indicia of a final judgment, commencing with a recitation of the factual

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<sup>706</sup> Bulletin of Notifications Trial Court (17 Dec. 2007) (R-60). See Aguirre Opinion, ¶ 7.7.5 and fn. 37.

<sup>707</sup> Aguirre Opinion, ¶¶ 7.7.4, 7.7.5.

<sup>708</sup> Electronic Docket, Case No. 2009-0477, *MSDIA v. Chang Huang*, Twelfth Court for Civil Affairs of Pichincha (First Instance Court), Entry 26, at p. 13 (R-125).

<sup>709</sup> Exhibit C-158, Testimony of Dr. Luís Ricardo Ponce Palacios, *MSDIA v. Chang-Huang*, dated 4 December 2008, at 1 (in response to Question 3: "I attest that that the verdict at hand was incomplete.")



allegations, then setting forth the defendant's objections, and including the formulaic language used by judges to indicate that, taking into account the facts, the following decision is made.

441. Moreover, the issue of the integrity of the electronic transmission of the trial court judgment was raised and adjudicated in the *Merck v. Chang Huang* case. The court found that the full version of the judgment was recorded in the Ecuadorian Automated Judicial Processing System (SATJE).<sup>710</sup> It relied on the certification from the Department of Information Technology of the Pichincha Provincial Office of the Judiciary Council that the judgment was entered in the system as “complete.”<sup>711</sup> The court, however, did point out the vulnerabilities of the SATJE identified by an expert entrusted with analyzing the integrity of email transmission.<sup>712</sup> It explained that if there was any error in transmission, it was due to the fact that the SATJE was imperfect, and that there could be errors in the transmission. The court, however, held that Merck had not established any wrongdoing in the transmission.

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<sup>710</sup> Electronic Docket, Case No. 2009-0477, *MSDIA v. Chang Huang*, Twelfth Court for Civil Affairs of Pichincha (First Instance Court) p. 8 (R-125)

<sup>711</sup> *Id.*

<sup>712</sup> *Id.*

The court explained:

EIGHTH [ . . . ]

The expert, carrying out the task entrusted to him, Eng. Luis Mafla, submitted his expert report on pages 604 to 609, and stated, inter alia “... he does not guarantee the integrity or confidentiality of e-mail messages...,” page 605; “... it is not possible to make an exact comparison between the digital document and its hard copy...,” page 7;” “...on occasion, their functionality can be a departure from what is provided in the standards...,” page 607. “... no information system is perfect, and there can be processing or transmission errors. The system used by the Ecuadorian Automated Judicial Processing System (Sistema Automático de Trámite Judicial Ecuatoriano – SATJE) for the distribution of e-mail messages is not secure. It leaves room for human intervention that could alter the functioning of the system, from the creation of the text of the ruling to its storage in the inbox of Dr. Luis Ponce Palacios’s computer...,” page 608. This evidence in and-of itself makes us understand that the distribution of e-mail messages is imperfect and can cause errors, but nowhere in said report does it identify the person who may have been involved in the human intervention.

442. What is abundantly clear is that Merck's attorneys were notified both physically and electronically about the issued judgment. Even if it were true that the judgment was received incomplete and/or misplaced from the attorney mailbox, any diligent attorney would have contacted the court to obtain the complete version of the judgment. There is no evidence of anyone from Quevedo & Ponce immediately taking this logical step.

443. Instead, Merck has produced a statement (originally produced in the *Merck v. Chang Huang* case) from Ms. María Belén Merchán Mera, who worked for Quevedo & Ponce as the assistant charged with receiving and delivering notices of court orders passed by the various judiciatures of this district, on a daily basis.<sup>713</sup> She states that on 19 December 2007 (i.e., two days after receiving the electronic version of the judgment), she checked the court's bulletin of notices, and found out that a notice had been rendered in the *NIFA* case on 17 December 2007.<sup>714</sup> It is a mystery why the experienced law firm of Quevedo & Ponce, on notice of the judgment as of 17 December 2007, waited until 19 December 2007 to check the bulletin or to ask the court for the complete version of the judgment. Yet, Ms. Merchán had no difficulty obtaining a copy of the complete judgment by going to the Second Court of Civil Affairs for Pichincha.<sup>715</sup>

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<sup>713</sup> Exhibit C-159, Testimony of María Belén Merchán Mera, *MSDIA v. Chang-Huang*, dated 4 December 2008, at 1-1 (in response to Question 1).

<sup>714</sup> Exhibit C-159, Testimony of María Belén Merchán Mera, *MSDIA v. Chang-Huang*, dated 4 December 2008, at 1-2 (in response to Question 6).

<sup>715</sup> Exhibit C-159, Testimony of María Belén Merchán Mera, *MSDIA v. Chang-Huang*, dated 4 December 2008, at 1-2 (in response to Questions 10, 11, 12). In particular, Ms. Belén Merchán stated in response to Question 11:

ELEVENTH QUESTION: Witness, state if *only by physically reviewing the proceedings pursued by NIFA S.A. against MSD on 19th December, 2007 you were able to know that the court order of 17th December, 2007 contained a sentence condemning MSD into paying two hundred million dollars*. ANSWER: Yes, only at the time of reviewing the docket I was able to *verify that it was a sentence condemning MSD into paying two hundred million dollars and fifty thousand dollars for fees to the other party*.

*Id.*

444. Merck's argument that it learned about the decision only because "our trainee had taken the initiative of reviewing every day the bulletins of the first instance Courts" -- supposedly when Ms. Merchán retrieved a physical copy -- is scarcely believable.<sup>716</sup> As stated above, Mr. Luis Ponce testified that what he received was a judgment. Merck was therefore on notice that the judgment was issued. The step taken by Ms. Merchán on 19 December 2007, could have been taken on December 17 or 18.

445. Merck's evidence hardly demonstrate any irregularity with respect to notice of the judgment, much less any scheme to trick it into foregoing its right to appeal. Indeed, in light of the obvious implications of the admitted email notification, and the practice of physical checking of attorney mail boxes, that anyone would consider such a "trick" as holding out the least prospect of success is simply not credible.

446. Moreover, of course, Merck suffered no prejudice whatsoever, even if its own lack of diligence led it to mistake the significance of the email notification. Merck was able to, and did, lodge its appeal within the statutory time limit.<sup>717</sup>

447. What follows is clear: Merck's due process allegations are nothing more than petty complaints cherry-picked and inflated in a major effort to portray an unfair process. They were laboriously pled to frame Merck's real grievance -- the amount of the trial court judgment. This amount was corrected by the National Court of Justice. What has since been left are the petty complaints unsupported by any reliable evidence.

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Furthermore, Carlos Espín Arias, the assistant to Dr. Luis Ponce Palacios, who was responsible for overseeing the proceedings, indicated that the case was in the archives and obtained a copy of the judgment on December 19, 2007. Electronic Docket, Case No. 2009-0477, *MSDIA v. Chang Huang*, Twelfth Court for Civil Affairs of Pichincha (First Instance Court), Entry 26 at p. 11 (R-125).

<sup>716</sup> Ponce Statement, ¶ 20.

<sup>717</sup> Claimant's Memorial, ¶ 61.

448. Merck’s allegations about the trial court do not demonstrate serious irregularities which would substantiate a denial of justice claim. Plainly and simply, they are too remote from showing that the court “administer[ed] justice in a seriously inadequate way.”<sup>718</sup> Even if they were true -- and they have clearly not been demonstrated in this arbitration -- they do not “shock a sense of judicial propriety and thus give rise to a breach of the minimum standard of treatment.”<sup>719</sup> Here, the record as a whole contains no indicia of any of the inadequacies that would raise a denial of justice concern.

449. In contrast, there can be no serious dispute that Merck was afforded a trial that fully comported, at the very least, with the minimum standard of justice recognized in international law. Merck was represented by several experienced and well-known counsel in Ecuador. The rules of procedure governing the trial afforded Merck all the means of presenting its defenses and advancing its interests. In particular, the court gave Merck a full opportunity to present its evidence, to submit its written and oral pleadings, and to present its two factual witnesses to rebut the testimony offered by NIFA’s only witness. And Merck made use of this opportunity.

450. None of Merck’s allegations with respect to the first instance proceedings can sustain a claim of denial of justice.

## **2. The Court of Appeals Proceedings**

451. Merck brings a similar set of complaints about the proceedings before the Provincial Court of Justice for Commercial and Civil Matters (the second instance or court of appeals). But, like its attacks on the first instance and NCJ proceedings, Merck has failed to demonstrate

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<sup>718</sup> *Azinian, Kenneth Davitian, & Ellen Baca v. The United Mexican States*, ICSID Case No. ARB (AF)/97/2, Award (1 Nov. 1999), ¶¶ 102-103 (CLM-36).

<sup>719</sup> *International Thunderbird Gaming Corporation v. Mexico*, UNCITRAL Rules (NAFTA), Award, 26 January 2006., ¶ 200 (CLM-128).

any irregularities amounting to a denial of justice. As shown below, Merck’s evidence fails to establish that the court of appeals’ notice of possession of the case was not properly served on Merck’s counsel; that the nullity petition submitted by Merck prior to the evidentiary phase was rejected by the court “without stating a clear rationale”; and that the appointment of three experts whose opinions were unfavorable to Merck were “irregular” or “improper.” Moreover, contrary to Merck’s allegations, the court did not deem all of Merck’s evidence waived. Both parties were given ample opportunity to present new evidence in addition to the evidence from the lower court. Finally, the court did not deprive Merck of an opportunity to request an oral hearing or submit final briefs by issuing the final judgment together with a clarification of its earlier writ.

**a. The Court of Appeals’ Notice**

452. Merck claims that it was not properly informed of the court of appeals’ order taking possession of the proceeding, which starts the clock for a ten-day period for the appellant to file its points of appeal.<sup>720</sup> This is as an extension of its assertion of a conspiracy to prevent it from exercising its right to appeal. However, the court’s clerk certified that on 15 July 2008 at 5:00pm, the order by which the court of appeals took possession of the case was notified to the parties’ attorneys’ judicial mailboxes.<sup>721</sup> This is reliable evidence of the parties being properly served, which, unless contradicted by compelling evidence to the contrary, prevails.<sup>722</sup> The fact that Merck never lodged a complaint about inadequate notice in this regard corroborates the presumption accorded to the regularity of notice certification.

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<sup>720</sup> Claimant’s Memorial, ¶ 66.

<sup>721</sup> Notice of Decree by the Court of Appeals (taking possession of the case) (15 Jul. 2008) (R-63) (“In Quito, on July fifteenth, two thousand eight at 5:00 p.m. It is hereby ordered that the foregoing decision be served on the LEGAL REPRESENTATIVE FOR NUEVA INDUSTRIA FARMACÉUTICA ASOCIADA S.A. (NINFA S.A.) at court mailbox No. 809, which belongs to Atty. Juan Carlos Andrade, and on LUIS ORTIZ, MERKSCHARP DOHME (INTER AMERICAN) AT COURT MAILBOX No. 915, which belongs to Atty. Corral.”)

<sup>722</sup> Aguirre Opinion, ¶ 7.7.4.

453. Merck does not produce any evidence to contradict this official certification. In support, Merck refers to the statement of Dr. Alejandro Ponce Martinez, who alleges that the 15 July 2008 decree was never served on Merck, “with clear objective of having the decision of first instance become enforceable against [Merck].”<sup>723</sup> But what Merck and Mr. Ponce have failed to reveal is that, according to the record, Mr. Ponce was not the attorney of record handling Merck’s appeal at the time.<sup>724</sup> Indeed, Mr. Ponce’s firm was not involved in the initial stages of the appellate proceedings. Mr. Ponce therefore has no personal knowledge of whether Merck’s counsel was properly notified about the court of appeals’ “receipt of the proceeding.”<sup>725</sup> No statement by Merck’s actual counsel of record is provided.

454. Moreover, as with previous complaints regarding notices, Merck can demonstrate no harm resulting from the alleged improper notification: it successfully lodged its opening brief within the required time period. Moreover, while Mr. Ponce states that it was only because a draft of an eventual brief had been prepared in advance that Merck was able to file on time, even a quick perusal of that brief reveals that it is a polished submission which hardly resembles what would have been a mere draft less than an hour before it was filed.<sup>726</sup> There is no evidence of anyone having “calculated to prevent MSDIA from exercising its right to appeal.”<sup>727</sup> Indeed, by

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<sup>723</sup> Ponce Statement, ¶ 28.

<sup>724</sup> After the appeal of the trial court judgment was lodged on 20 December 2007, Merck appointed Dr. Fabian Corral on January 31, 2008 to represent Merck in the NIFA litigation. Appointment of Fabian Corral, *MSDIA v. NIFA*, Court of Appeals (31 Jan. 2008) (R-62). Dr. Fabian Corral submitted the first appellate brief on behalf of Merck on 29 July 2008. See Merck’s Brief of 29 July 2008, *NIFA v. Merck*, Court of Appeals (R-64); cf. Exhibit C-156 (not including the date). Quevedo & Ponce, Dr. Alejandro Ponce’s law firm, was reappointed as Merck’s counsel on 28 October 2008. Reappointment of Alejandro Ponce Martinez as Merck’s counsel (R-67).

<sup>725</sup> See Ponce Statement, ¶ 28; Claimant’s Memorial ¶ 67.

<sup>726</sup> Claimant’s Memorial, ¶ 67. See MSDIA’s Brief of 29 July 2008, *NIFA v. Merck*, Court of Appeals (R-64).

<sup>727</sup> *Id.* As the tribunal in *Rumeli v. Kazakhstan* stated, an allegation of conspiracy “must, if it is to be supported only by circumstantial evidence, be proved by evidence which leads clearly and convincingly to the inference that a

Merck's own accounting, it was alerted to the pending deadline by a telephone call from the court, an action not required by law, and one taken in total contradiction to Merck's conspiracy theory.<sup>728</sup>

**b. The Recusal of Judge Toscano**

455. Merck also alleges that Judge Toscano's service on the second instance court somehow taints that court's handling of its appeal. But Merck has been unable to overcome the facts in the record in making this allegation.

456. Just two weeks after the court of appeals received the case file, and on the same day Merck filed its first appeals brief, Judge Toscano excused himself, *sua sponte*, from hearing or deciding the case since 1) he had participated in the lower court proceedings, and 2) his substitute judge<sup>729</sup> was NIFA's attorney at the trial level.<sup>730</sup> Judge Toscano thus complied with his duty under Article 879 of the Code of Civil Procedure, which requires a judge to disclose any circumstances that may entail recusal or disqualification.<sup>731</sup> The other two members of the Tribunal refused to excuse Judge Toscano because his reasons lacked merit.<sup>732</sup> This is because, according to the applicable legal standard, a judge is subject to disqualification only if he issued

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conspiracy has occurred.” *Rumeli Telekom AS and Telsim Mobil Telekomikasyon Hizmetleri AS v Kazakhstan*, ICSID Case No. ARB/05/16, Award (29 July 2008) (CLM-142), ¶ 709.

<sup>728</sup> Ponce Statement, ¶ 28.

<sup>729</sup> At that time, the courts would designate substitute judges at the suggestion of the permanent judges. Substitute judges would serve only when the judge was unavailable to perform his or her functions. Today, substitute judges are permanent judges that rotate.

<sup>730</sup> Judge Juan Toscano's Excuse, Court of Appeals, July 29, 2008 (R-65).

<sup>731</sup> Article 879 of the Ecuadorian Code of Civil Procedure (RLA-107)

<sup>732</sup> Court of Appeals Order of 25 September 2008, rejecting Judge Toscano's excuse (R-66).

the judgment in another instance in the same matter.<sup>733</sup> Because Judge Toscano did not issue the judgment at the trial level, this provision did not apply to him. Merck persisted and filed another motion demanding Judge Toscano’s recusal on 1 June 2009.<sup>734</sup> Immediately, Judge Toscano accepted Merck’s motion.<sup>735</sup> On 23 June 2009, the court of appeals replaced Judge Toscano with a deputy judge until it could resolve the recusal motion.<sup>736</sup>

457. Importantly, although Judge Toscano was part of the bench until 23 June 2009, he was not the “substantiating” judge<sup>737</sup> in the case, and therefore, he did not sign any orders relating to admission of evidence. Nor did he participate in any judicial inspections or issue relevant orders relating to witnesses and evidence. In sum, his role on the court does not support Merck’s allegation. Finally, the fact that Merck did not raise this issue in its later petition for cassation strongly suggests that even Merck never considered this allegation to represent a serious issue.

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<sup>733</sup> Article 856 (6) of the Code of Civil Procedure of Ecuador (RLA-107) (Counsel’s translation) (“A judge, from either a Court or a Tribunal, can be challenged by any party, and must separate himself from the case, for any of the following reasons: ... (6) Having *issued a judgment* in a previous instance in the same process or another matter in connection with said matter.” (emphasis added)).

<sup>734</sup> MSDIA’s Recusal Motion, NIFA v. MSDIA, Court of Appeals (1 June 2009) (R-71).

<sup>735</sup> Judge Toscano’s Petition asking the Court to accept MSDIA’s Recusal Motion (R-73).

<sup>736</sup> See Exhibit C-186, Court of Appeals Order of 23 June 2009, NIFA v. MSDIA (ordering Judge Toscano Garzón’s recusal and replacing him with Permanent Assistant Judge Marco Vallejo Jijón). In this order, the court decided to remove Judge Toscano temporarily pending a final decision on MSDIA’s recusal motion.

<sup>737</sup> A “substantiating judge” is generally responsible for processing all procedural and evidentiary aspects of the case.



### c. The Nullity Petition

458. Merck also complains that the court of appeals rejected its nullity petition seeking to dismiss the case for lack of jurisdiction “without stating a clear rationale.”<sup>738</sup> But the court’s order does present a clear and precise explanation for the court’s rejection of the nullity petition:

The [nullity] petition presented by the defendant is rejected, as the Chamber observes that the case has been accorded the processing due to an ordinary suit, as the plaintiff originally requested in the initial writings of the complaint, on the basis of which the record is declared valid for having complied with the requirements of the form.- Let the litigants be aware that the cause of action, as well as the objections to it shall be analyzed at the moment of issuing the judgment.<sup>739</sup>

The court found that NIFA’s claim was *prima facie* a civil claim, and was pleaded as such, so that the proper process was an ordinary civil proceeding. In addition, the court explained that it would consider all the objections with its final judgment.<sup>740</sup>

459. It should be noted that as part of its nullity arguments in its appellate brief, Merck could have challenged the alleged due process violations that it brandished as egregious flaws in this proceeding -- *i.e.*, the two notices relating to Mrs. Usher de Ranson. Merck’s failure to do so suggests that it did not deem them sufficiently serious to include as grounds for nullity of the lower court’s decision.<sup>741</sup>

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<sup>738</sup> Claimant’s Memorial, ¶ 74; Exhibit C-161, MSDIA’s Petition of 12 December 2008, *NIFA v. MSDIA*, Court of Appeals.

<sup>739</sup> Exhibit C-165, Court of Appeals Order of 29 January 2009, *NIFA v. MSDIA*, at 1.

<sup>740</sup> *Id.*

<sup>741</sup> The proper place to plead nullity based on due process violations was Merck’s initial appellate brief. *See* MSDIA’s Brief of 29 July 2008, *NIFA v. MSDIA*, Court of Appeals, p. 20 (R-64) (alleging that Judge Chang Huang acted arbitrarily).

**d. The Court of Appeals' Appointment and Use of Experts Was Not a Denial of Justice**

460. One of Merck's most egregious distortions of the record relates to its allegation that the second instance court's appointment and use of nearly all experts -- excluding the two that opined in a manner favorable to Merck -- was "irregular and improper."<sup>742</sup> In its Memorial, Merck finds fault with each stage of the process related to the experts who submitted reports unfavorable to Merck's position. It alleges that a) the procedure leading to their appointment, b) the use of their testimony, and c) the reasoning in their reports, and the court's reliance on those reports constitute a denial of justice. However, when considered with the facts in the record that Merck fails to include in its narrative, Merck's showing does not demonstrate the irregularity it alleges.

461. In its Memorial, Merck acknowledges and describes the proper procedure for the appointment of experts in Ecuadorian courts. This recognition of the proper appointment and use of experts is critical and stands in contrast to its remaining arguments regarding the experts appointed in the appellate proceedings. The Memorial explains:

Under the rules of Ecuadorian procedure, a court may appoint experts to opine on specified issues at the request of a party. Generally, where possible, these court-appointed individuals have been "accredited" as experts in the relevant subject matter by the regional office of Ecuador's Council of the Judiciary. If a party requests 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.<sup>743</sup>

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<sup>742</sup> Claimant's Memorial, ¶ 271(e).

<sup>743</sup> *Id.*, ¶ 85 (footnotes omitted).

462. The court of appeals used this process to appoint Dr. De León, who Merck fully supports, just as it used this process to appoint the experts Merck now criticizes. Merck has no complaint when this process resulted in the appointment of Dr. De León to opine on whether Merck had violated anti-trust laws, at the request of Merck,<sup>744</sup> and on the question of resulting damages, at the request of NIFA.<sup>745</sup> As described in the Memorial, Dr. De León was appointed after the court requested a list of recommended experts from the competent Ecuadorian institution, the Ecuadorian Competition Authority.<sup>746</sup> “In response, the Competition Authority provided three names to the court of appeals, one of whom was the internationally renowned Venezuelan competition lawyer, Dr. Ignacio De León to serve as its independent expert in antitrust law in response to MSDIA’s request.”<sup>747</sup> Based on the Competition Authority’s recommendation, the court appointed Dr. De León to serve “jointly as its expert on damages as well as on antitrust liability.”<sup>748</sup>

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<sup>744</sup> *Id.*, ¶¶ 86-87.

<sup>745</sup> *Id.*, ¶ 103 (citing Exhibit C-24, Report of Ignacio De León, NIFA v. MSDIA, Court of Appeals, dated 12 February 2010, at 98; see also Exhibit C-40, MSDIA’s Petition of 13 May 2011, NIFA v. MSDIA, Court of Appeals, at 1-3.).

<sup>746</sup> Claimant’s Memorial, ¶ 86 (citing Exhibit C-176, MSDIA’s Second Petition of 5 June 2009, NIFA v. MSDIA, Court of Appeals). Since there were no accredited experts in antitrust law on Ecuador’s Counsel of the Judiciary’s registry, the Court of Appeals requested recommendations for such an expert from the Ecuadorian Competition Authority.

<sup>747</sup> *Id.*, ¶ 87 (citing Exhibit C-22, Letter from Fausto E. Alvarado C., Ecuadorian Authority on Competition, to Lupe Veintimilla Zea, Court Reporter for the Court of Appeals, dated 29 June 2009).

<sup>748</sup> Claimant’s Memorial, ¶ 103 (“the court of appeals appointed Dr. De León, who is an economist as well as an internationally recognized competition lawyer and scholar, to serve jointly as its expert on damages as well as on antitrust liability.”) (citing Exhibit C-175, NIFA’s First Petition of 5 June 2009, NIFA v. MSDIA, Court of Appeals, at 4-5). See also Claimant’s Memorial, ¶ 87. Claimant explains that it requested the Court of Appeals to appoint an expert in antitrust law to evaluate whether Claimant could be held liable under antitrust principles.

463. Yet Merck now argues that this same process was “irregular and improper”<sup>749</sup> when it led to the appointment of Mr. Cabrera and Dr. Guerra, who did not reach conclusions in its favor. Not only were the appointments of Mr. Cabrera and Dr. Guerra conducted under the same process endorsed above by Merck; the appointments were carried out at Merck’s own behest.

464. The court designated Mr. Cabrera to analyze the parties’ damages claims. He was appointed as a second expert on damages at Merck’s request and using the process that Merck specifically suggested. Prior to the issuance of Dr. De León ’s report dated 12 February 2010,<sup>750</sup> in June 2009, Merck requested the court of appeals to appoint an expert on damages, explicitly listing the issues that the expert report should address.<sup>751</sup> Merck later suggested that the court ask the Pichincha College of Public Accountants for a list of qualified candidates.<sup>752</sup> In accordance with Merck’s own request, the court wrote to the College requesting recommended experts, and appended the list of questions and issues that Merck desired the expert to address.<sup>753</sup> By order dated 3 February 2010, the court then designated Mr. Cabrera at the College’s recommendation.<sup>754</sup> As the court had completely acceded to Merck’s request, Merck did not protest -- at least, not then.

465. However, after Dr. De León submitted his expert report dated 12 February 2010, finding that there had been no antitrust violations and no damages, Merck changed its mind. It no longer

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<sup>749</sup> Claimant’s Memorial, ¶ 271(e).

<sup>750</sup> Exhibit C-24, Report of Ignacio De León, *NIFA v. MSDIA*, Court of Appeals, dated 12 February 2010.

<sup>751</sup> MSDIA Petition, *NIFA v. MSDIA*, Court of Appeals (5 June 2009) (R-72).

<sup>752</sup> MSDIA Petition, *NIFA v. MSDIA*, Court of Appeals (5 Jan. 2010) (R-81).

<sup>753</sup> Order of Court of Appeals to the Pichincha School of Public Accountants, *NIFA v. MSDIA* (29 Jan. 2010) (R-84).

<sup>754</sup> Letter from the President of the Pichincha School of Public Accounts to the Court of Appeals (1 Feb. 2010) (R-85); Court of Appeals Order, *NIFA v. MSDIA* (3 Feb. 2010) (R-86).

wanted Mr. Cabrera’s expert report, because it preferred the court to rely solely on Dr. De León’s favorable opinion.<sup>755</sup> Wishing to rely on Dr. De León’s report and preclude any other opinion on damages, Merck “waive[d] its request for the expert Cristian Cabrera, whereby, accepting that waiver, the designation and the order that he present a report regarding the requested subjects will be left without effect.”<sup>756</sup> Again, the court acceded to Merck’s request, although it was entitled to maintain Mr. Cabrera as an independent, court-appointed expert. The court granted Merck’s petition on 26 April 2010 and discharged Mr. Cabrera as an expert.<sup>757</sup>

466. Later, NIFA requested that a further damages expert be appointed because Dr. De León did not address the question of damages.<sup>758</sup> In response, by order dated 10 May 2011, the court of appeals re-appointed Mr. Cabrera, who was already familiar with the case, had been recommended by the College of Accountants, and had been previously approved by both parties.<sup>759</sup> The court justified his appointment on the basis that Dr. De León’s report “did not

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<sup>755</sup> MSDIA Petition of 16 April 2010, *NIFA v. MSDIA*, Court of Appeals (C-26).

<sup>756</sup> *Id.*

<sup>757</sup> Court of Appeals Order, *NIFA v. MSDIA* (26 Apr. 2010) (R-87)

<sup>758</sup> NIFA Petition, Court of Appeals, 5 May 2011 (R-110).

<sup>759</sup> Exhibit C-39, NIFA Petition, *MSDIA v. NIFA*, Court of Appeals (5 May 2011). When Mr. Cabrera was first appointed at Merck’s request, he was already registered as an expert with the Judiciary Council. *See* Exhibit C-63, Memorandum from Wilson Rosero Gómez, Chief of Staff, to Iván Escandón, Provincial Director of the Council of the Judiciary for Pichincha, dated 31 May 2012, p. 2. According to Claimant, his accreditation was limited to “accounting, finance and tax.” MSDIA Submission to the Constitutional Court (received by the Court on 3 Apr. 2013) (R-117), ¶ 111. Merck also stated, without referencing any documentary support, that on January 25, 2011, Mr. Cabrera requested the then Director of the Judicial Council for the Province of Pichincha to update his credentials as an expert in damages. *Id.*, ¶ 112. The Judiciary Counsel did so. *See* Exhibit C-63, Memorandum from Wilson Rosero Gómez, Chief of Staff, to Iván Escandón, Provincial Director of the Council of the Judiciary for Pichincha, dated 31 May 2012, p. 2. It should be noted that this does not change the fact that when Mr. Cabrera was initially appointed by the court of appeals at Merck’s request, he was not accredited as an expert in damages and that Merck did not object to his appointment. Furthermore, as admitted by Merck, such accreditation was *not* a requirement to his appointment as an expert in damages. Claimant’s Memorial, ¶¶ 85-87.

fulfill the objective of the expert report for which he was appointed to do.”<sup>760</sup> Merck has not explained how this appointment “violated the procedural dispositive principle contained in the Constitution.”<sup>761</sup> Importantly, Merck itself has admitted that the Judiciary Council’s accreditation is not a prerequisite for appointment as an expert in court proceedings.<sup>762</sup>

467. Merck has also failed to show how Dr. Guerra’s appointment as an expert on antitrust law was anything other than “regular and proper.” Merck alleges that the court appointed Dr. Guerra in response to NIFA’s request based on the alleged “essential error” in Dr. De León’s report “without explanation.”<sup>763</sup> In fact, there is a clear explanation.

468. Pursuant to Article 258 of the Ecuadorian Code of Civil Procedure, the parties can challenge the opinion of a court-appointed expert who has committed essential error in his or her report.<sup>764</sup> If one party challenges the opinion of an expert, the court may authorize a summary proceeding during which both parties may submit evidence on whether an expert report is afflicted by essential error. This is exactly what happened in this case. After Dr. de León submitted his report, NIFA argued he had committed essential error.<sup>765</sup> The court of appeals opened a summary proceeding on the basis of Article 258 of the Ecuadorian Code of Civil Procedure,<sup>766</sup> during which both parties submitted their evidence.<sup>767</sup> In response to NIFA’s

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<sup>760</sup> Exhibit C-39, NIFA Petition, MSDIA v. NIFA, Court of Appeals (5 May 2011).

<sup>761</sup> Ponce Statement, ¶ 39.

<sup>762</sup> Claimant’s Memorial, ¶¶ 85-87.

<sup>763</sup> *Id.*, ¶ 93.

<sup>764</sup> Code of Civil Procedure, Art. 258 (RLA-107). (“If the expert report suffers from an essential error, having been summarily proven, the court must, by petition of the parties or *sua sponte*, order that it be corrected by another expert or experts, without prejudice to the responsibility incurred by the prior [experts] for negligence or bad faith.”)

<sup>765</sup> C-192, NIFA’s Petition of 11 May 2010, NIFA v. MSDIA, Court of Appeals, at 1-2.

<sup>766</sup> Electronic Docket, *NIFA v. MSDIA*, Court of Appeals, Entry 252 (R-122).

request to appoint an expert in antitrust law to challenge the findings of Dr. the León and in response to Merck's request for another expert to opine on Dr. De León's alleged essential error, the court of appeals appointed Dr. Guerra.<sup>768</sup> In this regard, NIFA attested to the court of appeals: "Both parties have requested that you appoint experts with knowledge in Antitrust Law and Antitrust Law and damages in order to clarify the truth and determine whether the argument filed by Ignacio de León reflects the truth."<sup>769</sup> Thus, pursuant to Article 258 of the Ecuadorian Code of Civil Procedure, at the request of both parties, Dr. Guerra was appointed as an additional expert on antitrust law, to assess whether Dr. De León had committed an essential error.

469. Merck's accusations go even further, alleging that the process leading to Dr. Guerra's appointment suggests "improper influence."<sup>770</sup> Merck argues that "[a] month after his accreditation, on 11 May 2010, NIFA filed a petition asserting that Dr. De León had committed 'essential error' and requesting the appointment of an additional antitrust expert."<sup>771</sup> Merck's insinuation that the mere proximity of his accreditation to NIFA's request somehow amounts to an "irregularity" is plainly without any merit. Merck has proffered no evidence whatsoever that Dr. Guerra's accreditation was influenced in any way by NIFA.

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<sup>767</sup> MSDIA submitted the testimony of two witnesses to show that Dr. de Leon had not committed essential error. See Electronic Docket, *NIFA v. MSDIA*, Court of Appeals, Entry 258 (R-122).

<sup>768</sup> Court of Appeals Order of 8 December 2010, *NIFA v. MSDIA* (C-29).

<sup>769</sup> NIFA Petition, *NIFA v. MSDIA*, Court of Appeals (12 Nov. 2010) (R-99); R-122 Electronic Docket, *NIFA v. MSDIA*, Court of Appeals, Entry 261.

<sup>770</sup> Claimant's Memorial, ¶ 91.

<sup>771</sup> *Id.*, ¶ 92.

470. Considerably more important, it was Merck itself that specifically requested the court to ask the competent authority, the Council of the Judiciary, to recommend a list of qualified experts to review Dr. De León's report<sup>772</sup> to determine if he had committed an essential error.<sup>773</sup> Again, the court followed Merck's proposed selection process, forwarding the request to the Judiciary Council of Pichincha.<sup>774</sup> The Judiciary Council of Pichincha responded by simply directing the court to the publicly accessible list of accredited experts available on its website.<sup>775</sup> Consistent with normal practice, by order dated 8 December 2010, the second instance court appointed Dr. Guerra from the list recommended by the Judiciary Council of Pichincha.<sup>776</sup> The fact that Dr. Guerra was accredited months prior to his appointment by the court is irrelevant. The list contained experts who were registered even later than Dr. Guerra;<sup>777</sup> the court could have designated any one of them.

471. During the parties' continual exchange of letters and briefs providing their thoughts on these court-appointed experts, Merck maintained that the court had properly appointed Dr. De León and that NIFA challenged his appointment as an expert only after his report no longer suited its case: "This challenge is absolutely untimely because when the expert was designated NIFA did not oppose that appointment and accepted it with its silence. In fact, it did not oppose that the court requested a list of recommended experts from the Ministry of Industry and

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<sup>772</sup> Exhibit C-24, Report of Ignacio De León, *NIFA v. MSDIA*, Court of Appeals, dated 12 February 2010.

<sup>773</sup> MSDIA Petition, *NIFA v. MSDIA*, Court of Appeals (29 Oct. 2010) (R-98).

<sup>774</sup> Letter from the Court of Appeals to the Provincial Director of Pichincha (Judicial Council) (26 Nov. 2010) (R-100).

<sup>775</sup> Letter from the Provincial Director of Pichincha to the Court of Appeals (30 Nov. 2010) (R-101).

<sup>776</sup> List of Certified Experts submitted by the Provincial Direction of Pichincha (R-102); Court of Appeals Order of 8 December 2010, *NIFA v. MSDIA* (8 Dec. 2010) (C-29).

<sup>777</sup> List of Certified Experts submitted by the Provincial Direction of Pichincha (R-102).



Competition. With that conduct, it is evident that at that time NIFA was in agreement with not only the process leading to the designation of the expert but also the appointment of that expert. In particular, it said nothing when the court appointed the expert ...”<sup>778</sup> Merck criticized NFIA’s late disavowal of the court-appointed expert, which Merck has now adopted as its own strategy in this arbitration: “Today, when it has an expert report that does not favor its interests, it decides to challenge the appointment. This behavior is contrary to the procedural loyalty that it must respect.”<sup>779</sup> This contradictory conduct further undermines Merck’s showing.

472. In addition to criticizing the court’s appointment of the experts, Merck finds fault with the way in which the second instance court treated Merck regarding the use of experts. Merck argues that this treatment demonstrated the court’s “predisposition to rule against MSDIA.”<sup>780</sup> In particular, Merck alleges that the court “largely disregarded” the two expert reports of Dr. De León and Dr. Petrecolla, who reached conclusions in Merck’s favor.<sup>781</sup> But the court record shows the contrary. With respect to Dr. Petrecolla, and despite NIFA’s objection to his report on the basis that it was submitted after the end of the evidentiary period, the court admitted his report and declared that it would consider it when appropriate.<sup>782</sup> As to Dr. De León, the court

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<sup>778</sup> MSDIA Petition, *NIFA v. MSDIA*, Court of Appeals (17 June 2010) (R-89).

<sup>779</sup> *Id.*

<sup>780</sup> Claimant’s Memorial, ¶ 113.

<sup>781</sup> *Id.*, ¶ 98.

<sup>782</sup> Court of Appeals Order of 25 April 2011, *NIFA v. MSDIA* (25 April 2011) (C-37).

did discuss his report in its final judgment,<sup>783</sup> but it had no obligation to follow the expert's findings.<sup>784</sup>

473. Concerning Dr. De León, after NIFA challenged his report as fundamentally flawed, the court continued to grant Merck's requests supporting Dr. De León's report. When the court realized that it had overlooked Merck's request for a clarification report, it quickly rectified the situation. Thus, rather than opening the period for the exchange of evidence regarding NIFA's challenge, the court recognized Merck's request to provide Dr. De León an opportunity to expand and clarify his findings in response to questions posed by Merck.<sup>785</sup> It also granted Dr. De León an extension of time for filing this additional clarifying report and allowed him access to the parties' pleadings regarding his original opinion, all as Merck had requested.<sup>786</sup> Needless to say, these facts contradicting Merck's theory were omitted in Merck's telling.

474. Merck also criticizes the court for not providing greater weight to the expert report by Dr. Petrecolla. As explained in Merck's Memorial, the proper process for the court to receive and consider an expert opinion is for a party to make a request for an expert to be designated and for the Court to then appoint one. Merck recognizes that under Ecuadorian law it is the court that "may appoint experts to opine."<sup>787</sup> But the court of appeals did not appoint Dr. Petrecolla, nor did it solicit his opinion. Merck took the unilateral action of directly hiring Dr. Petrecolla and presenting his report (which opined in Merck's favor) as an appendix to its own brief before

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<sup>783</sup> Exhibit C-4, Court of Appeals Judgment, *NIFA v. MSDIA*, dated 23 September 2011, at 13.

<sup>784</sup> Code of Civil Procedure, Article 262(2) (RLA-107). Article 262(2) provides: "The judge is not obliged to adopt, against his own conviction, the opinion of the experts."

<sup>785</sup> Court of Appeals Order, *NIFA v. MSDIA* (17 June 2010) (R-88).

<sup>786</sup> Court of Appeals Order, *NIFA v. MSDIA* (29 June 2010) (R-91).

<sup>787</sup> Claimant's Memorial, ¶ 85.

the court. Despite Merck's divergence from the appropriate process for obtaining expert views, and despite NIFA's active protest, the court nonetheless determined that it would take Dr. Petrecolla's opinion into consideration.<sup>788</sup> According to Article 263 of the Code of Civil Procedure, "In case of conflict between two expert reports, the judge *may consider* to appoint another expert to inform the judge's opinion."<sup>789</sup> While it did not deem it necessary to appoint a third expert on the subject matter, the court of appeals agreed to consider the report of Dr. Petrecolla, in response to Merck's request.

475. Mr. Ponce opines that Mr. Cabrera and Mr. Guerra "obviously did not have the requisite expertise or credentials to serve as experts in those fields,"<sup>790</sup> suggesting that the court knowingly appointed unqualified experts. He claims that during the litigation, "we obtained the applications for expert accreditation that had been submitted by Mr. Guerra and Mr. Cabrera to the Pichincha Provincial Director of the Council of the Judiciary."<sup>791</sup> As seen above, however, both were appointed in accordance with processes requested by Merck and were suggested by the competent recommending bodies. Moreover, these experts' respective competencies were not challenged by Merck until after Mr. Cabrera and Dr. Guerra produced their reports.<sup>792</sup> When Mr. Cabrera was recommended by the College of Accountants and appointed by the judge,

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<sup>788</sup> Court of Appeals Order of 25 April 2011, *NIFA v. MSDIA* (25 April 2011) (C-37).

<sup>789</sup> Code of Civil Procedure, Art. 259 (RLA-107).

<sup>790</sup> Ponce Statement, ¶ 40.

<sup>791</sup> *Id.*, ¶ 40.

<sup>792</sup> Claimant challenged Dr. Guerra's credentials more than two months after he submitted his report. *See MSDIA Petition*, Court of Appeals, 28 April 2011 (C-38).

Merck raised absolutely no objections as to Mr. Cabrera's credentials. Similarly, it raised no objection with Dr. Guerra, until after he issued the report.<sup>793</sup>

476. It appears that later Merck's local counsel may have complained to the Provincial Office of the Judiciary Counsel objecting to the accreditation of the two experts. Indeed, the report of the Provincial Director of Pichincha concerning the accreditation of Mr. Cabrera and Dr. Guerra was notified to Mr. Alejandro Ponce,<sup>794</sup> suggesting that the appropriateness of their accreditation was reviewed at the behest of Merck's local counsel. In its report of January 2012, the Provincial Director of Pichincha concluded that Mr. Cabrera had sufficient credentials to serve as an expert in "accounting and auditing"<sup>795</sup> only, and not in damages. The fact that Mr. Cabrera's accreditation was then limited to accounting and audit<sup>796</sup> does not, however, establish that the court appointed him improperly or that there was any improper influence on his initial accreditation by the Provincial Office of the Judiciary Counsel, and Merck furnishes absolutely no evidence to this effect. As with its other allegations, the Tribunal is asked to imagine links that are not borne out by Merck's evidence or the record.

477. Of course, Mr. Cabrera's testimony was subsequently disregarded by the NCJ.<sup>797</sup>

478. With respect to Dr. Guerra, whose credentials were not questioned by Merck when he was appointed, the Provincial Director of Pichincha Judiciary Council stated in its January 2012

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<sup>793</sup> See MSDIA Petition, Court of Appeals, 28 April 2011 (C-38)

<sup>794</sup> See Exhibit C-58, Report of Iván Escandón, Provincial Director of the Council of the Judiciary for Pichincha, dated 26 January 2012.

<sup>795</sup> Exhibit C-58, Report of Iván Escandón, Provincial Director of the Council of the Judiciary for Pichincha, dated 26 January 2012, at 2.

<sup>796</sup> Exhibit C-58, Report of Iván Escandón, Provincial Director of the Council of the Judiciary for Pichincha, dated 26 January 2012, at 2; Exhibit C-63, Memorandum from Wilson Rosero Gómez, Chief of Staff, to Iván Escandón, Provincial Director of the Council of the Judiciary for Pichincha, dated 31 May 2012.

<sup>797</sup> See Exhibit C-203, NCJ Judgment, *NIFA v. MSDIA*, dated 21 September 2012, paras. 16.5-16.6.

report that his 2011 accreditation had not been signed by the then-Provincial Director.<sup>798</sup> As a result, he was no longer deemed as an accredited expert. However, the Provincial Director also stated that “in previous years *there was no objection to his qualification.*”<sup>799</sup>

479. Merck has also failed to demonstrate that the appointment of Mr. Marco V. Yerovi Jaramillo, the second expert in real estate, was irregular or improper. In fact, like Dr. De León, Mr. Yerovi was appointed at the behest of *both* parties.<sup>800</sup> First, Merck requested the court of appeals to appoint an expert to determine whether the plants used in Mr. Manuel Silva’s expert report were appropriate for the pharmaceutical industry.<sup>801</sup> On the same date, NIFA argued that Mr. Silva’s report suffered from an essential error;<sup>802</sup> it therefore also sought an appointment of a new expert to address whether the plants mentioned by Mr. Silva were appropriate for the industry. At the behest of the two parties, the court of appeals sent a request to the Provincial Department of the Judicial Council to obtain a list of potential experts on the matter.<sup>803</sup>

480. At this stage, Merck did not object to the appointment of a new expert in real estate. It did, however, object to the scope of the newly appointed expert’s opinion but only because it

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<sup>798</sup> Exhibit C-58, Report of Iván Escandón, Provincial Director of the Council of the Judiciary for Pichincha, dated 26 January 2012.

<sup>799</sup> Exhibit C-58, Report of Iván Escandón, Provincial Director of the Council of the Judiciary for Pichincha, dated 26 January 2012, at 1 (emphasis added).

<sup>800</sup> Cf. Claimant’s Memorial, ¶ 102 (“NIFA requested appointment of a new expert, and again without explanation, the court of appeals complied . . . .”)

<sup>801</sup> MSDIA Petition, Court of Appeals, 30 September 2010 (R-92).

<sup>802</sup> NIFA Petition, Court of Appeals, 30 September 2010 (R-94). According to Article 258 of the Ecuadorian Code of Civil Procedure (RLA-107), “In case the report was afflicted by essential error, and if the error is proven summarily, the judge shall – sua sponte or at the request of one of the parties -- order that the report be corrected by other expert or experts, without prejudice to the liability the previous expert or experts may have incurred if the original report was made in bad faith.”

<sup>803</sup> Court of Appeals Order, 30 September 2010 (R-93).

sought to prevent the expert from addressing the issues raised by NIFA.<sup>804</sup> The court had no reason to grant Merck's request for a new expert but reject NIFA's request. Thus, in response to *both* parties' requests, the court appointed Mr. Yerovi, who was selected from the list of experts sent by the Provincial Department of the Judicial Council at the request of the court.<sup>805</sup> Merck did not object to his specific appointment, instead merely reserving the right to question Mr. Yerovi.<sup>806</sup>

481. Furthermore, as clearly set forth in its introduction, Mr. Yerovi's expert report addressed questions put forth by both NIFA and Merck.<sup>807</sup> After the first report was submitted by Mr. Yerovi,<sup>808</sup> Merck requested a supplementary report from him to address Merck's further questions.<sup>809</sup> Mr. Yerovi responded with a supplemental report within two weeks.<sup>810</sup> In short, not only did it *not* object to Mr. Yerovi's appointment as improper, Merck relied on Mr. Yerovi's expertise by submitting further questions.

482. Finally, Merck challenges various legal conclusions reached by all the experts who opined against it, as well as the reasoning of the court of appeals in relying on those experts.<sup>811</sup>

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<sup>804</sup> MSDIA Submission, NIFA v. MSDIA (Court of Appeals) (31 Jan 2011) (R-105).

<sup>805</sup> Court of Appeals Order, 30 September 2010 (R-93); Exhibit C-28, Court of Appeals Order of 26 October 2010, NIFA v. MSDIA.

<sup>806</sup> MSDIA Petition, Court of Appeals, 27 October 2010 (R-97).

<sup>807</sup> Exhibit C-30, Report of Marco V. Yerovi Jaramillo, NIFA v. MSDIA, Court of Appeals, dated 20 December 2010, p. 1 ("I, MARCO V. YEROVI JARAMILLO, [...], hereby respond to the questions asked by the company Merck Sharp & Dohme (Inter American) Corporation and Prophar S.A., under the following terms.")

<sup>808</sup> *Id.*

<sup>809</sup> MSDIA Petition, Court of Appeals, 31 January 2011 (R-105)

<sup>810</sup> Court of Appeals Order of 25 April 2011, NIFA v. MSDIA (25 Apr. 2011) (C-37).

<sup>811</sup> In fact, according to Article 262(2) of the Ecuadorian Code of Civil Procedure (RLA-107), "The judge is not obliged to follow the opinion of the expert, when it goes against his own conviction."

Merck's Memorial describes how it disagrees with the court's and the experts' interpretation and application of Ecuadorian law, alleging that it is flawed and unsupported.<sup>812</sup> As a party to a legal dispute, Merck is entitled to hold whatever position it deems fit concerning the correct application of the law or the evidence. But this position remains the perspective of one party in a contentious adversarial dispute -- in this case, the losing party. That Merck disagrees with the legal reasoning resulting in a judgment against it does not show that there was a denial of justice. There is an appropriate means for a losing party to contest the validity of a court's legal reasoning, as well as the evidence on which it relies: seeking appellate review. This Merck did, and, as discussed earlier, the National Court of Justice addressed Merck's concerns. But Merck's differences with the experts and the court of appeals' reliance upon them do not demonstrate a denial of justice.

**e. Evidentiary Phase**

483. Mr. Ponce cites as among the "serious procedural irregularities and violations of MSDIA's rights in the court of second instance,"<sup>813</sup> the fact that the only evidence concerning damages introduced by NIFA during the evidence term was an electronic report prepared by the consulting firm IMS-Ecuador.<sup>814</sup> By this allegation Merck intends to impugn the second instance court's fact-finding. But this suggestion is not only misleading in the extreme; Merck's showing falls far short of demonstrating irregularities in this regard.

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<sup>812</sup> See e.g., Claimant's Memorial, ¶¶ 93-97, 102, 107-109.

<sup>813</sup> Ponce Statement, ¶ 35.

<sup>814</sup> See Claimant's Memorial, ¶ 81 (citing Exhibit C-182, NIFA's First Petition of 5 June 2009, *NIFA v. MSDIA*, Court of Appeals, at 3-4 (describing electronic spreadsheet); Exhibit C-160, Letter from Iván Ponce (IMS-Ecuador) to NIFA dated 9 December 2008; Ponce Martínez Witness Statement at para. 36).

484. There was in fact no requirement that NIFA supplement what the lower court found sufficient. Mr. Ponce recognizes that “[w]hen either of the parties, in ordinary proceedings, in second instance, so request, the court grants a term of evidence where the parties may submit new evidence *not filed in the first* instance.”<sup>815</sup> It was Merck, as the appellant, that carried the burden of furnishing evidence to dispel the trial court’s decision.

485. NIFA relied on its best evidence from the lower court; as the party victorious at trial level, it expressly asked the court to rely on the evidence from the lower court that was favorable to it in the record, including its pleadings.<sup>816</sup> NIFA thus relied by reference on the same evidence before the court of appeals as it did before the trial court, obviating any requirement to submit additional evidence.<sup>817</sup>

486. Moreover, contrary to Merck’s allegation, in addition to the market data report,<sup>818</sup> NIFA submitted additional new evidence of damages before the court of appeals, including information about NIFA’s technical ability to carry out its expansion and product diversification program and technical reports describing the pharmaceutical market and pharmaceutical companies in Ecuador.<sup>819</sup> Finally, of course, the damages experts’ reports described above contained substantial information relating to damages, exactly as such reports are intended to do. Thus, NIFA expressly relied on Mr. Cabrera’s expert report on damages to quantify the damages.

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<sup>815</sup> Ponce Statement, ¶ 33.

<sup>816</sup> Exhibit C-182, NIFA’s First Petition of 5 June 2009, *NIFA v. MSDIA*, Court of Appeals.

<sup>817</sup> Aguirre Opinion, ¶¶ 5.2, 5.3, 5.4.

<sup>818</sup> *See* C-160.

<sup>819</sup> Exhibit C-182, NIFA’s First Petition of 5 June 2009, *NIFA v. MSDIA*, Court of Appeals.



487. Moreover, on the issue of liability, even if NIFA did not introduce its own new witnesses, it elicited evidence through cross-examination of Merck's witnesses, including Hans Forrer Ruegg,<sup>820</sup> Maria Fabiana Lacerca,<sup>821</sup> Luis Ortiz Monasterio,<sup>822</sup> Richard Trent,<sup>823</sup> Doris Pienknagura,<sup>824</sup> and Jacob Harel.<sup>825</sup> NIFA's cross-examination of these witnesses elicited information regarding the negotiations between the litigants.<sup>826</sup>

488. Furthermore, on both issues, liability and damages, NIFA relied on its evidence from below. For example, NIFA's factual witness, Mrs. Usher de Ranson, testified as to the failed negotiations.<sup>827</sup> NIFA also submitted email correspondence between Mrs. Usher de Ranson, Miguel Garcia, and Jill Gambino, which purported to show Merck's strategy with respect to NIFA. It also adduced more than 140 pages of emails related to the "beagle project" (the project to sell Merck's plant), to demonstrate the unusual intervention of high ranking personnel of Merck in the project.<sup>828</sup> On the question of damages, NIFA relied on the results of a judicial inspection of its plant carried out by the trial court.<sup>829</sup>

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<sup>820</sup> NIFA Petition, Court of Appeals, Interrogatory for Hans Forrer Ruegg, 5 June 2009 (R-75).

<sup>821</sup> NIFA Petition, Court of Appeals, Maria Fabiana Lacerca Interrogatory, June 5, 2009 (R-76).

<sup>822</sup> NIFA Petition, Court of Appeals, Luis Ortiz Monasterio Interrogatory, June 5 2009 (R-77).

<sup>823</sup> NIFA Petition, Court of Appeals, Richard Trent Interrogatory, June 5 2009 (R-78).

<sup>824</sup> Exhibit C- 173, Testimony of Doris Pienknagura, *NIFA v. MSDIA*, Court of Appeals, dated 4 June 2009, at 9

<sup>825</sup> NIFA Petition, Court of Appeals, Jacob Harel Interrogatory, June 5 2009 (R-79)

<sup>826</sup> *See, e.g.*, Exhibit C- 173, Testimony of Doris Pienknagura, *NIFA v. MSDIA*, Court of Appeals, dated 4 June 2009, at 10, 11 (response to questions nineteen and twenty four).

<sup>827</sup> *See* C-144, C-149.

<sup>828</sup> NIFA Petition, Court of Appeals, 5 June 2009 (R-74).

<sup>829</sup> *Id.*

489. Thus, Merck fails to demonstrate the irregularities it alleges in the evidentiary stage of the appellate proceedings.

**f. The Court of Appeals' Judgment**

490. Merck's final target of assault is the manner in which the second instance judgment issued from the court. Merck alleges that the second instance judgment was issued in an expedited manner,<sup>830</sup> that its reasoning was "bizarre" because the court "expressly stated that it was ignoring all of the evidence that had been submitted by MSDIA,"<sup>831</sup> that it ignored NIFA's burden of proof on liability and damages,<sup>832</sup> and that it relied on certain information in the public domain to conclude that Merck had a dominant market position.<sup>833</sup> But Merck fails to establish these allegations as due process violations.

491. First, there was nothing "remarkable" about the timing of the judgment. Merck alleges that when the court of appeals issued its judgment, there was a pending motion before it for clarification of a prior ruling, which should have been ruled on before the final merits decision.<sup>834</sup> Merck complains that "[b]y issuing its judgment jointly with its decision on the pending motion, the court deprived Merck of an opportunity to request a final oral hearing or to submit a final brief."<sup>835</sup>

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<sup>830</sup> Claimant's Memorial, ¶ 120.

<sup>831</sup> *Id.*, ¶ 121.

<sup>832</sup> *Id.*, ¶ 124.

<sup>833</sup> *Id.*

<sup>834</sup> *Id.*, ¶ 119.

<sup>835</sup> *Id.*, ¶ 120.

492. Contrary to Merck's allegation, Merck itself failed to exercise its right to ask for an oral hearing. Article 1016 of the Code of Civil Procedure provides that the parties have the right to request oral arguments after the closing of the evidentiary period or after the court declares that the case is ready for final judgment.<sup>836</sup> Moreover, the parties have the right to submit concluding written arguments any time after the end of the evidentiary pleadings.<sup>837</sup>

493. In this case, after the court of appeals issued a writ that the case was ready for the final judgment,<sup>838</sup> instead of requesting an oral hearing or submitting its final brief, Merck chose to bring a motion to suspend the proceedings asking the court to refer the interpretation of the Andean Community norms on competition to the Andean Tribunal.<sup>839</sup> The court rejected Merck's petition holding that the Andean Community norms were not applicable because the *NIFA v. Merck* litigation was a civil claim to be decided exclusively under Ecuadorian law.<sup>840</sup> Once again, instead of asking for an oral hearing on the case, Merck persisted and filed a request for clarification of this writ.<sup>841</sup> Since the court of appeal's initial denial to suspend the proceedings was clear,<sup>842</sup> this was just an attempt to delay the rendering of the judgment.<sup>843</sup> The

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<sup>836</sup> Code of Civil Procedure, Article 1016 (RLA-107).

<sup>837</sup> Code of Civil Procedure, Article 406 (RLA-107).

<sup>838</sup> See Electronic Docket of the Court of Appeals Proceedings, Case No. 2008-0421, *NIFA v. MSDIA*, Entry 375 (R-122).

<sup>839</sup> *Id.*, Entry 376 (R-122).

<sup>840</sup> See *id.* Entry 377 (Court of Appeals Order dated 26 August 2011).

<sup>841</sup> Merck's Clarification Request, *NIFA v. MSDIA* (Court of Appeals) (31 August 2011) (R-113). See also Electronic Docket of the Court of Appeals Proceedings, Case No. 2008-0421, *NIFA v. MSDIA*, Entry 378 (Expansion Request dated 31 August 2011) (R-122).

<sup>842</sup> See Electronic Docket, *NIFA v. MSDIA*, Court of Appeals, Entry 377 (R-122).

<sup>843</sup> The court had previously warned the parties to abstain from deleterious practices. See Electronic Docket of the Court of Appeals Proceedings, Case No. 2008-0421, *NIFA v. MSDIA*, Entry 373 (R-122) (Expansion and/or Clarification dated 1 August 2011) ("With respect to the petition made by the Plaintiff, we also warn the intent to

court nonetheless entertained Merck’s request and ordered NIFA to provide its response within 48 hours.<sup>844</sup> After hearing both parties on the issue, the court issued the clarification jointly with its final judgment.<sup>845</sup>

494. At any rate, the court of appeals’ issuance of the final judgment at the same time as its clarification on the prior ruling is not an unusual practice, and is also followed by international tribunals and courts all over the world.<sup>846</sup>

495. Second, Merck’s characterization of the judgment as “bizarre” because it “expressly stated that it was ignoring all of the evidence”<sup>847</sup> is nothing more than an empty polemic. Merck misrepresents the court of appeals’ judgment as stating that Merck had “expressly waived” all of the evidence it had submitted.<sup>848</sup> The judgment itself is clear in specifying that the only evidence it deemed waived by Merck was the evidence that Merck itself sought to exclude: “for the record, the defendant in this instance expressly waived the evidence aiming to dispel the grounds of the verdict in the first instance, *as appears on page 9940* of the court orders.”<sup>849</sup> Page 9940 of the record contains Merck’s waiver of its right to appoint an expert to determine whether NIFA

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delay the process with baseless petitions that do not reserve any resolution from the Chamber. – We warn the parties from continuing to provoke incidents that tend to obstruct the normal development of the case, or they shall be subject to article 263 of the Code of Civil Procedure and articles 130 numeral 13 and 131 of the Organic Code of the Judicial Function.”)

<sup>844</sup> Electronic Docket, *NIFA v. MSDIA*, Court of Appeals, Entry 380 (R-122).

<sup>845</sup> See Judgment of the Provincial Court of Justice of Pichincha for Commercial and Civil Matters (“Court of Appeals”), *NIFA v. MSDIA* (C-4).

<sup>846</sup> The readiest example is *In the Matter of the Indus Waters Kishenganga Arbitration*, where the arbitral tribunal issued its award on the merits and on the same day decided India’s request for a clarification of the tribunal’s partial award. *Indus Waters Kishenganga Arbitration (Pakistan v. India)*, PCA, Final Award (20 Dec. 2013) (RLA-125), *accompanied with* Decision on India’s Request for Clarification or Interpretation (20 Dec. 2013).

<sup>847</sup> Claimant’s Memorial, ¶ 121.

<sup>848</sup> *Id.*, ¶ 121.

<sup>849</sup> Court of Appeals Judgment, *NIFA v. MSDIA*, dated 23 September 2011, at 15 (C-4) (emphasis added).

had suffered damages arising from the failed negotiations.<sup>850</sup> This request, as discussed above, had been made by Merck because Dr. De León had produced a report that Merck wished to rely on as the only damages expert report because of its favorable conclusions. The court had duly noted this waiver in an order issued on 26 April 2010, prior to its final judgment.<sup>851</sup>

496. The court of appeals did not consider Merck's other evidence waived. The judgment expressly refers to the expert reports relied on as evidence by Merck, including the expert testimony of Mr. De León and Mr. Silva. Since its primary function was to review the decision below, the court considered the record of the trial court proceedings in addition to any new evidence submitted by both parties at the appellate level.<sup>852</sup> The sentence in the judgment cited by Merck simply notes by reference the single respect in which Merck expressly waived its rights.

497. Moreover, under Article 119 of the Code of Civil Procedure, the court has no obligation to credit *all* the evidence submitted by the parties, but only the evidence relevant to the final outcome of the case. Thus, that the court did not discuss the entire voluminous record of evidence submitted by the parties, does not mean that the court either waived or did not consider it. The court of appeals' final judgment reflects its appreciation of the evidence that it found most persuasive. Clearly, it does not detail *all* of NIFA's evidence it may have considered

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<sup>850</sup> MSDIA's Petition of 16 April 2010, *NIFA v. MSDIA*, Court of Appeals (C-26).

<sup>851</sup> Court of Appeals Order, 26 April 2010 (R-87); Court of Appeals Judgment, *NIFA v. MSDIA*, dated 23 September 2011, at 16 (C-4).

<sup>852</sup> Aguirre Opinion, ¶ 5.4. *See also id.*, ¶¶ 5.5-5.7, 7.2.

either. The court had no obligation to enumerate all the evidence that swayed its decision one way or another.<sup>853</sup>

498. Thus, Merck’s allegation that the court “ignored” its evidence, and relied only on NIFA’s evidence, is not supported.

499. Merck alleges that the court of appeals’ decision “ignored NIFA’s burden of proof on both liability and damages.”<sup>854</sup> The one example provided by Merck itself undermines its claim. Merck states that the court of appeals relied on the information available in the public domain about Merck’s economic power in the market, without citing applicable rules of procedure. The court’s power to rely on publicly available information derives from a specific provision in the Organic Code on the Judicial Functioning, which states: “Judges will only make decisions based upon the materials provided by the parties. Proof of public and well-known facts will not be required because the judge can declare them as part of the record to reach its decision.”<sup>855</sup> The court did not need to expressly cite this well-known principle, common to many jurisdictions.

500. Importantly, the record does not support Merck’s blanket allegation that the court of appeals simply ignored NIFA’s burden of proof. As described above, in addition to the expert

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<sup>853</sup> This practice is far from unusual. *See e.g.*, Swiss Supreme Court, Case No. 4A\_95/2013, Judgment (27 June 2013) (RLA-123). This case involved a contract between a Canadian mining company and a German consulting firm containing an ICC arbitration clause with jurisdiction in Zürich. When a dispute arose as to the payment of the fee, the German consultant started arbitral proceedings in Zürich. The ICC tribunal issued an award in January 2013 upholding the claim. An appeal was made to the Swiss Supreme Court on due process grounds. The Swiss Supreme Court found that not specifically mentioning a witness statement or the testimony at the hearing is not a violation of the right to be heard when the arbitral tribunal reaches a factual conclusion and simply states that “other evidence” does not support another conclusion:

There is neither a violation of the right to be heard, nor a denial of right in the fact that, thereafter, it no longer expressly addressed the witness statements mentioned in the appeal but found generally that the other evidence – in particular, the witness statements – could not change the results of the evidence.

*Id.*, ¶ 3.2.

<sup>854</sup> Claimant’s Memorial, ¶ 124.

<sup>855</sup> Organic Code on the Judicial Functioning, Art. 27 (enacted on 9 Mar. 2009) (RLA-91).

testimony and new evidence submitted by NIFA, the court of appeals had the entire lower court record before it, which included evidence on liability and damages.

501. In this regard, Mr. Ponce faults the court of appeals (as it does the trial court) for relying on the testimony of Mrs. Usher de Ranson “despite procedural violations in the taking of her evidence...”<sup>856</sup> But, as shown above, Merck fails to demonstrate anything irregular about the taking of Mrs. Usher de Ranson’s evidence; a conclusion corroborated, as noted above, by the fact that Merck did not seek to nullify the lower court’s decision based on any such alleged procedural violations. Finally, as a point of fact, there was evidence in the record before both courts that Mrs. Usher de Ranson, NIFA’s key witness on liability, had personal knowledge of the negotiations between Merck and NIFA in her position as the Executive Vice-President of Staubach in charge of client relations, and in charge of Merck’s account.<sup>857</sup>

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<sup>856</sup> Ponce Statement, ¶ 51.

<sup>857</sup> Claimant attempts to discredit Mrs. Anne Usher de Ranson’s testimony by suggesting that she was only involved in the early stages of the negotiations. Claimant’s Memorial, ¶ 46. This is belied by Claimant’s own evidence. *See also* Testimony of Edgardo Jaén, *NIFA v. MSDIA*, Trial Court, dated 18 October 2005, at 2 (C-151) (in response to Question 20) (“Mrs. Anne Usher de Ranson, who was my direct superior as Staubach, was aware of the progress made since this information was available in the weekly progress reports and the witten [sic] and electronic communication exchanged through Staubach between interested parties and Merck.”); *Id.* (in response to question 22) (“Mrs. Anne Usher de Ranson was aware of the two meetings that were held that day in Panama. As I coordinated the meetings between Merck and NIFA, she had access to the electronic mail messages exchanged on this regard.”); *id.*, p. 11 (in response to cross-Question from NIFA 5) (“Mrs. Anne Usher de Ranson had full access to the hard copies of all documents concerning projects that were carried out through the Panama office, including the promotion of the sale of MSD’s plain in Ecuador.”); Exhibit C-149, Testimony of Anne Karsen Renson [a/k/a Anne Usher de Ranson], *NIFA v. MSDIA*, Trial Court, dated 29 August 2005 (in response to Question 8) (“After May 14th, 2002, I stopped dealing directly, face to face, with the client in the negotiations with Merck, but I, as company officer and account manager for MSD, continued to be informed of everything that went on in the negotiations. Edgardo Jaen reported to me on most of the clients he was involved with, including MSD since I was an officer at Staubach Spanish Americas & Caribbean Inc. and his direct supervisor.”)

Furthermore, as the evidence produced in the lower courts also shows, Mrs. Usher de Ranson continued to play an important role in defining Staubach’s strategy to sell the Chilllos Valley Plant. *See, e.g.*, Email from Anne Usher de Ranson to Edgardo Jaen (Staubach), dated January 16, 2003 (R-12), instructing Mr. Jaen to inquire whether EQUAQUIMICA was still interested in the plant in light of Jacob Harel’s (Merck) intentions to hamper the deal with NIFA; Email from Anne Usher de Ranson to Jill Gambino (Staubach) and Edgardo Jaen (Staubach), dated January 22, 2003 (R-14), regarding the last meeting between NIFA and Merck on January 22, 2003.

502. In short, Merck’s barrage of alleged irregularities is not borne out by the record. Quite aside from the reasoning and amount of damages rendered by the court of appeals, which were corrected by the National Court of Justice, Merck cannot seriously claim that its fundamental due process rights were violated by the court of appeals. To the contrary, the second instance record shows that both litigants were afforded equal opportunity to submit new evidence and to rely on any evidence from below; obtain witness testimony through a compulsory court process and confront each other’s new witnesses; appoint various experts in three relevant areas (damages, real estate and antitrust laws) and question their conclusions. Each litigant had full opportunity to know the substance and source of any evidence against it and to contest its validity.<sup>858</sup> Each also had the right to submit written arguments and request oral arguments. Merck has not shown how this process was devoid of the requisite procedural safeguards to support its denial of justice claim.

### **3. Merck Has Failed To Demonstrate that the Lower Court Judgments Were “Influenced” By Judicial Corruption**

503. Merck alleges that “[t]here are *overwhelming indicia of corruption* among the judges assigned to the *NIFA v. MSDIA* litigation in the trial court and court of appeals, and that the judgments in those courts were *procured corruptly by the plaintiff*.”<sup>859</sup> As noted above, not only does Merck’s reliance on “indicia of corruption” mask the absolute absence of any actual proof of corruption, Merck has not even shown anything that could even serve as an indicator of corruption *relating to* the *NIFA v. MSDIA* case itself, much less meet the high degree of proof necessary to warrant a finding of a denial of justice. Instead, Merck cites to events completely

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<sup>858</sup> See F. García Amador, L. Sohn and R. Baxter, Codification of the Law of State Responsibility for Injury to Aliens (1974) (RLA-25).

<sup>859</sup> Claimant’s Memorial, ¶ 175 (emphasis added).



unrelated to its case as instances of corruption. Moreover, far from substantiating its assertion that the judiciary was corrupt, Merck's examples actually paint a picture of a judicial system that is responsive to charges of impropriety and corruption.

504. First, Merck argues that NIFA's general manager "has been publicly described ... as a corrupt figure with a history of bribing government officials."<sup>860</sup> Merck then invokes an unrelated incident involving another company owned by Mr. Garcia, which occurred 25 years ago.<sup>861</sup> Merck does not show how this past action "influenced" the *NIFA v. MSDIA* proceedings. What is more, Merck itself admits that Mr. Garcia was subjected to a criminal investigation, the contract under investigation was rescinded, the Minister of Health granting the contract was forced to resign, and several other officials from the Ministry of Industries were investigated and arrested.<sup>862</sup> This is not evidence of a system tolerant of or unresponsive to corruption. Rather, it undercuts Merck's attempt to portray a "corrupt, ineffective" system, in which corruption runs rampant with impunity.

505. Merck's evidence shows that Mr. Garcia was convicted of bribery and sentenced to a three-year of prison term.<sup>863</sup> However, when Mr. Garcia appealed the verdict entered against him based on the acquittal of the public official who allegedly received the bribes from Mr. Garcia,<sup>864</sup> the Supreme Court of Justice (Criminal Division) acquitted Mr. Garcia in 1994

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<sup>860</sup> *Id.*, ¶ 177.

<sup>861</sup> Claimant's Memorial, ¶¶ 178-179.

<sup>862</sup> *Id.*, ¶ 179.

<sup>863</sup> Order of 11 March 1991, President of the Supreme Court of Justice, at 10 (C-118).

<sup>864</sup> *See* Order of June 1994, Supreme Court of Justice (entering an order of acquittal in favor of Miguel García Costa) (C-117).

because the crime was not proved pursuant to the law.<sup>865</sup> None of the evidence submitted by Merck puts the validity of this acquittal of Mr. Garcia into question. Merck's description of the 2010 Truth Commission Report is grossly misleading. The report merely described the events surrounding the investigation that led to arrest of persons in connection with the Ecuahospital case, which is not in question. The report does not declare Mr. Garcia to have been guilty and does not even purport to offer evidence of such a crime.<sup>866</sup> As such it does nothing to undermine the fact that Mr. Garcia was eventually acquitted of the charges for which he was arrested. Merck's reliance upon the 2013 Human Rights Watch Report is perhaps even more egregious. Not only does the report make no mention whatsoever of Mr. Garcia, it does not even refer to the case involving him; rather, it refers to 117 unprosecuted alleged human rights violators also covered by the multi-volume Truth Commission Report.<sup>867</sup> The very fact that Merck feels the need to distort the evidence this blatantly shows the phantom nature of its so-called indicia of corruption.

506. Merck also refers to the removal from office of Judge Chang Huang, the trial court judge that issued the original judgment.<sup>868</sup> Again, Merck conveniently overlooks the fact that the complaints at issue, which eventually led to her removal from office, were completely unrelated

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<sup>865</sup> *See id.*

<sup>866</sup> Report of the Truth Commission, Volume 2: Crimes Against Humanity, Ecuador 2010, p. 36 (C-94). In 2007, President Rafael Correa established a "Truth Commission to Impede Impunity," with a specific mandate to investigate particularly human rights abuses that occurred during León Febres Cordero's administration (1984-1988). The Truth Commission focused on these abuses, including extrajudicial executions, torture, arbitrary detentions, and sexual violence. The Commission made 155 recommendations centered on satisfaction, restitution, rehabilitation, compensation and guarantees of non-repetition. This is another example in which the system itself is acting to rectify wrongdoing by preceding governments.

<sup>867</sup> Human Rights Watch, World Report 2013, pp. 228-229 (C-216).

<sup>868</sup> Memorial, ¶ 183.

to this case.<sup>869</sup> Moreover, the example of Judge Chang Huang shows that the system actually works against corruption because she was, in fact, removed for the defects in her performance at that time, unrelated to the NIFA litigation.<sup>870</sup> In addition, in the two instances cited by Merck where specific disciplinary charges were brought against Judge Chang Huang, again in two matters completely unrelated to the NIFA litigation, she was disciplined by the Ecuadorian Judiciary Council.<sup>871</sup> One of these disciplinary actions resulted in an *en banc* decision of the Judiciary Council to permanently bar Judge Chang Huang from office.<sup>872</sup> Judge Chang Huang has since brought an administrative action against this decision before the Administrative District Tribunal in Quito, seeking her reinstatement or, in the alternative, monetary compensation for termination of her duties.<sup>873</sup> This action is currently pending.

507. Merck itself has not lodged a disciplinary act against Judge Chang Huang based on its allegations of corruption in the NIFA litigation.

508. But considerably more important, Merck does not explain that under Ecuadorian Law, an aggrieved party can sue a judge if he or she believes the judge has committed a wrongdoing

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<sup>869</sup> Memorandum from Benjamin Cevallos Solorzano, President of the Judiciary Council, to Marco Rodas Bucheli, Pichincha Provincial Director of the Judiciary Council, Official Document No. 984 – P – CJ GP (1 July 2010) (C-104).

<sup>870</sup> Memorandum from Benjamin Cevallos Solorzano, President of the Judiciary Council, to Marco Rodas Bucheli, Pichincha Provincial Director of the Judiciary Council, Official Document No. 984 – P – CJ GP (1 July 2010) (C-104). Dr. Benjamin Cevallos Solorzano, President of the Judiciary Council, ordered the immediate end of tenure of Judge Chang Huang, pursuant to Art. 269(5) of the Organic Code of the Judicial Function, without prejudice to continuation of the summary administrative proceedings, which were underway against Judge Chang Huang. *See* Organic Code on the Judicial Functioning, Art. 269(5) (RLA-91).

<sup>871</sup> Temporary Judge Chang-Huang Personnel File, Disciplinary File No. Mot-099-UCD-010-MAC, file opened 9 April 2010 (C-190); Temporary Judge Chang-Huang Personnel File, Disciplinary File No. Mt 235-UCD-010-CJ, Decision of 12 January 2011 (C-194).

<sup>872</sup> Temporary Judge Chang-Huang Personnel File, Disciplinary File No. Mot-099-UCD-010-MAC, file opened 9 April 2010, Decision of April 6, 2011 (C-190).

<sup>873</sup> Administrative Proceedings initiated by Judge Chang Huang, Complaint (R-119).

in carrying out her functions. And that is precisely what Merck did.<sup>874</sup> Merck, however, did not reveal this fact or the lawsuit's outcome to the Tribunal.

509. The full story is as follows. On April 21, 2009, after its nullity petition was rejected by the Court of Appeals, Merck filed claims for damages against the Temporary Judge Chang Huang and Ricardo Javier Lopez Arauz, who served as her Judicial Assistant on the NIFA case, to recover additional attorney's fees spent to retain the services of new counsel to address the improper judgment reached through her judicial misconduct.<sup>875</sup> Merck made the same allegations against Judge Chang Huang as it does in the present proceedings, namely:

- Merck's counsel received an incomplete judgment by email on 17 December 2007;
- Merck's counsel did not receive the judgment in the attorney mailbox;
- Temporary Judge Chang Huang told two witnesses that she had not intended the decision and was glad to have the appellate court "correct" it;
- Temporary Judge Chang Huang reviewed the case within only 3 business days;
- Temporary Judge Chang Huang could not have typed the judgment within 3 hours; and
- Temporary Judge Chang Huang did not write the judgment and sections of the Complaint were literally transcribed in the judgment without analysis.<sup>876</sup>

510. The Ecuadorian Court hearing that case rejected every one of these allegations for lack of legal support or lack of evidence. In particular, the Court:

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<sup>874</sup> Electronic Docket, Case No. 2009-0477, *MSDIA v. Chang Huang*, Twelfth Court for Civil Affairs of Pichincha (First Instance Court) (R-125).

<sup>875</sup> Electronic Docket, Case No. 2009-0477, *MSDIA v. Chang Huang*, Twelfth Court for Civil Affairs of Pichincha (First Instance Court) (R-125).

<sup>876</sup> *Id.* MSDIA also complained that the judgment issued by Temporary Judge Chang Huang was based on general principles of law, rather than the specific law applicable to the subject matter, and that the damages awarded by her had no basis in legal analysis.

- did not find any evidence of wrongdoing either by Judge Chang Huang or Mr. Lopez in the electronic transmission of the judgment, while observing that the “system used by the Ecuadorian Automated Judicial Processing System (*Sistema Automático de Tramite Judicial Ecuatoriano* – SATJE) for the distribution of e-mail messages is not secure. It leaves room for human intervention that could alter the functioning of the system, from the creation of the text of the ruling to its storage in the inbox of Dr. Luis Ponce Palacios’s computer....;”<sup>877</sup>
- found that the court clerk’s certification publicly attesting that the Trial Court Judgment was notified to the parties “in-and-of-itself constitutes evidence” that the judgment was properly served on MSDIA.<sup>878</sup> Moreover, Merck was able to file a timely appeal; therefore, there was harm to Merck;<sup>879</sup>
- dismissed the testimony of the two witnesses (the clients of Dr. Santamaria, Merck’s local counsel), on the grounds that they had a dependent relationship with the counsel to Merck in the *NIFA v. MSDIA* litigation and that, therefore, they were not credible.
- held that with respect to the timing of the “taking cognizance” and the notification of the Trial Court Judgment to the Merck, “[t]his evidence cannot be considered technical evidence or as proving wrongdoing, because the start time and end time depend on the circumstances of the work of the Judiciary, and such time involves a long process of studying the case.”<sup>880</sup>

511. Thus, the claims of wrongdoing alleged against Temporary Judge Chang Huang in this arbitration were dismissed by the court. Merck appealed this decision, which is pending before the Court of Appeals. The court’s dismissal of this lawsuit and, in particular, its rejection of Merck’s evidence as insufficient to establish any wrongdoing, shed a very different light on this case. Specifically, as discussed above, it establishes that Merck’s allegation that Judge Chang

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<sup>877</sup> Electronic Docket, Case No. 2009-0477, *MSDIA v. Chang Huang*, Twelfth Court for Civil Affairs of Pichincha (First Instance Court), p. 10 (R-125).

<sup>878</sup> *Id.*, p. 11.

<sup>879</sup> *Id.*

<sup>880</sup> *Id.*, ¶ 10. The Court also ruled that other allegations of arbitrariness of the trial court judge could not be decided by it because her ruling had been appealed to the Court of Appeals and any ruling on the propriety of the judge’s own ruling would be improper interference with the Court of Appeals’ decision-making.

Huang “has herself acknowledged that her decision in the *NIFA v. MSDIA* litigation was not made on the merits”<sup>881</sup> is not supported by any reliable evidence and was flatly contradicted by Judge Chang Huang’s own testimony.<sup>882</sup>

512. Similarly, Merck alleges that Judge Hernán Alberto Palacios Durango, the president of the three-judge panel of the Court of Appeals that rendered the decision, has been investigated for corruption in two cases that are unrelated to the NIFA litigation.<sup>883</sup> Merck fails to advance any explanation for how these two cases have any relationship to the NIFA litigation. Even more importantly, Merck fails to show that this investigation resulted in any finding of wrongdoing by Judge Palacios. First, Merck cites a newspaper article stating that “the Civic Corruption Control Commission (CCCC) found evidence of criminal and civil liability against the judge of the Ninth Civil Court of Pichincha” and that it “sent all of this documentation to the Justice Department of Pichincha for it to issue the corresponding writ of investigation against the judge of the Ninth Civil Court of Pichincha, as well as the National Judicial Council.”<sup>884</sup> The story alleges that Judge Palacios seized the defendant’s tractor-trailers in connection with the Merck’s allegation of unpaid debt.<sup>885</sup> Aside from this inconclusive allegation that certain evidence was identified to support further investigation against Judge Palacios, Merck provides no other evidence of any wrongdoing by Judge Palacios.

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<sup>881</sup> Claimant’s Memorial, ¶ 188. It should be noted that Merck has since modified its earlier bold allegation that Judge Chang Huang “has openly acknowledged that her decision in the *NIFA* litigation represents a miscarriage of justice that was not made on the merits.” MSDIA’s Reply (5 Aug. 2012), ¶ 238.

<sup>882</sup> See Witness Statement of Victoria Chang-Huang Castillo, *MSDIA v. Chang Huang*, Twelfth Court for Civil Affairs of Pichincha (First Instance Court) (13 Jan. 2009) (R-69).

<sup>883</sup> Claimant’s Memorial, ¶ 196.

<sup>884</sup> *CCCC Asks for Judge to Be Removed*, LA HORA, 23 March 2002 (C-65).

<sup>885</sup> *Id.*

513. Second, Merck points to the dismissal and subsequent reinstatement of Judge Palacios and Judge Toscano, based on the allegation that they favored one of the parties in another case.<sup>886</sup> The initial charges that resulted in the dismissal of Judge Toscano and Judge Palacios involved moving up the date for a judicial confession of ones of the parties.<sup>887</sup> The judges explained this act as “favoring the principle of procedural speed.”<sup>888</sup> Importantly, Judge Palacios and Judge Toscano were both acquitted, an outcome described by Merck’s own evidence as “correcting an error.”<sup>889</sup>

514. In conclusion, none of the foregoing examples *relate* to the specific case at hand and fail to even demonstrate unrelated corruption.<sup>890</sup> None of them can satisfy the heightened standard of proof required to establish corruption. Certainly what Merck calls “the extraordinary outcomes in [the *NIFA v. MSDIA*] case”<sup>891</sup> were considered by the NCJ to be erroneous. But they do not make “[t]he conclusion that corruption produced these results [...] inescapable.”

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<sup>886</sup> Claimant’s Memorial, ¶ 196; *CJT Corrects Error That Harmed Two Judges*, LA HORA, 1 August 2012 (C-113)

<sup>887</sup> *CJT Corrects Error That Harmed Two Judges*, LA HORA, (1 Aug. 2012) (C-113); see *Ecuador Reverses the Dismissal of Two Judges*, UPI ESPAÑOL, (9 July 2012) (C-114).

<sup>888</sup> *Ecuador Reverses the Dismissal of Two Judges*, UPI ESPAÑOL (9 July 2012) (C-114).

<sup>889</sup> *CJT Corrects Error That Harmed Two Judges*, LA HORA, (1 Aug. 2012) (C-113). See also, *Ecuador Reverses the Dismissal of Two Judges*, UPI ESPAÑOL, (9 July 2012) (C-114) (“The Judicial Council of Transition (CJT) amended a mistake and restored to their the positions judges Alberto Palacios Durango and John Toscano Garzon.” (emphasis added)). As explained by Merck’s own exhibit, Judge Toscano was also restored to his position of the First Civil Chamber of the Provincial Court of Pichincha. *CJT Corrects Error That Harmed Two Judges*, LA HORA, (1 Aug. 2012) (C-113) (“The CJT recognized that, while it is true that the accused judges made new designations/dates for the taking of a judicial confession, these actions did not cause any harm to the process nor to the parties.”).

<sup>890</sup> Cf. *Vannessa Ventures Ltd. v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB(AF)04/6, Award (16 Jan. 2013), ¶ 228 (RLA-118) (“Allegations of a lack of independence and impartiality are more difficult to deal with. . . . But they must be properly proved; and the proof must, at least ordinarily, relate to the specific cases in which the impropriety is alleged to have occurred. Inferences of a serious and endemic lack of independence and impartiality in the judiciary, drawn from an examination of other cases or from anecdotal or circumstantial evidence, will not ordinarily suffice to prove an allegation of impropriety in a particular case.” (emphasis added)).

<sup>891</sup> Claimant’s Memorial, ¶ 176.

Such an inference cannot substitute for evidence; and Merck’s evidence falls far short of what is necessary even to prove “indicia of corruption,” much less actual corruption.

## **VII. MERCK WOULD NOT IN ANY EVENT BE ENTITLED TO THE DAMAGES IT CLAIMS**

515. The question of liability is clear: there is simply no denial of justice here. However, even if this Tribunal were to find liability, Merck would still not be entitled to the damages it claims. On top of the \$1.57 million it claims it would be due in restitution of the NCJ’s judgment, it also claims nearly *four times* that amount in legal fees. For the reasons explained below, its claim that it is due an exorbitant in legal fees is wholly without merit.

### **A. Merck May Not Claim Legal Fees Since It Has Not Provided Any Evidence to Support its Claim.**

516. Merck alleges that it is “entitled to recover the legal fees and costs it incurred in connection with its defense” of the Ecuadorian court proceedings.<sup>892</sup> But Merck may not merely claim damages on the basis of its own *ipse dixit*. It must provide actual evidence. “To the extent . . . that a claimant chooses to put its claim . . . in terms of monetary damages, then it must, as a matter of basic principle, be for the claimant *to prove* . . . its quantification in monetary terms and the necessary causal link between the loss or damage and the treaty breach.”<sup>893</sup>

517. Merck has not “proved” its quantification of damages. With no citation whatsoever, Merck alleges it is due \$6 million USD.<sup>894</sup> It has provided no basis for this figure, claiming only that it will provide such evidence “when it is necessary for the Tribunal’s quantification of

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<sup>892</sup> Memorial, ¶ 412.

<sup>893</sup> *Rompetrol Group N.V. v. Romania*, ICSID Case No. ARB/06/03, Award (6 May 2013) (Berman, Lalonde, Donovan) (“*Rompetrol*”), ¶ 190 (RLA-121) (emphasis supplied).

<sup>894</sup> Memorial, ¶ 413.



damages,” even though providing such a large sum in its Memorial has, no doubt, an unfairly prejudicial effect on Ecuador. Without any citation -- even to a damages expert who had independently quantified such figures -- providing such an unsubstantiated amount accomplishes no legitimate purpose.

518. In so requesting that the Tribunal consider at some undisclosed future point evidence that Merck promises to submit in support of its \$6 million claim for legal fees, Merck is essentially arrogating to itself the authority to bifurcate the damages phase of the proceedings, in contravention of the schedule ordered by this Tribunal. Indeed, in its 21 May 2013 Procedural Order, the Tribunal explicitly stated that Merck was required, when it submitted its Memorial, to “include[e] *all* the evidence upon which it relies.”<sup>895</sup> At no point in either of its Procedural Orders did this Tribunal contemplate that Merck would be able to submit some selected universe of evidence at a date that it decided, on its own, would be more convenient.<sup>896</sup>

519. Nor has Merck provided anything close to a justification for its failure to submit evidence in support of this claim. It gestures toward “sensitivities associated with billing records,” but does not state what those “sensitivities” are and leaves it to the Tribunal’s and Ecuador’s collective imagination.<sup>897</sup> Apparently, however, the “sensitivities” that are somehow “associated” with the billing record are *not* so sensitive as to exclude them (or the amount) from consideration altogether. More importantly, however, Merck promises to disclose that evidence at some later date to the Tribunal, completely undermining the assertion that there are any actual “sensitivities.” To the extent that Merck wants “confidentiality protections” in place, why has it

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<sup>895</sup> Procedural Order No. 2 (21 May 2013) (evidence supplied).

<sup>896</sup> *See id.*; *see also* Procedural Order No. 1 (18 July 2012).

<sup>897</sup> Memorial, ¶ 413.

not yet requested such protections? What prevented Merck from asking for such protections in advance of filing its Memorial? What prevents Merck from providing copies redacting “sensitivities”? The mysteries abound. The likely answer, though, is no mystery: Merck does not have the evidence to justify its exorbitant figure, and is hoping that the eye-popping number will sway this Tribunal and force a large award, without any actual evidence from Merck.

520. Even if Merck were now to request permission to submit evidence previously within its possession, such a request would necessarily have to be rejected. While the Tribunal has the general power and discretion under Article 15(1) to “conduct the arbitration in such a manner as it considers appropriate,” it must do so only “provided the parties are treated with equality.”<sup>898</sup> Moreover, each party must be “given a full opportunity of presenting his case.”<sup>899</sup> It is, in this case, unreasonable for Merck on the one hand to avoid its responsibility to present any evidence regarding this head of damages without any comprehensible justification, but then on the other to also assert a right to do so in the future.

521. Having presented no evidence regarding its claim for legal fees, it should be not awarded damages for them.

**B. Even If Merck Had Been Able To Demonstrate a Denial of Justice, a Large Portion of Legal Fees Cannot be Deemed as Wasted and Thus Recoverable.**

522. Likewise, Merck cannot fully provide the causal “link” between its \$6 million claim for legal fees and the injury claimed of here. Relying on its expert, Merck alleges that all of the legal costs incurred in its legal representation before the Ecuadorian courts are recoverable as

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<sup>898</sup> UNCITRAL Arbitration Rule, Art. 15(1); *see also* Procedural Order No. 1, ¶ 3.1.

<sup>899</sup> *Id.*

“the legal costs wasted on a defective lawsuit.”<sup>900</sup> But even in the event Merck succeeds in demonstrating that it was injured by a denial of justice, a large portion of those legal fees cannot be deemed as wasted, and thus that same portion cannot be recovered.

523. The *Chorzow Factory* case, which Merck cites in its Memorial, emphasizes that a claimant may only be compensated for damages “*actually* suffered,” and that the situation “has to be compared with the one that would have prevailed had the act not been committed.”<sup>901</sup> Even if Merck succeeds on a denial of justice claim, by its own allegations the damages that were incurred were, at best, from the point of the initial judgment. Yet a large portion of the legal work done was with regard to the proceeding before the initial court – including a period during which the parties were to submit evidence and take witness testimony.<sup>902</sup> Whatever the outcome in the first (or subsequent) proceeding, Merck would have had to do this legal work to defend itself against NIFA’s claim. Merck’s allegation is that Ecuador’s court *judgments* were a denial of justice. There can be no claim that that denial of justice began with NIFA’s complaint.

524. Accordingly, even if this Tribunal agrees that Merck can successfully demonstrate a denial of justice, and that legal fees incurred in the proceedings before the Ecuadorian courts should be awarded, those fees must be offset by the fees incurred by Merck when it defended itself before the trial court – which it would have had to do regardless. (It is, of course, impossible to know what amount of offset this might be, since Merck has unilaterally bifurcated the proceedings and keeps its legal costs in secret.) This is consistent with the formulation in the *Chorzow Factory* case, which requires only that *actual* damages be compensated. When

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<sup>900</sup> Memorial, ¶ 412.

<sup>901</sup> Exhibit CLM-162, R. Dolzer & C. Schreuer, *PRINCIPLES OF INTERNATIONAL INVESTMENT LAW* (2008), p. 272.

<sup>902</sup> Claimant’s Memorial, ¶¶ 37-52.

compared with the situation “that would have prevailed” had the alleged denial of justice not been committed, the constant is that Merck would have incurred legal fees in defending itself in the proceedings before the trial court, no matter what.

525. Moreover, Merck cannot claim fees incurred in prosecuting its appeal of the first instance judgment since it eventually prevailed on all of the grounds alleged before the appellate body.

526. Thus, even if Merck were, contrary to the Tribunal’s orders and the UNCITRAL Rules, permitted to submit late evidence in support of this head of damages, it could not be shown that the fees claimed were wasted as a result of the denial of justice Merck alleges.

### **C. Merck Has No Claim for “Moral Damages.”**

527. Finally, Merck alleges that it is “further entitled to recover the moral damages it has suffered as a result of the prolonged pendency” of the litigation before the Ecuadorian courts.<sup>903</sup> Similar to its claims for legal fees, Merck provides next to nothing by way of evidence. It only provides, again, its own *ipse dixit*: the “repeated findings of liability” were enough to “improperly suggest[] that Merck had been damaged.”<sup>904</sup> Yet despite claiming that this harm was simply “obvious,”<sup>905</sup> it provides *no evidence of any* “lost reputation,” or “lost credit,” or “lost social position,”<sup>906</sup> relying instead on its “obviousness.” But without evidence – not even the word of an expert – there is nothing for the Tribunal to find.

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<sup>903</sup> *Id.*, ¶ 414.

<sup>904</sup> *Id.*

<sup>905</sup> *Id.*

<sup>906</sup> See *Joseph Charles Lemire v. Ukraine*, ICSID Case No. ARB/06/18, Award (28 March 2011) (“*Lemire*”), ¶ 333 (CLM-130).

528. Regardless, as the Tribunal noted in the case *Franck Charles Arif v. Republic of Moldova*, although the Tribunal has some discretion in determining whether to award moral damages, such an award is an “exceptional remedy.”<sup>907</sup> That limit, as the Tribunal noted, “must be acknowledged and respected.”<sup>908</sup> For such an “exceptional remedy” to be granted, there must be “exceptional circumstances.”<sup>909</sup>

529. In determining whether “exceptional circumstances” in fact exist, the *Lemire* case is instructive. There, the Tribunal reviewed and considered various cases in which “exceptional circumstances” had been found. In one, the *Desert Line* case, the claimant was “subject to a siege with heavy artillery, an armed assault, an act of terror in its worst image.”<sup>910</sup> In the *Lusitania* case, damages were awarded due to the “mental sufferings or shock caused by the violent severing of family ties by reasons of the deaths” caused.<sup>911</sup> In the *Siag* case, the Tribunal stated – in a case where the claimants’ property was seized by force, “including the beating of one of Mr. Siag’s employees, who required hospital care” – that non-compensatory punitive damages (which the Tribunal analogized to moral damages) could be awarded only in “extreme cases of egregious behavior.”<sup>912</sup>

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<sup>907</sup> See *Mr. Franck Charles Arif v. Republic of Moldova*, ICSID Case No. ARB/11/23, Award (8 Apr. 2013) (Cremades, Hanotiau, Knieper), ¶¶ 590-592 (RLA-120).

<sup>908</sup> *Id.*, ¶ 592.

<sup>909</sup> *Lemire*, ¶ 326 (CLM-130).

<sup>910</sup> *Id.*

<sup>911</sup> *Id.*, ¶ 330.

<sup>912</sup> *Id.*, ¶ 332.

530. Based on this line of cases, the Tribunal in *Lemire* determined that moral damages “are not available to a party injured by the wrongful acts of a State,” but instead they can be awarded in the rare “exceptional case,” *provided that*

the State’s actions imply physical threat, illegal detention or other analogous situations in which the ill-treatment contravenes the norms according to which civilized nations are expected to act;

the State’s actions cause a deterioration of health, stress, anxiety, other mental suffering such as humiliation, shame and degradation, or loss of reputation, credit and social position; *and*

both cause and effect are grave and substantial.<sup>913</sup>

531. It is worth highlighting that the Tribunal’s factors in *Lemire* are conjunctive, not disjunctive. “Loss of reputation” – which Merck alleges without evidence – is not to be considered alone, but instead *alongside* “physical threat, illegal detention, *or other analogous situations.*” It is beyond dispute that *none* of the allegations made by Merck come close to meeting this standard.

532. As another recent case notes, “In general international law, while the award of moral damages is certainly accepted, both practice and the published literature show that this represents either damage to the honour and dignity of a State . . . or else indirect compensation under the rubric of diplomatic protection for injuries of a personal kind suffered by the citizens of the claimant State.”<sup>914</sup> But in the case of a foreign investor, reputational damage which shows itself in some economic fashion “is just another example of actual economic loss or damage, which is subject to the usual rules of proof.”<sup>915</sup> But, when such evidence cannot be provided, “[t]o resort

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<sup>913</sup> *Id.*, ¶ 333 (emphasis supplied).

<sup>914</sup> *Rompetrol*, ¶ 289 (RLA-121).

<sup>915</sup> *Id.*

instead to a purely discretionary award of moral solace would be to subvert the burden of proof and the rules of evidence,” which that Tribunal did not do. Nor should this one; Merck here is, indeed, attempting to “subvert the burden of proof.”

533. Merck’s request for moral damages is, in a word, frivolous. The standard for an award of such an “extraordinary remedy” is an extraordinarily high bar that it simply cannot meet, even it were to prevail on the ultimate question of liability before this Tribunal.

### **VIII. CONCLUSION AND REQUEST FOR RELIEF**

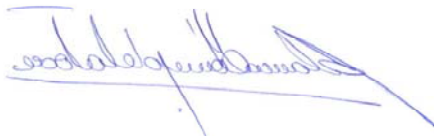
534. For the foregoing reasons and any further reasons that it may later submit, the Respondent, Republic of Ecuador, hereby respectfully requests that the Tribunal render an award in its favor:

- dismissing Merck’s claims as outside of the Tribunal’s jurisdiction, inadmissible and/or constituting an abuse of the arbitral process, or in the alternative, for lack of merit;
- awarding the Respondent all of its costs and expenses in this arbitration proceeding, including the fees and expenses of the Tribunal and the cost of the Republic’s legal representation, plus pre-award and post-award interest thereon; and
- granting any other or additional relief as may be appropriate under the circumstances or as may otherwise be just and proper.

535. The Republic expressly reserves its right to supplement or add to the above requests.

Respectfully submitted,

Dra. Blanca Gómez de la Torre



*Procuraduría General del Estado*  
Republic of Ecuador

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