

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

RESPONDENT'S REJOINDER

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I. INTRODUCTION

1. The Respondent, Republic of Ecuador, respectfully submits this Rejoinder in response to the Reply Memorial presented by Claimant, Merck Sharp & Dohme (I.A.) Corp. (“Claimant,” “Merck” or “MSDIA”) on 8 August 2014, as well as to Claimant’s Supplemental Reply Memorial presented on 16 January 2015.

2. From February 2002 to January 2003, Merck and Ecuadorian pharmaceutical manufacturer, NIFA S.A. (“NIFA,” or as it has been renamed “PROPHAR”) engaged in negotiations for PROPHAR’s possible purchase of Merck’s Chillos Valley production facility, which would have allowed PROPHAR to significantly expand its operations, product lines and sales. PROPHAR put aside other expansion plans and possible alternative factory purchases, and shared with Merck confidential, and for a competitor, valuable information concerning its plans, processes, products and finances.

3. By November 2002, the parties were eventually able to agree upon a purchase price for the plant. Then, in January 2003, after close to a year of negotiations, with no other major issues outstanding, Merck introduced a new demand that, as a condition of the purchase, PROPHAR enter into an undertaking not to compete with it by producing and selling for 5 years any of sixty-six unpatented generic drugs. Contemporaneous with its demand, Merck was analyzing the revenues it would lose if PROPHAR were to manufacture and sell four of the generic drugs that were on the list of the sixty-six generics that Merck presented to it as a new condition. Merck projected that it would avoid US \$4.1 million in lost revenues if PROPHAR did not agree to the restrictions on manufacture. Communications between Merck personnel stated: “How do we position such a request [to PROPHAR] with the current antitrust requirement in Ecuador.” At the same time, Merck was comparing the cost/benefit of selling the plant to PROPHAR if it did not

agree to the restrictions against selling to another potential purchaser. Negotiations broke down when PROPHAR would not agree to the restrictions.

4. PROPHAR brought suit in Ecuadorian civil courts under Articles 2214 and 2229 of the Ecuadorian Civil Code which provide liability for tortious conduct, and other statutes. Four separate panels of judges reviewed the many thousands of pages of documents and testimony, expert reports and briefs submitted and all concluded that Merck's conduct constituted an intentional tort under one or another of the recognized approaches to analyzing such conduct under Articles 2214 and 2229.

5. Merck had tried to excuse its behavior in the negotiations by citing to PROPHAR's attempt to get a permit for a particular drug with respect to which Merck still held a patent. But this excuse was not credited by the courts. Even if PROPHAR's explanation that it had applied for the permit based upon erroneous information it had received were not accepted as reasonable, this single instance was, unsurprisingly, not seen as justification for demanding that PROPHAR not produce many other drugs Merck sold but with respect to which it did not hold patents. Then, of course, there is the matter of the internal Merck emails that showed that it actually acted on the basis of a cold calculation of what losses it could expect to suffer from competing sales of such drugs by PROPHAR.

6. In any event, the imposition of liability on Merck for this conduct cannot be seen as anything but the normal judicial application of law to facts. Indeed, it cannot be seriously contested that such conduct would have been considered tortious in many other national legal systems, under one or all of the approaches adopted by the Ecuadorian courts. Merck's own acknowledgment of the reasonableness of liability for such conduct can be seen in its defense of the first judgment of the National Court of Justice ("NCJ") made in its briefs before the

Ecuadorian Constitutional Court. Although Merck is at pains now to emphasize where in its briefs it noted disagreement with the decision, it cannot avoid the implications of its repeated concessions that the NCJ's approach was a reasonable one.

7. To be sure, there were differences and even some errors along the way, as courts are sometimes prone to. As mentioned, the courts varied on exactly how to analyze Merck's conduct under Articles 2214 and 2229. And each had a different appreciation of what the evidence in support of PROPHAR's losses showed, with the two NCJ decisions reducing the damages previously awarded by the Court of Appeals by 99% and 95%, respectively. But as the case progressed, any such errors were being reviewed and addressed by higher levels of the court system, exactly as court systems are designed to work.

8. Merck could have allowed the ordinary processes of justice to run their course and defend itself against the claims arising from its conduct as well as it could. But Merck made different choices. First, it decided to put itself in a position to bypass the court system by pursuing international arbitration on a parallel course. And second, it decided to take every measure it could to cast normal operations of the Ecuadorian court system in an unfavorable light in order to support a claim in that arbitration that it had been denied justice under international law. In so doing, Merck has had to contrive grounds for jurisdiction, liability and damages to such an extent that it must be seen as having abused the rights that investors enjoy under the Ecuador-United States BIT.

9. First, in its rush to create a stand-by arbitral tribunal as a back-up in case it did not prevail in the courts, it locked itself, and Ecuador, into pursuing its arbitration under the ICSID Convention by accepting Ecuador's offer to, and seeking to "perfect" the parties' consent to, ICSID arbitration. Then, having thereby exercised its one and only choice of forum under

Article VI of the BIT, it turned around and commenced this UNCITRAL arbitration. As further shown in this Rejoinder, and as attested in Prof. Kenneth Vandeveld's second opinion, Merck's invocation of UNCITRAL arbitration is ineffective, despite its attempt to "reserve" a non-existent right to a second choice, and this Tribunal therefore lacks jurisdiction to hear Merck's claims.

10. Second, in order to bring its complaints within the scope of the BIT, which only covers disputes over rights or treatment of "investments," Merck has had to contort ordinary concepts of law in order to pretend that the actions of the Ecuadorian courts about which it complains constituted, not treatment only of Merck itself for its own independent tortious conduct, but rather treatment of something that can be deemed to be an "investment" under the BIT. But having sold, in a transaction unrelated to the present case, the one true investment it once had—the Chillos Valley plant—Merck's operations in Ecuador, even those conducted through an internal subdivision of itself manifested as a locally registered "branch"—as shown in Prof. Roberto Salgado Valdez's second opinion—are purely trading activities that cannot constitute an investment. Nor can the PROPHAR/Merck litigation itself be reasonably said to have "extended" the life of Merck's investment in the plant since it in no way affects Merck's rights of disposal of the plant, the only connection cited by Merck to rescue its claims from this defect. This is an independent ground upon which the Tribunal lacks jurisdiction under Article VI(1)(c) of the BIT and cannot find a breach of either Article II(3) or Article II(7) of the BIT.

11. Third, Merck acted in an abusively premature manner in failing, before commencing arbitration, to exhaust the available and effective remedy of the NCJ and the Constitutional Court of Ecuador. This continuing, and ever more salient, objection is further supported by the second opinions of Professors Juan Francisco Guerrero del Pozo, Lucius Caflisch and C. F.

Amerasinghe. Indeed, the lack of ripeness of Merck's claim of breach is only underscored by the very need for Merck to file a Supplemental Reply after the NCJ decision of 10 November 2014. This deficiency in Merck's claims defeats them on the merits, but also renders them inadmissible and outside of the Tribunal's jurisdiction.

12. But even if Merck's claims could survive these mortal deficiencies, they still should be dismissed for lack of merit. The most immediate reason is that the November 2014 NCJ decision represents a reasonable and rational disposition of the lawsuit. Any unresolved complaints about procedure, and Merck's strained attempts to impugn that decision, fail. In the decision, the Court found a violation of the tort provisions of Ecuador's Civil Code under principles relating to pre-contractual liability that are widely recognized and have long been at issue in the case— notwithstanding Merck's assertions to the contrary—and based on the same facts that were raised in the original complaint. In addition, the Court's conclusions as to damages were arrived at, not in the cartoonish manner portrayed by Merck, but in a rational analysis conforming to the recognized latitude of courts and arbitral tribunals the world around to appreciate evidence of loss and quantify damages. Finally, the absence in the decision of any order that PROPHAR return the money paid by Merck in satisfaction of the first NCJ decision is easily, and validly, explained by the fact that Merck never even requested such an order. The propriety and curative effects of the decision alone are sufficient to warrant the dismissal of Merck's claims.

13. But even if the November 2014 NCJ decision, which supplanted all previous decisions on the merits, were not dispositive, none of Merck's efforts to rehabilitate its attacks on the September 2012 NCJ decision, or the Court of Appeals and first instance proceedings, succeed. After abandoning numerous grounds it had previously cited as violations of due process—which is itself revelatory of the contrived nature of these complaints—Merck even attempts to raise

new grounds for attack which apparently did not strike it earlier as objectionable. With the assistance of the second opinions of Professors Luis Sergio Parraguez Ruiz, Carlos Molina Sandoval, Álvaro José Pólit García and Javier Aguirre Valdez, the Rejoinder will show, complaint by complaint, why there is no basis for holding any of them to constitute or contribute to a denial of justice.

14. Moreover, Merck's continued attempts to build a circumstantial case for the pervasive and universal corruption of the Ecuadorian court system are no more successful or justified than its earlier efforts. The evidence Merck relies on is notoriously unreliable and contradicted by its own State's foreign ministry, which recently concluded that the Ecuadorian courts are "generally considered independent and impartial." Charges of denial of justice are of a grave nature and Merck's case continues to lack the kind of evidence necessary to sustain them, or a justification for failing to exhaust domestic remedies. Merck has still utterly failed to come up with any proof of any corruption in the *PROPHAR/MERCK* litigation. Absent such direct evidence, it would be no more proper to infer corruption in these proceedings than it would be to infer that Merck has acted corruptly in Ecuador on the basis of the abundant evidence in the public record of widespread corruption in the pharmaceutical industry.

15. Finally, almost as if it is condescending to do so, Merck's Reply proffers for the first time what it asserts to be evidence of costs for attorney charges it incurred in the litigation. But not only is that evidence completely lacking in probative value, consisting as it does solely of the cover pages of invoices without any supporting data whatsoever, Merck offers no evidence that its claimed costs were in fact necessary and therefore caused by the Ecuadorian litigation, particularly with respect to the unexplained role therein of U.S. counsel. In addition, Merck puts forth for the first time a request for a permanent injunction ordering Ecuador to prevent the

enforcement of, and indemnify it against, any future judgment that might emerge from the litigation. However, Merck fails to establish any entitlement to such speculative relief.

16. In sum, as shown further in the Rejoinder, Merck's claims should be dismissed in their entirety.

II. IN LIGHT OF ARTICLE VI(3)(A) OF THE BIT, THIS UNCITRAL TRIBUNAL LACKS JURISDICTION BECAUSE MERCK ELECTED EXCLUSIVELY AND IRREVOCABLY TO SEEK RESOLUTION OF THE DISPUTE IN ICSID

17. 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 an investor has chosen to consent to one of the listed arbitration procedures, it may not subsequently make another choice of consent and submit the dispute to a different arbitration forum. Claimant has made such a choice when it definitively consented to ICSID arbitration with its Notice of Dispute dated 8 June 2009. It therefore impermissibly initiated these UNCITRAL proceedings and, as a result, the Tribunal has no jurisdiction over the dispute. This analysis is supported by the Second Legal Opinion of Prof. Kenneth Vandeveld, whom Claimant recognizes as the “leading commentator” on U.S. BITs.¹

18. When confronted with the legal consequences of its own actions, Claimant responds that Ecuador is to blame. Ecuador’s appeal to the Tribunal to enforce the conditions to jurisdiction contemplated by the Contracting States’ agreement in the BIT is labeled by Claimant as an attempt to “evade” its “commitment under the Treaty to settle investment disputes.”² Claimant would rather have the Tribunal fashion a result clearly proscribed by clear rules of international law in the name of “fairness” and “equity,” concepts that are in the eye of the beholder.³

¹ Claimant’s Memorial, ¶ 238.

² Claimant’s Reply, ¶ 180.

³ What is certain in international law is that “no participant in the international community, be it a State, an international organization or a physical or a legal person, has an inherent right of access to a jurisdictional recourse. For such right to come into existence, specific consent has to be given.” *ST-AD GmbH (Germany) v. Republic of Bulgaria*, PCA Case No. 2011-06, UNCITRAL, Award on Jurisdiction (18 July 2013) (Stern, Klein, Thomas) (“*ST-AD GmbH (2013)*”), ¶ 337 (RLA-124).

19. But Claimant does not stop here. It also claims that Ecuador has acknowledged that its position if accepted would “deprive” MSDIA of any forum in which to assert its claims.⁴ This is because Ecuador “has argued elsewhere that by virtue of its withdrawal from ICSID it is not subject to the jurisdiction of ICSID tribunals.”⁵ And because “it has *not* said that it would consent to the jurisdiction of this Tribunal if it had been constituted under the ICSID Rules.”⁶

20. Even if this were true, the meaning of a treaty may not vary depending on the circumstances. But in any event, it is not true that Ecuador’s interpretation of Article VI(3)(a) deprives Claimant of a forum in which to assert its claims, and nothing that Ecuador has submitted in these proceedings suggests otherwise. Claimant’s choice of consent to ICSID was made before the denunciation of the Convention by Ecuador. Ecuador has never contended that its denunciation was an impediment to Claimant’s assertion of its claims in ICSID pursuant to Article 72 of the Convention.

21. Moreover, while Ecuador has indeed argued elsewhere that by virtue of its denunciation of the Convention, it is not subject to the jurisdiction of the Centre, it did so in circumstances very different from those at play here. Ecuador opposed ICSID jurisdiction in connection with Murphy Exploration & Production Company’s (“Murphy”) attempt to re-register its claims in ICSID after the dismissal of its first ICSID case (and after Ecuador’s denunciation of the Convention). In contrast to Claimant, however, Murphy had acted on its choice of consent by initiating proceedings in ICSID. Therefore, and given that perfected consent may give rise to

⁴ Claimant’s Reply, ¶ 167.

⁵ Claimant’s Reply, ¶ 167 (citing *Murphy Exploration & Production Company – International v. Republic of Ecuador*, PCA Case No. AA434, UNCITRAL, Partial Award on Jurisdiction (13 Nov. 2013) (Hanotiau, Abi-Saab, Hobér) (*Murphy* (2013)), ¶ 164 (CLM-253)).

⁶ Claimant’s Reply, ¶ 167 (emphasis in original).

only one proceeding,⁷ there was no perfected consent in place at the time of Ecuador's denunciation; as a result, Murphy could not avail itself of the protection of Article 72 of the Convention.⁸

22. The sections that follow address the real issues in this case: the interpretation of Article VI(3)(a) and the validity of Claimant's choice of consent to ICSID. The first section establishes that under all applicable principles of treaty interpretation, Article VI(3)(a) prescribes an exclusive and irrevocable choice of arbitration procedure. The second section shows that Claimant engaged in a valid exercise of its right under Article VI(3)(a).

A. Article VI(3)(a) Provides For An Exclusive And Irrevocable Choice Of Arbitral Remedy

1. Introduction

23. In its Counter-Memorial, Ecuador showed that Article VI(3)(a) of the Ecuador-U.S. BIT affords investors one, *and only one*, choice of arbitration procedure to which to submit their claims for violations of the Treaty.⁹ This is because:

⁷ As Prof. Schreuer points out, in case an ICSID tribunal has given an award in which it finds that the dispute is not within the jurisdiction of the Centre, "a party may take the dispute to another forum for a decision on the merits." C. Schreuer, et al., *THE ICSID CONVENTION: A COMMENTARY* (2009), p. 1106 (RLA-87(bis)). This implies that the mutual consent of the parties, effectuating the exclusion of "any other remedy" during the pendency of ICSID proceedings pursuant to Article 26 of the Convention, ceases to exist after a dismissal for lack of jurisdiction.

⁸ Whereas Article 71 of the ICSID Convention provides that the denunciation takes effect six months after the receipt of the notice of denunciation, Article 72 stipulates that, with respect to rights and obligations arising out of consent to the jurisdiction of the Centre, the denunciation of the Convention takes effect at the date of receipt of the notice of denunciation. *Convention on the Settlement of Investment Disputes Between States and Nationals of Other States* ("ICSID Convention") (18 Mar. 1965), 575 U.N.T.S. 159, Arts. 71-72 (RLA-140).

⁹ Claimant suggests that Ecuador's interpretation is premised on an alleged presumption that an investor's right to arbitrate under a BIT is exclusive and irrevocable and that, therefore, Ecuador is in fact seeking to rely on the "discredited" canon of restrictive interpretation of treaties. Claimant's Reply, ¶ 183, fn. 153. This is a misrepresentation of Ecuador's position. Ecuador's submissions in its Counter-Memorial and the present memorial are squarely premised on the customary principles of treaty interpretation codified in the Vienna Convention on the Law of Treaties ("VCLT") that Claimant agrees govern the interpretation of the terms of Article VI(3). *See* Claimant's Reply, ¶¶ 184-185. That a covered investor's choice of consent under Article VI(3)(a) is exclusive and irrevocable is the result of the application of those agreed principles, and not of any presumption in favor of restrictive interpretation of dispute resolution clauses in bilateral investment treaties. Moreover, there is no presumption in favor of a *broad* interpretation of such clauses as well. *See ST-AD GmbH* (2013), ¶ 382 (RLA-124).

- Article VI(3)(a) employs a language structure (“*may choose to submit (a) or (b) or (c)*”) that is identical to that of Article VI(2), which indisputably prescribes an exclusive and irrevocable choice of dispute settlement procedure,¹⁰ and therefore the effect of that provision, as far as the same investment dispute is concerned, must be the same as that of Article VI(2).¹¹
- The fact that Article VI(3)(a) does not contain the formulation “under one of the following alternatives” that appears in Article VI(2) is not inconsistent with the above interpretation, because it is not that phrase that renders the choice under Article VI(2) exclusive and irrevocable.
- Rather, as evidenced by the absence of this formulation in Article VI(2) in the 1992 U.S. Model BIT, and by the interpretation of arbitral tribunals of that provision in relation to BITs adopting the language of that Model *verbatim*,¹² this effect is derived from the disjunctive term “or” in reference to the choice to be made.¹³
- This conclusion does not render the phrase “under one of the following alternatives” superfluous; it serves the important function of clarifying that the choice of dispute settlement under Article VI(2) is indeed exclusive and irrevocable.¹⁴ This clarificatory function is confirmed by the Letter of Submittal from the U.S. Department of State to the Committee of Foreign Relations of the U.S. Senate (“Submittal Letter”), which states that the relevant phrase simply “reiterat[es]” what the prototype language already provides, namely “that the investor may choose among [...] three alternatives,” and stresses that “[t]his addition *does not alter the operation of this provision*,”¹⁵ as well as by authoritative academic opinion specifically commenting on the inclusion of this phrase into the Ecuador-U.S. BIT.¹⁶
- The context of the provision points to the same conclusion. Both Article VI(3)(b), providing for the initiation of arbitration proceedings by either party to the dispute, and Article VI(4), stipulating the Contracting States’ consent to the submission of investment

¹⁰ Ecuador’s Counter-Memorial, ¶ 97.

¹¹ Ecuador’s Counter-Memorial, ¶¶ 99, 103, 112-113, and Table 2.

¹² Ecuador’s Counter-Memorial, ¶¶ 104-106, and Table 1.

¹³ Ecuador’s Counter-Memorial, ¶ 100.

¹⁴ Ecuador’s Counter-Memorial, ¶ 111.

¹⁵ Department of State, Letter of Submittal for U.S.-Ecuador Treaty Concerning the Encouragement and Reciprocal Protection of Investment *reprinted in* S. TREATY DOC. NO. 103-15 (1993) (“Ecuador BIT Submittal Letter”), p. 8 (RLA-34) (emphasis added).

¹⁶ K. Vandeveld, U.S. INTERNATIONAL INVESTMENT AGREEMENTS (2009), p. 644 (RLA-85(bis)) (the addition of the phrase “under one of the following alternatives” 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*”) (emphasis added). *See also* First Vandeveld Expert Report, ¶ 57.

disputes to international arbitration, contemplate only one choice of arbitration procedure.¹⁷

- This singular, exclusive and irrevocable choice under Article VI(3)(a) is entirely consistent with the object and purpose of Article VI, and of the BIT as a whole. *First*, Article VI(3)(a) is an elaboration of the election of remedies provision in paragraph (2), inserted in the BIT to avoid the multiplicity of proceedings with respect to the same investment dispute.¹⁸ *Second*, limiting the exclusivity and irrevocability of choice of dispute settlement to the election of local courts would dissuade investors from having recourse to such courts. Such a result would hardly be conducive to the promotion of “greater economic cooperation between the parties,” which necessarily implies mutual trust in the other Party’s legal system, or to the economic development of the Parties, which cannot be divorced from the development of their respective legal systems.¹⁹ *Finally*, the fact that the actual terms of Article VI establish that only one choice of arbitral procedure is afforded to covered investors cannot be deemed to be contrary to the BIT’s object and purpose of protecting investment; the “object and purpose” of the BIT may not be used to justify interpretations of treaty provisions which go beyond, or effectively nullify, the agreed terms of protection of investments.²⁰

24. In its Reply, Claimant, with the support of Prof. Ratner, disputes that Article VI(3)(a) requires an exclusive and irrevocable choice of arbitral forum. The following sections show why Claimant is wrong.

2. The Structure of Article VI(2) and (3)(a) Establishes A Single, Exclusive And Irrevocable, Choice Of Dispute Settlement Procedure

25. Claimant submits that, despite the identical structure of the two paragraphs, the BIT’s very use of the “two paragraph approach” manifests a distinction between the choice among dispute resolution options, on the one hand, and the choice among international arbitration options, with the fork-in-the-road only applying to the former, on the other hand.²¹ Under that logic,

¹⁷ Ecuador’s Counter-Memorial, ¶¶ 123-124.

¹⁸ Ecuador’s Counter-Memorial, ¶ 126.

¹⁹ Ecuador’s Counter-Memorial, ¶ 128.

²⁰ Ecuador’s Counter-Memorial, ¶¶ 129-130.

²¹ Claimant’s Reply, ¶ 192.

[h]ad the treaty meant for the fork in the road set forth in paragraph 2 to include a further fork among the four options for arbitration listed in paragraph 3, it would have simply listed those four choices along with the first two choices (domestic remedies and other agreed procedures), for a total of six ‘prongs’ of the fork [...].²²

26. Essentially, Claimant argues that because the choice of remedies under the BIT is regulated in two paragraphs of Article VI, rather than one, the choice of international arbitration under paragraph (2) is different in nature than the choice of a particular arbitration procedure under paragraph (3). The former is “exclusive and irrevocable.” The latter is allegedly not.

27. This argument is premised on the misguided assumption that the choice of the investor in favor of settlement of the investment dispute by binding arbitration under Article VI(2) is different from the choice of consent to a particular arbitration procedure under Article VI(3)(a).²³ In fact, it is one and the same, with the latter manifesting the former; as Prof. Vandeveldé opines, “[a]n investor does not, in some way, elect international arbitration in the abstract under Article VI(2) and then subsequently make a second election among the various international arbitral fora listed in Article VI(3).”²⁴ They are one and the same action.

28. One does not need to go beyond the actual terms employed in those provisions to realize that Prof. Vandeveldé is right. Article VI(2) provides:

In the event of an investment dispute, the parties to the dispute should initially seek a resolution through consultation and negotiation. If the dispute cannot be settled amicably, the national or company concerned *may choose to submit the dispute, under one of the following alternatives, for resolution:*
(a) to the courts or administrative tribunals of the Party that is a party to the dispute; or

²² Expert Report of Prof. Steven R. Ratner (1 Aug. 2014) (“Ratner Expert Report”), ¶ 18; *see also* Claimant’s Reply, ¶ 191.

²³ Claimant’s Reply, ¶ 190; *see also* Ratner Expert Report, ¶ 18.

²⁴ Second Expert Report of Prof. Kenneth J. Vandeveldé (19 Feb. 2014) (“Second Vandeveldé Expert Report”), ¶ 8.

- (b) in accordance with any applicable, previously agreed dispute-settlement procedures; or
- (c) in accordance with the terms of paragraph 3 [of Article VI].²⁵

29. There is no dispute between the Parties that this provision prescribes an exclusive and irrevocable choice of dispute settlement procedure.

30. The “terms of paragraph 3” establish that binding international arbitration is one of the “alternatives” to which “the national or company concerned” may choose, exclusively and irrevocably, to submit the dispute under Article VI(2). Given that international arbitration is based on the mutual consent of the parties, the “terms of paragraph 3” also set out how the investor may manifest its choice in favor of international arbitration:²⁶

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 *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”) 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; *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.²⁷

31. An investor’s choice of consent to one of the arbitral procedures listed in Article VI(3)(a) constitutes thus, *at the same time*, a choice in favor of the third *alternative* method of dispute

²⁵ Ecuador-US BIT, Art. VI(2) (C-1) (emphasis added).

²⁶ The Contracting States’ consent is given under Article VI(4), discussed below.

²⁷ Ecuador-US BIT, Art. VI(3)(a) (C-1) (emphasis added).

settlement under Article VI(2). Prof. Vandeveldel points out that Prof. Ratner “never explains how an investor could elect international arbitration under Article VI(2) without electing a specific international arbitral forum among those identified in Article VI(3).”²⁸ Rather, and contrary to Prof. Ratner’s interpretation:

If the investor chooses international arbitration, then that election occurs at the moment when the investor chooses to submit the dispute to a particular international arbitral forum. Once the investor makes the choice under Article VI, the election is completed and the investor may not make a second choice.²⁹

32. It follows that a choice of consent to *another* arbitration procedure listed in Article VI(3)(a) would in fact constitute a *second*, and therefore impermissible, choice of dispute settlement procedure under Article VI(2). Simply put, an investor who chose to consent to ICSID arbitration under the terms of Article VI(3)(a) has concurrently also chosen to submit the dispute to binding arbitration for purposes of Article VI(2). If it later submits the same investment dispute to, e.g., UNCITRAL arbitration, it will in fact be exercising its right of choice under Article VI(2) for the second time, which is not permitted under the BIT.

33. The Submittal Letter confirms that Articles VI(2) and (3)(a) are intended to afford the investor one, and only one, choice of arbitral procedure. The Letter treats these two provisions as a unity, “set[ting] forth the investor’s range of choices of dispute settlement.”³⁰ The Letter goes on to state that:

The investor may make *an exclusive and irrevocable choice to*: (1) employ *one* of the several arbitration procedures outlined in the Treaty; (2) submit the dispute to procedures previously agreed upon by the investment and the host country government in an

²⁸ Second Vandeveldel Expert Report, ¶ 8.

²⁹ Second Vandeveldel Expert Report, ¶ 8.

³⁰ Indeed, although the Submittal Letter devotes separate paragraphs to the discussion of Article VI’s paragraphs, paragraphs 2 and 3 are dealt with together.

investment agreement or otherwise; or (3) submits the dispute to the local courts or administrative tribunals of the host country.³¹

34. Far from drawing a distinction between the legal effects of paragraphs (2) and (3)(a), as Prof. Ratner argues,³² the Letter “prefaces its entire description of the various alternatives by noting that the choice among all of these alternatives is exclusive and irrevocable.”³³ In light of this introductory language, “the letter had no need to reiterate that the choice among the several arbitration procedures was exclusive and irrevocable.”³⁴ Moreover, the Letter thus makes it clear that it is not the choice of international arbitration *in general* that is “exclusive and irrevocable” under the BIT, as Claimant argues.³⁵ Rather, it is the choice of “*one* of the several arbitration procedures outlined in the Treaty [i.e. Article VI(3)(a)]” that has this effect.³⁶

35. In sum, the Submittal Letter confirms that paragraphs (2) and (3)(a) of Article VI constitute a “logical continuum,” with the latter constituting an “elaboration” of the former.³⁷

3. The Structure Of Article VI(2) And (3)(a) As Compared To Election Of Remedies Provisions In Other BITs

36. To support their “two-paragraph approach” argument, Claimant and Prof. Ratner also rely on third-party treaties which “have adopted [a one] paragraph approach and thereby applied

³¹ Ecuador BIT Submittal Letter, p. 8 (RLA-34) (emphasis added).

³² Prof. Ratner argues that the Submittal Letter draws a distinction between Article VI(2), in the context of which it mentions an “exclusive and irrevocable choice” on the part of the investor, and Article VI(3)(a), in the context of which it mentions the investor’s right to “choose between” the various listed arbitration procedures; this purported distinction, Prof. Ratner posits, “reinforces the ordinary meaning of Articles VI(2) and (3),” according to which only the choice under the former provision is exclusive and irrevocable. Ratner Expert Report, ¶ 39; *see also* Reply, ¶ 225.

³³ Second Vandeveldel Expert Report, ¶ 107.

³⁴ Second Vandeveldel Expert Report, ¶ 107. *See also id.*, ¶ 108 (“The purpose of the sentence [in the Submittal Letter] that states that ‘the investor may choose between’ the three procedures and upon which Prof. Ratner relies is simply to identify the procedures available.”).

³⁵ Claimant’s Reply, ¶ 224.

³⁶ Second Vandeveldel Expert Report, ¶ 107 (“This language makes clear that an investor may choose only *one* of the arbitration procedures identified in the treaty.”) (emphasis in original).

³⁷ *Murphy Exploration & Production Company v. Republic of Ecuador*, PCA Case No. AA434, UNCITRAL, Partial Award on Jurisdiction, Dissenting Opinion of Prof. Abi-Saab (13 Nov. 2013) (Hanotiau, Abi-Saab, Hobér) (“*Murphy* (2013), Dissenting Opinion of Prof. Abi-Saab”), ¶ 5 (RLA-188).

a fork-in-the-road to all of the listed options.”³⁸ In particular, Claimant and Prof. Ratner refer to the Canada-Venezuela BIT, the Germany-Poland BIT, and the Lebanon-Italy BIT. However, only the latter treaty affords to covered investors a right to choose among *equally* available international arbitral fora.³⁹ Only the latter treaty, therefore, may be relevant to their argument in the present case.

37. Under Article 7(2) of that BIT, an investor may choose to submit the dispute to (a) local courts “or” (b) ICSID “or” (c) *ad hoc* arbitration under the UNCITRAL Rules.⁴⁰ Article 7(2) goes on to state that “[t]he choice made as per subparagraphs a, b, and c herein above is final.”⁴¹ By reference to that particular provision, Claimant and Prof. Ratner argue that “when states want

³⁸ Claimant’s Reply, ¶¶ 192, 207-208 (referring to the Italy-Lebanon BIT, the Canada-Venezuela BIT, and the Germany-Poland BIT); *see also* Ratner Expert Report, ¶¶ 24-29.

³⁹ As Prof. Vandeveldé observes, the Canada-Venezuela BIT “*does not permit* an election of remedies among international arbitral fora because it allows arbitration before ICSID *only if* both parties are party to the ICSID Convention, arbitration before the Additional Facility *only if* one of the two parties is party to the ICSID Convention, and arbitration under the UNCITRAL Rules *if neither ICSID nor the Additional Facility is available.*” The treaty affords to covered investors no right to choose among equally available international arbitral fora and is, therefore, irrelevant to Claimant’s and Prof. Ratner’s argument. Second Vandeveldé Expert Report, ¶ 68 (emphasis added).

Similarly, the Germany-Poland BIT does not confer a right to choose among equally available international arbitral fora:

[the Germany-Poland BIT] prescribes an *ad hoc* arbitral procedure to which the two treaty parties consent. It then provides that, if both Germany and Poland accede to the ICSID Convention and if the investor and a treaty party have agreed to submit a dispute to ICSID, then the *ad hoc* arbitral procedure is not available. *Thus, the investor does not have the power to choose the forum.* If there is no agreement to submit the dispute to ICSID arbitration, then the only form of arbitration available to the investor is *ad hoc* arbitration under the BIT. If there is an agreement to submit the dispute to ICSID arbitration, the investor may submit the dispute only to that forum.

Second Vandeveldé Expert Report, ¶ 69 (emphasis added).

⁴⁰ Agreement between the Italian Republic and the Lebanese Republic on the Promotion and Reciprocal Protection of Investments, Article 7.2, *quoted in Toto Costruzioni Generali S.p.A. v. Republic of Lebanon*, ICSID Case No. ARB/07/12, Decision on Jurisdiction (11 Sept. 2009) (van Houtte, Feliciani, Moghaizel) (“*Toto* (2009)”), ¶ 203 (RLA-95).

⁴¹ *Toto* (2009), ¶ 203 (RLA-95).

to constrain the investor beyond the fork in the road between domestic remedies and international dispute settlement, they are capable of doing so through the words of the treaty.”⁴²

38. As Prof. Vandeveldel points out, however, this argument collapses “[o]nce one rejects [Prof. Ratner’s] mischaracterization of the Article VI election of remedies provision as involving two elections.”⁴³ There are, however, further reasons why this argument is unavailing to Claimant. *First*, and notwithstanding that Article 7(2) postdates the conclusion of the Ecuador-U.S. BIT by four years,⁴⁴ the fact that the finality of the choice between arbitration procedures was conveyed in the Lebanon-Italy BIT through a particular language does not mean that “such language is *necessary* to convey that meaning.”⁴⁵ Indeed, as Prof. Vandeveldel observes, “[b]ecause some BIT parties have chosen one way to express an idea does not mean that this is the *only* way to express the idea.”⁴⁶

39. *Second*, many BITs which contain an election of remedies provision *use only the conjunction “or” to establish the exclusive and irrevocable nature of the election.*⁴⁷ And what better example from the 1992 U.S. Model BIT, in use during the time when the Ecuador-United States BIT was negotiated, and U.S. BITs adopting such Model.⁴⁸

40. In sum, Claimant’s and Prof. Ratner’s argument based on the structure of the choice of remedies provisions of Article VI is premised on the misguided assumption that the choice in favor of international arbitration under Article VI(2) is different from the choice of consent to a

⁴² Ratner Expert Report, ¶ 29; *see also* Reply, ¶ 208.

⁴³ Second Vandeveldel Expert Report, ¶ 71.

⁴⁴ Second Vandeveldel Expert Report, ¶ 73.

⁴⁵ Second Vandeveldel Expert Report, ¶ 74 (emphasis added).

⁴⁶ Second Vandeveldel Expert Report, ¶ 75 (emphasis added).

⁴⁷ Second Vandeveldel Expert Report, ¶¶ 76-78 (referring to Article 9(2) of the Netherlands-Ethiopia BIT and Article 7(2) of the Switzerland-Lebanon BIT).

⁴⁸ Second Vandeveldel Expert Report, ¶ 79.

particular arbitration procedure under Article VI(3)(a).⁴⁹ This is simply not the case. Because Ecuador and the United States did not employ the same terms that Italy and Lebanon did in their BIT to denote the notion of exclusivity and irrevocability of the choice of international arbitration procedure, this does not mean that such choice is any less exclusive and irrevocable under Article VI(2) and (3)(a). In fact, much like other States in their BITs, Ecuador and the United States established the exclusive and irrevocable nature of the choice of remedies by using the term “or.”

4. The Principle of *Effet Utile* Is Not Inconsistent With Ecuador’s Interpretation

41. Claimant devotes much effort to arguing that its interpretation of the terms of Article VI(3)(a) is prescribed by the principle of *effet utile*. Claimant is wrong. Treaty terms frequently serve a confirmatory or clarificatory function. The phrase “under one of the following alternatives” in Article VI(2) serves precisely such function: to confirm the exclusive and irrevocable nature of the single choice of remedies afforded under Article VI.

a. The Phrase “Under One Of The Following Alternatives” Confirms The Exclusive And Irrevocable Nature Of The Single Choice Afforded Under Article VI(2) And (3)(a)

42. The same misguided assumption, that Article VI prescribes two choices, of a different nature, rather than one, underlines Claimant’s and Prof. Ratner’s argument that the inclusion of the phrase “under one of the following alternatives” in paragraph (2) of Article VI but not in paragraph (3)(a) means, in light of the principle of *effet utile*, that only the choice prescribed under the former provision is exclusive and irrevocable.⁵⁰ As Prof. Vandeveldel states:

[Prof. Ratner] wishes to create a second election in Article VI(3) in order to argue that the absence of the phrase “under one of the

⁴⁹ Claimant’s Reply, ¶ 190; *see also* Ratner Expert Report, ¶ 18.

⁵⁰ Claimant’s Reply, ¶¶ 200, 203-205.

following alternatives” from Article VI(3) indicates that the putative second election under Article VI(3) is not exclusive and irrevocable. In his view, an investor may therefore elect more than one of the remedies in Article VI(3).⁵¹

43. Claimant’s and Prof. Ratner’s argument collapses if the choice of arbitral procedure under Article VI(3)(a) manifests, at the same time, a choice of dispute resolution procedure under Article VI(2). The phrase “under one of the following alternatives” appears only in Article VI(2) because “that is the place where the treaty authorizes the investor to make the single election.”⁵² This is also the conclusion reached by Prof. Abi-Saab in his Dissenting Opinion in the *Murphy v. Ecuador* case:

Considering [...] that paragraph 3 [of Article VI] is an elaboration of paragraph 2 and remains within its framework, the repetition of the precautionary phrase [...] in paragraph 3, would have been redundant. *It would have had no “effet utile” at all, as the clarification has already been done in paragraph 2 of which paragraph 3 is a mere elaboration.*⁵³

44. *Second*, there would be no room for the application of the *effet utile* principle other than to confirm, as the Submittal Letter and academic commentary point out, the legal effect of the term “or” in the unadorned version of Article VI(2) in the 1992 U.S. Model BIT. This is also the conclusion reached by Prof. Abi-Saab in his Dissenting Opinion in the *Murphy v. Ecuador* case:

Without having to call on such abstruse jargon as “fork in the road”, the use of “or” in paragraph 2 of Article VI is sufficient to indicate that the choice is limited to one of the alternatives enumerated therein. The added phrase [“under one of the following

⁵¹ Second Vandeveldel Expert Report, ¶ 10.

⁵² Second Vandeveldel Expert Report, ¶ 9. Another reason why this phrase appears in Article VI(2) and not in or also in paragraph VI(3)(a) is explained at paragraphs 50-58 of Prof. Vandeveldel’s First Report. There, Prof. Vandeveldel explains that the phrase “under one of the following alternatives” was inserted in the 1994 U.S. Model BIT to clarify some ambiguities in the relationship between the choices listed in paragraph 2; however, “[n]o such 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.” First Vandeveldel Expert Report, ¶ 58; Second Vandeveldel Expert Report, ¶¶ 52-53.

⁵³ *Murphy* (2013), Dissenting Opinion of Prof. Abi-Saab, ¶ 9 (RLA-188) (emphasis added).

alternatives”] is not necessary. *However, it is not devoid of “effet utile” because it acts as a precautionary clarification, ex abundanti cautela, for the avoidance of doubt.*⁵⁴

b. The Principle Of *Effet Utile* Does Not Preclude The Confirmatory/Clarificatory Function Of Treaty Provisions

45. Claimant’s argument suffers from an additional defect. Claimant submits that Ecuador is attempting to read “out of the Treaty” the phrase “[under] one of the following alternatives.”⁵⁵ In making this assertion, Claimant assumes that the *effet utile* principle “always precludes an interpretation that language was inserted in a treaty merely out of an abundance of caution (*ex abundante cautela*) in order to clarify or confirm meaning.”⁵⁶ However, this is not true for the following four reasons.

46. *First*, as Prof. Vandeveldel demonstrates, none of the cases cited by Prof. Ratner stand for the proposition that the principle of *effet utile* automatically precludes the use of clarificatory or confirmatory terms to give particular emphasis on certain regulated issues.⁵⁷ In none of these cases, moreover, had it been argued that the relevant treaty terms were inserted *ex abundante cautela*, and none of the international courts or tribunals involved even addressed whether the treaty terms in question could be interpreted as having been inserted *ex abundante cautela*. This is in stark contrast with the situation here.

47. *Second*, several tribunals have acknowledged that treaty terms need not always convey a meaning independent of the meaning of other terms, and that their function may legitimately

⁵⁴ *Murphy* (2013), Dissenting Opinion of Prof. Abi-Saab, ¶ 8 (RLA-188) (emphasis added).

⁵⁵ Claimant’s Reply, ¶¶ 216-217; Ratner Expert Report, ¶ 22.

⁵⁶ Second Vandeveldel Expert Report, ¶ 14. *See in this regard* Claimant’s Reply, ¶ 219; Ratner Expert Report, ¶¶ 13-14.

⁵⁷ Second Vandeveldel Expert Report, ¶¶ 15-18 (discussing the various cases relied on by Prof. Ratner in paragraphs 9-15 of his Report).

consist of confirming or clarifying meaning that is established by other treaty terms.⁵⁸ Such a function is entirely consistent with the principle of *effet utile*; in fact, as Prof. Vandeveldel states, “clarification or confirmation is the[] *effet utile* [of these provisions].”⁵⁹

48. This was recognized, for example, in *Siemens v. Argentina*, where Argentina argued that the term “treatment” in Article 3 of the Germany-Argentina BIT, the BIT’s MFN clause, was limited in scope by the other terms of Article 3, and thereby did not encompass dispute resolution matters.⁶⁰ In support of this argument, Argentina cited the limited most-favored-nation treatment clauses in Article 4(3) and (4) of the BIT.⁶¹ Argentina argued that giving Article 3 the broad scope advocated by the claimant would violate the principle of *effet utile* since it would mean that the MFN clauses in Article 4 were “superfluous,” being entirely subsumed under Article 3.⁶² The claimant retorted that the special MFN clauses in Article 4(3) and (4) did not negate the general MFN clause in Article 3 and to find so “would negate the meaning of Article 3 altogether.”⁶³

49. The tribunal found that the generality of Article 3 did not render Article 4 superfluous.⁶⁴ It was perfectly legitimate for States parties to a BIT to “plac[e] emphasis on certain matters *ex abundante cautela*.”⁶⁵ Such action should not be seen as limiting the scope of clauses having a

⁵⁸ Second Vandeveldel Expert Report, ¶¶ 19-22.

⁵⁹ Second Vandeveldel Expert Report, ¶ 22 (emphasis in original).

⁶⁰ *Siemens A.G. v. Argentine Republic*, ICSID Case No. ARB/02/8, Decision on Jurisdiction (3 Aug. 2004) (Rigo Sureda, Brower, Bello Janeiro) (“*Siemens*”), ¶¶ 39-40, 84 (RLA-65).

⁶¹ Article 4(3) established MFN treatment in respect of compensation, etc., of losses incurred as a result of war, etc. Article 4(4) established MFN treatment in respect of the provision of full protection and legal security and protection against unlawful expropriation. The clauses are reproduced at paragraph 88 of the *Siemens* award (RLA-65).

⁶² *Siemens*, ¶¶ 44, 87 (RLA-65).

⁶³ *Siemens*, ¶ 67 (RLA-65).

⁶⁴ *Siemens*, ¶ 90 (RLA-65).

⁶⁵ *Siemens*, ¶ 90 (RLA-65).

more general character; rather, “[t]he repeated provision in a particular context stresses the concern of the parties in respect of that particular matter.”⁶⁶ The tribunal accordingly rejected Argentina’s *effet utile* argument.

50. Consistent with the *Siemens* award, the inclusion of the phrase “under one of the following alternatives” in Article VI(2) should not be seen as limiting the scope of the general term “or” in Article VI(3)(a), or as “superfluous” given the latter term’s generality.

51. In a similar vein, in *Walter Bau v. Thailand*, the tribunal agreed that it is perfectly legitimate for States to include clauses in BITs “under an abundance of caution.”⁶⁷ In *Arif v. Moldova*, the tribunal confirmed that a treaty provision may not add a “new, specific or distinct, treaty obligation to respect commitments made,” and yet still enjoy *effet utile*.⁶⁸

52. *Third*, accepting Claimant’s and Prof. Ratner’s theory that the principle of *effet utile* precludes the interpretation of treaty language as having merely confirmatory or clarificatory function would amount to disregarding an important feature of the BIT, and indeed of U.S. BITs in general. As Prof. Vandeveld demonstrates in his Second Legal Opinion, the BIT is “replete with language inserted *ex abundante cautela* to clarify or confirm meaning.”⁶⁹

53. *Fourth*, Claimant itself recognizes that certain treaty terms may serve a clarificatory function without this raising any inconsistency with the principle of *effet utile*. In the context of its effort to establish the existence of a protected investment, Claimant states that the addition of

⁶⁶ *Siemens*, ¶ 90 (RLA-65).

⁶⁷ *Walter Bau AG (In Liquidation) v. Kingdom of Thailand*, UNCITRAL (Germany-Thailand BIT), Award (1 July 2009) (Barker, Lalonde, Bunnag), ¶ 9.70 (KV-1).

⁶⁸ *Mr. Franck Charles Arif v. Republic of Moldova*, ICSID Case No. ARB/11/23, Award (8 Apr. 2013) (Cremades, Hanotiau, Knieper), ¶¶ 389, 391 (RLA-120).

⁶⁹ Second Vandeveld Expert Report, ¶¶ 23-32 (discussing, among others, the inclusion of illustrative examples to clarify the non-exhaustive definitions of “investment” in Article I(1), “return” in Article I(1)(d), and “transfers related to an investment” in Article IV(1), and the provisions on expropriation in Article III, which according to the Submittal Letter are intended to incorporate into the Treaty the customary international law standards of expropriation and compensation, despite the fact that the BIT in Article II(3)(a) already imposes treatment of investments in accordance with international law).

the term “branch” to the definition of “company” in Article 1(1)(b) of the 1994 U.S. Model BIT “had no effect on the interpretation of investment under Article 1(1)(a) [of the 1992 U.S. Model BIT], which was already broad enough to include branches.”⁷⁰ Under Claimant’s interpretation of *effet utile*, however, the subsequent addition of the term could only mean that the definition of investment in the 1992 U.S. Model BIT did *not* include branches. Claimant cannot have it both ways.

c. The Majority In *Murphy v. Ecuador* Ignored Crucial Elements Of Treaty Interpretation, Which Resulted In Its Misapplication Of The Principle Of *Effet Utile*

54. Claimant’s reliance on the decision in *Murphy v. Ecuador* is misplaced. The tribunal there did not disagree with the principle that States parties to a BIT may insert language merely to confirm or clarify the meaning of other provisions of the treaty.⁷¹ The tribunal disagreed on whether Ecuador and the United States did so in the case of Article VI. The majority held that they did not.⁷² But, in doing so, the majority seriously erred in its approach, inexplicably ignoring clear evidence that that the phrase “under one of the following alternatives” was inserted *ex abundante cautela* and not to change the meaning of the unadorned language of the 1992 U.S. Model BIT which did not contain the phrase.⁷³

⁷⁰ Claimant’s Reply, ¶ 106.

⁷¹ *Murphy* (2013), ¶ 180 (CLM-253) (stating that it did “not disagree with Respondent’s argument that treaty language can have a confirmatory or clarificatory purpose”).

⁷² *Murphy* (2013), ¶ 179 (CLM-253).

⁷³ Ecuador has reserved its right to challenge the majority’s award in Dutch courts (The Hague being the place of arbitration in that case as well). The present Tribunal is of course “at liberty not to follow erroneous decisions in prior awards.” See Second Vandervele Expert Report, ¶ 61, referring to the annulment committee’s observation in *Azurix Corp. v. Argentine Republic*, ICSID Case No. ARB/01/12, Decision on the Application for Annulment of the Argentine Republic (1 Sept. 2009) (Griffith Ajibola, Hwang), ¶ 375 (KV-9): “[w]hilst the Committee is mindful of the high importance of maintaining consistency in the ICSID jurisprudence, the Committee does not consider that an approach that it sees as wrong in principle should continue to be followed, merely for the sake of consistency with precedent.”).

55. *First*, as Prof. Vandeveldel points out, the “merely clarificatory” function of the phrase is confirmed by the Letters of Submittal for the other BITs concluded on the basis of the 1992 Model, which employ identical language to that used in the Submittal Letter for the Ecuador-U.S. BIT.⁷⁴ The majority in *Murphy* ignored the *express* language of these Submittal Letters which expressly stated that the added phrase “does not alter the operation” of Article VI(2), as well as Ecuador’s concurrence with this statement in the context of the arbitral proceedings.

56. Investment treaty tribunals have frequently relied on U.S. Letters of Submittal in the process of treaty interpretation.⁷⁵ For example, the tribunal in *Mondev v. U.S.* considered the “numerous transmittal statements” by the U.S. to interpret Article 1105 of NAFTA.⁷⁶ Similarly, the tribunal in *Generation Ukraine v. Ukraine* relied heavily on the Letter of Submittal of the U.S.-Ukraine BIT to interpret that BIT’s denial of benefits clause.⁷⁷

57. Indeed, such practice is commonplace in investment treaty jurisprudence. In *HICEE v. Slovakia*, arising under the Netherlands-Slovakia BIT, the Dutch Explanatory Notes and Slovakia’s submissions before the tribunal gave rise to a “concordance of views” of great interpretive value concerning the definition of “investment” in the BIT.⁷⁸ As the tribunal held, disregarding such fact because the Dutch Explanatory Notes and Slovakia’s position did not give

⁷⁴ Second Vandeveldel Expert Report, ¶ 59 (“[i]n other words, according to the Secretary of State’s Letters of Submittal, the meaning of Articles VI(2) and VI(3) in the BITs based on the 1992 model is precisely the same, regardless of whether they include the phrase ‘under one of the following alternatives.’ As I have said in my book, the addition of the phrase ‘under one of the following alternatives’ changes nothing and its absence from Article VI(3) can therefore have no effect.”).

⁷⁵ Prof. Ratner argues that “[t]he unilateral statements of the President of the United States to Congress [in the U.S. submittal letter] do not qualify as context, as they are not an agreement with Ecuador nor is there evidence that they have been accepted by Ecuador as an instrument related to the treaty.” Ratner Expert Report, ¶ 38. Consistent investment treaty jurisprudence proves him wrong.

⁷⁶ *Mondev International Ltd. v. United States of America*, ICSID Case No. ARB(AF)/99/2, Award (11 Oct. 2002) (Stephen, Schwebel, Crawford) (“*Mondev*”), ¶¶ 111-112 (RLA-54).

⁷⁷ *Generation Ukraine Inc. v. Ukraine*, ICSID Case No. ARB/00/9, Award (15 Sept. 2003) (Paulsson, Salpius, Voss) (“*Generation Ukraine*”), ¶¶ 15.4-15.7 (CLM-11).

⁷⁸ *HICEE B.V. v. Slovak Republic*, PCA Case No. 2009-11, UNCITRAL, Partial Award (23 May 2011) (Berman, Brower, Tomka) (“*HICEE*”), ¶ 136 (RLA-182).

rise to any of the particular forms of agreement specified in Articles 31-32 of the Vienna Convention “would fly in the face of logic and good sense,” and it would not be “reconcilable with the requirement that a treaty is to be interpreted in ‘good faith.’”⁷⁹ The tribunal concluded that “the Dutch Explanatory Notes, given their terms and content, taken together with the viewpoint adopted in these proceedings by Slovakia, constitute valid supplementary material which the Tribunal may, and in the circumstances must, take into account in dealing with the question before it.”⁸⁰

58. *Second*, the majority of the *Murphy* tribunal completely ignored the interpretive significance of the unadorned version of Article VI(2) and of several U.S. BITs adopting the unadorned version *verbatim*,⁸¹ in the context of which the exclusivity and irrevocability of the choice of dispute settlement procedure is established simply by the use of the term “or.” The majority noted that it “considers those treaties to be informative to the present exercise *only to the extent that [the tribunal’s] interpretation of the US-Ecuador BIT needs to be supplemented.*”⁸² In so finding, however, the majority excluded those materials from the stage of the interpretive process in which they matter the most: the construction of the ordinary meaning of the treaty terms under interpretation. As Gardiner writes in his seminal treatise on treaty interpretation:

reference in the interpretative process to [the] use [of a word] in other treaties *may be a legitimate means of identifying its ordinary*

⁷⁹ *HICEE*, ¶ 136 (RLA-182).

⁸⁰ *HICEE*, ¶ 136 (RLA-182).

⁸¹ U.S.-Armenia BIT, signed 23 Sept. 1992; EIF 29 Mar. 1996 (RLA-33); U.S.-Kazakhstan BIT, signed 19 May 1992; EIF 12 Jan. 1994 (RLA-32); U.S.-Kyrgyzstan BIT, signed 19 Jan. 1993; EIF 12 Jan. 1994 (RLA-35); U.S.-Moldova BIT, signed 21 Apr. 1993; EIF 25 Nov. 1994 (RLA-36); U.S.-Jamaica BIT, signed 4 Feb. 1994; EIF 7 Mar. 1997 (RLA-43); U.S.-Estonia BIT, signed 19 Apr. 1994; EIF 16 Feb. 1997 (RLA-45); U.S.-Ukraine BIT, signed 4 Mar. 1994; EIF 16 Nov. 1996 (RLA-44).

⁸² *Murphy* (2013), ¶ 174 (CLM-253) (emphasis added).

meaning, with the added utility derived from finding such use in a similar context if available.⁸³

59. The use of other treaties and model BITs in the interpretive process is of course “an accepted and established practice.”⁸⁴ There is no principled reason to ignore this practice, especially given that the interpretive materials in question point to an ordinary meaning that is contrary to the one eventually adopted by the majority.

60. Nowhere does the Murphy majority address this evidence of the treaty’s plain meaning, much less attempt to explain it away. Respondent maintains that it cannot be explained away. By holding that the “exclusive and irrevocable” nature of the choice of dispute settlement procedure under Article VI(2) was exclusively owed to the phrase “under one of the following alternatives,” rather than the term “or,” and that the absence of such phrase in Article VI(3)(a) denoted that the choice of arbitration procedure entailed different legal consequences than the ones arising from the choice under paragraph (2), the majority in *Murphy* misapplied the principle of *effet utile*.

⁸³ R. Gardiner, *TREATY INTERPRETATION* (2008), p. 282 (RLA-80(bis)) (emphasis added).

⁸⁴ See *Asian Agricultural Products Ltd. (AAPL) v. Republic of Sri Lanka*, ICSID Case No. ARB/87/3, Final Award (27 June 1990) (El-Kosheri, Goldman, Asante) (“*AAPL*”), ¶ 40 (Rule(F)) (RLA-30) (“When there is need of interpretation of a treaty it is proper to consider stipulations of earlier or later treaties in relation to subjects similar to those treated in the treaty under consideration”); *Aguas del Tunari, S.A. v. Republic of Bolivia*, ICSID Case No. ARB/02/3, Decision on Respondent’s Objection to Jurisdiction (21 Oct. 2005) (Caron, Alberro-Semerena, Alvarez), ¶ 292 (RLA-70) (“The practice of a State as regards the negotiation of BITs may be helpful, however, in testing the assertions of Parties as to the general policies of either Bolivia or the Netherlands concerning BITs, and in testing assumptions a tribunal may make regarding BITs.”); *Fedax N.V. v. Republic of Venezuela*, ICSID Case No. ARB/96/3, Decision on Jurisdiction (11 July 1997) (Orrego Vicuña, Heth, Owen), ¶ 34 (CLM-50); *SGS Société Générale de Surveillance S.A. v. Republic of the Philippines*, ICSID Case No. ARB/02/6, Decision of the Tribunal on Objections to Jurisdiction (29 Jan. 2004) (El-Kosheri, Crawford, Crivellaro), ¶ 132(e) (CLM-77); *Pan American Energy LLC and BP Argentina Exploration Company v. Argentine Republic*, ICSID Case No. ARB/03/13, Decision on Preliminary Objections (27 July 2006) (Caflisch, Stern, van den Berg), ¶ 108 (RLM-46); *Emilio Agustín Maffezini v. Kingdom of Spain*, ICSID Case No. ARB/97/7, Decision of the Tribunal on Objections to Jurisdiction (25 Jan. 2000) (Vicuña, Buergenthal, Wolf), ¶¶ 58-60 (CLM-62).

5. The Term “Or” In Article VI(3)(a) Denotes The Exclusivity Of The Choice Prescribed Thereunder

a. The Use Of The Term “Or” In Article VI(3)(a) Establishes That The Choice Among The Listed Arbitration Procedures Is Exclusive And Irrevocable

61. In light of the above, Claimant’s argument that the term “or” in Article VI(3)(a) does not entail the exclusive and irrevocable nature of the choice made thereunder rings hollow.⁸⁵

62. Ecuador agrees with Claimant that, in the abstract, “or” can have an inclusive or an exclusive meaning, and that much depends on the context in which the term is used.⁸⁶ Ecuador’s argument is that the present context unequivocally points to an exclusive, rather than inclusive, meaning.⁸⁷ This is so for the following three reasons.

63. *First*, in both paragraphs (2) and (3)(a) of Article VI “or” is used in reference to a *choice*, among dispute settlement procedures in the case of paragraph (2), among arbitration procedures in the case of paragraph (3)(a). This in itself is an important indicator that the Parties intended to use “or” in its disjunctive, rather than its conjunctive, sense. The BLACK’S LAW DICTIONARY confirms that when the term “or” is used in reference to a choice, it assumes a disjunctive meaning.⁸⁸ Similarly, in their article *Revisiting the Ambiguity of “And” and “Or” in Legal Drafting*, Profs. Adams and Kaye state that an important reason for using “or” in its disjunctive sense arises “when the speaker is presenting a *choice* and it does not matter to the speaker which alternative is chosen.”⁸⁹

⁸⁵ Claimant’s Reply, ¶ 195; Ratner Expert Report, ¶ 19.

⁸⁶ Claimant’s Reply, ¶ 199.

⁸⁷ That same context received insufficient consideration from the majority in *Murphy v. Ecuador*.

⁸⁸ BLACK’S LAW DICTIONARY (1990), p. 1095 (RLA-29) (defining “or” as a “disjunctive particle” when used to give a *choice* of one among two or more things).

⁸⁹ K. Adams & A. Kaye, *Revisiting the Ambiguity of “And” and “Or” in Legal Drafting*, 80(4) ST. JOHN’S L. R. 1167, p. 1181 (2006) (RLA-77) (emphasis added).

64. *Second*, and as explained above, in the unadorned version of Article VI(2) in the 1992 U.S. Model BIT, and in all of the BITs adopting *verbatim* such version, the exclusive and irrevocable nature of the choice of dispute settlement procedure results exclusively from the term “or.”⁹⁰ As Prof. Vandeveldel states,

[n]either the 1992 model nor any of the BITs concluded on the basis of that model, other than the Ecuador-United States BIT, included the phrase “under one of the following alternatives” in the election of remedies provisions [...].⁹¹

65. The U.S. therefore had the clear contemporaneous intention and understanding that the term “or” was used in its disjunctive sense to convey the exclusivity of the choice of dispute settlement procedures under paragraph (2). Prof. Ratner has accepted this.⁹² There is no basis whatsoever for assigning a different effect to the same term when used in reference to the investor’s choice of arbitration procedure under paragraph (3)(a).⁹³

66. The U.S.’s intention and understanding that the term “or” was used in its disjunctive sense in connection with the choice of dispute settlement procedures continues to this day. In its Counter-Memorial, Ecuador referred to Article 24(3) of the 2004 U.S. Model BIT, listing several dispute resolution possibilities but prescribing only one exclusive choice.⁹⁴ The legal effect of such choice is owed solely to the term “or.”

67. *Third*, it is true that Article VI(2) of the Ecuador-U.S. BIT departed from the unadorned version by adding the phrase “under one of the following alternatives.” However, such addition

⁹⁰ Second Vandeveldel Expert Report, ¶ 53 (“in the 1992 model on which the Ecuador-United States BIT was based, the United States used the word ‘or’ in Article VI(2) and in Article VI(3) to signal that the choice among the available remedies was exclusive and irrevocable.”).

⁹¹ *Id.*, ¶ 58.

⁹² Ratner Expert Report, ¶¶ 30-31.

⁹³ Second Vandeveldel Expert Report, ¶ 53.

⁹⁴ Ecuador’s Counter-Memorial, ¶¶ 120-121 (citing A. Reinisch & L. Malintoppi, *Methods of Dispute Resolution*, in *THE OXFORD HANDBOOK OF INTERNATIONAL INVESTMENT LAW* 691 (Muchlinski et al., eds., 2008), pp. 692-693 (RLA-81)).

served only a clarificatory purpose, and hence does not detract in the least from the expressed U.S. preference for the use of the term “or” in its disjunctive sense in the context of the dispute settlement provisions of U.S. BITs.⁹⁵ The reason, finally, why such clarificatory language was included in Article VI(2) and not in paragraph (3)(a) as well is simply because “that is the place where the treaty authorizes the investor to make the single election.”⁹⁶

b. The Introductory Phrase In Article VI(3)(a) Has No Bearing On The Question Whether The Provision Allows An Investor To Choose Among Arbitral Fora More Than Once

68. Claimant and Prof. Ratner make, almost in passing, an additional argument based on the fact that Article VI(3) allows an investor to consent to arbitration only if it “has not submitted the dispute for resolution under paragraph 2 (a) or (b) [i.e. to the local courts or to other previously agreed procedures].”⁹⁷ According to Claimant and Prof. Ratner, this language “confirm[s] that the only irrevocable choice that the investor must make pursuant to [paragraphs 2 and 3(a)] is among the three dispute resolution methods listed in Article VI(2).”⁹⁸

69. This argument “misperceives the purpose of this language.”⁹⁹ Prof. Vandeveld explains that this language aimed simply to enforce the U.S. policy of avoiding multiple proceedings, and has no bearing whatsoever on the question whether Article VI(3)(a) allows an investor to choose among the listed arbitration procedures more than once.¹⁰⁰ What is more, this language does not foreclose resort to *both* local remedies and previously-agreed procedures, and thus cannot be

⁹⁵ Second Vandeveld Expert Report, ¶ 53 (“[a]s I explicitly stated in my 2009 book, *U.S. International Investment Agreements*, Exhibit KV-2, at page 644, the insertion of the clarifying language ‘under one of the following alternatives’ in Article VI(2) of the Ecuador-United States BIT did not change the meaning of Article VI in any way and therefore its absence from Article VI(3)(a) would signify nothing.”).

⁹⁶ *Id.*, ¶ 9. *See also id.*, ¶ 51.

⁹⁷ Ecuador-U.S. BIT, Art. VI(3)(a) (C-1).

⁹⁸ Claimant’s Reply, fn. 167; Ratner Expert Report, ¶ 19.

⁹⁹ Second Vandeveld Expert Report, ¶ 35.

¹⁰⁰ *Id.*, ¶¶ 36-41.

seen as confirming that the “only irrevocable choice the investor must make is among the three methods listed in paragraph 2,” as Claimant and Prof. Ratner allege.¹⁰¹

6. There Is No Presumption That A “Fork-In-The-Road” Is Limited To An Irrevocable Choice Between Local Remedies And International Arbitration

70. Claimant next argues that while several tribunals have held that the language of Article VI(2) imposes an exclusive and irrevocable choice among the listed dispute resolution procedures, “none have suggested that Article VI(3)(a) imposes a second fork-in-the-road among arbitral options.”¹⁰² Claimant also argues that fork-in-the-road provisions are ordinarily understood by commentators,¹⁰³ including Prof. Vandeveldé,¹⁰⁴ and arbitral tribunals¹⁰⁵ to

¹⁰¹ *Id.*, ¶ 42.

¹⁰² Claimant’s Reply, ¶ 201; Ratner Expert Report, ¶ 23 (citing *M.C.I. Power Group L.C. and New Turbine, Inc. v. Republic of Ecuador*, ICSID Case No. ARB/03/6, Award (31 July 2007) (Vinuesa, Greenberg, Irrazábal), ¶ 181 (CLM-66); *Chevron Corporation and Texaco Petroleum Company v. Republic of Ecuador*, PCA Case No. 2009-23, UNCITRAL, Third Interim Award on Jurisdiction and Admissibility (27 Feb. 2012) (Veeder, Lowe, Naón), ¶ 4.73 (CLM-108); *IBM World Trade Corporation v. Republic of Ecuador*, ICSID Case No. ARB/02/10, Decision on Jurisdiction and Competence (22 Dec. 2003) (Letort, Aguilera, Martínez), ¶ 25 (CLM-242); *Occidental Exploration and Production Company v. Republic of Ecuador*, LCIA Case No. UN 3467, UNCITRAL, Final Award (1 July 2004) (Vicuña, Brower, Sweeney), ¶ 50 (CLM-256)).

¹⁰³ Claimant’s Reply, ¶ 211; Ratner Expert Report, ¶¶ 33-34 (citing R. Dolzer & C. Schreuer, *PRINCIPLES OF INTERNATIONAL INVESTMENT LAW* (2012), pp. 267-268 (CLM-299); C. Schreuer, *Travelling the BIT Route: Of Waiting Periods, Umbrella Clauses and Forks in the Road*, *JOURNAL OF WORLD INVESTMENT & TRADE*, Vol. 5, No. 2 (2004), pp. 239-240 (CLM-369); J. van Haersolte-van Hof & A. Hoffman, *The Relationship Between International Tribunals and Domestic Courts*, in *THE OXFORD HANDBOOK OF INTERNATIONAL INVESTMENT LAW* (P. Muchlinksi et al. eds., 2008), pp. 962, 998 (CLM-325); G. Kaufmann-Kohler et al., *Consolidation of Proceedings in Investment Arbitration: How can multiple proceedings arising from the same or related situations be handled efficiently?*, ICSID R. Vol. 21, No. 1, (2006), p. 67 (CLM-336); L. Reed et al., *GUIDE TO ICSID ARBITRATION* (2011), p. 100 (CLM-361)). As Prof. Vandeveldé shows in his Second Expert Report, and as is evident in the pages cited by Prof. Ratner read in context, there is nothing in these scholarly works that would support an argument that Claimant was entitled to submit the dispute to more than one arbitral forum. *See* Second Vandeveldé Expert Report, ¶¶ 91-96. To the contrary, and as shown below, some of these authorities appear to actually undercut Prof. Ratner’s argument.

¹⁰⁴ Claimant’s Reply, ¶ 212 (citing K. Vandeveldé, *U.S. INTERNATIONAL INVESTMENT AGREEMENTS* (2009), p. 580 (CLM-375)). As shown below, Prof. Ratner misconstrues Prof. Vandeveldé’s scholarly work.

¹⁰⁵ Claimant’s Reply, ¶ 209; Ratner Expert Report, ¶ 31 (citing *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 July 2002) (Fortier, Crawford, Fernandez Rozas), ¶ 54 (RLA-52); *CMS Gas Transmission Company v. Republic of Argentina*, ICSID Case No. ARB/01/8, Decision of the Tribunal on Objections to Jurisdiction (17 July 2003) (Orrego Vicuña, Lalonde, Rezek), ¶ 80 (RLA-56)). As Prof. Vandeveldé shows in his Second Legal Opinion, and as is evident in the paragraphs cited by Prof. Ratner read in context, there is nothing in

impose an irrevocable choice between domestic remedies and international arbitration, and not between different arbitration avenues. According to Prof. Ratner, this means that “the presumption absent clear textual proof is that a fork in the road clause is limited to an irrevocable choice between domestic remedies and international arbitration (and, if also in the relevant treaty, other agreed mechanisms).”¹⁰⁶

71. These arguments suffer from the same defect as Claimant’s other arguments based on the structure and the terms of Article VI(2) and (3)(a): they presume that an investor who chooses international arbitration over local courts under paragraph (2) makes, in so doing, a choice that is distinct from the choice of a particular arbitration procedure. That is not how the provisions of Article VI work.¹⁰⁷

72. These arguments are unavailing for other reasons, as well. *First*, none of the tribunals interpreting and applying Article VI of the Ecuador-U.S. BIT, with the exception of the *Murphy* tribunal discussed above, had occasion to consider the nature of the choice of arbitral procedure under paragraph (3)(a). The issue before them was whether international arbitration was foreclosed by a prior submission of the investment dispute to local courts, as well as whether such submission had in fact taken place.¹⁰⁸ Furthermore, as Prof. Vandeveld points out,¹⁰⁹ the tribunal in *Chevron v. Ecuador* stated, in the same paragraph cited by Prof. Ratner, that the issue

these cases that would support an argument that Claimant was entitled to submit the dispute to more than one arbitral forum. *See* Second Vandeveld Expert Report, ¶¶ 87-88.

¹⁰⁶ Ratner Expert Report, ¶ 36; *see also* Claimant’s Reply, ¶ 213.

¹⁰⁷ Second Vandeveld Expert Report, ¶ 81 (“the investor makes a single choice and does so at the moment when the investor chooses to submit its claim to a particular forum, either domestic or international. Once the investor makes the choice, the election is completed and the investor may not make a second choice.”).

¹⁰⁸ *Id.*, ¶ 63 (“The[se] tribunals in these cases thus had no occasion to discuss whether investors could submit the same dispute to multiple international arbitral fora. As would be expected, [these tribunals] discussed the ‘fork in the road’ solely in terms of the choice between domestic and international remedies because that was the choice at issue in the case before them.”).

¹⁰⁹ *Id.*, ¶ 65.

was whether “‘the dispute’ submitted to this Tribunal has already been submitted to the national courts of Ecuador or New York so as to trigger the fork in the road provision in *Article VI(3)*.”¹¹⁰ Further, the tribunal stated that “[t]he BIT’s fork in the road provision appears in *Article VI(3) of the BIT*.”¹¹¹ Thus, the *Chevron* tribunal used the term “fork in the road,” which Professor Ratner intends to limit to the provisions of paragraph (2) of Article VI, in connection with the provisions of paragraph 3, which further confirms Ecuador’s argument that paragraphs (2) and (3) constitute a “logical continuum,” with the latter constituting an “elaboration” of the former.¹¹²

73. *Second*, arguments based on the so-called ordinary meaning of fork-in-the-road clauses are premised on faulty logic. Prof. Ratner essentially argues that only clauses that fall within the “ordinary meaning” of the term “fork in the road,” that is clauses that prescribe a choice between local courts and international arbitration, can create an exclusive and irrevocable choice. Because Article VI(3)(a) does not fall within said ordinary meaning, it therefore does not create an exclusive and irrevocable choice. However, as Prof. Vandavelde points out, “[t]he ascription of a characteristic to a category simply does not prove that the characteristic is untrue of anything that falls outside the category.”¹¹³ A practical example, offered by Prof. Vandavelde in his Second Legal Opinion perfectly captures Prof. Ratner’s faulty logic:

Certain motor vehicles fall within the meaning of the term “convertible.”

Those motor vehicles are fun to drive.

The Lamborghini Aventador does not fall within the meaning of the term “convertible.”

¹¹⁰ *Chevron Corporation and Texaco Petroleum Company v. Republic of Ecuador*, PCA Case No. 2009-23, Third Interim Award on Jurisdiction and Admissibility (27 Feb. 2012) (Veeder, Grigera Naón, Lowe), ¶ 4.73 (RLM-14) (emphasis added).

¹¹¹ *Id.*, ¶ 4.72 (RLM-14) (emphasis added).

¹¹² *Murphy* (2013), Dissenting Opinion of Prof. Abi-Saab, ¶ 5 (RLA-188).

¹¹³ Second Vandavelde Expert Report, ¶ 82.

Therefore, the Lamborghini Aventador is not fun to drive.¹¹⁴

74. Of course, the Lamborghini Aventador is fun to drive (unless one is faint of heart), even though it is not a convertible. And “an election of remedies provision can create an exclusive and irrevocable choice regardless of whether tribunals or commentators have referred to it using the colloquial term ‘fork in the road.’”¹¹⁵

75. *Third*, as Prof. Vandeveldel thoroughly demonstrates, no tribunal or commentator cited by Prof. Ratner “even remotely hints that an election of remedies clause can be exclusive and irrevocable *only if* it falls within the category that they describe as the ‘fork in the road’ clause.”¹¹⁶ To the contrary, two of the cited authorities “appear to dispute Prof. Ratner’s inflexible definition of a fork in the road,” suggesting a more general focus on the need to avoid the submission of the same investment dispute to more than one dispute resolution fora.¹¹⁷ And in fact, one of these authorities confirms that paragraphs (2) and (3) of Article VI constitute a “logical continuum.” Immediately following the sentence quoted by Prof. Ratner, the authors of L. Reed *et al.*, GUIDE TO ICSID ARBITRATION (2011) state that, “[a]n illustration of a fork in the road provision is Article VI(2) *and* (3) of the US-Kazakhstan BIT.”¹¹⁸ These provisions adopt *verbatim* the language of the 1992 U.S. model BIT.¹¹⁹ The authors thus confirm the character of

¹¹⁴ *Id.*

¹¹⁵ *Id.*

¹¹⁶ *Id.* See further *id.*, ¶¶ 85-96.

¹¹⁷ *Id.*, ¶¶ 94-95 (analyzing J. van Haersolte-van Hof & A. Hoffman, *The Relationship Between International Tribunals and Domestic Courts*, pp. 962, 998 (CLM-325) and G. Kaufmann-Kohler et al., *Consolidation of Proceedings in Investment Arbitration: How can multiple proceedings arising from the same or related situations be handled efficiently?*, p. 68 (CLM-336)).

¹¹⁸ L. Reed & J. Paulsson, et al., GUIDE TO ICSID ARBITRATION (2011), p. 100 (CLM-361) (emphasis added).

¹¹⁹ See U.S.-Kazakhstan BIT, Art. VI(2) and (3) (RLA-32).

the election of remedies provision “as a single provision comprising both paragraph 2 and paragraph 3.”¹²⁰

76. In regard to Prof. Ratner’s citations from his own scholarly works, Prof. Vandeveldel states the following ,which it would be most efficient to quote in full:

At paragraph 35, Professor Ratner cites passages from my books. He begins with a sentence from page 580 of my 2009 book, *U.S. International Investment Agreements*, Exhibit KV-2, where I state that “This election-of-remedies clause, whereby an investor who submits a dispute to some other form of dispute resolution other than investor-state arbitration may not later submit the same dispute to investor-state arbitration, has become known colloquially as the ‘fork in the road’ clause.” Professor Ratner, however, has ignored the context in which the sentence appears. I was describing the 1983 U.S. model BIT, which did not give the investor a choice of international arbitral fora. In particular, I was discussing the relationship between previously-agreed procedures and international arbitration. *In the quoted sentence, I did not refer to a choice among international arbitral fora because I was writing about an early U.S. model BIT in which there was no such choice. Further, I referred to the “fork in the road” sobriquet as a “colloquialism” precisely to indicate that I was treating the term as a loose, informal expression and not as a formal term of art. I find the “fork in the road” metaphor potentially confusing and I generally do not use it in my writings.*

Professor Ratner also cites pages 441-442 of my 2010 book, *Bilateral Investment Treaties: History, Policy and Interpretation*, Exhibit CLM-376, a passage in which I discussed the exhaustion of local remedies requirement. I observed that, as opposed to requiring exhaustion of local remedies,

[s]ome BITs may actually discourage resort to local remedies. These BITs have an election of remedies clause, sometimes known as a “fork in the road clause, where by an investor’s choice of one remedy precludes the invocation of another.

I then offered, simply as an example, the situation where the submission of a dispute to local remedies forecloses submission of the dispute to investor-state arbitration. As in the case of several other passages written by the commentators cited by Professor Ratner, this passage, to the extent that it is relevant, actually

¹²⁰ Second Vandeveldel Expert Report, ¶ 96.

undercuts Professor Ratner's position. *In this passage, I did not use the term "fork in the road"—as Professor Ratner does—to refer to a choice between local remedies and international remedies, but, rather, to refer to any election or remedies provision in which the election of one remedy precludes the invocation of any other. [...] I gave as an example an invocation of local remedies, which would preclude investor-state arbitration, because the entire sentence appeared in the context of a discussion of local remedies. Nevertheless, my sentence plainly states that an investor may choose only one remedy. Thus, this particular discussion of the fork in the road provision is fully consistent with my interpretation of Article VI.*

Professor Ratner then cites a passage on page 436 of the same book, where I did not even mention the term "fork in the road." Rather, it is a passage in which I described how it is the case that, where multiple international fora are available, the investor generally controls "the choice" of forum. *Professor Ratner wonders why I did not say in this passage that the choice is exclusive and irrevocable. The exclusive or irrevocable nature of the choice, however, was not the subject of the paragraph. Rather, the paragraph addressed the issue of who makes the choice.*

In short, out of my two books totaling nearly 1300 pages, Professor Ratner identifies only two references to the term "fork in the road." In my 2010 book on BITs generally, my description of the fork in the road provision makes clear that, where such a provision appears, resort to any remedy precludes resort to any other remedy, precisely my interpretation of Article VI of the Ecuador-United States BIT. In my 2009 book on the U.S. BIT program, I used the term in the context of the 1983 U.S. model BIT, where no election among international arbitral fora is possible, and thus I had no occasion to speak about the choice among international fora. To the extent that any of this is actually relevant, my comment in one book supports my interpretation of Article VI and my comment in the other book is simply silent on the matter.¹²¹

77. In sum, none of the authorities cited by Claimant or Prof. Ratner address the nature of the choice of arbitral procedure under Article VI(3)(a). To the extent that (some of) these authorities are relevant, they confirm Ecuador's interpretation of the provision.

¹²¹ Second Vandeveldde Expert Report, ¶¶ 97-100 (emphasis added).

7. Provisions In Close Proximity With Article VI(3)(a) Confirm That The Choice Prescribed Thereunder Is Exclusive

78. Claimant agrees with Ecuador that Article VI(3)(a) must be read “in context” with its surrounding provisions, including Article VI(4).¹²² This provision reads as follows:

Each Party hereby consents to the submission of any investment dispute for settlement by binding arbitration *in accordance with the choice* specified in the written consent of the national or company under paragraph 3. Such consent, together with the written consent of the national or company when given under paragraph 3 shall satisfy the requirement for:

- (a) written consent of the parties to the dispute for purposes of Chapter II of the ICSID Convention (jurisdiction of the Centre) and for purposes of the Additional Facility Rules; and
- (b) an “agreement in writing” for purposes of Article II of the United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards, done at New York, June 10, 1958 (“New York Convention”).¹²³

79. Claimant and Prof. Ratner consider that, because Article VI(4) “does not mention any limitations on the ‘choice’ of arbitral forum” under Article VI(3)(a), it “does not preclude that the investor might, under unusual circumstances, need to make a second choice.”¹²⁴ They contend that this reading is consistent with the alleged purpose of Article VI(4), which is “to ensure that, when an investment dispute is submitted to arbitration, an arbitration agreement exists between the disputing parties for purposes of the ICSID Convention or the New York Convention.”¹²⁵

80. This reading is not supported by the actual text of Article VI(4). As Prof. Vandeveld states:

¹²² Claimant’s Reply, ¶ 230 (“Article VI(3) must be read in the context of the surrounding provisions of the Treaty, in particular, Article VI(4).”). Claimant has said nothing in its Reply about Article VI(3)(b), which confirms Ecuador’s interpretation by contemplating a single choice of arbitration procedure, in the same way that Article VI(4), discussed in greater detail below, does. Ecuador’s Counter-Memorial, ¶¶ 124-125.

¹²³ Ecuador-U.S. BIT, Art. VI(4) (C-1) (emphasis added).

¹²⁴ Claimant’s Reply, ¶¶ 232-233; Ratner Expert Report, ¶ 37.

¹²⁵ Claimant’s Reply, ¶ 233.

Article VI(4) refers to “the choice” by the investor. It does not refer to “any of the choices” of the investor or even simply “the choices” of the investor. *The use of the definite article “the” and the use of the singular “choice” both indicate that the investor may make only one choice.*¹²⁶

81. *Second*, nothing in Article VI(4), or in the entire Article VI for that matter, suggests an exception for “unusual circumstances” which would warrant an interpretation in disregard of the ordinary meaning of the terms agreed by the Parties to the BIT.¹²⁷ Prof. Ratner never quite explains why “unusual circumstances” would warrant a second choice of dispute settlement for an investor who has chosen international arbitration under paragraph 2(c), but not for an investor who has chosen recourse to local courts under paragraph 2(a) only to find such recourse has proven to be ineffective.¹²⁸ This cannot have been the intention of the Parties.

¹²⁶ Second Vandeveldel Expert Report, ¶ 102 (emphasis added). Prof. Ratner argues that the terms “the choice” could refer to multiple choices, citing for support Article II(5) of the BIT. This provision reads: “Companies which are legally constituted under the applicable laws or regulations of one Party, and which are investments, shall be permitted to engage top managerial personnel of their choice, regardless of nationality.” Prof. Ratner argues that this language does not preclude the company from making another choice should a manager prove unqualified. Ratner Expert Report, ¶ 37. However, as Prof. Vandeveldel explains, the grammatical function of the word “choice” in Article II(5) is “quite different” from that in Article VI(4):

Article VI(4) uses the word “choice” as a singular noun, modified by the definite article “the,” to describe the thing chosen. Article II(5), by contrast, uses a plural noun, “personnel,” to refer to the things chosen. The word “choice” then appears, without the definite article, in a prepositional phrase that modifies the plural noun “personnel.”

Second Vandeveldel Expert Report, ¶ 103. Prof. Vandeveldel concludes that “[t]he very different grammatical role of the word ‘choice’ in Article II(5) sheds no light on its meaning in Article VI(4).” *Id.*

¹²⁷ Second Vandeveldel Expert Report, ¶ 106.

¹²⁸ *Id.*, ¶ 105 (“So, Professor Ratner is in the position of arguing that an investor who chooses local remedies or previously agreed procedures and finds the choice not to be efficacious is nevertheless forever foreclosed from submitting the dispute to one of the international arbitral fora identified in paragraph 3, but an investor who chooses one of the international arbitral fora identified in paragraph 3 and finds the choice not to be efficacious may choose a second or third or fourth forum identified in paragraph 3. He offers no reason why an investor who chooses to submit a dispute to an international arbitral forum should have the opportunity to submit the same dispute to another international arbitral forum, while an investor who chooses to submit a dispute to domestic remedies should have no opportunity at all to submit the dispute to international arbitration.”).

8. The Object And Purpose Of Article VI(2) And (3)(a) Is To Avoid Multiple Proceedings With Respect To The Same Investment Dispute By Prescribing A Single, Exclusive And Irrevocable, Choice Of Dispute Settlement Procedure

82. Claimant submits that Prof. Vandevælde’s conclusion, after his exhaustive examination of the historical evolution of the election of remedies provision in U.S. BITs,¹²⁹ that Article VI(3) elaborates on the consistent U.S. policy of avoiding multiple proceedings with respect to the same investment dispute,¹³⁰ is “unwarranted.”¹³¹

83. Claimant’s contention is premised on three grounds. *First*, that Prof. Vandevælde “offers no evidence that the U.S. was concerned with avoiding proceedings before two different investor-state arbitral tribunals.”¹³² *Second*, that if there was such concern, the words “under one of the following alternatives” should have been inserted also into Article VI(3)(a).¹³³ And, *third*, that “there are no concerns about multiple proceedings here,” because “MSDIA never initiated ICSID arbitration,”¹³⁴ and presumably it cannot do so now because of Ecuador’s denunciation of the ICSID Convention. (In this latter regard, Claimant points out to the holding of the majority in *Murphy v. Ecuador* that because the circumstances of that case “involve[d] the replacement of an unavailable forum with an available one, and because the one arbitral forum to which Claimant could have theoretically resubmitted its dismissed claim is now unavailable, there can be no concern [...] about a duplication of proceedings.”¹³⁵)

¹²⁹ First Vandevælde Expert Report, ¶¶ 24-64.

¹³⁰ *Id.*, ¶ 55 (“To have allowed the investor to elect to submit the dispute to more than one form of investor-State arbitration [...] would have been inconsistent with the U.S. policy of avoiding multiple proceedings.”).

¹³¹ Claimant’s Reply, ¶ 240.

¹³² *Id.*; Ratner Expert Report, ¶ 53.

¹³³ Claimant’s Reply, ¶ 242; Ratner Expert Report, ¶ 53.

¹³⁴ Claimant’s Reply, ¶ 244.

¹³⁵ *Murphy* (2013), ¶ 191 (CLM-253).

84. None of these arguments detract from Prof. Vandeveldel's conclusion that Claimant's interpretation runs against the object and purpose of Article VI(3)(a). The U.S.'s concern over multiplicity of proceedings does not dissipate simply because the investor's choices are made in favor of international arbitration:

A state that does not wish to defend against the same claim twice does not change its view of the matter simply because the duplicate claims are before international fora. In fact, to the contrary, a host state, if it must defend the claim twice, might actually prefer that one of the proceedings be in domestic courts, where the procedures are familiar and the venue is convenient. [...] Notably, when the United States made a historic change in its policy and modified its election of remedies provisions in its 2004 model BIT to permit an investor to invoke domestic remedies and then international arbitration, the United States for the first time in a BIT created the possibility of multiple proceedings and the duplication was between domestic proceedings and international arbitration. As this indicates, when the United States was finally willing to allow multiple proceedings in at least some circumstances, the place where it would allow the investor to change its mind and institute a separate proceeding would be with respect to the choice as between domestic remedies and international arbitration, not as between different forms of international arbitration. Even when the United States ultimately allowed investors to choose domestic proceedings followed by international arbitration, it continued to demand that the investor choose only one international arbitral forum, as other commentators have also noted. See August Reinisch and Loretta Malintoppi, "Methods of Dispute Resolution," in Peter Muchlinksi et al. eds., *The Oxford Handbook of International Investment Law* 691, 693 (2008) ("In this kind of provision [referring to the language of the 2004 U.S. model BIT], 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).")¹³⁶

85. The argument that the words "under one of the following alternatives" should have also been inserted into Article VI(3)(a) (and since they were not, there was no concern against the multiplicity of proceedings before arbitral fora) rests, much like the majority of Claimant's

¹³⁶ Second Vandeveldel Expert Report, ¶ 126 (emphasis added).

arguments, on the faulty assumption that Article VI provides for “two elections necessitating two separate statements that the choice is exclusive and irrevocable.”¹³⁷ That is simply not the case, as shown above.

86. Finally, Claimant’s argument that the particular circumstances of this case may not implicate the object and purpose of Article VI(3)(a) (and therefore, presumably, Ecuador’s interpretation must be dismissed) is completely wrong. Even if this were true, which it is not, the circumstances of a case may only call for a mitigation of the legal consequences arising from the application of a treaty provision;¹³⁸ they do not affect the authentic meaning of that provision.¹³⁹ That would amount to equity *contra legem*, which is forbidden by international law.¹⁴⁰

87. Moreover, that Claimant did not initiate proceedings before ICSID does not mean that it did not submit the dispute to ICSID arbitration for purposes of Article VI(3)(a). The BIT distinguishes between the choice of consent to the submission of an investment dispute to international arbitration and the actual initiation of arbitration proceedings pursuant to such choice.¹⁴¹ Although an investor may indeed choose an arbitration procedure under Article

¹³⁷ *Id.*, ¶ 129.

¹³⁸ It is to be noted that Claimant was fully aware of the limitation imposed by Article VI(2) and (3)(a) when it exercised its right under Article VI by consenting to ICSID arbitration. The Submittal Letter is a public document, and in fact was attached to Claimant’s Notice of Dispute. *See* 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) (“Notice of Dispute”), Attachment A (C-2).

¹³⁹ *See, e.g., HICEE*, ¶¶ 139-140 (RLA-182).

¹⁴⁰ *See Murphy* (2013), Dissenting Opinion of Prof. Abi-Saab, ¶ 14 (RLA-188) (“[a]ll these liberties with the text are beyond the judge’s or arbitrator’s discretion; unless of course he is deciding *ex aequo et bono*, which can only be done with the agreement of the parties.”).

¹⁴¹ The BIT distinguishes the choice to submit an investment dispute to international arbitration from the actual initiation of arbitration proceedings pursuant to such choice. Article VI(3)(b) provides that “[o]nce the national or company concerned has *so consented* [i.e. to the submission of the dispute for settlement by binding arbitration to one of the listed arbitral procedures in Article VI(3)(a)], *either party to the dispute* may initiate arbitration in accordance with the choice so specified in the consent.” Ecuador-U.S. BIT, Art. VI(3)(b) (C-1) (emphasis added). Under Article VI(2) and (3)(a), the choice of submission of the dispute for resolution to a particular arbitration procedure lies within the purview of the investor. Under Article VI(3)(b), either party to the dispute, *i.e.* even the host State, may initiate arbitration proceedings.

VI(3)(a) by initiating arbitration proceedings before the particular forum, this may not always be the case, and it is certainly not the case here, given that Claimant expressed its consent to submit the dispute to ICSID arbitration with its Notice of Dispute dated 8 June 2009.¹⁴²

88. Finally, and in any event, the circumstances of the present case are very different than those in *Murphy v. Ecuador*. Murphy acted upon its choice of consent to ICSID arbitration, only to find its claims dismissed for lack of jurisdiction.¹⁴³ In the meantime, Ecuador denounced the Convention. Murphy therefore had no right to re-submit the case to ICSID, because that would presuppose an additional expression of consent, which was not possible because of the denunciation, as explained above. ICSID was indeed unavailable.

89. By contrast, here, Claimant has not acted upon its choice of consent to ICSID. Since it was given before the receipt of Ecuador's notice of denunciation by the World Bank,¹⁴⁴ it may give rise to rights and obligations protected against the legal effect of the denunciation by Article 72 of the ICSID Convention.¹⁴⁵ It follows that Claimant was free to seek arbitration proceedings before ICSID even after Ecuador's denunciation. In these circumstances, Claimant cannot plausibly maintain that its conduct has not already given rise to a risk of multiple proceedings.

9. Ecuador's Interpretation Is Consistent With The Object And Purpose Of The Treaty As A Whole

90. Claimant raises a similar argument under the guise of the "object and purpose of the Treaty." It maintains that "under the circumstances of [that] case," Ecuador's interpretation

¹⁴² Notice of Dispute, pp. 1-2 (C-2).

¹⁴³ See *Murphy (2010)*, ¶ 161 (RLM-42).

¹⁴⁴ "Ecuador Submits a Notice under Article 71 of the ICSID Convention" available at <https://icsid.worldbank.org/apps/ICSIDWEB/Pages/AllNewsItems.bak.aspx> (C-187).

¹⁴⁵ Under Article 72 of the ICSID Convention, the denunciation of the Convention by a Contracting State "shall not affect the rights or obligations under this Convention 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." ICSID Convention, Art. 72 (RLA-140) (emphasis added). According to the author of the most authoritative commentary on the ICSID Convention, Prof. Christoph Schreuer, the reference to "consent" in Article 72 is a reference to "perfected" or bilateral consent. C. Schreuer, et al., *THE ICSID CONVENTION: A COMMENTARY* (2009), p. 1280 (RLA-87(bis)).

“entirely forecloses” its access to international arbitration and therefore “run[s] counter to the object and purpose of the BIT.”¹⁴⁶ But, an interpretation of Article VI(3)(a) that forecloses a second choice of arbitration procedure does not run counter to the object and purpose of the BIT.

91. *First*, certain choices of remedies are exclusive of international arbitration, and irrevocable, even under Claimant’s and Prof. Ratner’s interpretation; yet they do not run counter to the object and purpose of the BIT.¹⁴⁷ The same applies here.

92. *Second*, as Prof. Vandeveldelde points out, the treaty should be interpreted “to provide access to arbitration on the terms and conditions specified in the treaty.”¹⁴⁸ Tribunals have consistently rejected the notion that the terms of protection of foreign investments must be exaggerated in the name of an, inherently subjective, appeal to the BIT’s “object and purpose.”¹⁴⁹ As stated by the tribunal in *HICEE v. Slovakia*:

in general, the purpose of bilateral investment treaties can be taken to be the encouragement of investment, on a mutual and reciprocal basis, while balancing the interests of the investors and of the receiving State in that regard; *in and of itself, however, that says nothing about where the balance has been drawn in the particular treaty in question.*¹⁵⁰

93. In a recent treatise on the interpretation of investment treaties, Prof. Trinh Hai Yen similarly cautions that a:

[l]iberal reading of the treaty object and purpose to justify the preference for broad investors’ rights should be avoided. Otherwise, the assumption of a single or dominant treaty purpose of protecting investments would likely lead to unintended

¹⁴⁶ Claimant’s Reply, ¶ 248 (citing *Murphy* (2013), ¶ 197 (CLM-253)).

¹⁴⁷ Second Vandeveldelde Expert Report, ¶ 110.

¹⁴⁸ *Id.*, ¶ 111.

¹⁴⁹ See Ecuador’s Counter-Memorial, ¶¶ 129-130, and jurisprudence cited therein. Prof. Abi-Saab stated that “the object and purpose of a BIT is not only to protect the interests of the foreign investor, but also those of the host State, particularly the respect of its sovereignty, including the conditions and limits it sets for its consent to international arbitration.” *Murphy* (2013), Dissenting Opinion of Prof. Abi-Saab, ¶ 16 (RLA-188).

¹⁵⁰ *HICEE*, ¶ 116 (RLA-182) (emphasis added).

meanings of treaty terms. *States' sovereign rights are confined only to obligations to which states have consented, rather than obligations allegedly implied in the treaty object and purpose. Ambiguity does not legitimize findings of all possible meanings that are in line with very general policies stated in the preamble or title of the treaty.* Instead, ambiguity simply means that nothing clear has been consented and the situation requires choosing the most certain and reasonable interpretation. Investment treaty disputes involve a sovereign state and a treaty of public international law signed among states. It is different from the case of private contracts where parties' rights and obligations are equally affected. Interpreting the obligations of states under investment treaties must follow the customary rules on treaty interpretation in public international law, regardless of narrowing or expanding effects on the rights of the private parties. These interpretation rules ensure a finding of the meaning of a treaty term is based on interpretive elements connoting the intent to be bound of states.¹⁵¹

94. Claimant's argument finds no confirmation in the "object and purpose" of the BIT for yet another reason. Consider the implication of Prof. Ratner's interpretation of Article VI(2) and (3)(a): some forum selections are exclusive and irrevocable (e.g., the choice of local remedies, or the choice in favor of "previously-agreed procedures"), and some are not (the choice of international arbitration procedures). In respect of the former, "or" means "or." In respect of the latter, "or" means "and," unless of course they are in favor of "a previously-agreed procedure," in respect of which "or" continues to mean "or."¹⁵² This interpretation:

leaves the tribunal without any textually-based criteria for deciding when the investor may choose one international arbitral forum and when the investor may choose more than one international arbitral forum. It also leaves the investor with no indication of whether it is in one of those situations where its choice is exclusive and irrevocable or whether it is in one of those situations where it may make more than one choice. Finally, it leaves the host state uncertain as to whether it must prepare to defend a claim in multiple fora or only one. Professor Ratner's interpretation places the tribunal, the investor, and the host state in a state of uncertainty

¹⁵¹ T. Hai Yen, *THE INTERPRETATION OF INVESTMENT TREATIES* (2014), p. 98 (RLA-190).

¹⁵² Second Vandevelde Expert Report, ¶ 44.

about the scope of the rights and obligations created by the treaty.¹⁵³

95. Prof. Ratner fails to explain how such an interpretation is consistent with the object and purpose of the BIT to encourage and protect investment on the basis of a stable and predictable framework.¹⁵⁴

10. Conclusion

96. In sum, the majority of Claimant's interpretive arguments rest on a faulty presumption, that the choice of the investor in favor of settlement of an investment dispute by binding arbitration under Article VI(2) is different from the choice of consent to a particular arbitration procedure under Article VI(3)(a). In fact, it is one and the same. In any event, Article VI(3)(a), as interpreted in accordance with the principles of treaty interpretation codified in the VCLT, allows only one choice of consent to the arbitration procedures listed therein.

B. Before Initiating This UNCITRAL Arbitration, Merck Definitively Consented To The Arbitration Of This Dispute Under The ICSID Convention

1. Introduction

97. In its Counter-Memorial, Ecuador showed that Claimant exercised its right to consent to one of the arbitration procedures listed in Article VI(3)(a) with its Notice of Dispute, dated 8 June 2009, whereby it consented in writing to the submission of the dispute for settlement by binding arbitration under the ICSID Convention.¹⁵⁵ Claimant's choice of consent was no less effective because it was accompanied by a "reservation of rights." Claimant's reservation was not formulated as a condition on or a term of its choice of consent to ICSID,¹⁵⁶ which is

¹⁵³ *Id.*, ¶ 44.

¹⁵⁴ *Id.*, ¶ 45.

¹⁵⁵ Ecuador's Counter-Memorial, ¶¶ 138, 141; *see also* First Vandevelde Expert Report, ¶ 66 ("[t]he June 8, 2009 letter [...] constitutes an explicit choice by MSDIA to consent [to] arbitration before the Centre.").

¹⁵⁶ Ecuador's Counter-Memorial, ¶ 144; First Vandevelde Expert Report, ¶ 69.

described in the letter, as Prof. Vandeveldel states, as “an accomplished fact.”¹⁵⁷ Moreover, reading the so-called reservation as a condition on Claimant’s choice of consent to ICSID would run contrary to the letter’s stated intent to “lock-in” Ecuador’s offer of consent to ICSID arbitration under the BIT.¹⁵⁸

98. In light of the above, Claimant was therefore precluded from consenting to arbitration in accordance with the UNCITRAL Arbitration Rules with its Notice of Arbitration, dated 29 November 2011. In turn, this UNCITRAL Tribunal lacks jurisdiction over the dispute.

99. In its Reply, Claimant alleges that its consent to UNCITRAL arbitration is valid, because, first, it did not exclusively and irrevocably consent to ICSID arbitration and, second, even if it did, such consent was invalid because of its reservation of rights. Both these arguments are unavailing, as shown below.

2. Claimant Exclusively And Irrevocably Consented To ICSID Arbitration

100. Claimant argues that it has not effectively exercised its right of choice under Article VI(3)(a) because its letter makes clear that “its consent to ICSID arbitration was non-exclusive and that it preserved its right to consent to other forms of arbitration under the Treaty.”¹⁵⁹ The letter reads in pertinent part:

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*

¹⁵⁷ First Vandeveldel Expert Report, ¶ 69.

¹⁵⁸ Ecuador’s Counter-Memorial, ¶ 146.

¹⁵⁹ Claimant’s Reply, ¶ 259.

*should the Republic of Ecuador decide to denounce the ICSID Convention pursuant to Article 71. 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.*¹⁶⁰

101. Claimant argues that “it is clear” from this wording that it intended its consent to ICSID arbitration and its reservation of rights “to be read together,” and that it regarded its reservation “as a term of its consent.”¹⁶¹

102. There are serious problems with this argument. *First*, as Claimant itself acknowledges,¹⁶² its reservation is not expressly formulated as a “condition of consent” (or “term of consent”). Claimant considers this omission “immaterial.”¹⁶³ It is not, especially when considered in context with the other textual elements discussed below.

103. *Second*, Claimant’s reservation is expressly made “*notwithstanding*” and “*without prejudice* to MSDIA’s right to *initiate ICSID arbitration* at some future date,”¹⁶⁴ not with respect to MSDIA’S choice of consent. The right to initiate ICSID arbitration must rest on previously perfected consent to the jurisdiction of the Centre, which the letter was intended to bring about.

As Prof. Vandeveldel states:

When it spoke of its right to “initiate” arbitration before ICSID, MSDIA confirmed that it had already consented to ICSID arbitration. MSDIA did not speak of its right to *consent* to ICSID arbitration in the future, but to its right to *initiate* ICSID arbitration in the future, because consent already had been given.¹⁶⁵

¹⁶⁰ Notice of Dispute, pp. 1-2 (C-2) (emphasis added).

¹⁶¹ Claimant’s Reply, ¶ 264.

¹⁶² *Id.*, ¶ 264.

¹⁶³ *Id.*

¹⁶⁴ Notice of Dispute, p. 2 (C-2) (emphasis added).

¹⁶⁵ Second Vandeveldel Expert Report, ¶ 140 (emphasis in the original).

104. The reservation was clearly not intended to be a term of, or condition on, Claimant's acceptance of Ecuador's offer of consent.

105. *Third*, as Claimant itself admits,¹⁶⁶ it intended with its letter to "lock-in" Ecuador to its choice of ICSID, and thereby preserve its right to initiate ICSID arbitration against the possibility of the denunciation of the Convention by Ecuador.¹⁶⁷ It could do so "only if [the letter] in fact constituted consent. MSDIA could perfect consent only by consenting."¹⁶⁸ The mutual consent of the parties has particular characteristics under the ICSID Convention, which are inconsistent with Claimant's contention that its reservation was intended to form an indispensable term of its consent. First, it is irrevocable.¹⁶⁹ Second, it is exclusive.¹⁷⁰

106. Claimant does not dispute that mutual consent to ICSID is irrevocable. On the other hand, Claimant contends that Article 26 "expressly provides that a party's consent to ICSID arbitration may be made on a non-exclusive basis,"¹⁷¹ and that therefore its reservation may be read consistently with the provisions of the ICSID Convention.¹⁷² Article 26 provides no such thing. As Prof. Schreuer writes, "[t]he exclusive remedy rule of Art. 26 is subject to modification by *agreement of the parties*."¹⁷³ No such agreement exists here. Moreover, and even if there was such agreement, as Prof. Schreuer goes on to state:

The exclusive remedy rule of Art. 26 is not a requirement of consent to ICSID arbitration, but merely a rule of interpretation,

¹⁶⁶ Claimant's Reply, ¶¶ 260, 269.

¹⁶⁷ Ecuador's Counter-Memorial, ¶ 139.

¹⁶⁸ *See also* Second Vandeveldel Expert Report, ¶ 137.

¹⁶⁹ ICSID Convention, Art. 25(1) ("When the parties have given their consent, no party may withdraw its consent unilaterally.") (RLA-140).

¹⁷⁰ ICSID Convention, Art. 26 ("Consent of the parties to arbitration under this Convention shall, unless otherwise stated, be deemed consent to such arbitration to the exclusion of any other remedy.") (RLA-140).

¹⁷¹ Claimant's Reply, ¶¶ 266-267.

¹⁷² *Id.*, ¶ 270.

¹⁷³ C. Schreuer, et al., *THE ICSID CONVENTION: A COMMENTARY* (2009), p. 355 (RLA-87(bis)) (emphasis added).

which operates to exclude other remedies “unless otherwise stated”. *Therefore, submission to other dispute settlement procedures cannot be interpreted as invalidating consent to ICSID arbitration.*¹⁷⁴

107. It follows that even if there was an agreement of the Parties to derogate from the exclusive nature of ICSID arbitration that would not have affected the validity of Claimant’s choice of consent under the ICSID Convention and the BIT.

3. Claimant’s Consent To ICSID Arbitration Was Valid

108. Claimant’s final argument is one of desperation and can be dispensed with easily. It argues that its reservation of rights constituted in fact a rejection of the terms of Ecuador’s offer of consent to arbitrate (that investors make an exclusive and irrevocable choice of consent to one of the arbitration procedures listed in Article VI(3)(a)) and hence it did not validly exercise its right under Article VI(3)(a).¹⁷⁵

109. The reasons why Claimant’s reservation is irrelevant to the exercise of its right under Article VI have been established above and need not be repeated here. Additionally, Claimant’s reservation is not even formulated as a proposed term or condition to Ecuador’s offer. Prof. Vandeveldel confirms that Claimant “phrased the sentence merely as a reservation of right, not as a condition of its consent.”¹⁷⁶ Finally, the letter states that MSDIA “accepts” Ecuador’s offer to arbitrate.¹⁷⁷ As Prof. Vandeveldel explains, “[a]n acceptance of any offer by definition does not add new terms or conditions to the offer.”¹⁷⁸

¹⁷⁴ *Id.*, pp. 355-356 (RLA-87(bis)) (emphasis added).

¹⁷⁵ Claimant’s Reply, ¶ 274.

¹⁷⁶ Second Vandeveldel Expert Report, ¶ 144.

¹⁷⁷ Notice of Dispute, p. 1 (C-2).

¹⁷⁸ Second Vandeveldel Expert Report, ¶ 146.

110. There can therefore be no dispute that Claimant's exercise of its choice of consent under Article VI(3)(a) with its 8 June 2009 Notice of Dispute was valid.

C. Conclusion

111. Article VI of the Treaty establishes Ecuador's offer of consent to settle investment disputes with U.S. investors through several methods of dispute settlement. Under the terms of that provision, an investor is required to make an exclusive and irrevocable choice of dispute settlement procedure. With its Notice of Dispute dated 8 June 2009, Claimant made its choice in favor of ICSID arbitration. Claimant's subsequent consent to UNCITRAL arbitration, which gave rise to the present proceedings, was therefore made in excess of Ecuador's consent under Article VI. 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.

III. MERCK HAS NO “INVESTMENT” UNDER THE BIT

A. Introduction

112. Merck asserts that the present arbitration is an “investment dispute” within the Ecuador-U.S. BIT because it is a dispute “arising out of or relating to [...] an alleged breach of [...] right[s] conferred or created by this Treaty *with respect to* an investment,” as defined by Article VI(1)(c).¹⁷⁹ Article VI(1)(c)’s text is set out below:

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 [...] (c) an alleged breach of any *right* conferred or created by this Treaty *with respect to an investment*.¹⁸⁰

113. Merck’s denial of justice claim is based on Article II(3)(a) of the Ecuador-U.S. BIT, which guarantees that an “investment”—not an “investor”—shall be granted “treatment” that is fair and equitable:

Investment 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.¹⁸¹

¹⁷⁹ Claimant’s Reply Memorial (8 Aug. 2014) (“Claimant’s Reply”), ¶¶ 60-64.

¹⁸⁰ Treaty between the United States of America and the Republic of Ecuador concerning the Encouragement and Reciprocal Protection of Investment, signed 27 Aug. 1993; EIF 11 May 1997 (“Ecuador-U.S. BIT”), Art. VI(1)(c) (R-1) (emphasis added).

¹⁸¹ *Id.*, Art. II(3)(a) (emphasis added). Merck also claims that Ecuador breached the Treaty obligation to provide full protection and security (Claimant’s Memorial, ¶¶ 380-382), as well as the obligation not to impair investment by arbitrary and discriminatory measures (Claimant’s Memorial, ¶¶ 383-393). Both these Treaty protections are limited to an “investment” and “investments,” respectively, and all arguments regarding denial of justice herein are equally applicable to these claims.

The full protection and security standard is contained in Article II(3)(a) of the Treaty, above. The arbitrary and discriminatory measures clause provides: “Neither Party shall in any way impair by arbitrary or discriminatory measures the management, operation, maintenance, use, enjoyment, acquisition, expansion, or disposal of *investments*.” Ecuador-U.S. BIT, Art. II(3)(b) (emphasis added).

114. Merck further claims that Ecuador breached Article II(7) of the Ecuador-U.S. BIT, the “effective means” provision. Article II(7), like Article VI(1)(c) above, is limited to “treatment” “with respect to an investment”:

Each Party shall provide effective means of asserting claims and enforcing rights *with respect to investment*, investment agreements, and investment authorizations.¹⁸²

115. It follows that there can only be jurisdiction under the BIT for claims regarding violative “treatment” of an “investment.” Yet Merck’s arbitration claims are not “with respect to” anything identified as an “investment.” Rather, Merck’s arbitration claims are based on domestic litigation regarding Merck’s own conduct, and cannot be said to be “with respect to” (i) its branch, (ii) its assets, or (iii) its ability to dispose of the Chillos Valley plant.

116. Moreover, and in any event, Merck has failed to prove that its branch, assets or plant qualified as “investments” under the BIT. What is more, Merck’s Reply has all but abandoned the nebulous notion (argued in the Memorial) that Merck’s “business” in Ecuador constituted an “investment.”¹⁸³ Each of these points will be developed in the paragraphs below.

B. There Is No “Investment Dispute” Under The BIT

117. There is no “investment dispute” in this case because no “rights” under the Ecuador-U.S. BIT were in issue in the underlying litigation.

118. The paragraphs below will demonstrate that no Treaty “right” “with respect to” an “investment” was subject to “treatment” of the Ecuadorian courts in the underlying litigation.

119. *First*, the litigation does not concern any “right” to sell the plant, or any duty Merck may have had to sell. The domestic litigation relates to personal conduct on the part of Merck in a

¹⁸² *Id.*, Art. II(7) (emphasis added).

¹⁸³ Claimant’s Memorial (2 Oct. 2013) (“Claimant’s Memorial”), ¶ 205 (stating: “MSDIA’s Business in Ecuador is an Investment.”).

manner that was injurious to NIFA—in other words, tortious behavior. NIFA complained that Merck had committed an “abuse of rights,” “deceit,” and “malicious acts” in order to delay its entry into the generic drugs products market in Ecuador.¹⁸⁴ NIFA further complained that Merck’s conduct in the protracted pre-contractual negotiations robbed NIFA of valuable business opportunities.¹⁸⁵

120. *Second*, Merck was not precluded from disposing of the plant at any point. Rather, Merck had complete freedom of contract.¹⁸⁶ Nor was Merck required to sell the plant to NIFA. The factual record shows that none of the Ecuadorian court judgments ruled on the actual sale and purchase transaction of the plant. The Second Court for Civil Affairs of Pichincha noted that Merck had *not acquired an obligation* towards NIFA *regarding the sale of the industrial plant*, and it was not appropriate for NIFA to demand the sale of the plant, because no promise to sell the property had been signed.¹⁸⁷ Therefore, the litigation did not deal with Merck’s *ability* to dispose of the plant.¹⁸⁸

121. In particular, the NCJ found that Merck had committed the tort (well-known in civil law systems) of *culpa in contrahendo*.¹⁸⁹ The doctrine is applicable to tortious behavior that takes place in the pre-contractual phase and that causes a plaintiff harm.¹⁹⁰ The NCJ was explicit in stating that in its ruling “[t]here is no sanction for the finalization of the negotiations *per se*,” by

¹⁸⁴ Judgment, *NIFA v. MSDIA*, Court of Appeals (23 Sept. 2011) (C-4).

¹⁸⁵ *Id.*

¹⁸⁶ NCJ Decision, *PROPHAR v. MSDIA*, National Court of Justice (10 Nov. 2014), p. 84 (R-194) (in which the Court stated: “It remains clear that the parties have freedom to contract.”).

¹⁸⁷ Judgment, *NIFA v. MSDIA*, Court of Appeals (23 Sept. 2011) (C-4).

¹⁸⁸ *C.f.*, Claimants’ Reply, ¶¶ 89, 150, 152.

¹⁸⁹ NCJ II, p. 82 (R-194).

¹⁹⁰ *Id.*, pp. 85-86.

Merck.¹⁹¹ Rather, the NCJ ruled on the basis that the negotiations did not have enough transparency and did not reflect the appropriate information.¹⁹² That conduct, therefore, is *totally extraneous* to any “rights” Merck may have had “with respect to” either its branch, assets or plant.

122. *Third*, Merck cannot allege that “[i]f not for MSDIA’s disposal of its plant, there *never* could have been a litigation between NIFA and MSDIA.”¹⁹³ This “but for” argument is baseless. The reason is simple. Even if Merck had abandoned the idea of selling the Chillos Valley plant altogether, the domestic litigation would have ensued *anyway*. Pre-contractual negotiations with NIFA had already taken place and, indeed, the negotiations lasted for *almost a year*.¹⁹⁴ NIFA, therefore, had cultivated the expectation that Merck would sell it the plant, which would have translated into a judicial complaint, regardless.

123. To conclude, Merck has failed to identify any State conduct that gave rise to an “investment dispute” within Article VI(1)(c) of the Ecuador-U.S. BIT. This issue will be further discussed in the sections below.

C. Merck’s Branch Does Not Qualify For Investment Protection Under The BIT

124. As noted in the Introduction, the dispute resolution clause of the Ecuador-U.S. BIT only encompasses disputes that cover the breach of any right conferred by the Treaty with respect to an “investment.”¹⁹⁵ Additionally, fair and equitable treatment under the BIT is limited to

¹⁹¹ *Id.*, p. 84.

¹⁹² *Id.*

¹⁹³ Claimants’ Reply, ¶ 153 (emphasis added).

¹⁹⁴ NCJ II, p. 37 (R-194) (“They had spent nearly a year in negotiations to acquire Merck Sharp Dohme (Inter American) Corporation’s industrial plant when on January 29, 2003, Mr. Jacob Harel informed NIFA S.A. that the conversations between his company and Nueva Industria Farmacéutica S.A. were terminated, with no regard for the serious damages that this had caused”); p. 38 (“The negotiations to acquire the industrial plant belonging to Merck Sharp Dohme (Inter American) Corporation were prolonged over the course of nearly a year [...]”).

¹⁹⁵ Ecuador-U.S. BIT, Art. VI(1)(c) (R-1).

“treatment” of an “investment.”¹⁹⁶ In spite of this explicit wording, Merck alleges that Ecuador has not accorded *it*, as a *party* in the domestic litigation, fair and equitable treatment on account of a denial of justice. Notably, Merck does not argue that Ecuador failed to provide fair and equitable treatment to its alleged “investments.”

125. Accordingly, this Tribunal must engage in a two-fold analysis. *First*, it must determine whether there was, in fact, “treatment” by Ecuadorian courts “with respect to” Merck’s three alleged investments (the branch, assets, and plant). *Second*, it must determine whether Merck’s alleged investments fulfill the legal criteria of “investment” under the Ecuador-U.S. BIT.¹⁹⁷

1. No Treaty Rights With Respect To Merck’s Branch Were At Issue In The Domestic Proceedings

126. The litigation initiated by NIFA in Ecuadorian courts concerned Merck’s extra-contractual, personal conduct committed during negotiations to sell its Chillos Valley plant. That litigation had nothing to do with Merck’s branch in Ecuador.¹⁹⁸

127. The case record shows these facts are beyond dispute. Merck’s alleged “investment”—its unincorporated Ecuadorian branch—is not, and could not be, the defendant in the domestic litigation.¹⁹⁹ Rather, the defendant is Merck Sharpe & Dohme (Inter American) Corporation, the parent company based in New Jersey, United States.

128. The factual record further shows that the pre-contractual negotiations for the sale of the Chillos Valley plant were carried out by executives from Merck’s U.S. headquarters—not Ecuador. The Second NCJ Decision contains multiple references to this. For example, “in February 2002, executives from Merck Sharpe & Dohme (Inter American) Corporation” verbally

¹⁹⁶ *Id.*, Art. II(3).

¹⁹⁷ K. Vandeveld, U.S. INTERNATIONAL INVESTMENT AGREEMENTS (2009) (“Vandeveld”), p. 114 (RLA-85(bis)).

¹⁹⁸ Accordingly, the fact that Merck once contributed capital, know how, services or other assets does not mean the domestic litigation relates to an “investment.” *C.f.* Claimant’s Reply, ¶ 118.

¹⁹⁹ It being clear that neither Merck’s assets nor the Chillos Valley plant could be defendants.

informed NIFA that they—Merck in the United States—had decided to sell the Chillos plant.²⁰⁰ Between 6 and 7 May 2002, NIFA met with representatives of Merck Sharpe & Dohme (Inter American) Corporation to “review the conditions of the negotiation” of the plant.²⁰¹ The same parties later signed a confidentiality agreement in respect of their negotiations²⁰² and, in late 2002, the parties held preliminary negotiations in Panama.²⁰³

2. Merck’s Branch Is Not An “Investment”

129. Merck’s Reply artificially inflates the definition of “investment” under the BIT in order to claim that Merck’s unincorporated Ecuadorian branch could qualify for Treaty protection.²⁰⁴ These arguments are flawed in law and in fact. This is because the concept of “investment” in the Ecuador-U.S. BIT has limits, which the Treaty drafters specifically negotiated.

130. By way of background, the very purpose of the Ecuador-U.S. BIT was to protect “investment”—a defined term—not all U.S.-owned property within the territory of the other BIT party.²⁰⁵ There was a limit to how much flexibility the drafters wished to incorporate, and U.S. negotiators wished to make clear that an asset would be covered by the definition *only* if it had the character of an investment. Thus, the “solution was to formulate a definition that would have an irreducible core of meaning that would help prevent an interpretation that was too narrow, but also a capacity for expansion to allow adaptation to new circumstances.”²⁰⁶ Accordingly, under the heading “Definitions,” Article I(c) of the 1983 Model BIT defines investment as “every kind of investment.” This tautological definition was intended to narrow coverage from the larger

²⁰⁰ NCJ II, p. 31 (R-194).

²⁰¹ *Id.*, p. 32.

²⁰² *Id.*

²⁰³ *Id.*, p. 58.

²⁰⁴ Claimant’s Memorial, ¶ 199; Claimant’s Reply, ¶ 81.

²⁰⁵ Vandeveld, p. 114 (RLA-85(bis)).

²⁰⁶ *Id.*

category of “assets.”²⁰⁷ European BITs, on the other hand, commonly define “investment” as extending to “every kind of *asset*.”²⁰⁸

a. The BIT Only Provides Protection To “Companies”—Not “Branches”

131. The definition of “investment” in Article I(1)(a) under the Ecuador-U.S. BIT has limits—it refers to companies,²⁰⁹ not branches. Article I(1)(b) is not a definition of “investor,” but a general definition of the term “company” in the context of references to “company of a Party.”²¹⁰

132. Merck’s Reply argues that an investment is not limited to business organized using a particular corporate form.²¹¹ Specifically, Merck alleges that the word “company” in Article I(1)(a) “confirms” that the Treaty was intended to protect “ongoing business” in Ecuador.²¹² First, the Ecuador-U.S. BIT definition does not refer to a “commercial enterprise”; it clearly says “investment.”²¹³ And second, if the reference to “company” in Article I(1)(a) does indeed encompass a branch, why does “company” have another definition in Article I(1)(b)? The only answer would be that the terms have two different meanings—which is illogical.²¹⁴

²⁰⁷ *Id.*

²⁰⁸ *Id.* (emphasis added).

²⁰⁹ Article I(1)(a) of the Ecuador-U.S. BIT provides: “‘investment’ means every kind of investment in the territory of one Party owned or controlled directly or indirectly by nationals or companies of the other Party, such as equity, debt, and service and investment contracts; and includes: (i) tangible and intangible property, including rights, such as mortgages, liens and pledges, (ii) *a company* or shares of stock or other interests in a company or interests in the assets thereof; (iii) a claim to money or a claim to performance having economic value, and associated with an investment; (iv) intellectual property [...]; (v) any right conferred by law or contract, and any licenses and permits pursuant to law.” Ecuador-U.S. BIT, Art. I(1)(a) (R-1) (emphasis added).

²¹⁰ Article I(1)(b) reads: “‘company’ of a party means 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 [...].” *Id.*, Art. I(1)(b).

²¹¹ Claimant’s Reply, ¶ 100.

²¹² *Id.*, ¶ 103.

²¹³ *C.f., id.*, ¶ 85.

²¹⁴ Merck always had the option of setting up a subsidiary company in Ecuador—it chose not to.

133. Merck’s argument, of course, misses the point. An unincorporated subdivision of a foreign company, in itself, is nothing more than the company it is attached to. The material question is, rather, whether there has been an “investment.”

134. Merck’s Reply also tries to cast doubt in Prof. Vandeveldel’s opinions in this arbitration, suggesting Ecuador’s pleadings are contradictory.²¹⁵ This tactic is futile: Prof. Vandeveldel did *not* previously write that *all* branches fall, *ipso facto*, within the definition of investment under Article I(1)(a) of the Ecuador-U.S. BIT.²¹⁶ As Merck’s Reply noted, Prof. Vandeveldel stated that a branch “may” fall within the definition of “investment” “whether or not it is separately constituted” and whether or not it is a “company” *if* it has the “character of an investment.”²¹⁷ This determination depends on the nature of the activities undertaken and any contractual rights held.²¹⁸

135. Nor did Prof. Vandeveldel write that the addition of the word “branch” to the 1994 U.S. Model BIT had no effect on whether a branch can be an investment.²¹⁹ To the contrary, Prof. Vandeveldel noted that the addition of the word “branch” did not change the requirement to be “constituted or organized under applicable law,” something that applies to anything falling under 1994 Model BIT’s definition of “company.”²²⁰ Thus, non-incorporated branches are still not “companies,” even under the 1994 Model BIT. This is equally true even when looking at companies as investments.

²¹⁵ Claimant’s Reply, ¶ 104.

²¹⁶ *C.f., id.*, ¶ 103.

²¹⁷ Vandeveldel, p. 122 (RLA-85(bis)). Prof. Vandeveldel did not go on to give any examples of when such an unincorporated branch could be said to have that character.

²¹⁸ Ecuador’s Corrected Counter-Memorial (27 Feb. 2014) (“Ecuador’s Counter-Memorial”), ¶ 162.

²¹⁹ Claimant’s Reply, ¶ 107, fn. 66 (*citing* Vandeveldel, p. 122 (CLM-105)).

²²⁰ Vandeveldel, p. 122 (RLA-85(bis)).

136. Merck’s Reply also attempts to broaden the definition of “investment” beyond the intention of the Treaty Parties. This cannot succeed. Ecuador’s subsequent treaty practice evinces no intention to include “branches” within the definition of “company.” Tellingly, Merck referred to only one treaty, the Spanish-Ecuador BIT, as a supporting authority for a supposed broad definition of “investment.” Yet Ecuadorian treaty practice points to the opposite conclusion. For example, the 1994 Ecuador-France BIT defines “companies” as “any body corporate,” and gives no indication of a looser definition.²²¹ Similarly, the 1994 Ecuador-China BIT defines an “investment” as “shares, capital and any kind of participation in *companies*.”²²² The Ecuador-Germany BIT of 1998 also refers to a “compan[y]” without making any mention of the word “branch.”²²³ Under the Ecuador-Germany BIT, a “compan[y]” is limited to legal persons constituted under Ecuadorian law and having their domicile in Ecuador.²²⁴ Finally, the Ecuador-Netherlands BIT defines investment as, *inter alia*, “rights derived from shares, bonds and other kinds of interests in *companies and joint ventures*.”²²⁵ Therefore, subsequent treaties do *not* demonstrate a consistent practice to expand the definition of “company,” as Merck alleges.

137. Furthermore, Merck’s Reply states that Ecuador “expressly represented” to potential foreign investors that branches would “be protected as foreign investments by the investment

²²¹ France-Ecuador BIT, signed 7 Sept. 1994; EIF 10 June 1996, Art. 1(3) (R-135) (providing: “The term ‘companies’ shall apply to: Any *body corporate* constituted in the territory of either Contracting Party in accordance with its legislation and having its registered office there; Any *body corporate* controlled by nationals of one Contracting Party or by bodies corporate having their registered office in the territory of one of the Contracting Parties and constituted in accordance with that Party’s legislation.”) (emphasis added).

²²² China-Ecuador BIT, signed 21 Mar. 1994; EIF 1 July 1997, Art. 1(1)(b) (R-136) (emphasis added). The Ecuador-China BIT also limits the definition of “investor” to entities that have their “seat” in Ecuador, thus excluding branches from the definition. *Id.*, Art. 1(2)(b).

²²³ Germany-Ecuador BIT, signed 21 Mar. 1996; EIF 12 Feb. 1999 (R-137).

²²⁴ *Id.*, Art. 1(4)(b).

²²⁵ Netherlands-Ecuador BIT, signed 27 June 1999; EIF 1 July 2001, Art. 1(a)(ii) (R-138) (emphasis added).

treaties to which Ecuador is party.”²²⁶ This is an incredible assertion. In the document Merck refers to, the Consulate of Ecuador in Bilbao gave a basic PowerPoint presentation saying that BITs were among the legal sources of regulation of investment activity in Ecuador.²²⁷ Ecuador most certainly did not “expressly” present to foreign investors that branches are, *ipso facto*, “protected as foreign investments by the investment treaties to which Ecuador is party.”²²⁸ Indeed, if Ecuador made as many representations as Merck alleges, it is curious that Merck could find only one “supporting” document. Nor has Merck offered a single witness to testify on this issue.

b. Ecuadorian Law Stipulates That Branches Receive Different Treatment To Companies

138. In the Reply, Merck and its legal expert, Dr. Fabián Flores Paredes, minimize the differences between domestic companies and branches. In particular, they appear to collapse the legal requirements into one, arguing that domestic companies and branches have similar rights and attributes under Ecuadorian law.²²⁹ This strategy is not based in law. Under Ecuadorian law, companies and branches are of a different legal nature. These differences were explained in Ecuador’s Counter-Memorial, and are further addressed below.²³⁰

139. First, companies incorporated abroad can only exercise their activities in Ecuador through a procedure known as “domiciliation.”²³¹ In turn, domiciliation merely contemplates recognition under Ecuadorian law of the existence and legal status of a foreign company.²³²

²²⁶ Claimant’s Reply, ¶¶ 131-133.

²²⁷ Consulate of Ecuador in Bilbao, *Aspectos jurídicos relacionados con la inversión en el Ecuador* (C-282).

²²⁸ Claimant’s Reply, ¶ 131.

²²⁹ Expert Report of Dr. Fabián Flores Paredes (7 Aug. 2014) (“Flores Expert Report”), pp. 2, 7-10.

²³⁰ Ecuador’s Counter-Memorial, ¶161; First Expert Report of Prof. Roberto Salgado Valdez (24 Feb. 2014) (“First Salgado Expert Report”), pp. 5-6 (noting the key differences between branches and companies under Ecuadorian law).

²³¹ First Salgado Expert Report, p. 3.

140. Second, one cannot equate an Ecuadorian branch with a company in terms of legal personality. Under Ecuadorian law, a branch does not enjoy a separate legal personality from its foreign parent.²³³ Merck’s own expert has recognized that, under Ecuadorian law, a branch “maintains the *same legal personality* as the company incorporated abroad [...].”²³⁴ Merck’s Ecuadorian branch, therefore, always kept the *same legal personality* of its parent in the United States.²³⁵ Revealingly, the President of Merck, Mr. Jean Marie Canan, has noted that Merck’s Ecuadorian branch is not “a separate corporate entity.”²³⁶

141. Third, branches in Ecuador do not enjoy “administrative and operational autonomy,” as Dr. Flores, alleges.²³⁷ Quite the reverse. Under Ecuadorian law, a branch performs its activities “administratively and operationally” by complying with policies adopted from its parent abroad. This is done through agents designated by the foreign company.²³⁸ So branches do not have a legal representative in Ecuador in the way that foreign companies do; rather, branches act through a designated agent.²³⁹

142. Fourth, a branch does not acquire the same “rights and obligations” as an Ecuadorian company, as Merck alleges.²⁴⁰ Merck either misuses, or is confused, about the formal report of its own expert. What Dr. Flores wrote was that “a foreign company”—not a branch—acquired

²³² Second Expert Report of Prof. Second Salgado Valdez Expert Report (20 February 2015) (“Second Salgado Expert Report”), p. 2.

²³³ *Id.*, pp. 4-5.

²³⁴ Flores Expert Report, p. 4 (emphasis added).

²³⁵ Second Salgado Expert Report, p. 2.

²³⁶ First Witness Statement of Jean Marie Canan (8 June 2012) (“First Canan Witness Statement”), ¶ 5 fn. 1.

²³⁷ Second Salgado Expert Report, p. 4.

²³⁸ *Id.*

²³⁹ *Id.*

²⁴⁰ Claimant’s Reply, ¶ 109 (citing Flores Expert Report, p. 6).

similar rights and obligations to an Ecuadorian company. In the interests of clarity, Dr. Flores' exact words are reproduced below:

When branches of foreign companies are registered in Ecuador, *these companies* acquire the same rights and obligations as Ecuadorian companies, and the law does not discriminate between them.²⁴¹

143. Dr. Flores then lists a number of sources, for his statement, including the Ecuadorian Constitution:

Foreign persons that are in the Ecuadorian territory will have the same rights and obligations as Ecuadorian persons, in accordance with the Constitution.²⁴²

144. Fifth, Ecuadorian law does not define “foreign investment” with reference to branches, as Dr. Flores states.²⁴³ In fact, the former Law on Promotion and Guarantees of Investment defined “investment” with respect to the “asset” transferred, not the entity receiving the transfers.²⁴⁴

145. Dr. Flores is also mistaken on this issue. In his second report, he states that “a foreign company that wants to continuously engage in business transactions within Ecuador must *either* establish a branch in Ecuador, or constitute a new company (a subsidiary) under local law.”²⁴⁵ This statement is empty, and completely irrelevant to whether a branch is an investment, which is now addressed below.

c. Merck’s Ecuadorian Branch Does Not Possess The Characteristics Of An “Investment”

146. Merck’s branch does not possess the necessary characteristics of an “investment,” as understood by investment-treaty jurisprudence.

²⁴¹ Flores Expert Report, pp. 5-6 (emphasis added).

²⁴² *Id.*, p. 6 fn 6.

²⁴³ Second Salgado Expert Report, p. 3 (*citing* Flores Expert Report, p. 8).

²⁴⁴ *Id.*, p. 3.

²⁴⁵ Claimant’s Reply, ¶ 109 (*citing* Flores Expert Report, p. 2) (emphasis in original).

147. Investment treaty decisions have observed that the open-ended nature of the definition of “investment” necessarily calls for recourse to inherent features.²⁴⁶ Tribunals, constituted under a variety of administering rules, have opined that an “investment” under a BIT comprises certain inherent economic features that are specific to the ordinary, objective meaning of the term.²⁴⁷ The mere existence of branch, therefore, cannot constitute an “investment.”²⁴⁸

148. Merck’s Reply admits that, in neither *MCI v. Ecuador* nor *Middle East Cement v. Egypt*, did the tribunals actually rule on whether branches themselves were “investments.”²⁴⁹ In particular, the *Middle East Cement* tribunal did not hold that the “business” was an investment; rather, it said the concession license and ship were an investment.²⁵⁰ As noted in Ecuador’s Counter-Memorial, *Middle East Cement* stands for the proposition that the factor determining whether an ‘investment’ qualifies for protection under a BIT is the nature of the activities

²⁴⁶ *Nova Scotia Power Incorporated v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB(AF)/11/1, Excerpts of Award (30 Apr. 2014) (Van Houtte, Williams, Vinuesa) (“*Nova Scotia Power* (2014)”), ¶ 78 (RLA-195) (citing *Romak S.A. v. The Republic of Uzbekistan*, PCA Case No. AA280, UNCITRAL (Switzerland-Uzbekistan BIT), Award (26 Nov. 2009) (Mantilla-Serrano, Rubins, Molfessis) (“*Romak*”), ¶¶ 184-185 (RLA-97) and *Joy Mining Machinery v. Egypt*, ICSID Case No. ARB/03/11, Award on Jurisdiction (6 Aug. 2004) (Orrego Vicuña, Weeramantry, Craig) (“*Joy Mining*”), ¶ 58 (RLA-66)).

²⁴⁷ As synthesized in *Romak*, ¶ 177 (RLA-97). See also *Alps Finance and Trade AG v. The Slovak Republic*, UNCITRAL (Slovak Republic-Switzerland BIT), Award (5 Mar. 2011) (Crivellaro, Klein, Stuber), ¶ 240 (RLA-105); E. Cabrol, *Pren Neka v. Czech Republic*, *The Notion of Investment Under Bilateral Investment Treaties: Does “investment” really mean “every kind of asset”?* in Y.B. ON INT’L INVEST. L. & POL’Y 2009-2010 (K. Sauvart ed., 2010) (RLA-175); *Caratube International Oil Company LLP v. Republic of Kazakhstan*, ICSID Case No. ARB/08/12, Award (5 June 2012) (Böckstiegel, Griffith, Hossain), ¶ 351 (RLA-184) (where the tribunal explained that bilateral investment treaties define investment “from the perspective of assets, claims and rights”).

²⁴⁸ *C.f.*, Claimant’s Reply, ¶ 124 (referring to Merck’s Memorial (¶ 213) when stating that “tribunals in other investment arbitrations have recognized that ongoing businesses structured as branches are protected investments.”).

²⁴⁹ Claimant’s Reply, ¶ 127 (stating: “[T]he tribunals in the two other cases that MSDIA identified in its Memorial did not reach the question whether the branches themselves could qualify as investments independent from their assets and activities.”).

²⁵⁰ *Middle East Cement Shipping and Handling Co. S.A. v. Arab Republic of Egypt*, ICSID Case No. ARB/99/6, Award (12 Apr. 2002) (Böckstiegel, Bernardini, Wallace) (“*Middle East Cement* (2002)”), ¶¶ 101, 135-138 (RLM-112).

undertaken by a branch as well as the property and contractual rights held through a branch, not the mere existence of the branch.²⁵¹

149. Finally, Merck’s Reply grossly misreads the holding of *Murphy v. Ecuador*.²⁵² In particular, Merck quotes the tribunal as saying that “companies or branches” could be investments under the Ecuador-U.S. BIT.²⁵³ The *Murphy* tribunal was clearly talking about “incorporated” branches—which Merck’s branch is not.²⁵⁴ Prof. Vandeveldel has further noted the important distinction between “incorporated” and “unincorporated” entities under the Ecuador-U.S. BIT.²⁵⁵

150. The following paragraphs will show how neither “contribution” nor “risk” is present with respect to Merck’s branch.

(a) Contribution

151. Ecuador’s Counter-Memorial explained how Merck had failed to establish any significant “contribution” to Ecuador because of the purely commercial nature of its operations since selling the Chillos Valley Plant in 2003.²⁵⁶ (After 2003, Merck ceased to carry out any production activities in Ecuador or operate any other significant assets.) Mr. Canan, for his part, acknowledged that the branch simply provides the sale and re-sale of medicines in Ecuador.²⁵⁷

152. Merck’s branch alone does not contribute anything to Ecuador. In all respects, it is the parent company that acts, through the branch. Indeed, that is all “domiciliation,” as explained

²⁵¹ Ecuador’s Counter-Memorial, ¶ 159.

²⁵² *Murphy Exploration and Production Co. Int’l v. Republic of Ecuador*, ICSID Case No. ARB/08/4, Award on Jurisdiction (15 Dec. 2010) (Oreamuno Blanco, Grigera Naón, Viñuesa) (“*Murphy*”) (RLM-42).

²⁵³ Claimant’s Reply, ¶ 126.

²⁵⁴ *Murphy*, ¶ 119 (RLM-42) (emphasis added).

²⁵⁵ See Section C.2.a above.

²⁵⁶ Ecuador’s Counter-Memorial, ¶ 166.

²⁵⁷ First Canan Witness Statement, ¶ 9.

above, is: the ability of foreign companies to operate in Ecuador through an agent.²⁵⁸ It was Merck that was given the permit to operate—not the branch. All branch employees are Merck employees. Merck pays the wages and salaries, and any taxes. The mere fact that Merck employs personnel to distribute goods within the country is not enough to make Merck’s “business” an “investment.”²⁵⁹

153. In its Reply, Merck elected to have its expert on company law “review” the available records on Merck’s Ecuadorian branch.²⁶⁰ Yet he is unable to point to a single factor that indicates an “investment.” In fact, Dr. Flores appears to admit that only “assets” and not branches can be considered “investments.”²⁶¹ Additionally, and as noted above, Dr. Flores’ Report does *not* equate Ecuadorian companies and branches in Ecuador; rather, it draws analogies between Ecuadorian companies and *foreign companies*.²⁶²

(b) Risk

154. Merck’s presence in Ecuador is not characterized by any risk beyond the normal risk of commercial sales. As noted above, Merck’s Ecuadorian branch simply kept the *same legal personality* of Merck in the United States.²⁶³ Since Merck disposed of its plant in July 2003, it has been conducting cross-border trading operations through individual sales contracts, mostly with private buyers in Ecuador. What is more, it was always possible for the branch’s parent company, Merck, to carry out these trading transactions, either alone or through an affiliate. Mr.

²⁵⁸ See Section C.2.b above; Second Salgado Expert Report, pp. 2, 4.

²⁵⁹ *C.f.*, Claimant’s Reply, ¶ 139.

²⁶⁰ Flores Expert Report, pp. 10-12; Claimant’s Reply, ¶¶ 114-115.

²⁶¹ Flores Expert Report, p. 2 (“the assets of both are considered investments.”).

²⁶² *Id.*

²⁶³ Second Salgado Expert Report, p. 2.

Canan’s witness statement testifies to this.²⁶⁴ Although Merck’s branch may have sold drugs to the government of Ecuador, Merck has not shown that it engaged in anything more than commercial sales after July 2003. Tellingly, Merck previously suggested it would prefer to walk away from its “investment” rather than satisfy the Court of Appeals’ US\$150 million judgment.²⁶⁵

155. Investment treaty tribunals, in this regard, have cautioned that investment risk is *distinguishable* from the risk that arises in an ordinary commercial transaction.²⁶⁶ In particular, the tribunal in the *Romak* case (which Merck is at pains to distinguish) endorsed a careful, systematic approach to the definition of “investment.” Under *Romak*’s reasoning, continuous sales would not qualify as “investments,” contrary to Merck’s argument.²⁶⁷ Unsurprisingly, Merck’s Reply glosses over the decisions that followed the *Romak* reasoning, no doubt because these cases provide no support for Merck’s branch sales theory.²⁶⁸

156. Investment treaty tribunals have also ruled a risk that flows directly from mutually agreed contractual terms *cannot* be indicative of an “investment.” In particular, the mere transfer of title for goods in exchange for full payment is not considered a “contribution” for the purposes of a protected investment under a BIT.²⁶⁹ For example, in *Global Trading v. Ukraine*, the tribunal found that claims arising from a sale of goods were “manifestly without legal merit,” due to the

²⁶⁴ Second Witness Statement of Jean Marie Canan (2 Aug. 2012) (“Second Canan Witness Statement”), ¶ 19.

²⁶⁵ *Id.*, ¶¶ 7-19.

²⁶⁶ Contrary to Claimant’s argument, Ecuador has cited several cases that hold that commercial operations cannot meet the definition of investment. *See* Claimant’s Reply, ¶ 218; Ecuador’s Counter-Memorial, ¶ 171.

²⁶⁷ Claimant’s Reply, ¶ 121.

²⁶⁸ Merck’s attempts to rely on *Middle East Cement Shipping v. Egypt* are unavailing, given that the respondent State in that case accepted that the claimant’s business—for the import and storage of bulk cement in depot ship and for packing the same to both *public and private* sectors—was granted by a concession from the Egyptian General Authority for Investment and Free Zones. *Middle East Cement* (2002), ¶ 82 (RLM-112).

²⁶⁹ *Romak*, ¶ 222 (RLA-97).

absence of an “investment.”²⁷⁰ What is more, the tribunal made this finding *even though the host State’s purpose in purchasing the goods was to foster the development of its economy.*²⁷¹ Commercial sales are thus not an “investment,” for by delivering goods a seller makes no contribution—the goods having been delivered in consideration of the price paid or to be paid—and takes no investment risks because the seller’s remuneration is entirely independent of the financial results of the purchaser’s business. More recently, in *Nova Scotia Power v. Venezuela II*, an ICSID tribunal expressly rejected a view that risk, for the purposes of “investment,” could be easily established; or that risk could be present in any transaction.²⁷²

157. As a result, the nature of Merck’s branch is at odds with the characteristics of an “investment” as defined by investment treaty tribunals.

D. Merck’s Assets Are Not Protected Under The BIT

1. No Treaty Rights With Respect To Merck’s Assets Were At Issue In The Domestic Proceedings

158. Merck’s Reply also alleges that the assets used in its “business operations” are “investments” under the Ecuador-U.S. BIT.²⁷³ Yet Merck must first show: (i) that the “treatment” by the Ecuadorian courts was “with respect to” its assets, and (ii) that any alleged

²⁷⁰ *Global Trading Resource Corp. and Globex International Inc. v. Ukraine*, ICSID Case No. ARB/09/11, Award (1 Dec. 2010) (Berman, Gaillard, Thomas) (“*Global Trading*”), ¶ 56 (RLM-91) (noting: “The fact that the trade in these particular goods was seen to further the policy priorities of the purchasing State does not bring about a qualitative change in the economic benefit that all legitimate trade brings in its train.”). *See also* S. Manciaux, *L’actualité de la notion d’investissement* in LA PROCEDURE ARBITRALE RELATIVE AUX INVESTISSEMENTS INTERNATIONAUX : ASPECTS RECENTS (C. Leben ed., 2010), ¶ 17 (RLA-176) (stating: “What distinguishes an investment from other types of transactions is the fact that achieving returns is uncertain and dependent upon the future profitability of the project in which the investor participates. [...] An investor’s return, which is both delayed in time and uncertain, cannot benefit from any of the legal techniques used to secure other international economic transactions, such as documentary letters of credit for international sales, the various types of liens and other security interests that can accompany international loans, or the use of installment payment schedules for the contractor based on the progress of work in public works projects and other construction contracts (use of systems of provisional work acceptance.”).

²⁷¹ *Global Trading*, ¶ 42 (RLM-91).

²⁷² *Nova Scotia Power* (2014), ¶ 104 (RLA-195).

²⁷³ Claimant’s Reply, ¶¶ 134-146.

Treaty breach was “with respect to” Merck’s assets. As outlined below, Merck cannot show either.

159. Section B of this chapter (above) explains that the Ecuadorian proceedings relate to tortious behavior by Merck that injured NIFA. NIFA’s initial complaint alleged that Merck had committed an “abuse of rights,” “deceit,” and “malicious acts” in order to delay its entry into the generic products market in Ecuador.²⁷⁴ NIFA further complained that Merck’s conduct in the pre-contractual negotiations robbed it of valuable business opportunities.²⁷⁵

160. It follows that the Ecuadorian proceedings, were not “with respect to” nor involved “any treatment of” Merck’s assets (*i.e.*, its alleged “investment”), as required by the fair and equitable treatment standard of the Ecuador-U.S. BIT.²⁷⁶ Nor did the Ecuadorian proceedings involve claims for the breach of any “right” with respect to Merck’s assets (again, its alleged “investment”) under the BIT, such as: (a) tangible property, including inventory, cash, and assets used to conduct the “business,” such as vehicles, computers, and office equipment; (b) intangible property, including leases for real property and “other” rights; (c) claims to money, including accounts receivable; or (d) licenses and permits, including the right to operate in Ecuador.²⁷⁷ In sum, the Ecuadorian proceedings had *nothing* to do with the assets of Merck.

2. Merck’s Assets Are Not An “Investment”

161. In its Reply, Merck alleges that the branch’s assets were used in its “ongoing domestic pharmaceutical business.”²⁷⁸ Merck does not argue that these assets are owned by its *branch*.

²⁷⁴ Judgment, *NIFA v. MSDIA*, Court of Appeals (23 Sept. 2011) (C-4).

²⁷⁵ See NCJ II, p. 39 (R-194).

²⁷⁶ Ecuador-U.S. BIT, Art. II(3) (R-1).

²⁷⁷ *Id.*, Art. VI(1)(c). It being noted already that Merck, not its branch, received the license to operate in Ecuador.

²⁷⁸ Claimant’s Reply, ¶¶ 134-136. Specifically, Merck argues that it owns in Ecuador, among other things, inventory, cash, and assets used to conduct the business, such as vehicles, computers, and office equipment; leases for real property and other rights; accounts receivable; the right to engage in commerce in Ecuador on an ongoing

Rather, the assets are owned by Merck itself.²⁷⁹ The mere status as assets is insufficient to constitute an “investment.” As noted in Section C.2 above, the purpose of the BIT was to protect investment, not all U.S.-owned property in the territory of the other BIT party.²⁸⁰ U.S. negotiators “wished to make clear that *an asset* would be covered by the definition *only if it had the character of an investment.*”²⁸¹

162. Investment treaty decisions also clarify that assets alone do not constitute “investments.”²⁸² One investment treaty tribunal opined that “assets cannot be protected *unless* they result from contributions, and contributions will not be protected *unless* they have actually produced the assets of which the investor claims to have been deprived.”²⁸³

163. The mere presence of facilities and employees cannot convert Merck’s activities in Ecuador into an “investment.” Following the disposal of the Chillos Valley plant in July 2003, Merck’s remaining facilities were merely leasehold interests used to facilitate commercial trading transactions. Merck submitted with its Reply documents—covering only limited periods of time and devoid of explanation—that it purports constitute evidence; but Merck cites these documents only for the proposition that it has employees, remains on the commercial register,

basis and to produce, market, and distribute patented and trademarked pharmaceutical products inside Ecuador. *Id.*, ¶ 135.

²⁷⁹ In any event, branches, having no legal personality of their own under Ecuadorian law, are unable to hold legal title to property. Second Salgado Expert Report, p. 3.

²⁸⁰ Vandeveld, p. 114 (RLA-85(bis)).

²⁸¹ *Id.* (emphasis added).

²⁸² See M.F. Houde, *Novel Features in Recent OECD Bilateral Investment Treaties* in INTERNATIONAL INVESTMENT PERSPECTIVES (2006), p. 176 (RLA-161) (“The broad asset-based definition of investment has now become the norm in recent [international investment agreements]. Because of its far reaching implications, however, there has been a move away from a totally open-ended definition so as not to cover operations which are not deemed to be ‘real’ investments.” (citing the 2004 U.S. and Canada Model BITs/FIPAs as examples of that move)).

²⁸³ *Malicorp Ltd. v. The Arab Republic of Egypt*, ICSID Case No. ARB/08/18, Award (7 Feb. 2011) (Tercier, Baptista, Tschanz) (“*Malicorp v. Egypt*”), ¶ 55 (RLA-66) (emphasis added).

and has received sums of capital from its parent.²⁸⁴ Importantly, Merck failed to demonstrate how trading certain pharmaceutical products entailed a contribution subject to non-commercial risk.²⁸⁵ There was no commitment of capital because Merck’s counterparties paid the price in exchange for something deemed to have the same economic value as the price paid (there is no suggestion of any differential price structure, for example). What is more, even if ordinary sales contracts are extremely complex—and even if they involve a State agency—they do not morph into an “investment.”²⁸⁶ These contracts are ultimately commercial and their prices are set in advance.²⁸⁷

164. In sum, although Merck may have a local presence in Ecuador, this alone does not *prove* that Merck’s assets were used to conduct “investment” in Ecuador.

²⁸⁴ *E.g.*, Merck does not provide information relating to alleged social security contributions for 2001, 2004, 2005, 2007, 2008, 2009 and 2010 (Claimant Exhibit C-226). It is also unclear why only certain years of certain documents have been translated into English. *See, e.g.*, Documentation from the Ecuadorian Social Security Institute (IESS) regarding social security contributions of MSDIA (Ecuador Branch), in 2000, 2002, 2003, 2006 and 2011 (C-226); General Information of MSDIA registered in the Superintendency of Companies (C-274).

²⁸⁵ *See Romak*, ¶ 207 (RLA-97) (“The Arbitral Tribunal therefore considers that the term ‘investments’ under the BIT has an inherent meaning [...] entailing a contribution [...] that involves some risk [...]. [I]f an asset does not correspond to the inherent definition of ‘investment,’ the fact that it falls within one of the categories listed in Article 1 [of the BIT] does not transform it into an ‘investment.’”) (emphasis in original).

²⁸⁶ *See Joy Mining*, ¶ 58 (RLA-66) (“[I]f a distinction is not drawn between ordinary sales contracts, *even if complex*, and an investment, the result would be that any sales or procurement contract involving a State agency would qualify as an investment. [...] Yet, those contracts are not investment contracts, except in exceptional circumstances, and are to be kept separate and distinct for the sake of a stable legal order.”) (emphasis added). *Cf.*, *Fedax N.V. v. Republic of Venezuela*, ICSID Case No. ARB/96/3, Decision on Objections to Jurisdiction (11 July 1997) (Orrego Vicuña, Heth, Owen), ¶¶ 37-43 (CLM-50) (finding a qualifying “investment,” but underscoring: (a) that Venezuela backed the promissory notes; (b) that Venezuela was a party to the promissory note contract; and (c) that by law the notes were created *to benefit the development* of Venezuela).

²⁸⁷ *Cf.*, *Salini Costruttori S.P.A. and Italstrade S.P.A. v. Morocco*, ICSID Case No. ARB/00/4, Decision on Jurisdiction (16 July 2001) (Briner, Cremades, Fadlallah), ¶ 56 (RLM-123) (where there was *always* uncertainty as to whether the initially agreed price would be adequate to cover the contractor’s costs); *Toto Costruzioni Generali S.p.A. v. The Republic of Lebanon*, ICSID Case No. ARB/07/12, Decision on Jurisdiction (11 Sept. 2009) (van Houtte, Feliciano, Moghaizel), ¶ 86 (RLA-95) (where there was *always* a risk that the contractors costs would not be approved, as they had to be certified by an engineer.).

E. The Chillos Valley Plant Is Not Protected Under The BIT

1. No Treaty Rights With Respect To The Chillos Valley Plant Were At Issue In The Domestic Proceedings

165. As explained in Section B.1 above, no Treaty rights with respect to Merck's disposition of the plant were in issue in the Ecuadorian proceedings. What *was* in issue was Merck's conduct in pre-contractual negotiations with NIFA.

166. The domestic litigation relates to *personal conduct* on the part of Merck in a manner that was injurious to NIFA—in other words, tortious behavior. NIFA complained that Merck had committed an “abuse of rights,” “deceit,” and “malicious acts” in order to delay its entry into the generic products market in Ecuador.²⁸⁸ NIFA further complained that Merck's conduct in the protracted pre-contractual negotiations robbed NIFA of valuable business opportunities.²⁸⁹

167. The NCJ pointed out that, at no point, was Merck precluded from disposing of the plant. Merck had complete freedom of contract.²⁹⁰ The Second Court for Civil Affairs of Pichincha clarified that Merck had *not acquired an obligation* towards NIFA *regarding the sale of the industrial plant*, and it was not appropriate for NIFA to demand the sale of the plant, because no promise to sell the property had been signed.²⁹¹

168. Finally, even if Merck had abandoned the idea of selling the Chillos Valley plant, the domestic litigation would have ensued anyway. Pre-contractual negotiations with NIFA had already taken place and, indeed, the negotiations lasted for almost a year.²⁹²

²⁸⁸ Judgment, *NIFA v. MSDIA*, Court of Appeals (23 Sept. 2011) (C-4).

²⁸⁹ What is more, by the time the *NIFA v. MSDIA* litigation arose, Merck's investment had already been “wound up.” Ecuador's Counter-Memorial, ¶ 180.

²⁹⁰ NCJ II, p. 84 (R-194) (in which the Court stated: “It remains clear that the parties have freedom to contract.”).

²⁹¹ Judgment, *NIFA v. MSDIA*, Court of Appeals (23 Sept. 2011) (C-4) (emphasis added).

²⁹² NCJ II, p. 37 (R-194) (“They had spent nearly a year in negotiations to acquire Merck Sharp Dohme (Inter American) Corporation's industrial plant when on January 29, 2003, Mr. Jacob Harel informed NIFA S.A. that the conversations between his company and Nueva Industria Farmacéutica S.A. were terminated, with no regard for

2. The Underlying Litigation Did Not Prolong The Chillos Valley Plant As An “Investment”

169. To argue that Merck has a protected interest in the Chillos Valley plant until the end of all lawsuits—regardless of the nature of the claims asserted or rights to be enforced—stretches the scope of the Treaty to the point of absurdity.²⁹³ Based on Merck’s theory, *any and all litigation* howsoever connected with the plant would automatically be protected under the Treaty.

170. Investor-State decisions have shown that investments benefit from protection throughout their lifespan *in certain categories of cases only*.²⁹⁴ Merck, in fact, relies on decisions in which tribunals were concerned that expropriated investments may not be able to benefit from investment treaty protection.²⁹⁵ For example, in *Mondev v. United States*, the rights being litigated were rights specifically with regard to the investment involved. By contrast, here, the Ecuadorian proceedings do not challenge Merck disposition of the plant, or seek its undoing. What is more, the *Mondev* “lifespan theory” was motivated by an equitable concern that is not present here. In *Mondev*, the tribunal was concerned that a State could defeat jurisdiction by virtue of its very own misconduct (*i.e.*, expropriation).

the serious damages that this had caused”); p. 38 (“The negotiations to acquire the industrial plant belonging to Merck Sharp Dohme (Inter American) Corporation were prolonged over the course of nearly a year [...].”).

²⁹³ Claimant’s Reply, ¶ 162.

²⁹⁴ Ecuador’s Counter-Memorial, ¶ 177.

²⁹⁵ *E.g.*, Claimant’s Memorial, ¶ 221 fn. 396 (*citing Jan de Nul N.V. and Dredging International N.V. v. Arab Republic of Egypt*, ICSID Case No. ARB/04/13, Decision on Jurisdiction (16 June 2006) (Kaufmann-Kohler, Mayer, Stern) (RLA-72)); Claimant’s Reply, ¶ 161 fn. 134 (*citing Mondev International Ltd. v. United States of America*, ICSID Case No. ARB(AF)/99/2, Award (11 Oct. 2002) (Stephen, Crawford, Schwebel) (RLA-54) (where the tribunal only addressed its comments to issues of expropriation and compensation, national treatment, and the international minimum standard)); Claimant’s Reply, ¶ 159 fn. 133 (*citing Víctor Pey Casado y Fundación Presidente Allende v. Republic of Chile*, ICSID Case No. ARB/98/2, Award (8 May 2008) (Lalive, Chemloul, Gaillard) (CLM-139) (holding that an investor had standing on account of its investment having been previously expropriated)).

171. The tribunal in *Chevron I*, a case on which Merck relies heavily, expressed this very concern.²⁹⁶ Moreover, there are several differences between the *Chevron I* case and the present dispute. The litigation in *Chevron I* arose *directly out of* Chevron’s production contracts with Ecuador. Importantly, the *Chevron I* tribunal was careful to base its ruling on the fact that Chevron’s claims “were excluded from any of the Settlement Agreements” with Ecuador.²⁹⁷

Merck did not quote the full reasoning of the *Chevron I* tribunal, which is now provided:

The Claimants’ investments were largely liquidated when they transferred their ownership in the concession to PetroEcuador and upon the conclusion of various Settlement Agreements with Ecuador. Yet, those investments were and are not yet fully wound up because of ongoing claims for money arising directly out of their oil extraction and production activities under their contracts with Ecuador and its state-owned oil company. *These claims were excluded from any of the Settlement Agreements* (R II, para. 169; C II, para. 40). The Claimants continue to hold subsisting interests in their original investment, but in a different form. 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.²⁹⁸

172. Merck’s argument that the sale of its plant is analogous to claims arising out of settlement agreements makes no sense: there is no basis here to resurrect Merck’s investment just because Merck committed a tort leading up to the plant sale.

173. Merck also cites with approval *Chevron II*—equally, to no avail.²⁹⁹ In *Chevron II*, the claims regarded rights “with respect to an investment” because the underlying dispute directly

²⁹⁶ *Chevron Corporation (USA) and Texaco Petroleum Company (USA) v. Republic of Ecuador*, PCA Case No. 34877, UNCITRAL (Ecuador-U.S. BIT), Interim Award (1 Dec. 2008) (Böckstiegel, Brower, van den Berg), ¶ 193 (CLM-44) (stating: “This approach resolves the concern expressed in *Mondev* and *Jan de Nul* that an investor whose investment was definitively expropriated would hold a claim to compensation but would technically no longer hold any existing ‘investment.’”).

²⁹⁷ *Id.*, 184.

²⁹⁸ *Id.*, (emphasis added).

²⁹⁹ Claimant’s Reply, ¶ 159.

concerned injuries caused by Chevron’s subsidiary, TexPet, in the performance of its contracts with Ecuador—a situation not found here.³⁰⁰

174. So, too, is Merck’s reliance on *GEA v. Ukraine* misplaced.³⁰¹ The *GEA v. Ukraine* tribunal actually took a close, forensic look at the contractual relationship of the parties when it assessed what constituted “investment activity.”³⁰² Merck also neglected to mention how the same tribunal found that a settlement agreement and associated repayment agreement were *not* investments under the Germany-Ukraine BIT or Article 25 of the ICSID Convention.³⁰³ The tribunal also held that an arbitral award was not an “investment.”³⁰⁴ The tribunal also highlighted that the settlement agreements and award involved “no contribution to, or relevant economic activity” within the host State.³⁰⁵

F. Conclusion

175. In sum, no “rights” with respect to Merck’s so-called “investments” were subject to “treatment” by Ecuador’s courts. The Ecuadorian proceedings were not “with respect to” either Merck’s branch or its assets. Nor was Merck’s actual *ability* to dispose of the Chillos Valley plant in issue because the domestic proceedings concerned Merck’s personal behavior vis-à-vis another entity, NIFA.

176. Therefore, Merck’s arbitration claim centers on domestic litigation that was not “with respect to”: (i) its branch, (ii) its assets, or (iii) its ability to dispose of the Chillos Valley plant.

³⁰⁰ The tribunal noted: “Without the former, the latter would not have come into existence.”, *Chevron Corporation and Texaco Petroleum Corporation (U.S.A.) v. Republic of Ecuador*, PCA Case No. 2009-23, Third Interim Award on Jurisdiction and Admissibility (27 Feb. 2012) (Veeder, Grigera-Naón, Lowe), ¶ 4.15 (RLM-14).

³⁰¹ Claimant’s Reply, ¶ 164.

³⁰² *GEA Group Aktiengesellschaft v. Ukraine*, ICSID Case No. ARB/08/16, Award (31 Mar. 2011) (van den Berg, Landau, Stern), ¶¶ 137-143 (following the *Salini* criteria) (CLM-126).

³⁰³ *Id.*, ¶ 157.

³⁰⁴ *Id.*, ¶ 161.

³⁰⁵ *Id.*, ¶ 162.

As a result, Merck's arbitration claim falls to satisfy the wording of Article VI(1)(c) and Article II(3) of the Ecuador-U.S. BIT, the dispute resolution clause and "fair and equitable treatment" standard, respectively.

177. Moreover, Merck has failed to prove that its branch and assets meet the definition of "investment" in Article I(1)(a)(ii) of the Ecuador-U.S. BIT. The definition of "company" under the Ecuador-U.S. BIT excludes unincorporated branches that perform pure sales activities, such as that of Merck. Merck's assets are also meaningless as regards whether "investment" activity exists. Finally, the *Mondev* "lifespan" theory is totally inapplicable to Merck's disposal of the Chillos Valley plant.

178. To conclude, because the underlying litigation does not relate to any alleged Treaty "right" and because Merck possesses no underlying "investment" as defined by the Ecuador-U.S. BIT, this Tribunal is deprived of jurisdiction to entertain Merck's investment treaty claims.

IV. 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

179. Claimant does not dispute that without exhaustion of reasonably available and effective domestic remedies there can be no liability for a denial of justice under the Treaty and customary international law. Its argument is that it has satisfied this element, even though it chose to forego an extraordinary protection action (“EPA”) before Ecuador’s Constitutional Court. This is not because the EPA was not “reasonably available” to Claimant, but because, in its view, the EPA could not provide an effective remedy. Had Claimant exercised its rights under Ecuadorian law, the veracity of the aforementioned statement could have been tested. It did not and as a consequence, Ecuador and the Tribunal must now engage in a counter-factual exercise.

180. The following sections establish that the EPA is indeed an effective remedy that Claimant could and should have resorted to before bringing its claims before the Tribunal. Its failure to do so deprives Claimant’s claims of any merit, regardless of the treaty provision it invokes in order to raise its denial of justice allegations. Moreover, Claimant’s initiation of investor-State proceedings in order to create a “stand-by” tribunal *in case* a denial of justice should occur *in the future* runs afoul of the mandates of jurisdiction and admissibility, and also constitutes an abuse of process.

A. The Extraordinary Protection Action Is An Effective Remedy That Claimant Could And Should Have Resorted To Before Asserting Its Denial Of Justice Claims Under The BIT

181. In its Counter-Memorial, Ecuador showed that the EPA was a reasonably available and effective remedy that Claimant could and should have pursued before asserting its denial of under the BIT.³⁰⁶

³⁰⁶ Ecuador’s Counter-Memorial, ¶¶ 206-227. As explained by Prof. Guerrero del Pozo, Claimant’s arguments concerning the alleged flaws of the September 2012 NCJ decision raise violations of constitutional rights, which

182. In its Reply, Claimant maintains that the EPA provides “no reasonable possibility” of effective redress because: (a) the remedy could not have suspended the enforcement of the September 2012 NCJ decision, and therefore a potential annulment of that judgment could not have forestalled the harm caused by it;³⁰⁷ (b) the Constitutional Court lacked the authority to order PROPHAR to reimburse to Claimant the amount paid in execution of the judgment;³⁰⁸ and (c) the Ecuadorian judiciary is afflicted by corruption and bias, which rendered recourse to further remedies futile, and the Constitutional Court is no exception as shown by its decision in PROPHAR’s EPA.³⁰⁹

183. Claimant is wrong on all accounts. Under international law, domestic remedies need not be exhausted only if they are “obviously futile.” The Constitutional Court has authority to order the full reparation of the constitutional violation, which may include monetary compensation for any harm incurred as a result of the constitutional violation. Even if the Constitutional Court merely annulled the challenged judgment, such annulment would have created an effective basis for recovery of the financial harm incurred as a result of the vacated judgment through an action for unjust enrichment. Therefore, the EPA cannot be considered an “obviously futile” remedy and nothing in the circumstances of this case detracts from this conclusion.

could have served “as sufficient basis for filing an extraordinary protective action against [the NCJ’S] decision.” First Expert Report on Ecuadorian Law of Juan Francisco Guerrero del Pozo (24 July 2012) (“First Guerrero Expert Report”), ¶ 17. Claimant has not contested this fact. According to Prof. Guerrero del Pozo, “the new allegations brought by MSDIA against the judgment issued by the National Court on 12 November 2014 would similarly suffice to file an extraordinary protection action.” Second Expert Report on Ecuadorian Law of Juan Francisco Guerrero del Pozo (18 Feb. 2015) (“Second Guerrero Expert Report”), p. 9 fn. 18.

³⁰⁷ *Id.*, ¶ 430(a).

³⁰⁸ *Id.*, ¶ 430(b).

³⁰⁹ *Id.*, ¶ 430(c).

1. Under International Law, Only *Obviously Futile* Remedies Need Not Be Exhausted

184. Claimant argues that the standard of “obvious futility” for determining the effectiveness of domestic remedies is “no longer good law.”³¹⁰ Rather, the proper test is whether the remedy offers “a reasonable possibility of effective redress,”³¹¹ as provided for in Article 15(a) of the International Law Commission’s (“ILC”) Draft Articles on Diplomatic Protection.³¹²

185. These arguments are premised on two assumptions: (a) that the “obvious futility” test does not adequately reflect the need that domestic remedies apply with regard to the factual circumstances of the case, which Ecuador does not dispute, and therefore the normative threshold for determining the futility of recourse to a remedy must be lower; and (b) that the formulation proposed by Prof. Dugard, the ILC’s Special Rapporteur on the question of diplomatic protection, and eventually adopted by the ILC, was a codification of existing international law, rather than an exercise in its progressive development. Both these assumptions, however, are misguided.

186. *First*, the “obvious futility” test is not inherently incompatible with the contextual application of the rule of exhaustion of local remedies. Mummery, one of the authorities Claimant seeks to rely on, aptly points out that:

the ineffectiveness or “futility” of the local remedies must be “obvious” or “clearly shown,” irrespective of how patient the international tribunal is in investigating this. Though this formula imports a high standard, it does not mean that exceptions are impossible or that the test is merely a rule of thumb, to be applied in rigid, automatic fashion.³¹³

³¹⁰ *Id.*, p. 98 fn. 484.

³¹¹ Second Expert Opinion of Prof. Jan Paulsson (8 Aug. 2014) (“Second Paulsson Expert Opinion”), ¶¶ 12-13.

³¹² International Law Commission (ILC), *Draft Articles on Diplomatic Protection* (2006), Art. 15(a) (CLM-110).

³¹³ D. Mummery, *The Content of the Duty to Exhaust Local Remedies*, 58 AM. J. INT’L L. 389 (1964), p. 400 (CLM-347).

187. None of the other authorities cited by Claimant goes as far as to suggest that the standard of obvious futility is inappropriate to determine the effectiveness of domestic remedies because the rule applies with regard to the factual circumstances of each case.³¹⁴

188. *Second*, none of the authorities cited by Claimant suggests that the “reasonable possibility of effective redress” formulation was proposed, and adopted by the ILC, as a codification of existing customary international law.³¹⁵

³¹⁴ See, e.g., *Separate Opinion of Judge Sir Hersch Lauterpacht in Certain Norwegian Loans (France v. Norway)*, Judgment (6 July 1957), 1957 I.C.J. Reports, p. 9, p. 39 (CLM-278) (expressing the view that the rule of exhaustion of local remedies “is not a purely technical or rigid rule,” but holding nonetheless that “however contingent or theoretical [domestic] remedies may be, an attempt ought to have been made to exhaust them.”); A. V. Freeman, *THE INTERNATIONAL RESPONSIBILITY OF STATES FOR DENIAL OF JUSTICE* (1938) (“Freeman”), pp. 418, 423-424 (CLM-320) (arguing that the rule of exhaustion of local remedies is endowed with “a flexibility designed to serve practical needs,” but maintaining nonetheless that the doctrine that ineffective remedies need not be exhausted finds an “admirable portrayal” in the *Finnish Ships* case, which of course upheld the standard of “obvious futility”). Claimant suggests that Prof. Amerasinghe’s works have “criticized the reasoning behind the ‘obvious futility’ standard.” Claimant’s Reply, p. 98 fn. 484. Prof. Amerasinghe, however, explains that his criticism was made *de lege ferenda*, and indeed nothing in his works can be reasonably seen as suggesting that international law accepts a “less strict than the ‘obvious futility’ test.” Second Expert Report of Prof. C.F. Amerasinghe (10 Feb. 2015) (“Second Amerasinghe Expert Report”), ¶ 11. See also C. Amerasinghe, *DIPLOMATIC PROTECTION* (2008), p. 152 (RLA-169) (“[i]n the law of diplomatic protection the principle that local remedies need not be exhausted where they are ‘obviously futile’ seems to be established.”).

³¹⁵ International Law Commission (ILC), Prof. J. Dugard, Special Rapporteur, *Third Report on Diplomatic Protection*, UN Doc. A/CN.4/523 (2002), ¶ 34 (CLM-334) (“It seems *wiser* [...] to seek a formulation that invokes the concept of reasonableness but which does not too easily excuse the claimant from compliance with the local remedies rule. A *possible* solution is to be found in option 3, that there is an exemption from the local remedies rule where ‘there is no reasonable possibility of an effective remedy before courts of the respondent State’.”) (emphasis added); International Law Commission (ILC), *Draft Articles on Diplomatic Protection with commentaries*, YILC, 2006, vol. II, Part Two, commentary on Article 15, pp. 77-78 (¶ 3) (CLM-335); J. Paulsson, *DENIAL OF JUSTICE IN INTERNATIONAL LAW* (2005), pp. 115-118 (RLA-68(bis)) (expressing the author’s agreement with formulation proposed by Prof. Dugard (*id.*, p. 118), but not the view that the formulation has settled the issue in customary international law). As Prof. Amerasinghe states, the examples cited by the ILC to support the formulation “would in any case satisfy the test of ‘obvious futility.’” Second Amerasinghe Expert Report, ¶ 23. For Prof. Amerasinghe, “[t]he ILC’s option for a ‘lower’ threshold appears [...] more an exercise of progressive development of the law than a codification of existing law, and this is evident in the recent rejection of the standard by the U.S. and the tribunal in *Apotex*.” *Id.* Prof. Amerasinghe also points out that the Prof. Dugard’s formulation originates from Judge Lauterpacht’s famous pronouncement in his *Separate Opinion* in the *Norwegian Loans* case, where Judge Lauterpacht remarked in respect of the facts of that case that “[t]he legal position on the subject cannot be regarded as *so abundantly clear* as to rule out as a matter of *reasonable possibility* an effective remedy before Norwegian courts.” *Separate Opinion of Judge Sir Hersch Lauterpacht in Certain Norwegian Loans (France v. Norway)*, Judgment (6 July 1957), 1957 I.C.J. Reports, p. 9, p. 39 (CLM-278) (emphasis added). In the opinion of Prof. Amerasinghe, *this statement does not reflect a different standard than “obvious futility”*:

A close reading of this statement, particularly taking into account the requirement of abundant clarity of legal position, and the absence of an explicit rejection of, or even reference to, the prevailing “obvious futility” test [...] leads to the conclusion that [Judge Lauterpacht] was merely defining the “obvious

189. In the most recent judicial pronouncement on the issue, the tribunal in *Apotex v. United States* agreed with the parties, which included Claimant’s home State, that only if recourse to such remedies is “obviously futile” would a claimant be excused from exhausting domestic remedies.³¹⁶ The tribunal acknowledged the adoption by the ILC of the “no reasonable possibility of an effective redress” formulation.³¹⁷ However, “this [language] was still described [by the ILC] as imposing a heavy burden on claimants.”³¹⁸ More importantly, the tribunal found that the ILC formulation in any event was “in the context of the general principle as to exhaustion of local remedies in customary international law, *as opposed to the more specific rule regarding judicial acts and ‘finality’* [...]”³¹⁹

190. The tribunal elaborated that the specific nature of the judicial finality rule³²⁰ entails that the exception of futility of further recourse to domestic remedies must meet a high threshold: indeed, “[b]ecause each judicial system must be allowed to correct itself, the ‘obvious finality’ exception must be construed narrowly.”³²¹ The tribunal then explained that a showing of “obvious futility” would require:

futility” test. It is too much to assume that he was replacing the accepted test with another test without even a reference to or dismissal of the former. Moreover, the formulation he put forward is clearly no more than a definition of the “obvious futility” test, because that test does not require *certainty* of failure, only the absence of even a *possibility of success*. The addition of the epithet ‘reasonable’ to describe the possibility does not do much to dilute the meaning given to obvious futility. Indeed, if there is no *reasonable possibility* of redress, exhausting remedies would be obviously futile.

Second Amerasinghe Expert Report, ¶ 24 (emphasis in original).

³¹⁶ *Apotex, Inc. v. The Government of the United States of America*, UNCITRAL (NAFTA), Award on Jurisdiction and Admissibility (14 June 2013) (Landau, Davidson, Smith) (“*Apotex* (2013)”), ¶ 257 (RLA-122).

³¹⁷ *Id.*, p. 93 fn. 149.

³¹⁸ *Id.*

³¹⁹ *Id.* (emphasis added).

³²⁰ *Id.*, ¶ 282 (denial of justice claims “depend upon the demonstration of a *systemic* failure in the judicial system.”) (emphasis added).

³²¹ *Id.*, ¶ 284.

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.³²²

191. Claimant argues that the tribunal applied the “obvious futility” standard “after *both* parties requested the application of that standard.”³²³ Prof. Paulsson goes as far as suggesting that the *Apotex* case may not be invoked in support the standard because “the claimants there acquiesced, perhaps now to their regret, to the application of the ‘obvious futility’ standard.”³²⁴ However, NAFTA tribunals are mandated under Article 1131 NAFTA to resolve disputes “in accordance with this Agreement and applicable rules of international law,” not standards commonly agreed by the parties.³²⁵ As a matter of fact, the *Apotex* tribunal specifically referred to Article 1131, empowering it to consider customary international law on the issue of State responsibility arising from acts of domestic courts.³²⁶ From such law, the tribunal derived that “the ‘obvious futility’ threshold is a high one.”³²⁷

192. Moreover, as surely Prof. Paulsson must know, the concordance of the parties’ views does not dispense an international court or tribunal from having *itself* to ascertain the content and applicability of rules of customary international law cable. As the International Court of Justice (“ICJ”) famously stated in the *Nicaragua v. U.S.* case, “[t]he mere fact that States declare their

³²² *Id.* (emphasis in original; internal citations omitted). *See also id.*, ¶ 276 (“the question whether the failure to obtain judicial finality may be excused for ‘obvious futility’ on grounds of that test “turns on the unavailability of relief by a higher judicial authority, *not on measuring the likelihood that the higher judicial authority would have granted the desired relief.*”) (emphasis added).

³²³ Claimant’s Reply, p. 98 fn. 484 (emphasis in original).

³²⁴ Second Paulsson Expert Opinion, p. 7 fn. 12.

³²⁵ North American Free Trade Agreement (NAFTA), *Chapter 11: Investment* (1 Jan. 1994), Art. 1131 (RLA-151).

³²⁶ *Apotex* (2013), ¶¶ 280-281 (RLA-122).

³²⁷ *Id.*, ¶ 279.

recognition of certain rules *is not sufficient* for the Court to consider these as being part of customary international law, and as applicable as such to those States.”³²⁸

193. In any event, as will be shown below, the EPA clearly provides a “reasonable possibility of effective redress.”

2. The EPA Was Capable Of Satisfying The Object Sought By Claimant

194. Claimant submits that for a remedy to be effective, “it must be ‘capable of redressing the complaint of the litigant.’”³²⁹ According to Claimant, the EPA is not an effective remedy in this sense because: (a) the Constitutional Court lacks authority to stay the enforcement of the decision challenged through an EPA;³³⁰ (b) the Constitutional Court lacks authority to order the repayment of the amount of the challenged decision or the reimbursement of “wasted costs” over the course of the underlying litigation;³³¹ and (c) the annulment of the challenged judgment as a result of a successful EPA does not create an effective legal basis for reimbursement of the amount paid in execution of the challenged judgment.³³² Again, Claimant is wrong on all three counts.

³²⁸ *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America)*, Merits, Judgment (27 June 1986), I.C.J. Reports 1986, p. 14, p. 97 (¶ 184) (RLA-144) (emphasis added). *See also id.*, pp. 97-98 (“[b]ound as it is by Article 38 of its Statute to apply, *inter alia*, international custom ‘as evidence of a general practice accepted as law’, the Court may not disregard the essential role played by general practice. Where two States agree to incorporate a particular rule in a treaty, their agreement suffices to make that rule a legal one, binding upon them; *but in the field of customary international law, the shared view of the Parties as to the content of what they regard as the rule is not enough.* The Court must satisfy itself that the existence of the rule in the *opinio juris* of States is confirmed by practice.”) (emphasis added).

³²⁹ Claimant’s Reply, ¶ 431 (emphasis omitted); Second Paulsson Expert Opinion, ¶ 14.

³³⁰ Claimant’s Reply, ¶¶ 433-435.

³³¹ *Id.*, ¶¶ 437-440.

³³² *Id.*, ¶¶ 441-456.

a. The EPA’s Inability Under The Law To Stay Enforcement Of The Challenged Judgment Does Not Affect Its Effectiveness As A Remedy

195. Claimant cannot possibly maintain that judicial finality is satisfied whenever a judgment becomes enforceable (and if it does, then it is flatly contradicted by its own expert,³³³ and the law).³³⁴ Nor could it possibly establish that the circumstances of this case justify a conclusion that the financial harm it could have incurred in the interim was such that it could put into question the reasonable availability of the constitutional remedy.³³⁵

196. Rather, Claimant’s argument appears premised on the assumption that the Constitutional Court could do no more than annul the challenged judgment *ex post facto*, *i.e.*, after its enforcement.³³⁶ If this assumption is shown to be wrong, which it is, as will be established below, Claimant’s argument falls with it. Indeed, under Prof. Paulsson’s own reasoning, if the constitutional remedy can be shown to allow for the recovery of the payment made in execution of the vacated judgment, it would be entirely unreasonable for a claimant not to have recourse to it even if it had to incur financial harm as a result of such payment in the interim.³³⁷

197. Moreover, as explained by Prof. Guerrero del Pozo:

The scenario in which a judicial decision is enforced while the resolution of an independent appeal is pending is not a peculiarity of the extraordinary protection action. In the Ecuadorian legal

³³³ Second Paulsson Expert Opinion, ¶ 18.

³³⁴ See Ecuador’s Counter-Memorial, ¶¶ 228-230.

³³⁵ Claimant casts doubt on the reasonable availability of the constitutional remedy only “in the event that the NCJ affirms the court of appeals’ \$150 million judgment against MSDIA.” Claimant’s Reply, p. 101 fn. 496. Although Ecuador has shown that even an order of such magnitude would not have affected the reasonable availability of the constitutional remedy, this event never materialized. See Ecuador’s Counter-Memorial, ¶¶ 215-218, 231-232 and NCJ Decision, *PROPHAR v. MSDIA*, National Court of Justice (10 Nov. 2014) (“November 2014 NCJ Decision”) (R-194). In these circumstances, “[there] was no impediment to addressing the Constitutional Court, especially considering the insignificance of the amounts involved vis-à-vis the importance of the Claimant’s assets [...]” Second Expert Report of Prof. Lucius Caflisch (16 Feb. 2015) (“Second Caflisch Expert Report”), ¶ 10.

³³⁶ Claimant’s Reply, ¶¶ 432-433.

³³⁷ See Second Paulsson Expert Opinion, ¶ 18.

system, there are a number of cases where this is possible. That does not make possible to question the effectiveness of these independent appeals [...].³³⁸

198. Rather, the effectiveness of the EPA “requires an appreciation of the effectiveness of the full reparation measures that the Constitutional Court can order when deciding an action.”³³⁹ These may include an order of monetary compensation, as will be shown below.

199. It would be absurd to suggest that, under *any* system of law, a remedy is *eo ipso* ineffective because the challenged judgment may be enforced in the interim.³⁴⁰ The proper inquiry, precisely as Prof. Paulsson puts it, is whether the remedy in question is “reasonably available” and “effective to redress the specific injury at issue.”³⁴¹ The former element is not in dispute, and surely Prof. Paulsson would have reached diametrically opposed conclusions regarding the latter had he been accurately apprised of the remedies available in Ecuador’s Constitutional Court.³⁴²

b. The Constitutional Court Has Authority To Order The Repayment Of The Amount Of The Vacated Judgment And Legal Costs Incurred As A Result Of The Constitutional Violation

200. Claimant argues that an EPA would not have provided it with an effective remedy because the Constitutional Court “did not have the authority to award repayment of the \$1.57

³³⁸ Second Guerrero Expert Report, ¶ 44. Prof. Guerrero del Pozo gives several examples of challenge actions “which generally do not suspend the enforcement of the challenged decision,” stating that “there has never been any contestation of their effectiveness as remedies.” *Id.*, ¶¶ 45-46. Dr. Oyarte’s suggestion that the EPA’s effectiveness is lacking because Ecuadorian law does not vest it with suspensive effect “has no doctrinal or jurisprudential basis whatsoever.” *Id.*, ¶ 42.

³³⁹ *Id.*, ¶ 43.

³⁴⁰ As Prof. Guerrero del Pozo points out, there is always risk involved when seeking to enforce a right that faces the possibility of being invalidated in the future through a cassation remedy. *See id.*, p. 12 fn. 28.

³⁴¹ Second Paulsson Expert Opinion, ¶ 18.

³⁴² *See id.*, ¶ 5 (“[a]s with my prior report, I express no view as to the accuracy of any factual contentions made by MSDIA and have not verified them or conducted my own factual investigation. Nor do I express any view on any question of Ecuadorian law. I simply assume the facts and propositions of Ecuadorian law as set out above to be true.”).

million that MSDIA was compelled to pay in satisfaction of the NCJ’s judgment,” and also “could not have ordered the reimbursement of MSDIA’s wasted costs over the course of the *NIFA v. MSDIA* litigation.”³⁴³ This is because the [EPA] is a “separate action and not an appeal,” and therefore the Constitutional Court “cannot issue a replacement judgment ordering a devolution of amounts previously paid.”³⁴⁴

201. Whether the Constitutional Court can order a “replacement judgment” is of course irrelevant to the question at hand. The real issue is: could Claimant have obtained appropriate reparation through an EPA? Express provisions of Ecuadorian law establish that it could.

202. Article 86 of the 2008 Ecuadorian Constitution provides that a declaration by the Constitutional Court of violation of constitutional rights empowers the Court to order “integral tangible and intangible *reparation*” of the violation.³⁴⁵ This provision is made applicable to EPA proceedings though Article 63 of the Organic Law on Jurisdictional Guarantees and Constitutional Control (“Organic Law”).³⁴⁶ Article 18 of the same law specifies that the concept of “full reparation” aims to ensure “that the person or persons who are the holders of the breached right enjoy the right in the most adequate manner possible, and that their situation prior to the breach is restored.”³⁴⁷ The same provision lists, in a non-exhaustive manner, measures that may be ordered to achieve “full reparation.” These expressly include *financial* compensation for “the loss or detriment to the income of the affected persons, expenses made with respect to the events and financial consequences that may have a causal link with the events of the case.”³⁴⁸

³⁴³ Claimant’s Reply, ¶ 436; Claimant’s Supplemental Reply, ¶ 31; Second Paulsson Expert Opinion, ¶ 15.

³⁴⁴ Second Expert Opinion of Rafael Oyarte Martínez (7 Aug. 2014) (“Second Oyarte Expert Opinion”), ¶¶ 18-21.

³⁴⁵ Constitution of the Republic of Ecuador (20 Oct. 2008), Art. 86 (RLM-15(bis)).

³⁴⁶ Organic Law of Jurisdictional and Constitutional Guarantees (22 Oct. 2009), Art. 63 (RLA-174).

³⁴⁷ *Id.*, Art. 18.

³⁴⁸ *Id.*

203. The Constitutional Court itself has unequivocally recognized that it can award compensation for damages as part of the full reparation it is empowered to order in the event it finds a violation of a constitutional right.³⁴⁹ It follows that nothing in Ecuadorian law would or could have prevented Claimant from seeking through an EPA monetary compensation for any harm it allegedly incurred as a result of the alleged denial of justice. Such compensation could have encompassed the legal costs incurred as a result of the constitutional violation.³⁵⁰

204. Tellingly, and surprisingly, none of the aforementioned provisions is cited in either of the two expert reports of Dr. Oyarte, Claimant's expert on the issue. Without an analysis of these fundamentals of constitutional reparations, Dr. Oyarte's expert reports obviously carry no weight of authority.

205. Ecuadorian law complements the Constitutional Court's power to award monetary compensation with an administrative proceeding for its quantification.³⁵¹ Article 19 of the Organic Law provides in pertinent part that in the event that the full reparation ordered by the Court "entails monetary payment to the affected party or the holder of the breached right, the determination on the amount due will be made [...] through contentious administrative proceedings, if claimed against the State."³⁵² In the case of the EPA, given that it may be filed

³⁴⁹ Constitutional Court judgment No. 004-13-SAN-CC issued in case No. 0015-10-AN (13 June 2013) (FG-46).

³⁵⁰ Second Guerrero Expert Report, ¶ 30. Hence, Claimant's unsupported allegation that the Constitutional Court lacked authority to award legal costs is not true. Claimant's Reply, ¶ 455. The Constitutional Court could award such costs, provided that they have "a causal link with the events of the case." Organic Law of Jurisdictional and Constitutional Guarantees (22 Oct. 2009), Art. 18 (RLA-174). These are the only costs that Claimant can legitimately under international law seek as part of its damages for a denial of justice, as is shown below and in Chapter VI of the present memorial.

³⁵¹ Second Guerrero Expert Report, ¶ 29.

³⁵² Organic Law of Jurisdictional and Constitutional Guarantees (22 Oct. 2009), Art. 19 (RLA-174).

only against judgments rendered by courts, such administrative proceedings must be brought against the body representing the judiciary, *i.e.*, the President of the Judiciary Council.³⁵³

206. Importantly, the Constitutional Court has specified, with general binding effect,³⁵⁴ that the proceedings pursuant to Article 19 of the Organic Law “entail an execution process *that does not involve a discussion of the rights violation declaration.*”³⁵⁵ This means that the reconsideration of the underlying facts, “including the reconsideration of whether the victim has a right to compensation,” is not allowed.³⁵⁶ The *only* issue for consideration, and determination, is “the amount due to the victim of the constitutional violation.”³⁵⁷

207. Therefore, if the Constitutional Court had awarded Claimant monetary compensation, which as shown above is empowered under the Ecuadorian legal framework to do, Claimant could have initiated administrative proceedings to quantify such compensation. The only issue then would be the establishment of the “pecuniary damage suffered as a result of the violation [...] without there being any rule preventing the victim from requesting reimbursement of legal costs incurred in the context of the underlying litigation.”³⁵⁸ And yet Claimant chose to forego these remedial rights under Ecuadorian law.

208. Even if the Constitutional Court had only annulled the challenged NCJ decision, Claimant “could [have] file[d] a motion with the [trial court that] executed the judgment of the National Court of Justice requesting that PROPHAR be ordered to return the paid amount.”³⁵⁹ If

³⁵³ Second Guerrero Expert Report, ¶ 29.

³⁵⁴ *See id.*, p. 7 fn. 12.

³⁵⁵ Constitutional Court judgment No. 004-13-SAN-CC issued in case No. 0015-10-AN (13 June 2013) (FG-46) (emphasis added).

³⁵⁶ Second Guerrero Expert Report, ¶ 27.

³⁵⁷ *Id. See also id.*, ¶ 31 (referring to Constitutional Court precedent confirming these principles).

³⁵⁸ *Id.*, ¶ 30.

³⁵⁹ *Id.*, ¶ 15.

PROPHAR refused to comply, the trial court “could [have] issue[d] the necessary orders to compel such reimbursement.”³⁶⁰

209. Claimant and Dr. Oyarte argue that this scenario “has no basis in Ecuadorian law,” because “a Constitutional Court decision would not have triggered enforcement proceedings at the trial court level.”³⁶¹ They also argue that in any event, the trial court could not have ordered the restitution of any payment made on the basis of the vacated judgment because PROPHAR would not have been a party to the EPA proceedings.³⁶² They finally point out to what transpired in the Ecuadorian courts after the annulment of the September 2012 NCJ decision: “the Constitutional Court’s decision was not sent to a trial court for enforcement. Nor did the Constitutional Court order NIFA to return MSDIA’s money or order any other court to commence enforcement proceedings to return the money paid by MSDIA.”³⁶³

210. Claimant and Dr. Oyarte are wrong. Prof. Guerrero del Pozo explains that although judgments rendered by the courts of ordinary jurisdiction are enforceable only by trial courts, the judgments rendered by the Constitutional Court can be enforced by appellate courts, or even the NCJ itself, “depending on the nature of the measure to achieve [the] full reparation ordered by the Constitutional Court.”³⁶⁴ Where the vacated judgment has previously been executed, Prof. Guerrero del Pozo opines, it is the trial court that enforced it that “could and should [have]

³⁶⁰ *Id.*

³⁶¹ Claimant’s Reply, ¶ 443 (emphasis omitted); Second Oyarte Expert Opinion, ¶ 18.

³⁶² Claimant’s Reply, ¶ 444; Second Oyarte Expert Opinion, ¶ 21.

³⁶³ Claimant’s Reply, ¶ 445; Second Oyarte Expert Opinion, ¶ 23.

³⁶⁴ Second Guerrero Expert Report, p. 5 fn. 8. Under Article 164(4) of the Organic Law, the Constitutional Court could itself execute “directly all necessary steps to enforce its decisions.” Specifically with respect to judgments rendered in EPAs, Article 165 provides that the Constitutional Court “shall exercise all the powers granted to any judge by the Constitution, this Law and the Organic Code of the Judiciary for the execution of their decisions, with the objective of enforcing the breached judgment and achieve full reparation of damages inflicted upon the claimant.” Organic Law of Jurisdictional and Constitutional Guarantees (22 Oct. 2009), Arts. 164(4) and 165 (RLA-174).

order[ed] the necessary measures for the payment to be refunded;”³⁶⁵ provided, of course, that it was requested by Claimant to do so.

211. Prof. Guerrero del Pozo supports the above with reference to Ecuadorian legal jurisprudence that is directly on point. In a 20 March 2012 judgment, the Constitutional Court upheld an EPA, ordering the annulment of decisions rendered by the courts below, including by the NCJ.³⁶⁶ Even though the Constitutional Court did not order the refund of the payments made based on the vacated decisions, and even though the EPA was not formally addressed to its counterparty, the EPA plaintiff requested the trial court to order its counterparty in the underlying litigation to refund the payments made to it. And the trial court did just that, granting the request.³⁶⁷

212. It follows that if Claimant had brought an EPA, “it would have had the power to request all necessary measures to obtain full reparation for the allegedly violated rights, including an order from the Constitutional Court for comprehensive financial compensation.”³⁶⁸ If the Constitutional Court had granted its request, Claimant could have initiated administrative proceedings to quantify such compensation. Even if the Constitutional Court had not ordered monetary compensation as part of the “full reparation” of the constitutional violation, its decision could have triggered enforcement proceedings at the trial court level, regardless of the fact that the EPA is not formally addressed to the counterparty, provided that the Claimant had so requested.

³⁶⁵ Second Guerrero Expert Report, p. 5 fn. 8.

³⁶⁶ *See id.*, ¶ 17 (*citing* Sentence No. 042-12-SEP-CC issued in Case No. 0085-09-EP (20 Mar. 2012) (FG-44)).

³⁶⁷ *See id.*, ¶ 16 (*citing* Sentence issued in Case No. 631-2006 (13 Mar. 2014) (FG-45)).

³⁶⁸ *Id.*, ¶ 32 (internal citations omitted).

213. In the case at hand, Claimant did not pursue an EPA to begin with. In light of the applicable provisions of Ecuadorian law and established jurisprudence, its omission is fatal to its claims before this Tribunal.

c. The Annulment Of The NCJ Judgment Would Have Created An Effective Legal Basis For The Reimbursement Of The Amount Of The Vacated Judgment

214. The previous section established that under the Ecuadorian legal and constitutional framework and jurisprudence, Claimant could have sought, and been awarded, monetary compensation from the Constitutional Court that could have remedied any “loss or detriment to the income of the affected persons, expenses made with respect to the events and financial consequences that may have a causal link with the events of the case.”³⁶⁹ Claimant therefore has failed to achieve judicial finality before asserting its denial of justice claims on the international level; indeed, under international law, it is inconceivable, absent extreme circumstances affecting the reasonable availability of the remedy, which do not exist here, that a remedy that could bring to a claimant such practical results should not be exhausted.

215. Even if the Constitutional Court had only annulled the NCJ decision, and even if Claimant had not sought the repayment of the amount it paid in execution of the annulled judgment by enforcing the Constitutional Court judgment as shown above, the annulment of the NCJ decision would have created an effective legal basis for reimbursement on grounds of the doctrine of unjust enrichment (or “payment without cause”).³⁷⁰

216. In its Reply, Claimant concedes that unjust enrichment is a recognized legal doctrine in Ecuadorian law and that it was not prevented in any way from initiating an action on such grounds. Regardless, Claimant maintains that international law does not require it to “initiat[e] a

³⁶⁹ Organic Law of Jurisdictional and Constitutional Guarantees (22 Oct. 2009), Art. 18 (RLA-174).

³⁷⁰ Ecuador’s Counter-Memorial, ¶¶ 225-226.

new, and entirely separate, civil action against [PROPHAR].”³⁷¹ Claimant is wrong. It is incontrovertible in international law that a claimant must exhaust “*all* the available judicial remedies provided for in the municipal law of the respondent State.”³⁷² The key question is of a different nature: in the circumstances of the present case, taking into account Ecuadorian law, is the remedy in question “obviously futile” or, according to Claimant’s standard, incapable of offering “a reasonable possibility of effective redress”? As will be shown below, a civil action on grounds of unjust enrichment could offer such means of redress to Claimant. Therefore, it should have been resorted to.

217. Claimant’s argument to the contrary is premised on three grounds, which are addressed in turn. *First*, Claimant argues that an action on grounds of unjust enrichment against PROPHAR “would have been subject to [PROPHAR’s] legal defenses and its outcome would have thus been uncertain [...]”³⁷³ In Dr. Oyarte’s view in particular, PROPHAR could have argued that it had “received the payment under a valid court order and that no court had ordered it to return the money.”³⁷⁴ Relatedly, and in light of what it sees as a court record that is irrevocably tainted by bias and corruption, Claimant argues that resorting to such action “would [amount only to further] waste of time and resources, and [will allow] new opportunities for denial of justice.”³⁷⁵

³⁷¹ Claimant’s Reply, ¶ 450. Relatedly, citing the works of Alwyn Freeman and Prof. Amerasinghe, Claimant argues that the requirement to exhaust local remedies “should not be interpreted to require a claimant to pursue lengthy and inefficient local remedies that, in effect, deprive the claimant of access to an international forum.” Claimant’s Reply, p. 105 fn. 511. Although this position is generally correct, it is not applicable here. As Prof. Amerasinghe states, this qualification does not apply “[w]here the chances of efficient justice are high;” in such case, “it is more reasonable to expect the alien to spend time and money on going through the municipal system [...]” *C.f.* Amerasinghe, *The Local Remedies Rule In Appropriate Perspective* (1976), p. 749 (CLM-293); Second Amerasinghe Expert Report, ¶ 12.

³⁷² International Law Commission (ILC), *Draft Articles on Diplomatic Protection with commentaries*, YILC, 2006, vol. II, Part Two, commentary on Article 14, p. 72 (¶ 4) (CLM-335) (emphasis added).

³⁷³ Claimant’s Reply, ¶ 451; Second Oyarte Expert Opinion, ¶ 23.

³⁷⁴ Second Oyarte Expert Opinion, ¶ 23.

³⁷⁵ Claimant’s Supplemental Reply, ¶ 32.

218. These arguments do not excuse Claimant’s failure to have recourse to an action for unjust enrichment. As Prof. Guerrero del Pozo explains, Dr. Oyarte’s opinion on PROPHAR’s likely defenses does not withstand scrutiny. The annulment of the September 2012 NCJ decision brought about the invalidation of the court order ordering Claimant to pay the amount of the judgment to PROPHAR.³⁷⁶ It follows that such payment has no longer been made under a valid court order.³⁷⁷ If PROPHAR had raised such defense, it would have been summarily rejected. Subject to Claimant’s diligent prosecution of its claim,³⁷⁸ an action for unjust enrichment would have had high chances of proving successful.

219. Moreover, under international law, uncertainty over outcome, lengthiness of proceedings, and the incurrence of associated costs are not a valid excuse for failing to exhaust local remedies.

As pointed out by the ILC,

In order to meet the requirement[] [that there are no reasonably available local remedies to provide effective redress, or the local remedies provide no reasonable possibility of such redress] *it is not sufficient for the injured person to show that the possibility of success is low or that further appeals are difficult or costly. The test is not whether a successful outcome is likely or possible but whether the municipal system of the respondent State is reasonably capable of providing effective relief.*³⁷⁹

³⁷⁶ Second Guerrero Expert Report, ¶¶ 86-89.

³⁷⁷ *Id.*, ¶ 56.

³⁷⁸ *Id.*, ¶¶ 51-52.

³⁷⁹ International Law Commission (ILC), *Draft Articles on Diplomatic Protection with commentaries*, YILC, 2006, vol. II, Part Two, commentary on Article 15, p. 79 (¶ 4) (CLM-335) (emphasis added). *See also* *Apotex* (2013), ¶ 288 (RLA-122) (“[i]n 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 its proper task, or indeed the correct inquiry.”) (emphasis added); Freeman, p. 421 (CLM-320) (“the mere expectation that an injustice will be done by the courts is not enough to excuse a party’s failure to test out remedies which are presumably efficient.”); Second Guerrero Expert Report, ¶ 50 (“arguments such as ‘waste of time’, ‘waste of resources’ and the speculation that it would be a new ‘opportunity for denial of justice’, do not constitute legal bases whatsoever to assert the ineffectiveness of the mentioned action.”). Prof. Paulsson’s (unsupported) view that the “burden and cost of this [...] proceeding” undermine its efficacy is therefore plainly wrong. Second Paulsson Expert Opinion, ¶ 15.

220. Finally, bias and corruption in the underlying Ecuadorian litigation is only in the imagination of Claimant. The sections that follow show that: (a) there is no evidence of bias and corruption anywhere in the court record; (b) the decisions of the higher Ecuadorian courts were fully rational and explained, and curative of any procedural or substantive error in the courts below; and (c) Claimant’s allegations of “systemic” corruption are grossly exaggerated and obviously fabricated to cover for its failure to exhaust domestic remedies before seeking to hold Ecuador liable under the BIT and customary international law.³⁸⁰ In the circumstances of the present case, and given the legal implications of the invalidation of the court order mandating the payment of the September 2012 NCJ decision, an action for unjust enrichment would have been highly likely to render a favorable disposition for Claimant.

221. *Second*, Claimant argues that an action for unjust enrichment “would have been ineffective in light of the fact that [PROPHAR] could not have been ordered to hold in escrow the amount of the NCJ’s judgment pending the resolution of MSDIA claim for the recovery of those amounts.”³⁸¹ This also is wrong. Under Ecuadorian law, if the debtor purposely diminishes his assets in order to avoid honoring a judicial order, while a court judgment is pending, and if the creditor has evidence of both the existence of the debt and the risk of non-satisfaction of the judgment, the creditor may file a request for a provisional measure (preemptive embargo) to prevent the fraudulent divestment of assets.³⁸² Moreover, Claimant has made no showing that PROPHAR is not in possession of assets that could have satisfied its claim for recovery of the amount of the September 2012 NCJ decision.

³⁸⁰ See *infra* Section V(G).

³⁸¹ Claimant’s Reply, ¶ 452; Second Paulsson Expert Opinion, ¶ 15.

³⁸² See Ecuadorian Code of Civil Procedure (24 Nov. 2011), Arts. 897-904 (RLA-107(bis)). The provisional measure may cover both movable and immovable property.

222. *Finally*, Claimant and Prof. Paulsson argue that an action for unjust enrichment would not have been an effective remedy because it would have allowed the recovery of only the amount of the NCJ decision, and not of the “considerable legal costs that [Claimant] incurred over the course of the *NIFA v. MSDIA* litigation.”³⁸³ As shown above, Claimant could have been reimbursed of legal costs that may have “a causal link with the events of the case [i.e., the constitutional violation]”³⁸⁴ through a successful EPA. There is no reason why Claimant could not have sought these costs in an action for unjust enrichment; neither it nor its expert on the issue (who in fact does not even raise this argument) point to any authority or provision in Ecuadorian law preventing them from doing so.

223. Moreover, a remedy does not need to fully redress the harm incurred by the foreign litigant in order to be deemed exhaustible. Rather, the remedy must be able to provide “adequate” redress.³⁸⁵ In the *Finnish Ships Arbitration*, Finland argued that the remedy of the shipowners with the Admiralty Board was ineffective because the applicable principles of English law, by which the Board was bound to assess compensation, did not allow for consideration of the fair market hire rates.³⁸⁶ The Arbitrator rejected the Finnish argument, finding that the “compensation which could be given under the Indemnity Act *does not fall short of what has been meant by the term adequate being used in connection with the term effective remedy.*”³⁸⁷

³⁸³ Claimant’s Reply, ¶ 455; Second Paulsson Expert Opinion, ¶¶ 15-16.

³⁸⁴ Organic Law of Jurisdictional and Constitutional Guarantees (22 Oct. 2009), Art. 18 (RLA-174).

³⁸⁵ International Law Commission (ILC), *Draft Articles on Diplomatic Protection with commentaries*, YILC, 2006, vol. II, Part Two, commentary on Article 15, pp. 78-79 (¶ 3) (CLM-335) (“judicial decisions [...] have held that local remedies need not be exhausted where [...] the local courts do not have the competence to grant as *appropriate* and *adequate* remedy to the alien [...]”) (emphasis added).

³⁸⁶ *Finnish Ships Case (Finland v. Great Britain)*, Award (9 May 1934), 3 U.N.R.I.A.A. 1479, p. 1496 (CLM-52).

³⁸⁷ *Id.*, p. 1497 (emphasis added).

224. In the present case, an action for unjust enrichment would have allowed Claimant to recover the payment of the amount of the vacated judgment, as well as any legal costs incurred in connection therewith. The fact that it may not have allowed Claimant to recover the *entirety* of its legal costs in the underlying litigation, which are not recoverable in any event,³⁸⁸ as will be shown below, does not render the remedy any less adequate or effective.

225. In sum, it cannot be seriously disputed that a potential annulment of the NCJ decision through a successful EPA would have created an effective legal basis for reimbursement of any payment made on the basis of the vacated judgment.³⁸⁹

d. In The Circumstances Of The Case, Ecuador’s Constitutional Court Would Have Been A Reasonably Available And Effective Remedy

226. Claimant also argues that an EPA would not have provided it with an effective remedy because “[t]here was every indication that the civil courts had been corrupted by MSDIA’s adversary in the *NIFA v. MSDIA* litigation, and MSDIA had no reason to believe that it could obtain a fair and impartial decision from the Constitutional Court.”³⁹⁰

227. This is a reckless charge without support. Claimant has pointed to *no direct evidence of corruption of Ecuador’s civil courts in the underlying litigation*. Rather, as will be discussed

³⁸⁸ Under international law, the measure of reparation for a denial of justice may extend to legal costs only insofar as they “necessarily and inevitably” flow from the denial of justice. Freeman, p. 592 (CLM-164). This of course is consistent with general principles of reparations law as codified in the judgment of the Permanent Court of International Justice (“PCIJ”) in the *Factory at Chorzów* case. *Case Concerning the Factory at Chorzów (Germany v. Poland)*, Judgment (13 Sept. 1928), P.C.I.J. Series A, No. 17, p. 47 (RLA-135) (a court or tribunal should “reestablish the situation which would, in all probability, have existed if [the internationally wrongful acts] had not been committed.”). This means that Claimant does not have an entitlement under international law to its *entire* legal costs incurred in the underlying litigation; it may only recover legal costs incurred *but for* the alleged denial of justice.

³⁸⁹ Second Guerrero Expert Report, ¶ 59 (“the action of ‘payment without cause’ is an adequate and effective mechanism that MSDIA could and should have utilized to recover a payment pursuant to a court decision that was later rescinded.”).

³⁹⁰ Claimant’s Reply, ¶ 457; Claimant’s Supplemental Reply, ¶¶ 97-98.

further below,³⁹¹ its entire case of “corruption” is fabricated on the basis of generalized country reports, which are: (a) notoriously unreliable, given that their rankings reflect perceptions of judicial performance, rather than actual behavior; (b) contradicted by other sources such as the U.S. Department of State Country Reports on Human Rights, which consistently describe Ecuadorian civil courts as independent and impartial; and (c) completely unrelated to the proceedings in the underlying litigation. The newspaper snippets that Claimant also cites are similarly completely unrelated to the proceedings in question and cannot mask Claimant’s failure to produce any specific evidence of corruption in the *NIFA v. MSDIA* litigation.

228. Moreover, arguing that Ecuador’s courts “are notoriously lacking in independence and are subject to improper influence or corruption” in the face of Claimant’s frequent use of the system³⁹² and litigation success³⁹³ is cynical, to say the least.

229. Claimant has also failed to point to any evidence that the Constitutional Court would not have been able to render a fair and impartial decision.³⁹⁴ As will be discussed further below, the

³⁹¹ See *infra* Section V(G).

³⁹² See List of claims by Merck and its Affiliates, available at <http://funcionjudicial.gob.ec/consultaprovincias> (last accessed 9 Jan. 2015) (R-197).

³⁹³ See Electronic Docket, Case No. 2003-9911, *PHARMABRAND v. Merck*, Second Contentious Chamber, Entry 1 (R-126).

³⁹⁴ Claimant criticizes Prof. Amerasinghe’s view that evidence must be particularized to the local remedy in question in order for it to be deemed non-exhaustible on grounds of corruption. Claimant’s Reply, p. 107 fn. 521 (citing First Expert Report of Prof. C. F. Amerasinghe (24 Feb. 2014), ¶ 32). To that effect, it relies on the *Robert E. Brown* arbitration, where the tribunal, according to Claimant, “relied on evidence of systematic corruption in concluding that the claimant did not need to exhaust further remedies.” Claimant’s Reply, p. 107 fn. 521. However, the *systematic* corruption in that case was actually the collusion of all branches of the government against Mr. Brown in the *specific case at hand*. The tribunal found that:

All three branches of the Government conspired to ruin [Mr. Brown’s] enterprise. The Executive Department issued proclamations for which no warrant could be found in the Constitution and laws of the country. The Volksraad enacted legislation which, on its face, does violence to fundamental principles of justice recognized in every enlightened community. The judiciary, at first recalcitrant, was at length reduced to submission and brought into line with a determined policy of the Executive to reach the desired result regardless of Constitutional guarantees and inhibitions. And in the end, growing out of this very transaction, a *system was created* under which all property rights became

Constitutional Court’s decision in PROPHAR’s EPA was rational and fully justified under Ecuadorian law, therefore irreproachable from the standpoint of international law.³⁹⁵

230. Claimant next rehashes its argument that international law does not require the exhaustion of “extraordinary” remedies such as the EPA.³⁹⁶ As explained in Ecuador’s Counter-Memorial, however, the nature of the EPA as an extraordinary remedy cannot, by and of itself, render it non-exhaustible.³⁹⁷ The authorities establishing that international law may require the exhaustion of extraordinary remedies are voluminous and need not be repeated here. The crucial question is, as stressed in the ILC’s commentary on Article 14 of its Draft Articles on Diplomatic

so manifestly insecure as to challenge intervention by the British Government in the interest of elementary justice for all concerned [...].

United States v. Great Britain (Robert E. Brown), Award (23 Nov. 1923), 6 U.N.R.I.A.A. 120, p. 129 (CLM-39) (emphasis added). It follows that the case is completely inapposite to Claimant’s argument. Moreover, Claimant has not produced any evidence at all of this nature here.

Claimant also misrepresents Prof. Amerasinghe’s views by suggesting that his writings “make clear that systemic evidence of corruption [...] is relevant to determine whether further recourse would be ineffective.” Claimant’s Reply, p. 107 fn. 521. Prof. Amerasinghe explains:

systemic corruption must be proven by something more than generic allegations that may pertain to different circumstances in time and are far from conclusive as to what actually transpired in the specific proceedings in question. Such allegations fail to leave “no room for reasonable doubt,” as famously proclaimed by the [ICJ] in the *Corfu Channel* case with respect to the probative value of indirect evidence in general. [...] Moreover, even if the Claimant’s evidence could meet the aforementioned test, it is insufficient to produce evidence only of the lack of independence and of corruption in the lower courts, when there are available remedial actions in Ecuador’s [NCJ] and the Constitutional Court. *In my writings, I spoke of systemic corruption; it is therefore necessary to show that the legal system as a whole, i.e. including the NCJ and the Constitutional Court, is corrupt and lacks independence. It makes absolutely no sense to exclude from the system its superior courts and tribunals.* It follows that there is no contradiction between my previous writings and paragraph 32 of my earlier expert opinion [...].

Second Amerasinghe Expert Report, ¶¶ 8-9 (emphasis added). *See also* Second Caflisch Expert Report, ¶ 12 (“whatever charges Claimant may make about the independence or otherwise of lesser courts, if the system as a whole has the reasonable potential to be effective, as it would appear to have in view of the wide powers of the Constitutional Court, the entire system, including the Constitutional Court, must be exhausted before there can be a denial of justice.”).

³⁹⁵ *See infra* Section V(D).

³⁹⁶ Claimant’s Reply, ¶ 461.

³⁹⁷ *See* Ecuador’s Counter-Memorial, ¶¶ 192-205.

Protection, “not the ordinary or extraordinary character of a legal remedy *but whether it gives the possibility of an effective and sufficient means of redress.*”³⁹⁸

231. Tellingly, none of the authorities cited by Claimant to muster support for its argument actually deny that a remedy with such remedial capacity (extraordinary in *that* sense as well) should be deemed non-exhaustible due to its classification under domestic law.³⁹⁹ Indeed, according to Prof. Caflisch,

the intervention of the Ecuadorian Constitutional Court could have fully repaired any procedural or substantive injustice allegedly suffered by the Claimant. *In these circumstances, the expression “indirect remedy” used by the Claimant is entirely inappropriate.*⁴⁰⁰

232. Finally, Claimant refers to the *Salem* case and the rejection therein of Egypt’s plea of non-exhaustion of local remedies based on the American national’s failure to file an application for retrial (*recours en requête civile*).⁴⁰¹ Claimant points out that “[e]ven though the *recours en requête civile* [...] clearly was available and could potentially have vacated the adverse judgment entered by the court of last resort, the tribunal nevertheless held that the claimant was not

³⁹⁸ International Law Commission (ILC), *Draft Articles on Diplomatic Protection with commentaries*, YILC, 2006, vol. II, Part Two, commentary on Article 14, p. 72 (¶ 4) (CLM-335) (citing to the established jurisprudence of the European Commission of Human Rights). *See also* Second Amerasinghe Expert Report, ¶ 28 (“it is not a valid argument that the remedies available to the Claimant were “extraordinary” or special, or that they involved more than one court and therefore they did not have to be exhausted; rather, provided the remedies in question were capable of producing adequate redress and were reasonably available, they must be addressed.”).

³⁹⁹ At most, these authorities stand for the proposition that remedies such as applications for retrial (*recours en requête civile*, at issue in the *Salem* case discussed below), actions against the judge for damages caused by her inexcusable mistakes or misconduct (*prise à partie*), and appeals to the executive power are not exhaustible. *See* Freeman, p. 419 (CLM-320); S. Sfériadès, *Le problème de l'accès des particuliers à des juridictions internationales*, 51 RCADI (1935), p. 77 (CLM-370); European Commission of Human Rights, Note by the Human Rights Department Concerning Article 26 of the Convention (current Article 35) (5 Sept. 1955), p. 12 (CLM-313). On the other hand, “the European Court has routinely admitted to examine constitutional remedies in the context of its assessment of whether the individual applicants have discharged their obligation to exhaust local remedies before asserting their claims on the international level.” Second Caflisch Expert Report, p. 3 fn. 7. *See also* Second Amerasinghe Expert Report, ¶ 27.

⁴⁰⁰ Second Caflisch Expert Report, ¶ 11 (emphasis added).

⁴⁰¹ *United States v. Egypt (Salem)*, Award (8 June 1932), 2 U.N.R.I.A.A. 1161 (“*USA v. Egypt (Salem)*, U.N.R.I.A.A. (1932)”) (RLA-16).

required to exhaust it.”⁴⁰² It also argues that such rejection is “instructive,”⁴⁰³ given that that remedy is “similar” to the EPA.⁴⁰⁴

233. Claimant is wrong on these points. *First*, at issue in that case was not whether the US national had to seek recourse from the “court of last resort,” but rather whether he had to seek in addition reconsideration after losing before the court of last resort. Here, of course, Merck did not resort to the court of last resort to begin with, so the question of reconsideration, such as that provided by the *recours en requête civile*, does not arise.

234. *Second*, as Prof. Amerasinghe explains,⁴⁰⁵ the *Salem* tribunal rejected Egypt’s plea “not because the *recours en requête civile* was, *per se*, not a type of remedy that international law requires [to] be exhausted,” but “in an exercise of special equitable powers that it considered it enjoyed under the arbitration agreement and in light of the particular circumstances of that case.”⁴⁰⁶

235. The tribunal did observe that, in contrast to a regular legal remedy, the *recours en requête civile* “intends to reopen a process which has already been closed by a judgment of last resort,” and that “[a]s a rule it is sufficient if the claimant has brought his suit up to the highest instance

⁴⁰² Claimant’s Reply, ¶ 465.

⁴⁰³ *Id.*, ¶ 463.

⁴⁰⁴ *Id.*, ¶ 468.

⁴⁰⁵ Claimant criticizes unduly Prof. Amerasinghe for misconstruing the *Salem* case when writing that the case stands for the proposition that a *recours en requête civile* “ha[s] been held to be [a] remed[y] that should have been exhausted.” Claimant’s Reply, p. 110 fn. 530 (*citing* C. Amerasinghe, LOCAL REMEDIES IN INTERNATIONAL LAW (2004), pp. 183-189 (RLA-61)). Prof. Amerasinghe explains:

In the paragraph where the citation appears, I am clearly speaking *of the position held by States in particular situations* and the *Salem* clearly states that *it was indeed held by Egypt that the recours en requête civile was a remedy that should have been exhausted.*

Second Amerasinghe Expert Report, ¶ 15 (emphasis added).

⁴⁰⁶ Second Amerasinghe Expert Report, ¶ 15.

of the national judiciary.”⁴⁰⁷ But that was not the end of its inquiry. The tribunal also observed, “[o]n the other hand,” that Egypt questioned whether the claim could even be said to have been “brought forward” to the highest instance, given the US contention that the Court of Appeal had acted *ultra petita*.⁴⁰⁸ The US also had doubts, as to the effectiveness of the remedy to begin with, not because of its nature and function, but because of the final statement in the impugned judgment that “[the] decision puts an end once [and] for all times to all claims brought forward by George Salem in his action.”⁴⁰⁹ Finally, the tribunal referred to the two States’ inability to agree on the terms under which Mr. Salem could have pursued the *recours en requête civile*.⁴¹⁰

236. As Prof. Amerasinghe states,

It was only “[u]nder these circumstances,” and, significantly, “in view of the fact that this Arbitral Tribunal is bound to decide in equity,” that the *Salem* tribunal found that Egypt’s local remedies rule objection was “not well founded.” *Thus, nothing in this decision is in any way inconsistent with the position taken in my treatise and in my first Opinion concerning the types of remedies that must be exhausted in order to establish finality of treatment by a State’s judicial system as a whole.* Indeed, the decision cannot even be read to suggest that the particular remedy of *recours en requête civile* is not, in normal circumstances, required to be exhausted.⁴¹¹

237. Prof. Amerasinghe considers also noteworthy that in his dissenting opinion the U.S. Commissioner (Nielsen) rejected the majority’s conclusion that the arbitration agreement empowered the tribunal to decide the question on grounds of equity.⁴¹² The U.S. Commissioner gave particular emphasis on the statement of the Court that the decision “puts an end once and

⁴⁰⁷ *USA v. Egypt (Salem)*, U.N.R.I.A.A. (1932), p. 1189 (RLA-16).

⁴⁰⁸ *Id.*

⁴⁰⁹ *Id.*

⁴¹⁰ *Id.*, p. 1190.

⁴¹¹ Second Amerasinghe Expert Report, ¶ 17 (*citing USA v. Egypt (Salem)*, U.N.R.I.A.A. (1932), p. 1190 (RLA-16)) (emphasis added) (internal citations omitted).

⁴¹² *USA v. Egypt (Salem)*, U.N.R.I.A.A. (1932), pp. 1225-1226 (RLA-16).

for all to all the claims preferred by George Salem.”⁴¹³ According to Prof. Amerasinghe, Commissioner Nielsen’s emphasis on that statement shows that for him, “the futility of the *recours en requête civile* was the key consideration.”⁴¹⁴

238. In sum, according to Prof. Amerasinghe:

none of the special circumstances determinative in *Salem* are present here. Not only does this case not involve a preexisting decision by the highest judicial authority, but I am unaware of any evidence of futility here comparable to the Court of Appeal’s statement in *Salem* that its decision “puts an end once and for all to all the claims.” Moreover, I see nothing in the BIT that allows a decision *ex aequo et bono* as was the basis (mistakenly, in Commissioner Nielsen’s view) for the *Salem* tribunal’s award.⁴¹⁵

239. *Third*, the EPA is very different from the *recours en requête civile*. The latter remedy is “essentially a remedy for reconsideration [by a judicial authority] of a prior decision made by that same authority.”⁴¹⁶ The EPA, on the other hand, extends beyond a mere reopening of proceedings; as shown above, the Constitutional Court has the power to order “full reparation,” which may assume the form of monetary compensation, in case a constitutional violation is established to the satisfaction of the Constitutional Court.⁴¹⁷

3. Conclusion

240. To sum up: under international law, only obviously futile remedies need not be exhausted. The EPA is not such a remedy. Its availability to Claimant is not disputed. In light of the above, its effectiveness should similarly be beyond reproach. Under the Ecuadorian legal and

⁴¹³ *Id.*, p. 1227.

⁴¹⁴ Second Amerasinghe Expert Report, ¶ 17.

⁴¹⁵ *Id.*, ¶ 19.

⁴¹⁶ *Id.*, ¶ 18 (citing to Commissioner Nilsen’s statement in his dissenting opinion that the *recours en requête civile* is “a measure by which the claimant would undertake to have the Court set aside its own decision.” (*USA v. Egypt (Salem)*, U.N.R.I.A.A. (1932), p. 1206 (RLA-16) (emphasis omitted)).

⁴¹⁷ Second Caflisch Expert Report, fn. 7 (“Resort to a constitutional court, when the latter offers ‘full reparation’ of the harm inflicted by the violation of the constitutional right, does not amount to a mere request for re-trial.”).

constitutional framework, the Constitutional Court has authority to order full reparation, which may assume the form of monetary compensation for any harm incurred as a result of the constitutional violation. Claimant could have been awarded the amount of the challenged NCJ decision as well as legal costs incurred as a result of the constitutional violation. Moreover, even if the Constitutional Court did not order monetary compensation as part of full reparation, but merely annulled the challenged judgment, such annulment would have created an effective basis for recovery of those amounts through an action for unjust enrichment. Finally, the circumstances of this case and the nature of the EPA as “extraordinary” remedy do not defeat its exhaustibility under international law. The conclusion is that Claimant could and should have resorted to the EPA before asserting its denial of justice claims under the BIT.

B. Exhaustion Of Available And Effective Domestic Remedies Is Mandatory For All Claimant’s Treaty Claims

241. In its Counter-Memorial, Ecuador showed that the same requirement of judicial finality permeates all of Claimant’s treaty claims.⁴¹⁸ Claimant has made no effort to show otherwise, with the exception of its claims under Article II(7) of the BIT.⁴¹⁹ The following sections show why Claimant’s attempt to escape the requirement through “skillful labelling”⁴²⁰ is to no avail.

1. Article II(7) Of The BIT Imposes Requirements No Less Stringent Than Those Imposed Under Customary International Law

242. As will be shown below, the Ecuadorian courts have not denied justice to Claimant. Nor, however, has Claimant complied with the fundamental requirement of judicial finality. Hence,

⁴¹⁸ Ecuador’s Counter-Memorial, ¶¶ 236-262.

⁴¹⁹ Claimant does not dispute that the same judicial finality requirement applies to its claims for breach of Article II(3)(a) (full protection and security) and II(3)(b) (arbitrary or discriminatory measures). *See* Claimant’s Reply, p. 181 fn. 948.

⁴²⁰ M. Sattorova, *Denial of Justice Disguised? Investment Arbitration and the Protection of Foreign Investors from Judicial Misconduct*, 61 INT’L & COMP. L. Q. 222 (2012), p. 241 (RLM-109) (“The exercise in ‘skillful labelling’ undermines the principal justification for the rule of judicial finality, which explains the mandatory exhaustion of local remedies by reference to the special nature of judicial activity and the host state’s duty to provide a fair and efficient system of justice, as opposed to ensuring justice at every stage of the judicial process.”).

there is no breach of Ecuador’s obligations under the BIT and customary international law. For the same reasons, there is no breach of Ecuador’s obligation to provide “effective means of asserting claims and enforcing rights” pursuant to Article II(7) of the BIT.

243. In its Counter-Memorial, Ecuador established that Article II(7) reflects nothing more than the customary international law standard for denial of justice.⁴²¹ In its Reply, Claimant maintained that Ecuador’s argument is “inconsistent with the text of the U.S.-Ecuador BIT and with the applicable rules of treaty interpretation. It is also inconsistent with the weight of applicable authority.”⁴²²

244. The following sections address Claimant’s criticism, and establish its unfoundedness. *First*, treaty provisions regularly reflect existing customary law without explicitly referencing it. Article II(7) performs a similar function. *Second*, Article II(7) does not violate the principle of *effet utile* merely because Article II(3)(a) also invokes customary international law. Indeed, treaty provisions regularly perform a clarificatory purpose; their *effet utile* is precisely to serve this purpose. *Third*, Ecuador will address the current split of authority on the interpretation of Article II(7) by arbitral tribunals, and establish that the *Chevron* and *White Industries* tribunals unduly departed from the *Duke Energy* tribunal’s interpretation of the same provision as “seek[ing] to implement and form part of the more general guarantee against denial of justice.”⁴²³ *Fourth*, although Claimant is correct that *some* U.S. BIT provisions go beyond customary international law, Article II(7) is not one of them. *Fifth*, Ecuador will show why,

⁴²¹ Ecuador’s Counter-Memorial, ¶¶ 245-261. At the very least, Article II(7) receives “operational guidance” from customary international law, and there is no reason why it should be read inconsistent with it. According to Judge Simma, where an applicable rule of customary law is highly relevant, it provides “operational guidance” for interpreting a treaty provision. 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. eds., 2009), p. 696 (RLA-89).

⁴²² Claimant’s Reply, ¶ 736.

⁴²³ *Duke Energy Electroquil Partners and Electroquil SA v. Republic of Ecuador*, ICSID Case No. ARB/04/19, Award (12 Aug. 2008) (Kaufmann-Kohler, Gómez-Pinzón, van den Berg) (“*Duke Energy*”), ¶ 391 (RLA-83).

notwithstanding Claimant’s protestations to the contrary, the deletion of Article II(7) from the 2004 U.S. Model BIT confirms that the protections it afforded were redundant. *Finally*, Claimant cannot bypass the requirement of judicial finality even under the interpretation of the standard by the *Chevron I* and *White Industries* tribunals.

2. Treaty Provisions, Including Article II(7), Regularly Reflect Existing Customary Law Without Explicitly Referencing It

245. Claimant argues that the “plain wording of Article II(7) imposes a specific, positive obligation” that goes beyond the customary international law standard for denial of justice because “Article II(7) makes no reference to international law or to international law standards for denial of justice.”⁴²⁴

246. Claimant is, of course, correct that Article II(7) does not explicitly “reference to international law or to international law standards for denial of justice.” However, this fact alone does not mean that the provision is not reflective of customary international law, in the same way that predecessor clauses in U.S. friendship, commerce, and navigation treaties, clauses prescribing a right of judicial access, were not to be read independent of international law even though they did not reference international law *expressis verbis*.⁴²⁵ Incorporation of customary international law may be achieved through other means. In the case at hand, it is the ordinary meaning of the terms of Article II(7) that effectuates the *renvoi* to customary international law.

⁴²⁴ Claimant’s Reply, ¶ 743.

⁴²⁵ R. Wilson, *THE INTERNATIONAL LAW STANDARD IN TREATIES OF THE UNITED STATES* (1953), p. 94 (RLA-136). *See also id.*, R. Wilson, *Access-to-Courts Provisions in United States Commercial Treaties*, 47 AJIL 20 (Jan. 1953), p. 47 (RLA-137) (“[t]here appears to be a recognized principle of customary international law giving to aliens rights of access to courts on a reasonable basis [...] *Declaratory* treaty provisions have emphasized the principle of international law, and there has been frequent assent to the national-treatment (as well as most-favored-nation treatment) basis. While types of international agreements other than commercial treaties have had some part in the process, commercial treaties have, for the United States, been a principal means of *acknowledging* the principle and setting standards for applying it.”) (emphasis added).

As shown in Ecuador’s Counter-Memorial and discussed further below, by using recognized terms of art in customary international law, Article II(7) reflects customary law.

247. Indeed, it is common practice for treaty drafters to incorporate customary international law by utilizing specific terms of art. Thus, in *Saluka v. Czech Republic*, the tribunal held that the word “deprivation” in Article of 5 the Netherlands-Czech Republic BIT was “to be understood in the meaning it has acquired in customary international law.”⁴²⁶ This had significant consequences: although Article 5 was “drafted very broadly and [did] not contain any exception for the exercise of regulatory power,” by “using the concept of deprivation,” the drafters “import[ed] into the Treaty the customary international law notion that a deprivation can be justified if it results from the exercise of regulatory actions aimed at the maintenance of public order.”⁴²⁷ In other words, based on the fact that the word “deprivation” is a customary term of art, the *Saluka* tribunal acknowledged the existence of an exception to the provisions of Article 5 despite the fact that no such exception was explicitly referenced therein.⁴²⁸

⁴²⁶ *Saluka Investments BV (The Netherlands) v. The Czech Republic*, UNCITRAL (Netherlands-Czech Republic BIT), Partial Award (17 Mar. 2006) (Watts, Fortier, Behrens) (“*Saluka*”), ¶ 261 (RLA-71).

⁴²⁷ *Id.*, ¶ 254.

⁴²⁸ Several other tribunals have found that the term “expropriation” incorporates customary international law on expropriation of foreign property. See *Glamis Gold, Ltd. v. The United States of America*, UNCITRAL (NAFTA), Award (8 June 2009) (Yong, Caron, Hubbard) (“*Glamis Gold*”), ¶ 354 (RLA-93) (“The inclusion in Article 1110 of the term “expropriation” incorporates by reference the customary international law regarding that subject”) (emphasis added); *AIG Capital Partners, Inc. and CJSC Tema Real Estate Company v. Republic of Kazakhstan*, ICSID Case No. ARB/01/6, Award (7 Oct. 2003) (Nariman, Bernardini, Vukmir), ¶ 10.3.1 (RLA-57) (“Article III incorporates into the BIT international law standards for ‘expropriation’ and ‘nationalisation’”).

Other tribunals have found that treaty expropriation standards cannot be interpreted independent of or inconsistently with the relevant customary international law. See *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) (Rovine, Lalonde, McRae), ¶¶ 67, 72 (RLA-119) (“it may not be possible to consider the scope and content of the term ‘expropriation’ in the BIT without considering customary and general principles of international law, as well as any other sources of international law in this area.”) (emphasis added); *SD Myers Inc. v. Government of Canada*, UNCITRAL, First Partial Award (NAFTA) (13 Nov. 2000) (Hunter, Schwartz, Chiasson), ¶ 280 (CLM-143) (“[t]he term “expropriation” in Article 1110 must be interpreted in light of the whole body of state practice, treaties and judicial interpretations of that term in international law cases.”).

248. *Saluka v. Czech Republic* is just one among many examples of a disputed term or phrase being recognized for what it was: nothing more than a term of art incorporating into a treaty regime pre-existing customary law obligations. Thus, the then-controversial question of whether the phrases “fair and equitable treatment” and “full protection and security” merely reflected existing custom or created new, more expansive obligations under the North American Free Trade Agreement⁴²⁹ was definitively settled when the Free Trade Commission confirmed that these concepts serve as shorthand for obligations established under customary international law. The Commission stated that those concepts “do not require treatment in addition to or beyond that which is required by the customary international law minimum standard of treatment of aliens.”⁴³⁰ And in *Asian Agricultural Products Ltd v. Republic of Sri Lanka*, the Tribunal held that “the words ‘shall enjoy full protection and security’ have to be construed *according to the ‘common use which custom has affixed [...].’*”⁴³¹

249. Standards contained in U.S. BITs are no different. In *Generation Ukraine Inc. v. Ukraine*, the tribunal, chaired by Prof. Paulsson, noted that it was “*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 in customary international law.*”⁴³²

⁴²⁹ See Thornton, *A Summary of the U.S. Position on the Minimum Standard of Treatment Obligation in NAFTA Article 1105(1)*, p. 1 (RLA-204) (“The United States maintains that from its first use in international investment agreements, the term ‘fair and equitable treatment’ referred to a developed body of customary international law which requires States to protect the property interests of nationals of other States. Several early NAFTA Chapter Eleven claimants disputed this contention, however, and argued that the obligation exceeded the minimum protections afforded to foreign investment under customary international law.”) (internal citations omitted).

⁴³⁰ See NAFTA Free Trade Commission, *Notes of Interpretation of Certain Chapter 11 Provisions* (31 July 2001), ¶ B(2) (RLA-50).

⁴³¹ *Asian Agricultural Products Ltd. (AAPL) v. Republic of Sri Lanka*, ICSID Case No. ARB/87/3, Award (27 June 1990) (El-Kosheri, Goldman, Asante) (“AAPL”), ¶ 47 (RLA-30).

⁴³² *Generation Ukraine Inc. v. Ukraine*, ICSID Case No. ARB/00/9, Award (15 Sept. 2003) (Paulsson, Salpius, Voss), ¶ 11.3 (CLM-11) (emphasis added).

250. And Article II(7) is no different: the obligation to afford “effective means” to foreign investors is a known quantity in customary international law. Indeed, as Ecuador pointed out in its Counter-Memorial,⁴³³ the operative language used in Article II(7) replicates, often word for word, that used in codificatory formulations of the strand of the international minimum standard requiring that States provide an effective framework or system enabling foreign investors to assert claims and enforce their rights.⁴³⁴ Thus, while Article II(7) calls for each party to provide “*effective means* of asserting claims and enforcing rights,”⁴³⁵ these codifications call on states to provide, for example, “*effective means* of redress for injuries,”⁴³⁶ or “*effective means* for the pursuit” of an alien’s rights.⁴³⁷

251. Claimant points out that Prof. Vandevelde’s treatise acknowledges that some “disagreement among publicists concerning the content of the right [of access to the courts] prompted the United States to seek treaty protection.”⁴³⁸ This is, however, only a partial

⁴³³ See Ecuador’s Counter-Memorial, ¶ 255.

⁴³⁴ This customary international law guarantee was decidedly not, as Merck misleadingly suggests in a footnote, merely limited to the provision of access to the courts “on an equal basis to nationals.” See Claimant’s Reply, p. 180, fn. 944. On the contrary, the codifications of the principle accepted that the international minimum standard would be the ultimate yardstick of the “effectiveness” of the means provided by the host State. See, e.g., *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 (RLA-9) (“[t]he protection secured by the local law is, however, the minimum of the state’s duty of protection. *The redress afforded to nationals may be so inadequate that it will not satisfy the state’s international obligation. In that event, the state may be under a duty to give to aliens a greater degree of redress than to nationals.*”), p. 148 (“[t]he subjection of the alien to the local law and remedies is necessarily based upon the assumption *that the local law and remedies measure up to the standard required by international law.*”) (emphasis added); Acts of the Conference for the Codification of International Law, held at The Hague from March 13th to April 12th, 1930, Minutes of the Third Committee, 9th 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.*, 665 (RLA-11) (per Mr. Becket (Great Britain)) (noting that states are obligated to provide “means for the protection and enforcement of rights [...] which come up to [the] international standard of justice and efficiency”).

⁴³⁵ See Ecuador-U.S. BIT, Art. II(7) (R-1) (emphasis added).

⁴³⁶ *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 (RLA-9) (emphasis added).

⁴³⁷ Freeman, p. 135 (RLA-18) (emphasis added).

⁴³⁸ K. Vandevelde, U.S. INTERNATIONAL INVESTMENT AGREEMENTS (2009) (“Vandevelde”), p. 411 (RLA-85(bis)). See Claimant’s Reply, ¶ 768.

quotation from Prof. Vandeveldel's work. In the very same sentence, Prof. Vandeveldel notes that customary international law at the time *did* "guarantee[] an alien the right of access to the courts of the host state."⁴³⁹ Nowhere does Prof. Vandeveldel equate these disagreements over the precise content and modalities of implementation of the standard to denial of the existence of the standard under customary international law.

252. Moreover, Claimant presents *absolutely no evidence* to suggest that the precise formulation ultimately chosen by the United States—that containing the phrase "effective means"—was meant to provide *higher* standards of protection than the nearly *identical* customary international law formulations mentioned above.⁴⁴⁰ On the contrary, in adopting the phrase "effective means," the United States merely recorded its agreement with the traditional formulation of the standard. It simply defies reason to argue that, despite this fact, the phrase "effective means" should be interpreted differently under Article II(7) than in customary international law. Had the drafters wished to create an entirely new standard of protection of unprecedented and undefined scope, not only would the travaux préparatoires have made note of that fact, but the drafters would have refrained from using a term of art—"effective means"—so laden with meaning in customary international law.

3. Article II(7) Does Not Violate The Principle Of *Effet Utile* Merely Because Article II(3)(a) Also Invokes Customary International Law

253. Claimant argues that "Ecuador's interpretation of Article II(7) as merely duplicating the customary international law standard for denial of justice, which is already incorporated in

⁴³⁹ *Id.*, p. 411 (RLA-85(bis)).

⁴⁴⁰ Claimant attempts to manipulate Prof. Vandeveldel's position by arguing that, "according to Professor Vandeveldel, Article II(7) was *intended to fill a gap in customary international law* and 'create an absolute standard for measuring the effectiveness of remedies and procedures for enforcing substantive rights.'" See Claimant's Reply, ¶ 769 (*citing* Vandeveldel, p. 413 (RLA-85)). The problem is that Prof. Vandeveldel said no such thing. To the extent that Claimant implies that Prof. Vandeveldel's treatise betrays a belief that the U.S. included Article II(7) to create a *higher* standard than that found in customary international law, it is being disingenuous.

Article II(3)(a), is ‘quite simply, forbidden by the principle of *effet utile*.’⁴⁴¹ If anything is “quite simple,” it is Claimant’s misconstruction of Ecuador’s position and the applicability of the principle of *effet utile* to it.

254. Ecuador agrees that, to the extent possible, “treaty clauses must be interpreted to avoid either rendering them superfluous or depriving them of significance for the relationship between the parties.”⁴⁴² The problem with Claimant’s conclusory position, however, is that Ecuador’s interpretation of Articles II(7) and II(3)(a) *simply does not deprive either provision of significance*. On the contrary, each *reinforces* the other, serving a very specific—and far from superfluous—purpose in the treaty as a whole.

255. As Prof. Vandeveldel’s Second Expert Opinion makes clear, “tribunals on many occasions have acknowledged that language may be inserted *ex abundante cautela* to confirm or clarify, notwithstanding the principle of *effet utile*.”⁴⁴³ Thus, in *Siemens v. Argentine Republic*, the tribunal rejected Argentina’s *effet utile* argument, explicitly stating that “the parties to a treaty are not precluded from placing emphasis on certain matters *ex abundante cautela*.”⁴⁴⁴ Similarly, in *Murphy Exploration & Production Company v. Republic of Ecuador*, the tribunal noted that it did “not disagree with [Ecuador’s] argument that treaty language can have a confirmatory or clarificatory purpose and that even such language must be given weight and

⁴⁴¹ Claimant’s Reply, ¶ 745 (*citing* Expert Report of Prof. Steven R. Ratner (1 Aug. 2014) (“Ratner Expert Report”), ¶ 22).

⁴⁴² *See* Claimant’s Reply, ¶ 745 (*citing* Ratner Expert Report, ¶ 9).

⁴⁴³ *See* Second Expert Report of Prof. Kenneth J. Vandeveldel (19 Feb. 2014) (“Second Vandeveldel Expert Report”), ¶ 14.

⁴⁴⁴ *Siemens A.G. v. The Argentine Republic*, ICSID Case No. ARB/02/8, Decision on Jurisdiction (3 Aug. 2004) (Rigo Suredo, Brower, Bello Janeiro), ¶ 90 (RLA-65).

effect.”⁴⁴⁵ And in *Walter Bau AG v. Thailand*, the tribunal held that certain provisions precluding retrospective application “can be seen as states acting under an abundance of caution.”⁴⁴⁶

256. What these and other cases⁴⁴⁷ make abundantly clear is that, as Prof. Vandeveldé puts it,

Provisions inserted *ex abundante cautela* are not without effect because they provide what the drafters regarded as a useful clarification or confirmation, although the absence of such provisions would not alter the meaning of the treaty. Clarification or confirmation *is* their *effet utile*.⁴⁴⁸

257. Claimant’s argument also overlooks that “the U.S. BITs in general and the Ecuador-United States BIT in particular are replete with language inserted *ex abundante cautela* to clarify or confirm meaning.”⁴⁴⁹

258. Indeed, it is indisputable that Article II(3)(a) overlaps significantly with provisions beyond Article II(7). To name just one example, Article III’s guarantees against uncompensated expropriation “incorporate into the Treaty the international law standards for expropriation and compensation,”⁴⁵⁰ even though the provision makes no reference to international law or to international standards for expropriation. Is this provision redundant in light of Article II(3)(a), stating that “[i]nvestment [...] shall in no case be accorded treatment less than that required by international law”? Certainly not. Article III plays an important role: it specifically guarantees standards already encompassed by the general protections provided in Article II(3)(a).

⁴⁴⁵ *Murphy Exploration & Production Company v. Republic of Ecuador*, PCA Case No. AA434, UNCITRAL, Partial Award on Jurisdiction (13 Nov. 2013) (Hanotiau, Abi-Saab, Hobér), ¶ 180 (CLM-253).

⁴⁴⁶ *Walter Bau AG (in liquidation) v. The Kingdom of Thailand*, UNCITRAL, Award (1 July 2009) (Barker, Lalonde, Bunnag), ¶ 9.70 (KV-1).

⁴⁴⁷ See, e.g., *Mr. Franck Charles Arif v. Moldova*, ICSID Case No. ARB/11/23, Award (8 Apr. 2013) (Cremades, Hanotiau, Knieper), ¶ 389 (RLA-120) (noting that a preservation of rights provision merely “confirms that the investor may benefit from more favourable treatment, but does not add a new, specific or distinct, treaty obligation to respect commitments made.”).

⁴⁴⁸ See Second Vandeveldé Expert Report, ¶ 22 (emphasis in original).

⁴⁴⁹ See *id.*, ¶ 23. Prof. Vandeveldé comprehensively describes many of the redundancies in the U.S. BITs, including the Ecuador-U.S. BIT. *Id.*, ¶¶ 24-32.

⁴⁵⁰ See Ecuador BIT Submittal Letter (RLA-34).

259. Article II(7)'s requirement that States provide "effective means of asserting claims and enforcing rights"⁴⁵¹ operates in the exact same way. This is precisely the understanding the tribunal in *Duke Energy v. Ecuador* had in mind when it stated that Article II(7) "seeks to implement and form part of the more general guarantee against denial of justice"⁴⁵²—the more general guarantee being the one found, of course, in Article II(3)(a).

4. Although Tribunals Are Currently Split On The Interpretation Of Article II(7), Those Interpreting The Article As Expanding Denial Of Justice Protections Under Customary Law Have Misconstrued Its Provisions

260. Until recently, the *Duke Energy v. Ecuador* tribunal was the only tribunal to have interpreted Article II(7) of the Ecuador-U.S. BIT. As shown above, its interpretation is entirely consistent with Ecuador's position.⁴⁵³ In 2010, however, the *Chevron I* tribunal adopted a radically more expansive interpretation, finding that Article II(7) "constitutes a *lex specialis* and not a mere restatement of the law on denial of justice,"⁴⁵⁴ that "a distinct and potentially less-demanding test is applicable under this provision as compared to denial of justice under customary international law,"⁴⁵⁵ and that a claimant under that provisions need not prove a "strict" exhaustion of local remedies in order for a breach of Article II(7) to be established.⁴⁵⁶

⁴⁵¹ See Ecuador-U.S. BIT, Art. II(7) (R-1) (emphasis added).

⁴⁵² *Duke Energy*, ¶ 391 (RLA-83).

⁴⁵³ The *Duke Energy* tribunal also 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, which the claimants in that case failed to make. *Id.*, ¶ 402. See also *id.*, ¶ 401 ("lack of clarity [...] is not sufficient to demonstrate that a remedy is futile").

⁴⁵⁴ *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) (Böckstiegel, Brower, van den Berg) ("*Chevron I* (Partial Award on the Merits)"), ¶ 242 (CLM-111).

⁴⁵⁵ *Id.*, ¶ 244.

⁴⁵⁶ *Id.*, ¶ 268. The tribunal in *White Industries v. India* subsequently "summarized" and accepted the *Chevron I* tribunal's conclusions on the issue without any analysis of their validity whatsoever. See *White Industries Australia Limited v. The Republic of India*, UNCITRAL (Australia-India BIT), Final Award (30 Nov. 2011) (Rowley, Brower, Lau), ¶ 11.3.2. (CLM-114).

261. As Ecuador showed in its Counter-Memorial, the *Chevron* tribunal was, quite simply, wrong.⁴⁵⁷ Its ruling cannot be reconciled with that made by the tribunal in *Duke Energy v. Ecuador*,⁴⁵⁸ and its cursory analysis falls apart on close examination. Indeed, Merck has not even attempted to address the critical flaws in the tribunal’s reasoning raised by Ecuador.

262. The *Chevron* tribunal’s conclusion appears to have been predicated primarily on two specific premises: first, that Article II(7) “does not make any explicit reference to denial of justice or customary international law” and that an intent to restate the law on denial of justice would only have been “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”;⁴⁵⁹ and second, that Article II(7) was “created as an independent treaty standard to address a lack of clarity in the customary international law regarding denial of justice.”⁴⁶⁰

263. When it comes to the first premise, any assumption that because the drafters made no “explicit reference to denial of justice or customary international law”⁴⁶¹ they must have not intended to incorporate those standards is simply wrong: as discussed above, U.S. drafters regularly incorporate customary international law standards through specific terms of art.⁴⁶²

⁴⁵⁷ See Ecuador’s Counter-Memorial, ¶¶ 245-259.

⁴⁵⁸ *Duke Energy*, ¶ 391 (RLA-83).

⁴⁵⁹ *Chevron I* (Partial Award on the Merits), ¶ 242 (CLM-111).

⁴⁶⁰ *Id.*, ¶ 243.

⁴⁶¹ *Id.*, ¶ 242.

⁴⁶² In its Reply, Claimant makes virtually no effort to support the Tribunal’s suggestion that the drafters would have made an “explicit reference to denial of justice or customary international law” if they intended those standards to be incorporated, turning instead to an *effet utile* argument. See Claimant’s Reply, ¶¶ 743-744. This omission is telling, given that Ecuador has previously called this Tribunal’s attention to Claimant’s failure to respond to the weakness of the *Chevron* tribunal’s reasoning on this issue. See Ecuador’s Counter-Memorial, ¶¶ 258, 259 (“[T]he *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,’ 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 [...] 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

264. Moreover, and contrary to the tribunal’s cursory conclusion to the opposite effect, the drafters *did* include “language corresponding to the prevailing standard for denial of justice at the time of drafting”;⁴⁶³ indeed, it is difficult to imagine language that more closely parallels contemporaneous customary standards than the phrase “effective means.”

265. The *Chevron* tribunal’s second premise—that Article II(7) was “created as an independent treaty standard to *address a lack of clarity* in the customary international law regarding denial of justice”⁴⁶⁴—does not necessarily lead to the conclusion that the drafters intended to *expand* the protection afforded under customary law. No such evidence of the drafters’ intentions exists. On the contrary, by using the phrase “effective means,” the drafters evidenced an intent to codify a *particular* formulation—among several similar possibilities—with *obvious* roots in customary law.⁴⁶⁵ Had the drafters intended to *expand* the protections found in that law, they would have had every reason to avoid such a well-worn customary phrase, one with which they were undeniably familiar.

266. The *Chevron I* and *Duke Energy* decisions simply cannot be reconciled. Indeed, the *Chevron I* tribunal glosses over the decision of its predecessor in a single sentence, failing to address their difference in opinion whatsoever.⁴⁶⁶ Instead, the core of the tribunal’s reasoning on the appropriate standard contains, as discussed above, fundamentally faulty premises and leaps

pointed out in its Rejoinder in the interim measures phase of this proceeding. Its silence is telling”) (*citing Chevron I* (Partial Award on the Merits), ¶ 242 (CLM-111) (internal citations omitted)).

⁴⁶³ Quoting *Chevron I* (Partial Award on the Merits), ¶ 242 (CLM-111). For a thorough tracing of the language employed in Article II(7) to the classical codifications of denial of justice under international law, see Ecuador’s Counter-Memorial, p. 115 fn. 397 and authorities cited therein.

⁴⁶⁴ *Chevron I* (Partial Award on the Merits), ¶ 243 (emphasis added) (CLM-111).

⁴⁶⁵ See *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) (RLA-9) (calling on states to provide “*effective means* of redress for injuries”) (emphasis added); and Freeman, p. 135 (RLA-18) (requiring “*effective means* for pursuit” of an alien’s rights) (emphasis added).

⁴⁶⁶ See *Chevron I* (Partial Award on the Merits), ¶ 242 (CLM-111).

of logic which ultimately lead it to justify the creation of an entirely new cause of action of unprecedented and ill-defined scope. Moreover, even if, counter-factually, there were no split in tribunals' treatment of this issue, the absence of *stare decisis* in international arbitration requires a fresh consideration of the issue in light of all the available evidence.

5. Although Claimant Is Correct That Some U.S. BIT Provisions Go Beyond Customary International Law, Article II(7) Is Not Among Them

267. Claimant devotes several paragraphs to showing that provisions of the Ecuador-U.S. BIT “can, and do, create obligations that go beyond customary international law on foreign investment.”⁴⁶⁷ Thus, according to Claimant, it “obviously makes no sense to apply a rule of interpretation that presumes the U.S. only wanted to codify customary international law when many of the substantive obligations of the Treaty go much further.”⁴⁶⁸

268. Ecuador, of course, agrees with the unremarkable proposition that the Ecuador-U.S. BIT incorporates some protections beyond those afforded by customary international law. Indeed, any suggestion to the contrary is a straw-man argument misconstruing Ecuador's position. At the same time, Claimant cannot deny that other provisions of the BIT incorporate nothing beyond the protections afforded under customary international law. The real question therefore is: can Article II(7) be seen as one of such provisions? As shown above, compelling reasons establish that it is.

269. In its Counter-Memorial, Ecuador pointed out Prof. Alvarez's statement that Article II(7), *in particular*, was one of the BIT's “open-ended invitations to deploy relevant customary

⁴⁶⁷ Claimant's Reply, ¶¶ 756-763, 766.

⁴⁶⁸ *Id.*, ¶ 759.

international law.”⁴⁶⁹ In its Reply, Claimant limits its response on this point to a conclusory footnote in which it alleges that, while Prof. Alvarez “suggests that customary international law may be relevant to the interpretation of ‘effective means’ provisions,” he “does not suggest that the boundaries of those provisions are limited to the protections in customary international law.”⁴⁷⁰ This statement misrepresents Prof. Alvarez’s statement for two reasons.

270. *First*, Prof. Alvarez, an experienced and academically distinguished former U.S. BIT negotiator, does not say that customary international law is simply “relevant to the interpretation” of “effective means” provisions. What he does say is that such provisions allow the *deployment* of customary international law, in other words, the direct incorporation of such standards. This is despite the fact that the provisions do not directly reference international law. Prof. Alvarez also does not say that customary international law is deployed only to be departed from.⁴⁷¹ Clearly, Prof. Alvarez does not share the *Chevron* tribunal’s conclusions to the opposite effect.

271. *Second*, indeed, Prof. Alvarez includes in the incorporated protections those afforded under “general principles of law.”⁴⁷² But this is to no avail to Claimant’s interpretation of Article II(7) as an autonomous standard. The “general principles of law” is a recognized source of public international law. Again, “effective means” provisions are not the source of distinct and

⁴⁶⁹ See Ecuador’s Counter-Memorial, ¶ 253 (citing J. Alvarez, *A BIT on Custom*, 42 N.Y.U. J. INT’L L. & POL. 17 (2009), pp. 31-32 (RLA-88)).

⁴⁷⁰ See Claimant’s Reply, p. 178 fn. 938.

⁴⁷¹ To the contrary, according to Prof. Alvarez, “investment agreements are, at least in part, explicit efforts to provide investors with the traditional protections of customary law, including the international minimum standard, full protection and security, and protections against denials of justice. Clauses such as those enumerated above are efforts to include customary protections as part of a BIT’s protections, not to *exclude* these ordinarily applicable general legal rules, as does *lex specialis*.” J. Alvarez, *A BIT on Custom*, 42 N.Y.U. J. INT’L L. & POL. 17 (2009), p. 33 (RLA-88) (emphasis in original).

⁴⁷² *Id.*, pp. 31-32.

independent obligations. They only permit the deployment of already established principles of international law.

272. It is thus impossible to reconcile Prof. Alvarez’s position on the meaning of Article II(7)—which clearly limits the provision’s scope to the protections afforded under international law—with that of Claimant or the tribunal in *Chevron I*.

6. The Deletion Of Article II(7) From The 2004 U.S. Model BIT Does Suggest That The Protections It Afforded Were Seen As Redundant

273. It is uncontroversial that “[w]hen there is need of interpretation of a treaty it is proper to consider stipulations of earlier or *later* treaties in relation to subjects similar to those treated in the treaty under consideration.”⁴⁷³ Thus, in *Suez, Sociedad General de Aguas de Barcelona, S.A. v. Argentine Republic*, the tribunal found that “subsequent U.K. BITs make clear through express language that the United Kingdom’s intent [in an earlier BIT was] not to exclude dispute settlement from the coverage of the U.K. BIT’s most-favored-nation clause.”⁴⁷⁴ And in *El Paso Energy International Company v. The Argentine Republic*, the tribunal confirmed the interpretation of the U.S.-Argentina BIT’s umbrella clause by reference to the subsequent 2004 US Model BIT.⁴⁷⁵

⁴⁷³ *AAPL*, ¶ 40 (Rule (F)) (RLA-30) (emphasis added). See also *Emilio Agustín Maffezini v. Kingdom of Spain*, ICSID Case No. ARB/97/7, Decision of the Tribunal on Objections to Jurisdiction (25 Jan. 2000) (Vicuña, Buergenthal, Wolf) (“*Maffezini* (Decision on Objections to Jurisdiction)”), ¶¶ 58-62 (CLM-62) (comparing the MFN clause of the Spain-Argentina BIT to MFN clauses found in other Spanish BITs).

⁴⁷⁴ 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). (“[S]ubsequent U.K. BITs make clear through express language that the United Kingdom’s intent is not to exclude dispute settlement from the coverage of the U.K. BIT’s most-favored-nation clause. United Kingdom BITs concluded after 1993, for example with Honduras, Albania, and Venezuela, each add a third paragraph to the two paragraphs [...] constituting its most-favored-nation clause: ‘(3) For the avoidance of doubt it is confirmed that the treatment provided in paragraphs (1) and (2) above shall apply to the provisions of Articles 1 to 11 of this Agreement.’ The 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: that the most-favored-nation clause is to cover all the articles [...] of the treaty [...]”) (emphasis omitted).

⁴⁷⁵ *El Paso Energy International Company v. The Argentine Republic*, ICSID Case No. ARB/03/15, Decision on Jurisdiction (27 Apr. 2006) (Caflisch, Stern, Bernardini), ¶ 80 (CLM-9).

274. In this context, the deletion of the “effective means” provision from the 2004 Model BIT, as “unnecessary” in light of the customary international law principles prohibiting denial of justice,⁴⁷⁶ clearly evidences that the provision was not intended to impose more stringent obligations than those applicable under customary international law.

275. Claimant argues that “[t]he fact that the drafters of the 2004 Model BIT may have concluded that the customary international law principle prohibiting denial of justice provides adequate protection does not logically imply that they regarded Article II(7) as redundant to customary international law.”⁴⁷⁷ While Ecuador agrees that the deletion of the provision cannot *independently* prove that its scope was limited to protections afforded elsewhere in the treaty and under customary international law, it *does* serve as powerful confirmation of the other evidence which, considered as a whole, *does* prove this fact. Indeed, Claimant offers absolutely no alternative explanation for the provision’s deletion.⁴⁷⁸

276. The preamble to the 2004 U.S. Model BIT confirms that Article II(7) was viewed as “unnecessary” precisely because it was incorporated into the BIT through the minimum standard of treatment.⁴⁷⁹ The preamble reads:

Recognizing the importance of providing effective means of asserting claims and enforcing rights with respect to investment [...].

277. The only way to “recognize” something, of course, is if it *already exists*.

⁴⁷⁶ Vandevelde, p. 415 (RLA-85(bis)) (“The judicial access provision was deleted from the 2004 model. 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”).

⁴⁷⁷ See Claimant’s Reply, ¶ 771.

⁴⁷⁸ See Claimant’s Reply, ¶¶ 770-773.

⁴⁷⁹ Vandevelde, p. 415 (RLA-85(bis)) (“to make clear that the BITs are intended to protect the right of judicial access, *albeit implicitly through the international minimum standard*, the preamble of the 2004 model was amended to state that the parties ‘[recognize] the importance of providing effective means of asserting claims and enforcing rights with respect to investment under national law.’”) (emphasis added).

278. Claimant also argues that the fact that the “effective means” provision was considered “unnecessary” in 2004 does not necessarily mean that it was “unnecessary” in 1993,⁴⁸⁰ when the Ecuador-U.S. BIT was signed. Yet Claimant has presented absolutely no evidence to suggest that U.S. understandings of the customary international law on denial of justice have changed since 1993. Unless U.S. interpretations of the relevant standards evolved substantially in the course of 11 years, then it seems clear that those standards *already contained* the mandate to provide “effective means of asserting claims and enforcing rights with respect to [an] investment” in 1993.

279. Subsequent U.S. practice surrounding the “effective means” standard confirms the above. In the recent *Apotex v. U.S.* case, the U.S. disputed a claim that it had violated the identically-worded “effective means” provision of the U.S.-Jamaica BIT, which the investor sought to import through NAFTA’s MFN clause.⁴⁸¹ In its Rejoinder, citing Prof. Vandeveld’s works and the *Duke Energy* tribunal’s interpretation of Article II(7) (rather than that by the *Chevron* tribunal), the U.S. stated that “Apotex failed to demonstrate that it would have been entitled to receive better treatment under the ‘effective means’ provision of the U.S.-Jamaica BIT than under NAFTA Article 1105.”⁴⁸² Given that Article 1105 incorporates customary international law,⁴⁸³ the U.S. statement makes it plain that the “effective means” provision in the U.S.-Jamaica

⁴⁸⁰ Claimant’s Reply, ¶¶ 771-772.

⁴⁸¹ *Apotex Holdings Inc. and Apotex Inc. v. United States of America*, ICSID Case No. ARB(AF)/12/1, Counter-Memorial on Merits and Objections to Jurisdiction of Respondent United States of America (14 Dec. 2012) (Veeder, Rowley, Crook), ¶ 383 (RLA-185) (internal citations omitted).

⁴⁸² *Apotex Holdings Inc. and Apotex Inc. v. United States of America*, ICSID Case No. ARB(AF)/12/1, Rejoinder on Merits and Reply on Objections to Jurisdiction of Respondent United States of America (27 Sept. 2013), ¶ 370 (RLA-187). While the United States does distinguish between the facts in *Chevron v. Ecuador* and *White Industries v. India*, on the one hand, and the case in which it was litigating, on the other, nowhere does it suggest that it agreed with those tribunals that Article II(7) provides greater protection than the minimum standard of treatment. *Id.*, ¶ 371.

⁴⁸³ See NAFTA Free Trade Commission, *Notes of Interpretation of Certain Chapter 11 Provisions* (31 July 2001), ¶ B(2) (RLA-50).

BIT, a BIT that is contemporaneous to the BIT applicable here, does not impose obligations greater than those imposed by customary international law.

280. In sum, Claimant has provided absolutely no alternative explanation of the U.S. drafters' decision to remove Article II(7) from the 2004 Model BIT. It has not explained the U.S.'s decision to "acknowledge" the existence of the same right in the preamble to the 2004 Model, or the United States' treatment of the operative phrase in subsequent litigation. Its silence is telling.

7. In Any Event, Claimant Has Failed To Exhaust Local Remedies Even Under The More Relaxed Interpretation Of The Standard By The *Chevron I* Tribunal

281. In any event, even if the *Chevron I* tribunal were correct in its construction of Article II(7), *quod non*, Claimant still cannot bypass the exhaustion requirement.

282. 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."⁴⁸⁴ The tribunal stressed, consistent with customary international law, that "a claimant is required to make use of *all* remedies that are available and might have rectified the wrong complained of,"⁴⁸⁵ and that a "high likelihood of success of these remedies is *not* required in order to expect a claimant to attempt them."⁴⁸⁶ The tribunal eventually found Ecuador liable for breach of Article II(7), holding that certain collateral procedural mechanisms could not have rectified the particular problem of the alleged delays in the judicial proceedings.⁴⁸⁷

283. The *Chevron I* tribunal's view that all remedies must be exhausted to establish a violation of Article II(7) even seen a *lex specialis*, is supported by the long history of the US position that

⁴⁸⁴ *Chevron I* (Partial Award on the Merits), ¶ 268 (CLM-111).

⁴⁸⁵ *Id.*, ¶ 326 (emphasis added).

⁴⁸⁶ *Id.* (emphasis added).

⁴⁸⁷ *Id.*, ¶¶ 330-332.

States may be held liable for judicial actions only upon exhaustion of domestic remedies. The US position has been firm since 1858,⁴⁸⁸ and was forcefully stated in its submissions in *Loewen v. US*.⁴⁸⁹ There is absolutely no evidence that the United States intended an exception to this firmly held position when it began to include provisions like Article II(7) into its BITs.

284. Claimant’s case of breach of Article II(7) fails to meet even this “qualified exhaustion” requirement. Even under the *Chevron I* tribunal’s interpretation of the standard, Claimant’s appeal to the Constitutional should have been resorted to, given that it “[is] available and might have rectified the wrong complained of,” as shown above.

8. Conclusion

285. *First*, Ecuador has shown that customary international law is regularly incorporated into treaty regimes indirectly through references to terms of art found in customary international law like “effective means.” *Second*, it has established that, contrary to Merck’s claims, Ecuador’s interpretation of Article II(7) does *not* violate the principle of *effet utile* precisely because of the principle of *ex abundante cautela*: in fact, emphasizing the same right contained in customary law and Article II(3)(a) *is* Article II(7)’s purpose. *Third*, Ecuador has addressed the split of opinion among tribunals addressing the issue at hand, showing that the decision of the *Chevron I* tribunal was characterized by faulty premises and lapses in reasoning. *Fourth*, Ecuador has shown not only that U.S. BIT provisions often incorporate pre-existing customary law, but also that Article II(7) *in particular* is one such provision. *Fifth*, Ecuador has explained why the

⁴⁸⁸ Letter from Mr. Marcy, U.S. Secretary of State, to Chevalier Bertinatti, Sardinian Minister (1 Dec. 1858) (“[t]he state is not responsible for the mistake or errors of its courts [...] when the decision has not been appealed to the court of last resort.”), cited in *The Loewen Group, Inc. and Raymond L. Loewen v. The United States of America*, ICSID Case No. ARB(AF)/98/3, Memorial of the United States of America on Matters of Competence and Jurisdiction (15 Feb. 2000) (“*Loewen*, U.S. Memorial”), p. 50 (RLA-155).

⁴⁸⁹ See *Loewen*, U.S. Memorial, pp. 49-56 (RLA-155); *The Loewen Group, Inc. and Raymond L. Loewen v. The United States of America*, ICSID Case No. ARB(AF)/98/3, Response of the United States of America to the Submissions of Claimants Concerning Matters of Jurisdiction and Competence (7 July 2000), pp. 16-32 (RLA-157).

United States ultimately removed Article II(7) from its 2004 Model BIT, choosing instead to “acknowledge” the existence of the same right under customary law and the minimum standard of treatment. *Finally*, the EPA is a remedy that should have been resorted to even under the interpretation of the provision by the tribunal in the *Chevron v. Ecuador* case.

286. It follows that Article II(7) is to no avail to Claimant: its inability to establish a denial of justice under customary international law for lack of judicial finality is equally dispositive here.

C. Claimant's Failure To Exhaust Local Remedies Deprives The Tribunal Of Jurisdiction And Renders Its Claims Inadmissible

287. The story of this arbitration is a simple one. Claimant has initiated investor-State proceedings to create a “stand-by” tribunal *in case* a denial of justice should occur *in the future*. In its haste to get a decision on the merits, Claimant chose not to follow the rules of international law requiring a claimant to first exhaust its local remedies. Not only does this run afoul of the mandates of jurisdiction and admissibility, it also constitutes an abuse of process. For these reasons, Claimant’s claims must not prevail.

288. For an investment treaty tribunal to proceed to the merits, a tribunal must first have jurisdiction over the parties and the claims. The tribunal should also examine the admissibility of the claim—*i.e.*, whether the claim is timely and ripe for adjudication and whether other circumstances exist that would render the exercise of established jurisdiction improper.

289. Claimant has accepted that, in order to bring a claim for denial of justice, the claimant “must have *exhausted* ‘reasonably available’ local remedies [...] ‘to correct the challenged action.’”⁴⁹⁰ Claimant’s legal expert has also endorsed this view.⁴⁹¹ As explained above, Claimant has failed to exhaust all reasonably available and effective local remedies with respect to the

⁴⁹⁰ Claimant’s Memorial, ¶ 375 (emphasis added).

⁴⁹¹ First Expert Report of Prof. Jan Paulsson (2 Oct. 2013) (“First Paulsson Expert Opinion”), ¶¶ 53-54.

NIFA v. MSDIA litigation proceedings. The allegations of mistreatment at the hands of Ecuador's judiciary, and in particular the NCJ, could have been the basis for an EPA. As a result, the Ecuadorian judiciary has been denied the opportunity to correct alleged wrongs.

290. This case does not represent a *bona fide* effort to invoke international arbitration for an accomplished breach of international law. Rather, Claimant initiated costly arbitral proceedings to have the comfort of a "stand-by" tribunal. Ecuador has been forced to defend itself on the international plane against premature claims. Claimant's conduct is an abuse of process, and must be sanctioned accordingly.

291. The following paragraphs will explain that denial of justice claims can be examined as a matter of jurisdiction; that there is no "investment dispute" within the Ecuador-U.S. BIT; that Merck's claims are inadmissible because they are premature and do not satisfy a *prima facie* jurisdictional test; and, finally, that this Tribunal cannot proceed to the merits because Claimant's claims are an "abuse of process."

1. Denial Of Justice Claims Can Be Assessed As A Matter Of Jurisdiction

292. In its Reply, Claimant asserts that its denial of justice claims can *only* be considered at the *merits* phase of proceedings.⁴⁹² This is incorrect. If a claimant submits a denial of justice claim prematurely, *i.e.*, before accomplishing the exhaustion of all available and effective remedies necessary to establish a breach, the failure to exhaust local remedies can indeed have jurisdictional implications.⁴⁹³ As described below, investor-state tribunals have dismissed claims

⁴⁹² Claimant's Reply, ¶¶ 54-59.

⁴⁹³ Second Amerasinghe Expert Report, p. 3 (*citing Alps Finance and Trade AG v. The Slovak Republic*, UNCITRAL (Slovak Republic-Switzerland BIT), Award (5 Mar. 2011) ("*Alps Finance*"), ¶¶ 251-252 (RLA-105); *Toto Costruzioni Generali S.p.A. v. The Republic of Lebanon*, ICSID Case No. ARB/07/12, Decision on Jurisdiction (11 Sept. 2009) (van Houtte, Feliciani, Moghaizel) ("*Toto (2009)*"), ¶¶ 164-168 (RLA-95)); Second Caflisch Expert Report, ¶¶ 14-15 (noting that the Tribunal has no jurisdiction over Merck's denial of justice claims because there was no cognizable claim under international law and the Ecuador-U.S. BIT at the time the Tribunal

of denial of justice for want of *prima facie evidence* to prove a violation of the treaty due to the claimant's failure to exhaust local remedies.

293. In *Toto v. Lebanon*, the claimant sought to couch its denial of justice claim as a violation of the “fair and equitable treatment” provision of the Italy-Lebanon BIT.⁴⁹⁴ The claim was predicated upon the delay in the adjudication of two actions that Toto had filed in Lebanese courts, including the Lebanese *Conseil d'État*. The ICSID tribunal evaluated—as a matter of *jurisdiction*—whether Toto had, in fact, exhausted its local remedies.⁴⁹⁵ In its evaluation, the tribunal looked to whether the procedures before the Lebanese *Conseil d'État* could be viewed as excessively long, given the circumstances of the case. In the end, the tribunal held that, *because the claimant had failed to make use of local remedies to shorten procedural delays*, there was no *prima facie* jurisdiction to entertain the claimant's alleged claims for denial of justice.⁴⁹⁶

294. Similarly, in *Alps Finance v. Slovak Republic*, an UNCITRAL tribunal declined to uphold jurisdiction for a denial of justice claim because of the claimant's failure to meet the test of establishing a *prima facie* a breach of the BIT.⁴⁹⁷ There, the tribunal clarified that international law does not prohibit “a possible error in law, but a system of justice which falls below a minimum standard so as to lead to an inevitable denial of justice.”⁴⁹⁸ In particular, the tribunal observed that “other remedies were still available to the Claimant in internal law” in order to

was seized given that Merck has failed to exhaust available and effective local remedies; and further noting that this exhaustion cannot happen after the initiation of arbitration proceedings).

⁴⁹⁴ *Toto* (2009), ¶ 143 (RLA-95).

⁴⁹⁵ *Id.*, ¶¶ 152-168.

⁴⁹⁶ *Id.*, ¶¶ 167-168.

⁴⁹⁷ *Alps Finance*, ¶ 248 (RLA-105) (citing *Impregilo S.p.A. v. Islamic Republic of Pakistan*, ICSID Case No. ARB/03/3, Decision on Jurisdiction (22 Apr. 2005) (Guillaume, Cremades, Landau), ¶ 108 (CLM-53); *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) (Kaufmann-Kohler, Berman, Böckstiegel) (“*Bayindir*”), ¶ 195 (CLM-1); *Jan de Nul and Dredging International N.V. v. Arab Republic of Egypt*, ICSID Case No. ARB/04/13, Decision on Jurisdiction (16 June 2006) (Kaufmann-Kohler, Mayer, Stern), ¶¶ 69-71 (RLA-72)).

⁴⁹⁸ *Alps Finance*, ¶ 250 (RLA-105).

revise the judgment the claimant had considered prejudicial.⁴⁹⁹ The tribunal concluded the claimant had failed to produce enough evidence to show a possible case for denial of justice; as a result, the *prima facie* test of a possible treaty claim had not been met.⁵⁰⁰

295. In *Apotex v. United States*, an UNCITRAL tribunal proceeded on the basis that the respondent's finality objection was a matter of *ratione materiae* jurisdiction.⁵⁰¹ In fact, the tribunal recognized that, from the inception of the proceedings, both parties had treated the question of judicial finality as a jurisdictional/threshold issue.⁵⁰²

296. In *Achmea v. Slovak Republic*, another UNCITRAL tribunal applied the *prima facie* test in order to assess if the claims put forward were capable of coming within the provisions of the Netherlands-Slovakia BIT.⁵⁰³ The tribunal dismissed all claims for failure to meet that test, including in relation to *past*, as well as future, State measures.⁵⁰⁴ The tribunal made important observations with regard to the test for *prima facie* jurisdiction. *First*, it stated that the facts, if assumed proven, must be capable of making out a treaty breach.⁵⁰⁵ *Second*, it stated that a claimant has the onus to marshal actual evidence to bear out a *prima facie* case, even at the

⁴⁹⁹ *Id.*, ¶ 251.

⁵⁰⁰ *Id.*, ¶ 252.

⁵⁰¹ *Apotex* (2013), ¶ 260 (RLA-122). See Second Amerasinghe Expert Report, ¶ 7 (stating: “[T]he ‘substantive’ nature of the rule in question, on which the parties in this case are agreed, does not automatically prevent the application of the rule from being examined at the stage of the jurisdictional inquiry.”).

⁵⁰² *Apotex* (2013), ¶ 260 (RLA-122).

⁵⁰³ *Achmea B.V. v. The Slovak Republic*, PCA Case No. 2013-12 (Number 2), UNCITRAL (Netherlands-Slovak Republic BIT), Award on Jurisdiction and Admissibility (20 May 2014) (Lévy, Beechey, Dupuy) (“*Achmea*”), ¶¶ 208, 214 (CLM-228).

⁵⁰⁴ *Id.*, ¶¶ 262-265.

⁵⁰⁵ The tribunal endorsed the *prima facie* test commonly associated with Judge Rosalyn Higgins of the ICJ in the *Oil Platforms* case. *Oil Platforms (Islamic Republic of Iran v. United States of America)*, Preliminary Objections, Separate Opinion of Judge Higgins (12 Dec. 1996), I.C.J. Reports 1996, p. 847, ¶ 32 (CLM-86).

jurisdictional stage.⁵⁰⁶ Finally, the tribunal noted that jurisdiction must exist “on the day of” the institution of the arbitral proceedings, not afterwards.⁵⁰⁷

297. In sum, denial of justice claims can certainly be assessed as a matter of jurisdiction, and previous tribunals have done so. In the present case, Merck has not exhausted available and effective local remedies in the Ecuadorian legal system, translating into a failure to state and prove a *prima facie* case under the BIT.

2. The Tribunal Has No Jurisdiction Because There Is No “Investment Dispute” Within Article VI Of The BIT

298. Because the actions of which Claimant complains do not constitute final actions of Ecuador’s judicial system as a whole, they cannot be the basis of any “investment dispute” under the Treaty.

299. Claimant hastily commenced this international arbitration to benefit from having a “stand-by” tribunal in place. The hope, no doubt, was that this Tribunal could “monitor” the developments in the underlying Ecuadorian litigation. It is little surprise, therefore, that the preconditions for the constitution of this Tribunal have not been met.

300. Specifically, this Tribunal’s adjudicative power is predicated upon the pre-existence of an “investment dispute,” as stated in Article VI(1) of the Ecuador-U.S. BIT.⁵⁰⁸ Claimant argues that an “investment dispute” under Article VI of the BIT exists as long as one party alleges a breach and the other positively opposes.⁵⁰⁹ This is, however, only half the story. Positive opposition is

⁵⁰⁶ *Achmea*, ¶ 215 (CLM-228).

⁵⁰⁷ *Id.*, ¶ 269.

⁵⁰⁸ The Ecuador-U.S. BIT defines an “investment dispute” as follows: “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 breach of any right conferred or created by this Treaty with respect to an investment.” Ecuador-U.S. BIT, Art. VI(1) (R-1).

⁵⁰⁹ Claimant’s Reply, ¶ 63.

not the only requirement for the existence of a “dispute.” There is also the requirement under general international law that the “dispute” be concrete.⁵¹⁰ Notably, Prof. Christoph Schreuer has cautioned that, in order to find a “dispute,” the disagreement between the parties “must not be purely theoretical.”⁵¹¹ Rather, it must contain “*clearly identified issues* between the parties” and be “stated in terms of a *concrete claim*.”⁵¹² Investment treaty tribunals have likewise stressed the need for a “dispute” to be concrete.⁵¹³

301. Claimant’s claim falls at the first hurdle. There is no “concrete” investment dispute in this arbitration.⁵¹⁴ Pending exhaustion of local remedies, Claimant’s claims in this arbitration are all *hypothetical*; indeed, this very arbitration has been initiated precisely to set in place a “stand-by” international tribunal.⁵¹⁵ The facts bear this out. Domestic proceedings in Ecuador are still

⁵¹⁰ *Case Concerning the Northern Cameroons (Cameroon v. United Kingdom)*, Preliminary Objections, Judgment (2 Dec. 1963), I.C.J. Reports 1963, p. 15, pp. 33-34 (RLA-138) (The ICJ emphasized: “The function of the Court is to state the law, but it may pronounce judgment only in connection with *concrete cases* where there exists at the time of the adjudication an actual controversy involving a conflict of legal interests between the parties.”) (emphasis added).

⁵¹¹ C. Schreuer, et al., *THE ICSID CONVENTION: A COMMENTARY* (2009) (“Schreuer”), p. 94 (RLA-87(bis)). Prof. Schreuer continues: “It is not the task of the Centre [ICSID] to clarify legal questions *in abstracto*.” *Id.* See also M. Waibel, *Investment Arbitration: Jurisdiction and Admissibility*, University of Cambridge Faculty of Law Legal Studies Research Paper Series (Feb. 2014), p. 24 (RLA-194); Ecuador’s Counter-Memorial, ¶¶ 263-270.

⁵¹² Schreuer, p. 94 (RLA-87(bis)) (emphasis added).

⁵¹³ *Maffezini* (Decision on Objections to Jurisdiction), ¶ 94 (CLM-62); *Tokios Tokelès v. Ukraine*, ICSID Case No. ARB/02/18, Decision on Jurisdiction (29 Apr. 2004) (Weil, Bernardini, Price), ¶ 106 (CLM-81); *AES Corporation v. The Argentine Republic*, ICSID Case No. ARB/02/17, Decision on Jurisdiction (26 Apr. 2005) (Dupuy, Böckstiegel, Bello Janeiro) (“*AES Corporation*”), ¶ 43 (CLM-107). Each of these cases followed with approval the legal test Prof. Schreuer was referring to, but, on the facts, found that a qualifying legal dispute did exist.

⁵¹⁴ Properly construed, Merck’s pleaded case at the time of initiation of these proceedings was that, at some point in the future, a denial of justice may occur. But because Ecuador’s courts had not at that time finally pronounced on the *NIFA v. MSDIA* litigation at issue, there was no offending measure that can be the subject of adjudication by this Tribunal.

⁵¹⁵ See Ecuador’s Rejoinder to Claimant’s Request for Interim Measures (17 Aug. 2012), ¶¶ 81-88; First Expert Report of Prof. Lucius Caflisch (24 Feb. 2014), p. 3 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.”). See also *Continental Casualty*, ¶ 92 (RLA-165); *Railroad Development Corporation (RDC) v. Republic of Guatemala*, ICSID Case No. ARB/07/23, Second Decision on Objections to Jurisdiction (18 May 2010) (Rigo Sureda, Eizenstat, Crawford), ¶ 136 (RLA-180). The *AES v. Argentina* tribunal further noted that the claimant’s claims must raise “legal issues in relation with a *concrete situation*.” *AES Corporation*, ¶ 44 (CLM-107).

underway. As shown above, Claimant has chosen to sit on its hands rather than invoke the judicial remedies available under Ecuadorian law.

302. Claimant's has initiated these arbitral proceedings in respect of a judicial violation that *may theoretically occur in the future*. This goes against the definition of "investment dispute" in Article VI of the Ecuador-U.S. BIT and general international law. As a result, the Tribunal is without jurisdiction to hear Claimant's claims.

3. Claimant's Claims Are Inadmissible Because They Are Not Ripe For Adjudication

303. As noted above, the Parties agree that a denial of justice claim can only be ripe and actionable once all domestic remedies have been exhausted.⁵¹⁶ And when a claim is not ripe for adjudication, it is inadmissible. Here, Claimant has deliberately failed to exercise its available remedial rights under Ecuadorian law.⁵¹⁷

304. Admissibility issues are threshold problems that preclude consideration on the merits. So, although the reasons may be *connected with* the merits, they are not one and the same thing.⁵¹⁸ International tribunals have stressed that, when a claim is premature, it is inadmissible.⁵¹⁹ For example, in the *Aminoil* arbitration, the tribunal rejected the claimant's attempts to challenge a law nationalizing Aminoil's concession case. The tribunal held that it could only entertain an

⁵¹⁶ Claimant's Memorial, ¶ 375; First Paulsson Expert Opinion, ¶¶ 53-54.

⁵¹⁷ An *ex-ante* assessment of machinations of Ecuador's court system is manifestly outside the jurisdiction of this Tribunal. Ecuador and the United States did not agree to such wide jurisdiction under the BIT, and Merck has not proved otherwise.

⁵¹⁸ See *Enron Corp. and Ponderosa Assets v. Argentine Republic*, ICSID Case ARB/01/3, Decision on Jurisdiction (14 Jan. 2004) (Orrego Vicuña, Gros Espiell, Tschanz), ¶ 33 (RLM-87).

⁵¹⁹ See *SGS Société Générale de Surveillance S.A. v. Republic of the Philippines*, ICSID Case No. ARB/02/6, Decision of the Tribunal on Objections to Jurisdiction (29 Jan. 2004) (El-Koshi, Crawford, Crivellaro) (CLM-77).

expropriation claim after concrete steps had been taken.⁵²⁰ Similarly, in the *Glamis Gold* case, an UNCITRAL tribunal held that mere threats of expropriation were “not sufficient to make such a claim ripe.”⁵²¹

305. For the reasons noted above, Claimant’s refusal to allow Ecuadorian Courts to correct the alleged wrongs means that Claimant’s Treaty claims fail, both in fact and in law.

4. The Tribunal Has No Jurisdiction Because Merck’s Initiation Of This Arbitration Is An Abuse Of Process

306. It is beyond question that the prohibition against abuse of process is a general principle of international law. For the reasons outlined below, and as discussed earlier in this chapter, the present arbitration is abusively premature.

a. Claimant Commenced This Arbitration In Haste

307. At the outset, Claimant launched this arbitration in contravention of the clear principle of international law that there can be no claim for denial of justice until *after* (a) Claimant has exhausted its remedial rights in the Ecuadorian judicial system, and (b) the system *as a whole* has spoken. At the time of its Request for Arbitration, Claimant was vigorously pressing an appeal before the NCJ, whose outcome was unknowable.

308. Throughout the course of this arbitration, Claimant has repeatedly found itself having to report contemporaneous developments in the Ecuadorian courts to the Tribunal.⁵²² By itself, this

⁵²⁰ *Aminoil v. Kuwait*, Final Award (24 Mar. 1982), 21 I.L.M. 976, p. 1026 (RLA-142). *See also Mariposa Development Company and Others (United States) v. Panama*, Decision (27 June 1933), 6 U.N.R.I.A.A. 338, p. 341 (RLA-150).

⁵²¹ *Glamis Gold*, ¶ 328 (RLA-93).

⁵²² *See* Claimant’s letters of 25 September 2012 (announcing to the Tribunal the issuance of the first NCJ decision); 6 November 2012 (announcing to the Tribunal the NCJ’s decision on clarification of the first NCJ decision); 12 December 2012 (announcing to the Tribunal’s Prophar’s filing of an extraordinary protection action with Ecuador’s Constitutional Court); 4 February 2013 (announcing to the Tribunal the admission of PROPHAR’s extraordinary protection action by the Constitutional Court); 13 March 2013 (announcing to the Tribunal the Constitutional Court’s judgment vacating the first NCJ decision); and 14 November 2014 (announcing to the Tribunal the NCJ’s judgment). Indeed, the continued pendency of proceedings in the Ecuadorian courts led Claimant to ask that the Tribunal suspend further action on its request for interim measures. *See* Claimant’s letters of 28 September 2012, p.

demonstrates that the Ecuadorian judicial system has not yet been afforded the opportunity, required by international law, to address finally the issues asserted by Claimant. Claimant simply wanted a “stand-by” tribunal to “monitor” the underlying Ecuadorian litigation. This is an abuse of the investment treaty arbitration process, and a breach of Claimant’s duty to arbitrate in good faith.⁵²³ This Tribunal should sanction such conduct by exercising its inherent powers to dismiss jurisdiction over each of Claimant’s claims.⁵²⁴

b. Abuse Of Process Implicates The Tribunal’s Jurisdiction

309. Under the principle of “abuse of process,” domestic courts may dismiss an action to prevent a misuse of the judicial procedure.⁵²⁵ Understandably, courts have a wide remit of powers to dismiss proceedings on such grounds. The late Sir Hersch Lauterpacht recognized this when saying that “[t]here is no [...] right[,] however well established, which could not, in some circumstances, be refused recognition on the ground that it has been abused.”⁵²⁶

1; 16 January 2013, p. 1; and 4 February 2013, p. 2. Claimant eventually withdrew its request for the very same reason. See Claimant’s Letter to the Tribunal (11 Mar. 2013), p. 1.

⁵²³ *Libananco Holdings Co. Limited v. Republic of Turkey*, ICSID Case No. ARB/06/8, Decision on Preliminary Issues (23 June 2008) (Hwang, Alvarez, Berman) (“*Libananco*”), ¶ 78 (RLA-170) (stating: “Nor does the Tribunal doubt for a moment that, like any other international tribunal, it must be regarded as endowed with the inherent powers required to preserve the integrity of its own process—even if the remedies open to it are necessarily different from those that might be available to a domestic court of law in an ICSID Member State. The Tribunal would express the principle as being that parties have an obligation to arbitrate fairly and in good faith and that an arbitral tribunal has the inherent jurisdiction to ensure that this obligation is complied with; this principle applies in all arbitration, including investment arbitration, and to all parties, including States (even in the exercise of their sovereign powers.”).

⁵²⁴ 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.”).

⁵²⁵ Or, in the seminal words of the UK House of Lords, to avoid the risk of bringing “the administration of justice into disrepute among right-thinking people.” *Hunter v. Chief Constable of the West Midlands Police and Others*, [1981] UKHL 13 (19 Nov. 1981), p. 1 (RLA-141). See also *Waste Management, Inc. v. United Mexican States*, ICSID Case No ARB(AF)/00/3, Decision on Mexico’s Preliminary Objection concerning the Previous Proceedings (26 June 2002) (Crawford, Civiletti, Magallón Gómez) (“*Waste Management*”), ¶¶ 49-50 (CLM-268) (endorsing the tribunal’s inherent powers to protect the integrity of arbitral proceedings).

⁵²⁶ H. Lauterpacht, *THE DEVELOPMENT OF INTERNATIONAL LAW BY THE INTERNATIONAL COURT* (1958), p. 164 (CLM-339).

310. A finding of “abuse of process,” or “abuse of right,” is to be determined in each case, taking into account all the relevant circumstances.⁵²⁷ When an “abuse of process” is present, the relevant court or tribunal possesses the power to dismiss jurisdiction over the claimant’s claims.⁵²⁸ This tribunal, like any other, is endowed with the inherent powers to preserve the integrity of its own process.⁵²⁹ Furthermore, Article 15(1) of the UNCITRAL Rules provides an investment treaty tribunal wide discretion.⁵³⁰ (This provision can be compared with corresponding Rule 19 of the ICSID Arbitration Rules, which is more narrowly drafted.⁵³¹)

311. Claimant does not dispute the existence, or application, of the doctrine of “abuse of process.” Indeed, Claimant agrees that, if a tribunal finds an abuse of rights, the tribunal can decide not to hear a claimant’s claims.⁵³² Claimant also agrees that a tribunal can find an “abuse of process” if one party has acted “unreasonably.”⁵³³ Given its tenuous position, Claimant misuses legal authorities to support its narrow articulation of “abuse of rights.” These errors are briefly outlined below.

⁵²⁷ *Mobil Corporation and others v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB/07/27, Decision on Jurisdiction (10 June 2010) (Guillaume, Kaufmann-Kohler, El-Kosheri), ¶ 177 (RLA-99).

⁵²⁸ *Phoenix Action, Ltd v. the Czech Republic*, ICSID Case No. ARB/06/5, Decision on Jurisdiction (15 Apr. 2009) (Stern, Bucher, Fernández-Armesto) (“*Phoenix Action*”), ¶¶ 143-144 (RLA-92); *ST-AD GmbH (Germany) v. The Republic of Bulgaria*, PCA Case No. 2011-06, UNCITRAL (Bulgaria-Germany BIT), Award on Jurisdiction (18 July 2013) (Stern, Klein, Thomas) (“*ST-AD GmbH*”), ¶¶ 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) (Binnie, Hanotiau, Stern) (“*Lao Holdings*”), ¶ 81 (RLA-126).

⁵²⁹ *Libananco*, ¶ 78 (RLA-170).

⁵³⁰ Article 15(1) of the UNCITRAL Rules provides: “Subject to these Rules, the arbitral tribunal may conduct the arbitration in such manner as it considers appropriate, provided that the parties are treated with equality and that at any stage of the proceedings each party is given a full opportunity of presenting his case.”

⁵³¹ Rule 19 of the ICSID Arbitration Rules provides: “The Tribunal shall make the orders required for the conduct of the proceeding.”

⁵³² Claimant’s Reply, ¶ 69 fn. 27 (citing *The Rompetrol Group N.V. v. Romania*, ICSID Case No. ARB/06/3, Award (6 May 2013) (Berman, Donovan, Lalonde), ¶ 115 (CLM-364)).

⁵³³ Claimant’s Reply, ¶ 70 (in which Merck concedes: “[I]nternational tribunals consistently have rejected claims for abuse of process absent clear evidence that the party alleged to have engaged in an abuse of process exercised its rights *unreasonably* or in bad faith.”) (emphasis added); see also *Phoenix Action*, ¶ 100 (RLA-92).

312. *First*, Claimant misattributes a provision of the Mexican Civil Code to the views of the late Prof. Ian Brownlie on the principle of “abuse of process.” In this regard, Claimant’s Reply states:

As explained by Prof. Brownlie, international tribunals have provided ‘*limited support*’ to the doctrine of abuse of process, recognizing its applicability only in cases where a ‘right was exercised *only in order to cause* [...] *damage, without any advantage* to the person entitled to the right.’⁵³⁴

313. These above views were *not* those of Prof. Brownlie. Rather, Prof. Brownlie was merely quoting Article 1912 of the Mexican Civil Code; he did not venture to say that provision was his *own* understanding of “abuse of rights” under international law. For the benefit of the Tribunal, the exact words of Prof. Brownlie are reproduced below:

Several systems of law know the doctrine of abuse of rights, exemplified by Article 1912 of the Mexican Civil Code: ‘When damage is caused to another by the exercise of a right, there is an obligation to make it good if it is proved that the right was exercised *only in order to cause* the damage, without any advantage to the person entitled to the right.’⁵³⁵

314. *Second*, Claimant cites to certain ICSID authorities, in an attempt to show that dismissing a case for “abuse of process” is some sort of extreme action.⁵³⁶ But Claimant misinterprets the very cases it employs. The authorities it uses actually stand for the proposition that an “abuse of process” must be supported by sufficient evidence; those cases do not support the legal limitations Claimant reads into them.⁵³⁷ For example, in *Bayindir v. Pakistan*, the tribunal merely

⁵³⁴ Claimant’s Reply, ¶ 68 (emphasis in original) (*citing* I. Brownlie, *PRINCIPLES OF PUBLIC INTERNATIONAL LAW* (2008) (“Brownlie”), p. 444 (CLM-301)).

⁵³⁵ Brownlie, p. 444 (CLM-301) (*citing* the Mexican Civil Code) (internal citations omitted).

⁵³⁶ Claimant’s Reply, ¶ 70 fn. 28.

⁵³⁷ *E.g.*, *Quiborax S.A., Non Metallic Minerals S.A. and Allan Fosk Kaplun v. Plurinational State of Bolivia*, ICSID Case No. ARB/06/2, Decision on Jurisdiction (27 Sept. 2012) (Kaufmann-Kohler, Lalonde, Stern), ¶ 297 (CLM-259) (where the tribunal concluded, on the facts, that the claimants had not fabricated evidence or engaged in fraud for the purpose of gaining access to ICSID arbitration; hence, there was no abuse of process).

held that making a submission at the end of the jurisdictional hearing did not, in itself, amount to an “abuse of process.”⁵³⁸ More worryingly—and contrary to Claimant’s legal argument,⁵³⁹ the tribunal in *Saipem v. Bangladesh* actually did find an abuse of right.⁵⁴⁰ In fact, the *Saipem* tribunal’s ruling could not have been any clearer. That tribunal found that the actions of Bangladesh had stymied the ICSID arbitration process. The tribunal’s reasoning is set out below:

For all these reasons, the Tribunal considers that the Bangladeshi courts abused their supervisory jurisdiction over the arbitration process. It is true that the revocation of an arbitrator’s authority can legitimately be ordered in case of misconduct. It is further true that in making such order national courts do have substantial discretion. However, they cannot use their jurisdiction to revoke arbitrators for reasons wholly unrelated with such misconduct and the risks it carries for the fair resolution of the dispute. Taken together, the standard for revocation used by the Bangladesh courts and the manner in which the judge applied that standard to *the facts indeed constituted an abuse of right.*⁵⁴¹

315. The tribunal in *Pac Rim v. El Salvador*, another decision Claimant cites, actually stated that assessing “abuse of process” as a matter of jurisdiction or adjudication was, in essence, one and the same thing.⁵⁴²

316. *Third*, investor-State tribunals have comfortably rejected claims on the grounds of “abuse of process,” contrary to what Claimant implies.⁵⁴³ In particular, tribunals have held that, when an

⁵³⁸ *Bayindir*, ¶ 172 (CLM-1).

⁵³⁹ See Claimant’s Reply, ¶ 70 fn. 28. Merck incorrectly argues that no “abuse of process” was found in that case.

⁵⁴⁰ *Saipem S.p.A. v. The People’s Republic of Bangladesh*, ICSID Case No. ARB/07/05, Award (30 June 2009) (Kaufmann-Kohler, Schreuer, Otton), ¶¶ 159, 161 (CLM-75).

⁵⁴¹ *Id.*, ¶ 159 (emphasis added).

⁵⁴² *Pac Rim Cayman LLC v. The Republic of El Salvador*, ICSID Case No. ARB/09/12, Decision on the Respondent’s Jurisdictional Objections (1 June 2012) (Veeder, Tawil, Stern), ¶ 2.10 (CLM-258) (stating: “In arriving at this decision, the Tribunal has noted that the Respondent’s jurisdictional objection based on Abuse of Process by the Claimant does not, in legal theory, operate as a bar to the existence of the Tribunal’s jurisdiction; but, rather, as a bar to the exercise of that jurisdiction, necessarily assuming jurisdiction to exist. For present purposes, the Tribunal considers this to be a distinction without a difference.”).

⁵⁴³ *Pan American Energy LLC and BP Argentina Exploration Company v. Argentine Republic and BP America Production Company, Pan American Sur SRL, Pan American Fueguina, SRL and Pan American Continental SRL v. Argentine Republic*, ICSID Case No. ARB/03/13 & ARB/04/8, Decision on Preliminary Objections (27 July

“abuse of process” has been established, it is *unnecessary to proceed to the merits*.⁵⁴⁴ Most recently, in *ST-AD GmbH v. Bulgaria*, an UNCITRAL tribunal held that the claimant had committed an “abuse” of the investment arbitration system because the claimant had attempted to manufacture a dispute it was not entitled to bring.⁵⁴⁵

317. *Fourth*, Claimant further argues that “an abuse of process implicates the tribunal’s jurisdiction only if it implicates an “issue of consent.”⁵⁴⁶ Again Claimant reads into previous cases limitations that are not there. “Abuse of process” certainly goes beyond issues of consent: it goes to the core principle that parties must abide by the principle of good faith.⁵⁴⁷

318. *Fifth*, Claimant’s argument also ignores the wide powers this Tribunal possesses under article 15(1) of the UNCITRAL Rules to regulate the proceedings.⁵⁴⁸ For example, in *Waste Management II v. Mexico*, the parties and the tribunal all acknowledged that there was an inherent power to prevent an “abuse of process.” In that case, Mexico had argued that the claimant’s initiation of serial proceedings before domestic courts and two arbitral tribunals was an “abuse of process” and “that the Tribunal should exercise its inherent power to prevent such

2006) (Caflisch, Stern, van den Berg) (“*Pan American*”), ¶ 52 (RLM-46); *Phoenix Action*, ¶¶ 143-144 (RLA-92); *ST-AD GmbH*, ¶ 423 (RLA-124); *Lao Holdings*, ¶ 81 (RLA-126).

⁵⁴⁴ *Phoenix Action*, ¶ 100 (RLA-92) (stating that good faith was a jurisdictional requirement); *Fraport AG Frankfurt Airport Services Worldwide v. Republic of the Philippines*, ICSID Case No. ARB/03/25, Award (16 Aug. 2007) (Fortier, Cremades, Reisman), ¶¶ 396-404 (RLA-78) (dismissing a claim on jurisdictional grounds because of the claimant’s lack of good faith); *Pan American*, ¶ 52 (RLM-46) (affirming that the tribunal should examine whether or not claims are abusive at the jurisdictional stage).

⁵⁴⁵ *ST-AD GmbH*, ¶ 423 (RLA-124).

⁵⁴⁶ Claimant’s Reply, ¶¶ 72-73.

⁵⁴⁷ See generally, *Cementownia “Nowa Huta” S.A. v. Republic of Turkey*, ICSID Case No. ARB(AF)06/2, Award (17 Sept. 2009) (Tercier, Lalonde, Thomas) (RLA-173); *Phoenix Action* (RLA-92).

⁵⁴⁸ Article 15(1) of the UNCITRAL Rules provides that the arbitral tribunal may conduct the proceedings in such a manner as it deems appropriate. The provision is said to reflect the procedural flexibility that is generally regarded as one of the main advantage of international arbitration. D. Caron, et al., *THE UNCITRAL ARBITRATION RULES: A COMMENTARY* (2006), p. 26 (RLM-85(bis)).

an abuse.”⁵⁴⁹ The tribunal agreed, saying that such a power existed “for the purpose of protecting the integrity of the Tribunal’s processes or dealing with genuinely vexatious claims.”⁵⁵⁰

319. In the present case, there is an abundance of evidence to support a finding of “abuse of process.” As demonstrated earlier, constitutional redress in Ecuadorian courts was an available and effective remedy that Claimant chose to ignore. Indeed, Claimant has consistently refused to act in furtherance of its interests in the underlying Ecuadorian litigation.⁵⁵¹ Instead, Claimant has opted to use the international arbitration process under the Ecuador-U.S. BIT as an insurance policy. By so doing, it has committed an abuse of process.

5. Conclusion

320. To recap, Claimant initiated this UNCITRAL arbitration in haste. This haste is evidenced by the premature claims and a hypothetical legal dispute engineered as a basis for this Tribunal’s jurisdiction. This attempt to benefit from a “stand-by” tribunal is also an “abuse of process.” The Tribunal must sanction this abuse by dismissing Claimant’s claims in their entirety.

⁵⁴⁹ *Waste Management*, ¶ 48 (CLM-268).

⁵⁵⁰ *Id.*, ¶ 49. On the facts, the tribunal found no such abuse had taken place, stating: “In particular, the Tribunal does not consider that, on the evidence available to it, there is any basis for saying that the present claim was brought in bad faith or that it is not a *bona fide* claim.” *Id.*, ¶ 50.

⁵⁵¹ In the words of the ILC, a claimant who wishes to act according to the requirement of exhaustion of local remedies “must show that he wants to win the case.” Report of the International Law Commission on the work of its 29th Sess., Doc. A/32/10, [1977 II/2] YILC. 31, U.N. Doc. A/CN.4/SER. A/1977 Add. I (Part 2), p. 47 (RLA-27).

V. EVEN IF THE NCJ JUDGEMENT 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

A. Introduction

321. 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 November 2014 NCJ decision resulting from those proceedings constitutes a denial of justice or other violation of the Treaty. As a consequence, even if Merck’s claims were not fatally premature, they still must be dismissed for lack of merit.

B. Ecuador Does Not Misstate The Applicable Standard For Finding A Denial Of Justice

322. Merck claims that Ecuador “[m]isstates”⁵⁵² the applicable legal standard for finding a denial of justice. Merck makes three particular allegations in this regard.

323. *First*, Merck alleges that Ecuador seeks to impose on it the burden of establishing both “fundamentally unfair proceedings” and an “outrageously wrong” result.⁵⁵³ Ecuador seeks no such thing. The issue here is that Merck cannot meet the high thresholds required of denial of justice claimants on either substantive *or* procedural grounds.

324. *Second*, Claimant argues that denial of justice claims are not subject to a “clear and convincing evidence” standard of proof.⁵⁵⁴ Claimant is wrong. A “clear and convincing” standard of proof *is* applicable to denial of justice claims, particularly those involving allegations of corruption or other forms of judicial impropriety.

⁵⁵² Claimant’s Reply, p. 65 (“*Ecuador Misstates the Applicable Standard*”) (emphasis in original).

⁵⁵³ Claimant’s Reply, ¶ 297.

⁵⁵⁴ Claimant’s Reply, ¶ 305.

325. Finally, Claimant argues that circumstantial evidence of corruption may include “evidence of systemic corruption in Ecuador” in the form of various general country reports.⁵⁵⁵ Ecuador will show that *general* evidence of corruption in a country—even if it could be said to exist in Ecuador—is insufficient to prove that a denial of justice has occurred in a *particular* case; and that circumstantial evidence is arguably sufficient only if it leaves *no room for reasonable doubt* as to the Respondent’s responsibility for a denial of justice under international law.

326. The following sections elaborate on Ecuador’s positions on the applicable standard for finding a denial of justice under international law.

1. Merck Must Meet The High Thresholds Required Of Denial Of Justice Claims On Either Substantive Or Procedural Grounds

327. Ecuador’s citation from the *Arif v. Moldova* case establishes, according to Claimant, that Ecuador’s view is that a claimant must establish both “fundamentally unfair proceedings” and an “outrageously wrong” result. It is not. Ecuador has accepted that a denial of justice may arise from “fundamentally unfair proceedings” or “an outrageously wrong” substantive outcome.⁵⁵⁶

328. At the same time, Claimant cannot, and, in fact, does not dispute the *unquestionably* high thresholds that apply in *either* case. It is simply indisputable that “an international arbitration tribunal is not an appellate body and its function is not to correct errors of domestic procedural

⁵⁵⁵ Claimant’s Reply, ¶ 677.

⁵⁵⁶ According to some commentators, including Claimant’s expert Prof. Paulsson, a denial of justice “is always procedural. There may be extreme cases where the proof of the failed process is that the substance of a decision is so egregiously wrong that no honest or competent court could possibly have given it.” J. Paulsson, *DENIAL OF JUSTICE IN INTERNATIONAL LAW* (2005), p. 98 (RLA-68(bis)). Ecuador concurs with other commentators that this approach is “nothing more than semantic camouflage for what amounts to a review of the substantive outcome produced by the domestic court. An international court cannot draw inferences from an injustice caused by substantive error unless it has determined that there has actually been a substantive error through an assessment of the applicable domestic law and that it is a particularly grave error.” Z. Douglas, *International Responsibility for Domestic Adjudication: Denial of Justice Deconstructed*, 63(4) ICLQ 867 (2014), pp. 882-883 (RLA-189). Since Claimant does not dispute that regardless of the approach adopted substantive errors are subject to the same high threshold, this theoretical dichotomy is not relevant to the present dispute.

or substantive law which may have been committed by the national courts.”⁵⁵⁷ The applicable standard is “stringent,”⁵⁵⁸ which explains why Tribunals have historically rarely found a State to have denied justice to a claimant on any basis whatsoever.

329. When it comes to denial of justice claims founded upon cases of questionable substantive outcome, Merck’s own expert has suggested that the court’s decision must be “*so outrageous* as to be *inexplicable* otherwise than as [an expression] of arbitrariness or gross incompetence.”⁵⁵⁹ And as Merck itself suggests,⁵⁶⁰ a valid substantive denial of justice claim may exist if it “*shocks* a sense of judicial propriety.”⁵⁶¹ This, Ecuador would agree with Merck’s expert, is an “*extreme test*,” requiring, as Ecuador pointed out in its Counter-Memorial, the commission of an error “*which no ‘competent judge could reasonably have made.’*”⁵⁶² That being the case, even if the Ecuadorean court decisions were wrong on the merits—a claim which is denied—the difference of opinion of experts before this Tribunal alone makes clear just how much reasonable minds may differ about the outcome of the dispute.⁵⁶³

⁵⁵⁷ *Liman Caspian Oil BV and NCL Dutch Investment BV v. Republic of Kazakhstan*, ICSID Case No. ARB/07/14, Award (22 June 2010) (Böckstiegel, Hobér, Crawford) (“*Liman Caspian*”), ¶ 274 (RLA-181) (“The Tribunal emphasizes that an international arbitration tribunal 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. The Tribunal stresses that the threshold of the international delict of denial of justice is high and goes *far beyond* the mere misapplication of domestic law.”) (emphasis added). See also Z. Douglas, *International Responsibility for Domestic Adjudication: Denial of Justice Deconstructed*, 63(4) ICLQ 867, p. 897 (RLA-189) (Noting that it is “generally accepted that no delictual responsibility towards foreign nationals can arise from an ‘implausible interpretation’ of national law by national courts.”).

⁵⁵⁸ *White Industries Australia Limited v. Republic of India*, UNCITRAL (Australia-India BIT), Final Award (30 Nov. 2011) (Rowley, Brower, Lau), ¶ 5.2.11 (CLM-114) (“[T]he test for denial of justice is a stringent one.”).

⁵⁵⁹ J. Paulsson, *DENIAL OF JUSTICE IN INTERNATIONAL LAW* (2005), p. 205 (RLA-68(bis)) (emphasis added).

⁵⁶⁰ Claimant’s Reply, ¶ 300.

⁵⁶¹ *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) (“*Jan de Nul* (Award)”), ¶ 193 (RLA-84).

⁵⁶² *Pantehniki S.A. Contractors & Engineers (Greece) v. Republic of Albania*, ICSID Case No. ARB/07/21, Award (30 July 2009) (Paulsson, sole arbitrator), ¶ 94 (RLA-94) (emphasis added).

⁵⁶³ See *Mr. Franck Charles Arif v. Republic of Moldova*, ICSID Case No. ARB/11/23, Award (8 Apr. 2013) (Cremades, Hanotiau, Knieper), ¶ 481 (RLA-120) (“In other words, the Tribunal is confronted with a complex question of Moldovan procedural law which has been answered differently and contradictorily by the judiciary and

330. It is presumably because “the substance of a decision” must be “so egregiously wrong”⁵⁶⁴ to even arguably contribute to a finding of a denial of justice on grounds of substance that Merck tries so desperately to prove that it has a case on the basis of inadequate procedure. Yet here, too, Merck hides the ball, selectively citing sources in an attempt to downplay what is clearly intended to be a high threshold (with a high standard of proof, as shown below). Thus, Merck’s expert’s reference to the adequacy of “sufficient” evidence of “procedural misconduct”⁵⁶⁵ glosses over the extremely high threshold of what would actually be “sufficient” in this context. As the Tribunal in *Liman Caspian v. Kazakhstan* made clear, Claimants must show “that the court system *fundamentally* failed.”⁵⁶⁶ This sort of failure, according to the Tribunal, is “mainly to be held established in cases of *major* procedural errors [...]”⁵⁶⁷ The tribunal in *Chevron Corporation and Texaco Petroleum Company v. Ecuador* similarly held that

[T]he test for establishing a denial of justice sets [...] a *high threshold*. While the standard is objective and does not require an overt showing of bad faith, it nevertheless requires the demonstration of ‘a *particularly serious shortcoming*’ and

by learned experts on Moldovan law. Both interpretations are based on arguments and on the words and objectives of the law. The Tribunal is not in a position and has no competence to take sides in this controversy. If it tried, it would indeed sit as a court of appeal over decisions of the Moldovan judiciary.”) *See also Flughafen Zürich A.G. and Gestión e Ingeniería IDC S.A. v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB/10/19, Award (18 Nov. 2014) (Fernández-Armesto, Alvarez, Vinuesa), ¶ 687 (RLA-200).

⁵⁶⁴ J. Paulsson, DENIAL OF JUSTICE IN INTERNATIONAL LAW (2005), p. 98 (RLA-68(bis)) (“There may be extreme cases where the proof of the failed process is that the substance of a decision is so egregiously wrong that no honest or competent court could possibly have given it.”).

⁵⁶⁵ Second Expert Report of Prof. Jan Paulsson (8 Aug. 2014), ¶ 22.

⁵⁶⁶ *Liman Caspian*, ¶ 279 (RLA-181). *See also Jan Oostergetel and Theodora Laurentius v. Slovak Republic*, UNCITRAL (Netherlands-Slovak Republic BIT), Final Award (23 Apr. 2012) (Kaufman-Kohler, Wladimiroff, Trapl) (“*Oostergetel*”), ¶ 273 (CLM-146) (“[t]o 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.*”) (emphasis added).

⁵⁶⁷ *Liman Caspian*, ¶ 279 (RLA-181).

egregious conduct that ‘shocks, or at least surprises, a sense of judicial propriety.’⁵⁶⁸

331. Ecuador denies that *any* procedural irregularities occurred under Ecuadorian or international law, let alone, in light of the NCJ decision, that its system “*fundamentally failed*,” as it would need to for Merck’s conclusory claims to withstand scrutiny.⁵⁶⁹ When one considers not only the “demanding nature”⁵⁷⁰ of denial of justice claims, but also that Merck must prove its claim by *clear and convincing* evidence—as shown below—it becomes clear just how untenable Merck’s position is.

2. MSDIA Must Prove Its Claim By Clear And Convincing Evidence

332. Merck asserts that “Ecuador is wrong that claims for denial of justice are subject to a higher evidentiary standard than other claims grounded in international law.”⁵⁷¹ Once again, it is not.

333. Merck bases its argument on two grounds. *First*, and in response to the authorities cited in Ecuador’s Counter-Memorial,⁵⁷² it makes a unilateral, completely unsupported, assertion that such authority is “no longer good law.”⁵⁷³ On the contrary, there is an abundance of

⁵⁶⁸ *Chevron Corporation (USA) and Texaco Petroleum Company (USA) v. Republic of Ecuador*, PCA Case No. 34877, UNCITRAL, Partial Award on the Merits (30 Mar. 2010) (Böckstiegel, Brower, van den Berg) (“*Chevron I* (Partial Award on the Merits)”, ¶ 244 (CLM-111) (internal citations omitted) (emphasis added).

⁵⁶⁹ *RosInvestCo UK Ltd. v. Russian Federation*, SCC Arbitration V (079/2005), Final Award (12 Sept. 2010) (Böckstiegel, Steyn, Berman), ¶ 279 (CLM-141) (emphasis added).

⁵⁷⁰ *Jan de Nul* (Award), ¶ 209 (RLA-84) (“The Tribunal is mindful that this is a high threshold for the Claimants to meet, but it reflects the demanding nature of the concept of fraud and of a claim for denial of justice.”). *See also Liman Caspian*, ¶ 274 (RLA-181) (“The Tribunal stresses that the threshold of the international delict of denial of justice is high and goes far beyond the mere misapplication of domestic law.”).

⁵⁷¹ Claimant’s Reply, ¶ 305.

⁵⁷² Ecuador’s Counter-Memorial, ¶ 276, fn. 424, referring to *United States of America (B. E. Chattin) v. United Mexican States*, United States-United Mexican States Claims Commission, Arbitral Award (23 July 1927), 4 U.N.R.I.A.A. 282, p. 288 (CLM-120) (stating that “*convincing* evidence is necessary to fasten liability” for denial of justice) (emphasis added); *Great Britain (El Oro Mining and Railway Co. (Ltd.)) v. United Mexican States*, Decision No. 55 (18 June 1931), 5 U.N.R.I.A.A. 191, p. 198 (RLA-12) (“It is obvious that such a grave reproach can only be directed against a judicial authority upon evidence of the *most convincing* nature.”) (emphasis added).

⁵⁷³ *See* Claimant’s Reply, ¶ 308.

jurisprudence—in addition to those cases referenced in Ecuador’s Counter-Memorial—supporting the application of a “clear and convincing” standard of proof in the case at hand.

Thus, in *Mondev v. United States*, the tribunal asserted that

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 [...].⁵⁷⁴

334. Merck’s expert, Prof. Paulsson, claims that it would be “an unjustified cumulation of requirements” to apply high substantive *and* evidentiary thresholds.⁵⁷⁵ This is nothing but Prof. Paulsson’s personal opinion since he cites no authority for this proposition. It may be recalled that he is actively serving as counsel against Ecuador in another case arising under the Ecuador-U.S. BIT.

335. In any event, Prof. Paulsson’s personal view is wrong. Take, for example, Baxter and Sohn’s Commentary to their Draft Convention on the Responsibility of States for Injuries to Aliens. The Commentary states that “[t]he alien must sustain a *heavy burden* of proving that there was an *undoubted* mistake of substantive or procedural law operating to his prejudice.”⁵⁷⁶ It is virtually impossible to read this statement, as Merck’s expert would presumably have this tribunal do, as being addressed at the “substantive” rather than the “evidentiary” threshold that

⁵⁷⁴ *Mondev International Ltd. v. United States of America*, ICSID Case No. ARB (AF)/99/2, Award (11 Oct. 2007) (Stephen, Crawford, Schwebel), ¶ 127 (RLA-54) (emphasis added). *See also* C. Greenwood, *State Responsibility for the Decisions of National Courts* in ISSUES OF STATE RESPONSIBILITY BEFORE INTERNATIONAL JUDICIAL INSTITUTIONS (M. Fitzmaurice et al eds., 2004), p. 58 (RLA-62) (“Only 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.”).

⁵⁷⁵ Second Paulsson Expert Report, ¶ 23.

⁵⁷⁶ Reproduced in F.V. García-Amador, et al., RECENT CODIFICATION OF THE LAW OF STATE RESPONSIBILITY FOR INJURIES TO ALIENS (1974), p. 198 (RLA-25(bis)) (emphasis added).

applies to denial of justice claims.⁵⁷⁷ On the contrary, the phrase “undoubted mistake of substantive or procedural law” clearly refers to a mistake *about which* there is no doubt, rather than merely to a mistake *the gravity of which* is particularly severe.

336. Claimant’s second line of attack is really an attempt to mislead this Tribunal by omitting analyses or selectively quoting from other investment treaty awards. Merck references, for example, *Fuchs v. Republic of Georgia*, highlighting the Tribunal’s suggestion that, as a general matter, the “vast majority” of arbitral tribunals have “not impose[d] [...] any burden of proof beyond a balance of probabilities.”⁵⁷⁸ What Merck does not point out is that nowhere in the entire opinion does the phrase “denial of justice” appear; the case simply did not concern denial of justice claims. This omission is particularly telling in light of the fact that, *a single paragraph later*, the Tribunal is careful to note that “in certain instances, *a more demanding burden may be imposed on a claimant* [...]”⁵⁷⁹

337. Indeed, selective citations of this sort permeate Merck’s Reply. Merck cites *Saipem S.p.A. v. The People’s Republic of Bangladesh*, claiming that the parties “agreed that a ‘balance of probabilities’ standard of proof was applicable to claims arising out of the conduct of Bangladeshi courts.”⁵⁸⁰ A closer look at the Tribunal’s opinion, however, reveals that what the parties actually “agreed” to was that, while a “balance of probabilities” was applicable in that

⁵⁷⁷ Second Paulsson Expert Report, ¶ 23 (“[T]he *substantive* threshold under the rules of international law on denial of justice is not to be confused with the *evidentiary* standard that applies to such claims.”) (emphasis added).

⁵⁷⁸ Claimant’s Reply, ¶ 306 (emphasis omitted) (citing *Ioannis Kardassopoulos & Ron Fuchs v. Republic of Georgia*, ICSID Case Nos. ARB/05/18 and ARB/07/15, Award (28 Feb. 2010) (Fortier, Vicuña, Lowe) (“*Ron Fuchs*”), ¶ 229 (CLM-244)).

⁵⁷⁹ *Ron Fuchs*, ¶ 230 (CLM-244) (emphasis added).

⁵⁸⁰ Claimant’s Reply, ¶ 309 (citing *Saipem S.p.A. v. People’s Republic of Bangladesh*, ICSID Case No. ARB/05/07, Award (30 June 2009) (Kaufmann-Kohler, Schreuer, Otton) (“*Saipem S.p.A.*”), ¶ 114 (CLM-75)) (emphasis in original).

particular case, “the standard for criminal acts, *such as conspiracy and collusion of State judiciary, [would] be held to a higher standard [...] namely beyond a reasonable doubt.*”⁵⁸¹

338. Merck similarly cites *Marion Unglaube & Richard Unglaube v. Republic of Costa Rica*, correctly noting the Tribunal’s statement that “the degree to which evidence must be proven can generally be summarized as a ‘balance of probability,’ ‘reasonable degree of probability’ or a preponderance of the evidence.”⁵⁸² Once again, however, Merck carelessly or intentionally omits a critical point: in a footnote attached to the very same sentence, the Tribunal explicitly states that “[s]ome claims in international arbitration such as corruption will require a heightened showing of ‘clear and convincing evidence.’”⁵⁸³ The Tribunal then goes on to state that “[b]ecause no single precise standard has been articulated, tribunals ultimately exercise discretion in this area.”⁵⁸⁴

339. Finally, Merck cites *Rompétrol Group N.V. v. Romania* as an example of a case in which a tribunal refused “to apply [a] heightened standard of proof to [a] claim alleging misconduct by prosecutors.”⁵⁸⁵ Even if the actions of an executive branch official could fairly be compared to those of the judiciary, and even if Merck is correct that the tribunal actually refused to apply a

⁵⁸¹ *Saipem S.p.A.*, ¶ 114 (CLM-75) (“With respect to the standard of proof, it is Bangladesh’s submission ‘that the standard of proof is proof on a balance of probabilities’ (Rejoinder p. 21, ¶ 69), being understood that ‘the standard for criminal acts, such as conspiracy and collusion of State judiciary, will be held to a higher standard [...] namely beyond reasonable doubt’ (*Id.* p. 33 ¶ 107). *Saipem did not dispute this submission.* The Tribunal will dispense with making a final ruling on the allegedly more stringent standard to prove conspiracy and/or collusion, since such a finding is not necessary in the present context.”) (emphasis added).

⁵⁸² Claimant’s Reply, fn. 304 (citing *Marion Unglaube & Richard Unglaube v. Republic of Costa Rica*, ICSID Case Nos. ARB/08/01 and ARB/09/20, Award (16 May 2012) (Kessler, Berman, Cremades) (“*Unglaube & Unglaube*”), ¶ 34 (CLM-249)).

⁵⁸³ *Unglaube & Unglaube*, fn. 8 (CLM-249) (emphasis added) (citing *EDF (Services) Limited v. Romania*, ICSID Case No. ARB/05/13, Award (8 Oct. 2009) (Bernardini, Rovine, Derains) (“*EDF (Services)*”), ¶ 221 (CLM-302)).

⁵⁸⁴ *Unglaube & Unglaube*, ¶ 34 (CLM-249).

⁵⁸⁵ Claimant’s Reply, fn. 311 (citing *The Rompétrol Group N.V. v. Romania*, ICSID Case No. ARB/06/3, Award (6 May 2013) (Berman, Donovan, Lalonde) (“*Rompétrol Group*”), ¶ 182 (RLA-121)).

heightened standard of proof in that case,⁵⁸⁶ Merck fails to point out that the Tribunal explicitly contrasted the situation in that case with one involving allegations of “bad faith, or fraud, or corruption.”⁵⁸⁷ Indeed, the tribunal goes on to state that

there may well be situations in which, given the nature of an allegation of wrongful (in the widest sense) conduct, and in the light of the position of the person concerned, an adjudicator would be reluctant to find the allegation proved in the absence of a sufficient weight of positive evidence—as opposed to pure probabilities or circumstantial evidence. But the particular circumstances would be determinative, and in the Tribunal’s view defy codification. The matter is best summed up in general and non-prescriptive terms by Judge Higgins, “*the graver the charge the more confidence must there be in the evidence relied on.*”⁵⁸⁸

340. Merck’s claims are of the gravest kind. As Judge Tanaka wrote in his Separate Opinion in the *Barcelona Traction* case,

It is an extremely serious matter to make a charge of a denial of justice vis-à-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.⁵⁸⁹

341. Merck’s Reply makes an almost wholesale condemnation of Ecuador’s judicial system at the highest levels, alleging “lack of notice and an opportunity to be heard, refusal to consider the evidence submitted by one party, and judgments motivated by bias or corruption”⁵⁹⁰ in one

⁵⁸⁶ In the paragraph following the one cited by Merck, the tribunal writes: “Therefore the Tribunal, while applying the normal rule of the ‘balance of probabilities’ as the standard appropriate to the generality of the factual issues before it, *will where necessary adopt a more nuanced approach* and will decide in each discrete instance whether an allegation of seriously wrongful conduct by a Romanian state official at either the administrative or policymaking level has been proved on the basis of the entire body of direct and indirect evidence before it.” *Rompetrol Group*, ¶ 183 (RLA-121) (emphasis added).

⁵⁸⁷ *Rompetrol Group*, ¶ 182 (RLA-121).

⁵⁸⁸ *Rompetrol Group*, ¶ 182 (RLA-121) (citing *Case Concerning Oil Platforms (Islamic Republic of Iran v. United States of America)*, Judgment (6 Nov. 2003), I.C.J. Reports 2003, Separate Opinion of Judge Higgins, p. 234, ¶ 33 (CLM-86)).

⁵⁸⁹ 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, Separate Opinion of Judge Tanaka, p. 160 (RLA-24).

⁵⁹⁰ Claimant’s Reply, ¶ 296.

place; and “overwhelming and indisputable evidence of corruption, bias, and gross due-process violations”⁵⁹¹ in another. It is, in fact, difficult to imagine allegations more serious than those made in this case. The truth is, Merck simply cannot have it both ways. If it wishes to make these baseless and abusive claims, it will have difficulty denying that the weight of legal authority—including many of its own sources—calls for higher standards of proof in precisely the sort of situation now before the Tribunal.

3. General Evidence Of Corruption Is Insufficient To Prove That A Denial Of Justice Has Occurred In A Particular Case, And Circumstantial Evidence Is Arguably Sufficient Only If It Leaves No Room For Reasonable Doubt

342. Merck claims that Ecuador has taken the position that Merck “may not rely on circumstantial evidence of corruption or ‘generalized’ evidence of systemic corruption.”⁵⁹² This is another straw man distorting what Ecuador has actually argued.

343. To clarify matters, Ecuador submitted with its Counter-Memorial that general reports of the kind submitted by Merck are *far from* sufficient to meet the standard of proof required of denial of justice claims because they bear no relationship to the underlying litigation.⁵⁹³ Ecuador adds with the present submission that if Claimants may ever rely exclusively on circumstantial evidence, such evidence must leave *absolutely no room for reasonable doubt* as to the Respondent’s responsibility.

344. When it comes to general reports on conditions within a country, the Tribunal in *Oostergetel v. Slovakia* explicitly stated that although “general reports are to be taken very seriously as a matter of policy, they *cannot substitute for evidence of a treaty breach in a specific*

⁵⁹¹ Claimant’s Reply, ¶ 316.

⁵⁹² Claimant’s Reply, ¶ 311 (citing Ecuador’s Counter-Memorial, ¶¶ 277-279).

⁵⁹³ Ecuador’s Counter-Memorial, ¶¶ 277-278.

instance.”⁵⁹⁴ In other words, “[m]ere insinuations” made through reliance on general reports on the state of affairs in a given country are insufficient to prove a denial of justice in a particular case.⁵⁹⁵ Thus, even if one were to accept that Ecuador’s judicial system struggles with corruption—ignoring the fact that Merck’s own source, the U.S. Department of State, affirms that Ecuador’s civil and administrative courts are “generally considered independent and impartial”⁵⁹⁶—such a finding alone would be insufficient to meet Merck’s burden to prove corruption by “clear and convincing” evidence.⁵⁹⁷

345. When it comes to circumstantial evidence, Merck alleges that it is often “the *only* evidence that a claimant reasonably can be expected to adduce.”⁵⁹⁸ As Ecuador noted in its Counter-Memorial, however, the Tribunal in *Vannessa Ventures v. Venezuela* stressed that

[i]nferences 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.⁵⁹⁹

346. Given its lack of direct evidence, Merck points to the ICJ’s Judgment in *The Corfu Channel Case*, which it argues “explain[s] that ‘inferences of facts and circumstantial evidence’

⁵⁹⁴ See *Oostergetel*, ¶ 303 (CLM-146) (emphasis added).

⁵⁹⁵ See *Oostergetel*, ¶ 303 (CLM-146) (“Mere insinuations cannot meet the burden of proof which rests on the Claimants.”).

⁵⁹⁶ U.S. Department of State, 2012 Country Report on Human Rights Practices: Ecuador, p. 10 (C-214).

⁵⁹⁷ *EDF (Services)* (2009), ¶ 221 (CLM-302) (“The seriousness of the accusation of corruption in the present case, considering that it involves officials at the highest level of the Romanian Government at the time, demands clear and convincing evidence. There is general consensus among international tribunals and commentators regarding the need for a high standard of proof of corruption.”).

⁵⁹⁸ Claimant’s Reply, ¶ 312 (emphasis in original).

⁵⁹⁹ *Vannessa Ventures Ltd. v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB(AF)/04/6, Award (16 Jan. 2013) (Lowe, Brower, Stern), ¶ 228 (RLA-118). See also *Oostergetel*, ¶ 296 (CLM-146) (“[M]ere 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.”).

is [sic] ‘admitted in all systems of law and its use is recognized in international arbitration.’”⁶⁰⁰

What Merck fails to point out is that, in the *very next* paragraph of its Judgment, the ICJ states that the proof “by means of indirect evidence” with which it was concerned could “be drawn from inferences of fact, provided that [those inferences left] *no room for reasonable doubt*.”⁶⁰¹ It would be absurd for Merck to claim that the general country reports it cites have proven the existence of impropriety through “clear and convincing” evidence. It would be outrageous for it to claim that such reports—even if they could be considered circumstantial evidence—have done so with “*no room*” for reasonable doubt.

347. In sum, Merck simply cannot prove—let alone by clear and convincing evidence—that Ecuador’s judicial system has “fundamentally failed,”⁶⁰² or that any of its courts’ decisions have been “so *outrageous* as to be *inexplicable* otherwise than as [an expression] of arbitrariness or gross incompetence.”⁶⁰³ Once one considers that Merck relies almost exclusively on general and

⁶⁰⁰ Claimant’s Reply, fn. 315 (incorrectly citing page 18 of the International Court of Justice’s Judgment in *The Corfu Channel Case (United Kingdom of Great Britain and Northern Ireland v. Albania)*, Judgment (25 Mar. 1948) (“*Corfu Channel Case*”), I.C.J. Reports 1949 (CLM-154). The correct citation is as follows: “Such a State should be allowed a more liberal recourse to inferences of fact and circumstantial evidence. This indirect evidence is admitted in all systems of law, and its use is recognized by international decisions.”).

⁶⁰¹ *Corfu Channel Case*, p. 18 (CLM-154) (some emphasis added). See also *Rumeli Telekom A.S. and Telsim Mobil Telekomikasyon Hizmetleri A.S. v. Republic of Kazakhstan*, ICSID Case No. ARB/05/16, Award (29 July 2008) (Hanotiau, Boyd, Lalonde), ¶ 709 (CLM-142) (“The Tribunal has therefore considered the evidence with particular care, reminding itself that an allegation such as this 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 conspiracy has occurred.”); and *EDF (Services)* (2009), ¶ 221 (CLM-302) (“The seriousness of the accusation of corruption in the present case, considering that it involves officials at the highest level of the Romanian Government at the time, demands clear and convincing evidence. There is general consensus among international tribunals and commentators regarding the need for a high standard of proof of corruption.”).

⁶⁰² *Liman Caspian*, ¶ 279 (RLA-181). See also *Oostergetel*, ¶ 273 (CLM-146) (“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.”) (emphasis added).

⁶⁰³ J. Paulsson, *DENIAL OF JUSTICE IN INTERNATIONAL LAW* (2005), p. 205 (RLA-68(bis)) (emphasis added).

circumstantial evidence—for which proof *beyond any reasonable doubt* is required⁶⁰⁴—it becomes clear just how untenable its position really is.

C. 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. The NCJ’s Construction Of “Pre-Contractual Liability” As A Valid Statement Of Ecuadorian Law Cannot Be Questioned By This Tribunal

348. Merck founds its denial of justice claim against the November 2014 NCJ decision on an argument that will be familiar to the Tribunal, because it is exactly the same as the central argument that it uses against the September 2012 NCJ decision. According to Merck, the NCJ’s imposition of pre-contractual liability on it in the November 2014 decision “is based on a new theory of liability” that “is not recognized in Ecuadorian law” and improperly relies on two provisions of the Ecuador Civil Code—Articles 721 and 1562—that do not “provide a basis for pre-contractual liability.”⁶⁰⁵ Although Merck approved of the substantive legal principle under which the NCJ awarded damages in its September 2012 decision (i.e., “lost opportunity”) and the manner in which, using lost opportunity as the guiding principle, the NCJ calculated the US \$1.57 million in damages against it there, Merck argues that, in the November 2014 decision, the NCJ “disregarded [...] settled principle in awarding purported ‘lost profits’ [for] NIFA’s failure to acquire MSDIA’s manufacturing plant.”⁶⁰⁶ It also argues that the NCJ’s calculation of damages was “manifestly irrational [...] guided neither by legal principle nor evidence.”⁶⁰⁷

⁶⁰⁴ *Corfu Channel Case*, p. 18 (CLM-154).

⁶⁰⁵ Claimant’s Supplemental Reply (16 Jan. 2015), ¶¶ 35, 49; *see also id.*, ¶¶ 50-54. Compare Merck’s almost identical argument that the September 2012 decision was a “newly-minted liability theory” that the NCJ impermissibly “rested solely upon a constitutional provision”—Article 224(3) of the 1998 Ecuadorian Constitution—“that never before had been interpreted to address matters of ‘unfair competition.’” Claimant’s Memorial, ¶¶ 12, 13(c); *see also id.*, ¶¶ 146, 388 (the NCJ decision “constructed a new and entirely different legal basis for liability” and “rewrote Ecuadorian law on unfair competition to achieve an outcome in favor of NIFA”).

⁶⁰⁶ Claimant’s Supplemental Reply, ¶ 63.

⁶⁰⁷ *Id.*, ¶ 61.

349. In support of its claim that the NCJ misapplied Ecuadorian law with regard to pre-contractual liability, Merck relies upon initial and supplemental opinions of an Ecuadorian lawyer, in the second of which he opines on how the NCJ improperly interpreted and applied Ecuadorian law and improperly evaluated a sentence in the 2002 confidentiality agreement between PROPHAR and Merck, and how the NCJ ought to have evaluated the evidence and decided the case.⁶⁰⁸ On the basis of its expert's opinions, Merck concludes that "pre-contractual liability has never been a recognized basis for liability in Ecuador."⁶⁰⁹ For its argument that lost profits are not recoverable as damages for tortious conduct in pre-contract negotiations and the purported "irrationality" of the NCJ's damage calculation, Merck relies on the initial opinion of the same expert, two authorities cited by the NCJ in its November 2014 decision, and various testimony and documents from the lower court proceedings in the *PROPHAR v. MSDIA* litigation.⁶¹⁰

350. Merck's allegations concerning the NCJ's November 2014 decision are just as false and wholly misrepresentative of that decision as its allegations concerning the September 2012 NCJ decision. Once again as an initial matter, however, this Tribunal must decline Merck's inducement that it sit as a supranational appellate court to review an NCJ decision and substitute its own application and interpretation of the substantive law of Ecuador for that of the NCJ, the country's highest civil law court. In Section VI(B)(2) of its Counter-Memorial, Ecuador has already demonstrated that, under long-established principles of international law, an international

⁶⁰⁸ Supplemental Report of Francisco Correa (15 Jan. 2015) ("Second Correa Expert Report"). Submitted with Merck's Reply prior to the NCJ's issuance of its November 2014 decision, Prof. Correa's initial opinion responded to the opinion of Ecuador's expert Prof. Luis Sergio Parraguez Ruiz on the applicability of pre-contractual liability to Prophar's claims against Merck. Prof. Correa's second expert report is largely a reiteration of his first opinion, but addresses the November 2014 decision.

⁶⁰⁹ Claimant's Supplemental Reply, ¶ 41; *see also, e.g., id.*, ¶ 3.

⁶¹⁰ *Id.*, ¶¶ 63-89.

tribunal is prohibited from assuming that role.⁶¹¹ To avoid repetition here of the overwhelming case law and other authority establishing that prohibition, Ecuador commends Section VI(B)(2) (¶¶ 287-297) of its Counter-Memorial to the Tribunal’s sound review.⁶¹²

351. The determination of the substantive law of Ecuador by the NCJ and its appreciation of the evidence in the *PROPHAR v. MSDIA* litigation is solely within the NCJ’s domain.⁶¹³

⁶¹¹ J. Paulsson, *DENIAL OF JUSTICE IN INTERNATIONAL LAW* (2005), p. 84 (RLA-68) (“the objective of the international adjudicator is *never* to conduct a substantive review” of a national court’s decision) (emphasis in original).

⁶¹² For ease of reference here, cases in which international tribunals recognized the prohibition on their sitting as a supranational appellate court include: *Mondev International Ltd. v. United States of America*, ICSID Case No. ARB (AF)/99/2, Award (11 Oct. 2002) (Stephen, Crawford, Schwebel) (“*Mondev* “), ¶ 126 (RLA-54) (“[I]t is not the function of NAFTA tribunals to act as courts of appeal.”); *Mr. Franck Charles Arif v. Republic of Moldova*, ICSID Case No. ARB/11/23, Award (8 Apr. 2013) (Cremades, Hanotiau, Knieper) (“*Arif* “), ¶ 441 (RLA-120) (“[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.”); *The Loewen Group, Inc. and Raymond L. Loewen v. United States of America*, ICSID Case No. ARB(AF)/98/3, Award (26 June 2003) (Mason, Mikva, Mustill) (“*Loewen Group & Loewen* “), ¶ 134 (RLA-55) (“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 courts.”); *RosInvestCo UK Ltd. v. The Russian Federation*, SCC Arbitration V (079/2005), Final Award (12 Sept. 2010) (Böckstiegel, Steyn, Berman) (“*RosInvestCo*”), ¶ 275 (CLM-141) (“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.”); *Jan Oostergetel and Theodora Laurentius v. The Slovak Republic*, UNCITRAL (Netherlands-Slovak Republic BIT), Final Award (23 Apr. 2012) (Kaufman-Kohler, Wladimiroff, Trapl) (“*Oostergetel*”), ¶¶ 291, 299 (CLM-146) (“[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.”); *Apotex Inc. v. The Government of the United States of America*, UNCITRAL (NAFTA), Award on Jurisdiction and Admissibility (14 June 2013) (Landau, Smith, Davidson) (“*Apotex (2013)* “), ¶ 278 (RLA-122) (“[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.”); *Waste Management, Inc. v. United Mexican States*, ICSID Case No. ARB(AF)/00/3, Award (30 Apr. 2004) (Crawford, Civiletti, Magallón Gómez) (“*Waste Management, Inc. (2004)*”), ¶ 129 (RLA-63) (“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.”).

⁶¹³ See First Expert Opinion of Prof. Javier Aguirre Valdez (25 Feb. 2014) (“First Aguirre Expert Opinion”), ¶ 6.2 (“The National Court of Justice is the highest court in Ecuador. [...] 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.”); see also First Expert Opinion of Dr. Luis Sergio Parraguez Ruiz (Feb. 2014) (“First Parraguez Expert Opinion”), ¶ 43 (“the National Court of Justice as a cassation court [has] the Constitutional authority sufficient to interpret and apply the law.”).

Accordingly, it is irrelevant how Merck’s expert witness on pre-contractual liability and Merck itself think that the NCJ should have interpreted Ecuadorian law on pre-contractual liability and the standards under which damages for pre-contractual liability are awarded. Those determinations plainly are not subject to this Tribunal’s re-adjudication. As noted in Ecuador’s Counter-Memorial, what is relevant to this Tribunal’s determination is whether, “*ex facie* or on closer examination”⁶¹⁴ and “in light of all the available facts,” it is “shock[ed] or [...] surpris[e]d [...] on reflection,” such that it has “justified concerns as to the judicial propriety of the outcome” and “can conclude [...] that the [...] decision was clearly improper and discreditable,”⁶¹⁵ “outrageously wrong” and “so void of reason that [it] breathe[s] bad faith,”⁶¹⁶ a “clear and malicious misapplication of the law,”⁶¹⁷ or without “reasonable objective foundation” and “outside the spectrum of the juridically possible.”⁶¹⁸

352. Nowhere in its Reply or Supplemental Reply does Merck dispute that this Tribunal is prohibited from substituting its own application and interpretation of the law or evidence involved in the November 2014 decision, nor does it dispute that the above criteria represent the stringent test that must be met in order for that decision to constitute a denial of justice. But that is exactly what Merck is requesting this Tribunal to do. As demonstrated below, none of Merck’s allegations even remotely justifies doing so with respect to the November 2014 NCJ decision.

2. Merck Has Failed To Demonstrate That The November 2014 NCJ Decision Was Improper, Much Less “So Outrageous As To Be

⁶¹⁴ *Waste Management, Inc.* (2004), ¶ 130 (RLA-63).

⁶¹⁵ *Mondev*, ¶ 127 (RLA-54).

⁶¹⁶ *Arif*, ¶¶ 445, 482 (RLA-120).

⁶¹⁷ *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) (“*Azinian et al.*”), ¶ 103 (CLM-36).

⁶¹⁸ *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) (Böckstiegel, Brower, van den Berg) (“*Chevron I* (Partial Award on the Merits)”), ¶ 198 (CLM-111) (*citing* the Opinion of Jan Paulsson *submitted in the case*).

Inexplicable Otherwise Than As” Arbitrary Or Grossly Incompetent, “Juridically Impossible,” Or “A Shock To A Sense Of Judicial Propriety”

a. Merck Does Not Contest That, Under International Law, An Erroneous Or Mistaken Judicial Decision Does Not Give Rise To A Denial Of Justice

353. At the outset of Section VI(B)(2)(b) (¶¶ 300-302) of its Counter-Memorial, Ecuador demonstrated that a national court’s misapplication of domestic law or erroneous factual findings in themselves will not give rise to a denial of justice under international law and that, applying this principle, international tribunals have consistently refused to find a denial of justice on the basis of an erroneous or mistaken judicial decision.⁶¹⁹ As explained there, the instances in which a misapplication of the law may properly be considered as an element of a denial of justice are extremely narrow, limited to “an extreme test: the error must be of a kind which no ‘competent judge could reasonably have made.’”⁶²⁰ “[T]he 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.’”⁶²¹ Merck does not dispute that it cannot prevail on its denial of justice claims against the substance of the November 2014 NCJ decision (or the September 2012

⁶¹⁹ *Eletronica Sicula S.p.A. (ELSI) (United States of America v. Italy)*, Judgment (20 July 1989), I.C.J. Reports 1989, p. 15, ¶ 124 (CLM-155) (“[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.”); C. De Visscher, *Le Déni de Justice en Droit International*, 52 RECUEIL DES COURS 2 (1935), p. 376 (CLM-161) (“The mere violation of internal law may never justify an international claim based on denial of justice.”); see also, e.g., *Loewen Group & Loewen*, ¶ 189 (RLA-55) (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.”); *Oostergetel*, ¶ 299 (CLM-146) (“The BIT does not grant protection for mere breaches of local procedural law [...]”); *RosInvestCo*, ¶ 275 (CLM-141) (“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”). See also, J. Paulsson, DENIAL OF JUSTICE IN INTERNATIONAL LAW (2005), pp. 81, 82, 87 (RLA-68(bis)) (“The erroneous application of national law cannot, in itself, be an international denial of justice.”).

⁶²⁰ *Pantechniki S.A. Contractors & Engineers (Greece) v. The Republic of Albania*, ICSID Case No. ARB/07/21, Award (30 July 2009) (Paulsson, sole arbitrator) (“*Pantechniki*”), ¶ 94 (RLA-94) (citing and quoting Gerald G. Fitzmaurice, *The Meaning of the Term Denial of Justice*, 13 BRIT. Y. B. INT’L L. 93 (1932), p. 114 (CLM-136)).

⁶²¹ *Chevron I* (Partial Award on the Merits), ¶ 198 (CLM-111) (citing the Opinion of Jan Paulsson submitted in the case).

NCJ decision or any of the other Ecuadorian court decisions in the *PROPHAR v. MSDIA* litigation) unless it can carry its burden to meet the “extreme test,”⁶²² the “high [...] threshold,”⁶²³ necessary to demonstrate that the decision is one, in substance, that was not “juridically possible”⁶²⁴ or that “no ‘competent judge could reasonably have made.’”⁶²⁵

354. Merck has failed to meet any of those tests with regard to the November 2014 NCJ decision (or any of the other Ecuadorian court decisions of which it complains). It mounts two attacks on the substance of the November 2014 decision: First, it argues that the decision “is based on a new theory of liability” that “is not recognized in Ecuadorian law” and improperly relies on Articles 721 and 1562 of the Civil Code of Ecuador that do not “provide[] a basis for pre-contractual liability.”⁶²⁶ As demonstrated below, this argument fails because it wholly mischaracterizes the substantive basis of the decision and the discrete role that Articles 721 and 1562 played in it. Also, to the extent that the NCJ construed and applied Articles 721 and 1562 of the Civil Code in reaching its ruling against Merck on pre-contractual liability grounds, that exercise was well-within the “juridically possible” and the NCJ’s authority and duty to interpret and apply Ecuadorian law.

355. Second, Merck asserts that the basis on which the NCJ awarded damages and the manner in which it calculated those damages in its November 2014 NCJ decision is “so irrational and so expressly contrary to the evidence in the record that it could not have emanated from any honest,

⁶²² *Pantechniki*, ¶ 94 (RLA-94).

⁶²³ *RosInvestCo*, ¶ 275 (CLM-141).

⁶²⁴ Paraphrasing Opinion of Jan Paulsson, *submitted and quoted in Chevron I* (Partial Award on the Merits), ¶ 198 (CLM-111).

⁶²⁵ *Pantechniki*, ¶ 94 (RLA-94).

⁶²⁶ Claimant’s Supplemental Reply, ¶¶ 35, 49; *see also id.*, ¶¶ 50-54.

competent court.”⁶²⁷ As with its attack on the decision’s substantive liability ruling, this argument is unavailing because it is founded on a gross distortion of how the NCJ carried out its calculation of damages, and it ignores the wide latitude that an Ecuadorian court enjoys when determining both the basis and manner of calculating a damages award.

356. But, as is the case with the September 2012 NCJ decision, perhaps the most telling proof that Merck cannot demonstrate that, in substance, the November 2014 NCJ decision was “juridically impossible” or one that “no competent judge could reasonably have made” is the fact that it failed to pursue review of the decision by the Constitutional Court. As noted by Ecuador’s expert Dr. Guerrero del Pozo and discussed elsewhere in this Rejoinder, if Merck really believed that the November 2014 NCJ decision contained the flaws it claims in this arbitration, it could have filed an extraordinary protection action of its own with the Constitutional Court.⁶²⁸ Again, the fact that Merck did not is directly contrary to its assertions in this arbitration that the November 2014 decision was legally baseless, irrational and incompetent.

b. The NCJ’s Construction And Application Of Pre-Contractual Liability And Its Application Of Articles 721 And 1562 Of The Ecuadorian Civil Code Were Well Within The “Spectrum Of The Juridically Possible” And The NCJ’s Authority To Interpret And Apply Ecuadorian Law

357. Like Merck’s false assertion that the NCJ’s September 2012 decision “invented” a new liability theory based “solely” on Article 224(3) of the Ecuador Constitution, Merck’s assertion that the NCJ held it liable to PROPHAR on the basis of “a new theory of liability” based upon Articles 721 and 1562 of the Ecuador Civil Code is untrue. The NCJ based its decision on Articles 2214 and 2229 of the Civil Code, read in conjunction with the principles analogized in

⁶²⁷ *Id.*, ¶ 59.

⁶²⁸ Second Expert Report on Ecuadorian Law of Juan Francisco Guerrero del Pozo (18 Feb. 2015) (“Second Guerrero Expert Report”), p. 10 fn. 21.

Articles 721 and 1562, the UNIDROIT principles, and multiple commentators and other sources establishing the jurisprudence of pre-contractual liability, i.e., tort liability that arises when a party to contract negotiations breaches its duty to conduct itself with good faith towards the other party to the negotiations by, among other types of conduct, terminating the negotiations in an unjustified and harmful manner or failing to disclose its real intentions.⁶²⁹ The NCJ was clear that it found Merck liable on the basis of Articles 2214 and 2229, which PROPHAR cited as a legal basis of its complaint against Merck. At the outset of its analysis of whether the claims stated in PROPHAR’s complaint sounded in tort, the NCJ cited Article 2214 as the basis of pre-contractual liability,⁶³⁰ and it cited Article 2214 or both Articles 2214 and 2229 in holding that Merck had breached its duty to conduct itself in good faith during its negotiations with PROPHAR and was liable to compensate PROPHAR for the harm arising from that tort.⁶³¹

358. There is a good reason why—with the exception of one quote from the November 2014 NCJ decision buried in footnote 39 of its Supplemental Reply—Merck omits any mention that Articles 2214 and 2229 were the basis for that decision. As demonstrated below, contrary to Merck’s assertions in this arbitration, the fact that it could be held liable to PROPHAR on pre-contractual liability grounds, for a breach of good faith during the parties’ contract negotiations, is not “new” to Merck. Nor was the possibility that the NCJ might look to Article 1562 of the Civil Code and other sources to determine the existence of an obligation of a party to conduct itself with good faith during contract negotiations. Merck has known all along that PROPHAR’s complaint is based on Articles 2214 and 2229 and raised pre-contractual liability allegations that Merck failed to conduct itself with good faith during the parties’ negotiations. During the lower

⁶²⁹ NCJ Decision, *PROPHAR v. MSDIA*, National Court of Justice (10 Nov. 2014) (“November 2014 NCJ Decision”), pp. 42-92 (R-194).

⁶³⁰ *Id.*, p. 45, fn. 40.

⁶³¹ *Id.*, pp. 84-86.

court proceedings, Merck sought evidence from numerous fact witnesses on the issue of whether it had acted in good faith during those negotiations with PROPHAR and from experts on whether the doctrine of pre-contractual liability exists under Ecuadorian law. Merck also made numerous filings in the lower courts, and it included arguments in its cassation petition to the NCJ, that, in light of the evidence in the record, it had not acted in bad faith during its negotiations with PROPHAR and expressly that it was not liable to PROPHAR on grounds of pre-contractual liability.

359. The lower court proceedings also show that there is nothing “new” in Civil Code Article 1562 and other sources bearing on a court’s finding that there is a duty to conduct oneself in good faith during contract negotiations. The First Instance Court in the *PROPHAR v. MSDIA* litigation referenced Article 1562 in reaching the conclusion that a party that causes harm to another during pre-contractual negotiations will be liable to compensate for that harm “because good faith must be present in all legal relationships between parties, and this principle can be found in article 1562 of the Civil Code.”⁶³² In addition, Dr. Ignacio de León, an expert witness during the Court of Appeals proceedings and on whose testimony Merck has relied heavily both in its litigation with PROPHAR and in this arbitration, concluded not only that pre-contractual liability exists under Ecuadorian law, but also that it exists in part because “according to article 1562 of the Civil Code, the parties [i.e., PROPHAR and Merck] were required to observe a good faith behavior during the preliminary negotiations.”⁶³³

360. The falsity of Merck’s claims that the November 2014 NCJ decision was based upon “a new theory of liability” under Civil Code provisions other than Articles 2214 and 2229, or that it

⁶³² Judgment, *NIFA v. MSDIA*, Trial Court (17 Dec. 2007), p. PDF 12 (C-3).

⁶³³ Report of Ignacio de León, *NIFA v. MSDIA*, Court of Appeals (12 Feb. 2010), p. 18 (C-24); *see also id.*, pp. 16-24. Merck’s misrepresentation, in footnote 49 of its Supplemental Reply of Dr. de León’s testimony on pre-contractual liability is discussed at below.

was somehow seduced by PROPHAR's antitrust arguments into thinking that pre-contractual liability and good faith conduct during negotiations were not at issue in the case, will be evident to the Tribunal. Both of those claims are wholly belied by Merck's own acknowledgement, throughout the *PROPHAR v. MSDIA* litigation, that it was susceptible of being held liable to PROPHAR on the basis of pre-contractual liability under Articles 2214 and 2229 of the Civil Code. Again like its arguments concerning the September 2012 NCJ decision, Merck's arguments about pre-contractual liability and Articles 721 and 1562 are manufactured for purposes of this arbitration, and as demonstrated below, so is its procedural denial of justice argument that it had "no notice" that the NCJ might hold it liable to PROPHAR on grounds of pre-contractual liability. As a consequence, Merck cannot be allowed to maintain before this Tribunal that the November 2014 NCJ decision was baseless, unprecedented or erroneous with regard to the NCJ's interpretation and application of pre-contractual liability and its decision's reference to Articles 721 and 1562.

361. For the sake of completeness only, the following paragraphs discuss Merck's arguments that the November 2014 NCJ decision's imposition of pre-contractual liability on it and the decision's references to Articles 721 and 1562 constituted a denial of justice. That interpretation and application was well within the NCJ's authority and cannot be said to be "juridically impossible" or one that "no competent judge could reasonably have made," for three reasons.

362. First, Articles 2214 and 2229 of the Ecuadorian Civil Code alone provided a sufficient basis for the NCJ to find Merck liable for the tort of breach of good faith during its contract negotiations with PROPHAR. As explained by Dr. Luis S. Parraguez Ruiz, an expert in Ecuadorian tort law, but as is also obvious from the face of PROPHAR's complaint⁶³⁴ and

⁶³⁴ NIFA's Complaint, *NIFA v. MSDIA*, Trial Court (16 Dec. 2003) (C-10).

Merck’s answer⁶³⁵ to it, the case presented to the NCJ is fundamentally a tort case, “based upon (among other laws) articles 2214 and 2229 of the Ecuador Civil Code, which governs civil liability for tortious conduct.”⁶³⁶ Dr. Parraguez Ruiz explains further:

[The NCJ’s] extended reasons in para. 9.3 of the [November 2014 decision] abounds in considerations on how MSDIA incurred pre-contractual liability. In fact, to support its reasons, it was not necessary for the claimant to invoke Articles 721 and 1562 of the Civil Code which contain the general principle of good faith, but which are not the immediate source of tort liability, the latter finding its source in Articles 2214 and 2229 of the Civil Code.⁶³⁷

363. The NCJ did not hold Merck liable under Articles 721 and 1562, as Merck claims; it held Merck liable on the basis of the provisions of the Ecuador Civil Code that provide the foundation for liability as to any type of tortious conduct—Articles 2214 and 2229. For this reason alone, the November 2014 NCJ decision cannot be said to be “judicially impossible” or one that “no competent judge could reasonably have made.” As demonstrated below, the same is true of the NCJ’s decision to include Articles 712 and 1562 in its construction and application of pre-contractual liability under Ecuadorian law.

364. Second, contrary to Merck’s assertion,⁶³⁸ pre-contractual liability *is* recognized under Ecuadorian law. As Merck’s expert Prof. Francisco Correa testifies, three provisions of Ecuadorian law, covering civil court auctions, public tenders, and commercial contracts for the purchase and sale of goods, contain provisions imposing pre-contractual liability for conduct related to those fields.⁶³⁹ While Prof. Correa opines that pre-contractual liability in Ecuador is

⁶³⁵ MSDIA’s Answer, *NIFA v. MSDIA*, Trial Court (23 Jan. 2004) (C-140).

⁶³⁶ Second Expert Opinion of Dr. Luis Sergio Parraguez Ruiz (16 Feb. 2015) (“Second Parraguez Expert Opinion”), ¶ 4.

⁶³⁷ *Id.*, fn. 14 (responding to the Second Expert Report, ¶ 12 of Merck’s expert Prof. Correa).

⁶³⁸ Claimant’s Supplemental Reply, ¶ 46.

⁶³⁹ First Expert Report of Francisco Correa (8 Aug. 2014) (“First Correa Expert Report”), ¶ 7.

“limited” by the legislature to those three examples, he provides no authority for that proposition beyond his own conclusory views.⁶⁴⁰

365. In fact, the opposite is true. Dr. Parraguez Ruiz confirms that, on at least two occasions prior to the November 2014 NCJ decision, the NCJ and its predecessor the Supreme Court of Justice recognized the applicability of good faith obligations to the pre-contractual phase. In 2009 the NCJ found that good faith is required during pre-contractual negotiations in the context of an insurance contract, stating that the contract is also one “in which good faith occupies a fundamental position, precisely because the insured is a non-profit organization and because this [good faith] manifests itself in the pre-contractual stage and obviously during the execution of the contract.”⁶⁴¹ Earlier, in a 2007 decision, the Supreme Court of Justice noted that good faith is a principle that dominates general obligations law.⁶⁴² It is not surprising then, that the NCJ would analyze PROPHAR’s complaint as stating a cause of action based upon pre-contractual liability to which issues of good faith were central, particularly given the existence of principles of good faith during negotiations in both Ecuadorian statutory and case law and the role that pre-contractual liability and good faith had already played in the lower court proceedings.

366. Third, even if the November 2014 decision had contained a “new legal theory”—which it did not—the NCJ arrived at it exactly as required by Ecuadorian law in particular and the Civil

⁶⁴⁰ *Id.*

⁶⁴¹ Second Parraguez Expert Opinion, ¶ 13, fns., 9, 10 (*citing and quoting* the NCJ’s decision in the Suplemento del Registro Oficial 144, 10 May 2011). In his Supplemental Report in support of Merck’s Supplemental Reply, Prof. Correa attempts to distinguish this case as relevant only to the parties’ conduct in the performance of the contract. However, as Dr. Parraguez Ruiz points out based upon the plain language of the relevant passage, the NCJ found that “the principle of good faith applied to the contract at issue for two independent reasons. “The first reason—and the only one referenced by Dr. Correa—was because the insured was a non-profit organization. The second, independent reason—which Dr. Correa ignores—was because good faith manifests itself during the pre-contractual stage as well as during the execution of a contract.” *Id.*, ¶ 13.

⁶⁴² *Id.*, ¶ 13 (*citing and quoting* Registro Oficial Suplemento 78, 1 December 2009 (“As doctrine has expressed it: *Uberrimae bona fidei* [utmost good faith], a principle that is not exclusive to the laws of insurance, but dominates general obligations law.”).

Law system in general. The absence of an explicit Ecuadorian Code provision governing pre-contractual liability does not mean that pre-contractual liability does not apply to contract negotiations in general in Ecuador pursuant to Civil Code Article 2214 and 2229 or that a person may behave in any way he desires during contract negotiations, without liability, as Dr. Correa rather astonishingly asserts.⁶⁴³ According to Dr. Parraguez Ruiz:

[U]nder Ecuador law pre-contractual liability (and other forms of liability) can arise under positive rules of the legal framework, or be based on general principles of law, such as the doctrines of good faith, fairness, trust, and reliance, or supported by the opinion of the most authoritative doctrine and jurisprudence on the matter, including doctrine developed in the jurisprudence of other countries whose legal systems are based upon the Civil Law. It is a fundamental tenet of Ecuadorian law that these sources of law constitute an appropriate legal basis on which a finding of tortious conduct and liability for such conduct may be based.

[...]

This is not an academic exercise, but the appropriate means of identifying the generally-accepted precepts in jurisprudence [...] under which a case will be decided. This is the mechanism used by judges in Ecuador and all other Civil Law countries, and it is very similar to the methods used by judges in the Common Law system to develop judge-made law in the areas of, for example, tort law and contract law.⁶⁴⁴

367. That is precisely the type of analysis in which the NCJ engaged in examining the basis of liability stated in PROPHAR's complaint, as even a cursory review of Clause 8.1 of the November 2014 decision makes plain. Entitled "Legal Problem," the Clause consists of an eleven-page analysis of authorities, doctrine, jurisprudence (including from other legal systems), and statutory provisions of Ecuadorian law on free competition, unfair competition, and good faith with regard to contracting—including as just one element of that analysis Article 721 of the

⁶⁴³ First Correa Expert Report, ¶ 5.

⁶⁴⁴ Second Parraguez Expert Opinion, ¶¶ 7, 11.

Civil Code.⁶⁴⁵ On the basis of that analysis, the NCJ concluded that while “parties [to contract negotiations] are not obligated to enter into a contract [...] they must proceed in accordance with the principle of good faith.”⁶⁴⁶ As the court “with the Constitutional authority sufficient to interpret and apply the law and [...] determine that specific conduct falls within the legal doctrine of extra-contractual liability,” even if “not previously invoked in jurisprudence” in Ecuador,⁶⁴⁷ the NCJ was well within its authority to find that pre-contractual liability exists in Ecuador, and Merck does not contest that it does.

368. Moreover, the NCJ had a statutory duty to engage in that exercise. As Dr. Parraguez Ruiz points out, “Article 18 of the Civil Code prohibits a judge from declining to adjudicate the claims and defenses in a case because of an ‘absence’ of positive law, and that article requires the judge to resort to analogies and general principles of universal law.”⁶⁴⁸ Article 28 of the Ecuador Code of Judicial Functions is to the same effect:

⁶⁴⁵ November 2014 NCJ Decision, pp. 42-52 (R-194). It is also the type of analysis that Dr. de León, in his role as a court-appointed expert during the Court of Appeals proceedings, carried out in his first report, to conclude that “in Ecuador, [tort liability] is invoked in relation to the commission of an illegal act resulting from a violation of the rules of good faith in the negotiation of a contact.” Report of Ignacio de León, *NIFA v. MSDIA*, Court of Appeals (12 Feb. 2010), p. 21 (C-24); *see also id.*, pp. 16-24.

⁶⁴⁶ November 2014 NCJ Decision, p. 52 (R-194).

⁶⁴⁷ First Parraguez Expert Opinion, ¶ 43.

⁶⁴⁸ Second Parraguez Expert Opinion, ¶ 9. Article 18 of the Civil Code provides that: “Judges shall not suspend or deny the administration of justice on the pretext that the law is unclear or silent on the matter. In such cases judgment shall be rendered in accordance with the following rules:

1a. - When the meaning of the law is clear, its wording shall not be disregarded on the pretext of paying due regard to the spirit of the law. However, in order to interpret an unclear expression of the law, the intent or spirit thereof clearly manifested therein, or the reliable legislative history of the enactment of the law may be used;

2a. - The words of the law shall be construed in their natural and obvious meaning, according to the general use of said words; but when the legislature has specifically defined certain matters, these shall be given in their legal meaning;

3a. - The technical words of any science or art shall be understood in accordance with the meaning given to them in said science or art, unless it clearly appears that they are to be given a different meaning;

They [judges] cannot be excused from exercising their authority or failing in the matters under their jurisdiction due to an absence or ambiguity of law and they must do so according to the legal framework applicable to the subject [before the court].

General principles of law, as well as doctrine and case law shall be used to interpret, integrate and delimit the scope of application of the legal system, as well as to cover the absence or inadequacy of the provisions governing a specific subject.⁶⁴⁹

369. As is clear from the foregoing, the NCJ's reference, clearly by way of analogy, to Articles 712 and 1562 of the Civil Code with regard to its examination of a duty to conduct oneself in good faith during contract negotiations was well-within its statutorily-mandated,

4a. - The context of the law shall serve to illustrate the meaning of each of its parts, so that between these there is due consistency and harmony.

Unclear passages of a law may be illustrated by other laws, particularly if they are about the same subject matter;

5a. - Positive or hateful aspects of a provision shall not be taken into account to extend or restrict its interpretation. The scope to be given to any law is determined by its true meaning and the preceding rules of interpretation;

6a. - In cases where the preceding rules of interpretation cannot be applied, unclear or contradictory passages are interpreted in the manner that seems most in keeping with the general spirit of the legislation and natural equity; and

7a. - In the absence of law, laws in effect in similar cases shall apply, and if there are none, the principles of universal law shall apply."

Ecuador Civil Code (2005) (CLM-189).

⁶⁴⁹ Organic Code on the Judicial Functioning (9 Mar. 2009), art. 28 (RLA-91(bis)). In ¶ 26 of his Opinion submitted in support of Merck's Reply, Prof. Paulsson states that it is "startling to hear a court in the civil law tradition spoken of as having a 'law creating' function," and he cites "Article 5 of the French Civil Code as it emerged in 1803: [as relevant to his view] (*Il est défendu aux juges de prononcer par voie de dispositions générale et réglementaire sur les causes qui leur sont soumises.*)" [It is forbidden for judges to decide by way of general or regulatory provisions on the cases brought before them]." Second Expert Opinion of Prof. Jan Paulsson (8 Aug. 2014) ("Second Paulsson Expert Opinion"), ¶ 26. Article 5 of the French Civil Code does not have the application that Prof. Paulsson seeks to give to it, and it certainly does not apply to either the September 2012 NCJ Decision (as to which Prof. Paulsson's opinion has been submitted) or to the November 2014 NCJ Decision. An outgrowth of France's break-off from the Ancien Régime, the purpose of Article 5 was to prohibit *arrêts de règlement*, i.e., a judge's exercise of his powers to create generally applicable legislation. It does not, however, prohibit a judge from interpreting and applying the law in the case before him. That function is provided for in Article 4 of the French Civil Code (*Le juge qui refusera de juger, sous prétexte du silence, de l'obscurité ou de l'insuffisance de la loi, pourra être poursuivi comme coupable de déni de justice.*) / "The judge who will refuse to judge, on the pretext of silence, obscurity or deficiency of the law, can be sued for denial of justice.", which states the almost identical rule as Article 18 in the Ecuador Civil Code and Article 28 of the Ecuador Code of Judicial Functions. See R. Libchaber, *Arrêt de règlement et Coupe du monde de football*, RTD Civ. (1998), p. 784 (RLA-152); French Civil Code (15 Mar. 1803) available at <http://www.legifrance.gouv.fr> (last accessed 2 Feb. 2015), art. 4 (R-134); Organic Code on the Judicial Functioning (9 Mar. 2009) (RLA-91(bis)).

judicially normative function of interpreting and applying Ecuadorian law to the *PROPHAR v. MSDIA* case before it. It did not constitute, as Merck and Dr. Correa suggest, the emergence of a “new legal theory” or the misapplication of Articles 721 and 1562 as the basis on which the NCJ held Merck liable to PROPHAR for its conduct during the parties’ negotiations. It certainly cannot be said to render the November 2014 decision “judicially impossible” or one that “no competent judge could reasonably have made.”

370. Moreover, international tribunals faced with denial of justice claims based upon allegations that—like Merck’s here—a judicial decision represented a “new law” have reached the same conclusion. For example, in *Mondev International Ltd. v. United States of America*, the Canadian investor sought to hold the United States liable for denial of justice. Mondev argued that a decision of the Massachusetts Supreme Judicial Court (“SJC”), upholding a trial court’s judgment finding that an agency of the City of Boston was immune from liability 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.”⁶⁵⁰

371. After recognizing that its function was not to act as a court of appeal to re-adjudicate either the SJC’s application of substantive and procedural Massachusetts law to claimant’s underlying dispute with city authorities, the *Mondev* tribunal addressed claimant’s argument that the SJC’s decision constituted “new law.” Observing that “it is doubtful whether the SJC made new law in its application of” principles in an earlier decision, the Tribunal found that “even if [the SJC] had done so,” its decision would be within the bounds of judicial adjudication and had

⁶⁵⁰ *Mondev*, ¶¶ 131, 135 (RLA-54).

nothing in it to “shock or surprise even a delicate judicial sensibility.”⁶⁵¹ Likewise, the tribunal found that the SJC’s decision on whether the alleged “new rule” regarding government contracts should be applied retroactively “fell well within the interstitial scope of law-making exercised by courts” and a normal judicial function.⁶⁵²

372. In light of the foregoing, there can be no doubt that the NCJ’s construction and application of Articles 712 and 1562 to the adjudication of PROPHAR’s claims was “judicially possible” and well-within “the interstitial scope of law-making exercised by courts” in other jurisdictions.

c. The NCJ’s Award Of Damages Was Rational And Well Within The Range Of Juridically Possible Outcomes

373. Merck also argues that, notwithstanding the fact that upon granting Merck’s cassation petition it thereupon cut the amount of Merck’s liability by 95%, the NCJ’s award of damages to NIFA in the amount of US \$7,723,471.81 constitutes an additional and independent ground for its claim of denial of justice.⁶⁵³ According to Merck, the damages award “is so irrational and so expressly contrary to the evidence in the record that it could not have emanated from any honest, competent court.”⁶⁵⁴ Claimant bases this sweeping charge on three sets of errors it contends the court made in establishing the damages it awarded for Merck’s intentionally tortious pre-contract conduct: (1) the court lacked any rational basis for its award because the eminent members of the NCJ panel did not know the difference between gross sales proceeds and profits⁶⁵⁵ and had no basis at all for reflecting in their damages calculations amounts equal to either the agreed price of

⁶⁵¹ *Id.*, ¶ 133.

⁶⁵² *Id.*, ¶ 137.

⁶⁵³ Claimant’s Supplemental Reply, ¶ 59.

⁶⁵⁴ *Id.*

⁶⁵⁵ *Id.*, ¶ 70.

the plant⁶⁵⁶ or NIFA's negotiating expenses;⁶⁵⁷ (2) the court improperly awarded lost profits which, somehow, is beyond the power of any municipal supreme court to hold is a proper element of damages recoverable for pre-contractual torts;⁶⁵⁸ and (3) the court failed to "correct" these errors upon Merck's request for clarification.⁶⁵⁹

374. However, none of these premises is remotely accurate and the NCJ's award of damages was entirely rational and well within the range of juridically possible damages outcomes. Indeed, Merck grossly misrepresents—or seriously misapprehends—the reasoned approach that the court actually took in arriving at its damages award; the actual reasoning applied by the court is described in full below.

375. It is also shown that none of the specific deficiencies alleged by Claimant are true. First, the court did not hold that NIFA's gross sales proceeds, either for actual sale or for lost sales, were themselves lost profits, but rather used these statistics to inform its determination of the amount by which the substantial, but excessively calculated, lost profits indicated in the record below should be limited to achieve a result proportional to the fault at issue. Moreover, the court's use of the negotiated price of the plant for this same purpose is equally unimpeachable, and the record below contained evidence of NIFA's negotiating expenses that was more than adequate to support their inclusion in the award as consequential damages.

376. It will then be shown that, quite apart from the fact that it is for the judicial officials of Ecuador to determine what are recoverable as damages under Ecuadorian law, authorities who have considered the issue, including those cited by Claimant itself, recognize that profits that

⁶⁵⁶ *Id.*, ¶ 86.

⁶⁵⁷ *Id.*, ¶ 89.

⁶⁵⁸ *Id.*, ¶ 62.

⁶⁵⁹ *Id.*, ¶ 93.

could have been earned but for opportunities lost as a result of a pre-contractual tort may be awardable.

377. Next, it will be shown that the court's approach to damage quantification was entirely consistent with Ecuadorian law and precedent and, furthermore, resembles the approaches often taken by international arbitral tribunals, as well.

378. Finally, it is explained why the court's determination that Merck's request for a clarification actually sought an impermissible revision to its judgment was fully justified and within its unquestionable discretion.

i. Claimant Has Grossly Misportrayed How The NCJ Determined The Damages Awardable

379. Once more, Merck has misrepresented what the NCJ did. What the decision actually provided is clearly evident on its face. First, as explained above, the NCJ had held MSDIA liable for an intentional pre-contractual tort. The court also determined that "the requirements required by the doctrine in order for the harm to be reparable" had been met: there was sufficient evidence of harm resulting from the "unjustified breakoff of the negotiations;" (2) the existence of norms proscribing Merck's unlawful act; and (3) a direct causal link between Merck's unlawful act and the harm NIFA suffered.⁶⁶⁰

380. Having found Merck liable to NIFA and the harm reparable, the NCJ proceeded to quantify NIFA's damages "in keeping with the principles of *complete reparation* of the harms as determined by articles 2214 and 2229 of the Civil Code."⁶⁶¹ This required it "[i]n this case [...] to review what is [meant by] *damnum emergens* [consequential damage] and *lucrum cessans*

⁶⁶⁰ November 2014 NCJ Decision, p. 85 (R-194).

⁶⁶¹ *Id.* (emphasis added).

[lost profits], which NIFA S.A.—today PROPHAR S.A.—failed to receive because of the thwarting of the negotiation, as well as the expectations that had been generated.”⁶⁶² It stated:

[A]rticle 2214 of the Civil Code determines that anyone who has committed a crime or a tort that has inflicted harm on another is obligated to indemnify. Article 2229 of the same legal text points out that, as a general rule, every [instance of] harm that can be imputed to the malice or negligence of another person must be repaired by the latter. Also, article 1572 of the previously mentioned code includes the consequential damage and the lost profits, whether it originates from [the fact that] the obligation was not fulfilled, or from [the fact that] it was fulfilled imperfectly, or from [the fact that] the fulfilment thereof was delayed. Let us recall that the principles that are the basis for liability in prior or preliminary negotiations are good faith and the freedom to contract, but additionally subject to not harming another.⁶⁶³

381. In its decision, the NCJ expressly stated that it had critically evaluated all the evidence: “Article 115 of the Code of Civil Procedure provides that evidence must be evaluated in its entirety in accordance with the rules of sound criticism.”⁶⁶⁴ This necessarily included the reports of the many experts produced in the Court of Appeals, which “serve as a reference for this Court and, in fact, they have been evaluated in accordance with the rules of sound criticism.” The court explained what it meant by sound criticism by pointing out that, under Article 262 of the Code of Civil Procedure, the duty to evaluate the evidence did not mean that a judge had “to abide by the judgment of the experts, against his or her own conviction.”⁶⁶⁵

382. Thus, in evaluating the expert report of Mr. Walter Cabrera, it declared that, while Mr. Cabrera’s report was an “item of evidence that was requested, ordered and conducted in these

⁶⁶² *Id.*, p. 86.

⁶⁶³ *Id.*, pp. 86-87 (emphasis omitted).

⁶⁶⁴ *Id.*, p. 87

⁶⁶⁵ *Id.*

proceedings,” it was to be evaluated “in accordance with the rules of sound criticism within the parameters of rationality and the maxims of experience.”⁶⁶⁶

383. Accordingly, the NCJ found Mr. Cabrera’s report partially relevant. First, the NCJ rejected as “irrational and illogical” Mr. Cabrera’s evaluation of losses of the Ecuadorian people through reduced competition.⁶⁶⁷ Second, it accepted Mr. Cabrera’s conclusion that NIFA was entitled to any expenses incurred during the negotiations, including those expenses made to acquire a loan in the amount of US \$48,000 and to commission a report costing US \$2,000.⁶⁶⁸ Third, the NCJ impliedly accepted that Mr. Cabrera’s report showed that NIFA had suffered substantial lost profits as a result of the business opportunities relinquished by engaging in fruitless negotiations with MSDIA, referring to Monsalve Caballero’s work on pre-contractual liability:

The [item of] harm, which is negative interest, consists in the harm that the subject suffers from having uselessly trusted in the conclusion in the validity of the contract [...] in these cases, it will be reparable *on the basis of the possible losses of opportunities* that failed to be concluded with serious and correct persons, under the same terms and conditions negotiated.⁶⁶⁹

384. Finally, however, the NCJ found that Cabrera’s calculations of NIFA’s lost profits over fifteen years were “exaggerated and out of proportion (as lost profits).”

385. In the court’s view, the exaggerated and disproportionate nature of Cabrera’s conclusions required it to establish a limitation on the damages awarded to conform to the constitutional principle of proportionality:

⁶⁶⁶ *Id.*, pp. 87-88.

⁶⁶⁷ *Id.*, p. 88.

⁶⁶⁸ *Id.*

⁶⁶⁹ V. Monsalve Caballero, *RESPONSABILIDAD PRECONTRACTUAL: LA RUPTURA INJUSTIFICADA DE LAS NEGOCIACIONES* (2014), p. 380 (RLA-193) (emphasis added).

Thus, there must exist the due proportionality as provided by the Constitution of the Republic and important criteria as pointed out by Ignacio Villaverde who states: ‘In those cases in which it is possible to use different means *to impose a limit* or [when this limit] admits of various intensities in the degree of its application, this is where one must resort to the principle of proportionality, because this is the technique whereby the mandate of optimization is carried, which is contained in every fundamental law and the principle of reciprocal effect.’⁶⁷⁰

386. The court further noted that the principle of proportionality guarantees that the limits inherent to every right in reciprocal relations are properly imposed without negating the existence of the right in question. Again, quoting Ignacio Villaverde, the Court stated:

Through the principle of proportionality, it is ensured that the intensity of the restriction or of the means for its application will be what is indispensable to make it effective, *in such a way that the limit will fulfill its function*, without making that limit constitute a mimicry of a sanction because of the erroneous belief that a fundamental right was being exercised, or to negate the existence of the right itself. The ultimate finality of the principle of proportionality is, obviously, to prevent the Public Power in charge of imposing the limits to a fundamental right from violating its essential content in applying those limits.⁶⁷¹

387. To arrive at an appropriate limit on the lost profits NIFA might have earned from opportunities it lost due to Merck’s intentionally tortious conduct during negotiations, the court exercised its discretion in accordance with Ecuadorian law and took into account three independent indicators of the magnitude of the related economic activities: 1) the amount of NIFA’s actual sales of existing products for 2003; 2) the amount of lost sales of new products that NIFA could have introduced in 2003; and 3) the last negotiated price for Merck’s plant. In thereby making an appreciation of the order of magnitude of the economic activities involved, which the NCJ saw as informing the question of what would be an acceptable and proportional

⁶⁷⁰ November 2014 NCJ Decision, p. 89 (R-194).

⁶⁷¹ *Id.*, pp. 89-90 (emphasis added).

result under the circumstances of the underlying case,⁶⁷² the court concluded that an amount reflecting the total of these indicators—US \$7,673,471.81—would be a reasonable limit upon the lost profits that NIFA might have realized but for Merck’s tortious conduct and, together with the US \$50,000 awarded as consequential damages, would represent a proportional amount of reparation.

388. Thus, what the NCJ actually did in its November 2014 decision bears no resemblance at all to the caricature portrayed by Claimant in its misleading and distorted description of the decision. Below it is demonstrated that, as thus properly understood, the NCJ’s judgment was reasoned, reasonable, rational, and in accordance with Ecuadorian law.

ii. The NCJ Properly Applied Data In The Record On Sales, Lost Sales And The Price Of The Plant To Arrive At A Reasonable Limit On Recoverable Lost Profits, And On Negotiating Expenses To Determine Consequential Losses

389. The values that the NCJ assigned to each of the elements of damages were neither arbitrary nor erroneous. To the contrary, these values were grounded on the evidence in the record.

390. *First*, the NCJ awarded NIFA US \$50,000 for out-of-pocket expenses made in connection with NIFA’s plans to acquire Merck’s plant. NIFA had spent US \$48,000 to obtain a loan agreement to buy Merck’s plant, and US \$2,000 to pay for a due diligence report required by the lending institution prior to executing the loan agreement.⁶⁷³ In its Supplemental Reply, Merck complains that the NCJ’s award of US \$50,000 in consequential damages was unsupported by the evidence in the record and that NIFA “never submitted evidence that it actually spent US

⁶⁷² Second Parraguez Expert Opinion, ¶ 41.

⁶⁷³ November 2014 NCJ Decision, pp. 87-88 (R-194).

\$50,000 in financing costs for a loan for the purchase of the plant.”⁶⁷⁴ This statement is disingenuous. On June 29, 2004, NIFA submitted voluminous documentary evidence to the trial court.⁶⁷⁵ This evidence included the executed US \$4,800,000 loan agreement with CONSORCIO SAN NICOLAS dated 13 January 2003.⁶⁷⁶ On its face, this document makes clear that NIFA disbursed on the date it was executed the US \$50,000 to cover costs related to the closing. Moreover, in its request for clarification of the NCJ’s judgment of November 2014, NIFA agreed with the award of US \$50,000 for out-of-pocket expenses. Merck stated: “the only damages alleged identified in the decision that could conceivably be indemnified, under a theory of pre-contractual liability, would be those expenses that NIFA allegedly incurred in order to obtain credit for the purchase of the industrial plant, and for the “Dum and Bradstreet” report, which amount to US \$50,000.”⁶⁷⁷ Therefore, the NCJ correctly awarded NIFA these out-of-pocket expenses.

391. *Second*, the NCJ awarded the lost profits that NIFA could have earned from opportunities lost as a result of Merck’s tortious conduct, limited by the three factors it had determined informed a reasonable and proportionate limit on the unjustified totals recommended in Mr. Cabrera’s report. These included the US \$4,133,833.24 in NIFA’s actual sales of existing products during 2003, and the US \$2,039,638.57 in sales NIFA could have made by introducing new products in the same year.⁶⁷⁸ The NCJ obtained these figures from Mr. Cabrera’s report, which relied on all the evidence in the record, including a study by IMS Health Inc., a leading

⁶⁷⁴ Claimant’s Supplemental Reply, ¶ 89.

⁶⁷⁵ NIFA Submission, *NIFA v. MSDIA*, Trial Court (29 June 2004) (R-24).

⁶⁷⁶ Credit Agreement between CONSORCIO INTERNACIONAL FINANCIERO SAN NICOLAS S.A. and NIFA (13 Jan. 2003) (R-141).

⁶⁷⁷ MSDIA’s Petition for Clarification, *NIFA v. MSDIA*, National Court of Justice (13 Nov. 2014), p. 2 (C-294).

⁶⁷⁸ NCJ Decision, *PROPHAR v. MSDIA*, National Court of Justice (10 Nov. 2014) (“November 2014 NCJ Decision”), p. 88 (R-194)

global provider of market intelligence for the pharmaceutical industry.⁶⁷⁹ To this total of US\$6,173,471.81 was added the US\$1,500,000 negotiated price for the sale of the plant to NIFA. Contrary to Merck’s suggestion in its Supplemental Memorial, the NCJ did not award NIFA this amount as if NIFA had paid the price to acquire the plant. Like the other indicators mentioned above, the agreed price of the plant served as a reference for the court to arrive at a proportionate damages figure.

392. Thus, the decision awarded lost profits up to this total limit of US\$7,673,471.81.

iii. Finding Lost Profits For Loss Of Opportunity To Be Recoverable As A Consequence Of Pre-Contractual Liability Is Fully Supported By Authority And Completely Rational

393. Merck complains that the NCJ erred in considering NIFA’s “lost profits” because “lost profits” are not recoverable under the theory of pre-contractual liability. In Merck’s view, the victim of a pre-contractual tort is only entitled to “out-of-pocket costs and expenses made during the negotiations.” But, in passages Claimant conveniently omits, the very authorities that Claimant cites to support this conclusion show that such lost opportunity damages may well be recoverable for pre-contractual torts.

394. Merck cites the work of Jorge Oviedo Alban, who explains:

Generally it is affirmed that the damages available in the pre-contractual phase compensate negative interest, rather than positive interest, which is recognized in the failure to perform contracts [...]. The protected interest [...] “is not the benefit that the contract would have provided the claimant had it been executed [...], but rather the damages resulting from the bad act, such as the

⁶⁷⁹ Report of Cristian Augusto Cabrera Fonseca, *NIFA v. MSDIA*, Court of Appeals (21 June 2011), p. 8 (C-42). See also NIFA IMS Report Methodology (C-290) and NIFA IMS Report Cover Letter from Ivan Ponce, IMS-Ecuador (C-291).

costs of negotiation and those that derive from the trust created in the counterparty and violated in bad faith by the defendant.”⁶⁸⁰

395. Merck also relies on Dr. de León’s expert report submitted to the Court of Appeals in the *NIFA v. MSDIA* litigation, where he concluded that “pre-contractual liability does not involve the recovery of all contractual damages suffered by the other party, but rather only those included in the so-called ‘negative interest.’”⁶⁸¹ Both are accurate statements of the law. And the NCJ’s damages award is not inconsistent with Mr. Oviedo’s and Dr. de León’s opinions because it was entirely based on NIFA’s “negative interest” as will be shown below.

396. Merck’s discomfort with the fact that the NCJ found NIFA to be entitled to lost profits derives from an incorrect reading of the concepts of “negative interest” and “positive interest.” First, Merck suggests that the NCJ calculated the quantum on the basis of NIFA’s positive interest, i.e., the lost profits NIFA would have earned from the contemplated transaction.⁶⁸² This is incorrect. The NCJ did not take into account the lost profits NIFA would have realized had it acquired the plant. Rather, the NCJ assessed the lost profits NIFA could have realized had it not relinquished other opportunities in the expectation that MSDIA was going to agree to the sale.

The NCJ found:

[NIFA S.A.] even put aside the possibility of purchasing other real estate properties, removing from its projects the planned expansion of the plant where NIFA S.A.—today PROPHAR S.A.—was carrying on its activities according to the plans for the project of the expansion of the NIFA industrial plant, which is in on record in the case file. After it had also lost for more than a year [the possibility of] having a new industrial plant, its development in production was stopped, since it could not offer all its pharmaceutical products on the market and the consequent loss of obtaining earnings, while each and every one of the

⁶⁸⁰ J. Oviedo Albán, *LA FORMACIÓN DEL CONTRATO: TRATOS PRELIMINARES, OFERTA, ACEPTACIÓN* (2008), p. 31 (CLM-435) (emphasis added).

⁶⁸¹ Report of Ignacio de León, *NIFA v. MSDIA*, Court of Appeals (12 Feb. 2010), p. 49 (C-24).

⁶⁸² Claimant’s Supplemental Reply, ¶ 62.

presuppositions that generate pre-contractual liability have been proven, in order to repair the harm in its entirety [...].⁶⁸³

397. Even Dr. de León agrees that, in addition to expenses made during the negotiations, the victim of a tort of pre-contractual liability is entitled to the negative interest arising out of loss of opportunity:

“the doctrine and case law are reluctant to grant the victim more than a “negative contractual interest”, in other words, the recovery of the expenses that the deceived negotiator may have justifiably incurred for relying on the honesty of the other negotiating party, *and also in the contracting offers that it could have executed in parallel and that it would have abandoned in the expectation of contracting with the liable party. It is evident that these are damages directly caused in the expectation of “executing a contract,” with all of its implied risks.*⁶⁸⁴

398. Dr. de León cites other authorities in support of his views, including a decision by the U.S. District Court for Puerto Rico confirming that loss of opportunity is recoverable in cases of pre-contractual liability:

pre-contractual liability does not involve the recovery of all the contractual damages suffered by the other party, but rather only those included in the so-called “negative interest”—*id quod interest contractum initium non fuisse*—in other words, all those expenses incurred by the other party, in the expectation of a future contract: trips, expenses, consulting services, etc., as well as all losses caused by not being in a position to take advantage of favorable opportunities that could have come up by contracting with others.⁶⁸⁵

399. Thus it is clear from the authorities relied by Merck itself that the “negative interest” protected by the principles of pre-contractual liability includes profits lost due to lost opportunities, which are to be distinguished from contract damages; the NCJ awarded only the

⁶⁸³ NCJ Decision, *PROPHAR v. MSDIA*, National Court of Justice (10 Nov. 2014), pp. 90-91 (R-194).

⁶⁸⁴ Report of Ignacio de León, *NIFA v. MSDIA*, Court of Appeals (12 Feb. 2010), pp. 48-49 (C-24) (emphasis added).

⁶⁸⁵ *Id.*, p. 49.

former. Moreover, these authorities show that Merck is wrong to the extent that it is suggesting that lost profits may be awarded to compensate the “positive interest only.”

400. Citing the Supreme Court of Colombia a few paragraphs after the text quoted above, Mr. Oviedo Alban suggests that damages for pre-contractual liability could be compensated beyond *damnum emergens* (expenses made in connection with the negotiation), and that the plaintiff could recover any future profits *for loss of opportunity*.⁶⁸⁶ The text that follows is the view of Colombia’s Supreme Court on damages for pre-contractual liability:

Aggrieved parties are entitled to a recovery, the extent of which is no longer tied to performance interest or positive interest—demandable only with contracts effectively and validly entered into—; instead, it will be determined by what is commonly known as *‘negative or expectation interest’*, ordered around the reparation of the negative patrimonial situation of those who trusted that the normal course of negotiations would not be interrupted, [...] in the case of the first of those concepts—consequential damage—the aggrieved may demand reimbursement for expenses incurred due to such negotiations, while under the concept of frustrated profits he could claim actual benefits not received due to the pre-contractual actions that did not move forward due to the unjustified withdrawal of the other party, keeping in mind, obviously, that the latter is not equivalent to lost profits due to non-performance of the projected business relationship itself—given that profit of this nature undoubtedly consists of positive or performance interest that, again, requires a valid and perfected contract *ab initio*—, but rather the loss that it would entail that, due to trusting that the other negotiating party would do what was necessary to perfect the projected business ties, it abandons an economically favorable position that actually existed at the time of the harmful event—for example, the actual possibility of entering into a different contract that would have been advantageous.⁶⁸⁷

401. This view is also supported by Monsalve Caballero, another author on whom the NCJ relied to calculate NIFA’s damages. According to Monsalve Caballero, the full reparation of the

⁶⁸⁶ J. Oviedo Albán, *LA FORMACIÓN DEL CONTRATO: TRATOS PRELIMINARES, OFERTA, ACEPTACIÓN* (2008), p. 32 (CLM-435).

⁶⁸⁷ *Id.*, pp. 32-33.

so-called negative interest in a pre-contractual setting consists of two items: 1) any expenses incurred during the negotiations (*damnum emergens*) and the loss of alternative business opportunities (lost profits).⁶⁸⁸

402. Finally, Merck's objections to the NCJ's calculation of damages are inconsistent with its arguments in defense of the first NCJ decision before the Constitutional Court of Ecuador. There, Merck opposed NIFA's extraordinary protection action seeking to vacate the September 2012 NCJ decision.⁶⁸⁹ Merck defended the NCJ's calculation of damages as "adequately reasoned" and within the "parameters of the Constitution and the Law [...]."⁶⁹⁰ Interestingly, NIFA's damages in the first NCJ decision were determined by reference to lost chance or opportunity for engaging in a failed negotiation with Merck.⁶⁹¹ Loss of opportunity was the same basis for NIFA's damages in the second NCJ decision despite the fact the court considered them to be excessive and out of proportion. So, Merck's arguments against the second NCJ' award on damages are undermined by its own prior conduct.

403. Therefore, it is clear that the NCJ's decision to award lost profits for loss of opportunity was reasonable and consistent with the law on pre-contractual liability.

iv. Ecuadorian Courts Enjoy Wide Latitude In Determining The Quantum Of A Damages Award, Resembling That Exercised By International Arbitral Tribunals

404. Ecuadorian courts enjoy wide latitude to determine the quantum of damages. In his treatise on extra-contractual obligations in Ecuador, Prof. Larrea Holguin explains that "The *assessment* of the amount of damages and *appropriate compensation* is left to the discretion of

⁶⁸⁸ V. Monsalve Caballero, *RESPONSABILIDAD PRECONTRACTUAL: LA RUPTURA INJUSTIFICADA DE LAS NEGOCIACIONES* (2014), p. 376 (RLA-193).

⁶⁸⁹ Judgment, *NIFA v. MSDIA*, National Court of Justice (21 Sept. 2012) (C-203).

⁶⁹⁰ *MSDIA* submission, Constitutional Court (13 Sept. 2013), ¶ 4 (R-120).

⁶⁹¹ Judgment, *NIFA v. MSDIA*, National Court of Justice (21 Sept. 2012), pp. 43-46 (C-203).

judges based on the value of the evidence that has been legally incorporated into the process.”⁶⁹²

As explained above, in exercising this discretion, the NCJ considered that NIFA’s lost profits for loss of opportunity as calculated by Mr. Cabrera were out of proportion, and decided to look at others indicators that reflected the magnitude of the economic activities involved in the dispute as a limit to NIFA’s exaggerated damages.

405. As also explained above, the NCJ considered Mr. Cabrera’s report as a reference only, taking what it believed to be reasonable figures, and discarding others as being exaggerated or baseless. This approach is consistent with Ecuadorian law and practice. As Prof. Parraguez explains, the rules on expert testimony allow Ecuadorian judges to make a decision beyond the conclusions of an expert by adding their own considerations or assessments, especially when the principles of equity or proportionality demand it.⁶⁹³ To illustrate this point, Prof. Parraguez cites to a 1999 decision of the Supreme Court of Ecuador where the court decided that in times of high inflation, it was necessary to add another indicator of compensation because interests alone would render the compensation meaningless.⁶⁹⁴ In another case, this time from 1977, the Supreme Court of Ecuador was required to estimate the damages resulting from a car accident and it had in front of it five different reports quantifying the value of the car from 0% to 75%. The court, in exercising its discretion, concluded that the car lost 35% of the original value based on the following criteria: 1) the persistence of visible effects after repairs; 2) the probable existence of other real defects which were not visible; 3) damages for out-of-pocket expenses for

⁶⁹² J. Larrea Holguin, *DERECHO CIVIL DEL ECUADOR* (2009), p. 64 (RLA-172) (emphasis added).

⁶⁹³ Second Parraguez Expert Opinion, ¶ 40.

⁶⁹⁴ *Id.*

keeping the car in a garage for long periods; and 4) the driver's reluctance to acquire a new car after having suffered a grave accident.⁶⁹⁵

406. Accordingly, the NCJ's appreciation of appropriate limiting factors was a similar exercise of its discretion to impose a proportionality limit on NIFA's damages.

407. Arbitral tribunals have displayed a similar approach to the award of damages in the international sphere. Legally, it is well-established that international arbitral tribunals have considerable latitude in settling matters on compensation.⁶⁹⁶ As the *Ad hoc* Committee stated in *Rumeli Telekom v. Republic of Kazakhstan*:

[T]ribunals are generally allowed a considerable measure of discretion in determining issues of quantum.

This is not a matter to be resolved simply on the basis of the burden of proof. To be sure, the tribunal must be satisfied that the claimant has suffered some damages under the relevant head as a result of the respondent's breach. But once it is satisfied of this, the determination of the precise amount of this damage is a matter for the tribunal's informed estimation in the light of all the evidence available to it. This is widely accepted in municipal law.⁶⁹⁷

408. This arbitral discretion was most recently illustrated in *Yukos Universal Limited v. The Russian Federation*.⁶⁹⁸ While the tribunal accepted that the claimants were entitled to recover the *but-for* value of their investment and dividends, it decided not award the amount of damages

⁶⁹⁵ L. Holguín, *DERECHO CIVIL DEL ECUADOR* (2009), p. 64 (RLA-172).

⁶⁹⁶ See e.g., *Marvin Roy Feldman Karpa v. United Mexican States*, ICSID Case No. ARB(AF)/99/1, Award (16 Dec. 2002) (Kerameus, Bravo, Gantz), ¶¶ 195-196 (RLA-158); *Archer Daniels Midland Company and Tate & Lyle Ingredients Americas, Inc. v. United Mexican States*, ICSID Case No. ARB(AF)/04/5, Award (21 Nov. 2007) (Cremades, Rovine, Siqueiros T.), ¶ 279 (RLA-167); *Wena Hotels LTD. v. Arab Republic of Egypt*, ICSID Case No. ARB/98/4, Annulment Decision (5 Feb. 2002) (Kerameus, Bucher, Orrego Vicuña), ¶ 91 (CLM-151); *Starrett Housing Corporation, Starrett Systems Inc., Starrett Housing International Inc. v. The Government of the Islamic Republic of Iran*, Case No: 24, Award No. 314-24-1(14 Aug. 1987), reprinted in 16 Iran-U.S. Cl. Trib. Rep. 112, ¶ 339 (RLA-146).

⁶⁹⁷ *Rumeli Telekom A.S. and Telsim Mobil Telekomunikasyon Hizmetleri A.S. v. Republic of Kazakhstan*, ICSID Case No. ARB/05/16, Decision of the *ad hoc* Committee (25 Mar. 2010) (Schwebel, McLachlan, Silva Romero), ¶¶ 146-147 (RLA-179).

⁶⁹⁸ *Yukos Universal Limited (Isle of Man) v. The Russian Federation*, PCA Case No. 227, UNCITRAL (Energy Charter Treaty), Final Award (18 July 2014) (Fortier, Poncet, Schwebel) ("*Yukos* (2014)") (RLA-198).

requested nor did it determine damages in the way requested by Yukos. Not only did the panel order significantly less damages, but like the November 2014 NCJ decision it also rejected the claimants' implementation of the methods used to calculate their losses. For example, because the tribunal selected different valuation dates, it could not directly apply the claimants' valuations or the respondent's corrections of Yukos' equity value. As such, the tribunal decided to determine "the value of Yukos as of the relevant valuation dates by adjusting Yukos' value as of November 2007 on the basis of the development of a relevant index."⁶⁹⁹ Allegedly, this indexing approach was neither proposed nor endorsed by the parties.⁷⁰⁰

409. Similarly, the *Yukos* tribunal used the claimants' hypothetical Free Cash Flow to Equity figures as a proxy for its "but-for" dividends. Even though these figures overstated the amount of Yukos' *but-for* dividends (because some of this would have been reinvested in Yukos and not distributed to shareholders), the tribunal nevertheless adopted this approach as a starting point.⁷⁰¹ It then made adjustments to the *but-for* dividends based on three risk factors: (i) higher income taxes, (ii) the company's dividend policy, and (iii) the "complex and opaque structure set up by Claimants."⁷⁰² None of these factors, however, had been addressed by the parties.⁷⁰³ Like the November 2014 NCJ decision, the tribunal in *Yukos* deemed it appropriate to impose some proportionality limits on claimants' damages.

⁶⁹⁹ *Id.*, ¶ 1788.

⁷⁰⁰ Writ of Summons (29 Nov. 2014), ¶¶ 417-418 (RLA-201).

⁷⁰¹ *Id.*, ¶ 422.

⁷⁰² *Yukos (2014)*, ¶¶ 1803-1810 (RLA-198).

⁷⁰³ Writ of Summons (29 Nov. 2014), ¶ 432 (RLA-201).

410. As a corollary of its discretion, a tribunal may also take into consideration equitable principles in determining quantum.⁷⁰⁴ Such considerations may be reflected through adjustments to the resulting amounts. This was recognized in *Phillips Petroleum v. Iran* where the IUSCT stated: “The need for such adjustments is understandable, as the determination of value by a tribunal must take into account all relevant circumstances, including equitable considerations.”⁷⁰⁵

411. Thus, the NCJ’s November 2014 decision is consistent with the practices of international tribunals. The NCJ exercised its wide margin of appreciation in placing proportionality limits on the indemnification of damages to NIFA based on the evidence available to it.

v. The Court’s Decision On Merck’s Request For Clarification Was Entirely Proper

412. On 13 November 2014, one day after the NCJ had issued its final judgment, Merck submitted an additional brief requesting the court to correct alleged errors in the damages calculation.⁷⁰⁶ The NCJ rejected this request on 10 December 2014.⁷⁰⁷ Merck argues that the NCJ’s “refusal to change course” shows that it is not a court committed to the rule of law.⁷⁰⁸ More than a correction of errors, Merck’s request invited the NCJ to reconsider or change its decision entirely. Accordingly, the NCJ held that Merck’s request had no merit because the

⁷⁰⁴ See, e.g., *Government of the State of Kuwait v. American Independent Oil Company (AMINOIL)*, Final Award (24 Mar. 1982) reprinted in 21 ILM 876 (1982), ¶ 78 (RLA-142); *Amoco Int’l Finance Corp. v. Islamic Republic of Iran*, Award (14 July 1987), 15 Iran-U.S. Cl. Trib. Rep. 189 reprinted in 27 ILM 1314 (1988), ¶ 220 (RLA-145); *Técnicas Medioambientales Tecmed, S.A. v. United Mexican States*, ICSID Case No. ARB (AF)/00/2, Award (29 May 2003) (Grigera Naon, Fernandez Rozas, Vereza), ¶ 190 (RLA-159); *Compañía del Desarrollo de Santa Elena S.A. v. The Republic of Costa Rica*, ICSID Case No. ARB/96/1, Final Award (17 Feb. 2000) (Fortier, Lauterpacht, Weil), ¶ 92 (RLA-156).

⁷⁰⁵ *Phillips Petroleum Co. Iran v. Islamic Republic of Iran and National Iranian Oil Co.*, Award No. 425-39-2 (29 June 1989), 21 Iran-U.S. Cl. Trib. Rep. 79, ¶ 112 (RLA-148).

⁷⁰⁶ Claimant’s Supplemental Reply, ¶ 91.

⁷⁰⁷ *Id.* ¶ 92.

⁷⁰⁸ *Id.*, ¶ 93.

judgment was clear, duly motivated and based on the law, doctrine and jurisprudence.⁷⁰⁹ Therefore, the NCJ's decision denying Merck's request for clarification was entirely proper.

vi. Conclusion

413. The NCJ's decision to limit NIFA's damages to a set of economic indicators derived from data in the record was reasonable. Although the NCJ correctly held that NIFA was entitled to lost profits for loss of opportunity, it found that NIFA's lost profits as calculated by Mr. Cabrera were exaggerated. In exercising its wide discretion to evaluate the evidence in the record, including expert reports, the NCJ viewed the report of Mr. Cabrera as a reference for the quantification of damages. Accordingly, the NCJ resorted to the constitutional law principle of proportionality to arrive at a reasonable limit on recoverable lost profits and awarded NIFA the amount of US \$7.7 million based on NIFA's sales and lost sales for the year 2003, the unpaid price of the plant, and NIFA's out-of-pocket expenses made during the negotiations. This approach was reasoned, rational and entirely consistent with Ecuadorian law and practice. As such, it was completely within the range of juridically possible damages outcomes and, thus, cannot be considered to be a denial of justice.

3. Merck Enjoyed A Full And Fair Opportunity To Present Its Case Before The NCJ, And Neither Of The Procedural Defects Alleged By Merck Constitutes A Denial Of Justice

414. Merck's arguments concerning procedural defects in the November 2014 NCJ decision are based on the same type of gross distortions that permeate its arguments that the NCJ wrongly applied the law in rendering that decision. Merck attacks the decision on two fronts: First, it asserts that it had "[no] notice that it could be found liable on" grounds of pre-contractual liability because "NIFA never asserted pre-contractual liability as a potential basis for its claim"

⁷⁰⁹ NCJ Decision on NIFA's Request for Clarification, *PROPHAR v. MSDIA*, National Court of Justice (10 Dec. 2014) (C-295).

and “never invoked the statutory provisions [Civil Code Articles 721 and 1562] under which the NCJ held MSDIA liable.”⁷¹⁰ Therefore, it argues, it was “deprived of an opportunity to be heard on the question of whether those statutes actually create a basis for imposing pre-contractual liability and whether MSDIA’s conduct violated any obligation created by those statutes.”⁷¹¹ As demonstrated above, this argument is based on a mischaracterization of the basis of the NCJ’s decision. Also, as with Merck’s nearly identical argument concerning the September 2012 decision that it had “no notice” that it could be held liable for unfair competition, it is also belied by the record of the lower court proceedings, during which Merck was not only on notice that PROPHAR’s claims could be construed as based upon pre-contractual liability and the duty for a party to conduct itself in good faith during contract negotiations, but it argued and took evidence on that grounds of liability.

415. Second, Merck claims that the “dispositive principle” of Ecuador’s Cassation Law limited the jurisdiction of the NCJ to “errors alleged by the parties in their respective Cassation Petitions” and that because “neither MSDIA nor NIFA requested in their cassation petitions that the NCJ rule on a claim for pre-contractual liability[,] [...] the NCJ did not have jurisdiction to do so.”⁷¹² This assertion, which Merck recycles from a similar argument against the September 2012 decision, is based upon a flagrant mischaracterization of NCJ procedure and jurisdiction by both Merck and by an expert who testified in support of its Memorial, but who—for reasons discussed below—did not testify in support of Merck’s Reply or Supplemental Reply. It is also directly contrary to Merck’s own description of correct NCJ procedure and jurisdiction in the Constitutional Court in its support of the September 2012 NCJ decision.

⁷¹⁰ Claimant’s Supplemental Reply, ¶¶ 43, 44.

⁷¹¹ *Id.*, ¶ 45.

⁷¹² Claimant’s Supplemental Reply, ¶¶ 55-57.

a. Merck Was On Notice Throughout The Litigation That Pre-Contractual Liability And Breach Of Good Faith Were Bases Of PROPHAR's Claims, And It Enjoyed, And Took Advantage Of, A Full And Fair Opportunity To Defend Against Them

416. Merck founds its argument that the NCJ denied it justice through procedural errors on its assertion—shown above to be plainly incorrect—that the NCJ based its November 2014 decision on a “a new theory of liability” based upon pre-contractual liability and Articles 721 and 1562 of the Ecuador Civil Code. As a result, Merck argues, the NCJ “deprived of an opportunity to be heard on the question of whether those statutes actually create a basis for imposing pre-contractual liability and whether MSDIA’s conduct violated any obligation created by those statutes.”⁷¹³ Therefore, “[t]he NCJ’s imposition of liability on a legal ground that was not invoked by the plaintiff and as to which MSDIA was not given an opportunity to be heard is a denial of justice.”⁷¹⁴

417. Merck’s assertion that it had “no notice” that it could be held liable under Articles 721 and 1562 and on grounds of pre-contractual liability is the same type of duplicitous argument that it tried to foist on this Tribunal by alleging that the September 2012 NCJ decision was based “solely” on Article 244(3) of the 1998 Constitution. First, as Merck knows but is again hiding from this Tribunal, the November 2014 NCJ decision was founded upon Articles 2214 and 2229 of the Ecuadorian Civil Code, which were cited by PROPHAR as grounds for its causes of action against Merck and govern civil liability for tortious conduct in Ecuador. Merck could not have been surprised to have been held liable on grounds that PROPHAR had cited in its complaint. Moreover, as demonstrated earlier and in the November 2014 decision itself, the NCJ cited Articles 721 and 1562 by analogy as evidence of the existence of an obligation for a party to a

⁷¹³ *Id.*, ¶ 45.

⁷¹⁴ *Id.*

negotiation to conduct itself in good faith, not as the grounds for holding Merck liable to PROPHAR for a breach of good faith during the parties' contract negotiations.

418. Second, Merck alleges that it had “no notice that it could be found liable on” grounds of pre-contractual liability” and was therefore “deprived of an opportunity to be heard on the question” because “NIFA never asserted pre-contractual liability as a potential basis for its claim” and never asserted Articles 721 or 1562. This allegation is false, as proved by the record of the lower court proceedings and Merck’s cassation petition. Merck’s “notice” that it had been accused of bad faith during its negotiations with PROPHAR for sale of its plant—the hallmark of a tort claim based upon pre-contractual liability—began with PROPHAR’s complaint. That complaint alleged that PROPHAR had believed Merck was acting with transparency and good faith during the negotiations; on that basis PROPHAR had delayed other plans for increasing its production capacity; but that Merck acted with deceit to delay its expansion in the market by imposing, late in the negotiations, a new condition that, for a period of five years, PROPHAR not produce generic pharmaceuticals at the plant that would compete with generic pharmaceuticals distributed by Merck in Ecuador.⁷¹⁵ In response, Merck denied that it had acted negligently at any time; that it had negligently or fraudulently terminated the negotiations with intent to harm PROPHAR; and that PROPHAR had not proved that it had acted in bad faith or that it had been harmed.⁷¹⁶

419. The record shows that, for the entire course of the lower court proceedings, Merck vigorously defended itself against PROPHAR’s allegations of bad faith, including specifically arguing that it was not culpable on grounds of pre-contractual liability. For example, in the proceedings in the First Instance Court, Merck filed at least five separate briefs arguing that it

⁷¹⁵ NIFA’s Complaint, *NIFA v. MSDIA*, Trial Court (16 Dec. 2003), ¶¶ d, n) (C-10).

⁷¹⁶ MSDIA’s Answer, *NIFA v. MSDIA*, Trial Court (23 Jan. 2004), pp. PDF 10-12 (C-140).

had not acted negligently, fraudulently or otherwise in bad faith during the negotiations.⁷¹⁷ For its part, PROPHAR submitted at least three separate briefs arguing that Merck was liable to it on grounds of pre-contractual liability and that its conduct should be condemned under general tort law, i.e., sections 2214 and 2229 of the Civil Code.⁷¹⁸

420. The First Instance Court proceedings culminated in the 17 December 2007 decision. In that decision, the First Instance Court found that Merck had acted with a lack of transparency and with deceit during its negotiations with PROPHAR and was liable to PROPHAR under (among other Code provisions) Articles 2214 and 2229 of the Civil Code. As one of the bases for its ruling, the court found that “if one of the parties [to the negotiations] has not acted in good faith, the affected party can request that it be indemnified for the damages it has been caused, because good faith must be present in all legal relationships between parties, and this principle can be found in Article 1562 of the Civil Code” and went on further to tie that obligation specifically to pre-contractual liability.⁷¹⁹

421. Merck knew for a certainty, then—i.e., throughout the Court of Appeals procedure in 2008-2011 and four years before it initiated proceedings in the NCJ—that it could be held liable to PROPHAR on grounds of pre-contractual liability for a breach of good faith in its conduct during the parties’ contract negotiations. It was also on notice that Civil Code Article 1562 could serve as a source for a court’s analysis of the existence of the good faith obligation and pre-contractual liability. Merck had, moreover, and took, a full “opportunity to be heard on” those

⁷¹⁷MSDIA Submission, *NIFA v. MSDIA*, Trial Court (20 Mar. 2007) (R-149); MSDIA Submission, *NIFA v. MSDIA*, Trial Court (6 Feb. 2007) (R-148); MSDIA Submission, *NIFA v. MSDIA*, Trial Court (4 Sept. 2006) (R-146); MSDIA Submission, *NIFA v. MSDIA*, Trial Court (2 July 2004) (R-143).

⁷¹⁸NIFA Submission, *NIFA v. MSDIA*, Trial Court (18 Oct. 2006) (R-147); NIFA Submission, *NIFA v. MSDIA*, Trial Court (20 Apr. 2007) (R-150).

⁷¹⁹Judgment, *NIFA v. MSDIA*, Trial Court (17 Dec. 2007), p. PDF 12 (C-3). Merck’s English translation of the term equivalent to “pre-contractual liability” in the relevant passage on p. 12 of C-3 is “fault in contracting.” The Spanish original uses the term *culpa in contrahendo*, however, which is the Spanish equivalent of “pre-contractual liability.”

questions in the Court of Appeals proceedings and to “defend itself” against that potential liability. It stepped up its attempts to show that it had acted in good faith during the negotiations with PROPHAR by, for example, submitting at least five questionnaires to witnesses in which it asked them to provide their testimony on whether it had acted in good faith during its negotiations with PROPHAR.⁷²⁰ Merck also submitted at least four briefs in which it variously argued that it had not acted in bad faith in the contract negotiations, that the doctrine of pre-contractual liability did not exist in Ecuador, that in any event it was not liable under that doctrine, and that the First Instance Court’s rulings in that regard were in error.⁷²¹ Similarly, PROPHAR submitted at least three briefs during the Court of Appeals proceedings, addressing issues of Merck’s bad faith conduct during the negotiations, pre-contractual liability, and Merck’s obligation to compensate it on those grounds.⁷²²

422. In addition, during the Court of Appeals proceedings, court-appointed expert Dr. Ignacio de León submitted two reports in which he concluded not only that pre-contractual liability exists under Ecuadorian law, but also that it exists in part because “according to article 1562 of the Civil Code, the parties [i.e., PROPHAR and Merck] were required to observe a good faith behavior during the preliminary negotiations.”⁷²³ A second court-appointed expert, Dr. Carlos

⁷²⁰ MSDIA Petition, *NIFA v. MSDIA*, Court of Appeals (5 June 2009 at 11:46 a.m.) (R-154); MSDIA Petition, *NIFA v. MSDIA*, Court of Appeals (5 June 2009 at 11:48 a.m.) (R-155); MSDIA Petition, *NIFA v. MSDIA*, Court of Appeals (5 June 2009 at 11:49 a.m.) (R-156); MSDIA Petition, *NIFA v. MSDIA*, Court of Appeals (5 June 2009 at 11:51 a.m.) (R-157).

⁷²¹ MSDIA Submission, *NIFA v. MSDIA*, Court of Appeals (16 Sept. 2010) (R-166); MSDIA Submission, *NIFA v. MSDIA*, Court of Appeals (undated) (R-200); MSDIA Submission, *NIFA v. MSDIA*, Court of Appeals (11 Mar. 2011) (R-173); MSDIA Submission, *NIFA v. MSDIA*, Court of Appeals (11 May 2010) (R-164).

⁷²² NIFA Submission, *NIFA v. MSDIA*, Court of Appeals (8 Oct. 2008) (R-151); NIFA Submission, *NIFA v. MSDIA*, Court of Appeals (10 May 2010) (R-163); NIFA Submission, *NIFA v. MSDIA*, Court of Appeals (14 Mar. 2011) (R-174).

⁷²³ Report of Ignacio de León, *NIFA v. MSDIA*, Court of Appeals (17 Feb. 2010), p. 18 (C-24); see also *id.*, pp. 16-24. In footnote 49 of its Supplemental Reply, Merck misrepresents Dr. de León as concluding that “there was no doctrine of pre-contractual liability in Ecuador.” In truth, Dr. de León concluded exactly the opposite, at pages 17-18 and 21 of his First Report, as indicated above. Later, as part of his Second Report, Dr. de León took questions from Merck, which asked him if “there is in Ecuador *an explicit and concrete* norm that establishes liability derived

Guerra, concluded that Merck had incurred pre-contractual liability on the basis of its efforts to prevent PROPHAR from competing with it.⁷²⁴

423. If more evidence of Merck’s “notice” that pre-contractual liability had been at issue in the lower court proceedings and that it had had an opportunity to defend itself against those issues is necessary, Merck’s cassation petition raised pre-contractual liability and bad faith conduct during contract negotiations as a ground on which it had been held liable to indemnify PROPHAR.⁷²⁵ Its attempt in its Reply to minimize that fact, by saying that it “mentioned pre-contractual liability” in its cassation petition “only in passing,”⁷²⁶ is to no avail. As demonstrated below, Merck argued the issue of pre-contractual liability in its cassation petition, as part of its argument that the Court of Appeals did not properly consider the evidence and should have accepted court-appointed expert Dr. de León’s conclusion that it was not liable to PROPHAR on grounds of pre-contractual liability.⁷²⁷ It also argued that there was no evidence in the lower court proceedings showing that its conduct during negotiations with PROPHAR constituted bad faith, an element of a claim based upon pre-contractual liability, and that the Court of Appeals would not have found

from *culpa in contrahendo* [i.e., pre-contractual liability] in the phase prior to the formalization of a contract, as does exist in other legal systems indicated in the expert report,” i.e. a Code provision. Dr. de León answer “no” to this question, but at the end of his Second Report, he ratified his First Report “in each and every one of its parts,” leaving his First Report’s conclusion of the existence of pre-contractual liability in Ecuador intact. *See* Supplemental Report of Ignacio Luis de León Delgado, *NIFA v. MSDIA*, Court of Appeals (20 July 2010), pp. 19, 21 (C-284) (emphasis added).

⁷²⁴ Report of Carlos Guerra Román, *NIFA v. MSDIA*, Court of Appeals (14 Feb. 2011), p. 76 (C-32).

⁷²⁵ Claimant’s Supplemental Reply, ¶ 56, fn. 49. As explained immediately below, the purpose of Merck’s cassation petition was to state its grounds for the NCJ to cassate, or annul, the Court of Appeals’ decision pursuant to Article 3 of the Cassation Law. It is not an argument about how, should the NCJ annul the Courts of Appeals’ decision, the NCJ should proceed to re-adjudicate PROPHAR’s complaint and Merck’s answer to it, in light of the evidence developed during the lower court proceedings. Merck’s cassation petition is compelling evidence, however, as a record of its knowledge that pre-contractual liability and whether it had acted in good faith, or bad faith, were at issue in the case, including in the event that the NCJ were to annul the Court of Appeals’ decision and re-adjudicate the case.

⁷²⁶ Claimant’s Supplemental Reply, ¶ 56.

⁷²⁷ MSDIA’s Cassation Petition, *NIFA v. MSDIA*, Court of Appeals (13 Oct. 2011), ¶ 120 (C-198).

that it had acted in bad faith if the Court had properly considered all of the evidence in the record.⁷²⁸

424. In sum, Merck has utterly failed to demonstrate that it had “no notice” that it could be held liable to PROPHAR on grounds of pre-contractual liability or that it did not have an opportunity to defend itself against such liability. On the contrary, the record of the lower court proceedings demonstrates exactly the opposite, as well as the baselessness of Merck’s argument that PROPHAR’s antitrust arguments diverted it from taking evidence on whether it had engaged in bad faith conduct during the parties’ negotiations and whether it was liable to PROPHAR on pre-contractual liability grounds.

b. Contrary To Merck’s Misrepresentations, The NCJ Applied Proper Procedure In Imposing Liability On The Basis Of Pre-Contractual Liability And It Had The Jurisdiction To Do So

425. Merck asserts that under the “dispositive principle,” the NCJ’s jurisdiction is limited to “ruling on causes of action establish by Article 3 of the Cassation Law and the errors alleged by the parties in their respective Cassation Petitions.”⁷²⁹ In support of that proposition, Merck relies on two sources. First, it cites the testimony of Dr. Carlos Humberto Páez Fuentes, an Ecuadorian lawyer who testified in support of Merck’s Memorial argument that it had “no notice” that it might be held liable in the first proceeding before the NCJ on grounds of unfair competition.⁷³⁰ According to Dr. Páez Fuentes, the NCJ’s September 2012 decision was “constrained by the ‘dispositive principle’ [...] [which] bars the judge from ruling on matters that have not been put

⁷²⁸ *Id.*, ¶¶ 103, 126.

⁷²⁹ Claimant’s Supplemental Reply, ¶ 55.

⁷³⁰ As noted above, Merck did not submit an opinion from Dr. Páez Fuentes in support of its Reply or Supplemental Reply, even though Ecuador put his testimony at issue in its Counter-Memorial. Perhaps that is because, in his opinion, Dr. Páez Fuentes testified that “Article 15 of the Cassation Law prohibits [the NCJ] from accepting new evidence” during a proceeding before it, thus confirming that, by submitting the June 2012 memorandum decertifying Cristian Augusto Cabrera as a damages expert, Merck itself created the conditions that led to the Constitutional Court’s vacatur of the September 2012 NCJ decision. *See* Expert Opinion of Carlos Humberto Páez Fuentes (1 Oct. 2013) (“Páez Fuentes Expert Opinion”), ¶ 21.

forward by the parties” in their cassation petitions.⁷³¹ Dr. Páez Fuentes states further that “[i]n the *NIFA v. MSDIA* proceedings, neither party listed as a basis of their cassation petitions the fact that the [Court of Appeals] failed to rule on the merits of a claim alleging unfair competition” and, because of that, “the NCJ violated the Cassation Law and the dispositive principle by finding MSDIA liable for acts of unfair competition.”⁷³² Merck also cites a 1996 decision of the Supreme Court of Ecuador (the predecessor of the NCJ), *Gerente de la Cooperativa de Educadores de El Oro v. Rebeca Minuche*,⁷³³ also cited in Dr. Páez Fuentes’s opinion, which Merck represents as establishing that “the NCJ’s jurisdiction is limited to addressing the specific grounds for cassation put to it by the parties.”⁷³⁴ On that basis, Merck applies Dr. Páez Fuentes’s opinion regarding unfair competition to its current assertion regarding pre-contractual liability, to conclude that “[b]ecause neither party requested the NCJ to rule on a claim of pre-contractual liability, the NCJ did not have jurisdiction to do so.”⁷³⁵

426. This argument is entirely counterfeit for multiple reasons, not the least of which is that if Merck really believed that the NCJ had *no jurisdiction* to have rendered a decision based upon pre-contractual liability, it would have filed a recourse with the Constitutional Court for a violation of its due process right to have its case heard by a competent judge,⁷³⁶ which—once again—it has not done. This is only reinforced by the fact that, in its Supplemental Reply, Merck relegates its “no jurisdiction” argument to a three-paragraph afterthought to its equally artificial

⁷³¹ *Id.*, ¶ 18.

⁷³² *Id.*, ¶ 22.

⁷³³ *Gerente de la Cooperativa de Educadores de El Oro v. Rebeca Minuche*, Supreme Court of Justice, First Civil and Commercial Division (26 July 1996), pp. 10-11 (CLM-197).

⁷³⁴ Claimant’s Supplemental Reply, ¶ 55.

⁷³⁵ *Id.*, ¶ 57.

⁷³⁶ First Guerrero Expert Report, ¶ 17(a).

argument that the November 2014 NCJ decision constituted a denial of justice because it had “no notice” that it could be held liable to PROPHAR on pre-contractual liability grounds.

427. As has been the case with almost all of the other arguments advanced by Merck in this arbitration, its statements in the Constitutional Court doom its “no jurisdiction” argument and corroborate not only that it does not believe that argument, but also that it must know it to be false. Worse, it is the same conduct that Merck accused PROPHAR of trying to perpetrate on the Constitutional Court, i.e., intentionally obfuscating NCJ procedure in order to mislead the Constitutional Court,⁷³⁷ and that Merck is now trying to perpetrate on this Tribunal.

428. In its April 3, 2013 submission to the Constitutional Court, Merck took pains to lay out that a proceeding before the NCJ consists of two phases—an initial cassation phase and, if the NCJ cassates, i.e., annuls, the case on the basis of the grounds argued in one of the parties’ cassation petitions, a second phase in which the NCJ sits as a court of third instance, equivalent to a court of first instance, to adjudicate the parties’ original claims and defenses in light of the evidence on the record below. Merck explained the initial cassation phase to the Constitutional Court at length,⁷³⁸ in support of its argument that, in the NCJ’s September 2012 decision, the NCJ applied the proper procedure during that phase and, accordingly, did not violate PROPHAR’s right to a defense because a “right to a defense” does not apply to the cassation phase. As Merck expounds, citing and quoting a commentator on civil cassation law in Ecuador and a prior decision of the Constitutional Court, the cassation phase is a debate between the lower court decision and the law, in which the NCJ determines whether that decision is in

⁷³⁷ Merck submission to the Constitutional Court (3 Apr. 2013), ¶ 37 (R-117) (“[PROPHAR’s] argument demonstrates [...] [its] clear intention to lead the Court into error [...]”).

⁷³⁸ *Id.*, ¶¶ 137-142.

accordance with the law, and it is not a determination of the parties' respective claims and defenses:

Regarding the nature of the cassation appeal.- Dr. Santiago Andrade Ubidia, in his article "Civil Cassation in Ecuador," discusses the issue of the civil cassation as a third judicial instance, and, among other things, states: "...C) *Civil cassation interrupts the normal course of the proceedings in respect of the appealed decision, as in reality it is a new proceeding, which changes the purposes of the original proceeding: it is a debate between the decision and the law, as it is usually defined, and the purposes of the original proceeding are not discussed. Instead, in the third instance the process is not interrupted, given that the purpose of the court's review in the third instance is the same as the original purpose of the claim and the response.*

As we can appreciate from the cited material, cassation should not be confused with an ordinary judicial proceeding, as it has its own particularities and purposes. This Constitutional Court has held in respect of the nature of cassation that: "*The word 'casar' comes from the Latin casare, which means to revoke or to annul. For its part, 'cassación' comes from the French word cassation, derived in turn from cassar, which means to annul, to break or to violate, and as such refers to an extraordinary appeal that seeks to annul a judicial decision that contains an incorrect interpretation of application of the law or that was issued in the course of a proceeding that did not comply with the relevant legal formalities. The decision is issued by a superior court of justice, and generally of the highest authority, such as, in our country the former Supreme Court of Justice, and the current National Court of Justice. The principal objectives of this appeal re: to obtain the correct application of the law on the part of various courts, as a guarantee of judicial security or certainty, and a consistent interpretation of the law through one single judicial body, establishing its jurisprudence.*" *The cassation creates a debate between the decision [of the lower court] and the law, not between the parties and their claims. It seeks to ensure that the decision is in accordance with the legal order, and the private interests of the parties to the proceedings are tangential to this purpose. It is intended to be a revision or examination of the decision in light of the relevant judicial norms, and thereby acts as a true control of the legality of the [lower court] decision. This is highly relevant given that normally the right to a defense, the omission of which would give rise to the state of "defenselessness" of the injured party, arises during the course of a proceeding where the adversaries are the parties thereto, and the purpose of the proceeding is to*

determine and protect, as the case may be, subjective rights of such parties.

The cassation case is distinct, and as a consequence is treated differently. In other words, the purposes and application of the right to a defense, as part of due process, in the analysis and resolution of a cassation appeal are distinct from the considerations taken into account in an ordinary appeal or judicial proceeding.

[...]

Conclusion: Cassation is not a recourse intended to decide between the positions of the parties, but to determine whether the decision [of the lower court] complies with judicial standards. Therefore, the right to a defense in the traditional sense is not applicable in a cassation.⁷³⁹

429. As Merck’s witness Dr. Páez Fuentes explains—in this instance, correctly—the cassation phase that Merck describes in the above passages from its Constitutional Court arguments are governed by Article 3 of the Cassation Law, which sets forth the exclusive grounds on which a cassation petition may be based and the only grounds on which the NCJ may cassate, or annul, the lower court decision for violations of either due process or a misapplication of the law.⁷⁴⁰

430. Elsewhere in the same Constitutional Court submission in which it explained the initial cassation phase, Merck explains that, if the NCJ cassates the lower court decision, it enters into the second phase of an NCJ proceeding, and sits as the equivalent of a court of first instance, it adjudicates the case under Article 16 of the Cassation Law (i.e., not Article 3) on the basis of the claimant’s (here PROPHAR’s) complaint and the evidence from the lower courts’ proceedings:

Article 16 of the Cassation Law establishes that: “If the Supreme Court of Justice finds an appeal admissible, it will accept the respective decision or order for review *and will issue its own decision in place of the reviewed decision* and based on the merits of the facts set forth in such decision or order.” That is, the respective Special Chamber of the National Court, if within the

⁷³⁹ *Id.*, ¶¶ 137-139, 142 (some emphasis added).

⁷⁴⁰ Páez Fuentes Expert Opinion, ¶¶ 13-14.

scope of its legal review of the decision, determines that such decision is not in accordance with legal principles and decides to overturn it—that is, to annul it—*the decision of the Cassation Court must “take the place” of the original decision, and in this respect, the Cassation Court must temporarily act as an ordinary court.*

As an ordinary court, the respective Special Chamber of the National Court must issue a decision, and in this respect, its only limitation is the “merits of the facts set forth in the decision or order [of the lower court],” *which necessarily implies a review of the evidence—which evidence is considered among the facts of the case—applying the rules of evidence set forth in the legal regulations of the lower courts.*

[...]

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 Propfar 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 within the doctrinal framework of unlawful competition and rules that, in the judges’ opinion, MSD’s conduct constituted a quasi-unlawful civil act in accordance with articles 2214 and 2229 of the Civil Code [...].⁷⁴¹

431. Contrary to Merck’s “no jurisdiction” argument, then, neither Article 3 of the Cassation Law, the “dispositive principle” that arises from it, nor what Merck and PROP HAR argued in their cassation petitions have anything to do with the NCJ’s jurisdiction to decide PROP HAR’s claims once the NCJ had determined that the Court of Appeals’ 23 September 2011 decision must be cassated, and proceeded to re-adjudicate the parties’ dispute in the same manner as a court of first instance. By Merck’s own admissions, that second phase is governed by Article 16 of the Cassation Law, and it involves the NCJ’s independent analysis of the evidence from the

⁷⁴¹ Merck submission to the Constitutional Court (received by the Court on 3 Apr. 2013), ¶¶ 120-121, 172 (emphasis added) (R-117).

lower court proceedings and its application to the grounds for liability that PROPHAR invoked in its original complaint.

432. Ecuador's expert in Ecuadorian civil procedure confirms both Merck's correct characterization of NCJ procedure in its Constitutional Court submission, on the one hand, and on the other, Merck's distortion of that procedure in its Supplemental Reply, its misuse of the *Gerente de la Cooperativa de Educadores de El Oro v. Rebeca Minuche* case, and the errors in Dr. Páez Fuentes's opinion:

As I stated in paragraph 6.1 of my first opinion, the procedure before the NCJ has two potential scenarios: in the first scenario, the NCJ acts as a Cassation Court in the strictest sense, the purpose of which is to determine errors defined by doctrine as in *procedendum* or in *judicando* that lower court judges have incurred in, based on the grounds expressed by the party that files the appeal. In this case, both parties filed a cassation appeal, and therefore both parties listed in their briefs any prejudice caused to them or the foundation for their corresponding appeals. As its primary function as a Cassation Court, the NCJ analyzes whether any of the events established by Art. 3 of the Cassation Law are present in the judgment that is the subject to the appeal and, if so, it must order the cassation of the judgment, and only then it will proceed to the second stage in which it "becomes" a trial court, in the terms indicated in paragraph 6.1 et seq. of my first opinion.

Article 3 of the Cassation Law establishes five grounds for cassation of a judgment. In fact, in its judgment of December 2012, the NCJ found an error in the judgment of the lower Court based on grounds four and five of Art. 3 of the Cassation Law, which were argued by MERCK in its appeal. I have been able to review the new judgment issued by the NCJ in November 2014 — which is separate from the one issued in December 2012 — where, the NCJ also orders the cassation of the judgment, finding the presence of ground five of Art. 3 of the Cassation Law argued by MERCK as one of the grounds for its appeal.

Both the "dispositive principle" alluded to by paragraph 55 of MERCK's Supplemental Reply, as the case cited in the footnote 48 of that document and the affirmation in paragraphs 18 through 22 of the opinion by Dr. Páez Fuentes, only apply to the initial phase in which the cassation court examines the grounds for cassation established in Art. 3 of the Cassation Law, which implies that the

NCJ may only order the cassation of the judgment for one of the grounds established by that article, when it is so alleged by the appellant, as it was in fact, sufficiently so, both in its ruling of September 2012 and of December 2014. The dispositive principle does not consequently prevent the Court, once cassation is admitted, and when it has become a trial court, from considering and ruling on all aspects which are the subject of the Litis, whether or not they were alleged as grounds for the appeal.

It is precisely for this reason that, once cassation is sustained (as it occurred in both of the aforementioned cases), the NCJ proceeded to become a “Trial Court” and to make a decision based on the grounds of NIFA’s complaint and the MERCK’s defenses, as well as on the evidence presented, in the same manner as it would be handled by any trial court. The dispositive principle is no longer applicable to this phase because the NCJ, in its new role — again, pursuant to Art. 16 of the Cassation Law — is no longer limited by the allegations brought by the parties on appeal, and has instead, broad assessment powers. The grounds of NIFA’s complaint are essentially that there was an improper conduct during the negotiations with MERCK, the latter having denied these events and giving rise to the litigation. Therefore, this is what must be evaluated and decided in the second phase of cassation, as it indeed happened. In fact, the allegation of having improperly applied Arts. 721 and 1562 of the Civil Code (as noted in NIFA’s Supplemental Reply) as they had not been argued as being the legal basis in the complaint, is not pertinent, given that the Code of Civil Procedure, in Art. 274 gives the Judge broad powers to base his judgments on the law (generically, because he must find the necessary rules to declare the law in the fairest manner possible) and on other sources of law, without omitting that Art. 280 therein requires judges to provide for omissions by parties regarding the standards of law that apply to the proceedings, a principle which has been correctly broadened in the first paragraph of Art. 140 of the Organic Law of the Judiciary.⁷⁴²

433. Merck’s assertion that the NCJ’s jurisdiction to “rule on a claim for pre-contractual liability” was “limited to addressing the specific grounds for cassation put to it by the parties” in their cassation petition is thus patently false. And even the briefest review of the November 2014 decision demonstrates that the NCJ applied the appropriate procedure and properly exercised its

⁷⁴² Second Expert Opinion of Prof. Javier Aguirre Valdez (20 Feb. 2015) (“Second Aguirre Expert Opinion”), ¶¶ 4.2-4.9.

jurisdiction in its adjudication of both Merck’s and PROPHAR’s cassation petitions and its subsequent *de novo* adjudication of PROPHAR’s complaint and Merck’s defenses against it, in light of the evidence. In Clauses 3 and 4 of the November 2014 decision, the NCJ stated the grounds for cassation of the Court of Appeals’ judgment that, pursuant to Article 3 of the Cassation Law, PROPHAR and Merck had raised in their cassation petitions.⁷⁴³ In Clauses 5 and 6, it proceeded to analyze each of Merck’s grounds for cassation.⁷⁴⁴ In the fourth paragraph of Clause 6.2, the NCJ determined that “there is evidence” in the Court of Appeals’ judgment “of some obscure, imprecise phrases, and confusion of concepts and application of rules with regards to matters such as free competition and tort [...] [and] dominant market position and unfair competition, which makes it clear that there is defective substantiation.”⁷⁴⁵ On the basis of that finding, the NCJ proceeded to cassate—annul—the Court of Appeals’ judgment pursuant to Article 3’s fifth ground for cassation stated in Merck’s cassation petition, and concluded that since it had cassated the case on that ground, it was not necessary to consider any other of Merck’s, or any of PROPHAR’s, grounds for cassation.⁷⁴⁶

434. Having annulled the Court of Appeals’ judgment, the NCJ then entered the second phase and “pursuant to what is set forth *in paragraph one of article 16 of the Law of Cassation*,” proceeded to sit as the equivalent of a first instance court to “issue the following judgment on the merits.”⁷⁴⁷ As its first step in that process, the NCJ did exactly what proper procedure and its jurisdiction required it to do: It laid out the claims in PROPHAR’s complaint and the defenses in

⁷⁴³ November 2014 NCJ Decision, Clauses 3 and 4, pp. 3-9 (R-194).

⁷⁴⁴ *Id.*, Clauses 5 and 6, pp. 9-42.

⁷⁴⁵ *Id.*, Clause 6.2, fourth paragraph, p. 29.

⁷⁴⁶ *Id.*, Clause 6.2, fourth and fifth paragraphs, p. 29.

⁷⁴⁷ *Id.*, Clause 6.2, sixth paragraph, p. 29 (emphasis added).

Merck's answer to it;⁷⁴⁸ conducted an in-depth analysis of the legal issues raised by those claims and defenses;⁷⁴⁹ and concluded as a matter of law that, while "it is clear that [...] parties are at liberty to enter or not a contract," a party to contract negotiations "must proceed in accordance with the principle of good faith [...] [which] entails the duty not to abandon the negotiations without just cause."⁷⁵⁰ The NCJ then comprehensively laid out the evidence from the lower court proceedings;⁷⁵¹ noted that it had "examined and studied each one of those items of evidence;"⁷⁵² proceeded to weigh the evidence and adjudicate whether it showed that Merck had breached the duty of good faith during its contract negotiations with PROP HAR.⁷⁵³ On the basis of that analysis, the NCJ concluded that Merck had and that its conduct had harmed PROP HAR; held Merck liable to indemnify PROP HAR under Articles 2214 and 2229 of the Civil Code on grounds of pre-contractual liability;⁷⁵⁴ and proceeded to quantify the damage award to PROP HAR.⁷⁵⁵

435. As demonstrated by the foregoing, other than one erroneous statement about NCJ procedure in Dr. Páez Fuentes's opinion and a mischaracterization of a Supreme Court of Justice case, Merck has not offered any evidence that the NCJ had no jurisdiction to rule on the basis of pre-contractual liability in its November 2014 decision, and it has utterly failed to establish its "no jurisdiction" argument. On the contrary, Merck's own statements to the Constitutional Court and the NCJ decision itself establish that it was unquestionably within the jurisdiction of the

⁷⁴⁸ *Id.*, pp. 30-42.

⁷⁴⁹ *Id.*, pp. 42-52.

⁷⁵⁰ *Id.*, p. 52.

⁷⁵¹ *Id.*, pp. 52-75.

⁷⁵² *Id.*, p. 75.

⁷⁵³ *Id.*, pp. 75-85.

⁷⁵⁴ *Id.*, pp. 84-85.

⁷⁵⁵ *Id.*

NCJ, sitting as the equivalent of a first instance court after it had annulled the Court of Appeals' decision, to rule on that basis. Moreover, as demonstrated above, Merck has also wholly failed to demonstrate that it had "no notice" that the NCJ might decide the case on the basis of pre-contractual liability or that it was deprived of an opportunity to be heard on that question. Accordingly, Merck's "no jurisdiction" argument must be rejected.

4. The November 2014 NCJ Cured Any Alleged Defects In The Lower Court Proceedings

436. This case is not about whether Merck was the victim of a denial of justice in the lower court proceedings. Rather, it is about whether Ecuador's court system as a *whole* has failed to deliver justice. In light of the above, and setting aside Merck's failure to have recourse to reasonably available and effective domestic remedies, the answer is no. Ecuador's highest court, the NCJ, cured any alleged errors by the lower courts in their determinations of liability and damages. Accordingly, Merck's allegations of bias and impropriety by the trial court and the Court of Appeals are moot.

437. The fact that the November 2012 NCJ decision reduced Merck's damages from US \$150 million to US \$7.7 million illustrates this point. In its Reply, Merck insinuates that the US \$150 million judgment by the Court of Appeals is evidence of incompetence and that such "irrational" amount supports the inference that the court was influenced by bias and corruption.⁷⁵⁶ By reducing 95% of Merck's damages, the NCJ wiped out any alleged vestiges of bias or impropriety reflected in the damages originally imposed by the lower courts.

438. Merck has also utterly failed to show that the lower court proceedings were anomalous—let alone plagued with procedural irregularities amounting to a denial of justice. In any event,

⁷⁵⁶ Claimant's Reply, ¶¶ 495, 498.

and as shown above, Merck complains of irregularities that played no role to the *de novo* determination of the case by the NCJ.

439. In sum, Claimant’s allegations of denial of justice based upon the NCJ decision of 10 November 2014 have no merit.

D. The Constitutional Court’s Decision Was Rational And Fully Justified Under Ecuadorian Law

440. After the NCJ rendered its 21 September 2012 decision, and its order on the parties’ requests for clarification and expansion thereof,⁷⁵⁷ PROPHAR filed an extraordinary protection action (“EPA”).⁷⁵⁸ In its action, PROPHAR claimed that the NCJ decision breached several of its constitutional rights⁷⁵⁹ and sought “a monetary compensation [...] set according to the damage caused to [it] [...] calculated on the basis of the evidence duly produced in the claim [...].”⁷⁶⁰ On 16 January 2013, the Constitutional Court admitted PROPHAR’s EPA for further processing.⁷⁶¹

441. Despite the fact that its complaints against the NCJ decision, as expressed in this arbitration at least,⁷⁶² implicate several constitutional provisions,⁷⁶³ MSDIA chose not to file an EPA. It did, however, fully participate in the Constitutional Court proceedings initiated by PROPHAR. Under Ecuadorian law, an EPA is addressed to the NCJ judges that rendered the

⁷⁵⁷ Court Order, *NIFA v. MSDIA*, National Court of Justice (27 Oct. 2012) (C-204).

⁷⁵⁸ PROPHAR’s Extraordinary Protection Action, Constitutional Court (22 Nov. 2012) (C-205).

⁷⁵⁹ *Id.*, § IV (C-205).

⁷⁶⁰ *Id.*, § VI (C-205). Claimant’s English translation erroneously translates the terms *indemnización pecuniaria* into “punitive compensation.” The proper translation is, of course, “monetary compensation.”

⁷⁶¹ Decision on PROPHAR’s Extraordinary Protection Action, Constitutional Court of Ecuador, Admission Chamber (16 Jan. 2013) (R-190).

⁷⁶² See Ecuador’s Counter-Memorial, ¶¶ 281-282, 327, 363 (contrasting Claimant’s allegations in this arbitration to its defense of the NCJ decision before the Constitutional Court).

⁷⁶³ See Ecuador’s Counter-Memorial, ¶ 188. According to Prof. Guerrero del Pozo, MSDIA’s complaints could have served as a “sufficient basis for filing an extraordinary protection action against [the NCJ’s] decision.” First Expert Report on Ecuadorian Law of Juan Francisco Guerrero del Pozo (24 July 2012) (“First Guerrero Expert Report”), ¶¶ 15-17, 75.

challenged decision, and not to the opposing party in the underlying proceeding.⁷⁶⁴ However, such a party may intervene in the proceedings.⁷⁶⁵ Accordingly, MSDIA filed multiple submissions with the Constitutional Court, totaling approximately 170 pages,⁷⁶⁶ whereby it defended the constitutionality, as well as the reasonableness, of the NCJ decision.⁷⁶⁷ It also attended the hearing and presented argument.⁷⁶⁸

442. On 12 February 2014, the Constitutional Court rendered its decision. The Court ruled that the NCJ decision breached PROPHAR's rights to due process, effective legal protection and legal certainty, enshrined in the Ecuadorian Constitution under Articles 75-76 and 82.⁷⁶⁹ The Court found in particular that the NCJ Judges had acted "improperly" by admitting and considering evidence submitted by Merck that was not part of the lower court record in the case, in violation of legal prohibitions and of the "legal nature and essence of the cassation appeal."⁷⁷⁰

443. The evidence in question was a Memorandum, issued by the Ecuadorian Council of the Judiciary at the behest of Mr. Marcelo Santamaría Martínez,⁷⁷¹ one of Claimant's fact witnesses

⁷⁶⁴ Constitution of the Republic of Ecuador (20 Oct. 2008), Arts. 94, 437 (RLM-15).

⁷⁶⁵ See Organic Law of Jurisdictional Guarantees and Constitutional Control (2009), Art. 12(1) (CLM-193) (allowing the opposing party in the underlying proceeding to file written submissions and attend, upon leave, the hearing).

⁷⁶⁶ MSDIA submission to the Constitutional Court (9 Jan. 2013) (R-116) (opposing the admissibility of PROPHAR's EPA); MSDIA submission to the Constitutional Court (3 Apr. 2013) (R-117) (opposing the admissibility and merits of PROPHAR's EPA); MSDIA submission to the Constitutional Court (13 Sept. 2013) (R-120) (opposing the admissibility and merits of PROPHAR's EPA).

⁷⁶⁷ See Ecuador's Counter-Memorial, ¶¶ 281-282, 327, 363 (contrasting Claimant's allegations in this arbitration to its defense of the NCJ decision before the Constitutional Court).

⁷⁶⁸ Procuraduría del Estado, Republic of Ecuador, Partial Transcript of the Audio recording of the Oral Submissions by MSDIA (30 Apr. 2013) (R-118).

⁷⁶⁹ Judgment, *NIFA v. NCJ*, Constitutional Court (12 Feb. 2014), p. 21 (C-285).

⁷⁷⁰ *Id.* (C-285). PROPHAR had argued that the NCJ's consideration of evidence invalidly entered into the cassation record in order to "leave without effect some validly produced evidence" amounted to breach of its right to due process and right to defense under the Ecuadorian Constitution. PROPHAR's Extraordinary Protection Action, Constitutional Court (19 Nov. 2012), pp. 4-6, 10-11 (C-205).

⁷⁷¹ See Memorandum from Wilson Rosero Gómez, Chief of Staff, to Iván Escandón, Provincial Director of the Council of the Judiciary for Pichincha (31 May 2012), (C-63).

in this arbitration, whereby, long after the Court of Appeals' decision, the Council suspended Mr. Christian Cabrera's accreditation as a damages expert. Mr. Cabrera's report had formed a basis of the Court of Appeal's ruling on damages. The Memorandum was submitted to the NCJ by MSDIA in June 2012,⁷⁷² that is, after the closure of the evidentiary phase of the case.⁷⁷³ The NCJ "view[ed] with concern" this Memorandum in the context of its analysis and legal conclusion that the Court of Appeal's calculation of damages was erroneous and had to be set aside.⁷⁷⁴

444. Claimant posits that the Constitutional Court's judgments on the admissibility and merits of PROPHAR's EPA illustrate the "systemic bias against MSDIA" and the fact that that Court's decisions are "just as susceptible to improper influence as [...] Ecuador's civil courts."⁷⁷⁵ Claimant does not base these allegations on actual proof of bias or improper influence. Indeed, it has submitted no proof whatsoever on these charges. Claimant's own expert on the issue, Dr. Oyarte, does not even suggest in his reports that the proceedings in Ecuador's Constitutional Court were improperly influenced in any way. Instead, Claimant asks the Tribunal to infer such bias and improper influence from what it contends to be the incorrectness, in substance, of the two Constitutional Court's decisions on the admissibility and the merits of PROPHAR's EPA, respectively.

445. The following sections establish (1) that the decisions of the Constitutional Court accorded with Ecuadorian law and jurisprudence, and (2) that even if Claimant's criticisms were correct, these decisions may not be considered as evidence of bias or improper influence, let

⁷⁷² MSDIA Submission to the National Court of Justice (27 June 2012) (R-184).

⁷⁷³ Second Expert Report on Ecuadorian Law of Juan Francisco Guerrero del Pozo (18 Feb. 2015) ("Second Guerrero Expert Report"), ¶ 69.

⁷⁷⁴ Judgment, *NIFA v. MSDIA*, National Court of Justice (21 Sept. 2012), ¶ 16.5 (C-203).

⁷⁷⁵ Claimant's Reply, ¶ 479.

alone justify the setting aside of the deference owed to the substantive determinations of the Constitutional Court under international law.⁷⁷⁶

1. The Constitutional Court’s Decision To Admit PROPHAR’s EPA Accorded With Ecuadorian Law And In Any Event Does Not Constitute Evidence Of Either Bias Or Undue Influence

446. According to Claimant, PROPHAR’s EPA “should not have been admitted.”⁷⁷⁷ The fact that it *was*, “indicates serious flaws—and a lack of impartiality—in the workings of the Constitutional Court.”⁷⁷⁸ In particular, Claimant alleges that PROPHAR’s complaints that focused on the allegedly mistaken evaluation of evidence or assessment of damages by the NCJ were not subject to Constitutional Court review.⁷⁷⁹ Claimant also argues that PROPHAR’s

⁷⁷⁶ For an erroneous judgment to engage the responsibility of the state, it must be established that the law had been misapplied in a way that is “clear and malicious” (*Robert Azinian, Kenneth Davitian, & Ellen Baca v. The United Mexican States*, ICSID Case No. ARB (AF)/97/2, Award (1 Nov. 1999) (Paulsson, Civiletti, von Wobeser) (“*Azinian et al.*”), ¶ 103 (CLM-36)), or “clearly improper and discreditable,” (*Mondev International Ltd. v. United States of America*, ICSID Case No. ARB(AF)/99/2, Award (11 Oct. 2002) (Stephen, Crawford, Schwebel) (“*Mondev*”), ¶ 127 (RLA-54)), or “in such an egregiously wrong way, that no honest, competent court could have possibly done so.” (*Mr. Franck Charles Arif v. Republic of Moldova*, ICSID Case No. ARB/11/23, Award (8 Apr. 2013) (Cremades, Hanotiau, Knieper), ¶ 442 (RLA-120)). As aptly summarized by Claimant’s expert Prof. Paulsson himself in the capacity as sole arbitrator in the *Pantehniki v. Albania* case,

[t]he 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.’ Such a finding would mean that the state had not provided even a minimally adequate justice system.

Pantehniki S.A. Contractors & Engineers (Greece) v. The Republic of Albania, ICSID Case No. ARB/07/21, Award (30 July 2009) (Paulsson, sole arbitrator), ¶ 94 (RLA-94).

The same or substantively similar tests were also endorsed in *Iberdrola Energía S.A. v. Republic of Guatemala*, ICSID Case No. ARB/09/5, Award (17 Aug. 2012) (Zuleta, Oreamuno, Derains), ¶ 432 (RLA-115); *Swisslion DOO Skopje v. The Former Yugoslav Republic of Macedonia*, ICSID Case No. ARB/09/16, Award (6 July 2012) (Guillaume, Price, Thomas), ¶ 263 (RLA-186); *RosInvestCo UK Ltd. v. The Russian Federation*, SCC Arbitration V (079/2005), Final Award (12 Sept. 2010) (Böckstiegel, Steyn, Berman), ¶ 275 (CLM-141); *Flughafen Zürich A.G. & Gestión e Ingeniería IDC S.A. v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB/10/19, Award (18 Nov. 2014) (Fernández-Armesto, Alvarez, Vinuesa), ¶ 640 (RLA-200); *Liman Caspian Oil BV and NCL Dutch Investment BV v. Republic of Kazakhstan*, ICSID Case No. ARB/07/14, Award (22 June 2010) (Böckstiegel, Hobér, Crawford) (“*Liman Caspian Oil*”), ¶ 274 (RLA-181).

⁷⁷⁷ Claimant’s Reply, ¶ 482; Second Expert Opinion of Rafael Oyarte Martínez (7 Aug. 2014) (“Second Oyarte Expert Opinion”), ¶ 54.

⁷⁷⁸ Claimant’s Reply, ¶ 482.

⁷⁷⁹ Claimant’s Reply, ¶ 481; Second Oyarte Expert Opinion, ¶ 53.

request for relief, that the Constitutional Court “reevaluate the evidence and establish a new damages award,”⁷⁸⁰ was “outside the jurisdiction of the Constitutional Court and was inconsistent with Ecuadorian law.”⁷⁸¹

447. These arguments are inconsistent with Ecuadorian law and practice.

a. The Admission Of PROPHAR’s Complaints Against The Manner In Which The NCJ Applied The Law, Appreciated Evidence, And Calculated Damages Does Not Render Its EPA Inadmissible

448. The decision to admit PROPHAR’s EPA is not invalid because the EPA included complaints against the manner in which the NCJ applied the law, appreciated evidence, and calculated damages. These complaints were not mentioned in the Court’s decision on the EPA’s admissibility and as it turned out played no role to the material outcome of PROPHAR’s constitutional case. The Court referred to these complaints in its subsequent judgment on the merits only to dismiss them, reminding the parties of the fact that

the extraordinary protection action is not an “additional instance,” in other words, it cannot be used to seek the analysis of merely legal matters that belong and are inherent to the ordinary justice. By virtue of that fact, the Constitutional Court cannot proceed to analyze, let alone decide on matters that are eminently legal. The purpose of its analysis must be directly aimed at the alleged violation of constitutional rights and rules of due process in the course of the challenged decision.⁷⁸²

449. The only complaint specifically mentioned as a basis for the Court’s decision on admissibility was PROPHAR’s argument concerning the improper admission and consideration of the Cabrera Memorandum by the NCJ.⁷⁸³ This complaint formed the ground upon which the

⁷⁸⁰ Claimant’s Reply, ¶¶ 480-482.

⁷⁸¹ *Id.*, ¶ 482.

⁷⁸² Judgment, *NIFA v. NCJ*, Constitutional Court (12 Feb. 2014), p. 12 (C-285).

⁷⁸³ Decision on PROPHAR’s Extraordinary Protection Action, Constitutional Court of Ecuador, Admission Chamber (16 Jan. 2013), pp. 1-2 (R-190).

Court later upheld the EPA on its merits. Claimant has not challenged the admissibility of this particular complaint. Its theory appears to be that an EPA may not properly be admitted unless all of the grounds asserted qualify, and not only some. This proposition is not only unsupported, but absurd on its face.

450. In any event, the admissibility of an EPA under Ecuadorian law consists solely of a “preliminary verification that exclusively pertains to the *content of the complaint*, and the discussions *therein contained*.”⁷⁸⁴ As Prof. Guerrero del Pozo states, “if the Admissibility Chamber finds that the complaint meets the necessary requirements, it is obliged to admit it, without being permitted to carry out any other kind of verification or examination.”⁷⁸⁵ Ecuadorian law even provides for an opportunity to correct defects in the content of an EPA that might affect its admissibility; according to Article 12 of the Regulation for Substantiating Competence Proceedings before the Constitutional Court, the applicant party may correct noncompliance with the admissibility requirements of the Organic Law.⁷⁸⁶

451. Prof. Guerrero del Pozo’s testimony on these issues was not contested by Dr. Oyarte in his Second Expert Opinion.

452. Indeed, applying a high threshold for the admissibility of an EPA would threaten the effectiveness of this remedy and therefore must be avoided. According to the Court itself, a decision not to admit recourse to constitutional judicial guarantees, such as the EPA, “is an

⁷⁸⁴ First Guerrero Expert Report, ¶ 27 (emphasis added).

⁷⁸⁵ Second Guerrero Expert Report, ¶ 61; First Guerrero Expert Report, ¶ 27. Indeed, the admissibility decisions of the Constitutional Court routinely contain statements to the effect that the admissibility of an EPA is “without prejudice” to the Court’s decision on the merits of the action. *See* First Guerrero Expert Report, ¶ 28. This is also the case with respect to the admissibility decision at issue in the present case. *See* Decision on PROPHAR’s Extraordinary Protection Action, Constitutional Court of Ecuador, Admission Chamber (16 Jan. 2013), p. 3 (R-190).

⁷⁸⁶ Regulation for Substantiating Competence Proceedings before the Constitutional Court (10 Feb. 2010), Art. 12 (R-162) (“Non-admissibility is applicable when the action or request fails to meet the requirements for such purpose, *and provided it cannot be remedied*.”) (emphasis added).

exceptional matter, that is, it should only be granted at the impossibility of the judge to rectify the minimum content requirements of the complaint.”⁷⁸⁷

453. In light of the foregoing, the Court’s admission of PROPHAR’s EPA is hardly surprising, let alone of a substantive quality that would justify setting aside the deference that it is entitled to under international law.

b. PROPHAR’S Request For Relief Does Not Render Its EPA Inadmissible

454. PROPHAR asked that the Constitutional Court set “a monetary compensation [...] calculated on the basis of the evidence duly produced in the claim.”⁷⁸⁸ Whether or not the relief requested was within the power of the Court to award, the fact that it was requested does not render the EPA inadmissible. Claimant’s allegation to the contrary is completely meritless.

455. The requirements for the admissibility of an EPA are set out in Articles 61 and 62 of the Organic Law of Jurisdictional Guarantees and Constitutional Control (“Organic Law”).⁷⁸⁹ They do not include, as Prof. Guerrero del Pozo states, “a comprehensive analysis by the Admissibility Chamber [...] of the measures for reparation requested by the plaintiff.”⁷⁹⁰ Therefore, as Prof. Guerrero del Pozo points out, “an improper request for measures of full reparation is not a sufficient cause to declare an extraordinary protection action inadmissible.”⁷⁹¹

456. In any event, PROPHAR’s request did “not bind or limit in any way the Constitutional Court’s discretion and ability to order all measures deemed necessary to obtain full reparation of

⁷⁸⁷ Judgment No. 102-13-SEP-CC, Constitutional Court, Case No. 0380-10 EP, published in Official Gazette No. 5 (27 Dec. 2013) (FG-55) (emphasis in original), *cited* in Second Guerrero Expert Report, ¶ 64.

⁷⁸⁸ PROPHAR’s Extraordinary Protection Action, Constitutional Court (19 Nov. 2012), p. 13 (C-205).

⁷⁸⁹ Articles 61 and 62 of the Organic Law of Jurisdictional Guarantees and Constitutional Control set out the requirements for the formal and material admissibility, respectively, of an EPA. Organic Law of Jurisdictional Guarantees and Constitutional Control, Arts. 61 and 62 (CLM-193). *See further* Ecuador’s Counter-Memorial, ¶ 209.

⁷⁹⁰ Second Guerrero Expert Report, ¶ 61.

⁷⁹¹ *Id.*, ¶ 65.

the harm caused by the violation of the constitutional right.”⁷⁹² Indeed, the Court rejected PROPHAR’s request, and instead ordered, having found that the NCJ improperly admitted and considered new evidence, the annulment of the NCJ decision and of any other procedural act and ruling issued in connection therewith, as well as the remand of the case to the NCJ for re-adjudication of the parties’ original 2011 cassation petitions “in adherence to the guarantees [of] due process, legal protection, and legal certainty.”⁷⁹³

2. The Constitutional Court’s Judgment Is Rational And Consistent With Ecuadorian Law

457. Claimant’s criticism of the Constitutional Court’s decision on the merits of PROPHAR’s EPA is equally unfounded. Ecuadorian law could not be clearer. Article 15 of the Law on Cassation provides: “[n]o evidence may be requested or ordered, nor may any motion be admitted, during the conduct of a cassation appeal.”⁷⁹⁴ According to Prof. Guerrero del Pozo, this provision establishes that “Ecuadorian law does not recognize the validity of evidence introduced during the proceedings of a cassation appeal.”⁷⁹⁵ Claimant’s own expert, Prof. Páez, has testified that Article 15 of the Cassation Law “prohibits [the NCJ] from accepting new evidence or addressing any collateral issues.”⁷⁹⁶ In turn, Article 76(4) of the Ecuadorian Constitution establishes that “evidence obtained or presented in violation of the Constitution *or the law* shall

⁷⁹² *Id.*, ¶ 62.

⁷⁹³ Judgment, *NIFA v. NCJ*, Constitutional Court (12 Feb. 2014), p. 22 (C-285). *See also* Second Guerrero Expert Report, ¶ 66 (“[the Constitutional Court’s judgment] confirms that the full reparation remedies requested in an extraordinary protection action are not binding on the judge deciding the action. In fact, in the judgment at issue, the measures of full reparation that the Court ordered differed from the ones requested by PROPHAR in its pleading.”).

⁷⁹⁴ The provision is cited in Constitutional Court Judgment, p. 18 (C-285). *See also* First Legal Opinion on Ecuadorian Civil Procedural Law of Javier Aguirre Valdez (“First Aguirre Legal Opinion”), fn. 9 (“[i]n the processing of a petition for writ of cassation, no evidence is examined and no motions may be filed, as they are expressly forbidden by Article 15 of the Cassation Law.”).

⁷⁹⁵ Second Guerrero Expert Report, ¶ 68.

⁷⁹⁶ Expert Opinion of Prof. Carlos Humberto Páez Fuentes (1 Oct. 2013), ¶ 21.

not have any validity and shall fail to qualify as evidence.”⁷⁹⁷ In light of these express provisions of the law, the Constitutional Court’s judgment could not have been any different.

458. Yet Claimant maintains that the Constitutional Court’s judgment “makes no sense” and is “contrary to Ecuadorian law.”⁷⁹⁸ Claimant never offers any support for the second prong of its attack. It does not even acknowledge the aforementioned provisions of Ecuadorian law. This is because such provisions are absolutely fatal to its claim. For this reason, Claimant’s efforts are devoted to semantics, i.e., the first prong of its attack.

459. According to Claimant, the NCJ’s reference to the Cabrera Memorandum was “not material to its decision.”⁷⁹⁹ Moreover, the NCJ “did not treat [the Cabrera Memorandum] as evidence [...] of NIFA’s purported damages”; rather, the Memorandum was relevant “only to the question of what weight the NCJ should give to [...] the expert report of Mr. Cabrera.”⁸⁰⁰ (Claimant does not explain how, even going only to “weight,” the Memorandum would not constitute evidence; indeed, one is left to wonder for what purpose Merck submitted the Memorandum to the NCJ if not as evidence intended to be considered by the Court in making its decision.) As a result, in Claimant’s view, the NCJ’s “reference” to the Cabrera memorandum “could not plausibly have constituted a violation of [PROPHAR’s] Constitutional rights, much less a ‘serious’ violation, as is required by Ecuadorian law.”⁸⁰¹ In addition, in its Supplemental Reply, Claimant complained that the Constitutional Court “did not order the return of the \$1.57

⁷⁹⁷ Constitution of the Republic of Ecuador (20 Oct. 2008), Art. 76(4) (RLM-15) (emphasis added).

⁷⁹⁸ Claimant’s Reply, ¶ 485.

⁷⁹⁹ Claimant’s Reply, ¶¶ 486-488.

⁸⁰⁰ *Id.*, ¶ 489.

⁸⁰¹ *Id.*, ¶ 491.

million [it] paid to NIFA or direct the NCJ to take into account the amount MSDIA had already paid in its subsequent decision.”⁸⁰²

460. Even if those allegations were true, *quod non*, the Constitutional Court’s judgment would not constitute evidence of bias or improper influence. At most, it would constitute evidence of the Court’s strict adherence to the provisions of the law. But in any event, Claimant is wrong. The sections that follow show that nothing justifies impugning the Constitutional Court for concluding, based on a reasonable reading of the text of the NCJ’s judgment, that the NCJ did consider the Cabrera Memorandum as evidence in breach of the due process guarantees of the Ecuadorian Constitution.

a. The Constitutional Court Cannot Be Impugned For Holding That The NCJ Rejected The Court Of Appeal’s Calculation Of Damages Based, *Inter Alia*, On The Cabrera Memorandum

461. The NCJ rejected the Court of Appeal’s calculation of damages on various independent grounds. These grounds can be reasonably taken to include the improperly submitted Cabrera Memorandum. In the relevant section of its judgment,⁸⁰³ the NCJ first generally observed that the Court of Appeal’s damages calculation was premised on its erroneous conceptualization of the matter as an antitrust matter.⁸⁰⁴ Then it specifically referred to Mr. Cabrera’s expert report, citing the Court of Appeal’s endorsement of its calculation parameters,⁸⁰⁵ and Claimant’s criticism thereof in its cassation petition.⁸⁰⁶ Significantly, with respect to that expert report, the NCJ

⁸⁰² Claimant’s Supplemental Reply, ¶ 24.

⁸⁰³ Judgment, *NIFA v. MSDIA*, National Court of Justice (21 Sept. 2012), ¶ 16 (C-203).

⁸⁰⁴ *Id.*, ¶ 16.2.

⁸⁰⁵ *Id.*, ¶ 16.3.

⁸⁰⁶ *Id.*, ¶ 16.4.

“view[ed] with concern” the Memorandum in question, whose text it also reproduced.⁸⁰⁷ It then concluded the following:

*From the foregoing it can be clearly seen that the challenged decision takes as a reference for compensation a parameter that [has] nothing to do with PROPHAR nor with MERCK, but rather “with domestic production and sales that are made of generic products, and also projecting this pharmaceutical information for the country as such over several years,” and with alleged profit and sales margins above the historic business and appropriate legal margins, which is manifestly illogical [...].*⁸⁰⁸

462. The NCJ’s conclusion, that the compensation granted by the Court of Appeals had been calculated erroneously, was thus based on a number of previously-stated elements (“*from the foregoing*”), which necessarily include the Cabrera Memorandum (alongside the NCJ’s express rejection of the Court of Appeal’s finding of liability and Claimant’s criticism in its cassation petition of the methodology adopted by Mr. Cabrera).⁸⁰⁹

463. The Constitutional Court examined the text of the NCJ decision, including the conclusion just mentioned.⁸¹⁰ It held that “based on the content of said memorandum,” the NCJ “decided not to take into account the expert evidence submitted before the [Court of Appeals].”⁸¹¹ As a result, the NCJ impermissibly acted on evidence that was not part of the lower court record.⁸¹² In view of the treatment of the Memorandum in the text of the NCJ decision (express reference to the Memorandum, reproduction of its pertinent part, value judgment of its content), the

⁸⁰⁷ *Id.*, ¶ 16.5.

⁸⁰⁸ *Id.*, ¶ 16.6 (some emphasis added).

⁸⁰⁹ Second Guerrero Expert Report, ¶ 76.

⁸¹⁰ Judgment, *NIFA v. NCJ*, Constitutional Court (12 Feb. 2014), p. 17 (C-285).

⁸¹¹ *Id.*

⁸¹² *Id.*, p. 18 (C-285) (“acting on evidence or admitting motions is barred in cassation appeals, because doing so would ignore the proper legal nature of said recourse, which is to perform an analysis of the ruling before the law, which means that the claims that gave rise to the litigation that produced said sentence may not be discussed.”)

Constitutional Court's conclusion could not possibly be seen as unreasonable.⁸¹³ Its decision is far from "clearly improper and discreditable."

464. Moreover, it is irrelevant whether the role played by the Cabrera Memorandum in the NCJ decision was "material" or not to the NCJ's decision to dismiss the parameters adopted by the Court of Appeal.⁸¹⁴ The Constitutional Court deemed Article 15's prohibition to be absolute, precluding the admission of new evidence "even as a due care step for clarification purposes."⁸¹⁵ Having found that the NCJ *did* admit new evidence, it is difficult to see how the Constitutional Court could not have found a breach of PROPHAR's due process rights. This finding was consistent with the provisions of the law, which Claimant does not dispute as such, and the prior jurisprudence of both the Constitutional Court and the NCJ.⁸¹⁶

b. The Constitutional Court Cannot Be Impugned For Holding That The Cabrera Memorandum Was Considered By The NCJ As Evidence

465. Equally incredibly, Claimant alleges that the Cabrera Memorandum related "only to the question of what weight the NCJ should give to [...] the expert report of Mr. Cabrera."⁸¹⁷ Therefore, according to Claimant, the NCJ did not treat the Cabrera Memorandum as evidence of

⁸¹³ Second Guerrero Expert Report, ¶ 81 ("the Constitutional Court's conclusion that the National Court of Justice's consideration of evidence extemporaneously produced into the proceedings by one of the parties constitutes a violation of due process, effective judicial protection and legal security of the counterparty, is reasonable and foreseeable in the context of the Ecuadorian legal system.").

⁸¹⁴ Claimant's argument on the materiality of the Memorandum is, of course, mere speculation. The Memorandum was expressly referred to, its contents reproduced and evaluated by the NCJ. As Prof. Guerrero del Pozo states, it is absurd to argue in these circumstances that "an opinion by the highest court in Ecuador regarding a document introduced in the proceedings by one of the parties would have no legal relevance whatsoever." Second Guerrero Expert Report, ¶ 77. Claimant's argument, moreover, is contradicted by its statement in paragraph 485 of its Reply, where it points out that the Memorandum "was obviously relevant to the NCJ's review of the court of appeals' decision." Claimant's Reply, ¶ 485. *See also* Second Guerrero Expert Report, ¶¶ 79-80.

⁸¹⁵ Judgment, *NIFA v. NCJ*, Constitutional Court (12 Feb. 2014), p. 20 (C-285).

⁸¹⁶ *Id.*, pp. 17-18.

⁸¹⁷ Claimant's Reply, ¶ 489.

PROPHAR's purported damages.⁸¹⁸ This of course begs the question: to what was Mr. Cabrera's expert report pertinent other than the calculation of PROPHAR's damages? Claimant's artificial distinction seeks to avoid the real question: was the Cabrera Memorandum treated as evidence by the NCJ? The answer is an unequivocal "yes."

466. *First*, as Prof. Guerrero del Pozo points out, the NCJ made reference to the Memorandum *after* the cassation of the impugned judgment and *while acting as an instance court* under Article 16 of the Law on Cassation.⁸¹⁹ In that capacity, the Court has competence to "render a new judgment on the merits" and, more importantly for present purposes, to "evaluate the evidence that is in the record of the proceedings."⁸²⁰ And indeed, as discussed above, the Court referred to the Memorandum specifically "with respect to [the] expert testimony" of Mr. Cabrera and in connection with the Court of Appeals' calculation of damages.⁸²¹ This reference was not made in passing. The Court reproduced the text of the Memorandum and "*view[ed]* [it] with concern,"⁸²² which implies assessment and conclusion as regards its probative value *vis-à-vis* Mr. Cabrera's expert qualifications.⁸²³

467. *Second*, Claimant itself sought to submit the Memorandum as evidence. In its motion addressed to the NCJ, dated 27 June 2012, Claimant expressly stated that it was submitting the Memorandum to the Court in order to

prove that Engineer Augusto Cabrera Fonseca [...] lack[s] sufficient knowledge and training in the matters about which [he] issued [his] report[] related to the calculation of damages [...] Therefore, said document[] accredit[s] the grounds of our appeal,

⁸¹⁸ *Id.*

⁸¹⁹ Second Guerrero Expert Report, ¶ 72.

⁸²⁰ *Id.*

⁸²¹ Judgment, *NIFA v. MSDIA*, National Court of Justice (21 Sept. 2012), ¶ 16.5 (C-203).

⁸²² *Id.*

⁸²³ Second Guerrero Expert Report, ¶ 73.

for violation of the legal principles regarding the weighing of the evidence.⁸²⁴

468. Having specifically determined that the NCJ acted as a trial court after its cassation of the Court of Appeal's judgment,⁸²⁵ and after having thoroughly examined the text of its judgment, in particular Clause 16,⁸²⁶ the Constitutional Court deemed that the NCJ "weighted the [Memorandum] as evidence."⁸²⁷ In light of the above, its decision is reasonable and far from "clearly improper and discreditable."

c. The Constitutional Court Cannot Be Impugned For Not Directing The NCJ To Ignore Mr. Cabrera's Expert Report, Or For Not Ordering The NCJ Or PROPHAR To Refund Ro Claimant The Amount Of The Vacated Judgment

469. Claimant also argues that the Constitutional Court remanded the case to the NCJ "direct[ing] [it] to ignore the fact that Mr. Cabrera is unqualified and that his report is unreliable."⁸²⁸ This is an outright distortion. The Constitutional Court did no such thing.⁸²⁹ On the other hand, the Constitutional Court *could not* have asked the NCJ to take into account the suspension of Mr. Cabrera's accreditation in the field of damages without exceeding its authority under Ecuador's Constitution. As Prof. Guerrero del Pozo explains, upon remand, the assessment of the evidence in the record, and the determination of their probative value, fell exclusively with the NCJ, and nothing in the Constitutional Court judgment could have lawfully had any implication in that regard.⁸³⁰

⁸²⁴ MSDIA Submission to the National Court of Justice (27 June 2012), p. 2 (R-184) (emphasis added).

⁸²⁵ Judgment, *NIFA v. NCJ*, Constitutional Court (12 Feb. 2014), pp. 19-20 (C-285).

⁸²⁶ *Id.*, p. 20.

⁸²⁷ *Id.*

⁸²⁸ Claimant's Reply, ¶ 490.

⁸²⁹ It is no coincidence that Claimant's assertion to the contrary is unsupported by any reference to the judgment of the Constitutional Court.

⁸³⁰ Second Guerrero Expert Report, ¶ 82.

470. For the same reason, the Constitutional Court could not have directed the NCJ to take into account in its subsequent decision the amount paid by Claimant in execution of the vacated judgment. Claimant’s argument to the contrary at paragraph 24 of its Supplemental Reply is unsupported by any authority and contradicted by the very function of the extraordinary protection action. Prof. Guerrero del Pozo explains:

If the Constitutional Court had made a pronouncement in that sense, it would have usurped functions that do not pertain to that court: it would have had anticipated how the judges of the National Court of Justice should decide in the case, which is not permitted given the nature of extraordinary protection action.⁸³¹

471. Nor could the Constitutional Court have ordered PROPHAR to pay back to Claimant the amount of the vacated judgment. *First*, the EPA was filed by PROPHAR, and not by Claimant. The Constitutional Court was asked to “fully repair violations of constitutional rights” of PROPHAR, not of Claimant.⁸³² *Second*, PROPHAR “did not request, nor can it be reasonably expected that it would have requested, as a measure of full reparation, an order for the return of the amounts paid to it by MSDIA.”⁸³³ The fact of the matter is, as shown above, that “[i]f MSDIA *had* submitted an extraordinary protection action, and the Constitutional Court had declared the existence of a violation of its constitutional rights during the course of the NCJ proceedings, it could have obtained the full reparation of the harm inflicted on its rights as a result of the NCJ judgment,” which could have included the refund of the payment of the vacated judgment, as well as any legal costs incurred in connection therewith.⁸³⁴

⁸³¹ *Id.*, ¶ 94.

⁸³² *Id.*, ¶¶ 4, 83-84.

⁸³³ *Id.*, ¶ 86(b).

⁸³⁴ *Id.*, ¶¶ 90-93 (emphasis in original).

3. Conclusion

472. Claimant's attack on the effectiveness of the constitutional remedy is unmeritorious. In the absence of actual proof of bias or improper influence, Claimant sought to infer such proof from the judgments of the Constitutional Court on the admissibility and merits of PROPHAR's EPA. In light of the above, the Constitutional Court's substantive determinations were rational, based on the underlying factual record, and consistent with a rich body of jurisprudence. They are entitled deference under international law. Claimant's claims to the contrary must therefore be dismissed.

E. Merck Has Not Demonstrated That The September 2012 NCJ Decision Denied It Justice

1. Merck Has Failed To Demonstrate That It Had No Notice And No Opportunity To Be Heard On Liability For Unfair Competition

473. Merck advances three arguments in an attempt to explain away the fact that, since at least 2006, it has taken the position that PROPHAR's claims were claims for unfair competition, which fatally contradicts its contention that it was not on notice that it could be held liable for unfair competition and was thereby denied an opportunity to be heard on that issue. First, it asserts that, because PROPHAR and it agreed that the ordinary civil courts in which PROPHAR was pursuing its claims would not have jurisdiction over those claims if they were ones for unfair competition, Merck "had no reason whatsoever to expect that the NCJ would rule on" that basis and "no notice that the NCJ, as a civil court [...] could decide MSDIA's cassation petition on the basis of unfair competition."⁸³⁵ This argument is wrong as a matter of law. Under Ecuadorian law, it is not within the power of the parties to "agree" that a court will, or will not, have jurisdiction over the subject matter of a dispute. Only a court can determine whether it has subject matter jurisdiction over a claim.

⁸³⁵ Claimant's Reply, ¶¶ 339, 340.

474. Second, Merck argues that “the NCJ had jurisdiction to consider only the grounds of cassation advanced in the parties’ respective cassation petitions,” and because Merck did not request “that the NCJ rule on the merits” of an unfair competition claim, the NCJ had no jurisdiction to do so.⁸³⁶ Therefore, it argues, it had “no notice that it could be held liable for unfair competition” and “no reason to litigate the merits of such a claim.”⁸³⁷ As demonstrated below, this argument, which is similar to one Merck makes against the November 2014 NCJ decision, is a non-sequitur. It, and its argument that the NCJ had no jurisdiction to rule on unfair competition claims because neither PROPHAR nor Merck requested it to do so in their cassation petitions, wholly misrepresents NCJ cassation procedure and jurisdiction and is directly contrary to Merck’s own description of correct NCJ procedure and jurisdiction in its submissions in the Constitutional Court in support of the September 2012 NCJ decision.

475. Third, Merck argues that, because PROPHAR “did not make a single reference to unfair competition in its complaint” and “expressly and repeatedly disclaimed unfair competition as the basis of its claim,” Merck “had no notice that it was facing such a claim.”⁸³⁸ This argument collapses because PROPHAR’s complaint indisputably advanced a claim for tort liability, Merck’s answer responded to it in the nature of a tort claim, and since at least 2006, Merck itself has argued that those claims are ones for unfair competition. Indeed, the possibility that the facts alleged to support NIFA’s tort claim could be analyzed under principles of unfair competition were acknowledged early on in the case and well before the NCJ’s decision. Merck has not identified any way in which its argument that the contentious administrative courts, and not the ordinary civil courts, had subject matter jurisdiction over those claims prevented it from seeking

⁸³⁶ *Id.*, ¶ 343-346.

⁸³⁷ *Id.*, ¶ 346.

⁸³⁸ *Id.*, ¶¶ 336, 337.

an opportunity to be heard on the merits of an unfair competition claim in any of the courts that have heard the *PROPHAR v. MSDIA* litigation.

a. Merck Could Not Have Relied Upon An “Agreement” With PROPHAR On Which Court Should Have Jurisdiction Over Unfair Competition Claims, Because The Parties To A Lawsuit Cannot Create Subject Matter Jurisdiction By Agreement

476. Over one-third of the twenty paragraphs constituting Merck’s “no notice” argument focus on Merck’s assertions that it had “no reason whatsoever to expect that the NCJ would rule on the basis”⁸³⁹ of an unfair competition claim because PROPHAR and it had agreed that, if PROPHAR’s claims were ones for unfair competition, the ordinary civil courts in which those claims were pending would not have jurisdiction; instead, per the parties’ “agreement,” the contentious administrative courts would have jurisdiction under the Intellectual Property Act. Because of that “agreement,” Merck argues, it had “no notice that the NCJ, as a civil court [...] could decide MSDIA’s cassation petition on” the basis of unfair competition.⁸⁴⁰

477. The problem with this argument is that, even if the parties’ positions in the lower courts could be characterized as an “agreement” at all, it is directly contrary to Ecuadorian law, which empowers the courts—and not the litigating parties—to determine subject matter jurisdiction in a case. As Dr. Javier Aguirre Valdez, an expert on Ecuadorian civil procedure law, explains:

In turn, in paragraph 339 of its Reply, Merck alleges that “ in their arguments the parties had coincided that the civil courts lacked subject matter jurisdiction to decide over merits of an unfair competition claim” and that “Nifa expressly admitted that all the claims of unfair competition were regulated under Intellectual Property Law” . Merck uses this assertion attempting to support its argument that Merck was “unaware” that it was facing potential liability because of unfair competiton, alleging agreement of the parties and Nifa’s admission. It must be clarified that any agreement between the parties or any admission made by one of

⁸³⁹ *Id.*, ¶ 339.

⁸⁴⁰ *Id.*, ¶ 340.

the parties in a contract, in regard to which judge or court has jurisdiction- be it civil ordinary courts or contentious administrative courts- to hear their claims, is irrelevant given that it is not under the parties powers to determine courts' subject-matter jurisdiction. In fact, procedural law itself which, from its very first article, lists the factors for courts' jurisdiction, and it allows extension only in the territory and none of the others which are: subject matter, degrees and persons. Complementary, it is noteworthy that the Organic code of the Judiciary, I more express on this subject. Therefore, the tribunal itself shall determine in each case whether it has subject matter jurisdiction, independently to what the parties had agreed in that respect in the contract. Arguing in contrary, is not only illegal - as it has been explained- but would also allow absurd situations, as for example, considering that it would be valid for the contracting parties in a labor agreement to submit controversies under such agreement before criminal or tenancy courts.⁸⁴¹

478. There is no indication that PROPHAR and Merck had any type of “agreement” with regard to the type of tort action PROPHAR could pursue. Any implicit or explicit “agreement” that PROPHAR and Merck may have reached on which Ecuadorian court should have subject matter jurisdiction over unfair competition claims could have had no bearing on what kind of “notice” Merck had of whether those claims would ever be heard by the civil chambers of the NCJ. Merck, which was represented by Ecuadorian counsel throughout the *PROPHAR v. MSDIA* litigation, could not possibly have relied upon an “agreement” with PROPHAR that it would never face an ordinary civil court’s adjudication of PROPHAR’s claims as ones stating the tort of unfair competition. It certainly could not have relied on such an “agreement” to conclude that it never had to do anything in the litigation to argue or take evidence to defend against unfair competition claims.

479. The authority to determine subject matter jurisdiction over such claims lay with the courts in which they were pending, i.e., the ordinary civil courts, including, eventually, the NCJ.

⁸⁴¹ Second Aguirre Expert Report, ¶ 4.2.

Accordingly, Merck’s argument does nothing to establish that the NCJ denied Merck justice due to a legally meaningless “agreement” between PROPHAR and Merck on which type of Ecuadorian court had subject matter jurisdiction over unfair competition claims. Certainly, the NCJ is not responsible for any such “agreement” that Merck and PROPHAR may have reached.

480. Moreover, nothing the parties did can be construed as an “agreement” on any limitation to the application of the Civil Code’s provisions on tort liability cited in NIFA’s complaint or in the facts cited in that complaint, or NIFA’s waiver of subject matter jurisdiction or submission to the contentious administrative courts. At best, the “agreement” appears to be NIFA’s adopted litigation strategy and Merck’s reaction to it.

b. Contrary To Merck’s Misrepresentations, Once The NCJ Annulled The Court Of Appeals’ Judgment, It Had Jurisdiction To Decide The Case As A Court Of First Instance On The Basis Of PROPHAR’s Complaint, Merck’s Answer To It, And The Evidentiary Record From The Lower Courts

481. Merck claims that, because “the NCJ had jurisdiction to consider only the grounds of cassation advanced in the parties’ respective cassation petitions,” and because Merck never asked “that the NCJ rule on the merits” of an unfair competition claim, the NCJ had no jurisdiction to do so.⁸⁴² It argues from this statement that, therefore, it had “no notice that it could be held liable for unfair competition” and “no reason to litigate the merits of such a claim.”⁸⁴³

482. This argument is a non sequitur and must be rejected on its face. As Merck’s expert Dr. Ortega confirms, “[t]he evidentiary period in the second instance of an ordinary proceeding [here, the Court of Appeals] is the last opportunity for the parties to present evidence,”⁸⁴⁴ and Merck’s expert Prof. Páez Fuentes confirms that “Article 15 of the Cassation Law prohibits [the

⁸⁴² *Id.*, ¶ 343-346.

⁸⁴³ *Id.*, ¶ 346.

⁸⁴⁴ Expert Report of Dr. Jaime Ortega (7 Aug. 2014) (“Ortega Expert Report (7 Aug. 2014)”), ¶ 33.

NCJ] from accepting new evidence” during proceedings before it.⁸⁴⁵ In light of that and its position that PROPHAR’s complaint was one for unfair competition, Merck would have developed evidence on those claims in the two lower courts. But at that point, Merck could not possibly have known what it might or might not request in a cassation petition to the NCJ. Therefore, what Merck ultimately *did* ask the NCJ to rule on in its cassation petition had no bearing on its earlier decision-making on whether to develop evidence on unfair competition claims in the lower courts. This argument, like Merck’s argument about an “agreement” with PROPHAR on jurisdiction over unfair competition claims, is an artifice.

483. Merck also argues that “the grounds provided in Article 3 of the Cassation Law” prohibited the NCJ from basing its September 2012 decision on unfair competition and that the NCJ could not rule on unfair competition because Merck did not request that it do so in its cassation petition.⁸⁴⁶ Both this and the previous argument rest upon a wholesale misrepresentation of NCJ cassation procedure and jurisdiction, and the same conduct that Merck accused PROPHAR of trying to perpetrate on the Constitutional Court, i.e., intentionally obfuscating NCJ procedure in order to mislead the Constitutional Court,⁸⁴⁷ and that Merck is now trying to perpetrate on this Tribunal. (As the Tribunal will recall, it is also the same misrepresentation that Merck uses in its futile attempts to show that the November 2014 NCJ decision was a denial of justice.)

484. Contrary to the assertion of Merck and its expert Prof. Páez Fuentes, the NCJ’s jurisdiction to have found Merck liable on grounds of unfair competition was not limited to the

⁸⁴⁵ Expert Opinion of Carlos Humberto Páez Fuentes (1 Oct. 2013) (“Páez Fuentes Expert Opinion”), ¶ 21. As explained in the text below, the NCJ only reviews the evidentiary record after it might cassate, *i.e.*, annul, a lower court decision.

⁸⁴⁶ Claimant’s Reply, ¶¶ 333, 334, 346.

⁸⁴⁷ Merck submission to the Constitutional Court (3 Apr. 2013), ¶ 37 (R-117) (“[PROPHAR’s] argument demonstrates [...] [its] clear intention to lead the Court into error [...]”).

“merits of new claims that were not addressed in the judgment that was being challenged in the NCJ” or what “grounds of cassation advanced in the parties’ respective cassation petitions.”⁸⁴⁸ Merck’s own words demonstrate that. In its 3 April, 2013 submission to the Constitutional Court, Merck took pains to lay out that a proceeding before the NCJ consists of two phases—an initial cassation phase and, if the NCJ cassates, i.e., annuls, the case on the basis of the grounds argued in one of the parties’ cassation petitions, a second phase in which the NCJ sits as a court of third instance, equivalent to a court of first instance, to adjudicate the parties’ original claims and defenses in light of the evidence on the record below.

485. Merck explained the initial cassation phase to the Constitutional Court at length,⁸⁴⁹ in support of its argument that, in the NCJ’s September 2012 decision, the NCJ applied the proper procedure during that phase and, accordingly, did not violate PROPHAR’s right to a defense because a “right to a defense” does not apply to the cassation phase. As Merck expounds, citing and quoting a commentator on civil cassation law in Ecuador and a prior decision of the Constitutional Court, the cassation phase is a debate between the lower court decision and the law, in which the NCJ determines whether that decision is in accordance with the law, and it is not a determination of the parties’ respective claims and defenses:

Regarding the nature of the cassation appeal.- Dr. Santiago Andrade Ubidia, in his article “Civil Cassation in Ecuador,” discusses the issue of the civil cassation as a third judicial instance, and, among other things, states: “[...] C) Civil cassation interrupts the normal course of the proceedings in respect of the appealed decision, as in reality it is a new proceeding, which changes the purposes of the original proceeding: it is a debate between the decision and the law, as it is usually defined, and the purposes of the original proceeding are not discussed. Instead, in the third instance the process is not interrupted, given that the purpose of

⁸⁴⁸ Claimant’s Reply, ¶¶ 333, 343.

⁸⁴⁹ Merck submission to the Constitutional Court (3 Apr. 2013), ¶¶ 137-142 (R-117).

the court's review in the third instance is the same as the original purpose of the claim and the response.”

As we can appreciate from the cited material, cassation should not be confused with an ordinary judicial proceeding, as it has its own particularities and purposes. This Constitutional Court has held in respect of the nature of cassation that: *“The word ‘casar’ comes from the Latin casare, which means to revoke or to annul. For its part, ‘cassación’ comes from the French word cassation, derived in turn from cassar, which means to annul, to break or to violate, and as such refers to an extraordinary appeal that seeks to annul a judicial decision that contains an incorrect interpretation or application of the law or that was issued in the course of a proceeding that did not comply with the relevant legal formalities. The decision is issued by a superior court of justice, and generally of the highest authority, such as, in our country, the former Supreme Court of Justice, and the current National Court of Justice. The principal objectives of this appeal re: to obtain the correct application of the law on the part of various courts, as a guarantee of judicial security or certainty, and a consistent interpretation of the law through one single judicial body, establish in its jurisprudence.”* The cassation creates a debate between the decision [of the lower court] and the law not between the parties and their claims. It seeks to ensure that the decision is in accordance with the legal order and the private interests of the parties to the proceedings are tangential to this purpose. It is intended to be a revision or examination of the decision in light of the relevant judicial norms, and thereby acts as a true control of the legality of the [lower court] decision. This is highly relevant, given that normally the right to a defense, the omission of which would give rise to the state of “defenselessness” of the injured party, arises during the course of a proceeding where the adversaries are the parties thereto, and the purpose of the proceeding is to determine and protect, as the case may be, subjective rights of such parties.

The cassation case is distinct, and as a consequence is treated differently. In other words, the purposes and application of the right to a defense, as part of due process, in the analysis and resolution of a cassation appeal are distinct from the considerations taken into account in an ordinary appeal or judicial proceeding.

[...]

Conclusion: Cassation is not a recourse intended to decide between the positions of the parties, but to determine whether the decision [of the lower court] complies with judicial standards. Therefore,

the right to a defense in the traditional sense is not applicable in a cassation.⁸⁵⁰

486. As Merck’s witness Prof. Páez Fuentes explains—in this instance, correctly—the cassation phase that Merck describes in the above passages from its Constitutional Court arguments are governed by Article 3 of the Cassation Law, which sets forth the exclusive grounds on which a cassation petition may be based and the only grounds on which the NCJ may cassate, or annul, the lower court decision for violations of either due process or a misapplication of the law.⁸⁵¹

487. Elsewhere in the same Constitutional Court submission in which it explained the initial cassation phase, Merck explains that, if the NCJ cassates the lower court decision, enters into the second phase of an NCJ proceeding, and sits as the equivalent of a court of first instance, it adjudicates the case under Article 16 of the Cassation Law (i.e., not Article 3) on the basis of the claimant’s (here PROPHAR’s) complaint and the evidence from the lower courts’ proceedings:

Article 16 of the Cassation Law establishes that: “If the Supreme Court of Justice finds an appeal admissible, it will accept the respective decision or order for review *and will issue its own decision in place of the reviewed decision* and based on the merits of the facts set forth in such decision or order.” That is, the respective Special Chamber of the National Court, if within the scope of its legal review of the decision, determines that such decision is not in accordance with legal principles and decides to overturn it—that is, to annul it—*the decision of the Cassation Court must “take the place” of the original decision, and in this respect, the Cassation Court must temporarily act as an ordinary court.*

As an ordinary court, the respective Special Chamber of the National Court must issue a decision, and in this respect, its only limitation is the “merits of the facts set forth in the decision or order [of the lower court],” *which necessarily implies a review of the evidence—which evidence is considered among the facts of the*

⁸⁵⁰ *Id.*, ¶¶ 137-139, 142 (some emphasis added).

⁸⁵¹ Páez Fuentes Expert Opinion, ¶¶ 13-14.

case—applying the rules of evidence set forth in the legal regulations of the lower courts.

[...] 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 within the doctrinal framework of unlawful competition and rules that, in the judges’ opinion, MSD’s conduct constituted a quasi-unlawful civil act in accordance with articles 2214 and 2229 of the Civil Code [...].⁸⁵²

488. Contrary to Merck’s “no notice” argument,⁸⁵³ then, neither Article 3 of the Cassation Law nor what Merck and PROPHAR argued in their cassation petitions have anything to do with the NCJ’s jurisdiction to adjudicate PROPHAR’s claims anew once the NCJ had determined that the Court of Appeals’ 23 September 2011 decision must be cassated, and to do so in the same manner as a court of first instance. By Merck’s own admissions in the Constitutional Court, that second phase is governed by Article 16 of the Cassation Law, and it involves the NCJ’s independent analysis of the evidence from the lower court proceedings and its application to the grounds for liability that PROPHAR invoked in its original complaint.

489. Ecuador’s expert in Ecuadorian civil procedure confirms both Merck’s correct characterization of NCJ procedure in its Constitutional Court submission, on the one hand, and on the other, Merck’s distortion of that procedure in its Reply, and the errors in Prof. Páez Fuentes’s opinion:

As I stated in paragraph 6.1 of my first opinion, the procedure before the NCJ has two potential scenarios: in the first scenario,

⁸⁵² Merck submission to the Constitutional Court (3 Apr. 2013), ¶¶ 120-121, 172 (R-117) (emphasis added).

⁸⁵³ See, e.g., Claimant’s Reply, ¶¶ 333, 334.

the NCJ acts as a Cassation Court in the strictest sense, the purpose of which is to determine errors defined by doctrine as in procedendum or in iudicando that lower court judges have incurred in, based on the grounds expressed by the party that files the appeal. In this case, both parties filed a cassation appeal, and therefore both parties listed in their briefs any prejudice caused to them or the foundation for their corresponding appeals. As its primary function as a Cassation Court, the NCJ analyzes whether any of the events established by Art. 3 of the Cassation Law are present in the judgment that is the subject to the appeal and, if so, it must order the cassation of the judgment, and only then it will proceed to the second stage in which it “becomes” a trial court, in the terms indicated in paragraph 6.1 et seq. of my first opinion.

Article 3 of the Cassation Law establishes five grounds for cassation of a judgment. In fact, in its judgment of December 2012, the NCJ found an error in the judgment of the lower Court based on grounds four and five of Art. 3 of the Cassation Law, which were argued by MERCK in its appeal. I have been able to review the new judgment issued by the NCJ in November 2014 — which is separate from the one issued in December 2012 — where, the NCJ also orders the cassation of the judgment, finding the presence of ground five of Art. 3 of the Cassation Law argued by MERCK as one of the grounds for its appeal.

Both the “dispositive principle” alluded to by paragraph 55 of MERCK’s Supplemental Reply, as the case cited in the footnote 48 of that document and the affirmation in paragraphs 18 through 22 of the opinion by Dr. Páez Fuentes, only apply to the initial phase in which the cassation court examines the grounds for cassation established in Art. 3 of the Cassation Law, which implies that the NCJ may only order the cassation of the judgment for one of the grounds established by that article, when it is so alleged by the appellant, as it was in fact, sufficiently so, both in its ruling of September 2012 and of December 2014. The dispositive principle does not consequently prevent the Court, once cassation is admitted, and when it has become a trial court, from considering and ruling on all aspects which are the subject of the Litis, whether or not they were alleged as grounds for the appeal.

It is precisely for this reason that, once cassation is sustained (as it occurred in both of the aforementioned cases), the NCJ proceeded to become a “Trial Court” and to make a decision based on the grounds of NIFA’s complaint and the MERCK’s defenses, as well as on the evidence presented, in the same manner as it would be handled by any trial court. The dispositive principle is no longer applicable to this phase because the NCJ, in its new role — again,

pursuant to Art. 16 of the Cassation Law — is no longer limited by the allegations brought by the parties on appeal, and has instead, broad assessment powers. The grounds of NIFA’s complaint are essentially that there was an improper conduct during the negotiations with MERCK, the latter having denied these events and giving rise to the litigation. Therefore, this is what must be evaluated and decided in the second phase of cassation, as it indeed happened. In fact, the allegation of having improperly applied Arts. 721 and 1562 of the Civil Code (as noted in NIFA’s Supplemental Reply) as they had not been argued as being the legal basis in the complaint, is not pertinent, given that the Code of Civil Procedure, in Art. 274 gives the Judge broad powers to base his judgments on the law (generically, because he must find the necessary rules to declare the law in the fairest manner possible) and on other sources of law, without omitting that Art. 280 therein requires judges to provide for omissions by parties regarding the standards of law that apply to the proceedings, a principle which has been correctly broadened in the first paragraph of Art. 140 of the Organic Law of the Judiciary.⁸⁵⁴

490. The Reply’s assertions that the NCJ was precluded from addressing merits of new claims that were not addressed in the judgment that was being challenged or that were stated in the parties’ cassation petition and, thus, that it could not rule on unfair competition claims, are patently false. While the NCJ is limited in the initial cassation phase to what has been raised in the parties’ cassation petitions pursuant to the permissible grounds in Article 3 of the Cassation Law and an analysis of whether the lower court judgment was wrong in law on one of those grounds, it is not limited to that scope once it enters the second phase and sits as a court of first instance. What Merck might have “requested” in its cassation petition has no bearing on that phase.⁸⁵⁵ Instead, once the NCJ sat as the equivalent of a court of first instance in the *PROPHAR v. MSDIA* litigation, it was PROPHAR’s complaint and the defenses Merck stated in its original

⁸⁵⁴ Second Aguirre Expert Opinion, ¶¶ 4.2-4.9.

⁸⁵⁵ Merck mischaracterizes the purpose of reference by Ecuador, based upon the testimony of its expert Prof. Aguirre, to Merck’s cassation petition’s position that PROPHAR’s claims were based upon unfair competition. Ecuador’s point is that, in its petition, Merck persisted in its characterization of PROPHAR’s claims as ones of unfair competition, not that—by taking that position—Merck was somehow “requesting” that the NCJ rule on that basis. That is not the purpose or operation of a cassation petition.

answer that the NCJ was required to adjudicate, in light of the evidence developed in the lower court proceedings. And, as acknowledged by Merck all along, those claims are ones for tortious conduct, and since at least 2006, including for the tort of unfair competition. Not only was Merck “on notice,” and not only did it have an opportunity to be heard and develop evidence on unfair competition claims in the lower courts, for the NCJ’s review if a cassation proceeding were ever warranted, it was Merck itself that took the position that PROPHAR’s claims were ones of unfair competition.

c. Merck Was On Notice That PROPHAR’s Complaint Stated A Tort Claim And Argued That Those Claims Were Ones For Unfair Competition

491. Merck’s remaining “no notice” argument asserts that, because PROPHAR “did not make a single reference to unfair competition in its complaint” and “expressly and repeatedly disclaimed unfair competition as the basis of its claim,” Merck “had no notice that it was facing such a claim” and “no reason to expect that it could be found liable for unfair competition in a civil court.”⁸⁵⁶ Merck also argues that it should not have had to “address every conceivable claim,” even those—like unfair competition claims—that PROPHAR had “forsaken,”⁸⁵⁷ such that it was justified in not litigating unfair competition claims on the merits in the lower courts. These arguments fail on all fronts.

492. First, Merck’s argument that it was not “fully informed [...] of the charges against” it, so that it could “prepare a defense” to PROPHAR’s complaint is ludicrous.⁸⁵⁸ Beyond the fact that those standards do not even apply here, where the “charges” against Merck were the allegations in a complaint filed by a private party, Merck knew the content of PROPHAR’s complaint all

⁸⁵⁶ Claimant’s Reply, ¶¶ 336, 337, 342.

⁸⁵⁷ *Id.*, ¶ 327.

⁸⁵⁸ *Id.*, ¶ 323.

along; in its answer, it treated them as a tort claim, which they are; and it has submitted no evidence that it ever complained to any of the Ecuadorian courts before which it has appeared in the case that the complaint somehow left it to guess what PROPHAR was claiming as Merck's wrongful conduct. On the contrary, by 2006 Merck itself took the position before the First Instance Court,⁸⁵⁹ and maintained that position in the Court of Appeals,⁸⁶⁰ in its NCJ cassation petition,⁸⁶¹ and before this Tribunal⁸⁶² that PROPHAR's claims were ones for unfair competition. It would have come as no surprise to Merck, then, when the NCJ cassated the Court of Appeals' judgment and sat as a court of first instance to re-adjudicate PROPHAR's complaint and Merck's defense to it, in light of the evidence developed by the parties in the lower courts, that the NCJ *agreed* with Merck that PROPHAR's claims constituted ones for unfair competition.

493. For these reasons, the two cases on which Merck relies for its argument that it was not "fully informed [...] of the charges against" it are inapposite. In *Pantehniki S.A. Contractors & Engineers Greece v. Republic of Albania*, the claimant alleged that the Albanian Court of Appeals took it upon itself to declare the invalidity of a contractual provision that the claimant had never invoked before the court.⁸⁶³ The same type of situation pertained in *Rumeli Telekom v. Kazakhstan*, in which an administrative "Working Group," in a "three and a half pages decision, summarily reasoned" invalidated a contract on "various, entirely different grounds" than those

⁸⁵⁹ MSDIA's First Appeals Brief, *MSDIA v. NIFA*, Court of Appeals (29 July 2008) (R-64).

⁸⁶⁰ Merck's Brief, *NIFA v. MSDIA*, Court of Appeals (28 July 2008), § 3.1 (C-156) ("In fact, NIFA's attempt is based on allegations that MSD committed acts of unfair competition against NIFA [...]."); *id.*, § 4.1 ("[T]he Plaintiff indicated that the defendant's actions, which resulted in the failed purchase and sale, constituted acts of unfair competition.").

⁸⁶¹ Merck's Cassation Petition, *NIFA v. MSDIA*, Court of Appeals (13 Oct. 2011), ¶ 39 (C-198) ("[PROPHAR's] complaint was based on alleged acts of unfair competition [...] on deceitful and fraudulent acts by MSD that prevented the plaintiff from acquiring the plant.").

⁸⁶² Claimant's Memorial, ¶ 68 ("In its opening brief in the court of appeals, MSDIA argued that the allegations in NIFA's complaint appeared to be aimed at establishing a claim of 'unfair competition.'").

⁸⁶³ *Pantehniki S.A. Contractors & Engineers Greece v. Republic of Albania*, ICSID Case No. ARB/07/21, Award (30 July 2009) ("*Pantehniki*"), ¶¶ 99 (RLA-94).

given by another governmental “Investment Committee,” without giving the claimant a real possibility of presenting its position.⁸⁶⁴

494. Those situations simply do not exist in the case before this Tribunal. In its September 2012 decision, the NCJ took exactly the same view of the nature of PROPHAR’s claims that Merck had advanced all along, i.e., they were ones for the tort of unfair competition. The NCJ did not need Merck to “request” that it decide the case on that basis, as it was the NCJ’s job to construe the claims in PROPHAR’s complaint and Merck’s answer, apply the evidence to it, and arrive at a decision in the same manner as a court of first instance. There can be no question that Merck knew that this was the procedure that, by law, the NCJ was required to follow. Moreover, Merck has not identified in this arbitration any instance in which the NCJ prohibited it from “presenting its position” to it. *Rumeli* and *Pantechniki* do nothing to help Merck.

495. Second, Merck argues at length that, because PROPHAR took the position that its claims sounded in antitrust, it was somehow not “on notice” and lacked an opportunity to be heard regarding liability for unfair competition.⁸⁶⁵ Again, Merck has not identified any type of evidence that it was prohibited from taking on the elements of an unfair competition claim or any argument regarding unfair competition that it was prevented from advancing because, to the extent that it might have, it elected to follow PROPHAR’s lead and litigate the case as an antitrust one.

496. Finally, the same is true of Merck’s choice to rely on jurisdictional arguments alone with regard to its position that PROPHAR’s complaint could only be heard by the contentious administrative courts. Merck may not like the fact that none of the courts before which it

⁸⁶⁴ *Rumeli Telekom A.S. & Telsim Mobil Telekomunikasyon Hizmetleri A.S. v. Republic of Kazakhstan*, ICSID Case No. ARB/05/16, Award (29 July 2008), ¶ 617 (CLM-142).

⁸⁶⁵ *See, e.g.*, Claimant’s Reply, ¶¶ 327-328, 337.

appeared—and in particular, the NCJ—agreed with its argument that a claim for unfair competition unrelated to intellectual property is subject to the Ecuador Intellectual Property Law. However, Merck has advanced no evidence or argument that could lead to the conclusion that its decision to rely upon jurisdictional arguments alone with regard to unfair competition claims in the *NIFA v. MSDIA* litigation somehow resulted in the NCJ providing it “no notice” and “no opportunity to be heard” on the potential that it could be held liable on grounds of unfair competition. Moreover, Merck’s persistence in this argument is a blatant attempt to induce this Tribunal into assuming the role that, under international law, it is prohibited from undertaking, specifically here, substituting its own adjudication of the national law of Ecuador and in particular jurisdictional determinations for that of the NCJ, which declined to accept Merck’s cassation appeal argument that the contentious administrative courts, and not the civil courts, have jurisdiction over claims unrelated to intellectual property.⁸⁶⁶

2. Merck Has Failed To Demonstrate That The September 2012 NCJ Decision Was Improper, Much Less “So Outrageous As To Be Inexplicable Otherwise Than As” Arbitrary Or Grossly Incompetent, “Judicially Impossible,” “A Shock To A Sense Of Judicial Propriety,” Or “One That No Competent Judge Could Make”

497. Merck attacks the September 2012 NCJ decision with arguments that it couches as procedural denials of justice, i.e., “interpretations of Ecuadorian law that could not have been anticipated by” Merck “and were not litigated by the parties,” but which are all veiled attacks on the substance of that decision. All of these efforts invite the Tribunal to substitute their interpretation of Ecuadorian law for that of the NCJ, which, under firmly-established principles of international law, it may not do. Moreover, none of Merck’s attacks on the substance of the September 2012 NCJ decision have any merit, as demonstrated below.

⁸⁶⁶ See Judgment, *NIFA v. MSDIA*, National Court of Justice (21 Sept. 2012), ¶¶ 4.5-4.6 (C-203).

a. Merck's Theory Of "Typification" Is Irrational

498. Merck's central attack on the substance of the September 2012 NCJ decision posits that, by virtue of provisions in the Constitutions of Ecuador of 1998 and 2008, Ecuador instituted a legal system in which all bases of civil liability must be "typified," meaning that "any prohibited acts which give rise to civil liability must be identified in the Ecuadorian Civil Code."⁸⁶⁷ In other words, since 1998 Ecuador has placed civil torts in Ecuador on the same footing as instances in which the State, in the exercise of its police powers, imposes criminal, administrative or other penalties on illegal acts. Accordingly, Merck argues, since 1998 it has been the law in Ecuador that any person may commit any civil harm he wishes to any other person without fear of civil liability, so long as that act is not specifically identified as wrongful in a provision of the Civil Code.

499. This argument would be laughable if it were not for the nefarious purposes to which Merck tries to put it: To excuse its admitted failure to litigate unfair competition claims on the merits and attempt to re-litigate before this Tribunal an argument that it lost on in the Ecuadorian courts, i.e., whether PROPHAR's claims are ones for unfair competition and, if so, whether they should have been heard in the contentious administrative courts and not the civil courts of Ecuador, including the civil chamber of the NCJ.

500. That strategy is revealed by the tortured argument Merck builds on its "typification" theory. According to Merck, since "[a]t the time of NIFA's complaint, the only statute in Ecuadorian law that typified acts of unfair competition was the 1998 Intellectual Property Law, and claims [...] could only be brought under that law [...] MSDIA had no notice that it could be

⁸⁶⁷ Claimant's Reply, ¶ 359.

held liable for unfair competition under any other Ecuadorian statute.”⁸⁶⁸ Therefore, it argues, PROPHAR’s “citation of Articles 2214 and 2229 in its complaint did not put MSDIA on notice that it could be held liable for unfair competition or that it should be litigating the merits of an unfair competition claim.”⁸⁶⁹

501. This Tribunal should not countenance such tactics. Merck’s “typification” theory, which is absurd on its face, has been presented for a spurious purpose. Nor does it support a denial of justice claim: Whatever notice *PROPHAR* may have given to Merck about the basis of its complaint cannot be attributed to the NCJ, much less to *Ecuador* as a matter of State responsibility. If anything, Merck’s “typification” argument should be treated as an admission that it has no denial of justice claim against Ecuador based on its procedural “no notice” argument and certainly not based upon the September 2012 NCJ decision’s substantive ruling that unfair competition is a tort actionable under sections 2214 and 2229 of the Civil Code.

502. Merck’s “typification” theory also has no basis in law. Merck rests its theory on the testimony of two of its experts, Dr. Cordoba and Dr. Oyarte. Beyond a case that does not stand for the proposition for which they try to use it,⁸⁷⁰ neither cites any legislative history or other authority for their conclusion that the phrase “of any other type” included in provisions of the 1998 and 2008 Ecuador Constitutions means that no one may incur liability for the commission

⁸⁶⁸ Claimant’s Reply, ¶ 361.

⁸⁶⁹ *Id.*

⁸⁷⁰ That case is *Begazuay, Bebidas Gaseosas del Azuay, S.A. v. Emprosur S.A.*, Judgment of the Fourth Chamber of the Superior Court of Cuenca (9 Nov. 2000) (CLM-403) and Judgment of the Supreme Court of Justice, Civil and Mercantile Chamber (31 May 2006) (CLM-404). Contrary to Merck’s and its experts’ assertions about the case, there is nothing in it that established or even supports the proposition that the tort of unfair competition must be “typified” in order to be actionable, or that Articles 2214 and 2229 do not apply to it. The Superior Court of Cuenca dismissed the complaint in *Begazuay* not because unfair competition is not an illegal act or that it is not typified; the case was dismissed because the plaintiff failed to prove the tortious act at issue. Likewise, the Supreme Court of Justice declined to cassate the case because it concluded that the legal errors identified in the cassation petition did not exist. The Supreme Court said nothing about typification in that ruling. Second Guerrero Expert Report, ¶¶ 127-132; Second Expert Report of Álvaro García José Pólit (18 Feb. 2015) (“Second Pólit Expert Report”), ¶¶ 39-45.

of a tort in Ecuador unless there is a Code provision specifying the relevant conduct as a wrong.⁸⁷¹ Given that if “typification” existed in Ecuador—which it does not—it would have erased the entire Civil Code tort regime, their failure to cite any authority or other corroboration of their theory only serves to confirm that “typification” does not, and never did, exist.

503. Dr. Guerrero del Pozo confirms that typification does not apply to a civil tort:

Since the [1998 and 2008] constitutional provisions refer to the imposition of sanctions as a result of the commission of an offense, it is clear that the principles of legality and typification are applicable when we are in a scenario in which the state exercises its punitive power, which is defined as, “... *any exercise of state coercion that does not seek redress (not part of the civil or private law in general) and does not contain or interrupts a harmful process in course or imminent (direct coercion of administrative law). ... There is punitive power when state coercion is not civil or administrative*”. The words used in the provisions of the 1998 and 2008 Constitutions on which MSDIA and its experts rely are not compatible with tort liability.

This is to say that when what is sought is the redress of the tortious acts of a person that cause damage to another person, the State does not have punitive power and therefore we are in a civil law context in which the use of terms such as “infraction”, “penalty” or “punishment” is incompatible with such context.⁸⁷²

504. Dr. Álvaro García José Pólit, an expert in Ecuadorian tort law, confirms:

Professors Oyarte and Fernández de Córdoba are wrong in stating that the Constitution of 1998 required “codification” of the acts that constituted a tort. Ecuadorian courts have not changed their approach and analysis of tort liability [...]. Professors Oyarte and Fernández de Córdoba have confused the concept of penalty or punishment with the concept of compensation, applying to the latter the requirements that apply only to the former. Consequently, Ecuadorian case law prior to 1998 is fully valid, effective, current, and is a source of law with respect to civil tort liability.⁸⁷³

⁸⁷¹ Second Expert Opinion of Rafael Oyarte Martínez (7 Aug. 2014) (“Second Oyarte Expert Opinion”), ¶¶ 41-42; Second Expert Report of Manuel Fernández de Córdoba (5 Aug. 2014), ¶¶ 6-7.

⁸⁷² Second Guerrero Expert Report, ¶¶ 112-113.

⁸⁷³ Second Pólit Expert Report, ¶ 23.

505. Moreover, the continuing applicability of Articles 2214 and 2229 of the Civil Code to the tort of unfair competition where intellectual property is not at issue has been settled by the NCJ.

As Dr. Pólit explains, in response to the Reply testimony of Merck's experts:

The cases cited in my first report, although Civil Chambers of Ecuadorian Courts did not issue them, are definite jurisprudential support that demonstrates the existence of a civil action for unfair competition, as we will explain further.

Both judgments (*Baquerizo Freile v Ibope del Ecuador*, and *S.G.S del Ecuador S. A. v Navarro Espinoza*) were issued by the Administrative Contentious Chamber of the then Supreme Court of Justice (now the National Court of Justice), which is a specialized Chamber of the same Court which issued the judgment in the *Prophar/Nifa v. Merck* case. The decisions of the Administrative Contentious Chamber of the Supreme Court of Justice (now the National Court of Justice) and the decisions of the Civil and Commercial Chamber of the National Court of Justice, which is the Chamber in which the *Prophar / NIFA v. Merck* case was heard and decided, are equivalent, as they come from one judicial source, i.e., the National Court of Justice. The Court's core analysis, in both cases, is to make clear that:

- a. There is no exclusive jurisdiction of Contentious Administrative Courts to hear cases of unfair competition. Neither the judgments cited, nor any other judgments of the Ecuadorian courts, state that from the entry into force date of the Intellectual Property Law, unfair competition is exclusively regulated by that law, and therefore there is no authority for the (incorrect) proposition that only the Contentious Administrative Courts could review claims of unfair competition, and that unfair competition can only apply in the cases provided for in the Intellectual Property Law. In *Baquerizo v. Ibope del Ecuador*, the Court stated: "... this rule [Intellectual Property Law], *that establishes the power, by exception, of the administrative jurisdiction to hear claims for unfair competition...*" By establishing that the contentious administrative jurisdiction can hear cases involving unfair competition *only by exception*, the Court is attributing jurisdiction to hear cases of unfair competition, as a general rule, to the courts of civil jurisdiction. If not, to what other jurisdiction?

- b. In the absence of a special jurisdiction to hear cases claiming unfair competition, then there is indeed a parallel system of competent jurisdiction to adjudicate unfair competition actions. The interpretation made by Professor Fernández de Córdoba at paragraph 23 of his report indicating that the judgment of *Baquerizo v IBOPE del Ecuador* defines a system of unfair competition that is previous to the enactment of the Intellectual Property Law and another, starting from its entry into force, is incorrect, since it is based on the tense of a verb used by the Court; however, it is clear that the Court uses the past tense to refer to the fact that the plaintiff must have substantiated its claim under the Civil Code rules since the facts of the case arose prior to the enactment of the Intellectual Property Law, and as such, the plaintiff should have based its claim on the civil rules and should have filed his action before the ordinary jurisdiction (civil courts). Because the Contentious Administrative Courts cannot hear civil tort liability actions and could not rule on the relevance of the claims under Articles 2241 (now 2214) and 2256 (now 2229), those type of claims are under the jurisdiction of the civil judges. In *S.G.S v. Navarro*, the Court stated plainly: “When the controversial issue relates to unfair practices not related to intellectual property rights, the judges of Contentious Administrative district courts of *do not have jurisdiction, rather, ordinary judges do.*” (emphasis added)

With regard to the ruling in *SGS v. Navarro*, it is important to clarify that, even if that judgment does not specify the legal ground upon which it is possible to file a claim seeking indemnification for damages caused by unfair competition, it is very clear that those actions are grounded upon the tort regime (encompassing damages, loss of profit and moral damages), because the Court moves on to distinguish between those indemnifications as moral damages and damages and loss of profit when a monetary injury has been sustained. Furthermore, regarding the procedure that must be followed in order to seek reparation of monetary damages, caused by the violation of intellectual property rights, and the indemnifications for moral damages, the Court concluded that: “*in that sense, a claim directed at seeking indemnification for injuries to intellectual rights derived from unfair competition, which is regulated by the Intellectual Property Act, is sustained in a different way than an action seeking reparation of moral damages for any unlawful act, even those deriving from unfair competition*” (emphasis added).

It must be kept in mind that in this case, the Court analyzed a claim for indemnification for moral damage, arising out of unfair competition not related to intellectual property. The Court concluded that the Contentious-Administrative Chamber has no jurisdiction to render decisions on claims of moral damages, since that is only within the competence of the civil jurisdiction and the ordinary courts, according to the tort regime provided for in the Civil Code.

- c. In these judgments we see that the plaintiffs sued for acts of unfair competition, based on civil law, but filed those claims in the contentious-administrative courts. In said judgments, the Supreme Court does not deny the right of litigants to resort to the ordinary courts (civil courts) to sue for unfair competition. The rulings only set forth that, if (and only if) they are to be heard by the Contentious-Administrative courts, unfair competition claims must be related to intellectual and industrial property; otherwise, the contentious-administrative courts are not competent to hear unfair competition claims. It is worth noting that, in para. 28 of his second opinion, Professor Fernández de Córdoba admits that this is the meaning of the decision of the Supreme Court (now the National Court of Justice) in the *SGS v. Navarro* case, but he tries to minimize such finding. He is incorrect, however. In fact, the rulings of the Supreme Court in the *Baquerizo* and *SGS* cases show that, if Prophar had brought its claim against Merck in the Contentious Administrative Court, it would have properly been dismissed for lack of jurisdiction, since Prophar's claims did not involve intellectual or industrial property rights.⁸⁷⁴

506. In an article written in 2002, Merck's own Ecuadorian legal counsel in the *PROPHAR v. MSDIA* litigation and a fact witness in this arbitration, Alejandro Ponce Martínez, acknowledges that unfair competition is a tort and that it is actionable under the Ecuadorian Civil Code.⁸⁷⁵ Of course, his legal position as written is that, after the IPA was enacted in 1997, all torts of unfair competition fall under the IPA. But, as demonstrated by Ecuador, the NCJ has held that Dr.

⁸⁷⁴ *Id.*, ¶¶ 46-49 (some emphasis in original; some emphasis added).

⁸⁷⁵ A. Ponce Martínez, et al., *Unfair Competition in Ecuador*, REVISTA JURÍDICA DE PROPIEDAD INTELECTUAL, No. 1 (2009), p. 49 (RLA-171).

Ponce was wrong in 2002 and that Merck is wrong now. As a result, by Dr. Ponce's own admission, unfair competition that is unrelated to intellectual property rights remains actionable under Articles 2214 and 2229 of the Ecuador Civil Code.

507. For the foregoing reasons, Merck's "typification" argument is meritless and its assertions that it had "on notice" that it could be held liable for unfair competition or that it should be litigating the merits of an unfair competition claim" are baseless.

b. Merck Had Notice And Exercised A Full The Opportunity To Be Heard With Regard to Article 244(3) Of The 1998 Constitution, And The September 2012 NCJ Decision Was Not Unprecedented

508. Merck's assertion that it had "no notice" or opportunity to be heard with regard to "the NCJ's reliance on" Article 244(3) of the 1998 Constitution is directly contradicted by the record in the *PROPHAR v. MSDIA* litigation and in this arbitration. *PROPHAR* cited Article 244(3) as a basis for its claim against Merck in its 2003 complaint,⁸⁷⁶ and Merck has not identified any way in which it was prevented from being heard on that provision's application to *PROPHAR*'s claims in the First Instance Court or the Court of Appeals. In addition, the Court of Appeals took Article 244(3) into account in its 2011 decision holding Merck liable to *PROPHAR* under Articles 2214 and 2229 of the Civil Code.⁸⁷⁷ Finally, in its very cassation petition to the NCJ, Merck argued to the NCJ that the Court of Appeals' judgment should be annulled because it "wrongfully interpreted [...] article 244, paragraph 3 of the 1988 Constitution by considering that such standards did not require a law for regulating the free competition."⁸⁷⁸ There is simply no basis for Merck's claim that it did not know that Article 244(3) was before the NCJ and that the NCJ might take it into account in rendering its decision.

⁸⁷⁶ NIFA's Complaint, *NIFA v. MSDIA*, Trial Court (16 Dec. 2003) (C-10), p. 10.

⁸⁷⁷ Judgment, *NIFA v. MSDIA*, Court of Appeals (23 Sept. 2011), p. 9 (C-4).

⁸⁷⁸ *MSDIA*'s Cassation Petition, *NIFA v. MSDIA*, Court of Appeals, p. 10 (C-198).

509. Ecuador has addressed above Prof. Paulsson’s testimony that it is “startling to hear a court in the civil law tradition spoken of as having a ‘law creating’ function’ [...] just for this case,” citing as relevant “Article 5 of the French Civil Code as it emerged in 1803. (*Il est défendu aux juges de prononcer par voie de dispositions générale et réglementaire sur les causes qui leur sont soumises.*) [It is forbidden for judges to decide by way of general or regulatory provisions on the cases brought before them].”⁸⁷⁹ As noted, Article 5 of the French Civil Code does not have the application that Prof. Paulsson seeks to give it, and it certainly does not apply to the September 2012 NCJ decision. What is even more curious is Prof. Paulsson’s understanding that the September 2012 NCJ decision created “an unprecedented unfair-competition theory *just for this case.*”⁸⁸⁰ Obviously, Prof. Paulsson has not been informed by Merck that its counsel, Dr. Ponce, himself has confirmed the long existence of tort liability for unfair competition under the Ecuador Civil Code. For the same reason, Merck’s claim that “the substantive principles of unfair competition articulated” in the September 2012 NCJ decision “had no basis or precedent in Ecuadorian law”⁸⁸¹ is baseless.

3. Merck Has Admitted That The NCJ Conducted A *De Novo* Review Of The Evidence And Resolved The Case In Accordance With Applicable Legal Principles

510. Little response is needed to Merck’s claim that the NCJ “failed to consider key elements of any unfair competition claim” and “failed to consider any of [its] evidence.”⁸⁸² As demonstrated in Ecuador’s Counter-Memorial,⁸⁸³ Merck’s defense of the September 2012 NCJ decision in the Constitutional Court speaks for itself. It was unequivocal there that the NCJ “did

⁸⁷⁹ Claimant’s Reply, ¶ 350; Second Paulsson Expert Opinion, ¶ 26.

⁸⁸⁰ Second Paulsson Expert Opinion, ¶ 26 (emphasis added).

⁸⁸¹ Claimant’s Reply, ¶ 370.

⁸⁸² *Id.*, ¶¶ 373-376, 395.

⁸⁸³ Respondent’s Counter-Memorial, ¶¶ 361-374.

review evidence,” “analyzed the evidence [...] *including the facts discussed in the decision* [...] *in accordance with the legal principles that the claimant invoked in its complaint* [...],” “legitimately performed” the “appreciation of the evidence,” and competently appraised “the evidence in the process.”⁸⁸⁴

511. Caught in its own words, Merck exercises mightily to explain away its sweeping praise of the September 2012 NCJ decision, advancing two main excuses. The first—that it always took the position in the Constitutional Court that it did not agree with the decision⁸⁸⁵—gets Merck nowhere. Ecuador acknowledged in its Counter-Memorial that Merck maintained that position. But that is the position of every disappointed litigant, and disagreement with the outcome of the case does nothing to meet Merck’s burden to prove that the September 2012 decision was a denial of justice.

512. Merck’s second excuse is that, in praising the September 2012 decision, it was only rebutting PROPHAR’s attempt to obtain nullification of it. The only conclusion that can be drawn from that excuse is that Merck *did not want* the decision overturned, which serves to demonstrate that it viewed the decision as a victory. There is no other explanation for the broad, unequivocal praise Merck heaped on the NCJ and its decision, as those type of characterizations would not have been necessary to rebut the specific points of PROPHAR’s appeal.

4. Conclusion

513. For all of the foregoing reasons, Merck has failed to carry its burden to demonstrate that the September 2012 NCJ decision is a denial of justice and, accordingly, its claim as to it should be denied.

⁸⁸⁴*Id.*, ¶ 363 (emphasis in original); *see also* Merck’s submissions to the Constitutional Court cited therein.

⁸⁸⁵ Claimant’s Reply, ¶¶ 412-413.

F. Merck's Claims That It Suffered A Denial Of Justice At The Lower Court Level Lack Merit

1. Merck Has Grossly Misrepresented The Court of Appeals Proceedings

514. Merck's Reply continues to complain about the proceedings before the Provincial Court of Justice for Commercial and Civil Matters (the "second instance court" or "Court of Appeals"). But as outlined below, it fails to refute Ecuador's argument showing that Merck has grossly exaggerated and misrepresented the alleged "irregularities" at the Court of Appeals level; indeed it has abandoned many of its original charges following that showing. More importantly, Merck's evidence fails to establish its allegations or to demonstrate any irregularities amounting to a denial of justice. To the contrary, what the evidence shows is that:

- The court of appeal's appointment of and reliance on a second set of experts was in no way irregular, let alone a denial of justice;
- The Court of Appeals did not consider only the evidence submitted by NIFA nor did it refuse to consider any of the evidence submitted or relied on by MSDIA; both parties were given ample opportunity to present new evidence in addition to the evidence from the lower court;
- The Court of Appeals provided MSDIA timely notice of its decisions;
- The Court of Appeals' notice declaring it had taken control of the case was properly served on Merck's counsel;
- The nullity petition submitted by Merck prior to the evidentiary phase was not rejected by the court "without stating a clear rationale";
- The court did not, in determining MSDIA's request for clarification together with the final judgment, deprive Merck of an opportunity to request an oral hearing or submit final briefs.

a. The Court Of Appeals' Appointment And Use Of The Second Set Of Experts Was Not A Denial Of Justice

515. Claimant continues with its egregious distortions of the record with respect to the Court of Appeals' appointment and use of three experts whose opinions were unfavorable to it.⁸⁸⁶ In its Memorial, Claimant attacked the processes by which these experts were appointed.⁸⁸⁷ However, after, and only after, Ecuador demonstrated in its Counter-Memorial that the three experts were appointed pursuant to the procedures endorsed by Claimant itself,⁸⁸⁸ Claimant now ignores or concedes these facts. In particular, with respect to Dr. Guerra (the essential error expert on antitrust law) and Mr. Yerovi (the essential error expert on real estate), Claimant neither refutes nor advances any new arguments to portray that the procedures leading to their appointments were somehow tainted. This silence is telling: it shows that the allegations were baseless to begin with, underscoring the contrived nature of Claimant's case.

516. As to Mr. Cabrera, the only expert who opined on damages before the Court of Appeals, Claimant similarly does not refute any of Ecuador's explanations of his appointment. Instead, it has shifted its discussion to another set of alleged "irregularities." Curiously, these irregularities—only partly and vaguely voiced in a footnote in Claimant's Memorial⁸⁸⁹—are now featured as major indications of impropriety giving rise to a denial of justice. This is a further indication of the artificiality of Claimant's contentions.

⁸⁸⁶ Claimant's Memorial, ¶ 271(e); Claimant's Reply, ¶¶ 586 *et seq.*

⁸⁸⁷ Claimant's Memorial, ¶ 271 (e).

⁸⁸⁸ Ecuador's Counter-Memorial, ¶¶ 460-482.

⁸⁸⁹ *See also* Claimant's Memorial, ¶ 201.

i. The Court Of Appeals' Compliance With Ecuadorian Rules Of Procedure Is Relevant To Show That Merck Has Unduly Exaggerated And Distorted The Record

517. While, contrary to Claimant's assertion, Ecuador does not contend that the Court of Appeal's full compliance with Ecuadorian rules of procedure is alone a complete defense to a claim of denial of justice *per se*, the fact that the appointment of the second set of experts was entirely consistent with Ecuadorian law betrays Claimant's exaggeration and distortion of the alleged "procedural irregularities." There was nothing irregular or improper about the appointment and use of Mr. Cabrera, Dr. Guerra and Mr. Yerovi. But even if there were, Claimant has not shown how they amount to a denial of justice.

518. Only "procedural irregularities of such severity that affected the outcome of the case" can give rise to a denial of justice under international law.⁸⁹⁰ Moreover, "a denial of justice implies the failure of a national system as a whole [...]."⁸⁹¹ This is not the case here since the Court of Appeals' judgment was set aside by the recent NCJ decision. The alleged "irregularities" are nothing more than normal procedures in a complex case containing almost 12,000 pages in which both parties submitted voluminous expert reports, abundant evidence and numerous motions. The *NIFA v. MSDIA* litigation is, therefore, the antithesis of a "textbook" denial of justice case. In contrast to cases where a denial of justice has been found, the *NIFA v. MSDIA* litigation was *not* marked by violations of rights inherent to the equitable nature of a fair judicial

⁸⁹⁰ *Jan Oostergetel and Theodora Laurentius v. The Slovak Republic*, UNCITRAL (Netherlands-Slovak Republic BIT), Final Award (23 Apr. 2012) (Kaufman-Kohler, Wladimiroff, Trapl) ("*Oostergetel*"), ¶ 287 (CLM-146) (assessing whether "the procedural irregularities were in fact severe improprieties with an impact on the outcome of the case, to the point that the entire procedure becomes objectionable."); *Swisslion DOO Skopje v. The Former Yugoslav Republic of Macedonia*, ICSID Case No. ARB/09/16, Award (6 July 2012) (Guillaume, Price, Thomas), ¶ 268 (RLA-186) (assessing whether there was "any serious procedural unfairness in the conduct of the legal proceedings."); *Liman Caspian Oil BV and NCL Dutch Investment BV v. Republic of Kazakhstan*, ICSID Case No. ARB/07/14, Award (22 June 2010) (Böckstiegel, Hobér, Crawford), ¶ 279 (RLA-181) (holding that "Respondent can only be held liable for denial of justice if Claimants are able to prove that the court system fundamentally failed. Such failure is mainly to be held established in cases of major procedural errors such as lack of due process.").

⁸⁹¹ *Oostergetel*, ¶ 273 (CLM-146).

process (*i.e.*, the right to be notified of the proceeding and its development, the right to be heard, and the right to submit evidence).⁸⁹² Indeed, the parties’ submissions and motions had become so unmanageable that the Court threatened to sanction both parties if they continued to obstruct the normal course of the proceedings through specious motions.⁸⁹³

519. According to Merck, Mr. Cabrera’s appointment as damages expert was irregular and contrary to Ecuadorian law.⁸⁹⁴ It is of course not surprising that Merck *vigorously* objected to Mr. Cabrera’s reappointment—filing at least eight different motions based on different arguments—since it did not want there to be *any* damages to be in the record. But, as shown (and Claimant does not dispute), Dr. de León did not address the issue of damages as required by the Court, but only NIFA’s “entitlement to damages;” and he was unpersuaded there was liability.⁸⁹⁵ Therefore, the court had no expert opinion on appropriate damages in case it were to ultimately find Merck liable.

520. Claimant’s attempt to portray normal procedures of a complex litigation as “procedural irregularities” is a desperate attempt to create an atmospheric argument where, in the end, none of this actually matters. The NCJ’s recent decision renders moot these issues.

ii. Claimant Does Not Present Any New Arguments Or Evidence To Disprove Ecuador’s Showing That Both Dr. Guerra And Mr. Yerovi Jaramillo Were Appointed In Accordance With Ecuadorian Law

521. In its Counter-Memorial, Ecuador demonstrated Merck’s failure to show that either of Dr. Guerra’s or Mr. Yerovi Jaramillo’s appointments were anything other than “regular and

⁸⁹² *Flughafen Zürich A.G. & Gestión e Ingeniería IDC S.A. v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB/10/19, Award (18 Nov. 2014) (Fernández-Armesto, Alvarez, Vinuesa), ¶ 639 (RLA-200).

⁸⁹³ Court Order, *NIFA v. MSDIA*, Court of Appeals (1 Aug. 2011) (C-46).

⁸⁹⁴ Claimant’s Reply, ¶ 573.

⁸⁹⁵ Report of Ignacio de León, *NIFA v. MSDIA*, Court of Appeals (12 Feb. 2010) (C-24).

proper.”⁸⁹⁶ Claimant makes no effort whatsoever to refute Ecuador’s showing, merely referring the Tribunal to its Memorial.⁸⁹⁷

522. Ecuador’s demonstration therefore remains unchallenged. Both Dr. Guerra and Mr. Yerovi were appointed pursuant to Article 258 of the Ecuadorian Code of Civil Procedure, which allows the parties to challenge the opinion of a court-appointed expert who has committed essential error in his or her report.⁸⁹⁸ 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 was undermined by essential error. This is exactly what happened in this case. After Dr. de León submitted his report, NIFA argued he had committed an essential error.⁸⁹⁹ The Court of Appeals opened a summary proceeding on the basis of Article 258 of the Ecuadorian Code of Civil Procedure,⁹⁰⁰ during which both parties submitted their evidence.⁹⁰¹ In response both to (1) NIFA’s request to appoint an expert in antitrust law to challenge the findings of Dr. the León, and (2) Merck’s request for another expert to opine on Dr. de León’s alleged essential error,⁹⁰² the Court of Appeals appointed Dr. Guerra.⁹⁰³ In this regard, NIFA attested to the Court of Appeals: “Both parties have requested that you appoint experts with knowledge in Antitrust Law and damages in order to clarify the truth and determine whether the argument filed

⁸⁹⁶ Ecuador’s Counter-Memorial, ¶¶ 467, 479.

⁸⁹⁷ Claimant’s Reply, ¶ 559.

⁸⁹⁸ Ecuadorian Code of Civil Procedure (24 Nov. 2011), 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 liability the previous expert or experts may have incurred if the original opinion was made in bad faith.”).

⁸⁹⁹ NIFA’s Petition of 11 May 2010, *NIFA v. MSDIA*, Court of Appeals (11 May 2010), pp. 1-2 (C-192).

⁹⁰⁰ Electronic Docket, Case No. 2008-0421, *NIFA v. MSDIA*, Provincial Court of Justice of Pichincha, First Civil and Commercial Chamber (Second Instance Court), Entry 252 (R-122).

⁹⁰¹ MSDIA submitted the testimony of two witnesses to show that Dr. de León had not committed essential error. *See id.*, Entry 258.

⁹⁰² MSDIA Petition, *NIFA v. MSDIA*, Court of Appeals (29 Oct. 2010) (R-168).

⁹⁰³ Court Order, *NIFA v. MSDIA*, Court of Appeals (8 Dec. 2010) (C-29).

by Ignacio de León reflects the truth.”⁹⁰⁴ Thus, pursuant to Article 258 of the Ecuadorian Code of Civil Procedure, and 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.

523. Importantly, 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 report⁹⁰⁵ and determine if he had committed an essential error.⁹⁰⁶ The court followed Merck’s proposed selection process, forwarding the request to the Provincial Director of Pichincha of the Council of the Judiciary.⁹⁰⁷ The Provincial Director of Pichincha responded by simply directing the court to the publicly accessible list of accredited experts available on its website.⁹⁰⁸ Consistent with normal practice, by order dated 8 December 2010, the Court of Appeals chose Dr. Guerra from the list recommended by the Provincial Director of Pichincha.⁹⁰⁹

524. Similarly, Merck concedes through its silence that the process leading to the appointment of Mr. Yerovi was similarly regular and proper. Like Dr. de León and Dr. Guerra, Mr. Yerovi was appointed at the behest of *both* parties.⁹¹⁰ 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.⁹¹¹ On the same date, NIFA argued that Mr. Silva’s

⁹⁰⁴ NIFA Petition, *NIFA v. MSDIA*, Court of Appeals (12 Nov. 2010) (R-99); Electronic Docket, Case No. 2008-0421, *NIFA v. MSDIA*, Provincial Court of Justice of Pichincha, First Civil and Commercial Chamber (Second Instance Court), Entry 261 (R-122).

⁹⁰⁵ Report of Ignacio de León, *NIFA v. MSDIA*, Court of Appeals (12 Feb. 2010) (C-24).

⁹⁰⁶ MSDIA Petition, *NIFA v. MSDIA*, Court of Appeals (29 Oct. 2010) (R-168).

⁹⁰⁷ Letter from the Court of Appeals to the Provincial Director of Pichincha (Judicial Council) (26 Nov. 2010) (R-100).

⁹⁰⁸ Letter from the Provincial Director of Pichincha to the Court of Appeals (30 Nov. 2010) (R-101).

⁹⁰⁹ List of accredited experts by the Judiciary Council of Pichincha (30 Nov. 2010) (R-102); Court Order, *NIFA v. MSDIA*, Court of Appeals (8 Dec. 2010) (C-29).

⁹¹⁰ *Cf.* Claimant’s Memorial, ¶ 102 (“NIFA requested appointment of a new expert, and again without explanation, the court of appeals complied [...]”).

⁹¹¹ MSDIA Request, *NIFA v. MSDIA*, Court of Appeals (30 Sept. 2010) (R-92).

report suffered from an essential error;⁹¹² therefore, it also sought the 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.⁹¹³

525. Thus, again 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.⁹¹⁴ Merck did not object to his specific appointment, instead merely reserving the right to put questions to Mr. Yerovi.⁹¹⁵

526. Furthermore, as clearly set forth in its introduction, Mr. Yerovi's expert report addressed questions put forth by *both* NIFA and Merck.⁹¹⁶ Again Claimant fails to address this fact. After the first report was submitted by Mr. Yerovi,⁹¹⁷ Merck requested a supplementary report from him to address Merck's further questions.⁹¹⁸ Mr. Yerovi responded with a supplemental report within two weeks.⁹¹⁹ In short, not only did Merck *not* object to Mr. Yerovi's appointment as improper, Merck relied upon Mr. Yerovi's expertise by submitting further questions.

⁹¹² NIFA Petition, *NIFA v. MSDIA*, Court of Appeals (30 Sept. 2010) (R-94). According to Article 258 of the Ecuadorian Code of Civil Procedure, "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 liability the previous expert or experts may have incurred if the original opinion was made in bad faith." Ecuadorian Code of Civil Procedure, Art. 258 (RLA-107).

⁹¹³ Court Order, *NIFA v. MSDIA*, Court of Appeals (30 Sept. 2010) (R-93).

⁹¹⁴ *Id.*; Court Order, *NIFA v. MSDIA*, Court of Appeals (26 Oct. 2010) (C-28).

⁹¹⁵ MSDIA Petition, *MSDIA v. NIFA*, Court of Appeals (27 Oct. 2010) (R-97).

⁹¹⁶ Report of Marco V. Yerovi, *NIFA v. MSDIA*, Court of Appeals (20 Dec. 2010), p. 1 (C-30) ("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.").

⁹¹⁷ *Id.*

⁹¹⁸ MSDIA Request, *NIFA v. MSDIA*, Court of Appeals (31 Jan. 2011) (R-105).

⁹¹⁹ Supplement to Report of Marco V. Yerovi Jaramillo, *NIFA v. MSDIA*, Court of Appeals (3 Mar. 2011) (C-261).

527. Claimant now asserts that NIFA failed to make the evidentiary showing required to justify the appointment of any of these three later-appointed experts.⁹²⁰ But not only did Merck fail to raise such an objection at the time, its allegation is inconsistent with its own behavior in the litigation. Considering that two of these experts, Dr. Guerra and Mr. Yerovi, were appointed at the behest of *both* parties (as shown above), it is disingenuous in the extreme for Merck to now challenge the legality of their appointment. Merck does not even attempt to dispute the critical fact that it participated fully in the process leading to the appointment of Dr. Guerra and Mr. Yerovi; instead, it pretends that the Court of Appeals did everything to please and favor the interests of NIFA. Moreover, the jurisprudence of the Ecuadorian Supreme Court has established that the Ecuadorian Code of Civil Procedure confers upon judges wide discretion and authority in the appointment and assessment of experts and their reports; it declares that the procedures on expert testimony are not mandatory but afford latitude to guarantee that the testimony of experts is effective and useful in finding the truth of disputed facts.⁹²¹

iii. The Court’s Appointment And Use Of Mr. Cabrera As A Damages Expert

528. To showcase its allegation that the “circumstances under which the court of appeals appointed the second set of experts” were questionable, Claimant focuses on the circumstances surrounding the appointment of Mr. Cabrera. It claims that the appointment of Mr. Cabrera was improper because the court shifted its rationale for his appointment on several occasions and

⁹²⁰ Claimant’s Reply, ¶¶ 592-594.

⁹²¹ Second Aguirre Expert Opinion, ¶ 3.12 (*citing* Judgment No. 306-2001, Supreme Court of Justice, Official Registry 627 (26 July 2002), which says in relevant part: “These are, instead, rules that confer upon the judge discretionary powers so that expert evidence can be effective and useful to establish the truth of the facts being examined or at issue in the proceeding. Thus, in Art. 261, it is stated that the judge, *ex officio* or by request of a party, may ask the expert for explanations, if the report is ‘obscure or insufficient,’ which holds no discretionary doubt; Art. 262 holds that the judge may order corrections to the report if it is shown to contain an essential error, which and the judge’s assessment is also subject to his free conviction; and Art. 263 allows for the appointment of another expert whenever the judge finds it necessary. All of these discretionary powers are supplemented in the end by what is provided under the second paragraph of Art. 266: ‘The judge is not obligated to abide by the judgment of the experts, against his or her own conviction.’”).

because it was untimely.⁹²² However, as with Claimant’s earlier baseless allegations, these new allegations do not hold water: Claimant exaggerates and distorts the Court of Appeals record to contrive an irregularity regarding Mr. Cabrera’s appointment where none exists.

(a) The Court’s appointment of Mr. Cabrera was not irregular, much less a denial of due process

529. Claimant’s expert, Dr. Ortega, seeks to discredit the regularity of Mr. Cabrera’s appointment stating (a) that NIFA failed to substantiate its claim that the original reports contained essential error and (b) that the overall circumstances of his appointment were “particularly improper and of prejudice to MSDIA.”⁹²³

530. *First*, as stated in Ecuador’s Counter Memorial, Mr. Cabrera was initially appointed in response to a request by Merck and according to a procedure requested by Merck.⁹²⁴ At that time, Merck did not oppose his appointment and, indeed, honored it until, before Mr. Cabrera submitted a report, Dr. de León, an expert appointed in response to NIFA’s request for an expert to address liability and damages, issued a report that opined that Merck was not liable and therefore did not address issues of damages quantification.

531. *Second*, Mr. Cabrera was appointed the second time at the request of NIFA because the Court had no expert presentation on damages quantification, were liability to be found. For this reason, NIFA’s request did not contain an “essential error” basis for the appointment of a new expert.⁹²⁵ The court appointed Mr. Cabrera by order dated 10 May 2011 to provide an opinion on

⁹²² Claimant’s Reply, ¶ 579.

⁹²³ Expert Report of Dr. Jaime Ortega (7 Aug. 2014) (“Ortega Expert Report (7 Aug. 2014)”), ¶ 43.

⁹²⁴ Court Order, *NIFA v. MSDIA*, Court of Appeals (3 Feb. 2010) (C-254). Ortega Expert Report (7 Aug. 2014), ¶ 43(d).

⁹²⁵ NIFA’s Brief, *NIFA v. MSDIA*, Court of Appeals (28 Mar. 2011) (C-262); NIFA’s Brief, *NIFA v. MSDIA*, Court of Appeals (8 Apr. 2011) (C-263).

damages quantification.⁹²⁶ The court’s justification was set forth as follows: “[W]hile the expert Ignacio de León submitted his report, listed on page 9247, he did not fulfill the plaintiff’s request, but rather states that he answers a question, meaning he did not fulfill the objective of the expert review for which he was appointed. Therefore, and having been a legitimate request, and since it was ordered in paragraph j) of court order of Friday, June 5, 2009 at 5:18 p.m., the Chamber appoints Mr. Cristian Augusto Cabrera Fonseca, accreditation number 268 of the Judicial Council.”⁹²⁷ It is clear, therefore, that the Court of Appeals made a determination that Dr. de León’s report was incomplete at best.

532. Because the court’s order did not cite to any specific provision of the Civil Code, Merck challenged this appointment.⁹²⁸ In response, by order dated 19 May 2011, the court *clarified* the basis of Mr. Cabrera’s appointment, explaining that he had been appointed *ex officio*, in accordance with Article 262 of the Code of Civil Procedure, which allows the court to appoint its own expert in the event another expert’s opinion is not “sufficiently clear.”⁹²⁹

533. Claimant’s expert, Dr. Ortega, alleges that in this order the court “changed the justification” for its appointment of Dr. Cabrera and failed to explain how Dr. de León’s report was not “sufficiently clear.”⁹³⁰ But Dr. Ortega cites no authority requiring such an explanation and is himself in no position to second guess the court’s conclusion that something was unclear to it. Specifically, Article 262 of the Ecuadorian Code of Civil Procedure provides judges with complete discretion in appointing experts: “If the judge does not find *sufficient clarity* in the expert report, *he/she may* officially appoint another or others to prepare a new report.” The

⁹²⁶ Court Order, *NIFA v. MSDIA*, Court of Appeals (10 May 2011) (C-39).

⁹²⁷ *Id.*, p. 3.

⁹²⁸ MSDIA Petition, *NIFA v. MSDIA*, Court of Appeals (13 May 2011) (C-40).

⁹²⁹ Court Order, *NIFA v. MSDIA*, Court of Appeals (19 May 2011) (C-264).

⁹³⁰ Ortega Expert Report (7 Aug. 2014), ¶ 43(p).

Court's order of 10 May 2011 expressly stated that Dr. de León had not fully carried out his mandate; he did not even address damages quantification.⁹³¹ The court did not need to cite Article 262 to justify Mr. Cabrera's appointment. However, in response to Merck's request, it did clarify that Article 262 was the basis for his appointment.

534. Thus, contrary to Claimant's allegations, there was no change in the rationale for the appointment of Mr. Cabrera as suggested by Dr. Ortega. Dr. Ortega questions the propriety of Mr. Cabrera's appointment by declaring that the court changed the basis for Mr. Cabrera's nomination from "that of an essential error expert, as the court had indicated on 25 April 2011, to that of a new substantive damages expert" as reflected in the court order of 10 May 2010.⁹³² It is true that the court order of 25 April 2011 expressly accepts NIFA's request to appoint a damages expert, stating that this request was made within the evidentiary period for Dr. de León's essential error.⁹³³ However, NIFA's written requests cited in the court order of 25 April 2011, did not ever suggest that NIFA was requesting the appointment of a damages expert to prove Dr. de León's essential error. In fact, Dr. Guerra had already been appointed to that effect. By that time, Mr. Guerra—who was indeed appointed as an essential error expert to examine Dr. de León's report—had already delivered his report finding essential error de León's report.⁹³⁴ So, the court order of 25 April 2011 was mistaken. And the Court of Appeals corrected that mistake days later, as will be shown below. This simple fact debunks Dr. Ortega's theory that the reappointment of Mr. Cabrera was irregular. Not surprisingly, Merck tries to mask it.

⁹³¹ Court Order, *NIFA v. MSDIA*, Court of Appeals (10 May 2011), Section 3 (C-39).

⁹³² Ortega Expert Report (7 Aug. 2014), ¶ 43 (n). *See also* Court Order, *NIFA v. MSDIA*, Court of Appeals (10 May 2011) (C-39) and Court Order, *NIFA v. MSDIA*, Court of Appeals (25 Apr. 2011) (C-37).

⁹³³ Court Order, *NIFA v. MSDIA*, Court of Appeals (25 Apr. 2011) (C-37).

⁹³⁴ Report of Carlos Guerra Roman, *NIFA v. MSDIA*, Court of Appeals (14 Feb. 2011) (C-32).

535. In response to the court order of 25 April 2011, and as part of its efforts to avoid the appointment of a damages expert, Merck challenged “the prospective appointment of an essential error expert, given that NIFA failed to request an essential error expert to review Dr. de León’s report on damages during the legal period for doing so.”⁹³⁵ Merck did so in a written submission dated 28 April 2011.⁹³⁶ The Court of Appeals responded to Merck’s challenge in an order dated 10 May 2011, in which it stated: “2) In connection to the revocation requested in paragraph II of the aforementioned communication and, since the court order challenged in fact has an error in the appointment of the expert in regards to the essential error test, the provisions of paragraph 5) of court order dated 28 April 28, 2011 at 2:48 p.m. is hereby revoked.”⁹³⁷ After it rectified the original mistake in its order of 25 April 2011, the court proceeded to explain the real basis of Mr. Cabrera’s appointment:

[...] in response to the communication filed by the plaintiff on May 5 of this year at 4:04 p.m., and from the review of the case file we find that in paragraph XI of the communication filed by the plaintiff on Friday, June 5 of 2009 at 3:03 p.m. which is in pages 5722 to 5723, within the term provided has requested: “please appoint an accredited expert to determine—based on the information provided and that which is already inserted into the case file in the first and second instance books—the damages that my client, Nifa S.A., has experienced as a result of the fraudulent acts and practices against free competition executed by the defendant in 2002 and the beginning of 2003...”; and while the expert Ignacio de Leon submitted his report, listed on page 9247, he did not fulfill the plaintiff’s request, but rather states that he answers a question, *meaning he did not fulfill the objective of the expert review for which he was appointed. Therefore, and having been a legitimate request, and since it was ordered in paragraph j)*

⁹³⁵ Ortega Expert Report (7 Aug. 2014), ¶ 43 (m).

⁹³⁶ MSDIA Petition, *NIFA v. MSDIA*, Court of Appeals (28 Apr. 2011) (C-38). The basis of Merck’s challenge was warranted, for it was anchored in the Court of Appeals mistake in its order of 25 April 2011.

⁹³⁷ Court Order, *NIFA v. MSDIA*, Court of Appeals (10 May 2011) (C-39).

of court order of Friday, June 5, 2009 at 5:18 p.m., *the Chamber appoints Mr. Cristian Augusto Cabrera Fonseca* [...] ⁹³⁸

536. Based on the above, it becomes clear that the Court of Appeals did not change “the basis for [Cabrera’s] nomination from that of an essential error to [...] that of a new substantive damages expert”⁹³⁹ as suggested by Dr. Ortega in his expert report. So, rather than changing the basis for the nomination of Cabrera in its order of 10 May 2011, the Court corrected a mistake it had made in the order of 25 April 2011.

537. Unfortunately, Merck’s and its expert’s manipulation of the record does not end here. But at this point in the story, and in order to fully understand Mr. Cabrera’s appointment, it is essential to keep in mind that the court order of 10 May 2011 expressly stated that Dr. de León “*did not fulfill the objective of the expert review for which he was appointed.*”⁹⁴⁰

538. So after the court order of 10 May 2011, Merck submitted another brief challenging Mr. Cabrera’s appointment. In his report, Dr. Ortega summarizes quite well the purpose and basis of this challenge: “On May 13, 2011, MSDIA challenged Mr. Cabrera’s appointment as unjustified given that the court had already appointed Dr. de León in response to NIFA’s June 5, 2009 petition.”⁹⁴¹ Six days later, on 19 May 2011, the Court of Appeals denied Merck’s request stating:

It is the Judge’s obligation to reach the truth through lawful means, i.e. the evidentiary means under Procedural Law. The fact that in the case file there are already expert reports is not a limitation to the aforementioned core objective; thus, Article 262 of the Civil Procedure Code reads: ‘If the Judge does not find enough clarity in the expert or experts reports, ex-officio he/she may appoint other or others to carry out the same procedure. The judge may, as well, ask the previous experts to produce the data he/she deems

⁹³⁸ *Id.*

⁹³⁹ Ortega Expert Report (7 Aug. 2014), ¶ 43 (m).

⁹⁴⁰ Court Order, *NIFA v. MSDIA*, Court of Appeals (10 May 2011) (C-39).

⁹⁴¹ Ortega Expert Report (7 Aug. 2014), ¶ 43 (o).

necessary. It is not the judge's obligation to go by—against his better judgment—to the experts' opinion'. Therefore, all expert reviews, along with all the evidence of the case will be analyzed upon rendering a verdict. On this basis, the revocation request filed by the defendant company is hereby dismissed.⁹⁴²

539. In this 19 May 2011 order, the Court of Appeals clarified that it was appointing Mr. Cabrera *ex officio* under the authority of Article 262 of the Code of Civil Procedure. But Merck's expert, Dr. Ortega, suggests that, in the 19 May 2011 order, the Court of Appeals changed once again the basis for the appointment of Mr. Cabrera without making a finding that Dr. de León's report was not sufficiently clear.⁹⁴³ Dr. Ortega omits here the clear language of the 10 May 2011 order reference above, where the Court of Appeals found that Dr. de León "did not fulfill the objective of the expert review for which he was appointed."⁹⁴⁴ This finding warranted the Court of Appeals *ex officio* appointment of Mr. Cabrera under article 262 of the Code of Civil Procedure.

540. After Mr. Cabrera issued his report on 21 June 2011,⁹⁴⁵ Claimant lodged another petition seeking to challenge his report based on "essential error." The court rejected this request.⁹⁴⁶ Dr. Ortega suggests that the court's order rejecting an appointment of an "essential error" expert shows that the court *again changed the basis* of its appointment of Mr. Cabrera, by rejecting Merck's request to appoint an essential error expert on the grounds that Cabrera was himself an essential error expert whose report was not reviewable by another essential error expert.⁹⁴⁷

⁹⁴² Court Order, *NIFA v. MSDIA*, Court of Appeals (19 May 2011) (C-264).

⁹⁴³ Ortega Expert Report (7 Aug. 2014), ¶ 43 (p).

⁹⁴⁴ Court Order, *NIFA v. MSDIA*, Court of Appeals (10 May 2011) (C-39).

⁹⁴⁵ Report of Cristian Augusto Cabrera Fonseca, *NIFA v. MSDIA*, Court of Appeals (21 June 2011) (C-42).

⁹⁴⁶ Court Order, *NIFA v. MSDIA*, Court of Appeals (19 July 2011) (C-45); Court Order, *NIFA v. MSDIA*, Court of Appeals (1 Aug. 2011) (C-46).

⁹⁴⁷ Court Order, *NIFA v. MSDIA*, Court of Appeals (19 July 2011) (C-45); Ortega Expert Report (7 Aug. 2014), Section u). *See also* Court Order, *NIFA v. MSDIA*, Court of Appeals (1 Aug. 2011) (C-46) (rejecting MSDIA's

Claimant argues that “because Mr. Cabrera was appointed as a substantive damages expert, under Ecuadorian law, his report was subject to challenge through a timely essential error petition.”⁹⁴⁸

541. But, as just seen, it is not true that Mr. Cabrera was appointed as a substantive damages expert. As Merck itself recognized in another brief just one month before the Court of Appeals issued its judgment,⁹⁴⁹ the Court of Appeals appointed him on the basis of Article 262 of the Code of Civil Procedure providing for clarifying experts. Article 262 grants Ecuadorian courts broad authority to appoint an expert *ex officio* when the report of a previous expert is unclear or incomplete.⁹⁵⁰ Like essential error experts appointed under article 258 of the code of Civil Procedure, an Article 262 expert is not subject to another essential error challenge. As Ecuador’s procedural law expert explains, the purpose of both provisions is the same: to correct or clarify the report of another expert with the sole purpose of finding the truth.⁹⁵¹ If it were permitted to subject experts designated under either Article 262 or 258 of the Code of Civil Procedure to essential error, there would be no limit to the number of essential error proceedings. And there would be no end to the proceedings, as the parties would continue to challenge one expert after the other. Therefore, even if the Court of Appeals had made a mistake while responding to Merck’s constant challenges to the appointment of Mr. Cabrera, this mistake did not have any impact on the outcome of the case.

request for reconsideration of its 19 July 2011 Order, on the grounds that Mr. Cabrera was an essential error expert, reasoning that “there is no procedural formula to prove essential error regarding another essential error.”)

⁹⁴⁸ Claimant’s Reply, ¶ 579.

⁹⁴⁹ MSDIA brief, *NIFA v. MSDIA*, Court of Appeals (3 Aug. 2011) (R-180).

⁹⁵⁰ Court Order, *NIFA v. MSDIA*, Court of Appeals (19 May 2011) (C-264).

⁹⁵¹ Second Aguirre Expert Opinion, ¶ 312.

542. In any event, it is important not to lose sight of the fact that the *NIFA v. MSDIA* litigation was a tremendously complex case with thousands of pages and hundreds of motions and petitions by the parties, one after the other. In particular, both parties made countless of requests regarding the need for experts, and both parties litigated fiercely over the content of their reports. The Court of Appeal’s confusion, if any, on whether Mr. Cabrera was an Article “258” or Article “262” expert is understandable under these circumstances. But still, it did not make a difference.

543. Moreover, Claimant’s statement that, if Merck “had been permitted to challenge Mr. Cabrera’s report for essential error, there would have been *no conceivable basis for the court’s reliance on Mr. Cabrera’s analysis*,” is of course purely speculative.⁹⁵² The determination of whether there has been an essential error finding is the court’s prerogative,⁹⁵³ and the mere fact that a party has challenged the report does not disqualify either the report or the expert.

544. Nor was Mr. Cabrera’s report thereby “shielded from adversarial review,” as Claimant contends.⁹⁵⁴ Not only did Merck submit a 30-page brief explaining why it considered Mr. Cabrera’s report to be unreliable and deficient,⁹⁵⁵ it also submitted—without seeking leave of the court—two witness statements by its own experts Walter Spurrier and Alberto Acosta, as well as an expert report by Carlos Montanez, in an attempt to show that Mr. Cabrera had committed essential error.⁹⁵⁶ In an order dated 19 July 2011, the Court of Appeals admitted *all of these submissions by Merck*.⁹⁵⁷ On 22 July 2011, Mr. Cabrera submitted a supplemental report to

⁹⁵² Claimant’s Reply, ¶ 580.

⁹⁵³ Judgment No. 306-2001, Supreme Court of Justice, Official Registry 627 (26 July 2002) (R-139).

⁹⁵⁴ Claimant’s Reply, ¶ 580.

⁹⁵⁵ MSDIA Brief, *NIFA v. MSDIA*, Court of Appeals (15 July 2011) (C-195).

⁹⁵⁶ *Id.*

⁹⁵⁷ Court Order, *NIFA v. MSDIA*, Court of Appeals (19 July 2011) (C-45).

respond to Merck’s allegations of essential error.⁹⁵⁸ Five days later Merck submitted additional observations to Mr. Cabrera’s supplemental report.⁹⁵⁹ In sum, Merck fully exercised its due process rights by confronting and disputing Mr. Cabrera’s opinion on several occasions; Claimant’s assertion that Mr. Cabrera’s report was “shielded from adversarial review” is completely spurious.

545. In short, Dr. Ortega’s suggestion that the rationale for the appointment of Mr. Cabrera shifted or was untimely is wrong. Aside from any errors corrected by the court in due course, which through no objective lens evidence corruption, there was simply nothing “unusual” or “improper” in the Court’s appointment of Mr. Cabrera.

(b) Whether the Court’s decision not to allow Merck to cross-examine Mr. Cabrera was unjustifiable under Ecuadorian law

546. Claimant’s legal expert, Dr. Ortega, also suggests that the Court of Appeals’ decision rejecting Merck’s request to cross-examine Mr. Cabrera was unjustifiable under Article 76 of the Constitution.⁹⁶⁰ But as Dr. Javier Aguirre explains in his second expert report, although Article 76 of the Constitution established the principle of oral participation in legal proceedings in general, the civil procedure laws of Ecuador had not yet been revised to implement this principle in civil cases, which has been the case for other types of proceedings, such as criminal and labor proceedings.⁹⁶¹ Therefore, the civil courts, including the Provincial Court of Pichincha, were not required to accept Merck’s request to cross-examine Mr. Cabrera orally in a hearing. This does not mean, however, that Merck’s due process rights were impaired. To the contrary, Merck

⁹⁵⁸ Walter Cabrera's Supplemental Report, *NIFA v. MSDIA*, Court of Appeals (22 July 2011) (R-177).

⁹⁵⁹ MSDIA Submission, *NIFA v. MSDIA*, Court of Appeals (27 July 2011) (R-179).

⁹⁶⁰ Ortega Expert Report (7 Aug. 2014), ¶ 45.

⁹⁶¹ Second Aguirre Expert Opinion, ¶ 3.14.

seized every opportunity to confront and object to Mr. Cabrera’s conclusions by submitting written observations on his report and by submitting questions directly to Mr. Cabrera, which he answered in a timely manner, all consistent with Ecuadorian procedure and practice.⁹⁶² Therefore, Merck’s right to be heard in an adversarial process was not affected simply because it was unable to question Mr. Cabrera orally.

(c) The Court of Appeals’ Use of and Reliance on Court-Appointed Experts Were Not Contrary to Ecuadorian Law

547. While Claimant avoids addressing Ecuador’s showing that the appointment of Dr. Guerra and Mr. Yerovi followed a normal process, Merck argues that their adverse opinions should not have been relied upon by the Court. In this connection, Claimant proffers in its Reply an entirely new argument: that the Court could not rely on their opinions because they were “essential error” experts.

548. However, Claimant does not show how the Court of Appeals “relied” on Dr. Guerra’s opinion. Merck claims that the court “arbitrarily and without justification *adopted the findings* of Dr. Guerra,”⁹⁶³ but cites no specific section of the court’s judgment. In fact, the Court of Appeals nowhere states that it has adopted Dr. Guerra’s findings or opinion.

549. As to Mr. Yerovi, who as noted had been appointed at the behest of both parties, the court refers to his analysis in its discussion of Mr. Silva’s findings, thus disproving Claimant’s allegation that the court “reject[ed], without explanation” Mr. Silva’s opinion.⁹⁶⁴

550. Contrary to Merck’s claims, the Court of Appeals was entitled to rely on Mr. Cabrera’s report. Mr. Cabrera was not appointed as an essential error expert as Merck recognized in a brief

⁹⁶² MSDIA Brief, *NIFA v. MSDIA*, Court of Appeals (15 July 2011) (C-195).

⁹⁶³ Claimant’s Reply, ¶ 561.

⁹⁶⁴ Judgment, *NIFA v. MSDIA*, Court of Appeals (23 Sept. 2011), p. 11 (C-4).

before the Court of Appeals⁹⁶⁵ and its cassation petition.⁹⁶⁶ He was the *only* expert who provided opinion on damages. Merck had an opportunity to appoint another expert on damages earlier in the proceedings, but withdrew the request it had made earlier that led to the initial appointment of Mr. Cabrera, and Merck chose instead to rely on Dr. de León’s opinion that stopped at finding no liability. Clearly, Merck’s strategy was to deprive the court of any expert opinion regarding damages quantification, forcing it to rely solely upon Dr. de León’s opinion that there was no liability.

551. Moreover, there is nothing irregular about the Court of Appeals relying on these three experts, whether “essential error” experts or not, to assist in its findings. Ecuadorian judges exercise discretion in their reliance on the expert reports.⁹⁶⁷ Therefore, Dr. Ortega is wrong when he makes the unsupported statement that “the court’s exclusive reliance on the reports of ‘essential error’ experts was procedurally improper because essential error reports are evidence that goes against other evidence, and the court should have used the essential error expert report only in contrast with the main report being considered.”⁹⁶⁸ In exercising this discretion, the court informed the parties on several occasions that it would weigh all the expert reports and decide on their use in the final judgment.⁹⁶⁹ One of the reasons the court decided to exercise its discretion in this manner was because it did not want to prejudge on any of the disputed issues before

⁹⁶⁵ MSDIA brief, *NIFA v. MSDIA*, Court of Appeals (3 Aug. 2011) (R-180).

⁹⁶⁶ MSDIA’s Cassation Petition, *NIFA v. MSDIA*, Court of Appeals (13 Oct. 2011), ¶ 73 (C-198) (“Nevertheless, though there wasn’t even a declaration on the existence of an essential error, twenty three months after the closing of the evidentiary period, given an unusual request from the plaintiff, they altered what they had decided when they named Dr. Ignacio de León as the expert to determine whether NIFA suffered damages or not, and ‘by official letter’ in accordance with the stipulations of article 262 of the Civil Procedure Code on April 25th, 2011 designated another legal expert, Cristian Cabrera, to establish the alleged damages under the pretext that no expert had been appointed for this purpose before.”) (emphasis omitted).

⁹⁶⁷ Judgment No. 306-2001, Supreme Court of Justice, Official Registry 627 (26 July 2002) (R-139).

⁹⁶⁸ Ortega Expert Report, ¶ 42.

⁹⁶⁹ Court Order, *NIFA v. MSDIA*, Court of Appeals (21 June 2011) (R-175).

issuing its judgment.⁹⁷⁰ It is telling that Merck did not fault the NCJ's later consideration of all of the expert reports, including the essential error experts.

552. Merck also complains that the court accepted the findings of one set of experts and disregarded the findings of another, without explanation.⁹⁷¹ According to Dr. Ortega, the “principle of *‘fundamentación’* [justification] provides that the court must explain why it is disregarding expert opinions in its decision.”⁹⁷² Again, Dr. Ortega does not cite any authority to support his statement. And, again, it is telling that Merck does not similarly fault the NCJ for its similar reticence in the first cassation judgment. In any event, and as mentioned previously, Article 262 of the Code of Civil Procedure gives the court broad discretion on how to use expert reports. Indeed, this provision, as Dr. Ortega acknowledges, does not obligate the court to take the opinions of such experts into account at all.⁹⁷³

553. Finally, 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 an 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: availing itself of all judicial means. Merck did seek cassation, and, as discussed earlier, the NCJ addressed Merck's concerns.

⁹⁷⁰ Court Order, *NIFA v. MSDIA*, Court of Appeals (19 July 2011) (C-45) (“In regards to the request in paragraph 68 of the last communication filed by the defendant, it is hereby denied as not pertinent because to declare at this stage of the process the existence of essential error in the report on essential error argued by the plaintiff, would imply an early opinion, which the judges are prohibited from issuing. All the evidence provided to the case will be analyzed upon rendering a verdict.”).

⁹⁷¹ Ortega Expert Report (7 Aug. 2014), ¶ 42.

⁹⁷² *Id.*

⁹⁷³ *Id.*

Merck's differences with the experts and the Court of Appeals' reliance upon them do not demonstrate a denial of justice.

iv. Qualifications Of The Replacement Experts Qualifications

554. Claimant now contends that Ecuador does not dispute that Dr. Guerra and Mr. Cabrera were "unqualified" to serve as experts in any Ecuadorian litigation. But Ecuador's actual position is that these experts came to be chosen under procedures recommended by Merck for identifying credentialed experts and that the court's reliance upon them over Merck's objection was a matter of the court's discretion which takes the question outside of the realm of a violation of due process or a denial of justice.

555. In his 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"⁹⁷⁴ only, and not in damages. However, the fact that Mr. Cabrera's accreditation was then limited to accounting and audit⁹⁷⁵ does not 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.

556. With respect to Dr. Guerra, the Provincial Director of Pichincha Judiciary Council stated in his January 2012 report that his 2011 accreditation had not been signed by the then-Provincial Director.⁹⁷⁶ As a result, he was no longer deemed as an accredited expert. However, the

⁹⁷⁴ Report of Iván Escandón, Provincial Director of the Council of the Judiciary for Pichincha (26 Jan. 2012), p. 2 (C-58).

⁹⁷⁵ *Id.*; Memorandum from Wilson Rosero Gómez, Chief of Staff, to Iván Escandón, Provincial Director of the Council of the Judiciary for Pichincha (31 May 2012) (C-63).

⁹⁷⁶ Report of Iván Escandón, Provincial Director of the Council of the Judiciary for Pichincha (26 Jan. 2012) (C-58).

Provincial Director also stated that “in previous years *there was no objection to his qualification.*”⁹⁷⁷

557. Moreover, Claimant’s counsel never questioned or objected to Mr. Cabrera’s or Dr. Guerra’s credentials *when they were appointed*—both were appointed in accordance with processes requested by Merck and were suggested by the competent recommending bodies. When Mr. Cabrera was recommended by the College of Accountants and appointed by the judge, Merck raised absolutely no objection as to his credentials. These experts’ respective competencies were challenged by Merck *only after* they had produced their reports adverse to Merck.⁹⁷⁸

v. The Court Of Appeals Did Not Fail To Consider Evidence Offered By Merck

558. Claimant conjures up yet another non-existent defect by asserting that the Court of Appeals treated all of Merck’s evidence as having been waived.⁹⁷⁹ But neither the court’s judgment nor other court orders support this fabrication.

559. *First*, as shown in the Counter-Memorial,⁹⁸⁰ the judgment itself is clear in specifying that the only evidence deemed to have been 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.”⁹⁸¹ Page 9940 of the record contains Merck’s withdrawal of its right to the appointment, according to its request, of an expert to determine whether NIFA had suffered

⁹⁷⁷ *Id.*, p. 1 (emphasis added).

⁹⁷⁸ See MSDIA Petition, *NIFA v. MSDIA*, Court of Appeals (28 Apr. 2011) (C-38). Claimant challenged Dr. Guerra’s credentials more than two months after he submitted his report. *See id.*

⁹⁷⁹ Claimant’s Reply, ¶¶ 641-650.

⁹⁸⁰ Ecuador’s Counter-Memorial, ¶¶ 495-496.

⁹⁸¹ Judgment, *NIFA v. MSDIA*, Court of Appeals (23 Sept. 2011), pp. 15-16 (C-4) (emphasis added).

damages arising from the failed negotiations.⁹⁸² This withdrawal, 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 on account of its favorable conclusions. The sentence in the judgment cited by Merck simply notes by reference the single aspect in which Merck expressly waived its rights.

560. *Second*, the court duly noted this withdrawal in its order issued on 26 April 2010, one-year-and-a-half prior to its final judgment.⁹⁸³ In several court orders issued after Merck's withdrawal, the Court of Appeals reaffirmed that it had to consider all evidence on the record, without stating that Merck's evidence was waived. For example, in an order dated 22 February 2011, the court expressly stated "[T]he whole of the evidence validly admitted into the record will be analyzed when the final judgment is made."⁹⁸⁴ The court reiterated this decision to both parties again in an order dated 21 June 2011⁹⁸⁵ and another order dated 19 July 2011.⁹⁸⁶

561. *Third*, the Court of Appeals' clarification decision, issued after the judgment, made clear that the only evidence that the court was not evaluating was "repetitive, impertinent, and irrelevant evidence."⁹⁸⁷ Had the court "waived" all the evidence as suggested by Merck, it would

⁹⁸² MSDIA Petition, *NIFA v. MSDIA*, Court of Appeals (16 Apr. 2010) (C-26).

⁹⁸³ Court Order, *NIFA v. MSDIA*, Court of Appeals (26 Apr. 2010) (R-87); Judgment, *NIFA v. MSDIA*, Court of Appeals (23 Sept. 2011), p. 16 (C-4).

⁹⁸⁴ Court Order, *NIFA v. MSDIA*, Court of Appeals (22 Feb 2011) (R-172).

⁹⁸⁵ Court Order, *NIFA v. MSDIA*, Court of Appeals (21 June 2011) (R-175).

⁹⁸⁶ Order, *NIFA v. MSDIA*, Court of Appeals (19 July 2011) (C-45) ("In regards to the request in paragraph 68 of the last communication filed by the defendant, it is hereby denied as not pertinent because to declare at this stage of the process the existence of essential error in the report on essential error argued by the plaintiff, would imply an early opinion, which the judges are prohibited from issuing. All the evidence provided to the case will be analyzed upon rendering a verdict.").

⁹⁸⁷ Clarification decision, *NIFA v. MSDIA*, Court of Appeals (6 Oct. 2011) (R-181) (stating: "With regard to the second request for amendment made by the defendant for amendment of the judgment to contain a discussion appraising all the evidence, the Chamber hereby notes that a judgment should contain a discussion appraising evidence that is pertinent, relevant and contributory, since its effect is to thereby arrive at the procedural truth. Therefore, it is not appropriate, in accordance with the rules of sound judgment, to appraise evidence that is considered repetitive, unimportant or irrelevant.").

not have needed to make a determination that it considered some of Merck's evidence to be irrelevant. The fact that the court considered Merck's evidence as such while exercising its discretion under the principles of sound criticism demonstrates that the Court of Appeals did much more than consider only NIFA's evidence.

562. Finally, it is, in the end, nonsensical to claim that the court would cite to this narrow language for the broad proposition that Merck waived its evidence. If the Court of Appeals corruptly wished to disregard Merck's evidence, it would not have reported this to the world based on a phony excuse. It could have done so without this waiver language.

563. The Court of Appeals' primary function was to review the decision below; the court therefore considered the record of the trial court proceedings, which included the evidence submitted by Merck, in addition to *new* evidence submitted by both parties at the appellate level.⁹⁸⁸

564. Claimant's expert, Dr. Ortega claims that the Court of Appeals did not follow the requirements of Article 115 of the Code of Civil Procedure which requires the court to "state in its decision the evaluation of all of the evidence produced." He claims that the court did not make "any reference to MSDIA's evidence. This by itself is proof that it did not evaluate or consider it."⁹⁸⁹ However, Article 115 does not require "listing" or references to all the evidence put by the parties on the record. Indeed, the court does not list or refer to NIFA's evidence either. Article 115 requires the court to provide its rationale for the assessment of evidence as a whole under the principle of sound criticism. As Merck acknowledged in its cassation petition, the principle of sound criticism codified in the first paragraph of Article 115 of the Code of Civil

⁹⁸⁸ First Expert Opinion of Prof. Javier Aguirre Valdez (25 Feb. 2014) ("First Aguirre Expert Opinion"), ¶ 5.4. *See also id.*, ¶¶ 5.5-5.7, 7.2.

⁹⁸⁹ Ortega Expert Report (7 Aug. 2014), ¶ 49.

Procedure allows the court to choose whatever evidence seems more credible and pertinent to the resolution of the dispute.⁹⁹⁰ The court's judgment demonstrates that it considered evidence as a whole.

565. But even if the judgment of the Court of Appeals had violated Article 115 of the Code of Civil Procedure, this defect was cured by the November 2014 NCJ decision. In fact, this decision listed, in more than 20 pages, all the evidence it considered and how it evaluated it.⁹⁹¹

vi. Notice Of The Court Of Appeal's Order Taking Control Of The Proceeding

566. Merck claims that it was not properly informed of the Court of Appeal's order taking control of the proceeding, the event that starts the clock running for the ten-day period for an appellant to file its points of appeal.⁹⁹² Merck makes this allegation to suggest that there was a conspiracy to prevent it from exercising its right to appeal.

567. Claimant's allegation is based on the witness statement of Mr. Ponce, but Mr. Ponce has admitted that he had no direct knowledge of whether the notice was served or not.⁹⁹³ In Claimant's Memorial, Merck and Mr. Ponce conveniently omitted to reveal that, according to the record, Mr. Ponce was not the attorney of record handling Merck's appeal at the time, and thus would not have received notice of the order in any event.⁹⁹⁴ Indeed, Mr. Ponce's firm was not

⁹⁹⁰ MSDIA's Cassation Petition, *NIFA v. MSDIA*, Court of Appeals (13 Oct. 2011), ¶ 27 (C-198).

⁹⁹¹ November 2014 NCJ Decision, pp. 52-76 (R-194).

⁹⁹² Claimant's Memorial, ¶ 66.

⁹⁹³ Second Witness Statement of Alejandro Ponce Martínez (5 Aug. 2014) ("Second Ponce Martínez Witness Statement"), ¶ 42. In the Military and Paramilitary Activities case, the International Court of Justice (ICJ) gave little weight to testimony from a witness with lack of personal knowledge. *See Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America)*, Merits, Judgment (27 June 1986), I.C.J. Reports 1986, p. 14, ¶ 68 (RLA-144) (stating: "Nor is testimony of matters not within the direct knowledge of the witness, but known to him only from hearsay, of much weight [...]").

⁹⁹⁴ After the appeal of the trial court judgment was lodged on 20 December 2007, Merck appointed Dr. Fabian Corral on 31 January 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 MSDIA's First Appeals Brief, MSDIA v. NIFA*, Court of Appeals (29 July 2008) (R-

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 Appeal’s “receipt of the proceeding.”⁹⁹⁵ In his second witness statement, Mr. Ponce alleges that he “consulted with the other lawyers on MSDIA’s team and was well aware of these events.”⁹⁹⁶ But this vague explanation only underscores his lack of personal knowledge and highlights the glaring absence of any direct evidence that the order had not been properly notified to Merck; i.e., the absence of a statement by Merck’s actual counsel of record at the time.

568. The only reliable evidence on the record is the court’s clerk certification 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.⁹⁹⁷ The accuracy of this official certification is corroborated by the fact that Merck did not contemporaneously lodge any complaint about inadequate notice in this regard; the presumption accorded to the regularity of notice certification must stand.⁹⁹⁸

569. More importantly, Claimant itself admits that it suffered o prejudice as a result of this alleged failure by the court.⁹⁹⁹ Indeed, 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

64); *cf.* MSDIA’s Brief, *NIFA v. MSDIA*, Court of Appeals (28 July 2008) (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 Martínez, *MSDIA v. NIFA*, Court of Appeals (28 Oct. 2008) (R-67).

⁹⁹⁵ See First Witness Statement of Alejandro Ponce Martínez (2 Oct. 2013) (“First Ponce Martínez Witness Statement”), ¶ 28; Claimant’s Memorial, ¶ 67.

⁹⁹⁶ Second Ponce Martínez Witness Statement, ¶ 42.

⁹⁹⁷ Notice of Decree by the Court of Appeals (taking possession of the case) (15 July 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.”).

⁹⁹⁸ First Aguirre Expert Opinion, ¶ 7.7.4.

⁹⁹⁹ Claimant’s Reply, ¶ 654.

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 that hardly resembles what would have been a mere draft less than an hour before it was filed.¹⁰⁰⁰ There is no evidence of anyone having “calculated to prevent MSDIA from exercising its right to appeal.”¹⁰⁰¹ Indeed, by 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.¹⁰⁰²

vii. The Recusal Of Judge Toscano

570. In its Memorial, Merck alleged that Judge Toscano’s service on the second instance court somehow tainted that court’s handling of its appeal. As shown, Judge Toscano “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.”¹⁰⁰³ Moreover, 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. Indeed, after Ecuador showed that Merck was unable to overcome the facts in the record that contradict this false allegation,¹⁰⁰⁴ Merck has now abandoned it.¹⁰⁰⁵

¹⁰⁰⁰ Claimant’s Memorial, ¶ 67. See MSDIA’s First Appeals Brief, *MSDIA v. NIFA*, Court of Appeals (29 July 2008) (R-64).

¹⁰⁰¹ Claimant’s Memorial, ¶ 67. 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 conspiracy has occurred.” *Rumeli Telekom AS and Telsim Mobil Telekomikasyon Hizmetleri A.S. v. Republic of Kazakhstan*, ICSID Case No. ARB/05/16, Award (29 July 2008) (Hanotiau, Boyd, Lalonde), ¶ 709 (CLM-142).

¹⁰⁰² First Ponce Martínez Witness Statement, ¶ 28.

¹⁰⁰³ Ecuador’s Counter-Memorial, ¶ 456.

¹⁰⁰⁴ *Id.*, ¶ 455-57.

¹⁰⁰⁵ Claimant’s Reply, ¶¶ 663-664.

viii. The Nullity Petition

571. Similarly, in its Memorial, Merck complained that the Court of Appeals rejected its nullity petition seeking to dismiss the case for lack of jurisdiction “without stating a clear rationale.”¹⁰⁰⁶ However, after Ecuador showed that the court’s order did “present a clear and precise explanation for the court’s rejection of the nullity petition,”¹⁰⁰⁷ Claimant also abandoned these frivolous arguments, effectively conceding they never had any merit whatsoever.

ix. The Court Of Appeals’ Judgment

572. In Claimant’s Memorial, Merck also alleged that the second instance judgment was rendered in an expedited manner,¹⁰⁰⁸ that its reasoning was “bizarre” because the court “expressly stated that it was ignoring all of the evidence that had been submitted by MSDIA,”¹⁰⁰⁹ that it ignored NIFA’s burden of proof on liability and damages,¹⁰¹⁰ and that it relied on certain information in the public domain to conclude that Merck “had a dominant market position.”¹⁰¹¹ But Merck fails to establish any of these allegations, much less show how they would constitute due process violations.

573. Claimant seems in light of Ecuador’s Counter-Memorial to have conceded that there was nothing “remarkable” about the timing of the judgment.¹⁰¹² Its most obvious weakness, among others, is the fact that Merck itself failed to exercise its right to request an oral hearing. After the

¹⁰⁰⁶ Claimant’s Memorial, ¶ 74; MSDIA’s Petition, *NIFA v. MSDIA*, Court of Appeals (12 Dec. 2008) (C-161).

¹⁰⁰⁷ Ecuador’s Counter-Memorial, ¶¶ 458-459.

¹⁰⁰⁸ Claimant’s Memorial, ¶ 120.

¹⁰⁰⁹ *Id.*, ¶ 121.

¹⁰¹⁰ *Id.*, ¶ 124.

¹⁰¹¹ *Id.*

¹⁰¹² Ecuador’s Counter-Memorial, ¶¶ 491-494.

Court of Appeals issued a writ that the case was ready for the final judgment,¹⁰¹³ 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.¹⁰¹⁴ The court rejected Merck's petition, holding that the Andean Community norms were not applicable because the *NIFA v. Merck* litigation was a civil tort claim to be decided exclusively under Ecuadorian law.¹⁰¹⁵ Once again, instead of asking for an oral hearing on the case, Merck persisted and filed a request for clarification of this writ.¹⁰¹⁶ Since the court of appeal's initial declination to suspend the proceedings was clear,¹⁰¹⁷ this was just an attempt to delay the rendering of the judgment.¹⁰¹⁸ The court nonetheless entertained Merck's request and ordered NIFA to provide its response within 48 hours.¹⁰¹⁹ After hearing both parties on the issue, the court issued the clarification jointly with its final judgment.¹⁰²⁰ This was not an unusual practice, and is also followed by international tribunals and courts all over the world.¹⁰²¹ Claimant has not challenged any of these explanations. Merck also insists that the

¹⁰¹³ See Electronic Docket, Case No. 2008-0421, *NIFA v. MSDIA*, Provincial Court of Justice of Pichincha, First Civil and Commercial Chamber (Second Instance Court), Entry 375 (R-122).

¹⁰¹⁴ *Id.*, Entry 376.

¹⁰¹⁵ See *id.*, Entry 377 (Court of Appeals Order dated 26 August 2011).

¹⁰¹⁶ Merck's Clarification Request, *NIFA v. MSDIA*, Court of Appeals (31 Aug. 2011) (R-113(bis)). 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 378 (R-122) (Expansion Request dated 31 August 2011).

¹⁰¹⁷ See Electronic Docket, Case No. 2008-0421, *NIFA v. MSDIA*, Provincial Court of Justice of Pichincha, First Civil and Commercial Chamber (Second Instance Court), Entry 377 (R-122).

¹⁰¹⁸ The court had previously warned the parties to abstain from deleterious practices. See *id.*, Entry 373 (Expansion and/or Clarification dated 1 August 2011) ("With respect to the petition made by the Plaintiff, we also warn the intent to 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.").

¹⁰¹⁹ *Id.*, Entry 380.

¹⁰²⁰ See Judgment, *NIFA v. MSDIA*, Court of Appeals (23 Sept. 2011), p. 11 (C-4).

¹⁰²¹ 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

court of appeal's judgment was improper because the court assumed without proof that MSDIA had significant market power.¹⁰²² As stated in Ecuador's Counter-Memorial, the court made this determination based on Article 27 of the Organic Code on Judicial Functioning.¹⁰²³ This provision allows a court to declare public and well-known facts without any additional proof as part of the record in order to reach its decision.¹⁰²⁴ Although the Court of Appeals did not expressly cite to this provision, the language of the judgment makes clear that the court relied on this basic principle of law.¹⁰²⁵

574. Claimant also claims that Ecuador made no effort to defend the Court of Appeals' judgment. Of course, Ecuador was not a party to the court of appeal proceedings and the court's judgment has been rendered moot by the new NCJ decision, which granted Merck's request for cassation and issued an entirely new judgment.

x. Other Instances Of The Court Of Appeals' Rulings Demonstrate That The Parties Were Accorded Equality

575. Claimant's grievances regarding the lower court proceedings are highly selective, restricted to specific instances where the Court of Appeals made decisions adverse to it. Moreover, Merck has distorted the record so as to give the impression that the Court of Appeals was biased against it. But a more critical look at the proceedings reveals that the parties were treated equally and that NIFA also suffered some setbacks in the litigation. For example, on 27 July 2011, *NIFA* submitted a brief accusing Mr. Cabrera of having committed essential error

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)).

¹⁰²² Claimant's Reply, ¶ 533.

¹⁰²³ Ecuador's Counter-Memorial, ¶ 499.

¹⁰²⁴ *Id.*

¹⁰²⁵ Judgment, *NIFA v. MSDIA*, Court of Appeals (23 Sept. 2011), pp. 13-14 (C-4) ("FIFTEENTH.- Merck Sharp & Dohme (Inter American) Corporation is a multinational company of great economic power, which operates worldwide and has a huge turnover. The defendant's ability and strength is a fact that requires no proof, *since it is public domain.*") (emphasis added).

because he failed to include in his assessment of damages all the potential products that NIFA could have made marketed with Merck's plant. NIFA asked the court to appoint a new damages expert.¹⁰²⁶ Contrary to what would be expected from a court motivated by corruption or bias against Merck, the Court of Appeals was quick to dismiss NIFA's request. The court accused NIFA of making baseless petitions and threatened to sanction it for boycotting the proceedings.¹⁰²⁷ A review of the voluminous record of the case before the Court of Appeals shows that this is but one example of the pattern of even-handedness that prevailed through the proceedings, which Claimant has made no effort to dispel in any systematic way.

b. Conclusion

576. In short, Merck has conceded that at least half of its initial litany of alleged "irregularities" are not borne out by the record. Claimant's new arguments do not salvage its claim either. Irrespective of the amount of the judgment that is no longer in force, 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 ample opportunity to present their respective cases. Each litigant had full opportunity to confront the substance and source of any evidence against it and to contest its validity.¹⁰²⁸ 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.

¹⁰²⁶ NIFA petition, *NIFA v. MSDIA*, Court of Appeals (27 July 2011) (R-178).

¹⁰²⁷ Court Order, *NIFA v. MSDIA*, Court of Appeals (1 Aug. 2011) (C-46) ("On the request filed by the plaintiff, it is hereby noticed the intent to delay the process with petitions without grounds that do not deserve a ruling from the Court. The parties are admonished that if you continue to cause incidents that aim to prevent the normal course of the claim, they will be subject to the provisions of Article 263 of the Civil Procedure Code and Articles 130, paragraph 13 and Article 131 of the Organic Code of the Judiciary.").

¹⁰²⁸ See F. García Amador, et al., CODIFICATION OF THE LAW OF STATE RESPONSIBILITY FOR INJURY TO ALIENS (1974) (RLM-88).

2. Merck's Claims Concerning The Trial Court Proceedings Are Grossly Exaggerated

577. Merck's Reply also continues to complain about the proceedings before the Second Court for Civil Affairs of Pichincha (the "first instance court" or "trial court"). Of course, as with the Court of Appeals' judgment, the trial court judgment has been mooted by the November 2014 NCJ decision. Moreover, as was shown in Respondent's Counter-Memorial,¹⁰²⁹ none of Merck's attempts to portray "irregularities" at the trial court level withstand scrutiny. As shown below, Merck's efforts to rehabilitate its charges in its Reply are equally unsuccessful. Not only does Merck continue to rely upon exaggerations and misrepresentations, its evidence again falls far short of demonstrating any irregularities amounting to a denial of justice. To the contrary, what that evidence shows is that:

- The trial court provided Merck with adequate notice of the testimony of NIFA's witness, Mrs. Anne Usher de Ranson;
- Merck did not suffer any prejudice as a result of its local counsel's failure to attend NIFA's witness's deposition; and
- The trial court's judgment was issued and delivered properly.

a. The Trial Court Provided Merck With Adequate Notice Of The Testimony Of PROPHAR's Witness

578. Merck continues to insist that it was deprived of the opportunity to confront NIFA's witness, Mrs. Usher de Ranson, because the trial court did not provide it with adequate notice of her testimony on two separate occasions. However, the record tells a different story. Merck's failure to attend Mrs. Usher de Ranson testimony on two separate occasions can only be attributed to its counsel, not the trial court. In any event, Merck counsel's failure to listen in

¹⁰²⁹ Ecuador's Counter-Memorial, ¶¶ 398-450.

person to Mrs. Usher de Ranson's testimony does not mean that Merck did not enjoy a full opportunity to confront this witness.

i. Mrs. Usher De Ranson's Testimony of 28 June 2004

579. Mr. Ponce Martínez claims that the speed with which the trial court accepted NIFA's petition to take Mrs. Usher de Ranson testimony was unusual. According to Mr. Ponce Martínez, "[the taking of Mrs. Usher de Ranson's testimony] was the only decree in the entire case that was issued so soon after the request by the petitioning party (within 12 minutes of the request by NIFA)."¹⁰³⁰ The reason why NIFA's request was granted that fast is simple: Mrs. Usher de Ranson was a non-resident witness who was present in Ecuador only briefly.¹⁰³¹

580. But Mr. Ponce Martínez's testimony is disingenuous at best. There happened to be multiple instances in the record where Merck's own motions and petitions were granted equally promptly by the trial court. For example, on 29 June 2004 at 5:53 p.m., Merck asked the trial court to request an Executive of the real estate company, Staubach in Panama, to forward a communication through diplomatic channels.¹⁰³² The very next day, just 32 minutes after opening its doors to the public, the trial court granted Merck's petition and ordered that the request be processed through the Ecuadorian consulate in Panama.¹⁰³³ Here is another example of Ecuadorian court efficiency, this time from the Court of Appeals: On 3 June 2009 at 9:48 a.m., Merck asked the Court of Appeals to take the testimony of Debora Doris Bertha Beitch Nimelman.¹⁰³⁴ The Court of Appeals accepted Merck's petition almost immediately, *a mere fifty*

¹⁰³⁰ Second Ponce Martínez Witness Statement, ¶ 5.

¹⁰³¹ Ecuador's Counter-Memorial, ¶ 402.

¹⁰³² MSDIA Request, *NIFA v. MSDIA*, Trial Court (29 June 2004) (R-23).

¹⁰³³ Order, *MSDIA v. NIFA*, Court of Appeals (30 June 2004) (R-28).

¹⁰³⁴ MSDIA's Petition, *NIFA v. MSDIA*, Court of Appeals (3 June 2009) (C-171).

minutes after Merck filed its request.¹⁰³⁵ These examples are remarkable not only because they show there was nothing unusual about the speed with which the trial court ordered Mrs. Usher de Ranson’s testimony, but also because they portray an efficient court system. Had the lower courts been sluggish, Merck would be complaining to this Tribunal of undue delays.

581. Mr. Ponce Martínez further insists he never received the court order to take Mrs. Usher de Ranson testimony.¹⁰³⁶ He offers no evidence—other than his unsupported statement—to disprove the court clerk’s certification showing that the notice was delivered to both parties and their attorneys at 5:20 p.m. on 25 June 2004.¹⁰³⁷ More significantly, Mr. Ponce Martínez has not denied his own statement, made in a later submission to the trial court, where he expressly acknowledged to have been served with the 25 June 2004 notice at 6:00 p.m. of the same day.¹⁰³⁸ Based on this contemporaneous admission, Merck can only blame its own counsel for not attending Mrs. Usher de Ranson’s first testimony, which took place the next business day, Monday 29 June 2004, in accordance with court practice.¹⁰³⁹

582. It is also telling that, instead of seeking to invalidate Mrs. Usher de Ranson’s testimony based on the alleged lack of notice, Merck’s counsel simply submitted its own set of written questions, and asked the trial court to schedule Mrs. Usher de Ranson’s cross-examination at a later date in Panama.¹⁰⁴⁰ By submitting its own interrogatory for cross-examination immediately thereafter, Merck validated the proceeding. While Merck subsequently attempted to strike Mrs. Usher de Ranson’s testimony on the ground that she lacked personal knowledge, Merck did not

¹⁰³⁵ Court Order, *NIFA v. MSDIA*, Court of Appeals (3 June 2009) (R-152).

¹⁰³⁶ Second Ponce Martínez Witness Statement, ¶ 6.

¹⁰³⁷ Ecuador’s Counter-Memorial, ¶ 402.

¹⁰³⁸ See, MSDIA Petition, *NIFA v. MSDIA*, Trial Court (30 Aug. 2005), p. 1 (R-46); Ecuador’s Counter-Memorial, ¶ 404.

¹⁰³⁹ Ecuador’s Counter-Memorial, ¶ 405.

¹⁰⁴⁰ MSDIA’s Petition, *NIFA v. MSDIA*, Trial Court (29 June 2004) (C-145).

even attempt to challenge her testimony on the basis of any alleged lack of notice; this omission reveals the lack of substance to Merck's objection here.¹⁰⁴¹

ii. Mrs. Usher De Ranson's Testimony Of 29 August 2005

583. As an initial matter, Mrs. Usher de Ranson's availability to appear and give testimony was limited because she lived in Panama. For this reason, on 18 August 2004, the trial court ordered the Ecuadorian consul in Panama to cross-examine Mrs. Usher de Ranson at Merck's request.¹⁰⁴² The sole purpose of this cross-examination was to allow Mrs. Usher de Ranson to answer Merck's interrogatory. Ultimately, Mrs. Usher de Ranson returned to Ecuador almost a year later, and the trial court seized the opportunity to carry out her cross-examination at the trial court.¹⁰⁴³

584. On Thursday 25 August 2005, four days in advance, the trial court ordered Mrs. Usher de Ranson to be deposed the next Monday, 29 August "at 9:00 AM."¹⁰⁴⁴ This order was notified to both parties' counsels at 4:49 p.m. on 25 August 2005.¹⁰⁴⁵ Again, Mr. Ponce Martínez failed to attend. Yet, this time he faults the order's lack of precision.¹⁰⁴⁶

585. But Mr. Ponce Martínez waited until Monday the 29th, the same day of the deposition, to seek clarification from the court as to the exact time of the deposition.¹⁰⁴⁷ Additionally, Merck used the opportunity to submit 18 additional questions to be posed to Mrs. Usher de Ranson during her testimony. As shown in the Counter-Memorial, Dr. Ponce Martínez had the entire day

¹⁰⁴¹ Ecuador's Counter-Memorial, ¶ 405, fn. 631 (*citing* MSDIA Request, *NIFA v. MSDIA*, Trial Court (29 June 2004) (R-23)).

¹⁰⁴² First Ponce Martínez Witness Statement, ¶ 12.

¹⁰⁴³ Ecuador's Counter-Memorial, ¶¶ 408-409. As it will be explained below, it was more convenient for Merck to have Mrs. Usher de Ranson be cross-examined in Ecuador rather than Panama.

¹⁰⁴⁴ Order, *NIFA v. MSDIA*, Trial Court (25 Aug. 2005) (C-147).

¹⁰⁴⁵ *Id.*

¹⁰⁴⁶ Second Ponce Martínez Witness Statement, ¶¶ 18-20.

¹⁰⁴⁷ Ecuador's Counter-Memorial, ¶¶ 414-415.

on Friday, 26 August, to ascertain the time of the deposition next Monday.¹⁰⁴⁸ Waiting as he did until just minutes before the beginning of the deposition to request clarification suggests a lack of diligence rather than any fault by the court.

586. In any event, Mrs. Usher de Ranson was deposed on 29 August 2005 at 2:20 p.m.¹⁰⁴⁹ Merck's original 12 questions were posed verbatim to, and answered by, Mrs. Usher de Ranson. Indeed, Mr. Ponce Martínez acknowledges that he knew that Mrs. Usher de Ranson was present at the court house that day, but he claims he could not find the place where she was being deposed.¹⁰⁵⁰ Mr. Ponce Martínez argues that he did not know where the deposition was taking place. It is curious, however, that the same judicial officer who received Mr. Ponce Martínez's request for clarification and additional questions at 8:43 a.m. (Juan Gallardo)¹⁰⁵¹ was the same officer present at Mrs. Usher de Ranson's second deposition that afternoon.¹⁰⁵² If he had any doubts, Mr. Ponce Martínez could have asked Mr. Gallardo about the exact time and place of the deposition. Again, his failure to do so cannot justify impugning the court.

587. Under these circumstances, the trial court's decision not to allow Merck to submit additional questions for the cross-examination of Mrs. Usher de Ranson was consistent with Ecuadorian law.¹⁰⁵³ Because the evidentiary period had ended almost a year before Merck submitted these additional 18 questions, Merck's request was untimely and abusive.¹⁰⁵⁴

¹⁰⁴⁸ *Id.*

¹⁰⁴⁹ Testimony of Anne Karsen Renson [a/k/a Anne Usher de Ranson], *NIFA v. MSDIA*, Trial Court (29 Aug. 2005), p. 1 (C-149).

¹⁰⁵⁰ First Ponce Martínez Witness Statement, ¶ 13.

¹⁰⁵¹ See *MSDIA* Petition, *NIFA v. MSDIA*, Trial Court (25 Aug. 2005) (R-45). Mr. Gallardo, as the Court's clerk, acknowledged receipt of Merck's petition.

¹⁰⁵² See Testimony of Anne Karsen Renson [a/k/a Anne Usher de Ranson], *NIFA v. MSDIA*, Trial Court (29 Aug. 2005) (C-149).

¹⁰⁵³ Court Order, *MSDIA v. NIFA*, Trial Court (1 Sept. 2005) (R-48).

¹⁰⁵⁴ Ecuador's Counter-Memorial, ¶ 415.

Accordingly, on 1 September 2005, the trial court dismissed Merck's additional questions.¹⁰⁵⁵ Merck did not appeal this order.¹⁰⁵⁶

b. Merck Did Not Suffer Any Prejudice As A Result Of Its Local Counsel's Failure To Attend Usher De Ranson's Deposition

588. Merck did not suffer any prejudice as a result of its own failure to attend Mrs. Anne Usher de Ranson's testimonies. First, Ecuadorian law does not allow the parties' counsels to confront a witness orally. Under Article 223 of the Code of Civil Procedure (CPC), the role of counsel is limited to submitting the questions, usually in writing.¹⁰⁵⁷ Only the judge is authorized to ask the questions or to assist the witness if necessary.¹⁰⁵⁸ Ultimately, even if Mrs. Usher de Ranson was not deposed in Panama as requested by Merck, Merck's questions were posed verbatim to the witness. Thus, Mrs. Usher de Ranson's testimony was consistent with the requirements of Ecuadorian procedural rules.

589. Interestingly, the outcome would not have been any different had Mrs. Usher de Ranson testified in Panama. It is extremely likely that Merck's counsel would not have attended, as demonstrated by other depositions that were taken outside Ecuador during the trial court and

¹⁰⁵⁵ Court Order, *MSDIA v. NIFA*, Trial Court (1 Sept. 2005) (R-48).

¹⁰⁵⁶ Mr. Ponce Martínez denies that he did not appeal this order. *See* Second Ponce Martínez Witness Statement, ¶ 26. After Mrs. Usher de Ranson's second deposition, Merck sought to nullify her testimony on 30 August 2005 solely on the basis that its counsel did not attend. *MSDIA* Petition, *NIFA v. MSDIA*, Trial Court (30 Aug. 2005) (C-237). In the same petition, Merck also asked the court to admit the 18 additional questions for Mrs. Usher de Ranson. The trial court denied Merck's request to nullify Mrs. Usher de Ranson's testimony on 23 September 2005. *Id.*, p. 1. Merck appealed this decision on 28 September 2005, and ultimately lost the appeal. *MSDIA* Appeal against Writ, *NIFA v. MSDIA*, Trial Court (28 Sept. 2005) (R-51); Second Ponce Martínez Witness Statement, ¶ 26. On the other hand, the trial court rejected Merck's additional 18 questions on 1 September 2005. Court Order, *MSDIA v. NIFA*, Trial Court (1 Sept. 2005) (R-48). Merck never appealed this decision. Merck only appealed the trial court's decision not to nullify Mrs. Usher de Ranson's testimony on the basis that its counsel did not attend her testimony. Therefore, Merck never contested the trial court's decision not to accept the new questions for Mrs. Usher de Ranson.

¹⁰⁵⁷ Ecuadorian Code of Civil Procedure (24 Nov. 2011), Art. 233 (RLA-107(bis)).

¹⁰⁵⁸ Ecuador's Counter-Memorial, ¶ 411. *See also*, Ecuadorian Code of Civil Procedure (24 Nov. 2011), Art. 235 (RLA-107(bis)).

appellate proceedings in the *NIFA v. MSDIA* litigation.¹⁰⁵⁹ The record shows that neither NIFA nor MSDIA were present during the depositions of witnesses living abroad. Nevertheless, the Ecuadorian consul in all those cases guaranteed the parties' due process rights by submitting, verbatim, all the questions posed by both sides. This is the exact same proceeding the trial court used in taking Mrs. Usher de Ranson's testimony. This shows that the parties' due process rights are not compromised by the failure to attend the testimony. Due process for the purpose of witness testimony means giving both parties the opportunity to submit their interrogatories. Here, both NIFA and MSDIA enjoyed this right on an equal footing. Furthermore, as stated in the Counter-Memorial, Merck submitted the testimony of Mr. Edgardo Jaen, a colleague of Mrs. Usher de Ranson in MSDIA's realtor, to rebut Mrs. Usher de Ranson's witness declaration.¹⁰⁶⁰

590. But even assuming that Mrs. Usher de Ranson's testimony should have been excluded, her testimony was corroborated by other evidence in the record. In other words, Mrs. Usher de Ranson's testimony did not affect the outcome of the case. There are several emails by Mrs. Usher de Ranson, which were admitted into the record, confirming that MSDIA had no intention to seal the deal with NIFA. For example, in this email dated 16 January 2003, Mrs. Usher de Ranson informs her Staubach colleague, Edgardo Jaen, that MSDIA "[seemed] intent on scuttling" the deal with NIFA by introducing late in the game the non-compete clause.¹⁰⁶¹ Indeed, the trial court reached the same decision after reviewing not only Mrs. Usher de Ranson's testimony, but emails and other evidence in the record.¹⁰⁶²

¹⁰⁵⁹ See, e.g., Testimony of Edgardo Jaén, *NIFA v. MSDIA*, Trial Court, 18 October 2005 (Exhibit C-151); Testimony of Luis Eduardo Ortiz, *NIFA v. MSDIA*, Court of Appeals (23 Nov. 2009) (C-252).

¹⁰⁶⁰ Ecuador's Counter-Memorial, ¶ 411.

¹⁰⁶¹ Email from Anne Usher de Ranson (Staubach) to Edgardo Jaen (Staubach) (16 Jan. 2003) (R-12).

¹⁰⁶² Judgment, *NIFA v. MSDIA*, Trial Court (17 Dec. 2007), p. 10 (C-3).

c. There Is No Evidence That The Trial Court’s Judgment Was Issued And Delivered Improperly

i. There Is No Indication That Judge Chang-Huang Did Not Review The Record Before Issuing Her Judgment

591. In its Reply, Merck also continues to claim that Judge Chang Huang did not review the case file before issuing the trial court’s judgment and that, accordingly, the judgment could not have been the product of her own work.¹⁰⁶³

592. *First*, Merck argues that Judge Chang-Huang must have written the trial court judgment in three hours, since the time shown at the beginning of the judgment is 2:06 p.m. and the time shown on the last page is 5:30 p.m.¹⁰⁶⁴

593. This simplistic analysis is clearly incorrect. What this time-stamps show is that, in reality, Judge Chang-Huang finished writing the judgment at 2:06 p.m. and that she gave notice of the judgment to the parties at 5:30 p.m. This is clear from the clerk’s certification, which shows that the judgment was served at 5:30 p.m. It states:

In Quito, on 17 December two thousand seven, at *17 hours and thirty minutes*, I [notified] 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.

REASON: On this date an identical copy of the foregoing judgment *is incorporated into the corresponding Copy book* – Quito, 17 December 2007.¹⁰⁶⁵

¹⁰⁶³ Claimant’s Reply, ¶¶ 656-657.

¹⁰⁶⁴ *Id.*; Judgment, *NIFA v. MSDIA*, Trial Court (17 Dec. 2007), p. 16 (C-3).

¹⁰⁶⁵ Judgment, *NIFA v. MSDIA*, Trial Court (17 Dec. 2007), p. 16 (C-3) (emphasis added).

594. Any court order from the record may help illustrate the point. Take for example, the order by which the trial court rejected Merck's attempt to improperly introduce a new set of questions for Mrs. Usher de Ranson's cross-examination.¹⁰⁶⁶ This order was written at 10:04 a.m. and it was later notified to the parties at 5:19 p.m. of the same day. Under Merck's logic, it took the judge more than six hours to write an order containing six lines. That is one line per hour.

595. *Second*, Merck asserts that the fact that Judge Chang-Huang took cognizance of the case on the same date the judgment was issued means that she had not studied the record. Indeed, to "take cognizance" represents an opportunity for the judge to formally introduce herself to the parties, as Mr. Ponce Martínez suggests.¹⁰⁶⁷ Yet, the timing for taking cognizance in the *NIFA v. MSDIA* litigation was unique in the case of Judge Chang-Huang because the only procedural act pending when she replaced judge Toscano was the judgment itself. Therefore, it is not surprising that judge Chang-Huang formally took cognizance when she issued the judgment. This does not indicate, however, that she began her review of the case at that moment.

596. *Third*, Mr. Ponce Martínez suggests that because one of the copies of the case files remained in storage until five days before the judgment was issued, Judge Chang-Huang could not have had access to the case before then.¹⁰⁶⁸ But the fact that one copy of the official file might have been in storage does not mean that the Judge did not have copies of the relevant case materials available to her sufficient time to permit an earlier start to her review or that she had not been studying the case well before the judgment was rendered.

597. *Fourth*, the fact that the judgment contains typographical and grammatical errors identical to those in NIFA's complaint is irrelevant. It is clear from the face of the judgment that

¹⁰⁶⁶ Court Order, *MSDIA v. NIFA*, Trial Court (1 Sept. 2005) (R-48).

¹⁰⁶⁷ Second Ponce Martínez Witness Statement, ¶ 33.

¹⁰⁶⁸ *Id.* ¶ 31.

its first eight pages of the judgment are devoted to reciting the factual allegations made by the plaintiff NIFA *verbatim*. Indeed, the judgment also recites the defenses raised by Merck in its answer to the complaint.¹⁰⁶⁹ This is consistent with Ecuadorian judicial practice, as confirmed by the fact that the judgment of the Court of Appeals also recites the claims of the parties).¹⁰⁷⁰ This does not constitute evidence that the trial court judgment was written by a third party any more than that the judgment of the Court of Appeals was written by a third party, which Merck has never contended.

598. In short, Merck has not been able to provide any evidence showing that Judge Chang-Huang did not study the record of the trial court or that it did not issue the judgment herself.

ii. Merck Has Not Shown It Was Not Properly Notified Of The Trial Court Judgment

599. Mr. Ponce Martínez continues to complain that he did not receive notice of the trial court judgment. Particularly, he disputes Ecuador's evidence showing that the judgment was physically delivered to his judicial mailbox¹⁰⁷¹ and that the Court's public bulletin put him on notice that the judgment had been issued.¹⁰⁷² Interestingly, Mr. Ponce Martínez acknowledges that a partial version of the judgment was transmitted to his office via email.¹⁰⁷³ He nonetheless suggests that that the trial court's failure to provide proper notice of its judgment was intended to deprive Merck of its right to appeal.¹⁰⁷⁴ But Dr. Ponce Martínez cannot deny that the email notification of the judgment, even if it was incomplete, contained indicia of a final judgment. Moreover, the fact that the judgment was incomplete would be obvious to almost anyone. A

¹⁰⁶⁹ Ecuador's Counter-Memorial, ¶ 430.

¹⁰⁷⁰ Judgment, *NIFA v. MSDIA*, Court of Appeals (23 Sept. 2011) (C-4).

¹⁰⁷¹ Ecuador's Counter-Memorial, ¶¶ 438-446.

¹⁰⁷² First Ponce Martínez Witness Statement, ¶ 20.

¹⁰⁷³ *Id.*; Second Ponce Martínez Witness Statement, ¶ 40.

¹⁰⁷⁴ First Ponce Martínez Witness Statement, ¶ 21.

minimum of due diligence would have easily uncovered that the document was incomplete, thus raising questions as to its significance and impact. Due diligence is expected especially in situations where, as in the *NIFA v. MSDIA* litigation, the court was ready to issue a final judgment. Therefore, assuming that the judgment was in fact incomplete, Merck had an obligation to inquire with the court's clerk what type of order was issued. Again, the consequences arising from an alleged lack of notice of the judgment can only be attributed to Merck's counsel.

600. In any event, as mentioned above, Merck did in fact file its appeal papers on time and could therefore not have suffered any prejudice.

d. Conclusion

601. The trial court proceedings were conducted in accordance with Ecuadorian law and practice. The evidence in the record shows that Merck was provided with adequate notice of all relevant procedures, including Mrs. Anne Usher de Ranson's testimony, and that Merck fully enjoyed and exercised its right to be heard in the trial court proceedings. Moreover, none of Merck's alleged due process violations had an impact in the outcome of the case.

G. Merck Has Failed To Demonstrate That Any Of The Proceedings At Issue In This Case Were "Influenced" By Judicial Corruption

1. Merck Has Not Offered Credible Evidence That The Lower Courts' Judgments Were The Product Of Corruption

602. Merck continues to assert that the judgments of the lower courts were the product of judicial corruption. To support this contention, Merck draws the tribunal's attention to "a documented pattern of allegations of judicial corruption" against the lower court judges.¹⁰⁷⁵ As explained in Ecuador's Counter-Memorial, however, none of the disciplinary complaints brought against Judges Chang-Huang, Toscano Garzón, and Hernan Palacios have any bearing with the

¹⁰⁷⁵ Claimant's Reply, ¶ 669.

NIFA v. MSDIA litigation. Merck simply cites to past events completely unrelated to its case as proof of corruption.

603. In its Reply, Merck recognizes that “the fact that the judges who authored the judgments [...] have been disciplined for judicial corruption in other cases does not definitely establish that they accepted bribes in the *NIFA* case [...].”¹⁰⁷⁶ Indeed, the fact that Judge Chang-Huang was disciplined for selling tickets for a raffle, soliciting money for paying her interns, and certifying copies with a clerk’s seal, does not prove in any way that she was corrupted to issue judgment in favor of *NIFA*.¹⁰⁷⁷ Similarly, an inconclusive accusation of judicial wrongdoing against Judge Alberto Palacios for ordering the attachment of two tractors in connection with an unpaid debt in 2002 is not evidence that he received bribes to deliver an unfavorable judgment against Merck in the Court of Appeals.¹⁰⁷⁸

604. Yet, Merck argues that the lower courts’ judges “history of corrupt behavior” is “powerful circumstantial evidence of corruption in the *NIFA v. MSDIA* case [...].”¹⁰⁷⁹ More than circumstantial evidence, this is in the nature of character evidence.¹⁰⁸⁰ The circumstantial use of character evidence by Merck to show that the lower court judges acted in the *NIFA* case in conformity with that character is improper. In Merck’s country of origin, for example, this type of evidence would not be admissible. Rule 404 of the United States’ Federal Rules of Evidence excludes character evidence if offered as a basis for inferring action in conformity with a trait

¹⁰⁷⁶ *Id.*, ¶ 670.

¹⁰⁷⁷ These were the three findings against Judge Chang-Huang by the Judiciary Council. See Temporary Judge Chang-Huang Personnel File, Disciplinary File No. Mot-099-UCD-010-MAC (9 Apr. 2010) (C-190).

¹⁰⁷⁸ Ecuador’s Counter-Memorial, ¶ 512.

¹⁰⁷⁹ Claimant’s Reply, ¶¶ 667, 670.

¹⁰⁸⁰ Character evidence is generally defined as “Evidence regarding someone’s general personality traits or propensities, of a praiseworthy or blameworthy nature [...]. Character evidence is [usually], but not always, prohibited if offered to show that the person acted in conformity with that character.” BLACK’S LAW DICTIONARY (B. Garner, ed., 9th ed. 2009), p. 636: “character evidence” (RLA-86(bis)).

character on a particular occasion, except when it is offered to show the *good character of criminal defendant* or to show the *bad character* of the alleged crime *victim*.¹⁰⁸¹ The rationale for the inadmissibility of character evidence is set forth by the California Law Review Commission in its rejection of a draft rule that would have expanded the use of this form of evidence in civil cases:

Character evidence is of slight probative value and may be very prejudicial. It tends to distract the trier of fact from the main question of what actually happened on the particular occasion. It subtly permits the trier of fact to reward the good man and to punish the bad man because of their respective characters despite what the evidence in the case shows actually happened. Because of the danger of abuse of this kind of evidence, the confusion of issues, collateral inquiry, prejudice, and the like, the revised rule restates the existing California law generally applicable in civil cases by excluding evidence of character to prove conduct in such cases.¹⁰⁸²

605. Several investment treaty arbitration tribunals have refused to consider anecdotal or circumstantial evidence from past cases as sufficient proof of corruption or impropriety in the specific matter in dispute. In the *Oostergetel v. Slovakia* case, for example, the claimants alleged

¹⁰⁸¹ Committee on the Judiciary, House of Representatives, FEDERAL RULES OF EVIDENCE (2014), pp. 4-5 (RLA-202): “Rule 404. Character Evidence; Crimes or Other Acts (a) CHARACTER EVIDENCE. (1) Prohibited Uses. Evidence of a person’s character or character trait is not admissible to prove that on a particular occasion the person acted in accordance with the character or trait. (2) Exceptions for a Defendant or Victim in a Criminal Case. The following exceptions apply in a criminal case: (A) a defendant may offer evidence of the defendant’s pertinent trait, and if the evidence is admitted, the prosecutor may offer evidence to rebut it; (B) subject to the limitations in Rule 412, a defendant may offer evidence of an alleged victim’s pertinent trait, and if the evidence is admitted, the prosecutor may: (i) offer evidence to rebut it; and (ii) offer evidence of the defendant’s same trait; and (C) in a homicide case, the prosecutor may offer evidence of the alleged victim’s trait of peacefulness to rebut evidence that the victim was the first aggressor. (3) Exceptions for a Witness. Evidence of a witness’s character may be admitted under Rules 607, 608, and 609. (b) CRIMES, WRONGS, OR OTHER ACTS. (1) Prohibited Uses. Evidence of a crime, wrong, or other act is not admissible to prove a person’s character in order to show that on a particular occasion the person acted in accordance with the character. (2) Permitted Uses; Notice in a Criminal Case. This evidence may be admissible for another purpose, such as proving motive, opportunity, intent, preparation, plan, knowledge, identity, absence of mistake, or lack of accident. On request by a defendant in a criminal case, the prosecutor must: (A) provide reasonable notice of the general nature of any such evidence that the prosecutor intends to offer at trial; and (B) do so before trial—or during trial if the court, for good cause, excuses lack of pretrial notice.” (emphasis added).

¹⁰⁸² California Law Revision Commission, *Tentative Recommendation and a Study relating to the Uniform Rules of Evidence: Article Vi. Extrinsic Policies Affecting Admissibility* (Mar. 1964), p. 615 (RLA-139).

that state officials conspired with a financial mafia to trigger the bankruptcy of their investment.¹⁰⁸³ Among the state officials that took part in this conspiracy, according to the claimants, were the members of the Regional Court of Bratislava. To prove their theory of conspiracy, the claimants submitted “local news clippings concerning irregularities in bankruptcy proceedings handled by the Regional Court of Bratislava and disciplinary proceedings by the Slovak Ministry of Justice against members of that court [...]”¹⁰⁸⁴ The tribunal did not find this evidence persuasive. After considering these and other reports offered to substantiate general allegations of corruption in Slovak courts, the tribunal dismissed the claimants’ theory of conspiracy and found that such evidence “cannot substitute for evidence of a treaty breach in a specific instance.”¹⁰⁸⁵

606. The *Vannessa Ventures Ltd. v. Venezuela* tribunal also refused to give any weight to inferences of lack of impartiality drawn from an examination of past cases or from circumstantial evidence unrelated to the underlying dispute. More specifically, the tribunal held that allegations of lack of independence and impartiality may only be proven with evidence “[relating] to the specific cases in which the impropriety is alleged to have occurred.”¹⁰⁸⁶

607. Because Merck has failed to submit any specific evidence of impropriety in the *NIFA v. MSDIA* litigation, its insinuation that the judgments of the lower courts were the product of judicial corruption must be dismissed.

608. It is also unknown whether any of the disciplinary complaints against the lower court judges that Merck cites have merit to begin with. For example, it is true that the Judicial Council

¹⁰⁸³ *Oostergetel*, ¶ 302 (CLM-146).

¹⁰⁸⁴ *Id.*

¹⁰⁸⁵ *Id.*, ¶ 303.

¹⁰⁸⁶ *Vannessa 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).

of Ecuador removed judge Chang-Huang—the judge who authored the trial court judgment—from her post for selling tickets for a raffle, soliciting money to pay interns and using the law clerk’s seal in an unauthorized manner.¹⁰⁸⁷ However, Judge Chang-Huang brought an administrative action against the Judicial Council, rejecting the factual basis of the decision to remove her and seeking her reinstatement. This action is currently pending.¹⁰⁸⁸

609. In the same vein, two of the judges in the appeals proceedings in the *NIFA v. MSDIA* litigation—Judges Toscano Garzón and Alberto Palacios—were dismissed for moving up the date of a judicial confession in one case. But the judicial authority at that time, the Transitional Judicial Authority, reinstated both judges after recognizing that the removal of both judges was a mistake.¹⁰⁸⁹

610. The one thing these disciplinary proceedings does show is that Ecuador’s judicial control systems work. And despite Merck’s insinuations of corruption, Merck has never lodged either a disciplinary complaint¹⁰⁹⁰ or a criminal complaint against any of the lower court judges.

611. Merck did file, however, a civil lawsuit against Judge Chang-Huang to recover additional attorney’s fees Merck spent to appeal the alleged improper judgment judge Chang-Huang issued in the trial court proceedings.¹⁰⁹¹ As stated in the Counter-Memorial, Merck’s damages claim in Ecuador repeats the same allegations of wrongdoing by judge Chang-Huang in this arbitration. But these allegations were dismissed in their entirety by the Twelfth Court for Civil Affairs of Pichincha because Merck’s evidence was insufficient to establish any

¹⁰⁸⁷ Temporary Judge Chang-Huang Personnel File, Disciplinary File No. Mot-099-UCD-010-MAC (9 Apr. 2010) (C-190).

¹⁰⁸⁸ Complaint, Administrative Proceedings initiated by Judge Chang-Huang (Sept. 2013) (R-119).

¹⁰⁸⁹ *CJT Corrects Error That Harmed Two Judges*, LA HORA (9 July 2012) (C-113); *Ecuador Reverses the Dismissal of Two Judges*, UPI ESPAÑOL (9 July 2012) (C-114).

¹⁰⁹⁰ See Organic Code on the Judicial Functioning (9 Mar. 2009), art. 113 (RLA-91(bis)).

¹⁰⁹¹ Ecuador’s Counter-Memorial, ¶ 509.

wrongdoing by judge Chang-Huang. That is also the same evidence Merck has submitted to this Tribunal,¹⁰⁹² which includes witness statements by two attorneys interested in the outcome of the *NIFA v. MSDIA litigation*.¹⁰⁹³ Therefore, the decision of the Twelfth Court for Civil Affairs of Pichincha not to take into account these witness statements cannot be faulted.¹⁰⁹⁴

612. Moreover, Merck insists that Mr. Marcelo Santamaría's witness statement (and the attached report) submitted to this tribunal is evidence that the trial court's judgment issued by Judge Chang-Huang was the product of judicial corruption.¹⁰⁹⁵ In his statement, Mr. Santamaría claims to have recorded a conversation with judge Chang-Huang on 9 March 2012, where she "confirmed that serious improprieties had occurred in connection with the issuance of the first instance judgment."¹⁰⁹⁶ Mr. Santamaría "literally" recorded this conversation "a few months" after it occurred.¹⁰⁹⁷ Mr. Santamaría statement is unreliable for at least four reasons. *First*, Mr. Santamaría's ability to transcribe literally the conversation with Judge Chang-Huang "a few months later" is extremely doubtful. *Second*, it is very suspicious that Merck did not offer Mr. Santamaría's report during the interim measures phase of these proceedings despite the fact that Mr. Santamaría's conversation with Judge Chang-Huang took place several months before. *Third*, Judge Chang-Huang contradicted Mr. Santamaría's statement in the civil damages case brought by Merck against judge Chang-Huang before the Twelfth Court for Civil Affairs of Pichincha. Indeed, in that case, judge Chang-Huang denied knowing Mr. Santamaría, let alone

¹⁰⁹² *Id.*, ¶ 510.

¹⁰⁹³ *Id.*, ¶ 432. See Testimony of Jorge Antonio Pinos Pérez, *MSDIA v. Chang-Huang* (4 Dec. 2008) (C-88); Testimony of María Cristina Ponce Villacís, *MSDIA v. Chang-Huang* (4 Dec. 2008) (C-89).

¹⁰⁹⁴ Ecuador's Counter-Memorial, ¶ 432.

¹⁰⁹⁵ Claimant's Reply, ¶ 672.

¹⁰⁹⁶ Santamaría Martínez Witness Statement, ¶ 3. See also First Ponce Martínez Witness Statement ¶ 24.

¹⁰⁹⁷ Ecuador's Counter-Memorial, ¶ 434; Santamaría Martínez Witness Statement, ¶ 3.

having a conversation with him regarding the *NIFA* case.¹⁰⁹⁸ *Fourth*, Mr. Santamaría is not a person “not interested in the outcome of the proceedings,”¹⁰⁹⁹ given his history of representation of MSDIA.¹¹⁰⁰

613. In short, Merck has failed to demonstrate, much less with clear and convincing evidence as required under international law, any improper influence or wrongdoing in the lower court proceedings.

2. There Is No Widespread Evidence Of Systemic Corruption In Ecuador’s Judiciary

614. Merck asserts that Ecuador’s judicial system as a whole is notoriously “corrupt, ineffective and lacking in independence and due process.”¹¹⁰¹ This claim is misplaced considering that Claimant and its affiliates in Ecuador have consistently used Ecuador’s justice system as plaintiffs before administrative, civil, criminal and labor courts. It is telling that, in support of its argument of systemic corruption, Merck prefers to cite indexes of perceptions giving Ecuador low rankings in judicial performance rather than drawing the tribunal’s attention to other instances where it could have been the victim of bias or due process violations.¹¹⁰² In fact, as showed in the Counter-Memorial, Merck has successfully defended in an Ecuadorian

¹⁰⁹⁸ Ecuador’s Counter-Memorial, ¶¶ 434-436.

¹⁰⁹⁹ In *Nicaragua v. Honduras*, the International Court of Justice stated that “witness statements produced in the form of affidavits should be treated with caution.” *Territorial and Maritime Dispute between Nicaragua and Honduras in the Caribbean Sea (Nicaragua v. Honduras)*, Judgment (8 Oct. 2007), I.C.J. Reports 2007, p. 659, ¶ 244 (RLA-166). Among the factors pertinent to assessing the probative value of affidavits, the Court identified whether the affidavit “is made by [...] persons not interested in the outcome of the proceedings.” *Id.*

¹¹⁰⁰ Santamaría Martínez Witness Statement, ¶ 2.

¹¹⁰¹ Claimant’s Memorial, ¶ 161.

¹¹⁰² See List of claims by Merck and its Affiliates, available at <http://funcionjudicial.gob.ec/consultaprovincias> (last accessed 9 Jan. 2015) (R-197).

court against a claim resembling NIFA's case.¹¹⁰³ In any event, this section will show that Merck's attempts to discredit Ecuador's judiciary before this Tribunal are wholly unsupported.

615. As "evidence" of systemic corruption in Ecuadorian Courts, Merck submits several NGO reports giving Ecuador low rankings in *perceptions* of judicial performance, reports by the U.S. State Department, and statements extracted from media outlets purportedly describing the state of Ecuador's judiciary. Ecuador's Counter-Memorial exposed the methodological shortcomings that render these reports unreliable for the purposes of judicial inquiry.¹¹⁰⁴ Additionally, Merck has not been able to establish in its pleadings how any of these reports and statements have any direct or indirect bearing on the underlying case in this arbitration.¹¹⁰⁵ Therefore, Merck's purported evidence of systemic corruption is irrelevant.

616. Several investment tribunals have rejected general claims of systemic corruption based on reports similar to the ones Merck cites. For example, the claimants in *Oostergetel*, just like Merck in this arbitration, tried to prove their allegations of corruption by relying on: 1) general reports about corruption in Slovak courts; 2) newspaper clippings concerning irregularities in bankruptcy proceedings before the Regional Court of Bratislava and disciplinary proceedings against judges of that court; and 3) U.S. and E.U. reports stating that bribery was widespread in Slovak courts.¹¹⁰⁶ After considering these reports and newspaper clippings, the *Oostergetel* Tribunal did not change its view that the claimants' allegations of corruption were nothing more than insinuations. The tribunal went on to state that "mere insinuations [of corruption] cannot

¹¹⁰³ Ecuador's Counter-Memorial, ¶ 358.

¹¹⁰⁴ *Id.*, ¶¶ 338-358.

¹¹⁰⁵ *Id.*

¹¹⁰⁶ *Oostergetel*, ¶ 302 (CLM-146).

meet the burden of proof which rests on the Claimants.”¹¹⁰⁷ Thus, the *Oostergetel* tribunal gave little—if any—probative value to these reports and press clippings.

617. Clearly, Merck relies on these reports and newspaper snippets to mask its failure to produce any direct or specific evidence of judicial corruption in the *NIFA v. MSDIA* litigation. Again, the *Oostergetel* decision stands as an insurmountable obstacle in the way of Merck’s theory of corruption. In that case, the tribunal held that general reports purportedly depicting the defects of a State’s judicial system “cannot substitute for evidence of a treaty breach in a specific instance.”¹¹⁰⁸

618. It is not surprising that Merck did not even try to distinguish its case from *Oostergetel* in its reply. It cannot.

619. There is another reason why Merck depicts Ecuadorian courts as corrupt, ineffective and biased: Merck hopes that its general insinuations of corruption will relieve it from the obligation to exhaust all available remedies—in this case, an Extraordinary Protection Action (EPA) before the Constitutional Court of Ecuador—prior to asserting its claims of breach of the Ecuador-U.S. BIT and customary international law.

620. According to Merck, local remedies are not “reasonably available” where they are notoriously lacking in independence or corrupt.¹¹⁰⁹ Ecuador has shown that the Constitutional Court of Ecuador does not fit this profile. Therefore, Merck was required to seek redress before the Ecuadorian Constitutional Court in order to have a viable claim for denial of justice. In any case, as the Inter-American Court of Human Rights put it in a recent decision regarding the availability of domestic remedies in another Latin American country often accused of having a

¹¹⁰⁷ *Id.*, ¶ 303.

¹¹⁰⁸ *Id.*

¹¹⁰⁹ Claimant’s Reply, ¶ 458.

weak judiciary, “a general argument on the lack of independence and impartiality of the judiciary” will not suffice to exempt a claimant from the requirement to exhaust local remedies.¹¹¹⁰ Merck’s claims fail for the same reason.

a. Merck’s Frequent Reliance On The Ecuadorian Courts Undermines Its Claims Of Systemic Corruption

621. Merck and its affiliates in Ecuador have been regular users of the Ecuadorian judicial system. There have been several cases since 1996 in which Merck and its affiliates have been involved as plaintiffs in civil, criminal, administrative and labor courts.¹¹¹¹ The fact that Merck does not mention any of these cases as instances where Ecuadorian courts have denied it justice demonstrates that its claim of systemic corruption and bias is baseless.

622. Moreover, Merck omits that it has been successful in Ecuadorian courts. As stated in Ecuador’s Counter-Memorial, in 2003 Merck was accused of commercial espionage by a competitor—Pharmabrand—before the Administrative Courts of Pichincha.¹¹¹² Pharmabrand alleged that Merck had improperly obtained information about its and others’ products in order to restrict competition. Yet, the Administrative Court of Pichincha dismissed the complaint in favor of Merck by finding that there was not sufficient evidence showing that Merck had engaged in unlawful conduct. Pharmabrand filed a cassation petition against the Administrative Court’s decision.¹¹¹³ Ultimately, Pharmabrand withdrew its cassation petition.¹¹¹⁴ If Merck’s claim of systemic corruption were true, could one properly infer that Merck influenced the

¹¹¹⁰ *Case of Allan Brewer Carías v. Venezuela*, Inter-American Court of Human Rights, Judgment on Preliminary Objections (26 May 2014), ¶ 105 (RLA-196).

¹¹¹¹ List of claims by Merck and its Affiliates, *available at* <http://funcionjudicial.gob.ec/consultaprovincias> (last accessed 9 Jan. 2015) (R-197).

¹¹¹² Ecuador’s Counter-Memorial, ¶ 358.

¹¹¹³ Electronic Docket, Case No. 2003-9911, *PHARMABRAND v. Merck*, Second Contentious Chamber, Entry 1 (R-126).

¹¹¹⁴ PHARMABRAND’s Withdrawal of Claim, *PHARMABRAND v. Merck*, Contentious Administrative Chamber of the National Court of Justice (13 Nov. 2012) (R-186).

judges of the Administrative Court of Pichincha to dismiss Pharmabrand’s complaint? Under Merck’s fallacious logic, which suggests that the *NIFA v. MSDIA* litigation was tainted by corruption because Ecuador’s judiciary as a whole is corrupt, the answer could very well be yes.

623. Merck’s insinuations of systemic corruption are also inconsistent with its own stance before the Ecuadorian Constitutional Court, where Merck opposed NIFA’s extraordinary protection action seeking to vacate the September 2012 NCJ decision.¹¹¹⁵ More specifically, Merck defended the NCJ’s calculation of damages as “adequately reasoned” and within the “parameters of the Constitution and the Law [...]”¹¹¹⁶ It is inconceivable that the NCJ decision, which reduced NIFA’s damages by 99% of the original amount, could be the product of a system plagued by corruption and lacking in independence and due process. The same may be said of the November 2014 NCJ decision, which reduced NIFA’s damages by 95%.¹¹¹⁷

b. General NGO Reports On Perceived Levels Of Corruption Offer Little Evidence About The State Of Ecuador’s Judiciary

624. Merck cites several NGO reports giving Ecuador low rankings in judicial performance as evidence of systemic corruption in Ecuador’s judiciary. As noted in Ecuador’s Counter-Memorial, these reports are unreliable because they do not assess proven or reported instances of corruption. Rather than measuring actual behavior, these reports simply record perceived levels of corruption.¹¹¹⁸ Perceptions, or beliefs, offer little evidence—if any—that Ecuador’s judiciary is in fact corrupt or lacking in independence.

625. The distinction between measures of behavior and measures of perceptions is crucial in understanding the limits of the NGO reports Merck cites. According to Kevin E. Davis, an

¹¹¹⁵ Judgment, *NIFA v. MSDIA*, National Court of Justice (21 Sept. 2012) (C-203).

¹¹¹⁶ MSDIA submission, Constitutional Court (13 Sept. 2013), ¶ 4 (R-120).

¹¹¹⁷ NCJ Decision, *PROPHAR v. MSDIA*, National Court of Justice (10 Nov. 2014) (R-194).

¹¹¹⁸ Ecuador’s Counter-Memorial, ¶¶ 340-347.

anticorruption law scholar, in order to evaluate the reliability of an indicator, it is critically important to determine whether it is designed to measure beliefs or behavior. Indicators that capture data on beliefs might be reliable measures of beliefs but unreliable measures of behavior.¹¹¹⁹

626. The World Justice Project (“WJP”) Rule of Law index, for example, purports to measure behavior by collecting data on beliefs. Therefore, the WJP Rule of Law index is an unreliable measure of corrupt behavior or practices. As Davis notes,

Indicators like the WJP Rule of Law Index often rely on data from surveys that ask what legal officials will do in specific hypothetical scenarios [...]. These indicators are best understood as measures of beliefs. For example, one of the questions on the WJP survey asks people how likely it is that a court will award fair compensation to homeowners displaced by a public works project. The question is clearly designed to solicit information about beliefs. There is no requirement that the respondent have ever participated in this kind of dispute. In fact, there is no guarantee that the hypothesized behavior has ever occurred (it is possible to form beliefs about the outcome of expropriation litigation even if no court has ever decided a case of the sort).¹¹²⁰

627. The WJP Rule of Law index has two components: 1) a General Population Poll (GPP), consisting of questions addressed to lay people; and 2) the Qualified Respondents’ Questionnaire (QRQ), purporting to gather knowledge from local “legal experts.”

628. In its Counter-Memorial, Ecuador provided examples of GPP questions designed to solicit information about the respondent’s beliefs.¹¹²¹ One of these questions, for instance, asks the respondent to *opine* whether judges decide cases on the basis of the law or influenced by private or other interests. There is no guarantee that the respondent has ever been part of a legal

¹¹¹⁹ K. E. Davis, *Legal Indicators: The Power of Quantitative Measures of Law*, ANN. REV. L. & SOC. SCI., Vol. 10 (Nov. 2014), p. 43 (RLA-199).

¹¹²⁰ *Id.*

¹¹²¹ Ecuador’s Counter-Memorial, ¶¶ 342-343.

dispute—let alone a civil dispute—or that the respondent knows what the law is or should be. The results of the GPP are not surprising: A 2010 poll showed that 3 out of 4 Ecuadorians distrusted the judiciary.¹¹²² At the same time, this poll revealed that the “majority” of the respondents did not know the functions of the many institutions that are considered part of the judiciary.¹¹²³ Consequently, the foundations of the respondents’ beliefs are at best questionable. This is one of the reasons why measures of belief, such as the WJP Rule of Law Index, cannot be given any probative weight.

629. Furthermore, the fact that the WJP Rule of Law index is partially based on the opinions of local experts does not make its conclusions more reliable. Like the GPP, the QRQ questions are designed to solicit the experts’ beliefs because they are entirely based on hypothetical scenarios. For instance, one of these scenarios involves a civil dispute between two neighbors. One of the questions asks: “In a case like this, how likely are the following people to request a bribe (or other monetary inducement) from Mr. A, Mr. B, or both, to perform their duties or to expedite the process?” Then, the poll lists several people that could potentially be involved in the dispute: a) Judge or Magistrate; b) Court Personnel; c) Commercial Arbitrator; d) Police; and e) Chief or Traditional Ruler. Clearly, the respondent will answer based on what he or she believes is likely to happen in a similar scenario. But as Mr. Davis notes, there is no guarantee the respondent has experienced that scenario or that the scenario has ever occurred.

¹¹²² Ecuador Inmediato, “3 out of every 4 Ecuadorians Distrust the Judicial System, According to Opinion Polls,” (19 June 2010) *available at* http://ecuadorinmediato.com/index.php?module=Noticias&func=news_user_view&id=128705&umt=3_cada_4_ecuatorianos_desconfia_del_sistema_judicial_segun_perfiles_opinion (last accessed 16 Feb. 2015) (R-165).

¹¹²³ *Id.*

630. The WJP has disclosed the names of 7 Ecuadorian experts who contributed to the report.¹¹²⁴ This is almost the same number of Ecuadorian experts Merck has relied upon in this arbitration. Yet, none of Merck’s Ecuadorian law experts has expressed his opinion on the integrity and impartiality of Ecuador’s judiciary.

631. In its reply, Merck suggests that Ecuador’s criticisms of the WJP Rule of Law index “appears to be a general objection to the use of survey data rather than a specific objection to the reliability of the WJP’s methodology or results.”¹¹²⁵ Merck goes on to say that “Ecuador’s objection overlooks the fact that surveys are routinely used to conduct statistical studies similar to those conducted by the WJP.”¹¹²⁶ This argument misses the point. Ecuador does not object to the WJP Rule of Law Index for using surveys. Rather, Ecuador disputes the reliability of the report because of the content of the questions and the information they elicit. As noted above, the WJP Rule of Law index is not reliable because it simply measures beliefs as opposed to actual behavior.

632. The World Economic Forum’s Global Competitiveness Report and Transparency International’s Corruption Perception index are beholden to the same shortcomings found in the WJP Rule of Law index.

633. The findings of the World Economic Forum’s Global Competitiveness report are based on an “Executive Opinion Survey” which purports to capture the insight of 134 Ecuadorian executives into their business operating environment.¹¹²⁷ Ecuador’s Counter-Memorial argued that the Executive Opinion Survey is unreliable because it is unclear whether the executives

¹¹²⁴ World Justice Project, List of Contributing Experts 2014 *available at* http://worldjusticeproject.org/sites/default/files/files/final_experts_2014.pdf (last accessed 2 Feb. 2015) (R-192).

¹¹²⁵ Claimant’s Reply, ¶ 685.

¹¹²⁶ *Id.*

¹¹²⁷ *Id.*, ¶ 691.

surveyed have any direct experience dealing with Ecuadorian civil courts. Merck disagrees and assumes that the 134 executives surveyed have experience litigating in Ecuadorian civil courts because “[m]any of the cases that are litigated in the civil courts involve business disputes, and significant businesses are often repeat users in the judicial system.”¹¹²⁸ Merck’s assertions are unsupported. It is also possible to argue that business leaders seldom resolve commercial disputes in traditional courts because they are more prone to use Alternative Dispute Resolution Mechanisms or to settle disputes out of court. In any case, the Global Competitiveness report does not reveal the identity of these executives or the businesses they represent. Therefore, it is impossible to corroborate the foundations of these business leaders’ opinions.

634. Moreover, Ecuador has not been able to assess whether the “Executive Opinion Survey” is designed to measure beliefs or actual behavior. Unfortunately, only one example of a typical “Executive Opinion Survey” question is publicly available. The question reads as follows: “In your country, how strong is the protection of intellectual property, including anti-counterfeiting measures?” The answers may vary between “extremely weak” or “extremely strong” on a scale of one (1) to seven (7).¹¹²⁹ If all the questions in the “Executive Opinion Survey” are phrased in this manner, there is no doubt that the Global Competitiveness report constitutes a measure of beliefs. In any event, the title of the “Executive Opinion Survey” strongly suggests that the findings of the Global Competitiveness report are based on opinions.

¹¹²⁸ *Id.*, ¶ 694.

¹¹²⁹ World Economic Forum, “Box 2: Example of a typical Survey question,” *available at* <http://reports.weforum.org/global-competitiveness-report-2014-2015/box-2-example-of-a-typical-survey-question/> (last accessed 13 Feb. 2015) (R-198).

635. In its reply, Merck concedes that the Transparency International's Corruption Perceptions Index (CPI) is entirely based on perceptions of corruption.¹¹³⁰ According to Transparency International, the CPI exclusively relies on perceptions of corruption because:

Corruption generally comprises illegal activities, which are deliberately hidden and only come to light through scandals, investigations or prosecutions. There is no meaningful way to assess absolute levels of corruption in countries or territories on the basis of hard empirical data. Possible attempts to do so, such as by comparing bribes reported, the number of prosecutions brought or studying court cases directly linked to corruption, cannot be taken as definitive indicators of corruption levels. Rather they show how effective prosecutors, the courts or the media are in investigating and exposing corruption. *Capturing perceptions of corruption of those in a position to offer assessments of public sector corruption is the most reliable method of comparing relative corruption levels across countries.*¹¹³¹

636. Merck relies on this explanation to suggest that assessing data on perceptions is the only way to measure levels of corruption in a given country. This is wrong. Merck overlooks the fact that Transparency International chose this method to compare “relative levels of corruption across countries” because assessing hard empirical data (e.g., bribes reported, prosecutions, or court cases linked to corruption) in more than 150 countries would be an impossible task, both economically and physically.

637. Merck also relies on a Human Rights Watch (“HRW”) report stating that “[c]orruption, inefficiency, and political influence have plagued Ecuador’s judiciary for years.”¹¹³² As stated in Ecuador’s Counter-Memorial, HRW did not provide any support for this statement.¹¹³³ HRW did

¹¹³⁰ Claimant’s Reply, ¶ 700.

¹¹³¹ Transparency International, “Corruption Perceptions Index 2012: Frequently Asked Questions” available at http://www.transparency.org/cpi2012/in_detailRLA-110, p. 3 (last accessed 13 Feb. 2015) (RLA-110) (emphasis added).

¹¹³² Human Rights Watch, *World Report 2013: Events of 2012* (2013), p. 229 (C-216).

¹¹³³ Ecuador’s Counter-Memorial, ¶ 347.

not explain the methodology it applied to reach this conclusion either. According to Merck, the HRW report does explain its methodology in the following paragraph:

In November 2011, six expert observers from Argentina, Brazil, Chile, Guatemala, Mexico, and Spain, chaired by Spanish Judge Baltazar Garzón, convened to monitor and make recommendations on the process of judicial reform [in Ecuador]. The observers reported in May 2012 that replacements would have to be found for 2,903 judges and court officials, over 1,500 of whom were removed after disciplinary proceedings, poor evaluations, or forced retirements. Many were replaced by temporary appointees without appropriate training.¹¹³⁴

638. Merck is wrong. This is not HRW's methodology. Here, HRW is reporting on the work of an independent commission of experts in charge of overseeing the judicial reform in Ecuador in 2011. Simply put, HRW report did not make any independent findings. Therefore, this report does not have any probative value.

639. Rather than showing a system plagued with corruption and inefficiency, the findings of this independent commission mentioned in the HWR report highlight the different institutional efforts to strengthen Ecuador's judiciary.

c. Claimant's Reliance On U.S. Department Of State Reports Is Misplaced And Selective

640. Merck argues that the U.S. Department of State has consistently concluded in several country reports that "[c]orruption is a serious problem in Ecuador", that 'in practice the [Ecuadorian] judiciary was susceptible to outside pressure and corruption' and that '[c]orruption was widespread, and questions continued regarding transparency within the judicial sector, despite attempts at procedural reform.'¹¹³⁵

¹¹³⁴ Human Rights Watch, *World Report 2013: Events of 2012* (2013), p. 229 (C-216).

¹¹³⁵ Claimant's Reply, ¶ 707.

641. One of the U.S. Department of State reports Merck cites to support this contention is the 2012 Country Report on Human Rights.¹¹³⁶ This report examines several indicators related to the protection of human rights, such as the freedom of speech, respect for the integrity of the person, respect for political and religious freedoms, and labor rights.

642. But rather than supporting Merck's insinuations, this report actually completely contradicts the gravamen of Merck's charges. In discussing due process rights in Ecuadorian courts, this report unequivocally describes Civilian Courts and Administrative Tribunals as "independent and impartial."¹¹³⁷ This statement was reiterated in the U.S. Department of State 2013 Country Report.¹¹³⁸ Not surprisingly, Merck did not address the significance of this statement in its Reply.

643. Clearly, Merck carefully selected only those statements in the 2012 Country Report that favored its position. In doing so, it failed to critically assess whether these statements had any bearing on the courts involved in the *NIFA v. MSDIA* litigation. To be sure, the underlying case in this arbitration was handled by Ecuadorian civil courts. According to the U.S. Department of State, Ecuadorian civilian courts are considered independent and impartial. Therefore, the U.S. Department of State Country Reports on Human Rights undermine Merck's theory of corruption.

644. Merck also cites the U.S. Department of State Investment Climate report of 2013, which suggests that Ecuador's judicial system is weak and susceptible to external pressures.¹¹³⁹ The Investment Climate reports have the same probative value of a sensationalist tabloid: They are

¹¹³⁶ U.S. Department of State, *Country Report on Human Rights Practices: Ecuador 2012* (2012) (C-214).

¹¹³⁷ *Id.*, p. 10.

¹¹³⁸ U.S. Department of State, *Country Report on Human Rights Practices: Ecuador 2013* (2013), p. 10 (R-188).

¹¹³⁹ Claimant's Reply, ¶ 710.

full of unsupported generalizations, and in the best of cases, they take at face value information from unreliable sources.

645. Take, for example, the following statement in the 2013 Investment Climate report: “Illicit payments for official favors and theft of public funds reportedly take place frequently.”¹¹⁴⁰ Ecuador is unable to respond to this statement because the Investment Climate report does not provide any sources or authority to support it. Worse still, its conclusion that corruption is rampant in Ecuador derives entirely from Transparency International’s reports.¹¹⁴¹ As noted above, Transparency International’s reports are unreliable.

d. Statements By Officials Extracted From The Press Do Not Prove That Ecuador’s Judiciary Is Corrupt

646. Merck submitted several press articles containing statements by Ecuadorian officials, most notably President Correa, purportedly “describing the failings of the Ecuadorian judiciary.”¹¹⁴² This is an exaggeration: there is nothing descriptive in these statements. President Correa’s statement, for example, that Ecuador has “a totally inefficient and corrupt judicial system that is falling into pieces”¹¹⁴³ is charged with political rhetoric and cannot be used as evidence of systemic judicial corruption. As explained in Ecuador’s Counter-Memorial, President Correa made this and other statements to garner popular support for a referendum aimed at reforming the Ecuadorian judiciary.¹¹⁴⁴

¹¹⁴⁰ U.S. Department of State, *2013 Investment Climate Statement: Ecuador* (Feb. 2013), p. 8 (C-217).

¹¹⁴¹ *Id.*

¹¹⁴² Claimant’s Reply, ¶ 716.

¹¹⁴³ *Id.*, ¶ 720.

¹¹⁴⁴ Ecuador’s Counter-Memorial, ¶ 354.

647. Under international law, States are not required to create perfect judicial systems. Rather, states must guarantee a judicial system designed to avoid or correct serious errors.¹¹⁴⁵ Ecuador's behavior, as reflected in the several statements from the press submitted by Merck, has been consistent with this obligation. When President Correa declared a "judicial emergency" upon the recommendation of the Transitional Judicial Council in September 2011, he did not act to eradicate corruption in the judiciary, but to address severe administrative shortcomings.¹¹⁴⁶

648. The fact that between 2006 and 2009 more than one third of Ecuadorian judges were sanctioned for impropriety further demonstrates that the mechanisms of control within the judiciary are effective.¹¹⁴⁷ Interestingly, none of the judges who intervened in the *NIFA v. MSDIA* litigation have been sanctioned for impropriety in that specific case. This strongly suggests that Merck's insinuations of corruption have no merit.

e. Extrapolating From General Reports That The *NIFA v. MSDIA* Proceedings Were Corrupt Is No More Proper Than Extrapolating From General Reports Of Pharmaceutical Industry Corruption That Merck Acted Corruptly While Operating In Ecuador

649. Scholars have noted that the goals of medical practice and pharmaceutical policy are frequently undermined by institutional corruption in the pharmaceutical industry.¹¹⁴⁸ The pharmaceuticals and healthcare sector is regularly cited as a high-risk sector for corruption.¹¹⁴⁹

¹¹⁴⁵ *Hesham Talaat M. Al-Warraaq v. The Republic of Indonesia*, UNCITRAL (OIC Investment Treaty), Award on Respondent's Preliminary Objections to Jurisdiction and Admissibility of the Claims (21 June 2012) (Cremades, Hwang, Nariman), ¶ 620 (RLA-203).

¹¹⁴⁶ Ecuador's Counter-Memorial, ¶ 355.

¹¹⁴⁷ "CJ acknowledges deficiencies in judge oversight," *El Universo* (22 June 2009) (C-93).

¹¹⁴⁸ For an overview of the different manifestations of corruption in the pharmaceutical industry, see M. A. Rodwin, *Conflicts of Interest, Institutional Corruption, and Pharma: An Agenda for Reform*, *JOURNAL OF LAW MEDICINE & ETHICS*, Vol. 40, No. 3 (Fall 2012) (R-182).

¹¹⁴⁹ Transparency International, "Why Is Transparency International Researching Corruption in the Pharmaceuticals & Healthcare Sector?" available at <http://www.transparency.org.uk/our-work/pharmaceutical-corruption> (last accessed 11 Feb. 2015) (R-199).

In a World Health Organization survey, an estimated 10–25% of global spending on health public procurement was lost to corruption.¹¹⁵⁰ One academic commentator observed that the “heavy hand of big pharma is felt at *all levels of government*.”¹¹⁵¹ Corruption occurs in the legislative process, with pharmaceutical companies accused of lobbying to pass legislation to improve their own interests, rather than those of the general public.¹¹⁵² Pharmaceutical corruption also manifests itself in the manufacturing, promotion and marketing of prescription drugs and medical devices writ large.¹¹⁵³

650. In recent years, the pharmaceutical industry has faced a flood of litigation launched by U.S. federal and state prosecutors, the Federal Trade Commission, as well as consumer groups charging multiple offenses.¹¹⁵⁴ There is now a clear upward trend of annual pharmaceutical company settlements with U.S. federal and state governments.¹¹⁵⁵ What is more, the pharmaceutical industry tops all other industries in the total amount of fraud payments for actions against the U.S. federal government under the False Claims Act.¹¹⁵⁶ Of the 165 settlements comprising US \$19.8 billion in penalties from 1990 to 2010, 73 percent occurred in a

¹¹⁵⁰ Transparency International, “Why Is Transparency International Researching Corruption in the Pharmaceuticals & Healthcare Sector?” available at <http://www.transparency.org.uk/our-work/pharmaceutical-corruption> (last accessed 11 Feb. 2015) (R-199) (citing Global Corruption Report, Transparency International (2006)).

¹¹⁵¹ M. Angell, M.D., *THE TRUTH ABOUT THE DRUG COMPANIES: HOW THEY DECEIVE US AND WHAT TO DO ABOUT IT* (2004), p. 193 (R-142) (when discussing the U.S. pharmaceutical industry) (emphasis added).

¹¹⁵² M. A. Rodwin, *Introduction: Institutional Corruption and the Pharmaceutical Industry*, *JOURNAL OF LAW MEDICINE & ETHICS*, Vol. 41, No. 3 (Fall 2013), p. 545 (R-187).

¹¹⁵³ B. Earle & A. Cava, *The Penumbra of the United States’ Foreign Corrupt Practices Act: Brazil’s Clean Companies Act And Implications for the Pharmaceutical Industry*, 13 *RICH. J. GLOBAL L. & BUS.* 3 (Fall 2014), p. 448 (R-191).

¹¹⁵⁴ M. Angell, M.D., *THE TRUTH ABOUT THE DRUG COMPANIES: HOW THEY DECEIVE US AND WHAT TO DO ABOUT IT* (2004), p. 218 (R-142) (when discussing the U.S. pharmaceutical industry).

¹¹⁵⁵ S. Almashat, M.D., M.P.H. et al., *Rapidly Increasing Criminal and Civil Monetary Penalties Against the Pharmaceutical Industry: 1991-2010*, Public Citizen’s Health Research Group (16 Dec. 2010), pp. 9-19 (R-170).

¹¹⁵⁶ *Id.*, p. 2 (R-170).

five-year time period (2006-2010).¹¹⁵⁷ Indeed, during that very period, in 2008, Merck was fined US \$650 million on account of overcharging government health programs and kickbacks.¹¹⁵⁸

651. Systematic pharmaceutical corruption is, of course, a global problem, even though drug companies' improper behavior exposes them to government prosecution and enormous fines. As recently as September 2014, China fined GlaxoSmithKline nearly US \$500 million in a case that alleged the company was bribing doctors, hospitals and government officials to buy and prescribe their drugs.¹¹⁵⁹ In 2012, Pfizer paid US \$60.2 million, and Eli Lilly & Co. paid US \$29.4 million, to settle allegations they had bribed government officials in China and other countries to approve and prescribe their products.¹¹⁶⁰ In the wake of these crises, the global pharmaceutical industry has been forced to tighten its Code of Practice, in an effort to curb this widespread bribery and corruption, particularly in emerging international markets.¹¹⁶¹

¹¹⁵⁷ *Id.* (R-170).

¹¹⁵⁸ S. Almashat, M.D., M.P.H. et al., *Rapidly Increasing Criminal and Civil Monetary Penalties Against the Pharmaceutical Industry: 1991-2010*, Public Citizen's Health Research Group (16 Dec. 2010), p. 16 (R-170). More recently, in 2012, GlaxoSmithKline agreed to plead guilty and pay US \$3 billion to resolve fraud allegations and its failure to report safety data. "GlaxoSmithKline to Plead Guilty and Pay \$3 Billion to Resolve Fraud Allegations and Failure to Report Safety Data," U.S. Department of Justice, Office of Public Affairs (2 July 2012) available at <http://www.justice.gov/opa/pr/glaxosmithkline-plead-guilty-and-pay-3-billion-resolve-fraud-allegations-and-failure-report> (last accessed 11 Feb. 2015) (R-185). The company Pfizer also agreed to pay US \$2.3 billion to resolve criminal and civil liability arising from the illegal promotion of certain pharmaceutical products. "Justice Department Announces Largest Healthcare Fraud Settlement in Its History: Pfizer To Pay \$2.3 Billion For Fraudulent Marketing," U.S. Department of Justice (2 Sept. 2009), available at <http://www.justice.gov/sites/default/files/usao-ma/legacy/2012/10/09/Pfizer%20-%20PR%20%28Final%29.pdf> (last accessed 11 Feb. 2015) (R-159).

¹¹⁵⁹ K. Bradsher & C. Buckley, "China Fines GlaxoSmithKline Nearly \$500 Million in Bribery Case," *New York Times* (Hong Kong, 19 Sept. 2014), available at http://www.nytimes.com/2014/09/20/business/international/gsk-china-fines.html?_r=0 (last accessed 11 Feb. 2015) (R-193); E. Kelton, "Is Big Pharma Addicted to Fraud?," *Forbes* (29 July 2013), available at <http://www.forbes.com/sites/erikakelton/2013/07/29/is-big-pharma-addicted-to-fraud/> (last accessed 11 Feb. 2015) (R-189).

¹¹⁶⁰ E. Kelton, "Is Big Pharma Addicted to Fraud?," *Forbes* (29 July 2013), available at <http://www.forbes.com/sites/erikakelton/2013/07/29/is-big-pharma-addicted-to-fraud/> (last accessed 11 Feb. 2015) (R-189).

¹¹⁶¹ "Global drug industry tightens anti-Corruption code," *Reuters* (1 Mar. 2012), available at <http://www.reuters.com/article/2012/03/01/us-pharmaceuticals-corruption-idUSTRE8200E020120301> (last accessed 11 Feb. 2015) (R-183).

652. In sum, the pharmaceutical industry is renowned for corrupt behavior. Does this mean that this general industry trend may be used to discredit Merck's activities in Ecuador? Of course not. General reports are no more relevant to discredit Merck than Merck's "evidence" is to discredit any of the Ecuadorian judicial panels that have dealt with the *NIFA v. Merck* litigation. In exactly the same way, the circumstantial "evidence" Merck employs with respect to Ecuador's judiciary being corrupt is wholly irrelevant to this case.

3. Conclusion

653. To conclude, Merck has offered no credible evidence that the lower courts' judgments were the product of corruption. Similarly, the NGO reports and press articles it cites offer no credible evidence that there is systemic corruption in Ecuador's judiciary. In fact, Merck has frequently, and successfully, relied on the Ecuadorian courts, which completely undermines its claims of systemic corruption.

VI. MERCK IS NOT ENTITLED TO THE RELIEF IT CLAIMS

654. As a matter of law, damage for denial of justice cannot occur until domestic adjudicative proceedings have reached their finality.¹¹⁶² If an adjudicative procedure fails to respect a foreign national's fundamental procedural rights, damage *only* occurs when “the substantive rights sought to be vindicated in that process are *finally denied*.”¹¹⁶³ Thus, a first instance court decision cannot generate the predicate conduct for delictual responsibility towards a foreign national in international law.¹¹⁶⁴

655. In short, there can be no *damage* until the adjudicative process has reached its final conclusion. In the present case, Merck has refused to exhaust its local remedies. Any analysis of Merck's claimed damages is therefore simply redundant; by law, no harm can have occurred.

656. Even if the Tribunal were to find liability, Merck is still not entitled to the damages it claims. The inflated sums Merck claims are ill-conceived in law and in fact, and remain unproven.

657. To summarize, in its Reply, Merck claimed US\$ 1.57 million in restitution, which is the amount it paid to NIFA in connection with the September 2012 NCJ decision.¹¹⁶⁵ In its Supplemental Reply, Merck then claimed a further sum of US\$ 7,723,471.81 in connection with

¹¹⁶² By way of background, damage is a constitutive element of delictual responsibility toward foreign nationals. There is no difference in that regard between general international law and the special regime of investment treaties. Z. Douglas, *International Responsibility of Domestic Adjudication: Denial of Justice Deconstructed*, 63(4) ICLQ 867 (Oct. 2014) (“Douglas”), p. 893 (RLA-189). See also *Merrill & Ring Forestry L.P. v Government of Canada*, UNCITRAL (NAFTA), Award (31 Mar. 2010) (Orrego Vicuña, Dam, Rowley), ¶ 245 (RLA-178); *Waste Management, Inc. v. United Mexican States*, ICSID Case No. ARB(AF)/00/3, Award (30 Apr. 2004) (Crawford, Civiletti, Magallón Gómez) (“*Waste Management, Inc.* (2004)”), ¶ 98 (RLA-63) (“Taken together, the *S.D. Myers*, *Mondev*, *ADF* and *Loewen* cases suggest that the minimum standard of treatment of fair and equitable treatment is infringed by conduct attributable to the State *and harmful to the claimant* if the conduct is arbitrary [...]”) (emphasis added).

¹¹⁶³ Douglas, p. 894 (RLA-189) (emphasis added).

¹¹⁶⁴ *Id.*

¹¹⁶⁵ Claimant's Memorial, ¶ 411.

the November 2014 NCJ decision.¹¹⁶⁶ Merck further claims *all* legal fees and costs incurred during the *NIFA v. MSDIA* litigation, which continues to the present day.¹¹⁶⁷ These legal fees and costs totaled US\$ 6,565,768.66, as of the date of Merck’s Reply.¹¹⁶⁸ Merck’s Supplemental Reply did not update this figure, instead reserving the right to do so at the Hearing.¹¹⁶⁹ In its Memorial, Merck alleged it suffered “moral damages” because of the *NIFA v. MSDIA* litigation; yet, in its Reply, Merck stayed silent.¹¹⁷⁰ Without any explanation whatsoever, Merck’s Reply introduces a request for injunctions directing Ecuador to prevent enforcement of any “future” judgment against it¹¹⁷¹ and to indemnify Merck against any “future” damages, including lost profits, as well as payment of its legal costs in resisting enforcement of any “future” judgment against it.¹¹⁷²

658. For the convenience of the Tribunal, Merck’s principle heads of claim are summarized in the table below.

¹¹⁶⁶ Claimant’s Supplemental Reply, ¶ 101(c).

¹¹⁶⁷ Claimant’s Memorial, ¶¶ 412-413.

¹¹⁶⁸ Claimant’s Reply, ¶ 786.

¹¹⁶⁹ Claimant’s Supplemental Reply, ¶ 101 fn. 95 (stating: “This figure was quantified as of 26 June 2014. MSDIA reserves its right to update this figure at the time of the merits hearing for purposes of the Tribunal’s final award.”).

¹¹⁷⁰ Claimant’s Memorial, ¶ 414.

¹¹⁷¹ Claimant’s Reply, ¶ 792(d); Claimant’s Supplemental Reply, ¶ 101(e).

¹¹⁷² Claimant’s Reply, ¶ 792(e)(f); Claimant’s Supplemental Reply, ¶ 101(f)(g).

Table: Merck’s Main Claims for Damages

Restitutory Relief	Ecuadorian Litigation Fees of Merck’s International Arbitration Counsel	Ecuadorian Litigation Fees of Merck’s Ecuadorian Counsel	Moral Damages	Injunctions
US\$ 1,570,000 US\$ 7,723,471.81	US\$ 4,775,340.11 (Feb. 2008-Oct. 2011)	US\$ 1,790,428.55 (July 2005-present)	Un-quantified	To prevent enforcement of any future judgment and to indemnify

659. Now, after two rounds of pleadings and a Supplemental Reply, Merck has still failed to prove (and, in the case of the claimed moral damages, even quantify) the above damages. In effect, Merck has refused to produce the underlying documentary evidence for the fees of its international arbitration and Ecuadorian counsel. Instead, Merck has simply adduced the first page of its legal bills, omitting the explanatory narrative in its entirety. This is despite Merck having *affirmatively used* the content of these documents for its damages claims. In so doing, Merck has effectively shielded itself against any challenge on the causal link between the claimed damages to the alleged treaty breaches. This is inconsistent with Merck’s burden to establish its claimed loss.

660. The paragraphs that follow will address the legal and factual implications of Merck’s failure to adequately prove its loss. It will be shown that, because of the scanty materials provided, Ecuador is unable to defend itself against Claimant’s damages claims. Indeed, Merck’s posture regarding evidence in this arbitration violates basic tenets of international law and practice. Finally, and without prejudice to the foregoing, Merck’s damages claims go beyond the legal standard of *Chorzów Factory*.

A. Merck Has Refused To Provide The Requisite Documentary Evidence

661. In its Memorial, Merck asserted that it was “entitled to recover the legal fees and costs it incurred in connection with its defense of the *NIFA v. MSDIA* proceedings in Ecuador’s courts.”¹¹⁷³ Without providing any supporting documentation, Merck estimated these fees and costs to be (at that time) “approximately US\$ 6,000,000.”¹¹⁷⁴ Merck unilaterally declared it would provide “a specific quantification of its fees and costs, including documentary support, *at a subsequent stage* of these proceedings.”¹¹⁷⁵ In its Counter-Memorial, Ecuador duly objected to Merck’s failure to discharge its burden of proof and comply with the Tribunal’s earlier Procedural Order.¹¹⁷⁶

662. Merck’s failure to avail itself of its scheduled opportunity to introduce evidence of its claimed damages passed with its Memorial. Under no procedural regime may a party arrogate to itself when it will prove its case, ignoring the schedule issued by the tribunal or court presiding in the case. This failure cannot be repaired by Merck’s belated proffer in its Reply. But even if Merck had not waived its opportunity to prove its damages, its Reply would not save it. Instead of adducing the documents to support its claims, and in a gesture almost of irritation that Ecuador has called it out for its lack of proof, Merck has deigned to submit only the first page each invoice in a (presumably detailed) set of invoices by its international arbitration counsel, WilmerHale, and its Ecuadorian counsel, Quevedo & Ponce.¹¹⁷⁷ In this way, the first page of each WilmerHale invoice simply reads: “FOR LEGAL SERVICES RENDERED through [date]

¹¹⁷³ Claimant’s Memorial, ¶ 412; Claimant’s Reply, ¶ 783. In its Notice of Arbitration, Merck originally only sought its “legal costs *in resisting enforcement* of the NIFA judgment within and outside of Ecuador.” See Notice of Arbitration (29 Nov. 2011), ¶ 160(d) (emphasis added).

¹¹⁷⁴ Claimant’s Memorial, ¶ 413.

¹¹⁷⁵ *Id.* (emphasis added).

¹¹⁷⁶ Ecuador’s Counter-Memorial, ¶¶ 516-521.

¹¹⁷⁷ Claimant’s Reply, ¶ 786-791.

in connection with the Ecuador matter, *as detailed in the attached.*¹¹⁷⁸ However, the all-important “attached” information has been completely deleted. For the Tribunal’s ease of reference, a typical WilmerHale invoice is reproduced below. All invoices by WilmerHale follow this format.



P.O. Box 7247-8760
PHILADELPHIA, PA 19170-8760
wilmerhale.com

FEDERAL TAX ID No. 04-1409810
BILLING INQUIRIES 866-736-5835
BILLING FAX No. 202-247-4722

Mary E. Bartkus
Counsel-Int'l Antitrust & Complex Lit.
Merck & Co., Inc.
One Merck Drive, P.O. Box 100
Mail Stop: WS-3B60
Whitehouse Station, NJ 08889

Invoice Date	03/12/08
Invoice No.	1929253
Matter No.	1519700-00127

FOR LEGAL SERVICES RENDERED through January 31, 2008 in connection with the Ecuador matter, as detailed on the attached.

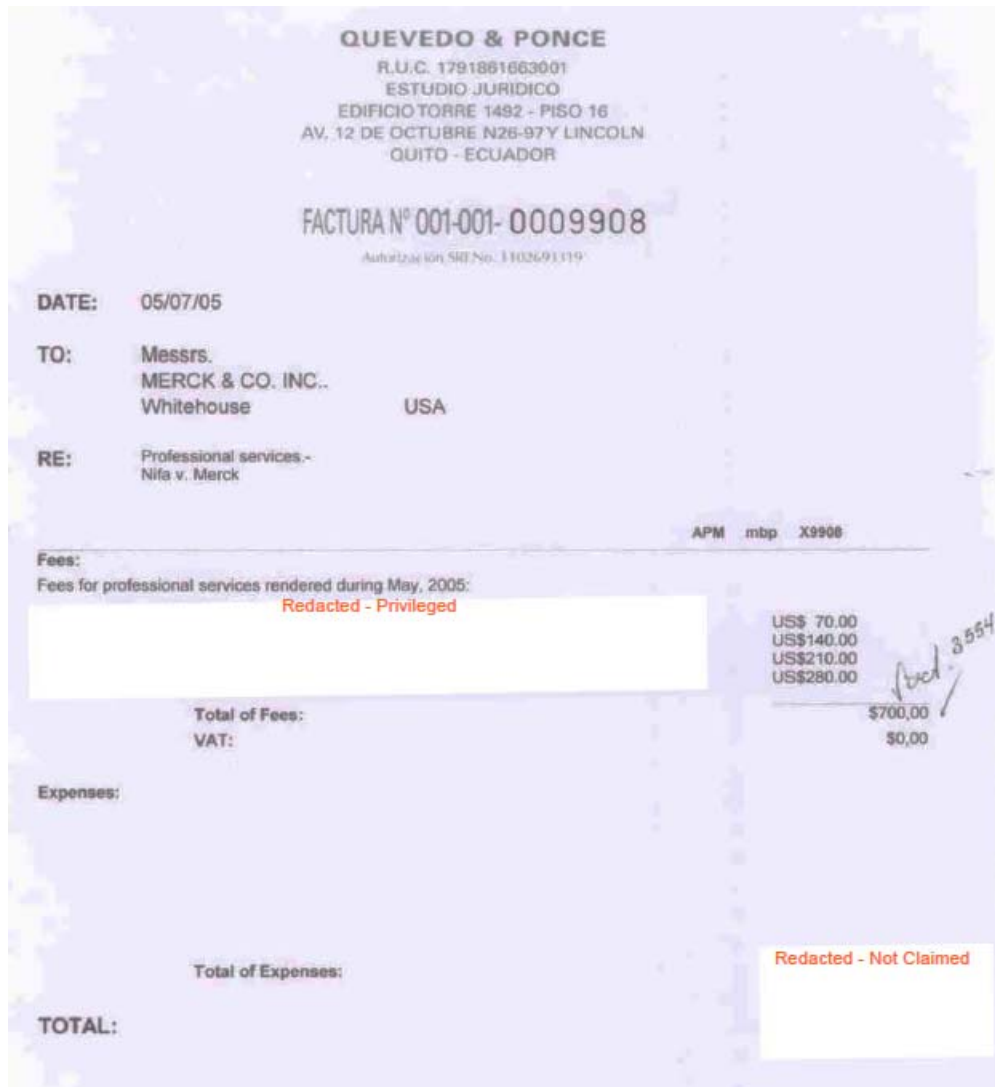
Total Legal Services	\$ 262,393.00
Total Disbursements	<u>8,996.00</u>
Total Amount Due	<u>\$ 271,389.00</u>

663. As the above sample shows, no explanatory detail is present in the invoice. In fact, all subsequent information has been excised.¹¹⁷⁹

664. It is thus impossible to understand the amounts charged by WilmerHale. A typical Quevedo & Ponce invoice is also reproduced below (again, with no underlying narrative). All invoices follow this basic format.

¹¹⁷⁸ WilmerHale invoice in *NIFA v. MSDIA* litigation, January 2008-October 2011 (24 Oct. 2011) (C-270) (emphasis added).

¹¹⁷⁹ *Id.*



665. The first page of a typical Quevedo & Ponce invoice simply reads: “Professional services” per the attached detail.¹¹⁸⁰ The remaining pages—presumably containing the underlying information—have been deleted.¹¹⁸¹

666. The only other “evidence” Merck produces is two tables detailing the fees and costs of WilmerHale and Quevedo & Ponce.¹¹⁸² In substance, these tables are nothing more than

¹¹⁸⁰ Quevedo & Ponce invoices in *NIFA v. MSDIA* litigation, July 2005-present (26 May 2014) (C-271) (emphasis added).

¹¹⁸¹ The invoices contain redactions such as “Redacted – handwritten notes,” and “Redacted – privileged.” *Id.*

¹¹⁸² Claimant’s Reply, pp. 185-186, Tables 1-2.

assertion. In fact, their content actually departs from the cover pages of the underlying invoices. For example, the WilmerHale table contains two columns, each with different amounts. One column is labeled “Invoice Total” and the other “Total Claimed.” Recognizing this discrepancy, Merck alleges that it reviewed WilmerHale’s “*detailed* invoices” for that period and “*excluded* any amounts not associated with the Ecuadorian litigation.”¹¹⁸³ Yet it is impossible for a third party to know if the WilmerHale totals claimed *are, in fact*, associated with the Ecuadorian litigation.

667. And the confusion does not end there: the damages table summarizing Quevedo & Ponce’s invoices includes disbursements. On the other hand, disbursements are *not included* in the calculations within the WilmerHale table. In practice, it is impossible for Ecuador—or anyone other than Merck, for that matter—to break down and analyze the US\$ 6,565,768.66 Merck claims in damages.¹¹⁸⁴

668. Recognizing the weakness of its position, Merck argued that, between February 2008 and September 2011, WilmerHale’s efforts “in connection with the matter” were focused primarily on the Ecuadorian litigation.¹¹⁸⁵ Merck alleged it excluded all amounts not associated with the *NIFA v. MSDIA* proceedings. Merck said it reduced the amounts claimed in connection with WilmerHale’s fees by 3% after eliminating fees unrelated to the Ecuadorian litigation. Merck further argued that, for a number of months, it received a 3% “early payment” discount on fees

¹¹⁸³ *Id.*, ¶ 789 (emphasis added).

¹¹⁸⁴ The legal fees by Merck’s international arbitration counsel, WilmerHale, are US\$ 4,775,340.11 and cover the time period February 2008 to September 2011. Claimant’s Reply, p. 186, Table 2; *NIFA v. MSDIA* litigation, January 2008-October 2011 (24 Oct. 2011) (C-270). The legal fees by Merck’s Ecuadorian counsel, Quevedo & Ponce, are US\$ 1,790,428.55 and cover the time period July 2005 to present. Quevedo & Ponce invoices in *NIFA v. MSDIA* litigation, July 2005-present (C-271); Claimant’s Reply, p. 185, Table 1.

¹¹⁸⁵ Claimant’s Reply, ¶¶ 788-789.

(but not costs) from WilmerHale.¹¹⁸⁶ Once more, without access to the underlying data, Merck’s assertion cannot be verified.

669. As a result, Ecuador is denied any opportunity to review, verify and challenge Claimant’s calculations. This deficiency requires dismissal of the unproven damages.

B. As A Result, Merck Has Failed To Satisfy Its Evidentiary Burden Of Proof

670. It is a maxim of international law that he “who asserts must prove” (*onus probandi actori incumbit*).¹¹⁸⁷ The principle is well-established in investment treaty jurisprudence.¹¹⁸⁸ A claimant thus bears the burden of proof in relation to the fact, and amount of, its loss. A claimant also bears the burden of proving the causal link between the respondent’s conduct and loss it claims.¹¹⁸⁹ Any alleged wrongful act must be the factual condition for the occurrence of the claimant’s loss (*conditio sine qua non*).¹¹⁹⁰

671. Under the legal test of causation, the wrongful conduct must be the direct cause of the harm or injury; this means that the injury cannot be too remote or inconsequential.¹¹⁹¹ Put

¹¹⁸⁶ *Id.*, ¶ 789 fn. 958.

¹¹⁸⁷ B. Cheng, GENERAL PRINCIPLES OF LAW AS APPLIED BY INTERNATIONAL COURTS AND TRIBUNALS (2006) (“Cheng”), p. 327 (RLA-163) (stating that “international judicial decisions are not wanting which expressly hold that there exists a general principle of law placing the burden of proof upon the claimant and that this principle is applicable to international judicial proceedings.”); *id.*, p. 329 (stating that “a party having the burden of proof must not only bring evidence in support of his allegations, but must also convince the Tribunal of their truth, lest they be disregarded for want, or insufficiency, of proof.”). This principle that a party must prove the allegation it makes is accepted in both common and civil law traditions. Y. Derains, *Towards Greater Efficiency in Document Production Before Arbitral Tribunals: A Continental Viewpoint*, ICC INT’L CT. ARB. BULL., 2006 Special Supplement (2006) (“Derains”), p. 86 (RLA-164). It is also accepted in the procedural rules governing this arbitration, the 1976 UNCITRAL Arbitration Rules. Article 24(1) of the UNCITRAL Rules states, in its entirety: “Each party shall have the burden of proving the facts relied on to support his claim or defence.”

¹¹⁸⁸ See, e.g., *SGS Société Générale de Surveillance S.A. v. The Republic of Paraguay*, ICSID Case No. ARB/07/29, Award (10 Feb. 2012) (Alexandrov, Donovan, García Mexía) (RLA-183).

¹¹⁸⁹ S. Ripinsky & K. Williams, DAMAGES IN INTERNATIONAL INVESTMENT LAW (2008) (“Ripinsky & Williams”), pp. 161-162 (RLA-168).

¹¹⁹⁰ Cheng, p. 244 (RLA-163) (noting that, in order for a loss to be regarded as the consequence of an act for purposes of reparation, “either the loss has to be the proximate consequence of the act complained of, or the act has to be the proximate cause of the loss.”).

¹¹⁹¹ International Law Commission, *Draft Articles on Responsibility of States for Internationally Wrongful Acts* (2001) (“ILC, *Draft Articles*”), Art. 31, ¶ 10 (CLM-330) (“The allocation of injury to a wrongful act is, in

simply, there must be a *sufficient link* or *nexus* between the wrongful act and the injury before any obligation to make reparations arises, and it is up to the claimant party to establish it. The tribunal in *Rompetrol v. Romania* has aptly summarized the burden of proof in respect of claims for damages:

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.¹¹⁹²

672. The basic rules of evidence are not optional. If a fact is not proven, it cannot be taken into account by a court or tribunal.¹¹⁹³ As one notable commentator has pointed out, it is not for the opposing party to prove the other side's case.¹¹⁹⁴ The Iran-U.S. Claims Tribunal, for example, has emphasized that a claimant must "produce factual evidence of the losses" it has suffered in order to satisfy the legal burden of proof. In particular, it has stressed the importance of producing primary evidence, such as billing records and invoices, when monetary damages are claimed.¹¹⁹⁵

principle, a legal and not only a historical or causal process."); see Ripinsky & Williams, p. 162 (RLA-168) (citing AM Honoré, *Causation and Remoteness of Damage* in INTERNATIONAL ENCYCLOPEDIA OF COMPARATIVE LAW (A. Tunc, ed., 1983)).

¹¹⁹² *The Rompetrol Group N.V. v. Romania*, ICSID Case No. ARB/06/3, Award (6 May 2013) (Berman, Donovan, Lalonde) ("*Rompetrol*"), ¶ 190 (RLA-121) (emphasis added).

¹¹⁹³ This comes from the Roman maxim *idem est non probari non esse* ("something that is not proven does not exist/is not true"). Ripinsky & Williams, p. 162, fn. 198.

¹¹⁹⁴ Derains, p. 87 (RLA-164).

¹¹⁹⁵ *The Islamic Republic of Iran v. The United States of America*, Cases Nos. A15 (IV) and A24-FT, Award No. 590-A15(IV)/A24-FT (28 Dec. 1998), ¶ 102 (RLA-154) (ruling that it was incumbent upon Iran "to produce factual evidence of the losses it suffered [...]"); *The Islamic Republic of Iran v. The United States of America*, Cases Nos. A15 (IV) and A24-FT, Award No. 602-A15(IV)/A24-FT, Concurring and Dissenting Opinion of Judge Charles N. Brower (2 July 2014), ¶¶ 3-5 (RLA-197) (opining that the claimant's claims for monetary losses should be dismissed because the claimant had produced "no records" to support certain charges; and further opining that equity had no role in relation to shifting the burden of proof). Requests for litigation costs must equally be supported by documentation. *Blount Brothers Corp. v. The Islamic Republic of Iran*, Case No. 53, Award No. 216-53-1 (6 Mar. 1986), reprinted in 10 Iran-U.S. Cl. Trib. Rep. 95, p. 102 (RLA-143) (dismissing Iran's request for costs and attorney's fees because the request was "unsubstantiated by documentation.").

673. In this arbitration, Merck’s posture on evidence violates these, most basic, tenets of international law and practice. That is to say, Merck had the ability to prove its alleged losses (and quantify them). Merck could easily have produced the full set of invoices upon which it relied so heavily. Instead, Merck based its damages predominantly on legal assertion, refusing to meet its burden of proof.¹¹⁹⁶ As a result, no-one can independently analyze or verify the sums Merck now claims. Additionally, Merck was required to prove—again, with documentary evidence—how the enormous legal fees and costs it claimed (and continues to claim) were incurred as a result of the alleged denial of justice. By only giving a tiny amount of information (the cover page of the invoices), Merck failed to demonstrate how this “loss,” rising to the level of US\$ 6,565,768 (and counting), was causally connected to the alleged breaches of the BIT.¹¹⁹⁷

674. This is most glaring with respect to the fees claimed for Merck’s arbitration counsel, WilmerHale. No explanation is offered as to why fees for U.S. counsel were required be incurred in a local litigation, such fees being at a rate of more than twice the fees charged by Merck’s local counsel. It strains credulity that WilmerHale services were not directed at preparing the present arbitration, and were indeed likely devoted to advising on how to guide the litigant, not with an

¹¹⁹⁶ The Iran-U.S. Claims Tribunal encountered a similar situation in the *Avco* case. There, certain of Avco’s claims were based on a large number of invoices that were not presented to the tribunal. The tribunal ruled it could not grant a claim based on summarized invoices, even though the existence of the invoices themselves was not in doubt. *Avco Corporation v. Iran Aircraft Industries*, Case No. 261, Award No. 377-261-3 (18 July 1988), reprinted in 19 Iran-U.S. Cl. Trib. Rep. 200, p. 214 (RLA-147). When U.S. Court of Appeals for the Second Circuit refused to enforce the award, Iran brought a follow-up claim before the Iran-U.S. Claims Tribunal. The second tribunal upheld the first award, ruling that Avco’s invoice claims had been properly denied because of a “lack of proof” that the invoices were payable. The tribunal went on to say that even production of the invoices themselves could not even have cured the overall “defect in proof.” *The Islamic Republic of Iran v. The United States of America*, Case No. A27, Award No. 586-A27-FT (5 June 1998), reprinted in Iran-U.S. Cl. Trib. Rep. 39, ¶ 66 (RLA-153).

¹¹⁹⁷ In *GAMI v. Mexico*, the tribunal, chaired by Claimant’s expert Prof. Paulsson, said that the claimant had not attempted to quantify the alleged prejudice arising from the particular alleged acts and omissions (even if there had been an expropriation under the NAFTA). In that case, the tribunal observed that no credible cause and effect analysis could lay the totality of the claimant’s disappointments, as an investor, at the feet of the Mexican government. In sum, it was not possible to prove that Mexico’s actions were directly causative of the claimant’s injury. *GAMI Investments, Inc. v. The Government of the United Mexican States*, UNCITRAL (NAFTA), Final Award (15 Nov. 2004) (Paulsson, Reisman, Lacarte Muró), ¶¶ 83-85, 100-104 (RLA-160).

eye to proceedings in the Ecuadorian courts, but to contriving “facts” that could be sued to assert a denial of justice Treaty claim. Absent any showing that such fees were incurred in advance of the litigation itself, no causation can be claimed.

675. The repercussions of Merck’s posture are significant. Without access to the information buried in the invoices (or elsewhere), Ecuador is unable to defend itself in this arbitration.¹¹⁹⁸ No damages expert appears to have independently quantified Merck’s damages, and Ecuador is unable instruct its own expert.

676. In its Memorial, Merck explained away its failure to produce evidence because of “sensitivities associated with billing records.”¹¹⁹⁹ In its Reply, in a mere footnote, Merck alleged that the supporting description of the work performed (and previously attached to all invoices) was “legally privileged.”¹²⁰⁰ Merck said that this information reflected confidential “litigation strategy.”¹²⁰¹

677. Merck’s argument is flawed: there is no legal impediment here; and Merck cannot suggest there is a factual one. By classifying its arbitration fees and costs as *damages*—not costs (which Merck itself admits¹²⁰²)—Merck has impliedly waived its privilege over the information in the invoices. In fact, Merck did not just *mention* the invoices in its pleadings; rather, Merck

¹¹⁹⁸ A party’s right to defend itself is embodied in Article 15(1) of the UNICITRAL Rules, which states: “Subject to these Rules, the arbitral tribunal may conduct the arbitration in such manner as it considers appropriate, provided that the parties are treated with equality and that at any stage of the proceedings each party is given a full opportunity of presenting his case.”

¹¹⁹⁹ Claimant’s Memorial, ¶ 413.

¹²⁰⁰ Merck wrote: “The *supporting description* of the work performed that is attached to these invoices is *legally privileged* and reflects MSDIA’s confidential litigation strategy. *That detail has not been included with the cover page invoices* that are included in Exhibits C-270 and C-271. Moreover, portions of the Quevedo & Ponce invoices contained handwritten notes that are privileged and/or do not relate to the amount of fees claimed and have been redacted.” Claimant’s Reply, ¶ 791 fn. 960 (emphasis added).

¹²⁰¹ *Id.*

¹²⁰² *Id.*, ¶ 786 fn. 954 (stating: “The fees and costs incurred by MSDIA in connection with this arbitration are *not included in the amount claimed as damages.*”) (emphasis added).

affirmatively used the invoices as part of its claim. What is more, these invoices are the *sole evidence* of Merck’s pleaded damages. It is unjust that Ecuador cannot see this information to defend itself, much less begin to quantify its potential exposure.

678. For the reasons cited above, the Tribunal must proceed to strike out Merck’s claims.¹²⁰³ In the alternative, the Tribunal must draw appropriate adverse inferences from Merck’s failure to produce the evidence supporting its enormous damages claims.¹²⁰⁴

C. The Majority Of The Damages Merck Claims Are Not Recoverable, In Any Event

679. Assuming, *arguendo*, that Ecuadorian courts did deny Merck justice, the task of this Tribunal would be to restore the *status quo ante*. As the ICJ pronounced in *Chorzów Factory*, a court or tribunal should “reestablish the situation which would, in all probability, have existed if that act had not been committed.”¹²⁰⁵ This entails, *inter alia*, as Bin Cheng famously wrote, that “the duty to make reparation extends only to those damages which are legally regarded as the *consequence* of an unlawful act.”¹²⁰⁶ In other words, because only real, “actual” damages can be compensated,¹²⁰⁷ an international court or tribunal is not at liberty to put the claimant in a better

¹²⁰³ See A. Carlevaris, *Preliminary Matters: Objections, Bi-furcation, Request for Provisional Measures* in LITIGATING INTERNATIONAL INVESTMENT DISPUTES: A PRACTITIONER’S GUIDE (2014), p. 195 (RLA-191) (stating that arbitrators have broad powers to organize proceedings as they deem appropriate, including the power to dispose of the parties’ claims on a summary basis, even in the absence of an express power).

¹²⁰⁴ The practice of drawing adverse inferences is well known in international arbitration, and the Tribunal undoubtedly possesses such a power. One commentator has concluded: “Indeed, there is no serious basis for doubt as to arbitrators’ power to draw adverse evidentiary inferences, including as a consequence of a party’s refusal to comply with a valid disclosure order. This authority is a fundamental aspect of the arbitrators’ *page* adjudicative mandate and is subsumed within the tribunal’s general authority over the admission and assessment of evidence” G. Born, INTERNATIONAL COMMERCIAL ARBITRATION, VOLUME II (2014), pp. 2390-2391 (RLA-192); *Marvin Feldman v. Mexico*, ICSID Case No. ARB(AF)/99/1, Award (16 Dec. 2002) (Kerameus, Covarrubias Bravo, Gantz), ¶ 178 (RLA-158) (where the tribunal drew adverse inferences from Mexico’s failure to produce documents on the grounds of domestic confidentiality laws). See also *Waste Management, Inc.* (2004), ¶ 30 (RLA-63).

¹²⁰⁵ *Case Concerning the Factory at Chorzów (Germany v. Poland)*, Judgment (13 Sept. 1928), P.C.I.J. Series A, No. 17, p. 47 (RLA-135).

¹²⁰⁶ Cheng, p. 253 (RLA-163).

¹²⁰⁷ R. Dolzer & C. Schreuer, PRINCIPLE OF INTERNATIONAL INVESTMENT LAW (2008), p. 272 (CLM-162).

position than it would have been in but for the acts (ostensibly) giving rise to liability. To do otherwise would over-compensate the claimant.¹²⁰⁸

680. Merck's damages claims go beyond the legal standard of *Chorzów Factory*, which, Merck admits, governs the question of damages.¹²⁰⁹

681. *First*, there can be no claim that the alleged denial of justice occurred at the inception of the case, with the filing of NIFA's *complaint*. Damages can only accrue after the denial of justice takes place¹²¹⁰—in the present case, the initial judgment (Merck's so-called "first" denial of justice). Merck nevertheless argues it is entitled to "wasted costs," including at the trial level.¹²¹¹ Moreover, even on Merck's pleaded case, *all* fees incurred by Merck with respect to the initial judgment were not automatically recoverable—only "wasted costs."¹²¹² Lastly, without knowing what tasks were carried out, it is impossible for Ecuador to verify if the costs Merck expended were, in fact "wasted."

682. *Second*, even if Merck succeeds in its damages claim, a large proportion of the fees it incurred cannot be deemed "wasted." Tellingly, Merck's own legal expert limits himself to mentioning "wasted litigation costs."¹²¹³ When compared with the situation "that would have prevailed" had a denial of justice not occurred, Merck would have incurred legal fees *anyway* in defending itself before the trial court.¹²¹⁴

¹²⁰⁸ *Victor Pey Casado and Foundation "Presidente Allende" v. Republic of Chile*, ICSID Case No. ARB/98/2, Decision on the Application for Annulment of the Republic of Chile (18 Dec. 2012) (Fortier, Bernardini, El-Kosheri), ¶ 269 (CLM-140).

¹²⁰⁹ Claimant's Memorial, ¶ 409.

¹²¹⁰ A.V. Freeman, *RESPONSIBILITY FOR THE DENIAL OF JUSTICE* (1938), pp. 587-588 (RLA-18(bis)).

¹²¹¹ Claimant's Reply, ¶ 785.

¹²¹² Second Paulsson Expert Report, ¶ 29; Claimant's Reply, ¶ 785.

¹²¹³ Second Paulsson Expert Report, ¶ 29; Claimant's Reply, ¶ 785.

¹²¹⁴ Ecuador's Counter-Memorial, ¶ 523.

D. Merck Is Not Entitled To Moral Damages

683. In its Memorial, Merck argued it was entitled to moral damages for alleged “non-pecuniary harm.”¹²¹⁵ Specifically, Merck claimed “obvious harm” to its “reputation and prestige” in Ecuador.¹²¹⁶ In its Reply, Merck all but abandoned this claim. Merck offered no more data on this alleged “harm” and simply elected to keep moral damages in its Prayer for Relief.¹²¹⁷ By staying silent in its Reply, Merck also failed to contest the arguments Ecuador raised in its Counter-Memorial. Ecuador’s Counter-Memorial had demonstrated that investment treaty tribunals have been highly reluctant to entertain claims for moral damages.¹²¹⁸ For example, in *Rompetrol v. Romania*, the tribunal cautioned that a discretionary amount of moral damages cannot be awarded as a proxy for the inability to *prove* actual economic loss.¹²¹⁹ That tribunal further noted that reputational damage to a foreign investor shows itself in some economic fashion; it is just another example of actual economic loss or damage “subject to the usual rules of proof.”¹²²⁰

684. In the present arbitration, Merck has not produced a single shred of evidence to support its moral damages claim.¹²²¹ Now, after two rounds of detailed pleadings, Merck has provided *no*

¹²¹⁵ Claimant’s Memorial, ¶ 415(f).

¹²¹⁶ *Id.*

¹²¹⁷ Claimant’s Reply, ¶ 792(i).

¹²¹⁸ Ecuador’s Counter-Memorial, ¶¶ 528-533 (citing *Joseph Charles Lemire v. Ukraine*, ICSID Case No. ARB/06/18, Award (28 Mar. 2011) (Fernández-Armesto, Paulsson, Voss) (“*Lemire*”), ¶ 333 (CLM-130); *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); *Rompetrol*, ¶ 289 (RLA-121)). See also *Yury Bogdanov v. Republic of Moldova*, SCC Arbitration No. V (114/2009), Award (30 Mar. 2010), ¶¶ 96, 98 (RLA-177); *Biloune & Marine Drive Complex Ltd. v. Ghana Investments Centre and the Government of Ghana*, 95 ILR 183 (1993) (RLA-149) (where the claimant received no moral damages despite an unwarranted arrest and detention, as well as a variety of harassment tactics).

¹²¹⁹ *Rompetrol*, ¶ 289 (RLA-121).

¹²²⁰ *Id.*

¹²²¹ See Ecuador’s Counter-Memorial, ¶ 527.

evidence of any “lost reputation,” “lost credit,” or “lost social position.”¹²²² Despite this harm being so “obvious,” Merck failed to offer *any* quantification—let alone any further explanation—of its so-called loss.

685. In sum, there is nothing for this Tribunal to find, and Merck’s claim for moral damages must accordingly be dismissed.

E. Merck Is Not Entitled To The Injunctive Relief It Seeks

686. In its Reply, Merck introduced a request for specific performance in its Prayer for Relief. First, Merck asks that Ecuador—including its courts, its executive branch, and its national police—be directed to take all steps within its power to prevent enforcement of any future judgment against Merck in the *NIFA v. MSDIA* case, both within and outside of Ecuador.¹²²³

687. But Merck’s Reply fails to provide any explanation or supporting authority whatsoever as a basis of this extraordinary request. This, alone, is reason to dismiss this claim.

688. In addition, however, restitution in kind in the international law of State responsibility is subject to stringent conditions, including that it “does not involve a burden out of all proportion to the benefit deriving from restitution instead of compensation.”¹²²⁴ In the present case, the requested measures would place an enormous burden on Ecuador, far out of proportion to any benefit they would bestow on a single litigant, Merck, in a private litigation in which the State is not even a party. In particular, compliance with the specific performance obligation Merck requests would contravene Ecuador’s Constitution and violate the rights under law of litigants in

¹²²² See *Lemire*, ¶ 333 (CLM-130).

¹²²³ Claimant’s Reply, ¶ 792(d); Claimant’s Supplemental Reply, ¶ 101(e).

¹²²⁴ ILC, *Draft Articles*, Commentary on Art. 35, pp. 96, 98 (CLM-330).

Ecuadorian courts, thereby exposing Ecuador to liability under its own domestic law.¹²²⁵ Any recommendation by the Tribunal that the Ecuadorian executive interfere with the enforcement of a court decision would contravene the doctrine of separation of powers¹²²⁶ and the independence of the Ecuadorian judiciary, both principles explicitly enshrined in the Ecuadorian Constitution.¹²²⁷ Finally, compliance with Merck’s requested order for specific performance may also expose Ecuador to international State responsibility.¹²²⁸

689. Second, Merck’s Reply also requests, for the first time, that Ecuador provide it with a blanket financial indemnity in relation to damages resulting from the “enforcement of any future judgment” against it in the *NIFA v. MSDIA* litigation.¹²²⁹ Merck stipulated this indemnity was to include “the value of any assets paid, seized, forfeited, or otherwise foregone [...] and any other damages to the Claimant’s business both inside and outside of Ecuador, including lost profits.”¹²³⁰ What is more, Merck also requested that Ecuador be directed to pay it “damages for its legal costs in resisting enforcement of any future judgment” against it “within and outside of Ecuador.”¹²³¹

690. But Merck has failed to provide any explanation whatsoever in its pleadings as to why it is entitled to such extraordinary relief. This failure is, once more, reason enough to dismiss Merck’s claim. These sweeping requests are based on a series of hypothetical, future events; they

¹²²⁵ A fuller explanation of relevant principles of Ecuador’s Constitution in this regard can be found in Ecuador’s Opposition to Claimant’s Request for Interim Measures (24 July 2012), ¶¶ 181-184; Ecuador’s Rejoinder in Opposition to Claimant’s Request for Interim Measures (17 Aug. 2012), ¶¶ 223-233.

¹²²⁶ Constitution of the Republic of Ecuador (20 Oct. 2008), Art. 225 (RLM-15).

¹²²⁷ *Id.*, Art. 168.

¹²²⁸ A fuller explanation in this regard can be found in Ecuador’s Opposition to Claimant’s Request for Interim Measures (24 July 2012), ¶¶ 185-188; Ecuador’s Rejoinder in Opposition to Claimant’s Request for Interim Measures (17 Aug. 2012), ¶¶ 234-237.

¹²²⁹ Claimant’s Reply, ¶ 792(e); Claimant’s Supplemental Reply, ¶ 101(f).

¹²³⁰ Claimant’s Reply, ¶ 792(e); Claimant’s Supplemental Reply, ¶ 101(f).

¹²³¹ Claimant’s Reply, ¶ 792(f); Claimant’s Supplemental Reply, ¶ 101(g).

are nothing more than pure speculation. They are also not based in law. One of the core attributes of damages in international law (and in general) is its *certainty*.¹²³² Arbitral tribunals have routinely upheld the certainty requirement in their awards.¹²³³ In particular, tribunals have disallowed claims for lost profits when they were uncertain.¹²³⁴

691. In sum, there is no basis in law or in fact for Merck’s requests for injunctive relief, and they must be dismissed.

F. Conclusion

692. To conclude, in this arbitration, it was Merck—and only Merck—who bore the legal burden of proving damages in the claimed amount of US\$ 6,565,768.66—a figure that continues to rise. Merck *affirmatively used* the content of its legal bills to support its claim for damages, but then refused to provide the all-elusive narrative. As a result, it is impossible for Ecuador—or anyone, for that matter—to verify the huge sums Merck claims, much less to establish their causal connection to the alleged Treaty breaches. Merck also has no claim for moral damages and, revealingly, Merck’s Reply was silent on this so-called “reputational harm.” Nor is Merck entitled to its newly-invented request for specific performance, which is completely unsuited to the present case. Finally, Merck’s newly-found claims for an indemnity, including legal costs in relation to enforcement of any future judgment, are wholly speculative in nature.

693. Merck’s claims for damages are thus flawed, in law and in fact. The Tribunal must dismiss them in their entirety.

¹²³² ILC, *Draft Articles*, Commentary on Art. 36, p. 104 (CLM-330) (noting that tribunals have been “reluctant to provide compensation for claims with inherently speculative elements.”) (internal citations omitted); Ripinsky & Williams, p. 164 (RLA-168).

¹²³³ Ripinsky & Williams, p. 164 (RLA-168).

¹²³⁴ *Id.*

VII. CONCLUSION AND REQUEST FOR RELIEF

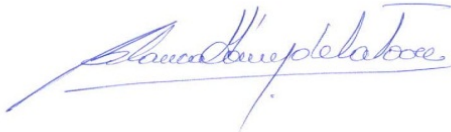
694. For the foregoing reasons and any further reasons that it may later submit, the Respondent, Republic of Ecuador, hereby respectfully requests that the Tribunal render an award in its favor:

- dismissing all of Merck's claims under the BIT as outside of the Tribunal's jurisdiction, inadmissible and/or constituting an abuse of the arbitral process, or in the alternative, for lack of any merit;
- denying in full each and every item of relief sought by Merck;
- 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.

695. The Republic expressly reserves its right to supplement or add to the above requests.

Respectfully submitted,

Dra. Blanca Gómez de la Torre



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