

**IN THE MATTER OF AN AD HOC ARBITRATION
UNDER THE UNCITRAL ARBITRATION RULES
PCA CASE NO. 2012-10**

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

Claimant

versus

THE REPUBLIC OF ECUADOR

Respondent

**CLAIMANT'S REPLY TO RESPONDENT'S OPPOSITION
TO ITS REQUEST FOR INTERIM MEASURES**

5 August 2012

I. INTRODUCTION

1. It is telling that in the more than 100 pages of its Opposition to Claimant's Request for Interim Measures, Ecuador offers no defense of the Ecuadorian courts' \$150 million judgment against MSDIA in the *NIFA v. MSDIA* litigation. Instead, Ecuador devotes the vast majority of its Opposition to the argument that MSDIA's Request is premature because Ecuador's National Court of Justice has not yet issued its decision in the case and devotes a good portion of the rest to the suggestion that MSDIA should avoid irreparable injury to its Ecuadorian investment by paying the arbitrary \$150 million judgment at issue in this arbitration. None of Ecuador's arguments has merit.

2. It is true that the *NIFA v. MSDIA* litigation is currently on appeal to Ecuador's National Court of Justice and that the Court has not yet issued its decision. Far from a reason not to issue the interim measures MSDIA has requested, this is, in fact, precisely why there is an urgent need for them.

3. Ecuador does not dispute that the National Court's decision could be issued any day, and Ecuador effectively concedes that the decision will almost certainly be issued long before a merits award in this arbitration. If, as there is every reason to expect, the decision of the National Court of Justice is adverse to MSDIA and sustains the manifestly unjust and irrational decision of Ecuador's lower courts, that decision will be immediately enforceable against MSDIA's assets in Ecuador. If there are by that time no interim measures of protection in place preventing the enforcement of that judgment, MSDIA's assets will be subject to immediate seizure and sale at public auction, and the business MSDIA has been operating in Ecuador for nearly forty years will be irrevocably destroyed. All of this will occur before a final award in this arbitration. On any view, this constitutes an urgent threat of irreparable harm, which the requested interim measures of protection are necessary to prevent.

4. Ecuador's principal objections to the requested relief are without merit:

a. Most fundamentally, MSDIA has established a *prima facie* case that the extant corrupt and irrational \$150 million judgment constitutes a denial of justice because any further remedies in Ecuador would be futile and ineffective. Ecuador's court system, in the words of Ecuador's current President, is "corrupt" and a "barbarity," and the *NIFA v. MSDIA* case, throughout its long course in Ecuador's courts, has borne that out. The notorious unreliability of Ecuador's judicial system and its unbroken record in this case of irrational, adverse rulings, establishes a *prima facie* case that MSDIA's further appeal rights are not effective. Moreover, the question whether there has been a denial of justice, including the question whether MSDIA is required to or did exhaust local remedies, is reserved for the Tribunal's consideration of the merits of the case, when there almost certainly will be a final judgment from Ecuador's National Court.

b. Ecuador is also wrong when it suggests that the requested measures are not necessary because MSDIA could simply pay the \$150 million judgment against it and avoid any irreparable harm to its business in Ecuador. MSDIA will not pay the judgment, which it considers unlawful and illegitimate, because it far exceeds the value of MSDIA's Ecuadorian business. It would be irrational for MSDIA—or any

company—to pay a \$150 million judgment in order to avoid the destruction of a business worth far less than that amount. Many other investment arbitration tribunals have held in similar circumstances that a claimant is not required to choose between paying the very amounts that are the subject of the parties’ dispute or suffering the destruction of its entire investment. Interim measures are intended and have frequently been issued to protect against just such a dilemma. Ecuador’s argument is unavailing here as it has been in those other cases.

5. In short, Ecuador has not offered any serious objection to MSDIA’s requested interim measures. MSDIA has met all requirements typically considered in connection with an interim measures request, including that the Tribunal has *prima facie* jurisdiction to hear the dispute, that the requested measures are necessary to avoid irreparable harm, and that the requested measures are urgent because the threatened harm is likely to occur before the Tribunal’s final award in the arbitration. MSDIA has also made a *prima facie* showing of the merits of its case and has demonstrated that the threatened harm to MSDIA far outweighs any conceivable harm to Ecuador resulting from the requested measures.

6. In the sections that follow, MSDIA responds to the arguments advanced by Ecuador and provides additional elaboration and support for its request for interim measures. Specifically:

a. In Section II, below, MSDIA responds in a single section to the various iterations of Ecuador’s argument that MSDIA cannot seek interim measures of protection because it has supposedly not fully exhausted local remedies in Ecuador;

b. In Section III below, MSDIA responds to Ecuador’s various jurisdictional arguments and demonstrates that it has (more than) established a *prima facie* case of the Tribunal’s jurisdiction;

c. In Section IV, below, MSDIA demonstrates that the requested interim measures are necessary in order to avoid irreparable harm to MSDIA’s business in Ecuador and that MSDIA is not required to and should not pay the \$150 million judgment against it in order to avoid that irreparable harm;

d. In Section V, below, MSDIA demonstrates that the requested interim measures are urgently needed because there is likely to be an adverse decision from the National Court of Justice, which would lead to enforcement of the judgment against MSDIA’s assets in Ecuador, prior to the Tribunal’s final award in this arbitration;

e. In Section VI, below, MSDIA demonstrates that it has made a *prima facie* case that it has been subject to a denial of justice in Ecuador’s courts because the \$150 million judgment against it is the result of judicial proceedings that were manifestly unfair and biased, failed to provide minimal due process protections, were likely tainted by judicial corruption, and resulted in an entirely irrational judgment that has no support in fact or law;

f. In Section VII, below, MSDIA demonstrates that the threatened harm to it if the requested interim measures are not granted far outweighs any conceivable harm to Ecuador if the measures are granted; and

g. In Section VIII, below, MSDIA demonstrates that it also has a right to interim measures of protection aimed at preventing the aggravation of this dispute or any impairment of the Tribunal's ability to award effective relief in these proceedings.

7. For all of the reasons set forth in MSDIA's Request for Interim Measures and set forth below, the Tribunal should grant the requested interim measures of protection.

II. GIVEN THE HISTORY AND STATUS OF THE ECUADORIAN COURT PROCEEDINGS, MSDIA IS ENTITLED AT THIS TIME TO THE INTERIM MEASURES IT SEEKS

8. Ecuador advances numerous versions of the same argument, contending that this Tribunal has no power to award interim measures of protection because Ecuador's National Court of Justice has not yet ruled on MSDIA's petition for cassation with respect to the Ecuadorian appellate court's \$150 million ruling in *NIFA v. MSDIA*.¹ It is inescapable that the vast majority of Ecuador's Opposition is devoted to this single assertion. These efforts are misplaced.

9. MSDIA has suffered two highly suspect rulings from Ecuador's courts, the second a final, unanimous decision of an Ecuadorian court of appeals awarding \$150 million on what is, objectively, a frivolous claim. As demonstrated in MSDIA's Request for Interim Measures and below, to this point in this decade-long litigation, the proceedings and judgments at all three levels of Ecuador's judicial system have reflected pervasive bias. It is true that yet another appeal is pending in Ecuador's National Court of Justice; but Ecuador does not deny that the judgment of that court may arrive at any time. If the judgment of Ecuador's National Court of Justice has not issued before this Tribunal holds its own hearing on September 4, 2012 in The Hague, it may issue on September 5 or on any date thereafter. Absent interim measures that prevent enforcement of an adverse judgment against MSDIA's assets in Ecuador, upon issuance the judgment will have immediate, severe and irreparable consequences for MSDIA. Specifically, it will destroy MSDIA's business in Ecuador. If (as Ecuador demands) the National Court of Justice's judgment had already issued before MSDIA sought interim measures, then MSDIA's business would already have been destroyed, and interim measures would be unavailing. This is precisely why interim measures of protection are both necessary and urgent right now.

A. The Reality of Ecuador's Courts and the History of the NIFA v. MSDIA Case Render Hollow Ecuador's Suggestion that Its National Court of Justice's Judgment Is Not Imminent and/or May Not Be Adverse to MSDIA

10. Ecuador argues first that the judgment of its National Court of Justice will not necessarily be issued imminently and that the requested interim measures therefore are not necessary.² But this is a nonsequitur. Ecuador offers no assurance that its court will wait until the processes of this Tribunal are complete and a final award is in place, and *indeed Ecuador does not deny that its National Court of Justice can rule at any time*.³ The history of this case demonstrates that

¹ See Respondent's Opposition, at pages 1-38, 44-56.

² See Respondent's Opposition, at paras. 8, 9, 104(a)-109.

³ See Respondent's Opposition, at paras. 10, 104(a).

rulings may suddenly accelerate and deviate significantly from the norm.⁴ Accordingly, the threat of irreparable injury is imminent and interim measures are appropriate.

11. As discussed in more detail below, apart from a final ruling, the proceedings before Ecuador's National Court of Justice, including briefing and oral argument, have been completed.⁵ There are no steps left for the parties or Ecuador's court to take before the issuance of the court's decision.⁶ Thus, Ecuador's court may issue its judgment at any time on any day. In other words, the judgment is imminent.

12. Ecuador does not deny that its court's decision could be issued at any moment. Ecuador argues only that its court is not *required* to rule until 270 business days after the close of proceedings.⁷ Obviously, however, this outside limit says nothing at all about when Ecuador's court actually will issue its judgment. Ecuador's courts are free to impose irreversible and severe injury on MSDIA at any moment, and this is sufficient to render that injury "imminent" and support interim measures here.⁸ Moreover, even if Ecuador's court took the maximum 270 days allowed under Ecuadorian law, its decision would still be issued well before a final award on the merits in this arbitration, making that judgment "imminent" within the broadly-accepted definition under international investment law.

13. In any event, there is reason in the history of *NIFA v. MSDIA* to expect a judgment soon. As discussed in more detail below, both Ecuador's court of appeals and its National Court of Justice have previously, at certain times, processed certain steps in the *NIFA v. MSDIA* litigation with highly unusual expedition, apparently to advantage the plaintiff or facilitate acts of corruption in its favor.⁹ Among other things, Ecuador's court of appeals issued its decision in the *NIFA* litigation without prior notice and (improperly) while certain procedural motions filed by MSDIA were still pending.¹⁰ As described in more detail below, this improper and highly unusual action by Ecuador's appellate court deprived MSDIA of its right to file a final written brief and to request a final oral argument.¹¹ Ecuador's National Court of Justice itself has expedited MSDIA's appeal in highly unusual and unexplained ways, such as by accepting the case and scheduling oral argument in advance of hundreds of other, earlier filed cases and by scheduling oral argument for Monday, December 26, when no other cases had ever been scheduled for arguments on Mondays *or* during the week after Christmas.¹² These prior actions of Ecuadorian courts in this case suggest that the judgment could issue at any time, without warning.

⁴ See *infra* at paras. 246-258.

⁵ See *infra* at para. 180.

⁶ See *infra* at para. 180.

⁷ Respondent's Opposition, at paras. 107-108.

⁸ See *infra* at paras. 180-186. See also Claimant's Request for Interim Measures, at para. 71.

⁹ See *infra* at paras. 246-258.

¹⁰ See *infra* at para. 247. See also Claimant's Notice of Arbitration, at paras. 120-121.

¹¹ See *infra* at para. 247. See also Claimant's Request for Interim Measures, at para. 132.

¹² See *infra* at para. 258. See also Claimant's Request for Interim Measures, at para. 157.

14. Ecuador also contends that its National Court of Justice may decide in favor of MSDIA, and that the requested interim measures therefore cannot be necessary.¹³ This, too, is a nonsequitur. A party seeking interim measures of protection does not need to show that the threatened harm is *certain*, but only that it is *likely*.¹⁴ If the Tribunal were to issue interim measures of protection, and subsequently the National Court of Justice were to rule in favor of MSDIA, then those interim measures of protection would have no effect. MSDIA has asked only for an order preventing enforcement of an adverse judgment. If—as is unlikely given the history—the judgment issued by the National Court of Justice is not adverse to MSDIA, then the Tribunal’s order would impose no burden on Ecuador because it would not obstruct any processes or actions. If, however, Ecuador’s court’s judgment is adverse to MSDIA, then interim measures will be needed to prevent irreparable harm.

15. MSDIA has shown that there is a substantial likelihood that it will need the requested interim measures, because there is a very substantial risk that the decision of Ecuador’s National Court of Justice will be adverse. As discussed in detail in MSDIA’s Request for Interim Measures and in the sections below, there is substantial evidence that the proceedings in the first instance court and the court of appeals were driven by bias in favor of the Ecuadorian plaintiff. Among other things:

- Ecuador’s courts in both proceedings failed to give MSDIA notice of important rulings;¹⁵
- the decision of Ecuador’s first instance judge was not written by her but was likely the work of the plaintiff’s lawyers;¹⁶
- Ecuador’s court of appeals rejected the expert opinions of well-credentialed court-appointed experts who concluded that there was no basis for liability or damages in the case and instead relied on a second set of court-appointed experts who lacked any credentials or experience and were appointed under highly suspect circumstances;¹⁷
- Ecuador’s court of appeals refused to consider any of the evidence submitted by MSDIA, holding (without any basis) that MSDIA had waived reliance on its evidence;¹⁸
- Ecuador’s courts in both proceedings purported to find that MSDIA was liable for an antitrust violation, when Ecuador at the time had no antitrust law, a fact which Ecuador acknowledged publicly at the time;¹⁹ and

¹³ See Respondent’s Opposition, at paras. 4, 15, 40, 42.

¹⁴ See *infra* at paras. 112-120. See also Claimant’s Request for Interim Measures, at paras. 71-80.

¹⁵ Claimant’s Request for Interim Measures at paras. 92, 96-97.

¹⁶ Claimant’s Request for Interim Measures at para. 95 & n.109.

¹⁷ Claimant’s Request for Interim Measures at paras. 98-128.

¹⁸ Claimant’s Request for Interim Measures at paras. 129-131.

¹⁹ Claimant’s Request for Interim Measures at paras. 133-141.

- the amount of damages awarded against MSDIA—\$200 million by Ecuador’s trial court and \$150 million by Ecuador’s court of appeals—has no conceivable relationship to any amount of loss conceivably suffered by NIFA, which at the time had annual profits of only \$2,165, as a result of the failed \$1 million real estate transaction at issue in the case.²⁰

16. In addition to the extensive evidence of bias and manifest lack of due process in the lower court proceedings, which caused significant prejudice to MSDIA, there is also evidence suggesting a high probability of outright corruption in those proceedings. Among other things, the evidence shows that 1) NIFA’s Managing Director and principal owner, 2) the Ecuadorian judge who issued the first instance court decision, and 3) the Ecuadorian judge who authored the court of appeals decision, *all* have been officially investigated for engaging in corruption in other matters, matters involving strikingly similar allegations to the circumstances here.²¹ Notably, NIFA’s Managing Director and principal owner was found in an official government report to have been a major figure in a multi-million dollar bribery scam against the government.²² Moreover, *both Ecuadorian judges* responsible for the judgments issued here—both the first instance and the appellate judge—were later dismissed from their judicial functions in connection with allegations of malfeasance, although the court of appeals judge was later reinstated.²³ This evidence, together with the fact that Ecuador’s entire justice system is notoriously corrupt, as Ecuador’s own President, its Council of the Judiciary, and other key government officials have acknowledged publicly,²⁴ leads to a reasonable expectation that the results of the proceedings in Ecuador’s National Court of Justice will be adverse to MSDIA as well.

17. That expectation is further bolstered by events in Ecuador’s National Court of Justice itself, where without explanation or reason this case was leap-frogged ahead of hundreds of other cases and subjected to a special and unprecedented hearing the day after Christmas, all in an apparent rush to judgment prior to a change in judicial personnel in January 2012.²⁵ Moreover, two of the three judges associated with those questionable events—although initially dismissed as part of an asserted purge of judges not qualified by talent or integrity to serve, have been reappointed as so-called “temporary judges” who will be charged, specifically, with ruling on cases pending in Ecuador’s National Court of Justice at the time of the personnel change.²⁶ For all of those reasons, while one may hope for justice against experience and the appearance of things, the risk of another unjust and biased judgment is without doubt very significant.

18. If Ecuador’s National Court of Justice issues a judgment adverse to MSDIA when no interim measures of protection are in place, the underlying plaintiff, NIFA, will take immediate steps to enforce the judgment in Ecuador. As set out in the First Expert Opinion of Dr. Jaime

²⁰ Claimant’s Request for Interim Measures at paras. 142-147.

²¹ *See infra*, at paras. 225-245.

²² *See infra* at paras. 226-229.

²³ *See infra* at paras. 230-245.

²⁴ *See infra* at paras. 216-222. *See also* Claimant’s Notice of Arbitration, at paras. 145-146.

²⁵ *See infra* at paras. 252-258. *See also* Claimant’s Request for Interim Measures, at paras. 156-159.

²⁶ *See infra* at para. 261.

Ortega Trujillo, the process of enforcing judgments in Ecuador follows a set of procedures that can be completed in a matter of weeks.²⁷ Thus, NIFA could enforce a judgment against MSDIA's assets in Ecuador in a matter of weeks, completely destroying MSDIA's long-established business there.

19. If no interim measures prevent enforcement at the time the court issues a judgment in favor of NIFA, it will quickly be too late for this Tribunal to act. Even if NIFA were not otherwise inclined to move swiftly, the existence of this arbitration would give NIFA every incentive to do so. And in the same way that the proceedings in the underlying litigation have often been subject to improper and highly unusual deviations from Ecuadorian civil procedure rules and customary time frames, there is every reason to fear that Ecuador's courts would be amenable to extreme expedition of enforcement.

20. For all of these reasons, irreparable injury is imminent and interim measures are appropriate and necessary.

B. Ecuador's Jurisdictional Argument Ignores Settled Principles of Investment Law

21. Ecuador also argues that because the National Court of Justice has not yet issued its judgment, this Tribunal lacks jurisdiction here. Ecuador's argument is wrong for several reasons.

22. Most fundamentally, the question of whether MSDIA has suffered a denial of justice is a decision on the merits of the case and is not a question that can or should be determined at the stage of the Tribunal's consideration of a request for interim measures or even in connection with a decision on its own jurisdiction. Many authorities confirm that the question whether there has been a treaty violation must not be prejudged in connection with an interim measures application, but must be reserved for the merits. As the ICJ and numerous investment tribunals have held, "it is at the merits that one sees 'whether there really has been a breach.'"²⁸

23. Specifically in connection with allegations of denial of justice, the authorities uniformly establish that questions about exhausting local remedies go to whether there has been a denial of justice, and thus are reserved for the merits stage of the case and cannot be prejudged in connection with consideration of jurisdictional objections or interim measures requests.

24. In *Loewen Group, Inc. and Raymond L. Loewen v. U.S.*, the tribunal declined to consider the claimants' alleged failure to exhaust local remedies in connection with a jurisdictional objection. The tribunal instead reserved the issue for "the hearing on the merits," explaining: "Similarly put over is consideration of the Respondent's submissions that the Loewen companies failed to pursue various local remedies which, according the Respondent, were open to them and

²⁷ Expert Opinion of Dr. Jaime Ortega Trujillo, dated June 11, 2012, ("First Ortega Expert Opinion"), at para. 19.

²⁸ Exhibit CLM-86, *Oil Platforms, (Iran v. United States)*, Judgment (12 December 1996) (Higgins, J. Separate Opinion), at para. 34 (citing *Mavrommatis Palestine Concessions, Judgement No. 2, 1924, P.C.I.J., Series A, No. 2*, p. 23)). See also Exhibit CLM-12, *Paushok et al. v. Gov't of Mongolia*, UNCITRAL Arbitration Rules, Order on Interim Measures (2 September 2008), at para. 55; *Maffezini v. Kingdom of Spain*, ICSID Case No. ARB/97/7, Procedural Order No. 2 (28 October 1999), at para. 21.

would, if successful, have resulted in an effective remedy under municipal law. The hearing of this ground of objection *should therefore stand over to the hearing on the merits.*²⁹

25. Similarly, in *Saipem S.p.A. v. The People's Republic of Bangladesh*, the tribunal expressly rejected the respondent's attempt to force the claimant to establish that it had exhausted local remedies in connection with its request for provisional measures. The tribunal held that:

“Whether the requirement of exhaustion of local remedies may be applicable by analogy to an expropriation by the acts of a court and whether, *in the affirmative, the available remedies were effective* are questions to be addressed *with the merits of the dispute*. The relevant test for jurisdictional purposes requires that the facts *alleged may constitute* a breach of Article 5 of the BIT. Saipem's contention that the courts of Bangladesh expropriated its investment and that the available remedies were futile meets this test.”³⁰

26. Other authorities considering this issue are in agreement.³¹ In his leading treatise on denial of justice, Jan Paulsson similarly explains that “exhaustion of local remedies in the context of denial of justice is therefore not a matter of procedure or admissibility, but an inherent material element of the delict.”³² Ecuador's argument thus finds no support in the authorities that have considered the issue.

27. Finally, Ecuador's argument ignores that the relevant showing of jurisdiction required at this stage is a minimal *prima facie* showing.³³ So long as MSDIA has articulated a plausible basis for the Tribunal's jurisdiction, the Tribunal should proceed to consider MSDIA's Request. There can be no serious question that MSDIA has met this minimal *prima facie* standard.

²⁹ Exhibit CLM-59, *Loewen Group, Inc. and Raymond L. Loewen v. United States*, ICSID Case No. ARB(AF)/98/3, Decision on hearing of Respondent's objection to competence and jurisdiction (9 January 2001), at para. 74 (emphasis added). The tribunal in *Chevron Corporation and Texaco Petroleum Corporation v. The Republic of Ecuador* relied on the *Loewen* decision in holding that the “[e]xhaustion of local remedies” in the context of a claim for denial of justice “is therefore an issue of the merits, *not jurisdiction*,” and that “a full examination of this issue must be reserved for the merits phase of this proceeding.” Exhibit CLM-44, *Chevron Corporation and Texaco Petroleum Corporation v. The Republic of Ecuador*, PCA Case No. 2009-23 (UNCITRAL), Interim Award (1 December 2008), at para. 234 (emphasis added). More recently, the same tribunal applied this principle in connection with a request for interim measures, and granted claimants' request for interim measures even though respondent disputed that claimants, who alleged a denial of justice, had exhausted local remedies. Exhibit CLM-6, *Chevron Corporation and Texaco Petroleum Corporation v. The Republic of Ecuador*, PCA Case No. 2009-23, Second Interim Award on Interim Measures (16 February 2012), at pp. 1-4.

³⁰ Exhibit CLM-15, *Saipem S.p.A. v. The People's Republic of Bangladesh*, ICSID Case No. ARB/05/07, Decision on Jurisdiction and Recommendation on Provisional Measures (2007), at para. 153 (emphasis added).

³¹ See Exhibit RLM-32, *Jan de Nul v. Egypt*, ICSID Case No. ARB/04/13, Award (6 November 2008), at para. 255 (“For the avoidance of doubt, the Tribunal notes before pursuing the requirement at issue here [exhaustion] relates to the merits of the denial of justice claim.”); Exhibit RLM-5, *Alps Finance and Trade AG v. Slovak Republic*, UNCITRAL, Award (5 March 2011), at para. 68 (“Indeed, in investment arbitrations the *common practice shows that attribution and exhaustion of local remedies are ruled in the merits decision.*”) (emphasis added) (citing Procedural Order No. 4 (9 September 2010)); *The Republic of Ecuador*, PCA Case No. 2009-23, Second Interim Award on Interim Measures (16 February 2012), at pp. 1-4.

³² Exhibit CLM-99, J. Paulsson, *Denial of Justice in International Law* 7 (2005).

³³ See Claimant's Request for Interim Measures, at para. 31, n. 18.

C. *Ecuador's Merits Argument Ignores the Facts and the Law*

28. Ecuador argues that the status of the \$150 million judgment in Ecuador's courts undermines MSDIA's *prima facie* case on the merits of its claims. Even if a *prima facie* showing on the merits is required in connection with a request for interim measures (and most authorities conclude that it is not³⁴), Ecuador is wrong.

29. As mentioned above, the question of whether MSDIA has in fact suffered a denial of justice is a question for the merits phase of this case.³⁵ Numerous authorities confirm that during its consideration of MSDIA's interim measures application the Tribunal cannot prejudge the ultimate merits question, namely whether MSDIA has suffered a denial of justice through the actions of the Ecuadorian courts.³⁶ The Tribunal's consideration would be limited to, at most, whether MSDIA has alleged a *prima facie* case.

30. MSDIA has plainly established a *prima facie* case of denial of justice. As set out above and in further detail below,³⁷ there is substantial evidence that the Ecuadorian courts' \$150 million judgment was the result of an unfair and ineffective judicial system, one that failed to follow procedures that guarantee procedural due process or apply the rule of law. The proceedings in the Ecuadorian courts have been characterized throughout by a manifest lack of due process, bias in favor of the Ecuadorian plaintiff, apparent corruption on the part of the judges, and a manifestly unjust judgment that finds no support in the factual record of the case or in Ecuadorian law. Indeed, the judgment is so manifestly without merit that it is, in and of itself, stark evidence of the failures of the Ecuadorian judicial system. Simply put, no fair, rational, and competent tribunal could have reached the decision that not one, but two, levels of Ecuador's judiciary, including a unanimous court of appeals panel, have endorsed.

31. Ecuador has offered no substantive defense of the judgment against MSDIA, and indeed, it could not do so. Instead, Ecuador's argument is that regardless of the deficiencies here—even deficiencies that are plainly symptomatic of Ecuador's entire judicial system that is, in Ecuador's President's words, "corrupt" and "falling in pieces"³⁸—MSDIA must await decision from Ecuador's highest court before it can make a *prima facie* showing of its case. This is wrong for several reasons.

32. First, the proper question is whether MSDIA has made a *prima facie* showing that it will likely prevail on its claim when the Tribunal reaches the merits.³⁹ Even Ecuador's own expert on Ecuadorian civil procedure admits that Ecuador's National Court of Justice is required to issue its decision no later than either December 2012 or January 2013,⁴⁰ a date that in all probability

³⁴ See *infra* at paras 195-196.

³⁵ See *above* at para. 22.

³⁶ See *infra* at para 195.

³⁷ See *infra* at paras 15-17, 223-263.

³⁸ Exhibit C-110, *President Correa. they wanted to disparage the government and they could not*, OPINIÓN, Nov. 13, 2011, <http://www.diariopinion.com/primeraPlana/verArticulo.php?id=812332>. See also Claimant's Notice of Arbitration, at para. 146.

³⁹ See *below* at paras. 203-206.

⁴⁰ Expert Opinion on Ecuadorian Law of Luis Alberto Moscoso Serrano ("Moscoso Legal Opinion"), para 8.

will be prior to the Tribunal's final award on the merits. By the time of an award in this case, therefore, Ecuador's objection that an National Court of Justice ruling must have occurred will be fully satisfied.

33. Moreover, Ecuador's objection has no force here. As Ecuador's Opposition acknowledges, the general principle that denial of justice claims require completion of proceedings before the highest judicial tribunal is not without limitation.⁴¹ A claimant asserting a denial of justice claim is required to exhaust local remedies only where those remedies can actually provide a meaningful remedy to the claimant.⁴² Where the available local remedies would be futile or ineffective, or where the judicial system is so fundamentally flawed that there is no meaningful prospect of redress in subsequent legal proceedings, the claimant may pursue its denial of justice claim without first exhausting local remedies.⁴³ Indeed, the circumstances here amply illustrate the wisdom and importance of that rule.

34. Here, the evidence of bias, corruption and manifest lack of due process in the underlying proceedings are not isolated anomalies that can be corrected through subsequent court proceedings. They are instead symptoms of a larger, systemic problem in Ecuador's judiciary. We discuss below the many authorities in Ecuador and around the world that have recognized that Ecuador's judiciary is, in President Correa's own words, "a totally inefficient and corrupt judicial system that is falling in pieces."⁴⁴ President Correa has acknowledged "the barbarity that is our justice system."⁴⁵ Given the Ecuadorian President's words, and similar conclusions asserted publicly by Ecuador's legislature, a former President of Ecuador's Supreme Court and its Council on the Judiciary,⁴⁶ Ecuador cannot deny these realities. In light of these indisputable deficiencies, and particularly in light of the history of this case, MSDIA has demonstrated—and at the very least has made a *prima facie* showing—that remaining remedies offered in the Ecuadorian courts are futile and ineffective. To hold that MSDIA must await yet another biased and unfair decision from Ecuador's courts before seeking protection under the BIT, with the result that MSDIA and other similarly situated businesses could never protect against the destruction of their businesses at the hands of such a judiciary, would be to read the "futility" and "ineffectiveness" exceptions out of the exhaustion rule.

35. Finally, wholly apart from MSDIA's *prima facie* case of denial of justice, the pendency of a decision from the National Court of Justice is entirely irrelevant to the other treaty violations at issue here. In particular, MSDIA has alleged that Ecuador violated Article II(7) of the Treaty,⁴⁷ which requires Ecuador to provide "effective means" of asserting claims and enforcing rights in Ecuador's courts.⁴⁸ Other tribunals considering this provision have held that Article

⁴¹ See below at paras. 207-213.

⁴² See below at paras. 207-213.

⁴³ See below at paras. 207-213.

⁴⁴ Exhibit C-110, *President Correa. they wanted to disparage the government and they could not*, OPINIÓN, Nov. 13, 2011, <http://www.diariopinion.com/primeraplana/verArticulo.php?id=812332>

⁴⁵ Exhibit C-101, *Correa anticipates that he will not be able to completely change justice*, EL UNIVERSO, Feb. 11, 2011, <http://www.eluniverso.com/2011/02/23/1/1355/correa-anticipa-podra-cambiar-totalmente-justicia.html>

⁴⁶ See *infra* at paras 216-222.

⁴⁷ See Claimant's Notice of Arbitration, at para. 159(d).

⁴⁸ See Exhibit C-1, Ecuador-United States BIT, Art. II(7).

II(7) is a *lex specialis*, which imposes a higher burden on Ecuador than customary international law.⁴⁹ Those tribunals have held that Article II(7) imposes obligations to provide an effective system of justice as a whole and also to provide effective execution of justice in specific cases.⁵⁰ Those tribunals have also held that Article II(7) does not require complete exhaustion of local remedies.⁵¹

36. MSDIA has certainly established a *prima facie* case that Ecuador violated Article II(7) by failing to provide an effective means for MSDIA to pursue its legal defenses and to protect its rights in the Ecuadorian courts. Indeed, the admissions of Ecuador's President and other key Ecuadorian government officials, and the highly deficient performance of its judiciary in this case certainly demonstrate a *prima facie* showing that Ecuador has breached this Treaty guarantee. As a result, even leaving aside whether it has made a *prima facie* case of denial of justice under customary international law, MSDIA is entitled to the interim measures of protection it seeks.

D. Ecuador's Argument Regarding Exhaustion of Local Remedies Would Deprive Any Claimant from Ever Seeking Interim Measures of Protection To Protect Against the Adverse and Irreparable Consequences of a Denial of Justice

37. Ecuador argues that MSDIA should not be allowed to seek interim measures of protection until Ecuador's National Court of Justice issues an adverse judgment.⁵² Indeed, even *after* there is a final and enforceable judgment from the National Court of Justice, Ecuador maintains that MSDIA still could not pursue its claims or seek interim measures of protection until it pursued other, similarly unlikely, avenues of relief.⁵³

38. Thus, under Ecuador's interpretation of the applicable Treaty provisions and Ecuadorian procedural law, a claimant who is subject to a violation of due process in Ecuador's courts – regardless of the nature and severity – must first (i) appeal to Ecuador's National Court of Justice and wait for that Court to issue its final judgment, (ii) then appeal that judgment to Ecuador's Constitutional Court (notwithstanding Ecuador's concession that the appeal to its Constitutional Court would not suspend enforcement of the judgment⁵⁴) and wait for the Constitutional Court to issue *its* final decision, (iii) then send a notice of dispute to Ecuador regarding the denial of justice it has suffered, (iv) then wait out a six-month "cooling off" period, (v) then initiate arbitration, and (vi) then wait until a Tribunal is constituted to consider the claimant's claims. Then, and only then, according to Ecuador, could the claimant seek interim measures of protection from the enforcement of the judgment. Of course, by the time the claimant had gone through all of these steps—indeed, by the time the first of the six had come to pass—the opportunity to prevent irreparable harm as a result of enforcement of the judgment would be lost.

⁴⁹ See *infra* at paras 264-266.

⁵⁰ See *id.*

⁵¹ See *id.*

⁵² See Respondent's Opposition, at paras. 3, 8, 17.

⁵³ See Respondent's Opposition, at paras. 43, 106.

⁵⁴ See Moscoso Legal Opinion, at para. 17.

39. Ecuador's argument would effectively mean that no foreign investor could ever seek interim measures of protection to avoid the irreparable harm flowing from a denial of justice, and no investment tribunal could ever award interim relief to prevent this kind of irreparable harm to the investor's rights under a bilateral investment treaty. Ecuador's approach would impose unjustified limitations on the rights of foreign investors and the authority of investment tribunals and would be contrary to the premises of the investment arbitration system.

40. Finally, Ecuador's suggestion that the requested measures are unwarranted because they would impose unreasonable burdens on Ecuador even before a completed denial of justice had occurred is also wrong.⁵⁵ MSDIA is not requesting that the Tribunal order Ecuador to take any immediate steps whatsoever. Rather, MSDIA is requesting an order that would have effect only *after* a decision is issued by its National Court of Justice rendered the judgment subject to enforcement. Only at that time would the interim measures requested by MSDIA direct Ecuador to take steps to avert the irreparable consequences of Ecuador's multiple breaches of the Treaty, including *inter alia* by ensuring that the judgment is not enforced within its borders. The interim measures sought by MSDIA would impose no obligations and no burdens whatsoever on Ecuador until after its National Court of Justice issued a judgment adverse to MSDIA.

III. MSDIA HAS MADE A PRIMA FACIE SHOWING OF JURISDICTION

41. Ecuador argues that MSDIA has not made a *prima facie* showing that this Tribunal has jurisdiction to hear this dispute. Two of Ecuador's "jurisdictional" arguments are simply variations of its primary argument that MSDIA's claim is premature because the National Court of Justice has not yet issued its decision in the *NIFA v. MSDIA* litigation. As noted above and discussed below, the question whether MSDIA has suffered a denial of justice is properly determined at the merits stage of this arbitration, and Ecuador cannot transform its defense on the merits into a jurisdictional objection in order to deprive the Tribunal of the ability to ever reach the ultimate question in this case.

42. Ecuador asserts two other purported jurisdictional objections, neither of which has merit. First, Ecuador argues that MSDIA does not have an "investment" within the meaning of the Ecuador-United States BIT. This is not true. As discussed below, MSDIA has operated a pharmaceutical business in Ecuador for nearly forty years, with more than 100 employees and nearly \$30 million in annual sales.⁵⁶ On any view, MSDIA has made significant long-term commitments of capital and other resources in building this business, and it has assumed a significant degree of risk because it has an uncertain return on its investment.

43. Second, Ecuador argues that MSDIA cannot pursue this arbitration under the UNCITRAL Rules, because the notice of dispute it sent to Ecuador in 2009 referred to potential arbitration under the ICSID Rules. This is also without merit. Subsequent to MSDIA's notice of dispute, Ecuador renounced the ICSID Convention. At the time MSDIA submitted its Notice of Arbitration in 2011, Ecuador had made it plain that it would not voluntarily submit to ICSID arbitration. Ecuador's suggestion that, under those circumstances, MSDIA could not initiate

⁵⁵ See Respondent's Opposition, at para. 177. See also *below* at paras. 268-300.

⁵⁶ See *infra* at 76-77, 79, 146.

UNCITRAL arbitration, to which Ecuador specifically agreed under the Treaty, is cynical and legally wrong.⁵⁷

A. *An Investment Dispute Exists Between the Parties*

44. Ecuador argues that MSDIA has “no right capable of being protected by the indication of interim measures,” and therefore, there is no “actionable investment dispute” between the parties.⁵⁸ Ecuador argues that the Tribunal consequently has no jurisdiction to hear this case.⁵⁹ Ecuador’s argument is contrary to the text of the Treaty and international jurisprudence regarding the admissibility of claims and the jurisdiction of investment tribunals.

45. The Tribunal’s jurisdiction is based on Article VI of the Treaty, which provides in relevant part:

“For purposes of this Article, an *investment dispute* is a dispute . . . relating to . . . an *alleged breach* of any right conferred or created by this Treaty with respect to an investment.”

46. It is clear from this language that an investment dispute arises when a claimant alleges a breach of the Treaty, not when the claimant establishes such a breach. Interpretations of the plain meaning of the term “dispute” by the Permanent Court of International Justice (PCIJ) and the International Court of Justice (ICJ) support this construction. In the *Mavrommatis Palestine Concessions Case*, for example, the PCIJ gave the following broad definition:

“A dispute is a *disagreement on a point of law or fact*, a conflict of legal views or of interests between two persons.”⁶⁰

47. In another case, the ICJ referred to “a situation in which the two sides held clearly opposite views concerning the question of the performance or non-performance of certain treaty obligations.”⁶¹ ICSID tribunals have adopted similar descriptions of “disputes,” often relying on the definitions adopted by the PCIJ and ICJ.⁶² The Tribunal in *Burlington Resources v. Ecuador*, for example, found that a “dispute” under Article VI of the applicable BIT entails:

⁵⁷ See *infra* at 94-103.

⁵⁸ Respondent’s Opposition, dated 24 July 2012, paras. 54-63.

⁵⁹ *Id.*

⁶⁰ Exhibit CLM-64, *Mavrommatis Palestine Concessions (Greece v. Great Britain)*, Judgment (30 August 1924), 1924 PCIJ (Ser. A) No. 2, at 11 (emphasis added).

⁶¹ Exhibit CLM-85, *Interpretation of the Peace Treaties with Bulgaria, Hungary and Romania*, Advisory Opinion of 30 March 1950 (first phase), 1950 ICJ Rep. 65, at 74. See also, Exhibit CLM-80, *Texaco Overseas Petroleum Company and California Asiatic Oil Company v. Libyan Arab Republic*, Preliminary Award of 27 November 1975, 53 ILR 389, at 416 (1979) (referring to a “present divergence of interests and opposition of legal views”).

⁶² Exhibit CLM-62, *Maffezini v. Spain*, Decision on Jurisdiction (25 January 2000), 40 ILM 1129, at paras. 93-94 (2001); Exhibit CLM-81, *Tokios Tokelés v. Ukraine*, Decision on Jurisdiction (29 April 2004), at paras. 106-107; Exhibit CLM-60, *Lucchetti v. Peru*, Award (7 February 2005), at para. 48; Exhibit CLM-53, *Impregilo v. Pakistan*, Decision on Jurisdiction (22 April 2005), at paras. 302-303; Exhibit CLM-107, *AES v. Argentina*, Decision on Jurisdiction (26 April 2005), at para. 43; Exhibit CLM-9, *El Paso Energy Int’l. Comp. v. Argentina*, Decision on Jurisdiction (27 April 2006), at para. 61; Exhibit CLM-78, *Suez, Sociedad General de Aguas de Barcelona S.A., and InterAguas Servicios Integrales del Agua S.A. v. Argentina*, Decision on Jurisdiction (16 May 2006), at para. 29;

“(i) a *disagreement between the parties on their rights and obligations*, an opposition of interests and views, and (ii) an expression of this disagreement, so that both parties are aware of the disagreement.”⁶³

48. Investment tribunals have also relied upon the definition of “legal dispute” found in the Report of the Executive Directors of the International Bank for Reconstruction and Development to the Board of Governors accompanying the draft ICSID Convention:

“*The dispute must concern the existence or scope of a legal right or obligation*, or the nature or extent of the reparation to be made for breach of a legal obligation.”⁶⁴

49. Relying on that statement, a Tribunal operating under the UNCITRAL Rules in *National Grid v. Argentina* found that a dispute existed between the parties as to whether there were facts that would give rise to a claim under the Treaty. It explained that:

“Although this Report does not apply to the interpretation of the Treaty, we find the foregoing language illustrative of the appropriate approach in this case. The arguments advanced by the parties and the facts alleged by them show that *a dispute exists between them as to whether the protection due to the investor under the Treaty has been violated* and as to whether commitments were made to the investor under the laws of the Argentine Republic that would give rise to a claim under the Treaty . . . Therefore, the Tribunal is satisfied that a dispute exists between the parties concerning an obligation of the Respondent with regard to an investment of the Claimant, as required under Article 8 of the Treaty, and rejects this objection to the extent that it concerns the absence of a legal dispute.”⁶⁵

50. In light of the broad definition of “dispute” that is uniformly adopted by the relevant authorities, a claimant can establish the existence of an investment dispute simply by alleging a violation of an obligation under an investment treaty, which the state party denies. According to Ecuador’s own authorities, in order to determine whether there is an investment dispute, a tribunal should merely determine whether the “claims fall under the relevant provisions of the BIT for the purposes of jurisdiction of the Centre and competence of the tribunal (*but not whether the claims are well founded*).”⁶⁶

51. Given the breadth of this standard, it is not surprising that Ecuador has not pointed to a single investor-State case in which the tribunal declined jurisdiction because of the claimant’s

CLM-66, *M.C.I. v. Ecuador*, Award (31 July 2007), at para. 63.

⁶³ Exhibit RLM-12, *Burlington Resources Inc. v. Republic of Ecuador and PetroEcuador*, ICSID Case No. ARB/08/5, Decision on Jurisdiction, 2 June 2010, at paras. 289, 320, 325.

⁶⁴ Exhibit CLM-100, Report of the Executive Directors on the Convention on the Settlement of Investment Disputes between States and Nationals of Other States (18 March 1965), adopted by Resolution No. 214 of the Board of Governors of the International Bank for Reconstruction and Development on 10 September 1964, 1 ICSID Rep. 23, at 28 (1993).

⁶⁵ Exhibit CLM-67, *National Grid P.L.C. v. Argentine Republic*, UNCITRAL, Decision on Jurisdiction (20 June 2006), at para. 160 (emphasis added).

⁶⁶ Exhibit RLM-46, *Pan American Energy LLC and BP Argentina Exploration Company v. The Argentine Republic*, ICSID Case No. ARB/03/13, Decision on Preliminary Objections (27 July 2006), at para. 50 (emphasis added).

failure to meet the standard for establishing the existence of a dispute. The investment tribunals in both of the cases on which Ecuador relies, *Pan American v. Argentina* and *UPS v. Canada*, rejected such jurisdictional objections.⁶⁷ According to a leading commentator on the ICSID Convention:

“Arguments attempting to deny the existence of a dispute have hardly ever succeeded. Therefore, an objection to jurisdiction based on the denial of a dispute between the parties is not a promising strategy. *Very little is required in the way of the expression of opposing positions by the parties to establish a dispute. In particular, the denial of the existence of a dispute by one party will be to no avail.*”⁶⁸

52. Moreover, in the context of an interim measures application, the claimant need only make a *prima facie* showing of jurisdiction. In light of the widely-accepted definition of “dispute” set out above, there can be no real question that MSDIA has made at least a *prima facie* showing that a dispute exists between the parties within the meaning of Article VI of the Treaty.

53. Specifically, MSDIA has alleged that Ecuador violated numerous provisions of the Treaty, including: Article II(1), obligating Ecuador “[t]o permit and treat investments, and activities associated therewith, on a basis no less favourable than that accorded in like situations to investments or associated activities of its own nationals or companies, or of nationals or companies of any third party, whichever is the most favourable;” Article II(3)(a), obligating Ecuador to “accord investments fair and equitable treatment, full protection and security, and treatment no less than that required by international law;” Article II(3)(b), obligating Ecuador “[n]ot to impair by arbitrary or discriminatory measures the management, operation, maintenance, use, enjoyment, acquisition, expansion, or disposal of investments;” and Article II(7), obligating Ecuador “to provide effective means of asserting claims and enforcing rights with respect to investments.”⁶⁹ Ecuador has denied these claims.⁷⁰

54. Thus, a disagreement exists between the parties as to the existence or scope of a legal right or obligation – which establishes that an investment dispute exists between the parties. Ecuador’s objection to the Tribunal’s jurisdiction on the grounds that no such dispute exists therefore is to no avail.

B. MSDIA Fulfilled the Prerequisites to Initiating Arbitration

55. Ecuador makes a second “jurisdictional” argument that is really just another variation of its argument that MSDIA’s claims are premature. Specifically, it claims that, “because there was no ripe ‘investment dispute’” at the time MSDIA sent its notice of dispute to Ecuador in 2009, MSDIA failed to meet the prerequisites to arbitration under Article VI and is therefore, “not able

⁶⁷ *Id.*

⁶⁸ Exhibit CLM-103, C. Schreuer, *What is a Legal Dispute?* in INTERNATIONAL LAW BETWEEN UNIVERSALISM AND FRAGMENTATION : Festschrift in Honour of Gerhard Hafner 959-979, 978 (2008) (emphasis added).

⁶⁹ Claimant’s Notice of Arbitration, at paras. 12, 159.

⁷⁰ Respondent’s Opposition, pp. 6-36.

to demonstrate that the Tribunal has jurisdiction, even on a *prima facie* basis.”⁷¹ This argument also fails on both the law and the facts.

1. MSDIA Complied with the Notice Requirements and Six-Month Waiting Period in the Treaty

56. Article VI(3)(a) of the Treaty provides:

“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 . . . “

57. As described in its Request, the first instance judgment of the Ecuadorian courts against MSDIA was issued on December 17, 2007. On June 8, 2009, MSDIA sent Ecuador a notice of the dispute in accordance with the provisions of Article VI. MSDIA asserted Ecuador had violated MSDIA’s rights under the Treaty through the actions of Ecuador’s courts, including by failing to provide fair and equitable treatment and by subjecting MSDIA to a denial of justice.⁷² In that notice letter and in a subsequent meeting with the Attorney General in September 2009, MSDIA attempted to seek a resolution to the dispute in good faith, as required under Article VI. In response, Ecuador’s courts and public prosecutors allowed NIFA to initiate criminal proceedings against MSDIA, which Ecuador’s courts refused to dismiss until just days before the court of appeals decision in the NIFA litigation in September 2011. These criminal proceedings effectively chilled any further efforts on the part of MSDIA to negotiate with Ecuador, and Ecuador made no further efforts to negotiate with MSDIA. MSDIA filed this arbitration on November 29, 2011, long after the six-month waiting period under Article VI had expired.

58. MSDIA’s notice and efforts to negotiate with Ecuador fulfilled the Treaty’s requirements under Article VI(2) and (3). When MSDIA notified Ecuador of the existence of this dispute, it unambiguously referred to alleged breaches of the Treaty and to a possible arbitration. Ecuador plainly had the opportunity to take any steps available to it to resolve the matter before the start of this arbitration. As Ecuador acknowledges, this is precisely the rationale of the requirements of Article VI: to provide the State notice of an investment dispute and an opportunity to rectify the violation or negotiate with the investor before the initiation of arbitration.⁷³

59. Ecuador argues that MSDIA did not fulfil the requirements of the Treaty’s six-month waiting period, because Ecuador “never had a real opportunity to redress any conduct capable of constituting a Treaty breach before submission of the claims to arbitration.”⁷⁴ Ecuador’s argument is exactly backwards. At the time of MSDIA’s notice letter, Ecuador had the best opportunity to take steps to rectify the violation of MSDIA’s rights, by ensuring to the best of its ability that the court of appeals process complied with the guarantees of due process and the rule of law. If MSDIA had notified Ecuador of the dispute only after the final decision of the

⁷¹ Respondent’s Opposition, para. 82. *See also, id.* at para. 69.

⁷² Claimant’s Notice of Arbitration, at para. 130.

⁷³ *See* Respondent’s Opposition, at para. 69.

⁷⁴ *Id.*

National Court of Justice, it is difficult to see what steps would have been available to Ecuador to remedy the Treaty violations suffered by MSDIA.

60. Ecuador's argument is also contradicted by other investment arbitration awards. The relevant authorities establish that an investment dispute arises under the Treaty for the purposes of Article VI(2) and (3) when a State is notified of an allegation under the Treaty. The notice is sufficient so long as it gives notice of a *dispute*, regardless of whether the claimant's allegations are later determined to have merit. Thus, for example, the tribunal in *Lauder v. Czech Republic* held:

“[T]he waiting period does not run from the date [on] which the alleged breach occurred, but **from the date [on] which the State is advised that said breach has occurred**. This results from the purpose of the waiting period, which is to allow the parties to enter into good-faith negotiations before initiating the arbitration.”⁷⁵

61. Ecuador can point to no case in which a tribunal has considered a claimant's notice of dispute to be defective because it allegedly did not have a meritorious claim at the time the notice of dispute was submitted. Among the many reasons such a requirement would be nonsensical is the fact that a respondent state can be compensated in the event that a claimant pursues an unmeritorious claim in arbitration. According to the tribunal in *Alps Finance*:

“Be it as it may, the Respondent cannot however treat the institution of the arbitration as invalid. If the Claimant's insistence in having the dispute arbitrated after expiry of the six months proves to be unmeritorious, **a remedy remains available to the Respondent, i.e. asking the Tribunal to charge the arbitration costs on the Claimant**, as Slovakia has indeed requested.”⁷⁶

62. In any event, MSDIA clearly has met the prerequisites to arbitration set forth in Article VI of the Treaty. MSDIA provided Ecuador with notice of a dispute under the Treaty, and Ecuador had ample opportunity to take steps to address MSDIA's complaints. Ecuador's effort to convert its primary complaint that MSDIA's claims are premature into a jurisdictional objection is inconsistent with the requirements of Article VI of the Treaty, and should be rejected.

2. The Notice and “Cooling-Off” Provisions of Article VI Are Not Jurisdictional Requirements, Particularly for a *Prima Facie* Showing of Jurisdiction

⁷⁵ Exhibit CLM-58, *Ronald S. Lauder v. the Czech Republic*, UNCITRAL Arbitration, Final Award, 3 September 2001, paras. 185. Similarly, in *Murphy Exploration and Prod. Co. Int'l v. Ecuador*, the tribunal held: “[W]ithout the prior **allegation** of a Treaty breach, it is not possible for a dispute to arise which could then be submitted to arbitration under Article VI of the BIT. In this sense, the Decision on Jurisdiction in the *Burlington* case holds that ‘... as long as no **allegation** of Treaty breach is made, no dispute will have arisen giving access to arbitration under Article VI.’” Exhibit RLM-42, *Murphy Exploration and Prod. Co. Int'l v. Republic of Ecuador*, ICSID Case No. ARB/08/4, Award on Jurisdiction (15 Dec. 2010), at para. 104 (emphasis added).

⁷⁶ Exhibit RLM-5, *Alps Finance and Trade AG v. Slovak Republic*, UNCITRAL (Slovak-Swiss BIT, Award (5 Mar. 2011), at paras. 200-211 (emphasis added).

63. Moreover, even if MSDIA had failed to comply with the requirements of Article VI, which it did not, similar notice and “cooling-off” requirements are generally not considered to be jurisdictional requirements. Even where such requirements have not been complied with, tribunals have often upheld their jurisdiction to hear the case on the merits, particularly where the non-compliance did not cause prejudice to the state party.

64. According to the tribunal in *Lauder v. The Czech Republic*, for example, a six-month waiting period requirement in the applicable treaty was not a jurisdictional provision, *i.e.* was not a limit on the authority of the tribunal to decide on the merits of the dispute, but rather was “a procedural rule that must be satisfied by the Claimant.”⁷⁷ The tribunal held that the claimant’s failure to comply strictly with the requirement, where the available evidence showed that it was unlikely the respondent would have entered into negotiations, did not deprive the tribunal of jurisdiction. The tribunal reasoned that:

“To insist that the arbitration proceedings cannot be commenced until 6 months after ... the Notice of Arbitration would, in the circumstances of this case, amount to ***an unnecessary, overly formalistic approach which would not serve to protect any legitimate interests of the Parties.***”⁷⁸

65. Like the tribunal in *Lauder*, the tribunals in *Ethyl v. Canada*,⁷⁹ *SGS v. Pakistan*,⁸⁰ *Bayindir v. Pakistan*,⁸¹ *Occidental v. Ecuador*⁸² and *Alps Finance v. Slovak Republic*⁸³ all found that they had jurisdiction notwithstanding the claimants’ failure to satisfy the formal notice requirement or negotiation and consultation provisions for reasons such as the respondent’s unwillingness to negotiate or because attempts at negotiation had proved futile.⁸⁴

66. As those cases illustrate and as prominent commentators on the ICSID Convention have observed:

“[T]he question of whether a mandatory waiting period is jurisdictional or procedural is of secondary importance. ***What matters is whether or not there was a promising opportunity for a settlement.*** There would be little point in declining jurisdiction and sending the parties back to the negotiating table if these negotiations are obviously futile.

⁷⁷ Exhibit CLM-58, *Ronald S. Lauder v. The Czech Republic*, UNCITRAL Arbitration, Final Award (3 September 2001), at paras. 187-191 (emphasis added).

⁷⁸ *Id.* at para. 190 (emphasis added)

⁷⁹ Exhibit CLM-48, *Ethyl Corporation v. The Government of Canada*, NAFTA Arbitration, Award on Jurisdiction (24 June 1998), at paras. 84-88.

⁸⁰ Exhibit CLM-76, *SGS Societe Generale de Surveillance S.A. v. Islamic Republic of Pakistan*, ICSID Case No. ARB/01/13, Decision on Jurisdiction (6 August 2003), at para. 184.

⁸¹ Exhibit CLM-1, *Bayindir Insaat Turizm Ticaret Ve, Sanayi A.S. v Islamic Republic of Pakistan*, ICSID Case No. ARB/03/29, Decision on Jurisdiction (14 November 2005), at paras. 88-102.

⁸² Exhibit CLM-69, *Occidental Petroleum Corporation and Occidental Exploration and Production Company v The Republic of Ecuador*, ICSID Case No. ARB/06/11, Decision on Jurisdiction, 9 September 2008, paras. 92-94.

⁸³ Exhibit RLM-5, *Alps Finance and Trade AG v. Slovak Republic*, UNCITRAL (Slovak-Swiss BIT), Award (5 March 2011), at paras. 200-211 (emphasis added).

⁸⁴ *Id.* at para. 202.

Negotiations remain possible while the arbitration proceedings are pending. *Even if the institution of arbitration was premature, compelling the claimant to start the proceedings anew would be a highly uneconomical solution.*⁸⁵

67. The cases on which Ecuador relies, *Burlington v. Ecuador* and *Murphy v. Ecuador*, do not contradict the cases discussed above regarding the purpose of a waiting period requirement. The *Burlington* tribunal observed that:

“The six-month waiting period requirement . . . is designed precisely to provide the State with an *opportunity to redress the dispute* before the investor decides to submit the dispute to arbitration.”⁸⁶

68. On that basis, the *Burlington* tribunal declined jurisdiction over the relevant claim because the claimant did not inform Ecuador of the existence of the dispute prior to the request for arbitration, and therefore Ecuador had not in fact had any opportunity to redress the dispute. Similarly, in *Murphy*, the tribunal declined jurisdiction because Ecuador was given only three days notice before the claimant filed of the arbitration, again depriving Ecuador of any meaningful opportunity to redress the dispute.⁸⁷

69. Ecuador can point to no case where a tribunal declined to exercise jurisdiction because of a violation of a procedural notice or cooling-off requirement where that requirement caused no prejudice to the state party. As discussed above, in this case, Ecuador was given notice of the dispute more than two years before MSDIA initiated the arbitration. Ecuador cannot seriously argue that it has had no meaningful opportunity to remedy the violations alleged by MSDIA.

C. *This Dispute Relates to an “Investment” Within the Meaning of the Ecuador-United States BIT*

70. Ecuador also argues that MSDIA has failed to establish the existence of a protected “investment,” as defined in Article I(1)(a) of the Treaty. Ecuador’s argument is contradicted by the language of the Treaty and by international investment law jurisprudence. Contrary to Ecuador’s argument, MSDIA’s ongoing business in Ecuador constitutes an investment within the meaning of the Treaty. Further, the manufacturing facility MSDIA sold in 2003, which led to the underlying *NIFA v. MSDIA* litigation was an investment within the meaning of the Treaty, and claims related to MSDIA’s disposition of that investment fall within the protection of the Treaty.

⁸⁵ Exhibit CLM-98, P. Muchlinski, F. Ortino, C. Schreuer, THE OXFORD HANDBOOK OF INTERNATIONAL INVESTMENT LAW, OUP 2008, at 846 (emphasis added).

⁸⁶ Exhibit RLM-12, *Burlington Resources Inc. v. Republic of Ecuador and PetroEcuador*, ICSID Case No. ARB/08/5, Decision on Jurisdiction (2 June 2010), at paras. 311-312 (emphasis added). The *Murphy* Tribunal reached a similar conclusion. Exhibit RLM-42, *Murphy Exploration and Prod. Co. Int’l v. Republic of Ecuador*, ICSID Case No. ARB/08/4, Award on Jurisdiction (15 Dec. 2010), at para. 108 (“Since the purpose of the six-month waiting period is to allow the interested parties to seek to resolve their dispute through consultation and negotiation, it is clear that for the negotiations to commence, it is essential that both parties are aware of the existence of the dispute.”)

⁸⁷ *Id.*; Exhibit RLM-42, *Murphy Exploration and Prod. Co. Int’l v. Republic of Ecuador*, ICSID Case No. ARB/08/4, Award on Jurisdiction (15 December 2010).

1. MSDIA's Ongoing Business in Ecuador Constitutes an Investment

71. Article I(1) of the Treaty provides a broad definition of "investment":

"1. For the purposes of this Treaty,

(a) "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 which includes, inter alia, rights relating to: literary and artistic works, including sound recordings; inventions in all fields of human endeavor; industrial designs; semiconductor mask works; trade secrets, know-how, and confidential business information; and trademarks, service marks, and trade names; and

(v) any right conferred by law or contract, and any license and permits pursuant to law."

72. As Ecuador itself observes, the tautological wording of the definition of investment – "investment" means every kind of investment" – was intentional.⁸⁸ U.S. negotiators wished to make it clear that:

"In effect, the treaty applies to all investment and to *nothing more and nothing less*. Despite its circularity, this phrase was thought to convey the flexibility that BIT drafters wanted to incorporate into the definition."⁸⁹

73. In other words, the Ecuador-United States BIT was not drafted with a strict, objective, definition of "investment" in mind. Rather, it was drafted in such a way as to permit arbitral tribunals to adopt definitions appropriate to the circumstances of individual cases.

74. In keeping with this principle, a long line of authority holds that, in determining whether an investment exists for jurisdictional purposes, a tribunal should assess whether some, but not necessarily all, of the characteristics typically associated with an investment are present in any given case. That was the methodology adopted by the tribunals in *Fedax v. Venezuela*,⁹⁰ *CSOB*

⁸⁸ Respondent's Opposition, dated 24 July 2012, para. 81.

⁸⁹ Exhibit, RLM-33, K. Vandeveld, U.S. INTERNATIONAL INVESTMENT AGREEMENTS (2009), at 114-115 (emphasis added).

⁹⁰ Exhibit CLM-50, *Fedax N.V. v. Venezuela*, ICSID Case No. ARB/96/3, Decision on Objections to Jurisdiction (11 July 1997), at para. 43.

v. Slovakia,⁹¹ *MCI v. Ecuador*,⁹² *Inmaris v. Ukraine*,⁹³ *Biwater Gauff v. Tanzania* among others.⁹⁴ It is the approach defended by prominent commentators, including the foremost commentator on the ICSID Convention.⁹⁵

75. According to this line of authority, some of the characteristics typically associated with an investment include, but are not limited to, contribution, duration and risk.⁹⁶ The thinking of the U.S. government on the subject can be seen from the modifications it has made in its more recent treaties and model BITs. Thus, the 2004 Model BIT defines “investment as “every asset . . . that has the characteristics of an investment, including such characteristics as the commitment of capital or other resources, the expectation of gain or profit, *or* the assumption of risk.”⁹⁷

76. MSDIA’s activities in Ecuador constitute an investment under any reasonable definition of that term. As MSDIA explained in its Notice of Arbitration and Request for Interim Measures:

“[F]or the past 40 years, MSDIA has distributed and sold essential pharmaceutical products in Ecuador, through a branch located in Ecuador, with employees, facilities, and extensive operations in Ecuador.”⁹⁸

77. Thus, MSDIA’s business in Ecuador possesses the typical hallmarks of an investment, including:

a. **Contribution:** MSDIA President Jean Marie Canan explains in his witness statement that “[b]uilding this business required a substantial investment by MSDIA in Ecuador, including in capital, personnel, training, and management resources.”⁹⁹ MSDIA has hired more than 100 employees, “the vast majority of whom are citizens of

⁹¹ Exhibit CLM-42, *Ceskoslovensko Obchodni Banka AS v. The Republic of Slovakia*, ICSID Case No. ARB/97/4, Procedural Order No. 4 (11 January 1999), at 2.

⁹² Exhibit CLM-66, *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), at para. 165.

⁹³ Exhibit CLM-54, *Inmaris Perestroika Sailing Maritime Services GmbH and others v. Ukraine*, ICSID Case No. ARB/08/8, Decision on Jurisdiction (8 March 2010), at para. 129.

⁹⁴ Exhibit CLM-40, *Biwater Gauff (Tanzania) Ltd. v. Tanzania*, ICSID Case No. ARB/05/22, Award (24 July 2008), at paras. 310-318.

⁹⁵ See Exhibit, CLM-31, C. Schreuer, *THE ICSID CONVENTION: A COMMENTARY* (2001), pp. 140, para. 122.

⁹⁶ See e.g., Exhibit CLM-42, *Ceskoslovensko Obchodni Banka AS v. The Republic of Slovakia*, ICSID Case No. ARB/97/4, Procedural Order No. 4 (11 January 1999), at 90 (the tribunal resisted respondent’s call to apply a definition of investment, stating that while the “elements of the suggested definition . . . tend as a rule to be present in most investments, [they] are not a formal prerequisite for the finding that a transaction constitutes an investment as that concept is understood under the Convention.”); Exhibit CLM-66, *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), at para. 165 (“the requirements that were taken into account in some arbitral precedents for purposes of denoting the existence of an investment protected by a treaty (such as the duration and risk of the alleged investment) must be considered as mere examples and not necessarily as elements that are required for its existence”).

⁹⁷ Exhibit CLM-105, K. Vandeveld, U.S. INTERNATIONAL INVESTMENT AGREEMENTS (2009), at 121-22 (emphasis added).

⁹⁸ Claimant’s Request for Interim Measures, dated 12 June 2012, para. 35. See Claimant’s Notice of Arbitration, at paras. 26-28.

⁹⁹ Second Witness Statement of Jean Marie Canan, at para. 4.

Ecuador.”¹⁰⁰ MSDIA Ecuador also has a contract with a local distribution and warehousing company.¹⁰¹

b. **Duration:** MSDIA “first invested in Ecuador in 1973” and remains invested in the country nearly forty years later.¹⁰² On any view, this satisfies the duration requirement. Moreover, Mr. Canan explains that “the sale of pharmaceutical products in Ecuador requires significant and ongoing investment in order to obtain and maintain various registrations and marketing authorizations, to maintain regulatory compliance and to engage in many other activities related to the marketing and distribution of medicines and vaccines.”¹⁰³ The company “would not have committed those resources to the business if [it] had not intended to make a long-term investment in growing a successful operating business in Ecuador.”¹⁰⁴

c. **Risk:** According to Mr. Canan, “MSDIA made the choice to invest in Ecuador knowing that the Ecuadorian pharmaceutical market was competitive and that there was a risk that its business would not succeed.”¹⁰⁵ That is, MSDIA “had no guarantee that its significant investments in Ecuador would result in a successful business.”¹⁰⁶

Thus, MSDIA’s business in Ecuador certainly constitutes an investment. Ecuador claims that MSDIA has not “discharge[d] [its] burden to establish the existence of a protected investment under the Treaty, even on a *prima facie* basis.”¹⁰⁷ It then makes three specific arguments to try to establish that MSDIA’s ongoing business in Ecuador does not constitute an investment for purposes of the Treaty.

78. First, Ecuador claims that “the sale and distribution of pharmaceutical products are ordinary trade transactions, which are not protected under the Treaty.”¹⁰⁸ Ecuador’s argument ignores the fact that MSDIA sells and distributes its products through its operating business *within* Ecuador. Although ordinary sales transactions standing alone do not constitute an investment for purposes of the Treaty, a local business established and operating within the country to sell products in the local market plainly does constitute an investment.¹⁰⁹ According to the Letter by which the U.S. Government submitted the Treaty to the U.S. Senate (on which

¹⁰⁰ Witness Statement of Jean Marie Canan, at para. 9.

¹⁰¹ *Id.*

¹⁰² Second Witness Statement of Jean Marie Canan, at para. 5.

¹⁰³ *Id.*

¹⁰⁴ *Id.*

¹⁰⁵ *Id.* at para. 5.

¹⁰⁶ *Id.*

¹⁰⁷ Respondent’s Opposition, para. 88.

¹⁰⁸ *Id.*

¹⁰⁹ See e.g., Exhibit RLM-54, *Romak S.A. v. The Republic of Uzbekistan*, PCA Case No. AA280, UNCITRAL, Award (26 Nov. 2009), para. 182 (“This treaty specifically regulates the two States’ mutual rights and obligations in relation to contracts for the sale of goods between parties established in the two States . . . The Arbitral Tribunal is therefore persuaded that the Contracting Parties to the BIT adopted a distinction – also drawn in international practice – between trade and investment, and that a special and discrete treaty was concluded with respect to investment.”)

Ecuador relies), the sort of “trade transactions” that are excluded from the scope of the Treaty are those that entail “a simple movement of goods across a border.”¹¹⁰ MSDIA’s business in Ecuador, which has been operating locally for nearly forty years and has more than 100 employees, clearly entails more than a mere sales contract for the movement of goods across the border into Ecuador.

79. Second, Ecuador claims that the “the mere transfer of title over goods in exchange for full payment is not considered a ‘contribution’ for purposes of the existence of an investment protected under a BIT.”¹¹¹ In support of this claim, Ecuador cites to *Romak v. Uzbekistan*, a case that involved a “one-off commercial transaction pursuant to which Romak undertook to deliver wheat against a price to be paid by the Uzbek parties.”¹¹² Unlike the claimant in *Romak*, MSDIA has not made a mere one-off sale into Ecuador. Rather, it has participated in Ecuador’s pharmaceutical market for 40 years through a local business consisting of numerous employees, and entailing extensive customer relationships with Ecuadorian purchasers, relationships with local Ecuadorian distributors and logistics companies, and investment in equipment and real estate, all of which have required extensive and ongoing capital commitments in the country.¹¹³ In fact, MSDIA Ecuador had total assets of approximately \$15.6 million at the end of 2011.¹¹⁴ MSDIA’s Ecuadorian business therefore meets the definition of “investment” laid down by the *Romak* tribunal as requiring “a contribution that extends over a certain period of time and that involves some risk.”¹¹⁵

80. Third, Ecuador argues that “the fact that MSDIA’s ‘business’ is conducted through a local branch, which has no independent legal personality in Ecuadorian law, shows that Claimant has undertaken no risk in this endeavor.”¹¹⁶ Here Ecuador cites to the definition of “company” in the Treaty, which provides in relevant part: “‘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 . . .”¹¹⁷

81. Although a branch may not be specifically included in the definition of “company” set out in the Treaty, that does not mean it does not constitute an investment for the purpose of the Treaty. A “company” is but one of the wide variety of forms that an investment can take under

¹¹⁰ Respondent’s Opposition, para. 88 (quoting an excerpt from Exhibit RLM-17, Department of State, Letter of Submittal for U.S.-Ecuador Treaty Concerning the Encouragement and Reciprocal Protection of Investment, reprinted in SENATE TREATY DOC. NO. 103-15 (1993), at p. 7 (“Dept. of State Letter of Submittal for U.S.-Ecuador BIT”)).

¹¹¹ Respondent’s Opposition, para. 89.

¹¹² *Id.* para. 83 (quoting Exhibit RLM-54, *Romak S.A. v. The Republic of Uzbekistan*, PCA Case No. AA280, UNCITRAL, Award (26 Nov. 2009), at para. 242).

¹¹³ Second Witness Statement of Jean Marie Canan, at paras. 4, 5.

¹¹⁴ *Id.* at para. 6.

¹¹⁵ Exhibit RLM-54, *Romak S.A. v. The Republic of Uzbekistan*, PCA Case No. AA280, UNCITRAL, Award (26 Nov. 2009), para. 207.

¹¹⁶ Respondent’s Opposition, dated 24 July 2012, para. 90 (internal citations omitted).

¹¹⁷ Exhibit C-1, Ecuador-United States BIT, Article 1(b).

Article I, which “provides a non-exclusive list of assets, claims and rights that constitute investment.”¹¹⁸ As the leading commentator on the U.S. model BIT program explains:

“The term ‘investment’ means every investment and *certainly a branch may fall within that definition whether or not it is separately constituted, and thus whether or not it is a company.*”¹¹⁹

Indeed a number of tribunals, including in a case that Ecuador relies upon, have accepted branches as investments without further comment, thereby illustrating that the proposition is not controversial.¹²⁰

82. It is appropriate to consider a branch as an investment given that the establishment and maintenance of a branch inevitably involves elements of capital contribution, risk and duration. In the case of MSDIA, for example, as Mr. Canan explains:

“Today, forty years after MSDIA made its initial investment – MSDIA continues to face strong competitive pressures in Ecuador and has no guarantees of long-term commercial success. The fact that our Ecuador business is structured as a branch does not minimize the commercial risks. In fact, structuring an operating business in a particular country as a branch can entail greater liability risk to a corporation than structuring an operating business as a subsidiary because a corporate subsidiary would afford greater protection against liability as a result of its separate corporate form.”¹²¹

83. This is exactly the type of “investment risk” that the tribunal in *Romak* was referring to when it stated:

“... An ‘investment risk’ entails a different kind of *alea*, a situation in which the investor cannot be sure of a return on his investment, and may not know the amount he will end up spending, even if all relevant counterparties discharge their contractual obligations. Where there is “risk” of this sort, the investor simply cannot predict the outcome of the transaction.”¹²²

84. Thus, MSDIA’s ongoing business in Ecuador falls squarely within the definition of “investment” listed in Article I(1)(a) of the Treaty and within the definition articulated by tribunals in numerous other investment arbitrations, including by those on whose decisions Ecuador relies. MSDIA has therefore demonstrated that it has a protected investment under the Treaty, and in any event, has plainly made a *prima facie* showing of that fact.

¹¹⁸ Exhibit RLM-17, Dept. of State Letter of Submittal for U.S.-Ecuador BIT, at p. 3.

¹¹⁹ Exhibit CLM-105, K. Vandeveld, U.S. INTERNATIONAL INVESTMENT AGREEMENTS (2009), at 122 (emphasis added).

¹²⁰ Exhibit RLM-42, *Murphy Exploration and Prod. Co. Int’l v. Republic of Ecuador*, ICSID Case No. ARB/08/4, Award on Jurisdiction (15 Dec. 2010); Exhibit CLM-65, *Middle East Cement Shipping and Handling Co. S.A. v. Egypt*, ICSID Case No. ARB/99/6, IIC 311, Decision on Jurisdiction (27 November 2000).

¹²¹ Second Witness Statement of Jean Marie Canan, at para. 5.

¹²² Exhibit RLM-54, *Romak S.A. v. The Republic of Uzbekistan*, PCA Case No. AA280, UNCITRAL, Award (26 Nov. 2009), at paras. 229-30.

2. The Manufacturing Facility that MSDIA Sold in 2003 Was an Investment Within the Meaning of the Treaty

85. Ecuador also argues that, because “Claimant did not own the manufacturing and packaging plant during the time at which Claimant claims the acts constituting a breach of the Treaty were allegedly committed by Ecuador,” the dispute submitted to the Tribunal does not relate to an investment in Ecuador protected by the Treaty.¹²³ Again, the language of the Treaty itself and international investment law jurisprudence contradict Ecuador’s argument. Both support the well-established view that the Treaty is designed to protect an investment throughout its entire lifespan, not only with respect to its establishment and maintenance, but also with respect to any rights arising from its disposal, including those subject to litigation.

86. The Treaty itself confirms that claims related to the disposal of an investment are still covered by the Treaty, notwithstanding that at the time of the dispute, the investor may no longer own the investment. A number of articles of the Treaty specifically relate to the disposal of investments. For example, Article II(3)(b) provides that “[n]either Party shall in any way impair by arbitrary or discriminatory measures the management, operation, maintenance, use, enjoyment, acquisition, expansion or disposal of investments.” And Article II(7) provides, “[e]ach Party shall provide effective means of asserting claims and enforcing rights with respect to investment.” Together these provisions demonstrate that the Treaty contemplates the possibility that the lifespan of an investment may endure through litigation past the date on which its assets are sold.

87. Ecuador ignores these provisions when it states that, “on December 17, 2003, Claimant retained no subsisting interest in an ‘investment’ in Ecuador.”¹²⁴ MSDIA still retained the protections of the Treaty in connection with the disposal of its investment, however, including in connection with legal claims arising out of the disposal of its investment. Ecuador’s suggestion that MSDIA must be in possession of the assets that constitute its investment on the date the dispute arose would effectively deprive every investor of the ability to assert claims related to the sale or disposition of an investment.

88. Investment treaty jurisprudence confirms that the protections extended by the Treaty endure even beyond the specific point in time that an investor no longer holds legal title to an investment. The principle that investment protections endure throughout various stages of the investment’s lifespan – from acquisition through disposal and ensuing litigation – is particularly well illustrated by the *Chevron v. Ecuador* and *Mondev v. USA* cases.

89. In *Chevron I*, where Ecuador made the same argument that it makes here, the tribunal held that Chevron had a protected investment in connection with litigation arising out of a concession that Chevron had sold years earlier. The tribunal summarized its findings as follows:

“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

¹²³ Respondent’s Opposition, para. 91.

¹²⁴ *Id.* at para. 91.

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 . . . 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.***¹²⁵

90. In reaching this conclusion, the *Chevron I* tribunal relied on the *Mondev* tribunal’s finding that Mondev had an investment in the United States, despite the fact that, by the time of entry into force of NAFTA, “all Mondev had were claims to money associated with an investment which had already failed.”¹²⁶ The tribunal considered that, in accepting jurisdiction, it would be providing protection to the subsisting interests that Mondev continued to hold in the original investment. The *Mondev* tribunal summarized its finding as follows:

“Issues of orderly liquidation and the settlement of claims may still arise and require ‘fair and equitable treatment’, ‘full protection and security’ and the avoidance of invidious discrimination. . . . The shareholders even in an unsuccessful enterprise retain interests in the enterprise arising from their commitment of capital and other resources, and ***the intent of NAFTA is evidently to provide protection of investments throughout their life-span***, i.e., ‘with respect to the establishment, acquisition, expansion, management, conduct, operation, and sale or other disposition of investments.’”¹²⁷

91. Finding that the language of NAFTA and the Ecuador-United States BIT was similar, the *Chevron I* tribunal stated that it saw no reason to depart from the reasoning in *Mondev*. In particular, the tribunal found that, “the relevant language of the BIT is at least as broad in scope as the NAFTA provisions relied upon by the *Mondev* tribunal for its ‘life-span’ theory of investment protection.”¹²⁸

92. The *Chevron II* tribunal agreed, also rejecting Ecuador’s argument regarding the absence of an investment by Chevron in Ecuador under Article I of the Treaty on the same set of facts as in *Chevron I* and holding:

“There is no reason in the wording of this BIT to limit the lifespan of a covered investment short of its complete and final demise, ***including the completion of all means for asserting claims and enforcing rights by the investor or others in regard to that investment.***”¹²⁹

¹²⁵ Exhibit CLM-44, *Chevron Corporation (U.S.A.) and Texaco Petroleum Corporation (U.S.A.) v. Republic of Ecuador [I]*, PCA Case No. AA 277, Interim Award (1 December 2008), at para. 185 (emphasis added).

¹²⁶ Exhibit RLM-41, *Mondev International Ltd. v. United States of America*, ICSID Case No. ARB (AF)/99/2, Award (11 October 2002), at para. 77.

¹²⁷ Exhibit RLM-41, *Mondev International Ltd. v. United States of America*, ICSID Case No. ARB (AF)/99/2, Award, (11 October 2002), at para. 81.

¹²⁸ Exhibit CLM-44, *Chevron Corporation (U.S.A.) and Texaco Petroleum Corporation (U.S.A.) v. Republic of Ecuador [I]*, PCA Case No. AA 277, Interim Award (1 December 2008), at paras. 185-86.

¹²⁹ See Exhibit CLM-108, *Chevron Corporation and Texaco Petroleum Company v. The Republic of Ecuador (II)*, PCA Case No. 2009-21, Third Interim Award on Jurisdiction and Admissibility (27 February 2012), at para. 4.13.

93. There is similarly no reason to depart from the reasoning of the *Chevron* and *Mondev* tribunals in this case. NIFA sued MSDIA in 2003 for claims in connection with MSDIA’s sale of its manufacturing facility in Ecuador, which indisputably qualifies as an “investment” under the Treaty.¹³⁰ In this arbitration, MSDIA is seeking to enforce rights it has in connection with the NIFA litigation, which is part of the life-span of its investment. Its rights in connection with that litigation therefore constitute “subsisting interests that [MSDIA] continue[s] to hold in the original investment.”¹³¹

D. *MSDIA Properly Consented to UNCITRAL Arbitration*

94. Finally, Ecuador argues that MSDIA was precluded from consenting to UNCITRAL arbitration in its Notice of Arbitration and that the Tribunal therefore lacks *prima facie* jurisdiction. It maintains that MSDIA exclusively and irrevocably consented to ICSID arbitration in the notice of dispute it sent to Ecuador on June 8, 2009.¹³²

95. Ecuador’s argument is disingenuous, at best. In entering into the Treaty, Ecuador consented under Article VI(4) “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.” Paragraph 3 permits an investor to choose between submitting a dispute for resolution, *inter alia*, to ICSID arbitration (“provided that the Party is a party to such Convention”) or “in accordance with the UNCITRAL Rules.” On 8 June 2009, MSDIA submitted its notice of dispute to Ecuador, which stated:

“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 ICSID Convention.”¹³³

96. At that time, MSDIA was aware that Ecuador had already sought to exclude some categories of cases from its consent to ICSID jurisdiction, and was challenging the jurisdiction of some ICSID tribunals on that basis.¹³⁴ As MSDIA was concerned about preserving its rights

¹³⁰ The manufacturing facility itself was tangible real property owned and controlled by MSDIA and plainly qualifies as an “investment” under Article I(1)(a).

¹³¹ Exhibit CLM-44, *Chevron Corporation (U.S.A.) and Texaco Petroleum Corporation (U.S.A.) v. Republic of Ecuador [I]*, PCA Case No. AA 277, Interim Award (1 December 2008), at para. 185.

¹³² Respondent’s Opposition, para. 97 (quoting Exhibit C-2, Claimant’s Notice of Dispute, dated 8 June 2009, at p. 2).

¹³³ Exhibit C-2, Claimant’s Notice of Dispute, dated 8 June 2009, at pp. 1-2.

¹³⁴ On 4 December 2007, Ecuador submitted a letter to ICSID stating that it wished to exclude disputes related to exploitation of natural resources from its consent to ICSID arbitration, which led to jurisdictional disputes in several treaty cases. Exhibit RLM-42, *Murphy Exploration and Prod. Co. Int’l v. Republic of Ecuador*, ICSID Case No. ARB/08/4, Award on Jurisdiction (15 Dec. 2010), at para. 44. Ecuador objected to ICSID jurisdiction on this basis in two cases, Exhibit RLM-42, *Murphy Exploration and Prod. Co. Int’l v. Republic of Ecuador*, ICSID Case No. ARB/08/4, Award on Jurisdiction (15 Dec. 2010), at para. 53 (holding that the letter of withdrawal under Article 25(4) was insufficient to preclude jurisdiction); Exhibit RLM-12, *Burlington Resources Inc. v. Republic of Ecuador and PetroEcuador*, ICSID Case No. ARB/08/5, Decision on Jurisdiction (2 June 2010), at paras. 311-312. The Article 25(4) (finding claims inadmissible on other grounds).

under the Treaty, it conditioned its consent on its reservation of its right at any time to consent to some other form of arbitration under the Treaty;

“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.”¹³⁵

97. Less than a month later, on 6 July 2009, Ecuador submitted a written notice of denunciation of the ICSID Convention to the World Bank.¹³⁶

98. Thus, when MSDIA submitted its Notice of Arbitration in November 2011, Ecuador had publicly stated its intention not to submit to ICSID arbitration. At that time, in order to avoid disputes about the jurisdiction of an ICSID tribunal, MSDIA elected to exercise the right it reserved in its notice letter to consent to UNCITRAL arbitration. In light of Ecuador’s withdrawal from the ICSID Convention, its effort now to resist UNCITRAL arbitration, particularly under the argument that MSDIA should have initiated ICSID arbitration, is obviously tactical and self-serving. It is also completely unsupported by reason and the law.

99. The essence of Ecuador’s argument is that MSDIA’s express reservation of rights to pursue an arbitral forum other than the one it specified in its notice of dispute failed because an investor has no right to rescind its consent to a specific arbitral forum once given.¹³⁷ As the leading commentator on US bilateral investment treaties explains, however, under those treaties, “the investor retains complete control over the issues of whether a dispute shall be submitted to arbitration, when the dispute shall be submitted, and which arbitral mechanism shall be utilized.”¹³⁸ This “complete control” surely includes the right to condition an acceptance of arbitration through a reservation of rights, particularly where the relevant state party is publicly threatening not to honor its offer to arbitrate under a particular arbitral forum specified in the Treaty.

100. Moreover, even if Ecuador were correct about the exclusivity and irrevocability of an investor’s choice of arbitral forum under the Treaty, MSDIA’s reservation of rights would not fail as a result. Instead, MSDIA’s consent to arbitration, as set forth in its notice of dispute, would be invalid.¹³⁹ In other words, if MSDIA was required by paragraph 3 of Article VI to

¹³⁵ See Exhibit C-2, Claimant’s Notice of Dispute, dated 8 June 2009, at p. 2.

¹³⁶ ICSID Website, *Ecuador Submits a Notice under Article 71 of the ICSID Convention*, available at <http://icsid.worldbank.org/ICSID/FrontServlet?requestType=CasesRH&actionVal=OpenPage&PageType=AnnouncementsFrame&FromPage=NewsReleases&pageName=Announcement20> (last accessed 3 August 2012). Pursuant to Article 71 of the ICSID Convention, Ecuador’s denunciation took effect six months later, on 7 January 2010.

¹³⁷ Respondent’s Opposition, para. 98.

¹³⁸ See Exhibit CLM-109, K. Vandevelde, *BILATERAL INVESTMENT TREATIES: HISTORY, POLICY, AND INTERPRETATION* (2010), at pp. 436-437.

¹³⁹ See Exhibit CLM-31, C. Schreuer, *THE ICSID CONVENTION: A COMMENTARY*, CUP 2009, at para. 514, p. 230 (“Where ICSID’s jurisdiction is based on an offer made by one party, subsequently accepted by the other, the parties’ consent exists only to the extent that offer and acceptance coincide... If the terms of acceptance do not coincide with the terms of the offer there is no perfected consent); Exhibit CLM-104, P. Szasz, *The Investment Disputes Convention – Opportunities and Pitfalls (How to Submit Disputes to ICSID)*, 5 J.L. & ECON. DEV. 23, 29 (1970-1971) (“[W]hen consent is expressed in diverse instruments ... it is only in the area of coincidence that the consent is both effective and irrevocable.”).

choose exclusively and irrevocably only one of the listed arbitral forums, then, by expressly reserving its rights to choose another forum at a later date, MSDIA failed to give a valid written consent to arbitration in its notice of dispute.

101. That outcome would be of no consequence for the Tribunal's jurisdiction in this case, as MSDIA has since submitted another valid consent to arbitration—this time to UNCITRAL arbitration—in its Notice of Arbitration.¹⁴⁰ It is well-established in investment arbitration jurisprudence that consent to jurisdiction “is perfected through the combination of the State's prior unequivocal consent in a BIT and the investor's acceptance by the filing of its own written consent by way of the request for arbitration.”¹⁴¹

102. Indeed, this principle is so well-established that Ecuador has been unable to cite to a single authority in support of its contrary reading of the Treaty as requiring MSDIA to “consent in writing to UNCITRAL arbitration prior to and separately from the submission of the alleged dispute to this arbitration.”¹⁴² When Paraguay made the same argument – namely that the investor was required to have made a written consent to arbitration separate and apart from the notice of arbitration – to try to defeat jurisdiction in another arbitration, that tribunal in that case rejected the argument, observing that:

“The general propositions for which [the Claimant] argues are by now so well established in practise and case-law that they are ‘no longer controversial.’ They are unanswerable.”¹⁴³

103. Accordingly, Ecuador can have no serious answer to MSDIA's assertion that it submitted a valid consent to UNCITRAL arbitration in its Notice of Arbitration. Having itself irrevocably and unequivocally consented to UNCITRAL arbitration when it entered into the Treaty, Ecuador is now subject to the Tribunal's jurisdiction with respect to the dispute submitted by MSDIA in its Notice of Arbitration and there certainly can be no doubt that MSDIA has made at least a *prima facie* showing of that fact. Accordingly, the last of Ecuador's objections to the Tribunal's *prima facie* jurisdiction also fails.

IV. MSDIA HAS SHOWN THAT THE REQUESTED MEASURES ARE NECESSARY TO AVOID THE THREAT OF IRREPARABLE INJURY

¹⁴⁰ Exhibit C-2, Claimant's Notice of Dispute, dated 8 June 2009, at para. 23 (“MSDIA therefore elects to consent to the submission of the dispute for settlement by binding arbitration in accordance with the Arbitration Rules of the United Nations Commission on International Trade Law (UNCITRAL).”)

¹⁴¹ Exhibit CLM-43, *Ceskoslovenska obchodni banka, a.s. v. Slovak Republic*, ICSID Case No. ARB/97/4, Decision of the Tribunal on Objections to Jurisdiction (24 May 1999), at para. 38. For the same proposition, see e.g., Exhibit CLM-49, *Eureko B.V. v. Slovak Republic*, UNCITRAL, Award on Jurisdiction, Arbitrability and Suspension (26 October 2010), at paras. 220-224; Exhibit CLM-77, *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 January 2004), at para. 31.

¹⁴² Respondent's Opposition, para. 98.

¹⁴³ Exhibit CLM-41, *Bureau Veritas, Inspection, Valuation, Assessment and Control, BIVAC B.V. v. Republic of Paraguay*, ICSID Case No. ARB/07/9, Decision of the Tribunal on Objections to Jurisdiction (29 May 2009), at para. 65 (citing Exhibit CLM-96, C. McLachlan, L. Shore and M. Weiniger, *INTERNATIONAL INVESTMENT ARBITRATION* (2007), at para. 3.27, p. 54).

104. Under Article 26 of the UNCITRAL Arbitration Rules, “the arbitral tribunal may take any interim measures it deems *necessary* in respect of the subject matter of the dispute.” The interim measures requested by MSDIA are both “necessary” and “in respect of the subject matter of the dispute.”

105. *First*, the interim measures requested by MSDIA are necessary. Tribunals have generally deemed interim measures to be necessary when there is a risk of substantial or irreparable harm to one of the parties.¹⁴⁴ As explained in the Request for Interim Measures,¹⁴⁵ and further explained below, in the absence of interim measures of protection, MSDIA will suffer substantial and irreparable harm to its business in Ecuador upon the issuance of a decision by Ecuador’s National Court of Justice affirming the lower court’s judgment against MSDIA. An order that protects against the immediate enforcement of the judgment against MSDIA’s assets is the only means available to avoid the destruction of MSDIA’s business in Ecuador during the pendency of this arbitration.

106. *Second*, the interim measures requested by MSDIA are in respect of the subject matter of this dispute.¹⁴⁶ MSDIA has alleged in this arbitration that its rights under the Ecuador-United States BIT have been violated by the proceedings in Ecuador’s national courts in the *NIFA v. MSDIA* litigation.¹⁴⁷ The proceedings in the National Court of Justice and the decision of that Court contribute to the denial of justice and other violations of the Treaty that MSDIA has alleged.

107. The irreparable harm to MSDIA from the enforcement of the NIFA judgment would flow directly from the violations of the Treaty that are the subject matter of the dispute.¹⁴⁸ Thus, the interim measures requested “are necessary in respect of the subject matter of the dispute” as required by Article 26 of the UNCITRAL Rules.

¹⁴⁴ See Exhibit CLM-26, Brower, THE IRAN UNITED STATES CLAIMS TRIBUNAL 218 (1998) (“[T]he Tribunal will require the party seeking interim protection to prove either (1) that there exists a threat of irreparable harm to property or a right capable of being protected by the Tribunal, or (2) that a threat exists to the Tribunal’s jurisdiction and authority.”); Exhibit CLM-10, *EnCana Corporation v. Republic of Ecuador*, UNCITRAL Arbitration Rules, Interim Award (31 January 2004), at para. 13 (“[T]he basis for establishing provisional measures must be that otherwise irreparable damage could be caused to the requesting party.”).

¹⁴⁵ Claimant’s Request for Interim Measures, at paras. 3-5, 9, 29-30, 41-70.

¹⁴⁶ It should be noted that “[t]he relationship between interim measures and the subject matter of the dispute is usually not problematic.” Exhibit CLM-28, D. Caron, et al., THE UNCITRAL ARBITRATION RULES: A COMMENTARY 534 (2006).

¹⁴⁷ See Claimant’s Notice of Arbitration, at para. 147-159. See also *id.* at para. 148 (“[T]he decisions of the Ecuadorian courts were manifestly unjust and were the product of gross deficiency in the administration of justice. The Ecuadorian courts were biased and partial in favor of the Ecuadorian plaintiff, as evidenced by a number of improper procedural decisions and failures to provide MSDIA with the guarantees of due process.”).

¹⁴⁸ Cf. Exhibit CLM-5, *Chevron Corporation and Texaco Petroleum Company v. The Republic of Ecuador*, PCA Case No. 2009-23, First Interim Award on Interim Measures (25 January 2012), at Section II (“If it were established that any judgment made by an Ecuadorian court in the Lago Agrio Case was a breach of an obligation by the Respondent owed to the Claimants as a matter of international law, the Tribunal records that *any loss arising from the enforcement of such judgment (within and without Ecuador) may be losses for which the Respondent would be responsible to the Claimants under international law*”) (emphasis added).

A. *MSDIA Has Rights Under the Ecuador-United States BIT That Are Capable of Protection Through Interim Measures*

108. Ecuador is wrong in asserting that “Claimant has no right that may be protected by way of interim measures.”¹⁴⁹ Once again, this argument is premised on the idea that MSDIA’s right to be free from a denial of justice by the Ecuadorian courts does not come into effect until after a final decision from Ecuador’s highest court, and that because the National Court of Justice has not yet issued its decision, MSDIA has no rights under the Treaty that can be protected by interim measures.¹⁵⁰

109. Ecuador’s argument makes no sense. MSDIA’s rights under the Treaty came into existence the day the Treaty came into force, and they continue to exist to this day. The existence of those rights were not and are not contingent on any future event. Among the rights on which MSDIA relies are the following:

- MSDIA’s right under Article II(3)(a) to have its investments accorded fair and equitable treatment, full protection and security, and treatment no less than that required by international law.
- MSDIA’s right under Article II(3)(b) not to have the management, operation, maintenance, use, enjoyment, acquisition, expansion, or disposal of its investments be impaired by arbitrary or discriminatory measures.
- MSDIA’s right under Article II(1) of the BIT to have its investments treated on a basis no less favorable than that accorded in like situations to investment or associated activities of Ecuador’s own nationals or companies.
- MSDIA’s right, under Article II(7), to effective means of asserting claims and enforcing rights with respect to investments.

110. Ecuador’s argument that MSDIA has no rights capable of protection is really just another variation of its argument that MSDIA has not suffered a denial of justice in Ecuador. But Ecuador’s defense on the merits – that there is no exhaustion of local remedies and therefore no valid claim for denial of justice – must be reserved for the Tribunal’s consideration of the merits.¹⁵¹ Ecuador cannot transform its (incorrect) argument that MSDIA does not have a valid claim on the merits into a threshold objection to MSDIA’s request for interim measures by suggesting that MSDIA has no rights under the Treaty capable of protection.

111. In addition, Ecuador’s argument overlooks the point that MSDIA has alleged multiple violations of the Treaty, including of Article II(7), which has been held by other tribunals not to require complete exhaustion of local remedies.¹⁵² The absence of a decision from the National

¹⁴⁹ Respondent’s Opposition, at para. 3.

¹⁵⁰ *See id.*, at paras. 38-45.

¹⁵¹ *See supra* at paras. 21-27.

¹⁵² *See infra* at paras. 264-267. *See also* Exhibit CLM-99, J. Paulsson, DENIAL OF JUSTICE IN INTERNATIONAL LAW 111, n. 35 (2005) (“It is possible that the actions of a lower court may breach international obligations under a treaty. ... For example, a treaty may contain promises of ‘fair and equitable treatment’ which are held not to be confined to

Court of Justice is irrelevant to MSDIA's claim under Article II(7), and there can be no real question that MSDIA's rights under that provision exist and are capable of protection under the Treaty. And Ecuador's argument also overlooks the clear application to the present case of the futility and ineffectiveness exceptions to the requirement of exhaustion of local remedies. The argument must be rejected for all of these reasons.

B. MSDIA Needs to Show Only That Irreparable Harm Is Likely, Not That It Is Certain, To Occur

112. Ecuador argues that the interim measures requested by MSDIA are not necessary because it is not certain that the decision in the National Court of Justice will be adverse to MSDIA.¹⁵³ Ecuador's argument misconceives the legal standard for showing necessity.

113. Contrary to Ecuador's suggestion, there is no requirement that the threatened harm be *certain* to occur in order to justify interim measures of protection. Rather, the relevant authorities all provide that a claimant seeking interim measures must show a threat of harm that is *likely* to occur. Indeed, Ecuador acknowledges that tribunals have routinely issued interim measures to address a "threat," a "possibility," or a "risk[]" of harm; i.e., harms that are not "certain" to occur.¹⁵⁴

114. The ICJ has awarded interim measures of protection when "prejudice was probable or possible,"¹⁵⁵ and even when it could only "not [be] excluded."¹⁵⁶ Similarly, in treaty arbitration

matters covered by the customary law of denial of justice; breaches of such promises may not require the exhaustion of local remedies.").

¹⁵³ Respondent's Opposition, at paras. 104(a)-105.

¹⁵⁴ *Id.* at para. 102. Ecuador claims that the ICJ's decision in *Passage through the Great Belt* is "illustrative" of the point that "[t]ribunals have not granted requests for interim measures where allegations of harm were based on mere speculation." See Respondent's Opposition, at paras. 132-133. However, *Passage through the Great Belt* is clearly inapposite. See Respondent's Opposition, at para. 133. In that case, Finland alleged that Denmark's planned construction of a bridge over the Great Belt would impair Finland's rights to passage, and requested provisional measures that would have prevented the construction of the bridge. See *Passage through the Great Belt (Finland v. Denmark)*, Request for the Indication of Provisional Measures, Order (29 July 1991), at para. 26. The Court denied the request for lack of urgency due to the likelihood that the cable works for the bridge, which would have impeded Finland's right, were not going to be constructed before the conclusion of the arbitration. See *Passage through the Great Belt (Finland v. Denmark)*, Request for the Indication of Provisional Measures, Order (29 July 1991), at para. 24. And although Finland claimed that the early stages of construction had interfered with its participation in "tenders regarding vessels," the Court noted that Finland had failed to adduce any "evidence ... of any invitations" to engage in such tenders. See *Passage through the Great Belt (Finland v. Denmark)*, Request for the Indication of Provisional Measures, Order (29 July 1991), at para. 29. Here, by contrast, the existence of MSDIA's business in Ecuador, and the harm that would be caused by the issuance of an adverse judgment, cannot seriously be contested. See *infra* at paras. 153-166.

¹⁵⁵ Exhibit RLM-31, J. Sztucki, INTERIM MEASURES IN THE HAGUE COURT 105 (1983).

¹⁵⁶ *Id.* Ecuador argues that the ICJ has only issued interim measures where the threatened harm was certain to occur, relying on a 1983 commentary by Jerzy Sztucki: "the ICJ has granted provisional measures in cases '[a]s a matter of fact, ... on the basis of events which were certain (since they already had taken place) or on the basis of events the occurrence of which in the near future could be regarded as certain unless prevented by some diplomatic or judicial action.'" Respondent's Opposition, at para. 102 (quoting Exhibit RLM-31, J. Sztucki, INTERIM MEASURES IN THE HAGUE COURT 105 (1983)). Ecuador's purported use of this authority for the proposition that a harm must be "certain" before it can be addressed through interim measures is misleading. *First*, Ecuador uses ellipses to remove the qualifier "*in almost all cases*" from the middle of Sztucki's quote, thus omitting the fact that in at least some ICJ cases the event triggering the threatened harm was *not* certain. See Exhibit RLM-31, J. Sztucki, *Interim Measures in the Hague Court* 105 (1983) ("As a matter of fact, *in almost all cases* in which interim protection was granted the Court acted either on the basis of events which were certain") (emphasis added). *Second*, Ecuador ignores the

cases, tribunals have not required a party seeking interim measures to establish that a threatened harm is certain to occur, but only that it is likely to occur.¹⁵⁷

115. In *Chevron v. Ecuador*, for example, the claimants requested the same interim relief the Claimant seeks in this case, an order directing Ecuador to take steps to prevent the enforcement of a judgment of the Ecuadorian courts. At the time the *Chevron* tribunal first granted the claimant's request, in an order dated 9 February 2011, there was no immediately enforceable judgment against Chevron (in fact, there was not even a judgment from the court of first instance).¹⁵⁸ Nevertheless, despite the inherent uncertainty of whether an enforceable judgment against Chevron would be issued, the tribunal "conclude[d] that the Claimants ha[d] made out a sufficient case ... under Article 26" to order interim measures.¹⁵⁹

116. Ecuador relies on the case of *Occidental v. Ecuador* to support its proposition that "[u]ncertain outcomes" have led to the rejection of requests for interim measures.¹⁶⁰ *Occidental* involved very different facts than the case at hand, and its principles in fact support MSDIA's request for interim measures.

117. In *Occidental*, the claimant requested interim measures designed to block Ecuador from transferring the oil field in dispute to another operator. The tribunal denied the requested measures stating that "[p]rovisional measures are not meant to protect against any potential or hypothetical harm susceptible to result from uncertain actions."¹⁶¹ As the tribunal noted, the claimant failed to provide any evidence that Ecuador intended to transfer the block, and even admitted that it did not know whether Ecuador intended to do so.¹⁶² Moreover, as the tribunal noted, Ecuador's counsel made "a very clear and emphatic statement" indicating that there was "no plan" and "no intention" to transfer the block and "no likelihood" of a change in that intention.¹⁶³ Absent any evidence that the harm was likely to occur at any point in the future, the harm was purely hypothetical and therefore not imminent. Thus, it is not surprising that the tribunal denied *Occidental*'s request.¹⁶⁴

commentator's observation that the ICJ has granted interim measures at times upon finding a "probability of irreparable prejudice, including situations when such consequences are only 'not excluded,'" a low probability indeed. *Id.* *Third*, Ecuador likewise ignores the commentator's observation that the ICJ "admits a margin of uncertainty regarding the irreparability of the alleged prejudice whether this uncertainty is related to the occurrence of a certain event or to its probable consequences or both." *Id.* Read in context, even the authority Ecuador relies on makes clear that the ICJ can and has granted interim measures when irreparable harm is not certain because the occurrence of a particular event is uncertain.

¹⁵⁷ See *infra* at paras. 172-178.

¹⁵⁸ Exhibit CLM-46, *Chevron Corporation and Texaco Petroleum Company v. The Republic of Ecuador*, PCA Case No. 2009-23, Order for Interim Measures (9 February 2011), at p. 2. As the Tribunal noted, the likely date of the court of first instance judgment "currently remains uncertain but potentially imminent." *Id.* Of course, not only was the date of the judgment uncertain, but so was its content.

¹⁵⁹ *Id.* at p. 3.

¹⁶⁰ Respondent's Opposition, at para. 105, n. 131.

¹⁶¹ Exhibit RLM-45, *Occidental Petroleum Corporation and Occidental Exploration and Production Company v. The Republic of Ecuador*, ICSID Case No. ARB/06/11, Decision on Jurisdiction (9 September 2008), at para. 89.

¹⁶² *Id.* at paras. 88-91.

¹⁶³ *Id.* at para. 90.

¹⁶⁴ It should be noted that the *Occidental* tribunal defined urgency in accordance with the established case law: "A

118. In contrast to *Occidental*, in this case, MSDIA does face a real threat of imminent and irreparable harm. The case of *NIFA v. MSDIA* is pending in the National Court of Justice, and that Court will issue a decision in the case. There is nothing hypothetical about the risk of an adverse judgment from that Court. Moreover, there is nothing hypothetical about the risk that NIFA would seek to enforce the \$150 million judgment against MSDIA's assets in Ecuador. Neither the National Court of Justice nor NIFA has given or could give any assurance that the threatened harm will not materialize. Thus, the factors that led the tribunal in *Occidental* to reject the request for interim measures in that case are not present here.

119. Ecuador's argument also ignores the history of the *NIFA v. MSDIA* litigation.¹⁶⁵ As set out in detail in Section VI, below, the history of the NIFA litigation demonstrates the Ecuadorian courts' pervasive bias against MSDIA, their fundamental lack of respect for due process, and their high degree of vulnerability to corruption and improper influence.¹⁶⁶ This history is consistent with public reports from governmental and non-governmental organizations that monitor Ecuador's judicial system, as well as Ecuador's own President, who has repeatedly acknowledged in striking terms that Ecuador's judiciary is pervasively corrupt and unreliable.¹⁶⁷

120. Ecuador has offered no defense of the Ecuadorian court proceedings in the *NIFA v. MSDIA* litigation, and it has offered no reason to believe that the outcome of proceedings in its National Court of Justice will be any different. Indeed, as set out below, the proceedings in Ecuador's National Court of Justice to date indicate that that Court is subject to the same failings as Ecuador's lower courts.¹⁶⁸ Given the experience MSDIA has had in the Ecuadorian courts in this litigation, one can find scant reason to hope that the outcome in the National Court of Justice will be any different than in the lower courts. For that reason, it is likely that MSDIA will suffer irreparable harm if Ecuador's National Court of Justice issues its judgment at a time when there are no interim measures of protection in place to prevent its enforcement.

C. The Harm To MSDIA From An Adverse Decision by Ecuador's National Court of Justice Would Be Substantial and Irreparable

121. Ecuador argues that the harm to MSDIA's business in Ecuador resulting from the enforcement of an adverse judgment in its National Court of Justice would not be irreparable because it could be compensated by an award of damages.¹⁶⁹ Ecuador further argues that, in any case, MSDIA could and would simply pay the judgment to safeguard its business, and that an adverse National Court of Justice judgment therefore would not cause the damage that MSDIA fears.¹⁷⁰

measure is urgent when 'action prejudicial to the rights of either party is *likely* to be taken before such final decision is given,' which again does not require certainty. *Id.* at para. 59.

¹⁶⁵ See Respondent's Opposition, at paras. 104(a)-105.

¹⁶⁶ See *infra* at paras. 203-263.

¹⁶⁷ See *infra* at paras. 203, 216-222. See also Claimant's Notice of Arbitration, dated 29 November 2011, at paras. 140-146.

¹⁶⁸ See *infra* at paras. 246-263.

¹⁶⁹ Respondent's Opposition, dated 24 July 2012, at paras. 125-142, 161-163.

¹⁷⁰ *Id.* at paras. 140-141, 145-158.

122. As set forth below, Ecuador is wrong on both counts. *First*, numerous tribunals have held that the destruction of an ongoing business constitutes irreparable harm that cannot be adequately compensated by an award of damages.¹⁷¹ *Second*, MSDIA is not required to pay the very judgment it is disputing in order to avoid irreparable harm to its assets, particularly where the amount of the judgment is many times the value of the assets at risk.¹⁷² Accordingly, an adverse National Court of Justice decision, and the resulting threat of enforcement of the \$150 million judgment against MSDIA, would swiftly lead to the destruction of MSDIA's investment in Ecuador.

1. The destruction of an ongoing business constitutes irreparable harm

123. Numerous tribunals and commentators have acknowledged that the destruction of an ongoing business constitutes irreparable harm. In its Request for Interim Measures, MSDIA cited four cases (three involving Ecuador itself) that held that the destruction of an ongoing business constitutes an irreparable harm that may properly be prevented through the imposition of interim measures:

- In *Perenco v. Ecuador*, the tribunal concluded that interim measures were warranted to prevent Ecuador's "imminent seizure of [Perenco's] assets in Ecuador," which would result in "Perenco's business [being] crippled, if not destroyed."¹⁷³
- In *Burlington Resources v. Ecuador*, the tribunal recognized that Ecuador's continued seizures could imperil the investment at issue and eventually destroy "the relationship between the foreign investor and Ecuador."¹⁷⁴
- In *City Oriente v. Ecuador*, the tribunal recognized that the amounts subject to seizure by Ecuador were "so high that there [was] a risk that the early payment of such amounts may jeopardize the company's economic feasibility."¹⁷⁵

¹⁷¹ See *infra* at paras. 123-135.

¹⁷² See *infra* at paras. 136-139. Even if, contrary to fact, the damages to MSDIA's business could, in theory, be fully compensated by an award of damages against the Ecuadorian state, interim measures would still be proper, in light of the obvious difficulty MSDIA would encounter in attempting to enforce any such award. See Exhibit CLM-28, D. Caron, L. Caplan & M. Pellonpää, THE UNCITRAL ARBITRATION RULES: A COMMENTARY 538 (2006) ("Crucial to the determination of whether the injury can be made whole is the likelihood of a monetary award being effective. ... Hence, potential pecuniary harm may necessitate interim measures where the arbitral tribunal has reason to believe that the damaged party would encounter difficulties in having a compensatory award enforced."). In a similar case involving a claim that Ecuador denied justice to a foreign investor, Ecuador has resisted enforcement of the award in foreign courts. See Exhibit C-112, S. Putter, "Netherlands: Ecuador loses set-aside action," *Global Arbitration Review* (17 May 2012), available at <http://www.globalarbitrationreview.com/journal/article/30551/netherlands-ecuador-loses-set-aside-action>.

¹⁷³ See Exhibit CLM-13, *Perenco Ecuador Ltd. v. Republic of Ecuador*, ICSID Case No. ARB/08/5, Decision on Provisional Measures (8 May 2009), at paras. 46, 53.

¹⁷⁴ Exhibit CLM-3, *Burlington Resources Inc. v. Republic of Ecuador*, ICSID Case No. ARB/08/5, Procedural Order No. 1 (29 June 2009), at para. 65.

¹⁷⁵ Exhibit CLM-8, *City Oriente Ltd. v. Republic of Ecuador*, ICSID Case No. ARB/06/21, Decision on Revocation of Provisional Measures and Other Procedural Matters (13 May 2008), at para. 76.

- In *Paushok v. Mongolia*, the tribunal recognized that interim measures were necessary to prevent the potential bankruptcy of the claimants' investment.¹⁷⁶

Similarly, the tribunal in *Cemex v. Venezuela* stated unequivocally that “the destruction of the ongoing concern that constitute[s] the investment [would] create[] an ‘irreparable harm.’”¹⁷⁷

124. Ecuador’s attempts to distinguish these cases are unconvincing. Ecuador argues that *Perenco*, *Burlington*, and *City Oriente* involved claims for specific performance,¹⁷⁸ and that the “factual and legal differences alone are enough to dismiss any relevance of these cases to the Claimant’s situation.”¹⁷⁹ Ecuador also seeks to infer—from the fact that the *Perenco* and *Burlington* tribunals ordered the claimants to place funds in escrow pending a final resolution – that “the *real* objective in granting the interim measures was to preserve contractual relationships between the parties based on the claimants['] requests for specific performance.”¹⁸⁰ However, the distinctions Ecuador seeks to draw between the current case and *Perenco*, *Burlington*, and *City Oriente* are immaterial to the issue here, which is whether the destruction of an ongoing business constitutes an irreparable harm that should be forestalled through interim measures.

125. Contrary to Ecuador’s argument, the tribunals in *Perenco*, *Burlington*, and *City Oriente* clearly found that the danger posed to the claimants’ ongoing businesses (and not simply the harm to the right of specific performance) was a central consideration in the decision to grant interim measures. The tribunal in *Perenco* stated that “in the absence of provisional measures, Perenco faces the imminent seizure of its assets in Ecuador (whether oil, plant, equipment or bank balances) to the extent of US \$327 million” and “[i]f Perenco’s business in Ecuador were effectively brought to an end in this way, *such injury* could not, in the Tribunal’s judgment, *be adequately compensated by an award of damages* should its claim be ultimately upheld.”¹⁸¹ Similarly, the *Burlington* tribunal, in a section dedicated specifically to the irreparable harm standard, emphasized that “the risk” it sought to prevent “is *the destruction of an ongoing investment* and of its revenue-producing potential which benefits both the investor and the

¹⁷⁶ Exhibit CLM-12, *Paushok v. Gov’t of Mongolia*, UNCITRAL Arbitration Rules, Order on Interim Measures (2 September 2008), at para. 77.

¹⁷⁷ Exhibit CLM-4, *CEMEX Caracas Investments B.V. and CEMEX Caracas II Investments B.V. v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB/08/15, Decision on the Claimants’ Request for Provisional Measures (3 March 2010), at para. 55. Contrary to Respondent’s argument (Opposition, at para. 130), *Plama v. Bulgaria* does not cast doubt on the principle that the destruction of a business concern constitutes irreparable harm. In that case, the claimant was only seeking “monetary damages.” Exhibit RLM-49, *Plama Consortium Limited v. Bulgaria*, ICSID Case No. ARB/03/24, Order on Provisional Measures (6 September 2005), at para. 46. Although the claimant faced the risk that it would “no longer have a going concern to operate,” the tribunal made it clear that this was “not an issue in the ICSID arbitration” because the claimant had “not sought restitution or any other relief from this Tribunal which would permit it to continue to operate the Nova Plama refinery.” Exhibit RLM-49, *Plama Consortium Limited v. Bulgaria*, ICSID Case No. ARB/03/24, Order on Provisional Measures (6 September 2005), at para. 47. Clearly this is not the case here. MSDIA is specifically seeking to safeguard its ability to continue to operate its Ecuadorian business.

¹⁷⁸ See Respondent’s Opposition, dated 24 July 2012, at para. 167.

¹⁷⁹ See *id.*

¹⁸⁰ *Id.* at para. 165 (emphasis added).

¹⁸¹ See Exhibit CLM-13, *Perenco Ecuador Ltd. v. Republic of Ecuador*, ICSID Case No. ARB/08/5, Decision on Provisional Measures (8 May 2009), at para. 46 (emphasis added).

State.”¹⁸² The *City Oriente* tribunal likewise noted the harm to the claimant’s “economic feasibility,” which was a potential effect of the violation of the right at issue.¹⁸³

126. The fact that the tribunals in *Perenco* and *Burlington* ordered the claimants to place the disputed funds in escrow is irrelevant to whether those tribunals believed that the destruction of a going concern constitutes irreparable harm. Directing the claimants in those cases to place the disputed funds (which Ecuador claimed it was owed) into escrow was intended to provide Ecuador with security that it could recover the amounts allegedly owed in the event that Ecuador ultimately prevailed in the arbitration.¹⁸⁴ This was a way to balance the rights of the parties while safeguarding against the destruction of the businesses through the seizure of the claimants’ assets by Ecuador. Such considerations are immaterial here.

127. Similarly, the fact that *Perenco*, *City Oriente* and *Burlington Resources* involved allegations of breaches of investment contracts does not distinguish those cases or make their holdings inapplicable. There is no reason that the irreparable harm flowing from a denial of justice in this case should be any less subject to interim measures of protection than the irreparable harm flowing from the breaches of contracts in *Perenco*, *City Oriente* and *Burlington Resources*.¹⁸⁵ Indeed, in *Perenco* and *Burlington Resources*, the tribunals awarded interim measures to prevent the consequences of violations of the claimants’ rights under investment treaties, as well as the parties’ contracts.¹⁸⁶ The question is whether the *harms* at issue were of a like kind, and they plainly were: destruction of a business is certainly irreparable injury.

¹⁸² Exhibit CLM-3, *Burlington Resources Inc. v. Republic of Ecuador*, ICSID Case No. ARB/08/5, Procedural Order No. 1 (29 June 2009), at para. 83 (emphasis added)

¹⁸³ Exhibit CLM-8, *City Oriente Ltd. v. Republic of Ecuador*, ICSID Case No. ARB/06/21, Decision on Revocation of Provisional Measures and Other Procedural Matters (13 May 2008), at para. 76. Tribunals routinely focus on the potential *effects* of the violation of a right in determining whether interim measures are necessary to prevent an irreparable harm. See, e.g., Exhibit RLM-43, *Nuclear Test Case (Australia v. France)*, Order on Provisional Measures (22 June 1973), I.C.J. Reports 1973, at para. 29 (noting that harm to be prevented was “damage to Australia ... caused by the deposit on Australian territory of radio-active fall-out resulting from such tests” which would be “irreparable”); Exhibit CLM-4, *CEMEX Caracas Investments B.V. and CEMEX Caracas II Investments B.V. v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB/08/15, Decision on the Claimants’ Request for Provisional Measures (3 March 2010), at para. 49 (noting that ICJ grants interim measures to address “[a]ctions which should be restrained, because *their effects*, though capable of financial compensation, are such that compensation cannot fully remedy the damage suffered ...”) (emphasis added); Exhibit CLM-12, *Paushok v. Gov’t of Mongolia*, UNCITRAL Arbitration Rules, Order on Interim Measures (2 September 2008), at para. 77 (noting that interim measures necessary to prevent the harm that would flow from respondent’s conduct; namely, “the insolvency and bankruptcy of GEM ... and the complete loss of Claimants’ investment in that company.”).

¹⁸⁴ See Exhibit CLM-13, *Perenco Ecuador Ltd. v. Republic of Ecuador*, ICSID Case No. ARB/08/5, Decision on Provisional Measures (8 May 2009), at para. 63 (“the Respondent should enjoy a measure of security in relation to sums accruing due to them from Perenco”); Exhibit CLM-3, *Burlington Resources Inc. v. Republic of Ecuador*, ICSID Case No. ARB/08/5, Procedural Order No. 1 (29 June 2009), at para. 87 (the funds in escrow would provide claimant “the assurance that such amounts could later be recovered if held not to be due.”).

¹⁸⁵ To the contrary, tribunals have recognized that by denying a party justice, a state can breach its obligations under a bilateral investment treaty. See, e.g., See Exhibit CLM-44, *Chevron Corporation and Texaco Petroleum Company v. The Republic of Ecuador*, UNCITRAL Arbitration Rules, Interim Award (1 December 2008), at paras. 206-207; Exhibit CLM-12, *Paushok v. Gov’t of Mongolia*, UNCITRAL Arbitration Rules, Order on Interim Measures (2 September 2008), at para. 4; Exhibit RLM-32, *Jan de Nul N.V. and Dredging International N.V. v. Arab Republic of Egypt*, ICSID Case No. ARB/04/13, Award (6 November 2008), at para. 188.

¹⁸⁶ See Exhibit CLM-3, *Burlington Resources Inc. v. Republic of Ecuador*, ICSID Case No. ARB/08/5, Procedural Order No. 1 on Burlington Oriente’s Request for Provisional Measures (29 June 2009), at para. 16 (noting that claimant alleged *inter alia* that Ecuador breached the Ecuador-United States BIT); Exhibit CLM-13, *Perenco Ecuador Ltd. v. The Republic of Ecuador*, ICSID Case No. ARB/08/6, Decision on Provisional Measures (8 May

128. Ecuador also seeks to evade *Paushok, Perenco, City Oriente* and *Burlington Resources* by arguing that there, the “financial burden[] ... [was] being sought directly by the State party to the arbitration.”¹⁸⁷ Ecuador argues that, in contrast, “Ecuador is not in any way a ‘beneficiary’ of the judgment issued by the Ecuadorian courts.”¹⁸⁸ Once again, this factual distinction is irrelevant to whether the injury at issue here is irreparable. MSDIA has alleged that Ecuador breached its obligation under the Treaty through the actions of its judiciary,¹⁸⁹ and MSDIA seeks to protect against the irreparable consequences of those breaches by restraining the Ecuadorian executive and judiciary from taking any actions to enforce the disputed judgment. Just as the claimants in *Paushok, Perenco, City Oriente* and *Burlington Resources* sought interim measures of protection to prevent state action that would lead to irreparable harm, MSDIA also seeks to restrain state action that would lead to the same irreparable harm.

129. Finally, Ecuador attempts to distinguish *Paushok* from the present case by citing (i) the state’s admission in that case that the law in dispute, the enforcement of which threatened irreparable harm, was ineffective, and (ii) the state’s commitment not to seize the claimants’ assets pursuant to that law.¹⁹⁰ While the *Paushok* tribunal did note these facts in its order on interim measures, these are obviously not the only factors that the tribunal considered,¹⁹¹ nor can they possibly render *obiter dictum* the tribunal’s substantive finding that the claimants were “facing ... very substantial prejudice unless some interim measures [were] granted” and that this “substantial prejudice” consisted of potential “insolvency and bankruptcy of GEM ... and the complete loss of the Claimants’ investment in that company.”¹⁹²

130. Ecuador argues that even if MSDIA’s business in Ecuador were destroyed, this harm could be compensated through payment of monetary damages. In all of the cases cited above,

2009), at para. 17 (Perenco asserted that alterations to its participation contract “violated the terms of both the [contract] and the Investment Treaty between the Governments of France and Ecuador ...”) (emphasis added).

¹⁸⁷ Respondent’s Opposition, at para. 168.

¹⁸⁸ Respondent’s Opposition, at para. 168.

¹⁸⁹ Exhibit CLM-59, *Loewen Group, Inc. and Raymond L. Loewen v. United States*, ICSID Case No. ARB(AF)/98/3, Decision on hearing of Respondent’s objection to competence and jurisdiction (5 January 2001), at para. 69 (“[I]t is now recognised that the judiciary is an organ of the State and that judicial action which violates a rule of international law is attributable to the State.”) (citing A.V. Freeman, *The International Responsibility of States for Denial of Justice*, 31-33 (1970)).

¹⁹⁰ Respondent’s Opposition, at para. 171.

¹⁹¹ Moreover, the fact that the respondent in *Paushok* committed to cease the conduct at issue would have weighed **against** the imposition of interim measures, as it would have proved the absence of an imminent harm. See Exhibit CLM-28, D. Caron, et. al., *The UNCITRAL Arbitration Rules: A Commentary* 537 (2006) (“The Tribunal has not found the prejudice sufficient to merit the granting of interim measures where the other party has given an assurance not to proceed with the actions allegedly threatening to cause the alleged harm, or where the prejudice is not likely to occur in the foreseeable future.”). That the *Paushok* tribunal decided to grant interim measures anyway underscores the significance and irreparability of the harm caused by the destruction of a business concern. As the tribunal in *Paushok* aptly noted, even though the respondent in that case had committed to cease the conduct at issue, the interim measures were *still* necessary to “formalize that commitment.” Exhibit CLM-12, *Paushok v. Gov’t of Mongolia*, UNCITRAL Arbitration Rules, Order on Interim Measures (2 September 2008), at para. 78. Here, Ecuador has declined to put an end to the manifestly unjust judicial proceedings, notwithstanding MSDIA’s repeated efforts to engage in discussions with the government. See Claimant’s Notice of Arbitration, at paras. 130-131. Thus, intervention by the Tribunal to safeguard MSDIA’s rights pending a resolution of this arbitration is even more necessary here than it was in *Paushok*.

¹⁹² Exhibit CLM-12, *Paushok v. Gov’t of Mongolia*, UNCITRAL Arbitration Rules, Order on Interim Measures (2 September 2008), at para. 77.

the tribunals held that the destruction of the claimants' ongoing business would be irreparable harm, notwithstanding that one could theoretically put a monetary figure on the resulting losses. This judgment plainly is correct.

131. Many injuries are deemed irreparable under the relevant international law standard notwithstanding that through some process they could theoretically be reduced to a monetary amount.¹⁹³ “[P]otential pecuniary harm may necessitate interim measures where the arbitral tribunal has reason to believe that the damaged party would encounter difficulties in having a compensatory award enforced. Sometimes the disputed property is so unique in nature, or so difficult to replace, as to render the potential harm ‘irreparable’ regardless of the availability of ‘effective’ monetary compensation.”¹⁹⁴

132. The Iran-United States Claim Tribunal, which operates under the UNCITRAL rules, has noted that “the burden of showing irreparable or substantial harm in the context of a request for interim measures is not as stringent as the burden of making such a showing in contemporary Anglo-American law.”¹⁹⁵ The tribunal added, “[t]he US definition of ‘irreparable harm’ is a harm that cannot readily be compensated by an award of damages. If this standard were strictly applied, most commercial disputes arbitrated under the UNCITRAL Rules would not qualify for interim protection under Article 26, since the award of money damages can, at least in theory, rectify nearly all commercial losses.”¹⁹⁶

133. Similarly, the *Paushok* tribunal quoted noted commentator, K.P. Berger for the proposition that the necessity “requirement is satisfied if the delay in the adjudication of the main claim ... would lead to a ‘substantial’ (but not necessarily ‘irreparable’ as known in common law doctrine) prejudice for the requesting party.”¹⁹⁷ The *Paushok* tribunal, operating under the UNCITRAL Rules, found that “the possible need for monetary compensation does not necessarily eliminate the possible need for interim measures... [I]n international law, the concept of ‘irreparable prejudice’ does not necessarily require that the injury complained of be not remediable by an award of damages.”¹⁹⁸

¹⁹³ Notably, the standard for showing irreparable or substantial harm under international law is flexible. See Exhibit CLM-28, D. Caron, L. Caplan & M. Pellonpää, *THE UNCITRAL ARBITRATION RULES: A COMMENTARY* 537 (2006) (while “the term ‘irreparable’ is utilized, ... one should keep in mind that a literal interpretation has not been adopted.”).

¹⁹⁴ *Id.* at 538.

¹⁹⁵ Exhibit CLM-37, *Behring Int’l, Inc. v. Islamic Republic Iranian Air Force*, Interim and Interlocutory Award No. ITM/ITL 52382-3 (21 June 1985), 8 Iran-US C.T.R. 238 n. 42 (1985) (emphasis added).

¹⁹⁶ Exhibit CLM-37, *Behring Int’l, Inc. v. Islamic Republic of Iran, Interim and Interlocutory Award No. ITM/ITL 52382-3 (21 June 1985)*, 8 Iran-US C.T.R. 94 n.50 (1985).

¹⁹⁷ Exhibit CLM-12, *Paushok v. Gov’t of Mongolia*, UNCITRAL Arbitration Rules, Order on Interim Measures (2 September 2008), at para. 68 (quoting Berger, KP, *International Economic Arbitration, in Studies in Transnational Economic Law*, vol. 9, Kluwer Law and Taxation Publishers, Deventer, Boston, 1993 at p. 336).

¹⁹⁸ Exhibit CLM-12, *Paushok v. Gov’t of Mongolia*, UNCITRAL Arbitration Rules, Order on Interim Measures (2 September 2008), at para. 68. See also *Saipem S.p.A v. The People’s Republic of Bangladesh*, Decision on Jurisdiction and Recommendation on Provisional Measures, ICSID Case No. ARB/05/07, ICC 280 (2007), at para. 182 (granting interim measures ordering respondent to return, and not pursue any payment demand under, a warranty bond, emphasizing that “there [was] a risk of irreparable harm if [claimant] has to pay the amount of the Warranty Bond,” even though the risk of loss was purely monetary).

134. Moreover, the destruction of a business entails irreparable injury under any reasonable understanding of the term.¹⁹⁹ It entails not only the pecuniary losses of the capital investments made in the business and future lost profits, but also the loss of reputation, customer relationships, goodwill, and the potential for future growth and opportunity. Moreover, it entails the loss of substantial investments of time and effort required to start and build a new business. The mere payment of money cannot adequately compensate those losses. Moreover, starting over or rebuilding a new business is not always a viable option for an investor whose business has been destroyed, particularly where that loss has come as the result of actions of the government of the host state.²⁰⁰ For all these reasons, the destruction of an ongoing business is irreparable and cannot be adequately compensated by the payment of money damages.

135. Just as in *Paushok*, *Perenco*, *City Oriente* and *Burlington Resources*, MSDIA faces the threat that its ongoing business in Ecuador will be destroyed as a result of Ecuador’s violations of the Treaty. Just as in those cases, the potential destruction of its business would be irreparable. Just as the claimants in those cases, MSDIA is therefore entitled to interim measures of protection to prevent the irreparable harm that would result from the destruction of its business.²⁰¹

2. Interim Measures Are Appropriate to Protect MSDIA’s Ecuadorian Business Notwithstanding MSDIA’s Theoretical Option—Which No Rational Business Would Choose to Exercise—To Pay this Corrupt and Arbitrary Judgment that Far Exceeds the Value of the Assets at Risk

136. MSDIA is not required to choose between (i) paying the \$150 million judgment that it contends is the result of a denial of justice and breach of Ecuador’s treaty obligations or (ii) suffering the complete destruction of its business in Ecuador, as Ecuador contends. Other tribunals faced with similar situations have specifically held that claimants are entitled to interim measures of protection specifically to prevent their being placed in such an impossible dilemma.

137. In *Perenco*, *Burlington* and *Paushok*, the tribunals specifically rejected the suggestion by the state parties that the claimants seeking interim measures could simply pay the disputed tax imposed by the state and thereby avoid the threatened harm to their businesses.²⁰²

¹⁹⁹ Even under the stricter US standard, the destruction of a business constitutes irreparable harm. *See, e.g., Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 585 (1952) (ordering injunctive relief against seizure of steel mill appropriate because “seizure and governmental operation of these going businesses were bound to result in many present and future damages of such nature as to be difficult, if not incapable, of measurement”); *American Trucking Associations, Inc. v. City of Los Angeles*, 559 F.3d 1046, 1058-59 (9th Cir. 2009) (finding irreparable harm from law imposing strict regulatory requirements on trucking companies, including a requirement to use employees instead of independent contractors, that would “disrupt and change the whole nature of its business in ways that most likely cannot be compensated with damages alone”); *Multi-Channel TV Cable Co. v. Charlottesville Quality Cable Operating Co.*, 22 F.3d 546, 552 (4th Cir. 1994) (“[T]he threat of a permanent loss of customers and the potential loss of goodwill also support a finding of irreparable harm.”).

²⁰⁰ *See, e.g.,* Expert Opinion of Brian Calvert, at para. 45; Second Canan Witness Statement, at para 18.

²⁰¹ Contrary to the Respondent’s assertion (Opposition, at para. 162), MSDIA’s alternative request for relief – seeking indemnification for all damages resulting from the enforcement of a judgment – is not an admission that such compensation could make it whole. It is simply a reflection of the fact that some relief is better than no relief.

²⁰² Opposition, at paras. 138-42; Hart Report, at paras. 20-41.

- In *Perenco*, as here, Ecuador suggested that “Perenco could resolve its difficulties by paying the full sum of US \$327 million due, which it was well able to do.”²⁰³ The tribunal did not consider this a reasonable suggestion. “Having initiated this arbitration to challenge the recoverability of enhanced payments not provided for in the Participation Contracts but demanded pursuant to Law 42, *Perenco should not, pending a final decision, be required to choose between making the very payments they dispute and suffering extensive seizure of its oil production or other assets.*”²⁰⁴
- In *Burlington*, in response to a suggestion that if Burlington did not pay the Law 42 tax, it would be walking away from its investment, the tribunal stated that “*expecting that a foreign investor will continue to operate a loss making investment over years is unreasonable as a matter of practice.*” Contrary to the Respondent’s assertion pursuant to which the protection would be granted against the investor’s own act of ‘walking away,’ the Tribunal considers that the project and its economic standing is at risk regardless of the conduct of the investor.”²⁰⁵
- In *Paushok*, the tribunal found that: “Respondent claims that over US \$41 million is currently owed by GEM, under the WPT Law. . . . [A]ssuming that Respondent is right in stating that *GEM’s net book value assets are worth less than 50% of the amount of WPT owing* and the possibility that the Mongolian Parliament would again refuse to amend the WPT Law, *it would be very presumptuous for any investor to make additional equity investments in that company.* The likelihood of GEM’s bankruptcy in such a context therefore becomes very real.”²⁰⁶

138. Ecuador argues that *Paushok* is distinguishable because GEM was a separately incorporated company while MSDIA’s Ecuadorian business is structured as a branch.²⁰⁷ This distinction is immaterial here. The *Paushok* tribunal found that the claimants in that case should not be forced to avoid the destruction of their investment in a foreign country by paying an amount that was more than twice the book value of the business.²⁰⁸ The *Burlington* tribunal similarly held that this kind of “loss making investment” would be “unreasonable as a matter of practice.”²⁰⁹ The same is true here: it would be completely unreasonable for MSDIA to pay a

²⁰³ Exhibit CLM-13, *Perenco Ecuador Ltd. v. Republic of Ecuador*, ICSID Case No. ARB/08/5, Procedural Order No. 1 (29 June 2009), at para. 51.

²⁰⁴ *Id.* at para. 60 (emphasis added).

²⁰⁵ Exhibit CLM-3, *Burlington Resources Inc. v. Republic of Ecuador*, ICSID Case No. ARB/08/5, Procedural Order No. 1 (29 June 2009), at para. 83 (emphasis added).

²⁰⁶ Exhibit CLM-12, *Paushok v. Gov’t of Mongolia*, UNCITRAL Arbitration Rules, Order on Interim Measures (2 September 2008), at para. 61. In *Paushok*, the claimants seeking interim measures were the two shareholders that were 100% owners of GEM. See Exhibit CLM-12, *Paushok v. Gov’t of Mongolia*, UNCITRAL Arbitration Rules, Order on Interim Measures (2 September 2008), at para. 3 (“Claimants, directly or indirectly, own 100% of the outstanding shares of KOO Golden East-Mongolia . . .”).

²⁰⁷ See Ecuador’s Opposition, at para. 173.

²⁰⁸ Exhibit CLM-12, *Paushok v. Gov’t of Mongolia*, UNCITRAL Arbitration Rules, Order on Interim Measures (2 September 2008), at paras. 61, 77.

²⁰⁹ Exhibit CLM-3, *Burlington Resources Inc. v. Republic of Ecuador*, ICSID Case No. ARB/08/5, Procedural Order No. 1 (29 June 2009), at para. 83.

\$150 million judgment to avoid the destruction of its investment in Ecuador, which is worth much less.²¹⁰

139. Just as none of the claimants in *Perenco*, *Burlington* and *Paushok* were required to make the choice between making the disputed payments or suffering a total loss of their investments, neither should MSDIA be put in the position of having to pay the disputed and manifestly unjust \$150 million judgment against it or suffer the complete loss of its business in Ecuador. Rather, it is entitled to interim measures of protection, which are intended to prevent exactly this type of threat of irreparable harm.

3. A Decision from Ecuador’s National Court of Justice Affirming the \$150 Million Judgment Against MSDIA Would Lead to the Destruction of MSDIA’s Business in Ecuador

140. As explained in MSDIA’s Request and the witness statements of MSDIA’s President, Jean Marie Canan, enforcement of the \$150 million judgment against MSDIA would lead to the complete destruction of MSDIA’s investment in Ecuador.²¹¹ Moreover, even before MSDIA’s assets were actually seized to satisfy the judgment, the threat of enforcement alone would lead to immediate and irreparable harm to MSDIA.

a) It Would Be Irrational for MSDIA to Pay a \$150 Million Judgment to Avoid the Destruction of its Business in Ecuador

141. Ecuador’s primary response to MSDIA’s claim that an adverse National Court of Justice decision would lead to the destruction of its business in Ecuador is that MSDIA could avoid any harm to its business by simply paying the judgment.²¹² Similarly, the majority of the expert report of Ecuador’s expert, Mr. Timothy Hart, is aimed at establishing that MSDIA could afford to pay the \$150 million judgment – by (i) using its net current assets (including accounts receivable),²¹³ (ii) securing intercompany financing,²¹⁴ or (iii) obtaining a third-party loan²¹⁵ – and thus could avoid the destruction of its business in Ecuador.²¹⁶

²¹⁰ Expert Opinion of Brian Calvert, at paras. 21-33; Second Witness Statement of Jean Marie Canan, at paras. 18-22; First Witness Statement of Jean Marie Canan, at paras. 6-8.

²¹¹ Claimant’s Request for Interim Measures, at paras. 63-70; Second Witness Statement of Jean Marie Canan, at paras. 14-19; First Witness Statement of Jean Marie Canan, at paras. 19-20.

²¹² Respondent’s Opposition, at paras. 138-142.

²¹³ Hart Report, at paras. 22-25.

²¹⁴ *Id.* at paras. 26-31.

²¹⁵ According to Mr. Hart, if MSDIA chooses to borrow money to pay the \$150 million judgment, it could repay this debt in five years, provided it devotes all of its net income during this period to this task. *Id.* at paras. 35-36 and Table 1.

²¹⁶ *Id.* at paras. 20-41. Mr. Hart devotes the majority of his expert report analysing MSDIA’s financial statements to show that MSDIA purportedly could come up with \$150 million to satisfy the judgment. In doing so, Mr. Hart criticizes MSDIA’s disclosure of its financial statements to Ecuador, contending that it is “unlikely” that MSDIA has no (1) management notes explaining its financial statements, (2) income statements or balance sheet for parts of 2012, and (3) forecasts of future revenues and expenses. Hart Report, at para. 9. As Mr. Canan explains in his Second Witness Statement, however, MSDIA is a Delaware holding company that is not required to include management notes in its financial statements, only produces income statements and balance sheets on an annual basis (after the fiscal year ends), and does not generate revenue and expense forecasts. Second Witness Statement of

142. Ecuador's and Mr. Hart's claim that MSDIA could somehow liquidate enough assets or borrow enough money to pay the \$150 million judgment, and thereby save its business in Ecuador, misses the point entirely. Before considering whether MSDIA could theoretically find a way to pay the judgment, one must first ask: "Would it be *rational* for MSDIA, or any other similarly situated company, to pay the (manifestly unjust) \$150 million judgment in order to save the assets that would otherwise be at risk, here the value of its business in Ecuador?"²¹⁷ As in the cases discussed above, the answer to this question, which neither Ecuador nor Mr. Hart confronts, clearly is "no."²¹⁸

143. In his expert report, Brian Calvert of Development Specialists, Inc. explains the importance of this threshold question:

"A significant component of Ecuador's Opposition to MSDIA's Request for Interim Measures, and the majority of the Hart Report, are devoted to MSDIA's ability to pay the \$150 million judgment against it. However, *Ecuador and Mr. Hart completely ignore the threshold question of whether it would be rational for MSDIA to make such a payment.* In order to determine this, one must consider the impact of payment of this judgment on MSDIA's value. Specifically, one must weigh the cost of satisfying a judgment of \$150 million against the likely losses to MSDIA if it does not pay that judgment.... [A]ssessing MSDIA's or [Merck's] ability to pay the judgment – what Ecuador and Mr. Hart do in their submissions – *is an irrelevant exercise. The fact that a company can pay for something does not mean that it should pay for it.*"²¹⁹

144. It is an accepted tenet of corporate finance that a company would pay a particular sum of money (e.g., the \$150 million required to satisfy the judgment) only to obtain or retain an asset (e.g., MSDIA Ecuador) if the transaction were value creating—i.e., if the value of the asset to the company were greater than the cost required to obtain or retain it.²²⁰ If the cost of obtaining or retaining the asset were greater than the asset's value, the "transaction would be value destroying and inconsistent with rational economic behaviour."²²¹

145. It follows that in the present case, it would be irrational for MSDIA to pay the unfair and arbitrary \$150 million judgment against it unless the value of its assets at risk, principally

Jean-Marie Canan, at paras. 20-23. Accordingly, the documents discussed by Mr. Hart do not exist. *Id.* at paras. 20-23.

²¹⁷ Although MSDIA has assets in many countries outside of Ecuador, because of the cost and difficulty NIFA would have in enforcing the manifestly unjust, corrupt, and procedurally defective judgment in those countries, MSDIA's assessment of its exposure is primarily directed to the potential losses in Ecuador.

²¹⁸ As noted above, the tribunals in the *Perenco*, *Burlington* and *Paushok* cases came to the same conclusion when faced with very similar questions.

²¹⁹ Expert Opinion of Brian Calvert, at paras. 13-14 (emphasis added).

²²⁰ *Id.* at para. 18.

²²¹ *Id.* This assertion is consistent with the observations of the *Paushok* and *Burlington* tribunals noted above. See Exhibit CLM-12, *Paushok v. Gov't of Mongolia*, UNCITRAL Arbitration Rules, Order on Interim Measures (2 September 2008), at para. 61 ("it would be very presumptuous for any investor to make additional equity investments" in a company that "was worth less than 50% of the amount of" the payment); Exhibit CLM-3, *Burlington Resources Inc. v. Republic of Ecuador*, ICSID Case No. ARB/08/5, Procedural Order No. 1 (29 June 2009), at para. 83 ("expecting that a foreign investor will continue to operate a loss making investment over years is unreasonable as a matter of practice").

MSDIA Ecuador, were to exceed \$150 million.²²² As explained below, MSDIA Ecuador is worth far less than \$150 million.

146. As Mr. Canan explains, and as MSDIA Ecuador’s audited financial statements confirm, MSDIA Ecuador is a small business with only \$1 million in cash in its bank accounts, net assets of just over \$1 million (in 2011, it had approximately \$15.6 million in total assets and approximately \$14.6 million in total liabilities), and 2011 sales of approximately \$27 million.²²³ Over the past five years, MSDIA Ecuador experienced a low cumulative annual sales growth rate of only 5%.²²⁴

147. In his Second Witness Statement, Mr. Canan explains that no rational company would pay a \$150 million judgment to save MSDIA Ecuador:

“The judgment ... vastly exceeds the total amount of assets of MSDIA’s business in Ecuador. It also vastly exceeds the value of the business, based on the business’s sales and revenues. No rational corporation faced with the same circumstances would elect to pay a manifestly corrupt judgment of this magnitude, especially to preserve a business with a far lower value than the judgment.”²²⁵

148. Mr. Canan therefore concludes that ***“we can state definitively today that MSDIA would not pay the \$150 million judgment*** in the NIFA case if that judgment were to be affirmed.²²⁶

149. Mr. Calvert reaches a similar conclusion in his expert report, concluding that MSDIA Ecuador is not worth ***“anywhere remotely close to \$150 million”***²²⁷ and that ***“it would not be rational to pay \$150 million to save MSDIA Ecuador because doing so clearly would be value destroying.”***²²⁸

150. Neither Ecuador nor Mr. Hart suggest that—or even attempted to evaluate whether—it would be economically rational for MSDIA to pay \$150 million to avoid the destruction of MSDIA Ecuador. Instead, Ecuador simply asserts, without support or further explanation, that “it would be reasonable” for MSDIA to pay the \$150 million judgment and that “[n]o reasonable company with operations like [MSDIA’s] would allow its assets to be seized where it can afford

²²² Expert Opinion of Brian Calvert, at paras. 20.

²²³ Second Witness Statement of Jean Marie Canan, at paras. 6-7; First Witness Statement of Jean Marie Canan, at para. 8; *see also* Financial Statements of MSDIA Ecuador (2007-2011), Exhibits C-82, C-92, C-97, C-102, C-111.

²²⁴ Expert Opinion of Brian Calvert, at paras. 26.

²²⁵ Second Witness Statement of Jean Marie Canan, at para. 8 (emphasis added).

²²⁶ Second Witness Statement of Jean Marie Canan, at para. 8 (emphasis added). Mr. Canan further notes that Mr. Hart’s suggestion that MSDIA could borrow \$150 million to satisfy the judgment and then pay back the loan by using five years’ worth of MSDIA’s net income makes no sense. Second Witness Statement of Jean Marie Canan, at paras. 9-11; *see also* Hart Report, at para. 35 and Table 1. As Mr. Canan explains: “No rational corporation faced with the same circumstances would devote all of its worldwide net income for nearly half a decade to paying a manifestly corrupt judgment of this magnitude, especially to preserve a business with a far lower value than the judgment.” Second Witness Statement of Jean Marie Canan, at para. 9.

²²⁷ Expert Opinion of Brian Calvert, at paras. 26 (emphasis added).

²²⁸ *Id.* at para. 33 (emphasis added).

satisfying the judgment and seamlessly continue its business operations.”²²⁹ But given the value of MSDIA Ecuador’s business, the opposite is obviously true: no reasonable company would pay \$150 million to avoid the seizure of assets worth far less.²³⁰ Neither Ecuador nor its expert, Mr. Hart, engage with this issue at all.

151. Accordingly, because doing so would be economically irrational (and inconsistent with MSDIA’s obligation to maximize value for its shareholders), MSDIA will not pay the judgment voluntarily. Therefore, a decision by Ecuador’s National Court of Justice affirming the judgment against MSDIA would lead immediately to an action in Ecuador’s courts to enforce the judgment against MSDIA’s assets in Ecuador.²³¹ This, in turn, would lead to the prompt seizure of MSDIA’s Ecuadorian assets—which would be insufficient to satisfy the judgment—and thus the complete destruction of its Ecuadorian business. As explained in MSDIA’s Request and the expert opinion of Dr. Jaime Ortega Trujilla, the seizure of MSDIA’s assets could happen as quickly as a month after issuance of an adverse decision by the National Court of Justice.²³²

152. Because MSDIA Ecuador’s assets are all used in MSDIA Ecuador’s ongoing business, the seizure of those assets (including its operating cash, inventory, accounts receivable, and equipment) will make it impossible for MSDIA Ecuador to operate. As soon as its assets are seized, MSDIA Ecuador will be unable to pay its employees, its suppliers, the businesses with which it trades, and its landlords,²³³ a fact that Ecuador does not (and cannot) dispute. MSDIA Ecuador also would be unable to provide products to its customers, since its inventories would be subject to seizure, and it would be unable to import additional products, which would also be subject to seizure. Under such circumstances, MSDIA would be forced to cease operating as soon as its assets were seized by the Ecuadorian government.

b) The Irreparable Harm to MSDIA Ecuador Would Begin Even Before the Seizure of Its Assets

153. Even before MSDIA Ecuador’s assets were physically seized through a court enforcement action, the mere threat of the imminent enforcement of the judgment following an adverse decision from Ecuador’s National Court of Justice would cause MSDIA Ecuador’s key employees, distributors, and leaseholders to seek other employers, suppliers, and tenants.²³⁴ This, in turn, would quickly bring about the destruction of MSDIA Ecuador, even before its assets are physically seized.²³⁵

²²⁹ Respondent’s Opposition, at paras. 153-154.

²³⁰ Expert Opinion of Brian Calvert, at paras. 13-33 (“Regardless of MSDIA’s and Merck’s past statements and their wish to do business in Ecuador, it would not be rational to pay \$150 million to save MSDIA Ecuador because doing so clearly would be value destroying. *MSDIA’s historical commitment to doing business in Ecuador, and its desire to continue to do business in Ecuador does not mean it should pay more to save MSDIA than it is worth.* Engaging in value destroying behaviour of this sort would be inconsistent with the sole purpose of a corporation to maximize shareholder value....”) (emphasis added).

²³¹ Claimant’s Request for Interim Measures, at paras. 76-80.

²³² *Id.* at para. 77; First Ortega Expert Opinion, at para. 19.

²³³ First Witness Statement of Jean Marie Canan, at paras. 20-24.

²³⁴ *Id.* at para. 21.

²³⁵ *Id.*

154. In its Opposition, Ecuador does not (and cannot) dispute that the actual seizure of MSDIA Ecuador's assets would cause the destruction of MSDIA Ecuador. Ecuador does dispute, however, MSDIA's submission that the imminent *threat* of enforcement occasioned by the issuance of an immediately enforceable judgment would itself trigger irreparable harm to MSDIA. According to Ecuador, MSDIA's assertions in this regard should be "dismissed outright"²³⁶:

"The first adverse judgment against MSDIA was issued in December 17, 2007 – almost five years ago. The Court of Appeals issued the reduced judgment on September 23, 2001 – ten months ago. It is remarkable indeed that, if any of the dire consequences speculated upon by Mr. Canan were real, they have not occurred at all during the period since the 2007 ruling."²³⁷

155. Ecuador's expert, Mr. Hart, pursues the same line of reasoning in his expert report:

"The existence of a judgment against MSDIA has been known since 2007, and if any employees, distributors or landlords were inclined to stop doing business with MSDIA, then evidence should already exist supporting this supposition. I do not see how the National Court of Justice upholding the judgment would change this."²³⁸

156. Ecuador and Mr. Hart miss a fundamental point, namely the fact that a National Court of Justice ruling affirming the \$150 million appeals court judgment against MSDIA would fundamentally alter the status quo that has existed for the past five years. Under Ecuadorian procedural law, the judgment against MSDIA is not currently enforceable against MSDIA. Following the decision of the National Court of Justice, however, the judgment would for the first time be fully enforceable with immediate effect.²³⁹ Accordingly, a decision by the National Court of Justice upholding the \$150 million judgment would mean that, for the first time, MSDIA would be facing imminent seizure unmediated by further extended legal proceedings, appeals, and delays.

157. In his Second Witness Statement, Mr. Canan describes this fundamental shift in the status quo that would follow an adverse decision by the National Court of Justice: "***a decision by the National Court of Justice upholding the \$150 million judgment against MSDIA would permit – for the first time – enforcement of the judgment against MSDIA, including via the seizure of MSDIA Ecuador's assets.***"²⁴⁰

158. In an effort to avoid this conclusion, Ecuador avers that in its opinion it is "unlikely" that employees, creditors, customers and landlords would be able to "distinguish the threat posed by a

²³⁶ Respondent's Opposition, at para. 145.

²³⁷ *Id.* at para. 147.

²³⁸ Hart Report, at para. 19.

²³⁹ Claimant's Request for Interim Measures, at para. 72; First Ortega Expert Opinion, at para. 11.

²⁴⁰ Second Witness Statement of Jean Marie Canan, at para. 16 (emphasis added).

trial court judgment and an appellate court review....”²⁴¹ Ecuador provides no support for this contention, which is simply wrong. As Mr. Calvert explains:

“Typically, management of [a business facing a large adverse judgment] can emphasize the unfairness of the judgment and the likelihood of the judgment being overturned on appeal. However, *once the final appeal is lost, the impact quickly becomes severe and more pronounced. Customers, employees and suppliers will react quickly to protect their own interests. Accordingly, I conclude that there will be a rapid loss of customers, key employees and suppliers if the \$150 million Ecuadorian judgment against MSDIA is affirmed by the National Court of Justice.*”²⁴²

Mr. Calvert testifies of a recent example of a business destroyed by precisely this effect.²⁴³

159. Mr. Canan agrees:

“*The threat of the seizure of MSDIA Ecuador’s assets – which has not previously existed – undoubtedly would cause key employees, distributors, and leaseholders of the company to seek other employers, suppliers and tenants.* The reason for this is clear: *once the judgment becomes enforceable against MSDIA in Ecuador, our employees and business partners would recognize that there is a serious and imminent risk that all of MSDIA Ecuador’s assets could be seized, which would lead to the complete destruction of the business....* Faced with the prospect of losing their jobs, MSDIA Ecuador’s employees would immediately begin to look for other employment. Similarly, faced with the possibility of MSDIA being suddenly unable to pay its distributors and landlords, those companies would immediately take steps to mitigate their exposure by seeking other business partners.”²⁴⁴

160. In his expert report, Mr. Hart argues that MSDIA Ecuador’s customers would not seek other suppliers and/or products following an adverse decision of the National Court of Justice. According to Mr. Hart:

“The products which MSDIA sells to customers are provided on credit, meaning that the customer receives the product and is required to pay MSDIA something in the future.... Most business operate in this manner and it does not seem reasonable that customers would stop doing business with MSDIA, as it is the customers who are receiving the credit.”²⁴⁵

161. Mr. Hart’s argument appears to be premised on his mistaken notion that MSDIA would pay this excessive and irrational judgment. Given that MSDIA would not in fact do so, however, MSDIA Ecuador’s customers would have no choice but to find alternative products and suppliers. Contrary to Mr. Hart’s suggestion that they would be in no hurry to do so, the reality

²⁴¹ Respondent’s Opposition, at para. 147.

²⁴² Expert Opinion of Brian Calvert, at para. 44 (emphasis added).

²⁴³ *Id.* at para. 39.

²⁴⁴ Second Witness Statement of Jean Marie Canan, at para. 18 (emphasis added).

²⁴⁵ Hart Report, at para. 17.

is that the threat of the imminent seizure of MSDIA Ecuador’s assets would cause its customers immediately to look for new suppliers. As Mr. Canan explains in his Second Witness Statement:

“Having a secure and predictable supply of products is extremely important to purchasers of pharmaceutical products. If there is a threat to the supply of a pharmaceutical product, the purchaser will have a strong incentive to change products and/or suppliers. The fact that it is buying the product on credit usually is of little consequence to this decision.”²⁴⁶

162. Mr. Canan concludes that because a decision by the National Court of Justice affirming the judgment against MSDIA would rapidly lead to the destruction of MSDIA Ecuador, ***“rational customers of MSDIA Ecuador would seek other suppliers in light of such a judgment.”***²⁴⁷ Mr. Calvert reaches a similar conclusion:

“While Mr. Hart is correct that customers typically do not evaluate their suppliers based on collectability, they do evaluate suppliers on the basis of stability. A National Court of Justice decision permitting enforcement of the \$150 million judgment against MSDIA will cast significant doubt on MSDIA Ecuador’s ability to supply its customers in Ecuador and will place MSDIA at a significant competitive disadvantage in Ecuador.”²⁴⁸

163. An adverse judgment by Ecuador’s National Court of Justice also would threaten the supply of MSDIA medicines and vaccines to patients in Ecuador.²⁴⁹ Ecuador disputes this fact on the basis that “MSDIA’s indirect corporate parent, Merck ... could very well import, distribute and market its medicines in Ecuador through other avenues without any risk of interruption in their availability to Ecuadorian patients.”²⁵⁰ Likewise, Mr. Hart states that even if MSDIA Ecuador were destroyed, “there is no reason that MSDIA could not do business in Ecuador using a different entity or business model....”²⁵¹ Ecuador’s and Mr. Hart’s arguments in this regard are wrong.

164. As Mr. Calvert explains in his expert report, even if MSDIA somehow could set up a new entity in Ecuador or change its business model, doing so would “require the existence of new assets in Ecuador” that might be subject to seizure.²⁵² In addition, this new entity or business model likely would “not resolve the perception of customers, employees and suppliers that the business is a Distressed Business....”²⁵³ Moreover, setting up a new entity would “entail

²⁴⁶ Second Witness Statement of Jean Marie Canan, at para. 18 (emphasis added).

²⁴⁷ *Id.* (emphasis added).

²⁴⁸ Expert Opinion of Brian Calvert, at para. 40 (emphasis added).

²⁴⁹ First Witness Statement of Jean Marie Canan, at paras. 23-24.

²⁵⁰ Respondent’s Opposition, at para. 194.

²⁵¹ Hart Report, at para. 18.

²⁵² Expert Opinion of Brian Calvert, at para. 45.

²⁵³ *Id.*

significant disruptions and would present MSDIA’s competitors with an opportunity to seize business from it.”²⁵⁴

165. Mr. Canan makes a similar point:

“If an adverse judgment of the National Court of Justice were enforced in Ecuador, *MSDIA’s ultimate parent Merck & Co., Inc., or other affiliates would need to secure the necessary regulatory authorizations and other licenses and permits, manufacture appropriately packaged product pursuant to those authorizations and seek to establish with the Respondent Republic of Ecuador and/or appropriate third parties an appropriate transaction structure to allow the Republic of Ecuador and/or third parties to purchase MSDIA medicines and vaccines* outside Ecuador and import them into Ecuador for distribution in Ecuador, *which in our experience often takes a significant amount of time*, assuming these authorizations, licenses and permits are approved. *The delay between the time of the seizure of MSDIA Ecuador assets and the time that Merck & Co., Inc. or affiliates and the Respondent Republic of Ecuador and/or appropriate third parties could implement an alternative arrangement would* despite the efforts of all concerned parties *likely cause an unacceptable interruption in the provision of critical medicines and vaccines to patients in Ecuador.*”²⁵⁵

166. For the reasons set forth above, a decision of Ecuador’s National Court of Justice affirming the \$150 million judgment against MSDIA would quickly lead to irreparable losses, and then the destruction of MSDIA Ecuador and a fundamental disruption in the provision of critical medicines and vaccines to patients in Ecuador. The destruction of MSDIA’s business in Ecuador would constitute irreparable harm to MSDIA.²⁵⁶ MSDIA is therefore entitled to interim measures of protection to prevent the enforcement of the disputed judgment, which would prevent the seizure of its assets and the destruction of its business in Ecuador.

V. MSDIA HAS SHOWN THAT ITS NEED FOR INTERIM MEASURES IS URGENT

167. Contrary to Ecuador’s various arguments, the requested interim measures of protection are urgently required. It is true, as Ecuador says, that Ecuador’s National Court of Justice has not yet issued its judgment; it is true that MSDIA cannot say precisely when the judgment will issue;²⁵⁷ and it is true that “the National Court of Justice’s decision is uncertain in content” and there is at least a theoretical possibility, contrary to experience and all appearances, that the National Court of Justice will decide in favor of MSDIA.²⁵⁸ But none of these circumstances alleviates the urgency of MSDIA’s need for interim measures of protection. As discussed below, Ecuador’s argument misconceives the legal standard required for a showing of urgency, and mischaracterizes the real posture of the *NIFA v. MSDIA* litigation in Ecuador.

²⁵⁴ *Id.*

²⁵⁵ Second Witness Statement of Jean Marie Canan, at para. 19 (emphasis added).

²⁵⁶ *See supra*, at paras. 134.

²⁵⁷ Respondent’s Opposition, at para. 100 (“urgency exists only when a threat of irreparable harm is immediate and not, as Claimant incorrectly suggests, when such harm is possible at an undetermined time prior to a final award”).

²⁵⁸ Respondent’s Opposition, at para. 100.

A. *The Need for Interim Measures of Protection Is Urgent Because Irreparable Harm Is Likely To Occur Before the Issuance of a Final Award*

1. Urgency Is Determined by Reference to the Issuance of a Final Award

168. Ecuador argues that the need for interim measures of protection can be urgent only when the threatened harm is immediate, in the sense that the injury must be only days away from occurring.²⁵⁹ Here, of course, a judgment could issue any day with immediate irreparable consequences, and thus even so extreme a requirement would be satisfied. But Ecuador is, in any event, clearly wrong about the standard. Although there are certainly cases (like this one) in which interim measures have been granted to prevent harm that could materialize in a matter of days, these cases do not establish that tribunals must wait to act until there is so immediate a threat of irreparable harm.

169. Rather, the relevant authorities uniformly hold that the urgency requirement is met when the threatened harm is likely to occur at any time before the issuance of a final award:

- Interim measures are warranted when there is “urgency in the sense that there is a real risk that action prejudicial to the rights of either party might be taken *before the Court has given its final decision*”²⁶⁰
- A measure is urgent when “action prejudicial to the rights of either party is likely to be taken *before [a] final decision is given*.”²⁶¹
- Urgency “may be satisfied when a party can prove that there is a need to obtain the requested measure at a certain point in the procedure *before the issuance of an award*.”²⁶²
- “[T]he criterion of urgency is satisfied when ‘a question *cannot await the outcome of the award on the merits*’.”²⁶³
- There is “sufficient urgency given the risk that substantial harm may befall the Claimants *before this Tribunal can decide the Parties’ dispute by any final award*”²⁶⁴

²⁵⁹ Respondent’s Opposition, at para. 103 (stating that, in *Perenco and Burlington*, the disputed payments “were due within a few days”).

²⁶⁰ Exhibit CLM-17, *Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Georgia v. Russian Federation)*, Request for the Indication of Provisional Measures, Order (15 October 2008), at para. 129 (emphasis added).

²⁶¹ Exhibit CLM-35, *Case Concerning Avena and Other Mexican Nationals (Mexico v. United States of America)*, Request for the Indication of Provisional Measures, Order (5 February 2003), at para. 50 (emphasis added) (quoting Exhibit CLM-20, *Passage Through the Great Belt (Finland v. Denmark)*, Request for the Indication of Provisional Measures, Order (29 July 1991), at para. 23).

²⁶² Exhibit CLM-2, *Biwater Gauff (Tanzania) Ltd. v. United Republic of Tanzania*, ICSID Case No. ARB/05/22, Procedural Order No. 1 (31 March 2006), at para. 76 (emphasis added).

²⁶³ Exhibit CLM-14, *Quiborax S.A. v. Plurinational State of Bolivia*, ICSID Case No. ARB/06/2, Decision on Provisional Measures (26 February 2010), at para. 150.

²⁶⁴ Exhibit CLM-6, *Chevron Corporation and Texaco Petroleum Company v. The Republic of Ecuador*, PCA Case No. 2009-23 (UNCITRAL), Second Interim Award on Interim Measures (16 February 2012), at para. 2 (emphasis added).

170. In its Opposition, Ecuador quotes a commentary on the UNCITRAL Rules, and contends that “Article 26 of the UNCITRAL Arbitration Rules contemplates that ‘the party requesting the measure is facing harm ... *so imminent* that it cannot await the tribunal’s decision on the merits.’”²⁶⁵ While Ecuador emphasizes the word “imminent” in this quote, it disregards the remainder of the quote, which defines “imminence” in the context of interim measures: harm is “imminent” in that context when it “*cannot await the tribunal’s decision on the merits.*” Another commentator cited by Ecuador similarly states that a central factor “relevant to the determination of the urgency of the matter” is “the estimated period likely to elapse before the decision of the court or tribunal on the principal claim,” because urgency exists where the requested measure is “something that cannot wait until the final decision in the case.”²⁶⁶

171. Ecuador ignores this settled authority (including even the authorities it cites itself) and insists that “urgency must be assessed from the present perspective and not just in relation to the future date of a final award.”²⁶⁷ In a footnote, Ecuador cites a single case in support of this remarkable proposition—*Bendone Derossi Int’l v. Iran*.²⁶⁸ But even *Bendone* provides no support for Ecuador’s argument. In *Bendone*, the tribunal denied the claimant’s request for interim measures that would have vacated an attachment order issued by a national court, because the tribunal was not satisfied that there was a prima facie basis for exercising jurisdiction: “[T]he Tribunal is not at present satisfied that it appears, prima facie, *that there exists a basis on which it can exercise jurisdiction over the present claim.*”²⁶⁹ In denying the claimant’s request for interim measures, the *Bendone* tribunal did not consider the relevant standard for assessing the urgency of the claimant’s request or make any findings as to whether the request was urgent.²⁷⁰ Ecuador cites no other authority to support its position. Thus,

²⁶⁵ Respondent’s Opposition, at para. 101 (quoting Exhibit RLM-55, S. Baker & M. Davis, *The UNCITRAL Arbitration Rules in Practice: The Experience of the Iran-United States Claims Tribunal* 139 (1992)) (emphasis in original).

²⁶⁶ Exhibit RLM-56, S. Rosenne, *Provisional Measures in International Law* 135 (2005).

²⁶⁷ Respondent’s Opposition, at para. 101.

²⁶⁸ Respondent’s Opposition, at para. 101, n. 115.

²⁶⁹ Exhibit RLM-67, *Bendone-Derossi Int’l v. Iran*, Case No. 375, Chamber One, Award No. ITM 40-375-1 (7 June 1984), *reprinted in* 6 Iran-U.S. Cl. Trib. Rep. 130, at p. 2 (emphasis added).

²⁷⁰ See Exhibit RLM-67, *Bendone-Derossi Int’l v. Iran*, Case No. 375, Chamber One, Award No. ITM 40-375-1 (7 June 1984), *reprinted in* 6 Iran-U.S. Cl. Trib. Rep. 130. In a footnote, Respondent misleadingly quotes a portion of the tribunal’s order in *Bendone*, and suggests that the quoted portion had been drafted by the tribunal. See Respondent’s Opposition, at p. 48 n. 115 (quoting *Bendone* order for the proposition that “the attachment of assets referred to by the Respondent was in effect for nearly ten months before the Respondent filed its Petition. The Claimant is unaware and the Respondent has not alleged, that any action with regard to the execution of the attachment is imminent.”). But in that passage the tribunal was not speaking for itself, but was *quoting a letter from the Claimant*. See Exhibit RLM-67, *Bendone-Derossi Int’l v. Iran*, Case No. 375, Chamber One, Award No. ITM 40-375-1 (7 June 1984), *reprinted in* 6 Iran-U.S. Cl. Trib. Rep. 130, at p. 2 (“In a *letter filed with the Tribunal on 16 May 1984 the Claimant stated* ...”) (emphasis added). Moreover, the concurrence in *Bendone* would have denied the request because the attachment was not incompatible with the proceedings of the tribunal. Exhibit RLM-67, *Bendone-Derossi Int’l v. Iran*, Case No. 375, Chamber One, Award No. ITM 40-375-1 (7 June 1984), *reprinted in* 6 Iran-U.S. Cl. Trib. Rep. 130, at p. 3 (Judge Holtzmann, Concurring Opinion). The concurrence also noted that there had been “no showing of urgency” because the attachment had been in place for “ten months before Respondent sought a stay.” Exhibit RLM-67, *Bendone-Derossi Int’l v. Iran*, Case No. 375, Chamber One, Award No. ITM 40-375-1 (7 June 1984), *reprinted in* 6 Iran-U.S. Cl. Trib. Rep. 130, at p. 9 (Judge Holtzmann, Concurring Opinion). This observation stands for the unsurprising notion that a situation cannot be considered urgent when the very party claiming urgency excessively delays in seeking interim measures. The *Tokios Tokelés* tribunal similarly concluded that the “Claimant cannot credibly claim that circumstances it did not consider urgent 18 months ago are urgent now.” Exhibit RLM-62, *Tokios Tokelés v. Ukraine*, ICSID Case No. ARB/02/18, Order No. 3 (18 January 2005), at

Ecuador's position that the Tribunal should consider whether the threatened harm will occur immediately, as opposed to whether the threatened harm is likely to occur before the issuance of the final award, is wholly without support.²⁷¹

2. Interim Measures Are Urgently Needed When Irreparable Injury is Likely, Even If Not "Certain," to Occur Before the Final Award

172. To satisfy the urgency requirement, the threatened harm must be *likely* to occur before the issuance of a final award. There is no requirement that the threatened harm be certain to occur, as Ecuador suggests.²⁷² A certainty requirement could almost never be met and would needlessly allow irreparable injury to befall victims of treaty violations.

173. As discussed above, the ICJ has held that interim measures of protection are warranted when "prejudice was probable or possible."²⁷³ For example, in *Avena and Other Mexican Nationals*, the ICJ ordered provisional measures with respect to a Mexican national on death row whose execution had already been scheduled, and also with respect to Mexican nationals on death row who were "at risk of execution in the coming months."²⁷⁴ The Court did not find that these individuals were *certain* to be executed at any particular time absent the interim measures of protection, but found that interim measures were still urgently needed because they were "at risk" of being executed at some unspecified point in the future.²⁷⁵ Indeed, when it is not wrongly

para. 13.

²⁷¹ Ecuador claims that MSDIA's supposed "delay in making its request for interim measures" proves that the harm to be averted is not imminent. Respondent's Opposition, at para. 116. This argument attempts to have it both ways. Had MSDIA requested interim measures any sooner, Ecuador surely would have protested (as it does now) that the request was premature and the potential harm not imminent enough. In any event, MSDIA has acted both with expedience and due respect for the proceedings in Ecuador: it filed this arbitration in the same month that the National Court of Justice admitted its appeal, and filed the instant Request for Interim Measures just two months after the constitution of the Tribunal.

²⁷² See Respondent's Opposition, at heading IV.A, paras. 101-104.

²⁷³ Exhibit RLM-31, J. Sztucki, *Interim Measures in the Hague Court* 105 (1983). Ecuador argues that the ICJ has issued interim measures only where the threatened harm was certain to occur, relying on a 1983 commentary by Jerzy Sztucki: "the ICJ has granted provisional measures in cases '[a]s a matter of fact, ... on the basis of events which were certain (since they already had taken place) or on the basis of events the occurrence of which in the near future could be regarded as certain unless prevented by some diplomatic or judicial action.'" Respondent's Opposition, at para. 102 (quoting Exhibit RLM-31, J. Sztucki, *Interim Measures in the Hague Court* 105 (1983)). Ecuador's purported use of this authority for the proposition that a harm must be "certain" before it can be addressed through interim measures is misleading. *First*, Ecuador uses ellipses to remove the qualifier "*in almost all cases*" from the middle of Sztucki's quote, thus omitting the fact that in at least some ICJ cases the event triggering the threatened harm was *not* certain. See Exhibit RLM-31, J. Sztucki, *Interim Measures in the Hague Court* 105 (1983) ("As a matter of fact, *in almost all cases* in which interim protection was granted the Court acted either on the basis of events which were certain ..."). *Second*, Ecuador ignores the commentator's observation that the ICJ has granted interim measures at times upon finding a "probability of irreparable prejudice, including situations when such consequences are only 'not excluded,'" a low probability indeed. Exhibit RLM-31, J. Sztucki, *Interim Measures in the Hague Court* 105 (1983). *Third*, Ecuador likewise ignores the commentator's observation that the ICJ "admits a margin of uncertainty regarding the irreparability of the alleged prejudice ... whether this uncertainty is related to the occurrence of a certain event or to its probable consequences or both." Exhibit RLM-31, J. Sztucki, *Interim Measures in the Hague Court* 105 (1983). Read in context, even the authority Ecuador relies on makes clear that the ICJ can and has granted interim measures when irreparable harm is not certain because the occurrence of a particular event is uncertain.

²⁷⁴ Exhibit CLM-35, *Case Concerning Avena and Other Mexican Nationals (Mexico v. United States of America)*, Request for the Indication of Provisional Measures, Order (5 February 2003), at para. 55.

²⁷⁵ *Id.*

insisting on “certainty” Ecuador acknowledges that tribunals have routinely issued interim measures to address a “threat,” a “possibility,” or a “risk[.]” of harm; i.e., harms that are not “certain” to occur.²⁷⁶

174. Similarly, as discussed above, in treaty arbitration cases, tribunals have not required a party seeking interim measures to establish that a threatened harm is certain to occur, but only that it is likely to occur. In *Chevron v. Ecuador*, for example, at the time the *Chevron* tribunal first granted the claimant’s request for interim measures, in an order dated 9 February 2011, there was no immediately enforceable judgment against Chevron (in fact, there was not even a judgment from the court of first instance).²⁷⁷ Nevertheless, despite the inherent uncertainty of whether and when an enforceable judgment against Chevron would be issued, the tribunal “conclude[d] that the Claimants ha[d] made out a sufficient case ... under Article 26” to order interim measures.²⁷⁸

175. Ecuador cites two cases, *Occidental v. Ecuador* and the *Interhandel Case*, to support its proposition that “[u]ncertain outcomes are akin to uncertain courses of action, which have been rejected in the past by investor-State tribunals for lack of urgency.”²⁷⁹ Neither case is in any way analogous to the current case, and neither undermines the widely-accepted principles explained above.

176. As discussed above, in *Occidental*, the claimant requested interim measures designed to block Ecuador from transferring the oil field in dispute to another operator. The tribunal denied the requested measures, stating that “[p]rovisional measures are not meant to protect against any potential or hypothetical harm susceptible to result from uncertain actions.”²⁸⁰ As the tribunal noted, the claimant failed to provide any evidence that Ecuador intended to transfer the block, and even admitted that it did not know whether Ecuador intended to do so.²⁸¹ Moreover, as the tribunal noted, Ecuador’s counsel made “a very clear and emphatic statement” that there was “no plan” and “no intention” to transfer the block and “no indication of a likelihood” of a change in that intention.²⁸² Absent any evidence that the harm was likely to occur at any point in the future, the harm was purely hypothetical and therefore not imminent.²⁸³

²⁷⁶ Respondent’s Opposition, at para. 102.

²⁷⁷ Exhibit CLM-46, *Chevron Corporation and Texaco Petroleum Company v. The Republic of Ecuador*, PCA Case No. 2009-23, Order for Interim Measures (9 February 2011), at p. 2. As the Tribunal noted, the likely date of the court of first instance judgment “currently remains uncertain but potentially imminent.” *Id.* Of course, not only was the date of the judgment uncertain, but so was its content.

²⁷⁸ Exhibit CLM-46, *Chevron Corporation and Texaco Petroleum Company v. The Republic of Ecuador*, PCA Case No. 2009-23, Order for Interim Measures (9 February 2011), at p. 3.

²⁷⁹ Respondent’s Opposition, at para. 105.

²⁸⁰ Exhibit RLM-45, *Occidental Petroleum Corporation and Occidental Exploration and Production Company v. The Republic of Ecuador*, ICSID Case No. ARB/06/11, Decision on Provisional Measures (17 August 2007), at para. 89.

²⁸¹ *Id.* at paras. 88-90.

²⁸² Exhibit RLM-45, *Occidental Petroleum Corporation and Occidental Exploration and Production Company v. The Republic of Ecuador*, ICSID Case No. ARB/06/11, Decision on Provisional Measures (7 August 2007), at para. 90.

²⁸³ It should be noted that the Occidental tribunal defined urgency in accordance with the established case law: “A measure is urgent where ‘action prejudicial to the rights of either party is *likely* to be taken before such final

177. The *Interhandel Case* similarly does not assist Ecuador’s argument. In that case, the government of Switzerland requested interim measures preventing the U.S. government from selling certain shares belonging to Swiss nationals. The ICJ rejected this request. Contrary to Ecuador’s suggestion, the ICJ did not hold that there could be no urgency because the sale of the shares was conditional on a court proceeding,²⁸⁴ but rather because of the likely time frame of those proceedings. The ICJ noted the fact that “there [was] no indication as to [the proceeding’s] speedy conclusion” and that the U.S. government assured the court that “it [was] not taking action at the present time to fix a time schedule for the sale of such shares.”²⁸⁵ Given these two factors, the threatened harm in the *Interhandel Case* was not imminent since the harm was unlikely to occur before a final decision in the case.

178. Neither of the cases relied on by Ecuador is analogous to MSDIA’s request for interim measures here. As discussed below, in contrast to *Occidental* and *Interhandel*, MSDIA faces a real and imminent threat of irreparable harm. None of the factors that led the tribunals in *Occidental* and *Interhandel* to reject the requests for interim measures in those cases is present in this case, and MSDIA has established that its need for interim measures of protection is urgent.

B. Ecuador’s National Court of Justice Is Likely to Issue a Judgment Adverse to MSDIA Before Issuance of a Final Award in this Arbitration

179. As explained above, to make a sufficient showing of urgency for the issuance of interim measures, MSDIA must show that it faces a real risk of harm that will occur before the issuance of the final award in this arbitration. As set out below, MSDIA has established that the judgment of Ecuador’s National Court of Justice will likely be issued before the final award in this arbitration, rendering the judgment immediately enforceable. Accordingly, there is a very serious risk and likelihood that absent the requested interim measures, the threat of impending enforcement of the judgment, and the enforcement itself, will cause irreparable harm to MSDIA before the final award.

1. Ecuador’s National Court of Justice Will Almost Certainly Issue Its Judgment Before Issuance of a Final Award in This Arbitration

180. As explained above, the proceedings in Ecuador’s National Court of Justice in the *NIFA v. MSDIA* litigation have been completed and there are no steps left to be taken in that Court, other than issuance of the judgment. The case has been pending in that court for more than eight months and the Court has declared it “ready for decision.” Thus, the judgment could come at any time. Ecuador does not deny that the case could be decided at any moment.²⁸⁶

decision is given,” which again does not require certainty. Exhibit RLM-45, *Occidental Petroleum Corporation and Occidental Exploration and Production Company v The Republic of Ecuador*, ICSID Case No. ARB/06/11, Decision on Provisional Measures (7 August 2007), at para. 59 (quoting Exhibit CLM-20, *Passage Through the Great Belt (Finland v. Denmark)*, Request for the Indication of Provisional Measures, Order (29 July 1991), at p. 17).

²⁸⁴ See Respondent’s Opposition, at p. 53 n. 131.

²⁸⁵ Exhibit RLM-29, *Interhandel Case (Switzerland v. United States of America)*, Request for the Indication of Interim Measures of Protection, Order (24 October 1957), at p. 112.

²⁸⁶ Second Expert Opinion of Dr. Jaime Ortega Trujillo, dated August 3, 2012, (“Second Ortega Expert Opinion”), at para. 6.

181. Ecuador argues that it is unlikely that the decision will be issued soon. Ecuador relies on the opinion of its expert on Ecuadorian procedural law, Dr. Moscoso Serrano, who states that under Ecuadorian procedural rules, the National Court of Justice is statutorily granted 270 days in which to issue its decision.²⁸⁷ Dr. Moscoso Serrano puts the point in a confusing way when he says that “the Court would have no fewer than 270 business days . . . to issue its judgment.”²⁸⁸ In fact, under Ecuadorian procedural law, this is the *maximum*, not minimum, amount of time for the National Court of Justice to issue its decision.²⁸⁹ The court may take many “fewer . . . days” if it so chooses. Moreover, as Claimant’s expert, Dr. Ortega, explains, it may be decided “at any time.”²⁹⁰ Notably, several articles of the Ecuadorian Constitution and the Organic Code of the Judicial Function require that judicial bodies, such as the National Court of Justice, apply the principles of immediacy, concentration, and speed.²⁹¹ Thus, despite Dr. Moscoso Serrano’s suggestion to the contrary, the National Court of Justice should be striving to issue a decision well before the statutory deadline is reached.²⁹²

182. But even if one accepts Dr. Moscoso Serrano’s premise that the National Court of Justice might use all of the time available to it, it is still the case that the decision of the National Court of Justice will almost certainly be issued before a final award in this arbitration. Even under the procedural timetable outlined by Dr. Moscoso Serrano, a final National Court of Justice decision in the NIFA litigation would issue no later than January 2013—i.e., in six months or less.²⁹³ The Tribunal’s final decision on the merits of this arbitration will obviously not be issued until well after that outside date.²⁹⁴

183. Moreover, the history of the *NIFA v. MSDIA* litigation indicates that the case could be expedited and a decision of the National Court of Justice could issue well before the statutory deadline has run. As discussed in more detail below, the court of appeals issued its decision in the NIFA litigation suddenly, and without prior notice, at a time when procedural motions were still pending before the court. Under ordinary practice, the court would have decided the pending procedural motions first, at which time the parties would have had the opportunity to file

²⁸⁷ Respondent’s Opposition, at para. 107.

²⁸⁸ Moscoso Legal Opinion, at para 8.

²⁸⁹ Second Ortega Expert Opinion, at para 6 (citing Article 17 of the Cassation Law) (emphasis added).

²⁹⁰ *Id.* at para. 5.

²⁹¹ *Id.* at para. 7.

²⁹² *Id.*

²⁹³ Moscoso Legal Opinion, at para. 8.

²⁹⁴ Other recent investment arbitrations have taken, on average, more than three years from the time the tribunal is constituted to the time the tribunal has a merits hearing. *See, e.g., Railroad Development Corporation v. Republic of Guatemala*, ICSID Case No. ARB/07/23 (tribunal constituted 14 April 2008; merits hearing held 8-16 December 2011; award issued 29 June 2012); *Ulysseas, Inc. v. The Republic of Ecuador*, UNCITRAL (tribunal constituted 3 November 2009; merits hearing held 5-9 December 2011; award issued 12 June 2012); *EDF International S.A., SAUR International S.A. and León Participaciones Argentinas S.A. v. Argentine Republic*, ICSID Case No. ARB/03/23 (tribunal constituted 2 June 2004; merits hearing held 2-7 November 2009; award issued 11 June 2012); *Toto Costruzioni Generali S.p.A. v. The Republic of Lebanon*, ICSID Case No. ARB/07/12 (tribunal constituted 30 October 2007; merits hearing held 17-21 October 2011; award issued 7 June 2012); *Marion Unglaube v. Republic of Costa Rica*, ICSID Case No. ARB/08/1 (tribunal constituted 12 June 2008; merits hearing held 21-23 February 2011; award issued 16 May 2012).

final written briefs and request a final oral argument. The court's sudden and unexpected decision precluded MSDIA from doing either.²⁹⁵

184. After the court of appeals issued its decision on September 23, 2011, the case moved through the appeal process with unusual speed. It took just a month for the court of appeals to consider and decide requests for clarification and amplification from both parties; to consider and accept petitions for cassation from both parties; to set a bond to be paid by MSDIA; and to send the case to the National Court of Justice, which it did on October 27, 2011.²⁹⁶

185. At that point, Ecuador's National Court of Justice similarly expedited the NIFA litigation in highly unusual ways. On November 11, 2011, the Court formally accepted both parties' petitions for cassation, moving the case ahead of hundreds of other cases whose petitions were still pending.²⁹⁷ The Court then set an oral hearing for December 12, 2011, again moving the NIFA case well ahead of hundreds of other cases that were still awaiting oral hearing dates.²⁹⁸ In fact, when the Court set the hearing for Monday, December 12, the NIFA case was the only case set for oral hearing on a day other than the Court's ordinary hearing days of Tuesday and Thursday. When (given the extraordinary expedition) MSDIA asked for a postponement of the oral hearing, citing the complexity of the case and the need for time to prepare, the Court set the oral hearing for Monday, December 26, 2011, the day after Christmas.²⁹⁹ In order to radically advance the case on its calendar, the National Court of Justice made the NIFA case the only one to have an oral hearing on a Monday and the only one to be heard during the entire week of December 26, 2011.

186. This record in the lower courts establishes that regardless of statutory deadlines and ordinary practice, the Ecuadorian courts can move with lightning speed when they decide—for whatever reason—to do so. This history confirms that the National Court of Justice could issue its decision literally at any time, and it also illustrates MSDIA's concern that without the requested interim measures in place, there is a very real risk of imminent harm to MSDIA in Ecuador.

2. The Judgment of Ecuador's National Court of Justice Will Almost Certainly Be Enforced Prior to the Issuance of a Final Award

187. As explained in the Request and the First Expert Opinion of Dr. Ortega, once Ecuador's National Court of Justice issues its decision, execution of the judgment could take place within a month.³⁰⁰ At that point, if there are no interim measures of protection already in place, irreparable harm will occur to MSDIA's business in Ecuador almost immediately. Even before MSDIA Ecuador's assets are physically seized, the mere threat of the imminent enforcement of the judgment resulting from an adverse National Court of Justice decision likely would cause

²⁹⁵ See *infra* at para. 247.

²⁹⁶ See *infra* at paras. 248-252.

²⁹⁷ Exhibit C-54, National Court of Justice Order dated 11 November 2011; see *infra* at paras 254-256.

²⁹⁸ *Id.*

²⁹⁹ Exhibit C-57, National Court of Justice Order dated 8 December 2011.

³⁰⁰ First Ortega Expert Opinion, at para. 19.

MSDIA Ecuador's key employees, distributors, and leaseholders to seek other employees, suppliers, and tenants.³⁰¹ By that point, it would almost certainly be too late for MSDIA to file a new request for interim measures of protection and for the Tribunal to decide that request in order to avoid serious irreparable harm to MSDIA's business. This is precisely why MSDIA has requested interim measures of protection now – so that they will be in place when the National Court of Justice decision is issued, and will be effective to forestall the harm that would otherwise occur to MSDIA's business.

188. Ecuador's expert, Dr. Moscoso Serrano, accepts that under Ecuadorian procedural law, NIFA could take steps to enforce an award in its favor very quickly. Although Dr. Moscoso Serrano believes that the full process of enforcement would take a matter of months, as opposed to a matter of weeks as explained by MSDIA's expert, Dr. Ortega,³⁰² even under Dr. Moscoso Serrano's view, NIFA would be able to enforce its judgment against MSDIA's assets well before a final award in this arbitration. Thus, even on Ecuador's logic, MSDIA has established that the interim measures of protection it is requesting are urgent because the threatened harm will occur before the issuance of a final award in this arbitration.

189. In any event, Dr. Moscoso Serrano's view that enforcement of a judgment in favor of NIFA could take up to six months is misguided.

190. *First*, Dr. Moscoso Serrano suggests that MSDIA could file a motion in the National Court of Justice for the clarification or amplification of the judgment, or for the correction of a calculation error therein, which would delay enforcement.³⁰³ However, any such motion must be filed within three days of the decision³⁰⁴ and must be resolved within two days.³⁰⁵ In addition, any filing made with the sole intention of delaying court processes must be immediately discarded by the judge, and the filing attorney sanctioned under the Code of Civil Procedure.³⁰⁶ Any effort by MSDIA intended solely to delay proceedings in the National Court of Justice after the issuance of a decision would therefore be procedurally improper and, in any event, would be unlikely to delay enforcement by more than a few days.

191. *Second*, Dr. Moscoso Serrano states that the process of appointing an expert to calculate costs and interest are time-consuming and would delay enforcement of the judgment by months.³⁰⁷ Again, Dr. Moscoso Serrano's opinion is misguided. Contrary to his view that the calculation of interest would delay enforcement by months, in fact, there would not be a

³⁰¹ Calvert Expert Opinion, at paras. 34-44; First Witness Statement of Jean Marie Canan, at para. 21; Second Witness Statement of Jean Marie Canan, at para. 14-19.

³⁰² First Ortega Expert Opinion, at para. 19.

³⁰³ Moscoso Legal Opinion, at para. 19 (“This is a mechanism regularly employed by litigants to delay enforcement because prior to deciding the request for clarification or decision on a matter not yet decided, the Court must hear the other party and afford it a period of time to explain its point of view.”).

³⁰⁴ Second Ortega Expert Opinion, at para. 8.

³⁰⁵ *Id.* It should be noted that motions to clarify, broaden or amend a calculation error in the National Court of Justice cannot be filed sequentially but rather simultaneously and thus MSDIA could not cause procedural delay by filing one motion after another. *Id.*

³⁰⁶ Second Ortega Expert Opinion, at para. 9.

³⁰⁷ Moscoso Legal Opinion, at paras. 22-26.

calculation of interest in this case *at all*. The court of appeals denied NIFA's request for interest, and there would therefore be no need for a calculation of interest in this case.³⁰⁸ In addition, there would be no need for a calculation of costs, because costs were fixed at \$50,000 by the court of first instance.³⁰⁹ The omission of any need for these procedural steps would necessarily reduce the time estimated by Dr. Moscoso Serrano for enforcement of the judgment significantly.

192. Dr. Moscoso Serrano also argues that sending and verifying the case files to the court of first instance would delay the enforcement of the judgment. However, Dr. Moscoso Serrano admits that sending and verifying the case files are "simply ... administrative task[s]."³¹⁰ Given the sanctions for unnecessarily delaying court actions, the applicable principles of speed, and NIFA's interests in expediting enforcement, such "administrative" delays are unlikely.³¹¹ Further, as noted above, the Ecuadorian courts have shown themselves to be perfectly capable of expediting administrative tasks when they are motivated to do so, and there is no reason to believe that a process such as copying the case file would delay enforcement of the NIFA judgment.

193. Finally, Dr. Moscoso Serrano makes the point that MSDIA could appeal an adverse decision by the National Court of Justice to the Constitutional Court. This is irrelevant for the purpose of determining whether interim measures are urgently needed. Constitutional Court review is discretionary, and that court does not hear the majority of the cases that are appealed to it.³¹² Moreover, as Dr. Moscoso Serrano admits, even if the Constitutional Court accepted an appeal in this case, the Constitutional Court proceedings would not suspend enforcement of the judgment during those proceedings.³¹³ Thus, even if MSDIA appealed to the Constitutional Court and prevailed in having the Constitutional Court overturn the NIFA judgment, by then, NIFA would have long-since executed its judgment against MSDIA's assets. Clearly, the theoretical possibility of an appeal to the Constitutional Court would not provide an effective remedy to MSDIA and, in any event, would not prevent irreparable harm to MSDIA's business in Ecuador.

194. For the reasons outlined above, MSDIA's request for interim measures of protection is urgent because in the absence of such measures, it is likely that MSDIA will suffer irreparable harm prior to the issuance of the final award in this arbitration.

VI. MSDIA HAS MADE A PRIMA FACIE CASE ON THE MERITS

195. As discussed above, MSDIA has met the three requirements tribunals typically require in order to grant interim measures – a *prima facie* showing of jurisdiction; necessity (threat of

³⁰⁸ Second Ortega Expert Opinion, at para. 9.

³⁰⁹ *Id.*

³¹⁰ Moscoso Legal Opinion, at para. 21.

³¹¹ Second Ortega Expert Opinion, at para. 11.

³¹² *Id.* at para. 12.

³¹³ Moscoso Legal Opinion, at para. 17.

irreparable harm); and urgency.³¹⁴ Under the applicable UNCITRAL Rules, the merits of the underlying claim are typically not considered in connection with a request for interim measures, and tribunals are careful not to prejudge the merits in considering an interim measures request.³¹⁵

196. A small number of tribunals have required parties seeking interim relief to demonstrate a *prima facie* case on the merits in addition to the three requirements outlined above. If this Tribunal wishes to do so, MSDIA has amply demonstrated its *prima facie* case on the merits.

A. *The Prima Facie Standard Does Not Require MSDIA to Establish the Merits of the Case, but Only (At Most) to Make a “Reasonable Case,” That, if Proven, “Might Possibly” Lead to an Award in Its Favor*

197. It is universally accepted that a tribunal should not prejudge the merits of a case at the stage of considering an interim measures request.³¹⁶ To the extent a tribunal considers the merits at all, its consideration is limited to the assessment whether the claimant has set forth allegations that, if proven, could potentially support an award in its favor.

198. The leading treaty case on the appropriate standard is *Paushok v. Mongolia*.³¹⁷ In *Paushok*, the tribunal held that the claimant must make “a reasonable case ... which, if the facts alleged are proven, might possibly lead the Tribunal to the conclusion that an award could be made in favor of Claimants.”³¹⁸ As the *Paushok* tribunal further explained:

“Essentially, the Tribunal needs to decide only that the claims made are not, on their face, frivolous or obviously outside the competence of the Tribunal. To do otherwise would require the Tribunal to proceed to a determination of the facts and, in practice, to a hearing on the merits of the case, a lengthy and complicated process which would defeat the very purpose of interim measures.”³¹⁹

³¹⁴ Request for Interim Measures, at para 31.

³¹⁵ Exhibit CLM-12, *Paushok v. Gov't of Mongolia*, UNCITRAL Arbitration Rules, Order on Interim Measures (2 September 2008), at para. 55 (citing *Victor Pey Casado, Président Allende Fondation c. République du Chili*, ICSID Case No. ARB/98/2, ICC 185 (2001 edition), Decision on Provisional Measures (25 September 2001), at para. 8; *Application on the Convention on the Punishment of the Crime of Genocide*, Provisional Measures, Order of September 13, 1993, [1993] I.C.J. Rep. 325, at para. 24).

³¹⁶ See Exhibit CLM-95, J. Lew, *Commentary on Interim and Conservatory Measures in ICC Arbitration Cases*, 11(1) ICC Ct. Bull. 23, 27 (2000) (“[A]n arbitral tribunal must refrain from prejudging the merits of the case.”); Exhibit RLM-68, C. Schreuer, *The ICSID Convention: A Commentary* Art. 47, at paras. 1-3 (2001) (noting “the need not to prejudge the merits of the case”); Exhibit RLM-21, *Emilio Agustín Maffezini v. Kingdom of Spain, Procedural Order No. 2*, ICSID Case No. ARB/97/7 (28 October 1999), paras. 20-21 (“The meritoriousness of the Claimant’s case will be decided by the Tribunal based on the law and the evidence presented to it. A determination at this time which may cast a shadow on either party’s ability to present its case is not acceptable.”).

³¹⁷ Exhibit CLM-12, *Paushok v. Gov't of Mongolia*, UNCITRAL Arbitration Rules, Order on Interim Measures (2 September 2008). In *Chevron v. Ecuador*, the tribunal found that the claimants made “a sufficient case as regards ... the Claimants’ case on the merits,” but did not explain the standard or explain how the claimants met it. Exhibit CLM-6, *Chevron Corporation and Texaco Petroleum Company v. The Republic of Ecuador*, PCA Case No. 2009-23, Second Interim Award on Interim Measures (16 February 2012), para. 2.

³¹⁸ Exhibit CLM-12, *Paushok v. Gov't of Mongolia*, UNCITRAL Arbitration Rules, Order on Interim Measures (2 September 2008), para. 55.

³¹⁹ *Id.*

199. Ecuador cites two additional cases, *Chevron v. Ecuador* and *Alps Finance v. Slovakia*, which discuss the standard for establishing a *prima facie* case on the merits in connection with an objection to the tribunal’s jurisdiction. Those cases adopt a standard similar to that applied in *Paushok*. Specifically, the *Chevron* tribunal *rejected* Ecuador’s contention that the claimants were required to “already have established their case with a 51% chance of success, i.e. on a balance of probabilities”³²⁰ Instead, the tribunal asked only whether the claimants’ case was “‘decently arguable’ or that it has ‘a reasonable possibility as pleaded’.”³²¹ Similarly, the *Alps Finance* tribunal, applying the *prima facie* standard, considered whether “the claims are sufficiently plausible under the BIT,” such that “[if] the facts or contentions alleged by the Claimants are ultimately proven true, they would be capable of constituting a violation of the BIT.”³²²

B. MSDIA Has More Than Met the Requirement of Showing a “Reasonable Case” That “Might Possibly” Lead to an Award in its Favor

200. MSDIA has more than made this *prima facie* showing. As set out in the Notice of Arbitration, and in the Request, MSDIA has provided ample factual allegations that the Ecuadorian proceedings amounted to a denial of justice under customary international law³²³ and violated multiple provisions of the Ecuador-United States BIT.³²⁴ MSDIA has made a *prima facie* showing of its case that Ecuador breached its obligations under multiple Treaty provisions through the denial of justice to MSDIA in the NIFA v. MSDIA litigation,³²⁵ and under Article II(7), by failing to “provide effective means of asserting claims and enforcing rights with respect to investments.”³²⁶

1. MSDIA Has Made a *Prima Facie* Case on the Merits of Its Denial of Justice Claim

201. MSDIA has more than satisfied a *prima facie* showing of a denial of justice in this case. A denial of justice occurs when a state fails “to create and maintain a *system of justice* which ensures that unfairness to foreigners either does not happen, or is corrected.”³²⁷ A denial of

³²⁰ Exhibit RLM-14, *Chevron Corporation and Texaco Petroleum Company v. The Republic of Ecuador*, PCA Case No. 2009-23, Third Interim Award on Jurisdiction and Admissibility (27 February 2012), para. 4.8.

³²¹ *Id.*

³²² Exhibit RLM-5, *Alps Finance and Trade AG v. Slovak Republic*, UNCITRAL Rules, Award (5 March 2011), para. 248.

³²³ See Claimant’s Notice of Arbitration, para. 158 (“The Ecuadorian proceedings amounted to a denial of justice, which violated Ecuador’s obligations under the Treaty.”). See also Claimant’s Request for Interim Measures, para. 165 (“The Ecuadorian proceedings amounted to a denial of justice, which violated Ecuador’s obligations under the Ecuador-United States BIT.”).

³²⁴ See Claimant’s Notice of Arbitration, paras. 2, 12, 147-159. See also Claimant’s Request for Interim Measures, paras. 1, 163-165.

³²⁵ See Claimant’s Notice of Arbitration, para. 159(b). See also Claimant’s Request for Interim Measures, para. 163(b).

³²⁶ See Claimant’s Notice of Arbitration, para. 159(d). See also Claimant’s Request for Interim Measures, para. 163(d).

³²⁷ Exhibit RLM-30, J. Paulsson, DENIAL OF JUSTICE IN INTERNATIONAL LAW 7 (2005) (emphasis in original). See also Exhibit RLM-1, A. Newcombe & L. Paradell, LAW AND PRACTICE OF INVESTMENT TREATIES: STANDARD OF TREATMENT 240-241(2009).

justice therefore occurs as a result of, among other things, “gross deficiency in the administration of judicial or remedial process, failure to provide those guarantees which are generally considered indispensable to the proper administration of justice, or a manifestly unjust judgment.”³²⁸ It can also include a “clear and malicious misapplication of the law.”³²⁹

202. As MSDIA set out in its Request for Interim Measures, and as is discussed in additional detail below, Ecuador’s system of justice is characterized by unfairness, bias, and corruption, and the proceedings in Ecuador’s courts in the *NIFA v. MSDIA* litigation were pervaded by these notorious failings. Contrary to Ecuador’s obligations under international law and under the Ecuador-United States BIT, Ecuador’s system of justice was manifestly biased and corrupt in favor of the Ecuadorian plaintiff and manifestly unjust and prejudicial to MSDIA. Ecuador’s courts here, as in other cases, demonstrated “gross deficiency” in the administration of justice, “failed to provide those guarantees which are generally considered indispensable to the proper administration of justice,” and issued “a manifestly unjust judgment” that revealed a “clear and malicious misapplication of the law.”

- a) MSDIA Has Made a *Prima Facie* Showing That at the Time of the Tribunal’s Award, There Will Likely Be a Decision From the National Court of Justice That Constitutes a Denial of Justice

203. Ecuador has offered no defense of the judgment against MSDIA by Ecuador’s courts. Instead, Ecuador has argued that regardless of the deficiencies of the lower court proceedings—deficiencies that are symptomatic of an entire judicial system that is, in President Correa’s words, “falling in pieces”—MSDIA cannot have suffered a denial of justice until Ecuador’s highest court has issued its own judgment.

204. Ecuador’s argument is wrong for many reasons. First, it obscures the issue presently before this Tribunal. The proper question is *not* whether a final judgment of the highest court in Ecuador has issued at the interim measures stage, but is rather whether MSDIA has made a *prima facie* showing that there will have been a final judgment from Ecuador’s courts that denies justice to MSDIA at the time of the Tribunal’s final award. That is clearly the case.

205. MSDIA’s expert on Ecuadorian civil procedure, Dr. Jaime Ortega Trujillo, has opined that the judgment of Ecuador’s National Court of Justice may issue at any time, and will be immediately enforceable against MSDIA’s assets.³³⁰ Ecuador’s own expert, Dr. Luis Alberto Moscoso Serrano, does not take issue with Dr. Ortega’s conclusion that the decision may issue at any time.³³¹ Instead, Dr. Moscoso Serrano contends that Ecuador’s National Court of Justice is

³²⁸ Exhibit CLM-94, I. Brownlie, *PRINCIPLES OF PUBLIC INTERNATIONAL LAW* 506-507 (2003) (quoting Article 9 of the Harvard Law School, Draft Convention on the Law of the Responsibility of States for Damages Done in Their Territory to the Person or Property of Foreigners). See also Exhibit RLM-32, *Jan de Nul N.V. and Dredging International N.V. v. Arab Republic of Egypt*, ICSID Case No. ARB/04/13, Award (6 November 2008), para 193 (“Denial of justice may occur irrespective of any trace of discrimination or maliciousness, if the judgment at stake shocks a sense of judicial propriety.”) (citing Exhibit RLM-41, *Mondev International Ltd. v. United States of America*, ICSID Case No. ARB (AF)/99/2, Award (11 October 2002), para 127).

³²⁹ Exhibit CLM-36, *Azinian, Davitian, & Baca v. Mexico*, ICSID Case No. ARB (AF)/97/2, Award (1 November 1999), paras. 102-103.

³³⁰ First Ortega Expert Opinion, at paras. 10-11.

³³¹ See Second Ortega Expert Opinion, at para. 6.

not *required* to issue its decision until December 17, 2012 or January 11, 2013, depending on one’s interpretation of the relevant provision of Ecuador’s cassation law, *and that the “most likely scenario” is that the Court will issue its fully enforceable judgment by one of those dates.*³³²

206. Accepting *arguendo* Dr. Moscoso Serrano’s assessment of the likely timing of a National Court of Justice judgment, it is virtually inconceivable that this Tribunal could issue a final award on the merits of this arbitration before December 2012 or January 2013—only three or four months after the Tribunal’s scheduling hearing on September 5, 2012. Because the parties agree that Ecuador’s National Court of Justice will likely issue a final, enforceable decision by January 2013 at the latest, and because this Tribunal will certainly issue its final award after that date, there can be no reasonable dispute that MSDIA has made a *prima facie* case that the local remedies available to MSDIA will have been exhausted by the time of an award in this case.

- b) Even if the Question Were Judged As of the Present Moment, MSDIA Has Made a *Prima Facie* Showing of Denial of Justice Because Exhaustion of Local Remedies Is Not Required Where Those Remedies Would Be Futile or Ineffective

207. Second, the general principle that a state can be responsible for denial of justice only after the claimant has exhausted local remedies is not an unyielding rule, but “is subject to reasonable practical limitations.”³³³ Many authorities, including those relied on by Ecuador, recognize that a denial of justice occurs where “there is no *reasonably available* national mechanism to correct the challenged action,”³³⁴ and that “a finding of denial of justice presupposes that the investor has first exhausted all *reasonable* internal recourse avenues available to it.”³³⁵ This is because, as Ecuador explains at the outset of its Opposition, “what international law prohibits is *a system of justice* which falls below a minimum standard so as to lead to an inevitable denial of justice.”³³⁶ Thus, “[t]he principle under which a State will be held internationally liable based on a given judicial decision presupposes that such decision is ... not open to any actually existing *and effective* recourse.”³³⁷

³³² Moscoso Expert Opinion, at para. 8 (emphasis added).

³³³ Exhibit RLM-37, *The Loewen Group, Inc. and Raymond L. Loewen v. United States*, ICSID Case No. ARB(AF)/98/3, Award (26 June 2003), para. 167. See also Exhibit CLM-68, *Norwegian Loans* (France v. Norway), [1957] I.C.J. Reports 9, at p. 34 (“[T]he requirement of exhaustion of local remedies is not a purely technical or rigid rule. It is a rule which international tribunals have applied with a considerable degree of elasticity.”).

³³⁴ Exhibit RLM-1, A. Newcombe & L. Paradell, *LAW AND PRACTICE OF INVESTMENT TREATIES: STANDARD OF TREATMENT* (2009) at p. 242 (quoting Exhibit CLM-99, J. Paulsson, *DENIAL OF JUSTICE IN INTERNATIONAL LAW* 100 (2005)).

³³⁵ Respondent’s Opposition, ¶ 30 (“a finding of denial of justice presupposes that the investor has first exhausted all *reasonable internal recourse* avenues available to it”) (emphasis added). See also Exhibit RLM-37, *The Loewen Group, Inc. and Raymond Loewen v. United States of America*, Case No. ARB(AF)/98/3, Award (26 June 2003), ¶ 154 (“No instance has been drawn to our attention in which an international tribunal has held a State responsible for a breach of international law constituted by a lower court decision when there was available an *effective and adequate appeal* within the State’s legal system.”) (emphasis added).

³³⁶ Respondent’s Opposition at 12 (emphasis in original) (quoting *Alps Finance and Trade AG v. Slovak Republic*, UNCITRAL (Slovak-Swiss BIT), Award (5 March 2011), paras. 249-250).

³³⁷ *Id.* at p. 14 (quoting L. C. Delany & T. Portwood, *La responsabilité de l’État pour déni de justice dans*

208. As one leading commentator has explained, even absent exhaustion, a state may be held liable for denial of justice if the local remedies it has made available to the claimant are “improbable”³³⁸ or “futile,”³³⁹ or fail to offer the victim a “reasonable probability of an effective remedy.”³⁴⁰ If pursuing a particular remedy is futile, improbable, or lacks a reasonable probability of success, or if the remedy is theoretically possible but will not meaningfully address the violation of the claimant’s rights, then the claimant need not exhaust it.³⁴¹ This principle is also reflected in the Draft Articles on Diplomatic Protection published by the International Law Commission: “Local remedies do not need to be exhausted where: (a) There are no reasonably available local remedies to provide effective redress, or the local remedies provide no reasonable possibility of such redress.”³⁴² Again, as Ecuador concedes, its obligation is to provide an adequate “*system of justice*.”

209. “It is a matter for determination by the international forum, on a *case-by-case* basis, whether a remedy is *reasonably available*, in terms of either adequacy or efficacy.”³⁴³ Thus, a court or tribunal considering a denial of justice claim must look past a state’s assertion that further remedies are theoretically possible, and consider whether those remedies provide a reasonable possibility of justice to the claimant.³⁴⁴ Without this important limitation on the

l’arbitrage d’investissement, 2005(3) REVUE DE L’ARBITRAGE 633, para. 26 (RLM-34).

³³⁸ Exhibit RLM-30, J. Paulsson, DENIAL OF JUSTICE IN INTERNATIONAL LAW 113 (2005) (“The victim of a denial of justice is not required to pursue improbable remedies.”).

³³⁹ *Id.*

³⁴⁰ *Id.*

³⁴¹ *Id.* (“The victim of a denial of justice is not required to pursue improbable remedies.”). *Cf.* Exhibit RLM-6, *Ambatielos Claim (Greece v. UK)*, Award (6 Mar. 1956), XII UNRIAA 83, p. 119 (“The views expressed by writers and in judicial precedents, however, coincide in that the existence of remedies which are obviously ineffective is held not to be sufficient to justify the application of the rule. Remedies which could not rectify the situation cannot be relied upon by the defendant State as precluding an international action.”); Exhibit CLM-52, *Finnish Ships Case (Finland v. Great Britain)* III Reports of International Arbitral Awards (9 May 1934) 1479, at p.1503 (“The parties in the present case, however, agree—and rightly—that the local remedies rule does not apply where there is no effective remedy.”); Exhibit CLM-39, *Robert E. Brown (United States v. Great Britain)* VI Reports of International Arbitral Awards (9 May 1934) 120, at 129 (holding that “futility of further proceedings” exempted claimant from having to exhaust local remedies); Exhibit CLM-57, *Las Palmeras v. Colombia*, Inter-Am Ct. HR. (Ser. C) No. 90, Judgment (6 December 2001), para. 58 (“It is the *jurisprudence constante* of this Court that it is not enough that such recourses exist formally; they must be effective . . .”).

³⁴² Exhibit CLM-110, Draft Articles on Diplomatic Protection published by the International Law Commission, (2006), Article 15(a).

³⁴³ Exhibit RLM-30, J. Paulsson, DENIAL OF JUSTICE IN INTERNATIONAL LAW 113 (2005) (“The victim of a denial of justice is not required to pursue improbable remedies.”) (first emphasis added; second emphasis in original). *See also* Exhibit RLM-37, *The Loewen Group, Inc. and Raymond Loewen v. United States of America*, Case No. ARB(AF)/98/3, Award (26 June 2003), para. 166 (“[O]ne commentator has suggested that the result in any particular case will depend upon a balancing of factors.”).

³⁴⁴ Exhibit RLM-30, J. Paulsson, DENIAL OF JUSTICE IN INTERNATIONAL LAW 116 (2005). *See also* Exhibit CLM-75, *Saipem S.p.A. v. The People’s Republic of Bangladesh*, ICSID Case No. ARB/05/7, Award (30 June 2009), paras. 182-183 (“The requirement of exhaustion of local remedies imposes on a party to resort only to such remedies as are effective. Parties are not held to ‘improbable remedies. . . . [Claimant] can thus be held to have exerted reasonable local remedies, having spent considerable time and money seeking to obtain redress without success although the allegation of misconduct was clearly ill-founded. Requiring [claimant] to do more and file appeals would amount to holding it to ‘improbable’ remedies.”); Exhibit RLM-32, *Jan de Nul N.V. and Dredging International N.V. v. Arab Republic of Egypt*, ICSID Case No. ARB/04/13, Award (6 November 2008), ¶ 258 (noting that an “exception” to the exhaustion rule “may be made when there is no effective remedy or ‘no reasonable prospect of success’ . . .”); Exhibit RLM-6, *Ambatielos Claim (Greece v. UK)*, Award (6 Mar. 1956), XII UNRIAA 83, at p. 119 (“The views expressed by writers and in judicial precedents, however, coincide in that the existence of

general principle of exhaustion of local remedies, a state's mere assertion that further local remedies theoretically exist would preclude a claimant from seeking international review of a denial of justice.³⁴⁵ Indeed, such a severe approach would require claimants to litigate wherever a forum was available, no matter the improbability of obtaining justice.³⁴⁶ For that reason, a claimant need not exhaust all remedies where "[t]he local courts are notoriously lacking in independence" or "[t]he respondent State does not have an adequate system of judicial protection."³⁴⁷ That is most assuredly the case here.

210. Ecuador relies on *Loewen v. U.S.*, but even that case acknowledged that a claimant's obligation to exhaust local remedies is "subject to reasonable practical limitations."³⁴⁸ In *Loewen*, the tribunal considered whether a \$500 million judgment against a Canadian investor, issued by a first instance court in the United States, amounted to a denial of justice.³⁴⁹ Discussing the standards applicable to denial of justice claims, as well as the exhaustion of local remedies rule, the tribunal stated that "[t]here is a body of opinion which supports the view that the complainant is bound to exhaust any remedy which is *adequate and effective* so long as the remedy is not "*obviously futile*."³⁵⁰ The tribunal pointed out, for example, that if an appeal would not eliminate the risk of immediate execution against the losing party's assets, the appeal would not be a "*reasonably available*" remedy.³⁵¹ Ultimately, the tribunal concluded that the claimant in that case *did* have the possibility of pursuing adequate and effective alternative local remedies in the Supreme Court of the United States, which he had failed to do, choosing instead to enter into a binding settlement agreement.³⁵² The tribunal recognized, however, that if the claimant had been able to show that such remedies were futile or ineffective, he would have been able to establish his denial of justice claim notwithstanding that he had not pursued them.³⁵³

remedies which are obviously ineffective is held not to be sufficient to justify the application of the rule."); Exhibit CLM-84, *ELSI Case* (U.S. v. Italy) I.C.J. Reports (20 July 1989) at p. 83 (Judge Schwebel, Dissenting Opinion) ("It has of course long been of the essence of the rule of exhaustion of local remedies that local remedies need not be exhausted where there are no effective remedies to exhaust.").

³⁴⁵ Exhibit RLM-30, J. Paulsson, DENIAL OF JUSTICE IN INTERNATIONAL LAW 113-114 (2005) ("[I]t would be sufficient for a respondent state to assert that some residual remedy might still be availing.") (internal quotes omitted).

³⁴⁶ See Exhibit RLM-37, *The Loewen Group, Inc. and Raymond Loewen v. United States of America*, Case No. ARB/98/3, Award (26 June 2003), paras. 167-170. See also Exhibit CLM-84, *ELSI Case* (U.S. v. Italy) I.C.J. Reports 1989, at p. 83 (Judge Schwebel, Dissenting Opinion) ("[W]here the substance of the issues of a case has been definitively litigated in the courts of a State, the rule [of exhaustion] does not require that those issues also have been litigated by the presentation of every relevant legal argument which any municipal forum might have been able to pass upon, however unlikely in practice the possibilities of reaching another result were.").

³⁴⁷ Exhibit RLM-30, J. Paulsson, DENIAL OF JUSTICE IN INTERNATIONAL LAW 118 (2005) (internal citations omitted)..

³⁴⁸ Exhibit RLM-37, *The Loewen Group, Inc. and Raymond Loewen v. United States of America*, ARB(AF)/98/3, Award (26 June 2003), para. 167.

³⁴⁹ *Id.* at paras. 4, 39.

³⁵⁰ *Id.* at para. 165

³⁵¹ *Id.* at para. 208 ("In these circumstances, if exercising the right of appeal, at the risk of immediate execution on Loewen's Mississippi assets, was the only alternative available to Loewen, it would not have been, 'a reasonably available remedy' to Loewen.").

³⁵² *Id.* at para. 215.

³⁵³ *Id.* at paras. 170-171.

211. The other cases Ecuador relies on also recognize these exceptions to the general principle requiring exhaustion of local remedies.³⁵⁴ In *Pantechniki*, the claimant alleged that the Albanian courts denied him justice because a first instance court erroneously nullified a disputed contract provision that obligated Albania to indemnify claimant for certain losses.³⁵⁵ The sole arbitrator acknowledged that claimants must give a “reasonable opportunity” to “the system as a whole” to correct the error, but he emphasized that this rule has limits: “This does not mean that remedies must be pursued *beyond a point of reasonableness*. It may not be necessary to initiate actions which exist on the books but are never in fact used. Oblique or indirect applications to parallel jurisdictions (e.g. an administrative appeal to remove a foot-dragging judge) *may similarly be held unnecessary*.”³⁵⁶

212. Similarly, in *Ambatielos*, the tribunal held that the claimants were required to exhaust only local remedies that are reasonable and not “*obviously futile*.”³⁵⁷ In *Ambatielos*, the court considered whether the United Kingdom could be held liable for its conduct in relation to a contract with a Greek national.³⁵⁸ The tribunal concluded that the Greek national’s failure to exhaust local “procedural remedies”³⁵⁹—as a result of his failure to call an “essential” witness in the court of first instance—was fatal to his claim.³⁶⁰ But even there, the tribunal recognized that the exhaustion requirement was bound by reasonableness limitations: “[I]t is generally considered that the ineffectiveness of available remedies, without being legally certain, may also result from circumstances which do not permit any hope of redress to be placed in the use of those remedies.”³⁶¹

213. Ecuador also contends that Claimant’s “own government” supports Ecuador’s position, quoting a statement by U.S. Secretary of State Marcy in 1848.³⁶² The principle articulated by Secretary Marcy – that a state is not responsible for mistakes of its judiciary until the decision has been appealed to the court of last resort – is true if further local remedies are available and effective. No such obligation exists, however, when the further remedies available to the claimant would be futile or ineffective. Consider the statement of another U.S. Secretary of State, Hamilton Fish, in 1873:

³⁵⁴ Respondent’s Opposition, para. 21, n. 6.

³⁵⁵ Exhibit RLM-47, *Pantechniki S.A. Contractors & Engineers v. Republic of Albania*, ICSID Case No. ARB/07/21, Award (30 July 2009) (Paulsson), para. 3.

³⁵⁶ Exhibit RLM-47, *Pantechniki S.A. Contractors & Engineers v. Republic of Albania*, ICSID Case No. ARB/07/21, Award (30 July 2009) (Paulsson), para. 96 (emphasis added).

³⁵⁷ Exhibit RLM-6, *Ambatielos Claim (Greece v. UK)*, Award (6 March 1956), XII UNRIAA 83, p. 119 (emphasis in original).

³⁵⁸ *Id.* at p. 119.

³⁵⁹ *Id.* at p. 110.

³⁶⁰ *Id.* at p. 119.

³⁶¹ *Id.* at p. 119.

³⁶² Respondent’s Opposition, para. 22 (quoting Exhibit RLM-36, Letter from Mr. Marcy, U.S. Sec. of State, to Chevalier Bertinatti, Sardinian Minister (1 December 1856), *reprinted in* 6 MOORE’S INT’L DIGEST 748).

*“A claimant in a foreign state is not required to exhaust justice in such state when there is no justice to exhaust.”*³⁶³

The question, then, is whether further litigation in Ecuador is “reasonably probable” to result in a just outcome for MSDIA. And to the contrary, the history of this case and the well established proclivities of the Ecuadorian judiciary render a just outcome improbable.

c) Pursuing Further Remedies in Ecuador Will Be Futile and Ineffective

214. There can be little doubt that Ecuador’s judicial system as a whole fails to provide an adequate system of protection, particularly for foreign parties. The gross injustices in this case, set forth in detail above and in MSDIA’s Notice of Arbitration and Request for Interim Measures, are the direct and inevitable by-product of an Ecuadorian judiciary that is fundamentally defective. As a consequence, pursuit of further remedies in the Ecuadorian courts is futile and ineffective, and MSDIA may bring this claim for denial of justice based on the unanimous, indefensible \$150 million court of appeals judgment rather than waiting until after Ecuador’s National Court of Justice has issued its own judgment.

215. Ultimately, the determination whether MSDIA has exhausted local remedies in Ecuador, and whether it meets the futility or ineffectiveness exception if not, are questions that must be adjudicated at the merits stage of this arbitration.³⁶⁴ At this stage, when the Tribunal is considering only MSDIA’s Application for Interim Measures of Relief, MSDIA must make, at most, only a *prima facie* showing under the facts of this case. MSDIA meets this burden easily.

(1) Ecuador’s system of justice is notoriously corrupt, ineffective, and lacking in due process

216. Non-governmental organizations have consistently concluded that Ecuador’s judiciary is corrupt and lacking in independence. The World Economic Forum’s Global Competitiveness Report for 2011–2012 ranked Ecuador 130 out of 142 countries in judicial independence,³⁶⁵ and 135 out of 142 counties in “efficiency of legal framework in settling disputes.”³⁶⁶ The same

³⁶³ Exhibit CLM-97, J.B. Moore, *Digest of International Law* (8 vols., Washington, DC: US Government Printing Office, 1906), vol. VI. at p. 677 (citing to Mr. Fish, Sec. of State, to Mr. Pile, min. to Venezuela, May 29, 1873, MS. Inst. Venez. II. 228).

³⁶⁴ Exhibit CLM-59, *The Loewen Group and Raymond L. Loewen v. United States of America*, ICSID Case No. ARB(AF)/98/3, Decision on hearing of Respondent’s objection to competence and jurisdiction (9 January 2001), at para 74; Exhibit CLM-15, *Saipem v. Bangladesh*, (ICSID Case No. ARB/05/07), Decision on Jurisdiction and Recommendation on Provisional Measures, 21 March 2007, para. 153 (“Whether the requirement of exhaustion of local remedies may be applicable by analogy to an expropriation by the acts of a court and whether, in the affirmative, the available remedies were effective are questions to be addressed with the merits of the dispute.”); Exhibit RLM-5, *Alps Finance and Trade AG v. Slovak Republic*, UNCITRAL (Slovak-Swiss BIT) Award (5 March 2011) at p. 20 (citing Procedural Order No. 4 (9 September 2010)) (Crivellaro, Stuber, Klein) (“Indeed, in investment arbitrations the **common practice shows that attribution and exhaustion of local remedies are ruled in the merits decision.**”) (emphasis added).

³⁶⁵ Exhibit C-99, World Economic Forum’s Global Competitiveness Report for 2011–2012, at p. 167, <http://reports.weforum.org/global-competitiveness-2011-2012/>

³⁶⁶ *Id.*

report identified “corruption” as the “most problematic factor[] for doing business” in Ecuador.³⁶⁷ Transparency International consistently ranks Ecuador near the bottom for corruption among countries it surveys in the region. In the Western Hemisphere, only Haiti, Honduras, Paraguay and Venezuela received lower scores than Ecuador.³⁶⁸

217. The Inter-American Commission on Human Rights reports that “[b]earing in mind that a basic condition to guarantee an effective Judiciary is broad access to prompt and effective justice, the Commission has received numerous reports alleging corrupt practices on the part of judicial officers. These practices range from demanding payments from litigants to accelerate the processing of the cases *to giving bribes to influence Supreme Court justices’ decisions.*”³⁶⁹

218. The U.S. Department of State has consistently warned that “[c]orruption is a serious problem in Ecuador,”³⁷⁰ and that “in practice the [Ecuadorian] judiciary was susceptible to outside pressure and corruption.”³⁷¹ Recent State Department reports note that:

a. “Systemic weakness in the judicial system and its susceptibility to political or economic pressures constitute important problems faced by U.S. companies investing in or trading with Ecuador. The Ecuadorian judicial system is hampered by processing delays, unpredictable judgments in civil and commercial cases, inconsistent rulings, and limited access to the courts.... *The courts are often susceptible to outside pressure and bribes.* Neither congressional oversight nor internal branch mechanisms have shown a consistent capacity to effectively investigate and discipline corrupt judges.”³⁷²

b. “While the constitution provides for an independent judiciary, *in practice the judiciary was at times susceptible to outside pressure and corruption. The media reported extensively on the susceptibility of the judiciary to bribes for favorable decisions and resolution of legal cases and on judges parcelling out cases to outside lawyers, who wrote the judicial sentences and sent them back to the presiding judge for signature.*”³⁷³

³⁶⁷ *Id.* at p. 166

³⁶⁸ Exhibit C-95, Transparency International, Corruption Perceptions Index 2010 Results, http://www.transparency.org/cpi2010/in_detail.

³⁶⁹ Exhibit C-72, Annual Report of the Inter-American Commission on Human Rights (2005), Chapter IV – Ecuador, para. 170, Feb. 27, 2006, <http://www.cidh.oas.org/annualrep/2005eng/chap.4b.htm> (emphasis added).

³⁷⁰ Exhibit C-33, U.S. Department of State, 2011 Investment Climate Statement – Ecuador, <http://www.state.gov/e/eeb/rls/othr/ics/2011/157270.htm>.

³⁷¹ Exhibit C-96, U.S. Dept. of State, Ecuador : Country Reports on Human Rights Practices - 2010, April 8, 2010, <http://www.state.gov/g/drl/rls/hrrpt/2010/wha/154504.htm>. The U.S. Department of State has made similar statements in every Investment Climate Statement since 2009 and every Country Report on Human Rights Practices since 2005. These annual reports can be found on the Department of State’s website. *See* <http://www.state.gov/g/drl/rls/hrrpt/index.htm> and <http://www.state.gov/e/eeb/rls/othr/ics/index.htm>.

³⁷² Exhibit C-33, U.S. Department of State, 2011 Investment Climate Statement – Ecuador, <http://www.state.gov/e/eeb/rls/othr/ics/2011/157270.htm> (emphasis added).

³⁷³ Exhibit C-96, U.S. Department of State, 2010 Country Report on Human Rights Practices – Ecuador, April 8, 2011, at 9, <http://www.state.gov/documents/organization/160163.pdf> (emphasis added).

c. “Academics and think tank analysts said that legal cases were not processed unless the police and judicial officials were bribed.”³⁷⁴

219. These reports are borne out by specific examples cited in the press and in other public reports. For example, in 2006 three judges were removed from Ecuador’s Supreme Court due to allegations (by a former congressman) that they requested a \$500,000 bribe to issue a favorable ruling.³⁷⁵ A leading Ecuadorian newspaper reported that from 2006 to 2009, more than *one-third* of Ecuadorian judges were sanctioned for corruption or other impropriety.³⁷⁶ And in 2007, the Ecuadorian Civic Committee against Corruption released 197 videos showing administrative personnel within the judiciary improperly receiving money for services.³⁷⁷

220. President Rafael Correa has commented publicly that Ecuador needs to purge the judicial system of “corrupt and negligent judges.”³⁷⁸ Only weeks after the court of appeals’ ruling in the *NIFA v. MSDIA* litigation, he stated: “***We have a concrete problem no one doubts, a totally inefficient and corrupt judicial system that is falling in pieces.***”³⁷⁹ Commenting on judicial reform efforts instituted in 2011, he has said that “to restructure ***the barbarity that is our justice system*** is an enormous challenge.”³⁸⁰

221. In the years during which the *NIFA v. MSDIA* litigation has been pending, the Ecuadorian courts have been subject to extensive interference and extreme instability:

a. In late 2004, Ecuador’s Congress dismissed the members of Ecuador’s Constitutional Tribunal and Electoral Court, and dismissed and replaced 27 of the 31 justices of Ecuador’s Supreme Court.³⁸¹

³⁷⁴ Exhibit C-61, U.S. Department of State, 2011 Country Report on Human Rights Practices – Ecuador, May 24, 2012, at p. 16, <http://www.state.gov/documents/organization/186722.pdf>

³⁷⁵ Exhibit C-76, U.S. Department of State, 2006 Country Reports on Human Rights Practices - Ecuador, March 6, 2007, <http://www.state.gov/g/drl/rls/hrrpt/2006/78890.htm>.

³⁷⁶ Exhibit C-93, *CJ acknowledges deficiencies in judge oversight*, EL UNIVERSO, June 22, 2009, <http://www.eluniverso.com/2009/06/22/1/1355/47742BFF4462458C8DAAB69D7D690F67.html>.

³⁷⁷ Exhibit C-74, Freedom House, *Countries at the Crossroads 2007*, Country Report – Ecuador, at 19, <http://www.freedomhouse.org/uploads/cct/country-7169-8.pdf>.

³⁷⁸ Exhibit C-105, *The transitional council was not installed*, EL UNIVERSO, July 22, 2011, <http://www.eluniverso.com/2011/07/22/1/1355/consejo-transicion-judicatura-instalo.html>.

³⁷⁹ Exhibit C-110, *President Correa. they wanted to disparage the government and they could not*, OPINIÓN, November 13, 2011 (emphasis added), <http://www.diariopinion.com/primeraPlana/verArticulo.php?id=812332>; Exhibit C-100, *Correa reiterates that he will lay hands on the Court and his campaign for Yes*, EL UNIVERSO, January 26, 2011, <http://www.eluniverso.com/2011/01/26/1/1355/correa-reitera-meterna-manos-corte-campana.html>.

³⁸⁰ Exhibit C-101, *Correa anticipates that he will not be able to completely change justice*, EL UNIVERSO, February 11, 2011 (emphasis added), <http://www.eluniverso.com/2011/02/23/1/1355/correa-anticipa-podra-cambiar-totalmente-justicia.html> (“Tener 18 meses un consejo tripartito para reestructurar esa barbaridad que es el sistema de justicia es un desafío enorme.”).

³⁸¹ Exhibit C-66, Resolution No. R-25-181, December 8, 2004; see also Exhibit C-67, Vladimiro Álvarez Asserts: “The separation of powers was violated,” HOY, December 13, 2004; Exhibit C-68, Gutiérrez clarifies his remarks before the London Tribunal, EL EXPRESO, February 18, 2005; Exhibit C-71, United Nations, Follow-up report submitted by the Special Rapporteur on the independence of judges and lawyers at 4-5, January 31, 2006.

b. On April 15, 2005, amid protests sparked by the replacement of the Supreme Court, Ecuador's then-President dismissed all then-newly-appointed judges of the Supreme Court.³⁸²

c. In November 2005, after a six month period during which the Supreme Court did not function, new judges of the Supreme Court were finally appointed pursuant to a new Organic Law of the Judiciary passed on April 25, 2005.³⁸³ In May 2006, the new Supreme Court unilaterally terminated the appointment of all lower-court judges who had served more than four years at the time.³⁸⁴

d. On April 24, 2007, Ecuador's Constitutional Tribunal was removed by Congress after the Constitutional Tribunal concluded that an earlier firing of more than half of the legislature by the Electoral Court had been unconstitutional.³⁸⁵ Human Rights Watch called the event "the latest in a series of arbitrary actions by competing political factions that have undermined the autonomy of the country's democratic institutions."³⁸⁶ It continued:

Disagreement with a judicial decision cannot justify the summary removal of judges, especially those responsible for Ecuador's Constitution.... Unfortunately this is only the latest example of Ecuadorian officials seeking to resolve political differences by summarily removing their opponents from their posts. ... Ecuador's democratic institutions have been in crisis for years. Three presidents have been ousted since 1997 before completing their term. In December 2004 Congress fired and replaced most of the judges of the Supreme Court. The Constitutional Tribunal was summarily fired in November 2004, and again in April 2005.³⁸⁷

e. On November 29, 2007, a month before the first instance decision in the *NIFA v. MSDIA* case, a newly-formed Constituent Assembly elected to rewrite Ecuador's decade-old Constitution, dismissed Congress and proclaimed that it held absolute authority, including the power to remove and sanction members of the judiciary that violate its decisions.³⁸⁸ After the newly-appointed Constitutional Tribunal held that the Constituent Assembly's decisions were not subject to challenge by any other organ of government, the President of the Supreme Court proclaimed: "[w]e cannot deny it: ***the judicial and***

³⁸² Exhibit C-69, Supreme Decree No. 2752 (published in Official Register No. 12, May 6, 2005).

³⁸³ Exhibit C-70, *Referendum*, HOY, July 24, 2005.

³⁸⁴ Exhibit C-73, Decision of the Supreme Court, sitting *en banc*, May 16, 2006 (published in Official Gazette No. 282, June 1, 2006).

³⁸⁵ Exhibit C-77, *Congress dismisses the judges*, EL COMERCIO, April 25, 2007.

³⁸⁶ Exhibit C-78, Ecuador: Removal of Judges Undermines Judicial Independence, Human Rights Watch, May 2007.

³⁸⁷ *Id.*

³⁸⁸ Exhibit C-80, Mandate No. 1 of the Constituent Assembly, November 29, 2007.

*constitutional reality in our country is a partial reality; we are not fully living in a state of law.*³⁸⁹

f. On October 20, 2008, Ecuador's current Constitution became effective. Among other things, it terminated the appointment of the 31 Supreme Court justices serving at the time and subjected them to a public lottery from which 21 would be chosen at random to serve on a new National Court of Justice.³⁹⁰ Most of the 31 Supreme Court justices chose to resign rather than submit to the lottery.³⁹¹

g. In 2009, the Chairman of the Civil and Criminal Commission of Ecuador's National Assembly stated, simply, “[o]ur system of justice has completely collapsed.”³⁹² And on June 22, 2010, Ecuador's Council of the Judiciary declared that “*the Judicial Branch is not independent.*”³⁹³

h. Ecuador's Council of the Judiciary was dissolved in July 2011 and replaced by a three-person “Transitional Judiciary Council,” which assumed the power to replace all sitting judges in Ecuador.³⁹⁴

i. Shortly after its establishment, the Transitional Judiciary Council announced a process by which it intended to select new judges for every court in the country. By August 20, 2011, it had established that a new membership of Ecuador's National Court of Justice would be in place by late January, 2012.³⁹⁵ *On September, 6 2011—just weeks before the court of appeals decision in the NIFA case—President Correa declared a judicial emergency in Ecuador.*³⁹⁶

j. As had been previously announced, on January 25, 2012, the entire National Court of Justice was removed and replaced. By March 2012, three newly-appointed judges were selected to preside over the *NIFA v. MSDIA* case.

k. Even after the recent changes in the National Court of Justice, significant uncertainty remains as to the Court's process of deciding pending cases. Notably, the

³⁸⁹ Exhibit C-81, *Gómez Mera: “The Country Is Not Living Under the Rule of Law,”* EL UNIVERSO, February 1, 2008 (emphasis added).

³⁹⁰ Exhibit C-85, *The former Supreme Court proposes rules for resuming business*, EL UNIVERSO, November 8, 2008; Exhibit C-86, *“We're not living in a State under the rule of law,”* EL COMERCIO, November 9, 2008; Exhibit C-83, *Draft impacts the judiciary's autonomy*, LA HORA, September 8, 2008.

³⁹¹ Exhibit C-84, *Supreme Court Justices reject their new posts*, EL TIEMPO, October 30, 2008.

³⁹² Exhibit C-91, *Justicia colapsada (Justice At a Standstill)*, LA HORA, April 16, 2009.

³⁹³ Exhibit C-98, *From the Judiciary Council to the Nation*, Resolution No. 043-2010, June 22, 2010 (emphasis added).

³⁹⁴ Exhibit C-48, Executive Decree No. 872, September 6, 2011.

³⁹⁵ Exhibit C-47, *Proceso Para Elegir a Los 21 Jueces Nacionales Desde Próxima Semana*, El Universo, August 20, 2011, <http://www.eluniverso.com/2011/08/20/1/1355/proceso-elegir-21-jueces-nacionales-desde-proxima-semana.html> (“As expected, the Transitional Judiciary Council (CJT) will hold the public service examination to restructure the National Court of Justice (CNJ) over the course of next week. ... According to the organization, the new Court will start to function in January 2012.”)

³⁹⁶ *Id.*

Transitional Counsel of the Judiciary has appointed 21 “temporary judges” to the Court to help address the backlog of cases pending before the Court.³⁹⁷ It is unclear which of the Court’s pending cases will be assigned to these temporary judges, many of whom were previously removed from the Court.³⁹⁸

222. In short, the Ecuadorian judiciary is plagued by systematic corruption and institutional instability. It is a system that is incapable of guaranteeing the basic protections of due process and rule of law. Although MSDIA has elected not to forego its appeal to the National Court of Justice, based on this history, it is not reasonably probable that Ecuador’s courts will correct the errors of the lower courts and issue a decision consistent with the basic protections of due process and rule of law. The record of Ecuador’s courts in this case and across the system as a whole clearly makes such a hope improbable. In these circumstances, MSDIA has more than shown a *prima facie* case of denial of justice.

- (2) The proceedings in Ecuador’s courts have been marred by multiple violations of Ecuadorian procedural law and due process, which have been prejudicial to MSDIA’s rights

223. Given the systemic failings of the Ecuadorian judiciary, it is perhaps not surprising that the legally and factually indefensible \$150 million judgment against MSDIA was the product of gross deficiency in the administration of justice. As detailed in MSDIA’s Notice of Arbitration and its Request for Interim Measures, the Ecuadorian courts were biased and partial in favor of the Ecuadorian plaintiff, and that clear bias was evidenced by a number of manifestly improper and prejudicial procedural decisions that resulted in a failure to afford MSDIA even minimal guarantees of due process. For example:

- a. Ecuador’s courts denied MSDIA fair notice of critical rulings and proceedings throughout the case, in violation of Ecuadorian law and practice and contrary to the minimum requirements of due process, demonstrating their bias and predisposition to rule against and disadvantage MSDIA.³⁹⁹
- b. Without a rational basis, the court of appeals dismissed the well-reasoned conclusions of internationally respected and highly credentialed court-appointed experts—who concluded that there was no basis for liability or damages in this case. Without proper legal justification under Ecuadorian law and procedure, the court appointed additional “experts,” who lacked relevant credentials or expertise, and who submitted unreasoned and unsupported reports that were entirely favorable to the Ecuadorian plaintiff.⁴⁰⁰

³⁹⁷ Exhibit C-115, Resolution of the National Judicial Council 70, Supplement to Official Gazette 746, dated July 16, 2012, at Art. 7; Exhibit C-116, Temporary [National Court of Justice] Chamber Personnel, July 2012.

³⁹⁸ As discussed below, one of the new temporary judges assigned to the Civil Chamber was a member of the prior Civil Chamber of the National Court of Justice assigned to hear the *NIFA v. MSDIA* case prior to the change in judges on January 26, 2012. See *infra*, para. 261.

³⁹⁹ Claimant’s Request for Interim Measures, dated 12 June 2012, paras. 92, 96-97.

⁴⁰⁰ *Id.* at paras. 98-122. After the court of appeals adopted the reasoning of those uncredentialed experts, the Pichincha Counsel of the Judiciary—the office entrusted with accrediting experts for appointment in judicial matters

c. The Ecuadorian court judgments relied on a supposed antitrust cause of action despite the fact that at the time of the sale and the judgment, Ecuador—by its own repeated admission—did not have an antitrust law and had not adopted or announced the substantive rules of competition that the courts purported to apply here.⁴⁰¹ The courts’ liability ruling was further manifestly contrary to the evidence and revealed their bias and predisposition because no rational, competent and unbiased court could have concluded that MSDIA’s actions violated principles of competition law.⁴⁰²

d. The court of appeals decision addressed the evidence submitted by the Ecuadorian plaintiff, but ignored completely the evidence submitted by MSDIA, with no legal basis and on plainly pretextual grounds, falsely and absurdly claiming that MSDIA had waived its evidentiary grounds for challenging the trial court’s judgment.⁴⁰³

e. Both the trial court and the court of appeals confirmed their bias and predisposition to rule against MSDIA and in favor of NIFA by awarding \$200 million and \$150 million, respectively, for supposed lost profits. There was no evidence to support any award of damages—much less damages at that magnitude—and given the utter absence of proof of damage even remotely of such an order of magnitude no rational, competent, unbiased court could have awarded damages in such amounts.⁴⁰⁴

f. The Ecuadorian plaintiff, enabled by Ecuadorian judges, abused criminal process in an effort to chill MSDIA’s ability to defend against NIFA’s lawsuit. NIFA initiated a criminal investigation of two of MSDIA’s U.S.-based lawyers when MSDIA chose to exercise its rights under the Ecuador-United States BIT by filing a notice of dispute in June 2009. The resulting criminal investigation, enabled by Ecuadorian judges who refused to accept initial prosecutorial recommendations to dismiss the charges, had a chilling effect on MSDIA’s ability to defend against NIFA’s lawsuit, and a chilling effect on MSDIA’s exercise of its rights under the Treaty, until the charges were finally dismissed just days before the court of appeals issued its decision in September 2011.⁴⁰⁵

224. In its July 24, 2012 submission, Ecuador does not contest *any* of these facts, which were set forth in detail in MSDIA’s Request.

(3) There are also serious indicia of corruption among the plaintiff and the judges assigned to the *NIFA v. MSDIA* litigation

in the Province—later confirmed that neither expert demonstrated the expertise required by law to serve as an expert, and took steps to confirm that neither expert retained the expert accreditation in the subject matter in which they opined in the *NIFA* litigation. *Id.* at paras. 123-128

⁴⁰¹ *Id.* at paras. 133-141.

⁴⁰² *Id.* at paras. 100-108.

⁴⁰³ *Id.* at paras. 129-131.

⁴⁰⁴ *Id.* at paras. 142-147.

⁴⁰⁵ *See id.* at paras 148-152. The U.S. Department of State has repeatedly warned of a commonly-employed abuse of the Ecuadorian criminal process whereby “[c]riminal complaints and arrest warrants against foreign company officials have been used to pressure companies involved in commercial disputes.” Exhibit C-33, U.S. Department of State, 2011 Investment Climate Statement – Ecuador, <http://www.state.gov/e/eeb/rls/othr/ics/2011/157270.htm>.

225. Although the evaluation of the specific facts and evidence underlying MSDIA’s denial of justice claim should be reserved for the Tribunal’s consideration of the merits, MSDIA sets out below further allegations that support its claims, both that Ecuador has violated MSDIA’s rights under international law and the Treaty and that pursuing further remedies in Ecuador is unlikely to lead to a correction of those violations.⁴⁰⁶ As explained below, the plaintiff in the *NIFA v. MSDIA* litigation publicly has been found to be corrupt, with a history of bribing government officials that is documented in official government reports. Further, the judges responsible for issuing the judgments against MSDIA in that litigation, in both the trial court and the court of appeals, have been investigated and disciplined by the Ecuadorian government for acts of corruption and allowing improper influence in their judicial decisions.

- (a) NIFA’s General Manager, Miguel García Costa, has a documented history of bribing government officials

226. NIFA’s General Manager, Miguel García Costa, has been publicly described in Ecuador as a corrupt figure with a history of bribing government officials. The most public and notorious of his acts of corruption was in connection with another company owned by Mr. Garcia, known as Ecuahospital.

227. In or around 1987, Mr. Garcia and Ecuahospital were the subject of a criminal investigation in connection with a bribery scheme involving a contract between Ecuahospital and Ecuador’s Ministries of Industries and Health. Ecuahospital had been awarded a two billion Sucres (approximately US \$13.7 million) contract—which included an advance of 140 million Sucres (approximately US \$1 million)—to build infrastructure to store and distribute medicines.⁴⁰⁷ The terms of the contract were unreasonably favorable to Ecuahospital. Further, Ecuahospital was awarded the contract despite not having a single license to distribute medicines in Ecuador.

228. The resulting scandal led to the revocation of the contract, the resignation of the Minister of Health, a congressional investigation and the issuance of arrest warrants for several individuals, including NIFA’s Mr. Garcia. Among the allegations under investigation was that Ecuahospital, under Mr. Garcia’s direction, had used the advance payment of 140 million Sucres—US \$1 million in 1987 dollars—to make illegal payments to government officials as kickbacks for having been awarded the contract. As has occurred in other meritorious investigations in Ecuador, the criminal investigation was eventually halted short of its conclusion.

229. In 2007, an Ecuadorian governmental “Truth Commission” was created by Executive Decree to investigate crimes against humanity in Ecuador from 1988 to 2008.⁴⁰⁸ In 2010, the

⁴⁰⁶ MSDIA offers this evidence pertinent to the events of this case while reserving the right to develop and submit additional evidence related to its claims at the merits phase of this case.

⁴⁰⁷ Exhibit C-64, Washington Post, January 6, 1987 (“Market Indicators”) (assuming exchange rate on January 5, 1987).

⁴⁰⁸ The “Truth Commission” was established by Executive Decree No. 305 with the purpose of investigating human rights violations in Ecuador that occurred between 1984 and 1988. Exhibit C-79, Republic of Ecuador, Executive Decree No. 305, 18 May 2007.

Commission issued a report, in which it identified the Ecuahospital case as among the most significant criminal matters of the second half of the 1980s. The Commission's Report discussed the circumstances of the case at length, including the bribery allegations against Mr. Garcia, as follows:

In the signing of a contract for warehousing and distributing generic medicines signed between the Drug Implementation Unit, a body of the Ministry of Industries and the Ministry of Health, and the Ecuahospital company, various irregularities were committed. Ecuahospital, with a capital of barely 10,000 sucres and without having the authorization to distribute drugs, was awarded with a 2,000 million sucres contract. In two years the profit would be 17.5 %, which is to say 350 million sucres. The Drug Implementation Unit did call for tenders and delivered an advance payment of 140 million sucres with which the company would build the infrastructure necessary to warehouse and market the drugs. Because of this scandal, the Minister of Health, Jorge Bracho, after complaining that the Drug Implementation Unit depended solely on the Ministry of Industry, resigned from his position. The Congress initiated an investigation and the Judiciary took over and ordered the arrest of the former Minister of Industries, Xavier Neira, the Assistant Secretary of the Ministry of Industries, Günther Liskén Buenaventura, of the latter's cousin, Carlos Gómez Buenaventura, and of the manager of Ecuahospital, Miguel García Costa. ***From the advance payment of 140 million, 81 million was distributed in money handouts and loans in favor of the partners of the Ecuahospital company, to relatives of the administrators, and one part was allocated to the bribery of senior public officials ...*** The contract was rescinded by the Minister of Industries Ricardo Noboa because Ecuahospital refused to explain the allocations it made of the advance payment.⁴⁰⁹

The same Mr. Garcia has been the principal owner and manager of NIFA throughout the litigation of this case.

- (b) Judge Chang Huang, who issued the trial court judgment, was subsequently removed from her judicial post for wrongdoing

230. As set out in MSDIA's Request, Temporary Judge Victoria Flordelina de Lourdes Chang Huang Castillo, who was responsible for issuing the first instance court decision awarding NIFA \$200 million, was appointed to the *NIFA v. MSDIA* case to replace the previous trial court judge Juan Toscano Garzon after the evidentiary proceedings had been completed. During her relatively short tenure as a judge,⁴¹⁰ Temporary Judge Chang Huang was the subject of several judicial complaints, including complaints suggestive of solicitation of payments and improper influence. Since her removal by the Council of the Judiciary in July 2012, she has been found to have committed additional serious violations during her tenure.

⁴⁰⁹ Exhibit C-94, Report Of The Truth Commission, Volume 2: Crimes against Humanity, Ecuador 2010 at p. 36 (emphasis added).

⁴¹⁰ Temporary Judge Chang Huang was appointed on September 17, 2007. See Exhibit C-3 (trial court judgment) at p. 1. As discussed below, she was removed for wrongdoing on July 1, 2010.

231. On July 1, 2010, the President of the Council of the Judiciary removed Temporary Judge Chang-Huang from her position as a judge for serious violations of her judicial duties. In a short, two-paragraph memorandum, the President stated:

“I inform you that this Presidency has reviewed the file of Victoria Chang Huang de Rodriguez, Provisional Judge in charge of the Second Civil Court of Pichincha, from which emerges a number of important complaints ranging from hurling insults at users of the Justice system, delay in dealing with cases under her control, to have persons in the Court persons who are not authorized by the Judicial Council, errors in the substantiation of proceedings, and up to the alleged request that a user buy a ticket to a raffle.”⁴¹¹

232. Following her removal, the Council has continued to process complaints brought against Temporary Judge Chang Huang in connection with her service as a judge, and has concluded that she engaged in additional instances of serious wrongdoing. In one complaint, considered by the Council of the Judiciary in January 2011, the Council found that Temporary Judge Chang Huang had violated the judicial code by failing to properly process a case pending before her, and noted that she had “a history of a similar violation” in the year 2000.⁴¹²

233. The Council’s finding that Temporary Judge Chang Huang improperly delayed the processing of multiple cases stands in stark contrast to her inexplicably rapid adjudication of the *NIFA v. MSDIA* case. Court records show that she “took cognizance” of the case—her first action in the case—on December 17, 2007, and within a matter of hours, issued her judgment against MSDIA.⁴¹³ Temporary Judge Chang Huang’s erratic decision-making is suggestive of corruption or improper influence. The U.S. State Department has repeatedly warned that Ecuadorian “[j]udges reportedly rendered decisions more quickly or more slowly due to political pressure or, in some cases, the payment of bribes.”⁴¹⁴

234. In another complaint, evaluated by the Council of the Judiciary in April 2012, the Council reviewed allegations against Temporary Judge Chang Huang *en banc* after the Provincial Director of Pichincha issued a report concluding that she had committed “minor and major disciplinary violations” in contravention of various provisions of the Judiciary Act.⁴¹⁵ In that complaint, a court clerk described Temporary Judge Chang Huang’s practice of selling of “raffle tickets” out of her office. The clerk described lawyers visiting Temporary Judge Chang Huang’s office in connection with her “raffle”:

⁴¹¹ Exhibit C-104, Memorandum from Benjamin Cevallos Solorzano, President of the Judiciary Council, to Marco Rodas Bucheli, Pichincha Provincial Director of the Judiciary Council, Official Document No. 984 – P – CJ GP, dated 1 July 2011.

⁴¹² Exhibit C-103, Temporary Judge Chang Huang Personnel File, Disciplinary File No. Mt 235-UCD-010-CJ 9, Decision dated 12 January 2011, at p. 6.

⁴¹³ Claimant’s Request for Interim Measures, dated 12 June 2012, paras. 94-95.

⁴¹⁴ See, e.g., Exhibit C-61, U.S. Department of State, 2011 Country Report on Human Rights Practices – Ecuador, 24 May 2012, at p. 8, <http://www.state.gov/documents/organization/186722.pdf>.

⁴¹⁵ Exhibit C-103, Temporary Judge Chang-Huang Personnel File, FILE N Mot-099-UCD-010-MAC (file opened April 9, 2010)

“different attorneys [] would request that I provide cases to [Temporary Judge Chang Huang] to pronounce judgment, they told me that *she had sold them tickets for a raffle or requested money in exchange for processing a case*; it should be noted that *Dr. Chang Huang does not process the cases unless and until the interested parties come and contact her*. She even put a sign on the door telling the interested parties to leave the number with the law clerk, when everyone knows that it is the Judge’s obligation to pronounce judgment whether or not the interested party comes to speak with her.”⁴¹⁶

235. Another courthouse witness described Temporary Judge Chang Huang’s practice of requesting the clerk’s seal, “even though she knew that the seal is to be exclusively handled by the Clerk’s office ... in order to place [the seal] on several documents that she would send, even though the clerk would tell her that she couldn’t do the certifying”:

“Nonetheless, she would do it, because she has a very particular way of pressuring people. I was often a witness that *she would ask for money for ‘my kids,’ as she would refer to the young people who are law clerks*, because she would say that the money they were paid could not come out of her salary.”⁴¹⁷

236. The Council concluded that *Temporary Judge Chang Huang’s actions violated the principle of integrity*, as set forth in Article 21 of the Judicial Code.⁴¹⁸ More significantly, it concluded that Temporary Judge Chang Huang’s actions constituted a major violation of Article 109(11), under which judicial officers may be dismissed for “*[s]olicit[ing] or borrow[ing] money or other goods, favors or services, which by its features call into question the impartiality of the servant of the Judiciary* in the service to be provided.”⁴¹⁹

237. Circumstances strongly suggest that Temporary Judge Chang Huang’s decision in the trial court proceedings was bound up with the pattern of wrongdoing described above. As detailed in MSDIA’s Request, among other things, there is very strong evidence in this case that Temporary Judge Chang Huang’s decision was not the product of her own work; instead, her opinion was largely a verbatim recitation of the plaintiff’s complaint. The inclusion of identical typographical and grammatical errors suggested the two documents originated from the same source.⁴²⁰ That evidence is consistent with U.S. Department of State reports that have recognized the “susceptibility of the judiciary to bribes for favorable judicial decisions and resolution of legal cases and of judges parcelling out cases to outside lawyers who wrote judicial sentences on cases before the court and sent them back to the presiding judge for signature.”⁴²¹

⁴¹⁶ *Id.* (emphasis added).

⁴¹⁷ *Id.* (emphasis added).

⁴¹⁸ *Id.*

⁴¹⁹ *Id.* (emphasis added).

⁴²⁰ See Claimant’s Request for Interim Measures, dated 12 June 2012, para. 95.

⁴²¹ Exhibit C-96, U.S. Dept. of State, Ecuador : Country Reports on Human Rights Practices - 2010, April 8, 2010, <http://www.state.gov/g/drl/rls/hrrpt/2010/wha/154504.htm>.

238. Indeed, remarkably, Temporary Judge Chang Huang has openly acknowledged that her decision in the *NIFA* litigation represents a miscarriage of justice that was not made on the merits.

239. According to the testimony of two witnesses in a litigation related to the *NIFA* matter in Ecuador, in September 2008, Temporary Judge Chang Huang openly (and without provocation) acknowledged misconduct in connection with the *NIFA* case during a meeting in her chambers on an unrelated subject.⁴²² According to the witnesses, both of whom were present at the meeting, Temporary Judge Chang Huang “began speaking about [the *NIFA*] case in a very open manner and commented how everyone wanted to meddle with her decision and how she was being pressured.”⁴²³ Temporary Judge Chang Huang claimed that she decided the *NIFA* case in the way she did because of that pressure,⁴²⁴ rationalizing that at the time she was new to the judiciary and felt pressure by outsiders seeking to interfere with—or even write—her decisions.⁴²⁵ In that discussion, Temporary Judge Chang Huang conceded—again, without provocation—that she decided cases based only on a superficial review of the file,⁴²⁶ and that she was relieved that MSDIA had appealed her decision because she was “off the hook.”⁴²⁷

240. While the full circumstances surrounding the issuance of Temporary Judge Chang-Huang’s decision are not yet clear, what *is* clear is that the *NIFA* case was decided by a judge who has openly acknowledged that the case was decided, *at best*, under improper influence and without *any consideration of the merits of the plaintiff’s claim* and who was subsequently removed for judicial misconduct

- (c) Court of Appeals Judge Hernan Alberto Palacios Durango—who wrote that Court’s \$150 million judgment—has been investigated and disciplined for corruption

241. MSDIA’s Request detailed a variety of procedural errors and manifestly partial and prejudicial procedural rulings during the court of appeals proceedings in the *NIFA* case. Judge Hernan Alberto Palacios Durango, who was the President of the three-judge chamber of the Provincial Court of Justice of Pichincha for Commercial and Civil Matters that presided over the

⁴²² Exhibit C-89, Testimony of Maria Cristina Ponce, *MSDIA v. Chang-Huang* (Second Court for Civil Affairs of Pichincha), at questions 8-9, 4 December 2008.

⁴²³ Exhibit C-88, Testimony of Jorge Pinos, *MSDIA v. Chang-Huang* (Second Court for Civil Affairs of Pichincha), at question 9, 4 December 2008; *see also* Exhibit C-89, Testimony of Maria Cristina Ponce, *MSDIA v. Chang-Huang* (Second Court for Civil Affairs of Pichincha), at questions 8-9, 4 December 2008.

⁴²⁴ Exhibit C-88, Testimony of Jorge Pinos, *MSDIA v. Chang Huang* (Second Court for Civil Affairs of Pichincha), at question 17, 4 December 2008.

⁴²⁵ Exhibit C-89, Testimony of Maria Cristina Ponce, *MSDIA v. Chang-Huang* (Second Court for Civil Affairs of Pichincha), at questions 11, 15, 4 December 2008.; Exhibit C-88, Testimony of Jorge Pinos, *MSDIA v. Chang-Huang* (Second Court for Civil Affairs of Pichincha), at questions 11, 13, 15, 4 December 2008.

⁴²⁶ Exhibit C-88, Testimony of Jorge Pinos, *MSDIA v. Chang-Huang* (Second Court for Civil Affairs of Pichincha), at question 5, 4 December 2008.

⁴²⁷ Exhibit C-89, Testimony of Maria Cristina Ponce, *MSDIA v. Chang-Huang* (Second Court for Civil Affairs of Pichincha), at questions 9-10, 4 December 2008.; *see also* Exhibit C-88, Testimony of Jorge Pinos, *MSDIA v. Chang-Huang* (Second Court for Civil Affairs of Pichincha), at question 10, 4 December 2008.

NIFA case, and who wrote the decision in that case, has also been investigated by Ecuadorian authorities on multiple occasions for corruption in connection with his judicial duties.

242. In March 2002, Ecuadorian media reported that Ecuador’s Commission for Civic Control Against Corruption (“CCCC”)⁴²⁸ had investigated Judge Palacios for illegally seizing property in connection with a pending litigation over which he was presiding, concluding that sufficient evidence existed to refer the case to the prosecutorial authority “for it to issue the corresponding writ of investigation against” Judge Palacios.⁴²⁹ The CCCC found evidence of “criminal and civil liability against the judge of the Ninth Civil Court of Pichincha, Alberto Palacios Durango, for the crime of malfeasance and for damaging a private company.”⁴³⁰

243. Notwithstanding that Judge Palacios was found by the CCCC to have violated his official obligations as a judge, Judge Palacios, who is well-connected in the Ecuadorian government, nonetheless was able to maintain his prominent position within Ecuador’s judiciary. As the U.S. Department of State concluded in 2006, despite the susceptibility of the courts to “outside pressure and bribes. ... [Ecuador’s] Congress no longer has the power to impeach judges, and the judiciary does a poor job of investigating and disciplining wayward judges.”⁴³¹

244. In April 2012, the Transitional Judicial Council dismissed **Judge Palacios and Judge Toscano** (the original trial court judge presiding over the *NIFA* case, who was later replaced by Judge Chang-Huang) for “serious offenses in the performance of their duties” intended to “illegally benefit the banker Fidel Egas Grijalva” in a case they were hearing.⁴³² According to a news report, the Transitional Judicial Council resolution of dismissal found Judges Palacios and Toscano:

“responsible of committing the disciplinary offenses defined in articles 108, paragraph 8, and [article] 109, paragraph 7, of the Code of Judicial Function, which states in order: ‘Not having properly substantiated his administrative acts, decisions or judgments, as appropriate; and, to intervene in cases in which they should act, as a judge, prosecutor or public defender, with bad faith, gross negligence or inexcusable error.’”⁴³³

The dismissal of Judges Palacios and Toscano—two central figures in the *NIFA* litigation—apparently resulted from an irregular decision to expedite the taking of witness testimony, to which one party to the litigation apparently objected. The Transitional Judicial Council later

⁴²⁸ Ecuador has had several official governmental anti-corruption agencies and commissions, and the names and composition of those entities have changed over time.

⁴²⁹ Exhibit C-65, *CCCC asks for Judge to be removed*, LA HORA, March, 23 2002.

⁴³⁰ *Id.*

⁴³¹ Exhibit C-75, The U.S. Dept. of State, 2006 Investment Climate Statement – Ecuador, <http://2001-2009.state.gov/e/eeb/ifd/2006/61978.htm>.

⁴³² Exhibit C-114, *Ecuador Reverses the Dismissal of Two Judges*, UPI ESPANOL, July 9, 2012.

⁴³³ Exhibit C-113, *CJT Corrects Error That Harmed Two Judges*, La Hora, July 9, 2012.

reversed its decision when Judges Palacios and Toscano argued that their action was taken in the interest of “the principle of procedural speed” and therefore was not improper.⁴³⁴

245. Strikingly, Judge Toscano was presiding over the *NIFA* case at the time that the trial court twice allowed NIFA’s only witness to testify on an expedited basis and without prior notice to MSDIA of the time and place of the testimony. Even after MSDIA’s repeated objections, Judge Toscano refused to require the witness to respond to many of the questions submitted by MSDIA to be put to the witness. Finally, when he was appointed to the court of appeals and while the NIFA case was still pending in his former court, Judge Toscano named NIFA’s counsel in its litigation against MSDIA—Juan Carlos Andrade—as his “alternate judge” who would hear matters from which Judge Toscano was disqualified.⁴³⁵

- (4) Proceedings in Ecuador subsequent to the court of appeals decision have further demonstrated bias and improper influence, including in the National Court of Justice

246. The proceedings in Ecuador that followed the issuance of the court of appeals decision in September 2011, including in the National Court of Justice, have been procedurally irregular, consistently and improperly favoring NIFA, further reflecting both the continued instability and unpredictability of the Ecuadorian judiciary as a whole, and the manifest bias against MSDIA in those specific proceedings. Those events confirm that it is not likely that Ecuador’s National Court of Justice will correct the violations of MSDIA’s rights reflected in the \$150 million judgment.

247. As set out above, shortly after the Transitional Judiciary Council announced that Ecuador’s National Court of Justice would be replaced in late January 2012, Judge Palacios for the court of appeals suddenly and unexpectedly issued his decision on September 23, 2011, upholding Judge Chang-Huang’s decision against MSDIA and awarding damages of \$150 million to NIFA. The unanimous court of appeals decision was issued despite the fact that there was a pending motion before the court for clarification of a prior ruling, which should have been ruled on separately from and previously to the final merits decision. Under normal circumstances, the court would have decided on that motion and then provided an opportunity for MSDIA to submit final arguments to the court of appeals. The court’s sudden issuance of its judgment, jointly with its decisions on the pending motions, deprived MSDIA of the opportunity it otherwise would have had to present its final arguments.

248. Consistent with Ecuadorian law, MSDIA filed a petition requesting clarification of the court of appeals decision within three days of its issuance. According to Ecuador’s own expert on procedural law, Dr. Moscoso Serrano, upon the filing of such a petition, a court must “hear the other party and afford it a period of time to explain its point of view,” and “[o]nly then, when at least one or two weeks of additional time has elapsed, would the Court issue its decision with

⁴³⁴ Exhibit C-114, *Ecuador Reverses the Dismissal of Two Judges*, UPI ESPANOL, July 9, 2012.

⁴³⁵ MSDIA Notice of Arbitration, at paras. 51-53; Exhibit C-87, MSDIA Recusal Action Against Judge Juan Toscano Garzon, December 4, 2008.

respect to the request for clarification. Then, three days after the court’s decision on the clarification motion, a judgment would become enforceable.”⁴³⁶

249. This required procedure outlined by Dr. Moscoso Serrano was not followed in the NIFA litigation. MSDIA and NIFA both submitted petitions requesting clarification of the court of appeals’ judgment on September 27, 2011.⁴³⁷ In its petition, MSDIA requested, among other things, that the court evaluate the evidence MSDIA had submitted into the record—which the court had refused to even consider—and that it clarify the basis for its decision. MSDIA also objected to the court’s failure to decide MSDIA’s pending procedural petition prior to rendering a judgment as procedurally improper, noting that the court’s failure to do so had the effect of denying MSDIA an opportunity to file a final brief or request an oral hearing.⁴³⁸ MSDIA attached its final brief in order to demonstrate that it had prepared the draft and was waiting for the appropriate opportunity to file it.⁴³⁹

250. On September 30, 2011, the court of appeals issued an order requesting that the parties respond to the petitions for clarification by October 5, 2011—just three business days later.⁴⁴⁰ MSDIA filed a timely response to NIFA’s petition on October 5, and NIFA declined to respond to MSDIA’s petition. According to Dr. Moscoso Serrano’s opinion “at least one or two weeks of additional time” would typically elapse before the court decided the petitions for clarification. Here, the court of appeals issued an order *the very next day*, October 6, 2011, granting NIFA’s request for clarification in part, and rejecting MSDIA’s petition in full. Then, rather than wait three days for its order to become final, the court immediately ordered that the parties file any cassation petitions requesting appeal to the National Court of Justice within a week.⁴⁴¹ The contrast between the manner in which Ecuadorian procedure is supposed to work—even according to Ecuador’s own expert in this arbitration—and the peremptory manner in which the second instance court dispensed with MSDIA’s request for clarification after issuing its judgment, is stark. Of course, these irregular actions were taken by the same judges, including Judge Palacios, who issued the indefensible \$150 million judgment. They suggested a judicial interest in expediting this case.

251. MSDIA filed a timely recourse of cassation on October 13, 2011, seeking review of the court of appeals’ decision by Ecuador’s National Court of Justice. On October 24, 2011, the court of appeals set a bond, which MSDIA posted forthwith.⁴⁴²

⁴³⁶ Moscoso Expert Opinion, at para 19.

⁴³⁷ Exhibit C-106, MSDIA Petition submitted to Court of Appeals, *NIFA v. MSDIA*, dated 27 September 2011; Exhibit C-107, NIFA Petition submitted to Court of Appeals, *NIFA v. MSDIA*, dated 27 September 2011 (requesting that the court to clarify that PROPHAR, not NIFA, was the name of the legal entity entitled to the damages, and requesting that the court reverse its decision denying NIFA interest, attorneys fees and costs).

⁴³⁸ Exhibit C-106, MSDIA Petition submitted to Court of Appeals, *NIFA v. MSDIA*, dated 27 September 2011.

⁴³⁹ *Id.*

⁴⁴⁰ Exhibit C-108, Court of Appeals Order dated 30 September 2011.

⁴⁴¹ Exhibit C-109, Court of Appeals Order dated 6 October 2011.

⁴⁴² Exhibit C-51, Court of Appeals Order dated 24 October 2011; Exhibit C-52, MSDIA Petition submitted to the Court of Appeals, *NIFA v. MSDIA*, October 25, 2011.

252. On October 25, 2011—the same day that MSDIA posted the bond—the court of appeals referred the case to the National Court of Justice.⁴⁴³ On November 11, 2011—also stunningly soon compared with usual practice—Ecuador’s National Court of Justice issued a decree formally admitting MSDIA’s recourse of cassation.⁴⁴⁴ The timing of both of these steps was highly unusual and further suggested an improper judicial interest in expediting the case.

253. In the normal course of Ecuadorian litigation, it would typically take several weeks before the court of appeals would refer the case to the National Court of Justice and several months or more before the National Court of Justice would admit a recourse of cassation. In the NIFA litigation, however, both courts expedited their processing of the case significantly. Indeed, the National Court of Justice accepted MSDIA’s recourse of cassation while (at a minimum) many hundreds of other, earlier-filed recourses were still awaiting the decision of the Court as to acceptance.

254. So far as MSDIA is aware, no other case in the National Court of Justice’s Civil Chamber has been referred or accepted in such a short time period. In fact, a search of the National Court of Justice records found that eighty-four cases were sent to the Civil Chamber of the National Court of Justice between October 20 and November 1, 2011. Of those eighty-four cases, as of July 30 to August 3, 2012 when the search was conducted, the Civil Chamber had ruled on the admissibility of only *five*. Three of those cases were transferred in February 2012 to the Chamber for Children and Adolescents. A fourth, cassation number 2011-1150, was admitted on July 17, 2012. But this case, *NIFA v. MSDIA*, was admitted on November 11, 2011, approximately *two weeks* after the file was received by the court of appeals, and *three months* before the earliest of the other cases was accepted. Three cases were archived pursuant to a specialized law. The other *seventy-six cases* filed at the same time as *NIFA v. MSDIA* remain pending even now at the admissibility stage.⁴⁴⁵

255. The anomalies and suggestions of improper interest in this matter at the National Court of Justice continued after the case was admitted. On November 29, 2011, the National Court of Justice set an oral hearing date for Monday, December 12, 2011.⁴⁴⁶ The rapid scheduling of this hearing, and its timing, were also highly unusual. As a matter of unvarying practice, the Civil Chamber of the National Court of Justice, as constituted at that time, held oral hearings only on Tuesdays and Thursdays; so far as MSDIA is aware, this was the first oral hearing the Court ever had set for a Monday. According to National Court of Justice records, no other cases were set for hearing on a Monday between December 2011 and May 2012.⁴⁴⁷

⁴⁴³ Exhibit C-53, Court of Appeals Order dated 25 October 2011

⁴⁴⁴ Exhibit C-54, National Court of Justice Order dated 11 November 2011.

⁴⁴⁵ Declaration of Maria Belen Merchan dated 4 August 2012, and accompanying Table 1 (The column titled “Date of Admission to the Civil Chamber” represents the date on which the case file was received by the Court. The column titled “Qualification” includes information on whether the Chamber has “admitted” the case.).

⁴⁴⁶ Exhibit C-55, National Court of Justice Order dated 29 November 2011.

⁴⁴⁷ Declaration of Maria Belen Merchan dated 4 August 2012, and accompanying Table 2 (showing the National Court of Justice Civil Chamber’s hearing schedule between December 2011 and May 2012, and including the time and date of each hearing).

256. Moreover, data collected from the Court further establishes that other cases admitted in the National Court of Justice earlier than MSDIA's case, but not subject to unusual expedition, were at that time having hearing dates set for April and May 2012 because the Court's Tuesday and Thursday calendar was full until then. Indeed, the Court's records confirm that not a single case that arrived at the Civil Chamber after the NIFA appeal had been set for hearing as of May 2012. The other cases that had oral hearings between December 2011 and May 2012 had arrived at the court long before MSDIA's appeal.⁴⁴⁸

257. The Court has never offered any legitimate explanation why it chose to treat the *NIFA v. MSDIA* case differently or why it had repeatedly moved that case ahead of hundreds of other cases that were still awaiting action by the Court. That said, a worrisome explanation is not difficult to imagine. By August 20, 2011, the government of Ecuador had announced that the then-extant judicial personnel on the National Court of Justice would be removed and a new court would be in place by January 2012.⁴⁴⁹ If the case was to be heard by the then-existing court, by judges whose identities had long been known to Mr. Garcia and Judge Palacios, it would have to be dramatically expedited.

258. On December 7, 2011, MSDIA filed a request to adjourn the hearing to a later date, as is permitted under Ecuadorian procedure,⁴⁵⁰ citing the complexity of the case and the need for adequate time to prepare for the hearing.⁴⁵¹ The next day, on December 8, 2011, the National Court of Justice set a new hearing date for **Monday, December 26, 2011**.⁴⁵² The timing of this hearing was also highly unusual. Not only was this alternate hearing date also set for a Monday, a date on which oral arguments are never heard in that court, but it was the only oral hearing held during the entire week of December 26. Indeed, to set a hearing for the day after Christmas is highly unusual in and of itself. The timing of the hearing made it impossible for MSDIA's corporate representatives in the United States to attend the hearing. MSDIA's Ecuadorian counsel did attend (although, notably, one of the judges presiding over the case at the time did not) and presented oral argument. Following the hearing, MSDIA's Ecuadorian counsel filed written post-hearing briefs and the judges who heard the argument had the matter under advisement.

259. Despite the extraordinary expedition of the proceedings in the National Court of Justice to that point and the day-after-Christmas hearing, for reasons not known to MSDIA, the judges

⁴⁴⁸ Declaration of Maria Belen Merchan dated 4 August 2012, and accompanying Table 2 (Table 2 shows the hearing date in *NIFA v. MSDIA* as December 26, 2011 and identifies the other cases scheduled for hearing in the months that followed. The *NIFA v. MSDIA* case is cassation number 1140-2011, which indicates that it was the 1,140th case to arrive at the Court in 2011. No case scheduled for hearing between December 2011 and May 2012 arrived at the Court after the *NIFA v. MSDIA* case, and most of those appeals arrived several hundred cases before *NIFA v. MSDIA*).

⁴⁴⁹ Exhibit C-47, *Proceso Para Elegir a Los 21 Jueces Nacionales Desde Próxima Semana*, El Universo, 20 August 20, 2011, <http://www.eluniverso.com/2011/08/20/1/1355/proceso-elegir-21-jueces-nacionales-desde-proxima-semana.html> ("As expected, the Transitional Judiciary Council (CJT) will hold the public service examination to restructure the National Court of Justice (CNJ) over the course of next week. ... According to the organization, the new Court will start to function in January 2012.")

⁴⁵⁰ Exhibit CLM-23, Ecuadorian Cassation Law, Article 14.

⁴⁵¹ Exhibit C-56, MSDIA Petition submitted to the National Court of Justice, *NIFA v. MSDIA*, 7 December 2011.

⁴⁵² Exhibit C-57, National Court of Justice Order dated 8 December 2011.

who heard the argument did not ultimately issue a decision before their terms expired on January 25, 2012.

260. As had been previously announced, on January 25, 2012, the entire membership of the National Court of Justice, including the three Civil Chamber judges presiding over the *NIFA v. MSDIA* case, were removed and replaced pursuant to a process established by the Transitional Judiciary Council. On January 30, the six judges of the new Civil Chamber were selected from among the full court.⁴⁵³ On or about March 26, 2012, three of the six judges assigned to the Civil Chamber were selected to preside over the *NIFA v. MSDIA* case.

261. There are no further proceedings to take place before the National Court of Justice, and a decision from that court could issue at any time.⁴⁵⁴ Nevertheless, new uncertainty has been injected into the process of deciding cases in the National Court of Justice. Since MSDIA submitted the present Request, the Transitional Council of the Judiciary announced the appointment of 21 “temporary judges” to the National Court of Justice. The function of the temporary judges is to help address the backlog of cases pending before the court, by deciding cases that were pending at the court as of January 25, 2012.⁴⁵⁵ Critically, one judge who was on the prior panel of judges assigned to the *NIFA v. MSDIA* case before the National Court of Justice was replaced has now been appointed as a temporary judge of the Civil Chamber.⁴⁵⁶ That Judge, Manuel Antonio Sanchez Zuraty, participated in the various decisions to expedite the *NIFA* case. Judge Sanchez sought but did not receive reappointment to the Court in January 2012 through the Transitional Counsel of the Judiciary selection process, which considered candidates’ qualifications including competency and integrity to serve in Ecuador’s judiciary. Judge Sanchez now may be in position where he could be reassigned to this case.

262. In short, the unjustified expedition of MSDIA’s appeal in the National Court of Justice, perhaps undertaken to ensure decision by certain judges on that court and the dramatic and ongoing changes in the Court’s membership add to already serious doubts that Ecuador’s courts will afford this case fair and unbiased consideration.

263. Under such circumstances, given that there is no practical alternative means of obtaining protection, MSDIA need not await a final adverse decision of the National Court of Justice before seeking protection against the imminent destruction of its rights.⁴⁵⁷

⁴⁵³ Exhibit C-62, National Court of Justice Order dated 30 May 2012.

⁴⁵⁴ First Ortega Expert Opinion, para. 19.

⁴⁵⁵ Exhibit C-115, Resolution of the National Judicial Council 70, Supplement to Official Gazette 746, dated 16 July 2012, Art. 7.

⁴⁵⁶ Exhibit C-116, Temporary [National Court of Justice] Chamber Personnel, July 2012.

⁴⁵⁷ As noted elsewhere, the Respondent argues that even if a decision adverse to MSDIA from the National Court of Justice had already issued, the Claimant would still not have a ripe claim for denial of justice because it could file an appeal to the Constitutional Court. Respondent’s Opposition, at para. 43. However, as the Respondent’s own expert admits, MSDIA’s filing an appeal with the Constitutional Court would not suspend the execution of a sentence affirmed by the National Court of Justice. Moscoso Opinion, at para. 17. Thus, while the appeal was pending, NIFA would surely have executed on MSDIA’s assets. It is widely accepted that an appeal of this type, which would not forestall the harm to the Claimant, need not be exhausted to have a ripe denial of justice claim. As the tribunal in *Loewen v. United States* noted, “if exercising the right of appeal, at the risk of immediate execution on Loewen’s Mississippi assets, was the only alternative available to Loewen, it would not have been, ‘a reasonably available remedy’ to Loewen.” Exhibit RLM-37, *Loewen v. United States*, ARB(AF)/98/3, Award, 26 June 2003, ¶

d) MSDIA Has Made a *Prima Facie* Case on the Merits of Its Claim under Article II(7) that Ecuador Failed to Provide Effective Means of Asserting Claims and Enforcing Rights With Respect to Investments

264. As set out in the Notice of Arbitration, MSDIA has asserted claims that Ecuador breached multiple obligations under the Ecuador-United States BIT, including Article II(7), which obligates Ecuador to “provide effective means of asserting claims and enforcing rights with respect to investment, investment agreements, and investment authorizations.”⁴⁵⁸ Ecuador contends—without explanation and contrary to fact and law—that “[a]lthough Claimant attempts to bring its complaints against Respondent under various provisions of the Ecuador-U.S. Bilateral Investment Treaty, specifically its Articles II(1), II(3)(a), II(3)(b), and II(7), in reality they constitute a single claim.”⁴⁵⁹

265. This is not the case. As the tribunal in the *Chevron I* arbitration observed, Article II(7) was included in the Treaty “as an independent treaty standard” different from “denial of justice.”⁴⁶⁰ Importantly, the *Chevron I* tribunal recognized that Article II(7) *did not* merely codify the customary international law requirement that a state not deny justice to an investor (as the respondent in that case had urged). The tribunal held that “Article II(7), setting out an ‘effective means’ standard, constitutes a *lex specialis* and *not a mere restatement of the law on denial of justice*.”⁴⁶¹ The tribunal added:

“that a distinct and potentially less-demanding test is applicable under this provision as compared to denial of justice under customary international law.... [U]nder Article II(7), a failure of domestic courts to enforce rights ‘effectively’ will constitute a violation of Article II(7), which may not always be sufficient to find a denial of justice under customary international law.”⁴⁶²

266. The tribunal then considered Ecuador’s argument that claimant was required to exhaust local remedies before pursuing a claim under Article II(7). The tribunal held that “Claimants’ claims for BIT violations and Article II(7) in particular ***are not subject to [a] strict requirement***

208. See also Exhibit RLM-6, *Ambatielos Claim (Greece v. UK)*, Award (6 Mar. 1956), XII UNRIAA 83, pp. 119 (RLM-6) (“Remedies which could not rectify the situation cannot be relied upon by the defendant State as precluding an international action.”); Exhibit CLM-51, *Finland v. Great Britain*, 9 May 1934, III RIAA 1479, at pg. 1489 (“It is no objection to an international claim that there exists some theoretical or technical possibility of resort to municipal jurisdictions. The local remedy must be really available and it must be effective and adequate.”)

⁴⁵⁸ Exhibit C-1, Ecuador-U.S. BIT, at Art. II(7).

⁴⁵⁹ Respondent’s Opposition, at n. 34, p. 19.

⁴⁶⁰ Exhibit CLM-111, *Chevron*, Partial Award on the Merits (30 March 2010), at para. 243. Applying a similar provision, the tribunal in *AMTO* stated “[t]he fundamental criteria of an ‘effective means’ for the assertion of claims and the enforcement of rights within the meaning of Article 10(2) is law and the rule of law.” Exhibit CLM-112, *Limited Liability Company AMTO v. Ukraine*, SCC Case No. 0801 2005 Final Award (26 March 2006), at para. 87.

⁴⁶¹ Exhibit CLM-111, *Chevron*, Partial Award on the Merits (30 March 2010).

⁴⁶² Exhibit CLM-111, *Chevron*, Partial Award on the Merits (30 March 2010), at paras. 242-244. In terms of the provision’s application, the tribunal concluded that the state’s provision of “effective means” could fairly be judged by reference to the system’s “operation in individual cases.” As the tribunal explained, “[w]hile Article II(7) clearly requires that a proper system of laws and institutions be put in place, the system’s effects on individual cases may also be reviewed. This idea is reflected in the language of the provision.” *Chevron*, at para. 247.

*of exhaustion.*⁴⁶³ The tribunal instead perceived a “qualified requirement of exhaustion of local remedies” under Article II(7), pursuant to which a claimant must use a state’s means of claims/rights enforcement to the extent necessary to allow a tribunal to “assess[] ... the ‘effectiveness’ of the system”⁴⁶⁴ In that case, although the claimant had not exhausted local remedies, the tribunal nevertheless found Ecuador liable for a violation of Article II(7).

267. MSDIA’s extensive and unsuccessful efforts to defend its rights in the Ecuadorian judiciary provide a more than sufficient basis to “assess the effectiveness of the system” of justice in Ecuador and to conclude that the system is woefully ineffective, including, in particular, in the *NIFA v. MSDIA* case. MSDIA has plainly made a *prima facie* showing that it has been denied “effective means of asserting claims and enforcing rights” in violation of Article II(7) of the Treaty.

VII. THE INTERIM MEASURES REQUESTED BY MSDIA WOULD NOT IMPOSE A DISPROPORTIONATE BURDEN ON ECUADOR

268. In its Opposition, Ecuador argues that the interim measures sought by MSDIA “would place an enormous burden on Ecuador far out of proportion to any benefit they would bestow on a single litigant in a private litigation.”⁴⁶⁵ Contrary to Ecuador’s argument, there is no evidence that a delay in the enforcement of a judgment rendered by the National Court of Justice for money damages against MSDIA would cause any harm whatsoever to Ecuador, let alone the sort of serious, imminent or irreparable harm that enforcement of a \$150 million judgment would cause to MSDIA.

269. There is also no basis for Ecuador’s suggestion that the requested measures would require it to violate the Ecuadorian Constitution to the detriment of NIFA’s civil rights or to violate the American Convention on Human Rights (the “Convention”) to the detriment of NIFA’s human rights.⁴⁶⁶ No provision in either of those instruments would prohibit Ecuador from suspending the enforcement of a judgment against MSDIA pending the outcome of this international arbitration to determine whether Ecuador has violated the Treaty to the detriment of MSDIA’s rights as an investor.⁴⁶⁷

⁴⁶³ *Id.* at para. 321.

⁴⁶⁴ Exhibit CLM-111, *Chevron*, Partial Award on the Merits (30 March 2010), at para. 324. The *Chevron I* tribunal’s assessment of Article II(7) was adopted by the tribunal in *White Industries Australia, Ltd. v. Republic of India* with regard to a similarly worded provision in another treaty. The *White Industries* tribunal observed, *inter alia*, the following: 1) “the ‘effective means’ standard is *lex specialis* and is a distinct and potentially less demanding test, in comparison to denial of justice in customary international law;” 2) “the standard requires both that the host State establish a proper system of laws and institutions and that those systems work effectively in any given case;” and 3) “the issue of whether or not ‘effective means’ have been provided by the host State is to be measured against an objective, international standard.” Exhibit CLM-114, *White Industries Australia, Ltd. v. Republic of India*, Final Award (30 November 2011) at 108-109. In applying Article II(7), the *White Industries* tribunal found that the circumstances in that case did not rise to the level of denial of justice but nevertheless breached the “effective means” standard.

⁴⁶⁵ Respondent’s Opposition, at para. 177.

⁴⁶⁶ See Respondent’s Opposition, dated 24 February 2012, at paras. 182-187.

⁴⁶⁷ See below at paras. 273-276, 283-287.

A. *The Requested Interim Measures Would Not Contravene the Ecuadorian Constitution or the American Convention on Human Rights*

270. Contrary to Ecuador’s contention, there is no conflict between the requested interim measures and Ecuador’s obligations under the Constitution and the Convention.⁴⁶⁸

1. The Ecuadorian Constitution

271. As Ecuador states in its Opposition, “Article 75 of the Ecuadorian Constitution establishes the right of all persons under Ecuadorian jurisdiction to due process of law.”⁴⁶⁹ The fundamental constitutional right to due process includes, according to Ecuador’s own expert, the: “(a) right to access to the court and right to a decision based on the questions of law; (b) [right to] reasoning for the legal decisions; (c) right to appeals; [and] (d) right to enforce decisions.”⁴⁷⁰ Ecuador argues that complying with the requested interim measures of protection would cause it to be in breach of the Ecuadorian Constitution, and in particular, its obligation under Article 75 to protect NIFA’s right to enforce a judgment of the Ecuadorian courts.

272. Ecuador has offered no justification as to why this Tribunal can or should take the Ecuadorian Constitution into account in exercising its mandate under the parties’ arbitration agreement and the Treaty. It is a cardinal rule of international law that a State may not invoke its domestic law to excuse or justify the breach of one of its international obligations.⁴⁷¹ Under the Treaty, the applicable arbitration rules, and international investment law, MSDIA is entitled to the interim measures it has requested. Ecuador cannot invoke its own domestic Constitution as a justification for seeking to avoid interim measures of protection to which MSDIA is otherwise entitled.⁴⁷²

⁴⁶⁸ See Respondent’s Opposition, at paras. 182-187.

⁴⁶⁹ Respondent’s Opposition, at para. 185.

⁴⁷⁰ Expert Opinion of Juan Francisco Guerrero del Pozo, dated 24 July 2012 (“Guerrero Expert Opinion”), at para. 18 (quoting Ecuadorian Constitutional Court, Decision No. 35-10-SEP-CC in case No. 261-09-EP, published in the supplement to the Official Register No. 294 dated October 2010, which has not been provided together with Mr. Guerrero’s Opinion). See also Expert Opinion of Freddy Oswaldo Cevallos Bueno, dated 5 August 2012, (“Cevallos Expert Opinion”), at para. 29.

⁴⁷¹ See Exhibit CLM-106, The Vienna Convention on the Law of International Treaties, Art. 27 (“A party may not invoke the provisions of its internal law as justification for its failure to perform a treaty.”). Arbitral tribunals adjudicating claims under bilateral investment treaties (BITs) have consistently followed this rule. See e.g., Exhibit CLM-72, *Victor Pey Casado and President Allende Foundation v Chile*, ICSID Case No ARB/98/2, Decision on Provisional Measures (25 September 2001), at para. 52; Exhibit CLM-13, *Perenco Ecuador Ltd. v. Republic of Ecuador*, ICSID Case No. ARB/08/6, Decision on Provisional Measures (8 May 2009), at para. 60. Some argue that consulting instruments other than the relevant BIT would expose arbitrators to the risk of having their awards annulled on the grounds that they have exceeded their powers. For a discussion of this concern, see Exhibit CLM-93, Charles H. Brower II, *Obstacles and Pathways to Consideration of the Public Interest in Investment Treaty Disputes*, in Karl P. Sauvant (ed), YEARBOOK ON INTERNATIONAL INVESTMENT LAW AND POLICY 2008–2009 (2009), 375.

⁴⁷² This is clear under Ecuadorian law as well. Cevallos Expert Opinion, at paras. 17-18 (noting Ecuador’s ratification of, and obligations pursuant to, the Vienna Convention on the Law of International Treaties), at para. 20 (noting that domestic laws not in accord with international treaties “have to be impugned as being unconstitutional”), at para. 23 (“The Constitution recognizes international law as a standard of conduct”), at para. 25 (noting that while the Constitutional Court can review the constitutionality of international instruments, subsequently “the Constitutional Court does not have the power to review and rule on the constitutionality of either international treaties ratified by Ecuador ... or of any other instrument of International Law), and at para. 35 n.3 (“The Ecuadorian Government ... ratified without reservations the Vienna Convention, which regulates

273. In any event, Ecuador would not violate its constitutional obligation to respect and ensure NIFA's right to the enforcement of judgments if it implemented the requested interim measures.⁴⁷³

274. First, the Ecuadorian Constitution itself “‘recognizes International Law as a norm of conduct’, which means that international treaties and instruments that are validly entered into in accordance with the norms of the Constitution, must be obligatorily fulfilled and have binding force and prevail over the internal law of the state.”⁴⁷⁴ MSDIA's expert, Dr. Cevallos, explains that there is no legal foundation for Ecuador's argument that complying with interim measures of protection ordered by this Tribunal would violate Ecuador's obligations under the Constitution. To the contrary, he explains that “nothing in the current Constitution modifies the State's obligation to fulfill its obligations under international law, as set forth in binding international treaties and agreements.”⁴⁷⁵ In other words, nothing in Ecuador's Constitution excuses Ecuador from its obligations under international treaties, such as the Ecuador-United States BIT, much less prevents Ecuador from complying with such obligations.

275. Second, interim measures are an integral component of the Ecuadorian judicial power,⁴⁷⁶ which, as would be the case here, are “adopted to avoid a subsequent wrong” over a period of time “solely limited to that necessary to prevent the violation of the rights of the parties.”⁴⁷⁷ Dr. Cevallos discusses the availability of interim measures of protection under Ecuadorian law and concludes that Ecuador would be obligated, as a matter of Ecuadorian law, to comply with interim measures of relief ordered by a competent arbitral tribunal:

“a precautionary measure from an International Arbitration Tribunal that orders the temporary suspension of a proceeding, is not an interference of justice nor can it be labeled as an arbitrary act or an act foreign to the Ecuadorian legal system that becomes impossible to enforce, but rather, on the contrary, ***it is a valid act with a constitutional and legal regulatory origin***, that has been exercised by a Public Law organization with the power to do so (Arbitral Tribunal), and that has been exercised because the circumstances established in the corresponding regulations (for that purpose) have materialized, and ***which in this case is of compulsory compliance for the Ecuadorian State***.”⁴⁷⁸

276. Third, no provision of the Constitution gives a party the right to enforcement of a judgment that itself violates the basic constitutional guarantees of due process and the rule of law.⁴⁷⁹ Consequently, nothing in the Constitution prevents Ecuador from suspending

International Treaty Law, and whose Article 27 expressly indicates that a party may not invoke the provisions of its domestic law as justification for the breach of a treaty.”).

⁴⁷³ See Respondent's Opposition, at paras. 182-185.

⁴⁷⁴ Cevallos Expert Opinion, at para. 23 (quoting the Ecuadorian Constitution, Article 416, number 9).

⁴⁷⁵ Cevallos Expert Opinion, at para. 21.

⁴⁷⁶ Cevallos Expert Opinion, at para. 32.

⁴⁷⁷ Cevallos Expert Opinion, at para. 33.

⁴⁷⁸ Cevallos Expert Opinion, at para. 34.

⁴⁷⁹ Cevallos Expert Opinion, at para. 31 (“no party has a right to execute a judgment that was obtained in violation of the other party's rights to due process.”).

enforcement of the NIFA judgment while this Tribunal considers whether the judgment violates Ecuador's obligation under the Treaty to provide those same guarantees.⁴⁸⁰

277. In the likely event that the Tribunal concludes that the \$150 million judgment against MSDIA was the result of a denial of justice by the Ecuadorian courts, the Tribunal's award will confirm that NIFA never had a legitimate constitutional right to enforcement of that judgment. As discussed above, a National Court of Justice ruling affirming the \$150 million judgment against MSDIA would represent the final step in a profoundly flawed and biased judicial process.⁴⁸¹ Both the trial court and the court of appeals proceedings and judgments were contrary to Ecuadorian law and procedure, were contrary to the minimum requirements of due process, and demonstrated a clear bias against MSDIA. Those courts relied on substantive law that did not exist in Ecuador and awarded NIFA damages for lost profits that bear no relationship whatsoever to any evidence of actual loss. If the Tribunal finds that the judgment is inconsistent with the minimal guarantees of due process, then it is also inconsistent with the protections guaranteed under the Ecuadorian Constitution, and Ecuador's suspension of enforcement of that judgment cannot have been a violation of NIFA's constitutional rights.

278. Fourth, the interim measures requested by MSDIA would only prevent the enforcement of the judgment temporarily, during the pendency of this arbitration.⁴⁸² By merely suspending enforcement of the judgment against MSDIA, the requested interim measures would do no more than has already been done in the *NIFA v. MSDIA* litigation. As discussed above, in connection with its appeal to the National Court of Justice, MSDIA posted a bond, which stayed the execution of the judgment pending the decision of the National Court of Justice.⁴⁸³ If Ecuador were to extend the period in which execution is stayed, at the direction of this Tribunal, this incremental delay in the enforcement of NIFA's judgment cannot constitute harm to NIFA's due process rights that rises to the level of a constitutional violation. (It is noteworthy that the failed real estate transaction that is the subject of the *NIFA v. MSDIA* litigation took place in 2003. Where the underlying litigation has already taken nearly ten years, it is difficult to see how a further incremental delay could be characterized as a serious constitutional violation.)⁴⁸⁴

279. Finally, in the unlikely event that the Tribunal finds the NIFA judgment is not the result of a denial of justice, NIFA could enforce its judgment having suffered only minimal incremental delay. By contrast, the harm to MSDIA from not suspending enforcement of the

⁴⁸⁰ Cevallos Expert Opinion, at paras. 34-37. It is more than a little ironic that, in opposing interim measures needed to address potential harm caused by Ecuador's failure to afford a private litigant's due process rights, Ecuador invokes the due process rights of another private litigant. See Respondent's Opposition, at paras. 185, 187-188.

⁴⁸¹ See Claimant's Notice of Arbitration, at para. 12; Claimant's Request for Interim Measures, at paras. 3-4, 10.

⁴⁸² Cevallos Expert Opinion, at paras. 34, 36 ("[A] precautionary measure from an International Arbitration Tribunal that orders the temporary suspension of a proceeding is not an interference of justice"; and "it is incorrect .. to claim that the adoption of a precautionary measure such as this threatens [NIFA's] right to legal protection.").

⁴⁸³ See *supra* at paras. 184, 251-252.

⁴⁸⁴ In addition, NIFA could not sue the state for damages as a result of a suspension of the judgment, (Cevallos Expert Opinion, at para. 37), and contrary to Dr. Guerrero's claims (Guerrero Expert Opinion, at para. 30), NIFA could not bring a constitutional action of protection because the suspension of the judgment would not be a violation of due process. Cevallos Expert Opinion, at paras. 40-42.

NIFA judgment – i.e., the destruction of its entire Ecuadorian business – would be severe and irreparable.⁴⁸⁵

280. Ecuador and its expert, Dr. Guerrero, imply that the right to enforcement of a judgment somehow trumps other due process rights guaranteed under the Constitution.⁴⁸⁶ As Dr. Cevallos explains, there is no such hierarchy of norms under Ecuadorian law,⁴⁸⁷ and this would make no sense. As he explains, “no party has a right to execute a judgment that was obtained in violation of the other party’s rights to due process.”⁴⁸⁸ Thus, it cannot be the case that one party’s right to enforcement of a judgment takes precedence over all other Constitutional rights.

281. In sum, having considered the relevant provisions of the Ecuadorian Constitution, and considering the obligations Ecuador has assumed under international treaties, including the Ecuador-United States BIT, Dr. Cevallos concludes:

“a temporary protective measure issued by a legitimate international Arbitral Tribunal ordering the suspension of a legal proceeding in progress is a binding and compulsory measure and must be complied with by the Ecuadorian State.”⁴⁸⁹

2. The American Convention on Human Rights

282. Ecuador and its expert, Mr. Guerrero, also claim that suspending enforcement of the NIFA judgment would violate NIFA’s human rights under the American Convention on Human Rights. The simple answer to this argument is that companies do not have any human rights under the Convention.⁴⁹⁰ Thus, the requested interim measures could not implicate Ecuador’s international obligations under the Convention.

283. Nor would compliance with the requested interim measures expose Ecuador to liability under international law, as Ecuador and its expert allege.⁴⁹¹ The Inter-American Commission of Human Rights, which is the first instance tribunal in the Inter-American system, routinely rejects petitions regarding alleged violations against juridical persons.⁴⁹² Although Mr. Guerrero claims

⁴⁸⁵ See above at paras. 121-166. See Exhibit CLM-8, *City Oriente Ltd. v. Republic of Ecuador*, ICSID Case No. ARB/06/21, Decision on Revocation of Provisional Measures and Other Procedural Matters (13 May 2008), at para. 78 (“having weighed the interests at stake, it is the opinion of this Tribunal that [provisional measures] prevent serious – and even irreparable – damage to the petitioner at the cost of lesser and reparable damage to Respondents.”).

⁴⁸⁶ Respondent’s Opposition, at para. 189; Guerrero Expert Opinion, dated 24 July 2012, at para. 20.

⁴⁸⁷ Cevallos Expert Opinion, at paras. 30-31.

⁴⁸⁸ Cevallos Expert Opinion, at para. 31.

⁴⁸⁹ Cevallos Expert Opinion, at para. 35.

⁴⁹⁰ Exhibit CLM-92, Article 1, American Convention on Human Rights (“(1) The State Parties to this Convention undertake to respect the rights and freedoms recognized herein and to ensure to all persons subject to their jurisdiction the free and full exercise of those rights and freedoms ... (2) **For the purposes of this Convention, ‘person’ means every human being.**”) (emphasis added) This is also true under Ecuadorian law. Cevallos Expert Opinion, at para. 39 (the NIFA v. MSDIA litigation “is a strictly commercial matter between two Companies, and not a personal Human Rights case. Moreover, since commercial companies are not human, they of course do not have Human Rights.”).

⁴⁹¹ Respondent’s Opposition, at para. 189; Guerrero Expert Opinion, dated 24 July 2012, at para. 19.

⁴⁹² See Exhibit CLM-101, Diego Rodríguez Pinzón, *The “Victim” Requirement, The Fourth Instance Formula And*

that if Ecuador were to implement the requested interim measures, a ruling against Ecuador by the Commission “would be likely, based on the precedents which are quoted in this report,”⁴⁹³ none of the precedents Mr. Guerrero quotes in his report involve allegations of human rights violations committed against a company.

284. Nor do any of those precedents (or indeed any other precedents from the Inter-American system) hold a State liable for implementing interim measures ordered by an international court or arbitral tribunal or for suspending enforcement of a court judgment pending a challenge to its validity. That is not surprising, given that the Inter-American Commission and Court themselves have asked or ordered States to suspend judicial proceedings or the execution of judgments pending their review.

285. For example, in *Emilio Palacio et al. vs. Ecuador*, the Commission asked Ecuador “to suspend immediately the effects of the judgment of February 15, 2012” as a precautionary measure pending further review.⁴⁹⁴ Similarly, in the *Matter of the Republic of Costa Rica (La Nación Case)*, the Commission asked Costa Rica to “suspend execution of the November 12, 1999 conviction handed down by the San José First Circuit Criminal Trial Court until such time as the Commission has examined the case”⁴⁹⁵ The Court later ordered provisional measures to the same effect in that case.⁴⁹⁶

286. Ecuador’s assertions with respect to the Convention are misguided in other respects as well. If the Convention applied to companies (which it does not), NIFA would not be the only party in the *NIFA v. MSDIA* litigation with due process rights protected by the Convention. As Ecuador itself points out, Article 8 of the Convention provides in relevant part:

“Every person has the right to a hearing, with due guarantees and within a reasonable time, by a competent, independent, and impartial tribunal, previously established by law ... for the determination of his rights and obligations of a civil, labor, fiscal, or any other nature.”⁴⁹⁷

MSDIA, too, would enjoy such rights, and the proceedings here are entirely consistent with the rights MSDIA would enjoy.

The Notion Of “Person” In The Individual Complaint Procedure Of The Inter-American Human Rights System, 7 ILSA J. Int’l & Comparative L 1, 14-15 (2001) (discussing decisions by the Inter-American Commission of Human Rights rejecting petitions regarding alleged violations against juridical persons) (citing *Banco de Lima v. Peru*, Case No. 10.169, Inter-Am. C.H.R. 423, OEA/ser. L/V/II. 79, doc. 12, rev. 1 (1991); *Tabacalera Bosquerón S.A. v. Paraguay*, Rep. No. 47/97, Inter-Am. C.H.R. 225, OEA/Ser.L/VII, doc. 7, rev. 1 (1998)).

⁴⁹³ Guerrero Expert Opinion, dated 24 July 2012, at para. 31. The Claimant’s expert disagrees. Cevallos Expert Opinion, at para. 39 (“[C]ontrary to Dr. Francisco Guerrero’s conclusion, an order of interim measures from an arbitral tribunal would in no way implicate human rights or the Inter-America Human Rights System.”).

⁴⁹⁴ As described by the Court in Exhibit CLM-70, *Emilio Palacio et al. v. Ecuador*, MC-406-11, Int.-Am.Ct.H.Rts., Feb. 21, 2012.

⁴⁹⁵ Exhibit CLM-55, Provisional Measures Requested by the Inter-American Commission in the Matter of the Republic of Costa Rica (La Nación Case), Order of Sept. 7, 2001, para. 1(1).

⁴⁹⁶ *Id.*

⁴⁹⁷ Respondent’s Opposition, at note 273 (quoting Convention, Art. 8).

287. Ecuador argues that this article protects NIFA's right to enforcement of the disputed judgment⁴⁹⁸ and that Ecuador would contravene this article if it complied with the requested interim measures.⁴⁹⁹ However, like Article 75 of the Ecuadorian Constitution, this article of the Convention protects private litigants' right not only to enforce judgments, but also their right to effective judicial proceedings in civil cases.⁵⁰⁰ Ecuador would not contravene this article if it complied with the requested interim measures (even assuming the article applied to companies). Instead, by respecting MSDIA's rights to effective civil proceedings in civil cases, it would implement its obligations under Article 1(1) of the Convention to respect rights recognized under the Convention and to ensure their protection.⁵⁰¹

B. The Potential Harm to MSDIA Outweighs the Potential Harm to Ecuador

288. Ecuador argues that the potential harm to it from the requested interim measures outweighs the threatened harm to MSDIA.⁵⁰² As discussed above, Ecuador seriously understates the harm that MSDIA would suffer if the interim measures were denied.⁵⁰³ Conversely, Ecuador seriously overstates the potential harm to itself if the requested measures are granted.

289. Ecuador claims that granting the requested measures would amount to an intrusion into its sovereignty,⁵⁰⁴ arguing that the requested interim measures are "over-reaching"⁵⁰⁵ and "effectively call[] upon the Republic to rewrite its own laws or act in disregard of such laws."⁵⁰⁶ Ecuador's claims about the scope of the requested measures and the threat they pose to its sovereignty are exaggerated and ultimately irrelevant.

290. MSDIA does not seek broad interim measures that would require Ecuador to rewrite its own laws. Nor does it seek interim measures interfering in pending judicial proceedings. MSDIA seeks only to restrain state action allowing the seizure of MSDIA's assets following the final decision of Ecuador's National Court of Justice, in order to avert irreparable injury from a denial of justice.

291. Notably, the Tribunal's order would be directed at Ecuador as a whole, and therefore would not entail the executive's interfering with the judicial process. The courts, too, would be

⁴⁹⁸ Respondent's Opposition, at para. 186.

⁴⁹⁹ Respondent's Opposition, at para. 189.

⁵⁰⁰ By its terms, Article 8 of the Convention protects the rights of "every person," irrespective of whether they are criminal or civil litigants, to due process. See Exhibit RLM-7, Inter-American Convention on Human Rights, Art. 8. See also, Exhibit CLM-32, *Apeh Uldozotteinek Szovetsege and Others v. Hungary*, ECtHR, 2000 (holding that Article 6 of the European Convention on Human Rights, which enshrines the right to a fair trial, applies to all civil rights and obligations created under domestic law and therefore to all civil proceedings).

⁵⁰¹ Article 1(1) of the Convention provides: "The States Parties to this Convention undertake to respect the rights and freedoms recognized herein and to ensure to all persons subject to their jurisdiction the free and full exercise of those rights and freedoms, without any discrimination for reasons of race, color, sex, language, religion, political or other opinion, national or social origin, economic status, birth, or any other social condition."

⁵⁰² Respondent's Opposition, at para. 177.

⁵⁰³ See *supra* at paras. 140-166.

⁵⁰⁴ Respondent's Opposition, para. 190.

⁵⁰⁵ Respondent's Opposition, para. 12.

⁵⁰⁶ Respondent's Opposition, para. 196.

subject to the order. As noted by the Claimant's expert, Dr. Cevallos, under the Ecuadorian Constitution, which both recognizes the legitimacy of arbitration and the prevalence of international law over domestic law, "a temporary protective measure issued by a legitimate international Arbitral Tribunal ordering the suspension of a legal proceeding in progress is a binding and compulsory measure and must be complied with by the Ecuadorian state. Thus, if such an order were to be issued, upon presentation of that order by Ecuador's Attorney General, or by the parties in the case, to an Ecuadorian court, that court would be obliged to give it effect under Ecuadorian law."⁵⁰⁷

292. Indeed, such a precedent exists. In the case *City Oriente v. Ecuador*, the Ecuadorian courts not only gave effect to a treaty tribunal's order of interim measures suspending certain criminal proceedings, but also nullified the prosecutor's investigation as a violation of due process for failure to respect the tribunal's orders.⁵⁰⁸

293. Moreover, any minor intrusion into Ecuador's sovereignty that might occur as a result of the requested measures is the natural and expected consequence of Ecuador having agreed to arbitrate foreign investment disputes. In the *Perenco* arbitration, Ecuador made a similar argument that implementing the requested interim measures would require it to violate its obligation to enforce domestic law and would therefore infringe its sovereignty. In response, the *Perenco* tribunal held:

"It is pertinent to recall that in any [investment treaty] arbitration one of the parties will be a sovereign State, and **where provisional measures are granted against it the effect is necessarily to restrict the freedom of the State to act as it would wish**. Interim measures may thus restrain a State from enforcing a law pending final resolution of the dispute on the merits . . . or from enforcing or seeking a local judgment."⁵⁰⁹

294. International courts and tribunals generally have not found state sovereignty to be an impediment to issuing interim measures similar to those requested here. Indeed, tribunals have placed much greater restraints on states than those MSDIA has requested, regularly ordering the suspension or even termination of domestic judicial proceedings.

295. For example, in *The Electricity Company of Sofia – Belgium v. Bulgaria*, the PCIJ ordered Bulgaria to ensure that, during the proceedings before the PCIJ, no further steps would be taken in a local collection action brought by the Municipality of Sofia.⁵¹⁰ In *ATA Construction v. Jordan*, an ICSID tribunal ordered "that the ongoing Jordanian court proceedings

⁵⁰⁷ Cevallos Expert Opinion, at para. 35.

⁵⁰⁸ Cevallos Expert Opinion, at para. 43.

⁵⁰⁹ Exhibit CLM-13, *Perenco Ecuador Ltd. v. Republic of Ecuador*, ICSID Case No. ARB/08/6, Decision on Provisional Measures (8 May 2009), at para. 50 (internal citations omitted). See also, Exhibit CLM-3, *Burlington Resources Inc. v. Republic of Ecuador*, ICSID Case No. ARB/08/5, Procedural Order No. 1 (29 June 2009), para. 66; Exhibit CLM-7, *City Oriente Ltd. v. Republic of Ecuador*, ICSID Case No. ARB/06/21, Decision on Provisional Measures (19 November 2007), at para. 43; Exhibit CLM-8, *City Oriente Ltd. v. Republic of Ecuador*, ICSID Case No. ARB/06/21, Decision on Revocation of Provisional Measures and Other Procedural Matters (13 May 2008), at para. 56-57.

⁵¹⁰ Exhibit CLM-18, *In re Electricity Co. of Sofia and Bulgaria (Belgium v. Bulgaria)*, PCIJ, Interim Measures Decision, Dec. 5, 1939, Series A/B, No. 79, at p. 199.

... be immediately and unconditionally terminated, with no possibility to engage in further judicial proceedings in Jordan or elsewhere on the substance of the dispute.”⁵¹¹ The ICSID tribunal in *Ceskoslovensko Obchodni Banka AS v. The Republic of Slovakia* ordered that bankruptcy proceedings be suspended and called on the parties to bring the order “to the attention of the appropriate judicial authorities of the Slovak Republic so that they may act accordingly.”⁵¹² And, in *Bayindir v. Pakistan*, the tribunal issued provisional measures “recommend[ing] that Pakistan take whatever steps may be necessary to ensure that [the Pakistan National Highway Authority] does not enforce any final judgment it may obtain from Turkish courts” with respect to the amount in dispute between the parties.⁵¹³

296. In addition to the *City Oriente* arbitration referenced above, Ecuador has been ordered by investor-State arbitral tribunals on other occasions to take certain actions with respect to domestic judicial proceedings. The ICSID tribunal in *Perenco*, for example, issued provisional measures restraining Ecuador from “instituting or further pursuing any action, judicial or otherwise, against Perenco or any of its officers or employees” with respect to the amounts and contracts in dispute.⁵¹⁴ Ecuador was also ordered to “discontinue the proceedings pending against the Claimant under the *coactiva* process and [not to] initiate new *coactiva* actions” by an ICSID tribunal in *Burlington*.⁵¹⁵ And, in *Chevron*, a UNCITRAL tribunal recently issued interim measures of protection restraining Ecuador from enforcing a third-party judgment against Chevron issued by the Ecuadorian courts.⁵¹⁶ As these cases illustrate, there is nothing unusual about the interim measures MSDIA has requested.

297. In addition to overstating the potential harm that the requested interim measures would cause it, Ecuador also appears to underestimate the potential benefits to it of such measures. Ecuador claims that it is “preposterous” to suggest that Ecuador might also benefit from the requested interim measures by avoiding damage to MSDIA that Ecuador would ultimately have to compensate MSDIA for in this arbitration and by avoiding any interruption in the supply of essential vaccines and medicines in Ecuador.⁵¹⁷

298. In spite of Ecuador’s protestations to the contrary, the destruction of MSDIA’s business would impose significant costs on Ecuador, which the requested interim measures of protection would avoid. Specifically, if MSDIA’s business is destroyed, Ecuador will have to compensate MSDIA for that loss, and there will be an interruption in the supply of essential vaccines and

⁵¹¹ Exhibit CLM-34, *ATA Construction v. Jordan*, ICSID Case No. ARB/08/2, Award (18 May 2010), para. 133.4.

⁵¹² Exhibit CLM-42, *Ceskoslovensko Obchodni Banka AS v The Republic of Slovakia*, ICSID Case No. ARB/97/4, Procedural Order No. 4 (11 January 1999), at 2.

⁵¹³ Exhibit CLM-1, *Bayindir Insaat Turizm Ticaret Ve Sanayi A.S. v. Islamic Republic of Pakistan*, ICSID Case No. ARB/03/29, Decision on Jurisdiction (14 November 2005), at para. 46 (quoting the tribunal’s Provisional Order No. 1).

⁵¹⁴ Exhibit CLM-13, *Perenco Ecuador Ltd. v. Republic of Ecuador*, ICSID Case No. ARB/08/6, Decision on Provisional Measures (8 May 2009), at para. 79(1) and (2).

⁵¹⁵ Exhibit CLM-3, *Burlington Resources Inc. v. Republic of Ecuador*, ICSID Case No. ARB/08/5, Procedural Order No. 1 (29 June 2009), Section IV(7).

⁵¹⁶ Exhibit CLM-6, *Chevron Corporation and Texaco Petroleum Company v. The Republic of Ecuador*, PCA Case No. 2009-23 (UNCITRAL), Second Interim Award on Interim Measures (16 February 2012), at paras. 2-3.

⁵¹⁷ Respondent’s Opposition, para. 195.

medicines in Ecuador.⁵¹⁸ Avoiding those two consequences would provide an unquestionable benefit to Ecuador.

299. In that sense, the facts of this case are very much like those in *Burlington and Paushok*.⁵¹⁹ In both cases, the tribunals determined that the investor's entire investment was likely to be destroyed and accordingly issued interim measures to preserve the claimants' investments and the relationship between the parties.⁵²⁰

300. Given that the destruction of MSDIA's business would cause severe and irreparable harm to MSDIA, and that Ecuador has not demonstrated any real prejudice to itself that would result from the imposition of the requested measures, the balance of the burdens weighs strongly in favor of granting the requested measures to avoid the irreparable harm to MSDIA.

VIII. THE TRIBUNAL HAS THE AUTHORITY TO AWARD INTERIM MEASURES TO PRESERVE THE STATUS QUO AND ITS ABILITY TO AWARD EFFECTIVE RELIEF AS WELL AS TO PREVENT THE AGGRAVATION OF THE DISPUTE

301. In addition to requesting interim measures to protect against irreparable harm caused by Ecuador's breaches of the Treaty, MSDIA has also requested interim measures to prevent the exacerbation or aggravation of the dispute and to safeguard the Tribunal's ability to award effective relief in this arbitration. Ecuador argues that MSDIA has no free-standing right to non-aggravation of this dispute.⁵²¹

302. MSDIA has sought and is entitled to interim measures of protection in connection with the specific rights that are the subject of this arbitration. Ecuador's argument that MSDIA does not have a free-standing right to non-aggravation of the dispute is therefore irrelevant, because MSDIA seeks a non-aggravation order together with interim measures related to the rights in dispute. In any event, Ecuador's argument that MSDIA does not have a free-standing right to non-aggravation of the dispute is also wrong. The weight of authority of those international tribunals that have considered the issue holds that there is a freestanding right to non-aggravation of the dispute.⁵²²

303. As early as 1939, the Permanent Court of International Justice (PCIJ) recognized that provisional measures were appropriate to prevent aggravation of a dispute when it required Bulgaria to "ensure that no step of any kind is taken capable of prejudicing the rights claimed by the Belgian Government or of aggravating or extending the dispute submitted to the Court."⁵²³ The PCIJ emphasized that Article 41 of the Statute:

⁵¹⁸ First Witness Statement of Jean Marie Canan, at paras. 22-24.

⁵¹⁹ Respondent's Opposition, para. 192-193.

⁵²⁰ Claimant's Request for Interim Measures, paras. 84-86.

⁵²¹ Respondent's Opposition, paras. 197-204.

⁵²² See below at paras. 308-312.

⁵²³ Exhibit CLM-18, *In re Electricity Co. of Sofia and Bulgaria (Belgium v. Bulgaria)*, PCIJ, Interim Measures Decision (5 December 1939), at p. 9.

“... applies *the principle universally accepted by international tribunals* ... to the effect that the parties to a case must abstain from any measure capable of exercising a prejudicial effect in regard to the execution of the decision to be given and, in general, *not allow any step of any kind to be taken which might aggravate or extend the dispute* ...”⁵²⁴

304. The ICJ has on numerous occasions over the years adopted provisional measures similar to those issued in the Bulgaria case. For example, in the *Burkina Faso/Republic of Mali* case, the ICJ entered provisional measures that called on both governments to:

“ensure that no action of any kind is taken which might aggravate or extend the dispute submitted to the Chamber or *prejudice the right of the other Party to compliance with whatever judgment the Chamber may render in the case* ...”⁵²⁵

305. It is true that, as Ecuador points out,⁵²⁶ the ICJ majority in the *Pulp Mills* case recalled that in all prior decisions in which the Court had adopted provisional measures designed to prevent aggravation of the dispute, it had also adopted provisional measures designed to address irreparable harm to the rights in dispute.⁵²⁷ On that basis alone and without further analysis, the *Pulp Mills* majority then concluded that it could not adopt provisional measures “directing the parties not to take any actions which could aggravate or extend the dispute or render more difficult its settlement ... in the absence of the conditions to indicate the first [type of] provisional measure.”⁵²⁸ Having already found that there was no imminent risk of irreparable prejudice to the rights of Uruguay in the dispute before it, the Court held that non-aggravation measures were not justified.

306. However, in a Separate Declaration, Judge Buergenthal argued that the majority’s holding in *Pulp Mills* failed to take into account the language of the ICJ’s Statute:

“The fact that the Court, as it emphasizes in paragraph 49 of its Order, has in all these prior cases also indicated the first type of provisional measures, does not detract from the wording of Article 41 of the Statute, which makes the decision whether or not to indicate provisional measures dependent upon the ‘circumstances’ that may require it. *These circumstances may involve an imminent threat of irreparable prejudice to the rights in dispute. But, independently thereof, no compelling reason has been advanced by the Court why they may not also apply to situations in which one party to the case resorts*

⁵²⁴ *Id.*

⁵²⁵ Exhibit RLM-25, *Frontier Dispute (Burkina Faso/Republic of Mali)*, Provisional Measures, Order (10 January 1986), I.C.J. Reports 1986, at p. 9, para. 18. *See also, e.g.*, Exhibit RLM-35, *Land and Maritime Boundary between Cameroon and Nigeria Case (Cameroon v. Nigeria)*, Order on Provisional Measures (15 March 1996), I.C.J. Reports 1996 (I), at pp. 22-23, para. 41; Exhibit CLM-33, *Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v. Uganda)*, Order (1 July 2000), I.C.J. Reports 2000, at p. 129, para. 47 (1); Exhibit CLM-56, *LaGrand Case (F.R.G. v. U.S.)*, Judgment (27 June 2001), 2001 I.C.J. 466, at para. 103.

⁵²⁶ *See* Respondent’s Opposition, at paras. 199-200.

⁵²⁷ Exhibit RLM-51, *Pulp Mills on the River Uruguay (Argentina v. Uruguay)*, Order on Provisional Measures (23 January 2007), I.C.J. Reports 2007, at para. 49.

⁵²⁸ Exhibit RLM-51, *Pulp Mills on the River Uruguay (Argentina v. Uruguay)*, Order on Provisional Measures (23 January 2007), I.C.J. Reports 2007, at para. 49.

to extrajudicial coercive measures, unrelated to the subject-matter in dispute, that aggravate a dispute by seeking to undermine or interfere with the rights of the other party in defending its case before the Court. In such situations the test would not be whether there is an imminent threat of irreparable harm to the subject-matter of the dispute, but whether the challenged actions are having a serious adverse effect on the ability of the party seeking the provisional measures to fully protect its rights in the judicial proceedings.”⁵²⁹

307. Judge Buergenthal read the Court’s previous decisions as being consistent with his view that the Court does have the power to order provisional measures to prevent aggravation of the dispute even where it does not order provisional measures to prevent irreparable harm to the rights in dispute.⁵³⁰

308. Almost all of the investment tribunals that have considered the issue have sided with Judge Buergenthal, including tribunals that have ordered interim measures against Ecuador. The Tribunal in *City Oriente v. Ecuador*, for example, rejected Ecuador’s argument that there is “no general, autonomous, abstract right to the non-aggravation of the dispute warranting, *ipso jure*, the passing of provisional measures.”⁵³¹ The tribunal concluded that the claimant did in fact have such a right, and that if the tribunal did not protect it:

*“Respondents may coercively collect amounts that were not required under the Contract [and thereby] put an end to Claimant’s right to demand performance of the Contract, and any potential award in its favor would be thus impossible to enforce and illusory.”*⁵³²

Accordingly, the *City Oriente* tribunal ordered Ecuador not to demand payment of amounts allegedly owed by the investor under Law 42 during the pendency of the arbitration.⁵³³

309. The tribunals in two similar cases, *Perenco v. Ecuador* and *Burlington v. Ecuador*, adopted the reasoning of the *City Oriente* tribunal. The *Burlington* tribunal concluded:

“In the Tribunal’s view, the rights to be preserved by provisional measures are not limited to those which form the subject-matter of the dispute or substantive rights as referred to by the Respondents, but may extend to procedural rights, including the

⁵²⁹ Exhibit RLM-51, *Pulp Mills on the River Uruguay (Argentina v. Uruguay)*, Order on Provisional Measures (23 Jan. 2007), I.C.J. Reports 2007 (Declaration of Judge Buergenthal), at para. 11 (emphasis added).

⁵³⁰ *Id.* at para. 11. Uruguay had not demonstrated that Argentina’s actions were undermining its ability effectively to protect its rights generally in the proceedings before the Court, so provisional measures were not warranted. *Id.* at para. 12.

⁵³¹ Exhibit CLM-7, *City Oriente Ltd. v. Republic of Ecuador*, ICSID Case No. ARB/06/21, Decision on Provisional Measures (19 November 2007), at paras. 60-61.

⁵³² *Id.* at 62.

⁵³³ *Id.* at para. 59. See also, Exhibit CLM-8, *City Oriente Ltd. v. Republic of Ecuador*, ICSID Case No. ARB/06/21, Decision on Revocation of Provisional Measures and Other Procedural Matters (13 May 2008), at para. 76 (finding that the Law 42 payments were “so high that there [was] a risk that the early payment of such amounts may jeopardize the company’s economic feasibility”).

general right to the status quo and to the non-aggravation of the dispute. These latter rights are thus self-standing rights.⁵³⁴

310. Both the *Perenco* and *Burlington* tribunals held that Ecuador's seizure of the claimants' assets would cripple their businesses and seriously aggravate the dispute between the parties. To protect the *status quo*, both tribunals ordered Ecuador to refrain from instituting or, if already in progress, to discontinue any judicial or other action to collect tax payments allegedly due.⁵³⁵

311. Finally, the tribunal in *Chevron v. Ecuador* issued an order consistent with the reasoning in the other Ecuador cases focusing on measures to avoid aggravation of the dispute. It ordered both parties, *inter alia*, to:

“maintain, as far as possible the status quo and not to exacerbate the procedural and substantive disputes before this Tribunal [and] to refrain from any conduct likely to impair or otherwise adversely affect, directly or indirectly, the ability of the Tribunal to address fairly any issue raised by the Parties before this Tribunal.”⁵³⁶

In particular, but without limiting the generality of its order, it ordered both parties to avoid making “any public statement tending to compromise these arbitration proceedings” and “not to exert, directly or indirectly, any unlawful influence or pressure on the Court addressing the pending litigation in Ecuador” against Chevron.⁵³⁷

312. Numerous other investment tribunals have recognized a free-standing right to non-aggravation of the dispute and ordered interim measures protecting such a right, even in the absence of conditions that would warrant interim measures to protect the particular rights at issue in the dispute.⁵³⁸ Ecuador has only been able to cite one investment award that held otherwise, *CEMEX v. Venezuela*. The *CEMEX* tribunal expressly adopted the ICJ majority's opinion in

⁵³⁴ Exhibit CLM-3, *Burlington Resources Inc. v. Republic of Ecuador*, ICSID Case No. ARB/08/5, Procedural Order No. 1 (29 June 2009), at para. 60.

⁵³⁵ Exhibit CLM-13, *Perenco Ecuador Ltd. v. Republic of Ecuador*, ICSID Case No. ARB/08/6, Decision on Provisional Measures (8 May 2009), at para. 79; Exhibit CLM-3, *Burlington Resources Inc. v. Republic of Ecuador*, ICSID Case No. ARB/08/5, Procedural Order No. 1 (29 June 2009), p. 28.

⁵³⁶ Exhibit CLM-45, *Chevron Corp. v. Republic of Ecuador*, PCA Case No. 2009-23 (UNCITRAL), First Order on Interim Measures (14 May 2010), at p. 5.

⁵³⁷ *Id.*

⁵³⁸ See e.g., Exhibit CLM-14, *Quiborax S.A. v. Plurinational State of Bolivia*, ICSID Case No. ARB/06/2, Decision on Provisional Measures (26 February 2010), at para. 117 (“the rights to be preserved by provisional measures are not limited to those which form the subject matter of the dispute, but may extend to procedural rights, including the general right to the preservation of the status quo and to the non-aggravation of the dispute these latter rights are self-standing rights”); Exhibit CLM-2, *Biwater Gauff (Tanzania) Ltd. v. Tanzania*, ICSID Case No. ARB/05/22, Procedural Order No. 1 (31 March 2006), at para. 71 (making no reference to the need for irreparable harm and noting that provisional measures may be used solely to ensure that “any arbitral decision which grants to the Claimant the relief it seeks [can] be effective and able to be carried out”); Exhibit CLM-38, *Biwater Gauff (Tanzania) Ltd. v. Tanzania*, ICSID Case No. ARB/05/22, Procedural Order No. 3 (29 September 2006) (making no reference to the need for irreparable harm and noting that the tribunal’s “mandate extends to attempting to reduce the risk of future aggravation and exacerbation of the dispute, which necessarily involves probabilities, not certainties”); Exhibit CLM-16, *Tokios Tokelés v. Ukraine*, ICSID Case No. ARB/02/18, Order No. 1 (1 July 2003), at para. 7 (making no reference to the need for irreparable harm and ordering “both parties [to] refrain from, suspend, and discontinue, any domestic proceedings ... which might prejudice the rendering or implementation of an eventual decision or award of this Tribunal or aggravate the existing dispute.”).

Pulp Mills and held that “‘non-aggravation’ measures are ancillary measures which cannot be recommended in the absence of measures of a purely protective or preservative kind.”⁵³⁹ The *CEMEX* award, in which the tribunal acknowledged that other tribunals had used “other standards,” is a clear outlier.⁵⁴⁰

313. In the circumstances of this case, even if MSDIA were not entitled to interim measures to protect the rights at issue in the arbitration, it would separately be entitled to interim measures to avoid aggravation of the dispute. A general non-aggravation order would protect the integrity of these proceedings and would protect against any actions that would exacerbate this dispute or frustrate the effectiveness of the Tribunal’s final award.

314. Ecuador complains that, in Claimant’s prayer for relief at paragraph 166(d) of its Request, “Claimant does not specify any actions that might be taken by Ecuador, beyond those described in its other requests, that would aggravate or exacerbate the dispute, threaten the integrity of the arbitral process or frustrate the effectiveness of the Tribunal’s award.”⁵⁴¹ Ecuador argues that MSDIA’s failure to specify in its prayer for relief what actions Ecuador might take to aggravate the dispute is fatal to its request for interim measures of protection against the aggravation of the dispute.⁵⁴²

315. This complaint ignores that it is common practice for parties in international arbitrations to seek, and international tribunals to award, general interim measures orders to protect the parties’ right to non-aggravation of the dispute.⁵⁴³ Indeed, the non-aggravation order MSDIA requests would be similar to that issued by the PCIJ in the seminal 1939 *Electricity Co. of Sofia and Bulgaria* case. That order reads in its entirety:

“The Court, indicates as an interim measure, that pending the final judgment of the Court in the suit submitted by the Belgian Application on January 26th, 1938, the State of Bulgaria *should ensure that no step of any kind is taken capable of* prejudicing the rights claimed by the Belgian Government or of *aggravating or extending the dispute submitted to the Court.*”⁵⁴⁴

⁵³⁹ Exhibit CLM-4, *CEMEX Caracas Investments B.V. and CEMEX Caracas II Investments B.V. v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB/08/15, Decision on Provisional Measures (3 Mar. 2010).

⁵⁴⁰ *Id.* at 55.

⁵⁴¹ Respondent’s Opposition, para. 198.

⁵⁴² Respondent’s Opposition, para. 198.

⁵⁴³ See Exhibit CLM-16, *Tokios Tokelés v. Ukraine*, ICSID Case No. ARB 02/18, Order No. 1 (1 July 2003), at para. 2 (“ICSID tribunals have repeatedly ruled ... that the parties to a dispute over which ICSID has jurisdiction must ... in general refrain from any action of any kind which might aggravate or extend the dispute or render its resolution more difficult ...”). See also Exhibit CLM-113, *Amco Asia Corp. v. Republic of Indonesia*, ICSID Case No. ARB/81/1, Decision on Request for Provisional Measures (9 December 1983), at p. 161.

⁵⁴⁴ Exhibit CLM-18, *In re Electricity Co. of Sofia and Bulgaria (Belgium v. Bulgaria)*, PCIJ, Interim Measures Decision, Dec. 5, 1939, Series A/B, No. 79, at p. 9.

General orders such as this apply the principle that a tribunal’s “mandate extends to attempting to reduce the risk of future aggravation and exacerbation of the dispute, which necessarily involves probabilities, not certainties.”⁵⁴⁵

316. It is impossible to anticipate precisely what actions Ecuador might take to exacerbate the dispute, threaten the integrity of the arbitration proceedings, or frustrate the effectiveness of the Tribunal’s award. Prior arbitral awards illustrate the variety of ways in which State action may infringe on an investor’s right to arbitration. For example, a number of tribunals have ordered states to suspend or refrain from initiating criminal proceedings where they would exacerbate the dispute. The tribunal in *City Oriente*, for example, ordered Ecuador to suspend criminal proceedings against City Oriente executives for embezzlement of the disputed amounts owed under an Ecuadorian law.⁵⁴⁶ The tribunal in *Bernhard von Pezold and Others v. Zimbabwe* ordered the State not to act on the letter it had sent threatening the claimant with criminal proceedings, if the Claimant did not agree with Zimbabwe’s disclosure schedule.⁵⁴⁷ And, in *Quiborax v. Bolivia*, the tribunal ordered the suspension of criminal proceedings against the claimant for forgery in relation to documents he had relied on in establishing the tribunal’s jurisdiction.⁵⁴⁸

317. In addition to issuing interim orders restraining a state from enforcing disputed judicial orders or initiating criminal proceedings, tribunals have ordered States not to make public statements that would exacerbate investment disputes,⁵⁴⁹ not to exert influence on the courts,⁵⁵⁰ and not to destroy evidence,⁵⁵¹ among other actions that could undermine the integrity of the arbitral proceedings.⁵⁵²

⁵⁴⁵ Exhibit CLM-38, *Bewater Gauff (Tanzania) Ltd. v. Tanzania*, ICSID Case No. ARB/05/22, Procedural Order No. 3 (29 September 2006), at para. 145.

⁵⁴⁶ Exhibit CLM-7, *City Oriente Ltd. v. Republic of Ecuador*, ICSID Case No. ARB/06/21, Decision on Provisional Measures (19 November 2007), at paras. 62-63. Ecuador has been criticized for allowing its courts and prosecutors to be used to initiate harassing criminal investigations, often in connection with private civil litigation. Exhibit C-76, U.S. Department of State, 2006 Country Reports of Human Rights Practices – Ecuador, Mar. 6, 2007, <http://www.state.gov/g/drl/rls/hrrpt/2006/78890.htm>. See also Claimant’s Notice of Arbitration, at paras. 130-139.

⁵⁴⁷ Exhibit CLM-73, *Bernhard von Pezold and Others v. Republic of Zimbabwe and Border Timbers Ltd, Border Timbers International (Private) Ltd, and Hangani Development Co. (Private) Ltd. v. Republic of Zimbabwe*, ICSID Case No. ARB/10/15, Directions Concerning Claimants’ Application For Provisional Measures of 12 June 2012 (12 June 2012), at paras. 3, 8

⁵⁴⁸ Exhibit CLM-14, *Quiborax S.a. v. Plurinational State of Bolivia*, ICSID Case No. ARB/06/2, Decision on Provisional Measures (26 February 2010), paras 37, 41-45

⁵⁴⁹ Exhibit CLM-45, *Chevron Corporation and Texaco Petroleum Company v. The Republic of Ecuador*, UNCITRAL, PCA Case No. 2009-23, Order on Interim Measures (14 May 2010), at p. 5; Exhibit CLM-38, *Bewater Gauff (Tanzania) Ltd. v. Tanzania*, ICSID Case No. ARB/05/22, Procedural Order No. 3 (29 September 2006), at p. 42.

⁵⁵⁰ *Id.*

⁵⁵¹ Exhibit CLM-2, *Bewater Gauff (Tanzania) Ltd. v. Tanzania*, ICSID Case No. ARB/05/22, Procedural Order No. 1 (31 March 2006), at paras. 80, 84-88.

⁵⁵² CLM-102, C. Schreuer, THE ICSID CONVENTION: A COMMENTARY 744 & 746 (2001) (The purpose of interim measures is “to induce behavior by the parties that is conducive to a successful outcome of the proceedings such as securing discovery of evidence, preserving the parties’ rights, preventing self-help, safeguarding the awards’ eventual implementation and generally keeping the peace”).

318. Specific orders of this type are usually accompanied by a catch-all general order of non-aggravation. Thus, for example, in its first order on interim measures, the tribunal in *Chevron v. Ecuador* ordered *inter alia*:

“The Claimants and the Respondent are both ordered to maintain, as far as possible the status quo and not to exacerbate the procedural and substantive disputes before this Tribunal, including (in particular but without limiting howsoever the generality of the foregoing) the avoidance of any public statement tending to compromise these arbitration proceedings . . .”⁵⁵³

319. In sum, even if MSDIA were not entitled to the interim measures of protection it seeks in connection with the rights that are in dispute in this arbitration (which it is), MSDIA would have a free-standing right to non-aggravation of this dispute. MSDIA is entitled to both kinds of interim measures it has requested, and Ecuador has not demonstrated any valid basis for rejecting MSDIA’s request for an order directing Ecuador to refrain from taking any action that would aggravate or exacerbate the dispute, threaten the integrity of these arbitral proceedings or frustrate the effectiveness of any award from this Tribunal.

IX. RELIEF REQUESTED

320. For all the foregoing reasons, MSDIA respectfully renews its request that the Tribunal grant the following interim measures of protection pending the outcome of this arbitration:

- a. Order Ecuador to take any and all available steps to prevent enforcement of any judgment in the NIFA litigation against MSDIA;
- b. Order Ecuador to refrain from any action, including by its courts and executive, to enforce any judgment in the NIFA litigation against MSDIA or its assets;
- c. Order Ecuador to make a written representation to any court in which NIFA attempts to enforce any judgment in the NIFA litigation, stating that the judgment is not enforceable pending the outcome of this Arbitration; and
- d. Order Ecuador to refrain from taking any action that would aggravate or exacerbate the dispute, threaten the integrity of these arbitral proceedings or frustrate the effectiveness of any award from this Tribunal.

⁵⁵³ Exhibit CLM-45, *Chevron Corporation and Texaco Petroleum Company v. The Republic of Ecuador*, UNCITRAL, PCA Case No. 2009-23, Order on Interim Measures (14 May 2010), at p. 5.

Respectfully submitted,

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