

**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 MEMORIAL

2 October 2013

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I. INTRODUCTION

1. In this arbitration, Merck Sharp & Dohme (I.A.) Corp. (“MSDIA”) has sought and seeks protection and compensation under the Treaty between the United States of America and the Republic of Ecuador Concerning the Encouragement of and Reciprocal Protection of Investment (the “U.S.-Ecuador BIT” or “Treaty”) from an extraordinary series of denials of justice and related treaty violations. Those violations have been imposed on MSDIA at every level of Ecuador’s notoriously corrupt court system in connection with a lawsuit initiated against MSDIA in 2003 in Ecuador’s national courts by a small Ecuadorian pharmaceutical company called *Nueva Industria Farmaceutica Asociada, S.A.* (“NIFA”).

2. MSDIA has proceeded herein with great reluctance. MSDIA and its employees have great respect for the people of Ecuador and have a long history of working constructively with Ecuador’s institutions of government. As discussed below, MSDIA first invested in Ecuador in 1973, and ever since has had significant business operations, dedicated employees, and property (both real property and personalty) there. MSDIA has provided medicines, prescribed for Ecuadorian citizens by Ecuadorian physicians, and thereby has played a role in safeguarding the health of Ecuador’s citizenry. MSDIA has teamed with the Ecuadorian government in a major public health campaign that has virtually eliminated a serious tropical disease. And MSDIA has in many other ways attempted to be a good corporate citizen and to foster constructive relationships with the government and Ecuador’s private sector.

3. Regrettably, however, the denials of justice perpetrated by Ecuador’s judicial system in the NIFA litigation have gravely violated MSDIA’s rights, under both Ecuadorian law and the Treaty, and threatened the destruction of MSDIA’s business in Ecuador.

4. NIFA—a company run by a man with a demonstrated public record of corrupt acts and with annual profits of barely \$2,000 in 2002—brought suit when its negotiations with MSDIA for the purchase of MSDIA’s small factory near Quito fell through in early 2003. The parties valued the factory at only \$1.5 million. Yet Ecuadorian judges in the trial court in 2007 and the appellate court in 2011—judges who like NIFA’s principal have been publicly charged with corruption in other matters—issued irrational and plainly lawless judgments for **\$200 million** and **\$150 million** respectively. Those judgments had no basis in law or fact and far exceeded the value of MSDIA’s assets in Ecuador.

5. Once it became clear that this small business dispute had become an existential risk to its business in Ecuador, MSDIA of course devoted proportional efforts and resources to saving that business. Ultimately, when it appeared that no national institution was willing to render impartial justice in this case, MSDIA was compelled to file this arbitration.

6. The Ecuadorian trial and appellate court proceedings and judgments denied justice in their absurd damages awards, their findings of liability, and their systematic and blatant denials of due process that deprived MSDIA of fair notice of critical events and deadlines. With respect to purely procedural issues, NIFA’s only fact witness at the trial level was permitted to testify twice without prior notice to MSDIA’s trial counsel, who for that reason was unable to question the witness. At the appellate level, the court of appeals first appointed highly credentialed independent experts on liability and damages who found no basis for liability or for NIFA’s

request for damages, but then replaced those experts with uncredentialed so-called “experts,” who were later deemed unqualified to serve in that capacity by Ecuador’s Council of the Judiciary, whose reports opined that MSDIA was liable and purported to validate the irrational damages award sought by NIFA. The court of appeals also disregarded *all* evidence and expert opinions submitted by MSDIA with the baseless assertion that MSDIA had “waived” its reliance on evidence. The court of appeals therefore rested its judgment solely on the evidence submitted by NIFA and the opinions of the uncredentialed and irregularly selected “experts.”

7. The trial court and court of appeals judgments also denied justice in their findings of liability. The sole claim that NIFA argued was an antitrust claim (also called “free competition”). NIFA claimed that MSDIA had abused “market power,” either in the pharmaceutical market or in the market for real estate suitable for pharmaceutical factories, in refusing to sell its small plant to NIFA.

8. But as MSDIA demonstrated and as the court of appeals’ own initial set of highly credentialed experts made clear, MSDIA had no market power in either market. As a court-appointed expert explained, MSDIA’s share of Ecuador’s pharmaceutical market was under 3% and there were numerous other parcels of real estate—including a large, unimproved parcel near the MSDIA facility that was already owned by NIFA—suitable for a factory of the type NIFA wished to own and operate. Moreover, Ecuador had no substantive antitrust law in 2002 or for many years thereafter. The liability rulings, like the damages award, were thus absurd and without any foundation in the rule of law. Subject to those irrational rulings, MSDIA filed this arbitration on 29 November 2011 and submitted its request for interim measures on 12 June 2012, the latter seeking only to forestall the execution of any final judgment until this Tribunal had had an opportunity to rule on the merits.

9. Although MSDIA’s experience and the broader reputation of Ecuador’s judicial system led MSDIA to believe that recourse to Ecuador’s National Court of Justice (“NCJ”)—Ecuador’s highest court—was almost certainly futile, MSDIA filed a petition for cassation in that court, and NIFA filed its own petition. The NCJ thus had an opportunity to correct these fundamental denials of justice, reverse the finding of liability, and preserve the rule of law.

10. Ruling just two weeks after this Tribunal’s hearing on interim measures and with this Tribunal’s ruling on interim measures imminent, the NCJ acknowledged the irrationality and complete lack of foundation in the court of appeals’ finding of antitrust liability and its award of \$150 million in damages to NIFA. The NCJ set aside those rulings with strong language conveying its appreciation of their utter lack of legal and factual foundation. No competent court attempting to preserve the appearance of legitimacy could have ruled otherwise.

11. But unfortunately, the NCJ did not end the denials of justice, then and there. Instead, the NCJ proceeded to credit and expressly rely upon the liability-related facts found by the corrupt and biased court of appeals and to enter *its own* judgment against MSDIA for \$1.57 million based on a new legal theory, *a theory that had been expressly disclaimed by NIFA throughout the proceedings and over which NIFA and MSDIA had agreed the court lacked subject matter jurisdiction.*

12. By entering judgment on that basis, the NCJ denied MSDIA any notice and opportunity to be heard on critical questions, including whether the court had jurisdiction, what the elements of the new legal theory might be, and whether the evidence in the record supported a finding of liability under the new legal theory. Moreover, by ruling on the basis of the court of appeals' irregular and corruptly influenced findings of fact, the NCJ incorporated that court's denials of justice into its own judgment. And by failing even to remand to a court capable of receiving evidence on the issue before entering judgment, the NCJ denied MSDIA any opportunity to adduce exculpatory evidence bearing on the NCJ's newly minted liability theory.

13. Specifically, the NCJ held that the theory of "unfair competition" on which it relied was "*completely different*" from the defective antitrust or "free competition" theory that NIFA had pursued and upon which the courts below had relied. The NCJ observed that a theory of "unfair competition" does not require a showing that the defendant had market power or caused harm to the larger economy or market. Liability instead can arise solely from harm to a competitor. But:

a. NIFA had repeatedly and explicitly stated throughout the litigation (including in the NCJ) that it did *not* claim MSDIA had committed unfair competition, conceded that the facts it had asserted would *not* support a claim of unfair competition, and conceded that any claim for unfair competition would *not* be within the subject matter jurisdiction of the courts, including the particular chamber of the NCJ in which the matter had been brought;

b. MSDIA therefore had never had any reason to introduce evidence pertinent to the various potential elements of "unfair competition"; and

c. The theory of unfair competition applied by the NCJ rested solely upon a constitutional provision that never before had been interpreted to address matters of "unfair competition," and the NCJ invoked foreign laws that never before had been applied in Ecuador. Moreover, even if NIFA had pursued such a claim, "unfair competition" under Ecuadorian law—and even under the laws of other countries—required proof entirely lacking in this case.

14. By relying on fact findings reached by the court of appeals in blatant violation of the rule of law and by ruling against MSDIA on a legal basis without affording MSDIA even minimal notice or opportunity to be heard, the NCJ's judgment denied justice and violated Ecuador's obligations under the Treaty. In doing so, the judgment imposed, wrongfully, a \$1.57 million liability on MSDIA, in addition to the substantially greater amounts that MSDIA expended in a futile effort to respond to the grossly irregular and manifestly corrupt injustices to which it was exposed in the Ecuadorian courts.

15. Finally, MSDIA's jeopardy in Ecuador's courts continues. No direct appeal was possible under Ecuadorian law from the NCJ's judgment, which was immediately enforceable, and so MSDIA was compelled to pay the judgment late last year. Nevertheless, unsatisfied with the reduced damages awarded by the NCJ, NIFA has filed a collateral action against the judges of the NCJ in Ecuador's Constitutional Court, seeking relief that, NIFA asserts, should include direction to the NCJ to restore or even increase the damages awarded in the court of appeals'

ruling. In this so-called “extraordinary action for protection,” MSDIA is not a party. Yet MSDIA is at risk of being subjected, without any avenue of appeal, to yet another indefensible judgment that (without any recourse or appeal within Ecuador) would destroy its business in Ecuador.

16. Accordingly, for these reasons and as more fully set forth below, MSDIA asks this Tribunal to rule that Ecuador has violated the U.S.-Ecuador BIT and to place MSDIA in the position it would and should have been in absent Ecuador’s many violations of the BIT and customary international law.

II. BACKGROUND

A. *MSDIA Has Maintained an Investment in Ecuador for Forty Years*

17. MSDIA, the Claimant in this arbitration, is an indirect subsidiary of Merck & Co., Inc. (“Merck”), “a global research-driven pharmaceutical company that discovers, develops, manufactures and markets a broad range of innovative products to improve health.”¹ Merck is incorporated in the United States and has its headquarters in the state of New Jersey.²

18. Merck is one of the world’s leaders in the research and development of pharmaceutical products. Several of Merck’s products are on the World Health Organization’s Model List of Essential Medicines, which serves as a guide for the development of national and institutional essential medicines lists.³ As explained by Jean Marie Canan, Merck’s Senior Vice President–Global Controller, “Merck is one of a few companies that remain dedicated to the complex business of researching and producing vaccines. Merck’s unique contributions have included the prevention of now rare diseases, like measles and mumps, to diseases never thought preventable, like shingles and cervical cancer.”⁴ Merck currently has over 50 prescription products in a variety of therapeutic areas, including cardiovascular disease, respiratory disease, oncology, neuroscience, infectious disease, immunology, and women’s health.⁵

19. Merck is also an extraordinarily public minded global citizen. For example, as Dr. William Foege—a noted international public health expert and former Director of the United States Centers for Disease Control—chronicled only last year, “Merck provided the science, product and inspiration [for] the largest pharmaco-philanthropic venture ever,” a global program under which for the past 25 years “one billion treatments have been provided free by Merck” for the terrible disease called “river blindness.”⁶ As a result of Merck’s sustained and on-going efforts, Dr. Foege explained, the scourge of river blindness is “diminishing”: “Today, we can

¹ Third Witness Statement of Jean Marie Canan, dated 30 September 2013, at para. 4 [hereinafter Third Canan Witness Statement].

² Third Canan Witness Statement at para. 4.

³ Third Canan Witness Statement at para. 13.

⁴ Third Canan Witness Statement at para. 14.

⁵ Third Canan Witness Statement at para. 15.

⁶ Exhibit C-206, Foege, *Global Partners in Fighting Disease*, WASHINGTON POST, dated 22 November 2012.

even contemplate its elimination, first in Latin America and eventually in even the most infected regions of Africa.”⁷

20. Like Merck, MSDIA is incorporated in the United States and has its registered address in the state of Delaware.⁸ MSDIA’s branch office in Quito, Ecuador (“MSDIA Ecuador”) “imports, distributes and markets a wide range of Merck prescription medicines and vaccines in Ecuador.”⁹ As explained by Mr. Canan, who in addition to his role at Merck serves as MSDIA’s President:

“MSDIA Ecuador has done business in Ecuador for forty years, having opened its first office in the country in 1973. During this period, MSDIA Ecuador has employed hundreds of Ecuador’s citizens, provided innovative medicines for prescription by Ecuador’s doctors to many thousands of patients, and contributed extensively to healthcare in Ecuador by providing education and training for doctors and free medicine to treat endemic disease in Ecuador.”¹⁰

21. As a result of these efforts, MSDIA Ecuador now ranks among the top 10 pharmaceutical companies in Ecuador, “with a market share of 2.46% and approximately \$30 million in annual sales to customers in Ecuador” as of 2012.¹¹ MSDIA employs more than 100 employees in Ecuador, “the vast majority of whom are citizens of Ecuador.”¹² MSDIA also has significant assets in Ecuador, in the form of its bank accounts, inventory, accounts receivable, and fixed assets including vehicles, computers, and office equipment.¹³

22. As Mr. Canan explains, “[b]uilding this business required a substantial investment by MSDIA in Ecuador, including in capital, personnel, training, and management resources.”¹⁴ Moreover, “the sale of pharmaceutical products in Ecuador requires significant and on going 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.”¹⁵ 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.”¹⁶

23. MSDIA’s investment has also resulted in significant contributions to Ecuador. MSDIA Ecuador has contributed to the development of the pharmaceutical market in Ecuador, providing essential vaccines and life-saving treatments for HIV, other infectious diseases, cardiovascular

⁷ Exhibit C-206, Foege, *Global Partners in Fighting Disease*, WASHINGTON POST, 22 November 2012.

⁸ Third Canan Witness Statement at para. 4.

⁹ Third Canan Witness Statement at para. 5.

¹⁰ Third Canan Witness Statement at para. 6.

¹¹ Third Canan Witness Statement at para. 8.

¹² Third Canan Witness Statement at para. 9.

¹³ Third Canan Witness Statement at para. 10.

¹⁴ Third Canan Witness Statement at para. 11.

¹⁵ Third Canan Witness Statement at para. 11.

¹⁶ Third Canan Witness Statement at paras. 15-16.

disease, and diabetes.¹⁷ As Mr. Canan relates, MSDIA Ecuador also “contributes thousands of hours of education and training of doctors and medical professionals in Ecuador on an annual basis.”¹⁸

24. Among other things, MSDIA Ecuador has carried Merck’s river blindness program (discussed above) forward in Ecuador, having “worked with the Ministry of Health of Ecuador and the Carter Foundation for fourteen years in an effort to eliminate river blindness disease endemic among poor populations” there.¹⁹ As a result of these efforts, Ecuador became, in 2010, the second country in the world able to suspend treatment for river blindness and may soon receive a certification by the World Health Organization that the disease has been eliminated in Ecuador.²⁰

B. Sale of MSDIA’s Chillos Valley Plant

25. MSDIA built a pharmaceutical manufacturing and packaging plant in the Chillos Valley region of Ecuador in 1974. From 1975 through 2003, MSDIA Ecuador used the plant for finishing and packaging for some of the Merck medicines that MSDIA Ecuador distributed in Ecuador.²¹

26. In late 2001, MSDIA made a business decision to consolidate its manufacturing operations in Latin America.²² As part of that effort, MSDIA reviewed its manufacturing operations in Ecuador and concluded that these operations should be transferred to MSDIA plants in other countries.²³ MSDIA therefore decided to sell the Chillos Valley plant, together with its equipment if possible.²⁴

27. In early 2002, MSDIA took initial steps to market and sell the Chillos Valley plant. It engaged Staubach Tie Leung Spanish Americas & Caribbean Inc. (“Staubach”), the Panama branch of a leading global real estate broker, to appraise the plant and promote the sale.²⁵

¹⁷ Third Canan Witness Statement at para. 15.

¹⁸ Third Canan Witness Statement at para. 20.

¹⁹ Third Canan Witness Statement at para. 19.

²⁰ Third Canan Witness Statement at para. 19.

²¹ Third Canan Witness Statement at para. 7.

²² See Exhibit C-119, Memorandum from Jacob Harel (Merck) to distribution, dated 11 December 2001; Exhibit C-120, Email from Fanny Coral (Merck) to distribution (attaching memorandum), dated 8 February 2002; Exhibit C-173, Testimony of Doris Pienknagura, *NIFA v. MSDIA*, Court of Appeals, dated 4 June 2009, at 1 (in response to Question 2); Exhibit C-191, Testimony of Richard Trent, *NIFA v. MSDIA*, Court of Appeals, dated 16 April 2010, at 1 (in response to Question 3). See also MSDIA’s Notice of Arbitration, dated 29 November 2011, at para. 29.

²³ See Exhibit C-120, Email from Fanny Coral (Merck) to distribution (attaching memorandum), dated 8 February 2002. See also MSDIA’s Notice of Arbitration, dated 29 November 2011, at para. 29.

²⁴ See Exhibit C-122, Email from Jacob Harel (Merck) to distribution (attaching memorandum and marketing materials), dated 26 February 2002; Exhibit C-189, Testimony of Ernesta Bello Tuñas, *NIFA v. MSDIA*, Court of Appeals, dated 25 January 2010, at 1-2 (in response to Question 5); Exhibit C-191, Testimony of Richard Trent, *NIFA v. MSDIA*, Court of Appeals, dated 16 April 2010, at 1 (in response to Questions 8 and 14). See also MSDIA’s Notice of Arbitration, dated 29 November 2011, at para. 29.

²⁵ See Exhibit C-151, Testimony of Edgardo Jaén, *NIFA v. MSDIA*, Trial Court, dated 18 October 2005, at 1 (in

28. Beginning in February 2002, MSDIA and Staubach sent notices to more than 100 companies, including companies in Latin America, Europe, North America, and Asia.²⁶ A number of companies expressed interest in the plant, and several potential purchasers visited the plant and placed bids.²⁷

29. NIFA—an Ecuadorian pharmaceutical manufacturer that sold over-the-counter and generic prescription drugs—was among several prospective buyers who expressed interest in the Chillos Valley plant in early 2002. NIFA was an extremely small presence in the Ecuadorian pharmaceutical market. Its total *sales* in 2002 (the year in which negotiations commenced) were **only \$2.4 million**.²⁸ Its total *profits* in 2002 were **just \$2,165**.²⁹

30. NIFA expressed an interest in acquiring the Chillos Valley plant and some of its equipment, and MSDIA entered into negotiations with NIFA. In May 2002, MSDIA and NIFA executed an agreement under which they agreed to keep confidential any business information exchanged during the process.³⁰ In that confidentiality agreement, NIFA and MSDIA agreed that “[n]othing contained in this Agreement or in any discussions undertaken or disclosures made

response to Question 1); Exhibit C-191, Testimony of Richard Trent, *NIFA v. MSDIA*, Court of Appeals, dated 16 April 2010, at 1 (in response to Question 14). See also MSDIA’s Notice of Arbitration, dated 29 November 2011, at para. 30.

²⁶ See Exhibit C-151, Testimony of Edgardo Jaén, *NIFA v. MSDIA*, Trial Court, dated 18 October 2005, at 2 (in response to Question 3); Exhibit C-191, Testimony of Richard Trent, *NIFA v. MSDIA*, Court of Appeals, dated 16 April 2010, at 1 (in response to Question 16); Exhibit C-121, Email from Doris Pienknagura (Merck) to Jacob Harel (Merck) et al., dated 26 February 2002; Exhibit C-124, Email from Edgardo Jaén (Staubach) to Jacob Harel (Merck) et al. (attaching marketing materials), dated 2 May 2002; Exhibit C-126, Memorandum from Gerald Younce (Staubach) to distribution, dated 22 May 2002. See also MSDIA’s Notice of Arbitration, dated 29 November 2011, at para. 31.

²⁷ See Exhibit C-151, Testimony of Edgardo Jaén, *NIFA v. MSDIA*, Trial Court, dated 18 October 2005, at 2 (in response to Question 6); Exhibit C-189, Testimony of Ernesta Bello Tuñas, *NIFA v. MSDIA*, Court of Appeals, dated 25 January 2010, at 1 (in response to Questions 3 and 4); Exhibit C-123, Email from María Barriga (MSDIA) to Jacob Harel (Merck) et al. (and attachments), dated 13 March 2002; Exhibit C-130, Email from María Barriga (MSDIA) to Jacob Harel (Merck) et al. (and attachment), dated 2 August 2002; Exhibit C-132, Email from Edgardo Jaén (Staubach) to Doris Pienknagura (Merck) Edgardo Jaén et al., dated 12 September 2002; Exhibit C-133, Email from María Barriga (MSDIA) to Jacob Harel (Merck) et al. (and attachment), dated 19 September 2002; Exhibit C-134, Email from Doris Pienknagura (Merck) to Jacob Harel (Merck) et al., dated 23 September 2002. See also MSDIA’s Notice of Arbitration, dated 29 November 2011, at para. 31.

²⁸ Exhibit C-20, Report of Rolf Stern, *NIFA v. MSDIA*, Court of Appeals, dated 4 June 2009, at 21.

²⁹ Exhibit C-20, Report of Rolf Stern, *NIFA v. MSDIA*, Court of Appeals, dated 4 June 2009, at 28 (determining NIFA’s profits based on NIFA’s tax returns). NIFA’s product sales accounted for between 0.12% and 0.14% of the total Ecuadorian pharmaceutical market between 2002 and 2004. Its generic product sales accounted for an average of only 2.7% of the generic pharmaceutical market during that period. *Id.* at 3 (determining NIFA’s market shares based on certified data compiled by IMS Ecuador S.A., a market research and data company, and introduced into the court record).

³⁰ Exhibit C-125, Confidentiality Agreement Between NIFA S.A. and MSDIA, dated 14 May 2002. Pursuant to this confidentiality agreement, MSDIA provided NIFA with extensive information regarding the plant, equipment, and the configuration of MSDIA’s operations. Also pursuant to that agreement, NIFA later provided a “business plan” to Staubach, so that Staubach could undertake to assist NIFA in obtaining financing for its purchase of the MSDIA plant. Exhibit C-151, Testimony of Edgardo Jaén, *NIFA v. MSDIA*, Trial Court, dated 18 October 2005, at 11 (in response to Questions 14 and 15).

pursuant hereto shall be deemed a commitment by [NIFA], on the one hand, or MSD[IA], on the other hand, to engage in any business relationship, contract or future dealing with each other.”³¹

31. Throughout the subsequent negotiations, NIFA expressed reservations about the MSDIA plant, complaining on numerous occasions that it was outdated, was not suitable to NIFA’s needs, and would require a complete overhaul.³² NIFA also repeatedly told MSDIA that it was considering other options for expanding its business, including building its own plant. At one point, NIFA halted the negotiations, informing MSDIA that it had decided not to purchase the plant because constructing its own facility would be less expensive than performing the necessary upgrades on the MSDIA plant.³³ At another point, NIFA informed MSDIA that it was negotiating with Albanova, another Ecuadorian pharmaceutical company, to purchase that company’s plant.³⁴

32. On 20 November 2002, MSDIA and NIFA met at Staubach’s offices in Panama. The parties discussed terms of a proposed sale, including price, tax obligations, and method of payment.³⁵ Subject to reaching a final agreement on all terms, the parties agreed in principle on a purchase price of \$1.5 million.³⁶ On the same day, MSDIA memorialized the terms discussed at the Panama meeting in a written document entitled a “Summary of meeting between MSD Ecuador and NIFA,” and NIFA accepted the terms set forth in that document via email on 26 November 2002.³⁷ The document communicated by MSDIA to NIFA made clear that it was

³¹ Exhibit C-125, Confidentiality Agreement Between NIFA S.A. and MSDIA, dated 14 May 2002, at para. 6. *See also* MSDIA’s Notice of Arbitration, dated 29 November 2011, at para. 33.

³² *See* Exhibit C-173, Testimony of Doris Pienknagura, *NIFA v. MSDIA*, Court of Appeals, dated 4 June 2009, at 2 (in response to Question 8); Exhibit C-189, Testimony of Ernesta Bello Tuñas, *NIFA v. MSDIA*, Court of Appeals, dated 25 January 2010, at 4-5 (in response to Questions 19, 20, 21, and 24); Exhibit C-128, Email from Fanny Coral (Merck) to Jacob Harel and Ernesta Bello (Merck) (attaching letter from NIFA General Manager Miguel García to Ernesta Bello), dated 1 July 2002; Exhibit C-131, Email from Edgardo Jaén (Staubach) to Doris Pienknagura (Merck) et al., dated 8 August 2002 (forwarding email from NIFA General Manager Miguel García to Edgardo Jaén, dated 8 August 2002). *See also* MSDIA’s Notice of Arbitration, dated 29 November 2011, at para. 34.

³³ *See* Exhibit C-173, Testimony of Doris Pienknagura, *NIFA v. MSDIA*, Court of Appeals, dated 4 June 2009, at 2 (in response to Questions 7 and 10); Exhibit C-189, Testimony of Ernesta Bello Tuñas, *NIFA v. MSDIA*, Court of Appeals, dated 25 January 2010, at 3-4 (in response to Question 18); Exhibit C-127, Email chain involving Ernesta Bello (Merck) and Jacob Harel (Merck) et al., dated 12 June 2002; Exhibit C-135, Email from Edgardo Jaén (Staubach) to Doris Pienknagura (Merck) et al., dated 23 September 2002. *See also* MSDIA’s Notice of Arbitration, dated 29 November 2011, at para. 34.

³⁴ *See* Exhibit C-189, Testimony of Ernesta Bello Tuñas, *NIFA v. MSDIA*, Court of Appeals, dated 25 January 2010, at 5 (in response to Question 25); Exhibit C-129, Email chain involving María Fernanda Andrade (Staubach) and Edgardo Jaén (Staubach) et al., dated 12 July 2002. *See also* MSDIA’s Notice of Arbitration, dated 29 November 2011, at para. 34.

³⁵ Exhibit C-5, Summary of Meeting Between MSDIA and NIFA, dated 20 November 2002. NIFA had not secured financing to purchase the facility at the time of the 20 November 2002 meeting. As a result, Staubach subsequently identified a source of financing, which the parties believed would be available to NIFA by March 2003. *See id.* *See also* Exhibit C-151, Testimony of Edgardo Jaén, *NIFA v. MSDIA*, Trial Court, dated 18 October 2005, at 3-4 (in response to Questions 9 and 13); Exhibit C-191, Testimony of Richard Trent, *NIFA v. MSDIA*, Court of Appeals, dated 16 April 2010, at 1 (in response to Question 20); Exhibit C-139, Email from Edgardo Jaén (Staubach) to Jacob Harel (Merck), dated 17 January 2003.

³⁶ Exhibit C-5, Summary of Meeting Between MSDIA and NIFA, dated 20 November 2002.

³⁷ Exhibit C-5, Summary of Meeting Between MSDIA and NIFA, dated 20 November 2002; Exhibit C-6, Email

neither a letter of intent nor a contract, stating that it was “not binding the parties to any of the above until a letter of intent or a contract is signed.”³⁸

33. Less than one week after the Panama City meeting, MSDIA discovered that, while negotiating for the purchase of MSDIA’s plant, NIFA had applied for and obtained certain registrations from the Ecuadorian Ministry of Health to produce the drug Rofecoxib, a patented drug that MSDIA had an exclusive right to market in Ecuador.³⁹ Rofecoxib, which was sold in Ecuador under the trademark “Vioxx,” was MSDIA’s most valuable patent in Ecuador at the time.⁴⁰

34. NIFA’s actions indicated that it planned to manufacture Rofecoxib in violation of MSDIA’s exclusive rights, which could cause substantial damages to MSDIA’s business in Ecuador. Moreover, NIFA’s apparent plans to violate Merck’s intellectual property rights with respect to Rofecoxib gave rise to a more general concern about other ways in which unscrupulous business practices might harm MSDIA’s business.⁴¹ Given NIFA’s actions, MSDIA was concerned that, if NIFA acquired the MSDIA plant and equipment, NIFA might manufacture and market copies of other products produced by MSDIA in a way that could confuse consumers as to their true origin.⁴²

35. MSDIA explained these concerns to NIFA, and at a meeting at MSDIA’s offices in Quito on 22 January 2003 MSDIA indicated that it would proceed with the proposed sale if NIFA agreed that for five years after the sale it would not produce copies of MSDIA’s products at the plant.⁴³ After some preliminary discussions about this proposal, NIFA’s representative walked out of the meeting and terminated the negotiations.⁴⁴

from NIFA General Manager Miguel García to Edgardo Jaén (Staubach), dated 25 November 2002 (indicating García’s approval of the minutes).

³⁸ Exhibit C-5, Summary of Meeting Between MSDIA and NIFA, dated 20 November 2002.

³⁹ See Exhibit C-7, Email from Héctor Tejeda (Merck) to Jacob Harel (Merck), dated 26 November 2002; Exhibit C-173, Testimony of Doris Pienknagura, *NIFA v. MSDIA*, Court of Appeals, dated 4 June 2009, at 2-3 (in response to Question 12).

⁴⁰ See Exhibit C-7, Email from Héctor Tejeda (Merck) to Jacob Harel (Merck), dated 26 November 2002; Exhibit C-170, Testimony of Nelson Fernando Bonilla Camacho, *NIFA v. MSDIA*, Court of Appeals, dated 28 May 2009, at 2 (in response to Questions 9 and 10); Exhibit C-173, Testimony of Doris Pienknagura, *NIFA v. MSDIA*, Court of Appeals, dated 4 June 2009, at 2-3 (in response to Question 12); Exhibit C-138, Letter from Alejandro Ponce Martínez to Miguel García, dated 2 December 2002.

⁴¹ Exhibit C-173, Testimony of Doris Pienknagura, *NIFA v. MSDIA*, Court of Appeals, dated 4 June 2009, at 3 (in response to Question 14).

⁴² Exhibit C-173, Testimony of Doris Pienknagura, *NIFA v. MSDIA*, Court of Appeals, dated 4 June 2009, at 3 (in response to Question 18).

⁴³ Exhibit C-173, Testimony of Doris Pienknagura, *NIFA v. MSDIA*, Court of Appeals, dated 4 June 2009, at 3-4 (in response to Questions 19 and 20).

⁴⁴ Exhibit C-173, Testimony of Doris Pienknagura, *NIFA v. MSDIA*, Court of Appeals, dated 4 June 2009, at 5 (in response to Question 25). See also Exhibit C-8, Memorandum from Jacob Harel (Merck) to distribution, dated 22 January 2003.

36. MSDIA subsequently began negotiations with Ecuacuímica, an Ecuadorian company active in the pharmaceutical sector. In July 2003, MSDIA sold the plant (without the equipment) to Ecuacuímica for a total price of \$830,000.⁴⁵

C. *The NIFA v. MSDIA Litigation*

1. The Trial Court Proceedings

37. On 16 December 2003, NIFA filed a complaint against MSDIA in the Second Court for Civil Affairs of Pichincha (the trial court).⁴⁶ Pursuant to the division of subject matter jurisdiction within Ecuador’s judicial system, the trial court is part of Ecuador’s civil court system, and therefore possessed subject matter jurisdiction only over civil claims, and not over criminal or administrative matters.⁴⁷

a) NIFA’s Complaint

38. NIFA’s complaint alleged that MSDIA had engaged in a “fraud perpetrated intentionally,” that purportedly “prevented [NIFA] from competing in the market with several of its generic pharmaceutical products.”⁴⁸ Specifically, the complaint alleged that MSDIA never had intended to sell NIFA its pharmaceutical plant, but instead falsely claimed that MSDIA had used the negotiations as a pretence to obtain NIFA’s confidential business plans and prevent NIFA from expanding its business.⁴⁹ NIFA also falsely claimed that it suffered at least **\$200 million** in damages as a result of the purported delay in its expansion plans—an amount that was **133 times** the proposed purchase price of the plant (\$1.5 million), nearly **100,000 times** NIFA’s annual profits in 2002, and **10 times** the sales revenues of the entire Ecuadorian generics market in 2002.⁵⁰

39. Apart from general allegations of MSDIA’s supposed “fraud,” NIFA’s complaint failed to identify any recognized legal basis for liability or the legal claim or theory of liability upon which NIFA relied.⁵¹ The complaint suggested that MSDIA had violated Article 244, Number 3

⁴⁵ Exhibit C-11, Report of Omar Herrera R., *NIFA v. MSDIA*, Trial Court, dated 25 October 2004, at 4. MSDIA executed the sales deed for the plant with an affiliate of Ecuacuímica. MSDIA sold the equipment separately to other parties. *Id.* at 2-3. *See also* Exhibit C-191, Testimony of Richard Trent, *NIFA v. MSDIA*, Court of Appeals, dated 16 April 2010, at 1-2 (in response to Questions 24, 25, and 27).

⁴⁶ Exhibit C-10, NIFA’s Complaint, *NIFA v. MSDIA*, Trial Court, dated 16 December 2003.

⁴⁷ *See* Expert Report of Professor Carlos Humberto Páez Fuentes, dated 1 October 2013, at para. 10 [hereinafter Expert Report of Professor Páez].

⁴⁸ Exhibit C-10, NIFA’s Complaint, *NIFA v. MSDIA*, Trial Court, dated 16 December 2003, at 8.

⁴⁹ Exhibit C-10, NIFA’s Complaint, *NIFA v. MSDIA*, Trial Court, dated 16 December 2003, at 8.

⁵⁰ Exhibit C-10, NIFA’s Complaint, *NIFA v. MSDIA*, Trial Court, dated 16 December 2003, at 9. *See also* Exhibit C-5, Summary of Meeting Between MSDIA and NIFA, dated 20 November 2002 (setting forth potential purchase price of \$1.5 million); Exhibit C-6, Email from NIFA General Manager Miguel García to Edgardo Jaén (Staubach), dated 25 November 2002 (indicating García’s agreement with MSDIA’s summary); Exhibit C-20, Report of Rolf Stern, *NIFA v. MSDIA*, Court of Appeals, dated 4 June 2009, at 16, 28 (calculating NIFA’s profits in 2002 and Ecuadorian generic pharmaceutical market revenues in 2002).

⁵¹ *See* Witness Statement of Alejandro Ponce Martínez, dated 2 October 2013, at para. 5 [hereinafter Ponce Martínez Witness Statement]. Exhibit C-10, NIFA’s Complaint, *NIFA v. MSDIA*, Trial Court, dated 16 December 2003.

of Ecuador's 1998 Constitution, in force at the time of NIFA's complaint,⁵² which provides that: "[w]ithin the social-market economy system the State shall ... [p]romote the development of competitive activities and markets, [and] foster free competition and punish, under the law, monopolistic and other practices that prevent and distort it."⁵³ NIFA's complaint did not, however, provide any indication as to how MSDIA might be held liable under this constitutional provision.

40. As MSDIA explained in its answer to NIFA's complaint, Article 244, Number 3 of Ecuador's 1998 Constitution did not create a basis for liability of any kind, and indeed, was entirely irrelevant to civil disputes.⁵⁴ Rather, as its text made clear, that provision did nothing more than describe the obligations *of the State* within the free market social economic system, provided for in the Constitution.⁵⁵

41. As explained below, no Ecuadorian court had ever held that Article 244, Number 3 created or supported a private cause of action—either for antitrust violations or otherwise. Likewise, the consensus among Ecuadorian practitioners and constitutional scholars was that the provision was purely programmatic, and thus, at most, directed the Ecuadorian government to take steps to *establish* antitrust laws to ensure the promotion of "free competition."⁵⁶

42. At the time MSDIA and NIFA began negotiations for the sale of MSDIA's plant in 2002, and for many years thereafter, Ecuador's legislature did not enact any antitrust law pursuant to the constitutional directive in Article 244, Number 3.⁵⁷ In fact, between 1998 (the year that Article 244, Number 3 came into existence) and 2009 (after the 1998 Constitution had been replaced by the 2008 Constitution), the Ecuadorian government repeatedly acknowledged both that the 1998 Constitution required the enactment of a substantive antitrust law and that no such law had been adopted:

- a. Between 1998 and 2003, governmental experts in antitrust from the Andean Community nations, including representatives from Ecuador, participated in a series of meetings for the purpose of evaluating possible revisions to Andean Community

⁵² Ecuador's 1998 Constitution was replaced by a new Constitution, which was enacted in 2008.

⁵³ Exhibit CLM-183, 1998 Ecuador Constitution, art. 244, no. 3.

⁵⁴ See Exhibit C-140, MSDIA's Answer, *NIFA v. MSDIA*, Trial Court, dated 23 January 2004, at 11. See also Ponce Martínez Witness Statement at para. 8; Expert Report of Professor Manuel Fernández de Córdoba, dated 30 September 2013 [hereinafter Expert Report of Professor Fernández de Córdoba], at para. 19 ("In the absence of a law implementing the policy described in Article 244-3, parties could not bring actions based on Art. 244-3, and it did not allow parties to be held liable for any alleged 'violations' of the policy described in Article 244-3.").

⁵⁵ See Exhibit C-140, MSDIA's Answer, *NIFA v. MSDIA*, Trial Court, dated 23 January 2004, at 11.

⁵⁶ See Expert Report of Professor Rafael Oyarte Martínez, dated 30 September 2013, at para. 8 ("Article 244(3) does not itself prohibit any conduct.") and para. 27 (same) [hereinafter Expert Report of Professor Oyarte]. See also Expert Report of Professor Fernández de Córdoba at para. 17 ("Article 244-3 ...did not establish any specific prohibitions on the activities of market operators. Instead, it established the State's obligation to enact law to give shape to the policy to promote free competition, including the procedural mechanisms for its effective protection."). In Ecuador, as in many other civil law jurisdictions, the term "free competition" refers to what is known elsewhere as antitrust law.

⁵⁷ See Expert Report of Professor Oyarte at paras. 8, 21-22; Expert Report of Professor Fernández de Córdoba at para. 19. See also Ponce Martínez Witness Statement at para. 22.

Decision No. 285, which was a 1991 decision establishing antitrust standards for transactions affecting competition in more than one member nation.⁵⁸ The official reports summarizing those meetings affirm the absence of a competition law in Ecuador throughout the 1998-2003 period.⁵⁹

b. In 2002, Ecuador's National Congress approved a bill intended to establish legal norms for free competition, presumably in light of Article 244, Number 3, but that bill was vetoed by the President.⁶⁰

c. Seven years later, in March 2009, in Executive Decree No. 1614, which established Ecuador's competition authority for purposes of applying Andean Community antitrust standards within Ecuador, Ecuadorian President Rafael Correa declared that "Ecuador did not have an internal regulation for the protection of economic competition [in March 2005]," and had not yet enacted an internal antitrust law as of the date of Executive Decree No. 1614.⁶¹

43. It was not until 2011 that Ecuador's legislature enacted an internal antitrust law.⁶²

b) Proceedings Before Judge Toscano Garzón

44. NIFA's complaint was assigned to Judge Juan Toscano Garzón, who presided over all of the proceedings in the trial court up to the point of issuance of the judgment, including the entire evidentiary phase of the trial.

45. Following the parties' initial pleadings, Judge Toscano Garzón ordered the opening of a 10-day evidence period, to run from 15 June 2004 through 29 June 2004, during which the parties were required to submit all of their evidence and request leave to take all of the witness testimony upon which they intended to rely.⁶³

46. NIFA submitted very little evidence, almost all of which purported to address the damages it allegedly suffered. NIFA, which concededly bore the burden of proof under

⁵⁸ See Exhibit C-12, Andean Community Decision No. 608, dated 28 May 2005, at 1 (describing Andean Community Decision No. 285, dated 21 March 1991).

⁵⁹ For example, the Report of the Fourth Meeting of Governmental Experts on Free Competition, dated 1 August 2003—almost precisely the moment NIFA was filing its lawsuit against MSDIA—summarized on-going efforts towards revising the existing Andean antitrust standards. It noted that the "delegations reached consensus on a procedural [provision], leaving [for] consultation of Bolivia and Ecuador, *countries that do not have competition rules and authorities*, the following articles in the Transitory Provisions." Exhibit C-9, Report of the Fourth Meeting of Andean Community Governmental Experts on Free Competition, dated 1 August 2003, at 2.

⁶⁰ See Exhibit C-24, Report of Ignacio De León, *NIFA v. MSDIA*, Court of Appeals, dated 12 February 2010, at 90.

⁶¹ Exhibit C-19, Republic of Ecuador Executive Decree No. 1614, dated 14 March 2009, at 1. Exhibit C-15, Andean Community Decision No. 616, dated 15 July 2005, art. 2 (enabling Ecuador to apply the antitrust standards of Andean Community Decision No. 608 internally, on the condition that Ecuador create an internal competition authority).

⁶² Expert Report of Professor Fernández de Córdoba at p. 4, fn. 5. See also Exhibit CLM-195, Organic Law of the Regulation and Control of the Power of the Market, Official Register Supplement No. 555, dated 13 October 2011.

⁶³ Exhibit C-141, Trial Court Order of 15 June 2004, *NIFA v. MSDIA* (opening evidentiary period).

Ecuadorian law,⁶⁴ requested to submit the testimony of only one witness on the issue of MSDIA's liability—a former Staubach employee named Anne Usher de Ranson, who was involved in the early negotiations between the parties, but was later removed from the project at MSDIA's request.⁶⁵

47. On Friday, 25 June 2004, NIFA filed a written petition with the court at 4:55 p.m., asking (for the first time) for Ms. Usher de Ranson's testimony.⁶⁶ Minutes later, at 5:07 p.m., the court granted the petition and ordered that her testimony be taken, but did not establish a specific time or place for the taking of the testimony.⁶⁷ Ms. Usher de Ranson's testimony was taken at 8:00 a.m. on the following working day, Monday, 28 June, which was highly unusual.⁶⁸ Typically, when witness testimony is requested by one party in an Ecuadorian court, the court will provide the counterparty in the litigation with notice and adequate time to prepare and submit cross-examination questions.⁶⁹ Here, however, MSDIA's counsel did not receive notice of Ms. Usher de Ranson's examination until after her testimony had commenced, and consequently was not present to observe her testimony and had no opportunity to put questions to her in cross-examination.⁷⁰

48. The next day, on 29 June 2004, MSDIA's counsel objected to Ms. Usher de Ranson's testimony due to the lack of notice, petitioned the court to permit MSDIA to cross-examine her, and introduced 12 written questions for that purpose.⁷¹ On 25 August 2005 (more than one year after Ms. Usher de Ranson initially testified), NIFA informed the court that Ms. Usher de Ranson, who was ordinarily resident in Panama, would be in Ecuador in the coming days. The court then issued a decree announcing that her cross-examination should take place on any day beginning 29 August 2005 or thereafter.⁷²

⁶⁴ Expert Report of Professor Fernández de Córdoba at para. 46.

⁶⁵ Exhibit C-144, Testimony of Anne Kareen Ranson [a/k/a Anne Usher de Ranson], *NIFA v. MSDIA*, Trial Court, dated 28 June 2004, at 1-3 (in response to Questions 3, 4, and 5). Ms. Usher de Ranson herself testified that she was removed for the project for failing to "accept" a written reprimand from MSDIA, *see id.* at 2 (in response to Question 4), and several MSDIA witnesses would later testify that Ms. Usher de Ranson was removed from the project for ineffectiveness. Exhibit C-191, Testimony of Richard Trent, *NIFA v. MSDIA*, Court of Appeals, dated 16 April 2010, at 1 (in response to Question 18); Exhibit C-151, Testimony of Edgardo Jaén, *NIFA v. MSDIA*, Trial Court, dated 18 October 2005, at 5-6 (in response to Questions 19, 20, 21, and 22).

⁶⁶ Exhibit C-142, NIFA's Petition of 25 June 2004, *NIFA v. MSDIA*, Trial Court, at 1-3 (requesting that trial court "indicate the date and time to take the testimony of Ms. Anne Usher de Ranson" and posing 12 questions to Ms. Usher de Ranson); Ponce Martínez Witness Statement at para. 11.

⁶⁷ Exhibit C-143, Trial Court Order of 25 June 2004, *NIFA v. MSDIA*, at 4. The order erroneously stated that the testimony was to begin "starting today" on 25 May 2004, but the order was issued on 25 June 2004. Ponce Martínez Witness Statement at para. 11.

⁶⁸ Ponce Martínez Witness Statement at para. 11.

⁶⁹ Ponce Martínez Witness Statement at para. 11.

⁷⁰ Exhibit C-145, MSDIA's Petition of 29 June 2004, *NIFA v. MSDIA*, Trial Court, at 1; Exhibit C-150, MSDIA's Petition of 1 September 2005, *NIFA v. MSDIA*, Trial Court, at 1; Ponce Martínez Witness Statement at para. 11.

⁷¹ Exhibit C-145, MSDIA's Petition of 29 June 2004, *NIFA v. MSDIA*, Trial Court; Ponce Martínez Witness Statement at para. 12.

⁷² Exhibit C-147, Trial Court Order of 25 August 2005, *NIFA v. MSDIA*, at 1; Ponce Martínez Witness Statement at para. 12.

49. MSDIA submitted a petition requesting that the court set a specific date and time for the testimony, so that counsel for MSDIA could appear and confront the witness, and submitted 18 additional cross-examination questions.⁷³ But immediately after the court opened on 29 August 2005, without additional notice to MSDIA’s counsel, while MSDIA’s petition that the court set a time for the testimony remained pending, the court took Ms. Usher de Ranson’s testimony. MSDIA’s counsel was again not present.⁷⁴ The court put MSDIA’s original 12 questions to Ms. Usher de Ranson, but did not ask her the additional 18 questions MSDIA had submitted with its petition.⁷⁵

50. The court’s decision to allow NIFA’s only witness to testify on two separate occasions without prior notice to MSDIA of the time and place was highly irregular, and deprived MSDIA of an opportunity to reveal inconsistencies and downright falsehoods in her testimony on cross-examination.⁷⁶ Despite this, the trial court, court of appeals, and the National Court of Justice all eventually relied on Ms. Usher de Ranson’s testimony (and ignored contrary testimony from other witnesses⁷⁷) in finding MSDIA liable to NIFA.⁷⁸

51. In support of its request for damages of \$200 million, NIFA primarily relied on a so-called “business plan,” dated October 2002. The business plan, which was purportedly prepared by NIFA for the purpose of securing financing for the purchase of MSDIA’s Chillos Valley

⁷³ Exhibit C-148, MSDIA’s Petition of 29 August 2005, *NIFA v. MSDIA*, Trial Court, at 1 (requesting that the trial court “partially reform” its ruling of 26 August and “indicat[e] the date and time when Ms. Anne Usher must appear to render her testimony, thus guaranteeing Merck Sharp & Dohme (Inter American) Corporation’s legitimate right to contradict ...”).

⁷⁴ Exhibit C-149, Testimony of Anne Karsen Renson [a/k/a Anne Usher de Ranson], *NIFA v. MSDIA*, Trial Court, dated 29 August 2005, at 1 (“In Quito, on August 29, 2005 at 14:20, Mrs. Anne Karsen Renson appeared before the undersigned, Juan Toscano Garzón, Atty., Judge of the Second Civil Court of Pichincha in order to render her deposition and answer the questions posed by the defendant.”); Ponce Martínez Witness Statement at para. 13.

⁷⁵ Ponce Martínez Witness Statement at para. 13; *compare* Exhibit C-149, Testimony of Anne Karsen Renson [a/k/a Anne Usher de Ranson], *NIFA v. MSDIA*, Trial Court, dated 29 August 2005, at 1-4 (responding to questions 1-12 posed by MSDIA), *with* Exhibit C-145, MSDIA’s Petition of 29 June 2004, *NIFA v. MSDIA*, Trial Court, at 2-4 (posing questions 1-12). *See also* Exhibit C-146, MSDIA’s Petition of 25 August 2005, *NIFA v. MSDIA*, Trial Court, at 1-4 (posing questions 13-30).

⁷⁶ Ponce Martínez Witness Statement at para 14.

⁷⁷ *See* Ponce Martínez Witness Statement at paras. 22, 51.

⁷⁸ Specifically, the trial court cited approvingly to Ms. Usher de Ranson’s testimony for the absurd proposition that “[MSDIA] was not seeking to sell the good offered up for sale, but that it did have the intention to research the national companies that were its competitors.” Exhibit C-3, Trial Court Judgment, *NIFA v. MSDIA*, dated 17 December 2007, at 9. The court of appeals cited Ms. Usher de Ranson for the completely unfounded conclusion that MSDIA suggested a non-compete clause to NIFA late in the negotiations as part of a long-planned effort to harm NIFA’s business, *see* Exhibit C-4, Court of Appeals Judgment, *NIFA v. MSDIA*, dated 23 September 2011, at 13, completely ignoring the obvious explanation for the timing of MSDIA’s suggestion—its discovery in late November 2002 that NIFA had taken steps to produce Rofecoxib at MSDIA’s plant in violation of Merck’s intellectual property rights. The National Court of Justice, in turn, relied on the court of appeals’ finding, predicating its final judgment on the obviously false allegation that MSDIA suggested a non-compete condition as part of its strategy to forestall competition from NIFA. *See* Exhibit C-203, NCJ Judgment, *NIFA v. MSDIA*, dated 21 September 2012, at section 11.5.

plant, purported to demonstrate NIFA's expected growth for the years 2003-2012 following the acquisition.⁷⁹

52. NIFA's "business plan" was based entirely on wholly unrealistic and implausible assumptions. Among other things, it assumed that NIFA would enjoy significant sales of Rofecoxib, which would have violated MSDIA's intellectual property rights, and that it would achieve an overall profit margin far in excess of the maximum profit allowed under Ecuadorian laws that regulated the price of medicines.⁸⁰ But even on the basis of these untenably optimistic assumptions, the plan forecast that the aggregate profit NIFA could earn from MSDIA's plant between 2003 and 2012 would total \$12.9 million—***\$187 million less than the \$200 million in lost profits claimed in NIFA's complaint.***⁸¹ No evidence at all supported the far higher figure that NIFA had claimed.

c) Proceedings Before Temporary Judge Chang-Huang Castillo

53. On 17 September 2007, Judge Toscano Garzón was elevated to the court of appeals and was replaced by Temporary Judge Chang-Huang Castillo.⁸² At the time Temporary Judge Chang-Huang was assigned to the case, the evidentiary phase of the case had been completed, the parties had submitted all legal briefing, and Judge Toscano Garzón had decreed the case ready for decision.⁸³

54. The court's records show that after she was assigned to the case, Temporary Judge Chang-Huang took no action on it for three months, during which time the entire case file (of more than 6,000 pages) remained unretrieved and unreviewed in the court's archives.⁸⁴ Court records further reveal that she took her first action in the case—"taking cognizance" of the matter, a step under Ecuadorian civil procedure by which the judge formally takes jurisdiction—on 17 December 2007, at 2:06 p.m.⁸⁵ Yet, less than three and a half hours after first taking cognizance of the case, Temporary Judge Chang-Huang issued a 15-page decision resolving liability and damages entirely in favor of NIFA.⁸⁶

⁷⁹ Exhibit C-136, NIFA's Business Plan, at section II; Exhibit C-137, NIFA's Business Plan, at section IV; Exhibit C-21, Report of Walter Spurrier Baquerizo, *NIFA v. MSDIA*, Court of Appeals, dated 4 June 2009, at 8-11 (summarizing the business plan).

⁸⁰ Exhibit C-21, Report of Walter Spurrier Baquerizo, *NIFA v. MSDIA*, Court of Appeals, dated 4 June 2009, at 3-4 (summarizing the unrealistic assumptions in NIFA's business plan); Exhibit C-44, Report of Carlos Montañez Vásquez, *NIFA v. MSDIA*, Court of Appeals, dated 15 July 2011, at 24.

⁸¹ See Exhibit C-10, NIFA's Complaint, *NIFA v. MSDIA*, Trial Court, dated 16 December 2003.

⁸² Ponce Martínez Witness Statement at para. 19.

⁸³ Exhibit C-152, Trial Court Order of 26 October 2006, *NIFA v. MSDIA*, at 1 (submitting case for judgment); Ponce Martínez Witness Statement at para. 19.

⁸⁴ Exhibit C-3, Trial Court Judgment, *NIFA v. MSDIA*, dated 17 December 2007, at 1.

⁸⁵ Exhibit C-3, Trial Court Judgment, *NIFA v. MSDIA*, dated 17 December 2007, at 1; Ponce Martínez Witness Statement at paras. 19, 23.

⁸⁶ Exhibit C-3, Trial Court Judgment, *NIFA v. MSDIA*, dated 17 December 2007, at 15; Exhibit C-17, Report of Judicial Inspection of *NIFA v. MSDIA* First Instance Case File, Patricio Carrillo Dávila, President of the Provincial Court of Justice of Pichincha, *MSDIA v. Chang-Huang*, dated 19 December 2008, at 3 (describing the record as including 6,243 pages); Ponce Martínez Witness Statement at para. 23.

55. Judge Chang-Huang held that MSDIA's conduct gave rise to a violation of Article 244, Number 3 of Ecuador's 1998 Constitution, though her decision remarkably failed to offer *any* analysis of *how* MSDIA's conduct violated that constitutional provision, other than generally to invoke antitrust and anti-monopoly rhetoric:

“The malicious acts of deceit by Merck Sharp & Dohme (Inter American) Corporation should be punished, and the judge cannot, in any case, suspend or deny the administration of justice, not even because of obscurity of the law or lack of law. ... Numeral 3 of article 244 of the Political Constitution of the Republic, imposes on the State, the obligation to penalize all practices of monopoly and others that impede or distort free competition. The constitutional regulation declares the illegality of all of those practices that affect or distort competition, even more so if these arise from a company with a large economic power that could impose monopoly power.”⁸⁷

56. Temporary Judge Chang-Huang also awarded NIFA the entire **\$200 million** in damages it had claimed, purportedly as profits NIFA would have somehow earned if MSDIA had sold the plant to it, rather than to Ecuacuímica.⁸⁸ Temporary Judge Chang-Huang appeared to rely exclusively on NIFA's 2002 “business plan” in support of this award, despite the fact that the business plan (as absurdly optimistic as it was) concluded that the profits NIFA could earn in connection with MSDIA's plant would have totalled **less than \$13 million over 10 years**.⁸⁹

57. The circumstances indicated that the judgment was not the product of Temporary Judge Chang-Huang's own work.⁹⁰ The opinion contained a largely verbatim recitation of the plaintiff's complaint, including identical typographical and grammatical errors, which suggested the two documents originated from the same source.⁹¹

58. Two linguistics experts compared a number of other judgments issued by Temporary Judge Chang-Huang to the *NIFA v. MSDIA* decision.⁹² Those experts concluded, based on various indicia including grammar and style, that the *NIFA v. MSDIA* decision was likely authored by someone other than Temporary Judge Chang-Huang.⁹³ Moreover, as explained in

⁸⁷ Exhibit C-3, Trial Court Judgment, *NIFA v. MSDIA*, dated 17 December 2007, at 13.

⁸⁸ Exhibit C-3, Trial Court Judgment, *NIFA v. MSDIA*, dated 17 December 2007, at 14.

⁸⁹ *See above* at para. 52; *see also* Ponce Martínez Witness Statement at para. 22 (explaining that “the judgment awarded NIFA the entire US \$ 200 million it had requested in its complaint without providing any explanation or analysis to support the finding that NIFA had been damaged or the calculation of the amount of damages awarded, which was entirely unsupported by the evidence in the record.”)

⁹⁰ Ponce Martínez Witness Statement at paras. 22-23; Exhibit C-18, Report of Alfonso León Asqui and Dr. Bruno Sáenz Andrade Regarding *NIFA v. MSDIA* First Instance Judgment, *MSDIA v. Chang-Huang*, dated 26 January 2009.

⁹¹ Ponce Martínez Witness Statement at para. 22; Exhibit C-18, Report of Alfonso León Asqui and Dr. Bruno Sáenz Andrade Regarding *NIFA v. MSDIA* First Instance Judgment, *MSDIA v. Chang-Huang*, dated 26 January 2009, at 4-9 (detailing similarities between NIFA's complaint and the judgment, and concluding that a significant section of the judgment is “essentially, the same text”).

⁹² Exhibit C-18, Report of Alfonso León Asqui and Dr. Bruno Sáenz Andrade Regarding *NIFA v. MSDIA* First Instance Judgment, *MSDIA v. Chang-Huang*, dated 26 January 2009, at 4-9.

⁹³ Exhibit C-18, Report of Alfonso León Asqui and Dr. Bruno Sáenz Andrade Regarding *NIFA v. MSDIA* First Instance Judgment, *MSDIA v. Chang-Huang*, dated 26 January 2009, at 4-9. *See also* Ponce Martínez Witness

Section II.E.2. below, years after issuing her judgment in the *NIFA v. MSDIA* case, Temporary Judge Chang-Huang indicated to MSDIA's counsel that she had not authored the judgment and confirmed that she had been pressured to rule against MSDIA.⁹⁴

59. Contrary to general court practice, MSDIA was not given regular notice of the judgment. Although Ecuador's procedural laws and general court practice require that a court clerk place a hard copy of a judgment in the court mailbox of each law firm that is counsel in the proceedings,⁹⁵ no one ever placed a notice of Temporary Judge Chang-Huang's judgment in the mailbox of MSDIA's counsel.⁹⁶

60. Moreover, although an electronic copy was transmitted to MSDIA's counsel of record, the version that was sent inexplicably omitted the section of the judgment that included, among other critical items, the court's award of \$200 million in damages.⁹⁷ Thus, the judgment MSDIA's counsel received appeared to address only liability, and appeared to reserve the issue of damages for further proceedings at the trial level.

61. Under Ecuadorian procedural law, MSDIA had three days to exercise its right to appeal the trial court's judgment. The court's failure to provide notice to MSDIA in accordance with its usual practice appears to have been calculated to prevent MSDIA from exercising its right to appeal within the three-day period allowed under Ecuadorian law.⁹⁸ Despite this, MSDIA made further inquiries and was able to file its appeal within the statutory time limit.⁹⁹

2. The Court of Appeals Proceedings

62. MSDIA appealed the trial court's judgment to the Provincial Court of Justice for Commercial and Civil Matters, an Ecuadorian court of appeals.¹⁰⁰ On 7 July 2008, the case was

Statement at para. 23. The U.S. Department of State has acknowledged that there have been numerous media reports in Ecuador "on the susceptibility of ... judges parceling out cases to outside lawyers, who wrote the judicial sentences and sent them back to the presiding judge for signature." Exhibit C-96, U.S. Department of State, 2010 Country Report on Human Rights Practices: Ecuador, at 9.

⁹⁴ See below at paras. 188-192.

⁹⁵ Exhibit CLM-190, Ecuadorian Code of Civil Procedure, art. 75; Ponce Martínez Witness Statement at para. 20

⁹⁶ Ponce Martínez Witness Statement at para. 20; Exhibit C-159, Testimony of María Belén Merchán Mera, *MSDIA v. Chang-Huang*, dated 4 December 2008, at 1, 3 (in response to Questions 4, 5, 15, 16, and 17); Exhibit C-158, Testimony of Dr. Luís Ricardo Ponce Palacios, *MSDIA v. Chang-Huang*, dated 4 December 2008, at 2 (in response to Question 7). See also MSDIA's Notice of Arbitration, dated 29 November 2011, at paras. 65-67.

⁹⁷ Ponce Martínez Witness Statement at para. 20; Exhibit C-158, Testimony of Dr. Luís Ricardo Ponce Palacios, *MSDIA v. Chang-Huang*, dated 4 December 2008, at 1-2 (in response to Questions 2, 3, 4, 5, and 6). See also MSDIA's Notice of Arbitration, dated 29 November 2011, at paras. 65-67.

⁹⁸ Ponce Martínez Witness Statement at para. 21.

⁹⁹ Exhibit C-159, Testimony of María Belén Merchán Mera, *MSDIA v. Chang-Huang*, dated 4 December 2008, at 1-2 (in response to Questions 6, 10, and 11); Ponce Martínez Witness Statement at paras. 20, 26.

¹⁰⁰ Ponce Martínez Witness Statement at para. 26. Exhibit C-156, MSDIA's Brief of 28 July 2008, *NIFA v. MSDIA*, Court of Appeals. Although the trial court failed to notify MSDIA of the judgment in accordance with general court practice, MSDIA learned of the judgment and was able to file its appeal within the statutory time limit. Exhibit C-159, Testimony of María Belén Merchán Mera, *MSDIA v. Chang-Huang*, dated 4 December 2008, at 1-2 (in response to Questions 6, 10, and 11).

assigned to the First Chamber of that court before Judges Alberto Palacios, Beatriz Suárez, and Juan Toscano Garzón.¹⁰¹

63. Judge Toscano Garzón was the same judge who had presided over the trial court proceedings from their inception in 2003 until September 2007, when he moved from the trial court to the court of appeals. As described above, Judge Toscano Garzón had overseen the entire proceeding in the trial court, with the exception of the issuance of the judgment.¹⁰²

64. Notwithstanding his involvement with the lower court proceedings that were on appeal, and despite MSDIA’s motion for his recusal, Judge Toscano Garzón participated in the first year of the court of appeals proceedings—a period that included the adjudication of a motion to dismiss for lack of jurisdiction filed by MSDIA¹⁰³ as well as the formal evidence period—before he was finally recused in June 2009.¹⁰⁴ Notably, when he was appointed to the court of appeals and while the *NIFA v. MSDIA* case was still pending in his former court, Judge Toscano Garzón named NIFA’s counsel in its litigation against MSDIA—Juan Carlos Andrade—as his “alternate judge” to hear matters from which Judge Toscano Garzón was disqualified.¹⁰⁵

65. Under Ecuador’s Code of Civil Procedure, the court of appeals is required to issue a decree at the outset of a case notifying the parties that it has formally “taken possession” of the case.¹⁰⁶ The appellant then has ten business days from that decree to file its opening appeal.¹⁰⁷ If the appellant fails to file its opening brief during the ten-day window, the appellant loses the right to appeal the trial court judgment.¹⁰⁸

66. The court of appeals issued a decree taking possession of the *NIFA v. MSDIA* case on 15 July 2008, six months after MSDIA filed its notice of appeal in the trial court.¹⁰⁹ Accordingly, MSDIA’s opening brief was due to the court ten business days later (29 July 2008).¹¹⁰

67. But again, for at least the fourth time, Ecuador’s courts failed to provide MSDIA normal and proper notice. MSDIA was not notified of the issuance of the court’s decree in accordance

¹⁰¹ Exhibit C-155, Court of Appeals Order of 7 July 2008, *NIFA v. MSDIA*; Ponce Martínez Witness Statement at para 27.

¹⁰² See above at paras. 44,53.

¹⁰³ As explained below, MSDIA argued that the allegations in NIFA’s complaint appeared to be aimed at establishing a claim of “unfair competition,” a theory of liability involving deceitful business practices that, unlike antitrust or “free competition” claims, turns on injury to a competitor but not to competition generally. MSDIA pointed out, as it would throughout the litigation, that Ecuador’s civil courts did not have jurisdiction over unfair competition claims, which were under the exclusive jurisdiction of the administrative courts. See below at para. 68.

¹⁰⁴ Exhibit C-186, Court of Appeals Order of 23 June 2009, *NIFA v. MSDIA* (ordering Judge Toscano Garzón’s recusal and replacing him with Permanent Assistant Judge Marco Vallejo Jijón).

¹⁰⁵ Ponce Martínez Witness Statement at para. 19; MSDIA’s Notice of Arbitration, dated 29 November 2011, at paras. 51-53; Exhibit C-87, MSDIA’s Petition of 4 December 2008, *NIFA v. MSDIA*, Court of Appeals, at 3-4 (requesting disqualification of Judge Toscano Garzón).

¹⁰⁶ Ponce Martínez Witness Statement at para. 27.

¹⁰⁷ Exhibit CLM-190, Ecuadorian Code of Civil Procedure, art. 408; Ponce Martínez Witness Statement at para. 27.

¹⁰⁸ Exhibit CLM-190, Ecuadorian Code of Civil Procedure, art. 408; Ponce Martínez Witness Statement at para. 27.

¹⁰⁹ Ponce Martínez Witness Statement at para. 28.

¹¹⁰ Exhibit CLM-190, Ecuadorian Code of Civil Procedure, art. 408; Ponce Martínez Witness Statement at para. 28.

with the court's ordinary practice. In fact, MSDIA was not notified of the court's decree until less than an hour before the court was to close on 29 July, *the last day of the ten-day appeal period*.¹¹¹ Although MSDIA managed to file a draft of its opening brief (which it had prepared in advance of receiving the court's decree) just minutes before the deadline expired, the court's failure to notify MSDIA that it had taken possession of the case in accordance with its ordinary practice—like the strange failures of notice in the trial court—appears to have been calculated to prevent MSDIA from exercising its right to appeal.¹¹²

a) MSDIA's nullity petition

68. In its opening brief in the court of appeals, MSDIA argued that the allegations in NIFA's complaint appeared to be aimed at establishing a claim of "unfair competition," a theory of liability involving deceitful business practices that, unlike antitrust or "free competition" claims, turns on injury to a competitor but not to competition generally.¹¹³ MSDIA pointed out that Ecuador's civil courts did not have jurisdiction over unfair competition claims, which were under the exclusive jurisdiction of the administrative courts. MSDIA argued that NIFA's claim therefore should be dismissed for lack of jurisdiction.¹¹⁴

69. In its responsive brief, NIFA made clear that it was not asserting a claim of unfair competition, but rather, that its claim rested *solely* on an antitrust—an abuse of market power—theory of liability:

"The complaint filed by [NIFA] is based on the anti-competitive practices performed against it by the defendant company. [MSDIA,] taking advantage of its eminent domain, derived from its high economic power, placed my principal in a position of dependence imposing the contracting conditions at its own will. ... *It was not the case of an unfair competition complaint* as it is now stated by the defendant...."¹¹⁵

¹¹¹ Ponce Martínez Witness Statement at para. 28.

¹¹² Ponce Martínez Witness Statement at para. 28.

¹¹³ Exhibit C-156, MSDIA's Brief of 28 July 2008, *NIFA v. MSDIA*, Court of Appeals, at section 3.1 ("In fact, NIFA's attempt is based on allegations that MSD committed acts of unfair competition against NIFA"); *id.* at section 4.1 ("[T]he Plaintiff indicated that the defendant's actions, which resulted in the failed purchase and sale, constituted acts of unfair competition."). *See also* Expert Report of Professor Fernández de Córdoba at para. 11 ("In an unfair competition claim... a claimant must show that the defendant used unfair or dishonest commercial practices that violate standards of fair dealing accepted within the industry and that the defendant acted with the intent to divert and in fact did divert customers from the claimant. It does not require and does not concern harm to the market or to competitive conditions as a whole, but rather harm to a particular competitor.").

¹¹⁴ Exhibit C-156, MSDIA's Brief of 28 July 2008, *NIFA v. MSDIA*, Court of Appeals, at section 3.1 ("The Fifth Transitional Provision of the Ecuadorian Intellectual Property Law, currently in force, provides that in disputes related to this subject (read: unfair competition) jurisdiction shall lie with the District Courts for Administrative Disputes."); *id.* at section 4.1 ("The District Courts for Administrative Disputes have exclusive jurisdiction over cases that involved unfair competition"). *See also* Expert Report of Professor Fernández de Córdoba at para. 34 (explaining that Ecuador's Law on Intellectual Property conferred exclusive jurisdiction over claims for unfair competition to administrative courts).

¹¹⁵ Exhibit C-157, NIFA's Brief of 9 October 2008, *NIFA v. MSDIA*, Court of Appeals, at 2 (emphasis added).

70. On 12 December 2008, after the parties' exchange of opening briefs, but prior to the evidentiary phase of the court of appeals proceedings, MSDIA filed a so-called "nullity petition," seeking dismissal of the case on the ground that the court of appeals, as an ordinary civil court, did not have jurisdiction over the unfair competition allegations upon which NIFA's complaint appeared to be predicated.¹¹⁶

71. In its answer to MSDIA's nullity petition, NIFA *agreed* that "***unfair competition cases must be judged by administrative law courts.***"¹¹⁷

72. NIFA argued, however, that the court of appeals had jurisdiction because NIFA's complaint *was not based on unfair competition*, but rather "seeks restitution for the anti-competitive actions ... taking advantage of [MSDIA's] dominant financial position," which NIFA argued were actionable under Article 244 of Ecuador's 1998 Constitution's "free-market competition ... guarantee[]." ¹¹⁸

"Contrary to what the defendant firm has maliciously claimed in an attempt to obtain a declaration of nullity a valid proceeding in which it was ordered to pay damages after the illegality of its actions was proven, ***the complaint was not lodged because of acts of unfair competition carried out by [MSDIA], but rather because of acts against free competition performed by said company through bad faith and disloyal tactics while taking advantage of its great economic power, which left [NIFA], a small company, in a situation of dependency upon the defendant.*** Through its actions, [MSDIA] sought to impose on [NIFA] contract clauses that eliminated its ability to compete, despite the fact that free-market competition was guaranteed under Article 244, Section 3 of the 1998 Constitution in force at that time, under penalty of suffering serious financial harm, since if my client did not accept said clauses, said corporation would deny it access to the new industrial plant, which by January, 2003 had become the only viable option for my client if it was to continue with its program to increase and diversify production.

"In this case the court is ruling on the illegality of the acts against free competition carried out by [MSDIA], for which said company must be punished for committing a civil offense against [NIFA]." ¹¹⁹

73. *NIFA then went on affirmatively to argue that the conduct upon which its complaint was predicated did not qualify as unfair competition.* NIFA characterized the notion that MSDIA's conduct constituted unfair competition as "absurd":

¹¹⁶ Exhibit C-161, MSDIA's Petition of 12 December 2008, *NIFA v. MSDIA*, Court of Appeals, at para. 38; Ponce Martínez Witness Statement at para. 29.

¹¹⁷ Exhibit C-164, NIFA's Brief of 23 January 2009, *NIFA v. MSDIA*, Court of Appeals, at 4 (emphasis added). *See also* Ponce Martínez Witness Statement at paras. 30-31.

¹¹⁸ Exhibit C-164, NIFA's Brief of 23 January 2009, *NIFA v. MSDIA*, Court of Appeals, at 2. *See also* Ponce Martínez Witness Statement at paras. 30-31.

¹¹⁹ Exhibit C-164, NIFA's Brief of 23 January 2009, *NIFA v. MSDIA*, Court of Appeals, at 3 (emphasis added).

“[T]he existence of acts of deceit **do not make the practices of [MSDIA] a type of unfair competition, as the defendant absurdly asserts.** Acts of unfair competition practices are intended to deprive a competitor of current or potential clients in order to secure that competitor’s clients. Competition exists, but it is not transparent; but rather, a competitor uses all types of sophistry to take clients away from other competitors. On the contrary, acts against free competition are intended to eliminate competition, whether by not allowing a competitor to compete in the market or by forcing it to leave the market.

“[MSDIA] sought to and got [NIFA] to not compete with it, by preventing [NIFA] from entering the market with a series of products it was developing in its research and development department ... **and thus took advantage of its market power and the position of dependency** in which my client found itself to try to impose upon my client an agreement not to produce various pharmaceutical products under penalty of being deprived of the industrial plant, which did in fact happen and which caused [NIFA] serious economic harm.

“Acts against free competition, which were defined as illegal by Article 244, Section 3 of the 1998 Constitution, are being judged on and no laws have been issued that impose criminal or administrative penalties [for such practices]; therefore, a civil judgment is the only recourse for obtaining restitution for the damages and losses sustained. **There is no law which assigns jurisdiction to a specialized court, as the Intellectual Property Law does where it provides that unfair competition cases must be judged by administrative law courts,** and therefore civil courts have jurisdiction [in this case].”¹²⁰

74. On 29 January 2009, without stating a clear rationale, the court of appeals issued a decree rejecting MSDIA’s nullity petition.¹²¹ Although purporting to reserve the right to address the jurisdictional issue in its final judgment (which it did not do), the court held that “the case has been accorded the processing due to an ordinary suit, as the plaintiff originally requested in the initial writings of the complaint, on the basis of which the record is declared valid for having complied with the requirements of the form.”¹²²

75. By rejecting MSDIA’s nullity petition, the court of appeals accepted NIFA’s characterization of its claim as an antitrust claim and not an unfair competition claim.¹²³ From that point in the litigation forward, the parties and the court of appeals all proceeded on the basis that NIFA’s claim asserted violations of antitrust principles and not a claim for unfair competition.¹²⁴

¹²⁰ Exhibit C-164, NIFA’s Brief of 23 January 2009, *NIFA v. MSDIA*, Court of Appeals, at 3-4 (emphasis added). See also Ponce Martínez Witness Statement at paras. 30-31.

¹²¹ Exhibit C-165, Court of Appeals Order of 29 January 2009, *NIFA v. MSDIA*, at 1. See also Ponce Martínez Witness Statement at para. 32.

¹²² Exhibit C-165, Court of Appeals Order of 29 January 2009, *NIFA v. MSDIA*, at 1.

¹²³ See Ponce Martínez Witness Statement at para. 32.

¹²⁴ See Ponce Martínez Witness Statement at paras 32, 34.

b) The evidentiary period

76. Following its rejection of MSDIA's nullity petition, the court of appeals (with Judge Toscano Garzón participating despite having handled the case in the trial court) proceeded to the merits of the case. Under Ecuadorian law, the court of appeals proceedings were conducted *de novo*, with a new evidentiary period and a new evaluation of all of the evidence and legal arguments presented by the parties without deference to the trial court's decision.¹²⁵

77. On 22 May 2009, the court of appeals decreed that there would be a ten-day evidentiary period, which would run between 25 May and 5 June 2009.¹²⁶ During that period, MSDIA submitted documentary evidence and fact and expert testimony demonstrating the absence of any basis for liability under antitrust law.¹²⁷

78. For example:

a. In response to the trial court's plainly erroneous finding that MSDIA's pharmaceutical plant was the only means available by which NIFA could expand its production at the time of the parties' negotiations, and that MSDIA abused its dominant market position to deprive NIFA of access to that facility, MSDIA requested that the court take the testimony of Mr. Norman Espinel, a respected Quito-based real estate broker and analyst.¹²⁸ Mr. Espinel's testimony conclusively established that a variety of alternatives existed at the time for NIFA to expand its production capacity. Citing public records, Mr. Espinel testified that NIFA was free to expand its own facility (which NIFA in fact had done following the negotiations), and that NIFA had owned a vacant lot near the MSDIA plant, on which it could have built and operated a pharmaceutical manufacturing facility more than three times the size of MSDIA's plant.¹²⁹ Mr. Espinel also identified a variety of other alternatives on the market between 2002 and 2004, including seven existing and properly zoned industrial plants, and hundreds of other structures and vacant lots.¹³⁰

b. MSDIA submitted the documentary evidence on which Mr. Espinel's testimony was based,¹³¹ and requested that the court appoint an expert to review the records and

¹²⁵ See Ponce Martínez Witness Statement at para. 33.

¹²⁶ Exhibit C-166, Court of Appeals Order of 22 May 2009, *NIFA v. MSDIA*, at 1 (opening evidentiary period); Ponce Martínez Witness Statement at para. 33.

¹²⁷ Ponce Martínez Witness Statement at para. 33.

¹²⁸ Exhibit C-167, MSDIA's First Petition of 25 May 2009, *NIFA v. MSDIA*, Court of Appeals, at 1 (requesting evidence).

¹²⁹ Exhibit C-169, Testimony of Norman Xavier Espinel Vargas, *NIFA v. MSDIA*, Court of Appeals, dated 26 May 2009, at 2-4. Indeed, as Mr. Espinel testified, NIFA already was permitted under applicable zoning laws to construct such a facility. Rather than do so, NIFA sold the lot in May 2003. *Id.* at 2-3.

¹³⁰ Exhibit C-169, Testimony of Norman Xavier Espinel Vargas, *NIFA v. MSDIA*, Court of Appeals, dated 26 May 2009, at 1-2.

¹³¹ Exhibit C-175, MSDIA's First Petition of 5 June 2009, *NIFA v. MSDIA*, Court of Appeals (requesting admission of evidence). Indeed, the court record already demonstrated that NIFA representatives were not only aware that alternatives to the MSDIA facility existed, but also frequently stated that NIFA was considering other options for

independently confirm Mr. Espinel's conclusions.¹³² The expert appointed by the court for that purpose, Mr. Manuel Silva, confirmed Mr. Espinel's testimony in all relevant respects, and added key findings beyond the scope of Mr. Espinel's testimony, including the fact that NIFA could have constructed a new plant similar in size to the MSDIA plant on the vacant lot it already owned for an amount comparable to the \$1.5 million tentative sales price of the MSDIA plant.¹³³

c. In response to the trial court's plainly erroneous finding that MSDIA had a dominant position in the Ecuadorian pharmaceutical market, MSDIA introduced data establishing the market shares of MSDIA, NIFA, and other participants in the pharmaceutical market, as well as information about the products offered for sale by NIFA and MSDIA and other relevant market data.¹³⁴ MSDIA's evidence—which included evidence that MSDIA's share of the overall Ecuadorian market was *less than 3%*—conclusively demonstrated that MSDIA did not have a dominant market position.¹³⁵

d. In response to the trial court's plainly erroneous conclusion that MSDIA had used the negotiations with NIFA as part of a complex scheme to prevent competitors from entering the market, MSDIA submitted documents generated during the negotiations, and requested testimony from a number of fact witnesses, that established conclusively that MSDIA had intended throughout the negotiations to sell the plant.¹³⁶

expanding its business. For example, on 20 June 2002, NIFA General Manager Miguel García explained to MSDIA that he was in discussions with the Ecuadorian pharmaceutical company Albanova for the purchase of its plant, and that Albanova's price was considerably lower. Exhibit C-129, Email chain between María Fernanda Andrade (Staubach) and Edgardo Jaén (Staubach) et al., dated 12 July 2002 (email from Ernesta Bello, dated 20 June 2002). That same day, NIFA told an MSDIA representative that NIFA was considering expanding the operation at its existing facility. *Id.* Even NIFA's own (and only) witness, former Staubach employee Anne Usher de Ranson, testified in the trial court that there were at least three other pharmaceutical plants (not including the Albanova plant) that went on sale at the same time as the MSDIA plant. Exhibit C-144, Testimony of Anne Kareen Renson [a/k/a Anne Usher de Ranson], *NIFA v. MSDIA*, Trial Court, dated 28 June 2004, at 4 (in response to Question 7).

¹³² Exhibit C-176, MSDIA's Second Petition of 5 June 2009, *NIFA v. MSDIA*, Court of Appeals, at 1-4.

¹³³ Exhibit C-23, Report of Manuel J. Silva Vásconez, *NIFA v. MSDIA*, Court of Appeals, dated 23 December 2009, at 9-10.

¹³⁴ Exhibit C-172, MSDIA's Petition of 4 June 2009, *NIFA v. MSDIA*, at 1-2 (attaching opinions of Walter Spurrier and Rolf Stern).

¹³⁵ Exhibit C-172, MSDIA's Petition of 4 June 2009, *NIFA v. MSDIA*, at 1-2.

¹³⁶ Exhibit C-167, MSDIA's First Petition of 25 May 2009, *NIFA v. MSDIA*, Court of Appeals, at 1 (requesting testimony of Fernando Bonilla (former MSD medical director) and Blanca Solís (Bonilla's assistant)); Exhibit C-171, MSDIA's Petition of 3 June 2009, *NIFA v. MSDIA*, Court of Appeals, at 1 (requesting testimony of Doris Pienknagura); Exhibit C-177, MSDIA's Third Petition of 5 June 2009, *NIFA v. MSDIA*, Court of Appeals (requesting that the court transmit letters rogatory through diplomatic channels for testimony to be taken from out-of-country witness Ernesta Bello (testimony to be taken in Washington, D.C.)); Exhibit C-178, MSDIA's Fourth Petition of 5 June 2009, *NIFA v. MSDIA*, Court of Appeals (similar request for Fabiana Lacerca (testimony to be taken in Washington, D.C.)); Exhibit C-179, MSDIA's Fifth Petition of 5 June 2009, *NIFA v. MSDIA*, Court of Appeals (similar request for Jacob Harel (testimony to be taken in New Jersey)); Exhibit C-180, MSDIA's Sixth Petition of 5 June 2009, *NIFA v. MSDIA*, Court of Appeals (similar request for Luís Eduardo Ortiz (testimony to be taken in Mexico City)); Exhibit C-181, MSDIA's Seventh Petition of 5 June 2009, *NIFA v. MSDIA*, Court of Appeals (similar request for Richard Trent (testimony to be taken in New Jersey)); Exhibit C-168, MSDIA's First

79. As it had done in the trial court, NIFA failed to provide any evidentiary support for its case. NIFA offered *no witness testimony* in the court of appeals proceedings, about either the failed negotiations or NIFA's purported damages.

80. Indeed, NIFA failed to offer *any evidence at all* bearing upon MSDIA's liability, despite the substantial evidence refuting liability offered by MSDIA.¹³⁷ In particular, although NIFA had repeatedly and emphatically stated that its claim was based on an alleged violation of antitrust law, NIFA did not purport to identify a relevant market in which MSDIA allegedly occupied a dominant position. NIFA also offered *no evidence at all* regarding barriers to entry in the Ecuadorian pharmaceutical market, the effects of MSDIA's conduct on that market, MSDIA's power to set prices independent of competitive pressure within that market, or MSDIA's ability to exclude competitors from that market.

81. With respect to its alleged lost profits, the only evidence NIFA submitted was an electronic spreadsheet containing "market data" and purported sales projections that NIFA claimed had been prepared by the market research company IMS-Ecuador.¹³⁸ The spreadsheet was accompanied by a one-page cover letter purportedly signed by an IMS-Ecuador employee,¹³⁹ but neither the letter nor the spreadsheet, nor any other evidence offered by NIFA, was certified¹⁴⁰ or meaningfully explained the data or the methodology behind the purported sales projections in the IMS-Ecuador spreadsheet.¹⁴¹

82. MSDIA informed the court that IMS-Ecuador previously had submitted certified market data to MSDIA, which was inconsistent with the market data reflected in the uncertified spreadsheet submitted by NIFA.¹⁴² MSDIA also pointed out to the court that the "methodology" tab contained in the spreadsheet revealed that much of the data contained in the spreadsheet had been supplied by NIFA, not by IMS-Ecuador.¹⁴³ MSDIA submitted the certified IMS-Ecuador data in its possession to the court in support of its case.¹⁴⁴

Petition of 26 May 2009, *NIFA v. MSDIA*, Court of Appeals, at 2-17 (requesting admission into evidence of emails, letters, and other documents generated during and after the parties' negotiation for the plant).

¹³⁷ See above at para. 78.

¹³⁸ Exhibit C-182, NIFA's First Petition of 5 June 2009, *NIFA v. MSDIA*, Court of Appeals, at 3-4 (describing electronic spreadsheet); Exhibit C-160, Letter from Iván Ponce (IMS-Ecuador) to NIFA, dated 9 December 2008; Ponce Martínez Witness Statement at para. 36.

¹³⁹ Exhibit C-182, NIFA's First Petition of 5 June 2009, *NIFA v. MSDIA*, Court of Appeals, at 3-4 (describing electronic spreadsheet); Exhibit C-160, Letter from Iván Ponce (IMS-Ecuador) to NIFA dated 9 December 2008; Ponce Martínez Witness Statement at para. 36.

¹⁴⁰ Exhibit C-185, MSDIA's Brief of 10 June 2009, *NIFA v. MSDIA*, Court of Appeals.

¹⁴¹ Ponce Martínez Witness Statement at para. 36.

¹⁴² Exhibit C-185, MSDIA's Brief of 10 June 2009, *NIFA v. MSDIA*, Court of Appeals, at 3 (stating objections to NIFA's IMS Study); Ponce Martínez Witness Statement at para. 36.

¹⁴³ Exhibit C-183, Spreadsheet submitted by NIFA, *NIFA v. MSDIA*, Court of Appeals, dated 5 June 2009, "Methodology" tab (noting that IMS "annualized NIFA's current products based on the percentages provided by the laboratory").

¹⁴⁴ Exhibit C-168, MSDIA's First Petition of 26 May 2009, *NIFA v. MSDIA*, Court of Appeals, at 1 (submitting data received by MSDIA from IMS-Ecuador).

83. Among other serious flaws, NIFA's spreadsheet included sales figures for NIFA that were greater than those reported by NIFA in its tax filings with the government of Ecuador, and it forecast significant sales for NIFA of multiple products protected by Merck patents.¹⁴⁵ Even more fundamentally, the spreadsheet did not even mention MSDIA or MSDIA's Chillos Valley plant.¹⁴⁶ Thus, it provided no basis for establishing damages caused by NIFA's failure to acquire MSDIA's Chillos Valley plant.¹⁴⁷

84. MSDIA requested that the court of appeals take the testimony of the IMS employee who NIFA claimed had signed the cover letter accompanying the spreadsheet, but the court refused.¹⁴⁸ The court declared that the spreadsheet was appropriately placed into the record and never addressed the remainder of MSDIA's objections.¹⁴⁹

c) Court-appointed experts

85. Under the rules of Ecuadorian procedure, a court may appoint experts to opine on specified issues at the request of a party. Generally, where possible, these court-appointed individuals have been "accredited" as experts in the relevant subject matter by the regional office of Ecuador's Council of the Judiciary.¹⁵⁰ If a party requests that the court appoint an expert in a subject matter for which there are no accredited experts, the court may seek recommendations from other bodies, such as a relevant Ecuadorian government ministry or trade association.¹⁵¹

The Court-Appointed Experts in Antitrust Law

86. Because NIFA argued that its complaint rested exclusively on a violation of antitrust law, and the court of appeals had accepted this position by rejecting MSDIA's nullity petition, MSDIA requested that the court appoint an expert in antitrust law to evaluate whether MSDIA could be held liable under antitrust principles.¹⁵² Although there were no accredited experts in antitrust law on Ecuador's Council of the Judiciary registry (presumably because Ecuador had

¹⁴⁵ See Exhibit C-184, MSDIA's Brief of 9 June 2009, *NIFA v. MSDIA*, Court of Appeals, at 2-3 (stating objections to NIFA's IMS Report); Exhibit C-185, MSDIA's Brief of 10 June 2009, *NIFA v. MSDIA*, Court of Appeals, at 3-4 (stating additional objections to NIFA's IMS Report). Like NIFA's "business plan," the spreadsheet included as "lost sales" projected sales of Rofecoxib. See *id.* See also *above* at para. 52.

¹⁴⁶ Ponce Martínez Witness Statement at para. 36.

¹⁴⁷ Ponce Martínez Witness Statement at para. 36.

¹⁴⁸ Ponce Martínez Witness Statement at para. 36; Exhibit C-185, MSDIA's Brief of 10 June 2009, *NIFA v. MSDIA*, Court of Appeals, at 3; Exhibit C-186, Court of Appeals Order of 23 June 2009, *NIFA v. MSDIA*, at 1 (rejecting MSDIA's request to question Iván Ponce of IMS-Ecuador).

¹⁴⁹ Ponce Martínez Witness Statement, at para. 36.

¹⁵⁰ See Exhibit CLM-24, Ecuadorian Code of Civil Procedure, art. 252.

¹⁵¹ See Exhibit CLM-24, Ecuadorian Code of Civil Procedure, art. 252.

¹⁵² MSDIA also requested that the court-appointed expert examine the conclusions of MSDIA's expert, a Peruvian antitrust expert named Dr. Diez Canseco, who opined that there was no competition law in place in Ecuador at the time of the parties' negotiations, that MSDIA did not hold a dominant position in any potentially relevant market, and that in any case MSDIA's actions were reasonable and not abusive. Exhibit C-176, MSDIA's Second Petition of 5 June 2009, *NIFA v. MSDIA*, Court of Appeals, at 13-18.

never had an antitrust law), the court of appeals requested recommendations for such an expert from the Ecuadorian Competition Authority.¹⁵³

87. In response, the Competition Authority provided three names to the court of appeals, one of whom was the internationally renowned Venezuelan competition lawyer, Dr. Ignacio De León.¹⁵⁴ Based on the Competition Authority's recommendation, the court appointed Dr. De León to serve as its independent expert in antitrust law in response to MSDIA's request.¹⁵⁵

88. Dr. De León concluded that:

a. The antitrust claims asserted by NIFA necessarily failed because *there were no applicable legal standards in place governing free competition* in Ecuador in 2002 or 2003.¹⁵⁶

b. Even if a prohibition against anticompetitive acts had been in effect in Ecuador, MSDIA's actions did not violate any accepted legal norm of competition law, because, among other things: (i) MSDIA did not hold a dominant position in the real estate or pharmaceutical markets¹⁵⁷; (ii) MSDIA had been under no obligation to sell its plant to NIFA, because (among other things) MSDIA's plant was not, as NIFA had claimed, an "essential facility"¹⁵⁸; and (iii) even if MSDIA had held a dominant position in a relevant market (which it did not), MSDIA had not committed any act that could be viewed as abusing such a position.¹⁵⁹

89. Shortly after Dr. De León filed his independent expert report, Dr. Carlos Guerra Román, an Ecuadorian intellectual property lawyer, filed an application with the Pichincha Provincial

¹⁵³ The Ecuadorian Competition Authority had been established in March 2009. *See* Exhibit C-19, Republic of Ecuador Executive Decree No. 1614, dated 14 March 2009.

¹⁵⁴ Exhibit C-22, Letter from Fausto E. Alvarado C., Ecuadorian Authority on Competition, to Lupe Veintimilla Zea, Court Reporter for the Court of Appeals, dated 29 June 2009. Another of the experts on antitrust law recommended to the court by the Competition Authority, Dr. Diego Petrecolli, an Argentinian antitrust expert, later served as an expert witness on the same issues for MSDIA, and supported the conclusions reached by Dr. De León. *See below* at paras. 96-97.

¹⁵⁵ Dr. De León has served previously as head of the Venezuelan Competition Authority. Exhibit C-215, Curriculum Vitae of Ignacio De León, Inter-American Development Bank. More recently, he has provided consulting services on competition policy to organizations such as the World Bank, UNCTAD, the Andean Community, and USAID. Exhibit C-24, Report of Ignacio De León, *NIFA v. MSDIA*, Court of Appeals, dated 12 February 2010, at 3.

¹⁵⁶ Exhibit C-24, Report of Ignacio De León, *NIFA v. MSDIA*, Court of Appeals, dated 12 February 2010, at 90, 96.

¹⁵⁷ Exhibit C-24, Report of Ignacio De León, *NIFA v. MSDIA*, Court of Appeals, dated 12 February 2010, at 95.

¹⁵⁸ Exhibit C-24, Report of Ignacio De León, *NIFA v. MSDIA*, Court of Appeals, dated 12 February 2010, at 60-61 ("**MSD was not in control of an asset, infrastructure, or good that was 'essential' to NIFA's production process.** The production facilities did not meet the requirements demanded by that doctrine . . .") (emphasis in original).

¹⁵⁹ Exhibit C-24, Report of Ignacio De León, *NIFA v. MSDIA*, Court of Appeals, dated 12 February 2010, at 78-81.

Director of the Council of the Judiciary seeking to be accredited as an antitrust expert.¹⁶⁰ MSDIA was not provided notice of, nor was aware of, Dr. Guerra's application at the time.¹⁶¹

90. Remarkably, Dr. Guerra's application reflected no prior experience or training in competition law whatsoever.¹⁶² Nevertheless, despite his complete lack of qualifications, the Council of the Judiciary approved Dr. Guerra's application on the very day it was submitted, 5 April 2010.¹⁶³

91. The actions of then-Council of the Judiciary Provincial Director, Marco Rodas Buchell, in accrediting Dr. Guerra, and of the court of appeals in appointing Dr. Guerra as a second "expert" on antitrust law, are strongly suggestive of improper influence. Among other things, as noted below, since the events at issue, Ecuador's Council of the Judiciary has concluded that Dr. Guerra was plainly unqualified to serve as an expert in competition law.¹⁶⁴

92. A month after Dr. Guerra's accreditation as an expert, on 11 May 2010, NIFA filed a petition asserting that Dr. De León had committed "essential error" and requesting the appointment of an additional antitrust expert to review Dr. De León's report.¹⁶⁵ In its petition, NIFA did not identify any actual errors committed by Dr. De León, but instead disagreed with his opinion that MSDIA could not be held liable to NIFA under any principle of Ecuadorian law and for any amount of damages.¹⁶⁶

93. Although Ecuadorian law requires that an "essential error" petition make a threshold evidentiary showing that the expert has committed an error, NIFA offered literally no

¹⁶⁰ Exhibit C-25, Application of Carlos Guerra Román for Expert Accreditation and accompanying Council of the Judiciary Accreditation, at 1-2; Ponce Martínez Witness Statement at para. 40.

¹⁶¹ Ponce Martínez Witness Statement at para. 40.

¹⁶² Exhibit C-25, Application of Carlos Guerra Román for Expert Accreditation and accompanying Council of the Judiciary Accreditation; Ponce Martínez Witness Statement at para. 40.

¹⁶³ Exhibit C-25, Application of Carlos Guerra Román for Expert Accreditation and accompanying Council of the Judiciary Accreditation, at 1-2 (application submitted by Dr. Guerra on 5 April 2010, and approved by then-Provincial Director of the Council of the Judiciary Marco Rodas Buchell the same day).

¹⁶⁴ See Exhibit C-58, Report of Ivan Escandón, Provincial Director of the Council of the Judiciary for Pichincha, dated 26 January 2012 (concluding that Dr. Guerra lacked the credentials required by Ecuadorian law to have been properly credited as an expert in competition law); Exhibit C-60, Memorandum from María Augusta Peña, Council of the Judiciary National Director of Legal Counsel, to Mauricio Jaramillo, Director General of the Council of the Judiciary, dated 30 April 2012, and Memorandum from Daniela Caicedo, Secretary to the Office of the Director General of the Council of the Judiciary, to Ivan Escandón, Provincial Director of the Council of the Judiciary for Pichincha, dated 4 May 2012 (same); Ponce Martínez Witness Statement at para. 45.

¹⁶⁵ Exhibit C-192, NIFA's Petition of 11 May 2010, *NIFA v. MSDIA*, Court of Appeals, at 1-2 (NIFA's Response to Ignacio De León). Under Ecuadorian procedure, a party may challenge the opinion of a court-appointed expert by filing a petition, supported by evidence, asserting that the expert has committed "essential error." At the request of the petitioning party, the court may open a limited evidence period, during which it will accept evidence from the parties regarding the alleged "essential error." During this evidence period, the court can appoint an expert with a limited mandate to review the report of the original expert and opine whether it contains an "essential error." If, with the benefit of such evidence, the court concludes that the expert in fact committed "essential error," then the court may appoint a second expert in the same subject matter. See Exhibit CLM-24, Ecuadorian Code of Civil Procedure, art. 258.

¹⁶⁶ Exhibit C-192, NIFA's Petition of 11 May 2010, *NIFA v. MSDIA*, Court of Appeals, at 48-50.

explanation or evidence in support of its request.¹⁶⁷ Nevertheless, on 8 December 2010, in response to NIFA’s request, the court of appeals (also without explanation) appointed Dr. Guerra to serve as a second antitrust expert.¹⁶⁸

94. On 14 February 2011, Dr. Guerra submitted a report concluding that Dr. De León had committed “essential error” and opining contrary to Dr. De León that MSDIA could be held liable under antitrust principles.¹⁶⁹ Dr. Guerra’s report included text that was obviously plagiarized from other sources without attribution, manifest analytical errors, misstatements of Ecuadorian law, and misapplications of broadly accepted antitrust principles.¹⁷⁰ Among other things, Dr. Guerra concluded absurdly that MSDIA’s plant had constituted an “essential facility,” a finding that made no sense whatsoever under recognized principles of antitrust law.¹⁷¹ Dr. Guerra also concluded, without citing any evidence, that MSDIA had a “dominant position” in the Ecuadorian market for pharmaceutical products.¹⁷²

95. Dr. Guerra plagiarized extensively from existing antitrust works without citation or attribution. Among others, Dr. Guerra plagiarized the work of an Argentinean economist and competition expert, Dr. Diego Petrecolla, a Latin American antitrust expert who—like Dr. De León—had been recommended to the court as an antitrust expert by Ecuador’s Competition Authority.¹⁷³ Dr. Guerra’s report misappropriated without attribution long passages from Dr. Petrecolla’s work and blatantly misapplied its principles.¹⁷⁴ Because he had been recommended

¹⁶⁷ Ponce Martínez Witness Statement at para. 38.

¹⁶⁸ Exhibit C-29, Court of Appeals Order of 8 December 2010, *NIFA v. MSDIA*.

¹⁶⁹ Exhibit C-32, Report of Carlos Guerra Román, *NIFA v. MSDIA*, Court of Appeals, dated 14 February 2011, at 99-102, 105.

¹⁷⁰ Ponce Martínez Witness Statement at para. 42.

¹⁷¹ Exhibit C-32, Report of Carlos Guerra Román, *NIFA v. MSDIA*, Court of Appeals, dated 14 February 2011, at 101-102. As Dr. De León properly concluded, in order for a resource to qualify as an “essential facility” as the concept is recognized in antitrust law, a facility must be controlled by a monopolist, it must constitute an input without which other firms cannot compete with the monopolist, and its reproduction must be impracticable for technical or financial reasons. Exhibit C-24, Report of Ignacio De León, *NIFA v. MSDIA*, Court of Appeals, dated 12 February 2010, at 60-63; *see also* Exhibit CLM-29, Abbott B. Lipsky, Jr. & J. Gregory Sidak, *Essential Facilities*, 51 Stan. L. Rev. 1187, 1211-1212 (1999); Exhibit CLM-30, Robert Pitofsky, Donna Patterson & Jonathan Hooks, *The Essential Facilities Doctrine Under U.S. Antitrust Law*, 70 Antitrust L.J. 443, 448-450 (2002). Moreover, the remedy where a facility is found to be “essential” under the doctrine is typically shared use of the essential resource in exchange for a reasonable royalty. Thus, the concept is most commonly associated with shared access to utility lines owned by a single enterprise. *See, e.g.*, Exhibit CLM-22, *MCI Commc’ns Corp. v. Am. Tel. & Tel. Co.*, 708 F.2d 1081, 1132-1133 (7th Cir. 1983) (requiring a telecommunications provider to provide access to the local service network, over which it held a monopoly, to competitors in long-distance services).

¹⁷² Exhibit C-32, Report of Carlos Guerra Román, *NIFA v. MSDIA*, Court of Appeals, dated 14 February 2011, at 100-102.

¹⁷³ Exhibit C-22, Letter from Fausto E. Alvarado C., Ecuadorian Authority on Competition, to Lupe Veintimilla Zea, Court Reporter for the Court of Appeals, dated 29 June 2009. Dr. Petrecolla has served as the Chief Economist for Argentina’s National Competition Commission and as Director of the Center for Regulatory Studies of the World Bank Institute. In addition, he has advised the governments of El Salvador, Costa Rica, Uruguay, and Ecuador on competition issues, and has served as a consultant on competition and utility regulation to the World Bank, Inter-American Development Bank, and UNCTAD. Exhibit C-35, Report of Diego Petrecolla, *NIFA v. MSDIA*, Court of Appeals, dated 10 March 2011, at 3.

¹⁷⁴ *See* Exhibit C-35, Report of Diego Petrecolla, *NIFA v. MSDIA*, Court of Appeals, dated 10 March 2011, at 5.

to the court of appeals by the Competition Authority, MSDIA asked Dr. Petrecolla to review the reports submitted by Dr. De León and Dr. Guerra and to submit to the court his own report, commenting on the work of the two court-appointed experts and offering his own opinion on the issues of antitrust law presented in the case.

96. On 11 March 2011, MSDIA submitted Dr. Petrecolla's report to the court of appeals. Dr. Petrecolla's analysis disclosed that Dr. Guerra had extensively plagiarized Dr. Petrecolla's own work; explained that Dr. Guerra had misused and misapplied that work and the applicable principles of competition law; and explained that Dr. Guerra's analysis and conclusions were wholly unfounded.¹⁷⁵

97. By contrast, Dr. Petrecolla concluded after a thorough analysis that Dr. De León's report and findings had reflected sound antitrust analysis and were entirely correct; namely, there was no possible basis to hold MSDIA liable to NIFA on the facts in the record, and in any event, NIFA had suffered no harm.¹⁷⁶

98. The court largely ignored the opinions of its own appointed expert, Dr. De León, and the other expert independently recommended to it by the Ministry of Competition, Dr. Petrecolla.¹⁷⁷ Instead, without explanation, the court adopted the findings of Dr. Guerra, who lacked any relevant training or experience in competition law, who had been accredited under highly questionable circumstances shortly after Dr. De León submitted his report, and whose analysis was largely plagiarized and lacked any grounding in the principles of competition law.¹⁷⁸

The Court-Appointed Experts in Real Estate

99. Because NIFA's damages theory depended entirely on its allegation that there was no other real estate in the Quito region suitable for a new plant (otherwise, NIFA obviously could have fulfilled whatever ambitions it had for expansion with a new plant at a different site), at MSDIA's request¹⁷⁹ the court of appeals appointed an expert in the Quito commercial real estate market, selecting Mr. Manuel J. Silva Vásquez.¹⁸⁰

100. As discussed above, based on uncontroverted documentary evidence, Mr. Silva's independent report concluded that NIFA had available to it *many* alternatives to MSDIA's small, aging factory. Given the availability of substitute properties, Mr. Silva's 23 December 2009 report demonstrated conclusively that NIFA could not have suffered significant injury from the failure of its attempted acquisition.

¹⁷⁵ Exhibit C-35, Report of Diego Petrecolla, *NIFA v. MSDIA*, Court of Appeals, dated 10 March 2011, at 5.

¹⁷⁶ Exhibit C-35, Report of Diego Petrecolla, *NIFA v. MSDIA*, Court of Appeals, dated 10 March 2011, at 5.

¹⁷⁷ Ponce Martínez Witness Statement at paras. 38, 42.

¹⁷⁸ Ponce Martínez Witness Statement at para. 51.

¹⁷⁹ See Exhibit C-176, MSDIA's Second Petition of 5 June 2009, *NIFA v. MSDIA*, Court of Appeals, at 1-4.

¹⁸⁰ Exhibit C-174, Court of Appeals Order of 5 June 2009, *NIFA v. MSDIA*, at 1.

101. Among Mr. Silva's findings were his conclusions that:

a. There were a number of existing, available, and properly zoned industrial plants, other structures, and vacant lots on which NIFA could have constructed a new facility after it ended the negotiations with MSDIA in January 2003.¹⁸¹

b. At least one other pharmaceutical plant was on the market in 2003 (owned by the Ecuadorian pharmaceutical company Albanova), and another facility available at the time was subsequently purchased by Pfizer and converted into a pharmaceutical manufacturing facility.¹⁸²

c. NIFA owned a vacant lot near the MSDIA plant, which it sold to another Ecuadorian company in May 2003, on which it had been permitted under the applicable zoning laws to build and operate a pharmaceutical manufacturing facility more than three times the size of MSDIA's plant.¹⁸³

d. NIFA had been free to expand its existing facility after the negotiations, and had in fact done so. It obtained a regularization permit in 2005 for 1,057 square meters of construction and obtained another permit for an additional 300 square meters' expansion in 2008.¹⁸⁴ Under applicable zoning laws in place in 2003, NIFA was free to build up to 29,000 square meters on its lot, which would have resulted in a facility far larger than the Chillos Valley plant.¹⁸⁵

102. Without explaining the basis for any objection to Mr. Silva or his conclusions, NIFA requested appointment of a new expert, and again without explanation, the court of appeals complied, appointing Mr. Marco V. Yerovi Jaramillo.¹⁸⁶ Mr. Yerovi then issued a report that (while not addressing the question of whether Mr. Silva committed an essential error—the *only question* posed to Mr. Yerovi) was more favorable to NIFA than Mr. Silva's report.¹⁸⁷ The court of appeals then simply ignored the existence of Mr. Silva's report and referred to certain observations in Mr. Yerovi's report—but notably did not acknowledge several key findings in

¹⁸¹ Exhibit C-23, Report of Manuel J. Silva Vásquez, *NIFA v. MSDIA*, Court of Appeals, dated 23 December 2009, at 1-6.

¹⁸² Exhibit C-23, Report of Manuel J. Silva Vásquez, *NIFA v. MSDIA*, Court of Appeals, dated 23 December 2009, at 1-2.

¹⁸³ Exhibit C-23, Report of Manuel J. Silva Vásquez, *NIFA v. MSDIA*, Court of Appeals, dated 23 December 2009, at 7-9.

¹⁸⁴ Exhibit C-23, Report of Manuel J. Silva Vásquez, *NIFA v. MSDIA*, Court of Appeals, dated 23 December 2009, at 7-8.

¹⁸⁵ Exhibit C-23, Report of Manuel J. Silva Vásquez, *NIFA v. MSDIA*, Court of Appeals, dated 23 December 2009, at 6-7, 9-10.

¹⁸⁶ Exhibit C-28, Court of Appeals Order of 26 October 2010, *NIFA v. MSDIA*.

¹⁸⁷ Exhibit C-30, Report of Marco V. Yerovi Jaramillo, *NIFA v. MSDIA*, Court of Appeals, dated 20 December 2010.

Mr. Yerovi's own report that agreed with Mr. Silva's report and undermined a finding of liability.¹⁸⁸

The Court-Appointed Experts in Damages

103. Earlier in the case, in response to NIFA's request for a court-appointed expert on damages,¹⁸⁹ the court of appeals appointed Dr. De León, who is an economist as well as an internationally recognized competition lawyer and scholar, to serve jointly as its expert on damages as well as on antitrust liability.¹⁹⁰ Dr. De León concluded that NIFA had suffered *no* damages from the failed acquisition, had failed to identify any illegal act that could have caused any damage, and had failed to support its allegations regarding lost profits, which were at best wholly speculative.¹⁹¹

104. As with the independent court-appointed antitrust and real estate experts whose conclusions supported a judgment in favor of MSDIA, the court on NIFA's unsupported request disregarded Dr. De León's conclusions regarding damages and appointed an unqualified person as a supplemental court-appointed "expert" to opine on the same issue.¹⁹² As its second expert on damages, the court of appeals appointed and eventually relied upon the opinion of Mr. Cristian Augusto Cabrera Fonseca, an Ecuadorian accountant.¹⁹³

105. As with Dr. Guerra's accreditation as a purported antitrust expert, Mr. Cabrera's application for accreditation as a damages expert demonstrated no prior experience in the relevant field of damages and lost profits analysis. And again like Dr. Guerra, as discussed below, Ecuador's Council of the Judiciary has since these events determined that Dr. Cabrera was unqualified to serve as an expert on damages.¹⁹⁴

106. On 21 June 2011, Mr. Cabrera submitted a report finding that NIFA was entitled to **\$204 million** in damages for lost profits, and that an additional damages award against MSDIA should be made in favor of "the Ecuadorian people" in the amount of more than **\$642 million**.¹⁹⁵

¹⁸⁸ Exhibit C-4, Court of Appeals Judgment, *NIFA v. MSDIA*, dated 23 September 2011, at 11. Notably, Mr. Yerovi's report did not conclude that Mr. Silva had committed essential error. The court of appeals also ignored evidence that NIFA had been in parallel negotiations for other potential manufacturing space at the same time it was negotiating with MSDIA—most notably, it considered the Albanova plant—and that NIFA had considered expanding its existing facility or building a new facility on open land instead of purchasing an existing one.

¹⁸⁹ Exhibit C-175, NIFA's First Petition of 5 June 2009, *NIFA v. MSDIA*, Court of Appeals, at 4-5.

¹⁹⁰ Exhibit C-24, Report of Ignacio De León, *NIFA v. MSDIA*, Court of Appeals, dated 12 February 2010, at 98; *see also* Exhibit C-40, MSDIA's Petition of 13 May 2011, *NIFA v. MSDIA*, Court of Appeals, at 1-3.

¹⁹¹ Exhibit C-24, Report of Ignacio De León, *NIFA v. MSDIA*, Court of Appeals, dated 12 February 2010, at 47-49, 98.

¹⁹² Ponce Martínez Witness Statement at paras. 38-39.

¹⁹³ As Dr. Ponce Martínez explains, the court of appeals offered conflicting and baseless explanations for its appointment of Mr. Cabrera. *See* Ponce Martínez Witness Statement at para. 39.

¹⁹⁴ *See below* at paras. 111-117.

¹⁹⁵ Exhibit C-42, Report of Cristian Augusto Cabrera Fonseca, *NIFA v. MSDIA*, Court of Appeals, dated 21 June 2011, at 22, 29.

107. Obviously, Mr. Cabrera’s report was wholly divorced from both accepted methodology for calculating lost profits and reality. Mr. Cabrera failed to identify any illegal act committed by MSDIA that had harmed NIFA, rendering it impossible to discern the basis on which he concluded NIFA had suffered any damages.¹⁹⁶ Absurdly, Mr. Cabrera included in his calculation of NIFA’s “lost sales” sales that, according to the source on which Mr. Cabrera purported to rely, NIFA **had actually made** between 2003 and 2008.¹⁹⁷ In other words, Mr. Cabrera contended that MSDIA should pay NIFA the value of sales NIFA actually made, as well as a huge volume of sales he (falsely) contended NIFA was deprived of making.

108. Moreover, Mr. Cabrera purported to calculate alleged damages to NIFA over an arbitrarily defined 15-year period ending in 2018, without providing any explanation or basis in fact as to how the unavailability of a single piece of property could possibly impose injury for such a long duration.¹⁹⁸

109. To reach his astronomical figures, Mr. Cabrera estimated NIFA’s profit margin during that 15-year period at nearly 50%—a profit margin more than **15 times** higher than NIFA’s historical margin, and **far exceeding the maximum profit margin on generic pharmaceutical products that was permitted under Ecuadorian law**.¹⁹⁹ And Mr. Cabrera made numerous other similarly indefensible and erroneous determinations, as plainly would be necessary to translate a very small company’s inability to purchase a small, generic facility valued by the parties at only \$1.5 million and sold for only \$830,000 into almost one billion dollars in purported injury.

110. On 15 July 2011, MSDIA filed a timely petition charging that Mr. Cabrera had committed essential error and providing a detailed basis for the charge, including the report of another well-qualified damages expert (Mr. Carlos Montañez Vásquez) who concluded that there was no conceivable basis for Mr. Cabrera’s calculation of NIFA’s supposed lost profits or harm to the Ecuadorian people.²⁰⁰ The court of appeals rejected MSDIA’s petition and refused to consider the report of Mr. Montañez.²⁰¹

¹⁹⁶ Ponce Martínez Witness Statement at para. 43.

¹⁹⁷ Exhibit C-44, Report of Carlos Montañez Vásquez, *NIFA v. MSDIA*, Court of Appeals, dated 15 July 2011, at 15-16 (analyzing the report submitted by Mr. Cabrera); Ponce Martínez Witness Statement at para. 43.

¹⁹⁸ Exhibit C-44, Report of Carlos Montañez Vásquez, *NIFA v. MSDIA*, Court of Appeals, dated 15 July 2011, at 11 (noting that “[Mr. Cabrera] does not list the technical reasons why he believes that fifteen years is a reasonable time to establish a sales forecast, when the usual practice is to do a five-year projection”); Ponce Martínez Witness Statement at para. 43.

¹⁹⁹ See, e.g., Exhibit C-44, Report of Carlos Montañez Vásquez, *NIFA v. MSDIA*, Court of Appeals, dated 15 July 2011, at 24; Ponce Martínez Witness Statement at para. 43.

²⁰⁰ Exhibit C-44, Report of Carlos Montañez Vásquez, *NIFA v. MSDIA*, Court of Appeals, dated 15 July 2011, at 2, 26. Mr. Montañez concluded that the only conceivable basis for damages identified by Mr. Cabrera was \$50,000 in consequential damages associated with costs NIFA claimed it incurred in connection with securing financing for purchasing MSDIA’s plant, but noted that NIFA appeared not to have introduced evidence into the record establishing those damages. *Id.* at 25-26.

²⁰¹ Exhibit C-45, Court of Appeals Order of 19 July 2011, *NIFA v. MSDIA* (rejecting MSDIA’s essential error petition regarding Mr. Cabrera’s report); Exhibit C-46, Court of Appeals Order of 1 August 2011, *NIFA v. MSDIA* (rejecting MSDIA’s request for reconsideration of its 19 July 2011 Order, on the ground that Mr. Cabrera was an essential error expert, reasoning that “there i[s] no procedural formula to prove essential error regarding another

The January 2012 Report Repudiating the Expert Accreditations of Dr. Guerra and Mr. Cabrera

111. Subsequent to the court of appeals' decision (which is discussed in the next section), the office entrusted with accrediting experts for appointment in judicial matters in the Province of Pichincha issued a report concluding that Mr. Cabrera and Dr. Guerra should never have been accredited as experts because their respective applications failed to demonstrate the requisite qualifications.²⁰²

112. The Provincial Director of the Council of the Judiciary for Pichincha, Dr. Iván Escandón, issued a report, dated 26 January 2012, which concluded, based on a review of Dr. Guerra's application materials and qualifications, that Dr. Guerra "has *scarse* knowledge and experience in intellectual property, unfair competition, competition law and damages law, [because] none of the certificates he has presented cover the aforementioned areas; *it is obvious that they are incompatible with the requirements to be deemed an expert.*"²⁰³ As to Mr. Cabrera, Dr. Escandón concluded that he "has not substantiated with any documentation, knowledge or experience his expertise with calculation of damages, consequential damage, lost profits or taxation. *It is not clear why he claimed to be an expert.*"²⁰⁴

113. Dr. Escandón's report confirmed what MSDIA had already established before the court of appeals: that Mr. Cabrera and Dr. Guerra never should have been appointed as experts in the case, and that, once appointed, the court of appeals never should have considered or relied upon their opinions. The court of appeals' decision to appoint two manifestly unqualified experts, in place of two other independently selected and highly distinguished experts was highly irregular. Indeed, the court of appeals' insistence on accepting and relying on the opinions of those experts, without any legal justification, and without addressing the numerous flaws in their opinions, demonstrated the court's predisposition to rule against MSDIA and in favor of the Ecuadorian plaintiff regardless of the facts and law.

114. On 30 April 2012, María Augusta Peña, an attorney for the Council of the Judiciary National Director of Legal Counsel, directed a memorandum to Dr. Mauricio Jaramillo, Director General of the Council of the Judiciary.²⁰⁵ The 30 April 2012 memorandum adopted and

essential error"). As Dr. Ponce Martínez explains, the court of appeal's stated reasoning for rejecting MSDIA's essential error petition could not be reconciled, as a matter of Ecuadorian procedure, with the court's order appointing Mr. Cabrera or the court's reliance on Mr. Cabrera's report in its judgment. *See* Ponce Martínez Witness Statement at para. 44 (concluding that "The Court's actions ... were contrary to law, and in my view, were clearly intended to benefit NIFA.").

²⁰² Exhibit C-58, Report of Iván Escandón, Provincial Director of the Council of the Judiciary for Pichincha, dated 26 January 2012. MSDIA alerted the National Court of Justice to Dr. Escandón's report on 23 February 2012; Exhibit C-59, MSDIA's Petition of 23 February 2012, *NIFA v. MSDIA*, NCJ; Ponce Martínez Witness Statement at para. 45.

²⁰³ Exhibit C-58, Report of Iván Escandón, Provincial Director of the Council of the Judiciary for Pichincha, dated 26 January 2012, at 2.

²⁰⁴ Exhibit C-58, Report of Iván Escandón, Provincial Director of the Council of the Judiciary for Pichincha, dated 26 January 2012, at 2.

²⁰⁵ Exhibit C-60, Memorandum from María Augusta Peña, Council of the Judiciary National Director of Legal Counsel, to Mauricio Jaramillo, Director General of the Council of the Judiciary, dated 30 April 2012.

confirmed Dr. Escandón’s earlier finding that the Council of the Judiciary of Pichincha should not have accredited Mr. Cabrera and Dr. Guerra as experts because their respective applications failed to demonstrate the requisite qualifications.²⁰⁶

115. Her memorandum therefore recommended that the Provincial Director be asked to “update the [list of] experts that are authorized at this time and to remove from the list those experts that are currently not authorized, so that only those experts that are suitable to fulfill this function are on the list.”²⁰⁷ It specifically recommended that the Provincial Director be directed to correct Mr. Cabrera’s accreditation “so that the aforesaid expert will be accredited [only] in the areas where he has experience”—*i.e.*, only in accounting.²⁰⁸ It did not make the same recommendation with respect to Dr. Guerra’s accreditation, however, because Dr. Guerra was no longer accredited as an expert at the time of the memorandum.²⁰⁹

116. Finally, Ms. Augusta Peña’s 30 April 2012 memorandum recommended that the relevant materials be sent to the Council of the Judiciary’s Disciplinary Audit Unit, “so that it can determine any possible responsibilities of the public servants and judicial servants, with respect to how the accreditation of [Mr. Cabrera] occurred.”²¹⁰

117. On 4 May 2012, the Secretary to the Office of the Director General of the Council of the Judiciary addressed a memorandum to Dr. Escandón, attaching the 30 April 2012 memorandum and directing Dr. Escandón to implement the recommendations contained therein.²¹¹ A memorandum addressed to Dr. Escandón on 31 May 2012 confirmed that Mr. Cabrera’s accreditation as an expert in damages and lost profits was revoked.²¹²

d) The court of appeals judgment

118. In late August 2011, while the case was still pending before the court of appeals, Ecuador’s Transitional Council of the Judiciary, which has oversight over the judiciary, announced that all of the sitting judges on Ecuador’s National Court of Justice would be replaced

²⁰⁶ Exhibit C-60, Memorandum from María Augusta Peña, Council of the Judiciary National Director of Legal Counsel, to Mauricio Jaramillo, Director General of the Council of the Judiciary, dated 30 April 2012, at 3. The 30 April 2012 memorandum found that Dr. Guerra “does not report sufficient experience to be considered as a specialist in ... unfair competition [or] right of competition ...” *Id.* at 2. It concluded that Mr. Cabrera “does not justify any experience ... in calculating damages, lost profit damages and taxation.” *Id.*

²⁰⁷ Exhibit C-60, Memorandum from María Augusta Peña, Council of the Judiciary National Director of Legal Counsel, to Mauricio Jaramillo, Director General of the Council of the Judiciary, dated 30 April 2012, at 3.

²⁰⁸ Exhibit C-60, Memorandum from María Augusta Peña, Council of the Judiciary National Director of Legal Counsel, to Mauricio Jaramillo, Director General of the Council of the Judiciary, dated 30 April 2012, at 3.

²⁰⁹ Exhibit C-60, Memorandum from María Augusta Peña, Council of the Judiciary National Director of Legal Counsel, to Mauricio Jaramillo, Director General of the Council of the Judiciary, dated 30 April 2012, at 3.

²¹⁰ Exhibit C-60, Memorandum from María Augusta Peña, Council of the Judiciary National Director of Legal Counsel, to Mauricio Jaramillo, Director General of the Council of the Judiciary, dated 30 April 2012, at 3.

²¹¹ Exhibit C-60, Memorandum from Daniela Caicedo, Secretary to the Office of the Director General of the Council of the Judiciary, to Iván Escandón, Provincial Director of the Council of the Judiciary for Pichincha, dated 4 May 2012.

²¹² Exhibit C-63, Memorandum from Wilson Rosero Gómez, Chief of Staff, to Iván Escandón, Provincial Director of the Council of the Judiciary for Pichincha, dated 31 May 2012.

in late January 2012.²¹³ Within weeks of that announcement, on 23 September 2011, the court of appeals issued a final judgment ratifying the trial court judgment and awarding NIFA **\$150 million** in supposed lost-profits damages for alleged antitrust violations.²¹⁴ The court of appeals held:

“The Court’s analysis reveals that the 1998 Constitution prohibited monopolistic practices and others that impede or distort competition. ... Any attempt against free competition affected a right and became a civil offence that imposes the obligation on the offender to repair the damage caused, pursuant to Article 2214 of the Civil Code. The defendant acted illegally and caused damages to the plaintiff, damages that are quantified, so it must be repaired through payment of compensation, under Article 1572 of the Civil Code. The defendant’s intent to harm appears from the analysis of the circumstances that surrounded the facts. It can be clearly seen in its actions. This claim contains all the elements necessary to create an obligation to pay compensation of damages to the plaintiff, since it has suffered a grave financial damage as an immediate and direct result of the defendant’s action, and the damage has been properly quantified. For the record, the defendant in this instance expressly waived the evidence aiming to dispel the grounds of the verdict in the first instance, as appears on page 9940 of the court orders. For the above considerations, ADMINISTERING JUSTICE ON BEHALF OF THE ECUADORIAN PEOPLE AND BY THE AUTHORITY OF THE CONSTITUTION AND THE LAW, the verdict is ratified regarding the grounds of the litigious matter, on the basis of the preceding analysis. It is amended regarding the amount of compensation which is set in one hundred and fifty million dollars, taking into account the delay in time in which this obligation will become effective and the international implications of this case.”²¹⁵

119. The timing of the decision was, at a minimum, remarkable. The *NIFA v. MSDIA* litigation had been pending in the court of appeals for nearly four years.²¹⁶ Moreover, at the time the court of appeals issued its judgment, there was a pending motion before the court for clarification of a prior ruling, which should have been ruled on prior to (and separately from) the final merits decision.²¹⁷ Under normal circumstances, the court would have decided on that motion and then waited at least three days prior to taking any further action in the case, during which time MSDIA would have been permitted to submit final arguments to the court of appeals.²¹⁸

²¹³ Exhibit C-47, *Process to Select the 21 National Judges as of Next Week*, EL UNIVERSO, 20 August 2011 (“As expected, the Transitional Judiciary Council (CJT) will hold the public hearing 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 of 2012.”); Ponce Martínez Witness Statement at para. 46.

²¹⁴ Exhibit C-4, Court of Appeals Judgment, *NIFA v. MSDIA*, dated 23 September 2011, at 16.

²¹⁵ Exhibit C-4, Court of Appeals Judgment, *NIFA v. MSDIA*, dated 23 September 2011, at 15-16.

²¹⁶ Ponce Martínez Witness Statement at para. 46.

²¹⁷ See Exhibit C-4, Court of Appeals Judgment, *NIFA v. MSDIA*, dated 23 September 2011, at 1; Ponce Martínez Witness Statement at paras. 47-48.

²¹⁸ Ponce Martínez Witness Statement at para. 47.

120. By issuing its judgment jointly with its decision on the pending motion, the court deprived MSDIA of an opportunity to request a final oral hearing or to submit a final brief.²¹⁹ This action appeared calculated to expedite the court of appeals' issuance of its judgment and to deny MSDIA the opportunity to present its final arguments in the case.²²⁰

121. The court of appeals' reasoning was even more bizarre. In its decision, the court expressly stated that it was ignoring all of the evidence that had been submitted by MSDIA throughout the proceedings. The court asserted that it was under no obligation to consider or address any of the evidence submitted by MSDIA because MSDIA purportedly had "expressly waived the evidence aiming to dispel the grounds of the verdict in the first instance."²²¹

122. In support of its claim that MSDIA had "expressly waived" all of the evidence it had submitted over the course of the proceedings in both the trial and appellate courts—including the testimony of 10 fact witnesses, a half-dozen expert reports, and hundreds of pages of documents—the court of appeals cited to a petition that MSDIA had filed on 16 April 2010, in which MSDIA withdrew a request it had made early in the proceeding for the appointment of a damages expert.²²² Far from "waiv[ing] the evidence aiming to dispel the grounds" for the trial court's verdict, MSDIA's petition made clear that it *was* relying on the evidence in the record.²²³

123. At the time MSDIA withdrew its request for appointment of a damages expert, Dr. De León had already been appointed to fulfill the same function pursuant to NIFA's request for appointment of a damages expert. MSDIA's withdrawal of a request for a redundant expert was plainly not a waiver of its reliance on all of the other evidence that already was in the record, and until the court of appeals' final opinion on the merits, no one—neither NIFA nor the court—had ever suggested that it could be so considered.

124. The court of appeals' decision also ignored NIFA's burden of proof on both liability and damages. For example, NIFA had alleged that MSDIA had a dominant market position—a key factual element of its antitrust claim²²⁴—but it had adduced no evidence to prove that allegation.²²⁵ To circumvent NIFA's complete failure of proof on an essential element of its

²¹⁹ Ponce Martínez Witness Statement at para. 48.

²²⁰ Ponce Martínez Witness Statement at para. 48 ("I believe that the court's actions were intended to deprive us of the right to seek a hearing and present our final arguments").

²²¹ Exhibit C-4, Court of Appeals Judgment, *NIFA v. MSDIA*, dated 23 September 2011, at 15.

²²² Exhibit C-26, MSDIA's Petition of 16 April 2010, *NIFA v. MSDIA*, Court of Appeals.

²²³ Ponce Martínez Witness Statement at para. 52 ("[T]he Court did not take into consideration any of MSDIA's evidence on the basis that MSDIA had supposedly waived its reliance on the evidence. I was shocked to see this in the Court's judgment. MSDIA obviously had not waived its reliance on the evidence. To the contrary, we had submitted documents and evidence from numerous witnesses and experts, and we had expressly relied on that evidence in defense of NIFA's claims. I could not understand how the court could even suggest that we had waived our reliance on the evidence we had submitted."). As Professor Páez, a former judge and an expert on Ecuadorian procedure explains, MSDIA clearly did not waive its reliance on its evidence. See Expert Report of Professor Páez, at para. 34 ("I have reviewed page 9940 of the record of the second instance proceeding, and I found *no indication that MSDIA had waived all of its evidence. ... I do not see any justification for the Court of Second Instance's finding that MSDIA abandoned or waived all of the evidence that it had presented.*") (emphasis added).

²²⁴ See Expert Report of Professor Fernández de Córdoba at paras. 38-39.

²²⁵ See Exhibit C-164, NIFA's Brief of 23 January 2009, *NIFA v. MSDIA*, Court of Appeals, at 2.

claim, the court of appeals simply asserted that this element of NIFA's claim "require[d] no proof":

"Merck Sharp & Dohme (Inter American) Corporation is a multinational company of great economic power, which operates worldwide and has a huge turnover. The defendant's ability and strength is a fact that *requires no proof, since it is public domain.*"²²⁶

125. The court of appeals identified no rule of procedure that allowed the court to consult "public domain" materials in order to relieve NIFA of its evidentiary burden to establish an element of its claim. Nor did the court of appeals identify any "public domain" materials it contended demonstrated MSDIA's purported "great economic power" in the Ecuadorian pharmaceutical (or any other) market. In fact, to the contrary, the evidence in the record (and the public domain) established conclusively that the Ecuadorian pharmaceutical market was *highly competitive* and that far from possessing any disproportionate market power, MSDIA had only a 3% market share in the Ecuadorian pharmaceutical market in 2002 (the time of the transaction at issue).²²⁷

126. Nor did the court of appeals offer any rationale or calculations in support of its \$150 million damages award. The court did not even attempt to explain how NIFA could have suffered damages that were *70,000 times* NIFA's annual profits in 2002 (\$2,165),²²⁸ *ten times* the gross annual sales (let alone profits) of the entire generic pharmaceutical market in Ecuador in 2002 (\$20.4 million),²²⁹ *\$187 million more* than NIFA's most implausibly optimistic evidence (the October 2002 business plan, which claimed that the MSDIA plant was worth \$12.9 million in profits to NIFA over ten years),²³⁰ and *100 times* the parties' agreed-upon price for the plant (\$1.5 million).

3. The NCJ Proceedings

a) Unusual Expedition of the Proceedings

127. Shortly after the court of appeals issued its decision on 23 September 2011, both MSDIA and NIFA filed cassation petitions in the court of appeals, the normal means of seeking review by Ecuador's National Court of Justice (NCJ).²³¹ MSDIA submitted its cassation petition on 13 October 2011, seeking reversal of the court of appeals' finding of liability and damages,²³² and

²²⁶ Exhibit C-4, Court of Appeals Judgment, *NIFA v. MSDIA*, dated 23 September 2011, at 13-14 (emphasis added); Ponce Martínez Witness Statement at para. 50.

²²⁷ Exhibit C-35, Report of Diego Petrecolla, *NIFA v. MSDIA*, Court of Appeals, dated 10 March 2011, at 7-8.

²²⁸ Exhibit C-20, Report of Rolf Stern, *NIFA v. MSDIA*, Court of Appeals, dated 4 June 2009, at 28.

²²⁹ Exhibit C-20, Report of Rolf Stern, *NIFA v. MSDIA*, Court of Appeals, dated 4 June 2009, at 16.

²³⁰ Exhibit C-21, Report of Walter Spurrier Baquerizo, *NIFA v. MSDIA*, Court of Appeals, dated 4 June 2009, at 3-4 (summarizing the unrealistic assumptions in NIFA's business plan).

²³¹ Exhibit C-198, MSDIA's Cassation Petition, *NIFA v. MSDIA*, Court of Appeal, dated 13 October 2011; Exhibit C-199, NIFA's Cassation Petition, *NIFA v. MSDIA*, dated 13 October 2011.

²³² Exhibit C-198, MSDIA's Cassation Petition, *NIFA v. MSDIA*, Court of Appeal, dated 13 October 2011. MSDIA's filing was entitled "Recurso de casacion," which translates to "Recourse of Cassation." The term

NIFA submitted its cassation petition on the same day, challenging the court of appeals' reduction of the damages award from \$200 million to \$150 million and the court of appeals' failure to award NIFA interest and fees.²³³ On 25 October 2011, the court of appeals admitted both parties' cassation petitions and referred the case to the NCJ.²³⁴ Seventeen days later, on 11 November 2011, the NCJ issued a decree formally admitting the case.²³⁵

128. The speed with which the case was referred by the court of appeals to the NCJ—whose judges were scheduled to be replaced in January 2012²³⁶—and then in turn admitted by the NCJ appears to have been unprecedented, and may have been the result of corrupt acts like those that likely occasioned the irrational judgments and unfair actions of the trial court and court of appeals.²³⁷ As far as MSDIA is aware, no other case in the NCJ's Civil Chamber ever had been referred to the court or accepted in such a short time period.²³⁸ Indeed, the NCJ accepted MSDIA's cassation petition while dozens of other, previously filed petitions were still awaiting the decision of the court as to acceptance.²³⁹

129. After the NCJ admitted MSDIA's cassation petition, the judges to whom the case was assigned—all of whom were losing their judicial appointments on the NCJ at the end of January—continued to expedite the case in unprecedented ways, apparently in order to enable them to issue a decision prior to their departure.²⁴⁰

“Recourse of Cassation” is understood to refer to a “petition” requesting that the NCJ review the case and setting forth all legal grounds for appeal. Accordingly, MSDIA hereinafter uses the term “cassation petition” to refer to its “Recourse of Cassation.”

²³³ Exhibit C-199, NIFA's Cassation Petition, *NIFA v. MSDIA*, Court of Appeals, dated 13 October 2011. As discussed below, in its cassation petition, NIFA primarily sought reinstatement of the trial court's \$200 million damages award. See *below* at para. 137.

²³⁴ Exhibit C-53, Court of Appeals Order of 25 October 2011, *NIFA v. MSDIA*.

²³⁵ Exhibit C-54, NCJ Order of 11 November 2011, *NIFA v. MSDIA*; Ponce Martínez Witness Statement at paras. 54-55.

²³⁶ Exhibit C-47, *Process to Select the 21 National Judges as of Next Week*, EL UNIVERSO, 20 August 2011

²³⁷ The court of appeals similarly fast-tracked its consideration of routine petitions for clarification of the judgment filed by both NIFA and MSDIA on 27 September 2011 (four days after the issuance of the court's judgment). The period of time that the court of appeals provided the parties to respond to each other's petitions for clarification was **three business days**. See Exhibit C-196, Court of Appeals Order of 30 September 2011, *NIFA v. MSDIA*, at 1 (ordering responses to petitions for clarification to be filed within “three days”). The court of appeals also issued an order **the day after MSDIA filed its response** (NIFA failed to file a response to MSDIA's petition), granting NIFA's request for clarification in part, and rejecting MSDIA's petition in full. See Exhibit C-197, Court of Appeals Order of 6 October 2011, *NIFA v. MSDIA*.

²³⁸ A search of the NCJ's records found that 84 cases were sent to the Civil Chamber of the NCJ between 20 October and 1 November 2011. Of those 84 cases, as of 3 August 2012, the Civil Chamber had ruled on the admissibility of only **five**. Witness Statement of María Belén Merchán Mera in support of MSDIA's Request for Interim Measures, dated 3 August 2012 (Merchán Witness Statement), and accompanying Table 1. The column of Table 1 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.

²³⁹ See Merchán Witness Statement, Table 1. See also Ponce Martínez Witness Statement at paras. 54-55.

²⁴⁰ Ponce Martínez Witness Statement at para. 58.

130. On 29 November 2011, eighteen days after its decree admitting the case, the NCJ set an oral hearing date for Monday, 12 December 2011.²⁴¹ So far as MSDIA is aware, the NCJ had never before issued an order setting an oral argument just eighteen days after admitting a civil case.²⁴² Nor is MSDIA aware of any other civil case in which the NCJ scheduled an oral argument to occur within one month of the admission of the case.

131. Moreover, at that time, the NCJ did not hear oral arguments on Mondays.²⁴³ As far as MSDIA is aware, this was the first oral hearing the Court ever had set for a Monday. An inspection of the NCJ's records for the five-month period between December 2011 and May 2012 revealed that no other cases were set for hearing on a Monday during that period.²⁴⁴

132. MSDIA requested to continue the hearing to a later date, invoking a commonly used statutory provision allowing a litigant to request postponement of an oral hearing date. In response, the NCJ continued the hearing by just two weeks, to Monday 26 December 2011, once again on a weekday never used for oral arguments and, more remarkable still, the day after Christmas. The timing of the hearing made it impossible for MSDIA's corporate representatives to attend the hearing. In fact, only two of the three NCJ judges presiding over the case attended the hearing.²⁴⁵

133. On 29 December 2011, just three days after the oral hearing in the NCJ, Ecuador's Attorney General sent a letter to the NCJ notifying it of this arbitration, which MSDIA had initiated on 29 November 2011.²⁴⁶ At that point, the unusual expedition of the *NIFA v. MSDIA* appeal immediately ceased. No further action was taken by the then-sitting NCJ judges before their terms expired several weeks later.²⁴⁷

134. As had been previously announced, on 25 January 2012, all of the judges on the National Court of Justice, including the three judges presiding over the *NIFA v. MSDIA* case, were removed and replaced. On 30 January 2012, the six judges of the new Civil Chamber were

²⁴¹ Exhibit C-55, NCJ Order of 29 November 2011, *NIFA v. MSDIA*, at 1 (“[S]et the Court Hearing ... for Monday, December 12, 2011, at 15:00 hours”).

²⁴² See Ponce Martínez Witness Statement at para. 56.

²⁴³ Ponce Martínez Witness Statement at paras. 56-57.

²⁴⁴ Merchán Witness Statement, Table 2 (showing the NCJ's Civil Chamber's hearing schedule between December 2011 and May 2012, and including the time and date of each hearing). Had the court set the hearing for a Tuesday or Thursday—its normal hearing days—the earliest available hearing date would have been in April 2012. Of course, the cases being scheduled for April 2012 had arrived at the court long before MSDIA's appeal. *Id.*, Table 2. 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*.

²⁴⁵ MSDIA's Ecuadorian counsel did attend and argue the case. Ponce Martínez Witness Statement at para. 60.

²⁴⁶ Exhibit C-202, Letter from Dr. Diego García Carrión (Attorney General of Ecuador) to Galo Martínez, Esq. (Presiding Judge of the Civil, Mercantile and Family Chamber of the NCJ), dated 29 December 2011, at 1 (informing the NCJ that, “[o]n December 2, 2011, the Attorney General of the State ... was notified of the existence of a dispute under the Bilateral Investment Treaty between the United States and Ecuador, by the company Merck Sharp & Dohme (Inter American), for alleged denial of justice, in regards to Case 2003-1022, for damages initiated by the company [NIFA].”).

²⁴⁷ Ponce Martínez Witness Statement at para. 59.

selected,²⁴⁸ and on or about 26 March 2012, three of the six judges assigned to the Civil Chamber were selected to preside over the *NIFA v. MSDIA* case.

b) The Parties' Cassation Petitions

135. Ecuador's cassation law sets out the exclusive grounds on which a party may appeal a judgment of a court of appeals to the NCJ.²⁴⁹ Under that law, the NCJ's mandate is limited to evaluating the grounds for appeal raised in the parties' cassation petitions.²⁵⁰

136. MSDIA's petition for cassation invoked all five grounds for appeal set forth in Ecuador's cassation law.

a. **First**, MSDIA challenged the failure of the lower courts to properly apply applicable legal standards, including through their failure to calculate damages in accordance with the proper legal standards and their misapplication of principles of free competition and Article 244, Number 3 of the 1998 Constitution to assess liability against MSDIA.²⁵¹

b. **Second**, MSDIA argued that the lower courts committed numerous procedural errors, including by failing to articulate the basis for their judgments and damages awards, failing to permit MSDIA to examine expert and lay witnesses, failing to resolve all pending requests and notify the parties that the case was ready for decision prior to issuing a judgment, exercising jurisdiction over a claim that sounded in unfair

²⁴⁸ Exhibit C-62, NCJ Order of 30 May 2012, *NIFA v. MSDIA* ("tak[ing] over" case between NIFA and MSDIA pursuant to "appoint[ment] by the Transitional Judicial Council, through Resolution 4-2012 of January 25, 2012; and the quorum of the National Court of Justice, through Resolution 1-2012 of January 30, 2012").

²⁴⁹ As explained in the Expert Report of Professor Páez, Ecuador's cassation law identifies five grounds upon which a cassation petition may be based: (1) "[u]ndue application, lack of application or misinterpretation of procedural rules, including mandatory case law precedents in the ruling or order which may have served as determinants in the part relative to provisions"; (2) "[u]ndue application, lack of application or misinterpretation of procedural rules where these may have vitiated the irremediable nullity process or may have resulted in defenselessness, provided that the foregoing may have influenced the ruling of the cause, and that the corresponding nullity may not have been legally validated"; (3) "[u]ndue application, lack of application or misinterpretation of the juridical precepts applicable to assessment of evidence, provided that these may have led to an incorrect application or the nonapplication of rules of law in the ruling or order"; (4) "[r]esolution, in the ruling or order, of matters not subject to the litigation or failure to resolve therein all the issues of the dispute"; and (5) "[w]here the ruling or order fails to contain the requirements stated by law or contradictory or incompatible decisions are adopted in its dispositive sections." See Expert Report of Professor Páez at paras. 12-13. See also Exhibit CLM-185, Cassation Act of Ecuador, dated 24 March 2004, art. 3 ("An appeal of cassation may only be based on the following causes of action"). MSDIA raised arguments under each of the five grounds for cassation set forth in the Cassation Act of Ecuador.

²⁵⁰ See Expert Report of Professor Páez at paras. 12-14, 22.

²⁵¹ Exhibit C-198, MSDIA's Cassation Petition, *NIFA v. MSDIA*, Court of Appeals, dated 13 October 2011, at paras. 29-37. In this regard, MSDIA invoked the first ground of Article 3 of the Cassation Law, which permits challenges based on "[i]mproper application, failure to apply, or erroneous interpretation of precepts of law, including mandatory case law precedents, in the judgment or order, which have been determinative in the holdings thereof." Exhibit CLM-185, Cassation Act of Ecuador, dated 24 March 2004, art. 3(1).

competition, and failing to rule only on evidence submitted by the parties.²⁵² MSDIA also argued that the lower courts improperly applied procedural standards by appointing a *second* damages expert, Cristian Cabrera Fonseca, *sua sponte*.²⁵³

c. **Third**, MSDIA challenged the lower courts' assessment of evidence, including the lower courts' consideration of Mr. Cabrera's purported expert report (despite the fact that Mr. Cabrera's appointment was contrary to law), the lower courts' heavy reliance on the testimony of NIFA's only witness (despite MSDIA being deprived of the opportunity to cross-examine that witness), and the court of appeals' decision to disregard *all* of MSDIA's evidence (on the false basis that MSDIA had waived its reliance on this evidence).²⁵⁴

d. **Fourth**, MSDIA objected to the court of appeals' failure to resolve issues that were raised in NIFA's complaint, including the question of which party terminated the parties' negotiations for the plant.²⁵⁵ MSDIA also objected to the court of appeals' reliance on issues that were not expressly invoked in the complaint, including the proposition that MSDIA abused a dominant position in the market for industrial plants.²⁵⁶

e. **Fifth**, MSDIA argued that the lower courts failed to resolve only the issues raised in the litigation, and to resolve those issues fully and clearly in a properly reasoned manner.²⁵⁷ In particular, MSDIA argued that the court of appeals purported to find the

²⁵² Exhibit C-198, MSDIA's Cassation Petition, *NIFA v. MSDIA*, Court of Appeals, dated 13 October 2011, at paras. 7, 12-21, 41-79. In this regard, MSDIA's arguments invoked the second ground of Article 3 of the Cassation Law, which permits a challenge based on an "[i]mproper application, failure to apply, or erroneous interpretation of procedural rules, when they have caused the proceeding to suffer from an incurable defect or have led to deprivation of due process, provided that they have influenced the decision in the case and that the respective nullification would not have been confirmed legally." Exhibit CLM-185, Cassation Act of Ecuador, dated 24 March 2004, art. 3(2). Citing the second ground of Article 3, MSDIA also argued that the lower courts committed other serious procedural errors, including by failing to obtain an interlocutory constitutional interpretation from Ecuador's Constitutional Court, failing to seek a pre-judgment interpretation on Andean Community antitrust standards from the Andean Court of Justice, and failing to grant MSDIA's request that the court of appeals consider arguments raised by MSDIA (not just arguments raised by NIFA). Exhibit C-198, MSDIA's Cassation Petition, *NIFA v. MSDIA*, Court of Appeals, dated 13 October 2011, at paras. 12-13, 16, 19.

²⁵³ Exhibit C-198, MSDIA's Cassation Petition, *NIFA v. MSDIA*, Court of Appeals, dated 13 October 2011, at paras. 59-61. MSDIA also invoked the second ground of Article 3 of the Cassation Law in support of this argument.

²⁵⁴ Exhibit C-198, MSDIA's Cassation Petition, *NIFA v. MSDIA*, Court of Appeals, dated 13 October 2011, at paras. 22-28. In this regard, MSDIA invoked the third ground of Article 3 of the Cassation Law, which permits a challenge based on "[i]mproper application, failure to apply, or erroneous interpretation the legal precepts applicable to the evaluation of evidence, provided that such has led to an erroneous application or the failure to apply rules of law in the judgment or order." Exhibit CLM-185, Cassation Act of Ecuador, dated 24 March 2004, art. 3(3).

²⁵⁵ Exhibit C-198, MSDIA's Cassation Petition, *NIFA v. MSDIA*, Court of Appeals, dated 13 October 2011, at para. 39. In this regard, MSDIA invoked the fourth ground of Article 3 of the Cassation Law, which permits challenges based on "[a] decision, in the judgment or order, on something that was not covered by the litigation or a failure to decide in it all parts of the *litis*." Exhibit CLM-185, Cassation Act of Ecuador, dated 24 March 2004, art. 3(4).

²⁵⁶ Exhibit C-198, MSDIA's Cassation Petition, *NIFA v. MSDIA*, Court of Appeals, dated 13 October 2011, at paras. 189-195.

²⁵⁷ Exhibit C-198, MSDIA's Cassation Petition, *NIFA v. MSDIA*, Court of Appeals, dated 13 October 2011, at paras. 38, 184-188. In this regard, MSDIA invoked the fifth ground of Article 3 of the Cassation Law, which permits

factual elements of a claim for antitrust law, despite the absence of any evidence to establish these elements.²⁵⁸

137. NIFA's cassation petition argued only that the court of appeals erred by awarding \$150 million (rather than the \$200 million awarded by the trial court), and by excluding interest and fees from its damages award.²⁵⁹ It did not suggest that liability should have been found on any basis other than that identified by the court of appeals, namely, antitrust.²⁶⁰ NIFA's cassation petition made no mention whatsoever of "unfair competition."²⁶¹

138. In response to MSDIA's cassation petition, NIFA again denied any reliance on a theory of liability grounded on unfair competition. NIFA also again expressly conceded that Ecuador's civil courts would not have had jurisdiction over an unfair competition claim:

"The claim filed by my client against [MSDIA] ***was not based on the unfair competition acts carried out by the defendant***; it was based on the acts against free competition it carried out. Thus, the allegations that the provisions of Article 346, paragraph 2 of the Civil Procedure Code and the Fifth Transitional Provision of the Intellectual Property Law [assigning jurisdiction of unfair competition claims to the administrative courts] were not applied are false [I]n this case the Fifth Transitional Provision of the Intellectual Property Law did not apply because said standard refers to cases of unfair competition and does not refer to acts against free-competition."²⁶²

139. Because the court of appeals had held MSDIA liable exclusively on antitrust grounds, ***neither party's cassation petition contained any discussion of the merits of a claim for unfair competition.***²⁶³

140. Under Ecuadorian procedural law, the NCJ was permitted to consider only the grounds expressly invoked in the parties' cassation petitions.²⁶⁴ MSDIA therefore reasonably expected that the NCJ would address only the legality of the court of appeals' decision imposing antitrust liability on MSDIA and its award of damages to NIFA.²⁶⁵

c) The NCJ Judgment

challenges "[w]hen the judgment or order does not contain the requirements set forth by the law or self-contradictory or incompatible decisions are taken in its holdings." Exhibit CLM-185, Cassation Act of Ecuador, dated 24 March 2004, art. 3(5).

²⁵⁸ Exhibit C-198, MSDIA's Cassation Petition, *NIFA v. MSDIA*, Court of Appeals, dated 13 October 2011, at paras. 38, 184-188.

²⁵⁹ Exhibit C-199, NIFA's Cassation Petition, *NIFA v. MSDIA*, Court of Appeals, dated 13 October 2011, at 6.

²⁶⁰ Expert Report of Professor Páez at para. 32.

²⁶¹ See Expert Report of Professor Páez at para. 29; Ponce Martínez Witness Statement at para. 60.

²⁶² Exhibit C-200, NIFA's Brief of 17 November 2011, *NIFA v. MSDIA*, Court of Appeals, at 11-12 (emphasis added).

²⁶³ Ponce Martínez Witness Statement at para. 60.

²⁶⁴ Expert Report of Professor Páez at paras. 12-14, 22; Ponce Martínez Witness Statement at para. 62.

²⁶⁵ Ponce Martínez Witness Statement at para. 62.

141. On 21 September 2012 (two weeks after the oral hearing on MSDIA’s request for interim measures of protection in this arbitration²⁶⁶), the National Court of Justice issued its final judgment.

142. The NCJ squarely rejected the court of appeals’ finding that MSDIA had committed an antitrust violation. First, it found that the court of appeals’ finding on liability was premised on the erroneous conclusion that MSDIA “ha[d] a dominant position in the market for industrial plants and it abused it, because the industrial plant that instigated this litigation was the only viable alternative for [NIFA].”²⁶⁷ The NCJ then concluded that the court of appeals judgment was “not duly reasoned” because it failed to substantiate any of the factual findings upon which it had predicated its finding of liability under antitrust law.²⁶⁸ Specifically, the NCJ held that:

a. The court of appeals did not “explain[] the legal basis for holding that the industrial plant that belonged to MERCK was the only possible alternative for [NIFA],”²⁶⁹ and thus it had failed to justify its conclusion that the pharmaceutical plant constituted an “essential facility” as a matter of antitrust law;

b. The court of appeals “d[id] not ... identif[y] ... the evidence that establishes that MERCK had a dominant position, that is more than 25% of the relevant market,”²⁷⁰ a prerequisite to a finding of liability as a matter of antitrust law; and

c. The court of appeals judgment “does not contain the proper identification of what the relevant market was.”²⁷¹

143. The NCJ thus concluded that there was no legal basis for a finding that MSDIA was liable for a violation of antitrust law.²⁷² Specifically, the NCJ held that, contrary to the court of

²⁶⁶ At that hearing, Ecuador repeated its position, set forth in detail in its prior submissions and based upon the opinion of its expert in Ecuadorian law and procedure, Dr. Juan Francisco Guerrero Del Pozo Guerrero, that the NCJ would not issue a decision in the case before December 2012, or January 2013 at the earliest. Hearing on Interim Measures, dated 4 September 2012, at 177:1-21,; *see also id.* at 104:8-15 (“due to working conditions and the backlog of cases, the National Court is unlikely to decide Claimant’s appeal before the 270-day deadline for doing so”); *id.* at 199:15-17 (“We also know that the National Court is facing a very large backlog. It’s like an hourglass, a lot of grains fighting through a narrow aperture.”).

²⁶⁷ Exhibit C-203, NCJ Judgment, *NIFA v. MSDIA*, dated 21 September 2012, at section 6.2 (emphasis omitted).

²⁶⁸ Exhibit C-203, NCJ Judgment, *NIFA v. MSDIA*, dated 21 September 2012, at section 6.1.1 (“The challenge based on this fifth cause of action is in fact supported on the fact that the judgment is not duly reasoned and that it contains conflicts”).

²⁶⁹ Exhibit C-203, NCJ Judgment, *NIFA v. MSDIA*, dated 21 September 2012, at section 6.1.1.

²⁷⁰ Exhibit C-203, NCJ Judgment, *NIFA v. MSDIA*, dated 21 September 2012, at section 6.1.1 (emphasis omitted).

²⁷¹ Exhibit C-203, NCJ Judgment, *NIFA v. MSDIA*, dated 21 September 2012, at section 6.1.1 (emphasis omitted).

²⁷² Specifically, the NCJ explained that “the event that gave rise to this conflict is an evidently civil matter, which had as its origin the failed purchase and sale of an industrial plant between two pharmaceutical companies, which matter in no way can affect all consumers and users in general in the country or of a sector *as would be the case of a real antitrust problem.*” Exhibit C-203, NCJ Judgment, *NIFA v. MSDIA*, dated 21 September 2012, at section 8.2 (original emphasis omitted and emphasis added). The NCJ further explained that the court of appeals judgment “does indeed suffer from serious defects of reasoning, *between the legal standards and principles on which it is based and the explanation of the pertinence of their application to the specific facts that are disputed between the parties.*” *Id.* at section 6.4 (emphasis omitted). Accordingly, the NCJ held:

appeals’ purported definition of the relevant market, “there is no ‘relevant market for industrial plants suitable for the pharmaceutical industry’ in the country ... but even if such relevant market for industrial plants might theoretically exist, it would not in any case have anything to do with the corporate objective of pharmaceutical companies.”²⁷³ The NCJ also held that it “*obviously is not the case*” that MSDIA had “an alleged dominant position and therefore market power over the relevant market for industrial plants.”²⁷⁴

144. The NCJ further held that the court of appeals’ massive damages awards lacked any credible basis, applying two exclamation points (“!!”) to communicate its view that the award was wholly indefensible:

“[T]he aforementioned Chamber of the Provincial Court with its erroneous conceptualizations, has set a compensation of US\$ 150,000,000.00 for a failed negotiation to sell an industrial plant, whose final offer was for US\$ 1,500,000.00. That is, with an amount that is equal to one hundred (100) times the value of the industrial plant that was the subject of the failed negotiation!!”²⁷⁵

145. Having concluded that there was no legal basis for the court of appeals’ decision on liability or damages, the NCJ should have vacated the court of appeals judgment and directed that judgment be entered in favor of MSDIA.²⁷⁶

146. But the NCJ did not in fact simply vacate the court of appeals judgment and dismiss NIFA’s claim. Instead, the NCJ constructed a new and entirely different legal basis for liability, which was not presented in the parties’ cassation petitions and was not considered by the court of appeals. Specifically, acting *sua sponte*—despite NIFA’s repeated express renunciations of the theory—the NCJ held that MSDIA was liable on a theory of unfair competition:

“This Court of Cassation therefore considers, in accordance with the cited doctrine, that it faces an action, not of Antitrust Law as has already been explained, but rather a tort case,

“For all of the foregoing reasons, and without it being necessary to consider the other causes of action for cassation claimed by the parties, this Court of Cassation believes that the challenged judgment is covered by the fifth cause of action of Article 3 of the Law of Cassation, because when it was reasoned it resorts to an incorrect explanation and application of the concept of a ‘relevant market’ belonging to ‘Antitrust Law,’ to a litigation circumscribed to the scope of ‘Civil Law’ and ‘Unfair Competition Law.’

Furthermore, the challenged judgment also engaged in the fourth cause of action of Article 3 of the Law of Cassation, by deciding a matter outside of the plaintiff’s claims; that is, *extra petita*, by declaring that [MSDIA] had a dominant position in the market for industrial plants and that it abused it, so long as indeed [NIFA’s] complaint did not make such arguments, but rather on damages and losses from a tort, that arose from acts of unfair competition; and also, *ultra petita*, by deciding on compensation calculated for 15 years, while the complaint only claimed a delay in production of 2 years.”

Exhibit C-203, NCJ Judgment, *NIFA v. MSDIA*, dated 21 September 2012, at section 10 (emphasis omitted).

²⁷³ Exhibit C-203, NCJ Judgment, *NIFA v. MSDIA*, dated 21 September 2012, at section 9.1 (emphasis omitted).

²⁷⁴ Exhibit C-203, NCJ Judgment, *NIFA v. MSDIA*, dated 21 September 2012, at section 9.2.1 (emphasis added). As the NCJ explained, the Ecuadorian plaintiff had failed to “demonstrate[] that MERCK sought to acquire the majority of storehouses, industrial plants, warehouses or properties in general in the country or in an entire province” *Id.*

²⁷⁵ Exhibit C-203, NCJ Judgment, *NIFA v. MSDIA*, dated 21 September 2012, at section 16.2 (emphasis omitted).

²⁷⁶ Expert Report of Professor Páez at paras. 22-32.

for damages and losses derived from other practices that prevent or distort competition, within the commercial concept that the doctrine of the Law of Unfair Competition (not ‘antitrust’ law), it classifies it as unfair competition, for acts of disorganization of a competitor, because of a refusal to sell.”²⁷⁷

147. This of course was precisely the ground that had repeatedly been foresworn by NIFA, that NIFA had conceded its factual allegations would not support, and that NIFA had conceded lay outside the jurisdiction of the courts in which it had pursued its claim.²⁷⁸

148. In order to establish a basis for MSDIA’s liability for an act of unfair competition without at the same time dismissing the matter for lack of jurisdiction, the NCJ held that Article 244, Number 3, of Ecuador’s 1998 Constitution, dealing with antitrust principles, also encompassed claims for unfair competition:

“Merck unquestionably committed ‘other practices that prevent and distort’ competition, as explained in paragraph 8.1 and others, which affected a negotiation of a civil nature, giving rise to the occurrence of a tort, pursuant to Article 244, number 3, of the Political Constitution of 1998 then in effect, and Articles 2214 and 2229, first paragraph, of the Civil Code, with the corresponding damages and injuries to be compensated to [NIFA] within what legal doctrine knows as a competitor’s acts of disruption, because of the refusal to sell, in the Law of Unfair Competition.”²⁷⁹

149. Prior to the NCJ’s decision in this case, no court or other authority had ever suggested that Article 244, Number 3 addressed anything other than antitrust law and specifically had never suggested that it could be interpreted to include acts of unfair competition.²⁸⁰ To the contrary, as both parties had agreed throughout the proceedings, “unfair competition” was exclusively a rubric within Ecuador’s Law on Intellectual Property, subject to the jurisdiction of Ecuador’s administrative courts.²⁸¹ As Professor Oyarte explains in his Expert Report, the plain language

²⁷⁷ Exhibit C-203, NCJ Judgment, *NIFA v. MSDIA*, dated 21 September 2012, at section 14.1 (emphasis omitted). *See also id.* at section 16.14 (holding that MSDIA “engaged in practices that prevented or distorted competition to the detriment of [NIFA] as indicated especially in point 8.1 and the fourteenth and fifteenth clauses of this judgment: **which gives rise to a tort, within what legal doctrine recognizes in Unfair Competition Law, as acts of disorganization of a competitor, because of a refusal to sell.**”) (emphasis in original).

²⁷⁸ *See above* at paras. 71-73, 138. *See also* Expert Report of Professor Páez, at paras. 24-28.

²⁷⁹ Exhibit C-203, NCJ Judgment, *NIFA v. MSDIA*, dated 21 September 2012, at section 15 (emphasis omitted). *See also id.* at section 8.1 (interpreting the phrase “other practices” in Article 244, Number 3 of Ecuador’s 1998 Constitution to refer to practices “which do not necessarily enter into the field of generally affecting the entire market of consumers and users, but rather that would give rise more to constituting specific torts, through other practices within the Law of Unfair Competition”) (emphasis omitted); *id.* at 46 (ordering MSDIA to “indemnify [NIFA] for damages and losses, pursuant to Article[] 244, number 3, of the Political Constitution of 1998, and Articles 2214 and 2229 of the Civil Code, for the tort of refusing to sell by acts of disruption of the competitor within the Law of Unfair Competition”).

²⁸⁰ *See* Expert Report of Professor Oyarte at para. 25.

²⁸¹ *See above* at paras. 68-71.

and drafting history of Article 244, Number 3 of Ecuador's 1998 Constitution make clear that the provision *does not* address principles of unfair competition.²⁸²

150. Moreover, in order to hold MSDIA liable for unfair competition, the NCJ relied on findings of fact and allegations set forth in the court of appeals' judgment,²⁸³ even though (as explained above) the factual record before the court of appeals had been tainted by manifest bias, one-sided procedural rulings, and repeated deprivations of MSDIA's due-process rights – including most notably, the court of appeals' decision to entirely disregard all of the evidence introduced and relied on by MSDIA.²⁸⁴ In light of the procedural irregularities that tainted the factual record in the court of appeals, and that resulted in that court's factual findings, the NCJ's own procedures required that it reach its own factual findings after conducting an independent review of the factual record below.²⁸⁵ The NCJ, however, failed to do so.

151. Specifically, the NCJ stated that, in support of its judgment on unfair competition, “in lieu of the one that is repealed [*i.e., for antitrust*], this Court of Cassation *refers to the following facts that can be found in the challenged judgment.*”²⁸⁶ The NCJ then proceeded to rely on the court of appeals' rendition of the parties' positions and the court of appeals' factual findings, without *any acknowledgment or consideration* of the substantial countervailing evidence that MSDIA had adduced in the lower courts, or any attempt to review independently the factual record.²⁸⁷ Although MSDIA had included as a ground in its cassation petition the fact that the court of appeals had *refused to consider any of MSDIA's evidence*, the NCJ did not even acknowledge that the factual findings of the court of appeals were based only on the Ecuadorian plaintiff's evidence.²⁸⁸

152. Because it is based on the court of appeals' findings of fact and renditions of the parties' positions, the NCJ's finding on liability is infected with the due process violations, corruption and other irregularities that characterize the proceedings and decision of the court of appeals.²⁸⁹

153. Having found MSDIA liable for unfair competition, the NCJ then assessed damages. The NCJ held that the \$150 million damages award entered by the court of appeals “lacks all proportion”²⁹⁰ and is “manifestly illogical.”²⁹¹ The court therefore disregarded the court of appeals' decision altogether and instead undertook a *de novo* calculation of damages, arriving at a figure of \$1.57 million in what it deemed “lost opportunity.”²⁹²

²⁸² Expert Report of Professor Oyarte at paras. 7, 14-20. *See below* at paras. 352-355.

²⁸³ Expert Report of Professor Páez at paras. 33-37.

²⁸⁴ *See above* at paras. 121-123. *See also* Expert Report of Professor Páez at paras. 19-20, 37.

²⁸⁵ *See* Expert Report of Professor Páez at paras. 35.

²⁸⁶ Exhibit C-203, NCJ Judgment, *NIFA v. MSDIA*, dated 21 September 2012, at section 11 (emphasis added).

²⁸⁷ Exhibit C-203, NCJ Judgment, *NIFA v. MSDIA*, dated 21 September 2012, at section 11.1-11.6.

²⁸⁸ *See above* at paras. 150-152. *See also* Expert Report of Professor Páez at paras. 33, 35.

²⁸⁹ *See* Expert Report of Professor Páez at para. 37. *See also* Exhibit C-203, NCJ Judgment, *NIFA v. MSDIA*, dated 21 September 2012, at section 15.

²⁹⁰ Exhibit C-203, NCJ Judgment, *NIFA v. MSDIA*, dated 21 September 2012, at section 16.2 (emphasis omitted).

²⁹¹ Exhibit C-203, NCJ Judgment, *NIFA v. MSDIA*, dated 21 September 2012, at section 16.6 (emphasis omitted).

²⁹² Exhibit C-203, NCJ Judgment, *NIFA v. MSDIA*, dated 21 September 2012, at sections 16.11, 16.13, 16.15.

d) Enforcement of the NCJ Judgment

154. The NCJ judgment against MSDIA was final and immediately enforceable under Ecuadorian law. There remained no further civil process by which MSDIA (or NIFA) could appeal or defend against enforcement of the judgment.²⁹³

155. The judgment of the NCJ was served on the parties on 24 September 2012.²⁹⁴ On 22 October 2012, the NCJ issued a further decree in response to requests for clarification of the judgment, which had been filed by the parties three days after the judgment issued.²⁹⁵ Upon the issuance of the 22 October 2012 decree, the NCJ's jurisdiction over the matter came to an end, and the judgment was remanded to the trial court for execution.

156. On 28 November 2012, just over one month after the clarification decree, the trial court issued a decree ordering MSDIA to satisfy the NCJ judgment within 24 hours.²⁹⁶ In compliance with the order from the trial court, MSDIA paid the \$1.57 million NCJ judgment against it the following day; it was necessary to do so to avoid execution on the judgment, which could have severely impacted MSDIA's on-going business.²⁹⁷

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

157. Although the *NIFA v. MSDIA* litigation is over, and MSDIA has paid the judgment against it that was the final product of that litigation, NIFA has initiated another legal proceeding in Ecuador that threatens additional damage to MSDIA in violation of Ecuador's treaty obligations. Specifically, on 19 November 2012, after the judgment of the NCJ had been sent to the trial court for enforcement, NIFA filed in Ecuador's Constitutional Court an "Extraordinary Action for Protection" against the NCJ judges, alleging that the decision of the NCJ violated Ecuador's Constitution.²⁹⁸

158. An Extraordinary Action for Protection is a unique procedure, created by Article 437 of the Ecuador's 2008 Constitution.²⁹⁹ Under that provision, parties can apply to Ecuador's Constitutional Court to seek remedies for alleged violations of constitutional rights effectuated by final, enforceable decisions of any other Ecuadorian court.³⁰⁰ According to Article 58 of the Organic Law of Jurisdictional and Constitutional Guarantees (the "Organic Law"):

²⁹³ See Second Expert Report of Dr. Jaime Ortega Trujillo, dated 3 August 2012, at paras. 8, 11.

²⁹⁴ Exhibit C-203, NCJ Judgment, *NIFA v. MSDIA*, dated 21 September 2012, at 1 (stating, in the Cover Decree dated 24 September 2012, that the NCJ judgment of 21 September 2012 had been "[r]eviewed in relation to the current case by the Honorable Judges Dr. Alvaro Ojeda Hidalgo, Maria Rosa Merchan Larrea and Paulina Aguirre Suarez. Quito, September 21, 2012").

²⁹⁵ Exhibit C-204, NCJ Order of 22 October 2012, *NIFA v. MSDIA*.

²⁹⁶ Exhibit C-207, Trial Court Order of 28 November 2012, *NIFA v. MSDIA*, at 1.

²⁹⁷ Exhibit C-208, MSDIA's Submission of Payment, *NIFA v. MSDIA*, Trial Court, dated 29 November 2012, at 1; Exhibit C-209, Trial Court Order of 29 November 2012, *NIFA v. MSDIA*.

²⁹⁸ Exhibit C-205, NIFA's Extraordinary Action for Protection, Constitutional Court, dated 19 November 2012.

²⁹⁹ Expert Report of Professor Oyarte at paras. 34-38.

³⁰⁰ Expert Report of Professor Oyarte at paras. 34-38

“The purpose of an extraordinary action for protection is to protect constitutional rights and due process in judgments, final orders, resolutions with force of judgment, in which the rights recognized in the Constitution have been violated by action or omission.”³⁰¹

159. NIFA’s Extraordinary Action for Protection is not an appeal of the NCJ judgment.³⁰² Under Ecuadorian law, it is a distinct action, legally separate from the NIFA v. MSDIA litigation, over which Ecuador’s Constitutional Court has exclusive jurisdiction.³⁰³ MSDIA is not a party to the proceedings.³⁰⁴ The action was initiated by NIFA against the judges of the Civil Chamber of the NCJ who issued the decision.³⁰⁵ The initiation of NIFA’s Extraordinary Action for Protection does not have any impact on the enforceability of the NCJ judgment, which, as discussed above, was remanded to the trial court, and which MSDIA has already paid as ordered by that court.³⁰⁶

160. In its Extraordinary Action for Protection, NIFA seeks “the full reparation of [NIFA’s] constitutional rights that have been violated” and “punitive compensation ... set according to the damage caused to [NIFA]”³⁰⁷—in other words, a damages award against MSDIA equivalent to the \$150 million damages award entered by the court of appeals, and, apparently, an additional amount in the form of “punitive compensation.”³⁰⁸ Thus, although MSDIA is not a party to NIFA’s Extraordinary Action for Protection, MSDIA’s rights may be substantially and materially affected by that proceeding.

D. Ecuador’s System of Justice is Notoriously Corrupt, Ineffective, and Lacking in Due Process

161. The circumstances surrounding the litigation between MSDIA and NIFA are, regrettably, not isolated events in Ecuador. Rather, a host of sources, including Ecuador itself, have repeatedly and decisively concluded that Ecuador’s system of justice is corrupt, ineffective and lacking in independence and due process.

³⁰¹ Exhibit CLM-193, Ecuador Organic Law of Jurisdictional and Constitutional Guarantees, art. 58. . See also Expert Report of Professor Oyarte at para. 36 & n. 11.

³⁰² Expert Report of Professor Oyarte at para. 37 (“The extraordinary action for protection thus brings about a new, independent proceeding, and is not a stage of the earlier proceedings.”).

³⁰³ Expert Report of Professor Oyarte at para. 37

³⁰⁴ Expert Report of Professor Oyarte at para. 35 (explaining that “[t]he other litigant in the underlying proceeding is not a party to the extraordinary action for protection”).

³⁰⁵ Expert Report of Professor Oyarte at para. 35 (“[T]he claimant whose rights were adversely affected by a final judicial decision initiates the action against the judge, tribunal, or court that issued the challenged decision.”).

³⁰⁶ Expert Report of Professor Oyarte at para. 38. *See also* Ecuador’s Rejoinder in Opposition to Claimant’s Request for Interim Measures, at p. 39, n. 138 (“[I]t is true that [the] filing of an appeal with the Constitutional Court would not suspend the execution of an adverse judgment by the National Court of Justice.”) (emphasis added); Second Report of Moscoso Serrano at para. 19 (stating that “the filing of a protective action [in the Constitutional Court] **does not prevent enforcement of the ruling** . . .”) (emphasis added).

³⁰⁷ Exhibit C-205, NIFA’s Extraordinary Action for Protection, Constitutional Court, dated 19 November 2012, at section VI.

³⁰⁸ Exhibit C-205, NIFA’s Extraordinary Action for Protection, Constitutional Court, dated 19 November 2012, at section VI.

162. Non-governmental organizations have consistently concluded that Ecuador's judiciary is corrupt and lacking in independence. The World Justice Project Rule of Law Index 2012-2013 ranked Ecuador 85 out of the 97 countries it reviewed in "[c]ivil [j]ustice," and its 2012 report concluded that Ecuador "underperforms the majority of Latin American countries in most dimensions of the rule of law," and that civil courts in Ecuador are "inefficient, and vulnerable to corruption and political interference."³⁰⁹

163. The World Economic Forum's Global Competitiveness Report for 2012-2013 ranked Ecuador 128 out of 144 countries in judicial independence,³¹⁰ and 130 out of 144 countries in "efficiency of legal framework in settling disputes."³¹¹ As it had in prior years, the report identified "corruption" as the "most problematic factor[] for doing business" in Ecuador.³¹²

164. Transparency International consistently ranks Ecuador near the bottom for corruption among countries it surveys in the region. Ecuador ranked 118 out of 176 countries surveyed for Transparency International's 2012 Corruption Perceptions Index and received a score of 32 out of 100, where a score of 100 indicates the lack of corruption.³¹³

165. Human Rights Watch reported in 2013 that "[c]orruption, inefficiency, and political influence have plagued Ecuador's judiciary for years. Despite a judicial reform program that the Correa administration initiated in 2011, political influence in the appointment and conduct of judges remains a serious problem."³¹⁴

166. The U.S. Department of State has consistently warned that "[c]orruption is a serious problem in Ecuador,"³¹⁵ and that "in practice the [Ecuadorian] judiciary was susceptible to outside pressure and corruption."³¹⁶ Most recently, it has concluded that "[c]orruption was widespread, and questions continued regarding transparency within the judicial sector, despite attempts at procedural reform."³¹⁷

³⁰⁹ Exhibit C-219, World Justice Project, Rule of Law Index 2012-2013, at 45, 84. The report covers 97 countries and jurisdictions, measuring nine dimensions of the rule of law (sub-categorized into 48 indicators): limited government powers; absence of corruption; order and security; fundamental rights; open government; regulatory enforcement; civil justice; criminal justice; and informal justice. The scores for the Index are based on assessments of the general public and local legal experts.

³¹⁰ Exhibit C-218, World Economic Forum, The Global Competitiveness Report 2012-2013, at 157.

³¹¹ Exhibit C-218, World Economic Forum, The Global Competitiveness Report 2012-2013, at 157.

³¹² Exhibit C-218, World Economic Forum, The Global Competitiveness Report 2012-2013, at 156. *See also* Exhibit C-99, World Economic Forum, The Global Competitiveness Report 2011-2012, at 166.

³¹³ Exhibit C-210, Transparency International, Corruption Perceptions Index 2012, at 3.

³¹⁴ Exhibit C-216, Human Rights Watch, World Report 2013, at 229.

³¹⁵ Exhibit C-217, U.S. Department of State, 2013 Investment Climate Statement: Ecuador, at 8; Exhibit C-33, U.S. Department of State, 2011 Investment Climate Statement: Ecuador, at 5.

³¹⁶ Exhibit C-214, U.S. Department of State, 2012 Country Report on Human Rights Practices: Ecuador, at 9. 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>.

³¹⁷ Exhibit C-214, U.S. Department of State, 2012 Country Report on Human Rights Practices: Ecuador, at 1.

167. A recent State Department report concluded that:

“While the constitution provides for an independent judiciary, in practice the judiciary was susceptible to outside pressure and corruption. The media reported on the susceptibility of the judiciary to bribes for favorable decisions and faster resolution of legal cases. Judges occasionally reached decisions based on media influence or political and economic pressures.”³¹⁸

168. The most recent State Department report to speak on the issue of Ecuador’s judiciary concluded that “[s]ystemic 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.”³¹⁹ The report further explained that:

“The Ecuadorian judicial system is hampered by processing delays, unpredictable judgments in civil and commercial cases, inconsistent rulings, and limited access to the courts. ...

“Concerns have been raised in the media, and by the private sector, that Ecuadorian courts may be susceptible to outside pressure and are perceived as corrupt, ineffective, and protective of those in power. ... The resource-starved judiciary continues to operate slowly and inefficiently. After a public referendum in May 2011, the judiciary is operating under an emergency decree that gives the executive branch power to restructure the judiciary. ... Neither legislative oversight nor internal judicial branch mechanisms have shown a consistent capacity to investigate effectively and discipline allegedly corrupt judges. ...

“Ecuador has laws and regulations to combat official corruption, but they are inadequately enforced. Illicit payments for official favors and theft of public funds reportedly take place frequently. Dispute settlement procedures are complicated by the lack of transparency and inefficiency in the judicial system.”³²⁰

169. The conclusions in 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 (a predecessor to the NCJ) due to allegations by a former congressman that they requested a \$500,000 bribe to issue a favorable ruling.³²¹ A leading Ecuadorian newspaper reported that from 2006 to 2009, more than *one-third* of Ecuadorian judges were sanctioned for corruption or other impropriety.³²² In 2007, the Ecuadorian Civic Committee against Corruption

³¹⁸ Exhibit C-214, U.S. Department of State, 2012 Country Report on Human Rights Practices: Ecuador, at 9.

³¹⁹ Exhibit C-217, U.S. Department of State, 2013 Investment Climate Statement: Ecuador, at 4.

³²⁰ Exhibit C-217, U.S. Department of State, 2013 Investment Climate Statement: Ecuador, at 4, 8.

³²¹ Exhibit C-76, U.S. Department of State, 2006 Country Report on Human Rights Practices: Ecuador, at 4.

³²² Exhibit C-93, *CJ Acknowledges Deficiencies in Judge Oversight*, EL UNIVERSO, 22 June 2009.

released 197 videos showing administrative personnel within the judiciary improperly receiving money for services.³²³

170. Human Rights Watch reported in 2013 that:

“In November 2011, six expert observers from Argentina, Brazil, Chile, Guatemala, Mexico, and Spain, chaired by Spanish Judge Baltazar Garzón, convened to monitor and make recommendations on the process of judicial reform [in Ecuador]. The observers reported in May 2012 that replacements would have to be found for 2,903 judges and court officials, over 1,500 of whom were removed after disciplinary proceedings, poor evaluations, or forced retirements. Many were replaced by temporary appointees without appropriate training.”³²⁴

171. Ecuador’s own government recognizes the catastrophic failings of the Ecuadorian judiciary. In 2009, the President of the Civil and Criminal Commission of the Ecuadorian National Assembly stated, simply, “[o]ur system of justice has completely collapsed.”³²⁵

172. President Rafael Correa has commented publicly that Ecuador needs to purge the judicial system of “corrupt and negligent judges.”³²⁶ 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.***”³²⁷ Commenting on judicial reform efforts instituted in 2011, he has said that “to restructure ***the barbarity that is our judicial system*** is an enormous challenge.”³²⁸ ***On 6 September 2011—just weeks before the court of appeals’ decision in the NIFA case—President Correa declared a judicial emergency in Ecuador.***³²⁹

173. 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. Soon after the appointment of a new Constitutional Tribunal in November 2007, the President of the Supreme Court proclaimed, “***the judicial and constitutional reality the country lives in is a partial***

³²³ Exhibit C-74, Freedom House, *Countries at the Crossroads 2007*, Country Report: Ecuador, at 19.

³²⁴ Exhibit C-216, Human Rights Watch, *World Report 2013*, at 229.

³²⁵ Exhibit C-91, *Justicia colapsada (Justice at a Standstill)*, LA HORA, 16 April 2009, at 1.

³²⁶ Exhibit C-105, *The Transitional Council Was Not Installed*, EL UNIVERSO, 22 July 2011, at 1.

³²⁷ Exhibit C-110, *President Correa: They Wanted to Disparage the Government and They Could Not*, OPINIÓN, 13 November 2011, at 2 (emphasis added); Exhibit C-100, *Correa Reiterates That He Will Lay Hands on the Court and His Campaign for Yes*, EL UNIVERSO, 26 January 2011.

³²⁸ Exhibit C-101, *Correa Anticipates That He Will Not Be Able to Completely Change Justice*, EL UNIVERSO, 23 February 2011 (emphasis added) (“Tener 18 meses un consejo tripartito para reestructurar esa barbaridad que es el sistema de justicia es un desafío enorme.”).

³²⁹ Exhibit C-48, Executive Decree No. 872, dated 5 September 2011, at 4.

*reality; we do not fully live in a state of law.*³³⁰ On 22 June 2010, Ecuador’s Council of the Judiciary declared that “*the Judicial Branch is not independent.*”³³¹

174. In short, the Ecuadorian judiciary is plagued by systematic corruption and institutional instability.

E. There Is Strong Evidence That the NIFA v. MSDIA Litigation Was Influenced by Judicial Corruption

175. There are overwhelming indicia of corruption among the judges assigned to the *NIFA v. MSDIA* litigation in the trial court and court of appeals, and that the judgments in those courts were procured corruptly by the plaintiff. Indeed, years after the trial court judgment was issued, the judge responsible for issuing the judgment admitted that she had been “tricked” into ruling against MSDIA by the first judge that presided over the trial court proceedings, and conceded that her judgment was a “terrible sentence” that had not been issued in accordance with the rule of law.³³²

176. As explained below, official Ecuadorian government reports found that the principal in NIFA—Miguel García Costa—had bribed government officials in connection with another investment. Further, the judges responsible for issuing the judgments against MSDIA in both the trial court and the court of appeals have been investigated and disciplined by the Ecuadorian government for acts of corruption in other cases and for allowing improper influence in their judicial decisions. Thus, the plaintiff and judges were found to be corrupt actors, and the extraordinary outcomes in this case cannot be explained based upon the facts and the law. The conclusion that corruption produced these results is inescapable.

1. NIFA’s General Manager, Miguel García Costa, Has a Documented History of Bribing Government Officials

177. NIFA’s General Manager, Miguel García Costa, has been publicly described in Ecuador as a corrupt figure with a history of bribing government officials.

178. In or around 1987, Mr. García was the subject of a criminal investigation in connection with a bribery scheme involving a contract between another company owned by him, Ecuahospital, and Ecuador’s Ministries of Industries and Health. Ecuahospital had been awarded a contract valued at two billion Sucres (approximately US \$13.7 million)—which included an advance of 140 million Sucres (approximately US \$1 million)—to build infrastructure to store and distribute medicines.³³³ The terms of the contract were unreasonably favorable to

³³⁰ Exhibit C-154, *Roberto Gómez Mera: “No vivimos en toda su plenitud un estado de derecho”*, EL PAÍS, 10 February 2008 (emphasis added).

³³¹ Exhibit C-98, Resolution No. 043-2010, *From the Judiciary Council to the Nation*, dated 22 June 2010, at 1 (emphasis added).

³³² Witness Statement of Marcelo Alberto Santamaría Martínez, dated 30 September 2013 [hereinafter Santamaría Martínez Witness Statement], and attached report.

³³³ Exhibit C-64, *Market Indicators*, WASHINGTON POST, 6 January 1987 (assuming exchange rate on 5 January 1987).

Ecuahospital. Further, Ecuahospital was awarded the contract despite not having a single license to distribute medicines in Ecuador.

179. 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 Mr. García. Among the allegations under investigation was that Ecuahospital, under Mr. García'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. Mr. García was convicted of bribery and sentenced to a three-year prison term.³³⁴ As has occurred in the case of other convictions in Ecuador, however, the conviction of Mr. García subsequently was vacated.³³⁵

180. In 2007, an Ecuadorian governmental “Truth Commission” was created by executive decree to investigate crimes against humanity in Ecuador from 1984 to 1988.³³⁶ In 2010, the Commission issued a report, in which it identified the Ecuahospital case, involving Mr. García, as among the most significant criminal matters of the second half of the 1980s.

181. The Commission's Report discussed the circumstances of the case at length, including the bribery allegations against Mr. García, 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 denouncing/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/capture 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

³³⁴ See Exhibit C-118, Order of 11 March 1991, President of the Supreme Court of Justice, at 10.

³³⁵ See Exhibit C-117, Order of June 1994, Supreme Court of Justice (entering an order of acquittal in favor of Miguel García Costa).

³³⁶ 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, Executive Decree No. 305, dated 3 May 2007, at 2.

the Minister of Industries Ricardo Noboa because Ecuahospital refused to explain the allocations it made of the advance payment.”³³⁷

182. In 2013, Human Rights Watch criticized the Ecuadorian government for its failure to hold Mr. García and others identified in the Truth Commission Report accountable, noting that as of November 2012, only one perpetrator had been charged out of the 118 cases identified in the report.³³⁸

2. Judge Chang-Huang, Who Issued the Trial-Court Judgment, Was Subsequently Removed from Her Judicial Post for Wrongdoing

183. During her relatively short tenure as a judge,³³⁹ Temporary Judge Chang-Huang, who was appointed to the *NIFA v. MSDIA* case to replace the previous trial court judge, Juan Toscano Garzón, 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 was found to have committed serious violations during her tenure as a temporary judge.

184. On 1 July 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, ... hav[ing] persons in the Court ... 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.***”³⁴⁰

185. Following her removal, the Council continued to process complaints brought against Temporary Judge Chang-Huang in connection with her service as a judge, and concluded that she engaged in additional instances of serious wrongdoing. In one 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

³³⁷ Exhibit C-94, Report of the Truth Commission, Volume 2: Crimes Against Humanity, Ecuador 2010, at 36 (emphasis added and citations omitted).

³³⁸ Exhibit C-216, Human Rights Watch, World Report 2013, at 228-229.

³³⁹ Temporary Judge Chang-Huang was appointed on 17 September 2007. See Exhibit C-3, Trial Court Judgment, *NIFA v. MSDIA*, dated 17 December 2007, at 1. As discussed below, she was removed for wrongdoing on 1 July 2010.

³⁴⁰ 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 2010.

various provisions of the Judiciary Act.³⁴¹ In that complaint, a court clerk described Temporary Judge Chang-Huang's practice of selling "raffle tickets" out of her office. The clerk described lawyers visiting Temporary Judge Chang-Huang's office in connection with her "raffle":

"[D]ifferent attorneys ... would request that I submit the 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."³⁴²

186. The clerk also described Temporary Judge Chang-Huang's irregular 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 often witnessed her *asking 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"³⁴³

187. The Council 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."³⁴⁴

188. Remarkably, Temporary Judge Chang-Huang has herself acknowledged that her decision in the *NIFA v. MSDIA* litigation was not made on the merits.

³⁴¹ Exhibit C-190, Temporary Judge Chang-Huang Personnel File, Disciplinary File No. Mot-099-UCD-010-MAC, file opened 9 April 2010, at para. 1.2.

³⁴² Exhibit C-190, Temporary Judge Chang-Huang Personnel File, Disciplinary File No. Mot-099-UCD-010-MAC, file opened 9 April 2010, at para. 6.1.9 (emphasis added and quotation marks omitted).

³⁴³ Exhibit C-190, Temporary Judge Chang-Huang Personnel File, Disciplinary File No. Mot-099-UCD-010-MAC, file opened 9 April 2010, at para. 6.1.9 (emphasis added and quotation marks omitted).

³⁴⁴ Exhibit C-190, Temporary Judge Chang-Huang Personnel File, Disciplinary File No. Mot-099-UCD-010-MAC, file opened 9 April 2010, at para. 9; Exhibit CLM-91, Ecuador Judiciary Act, art. 109(11) (emphasis added). In another 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 timely to enforce a judgment rendered by a higher court for several years after exercising jurisdiction over the case, and noted that she had "a history of a similar violation" in the year 2000. Exhibit C-194, Temporary Judge Chang-Huang Personnel File, Disciplinary File No. Mt 235-UCD-010-CJ, Decision of 12 January 2011, at 8. The Council concluded that Temporary Judge Chang-Huang's actions violated the "*principle of integrity*," as set forth in Article 21 of the Judiciary Act. See Exhibit C-190, Temporary Judge Chang-Huang Personnel File, Disciplinary File No. Mot-099-UCD-010-MAC, file opened 9 April 2010, at para. 8. See also Exhibit CLM-90, Ecuador Judiciary Act, art. 21.

189. In the years following her decision, Temporary Judge Chang-Huang has made multiple, conflicting statements to MSDIA representatives in an effort to rationalize her conduct in connection with the *NIFA v. MSDIA* case, or to deflect the blame to others. Most recently, during a meeting with MSDIA attorney Marcelo Santamaria in March 2012, the now-former Temporary Judge Chang-Huang claimed, remarkably, that she *never intended to issue the \$200 million decision in favor of NIFA*.³⁴⁵ She accused the original trial court judge, Judge Toscano Garzón (who presided over the case before her at the trial level and was subsequently elevated to the court of appeals, where he presided over the *NIFA* appeal during the evidence term), and her former clerk, Ricardo López, of playing a “dirty trick” on her.³⁴⁶ According to Temporary Judge Chang-Huang, Mr. López and Judge Toscano Garzón had prepared the decision, after which Mr. López obtained her signature without her realizing what she was signing.³⁴⁷

190. In the same conversation with Dr. Santamaria, Temporary Judge Chang-Huang expressed disbelief that the court of appeals had not reversed her judgment, explaining that she had expected one of the judges, Dr. Beatriz Suárez, to “fix” the error that Judge Chang-Huang admitted she made.³⁴⁸

191. Temporary Judge Chang-Huang had told a different—though also incriminating—story in September 2008. According to the testimony of two witnesses in a litigation related to the *NIFA* matter, 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.³⁴⁹ 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.”³⁵⁰ Temporary Judge Chang-Huang claimed that she decided the *NIFA* case in the way she did because of that pressure,³⁵¹ 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.³⁵² In that discussion, Temporary Judge Chang-Huang conceded—again, without

³⁴⁵ See Santamaría Martínez Witness Statement, and attached report; Ponce Martínez Witness Statement at paras 24-25.

³⁴⁶ See Santamaría Martínez Witness Statement, and attached report; Ponce Martínez Witness Statement at paras 24-25.

³⁴⁷ See Santamaría Martínez Witness Statement, and attached report; Ponce Martínez Witness Statement at paras 24-25. Temporary Judge Chang-Huang claimed at the time of her meeting with Dr. Santamaria that she was willing to cooperate with MSDIA to correct the injustice, but later failed to appear at an arranged meeting with MSDIA’s Ecuadorian attorneys. *Id.*

³⁴⁸ See Santamaría Martínez Witness Statement, and attached report; Ponce Martínez Witness Statement at paras 24-25.

³⁴⁹ Exhibit C-89, Testimony of María Cristina Ponce Villacís, *MSDIA v. Chang-Huang*, dated 4 December 2008, at 2 (in response to Question 9).

³⁵⁰ Exhibit C-88, Testimony of Jorge Antonio Pinos Pérez, *MSDIA v. Chang-Huang*, dated 4 December 2008, at 2 (in response to Question 9). See also Exhibit C-89, Testimony of María Cristina Ponce Villacís, *MSDIA v. Chang-Huang*, dated 4 December 2008, at 2 (in response to Question 9).

³⁵¹ Exhibit C-88, Testimony of Jorge Antonio Pinos Pérez, *MSDIA v. Chang-Huang*, dated 4 December 2008, at 3 (in response to Question 17).

³⁵² Exhibit C-89, Testimony of María Cristina Ponce Villacís, *MSDIA v. Chang-Huang*, dated 4 December 2008, at 2-3 (in response to Questions 11 and 15); Exhibit C-88, Testimony of Jorge Antonio Pinos Pérez, *MSDIA v. Chang-*

provocation—that she decided cases based only on a superficial review of the file,³⁵³ and that she was relieved that MSDIA had appealed her decision because she was “off the hook.”³⁵⁴

192. Although the full circumstances surrounding the issuance of Temporary Judge Chang-Huang’s decision are not yet entirely clear, those facts which have emerged are damning. 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; that the case was decided without *any consideration of the merits of the plaintiff’s claim*; and that the case was decided by a judge who was subsequently removed for judicial misconduct, including the solicitation of bribes.

3. Court of Appeals Judge Hernán Alberto Palacios Durango—Who Wrote That Court’s \$150 Million Judgment—Has Been Investigated and Disciplined for Corruption

193. Judge Hernán Alberto Palacios Durango, who was the president of the three-judge chamber of the court of appeals that presided over the *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.

194. In March 2002, Ecuadorian media reported that Ecuador’s Commission for Civic Control Against Corruption (CCCC)³⁵⁵ 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.³⁵⁶ 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.”³⁵⁷

195. Notwithstanding that Judge Palacios was found by the CCCC to have violated his official obligations as a judge, Judge Palacios 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.”³⁵⁸

Huang, dated 4 December 2008, at 2-3 (in response to Questions 11, 13, and 15).

³⁵³ Exhibit C-88, Testimony of Jorge Antonio Pinos Pérez, *MSDIA v. Chang-Huang*, dated 4 December 2008, at 2 (in response to Question 6).

³⁵⁴ Exhibit C-89, Testimony of María Cristina Ponce Villacís, *MSDIA v. Chang-Huang*, dated 4 December 2008, at 2 (in response to Questions 9 and 10). *See also* Exhibit C-88, Testimony of Jorge Antonio Pinos Pérez, *MSDIA v. Chang-Huang*, dated 4 December 2008, at 2 (in response to Question 10).

³⁵⁵ Ecuador has had several official governmental anti-corruption agencies and commissions, and the names and composition of those entities have changed over time.

³⁵⁶ Exhibit C-65, *CCCC Asks for Judge to Be Removed*, LA HORA, 23 March 2002.

³⁵⁷ Exhibit C-65, *CCCC Asks for Judge to Be Removed*, LA HORA, 23 March 2002.

³⁵⁸ Exhibit C-75, U.S. Department of State, 2006 Investment Climate Statement: Ecuador, at 2.

196. In April 2012, the Transitional Judicial Council dismissed *Judge Palacios and Judge Toscano Garzón* for “serious offenses in the performance of their duties” intended to “illegally benefit the banker Fidel Egas Grijalva” in a case they were hearing.³⁵⁹ As set out above, Judge Toscano Garzón was the original trial court judge presiding over the *NIFA v. MSDIA* case, who was later replaced by Temporary Judge Chang-Huang, and who Temporary Judge Chang-Huang later accused of “tricking” her into issuing her NIFA decision.³⁶⁰

197. According to a news report, the Transitional Judicial Council resolution of dismissal found Judges Palacios and Toscano Garzón

“responsible of committing the disciplinary offenses defined in article[] 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.’”³⁶¹

198. Thus, even apart from the irregular proceedings and manifestly baseless judgments of the trial court and court of appeals, the facts make clear that the *NIFA v. MSDIA* proceedings were not conducted in accordance with the rule of law. *Three of the five judges* that presided over the trial court and court of appeals proceedings have been sanctioned for judicial misconduct, the temporary judge who issued the \$200 million trial-court judgment *publicly admitted that she was pressured into rendering an opinion against MSDIA* and has been removed from her post.

III. THIS TRIBUNAL HAS JURISDICTION OVER MSDIA’S CLAIMS UNDER THE U.S.-ECUADOR BIT

199. The jurisdiction of this Tribunal rests on Article VI of the Treaty. In that provision, Ecuador “consent[ed] to the submission of any investment dispute for settlement by binding arbitration.”³⁶² An “investment dispute” is defined as “a dispute between a Party and a national or company of the other party arising out of or relating to ... an alleged breach of any right conferred or created by this Treaty with respect to an investment.”³⁶³ An investment is defined broadly to include, among other things, tangible and intangible property, a company or shares of stock in a company, and any right conferred by law or contract.³⁶⁴

³⁵⁹ Exhibit C-114, *Ecuador Reverses the Dismissal of Two Judges*, UPI ESPAÑOL, 9 July 2012. The Transitional Judicial Council later reversed its decision when Judges Palacios and Toscano Garzón argued that their action was taken in the interest of “the principle of procedural speed” and therefore was not improper. *Id.* Judge Toscano Garzón 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. *See above* at paras. 44-50. Even after MSDIA’s repeated objections, Judge Toscano Garzón refused to require the witness to respond to many of the questions submitted by MSDIA to be put to the witness. *See above* at paras. 49-50.

³⁶⁰ *See* Santamaría Martínez Witness Statement, and attached report.

³⁶¹ Exhibit C-113, *CJT Corrects Error That Harmed Two Judges*, LA HORA, 1 August 2012.

³⁶² Exhibit C-1, U.S.-Ecuador BIT, art. VI(4).

³⁶³ Exhibit C-1, U.S.-Ecuador BIT, art. VI(1).

³⁶⁴ *See* Exhibit C-1, U.S.-Ecuador BIT, art. I(1)(a).

200. The jurisdictional requirements of Article VI are clearly met in this case. As a corporation constituted under the laws of the state of Delaware, MSDIA indisputably qualifies as a “company of the other Party” for purposes of the Treaty.³⁶⁵ As set out below, there is a dispute between MSDIA and the Republic of Ecuador relating to Ecuador’s breach of MSDIA’s rights under the Treaty with respect to MSDIA’s investment in Ecuador. Thus, there is plainly an “investment dispute” for purposes of the Treaty.

201. In addition to these subject matter requirements, Article VI also contains certain procedural requirements. Specifically, Article VI provides that “the national or company concerned may choose to consent in writing to the submission of the dispute for settlement by binding arbitration,” “[p]rovided that the national or company concerned has not submitted the dispute for resolution [by the courts of the host State or in accordance with other agreed dispute settlement procedures] and that six months have elapsed from the date on which the dispute arose.”³⁶⁶

202. As discussed below, MSDIA has fully satisfied each of these procedural requirements. MSDIA provided notice of the investment dispute to Ecuador, the six-month waiting period elapsed prior to the initiation of these proceedings, and MSDIA accepted Ecuador’s offer to arbitrate under the Treaty.

A. MSDIA’s Claims Relate to a Protected Investment Under the Treaty

203. MSDIA easily satisfies the requirement that the dispute relate to an “investment” as defined by the Treaty. The Treaty defines “investment” broadly, providing an open list of examples:

“(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;

³⁶⁵ The Treaty defines a “company” of a Party as “any kind of corporation, company, association, partnership, or other organization, legally constituted under the laws and regulations of a Party or a political subdivision thereof whether or not organized for pecuniary gain, or privately or governmentally owned or controlled.” Exhibit C-1, U.S.-Ecuador BIT, art. I(1)(b).

³⁶⁶ Exhibit C-1, U.S.-Ecuador BIT, art. VI(3)(a). This six-month waiting period is intended to provide the parties an opportunity to “seek a resolution through consultation and negotiation.” *Id.*, art. VI(2).

(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 licenses and permits pursuant to law.”³⁶⁷

204. As discussed below, both MSDIA’s business in Ecuador and the Chillos Valley plant, which MSDIA owned and which was the subject of the underlying litigation in Ecuador, are covered investments.

1. MSDIA’s Business in Ecuador is an Investment

205. For 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.³⁶⁸ These on-going operations are a covered investment under the Treaty.

206. The Treaty defines “investment” broadly as “every kind of investment in the territory of one Party owned or controlled directly or indirectly by nationals or companies of the other Party,” and it provides a non-exclusive list of examples that illustrate the breadth of that definition. It is widely accepted that this type of broad definition in an investment treaty permits arbitral tribunals to evaluate the circumstances of individual cases when determining whether an “investment” exists.³⁶⁹

207. As part of this contextual, fact-specific analysis, tribunals have looked to a variety of factors, including the contribution of capital, the duration of the investment, and risk to the investor.³⁷⁰ These characteristics are typically associated with an investment, although they may

³⁶⁷ Exhibit C-1, U.S.-Ecuador BIT, art. I(1)(a).

³⁶⁸ See Third Canan Witness Statement at paras. 6 and 9.

³⁶⁹ A variety of investment tribunals have taken this approach, and Professor Christoph Schreuer, the leading commentator on the ICSID Convention, has similarly advocated for a “considerable margin of appreciation that may be applied at the tribunal’s discretion” rather than a rigid checklist of requirements. See, e.g., Exhibit CLM-50, *Fedax N.V. v. Republic of Venezuela*, ICSID Case No. ARB/96/3, Decision on Objections to Jurisdiction, dated 11 July 1997, at para. 43; Exhibit CLM-43, *Ceskoslovenska Obchodni Banka, A.S. v. Slovak Republic*, ICSID Case No. ARB/97/4, Decision on Objections to Jurisdiction, dated 24 May 1999, at para. 90; Exhibit CLM-66, *M.C.I. Power Group L.C. & New Turbine, Inc. v. Republic of Ecuador*, ICSID Case No. ARB/03/6, Award, dated 31 July 2007, at para. 165; Exhibit CLM-54, *Inmaris Perestroika Sailing Maritime Services GmbH & Others v. Ukraine*, ICSID Case No. ARB/08/8, Decision on Jurisdiction, dated 8 March 2010, at para. 129; Exhibit CLM-40, *Biwater Gauff (Tanzania) Ltd. v. United Republic of Tanzania*, ICSID Case No. ARB/05/22, Award, dated 24 July 2008, at paras. 310-318; Exhibit CLM-177, C. Schreuer, *THE ICSID CONVENTION: A COMMENTARY* (2d ed. 2009), at 133-134, paras. 171-172.

³⁷⁰ See, e.g., Exhibit RLM-54, *Romak S.A. v. Republic of Uzbekistan*, PCA Case No. AA280 (UNCITRAL), Award, dated 26 November 2009, at para. 207 (“The Arbitral Tribunal therefore considers that the term ‘investments’ under the BIT has an inherent meaning (irrespective of whether the investor resorts to ICSID or UNCITRAL arbitral proceedings) entailing a contribution that extends over a certain period of time and that involves some risk. The

be present in different combinations in any given case; accordingly, tribunals assess each investment as a whole.³⁷¹ MSDIA's investment in Ecuador undoubtedly has the characteristics of an investment.³⁷²

a) Capital Contribution

208. An investment generally requires the contribution of capital by the investor in the territory of the host State. Such a contribution reflects an intent on the part of the investor to

Arbitral Tribunal is further comforted in its analysis by the reasoning adopted by other arbitral tribunals which consistently incorporates contribution, duration and risk as hallmarks of an 'investment.') (citation omitted); *id.* at para. 202 (“[I]t seems that, in conformity with the objectives of the Convention, for a contract to be deemed an investment it must fulfil the following three conditions[:] a) the contracting party has made a contribution in the country in question, b) this contribution must extend over a certain period of time, and c) it must entail some risk for the contracting party.”) (translating and quoting *Consortium Groupement LESI-Dipenta v. People's Democratic Republic of Algeria*, ICSID Case No. ARB/03/8, Award, dated 10 January 2005, at para. 13(iv)); Exhibit CLM-177, C. Schreuer, *THE ICSID CONVENTION: A COMMENTARY* (2d ed. 2009), at 130-131, paras. 161-163 (discussing the characteristics of capital contribution, duration, and risk). These characteristics are also included in the 2004 U.S. Model BIT, which 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.” Exhibit CLM-105, K. Vandevelde, *U.S. INTERNATIONAL INVESTMENT AGREEMENTS* (2009), at 121-122 (emphasis added).

³⁷¹ See, e.g., Exhibit CLM-43, *Ceskoslovenska Obchodni Banka, A.S. v. Slovak Republic*, ICSID Case No. ARB/97/4, Decision on Objections to Jurisdiction, dated 24 May 1999, at para. 90 (“The Tribunal notes ... that these elements of the suggested definition [of “investment”], while they tend as a rule to be present in most investments, 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. & New Turbine, Inc. v. Republic of Ecuador*, ICSID Case No. ARB/03/6, Award, dated 31 July 2007, at para. 165 (“The Tribunal states that 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.”); Exhibit CLM-136, *Mytilineos Holdings SA v. State Union of Serbia & Montenegro & Republic of Serbia*, UNCITRAL, Partial Award on Jurisdiction, dated 8 September 2006, at paras. 124-125 (holding that the “combined effect” of a related series of contracts providing for sales, services and loans transactions was “the establishment of a long-term business relationship” and an investment for purposes of the relevant BIT); Exhibit RLM-123, *Salini Costruttori S.p.A. & Italstrade S.p.A v. Kingdom of Morocco*, ICSID Case No. ARB/00/4, Decision on Jurisdiction, dated 16 July 2001, at para. 52 (“The doctrine generally considers that investment infers: contributions, a certain duration of performance of the contract and a participation in the risks of the transaction. ... In reality, these various elements may be interdependent. Thus, the risks of the transaction may depend on the contributions and the duration of performance of the contract. As a result, these various criteria should be assessed globally even if, for the sake of reasoning, the Tribunal considers them individually here.”) (citation omitted).

³⁷² Some investment tribunals have also considered whether an investment contributes to the economic development of the host State, but this characteristic is controversial in light of its subjectivity. See, e.g., Exhibit CLM-122, *Deutsche Bank AG v. Democratic Socialist Republic of Sri Lanka*, ICSID Case No. ARB/09/02, Award, dated 31 October 2012, at para. 306 (“Finally, the criterion of contribution to economic development has been discredited and has not been adopted recently by any tribunal. It is generally considered that this criterion is unworkable owing to its subjective nature. ... Moreover, some transactions may undoubtedly be qualified as investments, even though they do not result in a significant contribution to economic development in a post hoc evaluation of the claimant's activities.”). In any event, MSDIA's activities in Ecuador did contribute to Ecuador's economic development, for example, through MSDIA's participation in and development of the local pharmaceutical market, its provision of life-saving pharmaceutical products, its donation of professional development training to local doctors, and its volunteer efforts to eradicate river blindness in Ecuador. See Third Canan Witness Statement at para. 12.

engage productively with the host State in return for the substantive protections of the BIT. Capital contributions can take the form of financial contributions or contributions of know-how, equipment, personnel, or services.³⁷³

209. As MSDIA's President, Jean Marie Canan, explains in his witness statement, building MSDIA's business in Ecuador required a substantial investment by MSDIA, including in capital, personnel, training, and management resources.³⁷⁴ Among other things, MSDIA's Ecuador branch has hired more than 100 employees, "the vast majority of whom are citizens of Ecuador."³⁷⁵ It has also provided thousands of hours of training as part of the professional development of these employees, totalling approximately 7,000 hours in each of 2012 and 2013.³⁷⁶

210. In addition, MSDIA's Ecuador branch has extensive customer relationships with Ecuadorian purchasers, relationships with local Ecuadorian distributors and logistics companies,³⁷⁷ and investments in equipment and real estate.³⁷⁸ Moreover, as Mr. Canan explains, "the sale of pharmaceutical products in Ecuador requires significant and on-going 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."³⁷⁹

211. MSDIA has committed these resources with the intent "to make a long-term investment in growing a successful operating business in Ecuador."³⁸⁰ The fact that MSDIA has operated its business in Ecuador continuously for 40 years is evidence of this commitment.

212. Ecuador has argued that MSDIA's business in Ecuador does not constitute an investment because it is organized as a branch and not as a separately incorporated Ecuadorian company.³⁸¹ There is nothing in the Treaty's definition of investment that limits investments to a particular corporate form or that precludes a branch from qualifying as an investment under the Treaty.

213. As the leading commentator on the U.S. BIT program has explained, "[t]he term 'investment' means every investment and certainly an operating branch may fall within that definition whether or not it is separately constituted."³⁸² Investment tribunals have found a

³⁷³ See Exhibit CLM-177, C. Schreuer, *THE ICSID CONVENTION: A COMMENTARY* (2d ed. 2009), at 130, para. 161.

³⁷⁴ Third Canan Witness Statement at paras. 12 and 20.

³⁷⁵ Third Canan Witness Statement at para. 9.

³⁷⁶ Third Canan Witness Statement at para. 20. MSDIA Ecuador also "contributes thousands of hours of education and training of doctors and medical professionals in Ecuador on an annual basis." *Id.*

³⁷⁷ Third Canan Witness Statement at para. 8.

³⁷⁸ Third Canan Witness Statement at para. 10.

³⁷⁹ Third Canan Witness Statement at para. 11.

³⁸⁰ Third Canan Witness Statement at para. 11.

³⁸¹ See, e.g., Ecuador's Opposition to MSDIA's Request for Interim Measures, dated 24 July 2012, at para. 90.

³⁸² Exhibit CLM-105, K. Vandevelde, *U.S. INTERNATIONAL INVESTMENT AGREEMENTS* (2009), at 122.

branch to constitute an investment in the host State under appropriate circumstances, including under the U.S.-Ecuador BIT.³⁸³

b) Duration

214. Another characteristic feature of an investment is the duration of the investor's activities in the host State. This indicates that "the expectation of a long-term relationship is clearly there."³⁸⁴ In this way, the host State must extend the substantive protections of the BIT only to investments that commit resources to the host State for a significant period of time, and not to claims based on merely a single transaction that touches the host State.³⁸⁵

215. There is no specific amount of time that must be met for activities in the host State to qualify as an investment. Tribunals considering whether an investment is of sufficient duration have accepted a duration of as little as two years.³⁸⁶ There can be no doubt that MSDIA meets this requirement, as it "first invested in Ecuador in 1973" and remains invested in the country forty years later.³⁸⁷

c) Risk

216. A third factor considered by tribunals assessing the existence of an "investment" is whether the investor has assumed any risk in connection with its investment in the host State. Like duration, the assumption of risk distinguishes between a single transaction and a substantial commitment over time that necessarily entails uncertainty and the potential for loss.³⁸⁸

217. Tribunals have defined "investment risk" as:

³⁸³ See Exhibit CLM-66, *M.C.I. Power Group L.C. & New Turbine, Inc. v. Republic of Ecuador*, ICSID Case No. ARB/03/6, Award, dated 31 July 2007, at para. 164 (finding an investment under Article I of the U.S.-Ecuador BIT where the claimants had established a branch office in Ecuador, despite the fact that the branch had ceased operations by the time the dispute arose, where the branch possessed accounts receivable, an operating permit, and certain contractual claims).

³⁸⁴ Exhibit CLM-177, C. Schreuer, *THE ICSID CONVENTION: A COMMENTARY* (2d ed. 2009), at 128, para. 153.

³⁸⁵ See, e.g., Exhibit CLM-176, N. Rubins, *The Notion of 'Investment' in International Investment Arbitration*, in N. Horn & S. Kröll (eds.), *ARBITRATING FOREIGN INVESTMENT DISPUTES* (2004), at 283, 297 ("Presumably, this criterion [of duration] refers to the Host State's desire to encourage commitments of capital from abroad on which it can rely for economic development. Operations of limited duration, in the Host-State's view, are unpredictable and prone to withdrawal or non-renewal when conditions deteriorate, worsening financial volatility in the country rather than mitigating it.").

³⁸⁶ See Exhibit CLM-177, C. Schreuer, *THE ICSID CONVENTION: A COMMENTARY* (2d ed. 2009), at 130, para. 162.

³⁸⁷ Third Canan Witness Statement at para. 12 (Second Witness Statement of Jean Marie Canan at para. 5).

³⁸⁸ See, e.g., Exhibit CLM-176, N. Rubins, *The Notion of 'Investment' in International Investment Arbitration*, in N. Horn & S. Kröll (eds.), *ARBITRATING FOREIGN INVESTMENT DISPUTES* (2004), at 283, 298 ("Thus, transactions where the risk is primarily or entirely placed on the Host State by contract—in particular the prepaid sale of goods or service agreements where payment is made substantially before completion of the foreigner's obligations—would tend to fall outside the realm of protected investments. The reason for this distinction seems relatively clear: it is precisely the possibility of contractual failure that necessitates international legal protection in order to entice such transactions into being. If the foreign entity bears little or no risk in concluding a deal, it is reasonable to assume that he will choose to engage in that activity even without the assurances of arbitral adjudication of future disputes.").

“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.”³⁸⁹

This concept has been applied broadly; some tribunals have accepted the existence of the investment dispute itself as an indication of “risk,” and others have held such risk inherent in any long-term commercial contract.³⁹⁰

218. MSDIA’s investment in Ecuador is subject to 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.”³⁹¹ That is, MSDIA “had no guarantee that its significant investments in Ecuador would result in a successful business.”³⁹²

219. Thus, MSDIA has sold its products in Ecuador for the last four decades through a local business, with local employees, local equipment and real estate, and a local distribution network. Investor-State tribunals have consistently found such an on-going business in the host State to be an investment for purposes of a bilateral investment treaty.³⁹³ MSDIA’s investment in its business in Ecuador thus qualifies for protection under the Treaty.

2. MSDIA’s Chillos Valley Plant Constitutes an Investment, the Disposal of Which Is Covered by the Treaty

220. Moreover, Ecuador has conceded that MSDIA’s Chillos Valley plant qualifies as a covered investment under the Treaty.³⁹⁴ Indeed, ownership of real property is a quintessential form of foreign investment that falls squarely within the broad definition in Article I of the BIT.³⁹⁵ MSDIA’s investment in the Chillos Valley plant is thus sufficient to establish the

³⁸⁹ Exhibit RLM-54, *Romak S.A. v. Republic of Uzbekistan*, PCA Case No. AA280 (UNCITRAL), Award, dated 26 November 2009, at paras. 229-230.

³⁹⁰ See Exhibit CLM-177, C. Schreuer, *THE ICSID CONVENTION: A COMMENTARY* (2d ed. 2009), at 131, para. 163.

³⁹¹ Third Canan Witness Statement at para. 12.

³⁹² Third Canan Witness Statement at para. 12.

³⁹³ See, e.g., Exhibit CLM-143, *S.D. Myers, Inc. v. Canada*, UNCITRAL, Partial Award, dated 13 November 2000, at para. 229 (holding that the claimant’s local business in Canada constituted an investment despite being privately owned by the individual investors as opposed to the claimant corporation and stating, “the Tribunal does not accept that an otherwise meritorious claim should fail solely by reason of the corporate structure adopted by a claimant in order to organise the way in which it conducts its business affairs”); Exhibit CLM-81, *Tokios Tokelès v. Ukraine*, ICSID Case No. ARB/02/18, Decision on Jurisdiction, dated 29 April 2004, at para. 78 (holding that claimant’s local subsidiary, through which it conducted its advertising and printing business, constituted an investment).

³⁹⁴ See Ecuador’s Rejoinder to MSDIA’s Request for Interim Measures, dated 17 August 2012, at para. 93 (“Ecuador agrees that the manufacturing plant and packaging facility in the Chillos Valley that Claimant sold in 2003 was an investment within the meaning of the Treaty.”) (footnote omitted).

³⁹⁵ See Exhibit C-1, U.S.-Ecuador BIT, art. I(1)(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 ... and includes: (a) tangible ... property”); Exhibit CLM-176, N. Rubins, *The Notion of ‘Investment’ in International Investment Arbitration*, in N. Horn & S. Kröll (eds.), *ARBITRATING FOREIGN INVESTMENT DISPUTES* (2004), at 283, 304

Tribunal’s jurisdiction over MSDIA’s claims because those claims relate to the “disposal” of MSDIA’s investment in 2003.

221. The Treaty is intended to protect an investment throughout its lifespan, from its establishment to its disposal. Indeed, the protections of the Treaty would be largely illusory if they did not protect an investor when disposing of its investment. As the *Chevron I* tribunal recognized in analyzing the U.S.-Ecuador BIT:

“[O]nce an investment is established, the BIT intends to close any possible gaps in the protection of that investment as it proceeds in time and potentially changes form. Once an investment is established, it continues to exist and be protected until its ultimate ‘disposal’ has been completed—that is, until it has been wound up.”³⁹⁶

222. The lifespan of an investment is not complete until the conclusion of any litigation related to the investment, including its disposal. This is confirmed by prior cases. The tribunal in *Chevron I*, for example, held that Chevron had a protected investment under the U.S.-Ecuador BIT in connection with litigation arising out of a concession that Chevron had sold years prior. As the tribunal stated:

“The Claimants’ investments were largely liquidated when they transferred their ownership in the concession to PetroEcuador and upon the conclusion of various Settlement Agreements with Ecuador. Yet, those investments were and are not yet fully wound up because of ongoing claims for money arising directly out of their oil extraction and production activities under their contracts with Ecuador and its state-owned oil company.... 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.”³⁹⁷

(identifying “land, factories and other production facilities” as “assets at the core of the classical notion of investment”) (footnote omitted).

³⁹⁶ Exhibit CLM-44, *Chevron Corp. (U.S.A.) & Texaco Petroleum Co. (U.S.A.) v. Republic of Ecuador (Chevron I)*, PCA Case No. 2007-2 (UNCITRAL), Interim Award, dated 1 December 2008, at para. 183; *see also* Exhibit RLM-102, *Jan de Nul N.V. & Dredging Int’l N.V. v. Arab Republic of Egypt*, ICSID Case No. ARB/04/13, Decision on Jurisdiction, dated 16 June 2006, at para. 135 (adopting the claimants’ argument that requiring an investment to be present in the territory of the host State at the time the dispute arose would “defeat[]” “the entire logic of investment protection treaties” and citing to Prof. Schreuer’s expert opinion to the effect that “[t]he duty to provide redress for a violation of rights persists even if the rights as such have come to an end”) (quotation marks omitted); Exhibit CLM-171, C. McLachlan, L. Shore & M. Weiniger, *INTERNATIONAL INVESTMENT ARBITRATION* (2007), at 176, para. 6.47 (“An investment will not cease to be covered under a treaty merely because it has ceased to exist.”).

³⁹⁷ Exhibit CLM-44, *Chevron Corp. (U.S.A.) & Texaco Petroleum Co. (U.S.A.) v. Republic of Ecuador (Chevron I)*, PCA Case No. 2007-2 (UNCITRAL), Interim Award, dated 1 December 2008, at para. 185. Other arbitral tribunals have similarly held that investment protection under a BIT continues to apply to an arbitral award that represents the “crystallization” or transformation of the claimant’s original investment. *See, e.g.*, Exhibit CLM-15, *Saipem S.p.A. v. People’s Republic of Bangladesh*, ICSID Case No. ARB/05/7, Decision on Jurisdiction and Recommendation on Provisional Measures, dated 21 March 2007, at para. 127 (“This said, the rights embodied in the ICC Award were not created by the Award, but arise out of the Contract. The ICC Award crystallized the parties’ rights and

223. The *Chevron II* tribunal similarly held under the same treaty that “[t]here 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.”³⁹⁸

224. An earlier NAFTA tribunal had come to a similar conclusion in *Mondev v. United States*, despite the fact that, by the time the NAFTA entered into force, “all Mondev had were claims to money associated with an investment which had already failed.”³⁹⁹ 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 explained:

“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.’”⁴⁰⁰

225. The present dispute relates to Ecuador’s actions in the litigation that arose out of MSDIA’s attempts to sell the Chillos Valley plant. As Ecuador’s National Court of Justice recognized in its decision in that litigation, the litigation “had as its origin the failed purchase and

obligations under the original contract. It can thus be left open whether the Award itself qualifies as an investment, since the contract rights which are crystallized by the Award constitute an investment within Article 1(1)(c) of the BIT.”); Exhibit CLM-125, *Frontier Petroleum Services Ltd. v. Czech Republic*, UNCITRAL, Final Award, dated 12 November 2010, at para. 231 (“This Tribunal accepts that Claimant’s original investment consisted of the payments made ..., which were transformed into an entitlement to a first secured charge in the Final Award. ... Accordingly, by refusing to recognise and enforce the Final Award in its entirety, the Tribunal accepts that Respondent could be said to have affected the management, use, enjoyment, or disposal by Claimant of what remained of its original investment.”); Exhibit CLM-114, *White Industries Australia Ltd. v. Republic of India*, UNCITRAL, Final Award, dated 30 November 2011, at para. 7.6.8 (pointing to “the developing jurisprudence on the treatment of arbitral awards to the effect that awards made by tribunals arising out of disputes concerning ‘investments’ made by ‘investors’ under BITs represent a continuation or transformation of the original investment”).

³⁹⁸ See Exhibit CLM-108, *Chevron Corp. & Texaco Petroleum Co. v. Republic of Ecuador (Chevron II)*, PCA Case No. 2009-23 (UNCITRAL), Third Interim Award on Jurisdiction and Admissibility, dated 27 February 2012, at para. 4.13. See also Exhibit CLM-126, *GEA Group Aktiengesellschaft v. Ukraine*, ICSID Case No. ARB/08/16, Award, dated 31 March 2011, at para. 124 (“The Tribunal agrees with the Claimant. The Respondent, in effect has attempted to create a standing requirement (*i.e.*, a requirement of ownership or control of the investment at the time of registration of the Request) that does not otherwise exist under the BIT, ICSID Convention or ICSID Rules. Indeed, such a requirement, if it existed, would exclude a significant range of cases where claims are made in respect of the divestment or expropriation of an investment.”); Exhibit CLM-139, *Pey Casado v. Chile*, ICSID Case No. ARB/98/2, Award, dated 8 May 2008, at para. 446 (holding that investor had standing where challenged measures related to investment expropriated twenty years earlier).

³⁹⁹ Exhibit RLM-41, *Mondev Int’l Ltd. v. United States of America*, ICSID Case No. ARB(AF)/99/2, Award, dated 11 October 2002, at para. 77.

⁴⁰⁰ Exhibit RLM-41, *Mondev Int’l Ltd. v. United States of America*, ICSID Case No. ARB(AF)/99/2, Award, dated 11 October 2002, at para. 81 (emphasis added).

sale of an industrial plant.”⁴⁰¹ Ecuador’s obligations under the Treaty extend to the litigation concerning MSDIA’s disposal of that plant, and MSDIA’s claims in this arbitration therefore relate to Ecuador’s breach of a right conferred by the Treaty with respect to a covered investment.

B. An Investment Dispute Exists Regarding MSDIA’s Investment in Ecuador

226. Article VI of the Treaty allows arbitration of an “investment dispute,” which is defined as a dispute “arising out of or relating to ... an alleged breach of any right conferred or created by this Treaty.”⁴⁰² MSDIA’s claims that the conduct of Ecuador’s judiciary in the *NIFA v. MSDIA* litigation breached the U.S.-Ecuador BIT unquestionably meet this requirement.

227. Investment tribunals have uniformly adopted an expansive interpretation of what constitutes an investment dispute.⁴⁰³ In *Burlington Resources v. Ecuador*, for example, the tribunal held that a “dispute” under the relevant provision of the applicable BIT entailed “(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.”⁴⁰⁴ Consistent with the breadth of this standard, MSDIA is unaware of any investor-State arbitration in which the tribunal declined jurisdiction because of the claimant’s failure to establish the existence of an investment dispute.⁴⁰⁵

228. Here, MSDIA has alleged that Ecuador violated numerous provisions of the Treaty,⁴⁰⁶ and Ecuador has denied these claims.⁴⁰⁷ Thus, a disagreement exists between the parties as to the

⁴⁰¹ Exhibit C-203, NCJ Judgment, *NIFA v. MSDIA*, dated 21 September 2012, at 21.

⁴⁰² Exhibit C-1, U.S.-Ecuador BIT, art. VI(1), (4).

⁴⁰³ Exhibit CLM-62, *Maffezini v. Kingdom of Spain*, ICSID Case No. ARB/97/7, Decision on Jurisdiction, dated 25 January 2000, at paras. 93-94; Exhibit CLM-81, *Tokios Tokelés v. Ukraine*, ICSID Case No. ARB/02/18, Decision on Jurisdiction, dated 29 April 2004, at paras. 106-107; Exhibit CLM-60, *Empresas Lucchetti, S.A. & Lucchetti Peru, S.A. v. Republic of Peru*, ICSID Case No. ARB/03/4, Award, dated 7 February 2005, at para. 48; Exhibit CLM-53, *Impregilo S.p.A. v. Islamic Republic of Pakistan*, ICSID Case No. ARB/03/3, Decision on Jurisdiction, dated 22 April 2005, at paras. 302-303; Exhibit CLM-107, *AES Corp. v. Argentine Republic*, ICSID Case No. ARB/02/17, Decision on Jurisdiction, dated 26 April 2005, at para. 43; Exhibit CLM-9, *El Paso Energy Int’l Co. v. Argentine Republic*, ICSID Case No. ARB/03/15, Decision on Jurisdiction, dated 27 April 2006, at para. 61; Exhibit CLM-78, *Suez, Sociedad General de Aguas de Barcelona S.A. & InterAguas Servicios Integrales del Agua S.A. v. Argentine Republic*, ICSID Case No. ARB/03/17, Decision on Jurisdiction, dated 16 May 2006, at para. 29; CLM-66, *M.C.I. Power Group L.C. & New Turbine, Inc. v. Republic of Ecuador*, ICSID Case No. ARB/03/6, Award, dated 31 July 2007, at para. 63.

⁴⁰⁴ Exhibit RLM-12, *Burlington Resources Inc. v. Republic of Ecuador*, ICSID Case No. ARB/08/5, Decision on Jurisdiction, dated 2 June 2010, at paras. 289, 320, 325.

⁴⁰⁵ Indeed, according to Professor Schreuer, the 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.” Exhibit CLM-103, C. Schreuer, *What Is a Legal Dispute?* in *INTERNATIONAL LAW BETWEEN UNIVERSALISM AND FRAGMENTATION: FESTSCHRIFT IN HONOUR OF GERHARD HAFNER* (2008), at 959, 978.

⁴⁰⁶ MSDIA’s Notice of Arbitration, dated 29 November 2011, at paras. 12, 159.

⁴⁰⁷ Ecuador’s Opposition to MSDIA’s Request for Interim Measures, dated 24 July 2012, at paras. 6-36.

existence or scope of a legal right or obligation—which establishes that an investment dispute exists between the parties.

C. MSDIA Initiated Arbitration in Compliance with Article VI of the Treaty

1. MSDIA Provided Notice of Its Investment Dispute and Waited Six Months Before Initiating Arbitration

229. Article VI(3)(a) of the Treaty states:

“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”

230. The first-instance judgment of the Ecuadorian courts against MSDIA was issued on 17 December 2007.⁴⁰⁸ On 8 June 2009, MSDIA sent Ecuador a notice of the dispute in accordance with the provisions of Article VI.⁴⁰⁹ MSDIA asserted that 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.⁴¹⁰ 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.⁴¹¹

231. 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, yet chose not to do so.

232. To the contrary, after MSDIA submitted its Notice of Dispute in June 2009, Ecuador’s courts and public prosecutors in the office of the District Attorney of Pichincha allowed the Ecuadorian plaintiff in the underlying litigation to initiate and maintain criminal proceedings against MSDIA’s U.S.-based attorneys, which Ecuador’s courts failed to dismiss until September 2011.⁴¹² These criminal proceedings effectively chilled any further efforts on the part of MSDIA

⁴⁰⁸ See Exhibit C-3, Trial Court Opinion, *NIFA v. MSDIA*, dated 17 December 2007.

⁴⁰⁹ See Exhibit C-2, MSDIA’s Notice of Dispute, dated 8 June 2009.

⁴¹⁰ See Exhibit C-2, MSDIA’s Notice of Dispute, dated 8 June 2009, at 3-4.

⁴¹¹ See Exhibit C-2, MSDIA’s Notice of Dispute, dated 8 June 2009; MSDIA’s Notice of Arbitration, dated 29 November 2011, at para. 131; MSDIA’s Request for Interim Measures, dated 12 June 2012, at para. 40 n.24.

⁴¹² As explained in MSDIA’s Request for Interim Measures, after MSDIA sent its Notice of Dispute to Ecuador’s Attorney General, NIFA’s General Manager filed a criminal complaint in the Pichincha Provincial Prosecution Office against MSDIA’s U.S.-based attorneys. See Exhibit C-27, Criminal Complaint initiated by Miguel García Costa and accompanying papers, as transmitted through the U.S. Department of Justice, on 6 July 2010. The Prosecution Office thereafter opened two criminal investigations into the allegations, both of which were premised on MSDIA’s attorneys’ act of giving notice under the U.S.-Ecuador BIT. Although prosecutors recommended that both investigations be dismissed, the Judge presiding over one of the investigations rejected the recommendation

to negotiate with Ecuador, and Ecuador made no further efforts to negotiate with MSDIA. MSDIA filed this arbitration on 29 November 2011, long after the six-month waiting period under Article VI had expired.⁴¹³

2. MSDIA Exercised Its Right Under the Treaty to Elect UNCITRAL Arbitration

233. 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 submit a dispute for resolution, *inter alia*, “in accordance with the UNCITRAL Rules.”

234. MSDIA submitted a valid consent to arbitration under the UNCITRAL Rules in its Notice of Arbitration.⁴¹⁴ The Treaty does not specify the form that an investor’s consent to arbitration must take, stating simply that “the national or company concerned may choose to consent in writing.”⁴¹⁵ The *EnCana v. Ecuador* tribunal, in analyzing this provision of the U.S.-Ecuador BIT, concluded that a consent to arbitration included in the claimant’s notice of arbitration was valid and resulted in a binding arbitration agreement. As that tribunal explained, “[u]nless otherwise specifically provided in the BIT, one would normally look for a statement of consent to arbitrate in the Notice of Arbitration itself, the document by which the arbitration is commenced.”⁴¹⁶

235. Ecuador has argued that MSDIA’s consent to UNCITRAL arbitration is invalid and does not establish a binding arbitration agreement because MSDIA previously consented to ICSID arbitration in its dispute notice.⁴¹⁷ Ecuador’s argument is without merit.

and allowed the investigation to continue. That investigation remained pending until eight days before the court of appeals rendered its judgment. See Exhibit C-43, Order of Judge Elsa Sanchez de Melo, 18th Criminal Court of Pichincha, Case No. 284-2011, dated 24 June 2011; Exhibit C-49, Recommended dismissal of criminal investigation, Case No. 284-2011, filed by Marco Freire López, District Attorney of Pichincha, dated 14 September 2011; Exhibit C-50, Order of Judge Elsa Sanchez de Melo, 18th Criminal Court of Pichincha dismissing criminal investigation, Case No. 284-2011, dated 15 September 2011.

⁴¹³ See MSDIA’s Notice of Arbitration, dated 29 November 2011.

⁴¹⁴ See MSDIA’s Notice of Arbitration, dated 29 November 2011, 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).”).

⁴¹⁵ Exhibit C-1, U.S.-Ecuador BIT, art. VI(3)(a), (b).

⁴¹⁶ Exhibit CLM-124, *EnCana Corp. v. Republic of Ecuador*, LCIA Case No. UN3481 (UNCITRAL), Partial Award on Jurisdiction, dated 27 February 2004, at para. 13. Indeed, investor-State tribunals have uniformly held that claimants may include their consent in the request for arbitration. See, e.g., Exhibit CLM-112, *Ltd. Liability Co. AMTO v. Ukraine*, SCC Case No. 080/2005, Final Award, dated 26 March 2008, at para. 46 (“A request for arbitration is by its very nature a consent to arbitrate because a legal proceeding cannot be requested by a party without their own participation in the proceeding.”).

⁴¹⁷ See, e.g., Ecuador’s Rejoinder in Opposition to MSDIA’s Request for Interim Measures, dated 17 August 2012, at para. 122.

236. **First**, in its dispute notice, MSDIA reserved its right to consent to some other form of arbitration under the Treaty. Specifically:

“By action of this letter, MSDIA hereby accepts the offer made by the Republic of Ecuador to submit investment disputes for settlement by binding arbitration before the International Centre for the Settlement of Investment Disputes (“ICSID”), pursuant to Article VI of the BIT and Article 25 of the Convention on the Settlement of Investment Disputes Between States and Nationals of Other States (“ICSID Convention”). ... 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.”⁴¹⁸

237. MSDIA reserved its rights in this respect because at the 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.⁴¹⁹ Less than a month later, on 6 July 2009, Ecuador submitted a written denunciation of the ICSID Convention to the World Bank.⁴²⁰

238. In light of these events and in an effort to avoid unnecessary jurisdictional wrangling, MSDIA chose to exercise its right under the reservation to consent to UNCITRAL arbitration. MSDIA was entitled to do so because, as the leading commentator on U.S. bilateral investment treaties explains, “the investor retains complete control [under such a treaty] 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.”⁴²¹

239. **Second**, even if MSDIA’s reservation of the right to consent to a different form of arbitration were not permissible under the ICSID Convention, which is denied, the consequence would be that MSDIA’s consent to ICSID arbitration would be invalid *ab initio*, and therefore that MSDIA was free to choose UNCITRAL arbitration.

240. Ecuador’s suggestion that MSDIA’s reservation could simply be ignored, and that MSDIA would be bound to arbitrate only under the ICSID Rules, would be contrary to the express terms of MSDIA’s consent to arbitration and to the fundamental principle that parties

⁴¹⁸ Exhibit C-2, MSDIA’s Notice of Dispute, dated 8 June 2009, at 1-2.

⁴¹⁹ 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. *See, e.g.*, Exhibit RLM-42, *Murphy Exploration & Production Co. Int’l v. Republic of Ecuador*, ICSID Case No. ARB/08/4, Award on Jurisdiction, dated 15 December 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*, ICSID Case No. ARB/08/5, Decision on Jurisdiction, dated 2 June 2010, at paras. 311-312 (finding claims inadmissible on other grounds).

⁴²⁰ Exhibit C-187, ICSID, *Ecuador Submits a Notice Under Article 71 of the ICSID Convention*, dated 9 July 2009. Pursuant to Article 71 of the ICSID Convention, Ecuador’s denunciation took effect six months later, on 7 January 2010.

⁴²¹ Exhibit CLM-109, K. Vandeveld, *BILATERAL INVESTMENT TREATIES: HISTORY, POLICY, AND INTERPRETATION* (2010), at 437.

can be forced to arbitrate only if they have consented to do so.⁴²² Moreover, as an equitable matter, it would also be manifestly unfair for Ecuador to evade the claims in this arbitration by suggesting that MSDIA should be forced to arbitrate under the ICSID Rules, when the very reason MSDIA elected UNCITRAL arbitration was Ecuador’s denunciation of the ICSID Convention.

* * * * *

241. In sum, MSDIA has established that an investment dispute exists between it and Ecuador as defined in Article VI of the Treaty. MSDIA properly initiated this arbitration, and the Tribunal accordingly has jurisdiction over MSDIA’s claims.

IV. ECUADOR’S COURTS DENIED JUSTICE TO MSDIA, WHICH WAS A BREACH OF ECUADOR’S OBLIGATIONS TO PROVIDE FAIR AND EQUITABLE TREATMENT AND TREATMENT NOT LESS THAN THAT REQUIRED BY INTERNATIONAL LAW

242. Under the Treaty, Ecuador is obligated to provide foreign investors with access to justice in its courts. The Treaty incorporates international law requirements that foreign nationals not be subjected to “unfair trial[s]” or “unjust determination[s]” by a State’s judicial system.⁴²³ Conduct by Ecuador’s courts that is “manifestly unjust or violative of due process or similarly offensive”⁴²⁴ constitutes a denial of justice and a breach of Ecuador’s obligations under the Treaty.

243. MSDIA’s treatment by the Ecuadorian courts fell far short of international standards of due process. The proceedings in the lower courts were marked by bias and repeated violations of MSDIA’s procedural due process rights and were manifestly tainted by corruption.⁴²⁵ Those proceedings resulted in judgments against MSDIA that were so manifestly unfair and irrational that no honest, competent court could have reached them. Specifically, the court of appeals held MSDIA liable for an antitrust violation—despite the fact that Ecuador had no antitrust law⁴²⁶ and despite no indicia of market power or other essential features of an antitrust claim⁴²⁷—and found

⁴²² See Exhibit CLM-177, C. Schreuer, *THE ICSID CONVENTION: A COMMENTARY* (2d ed. 2009), at 230, para. 514 (“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.”).

⁴²³ Exhibit CLM-170, R. Lillich, *INTERNATIONAL LAW OF STATE RESPONSIBILITY FOR INJURIES TO ALIENS* (1983), at 224 (citing *RESTATEMENT (SECOND) OF FOREIGN RELATIONS LAW OF THE UNITED STATES* (1965), at sections 179-182).

⁴²⁴ See Exhibit CLM-182, D. Wallace Jr., “Fair and Equitable Treatment and Denial of Justice: *Loewen v. U.S. and Chaitin v. Mexico*,” in *INTERNATIONAL INVESTMENT LAW AND ARBITRATION: LEADING CASES FROM THE ICSID, NAFTA, BILATERAL TREATIES AND CUSTOMARY INTERNATIONAL LAW* (Weiler, ed.) (2005), at 680.

⁴²⁵ See above at paras. 44-61.

⁴²⁶ See above at paras. 118, 42-43.

⁴²⁷ See above at paras. 124-125.

that the Ecuadorian plaintiff, NIFA, had suffered lost profit damages of **\$150 million** arising out of a failed **\$1.5 million** real estate transaction.⁴²⁸

244. With knowledge that this arbitration was pending, and ruling within two weeks after this Tribunal's hearing in The Hague on MSDIA's Request for Interim Measures, Ecuador's highest court, the National Court of Justice, recognized that the decision of the court of appeals was manifestly irrational and legally unsupportable.⁴²⁹ Rather than confirm that there was no basis for a finding of liability and reverse the court of appeals' decision, however, the NCJ instead invented an unprecedented legal theory by which to hold MSDIA liable (while also overturning the flagrantly excessive and wholly indefensible award of damages issued by the court of appeals).⁴³⁰

245. The NCJ obviously recognized that the basis for liability and quantum of damages established in the lower court proceedings were absurd and indefensible. But instead of simply ruling for MSDIA or remanding for new proceedings before an unbiased court, and without affording MSDIA notice or an opportunity to be heard, the NCJ relied on the factual findings and allegations as set forth in the tainted judgment of the court of appeals and held MSDIA liable on the basis of an entirely different legal theory than that relied on by the lower courts, namely, that MSDIA's conduct was actionable "unfair competition."⁴³¹

246. The NCJ reached this conclusion notwithstanding that the Ecuadorian plaintiff (i) ***had exclusively pursued a claim for an antitrust violation***; (ii) ***had consistently, repeatedly and expressly disclaimed that it was asserting a claim for unfair competition***; (iii) ***had conceded that the facts in the record did not establish the required elements of an unfair competition claim***; and (iv) ***had conceded that the civil courts would not have jurisdiction over an unfair competition claim (which it conceded was the exclusive province of other courts) in any event***.⁴³²

247. The NCJ also reached this decision notwithstanding its own recognition that MSDIA's actions did not violate antitrust law because they had no effect on competition, and despite the general understanding, prior to its ruling, that the constitutional provision on which it relied addressed only antitrust principles and on its face had no relevance to claims of unfair competition,⁴³³ which protects only competitors (not competition) and were exclusively governed by a different Ecuadorian statute under the jurisdiction of other tribunals.⁴³⁴

248. In determining that MSDIA had committed an act of unfair competition, the NCJ failed to address ***any*** of the substantial evidence and reliable expert opinions in the factual record of the

⁴²⁸ See above at para. 126. And, of course, the trial court issued a judgment apparently based on antitrust principles against MSDIA for \$200 million based on the same failed real estate transaction. See above at para. 56.

⁴²⁹ See above at paras. 142-144.

⁴³⁰ See above at paras. 146-149.

⁴³¹ See above at paras. 146-152.

⁴³² See above at paras. 71-73, 138, 149.

⁴³³ See above at para. 149.

⁴³⁴ See above at paras. 70-71, 147.

lower courts that established conclusively that MSDIA had committed no wrongdoing during its negotiations with NIFA. Indeed, the NCJ made no apparent effort whatsoever to reach an independent understanding of the facts and contentions below.

249. Instead, the NCJ *expressly and summarily relied upon* the factual findings set forth in the corrupt court of appeals judgment—the same factual findings that the court of appeals had reached after *expressly disregarding all of the evidence submitted by MSDIA and all of the expert opinions, including court-appointed expert opinions, favorable to MSDIA*. Even though MSDIA had informed the NCJ of the gross procedural irregularities and due-process violations that drove the court of appeals’ proceedings, the NCJ relied upon the factual findings made by that obviously biased and corrupt court. Accordingly, the factual findings upon which the NCJ’s finding of liability were based were tainted by the same denials of justice—the same rank bias and violations of due process—that pervaded the lower-court proceedings and animated the lower-court opinions.

250. Moreover, MSDIA had no notice that the NCJ could or would consider unfair competition as a basis for liability, much less that it would do so under a constitutional provision that had no facial bearing on unfair competition claims. Absent such notice MSDIA plainly had no opportunity to be heard with respect to such a claim.

251. Indeed, given that NIFA had plainly waived reliance on a theory of unfair competition and conceded that the courts were without jurisdiction to entertain such a claim; and given that neither NIFA nor any court or other authority had ever contended or suggested that the constitutional provision on which the NCJ relied encompassed an unfair competition claim; no reasonable litigant could have anticipated that it would be held liable on such a theory and therefore no reasonable litigant would have attempted to adduce the evidence and marshal the legal arguments against such liability. And, for those reasons, MSDIA did not do so.

252. As such, although the NCJ’s decision significantly reduced the amount of the (absurd) award of damages previously assessed against MSDIA, it did not fully remedy the denial of justice MSDIA had suffered in the lower courts. Rather, the decision of Ecuador’s highest court perpetuated Ecuador’s denial of justice to MSDIA by subjecting MSDIA to liability on the basis of facts as determined in the court of appeals’ judgment, which was tainted by the gross deprivations of due process in that court, and on the basis of a legal theory that was not asserted by the plaintiff and therefore was not before the court, and to which MSDIA through the NCJ judgment and the proceedings below was not given appropriate notice nor a sufficient opportunity to adduce evidence and respond. Ecuador’s actions violated its obligations under the Treaty, and as a result, MSDIA is entitled to relief.

253. Thus, as Professor Paulsson explains: “if MSDIA’s factual allegations about the *NIFA v. MSDIA* proceedings are true, *it plainly follows that the threshold of procedural impropriety required to establish a claim for denial of justice has been crossed.*”⁴³⁵

⁴³⁵ Expert Report of Professor Paulsson, dated 2 October 2013, at para. 50 [hereinafter Expert Report of Professor

A. *The Treaty Obligates Ecuador Not to Deny Justice to Foreign Investors*

254. As Professor Jan Paulsson, the pre-eminent authority on denial of justice, explains in his Expert Report, “[t]he basic premise of the rule of denial of justice is that a state incurs international responsibility if it administers its laws to aliens in a fundamentally unfair manner.”⁴³⁶

255. Ecuador’s obligation not to deny justice to MSDIA is found in Article II(3) of the Treaty, which states in relevant part that “[i]nvestment shall at all times be accorded fair and equitable treatment ... and shall in no case be accorded treatment less than that required by international law.”⁴³⁷ This Article incorporates the obligation not to deny justice to foreign nationals, both as part of the obligation to “accord[] fair and equitable treatment” and as part of the obligation to provide treatment “no ... less than that required by international law.”⁴³⁸

256. The question whether a State’s judicial system has committed a denial of justice in a particular case is highly fact-specific. As Professor Paulsson explains in his Expert Report, in order to determine whether a denial of justice has occurred, international tribunals typically consider all of the circumstances of the underlying litigation in the host State, paying particular attention to whether the final judgment in the litigation is the product of misconduct or gross error by the State’s judiciary.⁴³⁹ Thus, as Commissioner Nielsen explained in the *McCurdy* case,

Paulsson] (emphasis added).

⁴³⁶ Expert Report of Professor Paulsson at para. 20.

⁴³⁷ Exhibit C-1, U.S.-Ecuador BIT, art. II(3)(a).

⁴³⁸ As explained in *Jan de Nul N.V. v. Egypt*, “the fair and equitable treatment standard encompasses the notion of denial of justice.” Exhibit RLM-32, *Jan de Nul N.V. & Dredging Int’l N.V. v. Arab Republic of Egypt*, ICSID Case No. ARB/04/13, Award, dated 6 November 2008, at para. 188. See also Expert Report of Professor Paulsson, at para. 27 (explaining that Article II(3) of the U.S.-Ecuador BIT “protects against denials of justice in two ways. First, a denial of justice would be a breach of the ‘fair and equitable treatment’ standard. ... Second, since denial of justice is prohibited by customary international law, it is encompassed by the requirement that investments not be ‘accorded treatment less than that required by international law’.”); Exhibit RLM-37, *Loewen Group, Inc. & Raymond L. Loewen v. United States of America*, ICSID Case No. ARB(AF)/98/3, Award, dated 26 June 2003, at paras. 127-135; Exhibit CLM-162, R. Dolzer & C. Schreuer, PRINCIPLES OF INTERNATIONAL INVESTMENT LAW (2008), at 142; Exhibit CLM-174, J. Paulsson, DENIAL OF JUSTICE IN INTERNATIONAL LAW (2005), at 71 (“Such a provision [requiring fair and equitable treatment or full protection and security] naturally opens the door to liability, as found by an international tribunal, for denial of justice as a ‘fundamental rule of customary international law’.”); Exhibit CLM-112, *Ltd. Liability Co. AMTO v. Ukraine*, SCC Case No. 080-2005, Final Award, dated 26 March 2008, at para. 75 (denial of justice “is a manifestation of a breach of the obligation of a State to provide fair and equitable treatment and the minimum standard of treatment required by international law”); Exhibit CLM-142, *Rumeli Telekom A.S. & Telsim Mobil Telekomunikasyon Hizmetleri A.S. v. Republic of Kazakhstan*, ICSID Case No. ARB/05/16, Award, dated (July 29, 2008, at para. 651 (“[T]he duty not to deny justice arises from customary international law and can also be considered to fall within the scope of treaty provisions provid[ing] for ‘fair and equitable treatment.’”) (italics omitted); Exhibit CLM-150, *Waste Management, Inc. v. United Mexican States*, ICSID Case No. ARB(AF)/98/2, Award, dated 26 May 2000, at para. 98 (stating that the fair and equitable treatment obligation is breached “if the conduct is arbitrary, grossly unfair, unjust or idiosyncratic, is discriminatory and exposes the claimant to sectional or racial prejudice *or involves lack of due process* leading to an extreme outcome which offends judicial propriety—as might be the case with a manifest failure of natural justice in judicial proceedings or a complete lack of transparency and candour in an administrative process”) (emphasis added).

⁴³⁹ Expert Report of Professor Paulsson at paras. 20-50. See also Exhibit CLM-159, E. Borchard, THE DIPLOMATIC PROTECTION OF CITIZENS ABROAD (1919), at 330 (stating the term denial of justice “denotes some misconduct or

“*a combination of improper acts*” can constitute a denial of justice, even if each act individually is not an independent denial of justice.⁴⁴⁰

257. As Professor Paulsson explains in his treatise on the subject, the obligation not to deny justice requires that a State’s judicial system not subject a foreign national to “proceedings that are so faulty as to exclude all reasonable expectation of a fair decision.”⁴⁴¹ Cases giving rise to liability for denial of justice include, but are not limited to, “unreasonable delay, politically dictated judgments, corruption, intimidation, *fundamental breaches of due process*, and *decisions so outrageous as to be inexplicable otherwise than as expressions of arbitrariness or gross incompetence*.”⁴⁴²

258. As the International Court of Justice has recognized, the obligation to provide a foreign national with a fair hearing encompasses minimum international standards of procedural due process, and also requires that a State’s courts render impartial and reasoned decisions that are based on the rule of law:

“[C]ertain elements of the right to a fair hearing are well recognized and provide criteria helpful in identifying fundamental errors in procedure which have occasioned a failure of justice: for instance, the right to an independent and impartial tribunal established by law; the right to have the case heard and determined within a reasonable time; the right to a reasonable opportunity to present the case to the tribunal and to comment upon the opponent’s case; the right to equality in the proceedings vis-à-vis the opponent; and the right to a reasoned decision.”⁴⁴³

259. A lack of due process in the course of judicial proceedings consistently has been recognized by tribunals and commentators as giving rise to a claim for denial of justice.⁴⁴⁴ As explained by D.P. O’Connell:

inaction of the judicial branch of the government by which an alien is denied the benefits of due process of law. It involves, therefore, some violation of rights in the administration of justice, or a wrong perpetrated by the abuse of judicial process.”)

⁴⁴⁰ See Exhibit CLM-133, *McCurdy v. United Mexican States*, Award, dated 21 March 1929, IV RIAA 418 (1929), at p. 427.

⁴⁴¹ Exhibit CLM-174, J. Paulsson, DENIAL OF JUSTICE IN INTERNATIONAL LAW (2005), at 205 (italics omitted).

⁴⁴² Exhibit CLM-174, J. Paulsson, DENIAL OF JUSTICE IN INTERNATIONAL LAW (2005), at 205 (emphasis added).

⁴⁴³ Exhibit CLM-158, *Application for Review of Judgment No. 158 of the United Nations Administrative Tribunal*, Advisory Opinion, dated 12 July 1973, 1973 I.C.J. Reports 166, at para. 92. See also Exhibit CLM-169, *Judgment No. 2867 of the Administrative Tribunal of the International Labour Organization*, Advisory Opinion of 1 February 2012, at para. 30.

⁴⁴⁴ See Exhibit RLM-37, *Loewen Group, Inc. & Raymond L. Loewen v. United States of America*, ICSID Case No. ARB(AF)/98/3, Award, dated 26 June 2003, at para. 132 (stating that “[m]anifest injustice in the sense of a lack of due process leading to an outcome which offends a sense of judicial propriety is enough” to “establish unfair and inequitable treatment or denial of justice amount to a breach of international injustice”). See also Exhibit CLM-182, D. Wallace Jr., “Fair and Equitable Treatment and Denial of Justice: *Loewen v. U.S. and Chittin v. Mexico*,” in INTERNATIONAL INVESTMENT LAW AND ARBITRATION: LEADING CASES FROM THE ICSID, NAFTA, BILATERAL TREATIES AND CUSTOMARY INTERNATIONAL LAW (Weiler, ed.) (2005) at 680.

“Denial of justice also comprehends departure from what in English administrative law could be described as ‘the rules of natural justice’. This means that there must be a hearing and that the alien be given notice of it, at least if the judgment is to be more than provisional and open to reversal on appearance of the alien. It means too that there be separation of the roles of accuser and judge, and that there be full disclosure of the case against the alien and an opportunity to controvert the charges through use of counsel. He must be fully informed of them.”⁴⁴⁵

Thus, a court’s failure to afford a foreign national basic due process, including the right to notice of the legal issues and an opportunity to be heard on them, constitutes a denial of justice.⁴⁴⁶

260. Moreover, a court must apply its own procedures fairly and meaningfully. Tribunals have found denials of justice in cases involving “major procedural errors”⁴⁴⁷ and that have “tainted the proceedings irrevocably.”⁴⁴⁸ As the commissioners in the *Chattin* case explained, the procedures afforded to a foreign litigant must be meaningful and not a mere formality:

“Irregularity of court proceedings is proven with reference to absence of proper investigations, insufficiency of confrontations, withholding from the accused the opportunity to know all of the charges brought against him, undue delay of proceedings,

⁴⁴⁵ Exhibit CLM-173, D.P. O’Connell, *INTERNATIONAL LAW* (1965), at 1027. *See also* Exhibit CLM-175, A. Roth, *THE MINIMUM STANDARD OF INTERNATIONAL LAW APPLIED TO ALIENS* (1949), at 182 (“The alien should be informed of the charges against him, be able to prepare a defense, be allowed to produce proofs, and no documents should be withheld, hidden or destroyed by authorities to the prejudice of the foreigner’s case, and he should be allowed to produce all evidence and summon all witnesses in court . . .”); Exhibit CLM-164, A.V. Freeman, *THE INTERNATIONAL RESPONSIBILITY OF STATES FOR DENIAL OF JUSTICE* (1973), at 267 (explaining that a State has failed to satisfy its obligations under international law if “judicial action is taken without giving the alien a hearing or properly notifying him in advance to prepare a defense” or if its courts deprive a foreign litigant of the opportunity “to produce evidence or to summon valuable witnesses”). Even outside the context of claims alleging the breach of a bilateral investment treaty, international tribunals have emphasized that due process encompasses the right to be heard, and to submit evidence, on an opponent’s case. For instance, an appellate body of the World Trade Organization observed that “[d]ue process is intrinsically connected to notions of fairness, impartiality, and the rights of parties to be heard and to be afforded an adequate opportunity to pursue their claims, make out their defences, and **establish the facts in the context of proceedings conducted in a balanced and orderly manner, according to established rules**. The protection of due process is thus a crucial means of guaranteeing the legitimacy and efficacy of a rules-based system of adjudication.” Exhibit CLM-178, *Thailand – Customs and Fiscal Measures on Cigarettes from the Philippines*, Report from the Appellate Body, WT/DS371/AB/R, dated 17 June 2011, at para. 147 (emphasis added).

⁴⁴⁶ Exhibit CLM-145, *Siag & Vecchi v. Arab Republic of Egypt*, ICSID Case No. ARB/05/15, Award, dated 1 June 2009, at para. 452 (“A failure to allow a party due process will often result in a denial of justice.”); Exhibit RLM-37, *Loewen Group, Inc. & Raymond L. Loewen v. United States of America*, ICSID Case No. ARB(AF)/98/3, Award, dated 26 June 2003, at para. 132. *See also* Exhibit RLM-32, *Jan de Nul N.V. & Dredging Int’l N.V. v. Arab Republic of Egypt*, ICSID Case No. ARB/04/13, Award, dated 6 November 2008, at paras. 192-193 (adopting the *Loewen* standard); Exhibit CLM-155, *Elettronica Sicula S.p.A. (United States of America v. Italy)*, 1989 I.C.J. Reports 15, at para. 128 (denial of justice is “a willful disregard of due process of law, . . . which shocks, or at least surprises, a sense of judicial propriety”).

⁴⁴⁷ Exhibit CLM-141, *RosInvestCo UK Ltd. v. Russian Federation*, SCC Case No. V079/2005, Final Award, dated 12 September 2010, at para. 279.

⁴⁴⁸ Exhibit CLM-119, *Amco Asia Corp., et al. v. Republic of Indonesia*, Resubmitted Case Award, dated 31 May 1990, 1 ICSID Reports 569, at para. 138.

making the hearings in open court a mere formality, and a continued absence of seriousness on the part of the Court.”⁴⁴⁹

261. International law also requires that a State’s courts apply procedural and substantive laws in an even-handed manner, and not manipulate those laws to prejudice a foreign-national litigant. As Irizarry y Puente has explained, a denial of justice occurs where “the rules of procedure have been openly ignored to the manifest prejudice of the alien, or the law has been interpreted in a way that constitutes a plain corruption of its terms.”⁴⁵⁰ In other words, the *rule of law* must drive courts’ decision-making:

“[T]he expression ‘denial of justice’ can be defined as the failure of the state, in an appropriate action instituted by a foreigner to determine his legal rights, thereby preventing him from making them effective, either because he has been refused access to its courts; or, because there is no law, or existing law is inadequate, to govern his case; or, because the courts have refused or delayed to give judgment, or have disregarded the law, or misapplied it to the facts”⁴⁵¹

262. Moreover, it is well-settled that bias, including as a result of improper external influence or corruption, gives rise to a denial of justice: “The judicial action should neither be influenced by the government or any other political authority, *nor should it show a partiality for one of the parties*.”⁴⁵² International tribunals accordingly have emphasized the obligation to provide “*even-handed*” and “*ordinary justice*,”⁴⁵³ and not to issue decisions that are “*evidently unjust and partial*.”⁴⁵⁴ As A.V. Freeman explains, judicial “proceedings permeated with judicial fraud, venality, and corruption” give rise to liability for denial of justice.⁴⁵⁵

263. Similarly, as Professor Paulsson explains in his treatise, a clearly erroneous factual finding also may give rise to a denial of justice if “the evidentiary approach of the local court [is] so unfair against the foreigner as to vitiate the outcome.”⁴⁵⁶ As an example of this, Professor

⁴⁴⁹ Exhibit CLM-120, *B.E. Chattin (United States) v. United Mexican States*, IV R.I.A.A. 282 (1927), at para. 30. See also *id.* at para. 22 (noting that the failure to afford the accused an opportunity to cross-examine witnesses was procedurally irregular). As the tribunal in *Amco Asia Corp. v. Indonesia* explained, “a denial of justice ... would taint the decision” at issue “regardless of whether [the decision-maker] might have had substantive grounds for its action.” Exhibit 119, *Amco Asia Corp., et al. v. Republic of Indonesia*, Resubmitted Case Award, dated 31 May 1990, 1 ICSID Reports 569, at para. 137.

⁴⁵⁰ Exhibit CLM-166, J. Irizarry y Puente, *The Concept of ‘Denial of Justice’ in Latin America*, 43 Mich. L. Rev. 383, 403-404 (1944).

⁴⁵¹ Exhibit CLM-166, J. Irizarry y Puente, *The Concept of ‘Denial of Justice’ in Latin America*, 43 Mich. L. Rev. 383, 384 (1944).

⁴⁵² Exhibit CLM-175, A. Roth, *THE MINIMUM STANDARD OF INTERNATIONAL LAW APPLIED TO ALIENS* (1949), at 183 (emphasis added).

⁴⁵³ Exhibit CLM-127, *Idler (USA) v. Venezuela* (1885), in J Moore, *THE HISTORY AND DIGEST OF INTERNATIONAL ARBITRATIONS TO WHICH THE UNITED STATES HAS BEEN A PARTY* [hereinafter *ARBITRATIONS*], VOL. IV (1898), at 3491, 3517 (emphasis added).

⁴⁵⁴ Exhibit CLM-181, E. Vattel, *THE LAW OF NATIONS* (1852), at 464 (emphasis added).

⁴⁵⁵ See also Exhibit CLM-164, A.V. Freeman, *THE INTERNATIONAL RESPONSIBILITY OF STATES FOR DENIAL OF JUSTICE* (1973), at 268. See also Expert Report of Professor Paulsson at para. 39.

⁴⁵⁶ Exhibit CLM-174, J. Paulsson, *DENIAL OF JUSTICE IN INTERNATIONAL LAW* (2005), at 201. Professor Paulsson

Paulsson highlights the *Orient* case, in which a Mexican court seized a U.S. national's schooner and cargo, on the purported basis that the U.S. national had accepted a false manifest for his cargo. The commissioners held that the Mexican court had committed a denial of justice because the evidentiary basis for its finding was so lacking as to indicate that partiality—and not an interest in rendering a fair verdict—drove the court's decision-making:

“An examination of the proceedings in this case, and of the evidence upon which the sentence of confiscation was rendered ... has satisfied the board that the sentence was unwarranted by the evidence, and therefore unjust

“The decision of the court confiscating the vessel and cargo was thus founded on a single fact, ascertained to exist only on the testimony of a single witness, while it was expressly denied by four others, having an equal opportunity of knowing the truth and equally entitled to credit. A decision thus given in direct opposition to so strong a preponderance of testimony cannot be entitled to respect. It indicates strongly a predetermination on the part of the judge to confiscate the property without reference to the testimony.”⁴⁵⁷

264. Finally, as Professor Paulsson explains, a denial of justice may also be evident from a court's “[g]ross incompetence” in reaching a decision that “*no competent judge could reasonably have made*.”⁴⁵⁸ For example, “[s]urprising departures from settled patterns of reasoning or outcomes, *or the sudden emergence of a full-blown rule where none had existed*, must be viewed with the greatest scepticism if their effect is to disadvantage a foreigner.”⁴⁵⁹

265. In such cases, “the proof of the failed process is that the substance of a decision is so egregiously wrong that no honest or competent court could possibly have given it.”⁴⁶⁰ A “[w]rongful application of the law ... may ... provide ‘elements of proof of a denial of justice’” where no competent judge could have reached the same legal conclusion,⁴⁶¹ and “the decision of

also cites the *Bronner* case, in which a Mexican court ordered the confiscation of an importer's goods upon finding that the importer “had intended to defraud the customs authorities,” even though the evidence made clear that the importer had taken “more than usual precautions ... to prevent the possibility of any such accusation” and clearly did not “harbor[] an intention to deceive with the slightest hope of success.” Exhibit CLM-149, *United States v. Mexico*, in J. Moore, ARBITRATIONS, VOL. III (1898), at 3134, 3134. The Umpire found that the Mexican court's finding was “*so unfair as to constitute a denial of justice*.” *Id.* (emphasis added).

⁴⁵⁷ Exhibit CLM-148, *United States v. Mexico*, in J. Moore, ARBITRATIONS, VOL. III (1898), at 3229, 3231.

⁴⁵⁸ Exhibit CLM-174, J. Paulsson, DENIAL OF JUSTICE IN INTERNATIONAL LAW (2005), at 200 (emphasis added) (internal citations omitted).

⁴⁵⁹ Exhibit CLM-174, J. Paulsson, DENIAL OF JUSTICE IN INTERNATIONAL LAW (2005), at 200 (emphasis added). See also Exhibit CLM-137, *Occidental Exploration and Production Company v. Republic of Ecuador*, LCIA Case No. UN 3467, Final Award, dated 1 July 2004, at paras. 184-187.

⁴⁶⁰ Exhibit CLM-174, J. Paulsson, DENIAL OF JUSTICE IN INTERNATIONAL LAW (2005), at 98. See also Exhibit CLM-141, *RosInvestCo UK Ltd. v. Russian Federation*, SCC Case No. V079/2005, Final Award, dated 12 September 2010, at para. 279 (“The substantive outcome of a case can be relevant as an indication of lack of due process and thus can be considered as an element to prove denial of justice.”).

⁴⁶¹ Exhibit RLM-47, *Pantechniki S.A. Contractors & Engineers v. Republic of Albania*, ICSID Case No. ARB/07/21, Award, dated 30 July 2009, at paras. 94-95. See also Exhibit CLM-36, *Azinian, Davitian, & Baca v. Mexico*, ICSID Case No. ARB(AF)/97/2, Award, dated 1 November 1999, at paras. 102-103 (stating that a denial of justice can arise out of a “clear and malicious misapplication of the law”); Exhibit CLM-164, A.V. Freeman, THE

a court should not be arrived at by an obviously fraudulent or erroneous interpretation or application of the local law.”⁴⁶²

B. Ecuador Breached Its Obligation Not to Deny Justice to MSDIA

266. In the trial court and court of appeals proceedings in the *NIFA v. MSDIA* litigation, Ecuador’s courts denied justice to MSDIA by repeatedly and egregiously violating MSDIA’s basic due process rights. Those proceedings resulted in the issuance of decisions against MSDIA that were so manifestly irrational and lacking in legal basis that no competent and honest court could have reached them. Indeed, the evidence strongly suggests that those proceedings were tainted by bias and corruption.

267. The NCJ failed to remedy fully the denial of justice committed by the lower courts. The NCJ recognized that the decisions of those courts were manifestly irrational and without legal basis and that the award of damages to the Ecuadorian plaintiff in the amount of \$150 million was entirely unsupported. Rather than reverse the decision of the court of appeals and confirm that there was no basis for liability, however, the NCJ adopted an entirely different legal basis on which to find liability against MSDIA than that relied on by the court of appeals and one that had been formally disclaimed by NIFA on repeated occasions.

268. The NCJ issued a decision, adopting and relying on the tainted factual findings of the court of appeals, finding that MSDIA was liable for unfair competition, notwithstanding NIFA’s waiver of an unfair competition claim, NIFA’s concession that the civil courts did not have jurisdiction over an unfair competition claim, and NIFA’s concession that the facts in the record could not sustain a finding of unfair competition; and therefore despite the fact that, based on such positions of the plaintiff and the courts’ apparent lack of jurisdiction, MSDIA had not had notice that such a basis for liability was conceivably before the court. In so doing, far from remedying the denial of justice in the lower courts, the NCJ perpetuated the denial of justice committed by the lower courts.

269. Ecuador’s judiciary repeatedly violated MSDIA’s due process rights over the course of the *NIFA v. MSDIA* proceedings:

- a. As explained in Section IV.B.1 below, the trial court and court of appeals repeatedly deprived MSDIA of the notice and opportunity to be heard to which MSDIA was entitled. In clear violation of international law and the U.S.-Ecuador BIT, both courts issued obviously one-sided and irrational procedural rulings and final judgments marked by bias and corruption.

INTERNATIONAL RESPONSIBILITY OF STATES FOR DENIAL OF JUSTICE (1973), at 330-331 (noting that denial of justice exists where there has been a conscious misapplication of the law, an obviously baseless finding of fact, or a “decision that is so erroneous that no court which was composed of competent jurists could honestly have arrived at such a decision”).

⁴⁶² Exhibit CLM-175, A. Roth, *THE MINIMUM STANDARD OF INTERNATIONAL LAW APPLIED TO ALIENS* (1949), at 183.

b. As explained in Section IV.B.2 below, the NCJ nullified the legal conclusions and damages awards of the court of appeals, but nevertheless relied on the factual findings of the court of appeals as the basis for reaching its finding of liability against MSDIA. The NCJ's reliance on the factual findings of the court of appeals ratified and infected its own judgment with the due process violations of the lower courts.

c. As explained in Section IV.B.3 below, the NCJ invented a new theory of liability upon which to hold MSDIA liable after MSDIA established that the theory of liability relied on by the Ecuadorian plaintiff and applied by the lower courts was unsustainable. In doing so, the NCJ violated the established international rule requiring notice and an opportunity to be heard.

Thus, as Professor Paulsson explains in his Expert Report, “[t]hree Ecuadorean courts have committed separate and fully consummated denials of justice” in the *NIFA v. MSDIA* litigation.⁴⁶³

1. The Trial Court and Court of Appeals Denied Justice to MSDIA by Repeatedly and Egregiously Violating MSDIA's Due Process Rights and Issuing a Manifestly Irrational Decision That Is Evidence of a Tainted Procedure

270. As set out in Section II.C, the proceedings in Ecuador's trial court and court of appeals were profoundly flawed, biased, and likely corrupt. Those proceedings were marked by repeated deprivations of MSDIA's basic due process rights, baseless and one-sided procedural rulings, findings of liability that lacked any support in fact or law, and manifestly irrational damages awards that were massively disproportionate to the value of the underlying transaction. As Professor Paulsson explains in his Expert Report, the proceedings in the lower courts were “afflicted” by “*grave procedural and evidentiary defects*.”⁴⁶⁴

271. Specifically, in the lower court proceedings, MSDIA was subjected to numerous deprivations of its due process rights, including the following, among others:

a. The trial court scheduled the testimony of NIFA's *only* fact witness *without providing MSDIA with meaningful notice or the opportunity to attend the examination*.⁴⁶⁵

b. The Temporary Judge who decided the case in the trial court rendered a *15-page* final judgment only *three-and-one-half hours* after she took cognizance of the case.⁴⁶⁶

⁴⁶³ Expert Report of Professor Paulsson, at para. 13. See also *id.* at para. 15 (“I conclude ... that the Ecuadorean courts denied justice to MSDIA *at all three levels*.”) (emphasis added).

⁴⁶⁴ Expert Report of Professor Paulsson, at paras. 36-37 (emphasis added).

⁴⁶⁵ See *above* at paras. 47-50.

⁴⁶⁶ See *above* at para. 54.

Her judgment, which she admitted was drafted by someone else, included extensive passages verbatim (including typographical errors) from the plaintiff’s complaint.⁴⁶⁷

c. MSDIA did not receive proper notice of the **\$200 million** damages award in the trial court judgment, despite the fact that MSDIA was required to file any appeal from that judgment within three days of the judgment’s issuance.⁴⁶⁸

d. The court of appeals took possession of the case on 15 July 2008, triggering the period within which MSDIA was required to file its opening brief, but failed to inform MSDIA that it had done so until 29 July 2008,⁴⁶⁹ **less than an hour** before the deadline.⁴⁷⁰

e. The court of appeals appointed an internationally respected and highly credentialed expert who (correctly) concluded that there was no basis for liability or damages.⁴⁷¹ The court then disregarded that independent, expert opinion, **and instead appointed a new set of “experts” through a highly irregular and improper process.**⁴⁷² Those experts obviously lacked any relevant credentials or expertise—and the relevant governing body in Ecuador later recommended that the accreditations of two of the three be revoked. These purported “experts” then provided unreasoned and unsupported opinions that were entirely favorable to the Ecuadorian plaintiff,⁴⁷³ which the court then accepted without analysis.

f. The court of appeals considered the evidence submitted by the Ecuadorian plaintiff, but **ignored completely the evidence submitted by MSDIA**, holding that MSDIA had “expressly waived the evidence aiming to dispel the grounds of the verdict in first instance.”⁴⁷⁴ In support of its finding that MSDIA had voluntarily waived reliance on all of the evidence it had submitted, the court cited a petition in which MSDIA had withdrawn a request for the appointment of a damages expert in light of the fact that the initial court-appointed damages expert, appointed at NIFA’s request, had concluded that NIFA had suffered no damages. That petition in no way could be understood as waiving reliance on the evidence in the record; to the contrary, the petition clearly indicated that MSDIA was withdrawing the request for appointment of another expert precisely because it **was** relying on the evidence already in the record. The court of appeals’ holding that

⁴⁶⁷ See above at paras. 57-58.

⁴⁶⁸ See above at paras. 59-61.

⁴⁶⁹ See above at paras. 66-67.

⁴⁷⁰ See above at para. 67.

⁴⁷¹ See above at paras. 88, 103.

⁴⁷² See above at paras. 89-93, 104-105.

⁴⁷³ See above at paras. 95-98, 106-109. 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 in the Province—later confirmed that two of the experts did not demonstrate 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. See above at paras. 111-117.

⁴⁷⁴ Exhibit C-4, Court of Appeals Judgment, *NIFA v. MSDIA*, dated 23 September 2011, at 15-16.

MSDIA had waived reliance on the evidence was obviously pretextual and unjustifiable.⁴⁷⁵

g. The court of appeals issued its \$150 million judgment against MSDIA while simultaneously deciding pending procedural motions. ***MSDIA was therefore deprived of the opportunity to file its final brief*** – which it had already prepared and was waiting to file – and to request an oral hearing on the merits.

272. Standing alone, the highly irregular and flawed procedures in the lower courts evidence that those courts were biased against MSDIA and that their decisions were issued to achieve a predetermined result, not to apply of the rule of law.

273. The final decisions that were issued by those courts confirm that they failed to provide basic due process to MSDIA. In short, the decisions of the trial court and court of appeals were so manifestly unfair and irrational that no honest and competent court could possibly have reached them. In the words of one prominent commentary, the “***substantive absurdity***” of the legal conclusions “***evidences the procedural defect.***”⁴⁷⁶

274. Specifically:

a. The court of appeals held MSDIA liable for a violation of antitrust law despite the fact that Ecuador—by its own repeated declaration—***did not have any antitrust law*** and had not adopted or announced the substantive rules of competition that the courts purported to apply.⁴⁷⁷

b. The court of appeals irrationally concluded that MSDIA violated antitrust law contrary to all of the evidence and credible expert opinions in the record.⁴⁷⁸ Indeed, the NCJ’s reasoning on this point itself makes clear the complete and patent unsustainability of this theory on these facts.⁴⁷⁹

c. The damages awards entered by the lower courts (of ***\$200 million*** and ***\$150 million***, respectively⁴⁸⁰) were grossly disproportionate to the value of the underlying transaction and to the profitability of the plaintiff. There was no evidence to support any award of damages—much less damages that were more than ***100 times*** larger than the proposed purchase price of the plant (\$1.5 million),⁴⁸¹ nearly ***100,000 times*** NIFA’s annual profits in 2002 (\$2,165) that purportedly could have generated these profits,⁴⁸² and

⁴⁷⁵ See above at paras. 121-123.

⁴⁷⁶ Exhibit CLM-172, A. Newcombe & L. Paradell, LAW AND PRACTICE OF INVESTMENT TREATIES (2009), at 241 (emphasis added).

⁴⁷⁷ See above at paras. 42-43.

⁴⁷⁸ See above at paras. 86-98.

⁴⁷⁹ See above at paras. 142-143.

⁴⁸⁰ See above at paras. 56, 126.

⁴⁸¹ See above at para. 32.

⁴⁸² See above at para. 29.

nearly *10 times* the sales revenue of the entire Ecuadorian generics market in 2002.⁴⁸³ Again, the NCJ’s reasoning on this point itself makes clear that the trial court and court of appeals rulings were entirely irrational and unsupportable as to damages.⁴⁸⁴

275. No rational, competent, and unbiased court could possibly have concluded that MSDIA’s actions constituted an antitrust violation, in light of the absence of any antitrust law and the clear evidence that MSDIA did not violate principles of antitrust law. Nor could any rational, competent, and unbiased court have awarded damages of \$200 million or \$150 million, in light of the absence of evidence of any damage to NIFA, let alone damage so vastly exceeding any conceivable theoretical harm. The substantive decisions of the lower courts on both liability and damages were so manifestly absurd and unjust that they evidence a fundamentally flawed and biased procedure in violation of international law.⁴⁸⁵

276. Finally, even apart from the irregular proceedings in the trial court and court of appeals, and the irrational judgments issued by those courts, there is evidence that the courts’ rulings resulted from bias and corruption. As explained above, the temporary judge who issued the \$200 million trial court judgment against MSDIA admitted that she had been “tricked” into ruling against MSDIA by the judge who she replaced.⁴⁸⁶ Indeed, three of the judges who presided over the proceedings in the lower courts later were disciplined by Ecuador’s Council of the Judiciary.⁴⁸⁷ As Professor Paulsson explains, these facts are “*objectively troubling*,”⁴⁸⁸ and the temporary judge’s admission, if true, “*supports the conclusion that corruption has influenced the judicial decisions here*.”⁴⁸⁹

277. Thus, as Professor Paulsson explains, “*the defects in the trial court and court of appeals, and the final judgments resulting from those proceedings, constitute a deprivation of the due process of law, which amounts to a denial of justice*.”⁴⁹⁰

2. The NCJ Perpetuated the Denials of Justice Committed by Ecuador’s Lower Courts

278. The NCJ correctly found that there was no conceivable basis for the court of appeals’ finding that MSDIA was liable for an antitrust violation, and specifically criticized the court of

⁴⁸³ See above at para. 38.

⁴⁸⁴ See above at para. 144. Indeed, as Professor Paulsson explains, the trial court’s damages awards was “*astonishing*” by international law standards, and “*reflect[ed] a disregard of due process*.” Expert Report of Professor Paulsson at para. 45 (emphasis added). Similarly, Professor Paulsson observes that the court of appeals’ damages award to NIFA “*also lacks any foundation of proven harm*.” *Id.* at para. 46 (emphasis added).

⁴⁸⁵ Expert Report of Professor Paulsson at para. 38. See also *id.* at para. 47 (“[T]he excessive and grossly disproportionate damages awards in the trial court and court of appeals *are an indication that the NIFA v. MSDIA proceedings represented the antithesis of due process*.”) (emphasis added).

⁴⁸⁶ See above at paras. 188-192.

⁴⁸⁷ See above at paras. 183-187, 193-198.

⁴⁸⁸ Expert Report of Professor Paulsson at para. 42 (emphasis added).

⁴⁸⁹ Expert Report of Professor Paulsson at para. 43 (emphasis added).

⁴⁹⁰ Expert Report of Professor Paulsson at para. 38 (emphasis added).

appeals' factual findings on the elements of an antitrust claim.⁴⁹¹ Although the NCJ recognized that the factual findings of the court of appeals were unsupportable, the NCJ did not acknowledge or address the substantial violations of MSDIA's due process rights that infected the factual record in that court.⁴⁹²

279. Indeed, as explained above, the court of appeals expressly disregarded *all of the evidence submitted by MSDIA*, basing its decision only on the evidence submitted by the Ecuadorian plaintiff.⁴⁹³ As Professor Páez explains, the court of appeals' failure to consider any of MSDIA's evidence clearly was contrary to law:

“I found *no indication that MSDIA had waived all of its evidence*. Rather, MSDIA waived its request for the submission of a specific expert report, on the basis that the court already had before it an expert report on the same topic. I do not see *any* justification for the [court of appeals'] finding that MSDIA abandoned or waived all of the evidence that it had presented. *In my many years of experience, I have never seen a court rule in such an arbitrary, prejudicial, and biased way.*”⁴⁹⁴

280. In addition, the court of appeals manipulated the factual record by excluding expert opinions that were favorable to MSDIA, and by appointing and relying on the testimony of manifestly unqualified experts who issued opinions favorable to the Ecuadorian plaintiff.⁴⁹⁵ The factual findings of the court of appeals had been infected by numerous denials of justice, including improper bias and corruption,⁴⁹⁶ procedural misconduct,⁴⁹⁷ one-side procedural rulings,⁴⁹⁸ and the deprivation of MSDIA's most essential “*right to a reasonable opportunity to present the case to the tribunal and to comment upon the opponent's case.*”⁴⁹⁹

281. By basing its decision only on the evidence submitted by NIFA, the court of appeals plainly disregarded the due-process norm that a court must “*compil[e] ... a record,*” and “*bas[e] ... a decision on the record*” in making the factual findings upon which its final judgment is based.⁵⁰⁰ Indeed, international commentators and tribunals consistently have recognized that a

⁴⁹¹ See above at paras. 142-143.

⁴⁹² See above at paras. 150-152.

⁴⁹³ See above at paras. 121-123.

⁴⁹⁴ Expert Report of Professor Páez at para. 34 (emphasis added).

⁴⁹⁵ See above at paras. 85-117.

⁴⁹⁶ See Exhibit CLM-175, A. Roth, THE MINIMUM STANDARD OF INTERNATIONAL LAW APPLIED TO ALIENS (1949), at 183.

⁴⁹⁷ See Exhibit CLM-120, *B.E. Chattin (United States) v. United Mexican States*, IV R.I.A.A. 282 (1927), at para. 30.

⁴⁹⁸ See Exhibit CLM-166, J. Irizarry y Puente, *The Concept of 'Denial of Justice' in Latin America*, 43 Mich. L. Rev. 383, 384 (1944).

⁴⁹⁹ Exhibit CLM-158, *Application for Review of Judgment No. 158 of the United Nations Administrative Tribunal*, Advisory Opinion, 1973 I.C.J. 166, 209, para. 92 (emphasis added).

⁵⁰⁰ Exhibit CLM-165, D.J. Galligan, *DUE PROCESS AND FAIR PROCEDURES: A STUDY OF ADMINISTRATIVE PROCEDURES* (1996), at 202 (emphasis added).

court must actually consider, and cannot summarily disregard evidence submitted by a foreign-national litigant, against whom a judgment is issued.⁵⁰¹

282. For example, in *Amco Asia Corp. v. Indonesia*, an ICSID tribunal held that a decision revoking the claimant's license to invest in Indonesia, solely on the basis of allegations made by an Indonesian entity that had been engaged in a dispute with the claimant, "**constituted a denial of justice.**"⁵⁰² The President of Indonesia had approved the revocation of the license on the basis of an administrator's report that had "assess[ed] ... the facts ... based **solely on [the] 'meetings' with [the Indonesian entity's] representatives**" and failed to consider any of the countervailing evidence submitted by the claimant's representatives in their meetings with the administrator.⁵⁰³ "**[N]othing was said [in the report] about [the claimant's] side of the story or about [the administrator's] meeting with the [claimant's] representatives.**"⁵⁰⁴

283. The tribunal explained that "the procedure of the license revocation is unlawful."⁵⁰⁵ As the tribunal explained, "there are **many disturbing aspects** about the preparation" of the administrator's report, including the fact that the report simply "**repeated**" the clearly erroneous allegations by the Indonesian entity that had petitioned for the revocation of the claimant's license.⁵⁰⁶ On this basis, it concluded that "**the whole approach to the issue of revocation of the license was tainted by bad faith, reflected in events and procedures.**"⁵⁰⁷

⁵⁰¹ Exhibit CLM-174, J. Paulsson, DENIAL OF JUSTICE IN INTERNATIONAL LAW 61 (2005) (suggesting that even if "the judgment looks well-reasoned and balanced" it is necessary to consider whether "the trial record shows that **important elements of the foreigner's evidence have been excluded**") (emphasis added); See also Exhibit CLM-164, A.V. Freeman, THE INTERNATIONAL RESPONSIBILITY OF STATES FOR DENIAL OF JUSTICE (1973), at 268-269, 289 (noting that the "repeated refusal[] to hear [a] part[y]" gives rise to liability for denial of justice, as in the *Cotesworth & Powell* case). Indeed, international tribunals have examined whether a State's decision-makers have "**review[ed] the evidence presented**" by the foreign-national in rendering factual findings that are adverse to the foreign-national. See, e.g., Exhibit CLM-128, *International Thunderbird Gaming Corp. v. United Mexican States*, Award, dated 26 January 2006, at para. 198 (emphasis added).

⁵⁰² Exhibit CLM-119, *Amco Asia Corp., et al. v. Republic of Indonesia*, Resubmitted Case Award, dated 31 May 1990, 1 ICSID Reports 569, at para. 137 (emphasis added).

⁵⁰³ Exhibit CLM-118, *Amco Asia Corp., et al. v. Republic of Indonesia*, Award, dated 20 November 1984, 1 ICSID Reports 413, at para. 120 (emphasis added). This finding was made by an earlier tribunal, whose Award had been annulled by an *ad hoc* Committee, but whose findings as to the due-process violations committed by Indonesia were treated as *res judicata* by the second tribunal that was constituted to hear the case. See Exhibit CLM-119, *Amco Asia Corp., et al. v. Republic of Indonesia*, Resubmitted Case Award, dated 31 May 1990, 1 ICSID Reports 569, at para. 28.

⁵⁰⁴ Exhibit CLM-118, *Amco Asia Corp., et al. v. Republic of Indonesia*, Award, dated 20 November 1984, 1 ICSID Reports 413, at para. 120 (emphasis added). The conclusions of the one-sided report were parroted in a memorandum transmitted by the administrative agency to the President of Indonesia, who approved the revocation of the claimant's investment license. See *id.* at paras. 124-127. See also *id.* at paras. 128-129 (finding that the revocation order echoed the allegations set forth in the initial report).

⁵⁰⁵ Exhibit CLM-119, *Amco Asia Corp., et al. v. Republic of Indonesia*, Resubmitted Case Award, dated 31 May 1990, 1 ICSID Reports 569, at para. 65 (finding that first tribunal's finding of a due-process violation was *res judicata*).

⁵⁰⁶ Exhibit CLM-119, *Amco Asia Corp., et al. v. Republic of Indonesia*, Resubmitted Case Award, dated 31 May 1990, 1 ICSID Reports 569, at para. 81. Indeed, the first tribunal that presided over the case, and whose findings as to Indonesia's due-process violations were treated as *res judicata*, concluded that the procedure resulting in the revocation of the claimant's license was "**contrary ... to the general and fundamental principle of due process.**"

284. Thus, because of the court of appeals’ refusal to consider *any* of MSDIA’s evidence and the manifest denial of justice that tainted the factual record in the court of appeals, the NCJ should have disregarded entirely the court of appeals’ factual findings, and should have reviewed the lower-court record in order to reach an independent understanding of the parties’ contentions and the facts.⁵⁰⁸ Indeed, as Professor Páez, an expert on cassation proceedings in Ecuador, explains, the NCJ’s own procedures require that, if the factual findings of a lower court are “erroneous or otherwise distorted,” the NCJ “*must independently weigh the evidence in the entire record of the evidence of the lower court proceedings* and issue a new judgment *based on its own findings*.”⁵⁰⁹

285. Specifically, because the facts recited by the court of appeals were clearly based upon a manifestly one-sided examination of the evidence, the NCJ should have proceeded to review the entire evidentiary record *de novo* in issuing its decision. As Professor Páez explains:

“Because the Court of Second Instance had excluded MSDIA’s evidence in reaching its factual findings, those findings were *necessarily biased and distorted*. Therefore, having been advised of this distortion in the Cassation Petition filed by MSDIA (and by the express statement of the [court of appeals] itself), the NCJ was obligated to go beyond the distorted facts stated in the [court of appeals judgment] and to review all the evidence in the record. This is especially true given that the NCJ found MSDIA liable.”⁵¹⁰

286. Instead, however, the NCJ relied on the court of appeals’ recitation of the parties’ contentions and the court of appeals’ factual findings regarding MSDIA’s conduct. As the NCJ explained in paragraph 11 of its Judgment, in order to determine whether MSDIA could be held liable on a claim for unfair competition, “this Court of Cassation *refers to the following facts that can be found in the challenged judgment*.”⁵¹¹ The NCJ then proceeded to recite the facts set forth in the court of appeals’ judgment, and on that basis, to conclude that MSDIA had engaged in unfair competition.⁵¹²

287. As Professor Páez explains, the NCJ failed to independently evaluate the evidentiary record or to subject the court of appeals’ factual findings to *any* scrutiny in reaching its holding that MSDIA was liable for unfair competition.⁵¹³ Indeed, the NCJ did not even acknowledge that

Exhibit CLM-118, *Amco Asia Corp., et al. v. Republic of Indonesia*, Award, dated 20 November 1984, 1 ICSID Reports 413, at para. 201 (emphasis added). As that tribunal explained, it “would ... amount to a refusal of due process” if the administrative decision-maker “*had decided in advance not to take into account any argument of the investor whatsoever*.” *Id.* at para. 202 (emphasis added).

⁵⁰⁷ Exhibit CLM-119, *Amco Asia Corp., et al. v. Republic of Indonesia*, Resubmitted Case Award, dated 31 May 1990, 1 ICSID Reports 569, at para. 98 (emphasis added).

⁵⁰⁸ See above at paras. 150-152.

⁵⁰⁹ Expert Report of Professor Páez at paras. 19-20 (emphasis added).

⁵¹⁰ Expert Report of Professor Páez at para. 37.

⁵¹¹ Exhibit C-203, NCJ Judgment, *NIFA v. MSDIA*, dated 21 September 2012, at Section 11 (emphasis added).

⁵¹² Exhibit C-203, NCJ Judgment, *NIFA v. MSDIA*, dated 21 September 2012, at Section 15.

⁵¹³ Expert Report of Professor Páez at para. 36 (“On my review of the [NCJ] Judgment, *I find no evidence that the NCJ made an independent evaluation of the evidence in considering MSDIA’s liability for acts of unfair competition*.”) (emphasis added). Indeed, as Professor Páez explains, even if (contrary to fact) the NCJ had

the factual findings of the court of appeals were made based only on the evidence of the Ecuadorian plaintiff, without consideration of any of the evidence submitted by MSDIA.⁵¹⁴

288. By relying on the findings of the court of appeals – which the court of appeals expressly stated were based on a review of the evidence submitted by only one party – without scrutiny or independent review of the full factual record, the NCJ perpetuated the numerous denials of justice committed by Ecuador’s lower courts.⁵¹⁵ The NCJ’s decision to make factual findings that were adverse to MSDIA without considering *any* of the evidence submitted by MSDIA and on the basis of a factual record that had been manipulated in an obvious effort to prejudice MSDIA, constituted a clear violation of MSDIA’s right, under international law, to a judgment untainted by bias, corruption, and gross procedural misconduct.

289. As Professor Jan Paulsson explains in his Expert Report:

“If the final court bases its own decision on a factual record that was tainted by a denial of justice in the lower court proceedings, the decision of the final court naturally is infected by it and therefore is necessarily inconsistent with minimum standards of due process.”⁵¹⁶

290. The NCJ’s decision did not cure the denial of justice committed by the lower courts. Rather, that decision accepted the lower courts’ tainted and grossly unjust findings and thereby further violated MSDIA’s due process rights and perpetuated the denial of justice to MSDIA.

3. The NCJ Committed a Further Denial of Justice by Finding Liability Against MSDIA Without Notice or an Opportunity to Be Heard

291. The NCJ also committed a separate denial of justice by reason of its decision on the purported theory of unfair competition. Having found that there was no basis for the decision of the court of appeals, and having concluded that NIFA had failed to establish that MSDIA could be held liable on the only theory of liability NIFA had purported to advance, the NCJ should have reversed that decision and brought the Ecuadorian proceedings to a close. Instead, the NCJ failed to do what the law—and the rule of law—required. Just as the lower courts had done, the NCJ issued a decision with no basis in law or evidence.

independently examined the evidentiary record compiled in the lower courts, it still would reached a decision tainted by procedural misconduct, in light of the lower courts’ improper manipulation of that record to the detriment of MSDIA. *See id.* at para. 40. *See also id.* at para. 21 (“If ... the record is affected by procedural violations relating to the taking of evidence, those violations would affect the NCJ’s ability to make factual findings. Therefore, in such cases, the NCJ is required to annul the challenged judgment under the second cause of action under Article 3 of the Cassation Law and to remand the case to the lower courts in order to cure the defects in the record.”).

⁵¹⁴ *See above* at paras. 150-152.

⁵¹⁵ *See* Expert Report of Professor Paulsson, at paras. 48(f), 49.

⁵¹⁶ Expert Report of Professor Paulsson, at para. 17(b). As Professor Paulsson explains, the NCJ’s reliance on the lower courts’ factual findings constitutes conduct that is “defect[ive]” as a matter of international law. *See id.* at para. 48.

292. As explained below, the NCJ held MSDIA liable for unfair competition without regard to the due process rights of MSDIA, finding liability against MSDIA on a ground that had been expressly disavowed by the plaintiff and as to which MSDIA had no notice or opportunity to be heard. In its decision, the NCJ substantially reduced the amount of damages awarded to the plaintiff, finding the total awarded by the court of appeals to be absurd. Nevertheless, it awarded \$1.57 million (an amount greater than the agreed-upon sale price of the property at issue and 725 times larger than NIFA’s reported annual profit in 2002) ***on a legal theory of its own invention, without giving MSDIA the opportunity to address the legal or factual issues inherent in it.***

293. Although the final judgment rendered by the NCJ is 100 times less than the absurd amounts previously awarded by the trial court and court of appeals, obviously, ***any*** judgment—even one with seven rather than nine digits—must be consistent with the rule of law. Because the NCJ plainly violated MSDIA’s due process rights in rendering a judgment against MSDIA, the court’s \$1.57 million award is an indefensible denial of justice regardless of its size and regardless of its reduction in the previous, absurd rulings of the Ecuadorian courts.⁵¹⁷

294. Moreover, the \$1.57 million judgment issued by the NCJ did not remedy, but instead ***added to***, the collateral financial harm that MSDIA suffered throughout the *NIFA v. MSDIA* proceedings.⁵¹⁸ In particular, MSDIA expended millions of dollars in legal fees to avoid the potential annihilation of its business in Ecuador from the cascade of due process violations and unsupportable rulings rendered by the trial court and court of appeals. Thus, as Professor Paulsson explains in his Expert Report, MSDIA is entitled to recover from Ecuador not only the \$1.57 million it paid to satisfy the NCJ judgment, but also the legal fees it incurred throughout the *NIFA v. MSDIA* litigation.⁵¹⁹

a) Due Process Requires Notice and an Opportunity to Be Heard with Respect to Every Potential Basis for a Court’s Decision

295. International standards of due process minimally require that a State’s judiciary provide a civil defendant with notice and an opportunity to be heard. As D.P. O’Connell explains in his definitive treatise on State responsibility, the obligation not to deny justice, at its essence, requires that a foreign-national defendant receive “full disclosure of the case against [him] and an opportunity to controvert the charges through use of counsel.”⁵²⁰ In other words, a foreign national facing civil or criminal liability “must be fully informed” of the claims against him, and must have an opportunity to be heard (through the submission of legal and factual argument) on those claims.⁵²¹

⁵¹⁷ See Expert Report of Professor Paulsson, at para.17(a) .

⁵¹⁸ As Professor Paulsson explains, a successful denial of justice claimant is entitled to recover not only the amount that it paid to satisfy the national court’s judgment, but also all of the collateral harm that it suffered as a result of the denials of justice in the underlying litigation. See Expert Report of Professor Paulsson, at paras. 17(c), 64-66.

⁵¹⁹ Expert Report of Professor Paulsson, at paras. 17(c), 64-66.

⁵²⁰ Exhibit CLM-173, D.P. O’Connell, INTERNATIONAL LAW (1965), at 1027.

⁵²¹ Exhibit CLM-173, D.P. O’Connell, INTERNATIONAL LAW (1965), at 1027.

296. A foreign litigant must be specifically notified of the claims or issues upon which a final judgment may be rendered so that it has a meaningful opportunity to submit argument in its defense. It is not enough to inform the litigant of the pendency of a suit against it or of the potential for liability as a general matter. Instead, as the Great Britain-Colombia Mixed Claims Commission made clear in the *Cotesworth & Powell* case, a local court must notify the defendant of the *specific issue* upon which an adverse ruling may be based.⁵²² Investor-State tribunals have likewise recognized the importance of *specific notice* to a foreign investor of the potential for an adverse judicial decision (in the context of claims for denial of justice)⁵²³ or other adverse outcomes (in other contexts).⁵²⁴

297. As explained in the *Cotesworth & Powell* case, in order to provide a foreign national with a meaningful opportunity to be heard, a State must allow the national to be heard on each claim or potential basis for liability against it and ensure that the litigant's submissions are considered by the court in rendering a judgment.⁵²⁵ A prominent international commentator has accordingly

⁵²² Exhibit CLM-121, *Cotesworth & Powell (United Kingdom) v. Colombia*, in J. Moore, ARBITRATIONS, VOL. II (1898), at 2050, 2074-2075 (“The possessory action brought by Osorio was not notified to the defendant; **this was an act of notorious injustice.**”) (emphasis added). See also *id.* at 2084 (holding that the “failure to notify the defendant of [the plaintiff’s] counter action for possession, whilst the objects of the litigation were yet in possession of the court” was “a denial of justice”).

⁵²³ See below at paras. 295-305.

⁵²⁴ See, e.g., Exhibit CLM-135, *Middle East Cement Shipping & Handling Co. S.A. v. Arab Republic of Egypt*, ICSID Case No. ARB/99/6, Award, dated 12 April 2002, at paras. 143-144 (holding that administrative seizure and auction of claimant’s property amounted to expropriation due to insufficient notice, because the property was not taken under “due process of law”). See also Exhibit CLM-117, *Al Bahloul v. Republic of Tajikistan*, SCC Case No. V064/2008, Partial Award on Jurisdiction and Liability, dated 2 September 2009, at para. 221.

⁵²⁵ For instance, in the *Cotesworth and Powell* case, the tribunal found that Colombian courts had committed numerous denials of justice after rendering several decisions either without providing the foreign national with any opportunity to be heard or by summarily disregarding arguments that had been submitted to the courts by the foreign national. Exhibit CLM-121, *Cotesworth & Powell (United Kingdom) v. Colombia*, in J. Moore, ARBITRATIONS, VOL. II (1898), at 2050, 2074 (“**There was also an abuse of judicial authority in deciding an important question without hearing the defendant.**”) (emphasis added). As the tribunal in that case explained, “a plain violation of the substance of natural justice, as, for example, **refusing to hear the party interested, or to allow him opportunity to produce proofs, amounts to the same thing as an absolute denial of justice.**” *Id.* at 2083 (emphasis added). See also *id.* (stating that a “denial of justice ... occurs when the tribunals **refuse to hear the complaint or to decide upon petitions of complainant**, made according to the established forms of procedure”) (emphasis added); *id.* at 2084 (“The sentence releasing Isaacs & Co. from all responsibility resulting from their embargo of goods pertaining to the incidental partnership, was a denial of justice; because made without hearing the claimants as plaintiffs in the suit.”); *id.* (“The sentence recognizing the pretensions of the assignee, to embargo goods not among the bankrupts’ assets, was of very doubtful legality. This, however, **could never have arisen among the causes of complaint**, had not the judge **refused to hear the parties interested, on their petitions repeatedly and formally made**, thus denying them ordinary justice.” The decree of sale of certain embargoed goods stored out of Barranquilla, pending action for their possession, and without hearing the parties, was a denial of justice if not notorious injustice.”) (emphasis added); *id.* (“In the exhibitory action by Osorio, the sentence of March 18, 1859 was unjust; because the documents should have been previously returned. **The judge’s refusal to hear the defendant was a denial of justice.**”) (emphasis added). See also Exhibit CLM-167, G. Jaenicke, “Judicial Protection of the Individual within the System of International Law,” in JUDICIAL PROTECTION AGAINST THE EXECUTIVE (1971), at 303-304 (“[T]he emphasis of the aliens right to judicial protection is placed on the institutional and organizational aspect of the remedies: on the independence and impartiality of the judges, on the granting of an adequate hearing, on the opportunity to furnish evidence, on provisions against a delay in proceedings, etc.”). See also *id.* at 300 (“There is ... agreement that the

observed that “[t]he principle that both sides must be heard *on all issues affecting their legal position is one of the most basic concepts of fairness in adversarial proceedings.*”⁵²⁶

298. The Draft Convention on the International Responsibility of States for Injuries to Aliens expressly recognizes aliens’ right to notice and an opportunity to be heard as to all of the possible claims upon which they may be held liable:

“The denial to an alien by a tribunal or an administrative authority of a fair hearing in a proceeding involving the determination of his civil rights or obligations or of any criminal charges against him is wrongful if a decision or judgment is rendered against him or if he is accorded an inadequate recovery. In determining the fairness of any hearing, it is relevant to consider whether it was held before an independent tribunal and whether the alien was denied:

“(a) specific information in advance of the hearing of *any claim or charge* against him;”⁵²⁷

299. International tribunals have found that a foreign litigant was not given an adequate opportunity to be heard where a court rendered a judgment on grounds as to which the adversely-affected party could not have been aware.

300. For example, in *Pantechniki v. Albania*, the sole arbitrator (Paulsson) held that a national court committed a “*clear violation of fair procedure*” by rendering a judgment on an issue that was not in dispute and, therefore, had not been argued by the parties to the underlying litigation. In that case, the Albanian government had entered into a settlement agreement with the claimant, promising to comply with the terms of an indemnification provision in their underlying contract.⁵²⁸ The Albanian government failed to comply with the settlement agreement, and the claimant sued Albania in its local courts, seeking to enforce the settlement agreement (but *not* the underlying contract).⁵²⁹

301. Rather than address the claim to enforce the settlement agreement, Albania’s courts *sua sponte* concluded that the underlying contractual obligation, the validity of which *was not at issue* in the litigation, was contrary to public policy, and therefore void.⁵³⁰ The claimant then

alien must have access to the courts, that he must be granted a fair hearing in the proceedings, that the proceedings must contain a minimum of safeguards ensuring an unbiased decision and that the proceedings must not be unduly delayed.”).

⁵²⁶ Exhibit CLM-177, C. Schreuer, *THE ICSID CONVENTION: A COMMENTARY* (2d ed. 2009), at 987, para. 305 (emphasis added).

⁵²⁷ Exhibit CLM-163, Draft Convention on the International Responsibility of States for Injuries to Aliens, Prepared by the Harvard Law School, art. 7, Y.B. I.L.C., VOL. II (1969), at 143 (emphasis added).

⁵²⁸ Exhibit RLM-47, *Pantechniki S.A. Contractors & Engineers v. Republic of Albania*, ICSID Case No. ARB/07/21, Award, dated 30 July 2009, at paras. 16-18.

⁵²⁹ Exhibit RLM-47, *Pantechniki S.A. Contractors & Engineers v. Republic of Albania*, ICSID Case No. ARB/07/21, Award, dated 30 July 2009, at para. 99.

⁵³⁰ See Exhibit RLM-47, *Pantechniki S.A. Contractors & Engineers v. Republic of Albania*, ICSID Case No. ARB/07/21, Award, dated 30 July 2009, at para. 95.

asserted a claim for denial of justice against Albania, arguing that the “Albanian courts *took it upon themselves to declare the invalidity of a contractual provision which had never been invoked before them.*”⁵³¹ The arbitrator agreed:

“I am troubled by the *clear violation of fair procedure if it is true (as appears to be the case) that the Court of Appeals rejected the claim on a ground which the Claimant had not invoked and thus had no occasion to address. This is a serious matter.*”⁵³²

302. Investor-State tribunals have reached the same conclusion in the context of decisions by administrative decision-makers, holding that a decision violates a foreign investor’s due process rights if it is made without the investor having been given notice and an opportunity to be heard on the issues underlying the decision.⁵³³

303. For example, in *Rumeli Telekom v. Kazakhstan*, the Kazakh government terminated an investment contract with a Kazakh telecommunications provider controlled by Turkish investors.⁵³⁴ The investment contract granted the telecommunications provider certain tax benefits in exchange for the provider’s expansion of Kazakhstan’s telecommunications network.⁵³⁵

304. The Kazakh government initially terminated the investment contract on the ground that the telecommunications operator “had not complied with its reporting obligations” under the contract.⁵³⁶ After the investor adduced evidence to disprove the ground on which the contract was originally terminated, the Kazakh government purported to appoint an “inter-governmental Working Group” to identify additional bases upon which the concession could have been terminated.⁵³⁷ Without permitting the claimant to submit briefing or oral argument, the Working

⁵³¹ Exhibit RLM-47, *Pantehniki S.A. Contractors & Engineers v. Republic of Albania*, ICSID Case No. ARB/07/21, Award, dated 30 July 2009, at para. 99 (emphasis added).

⁵³² Exhibit RLM-47, *Pantehniki S.A. Contractors & Engineers v. Republic of Albania*, ICSID Case No. ARB/07/21, Award, dated 30 July 2009, at para. 100 (emphasis added). See also Exhibit RLM-41, *Mondev Int’l Ltd. v. United States of America*, ICSID Case No. ARB(AF)/99/2, Award, dated 11 October 2002, at para. 132 (noting that “there might be a problem [under international law] if the appellate decision *took into account some entirely new issue of fact essential to the decision and there was a substantial failure to allow the affected party to present its case.*”) (emphasis added).

⁵³³ Indeed, “[t]he administrative due process requirement is lower than that of a judicial process.” Exhibit CLM-128, *International Thunderbird Gaming Corporation v. United Mexican States*, Award, dated 26 January 2006, at para. 200 (emphasis added).

⁵³⁴ Exhibit CLM-142, *Rumeli Telekom A.S. & Telsim Mobil Telekomunikasyon Hizmetleri A.S. v. Republic of Kazakhstan*, ICSID Case No. ARB/05/16, Award, dated 29 July 2008, at paras. 113-114.

⁵³⁵ Exhibit CLM-142, *Rumeli Telekom A.S. & Telsim Mobil Telekomunikasyon Hizmetleri A.S. v. Republic of Kazakhstan*, ICSID Case No. ARB/05/16, Award, dated 29 July 2008, at paras. 101-103.

⁵³⁶ Exhibit CLM-142, *Rumeli Telekom A.S. & Telsim Mobil Telekomunikasyon Hizmetleri A.S. v. Republic of Kazakhstan*, ICSID Case No. ARB/05/16, Award, dated 29 July 2008, at para. 113. After the investment contract was terminated, the Kazakh judiciary also forced the Turkish investors to surrender their share of the telecommunications provider to local Kazakh investors, at prices significantly below the market price. *Id.* at paras. 142-146, 151-155.

⁵³⁷ Exhibit CLM-142, *Rumeli Telekom A.S. & Telsim Mobil Telekomunikasyon Hizmetleri A.S. v. Republic of Kazakhstan*, ICSID Case No. ARB/05/16, Award, dated 29 July 2008, at paras. 147-148.

Group “validated the termination of the Contract, **but did it on entirely different grounds than those forming the basis for the initial decision.**”⁵³⁸

305. The tribunal concluded that Kazakhstan had breached its obligations under the relevant BIT because the Working Group had rendered a decision that “lacked transparency and due process”:

“The Working Group founded its decision of validation not only on Kar-Tel’s non-compliance with its reporting obligations but also on various entirely different grounds than those forming the basis for the initial decision. The decision was made without Claimants having a real possibility to present their position.”⁵³⁹

On the basis of this finding, the tribunal in *Rumeli* concluded that Kazakhstan had violated the “fair and equitable treatment” obligation under its BIT with Turkey,⁵⁴⁰ which “includes in its generality the standard of denial of justice.”⁵⁴¹

306. Similarly, in *Deutsche Bank AG v. Sri Lanka*,⁵⁴² Sri Lanka’s Central Bank sought improperly to use an investigation, the full scope of which had not been disclosed to Deutsche Bank, to avoid its obligations under an oil-hedging contract between Deutsche Bank and Sri Lanka.⁵⁴³ The tribunal found that the conduct of Sri Lanka’s Central Bank “lack[ed] ... transparency and due process,” because Deutsche Bank “was not informed ... and ... was not offered the possibility to respond.”⁵⁴⁴ Expressing concerns “with respect to the legitimacy of the

⁵³⁸ Exhibit CLM-142, *Rumeli Telekom A.S. & Telsim Mobil Telekomunikasyon Hizmetleri A.S. v. Republic of Kazakhstan*, ICSID Case No. ARB/05/16, Award, dated 29 July 2008, at para. 407 (emphasis added). See also *id.* at para. 337 (“According to Claimants ... Respondent set up a Working Group over a year after the termination of the Investment Contract to examine alternative grounds for the termination of the Contract **rather than to examine the legality of the grounds on which the Contract was actually terminated in March 2002.** Furthermore, Claimants were *de facto* excluded from the meetings of the Working Group. ... [T]he decision of the Working Group validated the termination of the Contract on entirely different grounds than those forming the basis for the termination.”) (emphasis added).

⁵³⁹ Exhibit CLM-142, *Rumeli Telekom A.S. & Telsim Mobil Telekomunikasyon Hizmetleri A.S. v. Republic of Kazakhstan*, ICSID Case No. ARB/05/16, Award, dated 29 July 2008, at para. 617. See also Exhibit CLM-134, *Metalclad Corp. v. United Mexican States*, ICSID Case No. ARB(AF)/97/1, Award, dated 30 August 2000, at paras. 91, 101 (finding violation of the fair and equitable treatment provision of the NAFTA because the claimant’s municipal construction permit was denied “at a meeting of the Municipal Town Council of which Metalclad received no notice, to which it received no invitation, and at which it was given no opportunity to appear”).

⁵⁴⁰ Exhibit CLM-142, *Rumeli Telekom A.S. & Telsim Mobil Telekomunikasyon Hizmetleri A.S. v. Republic of Kazakhstan*, ICSID Case No. ARB/05/16, Award, dated 29 July 2008, at para. 618.

⁵⁴¹ Exhibit CLM-142, *Rumeli Telekom A.S. & Telsim Mobil Telekomunikasyon Hizmetleri A.S. v. Republic of Kazakhstan*, ICSID Case No. ARB/05/16, Award, dated 29 July 2008, at para. 654.

⁵⁴² Exhibit CLM-122, *Deutsche Bank AG v. Democratic Socialist Republic of Sri Lanka*, ICSID Case No. ARB/09/02, Award, dated 31 October 2012.

⁵⁴³ Exhibit CLM-122, *Deutsche Bank AG v. Democratic Socialist Republic of Sri Lanka*, ICSID Case No. ARB/09/02, Award, dated 31 October 2012, at para. 483.

⁵⁴⁴ Exhibit CLM-122, *Deutsche Bank AG v. Democratic Socialist Republic of Sri Lanka*, ICSID Case No. ARB/09/02, Award, dated 31 October 2012, at para. 487. The tribunal found that the investigation report “contain[ed] three new findings against [Deutsche Bank] of which it received no notice whatsoever and to which it had no opportunity to respond.” *Id.* at para. 488.

process,” the tribunal found that Sri Lanka had breached its obligation to afford Deutsche Bank’s investment fair and equitable treatment.⁵⁴⁵

307. Annulment decisions by *ad hoc* committees under the ICSID Convention also make clear that a decision-maker violates international standards of procedural due process by rendering a decision on grounds as to which the adversely-affected party lacked notice. For instance, an *ad hoc* committee found that the tribunal in the *Victor Pey Casado v. Chile* arbitration violated the respondent’s “right to be heard, which is a ***fundamental rule of procedure***,” by awarding damages *sua sponte* for a breach of the fair and equitable treatment obligation, even though the evidence in the record only related to damages for expropriation and the respondent, therefore, had not been “given a full, fair, or comparatively equal opportunity to ... present its defense, or produce evidence .”⁵⁴⁶ The *ad hoc* committee explained that the arbitral tribunal should have “reopen[ed] the proceeding before reaching a decision and allow[ed] the parties to put forward their views on the arbitrators’ new thesis.”⁵⁴⁷

308. Other *ad hoc* committee decisions have likewise emphasized that it is a “serious departure from a fundamental rule of procedure” for an arbitral tribunal to render a decision on grounds as to which the adversely-affected party was not on notice.⁵⁴⁸

309. Courts in France,⁵⁴⁹ Germany,⁵⁵⁰ the United Kingdom,⁵⁵¹ and the United States,⁵⁵² have reached the same conclusion and have relied on these principles of international law in examining both international arbitral awards and domestic judicial decisions.⁵⁵³

⁵⁴⁵ Exhibit CLM-122, *Deutsche Bank AG v. Democratic Socialist Republic of Sri Lanka*, ICSID Case No. ARB/09/02, Award, dated 31 October 2012, at para. 489.

⁵⁴⁶ Exhibit CLM-122, *Pey Casado v. Republic of Chile*, ICSID Case No. ARB/98/2, Decision on Annulment, dated 18 December 2012, at para. 184 (emphasis added).

⁵⁴⁷ Exhibit CLM-140, *Pey Casado v. Republic of Chile*, ICSID Case No. ARB/98/2, Decision on Annulment, dated 18 December 2012, at para. 267.

⁵⁴⁸ See, e.g., Exhibit CLM-151, *Wena Hotels Ltd. v. Arab Republic of Egypt*, ICSID Case No. ARB/98/4, Decision on Annulment, dated 28 January 2002, at para. 56. See also *id.* at para. 57 (“The said provision [Article 52(1)(d)] refers to a set of minimal standards of procedure to be respected as a matter of international law.”); Exhibit CLM-130, *Lemire v. Ukraine*, ICSID Case No. ARB/06/18, Award, dated 28 March 2011, at para. 38 (“If, on the basis of a jurisdictional objection never articulated by Respondent nor therefore answered by Claimant, the Tribunal had dismissed the arbitration, it would indeed have seriously departed from fundamental rules of procedure.”); Exhibit CLM-146, *[Redacted] v. Slovak Republic*, UNCITRAL, Final Award, dated 23 April 2012, at para. 141 (holding that the tribunal “should not base its decision on a legal theory which was not part of the debate and which the parties could not expect to be relevant,” despite its authority under governing Swiss law “to apply the law *ex officio* without being bound by the arguments and sources invoked by the Parties”).

⁵⁴⁹ Exhibit CLM-210, *Judgment of 23 June 2010, Société Top bagage internationale v. Société Wistar Enterprise Ltd* (légifrance) (French Cour de cassation civ. 1e) (annulling arbitral tribunal’s award on the ground that the tribunal “issu[ed] a ruling [against the respondent] intended to remedy a loss not invoked by [the claimant], without inviting the parties to explain themselves on this point”); Exhibit CLM-206, *Judgment of 6 April 1995, Thyssen Stahlunion v. Maaden*, 1995 Rev. arb. 448 (Paris Cour d’appel) (“[T]he adversarial principle assumes that ***no means of fact or law is raised by the tribunal itself without the parties having been invited to comment on it.***”) (emphasis added); Exhibit CLM-209, *Judgment of 3 December 2009, Société Engel Austria v. Société Don Trade* (légifrance) (Paris Cour d’appel) (partially annulling award because tribunal rendered decisions based on principle of foreign law raised *sua sponte* by arbitrators, without inviting parties’ submissions); Exhibit CLM-207, *Judgment of 25*

November 1997, *VRV v. Pharmachim*, 1998 Rev. arb. 684 (Paris Cour d'appel) (annulling award where tribunal *sua sponte* raised and decided an extra-contractual claim not raised by the claimant). In line with these decisions, Article 16 of the French Code of Civil Procedure provides that a judge “**shall not base his decision on legal arguments that he has raised sua sponte without having first invited the parties to comment thereon.**” Exhibit CLM-202, French Code of Civil Procedure, art. 16 (emphasis added).

⁵⁵⁰ Exhibit CLM-204, *Judgment of 21 March 1986*, BGH, NJW 1986 (Federal Supreme Court), at 2245 (holding that court of appeal erred by basing its decision on the invalidity of a notice of repudiation, even though both parties assumed the notice of repudiation to be valid); Exhibit CLM-211, *Judgment of 13 January 2011*, BGH, NJW 1993 (Federal Supreme Court), at 667 (holding that court of appeal erred by accounting for taxes in the damages award even though both parties assumed that taxes would not be accounted for in the damages award); Exhibit CLM-205, *Judgment of 23 September 1992*, BGH, NJW 1993 (Federal Supreme Court), at 667 (holding that court of appeal erred by basing its decision on construing a contract in a manner that neither party had proposed); Exhibit CLM-208, *Judgment of 6 December 2001*, XXIX Y.B. Comm. Arb. 742 (Oberlandesgericht Stuttgart) (2004) (stating that a “surprise decision” is one that is predicated on a legal basis “that was not mentioned by either party, discussed or drawn attention to”). Indeed, the German Code of Civil Procedure states: “The court may base its decision on an aspect that a party has recognisably overlooked or has deemed insignificant, provided that this does not merely concern an ancillary claim, **only if it has given corresponding notice of this fact and has allowed the opportunity to address the matter.** The same shall apply for any aspect that the court assesses differently than both parties do.” Exhibit CLM-203, German Code of Civil Procedure, Section 139, para. 2 (emphasis added).

⁵⁵¹ Exhibit CLM-218, *Zermalt Holdings SA v. Nu-Life Upholstery Repairs Ltd* [1984] 2 EGLR 14 (Q.B.) (“If an arbitrator is impressed by a point that has **never been raised by either side then it is his duty to put it to them so they can have an opportunity to comment.** If he feels that the proper approach is one that has not been explored or advanced in evidence or submissions, then again **it is his duty to give the parties a chance to comment.**”) (emphasis added). See also Exhibit CLM-217, *Vee Networks Ltd v. Econet Wireless Int'l Ltd* [2005] 1 Lloyd’s Rep. 192 (Q.B.), at paras. 14, 84, 91 (stating that both parties agreed that an arbitrator “had employed arguments of law and construction **which had not been relied upon by [the prevailing party] at the hearing**” and holding that “by advancing the point of construction [not argued by either party] **the arbitrator was neither acting fairly nor giving each party a reasonable opportunity of putting its case**” and thereby committed a “**substantial injustice and therefore a serious irregularity**”) (emphasis added); Exhibit CLM-214, *OAO Northern Shipping v. Remolcadores de Marin* [2007] 2 Lloyd’s Rep. 302 (Q.B.) (annulling arbitral award rendered on a ground as to which “no argument or discussion whatsoever was directed ... at the hearing”).

⁵⁵² See, e.g., Exhibit CLM-215, *Snider v. Melindez*, 199 F.3d 108, 113 (2d Cir. 1999) (“[P]roviding the adversely affected party with notice and an opportunity to be heard plays **an important role in establishing the fairness and reliability of the order.** It avoids the risk that the court may overlook valid answers to its perception of defects in the plaintiff’s case.”) (emphasis added); Exhibit CLM-216, *United States v. Parr*, 843 F.2d 1228, 1231-1232 (9th Cir. 1988) (“We are **foreclosed ... from affirming the district court’s [decision] on a theory not presented below when by doing so we unfairly deprive the defendant of the opportunity to adduce evidence.**”) (emphasis added). See also Exhibit CLM-201, *Ershow v. Site Holdings, Inc.*, 1995 WL 384457, at *5 (S.D.N.Y. June 28, 1995) (“[B]ecause plaintiffs themselves do not raise this alternative grounds of recovery, **due process requires that the court provide the parties notice and the opportunity to be heard on the question of the plaintiffs’ right to recover under quantum meruit**, before entering summary judgment against the defendants.”) (emphasis added); Exhibit CLM-213, *Lindsey v. Normet*, 405 U.S. 56, 66 (1972) (holding that every defendant has a due-process right to “**an opportunity to present every available defense**”) (emphasis added).

⁵⁵³ As A.V. Freeman explains, national-court decisions, particularly as to the scope of due process, shed light on the standard for denial of justice under international law. See Exhibit CLM-164, A.V. Freeman, *Denial of Justice* (1970), at 267 (“[T]he international judge will be at a distinct loss to the test the propriety of allegedly wrongful conduct unless he reviews it in the light of those practices which are condemned by the jurisprudence of his own country, of legal systems similar to that which he is familiar, and of others which may be dissimilar but which are deemed ‘civilized’ to the extent that a normal trial therein is regarded as sufficient to satisfy the mandates of international law.”).

- b) The NCJ Based Its Decision on Principles of Unfair Competition, Which Were Different than the Principles of Antitrust Law Relied on by the Court of Appeals
 - (1) The NCJ Rejected the Court of Appeals’ Finding of Antitrust Liability and Instead Entered a Judgment Based on Unfair Competition

310. As explained above, NIFA repeatedly stated throughout the litigation that it sought to hold MSDIA liable for a violation of the antitrust principles found in Article 244, Number 3 of Ecuador’s 1998 Constitution.⁵⁵⁴ For example, in response to MSDIA’s recourse of cassation in the NCJ, NIFA argued that its claim “against MSD was not based on ... unfair competition.”⁵⁵⁵

311. Even if (contrary to fact) Article 244, Number 3 plausibly could have supported a private cause of action for antitrust violations, the elements of an antitrust claim would have required the court to: (a) analyze the market for pharmaceutical manufacturing facilities; (b) find that MSDIA was in a dominant position in the market for such facilities; (c) find that MSDIA abused that dominant position and caused harm to the market; and (d) find that MSDIA’s plant was the only possible facility available to NIFA in its purported efforts to expand its production capacity.⁵⁵⁶

312. The NCJ held that NIFA had not established an antitrust violation and that the findings of the court of appeals were “*not duly reasoned*”⁵⁵⁷ and were clearly erroneous as a matter of law. As the NCJ held:

a. The court of appeals judgment “does not contain the proper identification of what the relevant market was” (the first factual inquiry performed by the court of appeals). The NCJ explained, “[i]n reality *there is no ‘relevant market for industrial plants suitable for the pharmaceutical industry’ in the country.*”⁵⁵⁸

b. The court of appeals failed to cite “evidence that establishes that MERCK had a dominant position, that is more than 25% of the relevant market.”⁵⁵⁹ The NCJ explained that it “*obviously is not the case*” that MSDIA had a “dominant position and therefore market power over the relevant market for industrial plants.”⁵⁶⁰

c. Contrary to the court of appeals’ finding that MSDIA had abused its purported market dominance to harm competition, the negotiations between NIFA and MSDIA “*in*

⁵⁵⁴ See above at paras. 69-73, 138.

⁵⁵⁵ Exhibit C-200, NIFA’s Brief of 17 November 2011, *NIFA v. MSDIA*, NCJ, at para. 12.

⁵⁵⁶ Exhibit C-4, Court of Appeals Judgment, *NIFA v. MSDIA*, dated 23 September 2011, at 9-15. See also Expert Report of Professor Fernandez de Córdoba at paras. 11, 25-26, 38-39.

⁵⁵⁷ Exhibit C-203, NCJ Judgment, *NIFA v. MSDIA*, dated 21 September 2012, at para. 6.1.1 (emphasis added).

⁵⁵⁸ Exhibit C-203, NCJ Judgment, *NIFA v. MSDIA*, dated 21 September 2012, at paras. 6.1.1, 9.1 (emphasis added).

⁵⁵⁹ Exhibit C-203, NCJ Judgment, *NIFA v. MSDIA*, dated 21 September 2012, at para. 6.1.1.

⁵⁶⁰ Exhibit C-203, NCJ Judgment, *NIFA v. MSDIA*, dated 21 September 2012, at para. 9.2.1 (emphasis added).

*no way can affect all consumers and users in general in the country or of a sector as would be the case of a real antitrust problem.*⁵⁶¹

d. The court of appeals failed to identify a “legal basis for holding that the industrial plant that belonged to MERCK was the only possible alternative for [NIFA], in its capacity as a manufacturer or importer of pharmaceutical products.”⁵⁶²

313. Thus, the NCJ held that there was no basis for the court of appeals’ findings as to any of the elements of an antitrust claim. The NCJ concluded that:

“The basic problem with the challenged judgment is that ... from a conflict that can only affect the companies [NIFA] S.A. and MERCK Corporation, a strange conceptual leap is made to try to convert it into a problem of the consumers and users of pharmaceutical products in general, or what is worse, an alleged relevant market for industrial plants. To do this, the challenged judgment ... tries to drag that civil conflict between the two pharmaceutical companies to the field of the Law of Competition.”⁵⁶³

314. Having held that the court of appeals erred in finding MSDIA liable for a violation of antitrust law—which was the only legal basis for the court of appeals’ judgment—the NCJ nevertheless went on to hold that MSDIA was liable under an entirely different legal theory. The NCJ held that while it was “clear that the failed negotiation between [NIFA] and MERCK for the purchase of an industrial plant is by no means a matter of Antitrust Law,” it was “rather a matter of a tort by an unfair practice, which is a *completely different matter*.”⁵⁶⁴

315. Specifically, the NCJ held that MSDIA’s conduct during the parties’ negotiations *did not violate any antitrust law*, but nevertheless constituted a “refusal to sell” as a matter of unfair competition law.⁵⁶⁵ The NCJ held that Article 244, Number 3 of Ecuador’s 1998 Constitution prohibited such acts of unfair competition,⁵⁶⁶ even though NIFA never had invoked any such theory during the parties’ litigation and no Ecuadorian court ever had interpreted Article 244, Number 3 to address acts of unfair competition.⁵⁶⁷

(2) Under Ecuadorian Law, Unfair Competition and Antitrust Are Entirely Different Legal Claims

316. Under Ecuadorian law, a claim for unfair competition is an entirely separate and distinct cause of action from a claim alleging an antitrust violation.⁵⁶⁸ Indeed, at the time NIFA initiated

⁵⁶¹ Exhibit C-203, NCJ Judgment, *NIFA v. MSDIA*, dated 21 September 2012, at para. 8.2 (emphasis added).

⁵⁶² Exhibit C-203, NCJ Judgment, *NIFA v. MSDIA*, dated 21 September 2012, at para. 6.1.1.

⁵⁶³ Exhibit C-203, NCJ Judgment, *NIFA v. MSDIA*, dated 21 September 2012, at para. 9.1.

⁵⁶⁴ Exhibit C-203, NCJ Judgment, *NIFA v. MSDIA*, dated 21 September 2012, at para. 13.1 (emphasis added).

⁵⁶⁵ See Exhibit C-203, NCJ Judgment, *NIFA v. MSDIA*, dated 21 September 2012, at paras. 13-15.

⁵⁶⁶ See Exhibit C-203, NCJ Judgment, *NIFA v. MSDIA*, dated 21 September 2012, at paras. 8.1, 15.

⁵⁶⁷ Expert Report of Professor Fernandez de Córdoba at para. 51 (“I do not know of any other judgment in which an Ecuadorian judge or court has resolved that Article 244-3 gave rise to a claim for unfair competition (or for anything else).”); Expert Report of Professor Oyarte at para. 25

⁵⁶⁸ Expert Report of Professor Fernandez de Córdoba at paras. 7, 11 (“The distinction between the purpose of laws

the underlying litigation against MSDIA and at the time of the decisions of the trial court and court of appeals, Ecuador had no antitrust law at all and did not provide any mechanism by which an individual or company could assert a claim for damages for an alleged violation of antitrust principles.⁵⁶⁹ When the NCJ rejected the court of appeals' decision imposing liability for an antitrust violation, and instead found liability for unfair competition, it adopted an entirely different legal basis for liability.

317. The NCJ expressly recognized the distinction between antitrust and unfair competition in its judgment, noting that antitrust law and unfair competition law constitute “*completely different matter[s]*.”⁵⁷⁰ Specifically, Article 244 of Ecuador's 1998 Constitution established a public policy in favor of free competition, i.e., in favor of preventing conduct by dominant market participants that impedes competition and harms the market as a whole.⁵⁷¹

318. By contrast, Ecuador's Law on Intellectual Property (the only statute addressing claims for unfair competition) prohibited acts contrary to good faith and fair dealing in trade practice, including misappropriation of trade secrets and patent infringement, and granted standing to any “aggrieved” party to file a civil claim in Ecuador's administrative courts against a competitor that engaged in unfair competition.⁵⁷² Ecuador's prohibition against unfair competition was not aimed at protecting the market as a whole or the interests of consumers, but instead was aimed at protecting individual market participants from unfair trade practices.⁵⁷³

319. This distinction was explained by a preeminent Ecuadorian authority, García Menéndez, who was quoted extensively in the NCJ judgment:

“[W]hile antitrust law battles those phenomena that seek to limit competition and to jeopardize the economic interest in general, protection against unfair competition accentuates the protection of the individual interests of the competitor against acts by its own competitor, penalizing those unfair practices that cause consumers to be attracted not by the best business, but rather by the one that uses means that go beyond socially acceptable parameters. *Broadly, antitrust protects the public economic order from the*

protecting free competition and laws prohibiting unfair competition is reflected in the different legal requirements and factual evidence necessary to establish a violation of each.”)

⁵⁶⁹ Expert Report of Professor Fernández de Córdoba at para. 19 (“Until 2009 there was no law in place in Ecuador sanctioning conduct harmful to free competition. In the absence of a law implementing the policy described in Article 244-3, parties could not bring actions based on Art. 244-3, and it did not allow parties to be held liable for any alleged “violations” of the policy described in Article 244-3.”).

⁵⁷⁰ Exhibit C-203, NCJ Judgment, *NIFA v. MSDIA*, dated 21 September 2012, at para. 13.1 (emphasis added).

⁵⁷¹ Expert Report of Professor Fernández de Córdoba, at paras. 15, 17 (“In other words, the object of Article 244-3 was to establish a state policy protecting and promoting free competition, which include market efficiency and consumer well-being.”).

⁵⁷² Expert Report of Professor Fernández de Córdoba, at paras. 28, 34.

⁵⁷³ Expert Report of Fernández de Córdoba, at para. 9 (“Unfair competition norms aims to ensure that market operators adhere to these standards and do not use unfair tactics when they compete, such as stealing trade secrets or distributing misleading information, in order to steal customers. Unfair competition is limited to the private realm, where one competitor is harmed by acts committed by another competitor.”).

*action of competitors, whereas protection against unfair competition penalizes the unfair acts of competitors ‘with respect to each other.’*⁵⁷⁴

320. Consistent with the fact that they serve distinct policy purposes, antitrust and unfair competition law arose in Ecuador from distinct legal sources.⁵⁷⁵

(a) Antitrust

321. Notably, at the time NIFA initiated the underlying litigation and for many years thereafter, Ecuador had no antitrust law at all.⁵⁷⁶ At the time of the NIFA litigation, the only provision of Ecuadorian law that addressed antitrust principles was Article 244, Number 3 of the 1998 Constitution. That provision provided that “[w]ithin the social-market economy system the State shall ... [p]romote the development of competitive activities and markets, [and f]oster free competition and punish, under the law, monopolistic and other practices that prevent and distort it.”⁵⁷⁷

322. The language of Article 244, Number 3 was widely understood to establish a public policy in favor of free competition in Ecuador, and to obligate the Ecuadorian legislature to adopt legislation prohibiting antitrust violations.⁵⁷⁸ Absent enacting legislation, however, Article 244, Number 3 did not establish a self-executing prohibition against anti-competitive actions or a private cause of action to recover damages for anti-competitive acts.⁵⁷⁹ Indeed, no Ecuadorian court—other than the lower courts in the *NIFA v. MSDIA* case—has ever held that Article 244, Number 3 created substantive prohibitions under which a party may be held liable.⁵⁸⁰

323. Ecuador did not adopt antitrust standards until 2009, and the Ecuadorian legislature did not adopt legislation prohibiting anti-competitive conduct until 2011.⁵⁸¹ Prior to that time, Ecuador acknowledged publicly on repeated occasions that it did not have an antitrust law.⁵⁸²

⁵⁷⁴ Exhibit C-203, NCJ Judgment, *NIFA v. MSDIA*, dated 21 September 2012, at para. 13.3 (citing Exhibit CLM-196, S. Garcia Menéndez, *COMPETENCIA DESLEAL: ACTOS DE DESORGANIZACIÓN DEL COMPETIDOR* (2004), at 22) (emphasis added).

⁵⁷⁵ Expert Report of Professor Fernández de Córdoba, at para. 6(a); *see generally id.* at paras. 13, 28.

⁵⁷⁶ Expert Report of Professor Fernández de Córdoba, at para. 12.

⁵⁷⁷ Exhibit CLM-183, 1998 Constitution of the Republic of Ecuador, art. 244.

⁵⁷⁸ Expert Report of Professor Fernández de Córdoba, at para. 17 (“Article 244-3 of the 1998 Constitution did not establish any specific prohibitions on the activities of market operators. Instead, it established the State’s obligation to enact law to give shape to the policy to promote free competition, including the procedural mechanisms for its effective protection.”). *See also* Expert Report of Professor Oyarte at paras. 14-24.

⁵⁷⁹ Expert Report of Professor Fernández de Córdoba, at paras. 17-19. *See also* Expert Report of Professor Oyarte at paras. 22-25 (“Article 244(3) did not create a substantive standard, but instead required the enactment of a specific law to carry out its mandate”).

⁵⁸⁰ Expert Report of Professor Fernández de Córdoba at para. 51 (“I do not know of any other judgment in which an Ecuadorian judge or court has resolved that Article 244-3 encompassed unfair competition or gave rise to a claim for unfair competition (or for anything else”); Expert Report of Dr. Oyarte at para. 25.

⁵⁸¹ Exhibit CLM-195, Organic Law of the Regulation and Control of the Power of the Market, Official Register Supplement No. 555, dated 13 October 2011.

⁵⁸² For example, official minutes from meetings of the Andean Community nations, including representatives from Ecuador, to evaluate possible revisions to Andean Community Decision No. 285, which established antitrust

324. Although Ecuador did not have an antitrust law of its own, the policies reflected in Article 244, Number 3 of the 1998 Constitution were understood in light of broadly-accepted international standards in relation to the promotion of free competition,⁵⁸³ including the principles adopted by the Andean Community. Under the relevant decision of the Andean Community at the time, antitrust laws were aimed at prohibiting conduct that restricts free competition, such as price-fixing agreements, agreements to restrict the supply or demand of products or services (in an effort to artificially inflate the price of such goods), agreements to erect barriers to market entry (in order to prevent additional competitors from entering the market), and abuse of a dominant market position.⁵⁸⁴

325. Establishing an antitrust violation in those jurisdictions that have adopted substantive antitrust laws therefore requires showing an adverse effect on free competition in a manner that causes harm to the market, and thus to the consuming public, and not merely to another market operator.⁵⁸⁵

326. If a violation arises out of the conduct of a single market participant for abuse of a dominant market position (as opposed to an agreement between competitors), it is necessary to establish that the entity in question actually has a “*dominant market position*,” which is generally defined to mean that it “can act independently, without regard to their competitors, buyers or suppliers.”⁵⁸⁶ In practice, determining whether a market operator occupies a dominant position involves establishing the relevant market at issue, the operator’s share of the relevant market, its power to set prices independent of competitive pressure within that market, and its ability to exclude competitors from that market.⁵⁸⁷

(b) Unfair Competition

327. At the time of the *NIFA v. MSDIA* litigation, unfair competition in Ecuador was governed by Articles 284-287 of Ecuador’s Law on Intellectual Property.⁵⁸⁸ Article 284 defines unfair

standards for transactions affecting competition in more than one member nation, affirm the absence of a competition law in Ecuador. *See* Exhibit C-9, Report of the Fourth Meeting of Andean Community Governmental Experts on Free Competition, dated 1 August 2003, at 2. Moreover, in 2002, the National Congress of Ecuador approved a bill intended to establish legal norms for free competition, presumably in light of the directive in Article 244, Number 3, but that bill was vetoed by the President. *See* Exhibit C-24, Report of Ignacio De León, *NIFA v. MSDIA*, Court of Appeals, dated 12 February 2010, at 90. In addition, in March 2009, in connection with the issuance of Executive Decree No. 1614, which established Ecuador’s competition authority, President Rafael Correa declared that “*Ecuador did not have an internal regulation for the protection of economic competition [in March 2005]*,” and had not yet enacted an internal antitrust law as of the date of Executive Decree No. 1614. Exhibit C-19, Republic of Ecuador Executive Decree No. 1614, dated 14 March 2009, at 1 (emphasis added).

⁵⁸³ *See* Expert Report of Professor Oyarte at para. 22

⁵⁸⁴ Exhibit CLM-219, Andean Community Decision No. 285, arts. 3-5.

⁵⁸⁵ Expert Report of Professor Fernández de Córdoba, at para. 11.

⁵⁸⁶ Exhibit CLM-219, Andean Community Decision No. 285, art. 3. *See also* Expert Report of Professor Fernández de Córdoba, at para. 26.

⁵⁸⁷ Expert Report of Professor Fernández de Córdoba, at para. 26.

⁵⁸⁸ As explained above, apart from the NCJ’s judgment in the *NIFA v. MSDIA* case, no Ecuadorian court has ever concluded that Article 244 of Ecuador’s 1998 Constitution encompasses the concept of unfair competition. Expert Report of Professor Fernández de Córdoba, at 15; Expert Report of Professor Oyarte at para. 25. Indeed, no court other than the NCJ in the *NIFA v. MSDIA* case has ever found that Article 244 created a private right of action for

competition as “[a]ny fact, act or enterprise that is *contrary to fair dealing or practice in the conduct of economic activities*.”⁵⁸⁹ A claim for unfair competition brought pursuant to this provision typically requires proof of three independent elements:

- (1) that the defendant committed an act that breached the standards for good faith and fair dealing in the particular industry⁵⁹⁰;
- (2) that the defendant acted with the specific intent to divert customers away from the plaintiff and to itself⁵⁹¹; and
- (3) that the plaintiff in fact suffered direct harm from the defendant’s unfair act.⁵⁹²

328. Establishing these elements requires different proof than that required for establishing an antitrust violation. Specifically, the question of what constitutes fair dealing or practice in national trade is a *question of fact*, which must be established by evidence of custom or usage in the relevant industry. It is not a purely legal question that judges may answer on their own by reference to law.⁵⁹³

329. Moreover, establishing unfair competition requires proof that the defendant acted with the specific intent to divert customers away from the plaintiff and to itself.⁵⁹⁴ NIFA recognized this fact in a brief submitted to the court of appeals in the *NIFA v. MSDIA* litigation, when it correctly stated that “[a]cts of unfair competition are intended to deprive a competitor of current or potential clients in order to secure that competitor’s clients.”⁵⁹⁵ In that brief, NIFA expressly disclaimed that it was asserting an unfair competition claim and explained that it was not offering proof that MSDIA had acted with an intent to divert NIFA’s customers to itself:

“[T]he complaint was not lodged because of acts of unfair competition carried out by [MSDIA] ... Acts of unfair competition are intended to deprive a competitor of current or potential clients in order to secure that competitor’s clients. Competition exists, but it is not transparent; but rather, a competitor uses all types of sophistry to take clients away from other competitors.”⁵⁹⁶

civil or criminal liability at all, under either antitrust law or unfair competition. Expert Report of Professor Fernández de Córdoba, at 51(a); Expert Report of Professor Oyarte at para. 25.

⁵⁸⁹ Exhibit CLM-191, Ecuador Law on Intellectual Property (1998), art. 284 (emphasis added).

⁵⁹⁰ The Law on Intellectual Property provides that the phrase “fair dealing or practice” in Article 284 must be defined by “reference ... to the criteria of national trade; nevertheless, in the case of acts or practices engaged in the context of international operations, or those that have links to two or more countries, the criteria determining fair practice that prevail in international trade shall be observed.” Exhibit 191, Ecuador Law on Intellectual Property (1998), art. 284. See also Expert Report of Manuel Fernández de Córdoba, at paras. 28-30.

⁵⁹¹ Expert Report of Manuel Fernández de Córdoba, at paras. 31, 33(d).

⁵⁹² Expert Report of Professor Fernández de Córdoba, at paras. 33(e), 34.

⁵⁹³ Expert Report of Professor Fernández de Córdoba, at para. 28.

⁵⁹⁴ Expert Report of Professor Fernández de Córdoba, at paras. 31, 33(d).

⁵⁹⁵ Exhibit C-164, NIFA’s Brief of 23 January 2009, *NIFA v. MSDIA*, Court of Appeals, at 3 (NIFA’s response to MSDIA’s nullity petition).

⁵⁹⁶ Exhibit C-164, NIFA’s Brief of 23 January 2009, *NIFA v. MSDIA*, Court of Appeals, at 1-3.

330. An unfair-competition plaintiff must also establish that it in fact suffered direct harm from the defendant's unfair act. As Dr. Fernández de Córdoba explains, the requirement to show harm is evident from Article 287 of the Law on Intellectual Property, which provides standing only to plaintiffs that are "*aggrieved*" as a result of the alleged act(s) of unfair competition.⁵⁹⁷ The proof of harm required is different from that required in an antitrust suit. While in the latter case, a plaintiff must show general economic harm to the market, in the context of an unfair competition claim, the plaintiff must show that the defendant enriched itself by depriving the plaintiff of its customers.⁵⁹⁸

331. Because Ecuador's unfair competition statute was found in Ecuador's Law on Intellectual Property, any claim asserting unfair competition was subject to the exclusive jurisdiction of Ecuador's Contentious Administrative Tribunals.⁵⁹⁹ Ecuador's civil courts did not have jurisdiction to hear the merits of claims under the Law on Intellectual Property, including claims of unfair competition.⁶⁰⁰ Indeed, apart from the NCJ's judgment in the *NIFA v. MSDIA* litigation, no successful claim for unfair competition had ever been brought outside of these specialized administrative courts, and no civil court in Ecuador has ever exercised jurisdiction over the merits of a claim for unfair competition.⁶⁰¹

332. Thus, under Ecuadorian law, if NIFA had chosen to pursue an unfair competition claim, as opposed to an antitrust claim, it would have had to assert its claim in an entirely different set of courts (Ecuador's Contentious Administrative Tribunals, as opposed to the civil courts) and would have had to establish facts that were entirely distinct from the facts it adduced in support of its antitrust claim. Specifically, to establish an unfair competition claim, NIFA would have needed to prove that: (i) MSDIA refused to sell the Chillos Valley plant to NIFA; (ii) MSDIA's refusal to sell the plant was contrary to fair dealing or practice as defined by national trade custom; (iii) MSDIA's refusal to sell the plant was not commercially justified or was intended to cause harm to NIFA; (iv) MSDIA acted with specific intent to steal customers from NIFA; and (v) MSDIA's conduct caused the diversion of customers away from NIFA to MSDIA and disrupted NIFA's business.⁶⁰²

333. As discussed below, NIFA elected *not* to pursue an unfair competition claim. In fact, it conceded that the evidence did not establish a claim of unfair competition, and it expressly and repeatedly said that it was not pursuing any such claim.⁶⁰³ The NCJ nevertheless found that MSDIA had violated a prohibition against unfair competition, which the NCJ claimed to find in

⁵⁹⁷ Expert Report of Professor Fernández de Córdoba, at para. 34 (citing Exhibit CLM-191, Ecuador Law on Intellectual Property (1998), art. 287 (emphasis added)).

⁵⁹⁸ Expert Report of Professor Fernández de Córdoba at para. 33(e).

⁵⁹⁹ Exhibit CLM-191, Ecuador Law on Intellectual Property, art. 294 *et seq.*; Expert Report of Professor Fernández de Córdoba at para. 34.

⁶⁰⁰ Expert Report of Professor Fernández de Córdoba at para. 34.

⁶⁰¹ Expert Report of Professor Fernández de Córdoba at paras. 34, 51(c).

⁶⁰² Expert Report of Professor Fernández de Córdoba at para. 45.

⁶⁰³ *See below* at para. 341. *See also above* at paras. 71-73, 138.

Article 244, Number 3 of the 1998 Constitution.⁶⁰⁴ The NCJ’s decision thus rested on a legal ground that was entirely different from the ground relied on by the court of appeals.⁶⁰⁵

(3) MSDIA Did Not Have Notice That the NCJ Could or Would Consider a Claim of Unfair Competition

334. The NCJ failed to provide MSDIA with *any* notice, let alone meaningful notice and an opportunity to be heard, that it could be found liable for unfair competition in the proceedings before that court. As set out in Section (a) below, throughout the court of appeals and NCJ proceedings, NIFA had expressly stated that it was not pursuing an unfair competition claim, that Ecuador’s civil courts lacked jurisdiction over claims for unfair competition, and that the evidence did not support a finding that MSDIA had engaged in unfair competition. MSDIA therefore had no reason to expect that it could face liability for unfair competition.

335. Moreover, as set out in Section (b) below, as a matter of Ecuadorian procedural law, the NCJ’s authority was limited to reviewing matters of law actually alleged in the parties’ cassation petitions—which did not address the merits of a claim for unfair competition. MSDIA had no notice that the NCJ might exceed that mandate and reach a decision on issues that were not even properly before that court and that had not previously been addressed on the merits in the parties’ submissions before the NCJ.

336. Finally, as set out in Section (c) below, Article 244, Number 3 of Ecuador’s 1998 Constitution, the constitutional provision on which the NCJ based its decision, did not address unfair competition, which was expressly governed by a separate statute. Moreover, the NCJ cited and applied principles of unfair competition that it borrowed from foreign jurisdictions, rather than the established principles of unfair competition found in Ecuador’s Law on Intellectual Property.

337. NIFA never argued that the constitutional provision at issue encompassed unfair competition claims, no court had ever so held, no other authority had ever so opined, and the NCJ never indicated to MSDIA that it could be subject to liability for unfair competition under that provision. Nor did NIFA ever argue, or the NCJ ever suggest, that MSDIA could be subject to liability under foreign principles of unfair competition. MSDIA thus never had the opportunity to submit legal arguments and factual evidence on the theory of unfair competition invented by the NCJ.

338. The NCJ’s failure to provide MSDIA with notice that it could be subject to a finding of liability for unfair competition is a denial of justice under accepted minimum international due process standards. As Professor Paulsson explains, the NCJ deprived MSDIA of “notice and an opportunity to be heard” by “basing its decision ... on a legal theory that had not been litigated by the parties, that the plaintiff in fact had expressly disclaimed, and that had no basis in

⁶⁰⁴ Exhibit C-203, NCJ Judgment, *NIFA v. MSDIA*, dated 21 September 2012, at paras. 8.1, 15.

⁶⁰⁵ See Expert Report of Professor Fernández de Córdoba, at paras. 35-37, 45; Expert Report of Professor Oyarte at paras. 19, 33.

Ecuadorian law.”⁶⁰⁶ As a result, the NCJ “*in fact further violated MSDIA’s due process rights*” and “*committed additional, new violations of due process that compounded the denial of justice*” committed by the lower courts.⁶⁰⁷

- (a) NIFA Pursued Only Antitrust Claims Turning on Allegations of Market Power and Harm to Competition, and Expressly Disclaimed a Claim of Unfair Competition

339. Throughout the court of appeals and NCJ proceedings, NIFA repeatedly and expressly stated that its claims were based on an alleged violation of antitrust law, turning on abuse of market power and harming competition; and it expressly disclaimed any reliance on a theory of unfair competition. Specifically:

a. In NIFA’s 23 January 2009 response to the nullity petition filed by MSDIA in the court of appeals, NIFA stated that its complaint was predicated upon MSDIA’s “anti-competitive practices,” and argued, in particular, that “[MSDIA] sought to and got [NIFA] not to compete with it, by preventing [NIFA] from entering the market ... and thus took advantage of its market power.”⁶⁰⁸

b. NIFA later argued, in an 11 May 2010 brief, that its allegations were based on “*acts contrary to competition*, as the defendant ... creat[ed] ... a barrier to access to various pharmaceutical markets where the defendant had a clear position of dominance.”⁶⁰⁹

c. In its 17 November 2011 response to MSDIA’s cassation petition in the NCJ, NIFA argued that its claim “*was based on ... acts against free competition*.”⁶¹⁰ During the 26 December 2011 oral hearing before the NCJ, NIFA’s counsel reiterated that point and stated further that “[s]ince its very beginning, it was a claim for acts contrary to competition.”⁶¹¹

340. Although NIFA consistently characterized its claim as a claim based on principles of antitrust law, MSDIA noted that the facts alleged by NIFA could be viewed as asserting a claim for unfair competition.⁶¹² MSDIA objected that, if NIFA were asserting a claim for unfair

⁶⁰⁶ Expert Report of Professor Paulsson, at para. 15.

⁶⁰⁷ Expert Report of Professor Paulsson, at paras. 48-49 (emphasis added).

⁶⁰⁸ Exhibit C-164, NIFA’s Brief of 23 January 2009, *NIFA v. MSDIA*, Court of Appeals, at 3 (NIFA’s response to MSDIA’s nullity petition).

⁶⁰⁹ Exhibit C-192, NIFA’s Petition of 11 May 2010, *NIFA v. MSDIA*, Court of Appeals, at 7 (NIFA’s response to Ignacio De León).

⁶¹⁰ Exhibit C-200, NIFA’s Brief of 17 November 2011, *NIFA v. MSDIA*, NCJ, at 11 (NIFA’s response to MSDIA’s cassation petition) (emphasis added).

⁶¹¹ Exhibit C-201, Transcript of NCJ Hearing as Recorded by Respondent, *NIFA v. MSDIA*, NCJ, dated 26 December 2011, at 1.

⁶¹² See, e.g., Exhibit C-153, MSDIA’s Brief of 5 December 2006, *NIFA v. MSDIA*, Trial Court, at 4-5 (stating that NIFA’s characterization of its claim, as predicated upon “unfair actions” committed by MSDIA, appeared to be a

competition, that claim would be subject to the jurisdiction of Ecuador’s administrative courts and not the civil courts in which NIFA had brought its claim.⁶¹³

341. NIFA rebutted MSDIA’s jurisdictional argument, stating repeatedly and emphatically that it was not asserting a claim for unfair competition. For example:

a. In its opening brief before the court of appeals, NIFA stated that its claim “**was not the case of an unfair competition complaint.**”⁶¹⁴ NIFA repeated this in its response to MSDIA’s nullity petition, stating “**the complaint was not lodged because of acts of unfair competition.**”⁶¹⁵

b. NIFA later reiterated, in its response to Dr. De Leon’s expert report, that “NIFA has not made a claim for the conduct of unfair competition, but rather for acts contrary to competition.”⁶¹⁶

c. In its response to MSDIA’s petition for cassation in the NCJ, NIFA stated that its claim “**was not based on the acts of unfair competition carried out by the defendant.**”⁶¹⁷ NIFA’s counsel stated again at the oral hearing that NIFA’s claim “**was not a claim for unfair competition. NIFA never filed a lawsuit based on acts of unfair competition.**”⁶¹⁸

342. NIFA conceded that, if it were asserting a claim for unfair competition, that claim would be subject to the jurisdiction of the administrative courts. In NIFA’s words, “**unfair competition cases must be judged by administrative law courts.**”⁶¹⁹ NIFA argued, however, that because its

claim for unfair competition, over which Ecuador’s civil courts lacked jurisdiction). *See also* Exhibit C-161, MSDIA’s Petition of 12 December 2008, *NIFA v. MSDIA*, Court of Appeals, at 8 (MSDIA’s Nullity Petition) (arguing that facts alleged in NIFA’s complaint qualified as “behavior ... expressly considered as unfair competition according to the Intellectual Property Law”).

⁶¹³ Exhibit C-153, MSDIA’s Brief of 5 December 2006, *NIFA v. MSDIA*, Trial Court, at 4 (arguing that Article 294 of the Intellectual Property Law “grants jurisdiction to the judges of District Courts for Intellectual Property over cases concerning these disputes, and transitional provision ten of said law provides that, until the district courts and tribunals for intellectual property cases have been created, the District Courts for Administrative Disputes shall hear cases on this subject. Therefore, civil court judges, and consequently Your Honor, do not have jurisdiction to hear the plaintiff’s claims on matters of unfair competition.”). *See also* Exhibit C-161, MSDIA’s Petition of 12 December 2008, *NIFA v. MSDIA*, Court of Appeals, at 10-11 (MSDIA’s Nullity Petition).

⁶¹⁴ Exhibit C-157, NIFA’s Brief of 9 October 2008, *NIFA v. MSDIA*, Court of Appeals, at 2 (NIFA’s Answer to MSDIA’s Fundamentation of Appeal) (emphasis added).

⁶¹⁵ Exhibit C-164, NIFA’s Brief of 23 January 2009, *NIFA v. MSDIA*, Court of Appeals, at 2 (NIFA’s Response to MSDIA’s Nullity Petition) (emphasis added).

⁶¹⁶ Exhibit C-192, NIFA’s Petition of 11 May 2010, *NIFA v. MSDIA*, Court of Appeals, at 7 (NIFA’s Response to Ignacio De León) (emphasis added).

⁶¹⁷ Exhibit C-200, NIFA’s Brief of 17 November 2011, *NIFA v. MSDIA*, NCJ, at 11 (NIFA’s Response to MSDIA’s Cassation Petition) (emphasis added).

⁶¹⁸ Exhibit C-201, Transcript of NCJ Hearing as Recorded by Respondent, *NIFA v. MSDIA*, NCJ, dated 26 December 2011, at 1.

⁶¹⁹ *See, e.g.*, Exhibit C-164, NIFA’s Brief of 23 January 2009, *NIFA v. MSDIA*, Court of Appeals, at 4 (NIFA’s Response to MSDIA’s Nullity Petition) (stating that “the Intellectual Property Law ... **provides that unfair competition cases must be judged by administrative law courts**” and “**assigns jurisdiction to a specialized court**”) (emphasis added); Exhibit C-200, NIFA’s Brief of 17 November 2011, *NIFA v. MSDIA*, NCJ, at 12 (NIFA’s

claims rested entirely on antitrust law as opposed to unfair competition, the civil courts were competent to hear its claims.⁶²⁰

343. NIFA also conceded that the evidence before the courts did not and could not support a finding of liability for unfair competition. In particular, NIFA argued: “the existence of acts of deceit *do not make the practices of [MSDIA] a type of unfair competition*, as the defendant absurdly asserts.”⁶²¹

344. In light of NIFA’s repeated representations to the court of appeals and the NCJ, MSDIA (correctly) proceeded on the basis that the only claim pursued by NIFA was an antitrust claim and that it could not be subject to liability for unfair competition.⁶²² MSDIA further understood that it was common ground between the parties that, if NIFA had chosen to assert an unfair competition claim, that claim would have been under the jurisdiction of Ecuador’s administrative courts and that Ecuador’s civil courts (including the court of appeals and the Civil Chamber of the NCJ) would lack jurisdiction over it.⁶²³ Finally, MSDIA proceeded on the basis that NIFA accepted that it had not submitted evidence to the courts that was sufficient to sustain a finding of unfair competition.⁶²⁴

345. For all these reasons, MSDIA was not on notice that it faced the possibility of being held liable by the NCJ for an act of unfair competition, and MSDIA did not address the merits of an unfair competition claim in its submissions to the NCJ.⁶²⁵

(b) Under Ecuadorian Law, the NCJ Was Limited to Review of the Legal Arguments Raised by the Parties

346. MSDIA also had no notice that the NCJ could or would impose liability for unfair competition because Ecuadorian law prohibited the NCJ from doing so.

347. *First*, as explained by Professor Oyarte, the NCJ’s decision to hold MSDIA liable on grounds expressly disclaimed by the plaintiff violated established rules of Ecuadorian procedure.⁶²⁶ As Professor Oyarte explains, MSDIA “*could not have anticipated the NCJ’s decision finding MSDIA liable for unfair competition* because NIFA had expressly disclaimed unfair competition as a ground for its claim, and it is a principle of Ecuadorian law that *a court*

Response to MSDIA’s Cassation Petition) (stating that “the Fifth Transitional Provision of the Intellectual Property Law,” which grants exclusive jurisdiction to administrative courts, “*refers to cases of acts of unfair competition*”) (emphasis added).

⁶²⁰ See Exhibit C-164, NIFA’s Brief of 23 January 2009, *NIFA v. MSDIA*, Court of Appeals, at 4 (NIFA’s Response to MSDIA’s Nullity Petition).

⁶²¹ Exhibit C-164, NIFA’s Brief of 23 January 2009, *NIFA v. MSDIA*, Court of Appeals, at 3-4 (NIFA’s Response to MSDIA’s Nullity Petition) (emphasis added).

⁶²² Ponce Martínez Witness Statement at paras. 30-32, 62.

⁶²³ Ponce Martínez Witness Statement at paras. 30-32, 62.

⁶²⁴ Ponce Martínez Witness Statement at paras. 30-32, 62.

⁶²⁵ Ponce Martínez Witness Statement at paras. 60.

⁶²⁶ Expert Report of Professor Oyarte at paras. 31-33.

*can only issue a decision based on the specific claim before it.*⁶²⁷ MSDIA had no notice that the NCJ would violate Ecuadorian law by considering liability under a ground disclaimed by NIFA. MSDIA therefore had no notice or opportunity to be heard on that claim.

348. **Second**, as Professor Páez explains, the NCJ is a court of cassation, and its mandate is expressly defined by Ecuador’s cassation law.⁶²⁸ That law allows the NCJ to consider *only* the specific grounds raised by the parties’ cassation petitions, which in turn can challenge only determinations of law made by the lower courts based on specific grounds enumerated in the cassation law.⁶²⁹

349. The court of appeals’ decision did not rest on principles of unfair competition, but rather was based entirely on antitrust law.⁶³⁰ The parties’ cassation petitions were therefore limited to whether the court of appeals’ finding of antitrust liability and its damages award had any legal basis.⁶³¹

350. Notably, neither party’s cassation petition (or any subsequent submission or argument) requested that the NCJ address the merits of a claim for unfair competition.⁶³² Given its repeated waivers of an unfair competition theory and the decisions of the courts below, it is inconceivable that NIFA would have raised the lower courts’ failure to rule in its favor on the basis of unfair competition as an error in its cassation petition. Thus, as Professor Páez explains, by making a finding of unfair competition, the NCJ “went beyond matters set forth in the parties’ cassation petitions, and thus violated the dispositive principle and the Cassation Law.”⁶³³

351. Given that NIFA did not raise the merits of a claim for unfair competition, MSDIA had no notice whatsoever that the issue could possibly be before the court as a basis for affirmation of a judgment of liability. Obviously, MSDIA also was not on notice that the NCJ would violate the Ecuadorian statutory prohibition against rendering a judgment on a basis not addressed in the parties’ petitions for cassation. It therefore was not on notice that it could be subject to liability on a legal ground not decided by the court of appeals or raised by the parties on cassation.⁶³⁴

⁶²⁷ Expert Report of Professor Oyarte at para. 33 (emphasis added). *See also id.* at para. 10..

⁶²⁸ Expert Report of Professor Páez at paras. 12-14.

⁶²⁹ Expert Report of Professor Páez at paras. 12-14, 22 (“[T]he Cassation Law and dispositive principle limit the NCJ’s examination of the challenged judgment to the causes of action established by Article 3 of the Cassation Law and to the errors claimed in the cassation petitions filed by the parties.”) (emphasis added).

⁶³⁰ *See above* at paras. 118.

⁶³¹ *See above* at paras. 135-140.

⁶³² *See above* at paras. 139-140. *See also* Expert Report of Professor Páez at para. 22 (“Neither party asked the NCJ to correct the [court of appeals judgment] based on the existence of a claim of unfair competition.”). As Professor Páez explains, MSDIA’s petition for cassation challenged the Ecuadorian civil courts’ jurisdiction to entertain claims for unfair competition; the NCJ’s mandate to resolve MSDIA’s argument on the issue of jurisdiction did not, however, provide the court with the further mandate to address the merits of a claim for unfair competition. *See* Expert Report of Professor Páez, at para. 23.

⁶³³ Expert Report of Professor Páez, at para. 32.

⁶³⁴ Expert Report of Professor Páez at paras. 12-14, 22, 32. Expert Report of Professor Paulsson, at para. 15 (“The NCJ compounded th[e] denial of justice [committed by the court of appeals] by basing its own decision ... on a legal theory that had not been litigated by the parties, that the plaintiff had in fact expressly disclaimed, and that had no

- (c) The Theory of Unfair Competition Applied by the NCJ Had No Basis in Ecuadorian Law and Could Not Have Been Anticipated by MSDIA at Any Time during the NCJ Proceedings or When it Engaged in the Negotiations that Gave Rise to Liability

352. MSDIA also had no notice that it could be found liable for unfair competition, because the theory of unfair competition applied by the NCJ was entirely unprecedented as a matter of Ecuadorian law.

353. *First*, the constitutional provision relied on by the NCJ did not encompass unfair competition. As explained above, the NCJ held that Article 244, Number 3 of Ecuador’s 1998 Constitution, which NIFA had invoked as the basis for its antitrust claim, prohibited acts of unfair competition.⁶³⁵ Article 244, Number 3, however, made *no mention* of unfair competition, has a natural meaning that limits it to antitrust principles, and had *never been interpreted* to incorporate a claim of unfair competition.⁶³⁶

354. As explained by Professor Oyarte, Article 244, Number 3 of Ecuador’s 1998 Constitution had never been understood to address acts of unfair competition, not involving market power or injury to competition at large, between private companies like NIFA and MSDIA.⁶³⁷ As Professor Oyarte explains, the constitutional provision’s plain meaning, the structure of Ecuador’s 1998 Constitution, and the Constitution’s drafting history all make clear that Article 244, Number 3 did not address the concept of unfair competition.⁶³⁸ Thus, as Professor Oyarte explains:

“I have found that the *Constitutional Tribunal has never held that ... Article 244(3) concerns any practices other than antitrust violations, and specifically that it has never ruled nor suggested that it encompasses unfair competition. Nor, to my knowledge, apart from the NCJ in the NIFA v. MSDIA matter, has any court in Ecuador done so.*”⁶³⁹

basis in Ecuadorean law. *MSDIA therefore had no notice or opportunity to be heard on that ground.*”) (emphasis added).

⁶³⁵ Exhibit C-203, NCJ Judgment, *NIFA v. MSDIA*, dated 21 September 2012, at paras. 8.1, 15.

⁶³⁶ Expert Report of Professor Fernández de Córdoba at para. 51(a). *See also* Expert Report of Professor Oyarte at paras. 15-20 (“It is clear from the literal meaning of Article 244(3) that it is concerned exclusively” with matters of antitrust law, and that “[t]he *Article does not mention ‘unfair competition’ or any other matters that extend beyond the concept of free competition.*”) (emphasis added).

⁶³⁷ Expert Report of Professor Oyarte at 25; Ponce Martínez Witness Statement at para. 63.

⁶³⁸ Expert Report of Professor Fernández de Córdoba, at paras. 15-16; Expert Report of Professor Oyarte at para. 7 (“Article 244(3) does not encompass the concept of unfair competition”). *See also id.* at paras. 15-20, 25, 27.

⁶³⁹ Expert Report of Professor Fernández de Córdoba, at para. 15 (“A plain reading of Article 244-3 reveals, therefore, that it did not address unfair competition, and, apart from the NCJ Judgment in the *NIFA v. Merck* case, I know of no court that has interpreted Article 244-3 to encompass unfair competition principles.”). *See also* Expert Report of Professor Oyarte para. 25 (emphasis added).

355. Moreover, Article 244 is not self-executing. As Professor Oyarte explains, “Article 244(3) did not create a substantive standard, but instead required the enactment of a specific law to carry out its mandate,”⁶⁴⁰ and Ecuador’s Constitutional Court “*has never held that Article 244(3) imposes actionable substantive prohibitions.*”⁶⁴¹ Therefore, even if Article 244 somehow could be read to encompass unfair competition, MSDIA was not on notice that the NCJ could impose liability based only on that provision in the absence of implementing legislation prohibiting MSDIA’s alleged conduct.⁶⁴² There was no such applicable law.⁶⁴³

356. *Second*, as discussed above, Ecuador’s civil courts, including the NCJ, did not have jurisdiction over claims of unfair competition.⁶⁴⁴ MSDIA therefore had no notice or reason to believe that the NCJ could issue a decision against it imposing liability for unfair competition.⁶⁴⁵

357. *Third*, even if (contrary to fact) Article 244, Number 3 of Ecuador’s 1998 Constitution encompassed a prohibition on unfair competition, and even if (again, contrary to fact) the NCJ had jurisdiction over such a claim, the principles of unfair competition that the NCJ purported to apply had no basis in Ecuadorian law (as the NCJ itself recognized).

358. In holding MSDIA liable for purported violations of unfair competition, the NCJ did not even purport to apply Ecuadorian standards for conduct that constituted unfair competition—*i.e.*, the standards set forth in the Law on Intellectual Property—but instead purported to import standards for conduct found in foreign law and not recognized in Ecuador at the time. As a result, in addition to depriving MSDIA of notice or opportunity to be heard on a theory of unfair competition *in general*, the NCJ further deprived MSDIA of notice or opportunity to be heard on the NCJ’s *particular theory of unfair competition*, which was based on legal principles that are *nowhere* articulated in Ecuadorian sources.

359. As Dr. Fernández de Córdoba, an Ecuadorian expert on the law of unfair competition, explains:

“The NCJ ... concluded that MSDIA was liable for ‘refusing to sell’ [its industrial plant to NIFA] under unfair competition law.... [This] decision[] was based upon any recognized principle of Ecuadorian law in effect at the time of the underlying dispute. In 2002, ‘refusal to sell’ *did not constitute ... an act of unfair competition.* The NCJ

⁶⁴⁰ Expert Report of Professor Fernandez de Córdoba, at para. 19 (“In the absence of a law implementing the policy described in Article 244-3, parties could not bring actions based on Art. 244-3, and it did not allow parties to be held liable for any alleged ‘violations’ of the policy described in Article 244-3.”). *See also* Expert Report of Professor Oyarte at para. 22.

⁶⁴¹ Expert Report of Professor Fernández de Córdoba at para. 51(e). *See also* Expert Report of Professor Oyarte at para. 25 (emphasis added).

⁶⁴² Expert Report of Professor Fernández de Córdoba at paras. 50, 51. *See also* Expert Report of Professor Oyarte at 27; Ponce Martínez Witness Statement at para. 63.

⁶⁴³ Expert Report of Professor Fernández de Córdoba at para. 12 (“When the dispute between NIFA and MSDIA arose in 2002 and 2003, Ecuador did not have a national law regulating acts contrary to free competition.”). *See above* at paras. 42-43.

⁶⁴⁴ *See above* at paras. 331-332.

⁶⁴⁵ *See above* at paras. 334-338.

Judgment implicitly acknowledged this when it justified its decision on doctrine developed under the unfair competition law of certain European countries, without citing to any Ecuadorian law on unfair competition.”⁶⁴⁶

360. Applying principles of foreign law in the absence of *any* Ecuadorian law on the subject, the NCJ held that MSDIA’s purported “refusal to sell” its plant was an act of unfair competition.⁶⁴⁷ As Dr. Fernández de Córdoba concludes, even beyond reaching a ground for liability (unfair competition) that had been disavowed by the plaintiff, had not been briefed before it, and over which it did not have jurisdiction: “*the NCJ did not examine or apply any of the norms on unfair competition that were in effect in Ecuador* at the time the dispute between NIFA and MSDIA arose.”⁶⁴⁸ Instead the NCJ “*based its decision on principles drawn from foreign laws that were distinct from the laws in effect in Ecuador.*”⁶⁴⁹

361. *Fourth*, even if (contrary to fact) a refusal to sell could give rise to liability for unfair competition under Ecuadorian law, a plaintiff still would need to establish the elements of an unfair competition claim. As explained above, an unfair competition plaintiff must demonstrate, among other things, that the conduct at issue violated an industry’s “customs, practices, principles” and was carried out with the intention to “divert others’ clientele to benefit oneself.”⁶⁵⁰

362. Indeed, NIFA itself recognized the latter element in its response to MSDIA’s nullity petition, arguing that “[a]cts of unfair competition are intended to deprive a competitor of current or potential clients in order to secure that competitor’s clients.”⁶⁵¹ NIFA explained that its claim did not involve such allegations and therefore was not a claim for unfair competition.⁶⁵²

363. The NCJ made no findings on whether MSDIA’s conduct was contrary to accepted industry customs or practices, or whether MSDIA acted with an intent to divert NIFA’s clientele to benefit itself.⁶⁵³ Nor could it have made such findings, because NIFA—consistent with its repeated representations to the NCJ and the lower courts—had made no effort to establish either element of a claim under unfair competition law. Even if (contrary to fact) MSDIA had notice that the NCJ might apply a theory of liability of unfair competition, it had no notice and could not have anticipated that the NCJ would apply principles of unfair competition that had no basis

⁶⁴⁶ Expert Report of Manuel Fernández de Córdoba, at paras. 35-36 (emphasis added).

⁶⁴⁷ Exhibit C-203, NCJ Judgment, *NIFA v. MSDIA*, dated 21 September 2012, at paras. 13-15.

⁶⁴⁸ Expert Report of Professor Fernández de Córdoba at para. 51(c) (emphasis added).

⁶⁴⁹ Expert Report of Professor Fernández de Córdoba at para. 51(d) (emphasis added).

⁶⁵⁰ See *above* at paras. 327-333. See also Expert Report of Professor Fernández de Córdoba, at para. 33; Exhibit CLM-191, Ecuador Law on Intellectual Property (1998), arts. 284-287.

⁶⁵¹ Exhibit CLM-164, NIFA’s Brief of 23 January 2009, *NIFA v. MSDIA*, Court of Appeals, at 3-4 (emphasis added). Indeed, the the primary authorities on which the NCJ relied in its judgment acknowledge these core requirements of unfair competition law. See, e.g., Exhibit C-203, NCJ Judgment, *NIFA v. MSDIA*, dated 21 September 2012, at section. 13.3 (citing approvingly to García Menéndez for the proposition that unfair competition involves “unfair practices that cause consumers to be attracted not by the best business, but rather by the one that use means that go beyond socially acceptable parameters”)

⁶⁵² Exhibit CLM-164, NIFA’s Brief of 23 January 2009, *NIFA v. MSDIA*, Court of Appeals, at 3-4.

⁶⁵³ See Expert Report of Manuel Fernández de Córdoba, at para. 52(a).

in Ecuadorian law.⁶⁵⁴ By finding MSDIA liable for unfair competition on the basis of an unprecedented theory of unfair competition, the NCJ violated MSDIA's due process rights in two, independent, ways.

364. First, the NCJ deprived MSDIA of an opportunity to be heard with respect to the theory of unfair competition applied by the NCJ, or to the facts that would be relevant to consideration of such claim. As explained above, international tribunals and commentators have recognized that a foreign litigant is entitled to be heard on every claim or legal theory on which it may be held liable.⁶⁵⁵ MSDIA had no notice, however, that the NCJ would interpret Article 244, Number 3 of Ecuador's 1998 Constitution to encompass claims for unfair competition, that the Civil Chamber of the NCJ would improperly exercise jurisdiction over a claim for unfair competition, that the NCJ would invoke principles of foreign law that had not previously been applied in Ecuador, or that the NCJ would disregard settled Ecuadorian law regarding the elements of a claim for unfair competition.

365. Second, the NCJ held MSDIA liable on the basis of a legal rule that was not in effect or articulated in Ecuador at the time that MSDIA purportedly engaged in the conduct at issue. As explained above, a State's courts may not subject a foreign national to liability for conduct absent fair notice that it was considered wrongful at the time of the conduct.⁶⁵⁶ In clear contravention of this principle, the NCJ invoked foreign law to sanction conduct (a purported "refusal to sell") that *had not previously been considered to give rise to liability for unfair competition in Ecuador, including at any time during the negotiations between MSDIA and NIFA for the Chillos Valley plant.*

(d) MSDIA Did Not Have an Opportunity to Present a Defense to a Claim of Unfair Competition

366. Internationally accepted due process standards require not only that a defendant be given notice of the specific claims asserted against it, but also that the defendant be given a meaningful opportunity to be heard with respect to those claims.⁶⁵⁷ In particular, the defendant must be given an opportunity to submit factual evidence and legal argument in defense of those claims.⁶⁵⁸

⁶⁵⁴ See Expert Report of Manuel Fernández de Córdoba, at para. 50 (“[T]he NCJ decision applied principles that were not recognized under Ecuadorian law on unfair competition, or indeed, even under the foreign norms of unfair competition that the NCJ’s decision was inspired by. I conclude, for the same reason, that the NCJ’s judgment could not have been reasonably anticipated by the parties.”).

⁶⁵⁵ See above at paras. 295-309.

⁶⁵⁶ See above at para. 264. See also Exhibit CLM-174, J. Paulsson, DENIAL OF JUSTICE IN INTERNATIONAL LAW (2005), at 200 (“Surprising departures from settled patterns of reasoning or outcomes, *or the sudden emergence of a full-blown rule where none had existed*, must be viewed with the greatest scepticism if their effect is to disadvantage a foreigner.”) (emphasis added). The invention of legal rules to prohibit conduct that was not wrongful at the time of its commission has been recognized as a due process violation by national courts as well. See, e.g., Exhibit CLM-212, *Landgraf v. USI Films Prods.*, 511 U.S. 244, 265 (1994) (“Elementary considerations of fairness dictate that individuals *should have an opportunity to know what the law is and to conform their conduct accordingly.*”) (emphasis added).

⁶⁵⁷ See above at paras. 258-259, 297-299.

⁶⁵⁸ See above at paras. 258-259, 282-283, 297-299.

MSDIA was never given an opportunity to be heard with respect to a claim of unfair competition, which is a violation of MSDIA's due process rights.

367. If MSDIA had been on notice that the NCJ might impose liability for unfair competition under Article 244, Number 3, MSDIA would have argued that the NCJ did not have the authority to consider whether the evidence would support a finding of unfair competition, because this was outside of the parties' cassation petitions, and therefore beyond the mandate of the NCJ.⁶⁵⁹ Because MSDIA was never given notice that the NCJ could impose liability for unfair competition, much less that it could do so under Article 244, Number 3, MSDIA was never afforded an opportunity to make these arguments.

368. In addition to having been deprived of the opportunity to make these legal arguments, MSDIA was also deprived of the ability to submit factual evidence in support of its defense. Because NIFA expressly disclaimed an unfair competition claim, MSDIA did not submit evidence in the trial court or court of appeals that would be relevant to defending a claim of unfair competition on the merits.⁶⁶⁰

369. Specifically, MSDIA did not submit evidence that MSDIA's conduct during the parties' negotiations was consistent with industry practice, that MSDIA's conduct did not divert NIFA's clients to MSDIA, and that MSDIA did not act with the specific intent to divert customers away from NIFA.⁶⁶¹ Instead, both parties focused their evidence in the court of appeals on issues that were relevant to NIFA's antitrust claims, namely the scope of any relevant markets, whether MSDIA had a dominant market position in any relevant markets, whether MSDIA abused its purported dominant position in any alleged markets, and whether the Chillós Valley plant qualified as an "essential facility."⁶⁶²

370. Moreover, there was no mechanism under Ecuador's cassation law or the NCJ's procedural rules whereby MSDIA could have introduced evidence relevant to the factual elements of a claim for unfair competition.⁶⁶³ As Professor Páez explains: "Article 15 of the Cassation Law *prohibits* [the NCJ] from accepting new evidence."⁶⁶⁴

⁶⁵⁹ See above at paras. 335-339. See also Ponce Martínez Witness Statement at paras. 60, 64.

⁶⁶⁰ Ponce Martínez Witness Statement at paras. 32, 64.

⁶⁶¹ See above at paras. 332-333. See also Ponce Martínez Witness Statement at paras. 64.

⁶⁶² See above at paras. 77-78. See also Witness Statement of Ponce Martínez, at paras. 32, 34.

⁶⁶³ Expert Report of Professor Páez, at para. 2. Cf. Exhibit CLM-116, *ADF Group Inc. v. United States of America*, ICSID Case No. ARB(AF)/00/1, Award, dated 9 January 2003, at para. 143 ("This kind of failure of proof of liability cannot be sought to be remedied at any subsequent phase of these proceedings as the Respondent would have been denied the opportunity to present its case against liability—if any—that is, to controvert the Claimant's proof. *This could amount to denial of due process.*") (emphasis added).

⁶⁶⁴ See Expert Report of Professor Páez, at para. 21. Although the NCJ was precluded from accepting new evidence, it still was required, in light of the gross procedural errors committed by the lower court, to "independently weigh the evidence in the entire record of evidence of the lower court proceedings" in forming its judgment). *Id.* at paras. 19-20. As explained above, however, the NCJ failed to do so, and instead adopted the facts set forth in the court of appeals' tainted judgment. See above at paras. 150-152.

371. Indeed, as explained above, the NCJ summarily adopted the facts set forth in the court of appeals' judgment, which was tainted by bias and serious procedural errors and which, in any case, primarily considered factual submissions from NIFA that NIFA itself claimed had no relevance to a claim for unfair competition.⁶⁶⁵ In determining whether the facts supported a finding of liability for unfair competition, the NCJ expressly "*refer[red] to the ... facts ... found*" in the court of appeals' judgment.⁶⁶⁶ As explained above, the court of appeals' judgment, and the factual findings upon which it relied, resulted from obvious bias and corruption in favor of NIFA, including the court of appeals' improper and unjustified refusal to consider any of the evidence submitted by MSDIA.

372. In sum, the NCJ's assessment of liability against MSDIA on unfair competition grounds is a clear violation of customary international law and constitutes a denial of justice. As in *Pantehniki, Rumeli*, and the other investor-State and national court authorities discussed above, the NCJ *sua sponte* decided the case on an entirely new ground not addressed by the parties, and thereby deprived MSDIA of notice and an opportunity to be heard with respect to the claim on which the NCJ based its decision.⁶⁶⁷

373. The NCJ's failure to afford MSDIA notice and an opportunity to be heard was even more egregious than in other investor-State cases, however. Specifically, NIFA's repeated disclaimer of an unfair competition claim, the court's indisputable lack of subject-matter jurisdiction over claims for unfair competition, and the absence of any reference to unfair competition in Article 244, Number 3 of the 1998 Constitution gave MSDIA no basis for anticipating that it could be held liable for unfair competition, let alone the novel theory of unfair competition that the NCJ imported from *foreign laws that never before had been applied in Ecuador*.⁶⁶⁸

374. Basing its decision on a claim that was not only never asserted by the plaintiff, but was also repeatedly and emphatically denied by the plaintiff, was a clear violation by the NCJ of MSDIA's due process rights. Thus, far from remedying the denial of justice in the lower courts, the NCJ further compounded the denial of justice suffered by MSDIA.⁶⁶⁹

C. *MSDIA Exhausted Available Remedies in Ecuador*

375. In order to establish a State's liability for denial of justice, the aggrieved claimant must have exhausted "reasonably available" local remedies in an attempt "to correct the challenged action."⁶⁷⁰ Thus, a claimant ordinarily must afford the State's entire judiciary "scope to operate, including by the agency of its ordinary corrective functions," in reaching a final judgment.⁶⁷¹

⁶⁶⁵ See above at paras. 73, 150-152. See also Expert Report of Professor Páez at paras. 6, 33-37.

⁶⁶⁶ Exhibit C-203, NCJ Judgment, *NIFA v. MSDIA*, dated 21 September 2012, at Section 11.

⁶⁶⁷ See above at paras. 300-309. See also Expert Report of Professor Páez at paras. 6, 33-40.

⁶⁶⁸ See above at paras. 357-360.

⁶⁶⁹ Expert Report of Professor Paulsson, at para. 50 ("[T]he threshold of procedural impropriety required to establish a claim for denial of justice has been crossed" by the Ecuadorian courts in their treatment of MSDIA over the course of the *NIFA v. MSDIA* litigation.").

⁶⁷⁰ Exhibit RLM-1, A. Newcombe & L. Paradell, *LAW AND PRACTICE OF INVESTMENT TREATIES: STANDARD OF TREATMENT* (2009), at 242 (quoting Exhibit CLM-99, J. Paulsson, *DENIAL OF JUSTICE IN INTERNATIONAL LAW*

376. The requirement that a claimant exhaust reasonably available local remedies is “not a matter of procedure or admissibility, but an inherent material element of the [denial of justice] delict.”⁶⁷² Tribunals have consistently recognized that the question of exhaustion is therefore an issue to be addressed as part of the merits of the claim.⁶⁷³

377. MSDIA has exhausted available remedies in Ecuador. The NCJ is Ecuador’s court of cassation, its highest civil court.⁶⁷⁴ The judgment of the NCJ rendered against MSDIA is **final and unappealable**.⁶⁷⁵ In fact, MSDIA was ordered to pay that judgment on 28 November 2012,⁶⁷⁶ and it made payment, fully satisfying the judgment, on 29 November 2012.⁶⁷⁷

378. Given these facts, MSDIA has plainly exhausted local remedies,⁶⁷⁸ and Ecuador has failed to remedy the denial of justice suffered by MSDIA. Professor Paulsson accordingly explains

(2005), at 100). *See also* Expert Report of Professor Paulsson, at para. 23 (“Inherent in the concept of denial of justice is that international adjudicators assess a product of the domestic legal system considered as a whole. This means that exhaustion of domestic remedies is a precondition to the existence of a denial of justice, unless the remaining remedies provide no reasonable possibility of effective redress, such as where they are merely theoretical or otherwise futile.”).

⁶⁷¹ *See* Exhibit CLM-99, J. Paulsson, DENIAL OF JUSTICE IN INTERNATIONAL LAW (2005), at 108. *See also id.* at 100 (explaining that liability for denial of justice does not attach to every “instance of judicial misconduct,” it clearly arises out of a state’s failure “to provide a fair and efficient *system* of justice” in resolving a case) (emphasis in original).

⁶⁷² Exhibit CLM-99, J. Paulsson, DENIAL OF JUSTICE IN INTERNATIONAL LAW (2005), at 7 (emphasis added). Exhibit CLM-15, *Saipem S.p.A. v. People’s Republic of Bangladesh*, ICSID Case No. ARB/05/07, Decision on Jurisdiction and Recommendation on Provisional Measures, dated 21 March 2007, at 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.”).

⁶⁷³ As the tribunal in *Chevron v. Ecuador (Chevron I)* explained, “[e]xhaustion of local remedies” in the context of a claim for denial of justice “is ... an issue of the merits, **not jurisdiction**.” Exhibit CLM-44, *Chevron Corp. & Texaco Petroleum Co. v. Republic of Ecuador (Chevron I)*, PCA Case No. 2007-2 (UNCITRAL), Interim Award, dated 1 December 2008, at para. 233. The tribunal in *Loewen v. United States* accordingly **refused** to address the rule of exhaustion at the jurisdictional phase, and instead deferred the issue “to the hearing on the merits.” Exhibit CLM-59, *Loewen Group, Inc. & Raymond L. Loewen v. United States*, ICSID Case No. ARB(AF)/98/3, Decision on Hearing of Respondent’s Objection to Competence and Jurisdiction, dated 9 January 2001, at para. 74. *See also* Expert Report of Professor Paulsson, at para. 54.

⁶⁷⁴ *See above* at paras. 135.

⁶⁷⁵ *See* Expert Report of Professor Páez, at paras. 8-11.

⁶⁷⁶ Exhibit C-207, Trial Court Order of 28 November 2012, *NIFA v. MSDIA*, at 1.

⁶⁷⁷ Exhibit C-208, MSDIA’s Brief of 29 November 2012, *NIFA v. MSDIA*, Trial Court (Notification of Payment), at 1; Exhibit C-209, Trial Court Order of 29 November 2012, *NIFA v. MSDIA*, at 1 (Receipt of Payment).

⁶⁷⁸ Whether MSDIA arguably could have initiated a **collateral** attack against the NCJ judgment before Ecuador’s Constitutional Court is immaterial to the question of exhaustion. Under customary international law, a claimant need only exhaust local remedies in the “**straight line**” from a State’s first-instance civil court to its court of cassation, without regard to other “oblique” or “indirect” challenges, such as an action in the Constitutional Court. *See* Exhibit RLM-47, *Pantehniki S.A. Contractors & Engineers v. Republic of Albania*, ICSID Case No. ARB/07/21, Award, dated 30 July 2009, at paras. 96, 102 (emphasis added). *See also* Expert Report of Professor Paulsson, at para. 56. As Professor Oyarte explains, a challenge to the NCJ judgment in Ecuador’s Constitutional Court is not an appeal from that judgment, but is instead a **separate action against the NCJ judges that issued the judgment**. *See* Expert Report of Professor Oyarte at para. 35 (“In an extraordinary action for protection, the claimant whose rights were adversely affected by a final judicial decision initiates the action against the judge,

that “in the circumstances of this case, the NCJ judgment was *a final product of the Ecuadorean legal system*.”⁶⁷⁹

V. ECUADOR’S TREATMENT OF MSDIA IN THE *NIFA V. MSDIA* LITIGATION ALSO BREACHED OTHER OBLIGATIONS UNDER THE TREATY

379. In addition to constituting a denial of justice under Article III(3)(b) of the Treaty and customary international law, the mistreatment of MSDIA’s investment by Ecuador’s courts also violated other provisions of the U.S.-Ecuador BIT. Specifically, Ecuador failed to provide MSDIA’s investment full protection and security and impaired MSDIA’s disposal of its investment by measures that were both arbitrary and discriminatory. Ecuador also failed to provide an effective means for MSDIA to assert claims and enforce rights with respect to its investment, because its judiciary is susceptible to bias and other improper influence and does not base its judgments on the rule of law.

A. *Ecuador Breached Its Obligation to Provide MSDIA’s Investment Full Protection and Security*

380. Article II(3)(a) of the Treaty requires that “[i]nvestment ... shall enjoy full protection and security.”⁶⁸⁰ In addition to the State’s obligation to exercise due diligence in ensuring the physical safety of an investor’s investment, “it is apparent that the duty of protection and security extends to providing a legal framework that offers legal protection to investors—including both substantive provisions to protect investments and appropriate procedures that enable investors to vindicate their rights.”⁶⁸¹

381. Accordingly, “where the acts of the host state’s judiciary are at stake, ‘full protection and security’ means that the state is under an obligation to make a functioning system of courts and legal remedies available to the investor.”⁶⁸² A State will incur liability for failure to provide “full protection and security” where its courts have failed to act in good faith or have reached decisions that are not “reasonably tenable.”⁶⁸³

382. For all the reasons discussed in Section IV above regarding denial of justice, Ecuador has also failed to provide MSDIA’s investment full protection and security, and has therefore breached Article II(3)(a) of the Treaty.

tribunal, or court that issued the challenged decision. ... The extraordinary action for protection thus brings about a new, independent proceeding, and is not a stage of the earlier proceedings.”).

⁶⁷⁹ Expert Report of Professor Paulsson at para. 56 (emphasis added).

⁶⁸⁰ Exhibit C-1, U.S.-Ecuador BIT, art. II(3)(a).

⁶⁸¹ Exhibit CLM-125, *Frontier Petroleum Services Ltd. v. Czech Republic*, UNCITRAL, Award, dated 12 November 2010, at para. 263; *accord id.* at paras. 264-272 (collecting cases).

⁶⁸² Exhibit CLM-125, *Frontier Petroleum Services Ltd. v. Czech Republic*, UNCITRAL, Award, dated 12 November 2010, at para. 273.

⁶⁸³ Exhibit CLM-125, *Frontier Petroleum Services Ltd. v. Czech Republic*, UNCITRAL, Award, dated 12 November 2010, at para. 273.

B. *Ecuador Breached Its Obligation Not to Impair MSDIA's Investment by Arbitrary or Discriminatory Measures*

383. Article II(3)(b) of the Treaty states 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.”⁶⁸⁴

384. For many of the same reasons the judgments of the Ecuadorian courts are a denial of justice, they are also arbitrary within the meaning of Article II(3)(b). In the *ELSI* Court’s oft-cited definition, “[a]rbitrariness is not so much something opposed to a rule of law, as something opposed to the rule of law. . . . It is a wilful disregard of due process of law, an act which shocks, or at least surprises, a sense of juridical propriety.”⁶⁸⁵

385. As discussed above, the court of appeals entered a judgment against MSDIA for an antitrust violation notwithstanding that Ecuador had no antitrust law.⁶⁸⁶ This was manifestly arbitrary and “opposed to the rule of law.” Similarly, the NCJ’s judgment against MSDIA for unfair competition was arbitrary, particularly in light of the fact that the plaintiff had disclaimed an unfair competition claim and had conceded both that the civil courts did not have jurisdiction over an unfair competition claim and that the facts before the courts did not support a finding of unfair competition.⁶⁸⁷

386. Moreover, the constitutional provision relied on by the court of appeals and the NCJ (Article 244, Number 3 of Ecuador’s 1998 Constitution) was not self-executing and had never been interpreted as a basis for imposing civil liability.⁶⁸⁸ The text of that provision expressly directed Ecuador’s legislature to adopt laws implementing the policy directives in that provision, but nothing in the text of the Constitution indicated that the Ecuadorian courts could impose liability in the absence of such laws.⁶⁸⁹ Not surprisingly, as Professor Oyarte explains, “the

⁶⁸⁴ Exhibit C-1, U.S.-Ecuador BIT, art. II(3)(b). The fair and equitable treatment standard also protects an investor from arbitrary or discriminatory conduct by the State. See Exhibit CLM-142, *Rumeli Telekom A.S. & Telsim Mobil Telekomunikasyon Hizmetleri A.S. v. Republic of Kazakhstan*, ICSID Case No. ARB/05/16, Award, dated 29 July 2008, at para. 609 (explaining that State conduct will violate the fair and equitable treatment standard where it is “arbitrary, grossly unfair, unjust, idiosyncratic, discriminatory, or lacking in due process”).

⁶⁸⁵ Exhibit CLM-155, *Elettronica Sicula S.p.A. (ELSI)* (U.S. v. It.), Judgment, 1989 I.C.J. 15, 76, para. 128 (20 July). The tribunal in *Lemire v. Ukraine* adopted the definition of arbitrariness as formulated by Professor Schreuer, which includes: “a. a measure that inflicts damage on the investor without serving any apparent legitimate purpose; b. a measure that is not based on legal standards but on discretion, prejudice or personal preference; c. a measure taken for reasons that are different from those put forward by the decision maker; d. a measure taken in wilful disregard of due process and proper procedure. Summing up, the underlying notion of arbitrariness is that prejudice, preference or bias is substituted for the rule of law.” Exhibit CLM-131, *Lemire v. Ukraine*, ICSID Case No. ARB/06/18, Decision on Jurisdiction and Liability, dated 14 January 2010, at paras. 262-263 (quotation marks omitted).

⁶⁸⁶ See *above* at para. 118.

⁶⁸⁷ See *above* at paras. 69-73.

⁶⁸⁸ Expert Report of Professor Oyarte at paras. 8, 21-25, 27.

⁶⁸⁹ Expert Report of Professor Oyarte at 21-24.

Constitutional Tribunal [of Ecuador] has never held that Article 244(3) imposes actionable substantive prohibitions.”⁶⁹⁰

387. Even if—contrary to fact—liability could be imposed directly under Article 244, Number 3, that provision is clearly limited by its terms to antitrust principles.⁶⁹¹ Prior to the NCJ’s decision, no court had ever held that Article 244 incorporated the concept of unfair competition,⁶⁹² which as the NCJ (correctly) recognized is a “*completely different*”⁶⁹³ legal principle from antitrust. This decision was particularly unexpected—and baseless—in light of the fact that Ecuadorian law contained a separate statute specifically addressing unfair competition, in the Law on Intellectual Property.⁶⁹⁴ The NCJ’s judgment finding liability for unfair competition under a constitutional provision addressing antitrust principles avoided the jurisdictional limitations in the law on unfair competition, which assigned exclusive jurisdiction to the administrative courts, as both parties recognized in the underlying litigation.⁶⁹⁵ The NCJ decision was accordingly arbitrary and without a basis in law.

388. Investor-State tribunals have condemned attempts by the host State to exploit an alleged lack of clarity in the law to the disadvantage of a foreign investor.⁶⁹⁶ Tribunals have similarly identified as arbitrary decision-making processes in which the decision-makers are free to manipulate the “rules of the game” in order to benefit one party over another for improper reasons such as nationality or political influence.⁶⁹⁷ In this case, the NCJ rewrote Ecuadorian law on unfair competition to achieve an outcome in favor of NIFA—the very definition of arbitrariness.

389. The judgments of the Ecuadorian courts also breached Ecuador’s obligation not to discriminate against foreign investors. Discrimination may occur in a variety of forms; animus or bias against a particular investment is certainly discriminatory, as is an unjustifiable or arbitrary distinction in the application of domestic law.⁶⁹⁸

⁶⁹⁰ Expert Report of Professor Oyarte at para. 25.

⁶⁹¹ Expert Report of Professor Oyarte at paras. 7, 14-20.

⁶⁹² Expert Report of Professor Oyarte at para. 25.

⁶⁹³ Exhibit C-203, NCJ Judgment, *NIFA v. MSDIA*, dated 21 September 2012, at para. 13.2 (emphasis added).

⁶⁹⁴ See Exhibit CLM-191, Ecuador Law on Intellectual Property (1999), art. 284.

⁶⁹⁵ Expert Report of Professor Fernández de Córdoba at para. 34. See *above* para 342.

⁶⁹⁶ See, e.g., Exhibit CLM-138, *Petrobart Ltd. v. Kyrgyz Republic*, SCC Case No. 126/2003, Award, dated 29 March 2005, at 76 (“The adoption of a new law which establishes that a previous law shall be interpreted in a restrictive way is retroactive legislation which is likely to have negative effects for some legal or physical persons in respect of previous business transactions. In this case, it is highly doubtful whether the adoption of the Foreign Investment Interpretation Law was compatible with the Kyrgyz Republic’s duty under the Treaty to protect foreign investments.”); Exhibit CLM-137, *Occidental Exploration & Production Co. v. Republic of Ecuador*, LCIA Case No. UN 3467, Final Award, dated 1 July 2004, at para. 163 (finding arbitrariness based on “confusion and lack of clarity” in interpretation of Ecuadorian tax code where Ecuador sought to deny VAT refunds to claimant on the basis of a new interpretation of the relevant legal provisions).

⁶⁹⁷ See, e.g., Exhibit CLM-131, *Lemire v. Ukraine*, ICSID Case No. ARB/06/18, Decision on Jurisdiction and Liability, dated 14 January 2010 (finding arbitrariness where system for allocating broadcasting licenses was manipulated in order to favor local, politically connected applicants less qualified than the claimant).

⁶⁹⁸ See, e.g., Exhibit CLM-144, *Saluka Investments BV v. Czech Republic*, Partial Award, dated 17 March 2006, at

390. The record of proceedings in the lower courts evidences discrimination against MSDIA and overt procedural advantages in favor of the Ecuadorian plaintiff. For example, the trial court repeatedly failed to provide MSDIA notice before taking testimony from NIFA's sole fact witness, denying MSDIA the right to be present and to cross-examine the witness.⁶⁹⁹ The trial court judge then relied heavily on that testimony and adopted wholesale NIFA's theory of the case.⁷⁰⁰

391. In addition, both the trial court and the court of appeals failed to notify MSDIA of critical rulings, which nearly caused MSDIA to lose its right to appeal the judgments of the trial court.⁷⁰¹ The court of appeals also uniformly rejected the opinions given by highly credentialed court-appointed experts whose opinions were favorable to MSDIA, and instead appointed and relied on a set of new experts who lacked credentials and relevant expertise, but who offered opinions entirely in NIFA's favor.⁷⁰² Similarly, the court of appeals considered the evidence offered into the record by NIFA, but held on a facially absurd basis that MSDIA had waived its right to rely on any evidence, including substantial amounts of fact evidence and expert opinion that conclusively disproved NIFA's claims.⁷⁰³

392. Thus, at each turn, the trial court and court of appeals repeatedly discriminated against MSDIA, systematically rejecting or ignoring the evidence put forward by MSDIA and refusing to provide to MSDIA the same due process they were extending to NIFA.

393. In sum, the decisions of the Ecuadorian courts holding MSDIA liable under a provision of Ecuador's 1998 Constitution that was not and had never been held to be self-executing, and that manifestly did not encompass and had never previously been applied to unfair competition, were arbitrary. Moreover, the proceedings in those courts were blatantly discriminatory and disadvantaged MSDIA in comparison to the Ecuadorian plaintiff. Ecuador's conduct impaired MSDIA's efforts to dispose of its investment in the Chillos Valley plant, and accordingly breached Ecuador's obligations under Article II(3)(b) of the Treaty.

para. 309 ("A foreign investor whose interests are protected under the Treaty is entitled to expect that the [State] will not act in a way that is manifestly inconsistent, non-transparent, unreasonable (*i.e.* unrelated to some rational policy), or discriminatory (*i.e.* based on unjustifiable distinctions)."); Exhibit CLM-147, *Tokios Tokelès v. Ukraine*, ICSID Case No. ARB/02/18, Award, dated 26 July 2007, at para. 123 (stating that a deliberate effort by State authorities to target or harass a foreign investment "must surely be the clearest infringement one could find of the provisions and aims of the Treaty").

⁶⁹⁹ See above at paras. 47-50. See also Ponce Martínez Witness Statement at 11-13.

⁷⁰⁰ See above at para. 50.

⁷⁰¹ See above at paras. 59-61, 65-67, 119. See also Ponce Martínez Witness Statement at paras. 20-28, 47-48.

⁷⁰² See above at paras. 85-117. See also Ponce Martínez Witness Statement at paras. 43-45.

⁷⁰³ See above at paras. 121-123. Contrary to the court of appeals' finding of waiver, MSDIA never waived any reliance on its evidence. See above at paras. 122-123. See also Ponce Martínez Witness Statement, at para. 52.

C. *Ecuador Breached Its Obligation to Provide MSDIA with an “Effective Means of Asserting Claims and Enforcing Rights”*

394. Article II(7) of the U.S.-Ecuador BIT requires the State Parties to provide an “effective means of asserting claims and enforcing rights.”⁷⁰⁴ A judiciary that is corrupt or otherwise incapable of providing litigants due process cannot meet this standard. Ecuador has accordingly breached its obligation under Article II(7).

1. Under Article II(7), Ecuador Has an Affirmative Obligation to Provide an Effective Means of Asserting Claims and Enforcing Rights

395. Article II(7) of the U.S.-Ecuador BIT states:

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

396. The imperative “*shall provide*” makes clear that the obligation to provide an “effective means of asserting claims and enforcing rights” cannot be satisfied by a State simply *avoiding* misconduct in the context of a particular case. Rather, Article II(7) affirmatively compels Ecuador to *provide*, by putting in place and maintaining, an “effective means of asserting claims and enforcing rights.”⁷⁰⁵ As the tribunal in *Chevron v. Ecuador (Chevron I)* explained:

“[T]he obligation in Article II(7) is stated as a *positive obligation* of the host State to provide effective means, as opposed to a negative obligation not to interfere in the functioning of those means.”⁷⁰⁶

397. Investor-State tribunals have interpreted the phrase “effective means of asserting claims and enforcing rights” to require that a State both establish an adequate procedural and legal framework and make sure that the framework is available and applied meaningfully by its judiciary whenever a foreign investor seeks to protect its investment through litigation. As the tribunals in *Chevron I* and *White Industries v. India* explained, the “effective means” 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.”⁷⁰⁷ Similarly, as the tribunal in *AMTO v. Ukraine* explained (in interpreting an analogous provision under the Energy Charter Treaty), the “effective means” obligation has two “fundamental” elements: “law and the rule of law.”⁷⁰⁸

⁷⁰⁴ Exhibit C-1, U.S.-Ecuador BIT, art. II(7).

⁷⁰⁵ The term “shall” requires that the specified action “*must*” be taken. See Exhibit C-220, Oxford English Dictionary, at 2-3 (emphasis added). The term “provide,” in turn, is defined to mean “make available.” Exhibit C-221, Oxford English Dictionary, at 4.

⁷⁰⁶ Exhibit CLM-111, *Chevron Corp. & Texaco Petroleum Co. v. Republic of Ecuador (Chevron I)*, PCA Case No. 2007-2 (UNCITRAL), Partial Award on the Merits, dated 30 March 2010, at para. 248.

⁷⁰⁷ Exhibit CLM-114, *White Industries Australia Ltd. v. Republic of India*, UNCITRAL, Award, dated 30 November 2011, at para. 11.3.2(b).

⁷⁰⁸ Exhibit CLM-112, *Ltd. Liability Co. AMTO v. Ukraine*, SCC Case No. 080/2005, Final Award, dated 26 March 2008, at para. 87.

398. The “effective means” obligation thus has two aspects:

a. **First**, the obligation requires the existence of a “*means* of asserting claims and enforcing rights.” More specifically, as the tribunal in *AMTO* explained, a State’s laws must provide “for the recognition and enforcement of property and contractual rights”⁷⁰⁹ and must include “secondary rules of procedure so that the principles and objectives of litigation can be translated by the investor into effective action in the domestic tribunals.”⁷¹⁰ As the tribunal in *Duke Energy v. Ecuador* recognized, the “effective means” obligation minimally requires “the existence and availability” of a State’s judicial system to foreign investors who seek to vindicate their rights.⁷¹¹

b. **Second**, the “effective means” obligation requires that a system of justice not only exist, but that it “*work effectively*” in a particular case.⁷¹² This means that the mere existence of laws and institutions capable of protecting an investor’s rights is not enough; instead, those laws must consistently be **enforced** by a State’s judicial system in an effective manner. The determination of “effectiveness” in a given case is highly fact-specific, but tribunals have, for example, considered “[u]ndue delay” in the resolution of a particular litigation to be a violation of Article II(7) where that delay “amounts to a denial of access to [effective] means.”⁷¹³ Similarly, it cannot seriously be disputed that a party is deprived of effective access to a court, and therefore cannot enforce its rights effectively, if it is deprived of an opportunity to be heard on a dispositive claim or defense, or if the court summarily disregards all of its legal or factual submissions.⁷¹⁴

⁷⁰⁹ Exhibit CLM-112, *Ltd. Liability Co. AMTO v. Ukraine*, SCC Case No. 080/2005, Final Award, dated 26 March 2008, at para. 87.

⁷¹⁰ Exhibit CLM-112, *Ltd. Liability Co. AMTO v. Ukraine*, SCC Case No. 080/2005, Final Award, dated 26 March 2008, at para. 87.

⁷¹¹ Exhibit RLM-18, *Duke Energy Electroquil Partners & Electroquil S.A. v. Republic of Ecuador*, ICSID Case No. ARB/04/19, Award, dated 18 August 2008, at para. 392.

⁷¹² Exhibit CLM-111, *Chevron Corp. & Texaco Petroleum Co. v. Republic of Ecuador (Chevron I)*, PCA Case No. 2007-2 (UNCITRAL), Partial Award on the Merits, dated 30 March 2010, at para. 248 (emphasis added). *See also* Exhibit CLM-114, *White Industries Australia Ltd. v. Republic of India*, UNCITRAL, Award, dated 30 November 2011, at para. 11.4.9 (“Because White does not suggest that India has not established a proper system of [f] laws and institutions, the question is, thus, whether the Delhi High Court worked effectively in handling White’s enforcement application.”); Exhibit RLM-18, *Duke Energy Electroquil Partners & Electroquil S.A. v. Republic of Ecuador*, ICSID Case No. ARB/04/19, Award, dated 18 August 2008, at para. 392 (“As a preliminary comment, the Tribunal notes that the existence and availability of the Ecuadorian judicial system and of recourse to arbitration under the Mediation and Arbitration Law are not at issue here. What is at issue and must be reviewed by the Tribunal is how these mechanisms performed”); Exhibit CLM-112, *Ltd. Liability Co. AMTO v. Ukraine*, SCC Case No. 080/2005, Final Award, dated 26 March 2008, at para. 88 (holding that “[i]ndividual failures” of the justice system may not themselves qualify as a breach of the effective means provision of the Energy Charter Treaty but that they nevertheless “might be evidence of systematic inadequacies”).

⁷¹³ Exhibit CLM-111, *Chevron Corp. & Texaco Petroleum Co. v. Republic of Ecuador (Chevron I)*, PCA Case No. 2007-2 (UNCITRAL), Partial Award on the Merits, dated 30 March 2010, at para. 250.

⁷¹⁴ *See above* at paras. 122-123. As Professor Paulsson explains, Article II(7) may be relied upon “by a claimant in an international investment arbitration who was a respondent in the domestic proceedings forming the subject matter of the international case. An investor must equally be able to ‘enforce rights’ *in defense of a claim brought against it in a domestic court.*” Expert Report of Professor Paulsson at para. 32 (emphasis added).

399. The “effective means” obligation under Article II(7) constitutes a *lex specialis* and “**not a mere restatement of the law on denial of justice.**”⁷¹⁵ Among other things, Article II(7) does not necessarily impose the same burden of proof or exhaustion requirement on the claimant as does the law of denial of justice.⁷¹⁶ The tribunal in *Chevron I* explained:

“In view of the [origin and purpose] and the language of Article II(7), the Tribunal agrees with the Claimants **that a distinct and potentially less-demanding test is applicable under [Article II(7)] as compared to denial of justice under customary international law.** The test for establishing a denial of justice sets, as the Respondent has argued, a high threshold. While the standard is objective and does not require an overt showing of bad faith, it nevertheless requires the demonstration of ‘a particularly serious shortcoming’ and egregious conduct that ‘shocks, or at least surprises, a sense of judicial propriety’. **By contrast, under 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.**”⁷¹⁷

“[Moreover,] [t]he Tribunal finds that a **qualified requirement of exhaustion** of local remedies applies under the ‘effective means’ standard of Article II(7). ... [I]n the consideration of whether the means provided by the State to assert claims and enforce rights are sufficiently ‘effective’, the Tribunal must consider whether a given claimant has done its part by properly using the means placed at its disposal. A failure to use these means may preclude recovery **if it prevents a proper assessment of the ‘effectiveness’ of the system for asserting claims and enforcing rights.**”⁷¹⁸

400. Indeed, in both *Chevron I* and *White Industries*, the tribunal found that the respondent State’s excessive delays in resolving claims brought before its courts did not give rise to liability for denial of justice, but **nevertheless** constituted a failure to “provide an effective means of asserting claims and enforcing rights.”⁷¹⁹

⁷¹⁵ Exhibit CLM-111, *Chevron Corp. & Texaco Petroleum Co. v. Republic of Ecuador (Chevron I)*, PCA Case No. 2007-2 (UNCITRAL), Partial Award on the Merits, dated 30 March 2010, at para. 242 (emphasis added). *See also* Expert Report of Professor Paulsson, at para. 33 (“Article II(7) is an example of a treaty provision which may create state responsibility for acts of the judiciary without applying the test for denial of justice under customary international law.”); *id.* at para. 31 (noting that the *Chevron* and *White* tribunals “held that Article II(7) imposed a broader obligation on states than the rules of customary international law concerning denial of justice.”).

⁷¹⁶ Exhibit CLM-111, *Chevron Corp. & Texaco Petroleum Co. v. Republic of Ecuador (Chevron I)*, PCA Case No. 2007-2 (UNCITRAL), Partial Award on the Merits, dated 30 March 2010, at para. 242. *See also* Expert Report of Professor Paulsson at para. 31.

⁷¹⁷ Exhibit CLM-111, *Chevron Corp. & Texaco Petroleum Co. v. Republic of Ecuador (Chevron I)*, PCA Case No. 2007-2 (UNCITRAL), Partial Award on the Merits, dated 30 March 2010, at para. 244 (emphasis added).

⁷¹⁸ Exhibit CLM-111, *Chevron Corp. & Texaco Petroleum Co. v. Republic of Ecuador (Chevron I)*, PCA Case No. 2007-2 (UNCITRAL), Partial Award on the Merits, dated 30 March 2010, at paras. 323-324 (emphasis added and citation omitted).

⁷¹⁹ Both tribunals also held, contrary to Ecuador’s argument, that claims under Article II(7) are not subject to the same exhaustion requirement as denial of justice claims. *See* CLM-111, *Chevron Corp. & Texaco Petroleum Co. v. Republic of Ecuador (Chevron I)*, PCA Case No. 2007-2 (UNCITRAL), Partial Award on the Merits, dated 30 March 2010, at paras. 323-324; Exhibit CLM-114, *White Industries Australia Ltd. v. Republic of India*,

2. Ecuador Has Violated Article II(7)

401. As explained below, Ecuador has failed to establish an “effective means of asserting claims and enforcing rights.” Ecuador’s judiciary is bound to apply Ecuador’s substantive laws in an impartial manner, but Ecuadorian judges consistently have succumbed to bias and corruption, including in the *NIFA v. MSDIA* litigation.

402. A judiciary that is corrupt or otherwise susceptible to improper influence cannot provide an “effective means of asserting claims and enforcing rights.”⁷²⁰ Corruption in one party’s favor allows bias to prevail over the rule of law.⁷²¹ In order to *effectively* assert claims and enforce its rights, an investor must be assured that the court will fairly and impartially consider its arguments and evidence and render a decision on the basis of the rule of law.⁷²²

403. As set forth in detail above, judicial proceedings in Ecuador frequently are marred by corruption and improper outside influences, which results in judgments inconsistent with the facts, the law, and basic justice.⁷²³ Indeed, Ecuador’s President Correa has recognized that: “***We have a concrete problem no one doubts, a totally inefficient and corrupt judicial system that is falling in pieces.***”⁷²⁴

404. The *NIFA v. MSDIA* litigation was very likely affected by improper influences. As set forth in detail above, various actors directly involved in the case—including NIFA’s General Manager, Miguel García; Judge Toscano Garzón, who presided over the trial court of appeals proceedings; Temporary Judge Chang-Huang Castillo, the Temporary Judge who issued the \$200 million trial court judgment in favor of NIFA; and Judge Palacios, who wrote the court of appeals’ \$150 million judgment in favor of NIFA—have all been investigated and censured for corruption in connection with other cases.⁷²⁵ Indeed, recognizing the clear lack of legal basis for her decision, Temporary Judge Chang-Huang admitted to MSDIA’s lawyer in Ecuador (among

UNCITRAL, Award, dated 30 November 2011, at para. 11.3.2(g) (adopting the *Chevron* analysis).

⁷²⁰ See, e.g., Exhibit CLM-138, *Petrobart Ltd. v. Kyrgyz Republic*, SCC Case No. 126/2003, Award, dated 29 March 2005, at 75 (“The Arbitral Tribunal considers that Minister Silayev’s letter must be regarded as an attempt by the Government to influence a judicial decision to the detriment of Petrobart. . . . The Arbitral Tribunal considers that such Government intervention in judicial proceedings is not in conformity with the rule of law in a democratic society and that it shows a lack of respect for Petrobart’s rights as an investor having an investment under the Treaty.”).

⁷²¹ See Exhibit CLM-138, *Petrobart Ltd. v. Kyrgyz Republic*, SCC Case No. 126/2003, Award, dated 29 March 2005.

⁷²² See Exhibit CLM-112, *Ltd. Liability Co. AMTO v. Ukraine*, SCC Case No. 080/2005, Final Award, dated 26 March 2008, at para. 87 (identifying “law and the rule of law” as two “fundamental” elements of the effective means obligation).

⁷²³ See above at paras. 161-198.

⁷²⁴ Exhibit C-110, *President Correa: They Wanted to Disparage the Government and They Could Not*, OPINIÓN, 13 November 2011 (emphasis added); Exhibit C-100, *Correa Reiterates that He Will Lay Hands on the Court and His Campaign for Yes*, EL UNIVERSO, 26 January 2011.

⁷²⁵ See above at paras. 177-198.

others) that her decision had been the product of improper influence by outsiders, including Judge Toscano Garzón, the first judge that presided over the case in the trial court.⁷²⁶

405. Moreover, in the *NIFA v. MSDIA* litigation, the courts issued rulings in NIFA's favor that were not based on the rule of law. To the contrary, as set out above, the proceedings at all levels of the judiciary suffered from irrational and arbitrary decision-making.⁷²⁷ These included the court of appeals' unreasoned decision to reject qualified experts simply because they issued opinions favorable to MSDIA, the court of appeals' decision to exclude consideration of all of the evidence relied on by MSDIA, the lower courts' finding of liability on the basis of an antitrust law that did not exist, and the NCJ's finding of liability on the basis of findings of fact of an obviously biased tribunal that had (without any support and inconsistent with the rule of law) ignored all of the evidence of the losing party and an unfair competition law that did not exist. As such, the Ecuadorian judiciary violated Article II(7) by making decisions based on bias or improper influence rather than on the basis of the rule of law.

406. Further, in order to provide an effective means of asserting claims and enforcing rights, a court must not only decide on the basis of the rule of law but must also ground its decision in a complete and unbiased factual record. Notice and an opportunity to be heard are, accordingly, indispensable elements of any such "effective means." Without notice, a defendant is unable to identify relevant evidence or legal principles. Without an opportunity to be heard, the defendant cannot ensure that the court will take that evidence and law into account in reaching its decision. Even when otherwise neutral evidentiary rules are in place, it is indisputable that those rules are not effectively implemented where the court either ignores them or applies them in a biased fashion.

407. The *NIFA v. MSDIA* litigation provides a stark example of the inability of the Ecuadorian judiciary to provide the due process required of an effective means of asserting claims and enforcing rights. As described in detail above, MSDIA suffered a multitude of procedural due process violations at all stages of the litigation, including the utter lack of notice and an opportunity to be heard before the NCJ.⁷²⁸ The cumulative result of these improprieties was the creation of an irremediably tainted record and the NCJ's reliance on that record.

408. Taken together, these various manifestations of corruption, partiality, and lack of due process make abundantly clear Ecuador's failure to provide an "effective means of asserting claims and enforcing rights." As Professor Paulsson explains, "if MSDIA's factual allegations about the *NIFA v. MSDIA* proceedings are true, it follows that MSDIA has established [a] violation of Article II(7) of the U.S.-Ecuador BIT."⁷²⁹

⁷²⁶ Marcelo Santamaría Witness Statement and attached report.

⁷²⁷ See above at paras. 44-153.

⁷²⁸ See above at paras. 147-152.

⁷²⁹ Expert Report of Professor Paulsson at para. 51.

VI. REQUEST FOR RELIEF

409. As the ICJ explained in the *Chorzów Factory* case, a denial of justice claimant is entitled to be compensated for all of the damages that it suffered as a result of the State's violation of international law:

“[R]eparation must, as far as possible, **wipe out all the consequences of the illegal act** and re-establish the situation which would, in all probability, have existed if that act had not been committed.”⁷³⁰

410. The denials of justice committed by Ecuador's judicial system directly resulted in the NCJ's issuance of a \$1.57 million judgment that MSDIA was forced to satisfy. As Dolzer and Schreuer explain, a successful international claimant is entitled to recover the amounts that it incurred as a result of the State's wrongful conduct:

“If an illegal act has been committed, the guiding principle is that reparation must, as far as possible, restore the situation that would have existed had the illegal act not been committed. ... Under this principle, damages for a violation of international law have to reflect the damage actually suffered by the victim. In other words, the victim's actual situation has to be compared with the one that would have prevailed had the act not been committed.”⁷³¹

411. Thus, as Professor Paulsson explains in his Expert Report, MSDIA is entitled to “the restitution of \$1.57 million”—the amount that it paid to NIFA pursuant to the NCJ judgment.⁷³²

412. MSDIA also is entitled to recover the legal fees and costs it incurred in connection with its defense of the *NIFA v. MSDIA* proceedings in Ecuador's courts. As Professor Paulsson explains in his Expert Report, “[i]n order to indemnify the victim in accordance with the *Chorzów* rule, it seems right that the legal costs wasted on a defective law suit must be reimbursed. **That would ... be the costs at the two inferior levels, in this case provided a denial of justice was also consummated at the superior level, plus, also the legal costs at that level as well.**”⁷³³ Indeed, the tribunal in *White Industries v. India* awarded the claimant the legal fees that it had incurred over the course of the litigation in the respondent-State's courts, reasoning that “had India not failed to provide [the claimant] with ‘effective means’ of asserting its claims ...

⁷³⁰ Exhibit CLM-152, *Case Concerning the Factory at Chorzów (Germany v. Poland)*, Judgment of 13 September 1928, PCIJ Series A, No. 21 (1928). Investor-State tribunals consistently have recognized the continued validity of the formulation in *Chorzów*. See Exhibit CLM-115, *ADC Affiliate Ltd. and ADC & ADMC Mgmt. Ltd. v. Republic of Hungary*, ICSID Case No. ARB/03/16, Award, dated 2 October 2006, at paras. 486-494. See also Expert Report of Professor Paulsson at para. 57 (“It is trite that if a state is responsible for conduct that is unlawful under international law, it is obliged to make full reparation for the consequences of its wrongful conduct and that this involves putting the wronged party in the position it would have been in had the wrongful conduct not occurred.”).

⁷³¹ Exhibit CLM-162, R. Dolzer & C. Schreuer, *PRINCIPLES OF INTERNATIONAL INVESTMENT LAW* (2008), at 272.

⁷³² Expert Report of Professor Paulsson at para. 18(a).

⁷³³ Expert Report of Professor Paulsson at para. 17(c). (emphasis added). See also *id.* at paras. 64-66.

[the claimant] would ... *not have incurred the costs which it has incurred in pursuing litigation through the Indian courts.*⁷³⁴

413. MSDIA estimates its legal fees and costs incurred in connection with the *NIFA v. MSDIA* litigation at approximately \$6,000,000. Given the sensitivities associated with billing records, MSDIA will provide a specific quantification of its fees and costs, including documentary support, at a subsequent stage of these proceedings, when it is necessary for the Tribunal's quantification of damages and when necessary confidentiality protections are in place, as directed by the Tribunal.

414. MSDIA is further entitled to recover the moral damages that it has suffered as a result of the prolonged pendency of the *NIFA v. MSDIA* litigation, during which MSDIA has been publicly found to have engaged in acts that it clearly did not commit. As the tribunal explained in *Lemire v. Ukraine*, moral damages are an appropriate form of compensation in cases where a claimant's business has suffered "*loss of reputation, credit and social position.*"⁷³⁵ For example, "loss of prestige" suffered by a business as a result of the breach of an bilateral investment treaty has been found to support an award of moral damages.⁷³⁶ Here, the repeated findings of liability by Ecuador's courts improperly suggested that MSDIA had acted dishonestly and improperly during its negotiations with NIFA, resulting in obvious harm to MSDIA's reputation and prestige in Ecuador, which MSDIA had spent nearly thirty years developing prior to the litigation.

415. Accordingly, MSDIA requests an award:

- a. Declaring that the actions of the Ecuadorian courts in connection with the *NIFA v. MSDIA* litigation breached Ecuador's obligations under the U.S.-Ecuador BIT;
- b. Directing that Ecuador pay MSDIA \$1,570,000 in compensation for MSDIA's payment of the judgment issued by the National Court of Justice;
- c. Directing Ecuador to pay all costs and attorneys' fees incurred by MSDIA in defending the *NIFA v. MSDIA* litigation, to be quantified in a subsequent stage of these proceedings, as directed by the Tribunal;
- d. Directing Ecuador to pay pre-award and post-award interest on all sums due;
- e. Directing Ecuador to pay MSDIA's costs and attorneys' fees in this arbitration;
and

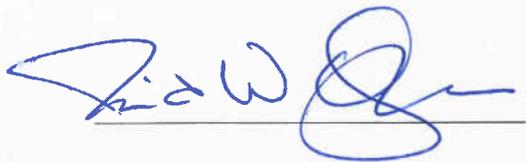
⁷³⁴ Exhibit CLM-114, *White Industries Australia Ltd. v. Republic of India*, UNCITRAL, Award, dated 30 November 2011, at section 14.3.3-14.3.6. (emphasis added). See also Exhibit CLM-164, A.V. Freeman, *THE INTERNATIONAL RESPONSIBILITY OF STATES FOR DENIAL OF JUSTICE* (1973), at 592-593 (recognizing that legal fees incurred during local proceedings are recoverable in a claim for denial of justice).

⁷³⁵ Exhibit CLM-130, *Joseph Charles Lemire v. Ukraine*, ICSID Case No. ARB/06/18, Award, dated 28 March 2011, at para. 333.

⁷³⁶ Exhibit CLM-123, *DLP v. Yemen*, ICSID Case No. ARB/05/17, Award, dated 6 February 2008, at para. 286 (citing the *Fabiani Case*).

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

Respectfully submitted,



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

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

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