

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

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

Claimant

versus

THE REPUBLIC OF ECUADOR

Respondent

CLAIMANT'S REPLY MEMORIAL

8 August 2014

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I. INTRODUCTION

1. The Claimant, Merck Sharp & Dohme (I.A.) Corp. (“MSDIA”), submits this Reply Memorial in response to the Counter-Memorial submitted by the Respondent, the Republic of Ecuador, on 27 February 2014. This Reply Memorial is accompanied by one witness statement and eight expert reports.

2. MSDIA’s Memorial, submitted on 2 October 2013, presented detailed evidence and legal authority establishing that MSDIA has been subjected to a denial of justice in Ecuador’s courts. For more than ten years, MSDIA has defended a baseless lawsuit brought by NIFA, a small Ecuadorian company that manufactures and sells generic pharmaceutical products. In that litigation, NIFA has claimed that MSDIA had violated Ecuadorian antitrust law by refusing to sell to NIFA a manufacturing plant the parties mutually valued at \$1.5 million. On that basis, NIFA has advanced the entirely implausible claim that it suffered **\$200 million** in damages.

3. In that prolonged litigation (and in related litigation), at every level of Ecuador’s legal system, Ecuador has violated MSDIA’s fundamental rights to due process of law.

4. One need only to look at the judgments issued against MSDIA by the trial court and court of appeals to see those courts’ manifest bias, almost certainly proceeding from corruption. Both courts imposed liability against MSDIA for purported antitrust violations in the preposterously excessive amounts of **\$200 million** (the trial court) and **\$150 million** (the court of appeals), notwithstanding that the parties had agreed that the negotiated value of the plant was at best **1/100th of those amounts** and uncontroverted evidence that NIFA had **annual profits of only \$2,165**. The judgments were indefensible for the further reason that **Ecuador plainly had no antitrust law at the time of the events at issue**.

5. No honest and competent court could have reached those decisions.

6. Ecuador’s highest civil court, the National Court of Justice (“NCJ”), recognized that these judgments were indefensible as to liability and damages. The NCJ overturned the manifestly irrational \$150 million judgment of the court of appeals, finding that its imposition of antitrust liability was “**not duly reasoned**,” and that its award of damages “**lack[ed] all proportion**.”

7. Ecuador appears to agree as well, choosing in its Counter-Memorial to offer no defense of the judgments of the trial court or court of appeals, and citing favorably the NCJ decision reducing the “exorbitant” damages award of the court of appeals. In fact, nowhere in its 257-page Counter-Memorial does Ecuador make any effort to show that the decisions of the trial court and court of appeals could have been the work of honest and competent courts applying the rule of law.

8. Ecuador argues instead that those judgments are irrelevant because the NCJ decision “remedied” or “cured” any violations of MSDIA’s due process rights when it reduced the amount of damages awarded from \$150 million to \$1.57 million. Ecuador reasons that the NCJ’s decision “represents an overwhelming victory for Merck” because “Merck’s liability was reduced by 99%.” Ecuador argues that “this essential fact is inescapable and completely vitiates any suggestion that the decision constitutes a denial of justice.”

9. It is of course true that the NCJ judgment (had it stood) imposed a smaller injury than the absurd court of appeals decision it set aside, but that is not the legally-relevant question. A judgment imposed in violation of minimum international standards of due process is a denial of justice even if the amount of damages imposed are not of catastrophic proportions. And the NCJ judgment, although it recognized the absurdity of the lower court decisions and set aside both their liability and damages holdings, imposed its own denial of justice by nevertheless holding MSDIA liable and imposing damages based upon a legal theory of which MSDIA had no notice and against which MSDIA had no opportunity to defend.

10. Thus, the NCJ decision neither “remedied” nor “cured” the denials of justice in the lower courts. Rather, the NCJ adopted the tainted, one-sided factual findings of the court of appeals—which emanated from an obviously biased tribunal and resulted from that tribunal’s blatant violations of MSDIA’s due process rights, including the right to equal treatment of the parties and the right to confront adverse evidence—and based on those tainted findings entered its new judgment against MSDIA.

11. The NCJ imposed liability on a theory of “unfair competition,” despite the fact that the plaintiff in the *NIFA v. MSDIA* litigation had repeatedly and expressly disclaimed unfair competition as a basis for its claims. As a result of the plaintiff’s repeated disclaimers, the parties had never litigated the theory of unfair competition, and indeed, they had expressly agreed the civil courts, including the applicable chamber of the NCJ, lacked jurisdiction over such claims. Given these disclaimers and the absence of any notice that the issue was pending on the merits before the NCJ, MSDIA had no opportunity to offer a defense to liability on that ground. The NCJ’s imposition of liability against MSDIA without notice and an opportunity to be heard, based on the court of appeals’ tainted findings of fact, was also a denial of justice.

12. Ecuador has no real response. Ecuador does not deny that the plaintiff in the *NIFA v. MSDIA* litigation repeatedly disclaimed unfair competition as a basis for its claims, but Ecuador contends that it was MSDIA’s fault for not briefing those issues nevertheless. It was MSDIA’s “litigation strategy,” Ecuador says, to “respond[] *only* to those arguments [advanced by NIFA]” and to “*follow[] [NIFA’s] antitrust litigation strategy.*” That contention is untenable.

13. Parties asserting claims in developed jurisdictions, including in Ecuador, are required to say what claims they are asserting, not in order to reveal their “litigation strategy” but rather as a matter of procedural due process. Before holding parties liable on a legal theory, courts in such jurisdictions as a matter of fundamental fairness ensure that they know of their jeopardy and have an opportunity to explain why they should not be held liable on such a theory. Ecuador’s suggestion that MSDIA should have litigated claims that were not actually asserted, and indeed were expressly disclaimed, by the plaintiff, is obviously wrong.

14. Ecuador also argues that MSDIA was on notice that the NCJ could impose liability for unfair competition, because NIFA had cited in its complaint the statutes and the Constitutional provision that the NCJ relied on in imposing liability for unfair competition. But those provisions are broad ones that do not expressly identify unfair competition, and indeed, had never before the NCJ’s decision in this case been construed by any court in Ecuador as encompassing unfair competition. Moreover, Ecuador’s argument ignores NIFA’s express and repeated statements that it was *not* asserting a claim for unfair competition under those (or any)

provisions of law. MSDIA therefore had no notice that the NCJ could impose liability on that basis.

15. Finally, Ecuador argues that the NCJ's judgment was not a denial of justice because it was not a final decision of the Ecuadorian courts. Ecuador argues that MSDIA could have filed an Extraordinary Action for Protection in Ecuador's Constitutional Court, and that MSDIA therefore failed to exhaust available domestic remedies.

16. As Ecuador's own experts acknowledge, however, the NCJ is Ecuador's highest civil court. A judgment from the NCJ, including the NCJ judgment here, is not subject to any further appeal. It is also immediately enforceable under Ecuadorian law. Accordingly, shortly after the NCJ issued its judgment in *NIFA v. MSDIA*, the case was remanded to the lower courts for enforcement proceedings and MSDIA was ordered to pay the \$1.57 million judgment. MSDIA did so on 29 November 2012. When it paid the judgment, MSDIA incurred the damage resulting from the denial of justice in the NCJ.

17. The extraordinary recourse suggested by Ecuador would not have been an appeal of the NCJ judgment, would not have suspended its enforcement, and could not have resulted in an order restoring to MSDIA the moneys it had been compelled it pay. It would have been an action against the NCJ judges themselves, to which NIFA would not have been a party. The extraordinary recourse is thus a collateral, distinct legal action from the litigation that produced the judgment. The Constitutional Court could not have provided an effective remedy for the harm to MSDIA, and MSDIA was not required to bring an Extraordinary Action for Protection before seeking a remedy under international law.

18. Disturbingly, although the NCJ's judgment was a final decision of the highest civil court in Ecuador, and although Ecuador compelled MSDIA to pay the NCJ's judgment in full, Ecuador's courts continued to abuse MSDIA's rights and to subject it to additional and cumulative denials of justice. Following the NCJ's ruling, the plaintiff in that action, NIFA, filed its own Extraordinary Action for Protection, arguing that the NCJ's reduction of its damages from \$150 million to \$1.57 million violated NIFA's constitutional rights.

19. After Ecuador had submitted its Counter-Memorial in this arbitration, the Constitutional Court granted NIFA's Extraordinary Action, annulled the NCJ decision, reinstated the court of appeals' \$150 million judgment, and ordered the NCJ to reconsider the parties' cassation petitions. As explained below, the Constitutional Court's rationales for intervening and finding that NIFA's rights were violated are extraordinarily weak.

20. Thus, Ecuador's courts have wiped away the NCJ decision that Ecuador has trumpeted as "curing" and "remedying" the denials of justice in the lower courts. The denial of justice perpetrated by the court of appeals has been restored. Incredibly, however, the injury the NCJ did *to MSDIA* persists, because the Constitutional Court's ruling did nothing to restore to MSDIA the money Ecuador's courts had compelled MSDIA to pay in satisfaction of the now-vacated NCJ judgment. Nor has any Ecuadorian court done anything to restore to MSDIA the legal fees it has been compelled to expend in seeking to overturn one outrageous violation of its rights after another in Ecuador's courts. MSDIA is therefore still entitled to seek recovery for those damages in this arbitration.

21. As noted, the Constitutional Court decision both fails to restore to MSDIA the funds it expended to satisfy a now-vacated judgment and reinstates the \$150 million judgment of the court of appeals on the same subject matter. Having paid \$1.57 million to satisfy one judgment relating to a failed \$1.5 million real estate transaction, MSDIA once again faces a judgment of \$150 million on the same facts.

22. Although the NCJ previously held that the reinstated court of appeals' judgment was unreasonable and disproportionate, the case now must be decided by entirely different NCJ judges who are not bound in any way to follow or defer to the reasoning in the NCJ's prior judgment. The new panel of judges takes the case as if the first cassation proceeding had never occurred.

23. Numerous international tribunals and commentators have recognized, and Ecuador does not deny, that an egregiously wrong judgment can be proof of a failed process. The court of appeals' judgment is so egregiously wrong that it is decisive evidence of a failed process. That decision imposes antitrust liability when, as Ecuador again does not deny, Ecuador had no antitrust law at the time of the conduct at issue. Moreover, the court of appeals' reasoning is antithetical to the most basic notions of antitrust law as they are known around the world.

24. The court of appeals damages award is also indefensible. It awards damages for purported "lost profits" of \$150 million when the parties valued the manufacturing plant at issue at only \$1.5 million and the plaintiff had annual profits of only \$2,165. The NCJ described the damages award as "lacking all proportion," and Ecuador's own Counter-Memorial described it as "exorbitant." Both descriptions are accurate.

25. Ecuador's only effort to defend the court of appeals' exorbitant judgment is to argue that the procedures in the court of appeals were consistent with Ecuadorian procedural law. But compliance with domestic procedures is not a defense to an internationally-wrongful deprivation of due process.

26. Ecuador is also obviously wrong in claiming that MSDIA has not identified any "fundamental[]" due process violations, and makes only "particle accusations." Contrary to Ecuador's conclusory assertion, MSDIA's allegations are certainly *not* "the normal complaints of a losing party." Ecuador ignores entirely the court of appeals' decision itself, which is unmistakable proof of the judicial bias and likely judicial corruption behind it. Being subjected to a judicial decision motivated by bias or corruption—or even gross incompetence, the only other possible explanation for the result here—is not a "particle accusation." It is an "outrageous failure of the judicial system," and thus is recognized as a violation of international law.

27. The court of appeals' conduct of the proceedings further imposed serious deprivations of MSDIA's fundamental due process rights, and further reveals the court's bias and corruption. Ecuador seeks to address MSDIA's complaints about the court of appeals' proceedings as if they were in fact only "particle accusations," breaking them down into small steps and arguing that each small step is technically consistent with Ecuadorian procedural law. Even if that were correct (which it is not), Ecuador's approach is designed to lose the forest for the trees.

28. Reviewing the full course of proceedings, including the various procedural maneuvers and errors and the outcome, it is pellucid that the court of appeals manipulated the factual record to create evidence that it could rely on in support of a predetermined result. That is an undeniable denial of justice.

29. Specifically, when the first, well-credentialed set of experts appointed by that court supported MSDIA's position on the facts and the law, the court simply discarded and replaced those qualified experts with a second set, each of whom obviously lacked any relevant credentials or expertise, and whose testimony proved badly reasoned and entirely favorable to NIFA. Ecuador does not dispute this pattern or the specifics.

30. The court of appeals denied MSDIA any opportunity to challenge the expert reports issued by the second set of experts, thereby depriving MSDIA of a fundamental due process right to confront the evidence against it. Moreover, the court's unexplained rejection of the well-reasoned reports of well-qualified experts and procedural machinations to replace them with the unreasoned and illogical reports of unqualified experts denied MSDIA's fundamental due process right to equal treatment of the parties and to an unbiased and impartial decision based on an honest and independent assessment of the evidence.

31. Further, the court of appeals relied on the evidence of NIFA's *only* fact witness, notwithstanding that her evidence was taken by the trial court on two separate occasions without MSDIA's counsel in attendance. This was another violation of MSDIA's fundamental due process rights, including the right to equal treatment of the parties and the right to confront adverse evidence.

32. In addition, incredibly, the court of appeals expressly disregarded *all of the evidence* that MSDIA had offered, with no justification or credible legal basis. Ecuador does not dispute that disregarding MSDIA's evidence and relying on an entirely one-sided factual record consisting only of NIFA's evidence would constitute a violation of MSDIA's fundamental due process guarantees.

33. Ecuador's only response is that this could not be what the court of appeals meant when it claimed that MSDIA "expressly waived the evidence aiming to dispel the grounds of the verdict in first instance." Ecuador argues that by this the court of appeals meant only that MSDIA had waived its request for appointment of a damages expert. But the court of appeals' language was clear; "the evidence aiming to dispel the grounds of the verdict in first instance" is necessarily *all* of the evidence that MSDIA submitted in the court of appeals, because all of that evidence was intended to support the appeal and thus "dispel" the grounds of the trial court's decision. Consistent with the clear meaning of the court of appeals' words, the court of appeals in its judgment did not refer to a single piece of evidence submitted by MSDIA in that proceeding.

34. The court of appeals' result-oriented manipulation of the factual record in that proceeding is, standing alone, a serious deprivation of MSDIA's fundamental due process rights. It is also further evidence of the bias, partiality, and likely corruption that influenced the court's exercise of its judicial function. To adopt the articulation of the legal standard proposed by Ecuador, the court of appeals' judgment was certainly the result of an "outrageous failure of the judicial

system.” On that basis or under other formulations of the test, that judgment constitutes an internationally-wrongful denial of justice.

35. Although the court of appeals’ decision is now (once again) the subject of cassation proceedings in the NCJ, it nevertheless gives rise to Ecuador’s international responsibility for denial of justice. After more than ten years of defending the *NIFA v. MSDIA* litigation at every level of Ecuador’s courts, it has become overwhelmingly clear that there remain no reasonably available and effective means by which MSDIA can obtain the remedy it seeks in Ecuador’s courts.

36. International law does not require that MSDIA continue litigating endlessly in the same Ecuadorian courts in which it has already suffered denials of justice. MSDIA has exhausted all reasonably available and effective remedies in the *NIFA v. MSDIA* litigation, and it has therefore established all of the elements of its claims for denial of justice, including with respect to the \$150 million judgment of the court of appeals.

37. In addition, MSDIA has established that Ecuador breached its obligations under Article II(7) of the Ecuador-U.S. BIT by failing to provide “effective means” for MSDIA to enforce its rights in the *NIFA v. MSDIA* litigation.

38. Ecuador’s jurisdictional objections, although briefed at great length, are entirely without merit.

39. Ecuador’s first jurisdictional objection, regarding MSDIA’s alleged failure to exhaust domestic remedies, is not a jurisdictional argument at all, but is an element of the merits of MSDIA’s claim for denial of justice.

40. Ecuador’s second jurisdictional objection – that MSDIA has no protected investment in Ecuador and that this dispute is therefore not an investment dispute – makes no sense. MSDIA operates a branch in Ecuador that is itself an investment and has assets in Ecuador that are investments under the Ecuador-U.S. BIT. Moreover, this dispute arises directly out of MSDIA’s sale of a manufacturing plant that Ecuador concedes was an investment.

41. Ecuador’s third jurisdictional objection is equally baseless. MSDIA properly consented to UNCITRAL arbitration when it filed the Notice of Arbitration in this case; its prior Notice of Dispute reserving its right to submit the dispute to ICSID arbitration or to any other available arbitral forum (which includes UNCITRAL) does not deprive this Tribunal of jurisdiction.

42. This Tribunal plainly has jurisdiction to decide the merits of MSDIA’s claims. As set out below, MSDIA has established that it was subjected to denials of justice at every level of Ecuador’s civil court system. Those denials of justice resulted in damage to MSDIA in the amount of the \$1.57 million MSDIA paid in satisfaction of the now-vacated judgment of the NCJ, MSDIA’s extensive litigation costs these denials compelled it to expend defending the *NIFA v. MSDIA* litigation in Ecuador’s courts for the past decade, and the now-reinstated \$150 million judgment of the court of appeals.

43. MSDIA is entitled to a remedy for Ecuador’s violations of international law, which are a breach of Ecuador’s obligations under the Ecuador-U.S. BIT. MSDIA respectfully requests that

this Tribunal finally put an end to Ecuador's repeated violations of international standards of due process by awarding MSDIA the relief it seeks.

II. ECUADOR'S JURISDICTIONAL ARGUMENTS ARE WITHOUT MERIT

44. Ecuador asserts three jurisdictional objections, none of which has merit.

45. First, Ecuador argues that this Tribunal lacks jurisdiction because MSDIA has allegedly not exhausted all available remedies in Ecuador in its defense of the *NIFA v. MSDIA* case. As explained in Section III(B)(5) below, MSDIA *has* exhausted all reasonably available and effective domestic remedies in that litigation. But, in any event, the question whether MSDIA has exhausted local remedies is relevant *only* to the *merits* of MSDIA's claims, not to their *admissibility or to the Tribunal's jurisdiction*. Ecuador cannot transform its defense on the merits into a jurisdictional objection in an effort to deprive the Tribunal of the ability to ever reach the ultimate question in this case.

46. Second, Ecuador argues that this Tribunal lacks jurisdiction because MSDIA has failed to establish that this dispute relates to Ecuador's obligations with respect to an "investment" protected by the Ecuador-United States BIT.

47. This is plainly wrong. This dispute relates to an investment that MSDIA made more than forty years ago when it established a branch in Ecuador. That branch operates pursuant to an operating permit from the Superintendent of Companies and has more than 100 employees, significant assets and nearly \$30 million in annual sales in Ecuador. The branch itself is an investment within the meaning of the Ecuador-U.S. BIT, and the assets used in the operation of the business carried out by the branch are also protected investments.

48. Moreover, and independently, the subject of the litigation underlying MSDIA's denial of justice claims in this arbitration was the sale of MSDIA's Chillos Valley manufacturing plant, which Ecuador concedes was an investment. MSDIA's claims in this arbitration therefore relate to MSDIA's disposal of an investment and are within the jurisdiction of this Tribunal. On any view, this is an investment dispute within the meaning of the Treaty.

49. Third, Ecuador argues that this Tribunal lacks jurisdiction because MSDIA initiated the arbitration under the UNCITRAL Rules rather than in ICSID. Ecuador argues that MSDIA exclusively and irrevocably chose to consent to ICSID arbitration in its dispute notice in 2009. That is wrong for many reasons.

50. Nothing in the Treaty requires MSDIA to make an exclusive and irrevocable choice of arbitral forum, and MSDIA's 2009 dispute notice did not make such a choice. Moreover, if the Treaty had required an investor to make an exclusive and irrevocable choice of arbitral forum, MSDIA did not validly make a choice of ICSID arbitration, because it expressly reserved its right later to make a different choice. MSDIA was therefore free to consent to UNCITRAL arbitration, which it did when it commenced this arbitration.

51. Of course, Ecuador has now withdrawn from the ICSID Convention, and thus its argument that MSDIA cannot have this dispute resolved through UNCITRAL is arbitration intended to deprive MSDIA of any arbitral forum in which to assert its claims. The argument is

cynical and self-serving and would deprive the Treaty of its purpose and intended effect, and must be squarely rejected.

52. In short, this Tribunal has jurisdiction to reach the merits of MSDIA's claims, and Ecuador's efforts to avoid a decision on the merits are unavailing.

A. Ecuador's Exhaustion Arguments Are Not Jurisdictional

53. Ecuador argues that this Tribunal lacks jurisdiction over MSDIA's claims because MSDIA has not exhausted all possible local remedies in Ecuador.¹ As explained in Section III(B)(5) below MSDIA *has* exhausted all reasonably available and effective local remedies in its defense of the *NIFA v. MSDIA* case.² In any event, Ecuador's assertion that MSDIA has not exhausted local remedies is relevant *only* to the *merits* of MSDIA's claims, not to their admissibility or to the Tribunal's jurisdiction.

1. Exhaustion of Local Remedies Is Not a Jurisdictional Prerequisite under the BIT, But Is Instead an Element of the Merits of a Claim For Denial of Justice

54. Although customary international law requires claimants to exhaust local remedies as a condition to the admissibility or jurisdiction of a claim grounded in international law, the U.S.-Ecuador BIT (like most other BITs) validly waives this requirement.³ As a consequence, U.S. investors can assert claims against Ecuador under the Treaty without first exhausting local remedies, and an investor's failure to exhaust local remedies does not deprive a tribunal of jurisdiction over claims asserted under the Treaty.

55. This is equally true for claims of denial of justice asserted under the Treaty.⁴ As set out in MSDIA's Memorial, the requirement to exhaust local remedies is a *material element* of a claim for denial of justice.⁵ Thus, failure to exhaust local remedies may be a defense to the merits of a denial of justice claim, but it does not deprive a tribunal of jurisdiction to consider the merits of the claim. As Professor Paulsson explains:

¹ Ecuador's Counter-Memorial, at paras. 263-269.

² See below at paras. 419-471.

³ See Exhibit-CLM-44, *Chevron Corporation and Texaco Petroleum Corporation v. Republic of Ecuador*, UNCITRAL, Interim Award, dated 1 December 2008, at para. 232. Specifically, Article VI of the U.S.-Ecuador BIT provides that an investment dispute may be "submit[ted] ... for settlement by binding arbitration" at least six months after the dispute arose, provided that the foreign investor *has not* previously submitted the dispute for resolution by the State's courts or administrative tribunals. See Exhibit C-1, Treaty Between the United States of America and the Republic of Ecuador Concerning the Encouragement and Reciprocal Protection of Investment, art. VI(2)-(3). As Professor Amerasinghe explains, "fork-in-the-road" provisions of this sort give the "investor ... the *option* of resorting to local remedies," such that "arbitration instituted by the investor and the host state under the provision *would not be subject to the prior exhaustion of local remedies.*" Exhibit CLM-295, C. Amerasinghe, LOCAL REMEDIES IN INTERNATIONAL LAW (2004), at 271 (emphasis added). See also Exhibit CLM-338, U. Kriebaum, "Local Remedies and the Standards for the Protection of Foreign Investment," in INTERNATIONAL INVESTMENT LAW FOR THE 21ST CENTURY: ESSAYS IN HONOUR OF CHRISTOPH SCHREUER (2009), at 460 ("If a State wants to keep the exhaustion requirement, it must explicitly insist on it in its instrument of consent.").

⁴ Exhibit CLM-99, J. Paulsson, DENIAL OF JUSTICE IN INTERNATIONAL LAW (2005), at 102-112.

⁵ MSDIA Memorial, at para. 376.

“As it pertains to denial of justice, finality is a *substantive element* of the claim that stands apart from the authority of the international tribunal to adjudicate the claim. It is corollary to the principle that a State’s international responsibility is judged by the final product—or at least a *sufficiently* final product—of its administration of justice. Questions of exhaustion of local remedies have thus properly been considered in deciding the merits of claims for denial of justice.”⁶

56. Notably, Ecuador’s own expert, Professor Amerasinghe, agrees:

“Proof of ... exhaustion is an element of the delict of denial of justice itself. (*This is different from application of the local remedies rule*, which applies to all international claims *unless it has been waived, as has been done by operation of the terms of modern BITs.*)”⁷

57. In other investor-State arbitrations involving claims for denial of justice, tribunals have concluded that the issue of whether local remedies have been exhausted should not be assessed as a matter of jurisdiction, but instead must be considered as an element of the merits.⁸ For example, in *Chevron Corporation and Texaco Petroleum Corporation v. Republic of Ecuador* (“*Chevron I*”), Ecuador objected to the tribunal’s jurisdiction over the claimants’ denial of justice claim under the U.S.-Ecuador BIT on the basis that the claimants had not exhausted local remedies.

58. The *Chevron I* tribunal rejected Ecuador’s jurisdictional objection, explaining:

“This exhaustion requirement can be viewed as a necessary element both for a denial of justice under customary international law and for the breach of a substantive BIT

⁶ Exhibit CLM-99, J. Paulsson, DENIAL OF JUSTICE IN INTERNATIONAL LAW (2005), at 111.

⁷ Amerasinghe Report, at para. 8 (emphasis added). See also Exhibit CLM-99, J. Paulsson, DENIAL OF JUSTICE IN INTERNATIONAL LAW (2005), at 7 (explaining that, in the context of claims for denial of justice, the requirement to exhaust local remedies is “not a matter of procedure or admissibility, but an inherent material element of the [denial of justice] delict”). Professor Cafilisch likewise observes that “[p]roof of such exhaustion is therefore an element of the delict of denial of justice.” Cafilisch Report, at para. 8; Exhibit CLM-374, United Kingdom Materials on International Law, 69 B.Y.I.L. (1998), at 558-559 (“The recourse to ‘local remedies’ is in this context [of denial of justice] not at all of the same nature as recourse to local remedies as a procedural precondition.”).

⁸ See, e.g., 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.”); 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 (explaining that question of whether denial-of-justice claimant has exhausted local remedies must be dealt with “on the merits”); Exhibit RLA-120, *Mr. Franck Charles Arif v. Republic of Moldova*, ICSID Case No. ARB/11/23, Award, dated 8 April 2013, at para. 346 (“Even for claims for denial of justice, the exhaustion of local remedies is a question *to be addressed with the merits of the dispute*. It is a substantive standard, rather than a procedural bar.”) (emphasis added); Exhibit RLM-32, *Jan de Nul v. Egypt*, ICSID Case No. ARB/04/13, Award (6 November 2008), at para. 255 (“For the avoidance of doubt, the Tribunal notes before pursuing the requirement at issue here [exhaustion] *relates to the merits of the denial of justice claim*.”) (emphasis added); Exhibit RLM-5, *Alps Finance and Trade AG v. Slovak Republic*, UNCITRAL, Award (5 March 2011), at para. 68 (“Indeed, in investment arbitrations the common practice shows that attribution and exhaustion of local remedies *are ruled in the merits decision*.”) (emphasis added).

obligation such as ‘fair and equitable treatment.’ However, in both cases, the question concerns *the substance of the claims put before the Tribunal*. Despite couching its objection in the language of ripeness and admissibility, what the Respondent raises is an issue affecting liability. *Exhaustion of local remedies in this context is therefore an issue of the merits, not jurisdiction.*”⁹

59. Likewise, in this case, the requirement to exhaust local remedies is relevant to the merits of MSDIA’s denial of justice claim. The exhaustion requirement is not relevant to the Tribunal’s jurisdiction to consider the merits of that claim.

2. Exhaustion of Local Remedies Is Irrelevant to the Existence of an “Investment Dispute”

60. Ecuador also argues that because MSDIA purportedly failed to exhaust local remedies, there is no “investment dispute” under Article VI of the Treaty.¹⁰ According to Ecuador, “[c]laims of breach [of the Treaty] that do not possess all the essential characteristics of claims capable to denote a violation of the Treaty ... fail the jurisdictional test.”¹¹ In essence, Ecuador argues that if an element necessary to establish the *merits* of Ecuador’s claim for denial of justice has not been satisfied, there is no “investment dispute” and the Tribunal lacks jurisdiction over the claim.¹² As MSDIA has explained in its prior submissions, Ecuador’s argument is frivolous.¹³

61. Article VI of the Treaty defines “investment dispute” as follows:

“For purposes of this Article, an investment dispute is a dispute ... relating to ... an alleged breach of any right conferred or created by this Treaty with respect to an investment.”¹⁴

62. To meet the Treaty’s definition of “investment dispute,” a claimant does not need to *establish* all of the elements of a claimed breach of the Treaty, but instead must only *allege* that a right under the Treaty has been breached. The use of the term “*alleged*” in Article VI is a

⁹ Exhibit CLM-44, *Chevron Corporation and Texaco Petroleum Corporation v. Republic of Ecuador*, UNCITRAL, Interim Award, dated 1 December 2008, at para. 233.

¹⁰ See Ecuador’s Counter-Memorial, at para. 264.

¹¹ Ecuador Rejoinder in Opposition to MSDIA’s Request for Interim Measures, at para. 81.

¹² Ecuador’s Counter-Memorial, at para. 264 (“State responsibility for denial of justice arises only after the fruitless resort to local remedies. In other words, international law has not been violated at the time of the initial injury to the alien, but only after local remedies have been exhausted. As long as the individual has not exhausted local remedies, the international wrongful act does in fact not yet exist or has at least not been completed. It follows that Merck’s non-compliance with the requirement to exhaust local remedies entails its failure to state an ‘investment dispute’ within the meaning of Article VI of the BIT and, in turn, its non-compliance with the jurisdictional prerequisites of Article VI.”). Ecuador’s expert, Professor Caflisch, apparently agrees that an “investment dispute” cannot exist absent the exhaustion of local remedies, though he cites no authority in support of this proposition. Caflisch Report, at fn. 1 (“Claimant’s ability to establish that it has complied with its duty to exhaust local remedies in Ecuador also affects the question of whether an ‘investment dispute’ exists within the meaning of Article VI of the Treaty.”).

¹³ See MSDIA Reply to Ecuador’s Opposition to its Request for Interim Measures, at paras. 44-54. See also MSDIA’s Memorial, at paras. 226-228.

¹⁴ Exhibit C-1, Treaty Between the United States of America and the Republic of Ecuador Concerning the Encouragement and Reciprocal Protection of Investment, Art. VI (emphasis added).

complete answer to Ecuador’s assertion that there is no “investment dispute” unless a claimant can *establish* the existence of an “international wrongful act.” The term “alleged” presumes that an investment dispute may exist even if a claimant ultimately cannot establish that the respondent State is responsible for breaching a right conferred or created by the Treaty.¹⁵

63. As international tribunals have uniformly explained, an investment dispute exists when there is *any* disagreement between the parties either as to the existence of the rights invoked by the claimant¹⁶ or as to the alleged breach of those rights.¹⁷ Here, MSDIA has alleged a breach of

¹⁵ In its interim-measures submissions, Ecuador did not assert (as it does now) that MSDIA needs to *establish* all of the elements of its claim for breach of the Treaty. Instead, Ecuador asserted that MSDIA is required to *allege* those elements in order for an “investment dispute” to exist. *See* Ecuador Opposition to MSDIA Request for Interim Measures, at para. 55; Ecuador Rejoinder in Opposition to MSDIA Request for Interim Measures, at paras. 81-82. However, MSDIA *has* alleged all of the elements of its claim for denial of justice, including that it exhausted local remedies in Ecuador. *See* MSDIA’s Memorial, at paras. 375-378. Moreover, as MSDIA previously has explained, Article VI does not require a claimant to allege all of the factual elements of its claim in order for an “investment dispute” to exist, but only requires that a claimant allege that a breach has occurred. MSDIA Reply in Support of its Request for Interim Measures, at paras. 46-54. *See also* Exhibit CLM-228, *Achmea B.V. v. The Slovak Republic*, PCA Case No. 2013-12 (UNCITRAL Rules), Award on Jurisdiction and Admissibility, dated 20 May 2014, at para. 180 (explaining that a claimant does not need to allege the elements of an internationally wrongful act in order for an investment dispute to exist).

¹⁶ Exhibit RLM-12, *Burlington Resources Inc. v. Republic of Ecuador and PetroEcuador*, ICSID Case No. ARB/08/5, Decision on Jurisdiction, dated 2 June 2010, at paras. 289, 320, 325 (explaining that an “investment dispute” exists when there is “(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.”); Exhibit CLM-80, *Texaco Overseas Petroleum Company and California Asiatic Oil Company v. Libyan Arab Republic*, Preliminary Award of 27 November 1975, 53 ILR 389, at 416 (1979) (referring to a “present divergence of interests and opposition of legal views”). Thus, as the ILC has explained, a “*dispute [can] arise before the exhaustion of local remedies,*” even where the requirement is an element of the merits as in a claim for denial of justice, in light of the fact that “*legal disputes may well arise before the perpetration of an internationally wrongful act, and even without any such act occurring.*” Exhibit RLA-27, Report of the International Law Commission on the work of its 29th Sess., Doc. A/32/10, 1977 [II/2] Y.B. Int’l L. Comm. 31, U.N. Doc. A/CN.4/SER.A/1977 Add. I (Part 2), at 42 (emphasis added).

¹⁷ Exhibit CLM-67, *National Grid P.L.C. v. Argentine Republic*, UNCITRAL, Decision on Jurisdiction, dated 20 June 2006, at para. 160 (“The arguments advanced by the parties and the facts alleged by them show that a dispute exists between them as to ***whether the protection due to the investor under the Treaty has been violated . . .***”) (emphasis added). *See also* Exhibit CLM-85, *Interpretation of the Peace Treaties with Bulgaria, Hungary and Romania*, Advisory Opinion of 30 March 1950 (first phase), 1950 ICJ Rep. 65, at 74 (There has thus arisen a situation in which the two sides hold clearly opposite views concerning the question of the performance or non-performance of certain treaty obligations. Confronted with such a situation, the Court must conclude that international disputes have arisen.”); Exhibit CLM-62, *Maffezini v. Spain*, Decision on Jurisdiction, dated 25 January 2000, 40 ILM 1129, at paras. 93-98 (finding existence of a dispute giving rise to jurisdiction under the relevant BIT on the basis of a dispute between the parties on a point of fact or law); Exhibit CLM-81, *Tokios Tokelés v. Ukraine*, Decision on Jurisdiction, dated 29 April 2004, at paras. 106-107 (finding that dispute existed where claimant complained notified government about “seizures of its documents, unfounded judicial action, and publicly stated accusations by governmental authorities”); Exhibit CLM-60, *Lucchetti v. Peru*, Award, dated 7 February 2005, at paras. 48-49 (explaining that dispute exists where “each side held conflicting views regarding their respective rights and obligations”); Exhibit CLM-53, *Impregilo v. Pakistan*, Decision on Jurisdiction, dated 22 April 2005, at paras. 302-303 (same); Exhibit CLM-107, *AES v. Argentina*, Decision on Jurisdiction, dated 26 April 2005, at para. 43-44 (explaining that dispute exists under treaty where claimant “raises some legal issues in relation with a concrete situation” and “the Tribunal’s determination of the answer to be given to these issues would have some practical and concrete consequences”); Exhibit CLM-9, *El Paso Energy Int’l. Comp. v. Argentina*, Decision on Jurisdiction, dated 27 April 2006, at para. 61-64 (“Whether the rights invoked do in fact exist, whether they are protected by international law, and whether they have effectively been violated are issues the determination of which

rights conferred by the Treaty,¹⁸ and Ecuador has disputed those alleged breaches.¹⁹ An investment dispute therefore exists between the parties.

64. Given the breadth of the definition of “investment dispute,” it is not surprising that Ecuador has failed to cite *a single case* in which an investor-State tribunal declined jurisdiction because the claimant failed to establish the existence of an investment dispute. As Professor Schreuer has explained:

“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.*”²⁰

3. MSDIA’s Denial of Justice Claim Is Not an Abuse of Process

65. Ecuador also argues that MSDIA’s assertion of a denial of justice claim allegedly before it had exhausted local remedies is an “abuse of process” that can be sanctioned by the Tribunal “dismiss[ing] jurisdiction over [MSDIA’s] claims.”²¹ This argument is hopelessly wrong.

66. First, as explained below, MSDIA has fully satisfied the exhaustion requirement with respect to both the \$1.57 million NCJ judgment and the \$150 million court of appeals judgment.²²

67. Second, in any event, as Professor Paulsson explains, MSDIA does not have a “*duty*” to exhaust local remedies (as Ecuador claims it does²³). Instead, the requirement to exhaust local remedies “is simply an element of the claim [for denial of justice], no different from any other element.”²⁴ Even if it were true that MSDIA had not exhausted local remedies (which, as discussed above, it is not), at most, the consequence would be that MSDIA could not establish the necessary elements of its claim. MSDIA could not be said to have breached or neglected any duty or otherwise acted abusively by asserting unsuccessful claims for denial of justice.

68. Third, Ecuador’s allegations do not even come close to meeting the high threshold of establishing an abuse of process by MSDIA. Sir Hersch Lauterpacht has stated that international

must await the examination of the case on its merits. What matters [in determining the existence of a dispute] is whether the claims, as formulated, fit into the categories of claims over which the ICSID has jurisdiction under the terms of the BIT and the Washington Convention.”); Exhibit CLM-78, *Suez, Sociedad General de Aguas de Barcelona S.A., and InterAguas Servicios Integrales del Agua S.A. v. Argentina*, Decision on Jurisdiction, dated 16 May 2006, at para. 29 (explaining that a “disagreement exists between the Claimants and the Respondent about law, facts, and legal views” and that the “core of the dispute centers on a basic question: Did the Respondent by its actions violate the rights granted to the Claimants and their investment under international law?”).

¹⁸ MSDIA’s Notice of Arbitration, dated 29 November 2011, at paras. 12, 159.

¹⁹ Ecuador’s Opposition to MSDIA’s Request for Interim Measures, dated 24 July 2012, at paras. 6-36.

²⁰ 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 (emphasis added).

²¹ Ecuador’s Counter-Memorial, at paras. 267-268.

²² See below at Section III(B).

²³ See Ecuador’s Counter-Memorial, at para. 267.

²⁴ Second Paulsson Expert Report, at fn. 3.

tribunals should apply the doctrines of abuse of rights or abuse of process with “*studied restraint*” in light of the exceptional character of the relief requested.²⁵ As explained by Professor Brownlie, international tribunals have provided “*limited support*” to the doctrine of abuse of process, recognizing its applicability only in cases where a “right was exercised *only in order to cause ... damage, without any advantage* to the person entitled to the right.”²⁶

69. As the *Chevron I* tribunal explained in the context of an investor-State claim, a respondent alleging an abuse of process must meet an exceedingly high burden of proof:

“A claimant is not required to prove that its claim is asserted in a non-abusive manner; *it is for the respondent to raise and prove an abuse of process as a defense.*”

“[I]t has to be further noted that in all legal systems, the doctrines of abuse of rights, estoppel and waiver *are subject to a high threshold.* Any right leads normally and automatically to a claim for its holder. *It is only in very exceptional circumstances that a holder of a right can nevertheless not raise and enforce the resulting claim. The high threshold also results from the seriousness of a charge of bad faith amounting to abuse of process.*”²⁷

70. In light of this very high bar, international tribunals consistently have rejected claims for abuse of process absent clear evidence that the party alleged to have engaged in an abuse of process exercised its rights unreasonably or in bad faith.²⁸ As the tribunal explained in *Lauder v. The Czech Republic*, a claimant’s failure to allege or establish a substantive element of its claim

²⁵ Exhibit CLM-339, H. Lauterpacht, *THE DEVELOPMENT OF INTERNATIONAL LAW BY THE INTERNATIONAL COURT* 164 (1958).

²⁶ Exhibit CLM-301, I. Brownlie, *PRINCIPLES OF PUBLIC INTERNATIONAL LAW* (2008), at 444.

²⁷ 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 paras. 138, 143 (emphasis added). Exhibit RLA-121, *Rompetrol v. Romania*, ICSID Case No. ARB/06/03, Award, dated 6 May 2013 (Berman, Lalonde, Donovan), at para. 115 (“Marshalled as it is as an objection at this preliminary stage, this is evidently a proposition of *a very far-reaching character*; it would entail an ICSID tribunal, after having determined conclusively (or at least *prima facie*) that the parties to an investment dispute had conferred on it by agreement jurisdiction to hear the dispute, deciding nevertheless not to entertain the application to hear the dispute.”) (emphasis added).

²⁸ See, e.g., Exhibit CLM-257, *Pac Rim Cayman LLC v. The Republic of El Salvador*, ICSID Case No. ARB/09/12, Decision on the Respondent’s Jurisdictional Objections, dated 1 June 2012, at para. 2.110 (rejecting claim of abuse of process based on claimant’s change in nationality, which purportedly was made in an attempt to obtain protections under relevant BIT); Exhibit CLM-1, *Bayindir v. Pakistan*, ICSID Case No. ARB/03/29, Decision on Jurisdiction, dated 14 November 2005, at paras. 169-172 (explaining that the claimant’s belated invocation of treaty claims and abandonment of contract claims was “regret[table]” but did not amount to an abuse of process); Exhibit RLA-106, *Abaclat and others v. Argentine Republic* (ICSID Case No. ARB/07/5), Decision on Jurisdiction And Admissibility, 4 August 2011, at para. 657 (denying claim for abuse of process based on alleged misuse of proceedings by claimants’ representative, even after finding that representative’s conduct was “morally condemnable”); Exhibit CLM-259, *Quiborax S.A. v. Bolivia*, ICSID Case No. ARB/06/2, Decision on Jurisdiction, dated 27 September 2012, at paras. 297-298 (holding “that the Claimants did not engage in ... an abuse of process” by “fabricat[ing] the conditions to establish ICSID jurisdiction”); Exhibit CLM-15, *Saipem S.p.A. v. The People’s Republic of Bangladesh*, ICSID Case No. ARB/05/07, Decision on Jurisdiction and Recommendation on Provisional Measures, dated 21 March 2007, at paras. 156-158 (denying claim for abuse of process predicated on claimant’s alleged use of treaty arbitration to circumvent Bangladeshi courts’ annulment of ICC award); Exhibit CLM-281, *Right of Nationals of United States of America in Morocco (France v. United States)*, 1952 I.C.J. 176, 212 (27 August 1952); Exhibit CLM-269, *Anglo-Norwegian Fisheries Case (United Kingdom v. Norway)*, 1951 I.C.J. 116, 142 (18 December 1951).

is *not* an abuse of process.²⁹ Instead, tribunals have emphasized that a respondent must establish that a claimant engaged in “*unacceptable manipulations*” and in “*bad faith*” conduct.³⁰

71. Ecuador has not even begun to make such a showing, relying instead on unsupported speculation about MSDIA’s purported motives in bringing this arbitration.³¹ It is indisputable that MSDIA has at all times pursued its claims in this arbitration reasonably and in good faith.

72. Fourth, Ecuador’s assertion that the finding of an abuse of process “certainly” entitles a tribunal to “dismiss jurisdiction over claims” is a gross mischaracterization of international precedent. An abuse of process implicates the tribunal’s jurisdiction only if it “can be seen *as an issue of consent* and thus of jurisdiction,” because the procedural abuse committed by the claimant is considered “*to be [a] key component[] of the consent of the Host State*” under the relevant BIT (*e.g.*, in cases involving pretextual investments and changes in nationality).³²

73. Where the alleged abuse of process has no bearing whatsoever on the respondent State’s consent to arbitrate under the relevant treaty, however, it may not be invoked as a basis to decline jurisdiction. As the tribunal explained in *CME Czech Republic v. The Czech Republic* any “possible abuse” of process could not deprive the tribunal of jurisdiction that the BIT “granted.”³³ Similarly, in *Azurix Corp. v. The Argentine Republic*,³⁴ and *Waste Management v. United Mexican States*,³⁵ the tribunals rejected abuse of process claims where the alleged abuses

²⁹ Exhibit CLM-58, *Lauder v. The Czech Republic*, UNCITRAL Rules, Final Award, dated 3 September 2001, at para. 179 (“There is also no abuse of process by the Claimant’s alleged non-disclosure of a *prima facie* case that the Respondent has breached the Treaty. No such obligation derives from the Treaty or from the UNCITRAL Arbitration Rules. Even less would the absence of such disclosure result in the Arbitral Tribunal lacking jurisdiction.”).

³⁰ See Exhibit CLM-257, *Pac Rim Cayman LLC v. The Republic of El Salvador*, ICSID Case No. ARB/09/12, Decision on the Respondent’s Jurisdictional Objections, at para. 2.107 (emphasis added).

³¹ See Ecuador’s Counter-Memorial, at paras. 267-269.

³² Exhibit RLA-106, *Abaclat and Others v. The Argentine Republic*, ICSID Case No. ARB/07/5, Decision on Jurisdiction and Admissibility, dated 4 August 2011, at para. 649(i). See also Exhibit CLM-257, *Pac Rim Cayman LLC v. The Republic of El Salvador*, ICSID Case No. ARB/09/12, Decision on the Respondent’s Jurisdictional Objections, at para. 2.107 (explaining that, in order for a tribunal to decline jurisdiction on the grounds of an abuse of process, the respondent must establish that the claimant “manipulat[ed] the [arbitral] process ... in bad faith *to gain unwarranted access to international arbitration.*”) (emphasis added). See, *e.g.*, Exhibit RLA-92, *Phoenix Action, Ltd. v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB/06/5, Decision on Jurisdiction, dated 15 April 2009, at para. 120-150 (declining to exercise jurisdiction over claim involving investment “made solely for the purpose of getting involved with international legal activity” on the ground that the BIT “cannot be deemed to offer access to the ICSID dispute settlement mechanism to investments not made in good faith”); Exhibit RLA-124, *ST-AD GmbH (Germany) v. The Republic of Bulgaria*, UNCITRAL, Award on Jurisdiction, dated 18 July 2013, at paras. 420-425 (declining jurisdiction over claim asserted by claimant that had changed nationality after the dispute had arisen on the ground that the BIT could not be interpreted “to protect ... domestic investments disguised as international investments or domestic disputes repackaged as international disputes for the sole purpose of gaining access to international arbitration”).

³³ Exhibit CLM-237, *CME Czech Republic B.V. v. The Czech Republic*, UNCITRAL, Partial Award, dated 13 September 2001, at para. 412 (emphasis added).

³⁴ Exhibit CLM-231, *Azurix Corp. v. The Argentine Republic*, ICSID Case No. ARB/01/12, Decision on Jurisdiction, dated 8 December 2003, at para. 23. Argentina also argued that the tribunal lacked jurisdiction because the underlying concession agreement contained a forum selection clause granting exclusive jurisdiction to Argentina’s provincial courts. *Id.*

³⁵ Exhibit CLM-267, *Waste Management v. Mexico*, ICSID Case No. ARB(AF)/98/2, Decision on Jurisdiction, dated 2 June 2000, at paras. 22-49.

of process did not implicate the respondent-States' consent to arbitrate under the relevant treaties.

74. In short, there is no basis for Ecuador's suggestion that MSDIA's assertion of denial of justice claims is an abuse of process. MSDIA has asserted its claims in this arbitration in good faith, in order to protect its rights under the Ecuador-U.S. BIT and to preserve its investment in Ecuador. Ecuador offers no evidence to the contrary and has not even come close to meeting its burden of establishing an abuse of process.

4. Exhaustion of Local Remedies Is Irrelevant To the Admissibility or "Ripeness" of a Claim For Denial of Justice

75. Finally, as an alternative to its jurisdictional objection, Ecuador also asserts that MSDIA's alleged failure to exhaust local remedies renders its claims inadmissible.³⁶ Ecuador cites *no* international awards or judgments or even commentary in support of this assertion, which is obviously wrong. Ecuador merely asserts in a single sentence in its Counter-Memorial that: "For the same reasons [as given in support of its jurisdictional objection], Merck's claims are not ripe and are therefore inadmissible."³⁷

76. As Sir Gerald Fitzmaurice has explained, challenges to the admissibility of a claim are based on "some grounds *other than* [the] ultimate merits" of the claim.³⁸ As discussed above, the exhaustion of local remedies is a material element of the merits of a denial of justice claim, and it is no more relevant to admissibility than it is to jurisdiction. Professor Paulsson explains

³⁶ Even if MSDIA's purported failure to exhaust local remedies rendered its claims inadmissible (which it does not), that would be irrelevant to the Tribunal's jurisdiction. Admissibility and jurisdiction are distinct concepts. Exhibit CLM-355, J. Paulsson, "Jurisdiction and Admissibility," in GLOBAL REFLECTIONS ON INTERNATIONAL LAW, COMMERCE AND DISPUTE RESOLUTION: LIBER AMICORUM IN HONOUR OF ROBERT BRINER (G. Aksen, et al., eds.) (2005), at 617. See also Exhibit CLM-317, G. Fitzmaurice, THE LAW AND PROCEDURE OF THE INTERNATIONAL COURT OF JUSTICE (1986), at 438-439. Defects in admissibility are not a proper basis on which to deny jurisdiction over a claim. See, Exhibit RLA-113, *ICS Inspection and Control Servs. Ltd. v. The Argentine Republic*, PCA Case No. 2010-9 (UNCITRAL Rules), Award on Jurisdiction, dated 10 February 2012, at paras. 252-262; Exhibit RLA-106, *Abaclat and Others v. Argentine Republic*, ICSID Case No. ARB/07/5, Decision on Jurisdiction and Admissibility, dated 4 August 2011, at para. 496 (holding that "any non-compliance with" a requirement to litigate in domestic courts for 18 months prior to filing an arbitration "may not lead to a lack of ICSID jurisdiction, and only – if at all – to a lack of admissibility of the claim"). As the *Chevron I* tribunal explained:

"An objection to the admissibility of a claim does not, of course, impugn the jurisdiction of a tribunal over the disputing parties and their dispute; to the contrary, it necessarily assumes the existence of such jurisdiction; and it only objects to the tribunal's exercise of such jurisdiction in deciding the merits of a claim beyond a preliminary objection."

See Exhibit CLM-108 *Chevron Corporation & Texaco Petroleum Company v. The Republic of Ecuador*, PCA Case No. 2009-23, 1976 UNCITRAL Rules, Third Interim Award on Jurisdiction and Admissibility, dated 27 February 2012, at para. 4.91.

³⁷ Ecuador's Counter-Memorial, at para. 265.

³⁸ Exhibit CLM-317, G. Fitzmaurice, THE LAW AND PROCEDURE OF THE INTERNATIONAL COURT OF JUSTICE (1986), at 438-439. Consistent with Professor Paulsson's opinion, Sir Gerald Fitzmaurice has recognized that the requirement to exhaust local remedies may be a matter of admissibility *if* it serves as a procedural precondition to the submission of a claim before an international forum. *Id.* at fn. 6.

that “exhaustion of local remedies in the context of denial of justice is ... *not a matter of procedure or admissibility*, but an inherent material element of the delict.”³⁹

77. Professor Amerasinghe similarly explains that the requirement to exhaust local remedies *is not relevant to “preliminary objection[s],”* like admissibility or jurisdiction in the context of a claim for denial of justice. Professor Amerasinghe makes clear that the requirement instead “*always ha[s] to be dealt with as a matter relating to the merits*”:

“If it be regarded as a matter of substance, then the non-exhaustion of local remedies is relevant to the merits; since without the factor there could be no cause of action. *Hence, it would always have to be dealt with as a matter relating to the merits.* Judge Hudson adopted this view in the *Panevezys-Saldutiskis Railway Case* where in a dissenting opinion he said ... ‘This is not a rule of procedure,’ ‘It is not merely a matter of orderly conduct. It is part of the substantive law as to international, i.e., State-to-State responsibility. Thus he based his opinion whether the question was one to be dealt with on the merits, or as a preliminary objection, on whether the rule had a substantive or procedural character.’”⁴⁰

78. Ecuador’s contention that MSDIA’s claim is not “ripe” rests on Ecuador’s assertion that MSDIA has failed to exhaust local remedies – i.e., on the alleged absence of a material element of the merits of the claim. Ecuador’s argument is thus a merits argument, not an argument regarding admissibility.⁴¹

79. In *Arif v. Moldova*, the respondent State argued that the claimant’s allegations of “mistreatment by the Moldovan judiciary” were not “ripe for arbitration” because the claimant had not “exhausted local remedies.”⁴² The tribunal, however, disagreed, explaining that a ripeness objection predicated upon a claimant’s failure to establish an element of its claim for denial of justice must be addressed with the merits, not admissibility or jurisdiction:

³⁹ Exhibit CLM-99, J. Paulsson, DENIAL OF JUSTICE IN INTERNATIONAL LAW (2005), at 7 (emphasis added). *See also* Second Paulsson Expert Report, at para. 10 (“Although Ecuador submits that this [exhaustion] inquiry might also be viewed in terms of the ripeness or admissibility of the claim, this conflates the procedural treatment of exhaustion of local remedies in most international contexts with its substantive role in the denial-of-justice context.”); 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. 151 (explaining that the “requirement [to exhaust local remedies] does apply to claims based on denial of justice, *but this is not a matter of the claim’s admissibility* but a substantive requirement.”) (emphasis added); Exhibit RLA-55, *The Loewen Group, Inc. and Raymond Loewen v. United States of America*, Award, dated 26 June 2003, at para. 153 (explaining that “in a case in which the alleged violation of international law is founded upon a judicial act ... the pursuit of local remedies plays a part in creating the ground of the complaint that there has been a breach of international law”).

⁴⁰ Exhibit CLM-292, C. Amerasinghe, STATE RESPONSIBILITY FOR INJURIES TO ALIENS, at 202-203.

⁴¹ *See* Exhibit CLM-355, J. Paulsson, “Jurisdiction and Admissibility,” in GLOBAL REFLECTIONS ON INTERNATIONAL LAW, COMMERCE AND DISPUTE RESOLUTION (2005), at 607 (explaining that ripeness challenges predicated upon a claimant’s failure to establish one of the material elements of its claim are akin to “strike-out applications,” not challenges to admissibility).

⁴² Exhibit RLA-120, *Arif v. Moldova*, ICSID Case No. ARB/11/23, Award, dated 8 April 2013, at para. 129.

“Even for claims for denial of justice, the exhaustion of local remedies is a question to be addressed with the merits of the dispute. It is a substantive standard, rather than a procedural bar.”⁴³

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

80. Ecuador also argues that this Tribunal lacks jurisdiction because MSDIA has failed to establish that this dispute arises out of or relates to rights with respect to an “investment,” as defined in Article I(1)(a) of the Treaty.⁴⁴ This effort to deny the Tribunal jurisdiction to decide the merits of MSDIA’s claims is also baseless.

81. As detailed in MSDIA’s Memorial, this dispute involves Ecuador’s breach of its obligations under the Treaty with respect to MSDIA’s investment in Ecuador. MSDIA first made that investment more than forty years ago, when it established a local presence in Ecuador from which to operate an ongoing domestic pharmaceutical business.

82. MSDIA’s Ecuadorian branch was established pursuant to the requirements of Ecuadorian company law, and it operates pursuant to an operating permit from the Superintendency of Companies. It has, within the territory of Ecuador, premises, employees, bank accounts, inventories, accounts receivable, regulatory authorizations, contracts, and other hallmarks of an ongoing enterprise. It contributes materially to Ecuador’s economy through the capital it contributes, the revenue it generates, and the taxes and salaries it pays, and to public health in Ecuador through the life-saving medicines it supplies and its disease-eradication efforts.

83. Ecuador argues that MSDIA does not have a protected investment in Ecuador because its operations in Ecuador are conducted through a branch rather than a corporation or company.⁴⁵ This ignores the very broad definition of “investment” under Article I(1)(a) of the Treaty.

84. As set out in the following sections, nothing in the Treaty’s definition of “investment” requires investments to possess a particular corporate form or otherwise excludes investments that are structured as branches from the protections of the Treaty.

85. MSDIA’s branch has the characteristics that are ordinarily associated with investments within the meaning of the Treaty and has the same character as a company, which is expressly included as an illustrative example of a covered investment. If an ongoing commercial enterprise structured as a company is expressly included within the broad definition of

⁴³ Exhibit RLA-120, *Arif v. Moldova*, ICSID Case No. ARB/11/23, Award, dated 8 April 2013, at para. 346 (emphasis added). The sole commentary cited by Ecuador does nothing to support its position. See Exhibit RLA-130, V. Heiskanen, “Menage a Trois? Jurisdiction, Admissibility and Competence in Investment Treaty Arbitration,” ICSID Review (2013). Ecuador seizes upon the article’s statement that claims for denial of justice “can[not] be brought before an international court or tribunal” before local remedies have been exhausted, but this assertion is plainly wrong, as Ecuador’s own experts recognize. See *above* at para. 56. Indeed, the article’s author elsewhere cites approvingly to Professor Paulsson’s statement that “[e]xhaustion of local remedies in the context of a denial of justice is . . . **not a matter of procedure or admissibility.**” *Id.* at 8 fn. 29 (emphasis added).

⁴⁴ Ecuador’s Counter-Memorial, at para. 53.

⁴⁵ Ecuador’s Counter-Memorial, at para. 163.

investment, there is no reason to exclude an ongoing commercial enterprise that has similar attributes but is structured as a branch.

86. Moreover, and independently, regardless of whether the branch itself is a covered investment, MSDIA's branch uses assets in Ecuador that are expressly included within the definition of investment, including tangible and intangible property, accounts receivable and licenses and permits pursuant to Ecuadorian law. The assets owned by MSDIA in Ecuador are used in the conduct of its ongoing business in Ecuador and are expressly included within the definition of investment under the Treaty.⁴⁶

87. Ecuador does not deny that MSDIA owns assets in Ecuador that are expressly within the definition of investment under the Treaty. Ecuador argues, however, that those assets are used only in the conduct of "cross-border trading transactions" and therefore are not protected investments.⁴⁷ Ecuador's argument mischaracterizes the nature of MSDIA's business in Ecuador.

88. MSDIA does not sell products into Ecuador through a series of simple "cross-border trading transactions," as Ecuador suggests. Rather, MSDIA's branch operates an established business *within* the territory of Ecuador, marketing, selling and distributing pharmaceutical products to Ecuadorian purchasers. These are not simple cross-border trading transactions.

89. In addition and independently, this Tribunal has jurisdiction because the underlying *NIFA v. MSDIA* litigation involved the sale of MSDIA's manufacturing plant, which Ecuador concedes was an investment. Ecuador argues that, although MSDIA's Chillos Valley manufacturing plant was an investment, the *NIFA v. MSDIA* litigation that underlies this dispute did not arise out of MSDIA's disposal of that investment and Ecuador therefore has no obligations under the Treaty with respect to that litigation.⁴⁸ This argument is based on an erroneous characterization of the *NIFA v. MSDIA* litigation and a misapplication of the Treaty.

90. In the litigation that gave rise to MSDIA's claims under the Treaty, NIFA sued MSDIA alleging that it violated antitrust law by selling the Chillos Valley plant to another Ecuadorian purchaser rather than to NIFA. As the NCJ held, the litigation "had as its origin the failed purchase and sale of an industrial plant."⁴⁹ NIFA's claim related directly to MSDIA's efforts to dispose of a protected investment, and MSDIA's rights in connection with the litigation are therefore protected by the Treaty. This is a separate and independent basis for finding that this dispute arises out of rights with respect to an investment.

1. MSDIA's Branch in Ecuador Is Itself a Protected Investment

91. As demonstrated in MSDIA's Memorial, the Treaty defines "investment" very broadly as "*every kind of investment in the territory of one Party* owned or controlled directly or indirectly

⁴⁶ Exhibit, RLM-33, K. Vandevelde, U.S. INTERNATIONAL INVESTMENT AGREEMENTS (2009), at 114-115 (asserting that the definition of "investment" "applies to all investment and to nothing more and *nothing less*") (emphasis added).

⁴⁷ Ecuador's Counter-Memorial, at para. 163.

⁴⁸ Ecuador's Counter-Memorial, at para. 176.

⁴⁹ Exhibit C-203, NCJ Judgment, *NIFA v. MSDIA*, dated 21 September 2012, at 21.

by nationals or companies of the other Party.” According to Ecuador’s own expert, Professor Vandevelde, the tautological wording of the *definition* of investment – “‘investment’ means every kind of investment” – was intentional and “was thought to convey the flexibility that BIT drafters wanted to incorporate into the definition.”⁵⁰

92. In other words, the Treaty was not intended to impose a strict, formulaic definition of “investment.” Rather, it directs arbitral tribunals to assess whether the claimant has an “investment” within the meaning of the Treaty by applying the factors the tribunal considers appropriate to the circumstances of individual cases.⁵¹

93. While giving tribunals broad flexibility, the Treaty provides a non-exclusive list of examples of “investment,” which illustrate the breadth that definition is intended to have. Specifically, Article I(1)(a) of the Treaty provides in relevant part:

“‘investment’ means every kind of investment in the territory of one Party owned or controlled directly or indirectly by nationals or companies of the other Party, such as equity, debt, and service and investment contracts; and includes:

- i. tangible and intangible property, including rights, such as mortgages, liens and pledges;
- ii. a company or shares of stock or other interests in a company or interests in the assets thereof;
- iii. a claim to money or a claim to performance having economic value, and associated with an investment;
- iv. intellectual property which includes, inter alia, rights relating to: literary and artistic works, including sound recordings; inventions in all fields of human endeavor; industrial designs; semiconductor mask works; trade secrets, know-how, and confidential business information; and trademarks, service marks, and trade names; and
- v. any right conferred by law or contract, and any license and permits pursuant to law.”⁵²

94. As demonstrated in MSDIA’s Memorial and as set out in more detail below, MSDIA’s branch plainly meets the definition of investment in Article I(1)(a).⁵³

95. First, MSDIA’s branch in Ecuador has the same character under Ecuadorian law as a company, which is expressly included within the definition of investment. If an ongoing business structured as a company is an investment, a similar ongoing enterprise structured as a branch must be regarded as an investment as well.

⁵⁰ Exhibit, RLM-33, K. Vandevelde, U.S. INTERNATIONAL INVESTMENT AGREEMENTS (2009), at 114-115.

⁵¹ See, MSDIA’s Memorial, at para. 207.

⁵² Exhibit C-1, Ecuador-United States BIT, Art. 1(a).

⁵³ MSDIA’s Memorial, at paras. 203-219.

96. Second, MSDIA’s Ecuadorian branch has the characteristics most often associated with investments. Specifically, MSDIA’s branch possesses the attributes of contribution, duration, and risk.

97. Third, numerous commentators and tribunals in other investment arbitrations have regarded branches as investments. For the same reasons that those tribunals and commentators found branches to be protected investments, MSDIA’s branch in Ecuador is a protected investment under the Ecuador-U.S. BIT.

98. Finally, Ecuador’s own investment law recognizes and defines branches as foreign investments in Ecuador. Indeed, Ecuador has represented to foreign investors that if they establish branch operations, those branches would be protected foreign investments under Ecuadorian law and under the bilateral investment treaties to which Ecuador is a party.

a) MSDIA’s Branch in Ecuador Has the Same Character as a Company, Which Is Expressly Included within the Definition of Investment

99. Ecuador argues that MSDIA’s branch cannot qualify as an investment because “operating a branch office within the territory of Ecuador, by itself, cannot be considered an investment qualifying Merck for protection under the BIT.”⁵⁴ Ecuador’s argument ignores the very broad definition of “investment” under Article I(1)(a) of the Ecuador-U.S. BIT.

100. Under Article I(1)(a), an investment includes “every kind of investment,” and is not limited to a business that is organized using any particular corporate form.⁵⁵ MSDIA’s branch falls within the definition of “investment” in Article I(1)(a) because it was established in Ecuador, pursuant to Ecuadorian law, through contributions of capital, in order to establish an ongoing local presence in Ecuador.⁵⁶

101. Ecuador suggests that MSDIA’s branch is not an investment because a branch does not fall squarely within Article I(1)(a)(ii) of the Treaty, which provides as an example that “investment” includes “a company or shares of stock or other interests in a company or interests in the assets thereof.”⁵⁷ According to Ecuador, the reference to “company” in Article I(1)(a)(ii) must be understood by reference to the definition of “company” in Article I(1)(b) of the Treaty.⁵⁸ Ecuador asserts that “this definition plainly does not include the establishment of a branch in Ecuador,” because a branch cannot be considered “legally constituted” under the laws and regulations of Ecuador.⁵⁹

⁵⁴ Ecuador’s Counter-Memorial, at para. 163.

⁵⁵ *See above* at para. 93.

⁵⁶ *See below* at paras. 111-116.

⁵⁷ Ecuador argued in its Opposition to Interim Measures that the fact that MSDIA’s branch is not a separate corporate entity meant that it was “not a ‘company’ for purposes of Article I(1)(a)(ii)” of the BIT. Ecuador’s Opposition to MSDIA’s Request for Interim Measures, dated 24 July 2012, at note 102. This was, according to Ecuador, one of the reasons why MSDIA “cannot establish the existence of a protected investment under the Treaty.” *Id.* at para. 92 (emphasis added).

⁵⁸ Ecuador’s Counter-Memorial, at para. 160.

⁵⁹ Ecuador’s Counter-Memorial, at para. 161 (“‘legally constituted’ refers to the formation of a legal person with

102. Ecuador's argument is incorrect, because Article I(1)(b) is irrelevant to the question whether MSDIA has an "investment" under Article I(1)(a). Article I(1)(b) defines when a specific legal entity is an *investor* ("company" of a Party) that can assert rights under the Treaty, but it is not relevant to whether that investor's business is an *investment* to which the Parties to the Treaty owe substantive protections.⁶⁰ Article I(1)(b) establishes that a company may be regarded as an *investor* so long as it is "any kind of corporation, company, association, partnership, or other organization, legally constituted under the laws and regulations of a Party"⁶¹ MSDIA is a company legally constituted under the laws of Delaware and therefore qualifies as company of the United States under Article I(1)(b).

103. The question whether MSDIA has a protected "investment" in Ecuador is governed by Article I(1)(a).⁶² Article I(1)(a)(ii) includes as an illustrative example of "investment" a "company or shares of stock or other interests in a company or interests in the assets thereof."⁶³ The inclusion of "company" as an example of the sort of investment that is protected under the Treaty in fact *confirms* that the Treaty was intended to protect ongoing businesses in Ecuador, such as MSDIA's branch.

104. Ecuador's expert, Professor Vandeveld, has acknowledged that under the very broad wording of Article I(1)(a), branches are recognized as protected investments. Professor Vandeveld's treatise on U.S. investment agreements explains that "[t]he term '*investment*' means every investment and certainly a branch may fall within that definition."⁶⁴

105. Ecuador argues that Professor Vandeveld's comment is not relevant to interpreting the term investment in the 1992 U.S.-Ecuador BIT because his comment was made in the context of a discussion of the 1994 U.S. Model BIT.⁶⁵ That argument is unavailing.

106. In fact, in this section of his treatise, Professor Vandeveld was discussing the consequences of adding "branch" to the definition of "company" in Article I(1)(b) of the 1994 Model BIT. Professor Vandeveld's discussion makes clear that the addition of the word "branch" in Article I(1)(b) had no effect on the interpretation of investment under Article I(1)(a), which was already broad enough to include branches. Thus in the Ecuador-United States BIT, the absence of the word "branch" from the definition of "company" does not indicate that a branch is not an investment under Article I(1)(a).

independent legal personality and the establishment of a branch of a foreign company does not amount to constituting a new legal person independent of the legal personality of its foreign parent company"), *citing* Expert Report of Prof. Roberto Salgado Valdez, dated 24 February 2014, ("Salgado Expert Report") pp. 6-7.

⁶⁰ This is clear from the fact that Article I(1)(b) defines the phrase "company" of a Party," a phrase that is used in Article I(1)(a) only to refer to who may own or control an investment. *See*, Exhibit CLM-105, K. Vandeveld, U.S. INTERNATIONAL INVESTMENT AGREEMENTS (2009), at 122.

⁶¹ Exhibit C-1, Ecuador-United States BIT, Art. I(1)(b).

⁶² Thus, the Expert Report of Professor Salgado addressing the question of whether a branch is a legally constituted entity in Ecuador has no bearing on this case. *See* Salgado Expert Report . Tribunals tend to discuss the significance of a branch's legal personality only in the context of determining whether an entity is an investor, not an investment. *See e.g.*, Exhibit RLM-42, *Murphy Exploration and Prod. Co. Int'l v. Republic of Ecuador*, ICSID Case No. ARB/08/4, Award on Jurisdiction (15 Dec. 2010), at para. 119.

⁶³ *See* above at para. 93.

⁶⁴ Exhibit CLM-105, K. Vandeveld, U.S. INTERNATIONAL INVESTMENT AGREEMENTS (2009), at 122.

⁶⁵ Ecuador's Counter-Memorial, at para. 160.

107. Professor Vandavelde explains:

“The 1994 model lists ‘branch’ as an entity that falls within the definition of ‘company.’ Inclusion of the word ‘branch’ created a conceptual problem, however. In the 1994 model, a company is an entity ‘constituted or organized under applicable law.’ The term ‘branch,’ however, often refers to a part of an operation that has no separate corporate existence. That is, a branch is not necessarily constituted as such under applicable law. Thus, the 1994 model seemed technically to exclude from the definition of ‘company’ any branch that was not separately constituted.

Such an exclusion would have different consequences, depending on how the term ‘company’ was being used. A company may be an investment or an investor. *Where ‘company’ refers to an investment, whether a branch falls within the definition of ‘company’ should have no practical consequence. The term ‘investment’ means every investment and certainly a branch may fall within that definition whether or not it is separately constituted, and thus whether or not it is a ‘company.’* Where ‘company’ refers to an investor, however, the fact that the branch is not separately constituted is potentially significant because, under the 1994 model, if a branch is not a company or a national, then it cannot be an investor.”⁶⁶

108. Ecuador suggests that an Ecuadorian branch has different attributes than an Ecuadorian company, and that Article I(1)(a)(ii) therefore does not support an interpretation of investment that includes branches.⁶⁷ However, as explained in the expert report of Dr. Fabián Flores Paredes, an expert on Ecuadorian company law, branches and companies have similar attributes and rights under Ecuadorian law, and both are regarded as investments under Ecuadorian investment law.⁶⁸

109. Indeed, Dr. Flores explains that “a foreign company that wants to continuously engage in business transactions within Ecuador must *either* establish a branch in Ecuador, or constitute a new company (a subsidiary) under local law.”⁶⁹ Once established in Ecuador according to certain domiciliation requirements, Dr. Flores explains, branches of foreign companies “acquire the same rights and obligations as Ecuadorian companies, and the law does not discriminate between them.”⁷⁰ Among other things, both branches and companies must contribute and

⁶⁶ Exhibit CLM-105, K. Vandavelde, U.S. INTERNATIONAL INVESTMENT AGREEMENTS (2009), at 122. Professor Vandavelde explained that this problem was addressed in the 2004 Model BIT: “The 2004 model addresses the problem that the absence of separate corporate existence could deprive a branch of the status of company under the 1994 model. It provides that the term ‘enterprise’ includes ‘a branch of an enterprise.’ This, in turn, means that a branch lacking separate corporate existence is nevertheless explicitly included within the definition of ‘investment’ by virtue of its explicit inclusion within the term ‘enterprise.’ More importantly, a branch lacking separate corporate existence may nevertheless be an investor.”

⁶⁷ Ecuador’s Counter-Memorial, at para. 161 (relying on the Salgado Expert Report, which lists differences between companies and branches).

⁶⁸ Expert Report of Dr. Fabián Flores Paredes, dated 7 August 2014 (“Flores Expert Report”), at p 2, 7-10 (noting that “Dr. Salgado emphasizes differences of little importance regarding the treatment under local law of local companies and branches . . . [T]he differences Dr. Salgado mentions in his report do not affect the [point that] a branch of a foreign company . . . is considered an investment under Ecuadorian law”).

⁶⁹ Expert Report of Dr. Fabián Flores Paredes, dated 7 August 2014 (“Flores Expert Report”), at p 2.

⁷⁰ Flores Expert Report, at p 6.

maintain a statutory minimum amount of capital, appoint a local registered agent, pay the same rate of corporate income tax, and follow the same rules for financial reporting and auditing.⁷¹ Moreover, Ecuadorian law provides for equal protection of branches of foreign companies and locally incorporated companies.⁷²

110. Just as nothing in Ecuadorian law discriminates against investments made by way of branches as opposed to companies, nothing in the definition of “investment” in the Treaty requires investments to possess a particular corporate form or otherwise excludes investments that are structured as a branch from the protections of the Treaty.⁷³ MSDIA’s branch has the same character as a company, which is expressly included in the Treaty’s definition as an illustrative example of a covered investment. If an ongoing business structured as a company is expressly included within the broad definition of investment, there is no reason to exclude an ongoing business that has similar attributes but is structured as a branch.

b) MSDIA’s Branch Has the Characteristics Commonly Associated with Investment, Namely Contribution, Duration and Risk

111. MSDIA’s Memorial established that MSDIA’s branch has the characteristics that Ecuador has identified as most often associated with investments, namely contribution, duration, and risk.⁷⁴ As set out in MSDIA’s Memorial, its branch contributes to Ecuador’s economy through the capital it contributes,⁷⁵ the revenue it generates and the taxes and salaries it pays, and to public health in Ecuador through the life-saving medicines it supplies and its disease-eradication efforts.⁷⁶ MSDIA has operated its branch continuously for the past forty years,

⁷¹ Flores Expert Report, at pp. 2-7.

⁷² Flores Expert Report, at p. 6.

⁷³ In the 1994 U.S. Model BIT, the U.S. amended the definition of “company” to expressly include a “branch” and to refer to both “investors” and “investments.” See Ecuador’s Counter-Memorial, para. 160 (referring to this fact and their expert’s discussion of it his treatise, Exhibit CLM-105, K. Vandeveld, U.S. INTERNATIONAL INVESTMENT AGREEMENTS (2009), at 122). And, in the 2004 Model BIT, the term “company” was replaced with the even broader term “enterprise” and defined to include “a branch of an enterprise.” See Exhibit CLM-105, K. Vandeveld, U.S. INTERNATIONAL INVESTMENT AGREEMENTS (2009), at 122. Similarly, in its 1996 BIT with Canada, Ecuador included “branch” in the list of entities that may constitute an “enterprise,” a term used as an example of an entity that may constitute either an investment or an investor. Exhibit CLM-285, Agreement between the Government of Canada and the Government of the Republic of Ecuador for the Promotion and Reciprocal Protection of Investments (“Canada-Ecuador BIT”), 6 June 1997, Article 1(b). These subsequent models and treaties are significant to the extent they confirm the plain meaning of the broad definition of investment in the U.S.-Ecuador BIT as not intended to exclude branches. See Ratner Expert Report, at para. 45 (“A model BIT proposed by a state after the conclusion of a prior BIT may be a form of subsequent practice, although it would only be of one party”) (citing Exhibit CLM-362, Anthea Roberts, “Power and Persuasion in Investment Treaty Interpretation: The Dual Role of States,” 104 American Journal of International Law 179, 221-22 (2010)).

⁷⁴ See MSDIA’s Memorial, at para. 207 (noting that most tribunals have considered these characteristics in the context of a holistic assessment of the claimant’s investment in the host State).

⁷⁵ MSDIA has contributed \$26 million to its Ecuadorian branch during its existence. Exhibit C-274, General Information of MSDIA registered in the Superintendency of Companies, available at <http://www.supercias.gob.ec/portal/> (p. 27, financial statements corresponding to year 2013).

⁷⁶ Tribunals have held that contribution includes both financial contributions and contributions of know-how, personnel, or services. See MSDIA’s Memorial, at para. 208. Ecuador accepts this definition of contribution. See Ecuador’s Counter-Memorial, at para. 165, at note 252. Dr. Flores notes that Ecuador’s expert, Dr. Salgado, in his book, *Companies and Foreign Entities in Ecuador*, “explains that foreign investment may be made not only through capital contributions to a branch, but also contributions of ‘intangible assets’ and that ‘intangible assets shall be understood to mean intellectual property rights.’” Flores Expert Report, p. 8 (internal citations omitted). MSDIA

satisfying any conceivably applicable requirement of duration.⁷⁷ And operating an ongoing business in Ecuador involves significant risk for MSDIA, which cannot be sure of a return on the money it has invested in building that business.⁷⁸

112. Ecuador does not dispute any of the facts that MSDIA has presented with respect to the contributions of its branch to the economy and public health in Ecuador, the duration of its branch operations, or the risks MSDIA faces as a result of having a branch in Ecuador. Ecuador claims, however, that MSDIA has failed “to establish that it has made any contribution in the territory of Ecuador,” because it has allegedly “produced no documentary evidence” in support of those facts.⁷⁹

113. With its Memorial, MSDIA submitted witness testimony from Mr. John Canan outlining in detail the attributes of MSDIA’s branch in Ecuador. Ecuador has not challenged that testimony or offered any contrary evidence. MSDIA also produced the audited financial statements of its Ecuadorian branch, which includes Ecuadorian tax information.⁸⁰ Much of the other evidence confirming the contributions of MSDIA’s branch and its duration – for example, documents regarding its establishment pursuant to Ecuadorian company law, its acquisition and maintenance of its operating license and receipt of permits to sell its products – is contained in the public record of Ecuador’s Superintendency of Companies.

114. Although this evidence is already within the possession of Ecuador, MSDIA has asked its expert on company law, Dr. Flores, to review the available public records and to provide additional information regarding MSDIA’s Ecuadorian branch.⁸¹ MSDIA is also submitting a

has made financial contributions to Ecuador by spending capital to buy assets in Ecuador, generating revenues in Ecuador from sales of its pharmaceutical products, paying taxes to the Government, employing Ecuadorian workers, and paying salaries to those employees. *See* MSDIA’s Memorial, at paras. 17-24; Third Canan Witness Statement at paras. 4-20; Flores Expert Report, at p. 12. MSDIA has also contributed substantial know-how in the form of training for its workforce and doctors and medical professionals in Ecuador. MSDIA has also contributed to public health in Ecuador by distributing patented and trademarked life-saving and life-altering pharmaceutical products to the Ecuadorian people to treat a variety of debilitating diseases and conditions, including HIV, other infectious diseases, cardiovascular disease, and diabetes. It has also engaged in a campaign to eradicate river blindness in Ecuador. MSDIA’s Memorial, at paras. 17-24; Third Canan Witness Statement at paras. 4-20.

⁷⁷ While tribunals have not agreed on any specific length of time for purposes of determining whether an investment satisfies the requirement of duration, on any view, operating a business for forty years is certainly sufficient. *See* MSDIA’s Memorial, at paras. 214-215. MSDIA established its branch in Ecuador in 1973. *See* MSDIA’s Memorial, para. 20; Third Canan Witness Statement at para. 6.

⁷⁸ Investment risk is generally understood to mean that the foreign investor cannot be sure of a return on its investment. *See* MSDIA’s Memorial, at paras. 216-217. Ecuador relies on this definition of “investment risk.” *See* Ecuador’s Counter-Memorial, at para. 171. MSDIA took significant commercial risks by acquiring assets and establishing an operating business within Ecuador without any guarantee that it will succeed in the competitive Ecuadorian pharmaceutical market. By establishing an operating business in Ecuador, MSDIA has also exposed itself to the jurisdiction of Ecuador’s courts and regulators. *See* MSDIA’s Memorial, at para. 218; Third Canan Witness Statement, at para. 12.

⁷⁹ Ecuador’s Counter-Memorial, at para. 165.

⁸⁰ Exhibit C-82, Merck, Sharp & Dohme (Inter-American Corporation-Ecuador Branch, Financial Statements, December 31, 2007 and 2006.

⁸¹ *See* Flores Expert Report, at pp. 10-12.

certificate from the Superintendency of Companies certifying the continuing validity of the operating license of MSDIA's branch.⁸²

115. Dr. Flores explains:

“I have reviewed both publicly available documents and documents provided to me by MSDIA's attorneys pertaining to the activities in Ecuador of the MSDIA branch. As I explain below, these documents show that MSDIA has (i) assigned capital to the branch and otherwise fulfilled the legal requirements for domiciliation in 1973, (ii) remained in good standing since that time, (iii) undertaken activities in furtherance of its corporate purpose, (iv) hired hundreds of employees, (v) been represented by duly authorized agents, (vi) filed annual reports with the Superintendency of Companies, and (vii) complied with its social security and tax obligations under Ecuadorian law. From these documents, it is also evident that MSDIA, through its Ecuadorian branch, has made a substantial investment (as defined under Ecuadorian law) in Ecuador.”⁸³

116. All of this additional evidence confirms the information that was previously provided with MSDIA's Memorial.

117. Ecuador also argues that MSDIA's branch does not make any contribution in the territory of Ecuador because it engages in “the conduct of sales operations in Ecuador.”⁸⁴ There is nothing in the text of the Ecuador-U.S. BIT or any other rule of international law that would exclude foreign businesses that engage in sales operations within host countries from the protection of bilateral investment treaties.

118. When a foreign investor contributes capital, know-how, services, or other assets in the host State to build a business, the economic activity its business conducts in that State is protected, whether it involves extracting natural resources, providing services, or selling products to consumers or other businesses. Ecuador does not cite a single case that supports its claim that “purely commercial . . . operations (importation, sale and distribution of pharmaceutical products)” cannot meet the definition of investment.⁸⁵

119. The only case that Ecuador does cite, *Romak v. Uzbekistan*, does not support Ecuador's claim. Ecuador suggests that the *Romak* tribunal held that a business engaged in sales transactions bore nothing more than “a pure commercial, counterparty risk, or otherwise stated, the risk of doing business generally” and therefore could not qualify as an investment.⁸⁶

⁸² See Exhibit C-272, Certificate of the Commercial Register, dated Quito of 29 May 2014.

⁸³ Flores Expert Report, at p. 10.

⁸⁴ Ecuador's Counter-Memorial, at paras. 164, 166 (“Merck cannot show that it has made any substantial contribution in the territory of Ecuador because of the purely commercial nature of its operations (importation, sale and distribution of pharmaceutical products”).

⁸⁵ Ecuador's Counter-Memorial, at para. 166.

⁸⁶ Ecuador's Counter-Memorial, at para. 171 (quoting Exhibit RLA-97, *Romak S.A. v. The Republic of Uzbekistan*, PCA Case No. AA280, UNCITRAL, Award (26 Nov. 2009), at para. 229).

120. However, in the passage Ecuador quotes selectively, the *Romak* tribunal was referring to the argument by the claimant that its one-off cross-border sales contract with the respondent state entailed “investment risk.”⁸⁷ In rejecting that argument, the tribunal observed that:

“[A]ll contracts – including contracts that do not constitute an investment – carry the risk of non-performance. However, *this kind of risk* is pure commercial, counterparty risk, or, otherwise stated, the risk of doing business generally. It is therefore not an element that is useful for the purpose of distinguishing between an investment and a commercial transaction.”⁸⁸

121. This passage stands for the proposition that, while a single contract standing alone may or may not entail investment risk, the determining factor is not whether there is counterparty risk. It does not suggest that a commercial business involving the ongoing sale and distribution of products – like the business of MSDIA’s branch – does not incur “investment risk.” That would make no sense.

122. In *Middle East Cement Shipping v. Egypt*, the tribunal – and the respondent State – accepted that the claimant’s business in Egypt “for the import and storage of bulk cement in depot ship . . . and for packing and dispatch of same within Egypt to both the private and public sectors” was an investment under the Egypt-Greece BIT and the ICSID Convention.⁸⁹

123. That award confirms that a business like MSDIA’s that is engaged in ongoing, prolonged commercial sales operations within the host state qualifies as an investment. It demonstrates that, when a foreign investor contributes capital, owns assets and engages in commerce within the host State, its business is protected.

c) Tribunals in other Investment Arbitrations Have Recognized that Branches Are Protected Investments

124. MSDIA’s Memorial established that tribunals in other investment arbitrations have recognized that ongoing businesses structured as branches are protected investments.⁹⁰

125. Ecuador seeks to minimize the importance of those cases, arguing that the tribunals in those cases found that the assets and activities of the branches constituted investments, while the branches themselves did not.⁹¹ That argument misreads the cases, and is in any event irrelevant because, as discussed below, MSDIA’s branch has assets and activities that are comparable to (and indeed more significant than) the branches in those cases.

⁸⁷ Exhibit RLA-97, *Romak S.A. v. The Republic of Uzbekistan*, PCA Case No. AA280, UNCITRAL, Award (26 Nov. 2009), at para. 229.

⁸⁸ Exhibit RLA-97, *Romak S.A. v. The Republic of Uzbekistan*, PCA Case No. AA280, UNCITRAL, Award (26 Nov. 2009), at para. 229.

⁸⁹ See Exhibit CLM-65, *Middle East Cement Shipping and Handling Co. S.A. v. Egypt*, ICSID Case No ARB/99/6, IIC 311, Award (12 April 2002), at para. 50.

⁹⁰ MSDIA’s Memorial, at para. 213. See also, MSDIA’s Reply to Ecuador’s Opposition to Interim Measures, at para. 81.

⁹¹ See Ecuador’s Counter-Memorial, at paras. 157-159.

126. First, applying the U.S.-Ecuador BIT, the tribunal in *Murphy v. Ecuador I* clearly stated that branches themselves – not just their assets and activities – fall within the definition of “investment.”⁹² It observed that, “[i]n some cases, foreign investors choose to incorporate companies *or branches* in the country where they invest (sometimes in order to abide by the country’s legislation).”⁹³ The *Murphy I* tribunal concluded that there should not be “any doubt of the intention to protect such investments” under BITs.⁹⁴

127. Second, the tribunals in the two other cases that MSDIA identified in its Memorial did not reach the question whether the branches themselves could qualify as investments independent from their assets and activities. In *M.C.I. Power v. Ecuador*, the investor contended that its branch (established for the purpose of carrying out the Seacoast power project) and its remaining intangible assets in Ecuador qualified as investments.⁹⁵ The tribunal concluded that “the rights and interests alleged by the Claimants to have subsisted as a consequence of the Seacoast project” were investments and gave the specific examples of the project’s “intangible assets of accounts receivable [and] the existence of an operating permit.”⁹⁶ Having found that the assets of the branch were protected investments, the tribunal did not reach the question whether the branch that carried out that project was also an investment.

128. Similarly, in *Middle East Cement v. Egypt*, the tribunal did not confront the question whether the claimant’s branch was itself an investment. The parties agreed that the claimant had made an investment in Egypt,⁹⁷ and the tribunal did not reach the question whether the claimant’s investment consisted of its branch (which imported, stored, packed and dispatched cement) or the branch’s assets.⁹⁸

d) Ecuador’s Own Investment Law Recognizes that Branches Have the Characteristics of Investment

129. Ecuador’s insistence that a branch does not constitute an investment under Article I(1)(a) of the Treaty is at odds with Ecuador’s own laws on foreign investment, which expressly

⁹² Ecuador did not challenge the tribunal’s jurisdiction on the grounds that the claimant did not have an investment, and the tribunal, by a majority, declined jurisdiction on other grounds – that the claimant had not complied with a six-month “cooling off” period requirement. See Exhibit RLM-42, *Murphy Exploration and Prod. Co. Int’l v. Republic of Ecuador*, ICSID Case No. ARB/08/4, Award on Jurisdiction (15 Dec. 2010).

⁹³ Exhibit RLM-42, *Murphy Exploration and Prod. Co. Int’l v. Republic of Ecuador*, ICSID Case No. ARB/08/4, Award on Jurisdiction (15 Dec. 2010), at para. 119.

⁹⁴ Exhibit RLM-42, *Murphy Exploration and Prod. Co. Int’l v. Republic of Ecuador*, ICSID Case No. ARB/08/4, Award on Jurisdiction (15 Dec. 2010), at para. 119.

⁹⁵ 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 paras. 39, 147.

⁹⁶ 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.

⁹⁷ See Exhibit CLM-65, *Middle East Cement Shipping and Handling Co. S.A. v. Egypt*, ICSID Case No ARB/99/6, IIC 311, Decision on Jurisdiction (27 November 2000), para. 95.

⁹⁸ In *Middle East Cement v. Egypt*, the claimant was found to have an investment under the Greece-Egypt BIT because its branch still appeared in the commercial registry and it owned a ship in Egypt. See Exhibit CLM-65, *Middle East Cement Shipping and Handling Co. S.A. v. Egypt*, ICSID Case No ARB/99/6, IIC 311, Decision on Jurisdiction (27 November 2000), para. 109. It appears that the branch was no longer in operation and the ship was not even being used for ongoing business activities, but the mere ownership of assets in the host state was deemed to constitute a protected investment.

recognize that a branch established in Ecuador is regarded as an investment by Ecuadorian law. “Ecuadorian law specifically defines as ‘foreign investment’ the contribution of capital a foreign company makes to obtain the required authorization necessary for it to exercise economic activities in Ecuador through a branch, as well as other capital contributions or transfers that the foreign company makes to its Ecuadorian branch.”⁹⁹

130. MSDIA’s expert Dr. Flores explains:

“One of the ways in which Ecuadorian law promotes, recognizes and guarantees foreign investment is through the establishment of branches of foreign companies in Ecuador, subject to several domiciliation requirements. *Although there are certain specific differences between the treatment of Ecuadorian companies and the branches of foreign companies under Ecuadorian law, as a general matter, both types of companies have the same rights and obligations, and the assets of both are considered investments.* Further, under Ecuadorian law, branches of foreign companies domiciled in Ecuador have legal existence in Ecuador, and their legal personality is recognized by the State of Ecuador and its institutions.”¹⁰⁰

131. Indeed, in other contexts, Ecuador has expressly represented to foreign investors that if they establish branches in Ecuador, those branches will be protected as foreign investments by the investment treaties to which Ecuador is party.¹⁰¹

132. For example, in a presentation entitled “Legal Aspects Relating to Investing in Ecuador,” the Ecuadorian government explained to Spanish investors that, in order to carry out “permanent activities in Ecuador” that would be “*regulated by the treaties of which Ecuador is a party,*” they could achieve “domiciliation” in the country by “opening a branch.”¹⁰²

133. Ecuador thereby confirmed that branches of Spanish companies in Ecuador would be protected by Ecuador’s treaties, including by the Spain-Ecuador BIT (which, like the U.S.-Ecuador BIT, does not expressly include “branch” in its non-exclusive list of example investments).¹⁰³ Ecuador’s public statements are consistent with the plain language of the U.S.-Ecuador BIT, which includes a very broad definition of “investment” and does not in any way exclude branch operations from that definition.

⁹⁹ Flores Expert Report, at p. 7.

¹⁰⁰ Flores Expert Report, at p. 2. *See also*, Salgado Expert Report, at p. 3 (“Companies incorporated abroad can habitually exercise their activities in Ecuador via a procedure that is called ‘*domiciliación*’ [*domiciliation*], which is the term used to define the establishment of a branch in Ecuadorian territory”); p. 5 (“Once the branch has been established, it is understood that the Company incorporated abroad has a domicile in the Republic of Ecuador and, consequently, it is *subject to the laws of said Republic as to legal acts and transactions that will be performed or will cause an effect in the national territory*”); p. 7 ([T]he act of domiciliation or opening a branch of a foreign Company . . . recognizes the existence of the foreign Company . . . and *its intention to act through an office with a general representative in the Republic of Ecuador*”).

¹⁰¹ *See*, CLM-239, *Eastern Sugar B.V. v. Czech Republic*, SSC Case No. 088/2004, Partial Award (27 Mar. 2007), at para. 244 (giving evidentiary weight to the public pronouncements of the respondent government).

¹⁰² Exhibit C-282, Consulate of Ecuador in Bilbao, Juridical Aspects Related to Investment in Ecuador, undated, p. 3, available at <http://www.camarabilbao.com/ccb/contenidos.downloadatt.action?id=342439> (last visited on 5 August 2014).

¹⁰³ Exhibit CLM-287, Agreement for the Reciprocal Promotion and Protection of Investment Between the Kingdom of Spain and the Republic of Ecuador, 18 June 1997 (“Spain-Ecuador BIT”), at Article I(2).

2. The Assets Used in the Ongoing Business Operations of MSDIA's Ecuadorian Branch Are Protected Investments

a) MSDIA Owns Assets in Ecuador that Are Protected Investments

134. Even if MSDIA's Ecuadorian branch were not itself a protected investment under Article I(1)(a) of the Treaty, MSDIA owns assets in Ecuador that are used in the ongoing operations of its branch, which expressly fall within the definition of "investment."

135. Specifically, MSDIA owns, within Ecuador, among other things:

- a. **tangible property**, including inventory, cash, and assets used to conduct the business, such as vehicles, computers, and office equipment;¹⁰⁴
- b. **intangible property**, including leases for real property and other rights;¹⁰⁵
- c. **claims to money**, including accounts receivable;¹⁰⁶ and
- d. **licenses and permits** pursuant to Ecuadorian law, which give MSDIA the right to engage in commerce within Ecuador on an ongoing basis¹⁰⁷ and to produce, market and distribute patented and trademarked pharmaceutical products inside Ecuador.¹⁰⁸

136. These assets are unquestionably investments in Ecuador that are subject to the protection of the Treaty, and indeed, it is these assets that are at risk if the \$150 million judgment of the court of appeals is enforced against MSDIA's assets in Ecuador.

¹⁰⁴ Third Canan Witness Statement at para. 10; Flores Expert Report, at pp. 11-12 ("The Superintendency of Companies' website shows that the assigned capital to the MSDIA branch was \$5,943, and that MSDIA has made additional capital contributions to the branch totaling more than \$26 million. The MSDIA branch's audited financial statements for the year ending December 31, 2011 confirm that MSDIA has had a policy of "permanently supporting the branch" through, among other things, capital contributions, which totaled more than \$17 million by the end of 2011"). See Exhibit C-274, General Information of MSDIA registered in the Superintendency of Companies, available at <http://www.supercias.gob.ec/portal/> (p. 27, financial statements corresponding to year 2013); Exhibit C-111 Merck Sharp & Dohme (Inter American) Corporation - Ecuador Branch, Financial Statements, December 31, 2011 and 2010. Dr. Flores notes that Ecuador's expert, Dr. Salgado, that in his book, *Companies and Foreign Entities in Ecuador*, "observes that under Article 12 of Regulations Replacing the Investment Promotion and Protection Law, investment is defined as "any type of transfer of capital to Ecuador from abroad, made by foreign natural persons or legal entities, intended for use in the production of goods and services." Flores Expert Report, p. 8.

¹⁰⁵ Second Canan Witness Statement at para. 6; Flores Expert Report, p. 16 ("[T]he MSDIA branch has traded assets, created sources of employment and met its obligations, including tax obligations. These activities constitute investments under Article 13 of the COPTI and Article 6 of the Regulations Replacing the Investment Promotion and Protection Law"). As discussed below, MSDIA also once owned the Chillós Valley plant and is still entitled to the Treaty's protections in the NIFA litigations, which are in regard to that investment. See below at paras. 147-165.

¹⁰⁶ Third Canan Witness Statement at para. 10.

¹⁰⁷ Flores Expert Report, p. 12 (confirming that MSDIA has a valid operating permit from the Superintendency of Companies). See also, Exhibit C-272, Certificate of the Commercial Register of Quito of 29 May 2014.

¹⁰⁸ Flores Expert Report, p. 12 ("To sell its products, the MSDIA branch had to obtain permits from the sanitation department for each product. It currently has 63 valid sanitation permits, as can be seen in the attached list showing the product name, registration number and date of issuance"). See also, Exhibit C-276, List of Sanitation Permits of MSDIA in Ecuador.

b) MSDIA's Assets in Ecuador Are Used in an Ongoing Domestic Pharmaceutical Business, Not in Simple Cross-Border Trading Transactions

137. Ecuador does not deny that MSDIA owns assets in Ecuador that are expressly listed within the definition of investment in Article I(1)(a).

138. Ecuador argues, however, that MSDIA's assets are used solely in "cross-border trading" activities and therefore are not protected investments.¹⁰⁹ This is wrong.

139. MSDIA's branch was established *in Ecuador* to have a permanent local presence *in Ecuador*, to market, sell, and distribute pharmaceutical products to *Ecuadorian* purchasers *in Ecuador*. Simply put, MSDIA's Ecuadorian branch operates a domestic pharmaceutical business. The rule that excludes claims to money arising solely from cross-border trade transactions does not apply to the assets of MSDIA's Ecuadorian branch.

140. If MSDIA had wanted to engage in cross-border sales of its products into Ecuador, it would not have needed to establish a local branch or to comply with the requirements of Ecuadorian law for establishing a local presence. Rather, MSDIA could have sold its products into Ecuador from an overseas entity.

141. MSDIA chose instead to build a local business in Ecuador. It established a branch under Ecuadorian law, contributing capital, appointing a local representative, and obtaining an operating license from the Superintendency of Companies. MSDIA's branch established permanent facilities, hired a workforce of more than 100 employees, invested in warehouse space, computers, office equipment, and other assets to run its business, bought inventory, and undertook to comply with Ecuadorian laws and regulations for companies that are operating domestically.

142. Thus, MSDIA's business in Ecuador is readily distinguishable from the cases in which tribunals have held that rights arising solely from cross-border trade transactions are excluded from the protection of bilateral investment treaties.

143. In each of the cases in which tribunals have invoked this rule, the transactions at issue involved a seller in one jurisdiction undertaking to deliver goods or perform a contract in another jurisdiction. In each of these cases, the investor had no permanent presence in the host state, but sought to rely on commercial transactions initiated from its home state for the movement of goods or capital into the host state.

144. Specifically, tribunals have invoked the rule excluding simple cross-border trade transactions from the protection of investment treaties in the following circumstances:

- ***A one-off, cross-border commercial sales transaction pursuant to which a claimant in the home state undertook to deliver wheat against a price to be paid by parties in the respondent state:*** In *Romak v. Uzbekistan*, the tribunal indicated that it would be willing to find that "[a]ny dedication of resources that has economic value, whether in

¹⁰⁹ Ecuador's Counter-Memorial, at para. 168.

the form of financial obligations, services, technology, patents or technical assistance” was a “contribution” to the respondent state and signified the existence of an investment.¹¹⁰ However, the claimant in *Romak* had made no contribution whatsoever in “cash, kind or labor” in furtherance of a venture inside the territory of Uzbekistan,¹¹¹ and instead had simply made a cross-border “transfer of title over goods in exchange for full payment.”¹¹² Such a transaction did not amount to an investment under the Switzerland-Uzbekistan BIT.

- ***An unsuccessful attempt by a company with no property, presence or employees in the respondent state to obtain generic drug approval in the respondent state and then export drugs to customers there:*** In *Apotex v. USA*, the tribunal analyzed the location and nature of the property and activities relied on by the claimant.¹¹³ It found that the claimant conducted no business inside the United States and noted that, “Apotex has not claimed to have an equity or debt interest in any U.S. company . . . to have purchased property or to have built facilities or to have hired a workforce in the U.S. . . . [or] to reside or have a place of business in the United States.”¹¹⁴ A purely Canadian business with no assets or activities inside the U.S. that hoped to engage in trade with parties in the U.S. could not be considered an investment in the U.S. for purposes of NAFTA.
- ***Sale of equipment by a party in the home state pursuant to a one-off cross-border sales contract:*** In *Joy Mining Machinery v. Egypt* the tribunal held that a one-off cross-border sales contract providing for delivery of goods from the investor in the home state to a buyer in the host state was not an investment.¹¹⁵ The tribunal analysed the underlying sales contract as a whole and determined that the fact that the sale of complex equipment involved “additional activities . . ., such as . . . stocking of spare parts . . . and incidental services such as supervision of installation” did not transform the sales contract into an investment.¹¹⁶
- ***A distribution agreement with a distributor in the host state:*** In *Grand River Enterprises v. USA*, the tribunal found that a claimant who did not itself sell any products, maintain any place of business, employ anyone or own any property in the respondent state,¹¹⁷ but merely appointed a separate company to distribute the claimant’s products in the host state did not have an “enterprise” in the U.S.

¹¹⁰ See Exhibit RLM-54, *Romak S.A. v. The Republic of Uzbekistan*, PCA Case No. AA280, UNCITRAL, Award (26 Nov. 2009), at para. 214.

¹¹¹ *Id.*

¹¹² *Id.* at para. 242.

¹¹³ Exhibit RLA-122, *Apotex Inc. v. The Government of the United States of America*, UNCITRAL (NAFTA), Award on Jurisdiction and Admissibility (14 June 2013) at paras. 165, 167

¹¹⁴ Exhibit RLA-122, *Apotex Inc. v. The Government of the United States of America*, UNCITRAL (NAFTA), Award on Jurisdiction and Admissibility (14 June 2013) at paras. 165, 167.

¹¹⁵ Exhibit RLA-66, *Joy Mining Machinery v. Egypt*, ICSID Case No. ARB/03/11, Award on Jurisdiction (6 Aug. 2004), at para. 55.

¹¹⁶ Exhibit RLA-66, *Joy Mining Machinery v. Egypt*, ICSID Case No. ARB/03/11, Award on Jurisdiction (6 Aug. 2004), at para. 55.

¹¹⁷ Exhibit RLA-103, *Grand River Enterprises Six Nations, Ltd., et al. v. United States of America*, UNCITRAL, Award (12 Jan. 2011), at para. 94.

Moreover, because the claimant's business and all of its assets were outside of the U.S., there was no investment in the U.S.¹¹⁸

145. MSDIA's branch in Ecuador bears no resemblance to these cases. Unlike the claimants in these cases, MSDIA's branch sells products and conducts business from *within* the respondent State. Unlike the claimants in those cases, MSDIA's Ecuadorian branch has permanent facilities, nearly 100 employees, inventory, accounts receivable, computers, office equipment, and other assets *within Ecuador* that are used to conduct an ongoing business *in Ecuador*. It is also subject to the respondent state's regulatory requirements for businesses engaged in ongoing commerce *inside* its territory, unlike the claimants in those cases.¹¹⁹ As MSDIA is not engaged solely in cross-border trade, it follows that, unlike the claimants in those cases, its assets and activities inside the respondent state are not simply ancillary to cross-border trade.¹²⁰

* * * * *

146. In conclusion, MSDIA has sold its pharmaceutical products in Ecuador for the last four decades through an Ecuadorian branch, with local premises, local employees, local equipment, and a local distribution network, all the while paying local taxes and being subject to local litigation and regulatory risks. MSDIA's branch, and the assets MSDIA owns in Ecuador, which it uses to operate that business, clearly qualify as an investment in Ecuador under the broad definition in Article I(1)(a) of the Treaty.

3. MSDIA's Chillos Valley Plant is an Investment, the Disposal of Which Is Covered by the Treaty

147. Even if (contrary to fact) MSDIA's branch and the assets it owns in Ecuador were not investments within the meaning of the Treaty, this Tribunal would still have jurisdiction over

¹¹⁸ Exhibit RLA-103, *Grand River Enterprises Six Nations, Ltd., et al. v. United States of America*, UNCITRAL, Award (12 Jan. 2011), at paras. 90, 106, 122.

¹¹⁹ See Exhibit RLA-103, *Grand River Enterprises Six Nations, Ltd., et al. v. United States of America*, UNCITRAL, Award (12 Jan. 2011), at para. 88 ("a salient characteristic of an investment covered by the protection of NAFTA Chapter Eleven would be that the investment is primarily regulated by the law of a state other than the state of the investor's nationality, and that this law is created and applied by that state which is not the state of the investor's nationality"). See Flores Expert Report, at pp. 11-12 (confirming that MSDIA conducts ongoing commercial operations pursuant to a license from the Superintendent of Companies and sells its products pursuant to permits from Ecuador's Department of Health); Exhibit C-272, Certificate of the Commercial Register of Quito of 29 May 2014; Exhibit C-276, List of Sanitation Permits of MSDIA in Ecuador. Ecuador acknowledges that MSDIA "would never have incurred these expenses" in order "to obtain and maintain various registrations and marketing authorizations [and] to maintain regulatory compliance" if it had not "been required to do so under Ecuadorian regulatory requirements." Ecuador's Counter-Memorial, at para. 169.

¹²⁰ See Ecuador's Counter-Memorial, at para. 168. According to the cases on which Ecuador relies, the type of assets and activities that are ancillary to cross-border trade include: (1) activities relating to the installation or maintenance of an exported product (see Exhibit RLA-66, *Joy Mining Machinery v. Egypt*, ICSID Case No. ARB/03/11, Award on Jurisdiction (6 Aug. 2004), at para. 55); (2) efforts and expenditures made outside of the respondent state to obtain licenses necessary for engaging in cross-border trade (see Exhibit RLA-122, *Apotex Inc. v. The Government of the United States of America*, UNCITRAL, Award on Jurisdiction and Admissibility (14 Jun. 2013), para. 236); or (3) arms-length arrangements with distributors of exported products (see Exhibit RLA-103, *Grand River Enterprises Six Nations, Ltd., et al. v. United States of America*, UNCITRAL, Award (12 Jan. 2011), at paras. 90, 106, 122).

MSDIA’s claims in this arbitration, because those claims relate to MSDIA’s disposal of its Chillos Valley plant, which Ecuador concedes was an investment.¹²¹

148. As demonstrated in MSDIA’s Memorial, the Treaty is intended to protect an investment throughout its lifespan, from its establishment to its disposal.¹²² The tribunal in *Chevron I* held:

“[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.***”¹²³

149. Prior cases confirm that the protections of the Treaty extend throughout litigation relating to the disposal of an investment.¹²⁴

150. Ecuador argues that the *NIFA v. MSDIA* litigation has “nothing to do with the disposal of the Plant as effectuated by Merck.”¹²⁵ Ecuador argues instead that the litigation arose from NIFA’s complaint that MSDIA “had engaged in a violation of competition rules by never intending to sell the plant to it.”¹²⁶ Ecuador’s argument makes no sense. NIFA argued that MSDIA had violated antitrust law by refusing to sell the plant to NIFA. As Ecuador’s own courts held, the *NIFA v. MSDIA* litigation “had as its origin the ***failed purchase and sale of an industrial plant.***”¹²⁷

151. Ecuador also argues that the lifespan theory applies only to specific categories of claims that are not at issue in this case. Ecuador’s argument adopts an overly-restrictive interpretation of the relevant cases and is inconsistent with the reasoning in those decisions.

a) The *NIFA v. MSDIA* Litigation Relates to MSDIA’s Disposal of the Chillos Valley Plant

¹²¹ 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); Ecuador’s Counter-Memorial, at para. 180 (referring to the plant as “an investment [that] has already been disposed of” and as “Merck’s former investment”).

¹²² See MSDIA’s Memorial, at paras. 221-224.

¹²³ 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

¹²⁴ *Id.* citing 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 (“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”); 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 (“[t]here is no reason in the wording” of the U.S.-Ecuador 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”).

¹²⁵ See Ecuador’s Counter-Memorial, at para. 176.

¹²⁶ See Ecuador’s Counter-Memorial, at para. 176.

¹²⁷ Exhibit C-203, NCJ Judgment, *NIFA v. MSDIA*, dated 21 September 2012, at 21.

152. Ecuador argues that the *NIFA v. MSDIA* litigation does not relate to MSDIA's disposal of the Chillos Valley plant.¹²⁸ This is inconsistent with the record of that litigation.

153. The issue in the *NIFA v. MSDIA* litigation was whether MSDIA had violated Ecuadorian law by selling its pharmaceutical plant to another Ecuadorian buyer instead of NIFA. All of the factual issues in the litigation related to the negotiations between MSDIA and NIFA regarding the sale of the plant, and the circumstances surrounding the ultimate sale of the plant by MSDIA to another buyer. If not for MSDIA's disposal of its plant, there never could have been a litigation between NIFA and MSDIA.

154. Ecuador argues that the specific allegations at issue in the case related to alleged anticompetitive behavior and not to MSDIA's right to dispose of the investment. That is both wrong and irrelevant.

155. NIFA's allegations related to alleged anticompetitive conduct *in the sale of the plant*. Specifically, as discussed above, NIFA's antitrust theory was premised on the assertion that MSDIA's sale of the plant to another buyer rather than NIFA caused harm to NIFA because the plant was an essential facility without which NIFA could not expand its business.¹²⁹ Thus, the litigation was about the terms on which MSDIA could dispose of its investment, and the terms on which it could refuse to dispose of its investment. And NIFA's damages claim, and the damages awards of all three courts that have ruled on it, is based entirely on profits it would have made if MSDIA had sold the plant to it rather than to a different Ecuadorian entity.

156. Indeed, Ecuador's own courts have held that the case was about MSDIA's disposal of its investment. Specifically, the NCJ concluded that the *NIFA v. MSDIA* litigation "had as its origin the *failed purchase and sale of an industrial plant*."¹³⁰ That characterization, based on the NCJ's review of the court of appeals' decision and the parties' cassation petitions, was obviously right.

b) The Lifespan Theory of Investment Applies to MSDIA's Rights in Connection with the *NIFA v. MSDIA* Litigation

157. Ecuador argues that investments are only protected throughout their lifespans in certain narrow categories of cases, specifically: "(a) ongoing [contractual] claims for money . . . (b) claims to money for breach and wrongful interference with a contract . . . and (c) litigation [involving] the investor's activities under its original investment."¹³¹ Ecuador argues that because the *NIFA v. MSDIA* litigation does not involve claims that fall into any of these categories, MSDIA therefore has no continuing interest in its investment that is protected by the Treaty.¹³²

158. However, nothing in the cases establishing that an investment is protected throughout its lifetime, including through its disposal, suggests that litigation involving an investment should be

¹²⁸ See Ecuador's Counter-Memorial, at para. 176.

¹²⁹ See above at paras. 2-6.

¹³⁰ Exhibit C-203, NCJ Judgment, *NIFA v. MSDIA*, dated 21 September 2012, at 21.

¹³¹ See Ecuador's Counter-Memorial, at para. 176 (internal citations omitted).

¹³² See Ecuador's Counter-Memorial, at para. 178.

denied treaty protection unless it falls into one of those narrow categories. Ecuador is reading into those cases restrictions that are simply not there.

159. As the *Chevron II* Tribunal held:

“There is no reason in the wording of [the U.S.-Ecuador] 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*.”¹³³

160. Thus, the only limitation on the Treaty’s protections regarding litigation involving a foreign investor is that the litigation must be “in regard to” an investment.

161. Indeed, in each of the cases establishing that an investment is protected throughout its lifetime, it was the fact that litigation was ongoing with regard to an investment that the investor no longer owned, not the nature of the claims in the litigation, that made the litigation about the disposal of an investment and thus protected under the treaty.¹³⁴ The tribunal in *Chevron I* summarized its findings as to why litigation was protected under the treaty, even though the investor no longer owned the original investment, as follows:

“The Claimants’ investments were largely liquidated when they transferred their ownership in the concession to PetroEcuador and upon the conclusion of various Settlement Agreements with Ecuador. Yet, those investments were and are not yet fully 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.***”¹³⁵

¹³³ 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).

¹³⁴ Exhibit CLM-44, *Chevron Corporation (U.S.A.) and Texaco Petroleum Corporation (U.S.A.) v. Republic of Ecuador [I]*, PCA Case No. AA 277, Interim Award (1 December 2008), at para. 185; Exhibit CLM-108, *Chevron Corporation and Texaco Petroleum Company v. The Republic of Ecuador (II)*, PCA Case No. 2009-21, Third Interim Award on Jurisdiction and Admissibility (27 February 2012), at para. 4.13; Exhibit RLM-41, *Mondev International Ltd. v. United States of America*, ICSID Case No. ARB (AF)/99/2, Award (11 October 2002), at para. 77.

¹³⁵ Exhibit CLM-44, *Chevron Corporation (U.S.A.) and Texaco Petroleum Corporation (U.S.A.) v. Republic of Ecuador [I]*, PCA Case No. AA 277, Interim Award (1 December 2008), at para. 185 (emphasis added).

162. The situation here is no different. MSDIA continues to have a protected interest in its Chillos Valley plant until the end of all lawsuits regarding that plant, regardless of the nature of the claims asserted or rights sought to be enforced with regard to the plant. As the *NIFA v. MSDIA* litigation is plainly “in regard to” MSDIA’s investment in the plant, Ecuador owes MSDIA the protections of the Treaty in connection with that litigation until its end.

163. Ecuador suggests that the disposal of an investment should only receive treaty protection “where an investor had an investment expropriated or destroyed by a respondent state,”¹³⁶ and not if the investor disposed of its investment itself before the litigation concerning that investment arose. Ecuador’s argument relies on a mistaken interpretation of “the concerns motivating the original articulation in *Mondev* of the ‘lifespan’ theory.”¹³⁷

164. *Mondev* actually stands for the proposition that treaty protection extends to “the establishment, acquisition, expansion, management, conduct, operation, and ***sale or other disposition of investments***.”¹³⁸ As the tribunal in *GEA Group Aktiengesellschaft v. Ukraine* explained, the absence of a “requirement of ownership or control of the investment at the time of registration of the Request” ensures that claims made “in respect of the divestment ***or*** expropriation of an investment” both receive treaty protection.¹³⁹ Because the *NIFA v. MSDIA* litigation relates to MSDIA’s disposal or “divestment” of the Chillos Valley plant, the Treaty’s protections extend to that litigation.

165. In conclusion, nothing limits the lifespan theory to the narrow categories of litigation suggested by Ecuador. Rather, that theory establishes that an investor continues to have protected treaty rights through the end of the life of its investment. If an investor disposes of an investment, but there are ongoing litigation proceedings relating to the investment, the state owes the investor the continuing protections of the treaty through the end of those litigation proceedings. The *NIFA v. MSDIA* litigation relates to MSDIA’s disposal of the Chillos Valley plant – which Ecuador concedes was a covered investment – and MSDIA continues to benefit from the protections of the Treaty throughout that litigation.

C. *MSDIA’s Consent to UNCITRAL Arbitration Created a Valid Arbitration Agreement Under Which This Tribunal Has Jurisdiction*

166. Ecuador also asserts that this Tribunal lacks jurisdiction because MSDIA chose to initiate this arbitration under the UNCITRAL Rules rather than in ICSID. MSDIA did so, of course, only because Ecuador denounced the ICSID Convention.

¹³⁶ See Ecuador’s Counter-Memorial, at para. 179.

¹³⁷ *Id.* In *Mondev*, the investor’s business had already failed at the time the litigation underlying the investment dispute began. Its claims were for violation of the minimum standard of treatment under NAFTA Article 1105; there was no claim that the state had expropriated or destroyed the investment. See Exhibit RLM-41, *Mondev International Ltd. v. United States of America*, ICSID Case No. ARB (AF)/99/2, Award, (11 October 2002), at para. 77.

¹³⁸ Exhibit RLM-41, *Mondev International Ltd. v. United States of America*, ICSID Case No. ARB (AF)/99/2, Award, (11 October 2002), at para. 81.

¹³⁹ Exhibit CLM-126, *GEA Group Aktiengesellschaft v. Ukraine*, ICSID Case No. ARB/08/16, Award, dated 31 March 2011, at para. 124.

167. Notably, Ecuador has argued elsewhere that by virtue of its withdrawal from ICSID it is not subject to the jurisdiction of ICSID tribunals.¹⁴⁰ And it has *not* said that it would consent to the jurisdiction of this Tribunal if it had been constituted under the ICSID Rules. Rather, Ecuador essentially acknowledges that its position if accepted would deprive MSDIA of any forum in which to assert its claims.¹⁴¹ As discussed below, Ecuador’s effort to renege on its promise to arbitrate disputes with U.S. investors finds no support in either the law or the facts.

168. Ecuador discloses in a footnote of its Counter-Memorial that another arbitral tribunal has recently considered and rejected the same jurisdictional objection that Ecuador makes here.¹⁴² In *Murphy Exploration & Production Company – International v. Republic of Ecuador*, the claimant initially brought an ICSID arbitration, which the tribunal dismissed for lack of jurisdiction in 2010 because the claimant had not complied with the six-month cooling-off period under Article VI(3) of the Treaty. After curing that non-compliance, the investor attempted to resubmit its claims to ICSID in 2011. In the meantime, Ecuador had denounced the ICSID Convention, and Ecuador argued that it was not subject to the jurisdiction of a new ICSID tribunal.¹⁴³

169. The claimant then withdrew its ICSID claim and initiated UNCITRAL arbitration instead. Ecuador objected to the jurisdiction of the UNCITRAL tribunal, arguing that the claimant’s consent to ICSID arbitration was exclusive and irrevocable, and that the claimant could not subsequently consent to UNCITRAL arbitration.¹⁴⁴

170. The tribunal in that case rejected Ecuador’s jurisdictional objections and allowed the UNCITRAL arbitration to proceed on the merits. According to the majority, “any interpretation leaving Murphy without access to international arbitration would be ‘manifestly absurd and unreasonable.’”¹⁴⁵

¹⁴⁰ See Exhibit CLM-253, *Murphy Exploration & Production Company – International v. Republic of Ecuador* (UNCITRAL, PCA Case No. AA434), Partial Award on Jurisdiction (13 November 2013), para. 164 (indicating that Ecuador relied on its denunciation of the ICSID Convention in objecting to jurisdiction with respect to an ICSID claim filed after that denunciation).

¹⁴¹ Ecuador’s Counter-Memorial para. 85 (“Having first chosen arbitration under the auspices of the ICSID Convention, [MSDIA] has to live with that choice, however that choice plays out; it may not choose later to consent to arbitration under the UNCITRAL Rules”). See also Exhibit CLM-253, *Murphy Exploration & Production Company – International v. Republic of Ecuador* (UNCITRAL, PCA Case No. AA434), Partial Award on Jurisdiction (13 November 2013), at paras. 196-197 (indicating that Ecuador was aware that, under the circumstances of the case, Ecuador’s “interpretation of Article VI(3)(a)” – which was the same as it is in this case – “entirely forecloses Claimant’s access to international arbitration”).

¹⁴² Ecuador’s Counter-Memorial note 218. See Exhibit CLM-253, *Murphy Exploration & Production Company – International v. Republic of Ecuador* (UNCITRAL, PCA Case No. AA434), Partial Award on Jurisdiction (13 November 2013), at paras. 18, 163. Ecuador has disclosed the award and dissenting opinion in *Murphy* to MSDIA subject to the understanding that it will be used only for purposes of this arbitration and will not be disclosed to any third party.

¹⁴³ Exhibit CLM-253, *Murphy Exploration & Production Company – International v. Republic of Ecuador* (UNCITRAL, PCA Case No. AA434), Partial Award on Jurisdiction (13 November 2013), at paras. 18, 163-164.

¹⁴⁴ Exhibit CLM-253, *Murphy Exploration & Production Company – International v. Republic of Ecuador* (UNCITRAL, PCA Case No. AA434), Partial Award on Jurisdiction (13 November 2013), at paras. 164-166.

¹⁴⁵ Exhibit CLM-253, *Murphy Exploration & Production Company – International v. Republic of Ecuador* (UNCITRAL, PCA Case No. AA434), Partial Award on Jurisdiction (13 November 2013), at para. 197.

171. Ecuador's effort to evade its obligation to arbitrate was rejected by the *Murphy* tribunal, and it should be rejected here as well. Ecuador does not deny that it freely agreed under the U.S.-Ecuador BIT that it would arbitrate investment disputes with U.S. investors. Ecuador has not suggested that it has suffered any prejudice from MSDIA's decision to initiate UNCITRAL arbitration instead of ICSID arbitration after Ecuador withdrew from the ICSID Convention. In fact, Ecuador has made clear that it prefers UNCITRAL arbitration to ICSID arbitration, which is why it denounced the ICSID Convention. Nor has Ecuador denied that it would have objected to the jurisdiction of an ICSID tribunal if MSDIA had initiated this arbitration under the ICSID Rules.

172. In short, Ecuador's objection is nothing more than an opportunistic effort to terminate valid claims by withdrawing from the ICSID system and thereby avoiding its obligation to arbitrate in any forum, under any rules. The U.S.-Ecuador BIT and international law obviously do not permit that result.

173. In any event, it is clear that MSDIA's consent to UNCITRAL arbitration created a valid arbitration agreement under which this Tribunal has jurisdiction. As discussed below, an investor's consent to a particular arbitral forum does not constitute an exclusive and irrevocable choice under the Treaty. Even if an investor's choice ordinarily did constitute an exclusive and irrevocable choice, MSDIA expressly did not consent to ICSID arbitration on an exclusive basis, thereby leaving it free to consent to UNCITRAL arbitration in its 2011 Notice of Arbitration.

1. Ecuador Consented to Arbitrate Disputes with U.S. Investors

174. Ecuador acknowledges that under the U.S.-Ecuador BIT, it consented to arbitrate disputes with U.S. investors regarding their investments in Ecuador.¹⁴⁶ Indeed, one of the principal objectives of the BIT is to provide investors access to international arbitration to settle investment disputes.¹⁴⁷

175. Articles VI(2) and VI(3) of the Treaty provide:

“2. In the event of an investment dispute, the parties to the dispute should initially seek a resolution through consultation and negotiation. If the dispute cannot be settled amicably, the national or company concerned may choose to submit the dispute, under one of the following alternatives, for resolution:

- (a) to the courts or administrative tribunals of the Party that is a party to the dispute; or
- (b) in accordance with any applicable, previously agreed dispute-settlement procedures; or

¹⁴⁶ Ecuador's Counter-Memorial, at para. 149 (“Article VI of the Treaty holds a general standing offer of Ecuador to settle investment disputes with U.S. investors through several methods of dispute settlement”).

¹⁴⁷ See Exhibit CLM-253, *Murphy Exploration & Production Company – International v. Republic of Ecuador* (UNCITRAL, PCA Case No. AA434), Partial Award on Jurisdiction (13 November 2013), at para. 188 (“One of the objectives of the Treaty is to give the investor access to a meaningful arbitration”).

(c) in accordance with the terms of paragraph 3.

3. (a) Provided that the national or company concerned has not submitted the dispute for resolution under paragraph 2 (a) or (b) and that six months have elapsed from the date on which the dispute arose, the national or company concerned may choose to consent in writing to the submission of the dispute for settlement by binding arbitration:

(i) to the International Centre for the Settlement of Investment Disputes (“Centre”) established by the Convention on the Settlement of Investment Disputes between States and Nationals of other States, done at Washington, March 18, 1965 (“ICSID Convention”), provided that the Party is a party to such Convention; or

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

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

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

(b) Once the national or company concerned has so consented, either party to the dispute may initiate arbitration in accordance with the choice so specified in the consent.”¹⁴⁸

176. Article VI(3) records Ecuador’s consent to resolve investment disputes through arbitration, so long as the investor has not previously submitted the dispute for resolution to national courts or to other agreed dispute settlement procedures and six months have passed since the dispute arose. Article VI(3) also records Ecuador’s agreement that the choice of arbitral forum is left to the investor.

177. Under Article VI(3)(a), Ecuador has made a standing offer to arbitrate under the ICSID Rules, under the ICSID Additional Facility Rules (if the ICSID Rules are not available), under the UNCITRAL Rules, and under any other arbitration rules agreed by the parties. The article imposes no constraints on an investor’s choice among these arbitral forums (other than to limit use of the ICSID Additional Facility Rules to situations where the ICSID Rules are unavailable).

178. Ecuador does not deny that Article VI(3) is a standing offer to settle investment disputes by arbitration. Nor does Ecuador deny that it is bound to arbitrate investment disputes with U.S. investors under the UNCITRAL Rules if the investor has consented to arbitration under the UNCITRAL Rules in accordance with Article VI(3).

179. Ecuador argues, however, that it should not be subjected to the jurisdiction of this Tribunal because MSDIA elected to submit this arbitration to UNCITRAL arbitration instead of ICSID arbitration. Ecuador points to the principle that “no State can, without its consent, be

¹⁴⁸ Exhibit C-1, Ecuador-United States BIT, Arts VI(2) and VI(3).

compelled to submit its disputes ... to arbitration” and the “corollary of that principle, [which] is that a State’s consent to arbitration ‘shall not be presumed in the face of ambiguity.’”¹⁴⁹

180. There is no ambiguity in Ecuador’s consent to settle disputes through arbitration, or in its standing offer to arbitrate in the arbitral forum selected by the investor, as expressed in Article VI(3). Ecuador’s argument that MSDIA submitted its dispute to the wrong forum seeks to evade Ecuador’s fundamental commitment under the Treaty to settle investment disputes in the forum chosen by the investor. Indeed, Ecuador ignores the fundamental rule of customary international law that states must perform their treaty obligations in good faith (*pacta sunt servanda*).¹⁵⁰

181. In any event, as discussed below, Ecuador’s argument is based on a misreading of the Treaty and is wrong as a matter of law.

2. Article VI(3) Does Not Require an Exclusive and Irrevocable Choice of Arbitral Forum

182. Ecuador argues that a sovereign’s consent to arbitration “is an extraordinary concession of sovereignty,”¹⁵¹ and that an investor’s right to consent to an arbitration procedure is “a limited one, and of limited availability” which, once exercised, “becomes exclusive and irrevocable.”¹⁵²

183. There is no canon of construction under international law – not even the discredited canon of restrictive interpretation – that would direct an arbitral tribunal to ignore an affirmative expression of consent to arbitration by a sovereign or to presume that an investor’s right to consent to arbitrate is exclusive or irrevocable.¹⁵³ Instead, the relevant terms of a treaty must be examined according to the customary international law rules of interpretation set forth in the Vienna Convention on the Law of Treaties (“VCLT”).¹⁵⁴

¹⁴⁹ Ecuador’s Counter-Memorial para. 133-134 (quoting Exhibit RLA-6, *Case Concerning Status of Eastern Carelia*, Advisory Opinion, 23 July 1923, PCIJ Series B, No. 5, at p. 27).

¹⁵⁰ See Exhibit CLM-106, VCLT, Article 26. See also Exhibit CLM-274, *Case concerning the Gabčíkovo-Nagymaros Project (Hungary v. Slovakia)*, 1997 ICJ Rep. 67, at para. 110; Exhibit CLM-263, *Texaco Overseas Petroleum Co. (TOPCO) and California Asiatic Oil Co. v. Government of the Libyan Arab Republic*, 17 I.L.M. 1, Award (Jan. 19, 1977), at 23-24 (“a State cannot invoke its sovereignty to disregard commitments freely undertaken through the exercise of this same sovereignty”); Exhibit CLM-113, *Amco Asia Corp. v. Republic of Indonesia*, ICSID Case No. ARB/81/1, Award (Nov. 20, 1984), at para. 248.

¹⁵¹ Ecuador’s Counter-Memorial, at para. 83.

¹⁵² Ecuador’s Counter-Memorial, at para. 84.

¹⁵³ Ecuador argues that, because a sovereign’s consent to arbitration “is an extraordinary concession of sovereignty,” Article VI(3) must be construed narrowly to “afford[] investors one, and only one, choice of arbitral mechanism to which to submit their claims for violations of the Treaty.” *Id.* at paras. 83-84. While Ecuador claims to disavow the “so-called principle of restrictive interpretation in this proceeding,” *Id.* at para. 135, its argument reflects that now discredited canon. See Ratner Expert Report, at para. 12 (attesting that “tribunals have long rejected any presumption that treaties be interpreted so as to impose the least restrictive obligations on the freedom of the state” and citing decisions by the International Court of Justice and investor-state tribunals).

¹⁵⁴ See Ratner Expert Report, at para. 12 (indicating that “treaties are an exercise of the sovereignty of the state and must be interpreted according to the Vienna Convention rules”). Although the VCLT is not in force between Ecuador and the United States, its provisions on interpretation are accepted as being reflective of customary international law. See, e.g., Exhibit CLM-271, *Avena (Mex. v. U.S.)*, 2004 ICJ Rep. 12, 37-28 (31 March 2004), at para.83.

184. Article 31(1) of the VCLT provides that a “treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.”¹⁵⁵ One canon of construction that follows from this rule, and that is widely accepted by international tribunals and is particularly relevant here, is the principle of *effet utile*.¹⁵⁶ That principle means that “treaty clauses must be interpreted to avoid either rendering them superfluous or depriving them of significance for the relationship between the parties.”¹⁵⁷

185. Applying these rules of interpretation, Articles VI(2) and (3) of the Treaty do not set up a so-called “fork-in-the-road” for an investor’s selection of an arbitral forum, as Ecuador asserts.¹⁵⁸ While Articles VI(2) and VI(3) expressly limit an investor to a single, irrevocable choice to submit its dispute to one of three methods of dispute resolution – *i.e.*, local courts, previously agreed dispute resolution procedures, or arbitration – nothing in the Treaty precludes an investor from consenting to arbitration under the rules of more than one arbitral forum.¹⁵⁹

a) The Ordinary Meaning of Article VI(3) Does Not Impose a Fork-in-the-Road Among Arbitral Options

186. Articles VI(2) and VI(3) of the U.S.-Ecuador BIT impose a “fork-in-the-road” for an investor choosing among the three dispute resolution options listed in Article VI(2): local courts, previously agreed dispute resolution procedures, or arbitration.¹⁶⁰ Article VI(3) then lists the available options for an investor should it choose international arbitration: arbitration under the ICSID Rules, arbitration under the ICSID Additional Facility, arbitration under the UNCITRAL rules, and arbitration under any other agreed rules.

187. Ecuador argues that the arbitration options in Article VI(3) are mutually exclusive and irrevocable – that is, like Article VI(2), Article VI(3) operates as a “fork-in-the-road” for an investor choosing among the listed options.¹⁶¹ Specifically, Ecuador claims that the word “or” between the options in each of the paragraphs is disjunctive and thus renders the choice to be made exclusive and irrevocable.¹⁶²

188. As discussed below, the ordinary meaning of the text of Articles VI(2) and VI(3) does not allow for such an interpretation. Article VI(2) contains a fork-in-the-road, directing an investor to choose “one of the following alternatives,” but Article VI(3) does not include that same

¹⁵⁵ Exhibit CLM-106, The Vienna Convention on the Law of International Treaties, Art. 32(1). Article 32 of the VCLT allows for recourse to “supplementary means of interpretation, including preparatory work of the treaty and the circumstances of its conclusion,” in order to confirm the interpretation reached under Article 31, or – as a last resort – to provide an interpretation when the result of an Article 31 analysis leaves the meaning ambiguous or manifestly absurd.

¹⁵⁶ See Ratner Expert Report, at paras. 9-11.

¹⁵⁷ See Ratner Expert Report, at para. 9.

¹⁵⁸ Ecuador’s Counter-Memorial at paras. 90-92.

¹⁵⁹ Ecuador’s interpretation was rejected by the Murphy tribunal. See Exhibit CLM-253, *Murphy Exploration & Production Company – International v. Republic of Ecuador* (UNCITRAL, PCA Case No. AA434), Partial Award on Jurisdiction (13 November 2013).

¹⁶⁰ See Ecuador’s Counter-Memorial, at para. 97. See also, Ratner Expert Report, at para. 14.

¹⁶¹ See Ecuador’s Counter-Memorial, at paras. 98-99.

¹⁶² See Ecuador’s Counter-Memorial, at paras. 99-100.

language. This difference must be interpreted to have effect; it indicates that there is not a second fork-in-the-road in Article VI(3), and that an investor is not precluded from consenting to more than one arbitral forum. This interpretation is confirmed by the award of the tribunal in *Murphy v. Ecuador*, by comparing Articles VI(2) and VI(3) with other treaties, and by considering the ordinary understanding of fork-in-the-road clauses.

(1) The Structure and Language of Article VI(3)

189. Both the structure of Articles VI(2) and VI(3) and the choice of words used in those provisions contradict Ecuador's claim that Article VI(3) constitutes a fork-in-the-road.

190. *First*, the overall structure of Articles VI(2) and VI(3) indicates that the two paragraphs have a legally different character, with Article VI(2) limiting an investor's options in a way that Article VI(3) does not. Professor Steven Ratner describes that structure as a "nested procedure."¹⁶³ Article VI(2) sets up a fork-in-the-road at the point at which an investor submits a dispute to domestic remedies, other agreed procedures, or international arbitration, while Article VI(3) sets out the options if an investor chooses international arbitration.¹⁶⁴

191. As Professor Ratner explains:

"The structure of providing for the option of international arbitration in two paragraphs, rather than one, makes clear that the choices offered to the investor in paragraph 2 have a legally different character from the choices offered the investor in paragraph 3. ***Had the treaty meant for the fork in the road set forth in paragraph 2 to include a further fork among the four options for arbitration listed in paragraph 3, it would have simply listed those four choices along with the first two choices*** (domestic remedies and other agreed procedures), for a total of six "prongs" of the fork (i.e., domestic remedies, other agreed procedures, ICSID, the ICSID Additional Facility, arbitration under UNCITRAL rules, and arbitration under other rules)."¹⁶⁵

192. As discussed below and in Professor Ratner's report, other treaties have adopted that one paragraph approach and thereby applied a fork-in-the-road to all of the listed options.¹⁶⁶ In using a two paragraph approach, the U.S.-Ecuador BIT distinguishes between the choice among dispute resolution options and the choice among international arbitration options, with the fork-in-the-road only applying to the former.

193. *Second*, it is clear from the words used in Articles VI(2) and VI(3) that there is a difference in the nature and consequences of the choices made pursuant to these two paragraphs. Article VI(2) expressly provides that an investor can choose to submit a dispute "under ***one*** of the following alternatives," while Article VI(3) does not contain any language limiting the number of choices an investor may make from among the listed alternatives.¹⁶⁷

¹⁶³ See Ratner Expert Report, at para. 18.

¹⁶⁴ See Ratner Expert Report, at para. 18.

¹⁶⁵ See Ratner Expert Report, at para. 18.

¹⁶⁶ See *below* at paras. 207-208; Ratner Expert Report, at paras. 24-29.

¹⁶⁷ Article VI(3) allows an investor to consent to arbitration only if it "has not submitted the dispute for resolution" to the local courts or to other agreed procedures, thereby confirming that the only irrevocable choice that the

194. As Professor Ratner explains, the difference in language between Articles VI(2) and VI(3) is significant.¹⁶⁸ Reading Article VI(3) to mean that an investor can choose to consent to only one of the four listed arbitral forums would fail to give effect to the different wording of Article VI(2) and would be contrary to the principle of *effet utile*:

“Indeed, to interpret the phrase “one of the following alternatives” in Article VI(2) to mean exactly the same as the mere list of arbitral options in Article VI(3) that does not contain that phrase – *i.e.*, to interpret both paragraphs as creating forks in the road – would be to render that phrase completely superfluous. ***Such an interpretation is, quite simply, forbidden by the principle of the effet utile . . .*** Once the parties inserted the phrase, it must be given an effective meaning, as the International Court of Justice and numerous ad hoc arbitration tribunals have recognized.”¹⁶⁹

195. The use of the word “or” in both Articles VI(2) and VI(3) does not give both articles the effect of a fork-in-the-road, as Ecuador argues. The fork-in-the-road in Article VI(2) derives from the phrase “under one of the following alternatives.” As Professor Ratner explains:

“While the words “or” separating the four arbitral fora under paragraph 3 make clear that each of the four are options for the investor (as opposed to language that would list only one forum), ***the word “or” does not alone mean that they are irrevocable choices in the sense of the three avenues listed in paragraph 2.*** It thus does not follow from the wording that there is no possibility for the investor to choose from a second option under some circumstances.”¹⁷⁰

196. Ecuador’s argument wrongly presumes that the word “or” necessarily has a disjunctive meaning. None of the grammatical authorities relied on by Ecuador support this interpretation.¹⁷¹

197. The *Cambridge Grammar of the English Language*, which Ecuador relies on,¹⁷² indicates that “or” may be either inclusive or exclusive depending on the context. Specifically, it notes that “or doesn’t mean that only one of the alternatives is true” and a disjunction, like ‘or,’ “is perfectly consistent with both component propositions being true.”¹⁷³

198. Likewise, Black’s Law Dictionary, which Ecuador cites, observes that, “[i]n some usages, the word ‘or’ creates a multiple rather than an alternative obligation; where necessary in interpreting an instrument, ‘or’ may be construed to mean ‘and.’”¹⁷⁴

investor must make pursuant to these two paragraphs is among the three dispute resolution methods listed in Article VI(2).

¹⁶⁸ See Ratner Expert Report, at para. 19.

¹⁶⁹ Ratner Expert Report, at para. 22.

¹⁷⁰ See Ratner Expert Report, at para. 19.

¹⁷¹ See Ecuador’s Counter-Memorial at paras. 101-102.

¹⁷² See Ecuador’s Counter-Memorial, at para. 101 (citing Exhibit RLA-77, K. Adams & A. Kaye, Revisiting the Ambiguity of “And” and “Or” in Legal Drafting, 80(4) ST. JOHN’S L. R. 1167, at 1180 (2006), who in turn cite the Cambridge Grammar of the English Language).

¹⁷³ Exhibit CLM-327, R. Huddleston & G. Pullum, CAMBRIDGE GRAMMAR OF THE ENGLISH LANGUAGE. at 1294, (2002).

¹⁷⁴ Exhibit RLA-29, Nolan and Nolan-Haley, eds. BLACK’S LAW DICTIONARY at 1095 *in fine* (6th ed. 1990).

199. Because “or” can have an inclusive or an exclusive meaning, it is important to consider the context in which that word is used.¹⁷⁵ In Article VI(2), the word “or” is used in connection with the phrase “under one of the following alternatives.” The use of the phrase “under one of the following alternatives” suggests that the drafters of the Treaty recognized the ambiguity of the word “or” standing alone and wanted to state expressly that the choice among the three types of dispute resolution (national courts, arbitration, other agreed procedures) in Article VI(2) was exclusive.¹⁷⁶

200. In order to give the phrase “one of the following alternatives” an effective meaning, the list of options in Article VI(2) must mean something different than the list of options in Article VI(3), which does not include that phrase. Given the difference in their wording, it cannot be the case that both articles impose the same kind of fork-in-the-road. Indeed, the inclusion of the phrase in Article VI(2), but not in Article VI(3), suggests that the drafters intended Article VI(2) to require an exclusive choice from among the listed options, but did not intend to impose the same requirement in Article VI(3).

201. Cases interpreting Articles VI(2) and VI(3) of the U.S.-Ecuador BIT confirm this interpretation. While several tribunals have held that the language of Article VI(2) of the BIT imposes a fork-in-the-road between domestic litigation and international arbitration,¹⁷⁷ none have suggested that Article VI(3) imposes a second fork-in-the-road among arbitral options.

202. The tribunal in *Murphy v. Ecuador II* considered exactly this question. The majority of the *Murphy* tribunal (Professors Kaj Hobér and Bernard Hanotiau)¹⁷⁸ rejected the interpretation

¹⁷⁵ Professors Adams and Kaye, whom Ecuador also cites, emphasize the importance of context: “Or introduces alternatives. But . . . authorities on legal drafting have stated that or is ambiguous, in that it can be ‘inclusive,’ meaning A or B, or both, or it can be ‘exclusive,’ meaning A or B, but not both.” They conclude that “[f]or a proper understanding of the ambiguity associated with or, one must explore the different grammatical contexts in which or is used.” Exhibit RLA-77, K. Adams & A. Kaye, *Revisiting the Ambiguity of “And” and “Or” in Legal Drafting*, 80(4) ST. JOHN’S L. R. 1167, at 1180 (2006) (emphasis added).

¹⁷⁶ See below at paras. 222-225 (discussing the U.S. Submittal Letter indicating as much).

¹⁷⁷ See Ratner Expert Report, at para. 23 citing Exhibit CLM-66, *M.C.I. Power Group L.C. and New Turbine, Inc. v. Republic of Ecuador*, ICSID Case No. ARB/03/6, Award, 31 July 2007, para. 181 (“the ‘fork-in-the-road’ rule . . . refers to an option, expressed as a right to choose irrevocably between different jurisdictional systems. Once the choice has been made there is no possibility of resorting to any other option.”) (emphasis added); Exhibit CLM-108 *Chevron Corporation and Texaco Petroleum Company v. Republic of Ecuador*, PCA Case No. 2009-23 (UNCITRAL Rules), Third Interim Award on Jurisdiction and Admissibility, 27 February 2012, para. 4.73 (“The question is whether ‘the dispute’ submitted to this Tribunal has already been submitted to the national courts of Ecuador or New York so as to trigger the fork in the road provision in Article VI(3).”); Exhibit CLM-242, *IBM World Trade Corporation v. República del Ecuador*, ICSID Case No. ARB/02/10, Decisión sobre Jurisdicción y Competencia, 22 December 2003, para. 25 (“Article VI establishes among the alternatives for the resolution of investment disputes that of recourse to the judicial or administrative tribunals of either contracting Party, or recourse to binding arbitration, among other possible choices, to submission to the system administered by ICSID . . .”) (unofficial translation); Exhibit CLM-256 *Occidental Exploration and Production Company v. Republic of Ecuador*, LCIA Case No. UN3467 (UNCITRAL Rules), Final Award, 1 July 2004, para. 50 (tribunal’s finding that investor may sue on different claims in different venues “cannot be taken to mean that the death knell has sounded for the ‘fork in the road’ provisions of bilateral investment treaties . . . because the functions of domestic mechanisms and international arbitration are different”).

¹⁷⁸ While Professor Georges Abi-Saab disagreed with the majority’s construction of Article VI(3), he agreed that *Murphy* had validly consented to UNCITRAL arbitration and that the tribunal had jurisdiction. This is discussed further in Section paras. 279 and 285, below.

of Article VI(3) that Ecuador argues for here, expressly finding that Article VI(3) does not contain a fork-in-the-road.¹⁷⁹

203. The *Murphy* majority considered that the word “or” in Article VI(3) could have an inclusive meaning, and that Ecuador had not met its burden of proving otherwise.¹⁸⁰ It further observed that Article VI(2) explicitly restricts an investor’s choice to “one of the following alternatives,” while Article VI(3) does not include this wording.¹⁸¹

204. This, according to the majority, “enhances the plausibility of assigning a meaning to Article VI(3)(a) under which the ‘or’ is inclusive only.”¹⁸² They concluded that, while Article VI(2) operates as a fork-in-the-road, Article VI(3) does not,¹⁸³ reasoning:

“[T]he effet utile principle dictates a textual interpretation of the BIT under which the word ‘or’ in both Articles VI(2) and VI(3)(a) denotes inclusiveness, and the phrase ‘under one of the following alternatives’ in Article VI(2) is not superfluous to the text. Rather, the phrase is necessary to establish a restrictive definition.”¹⁸⁴

205. Thus, based on the principle of *effet utile*, the *Murphy* tribunal rejected the argument that Ecuador makes here and refused to find that Article VI(3) of the BIT imposes a fork-in-the-road among arbitral options.

206. In conclusion, the structure and text of Articles VI(2) and VI(3) establish that: Article VI(2) requires an investor to make an exclusive choice among domestic litigation, international arbitration, or other agreed procedures, while Article VI(3) lists the options for the investor should it choose international arbitration but does not limit the investor’s ability to choose more than one of those options. In other words, according to the ordinary meaning of their terms, Article VI(2) establishes a fork-in-the-road, but Article VI(3) does not.¹⁸⁵

(2) The Language of Other Treaties Confirms that Article VI(3) Does Not Impose a Fork-in-the-Road

207. Other treaties that place limits on both the investor’s choice of dispute settlement (between domestic litigation and international arbitration) and the investor’s choice of arbitral forum confirm that when States want to impose such limits, they do so expressly. For example, the Italy-Lebanon BIT provides, after listing three arbitral options, that “[t]he choice made as per subparagraphs a, b, and c herein above is final.”¹⁸⁶ The Canada-Venezuela BIT¹⁸⁷ and the

¹⁷⁹ See Exhibit CLM-253 *Murphy Exploration & Production Company – International v. Republic of Ecuador* (UNCITRAL, PCA Case No. AA434), Partial Award on Jurisdiction (13 November 2013),

¹⁸⁰ *Id.* at para. 172.

¹⁸¹ *Id.* at para. 178.

¹⁸² *Id.*

¹⁸³ *Id.* at paras. 173, 178.

¹⁸⁴ *Id.* at para. 179.

¹⁸⁵ See Ratner Expert Report, at para. 6.

¹⁸⁶ Article 7.2 of the Italy-Lebanon BIT provides:

“If these consultations do not result in a solution within six months from the date of written request for settlement, the investor may submit the dispute, at his choice, for settlement to:

(a) the competent court of the Contracting Party in the territory of which the investment has been made; or

Germany-Poland BIT¹⁸⁸ use different structures and language, but both also impose express limitations on the menu of arbitration options available to the investor.

208. As Professor Ratner explains, “[a]ll these treaties make clear that when states want to constrain the investor beyond the fork in the road between domestic remedies and international dispute settlement, they are capable of doing so through the words of the treaty.”¹⁸⁹

(3) The Ordinary Understanding of Fork-in-the-Road Provisions Confirms that Article VI(3) Does Not Impose a Fork-in-the-Road

209. Fork-in-the-road provisions are ordinarily understood by arbitral tribunals to impose an irrevocable choice between domestic remedies and international arbitration.¹⁹⁰ Numerous arbitral decisions refer to fork-in-the-road clauses – including clauses similar to Article VI of the U.S.-Ecuador BIT – as clauses that offer such a choice.¹⁹¹ Arbitral decisions do not generally regard

(b) the International Center for the Settlement of Investment Disputes (ICSID) . . . in case both Contracting Parties have become members of this Convention; or
(c) an ad hoc tribunal which, unless otherwise agreed by the Parties to the dispute, shall be established under the arbitration rules of the United Nations Commission of International Trade Law (UNCITRAL).

The choice made as per subparagraphs a, b, and c herein above is final.”

Agreement between the Italian Republic and the Lebanese Republic on the Promotion and Reciprocal Protection of Investments, Article 7.2, *quoted* in Exhibit CLM-64, *Toto Costruzioni Generali S.P.A v. Republic of Lebanon*, ICSID Case No. ARB/07/12, Decision on Jurisdiction, 11 September 2009, at para. 203.

¹⁸⁷ After Article XXII(2)Article XII(4) of the Canada-Venezuela BIT provides:

“The dispute may, by the investor concerned, be submitted to arbitration under:

- a. The International Centre for the Settlement of Investment Disputes (ICSID) . . . provided that both the disputing Contracting Party and the Contracting Party of the investor are parties to the ICSID Convention; or
- b. the Additional Facility Rules of ICSID, provided that either the disputing Contracting Party or the Contracting Party of the investor, but not both, is a party to the ICSID Convention; or

In case neither of the procedures mentioned above is available, the investor may submit the dispute to an international arbitrator or ad hoc arbitration tribunal established under the Arbitration Rules of the United Nations Commission on International Trade Law (UNCITRAL).”

Exhibit-CLM-286, Agreement Between the Government of Canada and the Government of the Republic of Venezuela for the Promotion and Protection of Investments, Article XII(4), *available* at www.investmentpolicyhub.unctadxi.org.

¹⁸⁸ After providing for a procedure for non-ICSID, ad hoc arbitration in paragraph 10(3)-(5), paragraph 10(6) of the Germany-Poland BIT provides:

“If both Contracting Parties are members of the Convention of 18 March 1965 on the settlement of investment disputes between states and nationals of other states the arbitral tribunal provided for above may in consideration of the provisions of paragraph 1 of Article 27 of the said Convention not be appealed to in so far as agreement has been reached between the investor of one Contracting Party and the other Contracting Party under Article 25 of the Convention. This shall not affect the possibility of appealing to such arbitral tribunal in the event that a decision of the Arbitral Tribunal established under the said Convention is not complied with (Article 27) or in the case of an assignment under a law or pursuant to a legal transaction as provided for in Article 6 of the present Treaty.”

Exhibit-CLM-288, Germany-Poland Treaty Concerning the Encouragement and Reciprocal Protection of Investments of 10 November 1989, Article 10(6).

¹⁸⁹ Ratner Expert Report, at para. 29.

¹⁹⁰ *See* Ratner Expert Report, at para. 31.

¹⁹¹ *Id.*

fork-in-the-road clauses as requiring the investor to make an irrevocable choice between different arbitration venues.¹⁹²

210. Where the existence of a fork-in-the-road is not clearly established through the words or structure used in the text of the treaty, tribunals have declined to imply one to limit an investor's options.¹⁹³ Thus, for example, the tribunal in *SGS v. Pakistan* contrasted explicit fork-in-the-road clauses in the France-Argentina BIT and NAFTA with the absence of such a clause in the Switzerland-Pakistan BIT, and refused to imply a fork-in-road clause in the latter BIT.¹⁹⁴

211. Commentators likewise generally understand fork-in-the-road clauses as requiring a choice between domestic remedies, on the one hand, and international arbitration, on the other hand, absent express language or a structure indicating the contrary.¹⁹⁵ For example, Christoph Schreuer, a leading expert on the ICSID Convention, writes:

“A typical clause provides that the investor must choose between the litigation of its claims in the host State's domestic courts or international arbitration and that, once made,

¹⁹² See *Id.* (citing Exhibit RLA-52, *Compañia de Aguas del Aconquija S.A. and Vivendi Universal v. Argentine Republic*, ICSID Case No. ARB/97/3, Decision on Annulment, 3 July 2002, at para. 54 (accepting tribunal's view that the fork in the Argentina-United States BIT is between domestic and international fora), though later annulling the decision regarding whether the claimant had taken the domestic prong); Exhibit CLM-238, *CMS Gas Transmission Company v. Republic of Argentina*, ICSID Case No. ARB/01/8, Decision of the Tribunal on Objections to Jurisdiction, 17 July 2003, at para. 80 (noting that contractual claims are different from treaty claims and “this view applies to the instant dispute, since no submission has been made by CMS to local courts and since, even if TGN had done so . . . this would not result in triggering the ‘fork in the road’ provision against CMS”). But see Exhibit CLM-64, *Toto Costruzioni Generali S.P.A v. Republic of Lebanon*, ICSID Case No. ARB/07/12, Decision on Jurisdiction, 11 September 2009 (holding that the treaty explicitly required a irrevocable choice of arbitral forum within the fork in the road clause itself).

¹⁹³ See Ratner Expert Report, at para. 32.

¹⁹⁴ See Exhibit CLM-261, *SGS Société Générale de Surveillance v. Islamic Republic of Pakistan*, ICSID Case No. ARB/01/13, Decision of the Tribunal on Objections to Jurisdiction, 6 August 2003, para. 176. See also, Exhibit CLM-234, *Camuzzi International S.A. v. Argentine Republic*, ICSID Case No. ARB/03/2, Decision on Objections to Jurisdiction, 11 May 2005, at para. 117 (noting that Belgo/Luxembourg- Argentina BIT does not contain fork in the road clause and thereby claimant may submit claim to domestic courts first).

¹⁹⁵ See Ratner Expert Report, at para. 33 (citing Exhibit CLM-299, Rudolf Dolzer and Christoph Schreuer, *PRINCIPLES OF INTERNATIONAL INVESTMENT LAW* (2d ed. 2012) at 267- 268; Exhibit CLM-369, Christoph Schreuer, *Travelling the BIT Route: Of Waiting Periods, Umbrella Clauses and Forks in the Road*, 5 *JOURNAL OF WORLD INVESTMENT & TRADE* 231 (2004), at 239-40; Exhibit CLM-325, Jacomijn J. van Haersolte-van Hof and Anne K. Hoffman, *The Relationship Between International Tribunals and Domestic Courts*, in Peter Muchlinski et al. eds., *THE OXFORD HANDBOOK OF INTERNATIONAL INVESTMENT LAW* (2008), at 962, 998; Exhibit CLM-366, Gabrielle Kaufmann-Kohler et al., *Consolidation of Proceedings in Investment Arbitration: How Can Multiple Proceedings Arising from the Same or Related Situations Be Handled Efficiently?*, 21 *ICSID REVIEW* 59, 67 (2006); Exhibit CLM-361, Lucy Reed et al., *GUIDE TO ICSID ARBITRATION* (2d ed. 2011), at 100.). As discussed below, Ecuador points to the observation by the commentators Professor Reinisch and Loretta Malintoppi that Article 24(3) of the 2004 U.S. Model BIT requires choice between arbitral options that is “to the exclusion of any other.” See Ecuador's Counter-Memorial, at para. 120-121 (referring to Exhibit RLA-81, A. Reinisch & L. Malintoppi, *Methods of Dispute Resolution*, in *THE OXFORD HANDBOOK OF INTERNATIONAL INVESTMENT LAW* 691 (Muchlinski et al., eds., 2008), pp. 692-93. However, as Professor Ratner observes, these commentators do not refer to this remedies clause as a fork-in-the-road clause. Ratner Expert Report, at para. 24.

the choice is final. . . . *This type of clause is often referred to as a ‘fork in the road’ provision.*”¹⁹⁶

212. In his academic writings, Ecuador’s expert, Professor Vandeveldel, describes typical fork-in-the-road provisions as requiring an irrevocable choice between domestic courts and international arbitration, and not in terms of an irrevocable choice between arbitral options. For example, in his treatise on bilateral investment treaties, Professor Vandeveldel writes:

“[An] election-of-remedies clause, whereby an investor who submits a dispute to *some form of dispute resolution other than investor-state arbitration* may not later submit the same dispute to investor-state arbitration, has become known colloquially as the *‘fork in the road clause.’*”¹⁹⁷

213. The uniform understanding by scholars of the scope of a typical fork-in-the-road clause as requiring a choice between domestic and international remedies further confirms the ordinary meaning of Articles VI(2) and VI(3) as not containing an additional “fork within a fork.”¹⁹⁸ As Professor Ratner explains, although states may draft treaties to provide a fork between different arbitral options, “the presumption absent clear textual proof is that a fork in the road clause is limited to an irrevocable choice between domestic remedies and international arbitration (and, if also in the relevant treaty, other agreed mechanisms).”¹⁹⁹

(4) Ecuador’s Arguments Regarding the 1992 Model BIT and the U.S. Submittal Letter Are Contrary to Accepted Principles of Treaty Interpretation

214. Ecuador tries to find support for its interpretation of Article VI(3) in the 1992 U.S. Model BIT and in the U.S. submittal letter which was sent to the U.S. Senate together with the U.S.-Ecuador BIT. Ecuador’s arguments misread those sources and are contrary to the principles of treaty interpretation set out in the VCLT.

215. Ecuador first points out that although the 1992 U.S. Model BIT does not contain the phrase “under one of the following alternatives” in Article VI(2), it is nevertheless understood to create a fork in the road for an investor’s choice among national courts, other agreed dispute resolution procedures, or international arbitration.²⁰⁰ Ecuador argues that it must be the word “or,” which links each of the alternatives, that establishes the fork-in-the-road.²⁰¹ Ecuador

¹⁹⁶ Exhibit CLM-369, Christoph Schreuer, *Travelling the BIT Route: Of Waiting Periods, Umbrella Clauses and Forks in the Road*, 5 JOURNAL OF WORLD INVESTMENT & TRADE 231 (2004), at 239-40.

¹⁹⁷ Exhibit CLM-375, K. Vandeveldel, U.S. INTERNATIONAL INVESTMENT AGREEMENTS (2009), at p. 580.

¹⁹⁸ Ratner Expert Report, at para. 36.

¹⁹⁹ Ratner Expert Report, at para. 36.

²⁰⁰ Ecuador’s Counter-Memorial, at paras. 104-107; Expert Opinion of Professor Kenneth J. Vandeveldel, 16 January 2004, at paras. 57-58 (“Vandeveldel Expert Report”). Ecuador points to the decisions of several arbitral tribunals which have held that Article VI(2) of the 1992 Model BIT is a fork-in-the-road, notwithstanding that it does not include the phrase “under one of the following alternatives.” These awards confirm the ordinary understanding of fork-in-the-road provisions as requiring a choice between domestic courts and international arbitration. They do not say anything about whether the same kind of fork should be read into Article VI(3), much less offer any interpretation of the meaning of Articles VI(2) and VI(3) of the U.S.-Ecuador BIT, which use different language.

²⁰¹ Ecuador’s Counter-Memorial, at paras. 104-107.

reasons that the word “or” in Article VI(3) of the U.S.-Ecuador BIT therefore must also impose a fork-in-the-road.²⁰²

216. Ecuador’s argument ignores the language of the U.S.-Ecuador BIT, which under the VCLT is paramount. Unlike the 1992 Model BIT, Article VI(2) of the U.S.-Ecuador BIT includes the phrase “one of the following alternatives,” which creates an express fork-in-the-road. Ecuador’s argument requires reading that phrase as superfluous, which would deprive that phrase of its *effet utile* and is impermissible under the VCLT.²⁰³

217. The *Murphy* tribunal refused to read the phrase “one of the following alternatives” out of the Treaty. The tribunal found it unnecessary to look to the Model BIT or other treaties Ecuador had cited, noting that it “considers those treaties to be informative to the present exercise only to the extent that [the tribunal’s] interpretation of the U.S.-Ecuador BIT needs to be supplemented.”²⁰⁴ The tribunal interpreted Article VI(3) not to include a fork-in-the-road, explaining:

“[T]he presence of the phrase ‘under one of the following alternatives in Article VI(2) and its corresponding absence in Article VI(3)(a) are meaningful. The inclusion of this language in Article VI(2) puts its operation as a fork-in-the-road provision beyond doubt. The fact that this language is absent from Article VI(3)(a) satisfies the Tribunal that this provision does not operate as a fork-in-the-road. The Tribunal cannot read a limitation into a provision that does not have a limitation.”²⁰⁵

218. Ecuador argues that “[i]t is commonplace in international law that terms in a treaty provision may serve a precautionary clarification.”²⁰⁶ Ecuador suggests that even if its interpretation would render the phrase “under one of the following alternatives” superfluous, that phrase may have been added out of an abundance of caution – *ex abundante cautela* – and may have been intended to be superfluous.

219. Contrary to Ecuador’s assertion, it is not “commonplace in international law” for treaties to contain superfluous provisions.²⁰⁷ As Professor Ratner explains, “as a general matter, interpreting a treaty so as to accept the redundancy of a phrase – *i.e.*, to treat it as having no independent legal effect -- is in tension with the maxim of *effet utile*, and thus it is not an accepted mode of treaty interpretation.”²⁰⁸ As a result, tribunals have not relied on this principle to interpret bilateral investment treaties.²⁰⁹

²⁰² Ecuador’s Counter-Memorial, at para. 116; Vandeveld Expert Report, at para. 53.

²⁰³ Ratner Expert Report, at para. 22 (Ecuador’s effort to read “one of the following alternatives” out of the Treaty is “quite simply forbidden” under the rules of interpretation set out in the VCLT, because once “the parties inserted the phrase, it must be given an effective meaning.”).

²⁰⁴ See Exhibit CLM-253, *Murphy Exploration & Production Company – International v. Republic of Ecuador* (UNCITRAL, PCA Case No. AA434), Partial Award on Jurisdiction (13 November 2013), para. 179

²⁰⁵ See Exhibit CLM-253, *Murphy Exploration & Production Company – International v. Republic of Ecuador* (UNCITRAL, PCA Case No. AA434), Partial Award on Jurisdiction (13 November 2013), para. 179.

²⁰⁶ Ecuador’s Counter-Memorial, at note 189, citing Exhibit RLA-65, *Siemens A.G. v. The Argentine Republic*, ICSID Case No. ARB/02/8, Decision on Jurisdiction (3 Aug. 2004), ¶ 90 .

²⁰⁷ See Ratner Expert Report, at para. 14.

²⁰⁸ See Ratner Expert Report, at para. 13 (citing the International Court of Justice and the International Law

220. Ecuador points to the case of *Siemens v. Argentina* in support of its reliance on the principle of *ex abundante cautela*.²¹⁰ In the *Siemens* case, the tribunal accepted that the parties to the Germany-Argentina BIT were acting out of caution when they included a most favored nation (MFN) treatment clause in both the article of the treaty concerning the treatment to be afforded to foreign investors generally and the article on their treatment in the event of armed conflict and emergencies.²¹¹

221. Thus, as Professor Ratner explains, in *Siemens*, the principle of *ex abundante cautela* was invoked only to demonstrate that the simultaneous use of a phrase in a broader provision of the BIT (the general MFN clause) and a narrow provision (the clause on armed conflicts) did not deprive the broader provision of its full effect.²¹² *Siemens* does not support Ecuador's contention that the principle of *ex abundante cautela* may be invoked to show that both the existence of a phrase in one provision of a treaty and the absence of the same phrase in another provision of the treaty is legally insignificant.²¹³

222. Ecuador argues that the U.S. Letter of Submittal of the U.S.-Ecuador BIT indicates that the U.S. intended the phrase "under one of the following alternatives" to be superfluous.²¹⁴ Preliminarily, Professor Ratner explains that the unilateral statements in the U.S. submittal letter are not a relevant source for interpreting the treaty, "as they are not an agreement with Ecuador nor is there evidence that they have been accepted by Ecuador as an instrument related to the treaty."²¹⁵

223. In any event, the U.S. submittal letter does not establish the meaning Ecuador ascribes to it. In its explanation of Article VI, the submittal letter states that Articles VI(2) and VI(3):

"set forth the investor's range of choices of dispute settlement. The investor may make an exclusive and irrevocable choice to: (1) employ one of the several arbitration procedures outlined in the Treaty; (2) submit the dispute to procedures previously agreed upon by the investment and the host country government in an investment agreement or otherwise; or (3) submit the dispute to the local courts or administrative tribunals of the host country."

With respect to the arbitration options listed in Article VI(3), the letter simply states that "the investor may choose between" ICSID, ICSID Additional Facility, and UNCITRAL arbitration.

224. Nothing in this language indicates that the U.S. viewed Article VI(3) as a fork-in-the-road.²¹⁶ The placement of the colon in the quote above indicates that the choice that is "exclusive

Commission).

²⁰⁹ See Ratner Expert Report, at para. 44.

²¹⁰ Ecuador's Counter-Memorial, at note 189, citing Exhibit RLA-65, *Siemens A.G. v. The Argentine Republic*, ICSID Case No. ARB/02/8, Decision on Jurisdiction (3 Aug. 2004), at para. 90.

²¹¹ See Exhibit RLA-65, *Siemens A.G. v. Argentine Republic*, ICSID Case No. ARB/02/8, Decision on Jurisdiction (3 Aug. 2004), at para. 90.

²¹² Ratner Expert Report, at para. 15.

²¹³ Ratner Expert Report, at para. 15.

²¹⁴ Ecuador's Counter-Memorial, at note 105.

²¹⁵ *Id.* at para. 38.

²¹⁶ Ecuador's Counter-Memorial, at paras. 106, 117-118. See also Expert Opinion of Professor Kenneth J. Vandeveld, 16 January 2014, at para. 64.

and irrevocable” is the choice of whether to go to: (1) arbitration; (2) procedures previously agreed upon; or (3) the local courts or administrative tribunals of the host country. In other words, the fork-in-the-road is, as it is commonly understood, a fork between domestic remedies and international arbitration.

225. Professor Ratner notes the distinction between the letter’s reference to Article VI(2) as requiring an “exclusive and irrevocable choice” and Article VI(3), which says that the investor may “choose” from among the listed options. As he explains, that difference is meaningful:

“Given the care with which these Messages are prepared by experienced lawyers at the United States Department of State and the Office of the United States Trade Representative, *the mention of an irrevocable choice in one context but not the other at a minimum cannot be said to support an interpretation of the treaty different from the plain meaning discussed above. Rather, it reinforces the ordinary meaning of Articles VI(2) and (3).* The only evidence to the contrary is the use of the phrase “one of the several arbitration procedures” in the passage quoted above, but in my opinion this is counteracted by the contrast between the phrase “exclusive and irrevocable choice” used to describe Article VI(2) and the mere reference that “the investor may choose” used to describe Article VI(3).”²¹⁷

226. Ecuador also observes that Article 24(3) of the 2004 U.S. Model BIT does not include the phrase “under one of the following alternatives,”²¹⁸ but that Professors Reinisch and Malintoppi nevertheless characterized it as offering investors a choice of dispute settlement forums that, once made, “is made to the exclusion of any other.”²¹⁹ Ecuador asserts that, from this, “it is clear that, textually, this fork-in-the-road effect is owed to ‘or.’”²²⁰

227. Article 24(3) of the 2004 Model BIT is of no interpretative guidance to Article VI(3) of the U.S.-Ecuador BIT because of the significant structural differences between the two provisions. Among other things, the 2004 Model BIT does not contain a fork in the road at all with respect to the choice between domestic court procedures and international arbitration.²²¹

²¹⁷ Ratner Expert Report, at para. 35.

²¹⁸ Article 24(3) of the 2004 U.S. Model BIT states:

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

- (a) under the ICSID Convention and the ICSID Rules of Procedure for Arbitration Proceedings, provided that both the respondent and the non-disputing Party are parties to the ICSID Convention;
- (b) under the ICSID Additional Facility Rules, provided that either the respondent or the non-disputing Party is a party to the ICSID Convention;
- (c) under the UNCITRAL Arbitration Rules; *or*
- (d) if the claimant and respondent agree, to any other arbitration institution or under any other arbitration rules.

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

²¹⁹ *Id.* citing Exhibit RLA-81, A. Reinisch & L. Malintoppi, Methods of Dispute Resolution, in THE OXFORD HANDBOOK OF INTERNATIONAL INVESTMENT LAW 691 (Muchlinski et al., eds., 2008), at pp. 692-93.

²²⁰ Ecuador’s Counter-Memorial, para. 121. As Professor Ratner observes, these commentators do not refer to this remedies clause as a fork-in-the-road clause. Ratner Expert Report, at p. 35.

²²¹ While Article 26 of the 2004 Model BIT does preclude the initiation or continuation of domestic proceedings after the initiation of arbitration, that Article does not provide that a claimant cannot pursue arbitration if such domestic proceedings were previously initiated, and the exclusion of domestic proceedings results from an express

The *Murphy* tribunal rejected Ecuador's argument regarding the 2004 Model BIT, finding that it was not helpful to the interpretation of Article VI(3) of the U.S.-Ecuador BIT.²²²

228. Finally, even if the principle of *ex abundante cautela* were applicable, Ecuador's reliance on that principle is misplaced. Even if one were to assume that the phrase "under one of the following alternatives" in Article VI(2) was intended to confirm, rather than to establish, that an investor had the right to submit a dispute to only one type of dispute resolution procedure, it would be meaningful that the drafters of the Treaty included that confirmation only in Article VI(2) and not in Article VI(3). The principle of *ex abundante cautela* offers no explanation for that difference. Thus, under the applicable rules of treaty interpretation, Article VI(3) cannot be read as imposing the same kind of fork-in-the-road that is found in Article VI(2).

b) Articles VI(2) and VI(3) in Their Context and in Light of the Object and Purpose of the BIT

229. An interpretation of Article VI as containing only one fork-in-the-road is supported by considering that provision in its context within the Treaty and in light of the object and purpose of that provision and of the Treaty as a whole.

(1) The Context of Article VI(3)

230. Article VI(3) must be read in the context of the surrounding provisions of the Treaty, in particular, Article VI(4). Article VI(4) supports the interpretation that Article VI(3) does not impose a second fork-in-the-road.

231. Article VI(4) provides:

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

(a) ***written consent of the parties to the dispute*** for purposes of Chapter II of the ICSID Convention (jurisdiction of the Centre) and for purposes of the Additional Facility Rules; and

(b) ***an 'agreement in writing'*** for purposes of Article II of the United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards, done at New York, June 10, 1958 ('New York Convention')."²²³

232. Ecuador argues that Article VI(4) provides that either party to the dispute may initiate arbitration "in accordance with the choice specified in the written consent of the national or

written waiver of claims, not by a fork in the road in the treaty. See Exhibit RLA-60, 2004 U.S. Model BIT, Article 24(3)

²²² See Exhibit CLM-253, *Murphy Exploration & Production Company – International v. Republic of Ecuador* (UNCITRAL, PCA Case No. AA434), Partial Award on Jurisdiction (13 November 2013), para. 176.

²²³ Exhibit C-1, Ecuador-United States BIT Art. VI(4).

company,” and that the Treaty therefore only permits “the creation of *one* [consensual bond] between the claimant investor and the host State.”²²⁴ Nothing in Article VI(4) can be read to impose that limitation.

233. Article VI(4) does not mention any limitations on the “choice” of arbitral forum specified by the investor. As Professor Ratner observes, Article VI(4) “does not preclude that the investor might, under unusual circumstances, need to make a second choice.”²²⁵ That is not surprising, given that the purpose of Article VI(4) is to ensure that, when an investment dispute is submitted to arbitration, an arbitration agreement exists between the disputing parties for purposes of the ICSID Convention or the New York Convention.

234. Allowing an investor to consent to more than one arbitral forum is consistent with the purpose of Article VI(4), which is to ensure that, at the time the dispute is actually submitted to arbitration there exists a valid arbitration agreement. Particularly where (as here) the State has withdrawn its consent to one of the available arbitral forums (here, ICSID), allowing the investor to consent to arbitration in a second forum furthers the purpose of Article VI(4) by ensuring that the investor will subsequently be able to submit the dispute to arbitration and that when it does so, there will be a valid arbitration agreement between the parties.

(2) The Object and Purpose of Article VI(3)

235. Principles of treaty interpretation under the VCLT also direct one to consider the object and purpose of the relevant provisions. As noted above, the object and purpose of Articles VI(2) and VI(3) is to record Ecuador’s agreement to arbitrate investment disputes, and to do so in the forum of the investor’s choice. Interpreting Article VI(3) as allowing more than one choice of arbitral forum is consistent with that object and purpose.

236. Ecuador argues that the object and purpose of Article VI(3) is to prevent a multiplicity of proceedings with respect to the same investment dispute. Ecuador argues that Article VI(3) must therefore be interpreted to impose a fork-in-the-road with respect to an investor’s choice of arbitration forum.²²⁶ Ecuador relies on Professor Vandeveld, who asserts that allowing an investor to submit a dispute to both ICSID and an UNCITRAL tribunal “either simultaneously or consecutively, would have subverted U.S. policy of avoiding multiple proceedings.”²²⁷ Ecuador’s reliance on Professor Vandeveld’s opinion is misplaced.

237. As a preliminary matter, Professor Vandeveld’s opinion cannot be considered preparatory work of the Treaty (which may be taken into account in order to confirm a treaty’s ordinary meaning or ensure that its meaning is not ambiguous or manifestly absurd²²⁸) and is not otherwise relevant to the interpretation of the Treaty as guided by Articles 31 and 32 of the VCLT.²²⁹

²²⁴ Ecuador’s Counter-Memorial, at para. 124 (citing Articles VI(3)(b) and (4)).

²²⁵ Ratner Expert Report, at para. 37.

²²⁶ Ecuador’s Counter-Memorial, at para. 126.

²²⁷ Vandeveld Expert Report, at para. 55. *See also*, Ecuador’s Counter-Memorial, para. 126.

²²⁸ *See above* at para. 188.

²²⁹ *See* Ratner Expert Report, at para. 48. Professor Ratner explains that the absence of any travaux that would call into question the ordinary meaning of the Treaty is legally significant. *Id.* at para. 43.

238. In any event, Professor Vandeveldel's report provides no meaningful support for the proposition that Article VI(3) embodies a U.S. policy of avoiding multiple proceedings.

239. Professor Vandeveldel does not actually describe the views of the United States with respect to Article VI(3) or provisions like it in other U.S. bilateral investment treaties. Rather, he merely summarizes the historical evolution of the election of remedies provision in U.S. BITs and identifies changes that were made to impose a fork-in-the-road in Article VI(2) with respect to an investor's choice to submit a dispute to national courts, agreed dispute resolution procedures, or international arbitration.²³⁰

240. Without any support, Professor Vandeveldel then infers that the U.S. policy to avoid multiple proceedings – which he claims motivated changes to Article VI(2) – would be subverted by a reading of Article VI(3) that would allow an investor “to elect to submit the dispute to more than one form of investor-state arbitration.”²³¹ This inference is unwarranted.

241. First, Professor Vandeveldel claims the U.S. policy of avoiding multiple proceedings was concerned with avoiding proceedings at both the domestic and international level over the same BIT claim.²³² Professor Vandeveldel offers no evidence that the U.S. was concerned with avoiding proceedings before two different investor-state arbitral tribunals.²³³

242. Second, the argument that the U.S. policy to avoid multiple proceedings extended to multiple arbitral proceedings cannot be reconciled with the insertion of the words “under one of the following alternatives” only into Article VI(2) and not into Article VI(3) of the U.S.-Ecuador BIT. Professor Vandeveldel argues that the purpose of the insertion, “was to emphasize the exclusivity and irrevocability of the election among local remedies, previously agreed procedures and investor-state arbitration and NOT to indicate, by any kind of negative implication, that the choice among methods of investor-state arbitration under the BIT was not exclusive and irrevocable.”²³⁴

243. Professor Ratner explains that “this claim is unsupported, illogical, and ultimately irrelevant”:

“It is *unsupported* because . . . the key concern of the United States was the possibility of simultaneous or subsequent domestic-international dispute settlement. It is *illogical* because if the choice among arbitral remedies were also irrevocable, then it does not make sense that the drafters of the 1994 Model BIT would clarify the fork in the road on domestic vs. international domestic remedies, but not the supposed fork in the road among international arbitral venues. . . . And it is *irrelevant* because the text, whose ordinary meaning is paramount, indeed makes a distinction between the fork in the road

²³⁰ See Vandeveldel Expert Report, at paras. 24-64.

²³¹ Vandeveldel Expert Report, at para. 55.

²³² See Vandeveldel Expert Report, at para. 47 (the 1992 model meant to “eliminate any doubt concerning whether an investor could submit a dispute both to local remedies and previously agreed procedures, if they were different”); *id.*, at para. 50 (the 1992 model sought “to make clear . . . that the election among remedies of (1) submission to local courts, (2) utilization of previously agreed procedures, and (3) investor-state arbitration was completely exclusive and irrevocable.”).

²³⁴ Vandeveldel Expert Report, at para. 57.

and the investor’s menu of arbitral fora, not by a silent or hidden ‘negative implication,’ but rather, as discussed above, by a use of different words in Articles VI(2) and (3).”²³⁵

244. Finally, even if the object and purpose of Article VI(3) were to avoid multiple arbitral proceedings (which is unsupported) there are no concerns about multiple proceedings here. MSDIA never initiated ICSID arbitration, because Ecuador denounced the ICSID Convention and declared that it did not consider itself subject to the jurisdiction of ICSID tribunals. In those circumstances, recognizing MSDIA’s consent to a second choice of arbitral forum does not give rise to a risk of multiple proceedings.

245. That is the reasoning that led the *Murphy* tribunal to reject as irrelevant Ecuador’s argument that one of the purposes of a fork-in-the-road provision is to prevent a multiplicity of proceedings with respect to the same investment dispute.²³⁶ The *Murphy* tribunal held:

“Because this case involves the replacement of an unavailable forum with an available one, and because the one arbitral forum to which Claimant could have theoretically resubmitted its dismissed claim is now unavailable, ***there can be no concern here about a duplication of proceedings.***”²³⁷

246. The reasoning of the *Murphy* tribunal is equally applicable here. Allowing MSDIA to replace ICSID arbitration, when Ecuador has denounced the ICSID Convention, with UNCITRAL arbitration cannot give rise to concerns about a multiplicity of proceedings. It would simply give effect to the intent of Article VI(3) by ensuring that MSDIA has at least one available arbitral forum for the resolution of this investment dispute.

(3) Object and Purpose of the Treaty as a Whole

247. As discussed above, one of the principal objects and purposes of the U.S.-Ecuador BIT is to provide investors access to international arbitration to settle their investment disputes.²³⁸

248. The *Murphy* tribunal held that the interpretation of Article VI(3)(a) that was most in accord with the object and purpose of the Treaty was the interpretation that allowed an investor to make more than one choice of arbitral forum.²³⁹ In particular, the tribunal noted that:

²³⁵ Ratner Expert Report, at para. 53 (also noting that, in the discussion of the Ecuador-United State BIT in his treatise, Professor Vandeveldt writes, “This phrase [“under one of the following alternatives”] was intended to make clear that the investor may choose only one of the alternatives [i.e., the three listed in Article VI(2)],” with no suggestion of any such limited choice in Article VI(3)).

²³⁶ See Exhibit CLM-253 *Murphy Exploration & Production Company – International v. Republic of Ecuador* (UNCITRAL, PCA Case No. AA434), Partial Award on Jurisdiction (13 November 2013), at para. 191.

²³⁷ *Id.* at 191. The tribunal also made the more general observation that “fork-in-the-road provisions typically distinguish between contract claims and treaty claims. They are not designed to prevent the kind of situation that arises here.” *Id.*

²³⁸ See *above* at para. 174. The U.S. Submittal Letter lists as one of the principal BIT objectives to ascertain that “[n]ationals and companies of either Party, in investment disputes with the host government, have access to binding international arbitration, without first resorting to domestic courts.” Exhibit RLM-17, Dept. of State Letter of Submittal for U.S.-Ecuador BIT, p. 3.

²³⁹ Exhibit CLM-253, *Murphy Exploration & Production Company – International v. Republic of Ecuador* (UNCITRAL, PCA Case No. AA434), Partial Award on Jurisdiction (13 November 2013), at para. 187.

“Under the circumstances of this case, *Respondent’s interpretation of Article VI(3)(a) entirely forecloses Claimant’s access to international arbitration. The Tribunal considers such a result to run counter to the object and purpose of the BIT* and to be ‘manifestly absurd and unreasonable’ under the meaning of Article 32 of the Vienna Convention.”²⁴⁰

249. Ecuador argues that an interpretation of the Treaty allowing an investor to consent to more than one arbitral forum would undermine another object and purpose of the Treaty, namely “promot[ing] greater economic cooperation between the parties,” because it would “exaggerate the protection accorded to investors opting for international arbitration, to the detriment of those opting for local courts.”²⁴¹ Ecuador’s reasoning is flawed.

250. Allowing a party to consent to more than one arbitral forum does not necessarily allow that investor to submit its dispute for resolution to more than one arbitral forum (a question that this Tribunal need not reach²⁴²). Moreover, there is nothing in the Treaty that precludes an investor from submitting a dispute to more than one local court (*i.e.*, there is no additional fork-in-the-road embedded within Article V(2)(a) of the Treaty).²⁴³ Thus, those opting for local courts are in no way disadvantaged relative to an investor who consents to more than one forum for arbitration.

251. Finally, Ecuador argues that MSDIA’s reading of the Treaty inappropriately gives MSDIA “as many bites at the apple as it wishes.”²⁴⁴ That is not right as a general matter or in the specific circumstances of this case. Moreover, Ecuador is advocating for an interpretation of the Treaty that would not afford MSDIA *even one bite* at the apple, which obviously is not what the Parties to the Treaty intended.

²⁴⁰ Exhibit CLM-253, *Murphy Exploration & Production Company – International v. Republic of Ecuador* (UNCITRAL, PCA Case No. AA434), Partial Award on Jurisdiction (13 November 2013), at para. 197.

²⁴¹ Ecuador’s Counter-Memorial, paras. 127-128.

²⁴² This was the question facing the tribunal in *Murphy v. Ecuador* and it held that, under the circumstances of that case, the investor was entitled to submit its dispute for resolution to a second arbitral forum. See Exhibit CLM-253 *Murphy Exploration & Production Company – International v. Republic of Ecuador* (UNCITRAL, PCA Case No. AA434), Partial Award on Jurisdiction (13 November 2013).

²⁴³ Investors who submit the same dispute to multiple courts and investors who submit the same dispute to multiple arbitral tribunals are equally likely to face objections on the grounds of *lis pendens* or *res judicata*.

²⁴⁴ Ecuador’s Counter-Memorial, at para. 129.

3. Even if the Treaty Required an Exclusive and Irrevocable Consent (Which is Denied), MSDIA's Consent to UNCITRAL Arbitration Would Still be Valid

252. Even if the Treaty generally required an exclusive and irrevocable choice of arbitral forum under Article VI(3) (which, as discussed above, it does not), MSDIA's consent to UNCITRAL arbitration would still be valid.

253. Ecuador argues that MSDIA consented to ICSID arbitration in its Notice of Dispute on 8 June 2009, thereby triggering the fork-in-the-road effect of Article VI(3)(a) of the BIT and making its consent to ICSID exclusive and irrevocable. However, if there were such a fork, MSDIA's June 2009 letter did not take it.

254. MSDIA's letter consented to ICSID arbitration for the limited purpose of perfecting Ecuador's consent to ICSID arbitration for purposes of Article 72 of the ICSID Convention, because Ecuador had announced its intention to withdraw from ICSID. MSDIA's June 2009 letter also contained an express reservation of MSDIA's right to consent to arbitration in a different forum under Article VI(3) of the BIT.

255. The text of MSDIA's letter makes clear that MSDIA did not regard these two statements as separable. No reasonable reading of MSDIA's letter could conclude that MSDIA had consented to ICSID arbitration on an exclusive and irrevocable basis.

256. The essence of Ecuador's argument is that MSDIA did not have the right to condition its consent or make a counteroffer and that its reservation of rights can therefore be ignored.²⁴⁵ Ecuador's argument regarding Article VI(3) thus depends not only on implying conditions to Ecuador's consent (i.e., that the investor must make an exclusive and irrevocable choice of arbitral forum), but also on disregarding the express terms of MSDIA's consent in its June 2009 letter. Neither international law nor basic canons of construction permit this result.

257. If Article VI(3) contains a fork-in-the-road requiring an exclusive and irrevocable choice of arbitral forum, it follows that MSDIA did not validly consent to ICSID arbitration. In other words, if MSDIA's reservation of rights was invalid, then its consent was too.

258. MSDIA therefore retained the right to consent to UNCITRAL arbitration and did so validly in December 2012 in its Notice of Arbitration commencing these proceedings.

a) **MSDIA Did Not Exclusively and Irrevocably Consent to ICSID Arbitration**

259. In its Notice of Dispute, dated 8 June 2009, MSDIA expressly stated that its consent to ICSID arbitration was non-exclusive and that it reserved its right to consent to other forms of arbitration under the Treaty. Specifically, MSDIA wrote:

“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

²⁴⁵ Ecuador's Counter-Memorial, at para. 143-148; Vandeveldel Expert Report, at para. 68.

International Centre for the Settlement of Investment Disputes (“ICSID”), pursuant to Article VI of the BIT and Article 25 of the Convention on the Settlement of Investment Disputes Between States and Nationals of Other States (“ICSID Convention”). This letter serves to perfect ‘consent to the jurisdiction of the Centre’ for purposes of Article 72 of the ICSID Convention, thereby preserving MSDIA’s rights should the Republic of Ecuador decide to denounce the ICSID Convention pursuant to Article 71.2 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.***”²⁴⁶

260. MSDIA’s letter explains that MSDIA elected to consent to ICSID jurisdiction in June 2009 in order to ***preserve its rights under Article 72 of the ICSID Convention*** in case Ecuador withdrew from the ICSID Convention, as it had said it would. MSDIA’s intention is express: “This letter serves to perfect ‘consent to the jurisdiction of the Centre’ for purposes of Article 72 of the ICSID Convention.”²⁴⁷

261. In the same paragraph, MSDIA went on to provide that its consent was non-exclusive. Thus, MSDIA sought to preserve the menu of arbitral options that exist under Article VI(3) of the Treaty.

262. Ecuador argues that MSDIA’s consent to ICSID arbitration was valid, but that MSDIA’s express reservation of rights was invalid and should be disregarded.²⁴⁸ Ecuador’s contention is entirely at odds with the fundamental principle that arbitration is a matter of consent. Ecuador argues, in essence, that MSDIA should be held to have made an exclusive and irrevocable choice of ICSID arbitration, notwithstanding that MSDIA’s letter said it was doing precisely the opposite. That contention flies in the face of every principle relevant to the formation and interpretation of international arbitration agreements.

263. Ecuador argues that MSDIA’s June 2009 letter did not expressly condition MSDIA’s consent to ICSID arbitration on MSDIA’s reservation of rights, and that its reservation of rights can therefore be disregarded.²⁴⁹ This is inconsistent with the text of MSDIA’s letter.

264. It is clear from the wording of MSDIA’s letter that MSDIA intended its consent to ICSID arbitration and its reservation of rights, which are contained in the same paragraph, to be read together, and that it regarded its reservation of rights as a term of its consent. The fact that

²⁴⁶ Exhibit C-2, MSDIA’s Notice of Dispute, dated 8 June 2009, at 1-2. Notably, Ecuador never made any objection to MSDIA’s Notice of Dispute or indicated that it did not accept MSDIA’s reservation of rights. If Ecuador had believed that MSDIA’s consent contained impermissible conditions or an unacceptable reservation of rights, one would expect Ecuador to have replied to MSDIA’s letter stating its objection. To the contrary, Ecuador provided no response at all to MSDIA’s letter (other than to initiate criminal proceedings against the U.S. lawyers who signed the letter on behalf of MSDIA).

²⁴⁷ Exhibit CLM-368, Convention on the Settlement of Investment Disputes Between States and Nationals of Other States (“ICSID Convention”) (2006), Article 72 (“Notice by a Contracting State pursuant to Articles 70 or 71 [denouncing the Convention] shall not affect the rights or obligations under this Convention of that State . . . arising out of consent to the jurisdiction of the Centre given by one of them before such notice was received by the depositary”) reprinted in Christoph Schreuer, *The ICSID Convention: A Commentary* (2d ed. 2009), at XIIX-IXVII.

²⁴⁸ Ecuador’s Counter-Memorial, paras. 138-148.

²⁴⁹ Ecuador’s Counter-Memorial, para. 144.

MSDIA did not use the word “condition” when it “*reserve[d] its right* at any time to select any form of arbitration set forth under Article VI(3)(a) of the BIT” is immaterial.²⁵⁰ Ecuador’s suggestion that MSDIA’s consent can be detached from its reservation of rights is inconsistent with any reasonable reading of that letter.

265. Ecuador argues that MSDIA’s reservation of the right to consent to some other form of arbitration under the Treaty can be disregarded because an investor’s choice of consent under Article 25 of the ICSID Convention²⁵¹ is exclusive and irrevocable. Ecuador relies on Professor Vandavelde, who argues that MSDIA “sought to reserve a right to consent to a different forum – a right that, in actuality, it did not have.”²⁵²

266. Ecuador’s argument assumes incorrectly that the ICSID Convention requires an investor to make an exclusive and irrevocable consent to arbitration under the Convention to the exclusion of any other remedy.²⁵³ Although Article 25 of the ICSID Convention prohibits an investor from withdrawing its consent to ICSID arbitration unilaterally,²⁵⁴ Article 26 of the Convention expressly provides that a party’s consent to ICSID arbitration may be made on a non-exclusive basis.²⁵⁵ Specifically, Article 26 provides in relevant part:

“Consent of the parties to arbitration under this Convention shall, *unless otherwise stated*, be deemed consent to such arbitration to the exclusion of any other remedy...”²⁵⁶

267. MSDIA expressly stated in its June 2009 letter that it did not consent to ICSID arbitration to the exclusion of any other remedy. It would be contrary to the text of the ICSID Convention to disregard MSDIA’s reservation of rights and hold that MSDIA had consented to ICSID arbitration on an exclusive basis. It would also be a perverse result, given Ecuador’s denunciation of the ICSID Convention.

268. Ecuador asserts that “reading the ‘reservation of rights’ as a condition on Merck’s choice of consent to ICSID arbitration runs contrary to the letter’s stated intent to lock-in Ecuador’s offer of consent to ICSID arbitration.”²⁵⁷ This too is wrong.

²⁵⁰ Exhibit C-2, MSDIA’s Notice of Dispute, dated 8 June 2009 (emphasis added).

²⁵¹ Ecuador’s Counter-Memorial, paras. 139-140 (Ecuador claims that Article 25 of the ICSID Convention prohibits an investor from “choos[ing] to consent to the submission of the same dispute to arbitration in any other forum”).

²⁵² Expert Report by Prof. Vandavelde, at para. 68.

²⁵³ Expert Report by Prof. Vandavelde, at paras. 139-140 (claiming that Article 25 of the ICSID Convention prohibits an investor from “choos[ing] to consent to the submission of the same dispute to arbitration in any other forum”).

²⁵⁴ [Exhibit CLM-368, Convention on the Settlement of Investment Disputes Between States and Nationals of Other States (“ICSID Convention”) (2006), Article 25 (“When the [disputing] parties have given their consent, no party may withdraw its consent unilaterally”)”] reprinted in Christoph Schreuer, *The ICSID Convention: A Commentary* (2d ed. 2009), at XIX-IXVII.

²⁵⁵ As Professor Ratner explains, “[w]hatever legal effects the letter may have had for purposes of the ICSID Convention are distinct from the question of whether the letter constitutes valid consent under the BIT.” Ratner Expert Report, at para. 68.

²⁵⁶ Exhibit CLM-368, Convention on the Settlement of Investment Disputes Between States and Nationals of Other States (“ICSID Convention”) (2006), Article 26”) reprinted in Christoph Schreuer, *The ICSID Convention: A Commentary* (2d ed. 2009), at XIX-IXVII.

²⁵⁷ Ecuador’s Counter-Memorial, para. 146.

269. By its terms, MSDIA's letter sought "to perfect 'consent to the jurisdiction of the Centre' *for purposes of Article 72 of the ICSID Convention*, thereby preserving MSDIA's rights should the Republic of Ecuador decide to denounce the ICSID Convention pursuant to Article 71.2."²⁵⁸ As Professor Ratner explains:

"[A] prudent claimant would not wish to bet that a tribunal would regard the claimant's lack of consent before the state's withdrawal from ICSID as legally irrelevant under Article 72. In this case, Claimant, aware of the possibility that Ecuador would denounce the ICSID Convention – which it did less than a month after the date of Claimant's letter – was seeking to preserve the possibility of ICSID jurisdiction."²⁵⁹

270. MSDIA's letter expressly stated that MSDIA sought to "lock-in" Ecuador's consent to ICSID jurisdiction for purposes of Article 72 of the Convention, while consenting to ICSID jurisdiction on a non-exclusive basis for purposes of Article 25 of the Convention (as Article 26 expressly permits) and Article VI(3) of the BIT.

271. Ecuador also asserts that the phrase "[MSDIA] hereby accepts the offer made by the Republic of Ecuador" to submit disputes to ICSID means that Claimant could not have been making a counter-offer or somehow conditioning its consent.²⁶⁰ Ecuador suggests that MSDIA's letter should be read as an unconditional acceptance of Ecuador's offer to arbitrate in ICSID.

272. As Professor Ratner observes, "this would be true only if that sentence were read in isolation," but "[a]ll of the sentences of the letter should be read as a whole," in accordance with principles of interpretation applicable to unilateral declarations of consent.²⁶¹ When read together with the two sentences that follow – which state that the letter sought to perfect consent for purposes of Article 72 of the ICSID Convention and that MSDIA reserved its right to consent to another form of arbitration – the phrase "hereby accepts" cannot be understood as an exclusive choice of ICSID arbitration.

273. To conclude, the only objectively reasonable interpretation of MSDIA's June 2009 letter is that MSDIA was seeking to preserve its right under Article 72 to initiate ICSID arbitration at some point in the future (even if Ecuador, as expected, denounced the ICSID Convention), while also preserving its ability to choose to initiate arbitration in some other forum. In other words, MSDIA sought to preserve the menu of options Ecuador had agreed to under Article VI(3)(a) of the Treaty. There is no reasonable reading of the letter that would support Ecuador's contention that MSDIA's reservation of rights did not form an integral and essential term of its consent to ICSID arbitration.

b) If Article VI(3) Requires an Exclusive and Irrevocable Choice of Forum, MSDIA Never Validly Consented to ICSID Arbitration

274. If, as Ecuador contends, Ecuador's offer to arbitrate under the ICSID Convention is conditioned on an investor exclusively and irrevocably consenting to the submission of the

²⁵⁸ Exhibit C-2, MSDIA's Notice of Dispute, dated 8 June 2009 (emphasis added).

²⁵⁹ Ratner Expert Report, at para. 68.

²⁶⁰ Ecuador's Counter-Memorial, para. 147.

²⁶¹ Rather Expert Report, at para. 70 (citing the International Court of Justice).

dispute to ICSID, then MSDIA's reservation of rights constituted a rejection of one of the terms of Ecuador's offer to arbitrate. As a consequence, MSDIA's acceptance would not match the terms of Ecuador's offer, and no mutual consent to arbitrate would have arisen.

275. Where a state has conditioned its consent to arbitration on the investor meeting certain requirements, "then the party's choice to consent to an arbitral process is valid if and only if it meets the conditions."²⁶² This conclusion is confirmed by a leading commentator on the ICSID Convention, Professor Schreuer, who explains:

"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.***"²⁶³

276. If Ecuador were correct that its offer to arbitrate under the ICSID Convention was conditioned on an investor making an exclusive choice of ICSID arbitration, then MSDIA's reservation of rights added new terms or conditions to Ecuador's offer, which, as Ecuador acknowledges, "would convert the acceptance to a *counter-offer*."²⁶⁴ If Ecuador's silence in response to MSDIA's June 2009 letter were deemed a rejection of MSDIA's counter-offer, then no valid arbitration agreement would have come into existence.²⁶⁵

277. This reasoning is consistent with that of the tribunal in *Murphy v. Ecuador*. There the tribunal (Professors Kaj Hobér, Georges Abi-Saab, Bernard Hanotiau) unanimously held that, even if Article VI(3) required an exclusive and irrevocable choice of arbitral forum, Murphy had not validly chosen ICSID because its effort to do so had proven to be ineffective (when the tribunal rejected jurisdiction in 2010).²⁶⁶

278. The *Murphy* tribunal held that Article VI(3) of the U.S.-Ecuador BIT only permitted investors to "choose to consent" to arbitration after they had met the 6-month cooling-off requirement (and as long as they had not chosen local courts or other procedures under Article

²⁶² See Ratner Expert Report, at para. 56, citing CLM-150, *Waste Management Inc., v. United Mexican States*, ICSID Case No. ARB(AF) 198/2, Award, dated 26 May 2000, at para. 17.. As Professor Ratner explains, as a consequence of an investor failing to consent validly to arbitration as required under a BIT, a tribunal may find that it lacks jurisdiction or competence over the investor's claim. See Ratner Expert Report, at para. 58, citing Exhibit CLM-3, *Burlington Resources Inc. v. Republic of Ecuador*, ICSID Case No. ARB/08/5, Decision on Jurisdiction, 2 June 2010, para. 340; Exhibit CLM-252, *Murphy Exploration and Production Company International v. Republic of Ecuador*, ICSID Case No. ARB/08/4, Award on Jurisdiction, 15 December 2010, para. 161(c); Exhibit CLM-246, *Kiliç İnşaat İthalat İhracat Sanayi ve Ticaret Anonim Şirketi v. Turkmenistan*, ICSID Case No. ARB/10/1, Award, 2 July 2013, para. 6.3.15. (But see, e.g., Exhibit RLM-106, *Abaclat and Others v. Argentine Republic*, ICSID Case No. ARB/07/5, Decision on Jurisdiction and Admissibility, 4 August 2011, paras. 585-91 (holding that the failure of an investor to follow certain conditions specified in the treaty does not deprive the tribunal of jurisdiction)).

²⁶³ See Exhibit CLM-31, C. Schreuer, THE ICSID CONVENTION: A COMMENTARY, CUP 2009, at para. 514, p. 230.

²⁶⁴ Ecuador's Counter-Memorial, paras. 147 quoting Expert Report by Prof. Vandeveld, ¶ 69.

²⁶⁵ See 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."); Exhibit CLM-31, C. Schreuer, THE ICSID CONVENTION: A COMMENTARY, Camb. Univ. Press 2009, at para. 514, p. 230.

²⁶⁶ Exhibit CLM-253, *Murphy Exploration & Production Company – International v. Republic of Ecuador* (UNCITRAL, PCA Case No. AA434), Partial Award on Jurisdiction (13 November 2013), para. 203-204.

VI(2)).²⁶⁷ Since Murphy had not met the cooling-off requirement when it first tried to consent to ICSID, that choice was not valid.²⁶⁸

279. The *Murphy* tribunal was unanimous on this point. In his separate opinion, Prof. Georges Abi-Saab concurred with this conclusion, reasoning that because Murphy failed to meet one of the conditions of consent under Article VI(3)(a) of the BIT, “this choice of consenting to ICSID arbitration, as legal act (*acte juridique*) was ineffective because it failed to produce the legal effect it purported to achieve. In other words, it was a defective legal act.”²⁶⁹

280. The outcome would be the same here. If MSDIA’s June 2009 letter constituted an invalid acceptance or a counter-offer because MSDIA did not accept the alleged condition of exclusivity, then MSDIA’s consent to ICSID arbitration was ineffective.

c) MSDIA Was Entitled to Consent to UNCITRAL Arbitration

281. If MSDIA did not validly consent to ICSID arbitration, it did not take a fork-in-the-road under Article VI(3) (even assuming for the sake of argument that there was one). MSDIA therefore still had the right to make a choice of arbitral forum under Article VI(3), which it did when it initiated this UNCITRAL arbitration.

282. Professor Ratner explains:

“[One of the] consequences if an investor has not validly consented to the jurisdiction of an arbitral tribunal (regardless of whether the investor actually instituted proceedings there, resulting in a finding of lack of jurisdiction), is that ***the investor is free to pursue arbitral proceedings, whether within the same arbitral forum or within another one.***”²⁷⁰

283. Numerous cases have held that an investor may bring a case again in the same or a different forum if the conditions for consent were not met on the investor’s first attempt.²⁷¹ The holding in *Tradex Hellas S.A. v. Albania*, for example, makes clear that an invalid consent due to failure to meet the conditions precedent to the jurisdiction of one arbitral forum allows the investor to make a claim in another arbitral forum to whose jurisdiction the state has already consented.²⁷² The *Tradex* tribunal interpreted Albania’s consent to ICSID jurisdiction to cover the claim at issue in part because to deny ICSID jurisdiction would force the investor to initiate UNCITRAL arbitration and Albania had not indicated whether it would contest UNCITRAL jurisdiction.²⁷³

284. Professor Ratner explains:

²⁶⁷ *Id.*

²⁶⁸ *Id.*

²⁶⁹ *See id.* Separate Opinion of Prof. Georges Abi-Saab., para. 26.

²⁷⁰ Ratner Expert Report, at para. 61 (internal citations omitted).

²⁷¹ *Id.* (citing cases).

²⁷² *Id.* at para. 61 *citing* Exhibit CLM-265, *Tradex Hellas S.A. (Greece) v. Republic of Albania*, ICSID Case No. ARB/94/2, Decision on Jurisdiction, 24 December 1996, reported at 14 ICSID Review 161 (1999).

²⁷³ *Id.* at para. 60.

“The [Tradex] tribunal’s opinion underscores that a state’s commitment to investor protection, whether through a domestic law or a BIT, *requires giving the investor access to at least one international arbitral forum if the state has consented to such international arbitral options* and the investor chooses to use one of them (and meets the conditions to consent).”²⁷⁴

285. The *Murphy* tribunal unanimously adopted similar reasoning. Specifically, it held that, because Murphy’s initial consent to ICSID jurisdiction was invalid for failing to respect the cooling-off period in the BIT, Murphy was free to proceed with UNCITRAL arbitration.²⁷⁵

286. The outcome is the same here. If MSDIA’s June 2009 letter constituted an invalid acceptance or a counter-offer to Ecuador’s offer to arbitrate, then MSDIA’s consent to ICSID arbitration was invalid. In that case, Ecuador’s offer to arbitrate under Article VI(3) was still open, and MSDIA’s consent to UNCITRAL arbitration in its Notice of Arbitration in December 2012 was a valid acceptance of Ecuador’s offer, which formed a valid and binding agreement to arbitrate under the UNCITRAL Rules.

III. MSDIA HAS SUFFERED A DENIAL OF JUSTICE

287. MSDIA’s Memorial and Professor Paulsson’s first Expert Report established that the Ecuadorian judiciary denied justice to MSDIA in the *NIFA v. MSDIA* litigation. The trial court, the court of appeals, and the NCJ repeatedly violated fundamental rights of due process to which MSDIA is entitled as a matter of international law.²⁷⁶ In particular, the trial court and the court of appeals exhibited clear bias in favor of the Ecuadorian plaintiff, NIFA,²⁷⁷ applied procedural rules and rules of evidence in an obviously one-sided manner,²⁷⁸ and expressly chose to consider only the evidence adduced by NIFA and to disregard the evidence submitted by MSDIA.²⁷⁹ The conduct of the proceedings in the trial court and court of appeals strongly indicated improper influence on the judges, very likely as the result of corruption by NIFA.

288. The most compelling proofs of the bias and unfairness in the trial court and the court of appeals are the judgments issued by those courts: the \$200 million judgment of the trial court and the \$150 million judgment of the court of appeals, both of which were purportedly intended to compensate NIFA for lost profits resulting from failure to acquire from MSDIA a manufacturing facility the parties themselves had valued at \$1.5 million. As set out in MSDIA’s Memorial, no honest and competent court could have issued those decisions, particularly where

²⁷⁴ *Id.* at para. 61.

²⁷⁵ Exhibit CLM-253, *Murphy Exploration & Production Company – International v. Republic of Ecuador* (UNCITRAL, PCA Case No. AA434), Partial Award on Jurisdiction (13 November 2013), para. 203-204; sep. op. *Abi Saab* para. 26.

²⁷⁶ MSDIA Memorial, at paras. 266-269; First Expert Report of Paulsson, at para. 15.

²⁷⁷ See also Exhibit CLM-175, A. Roth, *THE MINIMUM STANDARD OF INTERNATIONAL LAW APPLIED TO ALIENS* (1949), at 183 (emphasis added); Exhibit CLM-164, A.V. Freeman, *THE INTERNATIONAL RESPONSIBILITY OF STATES FOR DENIAL OF JUSTICE* (1973), at 268

²⁷⁸ See also 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.

²⁷⁹ See also 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.

NIFA's annual profits at the time of the sale of the manufacturing facility were barely two thousand dollars.

289. Ecuador's Counter-Memorial leaves MSDIA's position regarding the lower court proceedings largely unchallenged. Most notably, Ecuador has no response to the single most powerful evidence of the flawed process in the lower courts: the judgments themselves. It provides no legal or factual justification for the trial court's or court of appeals' findings of liability or the courts' \$200 million and \$150 million damages awards.²⁸⁰ No such defense can be made.

290. Rather than make any effort to defend those judgments, Ecuador focused its arguments on the decision of the NCJ, trumpeting the NCJ's decision and claiming that it supposedly "rectified" the faults of the lower courts and "cured" any violations of MSDIA's due process rights.²⁸¹ Among other things, Ecuador declared that the NCJ judgment purportedly "represents a major victory for Merck," which reduced Merck's liability by 99%.²⁸²

291. Ecuador's reliance on the NCJ's judgment was wrong in many respects. Although reducing dramatically the absurd \$150 million judgment of the court of appeals and recognizing that the lower courts' "antitrust" theory was indefensible, it nevertheless imposed damages in seven figures based on a different legal ground as to which MSDIA lacked notice and an opportunity to be heard. As explained in MSDIA's Memorial, the NCJ held MSDIA liable on a theory of unfair competition that had been *expressly disclaimed* by the Ecuadorian plaintiff, that the parties had not litigated on its merits, and that was not properly before the NCJ itself.

292. A decision imposing liability without proper notice and an opportunity to be heard with respect to the legal ground is a denial of justice, regardless of the magnitude of the damages.²⁸³ Ecuador's Counter-Memorial does not even attempt to rebut the many statements by respected commentators and international tribunals, including Professor Paulsson, confirming that minimum international standards of due process entitle a foreign litigant to be given notice and an opportunity to be heard on the grounds with respect to which it may be held liable.²⁸⁴ This principle, which traces back more than one-hundred years to the *Cotesworth & Powell* case, has been affirmed by numerous investor-State tribunals, including in the awards in *Pantechniki v. Albania*, *Rumeli v. Kazakhstan*, and *Deutsche Bank AG v. Sri Lanka*.²⁸⁵ Ecuador has offered no authority in response.

293. Moreover, in any event, after Ecuador submitted its Counter-Memorial (and after Ecuador's courts enforced the NCJ's \$1.57 million judgment, compelling MSDIA to pay it in

²⁸⁰ Ecuador appears to recognize that amount of the judgments in the trial court (\$200 million) and court of appeals (\$150 million) may give rise to a denial of justice claim: "*Quite aside from the reasoning and amount of damages rendered by the court of appeals*, which were corrected by the National Court of Justice, *Merck cannot seriously claim that its fundamental due process rights were violated by the court of appeals.*" Ecuador Counter-Memorial, at para. 502 (emphasis added). The implication of this statement is that with respect to the reasoning and amount of damages awarded by the court of appeals, MSDIA can make out a denial of justice claim.

²⁸¹ Ecuador Counter-Memorial, at para. 384.

²⁸² Ecuador Counter-Memorial, at para. 10.

²⁸³ See Second Expert Report of Paulsson, at para. 27.

²⁸⁴ See, e.g., MSDIA Memorial, at paras. 257-269, 295-309.

²⁸⁵ See MSDIA Memorial, at paras. 295-306.

full), Ecuador's Constitutional Court on specious grounds vacated the decision of the NCJ, and reinstated the \$150 million judgment of the court of appeals. Thus, MSDIA again faces a judgment that no honest and competent court could possibly have reached, 100 times greater than the amount imposed by the NCJ (and now already paid), based on the antitrust theory rightly repudiated by the NCJ as lacking all foundation, and based on a fundamentally unfair legal process. Ecuador's mistaken reliance on the flawed NCJ decision as "curing" the defects in the court of appeals decision not only rings hollow in the face of its own Constitutional Court's later ruling; it betrays the fundamental, systemic and specific bias against MSDIA that pervades Ecuador's legal system.

294. The sections below respond to Ecuador's arguments regarding the appropriate legal standard for evaluating MSDIA's denial of justice claim (Section A); respond to Ecuador's arguments regarding the (now-vacated) \$1.57 million judgment of the NCJ and establish that it is a consummated and actionable denial of justice (Section B); describe the plainly improper decision of the Constitutional Court vacating the NCJ decision and the consequences of that decision for MSDIA's denial of justice claim (Section C); and respond to Ecuador's arguments regarding the violations of MSDIA's procedural due process rights in the trial court and court of appeals and establish that the now-reinstated \$150 million judgment of the court of appeals is a denial of justice (Section D).

A. Ecuador Misstates the Applicable Standard for Finding a Denial of Justice

295. MSDIA's Memorial set forth the generally accepted legal standards governing denial of justice claims under international law. As set out there, conduct by Ecuador's courts that is "manifestly unjust or violative of due process or similarly offensive" constitutes a denial of justice and a breach of Ecuador's obligations under the Treaty.²⁸⁶ Professor Paulsson explains in his leading treatise that whether a denial of justice has occurred is fact-specific, and typically arises out of cases involving "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."²⁸⁷

296. Ecuador's Counter-Memorial does not challenge the applicable legal standard. In particular, Ecuador makes no attempt to dispute that the type of conduct forming the basis of MSDIA's claim here – *i.e.*, lack of notice and an opportunity to be heard, refusal to consider the evidence submitted by one party, and judgments motivated by bias or corruption, among others – consistently has been recognized by established international legal authorities as fundamentally improper and contrary to minimum international standards of due process.

297. Ecuador instead claims that MSDIA faces particularly demanding substantive and evidentiary standards, by suggesting incorrectly that MSDIA must establish both "fundamentally unfair proceedings" *and* an "outrageously wrong" result,²⁸⁸ that MSDIA must establish its claim

²⁸⁶ See MSDIA Memorial, at para. 242 (quoting Exhibit CLM-182, D. Wallace Jr., "Fair and Equitable Treatment and Denial of Justice: *Loewen v. U.S. and Chattin 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).

²⁸⁷ Exhibit CLM-174, J. Paulsson, DENIAL OF JUSTICE IN INTERNATIONAL LAW (2005), at 205.

²⁸⁸ Ecuador Counter-Memorial, at para. 275.

through “clear and convincing evidence,”²⁸⁹ and that MSDIA’s allegations of corruption are subject to an “even more demanding” standard of proof.²⁹⁰ Ecuador’s arguments misstate the applicable legal standard for finding a denial of justice. Although MSDIA’s denial of justice claim would readily survive even if Ecuador were correct, all three propositions are demonstrably wrong as a matter of international law.

1. Denial of Justice Claims Do Not Require a Showing of Both Fundamentally Unfair Proceedings and a Outrageously Wrong Decision

298. First, Ecuador is wrong that a claimant must show *both* “fundamentally unfair proceedings *and* outrageously wrong, final and binding decisions.”²⁹¹ Ecuador makes this argument because it claims that the \$1.57 million judgment of the NCJ, regardless of whether it resulted from a flawed process or had any basis in Ecuadorian law, reached a facially reasonable calculation of NIFA’s purported damages.²⁹²

299. Ecuador is wrong that establishing a denial of justice requires evidence of both procedural unfairness and a manifestly outrageous substantive result. As Ecuador’s own authorities recognize, a denial of justice can be, and most often is, established *solely* by evidence of procedural misconduct, without regard to the credibility of the court’s ultimate determination.²⁹³ As Freeman explains, a State denies justice to a foreign litigant if it conducts its proceedings in a manner that falls short of minimum international standards:

“Th[e] mandates of [international law] ... should be considered as disregarded in civil proceedings whenever judicial action is taken *without giving the alien a hearing or without properly notifying him in order to prepare a defense; whenever misconduct of the judge in withholding, hiding or destroying papers essential to the foreigner’s case is prejudicial in effect; whenever he has not been permitted to produce evidence or to summon valuable witnesses; whenever judicial action is influenced by the government or by partiality for one of the parties ...; or whenever proceedings are permeated with fraud, venality, and corruption.*”²⁹⁴

Each of these defects is present here.

300. Of course, the substance of a national court decision can also evidence a denial of justice, even absent any evidence of procedural misconduct. As the tribunal explained in *Jan de Nul v. Egypt*, “[d]enial of justice may occur *irrespective of any trace of discrimination or maliciousness*, if the judgment at stake shocks a sense of judicial propriety.”²⁹⁵ Similarly, in

²⁸⁹ Ecuador Counter-Memorial, at para. 276.

²⁹⁰ Ecuador Counter-Memorial, at para. 279.

²⁹¹ See Ecuador Counter-Memorial, at para. 275. See also Ecuador Counter-Memorial, at paras. 272-273

²⁹² Ecuador Counter-Memorial, at para. 285.

²⁹³ See, e.g., Exhibit RLA-62, Greenwood, *State Responsibility for the Decisions of National Courts*, in ISSUES OF STATE RESPONSIBILITY BEFORE INTERNATIONAL JUDICIAL INSTITUTIONS (Fitzmaurice, et al., eds.) (2004), at 59 (explaining that denial of justice can be established through evidence of an “undoubted mistake of substantive or procedural law operating to [the claimant’s] prejudice”) (internal citation omitted).

²⁹⁴ See Exhibit CLM-164, A.V. Freeman, *THE INTERNATIONAL RESPONSIBILITY OF STATES FOR DENIAL OF JUSTICE* (1970), at 267-268 (discussing procedural violations that constitute denial of justice) (emphasis added).

²⁹⁵ See Exhibit RLA-84, *Jan de Nul N.V. and Dredging International N.V. v. Arab Republic of Egypt*, ICSID Case

Mondev International Ltd. v. United States of America, upon which Ecuador relies, the tribunal observed that a claimant can establish a denial of justice, even absent direct evidence of procedural misconduct, if the national-court judgment was “**clearly** improper and discreditable” in light of “all the available facts.”²⁹⁶

301. As explained by the tribunal in *RosInvestCo UK Ltd. v. The Russian Federation*, “[t]he **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.”²⁹⁷ Sir Gerald Fitzmaurice likewise observes that the “[t]he relevance of the **degree** of injustice” is that it “raises a strong presumption of dishonesty” on the part of the national court that issued the impugned decision.²⁹⁸

302. Thus, if there is direct evidence that the national court proceedings violated the claimant’s fundamental right to due process, then such evidence, standing alone, is sufficient to prove a denial of justice, regardless of whether the substance of the decision is also “clearly improper and discreditable.” As Professor Paulsson explains:

“A judgment need not be ‘outrageously wrong’ in order to constitute a denial of justice. As explained in my prior report, the modern understanding is that the unjustness and partiality in question is not due to substantive error, but to the arbitrary treatment of the litigant: a failure of due process. The outrageousness of a decision may provide supporting evidence of a violation of due process (in the sense that the judgment is inexplicable other than as an expression of corruption, arbitrariness, or gross incompetence) but it is not a necessary element of the delict. **Where the claimant adduces sufficient direct evidence of procedural misconduct, moreover, it need not also establish that the final judgment was outrageously wrong.**”²⁹⁹

303. In any event, it is clear that MSDIA has been subjected to both fundamentally flawed procedures and manifestly improper and discreditable judgments. Where liability is imposed on a judicially manufactured basis that had been disclaimed by the plaintiff and therefore not briefed by the defendant, it is no answer that the damages imposed were less than an absurdly high amount previously imposed by the judicial system. The **liability** holding is manifestly unjust even if the damages although substantial are by comparison more modest than the preposterous levels in the lower courts. And unsurprisingly given the lack of briefing, the NCJ’s finding that MSDIA engaged in unfair competition lacked any basis in Ecuadorian law and was completely at odds with the factual record.³⁰⁰

304. Moreover, as discussed below, the \$200 million judgment of the trial court and the \$150 million judgment of the court of appeals, which Ecuador makes no attempt to defend, were

No. ARB/04/13, Award, dated 6 November 2008, at para. 193 (emphasis added).

²⁹⁶ See Exhibit RLA-54, *Mondev International Ltd. v. United States of America*, ICSID Case No. ARB(AF)/99/2, Award, dated 11 October 2002, at para. 127 (emphasis added).

²⁹⁷ Exhibit CLM-141, *RosInvestCo UK Ltd. v. The Russian Federation*, SCC Arbitration V 079/2005, Final Award, dated 12 September 2010, at para. 279 (emphasis added).

²⁹⁸ Exhibit CLM-316, G. Fitzmaurice, *Meaning of the Term ‘Denial of Justice’*, 13 Brit. Y.B. Int’l L. 93, 112-113 (1932).

²⁹⁹ Second Paulsson Expert Report, at para. 22 (emphasis added). See also Exhibit CLM-174, J. Paulsson, DENIAL OF JUSTICE IN INTERNATIONAL LAW (2005), at 98.

³⁰⁰ See below at paras. 352-389.

manifestly “improper and discreditable” and “outrageously wrong.”³⁰¹ The \$150 million judgment has now been reinstated, and its manifest irrationality confirms the procedural due process violations that occurred in Ecuador’s courts. Thus, even under Ecuador’s incorrect heightened bar, these judgments constitute a denial of justice.

2. MSDIA’s Claim for Denial of Justice Is Not Subject to a “Clear and Convincing Evidence” Standard of Proof

305. Second, Ecuador is wrong that claims for denial of justice are subject to a higher evidentiary standard than other claims grounded in international law.³⁰²

306. International arbitral tribunals generally require a claimant to satisfy a “balance of probabilities” or preponderance of the evidence standard of proof.³⁰³ As the tribunal in *Fuchs v. Republic of Georgia* explained, the “balance of probabilities” standard of proof has been applied to the “*vast majority*” of investor-State claims:

“The Tribunal finds that the principle articulated by the *vast majority* of arbitral tribunals in respect of the burden of proof in international arbitration proceedings applies in these concurrent proceedings and does not impose on the Parties *any burden of proof beyond a balance of probabilities*.”³⁰⁴

307. Ecuador suggests the “gravity” of a denial of justice claim justifies subjecting it to a heightened evidentiary standard, but there is nothing inherently more “grave” about an alleged violation of international law by a State’s judiciary than by its executive or legislative bodies. As Professor Paulsson explains, proof of a denial of justice by a preponderance of the evidence is certainly sufficient to require compensation:

“[T]he *substantive* threshold under the rules of international law on denial of justice is not to be confused with the *evidentiary* standard that applies to such claims. . . . To hold both that the threshold of unfairness is very high, and that the facts constituting the crossing of that high threshold must be established to a degree of certainty higher than the balance of probabilities would be an unjustified cumulation of requirements.”³⁰⁵

308. The two awards that Ecuador cites in support of its assertion that a claim for denial of justice is subject to a “clear and convincing evidence” standard are no longer good law.³⁰⁶ The

³⁰¹ See *below* at paras. 508-512.

³⁰² Ecuador Counter-Memorial, at para. 276. Specifically, Ecuador asserts that “*only clear and convincing evidence* will suffice to meet [MSDIA’s] burden of showing that a national judiciary has conducted itself in so egregious a manner as to warrant a finding of a denial of justice.” *Id.*

³⁰³ See Exhibit CLM-360, A. Redfern, *The Standards and Burden of Proof in International Arbitration*, Arbitration International, Vol. 10, Issue 3, at 320-321 (emphasis added).

³⁰⁴ Exhibit CLM-244, *Ioannis Kardassopoulos & Ron Fuchs v. Republic of Georgia*, ICSID Case Nos. ARB/05/18 and ARB/07/15, Award, dated 3 March 2010, at para. 229 (emphasis added). See also Exhibit CLM-249, *Marion Unglaube & Richard Unglaube v. Republic of Costa Rica*, ICSID Case Nos. ARB/08/1 (consolidated with ICSID Case No. ARB/09/20), Award, dated 16 May 2012, at para. 34 (“The degree to which evidence must be proven can generally be summarized as a ‘*balance of probability*,’ ‘reasonable degree of probability’ or a *preponderance of the evidence*.”) (emphasis added).

³⁰⁵ Second Expert Report of Paulsson, at para. 23.

³⁰⁶ See Ecuador Counter-Memorial, at para. 276.

awards in *Chattin* (decided in 1927) and *El Oro Mining* (decided in 1931) relied upon an antiquated rule that afforded a presumption of compliance with international law to the decisions of national courts.³⁰⁷ As the *Arif v. Moldova* tribunal recently explained, that presumption is “*obsolete*”:

“International law has evolved in recent decades and the previous conviction as expressed in the *Chattin* award that acts of the judiciary had to be judged with more ‘delicacy’ and circumspection than acts committed by other branches of government, *is obsolete*.”³⁰⁸

309. Under contemporary jurisprudence, there is no basis for imposing a higher standard of proof in connection with international law claims that arise out of acts of a State’s judiciary than those that arise out of the acts of other State actors. In recent awards, investor-State tribunals have applied a balance of probabilities standard of proof in cases involving allegations of impropriety by judicial actors. For instance:

- a. In *Tokios Tokelés v. Ukraine*, the tribunal applied a “balance of probabilities” standard of proof to a claim involving allegations of wrongdoing by Ukrainian judges (as well as other high-level governmental officials).³⁰⁹
- b. Indeed, in *Saipem S.p.A. v. The People’s Republic of Bangladesh*, both parties *agreed* that a “balance of probabilities” standard of proof was applicable to claims arising out of the conduct of Bangladeshi courts.³¹⁰

310. Thus, as Professor Paulsson explains, claims for denial of justice are subject to the same “balance of probabilities” standard of proof that applies to any other claim under international law:

“[T]he claimant [need not] meet a heightened standard of proof There is no reason of principle to require a more exacting evidentiary standard. The facts constituting a crossing of the high substantive threshold *are to be established on the balance of probabilities in the ordinary way*.”³¹¹

³⁰⁷ See Exhibit CLM-120, *B.E. Chattin (United States) v. United Mexican States*, United States-Mexican States Claims Commission, Award, dated 23 July 1927, 4 U.N.R.I.A.A. 282, 288 (applying “convincing evidence” standard in light of the then-prevailing rule that “it is a matter of the greatest political and international delicacy for one country to disacknowledge the judicial decision of a court of another country”); Exhibit RLA-12, *Great Britain (El Oro Mining and Railway Co. (Ltd.) v. United Mexican States*, Decision No. 55, dated 18 June 1931, 5 U.N.R.I.A.A. 191, 198 (stating that “such a grave reproach can only be directed *against a judicial authority* upon evidence of the most convincing nature”) (emphasis added).

³⁰⁸ Exhibit RLA-120, *Mr. Franck Charles Arif v. Republic of Moldova*, ICSID Case No. ARB/11/23, Award, dated 8 April 2013, at para. 439 (emphasis added). Exhibit CLM-356, J. Paulsson, DENIAL OF JUSTICE IN INTERNATIONAL LAW (2005), at 72 (“*There is no presumption of [national courts’] compliance with international law.*”) (emphasis added).

³⁰⁹ Exhibit CLM-147, *Tokios Tokelés v. Ukraine*, ICSID Case No. ARB/02/18, Award, dated 26 July 2007, at para. 124.

³¹⁰ Exhibit CLM-75, *Saipem S.p.A. v. The People’s Republic of Bangladesh*, ICSID Case No. ARB/05/7, Award, dated 30 June 2009, at para. 114.

³¹¹ Second Expert Report of Paulsson, at para. 23 (emphasis added). See generally, Exhibit RLA-121, *Rompetrol Group N.V. v. Romania*, ICSID Case No. ARB/06/03, Award, dated 6 May 2013, at para. 182 (refusing to apply

3. Circumstantial Evidence of Corruption, Including Evidence of Systemic Corruption in Ecuador, Is Relevant to MSDIA’s Claim for Denial of Justice

311. Third, Ecuador is also wrong when it claims that MSDIA’s allegations of corruption are subject to an “even more demanding” standard of proof (more demanding even than the “clear and convincing evidence” standard that purportedly applies to claims for denial of justice), and that MSDIA may not rely on circumstantial evidence of corruption or “generalized” evidence of systemic corruption.³¹² If accepted, this specious argument would shield corruption by State actors from review by international tribunals.³¹³

312. As explained in *Oostergetel v. Slovakia*, upon which Ecuador relies, “**corruption can also be proven by circumstantial evidence.**”³¹⁴ Indeed, circumstantial evidence often is the *only* evidence that a claimant reasonably can be expected to adduce in order to establish acts of corruption that, by their very nature, are “designed not to be able to be identified or detected.”³¹⁵ As Professor Paulsson explains:

“[N]o additional or special rules of evidence apply to allegations of fraud and corruption. It is true that such charges are serious, but it is also true that direct evidence of such malfeasance is rare.”³¹⁶

313. Moreover, Professor Paulsson explains that evidence of systemic corruption in Ecuador’s judiciary supports the conclusion that the outrageous judgments in the *NIFA v. MSDIA* litigation were the product of corruption:

“Both casuistic and systemic evidence of corruption should be considered holistically in assessing claims for denial of justice. Evidence is relevant if it makes a fact more or less probable. An allegation of graft in a particular case becomes more probable if it occurs within a judiciary plagued by corruption. **To the extent that Ecuador suggests that certain categories of relevant evidence (such as systemic conditions) should be**

heightened standard of proof to claim alleging misconduct by prosecutors) (citing Exhibit RLM-66, *Libananco Holdings Co. v. Republic of Turkey*, ICSID Case No. ARB/06/8, Award, dated 2 September 2011, at para. 125).

³¹² Ecuador Counter-Memorial, at paras. 277-279.

³¹³ Exhibit CLM-380, S. Wilske & T. Fox, *Corruption in International Arbitration and Problems with Standard of Proof: Baseless Allegations or Prima Facie Evidence?*, in S. Kröll, *INTERNATIONAL ARBITRATION AND INTERNATIONAL COMMERCIAL LAW: SYNERGY CONVERGENCE AND EVOLUTION* (2011), at 504 (“**What should be avoided by all means however is that arbitrators dodge the rather ‘touchy’ issue of corruption by hiding behind formulas of a high standard of proof.**”) (emphasis added).

³¹⁴ Exhibit CLM-146, *Jan Oostergetel and Theodora Laurentius v. The Slovak Republic*, UNCITRAL, Final Award, dated 23 April 2012, at para. 303.

³¹⁵ Exhibit CLM-345, K. Mills, *Corruption and Other Illegality in the Formation and Performance of Contracts and in the Conduct of Arbitrations Relating Thereto*, ICCA Congress Series, No. 11 (2003), at 295. Even tribunals that have applied a clear and convincing evidence standard of proof have recognized that “corruption ... is notoriously difficult to prove” through direct evidence “since, typically, there is little or no physical evidence.” Exhibit CLM-302, *EDF (Services) Ltd. v. Romania*, ICSID Case No. ARB/05/13, Award, dated 8 October 2009, at para. 221. See generally Exhibit CLM-145, *Corfu Channel (United Kingdom of Great Britain and Northern Ireland v. Albania)*, Judgment of 9 April 1949, IC.J. Rep. 4, at para. 18 (explaining that “inferences of facts and circumstantial evidence” is “admitted in all systems of law and its use is recognized in international arbitration”).

³¹⁶ Second Expert Report of Paulsson, at para. 24.

*segregated and either viewed in isolation or excluded from consideration altogether, it is distorting reality and defying common sense.*³¹⁷

314. Similarly, Ecuador’s own expert, Professor Amerasinghe, in his book *agrees* that evidence of systemic corruption is highly probative, observing that “**where the courts are packed with corrupt judges ... there would be a denial of justice.**”³¹⁸ Tribunals in investment and commercial arbitrations have expressly relied upon evidence of systemic corruption as relevant circumstantial evidence of a State’s misconduct in the context of a specific case.³¹⁹ To fail to recognize that corruption is a more plausible explanation for obvious unfairness in legal systems that are rife with corruption would make no sense whatsoever.

* * * * *

315. It is revealing that Ecuador tries so hard to manufacture an artificially high standard of proof in defense of MSDIA’s claim for denial of justice. Plainly, Ecuador recognizes that it has no response to MSDIA’s claims on the merits.

316. Indeed, as set out below, Ecuador has utterly failed to rebut **any** of the overwhelming and indisputable evidence of corruption, bias, and gross due-process violations throughout the *NIFA v. MSDIA* litigation. Turning now to the merits of MSDIA’s denial of justice claim, MSDIA has established that it was subjected to a denial of justice at every level of Ecuador’s judicial system.

B. The NCJ Decision Finding MSDIA Liable for Unfair Competition Constituted a Denial of Justice

317. MSDIA’s Memorial established that the NCJ decision awarding \$1.57 million in damages to NIFA, which was the operative decision at the time of MSDIA’s Memorial, denied justice to MSDIA. In particular, the **only** claim that NIFA invoked (and the **only** ground on which the trial court and court of appeals had found MSDIA liable), had been supposed **antitrust** liability. The NCJ correctly rejected that ground.

318. But the NCJ gave MSDIA no notice whatsoever that the NCJ would nevertheless hold it liable for unfair competition. The parties had **never** litigated the merits of unfair competition

³¹⁷ Second Expert Report of Paulsson, at para. 24. *See also* First Expert Report of Paulsson, at para. 42 (observing that evidence of systemic corruption in Ecuador’s judiciary “seem[s] objectively troubling and can hardly fail to lend contextual plausibility to MSDIA’s complaint”).

³¹⁸ Exhibit CLM-292, C. Amerasinghe, *STATE RESPONSIBILITY FOR INJURIES TO ALIENS* (1967), at 99 (emphasis added). As set out below, Professor Amerasinghe also notes that systemic corruption can evidence the ineffectiveness of local remedies in the context of the requirement to exhaust local remedies.

³¹⁹ *See, e.g.*, Exhibit CLM-142, *Rumeli Telekom A.S. v. Republic of Kazakhstan*, ICSID Case No. ARB/05/16, Award, dated 29 July 2008, at paras. 710-711 (considering “press reports, which tend to establish that the whole country, the whole political system and the whole economy of Kazakhstan are controlled by President Nurabayev and his family The Tribunal was also shown a report by the UN Economic and Social Council which indicates that the judiciary is not independent and is prone to allegations of bribery”); Exhibit CLM-329, ICC Case No. 3916 (1982), Collection of ICC Arbitral Awards 1974-1985, at 507 (relying on widespread corruption in Iran as circumstantial evidence of corrupt practices). *See also* Exhibit CLM-381, S. Wilske & T. Fox, *Corruption in International Arbitration and Problems with Standard of Proof: Baseless Allegations or Prima Facie Evidence?*, in S. Kröll, *INTERNATIONAL ARBITRATION AND INTERNATIONAL COMMERCIAL LAW: SYNERGY CONVERGENCE AND EVOLUTION* (2011), at 501-503.

and, as Ecuador concedes, NIFA repeatedly and expressly disclaimed unfair competition as a basis for its claim. Neither NIFA nor MSDIA had put the possibility of liability based upon unfair competition before the NCJ for decision. Imposing liability on this ground without notice and opportunity to brief the facts and the law denied justice under fundamental due process principles. The NCJ also denied justice to MSDIA by expressly incorporating and relying upon the court of appeals' factual findings, which were tainted by gross violations of minimum international standards of due-process.

319. Ecuador's Counter-Memorial does not meaningfully dispute the essential factual elements of MSDIA's claim with respect to the NCJ decision. As explained in Section III(B)(1) below, there is no merit to the arguments that Ecuador makes in the few short paragraphs of its Counter-Memorial in which it addresses the fundamental issue of whether MSDIA had adequate notice of NIFA's claim for unfair competition.

320. Because Ecuador cannot meaningfully dispute that MSDIA had no notice or opportunity to be heard, its primary defense is to argue that the NCJ's decision, even if it is a denial of justice, cannot give rise to international responsibility because it was not a final judgment by a "court of last resort." But the National Court of Justice is Ecuador's highest court. As explained in Section III(B)(4) below, there is no basis in international law for Ecuador's assertion that MSDIA had a "duty" to bring a Constitutional Court challenge to the NCJ decision. The NCJ decision was a final decision of the Ecuadorian judicial system from which no appeal lay. It was immediately enforceable, and no means existed under Ecuadorian law and procedure to stay its enforcement. MSDIA was obligated to pay and did pay. That judgment is therefore actionable as a denial of justice.

321. Finally, as explained in Section III(B)(5) below, the fact that the NCJ decision has now been vacated does not preclude a denial of justice claim, because Ecuador compelled MSDIA to pay the final judgment. At that point, certainly, there was a final consummated denial of justice. The fact that in collateral proceedings brought by NIFA against the NCJ judges; the Constitutional Court has vacated the decision after MSDIA was compelled to pay it, reinstating the irrational and arbitrary \$150 million judgment of the court of appeals, is plainly a further denial of justice requiring this Tribunal's attention, not a reason to stand aside.

1. MSDIA Lacked Notice and an Opportunity to Be Heard Regarding Liability for Unfair Competition

322. As explained in MSDIA's Memorial, a foreign litigant is entitled to notice and an opportunity to be heard with respect to every potential basis for a national court's decision.³²⁰ As D.P. O'Connell explains:

"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 [must] be separation of the rules of accuser and judge, ***and that there be full disclosure***

³²⁰ See MSDIA Memorial, at p. 88, heading (a). See also *id.* at paras. 295-309.

of the case against the alien and an opportunity to controvert the charges through use of counsel. He must be fully informed of them.”³²¹

323. A State’s obligation to “**fully inform[]**” a foreign litigant of the charges against him or her is a predicate to the foreigner’s ability to “**prepare a defense**,” “produce proofs,” and “produce all evidence and summon all witnesses in court” in defense of the specific claims on which he or she may be held liable.³²² Investor-State tribunals have thus consistently recognized that notice and the opportunity to be heard with respect to any basis for liability are fundamental to a foreign investor’s due process rights under customary international law.³²³

324. As Professor Paulsson explained in his first Expert Report, a national court commits a clear violation of a foreign national’s due-process rights when it imposes liability on the basis of a legal claim that has not been litigated (or even raised) by the plaintiff.³²⁴ For instance, the tribunal in *Rumeli Telekom v. Kazakhstan* held that an administrative decision-maker in the Republic of Kazakhstan had violated minimum international standards of due process by rendering a decision against the claimants “on various **entirely different grounds than those forming the basis for the initial decision**.”³²⁵ Central to the tribunal’s analysis was its finding that the claimants had no “**real possibility to present their position**.”³²⁶

325. Ecuador **does not even attempt to rebut** Professor Paulsson’s opinion or MSDIA’s authorities on this point. Indeed, none of Ecuador’s three experts on international law, Professors Amerasinghe, Caflisch, and Vandeveld, even addresses the standard for denial of justice. Rather, Ecuador asserts that MSDIA purportedly “had a full and fair opportunity to present evidence” as to the merits of the claim for unfair competition on which the NCJ found it liable. As explained below, Ecuador’s arguments are based on a mischaracterization of the procedural history of the *NIFA v. MSDIA* litigation and of Ecuadorian law.

a) The NCJ Found MSDIA Liable on a “Completely Different” Ground from the One the Parties Actually Litigated

326. Critically, Ecuador does not dispute that the NCJ found MSDIA liable on what the NCJ recognized was a “**completely different**”³²⁷ ground than the one the parties litigated. Nor does Ecuador deny that the subject of the proceedings before the trial court and the court of appeals was NIFA’s antitrust claim,³²⁸ that NIFA pursued **only** an antitrust claim in the NCJ,³²⁹ that NIFA

³²¹ Exhibit CLM-173, D.P. O’Connell, INTERNATIONAL LAW (1965), at 1027.

³²² Exhibit CLM-175, A. Roth, THE MINIMUM STANDARD OF INTERNATIONAL LAW APPLIED TO ALIENS (1949), at 182

³²³ See, e.g., 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.

³²⁴ First Expert Report of Paulsson, at paras. 48-49.

³²⁵ 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 (emphasis added).

³²⁶ 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 (emphasis added).

³²⁷ Exhibit C-203, NCJ Judgment, *NIFA v. MSDIA*, dated 21 September 2012, at Section 13.1 (noting that unfair competition and antitrust are “completely different matter[s]”). See also MSDIA Memorial, at paras. 316-317.

³²⁸ Ecuador Counter-Memorial, at para. 378.

expressly and repeatedly *disclaimed* any claim for unfair competition, that NIFA *conceded* that the civil courts before which the parties were litigating *lacked jurisdiction to hear an unfair competition claim*, or that the two lower courts found MSDIA liable only on antitrust, not unfair competition, grounds.³³⁰

- (1) MSDIA, Like Any Reasonable Litigant, Addressed Only the Claims Made By the Ecuadorian Plaintiff Cannot Excuse Ecuador’s Denial of Justice

327. Ecuador recognizes that NIFA made a “*choice* to argue its case on antitrust grounds”³³¹ but then claims that MSDIA must take “responsibility” for what Ecuador calls MSDIA’s “litigation strategy”³³² to “respond[] *only* to those arguments [advanced by NIFA]”³³³ and to “*follow[] [NIFA’s] antitrust litigation strategy.*”³³⁴ The implication of Ecuador’s argument is that a litigant cannot focus its defenses on the claims raised by the plaintiff and decided by the lower courts, but instead somehow has notice and an opportunity to address every conceivable claim, even claims expressly forsaken, and conceded to be outside the court’s jurisdiction, by the claimant.

328. On its face, this argument is absurd. As explained above, customary international law requires that a foreign investor be “*fully informed*” of the claims on which he or she may be held liable.³³⁵ A State’s courts cannot render these obligations illusory by asserting that the foreigner is obligated to independently investigate and defend against all the theoretical grounds on which he or she may be held liable. As the Draft Convention on the International Responsibility of States for Injuries to Aliens provides, a State has the obligation to ensure that a foreign litigant has “*specific information* in advance of the hearing *of any claim* or charge against him.”³³⁶ Requiring a litigant to anticipate any conceivable basis – sound or not – on which it could potentially be held liable is obviously inconsistent with this affirmative obligation.

329. Indeed, a foreign litigant’s purported ability to independently assess alternative grounds on which a court might without warning hold it liable, notwithstanding that those grounds have been disclaimed by the plaintiff, has never before been considered relevant to the question whether a State has provided a foreign litigant with notice and an opportunity to be heard. For instance, in *Pantechniki v. Albania*, the sole arbitrator (Paulsson) held that Albanian courts committed a “*clear violation of fair procedure*” by dismissing an action to enforce a settlement agreement, on the ground that the underlying contractual obligation that was the subject of the settlement was invalid. Even though the claimant was indisputably aware of and could have affirmatively addressed the potential challenges to the validity of the contractual obligation,³³⁷ the

³²⁹ Ecuador Counter-Memorial, at para. 380.

³³⁰ Ecuador Counter-Memorial, at para. 380; Expert Report of Aguirre, 5.6, 7.2.

³³¹ Ecuador Counter-Memorial, at para. 378.

³³² Ecuador Counter-Memorial, at para. 378.

³³³ Ecuador Counter-Memorial, at para. 378.

³³⁴ Ecuador Counter-Memorial, at para. 379.

³³⁵ See above at para. 322.

³³⁶ 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).

³³⁷ Exhibit RLM-47, *Pantechniki S.A. Contractors & Engineers Greece v. Republic of Albania*, ICSID Case No. ARB/07/21, Award, dated 30 July 2009, at para. 18-19 (explaining that government had refused to comply with

arbitrator focused on the fact that the legal basis applied by national courts “*had not [been] invoked*”:

“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.”³³⁸

330. Similarly, in *Rumeli Telekom v. Kazakhstan*, the tribunal found that an administrative decision-maker violated standards of due process in rendering a decision against the claimant on “entirely different grounds” from those with which the claimant was confronted; there was no discussion of whether the claimant could have independently ascertained these grounds (which it surely could have).³³⁹ Indeed, Ecuador’s approach would entirely eliminate the notice requirement, long understood to be fundamental to the due process of law, because it would deem foreign litigants to have “notice” of virtually any basis for liability a national organ might decide to impose.

331. Moreover, in Ecuador’s legal system, as in the legal systems of most other developed States, a civil plaintiff is required to assert specific legal claims against the defendant **and is bound by** those asserted claims.³⁴⁰ As Professor Jaime Ortega, MSDIA’s expert on Ecuadorian procedural law, explains:

“Due process, and specifically the right to a defense, duly guaranteed by the Constitution of the Republic of Ecuador, requires the defendant to be clearly and accurately informed of the action filed against him. To that end, ***Ecuadorian procedural rules mandate that the complaint must be unequivocal with regard to the plaintiff’s prayer for relief and the cause of action.*** The clarity and precision of the complaint allow the defendant to know exactly what he is being charged with and why; otherwise, the defendant would be prevented from adequately preparing his defense and properly putting forth his defense.”³⁴¹

332. This requirement is important to procedural due process and is intended to put the defendant on notice of the specific claims that it may be held liable for and that it is required to defend. In Ecuador’s legal system, as in the legal systems of other developed States, a civil defendant is entitled to rely on the plaintiff’s articulation of its claims and is expected to defend against only those claims that were actually asserted.³⁴² As Professor Ortega explains, Ecuador’s suggestion that MSDIA adopted a “litigation strategy” of responding only to the claims NIFA actually asserted – implying that it could have adopted a different litigation strategy of responding to claims that NIFA did not in fact assert – misconceives how civil litigation is conducted in Ecuador:

settlement agreement by disputing the validity of the underlying contractual obligation to compensate the claimant for losses suffered during period of public rioting).

³³⁸ 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 para. 100.

³³⁹ 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.

³⁴⁰ Second Expert Report of Ortega, at paras. 8, 11.

³⁴¹ Second Expert Report of Ortega, at para. 8.

³⁴² Second Expert Report of Ortega, at para. 11, note 7. See also Expert Report of Paez, at para. 18.

“The defendant *must be able to refer to what the plaintiff claims*, as well as what it asserts and disclaims, in preparing his defense. Thus, principles of due process, and specifically the dispositive principle, *preclude judges and courts from ruling on a matter that parties have not set as the subject of the litigation*, more so when the plaintiff has disclaimed that its claim is based on such a matter. Otherwise, a plaintiff could create great uncertainty and procedural chaos by constantly changing the subject of the litigation, which indisputably leaves the defendant unable to present a defense.”³⁴³

333. Indeed, even if (contrary to fact) MSDIA had reason to know that it could be held liable for unfair competition, it would not have been afforded an opportunity to be heard on the merits of that claim in the NCJ. As explained in MSDIA’s Memorial, the court of appeals’ \$150 million judgment was predicated solely on an antitrust claim.³⁴⁴ Under the NCJ’s procedural rules, MSDIA was precluded from addressing merits of new claims that were not addressed in the judgment that was being challenged in the NCJ:

“The NCJ, on the other hand, when deciding whether to annul or not annul a lower court decision, is limited to review certain errors of law ... limited to the five causes of action defined in Article 3 of the Cassation Law.”³⁴⁵

334. The grounds provided in Article 3 of the Cassation Law do not allow the NCJ to consider entirely new legal claims.³⁴⁶ MSDIA therefore had no opportunity to be heard with respect to a claim for unfair competition, which was not at issue in the decisions of the lower courts.

(2) MSDIA Did Not Have Notice That It Faced Potential Liability for Unfair Competition

335. Ecuador argues that MSDIA did in fact have notice in the *NIFA v. MSDIA* proceedings that it faced potential liability for unfair competition.³⁴⁷ This argument ignores the record of the lower-court proceedings and makes no sense.

336. *First*, NIFA conceded during the litigation that unfair competition was governed exclusively by the Intellectual Property Law.³⁴⁸ NIFA did not invoke the Intellectual Property

³⁴³ Second Expert Report of Ortega, at para. 11.

³⁴⁴ MSDIA Memorial at para. 118. *See also* Exhibit C-4, Court of Appeals Judgment, *NIFA v. MSDIA*, dated 23 September 2011, at 15-16; Exhibit C-203, NCJ Judgment, *NIFA v. MSDIA*, dated 21 September 2012, at Section 9.1.

³⁴⁵ Expert Report of Paez, at para. 12.

³⁴⁶ Expert Report of Paez, at paras. 14, 18.

³⁴⁷ *See* Expert Report of Aguirre, at para. 3.5 (“the object of the case was set as a civil claim for damages”).

³⁴⁸ Exhibit C-164, NIFA’s Brief of 23 January 2009, *NIFA v. MSDIA*, Court of Appeals, at 3-4 (emphasis added) (“There is no law which assigns jurisdiction to a special court, *as the Intellectual Property Law does where it provides that unfair competition cases must be heard and decided by administrative law courts*, and therefore civil courts have jurisdiction [in this case].”). *See also* First Expert Report of Cordoba, at para. 28. While “[t]here were also references to unfair competition in statutes that regulated specific industries like telecommunications and electricity providers[,] [t]hese provisions were limited to the activities regulated by the specific statutes, and were thus not applicable to the dispute between NIFA and MSDIA.” *Id.* at para. 28, fn. 12.

law and in fact did not make a single reference to unfair competition in its complaint.³⁴⁹ MSDIA therefore had no notice that it was facing such a claim.³⁵⁰

337. **Second**, on the contrary, NIFA expressly and repeatedly disclaimed unfair competition as the basis of its claim,³⁵¹ asserting, *inter alia*, that its claim was “**not the case of an unfair competition complaint**,”³⁵² that MSDIA’s acts “[were not] a type of unfair competition, as the defendant absurdly asserts,”³⁵³ and that “**NIFA never filed a lawsuit based on acts of unfair competition**.”³⁵⁴ Remarkably, neither Ecuador nor its experts—including Professor Aguirre, who claims to have reviewed the entire 6,000-page record and was tasked with summarizing the proceedings—even mention these disclaimers. They certainly do not deny that NIFA made them.

338. Under Ecuadorian law, NIFA’s express confirmation that it was not pursuing a claim of unfair competition precluded the NCJ from finding MSDIA liable on that ground.³⁵⁵ Thus, even if the general civil tort statutes in Articles 2214 and 2229 could be said to encompass unfair competition as a general matter (which, as discussed below,³⁵⁶ they cannot), NIFA repeatedly and expressly said that it was not making such a claim. Such a disclaimer by the plaintiff, as a general matter, in and of itself deprives a defendant of notice that the court will nevertheless impose liability on such a ground. This is all the more so given that under Ecuadorian law the court was precluded from doing so. MSDIA therefore had no notice that it could be held liable for unfair competition, and it had no reason to litigate the merits of such a claim.³⁵⁷

339. **Third**, in this case the parties in their submissions **had concurred** that civil courts lacked jurisdiction to decide the merits of an unfair competition claim. In the court of appeals and the NCJ, NIFA expressly conceded that all unfair competition claims were governed by the Intellectual Property Law (which NIFA had not cited in its complaint) and were subject to the exclusive jurisdiction of the contentious administrative courts.³⁵⁸ NIFA further conceded that, if it were asserting a claim for unfair competition, that claim could not be decided by the civil courts in which it had chosen to litigate.³⁵⁹ This is precisely why NIFA repeatedly and affirmatively insisted that it was not asserting a claim for unfair competition and why MSDIA had no reason whatever to expect that the NCJ would rule on this basis.

³⁴⁹ Second Expert Report of Ortega, at para. 14.

³⁵⁰ Second Expert Report of Ortega, at para. 24.

³⁵¹ MSDIA Memorial at para. 341. *See also* Ponce Martínez First Witness Statement at paras. 30-31.

³⁵² Exhibit C-157, NIFA’s Brief of 9 October 2008, *NIFA v. MSDIA*, Court of Appeals, at 2 (emphasis added).

³⁵³ 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 First Witness Statement at paras. 30-31.

³⁵⁴ Exhibit C-201, Transcript of Hearing, *NIFA v. MSDIA*, NCJ, recorded by the defendant, December 26, 2011, at 1)

³⁵⁵ Second Expert Report of Ortega, at para. 33; *See also* First Expert Report of Oyarte, at paras. 31-33.

³⁵⁶ *See below* at paras. 358-365.

³⁵⁷ Second Expert Report of Ortega, at paras. 33, 34, 36; Expert Report of Paez, at paras. 24-32. All but the disclaimer made before the NCJ on December 26, 2011, were made prior to the commencement of the second evidentiary period.

³⁵⁸ Exhibit C-164, NIFA’s Brief of 23 January 2009, *NIFA v. MSDIA*, Court of Appeals, at 3-4 (“There is no law which assigns jurisdiction to a special court, **as the Intellectual Property Law does where it provides that unfair competition cases must be heard and decided by administrative law courts**, and therefore civil courts have jurisdiction [in this case.]”) (emphasis added).

³⁵⁹ Exhibit C-164, NIFA’s Brief of 23 January 2009, *NIFA v. MSDIA*, Court of Appeals, at 3-4.

340. MSDIA raised a jurisdictional objection in the *NIFA v. MSDIA* litigation, arguing that the civil courts could not decide the merits of an unfair competition claim. NIFA responded to MSDIA's jurisdictional argument by insisting that it was not asserting a claim for unfair competition, and the lower courts responded by maintaining jurisdiction but deciding the case on the basis of antitrust principles.³⁶⁰ MSDIA therefore had no notice that the NCJ, as a civil court that the parties agreed lacked jurisdiction over unfair competition claims, could decide MSDIA's cassation petition on the basis of unfair competition.

341. Ecuador ignores NIFA's concessions in the underlying litigation and argues that there was no limitation on the civil courts' jurisdiction over unfair competition claims. But Ecuador fails to identify a single case in which the civil courts exercised jurisdiction over a claim of unfair competition in the period when the Intellectual Property Law statute on unfair competition was in effect.³⁶¹

342. That Ecuador could not find such a case is both telling and not surprising. As MSDIA's expert in unfair competition in Ecuadorian law, Dr. Fernandez de Cordoba, explains, "at the time that the dispute arose between NIFA and MSDIA, unfair competition claims were governed exclusively by the Intellectual Property Law..., and were subject to the exclusive jurisdiction of the Contentious Administrative Courts."³⁶² Accordingly, given that NIFA did not assert a claim for unfair competition in its complaint and later expressly disclaimed it, MSDIA had absolutely no reason to expect that it could be found liable for unfair competition by a civil court.

343. **Fourth**, under Ecuador's Cassation Law, the NCJ had jurisdiction to consider only the grounds of cassation advanced in the parties' respective cassation petitions.³⁶³ As Dr. Paez explained in his expert report, neither MSDIA nor NIFA requested that the NCJ correct the second instance judgment by deciding the case on unfair competition grounds.³⁶⁴ The NCJ was therefore prohibited under Ecuadorian law from deciding the case on unfair competition grounds. MSDIA thus had yet further reason to understand that it could not be found liable for unfair competition and had no reason to address the merits of unfair competition in its submissions to the NCJ.

344. Ecuador does not dispute that the NCJ was limited to deciding upon the grounds set out in the parties' cassation petitions, but it argues that MSDIA did request that the NCJ annul the lower court judgments for failing to rule on the merits of an unfair competition claim.³⁶⁵ This is a blatant mischaracterization of MSDIA's cassation petition.

345. In fact, what MSDIA argued was that an unfair competition claim **could not be** decided by the civil courts.³⁶⁶ The report of Ecuador's own expert, Professor Aguirre, makes this clear. Professor Aguirre states that "[MSDIA's] own cassation petition states that disputes involving

³⁶⁰ Exhibit C-157, NIFA's Brief of 9 October 2008, *NIFA v. MSDIA*, Court of Appeals, at 2; Exhibit C-164, NIFA's Brief of 23 January 2009, *NIFA v. MSDIA*, Court of Appeals, at 3-4.

³⁶¹ Second Expert Report of Cordoba, at para. 15.

³⁶² Second Expert Report of Cordoba, at para. 3.

³⁶³ See Expert Report of Páez, at para. 22.

³⁶⁴ Expert Report of Páez, at para. 22.

³⁶⁵ Ecuador Counter-Memorial, at para. 382.

³⁶⁶ See Expert Report of Paez, at para. 23.

unfair competition *ought to have been processed by the administrative rather than the civil courts.*³⁶⁷

346. In arguing that the civil courts, including the Civil Chamber of the NCJ, did not have jurisdiction over an unfair competition claim, MSDIA was *not* requesting that the NCJ rule on the merits of that claim; it was suggesting that the case had been brought in the wrong forum and should be dismissed for want of jurisdiction.³⁶⁸ NIFA's response was not to argue that an unfair competition claim could have been filed in the civil courts. To the contrary, it agreed that the NCJ lacked jurisdiction to resolve such a claim³⁶⁹ and expressly stated in its submissions to the NCJ that it had "*never filed a lawsuit based on acts of unfair competition.*"³⁷⁰ MSDIA therefore had no notice that it could be held liable for unfair competition, and it had no reason to litigate the merits of such a claim.³⁷¹

- b) The NCJ Decision Relied on Interpretations of Ecuadorian Law that Could Not Have Been Anticipated by MSDIA and Were Not Litigated by the Parties

347. As discussed above, MSDIA had no notice that the NCJ might hold it liable for acts of unfair competition, because NIFA had expressly disclaimed unfair competition as the basis for its claims and because the civil courts had no jurisdiction over unfair competition claims. Moreover, MSDIA could not have anticipated or defended against the NCJ's finding of liability, because the NCJ's decision rested on legal principles that had no basis in and were contrary to settled Ecuadorian law.

348. Ecuador suggests that in interpreting provisions of the Constitution and Civil Code to encompass unfair competition, and in finding MSDIA liable based on such construction, the NCJ was merely exercising its "law-making" function and prerogative "to interpret and apply law of Ecuador in an evolutionary way."³⁷² Ecuador also argues that MSDIA was on notice of its potential liability for unfair competition because the NCJ purported to reach a finding of unfair competition pursuant to a Constitutional provision and two civil statutes to which NIFA's original complaint referred. These arguments are wrong.

- (1) The NCJ's Purported "Law-Making" Function Is Not a Defense to MSDIA's Claim for Denial of Justice

349. Although the NCJ may have a "law-making" function, as Professor Oyarte explains, under the constitutional principle of typification, Ecuadorian courts cannot "fill a legal lacuna or interpret an unclear rule" to impose a penalty "for an act that was not typified by law as an infraction."³⁷³ In other words, Ecuadorian courts can impose sanctions only where the law

³⁶⁷ Ecuador Counter-Memorial, at para. 380 (quoting Expert Opinion of Javier Aguirre Valdez, at para. 6.4).

³⁶⁸ See Expert Report of Paez, at para. 23; Second Expert Report of Ortega, at paras. 27-29.

³⁶⁹ See Expert Report of Paez, at paras. 25-26; Second Expert Report of Ortega, at para. 30.

³⁷⁰ Exhibit C-201, Transcript of Hearing, *NIFA v. MSDIA*, NCJ, recorded by the defendant, December 26, 2011, p. 1. See also Expert Report of Paez, at paras. 24-25; Second Expert Report of Ortega, at paras. 28-30.

³⁷¹ See Second Expert Report of Ortega, at paras. 33-34, 36.

³⁷² Ecuador Counter-Memorial, at paras. 320, 322.

³⁷³ Second Expert Report of Oyarte, at para. 49.

clearly defines (“typifies”) the infraction and the penalty, and courts cannot circumvent this Constitutional requirement by “law-making” or interpreting the law in “an evolutionary way.”

350. More fundamentally, even if Ecuadorian law allowed the NCJ to “make” law to impose penalties for acts that were not typified as offenses, MSDIA had a due-process right to know in advance what statutes and legal principles the NCJ was applying to do so and to have its positions heard in regard to those points of law. As Professor Paulsson explains:

“It is startling to hear a court in the civil law tradition spoken of as having a “law creating” function. (This was famously and emphatically rejected in Article 5 of the French Civil Code as it emerged in 1803: “*Il est défendu aux juges de prononcer par voie de disposition générale et réglementaire sur les causes qui leur sont soumises.*”) But even were this the case in Ecuador, it would not prevent the Tribunal from determining whether the law created by the NCJ here is sufficiently novel, idiosyncratic, or arbitrary so as to evidence an international delict, as described in paragraph 22 above. As set forth in my prior report, moreover, ***MSDIA’s charge is not limited to the NCJ’s creation of an unprecedented unfair-competition theory just for this case, it is also that NIFA expressly disclaimed it and MSDIA was denied an opportunity to argue it.*** Suffice it to say that all attributes of the NCJ’s decision should be considered and assessed.”³⁷⁴

351. It is indisputable that the NCJ never afforded MSDIA that opportunity, and the NCJ’s reliance on legal theories that were not only novel as a matter of Ecuadorian law, but also that were never disclosed to the parties for comment during the NCJ proceedings, is a denial of justice to MSDIA.

(2) MSDIA Was Not on Notice of the NCJ’s Novel and Baseless Application of Ecuadorian Law

352. Ecuador argues that MSDIA was on notice of the grounds on which it ultimately was held liable because NIFA’s original complaint identified the constitutional provision and statutes which the NCJ purported to apply. The NCJ’s interpretation of those provisions, however, was entirely novel and unprecedented in Ecuadorian law and could not have been anticipated by the parties. Specifically, the NCJ held, ***for the first time in Ecuadorian history***, that Article 244(3) of the 1998 Ecuadorian Constitution, together with Articles 2214 and 2229 of the Ecuadorian Civil Code, proscribed acts of unfair competition.

353. According to the NCJ’s judgment, MSDIA’s actions gave rise:

“to the occurrence of a tort, pursuant to Article 244, number 3, of the Political Constitution of 1998 then in effect, and Article 2214 and 2229, first paragraph of the Civil Code ... within what legal doctrine knows as a competitor’s acts of disruption, because of the refusal to sell, in the Law of Unfair Competition.”³⁷⁵

³⁷⁴ Second Expert Report of Paulsson, at para. 26 (emphasis added).

³⁷⁵ Exhibit C-203, NCJ Judgment, *NIFA v. MSDIA*, dated 21 September 2012, at Section 15.

354. MSDIA had no reason to expect that the provisions of Ecuadorian law cited in NIFA’s complaint could be applied to impose liability for unfair competition, because those provisions had never before been interpreted in that manner. And even if the provisions of Ecuadorian law cited by NIFA were broad enough to encompass claims for unfair competition – and they were not – MSDIA still would not have had the *specific* notice to which it is entitled as a matter of international law.

355. The case of *Amco Asia Corp. v. Indonesia*, to which MSDIA referred in its Memorial, is instructive. There the Republic of Indonesia argued that it provided the claimant with adequate “warning” of the potential revocation of its contractual rights when the State’s Central Bank issued a letter informing the claimant of its obligations under an administrative decree that, in broad terms, set forth a variety of reporting obligations upon investors. The tribunal disagreed, noting *inter alia* that the letter “**did not indicate the reasons for which the revocation was finally decided.**”³⁷⁶ As the tribunal explained:

“[T]his letter from Bank of Indonesia could not fulfil the purpose and function of the warning, or warnings, provided for by Decree 01/1977. The purpose and function of these warnings are to give the addressee of the warnings the opportunity to remedy the failures (if any) mentioned therein; and even in cases where such remedy could not be offered or made, in fact or in law, ... **to give him the opportunity to discuss the administration’s grievances and to defend himself against the same.** ... In the instant case, this protection was not made available to the Claimants, who were thus deprived of due process ... contrary to general principles of law.”³⁷⁷

356. The *Amco* award establishes that a general reference to a particular provision of law or regulation is not sufficient to put an investor on notice of the basis on which he or she could be found liable. Rather, the investor must have specific notice of the theory or reasoning that underlies the potential finding of liability. Thus, the fact that NIFA’s complaint referred generally to Article 244(3) of the 1998 Ecuadorian Constitution and Articles 2214 and 2229 of the Civil Code could not, standing alone, have put MSDIA on notice that it could be found liable for *unfair competition*. That is particularly true, of course, since NIFA had denied that it was making such a claim.

357. Moreover, established principles of Ecuadorian law would have led MSDIA, and any other reasonable litigant, to understand that liability for unfair competition **could not** be grounded on the provisions of Ecuadorian law cited in NIFA’s complaint.

358. **First**, Ecuador argues that “Articles 2214 and 2229 of the Ecuadorian Civil Code **alone** provided a basis for the NCJ to find Merck liable for the tort of unfair competition.”³⁷⁸ Leaving

³⁷⁶ Exhibit CLM-118, *Amco Asia Corp., et al. v. Republic of Indonesia*, Award, dated 20 November 1984, 1 ICSID Rep. 413, at para. 197 (emphasis added).

³⁷⁷ Exhibit CLM-118, *Amco Asia Corp., et al. v. Republic of Indonesia*, Award, dated 20 November 1984, 1 ICSID Rep. 413, at para. 198 (emphasis added). See also Exhibit CLM-248, *Marguerite de Joly de Sabla (United States) v. Panama*, VI RIAA 358, Award, dated 29 June 1933, at 362 (“The assertion of inadequacy of notice is that, although the *edictos* were both posted and published, the boundaries of the land applied for, as described in the applications and consequently in the *edictos*, were customarily **so vague that a landowner could not tell whether the land applied for was on his property or not.**”) (emphasis added).

³⁷⁸ Ecuador Counter-Memorial, at para. 318 (emphasis added). Ecuador’s Counter-Memorial, at para. 312 (arguing

aside NIFA's representations in the underlying litigation disclaiming reliance on unfair competition, and leaving aside the fact that the NCJ did not decide the case on this basis, Ecuador's theory that Articles 2214 and 2229 encompassed a civil tort of unfair competition, distinct from the cause of action for unfair competition defined in the Intellectual Property law, has no basis in Ecuadorian law and could not have been anticipated by MSDIA.

359. As Professors Oyarte and Cordoba explained in their first expert reports, the 1998 Constitution required that all bases of civil liability be expressly defined ("typified") under the law.³⁷⁹ This requirement for typification of civil offenses was significant, because prior to the entry-into-force of the 1998 Constitution, Ecuador's Constitution required only that criminal offenses be typified by the law. Ecuador's 1998 Constitution extended this due process protection to civil claims as well, requiring that any prohibited acts which give rise to civil liability must be identified in the Ecuadorian Civil Code.³⁸⁰ Professor Cordoba explains, "after the entry into force of the 1998 Constitution, it was not possible to bring a civil claim, for unfair competition or otherwise, absent a statute typifying the conduct as illicit."³⁸¹

360. The principle of typification is, of course, grounded in the due process requirement of notice, in that it prohibits the imposition of liability for an act that the actor could not have known to be unlawful. Article 2229 of the Civil Code typifies only certain personal injury torts,³⁸² while Article 2214 is merely a general damages provision, which provides that if a person commits a tort or infraction, he or she must indemnify the injured party for any harm that results. As Professor Cordoba explains, "[Article 2214] is operative in the event a party commits a crime or misdemeanour, *but does not itself identify what acts constitute a crime or misdemeanour.*"³⁸³

361. At the time of NIFA's complaint, the only statute in Ecuadorian law that typified acts of unfair competition was the 1998 Intellectual Property Law, and claims for unfair competition could be brought only under that law.³⁸⁴ Accordingly, MSDIA had no notice that it could be held liable for unfair competition under any other Ecuadorian statute.³⁸⁵ Certainly, NIFA's citation of Articles 2214 and 2229 in its complaint did not put MSDIA on notice that it could be held liable for unfair competition or that it should be litigating the merits of an unfair competition claim.

362. Indeed, the Ecuadorian courts have expressly rejected the theory that a party can be held liable for unfair competition under the general tort statutes of the Civil Code. In *Begazuay v. Emprosur*, the court of appeals rejected a claim for unfair competition brought under Articles 2214 and 2229 of the Civil Code.³⁸⁶ The plaintiff's claim in that case was brought prior to the

that Articles 2214 and 2229 "provide firmly-established, long-standing bases for a finding of liability *for conduct that constitutes* unfair competition.") (emphasis added).

³⁷⁹ First Expert Report of Oyarte, at para. 24; First Expert Report of Cordoba, at para. 19.

³⁸⁰ Second Expert Report of Cordoba, at paras. 6-7; Second Expert Report of Oyarte, at paras. 41-42.

³⁸¹ Second Expert Report of Cordoba, at para. 7.

³⁸² Second Expert Report of Cordoba, at para. 8; Second Expert Report of Oyarte, at paras. 45.

³⁸³ Second Expert Report of Cordoba, at para. 8. *See also* Second Expert Report of Oyarte, at para. 46.

³⁸⁴ Second Expert Report of Cordoba, at para. 3.

³⁸⁵ First Expert Report of Cordoba, at paras. 15.

³⁸⁶ Exhibit CLM-403, *Begazuay, Bebidas Gaseosas del Azuay, S.A. v. Emprosur S.A.*, Fourth Chamber of the Superior Court of Cuenca, 9 November 2000.

entry-into-force of the Intellectual Property Law, but was still found to be subject to the typification requirement of the 1998 Constitution.³⁸⁷ As Professor Cordoba explains:

“The court ruled that the claim was inadmissible because, at the time the complaint was filed in 1994 (four years before the Intellectual Property Law was enacted), ‘*acts of unfair competition were not typified in Ecuadorian law.*’”³⁸⁸

The Court of Appeals decision was affirmed by the Supreme Court.³⁸⁹

363. Ecuador has failed to identify a single case of unfair competition brought outside of the Intellectual Property Law (or outside the contentious administrative courts, which have jurisdiction under that law) during the time that the unfair competition statute in the Intellectual Property Law and the 1998 Constitution were in effect. No such case or claim exists.³⁹⁰

364. Ecuador and its experts have identified only one case, Case 437, which supposedly involved claims for unfair competition brought outside the Intellectual Property Law. Ecuador and its experts have characterized Case 437 as “*of paramount importance*”³⁹¹ and argue that it establishes unfair competition as “an unlawful civil act under Articles 2214 and 2229.”³⁹²

365. That case, however, does not support Ecuador’s claims. Case 437 was decided *before* the 1998 Constitution (which first required the typification of civil offenses) and *before* the 1998 Intellectual Property Law (which first typified unfair competition).³⁹³ As Professor Cordoba explains, “[it] follows from the Court’s decision in *Begazuay* that from 1998 on, the only basis in Ecuadorian law for a claim of unfair competition was the Intellectual Property Law.”³⁹⁴ Again, Ecuador’s failure to cite *any* relevant Ecuadorian authority is remarkable and decisive.

366. *Second*, the NCJ’s interpretation that Article 244-3 of the Constitution encompassed acts of unfair competition was unprecedented, contrary to the plain text of the provision, and unconstitutional.³⁹⁵ MSDIA therefore had no notice or opportunity to be heard with respect to the NCJ’s reliance on this provision.

³⁸⁷ Second Expert Report of Cordoba, at paras. 10.

³⁸⁸ Second Expert Report of Cordoba, at para. 11.

³⁸⁹ Exhibit CLM-404, *Begazuay, Bebidas Gaseosas del Azuay, S.A. v. Emprosur S.A.*, Supreme Court, Civil and Mercantile Chamber, 31 May 2006.

³⁹⁰ Second Expert Report of Cordoba, at para. 15.

³⁹¹ Expert Report of Polit Garcia, at para. 12.

³⁹² Ecuador Counter-Memorial, at para. 313 (quoting Expert Report of Polit Garcia, at para. 7).

³⁹³ Second Expert Report of Cordoba, at para. 15.

³⁹⁴ Second Expert Report of Cordoba, at para. 13. Moreover, Case 437 did not establish a civil tort of unfair competition akin to the one invented by the NCJ. As Professor Cordoba explains, “[t]o the extent Case 437 established any unfair competition claim that survived the Intellectual Property Law (which, as I described above, it did not and could not have), that claim requires the same elements as those required under the Intellectual Property Law.” Second Expert Report of Cordoba, at para. 39, fn. 37.

³⁹⁵ Over 12 pages of its Counter-Memorial, Ecuador argues that “[t]he NCJ’s construction of ‘unfair competition’ under Ecuadorian law *cannot be questioned* by this Tribunal as a valid statement of Ecuadorian law,” because the misinterpretation of national law by a national court ordinarily cannot give rise to a denial of justice. See Ecuador Counter-Memorial, p. 130, heading (2)(a) (emphasis added); *id.* at paras. 287-302. This argument misses the point. The question is not whether the NCJ’s manifestly erroneous interpretation of Ecuadorian law directly gives rise to international responsibility, but whether MSDIA had notice that it could be found liable for unfair competition. As

367. Article 244-3 of the 1998 Constitution provides that antitrust violations should be sanctioned in accordance with law: “Within the social-market economy system the State shall: ... Promote the development of competitive activities and markets. Foster free competition and punish, under the law, monopolistic and other practices that prevent and distort it.”

368. Article 244-3 makes *no* reference to acts of unfair competition between individual market participants. To the contrary, it refers to antitrust, free competition and concerns about monopoly, all problems focused on market power and the competitiveness of markets. Not surprisingly, there is not a single judgment in which an Ecuadorian court has ever held that Article 244-3 of the 1998 Constitution encompassed acts of unfair competition.³⁹⁶ Indeed, under the principle of typification described earlier, such a holding would be unconstitutional.

369. In addition, Article 244-3 is not self-executing. It instructs the legislature to pass a law such that antitrust violations can be sanctioned “under the law.” In light of this, it is unsurprising that the provision did not, and had never been held to, form the basis of a private cause of action.³⁹⁷ Given that Article 244-3 did not refer to unfair competition and was not self-executing, MSDIA did not have any notice that it could be held liable for unfair competition under Article 244-3.

370. *Third*, the substantive principles of unfair competition articulated by the NCJ had no basis or precedent in Ecuadorian law. MSDIA therefore could not have anticipated them or offered any meaningful defense to the legal basis on which the NCJ unilaterally imposed liability. In other words, the legal basis on which the NCJ held MSDIA liable was so novel and contrived as a matter of Ecuadorian law that MSDIA could not have possibly anticipated it.

371. The NCJ described the civil tort that MSDIA was supposedly liable for as “a competitor’s acts of disruption, because of the refusal to sell, in the Law of Unfair Competition.”³⁹⁸ There is no precedent in Ecuadorian law for such a theory, which is why Ecuador and its experts attempt to justify the NCJ’s decision by reference to Argentine unfair competition law,³⁹⁹ Chilean pre-contractual liability law,⁴⁰⁰ and French tort law.⁴⁰¹ The fact that Ecuador and its experts cannot

Professor Paulsson explains, the NCJ’s clear misapplication of Ecuadorian law serves as evidence that MSDIA was deprived of its right to notice and an opportunity to be heard. *See* Second Expert Report of Paulsson, at para. 26. Moreover, an egregiously incorrect judicial decision indisputably can constitute *decisive* circumstantial evidence of fundamental procedural unfairness, like bias, incompetence, or a lack of due process: “An unjust judgment may and often does afford strong evidence that the court was dishonest, or rather it raises a strong presumption of dishonesty. It may even afford *conclusive evidence*, if the injustice be sufficiently flagrant, so that the judgment is of a kind which no honest and competent court could possibly have given.” *See* Exhibit CLM-316, G. Fitzmaurice, *The Meaning of the Term ‘Denial of Justice’*, 13 Brit. Y.B. Int’l L. 93, 112 (1932). *See also* Exhibit CLM-174, J. Paulsson, DENIAL OF JUSTICE IN INTERNATIONAL LAW (2005), at 98 (“[P]roof 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.”).

³⁹⁶ MSDIA Memorial, at para. 344; First Expert Report of Oyarte, at para. 15-16, 25; First Expert Report of Cordoba, at para. 15.

³⁹⁷ MSDIA Memorial, at para. 355; First Expert Report of Oyarte, at para. 25; First Expert Report of Cordoba, at para. 51(e).

³⁹⁸ Exhibit C-203, NCJ Judgment, *NIFA v. MSDIA*, dated 21 September 2012, at Section 15.

³⁹⁹ *See* Expert Report of Molina Sandoval, at para. 70.

⁴⁰⁰ *See* Expert Report of Parraguez at paras. 22-34.

⁴⁰¹ Ecuador Counter-Memorial, at para. 316; Expert Report of Aguirre, at para. 6.10.

point to any precedent in Ecuadorian law for the NCJ's theory is telling; it confirms that MSDIA could not have anticipated or defended against the imposition of liability on such a theory.

372. As Professor Cordoba explained in his first expert report, at the time of NIFA's complaint, Ecuadorian law on unfair competition did not recognize (and had never recognized) "refusal to sell" as a basis for liability.⁴⁰² Ecuador has not been able to identify any precedent in Ecuador holding that refusing to sell a particular asset is an act of unfair competition.⁴⁰³

373. **Fourth**, in any event, the NCJ failed to consider key elements of any unfair competition claim.

374. Specifically, the NCJ did not consider whether MSDIA's conduct was contrary to accepted industry or customs; whether the "refusal to sell" was justified by MSDIA's interest in protecting its brand⁴⁰⁴; whether MSDIA acted with intent to divert NIFA's clients and disorganize NIFA's business; whether NIFA's clients were indeed diverted; and whether the refusal to sell resulted in the disorganization of NIFA's business.⁴⁰⁵ Notably, even Ecuador's expert, Professor Molina Sandoval, recognizes that these elements are necessary to establishing unfair competition (although he failed to consider them in his analysis of the NCJ decision).⁴⁰⁶

375. It is undisputed that these elements are distinct from the elements that comprise an antitrust claim. It is also undisputed that in the underlying *NIFA v. MSDIA* litigation, neither party took a position on what elements comprise "unfair competition" or made any effort to argue whether the elements of an unfair competition claim in other countries were supported by the evidence. Indeed, there was no reason for either party to do so, because they were not germane to the antitrust claim at issue in the case.⁴⁰⁷

376. In fact, during the litigation NIFA acknowledged that establishing a claim for unfair competition requires proving the intent to divert a competitor's clients,⁴⁰⁸ a showing it could not make. But NIFA said that it was not required to establish such diversion in this case *because it*

⁴⁰² First Expert Report of Cordoba, at para. 27.

⁴⁰³ Second Expert Report of Cordoba, at para. 44. In fact, it is particularly telling that even Ecuador's expert, Professor Molina Sandoval, who analyzes the NCJ's decision according to foreign-law principles, attempts to justify the NCJ's decision according to *another* theory, recasting the so-called unfair act from "refusal to sell" (the theory invented by the NCJ) to "delaying, through the offer and negotiation of the sale of an industrial plant, the entry of a competitor into a given market where the intention was not to sell the industrial plan, but instead to enter into an agreement no to produce or sell a given product." Expert Report of Molina Sandoval, at para. 31. The latter theory, of course, was not the basis of the NCJ's decision; nor was it an act of unfair competition in Ecuador.

⁴⁰⁴ Notably, Garcia-Menendez's text on unfair competition, which both the NCJ and Ecuador's expert, Professor Molina Sandoval, rely on, *see* Expert Report of Molina Sandoval, at para. 30, recognizes that a party can defend against an unfair competition claim by establishing that its refusal to sell a particular asset was justified by the defendant's legitimate business interests or its protection of its brand integrity. First Expert Report of Cordoba, at para. 43; Exhibit CLM-196, García Menéndez, COMPETENCIA DESLEAL: ACTOS DE DESORGANIZACIÓN DEL COMPETIDOR (2004), at p. 169. This issue was not litigated in the underlying litigation, because MSDIA had no reason to believe it should be litigating a defense to an unfair competition claim.

⁴⁰⁵ First Expert Report of Cordoba, at para. 52.

⁴⁰⁶ Second Expert Report of Cordoba, at para. 55.

⁴⁰⁷ MSDIA's Memorial, at para. 363.

⁴⁰⁸ Exhibit C-164, NIFA's Brief of 23 January 2009, *NIFA v. MSDIA*, Court of Appeals, at 3-4.

*was not alleging that MSDIA had committed an act of unfair competition.*⁴⁰⁹ The fact that the parties did not litigate these elements is further decisive proof that they did not understand themselves to be litigating the merits of an unfair competition claim.⁴¹⁰ MSDIA therefore had no reason to know that it could be held liable on that basis.

377. *Finally*, Ecuador suggests MSDIA was on notice that it could be held liable under a theory of a “civil” unfair competition because “conduct such as that alleged to have been engaged in by Merck may give rise to liability under principles of pre-contractual liability that are well-established under Ecuadorian law.”⁴¹¹ This is a transparent post-hoc effort to rescue the NCJ’s decision. The NCJ did not find MSDIA liable under any norm of pre-contractual liability, and NIFA never asserted such a claim. In fact, just as it had with respect to any unfair competition claim, NIFA expressly disclaimed any supposed “principles of pre-contractual liability,” stating unequivocally that its claim “*is not grounded upon pre-contractual negligence or liability of the Defendant.*”⁴¹² And therefore Ecuador’s contention is plainly wrong.

378. In any event, no general law of pre-contractual liability even existed in Ecuador. As MSDIA’s expert in civil law in Ecuador, Dr. Francisco Correa, explains:

“Under Ecuadorian law, there is no general form of ‘pre-contractual civil liability.’ Ecuadorian law strongly protects the freedom to contract and the right to refuse to enter into contract, notwithstanding the existence of previous negotiations. In other words, the existence of negotiations does not create or impose any legal obligation on the negotiating parties vis-à-vis the counter-party As a general matter, any party may withdraw from negotiations at any point and for any reason.”⁴¹³

379. Even Ecuador’s own expert, Professor Parraguez, acknowledges that there is no “explicit standard referring to pre-contractual liability” in Ecuador.⁴¹⁴ The only support Professor Parraguez is able to muster for his argument that pre-contractual liability nevertheless exists in Ecuador is a half-hearted citation of a few decisions of non-Ecuadorian courts and commentary on non-Ecuadorian laws, and the argument that the doctrine can be “*inferred*” from the

⁴⁰⁹ Exhibit C-164, NIFA’s Brief of 23 January 2009, *NIFA v. MSDIA*, Court of Appeals, at 3.

⁴¹⁰ In addition, as discussed below, the NCJ failed to conduct an independent assessment of the factual record even with respect to the facts on which it relied in support of its finding that MSDIA was liable for unfair competition. Not only were those facts insufficient as a matter of law to establish unfair competition, but they were also unsupported. The record in the *NIFA v. MSDIA* litigation demonstrated that (i) MSDIA had in fact intended to sell its plant, (ii) that it entered into good faith negotiations for a sale to NIFA, (iii) that even after NIFA’s conduct caused MSDIA justifiable concerns that NIFA intended to violate MSDIA’s intellectual property rights and mislead customers about the origin of generic copies of MSDIA’s drugs it might produce, MSDIA attempted to find compromise terms on which it could still proceed with the sale, (iv) that MSDIA did in fact sell the plant to another purchaser, (v) that the delays in the negotiations with NIFA resulted from NIFA’s inability to secure financing, not from any effort by MSDIA to draw out those negotiations, and (vi) that it was ultimately NIFA and not MSDIA that broke off the negotiations. See MSDIA Memorial, at paras. 25-36. The NCJ’s failure to consider the complete factual record, including the evidence submitted by MSDIA, led it to adopt the erroneous and biased factual findings of the court of appeals and was prejudicial to MSDIA.

⁴¹¹ Ecuador’s Counter-Memorial, at para. 314.

⁴¹² Exhibit C-238, NIFA’s Brief of 18 October 2006, *NIFA v. MSDIA*, Trial Court.

⁴¹³ Expert Report of Correa, at paras. 5-6.

⁴¹⁴ Expert Report of Parraguez, at. 12.

Ecuadorian Commercial Code (which NIFA never cited and the NCJ never applied).⁴¹⁵ But law and doctrine outside Ecuador do not establish law in Ecuador, and Professor Parraguez’s argument that the doctrine can be “*inferred*” from the Commercial Code is manifestly baseless.

380. The Commercial Code strictly limits the application of pre-contractual liability to defined commercial transactions, which do not encompass the sale of real property.⁴¹⁶ The existence of specific statutes establishing pre-contractual liability in certain specified circumstances could not possibly create an “inference” that some broader, general doctrine exists. In fact, as Professor Correa explains, it “necessarily lead[s] to the exact opposite conclusion: that the Ecuadorian legislature decided to limit such liability to very specific instances, and to not adopt a general rule.”⁴¹⁷

381. Moreover, even if some general doctrine of pre-contractual liability could be “inferred,” there would be no room for its application to the NIFA-MSDIA negotiations, which involved the sale of real property. As Professor Correa explains, real property can only be sold and transferred in Ecuador through the execution of a formal public instrument. In turn, the law is absolutely categorical that no obligations (or expectations) can arise from mere negotiations over a real-estate contract. Ecuadorian courts refuse to award damages for the failure to transfer property even where the parties have signed a private contract demonstrating agreement on all terms.

382. In fact, even where the buyer has commenced payment under such a private agreement, where the public instrument has not been executed, the only damages available for the failure to transfer property is restitution of the payments already made; no other rights or damages can arise.⁴¹⁸ Certainly no liability could arise from the NIFA-MSDIA negotiations for the Chillos Valley plant, which did not even culminate in an agreement on all terms—let alone any payment to MSDIA.

383. Moreover, even if, contrary to fact, pre-contractual liability could be a basis for holding MSDIA liable under Ecuadorian law, the record of the *NIFA v. MSDIA* proceedings could not support such a finding. The evidence in the trial court and court of appeals establishes that MSDIA acted in good faith throughout its negotiations and made every effort to finalize the sale of its pharmaceutical plant to NIFA.

384. Ecuador parrots NIFA’s claim that MSDIA planned from the start of the negotiations to introduce “*at the eleventh hour*” a non-compete proposal secretly designed to derail the negotiations.⁴¹⁹ However, as explained in MSDIA’s Memorial, MSDIA always intended to sell the plant, and did in fact sell the plant.

385. MSDIA had not considered asking for a non-compete clause at the outset of negotiations, but only did so *after* NIFA applied for and obtained registrations from the Ecuadorian Ministry of Health to produce the drug Rofecoxib, which was the subject of MSDIA’s *most valuable*

⁴¹⁵ Expert Report of Correa, at para. 9.

⁴¹⁶ Expert Report of Correa, at paras. 7.

⁴¹⁷ Expert Report of Correa, at para. 10.

⁴¹⁸ Expert Report of Correa, at para. 17.

⁴¹⁹ Ecuador Counter-Memorial, at para. 30.

patent in Ecuador and which MSDIA had an exclusive right to market in Ecuador.⁴²⁰ Indeed, *NIFA acknowledged* during the negotiations that its registration to produce Rofecoxib was improper. In these circumstances, it was entirely reasonable for MSDIA to request a formal agreement that NIFA would not use MSDIA's plant to make copies of MSDIA's products.⁴²¹

386. It is furthermore inconceivable that MSDIA could be held liable under any pre-contractual liability doctrine, given that the parties expressly agreed in writing that the negotiations would not give rise to any obligation between them. As Professor Correa explains, such agreements are legally binding and effectively waive pre-contractual liability between the parties in the limited circumstances in which it can arise in Ecuador.⁴²²

387. In this case, MSDIA and NIFA agreed in May 2002,⁴²³ at the commencement of discussions, and again in November 2002,⁴²⁴ just prior to the breakdown in negotiations, that no obligations would arise for either party from their ongoing discussions. MSDIA “reserve[d] the right to terminate the proposed discussions for any reason at any point in time” via an email from its broker, Staubach, to NIFA in October 2002.⁴²⁵ In such circumstances, pre-contractual liability was out of the question, even if the doctrine were applicable in Ecuador. Ecuador and its expert entirely fail to address these points.

388. In addition, even if the NCJ's finding of liability could be justified by an implied doctrine of pre-contractual liability (which it cannot), the NCJ's damages award could not be. As the foreign commentary that Professor Parraguez relies upon makes clear, damages for claims of

⁴²⁰ See Exhibit C-7, Email from Héctor Tejada (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). Rofecoxib was sold in Ecuador under the trademark “Vioxx.” See 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); ExExhibit C-138, Letter from Alejandro Ponce Martínez to Miguel García, dated 2 December 2002.

⁴²¹ Ecuador suggests that MSDIA's proposal was overbroad because it encompassed products other than Rofecoxib, including products that were not under patent. Ecuador Counter-Memorial at para. 33. But MSDIA's non-compete request encompassed products other than Rofecoxib because NIFA's actions with respect to Rofecoxib gave rise to a more general concern about other ways in which NIFA might cause substantial harm MSDIA's business in Ecuador (in addition to violating MSDIA's exclusive rights with respect to Rofecoxib). In particular, NIFA's registration for Rofecoxib evidenced its intent to use the machinery and equipment, employees, and know-how in MSDIA's plant to produce copies of MSDIA's products and to confuse consumers about the origin and quality of those copies. See, e.g., Exhibit C-173, Testimony of Doris Pienknagura, *NIFA v. MSDIA*, Court of Appeals, dated 4 June 2009, at 5 (in response to Question 18). In light of these concerns, MSDIA would have been fully justified—and well within its rights—to simply end the negotiations in the wake of the Rofecoxib discovery. Instead, MSDIA sought to discuss a means by which to continue with the sale but also attempt to protect its legitimate business interests by proposing an agreement according to which NIFA would not produce copies of MSDIA's products at MSDIA's plant for a reasonable period of time after the sale. *Id.* Moreover, in fact, it was *NIFA* (not MSDIA) that terminated the parties' negotiations. 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. Ecuador purports to fault MSDIA for failing to engage with NIFA when NIFA attempted to revive the deal several days after walking away from the bargaining table. See Ecuador Counter-Memorial, at para. 41. But it was entirely reasonable for MSDIA to seek a more reliable negotiating counter-party after NIFA's erratic behavior over the course of the parties' negotiations.

⁴²² Expert Report of Correa, at paras. 19-22.

⁴²³ Exhibit C-125, Confidentiality Agreement Between NIFA S.A. and MSDIA, dated 14 May 2002.

⁴²⁴ Exhibit C-5, Summary of Meeting Between MSDIA and NIFA, dated 20 November 2002.

⁴²⁵ Exhibit C-232, email from Edgardo Jaen to Miguel Garcia, dated 3 October 2002.

pre-contractual liability, where it is recognized, are limited to direct costs arising from the negotiation. The NCJ's award of two-years' worth of "lost opportunity" damages is contrary to any accepted doctrine of pre-contractual liability finds no basis anywhere in Ecuadorian law.⁴²⁶

389. In sum, Ecuador's attempt to justify the NCJ decision by way of some "pre-contractual liability" claim—a claim that the NCJ decision did not decide, that the plaintiff never asserted, that did not even exist in Ecuadorian law, that was foreclosed by the agreement of the parties, and that could not in any case justify a damages award of "lost opportunities"—further illustrates the indefensibility of the NCJ decision.

2. The NCJ's Decision Failed to Consider Any of MSDIA's Evidence and Perpetuated other Grave Procedural Violations Committed by the Lower Courts

390. Not only did the NCJ decide against MSDIA on a legal ground that had not been litigated by the parties and of which MSDIA did not have notice or an opportunity to be heard, but the NCJ also decided against MSDIA based on a tainted and one-sided evidentiary record that resulted from the manifestly biased and corrupt lower court proceedings.

391. As explained in MSDIA's Memorial, the NCJ did not correct, but instead ratified and adopted the factual findings of the court of appeals, which were based entirely on the evidence submitted by NIFA and which disregarded *all* of the evidence submitted by MSDIA. Specifically, the court of appeals wrongly held that MSDIA had "expressly waived the evidence aiming to dispel the grounds of the verdict in the first instance"⁴²⁷ – in other words, all of the evidence submitted and relied on by MSDIA. The NCJ compounded this error by holding MSDIA liable for unfair competition entirely upon the facts "*that can be found in the challenged [i.e. court of appeals] judgment.*"⁴²⁸

392. By relying on the factual findings of the court of appeals, which had improperly refused to consider MSDIA's evidence and which had exhibited obvious bias against MSDIA in multiple ways, the NCJ perpetuated the violations of MSDIA's due process rights that had occurred in the lower courts and itself denied justice to MSDIA by imposing liability on the basis of a tainted factual record.⁴²⁹

393. Ecuador disputes that the NCJ relied on the factual findings of the court of appeals but it offers no evidence that the NCJ undertook an independent review of the evidence.

394. The NCJ did not refer to any of MSDIA's evidence in its judgment. This is compelling evidence that it simply adopted the court of appeals' tainted factual findings. As Professor Ortega explains, Article 115 of the Code of Civil Procedure requires that the court "state in its decision the evaluation of all of the evidence produced."⁴³⁰ This rule applies to courts of first and

⁴²⁶ Expert Report of Correa, at paras. 23-27.

⁴²⁷ MSDIA Memorial, at para. 271 (f); Exhibit C-4, Court of Appeals Judgment, *NIFA v. MSDIA*, dated 23 September 2011, at 15-16.

⁴²⁸ Expert Report of Paez, at para. 35; Exhibit C-203, NCJ Judgment, *NIFA v. MSDIA*, dated 21 September 2012, at Section 11.

⁴²⁹ First Expert Report of Paulsson, at para. 48(f).

⁴³⁰ Second Expert Report of Ortega, at para. 15 (quoting Article 115 of the Code of Civil Procedure (Exhibit CLM-

second instance, including to the NCJ when it is acting as a court of instance, as it was in this case.

395. Had the NCJ actually conducted a *de novo* review of the parties' evidence on the merits, the NCJ would have recited the evidence upon which it relied. The evidence the NCJ does refer to is found in the court of appeals' judgment *and* is *NIFA's* evidence. The fact that the NCJ did not refer to any of *MSDIA's* evidence demonstrates that the NCJ, like the court of appeals before it, failed to consider any of *MSDIA's* evidence.⁴³¹ This is, of course, entirely consistent with the NCJ's express statement that it would reference the facts found in the court of appeals' judgment in deciding *MSDIA's* liability.⁴³²

396. Ecuador advances three counter-arguments, none of which has merit.

397. *First*, Ecuador claims that *MSDIA* made a submission in *NIFA's* Constitutional Court action challenging the NCJ's decision in which *MSDIA* admitted that the NCJ properly reviewed the evidence.⁴³³ But once again Ecuador mischaracterizes *MSDIA's* submission.

398. As Dr. Alejandro Ponce Martínez, *MSDIA's* counsel in the *NIFA v. MSDIA* litigation, explains:

“Because the only issue in the Constitutional Court was whether the NCJ had violated *NIFA's* Constitutional rights, the question of whether the NCJ had properly reviewed the evidence in holding *MSDIA* liable was entirely irrelevant. Thus, *MSDIA's* discussion of the evidence was limited to addressing *NIFA's* specific argument that the NCJ had not properly analyzed the evidence in calculating its \$1.57 million damages award. *MSDIA's* principal response to *NIFA's* argument was that *NIFA* could not complain that its rights were violated *because the NCJ relied on NIFA's own evidence in calculating damages.*”⁴³⁴

399. Thus, *MSDIA's* submission did not address at all whether the NCJ independently considered any evidence with regard to the NCJ's liability finding. Moreover, *MSDIA's* argument that the NCJ considered only *NIFA's* own evidence with respect to damages was wholly consistent with *MSDIA's* argument here that the court of appeals, and subsequently the NCJ, completely and improperly disregarded *MSDIA's* evidence and considered only *NIFA's* evidence.

400. *Second*, Ecuador admits that in Clause 11 of its decision the NCJ stated that “the following facts can be found in the challenged judgment,” *i.e.*, the court of appeals' judgment. As set out in *MSDIA's* Memorial, this reflects the NCJ's adoption of the court of appeals' factual findings without the NCJ undertaking its own assessment of the evidence. Ecuador

190)).

⁴³¹ Second Expert Report of Ortega, at para. 15; *see also* Expert Report of Paez, at paras. 36-37.

⁴³² Exhibit C-203, NCJ Judgment, *NIFA v. MSDIA*, dated 21 September 2012, at Section 15. *See also* Second Expert Report of Ortega, at paras. 46-51.

⁴³³ Ecuador counter-Memorial, at para. 387.

⁴³⁴ Ponce Martínez Second Witness Statement, at para. 102 (emphasis added).

argues that this statement should be disregarded because Clause 11 “has nothing to do with whether the NCJ ‘relied on ... the court of appeals’ findings to reach its decision...”⁴³⁵

401. Ecuador’s position is untenable: It fails to quote the NCJ’s entire statement, the meaning of which is unmistakable:

“To proceed pursuant to the first subsection of Article 16 of the Law of Cassation, and to enter the appropriate decision in lieu of the one that is repealed, this Court of Cassation refers to the following facts that can be found in the challenged judgment.”⁴³⁶

402. Article 16 provides that when the NCJ annuls a lower court decision, the NCJ can then act as court of instance and render a new decision. In doing so, the NCJ should make its own assessment of the evidence.⁴³⁷ The meaning of Clause 11 in the NCJ opinion thus is clear: the NCJ, after annulling the lower court’s judgment, relied upon the facts found in the court of appeals’ judgment in order to proceed as a court of instance and “enter the appropriate decision.” Thus, Ecuador’s suggestion that the court of appeals’ factual findings were irrelevant to the NCJ’s liability finding is demonstrably wrong.

403. **Third**, Ecuador asserts that the NCJ’s “findings were based upon its own review of the evidence rather than lower court’s factual findings.”⁴³⁸ But this position is inconsistent with the NCJ’s own statement adopting the court of appeals’ finding of facts, discussed immediately above, and Ecuador is unable to point to anything in the NCJ decision that suggests the NCJ made an independent assessment of the evidence.

404. Ecuador identifies only one instance of the NCJ allegedly reviewing evidence for itself. Ecuador claims “[i]t is evident from Clause 16.9 of the NCJ decision that, at a minimum, the court reviewed Mr. Harel’s January 15, 2003 email, discussed above, in setting the outside parameter ... for the calculation of its damage award to Propfar, because in that Clause the court stated that ‘MERCK itself quantified the losses....’”⁴³⁹

405. But once again, Ecuador’s only example is based on an incomplete and misleading quotation of the NCJ decision. The NCJ judgment does not even refer to the 15 January 2003 email.⁴⁴⁰ To the contrary, in clause 16.9 of the NCJ decision, the NCJ is actually referring expressly to the court of appeals’ judgment.

406. Ecuador selectively quotes the NCJ decision, suggesting that the NCJ was making an **independent** assessment that the evidence showed that Merck itself had quantified NIFA’s

⁴³⁵ Ecuador Counter-Memorial at para. 367.

⁴³⁶ Exhibit C-203, NCJ Judgment, *NIFA v. MSDIA*, dated 21 September 2012, at Section 15 (emphasis added).

⁴³⁷ Expert Report of Paez, at paras. 20-21.

⁴³⁸ Ecuador Counter-Memorial, at para. 374.

⁴³⁹ Ecuador Counter-Memorial, at para. 373.

⁴⁴⁰ Indeed, had the NCJ actually reviewed the email that Ecuador now claims that it did, the NCJ would never have used it as a basis to establish NIFA’s lost opportunity damages. Even a cursory glance at that email makes clear that the losses it discusses are MSDIA’s projected lost sales, not lost profits. See Exhibit C-286, Email from Jacob Harel to Federico Wintour, et al., dated 15 January 2003. See also Exhibit C-252, Testimony of Luis Eduardo Ortiz, *NIFA v. MSDIA*, Court of Appeals, dated 23 November 2009, at 5-6 (in response to Questions 26-30).

losses. In fact, however, the sentence from which Ecuador selectively quotes actually reads: “Moreover, the *judgment [i.e., the court of appeals’ judgment]* states that Merck itself quantified the losses....”⁴⁴¹ The remainder of clause 16.9 of the NCJ judgment also comes directly from the court of appeals’ decision (including a lengthy quote from that decision).⁴⁴²

407. Ecuador fails to note numerous other references in the NCJ’s decision to the factual findings of the court of appeals. For example, the NCJ relied on the facts found in the court of appeals’ judgment in establishing a two year period for the calculation of damages, because of what “can be seen” in “*the judgment itself* of the Provincial Court.”⁴⁴³ Similarly, when the NCJ referred to the underlying facts in Clause 8.2 of its judgment, the NCJ began its summary of the facts by stating: “*From the challenged judgment it can be seen....*” The NCJ subsequently concluded: “This basic background information is [found] in the first clauses *of the challenged judgment....*”⁴⁴⁴

408. It is also notable that what the NCJ describes as “facts” are actually NIFA’s allegations – or, as Ecuador would put it, an “accurate summary of [NIFA’s] claims” – which further supports the conclusion that the NCJ, like the court of appeals, considered only NIFA’s evidence.⁴⁴⁵ At bottom, the only support Ecuador offers for its argument that the NCJ conducted a *de novo* review of the full factual record, including MSDIA’s evidence, is Professor Aguirre’s completely unsupported, bald assertion that the NCJ did so.⁴⁴⁶ A review of the NCJ decision plainly shows otherwise.

3. MSDIA Has Never Accepted the NCJ’s Decision on Liability or Waived Any Objection by Opposing NIFA’s Constitutional Court Challenge

409. Although MSDIA was not a party to NIFA’s Extraordinary Action for Protection in the Constitutional Court, MSDIA appeared as an interested third party and submitted briefs opposing NIFA’s request that the Constitutional Court reinstate the court of appeals’ \$150 million damages award. Ecuador argues that in MSDIA’s submissions to the Constitutional Court, MSDIA “vigorously defended the validity and propriety of the NCJ decision”⁴⁴⁷ and that its positions in the Constitutional Court proceedings are inconsistent with its arguments in this arbitration.⁴⁴⁸ Ecuador’s argument completely misrepresents MSDIA’s position in the Constitutional Court proceedings.

410. First, the question whether the NCJ decision was correct on the merits was not before the Constitutional Court. The only issue in the Constitutional Court proceedings was whether the

⁴⁴¹ Exhibit C-203, NCJ Judgment, *NIFA v. MSDIA*, dated 21 September 2012, at Section 16.9.

⁴⁴² See Exhibit C-4, Court of Appeals Judgment, *NIFA v. MSDIA*, dated 23 September 2011, at Section 13. The evidence on which the Court of Appeals relied for this alleged finding of fact was submitted by NIFA. Ponce Martínez Second Witness Statement, at para. 102.

⁴⁴³ Exhibit C-203, NCJ Judgment, *NIFA v. MSDIA*, dated 21 September 2012, at Section 16.10.1.

⁴⁴⁴ Exhibit C-203, NCJ Judgment, *NIFA v. MSDIA*, dated 21 September 2012, at Section 8.2.

⁴⁴⁵ The descriptions in Sections 8.2 and 11 of the NCJ decision are basically identical. Ecuador characterizes the latter description as an “accurate summary of [NIFA’s] claims.” Ecuador’s Counter-Memorial, at para. 365.

⁴⁴⁶ See Expert Report of Aguirre, at para. 6.9.

⁴⁴⁷ Ecuador Counter-Memorial, at para. 80.

⁴⁴⁸ Ecuador Counter-Memorial, at para. 359.

NCJ decision *violated NIFA's Constitutional rights*.⁴⁴⁹ As a result, MSDIA's briefs were properly focused on rebutting NIFA's baseless arguments that the NCJ's decision awarding NIFA \$1.57 million in damages somehow violated *NIFA's* Constitutional rights. Neither the correctness of that holding, nor whether any aspect of the decision violated MSDIA's rights, was at issue in the Constitutional Court.

411. Because the propriety of the NCJ's decision was not at issue in the Constitutional Court proceedings, Ecuador's effort to attribute significance to the fact that MSDIA failed to attack certain aspects of the NCJ judgment in its Constitutional Court briefing is disingenuous. For example, Ecuador repeatedly asserts that MSDIA in its Constitutional Court briefing did not attack the NCJ's "application of Article 244(3)" of the 1998 Constitution as a basis for unfair competition liability.⁴⁵⁰ It is true that this was not the focus of MSDIA's Constitutional Court submissions, for the simple reason that the issue was not before the Constitutional Court. As Dr. Ponce Martínez explains:

"[T]his argument misunderstands the nature of NIFA's Extraordinary Action for Protection. Because the only issue in that proceeding was whether the NCJ decision violated NIFA's Constitutional rights, the question of whether MSDIA believed that the decision was correct or incorrect was not relevant. Such matters were completely irrelevant to the Constitutional Court's inquiry."⁴⁵¹

412. Nevertheless, MSDIA was careful to affirm repeatedly throughout its Constitutional Court briefing that it disagreed with the NCJ's decision on liability. As Dr. Ponce Martínez explains, MSDIA stated its position on the NCJ's decision unambiguously at the very beginning of its first submission to the Constitutional Court after NIFA's Extraordinary Action was admitted:

"in the first paragraph of MSDIA's first merits brief in the Constitutional Court, MSDIA stated that it had paid the damages ordered by the NCJ only 'because there were no further avenues available for civil appeals, despite the fact that MSD[IA] believed and still believes there was no basis under Ecuadorian law to hold it liable and that [NIFA] was not entitled to any damages.'"⁴⁵²

413. Dr. Ponce Martínez identified "at least 10 other instances in that brief alone in which MSDIA reiterated that it disagreed that it could be held liable under any theory or for any amount of damages."⁴⁵³ Among other things, MSDIA asserted that:

a. it "[did] not agree that it caused any damages whatsoever to [NIFA],"⁴⁵⁴

⁴⁴⁹ Ponce Martínez Second Witness Statement at para. 95.

⁴⁵⁰ Ecuador Counter-Memorial, at para. 308.

⁴⁵¹ Ponce Martínez Second Witness Statement at para. 100.

⁴⁵² Ponce Martínez Second Witness Statement at para. 96 (quoting Exhibit R-117, MSDIA submission to the Constitutional Court dated 3 Apr. 2013 at para. 1).

⁴⁵³ Ponce Martínez Second Witness Statement at para. 96 and note 8.

⁴⁵⁴ Exhibit R-117, MSDIA submission to the Constitutional Court dated 3 Apr. 2013, at para 18.

- b. “there was never any reason to compensate [NIFA], as [MSDIA] took no unlawful action that could have created liability ... and therefore, [NIFA’s] claim should have been rejected [in its entirety],”⁴⁵⁵
- c. it “[did] not agree with the [NCJ]’s decision to order any indemnification amount at all,”⁴⁵⁶ and
- d. it “does not agree with the decision of the [NCJ] where it determines MSD’s responsibility to [NIFA].”⁴⁵⁷

MSDIA’s position on the NCJ judgment was therefore very clear and entirely consistent with its position here.

414. Ecuador nonetheless cherry-picks a handful of isolated quotes from MSDIA’s briefs in an effort to create the false impression that MSDIA argued in favor of the NCJ’s holding on liability. For example, Ecuador argues that MSDIA conceded to the Constitutional Court that the NCJ decision was “based upon recognized Ecuadorian legal principles” (Ecuador’s words) when MSDIA stated in a brief that the NCJ “affirmed that [NIFA’s] claim fell within the framework of unfair competition and that unlawful competition is typified as a quasi-unlawful civil act,” which the NCJ applied to find MSDIA liable.⁴⁵⁸

415. Ecuador’s quotation is highly misleading and its characterization is wrong. Placed in proper context, MSDIA was simply describing what *the NCJ* purported the law to be in support of the argument that the decision did not violate NIFA’s constitutional rights.⁴⁵⁹ Moreover, in the very next sentence MSDIA reiterated that MSDIA “*does not agree*” that the NCJ properly held it liable for damages..⁴⁶⁰

416. Ecuador also quotes misleadingly from a Constitutional Court brief in which MSDIA explained that:

“The [NCJ] decision does not violate [NIFA’s] rights.... [the NCJ] decision establishes that these principles [alleged by NIFA] are within the doctrinal framework of unlawful competition and rules that, in the judges’ opinion, [MSDIA]’s conduct constituted a quasi-unlawful act in accordance with articles 2214 and 2229 of the Civil Code. The cassation decision explains the differences between Competition Defense Law and

⁴⁵⁵ Exhibit R-117, MSDIA submission to the Constitutional Court dated 3 Apr. 2013, at para. 19.

⁴⁵⁶ Exhibit R-117, MSDIA submission to the Constitutional Court dated 3 Apr. 2013, at para. 166.

⁴⁵⁷ Exhibit R-117, MSDIA submission to the Constitutional Court dated 3 Apr. 2013, at para. 266.

⁴⁵⁸ Ecuador Counter-Memorial at para. 307 (quoting Exhibit R-117, MSDIA submission to the Constitutional Court dated 3 Apr. 2013, at para. 175).

⁴⁵⁹ As Dr. Ponce Martínez notes, Ecuador’s translation of the above language from MSDIA’s brief creates the misimpression that MSDIA intended to communicate that that the NCJ’s reasoning was correct. As he explains, “[t]he Spanish word ‘afirma’ in MSDIA’s brief, which Ecuador translates as meaning ‘affirmed,’ is more properly translated as ‘states’ in this context.” Ponce Martínez Second Witness Statement at para. 99.

⁴⁶⁰ Exhibit R-117, MSDIA submission to the Constitutional Court, dated 3 Apr. 2013, at para 175.

unlawful competition and relates these two separate concepts to the evidence and facts of the case.”⁴⁶¹

417. Again, Ecuador’s suggestion that this language constitutes an endorsement of the NCJ’s reasoning is plainly wrong. As Dr. Ponce Martínez explains, MSDIA “was not expressing its own views about the NCJ decision,” but rather was “describing to the Constitutional Court how the NCJ had decided the case in order to establish that it could not have violated NIFA’s rights.”⁴⁶² Again, in describing the NCJ decision, MSDIA was careful to “mak[e] clear that MSDIA did not agree with the outcome.”⁴⁶³ Dr. Ponce Martínez’s characterization of MSDIA’s intentions is confirmed in the quoted language itself, which is clearly framed around the question whether the NCJ decision “violate[d] [NIFA’s] rights” and takes pains to describe the NCJ’s liability finding as a matter of “the judges’ opinion.”⁴⁶⁴

418. In short, MSDIA did not accept or endorse the NCJ’s liability decision in its briefing to the Constitutional Court, but rather made clear its disagreement with the decision. Even assuming MSDIA’s positions in that proceeding could somehow estop MSDIA from taking contrary positions in this arbitration—and Ecuador offers no legal support for its assertion to that effect—MSDIA’s position on the NCJ’s liability holding has been entirely consistent in both fora.

4. The NCJ’s Decision Was a Final Decision of Ecuador’s Legal System

419. As set out in MSDIA’s Memorial, a State’s international responsibility for denial of justice arises once a final judgment has been rendered by a *court of last resort*.⁴⁶⁵ The authorities cited by Ecuador recognize that a claimant is only required to exhaust “ordinary corrective functions”⁴⁶⁶ until a judgment has been rendered by “the highest court *to which a case is appealable*.”⁴⁶⁷

⁴⁶¹ Ecuador Counter-Memorial at para 306 (quoting Exhibit R-200, MSDIA submission to the Constitutional Court dated 13 Sept. 2013), para. 172.

⁴⁶² Ponce Martínez Second Witness Statement at para. 98.

⁴⁶³ Ponce Martínez Second Witness Statement at para. 98.

⁴⁶⁴ Exhibit R-200, MSDIA submission to the Constitutional Court dated 13 Sept. 2013), para 9.

⁴⁶⁵ MSDIA Memorial, at paras. 375-377.

⁴⁶⁶ See Exhibit CLM-99, J. Paulsson, DENIAL OF JUSTICE IN INTERNATIONAL LAW (2005), at 108; Exhibit RLA-10, E.M. Borchard, *Responsibility of States at the Hague Codification Conference*, 24 Am. J. Int’l L. 517, 532 (1930) (emphasis added) (explaining that “all appeals [must] be[] exhausted” as a prerequisite to international responsibility for denial of justice).

⁴⁶⁷ Exhibit RLA-5, E.M. Borchard, THE DIPLOMATIC PROTECTION OF CITIZENS ABROAD (1919), at 198 (emphasis added); Exhibit RLA-111, *Case of Amos B. Corwin v. Venezuela*, UNRIAA vol. XXIX 260, 268 (“a state’s liability begins only when the *court of last resort*, accessible by reasonable means, has acted on it”) (emphasis added); Exhibit RLA-17, F.K. Nielsen, INTERNATIONAL LAW APPLIED TO RECLAMATIONS (1933), at 28 (explaining that a denial of justice “can be predicated only on a decision of a court of last resort”); Exhibit CLM-34, *ATA Construction, Industrial and Trading Company v. The Hashemite Kingdom of Jordan*, ICSID Case No. ARB/08/2, Award, dated 18 May 2010, at para. 107 (explaining that denial of justice arises from a decision by a “*final judicial instance*”) (emphasis added).

420. Ecuador does not dispute that the NCJ was the court of last resort in the *NIFA v. MSDIA* litigation. Ecuador’s expert, Professor Javier Aguirre Valdez, agrees that “[t]he National Court of Justice is the **highest court in Ecuador**.”⁴⁶⁸

421. Ecuador also does not dispute that the NCJ’s \$1.57 million judgment against MSDIA was not subject to any appeal. Ecuador’s expert, Juan Francisco Guerrero del Pozo, agrees that “as to the final judgment handed down by the National Court of Justice, **there were no other remedies available before the ordinary jurisdiction**.”⁴⁶⁹ Professor Guerrero del Pozo explains that “**no vertical appeal whatsoever could be allowed**, given the fact that **Ecuador’s ordinary justice system does not have nor did it have any higher body to which the party could appeal for review of the judgment issued in the cassation remedy**.”⁴⁷⁰

422. Thus, the NCJ’s \$1.57 million judgment against MSDIA was a final decision rendered by an Ecuadorian court of last resort in the *NIFA v. MSDIA* litigation. Because the judgment was not subject to any further appeals, it was immediately enforceable against MSDIA’s assets in Ecuador, and MSDIA was ordered to pay the judgment (which it did). As Ecuador’s own authorities on international law recognize, such a judgment gives rise to a State’s international responsibility for denial of justice.

423. Although Ecuador does not dispute that the NCJ was the court of last resort in the *NIFA v. MSDIA* litigation, Ecuador nevertheless argues that the NCJ’s judgment could not give rise to international responsibility for denial of justice. Specifically, Ecuador asserts that even if the decision of the NCJ violated MSDIA’s due process rights, the NCJ’s decision would not constitute a denial of justice, because MSDIA chose not to file what Ecuador concedes would have been an entirely “**separate and independent**”⁴⁷¹ collateral action to challenge the NCJ judgment—specifically, an “**Extraordinary Action for Protection**” in Ecuador’s Constitutional Court.⁴⁷²

424. As explained below, Ecuador’s argument simply cannot stand. The NCJ is the highest civil court, there is no right of appeal from an NCJ decision, and that decision is final and immediately enforceable. As a consequence, the filing of an Extraordinary Action for Protection in Ecuador’s Constitutional Court could not have suspended the enforcement of the NCJ’s judgment or relieved MSDIA of its obligation under Ecuadorian law to pay that judgment. Moreover, even if MSDIA had filed an Extraordinary Action for Protection and prevailed, **the**

⁴⁶⁸ Second Aguirre Expert Report, at para. 6.2. *See also* Second Expert Report of Oyarte, at para. 10 (“The NCJ is the **highest court in [Ecuador’s] judicial branch of Government**.”) (emphasis added). (emphasis added).

⁴⁶⁹ Expert Report of Guerrero del Pozo, at para. 20 (emphasis added).

⁴⁷⁰ Expert Report of Guerrero del Pozo, at para. 19 (emphasis added).

⁴⁷¹ Expert Report of Guerrero del Pozo, at para. 12 (emphasis added). *See also* Second Expert Report of Oyarte, at para. 19 (explaining that an Extraordinary Action for Protection “is a **separate action and not an appeal**.”) (emphasis added). Indeed, the Constitutional Court has explained that an Extraordinary Action for Protection cannot even be brought until the underlying judgment “cannot be contested by vertical remedies (appeal, etc.) or horizontal remedies (reversal),” that is, until a decision “has been issued by the **court of last resort**.” Second Expert Report of Oyarte, at para. 8, fn. 2 (citing CLM-187, Constitutional Court Judgment No. 068-10-SEP-CC, dated 27 January 2011, p. 41) (emphasis added). Thus, an Extraordinary Action for Protection necessarily does not constitute a vertical appeal or horizontal remedy and, correspondingly, the NCJ’s judgment qualifies as a judgment by a court of last resort.

⁴⁷² Ecuador Counter-Memorial, at para. 192.

Constitutional Court lacked the authority to order NIFA (which would not even have been party to that action) to repay the judgment to MSDIA. Thus, the Constitutional Court could not have effectively remedied the harm caused to MSDIA by the NCJ's \$1.57 million judgment.

425. At the point in time that the NCJ issued a final and immediately enforceable judgment against MSDIA that the Ecuadorian courts did enforce and that MSDIA paid, there was a completed and actionable denial of justice within the meaning of the Treaty.⁴⁷³

- a) MSDIA Was Not Required to Pursue an Extraordinary Action For Protection Because the Constitutional Court Could Not Afford an Effective Remedy

426. MSDIA was not required to file an Extraordinary Action for Protection, because the Constitutional Court could not have provided MSDIA with an effective remedy from the denial of justice inherent in the NCJ's \$1.57 million judgment.

427. Ecuador acknowledges that a claimant is not required to exhaust local remedies that provide no "reasonable probability of an effective remedy."⁴⁷⁴ As Professor Amerasinghe acknowledges, "**those remedies which are ineffective or inadequate need not be exhausted.**"⁴⁷⁵

428. "It is a matter for international determination by the international forum, on a case-by-case basis, whether a remedy is reasonably available, in terms of either adequacy or efficacy."⁴⁷⁶ For instance, the requirement to exhaust local remedies has been held to be inapplicable where such remedies "give every indication of being **plainly inadequate or unsatisfactory**"⁴⁷⁷ or are ineffective,⁴⁷⁸ where "[t]he local courts are **notoriously lacking in independence**,"⁴⁷⁹ as a result of corruption or outside pressure,⁴⁸⁰ or if "the circumstances under which [the] denial of justice was produced may reveal the **futility and hopelessness of further proceedings.**"⁴⁸¹ As Professor Paulsson explains:

⁴⁷³ See First Expert Report of Paulsson, at para. 56; Second Expert Report of Paulsson, at paras. 11-19.

⁴⁷⁴ See Ecuador Counter-Memorial, at para. 206; Expert Report of Amerasinghe, at para. 19 ("**[I]neffective remedies need not be exhausted.**") (emphasis added); Expert Report of Cafilisch, at para. 16. See also Exhibit CLM-334, International Law Commission (Dugard), Third Report on Diplomatic Protection, UN Doc. A/CN.4/523 (2002), at 6, para. 19.

⁴⁷⁵ Expert Report of Amerasinghe, at para. 16 (emphasis added).

⁴⁷⁶ Exhibit CLM-99, J. Paulsson, DENIAL OF JUSTICE IN INTERNATIONAL LAW (2005), at 113.

⁴⁷⁷ Exhibit CLM-320, A.V. Freeman, THE INTERNATIONAL RESPONSIBILITY OF STATES FOR DENIAL OF JUSTICE (1970), at 420-421. See also Exhibit RLM-6, *Ambatielos Claim (Greece v. United Kingdom)*, Award, dated 6 March 1956 ("[I]t is generally considered that the ineffectiveness of available remedies, without being legally certain, may also result from circumstances which do not permit any hope of redress to be placed in the use of those remedies.").

⁴⁷⁸ First Expert Report of Paulsson, at para. 55 (explaining that a claimant need not exhaust remedies which "would not provide meaningful redress for the wrong complained of"). See also Exhibit CLM-52, *Finnish Ships Case (Finland v. Great Britain)*, III RIAA 1479, dated 9 May 1934, at 1503 ("The parties in the present case, however, agree—and rightly—that the local remedies rule does not apply where there is no effective remedy."); Exhibit RLA-55, *The Loewen Group, Inc. and Raymond Loewen v. United States of America*, ARB(AF)/98/3, Award, dated 26 June 2003, at paras. 165-167.

⁴⁷⁹ Exhibit RLM-30, J. Paulsson, DENIAL OF JUSTICE IN INTERNATIONAL LAW, at 118 (2005) (emphasis added).

⁴⁸⁰ See Exhibit RLM-39, *United States v. Great Britain (Robert E. Brown)*, Award, dated 23 November 1923, Vol. VI UNRIAA 120 (1923), at 129.

⁴⁸¹ Exhibit CLM-320, A.V. Freeman, THE INTERNATIONAL RESPONSIBILITY OF STATES FOR DENIAL OF JUSTICE

“[T]he ‘crucial question’ is whether a legal remedy ‘gives the possibility of an effective and sufficient means of effective redress.’ This is absent where the ‘local remedies provide no possibility of effective redress,’ such as where ‘the local courts do not have the competence to grant a[n] appropriate and adequate remedy to the alien

“[T]he principle that local remedies must ordinarily be exhausted is ... *predicated on their reasonable prospect of providing an effective cure for the harm complained of.*”⁴⁸²

429. As a result of these limitations on the requirement, commentators have recognized that the requirement to exhaust local remedies is “*in practice ... a rather low and porous obstacle, more a sandbar than a dam.*”⁴⁸³ As explained by Judge Lauterpacht in his oft-cited opinion in the *Norwegian Loans* case:

“[T]he requirement of exhaustion of local remedies is *not a purely technical or rigid rule*. It is a rule which international tribunals have applied *with a considerable degree of elasticity.*”⁴⁸⁴

(1970), at 422 (emphasis added).

⁴⁸² Second Expert Report of Paulsson, at paras. 14-15 (emphasis added) (quoting Exhibit CLM-335, International Law Commission, *Draft Articles on Diplomatic Protection* (2006), art. 14, cmt. 4).

⁴⁸³ Exhibit CLM-363, C. Romano, *The Rule of Prior Exhaustion of Domestic Remedies: Theory and Practice in International Human Rights Procedures*, in INTERNATIONAL COURTS AND THE DEVELOPMENT OF INTERNATIONAL LAW (2013), at 564 (emphasis added). Ecuador concedes that the requirement of exhaustion is to be applied flexibly and with regard to the factual circumstances. See Ecuador Counter-Memorial, at paras. 206-227.

⁴⁸⁴ Exhibit CLM-278, *Separate Opinion of Judge Sir Hersch Lauterpacht in Certain Norwegian Loans (France v. Norway), Judgment (6 July 1957)*, 1957 I.C.J. Reports 9, at p. 39 (emphasis added). See also Exhibit CLM-320, A.V. Freeman, THE INTERNATIONAL RESPONSIBILITY OF STATES FOR DENIAL OF JUSTICE (1970), at 418 (“[I]nternational law has endowed the rule with a flexibility designed to serve practical needs. Accordingly there are *many circumstances* under which a strict, literal exhaustion of local remedies is considered to be unnecessary.”) (emphasis added). Ecuador and its expert, Professor Amerasinghe, argue that a claimant is required to establish that remaining remedies are “obviously futile.” See Ecuador Counter-Memorial, at para. 201; Expert Report of Amerasinghe, at paras. 20-24. However, the standard of “obvious futility” is no longer good law, and contemporary commentators and tribunals have recognized that a far less rigid standard governs the determination of whether a remedy is “effective.” See Second Expert Report of Paulsson, at para. 12. See also Exhibit CLM-309, Dugan, et al., INVESTOR-STATE ARBITRATION (2008), at 350-351 (noting that the “obvious futility” test has been “described as too strict” and has been disavowed by Dugard’s third report on diplomatic protection, which set forth the more permissive formulation: “provide no reasonable possibility of an effective remedy”); Exhibit CLM-99, J. Paulsson, DENIAL OF JUSTICE IN INTERNATIONAL LAW (2005), at 117; Exhibit CLM-347, D. Mummery, *The Content of the Duty to Exhaust Local Remedies*, 58 Am. J. Int’l L. 389, 401 (1964) (explaining that the concept of “obvious futility” “contributes very little to precision and objectivity of thought”). Indeed, Professor Amerasinghe’s own writings have criticized the reasoning behind the “obvious futility” standard, noting that “absence of justification for applying *such a strict criterion* to the resort by aliens to local remedies when, pragmatically speaking, litigants can in normal circumstances be expected not to spend time and money exercising available recourse, if it appears reasonably rather than highly probable that they are not likely to succeed.” Exhibit CLM-293, C. Amerasinghe, *The Local Remedies Rule in an Appropriate Perspective*, 36 Zeitschrift für ausländisches öffentliches Recht und Völkerrecht 726, 752 (1976). While the tribunal in *Apotex v. United States* recently applied the standard of “obvious futility,” it only did so after *both parties* requested the application of that standard. See Exhibit RLA-122, *Apotex, Inc. v. The Government of the United States of America*, UNCITRAL, Award on Jurisdiction and Admissibility, dated 14 June 2013, at para. 268 (noting that the test of “obvious futility” was “*the Parties’ common test*”) (emphasis added); Second Expert Report of Paulsson, at p. 8, fn. 12.

430. Here, as explained in further detail in the sections below, there are three reasons that an Extraordinary Action for Protection in the Constitutional Court would not have provided an effective remedy to MSDIA, and, thus, that MSDIA had no obligation to pursue that action:

a. First, because the NCJ’s \$1.57 million judgment was immediately enforceable and enforcement could not have been suspended pending the Constitutional Court’s resolution of an Extraordinary Action for Protection, the Constitutional Court’s annulment of the NCJ’s judgment could not have forestalled the harm caused by that judgment to MSDIA. Thus, Ecuador’s courts compelled MSDIA to pay the judgment within weeks of the NCJ’s ruling and the Constitutional Court offered no means to forestall that obligation.

b. Second, even if MSDIA had prevailed in an Extraordinary Action for Protection, the Constitutional Court would have lacked the authority to order NIFA to reimburse to MSDIA the \$1.57 million that MSDIA had already paid in satisfaction of the NCJ’s judgment. It is entirely unclear how a favorable result in the Constitutional Court could have addressed the NCJ’s denial of justice.

c. Third, the corruption and bias that afflicts Ecuador’s judiciary rendered further remedies, including an Extraordinary Action for Protection in the Constitutional Court, futile. Indeed, the Constitutional Court’s decision in NIFA’s own Extraordinary Action for Protection makes clear that it is not an effective remedy. As discussed below,⁴⁸⁵ the Constitutional Court’s decision was manifestly irrational, and had the effect of reinstating the decision of the court of appeals, which imposed \$150 million in liability against MSDIA with no conceivable basis in the facts or in Ecuadorian law—a decision that the NCJ itself said was based on “an incorrect explanation and application” of law and awarded damages that “lack[ed] all proportion,” and which Ecuador concedes in its Counter-Memorial was indefensible.⁴⁸⁶ The absurdity of the outcome in the Constitutional Court is striking evidence that the process in that court, just as the process at every level in the *NIFA v. MSDIA* case, was deeply flawed and lacking in impartiality, and that the Constitutional Court could not have provided an effective remedy for violations of MSDIA’s rights in the NCJ.

Any one of these reasons is fatal to Ecuador’s assertion that it cannot be held responsible for the denial of justice resulting from the \$1.57 million judgment of the NCJ because of MSDIA’s failure to file an Extraordinary Action for Protection in Ecuador’s Constitutional Court.

(1) The Constitutional Court Could Not Have Suspended Enforcement of the NCJ’s Judgment

431. For a local remedy to be effective, it must be “*capable of redressing the complaint of the litigant*.”⁴⁸⁷ Ecuador’s expert, Professor Amerasinghe, recognizes that a local remedy need not be exhausted where it “will not satisfy the object sought by the Claimant,”⁴⁸⁸ such as in a case

⁴⁸⁵ See below at paras. 475-493.

⁴⁸⁶ Ecuador Counter-Memorial, at para 76.

⁴⁸⁷ Second Expert Report of Paulsson, at para. 14.

⁴⁸⁸ Expert Report of Amerasinghe, at para. 27.

where a local court or tribunal lacks the authority to reverse the harm caused to a foreign litigant by the challenged judgment.⁴⁸⁹

432. Here, it is indisputable that the only relief available to MSDIA in the Constitutional Court would not have redressed the harm to MSDIA. As MSDIA's expert on Constitutional law, Professor Oyarte explains, if MSDIA had filed an Extraordinary Action for Protection against the NCJ's \$1.57 million judgment and prevailed, the judgment (at most) would have been **annulled** by the Constitutional Court:

“Dr. Guerrero del Pozo describes the consequences of an [Extraordinary Action for Protection] being granted by the Constitutional Court with respect to a decision by the NCJ: **the challenged decision is annulled** and different judges of the NCJ rehear the cassation appeal and issue a new decision without committing the errors found by the Constitutional Court.”⁴⁹⁰

433. However, the potential annulment of the NCJ's judgment would not have remedied the harm caused to MSDIA by the NCJ's \$1.57 million judgment because the judgment would have been enforced **prior to** its annulment by the Constitutional Court.⁴⁹¹ As explained by Professor Oyarte, the NCJ's 21 September 2012 judgment awarding NIFA \$1.57 million was immediately enforceable as a matter of Ecuadorian law.⁴⁹² Indeed, following the issuance of the NCJ's decision, on 28 November 2012, the Ecuadorian trial court to which the case was remanded for the enforcement of the judgment ordered MSDIA to pay the \$1.57 million NCJ judgment within 24 hours.⁴⁹³ MSDIA complied with this legally binding obligation and paid \$1.57 million in satisfaction of the judgment the next day, on 29 November 2012.⁴⁹⁴

434. Moreover, the Constitutional Court lacked the authority to stay the enforcement of the NCJ's \$1.57 million judgment. As Professor Oyarte explains:

“Filing an Extraordinary Action for Protection **does not stay enforcement of the underlying court decision**. Moreover, because the legislature wanted to prevent dilatory tactics with respect to the enforcement of judgments, the law prohibits granting interim relief in an Extraordinary Action for Protection. Therefore, **even when a party demonstrates that it will be harmed otherwise, the Constitutional Court is legally prevented from staying the enforcement of challenged decision**.”⁴⁹⁵

435. Because the filing of an Extraordinary Action for Protection could, at most, have resulted in the annulment of a judgment that already had been enforced against MSDIA, it would not have provided MSDIA with an effective remedy for the denial of justice resulting from the

⁴⁸⁹ See Expert Report of Amerasinghe, at para. 19-20 (citing Exhibit CLM-52, *Claim of Finnish Shipowners (Finland v. Great Britain)*, UNRIAA, Award, dated 9 May 1934, at 1504).

⁴⁹⁰ Second Expert Report of Oyarte, at para. 15 (citing Guerrero del Pozo Report, at para. 40).

⁴⁹¹ Second Expert Report of Oyarte, at para.16 (explaining that annulment “**would not have helped MSDIA because the judgment compelling it to pay \$1.57 million had already been enforced.**”) (emphasis added).

⁴⁹² Second Expert Report of Oyarte, at para. 13.

⁴⁹³ Exhibit C-207, Trial Court Order of 28 November 2012, *NIFA v. MSDIA*, at 1.

⁴⁹⁴ 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*.

⁴⁹⁵ Second Expert Report of Oyarte, at para. 13 (emphasis added).

NCJ's decision. As Professor Paulsson explains, citing the *Ambatielos* tribunal, "[r]emedies which **could not rectify the situation** cannot be relied upon by the defendant State as precluding an international action."⁴⁹⁶

(2) An Extraordinary Action for Protection Could Not Have Resulted in Reimbursement to MSDIA of the \$1.57 Million that MSDIA Had Paid

436. In addition, an Extraordinary Action for Protection in the Constitutional Court would not have provided MSDIA with an effective remedy because the Constitutional Court did not have the authority to award repayment of the \$1.57 million that MSDIA was compelled to pay in satisfaction of the NCJ's judgment. The Constitutional Court also could not have ordered the reimbursement of MSDIA's wasted costs over the course of the *NIFA v. MSDIA* litigation.

(a) The Constitutional Court Does Not Have Authority to Order Repayment

437. As Professor Oyarte explains, even where (as here) the underlying judgment has been enforced and its annulment would fail to provide a claimant with any practical redress, the Constitutional Court lacks the authority to order the judgment-creditor to reimburse its ill-gotten gains:

"Since the EAP is a separate action and not an appeal, ***the Constitutional Court cannot issue a replacement judgment ordering a devolution of amounts previously paid.*** Therefore, when the Constitutional Court issues a judgment on an EAP, it limits itself solely to annulling the challenged decision; ***it says nothing about economic redress and does not order the return of payments made by order of the decision that was annulled.***"⁴⁹⁷

438. Thus, the consequence of succeeding in an Extraordinary Action for Protection would have been to return MSDIA to the NCJ to face another decision on NIFA's claims, with the risk of another judgment against it, but with no possibility of the return of the money it had already wrongly been compelled to pay.

⁴⁹⁶ Second Expert Report of Paulsson, at para. 16 (quoting Exhibit RLA-21, *Ambatielos Claim (Greece v. United States)*, Award, dated 6 March 1956, XII UNRIAA 83 (1956), at 119) (emphasis added). The question of whether the Constitutional Court offered MSDIA an "effective" remedy is distinct from the question of whether it offered MSDIA a "reasonably available" remedy. While the Constitutional Court's potential annulment of the NCJ's \$1.57 million judgment was rendered ineffective by the fact that the judgment was immediately enforceable, the judgment's enforceability also had implications for the availability of the Constitutional Court remedy. As Ecuador acknowledges, the *Loewen* tribunal explained that where the "financial ramifications of the threat of enforcement" of a judgment are significant in relation to the claimant's assets, then a local remedy is not "reasonably available" to the extent that it lacks the ability stay the judgment's enforcement. See Ecuador Counter-Memorial, at paras. 217-218. See also Exhibit RLA-55, *The Loewen Group, Inc. and Raymond Loewen v. United States of America*, ARB(AF)/98/3, Award, dated 26 June 2003, at paras. 207-208. Thus, in the event that the NCJ affirms the court of appeals' \$150 million judgment against MSDIA, MSDIA clearly would not be required to file an Extraordinary Action for Protection in the Constitutional Court challenging the NCJ's decision.

⁴⁹⁷ Second Expert Report of Oyarte, at para. 19 (emphasis added)..

439. The Constitutional Court’s inability to order NIFA to repay MSDIA the \$1.57 million that MSDIA paid in satisfaction of the NCJ’s judgment renders an Extraordinary Action for Protection an ineffective remedy as a matter of international law in these circumstances. As explained by Freeman, “resort to local tribunals [is not] necessary ... **where those tribunals ha[ve] no power to grant compensation.**”⁴⁹⁸ More broadly:

“[The requirement to exhaust local remedies is] clearly not meant to extend to cases where the opportunity of appeal is one which **could not bring any practical results to the foreign suitor.** As a consequence, international law does not insist upon the institution of ineffective procedures which would only involve the interested party in increased disbursements for litigation. A ‘remedy’ which offers no hope of *effective redress* is not worthy of the name and does not fall within the ambit of the rule [of exhaustion].”⁴⁹⁹

440. The Constitutional Court was therefore not an effective remedy because it lacked the ability to order repayment. As Professor Paulsson explains:

“As things presently stand, the harm here is the \$1.57 million judgment that Ecuador ordered MSDIA to pay (without possibility of a stay) and the wasted costs incurred by MSDIA during the litigation leading to that final judgment. Recourse to the Constitutional Court was not an effective remedy for these injuries. Taking as true the assumption that the Constitutional Court may not order the return of any amounts paid in satisfaction of the challenged judgment, **MSDIA could not obtain reparation through an extraordinary petition.**”⁵⁰⁰

(b) Annulment of the NCJ’s Judgment Would Not Have Created an Effective Legal Basis for Reimbursement of the \$1.57 Million Already Paid

441. Ecuador argues that although the Constitutional Court could not have ordered NIFA to repay the NCJ’s \$1.57 million judgment, the potential annulment of the NCJ’s judgment could have “creat[ed] a ground for the recovery of the amount” from NIFA.⁵⁰¹ Specifically, Ecuador’s expert, Professor Guerrero del Pozo, argues that MSDIA could have invoked the annulment of

⁴⁹⁸ Exhibit CLM-320, A.V. Freeman, INTERNATIONAL RESPONSIBILITY OF STATES FOR DENIAL OF JUSTICE (1970), at 427 (emphasis added). Freeman refers to the *Finnish Ships* arbitration, in which the Arbitrator rejected Great Britain’s assertion that a remedy must be exhausted even it cannot “**actually ... award compensation at all.**” Exhibit CLM-51, *Finland v. Great Britain*, Award, dated 9 May 1934, at p. 1497. As the Arbitrator explained, a foreign litigant is not required to incur “loss of money and time by going through the courts, only to exhaust what to him – at least for the time being – must be only a very unsatisfactory remedy.” *Id.*

⁴⁹⁹ Exhibit CLM-320, A.V. Freeman, THE INTERNATIONAL RESPONSIBILITY OF STATES FOR DENIAL OF JUSTICE (1970), at 423-424 (first emphasis added, second emphasis in original). See Exhibit CLM-295, C.F. Amerasinghe, LOCAL REMEDIES IN INTERNATIONAL LAW (2004), at 205 (“Where it is clear that the resort to an appeal or reference to another court or tribunal would not be a source of adequate redress, **the alien is excused from spending his money and time.**”) (emphasis added). See also Exhibit CLM-330, ILC ARTICLES ON STATE RESPONSIBILITY FOR INTERNATIONALLY WRONGFUL ACTS (2001), Article 44, Commentary (5) (explaining that a claimant is not required to exhaust a “remedy which offers **no possibility of redressing the situation**”) (emphasis added); Exhibit CLM-291, García Amador, *International Responsibility: Third Report*, 2 Y.B. Int’l L. 55 (1958), at 55 (observing that local remedies must enable a claimant to “**obtain[] appropriate reparation**”) (emphasis added).

⁵⁰⁰ Second Expert Report of Paulsson, at para. 15.

⁵⁰¹ Ecuador Counter-Memorial, at para. 227.

the NCJ's judgment in one of two *separate* proceedings against NIFA, as a basis for seeking the repayment of the NCJ's \$1.57 million judgment:

“1). The trial judge assigned to enforce the judicial decision of the Constitutional Court can order the measures of enforcement necessary for the restitution of such payments, or,

2). In the event that the Constitutional Court has not ordered restitution to be paid, ‘payment without cause’ would be set up by virtue of which, the person who made the payments would be afforded an expedited ordinary civil action in which to seek refund for payment from the recipient party.”⁵⁰²

442. As Professor Oyarte explains, neither of Ecuador's alternatives correctly reflects the consequences of a decision by the Constitutional Court annulling the NCJ's judgment.

- (i) The Constitutional Court's Judgment Would Not Be Subject to Enforcement Proceedings at the Trial Court Level

443. The first scenario posited by Professor Guerrero del Pozo has no basis in Ecuadorian law. As Professor Oyarte explains, there could have been no basis for a trial court to issue “measures of enforcement ... for the restitution” of the NCJ's \$1.57 million judgment because a Constitutional Court decision **would not have triggered enforcement proceedings at the trial court level.**⁵⁰³ Instead, because the Constitutional Court would have annulled the NCJ's judgment, the *NCJ* (and not any trial court) would have been required to carry out the Constitutional Court's order by re-adjudicating the *NIFA v. MSDIA* case.⁵⁰⁴

444. Even if (contrary to law) a Constitutional Court decision annulling the NCJ's \$1.57 million judgment would have triggered enforcement proceedings at the trial-court level, there would have been no legal basis for the trial court to order “measures of enforcement necessary for the restitution of ... payments” made by MSDIA in satisfaction of the NCJ's \$1.57 million judgment. As Professor Oyarte explains:

“The general rule is that judgments only produce effects within the cases in which they are issued, and with regard to the parties thereto. The recipient of a decision of the Constitutional Court is the authority, body or person ‘against whose acts or omissions the action has been filed,’ in this case, the judges. **Since NIFA could not be a party to the EAP proceeding, it could never be the ‘addressee of the judicial decision.’**”⁵⁰⁵

445. Professor Oyarte's opinion is supported by what actually happened in the Ecuadorian courts after the Constitutional Court resolved NIFA's Extraordinary Action for Protection. After the Constitutional Court granted NIFA's action and annulled the NCJ's \$1.57 million judgment, the Constitutional Court's decision was not sent to a trial court for enforcement.⁵⁰⁶ Nor did the

⁵⁰² Expert Report of Guerrero, at para. 43.

⁵⁰³ Second Expert Report of Oyarte, at para. 18.

⁵⁰⁴ Second Expert Report of Oyarte, at para. 18.

⁵⁰⁵ Second Expert Report of Oyarte, at para. 21.

⁵⁰⁶ Second Expert Report of Oyarte, at para. 21 (emphasis added).

Constitutional Court order NIFA to return MSDIA's money or order any other court to commence enforcement proceedings to return the money paid by MSDIA.⁵⁰⁷ Rather, the case was simply returned to the NCJ with a direction to the NCJ to rehear the parties' cassation petitions and issue a new decision.

446. Thus, even if MSDIA had brought an Extraordinary Action for Protection and prevailed, the Constitutional Court could not have ordered NIFA to repay the \$1.57 million it had been paid by MSDIA and could not have directed any other court to order such restitution.

(ii) The Requirement to Exhaust Local Remedies Does Not Encompass A New Civil Action for Unjust Enrichment

447. Ecuador's second hypothetical scenario is equally misguided. There is no mechanism under Ecuador's rules of civil procedure in which MSDIA could have asserted a claim *within* the *NIFA v. MSDIA* litigation to recover its \$1.57 million payment from NIFA under a theory of "payment without cause." Thus, in order for MSDIA to seek the repayment of the NCJ's \$1.57 million judgment following the Constitutional Court's annulment of that judgment, MSDIA would have needed to commence an entirely new proceeding against NIFA in an Ecuadorian trial court.

448. As Professor Oyarte explains:

"There is no special or 'expedited' proceeding for an action for payment without cause. As Dr. Guerrero himself states, the available recourse for a payment without cause is an 'ordinary civil action.' Thus, MSDIA *would have had to initiate a new ordinary action against NIFA on the theory that the annulment of the NCJ judgment resulted in NIFA having received payment without cause.*"⁵⁰⁸

449. Ecuador's suggestion that the requirement to exhaust local remedies would have required MSDIA to initiate a *third* proceeding (in addition to the original *NIFA v. MSDIA* litigation and the Extraordinary Action for Protection) is meritless for five, independent, reasons.

450. *First*, as discussed in more detail below, it is well established that exhaustion of local remedies requires pursuing a litigation to a final decision of a court of last resort.⁵⁰⁹ Initiating a new, and entirely separate, civil action against NIFA seeking return of the \$1.57 million paid under the now-vacated NCJ judgment under a theory of "payment without cause" is clearly not a step along the ordinary path of the *NIFA v. MSDIA* litigation. The fact that an Extraordinary Action for Protection in Ecuador's Constitutional Court could not have provided MSDIA with the remedy it sought absent the prosecution of an entirely new claim in entirely new proceedings would have rendered the Constitutional Court action ineffective. Pursuit of new and independent suits is simply not required once a final and enforceable judgment has been imposed by the court of last resort.

⁵⁰⁷ Second Expert Report of Oyarte, at para. 23 (emphasis added).

⁵⁰⁸ Second Expert Report of Oyarte, at 23.

⁵⁰⁹ See *below* at paras. 461-471.

451. **Second**, as Professor Oyarte explains, a separate civil action against NIFA, in which MSDIA would theoretically have sought repayment of the \$1.57 judgment under a payment without cause, or unjust enrichment theory, would have been subject to NIFA's legal defenses and its outcome would have thus been uncertain and would have taken years to resolve.⁵¹⁰ As Freeman explains, the requirement to exhaust local remedies is subject to "rational" limitations, which excuse a claimant from having to engage in perpetual litigation in local courts prior to being able to seek recourse in an international forum:

"[A claimant] is not required to commence *a conceivably interminable series of litigations*, each having for purpose the correction of some prior functionary's wrongful act. The obligation of an alien to exhaust municipal remedies before soliciting the protection of his government must, as the Umpire declared, 'be understood in a rational manner, that such obligation does not make delusive the rights of the foreigner.'"⁵¹¹

452. **Third**, any such proceeding would have been ineffective in light of the fact that NIFA could not have been ordered to hold in escrow the amount of the NCJ's judgment pending the resolution of MSDIA claim for the recovery of those amounts.⁵¹² As Professor Paulsson explains:

"Ecuador does not adequately remedy its denial of justice *by starting MSDIA on a chase after NIFA for a portion of the damages wrought*. ...

"The root of the problem here is the defective nature of the NCJ judgment and the inability to stay its execution. By the time the Constitutional Court would have ruled, MSDIA's assets, once transferred to NIFA, could have been dissipated or rendered beyond MSDIA's reach. As Ecuador provided MSDIA no effective means to recoup the funds paid to NIFA and to erase the other injuries caused by the denial of justice, it has incurred international responsibility."⁵¹³

453. **Fourth**, MSDIA clearly would have had no reason to believe it could obtain an effective remedy by initiating a new civil lawsuit against the same adversary in the very same civil courts when there was every indication that those civil courts were biased in favor of NIFA and had

⁵¹⁰ Second Expert Report of Oyarte, at para. 23.

⁵¹¹ Exhibit CLM-320, A.V. Freeman, *THE INTERNATIONAL RESPONSIBILITY OF STATES FOR DENIAL OF JUSTICE* (1970), at 418-419 (emphasis added). Ecuador's expert, Professor Amerasinghe, has recognized that the requirement to exhaust local remedies should not be interpreted to require a claimant to pursue lengthy and inefficient local remedies that, in effect, deprive the claimant of access to an international forum. See Exhibit CLM-293, C. Amerasinghe, *The Local Remedies Rule in an Appropriate Perspective*, at 749 ("Clearly expenditures of time and money are related in direct proportion to the efficiency of justice in this principle. Where the chances of efficient justice are high, it is more reasonable to expect the alien to spend time and money on going through the municipal system, even if eventually he does not receive satisfaction and is, compelled ultimately to seek a remedy at an international level. Conversely, where the chances of efficient justice are low, it is less reasonable to expect such expenditure of time and money before the alien invokes international procedures.").

⁵¹² Second Expert Report of Oyarte, at para. 13, fn. 8 (explaining that "once the judgment [that is the subject of an Extraordinary Action for Protection] is executed, the prevailing party in the lawsuit has no obligation to safeguard the money; given that there are no provisional measures in an extraordinary action for protection, no safeguarding measures can be ordered to guarantee a possible return of the payment, in the event the sentence was left without effect by the Constitutional Court.").

⁵¹³ Second Expert Report of Paulsson, at paras. 16-17 (emphasis added).

very likely been corrupted in the prior proceedings. As explained below, the trial court and court of appeals in the *NIFA v. MSDIA* litigation—the *same courts* in which MSDIA would have litigated a purported “unjust enrichment” claim against NIFA—systematically deprived MSDIA of its due-process rights and manipulated the evidentiary record to generate an outcome that was favorable to NIFA.⁵¹⁴

454. The requirement to exhaust local remedies does not obligate a claimant to exhaust remedies that are highly likely to render an unfavorable disposition. As *Ecuador’s own expert*, Professor Amerasinghe, has acknowledged:

“[P]ragmatically speaking, litigants can in normal circumstances be expected not to spend time and money exercising available recourse, *if it appears reasonably rather than highly probable that they are not likely to succeed*. The argument in the case of the alien is even more cogent. In his case what is involved is really not a choice between resorting to remedies and completely failing to secure redress by not so resorting, as is the case with the ordinary litigant. It is a choice between resorting to remedies both at the local level and at the international level and not resorting to remedies at the local level while invoking an international remedy which could result in adequate redress.”⁵¹⁵

455. *Fifth*, and in any event, MSDIA’s purported ability to seek the full \$1.57 million judgment in a *new* action for unjust enrichment would not have remedied the harm that it suffered as a result of the denials of justices committed by Ecuador’s courts in the *NIFA v. MSDIA* litigation. As Professor Paulsson explains (and as Ecuador *concedes* in its Counter-Memorial), MSDIA’s damages are not limited to the NCJ’s judgment, but also include the considerable legal costs that it incurred over the course of the *NIFA v. MSDIA* litigation.⁵¹⁶ Because the Constitutional Court lacked the authority to award these legal costs, or even to provide a basis for their recovery through a subsequent action for unjust enrichment, “[a]n extraordinary action . . . carried *at most* the promise of *partially* addressing the harm MSDIA suffered as a result of the final and enforceable NCJ judgment.”⁵¹⁷

456. As Professor Paulsson explains:

“[E]ven where MSDIA able to recoup the full amount of the judgment from NIFA, it would still be out its wasted litigation costs as the result of Ecuador’s denials of justice.

⁵¹⁴ See below at paras. 494-676.

⁵¹⁵ Exhibit CLM-293, C. Amerasinghe, *The Local Remedies Rule in an Appropriate Perspective*, at 752 (emphasis added). See also Exhibit CLM-347, D. Mummery, *The Content of the Duty to Exhaust Local Remedies*, 58 Am. J. Int’l L. 389, 400-401 (1964) (“For example, in a situation in which the best local legal advice suggests that it is ‘highly unlikely’ that further resort to local remedies will result in a disposition favourable to the claimant, the correct conclusion may well be that local remedies have been exhausted if the cost involved in proceeding further considerably outweighs the possibility of any satisfaction resulting; otherwise, if little or no trouble or cost is involved in proceeding further.”); Exhibit CLM-320, *Antoine Fabiani (no. 1) (France v. Venezuela)*, in Moore, *ARBITRATIONS*, Vol. IV, at 4904 (“It would, indeed, be unacceptable to require Fabiani to legally declare these obvious miscarriages of justice to the active Venezuelan courts, of which for years he had fruitlessly demanded the execution of an irreproachable judgment and provided the exequatur required by the territorial laws . . .”).

⁵¹⁶ First Expert Report of Paulsson, at para. 66; Second Expert Report of Paulsson, at para. 15.

⁵¹⁷ Second Expert Report of Paulsson, at para. 16 (emphasis added).

Such costs, as recited above, *could not have been awarded by the Constitutional Court.*

...

“[A]n extraordinary action did not offer the prospect of adequate redress for MSDIA after it had been compelled to pay the \$1.57 million judgment to NIFA. *Even annulment by the Constitutional Court and collection by MSDIA from NIFA would not have eliminated Ecuador’s liability for its denial of justice.*”⁵¹⁸

(3) Ecuador’s Judiciary Is Notoriously Lacking In Independence and Is Subject To Improper Influence and Corruption

457. Finally, an Extraordinary Action for Protection in Ecuador’s Constitutional Court would not have provided an effective remedy for MSDIA because Ecuador’s courts are notoriously lacking in independence and are subject to improper influence and corruption. There was every indication that the civil courts had been corrupted by MSDIA’s adversary in the *NIFA v. MSDIA* litigation, and MSDIA had no reason to believe that it could obtain a fair and impartial decision from the Constitutional Court.

458. Local remedies are not “reasonably available” where they are “notoriously lacking in independence,” including as a result of corruption.⁵¹⁹ As Professor Amerasinghe explains in his treatise on state responsibility:

“According to the same principle of independence, legally instituted ordinary courts will not be of avail as a means of adjudication, if the judiciary is not independent. Thus, *where the courts are packed with corrupt judges, albeit in accordance with municipal law, there would be a denial of justice or an absence of remedies.*”⁵²⁰

Citing the commentary to the ILC’s Draft Articles on Diplomatic Protection, Professor Caflisch likewise observes that a claimant is excused from the obligation to exhaust local remedies where “the local courts patently lack independence.”⁵²¹

⁵¹⁸ Second Expert Report of Paulsson, at paras. 15, 18 (emphasis added).

⁵¹⁹ Exhibit CLM-99, J. Paulsson, DENIAL OF JUSTICE IN INTERNATIONAL LAW (2005), at 118.

⁵²⁰ Exhibit CLM-292, C. Amerasinghe, STATE RESPONSIBILITY FOR INJURIES TO ALIENS (1967), at 99 (emphasis added). See also Exhibit CLM-293, C. Amerasinghe, *The Local Remedies Rule in an Appropriate Perspective*, 36 Zeitschrift für ausländisches öffentliches Recht und Völkerrecht 726, 757 (1976) (explaining that “bias against aliens, corruption or absence of independence of the judiciary ... lead[] to the decision to exempt the claimant from exhausting local remedies”). The principle that a claimant is not required to exhaust corrupt local remedies is consistent with the broader rule that a local remedy is not “effective” if it invariably would rule in a manner adverse to the foreign claimant. See, e.g., Exhibit CLM-260, *S.S. Lisman (United States, Great Britain)*, III RIAA 1767, at 1773-1774, 1793 (explaining that a claimant need not exhaust a local remedy that it “would have been vain and foolish to have pursued,” where the judgment being appealed “would inevitably have been affirmed”).

⁵²¹ Expert Report of Caflisch, at para. 16. In his report, Professor Amerasinghe argues that MSDIA’s evidence of pervasive corruption in Ecuador’s judiciary is insufficient to establish that the Constitutional Court would not have been a reasonably available remedy. Specifically, Professor Amerasinghe claims that evidence of corruption must be particularized to the local remedy that the claimant has not exhausted. Expert Report of Amerasinghe, at para. 32. This argument is unsupported and wrong. See Second Expert Report of Paulsson, at para. 19. Indeed, in the *Robert E. Brown* arbitration, the tribunal relied on evidence of systematic corruption in concluding that the claimant

459. As explained in more detail below, every level of Ecuador’s judiciary is subject to pervasive corruption, as numerous prominent international organizations have recognized.⁵²² As a result, MSDIA, like other foreign litigants in Ecuador, had no reason to believe that an Extraordinary Action for Protection would be decided in an unbiased, honest way.⁵²³

460. Thus, as Professor Paulsson explains:

“[F]utility can also be established where a claimant can show that the system as a whole is fundamentally defective, such that the claimant or its claim had no reasonable prospect of success. If credited, MSDIA’s description of Ecuador’s judicial system as systematically corrupt and lacking due process, considered alongside the tribulations faced by MSDIA in this case, could support a finding that any further efforts by MSDIA to seek recourse in Ecuadorean courts would be futile.”⁵²⁴

b) In the Circumstances of This Case, It Would Not Have Been Reasonable To Require MSDIA To Pursue an Extraordinary Action for Protection in Ecuador’s Constitutional Court

461. Even apart from the ineffectiveness of the Constitutional Court, it would not be reasonable to condition Ecuador’s responsibility for denial of justice on MSDIA’s exhaustion of a tangential and extraordinary remedy in Ecuador’s Constitutional Court, followed by a third litigation against MSDIA to make effective any judgment won there, after more than *nine years* of litigation in Ecuador’s civil courts. As explained by Professor Paulsson:

“The victim of a denial of justice *is not required* to ... contrive *indirect or extravagant applications beyond the ordinary path of a frontal attempt to have the judgment by which he was unjustly treated by set* aside, or to be granted a trial he was denied.”⁵²⁵

Indeed, for over one hundred years, leading international commentators and practitioners, including A.V. Freeman and Stelio Sfériadès, have observed that claimants are not required to pursue extraordinary remedies after a judgment has been rendered by a court of last resort.⁵²⁶

did not need to exhaust further remedies. See Exhibit CLM-39, *United States v. Great Britain (Robert E. Brown)*, Award, dated 23 November 1923, Vol. VI UNRIAA 120 (1923), at 129. Professor Amerasinghe’s own writings make clear that systemic evidence of corruption and other procedural defects is relevant to determine whether further recourse would be ineffective. See Exhibit CLM-295, C.F. Amerasinghe, LOCAL REMEDIES IN INTERNATIONAL LAW (2004), at 210 (“[T]he absence of due process of law in the legal system of the host or respondent state is *clearly* a good excuse for not exhausting remedies.”); *id.* at 208 (“[A]bsence of independence of the courts has been held to exempt the alien or claimant from resorting to the courts.”).

⁵²² See below at paras. 677-725.

⁵²³ See below at paras. 726-731.

⁵²⁴ Second Expert Report of Paulsson, at para. 19.

⁵²⁵ Exhibit CLM-99, J. Paulsson, DENIAL OF JUSTICE IN INTERNATIONAL LAW (2005), at 113 (emphasis added). As Justice Schwebel recognized in *United States v. Italy*, the requirement to exhaust local remedies is subject to “sensible limits”: “[W]here the substance of the of the issues of a case has been definitively litigated in the courts of a State, the rule does not require that those issues also have been litigated by the presentation of every relevant legal argument which any municipal forum might have been able to pass upon.”). Exhibit CLM-282, *United States v. Italy*, ICJ Reports 15, at p. 94.

⁵²⁶ Exhibit CLM-320, A.V. Freeman, THE INTERNATIONAL RESPONSIBILITY OF STATES FOR DENIAL OF JUSTICE

462. Absent such reasonable limits on the requirement to exhaust local remedies, States could effectively evade international responsibility by asserting the existence of one or more obscure remedies that a claimant is required to navigate, at considerable time and expense, before being able to seek the relief to which they it is entitled in an international forum. As the Umpire in the *Montano (United States v. Peru)* arbitration explained, in concluding that the claimant was not required to file a new action against the government official (a marshal) who was alleged to have committed a denial of justice:

“The obligation of a stranger to exhaust the remedies which nations have for obtaining justice, before soliciting the protection of his government, ought to be understood in a **rational manner**, that such obligation does not **make delusive the rights of the foreigner**.”⁵²⁷

463. The decision in the arbitration between the United States and Egypt (the “*Salem*” arbitration), which Freeman discusses, is instructive. In *Salem*, an American citizen alleged that an Egyptian claims commission committed a denial of justice.⁵²⁸ After an Egyptian court of last resort rendered a judgment against the American claimant, the United States espoused his claim and filed an arbitration against Egypt.

464. Egypt argued that the American national had “not yet exhausted all local remedies” because he had not filed a *recours en requête civile*—a request to re-open—against the decision of the claims commission.⁵²⁹ The tribunal, however, rejected this argument, noting that the claimant was not required to exhaust remedies that would “reopen a process which has already been closed by a judgment of last resort”:

“However, the rule of exhausting national remedies is not acknowledged by international law as being absolute. The international tribunals which had to deal with this objection have judged it in accordance with the circumstances. ... In this case it must be considered that the *recours en requête civile* is no regular remedy but **intends to reopen a process which has already been closed by a judgment of last resort. As a rule it is**

(1970), at 419; Exhibit CLM-370, *S. Séfériadès, Le Problème de L'accès des Particuliers a des Jurisdictions Internationales*, in 51 Recueil des Cours de l'Académie de Droit International de La Haye (1935), at 77 (“**individuals cannot be expected to exhaust the extraordinary remedies** that might be recognized by our Code of Procedure.”) (emphasis added). Similarly, in its exhaustive commentary on the predecessor to Article 35 of the European Convention, which requires the exhaustion of domestic remedies as a precondition to the admissibility of a claim, the Human Rights Department of the European Commission has explained:

“On the other hand, it is agreed that **extraordinary procedure** such as *requête civile* (application for re-trial), **la prise partie (suit against a judge)**, *recours en révision* (application for re-trial in criminal case), etc. **do not come within the sphere of application of th[e] rule [of exhaustion of local remedies under customary international law]**.

“Th[e] rule [of exhaustion of local remedies under customary international law], therefore **applies only to the ordinary remedies** available according to the local law to the injured party.”

Exhibit CLM-313, European Commission of Human Rights, Note by the Human Rights Department Concerning Article 26 of the Convention, dated 5 September 1955, at 12 (emphasis added).

⁵²⁷ Exhibit CLM-251, *The Montano Case (United States v. Peru)*, ARBITRATIONS, VOL. II (1898), at 1630, 1637 (emphasis added).

⁵²⁸ Exhibit RLA-16, *United States v. Egypt (Salem)*, Award, dated 8 June 1932, 2 U.N.R.I.A.A. 1161.

⁵²⁹ Exhibit RLA-16, *United States v. Egypt (Salem)*, Award, dated 8 June 1932, 2 U.N.R.I.A.A. 1161.

*sufficient if a claimant has brought his suit up to the highest instance of the national judiciary.*⁵³⁰

465. As Christopher Dugan explains, the *Salem* award illustrates that “[f]or the local remedies rule to have **practical application**, tribunals should take a **realistic view** of domestic judicial systems, following the estimation of the ICJ that the foreign claimant’s duty is **not to exhaust every theoretical possibility of remedy**.”⁵³¹ Even though the *recours en requête civile* at issue in *Salem* clearly was available and could potentially have vacated the adverse judgment entered by the court of last resort, the tribunal nevertheless held that the claimant was not required to exhaust it.

466. Here, as Ecuador’s own experts recognize, the NCJ’s \$1.57 million judgment against MSDIA brought the *NIFA v. MSDIA* litigation to an end, leaving MSDIA with no ability to appeal the judgment in a higher court. In order for MSDIA to collaterally challenge the NCJ’s judgment in the Constitutional Court, it would have been required to file (in Ecuador’s expert’s words) a “**separate and independent action**” against the NCJ in the Constitutional Court.⁵³² Consistent with the name “Extraordinary Action for Protection,” this separate and independent action would have been “**extraordinary**” in numerous respects.

467. As Professor Oyarte explains, an Extraordinary Action for Protection in the Constitutional Court would have pitted MSDIA against the NCJ’s judges. NIFA, “the [other] party ... in the underlying litigation,” would not have been a defendant to the Constitutional Court proceeding.⁵³³ Moreover, unlike with an ordinary appeal from the NCJ’s judgment, “[t]he Constitutional Court does not analyze the facts of a case, does not evaluate evidence and does not interpret the law, **nor does it apply the law to the facts of the particular case**.”⁵³⁴

468. An Extraordinary Action for Protection in Ecuador’s Constitutional Court is similar to the relief at issue in the *Salem* arbitration.⁵³⁵ As Professor Oyarte explains, a party bringing an Extraordinary Action for Protection seeks to re-open proceedings that already have been closed:

⁵³⁰ Exhibit RLA-16, *United States v. Egypt (Salem)*, Award, dated 8 June 1932, 2 U.N.R.I.A.A. 1161, 1189 (emphasis added). Ecuador relies on a passage of Professor Amerasinghe’s book, *Local Remedies in International Law*, in which Professor Amerasinghe cites the *Salem* case for the proposition that “[a] resort to a *recours en requête civile* in order to reopen a process which had ended in a judgment on appeal ... ha[s] been held to be [a] remed[y] that should have been exhausted.” See Ecuador Counter-Memorial, at para. 201 (citing Exhibit RLA-61, C. Amerasinghe, *LOCAL REMEDIES IN INTERNATIONAL LAW* (2d ed. 2004), at 183-189). However, Professor Amerasinghe’s interpretation of *Salem* is obviously wrong and is contradicted by the plain language of the tribunal’s award in that case.

⁵³¹ Exhibit CLM-309, C. Dugan, et al., *INVESTOR-STATE ARBITRATION* (2008), at 363-364.

⁵³² Expert Report of Guerrero del Pozo, at para. 12 (emphasis added). See also Second Expert Report of Oyarte, at para. 19 (explaining that an Extraordinary Action for Protection “is a **separate action and not an appeal**.”) (emphasis added).

⁵³³ Second Expert Report of Oyarte, at para. 8.

⁵³⁴ Second Expert Report of Oyarte, at para. 12 (emphasis added).

⁵³⁵ Ecuador argues that the tribunal in *Loewen v. United States* “clearly contemplated recourse to parallel jurisdictions, *i.e.*, proceedings pursuant to Chapter Eleven of the U.S. Bankruptcy Code.” Ecuador Counter-Memorial, at para. 200, fn. 311. However, the *Loewen* tribunal only addressed the circumstance “in which it would be reasonable to expect an impecunious claimant to file [for protection] under [bankruptcy law] **in order to exercise an available right of appeal**.” Exhibit RLA-55, *The Loewen Group, Inc. and Raymond L. Loewen v. United States*

“If granted, an EAP has the effect of reopening a judicial proceeding that has come to a close for the purpose of safeguarding constitutional rights.... [T]he court that issued the decision must then decide the case again without committing the constitutional violations noted by the Constitutional Court.”⁵³⁶

469. In an Extraordinary Action for Protection, the Constitutional Court can do no more than reopen the case and order that it be decided again. In other words, the Constitutional Court lacks the powers of review of a regular court. The limited scope of an Extraordinary Action for Protection is consistent with the fact that the Constitutional Court is not even a part of Ecuador’s judicial system. As Professor Oyarte explains:

“[T]he NCJ is the highest court in the judicial branch of Government,[but the Constitutional Court] **does not belong to any of the branches of Government**. It is separate from the judicial, legislative, and administrative/governmental branches, and it acts as a constitutional control over these branches.”⁵³⁷

470. As a consequence, the Constitutional Court does not exercise any “authority or decision making o[ver] these other branches.”⁵³⁸ As Dr. Oyarte explains:

“In keeping with this limited function, under no circumstances can the Constitutional Court order or instruct the NCJ how to decide a case. As the Constitutional Court itself has said, this would mean not only exercising jurisdictional authority that it does not have, but it would violate the principle of judicial independence – which establishes that the judicial branch is independent of the other branches of Government, including the Constitutional Court.”⁵³⁹

471. In sum, MSDIA cannot be expected to go *outside* Ecuador’s judicial branch to exhaust an entirely new proceeding in a Court that does not even exercise appellate authority over the courts that systematically denied justice to MSDIA. That is especially true where, as Ecuador’s own expert admits, MSDIA would be required to pursue *other proceedings, in yet other courts, to have any chance of giving* effect to a potentially favorable judgment in the Constitutional Court. After more than *nine years* of litigation in Ecuador’s courts, it clearly would not be reasonable to require years more of continuing litigation, in multiple proceedings in multiple courts, before allowing MSDIA to avail itself of the rights to which it is entitled under the Treaty.

* * * * *

of America, ICSID Case No. ARB(AF)/98/3, Award, dated 26 June 2003, at para. 209 (emphasis added). Thus, the tribunal in *Loewen* considered the reasonableness of collateral proceedings only in the context of considering the claimant’s asserted justification for failing to exhaust a direct appeal. *Id.* *Loewen* does not support Ecuador’s argument that it would be reasonable to require recourse to such collateral remedies in addition to, and after, all direct appeals to a court of last resort have been pursued and failed.

⁵³⁶ Second Expert Report of Oyarte, at para. 9.

⁵³⁷ Second Expert Report of Oyarte, at para. 10 (emphasis added).

⁵³⁸ Second Expert Report of Oyarte, at para. 10.

⁵³⁹ Second Expert Report of Oyarte, at para. 11.

472. In sum, Ecuador has no serious defense to MSDIA's claim that the NCJ's \$1.57 million judgment was a denial of justice. The NCJ found MSDIA liable for unfair competition, notwithstanding NIFA's repeated express disclaimers of a claim for unfair competition and notwithstanding that both parties had expressly agreed that the civil courts did not have jurisdiction over such a claim. The NCJ imposed liability on MSDIA under statutes that cannot be and never had been interpreted to provide a basis for unfair competition and without providing MSDIA with notice or an opportunity to be heard. In addition, the NCJ did not correct the procedural due process violations MSDIA had suffered in the lower courts, but instead adopted the factual findings of those courts, thereby perpetuating those denials of justice.

473. Ecuador makes only two real efforts to defend the NCJ decision. Its first effort – insisting that the NCJ's reduction of the damages award from \$150 million to \$1.57 million was a major victory for MSDIA that cured the violations in the lower courts⁵⁴⁰ – is obviously non-responsive. The notion that there is no harm in a seven figure judgment imposed without due process of law – or that judgments of that magnitude may be imposed without regard to principles of fairness and regular procedures – is obviously untenable. The fact is that a substantial judgment was imposed without notice and an opportunity to be heard. That is a denial of justice.

474. Ecuador's second effort – suggesting that MSDIA did not exhaust local remedies in Ecuador because it did not initiate an Extraordinary Action for Protection in Ecuador's Constitutional Court⁵⁴¹ (to be followed by yet a third action seeking to recover the moneys MSDIA had wrongly been compelled to pay) – ignores the nature and limitations of that proceeding under Ecuadorian law. The NCJ judgment was final, enforceable, and not appealable to any other court in Ecuador. Ecuador compelled MSDIA to pay it in full. Thus, no further exhaustion was necessary for MSDIA to invoke its rights under the Treaty. Moreover, an action in Ecuador's Constitutional Court would have been collateral, against the NCJ judges and not NIFA, and could not have provided MSDIA with the remedy it sought. It was therefore not an effective or reasonable remedy for MSDIA to pursue.

5. The Constitutional Court Decision Was Manifestly Irrational and Exposes MSDIA to Additional Damages

475. MSDIA's Memorial focused on the denial of justice resulting from the NCJ's \$1.57 million judgment. As discussed above, at the time of MSDIA's Memorial, that judgment, which was issued by the highest court in Ecuador, had been enforced against MSDIA, and MSDIA had already paid that judgment. But, as it turns out, the NCJ's \$1.57 million judgment was not the end of the story of the *NIFA v. MSDIA* litigation.

476. Following MSDIA's payment of the NCJ's \$1.57 million judgment, NIFA submitted an Extraordinary Action for Protection in Ecuador's Constitutional Court. NIFA's Extraordinary Action for Protection was a new legal action, initiated against the NCJ judges who had issued the \$1.57 million judgment in NIFA's favor, in which NIFA asserted that the NCJ panel had violated NIFA's constitutional rights by reducing the amount of the damages award from \$150 million to

⁵⁴⁰ Ecuador Counter-Memorial, at para 280.

⁵⁴¹ Ecuador Counter-Memorial, at Section V.

\$1.57 million. In accordance with Ecuadorian procedural law, NIFA named only the NCJ judges as parties in that proceeding; MSDIA was not a party.

477. On 16 January 2013, the Constitutional Court admitted NIFA's Extraordinary Action for Protection, and on 12 March 2014, the Constitutional Court issued a decision in NIFA's favor, vacating the NCJ's \$1.57 million judgment. The Constitutional Court reinstated the court of appeals' \$150 million judgment against MSDIA and remanded the case to a new panel of NCJ judges to reconsider the parties' cassation petitions anew.

478. As an initial matter, because Ecuador's courts compelled MSDIA to pay the final judgment imposed by the NCJ, and because the Constitutional Court's ruling did not (as under Ecuadorian law it could not) compel NIFA to return the funds,⁵⁴² its decision to vacate the NCJ decision does not cure the denial of justice to MSDIA or remedy the harm caused by that denial of justice. In fact, the ruling further denies justice to MSDIA by exposing it to a second, \$150 million judgment for the same alleged conduct as to which it has already been held liable and been compelled to pay damages.

479. The conduct of the Constitutional Court in NIFA's Extraordinary Action for Protection was irrational and further illustrates the systemic bias against MSDIA that pervades all levels of the Ecuadorian courts. In addition, the Constitutional Court's decision reflects that the decisions of that court are just as susceptible to improper influence as – and no more able to follow the rule of law than – Ecuador's civil courts. The decision in NIFA's Extraordinary Action for Protection is stark confirmation that MSDIA is unable to receive an effective remedy from any level of the Ecuadorian judiciary.

480. NIFA's Extraordinary Action for Protection alleged that the NCJ violated NIFA's constitutional rights by reducing the amount of damages awarded from \$150 million to \$1.57 million.⁵⁴³ In its prayer for relief, NIFA asked the Constitutional Court to reevaluate the evidence and to establish a new damages award:

“In order to fully redress the constitutional rights of NIFA S.A. *I ask the Court to set a monetary compensation* in keeping with the damage caused to my client, a compensation that must be calculated *based on the evidence duly reviewed* in the proceedings, from which objective parameters may be extracted in order to set its amount.”⁵⁴⁴

481. Under Ecuadorian law, the calculation of monetary damages is not governed by Constitutional principles, but by ordinary civil law provisions. A court's mistaken evaluation of evidence or incorrect assessment of damages is not a constitutional violation. As Professor Oyarte explains, such mistakes are therefore not subject to Constitutional Court review: “The Constitutional Court is not a fourth instance that can reassess the evidence, much less replace the challenged judgment with another.”⁵⁴⁵ NIFA's request that the Constitutional Court reassess the evidence and establish a new damages award was therefore entirely improper under Ecuadorian law.

⁵⁴² Exhibit C-285, Ruling of the Constitutional Court.

⁵⁴³ Exhibit C-205, NIFA's Extraordinary Action for Protection, Constitutional Court, dated 19 November 2012.

⁵⁴⁴ Exhibit C-205, NIFA's Extraordinary Action for Protection, Constitutional Court, dated 19 November 2012.

⁵⁴⁵ Second Expert Report of Oyarte, at para. 54.

482. Because NIFA’s request was outside the jurisdiction of the Constitutional Court and was inconsistent with Ecuadorian law, NIFA’s Extraordinary Action for Protection should not have been admitted, and the Constitutional Court should have exercised its discretion to refuse to hear NIFA’s Extraordinary Action for Protection. Professor Oyarte explains that NIFA’s request rendered “*its complaint totally inadmissible, and it is surprising that this complaint was admitted.*”⁵⁴⁶ While a mere legal error by the Constitutional Court would not, in and of itself, be a denial of justice under international law, the Court’s decision to admit NIFA’s Extraordinary Action for Protection was so manifestly without legal basis that it indicates serious flaws – and a lack of impartiality – in the workings of the Constitutional Court.

483. Not only was the Constitutional Court’s decision to admit NIFA’s Extraordinary Action for Protection for review manifestly without legal basis, but its decision on the merits of NIFA’s Extraordinary Action for Protection was also manifestly irrational. The Constitutional Court annulled the NCJ’s \$1.57 million judgment purportedly because the NCJ’s judgment referenced a memorandum that was not in the record of the lower court proceedings.

484. The memorandum in question, Memorandum No. 1942-DP-DPP, was issued by the Ecuadorian Council of the Judiciary (“COJ”) in May 2012, after the decision of the court of appeals had been issued and well after the close of the evidentiary period in that court. In Memorandum No. 1942-DP-DPP, the COJ reported its finding that one of the court-appointed experts, Mr. Cristian Cabrera—who issued the expert report on damages on which the court of appeals relied in awarding \$150 million to NIFA—was not qualified to be a damages expert.⁵⁴⁷ The COJ found that it had mistakenly issued Mr. Cabrera’s accreditation as a damages expert “due to an involuntary error of lack of information.”⁵⁴⁸ The COJ memorandum explained that the COJ was therefore suspending Mr. Cabrera’s accreditation as a damages expert.⁵⁴⁹

485. Memorandum No. 1942-DP-DPP was obviously relevant to the NCJ’s review of the court of appeals’ decision. The Constitutional Court held that the NCJ should not have considered the COJ memorandum, because it could not consider evidence that was not in the record of the lower court proceedings. The Constitutional Court’s holding makes no sense and is contrary to Ecuadorian law.

486. *First*, it is plain from the face of the NCJ judgment that the NCJ’s reference to Memorandum No. 1942-DP-DPP was not material to its decision. The NCJ had squarely rejected the court of appeals’ \$150 million damages calculation on independent grounds even before referencing the COJ memorandum. Specifically:

- a. In paragraph 16.2, the NCJ rejected the court of appeals’ award of damages, which was based on the expert report of Mr. Cabrera, as being facially absurd and unsupportable, noting that the amount of damages awarded was “equal to one hundred

⁵⁴⁶ Second Expert Report of Oyarte, at para. 54 (emphasis added).

⁵⁴⁷ The COJ memorandum concluded that Mr. Cabrera was only qualified to be an “accounting and audit” expert.

⁵⁴⁸ 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; Exhibit C-203, NCJ Judgment, *NIFA v. MSDIA*, dated 21 September 2012, at Section 16.5.

⁵⁴⁹ 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.

(100) times the value of the industrial plant that was the subject of the failed negotiation!! ... lacks all proportion.”⁵⁵⁰

b. The NCJ had found that the basis of MSDIA’s liability was an act of unfair competition, not an antitrust violation. Mr. Cabrera’s damages calculation was based on a supposed violation of antitrust law.⁵⁵¹ The NCJ’s rejection of Mr. Cabrera’s damages analysis followed from its decision on liability, among other things.

c. In paragraph 16.3, the NCJ noted that Mr. Cabrera, “made the calculation of damages and losses taking into account the future sales forecasts, based on the production and sales cost” of the entire pharmaceutical generics market in Ecuador. Then, in paragraph 16.6, the NCJ explains that that approach was mistaken: “[O]nce more it can be seen how the lower court judgment confuses ‘Antitrust Law’ with a case that corresponds to a matter of ‘Unfair Competition Law,’ by using a national parameter of sales of generic products for a specific case, with the aggravating factor that the particular does not even refer to the sale of a specific drugs, but rather to the sale of an industrial plant as has already been stated so many times.”

487. Ecuador agrees that the NCJ’s decision to reject Mr. Cabrera’s report had nothing to do with the Council of the Judiciary memorandum. As Ecuador explains in its Counter-Memorial, the NCJ “rejected the report’s damage calculation” in Mr. Cabrera’s report “on the grounds that it was based upon ‘a parameter that [has] nothing to do with [NIFA] nor with [MSDIA],’ but rather on an analysis of the market for generic pharmaceuticals related to the antitrust law basis of the Court of Appeals’ decision that ... the NCJ had rejected earlier in its decision.”⁵⁵²

488. In short, the NCJ’s decision makes clear that the NCJ did not disregard Mr. Cabrera’s report because of Memorandum No. 1942-DP-DPP. Instead, the NCJ found that the court of appeals’ damages calculation, and the report of Mr. Cabrera on which it relied, was based on a mistaken legal theory and was implausible on its face.

489. **Second**, the NCJ did not treat Memorandum No. 1942-DP-DPP as evidence. That memorandum obviously could not be used to prove or disprove the extent of NIFA’s purported damages.⁵⁵³ Rather, the memorandum is relevant only to the question of what weight the NCJ should give to a piece of evidence that was in the record, namely the expert report of Mr. Cabrera. Memorandum No. 1942-DP-DPP, which was not even in existence at the time of the court of appeals’ decision, contains important information about the evidence on which the court of appeals’ decision was based.

⁵⁵⁰ Exhibit C-203, NCJ Judgment, *NIFA v. MSDIA*, dated 21 September 2012, at Section 16.2 (holding that the court of appeals damages award “equal to one hundred (100) times the value of the industrial plant that was the subject of the failed negotiation!! ... lacks all proportion.”)

⁵⁵¹ Exhibit C-42, Report of Cristian Augusto Cabrera Fonseca, submitted to Court of Appeals, *NIFA v. MSDIA*, at p. 10.

⁵⁵² Counter Memorial at para. 284 (quoting Exhibit C-203, NCJ Judgment, *NIFA v. MSDIA*, dated 21 September 2012, at Sections 16.4 & 16.6).

⁵⁵³ As Professor Oyarte notes: “Referencing this memorandum in the judgment does not mean that the NCJ assessed it as evidence, because assessing evidence goes to verifying, proving or corroborating the truth or falseness of the arguments raised at trial. Nothing in the judgment indicates that the Cassation Division used the memorandum to verify, prove or corroborate the amount of damages.” Second Expert Report of Oyarte, at para. 57.

490. Indeed, it is preposterous to suggest that the NCJ could not consider information that subsequently came to light showing that the evidentiary basis for the court of appeals' decision is unreliable. Remarkably, the Constitutional Court did not find fault with the COJ's conclusion that Mr. Cabrera is not qualified to serve as an expert on damages calculations, but the Constitutional Court nevertheless remanded the case to the NCJ and directed the NCJ to ignore the fact that Mr. Cabrera is unqualified and that his report is unreliable. This is an absurd result.

491. Under these circumstances, the NCJ's reference to Memorandum No. 1942-DP-DPP could not plausibly have constituted a violation of NIFA's Constitutional rights, much less a "serious" violation, as is required by Ecuadorian law for a decision of the Constitutional Court even to admit an Extraordinary Action for Protection for consideration on the merits, much less to award relief.⁵⁵⁴

492. The Constitutional Court's irrational judgment once again exposes MSDIA to the judgment of the court of appeals awarding \$150 million to NIFA for alleged antitrust violations by MSDIA. As discussed in Section D below, the court of appeals' judgment – which Ecuador has essentially conceded is indefensible – was the result of very serious due process violations and blatant judicial corruption and is unquestionably a denial of justice. As Professor Paulsson explains:

“Obviously the annulment of the NCJ decision provides MSDIA no succour. As it carries the possibility of another final and enforceable judgment and fails to provide full compensation for MSDIA's injuries arising from the first final and enforceable judgment, the annulment in fact aggravates the situation.”⁵⁵⁵

493. Under the pretext of remedying a purported violation of NIFA's Constitutional rights, the Constitutional Court has given effect to genuine and flagrant violations of *MSDIA's* Constitutional rights. The Constitutional Court was apparently untroubled by the prospect of imposing a \$150 million damages award against MSDIA, made without reference to any evidence offered by MSDIA and supported only by an “expert” report drafted by someone whom the Ecuadorian judiciary itself has determined is not an expert. As noted above, the absurdity of the outcome in the Constitutional Court is striking evidence that the process in that court, just as the process at every other level in the *NIFA v. MSDIA* case, was deeply flawed and lacking in impartiality.

C. *The \$150 Million Judgment of the Court of Appeals Is a Denial of Justice*

494. MSDIA's Memorial established that no honest and competent court could have reached the decisions of the trial court and the court of appeals in the *NIFA v. MSDIA* case, which awarded NIFA \$200 million and \$150 million, respectively, in supposed lost-profits damages against MSDIA.⁵⁵⁶ As noted above, the NCJ's decision overturning the court of appeal's judgment found that the court of appeals' judgment lacked any legal basis in Ecuadorian law and was illogical and disproportionate.

⁵⁵⁴ Second Expert Report of Oyarte, at para. 53 (a requirement for admission of an EAP is that such admission “cure a grave violation of [constitutional] right[s].”)

⁵⁵⁵ Second Expert Report of Paulsson, at p. 11, fn. 24.

⁵⁵⁶ MSDIA Memorial at paras. 53-61, 118-126.

495. The judgment has now been reinstated, and MSDIA once again is facing a \$150 million judgment that is manifestly irrational, that lacks any legal or factual basis, that was the product of deeply flawed proceedings in the lower courts, and that quite obviously was influenced by judicial corruption.

496. In its Counter-Memorial, Ecuador does not even attempt to defend the substance of the court of appeals' judgment (or, for that matter, the trial court's judgment). In particular, Ecuador offers no legal or factual justification for the court of appeals' award of **\$150 million** in damages for the failed sale of a \$1.5 million manufacturing facility to a company with only \$2,165 in annual profits.⁵⁵⁷ Nor does Ecuador make any effort to defend, or even address, the court of appeals' conclusion that MSDIA was liable for an antitrust violation despite the absence of any antitrust law in Ecuador at any time relevant to the underlying litigation.⁵⁵⁸

497. Instead, as set forth below, Ecuador either ignores or concedes the three fundamental bases of MSDIA's claim with respect to the court of appeals' judgment. Specifically, those are, as set out in MSDIA's Memorial, (i) the manifest irrationality of the court of appeals' findings on liability and damages, which are evidence of a deeply flawed procedure, (ii) the significant procedural irregularities in the lower-court proceedings, which denied MSDIA an opportunity to be heard and led to a tainted, one-sided evidentiary record, and (iii) the overwhelming evidence of corruption in Ecuador's judicial system, including with respect to the judges who were responsible for the judgments in the *NIFA v. MSDIA* litigation.

498. **First**, the court of appeals' judgment was so manifestly irrational that no honest and competent court could possibly have reached that decision. The court's findings on liability and damages are evidence that the court was influenced by bias and corruption and did not follow the rule of law.⁵⁵⁹

499. Ecuador makes no effort at all to defend the substance of the court of appeals' judgment and does not deny that the judgment had no possible legal or factual basis. Ecuador trumpets the NCJ's decision, which sharply criticized the court of appeals' application of a non-existent theory of antitrust liability and calculation of a "disproportionate" damages award.⁵⁶⁰ As explained above, however, Ecuador's reliance on the NCJ's judgment was ill-advised, in light of the Constitutional Court's subsequent reinstatement of the court of appeals' judgment.⁵⁶¹

500. **Second**, the lower court proceedings systematically violated MSDIA's due-process rights under international law, including its right to a fair trial, its right to submit evidence in its defense, and its right to be heard on the factual and legal elements of NIFA's claim. Among other egregious irregularities, the trial court received testimony from NIFA's **only fact witness** outside the presence of MSDIA's counsel, and the court of appeals arbitrarily ignored the opinions of the highly-credentialed experts **it appointed** when their opinions favored MSDIA and instead replaced them with a new slate of unqualified experts whose opinions MSDIA was not permitted to contest. Ecuador does not (and cannot) seriously dispute that these irregularities in

⁵⁵⁷ MSDIA Memorial at para. 126.

⁵⁵⁸ MSDIA Memorial at paras. 118, 42-43.

⁵⁵⁹ See MSDIA Memorial, at 273-275.

⁵⁶⁰ Ecuador Counter-Memorial, at para. 76.

⁵⁶¹ See above at paras. 475-493.

the lower courts resulted in substantial prejudice to MSDIA's rights and evidenced the courts' impermissible bias.

501. *Third*, the compelling evidence of systemic corruption in Ecuador's civil courts, together with the evidence that the specific actors involved in the *NIFA v. MSDIA* litigation have a history of judicial corruption, confirms that the procedural violations and manifestly irrational decisions in that case were not the result of judicial error. Ecuador quibbles with some of the specific authorities on which MSDIA relies, but Ecuador cannot deny that there is an overwhelming body of evidence of judicial corruption in Ecuador. It offers no independent assessments that reach a different conclusion. Nor could it, when Ecuador's own President and other officials routinely cite judicial corruption as a profound problem that requires wide ranging judicial reforms.

502. Ecuador's only real response to the court of appeals' judgment in its Counter-Memorial was to say that the decision was not relevant because it had been remedied by the decision of the NCJ.⁵⁶² Now that Ecuador has lost that line of defense, its last remaining argument will be a recycling of its refrain that the court of appeals' judgment is not a "final" decision of Ecuador's highest court. As discussed below, however, after more than ten years of litigation in Ecuador's courts, and after having seen every level of court in Ecuador's judicial system deny justice to MSDIA and issue decisions that are motivated by bias and improper influence rather than the rule of law, and after having paid one "final judgment" imposed without due process only to be subjected to another 100 times greater, MSDIA plainly has no effective remedy in the courts of Ecuador. MSDIA therefore has exhausted its remedies in Ecuador, and it is free to pursue its remedies under international law for the denial of justice resulting from the court of appeals' \$150 million judgment.

1. The Court of Appeals' Judgment was Manifestly Irrational

503. As set out in MSDIA's Memorial, the now-resurrected court of appeals' judgment (like the trial-court judgment before it) was manifestly irrational. That judgment found MSDIA liable under an antitrust theory of liability, notwithstanding that Ecuador had no antitrust law, and awarded NIFA **\$150 million** in damages for lost profits NIFA purportedly would have earned if MSDIA had chosen to sell its Chillos Valley manufacturing plant, which was valued by the parties at only \$1.5 million, to NIFA, rather than to another bidder.⁵⁶³

504. In its Counter-Memorial, Ecuador does not deny that there is no conceivable basis for the court of appeals' \$150 million award of damages. Ecuador also does not deny that there was no basis under Ecuadorian law for MSDIA to be held liable under antitrust principles, in light of the absence of *any* antitrust law in Ecuador. Rather than defend the court of appeals' damages award or its legal reasoning, Ecuador repeatedly cites with approval the finding of the NCJ that the court of appeals' damages award was entirely baseless as a matter of law and was "disproportionate" to any conceivable measure of NIFA's purported damages.⁵⁶⁴

505. Ecuador also does not dispute that the manifest irrationality of the court of appeals' judgment is decisive independent evidence that MSDIA suffered a denial of justice. As

⁵⁶² Ecuador Counter-Memorial at paras. 384-389.

⁵⁶³ MSDIA Memorial at para. 118-126.

⁵⁶⁴ Ecuador Counter-Memorial at para. 76.

explained in *Mondev v. United States*, upon which Ecuador relies, a “clearly improper and discreditable” decision by a national court serves as compelling evidence that a foreign investor has suffered a denial of justice.⁵⁶⁵ Indeed, Ecuador’s own expert, Professor Amerasinghe, has recognized that a denial of justice “occurs when a manifestly unjust judgment is delivered against a litigant with the result that the latter is subjected to discriminatory or arbitrary treatment.”⁵⁶⁶

506. As Sir Gerald Fitzmaurice explains:

“An unjust judgment may and often does *afford strong evidence that the court was dishonest, or rather it raises a strong presumption of dishonesty*. It may even afford *conclusive evidence*, if the injustice be sufficiently flagrant, so that the judgment is of a kind which no honest and competent court could possibly have given.”⁵⁶⁷

507. Here, it is indisputable that no honest or competent court could have reached either the court of appeals’ massively disproportionate damages award or its imposition of liability as a matter of non-existent antitrust law.

a) The Court of Appeals’ Damages Award Was Manifestly Irrational

508. As Professor Paulsson explained in his first Expert Report, “the 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.”⁵⁶⁸ As explained above, Ecuador does not rebut (and instead *acknowledges*) that the excessive court of appeals’ damages award is grounds for finding a denial of justice.

509. As set out in MSDIA’s Memorial, the court of appeals’ award of lost profits of \$150 million was:

- a. almost **70,000 times** the plaintiff’s total annual 2002 profits of \$2,165;⁵⁶⁹
- b. **100 times** the parties’ valuation of the plant, as reflected in a proposed purchase price of \$1.5 million;⁵⁷⁰ and
- c. nearly **10 times** the **total sales** of the entire Ecuadorian generic pharmaceutical market in 2002, which was only \$20.4 million (the total **profits** earned by all generic

⁵⁶⁵ Exhibit RLA-54, *Mondev Int’l Ltd. v. United States of America*, ICSID Case No. ARB(AF)/99/2, Award, dated 11 October 2002, at para. 127.

⁵⁶⁶ Exhibit CLM-295, C.F. Amerasinghe, *LOCAL REMEDIES IN INTERNATIONAL LAW* (2004), at 90.

⁵⁶⁷ Exhibit CLM-316, G. Fitzmaurice, *The Meaning of the Term Denial of Justice*, 13 Brit. Y.B. Int’l L. 93, 112-113 (1932) (emphasis added).

⁵⁶⁸ First Expert Report of Paulsson, at para. 47.

⁵⁶⁹ Exhibit C-20, Report of Rolf Stern, *NIFA v. MSDIA*, Court of Appeals, dated 4 June 2009, at 26 (English translation at 28).

⁵⁷⁰ 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-10, NIFA’s Complaint, *NIFA v. MSDIA*, Trial Court, dated 16 December 2003, at 6 (noting the parties agreement at the Panama meeting).

pharmaceutical manufacturers on those sales would have been a fraction of that amount).⁵⁷¹

510. Simply put, no honest and competent court could have concluded that MSDIA's conduct caused NIFA \$150 million in lost profits.⁵⁷² In fact, the most implausibly optimistic evidence NIFA offered to support the extent of its alleged harm—and the only evidence the trial court cited in support of its damages award—was a “business plan” prepared by NIFA in October 2002 for the purpose of securing financing for the purchase. NIFA's “business plan” forecast the total aggregate profit NIFA could earn from MSDIA's plant between 2003 and 2012 at \$12.9 million—less than \$1.3 million per year.⁵⁷³

511. NIFA's “business plan” was built on plainly unrealistic assumptions, including that NIFA would enjoy significant sales of Rofecoxib, which would have violated MSDIA's intellectual property rights, and would achieve a profit margin in excess of the 20% maximum profit allowed under Ecuadorian laws that regulate the price of medicines.⁵⁷⁴ But even NIFA's own overly optimistic plan—which constituted its primary evidence of damages—fell more than **\$137 million** short of the court of appeals' damages award (and **\$187 million** short of the \$200 million in lost profits it claimed and the trial court awarded).⁵⁷⁵ Neither the court of appeals nor the trial court made any effort to explain the disparity between their damages award and the evidence adduced by NIFA.

512. Ecuador does not dispute that the court of appeals' \$150 million damages award—which has now been reinstated by Ecuador's Constitutional Court—is completely indefensible and constitutes a denial of justice. Nowhere in its 257-page Counter-Memorial does Ecuador make the slightest attempt to argue that the damages award was supportable in any respect. The court of appeals' award of damages, standing alone, is so outrageous and, in the words of the NCJ,

⁵⁷¹ Exhibit C-20, Report of Rolf Stern, *NIFA v. MSDIA*, Court of Appeals, dated 4 June 2009, at 15 (English translation at 16) (calculating Ecuadorian generic pharmaceutical market revenues in 2002).

⁵⁷² The trial court's **\$200 million** damages award was, of course, even more disproportionate to any rational measure of NIFA's purported lost profits.

⁵⁷³ 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). In the court of appeals, the **only** evidence NIFA submitted in support of its damages claim was an electronic spreadsheet containing “market data” and supposed sales projections that NIFA claimed had been prepared by the market research company IMS-Ecuador. As is set forth in MSDIA's Memorial, among other serious errors and deficiencies, NIFA's IMS-Ecuador “report” was uncertified, inconsistent with the certified data IMS-Ecuador previously had provided to MSDIA, and indicated on its face that much of its data had been supplied by NIFA, not by IMS-Ecuador. See MSDIA Memorial at paras. 81-84. But even setting aside all of its flaws, NIFA's IMS-Ecuador “report” concluded that NIFA had only \$28 million in lost sales. While that calculation was preposterously high, those additional sales would have resulted in less than \$1 million in lost profits at NIFA's historic profit margin. Exhibit C-21, Report of Walter Spurrier Baquerizo, submitted to the Court of Appeals, *NIFA v. MSDIA*, 4 June 2009 at 22 (English translation at 19). (calculating NIFA's annual profit margin based on NIFA tax returns introduced into the Ecuadorian court record). Applying NIFA's average profit margin between 2003 and 2006 of 3.2%, lost sales of \$28 million translates to lost profits of just under \$900,000.

⁵⁷⁴ Ponce Martínez First Witness Statement at para. 43; Exhibit C-44, Report of Carlos Montañez Vásquez, submitted to the Court of Appeals, *NIFA v. MSDIA*, 15 July 2011 at p. 25 (English translation at 21); 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)

⁵⁷⁵ 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).

lacking in proportion that it establishes, in and of itself, that MSDIA was subjected to a denial of justice.

- b) The Court of Appeals' Finding That MSDIA Committed an Antitrust Violation is Irrational and Contrary To All Accepted Principles of Antitrust Law

513. Ecuador also does not dispute that the court of appeals' application of an antitrust legal theory that *did not exist under Ecuadorian law* was a denial of justice. As Professor Paulsson has explained:

“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.”⁵⁷⁶

514. As explained below, Ecuador does not dispute that there were no antitrust laws in place in Ecuador at the time that MSDIA and NIFA engaged in negotiations for the sale of the plant (*i.e.*, the time of the conduct that the court purported to sanction). Moreover, even if there had been an antitrust law in place, the trial court's purported application of antitrust principles was completely divorced from broadly accepted principles of antitrust law. In fact, no competent court applying any recognized principles of antitrust law could have held MSDIA liable on that basis.

- (1) There Was No Antitrust Law in Ecuador at the Time of the Negotiations Between MSDIA and NIFA

515. Article 244, Number 3 of Ecuador's Political Constitution of 1998, which was in place at the time of the negotiations between MSDIA and NIFA, set forth a policy in favor of free competition, and directed the government to enact legislation:

“To promote the development of competitive activities and markets, to foster free competition and to sanction, in accordance with the law, monopolistic and other practices that impede and distort it.”⁵⁷⁷

516. The plain language of Article 244(3) makes clear that Article 244(3) did not itself establish antitrust standards within Ecuador, but rather directed the government to do so via legislation. As MSDIA's expert on antitrust law, Dr. Andres Calderon Lopez, explains:

“The 1998 Constitution recognized free competition as one of the objectives of Ecuador's economic policy. However, it did not specifically establish antitrust policy; *i.e.*, the specific definition of the outlines of what would constitute illicit and punishable anticompetitive conduct. Rather, it provided that the State should establish laws outlining such standards and the consequences of violating them.”⁵⁷⁸

⁵⁷⁶ Exhibit CLM-174, J. Paulsson, DENIAL OF JUSTICE IN INTERNATIONAL LAW (2005), at 200 (emphasis added).

⁵⁷⁷ Exhibit CLM-183, 1998 Constitution of the Republic of Ecuador, art. 244.

⁵⁷⁸ Expert Report of Calderon Lopez, at para. 13.

517. As Dr. Calderon’s report describes in detail, however, in the years following the adoption of the 1998 Constitution “no law defining anti-competitive conduct or establishing legal parameters for free competition was in place in Ecuador.”⁵⁷⁹

518. In 2002—the year the negotiations between MSDIA and NIFA began—Ecuador’s legislature tried and failed on two separate occasions to enact antitrust laws.⁵⁸⁰ Commentators writing in 2003—the year NIFA initiated its lawsuit against MSDIA—noted these failures to enact legislation, and commented that “Ecuador still [does] not have an institutional framework directed to combat anticompetitive practices and promote competition.”⁵⁸¹

519. As Dr. Calderon explains in detail, Ecuador itself confirmed on multiple occasions that no antitrust law was in place in Ecuador between 2000 and 2005, in the context of discussions among the member states of the Andean Community and later proposals to establish internal antitrust standards in Ecuador.⁵⁸²

520. Ecuador’s discussion of a possible adoption of antitrust laws culminated in a 14 March 2009 Executive Decree in which Ecuador’s President Rafael Correa announced the establishment of Ecuador’s competition authority and the adoption of internal antitrust standards in Ecuador for the first time via the incorporation of an existing Andean Community standard.⁵⁸³ In that decree, President Correa declared that “*Ecuador did not have an internal regulation for the protection of economic competition*” either in 2005 or at the time of the decree.⁵⁸⁴

521. It was not until October 2011 that Ecuador enacted internal antitrust standards through the normal legislative process.⁵⁸⁵

522. It is therefore perfectly clear, and it is undisputed by Ecuador in this arbitration, that at the time of the negotiations between NIFA and MSDIA for the sale of MSDIA’s plant, Ecuador had no antitrust law, and there were no antitrust rules in place within the country. The court of appeals’ entry of a judgment against MSDIA imposing liability for a supposed violation of antitrust law therefore had no basis whatsoever in Ecuadorian law and was a denial of justice.

⁵⁷⁹ Expert Report of Calderon Lopez, at para. 14.

⁵⁸⁰ Expert Report of Calderon Lopez, at paras. 15-16.

⁵⁸¹ Expert Report of Calderon Lopez, at para. 17 (citing CLM-314, Falla, Alejandro y Eduardo Quintana. “Construyendo una estrategia común: el derecho de la competencia en la comunidad andina” (“Building a common strategy: competition law in the Andean Community”) in THEMIS 47, 2003, at 190.)

⁵⁸² Expert Report of Calderon Lopez, at paras. 19-24; Exhibit C-227, Report of the Second Meeting of Andean Community Governmental Experts on Free Competition, 3 March 2000, at 11; Exhibit C-228, Report of the Third Meeting of Andean Community Governmental Experts on Free Competition, 13 November 2001, at 7; Exhibit C-9, Report of the Fourth Meeting of Andean Community Governmental Experts on Free Competition, 1 August 2003, at 2; Exhibit C-13, Letter from Dr. Oswaldo Molestina Zavala, Ecuador Minister for External Commerce, Industrialization, Fisheries and Competition, to Allan Wagner, Secretary General of the Andean Community, 11 May 2005.

⁵⁸³ Expert Report of Calderon Lopez, at para. 25; Exhibit C-19, Republic of Ecuador Executive Decree No. 1614, 14 March 2009.

⁵⁸⁴ Expert Report of Calderon Lopez, at paras. 25-26; Exhibit C-19, Republic of Ecuador Executive Decree No. 1614, 14 March 2009, at 1 (emphasis added).

⁵⁸⁵ Expert Report of Calderon Lopez, at para. 13; Exhibit CLM-195, Law Governing Market Power Regulation and Control, dated 13 October 2011.

(2) The Court of Appeals' Judgment was Contrary to Any Recognizable Principles of Antitrust Law

523. Because there was no antitrust law in place in Ecuador, there was no basis on which to hold MSDIA liable for supposed antitrust violations. But even if there had been such a law, the court of appeals' purported application of antitrust standards cannot be reconciled with any recognized principles of antitrust law as they are broadly recognized throughout the world. No competent court applying any recognized principles of antitrust law could have found MSDIA liable on that basis. As Dr. Calderon's report makes clear, the court of appeals failed even to identify—much less apply—any of the most basic antitrust principles recognized in other legal systems.

524. It is important to note that MSDIA is not alleging that the court of appeals applied antitrust principles incorrectly. Rather, MSDIA's point is that the court did not identify or apply any conceivably applicable legal principles at all. This is not an allegation of legal error; it is an allegation of a complete absence of the rule of law and an arbitrary, presumptively corrupt decision.

525. Unlike the trial court, which had apparently suggested that MSDIA had abused a dominant position in the Ecuadorian *pharmaceutical market*,⁵⁸⁶ the court of appeals concluded that MSDIA abused a dominant position in the *Ecuadorian real estate market*. As MSDIA's competition-law expert, Dr. Calderon, explains, the court of appeals' analysis in support of this conclusion fails to apply even the most basic precepts of antitrust law.⁵⁸⁷

526. First, the court's conclusion that MSDIA held a dominant position in the real estate market started from the unproven presumption "that the only product (without substitutes)" in the relevant market at issue "was precisely the specific industrial plant that was put up for sale by MSDIA."⁵⁸⁸ As Dr. Calderon explains, the court's reasoning in this regard is irreconcilable with generally-accepted antitrust principles because such an approach by definition would always result in a finding of liability:

⁵⁸⁶ Expert Report of Calderon Lopez, at para. 63. As Dr. Calderon explains, the trial court's conclusion lacked any substance. Among other errors of law, the trial court made no effort to define the relevant markets in which MSDIA purportedly held and abused its supposed "dominant" position—a "*basic error of competition law*." *Id.* At para. 45. The trial court likewise violated "standards for competition law as they are understood *anywhere in the world*" when it failed to analyze either whether MSDIA held a dominant position in any relevant market or whether MSDIA's conduct affected *competition* in the market an error that "no competent judicial authority applying Competition Law would" make, *id.* At 106-109. The trial court also reached factual findings that were flatly contrary to indisputable facts in the record, by suggesting that MSDIA had market power to exclude NIFA's products from the Ecuadorian pharmaceutical market (even though MSDIA had a market share of barely 3% of the Ecuadorian pharmaceutical market in 2002) and that MSDIA used that power to prevent NIFA from lawfully competing in any conceivable market (even though MSDIA did not, in any way, prevent or interfere with NIFA's expansion of its business, or with NIFA's ability to introduce new products, buy other facilities, or build its own facilities). Exhibit C-35, Report of Diego Petrecolla, *NIFA v. MSDIA*, Court of Appeals, dated 10 March 2011, at 7-8.. In any event, antitrust principles could not have imposed any obligation on MSDIA to sell its plant at all, much less to NIFA.

⁵⁸⁷ Expert Report of Calderon Lopez, at para. 50.

⁵⁸⁸ Expert Report of Calderon Lopez, at para 50.

“[F]rom the perspective of Competition Law, the analysis of substitutability must not include only the characteristics or conditions of the asset demanded by one consumer in particular, but rather the characteristics according to the needs of any reasonable consumer. When applied to the specific case, the question should not be: what conditions are needed for a building in order for NIFA to compete in the pharmaceutical market? But rather: **what conditions are needed for the building in order for an efficient pharmaceutical company to compete in the market?** This principle is essential to competition law, because without it, every plaintiff would be free to define its own specialized relevant market, however unreasonably, in a manner that would guarantee that it would prevail in litigation.”⁵⁸⁹

527. Moreover, in order to arrive at this conclusion, the court of appeals “assumed it was not possible to build a new pharmaceutical plant, or to convert an existing structure for that use”:

“But pharmaceutical industrial plants are not elements that are found in nature. Rather, they result from an investment, a business decision to build a structure with the physical and technical conditions necessary for pharmaceutical production. Thus, in the same way as for the construction of a new house for residence is an alternative to the purchase of an already existing house, a natural substitute for the purchase of an existing industrial plant consists in the construction of a new one.”⁵⁹⁰

528. As Dr. Calderon explains, he has not identified a single case anywhere in the world “in which the sale of an industrial plant in particular has been considered in itself as a relevant market.”⁵⁹¹ This is because “[t]he high [degree of] competition in the real estate property market makes it inconceivable that a building in general, or one factory in particular, can be considered as unsubstitutable and, therefore, a relevant market in itself.”⁵⁹² In Dr. Calderon’s view, “no competent, impartial court, properly applying principles of competition law, could have arrived at this conclusion.”⁵⁹³

529. Dr. Calderon further explains that the court of appeals’ finding that MSDIA held a dominant position is similarly irreconcilable with basic principles of antitrust law, and results from a cascade of legal and logical errors:

530. First, “because the Court had already incorrectly restricted the relevant market to a single piece of real estate,” it concluded that MSDIA controlled 100% of the relevant market.⁵⁹⁴

531. Second, despite its focus on the *real estate market*, the court proceeded to describe MSDIA’s supposed power in the *pharmaceutical market*. As Dr. Calderon explains, the court’s “inconsistency ... is made manifest with the delimitation of the relevant market and the

⁵⁸⁹ Expert Report of Calderon Lopez, at para 55 (emphasis in original).

⁵⁹⁰ Expert Report of Calderon Lopez, at para 53.

⁵⁹¹ Expert Report of Calderon Lopez, at para 58.

⁵⁹² Expert Report of Calderon Lopez, at para 58.

⁵⁹³ Expert Report of Calderon Lopez, at para 60.

⁵⁹⁴ Expert Report of Calderon Lopez, at para 65.

consideration of circumstances of a different market in order to define the existence of a position of dominance.”⁵⁹⁵

532. Finally, the court concludes that the fact of MSDIA’s market power required no evidence, asserting that MSDIA “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.”⁵⁹⁶ As Dr. Calderon explains, “[i]t is shocking from a competition law perspective that a Court would simply presume that a defendant possessed a dominant position without analyzing the evidence relevant to that conclusion.”⁵⁹⁷ He is again aware of no other case anywhere in the world in which a court claiming to apply principles of free competition law made such a finding.⁵⁹⁸

533. In its Counter-Memorial, Ecuador argues that the court of appeals acted properly in assuming that MSDIA had significant market power because it had the power “to rely on publicly available information” under Article 27 of the Organic Code on the Judicial Functioning, which states: “Judges will only make decisions based upon the materials provided by the parties. Proof of public and well-known facts will not be required because the judge can declare them as part of the record to reach its decision.”⁵⁹⁹

534. Ecuador’s argument is mistaken. Notably, the court of appeals did not identify Article 27 as the basis for its decision to assume the disputed fact of MSDIA’s market power. There is no basis in the record or in the court’s judgment on which to conclude that the court was exercising any purported authority under that provision, and Ecuador’s argument therefore appears to be an effort at post-hoc rationalization.

535. In any event, Article 27 would not provide a legal basis under Ecuadorian law on which a court could assume a disputed fact that comprises an element of the claim, such as whether MSDIA possessed dominant market power. Article 27 requires the court to decide the case based on the evidence submitted by the parties, but grants a limited exception to that rule for undisputed public facts—“facts that are known by everyone, and are not subject to debate or differing opinions.”⁶⁰⁰

536. Article 27 does not allow a court to assume a fact—such as MSDIA’s market power—that constitutes a disputed element of a claim.⁶⁰¹ As Dr. Jaime Ortega (an expert on Ecuadorian Procedural law) explains: “[Article 27] **certainly does not excuse a claimant from having to prove the key elements of its claim.**”⁶⁰² Moreover, far from “requiring no proof,” the overwhelming evidence in the record—including from the Court’s own court-appointed experts—showed that MSDIA did **not** have dominant market power.⁶⁰³

⁵⁹⁵ Expert Report of Calderon Lopez, at para. 69.

⁵⁹⁶ Exhibit C-4, Court of Appeals Judgment, *NIFA v. MSDIA*, dated 23 September 2011, at 13-14.

⁵⁹⁷ Expert Report of Calderon Lopez, at para. 70.

⁵⁹⁸ Expert Report of Calderon Lopez, at para. 70.

⁵⁹⁹ Ecuador Counter-Memorial at para. 499.

⁶⁰⁰ Ponce Martínez Second Witness Statement at para. 78; Second Expert Report of Ortega, at para. 53.

⁶⁰¹ Ponce Martínez Second Witness Statement at para. 78; Second Expert Report of Ortega, at para. 53.

⁶⁰² Second Expert Report of Ortega, at para. 53.

⁶⁰³ The evidence in the record (and the public domain) established conclusively that the Ecuadorian pharmaceutical

537. Finally, based on the flawed premises described above, the court of appeals concluded that MSDIA's supposed refusal to sell its manufacturing facility violated antitrust principles because the plant constituted an "essential facility."⁶⁰⁴ As Dr. Calderon explains the court's application of the so-called "essential facility doctrine" was also contrary to basic principles of antitrust law.

538. The essential facilities doctrine is a specific theory of antitrust law that holds that a market participant that controls certain indispensable inputs to a commercial activity must grant access to those inputs even to its own competitors in the market. An input is considered an "essential facility" "only when the duplication of the existing facility is impossible or extremely difficult, either because it is physically or legally impossible to duplicate, or because a second facility is not economically viable in the sense that it would not generate enough revenue to cover its costs."⁶⁰⁵

539. Thus, the essential facilities doctrine is primarily associated with "industries with networks and markets with conditions that are proper to a natural monopoly," such as public utilities, where costs and barriers to entry make it economically unviable to replicate the investment that a dominant operator initially made in a resource.⁶⁰⁶ As a result, the remedy for blocking access to an "essential facility" is not a forced sale (which would not address the problem), but instead is typically an order directing that the facility be shared on reasonable terms.⁶⁰⁷

540. As Dr. Calderon explains, the court of appeals' application of the essential facilities doctrine to the MSDIA manufacturing facility was based on the nonsensical assumption "that MSDIA's [] plant was indispensable for participation in the pharmaceutical production market."⁶⁰⁸ The court of appeals provided no support for that conclusion.⁶⁰⁹

541. Indeed, as MSDIA's Memorial describes in detail, the record contained extensive, unrebutted evidence that NIFA had various alternatives available by which it could have expanded its production capacity after the negotiations with MSDIA failed.⁶¹⁰ Dr. Calderon was unable to identify any case in any jurisdiction "in which a building such as an industrial plant has been considered as an essential facility."⁶¹¹

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

⁶⁰⁴ Exhibit C-4, Court of Appeals Judgment, *NIFA v. MSDIA*, dated 23 September 2011, at 12.

⁶⁰⁵ Expert Report of Calderon Lopez, at para. 85 (citing Exhibit CLM-310, EUROPEAN COMMISSION, DG Competition discussion paper on the application of Article 82 of the Treaty to exclusionary abuses. Brussels, December 2005, Paragraph 229, at p. 635).

⁶⁰⁶ Expert Report of Calderon Lopez, at para. 88..

⁶⁰⁷ See, e.g., Exhibit CLM-22, *MCI Communications v. American Tel. & Tel. Co.*, 708 F.2d 1081, 1132-33 (7th Cir. 1983) (requiring a telecommunications provider to provide access to the local service network, over which it held a monopoly, to competitors in long-distance services).

⁶⁰⁸ Expert Report of Calderon Lopez, at 86.

⁶⁰⁹ Expert Report of Calderon Lopez, at 87.

⁶¹⁰ See, e.g., MSDIA Memorial at paras. 78, 101.

⁶¹¹ Expert Report of Calderon Lopez, at 89.

542. In short, the court of appeals, like the trial court before it, purported to hold MSDIA liable under a theory that had no basis in Ecuadorian law—or the law of any other country—and which found no support in the record. No unbiased and impartial court could have upheld NIFA’s claim.

2. The Lower Court Proceedings Violated MSDIA’s Due-Process Rights

543. MSDIA’s Memorial established that the proceedings in the trial court and court of appeals were marked by repeated serious violations of MSDIA’s due process rights. Those violations included, among others:

- a. the trial court’s failure to allow MSDIA’s counsel to attend the questioning of NIFA’s only fact witness (on whose testimony the trial court and court of appeals relied);
- b. the court of appeals’ rejection, without explanation, of well-reasoned expert reports prepared by well-credentialed court-appointed experts;
- c. the court of appeals’ replacement of those experts by a second set of court-appointed experts who lacked relevant credentials, who were appointed in highly irregular circumstances without justification, and whose testimony MSDIA was not permitted the opportunity to challenge;
- d. the court of appeals’ unjustified refusal to consider any of the evidence submitted or relied on by MSDIA, and its consideration of only the evidence submitted by NIFA; and
- e. the failure of the trial court and court of appeals to provide MSDIA timely notice of important decisions.

544. These actions of the trial court and court of appeals were calculated to deny MSDIA the opportunity to be heard and to present its defense in the Ecuadorian courts. The courts transparently manipulated the factual record to exclude or disregard evidence in MSDIA’s favor and to prevent MSDIA from challenging the evidence relied on by NIFA. They did so in order to create a factual record they could rely on in support of a pre-determined finding of liability against MSDIA.

545. Thus, as Professor Paulsson explained in his first Expert Report, MSDIA was repeatedly denied justice over the course of these irregular proceedings in the *NIFA v. MSDIA* litigation.⁶¹² International law does not permit national courts to “openly ignore[]” the “rules of procedure ... ***to the manifest prejudice of the alien.***”⁶¹³ But that is precisely what the court of appeals and trial court did, by manipulating their own procedural rules in an effort to deprive MSDIA of the opportunity to rebut the “evidence” against it or to have its own evidence considered by the courts. As the commissioners in the *Chattin* case explained:

⁶¹² First Expert Report of Paulsson, at paras. 35-38.

⁶¹³ Exhibit CLM-166, J. Irizarry y Puente, *The Concept of ‘Denial of Justice’ in Latin America*, 43 Mich. L. Rev. 383, 403-404 (1944).

“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, making the hearings in open court a mere formality, and a continued *absence of seriousness on part of the Court.*”⁶¹⁴

546. Ecuador’s Counter-Memorial argues that the procedural violations identified by MSDIA are the ordinary disappointments of any unsuccessful litigant.⁶¹⁵ Ecuador also suggests that MSDIA’s counsel in those proceedings was responsible for many of the courts’ evidentiary decisions.⁶¹⁶ As discussed below, and as addressed in detail in the Reply Witness Statement of Dr. Ponce Martínez (MSDIA’s counsel in the *NIFA v. MSDIA* litigation) and the Expert Report of Dr. Ortega, there is no basis for either of these contentions.

547. The record of the *NIFA v. MSDIA* litigation clearly shows that MSDIA directly and repeatedly requested opportunities to confront the evidence against it and complained about the courts’ refusals to allow it to be heard. Dr. Ponce Martínez and Dr. Ortega also explain that the actions of the trial court and court of appeals were not in accordance with ordinary Ecuadorian procedural law and strongly indicate the courts’ bias against MSDIA.

548. As with its defense of the NCJ judgment and its failure to confront the manifest irrationality of the substance of the court of appeals’ decision, Ecuador also fails to address the most fundamental facts regarding the procedural due process violations in the lower courts.

549. It is striking that Ecuador makes no effort whatsoever to defend the court-appointed experts on whose reports the court of appeals relied. Ecuador does not dispute that those experts lacked relevant qualifications and were later disqualified by Ecuador’s Council of the Judiciary, which found that they never should have been accredited as experts. Nor does Ecuador dispute that the reports of those experts are, on their face, entirely illogical and absurd. To the contrary, Ecuador cites approvingly the NCJ’s decision categorically rejecting the reasoning of those experts.⁶¹⁷

550. Ecuador’s only defense of the expert reports relied on by the court of appeals is to say that those experts were appointed in accordance with procedures set down by Ecuadorian law and therefore the substance of their reports is beyond challenge.⁶¹⁸ As discussed below, that is wrong on two counts.

551. First, even if the Ecuadorian courts did adhere to the letter of Ecuadorian procedural law, that is no defense if their decisions were motivated by bias or corruption or if they applied Ecuadorian procedural laws in a manner that deprived MSDIA of fundamental due process rights under international law. Second, Ecuador is wrong that the court of appeals acted in accordance

⁶¹⁴ 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).

⁶¹⁵ Ecuador Counter-Memorial at para. 6.

⁶¹⁶ *See, e.g.*, Ecuador Counter-Memorial at paras. 403, 410.

⁶¹⁷ Ecuador Counter-Memorial at para. 76.

⁶¹⁸ *See, e.g.*, Ecuador Counter-Memorial at para. 463.

with Ecuadorian procedural law. The record of the court's appointment of experts demonstrates the court's disregard of Ecuadorian procedural law and its determination to engineer a record of expert evidence that would support a finding of liability against MSDIA and an enormous award of damages in favor of NIFA.

552. Ecuador also has no real response to the fact that MSDIA was excluded from attending the oral testimony of NIFA's only fact witness, who testified on two separate occasions without the presence of MSDIA's counsel. Ecuador does not dispute that MSDIA's counsel made it known to the trial court on multiple occasions that it wanted to and intended to attend the testimony of NIFA's witness, and it does not dispute that the trial court took the witness's testimony – on two separate occasions – when MSDIA's counsel was not present.

553. Ecuador's only response is to argue that the trial court acted consistently with Ecuadorian procedural law and that if MSDIA's counsel had been more diligent, he might have been able to attend the witness's testimony.⁶¹⁹ This half-hearted defense of the trial court is not serious. Ecuador's argument rests on unreasonably formalistic interpretations of Ecuadorian procedural law and ignores the practice of the Ecuadorian courts and the actual record of the trial court proceedings in this case.

554. Ecuador's defenses of the numerous other procedural irregularities in the court of appeals and trial court are equally unavailing. Viewed as a whole, the record of the proceedings in the trial court and court of appeals clearly demonstrates an effort by the courts to manipulate their processes in order to generate support for a predetermined result. Notably, Ecuador fails to identify a *single* international case or commentary for the proposition that its courts' conduct was permissible as a matter of international law. As explained below, Ecuador's defense does not in any way address the indisputable fact that the lower-court proceedings evidenced impermissible bias and violated MSDIA's due-process rights.

a) Ecuador Cannot Defend the Court of Appeals' Reliance on the Second Set of Court-Appointed Expert Reports

555. MSDIA's Memorial described how the court of appeals appointed an initial set of well-credentialed experts, who issued well-reasoned expert reports concluding that there was no basis on which to hold MSDIA liable and no basis for any damages in favor of NIFA. MSDIA's Memorial also described how the court of appeals then appointed a second set of experts, who lacked any credentials in the subjects as to which they were instructed to opine, under highly irregular circumstances, and how those experts then issued facially-absurd opinions entirely in favor of NIFA.

556. Ecuador does not dispute that first court-appointed experts were highly qualified or that their expert reports contained sound and convincing analysis. Nor does Ecuador dispute that the second set of court-appointed experts lacked the credentials ordinarily required under Ecuadorian law. Indeed, Ecuador cannot seriously make such a defense when Ecuador's own Council of the Judiciary subsequently revoked the expert credentials of two of those experts, finding that they lacked any expertise and never should have been accredited. Ecuador also makes no effort to

⁶¹⁹ See, e.g., Ecuador Counter-Memorial at paras. 400, 403, 410.

defend the substance of the reports submitted by the second set of experts, and it offers no justification for the court of appeals' decision to rely on those reports.

557. That is because, on any view, there is no plausible explanation for the court of appeals' decision to reject the sound and well-reasoned reports of the first set of court-appointed experts or to rely on the facially-absurd reports of the second set. Ecuador concedes as much by making no effort to defend the reports of the second set of experts and by trumpeting the decision of the NCJ, which sharply criticized the court of appeals' reliance on the second set of court-appointed experts.⁶²⁰

558. MSDIA presented a detailed account of the two sets of expert reports in its Memorial.⁶²¹ To recap, in brief, the circumstances surrounding the first set of court-appointed experts were as follows:

a. In response to MSDIA's request that the court appoint an independent expert in antitrust law to evaluate whether MSDIA could be held liable under antitrust principles,⁶²² the court of appeals appointed an internationally-renowned Venezuelan competition lawyer, Dr. Ignacio De León.⁶²³ Dr. De León concluded that 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 2003.⁶²⁴ He further concluded that, 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 markets⁶²⁵; (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"⁶²⁶; 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.⁶²⁷

⁶²⁰ Ecuador Counter-Memorial at para. 76; 284.

⁶²¹ MSDIA Memorial at paras. 85-116.

⁶²² 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-248, MSDIA's Second Petition of 5 June 2009, *NIFA v. MSDIA*, Court of Appeals, at 5-9.

⁶²³ 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 Petrecollo, 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 MSDIA Memorial at paras. 96-97.

⁶²⁴ Exhibit C-24, Report of Ignacio De León, *NIFA v. MSDIA*, Court of Appeals, dated 12 February 2010, at 90, 96.

⁶²⁵ Exhibit C-24, Report of Ignacio De León, *NIFA v. MSDIA*, Court of Appeals, dated 12 February 2010, at 95.

⁶²⁶ 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 ...").

⁶²⁷ Exhibit C-24, Report of Ignacio De León, *NIFA v. MSDIA*, Court of Appeals, dated 12 February 2010, at 78-81.

b. 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,⁶²⁸ at MSDIA's request⁶²⁹ the court of appeals appointed an expert in the Quito commercial real estate market, Mr. Manuel J. Silva Vásquez.⁶³⁰ Based on uncontroverted documentary evidence, Mr. Silva concluded that NIFA had available to it *many* alternatives to MSDIA's small, aging factory.⁶³¹ Given the availability of substitute properties, Mr. Silva's report demonstrated conclusively that NIFA could not have suffered significant injury from the failure of its attempted acquisition of MSDIA's plant.⁶³²

c. In response to NIFA's request for a court-appointed expert on damages,⁶³³ 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 an expert on damages as well as on antitrust liability.⁶³⁴ 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.⁶³⁵

559. MSDIA's Memorial further details how, under irregular circumstances and contrary to Ecuadorian procedure, the court of appeals then appointed a second set of experts in antitrust law (Dr. Carlos Guerra Román), real estate (Mr. Marco V. Yerovi Jaramillo), and damages (Mr. Cristian Augusto Cabrera Fonseca). As explained below, the court of appeals' new "experts," Dr. Guerra and Mr. Cabrera, lacked any legitimate credentials or expertise with respect to the subject matter of their opinions.⁶³⁶

560. All three experts then provided unreasoned and unsupported opinions that were entirely favorable to the Ecuadorian plaintiff:

⁶²⁸ Otherwise, NIFA obviously could have fulfilled whatever ambitions it had for expansion with a new plant at a different site.

⁶²⁹ See Exhibit C-248, MSDIA's Second Petition of 5 June 2009, *NIFA v. MSDIA*, Court of Appeals, at 1-4.

⁶³⁰ Exhibit C-174, Court of Appeals Order of 5 June 2009, *NIFA v. MSDIA*, at 1.

⁶³¹ Exhibit C-23, Report of Manuel J. Silva Vásquez, *NIFA v. MSDIA*, Court of Appeals, dated 23 December 2009.

⁶³² Exhibit C-23, Report of Manuel J. Silva Vásquez, *NIFA v. MSDIA*, Court of Appeals, dated 23 December 2009. 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; (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; (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; and (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. 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.

⁶³³ Exhibit C-182, NIFA's First Petition of 5 June 2009, *NIFA v. MSDIA*, Court of Appeals, at 4-5.

⁶³⁴ 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.

⁶³⁵ Exhibit C-24, Report of Ignacio De León, *NIFA v. MSDIA*, Court of Appeals, dated 12 February 2010, at 47-49, 98.

⁶³⁶ See below at paras. 562-564.

a. Dr. Guerra's report on antitrust law included manifest analytical errors, misstatements of Ecuadorian law, and misapplications of broadly accepted antitrust principles.⁶³⁷ Among other things, Dr. Guerra concluded without any factual or legal basis that MSDIA's plant was an "essential facility" -- a finding that, for reasons detailed above, made no sense whatsoever under any recognized principle of antitrust law.⁶³⁸ Dr. Guerra also concluded, without citing any evidence, that MSDIA had a "dominant position" in the Ecuadorian market for pharmaceutical products,⁶³⁹ a finding that was directly contradicted by the un rebutted evidence in the record.⁶⁴⁰

b. Mr. Yerovi's real estate report did not challenge the basic, undeniable facts that alternatives to the MSDIA plant, identified by Mr. Silva, were readily available to NIFA in 2003 and thereafter and that NIFA had in fact expanded its existing facility after the negotiations with MSDIA ended. He agreed that the alternative manufacturing plants identified by Mr. Silva were available to NIFA in 2002 and 2003 and were zoned for pharmaceutical manufacturing.⁶⁴¹ Mr. Yerovi asserted, however, that none of those facilities was being used for pharmaceutical manufacturing.⁶⁴² That was contrary to the evidence in the record.⁶⁴³ Moreover, it was wholly irrelevant, since such facilities could with some additional investment be adapted to that function. MSDIA alerted Mr. Yerovi to documentary evidence that directly refuted his conclusions, and submitted a petition requesting that he clarify his report accordingly, but Mr. Yerovi refused to consider that evidence or revise his report.⁶⁴⁴

c. Mr. Cabrera's damages analysis was also completely contrary to Ecuadorian law, to the facts of the case, and to basic reason. He concluded, also based on an unsupportable antitrust theory, that NIFA was entitled to \$204 million in damages for lost

⁶³⁷ MSDIA Memorial at para. 42.

⁶³⁸ 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* Expert Report of Calderon Lopez, at paras. 79-89.

⁶³⁹ Exhibit C-32, Report of Carlos Guerra Román, *NIFA v. MSDIA*, Court of Appeals, dated 14 February 2011, at 100-102.

⁶⁴⁰ MSDIA Memorial at para. 125.

⁶⁴¹ Exhibit C-30, Report of Marco V. Yerovi Jaramillo, *NIFA v. MSDIA*, Court of Appeals, dated 20 December 2010, at 2-4.

⁶⁴² Exhibit C-30, Report of Marco V. Yerovi Jaramillo, *NIFA v. MSDIA*, Court of Appeals, dated 20 December 2010, at 5-10.

⁶⁴³ Among other things, documentary evidence demonstrated that NIFA was considering purchasing a manufacturing facility owned by the Ecuadorian pharmaceutical company Albanova, which was available for sale during 2002 and 2003. 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). In addition, 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).

⁶⁴⁴ Exhibit C-260, MSDIA's Petition of 31 January 2011, *NIFA v. MSDIA*, Court of Appeals; Exhibit C-261, Supplement to Report of Marco V. Yerovi Jaramillo, *NIFA v. MSDIA*, Court of Appeals, dated 3 March 2011.

profits,⁶⁴⁵ 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.⁶⁴⁶ In order to arrive at his conclusions, Mr. Cabrera ignored accepted methodology for calculating lost profits. Among other errors, Mr. Cabrera included in his calculation of NIFA’s “lost sales,” sales that even according to NIFA’s own flawed evidence, NIFA had actually made between 2003 and 2008, calculated damages over an arbitrary 15-year period, and estimated NIFA’s profit margin during that period at nearly 50%, which far exceeds the 20% maximum profit margin on generic pharmaceutical products that was permitted under Ecuadorian law.⁶⁴⁷

561. The court of appeals nonetheless accepted these obviously unreliable, later-filed reports in its judgment without analysis or explanation:

- a. The court arbitrarily and without justification adopted the findings of Dr. Guerra, whose lack of training or experience in competition law had been brought to the court’s attention by MSDIA, and whose analysis lacked any grounding in the principles of competition law. The court simply ignored the contrary analysis in Dr. De Leon’s report, without explanation.
- b. The court adopted key observations from Mr. Yerovi’s report, simply ignoring the existence of Mr. Silva’s report, and ignoring key findings in Mr. Yerovi’s own report that agreed with Mr. Silva’s report.⁶⁴⁸
- c. Finally, the court relied expressly, and exclusively, on Mr. Cabrera’s incoherent report in support of its decision to award NIFA \$150 million in damages.⁶⁴⁹ In adopting Mr. Cabrera’s analysis, the court neither acknowledged nor addressed the many incontrovertible problems with his analysis, which were obvious on the face of the report and had been identified by MSDIA and its expert, including among other things, his failure to demonstrate a causal link between the supposed injuries and any wrongful act by MSDIA. The court also failed to provide any rationale whatsoever for its assessment of damages as \$150 million, a number that had not been suggested by the trial court, by NIFA, or by Mr. Cabrera.

⁶⁴⁵ Exhibit C-42, Report of Cristian Augusto Cabrera Fonseca, *NIFA v. MSDIA*, Court of Appeals, dated 21 June 2011, at 22-23.

⁶⁴⁶ Exhibit C-42, Report of Cristian Augusto Cabrera Fonseca, *NIFA v. MSDIA*, Court of Appeals, dated 21 June 2011, at 28-29.

⁶⁴⁷ Ponce Martínez First Witness Statement at para. 43; Exhibit C-44, Report of Carlos Montañez Vásquez, submitted to the Court of Appeals, *NIFA v. MSDIA*, 15 July 2011 at p. 27 (English translation at 24) (analyzing the report submitted by Mr. Cabrera).

⁶⁴⁸ 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 a pharmaceutical plant offered by Albanova—and that NIFA had considered expanding its existing facility or building a new facility on open land instead of purchasing an existing one.

⁶⁴⁹ Exhibit C-4, Court of Appeals Judgment, *NIFA v. MSDIA*, dated 23 September 2011, at 14-15.

562. Subsequent to the court of appeals' decision, Dr. Ivan Escandon, the Provincial Director of the Council of the Judiciary for Pichincha—the office entrusted with accrediting experts for appointment in judicial matters in the Province—issued a report concluding that his predecessors in the office of the Provincial Director should never have accredited Mr. Cabrera and Dr. Guerra as experts because their respective applications failed to demonstrate the requisite qualifications.⁶⁵⁰

563. Dr. Escandon's report, dated 26 January 2012, concluded, based a review of Dr. Guerra's application materials and qualifications, that Dr. Guerra "has scarce 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."⁶⁵¹ As to Mr. Cabrera, Dr. Escandon concluded that he "has not substantiated with any documentation, knowledge or experience his expertise on calculation of damages, consequential damage, lost profit or taxation. *It is not clear why he claimed to be an expert . . .*"⁶⁵²

564. Dr. Escandon's report, which was subsequently affirmed by more senior officials at the Council of the Judiciary,⁶⁵³ 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.⁶⁵⁴ The National Director of Legal Counsel for the Council of the Judiciary expressed concern about the circumstances surrounding the accreditation of these experts and recommended that the Council's Disciplinary Audit Unit conduct a review to "determine any possible responsibilities of the public servants and judicial servants, with respect to how the accreditation of [Mr. Cabrera] occurred."⁶⁵⁵

565. The court of appeals' decision to appoint manifestly unqualified experts and its 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.

⁶⁵⁰ Exhibit C-58, Report of Ivan Escandon, Provincial Director of the Council of the Judiciary for Pichincha, January 26, 2012. MSDIA alerted the National Court of Justice to Dr. Escandon's report on 23 February 2012. Exhibit C-59, MSDIA Petition dated 23 February 2012.

⁶⁵¹ Exhibit C-58, Report of Ivan Escandon, Provincial Director of the Council of the Judiciary for Pichincha, January 26, 2012, at 3.

⁶⁵² Exhibit C-58, Report of Ivan Escandon, Provincial Director of the Council of the Judiciary for Pichincha, January 26, 2012, at 3.

⁶⁵³ 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, 30 April 2012; Exhibit C-63, Memorandum from Wilson Rosero Gómez, Chief of Staff, to Ivan Escandon, Provincial Director of the Council of the Judiciary for Pichincha, 31 May 2012.

⁶⁵⁴ See e.g., Exhibit C-38, MSDIA Petition submitted to Court of Appeals, *NIFA v. MSDIA*, 28 April 2011, at paras. 3-7 (alerting the court of appeals to Dr. Guerra's improper accreditation); Exhibit C-267, MSDIA Brief submitted to Court of Appeals, *NIFA v. MSDIA*, 15 July 2011 (alerting the court of appeals to Mr. Cabrera's improper accreditation). See also Ponce Martínez Second Witness Statement at paras. 68-69.

⁶⁵⁵ 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, 30 April 2012.

566. As Professor Paulsson explained in his first Expert Report, it was a clear “*deprivation of [] due process*” for the court of appeals to disregard the opinions of the first set of court-appointed experts and to base its decision on “other experts whose qualifications and expertise ... were highly doubtful.”⁶⁵⁶ Indeed, the court of appeals’ attempt to use its own procedures to manipulate the evidence in the record to the detriment of MSDIA exemplifies the type of “*partiality*” and “*bias*,” which international commentators and tribunals consistently have condemned as a denial of justice.⁶⁵⁷

567. Ecuador’s silence regarding the court of appeals’ reliance on these reports speaks volumes.

b) Ecuador Cannot Justify the Circumstances under which the Court of Appeals Appointed the Second Set of Experts

568. Ecuador’s only defense to the court of appeals’ reliance on the second set of court-appointed expert reports is that the court’s appointment of the later-appointed experts was consistent with Ecuadorian procedural law. Specifically, Ecuador argues that rules of Ecuadorian procedure permitted the court of appeals to appoint each of the later-appointed experts.⁶⁵⁸ This argument is irrelevant and wrong.

(1) The Court of Appeals’ Compliance With Ecuadorian Rules of Procedure Is Irrelevant as a Matter of International Law

569. Compliance with national law is *no defense* to a claim for denial of justice when the operation or application of that national law deprives a foreign national of due-process rights guaranteed by customary international law. As Professor Paulsson has explained:

“[T]he validity under national law of ... a decree or judgment is *irrelevant* when reviewed at the international level. The question is whether the national decree or judgment *operates as a denial of justice under the criteria of international law*. The denial of justice, once more, is not substantive error, but fundamental unfairness as understood by reference to international norms.”⁶⁵⁹

570. As Irizarry y Puente has explained, where a national court interprets its laws or rules of procedure “*in a way that constitutes a plain corruption of its terms*” to the prejudice of a foreign national, it commits a denial of justice.⁶⁶⁰

571. Here, even if (contrary to fact) the court of appeals’ rules of procedure authorized the court to appoint a second set of unqualified experts, that does not excuse the manner in which the court of appeals manipulated those rules to the prejudice of MSDIA. Indeed, Ecuador makes no effort to provide any substantive justification for the reasoning contained in the later-appointed experts’ reports on which the court of appeals ultimately relied, or to otherwise explain why any

⁶⁵⁶ First Expert Report of Paulsson, at para. 37.

⁶⁵⁷ See MSDIA Memorial, at paras. 260-261.

⁶⁵⁸ Ecuador Counter-Memorial at paras. 463, 466-467.

⁶⁵⁹ Exhibit CLM-356, J. Paulsson, Denial of Justice in International Law (2005), at 87 (emphasis added).

⁶⁶⁰ Exhibit CLM-166, J. Irizarry y Puente, *The Concept of ‘Denial of Justice’ in Latin America*, 43 Mich. L. Rev. 383, 403-404 (1944) (emphasis added).

rational or competent court would elect to rely on those opinions instead of the opinions of the first set of court-appointed experts.

(2) The Court of Appeals Did Not Comply with Ecuadorian Rules of Procedure in Appointing Court-Appointed Experts

572. In any event, Ecuador is wrong that the court of appeals' conduct was consistent with rules of Ecuadorian procedure. To the contrary, as Dr. Ortega and Dr. Ponce Martínez explain, the court of appeals repeatedly violated fundamental rules of Ecuadorian procedure to the detriment of MSDIA.

(a) Mr. Cabrera's Appointment as a Second Expert in Damages Was Contrary to Ecuadorian Law

573. As set out in Dr. Ortega's Expert Report on Ecuadorian procedural law, the irregular circumstances of Mr. Cabrera's appointment by the court of appeals underscores the extent to which the court was willing to disregard its own procedures and MSDIA's due-process rights in its effort to introduce into the record an expert opinion that was favorable to NIFA.⁶⁶¹

574. Mr. Cabrera was appointed to the case on two separate occasions. His first appointment was made in response to MSDIA's request early in the case for the appointment of a damages expert.⁶⁶² MSDIA later withdrew that request after Dr. De Leon submitted his expert report on damages.⁶⁶³ Mr. Cabrera never issued a report in connection with his first appointment.⁶⁶⁴

575. Mr. Cabrera's second appointment to the case, which was the appointment pursuant to which he submitted his expert report, was initially made by the court of appeals in response to a petition from NIFA requesting the appointment of an "essential error" expert to review and opine upon Dr. De Leon's expert report on damages.⁶⁶⁵ NIFA's petition was submitted long after the time during which NIFA was permitted to file an essential error petition under Ecuadorian procedural law.⁶⁶⁶ MSDIA therefore objected that Mr. Cabrera's appointment as an "essential error" expert was untimely.⁶⁶⁷

576. Apparently recognizing that NIFA was time-barred from seeking appointment of an "essential error" expert, the court of appeals declared *sua sponte* that it would change the nature of Mr. Cabrera's appointment from that of an "essential error" expert to that of a substantive damages expert, and that the basis for his appointment as a substantive damages expert was

⁶⁶¹ Second Expert Report of Ortega at paras. 43-44.

⁶⁶² Ponce Martínez Second Witness Statement at para. 50.

⁶⁶³ Ponce Martínez Second Witness Statement at para. 50.

⁶⁶⁴ Ponce Martínez Second Witness Statement at para. 50.

⁶⁶⁵ Exhibit C-263, NIFA Petition of 8 April 2011, *NIFA v. MSDIA*, Court of Appeals; Exhibit C-37, Court of Appeals Order dated 25 April 2011.

⁶⁶⁶ As Professor Ortega explains, Mr. Cabrera's appointment after the deadline for the appointment of an essential error expert violated Article 119 of Ecuador's Code of Civil Procedure. Second Expert Report of Ortega, at para. 43; *see also* Ponce Martínez Second Witness Statement at paras. 53-54.

⁶⁶⁷ *See* Exhibit C-38, MSDIA Petition submitted to Court of Appeals, *NIFA v. MSDIA*, 28 April 2011, at paras 11-17.

NIFA's June 2009 request for the appointment of a damages expert.⁶⁶⁸ MSDIA again objected, reminding the court that it had previously appointed Dr. de Leon as an expert in damages in response to NIFA's June 2009 request. Given that the court had already appointed a damages expert in response to NIFA's June 2009 request, that request could not be the basis for the appointment of a *second* damages expert.⁶⁶⁹

577. In response to MSDIA's second objection, the court changed its rationale once again, asserting that it was appointing Mr. Cabrera not pursuant to NIFA's June 2009 request or as an "essential error" expert, but rather as a substantive damages expert at the court's own initiative.⁶⁷⁰ The court, however, failed to explain how it found Dr. de Leon's report "insufficiently clear," as is required to justify an *ex officio* appointment.⁶⁷¹ As Dr. Ortega explains, the court's "shifting justifications for [Mr. Cabrera's] appointment, and the fact that the court failed to identify any lack of clarity in Dr. de Leon's report, clearly indicates that the court was acting unjustifiably."⁶⁷²

578. After Mr. Cabrera submitted his report in June 2011, MSDIA filed a timely petition charging that Mr. Cabrera had committed essential error. MSDIA's petition provided a detailed evidentiary basis for the charge of essential error, including the report of another damages expert, Mr. Carlos Montañez Vásquez, who concluded that there was *no conceivable basis for Mr. Cabrera's calculation of NIFA's supposed lost profits* or harm to the Ecuadorian people.⁶⁷³ In its essential error petition, MSDIA also notified the court of the fact that Mr. Cabrera lacked the credentials required under Ecuadorian law to serve as a damages expert.⁶⁷⁴

579. Because the court had stated that it was appointing Mr. Cabrera as a substantive damages expert, under Ecuadorian law, his report was subject to challenge through a timely essential error petition.⁶⁷⁵ The court rejected MSDIA's petition, however, asserting that Mr. Cabrera was not, in fact, a substantive damages expert, but was himself an "essential error" expert and was therefore not subject to challenge for essential error.⁶⁷⁶

580. The court of appeals was well aware that, if MSDIA had been permitted to challenge Mr. Cabrera's report for essential error, there would have been no conceivable basis for the court's reliance on Mr. Cabrera's analysis. As a consequence, the court of appeals introduced into evidence an untimely opinion that was favorable to NIFA, shielded that opinion from adversarial

⁶⁶⁸ Exhibit C-39, Court of Appeals Order dated 10 May 2011.

⁶⁶⁹ As Professor Ortega explains, this change in rationale violated Ecuadorian procedural rules. Second Expert Report of Ortega at para. 44. See also Ponce Martínez First Witness Statement at para 39.

⁶⁷⁰ Exhibit C-264, Court of Appeals Order dated 19 May 2011.

⁶⁷¹ Second Expert Report of Ortega, at para. 43(p).

⁶⁷² Second Expert Report of Ortega, at para. 44.

⁶⁷³ Exhibit C-267, MSDIA Brief submitted to Court of Appeals, *NIFA v. MSDIA*, 15 July 2011; Ponce Martínez Second Witness Statement at para. 55; Exhibit C-44, Report of Carlos Montañez Vásquez, submitted to the Court of Appeals, *NIFA v. MSDIA*, 15 July 2011, at 2, 28-29 (English translation at p. 2, 26).

⁶⁷⁴ Exhibit C-267, MSDIA Brief submitted to Court of Appeals, *NIFA v. MSDIA*, 15 July 2011; Ponce Martínez Second Witness Statement at para. 69.

⁶⁷⁵ Ponce Martínez Second Witness Statement at para. 55; Second Ortega Report, at para. 45.

⁶⁷⁶ Exhibit C-45, Court of Appeals Order dated 19 July 2011 (rejecting MSDIA's essential error petition regarding Mr. Cabrera's report); Exhibit C-46, Court of Appeals Order dated 1 August 2011 (rejecting MSDIA's request for reconsideration of its 19 July 2011 Order, on the grounds that Mr. Cabrera was an essential error expert, reasoning that "there is no procedural formula to prove essential error regarding another essential error.").

review, and then relied on that opinion in its final judgment as the exclusive basis for its award of \$150 million in damages.⁶⁷⁷

581. Even without knowing anything about Ecuadorian procedural law, the record of the court's shifting justifications for its appointment of Mr. Cabrera and its determination to shield his report from attack by MSDIA are plainly contrived and irregular. Not surprisingly, as explained in detail by Dr. Ortega and Dr. Ponce Martínez, the court's actions in connection with Mr. Cabrera's appointment are also contrary to Ecuadorian procedural law.⁶⁷⁸

582. In its Counter-Memorial, Ecuador makes no effort to justify or reconcile the court of appeals' contradictory orders regarding Mr. Cabrera. Ecuador instead argues that Mr. Cabrera's appointment was appropriate and consistent with Ecuadorian procedural law, purportedly because MSDIA requested or accepted his appointment and because his expert opinion was necessary to address an issue of damages that the earlier-appointed expert neglected to address.⁶⁷⁹ These arguments are contrary to the record of the proceedings in the court of appeals and are wrong as a matter of Ecuadorian law.

(i) MSDIA Did Not Request or Accept Mr. Cabrera's Appointment

583. Ecuador argues that there was nothing improper about Mr. Cabrera's appointment as a damages expert because MSDIA purportedly consented to his appointment years earlier in response to its own June 2009 request for a damages expert.⁶⁸⁰ This is a gross mischaracterization of the record of the court of appeals' proceedings. There is no basis on which to conclude that MSDIA consented to the circumstances surrounding Mr. Cabrera's appointment as a damages expert.

584. As explained in MSDIA's Memorial, both MSDIA and NIFA submitted requests in June 2009, during the evidentiary period in the court of appeals, that the court appoint an expert in damages. In response to NIFA's request, the court appointed Dr. De Leon. In response to MSDIA's request, the court appointed Mr. Cabrera.⁶⁸¹

585. Mr. Cabrera never submitted a report on damages in connection with his first appointment as a damages expert.⁶⁸² Rather, when Dr. De Leon submitted his report addressing both antitrust law and damages, MSDIA withdrew its request for a damages expert, and the court withdrew Mr. Cabrera's appointment as an expert.⁶⁸³

586. As Dr. Ponce Martínez explains, MSDIA withdrew its request for a second damages expert because Dr. De Leon had already comprehensively addressed NIFA's entitlement to

⁶⁷⁷ Exhibit C-4, Court of Appeals Judgment, *NIFA v. MSDIA*, dated 23 September 2011, at 14-15.

⁶⁷⁸ Second Expert Report of Ortega, at paras. 44-45; Ponce Martínez Second Witness Statement at paras. 53-56.

⁶⁷⁹ Ecuador Counter-Memorial, at paras. 464-466.

⁶⁸⁰ Ecuador Counter-Memorial, at paras. 464, 466.

⁶⁸¹ Exhibit R-86, Court of Appeals Order dated 3 February 2010; Ponce Martínez Second Witness Statement at para. 50.

⁶⁸² Ponce Martínez Second Witness Statement at para. 50.

⁶⁸³ Exhibit C-26, MSDIA's Petition of 16 April 2010, *NIFA v. MSDIA*, Court of Appeals; Exhibit R-87, Court of Appeals Order dated 26 April 2010; Ponce Martínez Second Witness Statement at para. 50.

damages and had concluded that there was no basis for NIFA's claim.⁶⁸⁴ MSDIA therefore saw no need for a subsequent report on the same topic, particularly given that under Ecuadorian law, MSDIA would have borne the cost of Mr. Cabrera's report.⁶⁸⁵ As Dr. Ponce Martínez explains, it is entirely customary under Ecuadorian procedure that, when two parties request the appointment of a court-appointed expert on the same subject matter, only one opinion ultimately is received into evidence.⁶⁸⁶

587. MSDIA *did not* consent to Mr. Cabrera's qualifications or expertise as an expert when he was appointed as a damages expert in June 2009. Because MSDIA *withdrew* its request prior to Mr. Cabrera's submission of a damages report, MSDIA had no reason to focus on Mr. Cabrera's qualifications or to consider whether there was a basis for objecting to his appointment.

588. Moreover, even if (contrary to fact) MSDIA had consented to Mr. Cabrera's appointment in response to its June 2009 request, that obviously could not operate as a consent to the highly irregular circumstances under which the court of appeals appointed Mr. Cabrera nearly two years later. To the contrary, as explained above, MSDIA repeatedly objected to Mr. Cabrera's subsequent appointment as contrary to Ecuadorian rules of procedure. MSDIA also objected to the court of appeals' refusal to allow MSDIA to challenge Mr. Cabrera's opinion in contravention of MSDIA's due-process rights.⁶⁸⁷

(ii) Mr. Cabrera's Appointment Was Not Justified by Dr. De Leon's Purported Failure to Address Damages In His Expert Report

589. Ecuador also argues that Mr. Cabrera's appointment was justified because Dr. De Leon allegedly did not address issues related to the calculation of damages in his report, as he had been appointed to do.⁶⁸⁸ Preliminarily, this argument is contrary to the court of appeals' ultimate justification for Mr. Cabrera's appointment. As noted above, the court of appeals ultimately asserted that Mr. Cabrera was appointed as an essential error expert tasked with reviewing and opining on Dr. De Leon's opinion on damages. If Mr. Cabrera was appointed because Dr. De Leon had not addressed damages in his report, as Ecuador suggests, this would further undercut the court's explanation that Mr. Cabrera was appointed as an essential error expert.

⁶⁸⁴ Ponce Martínez Second Witness Statement at para. 50; Exhibit C-26, MSDIA's Petition of 16 April 2010, *NIFA v. MSDIA*, Court of Appeals.

⁶⁸⁵ Ponce Martínez Second Witness Statement at para. 50.

⁶⁸⁶ Ponce Martínez Second Witness Statement at para. 50 (explaining that when the parties both request a court-appointed expert in the same subject matter, it is common for the court to appoint a single expert in that subject matter). Ecuador suggests that MSDIA's withdrawal of its request for Mr. Cabrera's first appointment indicates that MSDIA was cherry-picking a report that it viewed favorably and trying to preclude the submission of a less-favorable report. Ecuador Counter-Memorial, at para. 465. This argument is, of course, inconsistent with Ecuador's assertion that MSDIA somehow consented to Mr. Cabrera's second appointment. In any event, MSDIA was well-within its rights under Ecuadorian procedure to withdraw its request for a redundant court-appointed expert after another court-appointed expert had already carried out the same mandate. MSDIA's actions were entirely normal particularly in light of the fact that Ecuadorian law makes the party that requests an expert's appointment responsible for the expert's fees. Ponce Martínez Second Witness Statement at para. 50.

⁶⁸⁷ Exhibit C-249, MSDIA Petition submitted to Court of Appeals, *NIFA v. MSDIA*, 22 July 2011.

⁶⁸⁸ Ecuador Counter-Memorial, at 466.

590. In any event, Ecuador’s assertion is wrong. Dr. De Leon dedicated an entire section of his report (Section 5.5) to the appropriate standard for measuring damages and the question of whether, assuming that MSDIA could be held liable, NIFA had suffered any damages as a result of MSDIA’s actions.⁶⁸⁹ As noted above—*and as Ecuador itself recognizes in its Counter-Memorial*⁶⁹⁰—Dr. De Leon ultimately concluded that NIFA suffered no harm.⁶⁹¹ Dr. De Leon also responded to NIFA’s particular request concerning damages on the final page of his report, reiterating that NIFA had failed to demonstrate it had suffered any harm and referring back to his analysis on that issue contained in Section 5.5 of his report.⁶⁹²

591. Dr. De Leon clearly fulfilled his appointment to serve as an expert in damages. There was no justification for the court’s appointment of Mr. Cabrera, and Ecuador’s efforts to manufacture one are inconsistent with the record of the court of appeals’ proceedings.

(b) NIFA Failed to Make the Evidentiary Showing Required to Justify the Appointment of Any of the Three Later-Appointed Experts

592. Ecuador ignores a separate reason why none of the three later-appointed experts should have been appointed at all. Under Ecuadorian procedural rules and practice, when a party challenges the report of a court-appointed expert as containing “essential error” and seeks the appointment of a second, “essential error” expert for the purpose of reviewing the first expert’s report, the challenging party is not automatically entitled to the appointment of an essential error expert. Rather, the challenging party must make a *prima facie* evidentiary showing that the first expert has committed error.⁶⁹³ If the party fails to make such a showing, the court should deny the request for the essential error expert.⁶⁹⁴

593. Here, NIFA did not even *purport* to make such a showing in its petitions requesting the additional experts,⁶⁹⁵ but the court of appeals nonetheless granted each of NIFA’s three requests for new experts. As Dr. Ponce Martínez explained in his First Witness Statement, given NIFA’s failure to provide support for its petitions, it was highly irregular for the court to appoint the second set of experts.⁶⁹⁶ Dr. Ortega confirms that the fact that the court made the appointments, in spite of NIFA’s failure to substantiate its applications, violated procedural rules.⁶⁹⁷

⁶⁸⁹ Exhibit C-24, Report of Ignacio De Leon, submitted to the Court of Appeals, *NIFA v. MSDIA*, 17 February 2010, at p. 47-49.

⁶⁹⁰ Ecuador Counter-Memorial at para 465.

⁶⁹¹ Exhibit C-24, Report of Ignacio De Leon, submitted to the Court of Appeals, *NIFA v. MSDIA*, 17 February 2010, at p. 47-49.

⁶⁹² Exhibit C-24, Report of Ignacio De Leon, submitted to the Court of Appeals, *NIFA v. MSDIA*, 17 February 2010, at p. 98.

⁶⁹³ Second Expert Report of Ortega, at para. 39; Ponce Martínez First Witness Statement at para. 38; Ponce Martínez Second Witness Statement at para. 47.

⁶⁹⁴ Second Expert Report of Ortega, at para. 39; Ponce Martínez First Witness Statement at para. 38; Ponce Martínez Second Witness Statement at para. 47.

⁶⁹⁵ See, e.g., Exhibit C-38, MSDIA Petition submitted to Court of Appeals, *NIFA v. MSDIA*, 28 April 2011 at para 15 (noting that in addition to NIFA’s failure to request a timely essential error expert on damages, it had not satisfied its obligation to “providing evidence of essential error in relation to the allegation thereof in Dr. Ignacio De León’s report”).

⁶⁹⁶ Ponce Martínez First Witness Statement at para. 38 (“The appointment of the second set of experts was highly

594. Ecuador ignores the court of appeals' failure to apply this evidentiary requirement in characterizing the appointment of the later-appointed experts as procedurally proper. The court's failure to hold NIFA to its evidentiary burden further demonstrates its willingness to side-step Ecuadorian procedural rules in an effort to generate an evidentiary record favorable to NIFA.

(c) Ecuador's Suggestion that MSDIA Consented to the Qualifications of the Replacement Experts Qualifications

595. As explained above, Ecuador does not dispute that Dr. Guerra and Mr. Cabrera were unqualified to serve as experts in any Ecuadorian litigation. Nor does Ecuador offer any explanation for the court of appeals' decision to credit the opinions of these unqualified experts over the earlier-submitted opinions from renowned experts. Indeed, the only plausible explanation for the court of appeals' actions in accepting the opinions of Dr. Guerra and Mr. Cabrera is that the court was committed to finding *some* evidentiary basis, *no matter how partisan or unqualified*, on which to rest its absurd finding that the failed sale of a *\$1.5 million* pharmaceutical plant could result in *\$150 million* in lost-profit damages.

596. Rather than dispute, or even address, these fundamental issues, Ecuador insinuates that MSDIA is somehow estopped from arguing that these "experts" lacked the necessary qualifications. Specifically, Ecuador argues that, in a brief submitted in the court of appeals more than *two years* before Dr. Guerra and Mr. Cabrera submitted their opinions, MSDIA accepted that the court of appeals could appoint experts who were not accredited by Ecuador's Council of the Judiciary in the event that no accredited experts were available.⁶⁹⁸ Ecuador also argues that MSDIA did not complain about the experts' lack of credentials until after they issued their reports.⁶⁹⁹ Ecuador suggests that MSDIA therefore consented to the appointment of manifestly unqualified experts and cannot complain that the court's reliance on their reports violates MSDIA's due process rights.⁷⁰⁰ Ecuador's arguments are illogical and wrong.

597. *First*, MSDIA is not arguing that it was a denial of justice for the court to appoint experts who were not accredited by Ecuador's Council of the Judiciary. Rather, MSDIA is arguing that it was a denial of justice for the court to appoint and rely on manifestly unqualified experts. The relevance of the Council of the Judiciary's finding that Mr. Cabrera and Dr. Guerra should not

irregular because NIFA's essential error petitions requesting new experts were supported by no evidence that the original experts had committed any error whatsoever, and such evidence is required under Ecuadorian procedure before the court may appoint a second expert on the same subject.")

⁶⁹⁷ Second Expert Report of Ortega, at paras. 39, 41.

⁶⁹⁸ Ecuador Counter-Memorial, at paras. 462-463. When a party in Ecuadorian litigation requests a court-appointed expert, and one or more experts have been accredited by Ecuador's Council of the Judiciary in that subject matter, an expert will be appointed from the Council of the Judiciary's registry. Ponce Martínez Second Witness Statement at para. 63. If there are no accredited experts in the registry in the relevant subject matter, the court (often at the suggestion of the requesting party) will seek recommendations for potential experts from some other government body, trade group, or similar organization. Ponce Martínez Second Witness Statement at para. 63. Although MSDIA suggested that the court of appeals look to these other organizations for competent, experienced experts, that in no way reflected acquiescence in the court of appeals' subsequent choice of obviously unqualified, partisan "experts."

⁶⁹⁹ Ecuador Counter-Memorial, at para. 475.

⁷⁰⁰ Ecuador Counter-Memorial, at para. 475.

have been accredited is that, in reaching that decision, the Council of the Judiciary found that they lacked any relevant qualifications or expertise in the areas in which they were appointed as experts.⁷⁰¹

598. MSDIA accepted that the court of appeals could appoint experts who were not accredited by the Council of the Judiciary if there were no such available accredited experts. But it goes without saying that MSDIA would have expected that any such experts would nevertheless be qualified and would possess relevant expertise. By accepting that the court could appoint experts who were not accredited, MSDIA was not accepting the appointment of experts like Dr. Guerra and Mr. Cabrera, who were entirely unqualified to offer expert evidence.⁷⁰²

599. *Second*, it is also irrelevant that MSDIA challenged the qualifications and expertise of Dr. Guerra and Mr. Cabrera only after they submitted reports that were manifestly biased in favor of NIFA. As noted above, Ecuador does not deny that these two purported experts were in fact manifestly unqualified. Ecuador argues only that MSDIA should have raised that issue earlier, and implies that MSDIA should therefore be regarded as having waived the objection.

600. However, MSDIA had no reason to challenge the expertise and qualifications of Dr. Guerra and Mr. Cabrera *before* they submitted expert reports. As Dr. Ponce Martínez explains, ordinarily “it is presumed that the Council of the Judiciary’s officers act properly in accrediting an expert in a particular subject matter.”⁷⁰³ At the time of their appointment, Dr. Guerra and Mr. Cabrera had been accredited by the Provincial Director of the Council of the Judiciary, and MSDIA therefore had no reason to conduct due diligence on their qualifications at the time they were appointed.

601. Dr. Ponce Martínez explains:

⁷⁰¹ Exhibit C-58, Report of Ivan Escandon, Provincial Director of the Council of the Judiciary for Pichincha, January 26, 2012; 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, 30 April 2012; Exhibit C-63, Memorandum from Wilson Rosero Gómez, Chief of Staff, to Ivan Escandon, Provincial Director of the Council of the Judiciary for Pichincha, 31 May 2012.

⁷⁰² Indeed, as explained in MSDIA’s Memorial, both Mr. Cabrera and Dr. Guerra were accredited as experts at the time of their appointment by the court of appeals. While MSDIA does not dispute this fact, it bears emphasis that the circumstances surrounding the two experts’ accreditations were highly irregular. As explained in MSDIA’s Memorial, both Dr. Guerra and Mr. Cabrera happened to be accredited shortly before they were appointed as experts by the court of appeals and in unusually expeditious fashion. For instance, even though Dr. Guerra’s application, which was submitted just weeks after Dr. De Leon submitted his expert report, reflected no prior experience in competition law, it was approved by the Provincial Director of the Council of the Judiciary on the very day it was submitted. Exhibit C-25, Application of Carlos Guerra Román for Expert Accreditation and accompanying Council of the Judiciary Accreditation, at 1-2; Ponce Martínez Second Witness Statement at para. 60; Ponce Martínez First Witness Statement at para. 40. Similarly, Mr. Cabrera’s application, which was submitted just *weeks* before his second appointment by the court of appeals, was granted within three days of receipt by the Provincial Director of the Council of the Judiciary, even though it failed to provide any supporting documentation of his purported credentials. Exhibit C-259, Application of Cristian Cabrera for Expert Accreditation and accompanying Council of the Judiciary Accreditation; Ponce Martínez Second Witness Statement at para. 65; Ponce Martínez First Witness Statement at para. 40. These events are further compelling evidence of the court of appeals’ determination to manufacture an evidentiary record upon which it could base its predetermined finding of liability against MSDIA.

⁷⁰³ Ponce Martínez Second Witness Statement at para. 68.

“In the case of Dr. Guerra and Mr. Cabrera, it was only after we reviewed their reports and realized that their analysis was contrary to logic, ignored the basic facts of the case, and failed to apply basic and accepted principles of law, that we became concerned about their qualifications and decided to investigate their credentials. As soon as we realized that the Provincial Director had accredited them despite their lack of expertise, and that their accreditations appeared to have been timed so as to ensure their appointment to the NIFA v. MSDIA case, we immediately brought the matter to the attention of the Council of the Judiciary, which agreed with our assessment that both Dr. Guerra and Mr. Cabrera were unqualified to serve as an experts and that the Provincial Director should not have accredited them.”⁷⁰⁴

602. International standards of due process require that a court make an honest and impartial assessment of the evidence.⁷⁰⁵ Thus, when presented with illogical and undeniably flawed expert reports, the court of appeals was obligated to subject those reports to scrutiny and to consider whether the authors of the reports were qualified and were faithfully carrying out their mandate. When evidence that the experts were manifestly not qualified was brought to the court’s attention, the court was obligated to consider that evidence and to take it into account when deciding whether to give weight to those reports.

603. Even if MSDIA had failed to object to the qualifications of these experts, the court could not abdicate its own responsibility to evaluate the reports honestly and impartially. But, as the record unequivocally demonstrates, MSDIA did properly object to the qualifications of these experts and sought to challenge the substance of their evidence. The court’s refusal to allow such challenge is evidence of the court’s disregard for its judicial function and for the due process rights of MSDIA.

(d) The Court of Appeals’ Reliance On “Essential Error” Expert Opinions Was Contrary to Ecuadorian Law

604. The court of appeals’ reliance on the second set of court-appointed experts in its judgment further evidences the court’s bias against MSDIA and its pattern of ignoring principles of Ecuadorian law and procedure in order to manufacture an evidentiary record that could support a pre-determined outcome. This is because the court of appeals justified the appointment of the second set of court-appointed experts by indicating that they were “essential error” experts who were appointed with the limited mandate of reviewing the substance of the reports submitted by the first set of experts. But under Ecuadorian procedural law, a court may not rely on “essential error” experts as substantive evidence in its judgment.⁷⁰⁶

605. Ecuador’s Counter-Memorial completely ignores the critical distinction under Ecuadorian law between a substantive court-appointed expert, and an “essential error” expert. A proper understanding of this distinction provides further confirmation that the court of appeals’ actions with respect to all three of the later-appointed experts violated Ecuadorian procedural rules.

⁷⁰⁴ Ponce Martínez Second Witness Statement at para. 68.

⁷⁰⁵ MSDIA Memorial, at paras. 264-265 (citing Exhibit CLM-148, *United States v. Mexico*, in J. Moore, ARBITRATIONS, Vol. III (1898), at 3229, 3231).

⁷⁰⁶ Ponce Martínez Second Witness Statement at paras. 45-47.

606. Substantive court-appointed experts are appointed, at the request of the parties, to provide opinions on matters concerning technical expertise.⁷⁰⁷ Under Ecuadorian procedure, reports prepared by substantive court-appointed experts are valid evidence concerning the subject matter of the report, on which a court may rely in its judgment.⁷⁰⁸

607. “Essential error” experts serve a different, more limited role. Under Ecuadorian procedure, a party may challenge the opinion of a substantive court-appointed expert by filing a petition, supported by evidence, asserting that the expert has committed “essential error.”⁷⁰⁹ 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.”⁷¹⁰

608. During this limited evidence period, if the party challenging the substantive expert’s report has provided a sufficient evidentiary basis for its essential error petition, the court can appoint an expert with a limited mandate to review the report of the original expert and opine on whether it contains an “essential error.”⁷¹¹ If, based on that evidence, the court finds that the expert committed “essential error,” then the court may appoint a second substantive expert in the same subject matter.⁷¹² Importantly, however, as Dr. Ponce Martínez explains: “the opinion of the ‘essential error’ expert is not evidence in the record on the merits” of the issues in dispute, “and the court cannot rely on the “essential error” expert report in its decision.”⁷¹³

609. As Dr. Ortega explains:

“the court’s exclusive reliance on the reports of ‘essential error’ experts was procedurally improper because essential error reports are evidence that goes against other evidence, and the court should have used the essential error expert report only in contrast with the main report being considered.”⁷¹⁴

610. Setting aside for the moment the other irregularities in the appointment of the second set of experts, the court of appeals purported to appoint all three as “essential error” experts.⁷¹⁵ As a

⁷⁰⁷ Ponce Martínez Second Witness Statement at para. 46.

⁷⁰⁸ Ponce Martínez Second Witness Statement at para. 46.

⁷⁰⁹ Ponce Martínez Second Witness Statement at para. 47. Second Expert Report of Ortega, at para. 39. As explained in MSDIA’s Memorial, NIFA failed to present any evidence in support of its essential error petitions challenging Dr. De Leon’s report on antitrust law and Mr. Silva’s report on real estate. MSDIA Memorial at paras. 93, 102, 104. Thus, the court of appeals should have rejected those essential error petitions without further inquiry or resort to additional evidence. Ponce Martínez First Witness Statement at para. 38.

⁷¹⁰ Ponce Martínez Second Witness Statement at para. 47.

⁷¹¹ Ponce Martínez Second Witness Statement at para. 47.

⁷¹² Ponce Martínez Second Witness Statement at para. 47.

⁷¹³ Ponce Martínez Second Witness Statement at para. 47.

⁷¹⁴ Second Expert Report of Ortega, at para. 42.

⁷¹⁵ Exhibit C-28, Court of Appeals Order of 26 October 2010, *NIFA v. MSDIA* (appointing Mr. Yerovi); Exhibit C-29, Court of Appeals Order of 8 December 2010, *NIFA v. MSDIA* (appointing Dr. Guerra); Exhibit C-45, Court of Appeals Order of 19 July 2011, *NIFA v. MSDIA*; Exhibit C-46, Court of Appeals Order of 1 August 2011, *NIFA v. MSDIA* (refusing MSDIA’s request to subject Mr. Cabrera to challenge on the purported ground that Mr. Cabrera was an essential error expert). Ponce Martínez Second Witness Statement at para. 48. As is described above, the court issued several decrees describing various alternative (and inconsistent) purposes for Mr. Cabrera’s appointment before ultimately claiming that Mr. Cabrera had been appointed as an essential error expert in damages.

result, under Ecuadorian procedural law, the court of appeals was not permitted to rely on their reports in its judgment.

611. The court nonetheless expressly relied on Mr. Yerovi's findings on matters of Ecuadorian real estate and implicitly adopted Mr. Guerra's antitrust analysis in support of its liability holding.⁷¹⁶ It further expressly—and exclusively—relied on Mr. Cabrera's analysis in support of its damages calculation.⁷¹⁷ Because these experts were appointed as essential error experts, however, the court's reliance on their opinions was contrary to Ecuadorian procedural law.

612. Ecuador has not sought to defend the court's improper reliance on the merits of those later-filed reports as substantive evidence. Indeed, the fact that the court blatantly disregarded rules of Ecuadorian procedural law in relying on those opinions entirely undercuts Ecuador's only defense of them, namely its effort to hide behind the shield of Ecuadorian procedural law. The inescapable truth of the matter is that the court of appeals was not motivated by Ecuadorian procedural law, or any other rule of law, in its handling of court-appointed experts. It was motivated only by its desire to manufacture an evidentiary record to support a finding of liability against MSDIA. That is a denial of justice under international law.

c) MSDIA Was Deprived of an Opportunity to Attend the Examination of NIFA's Only Fact Witness

613. MSDIA's Memorial also established that MSDIA's counsel was denied an opportunity to attend the witness testimony of NIFA's *only* fact witness, Mrs. Usher de Ranson, on two separate occasions, despite having made it clear to the trial court that he wanted to and intended to attend. Despite the highly irregular circumstances surrounding Mrs. Usher de Ranson's testimony, the trial court, court of appeals, and NCJ all relied on Mrs. Usher de Ranson's testimony (and ignored contrary testimony from other witnesses) in finding MSDIA liable to NIFA.⁷¹⁸

614. This was a violation of MSDIA's due process rights to confront and address the evidence being asserted against it.

615. Ecuador does not dispute that minimum standards of international due process require that a foreign litigant be afforded an opportunity to contest the evidence, including testimonial evidence, against it. As explained in MSDIA's Memorial, a national court's failure to afford a foreign litigant the opportunity to *confront* the witnesses who submit testimony against it is a textbook denial of justice—it offends the alien's fundamental due-process right to be heard on the opponent's case.⁷¹⁹

616. As the International Court of Justice has explained:

“[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;

⁷¹⁶ Exhibit C-4, Court of Appeals Judgment, *NIFA v. MSDIA*, dated 23 September 2011, at 11.

⁷¹⁷ Exhibit C-4, Court of Appeals Judgment, *NIFA v. MSDIA*, dated 23 September 2011, at 14.

⁷¹⁸ MSDIA Memorial at para. 50; *See also* Ponce Martínez First Witness Statement at paras. 22, 51.

⁷¹⁹ *See* MSDIA Memorial, at 260.

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.”⁷²⁰

617. Likewise, the commissioners in the *Chattin* case explained:

“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, making the hearings in open court a mere formality, and a continued absence of seriousness on part of the Court.”⁷²¹

618. Ecuador does not dispute this principle, and it does not deny that Mrs. Usher de Ranson testified on two occasions outside of the presence of MSDIA’s counsel. Ecuador argues, however, that in Ecuador’s civil law system, there is no prejudice resulting from counsel’s absence from witness testimony, which is conducted by the judge. Ecuador also argues that the failure of MSDIA’s counsel to attend the testimony was attributable to a failure of diligence.⁷²² Ecuador’s arguments are mistaken.

(1) The Trial Court Failed to Provide MSDIA With Adequate Notice of Mrs. Usher De Ranson’s Testimony

619. Ecuador argues that MSDIA was not precluded from attending Mrs. Usher de Ranson’s testimony because the court purportedly provided MSDIA with advance notice of the testimony. This ignores the record of the trial court proceedings.

620. MSDIA’s Memorial set out in detail the sequence of procedural steps that led to Mrs. Usher de Ranson’s testimony, which the court heard on two separate occasions.⁷²³ MSDIA’s Memorial and the Witness Statement of Dr. Ponce Martínez established that on both occasions, MSDIA’s counsel was not notified in advance of the testimony in accordance with Ecuadorian procedural law and ordinary court practice.⁷²⁴

621. Ecuador asserts that the court decree ordering the first taking of Mrs. Usher de Ranson’s testimony was placed in the judicial mailbox of MSDIA’s attorneys at **5:20 pm** on Friday, 25 June 2004. Notably, NIFA’s petition for the taking of Mrs. Usher de Ranson’s testimony was submitted at 4:55 pm that day,⁷²⁵ and was granted just **12 minutes** later, at 5:07 pm. Dr. Ponce

⁷²⁰ 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.

⁷²¹ 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).

⁷²² Ecuador Counter-Memorial at paras. 403, 410.

⁷²³ MSDIA Memorial at paras. 46-50.

⁷²⁴ MSDIA Memorial at paras. 46-50; Ponce Martínez First Witness Statement at paras. 11-14.

⁷²⁵ Exhibit C-142, NIFA’s Petition of 25 June 2004, *NIFA v. MSDIA*, Trial Court, at 1-3 (requesting that trial court

Martínez explains in his Reply Witness Statement that in the entire ten-year record of the *NIFA v. MSDIA* proceedings, no other petition has ever been decided so quickly by any court.⁷²⁶

622. Moreover, in granting NIFA's petition, the court declared that Mrs. Usher de Ranson's testimony could begin at any time after 5:00 pm that day, i.e., *immediately*. Dr. Ponce Martínez explains that this was contrary to then-prevailing court practice, under which witness testimony ordinarily was scheduled to begin after 2:00 pm on the following working day.⁷²⁷ Dr. Ponce Martínez explains that this practice allowed counsel in the case to receive proper notice in advance of the testimony so that they could make arrangements to attend and to submit questions to be put to the witness by the judge in cross examination.⁷²⁸

623. Thus, even if Ecuador were correct that the notice of Mrs. Usher de Ranson's testimony was delivered to MSDIA's counsel at 5:20 pm on Friday, 25 June 2004, that notice would still have been contrary to the ordinary procedural rules and practices of the Ecuadorian courts.

624. But, in fact, the notice of Mrs. Usher de Ranson's testimony was not delivered to MSDIA's counsel at 5:20 pm on 25 June. Ecuador relies on the notation on the court's order granting NIFA's petition, which says that the order was delivered to MSDIA's court mailbox at 5:20 pm.⁷²⁹ However, as Dr. Ponce Martínez explains:

“Ecuador is mistaken about the time when the order was placed in our judicial mailbox. Although the court clerk's certification said that the order was delivered at 17h20 (5:20 p.m.)[, i]n fact, at the end of the day, around 18h00 (6:00 p.m.), when the court closed, we checked our judicial mailbox, as is our usual practice, and the notice was not in our mailbox.”⁷³⁰

625. Because MSDIA's attorneys did not receive the notice of Mrs. Usher de Ranson's testimony before the end of the day on Friday, 25 June, they did not learn that Mrs. Usher de Ranson's testimony had been ordered until the court opened for business at 8:00am the following Monday. That was precisely the time when the court began Mrs. Usher de Ranson's testimony. As Dr. Ponce Martínez confirms, MSDIA “had not yet received the notice of Mrs. Usher de Ranson's testimony at [that] time” and therefore was unable to attend.⁷³¹

626. As Dr. Ponce Martínez explains in detail, MSDIA immediately objected to Mrs. Usher de Ranson's initial testimony and requested that she be recalled for further testimony so MSDIA

“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 Second Witness Statement at para. 5.

⁷²⁶ Ponce Martínez Second Witness Statement at para. 5.

⁷²⁷ Ponce Martínez Second Witness Statement at para. 7.

⁷²⁸ Ponce Martínez Second Witness Statement at para. 7.

⁷²⁹ Ecuador Counter-Memorial at para. 402.

⁷³⁰ Ponce Martínez Second Witness Statement at para. 6. Dr. Ponce Martínez further explains that “I note that it is possible for a judicial officer to certify that an order was placed in a party's judicial mailbox at a certain time but then delay the actual delivery of that order for a short time.” Ponce Martínez Second Witness Statement at para. 6.

⁷³¹ Ponce Martínez Second Witness Statement at para. 9.

could attend and submit questions to be put to her.⁷³² With its petition for her re-examination, MSDIA submitted an initial 12 questions in writing for that purpose.⁷³³

627. In response, on 18 August 2004 the court ordered that Mrs. Usher de Ranson would be subject to further cross examination in Panamá.⁷³⁴ But the court never sent the letter rogatory to the Ecuadorian consulate in Panamá, as was necessary for the taking of testimony there.⁷³⁵ Accordingly, Mrs. Usher de Ranson never testified pursuant to that order.⁷³⁶

628. After the court had failed to take action on MSDIA's request for over a year, notwithstanding MSDIA's specific request that the court send the letter rogatory to Panama, NIFA filed a petition with the court on 18 August 2005 explaining that Mrs. Usher de Ranson was travelling to Quito and would be available for testimony.⁷³⁷ On Thursday, 25 August 2005, the court ordered that her testimony could begin at any time after 9:00 am on 29 August 2005.⁷³⁸

629. At 8:29 am on 29 August—i.e., *before* the testimony could begin under the court's order—MSDIA filed a petition requesting the court to amend its decree to establish a precise date and time for Mrs. Usher de Ranson to appear in court to ensure that MSDIA's counsel could attend, and submitting 18 additional questions for Mrs. Usher de Ranson's examination.⁷³⁹

630. The court took no action on MSDIA's petition prior to the testimony and did not provide any additional notice of the time and place of the testimony to MSDIA's counsel.⁷⁴⁰ The court heard Mrs. Usher de Ranson's testimony at 2:00 pm on 29 August, but MSDIA's counsel—having received no response to its request for notice of the time and location of the testimony—was not present.⁷⁴¹ As Dr. Ponce Martínez explains:

“After Mrs. Usher de Ranson's testimony had begun, we learned from court employees that she was present in the courthouse. We immediately tried to find the location of her testimony so we could attend. Ecuador asserts that she testified in the ordinary hearing room of the Second Civil Court. This is wrong. We checked the hearing room, where testimony is typically given, and Mrs. Usher de Ranson did not provide her testimony there. We later learned that Mrs. Usher de Ranson had testified in the judge's office,

⁷³² Exhibit C-145, MSDIA's Petition of 29 June 2004, *NIFA v. MSDIA*, Trial Court; Exhibit C-234, MSDIA's Second Petition of 29 June 2004, *NIFA v. MSDIA*, Trial Court; Ponce Martínez Second Witness Statement at paras. 15-16.

⁷³³ Exhibit C-145, MSDIA's Petition of 29 June 2004, *NIFA v. MSDIA*, Trial Court; Ponce Martínez Second Witness Statement at para. 15.

⁷³⁴ Ponce Martínez Second Witness Statement at para. 17.

⁷³⁵ Ponce Martínez Second Witness Statement at para. 17.

⁷³⁶ Ponce Martínez Second Witness Statement at para. 17.

⁷³⁷ Exhibit C-236, NIFA Petition of 18 August 2005, *NIFA v. MSDIA*, Trial Court; Ponce Martínez Second Witness Statement at para. 18.

⁷³⁸ Exhibit C-147, Trial Court Order of 25 August 2005, *NIFA v. MSDIA*, at 1; Ponce Martínez Witness Statement at para. 12; Ponce Martínez Second Witness Statement at para. 18.

⁷³⁹ Exhibit C-148, MSDIA's Petition of 29 August 2005, *NIFA v. MSDIA*, Trial Court, at 1 (requesting that the trial court “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.”); Ponce Martínez Second Witness Statement at para. 18.

⁷⁴⁰ Ponce Martínez Second Witness Statement at para. 20.

⁷⁴¹ Ponce Martínez Second Witness Statement at para. 20.

which was highly unusual. In my experience, witness testimonies are usually conducted in the hearing room or on occasions, in the Court's clerks area, but never in a Judge's Chambers."⁷⁴²

The court posed MSDIA's 12 original questions to Mrs. Usher de Ranson but did not require her to answer MSDIA's additional 18 questions.⁷⁴³

631. Thus, on two separate occasions, MSDIA's counsel was not given adequate notice and an opportunity to attend the examination of NIFA's only fact witness. MSDIA had notified the court in advance that it intended to attend the examination, and the court's failure to provide advance notice was plainly intended to deprive MSDIA's counsel of that opportunity. This failure of notice and deprivation of the right to attend witness examination in accordance with ordinary procedures in the Ecuadorian courts is a denial of justice.

(2) MSDIA Was Prejudiced By The Trial Court's Failure to Provide It With Notice of Mrs. Usher De Ranson's Testimony

632. Ecuador argues that MSDIA overstates the significance of counsel's attendance for witness testimony. Ecuador suggests that because questions are put to the witness by the judge rather than by counsel, counsel's role at testimony is limited and counsel's attendance therefore has limited importance. Ecuador's argument is both irrelevant and wrong.

633. As explained above, compliance with a State's rules of procedure is not a defense to a violation of international standards of due process.⁷⁴⁴ Ecuador does not cite *any* international authorities for the proposition that a national court is entitled to apply its own rules of procedure to deprive a foreign litigant of its rights *under international law* to adequate notice of the evidence against it, and the ability confront the testimony of adverse witnesses.

634. In any event, Ecuador's description of the role of counsel in the taking of witness testimony in the Ecuadorian courts is misleading.

635. Dr. Ponce Martínez explains that, as one would suspect, Ecuadorian lawyers generally attend the taking of witness testimony, and their attendance is significant to the evidentiary procedures in the case.⁷⁴⁵ Among other things, it is customary practice for opposing counsel to attend the taking of evidence and to submit questions to the judge for cross-examination of the witness at the time of the testimony.⁷⁴⁶

⁷⁴² Ponce Martínez Second Witness Statement at para. 23.

⁷⁴³ Ponce Martínez Second Witness Statement at para. 22; 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).

⁷⁴⁴ See above at paras. 569-571.

⁷⁴⁵ Ponce Martínez Second Witness Statement at paras. 11-13.

⁷⁴⁶ Ponce Martínez Second Witness Statement at paras. 11-12.

636. Contrary to Ecuador's contention, questions are not ordinarily submitted significantly in advance of the witness's testimony, because this would provide time for the witness to prepare his or her answers in advance knowing what questions would be asked.⁷⁴⁷ Instead, experienced counsel wait until shortly before or even after the testimony commences before presenting the questions they want the court to put to the witness.⁷⁴⁸

637. In addition, counsel attend the taking of witness evidence so they can assess the credibility of the witness for themselves and to ensure that the court's transcript of the testimony accurately reflects the witness's testimony. As Dr. Ponce Martínez explains:

“witness testimony in Ecuadorian court is not recorded by a court reporter as a verbatim transcript. Instead, a court clerk who is not a specialist in such matters is directed to memorialize the witness's answers as they are given. Because of this, there is a high risk that the record will include errors or inaccuracies, but when an attorney is present he or she can attempt to ensure that the record accurately reflects the testimony. Second, attending witness testimony enables a lawyer to make a judgment as to the credibility of the witness. In my experience, if an adverse witness is not credible, a judge is less likely to rely on an untrustworthy witness in resolving a case if opposing counsel was present at the testimony. ... [B]oth the courts of first and second instance relied heavily on Mrs. Usher de Ranson's testimony, which was not supported by actual facts, in finding MSDIA liable.”⁷⁴⁹

638. The absence of MSDIA's counsel from Mrs. Usher de Ranson's testimony was therefore significant and did cause prejudice to MSDIA. The court's failure to provide MSDIA with adequate notice and an opportunity to participate in the testimony of Mrs. Usher de Ranson through the ordinary procedures of the Ecuadorian courts was a denial of justice. Ecuador has offered no meaningful defense of the court's actions with respect to that testimony.

(3) MSDIA Timely Objected to Mrs. Usher De Ranson's Testimony

639. Finally, Ecuador asserts that MSDIA should be precluded from complaining about the testimony of Mrs. Usher de Ranson because it allegedly did not object to Mrs. Usher de Ranson's first testimony on 28 June 2004 or to the trial court's failure to pose MSDIA's 18 additional questions to Mrs. Usher de Ranson during her second appearance.⁷⁵⁰ Ecuador is wrong on both counts.

640. With respect to the 28 June 2004 testimony, MSDIA filed two petitions the very next day explicitly objecting to the court's failure to provide adequate notice of the testimony.⁷⁵¹ As to the

⁷⁴⁷ Ponce Martínez Second Witness Statement at para. 12.

⁷⁴⁸ Ponce Martínez Second Witness Statement at para. 12. The strategic benefit of this approach is obvious: it prevents a situation in which opposing counsel and the witness have time to consider the questions and craft responses. In stark contrast, the court's actions protected Mrs. Usher de Ranson from answering questions without significant notice—each of the 12 questions she was required to answer had been in the public record for more than a year by the time she was required to answer.

⁷⁴⁹ Ponce Martínez Second Witness Statement at para. 13.

⁷⁵⁰ Ecuador Counter-Memorial, at paras. 406, 415.

⁷⁵¹ Exhibit C-145, MSDIA's Petition of 29 June 2004, *NIFA v. MSDIA*, Trial Court; Exhibit C-234, MSDIA's

29 August 2005 testimony, MSDIA again objected on the very next day, requesting that the court declare the testimony null because MSDIA's lawyers were not permitted to attend due to lack of adequate notice, and because the court did not pose the 18 additional questions that had been submitted by MSDIA.⁷⁵² When MSDIA's petition was rejected, MSDIA pressed for reconsideration and then appeal, both of which were rejected without adequate reasoning.⁷⁵³

d) The Court of Appeals Judgment Failed to Consider Any of the Evidence Offered by MSDIA

641. MSDIA's Memorial explains that the court of appeals' judgment was entirely one-sided and biased in favor of the Ecuadorian plaintiff, because it considered *only* the evidence offered by the plaintiff and refused to consider *any of the evidence* offered by MSDIA in its defense. The court of appeals expressly and without basis said in its judgment that MSDIA had waived its reliance on all of the evidence it had submitted in the court of appeals proceedings, concluding that: "For the record, the defendant in this instance expressly waived the evidence aiming to dispel the grounds of the verdict in the first instance."⁷⁵⁴

642. The "evidence aiming to dispel the grounds of the verdict in the first instance" was, of course, all of the evidence submitted by MSDIA in the course of the court of appeals proceedings. Indeed, the very purpose of MSDIA's appeal of the trial court judgment to the court of appeals was to "dispel the grounds of the verdict in the first instance."

643. The court of appeals' refusal to consider MSDIA's evidence left the court to consider *only* the evidence submitted by NIFA. The court's consideration of the evidence of only one party led to a distorted and one-sided analysis of the factual record that was an obvious denial of justice to MSDIA.

644. As explained by the tribunal in the *Amco Asia Corp. v. Indonesia* award, which MSDIA discussed in detail in its Memorial, it is a denial of justice for a national decision-maker to "assess" the "facts ... based *solely* on" the evidence submitted by one party, without taking into account a foreign litigant's "side of the story."⁷⁵⁵ In that case, the tribunal held that a decision revoking the claimant's license to invest in Indonesia "was tainted by bad faith, reflected in events in procedures," as a result of the decision-maker's mere repetition of the clearly erroneous

Petition of 29 June 2004, *NIFA v. MSDIA*, Trial Court; Ponce Martínez Second Witness Statement at para 16.

⁷⁵² Exhibit C-237, MSDIA Petition of 30 August 2005, *NIFA v. MSDIA*, Trial Court; Ponce Martínez Second Witness Statement at para 26.

⁷⁵³ Ponce Martínez Second Witness Statement at para. 26.

⁷⁵⁴ Exhibit C-4, Court of Appeals Judgment, *NIFA v. MSDIA*, dated 23 September 2011, at 15-16; MSDIA Memorial at paras. 121-122

⁷⁵⁵ 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.

allegations made by the Indonesian entity that had petitioned for the revocation of the claimant's license.⁷⁵⁶

645. In its Counter-Memorial, Ecuador argues that the court of appeals did not conclude that MSDIA had waived reliance on all of the evidence it submitted.⁷⁵⁷ Ecuador argues that the page in the record to which the court cites in support of its reference to MSDIA's waiver of evidence is a petition filed by MSDIA on 16 April 2010, in which MSDIA withdrew a request it had made early in the proceeding for the appointment of a damages expert.⁷⁵⁸ Ecuador argues that the court must have meant that MSDIA waived only its request for a damages expert and not that MSDIA waived reliance on all of the evidence it had submitted.⁷⁵⁹

646. Setting aside the merits of its argument, Ecuador's reading of the MSDIA petition on which the court relied in support of its conclusion that MSDIA had "waived the evidence aiming to dispel the grounds of the verdict in the first instance" is obviously correct. That petition was indeed expressly limited to the withdrawing of a request that a single expert be appointed, and as Ecuador acknowledges, there is simply no reasonable reading by which MSDIA could be deemed to have "waived" anything further.⁷⁶⁰

647. Ecuador's argument that the court did not find MSDIA to have waived reliance on all of its evidence, however, does not withstand scrutiny. In fact, the court plainly used MSDIA's petition as a pretext by which to hold just that.

648. The court of appeals' judgment easily could have stated that MSDIA withdrew its petition for a damages expert, but it does not. Instead the court states broadly that MSDIA "expressly waived the evidence aiming to dispel the grounds of the verdict in the first instance."⁷⁶¹ All of the evidence MSDIA submitted in the court of appeals was "aiming to dispel the grounds of the verdict in the first instance," and the court's reference to MSDIA's evidence is naturally understood to include all of the evidence it submitted in the court of appeals.⁷⁶²

649. Consistent with the court's broad language, the court of appeals' judgment does not in fact consider *any* of the evidence introduced by MSDIA. Ecuador argues that the court of appeals considered (and summarily rejected) the expert reports submitted by Dr. De Leon and Mr. Silva (who had been appointed by the court at MSDIA's request).⁷⁶³ Dr. De Leon and Mr.

⁷⁵⁶ 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

⁷⁵⁷ Ecuador Counter-Memorial, at paras. 495-496.

⁷⁵⁸ Ecuador Counter-Memorial, at para. 495.

⁷⁵⁹ Ecuador Counter-Memorial, at paras. 495-496.

⁷⁶⁰ Ecuador Counter-Memorial, at paras. 495; Exhibit C-26, MSDIA's Petition of 16 April 2010, *NIFA v. MSDIA*, Court of Appeals. See also Ponce Martínez First Witness Statement at paras. 52-53.

⁷⁶¹ Exhibit C-4, Court of Appeals Judgment, *NIFA v. MSDIA*, dated 23 September 2011, at 15-16.

⁷⁶² Moreover, as Dr. Ortega observes, the court used the plural form of the Spanish word for evidence ("pruebas"), which references multiple pieces of evidence and "could not refer solely to the report of Mr. Cabrera." Second Expert Report of Ortega, at para. 48.

⁷⁶³ Ecuador Counter-Memorial, at para. 496.

Silva were *court-appointed* experts, however, and their reports were not evidence offered by MSDIA.⁷⁶⁴

650. In fact, there is no reference anywhere in the court of appeals' judgment to any of MSDIA's documentary evidence (including hundreds of pages of emails and other correspondence generated between MSDIA and NIFA during the negotiations), or to any of the market data, numerous witness statements, party-provided expert reports, or anything else in the thousands of pages of evidence introduced by MSDIA into the record in the court of appeals.⁷⁶⁵ The court's failure to consider any of MSDIA's evidence is consistent with its statement that it regarded MSDIA as having waived its reliance on all of the evidence it had submitted. It is also a textbook denial of justice.

e) Other Procedural Irregularities In the Lower-Court Proceedings Are Further Evidence of the Courts' Bias and Predisposition to Find Against MSDIA

651. MSDIA's Memorial and the Witness Statements of Dr. Ponce Martínez detail other examples of procedural misconduct in the lower courts that serve as further evidence of those courts' bias and predisposition to find in favor of NIFA and against MSDIA.

652. Among other things, the lower courts repeatedly failed to provide MSDIA notice of key decisions that were important to MSDIA's exercise of its appeal rights.⁷⁶⁶ These failures of notice were plainly calculated to cause prejudice to MSDIA and to prevent MSDIA from being able to present its case and defend against NIFA's outrageous claims.⁷⁶⁷ This pattern of conduct is inconsistent with international minimum standards of due process and further confirms that MSDIA was subjected to a denial of justice in those courts.

653. Ecuador offers no real response to the pattern of calculated efforts to deprive MSDIA of its appeal rights. Ecuador argues that because the failures to properly notify MSDIA of key decisions did not in fact result in MSDIA losing its right to appeal, they are irrelevant.⁷⁶⁸ This misses the point.

654. MSDIA is not arguing that it was deprived of due process because it was unable to appeal. Rather, the courts' repeated failures to provide notice in accordance with Ecuadorian procedure and their own ordinary practice is evidence of bias and partiality against MSDIA. It is the courts' bias and partiality that is inconsistent with international standards of due process and constitutes a denial of justice. MSDIA's detailed rebuttals to the factual responses raised by

⁷⁶⁴ Ponce Martínez Second Witness Statement at para. 81.

⁷⁶⁵ Second Expert Report of Ortega, at paras. 49-51; Ponce Martínez Second Witness Statement at para. 82.

⁷⁶⁶ *E.g.*, MSDIA Memorial at paras. 59-61; 62-67.

⁷⁶⁷ Ecuador asserts that the lower courts ruled in MSDIA's favor on certain minor evidentiary matters, which purportedly evidences their impartiality. The fact that the lower courts happened to rule in MSDIA's favor on a handful of procedural matters while simultaneously depriving MSDIA of its due-process rights is, of course, irrelevant to Ecuador's liability as a matter of international law. In any event, it is revealing that the "favorable rulings" cited by Ecuador addressed immaterial issues, whereas the rulings made by the lower courts in NIFA's favor principally included their \$150 and \$200 million damages awards.

⁷⁶⁸ Ecuador Counter-Memorial at paras. 446, 454.

Ecuador in this respect are provided in the Reply Witness Statement of Dr. Ponce Martínez, at paragraphs 37 through 43.

655. MSDIA’s Memorial also set forth in detail the highly irregular circumstances surrounding the issuance of the trial court judgment.⁷⁶⁹ Those circumstances powerfully suggest that the trial court’s judgment was the product of bias and corruption, and not a good-faith review of the factual record.

656. As MSDIA explained in its Memorial, the judge who issued the trial court decision, Temporary Judge Chang-Huang, was appointed to the case to replace the trial court judge who had presided over the entire trial court proceedings.⁷⁷⁰ She took no action on the case for more than three months following her appointment, and then abruptly took cognizance of the case and issued the judgment three hours later.⁷⁷¹ She could not have undertaken a meaningful review of the case file, which consisted of more than 6,000 pages of evidence and briefing,⁷⁷² prior to issuing the decision.

657. Moreover, there is decisive evidence suggesting that the judgment was not the product of her own work. Among other things the judgment contained identical typographical and grammatical errors to NIFA’s complaint, which suggested the two documents originated from the same source,⁷⁷³ and two linguistics experts compared a number of other judgments issued by Temporary Judge Chang-Huang and concluded that the *NIFA v. MSDIA* decision was likely authored by someone other than Temporary Judge Chang-Huang.⁷⁷⁴ In addition, as noted above, Temporary Judge Chang-Huang subsequently admitted that she had not authored the judgment and that she had been improperly pressured to rule against MSDIA.⁷⁷⁵

658. In its Counter-Memorial, Ecuador offers no evidence that establishes or even suggests that Temporary Judge Chang-Huang independently reviewed the *NIFA v. MSDIA* court file or authored the judgment that issued under her name. Ecuador merely complains that MSDIA’s evidence does not definitively foreclose some possibility that Temporary Judge Chang-Huang did so.

659. First, Ecuador suggests that MSDIA has not established conclusively that Temporary Judge Chang-Huang failed to adequately study the record before issuing the decision, because

⁷⁶⁹ MSDIA Memorial at paras. 53-58.

⁷⁷⁰ MSDIA Memorial at para. 53; Ponce Martínez First Witness Statement at paras. 19.

⁷⁷¹ MSDIA Memorial at para. 54; Exhibit C-3, Trial Court Judgment, *NIFA v. MSDIA*, dated 17 December 2007; Ponce Martínez First Witness Statement at paras. 19, 23.

⁷⁷² Ponce Martínez First Witness Statement at para. 23.

⁷⁷³ 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”).

⁷⁷⁴ 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 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.

⁷⁷⁵ MSDIA Memorial at paras. 188-192.

she could have reviewed the record during the two months between her assignment to the case and the issuance of the judgment.⁷⁷⁶ Ecuador's speculation on this point is contradicted by the court's own records.

660. As Dr. Ponce Martínez explains in his Reply Witness Statement, the courts' own file records show that Temporary Judge Chang-Huang did not access the case file in the *NIFA v. MSDIA* case until Wednesday, 12 December 2007, and the file was returned on Monday, 17 December 2007, the same day the judgment issued.⁷⁷⁷ In other words, the court's records demonstrate conclusively that Temporary Judge Chang-Huang did not undertake to review the *NIFA v. MSDIA* record during the two months following her appointment to the case. Instead, she accessed the record for only a few days before issuing her decision. It is simply not possible that she could have conducted a meaningful review of the 6,000 page record in that time.

661. Ecuador further argues that Temporary Judge Chang-Huang's taking cognizance of the case less than three and a half hours before issuing the judgment does not establish that she had not done work on the matter prior to that time.⁷⁷⁸ But, as *MSDIA*'s lead counsel Dr. Alejandro Ponce Martínez confirms, the act through which a judge "takes cognizance" of a case "is not merely a formal step."⁷⁷⁹

662. The purpose of the act of taking cognizance is to provide notice to the parties of the identity of the judge who will decide the case, and as such the step should be taken as a judge's "very first act in [a] matter, before undertaking any work in the case."⁷⁸⁰ That Temporary Judge Chang-Huang took cognizance of the matter only hours before issuing the decision is further evidence that she did not undertake any meaningful analysis of the case before issuing her decision.

663. In addition, Ecuador speculates that the original trial court judge, Judge Toscano Garzón, could have prepared some or all of a draft judgment prior to his elevation to the court of appeals in September 2007, which Temporary Judge Chang-Huang could have subsequently adopted as her own work.⁷⁸¹ The circumstances of the case strongly suggest that this did not occur.

664. When Judge Toscano Garzón later recused himself from the court of appeals panel assigned to decide the appeal of Temporary Judge Chang-Huang's judgment, he did so on the narrow grounds that he had appointed *NIFA*'s counsel, Juan Carlos Andrade, as his "alternative" judge to preside over cases in which he could not participate.⁷⁸² He did not cite as grounds for recusal the fact that he had drafted some or all of the judgment that was on appeal. Had he drafted the judgment, he would have been required to cite that fact as a primary grounds for his recusal.⁷⁸³

⁷⁷⁶ Ecuador Counter-Memorial at para. 426.

⁷⁷⁷ Exhibit C-234, Testimony of Carlos Alfonso Espín Arias, *MSDIA v. Chang-Huang*, dated 4 December 2008, at 1-2 (in response to Questions 6-10); Ponce Martínez Second Witness Statement, at paras. 30-31.

⁷⁷⁸ Ecuador Counter-Memorial at para. 426.

⁷⁷⁹ Ponce Martínez Second Witness Statement at para 32.

⁷⁸⁰ Ponce Martínez Second Witness Statement at para 32.

⁷⁸¹ Ecuador Counter-Memorial at para. 427.

⁷⁸² Exhibit C-241, Submission of Judge Juan Toscano Garzón, *NIFA v. MSDIA*, dated 29 July 2008.

⁷⁸³ Ponce Martínez Second Witness Statement at para. 32.

665. In short, the factual record confirms what is apparent on the face of the judgment: Temporary Judge Chang-Huang did not (and could not have) undertaken a meaningful study of the court record before issuing her decision.

666. Temporary Judge Chang-Huang’ failure to undertake even a cursory review of the record prior to issuing a judgment in which she adopted NIFA’s unsupported allegations as her own and awarded NIFA the \$200 million in damages that it sought in its complaint—under circumstances strongly suggesting that the judgment was not the product of her own work—is also a textbook denial of justice.

3. Ecuador Does Not Deny that the Lower Court Judges and the Ecuadorian Plaintiff Have a History of Corrupt Behavior

667. MSDIA’s Memorial described the long list of judicial complaints leveled at the trial court judge, Temporary Judge Chang-Huang, during her short tenure as a judge, including allegations that she solicited payments and allowed other forms of improper influence on her decision-making as a judge. These complaints ultimately led to her removal from office in July 2010 for wrongdoing. In July 2012, Ecuador’s Council of the Judiciary determined that she had committed serious violations during her tenure as a temporary judge.⁷⁸⁴

668. MSDIA also set out in its Memorial that Judge Hernán Alberto Palacios Durango, the president of the three-judge chamber of the court of appeals that presided over the *NIFA* case, and the author of the decision in that case, has been investigated by Ecuadorian authorities on multiple occasions for corruption in connection with his judicial duties. Among other things, he was temporarily dismissed from his position along with Judge Toscano Garzón (who presided over much of the *NIFA v. MSDIA* case in the trial court) for “serious offenses in the performance of their duties” intended to “illegally benefit” a party in a case they were hearing.⁷⁸⁵

669. Ecuador attempts to downplay the history of corruption of Judges Palacios Durango and Chang-Huang, arguing that the documented pattern of allegations of judicial corruption is irrelevant because none of the disciplinary complaints brought against them related directly to the *NIFA v. MSDIA* case.⁷⁸⁶ Ecuador’s suggestion that this Tribunal should turn a blind eye to any allegations of judicial corruption in other cases, even allegations directed against the very judges who issued the judgments against MSDIA, is surprising.

670. As explained above, while the fact that the judges who authored the judgments in the *NIFA v. MSDIA* case have been disciplined for judicial corruption in other cases does not definitively establish that they accepted bribes in the *NIFA* case, it is powerful circumstantial evidence of corruption in the *NIFA v. MSDIA* case, particularly in light of the manifestly irrational nature of the judgments in that case.⁷⁸⁷

671. Ecuador also tries to downplay Temporary Judge Chang-Huang’s own multiple statements admitting that she had not exercised her judicial function to decide the *NIFA v.*

⁷⁸⁴ MSDIA Memorial at paras. 183-192.

⁷⁸⁵ Exhibit C-114, *Ecuador Reverses the Dismissal of Two Judges*, UPI ESPAÑOL, 9 July 2012.

⁷⁸⁶ Ecuador Counter-Memorial at paras. 506, 513.

⁷⁸⁷ *See above* at Section III(A).

MSDIA case independently and honestly.⁷⁸⁸ As set out in MSDIA’s Memorial, in September 2008, Temporary Judge Chang-Huang openly (and without provocation) told Quevedo & Ponce attorney María Cristina Ponce Villacís and Quito lawyer Jorge Antonio Pinos, that she issued the \$200 million decision in favor of NIFA because of pressure by outsiders seeking to interfere with her decisions.⁷⁸⁹ She further admitted to Mr. Pinos and Ms. Ponce that she routinely decided cases based only on a superficial review of the file,⁷⁹⁰ and that she was relieved that MSDIA had appealed her decision because she was “off the hook.”⁷⁹¹

672. In March 2012, then-former Temporary Judge Chang-Huang told MSDIA attorney Marcelo Santamaria that she never intended to issue the decision,⁷⁹² but that the original trial court judge, Judge Toscano Garzón, and her former clerk, Ricardo López, played a “dirty trick” on her⁷⁹³ by preparing the decision and obtaining her signature without her realizing what she was signing.⁷⁹⁴

673. Ecuador offers no evidence of its own regarding Temporary Judge Chang-Huang’s issuance of the judgment or her comments to MSDIA’s attorneys. Ecuador merely argues that MSDIA’s evidence of Temporary Judge Chang-Huang’s statements about the judgment is untrustworthy because it was relayed by people who represent or represented MSDIA.⁷⁹⁵ Ecuador’s criticism is misguided.

674. As an initial matter, Mr. Pinos does not represent MSDIA.⁷⁹⁶ More fundamentally, the statements by Ms. Ponce, Mr. Pinos, and Dr. Santamaria contain strong indicia of reliability. Two separate witnesses to Temporary Judge Chang-Huang’s September 2008 statements provided consistent, sworn testimony attesting to the substance of her statements.⁷⁹⁷ Similarly, Dr. Santamaria personally attested to the substance of Temporary Judge Chang-Huang’s March 2012 statements in a signed account to this Tribunal.⁷⁹⁸ Moreover, Dr. Ponce Martínez confirms that the accounts of Temporary Judge Chang-Huang’s statements provided in MSDIA’s

⁷⁸⁸ Ecuador Counter-Memorial at paras. 432-435.

⁷⁸⁹ MSDIA Memorial at para. 191; Exhibit C-88, Testimony of Jorge Antonio Pinos Pérez, *MSDIA v. Chang-Huang*, dated 4 December 2008, at 3 (in response to Question 17).

⁷⁹⁰ Exhibit C-88, Testimony of Jorge Antonio Pinos Pérez, *MSDIA v. Chang-Huang*, dated 4 December 2008, at 2 (in response to Question 6).

⁷⁹¹ 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).

⁷⁹² MSDIA Memorial at para. 190; Santamaría Martínez Witness Statement, and attached report; Ponce Martínez Witness Statement at paras 24-25.

⁷⁹³ *See* Santamaría Martínez Witness Statement, and attached report; Ponce Martínez Witness Statement at paras 24-25.

⁷⁹⁴ *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.*

⁷⁹⁵ Ecuador Counter-Memorial at paras. 432-435.

⁷⁹⁶ Ponce Martínez Second Witness Statement at para. 36.

⁷⁹⁷ Exhibit C-89, Testimony of María Cristina Ponce Villacís, *MSDIA v. Chang-Huang*, dated 4 December 2008; Exhibit C-88, Testimony of Jorge Antonio Pinos Pérez, *MSDIA v. Chang-Huang*, dated 4 December 2008.

⁷⁹⁸ *See* Santamaría Martínez Witness Statement, and attached report.

Memorial are in both cases “completely consistent with descriptions of the conversations that were given to me immediately after they happened.”⁷⁹⁹

675. In other words, there are compelling reasons to conclude that Temporary Judge Chang-Huang said the words that the witnesses to those conversations have attributed to her. Particularly when viewed in light of the substance of the judgment, the circumstances surrounding its issuance, and Temporary Judge Chang-Huang’s confirmed record of judicial misconduct, Temporary Judge Chang-Huang’s statements amount to powerful evidence that the judgment was a product of improper influence on the court.

676. Ecuador’s argument that inconsistencies between Temporary Judge Chang-Huang’s two statements renders them unreliable⁸⁰⁰ misses the point. MSDIA has not claimed that one or the other of her explanations is true. What both statements share, however, is Temporary Judge Chang-Huang’s acknowledgement that she did not issue an honest judgment after making an independent assessment of the case. Had she done her job honestly, she would have no incentive to claim that the decision was the result of anything other than a full and appropriate review of the record.

D. There Is Widespread Evidence of Systemic Corruption in Ecuador’s Judiciary

677. MSDIA’s Memorial cited numerous reports by non-governmental organizations and the U.S. Department of State, as well as public statements by Ecuadorian officials, that all concluded that Ecuador’s system of justice is corrupt, ineffective and lacking in independence and due process.⁸⁰¹

678. As set out in MSDIA’s Memorial, significant international watchdogs of judicial corruption—including the World Justice Project, the World Economic Forum, Transparency International, and Human Rights Watch—all consistently criticize Ecuador’s judiciary for pervasive corruption.⁸⁰² The U.S. State Department, whose annual country reports are widely-cited by international commentators and tribunals, likewise observes that “[s]ystemic weaknesses in [Ecuador’s] judicial system and its susceptibility to political or economic pressures constitute important problems faced by U.S. companies investing in or trading with Ecuador.”⁸⁰³ Even Ecuador’s own senior government officials, including President Correa, have criticized Ecuador’s judiciary for corruption.⁸⁰⁴

679. In its Counter-Memorial, Ecuador cites no commentary, analysis, or even statements by its own government officials in defense of its judiciary. Simply put, Ecuador has offered no evidence that its judicial system is capable of dispensing impartial decisions based on the rule of law. Instead of offering a defense of its judiciary, Ecuador suggests that the many public reports

⁷⁹⁹ Ponce Martínez Second Witness Statement at para 36.

⁸⁰⁰ Ecuador Counter-Memorial at para. 435.

⁸⁰¹ MSDIA Memorial at para. 161.

⁸⁰² Exhibit C-219, World Justice Project, Rule of Law Index 2012-2013; Exhibit C-218, World Economic Forum, The Global Competitiveness Report 2012-2013; Exhibit C-210, Transparency International, Corruption Perceptions Index 2012; Exhibit C-216, Human Rights Watch, World Report 2013.

⁸⁰³ Exhibit C-217, U.S. Department of State, 2013 Investment Climate Statement: Ecuador, at 4.

⁸⁰⁴ Exhibit C-110, *President Correa: They Wanted to Disparage the Government and They Could Not*, OPINIÓN, 4 August 2012, at 2.

of corruption cited by MSDIA are unreliable.⁸⁰⁵ Specifically, Ecuador challenges the research methodologies used by non-governmental organizations,⁸⁰⁶ challenges the neutrality of the U.S. State Department's reports,⁸⁰⁷ and suggests that the damaging statements of Ecuador's senior officials were taken out of context.⁸⁰⁸

680. Ecuador's criticisms of the evidence of corruption cited by MSDIA are misplaced and wrong. As discussed below, the reports of widespread corruption in Ecuador's judiciary are reliable and are widely-accepted as accurate. Moreover, even if one could find fault with the methodology or factual basis of individual sources, Ecuador cannot deny – and has not denied – that there is an international consensus that Ecuador's judicial system is corrupt, ineffective, and lacking in independence and due process.

a) The World Justice Project Rule of Law Index 2012-2013

681. In its Memorial, MSDIA cited the World Justice Project (“WJP”) Rule of Law Index 2012-13, which ranked Ecuador 85 out of the 97 countries it reviewed in “[c]ivil [j]ustice,” reported that Ecuador “underperforms the majority of Latin American countries in most dimensions of the rule of law,” and reported that civil courts in Ecuador are “inefficient, and vulnerable to corruption and political interference.”⁸⁰⁹

682. In its Counter-Memorial, Ecuador argues that the WJP's findings are inconclusive and that, “according to the authors themselves, [the Index] does not provide a full diagnosis of the countries assessed.”⁸¹⁰ Ecuador cites a portion of an article describing the methodology used to create the WJP Index, in which the authors note several “limitations” of the Index's “methodological strengths.”⁸¹¹

683. The “limitations” disclosed by the authors of the WJP Index, however, are simply general survey limitations that are inherent to any large statistical study, such as the possibility of “measurement error.”⁸¹² The authors of the Index also report, in another section of the same article (not cited by Ecuador), that “the Index's rankings and scores are the product of a very rigorous data collection and aggregation methodology.”⁸¹³

684. The WJP website further explains the research methodology.⁸¹⁴ First, the WJP Index team—in conjunction with academics, practitioners, and local experts—developed a conceptual framework measuring nine factors contributing to the rule of law, broken down into 47 sub-factors. The Index team then created a set of five questionnaires based on this framework and distributed the questionnaires to experts and the general public. After the questionnaires were administered, the team constructed the final rule of law scores using a five-step process.

⁸⁰⁵ Ecuador Counter-Memorial at paras. 340-347.

⁸⁰⁶ Ecuador Counter-Memorial at paras. 340-347.

⁸⁰⁷ Ecuador Counter-Memorial at paras. 348-350.

⁸⁰⁸ Ecuador Counter-Memorial at paras. 351-355.

⁸⁰⁹ Exhibit C-219, World Justice Project, Rule of Law Index 2012-2013, at 45, 84.

⁸¹⁰ Ecuador Counter-Memorial at para. 340.

⁸¹¹ Exhibit RLA-102, J. Botero & A. Ponce, *Measuring the Rule of Law*, World Justice Project (2011), p. 26.

⁸¹² Exhibit RLA-102, J. Botero & A. Ponce, *Measuring the Rule of Law*, World Justice Project (2011), p. 27.

⁸¹³ Exhibit RLA-102, J. Botero & A. Ponce, *Measuring the Rule of Law*, World Justice Project (2011) p. 27.

⁸¹⁴ Exhibit C-287, *Methodology*, World Justice Project.

Specifically, the team: (1) codified the questionnaire items into numerical values, (2) produced raw country scores using the aggregated responses, (3) normalized those scores, (4) aggregated the normalized scores into factors using averages, and (5) produced the final rankings using these normalized scores. Before organizing this data into country reports and tables, the data was subjected to rigorous bias, sensitivity, and error tests. In short, the WJP Index was the product of a professional and scientific research methodology.

685. Ecuador also criticizes the WJP Index for basing its rankings on (1) a general population poll (GPP), which is “conducted by leading local polling companies using a representative sample of 1,000 respondents in three cities per country,” and (2) responses to qualified respondents’ questionnaires (QRQ), which consist of “closed-ended questions completed by in-country practitioners and academics with expertise in civil and commercial law, criminal justice, labor law, and public health.”⁸¹⁵ According to Ecuador, the solicitation of “subjective answers” from survey respondents is tantamount to basing the Index on “speculation and rumor.”⁸¹⁶ Ecuador’s objection appears to be a general objection to the use of survey data rather than a specific objection to the reliability of the WJP’s methodology or results. Ecuador’s objection overlooks the fact that surveys are routinely used to conduct statistical studies similar to those conducted by the WJP. Indeed, “[i]n statistics, data can be gathered by way of a survey, a study, or a combination of the two. Survey theory and the theory of experimental designs for scientific studies provide good methods for collecting data.”⁸¹⁷ It is therefore no surprise that the WJP administered its surveys utilizing questionnaires—addressed to both experts and to the general population—as “questionnaires are one of the most widely used research tools in the social sciences.”⁸¹⁸

686. As the report cited by Ecuador reveals, the authors of the WJP Index crafted their study carefully to choose as survey respondents individuals whose personal experiences would be relevant to the questions asked. For example, for the QRQ, the authors polled a wide array of experts with diverse backgrounds and professional expertise “to get a richer picture of the [rule of law]”⁸¹⁹ and “tailored [the questionnaires] to suit the knowledge and expertise of each type of respondent.”⁸²⁰ Among these experts were local law professors, lawyers, business people, and even an official in Ecuador’s national police service, all of whom would have had first-hand knowledge of the working of Ecuador’s judicial system.⁸²¹ There is no basis for dismissing their views about judicial corruption as mere “speculation and rumor.”

687. Furthermore, by employing both the GPP and QRQ as survey tools, the authors of the WJP study were able to “complement the information provided by the experts’ assessments (specialized knowledge of certain processes, actors, and circumstances) with that of the general public’s assessment (characterizations of different rule of law problems as experienced in real

⁸¹⁵ Exhibit RLA-102, J. Botero & A. Ponce, *Measuring the Rule of Law*, World Justice Project (2011) p. 2-3.

⁸¹⁶ Ecuador Counter-Memorial at para. 343.

⁸¹⁷ Exhibit CLM-354, R. Lyman Ott, *AN INTRODUCTION TO STATISTICAL METHODS AND DATA ANALYSIS* (4th ed. 1993), at 20.

⁸¹⁸ Exhibit CLM-312, 3 *ENCYCLOPEDIA OF MEASUREMENT AND STATISTICS* 808 (Neil J. Salkind ed., 2007).

⁸¹⁹ Exhibit RLA-102, J. Botero & A. Ponce, *Measuring the Rule of Law*, World Justice Project (2011), p. 25.

⁸²⁰ Exhibit RLA-102, J. Botero & A. Ponce, *Measuring the Rule of Law*, World Justice Project (2011) p. 19.

⁸²¹ Exhibit C-288, *Contributing Experts from Ecuador*, World Justice Project.

life by the people).”⁸²² As “experts and people are knowledgeable about different situations,”⁸²³ this survey method enabled the authors of the study to “combine expert opinion with rigorous polling of the general public to ensure that the findings reflect[ed] the conditions experienced by the population.”⁸²⁴

688. In short, the Index is the result of extensive polling of both experts with personal, first-hand knowledge and expertise of the judicial system and a broad sampling of the general public. As the study’s authors explained, their data “comprise[d] both experience-based questions as well as perception-based questions.”⁸²⁵ As the WJP Index reports, those experts and the general public widely reported both knowledge and perception of corruption and lack of independence in the Ecuadorian judiciary. Indeed, the full country report shows that when survey respondents were asked specifically about bribery in Ecuador’s civil court system, asking whether civil judges fail to “move the cases unless the parties bribe them,”⁸²⁶ on a scale of 1 to 10, with 10 being the worst, respondents gave Ecuador an 8.5.

689. Finally, it is notable that the WJP Index is widely-accepted by academics and the media alike.⁸²⁷ Indeed, even a U.S. federal appeals court judge, when commenting on the general acceptance of the Index as a tool to measure the rule of law, described the Index as “perhaps as close to an international, twenty-first-century consensus as we have managed to achieve.”⁸²⁸

b) The World Economic Forum 2012-2013 Global Competitiveness Report

690. MSDIA also cited the World Economic Forum’s 2012-2013 Global Competitiveness Report (GCR), which ranked Ecuador 128 out of 144 countries in judicial independence,⁸²⁹ ranked Ecuador 130 out of 144 countries in “efficiency of legal framework in settling disputes”⁸³⁰ and identified “corruption” as the “most problematic factor[] for doing business” in Ecuador.⁸³¹

691. Ecuador tries to discredit the GCR by claiming that the report’s findings are “unreliable” and “irrelevant.”⁸³² Ecuador asserts that the report’s findings, which are based on responses to an “Executive Opinion Survey” that polls local business leaders, cannot be treated as “‘evidence’ of

⁸²² Exhibit RLA-102, J. Botero & A. Ponce, *Measuring the Rule of Law*, World Justice Project (2011), p. 17.

⁸²³ Exhibit RLA-102, J. Botero & A. Ponce, *Measuring the Rule of Law*, World Justice Project (2011), p. 17.

⁸²⁴ Exhibit RLA-102, J. Botero & A. Ponce, *Measuring the Rule of Law*, World Justice Project (2011), p. 3.

⁸²⁵ Exhibit RLA-102, J. Botero & A. Ponce, *Measuring the Rule of Law*, World Justice Project (2011), p. 3.

⁸²⁶ Exhibit CLM-382, *Ecuador*, World Justice Project Rule of Law Index 2014, p. 5.

⁸²⁷ See Exhibit CLM-342, Tamar Meshel, *The Use and Misuse of the Corruption Defence in International Investment Arbitration*, Journal of International Arbitration, (Kluwer Law International 2013, Volume 30 Issue 3), at 277; Exhibit CLM-306, Benjamin P. Cooper, *Access to Justice without Lawyers*, 47 Akron L. Rev. 205 (2014); Exhibit CLM-328, Blake Hudson, *Fail-Safe Federalism and Climate Change: The Case of U.S. and Canadian Forest Policy*, 44 Conn. L. Rev. 925, 938 (2012); Exhibit C-268, “Top 10 Countries Where Justice Prevails”, FORBES, 6 March 2014 (available at: <http://www.forbes.com/sites/kenrapoza/2014/03/06/top-10-countries-where-justice-prevails/>).

⁸²⁸ Exhibit CLM-353, Diarmuid F. O’Scannlain, *The Rule of Law and the Judicial Function in the World Today*, 89 Notre Dame L. Rev. 1383, 1386 (2014).

⁸²⁹ Exhibit C-218, World Economic Forum, *The Global Competitiveness Report 2012-2013*, at 157.

⁸³⁰ Exhibit C-218, World Economic Forum, *The Global Competitiveness Report 2012-2013*, at 157.

⁸³¹ Exhibit C-218, World Economic Forum, *The Global Competitiveness Report 2012-2013*, at 156.

⁸³² Ecuador Counter-Memorial at para. 345.

the general state of Ecuador’s system of justice” because those leaders supposedly lack “any experience or knowledge of the issues on which they were questioned.”⁸³³

692. The World Economic Forum explains that its Executive Opinion Survey is a “tool that aims to capture crucial information that is not otherwise available on a global scale” and provides a “unique source of insight” into how business executives view the state of their own judicial system.⁸³⁴ The Executive Opinion Survey targets business leaders with experience in the main sectors of the economy—agriculture, manufacturing industry, non-manufacturing industry, and services—and asks them “to evaluate, on a scale of 1 to 7, one particular aspect of their operating environment,”⁸³⁵ namely the judicial system.

693. The 134 business leaders in Ecuador who were given the Executive Opinion Survey reported widespread corruption, lack of judicial independence, and a weak and inefficient legal framework in Ecuador.⁸³⁶

694. Ecuador’s suggestion that these business leaders lack experience and knowledge of the judicial system is wrong. Many of the cases that are litigated in the civil courts involve business disputes, and significant businesses are often repeat users of the judicial system. In addition, business leaders are very familiar with the risk calculus one undertakes when deciding whether to pursue litigation or how to calculate the settlement value of a case; those decisions are obviously influenced by the susceptibility of national court judges to corruption and improper influence. Indeed, in many ways, business leaders are the most experienced and sophisticated repeat users of the judicial system.

695. The World Economic Forum reports that the survey guidelines and administration process for the Executive Opinion Survey “underwent a stringent review in 2007, with the consultation of a renowned survey consultancy.”⁸³⁷ The Global Competitiveness Report is widely used by “international and national organizations, government bodies, academia, and private-sector companies,” which rely on the survey’s data in formulating public policy and private strategy decisions.⁸³⁸

696. In short, the Global Competitiveness Report provides relevant and reliable data. That report unambiguously condemns Ecuador’s judiciary as corrupt and ineffective, and Ecuador has offered no basis for rejecting the report’s conclusions.

c) Transparency International’s 2012 Corruption Perceptions Index

⁸³³ Ecuador Counter-Memorial at para. 345.

⁸³⁴ Exhibit C-218, World Economic Forum, The Global Competitiveness Report 2012-2013, at 69.

⁸³⁵ Exhibit C-218, World Economic Forum, The Global Competitiveness Report 2012-2013, at 70.

⁸³⁶ Exhibit C-218, World Economic Forum, The Global Competitiveness Report 2012-2013, at 156-157.

⁸³⁷ Exhibit C-218, World Economic Forum, The Global Competitiveness Report 2012-2013, at 71.

⁸³⁸ Exhibit C-218, World Economic Forum, The Global Competitiveness Report 2012-2013, at 69; *see, e.g.*, Exhibit CLM-344, John Miles, Elizabeth Karanja, et al., Chapter 3, §3.02: *Guerrilla Tactics and How-to-Counter Them in National Litigation: [E] Experiences from African Legal Systems* in Günther J. Horvath and Stephan Wilske (eds), *Guerrilla Tactics in International Arbitration*, International Arbitration Law Library (Kluwer Law International 2013, Volume 28), at 175-77; Exhibit CLM-380, Stephan Wilske and Jade G. Ewers, *Why South Africa Should Update Its International Arbitration Legislation: An Appeal from the International Arbitration Community for Legal Reform in South Africa*, *Journal of International Arbitration*, 28(2): 1,2, 2011 (Kluwer Law International 2011), at 2.

697. MSDIA also cited Transparency International's 2012 Corruption Perceptions Index (CPI), which ranked Ecuador 118 out of 176 countries surveyed and gave Ecuador a score of 32 out of 100, where 100 indicates the lack of corruption.⁸³⁹

698. Ecuador disputes the findings of the CPI because the CPI is "a compilation of a survey of other surveys."⁸⁴⁰ Ecuador does not explain why this would make the CPI any less reliable. It obviously does not.

699. Transparency International explains that "[t]he 2012 CPI draws on data sources from independent institutions specialising in governance and business climate analysis" and "includes only sources that provide a score for a set of countries/territories and that measure perceptions of corruption in the public sector."⁸⁴¹ To verify the accuracy of the surveys it includes, "Transparency International reviews the methodology of each data source in detail to ensure that the sources used meet Transparency International's quality standards."⁸⁴² The fact that the CPI relies on other well-regarded and carefully-selected survey results does not make it any less reliable.

700. Ecuador also complains that the CPI's findings are based on perceptions of corruption instead of on specific evidence of corruption.⁸⁴³ That is true, but Transparency International explains that the CPI relies on perceptions of corruption because:

"Corruption generally comprises illegal activities, which are deliberately hidden and only come to light through scandals, investigations or prosecutions. There is no meaningful way to assess absolute levels of corruption in countries or territories on the basis of hard empirical data. Possible attempts to do so, such as by comparing bribes reported, the number of prosecutions brought or studying court cases directly linked to corruption, cannot be taken as definitive indicators of corruption levels. Rather they show how effective prosecutors, the courts or the media are in investigating and exposing corruption. Capturing perceptions of corruption of those in a position to offer assessments of public sector corruption is the most reliable method of comparing relative corruption levels across countries."⁸⁴⁴

701. Like the other sources relied on by MSDIA, Transparency International's CPI is widely used by both public and private institutions. Courts,⁸⁴⁵ parties to arbitration proceedings,⁸⁴⁶

⁸³⁹ Exhibit C-210, Transparency International, *Corruption Perceptions Index 2012*, at 3.

⁸⁴⁰ Ecuador Counter-Memorial at para. 346.

⁸⁴¹ Exhibit RLA-110, *Corruption Perceptions Index 2012: Frequently Asked Questions*, Transparency International, p. 4.

⁸⁴² Exhibit RLA-110, *Corruption Perceptions Index 2012: Frequently Asked Questions*, Transparency International, p. 4.

⁸⁴³ Ecuador Counter-Memorial at para. 346.

⁸⁴⁴ Exhibit RLA-110, *Corruption Perceptions Index 2012: Frequently Asked Questions*, Transparency International, p. 4.

⁸⁴⁵ See, e.g., Exhibit CLM-348, *Netherlands No. 31, Yukos Capital s.a.r.l. (Luxembourg) v. OAO Rosneft (Russian Federation)*, *Gerechtshof* [Court of Appeal], Amsterdam, 200,005,269, 28 April 2009 in Albert Jan van den Berg (ed), *Yearbook Commercial Arbitration 2009 - Volume XXXIV*, (Kluwer Law International 2009), at 708.

⁸⁴⁶ See Exhibit CLM-232, *Bureau Veritas, Inspection, Valuation, Assessment and Control, BIVAC B.V. v. Republic of Paraguay*, ICSID Case No. ARB/07/9, Further Decision on Objections to Jurisdiction, 9 October 2012, at 57; Exhibit CLM-257, *Pac Rim Cayman LLC v. Republic of El Salvador*, ICSID Case No. ARB/09/12, Claimant

practitioners,⁸⁴⁷ and academics⁸⁴⁸ all rely on the CPI when describing judicial corruption around the world. This reflects the international consensus that “Transparency International’s [CPI], and the organisation’s report on judicial corruption, are valuable and updated resources in [the assessment of judicial corruption].”⁸⁴⁹ The broad acceptance of the CPI is evidence that its methodology is regarded as reliable and that its results are regarded as accurate.

d) Human Rights Watch 2013 World Report

702. MSDIA also cited the Human Rights Watch (HRW) 2013 World Report, which found that “[c]orruption, inefficiency, and political influence have plagued Ecuador’s judiciary for years.”⁸⁵⁰

703. Ecuador attempts to undermine the HRW Report by arguing that MSDIA provided no supporting evidence for HRW’s statement and failed to explain HRW’s research methodology.⁸⁵¹ This is wrong. The HRW Report does explain HRW’s methodology and provides evidence to support HRW’s conclusion.

704. For example, the HRW 2013 World Report states 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.”⁸⁵²

705. In addition, the HRW 2013 World Report reported specific instances of judicial corruption, such as:

“In July 2012, a prosecutor, Antonio Gagliardo, dismissed charges of prevarication and forgery against Judge Juan Paredes—who had convicted Palacio [the former head of the

Memorial on Merits and Quantum, 29 March 2013, at 63; Exhibit CLM-236, *Chevron Corporation (U.S.A.) & Texaco Petroleum Corporation (U.S.A.) v. Republic of Ecuador [II]*, PCA Case No. 2009-23, Claimant’s Request for Interim Measures, 1 April 2010, at 32.

⁸⁴⁷ See Exhibit CLM-315, Raed Fathallah, *Corruption in International Commercial and Investment Arbitration: Recent Trends and Prospects for Arab Countries* in Jalal El Ahdab (ed), *International Journal of Arab Arbitration*, (International Journal of Arab Arbitration 2010, Volume 2 Issue 3), at 65.

⁸⁴⁸ See Exhibit CLM-323, *Part I: Preliminary Matters, Chapter 3: Why Choose ICC Arbitration?* in Jacob Grierson and Annet van Hooff, *Arbitrating under the 2012 ICC Rules*, (Kluwer Law International 2012), at 23; Exhibit CLM-359, Hilmar Raeschke-Kessler, *Corrupt Practices in the Foreign Investment Context: Contractual and Procedural Aspects* in Norbert Horn and Stefan Michael Kröll (eds), *Arbitrating Foreign Investment Disputes: Procedural and Substantive Legal Aspects*, (Kluwer Law International 2004), at 472;

⁸⁴⁹ Exhibit CLM-341, *Chapter One: The Elements of an International Dispute Resolution Agreement* in Michael McIlwrath and John Savage, *International Arbitration and Mediation: A Practical Guide*, (Kluwer Law International 2010), at 34.

⁸⁵⁰ Exhibit C-216, Human Rights Watch, *World Report 2013*, at 229.

⁸⁵¹ Ecuador Counter-Memorial at para. 347.

⁸⁵² Exhibit C-216, Human Rights Watch, *World Report 2013*, at 229.

opinion section of the newspaper El Universo] and his colleagues from El Universo in July 2011—as well as Gutemberg Vera, Correa’s lawyer, despite credible evidence that the latter had given Paredes a draft of the sentence in a pen drive beforehand. Paredes was selected for a permanent judicial post, and in October Gagliardo was appointed to the Constitutional Court.”⁸⁵³

706. The HRW Report was obviously based on the work of expert observers who investigated specific instances of judicial corruption.⁸⁵⁴ Thus, unlike the general surveys on corruption described above, which Ecuador criticized as reflecting perceptions of corruption rather than specific instances of corruption, the HRW Report looked at specific instances of judicial corruption in Ecuador and found that the Ecuadorian judiciary is “plagued” by corruption and improper political influence. Furthermore, like the other reports cited by MSDIA, HRW reports are widely accepted and relied upon by both academics and practitioners when assessing human rights issues in various countries.⁸⁵⁵

e) The Reports of the U.S. Department of State

707. MSDIA also cited to reports of the U.S. Department of State, which consistently have concluded that “[c]orruption is a serious problem in Ecuador,”⁸⁵⁶ that “in practice the [Ecuadorian] judiciary was susceptible to outside pressure and corruption”⁸⁵⁷ and that

⁸⁵³ Exhibit C-216, Human Rights Watch, World Report 2013, at 230. The HRW Report also provided evidence of political influence in the appointment of judges: “In July 2012, 210 permanent first instance judges appointed by the transitional council took their seats. The results of the qualifying exams were widely criticized for alleged anomalies. Those who failed to achieve a minimum mark in a final training course held by the council—in which an interview was a key component—were rejected without the right to appeal, even though they rated highly in their overall grade. Two judges who had ruled in Correa’s favor in the El Universo case were appointed to permanent posts although their overall scores were lower than others who were rejected. Among its preliminary recommendations, the observers’ group suggested that “the excessive weighting” given to the final interview be reconsidered.” *Id.* at 229-230.

⁸⁵⁴ HRW’s website further explains the methodology used by the Report’s authors: “[R]esearchers work to an established, proven, and consistent methodology based on information gathering from a broad range of sources, and with field-based research at its core. Some of our researchers are permanently out in the field, within or close to the locations they focus on . . . [o]thers work out of our main offices in New York, Berlin, Brussels, London, Johannesburg, Moscow or Washington DC. All are regularly on mission to conduct field investigations, interviewing victims and witnesses to put the human story front and center of our reporting and advocacy. They cooperate with local civil society activists, lawyers, and journalists, and they seek contacts with state and government officials. From their permanent base our researchers constantly follow developments relevant to their work through the media, the output of peer organizations and the research community, and continuous phone and email communication with trusted contacts in the local activist community.” Exhibit C-283, *Our Research Methodology*, Human Rights Watch (available at: <http://www.hrw.org/node/75141>).

⁸⁵⁵ See Exhibit C-319, Brian A. Ford, *From Mountains to Molehills: A Comparative Analysis of Drug Policy*, 19 ANN. SURV. INT’L & COMP. L. 197, 209 (2013); Amos N. Guiora, *Transnational Comparative Analysis of Balancing Competing Interests in Counter-Terrorism*, 20 TEMP. INT’L & COMP. L.J. 363, 372 (2006); Exhibit C-318, Craig Forcese, *Globalizing Decency: Responsible Engagement in an Era of Economic Integration*, 5 YALE HUM. RTS. & DEV. L.J. 1, 12 (2002).

⁸⁵⁶ 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.

⁸⁵⁷ 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

“[c]orruption was widespread, and questions continued regarding transparency within the judicial sector, despite attempts at procedural reform.”⁸⁵⁸

708. Ecuador asserts that the State Department’s reports of systemic corruption in Ecuador “refer to criminal cases or instances in which [Ecuador] has been a party in the proceedings, none of which even resembles the kind of controversy that gave rise to this arbitration.”⁸⁵⁹ Ecuador’s suggestion that the State Department reports are irrelevant because they involve corruption in different kinds of cases is wrong.

709. The State Department reports do not limit their warnings of corruption in Ecuador’s judicial branch to criminal matters or matters in which Ecuador is a party. Instead, they discuss widespread corruption throughout the judiciary, and in particular note the prevalence of corruption in cases involving U.S. investors.⁸⁶⁰

710. For example, in its 2013 Investment Climate Statement, the State Department explained that “[s]ystemic weaknesses 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.”⁸⁶¹ That report also notes that “[c]oncerns 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.”⁸⁶² The Investment Climate Statement specifically considers judicial conduct related to foreign investment and investment-related disputes, and its report of widespread judicial corruption is obviously not limited to criminal cases or cases involving Ecuador as a party.⁸⁶³

711. Ecuador asserts that the State Department’s 2013 Investment Climate Statement “has no evidentiary weight because it consists of unsupported generalizations about the investment climate within Ecuador.”⁸⁶⁴ Even if it were true that the State Department’s Investment Climate Statement contained only “unsupported generalizations,” it would still be evidence of what the U.S. diplomatic community has learned about the general operation of Ecuador’s courts, in particular as it may be relevant to cases involving U.S. investors. But the Investment Climate Statement does not consist of unsupported generalizations. It addresses specific risks for U.S. investors in Ecuador, including the specific risk of judicial corruption. For instance, the report states that “Ecuadorians involved in business disputes allegedly can sometimes arrange for their opponents, including foreigners, to be jailed pending resolution of [civil disputes].”⁸⁶⁵

<http://www.state.gov/e/eeb/rls/othr/ics/index.htm>

⁸⁵⁸ Exhibit C-214, U.S. Department of State, 2012 Country Report on Human Rights Practices: Ecuador, at 1.

⁸⁵⁹ Ecuador Counter-Memorial at para. 348.

⁸⁶⁰ Exhibit C-214, U.S. Department of State, 2012 Country Report on Human Rights Practices: Ecuador, at 20; Exhibit C-217, U.S. Department of State, 2013 Investment Climate Statement: Ecuador, at 4.

⁸⁶¹ Exhibit C-217, U.S. Department of State, 2013 Investment Climate Statement: Ecuador, at 4.

⁸⁶² Exhibit C-217, U.S. Department of State, 2013 Investment Climate Statement: Ecuador, at 4.

⁸⁶³ See also Exhibit C-214, U.S. Department of State, 2012 Country Report on Human Rights Practices: Ecuador, at 20 (“[t]he [Ecuadorian] government recognized extensive corruption in the judicial branch and began a process to reform the judiciary that continued throughout the year.”).

⁸⁶⁴ Ecuador Counter-Memorial at para. 349.

⁸⁶⁵ Exhibit C-217, U.S. Department of State, 2013 Investment Climate Statement: Ecuador, at 4.

Unfortunately, “[n]either legislative oversight nor internal judicial branch mechanisms have shown a consistent capacity to investigate effectively and discipline allegedly corrupt judges.”⁸⁶⁶

712. Ecuador also argues that “it is common knowledge that the country reports prepared by the U.S. Department of State contain largely similar statements from year to year, which suggests that they are not very responsive or reflective of improvements or reforms.”⁸⁶⁷ In fact, the State Department’s reports do report on Ecuador’s “attempts at procedural reform,” but nevertheless conclude that corruption continues to be “widespread” and that “questions continue regarding transparency within the judicial sector.”⁸⁶⁸ The fact that the State Department has made similar statements concerning judicial corruption in Ecuador in every Investment Climate Statement since 2009 and in every Country Report on Human Rights Practices since 2005 simply reflects the general consensus that “[c]orruption is a serious problem in Ecuador.”⁸⁶⁹

713. Finally, Ecuador argues that the State Department’s Country Reports are biased, because they “naturally reflect the views of the U.S. Government whose relations with Ecuador are generally perceived to be strained.”⁸⁷⁰ Even if relations between the U.S. and Ecuador were strained (which Ecuador has not established), there is no reason to think that the State Department would have any incentive to include inaccurate or misleading information in the Investment Climate Reports. These reports are published for the benefit of U.S. investors, who rely on them for accurate information about the investment climate. Regardless of the U.S. government’s diplomatic relationship with Ecuador, it has every reason to provide accurate, up-to-date, reliable information to its citizens who are investing in Ecuador.

714. Ecuador’s allegations of bias are also unpersuasive in light of the State Department’s positive comments about Ecuador on issues other than judicial corruption. For instance, the 2013 Investment Climate Statement acknowledges that “[t]he central government and a number of provincial governments are exploring ways to provide investment attraction services to support current investment, facilitate the entry of new investment, and alleviate bureaucratic and other hurdles.”⁸⁷¹ The Statement also notes that “[t]here is substantial awareness of corporate social responsibility (CSR) among the large businesses operating in Ecuador . . . Ecuador’s investment promotion body, InvestEcuador, emphasizes on its website that opportunities are available for investors who maintain an ethical commitment to their workers, nature, the State, and the community.”⁸⁷²

715. Moreover, Ecuador’s efforts to dismiss the State Department reports are undermined by the fact that the findings of those reports are entirely consistent with the findings of numerous non-governmental organizations and, as discussed below, the assessments of Ecuador itself.

f) The Statements of Senior Ecuadorian Officials

⁸⁶⁶ Exhibit C-217, U.S. Department of State, 2013 Investment Climate Statement: Ecuador, at 4.

⁸⁶⁷ Ecuador Counter-Memorial at para. 350.

⁸⁶⁸ Exhibit C-214, U.S. Department of State, 2012 Country Report on Human Rights Practices: Ecuador, at 1.

⁸⁶⁹ Exhibit C-217, U.S. Department of State, 2013 Investment Climate Statement: Ecuador, at 8.

⁸⁷⁰ Ecuador Counter-Memorial at para. 350.

⁸⁷¹ Exhibit C-217, U.S. Department of State, 2013 Investment Climate Statement: Ecuador, at 14.

⁸⁷² Exhibit C-217, U.S. Department of State, 2013 Investment Climate Statement: Ecuador, at 8.

716. In its Memorial, MSDIA also set out numerous statements that have been made by senior Ecuadorian government officials describing the failings of the Ecuadorian judiciary.⁸⁷³ Those statements, many of which were made in the context of justifying far-ranging judicial reform efforts, acknowledged that there was rampant corruption, inefficiency, and a lack of due process in the Ecuadorian courts.

717. Ecuador argues that MSDIA took these statements out of context and misconstrued the point the various government officials were trying to make.⁸⁷⁴ While MSDIA acknowledges that the government officials who made these statements may have been discussing judicial reform efforts, the point is that they acknowledged the need for reform *because of* the rampant corruption and ineffectiveness of Ecuador's judicial branch.

718. For example, MSDIA cited a 2009 statement by the President of the Civil and Criminal Commission of the Ecuadorian National Assembly that “[o]ur system of justice has completely collapsed.”⁸⁷⁵ Ecuador contends that this statement “was made in the context of [the President’s] discussion of the role of other institutions in the administration of justice.”⁸⁷⁶ To support this contention, Ecuador quotes another statement by the President, in which she said that “[t]o administer justice, we need the Prosecutor, the Attorney General, the ombudsman’s office and a coherent and ordered judiciary all to work together . . . a system of justice where there is a large imbalance between these parts is of no use to the country.”⁸⁷⁷ According to Ecuador, “[t]his observation does not suggest any lack of integrity among Ecuador’s judges and is of no relevance whatsoever to [MSDIA’s] underlying case.”⁸⁷⁸

719. However, nothing from the context of these statements suggests that the President was referring only to other institutions and not to the courts.⁸⁷⁹ After the President stated that “[o]ur system of justice has completely collapsed,” she clarified that “when we say that there are big problems, we are not *just* talking about judges.”⁸⁸⁰ The President’s comments were broadly directed to the general failings of the rule of law in Ecuador, as noted by a leading newspaper, which reported that “[i]n her presentation, [the President] also addressed the issues of constitutional principles, independence, impartiality, specialty, jurisdictional unity, cost, representation, full-time devotion, access to justice, etc.”⁸⁸¹

720. Ecuador also tries to minimize a public comment from President Correa that Ecuador has “a totally inefficient and corrupt judicial system that is falling in pieces.”⁸⁸² Ecuador argues that this was merely a “political statement”⁸⁸³ that was “made in the context of seeking public support

⁸⁷³ MSDIA Memorial at paras. 171-173

⁸⁷⁴ Ecuador Counter-Memorial at paras. 351-355.

⁸⁷⁵ Exhibit C-91, *Justicia colapsada (Justice at a Standstill)*, LA HORA, 16 April 2009, at 1.

⁸⁷⁶ Ecuador Counter-Memorial at para. 353.

⁸⁷⁷ Ecuador Counter-Memorial at para. 353.

⁸⁷⁸ Ecuador Counter-Memorial at para. 353.

⁸⁷⁹ Exhibit C-91, *Justicia colapsada (Justice at a Standstill)*, LA HORA, 16 April 2009, at 1.

⁸⁸⁰ Exhibit C-91, *Justicia colapsada (Justice at a Standstill)*, LA HORA, 16 April 2009, at 1 (emphasis added).

⁸⁸¹ Exhibit C-91, *Justicia colapsada (Justice at a Standstill)*, LA HORA, 16 April 2009, at 1.

⁸⁸² Exhibit C-110, *President Correa: They Wanted to Disparage the Government and They Could Not*, OPINIÓN, 4 August 2012, at 2.

⁸⁸³ Ecuador Counter-Memorial at para. 354.

for a referendum to reform the Ecuadorian Judiciary.”⁸⁸⁴ The fact that President Correa sought public support for reforms of the Ecuadorian judicial system is laudable. But it in no way minimizes his assessment of why that system was so badly in need of reform. Just because a statement is made by the President to advance a political agenda does not mean that statement is not true and should be discounted. Indeed, one would hope that even statements made by the President to advance his political agenda are statements that he believes to be true.

721. Similarly, Ecuador tries to recast another statement of President Correa regarding his judicial reform agenda in which he said that “to restructure the barbarity that is our judicial system is an enormous challenge.”⁸⁸⁵ According to Ecuador, this statement “was made to emphasize the huge challenges that were being faced by Ecuador in its effort to complete the judicial reforms in an efficient manner.”⁸⁸⁶ It may be true that President Correa’s judicial reform agenda poses huge challenges, but that does not help Ecuador’s case. There are huge challenges in implementing the necessary judicial reforms – precisely because Ecuador’s system is so badly broken and in need of drastic reforms. Contrary to Ecuador’s suggestion that the context of this statement minimizes its importance, in fact, the context confirms that Ecuador’s own government recognizes the systemic failings of the Ecuadorian judiciary.⁸⁸⁷

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722. In short, while Ecuador tries to undermine the individual sources cited by MSDIA, all of which condemn Ecuador’s judiciary as corrupt and ineffective, Ecuador is unable to identify a single source that suggests Ecuador’s judiciary is independent and impartial.

723. Notably, Ecuador completely ignores the many other sources MSDIA cited that reflect the pervasive corruption in Ecuador’s courts.⁸⁸⁸ For instance, Ecuador has no response to the fact that “[a] leading Ecuadorian newspaper reported that from 2006 to 2009, more than one-third of Ecuadorian judges were sanctioned for corruption or other impropriety.”⁸⁸⁹ Or that “[i]n 2007, the Ecuadorian Civic Committee against Corruption released 197 videos showing administrative personnel within the judiciary improperly receiving money for services.”⁸⁹⁰ Or that “[o]n 22 June 2010, Ecuador’s Council of the Judiciary declared that ‘the Judicial Branch is not independent.’”⁸⁹¹

724. The inescapable reality is that the Ecuadorian judicial system is notoriously corrupt, ineffective, and lacking in independence. This is recognized by users of the system, by actors within the system, by the general public, and even by the Ecuadorian government.

⁸⁸⁴ Ecuador Counter-Memorial at para. 354.

⁸⁸⁵ Exhibit C-101, *Correa Anticipates That He Will Not Be Able to Completely Change Justice*, EL UNIVERSO, 23 February 2011.

⁸⁸⁶ Ecuador Counter-Memorial at para. 355.

⁸⁸⁷ MSDIA Memorial at para. 171.

⁸⁸⁸ MSDIA Memorial at paras. 169, 173.

⁸⁸⁹ MSDIA Memorial at para. 169; Exhibit C-93, *CJ Acknowledges Deficiencies in Judge Oversight*, EL UNIVERSO, 22 June 2009.

⁸⁹⁰ MSDIA Memorial at para. 169; Exhibit C-74, Freedom House, *Countries at the Crossroads 2007*, Country Report: Ecuador, at 19.

⁸⁹¹ Memorial at para. 173; Exhibit C-98, Resolution No. 043-2010, *From the Judiciary Council to the Nation*, dated 22 June 2010, at 1.

725. As noted above, this evidence of systemic corruption in Ecuador’s judiciary supports the conclusion that the outrageous judgments in the *NIFA v. MSDIA* litigation were the product of corruption. As Ecuador’s own expert, Professor Amerasinghe, explains, evidence of systemic corruption is highly probative, observing (in his book) that “*where the courts are packed with corrupt judges ... there would be a denial of justice.*”⁸⁹² Moreover, as also discussed above, a claimant is excused from the obligation to exhaust local remedies where “the local courts patently lack independence,”⁸⁹³ as Ecuador’s do.

E. There Are No Remaining Avenues Through Which MSDIA Can Seek Effective Relief in Ecuador’s Courts

726. As explained above, a State’s international responsibility for denial of justice arises once a claimant has exhausted reasonably available and effective local remedies, or if requiring the claimant to exhaust further remedies would be unreasonable. Following the Constitutional Court’s decision, which resulted in the reinstatement of the court of appeals’ manifestly irrational \$150 million judgment, it has become overwhelmingly clear that there remain no reasonably available and effective means by which MSDIA can seek relief in Ecuador’s courts.

727. For more than a decade, MSDIA has been compelled to defend itself in Ecuador’s courts against objectively frivolous claims brought by NIFA, a small Ecuadorian company run by a man with a demonstrated public record of corrupt acts.⁸⁹⁴ At the trial court and court of appeals levels, judges who like NIFA’s principal have been publicly charged with corruption in other matters issued facially absurd judgments for \$200 million and \$150 million respectively, which Ecuador has not even attempted to defend in this arbitration.⁸⁹⁵ The trial court judge has since admitted that her decision was the product of improper influence.⁸⁹⁶

728. The NCJ acknowledged the irrationality and complete lack of foundation in the court of appeals’ finding of antitrust liability and its enormous award of damages to NIFA and set aside those rulings with strong language conveying its conviction that they utterly lack legal and factual foundation. But having found that MSDIA could not be held liable under antitrust principles—the only theory that NIFA had argued in the litigation—the NCJ did not dismiss NIFA’s complaint. Instead, the NCJ relied upon the facts found by the corrupt and biased court of appeals 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, that was never litigated by the parties, and over which NIFA and MSDIA had agreed the court lacked subject matter jurisdiction.⁸⁹⁷

729. Despite its vehement disagreement with the decision of the NCJ, MSDIA paid the \$1.57 million judgment against it. But despite all of this, MSDIA remains at risk of further jeopardy. Not satisfied with its \$1.57 million windfall, NIFA filed a collateral action against the judges of

⁸⁹² Exhibit CLM-292, C. Amerasinghe, *STATE RESPONSIBILITY FOR INJURIES TO ALIENS* (1967), at 99 (emphasis added).

⁸⁹³ Caflich Report, at para. 16.

⁸⁹⁴ MSDIA Memorial at pp. 10-47.

⁸⁹⁵ MSDIA Memorial at pp. 10-36.

⁸⁹⁶ MSDIA Memorial at pp. 183-192.

⁸⁹⁷ MSDIA Memorial at pp. 37-47.

the NCJ in Ecuador's Constitutional Court, which issued an irrational decision reinstating the corrupt and biased \$150 million court of appeals judgment. Thus revived by the Constitutional Court, the *NIFA v. MSDIA* litigation is now before a new panel of NCJ judges, which could issue a new judgment at any time.

730. MSDIA has now pursued appeals through the entire Ecuadorian civil court system. It has been held liable by three different courts, each time without legal or factual basis. Both the ultimate results and the procedural maneuverings of those courts are strongly suggestive of improper influence and bias against MSDIA. All of this makes clear that Ecuador's courts will not permit a just outcome in favor of MSDIA to stand.

731. International law does not require that MSDIA continue litigating endlessly in the same Ecuadorian courts in which it has already suffered denials of justice. MSDIA has exhausted all reasonably available and effective remedies in the *NIFA v. MSDIA* litigation, and it has therefore established all of the elements of its claims for denial of justice, including with respect to the \$150 million judgment of the court of appeals.

IV. ECUADOR HAS BREACHED ITS OBLIGATION UNDER ARTICLE II(7) TO PROVIDE EFFECTIVE MEANS OF ASSERTING CLAIMS AND ENFORCING RIGHTS

732. In its Memorial, MSDIA established that Article II(7) of the Treaty imposes on the Parties an absolute obligation to “*provide effective means of asserting claims and enforcing rights* with respect to investment, investment agreements, and investment authorizations” that is more stringent than the obligation under customary international law not to deny justice to aliens.⁸⁹⁸ MSDIA also established that Ecuador breached its obligations under Article II(7) with respect to the *NIFA v. MSDIA* litigation.⁸⁹⁹

733. In its Memorial, MSDIA referred to the decisions of the tribunals in *Chevron v. Ecuador* (*Chevron I*) and *White Industries v. India*. In each of those cases, the tribunals held that the requirement to “provide effective means of asserting claims and enforcing rights with respect to investment,” constitutes an “*independent, specific treaty obligation . . . and not a mere restatement of the [customary international] law on denial of justice.*”⁹⁰⁰ Those tribunals also

⁸⁹⁸ MSDIA's Memorial, at paras. 394-408.

⁸⁹⁹ MSDIA's Memorial, at paras. 401-408.

⁹⁰⁰ 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). Exhibit CLM-114, *White Industries Australia Ltd. v. Republic of India*, UNCITRAL, Award, dated 30 November 2011, at para. 11.3.2(a) (quoting *Chevron I*). 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.”).

concluded that Article II(7) is subject to a lower threshold for establishing a breach than denial of justice⁹⁰¹ and to a qualified requirement of exhaustion of local remedies.⁹⁰²

734. According to Ecuador, those tribunals were wrong to treat Article II(7) as an independent treaty standard. Rather, according to Ecuador, Article II(7) of the Treaty “merely incorporates guarantees against denial of justice already available under customary international law” and already incorporated in the Treaty through Article II(3)(a).⁹⁰³ It follows, according to Ecuador, that Article II(7) cannot be breached unless a denial of justice is established under Article II(3)(a)⁹⁰⁴ and “the concomitant duty to exhaust local remedies” has been complied with to “consummate[] the delict.”⁹⁰⁵

735. As discussed above, MSDIA has established a denial of justice under the standards of international law and has exhausted all reasonably available and effective remedies in the Ecuadorian judicial system. MSDIA therefore has established a consummated denial of justice under Article II(3)(a).

736. Ecuador is wrong, however, that Article II(7) does nothing more than repeat the same requirement to comply with customary international law that is found in Article II(3)(a). Ecuador’s argument is inconsistent with the text of the U.S.-Ecuador BIT and with the applicable rules of treaty interpretation. It is also inconsistent with the weight of applicable authority.

A. The Ordinary Meaning of Article II(7)

737. Article II(7) of the U.S.-Ecuador BIT provides:

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

738. The meaning of the text of Article II(7) is easily understood. It imposes an affirmative obligation on the Parties both to establish effective means of asserting claims and enforcing rights and to ensure that those means work effectively in a particular case.⁹⁰⁶ Where the words of a treaty provision are clear, established rules of treaty interpretation require that they are interpreted and given effect in accordance with their plain meaning.

⁹⁰¹ 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). Exhibit CLM-114, *White Industries Australia Ltd. v. Republic of India*, UNCITRAL, Award, dated 30 November 2011, at para. 11.3.2(a) (quoting *Chevron I*). See also Expert Report of Professor Paulsson, at para. 31 (noting that the *Chevron* and *White Industries* tribunals “held that Article II(7) imposed a broader obligation on states than the rules of customary international law concerning denial of justice.”).

⁹⁰² See 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. 268 (“the Tribunal also does not accept the Respondent’s contention that the Claimants must prove a strict exhaustion of local remedies in order for the Tribunal to find a breach of Article II(7)”); Exhibit CLM-114, *White Industries Australia Ltd. v. Republic of India*, UNCITRAL, Award, dated 30 November 2011, at para. 11.3.2(a) (“a claimant alleging a breach of the “effective means” standard does not need to prove that it has exhausted local remedies”).

⁹⁰³ Ecuador’s Counter-Memorial, at para. 395. See also *id.* at para. 245.

⁹⁰⁴ Ecuador’s Counter-Memorial, at para. 395.

⁹⁰⁵ Ecuador’s Counter-Memorial, at para. 245.

⁹⁰⁶ MSDIA’s Memorial, at paras. 395-400.

739. Ecuador largely ignores the words of Article II(7) and instead engages in an extended discussion about the alleged object and purpose of U.S. investment treaties. This discussion is largely irrelevant, because speculation about the objectives of one party to a bilateral treaty cannot displace the plain meaning of the words of a provision of that treaty. Ecuador's own authorities unequivocally confirm this.

740. In any event, Ecuador's arguments regarding the object and purpose of U.S. investment treaties are misguided. As Ecuador's own authorities confirm, the object and purpose of Article II(7) was to create a specific obligation that extends beyond the standards of international law regarding denial of justice.

1. Plain Meaning of the Text of Article II(7)

741. The plain wording of Article II(7) imposes a specific, positive obligation on the Parties.⁹⁰⁷ It expressly requires that the Parties take affirmative steps – “Each Party *shall provide*” – to make available the *means* to assert claims and enforce rights with respect to investment. It also requires that the Parties take affirmative steps to ensure that those means are *effective*, in other words, that they actually work in a particular case.⁹⁰⁸

742. Ecuador recognizes that Article II(3)(a) incorporates customary international law regarding denial of justice, but it argues that Article II(7) was intended to do exactly the same thing.⁹⁰⁹ Ecuador's argument is inconsistent with the applicable principles of treaty interpretation under the VCLT.⁹¹⁰

743. In arguing that Article II(7) and Article II(3)(a) are coterminous, Ecuador ignores that, while Article II(3)(a) expressly requires treatment no less than that required by international law, Article II(7) makes no reference to international law or to international law standards for denial of justice. As discussed above, differences in language between treaty provisions must be assumed to have meaning.⁹¹¹ According to the tribunals in *Chevron* and *White Industries*, the

⁹⁰⁷ As the *Chevron I* tribunal explained, “the 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.” 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.

⁹⁰⁸ See MSDIA Memorial, dated 2 October 2013, at paras. 396-398, citing 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 (the “effective means” obligation requires that a system of justice not only exist, but that it “work effectively” in a particular case); Exhibit CLM-114, *White Industries Australia Ltd. v. Republic of India*, UNCITRAL, Award, dated 30 November 2011, at para. 11.3.2(b) (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”); Exhibit CLM-112, *Ltd. Liability Co. AMTO v. Ukraine*, SCC Case No. 080/2005, Final Award, dated 26 March 2008, at para. 87 (the “effective means” obligation has two “fundamental” elements: “law and the rule of law”).

⁹⁰⁹ Ecuador Counter-Memorial, at paras. 245, 395.

⁹¹⁰ See *above* at paras. 183-184. See also Ratner Expert Report, at paras. 7-8. Specifically, treaty provisions must be interpreted in good faith according to their ordinary meaning in their context and in the light of the treaty's object and purpose, and their meaning may be confirmed by recourse to supplementary means of interpretation, including the preparatory work of the treaty and the circumstances of its conclusion.

⁹¹¹ Ratner Expert Report, at para. 21.

absence of language referring to customary international law or denial of justice in Article II(7) indicates that it was not intended to be “a mere restatement of the law on denial of justice.”⁹¹²

744. Of course, if the Parties had intended merely to incorporate customary international law standards regarding denial of justice, they would not have needed to include Article II(7) at all. Article II(3)(a) of the Treaty already incorporates the Parties’ obligations under international law, including their obligation not to deny justice to foreign investors. Ecuador’s argument, therefore, requires interpreting Article II(7) as superfluous – a provision added to the Treaty merely to reiterate obligations that were included elsewhere in the Treaty.

745. As discussed above, the principle of *effet utile*, which follows from the rules of treaty interpretation set forth in Article 31 of the VCLT, requires that “treaty clauses must be interpreted to avoid either rendering them superfluous or depriving them of significance for the relationship between the parties.”⁹¹³ Ecuador’s interpretation of Article II(7) as merely duplicating the customary international law standard for denial of justice, which is already incorporated in Article II(3)(a), is “quite simply, forbidden by the principle of *effet utile*.”⁹¹⁴

746. Ecuador invokes another principle of treaty interpretation: that contracting states are taken “to refer to general principles of international law for all questions which the treaty does not itself resolve in express terms and in a different way.”⁹¹⁵ This principle lends no support to Ecuador’s argument.

747. Article II(7) imposes an absolute obligation to provide effective means of asserting claims and enforcing rights in express terms and in a different way than customary international law. It establishes a specific and positive obligation on the Parties to do two things: first, to provide the means to assert claims and enforce rights with respect to investment and second to ensure that those means work effectively. That standard is different and imposes higher obligations on the Parties than the standards applicable for denial of justice under customary international law.⁹¹⁶

⁹¹² See 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 (holding that “Article II(7), however, appears in the BIT as an independent, specific treaty obligation and does not make any explicit reference to denial of justice or customary international law. The Tribunal thus finds that Article II(7), setting out an “effective means” standard, constitutes a *lex specialis* and not a mere restatement of the law on denial of justice. Indeed, the latter intent could have been easily expressed through the inclusion of explicit language to that effect or by using language corresponding to the prevailing standard for denial of justice at the time of drafting.”). See also, Exhibit CLM-112, *Ltd. Liability Co. AMTO v. Ukraine*, SCC Case No. 080/2005, Final Award, dated 26 March 2008, at para. 88.

⁹¹³ See *above* at para. 184. See also Ratner Expert Report, at para. 9

⁹¹⁴ Ratner Expert Report, at para. 22. As Professor Ratner explains, differences in language between treaty provisions must be assumed to have meaning in keeping with the VCLT’s rules of treaty interpretation. *Id.* at 21.

⁹¹⁵ Ecuador Counter-Memorial, at para. 257.

⁹¹⁶ See Exhibit 356, J. Paulsson, *DENIAL OF JUSTICE IN INTERNATIONAL LAW* (2005), at 72 (as Paulsson emphasizes, citing Jiménez de Aréchaga, “State responsibility for acts of the Judiciary does not exhaust itself in the concept of denial of justice”).

748. That is precisely what the tribunals in *Chevron v. Ecuador* and *White Industries v. India* held. As the *Chevron I* tribunal found, Article II(7) “appears in the BIT as an **independent, specific treaty obligation**,” “**not a mere restatement of the law on denial of justice**.”⁹¹⁷

749. The *Chevron I* tribunal explained that:

“[A] **distinct and potentially less-demanding test is applicable under this provision as compared to denial of justice under customary international law**. . . . [U]nder Article II(7), a failure of domestic courts to enforce rights “effectively” will constitute a violation of Article II(7), which may not always be sufficient to find a denial of justice under customary international law.”⁹¹⁸

750. The tribunal in *White Industries* agreed with the reasoning of the *Chevron* tribunal and held, with respect to an almost identical provision in the India-Kuwait BIT, that:

“(a) the ‘effective means’ standard is . . . **a distinct and potentially less demanding test, in comparison to denial of justice in customary international law**; [and] (b) the standard requires both that the host State establish a proper system of laws and institutions and that those systems work effectively in any given case.”⁹¹⁹

751. Consistent with these holdings, Professor Paulsson asserts, “Article II(7) has properly been read to impose a broader obligation than the rules of customary international law.”⁹²⁰

752. The *Chevron I* and *White Industries* tribunals also found that “**a qualified requirement of exhaustion of local remedies** applies under the ‘effective means’ standard.”⁹²¹ In language that was later echoed by the *White Industries* tribunal, the tribunal in *Chevron I* explained:

“[T]he Tribunal also does not accept the Respondent’s contention that the Claimants must prove a strict exhaustion of local remedies in order for the Tribunal to find a breach of Article II(7). . . . The Claimants must, however, have adequately utilized the means made available to them to assert claims and enforce rights in Ecuador in order to prove a breach of the BIT.”⁹²²

⁹¹⁷ 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. Given that Article II(7) constituted a *lex specialis*, the *Chevron I* tribunal emphasized that its role was “to interpret and apply Article II(7) as it appears in the present BIT” not to apply customary international law on denial of justice. *Id.* at para. 244.

⁹¹⁸ 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.

⁹¹⁹ Exhibit CLM-114, *White Industries Australia Ltd. v. Republic of India*, UNCITRAL, Award, dated 30 November 2011, at para. 11.3.2. The effective means provision in the India-Kuwait BIT was incorporated into the Australia-India BIT through its most favored nation clause.

⁹²⁰ Second Paulsson Expert Report, at para. 28.

⁹²¹ 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); Exhibit CLM-114, *White Industries Australia Ltd. v. Republic of India*, UNCITRAL, Award, dated 30 November 2011, at para. 11.3.2.

⁹²² 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. 268.

753. In other words, Article II(7) requires an investor to “properly us[e] the means placed at its disposal” so that a tribunal may determine “whether the means provided by the State to assert claims and enforce rights are sufficiently ‘effective.’”⁹²³

754. However, as soon as it becomes clear that the State has not provided sufficiently effective means for an investor to assert claims or enforce rights, there is a breach of Article II(7). Thus, the tribunals in *Chevron I* and *White Industries* found violations of effective means provisions notwithstanding that there was no final decision from the court of last resort within the respondent State’s judicial system.⁹²⁴

2. Object and Purpose of Article II(7)

755. Ecuador largely ignores the words of Article II(7) and focuses instead on the provision’s alleged origin and purpose.⁹²⁵ Ecuador argues that “the primary United States’ interest in concluding BITs was to protect existing investment while reaffirming the United States’ understanding of traditional international law on foreign investment.”⁹²⁶ Ecuador concludes that Article II(7) “reflects the customary international law standard of denial of justice ... and nothing more, or less.”⁹²⁷

756. Ecuador’s premise and its conclusion are both wrong. Even if the unilateral intent of the United States were relevant to interpreting the Treaty, as discussed below, the United States entered into BITs because it wanted to codify its view of international law and remedy perceived limitations on the protections afforded by custom. Moreover, U.S. investment treaties contain numerous obligations that go beyond the obligations imposed by customary international law. It would make no sense to presume that the provisions of U.S. investment treaties are limited in scope to the protections of customary international law when so many of the substantive obligations of those treaties go beyond what is required by custom.

⁹²³ 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); Exhibit CLM-114, *White Industries Australia Ltd. v. Republic of India*, UNCITRAL, Award, dated 30 November 2011, at para. 11.3.2.

⁹²⁴ 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. 331-332 (“The Claimants’ failure to file recusals for delay thus does not preclude a finding of breach of Article II(7). This effectively disposes of the Respondent’s objection . . . In light of the above finding that the remedies presented by Ecuador did not rise to the level where their exhaustion is required under the standard of Article II(7), there is no need to pass judgment generally upon the independence or lack thereof of Ecuador’s judiciary, and the Tribunal refrains from doing so); Exhibit CLM-114, *White Industries Australia Ltd. v. Republic of India*, UNCITRAL, Award, dated 30 November 2011, at para. 11.4.19 (“In these circumstances, and even though we have decided that the nine years of proceedings in the set aside application do not amount to a denial of justice, the Tribunal has no difficulty in concluding the Indian judicial system’s inability to deal with White’s jurisdictional claim in over nine years, and the Supreme Court’s inability to hear White’s jurisdictional appeal for over five years amounts to undue delay and constitutes a breach of India’s voluntarily assumed obligation of providing White with ‘effective means’ of asserting claims and enforcing rights”).

⁹²⁵ See Ecuador Counter-Memorial, at paras. 247-262.

⁹²⁶ Ecuador Counter-Memorial, at para. 249 (quoting Exhibit RLA-28, K. Vandeveld, *The Bilateral Investment Treaty Program of the United States*, 21 CORNELL INT’L L.J. 201, 212 (1988)).

⁹²⁷ Ecuador Counter-Memorial, at para. 245.

757. Moreover, Ecuador's own authorities recognize that Article II(7) was intended to establish a specific obligation of the Parties that went beyond the requirements of customary international law. These authorities confirm what the plain language of Article II(7) indicates, namely that it imposes an affirmative obligation on the Parties that goes beyond customary international law.

(1) An Object of the U.S. BIT Program Was to Adopt Obligations that Go Beyond Customary International Law

758. Ecuador argues that “the primary United States’ interest in concluding BITs was to protect existing investment while reaffirming the United States’ understanding of traditional international law on foreign investment.”⁹²⁸ Even if an object of the U.S. BIT program was to codify traditional international law on foreign investment (and even if that were relevant to interpreting the Treaty), it provides Ecuador no help.⁹²⁹ As Ecuador’s own authorities acknowledge, it was also an object of the U.S. BIT program to include in U.S. investment treaties obligations that go beyond the requirements of prevailing customary international law.⁹³⁰

759. The Ecuador-U.S. BIT, which largely follows the 1992 Model BIT, includes many obligations that are not found in traditional international law on foreign investment, including, for example, the obligation not to impose performance requirements and the obligation to permit all transfers related to an investment to be made freely and without delay.⁹³¹ It obviously makes no sense to apply a rule of interpretation that presumes the U.S. only wanted to codify customary international law when many of the substantive obligations of the Treaty go much further.

760. Ecuador cites an article by Professor Vandeveldel that includes the statement: “[U.S.] BITs rely on international law to fill gaps and establish minimum standards of treatment, thereby protecting against misinterpretations of the negotiated BIT texts.”⁹³² Professor Vandeveldel’s

⁹²⁸ Ecuador Counter-Memorial, at para. 249 (quoting Exhibit RLA-28, K. Vandeveldel, *The Bilateral Investment Treaty Program of the United States*, 21 CORNELL INT’L L.J. 201, 212 (1988)).

⁹²⁹ As discussed above at para. 222, a State’s alleged unilateral statements of intent are not regarded as appropriate sources of treaty interpretation. Moreover, as Professor Vandeveldel, one of the authorities on whom Ecuador relies with respect to the U.S. Government’s intentions, acknowledges, his writing on the subject of the U.S. BIT program is his “own analysis and is in no sense an official statement of the United States Government’s interpretation of the BITs.” Exhibit RLA-28, K. Vandeveldel, *The Bilateral Investment Treaty Program of the United States*, 21 CORNELL INT’L L.J. 201, 202 (1988).

⁹³⁰ See Exhibit RLA-88, José E. Alvarez, “A BIT on Custom,” 42 N.Y.U. J. J. INT’L L. & POL. 17 (2009) (the United States “desire[d] to use these treaties to ‘bolster’ CIL,” citing K. Vandeveldel, *The BIT Program: A Fifteen-year Appraisal*, 86 AM. SOC’Y INT’L L. PROC. 532, 537 (1992); Exhibit RLA-28, K. Vandeveldel, *The Bilateral Investment Treaty Program of the United States*, 21 CORNELL INT’L L.J. 201, 202 (1988) (“The BITs had three purposes: (1) to provide greater protection for United States investment in those countries with which the United States negotiated BITs, (2) to reaffirm that the protection of United States foreign investment remained an important element of United States foreign policy, and (3) to establish a body of practice to support the United States view of international law governing the protection of foreign investment”). See also Exhibit CLM-430, C. McLachlan, *Investment Treaties and General International Law*, 57 ICLQ 2008, 361-401, 365 (“States often entered into investment treaties precisely in order to remedy perceived limitations in the protections afforded by custom”).

⁹³¹ Exhibit RLA-31, The 1992 U.S. Model BIT, Arts. 2.7 and 5, reprinted in K. Vandeveldel, U.S. INTERNATIONAL INVESTMENT AGREEMENTS (2009), at 810.

⁹³² Ecuador’s Memorial, at para. 249, quoting Exhibit RLA-28, K. Vandeveldel, *The Bilateral Investment Treaty Program of the United States*, 21 CORNELL INT’L L.J. 201, 212 (1988).

statement does not imply that provisions of U.S. investment treaties should therefore be interpreted restrictively to limit their protections to the scope of customary international law.

761. Professor Vandeveldé also observes in that same article,⁹³³ as well as in his treatise on United States investment treaties, that, while some BIT provisions incorporate standards of international law:

“Many other BIT provisions require that covered investment be afforded protection *in excess of* that required by international law. *Obviously, in such cases, BIT parties must abide by the higher BIT standard.*”⁹³⁴

762. Ecuador also relies on Professor Jose Alvarez, who stated in an article on the use of customary international law in investment treaties that U.S. BITs “sought to re-affirm, not derogate from, relevant customary law.”⁹³⁵ Professor Alvarez was not suggesting, of course, that U.S. investment treaties do not contain obligations that go beyond customary international law.

763. In the same article, he recognizes that:

“[T]he United States initiated relatively strong BITs (in the mid-1980s) . . . that were intended precisely to affirm the traditional rules of state responsibility to aliens, *add additional treaty protections not present in the general law* (such as NT and MFN) and assure that both customary and treaty rights could be enforced through binding international arbitration.”⁹³⁶

764. Professor Alvarez identifies specific provisions of U.S. investment treaties that codify international law, such as the minimum standard of treatment and expropriation provisions.⁹³⁷ He also recognizes that there are provisions in U.S. BITs that go beyond customary international law, such as the national treatment and most favoured nation provisions.⁹³⁸

765. Notably, Article II(3)(a) of the Treaty provides: “Investment . . . *shall in no case* be accorded treatment *less than* that required by international law.” Professor Vandeveldé observes

⁹³³ Ecuador’s Memorial, at para. 249, quoting Exhibit RLA-28, K. Vandeveldé, *The Bilateral Investment Treaty Program of the United States*, 21 CORNELL INT’L L.J. 201, 221, note 137 (1988) (“Where the BIT requires treatment exceeding that required by international law, host states must abide by the higher BIT standard”).

⁹³⁴ Exhibit CLM-375, K. Vandeveldé, U.S. INTERNATIONAL INVESTMENT AGREEMENTS (2009), at p. 258.

⁹³⁵ Ecuador Counter-Memorial, at para. 250 (quoting Exhibit RLA-88, José E. Alvarez, “A BIT on Custom,” 42 N.Y.U. J. INT’L L. & POL. 17 (2009), at 33-34).

⁹³⁶ Exhibit RLA-88, José E. Alvarez, “A BIT on Custom,” 42 N.Y.U. J. J. INT’L L. & POL. 17 (2009), at p. 40.

⁹³⁷ Exhibit RLA-88, José E. Alvarez, “A BIT on Custom,” 42 N.Y.U. J. J. INT’L L. & POL. 17 (2009), at pp. 31-32.

⁹³⁸ Exhibit RLA-88, José E. Alvarez, “A BIT on Custom,” 42 N.Y.U. J. J. INT’L L. & POL. 17 (2009), at 34, fn. 66.

Ecuador is wrong that Professor Alvarez considers “effective means” provisions merely codify customary international law. Ecuador Counter-Memorial, at para. 253. Professor Alvarez suggests that customary international law may be relevant to the interpretation of “effective means” provisions, but he does not suggest that the boundaries of those provisions are limited to the protections provided in customary international law. See Exhibit RLA-88, José E. Alvarez, “A BIT on Custom,” 42 N.Y.U. J. J. INT’L L. & POL. 17 (2009), at 32 (“Other provisions of [U.S. BITs], such as *a clause . . . according investors ‘effective means of asserting claims’ in local fora’ are open-ended invitations to deploy relevant CIL or general principles of law*, given, for example, emerging principles to promote due process, transparency, or accountability across a number of regimes, including those involving human rights.”).

that Article II(3)(a) “makes clear that no BIT provision authorizes treatment that is less than that required by international law.”⁹³⁹

766. In other words, Article II(3)(a) establishes a *floor*, below which the Parties cannot go in their treatment of foreign investment in their territory. It does not establish a *ceiling* for treatment of foreign investment. Rather, other provisions of the Treaty can, and do, create obligations that go beyond customary international law on foreign investment.

(2) The Object and Purpose of Article II(7) Was to Go Beyond Customary International Law

767. Ecuador suggests that there is a “long-established customary international law principle under the rubric of the international minimum standard requiring that States provide an effective framework or system enabling foreign investors to assert claims and enforce their rights.”⁹⁴⁰ Ecuador suggests that Article II(7) was intended to codify this “long-established customary international law principle.”

768. Ecuador’s own authorities suggest otherwise. In his treatise, Professor Vandeveldel provides an account of the history of “effective means” provisions (like Article II(7)) and explains that they arose in U.S. treaty practice at a time when there was “disagreement among publicists concerning the content” of customary international law regarding guarantees of access to the courts of the host state.⁹⁴¹ Professor Vandeveldel explains that Article II(7) was “*created as an independent treaty standard to address a lack of clarity in the content of customary international law regarding judicial access.*”⁹⁴²

769. Thus, according to Professor Vandeveldel, Article II(7) was intended to fill a gap in customary international law and “create an absolute standard for measuring the effectiveness of remedies and procedures for enforcing substantive rights.”⁹⁴³ This is consistent with the other

⁹³⁹ Exhibit CLM-375, K. Vandeveldel, U.S. INTERNATIONAL INVESTMENT AGREEMENTS (2009), at 258.

⁹⁴⁰ Ecuador Counter-Memorial, at para. 255.

⁹⁴¹ Exhibit CLM-105, K. Vandeveldel, U.S. INTERNATIONAL INVESTMENT AGREEMENTS (2009), at 411.

⁹⁴² See 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. 243.

⁹⁴³ Exhibit RLA-85, K. Vandeveldel, U.S. INTERNATIONAL INVESTMENT AGREEMENTS (2009), at 413. Elsewhere in his treatise, Professor Vandeveldel treats “judicial access” provisions that require “the parties to provide investors with ‘effective means’” as distinct from claims “under customary international law . . . for a denial of justice.” See, e.g., *id.* at 580. See 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. 243.

authorities on which Ecuador relies, none of which show that such a principle existed under customary international law at the time the U.S.-Ecuador BIT was drafted.⁹⁴⁴

770. Ecuador argues that the deletion of the “effective means” provision from the 2004 Model BIT “clearly evidences that the provision was never intended to impose more stringent obligations than those applicable pursuant to international law.”⁹⁴⁵ Ecuador relies on Professor Vandevelde, who reported that the “effective means” provision was deleted from the 2004 Model BIT because the U.S. drafters believed that “the customary international law principle prohibiting denial of justice provides adequate protection and that a separate treaty obligation was unnecessary.”⁹⁴⁶

771. The fact that the drafters of the 2004 Model BIT may have concluded that the customary international law principle prohibiting denial of justice provides adequate protection does not logically imply that they regarded Article II(7) as redundant to customary international law. In particular does not establish that they considered it to be redundant to customary international law *in 1993*, when the Treaty was signed.

772. The fact that the drafters of the 2004 Model BIT regarded Article II(7) as “unnecessary” *in 2004* – whether because they regarded it as redundant to customary law as it stood in 2004 or because they regarded it as “unnecessary” to extend additional protections to investors beyond those in customary international law as it stood in 2004 – says nothing about how the drafters of the U.S.-Ecuador BIT regarded Article II(7) in 1993. It certainly does not imply, as Ecuador asserts, that Article II(7) “was *never* intended to impose more stringent obligations than those applicable pursuant to international law.”

⁹⁴⁴ See Ecuador’s Counter-Memorial, dated 27 February 2014, note 397 and chart at para. 255. Instead, the materials Ecuador cites demonstrate that, in the 1920s and 1930s, a customary international law principle under the rubric of non-discrimination (*i.e.*, national treatment) required States to provide foreigners access to any existing framework or system for asserting claims and enforcing rights *on an equal basis to nationals*. These authorities do not establish a long-standing principle establishing an absolute minimum standard requiring effective means of asserting claims and enforcing rights. See Exhibit RLA-14, Questionnaire No. 4 on “Responsibility of States for Damage Done in their Territories to the Person or Property of Foreigners” adopted by the League of Nations Committee of Experts for the Progressive Codification of International Law at its Second Session, held in Geneva, 1926, Report of the Sub-Committee, reproduced in A. Freeman, THE INTERNATIONAL RESPONSIBILITY OF STATES FOR DENIAL OF JUSTICE (1932), p. 632 (“[a] State’s duty to protect foreign nationals within its territory includes the obligation to provide ‘the necessary means for defending their rights . . . allow[ing] foreigners to have access to its courts *on the same terms as its own nationals*’”); Exhibit RLA-9, Law of Responsibility of States for Damages Done in Their Territory to the Person or Property of Foreigners, reproduced in 23 AJIL SPECIAL SUPPLEMENT (1929), at 147-148 (“[a] state has a duty to afford an alien means of redress for injuries which are *not less adequate than the means of redress afforded to its nationals*.” Exhibit RLA-11, Acts of the Conference for the Codification of International Law, held at The Hague from March 13th to April 12th, 1930, Minutes of the Third Committee, 9th meeting, Consideration of Bases of Discussion Nos. 5 and 6, reprinted in A. Freeman, THE INTERNATIONAL RESPONSIBILITY OF STATES FOR DENIAL OF JUSTICE (1932), pp. 658 et seq., at 664.

⁹⁴⁵ Ecuador Counter-Memorial, at para. 254.

⁹⁴⁶ Exhibit RLA-85, K. Vandevelde, U.S. INTERNATIONAL INVESTMENT AGREEMENTS (2009), at 415.

773. As the *Chevron I* tribunal held, the deletion of Article II(7) in the 2004 Model BIT in fact confirms the nature of Article II(7) as an independent treaty standard that imposes more stringent obligations than customary international law on denial of justice.⁹⁴⁷

B. Ecuador Has Violated Article II(7)

774. In its Memorial, MSDIA established that Ecuador has violated its obligations under Article II(7) to provide “effective means” for MSDIA to enforce its rights in the *NIFA v. MSDIA* litigation. As MSDIA explained, a judiciary that is influenced by bias or corruption or is otherwise unable to dispense justice through an impartial application of the rule of law is unable to provide a party with an “effective means” of asserting claim and enforcing rights.

775. As discussed above, the Ecuadorian courts in the *NIFA v. MSDIA* litigation have fallen far short of providing “effective means.” For more than ten years,⁹⁴⁸ MSDIA has been fighting a patently frivolous lawsuit, to no avail. MSDIA pursued the case through three levels of Ecuadorian civil courts, where it was subjected to denials of justice at every level. Even after MSDIA paid the final judgment of the highest civil court in Ecuador, the case continued, subjecting MSDIA to another round of litigation and the prospect of further damages for the same alleged wrongs.

776. The Ecuadorian courts have repeatedly and systematically denied MSDIA a fair, impartial, and effective process for defending its rights. At every level, those courts have exhibited bias and been subject to improper influences. They have proven themselves incapable of applying the rule of law. No reasonable observer would conclude that the *NIFA v. MSDIA* litigation had provided MSDIA an “effective means” for enforcing its rights in Ecuador.

777. Ecuador does not dispute that in order for an investor to have “effective means” of asserting claims and enforcing rights, it must be assured that the courts in the host State will fairly and impartially consider its arguments and evidence and render a decision on the basis of the rule of law.

778. Ecuador’s defense is that Article II(7) is subject to the same exhaustion requirement as denial of justice claims under customary international law, and that MSDIA therefore cannot assert a claim under Article II(7) until it has exhausted all available remedies in Ecuador.⁹⁴⁹ As discussed above, MSDIA has exhausted all reasonably available and effective remedies under

⁹⁴⁷ See 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. 243 (interpreting Professor Vandevelde’s explanation of the provision’s deletion “as confirming the *lex specialis* nature of Article II(7)”).

⁹⁴⁸ See 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. 243, at para. 250 (“The Ecuadorian legal system must thus, according to Article II(7), provide foreign investors with means of enforcing legitimate rights within a reasonable amount of time. The limit of reasonableness is dependent on the circumstances of the case.”).

⁹⁴⁹ Ecuador also invokes its exhaustion defense in response to MSDIA’s claims under Article II(3)(a) (full protection and security) and Article II(3)(b) (arbitrary or discriminatory measures). Because Ecuador has offered no other substantive response to those claims, MSDIA relies on its discussion of those claims in paragraphs 380-393 of its Memorial.

Ecuadorian law. But in any event, Ecuador is wrong that Article II(7) is subject to the same exhaustion requirement.

779. As discussed above, the tribunals in *Chevron I* and *White Industries* held that Article II(7) is subject to a lower exhaustion requirement than claims for denial of justice. Specifically, an investor asserting claims under Article II(7) must have utilized the means available to it in the host State's judicial system to an extent that allows the tribunal to make an assessment of whether those means were "effective."

780. As soon as it has become clear that the means provided are not "effective," the investor will have established the material elements of its claim and will be able to assert a claim under Article II(7) without continuing to pursue such ineffective means any further.

781. MSDIA has adequately utilized the means made available to it in Ecuador to enforce its rights. It has litigated in Ecuador for more than a decade, through every level of the Ecuadorian courts, and its rights are still being violated. The record of the *NIFA v. MSDIA* proceedings is extensive, and the story of those proceedings has been set out at length in MSDIA's Memorial and in this Reply Memorial, and in the witness statements of Dr. Ponce Martínez, MSDIA's counsel in Ecuador. This Tribunal has sufficient evidence before it on which to make an assessment of whether the means Ecuador has provided to MSDIA for the protection of its rights in Ecuador have been "effective." They plainly have not.

782. As Professor Paulsson concludes in his expert report in these proceedings:

"Article II(7) has properly been read to impose a broader obligation than the rules of customary international law. Crediting MSDIA's evidence, its case under Article II(7) follows *a fortiori*: Ecuador not only failed to remedy the seriatim denials of due process, it cemented the international violation by compelling MSDIA to pay the NCJ judgment in full. That its travails continue with the prospect of another enforceable award only serves to underscore the conclusion that Ecuador has not provided MSDIA an "effective means" to enforce its rights."⁹⁵⁰

V. MSDIA IS ENTITLED TO LEGAL FEES AND COSTS INCURRED IN CONNECTION WITH ITS DEFENSE OF THE *NIFA V. MSDIA* CASE

783. As MSDIA explained in its Memorial, it 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.

784. In its Memorial, MSDIA estimated its legal fees and costs at approximately \$6,000,000 and committed to provide a specific quantification of its fees and costs, including documentary support, at a subsequent stage of these proceedings. Ecuador objects to MSDIA's claim for costs and fees incurred in connection with the Ecuadorian litigation on two grounds. First, it argues that MSDIA is not entitled to fees incurred prior to the issuance of the trial court decision in December 2007, because no denial of justice could have taken place prior to that time. Second, it argues that MSDIA has not adequately demonstrated its costs and fees through evidence.

⁹⁵⁰ Second Expert Report of Paulsson, at para. 28.

785. As Professor Paulsson explains in his second expert report, Ecuador’s position that there can be no recovery for costs and fees incurred prior to the trial court judgment is “overstated.”⁹⁵¹ That is because “MSDIA is entitled to compensation for any wasted litigation costs it incurred as a result of Ecuador’s internationally wrongful conduct, including that occurring at the trial level.”⁹⁵² Professor Paulsson’s view is consistent with the tribunal’s approach in *White Industries v. India*, in which the claimant was awarded legal fees it had incurred over the full course of the litigation in the respondent-State’s courts.⁹⁵³

786. MSDIA currently quantifies the costs and fees incurred in the *NIFA v. MSDIA* litigation for which it is seeking recovery at \$6,565,768.66.⁹⁵⁴

787. That amount includes the professional fees paid to MSDIA’s lead Ecuadorian counsel, Quevedo & Ponce, in connection with the *NIFA v. MSDIA* litigation, for the time period from July 2005 to present, which total \$1,790,428.55.⁹⁵⁵ MSDIA’s claim excludes Quevedo & Ponce’s fees prior to July 2005 because prior to that time, Quevedo & Ponce’s invoices also included fees for work done in connection with other matters that were being handled by Quevedo & Ponce on behalf of MSDIA at the time.⁹⁵⁶

788. The amount of fees and costs claimed by MSDIA also includes costs and fees paid to MSDIA’s international counsel in connection with the *NIFA v. MSDIA* litigation, WilmerHale, for the time period between February 2008 and October 2011, which total \$4,775,340.11.⁹⁵⁷

789. Between February 2008 and September 2011, WilmerHale’s efforts in connection with the matter were focused primarily on the Ecuadorian litigation. MSDIA has reviewed WilmerHale’s detailed invoices for that period and has excluded any amounts not associated with the Ecuadorian litigation. As a result, for a number of months, the amount claimed is less than the total amount invoiced by WilmerHale to MSDIA.⁹⁵⁸

790. After September 2011, WilmerHale’s work was focused primarily on this arbitration.⁹⁵⁹ MSDIA has therefore elected not to claim any of WilmerHale’s fees or costs for work done after

⁹⁵¹ Second Expert Report of Paulsson, at para. 29.

⁹⁵² Second Expert Report of Paulsson, at para. 29.

⁹⁵³ 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).

⁹⁵⁴ Given the ongoing litigation in Ecuador, MSDIA reserves the right to supplement its claim for fees and costs at a later stage in this arbitration. The fees and costs incurred by MSDIA in connection with this arbitration are not included in the amount claimed as damages. MSDIA reserves the right to quantify and claim the fees and costs associated with this arbitration at the appropriate time.

⁹⁵⁵ Exhibit C-271, Quevedo & Ponce invoices in *NIFA v. MSDIA* litigation, July 2005-present.

⁹⁵⁶ In the interest of simplicity and clarity, rather than undertake to determine the portion of the pre-July 2005 invoices attributable to the *NIFA v. MSDIA* litigation, MSDIA is claiming only those fees associated with invoices in which the NIFA matter was treated as distinct.

⁹⁵⁷ Exhibit C-270, WilmerHale invoices in *NIFA v. MSDIA* litigation, January 2008-October 2011.

⁹⁵⁸ For a number of months, MSDIA received from WilmerHale a 3% “early payment” discount on fees (but not costs). For those months, MSDIA has reduced the amounts claimed in connection with WilmerHale’s fees by 3% after eliminating those fees, if any, unrelated to the Ecuadorian litigation.

⁹⁵⁹ Although WilmerHale has continued to perform work in connection with the Ecuadorian litigation after

September 2011 as damages in connection with its denial of justice claim. MSDIA will seek to recover those costs separately as the costs of this arbitration proceeding.

791. For the convenience of the Tribunal, details of the fees and costs claimed by MSDIA are set forth in the following tables. The invoices reflecting the fees and costs invoiced and paid are included as Exhibits C-270 and C-271.⁹⁶⁰

September 2011, in the interest of simplicity it has not undertaken to isolate that work from its work on the arbitration.

⁹⁶⁰ The supporting description of the work performed that is attached to these invoices is legally privileged and reflects MSDIA's confidential litigation strategy. That detail has not been included with the cover page invoices that are included in Exhibits C-270 and C-271. Moreover, portions of the Quevedo & Ponce invoices contained handwritten notes that are privileged and/or do not relate to the amount of fees claimed and have been redacted.

Table 1: Invoices Paid to Quevedo & Ponce in connection with the NIFA v. MSDIA litigation⁹⁶¹
(Work performed July 2005 – Present)

Invoice Date	Fees Claimed	Invoice Date	Fees Claimed	Invoice Date	Fees Claimed
5-Jul-05	\$700.00	6-Jan-09	\$32,955.00	5-Apr-11	\$45,132.00
10-Nov-05	\$1,330.00	23-Jan-09	\$41,830.00	24-May-11	\$6,110.00
9-Dec-05	\$1,120.00	24-Feb-09	\$450.02	17-Jun-11	\$11,208.00
20-Dec-05	\$280.00	24-Feb-09	\$1,153.12	26-Jul-11	\$44,550.00
22-Feb-06	\$2,755.00	24-Feb-09	\$462.28	9-Sep-11	\$28,440.00
22-Feb-06	\$840.00	25-Feb-09	\$55,627.50	27-Oct-11	\$61,761.00
9-Mar-06	\$1,015.00	24-Mar-09	\$53,578.33	10-Jan-12	\$93,669.00
29-May-06	\$1,812.50	15-Apr-09	\$30,467.00	7-Mar-12	\$102,132.00
19-Jun-06	\$1,450.00	26-May-09	\$33,629.83	8-Jun-12	\$8,766.00
20-Oct-06	\$362.50	25-Jun-09	\$99,429.50	20-Jul-12	\$10,264.00
20-Nov-06	\$290.00	22-Jul-09	\$52,677.00	13-Sep-12	\$20,136.00
11-Jan-07	\$290.00	21-Aug-09	\$42,286.33	7-Nov-12	\$5,502.00
15-Feb-07	\$2,040.00	15-Sep-09	\$11,363.33	28-Nov-12	\$5,904.00
23-Mar-07	\$865.00	17-Nov-09	\$26,342.83	24-Jan-13	\$17,460.00
27-Apr-07	\$2,980.00	21-Dec-09	\$12,440.00	7-Mar-13	\$65,360.00
14-Jun-07	\$3,315.00	25-Jan-10	\$5,295.00	5-Apr-13	\$42,560.00
26-Jun-07	\$1,380.00	26-Feb-10	\$8,205.00	22-May-13	\$55,100.00
30-Jun-07	\$1,380.00	23-Mar-10	\$22,883.33	28-Jun-13	\$4,560.00
7-Aug-07	\$1,040.00	22-Apr-10	\$15,250.00	17-Jul-13	\$1,140.00
17-Aug-07	\$480.00	26-May-10	\$4,387.50	9-Sep-13	\$9,120.00
16-Jan-08	\$800.00	3-Jun-10	\$8,162.50	14-Nov-13	\$47,500.00
20-Feb-08	\$22,350.00	30-Jun-10	\$7,200.00	19-Dec-13	\$13,680.00
13-Mar-08	\$15,000.82	28-Jul-10	\$13,262.50	24-Jan-14	\$21,660.00
14-Apr-08	\$37,935.00	26-Aug-10	\$5,580.00	27-Feb-14	\$14,060.00
26-May-08	\$15,409.17	20-Sep-10	\$180.00	31-Mar-14	\$18,240.00
11-Jun-08	\$1,647.50	19-Oct-10	\$9,900.00	16-May-14	\$44,840.00
14-Jul-08	\$8,712.50	9-Dec-10	\$15,490.00	26-Jun-14	\$140,220.00
27-Aug-08	\$11,178.33	4-Feb-11	\$3,000.00	Total	\$1,790,428.55
16-Oct-08	\$5,340.83	1-Mar-11	\$3,540.00		
18-Nov-08	\$71,477.50	14-Mar-11	\$18,750.00		

⁹⁶¹ Exhibit C-271, Quevedo & Ponce invoices in *NIFA v. MSDIA* litigation, July 2005-present.

Table 2: Invoices paid to WilmerHale in connection with the NIFA v. MSDIA litigation (Work Performed February 2008 – September 2011)⁹⁶²

Invoice Date	Invoice Total	Total Claimed	Invoice Date	Invoice Total	Total Claimed
12-Mar-08	\$271,389.00	\$167,020.16	23-Dec-10	\$48,423.81	\$46,907.67
31-Mar-08	\$206,072.36	\$200,217.80	12-Apr-11	\$10,432.45	\$10,361.77
7-May-08	\$148,500.54	\$144,549.35	12-Apr-11	\$88.00	\$0.00
30-May-08	\$220,610.12	\$214,868.24	12-Apr-11	\$3,352.10	\$3,311.60
27-Jun-08	\$230,031.85	\$223,554.46	12-Apr-11	\$59,322.25	\$55,843.46
24-Jul-08	\$389,695.05	\$383,388.37	13-Apr-11	\$1,326.00	\$58,939.14
21-Aug-08	\$312,168.57	\$306,705.39	13-Apr-11	\$64,253.90	\$10,320.12
29-Sep-08	\$60,257.34	\$58,585.60	13-Apr-11	\$2,940.00	\$2,851.80
21-Oct-08	\$54,608.55	\$52,360.29	27-May-11	\$25,261.51	\$24,547.51
26-Nov-08	\$222,810.19	\$216,658.51	27-May-11	\$813.00	\$813.00
8-Dec-08	\$125,707.63	\$125,707.63	22-Jun-11	\$83,134.40	\$60,951.60
30-Jan-09	\$138,994.72	\$136,827.91	22-Jun-11	\$3,626.00	\$3,517.22
27-Feb-09	\$130,190.09	\$126,315.29	21-Jul-11	\$56,587.75	\$54,711.04
19-Mar-09	\$278,403.51	\$273,142.75	21-Jul-11	\$423.00	\$410.31
18-May-09	\$268,229.96	\$263,089.32	25-Aug-11	\$79,916.77	\$58,590.39
29-May-09	\$246,611.30	\$241,586.88	25-Aug-11	\$1,064.00	\$1,032.08
24-Jun-09	\$264,488.92	\$258,228.32	21-Sep-11	\$107,661.60	\$99,966.10
28-Jul-09	\$162,339.37	\$145,650.52	21-Sep-11	\$363.50	\$363.50
31-Aug-09	\$92,655.32	\$89,986.42	24-Oct-11	\$89,046.40	\$48,878.40
24-Sep-09	\$64,797.37	\$58,640.46	24-Oct-11	\$1,831.00	\$1,831.00
30-Oct-09	\$99,345.41	\$72,279.42	Total	\$5,143,474.23	\$4,775,340.11
17-Nov-09	\$45,007.30	\$39,052.09			
11-Dec-09	\$80,102.75	\$77,849.37			
29-Jan-10	\$43,229.88	\$35,491.38			
9-Mar-10	\$73,930.49	\$61,193.05			
5-Apr-10	\$87,593.16	\$85,068.66			
12-Apr-10	\$66,908.08	\$65,726.08			
20-May-10	\$44,507.47	\$40,505.59			
11-Jun-10	\$16,397.97	\$15,952.80			
13-Jul-10	\$21,911.31	\$18,281.49			
19-Aug-10	\$21,570.56	\$18,604.17			
19-Aug-10	\$14,540.65	\$14,104.69			

⁹⁶² Exhibit 270, WilmerHale invoices in NIFA v. MSDIA litigation, February 2008-October 2011.

VI. REQUEST FOR RELIEF

792. As set forth in MSDIA's Memorial and Notice of Arbitration, and for the reasons outlined above, MSDIA respectfully 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 on 21 September 2012;
- c. Directing Ecuador to pay all costs and attorneys' fees incurred by MSDIA in defending the *NIFA v. MSDIA* litigation, presently quantified in the amount of \$6,565,768.66;
- d. Directing Ecuador—including specifically its courts, its executive branch, and its national police—to take all steps within its power to prevent enforcement of any future judgment against MSDIA in the *NIFA v. MSDIA* case, both within and outside of Ecuador;
- e. Directing that Ecuador indemnify and hold harmless the Claimant against any and all damages resulting from enforcement of any future judgment against MSDIA in the *NIFA v. MSDIA* case, including the value of any assets paid, seized, forfeited, or otherwise foregone in connection with the enforcement of the NIFA judgment and any other damages to the Claimant's business both inside and outside of Ecuador, including lost profits;
- f. Directing Ecuador to pay the Claimant damages for its legal costs in resisting enforcement of any future judgment against MSDIA in the *NIFA v. MSDIA* case, within and outside of Ecuador;
- g. Directing Ecuador to pay pre-award and post-award interest on all sums due;
- h. Directing Ecuador to pay the Claimant all costs and attorneys' fees incurred in connection with this arbitration; and
- i. 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,

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