

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

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

Claimant,

-and-

THE REPUBLIC OF ECUADOR,

Respondent.

PCA Case No. 2012-10

**REJOINDER OF RESPONDENT REPUBLIC OF ECUADOR IN OPPOSITION
TO CLAIMANT'S REQUEST FOR INTERIM MEASURES**

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I. INTRODUCTION

1. In order to prevail on its Request for Interim Measures, Claimant must meet *all* of the applicable tests. In fact, after two extensive pleadings, dozens of exhibits and multiple witness and expert statements, it has not shown that it meets *any* of those tests. As Respondent showed in its Opposition, Claimant cannot make the threshold showings for interim measures (1) that it has an existing right requiring protection, (2) that it has a likelihood of succeeding on the merits of its assertions of jurisdiction and liability, (3) that it actually faces harm that is irreparable and not compensable by damages, or (4) that any such harm is in fact imminent. Respondent also showed that the requested measures disproportionately burden it by requiring action inconsistent with its Constitution and its international obligations with respect to third parties and that mere aggravation of the dispute alone, even if it could be shown, was inadequate to warrant such measures.

2. Claimant's Reply fails to rehabilitate its Request in any of these respects. In fact, it has the opposite effect. Documents submitted with the Reply show beyond cavil that Claimant's ongoing prosecution of an appeal in cassation before the Ecuadorian National Court of Justice contradicts each and every element of its case for interim measures, and, moreover, reveals a shocking duplicity on the part of Claimant that must be sanctioned by this Tribunal by a flat rejection of the Request and an award to Respondent of its cost of opposing it.

3. Claimant based its Request upon the supposition that the decision in that appeal, which it alleged was imminent, and subsequent enforcement of the lower court judgment, would cause it immediate and irreparable harm requiring interim relief before this Tribunal decided the merits of its invocation of jurisdiction or its assertions of liability. In its Opposition, Respondent pointed out the obvious flaw in this assertion: in light of the fact that there are at least nine

possible outcomes to that appeal, only one of which would be adverse to Claimant,¹ there is no way to know in advance what that decision will be, and therefore no way to determine whether any adverse impact is probable or not. Recognizing the fatal implications of this flaw – that there is no possibility of harm at all if the National Court decision does not uphold the judgment – in its Reply Claimant for the first time asserts that:

- “there is every reason to expect [a] decision of the National Court of Justice [that] is adverse to MSDIA.”²
- “there is likely to be an adverse decision from the National Court of Justice, which would lead to enforcement of the judgment against MSDIA’s assets in Ecuador;”³
- “Ecuador’s National Court of Justice is likely to issue a judgment adverse to MSDIA.”⁴

Claimant now concedes that its case of irreparable harm depends upon the likelihood of “the issuance of a decision by Ecuador’s National Court of Justice affirming the lower courts judgment against MSDIA.”⁵

4. But here is the rub. Claimant’s own documents prove that, *in its own view*, there is *no* likelihood of a National Court decision adverse to Claimant and *no* imminent threat of harm, much less irreparable harm, to Claimant. These documents show that the entire premise of Claimant’s Request for Interim Measures is false, and therefore that the Request is a sham.

¹ See Ecuador’s Opposition to Claimant’s Request for Interim Measures, ¶ 104(b) (“Ecuador’s Opposition”).

² Claimant’s Reply to Respondent’s Opposition to its Request for Interim Measures, ¶ 3 (“Claimant’s Reply”).

³ *Id.*, ¶ 6.

⁴ *Id.*, Title, section V.B, p. 54.

⁵ *Id.*, ¶ 105.

5. On 30 April 2012, as required by Ecuadorian law,⁶ Claimant filed with the Ecuadorian Superintendence of Companies its financial statements for its Ecuadorian branch for 2011, audited by Price Waterhouse Coopers. Claimant submitted a copy of this document with its Reply as Exhibit C-111, and a duplicate copy of its filing of the document with the Superintendence of Company is attached to this Rejoinder as Exhibit REM-5. In that financial statement, tucked away deep in the explanatory notes, Claimant addressed the very question at issue in this proceeding, namely, what risk is posed to MSDIA by the NIFA proceedings and the judgment rendered in that case. In explaining why no provision was made in the financial statement for the financial implications of the NIFA action and a second, unrelated action against it in the Ecuadorian courts, Claimant declared:

Management believes that it is not necessary to establish provisions to cover risks of loss derived from these actions *inasmuch as a decision favorable to the branch is expected at the superior judicial levels.*⁷

6. In other words, contrary to the representations and allegations made in its Request and Reply, Claimant vouchsafed to the Ecuadorian government, that a *favorable* decision, not an *adverse* decision, was likely to emanate from the National Court of Justice and that, as a result, there was no need whatsoever to make any allowance “to cover risk of loss” deriving from the NIFA litigation.

⁶ Ley de Compañías, Codificación, Registro Oficial 312 de 5 de noviembre de 1999, Articles 23, 318 and 319 (RLM-108) (“Ley de Compañías”). See also Resolución No. 2, Superintendencia de Compañías, Registro Oficial 400 de 10 de marzo de 2011, Article 5 (RLM-119) (“Resolución No. 2”). This law applied to MSDIA Ecuador’s financial statements submitted in 2012. The law has been repealed and replaced with Resolución No. 3, which maintains the requirement. See Resolución No. 3, Superintendencia de Compañías, Registro Oficial 676 de 4 de abril de 2012, Article 5 (RLM-120) (“Resolución No. 3”).

⁷ MSDIA’s April 30, 2012 Audited Financial Statement for Year Ending December 31, 2011, Note 18 of Explanatory Notes, p. 41 (English translation; emphasis added) (in the Spanish original: “*La Administración considera que no es necesario constituir provisiones para cubrir riesgos de pérdida derivados de estos juicios ya que espera una resolución favorable a la Sucursal en las instancias judiciales superiores.*”) (C-111) (“Report of the Independent Auditors”).

7. This statement was made *five months after* Claimant first announced its intention to seek interim measures in its November 29, 2011 Notice of Arbitration⁸ and *more than two months after* it stressed to the PCA the urgency of constituting the tribunal so that it could make its application of interim measures.⁹ It was made a *mere six weeks before* it actually filed its Request. And significantly, it was made *after* all of the events in the National Court appellate proceeding that it now criticizes.¹⁰

8. This statement must be taken as an accurate representation of Claimant's true view of the risks it faces. Representations made in audited financial statements have serious consequences. If Claimant truly believed what it has alleged in its Request and Reply, it would have had to have disclosed the financial implications of the alleged likelihood of loss in the statement of the financial condition of the branch.¹¹ As stated in the Report Of The Independent Auditors attached to the financial statement, "The Management of Merck Sharp & Dohme (Inter American) Corporation – Ecuador Branch, is responsible for the preparation and reasonable presentation of these financial statements in accordance with International Financial Reporting Standards (IFRS), and the internal control necessary to allow for the preparation of financial

⁸ Notice of Arbitration, ¶ 14 (29 Nov. 2011).

⁹ Claimant's Feb. 25, 2012 Letter to PCA, p. 1 ("Most urgently, as indicated in the Request for Arbitration, MSDIA anticipates submitting an application for interim measures immediately upon the constitution of a tribunal, or as soon thereafter as possible. Delay in the process of selecting a presiding arbitrator would delay MSDIA's ability to request and obtain interim relief. It is possible that these delays would effectively prevent MSDIA from ever obtaining effective interim relief, denying it the protections guaranteed by the applicable U.S.-Ecuador BIT and the UNCITRAL Rules and causing irreparable harm.") (REM-1).

¹⁰ Claimant states that "Between December 31, 2011 and the date these financial statements are issued (April 25, 2012), no events occurred which, in the opinion of the Branch Management, might have a material effect on the financial statements or require disclosure." Report of the Independent Auditors, ¶ 19 (C-111).

¹¹ Second Expert Report of Timothy H. Hart (Aug. 17, 2012) ("Second Hart Expert Report"), ¶¶ 7, 16.

statements *that are free of material distortions, due to fraud or error.*¹² In the cover form by which the financial statement was filed with the Ecuadorian Superintendent of Corporations, Claimant's managers certified the veracity of the information in the report.¹³ And not only is filing of the report required by law, as noted above, but the submission of incomplete documents or false information is subject to administrative fines,¹⁴ as well as civil and criminal sanctions.¹⁵ Claimant's certification of veracity shows that it disclosed this information in full knowledge of the applicable law.¹⁶

9. Claimant made similar statements in the financial statement filed for the branch for earlier years.¹⁷ Significantly, those statements were qualified by the opinion of Claimant's legal counsel that the outcome of the NIFA litigation was uncertain.¹⁸ Of course, such a qualification is itself inconsistent with Claimant's allegations that it is likely to receive an adverse decision

¹² Report of the Independent Auditors, ¶ 2 (C-111).

¹³ "The management of the company declares that it takes responsibility for the truth of the information presented in this form in fulfillment of the requirements of Article 20 and 23 of the Companies Law, in accordance with the regulations that establish the information and documents that must be submitted to the Superintendencia de Compañías [by] associations subject to its control and enforcement" MSDIA's April 30, 2012 Submission of Financial Statements to the *Superintendencia de Compañías*, cover page (REM-5).

¹⁴ Ley de Compañías, Articles 25, 325 (RLM-108).

¹⁵ *Id.*, Article 126 and Código Penal, Codificación, Registro Oficial Suplemento 147 de 22 de enero de 1971, Articles 340, 363 (RLM-83).

¹⁶ MSDIA's April 30, 2012 Submission of Financial Statements to the *Superintendencia de Compañías*, cover page (REM-5).

¹⁷ *See, e.g.*, Exhibit C-82, Note 10 ("Based on the judgment of its legal counsel, Management believes that it is not necessary to establish provisions to cover the risks of loss derived from these actions inasmuch as a resolution favorable to the Branch is expected in the higher courts. However, at this time it is not possible to predict the final outcome of this action and, therefore, determine its effects, if any, on the financial position and results of the Branch."). *See also* Exhibit C-92, Note 10; Exhibit C-97, Note 10; Exhibit C-102, Note 11,

¹⁸ *Id.*

from the National Court. But what is even more significant is the fact that the financial statements filed by Claimant on April 30, 2012 make no such qualification whatsoever.

10. Claimant's statement contradicts fundamental elements of its claim of entitlement to interim measures. While Claimant alleges here that it should be excused from exhausting local remedies because of defects in the Ecuadorian judiciary and in the National Court proceedings which somehow show that its appeal is futile, its statement shows that it actually expects a complete victory in the appeal. While Claimant alleges here that it faces irreparable harm, its statement shows that it is unlikely to face any harm. While Claimant alleges here that the threat is imminent, its statement shows that harm is unlikely ever to come. While Claimant alleges here that the burden it faces without interim measures is greater than the burden that Respondent will suffer as a result of the measure it requests, its statement shows that it will not likely suffer any burden whatsoever.¹⁹

11. Claimant cannot be allowed to say one thing to this Tribunal and another, under penalty of law, to its auditors and the Ecuadorian government. And the Tribunal cannot allow itself to be an instrument in this duplicitous conduct. Therefore, for this reason alone, the Tribunal should deny Claimant's Request for Interim Measures.

12. But, in the Rejoinder, Respondent goes further to show why, even if Claimant's true appreciation of its risk had not been revealed, it has failed to meet the tests for interim measures. In Part II, Respondent shows that Claimant's alleged rights under the Treaty are not eligible for protection under the Treaty in the absence of the exhaustion of available and effective legal

¹⁹ As discussed below, other statements in the financial statement also show that, even if the NIFA judgment were to be upheld, the resources available to it are more than sufficient to avoid any irreparable le harm, in complete contradiction to Claimant's allegation of irreparability. See Expert Report of Timothy H. Hart (24 July 2012) ("Hart Expert Report"), ¶¶ 22-23 (citing Appendix E, MSDIA-000002, MSDIA-000004, MSDIA-000006, MSDIA-000008, MSDIA-000010).

remedies in Ecuador. For the same reason, Claimant fails to establish a likelihood of success on the merits of its case on liability and jurisdiction. Part III establishes that Claimant's Request suffers from additional jurisdictional defects: Claimant fails to establish the existence of a protected investment; moreover, it has not validly consented to UNCITRAL Arbitration. Part IV establishes that even assuming *arguendo* the veracity of its fake arguments, which are obviously in discord with its own belief, Claimant has failed to show that it will suffer irreparable harm absent interim measures and that its Request fails to meet the urgency requirement. Part V shows that Claimant's broad and radical Request in no way comports with the requirement of proportionality. Finally, in Part VI, Respondent submits that Claimant's appeal to the authority of the Tribunal to award interim measures to prevent the aggravation of the dispute and to preserve its ability to award effective relief fails due to its failure to meet the generally accepted requirements for the indication of interim measures.

13. As demonstrated below, Claimant's statements in its financial statement that it has little risk of an adverse decision from the National Court of Justice are relevant to every point on which Claimant bears the burden of proof in these proceedings, and, even apart from that statement, Claimant has failed to meet that burden in all respects. Accordingly, its Request for Interim Measures must be dismissed in its entirety. Ecuador continues to reserve all defenses to this arbitration, including merits and jurisdictional defenses. Nor does Ecuador waive any of such defenses by submission of this Rejoinder.

II. CLAIMANT’S REQUEST FOR INTERIM MEASURES MUST BE DENIED BECAUSE THE CLAIM IS NOT BASED ON ANY FINAL ACTION OF ECUADOR’S JUDICIAL SYSTEM AS A WHOLE AND THUS THERE EXISTS NO RIGHT TO BE PROTECTED AND NO PRIMA FACIE CASE ON THE MERITS.

1. Claimant cannot dispute, and indeed it has not, that state responsibility for a judicial act arises only when there was a final action by the state’s judicial system as a whole.²⁰ Under the obligation not to deny justice, States need not guarantee that the procedures employed at each and every step of a court proceeding were proper, an impossible task in any event. Instead, where judicial action is concerned, States are required to provide a judicial system which, in its totality, offers fair and efficient proceedings. A fundamental manifestation of this principle is the requirement that local remedies be exhausted before judicial action can implicate State responsibility. In the words of the *Loewen* tribunal, since judicial action is a single action from beginning to end, “the State has not spoken until all appeals have been exhausted.”²¹ Or as stated in the *Ambatielos* award: “[i]t is the whole system of legal protection, as provided by municipal law, which must have been put to the test.”²²

2. Claimant tries to go around this incontrovertible principle in two ways. First, it asserts that the judicial conduct at issue violates the Treaty other than as a denial of justice, in particular as a breach of Article II(7)’s requirement to provide “effective means” of asserting claims and

²⁰ Ecuador’s Opposition, ¶¶ 21-31.

²¹ *Loewen Group, Inc. and Raymond L. Loewen v. United States*, ICSID Case No. ARB(AF)/98/3, Award (26 June 2003) (Mason, Mikva, Mustill), ¶ 143 (“*Loewen*”) (RLM-37).

²² *Ambatielos Claim (Greece v. UK)*, Award (6 Mar. 1956), XII UNRIAA 83, p. 120 (RLM-6) (“*Ambatielos*”).

enforcing rights.²³ Second, it attempts to show that its recourse to Ecuador’s National Court of Justice is futile.²⁴ But, as shown below, neither of these arguments is availing.

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

3. Claimant initiated this arbitration alleging that the “Ecuadorian proceedings amounted to a denial of justice, which violated Ecuador’s obligations under the Treaty.”²⁵ Claimant appears now to allege those proceedings amount to “multiple violations of the Treaty”²⁶ other than as a denial of justice. But merely putting a different label on identical factual allegations, however, cannot evade the requirement of exhaustion of local remedies. While indeed there is no reason *per se* why State conduct cannot breach multiple provisions of an investment treaty, the requirement of exhaustion of local remedies must be met, regardless of the treaty rubric invoked, to establish the State’s responsibility for judicial action.²⁷ Claimant has not cited any other State

²³ Claimant’s Reply, ¶¶ 111, 259.

²⁴ *Id.*, ¶¶ 111, 214-263.

²⁵ Request for Arbitration, ¶ 158 (“The Ecuadorian proceedings amounted to a denial of justice, which violated Ecuador’s obligations under the Treaty.”). *See also* Claimant’s Request for Interim Measures, ¶ 1; Claimant’s Reply, ¶ 201 (“MSDIA has more than satisfied a *prima facie* showing of a denial of justice in this case.”).

²⁶ *Id.*, ¶ 111.

²⁷ *Loewen Group, Inc. and Raymond L. Loewen v. United States*, ICSID Case No. ARB(AF)/98/3, Award (26 June 2003) (Mason, Mikva, Mustill), ¶ 156 (“The requirement [of judicial finality] has application to breaches of Articles 1102 [national treatment] and 1110 [expropriation] as well as Article 1105 [minimum standard of treatment, including fair and equitable treatment and full protection and security].”) (“*Loewen*”) (RLM-37). Claimant’s reliance on Jan Paulsson’s treatise on denial of justice is contradicted by the *Pantechniki v. Albania* award, in which Jan Paulsson sat as sole arbitrator. Paulsson considered that the claimant in that case prematurely abandoned its appeal to the Albanian Supreme Court and therefore its claim for breach of fair and equitable treatment was defective on its merits for failure to pursue local remedies. *Pantechniki S.A. Contractors & Engineers v. Republic of Albania*, ICSID Case No. ARB/07/21, Award (30 July 2009) (Paulsson), ¶¶ 101-102 (“*Pantechniki*”) (RLM-47). *See also* M. Sattorova, *Denial of Justice Disguised? Investment Arbitration and the Protection of Foreign Investors from Judicial Misconduct*, 61 INT’L & COMP. L. Q. 222 (2012), p. 241 (“The exercise in ‘skillful labelling’ undermines the principal justification for the rule of judicial finality, which explains the mandatory exhaustion of local remedies by reference to the special nature of judicial activity and the host state’s duty to provide a fair and efficient system of justice, as opposed to ensuring justice at every stage of the judicial process.”) (“*Sattorova*”) (RLM-109); G. K. Foster, *Striking A Balance between Investor Protections and National Sovereignty: The*

measures, nor made other factual arguments, that would change the character of the conduct complained to anything other than a denial of justice.²⁸

4. Claimant's special reliance on Article II(7) is similarly unavailing. Claimant points to the *Chevron v. Ecuador* Partial Award of 30 March 2010 (hereinafter, "*Chevron I*"), which stated that Article II(7) was included in the Treaty "as an independent, specific treaty obligation" that constitutes *lex specialis* and not "a mere restatement of the law on denial of justice."²⁹ The implications for that finding, in the opinion of the *Chevron I* tribunal, were twofold (and were proven crucial for the success of the claimants in that case): *first*, "that a distinct and potentially less-demanding test is applicable under this provision as compared to denial of justice under customary international law"³⁰ and; *second*, claimants did not have to prove a "strict" exhaustion of local remedies in order for the tribunal to find a breach of Article II(7).³¹ But *Chevron I* does not free Claimant from the exhaustion requirement, for two reasons.

Relevance of Local Remedies in Investment Treaty Arbitration, 49 COLUM. J. TRANSNAT'L L. 201 (2010-2011), p. 241 ("[i]t is not clear why the decision to eliminate the *procedural* exhaustion of local remedies requirement would necessarily imply the elimination of *substantive* elements implicating local remedies.") (emphasis in the original text) (RLM-89) ("Foster"). See also *id.*, pp. 244-249 (showing that "it is largely moot whether or not any claim based on judicial conduct must be viewed as, in effect, a denial of justice claim, because local remedies are likely to remain relevant no matter how the claim is characterized.").

²⁸ See, e.g., *Malicorp Ltd v. The Arab Republic of Egypt*, ICSID Case No. ARB/08/18, Award (7 Feb. 2011) (Tercier, Baptista, Tschanz), ¶ 124 ("when an investor bases its action principally on the fact that it has been the victim of an expropriation, that measure necessarily implies treatment that was, precisely, neither fair nor equitable. In order to rely on both provisions, the investor must be able to establish that it has also been the victim of other measures, different from expropriation. This condition has not been fulfilled in the present case since the Claimant's sole but essential complaint concerns the rescission of the Contract. Nowhere in its pleadings does it explain in what way it was also the victim of unfair or inequitable treatment, giving rise to additional consequences.") (RLM-111) ("*Malicorp*").

²⁹ *Chevron Corporation (USA) and Texaco Petroleum Company (USA) v. The Republic of Ecuador*, PCA Case No. 34877 (UNCITRAL), Partial Award on the Merits (30 Mar. 2010) (Böckstiegel, Brower, van den Berg), ¶ 242 (CLM-111) ("*Chevron I*").

³⁰ *Id.*, ¶ 244.

³¹ *Id.*, ¶ 268. Notably, despite being construed as a standard distinct from denial of justice, Article II(7) was applied by the tribunal on the basis of the same principles that usually govern the finding of a denial of justice in all but exhaustion of remedies aspects. This has led commentators to question whether the two grounds of state

5. First, the *Chevron I* tribunal’s conclusions with respect to Article II(7) were not supported by the proper application of the rules of treaty interpretation. Of course, its findings with respect to the interpretation and application of Article II(7) are not binding on this Tribunal and any persuasive force they may possess depends on that tribunal’s reasoning.³² The little effort it takes to highlight the shortcomings of the *Chevron I* tribunal’s analysis of Article II(7) as *lex specialis* is indicative in this respect.

6. As evidence of the *lex specialis* nature of Article II(7), the *Chevron I* tribunal considered the fact that the provision does not make an “explicit reference to denial of justice or customary international law,”³³ and that it was created as an independent treaty standard “to address a lack of clarity in the customary international law regarding denial of justice.”³⁴

7. Yet, the fact that Article II(7) does not mention denial of justice or customary international law is hardly conclusive. As the tribunal in *Duke Energy v. Ecuador* stated, Article II(7) guarantees the Contracting Parties’ “access to the courts and the existence of institutional

responsibility are materially different and to characterize the *Chevron* tribunal’s reliance on the provision as an “attempt to avoid the local remedies rule.” Sattorova, pp. 27-238 (RLM-109). The tribunal in *Jan de Nul v. Egypt* followed a markedly different approach: it applied the standard of denial of justice to the claimants’ complaint of judicial mistreatment, rather than the standard of fair and equitable treatment, since:

the relevant standards to trigger State responsibility for the first set of acts are the standards of denial of justice, including the requirement of exhaustion of local remedies as will be discussed below. *Holding otherwise would allow to circumvent the standards of denial of justice.*

Jan de Nul N.V. and Dredging International N.V. v. Arab Republic of Egypt, ICSID Case No. ARB/04/13, Award (6 Nov. 2008) (Kaufmann-Kohler, Mayer, Stern), ¶ 191 (emphasis added) (“*Jan de Nul*”) (RLM-32).

³² *SGS Société Générale de Surveillance S.A. v. Republic of the Philippines*, ICSID Case No. ARB/02/6, Decision of the Tribunal on Objections to Jurisdiction (29 Jan. 2004) (El-Koshi, Crawford, Crivellaro), ¶ 97 (CLM-7). A conflicting decision on the same subject may further weaken the persuasive value of an arbitral award. See *AWG Group Ltd. v. Argentine Republic*, UNCITRAL, Decision on Liability (30 July 2010) (Salakuse, Kaufmann-Kohler, Nikken), ¶¶ 144, 152, 167 (RLM-75).

³³ *Chevron*, ¶ 242 (CLM-111).

³⁴ *Id.*, ¶ 243.

mechanisms for the protection of investments,”³⁵ and thereby implements and forms part of the “more general” guarantee against denial of justice.³⁶ Indeed, the terms of the provision replicate almost *verbatim* the obligation under customary international law to provide “effective means” of redress for injuries to foreign investors.³⁷ Considered in the context of the other substantive standards in the Treaty,³⁸ and taking into account³⁹ “relevant rules of international law,”⁴⁰ which

³⁵ *Duke Energy Electroquil Partners & Electroquil, S.A. v. Republic of Ecuador*, ICSID Case No. ARB/04/19, Award (18 Aug. 2008) (Kaufmann-Kohler, Gómez Pinzón, van den Berg), ¶ 391 (“*Duke Energy*”) (RLM-18).

³⁶ *Id.*

³⁷ See 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, reproduced in A. Freeman, *THE INTERNATIONAL RESPONSIBILITY OF STATES FOR DENIAL OF JUSTICE* (1938), pp. 627-633 (a State’s duty to protect foreign nationals within its territory includes the obligation to provide “*the necessary means for defending their rights.*”) (emphasis added) (RLM-69) (“Freeman”); *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), pp. 147-8 (providing that foreign nationals must be provided with “*effective means of redress for injuries*” that “measure up to the standard required by international law”) (emphasis added) (RLM-107); Freeman, p. 135 (noting that “every State is duly bound to possess a judicial organization guaranteeing that lawsuits will be impartially and competently adjudicated ... “[*the procedural apparatus which is set up must ... provide the alien ... with effective means for the pursuits of his rights.*”) (emphasis added) (RLM-69).

³⁸ See K. Vandevelde, *The Bilateral Investment Treaty Program of the United States*, 21 *CORNELL INT’L L. J.* 201 (1988), p. 222 (“[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.”) (RLM-104); J. Alvarez, *A BIT on Custom*, 42 *N.Y.U. J. INT’L L. & POL.* 17 (2009), pp. 33-34 (noting that U.S. BIT clauses are properly interpreted as “efforts to include customary protections as part of a BIT’s protections” rather than to “exclude these ordinarily applicable general legal rules, as does *lex specialis.*”) (emphasis added) (“Alvarez”) (RLM-100). See also *id.* (“U.S. BIT negotiators have affirmed in scholarly commentaries, in testimony before Congress, and most importantly in the course of BIT negotiations that these treaties sought to re-affirm, not derogate from, relevant customary law.”) (emphasis added).

³⁹ It must be noted that the *Chevron* tribunal ignored completely the prescription of Article 31(3)(c) of the Vienna Convention on the Law of Treaties that asks the interpreter to apply, together with the context, “any relevant rules of international law applicable in the relations between the parties.” See *Chevron*, ¶ 161 (CLM-111). As one commentator notes, “whatever flexibility and discretion the [VCLT] rules themselves may provide, ignoring them is not a part of this.” D. French, *Treaty Interpretation and the Incorporation of Extraneous Legal Rules*, 55 *ICLQ* 281 (2006), p. 301 (RLM-86).

⁴⁰ Forming part and parcel of the “general rule of interpretation” of Article 31 of the Vienna Convention on the Law of Treaties, Article 31(3)(c) does not confirm the meaning of Article II(7); rather, consistently with the chapeau of Article 31(3)(c), other “relevant” rules of international law contextualize the meaning resulting from the application of the first paragraph of Article 31. Moreover, Article 31(3)(c) does not encompass a discretionary prescription but constitutes a mandatory aspect of the application of Article 31. See WTO Panel Report, *European*

provide important operational guidance to its interpretation,⁴¹ Article II(7) cannot be read in a manner inconsistent with customary international law.⁴²

8. It follows that far from demonstrating an intention to derogate from established rules of customary international law, which must be clear and cannot be presumed *sub silentio*,⁴³ Article II(7)'s reproduction of the customary law obligation to provide "effective means" establishes the Parties' intent to incorporate such obligation into the Treaty.⁴⁴ Thus, Article II(7) cannot be said

Communities - Measures Affecting the Approval and Marketing of Biotech Products, WT/DS291, 292, 293/R, adopted on 29 Sept. 2006, ¶ 7.69 (RLM-133).

⁴¹ B. Simma & T. Kill, *Harmonizing Investment Protection and International Human Rights: First Steps Towards a Methodology* in INTERNATIONAL INVESTMENT LAW FOR THE 21ST CENTURY: ESSAYS IN HONOR OF C. SCHREUER (C. Binder *et. al.*, 2009), p. 696 (RLM-76). The International Law Commission has similarly stated that when a conventional rule is a "known quantity" in general international law, the contracting parties are presumed to have intended to incorporate general international law. *Conclusions of the work of the Study Group on the "Fragmentation of International Law: Difficulties arising from the Diversification and Expansion of International Law,"* reproduced in Y.B. ILC, vol. II, Part II, 2006, Conclusion 20(b) (RLM-84).

⁴² Professor Alvarez, a former U.S. negotiator, includes Article II(7) in provisions in US BITs that "explicitly or implicitly rely on general international law or reflect an intent by their drafters to affirm traditional principles of state responsibility." For Professor Alvarez, the obligation to accord "effective means of asserting claims and enforcing rights" is "an open-ended invitation ... to deploy relevant customary international law." Alvarez, pp. 31-32 (RLM-100).

⁴³ *Conclusions of the work of the Study Group on the "Fragmentation of International Law: Difficulties arising from the Diversification and Expansion of International Law,"* reproduced in Y.B. ILC, vol. II, Part II, 2006, Conclusion 19(b) (RLM-84). *See also* Loewen, ¶ 160 ("[a]n important principle of international law should not be held to have been tacitly dispensed with by international agreement, in the absence of words making clear an intention to do so.") (RLM-37).

⁴⁴ *See* Alvarez, pp. 33-34 (noting that U.S. BIT clauses are properly interpreted as "efforts to include customary protections as part of a BIT's protections" rather than to "exclude these ordinarily applicable general legal rules, as does *lex specialis*." (emphasis added) (RLM-100). *See also id.* ("U.S. BIT negotiators have affirmed in scholarly commentaries, in testimony before Congress, and most importantly in the course of BIT negotiations that these treaties *sought to re-affirm, not derogate from, relevant customary law.*") (emphasis added). Although the *Chevron* tribunal took note of the development, it refused to appreciate the interpretive significance of the deletion of Article II(7) from the 2004 U.S. Model BIT, which clearly evidences that the provision was never intended to impose more stringent obligations on Ecuador and the United States than those imposed under the customary international law on denial of justice. *See* K. Vandevelde, U.S. INTERNATIONAL INVESTMENT AGREEMENTS (2009), p. 415 (RLM-105).

to dispense with any requirements of customary international law applicable to denial of justice, including the exhaustion requirement.⁴⁵

9. But even if *Chevron I* is seen as correct in its construction of Article II(7), Claimant can still not evade the exhaustion requirement. The *Chevron I* tribunal itself did not dispute that, even under its view of Article II(7) as *lex specialis*, “[t]he Claimants must ... have adequately utilized the means made available to them to assert claims and enforce rights in Ecuador in order to prove a breach of the BIT.”⁴⁶ The tribunal stressed that “a claimant is required to make use of all remedies that are available and might have rectified the wrong complained of,”⁴⁷ and that a “high likelihood of success of these remedies is not required in order to expect a claimant to attempt them.”⁴⁸ More importantly, the tribunal emphasized that the failure to use means available in the Ecuadorian legal system could preclude recovery if it prevented a proper assessment of the “effectiveness” of the system.⁴⁹ The tribunal found Ecuador liable even

⁴⁵ The *Chevron I* tribunal’s reliance on the “origin and purpose” of the provision is also misplaced. Non-contingent “judicial access” provisions in early U.S. treaty practice were created precisely to solidify guarantees existing under customary international law, thereby ensuring that the co-contracting parties could no longer question the existence of the underlying customary law, being bound by the rule qua contractual obligation. The concern for certainty of content in no way indicated a view on the part of the United States that customary international law did not already include the elements expressed in the text of Article II(7). And indeed, as a leading commentator on the subject of United States’ Friendship, Commerce and Navigation Treaties program states, “judicial access” provisions were not intended to go beyond the international minimum standard of treatment of aliens and their property. R. Wilson, *THE INTERNATIONAL LAW STANDARD IN TREATIES OF THE UNITED STATES* (1953), p. 94 (RLM-118)

⁴⁶ *Chevron I*, ¶ 268 (CLM-111). Similarly, the *Duke Energy* tribunal did not dispute that a claim for breach of Article II(7) requires a showing that the claimant has exhausted all available and effective remedies. *Duke Energy*, ¶ 402 (RLM-18).

⁴⁷ *Chevron I*, ¶ 326 (CLM-111).

⁴⁸ *Id.*

⁴⁹ *Id.*, ¶ 324. See also Foster, p. 247 (“Just as a host State’s conduct is not necessarily “unfair” or “inequitable” even if a lower court has issued a wrongful decision, provided that an appeal is available, so the State should not be liable for failing to provide effective means of asserting claims and enforcing rights if there is a domestic mechanism available that could further the investor’s claims or the enforcement of the investor’s rights.”) (RLM-89).

though the claimants had not used certain collateral procedural mechanisms available to them – none involving appellate review – since it was not convinced that any of these procedures could have rectified the alleged delay.⁵⁰

10. Claimant’s case of breach of Article II(7) fails to meet even this “qualified exhaustion” requirement. Even under the *Chevron I* tribunal’s test, Claimant’s appeal to the National Court would have constituted a remedy “that [is] available and might have rectified the wrong complained of.” As will be shown below, Claimant spectacularly fails to establish the futility of the remedies available in Ecuador; indeed, by its own admission, its recourse to the National Court of Justice offers a high likelihood of success, which is not even required according to the analysis of the *Chevron I* tribunal. In light of Claimant’s failure, until the National Court of Justice renders its decision, and assuming that other local remedies are futile or ineffective, which Ecuador disputes, any assessment of the “effectiveness” of the Ecuadorian Judiciary is, at the very least, highly premature.

11. In sum, all of Claimant’s claims under the Treaty, by virtue of their subject matter, are subject to the requirement to exhaust available and effective local remedies in Ecuador. Until Claimant exhausts such remedies, and unless it establishes that they are obviously inadequate or futile, Claimant’s Treaty claims cannot be asserted against Ecuador, which, as will be shown below, is fatal to Claimant’s assertion of rights capable of protection through interim measures,

⁵⁰ *Chevron I*, ¶¶ 330-331 (CLM-111). By contrast, the fact that it was “unclear” whether the further pursuit of local remedies would allow for the relief sought was deemed by the *Duke Energy* tribunal insufficient to excuse the claimants in that case from their duty of exhaustion. *Duke Energy*, ¶ 401 (“It is unclear from the record, however, whether Ecuadorian courts would assimilate an erroneous decision dismissing jurisdiction to an excess of power, as would be for instance the case under Art. 52(1)(b) of the ICSID Convention. Yet, *lack of clarity it is not sufficient to demonstrate that a remedy is futile.*”) (emphasis added) (RLM-18). It may be that the *Chevron I* tribunal considered the case of delay a special situation which warranted a more relaxed approach to the requirement of exhaustion. *Chevron I*, ¶ 321 (“...specific considerations become relevant to examine whether and how the non-exhaustion of local remedies can be raised and applied in cases where the delay of the domestic courts in deciding a case is the breach, because it is the domestic courts themselves that cause the non-exhaustion of the local remedies.”) (CLM-111).

as well as its ability to establish a likelihood of success on the merits of its case on liability and jurisdiction.

B. Claimant Has Failed To Show Futility.

12. Claimant is currently pursuing its appeal to the National Court of Justice of Ecuador which offers an effective remedy that is capable of remedying all its grievances.⁵¹ Faced with this situation, and in order to sustain its denial of justice complaint under the Treaty with a straight face, Claimant is left with one choice: to plead that such remedy is futile.⁵²

13. Ecuador agrees with Claimant⁵³ that exhaustion of local remedies is a precondition to the occurrence of a denial of justice, unless the remaining remedies provide no reasonable possibility of effective redress, such as where they are merely theoretical, or obviously inadequate or futile or ineffective, which is to be determined on a case-by-case basis. This is not an assumption to be made lightly,⁵⁴ however, even under the *Chevron I* tribunal's "qualified" exhaustion requirement of Article II(7). And the burden of proof to establish that exceptional circumstances relieve of

⁵¹ Claimant cannot dispute that the National Court of Justice's decision, were it to be favorable to MSDIA, will rectify the alleged mistreatment. Claimant's argument is one of futility, rather than ineffectiveness of Ecuadorian legal remedies.

⁵² An exhaustion of local remedies standard is typically applied to decide whether the judicial finality requirement has been met.

⁵³ Claimant's Reply, ¶¶ 207-209.

⁵⁴ *Pantechniki*, ¶ 102 (RLM-47); *Loewen*, ¶ 165 (RLM-37); *Ambatielos*, pp. 119, 122-123 (RLM-6); *Finnish Ships Arbitration*, Award (9 May 1934), 3 RIAA 1479, p. 1504 (rejecting the argument that mere appearance of futility excuses failure to pursue local remedies, and holding that the rule excusing failure to appeal where reversal was "hopeless" is "most strictly construed, and if substantial right of appeal existed, failure to prosecute an appeal operated as a bar to relief.") (CLM-52). Article 15(b) of the Draft Articles on Diplomatic Protection appears to set up a less stringent standard than obvious futility) (remedies need not be exhausted where "there are no reasonably available local remedies to provide effective redress, or the local remedies provide no reasonable possibility of such success."). Draft Articles on Diplomatic Protection published by the International Law Commission, (2006), Article 15(a) (CLM-110). The more balanced formulation is that adopted by Claimant's government and is reflected in Section 703 comment d and Section 713 comment f *Restatement of the Law (Third): Foreign Relations Law of the United States*: "Under international law, ordinarily a state is not required to consider a claim by another state for an injury to its national until that person has exhausted domestic remedies, unless such remedies are *clearly sham or inadequate*, or their application is unreasonably prolonged." (emphasis added) (RLM-121). As shown below, Claimant fails to meet any standard applicable for pleading exhaustion.

the obligation to exhaust available local remedies rests upon Claimant.⁵⁵ Hence, while it is undoubtedly true that “a court or tribunal considering a denial of justice claim must look past a state’s assertion that further remedies are theoretically possible,”⁵⁶ it must also look past a claimant’s assertion that its recourse to local remedies is futile.

1. Claimant’s contentions about the general state of Ecuador’s judiciary are manifestly unfounded.

14. Claimant’s contention that “Ecuador’s system of justice is notoriously corrupt, ineffective, and lacking in due process”⁵⁷ is not only unfounded but also expressly contradicted by its conduct. Aside from the fact it is vigorously pursuing its claim before the National Court of Justice, Claimant has stated in a binding declaration disclosed to the Ecuadorian Government that it actually expects to succeed on its appeal. This in and of itself contradicts any notion that Claimant considers its appeal rights as futile. In the financial statement for 2011 filed with the Ecuadorian Superintendence of Companies on 30 April 2012, audited by Price Waterhouse Coopers, Merck’s management declared that:

it is not necessary to establish provisions to cover risks of loss derived from [NIFA’s action] *inasmuch as a decision favorable to the branch is expected at the superior judicial levels.*⁵⁸

⁵⁵ International Law Commission, Special Rapporteur J. Dugard, Third Report on Diplomatic Protection, U.N. Doc. A/CN.4/523 (2002), ¶ 19 (RLM-99); *Ahmadou Sadio Diallo (Republic of Guinea v. Democratic Republic of Congo)*, Judgment on Preliminary Objections (24 May 2007), I.C.J. Reports 2007, ¶ 44 (RLM-70) (“*Diallo*”). See also *Chevron*, ¶ 329 (CLM-111).

⁵⁶ Claimant’s Reply, ¶ 209.

⁵⁷ *Id.*, Part VI, section B(1)(c).

⁵⁸ MSDIA’s April 30, 2012 Audited Financial Statement for Year Ending December 31, 2011, Note 18 of Explanatory Notes, p. 41 (in the Spanish original: “*La Administración considera que no es necesario constituir provisiones para cubrir riesgos de pérdida derivados de estos juicios ya que espera una resolución favorable a la Sucursal en las instancias judiciales superiores.*”) (REM-5).

15. This statement was made a mere eight weeks before Claimant filed its application for interim measures,⁵⁹ *i.e.*, at a time postdating the alleged irregularities in the National Court of Justice's process, and is in stark contradiction to what Claimant is alleging now before the Tribunal.

16. This statement also carries real legal consequences. Under Ecuadorian law, foreign companies are required to submit financial reports and external auditing statements on an annual basis.⁶⁰ Reported are assets, liabilities, equity, income and expenses that are directly related to a company's financial position. The submission of incomplete documents or false information is subject to administrative fines,⁶¹ as well as civil and criminal sanctions.⁶² MSDIA's declaration on the documents it filed with the Superintendence of Companies shows that it disclosed this information in full knowledge of the applicable law.⁶³ As a consequence, Claimant cannot be allowed to blow hot and cold before the Tribunal by alleging that "[t]here can be little doubt that Ecuador's judicial system as a whole fails to provide an adequate system of protection,

⁵⁹ Claimant states that "Between December 31, 2011 and the date these financial statements are issued (April 25, 2012), no events occurred which, in the opinion of the Branch Management, might have a material effect on the financial statements or require disclosure." *Id.*, ¶ 19.

⁶⁰ Ley de Compañías, Articles 23, 318-319 (RLM-108). *See also* Resolución No. 2, Article 5 (RLM-119). This law applied to MSDIA Ecuador's financial statements submitted in 2012. The law has been repealed and replaced with Resolución No. 3, which maintains the requirement. *See* Resolución No. 3, Article 5 (RLM-120).

⁶¹ Ley de Compañías, Articles 25, 325 (RLM-108).

⁶² *Id.*, Article 126 and Código Penal, Codificación, Registro Oficial Suplemento 147 de 22 de enero de 1971, Articles 340, 363 (RLM-83).

⁶³ "The management of the company declares that it takes responsibility for the truth of the information presented in this form in fulfillment of the requirements of Article 20 and 23 of the Companies Law, in accordance with the regulations that establish the information and documents that must be submitted to the Superintendencia de Compañías [by] associations subject to its control and enforcement" MSDIA's April 30, 2012 Audited Financial Statement for Year Ending December 31, 2011, cover page (REM-5).

particularly for foreign parties.”⁶⁴ Ecuador is justified in relying on this statement for purposes of the exhaustion of local remedies rule.⁶⁵

17. In light of the above, the following paragraphs deal with Claimant’s “futility” case purely for the sake of completeness. Even if Claimant could maintain its “futility” argument despite its representations to the Ecuadorian Government, it utterly fails to establish that its recourse to the National Court of Justice is indeed futile. In the face of international law’s recognition of a presumption in favor of the judicial process, Claimant’s effort is based on pure speculation, and predictably results in a meshing of events and quotations that lacks internal consistency and does not survive close scrutiny. And Claimant fails to explain how the few isolated charges that manage to survive close scrutiny had any direct or indirect bearing on the particular case underlying the instant arbitration. As stated by Judge Higgins in the *Oil Platforms* case, “the graver the charge the more confidence must there be in the evidence relied on.”⁶⁶ Plainly, Claimant’s evidence fails to meet the “substantial credibility”⁶⁷ test identified in international jurisprudence with respect to an interim measures request.

⁶⁴ Claimant’s Reply, ¶ 214. This statement is all the more surprising given MSDIA Ecuador counsel’s acknowledgment of “Ecuadorian judges’ usual and honest way of proceeding and the experience that [MSDIA Ecuador] has had in previous cases in Ecuador.” MSDIA’s Brief to the Twelfth Civil and Commercial Court of Pichincha, dated 29 March 2010 (REM-6).

⁶⁵ Principles of estoppel and preclusion have found application in the context of the rule of exhaustion of local remedies. In the *Diallo* case, the ICJ found that DRC could not rely on an error allegedly made by its administrative agencies at the time in the legal characterization of Mr. Diallo’s expulsion. As the Court held, “Mr. Diallo, as the subject of the refusal of entry, was justified in relying on the consequences of the legal characterization thus given by the Zairean authorities, including for purposes of the local remedies rule.” *Diallo*, ¶ 46 (RLM-70).

⁶⁶ Separate Opinion of Judge Higgins in *Oil Platforms (Islamic Republic of Iran v. United States of America)*, Judgment (6 Nov. 2003), I.C.J. Reports 2003, p. 161 at p. 234 (¶ 33) (RLM-127).

⁶⁷ As regards the question how much account should be taken of the evidence produced by the parties in the context of provisional measures proceedings before the ICJ, Judge *ad hoc* Elihu Lauterpacht wrote in his Separate Opinion in the *Application of the Convention on the Prevention and Punishment of the Crime of Genocide* case (Order for Provisional Measures), that:

18. Claimant attempts to establish its “futility” case by relying, first, on general “perceptions” of corruption indicated in reports prepared by non-governmental organizations, the Inter-American Commission on Human Rights and the United States’ Department of State, as well as on certain statements, quoted out of context, made by President Correa. A closer look at this evidence reveals a picture that is very different from the one that Claimant attempts to paint.

There is no fundamental *legal* difference in the rules of evidence applicable to the consideration of the merits of a case and those applicable in proceedings relating to provisional measures. There is, however, a *practical* difference in that in the latter there may be less time for the applicant to prepare its evidence in the most cogent form, or for critical scrutiny of that evidence by the respondent and the Court, than there is in the extended merits stage of a case. *But it does not follow that evidence produced at the provisional measures stage is a priori to be treated as less adequate or less acceptable than evidence produced at the merits stage or that it is incapable of sustaining more than the most generalized findings of fact.*

Separate Opinion of Judge ad hoc Lauterpacht in *Application of the Convention on the Prevention and Punishment of the Crime of Genocide*, Order on Provisional Measures (13 Sept. 1993), I.C.J. Reports 1993, p. 325, at 422-423 (¶ 41) (third emphasis added) (RLM-125). Similarly, Judge Shahabuddeen noted that the principle that the Court cannot at this stage make definitive findings on the merits does not entail that it must “*mechanically indicate measures so long as some supporting material is before it and regardless of its evidential quality.*” Separate Opinion of Judge Shahabuddeen in *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro)*, Order on Provisional Measures (13 Sept. 1993), I.C.J. Reports 1993, p. 325, at p. 359 (emphasis added) (RLM-126). He went on to add as follows:

A court which does that may claim the virtue of avoiding all risk of prejudgment, but it is a virtue bought at the price of placing both parties on an artificial basis of evidential equality in circumstances in which the evidence on one side may be patently weak. A preliminary appraisal of the quality of the evidence avoids payment of that price [...] Provisional measures (whether legally binding or not) are expected to be implemented and can be immediately productive or of important practical consequences. They are not indicated by the Court unthinkingly [...] The Court cannot know what the circumstances are without having to consider the evidence produced in proof of the circumstances. This the Court must do if Judge Anzilotti was correct in speaking of “the possibility of the right claimed [...] and the possibility of the danger to which that right was exposed” (*Polish Agrarian Reform and German Minority, P.C.I.J., Series A/B, No. 58, p. 181*). If that is the test [...] the Court is called upon at this stage to make a decision as to whether there is on the evidence a possibility ... of danger to [claimed] rights; it cannot do that without considering the quality of the material before it.

Id., pp. 359-360. Judge Shahabuddeen concluded that although it is not necessary to produce “absolutely convincing proof,” “substantial credibility” is required. *Id.*, p. 360.

19. In particular, Claimant relies on reports prepared by certain non-governmental organizations, which gave Ecuador a low ranking in corruption and judicial independence issues.⁶⁸ Yet these reports are hardly a conclusive assessment of Ecuador's judiciary (let alone evidence of Claimant's mistreatment), since they are based on perceptions rather than direct measurements.⁶⁹

20. Claimant also invokes the 2005 Inter-American Commission of Human Rights Report.⁷⁰ However, it quotes it selectively since it fails to mention that the same report states at paragraph 121 that

... the assumption of a new Government on April 20, 2005, as well as the initiatives adopted since its arrival to power, *constitute a positive sign for the reestablishment of some of the institutions*; whose destabilization is questioned in this report and that turn out to be fundamental for the protection of the human rights, such as the well functioning of a judicial power, independent, and impartial. In this framework, the process of appointment of Supreme Court judges, assuring a transparent selection with international verification *constitutes an important step*, above all because it has been the result of an internal democratic dialogue. Continuing this line, the Commission received with consent information coming from the Government stating that the Constitutional Court will be soon appointed ...⁷¹

⁶⁸ Claimant's Reply, ¶ 216.

⁶⁹ The World Economic Forum's Global Competitiveness Report has been criticized as being "too broad, the approach biased and the methodology flawed. Many qualitative measures are vague, redundant or wrong." See S. Lall, *Competitiveness Indices and Developing Countries: An Economic Evaluation of the Global Competitiveness Report*, 29(9) WORLD DEVELOPMENT 1501 (2001) (REM-8).

⁷⁰ Claimant's Reply, ¶ 217.

⁷¹ Annual Report of the Inter-American Commission on Human Rights (2005), Chapter IV- Ecuador, ¶ 121 (emphasis added) (C-72).

21. Claimant further relies on the country assessment of the U.S. Department of State.⁷² It is, however, 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. Claimant itself agrees that “[t]he 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.”⁷³ Furthermore, the U.S. Department of State’s reports naturally reflect the views of the U.S. Government whose relations with Ecuador are generally perceived to be strained.⁷⁴

22. Claimant also attempts to exploit newspaper snippets⁷⁵ in order to paint a distorted picture of the judicial reforms which have been widely applauded by international organizations and indeed, Claimant itself.⁷⁶ While the allegations of corruption contained in such press reports are not trivial, Claimant fails to appreciate the obvious fact emerging from these press reports: that Ecuador is taking effective steps to make its Judiciary more transparent and efficient in these cases by sanctioning judges for corruption and impropriety.⁷⁷ The very fact that the press and an established constitutional anti-corruption agency criticize and identify defects within the

⁷² Claimant’s Reply, ¶ 218.

⁷³ *Id.*, fn. 371.

⁷⁴ See J. Cárdenas, *President Correa’s chutzpah hurts Ecuador-U.S. relations*, FOREIGN POLICY, July, 2012 (REM-3).

⁷⁵ Claimant’s Reply, ¶ 219.

⁷⁶ See Notice of Dispute, p. 1 (“applauding President Correa’s “deep commitment to addressing problems with judicial corruption.”).

⁷⁷ The Civic Committee against Corruption, whose public disclosure of video evidencing improper judicial conduct Claimant relies upon at paragraph 219 of its Claimant’s Reply, is a specialized institution created to prevent and fight corruption. The Global Integrity Report states that the Committee is an independent organization free from political interference and highly effective. See Global Integrity Report Ecuador: Integrity Indicator, 2007 Assessment (REM-2).

Ecuadorian Judiciary and request corrective actions reflects positively on the independence, transparency, and efficiency of the Ecuadorian Judiciary.

23. It is Claimant's reliance on President Correa's apparent assessment of Ecuador's Judiciary as "corrupt", "falling in pieces" and a "barbarity,"⁷⁸ that is most illustrative of its cavalier attitude in its evidence regarding its "futility" argument. President Correa's statement of January 25, 2011,⁷⁹ in which he was critical of the Ecuadorian courts, was made in the context of seeking public support for a referendum that aimed to reform the Ecuadorian Judiciary. He identified the problems of the Judiciary in his efforts to garner public support for these reforms. President Correa's statement, reported on February 23, 2011, regarding the "monstrosity which is the judicial system" 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. To put in proper context, President Correa followed the statement quoted by Claimant by saying:

And it's not that I can guarantee that after that (18 months) every judge will be an honest judge. What I can guarantee is to place honest leaders within the judicial system ... There has to be leadership, to lead, to guide, to motivate, to make it transparent. That we do guarantee. I cannot guarantee that every single judge will be honest."⁸⁰

24. One wonders which political leader can honestly guarantee that each and every single judge in a legal system would be honest. Under Claimant's standard, any judiciary would appear politicized, corrupt and broken.

⁷⁸ Claimant's Reply, ¶¶ 4, 31, 34.

⁷⁹ Claimant's Exhibit C-110.

⁸⁰ See Claimant's Exhibit C-101.

25. The events of 2004-2005, upon which Claimant appears to place significance,⁸¹ had no bearing on its case. Indeed, the lower courts continued to function uninterrupted during the period in which Ecuador undertook the fundamental reform process which resulted in the merit-based screening and selection of a new Supreme Court in 2005. The new merit-selected Supreme Court (now called National Court of Justice) has worked independently, impartially, and efficiently since its establishment in November 2005. The Follow-up Report submitted by the United Nations Special Rapporteur on the independence of judges and lawyers, cited by Claimant, reflects the international approval of this process:

[The] process of selecting members of the Supreme Court has some singular and original aspects which could be applied in similar circumstances. The originality of this experience lies in the characteristics of the process: transparency, public monitoring, supervision by national and international observers and the participation of judges from other countries in the region and of international judicial bodies, such as the International Association of Judges ...⁸²

26. Following in Claimant's repertoire of straw man arguments is its focus on certain developments in the specialized Electoral and Constitutional Courts.⁸³ Yet Claimant cannot rely on their experiences, especially in times of political turmoil, in order to evaluate the independence of the Ecuadorian Judiciary. The Constitutional and Electoral Tribunals are by constitutional design, as in many countries, not purely juridical institutions.⁸⁴ This is true with

⁸¹ Claimant's Reply, ¶ 221(a)-(c).

⁸² United Nations, Follow-up report submitted by the Special Rapporteur on the independence of judges and lawyers, 31 Jan. 2006, ¶ 18 (C-71).

⁸³ Claimant's Reply, ¶ 221(d).

⁸⁴ See S. Rose-Ackerman, Independence, political interference and corruption, Global Corruption Report 2007: Corruption in Judicial Systems, Transparency International, p. 20 fn. 16 (stating that due to their "special status," using data on constitutional courts to measure the independence of judicial courts can lead to "a potentially misleading measure.") (REM-9).

respect to the manner in which their members are selected,⁸⁵ as well with respect to their terms of office and the manner in which they can be removed.⁸⁶

27. Claimant cites to a statement by a former president of the Supreme Court, who allegedly stated in the aftermath of the formation of the Constituent Assembly in 2007 that “the judicial and constitutional reality in our country is a partial reality; we are not fully living in a state of law.”⁸⁷ However, Claimant grossly misrepresents this statement. Judge Mera simply criticized the Constituent Assembly for capping public sector salaries (thereby affecting the salaries of the 31 Supreme Court Judges). At the same time, he “acknowledged the full authority of the Constituent Assembly, since they were granted this authority by the voters, and he noted that this is a matter of law.”⁸⁸

28. Claimant similarly misrepresents the 2009 statement by the Chairman of the Civil and Criminal Commission of Ecuador’s National Assembly.⁸⁹ Ms. Romo’s statement that “[Ecuador’s] system of justice has completely collapsed” was made in the context of her discussion of the role of other institutions in the administration of justice. She emphasized that “[t]o administer justice, we need the Prosecutor, the Attorney General, the ombudsman’s office and a coherent and ordered judiciary all to work together ... a system of justice where there is a large imbalance between these parts is of no use to the country.”⁹⁰ This observation lacks any

⁸⁵ See Articles 209 and 275 of the Ecuadorian Constitution (RLM-15).

⁸⁶ *Id.*, Article 130.

⁸⁷ Claimant’s Reply, ¶ 221(e).

⁸⁸ Claimant’s Exhibit C-81, p. 2.

⁸⁹ Claimant’s Reply, ¶ 221(g).

⁹⁰ Claimant’s Exhibit C-91, p. 2.

relevance whatsoever to Claimant’s underlying case. Notably, Ms. Romo also commented with approval on the new Ecuadorian Constitution, pointing out that “with the promulgation of the new norms the judicial branch did not suffer from any reduction in its function or responsibilities nor was it relegated to the background,” and that “in the new model there is a clear separation, where the Judicial Branch is autonomous in relation to the other functions of the State and the judges of these entities.”⁹¹

29. Claimant next refers to a declaration by Ecuador’s Council of the Judiciary, which stated that “the Judicial Branch is not independent.”⁹² The Council’s preoccupation was that during the transition period following the adoption of the new Ecuadorian Constitution the Judicial Branch lacked economic and financial authority, which would have an impact on its independence.⁹³ However, the subsequent reforms which Claimant foreshadows in paragraph 221 of its Reply⁹⁴ created, pursuant to the provisions of the 2008 Constitution and the Referendum held in 2011, a new institutional structure which remedied several of the Council’s concerns.

30. Finally, Claimant cites the declaration by President Correa, by which he declared a judicial emergency in Ecuador, “just weeks before the court of appeals decision in the NIFA case,” as Claimant stresses in dramatic tones.⁹⁵ This is another instance of Claimant’s liberties with evidence. President Correa declared the state of judicial emergency acting upon a recommendation by the President of the Transitional Judicial Council because:

⁹¹ *Id.*, pp. 2-3.

⁹² Claimant’s Reply, ¶ 221(g).

⁹³ Claimant’s Exhibit C-98, p. 2 (¶ 1).

⁹⁴ Claimant’s Reply, ¶ 221(h)-(k).

⁹⁵ *Id.*, ¶ 221(i).

[the Judicial Branch] (i) does not have appropriate information systems that allow reliable information to be generated for institutional strategic planning; ii) the modernization processes have not been sustained and therefore the expected results have not been achieved; iii) the functional organic structures are not in keeping with citizens' requirements of the Judicial Branch; iv) judicial proceedings have not taken technological development into account and they have not improved the stages, phases, and steps thereof, which has conspired with a lack of opportunity in the administration of justice; v) the incorporation of technology into both judicial and institutional processes is of vital importance to eradicate the accumulation of cases as well as the inaction of the administrative bodies which have conspired against the right of the citizens to the efficient and timely administration of justice; vi) there is no adequate coordination among the different institutions of the Judicial Branch and between it with the agencies involved in the justice and citizen safety system; vii) the annual increase in cases that must be heard and serviced by the Judicial Branch in 2008 was greater than forty percent (40%) with respect to 2002; viii) the decrease in the resolution of claims in the best of cases was only seventy percent (70%) of resolutions forecast in the last year to be complied with; ix) all of the conditions indicated above have led to the clogging of approximately one million two hundred and fifteen thousand cases that must be heard.⁹⁶

31. It follows that the main reasons for President Correa's declaration were the failure to take into account technological developments that could facilitate the administration of justice, the lack of coordination between the various agencies and institutions involved in the administration of justice (which brings to mind the concern expressed by Ms. Romo) and, more importantly, the delays noticeable in the resolution of cases. These reasons have nothing to do with the procedural irregularities alleged by Claimant in its underlying case. Indeed, Claimant appears to take issue with the timely resolution of its case, rather than its delay.

⁹⁶ Claimant's Exhibit C-48, p. 4.

32. In sum, Claimant’s list of horrors manifestly fails to establish its argument that Ecuador’s judiciary “is plagued by systematic corruption and institutional instability.”⁹⁷ Rather than negatively impacting Claimant’s ability to obtain justice, the reforms to Ecuador’s judiciary, which Claimant inadvertently highlights, render reasonably probable that the National Court of Justice will correct the errors of the lower courts, if there are any, and will issue a decision that is consistent with the basic protections of due process and the rule of law.

2. Claimant’s complaints of procedural irregularities in the lower courts do not establish the futility of its recourse to the National Court of Justice.

33. Claimant goes on to state that the proceedings in its underlying case against NIFA have been “marred by multiple violations of Ecuadorian procedural law and due process.”⁹⁸ Claimant then lists its specific complaints against the proceedings in the lower courts, which at the same time form the grounds for its appeal before the National Court of Justice for cassation of the judgment.⁹⁹ The reason that Ecuador has not contested these alleged facts is precisely this: they are *sub judice* before the National Court of Justice, in the context of litigation between two private parties. Pending the resolution of Claimant’s appeal, Ecuador has no opinion on Claimant’s specific complaints relating to its underlying case.

34. At the same time, however, it is impossible not to point out the extent to which Claimant has stretched its already very thin evidence beyond reason. For example, Claimant alleges that “[t]he Ecuadorian plaintiff, enabled by Ecuadorian judges, abused criminal process in an effort to

⁹⁷ Claimant’s Reply, ¶ 222.

⁹⁸ *Id.*, ¶¶ 13, 15, Part VI, section B(1)(c)(2) and ¶ 248.

⁹⁹ Moscoso First Expert Opinion, ¶ 9 (“It must be noted that the procedural irregularities and the violations of substantive laws that MSDIA invokes as the foundation for its request for arbitration are included in the causes for cassation that MSDIA has invoked in its appeal before the National Court of Justice.”).

chill MSDIA’s ability to defend against NIFA’s lawsuit,” and that the resulting criminal investigations “had a chilling effect on MSDIA’s ability to defend against NIFA’s lawsuit, and a chilling effect on MSDIA’s exercise of its rights under the Treaty.”¹⁰⁰ But as Claimant well knows, whenever a private person files a criminal complaint with the appropriate authorities said authorities are required by law to take cognizance of the complaint.¹⁰¹ Ecuador cannot be responsible for a private person’s filing of a criminal complaint, irrespective of its merit, and pursuit of its rights before Ecuadorian criminal authorities. In any event, as Claimant admits, the criminal investigations were dismissed because the Ecuadorian prosecutorial authorities deemed them meritless.¹⁰² And, of course, Claimant never explains what precise chilling effect those criminal investigations had on the pursuit of its rights.

35. Claimant’s argument that “proceedings in Ecuador subsequent to the court of appeals decision have further demonstrated bias and improper influence”¹⁰³ is also meritless. Claimant’s allegations with respect to the proceedings before the National Court of Justice will be addressed below. Suffice it here to respond to Claimant’s argument regarding its request for clarification of the court of appeal decision. Claimant essentially complains of the procedure followed with respect to its petition, which, in its view, “suggested a judicial interest in expediting this case.”¹⁰⁴ But Claimant is missing the proverbial forest for the trees. As Dr. Moscoso states, a clarification

¹⁰⁰ Claimant’s Reply, ¶ 223(f). *See also* Claimant’s Request for Interim Measures, ¶¶ 148-152.

¹⁰¹ Code of Criminal Procedure of Ecuador, Articles 42 and 46 (RLM-82).

¹⁰² Claimant’s Request for Interim Measures, ¶¶ 151-152.

¹⁰³ Claimant’s Reply, Part VI, section B(1)(c)(4).

¹⁰⁴ *Id.*, ¶¶ 249-250.

request is a “mechanism regularly employed by litigants to delay enforcement.”¹⁰⁵ In Claimant’s case, on 24 October 2011, one month after the issuance of its decision, the court of appeals set a bond in the amount of US\$23,500,¹⁰⁶ which obviously is more than reasonable considering the \$150 million judgment against Claimant. It follows that proceedings subsequent to the court of appeals’ judgment actually facilitated the exercise of Claimant’s appeal rights, rather than undermined them. Plainly, in these circumstances, MSDIA has been afforded a “substantial right of appeal,” in the words of the arbitrator in the *Finnish Ships* arbitration, or a “reasonable available remedy,” in the sense described by the tribunal in *Loewen*, which should operate to bar its futility argument.

36. And even if there exist procedural irregularities in the proceedings before the lower courts, for which, in any event, Claimant must sustain a heavy burden of proving,¹⁰⁷ Claimant’s contentions do not establish that the National Court of Justice will rule the same, *i.e.*, that it will not accept MSDIA’s causes for cassation¹⁰⁸ (and certainly this is not the perception of Claimant, as shown above). While legal systems strive for perfection at all levels, they also recognize that such result is unlikely to be attainable. It is precisely for this reason that Ecuador’s legal system, like all developed legal systems, makes extensive provision for appeal and also contains other provisions for challenging decisions of the lower courts on grounds which violate constitutional

¹⁰⁵ Moscoso First Expert Opinion, ¶ 19.

¹⁰⁶ Claimant’s Exhibit C-51.

¹⁰⁷ F. García Amador, L. Sohn and R. Baxter, CODIFICATION OF THE LAW OF STATE RESPONSIBILITY FOR INJURY TO ALIENS (1974), p. 198 (commentary to article 8) (RLM-88). According to the tribunal in *Loewen*, bad faith is not required but what has to be shown is “manifest injustice in the sense of a lack of due process leading to an outcome which offends a sense of judicial propriety.” *Loewen*, ¶ 132 (RLM-37).

¹⁰⁸ As explained by Dr. Moscoso, the National Court has full jurisdiction to review *de novo* all facts and evidence presented in the lower courts, within the scope of the issues on appeal by the parties. Moscoso Second Expert Report, ¶ 4.

safeguards. Most trial errors are meant to be corrected in domestic courts, through a process that is “more determinate, more accountable, more legitimate and less intrusive upon sovereignty” than an arbitral tribunal’s review under a bilateral investment treaty.¹⁰⁹ For purposes of international law, Ecuador’s legal system must be presumed to include the appellate and review procedures for which it provides, unless such procedures are obviously futile and ineffective, which Claimant in any event fails to establish.

3. Far from constituting indicia of corruption among the plaintiffs and judges associated with the NIFA litigation, MSDIA’s allegations paint the picture of a responsive system that is in stark contradiction with its allegation of a “fundamentally defective” system.

37. Claimant also argues that the owner of the plaintiff in the underlying litigation has previously been accused of corruption, and the judges responsible for issuing the lower courts’ decisions against MSDIA have been investigated and disciplined by the Ecuadorian government. On the basis of these allegations, Claimant maintains that pursuing further remedies is “unlikely” to lead to a correction of the alleged violations in the lower courts by the National Court of Justice.¹¹⁰ Aside from the fact that it is not sufficient to show that a further remedy is “unlikely” to be successful for purposes of the rule of exhaustion of local remedies,¹¹¹ Claimant does not explain how these allegations would affect the way the National Court of Justice decides its case. Moreover, Claimant’s innuendos and speculations end up undermining the flimsy foundations of its “futility” case by actually establishing the responsiveness of the Ecuadorian Judiciary to

¹⁰⁹ W. Dodge, *Loewen v. United States: Trials and Errors under NAFTA Chapter Eleven*, 52 DEPAUL L. REV. 563, 573 (2002) (RLM-132).

¹¹⁰ Claimant’s Reply, ¶ 16 and Part VI, section B(1)(c)(1)(a)-(c).

¹¹¹ See also C. Amerasinghe, LOCAL REMEDIES IN INTERNATIONAL LAW (1990), p. 195 (“[t]he *Finnish Ships* arbitration made it clear that the test is obvious futility or manifest ineffectiveness, *not the absence of reasonable prospect of success or the improbability of success ...*”) (emphasis added) (RLM-78).

charges of corruption. It is the absence of the corrective procedures which should be worrisome; not their presence.

38. First, Claimant argues that NIFA’s general manager “has been publicly described ... as a corrupt figure with a history of bribing government officials.”¹¹² Claimant then invokes an unrelated incident involving another company owned by Mr. Garcia that occurred 25 years ago. Claimant never explains the relevance of this case to the underlying NIFA litigation and how it establishes that its recourse to the National Court of Justice is futile. What is more, Claimant itself admits that Mr. Garcia was subjected to a criminal investigation, that the contract under investigation was rescinded, that the Minister of Health granting the contract was forced to resign, and that several other officials from the Ministry of Industries were arrested.¹¹³ This is hardly the picture of a “fundamentally defective” system in which corruption runs rampant with impunity.

39. Second, Claimant points out that Judge Chang Huang, who issued the trial court judgment, was subsequently removed from her judicial post for wrongdoing.¹¹⁴ Whatever the complaints leading to her removal from office were, they are completely unrelated to Claimant’s underlying case.¹¹⁵

40. Claimant also submits that Judge Chang Huang “has openly acknowledged that her decision in the NIFA litigation ‘represents a miscarriage of justice that was not made on the

¹¹² Claimant’s Reply, ¶ 226.

¹¹³ *Id.*, ¶¶ 227-228.

¹¹⁴ *Id.*, ¶ 231.

¹¹⁵ *Id.*, ¶¶ 231-232, 234.

merits’.”¹¹⁶ What evidence does Claimant invoke to substantiate this astonishing submission? Two witness statements, with obvious self-serving content that were largely dictated by its local counsel.¹¹⁷ What is more interesting, however, is that Claimant submitted these witness statements in its complaint against Judge Chang Huang before the Twelfth Civil Court of Pichincha. Claimant has not deemed pertinent to produce the decision rendered in its case.¹¹⁸ And for obvious reasons, as will be shown below.

41. The Ecuadorian court dismissed the testimony of the witnesses invoked by Claimant in the instant arbitration under Art. 216 (6) of the Code of Civil Procedure, stating that the witnesses in question have a “dependent relationship” with the law firm of Quevedo & Ponce (local counsel for Claimant), and are thus not impartial.¹¹⁹ The Court also dismissed the claim that MSDIA did not receive timely notice of Judge Chang Huang’s ruling, relying on a forensic examination of the electronic evidence showing that the ruling had been timely sent by email and had been sent in its entirety. Indeed, an assistant to Dr. Luis Ponce (local counsel for Claimant) was present at the time of this examination and was himself able to retrieve a copy of the entire decision from the electronic archive under review.¹²⁰ None of the experts found any evidence of human intervention or of a technical failure in the email system. Furthermore, there was no proof that the notification of delivery to the physical mailbox was not sent.¹²¹ The Court also

¹¹⁶ *Id.*, ¶ 238.

¹¹⁷ Claimants Exhibits C-88 and C-89.

¹¹⁸ Juzgado Décimo Segundo de lo Civil de Pichincha, *Daveler v. Chang Huang*, Case No. 2009-0477 (REM-4).

¹¹⁹ *Id.*, pp. 9-10. The two witnesses accompanied Claimant’s local counsel to request a decision on a divorce by mutual consent.

¹²⁰ *Id.*, p. 9.

¹²¹ *Id.*, p. 11

ruled that the other allegations of arbitrariness of Judge Chang Huang could not be decided by this court, because her ruling had been appealed to another court, and any ruling on the propriety of Judge Chang Huang's ruling would be an improper interference on the court handling the appeal.¹²² None of these facts have been mentioned by the Claimant, who has preferred to leave the Tribunal in the dark concerning the full story.

42. In any event, Claimant's allegations against Judge Chang Huang are *sub judice*, and her removal from office is a pertinent fact that has been brought to the National Court's attention. Claimant's allegations against Judge Chang Huang in no way establish its contention that its recourse to the National Court of Justice is futile.

43. Finally, Claimant points to the fact that Judge Palacios, the president of the appellate court panel that rendered the decision that it appealed before the National Court of Justice has been investigated and disciplined for corruption in cases that are unrelated to the NIFA litigation.¹²³ Again, Claimant fails to explain how this supports its case that its recourse to the National Court of Justice is futile. Moreover, Claimant cannot shy away from the fact that Judge Palacios was acquitted,¹²⁴ an outcome described by the evidence Claimant relies upon as a "correcting an error."¹²⁵

44. In sum, most of Claimant's allegations rest upon speculation rather than fact. And, far from constituting indicia of corruption among the plaintiffs and judges associated with the NIFA litigation, those that have any factual grounding at all paint a picture of a responsive system that

¹²² *Id.*, p. 12.

¹²³ Claimant's Reply, ¶¶ 241-243.

¹²⁴ *Id.*, ¶ 244.

¹²⁵ Claimant's Exhibits C-113, C-114.

is in stark contradiction with Claimant’s allegation of a “fundamentally defective” one. The Ecuadorian Judiciary takes formal allegations of corruption and misconduct seriously; promptly and fully investigates them; allows accused judges to exercise their right to defense; and metes out the appropriate disciplinary remedies, ranging from suspension to full removal.

4. There can be no serious allegation that proceedings before the National Court of Justice are tainted or that they do not allow a reasonable prospect of success for MSDIA.

45. Stretching its “futility” case beyond any proportion, Claimant finally concocts the argument that the proceedings before the National Court of Justice evidence “an improper judicial interest in expediting [its] case.”¹²⁶ For Claimant, the timing of the acceptance of Claimant’s recourse of cassation and of the scheduling of the oral hearing has but one explanation: “if the case was to be heard by the then-existing court, by judges whose identities had long been known to Mr. Garcia and Judge Palacios, it would have to be expedited.”¹²⁷

46. This is a ludicrous argument. Claimant’s allegations are completely unsubstantiated and, furthermore, contradicted by fact. As Claimant admits, “For reasons not known to MSDIA the judges who heard the argument *did not ultimately issue a decision before their terms expired on January 25, 2012.*”¹²⁸ This of course means that Claimant’s underlying case will be decided by the in-coming judges.¹²⁹ Thus, the basis for Claimant’s “improper judicial interest” argument completely evaporates.

¹²⁶ Claimant’s Reply, ¶¶ 13, 17, 252-256, 258.

¹²⁷ *Id.*, ¶ 257.

¹²⁸ *Id.*, ¶ 259 (emphasis added).

¹²⁹ *Id.*, ¶ 260.

47. What is more, Claimant cannot establish that the alleged expedition of its case prejudiced its rights in any way. Rather, the opposite holds true: in light of the identified clogging problems in Ecuador’s judiciary, Claimant’s efficient administration of its case by the National Court of Justice must be commendable. Claimant offers only one hint at prejudice in the form of its comment that “[t]he timing of the hearing made it impossible for MSDIA’s corporate representatives in the United States to attend the hearing.”¹³⁰ Claimant does not explain why due process would require the presence of its U.S.-based managers, given that it had local managers. But what is even more important is the fact that the “unusual” timing of the hearing did not prejudice MSDIA’s right to representation; as Claimant admits, MSDIA’s Ecuadorian counsel *did* attend and present oral argument before the Court.¹³¹

48. Claimant’s last grasp of argument is similarly based on speculation un-sustained by fact. It argues that “new uncertainty has been injected into the process of deciding cases in the National Court of Justice,” by virtue of the appointment of 21 temporary Judges to the Court, which include one of the Judges (Judge Sanchez) who was on the prior panel of judges assigned to the *NIFA* case before the National Court of Justice (and was replaced on 25 January 2012).¹³² Of course, “uncertainly” is not the standard for futility. Moreover, nothing concerning Claimant’s chances on appeal can be inferred from the mere fact that Judge Sanchez was on the

¹³⁰ *Id.*, ¶ 258.

¹³¹ *Id.* (emphasis added). Moreover, as Claimant admits, after the hearing, MSDIA’s Ecuadorian counsel filed post-hearing briefs, which could conceivably include any contribution that the U.S.-based counsel wished to make. *Id.*

¹³² *Id.*, ¶¶ 17, 261.

original panel. But most tellingly, although Claimant's fail to mention this, is the fact of the matter that Judge Sanchez is, in fact, *not* among the Judges who will decide the case.¹³³

5. Claimant's reliance on case law is unavailing.

49. In light of the above, Claimant's recourse to the National Court of Justice, and pursuit of a remedy that is fully capable to redress the alleged violation of its rights, is not futile since it has reasonably been made available to it and Claimant has, at the very least, a reasonable chance of success; therefore, at present, Claimant has failed to exhaust local remedies in Ecuador. And the case law cited by Claimant in paragraphs 208-212 of its Reply fully supports this proposition.

50. In *Loewen*, for instance, the tribunal stated that if an appeal would not eliminate the risk of immediate execution against the losing party's assets, it would not be a "reasonably available" remedy.¹³⁴ This is obviously not the case here. The bond suspending the execution of the NIFA judgment pending the resolution of its appeal to the National Court of Justice was set at \$23,500, an amount well within the financial capabilities of Claimant.

51. The United States further argued that Loewen could have challenged the bond requirement and its application in this case before the United States Supreme Court or filed for bankruptcy under Chapter 11 of the U.S. Bankruptcy Code (which allows a form of protective bankruptcy and would have precluded enforcement of the judgment). Loewen denied that there was any realistic prospect of success in the Federal Courts and rejected the Chapter 11 route as a viable option. The tribunal held that the onus was on Loewen to show why the various remedies that it might have pursued, specifically the challenge to the bonding requirement in the United States Supreme Court, were not in fact reasonably available to it and found that it had failed to

¹³³ National Court of Justice, Civil and Commercial Chamber, Order, 30 May 2012 at 11:20 (REM-7).

¹³⁴ *Loewen*, ¶ 208 (RLM-37).

discharge this burden. The tribunal was “simply left to speculate on the reasons which led to the decision to [conclude the settlement] rather than pursue other options” and this was not a case in which “it can be said that [concluding the settlement agreement] was the only course which Loewen could reasonably be expected to take.”¹³⁵

52. In *Ambatielos*, the United Kingdom objected to the claim’s admissibility, *inter alia*, on grounds of Mr. Ambatielos’s failure to exhaust his appellate rights after the lodging of his appeal against the decision of Justice Hill. The tribunal stated that “the failure of Mr. Ambatielos to prosecute the general appeal which he had lodged against the decision of Mr. Justice Hill would ordinarily be considered a failure to exhaust local remedies. Such failure requires some excuse or explanation.” It further held that “[i]t would be wrong to hold that a party who, by failing to exhaust his opportunities in the Court of first instance, has caused an appeal to become futile should be allowed to rely on this fact in order to rid himself of the rule of exhaustion of local remedies.”¹³⁶

53. Finally, in *Pantechniki*, Arbitrator Paulsson was “unpersuaded” by Claimant’s argument that “enough is enough” with respect to the pursuit of its claims before Albanian courts, noting that he could not assume:

that the courts of appeal would always be unable or unwilling to conduct themselves in accordance with the minimum international standard. I am not sure that I truly understand why the Claimant did not stay the course before the Albanian courts. But it is inevitable that its failure to take the final step in the straight line to the Supreme Court is fatal to its claim of denial of justice.¹³⁷

¹³⁵ *Id.*, ¶ 216.

¹³⁶ *Ambatielos*, p. 122 (RLM-6).

¹³⁷ *Pantechniki*, ¶ 102 (RLM-47).

54. Here, Claimant has taken a crucial step, but certainly not the final step alluded to by Paulsson.¹³⁸ In light of Claimant’s failure to substantiate its futility argument, the process it initiated must be allowed to take its course without interruption or interference such as that which Claimant aspires to by bringing this request for interim measures.

6. Conclusion

55. Claimant made an independent assessment of the adequacy and effectiveness of Ecuador’s Judiciary and decided to pursue an appeal of the *NIFA v. MSDIA* judgment in the National Court of Justice. Claimant’s own financial statements filed with Ecuador’s Superintendencia de Compañías show its strong confidence as of April 25, 2012 that the National Court of Justice proceedings shall result in “a decision *favorable* to the branch.”¹³⁹ This is a clear admission by Claimant that, *at the very least*, it has reasonable chances of prevailing on the merits of its underlying litigation. This alone should be dispositive of its “futility” argument.

56. Having effectively¹⁴⁰ pursued its appeal rights before the National Court of Justice, and in light of its admissions regarding its prospects of success, Claimant’s disparaging remarks ring hollow.¹⁴¹ As famously stated by Judge Hersch Lauterpacht in a separate opinion in the

¹³⁸ Although it is true that Claimant’s filing of an appeal with the Constitutional Court would not suspend the execution of an adverse judgment by the National Court of Justice, as Dr. Moscoso explains a subsequent challenge before the Constitutional Court will have real chances of success. Moscoso Second Expert Opinion, ¶ 19. In case the Constitutional Court nullifies the judgment by the National Court of Justice, MSDIA could seek damages for unjust enrichment from NIFA because of the undue enforcement of the judgment. Moscoso First Expert Opinion, ¶ 17.

¹³⁹ MSDIA’s April 30, 2012 Submission of Financial Statements to the *Superintendencia de Compañías*, ¶ 18 (REM-5).

¹⁴⁰ It is reminded that the court of appeals set the bond for the suspension of its judgment pending the resolution of MSDIA’s appeal to the National Court bond in the amount of US\$23,500, which is more than reasonable considering the \$150 million judgment against Claimant, thereby facilitating the exercise of its appeal rights, rather than undermining them.

¹⁴¹ Indeed, Claimant’s generalizations that the Ecuadorian Judiciary is corrupted do not establish its case any more than generalizations that pharmaceutical companies engage in corrupt practices in developing countries establish that Claimant has engaged in such practices in Ecuador.

Norwegian Loans case, the test for exhaustion is whether the legal position is “so abundantly clear as to rule out, as a matter of reasonable possibility, any effective remedy.”¹⁴² Claimant fails to even come close to meeting this test.

C. Because Claimant Has Not Exhausted All Available And Effective Remedies, Claimant Has No Right Eligible For Protection Through Interim Measures.

57. In light of the above, viewed in the context of its admission that state responsibility for judicial action requires a final action of the court system, Claimant’s assertion of rights under the Treaty that have been “violated by the proceedings in Ecuador’s national courts in the *NIFA v. MSDIA* litigation”¹⁴³ is unsustainable. It is for this reason precisely that Claimant’s so-called rights under the Treaty are not capable of protection through interim measures. Until Claimant exhausts local remedies in Ecuador, it has no rights that it can assert against Ecuador at the international level, and, consequently, no rights capable of protection through interim measures. In other words, since Claimant has no rights cognizable by international law at this stage, Claimant’s request for interim measures fails.¹⁴⁴

58. Claimant attempts to detract from this fact by alleging that its rights under the Treaty “came into existence the day the Treaty came into force, and they continue to exist to this day.”¹⁴⁵ However, as shown above, whether under general international law or under the specific provisions of the Treaty, Ecuador owes to Claimant a *system* of justice which affords fair

¹⁴² Separate Opinion of Judge Sir Hersch Lauterpacht in *Certain Norwegian Loans (France v. Norway)*, Judgment (6 July 1957), I.C.J. Reports 1957, p. 9, at 39 (RLM-124).

¹⁴³ Claimant’s Reply, ¶ 106.

¹⁴⁴ *Occidental Petroleum Corporation and Occidental Exploration and Production Company v. Republic of Ecuador*, ICSID Case No. ARB/06/11, Decision on Provisional Measures (17 Aug. 2007) (Fortier, Stern, Williams), ¶¶ 86, 101 (RLM-45).

¹⁴⁵ Claimant’s Reply, ¶ 109.

and equitable and non-discriminatory treatment.¹⁴⁶ And since judicial action is a single action from beginning to end, “the State has not spoken until all appeals have been exhausted.”¹⁴⁷

59. In the words of Sir Christopher Greenwood:

So long as the system itself provides a sufficient guarantee of such treatment, the State will not be in violation of its international obligation merely because a trial court gives a defective decision which can be corrected on appeal It follows that the responsibility of the State for a denial of justice arises *only if the system as a whole produces a denial of justice*. Where there is a manifestly defective judgment by a lower court, this will not amount to a denial of justice – ***and thus will not constitute a violation of international law by the State*** – if there is available to the foreign national an effective means of challenging the judgment.¹⁴⁸

60. This is an undisputed proposition,¹⁴⁹ further confirmed by the character of the obligation to provide a fair and efficient system of justice as an “obligation of result.”¹⁵⁰ An obligation of result presupposes some form of finality of action:

When the conduct of the State has created a situation not in conformity with the result required of it by an international obligation, but the obligation allows that this or an equivalent result may nevertheless be achieved by subsequent conduct of the State, there is a breach of the obligation only if the State also fails

¹⁴⁶ Sir C. Greenwood, *State Responsibility for the Decisions of National Courts* in ISSUES OF STATE RESPONSIBILITY BEFORE INTERNATIONAL JUDICIAL INSTITUTIONS (M. Fitzmaurice & D. Sarooshi eds., 2004), p. 61 (RLM-129) (“Greenwood”).

¹⁴⁷ *Loewen*, ¶ 143 (RLM-37).

¹⁴⁸ Greenwood, p. 61 (emphasis added) (RLM-129).

¹⁴⁹ *See, e.g., Loewen*, ¶ 156 (RLM-37); International Law Commission, Special Rapporteur J. Dugard, Second Report on Diplomatic Protection, U.N. Doc. A/CN.4/514 (2001), ¶ 64 (RLM-98).

¹⁵⁰ Greenwood, p. 67 (RLM-129).

by its subsequent conduct to achieve the result required of it by that obligation.¹⁵¹

61. Through the lens of an obligation of result, the international delict of denial of justice materializes only when the State “failed to take any of the opportunities available to it to produce the required result.”¹⁵²

62. Simply put, no violation of international law, be it general international law or the specific provisions of the Treaty, will have occurred until local remedies are exhausted. It is only when an attempt by a foreign national to remedy the situation in the national realm fails that the breach of international law is consummated. It follows that the exhaustion of local remedies requirement is pivotal for the question whether international responsibility arises at all at this stage of the proceedings. If Claimant cannot assert rights against Ecuador at the international level, it has no rights capable of protection through interim measures.

63. Claimant complains that Ecuador’s argument, which as noted above is perfectly consistent with the position under international law, would “effectively mean that no foreign investor could ever seek interim measures of protection to avoid the irreparable harm flowing

¹⁵¹ International Law Commission, Report on the work of the Twenty-ninth Session (9 May-29 July 1977), U.N. Doc. A/32/10, article 21 (RLM-95).

¹⁵² Greenwood, p. 67 (RLM-129). The distinction between obligations of result and obligations of conduct did not make it to the final draft articles, since it was not considered useful by special Rapporteur Crawford in a set of general articles dealing with the secondary rules of State responsibility (i.e. the legal framework of responsibility) rather than the specific rules for the breach of which the State would incur international responsibility. See International Law Commission, *Draft Articles on Responsibility of States for Internationally Wrongful Acts, with commentaries*, Y.B. INT’L L. COMMISSION, 2001, vol. II, Part Two, ILC Commentary to article 12, ¶ 11 (RLM-97). However, Professor Crawford does not dispute the judicial finality rule. As he observed in its Second Report: “[t]here are also cases where the obligation is to have a system of a certain kind, e.g., the obligation to provide a fair and efficient system of justice. There, systemic considerations enter into the question of breach, and an aberrant decision by an official lower in hierarchy, which is capable of being reconsidered, does not in and of itself amount to an unlawful act.” International Law Commission, Second Report by Special Rapporteur J. Crawford on State Responsibility, U.N. Doc. A/CN.4/498, ¶ 75 (RLM-96).

from a denial of justice, and no investment tribunal could ever award interim relief to prevent this kind of irreparable harm to the investor’s rights under a bilateral investment treaty.”¹⁵³

64. This is of course false. Ecuador is not arguing that no investor could ever seek interim protection to avoid irreparable harm flowing from denial of justice. Ecuador is only disputing whether a denial of justice has indeed occurred in the present case, where Claimant is in the process of asserting its appeal rights in Ecuadorian courts, and whether the circumstances of the present case warrant its request for interim measures. Indeed, it could be equally asserted that Claimant’s assertion of a right that is not ripe for protection under the Treaty has far-reaching implications; were it to succeed, it would effectively allow the manipulation of the institution of interim measures by claimant investors eager to coerce States under the threat of international arbitration.¹⁵⁴

65. In light of the above, Ecuador maintains that Claimant has no “right” that it is “necessary” for the Tribunal to protect through interim measures pursuant to Article 26 of the UNCITRAL Rules. This reality is fatal to Claimant’s Request for Interim Measures and, for this reason alone, it must be denied.

¹⁵³ Claimant’s Reply, ¶ 39.

¹⁵⁴ For example, Claimant appears to suggest that it will only accept the verdict from Ecuador’s Judiciary if it is favorable to it. Otherwise, Ecuador’s judicial system is “corrupt, inefficient, and lacking due process.” Claimant’s true purpose in bringing this arbitration and request for interim measures appears to be to use this Tribunal to sabotage a private lawsuit in Ecuador and subvert the justice system even though the Republic of Ecuador is not, and has never been, a party to that private litigation. Claimant states in its Reply: “MSDIA has acted both with expedience and due respect for the proceedings in Ecuador: it filed this arbitration in the same month that the National Court of Justice admitted its appeal...” Claimant’s Reply, fn. 271. Yet it also states with audacity that it “need not await a final adverse decision of the National Court of Justice.” *Id.*, ¶ 263.

D. For The Same Reasons, Claimant Has Failed To Establish A Likelihood Of Success On The Merits Of Its Case On Liability And Jurisdiction.

66. Ultimately, Claimant's failure to establish the futility of its on-going recourse to the National Court of Justice is fatal to its ability to demonstrate a reasonable probability of prevailing on its case, in regard to both jurisdiction and liability. In the absence of a final action by the Ecuadorian Judiciary, Claimant does not succeed in showing any likelihood that it can establish that the Tribunal has jurisdiction, or that it will prevail on the merits of its underlying claim.¹⁵⁵

1. Claimant has not established a *prima facie* case of Ecuador's liability under the Treaty.

67. Notable commentators on the UNCITRAL Arbitration Rules have suggested that:

Although at the interim measures stage an arbitral tribunal should not be overly concerned with the merits of the case, a party whose case is clearly without merit should not be granted a request for interim measures. There can be no prejudice if there is little or no prospect that the alleged right threatened will be recognized as a right.¹⁵⁶

68. This is precisely the case here. As shown above, Claimant's case of denial of justice is clearly without merit, in the absence of a final action by the Ecuadorian Judiciary. Similarly meritless is Claimant's assertion of futility, which it cannot maintain in the face of its vigorous pursuit of a remedy before the National Court of Justice and confidence in obtaining a result

¹⁵⁵ Claimant cautiously attempts to cast doubt on the mandatory nature of the requirement of the *prima facie* case on the merits in considering an interim measures request. Claimant's Reply, ¶¶ 28, 195-196. But Claimant's experienced counsel undoubtedly knows that the requirement is always a factor to be considered in the granting of interim measures, albeit *sotto voce* on occasion. G. Kaufmann-Kohler & A. Antonietti, *Interim Relief in International Investment Agreements* in ARBITRATION UNDER INTERNATIONAL INVESTMENT AGREEMENTS: A GUIDE TO KEY ISSUES (K. Yannaca-Small ed., 2010), pp. 533-534 ("Kaufmann-Kohler & Antonietti") (RLM-90). Article 26(3)(b) of the 2010 version of the Rules makes it clear that "a reasonable possibility that the requesting party will succeed on the merits of the claim" is required. UNCITRAL Arbitration Rules (as revised in 2010), article 26(3)(b) (RLM-131).

¹⁵⁶ D. Caron et al., THE UNCITRAL ARBITRATION RULES: A COMMENTARY (2006), p. 537 (RLM-85).

favorable to it, as well as its completely unsubstantiated allegations against Ecuador's judiciary. Therefore Claimant's request for interim measures should not be granted, *inter alia*, for failure to establish the requisite likelihood of success of its assertions of liability under the Treaty.

69. Claimant nonetheless maintains that the Tribunal's consideration of the merits of its case at this stage must be "limited to the assessment whether the claimant has set forth allegations that, if proven, could potentially support an award in its favor."¹⁵⁷ It is true that for purposes of the *prima facie* on the merits test, in principle, it should be presumed that the Claimant's factual allegations are true. However, this is no more than simply the first step in the Tribunal's determination. The *prima facie* test is not an absolute rule that prevents the Tribunal from examining Ecuador's evidence that contradicts Claimant's allegations. As stated by the tribunal in *Joy Mining v. Egypt*, in connection with an objection to the tribunal's jurisdiction,¹⁵⁸ the *prima facie* rule must "always yield to the specific circumstances of each case."¹⁵⁹ The tribunal went on to add that

If, as in the present case, the parties have such divergent views about the meaning of the dispute in the light of the Contract and the Treaty, it *would not be appropriate for the Tribunal to rely only on the assumption that the contentions presented by the Claimant are correct*. The Tribunal necessarily has to examine the

¹⁵⁷ Claimant's Reply, ¶¶ 197-198 (relying on *Sergei Paushok, CJSC Golden East Company and CJSC Vostokneftegaz Company v. Government of Mongolia*, UNCITRAL (Russia-Mongolia BIT), Order on Interim Measures (2 Sept. 2008) (Lalonde, Stern, Grigera Naón), ¶ 55 (CLM-12) ("*Paushok*"). It must be noted that in *Paushok* Mongolia, while not admitting liability, nevertheless recognized that the challenge tax measure "should be replaced by a less severe taxation regime." The tribunal identified this statement as one of the "specific features surrounding this particular request" which differentiated, in its view, from other awards on interim measures referred to by the Parties." *Id.*, ¶ 43.

¹⁵⁸ It is submitted that the test for a showing of a *prima facie* case on the merits is not fundamentally different from the test of a plausible treaty claim for jurisdictional purposes. This is evident, *inter alia*, from the authorities cited by the *Paushok* tribunal establishing its assertion of a "*prima facie* establishment of the case" requirement. *Paushok*, ¶¶ 55-56 (CLM-12).

¹⁵⁹ *Joy Mining Machinery v. Egypt*, ICSID Case No. ARB/03/11, Award on Jurisdiction (6 Aug. 2004) (Orrego Vicuña, Weeramantry, Craig), ¶ 30 (RLM-103) ("*Joy Mining*").

contentions in a broader perspective, including the views expressed by the Respondent, so as to reach a jurisdictional determination. This is the procedure the Tribunal will adopt.¹⁶⁰

70. Similarly, the *Chevron I* tribunal stressed that the *prima facie* presumption “is not meant to allow a claimant to frustrate jurisdictional review by simply making enough frivolous allegations to bring its claim within the jurisdiction of the BIT.”¹⁶¹ The tribunal agreed with Ecuador that Judge Higgins “did not have any rebuttal evidence to consider when she devised her test in the Oil Platforms case” and that her approach does not prevent a tribunal from denying jurisdiction if, from the evidence submitted by the parties, the tribunal finds that “facts alleged by the Claimants are shown to be false or insufficient to satisfy the *prima facie* test.”¹⁶² The tribunal concluded as follows:

The ultimate result of the above presumption is that the Respondent bears the burden of proof to disprove the Claimant’s allegations. This means that, *if the evidence submitted does not conclusively contradict the Claimant’s allegations, they are to be assumed to be true for the purposes of the prima facie test.*¹⁶³

71. As shown above, in no way Claimant succeeds in establishing that the remedy it is currently pursuing with vigor before the National Court of Justice, which it considers as capable

¹⁶⁰ *Id.* (emphasis added). See also *PSEG Global Inc., et al, v. Republic of Turkey*, ICSID Case No. ARB/02/5, Decision on Jurisdiction, (4 Jun. 2004) (Orrego Vicuña, Kaufmann-Kohler, Fortier), ¶¶ 63-64 (RLM-116); *Total S.A. v. Argentine Republic*, ICSID Case No. ARB/04/1, Award on Jurisdiction (25 Aug. 2006) (Sacerdoti, Alvarez, Herrera Marcano), ¶ 53 (“[the *prima facie* test] does not necessarily mean that the Claimant’s description of the facts must be accepted as true, without further examination of any type. *The Respondent might supply evidence showing that the case has no factual basis even on a preliminary scrutiny*, so that the Tribunal would not be competent to address the subject matter of the dispute as properly determined.”) (emphasis added) (RLM-130).

¹⁶¹ *Chevron Corporation (USA) and Texaco Petroleum Company (USA) v. The Republic of Ecuador*, PCA Case No. 34877 (UNCITRAL), Interim Award (1 Dec. 2008) (Böckstiegel, Brower, van den Berg), ¶ 109 (citing the tribunal in *Pan American Energy v. Argentina*, which stated, “if everything were to depend on characterizations made by a claimant alone, the inquiry to jurisdiction and competence would be reduced to naught, and tribunals would be bereft of the compétence de la compétence enjoyed by them.”) (CLM-44).

¹⁶² *Id.*, ¶ 110 (emphasis added).

¹⁶³ *Id.*, ¶ 112 (emphasis added).

of producing a result that is favorable to it, is futile. Ecuador's evidence and arguments conclusively contradict Claimant's contentions regarding the general state of Ecuador's judiciary are manifestly unfounded; its *ipse dixit* allegations of procedural irregularities that are sub judice before the National Court of Justice, and, in any event, do not establish the futility of its recourse there; Claimant's "indicia of corruption among the plaintiffs and judges associated with the NIFA litigation," which are completely unrelated to its underlying case and, furthermore, contradict its allegations of a "fundamentally defective" system; and, finally, its allegations that proceedings before the National Court of Justice are tainted or that they do not allow a reasonable prospect of success for MSDIA. For all these reasons, Claimant fails to establish a reasonable possibility of prevailing on its case.

72. Claimant's last effort at maintaining its request for interim measures with a straight face appears to be its argument that "whether MSDIA has suffered a denial of justice is a decision on the merits of the case and is not a question that can or should be determined at the stage of the Tribunal's consideration of a request for interim measures ..."¹⁶⁴ For Claimant, "specifically in connection with allegations of denial of justice, the authorities uniformly establish that questions about exhausting local remedies ... cannot be prejudged in connection with consideration of jurisdictional objections or interim measures."¹⁶⁵

73. Claimant's confidence in this argument, however, is unjustified. Ecuador has already referred to the *Alps Finance* case, in which claimants' failure to exhaust local remedies was considered a bar to its ability in that case to meet the required likelihood of success on a treaty

¹⁶⁴ Claimant's Reply, ¶¶ 22, 29, 215.

¹⁶⁵ *Id.*, ¶ 23.

claim.¹⁶⁶ The tribunal in that case stressed that Slovakia “convincingly objected” to claimants’ assertion of a *prima facie* case of denial of justice that other remedies were still available to the claimant in internal law in order to try to obtain revision of the judgment that it considered prejudicial to its interests.¹⁶⁷ The tribunal further emphasized that “[t]he non-exhaustion of local remedies is *per se* sufficient to exclude the State’s responsibility in international law for actions or omissions of its judiciary,”¹⁶⁸ concluding that the *prima facie* test of a plausible treaty-claim is “far from being met.”¹⁶⁹

74. Similarly, in *Toto v. Lebanon*, the tribunal, based on its prior finding that the claimant had failed to make use of local remedies to speed up the proceedings before the Lebanese *Conseil d’Etat*, found that the claimant failed to meet its burden of establishing a *prima facie* case of denial of justice under the applicable BIT.¹⁷⁰ Again, the tribunal did not question its competence to consider the rule of exhaustion in the context of its examination whether the *prima facie* test of a plausible treaty claim had been met.

75. Moreover, Claimant’s reliance on the authorities it cites is unavailing. Paulsson’s treatise and the *Jan de Nul* award are inapposite in that they simply address the conceptual dichotomy between exhaustion of local remedies as a procedural bar to the admissibility of an international

¹⁶⁶ Ecuador’s Opposition, ¶¶ 48-50.

¹⁶⁷ *Alps Finance and Trade AG v. Slovak Republic*, UNCITRAL (Slovak-Swiss BIT), Award (5 Mar. 2011) (Crivellaro, Stuber, Klein), ¶ 251 (RLM-5) (“*Alps Finance*”).

¹⁶⁸ *Id.*

¹⁶⁹ *Id.*, ¶ 252 (adding: “This inevitably implies that, even in the (remote) case that the Tribunal would retain jurisdiction over the case, it would be highly unlikely that the Claimant’s claims could successfully overcome the merits’ examination.”).

¹⁷⁰ *Toto Costruzioni Generali S.p.A. v. Republic of Lebanon*, ICSID Case No. ARB/07/12, Decision on Jurisdiction (11 Sept. 2009), ¶¶ 154, 168 (RLM-63).

claim and as a substantive element of a claim of denial of justice.¹⁷¹ It is true that the *Chevron I* tribunal held that the exhaustion of local remedies requirement in the context of a denial of justice claim is an issue of the merits, not of jurisdiction.¹⁷² However, the tribunal did not question its competence to examine this issue on a *prima facie* basis and in the context of Ecuador's objections over whether Chevron had made out a case of substantive breaches of the Treaty:

[that a full examination of the issue of exhaustion must be reserved for the merits phase of the proceeding] does not mean that the Tribunal may not still examine the issue *prima facie* ...¹⁷³

76. This all the more pertinent where, as here, an order of interim measures against one the parties is what is at issue.

77. Having determined, as discussed above, that the *prima facie* test presumes the veracity of claimant's allegations so long as the evidence submitted by the respondent does not conclusively contradict it,¹⁷⁴ the tribunal found that the claimants had indeed put forward a *prima facie* test.¹⁷⁵

78. Similarly, in *Saipem*, and in connection with Bangladesh's jurisdictional objections (and not with Saipem's request for provisional measures as Claimant erroneously suggests),¹⁷⁶ the tribunal did not dispute that it had the power to examine whether the requirement of exhaustion

¹⁷¹ Claimant's Reply, ¶ 26 n. 31-32 (citing Paulsson, p. 7 (CLM-99) and *Jan de Nul*, ¶ 255 (RLM-32)).

¹⁷² *Chevron I Interim Award*, ¶ 235 (CLM-44).

¹⁷³ *Id.*, ¶¶ 235-236.

¹⁷⁴ *Id.*, ¶ 112.

¹⁷⁵ *Id.*, ¶¶ 236-238.

¹⁷⁶ Claimant's Reply, ¶ 25.

had been met on a *prima facie* basis.¹⁷⁷ The tribunal did misconstrue, however, the relevant standard by assuming the truthfulness of Saipem's alleged facts without more.¹⁷⁸

79. In sum, Claimant is unable to show any likelihood of success on the merits of its claims against Ecuador. In these circumstances, the Tribunal must not entertain Claimant's Request for Interim Measures.¹⁷⁹

2. Because Claimant's claims are not based upon final actions of Ecuador's judicial system as a whole, Claimant cannot establish the Tribunal's jurisdiction even on a *prima facie* basis.

80. Because the actions complained-of by Claimant do not constitute final actions of Ecuador's judiciary, and since its "futility" claim is meritless, Claimant's claims cannot denote violations of the Treaty, even on a *prima facie* basis. The same reason leads to the conclusion that Claimant has abused the mandatory jurisdictional requirements imposed by Article VI, paragraphs 2 and 3.

a. Claimant has not stated an "investment dispute" because it fails to satisfy the judicial finality element of denial of justice, without which its claims are not ripe for arbitration.

81. As shown above, Claimant has failed to show that it has exhausted the remedies available to it in the Ecuadorian courts, as required to permit the conclusion, as a matter of international law, that Ecuador's judicial system as a whole has been tested and any deficiencies were left uncorrected. To the contrary, it is effectively pursuing its appeal to the National Court of Justice

¹⁷⁷ *Saipem v. Bangladesh*, (ICSID Case No. ARB/05/07), Decision on Jurisdiction and Recommendation on Provisional Measures (21 Mar. 2007) (Kaufmann-Kohler, Schreuer, Otton), ¶ 153 (CLM-15).

¹⁷⁸ *Id.*

¹⁷⁹ It is not disputed that the decision given in the present proceedings by the Tribunal is without prejudice to the question of its jurisdiction to deal with the merits of the case, or the merits themselves. *Anglo-Iranian Oil Co. (United Kingdom v. Iran)*, Preliminary Objection, Judgment (22 July 1952), I.C.J. Reports 1952, pp. 102-103 (RLM-9); *Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Georgia v. Russian Federation)*, Preliminary Objections, Judgment, ¶ 129 (RLM-71) ("*Georgia v. Russian Federation*").

and is confident that it will obtain a result favorable to it. These facts alone defeat Claimant’s futility claim. As a consequence, Claimant’s alleged facts are not capable of establishing a breach of the provisions of the Treaty even on a *prima facie* basis, which, as shown above, does not mean that the Tribunal must refrain from considering Ecuador’s arguments and evidence establishing that such facts are false or otherwise insufficient. Claims of breach that do not possess all the essential characteristics of claims capable to denote a violation of the Treaty at the time of commencement of proceedings¹⁸⁰ fail the jurisdictional test.

82. Claimant’s argument to the contrary is largely irrelevant and can be dismissed summarily. Ecuador has not disputed that a “legal dispute” between the parties exists.¹⁸¹ What Ecuador disputes is Claimant’s allegation that it is enough to “allege” the existence of a breach: Claimant must still establish that its claims are capable of falling within the provisions of the Treaty, and, as a consequence, the dispute is one relating to a right conferred or created by the Treaty. And Claimant manifestly failed to do.

b. In the absence of an “investment dispute” ripe for arbitration, Claimant cannot have met the jurisdictional prerequisites of Article VI.

83. Since, at the time Claimant “alleged” that the dispute arose, its claims under the Treaty were not ripe, Ecuador never had a real opportunity to remedy a possible breach and avoid costly

¹⁸⁰ It is an incontrovertible principle of international law that jurisdiction shall be determined by reference to the date on which judicial proceedings are instituted. As recalled by the ICJ in the *Arrest Warrant* case, “... according to its settled jurisprudence, its jurisdiction must be determined *at the time that the act instituting proceedings was filed*. Thus, *if* the Court has jurisdiction on the date the case is referred to it, it continues to do so ...” *Case Concerning the Arrest Warrant of 11 April 2000 (Democratic Republic of Congo v. Belgium)*, Judgment, I.C. Reports 2002, ¶ 26 (emphasis added) (RLM-74). Investment treaty tribunals have applied this principle consistently. *See, e.g., Bayindir Insaat Turizm Ticaret Ve Sanayi A.S. v. Islamic Republic of Pakistan*, ICSID Case No. ARB/03/29, Decision on Jurisdiction (14 Nov. 2005), ¶ 178 (CLM-1).

¹⁸¹ *See* Claimant’s Reply, ¶¶ 46-49, 51-54.

arbitration proceedings.¹⁸² Giving notice of a contingent claim abuses the mandatory jurisdictional prerequisites of Article VI and must be sanctioned by the Tribunal by dismissing Claimant's Request for Interim Measures.

84. Claimant argues that a notice for purposes of Article VI(2) and (3) is sufficient "so long as it gives notice of a *dispute*, regardless of whether the claimant's allegations are later determined to have merit."¹⁸³ Yet, an allegation of breach of a right that is not yet ripe for protection under the Treaty was not facing the *Lauder* and *Murphy* tribunals; certainly, such an allegation satisfies the notice requirement only in name. Indeed, it would defeat the purpose of the requirements of Article VI(2) and (3), described by the same tribunals as aiming towards the facilitation of "*good-faith* negotiations before initiating the arbitration,"¹⁸⁴ to allow Claimant to pretextually satisfy such requirements by giving notice of premature claims in a situation of an on-going judicial action in Ecuadorian courts.

85. Based on certain arbitral tribunals' findings that they had jurisdiction notwithstanding the claimants' failure to satisfy prerequisites to state consent to arbitration under BITs, Claimant also argues that notice and "cooling-off" requirements are generally not considered jurisdictional requirements.¹⁸⁵ Claimant's position, as well as that of those tribunals, utterly fails to recognize and respect an established principle of international law embedded in Article VI of the Treaty

¹⁸² Claimant asserts that a respondent state can be compensated in the event that a claimant pursues an unmeritorious claim. Claimant's Reply, ¶ 61. Ecuador fails to see how this cures the jurisdictional deficiency caused by Claimant's abuse.

¹⁸³ Claimant's Reply, ¶ 60 (emphasis in the original text).

¹⁸⁴ *Ronald S. Lauder v. the Czech Republic*, UNCITRAL Arbitration, Final Award (3 Sept. 2001), ¶ 185 (emphasis added) (CLM-58).

¹⁸⁵ Claimant's Reply, ¶¶ 64-65.

that jurisdiction of a dispute settlement body is based on the consent of the parties, and is confined to the extent accepted by them. As stated recently by the tribunal in *ICS v. Argentina*:

At the time of commencing dispute resolution under the treaty, the investor can only accept or decline the offer to arbitrate, but cannot vary its terms. The investor, regardless of the particular circumstances affecting the investor or its belief in the utility or fairness of the conditions attached to the offer of the host State, must nonetheless contemporaneously consent to the application of the terms and conditions of the offer made by the host State, *or else no agreement to arbitrate may be formed* ... the investment treaty presents a ‘take it or leave it’ situation at the time the dispute and the investor’s circumstances are already known.¹⁸⁶

86. It follows that the examination of such conditions pertains to the jurisdiction of the Tribunal and not to the admissibility of Claimant’s claims.¹⁸⁷

87. Claimant finally attempts to cast distorting light on *Burlington v. Ecuador* and *Murphy v. Ecuador*.¹⁸⁸ It essentially contends that a total lack of “opportunity” to engage in negotiations was the primary rationale justifying the dismissal of claims for lack of jurisdiction. In other words, Claimant implies that in these cases the finding of a fact preceded, if not determined, the declaration of a legal principle. The reverse is true, however. In both *Burlington* and *Murphy*, tribunals first determined as a matter of legal principle that the compromissory clauses in the

¹⁸⁶ *ICS Inspection and Control Services Ltd. v. Argentine Republic*, PCA Case No. 2010-9, UNCITRAL, Award on Jurisdiction (10 Feb. 2012) (Dupuy, Torres Bernárdez, Lalonde), ¶ 272 (emphasis added) (RLM-28) (“*ICS Inspection*”).

¹⁸⁷ *Armed Activities on the Territory of the Congo (New Application: 2002) (Democratic Republic of the Congo v. Rwanda)*, Jurisdiction and Admissibility, Judgment (3 Feb. 2006), I.C.J. Reports 2006, ¶ 88 (RLM-72); *Certain Questions of Mutual Assistance in Criminal Matters (Djibouti v. France)*, Judgment (4 June 2008), I.C.J. Reports 2008, ¶ 48 (RLM-81); *Georgia v. Russian Federation*, ¶ 131 (RLM-71); *Enron Corp. and Ponderosa Assets, L.P. v. Argentine Republic*, ICSID Case No. ARB/01/3, Decision on Jurisdiction (14 Jan. 2004) (Orrego Vicuña, Gros Espiell, Tschanz), ¶ 88 (RLM-87); *Burlington Resources Inc. v. Republic of Ecuador and Empresa Estatal Petróleos del Ecuador (PetroEcuador)*, ICSID Case No. ARB/08/5, Decision on Jurisdiction (2 Jun. 2010) (Kaufmann-Kohler, Stern, Orrego Vicuña), ¶¶ 317-318, 342 (RLM-12) (“*Burlington*”); *Murphy Exploration and Prod. Co. Int’l v. Republic of Ecuador*, ICSID Case No. ARB/08/4, Award on Jurisdiction (15 Dec. 2010) (Oreamuno Blanco, Naón, Vinuesa), ¶¶ 143-146, 149, 156-157 (RLM-42) (“*Murphy*”).

¹⁸⁸ Claimant’s Reply, ¶¶ 67-68.

applicable BITs imposed certain requirements which the investors were legally obligated to fulfill prior to submitting their claims to arbitration. Then, applying that principle to the facts, the tribunals reached their conclusions on jurisdiction.

88. In conclusion, because Claimant failed to meet the mandatory jurisdictional prerequisites of Article VI(2) and (3), it is not able to demonstrate that the Tribunal has jurisdiction, even on a *prima facie* basis, and its Request must be denied.

*
* *

89. In sum, Claimant's efforts to circumvent the requirement of judicial finality, which informs all of its claims under the Treaty, fail. And, indeed, how can it be otherwise, when Claimant itself declares that it expects a "decision favorable to the branch" by the National Court of Justice. In light of this admission, Ecuador's defence to Claimant's speculations and innuendos is simply *arguendo* but nonetheless necessary to show the extent of Claimant's cavalier attitude. Claimant's failure to meet the judicial finality requirement proves fatal to its assertion of a "right" eligible for protection through interim measures and ability to establish a likelihood of success on the merits of its case on liability and jurisdiction.

III. CLAIMANT HAS FAILED TO ESTABLISH THE TRIBUNAL'S PRIMA FACIE JURISDICTION OVER ITS REQUEST

90. The previous section showed why Claimant cannot show a likelihood of success on the merits in terms of the Tribunal's jurisdiction due to its failure to state plausible claims under the Treaty and to meet the jurisdictional prerequisites of Article VI(2) and (3). As was shown in Respondent's Opposition, Claimant's Request suffers from further jurisdictional defects that, as shown below, Claimant has still not been able to overcome. First, Claimant fails to satisfy the quintessential requirement for its protection under the Treaty: the existence of a protected "investment." Second, Claimant failed to validly consent to UNCITRAL arbitration, having first consented to ICSID Arbitration. Claimant's shortcomings will be addressed in turn.

A. Claimant Has Failed To Establish the Existence of a Protected Investment

91. Claimant's attempt to base jurisdiction on a breach of its alleged Treaty rights with respect to an investment also fails because it has not shown that it owned or controlled anything that could be deemed to constitute a "protected investment" within the meaning and reach of the Treaty at the material time, the commencement of the present arbitration.

92. As protected "investments" in Ecuador Claimant claims (a) its "ongoing business" in Ecuador; and (b) a manufacturing and packaging facility that was sold in 2003, which Claimant views as associated to the underlying *NIFA v. MSDIA* litigation.¹⁸⁹ Both claims, however, are without any merit.

1. Claimant's investment in the Chillos Valley manufacturing plant

¹⁸⁹ Claimant's Reply, ¶ 70.

93. Ecuador agrees that the manufacturing and packaging facility in the Chillos Valley that Claimant sold in 2003¹⁹⁰ was an investment within the meaning of the Treaty. However, in July 2003 MSDIA sold its Chillos Valley manufacturing and packaging plant to an affiliate of Ecuaquimica, a private company in Ecuador.¹⁹¹ It was at this date that the nature of Claimant’s business in Ecuador was transformed from a manufacturing business to a purely commercial cross-border trading business. Plainly, Claimant did not own the manufacturing and packaging plant during the time at which Claimant claims the acts constituting the breach of the Treaty were allegedly committed by Ecuador.

94. Claimant attempts to circumvent this incontrovertible fact by professing the so-called “lifespan of the investment” theory, which posits that an investment qualifies for protection as it proceeds in time and potentially changes form until its wound up. Claimant’s attempt to draw analogies in the present case, however, does not withstand scrutiny. The crucial question can be put in simple terms: does the NIFA litigation somehow detract from the conclusion that Claimant’s investment in the Chillos Valley plant reached its “complete and final demise”¹⁹² at the time of commencement of this arbitration?

95. The answer must be in the negative. The jurisprudential foundations of the life-span theory – the *Mondev* and *Chevron I and II* cases – show that tribunals were prepared to accept as expanding the lifespan of an investment: (a) ongoing claims for money arising *directly* out of

¹⁹⁰ Notice of Arbitration, ¶ 39.

¹⁹¹ Claimant’s Request, ¶ 19.

¹⁹² *Chevron II*, ¶ 4.19 (CLM-108).

activities undertaken pursuant to concession agreements constituting the original investment,¹⁹³ (b) claims to money for breach and wrongful interference with a contract;¹⁹⁴ and (c) litigation whose “principal subject-matter” addresses the investor’s activities under its original investment.¹⁹⁵

96. In the instant case, it is plain that situations (a) and (b) are inapplicable. The *NIFA* litigation does not involve any ongoing claim by Claimant for money arising directly out of its investment in the Chillos Valley plant; or any claim by Claimant for damages for interference with its investment by Ecuador. Situation (c) merits a closer look, but the conclusion remains the same.

97. The underlying NIFA litigation is not associated with the disposition of Claimant’s investment or Claimant’s investor activities in Ecuador. It arose out of NIFA’s claims of “abuse of rights”, “deceit,” and “malicious act” by MSDIA allegedly aimed to implement a strategy by Claimant to delay NIFA’s entry into the generic products market in Ecuador.¹⁹⁶ MSDIA’s assertion that there was no breach of contract for the sale of the plant was upheld by the Second Court for Civil Affairs of Pichincha, which clearly noted that “MSDIA had not acquired an obligation towards NIFA *regarding the sale of the industrial plant*, whereby it is not appropriate that [NIFA] demand the sale of the plant, because no promise of sale of the real property had

¹⁹³ *Chevron I Interim Award*, ¶ 184 (“Thus, the Claimants’ investments have not ceased to exist: their lawsuits continued their original investment through the entry into force of the BIT and to the date of commencement of this arbitration.”) (CLM-44).

¹⁹⁴ *Mondev*, ¶ 80 (RLM-41).

¹⁹⁵ *Chevron II*, ¶¶ 4.17, 4.19 (CLM-108).

¹⁹⁶ *NIFA v. MSDIA*, Provincial Court of Justice of Pichincha for Commercial and Civil Matters, Judgment (Sep. 23, 2011) (C-4).

been signed, complying with the requirements required by law.” Thus, the judgments that issued from the litigation had nothing to do with the disposition of the Chillos Valley plant.

98. What is more, the *Mondev* tribunal’s articulation of the life-span theory was motivated by an equitable concern that is simply not involved here. In particular, the tribunal was very concerned with the principle that an investor had to maintain its right to assert claims under NAFTA even though its investment had been expropriated, or in *Mondev*’s case, destroyed, by the respondent state. There is no basis to extend *Mondev*’s reach to claims by private third parties not related to the termination of an investment brought after the free and unhindered termination of the investment. The *Mondev* tribunal’s equitable concern that a State not be able to defeat jurisdiction by virtue of the very misconduct (i.e. expropriation) which was at issue in that arbitration is an equitable concern that is simply not present here.

B. MSDIA’s “Ongoing Business” Does Not Constitute An Investment Protected Under The Treaty.

1. The Concept Of “Investment” In the BIT Has An Objective Meaning Well Established In International Law.

99. The term “investment” in investment treaties is not a vacuous notion. The investor-state tribunals have recognized that the concept of “investment” inherently carries an objective meaning, irrespective of whether it is mentioned in the ICSID Convention or defined in BITs.

100. UNCITRAL tribunals have expressly recognized the inherent objective meaning of “investment” that applies across all BITs using the term.¹⁹⁷ As described in Ecuador’s

¹⁹⁷ See *Romak S.A. v. The Republic of Uzbekistan*, PCA Case No. AA280, UNCITRAL, Award (26 Nov. 2009) (Mantilla-Serrano, Rubins, Molfessis), ¶ 207 (RLM-54) (emphasis added) (“*Romak*”) (adding “[i]f an asset does not correspond to the inherent definition of “investment,” the fact that it falls within one of the categories listed in [the BIT] does not transform it into an “investment.”); *Alps Finance and Trade AG v. Slovak Republic*, UNCITRAL (Slovak-Swiss BIT), Award (5 Mar. 2011) (Crivellaro, Stuber, Klein), ¶ 229 (RLM-5) (“*Alps Finance*”). See *Bayindir Insaat Turizm Ticaret Ve Sanayi A.S. v. Islamic Republic of Pakistan*, ICSID Case No. ARB/03/29, Award (27 Aug. 2009) (Kaufmann-Kohler, Berman, Böckstiegel) ¶ 145.

Opposition, in *Romak v. Uzbekistan*, the tribunal reasoned that “[t]here is no basis to suppose that this word [“investment”] has a different meaning in the context of the ICSID Convention than it bears in relation to the BIT.”¹⁹⁸ It held “that the term ‘investments’ under the BIT *has an inherent meaning (irrespective of whether the investor resorts to ICSID or UNCITRAL arbitral proceedings) entailing a contribution that extends over a certain period of time and that involves some risk.*”¹⁹⁹

101. It cannot be otherwise: “investment” used in BITs must bear uniform objective characteristics to ensure, *inter alia*, legal predictability and effectiveness of investor-state system as a whole, which benefit both the investor and the State. As noted by a leading commentator:

The purpose of the BITs, however, was to protect investment, not all U.S.-owned property in the territory of the BIT party. U.S. negotiators thus wished to make clear that an asset would be covered by the definition only if it had the character of an investment.²⁰⁰

102. Having recognized that the term “investment” has an inherent objective meaning, the UNCITRAL tribunals have relied on ICSID jurisprudence on the issue of definition of investment.²⁰¹ The tribunal in *Alps Finance and Trade AG v. Slovak Republic* singled out the

¹⁹⁸ *Id.* ¶ 194.

¹⁹⁹ *Romak*, ¶ 207 (RLM-54). *See also Alps Finance*, ¶ 229 (RLM-5) (stressing that the issue of whether claimant’s alleged investment (assignment of receivables) qualified as an investment must be examined “both under the BIT and under international law rules.”)

²⁰⁰ K. Vandevelde, U.S. INTERNATIONAL INVESTMENT AGREEMENTS (2009), pp. 114-115 (emphasis added) (RLM-33). The Treaty is based on the 1992 model BIT, which left the essential definition of investment in the 1983 model unchanged. K. Vandevelde, U.S. INTERNATIONAL INVESTMENT AGREEMENTS (2009), pp. 102, 118-120 (RLM-105).

²⁰¹ Thus the *Romak* tribunal, although a non-ICSID case, undertook a thorough analysis of the definition of investment, considering the claimant’s argument that such definition may vary depending on the investor’s choice between UNCITRAL and ICSID arbitration, as an unreasonable proposition:

it would be unreasonable to conclude that the Contracting Parties contemplated a definition of the term “investments” which would effectively exclude recourse to the ICSID Convention and therefore render meaningless – or without *effet*

following mandatory features of “investment” recognized by the ICSID tribunals: “(a) a capital contribution to the host State by the private contracting party; (b) a significant duration over which the project is implemented; and (c) sharing of operational risks inherent to the contribution together with long-term commitments.”²⁰² These three objective criteria have been recognized as mandatory.²⁰³ In addition, some tribunals have required for the investment to be of “significant contribution to the host State’s development.”²⁰⁴ Importantly, all of these elements must be considered cumulatively “in their totality.”²⁰⁵

utile – the provision granting the investor a choice between ICSID or UNCITRAL Arbitration.”

Romak ¶¶ 193-195 (RLM-54).

²⁰² *Alps Finance*, ¶ 241 (RLM-5).

²⁰³ *Kardassopoulos v. Georgia*, Decision on Jurisdiction, ICSID Case No ARB/05/18 (6 Jul. 2007), ¶ 116 (Fortier, Orrego Vicuña, Watts) (RLM-106) (held that “[t]here must be: (i) a contribution, (ii) a “certain duration of performance of the contract,” (iii) a “participation in the risks of the transaction,” and (iv) a contribution to the host State’s economic development.” (emphasis added)); *Jan de Nul N.V. and Dredging International N.V. v. Arab Republic of Egypt*, ICSID Case No. ARB/04/13, Decision on Jurisdiction (16 Jun. 2006), ¶ 91 (Kaufmann-Kohler, Mayer, Stern) (RLM-102) (“*Jan de Nul (Jurisdiction)*”) (“The Tribunal concurs with ICSID precedents which, subject to minor variations, have relied on the so-called “*Salini* test”. Such test identifies the following elements as indicative of an “investment” for purposes of the ICSID Convention: (i) a contribution, (ii) a certain duration over which the project is implemented, (iii) a sharing of operational risks, and (iv) a contribution to the host State’s development, being understood that these elements may be closely interrelated, should be examined in their totality and will normally depend on the circumstances of each case.”); *Helnan International Hotels A/S v Egypt*, ICSID Case No ARB/05/19, Decision on Jurisdiction (17 Oct. 2006) (Derains, Lee, Dolzer), ¶ 77 (RLM-92) (“*Helnan International*”) (“The Arbitral Tribunal accepts the Respondent’s suggestion, based on ICSID precedents, as summarized in the unchallenged statement by Prof. Ch. Schreuer, that to be characterized as an investment a project “**must show** a certain duration, a regularity of profit and return, an element of risk, a substantial commitment, and a significant contribution to the host State’s development” (emphasis added)).

²⁰⁴ *Global Trading Resource Corp. and Globex International, Inc. v. Ukraine*, ICSID Case No. ARB/09/11, Award (1 Dec. 2010) (Berman, Gaillard, Thomas), ¶ 43 (RLM-91) (“*Global Trading Resource*”) (“The Tribunal need do no more than refer in this connection to a long line of previous decisions starting with *Alcoa Minerals v. Jamaica* in 1975 through *Salini Costruttori S.p.A. and Italstrade S.p.A. v. Kingdom of Morocco* (and the various subsequent cases in which tribunals have discussed, modified and grafted on various indicia to the so called *Salini* test for determining the existence of an investment), and culminating most recently in *Saba Fakes v. Republic of Turkey*.”); *Saba Fakes v. Republic of Turkey*, ICSID Case No. ARB/07/20, Award (14 Jul. 2012) (van Houtte, Lévy, Gaillard), ¶ 108 (RLM-122) (“*Saba Fakes*”) (“First, the Tribunal considers that the notion of investment, which is one of the conditions to be satisfied for the Centre to have jurisdiction, cannot be defined simply through a reference to the parties’ consent, which is a distinct condition for the Centre’s jurisdiction. The Tribunal believes that an objective definition of the notion of investment was contemplated within the framework of the ICSID Convention, since certain terms of Article 25 would otherwise be devoid of any meaning.”); *Helnan International*, ¶ 77 (RLM-92); *Jan de Nul (Jurisdiction)*, ¶ 91 (RLM-102); *Salini Costruttori S.P.A. and Italstrade S.P.A. v. Morocco*, ICSID

103. These “legal” requirements are closely linked to the inherent economic notion of “investment:” the economic materialization of an investment requires the commitment of resources to the economy of the host state by the investor entailing the assumption of risk in expectation of commercial return. Zachary Douglas explains the legal requirements and the inherently economic sense of the term “investment” must be considered in tandem:

If, by way of illustration, the legal characteristics of an investment were to be considered in isolation from the common sense economic meaning of that term, then, pursuant to some investment treaty definitions of an investment, a metro ticket might qualify as a ‘claim to money or to any performance under contract, having a financial value’ and thus an investment.²⁰⁶

104. The Treaty recognizes this inherent economic sense of “investment.” The Preamble of the Treaty states that the objects and purposes of the Treaty are to “stimulate the flow of private capital and the economic development” in the territories of the contracting states and the “encouragement and reciprocal protection of investment.”²⁰⁷ Indeed, one of the primary goals of the Treaty is the “increased flow of capital.”²⁰⁸

105. Aside from the contribution to the economic development of the State, Claimant has not disputed that it must meet these requirements. However, Claimant has failed to establish that its commercial or trading transactions in Ecuador rise to the level of “investment.”

Case No. ARB/00/4, Decision on Jurisdiction (16 Jul. 2001) (Briner, Cremades, Fadlallah), ¶¶ 52-7 (RLM-123) (“Salini v. Morocco”).

²⁰⁵ See, e.g., *Jan de Nul N.V (Jurisdiction)*, ¶ 91 (RLM-102).

²⁰⁶ Z. Douglas, *THE INTERNATIONAL LAW OF INVESTMENT CLAIMS* (2010), 163 (RLM-134) (“Douglas”).

²⁰⁷ Treaty between the United States of America and the Republic of Ecuador Concerning the Encouragement and Reciprocal Protection of Investment, (11 May 1997) (Claimant’s Exhibit C-1). .

²⁰⁸ Department of State, Letter of Submittal for U.S.-Ecuador Treaty Concerning the Encouragement and Reciprocal Protection of Investment, reprinted in SENATE TREATY DOC. NO. 103-15 (1993) (REM-10).

2. Claimant’s Trading And Distribution Activities Fail To Constitute “Investment” Within The Objective Meaning.

a. Claimant Has Made No Contribution.

106. Tribunals have assessed the investment’s “contribution” in terms of contribution in kind; financial input, equipment, know-how, and personnel.²⁰⁹ It bears emphasis that not all foreign owned assets constituted protected investment under the BIT: the asset must correspond to the inherent definition of “investment.”²¹⁰ As put by one tribunal: “assets cannot be protected *unless they result from contributions, and contributions will not be protected unless they have actually produced the assets of which the investor claims to have been deprived.*”²¹¹ Assets that are merely incidental to “trading transactions” are not “investments.”²¹² In one relevant case, *Global Trading*, the supply of poultry at the invitation of the sovereign state and the claims brought thereunder were held to be “manifestly without legal merit” since they were claims to payment under trading contracts and not claims based on “investments.”²¹³ The tribunal summarily dismissed a claim arising out of contracts for the supply of poultry, holding that the purchase and

²⁰⁹ See, e.g., *Saipem S.p.A. v. The People's Republic of Bangladesh*, ICSID Case No. ARB/05/07 (Bangladesh/Italy BIT), Decision on Jurisdiction, Mar. 21, 2007 (Kaufmann-Kohler, P.; Schreuer; Otton) ¶ 101 (“*Saipem v. Bangladesh*”) (noting the company’s significant contribution in terms of both technical and human resources); *Patrick Mitchell v. Democratic Republic of the Congo*, ICSID Case No. ARB/99/7 (US/DRC BIT), Decision on the Application for Annulment of the Award (1 Nov. 2006) (Dimolitsa, P.; Dossou; Giardina), ¶ 27 (emphasis added) (RLM-114) (“*Patrick Mitchell (Annulment)*”) (noting the commitment may be financial or through know-how); *Jan de Nul*, ¶ 92 (finding claimant’s significant contribution based on the amount of work with the dredging operation in the Suez Canal and the compensation claimant received); *Bayindir*, ¶ 131 (emphasizing that Bayindir made a significant contribution both in terms of know-how, equipment, personnel and financial terms); *Salini*, ¶ 53.

²¹⁰ *Romak* ¶ 207 (. But if an asset does not correspond to the inherent definition of “investment,” the fact that it falls within one of the categories listed in Article 1 does not transform it into an “investment.”)

²¹¹ *Malicorp*, ¶ 110 (RLM-111).

²¹² *Joy Mining*, ¶ 55 (RLM-103).

²¹³ *Global Trading Resource*, ¶ 52 (RLM-91).

sale contracts at issue were pure commercial transactions that did not constitute an “investment” under Article 25.²¹⁴

107. MSDIA cannot show that it has made any substantial investment in Ecuador since its disposal of the plant in 2003 because of the nature of its current commercial operations in Ecuador.

108. First, when MSDIA sold its plant in 2003, it ceased to carry out any production activities or operate any other significant assets. Indeed, its sale of the plant in 2003 resulted in an “outflow of capital.” According to MSDIA’s President, Mr. Canan, the purpose of MSDIA’s business is to provide Merck medicines for sale and distribution.²¹⁵ Its branch in Ecuador, the so-called “MSDIA Ecuador” is set up exactly for that purpose: Mr. Canan describes that the branch “provide[s] [Merck] medicines in Ecuador for distribution, sale (and resale), prescription, purchase and use by private and public purchasers including distributors, wholesalers, pharmacies, hospitals, doctors, patients and the Ecuadorian government.”²¹⁶ In addition, in his second statement, Mr. Canan explains that it is possible for the parent company, Merck to engage in the same trading transactions (i.e. sale and distribution of its medicines) without MSDIA, let alone its branch, by itself or through affiliates.²¹⁷ Importantly, Claimant itself suggested that it would rather walk away from its so-called “investment” than satisfy the \$150 million judgment. Indeed, it has nothing there to hold on to, particularly because it can set up alternative ways of carrying out its trading transactions of medicines. These are “trading transactions” that do not

²¹⁴ *Global Trading Resource*, ¶¶ 53 & 56-57 (RLM-91).

²¹⁵ First Canan Witness Statement, ¶ 8.

²¹⁶ *Id.*, ¶ 9. In *Global Trading*, the tribunal did not find investment even though poultry was sold to the state. *Global Trading*, ¶ 55 (RLM-91).

²¹⁷ Second Canan Witness Statement, ¶ 19.

constitute “investment.” Claimant itself indirectly recognizes that its current (since 2003) “trading transactions” do not fall within the definition of “investment” within the Treaty, which does not cover commercial activities.²¹⁸

109. Second, following July 2003, its remaining assets used to facilitate these trading transactions do not constitute an investment.²¹⁹ Its assets in Ecuador are clearly ancillary to its trading transactions. Mr. Canan stated, without specifying, that its branch has inventory, accounts receivable and certain fixed assets (vehicles, computers and office equipment) and that “MSDIA Ecuador's only cash in Ecuador is a small amount in its bank accounts (approximately \$1 million).”²²⁰

110. Moreover, MSDIA’s employment contracts with its employees are not protected investments; they are contracts for “incidental services”²²¹ to its undertaking of the trading activities. Nor are they “investment agreements.” They are commercial contracts with private parties. Similarly, MSDIA’s distribution and warehousing contracts all relate to the cross-border trade of its pharmaceutical products. They are neither investments nor investment agreements.

111. In its Reply, MSDIA has failed to show any “proprietary rights” or “contractual rights” which can be deemed to be an investment. It refers to “substantial investment” but cannot pinpoint where its substance lies.

²¹⁸ Claimant itself admits such commercial transactions are not protected investment within the meaning of the BIT. It has referred to NAFTA as an interpretive tool for the Ecuador-U.S. BIT. *See* Claimant’s Reply, ¶ 91. Article 1139 of NAFTA expressly excludes from the definition of “investment” “commercial contracts for the sale of goods or services by a national or enterprise in the territory of a Party to an enterprise in the territory of another Party.” NAFTA, Art. 1139 (definition of “investment”).

²¹⁹ *See Joy Mining*, ¶ 55 (RLM-103).

²²⁰ First Canan Witness Statement, ¶ 19.

²²¹ *Joy Mining*, ¶ 55 (RLM-103).

112. Mr. Canan tries to solve this problem by stating that “our Ecuador branch has been in business for 40 years.”²²² However, amalgamating all of MSDIA’s activities carried out in the span of 40 years distorts the reality of MSDIA’s business activities in Ecuador, by encompassing the period when it operated the plant. While it may be true that MSDIA had an investment in Ecuador before 2003, following the sale and disposal of the plant and equipment in July 2003, MSDIA ceased to have any proprietary or contractual rights associated with an investment. It made a business decision to terminate its investment and continue its operations in Ecuador on a purely commercial basis.

113. In short, subsequent to the sale and disposal of the manufacturing plant, from 2003 onwards, MSDIA’s business in Ecuador comprised of purely trading and commercial activities, which are not protected by the Treaty.

b. MSDIA has failed to show an element of risk.

114. The *Romak* tribunal clarified the nature of investment risk:

All economic activity entails a certain degree of risk. As such, all 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.

An “investment risk” entails a different kind of *alea*, a situation in which the investor cannot be sure of a return on his investment, and may not know the amount he will end up spending, even if all relevant counterparties discharge their contractual obligations. Where there is “risk” of this sort, the investor simply cannot predict the outcome of the transaction.²²³

²²² Second Canan Witness Statement, ¶ 4.

²²³ *Romak* ¶¶ 229-230.

115. MSDIA claims that it meets the requirement of “investment risk” because according to Mr. Canan “MSDIA made the choice to invest in Ecuador knowing that the Ecuadorian pharmaceutical market was competitive and that there was a risk that its business would not succeed” and that it “had no guarantee that its significant investments in Ecuador would result in a successful business.”²²⁴ However, risks associated with purely cross-border trading activities are the kind of normal business risks as opposed to “investment risks”.²²⁵ It therefore fails to meet the risk requirement because its risk is no other than the general risk inherent to commercial transactions.

c. MSDIA has failed to show the requisite duration requirement.

116. Claimant misconstrues and misapplies the notion that investment has to be “of a certain duration.”²²⁶ The tribunals have found that one-off sales contracts do not meet the requirement of “certain duration” of an investment. As explained by the tribunal *Global Trading Resource*:

...each individual contracts, of limited duration, for the purchase and sale of goods, on a commercial basis and under normal CIF trading terms, and which provide for delivery, the transfer of title, and final payment, before the goods are cleared for import into the recipient territory; and that neither contracts of that kind, nor the moneys expended by the supplier in financing its part in their performance, can by any reasonable process of interpretation be construed to be ‘investments’ for the purposes of the ICSID Convention.²²⁷

²²⁴ Second Canan Statement, ¶ 5.

²²⁵ *Romak*, ¶ 230 (holding that “[a]n “investment risk” entails a different kind of alea, a situation in which the investor cannot be sure of a return on his investment, and may not know the amount he will end up spending, even if all relevant counterparties discharge their contractual obligations. Where there is “risk” of this sort, the investor simply cannot predict the outcome of the transaction.”)

²²⁶ *See Salini*, ¶¶ 52-54 (RLM-123).

²²⁷ *Global Trading Resource*, ¶ 56 (RLM-91).

Similarly, the *Romak* tribunal noted: “The one-off sale of goods under the contract in question constitutes such limited economic activity that it does not fulfill the requirement of duration.”²²⁸

117. MSDIA considers that it satisfies the duration requirement because it “first invested in Ecuador in 1973 and remains invested in the country nearly forty years later.”²²⁹ As noted earlier, MSDIA may have had an investment in Ecuador until it disposed of it in July 2003.²³⁰ However, since then, based on Mr. Canan’s own statements, MSDIA has been conducting cross-border trading operations through individual sales contracts mostly with private buyers in Ecuador. It may have sold drugs to the government of Ecuador, but has not shown that it has engaged in anything more than mere commercial sales of medicines. Thus, all of MSDIA’s trading activities involve one-off sales – i.e., transactions in which goods are supplied in exchange for payment. By definition, and as found by other tribunals, they do not fulfill the duration criteria of an “investment.”

d. Nor can MSDIA show a significant contribution to Ecuador’s development.

118. While this requirement has not been embraced uniformly by the tribunals, this element has been applied in several notable decisions. In the often cited case, *Patrick Mitchell*, the *ad hoc* Annulment Committee annulled the tribunal’s award in a case relating to the closure of a foreign law office. The *ad hoc* Committee accepted that the provision of legal services fell within certain categories in the BIT, yet it set the award aside for failure of the claimant to state how the alleged investment contributed to the economic development of the host state as required by the

²²⁸ *Romak* ¶ 106.

²²⁹ Claimant’s Reply, ¶ 77.

²³⁰ *Id.*, ¶ 19.

fourth factor of the *Salini* test.²³¹ In *MHS v Malaysia*, the tribunal referred to the requirement of economic contribution as the “litmus test” for the entire investment. It found that “the question of contribution to the host State’s development assumes significant importance because the other typical hallmarks of “investment” are either not decisive or appear only to be superficially satisfied.”²³² The tribunal found that the salvage operations did not rise to the level of an investment because, among other things, the contract “did not make any significant contributions to the economic development of Malaysia”.²³³ The tribunal noted:

To determine whether the Contract is an “investment,” the litmus test must be its overall contribution to the economy of the host State, Malaysia.²³⁴

In his strong dissenting opinion to the subsequent annulment decision by a divided *ad hoc* Committee, former ICJ Judge Mohamed Shahabuddeen reasoned:

My main reasons for holding that economic development of the host State is a condition of an ICSID investment are these: (a). However wide is the competence of parties to determine the terms of an investment, that competence is subject to *some outer limits outside of their will*, if only to measure the width of their competence within those limits. (b). The outer limits in this case included a requirement that an investment *must contribute to the economic development of the host State*. (c). The Tribunal was correct in finding that the contribution to the economic development of the host State had to be substantial or significant. .

²³⁵

²³¹ *Patrick Mitchell (Annulment)*, ¶¶ 36-40 (RLM-114).

²³² *Malaysian Historical Salvors, SDN, BHD v. The Government of Malaysia*, ICSID Case No. ARB/05/10, Award on Jurisdiction (17 May 2007), ¶ 130 (Hwang) (RLM-93) (“*Malaysian Historical Salvors*”).

²³³ *Id.*, ¶ 146.

²³⁴ *Malaysian Historical Salvors*, ¶ 135 (RLM-93).

²³⁵ *Malaysian Historical Salvors SDN BHD v. The Government of Malaysia*, ICSID Case No. ARB/05/10, Dissenting Opinion of Judge Shahabuddeen (19 Feb. 2009), ¶ 4 (Schwebel, Shahabuddeen, Tomka) (RLM-110).

Failing to satisfy the core three elements, Claimant has not even addressed this requirement. MSDIA's trading activities are not an "investment" because Claimant does not positively contribute to Ecuador's economic development.

119. Contrary to Claimant's argument, the presence of a local branch in Ecuador does not *per se* constitute "investment."²³⁶ Those two cases did not in fact address the issue of whether a "branch" constitutes an investment. In *Murphy v. Ecuador*, the investor was undertaking certain investment activities – namely, production and supply of oil under an oil concession contract (well-recognized forms of investment) with the host state – through a branch (by itself not an investment).²³⁷ Similarly, in *Middle East Cement v. Egypt*, the tribunal noted that the claimant's activities through its branch met the requirements of "investment" as recognized by local laws and was specifically authorized by the state to investment a certain amount of money during a fixed duration of 10 years.²³⁸ In addition, the tribunal noted that the claimant's rights as lessee of a ship property fitted within the broad definition of an investment set out in the applicable treaty.²³⁹

120. These cases thus demonstrate that what determines whether a branch satisfies the "investment" definition is the nature of its activities not merely the form of its existence.²⁴⁰

²³⁶ See Claimant's Reply, ¶ 81, n. 120.

²³⁷ *Murphy v. Ecuador*, ¶¶ 3, 32, 119.

²³⁸ *Middle East Cement Shipping and Handling Co. S.A. v. Arab Republic of Egypt*, ICSID Case No. ARB/99/6, Award, (12 Apr. 2002), ¶¶ 82, 136 (Georgilis, Shahid, Yehia) (RLM-112) ("*Middle East Cement*").

²³⁹ *Id.*, ¶ 136.

²⁴⁰ The facts of both cases relied on by Claimant, *Murphy v. Ecuador* and *Middle East Cement v. Egypt*, are starkly different from the present case. It was not the presence of the branch but the nature of the business transaction which determines the existence of a "protected investment." In *Murphy v. Ecuador* the investor was clearly operating in Ecuador an undertaking.

Thus, operating a branch office within the territory of Ecuador, by itself, is not an investment, particularly when its purpose is to conduct cross-border trading transactions.

121. In conclusion, MSDIA’s “ongoing business” of selling and distributing its products on a cross-border basis to private distributors in Ecuador does not constitute an investment since by its very nature it involves “trading transactions.” It therefore fails to satisfy the notion of “investment” which incorporates certain legal and economic characteristics.²⁴¹

C. Claimant’s Initiation Of This Arbitration Contravenes Article VI Of The Treaty

122. As Ecuador explained in its Opposition brief, Claimant’s “reservation” at any time to select any form of arbitration set forth under Article VI(3)(a)” is ineffective, both on account of the Treaty, which requires investors to make a definitive and exclusive choice of arbitral forum,²⁴² as well as a result of the ICSID Convention.²⁴³

123. Claimant’s Reply is not relieving it of its awkward position.

124. Claimant is essentially making three arguments. First, it argues that because it was “concerned about preserving its rights,” in light of Ecuador’s declaration under Article 25(4) of the ICSID Convention,²⁴⁴ it conditioned its consent on its reservation of its right at any time to consent to some other form of arbitration under the Treaty.²⁴⁵ Of course, this is a ludicrous argument – and in any event, has no legal relevance in the face of the Treaty’s explicit dictates.

²⁴¹ See, e.g, Douglas, p. 163 (RLM-134).

²⁴² Ecuador’s Opposition, ¶¶ 94-96.

²⁴³ *Id.*, ¶ 97.

²⁴⁴ The provision reads: “Any Contracting State may, at the time of ratification, acceptance or approval of this Convention or at any time thereafter, notify the Centre of the class or classes of disputes which it would or would not consider submitting to the jurisdiction of the Centre. The Secretary-General shall forthwith transmit such notification to all Contracting States. Such notification shall not constitute the consent required by paragraph (1).”

²⁴⁵ Claimant’s Reply, ¶¶ 96, 98.

Ecuador's declaration under Article 25(4) of the ICSID Convention excluded from its consent to the jurisdiction of the Centre disputes related to the exploitation of its natural resources.

Assuming *arguendo* that Claimant possessed at the relevant time a protected investment under the Treaty, it cannot seriously suggest that its dispute with Ecuador relates to the exploitation of its natural resources.

125. Related is the suggestion by Claimant that events subsequent to its consent to ICSID jurisdiction, namely the denunciation of the Convention by Ecuador, somehow justify in retrospect its reservation of rights. Again, there is no legal significance to this argument. But this argument is also disingenuous. Article 72 of the ICSID Convention provides that a Contracting State's denunciation of the Convention "shall not affect ... the obligation under [the] Convention of that State ... arising out of consent to the jurisdiction of the Centre given by [the State] before [notice of denunciation] was received by the depositary." As Claimant admits, Ecuador denounced the Convention one month later after its consent.²⁴⁶

126. Claimant's first legal argument is premised on the concept of "complete control" of the investor over its right to arbitrate disputes with the host State that are covered by a bilateral investment treaty; for Claimant, "complete control" "surely includes the right to condition an acceptance of arbitration through a reservation of rights."²⁴⁷ Yet "complete control" does not give the investor the right to choose more than one alternative. As Professor Vandeveld, the authority relied upon by Claimant, states:

... if multiple fora for international arbitration are available, the investor may choose among them. Even where such language does not appear, as a practical matter the investor generally controls the

²⁴⁶ Claimant's Reply, ¶ 97.

²⁴⁷ Claimant's Reply, ¶ 99 (citing Vandeveld, pp. 436-437 (CLM-109)).

choice. The reason is that BITs typically include the host state's consent to each of the available alternatives, but never the investor's consent because the investor is not a party to the BIT, the investor thus may control the choice to consenting *to only one of the alternatives*.²⁴⁸

127. Claimant next argues that in light of the exclusivity and irrevocability of its consent to ICSID arbitration, its reservation of rights somehow brings about the invalidity of its consent.²⁴⁹ But this argument is contradicted by Claimant's authorities, which clearly stipulate a presumption in favor of a perfected consent in the area where offer and acceptance coincide. Claimant's first authority, Professor Schreuer's commentary on the ICSID Convention, confirms this proposition: Claimant's offer, submitted by way of its 8 June 2009 letter, coincided with Ecuador's offer, contained in the Treaty, thereby perfecting the parties' consent.²⁵⁰ That offer and acceptance did not completely coincide in expression -- Claimant's so-called "reservation of rights" -- does not invalidate the consent; rather, Claimant's reservation lies outside the parties' consent. In other words, it is Claimant's reservation that must be ignored as invalid not the consent, which has been perfected, "to the extent" that offer and acceptance coincided.²⁵¹ And indeed, the second authority cited by Claimant confirms this: "it is only in the area of coincidence that the consent is both effective and irrevocable."²⁵²

²⁴⁸ Vandeveldde, p. 436 (CLM-109).

²⁴⁹ Claimant's Reply, ¶ 100.

²⁵⁰ Schreuer, *THE ICSID CONVENTION : A COMMENTARY* (2009), p. 230 (¶ 514) (RLM-79).

²⁵¹ *Id.*

²⁵² Szasz, p. 29 (CLM-104).

128. In light of the above, Ecuador responds to Claimant’s final contention regarding the sequencing of its consent and submission of dispute to arbitration *arguendo*. The Treaty terms are clear:

- Under Article VI(3)(a) the first step is for the investor to “to choose to consent in writing to the submission of the dispute for settlement by binding arbitration” to one of the four arbitral forums specified in sub-paragraphs (i) to (iv).
- The second and separate step is the initiation of arbitration which is clearly stated in Article 3(b): “**Once** the [investor] has so consented, either party to the dispute may initiate arbitration in accordance with the choice so specified in the consent.”

129. In its letter of June 8, 2009 MSDIA itself acknowledges the two step process and completed the first of the two steps. Thus MSDIA perfected its consent “prior to and separately” from submission of the request for arbitration -- something it now claims cannot be done.

130. In conclusion, Article VI of the Treaty holds a standing offer of Ecuador to settle investment disputes with investors through several methods of dispute settlement. It is clear from the terms of Article VI that, in order to refer an investment dispute for settlement, an investor has to make a choice among the different alternative methods available, which perfects Ecuador’s standing offer. Each alternative has its own relative advantages and disadvantages. Thus, an investor is required to evaluate its options and make an “exclusive and irrevocable choice.” What is not permissible is for the investor to make more than one choice; or make one choice and reserve its rights to resort to a second at its whim. Once a choice is made an investor has to live with that. Indeed, as stated by the tribunal in *ICS v. Argentina*, an investment treaty “presents a ‘take it or leave it’ situation.”²⁵³

²⁵³ *ICS Inspection*, ¶ 272 (RLM-28).

IV. CLAIMANT HAS FAILED TO DEMONSTRATE AN URGENT NEED TO PREVENT IRREPARABLE HARM.

131. Claimant has failed to carry its burden to show that there is any imminent threat of irreparable harm to it or its business in Ecuador, or that the interim measures it has requested are urgently needed. In its Reply, Claimant argues that its Ecuador business will suffer irreparable harm from a judgment by the National Court of Justice because (1) there is a likelihood of an adverse decision by the National Court of Justice; and (2) once the decision is rendered, NIFA will seek to enforce it against MSDIA's assets in Ecuador.²⁵⁴ Claimant argues that these events are imminent, and justify urgency because (1) the National Court decision is "likely" to be issued before the final award in this case and (2) it would be "immediately enforceable" by NIFA.²⁵⁵

132. Claimant's own evidence shows, however, that it believes there is no risk whatsoever that an adverse judgment will be issued against it by the National Court of Justice or that it will suffer harm as a result thereof. As discussed in Section II(B)(1) above and summarized below, Claimant submitted with its Reply its financial statements for 2011, audited by PWC as of 25 April 2012.²⁵⁶ On 20 April 2012 -- after every event in the National Court of Justice of which Claimant now complains to this Tribunal had occurred -- Claimant submitted those same financial statements to the Ecuadorian Superintendence of Companies, stating that it expects a decision favorable to it in its appeal to the National Court of Justice and, for that reason, it is not

²⁵⁴ Claimant's Reply, ¶ 118.

²⁵⁵ Claimant's Reply, ¶ 179.

²⁵⁶ C-111.

necessary for it to take any steps to cover any risk of loss from the outcome of its appeal.²⁵⁷ In Claimant's own words, written subject to civil and criminal penalties under Ecuadorian law less than six weeks before it filed its request for interim measure, there is no risk, no imminent harm, and no urgency regarding a National Court of Appeals' judgment.

133. Claimant's arguments on irreparable harm and urgency, like its arguments on futility, are fake. They are all based upon Claimant's manufactured assertion, for the ears of this Tribunal only and wholly belied by its contemporaneous statements in its financial statements, that the judgment of the National Court of Justice is "likely" to be adverse to it. Even if the disingenuousness of its arguments had not been revealed, however, Claimant has offered no evidence, and no legal arguments, that meet its burden of proving that its requested measures are urgently needed to prevent irreparable harm to its rights.

A. Claimant Has Failed To Demonstrate That Its Ecuador Business Would Be Irreparably Harmed.

1. While Claimant's Reply asserts that the National Court of Justice's decision will likely be adverse to it, its evidence does not support the assertion and actually flatly contradicts it.

134. Claimant posits that, in order to succeed on its interim measures request, it need only show that a threat of harm from an adverse decision of the National Court of Justice is "likely."²⁵⁸ But Claimant has admitted throughout its Request and its Reply that, although it considers an adverse decision to be likely, it actually has no idea how the National Court of Justice will rule. Quoting Ecuador's Opposition, Claimant unequivocally agrees that "it is true

²⁵⁷ MSDIA's April 30, 2012 Submission of Financial Statements to the *Superintendencia de Compañías* (REM-5).

²⁵⁸ Claimant's Reply, ¶ 113.

that 'the National Court of Justice's decision is uncertain in content'.²⁵⁹ In fact, it is now clear that, in vigorously pursuing its appeal to the National Court of Justice, Claimant actually expects, and has so informed its auditors and the Ecuadorian Government that it unreservedly believes that the National Court will rule in its favor. According to Claimant, it is not only "likely" that it will succeed on its appeal; it is certain that it will. But even without the revelation, Claimant has mustered no evidence of a likelihood of an adverse decision in any event.

135. Claimant's failing in this respect begins with its admission that the interim measures are not urgent and are contingent upon how the National Court of Justice will decide its appeal.

According to Claimant:

*MSDIA is not requesting the Tribunal order Ecuador to take any immediate steps whatsoever. Rather, MSDIA is requesting an order that would have effect only after a decision is issued by its National Court of Justice rendered the judgment subject to enforcement....The interim measures sought by MSDIA would impose no obligations and no burdens whatsoever on Ecuador until after its National Court of Justice issued a judgment adverse to MSDIA.*²⁶⁰

136. Claimant's President, Mr. Jean Marie Canan, confirms that Claimant at best is unsure how the National Court of Justice will rule on its appeal: "I understand that, in the event the National Court of Justice upholds the \$150 million judgment against MSDIA, and that MSDIA

²⁵⁹ Claimant's Reply, ¶ 167.

²⁶⁰ Claimant's Reply, ¶ 40 (emphasis added); *see also, e.g.*, Request, ¶ 80 ("As explained above, *if* the National Court of Justice affirms the judgment against MSDIA, the damage to MSDIA's business in Ecuador would be swift and irreparable"); ¶ 30 ("*If* the manifestly partial and unjust judgment [of the court of appeals] against MSDIA is enforced against MSDIA's assets while this arbitration is pending..."); ¶ 65 ("*If* the Ecuadorian courts order the seizure of MSDIA's assets in Ecuador to satisfy the judgment against it..."); Claimant's Reply, ¶ 3 ("*If*, as there is every reason to expect, the decision of the National Court of Justice is adverse to MSDIA..."); ¶ 14 ("*If* -- as is unlikely given the history -- the judgment issued by the National Court of Justice is not adverse to MSDIA...") (emphasis added in each quotation) .

subsequently elects not to pay the judgment voluntarily, NIFA would be free to ask the Ecuadorian courts to order the seizure of MSDIA Ecuador's assets."²⁶¹

137. Claimant's submissions in this proceeding are devoid of any evidence that the National Court of Justice will rule in a manner that would be adverse to it. Indeed it appears that its expert on Ecuadorian law, Dr. Jaime Ortega Trujillo, was pointedly not asked his opinion on this. In his second expert opinion, Dr. Ortega states that:

It is worth noting that I have not been asked, either in my first report or in this report, to analyze the merits of the arguments submitted to the National Court of Justice by [MSDIA and NIFA]. The merits of the case before the National Court of Justice is [sic], therefore, beyond the scope of my opinion.²⁶²

138. Instead, Claimant's argument on the "likelihood" of irreparable harm from the National Court's eventual ruling rests entirely upon the same speculation and innuendo that it advances to support its futility argument, i.e., unfounded assertions about the general state of the Ecuadorian judiciary and non sequiturs imputing the alleged irregularities in the lower courts, as well as a now-superseded panel of National Court of Justice judges, to the panel of judges that will decide its appeal. As Ecuador has already demonstrated in Section II(B) above, however, Claimant has utterly failed to establish that its recourse to the National Court of Justice is futile. For the same reasons, it has failed to establish any "likelihood" that a ruling by the National Court will harm its business in Ecuador, imminently or otherwise.

139. The uncertainty of outcome of the decision of the National Court of Justice is made clear by the testimony of Dr. Moscoso Serrano. He explains that, given the nature of Claimant's

²⁶¹ Second Canan Witness Statement, ¶ 13. *See also*, First Canan Witness Statement, ¶ 18 ("I understand that *if that judgment is confirmed by the National Court of Justice*, NIFA would be free to proceed to enforce that judgment against MSDIA's assets in Ecuador and to initiate further action outside Ecuador in an effort to enforce the judgment obtained in Ecuador in the courts of other countries").

²⁶² Second Ortega Opinion, ¶ 2.

appeal, it is "impossible to anticipate or predict. . .the content of the National Court's decision."²⁶³ As explained by Dr. Moscoso Serrano and set forth in detail in Ecuador's Opposition, Claimant has advanced multiple violations of procedural and due process rules and violations of substantive law in its appeal, resulting in at least nine eventualities for the National Court of Justice's decision, only *one* of which is its affirmation of the Ecuador Court of Appeals' decision.²⁶⁴ In his opinion in support of this Rejoinder, Dr. Moscoso Serrano further explains:

In order for the judgment [of the Court of Appeals] to be enforceable, the National Court would have to reject: (i) MSDIA's allegation of lack of jurisdiction, and by consequence, its request for irremediable nullity of process; (ii) the request for nullity for lack of the required pre-judicial interpretation by the Court of Justice of the Andean Community; (iii) the allegations of constitutional violations; and (iv) the allegations of improper application, failure to apply, or misinterpretation of the law, including mandatory judicial precedents or evidentiary standards. Yet if one or more of these arguments were accepted, the judgment would have to be modified or revoked, which would make enforcement impossible. For example, (i) if the National Court accepts the argument concerning lack of jurisdiction, this would result in the proceeding being closed. Similarly, (ii) if the National Court accepts the request for nullity for lack of pre-judicial interpretation by the Court of Justice of the Andean Community, this would give rise to the nullity, if not of the entire process, at least of the judgment issued by the Provincial Court. This would return the case to its status at the time when the Provincial Court failed to seek the opinion of the Court of Justice [of the Andean Community], thereby revoking the [Court of Appeals'] judgment issued on September 23, 2011, and resulting in there not being any enforceable judgment in existence. (iii) If the National Court accepts one or more of [the] allegations of nullity resulting from constitutional violations, the case would return to the status when such violations occurred. This could result in [a] declaration of complete nullity of the case if the National Court determines that the violation occurred at the time the claim was filed, which would result in the revocation of the judgment, thus making it impossible

²⁶³ First Moscoso Legal Opinion, ¶ 7.

²⁶⁴ Ecuador's Opposition, ¶¶ 104(b), quoting First Moscoso Legal Opinion, ¶ 7.

to enforce. (iv) If the National Court grants one or more of the claims of improper application, failure to apply or misinterpretation of the law, the appealed judgment would have to be amended and revoked, and its errors would have to be corrected, and therefore, it would also not be possible to enforce the judgment of the Provincial Court. If the National Court accepts any of the allegations asserted by NIFA, this would also require the modification of the judgment.²⁶⁵

140. Further eroding the "likelihood" that Claimant will ever suffer any harm whatsoever from the pending appeal, the National Court of Justice will review the entire record of the case and has the power to correct any error made by the court of first instance or the Court of Appeals.

According to Dr. Moscoso Serrano:

It bears emphasizing that the National Court has the full jurisdiction to review de novo all facts and evidence presented in the courts of first and second instance and within the scope of issues presented on appeal by the parties. To the extent it determines that a judgment is null, the National Court will revoke the judgment and transfer the case back to the relevant court. If the National Court determines that a judgment is not null but contains errors, it has full authority to correct those errors and issue a new corrected ruling. If the National Court determines that the entire cause of action is null, it has full authority to dismiss and close the case.²⁶⁶

141. Given the multiple grounds of error Claimant has raised on appeal and the National Court of Justice's powers to review and correct them, then, it is no wonder that Claimant has expressed certitude about prevailing there. But whether this Tribunal relies on Claimant's evidence in its financial statements that it will prevail and that the Court of Appeals' decision poses no threat to its business in Ecuador, or Claimant's concession in its Reply that the National Court's ultimate decision "is uncertain in content," corroborated by Dr. Moscoso Serrano's testimony that "it is

²⁶⁵ Second Moscoso Legal Opinion, ¶ 3.

²⁶⁶ Second Moscoso Legal Opinion, ¶ 4.

impossible to conclude that enforcement of a judgment against [Claimant] will ever occur,"²⁶⁷ the same result obtains. Claimant has failed to carry its burden to show any "likelihood" that the National Court of Justice will ever issue a ruling that could cause harm to its business in Ecuador.

142. Claimant's attempts to distinguish the cases relied upon by Ecuador fail for the same reasons. Claimant cites with approval the tribunal's holding in *Occidental Petroleum v. Ecuador* that "[p]rovisional measures are not meant to protect against any potential or hypothetical harm susceptible to result from uncertain action,"²⁶⁸ but argues that -- supposedly unlike the facts in *Occidental* -- "there is nothing hypothetical about the risk of an adverse judgment from the [National Court of Justice]" and "nothing hypothetical about the risk that NIFA would seek to enforce the \$150 million judgment against MSDIA's assets in Ecuador."²⁶⁹ The facts of this case are precisely the same as those in *Occidental*, however, whichever of Claimant's assertions about the "risk" of an adverse National Court judgment the Tribunal believes.

143. The tribunal in *Occidental* rejected the hypothetical nature of *Occidental's* assumption that Ecuador was threatening to transfer the oil concession that it sought to protect through interim measures, and it held that "interim measures are not meant to protect against any potential or hypothetical harm." The tribunal reached this decision because *Occidental* was "not even sure" that a transfer was being planned.²⁷⁰ Claimant here is even less sure than *Occidental*

²⁶⁷ First Moscoso Legal Opinion, ¶ 13.

²⁶⁸ Claimant's Reply, ¶ 117 (citing *Occidental Petroleum Corporation and Occidental Exploration and Production Company v. The Republic of Ecuador*, ICSID Case No. ARB/06/11, Decision on Interim Measures (17 August 2007), ¶ 89 (RLM-45)).

²⁶⁹ Claimant's Reply, ¶ 118.

²⁷⁰ *Occidental Petroleum Corporation and Occidental Exploration and Production Company v. The Republic of Ecuador*, ICSID Case No. ARB/06/11, Decision on Interim Measures (17 August 2007), ¶ 89 (RLM-45).

about the "risk" of irreparable harm; it has admitted that the National Court of Justice's pending decision is "uncertain in content."

144. Moreover, Claimant itself provides the type of assurances of no risk of irreparable harm to its business in Ecuador that Ecuador's counsel provided in *Occidental* and that the tribunal used only to corroborate its rejection of *Occidental's* uncertain, "hypothetical harm" to its claimed rights in the oil concession. In *Occidental*, Ecuador's counsel stated to the tribunal that Ecuador had "no plan" and "no intention" of transferring the oil concession; Claimant has stated unequivocally that there is no risk that it will receive an adverse judgment from the National Court and for that reason it has made no provisions to cover any loss from a judgment. Claimant's argument that *Occidental* "involved very different facts from the case at hand" proves too much.²⁷¹ The facts of this case could not be more congruous to those in *Occidental*.

145. Claimant's effort to distinguish the interim measures decision of the International Court of Justice ("ICJ") in the *Interhandel Case* is equally unavailing. According to Claimant, the ICJ "did not hold that there could be no urgency because the sale of the shares was conditional on a court proceeding."²⁷² The general uncertainty of the resolution of pending judicial proceedings was considered by the ICJ in *Interhandel*, however. That point was made clear by the ICJ, which stated:

According to the law of the United States, the sale of those shares can only be effected after termination of a judicial proceeding which is *at present pending in that country* in respect of which there is *no indication as to its speedy conclusion, and whereas*

²⁷¹ Claimant's Reply, ¶ 116.

²⁷² Claimant's Reply, ¶ 177.

such a sale is therefore conditional upon a judicial decision rejecting the claims of Interhandel.”²⁷³

146. The ICJ declined to indicate the requested measures, finding that the sale of the shares was not imminent²⁷⁴ and clearly recognizing both that the outcome of judicial proceedings at issue could not be known and that the timeframe was not imminent. That is precisely Ecuador’s argument: The outcome of the National Court of Justice’s decision is unknown and unknowable in content, and it is not imminent. Consequently, the uncertainty of both the timing and content of a judicial ruling demonstrates that the urgency requirement for obtaining provisional measures had not been met.

147. The sole case cited by Claimant in support of its argument that it need only show that an adverse decision of the National Court of Justice is "likely" and that it has carried its burden of proof to make that showing is *Chevron Corporation and Texaco Petroleum Company v. The Republic of Ecuador* ("*Chevron II*"). In its Opposition, Ecuador has already shown that both the factual background and the legal issues in *Chevron II* are not analogous to this case,²⁷⁵ and Claimant does not disagree that *Chevron II* presented fundamentally different facts and law than the present case. Among other facts and issues that diverge from those in this case, the arbitration between Chevron and Ecuador involved intense publicity and allegations by claimant, all untrue, that the Government of Ecuador had improperly extended support to the Lago Agrio plaintiffs and interfered with the court proceedings. Claimant has made no allegations of any interference by the Government with regard to NIFA's case against it. Moreover, *Chevron III* 's

²⁷³ *Interhandel Case (Switzerland v. United States), Order on Provisional Measures (24 Oct. 1957), I.C.J. Reports 1957*, pp. 110, 112 (emphasis added) ("*Interhandel Case*") (RLM-29).

²⁷⁴ *Id.*, p. 106.

²⁷⁵ Ecuador’s Opposition, ¶¶ 75-76.

award of interim measures is an outlier that flies in the face of the overwhelming majority of arbitral and other international tribunal decisions that have acknowledged that interim measures are not appropriate in the absence of a final decision of the respondent state's judicial system and a showing of futility of local remedies.

2. Claimant's assertion that it merits interim measures because its payment of an adverse decision of the National Court of Justice would be "irrational" is meaningless and does nothing to meet its burden to demonstrate irreparable harm.

148. Claimant began this interim measures proceeding with the same kind of attempted deception about the impact of an adverse judgment on its Ecuador operations as the other attempts that permeate its entire Request for interim measures. It alleged that MSDIA Ecuador would be "completely destroyed" because the only assets available to satisfy a judgment in NIFA's favor would be those of its Ecuador branch, the total value of which, Claimant said, "is far less than the amount of the \$150 million judgment" that it is appealing to the National Court of Justice. Therefore, Claimant argued, a seizure of MSDIA's assets in Ecuador to satisfy the hypothetical judgment "will completely destroy MSDIA's business in Ecuador."²⁷⁶

149. In its Opposition, Ecuador exposed that argument for what it was: a misleading attempt to portray MSDIA's Ecuador branch as if it were a separate legal entity and to draw the Tribunal's attention away from the fact that the judgment that MSDIA is appealing is against MSDIA itself and implicates its assets as a whole. Ecuador's financial expert, Mr. Timothy H. Hart, analyzed the entire financial situation of MSDIA, based on balance sheets and income statements for 2007-2011 that Ecuador requested and obtained from MSDIA. Mr. Hart concluded that Claimant would have the financial wherewithal to satisfy a \$150 million

²⁷⁶ Claimant's Request, ¶¶ 64-65.

judgment without disruption to its business operations or significant impact on its net current assets of \$ 1.13 billion.²⁷⁷ In fact, based on Claimant’s cash reserves and accounts receivable (not counting inventory and prepaid amounts that it holds), Claimant could satisfy a \$150 million judgment in as little as one and a half months without disruption to its business.²⁷⁸ Mr. Hart reiterates his conclusion in his second expert report submitted with this Rejoinder:

I have shown that MSDIA has the ability to satisfy the judgment from its own existing net current assets. I reviewed MSDIA’s income statements and balance sheets for the years 2007 through 2011. I verified that the name listed at the top of these financial statements is in fact the same as MSDIA which is requesting the interim measures and against whom the judgment of the Ecuador court of appeals has been issued. The balance sheets show “MSDIA’s assets”. From my review of the balance sheets, MSDIA’s assets exceed \$1.2 billion as of December 31, 2011. If the Ecuadorian court of appeal's judgment is enforced against MSDIA’s assets, MSDIA would be able to satisfy the judgment through the use of its current assets in one and a half to two and a half months. This would have minimal impact on MSDIA’s short term operations and in no way would destroy the MSDIA business in Ecuador or significantly affect the MSDIA business.²⁷⁹

150. In its Reply, Claimant does not dispute Mr. Hart's conclusions that MSDIA is the party against which the judgment would be enforced and the party whose financial wherewithal must be evaluated in order to determine whether irreparable harm could or would occur. Claimant also does not dispute that it has the means to pay a judgment against it in the full \$150 million amount of the Court of Appeals' judgment, with no adverse impact on it. Apparently unable to come up with any argument why it could not pay an adverse judgment if the National Court of Justice were to issue one, and thereby avoid any irreparable harm to its Ecuador operations,

²⁷⁷ Expert Report of Timothy H. Hart, (24 July 2012) (“First Hart Expert Report”), ¶¶ 24-25.

²⁷⁸ *Id.*

²⁷⁹ Hart Second Expert Report, ¶ 19.

Claimant advances an entirely new argument in its Reply. It admits that it has the wherewithal to pay an adverse judgment in the full \$150 million amount, but -- supported by its financial expert, Mr. R. Brian Calvert -- Claimant now asserts that "[t]he fact that a company can pay for something does not mean that it should pay for it."²⁸⁰ According to Mr. Calvert, because a \$150 million judgment is worth more than Claimant's \$14.3 million in assets located in Ecuador, it would not be "rational" for Claimant to pay a judgment to retain those assets. Claimant's President Mr. Canan agrees with Mr. Calvert: Claimant's payment of a \$150 million judgment against it would not be "rational," such that "we can state definitely today that MSDIA would not pay the \$150 million judgment in the NIFA case if that judgment were to be affirmed."²⁸¹

151. This is a stunning proposition. In effect, Claimant's position is: "We have the means to protect our Ecuador business -- which we have said is vital to us -- from irreparable harm, but we won't lift a finger to do so, so grant us interim measures so that we won't have to cause irreparable harm to it." In Claimant's paradigm, it is not Ecuador or its judicial system that would cause irreparable harm to Claimant's Ecuador business; it is Claimant itself that would choose irreparable harm. There is no support in law or fact for finding that an applicant for interim measures that has the ability to avoid irreparable harm needs interim measures to protect its rights.

152. While urged as a "rational" choice by Claimant, its purported decision to destroy its Ecuador business if the National Court of Justice rules in a manner adverse to it is, first and foremost, meaningless. As Mr. Hart explains:

²⁸⁰ Expert Opinion of R. Brian Calvert ("Calvert Expert Opinion"), ¶¶ 13-14; *see also* Claimant's Reply, ¶¶ 142-143.

²⁸¹ Second Canan Witness Statement, ¶ 8.

Mr. Calvert's analysis is flawed for many reasons, but more importantly I find that the Calvert Report is irrelevant as it ignores how MSDIA has treated the \$150 million judgment in its audited financial statements.

....

It is important to understand that financial statements, even when audited by outside accountants, are the statements of the company itself and the responsibility of company management....

The management of MSDIA is responsible for the preparation and reasonable presentation of their financial statements for their Ecuador operations in accordance with International Financial Reporting Standards, and the internal controls necessary to allow for the preparation of financial statements that are free of material distortions, due to fraud or error. The representations made by management are relied upon by the auditors and in turn the consolidating company (in this case, MSDIA's parent, Merck & Co. Inc. ("Merck"), which is a publicly-traded company).²⁸²

153. Mr. Hart goes on to explain that, because Mr. Calvert is not an accountant, he may not have appreciated the import of Claimant's April 2012 statement that MSDIA expects a decision from the National Court of Appeals favorable to it and that, accordingly, it has taken no steps to cover any risk of loss due to NIFA's lawsuit. As Mr. Hart explains:

If MSDIA believed it might lose the appeal, it should have reduced its reported earnings by taking a provision or a reserve to account for the loss they believed was likely. MSDIA did not make this entry in their financial statements.

....

Mr. Calvert has overlooked or failed to understand the implications of management statements to its accountants PWC, that the \$150 million judgment does not pose a significant risk to its Ecuador operations. MSDIA's own disclosures say they do not believe that they will lose the appeal.²⁸³

²⁸² Second Hart Expert Report, ¶¶ 4, 6-7.

²⁸³ Second Hart Expert Report, ¶ 11, 17.

154. Mr. Hart goes on to analyze the two explanations that Mr. Calvert gives for his conclusion that it would not be "rational" for Claimant to pay the judgment, and he explains that, as to both explanations, Mr. Calvert's analyses are based upon flawed reasoning and are fundamentally irrational. To summarize, Mr. Hart demonstrates that Mr. Calvert's analyses fail to take into account the historical practices of Claimant and its parent Merck regarding Claimant's intercompany finances; or that any judgment would be against Claimant's assets as a whole; or that Mr. Canan has concluded in his testimony in this case that Claimant expects that NIFA would try to execute on Claimant's assets outside of Ecuador.²⁸⁴ Mr. Hart explains that, when Mr. Calvert's explanations for why non-payment of the judgment is adjusted for these factors, it would be irrational for Claimant not to pay a \$150 million judgment if the National Court of Justice were to uphold the Court of Appeals' judgment against Claimant in all respects. As Mr. Hart explains, the difference between the value of Claimant's \$1.2 billion in assets and a \$150 million judgment is over \$1 billion dollars, which -- under Mr. Calvert's analysis -- would mean payment would be "value creating" for Claimant, not "value destroying," and therefore the only rational decision would be to pay the judgment. In addition, Mr. Hart concludes:

It is my opinion that no one analyzing MSDIA's financial statements and the financial statements of its Ecuador operations could exclude the possibility, which Mr. Canan actually predicts will occur, that NIFA would seek to execute a judgment against MSDIA outside of Ecuador. As discussed above, MSDIA's assets exceeded \$1.2 billion as of December 31, 2011, and the financial statements of MSDIA's Ecuador branch show that its assets in Ecuador as of December 31, 2011 were \$14.3 million. MSDIA's assets outside Ecuador are approximately 84 times larger than its assets in Ecuador, and they are 8 times larger than the \$150 million judgment that MSDIA is appealing. NIFA would have the possibility of recovering the full amount of a \$150 million judgment by executing on it outside Ecuador, but it would only be

²⁸⁴ Second Hart Expert Report, ¶¶ 23-35.

possible for it to recover less than one-tenth of the value of a \$150 million judgment if it executed on it in Ecuador. Mr. Calvert did not take any of these financial factors into account, and he ignored Mr. Canan's predictions that NIFA would try to enforce a judgment outside of Ecuador.²⁸⁵

155. Claimant is free, of course, to decide not to pay a judgment, should one be rendered against it by the National Court of Justice. But its reliance on the "rationality" of such a decision does not help it to carry its burden to show the likelihood of irreparable harm to its business in Ecuador. In fact, it has the opposite effect; it demonstrates that any irreparable harm that might flow from Claimant's decision not to pay a judgment, when it has the means to do so without harm to itself, would be attributable to itself, and not to Ecuador.

3. Claimant's argument that international law grants it an option not to pay any judgment it considers unjust in the absence of irreparable harm to the Claimant is unfounded.

156. MSDIA claims that it is "not required to choose between (i) paying the \$150 million judgment . . . or (ii) suffering the complete destruction of its business in Ecuador."²⁸⁶ It contends that "[o]ther tribunals faced with similar situations have specifically held that claimants are entitled to interim measures of protection specifically to prevent their being placed in such an impossible dilemma."²⁸⁷ This contention is incorrect for at least three reasons. First, the only three cases cited by Claimant in support did not involve "similar situations." Second, as discussed below, the tribunals did not approach the issue as framed by the Claimant – the "impossible dilemma." Finally, Claimant's argument fails to take into account that under international law, it has the obligation to mitigate its damages and that, as it has admitted, if it

²⁸⁵ Second Hart Expert Report, ¶ 34.

²⁸⁶ Claimant's Reply, ¶ 136.

²⁸⁷ *Id.* (emphasis added).

does not satisfy the judgment and allows its assets to be seized in the fashion it describes, it will have single-handedly contributed to its future damages.

157. First, as described in Ecuador’s Opposition, *Perenco* and *Burlington* did not involve similar situations. They involved ongoing monthly levies on the claimants’ oil sales and the claimants’ request for specific performance, which was accepted by the tribunals. The quotes cited by the Claimant were lifted out of context. In *Perenco*, the tribunal made the statement cited by the Claimant that “Perenco should not, pending a final decision, be required to choose between making the very payments they dispute and suffering extensive seizures of its oil production or other assets”²⁸⁸ in response to the “fundamental question” that it formulated in that case, namely “whether, an arbitration having been initiated to determine whether Perenco’s rights under the Participation Contracts have been modified or superseded by the requirement in Law 42 that it make enhanced payments to Ecuador, not provided for in those contracts, circumstances should be considered by the Tribunal to require the grant of provisional measures.”²⁸⁹ As discussed below, the tribunal did not address whether “irreparable harm” would be caused to Perenco.²⁹⁰

158. Similarly, Claimant misinterprets the quote in *Burlington*. Claimant’s erroneous proposition that the tribunal was engaged in addressing the so-called “impossible dilemma” of making the claimant pay even if it can, is clear from the quote it cites:

²⁸⁸ *Perenco Ecuador Ltd. v. Republic of Ecuador*, ICSID Case No. ARB/08/6, Decision on Provisional Measures (8 May 2009), ¶ 60 (CLM-13) (“*Perenco*”).

²⁸⁹ *Id.*, ¶ 53.

²⁹⁰ This is clear from the tribunal’s discussion of legal authorities in support of its finding in paragraphs ¶¶ 55-58 of the decision, none of which were cited for “irreparable harm.” In particular, the tribunal “paid close attention to the first decision on provisional measures of the ICSID Tribunal in *City Oriente v. Ecuador*, which as stated earlier, *did not involve* irreparable harm discussion. *Id.*, ¶ 57.

While profit sharing may be legitimate, expecting that a foreign investor will continue to operate a loss making investment over years is unreasonable as a matter of practice. Contrary to the Respondents' assertion pursuant to which the protection would be granted against the investor's own act of "walking away", the Tribunal considers that the project and its economic standing is at risk ***regardless of the conduct of the investor.***²⁹¹

159. In other words, whether the claimant "walked out" (in this case, let its assets be seized) or continued to perform the participation contract (in this case satisfy the adverse judgment, if any), the tribunal's decision would have been the same. In addition, it bears repeating that if Claimant satisfies the judgment, again in the hypothetical scenario of the National Court's affirmation of the lower court's judgment, its business would not be destroyed and if its claim before this Tribunal turns out to be meritorious, it will be indemnified fully for the payment of the judgment.

160. Finally, the Claimant fails to explain how its situation is similar to that described in the quote it cites from *Paushok*, in which the tribunal stated that it "would be very presumptuous for any investor to make additional equity investments in that company" because "GEM's net book value assets are worth less than 50% of the amount of WPT owing and the possibility that the Mongolian Parliament would again refuse to amend the WPT Law."²⁹² In other words, would any bank or institution ever consider granting a loan to a branch, which does not have a distinct legal personality.

161. In short, none of the authorities cited by the Claimant establishes that the tribunals considered the a scenario where the Claimant could pay without being significantly impacted, or had a choice not to pay, and on that basis granted interim measures.

²⁹¹ *Burlington*, ¶ 83 (CLM-3).

²⁹² *Paushok*, ¶ 61 (CLM-12).

162. Importantly, Claimant’s decision not to satisfy the potentially adverse judgment in the NIFA litigation or “any judgment” that it finds “unjust” does not excuse it from its obligation to mitigate its damages. Tribunals have recognized that contributory negligence and failure to mitigate damages are reasons why a claimant should not receive compensation, or at least full compensation, for losses.²⁹³ If the Claimant lets its assets be seized, any resulting “destruction” of its branch operations would be the result of its own action. Even if it were to ultimately prevail in this arbitration, it would have to prove that it did not fail to mitigate its alleged loss of business in Ecuador.

4. Claimant Has Failed To Show Why Monetary Compensation Would Not Make It Whole for the Injury It Alleges It Would Suffer.

163. As demonstrated above, Claimant has not shown that it will suffer irreparable harm or that its business in Ecuador will be destroyed.

164. But even if MSDIA could show that its business in Ecuador would be destroyed, Claimant's right to pursue its claims for damages in this arbitration and the Tribunal's ability to decide those claims will not be affected in the absence of the interim measures requested.²⁹⁴ As explained in Ecuador’s Opposition, international law establishes that, where alleged injuries may be compensated for in the final award, there is by definition no “irreparable harm” and

²⁹³ See, e.g., *MTD Equity Sdn. Bhd. and MTD Chile S.A. v. The Republic of Chile*, ICSID Case No. ARB/01/7, Award (25 May 2004), ¶¶ 242-244 (Sureda, Lalonde, Oreamuno) (RLM-113) holding that the claimants should bear responsibility for a portion of their damages resulting from their own decisions that increased their risks in the transaction and for which they bore responsibility, regardless of the treatment given by the State); *Middle East Cement*, ¶¶ 166-171 (recognizing the investor’s obligation to mitigate damages and concluding that, had the State provided proof that substitution of the commercial activity was economically viable, the tribunal would have reduced the investor’s compensation) (RLM-112).

²⁹⁴ See *Plama Consortium Limited v. Bulgaria*, ICSID Case No. ARB/03/24, Order on Provisional Measures (6 Sept. 2005) (Salans, van den Berg, Veeder), ¶ 46 (RLM-49).

provisional measures will not be granted.²⁹⁵ As held by the Iran-U.S. Claims Tribunal in a case where the Iranian Air Force sought an order requiring the claimants and the United States to refrain from taking any action to execute a judgment issued by the U.S. courts against it:

A stay of execution of judgment in the present case is not necessary either to protect a party from irreparable harm or to avoid prejudice to the jurisdiction of this Tribunal. ***Monetary damages are not irreparable harm, and the Tribunal has the power in the proceedings . . . to rectify any damages caused by execution of the judgment.***²⁹⁶

165. Claimant does not and cannot refute this well-established standard under the UNCITRAL Rules. Instead, Claimant seeks to except its case, relying repeatedly on the four cases discussed above – *City Oriente*, *Perenco*, *Burlington* and *Paushok* – in support of its argument that the destruction of an “ongoing business constitutes irreparable harm.”²⁹⁷

However, as was already shown in Ecuador’s Opposition, those cases are factually and legally inapposite here.²⁹⁸ Furthermore, they did not apply the standard of “irreparable harm” well established under the UNCTIRAL Rules and alleged by the Claimant in its Request.

²⁹⁵ Ecuador’s Opposition, ¶¶ 125-134. See, e.g., *Aegean Sea Continental Shelf Case (Greece v. Turkey)*, Request for Indication of Provisional Measures of Protection, Order, 1976 I.C.J. 3, 15-16 (11 Sept. 1976) (separate opinion of President Jimenez de Aréchaga) (RLM-4) (alleged breaches by Turkey of the exclusivity of rights claimed by Greece were capable of remedy in the final judgment and, therefore, provisional measures were not warranted); *Nuclear Tests Case (Australia v. France)*, Order on Provisional Measures, I.C.J. Reports 1973, ¶¶ 27, 29 (RLM-43) (awarding provisional measures when the effects of French nuclear tests on Australia “can never be undone and would be irremediable by any payment of damages”); *Sino-Belgian Treaty Case*, Order on Interim Measures, P.C.I.J., Ser. A, No. 8, 7 (1927) (awarding provisional measures because a possible infraction of the Claimant’s rights “could not be made good simply by the payment of an indemnity or by compensation or restitution in some other material form”) (RLM-128).

²⁹⁶ *Boeing Company, et al. and Government of the Islamic Republic of Iran*, Interim Award No. ITM 34-222-1, p. 4 (17 Feb. 1984) (RLM-77).

²⁹⁷ Claimant’s Reply, ¶ 123.

²⁹⁸ Ecuador’s Opposition, ¶¶ 165-173.

166. First, in *City Oriente*, *Perenco* and *Burlington*, the tribunals expressly applied a more relaxed notion of harm under the ICSID rules. The tribunal in *Perenco* stated at the outset that under Article 47 of the ICSID Rules, the rule of necessity was not irreparable harm:

[A]s the Respondents correctly submit, many of the authorities express the test in terms of “irreparable loss”. Where action by one party may cause loss to the other which may not be capable of being made good by an eventual award of damages, the test in the Article is likely to be met. ***But the Article [47] does not lay down a test of irreparable loss and the authorities do not warrant so narrow a construction*** (see paragraphs 55-58 below). Provisional measures may only be granted where they are urgent, because they cannot be necessary if, for the time being, there is no demonstrable need for them. ***Provisional measures will be granted if necessary, at the time of the decision, to preserve the effectiveness and integrity of the proceedings and avoid severe aggravation of the dispute.***²⁹⁹

167. Thus, the tribunal set forth its approach for “necessity,” which did not encompass irreparable harm. In its conclusions, the tribunal made it clear that “Perenco specified restitution as a form of relief requested.³⁰⁰ In the tribunal’s judgment, the seizure of Perenco’s assets, as described above, would seriously aggravate the dispute between the parties and jeopardize the ability of Perenco to explore for and produce oil in Blocks 7 and 21 pursuant to the Participation Contracts.”³⁰¹ The tribunal further made it clear that the provisional measures were necessary to safeguard Claimant’s contractual rights: “That question is whether, an arbitration having been initiated to determine whether Perenco’s rights under the Participation Contracts have been modified or superseded by the requirement in Law 42 that it make enhanced payments to

²⁹⁹ *Perenco*, ¶ 43 (CLM-13).

³⁰⁰ In *Perenco v. Ecuador*, the claimant sought provisional measures seeking to preserve certain “acquired [contractual] rights;” it argued that “[i]f provisional measures were not granted, the *very contractual and international law rights* that were the subject of the arbitration would be impaired, probably irreversibly, and the Tribunal’s ability to grant full relief would be compromised.” *Perenco*, ¶¶ 20, 23 (CLM-13).

³⁰¹ *Id.*, ¶ 46 (emphasis added).

Ecuador, not provided for in those contracts, circumstances should be considered by the Tribunal to require the grant of provisional measures.”³⁰² Hence, the consideration of harmful consequences was linked to the preservation of the claimant’s contractual rights. The tribunal’s finding that “Perenco’s business in Ecuador would be crippled” was thus linked to the claimant’s right of preservation of its contractual rights.³⁰³ No finding of “irreparable harm,” i.e., harm not compensable by monetary damages, was made.

168. Similarly, in *Burlington v. Ecuador*, the tribunal stated that “it [is] appropriate to follow those cases that adopt the [reduced] standard of ‘harm not adequately reparable by an award of damages.’”³⁰⁴ It also stated that it would grant interim measures after having assessed the risk of harm “with respect to the rights of both parties.”³⁰⁵ That the tribunal applied a much reduced standard of harm is evident from its response to Ecuador’s argument “that the effect of the seizures was economically neutral for the Claimant” as follows:

Yet, it misses the point. Indeed, the *risk of further deterioration of the relationship possibly ending with the destruction of the investment would still exist*. . . . The consequences of the end of the investment relationship would affect the investor as well as the State. The latter would then in effect lose future Law 42 payments if they are ultimately held to be due.³⁰⁶

169. This passage makes it clear that the tribunal was not concerned with the economic effect of Law 42 payments on the claimant independent of the preservation of its contractual rights.

³⁰² *Id.* ¶ 53 (emphasis added).

³⁰³ *Id.*, ¶¶ 53-57.

³⁰⁴ *Id.*; *Burlington*, ¶ 82 (emphasis added) (CLM-3).

³⁰⁵ *Id.*, ¶ 81.

³⁰⁶ *Id.*, ¶ 84.

170. In *City Oriente*, as already explained in Ecuador’s Opposition, the claimant made its request for interim measures not on the basis of irreparable harm to itself; rather its request was based on the urgency of preservation of its rights.³⁰⁷ No mention was made of irreparable harm at all. Ecuador did not initially respond to the claimant’s request but subsequently sought revocation of the interim measures issued by the tribunal on the basis that, inter alia, they were not necessary to prevent irreparable harm.³⁰⁸ The tribunal distinguished *City Oriente*’s request from other investment cases because it involved the claimant’s request for specific performance of the contract.³⁰⁹ It stressed that neither Article 47 of the ICSID Convention nor Arbitration Rule 39 “require that provisional measures be ordered *only as means to prevent irreparable harm*.”³¹⁰ It stated that “[i]t is not so essential that provisional measures be necessary to prevent irreparable harm, but that the harm spared the petitioner by such measures must be significant and that it exceed greatly the damage caused to the party affected thereby.”³¹¹ Focusing on the main relief sought by the claimant – the performance of the contract with Ecuador – and in view of preservation of the contractual rights, it considered the consequences of revoking the provisional measures as follows:

if the Provisional Measures are revoked, the expiration proceedings would go on with a high risk that the Contract may be *finally terminated* by an administrative declaration unilaterally

³⁰⁷ *City Oriente Ltd.* (2007), ¶ 54 (CLM-7).

³⁰⁸ *City Oriente Limited v. Republic of Ecuador*, ICSID Case No. ARB/06/21, Decision on Revocation of Provisional Measures (13 May 2008) (Fernández-Armesto, Grigera Naón, Thomas), ¶ 19 (CLM-8) (“*City Oriente 2008*”).

³⁰⁹ *Id.*, ¶ 86.

³¹⁰ *Id.*, ¶ 70 (emphasis added). (“The only requirement arising from the wording of Rule 39 is the traditional urgency requirement; this requirement was analyzed by the Arbitral Tribunal in paragraphs 67 *et seq.* of the Decision dated November 19, 2007, and the Tribunal concluded that it has effectively been fulfilled.”).

³¹¹ *Id.*, ¶ 72.

adopted by the State. Moreover, Petroecuador would become entitled forthwith to demand that City Oriente pay an amount of money not originally required under the Contract that doubles the total return earned in FY 2007. ***In this case, if these proceedings result in a final award granting the relief sought by Claimant, the decision would be impossible to perform, for the Contract would have already been terminated.*** Besides, the amounts claimed by Respondents are so high that there is a risk that the early payment of such amounts may jeopardize the company's economic feasibility.³¹²

171. It is clear from the tribunal's reasoning that the company's economic feasibility was not considered by the tribunal independent of the preservation of the claimant's contractual rights.³¹³

172. Thus, none of the foregoing cases can be considered as establishing the rule that the destruction of an ongoing business constitutes "irreparable harm" within the meaning of Article 26. Indeed, the tribunals could not have found that the businesses would be irreparably destroyed in the absence of interim measures, and at the same time order the claimants to put the amounts they owed under Law 42 in escrow accounts.³¹⁴ Importantly, in this case, Claimant's request is not based on any rights arising under the *intuito personae* concession contracts. Even if the tribunals considered harmful consequences to the claimants' concession contracts in those cases, the factual differences alone are enough to dismiss any idea that these cases are relevant to the Claimant's situation.

173. Finally, the claimant's analysis of *Paushok* misses the point. In *Paushok*, the tribunal expressly stated that its decision to grant provisional measures was anchored to the specific

³¹² *City Oriente 2008*, ¶ 76 (CLM-8).

³¹³ *Id.*, ¶ 76 (CLM-8) (emphasis added).

³¹⁴ *Perenco*, ¶ 63 (CLM-13) ("[T]he tribunal considers that Respondents should enjoy a measure of security in relation to sums accruing due to them from *Perenco* (not the Consortium) under Law 42 from the date of this Decision forward until such later decision." (emphasis added); *Burlington*, ¶¶ 87-88 (CLM-3) (noting that this would be "a balanced solution likely to preserve each Party's rights.").

circumstances of that case. Prior to addressing the issue of “significant harm”, the tribunal set forth the specific features of the request:

In deciding upon the present request for interim measures, the Tribunal will ***attach significant importance to the specific features*** surrounding this particular request ***which differentiate it from other awards referred to by the Parties***. In particular, the Government of Mongolia, while not admitting to any illegality in the measures which have been enacted and which are challenged in this case, has recognized, both in 2007 and 2008, that the WPT Law was not achieving its objectives and should be replaced by a less severe taxation regime. In addition, Respondent appears to wish GEM to continue its operations in Mongolia. . . . no seizure of or lien on GEM's assets would take place in connection with this dispute until a final award has been rendered in the present case.³¹⁵

174. This is not obiter dictum. This *is* the tribunal’s explanation for its decision. To be sure, in finding that interim measures were justified to avert the bankruptcy of the claimant’s local subsidiary GEM, the tribunal again underlined the specific circumstances of the case:

The Tribunal is aware of preceding awards concluding that even the possible aggravation of a debt of a claimant did not ("generally" says the *City Oriente* case cited below) open the door to interim measures when, as in this case, the damages suffered could be the subject of monetary compensation, on the basis that no irreparable harm would have been caused. ***And, were it not for the specific characteristics of this case, the Tribunal might have reached the same conclusion.***³¹⁶

175. Thus, the Claimant’s own authority supports Ecuador’s position that if the damages allegedly to be suffered in the absence of interim measures are remediable by a monetary award, no irreparable harm can be shown. Claimant cannot show any “specific circumstances” in its case; it cannot and has not shown that its alleged potential damages are not compensable by

³¹⁵ *Paushok*, ¶ 43 (CLM-12).

³¹⁶ *Id.*, ¶ 62.

monetary award. Nor can it show that its request not to have an adverse judgment enforced against it meets the disproportionality test, as will be shown below.

176. But even if the level of harm found in *Paushok* was applicable to Claimant's case, Claimant would not be able to show such harm in its case. While Claimant quotes the tribunal's description of the extent of harm that the local subsidiary in Paushok would suffer, it does not explain how it, MSDIA, would be similarly damaged by the adverse judgment in the absence of interim measures: Claimant cannot show that its "net book value assets are worth less than 50% of the [amount of the adverse judgment]."³¹⁷

177. MSDIA obviously attempts to have its "branch" treated as though it were the subsidiary as in *Paushok*. However, it has failed to explain how, legally speaking, a "branch" can be treated in the same way as the local subsidiary in *Paushok*. Claimant's argument elides altogether the fact that a branch is not a separate legal entity and cannot be viewed as a separate entity for the purposes of the enforcement of any judgment. Any judgment will be enforced against MSDIA, not its branch. Indeed, Mr. Canan recognized this stating that "structuring an operating business in a particular country as a branch can entail greater liability risk to a corporation than structuring an operating business as a subsidiary because a corporate subsidiary would afford greater protection against liability as a result of its separate corporate form."³¹⁸ Claimant therefore admits that its choice of setting up its business as a branch exposed it to greater liability.

178. In sum, the injury that Claimant seeks to prevent does not pertain to any rights that are special (such as contract rights) and is purely economic in nature. It does not dispute that its alleged damages can be compensated by a monetary award. Finally, Claimant fails to take into

³¹⁷ *Id.*, ¶ 61 (emphasis added).

³¹⁸ Canan's Second Witness Statement, ¶ 5.

account the fact that if it prevails on the merits and a potential adverse decision is found it will be made whole by the indemnification from the Republic of Ecuador.

B. Claimant Has Failed To Demonstrate That Interim Measures Are Urgently Needed.

179. The well-settled legal standard for urgency is a showing of an imminent potential of the action alleged to prejudice the Claimant's rights. After acknowledging and adopting the proper standard of imminence in its Request for Interim Measures, upon realizing that it could not meet this standard after Ecuador's Opposition, Claimant changed its position in its Reply and now contends that the alleged prejudicial action need not be immediately threatened as long as it is possible that it might arise some time before the final arbitral award. This approach eviscerates the substance of the urgency requirement under Article 26. In addition, realizing that despite the formulation adopted by some tribunals that urgency arises when the risk exists that irreparable harm may befall the applicant before the final award, it must show immediacy of its alleged harm on the facts, Claimant alleges in its Reply that it faces an immediate threat of irreparable harm.³¹⁹ However, Claimant's application of the immediacy requirement to its situation is without avail. Claimant's alleged harm is many degrees removed from being urgent.

180. *First*, as shown above, Claimant actually acknowledges, not only that an adverse decision of the National Court is not imminent, but that it is likely never to occur. In the audited financial statement filed with Ecuador's Superintendence of Companies on 30 April 2012, Claimant clearly indicated that it expects that it would prevail on its appeal before the National Court.

181. *Second*, even if the National Court affirms the court of appeals' judgment – an unlikely event in Claimant's view and the only one of the *nine eventualities* for the National Court's

³¹⁹ Claimant's Reply, ¶ 168.

decision that would cause the harmful consequences alleged by Claimant –the issuance of the National Court’s decision is not imminent.

182. *Finally*, Claimant’s portrayal of a swift enforcement of the affirmed judgment against it ignores the normal procedural steps that are involved in the enforcement of a judgment in Ecuador. In addition, the hypothetical nature of Claimant’s argument is amplified by its lack of knowledge of how NIFA, a third party absent in these proceedings, will act. Yet it is NIFA that will be deciding whether to enforce the judgment in Ecuador or opt for other jurisdictions instead, such as the United States, where it can obtain a full satisfaction of its judgment.

183. In short, for all of these reasons, ascertaining the imminence of any possible harm to Claimant is fraught with uncertainty.

1. Claimant Has Failed To Apply The Correct Test of Urgency, Requiring That The Action Alleged To Prejudice The Claimant’s Rights Be Imminent From the Present Perspective.

a. The legal standard for urgency is a showing of an imminent potential of the action alleged to prejudice the Claimant’s rights.

184. Even if Claimant had not revealed its actual view that an adverse decision is not likely, and thus not urgent, Claimant could not in any event meet the standards for determining urgency. The test of urgency under Article 26 requires that the action alleged to prejudice the Claimant’s rights be imminent at the time of the request, i.e., from the present perspective. Article 26 of the UNCITRAL Arbitration Rules enables the Tribunal to “take any interim measures it deems necessary in respect of the subject-matter of the dispute.” As discussed in Ecuador’s Opposition, implicit in the necessity provision is the requirement that the risk of irreparable harm must exist at the time when the applicant makes its request for provisional measures.³²⁰ Interim measures

³²⁰ See Ecuador’s Opposition, ¶¶ 101-104.

are not meant to safeguard against remote hypothetical risks. They are intended to avert “*imminent danger* of serious prejudice.”³²¹

185. Claimant’s statement that Ecuador has not cited a single authority in support of this test, well-established in international law, is simply untrue. Claimant has altogether avoided the authorities cited by Ecuador that recognized the imminence as the standard. Ecuador has cited cases where investor-State tribunals under both the UNCITRAL and ICSID rules have invariably found urgency only in cases of an *immediate* and *real* threat of harm, not an uncertain one.³²²

186. Claimant’s own cases support this view. Curiously, Claimant omits any discussion of the authorities it relies on for its irreparable harm arguments that also addressed the urgency requirement. In *Perenco v. Ecuador*, *City Oriente v. Ecuador*, and *Burlington v. Ecuador* – all relied on by Claimant – the tribunals were faced with PetroEcuador’s demand for *immediate* payment of levies and imminent seizure of assets under Law 42, and in two of these cases the payments were due *within a few days*.³²³ In *Perenco*, the tribunal stressed that “[p]rovisional

³²¹ *Paushok*, ¶ 62 (emphasis added) (CLM-12).

³²² See, e.g., *Id.*, ¶¶ 45, 62 (“But those specific features point not only to the urgency of action by the Tribunal but also to the necessity of such action in the face of an imminent danger of serious prejudice.”; *EnCana Corporation v. Republic of Ecuador*, LCIA Case No. UN 3481, Interim Award (31 Jan. 2004) (Crawford, Grigera Naón, Barrera Sweeney), ¶ 14 (CLM-10) (“*EnCana*”) (“In the present circumstances the Tribunal is satisfied that the measures taken give rise to a situation of urgency. They involve the freezing of accounts and the attempted attachment of substantial sums which are in dispute.”); *Occidental Petroleum Corporation and Occidental Exploration and Production Company v. Republic of Ecuador*, ICSID Case No. ARB/06/11, Decision on Provisional Measures (17 Aug. 2007) (Fortier, Stern, Williams), ¶ 87 (RLM-45) (“*Occidental Petroleum*”) (“An order for provisional measures will only be made where such measures are found to be necessary and **urgent in order to avoid imminent** and irreparable harm.” (emphasis added)).

³²³ See *Perenco*, ¶ 46 (CLM-13) (“On the material currently before the Tribunal, it seems clear that, as matters now stand, and in the absence of provisional measures, Perenco faces the imminent seizure of its assets in Ecuador . . . unless it pays that sum within a very few days” (emphasis added)); *Burlington*, ¶ 15 (CLM-3) (“[Respondents] had actually stated in a letter of 3 March 2009 that “steps have been, or will imminently be, taken by the ‘coactivas judge’ to seize certain assets in satisfaction of the debts claimed in C-55 to Burlington Oriente’s Request for Provisional Measures”. Although no amounts were specified, there is no dispute that Ecuador has seized certain quantities of oil produced by Burlington.”); *City Oriente Limited v. The Republic of Ecuador*, ICSID Case No. ARB/06/21, Decision on Provisional Measures, November 19, 2007, Decision on Provisional Measures (Nov. 19, 2007), ¶ 69 (CLM-7) (“*City Oriente Ltd.* (2007)”) (“The letter which Petroecuador attached to its latest invoice

measures may only be granted where they are urgent, because they cannot be necessary if, *for the time being, there is no demonstrable need for them.*”³²⁴

187. In addition, while the legal formulation of the urgency standard often refers to the risk of irreparable harm "before a final decision," the application of the standard has required that the alleged threatened harm be imminent at the time of the application for provisional measures.³²⁵

Thus, the ICJ has often formulated the urgency requirement “*in the sense that action prejudicial to the rights of the other party is likely to be taken before such final decision is given.*”³²⁶

However, the application of this standard by the ICJ has shown two approaches. In the first approach, the ICJ has found urgency where patent irreparable harm was imminent from the present perspective (e.g., risk of loss of human lives), as, for example, in the *LaGrand* case, where the Court spoke of “the greatest urgency.”³²⁷ This approach concerns cases where the complained-of action is already occurring and therefore the risk is present and not future. In the second approach, the ICJ has found urgency where the occurrence of the action prejudicial to the

differs from all previous letters, as it includes a demand for payment “*notwithstanding any pending proceeding.*” . . . In the Tribunal’s opinion, the passing of the provisional measures is indeed urgent, precisely to keep the enforced collection or termination proceedings from being started. . . .”

³²⁴ *Perenco*, ¶ 43 (emphasis added) (CLM-13).

³²⁵ *See* Claimant’s Reply, ¶ 169.

³²⁶ *Passage Through the Great Belt (Finland v. Denmark)*, Order on Provisional Measures (29 July 1991) ¶ 23 (emphasis added) (CLM-20).

³²⁷ *LaGrand (Germany v. United States of America)*, Order on Provisional Measures (3 Mar. 1999), I.C.J. Reports 1999, ¶ 9 (CLM-19). *See also Frontier Dispute (Burkina-Faso v. Republic of Mali)*, Order on Provisional Measures (10 Jan. 1986), ICJ Reports 1986, ¶ 21 (RLM-25); *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Yugoslavia (Serbia and Montenegro))*, Order on Provisional Measures (8 Apr. 1993), I.C.J. Reports 1993, ¶ 45 (RLM-10); *Land and Maritime Boundary (Cameroon v. Nigeria)*, Order on Provisional Measures (15 Mar. 1996), I.C.J. Reports 1996, ¶¶ 17, 38 (RLM-35).

applicant was in the near future and was certain.³²⁸ In contrast, if the alleged event can take place at some *more distant* future time, especially when its actual occurrence in the future is *still uncertain*, the Court has not indicated interim measures.³²⁹

188. In cases where the risk of harm was not imminent, the ICJ declined to grant provisional measures.³³⁰

189. Claimant takes issue with Ecuador's quote to Docent Sztucki, who summarized the state of ICJ jurisprudence in 1983.³³¹ However, there is nothing misleading in Ecuador's citation to

³²⁸ See, e.g., *Nuclear Test Case (Australia v. France)*, Order on Provisional Measures (22 June 1973), I.C.J. Reports 1973, p. 99 (RLM-43); *Nuclear Tests (New Zealand v. France)*, Order on Provisional Measures (22 June 1973), I.C.J. Reports 1973, p. 135 (RLM-44) ("*Nuclear Tests (New Zealand v. France)*").

³²⁹ For instance, in the *Interhandel* case, the Court relied on the contents of US law and a US declaration that it would abstain from taking any further action for the time being with respect to the subject matter of the dispute, thereby dismissing Switzerland's request on account of lack of urgency. *Interhandel Case*, pp. 112-113 (RLM-29). In the *Case Concerning Certain Criminal Proceedings in France*, the Court viewed the risk for the Congolese Head of State from criminal proceedings pending in France as only a hypothetical one, in view of statements of French counsel explaining that French law embodies the principle of sovereign immunity "in conformity with international law", which practically precluded the criminal prosecution of acting Head of States. *Certain Criminal Proceedings in France (Republic of the Congo v. France)*, Order on Provisional Measures (17 June 2003), I.C.J. Reports 2003 (RLM-13), 129, ¶¶ 33-35 (emphasis added). In the *Arrest Warrant* case, the Court took notice of the fact that the person concerned in the disputed arrest warrant ceased to exercise the functions of Minister for Foreign Affairs and was charged with those of Minister of Education, which involved less frequent international travel. *Arrest Warrant of 11 April 2000 (Democratic Republic of the Congo v. Belgium)*, Order on Provisional Measures (8 Dec. 2000), I.C.J. Reports 2000 (RLM-73). Accordingly, it was not established that irreparable prejudice might be caused in the immediate future to the Congo's rights or that the degree of urgency was such that those rights needed protection through the indication of provisional measures. *Id.*, ¶ 72.

³³⁰ See e.g., *Pulp Mills on the River Uruguay (Argentina v. Uruguay)*, Order on Provisional Measures (23 Jan. 2007), I.C.J. Reports 2007, ¶¶ 41-42 (RLM-51) ("*Pulp Mills Case 2007*") ("without addressing whether the roadblocks may have caused or may continue to cause damage to the Uruguayan economy," denied the request for provisional measures because the applicant "it has not been shown that were **there such a risk of prejudice to the rights claimed by Uruguay in this case, it is imminent.**" (emphasis added)); *Pulp Mills on the River Uruguay (Argentina v. Uruguay)*, Order on Provisional Measures (13 July 2006), ICJ Reports 2006, ¶¶ 73-76 (RLM-117) ("*Pulp Mills Case 2006*") (Despite noting its great concern for the protection of the environment, the Court denied provisional measures because, inter alia, "in the Court's view, there is however **nothing in the record to demonstrate** that the very decision by Uruguay to authorize the construction of the mills **poses an imminent threat of irreparable damage** to the aquatic environment of the River Uruguay or to the economic and social interests of the riparian inhabitants on the Argentine side of the river . . . **at this stage of the proceedings**"); *Certain Criminal Proceedings in France (Republic of the Congo v. France)*, Order on Provisional Measures (17 June 2003), I.C.J. Reports 2003, ¶ 35 (RLM-13) (The court found that the proceedings, which at the time of filing were only an investigation regarding a lawsuit filed against Congolese officials, did not pose "**at the present time**" a "risk of irreparable prejudice.").

³³¹ See Claimant's Reply, n. 273.

Sztucki, who completes his summary of the application of the urgency requirement *on the facts*, by the ICJ stating that “in practice, the Court was confronted mainly with the task of evaluating the consequences of the events in question” and that “[t]his practice seems correctly to reflect the idea underlying the adoption of Article 41, according to which the possibility of granting interim protection was related to ‘certain acts already committed or *about to be committed*’ - i.e., partially certain in the *near future*.”³³² Furthermore, Sztucki explains that the only exception to this practice was the *Electricity Company Case*, which was distinguished by Ecuador in its Opposition.³³³ Sztucki further characterized this case as “the only instance in which the Court indicated provisional measures using *exclusively* general terms.”³³⁴

190. The five cases Claimant cites which included a variant of the formulation that urgency exists when “there is a real risk that action prejudicial to the rights of either party might be taken before the Court has given its final decision” actually illustrate that the tribunal’s application of this test has required a showing of immediacy of the alleged irreparable harm.³³⁵

191. The most striking (and cynical) example illustrating Claimant’s flawed analysis of the urgency requirement is its attempt to assimilate its case to *Avena and Other Mexican Nationals*, where, as Claimant summarizes itself, “the ICJ ordered provisional measures with respect to a Mexican national on death row whose *execution had already been scheduled, and also with respect to Mexican nationals on death row who were “at risk of execution in the coming*

³³² J. Sztucki, INTERIM MEASURES IN THE HAGUE COURT (1983), pp. 105-106 (RLM-101) (“Sztucki”).

³³³ See *id.*, p. 106; see Ecuador’s Opposition, ¶¶ 73-74.

³³⁴ Sztucki, p. 75 (emphasis added) (RLM-101).

³³⁵ See Claimant’s Reply, ¶ 169 (citing *Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Georgia v. Russia)*, Order on Provisional Measures, Order (15 Oct. 2008), ¶ 129 (CLM-17)).

months.”³³⁶ The Mexican nationals were ““at risk of execution in the coming months, or possibly even weeks.””³³⁷ The Court was looking at a question concerning “the sanctity of human life.”³³⁸ The patent dissimilarity between Claimant’s case and *Avena*, where the death penalty had been “already scheduled,” requires no further elucidation. No decision has been rendered that is adverse to the Claimant. In fact, there is at least the same likelihood of success that the National Court’s decision will be favorable to Claimant. Claimant itself believes that its appeal will be successful.

192. In *Georgia v. Russian Federation*,³³⁹ the ICJ was concerned with the imminent vulnerability of the ethnic Ossetian and Abkhazian populations. Georgia argued that ethnic Georgians in South Ossetia, Abkhazia and other parts of Georgia were “at *imminent risk of violent attack and forced expulsion*.”³⁴⁰ Moreover, Georgia stated that “the risk of irreparable prejudice to the rights at issue in this case is not only imminent, [but] *is already happening*.”³⁴¹ As such, the Court found that the situation was “unstable and could rapidly change,” and the ethnic Ossetian and Abkhazian populations were, at the time of the ruling, vulnerable.³⁴² The provisional measures were issued to protect human life, which was currently in danger.

³³⁶ Claimant’s Reply, ¶ 173; *Case Concerning Avena and Other Mexican Nationals (Mexico v. United States of America)*, Request for the Indication of Provisional Measures, Order (5 February 2003) (CLM-35) (“*Avena*”) (emphasis added).

³³⁷ *Id.*, ¶ 55 (CLM-35).

³³⁸ *Id.*, ¶ 12.

³³⁹ *Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Georgia v. Russian Federation)*, Request for the Indication of Provisional Measures, Order (15 October 2008) (CLM-17).

³⁴⁰ *Id.*, p. 131 (emphasis added).

³⁴¹ *Id.*, p. 133 (emphasis added).

³⁴² *Id.*, p. 143.

193. In *Quiborax S.A. v. Plurinational State of Bolivia*, the tribunal was concerned with domestic court proceedings that were allegedly interfering with the integrity of the arbitration itself. The tribunal’s standard of urgency was “if measures are intended to protect the procedural integrity of the arbitration, in particular with respect to access to or integrity of the evidence, they are urgent by definition.”³⁴³ The ICSID tribunal found that “the question of whether a Party has the opportunity to present its case or rely on the integrity of specific evidence is essential to (and therefore cannot await) the rendering of an award on the merits,” and therefore merited provisional measures.³⁴⁴ Because the Court found that “the direct relationship between the criminal proceedings and this ICSID arbitration is preventing Claimants from accessing witnesses that could be essential to their case,” it issued provisional measures.³⁴⁵ This situation is clearly not analogous to the current case. There are no allegations that the National Court of Justice, if issued before the Tribunal renders its award, would interfere with the current arbitration.

194. In *Biwater v. Tanzania*, the tribunal stated:

In the Arbitral Tribunal’s view, the degree of “urgency” which is required depends on the circumstances, including the requested provisional measures, and may be satisfied where a party can prove that there is a need to obtain the requested measure at a certain point in the procedure before the issuance of an award. In most situations, this will equate to “urgency” in the traditional sense (i.e. a need for a measure in a short space of time). In some cases, however, the only time constraint is that the measure be granted before an award – even if the grant is to be some time hence. ***The Arbitral Tribunal also considers that the level of***

³⁴³ *Quiborax S.A. v. Plurinational State of Bolivia*, ICSID Case No. ARB/06/2, Decision on Provisional Measures (26 February 2010), ¶ 153 (CLM-14).

³⁴⁴ *Id.*, ¶ 153.

³⁴⁵ *Id.*, ¶ 163.

*urgency required depends on the type of measure which is requested.*³⁴⁶

195. Indeed, the nature of interim measures was very different from Claimant's request: it involved the preservation of evidence, compilation of an inventory of documents, and production of documents.³⁴⁷ Needless to say, different considerations ought to be made when the preservation of documents is at stake.³⁴⁸

196. In sum, as illustrated by the foregoing cases, urgency is a fact-specific determination. However, even if tribunals sometimes formulated the urgency standard by reference to the occurrence of a threatened harm "before a final decision," they have granted interim measures in situations where imminent risk existed at the time of the application.

197. Importantly, there is no contradiction between the requirement that the alleged harm must arise prior to the tribunal's final award and the requirement that it be imminent. This is illustrated by the recent ICJ decision in *Costa Rica v. Nicaragua*.³⁴⁹ In that case, the ICJ formulated the urgency requirement as follows:

Whereas the power of the Court to indicate provisional measures will be exercised only if there is urgency, in the sense that there is a real and imminent risk that irreparable prejudice may be caused to the rights in dispute before the Court has given its final decision (see, for example, Questions relating to the Obligation to Prosecute or Extradite (Belgium v. Senegal), Provisional Measures, Order of

³⁴⁶ *Biwater Gauff (Tanzania) Ltd. v. United Republic of Tanzania*, ICSID Case No. ARB/05/22, Procedural Order No. 1 (31 March 2006), ¶ 76 (emphasis added) (CLM-2).

³⁴⁷ *Id.*, ¶ 82.

³⁴⁸ Finally, *Chevron v. Ecuador* was distinguished by Ecuador in its Opposition, paragraphs 75-76 and 189. The tribunal's award of Feb. 16, 2012 is of limited value because the tribunal does not discuss which facts influenced its decision. See *Chevron Corporation and Texaco Petroleum Company v. The Republic of Ecuador*, PCA Case No. 2009-23 (UNCITRAL), Second Interim Award on Interim Measures (16 Feb. 2012) (CLM-6).

³⁴⁹ *Certain Activities Carried Out By Nicaragua in the Border Area (Costa Rica v. Nicaragua)*, Request for the Indication of Provisional Measures (8 Mar. 2011) (RLM-80) ("*Costa Rica v. Nicaragua*").

28 May 2009, para. 62); and whereas the Court must therefore consider whether such a risk exists in these proceedings.³⁵⁰

198. In applying this requirement, the ICJ found that the situation at hand “gives rise *to a real and present risk of incidents liable to cause irremediable harm* in the form of bodily injury or death,” concluding that “under these circumstances that provisional measures should be indicated.”³⁵¹ The alleged facts involved certain activities being carried out at the time of the request for provisional measures. Costa Rica claimed that Nicaragua had entered Costa Rican territory to construct a canal across and dredge the San Juan river.³⁵² Costa Rica claimed that Nicaragua’s activities would cause severe environmental damage to the Colorado River and Wildlife Refuge, and sought provisional measures to prevent Nicaragua from these actions.³⁵³ The ICJ noted that the request for provisional measures also referred to the presence of Nicaraguan armed forces and “the continued damage being inflicted on [Costa Rican] territory” by Nicaragua’s activities.³⁵⁴ While Nicaragua indicated in response that the work in the area has come to an end but that it “does intend to carry out certain activities, if only occasionally, in the disputed territory,” the ICJ found that the risk “*of incidents liable to cause irremediable harm* in the form of bodily injury or death” was real and present.³⁵⁵

199. Claimant criticizes Ecuador’s emphasis of the term “imminent” in the commentary of Baker and Davis that Article 26 of the UNCITRAL Arbitration Rules contemplates that “the

³⁵⁰ *Id.*, ¶ 64 (emphasis added).

³⁵¹ *Id.*, ¶¶ 75-76 (emphasis added).

³⁵² *Id.*, p. 2.

³⁵³ *Id.*, ¶ 32.

³⁵⁴ *Id.*, ¶¶ 65, 69.

³⁵⁵ *Id.*, ¶ 75.

party requesting the measure is facing harm . . . *so imminent* that it cannot await the tribunal’s decision on the merits.”³⁵⁶ Yet, while Ecuador does not deny the two prongs of the urgency requirement (i.e., that irreparable harm must be both imminent and arise before the final award), Claimant only focuses on one prong, which covers only the overall notion that urgency is satisfied only if the harm arises prior to the final award.

200. In short, while the wording used by the tribunals is relative to the final award, the tribunals granted interim measures only when the claimant faced immediate potential risk.

b. Claimant has admitted that the application of the urgency standard requires a showing of an imminent action prejudicial to the Claimant.

201. In its Request for Interim Measures, Claimant has relied on the correct formulation of the requirement of urgency referring to “immediate” or “imminent” harm that Claimant allegedly faces pending the appeal before the National Court.³⁵⁷

202. However, following Ecuador’s Opposition, Claimant has altered its strategy, renouncing the immediacy requirement and instead focusing on the general formulation of the urgency requirement devoid of its substantive requirement. Thus, Claimant retreated from its initial recognition that the legal standard of urgency is that the threat of harm to it must be imminent.

203. But irrespective of the legal standard now advanced by the Claimant following Ecuador’s opposition, Claimant persists with its allegation that it is seeking to “prevent harm that could materialize in a matter of days.”³⁵⁸ Indeed, Claimant’s forced characterization of its facts as “imminent” recognizes that when considering whether to grant interim measures on the facts, the

³⁵⁶ Claimant’s Reply, ¶ 170.

³⁵⁷ *See, e.g.*, Claimant’s Request, ¶ 72 (“The threat of harm to MSDIA is imminent.”)

³⁵⁸ Claimant’s Reply, ¶ 168.

proper test is the immediate potential of a harmful action. Claimant admits that even if the legal standard of urgency has been formulated by the tribunals by reference to the issuance of a final award – i.e., that urgency can be met so long as “the threatened harm is likely to occur at any time before the issuance of a final award” – when considering facts, the international tribunals have required a showing of imminence.

204. But even when discussing its case, Claimant contradicts itself stating that on the one hand, the harm it alleges “can materialize in a matter of days,”³⁵⁹ but admitting that it is impossible to predict “when the judgment [of the National Court] will issue.”³⁶⁰

2. Claimant Has Failed To Rebut Ecuador’s Showing That The Issuance Of The National Court’s Decision Is Not Imminent.

205. Claimant acknowledges that “[i]t is true, as Ecuador says, that the Ecuador’s National Court of Justice has not yet issued its judgment; it is true that MSDIA *cannot say precisely when the judgment will issue*; and it is true that ‘the National Court of Justice’s decision is uncertain in content.’”³⁶¹ But it proceeds to maintain that “none of these circumstances alleviates the urgency of MSDIA’s need for interim measures of protection”³⁶² principally because “the urgency requirement is met when the threatened harm is likely to occur at any time before the issuance of a final award.”³⁶³ Furthermore, as to its own case, on the facts, it alleges that its

³⁵⁹ *Id.*, ¶ 168. MSDIA later switches to the relaxed standard of “before the final award,” alleging that “it faces a real risk of harm that will occur before the issuance of the final award in this arbitration.” *Id.*, ¶ 179.

³⁶⁰ *Id.*, ¶ 167.

³⁶¹ Claimant’s Reply, ¶ 167 (emphasis added).

³⁶² *Id.*

³⁶³ *Id.*, ¶ 169.

alleged harm “can materialize in a matter of days.”³⁶⁴ Claimant’s position is not only inconsistent but is incorrect as a matter of procedural law and the reality of Claimant’s situation.

206. As established above, it is simply not enough to show that a decision of the National Court might be issued prior to issuance of a final award in this arbitration to establish urgency: The standard is not mere possibility, it is the danger of irreparable harm being imminently threatened.

207. Emphasizing its argument that a decision of the National Court will issue before the final award in this arbitration, Claimant admits that it cannot meet the real urgency test.

208. Furthermore, its allegation that “the judgment could come at any time” is theoretical.³⁶⁵ As demonstrated by Dr. Moscoso Serrano, the decision of the National Court is not imminent because the National Court is facing a delay in the resolution of its cases.³⁶⁶ In his first opinion, Dr. Moscoso Serrano explained that:

Article 17 of the Law of Cassation does not expressly state *when this period begins to run*; however, the law could be interpreted to mean that the period does not begin to run until the proceeding has ended, that is, after the judicial hearing which in this case was held on December 26, 2011. In that case, the period within which to issue a decision would end on December 17, 2012. Alternatively, the period could be understood to begin to run upon the expiration of the deadline to answer the counterparties’ allegations, which in this case was on November 24, 2011. In that case, the period within which to issue a decision would end on January 11, 2013.³⁶⁷

³⁶⁴ *Id.*, ¶ 168. MSDIA later switches to the relaxed standard of “prior to the final award,” alleging that “it faces a real risk of harm that will occur before the issuance of the final award in this arbitration.” *Id.* ¶ 179.

³⁶⁵ Claimant’s statement that “Ecuador does not deny that the case could be decided at any moment,” citing to the Second Opinion of Dr. Jaime Ortega Trujillo (3 Aug. 2012) is also untrue. *See* Claimant’s Reply, ¶ 180. Ecuador never stated that the decision can be issued at any moment.

³⁶⁶ Moscoso First Legal Opinion, ¶ 8.

³⁶⁷ *Id.* (emphasis added).

209. Instead of disputing these circumstances, Claimant “advises” that the National Court “should be striving to issue a decision well before the statutory deadline is reached.”³⁶⁸

210. In response to Dr. Ortega’s Second Opinion, Dr. Moscoso Serrano reconfirms that given the large backlog of cases, the National Court will most likely take the entire allotted 270 business days to decide the appeal.³⁶⁹ He also opined that it is unrealistic to maintain that the National Court’s decision can be issued “at any moment.”³⁷⁰ He clarifies that the issuance of the National Court’s decision does not depend merely on the time stipulated in the regulations of the Law of Cassation: “It also depends on a procedural and administrative reality that prevents the decision from being issued within the maximum time period stipulated in Art. 17 of the Law of Cassation, not because of neglect or omission on the part of the judges, but, because working conditions prevent it.”³⁷¹ That the National Court will not decide the case soon is evidenced from the table submitted by Miss Merchán, which shows that the New Court inherited a large docket of cases and is experiencing significant delays in their resolution.³⁷² This “unavoidable procedural reality of congested dockets” makes it unrealistic that the National Court will issue its decision “at any moment.”³⁷³

211. Claimant cannot and does not dispute the statutory timeframe of 270 days for the National Court’s decision. Instead, in order to create an artificial sense of urgency, Claimant

³⁶⁸ Claimant’s Reply, ¶ 181.

³⁶⁹ Moscoso Second Legal Opinion, ¶ 12.

³⁷⁰ Moscoso Second Legal Opinion, ¶ 6.

³⁷¹ *Id.*

³⁷² *Id.*, ¶ 7.

³⁷³ *Id.*, ¶¶ 6, 8. Furthermore, if any one of the judges on the case is replaced with a new judge, the 270 timeframe will recommence to give the new judge an opportunity to deliberate on the case. *See id.*, ¶ 9.

seeks to attribute the administration of the NIFA litigation by the lower courts to the National Court's handling of the appeal.³⁷⁴ However, this attribution is unfounded and unheard of in international or municipal laws: the *raison d'être* of the National Court is to correct any mistakes by the lower courts. Claimant does not cite a single authority in support of this argument. Claimant has no basis in law or fact to cite the history of the lower courts' actions as predicting in any way the actions of the highest court.

212. Claimant's urgency argument hinges on its baseless allegations (that are in discord with its own belief) that the National Court would handle the appeal in the same allegedly biased fashion as the lower courts. However, Claimant's argument that the National Court's decision can materialize at any moment is once again unsupported by any legal authority and ungrounded in fact. If anything, Claimant cannot seriously maintain that the lower courts handled its case "swiftly."³⁷⁵

213. Furthermore, all of the complained-of irregularities of the National Court's treatment of its case arose prior to the 30 April 2012 filing of Claimant's financial accounts with the Superintendence of Companies, in which the Claimant expressed its belief that it will prevail on its appeal before the National Court. Had the Claimant believed that it would not be treated differently by the National Court, it would have had to report its potential loss of the case in the NIFA litigation. If the Claimant made false statements to the Superintendence of Companies, it is liable civilly and criminally. At any rate, having filed its appeal before the National Court and believing that it would prevail on it, MSDIA is now arguing that its appeal to the National Court

³⁷⁴ See *supra* Section II (B)(2).

³⁷⁵ See *supra* Section II (B)(3).

is futile and unavailing. Claimant cannot have it both ways: It cannot rely on the absence of civil and criminal penalties for its misrepresentations and false statements before this Tribunal.

3. Even If The Issuance Of A National Court’s Decision May Occur Within Six Months, Claimant Has Failed to Establish That The Enforcement Of A Future Decision Adverse To MSDIA, If One Ever Exists, Will Be Swift As A Matter of Ecuadorian Civil Procedure.

214. It is now clear from its Reply and its belief that it will prevail on its appeal before the National Court, that Claimant is seeking to secure interim measures in lieu of an insurance against future uncertain risk. Claimant states that it is seeking interim measures because once a decision adverse to it is issued, it would be “too late” to do anything as the key employees will start to leave, etc., unless interim measures are already “in place” to forestall the harm.”³⁷⁶

However, it fails to refute the following fact: even if a decision of the National Court adverse to Claimant is issued, the execution of any surviving monetary judgment would likely take *as many as six months* and would not be swift.

215. It must be emphasized at the outset that the procedure of enforcement addressed by Dr. Moscoso Serrano considered the enforcement of *the* judgment resulting from the National Court’s affirmation of the court of appeals’ decision.³⁷⁷ As explained by Dr. Moscoso Serrano, the likelihood of such affirmation is uncertain because of the grounds of appeal raised by MSDIA and the powers of the National Court to rehear the case *de novo* on the merits.³⁷⁸ If the National Court admits any of the grounds of the cassation petition that involve modification of the judgment, even if it results in a modified but adverse judgment to the Claimant, the

³⁷⁶ Claimant’s Reply, ¶ 187.

³⁷⁷ Moscoso Second Legal Opinion, ¶ 2.

³⁷⁸ *Id.*, ¶ 5.

enforcement procedure will necessarily involve the clarification procedure and the calculation of interest and fees.³⁷⁹

216. Dr. Ortega admits this possibility that once the National Court has issued its decision, the parties may file for the clarification proceedings, or horizontal appeals.³⁸⁰ In addition, as explained in Dr. Moscoso Serrano's first opinion, prior to granting the "order for enforcement", the court must recalculate the interest on the judgment and calculate the court fees. Dr. Ortega erroneously suggests that there is no need for the calculation of interest and fees procedures, involving expert and both parties, because they were set in the judgment of the court of first instance. According to Dr. Moscoso Serrano, this statement is not accurate. He explains that even though the interest was set in the judgment issued by the court of first instance, if the judgment is affirmed by the National Court, the lower court would still have to calculate the interest accruing from the date of the first judgment (December 17, 2011).³⁸¹

217. Similarly, Dr. Ortega's statement about the fees does not take into account the fact that the lower court's judgment only referred to one attorney's fees. Thus, the interest and fees will not be settled *if* the judgment is affirmed by the National Court. The normal procedure for the calculation of interest and fees can be lengthy because it involves both expert reports to assist the court in the calculation and the participation of both parties to the litigation.³⁸² There is no

³⁷⁹ *Id.*, ¶¶ 13-14.

³⁸⁰ Ortega Opinion, ¶ 13.

³⁸¹ *Id.*, ¶ 14.

³⁸² *Id.*

reason why the court in the *NIFA* litigation would deny such a standard procedure that benefits both parties.³⁸³

218. Finally, Mr. Moscoso Serrano points out that the “volume and complexity of the cases which the judges of the first instance must resolve, and the decisions that they must enforce, are such that it is physically impossible to attend to them within the time period” provided in law.³⁸⁴

219. In short, the enforcement of the affirmed judgment, *if* one is issued and *if* it is enforced,³⁸⁵ is not “swift” and would not catch MSDIA unawares. The realistic timeframe for the enforcement of the affirmed judgment is approximately six months.³⁸⁶

220. Given these time delays for the enforcement of a judgment that does not exist today, Claimant’s argument that “MSDIA has requested interim measures of protection now – so that they will be in place when the National Court of Justice decision is issued, and will be effective to forestall the harm that would otherwise occur to MSDIA’s business”³⁸⁷ is entirely without merit. It is now clear that Claimant is attempting to secure insurance against future uncertain risk through interim measures. This is simply not the objective of interim measures under international law.³⁸⁸ Interim measures are not meant to serve as insurance against future

³⁸³ *Id.*, ¶¶ 14-16.

³⁸⁴ Moscoso Second Legal Opinion, ¶ 18.

³⁸⁵ Claimant acknowledges that even if the judgment is affirmed, it may not be enforced against Claimant’s assets. *See* Claimant’s Request, ¶¶ 30, 65.

³⁸⁶ Moscoso First Legal Opinion, ¶ 29.

³⁸⁷ Claimant’s Reply, ¶ 187.

³⁸⁸ *See Certain Criminal Proceedings in France* (Republic of the Congo v. France, 2003), Order of June 17, 2003, ICJ Reports 2003, ¶ 35 (RLM-13). (“[I]t appears to the Court... there is *at the present time* no risk of irreparable prejudice, so as to justify the indication of provisional measures as a matter of urgency.”) (emphasis added).

uncertain harm let alone to subdue the claimant's desire to control the future. On this basis alone Claimant's request must be denied.

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221. Claimant has failed to show that its Request meets the internationally recognized standards for irreparable harm and urgency. While believing that it will prevail on its appeal before the National Court, Claimant disingenuously asserts before this Tribunal that it is facing a risk of irreparable harm before the final decision of the Tribunal. However, Claimant's alleged harm is so remote and hypothetical, shrouded in the unpredictability of the National Court's decision *and* the unknown actions of NIFA, that a meaningful ascertainment of the *risk of alleged irreparable harm* is simply impossible at this stage. Claimant's premature Request therefore must be denied.

V. **GRANTING THE INTERIM MEASURES REQUESTED BY CLAIMANT WOULD IMPOSE A DISPROPORTIONATE BURDEN ON ECUADOR.**

222. Claimant's Request for Interim Measures in no way comports with the requirement of proportionality. Granting Claimant's Request, in circumstances where any allegedly threatened prejudice to its rights is fully remediable through monetary damages, would put Ecuador in an impossible situation, effectively calling for a violation of its Constitution, as well as of its international obligations under international instruments for the protection of human rights. Neither the letter nor the spirit of the Treaty or the UNCITRAL Arbitration Rules justifies the granting of interim measures of such extent, to the detriment of a third party to these proceedings.

A. **Ecuador's Compliance With The Requested Interim Measures Would Contravene Its Own Constitution And International Obligations.**

223. Claimant's main contention is that there is no conflict between the requested interim measures and Ecuador's obligations under its Constitution. But Ecuador does not allege that the provisions of its Constitution are part of the applicable law, as Claimant appears to suggest.³⁸⁹ Nor does it seek to exonerate itself from international responsibility by invoking its Constitution.³⁹⁰ The Ecuadorian Constitution and its provisions, however, constitute relevant facts which must be taken into account by the Tribunal in the balancing of the relevant burdens. In other words, whether Ecuador's compliance with a possible order by the Tribunal granting Claimant's Request exposes Ecuador to liability under its domestic law constitutes a relevant fact

³⁸⁹ Claimant's Reply, ¶ 272 ("Ecuador has offered no justification as to why this Tribunal can or should take the Ecuadorian Constitution into account in exercising its mandate under the parties' arbitration agreement and the Treaty.").

³⁹⁰ Claimant's invocation of Article 27 of the Vienna Convention is simply irrelevant. *See Id.*, n. 471.

which the Tribunal can and must take into account in examining whether the proportionality requirement in the instant case is met.

224. Claimant next argues that Ecuador “would not violate its constitutional obligation to respect and ensure NIFA’s right to the enforcement of judgments if it implemented the requested interim measures.”³⁹¹ It offers a number of reasons for that proposition, which Ecuador examines in turn. As will become evident, all of Claimant’s arguments in this respect are unavailing: Ecuador’s compliance with an award of interim measures would breach its Constitution and international obligations, thereby resulting in its liability under Ecuadorian law and, subject to exhaustion of local remedies, the Inter-American Convention on Human Rights.

225. First, Claimant argues that, under its Constitution, Ecuador is obligated to fulfill its obligations under the Treaty, which prevail over Ecuador’s internal law.³⁹² Ecuador is not disputing this. But an UNCITRAL Tribunal’s order of interim measures is hardly “international law” in the sense contemplated by the constitutional drafters when considering international law’s status in the Ecuadorian legal order. In any event, international treaties and instruments that are validly entered into prevail over inconsistent provisions of Ecuador’s *secondary* internal law.³⁹³ From the standpoint of Ecuador’s internal legal order, however, international law does not prevail over the provisions of the Constitution. Article 425 of the Constitution makes it clear that the Constitution is the supreme law of the land and international treaties and conventions lie hierarchically below.³⁹⁴ Therefore if a conflict were to occur between the Constitution and an

³⁹¹ Claimant’s Reply, ¶ 273.

³⁹² *Id.*, ¶ 274.

³⁹³ Constitution of Ecuador, Article 424 (RLM-15).

³⁹⁴ Constitution of Ecuador, Article 425 (RLM-15).

international treaty, by express provision of Article 425, paragraph 2, “the Constitutional Court, judges, administrative officials and public servants will resolve it by application of the standard having the higher hierarchical level.”

226. The only exception to this rule is in favor of international instruments related to fundamental human rights, such as the Inter-American Convention on Human Rights, which, pursuant to Article 426, prevails over the Constitution.³⁹⁵ As Dr. Guerrero explains, Ecuador’s obligations under the Convention form part of the so-called “Constitutional Body of Law,” and its provisions must be considered when analyzing whether Ecuador’s compliance with a possible order by the Tribunal would affect individuals’ fundamental rights under the Ecuadorian Constitution.³⁹⁶ This means that a conflict between the Tribunal’s order and constitutional provisions aimed at safeguarding human rights will be resolved by Ecuadorian courts in favor of the latter, lest the relevant court incur liability.

227. In fact, there is precedent for this proposition.³⁹⁷ After the issuance of the *Chevron II* tribunal’s First Interim Award on Interim Measures, in *Maria Aguínda y otros v. Chevron*, the Provincial Court of Justice of Sucumbíos was asked to give effect to that award. The Court appreciated Ecuador’s international obligations beyond the Treaty and found itself in a situation of conflict between, on the one hand, the binding force of the arbitral award and, on the other hand, the binding force of Ecuador’s obligations under human rights instruments forming part of the “Constitutional Body of Law.”³⁹⁸ Relying on accepted interpretative presumptions in favor

³⁹⁵ *Id.*, Article 426 (RLM-15). See also Guerrero First Expert Report, ¶¶ 11-15.

³⁹⁶ Guerrero First Expert Opinion, ¶¶ 13-16.

³⁹⁷ Guerrero Second Expert Opinion, ¶ 7.

³⁹⁸ Provincial Court of Justice, Sucumbíos, *Maria Aguínda y otros v. Chevron Corporation*, Case No. 2011-0106, Decision (17 Feb. 2012), p. 2 (RLM-115) (“*Maria Aguínda y otros v. Chevron*”).

of expanding the scope of protection of human rights, as well as Article 29 of the Inter-American Convention on Human Rights³⁹⁹ and several provisions of the Ecuadorian Constitution, the Court held that the arbitral award cannot be given greater weight than Ecuador's obligation under the Convention to ensure to its citizens the unimpeded enjoyment of their right to effective judicial protection.⁴⁰⁰ The Court recalled that as a public institution it is obligated to redress violations of the rights of private parties due to the failure or deficiencies in the provision of its services.⁴⁰¹

As a consequence, it could not:

simply “obey” the demands of Chevron Corp. or the Arbitration Tribunal and fail to perform the functions we were sworn into office to perform without first analyzing the legal rules in conflict and without valid legal support. A simple arbitration award, although it may bind Ecuador, cannot obligate Ecuador's judges to violate the human rights of our citizens. That would not only run counter to the rights guaranteed by our Constitution, but would also violate the most important international obligations assumed by Ecuador in matters of human rights ... The rules of procedure and the rule of law in place in Ecuador impose on judges the duty to act in keeping with the Constitution, with international human rights instruments and with the law, as established by Article 123 of the Judiciary Act, and holds us liable for acts or omissions that

³⁹⁹ The provision reads: “No provision of this Convention shall be interpreted as:

- a. permitting any State Party, group, or person to suppress the enjoyment or exercise of the rights and freedoms recognized in this Convention or to restrict them to a greater extent than is provided for herein;
- b. restricting the enjoyment or exercise of any right or freedom recognized by virtue of the laws of any State Party or by virtue of another convention to which one of the said states is a party;
- c. precluding other rights or guarantees that are inherent in the human personality or derived from representative democracy as a form of government; or
- d. excluding or limiting the effect that the American Declaration of the Rights and Duties of Man and other international acts of the same nature may have.

Inter-American Convention on Human Rights, Article 29 (RLM-7) (emphasis added).

⁴⁰⁰ Provincial Court of Justice, Sucumbíos, *Maria Aguínda y otros v. Chevron Corporation*, Case No. 2011-0106, Order (17 Feb. 2012), pp. 2-3 (RLM-115).

⁴⁰¹ *Id.* (citing Ecuadorian Constitution, Article 11(9)).

are harmful to the parties, as Chevron rightfully indicates in its motion.⁴⁰²

228. In light of this, the Court concluded that it did not have the power to suspend the enforcement of the *Lago Agrio* judgment, without incurring civil and criminal liability with respect to the parties.

The fact that international treaties, with the exception of international treaties relating to human rights, yield before the provisions of the Ecuadorian Constitution does not, of course, entail that they somehow lose their effectiveness or are rendered unconstitutional, as Claimant's expert, Dr. Cevallos, appears to suggest.⁴⁰³ Dr. Guerrero states that these propositions run completely contrary to the Ecuadorian constitutional order.⁴⁰⁴ But, as happens in every legal order, one legal standard may be found to run counter to another legal standard, in which case conflict-resolution techniques are employed to determine which legal standard prevails. This does not mean that the standard which yields loses its effectiveness in law or is abrogated; it is simply displaced from application to a particular case, to the extent covered by the conflict. Derogation from the prevailing standard in a specific case by a decision-maker, however, may lead to an excess of authority, which is subject to sanctions in the Ecuadorian legal order as it would be anywhere else.

229. Relying on its expert, Claimant next argues that, as a matter of Ecuadorian law, Ecuador would be obligated to comply with an order of interim measures of relief and that that would not constitute "an interference of justice nor can it be labeled as an arbitrary act or an act foreign to the Ecuadorian legal system that becomes impossible to enforce."⁴⁰⁵ But this is not true.

Ecuadorian courts, as indeed all public institutions, submit to the principles of constitutionality

⁴⁰² *Id.*

⁴⁰³ Cevallos Expert Opinion, ¶ 24.

⁴⁰⁴ Guerrero Second Expert Opinion, ¶¶ 4, 6-7.

⁴⁰⁵ Claimant's Reply, ¶ 275 (citing Cevallos Expert Opinion, ¶ 34). Claimant cites as precedent for this proposition *City Oriente v. Ecuador. Id.*, ¶ 292. However, this case is easily distinguishable since the provisional measures were directed at and affected only the parties involved in the arbitration proceeding. Guerrero Second Expert Opinion, ¶¶ 30-32.

and legality pursuant to which they may only act as expressly permitted and authorized by the Constitution and the laws of Ecuador.⁴⁰⁶ In this regard, as explained by Dr. Guerrero, even if the Attorney General’s Office could sidestep its mandate to refrain from interfering in cases in which the State is not a party without this amounting to unlawful interference with the judiciary,⁴⁰⁷ Ecuadorian courts cannot circumvent their procedure and law in order to comply with an arbitral award of interim measures: no provision in the Ecuadorian law allows a court to suspend the enforcement of a ruling at the petition of a third party to the underlying proceedings, as the Ecuadorian State is in this case.⁴⁰⁸ The *Maria Aguínda y otros v. Chevron* precedent is particularly relevant here as well.

230. In that case, the Provincial Court of Justice of Sucumbios dismissed plaintiffs’ request that the Court impose on Chevron to post a bond in order to suspend the enforcement of the *Lago Agrio* judgment, pursuant to the arbitral award’s requirement that Ecuador “take[s] all measures at its disposal to suspend or cause to be suspended the enforcement . . . of any judgment against [Chevron] in the Lago Agrio case,”⁴⁰⁹ because:

requesting a bond to suspend the enforcement of a case subject to cassation appeal is a right, not an obligation—or even a burden—for the appealing party, and one cannot attempt to force that party to exercise that right. The bond to which the parties refer is the sole legal mechanism established to give litigants in Ecuador an

⁴⁰⁶ Constitution of Ecuador, Article 426 (RLM-15).

⁴⁰⁷ Ecuador’s Opposition, ¶¶ 182-183.

⁴⁰⁸ Guerrero Second Expert Opinion, ¶¶ 8-9. See also *id.*, ¶ 11 (“Dr. Cevallos’ conclusion in Paragraph 35 of his statement . . . wants for substance since it fails to invoke a legal standard—because no such legal standard exists—authorizing a jurisdictional entity to suspend the enforcement of a ruling, based on a protective order issued in a proceeding, in which there is no identity of parties with respect to the proceeding in which the ruling that is sought to be suspended was issued.”).

⁴⁰⁹ *Chevron Corp. v. Republic of Ecuador*, PCA Case No. 2009-23 (UNCITRAL), First Interim Award on Interim Measures (25 January 2012), p. 16 (CLM-5).

opportunity to suspend enforcement of judgments on cassation appeal, and thus it is inconsistent with the law to attempt to impose this as an obligation under any circumstance.⁴¹⁰

231. Claimant’s argument that “no provision of the [Ecuadorian] Constitution gives a party a right to enforcement of a judgment that itself violates the basic constitutional guarantees of due process”⁴¹¹ is ludicrous and may be summarily dismissed. Such argument, as Dr. Guerrero explains, invites a relativism that is counter to any notion of judicial security:⁴¹²

In effect the statement that an enforceable judicial ruling was obtained in violation of the right of due process of the other party, can be adopted *solely and exclusively by the Ecuadorian Constitutional Court* as the result of an extraordinary protective action, provided that it was commenced in a timely manner by the party that was considered affected by the ruling. The simple subjective evaluation by one of the parties that a ruling was issued in violation of its procedural rights cannot constitute a valid argument to limit the fundamental right to enforce it, since if this position were to be accepted, it would be an attack against the right of judicial security that is constitutionally recognized, *since it would be sufficient for the party that considers itself to be affected by a ruling to claim that the ruling was issued in violation of its right to due process in order for the constitutional right to enforce rulings decreed by the judicial administration of a State to be limited or suspended*. This would create a situation of absolute uncertainty for the other party, which, in spite of having resorted to the judicial authorities of the State to administer justice in a specific case, could not enforce a final ruling as a result of the sole opinion of its opposing party. This would be equivalent to leaving it in an indefensible condition and denying it the legal protection of its rights and interests.⁴¹³

232. Claimant’s final argument is that because the interim measures would only prevent the enforcement of the NIFA judgment temporarily, the damage done to NIFA’s right to effective

⁴¹⁰ *Maria Aguinda y otros v. Chevron*, pp. 1-2 (RLM-115).

⁴¹¹ Claimant’s Reply, ¶ 276.

⁴¹² Constitution of Ecuador, Article 82 (RLM-15).

⁴¹³ Guerrero Second Expert Opinion, ¶ 21 (emphasis added) (internal footnotes omitted). See also *id.*, ¶ 23.

judicial protection does not arise to the level of a constitutional violation.⁴¹⁴ Much like Claimant's other arguments on Ecuadorian law and practice,⁴¹⁵ this too is uninformed. The right to enforcement of a judicial ruling is absolute. This is evident in Article 27 of the Organic Law of Jurisdictional Guarantees and Constitutional Control, which, as Dr. Guerrero explains, reflects the result of the balancing between two competing rights: the right to effective judicial protection of a party which obtains a favorable and enforceable ruling and the opposing party's right to challenge that ruling as a violation of its fundamental rights. The Ecuadorian Legislature considered that the former right carries greater weight, and this is why Article 27 proscribes the suspension of enforcement of a ruling even when an extraordinary protective action is filed.⁴¹⁶

233. In sum, Claimant's far-reaching Request has implications that go beyond the suspension of the enforcement of any judgment favorable to NIFA that might be rendered in its underlying case. Ecuador's compliance with an award of interim measures would effectively mean that it will be acting inconsistently with its own Constitution and international obligations with ensuing consequences in terms of its exposure to liability. The Tribunal must weigh this burden against Claimant's inability to show any possibility of irreparable harm and dismiss Claimant's Request on this ground.

⁴¹⁴ Claimant's Reply, ¶¶ 278-280.

⁴¹⁵ For instance, Claimant's expert suggests that "since commercial companies are not human, they of course do not have human rights." Cevallos Expert Opinion, ¶ 39. *See also* Claimant's Reply, ¶ 282. Dr. Guerrero demonstrates exhaustively the falsity of this assertion as a matter of Ecuadorian law and in respect of the right to effective judicial protection in particular. Guerrero Second Expert Opinion, ¶¶ 14-19, 24.

⁴¹⁶ Guerrero Second Expert Opinion, ¶¶ 22-23.

B. Compliance With The Requested Interim Measures May Expose Ecuador To State Responsibility.

234. Claimant argues that, as a legal person rather than as a natural person, NIFA cannot claim a breach of Articles 8 and 25 of the Inter-American Convention on Human Rights before the organs of the Inter-American system of protection of human rights.⁴¹⁷ For this proposition, Claimant relies on an academic article published in 2001.⁴¹⁸ It is no surprise, then, that it fails to take account of the more recent jurisprudence of the Inter-American Court of Human Rights reflected in its 2001 judgment in *Cantos v. Argentina*.⁴¹⁹

235. In that case, Argentina, much like Claimant in this case, alleged that legal entities are not included in the American Convention, and therefore, its provisions are not applicable to them, since they do not have human rights.⁴²⁰ The Court rejected this contention, stating that:

although the figure of legal entities has not been expressly recognized by the American Convention, as it is in Protocol No. 1 to the European Convention on Human Rights, *this does not mean that, in specific circumstances, an individual may not resort to the inter-American system for the protection of human rights to enforce his fundamental rights, even when they are encompassed in a legal figure or fiction created by the same system of law.* However, it is worth making a distinction in order to identify which situations could be examined by this Court within the framework of the American Convention. In this respect, *this Court has already examined the possible violation of the rights of individuals when they are shareholders.*⁴²¹

⁴¹⁷ Claimant's Reply, ¶ 283,

⁴¹⁸ Diego Rodríguez Pinzón, *The "Victim" Requirement, The Fourth Instance Formula And The Notion Of "Person" In The Individual Complaint Procedure Of The Inter-American Human Rights System*, 7 ILSA J. Int'l & Comparative L 1, 14-15 (2001) (CLM-101).

⁴¹⁹ Inter-American Court of Human Rights, *Case of Cantos v. Argentina*, Preliminary Objections, Judgment (7 Sept. 2001) (RLM-94).

⁴²⁰ *Id.*, ¶ 27.

⁴²¹ *Id.*, ¶ 29 (emphasis added) (internal footnotes omitted).

236. The Court observed that all of the administrative and legal claims attempted in the underlying case were submitted directly by Mr. Cantos in his own name “and in the name of his companies.”⁴²² The Court was satisfied that this would be sufficient to allow it to examine the alleged violations of Mr. Cantos’ rights under the Convention and dismissed Argentina’s objection.⁴²³ It follows that Claimant’s categorical statement is far from true; any violation of NIFA’s rights might well be pursued in its name along with those of its shareholders.

237. Claimant also points out that the Inter-American Commission and Court of Human Rights themselves have asked States to suspend judicial proceedings or the execution of judgments pending their review.⁴²⁴ This is true. But it takes little effort to show that this has occurred in circumstances distinctly different from those present here, involving alleged violations of the freedom of expression and criminal sentences rendered against individuals in proceedings initiated by the State. Furthermore, as explained above, human rights obligations prevail over the dictates of all Ecuadorian law, including the provisions of the Constitution.

238. Finally, Claimant asserts that it too may enjoy rights under the Inter-American Convention.⁴²⁵ Ecuador sees no reason to opine on MSDIA’s rights under the Convention, if any, or generally MSDIA’s other remedies under international law.

C. Claimant’s Efforts To Minimize The Burden Of Ecuador Are Unavailing.

239. Claimant’s remaining arguments do not add to what has been said already in the previous submissions of the parties. Claimant’s litany of cases in which States were asked to suspend or

⁴²² *Id.*, ¶ 30.

⁴²³ *Id.*

⁴²⁴ Claimant’s Reply, ¶¶ 284-285.

⁴²⁵ *Id.*, ¶¶ 286-287.

terminate judicial proceedings by way of interim measures involved the respondent State as a party to the underlying proceedings and did not risk its liability under its own law and international law⁴²⁶ -- with the exception of the *Chevron II* case, whose particular circumstances are not replicated here.⁴²⁷

240. Claimant also maintains that the requested interim measures would actually benefit Ecuador.⁴²⁸ Ecuador fails to see why this is so. Claimant has brought a completely unmeritorious claim with no possibility of success on the merits. Even if the National Court of Justice renders a judgment which is adverse to it, Claimant's continued business will not be affected. And the facts of this case are very much different from those in *Burlington* and *Paushok*.⁴²⁹

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* *

241. In sum, Claimant's request is broad, radical and in no way comports with the requirement of proportionality – considering also that even if Ecuador is found liable under the Treaty, Claimant's harm is fully reparable by the award of monetary damages. In these circumstances, Claimant's request must be denied in its entirety.

⁴²⁶ *Id.*, ¶¶ 293-296 (citing *Perenco, Electricity Company of Sofia, Burlington, City Oriente, ATA v. Jordan, Bayindir* and *COSB v. Slovakia*).

⁴²⁷ Ecuador's Opposition, ¶ 189.

⁴²⁸ Claimant's Reply, ¶¶ 297-298.

⁴²⁹ Ecuador's Opposition, ¶¶ 191-192.

VI. CLAIMANT’S “NON-AGGRAVATION” MEASURES FAIL ABSENT ITS ENTITLEMENT TO INTERIM MEASURES UNDER ARTICLE 26 OF THE UNCITRAL RULES.

242. Claimant also requests interim measures to “prevent the exacerbation or aggravation of the dispute and to safeguard the Tribunal’s ability to award effective relief in this arbitration.”⁴³⁰

However, absent Claimant’s entitlement to interim measures for failure to meet the requirements of Article 26 of the UNCITRAL Arbitration Rules, Claimant’s requested inevitably fails.⁴³¹

243. As Ecuador explained in its Opposition brief, the question whether an international court or tribunal has the power to indicate measures directed against a party which risks aggravating the dispute but whose conduct is not such as to cause an imminent risk of irreparable harm to the rights of the other party has been answered authoritatively by the ICJ in the negative.⁴³² Judge Buergenthal’s separate declaration hardly casts doubt on the overwhelming majority’s decision on what is now settled law in the jurisprudence of the Court.

244. For example, in the recent case concerning *Certain Activities Carried out by Nicaragua in the Border Area* between Costa Rica and Nicaragua, the ICJ affirmed that although on a number of occasions the Court indicated provisional measures ordering the parties to refrain from action which would aggravate or extend the dispute or render it more difficult to resolve,⁴³³ in all those cases provisional measures *other* than measures directing the parties not to take actions to aggravate or extend the dispute or to render more difficult its settlement were also

⁴³⁰ Claimant’s Reply, Part VIII.

⁴³¹ Ecuador does not dispute that Claimant has, in addition to its alleged rights under the Treaty, which Ecuador disputes as shown above, a procedural right to the non-aggravation of the dispute and the maintenance of the *status quo*. What Ecuador disputes is whether the Tribunal can indicate interim measures in the absence of an imminent risk of irreparable harm as the case is here.

⁴³² *Pulp Mills Case 2007*, ¶¶ 49-51 (RLM-51). See also Ecuador’s Opposition, ¶¶ 199-200.

⁴³³ See, e.g., Claimant’s Reply, ¶ 304 and n. 525.

indicated.⁴³⁴ In light of this, the Court rejected the final provisional measure sought by Nicaragua, also finding it “very broadly worded,” and “linked to the rights which form the subject of the case before the Court on the merits, in so far as it is a measure complementing *more specific* measures protecting those same rights,” that were also requested by Costa Rica.⁴³⁵

245. It follows that the *CEMEX* tribunal, comprised of Judge Gilbert Guillaume, a former President of the ICJ, and Professors Abi-Saab and von Mehren, is certainly not an “outlier,” as Claimant characterizes it,⁴³⁶ in holding that when there is no urgency or necessity to adopt provisional measures directed at the preservation of the rights of the parties it is not possible to recommend other provisional measures in order to avoid the aggravation of the dispute.⁴³⁷

246. The cases that Claimant cites do not detract from this position: Claimant cannot point to a single instance where non-aggravation measures were indicated absent the satisfaction of the ordinary requirements for the indication of interim measures, however their construction by the relevant tribunals.⁴³⁸

247. There can be no other conclusion than that the principle of non-aggravation does not obviate Claimant’s need to meet the requirements of Article 26 of the UNCITRAL Rules and does not justify the indication of interim measures in the absence of such requirements.

⁴³⁴ *Costa Rica v. Nicaragua*, ¶ 62 (citing *Pulp Mills Case 2007*, ¶ 49) (RLM-80).

⁴³⁵ *Id.* (emphasis added).

⁴³⁶ Claimant’s Reply, ¶ 312. Indeed, as Claimant admits the “non-aggravation” principle stems from the jurisprudence of the ICJ, it is only appropriate that such jurisprudence is taken into account. *See* Claimant’s Reply, ¶ 303 (citing *Electricity Company of Sofia*).

⁴³⁷ *Cemex*, ¶¶ 63-64 (CLM-4).

⁴³⁸ *See City Oriente 2008*, ¶¶ 70-78 (CLM-8); *Burlington*, ¶¶ 75-82 (CLM-3); *Perenco*, ¶ 43 (CLM-13); *Quiborax*, ¶¶ 154-157 (CLM-14); *Biwater*, Procedural Order No. 1, ¶ 75 (CLM-2); *Biwater*, Procedural Order No. 3, ¶ 135 (CLM-38) (referring to the prevention of “current or *imminent harm or prejudice* to the arbitral process itself) (emphasis added).

248. Similarly, the Tribunal's ability to award effective relief in this arbitration is not at risk. As explained above, any prejudice that Claimant faces, which Ecuador disputes in any event, is not "irreparable" in that it is fully remediable through compensatory damages.

249. In these circumstances, Claimant's appeal to the Tribunal's authority to award interim measures to prevent the aggravation of the dispute and to preserve its ability to award effective relief must be dismissed along with the other interim measures requested by Claimant.

VII. CONCLUSION

250. For the foregoing reasons, Claimant's Request for Interim Measures must be denied in its entirety.

Respectfully submitted,

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