

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

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

Claimant

versus

**THE REPUBLIC OF ECUADOR**

Respondent

**CLAIMANT'S REQUEST FOR INTERIM MEASURES**

**12 June 2012**

## I. INTRODUCTION

1. In this arbitration, Merck Sharp & Dohme (I.A.) Corp. (“MSDIA”) seeks relief from a \$150 million judgment entered against it by the Ecuadorian courts, an irrational and indefensible imposition produced through a clearly biased and irregular judicial process and resulting from Ecuador’s failure to afford an impartial tribunal to adjudicate the underlying claim. Throughout the litigation, Ecuador’s courts manipulated the process to MSDIA’s prejudice, and their finding of liability and enormous damages award are entirely unsupported in reason or law. The judicial process and the resulting judgment constitute a denial of justice and breach Ecuador’s obligations under the Treaty between the United States of America and the Republic of Ecuador Concerning the Encouragement and Reciprocal Protection of Investment (the “Ecuador-United States BIT” or “Treaty”).

2. Since the entry of the Ecuadorian appeals court’s \$150 million judgment in September 2011, MSDIA has filed a recourse of cassation with Ecuador’s highest court, the National Court of Justice, and that last petition is pending. All substantive proceedings before the National Court of Justice are complete, and the final decision of that court may issue at any time. The timing of the decision is entirely within the unilateral discretion of the National Court of Justice, and MSDIA has no ability to delay that decision.

3. Absent the Interim Measures sought in this application, the decision of the National Court of Justice will trigger immediate and irreversible harm to MSDIA. Under Ecuadorian law, the final judgment will be fully enforceable in Ecuador, and enforcement of the judgment against MSDIA’s assets, accomplished with the aid of the Ecuadorian state, can then occur swiftly—very possibly resulting in a seizure of MSDIA’s assets in Ecuador in less than a month. Because the enormous judgment far exceeds the value of MSDIA’s business in Ecuador, shortly after an adverse National Court of Justice ruling that business therefore will very likely be completely destroyed.

4. Moreover, because that devastating result will appear to be inevitable, the prospect of the imminent destruction of MSDIA’s business in Ecuador will have immediate and irreparable effects on MSDIA’s ability to retain its employees and many other crucial business relationships that depend on confidence in the business’s survival. These irreversible harms will befall MSDIA merely upon entry of an adverse ruling by the National Court of Justice—even before the plaintiff takes steps to enforce that judgment.

5. For these reasons, MSDIA faces an imminent threat that its long-term investment in Ecuador will be severely and irreparably harmed by the actions of Ecuador’s judiciary and agents of Ecuador’s executive branch carrying out its judiciary’s orders. That harm includes the very real and imminent likelihood that MSDIA’s entire business in Ecuador will be destroyed. No later relief within the powers of this or any tribunal could fully remediate that harm.

6. This Tribunal has the authority to issue interim measures of protection in order to preserve the status quo and to prevent substantial and irreparable injury to MSDIA. Such interim measures are appropriate and necessary to preserve this Tribunal’s ability to award effective relief vindicating MSDIA’s rights under the Treaty.

7. In arbitral proceedings under bilateral investment treaties, interim measures of protection are granted where: 1) the tribunal has *prima facie* jurisdiction, 2) the measures are necessary to prevent a threat of substantial or irreparable harm or prejudice, and 3) urgency exists because the threatened harm would likely occur before the arbitral proceeding is concluded. These factors are all clearly satisfied in the circumstances of this case.

8. *First*, this Tribunal has *prima facie* jurisdiction. Under the Ecuador-United States BIT, Ecuador agreed to arbitrate investment disputes with U.S. companies, such as MSDIA, involving investments in Ecuador. The dispute before this Tribunal concerns claims for breaches of Ecuador's obligations under the Treaty with respect to MSDIA's investment in Ecuador, and thus plainly falls within the scope of Ecuador's offer to arbitrate. Ecuador's agreement to arbitration in the Treaty and MSDIA's consent to arbitration result in a binding arbitration agreement, under which this Tribunal has *prima facie* jurisdiction to hear this dispute.

9. *Second*, the measures MSDIA is requesting are necessary to prevent the threat of substantial and irreparable harm to MSDIA. If the Ecuadorian courts' judgment is enforced against MSDIA's assets, MSDIA's business in Ecuador will be completely destroyed. Once that occurs, nothing this or any other tribunal can do will be capable of restoring the status quo or resuscitating MSDIA's business. At the same time, serious harm will be visited upon the employees and business partners of MSDIA, as well as upon the Ecuadorian patients that MSDIA currently serves.

10. *Third*, MSDIA's request is urgent because the threatened harm to MSDIA will occur before these arbitral proceedings are completed. Under Ecuadorian procedure, the decision of the National Court of Justice may issue at any time, and will be immediately enforceable against MSDIA's assets. The timing of that event is entirely within the control of Ecuador and its agents (specifically, of its highest court), and executive agents of the Ecuadorian state would be expected to seize and liquidate MSDIA's assets to satisfy the judgment. Immediately upon issuance of an adverse judgment, MSDIA's Ecuadorian business will suffer irreparable harm in retaining and renewing ongoing business relationships due to the imminence of its destruction.

11. For these reasons, MSDIA respectfully requests that this Tribunal issue interim measures of protection in favor of MSDIA to preserve the status quo and to prevent the substantial and irreparable harm that would result if Ecuador were able to enforce the judgment against MSDIA's assets.

## **II. BACKGROUND OF THE DISPUTE**

12. This arbitration concerns a manifestly unjust and irregular \$150 million judgment issued against MSDIA by Ecuador's courts. The judgment was the result of a profoundly flawed and biased judicial process, and the proceedings that culminated in the judgment constituted a denial of justice, which violated Ecuador's obligations under the Ecuador-United States BIT. MSDIA was not provided with an effective means of asserting claims and enforcing rights through the Ecuadorian courts; it was not treated fairly and equitably by the Ecuadorian courts; its investment was not accorded full protection and security; its investment was impaired through arbitrary and discriminatory measures; and its treatment in the Ecuadorian courts was far less than that required by international law. Ecuador did not afford impartial tribunals to adjudicate

the claims against MSDIA. Instead, MSDIA was subjected to an unfair and one-sided judicial process that prejudiced its rights and prevented it from having the claims against it fairly considered and its defenses fully presented and impartially evaluated in accordance with the rule of law.

13. As detailed in MSDIA's Notice of Arbitration, the judgment at issue arose out of a lawsuit brought against MSDIA by an Ecuadorian company, Nueva Industria Farmaceutica Asociada, S.A. ("NIFA") in December 2003, complaining that MSDIA had sold a small, aging, 26-year-old manufacturing and packaging plant located in the Chillos Valley of Ecuador to another Ecuadorian company instead of NIFA.<sup>1</sup>

14. MSDIA decided to sell the Chillos Valley plant in late 2001 as part of a business decision to consolidate its Latin American manufacturing operations. By early 2002, MSDIA had begun to seek potential buyers in a variety of industries, inside Ecuador and internationally.

15. NIFA—an Ecuadorian pharmaceutical manufacturer that sold over-the-counter and generic prescription drugs—was among several prospective buyers who expressed interest in the Chillos Valley plant in early 2002. NIFA was a relatively small presence in the Ecuadorian pharmaceutical market. Its total *sales* in 2002 (the year in which negotiations commenced) were only \$2.4 million.<sup>2</sup> Its total *profits* in 2002 were just \$2,165.<sup>3</sup>

16. By May 2002, MSDIA and NIFA had begun negotiations for a possible sale of the plant. In late November 2002, the parties agreed in principle on a purchase price of just \$1.5 million for the plant, expressly subject to reaching a final agreement on all terms.<sup>4</sup> The discussions soured shortly thereafter because MSDIA discovered that NIFA, while negotiating for the purchase of MSDIA's plant, had applied for and obtained certain registrations from the Ecuadorian Ministry of Health to produce Rofecoxib, a drug under patent that MSDIA had an exclusive right to market in Ecuador.<sup>5</sup> At the time, Rofecoxib was MSDIA's most profitable patent in Ecuador.

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<sup>1</sup> NIFA became "PROPHAR S.A." in August 2010.

<sup>2</sup> Exhibit C-20, Report of Rolf Stern, submitted to Court of Appeals, *NIFA v. MSDIA*, 4 June 2009, at p. 19 (English translation at p. 21).

<sup>3</sup> *Id.*, at p. 26 (English translation at p. 28) (determining NIFA's profits based on NIFA tax returns). NIFA's product sales accounted for between 0.12% and 0.14% of the total Ecuadorian pharmaceutical market between 2002 and 2004. Its generic product sales accounted for an average of only 2.7% of the generic pharmaceutical market during that period. *Id.* at p. 15 (English translation at p. 16) (determining NIFA's market shares based on certified data compiled by the market research and data company, IMS Ecuador S.A., and introduced into the court record).

<sup>4</sup> Exhibit C-5, Summary of Meeting Between MSDIA and NIFA, 20 November 2002. The parties affirmed on several occasions during the negotiations that there was no binding agreement and either party could walk away at any time. Most notably, on November 20, 2002, MSDIA and NIFA met in Panama to discuss the terms of a proposed sale, including price, tax obligations, and method of payment. At that meeting, and subject to reaching a final agreement on all terms, the parties agreed in principle on a purchase price of \$1.5 million. MSDIA memorialized the terms discussed at the Panama meeting in a letter transmitted electronically, which made clear it was neither a letter of intent nor a contract, stating that "[t]his letter is not binding the parties to any of the above until a letter of intent or a contract is signed." NIFA approved the letter via email on 25 November 2002. *Id.*; Exhibit C-6, Email from NIFA General Manager Miguel Garcia to Ed Jáen (MSDIA consultant), et seq., 25 November 2002.

<sup>5</sup> Exhibit C-7, Email from Hector Tejada (MSDIA) to Jacob Harel (Merck & Co.) November 26, 2002.

17. Based on what appeared to be at best cavalier business practices and intentions on NIFA's part, and at worst unscrupulous ones, MSDIA's trust in NIFA had eroded. MSDIA asked NIFA for promises that would foreclose the risk that NIFA might use MSDIA's former plant and equipment to trade on MSDIA's excellent reputation, confuse patients and doctors as to the true origin of products NIFA manufactured in MSDIA's former facility, and harm MSDIA by misappropriating its know-how and trade secrets.

18. Thus, at a meeting between the parties on January 22, 2003, MSDIA asked NIFA to agree not to produce copies of MSDIA's products at the plant for five years after the sale. Following preliminary discussions of MSDIA's proposal, NIFA walked out of the meeting and terminated the negotiations.<sup>6</sup>

19. In July 2003, MSDIA sold the plant (without equipment) to an affiliate of Ecuaquimica, another Ecuadorian company, for \$830,000.<sup>7</sup>

20. In December 2003, NIFA filed a civil complaint against MSDIA in the Second Court for Civil Affairs of Pichincha. NIFA's claims were based on alleged antitrust violations that, while never clearly articulated, appeared to be premised on a theory that by selling the Chillós Valley plant to a different company MSDIA had used an alleged "dominant" market position to prevent NIFA from introducing new products into the pharmaceutical market. NIFA—a company with previous reported annual profits of only *two thousand* dollars—alleged that by selling the small plant to a different company, MSDIA had somehow caused NIFA lost-profits damages of at least *\$200 million*.<sup>8</sup>

21. As an objective matter, NIFA's legal theory had no conceivable support either in the facts of the case or in the law of Ecuador.

22. As explained more fully below, at both the time of the events at issue and at the time of NIFA's complaint, Ecuador had not adopted any antitrust laws. There simply were no competition laws in effect in Ecuador for MSDIA (or anyone else) to violate. Moreover, even if Ecuadorian law *had* included a substantive competition law and had recognized antitrust claims at the relevant times (and it did not), NIFA's antitrust theory had no basis whatever in the objective facts. MSDIA plainly did not and does not have a dominant position in the Ecuadorian pharmaceutical market; in fact, in 2002 it had only a 3% market share.<sup>9</sup> At least *seven* other companies had an *equal or larger share* of the (highly competitive) market than MSDIA.<sup>10</sup> And there could be no serious claim that MSDIA held a dominant position in the Ecuadorian *real estate* market—the market most relevant to the failed negotiation.

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<sup>6</sup> Exhibit C-8, Memorandum from Jacob Harel (Merck & Co.) to distribution, 22 January 2003.

<sup>7</sup> Exhibit C-11, Report of Omar Herrera R., submitted to court of first instance, *NIFA v. MSDIA*, 25 October 2004, at p. 4 (English translation at p. 3). MSDIA executed the sales deed for the plant with an affiliate of Ecuaquimica. MSDIA sold the equipment separately to other parties. *Id.* at p. 3-4 (English translation at p. 3-4).

<sup>8</sup> Exhibit C-10, NIFA Complaint, 16 December 2003, at p. 10 (English translation at p. 8).

<sup>9</sup> Exhibit C-35, Report of Diego Petrecollo, submitted to the Court of Appeals, *NIFA v. MSDIA*, 11 March 2011 at p. 10 (English translation at p. 7-8).

<sup>10</sup> In 2003, the top 20 companies all had market shares between 1.6% and 6%. *Id.* at p. 11 (English translation at p. 9).

23. Thus, there could be no plausible antitrust theory requiring MSDIA, despite its doubts about NIFA's motives, to sell its plant to NIFA as opposed to any other entity.

24. Nor was there any credible factual or legal basis for the proposition that any action by MSDIA caused any harm to NIFA, much less damages on the preposterous magnitude of \$200 million.

25. Despite NIFA's failure to identify a legal or factual basis for its claims or any plausible basis for damages, much less substantial damages, on December 17, 2007, the Ecuadorian court of first instance issued a manifestly unjust and irrational judgment against MSDIA, and awarded \$200 million in damages for profits NIFA purportedly would have earned if MSDIA had sold the small plant to it, rather than to Ecuaquimica.<sup>11</sup> A "Temporary Judge," who had had no prior involvement in the litigation, assumed responsibility for the case at the last moment. Evidence suggests that her 15-page opinion was the work of someone else. The Temporary Judge issued the opinion resolving a four year litigation with a record larger than 6,000 pages<sup>12</sup> less than *three and a half hours* after she assumed responsibility for the case. Her opinion largely recited verbatim the language of the plaintiff's complaint, and included identical typographical and grammatical errors, suggesting that the two documents originated from the same source.<sup>13</sup> Her decision awarded \$200 million by fiat, without even attempting to undertake any analysis into whether NIFA had suffered damages or the magnitude of any damages.

26. On September 23, 2011, an Ecuadorian court of appeals ratified and amended the trial court's judgment, awarding NIFA \$150 million in supposed lost-profits damages for alleged antitrust violations.<sup>14</sup> The court of appeals process was characterized by apparently deliberate failures to provide notice of rulings in an effort, sometimes successful, to deprive MSDIA of procedural and substantive rights; blatant manipulation of the court's power to appoint experts on crucial issues of liability and damages by supplanting the initially appointed, highly credentialed court-appointed experts who reached opinions favoring MSDIA with later-appointed, uncredentialed individuals whose poorly reasoned, unsubstantiated opinions favored NIFA; and an opinion on liability and damages that failed to address the legal arguments and evidence submitted by MSDIA or to offer any coherent explanation why \$150 million—as opposed to \$0 or, for that matter, the \$200 million award that was on appeal—was a plausible quantum of lost-profits damages.

27. Thus, the clear lack of impartiality of the Ecuadorian courts has systematically denied MSDIA the guarantees of due process and has imposed on it a clear denial of justice.

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<sup>11</sup> Exhibit C-3 at p. 15.

<sup>12</sup> *Id.* at p. 1, 15; Exhibit C-17, Report of Judicial Inspection of *NIFA v. MSDIA* First Instance Case File, Patricio Carrillo Davila, President of the Provincial Court of Justice of Pichincha, *MSDIA v. Chang-Huang* (Second Court for Civil Affairs of Pichincha), 19 December 2008, at p. 3.

<sup>13</sup> Exhibit C-18, Report of Alfonso Leon Asqui and Dr. Bruno Saenz Andrade Regarding *NIFA v. MSDIA* First Instance Judgment, *MSDIA v. Chang-Huang*, 26 January 2009, at p. 4-9.

<sup>14</sup> Exhibit C-4 at p. 16.

### III. MSDIA IS ENTITLED TO INTERIM MEASURES OF PROTECTION

28. The UNCITRAL Arbitration Rules confer broad authority on arbitral tribunals to award interim measures of protection. Article 26(1) provides that “the arbitral tribunal may take *any interim measures it deems necessary in respect of the subject-matter of the dispute.*”<sup>15</sup> By its terms, Article 26(1) requires only that the requested measure of protection be “necessary” “in respect of the subject matter of the dispute.” Article 26(1) thus “leaves wide[ ] discretion to the Tribunal in awarding provisional measures.”<sup>16</sup> This provision is understood to grant arbitral tribunals broad authority to award a wide range of potential remedies.<sup>17</sup>

29. MSDIA requires protection during the course of these arbitration proceedings from enforcement, against its assets in Ecuador or elsewhere in the world, of any judgment in the NIFA litigation. These interim measures are necessary in respect of the subject matter of the dispute before this Tribunal, specifically MSDIA’s rights, under the Ecuador-United States BIT, to be treated fairly and equitably by Ecuador’s courts and not to be subjected by them to a denial of justice.

30. If the manifestly partial and unjust judgment against MSDIA is enforced against MSDIA’s assets while this arbitration is pending, such that MSDIA’s business in Ecuador is completely destroyed, MSDIA will irreparably lose rights that this Tribunal, despite awarding monetary relief, could never fully redress. Even before execution of the judgment, MSDIA will begin to lose employees and crucial business relationships in Ecuador. And once MSDIA’s assets are seized and sold at auction, the ongoing goodwill and business relationships it has built over decades in Ecuador will be irreversibly destroyed. Thus, it is necessary for this Tribunal to prevent the enforcement of the disputed judgment pending the resolution of this arbitration, in order to safeguard the subject matter of the dispute and the Tribunal’s ability to award fully effective relief.

31. Tribunals operating under the UNCITRAL Rules have generally required that parties requesting interim measures of protection meet three requirements: (1) that the tribunal has *prima facie* jurisdiction; (2) that the requested measures are necessary to prevent a threat of substantial or irreparable harm or prejudice; and (3) that urgency exists because the threatened

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<sup>15</sup> Exhibit CLM-26, 1976 UNCITRAL Arbitration Rules, Art. 26(1) (emphasis added). Article 26(2) provides that the tribunal may grant interim measures “in the form of an interim award.”

<sup>16</sup> Exhibit CLM-12, *Paushok v. Gov’t of Mongolia*, UNCITRAL Arbitration Rules, Order on Interim Measures (2 September 2008), at para. 36.

<sup>17</sup> Exhibit CLM-28, D. Caron, D. Caplan & M. Pellonpää, *The UNCITRAL Arbitration Rules: A Commentary* 539 (2006) (an arbitral tribunal has the “power to order any ... measures ‘it deems necessary’ in light of the particular circumstances”); Similarly, under Article 47 of the ICSID Convention, ICSID tribunals have the power to order “any provisional measures which should be taken to preserve the respective rights of the parties,” which has been construed to permit tribunals to order a wide range of interim remedies. *See* C. Schreuer, *The ICSID Convention: A Commentary* 779 (2009) (“[N]o exhaustive list of provisional measures which may be used by tribunals can be given.”).

harm will likely occur before the arbitral proceeding is concluded.<sup>18</sup> MSDIA easily satisfies each of these elements.

A. *The Tribunal Has Prima Facie Jurisdiction*

32. MSDIA clearly meets the requirement that petitioner make a *prima facie* showing that the Tribunal has jurisdiction to hear the parties' dispute.

33. Under Article VI(1) of the Ecuador-United States BIT, Ecuador agreed to arbitrate, *inter alia*, "a dispute ... arising out of or relating to ... (c) an alleged breach of any right conferred or created by this Treaty with respect to an investment."<sup>19</sup>

34. Article I(1)(a) defines "investment" as "every kind of investment in the territory of one Party owned or controlled directly or indirectly by nationals or companies of the other Party, such as equity, debt service and investment contracts; and includes (i) tangible and intangible property, including rights, such as mortgages, liens and pledges; (ii) a company or shares of stock or other interests in a company or interests in the assets thereof; (iii) a claim to money or a claim to performance having economic value, and associated with an investment; (iv) intellectual property ...; and (v) any right conferred by law or contract, and any licenses and permits pursuant to law."<sup>20</sup>

35. The current dispute arises out of or relates to rights conferred or created by the Treaty with respect to MSDIA's investment. MSDIA is a company incorporated in the United States and therefore is a "company[y] of the other Party." As set out in MSDIA's Notice of Arbitration, for the past 40 years, MSDIA has distributed and sold essential pharmaceutical products in Ecuador, through a branch located in Ecuador, with employees, facilities, and extensive operations in Ecuador. MSDIA's ongoing business in Ecuador plainly constitutes an investment for purposes of Article I(1)(a).

36. More specifically, until 2003, MSDIA owned and operated a manufacturing facility in Ecuador, the sale of which is at the heart of this dispute. The manufacturing facility itself was tangible real property owned and controlled by MSDIA and plainly qualifies as an "investment" under Article I(1)(a).

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<sup>18</sup> See, e.g., Exhibit CLM-10, *Encana Corp. v. Republic of Ecuador*, UNCITRAL Arbitration Rules, Interim Award (31 January 2004), at para. 13 ("[T]hree conditions ought in principle to be met before interim measures are established.... First, there must be an apparent basis of jurisdiction. Second, the measure sought must be urgent. Third, the basis for establishing provisional measures must be that otherwise irreparable damage could be caused to the requesting party."); Exhibit CLM-28, D. Caron, D. Caplan & M. Pellonpää, *The UNCITRAL Arbitration Rules: A Commentary* 535-37 (2006); Exhibit CLM-27, C. Brower, J. Brueschke, *The Iran United States Claims Tribunal* 218 (1998). These three requirements have also been applied in numerous decisions of the International Court of Justice ("ICJ") and in arbitral awards under the ICSID Convention. See e.g. Exhibit CLM-21, *Pulp Mills on the River Uruguay (Argentina v. Uruguay)*, Request for the Indication of Provisional Measures, Order (13 July 2006), at paras. 59-62; Exhibit CLM-19, *LaGrand Case (Germany v. United States of America)*, Request for the Indication of Provisional Measures, Order (3 March 1999), paras. 18, 22; See also Exhibit CLM-31, Schreuer, *The ICSID Convention: A Commentary* 771-77 (2009).

<sup>19</sup> Exhibit C-1, U.S.-Ecuador BIT.

<sup>20</sup> *Id.*



37. The Treaty guarantees that Ecuador will accord MSDIA's investment fair and equitable treatment, full protection and security, and treatment no less than that required by international law, among other things. Under the Treaty, Ecuador also promises that it will not impair MSDIA's investment by arbitrary or discriminatory measures and that it will provide MSDIA with an effective means of asserting claims and enforcing rights in Ecuador. The present dispute concerns Ecuador's breach of these obligations and its impairment of the rights guaranteed to MSDIA's investment under the Treaty. Thus, the dispute plainly falls within the scope of the agreement to arbitrate.

38. The arbitration agreement under which this Tribunal's authority derives was properly formed. Ecuador made a binding offer to arbitrate when it entered into the Treaty. MSDIA accepted Ecuador's offer to arbitrate when it filed its Notice of Arbitration.<sup>21</sup> Under Article VI(4) of the Treaty, this resulted in a binding arbitration agreement.

39. Under Article VI(4) of the Treaty, MSDIA properly initiated an arbitration against Ecuador under the UNCITRAL Rules. The Treaty provides that initiation of arbitration is proper where: (1) the investor has not submitted the dispute for resolution either to the courts or administrative tribunals of the host State or in accordance with any previously-agreed dispute settlement procedures; and (2) six months has elapsed from the date when the dispute arose.

40. Each of these requirements has been satisfied. MSDIA has not submitted its claims under the BIT for resolution either to the courts or administrative tribunals of Ecuador or to any other applicable, previously-agreed dispute settlement procedure. And more than six months has elapsed since this dispute arose in December 2007, when the Second Court for Civil Affairs of Pichincha issued its judgment against MSDIA.<sup>22</sup> MSDIA notified Ecuador of the dispute in accordance with the provisions of the Treaty on June 8, 2009.<sup>23</sup> The six-month waiting period has long since expired.<sup>24</sup>

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<sup>21</sup> See generally Exhibit CLM-11, *Generation Ukraine Inc. v. Ukraine*, ICSID Case No. ARB/00/9, Award (15 September 2003), at paras. 12.2, 12.3 (“[I]t is firmly established that an investor can accept a State’s offer of ICSID arbitration contained in a bilateral investment treaty by instituting ICSID proceedings. There is nothing in the BIT to suggest that the investor must communicate its consent in a different form directly to the State . . . It follows that the Claimant validly consented to ICSID arbitration by filing its Notice of Arbitration at the ICSID Centre.”); Exhibit CLM-9, *El Paso Energy Int’l v. Argentina*, ICSID Case No. ARB/03/15, Decision on Jurisdiction (Apr. 27, 2006), at para. 35 (“It is now established beyond doubt that a general reference to ICSID arbitration in a BIT can be considered as being the written consent of the State, required by Article 25 to give jurisdiction to the Centre, and that the filing of a request by the investor is considered to be the latter’s consent.”).

<sup>22</sup> Exhibit C-3.

<sup>23</sup> Exhibit C-2, Letter from Ethan Shenkman and Howard Shapiro to Dr. Diego García Carrión, June 8, 2009.

<sup>24</sup> The BIT also suggests the parties initially “should” seek a resolution through negotiation. MSDIA attempted to negotiate with Ecuador in good faith. After MSDIA sent the June 8, 2009 letter notifying Ecuador of the dispute, attorneys for MSDIA met with Ecuador’s Attorney General to discuss the case in September 2009. Unfortunately, this led NIFA to bring criminal charges against MSDIA’s attorneys for allegedly interfering with the judicial process. These criminal charges were pending against MSDIA’s attorneys during the entire time that MSDIA appealed the NIFA judgment in the Court of Appeals. They were not finally dismissed until September 2011. See paras. 148-152 below.

*B. The Requested Measures Are Necessary to Prevent Irreparable Harm to MSDIA's Rights*

41. The second requirement for establishing entitlement to interim measures of protection is that the requested measures are necessary to prevent a threat of substantial or irreparable harm or prejudice. This requirement is also clearly met in this case.

1. Interim Measures of Protection Are Appropriate to Prevent Seizure of a Claimant's Assets if the Seizure Would Lead to Irreparable Harm

42. The purpose of interim measures is to “prevent irreparable prejudice or harm to the rights of a party.”<sup>25</sup> Such “rights may be threatened by actions capable of prejudicing the execution of any decision, which may be given by the tribunal.”<sup>26</sup> Tribunals have held that interim measures of protection are therefore justified in order to preserve the *status quo*, to prevent the aggravation of the dispute, and to preserve the tribunal's ultimate authority to award fully effective relief in connection with the claims before it.<sup>27</sup>

43. Arbitral tribunals have issued interim measures of protection restraining states from enforcing disputed legislative measures or judicial orders pending the outcome of an arbitration challenging the disputed measure or order. These tribunals have held that such interim measures were necessary to preserve the subject matter of the dispute during the pendency of the arbitration so that the tribunal would retain the ability to award effective relief in its final award.

a) Cases restraining states from enforcing disputed legislative measures

44. In *Perenco v. Ecuador*, an investor initiated an arbitration alleging that a certain law adopted by Ecuador—Law 42, which increased Ecuador's share in existing hydrocarbon participation contracts—violated Ecuador's contractual and treaty obligations. Perenco sought

<sup>25</sup> Exhibit CLM-28, D. Caron, D. Caplan & M Pellonpää, *The UNCITRAL Arbitration Rules: A Commentary* 536 (2006) (internal emphasis omitted).

<sup>26</sup> Exhibit CLM-28, D. Caron, D. Caplan & M Pellonpää, *The UNCITRAL Arbitration Rules: A Commentary* 536 (2006) (internal quotation omitted). *See also* Exhibit CLM-19, *LaGrand Case (Germany v. United States of America)*, Request for the Indication of Provisional Measures, Order (3 March 1999), at para. 22 (Interim measures are intended “to preserve the respective rights of the parties pending [the Tribunal's] decision, and presuppose[] that irreparable prejudice shall not be caused to rights which are the subject of a dispute in judicial proceedings.... [T]he Court must be concerned to preserve by such measures the rights which may subsequently be adjudged by the Court to belong either to the Applicant, or to the Respondent.”).

<sup>27</sup> *See, e.g.*, Exhibit CLM-8, *City Oriente Ltd. v. Republic of Ecuador*, ICSID Case No. ARB/06/21, Decision on Revocation of Provisional Measures and Other Procedural Matters (13 May 2008), at para. 62 (finding that without provisional measures there was a risk that City Oriente's contractual relationship with Ecuador would end and “any potential award in [City Oriente's] favor would be ... impossible to enforce and illusory.”); Exhibit CLM-14, *Quiborax S.a. v. Plurinational State of Bolivia*, ICSID Case No. ARB/06/2, Decision on Provisional Measures (26 February 2010), at para. 117 (provisional measures may be used to preserve the “right to the preservation of the *status quo* and to the non-aggravation of the dispute.”); Exhibit CLM-2, *Biwater Gauff (Tanzania) Ltd. v. Tanzania*, ICSID Case No. ARB/05/22, Procedural Order No. 1 (31 March 2006), at para. 71 (provisional measures may be used to ensure that “any arbitral decision which grants to the Claimant the relief it seeks [can] be effective and able to be carried out”); Exhibit CLM-16, *Tokios Tokelés v. Ukraine*, ICSID Case No. ARB/02/18, Order No. 1 (1 July 2003), at para. 7 (ordering “both parties [to] refrain from, suspend, and discontinue, any domestic proceedings ... which might prejudice the rendering or implementation of an eventual decision or award of this Tribunal or aggravate the existing dispute.”).

provisional measures from the tribunal to prevent Ecuador from seizing oil to satisfy amounts allegedly owed under Law 42.

45. The tribunal held that “Perenco should not, pending a final decision, be required to choose between making the very payments they dispute and suffering extensive seizure of its oil production or other assets.”<sup>28</sup> The tribunal found that Ecuador’s “imminent seizure of [Perenco’s] assets in Ecuador”<sup>29</sup> would result in “Perenco’s business [being] crippled, if not destroyed,”<sup>30</sup> and that “the seizure of Perenco’s assets ... would seriously aggravate the dispute between the parties.”<sup>31</sup> The tribunal added that “[i]f Perenco’s business was effectively brought to an end ... such injury could not, in the Tribunal’s judgment, be adequately compensated by an award of damages.”<sup>32</sup>

46. The tribunal ordered provisional measures restraining Ecuador from demanding payments allegedly due under Law 42 and from taking any action, judicial or otherwise, to collect any payments allegedly owed. The tribunal also ordered provisional measures restraining Ecuador from engaging in any other conduct that would affect or alter Perenco’s rights under its participation contracts with Ecuador pending the outcome of the arbitration.<sup>33</sup>

47. In two other arbitrations involving Law 42 payments, the tribunal awarded similar interim measures of protection in order to preserve the status quo and avoid aggravation of the dispute. Like the *Perenco* tribunal, these two tribunals found that the destruction of a going concern was a harm that could not be adequately compensated by an award of damages.

48. In *Burlington Resources v. Ecuador*, after initially making Law 42 payments, the investor ceased making such payments and initiated an ICSID arbitration against Ecuador. Ecuador then instituted summary proceedings against the investor in Ecuadorian courts to enforce payment of amounts allegedly owed under Law 42. Pursuant to these summary proceedings, Ecuador seized the investor’s oil production.

49. The tribunal noted that “the rights to be preserved by provisional measures are not limited to those which form the subject-matter of the dispute ..., but may extend to procedural rights including the general right to the *status quo* and to the non-aggravation of the dispute... [which] are thus self-standing rights.”<sup>34</sup> The tribunal found that if the seizures of oil were to continue, such seizures were “bound to aggravate the present dispute,” and it was “most likely that the conflict [would] escalate and there [was] a risk that the relationship between the foreign investor and Ecuador [would] come to an end.”<sup>35</sup> The tribunal concluded that interim measures of

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<sup>28</sup> Exhibit CLM-13, *Perenco Ecuador Ltd. v. Republic of Ecuador*, ICSID Case No. ARB/08/6, Decision on Provisional Measures (8 May 2009), at para. 60.

<sup>29</sup> *Id.* at para. 46.

<sup>30</sup> *Id.* at para. 53.

<sup>31</sup> *Id.* at para. 46.

<sup>32</sup> *Id.* at para. 46.

<sup>33</sup> *Id.* at para. 79.

<sup>34</sup> Exhibit CLM-3, *Burlington Resources Inc. v. Republic of Ecuador*, ICSID Case No. ARB/08/5, Procedural Order No. 1 (29 June 2009), at para. 60.

<sup>35</sup> *Id.* at para. 65.

protection were necessary to prevent “the destruction of an ongoing investment,”<sup>36</sup> and it ordered Ecuador to cease the summary proceedings in its courts and not to initiate new ones pending the outcome of the arbitration.

50. Similarly, in *City Oriente v. Ecuador*, the tribunal affirmed that, “pending a decision on this dispute, the principle that neither party may aggravate or extend the dispute or take justice into their own hands prevails.”<sup>37</sup> Accordingly, the *City Oriente* tribunal ordered Ecuador not to demand payment of amounts allegedly owed by the investor under Law 42 during the pendency of the arbitration.<sup>38</sup> Subsequently, Ecuador petitioned the tribunal to have the interim measures revoked. The tribunal refused, finding that the Law 42 payments were “so high that there [was] a risk that the early payment of such amounts may jeopardize the company’s economic feasibility.”<sup>39</sup> The tribunal thus concluded that the provisional “measures prevent[ed] serious – and even irreparable – damage to the petitioner.”<sup>40</sup>

51. In *Paushok v. Mongolia*, the claimants initiated an UNCITRAL arbitration contesting Mongolia’s windfall profit tax on gold sales, claiming that that tax violated their right to fair and equitable treatment. The claimants sought interim measures preventing Mongolia from enforcing the tax while the arbitration was pending.

52. The tribunal found that enforcement of the tax would likely lead to the complete loss of the claimants’ investment.<sup>41</sup> The tribunal found that such circumstances posed “an imminent danger of serious prejudice,” and warranted interim measures of protection.<sup>42</sup> The tribunal suspended payment of the disputed windfall tax until it ruled on the merits of the claimants’ request for relief, and it ordered Mongolia to refrain from seizing or obtaining a lien on the claimants’ assets during the arbitration.<sup>43</sup>

53. The tribunals in *Perenco, Burlington Resources, City Oriente*, and *Paushok* issued interim measures restraining state action to enforce disputed legislation against the assets of the investor during the arbitration. These awards establish that interim measures of protection are appropriate to prevent seizure of an investor’s assets during the pendency of an arbitration

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<sup>36</sup> *Id.* at para. 83.

<sup>37</sup> Exhibit CLM-7, *City Oriente Ltd. v. Republic of Ecuador*, ICSID Case No. ARB/06/21, Decision on Provisional Measures (19 November 2007), at para. 57.

<sup>38</sup> *Id.* at para. 59.

<sup>39</sup> Exhibit CLM-8, *City Oriente Ltd. v. Republic of Ecuador*, ICSID Case No. ARB/06/21, Decision on Revocation of Provisional Measures and Other Procedural Matters (13 May 2008), at para. 76.

<sup>40</sup> *Id.* at para. 78.

<sup>41</sup> Exhibit CLM-12, *Paushok v. Gov’t of Mongolia*, UNCITRAL Arbitration Rules, Order on Interim Measures (2 September 2008), at para. 77.

<sup>42</sup> *Id.* at para. 62.

<sup>43</sup> *Id.* at p. 16.

challenging the basis on which the state purports to seize those assets, where doing so would cause serious or irreparable harm to the business of the investor.<sup>44</sup>

b) Cases restraining states from enforcing disputed judicial orders

54. Applying similar principles, tribunals have also issued interim measures of protection restraining state action to enforce a disputed court judgment, where doing so would cause serious or irreparable harm to the business of the investor. For example, in *Bayindir v. Pakistan*, the Pakistan National Highway Authority (“NHA”) had sought a judgment from the Turkish courts allowing it to cash a \$196 million bank guarantee that had been provided by the investor. The investor sought interim measures of protection from an arbitral tribunal.

55. The tribunal issued provisional measures “recommend[ing] that Pakistan take whatever steps may be necessary to ensure that NHA does not enforce any final judgment it may obtain from Turkish courts with regard to the Mobilisation Advance.”<sup>45</sup> The tribunal’s decision to issue interim measures demonstrates that tribunals are able and willing to restrain state action to enforce judicial orders as well as legislative measures in order to preserve the claimant’s rights pending the outcome of the arbitration.

56. Similarly, in *The Electricity Company of Sofia – Belgium v. Bulgaria*, a case heard by the Permanent Court of International Justice (“PCIJ”), predecessor to the ICJ, the PCIJ ordered Bulgaria to ensure that, during the proceedings before the PCIJ, no further steps would be taken in a local collection action brought by the Municipality of Sofia.<sup>46</sup> In its request for interim measures, the Belgian government had noted that the payment of the sums sought by the municipality “would not only seriously prejudice the Company’s position but also impede the restoration of its rights” should Belgium prevail.<sup>47</sup> In these circumstances, the PCIJ considered that interim measures were necessary “to prevent ... the performance of acts likely to prejudice ... the respective rights which may result from the impending judgment.”<sup>48</sup>

57. Applying these principles, the arbitral tribunal in *Chevron v. Ecuador* recently issued interim measures of protection restraining Ecuador from enforcing a third-party judgment against Chevron issued by Ecuadorian courts. In that case, which is proceeding under the UNCITRAL Rules, Chevron alleges that a multi-billion dollar judgment against it is “tainted by fraud and/or

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<sup>44</sup> In analyzing the *Perenco* and *Burlington* decisions, the tribunal in *Cemex v. Venezuela* noted that “the destruction of the ongoing concern that constituted the investment, would have created an ‘irreparable harm.’” *CEMEX Caracas Investments B.V. v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB/08/15, Decision on the Claimants’ Request for Provisional Measures (3 March 2010), at para. 55.

<sup>45</sup> Exhibit CLM-1, *Bayindir Insaat Turizm Ticaret Ve Sanayi A.S. v. Islamic Republic of Pakistan*, ICSID Case No. ARB/03/29, Decision on Jurisdiction (14 November 2005), at para. 46 (quoting the tribunal’s Provisional Order No. 1).

<sup>46</sup> Exhibit CLM-18, *In re Electricity Co. of Sofia and Bulgaria (Belgium v. Bulgaria)*, PCIJ, Interim Measures Decision, Dec. 5, 1939, Series A/B, No. 79, at p. 199.

<sup>47</sup> *Id.* at p. 196.

<sup>48</sup> *Id.* at p. 199.

serious due process violations” and breached Ecuador’s obligations under the U.S.-Ecuador BIT to provide fair and equitable treatment.<sup>49</sup>

58. Chevron filed for arbitration and sought interim measures of protection even before the first instance judgment was issued in Ecuador. Chevron noted that enforcement of a judgment it believed imminent could “render[] the[] arbitration proceedings inefficacious and, if not thereby thwarting the Claimants’ claim against the Respondent, causing loss to the Claimants not compensable in damages.”<sup>50</sup>

59. The *Chevron* tribunal reasoned that “[i]f it were established that [the] judgment ... was a breach of an obligation [Ecuador] owed to the Claimants as a matter of international law ... any loss arising from the enforcement of such judgment (within and without Ecuador) may be losses for which [Ecuador] would be responsible to the Claimants under international law.”<sup>51</sup> The tribunal concluded it was therefore appropriate “to take interim measures in respect of the subject matter of the Parties’ dispute.”<sup>52</sup> The tribunal ordered Ecuador “to take all measures at its disposal to suspend or cause to be suspended the enforcement or recognition within and without Ecuador of any judgment against [Chevron].”<sup>53</sup>

60. The *Chevron* tribunal initially granted Chevron’s request for interim measures in a procedural order dated February 9, 2011.<sup>54</sup> On February 14, 2011 the first instance court in Ecuador issued a multi-billion dollar judgment against Chevron, which was subsequently affirmed by the court of appeal on January 3, 2012.<sup>55</sup> In light of these developments, and upon Chevron’s request, the tribunal “confirm[e]d and reissue[d]” its prior order on interim measures “as an Interim Award pursuant to Articles 26 and 32 of the UNCITRAL Arbitration Rules.”<sup>56</sup> In addition to requiring Ecuador “to take all measures at its disposal to suspend or cause to be suspended the enforcement or recognition within and without Ecuador” of the judgment against Chevron, the tribunal also directed Ecuador “to inform this Tribunal ... of all measures which the Respondent has taken for the implementation of this Interim Award.”<sup>57</sup>

61. After a hearing on interim measures, the *Chevron* tribunal issued a Second Interim Award on interim measures. The tribunal determined that Chevron had established the following: “(i) a sufficient case as regards both this Tribunal’s jurisdiction to decide the merits of the parties’

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<sup>49</sup> Exhibit CLM-5, *Chevron Corp. v. Republic of Ecuador*, PCA Case No. 2009-23 (UNCITRAL), First Interim Award on Interim Measures (25 January 2012), at p. 14. After the judgement against it was affirmed on appeal, Chevron submitted a supplemental memorial on the merits adding a claim of denial of justice. See Chevron’s *Claimants’ Supplemental Memorial on the Merits*, dated 20 March 2012, available at [http://italaw.com/documents/ClmtsSupplementalMemorial\\_Eng.pdf](http://italaw.com/documents/ClmtsSupplementalMemorial_Eng.pdf).

<sup>50</sup> Exhibit CLM-5, *Chevron Corp. v. Republic of Ecuador*, PCA Case No. 2009-23 (UNCITRAL), First Interim Award on Interim Measures (25 January 2012), at p. 7.

<sup>51</sup> *Id.* at p. 8.

<sup>52</sup> *Id.* at p. 11.

<sup>53</sup> *Id.* at p. 11.

<sup>54</sup> *Id.* at p. 9.

<sup>55</sup> *Id.* at p. 13.

<sup>56</sup> *Id.* at p. 16.

<sup>57</sup> *Id.* at p. 16.

dispute and the Claimants' case on the merits against Respondent; (ii) a sufficient urgency given the risk that substantial harm may befall the Claimants before this Tribunal can decide the Parties' dispute by any final award; and (iii) a sufficient likelihood that harm to the Claimants may be irreparable in the form of monetary compensation."<sup>58</sup> The tribunal again ordered Ecuador "(whether by its judicial, legislative or executive branches) to take all measures necessary to suspend or cause to be suspended the enforcement and recognition within and without Ecuador of the judgments" against Chevron and "to continue to inform this Tribunal ... of all measures which the Respondent has taken for the implementation of its legal obligations under this Second Interim Award."<sup>59</sup>

62. As discussed below, the present case involves a large judgment resulting from a denial of justice in the Ecuadorian courts. As in *Chevron*, it is appropriate for this Tribunal to order interim measures to restrain enforcement of a judgment that would cause MSDIA irreparable harm to its assets and its ongoing business in Ecuador.

2. Absent Interim Measures, the Threat of Enforcement, and Enforcement Itself, of the Disputed Judgment Against MSDIA's Assets Will Cause Immediate, Substantial and Irreparable Harm

63. Once an adverse decision issues from the National Court of Justice, even before MSDIA's assets are seized to satisfy such a judgment, MSDIA will suffer irreparable injury. If employees and business partners perceive that MSDIA will be put out of business in Ecuador by the judgment, they will act to protect their own interests. Key employees will seek and find other employment. Distributors will turn to other suppliers. Those from whom MSDIA leases facilities will look for other tenants likely to occupy the premises over the long term. These injuries will be immediate and produce irreversible consequences.<sup>60</sup>

64. In addition, the total value of MSDIA's assets in Ecuador—the ongoing business of its Ecuadorian branch, which provides pharmaceutical products in Ecuador, including medicines for the treatment of HIV, the virus that causes AIDS, high cholesterol, hypertension, diabetes, fungal and candida infections, and other infectious diseases, among other things, as well as vaccines for the prevention of disease<sup>61</sup>—is far less than the amount of the \$150 million judgment.<sup>62</sup> MSDIA's Ecuadorian branch has approximately \$27 million in annual sales and more than 100 employees.<sup>63</sup> The branch's assets consist of inventory, accounts receivable and fixed assets including vehicles, computers and office equipment, and a small balance of operating cash.<sup>64</sup>

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<sup>58</sup> Exhibit CLM-6, *Chevron Corporation and Texaco Petroleum Company v. The Republic of Ecuador*, PCA Case No. 2009-23 (UNCITRAL), Second Interim Award on Interim Measures (16 February 2012), at para. 2.

<sup>59</sup> *Id.* at para. 3.

<sup>60</sup> Witness Statement of Jean Marie Canan, dated June 8, 2012, ("Canan Witness Statement"), at para. 21.

<sup>61</sup> *Id.* at paras 11-14 and accompanying Appendix.

<sup>62</sup> *Id.* at para 19.

<sup>63</sup> *Id.* at paras 8-9.

<sup>64</sup> *Id.* at para 19.

65. Because MSDIA's Ecuador branch does not have cash or other liquid assets sufficient to satisfy the judgment, the judgment-creditor would have to ask the Ecuadorian courts to order the seizure of MSDIA's assets in Ecuador.<sup>65</sup> These assets are necessary to the operation of MSDIA's business—indeed, apart from MSDIA's goodwill, good name, and relationships, these assets *are*, in effect, MSDIA's business. If the Ecuadorian courts order the seizure of MSDIA's assets in Ecuador to satisfy the judgment against it, this will completely destroy MSDIA's business in Ecuador.<sup>66</sup>

66. The seizure of MSDIA's assets in Ecuador would have irreparable effects not only on MSDIA, which would be put entirely out of business in Ecuador, but also on MSDIA's employees in Ecuador, whom MSDIA would not be able to pay, and on the supply of essential pharmaceutical products to the Ecuadorian people.<sup>67</sup> None of these harms can be redressed through an award of monetary damages.

67. Moreover, unless Ecuador takes steps to prevent the enforcement of the disputed judgment outside of Ecuador, there is a substantial risk that the judgment-creditor, NIFA, will take steps to enforce the judgment in other countries where MSDIA has assets, which will cause substantial and irreparable harm to MSDIA businesses in other countries outside Ecuador as well.<sup>68</sup>

68. Arbitral tribunals have granted interim measures in just such circumstances as these. As noted above, the tribunals in *Perenco*, *Burlington Resources*, *City Oriente*, and *Paushok* held that the claimants should not be forced to choose between making the disputed payments that were the subject of the arbitration and having their investments crippled or destroyed by the seizure of their assets. In those cases, the tribunals accepted that it was appropriate and necessary to restrain the state from taking steps to seize the claimant's assets to satisfy the disputed payments. In *Bayindir v. Pakistan* and *Chevron v. Ecuador*, the tribunals applied this reasoning and ordered interim measures restraining the state from taking steps to enforce disputed court judgments.<sup>69</sup>

69. Similarly, in this case, MSDIA is challenging a state action—i.e., the judgment of the Ecuadorian courts—directing MSDIA to pay \$150 million. MSDIA challenges this action as a denial of justice and breach of Ecuador's obligations under the BIT. Thus, as in *Chevron*, “[i]f it were established that [this] judgment ... was a breach of an obligation [Ecuador] owed to the Claimant[] as a matter of international law ... any loss arising from the enforcement of such judgment (within and without Ecuador) may be losses for which [Ecuador] would be responsible to the Claimant[] under international law.”<sup>70</sup>

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<sup>65</sup> Expert Opinion of Dr. Jaime Ortega Trujillo, dated June 11, 2012, (“Ortega Expert Opinion”), at paras. 16-21.

<sup>66</sup> Canan Witness Statement at paras. 20-22.

<sup>67</sup> *Id.*

<sup>68</sup> MSDIA is a U.S. corporation with assets and operations in a number of countries, including Ecuador.

<sup>69</sup> See paras. 54-62 above.

<sup>70</sup> Exhibit CLM-5, *Chevron Corp. v. Republic of Ecuador*, PCA Case No. 2009-23 (UNCITRAL), First Interim Award on Interim Measures (25 January 2012), at p. 8.



70. Moreover, similarly to *Perenco, Burlington Resources, City Oriente*, and *Paushok*, the threatened state action in this case would destroy MSDIA's business in Ecuador. As discussed above, entry of an enforceable judgment will cause immediate, substantial, irreparable harm through loss of key employees and other crucial business relationships in Ecuador, and if enforcement proceeds in Ecuador or beyond while this arbitration is pending, MSDIA's business in Ecuador will be entirely destroyed, entailing still greater irreparable injury. If any of this were to occur, this Tribunal would lose its ability to award MSDIA fully effective relief in respect of the claims before it. Interim measures of protection are therefore necessary and appropriate to protect the status quo and to protect the Tribunal's ultimate authority to award relief on the claims at issue in this arbitration.

### C. *The Threat of Harm to MSDIA Is Imminent*

71. The third requirement for establishing entitlement to interim measures of protection is that there is "urgency in the sense that there is a real risk that action prejudicial to the rights of either party might be taken before the Court has given its final decision."<sup>71</sup> The degree of urgency "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 measures before the issuance of an award."<sup>72</sup> This requirement is also easily met in this case.

72. The threat of harm to MSDIA is imminent. Under Ecuadorian procedure, the judgment of the National Court of Justice will be final and enforceable with immediate effect.<sup>73</sup>

73. As discussed above, once an adverse decision issues from the National Court of Justice, even before MSDIA's assets are seized to satisfy such a judgment, MSDIA will suffer irreparable injury in the form of loss of employees and other business relationships.<sup>74</sup>

74. In addition, there is a high likelihood that, absent interim measures, the judgment would be enforced against MSDIA's assets long before this Tribunal could render a final award on the merits. Once the National Court of Justice has entered its judgment, it will return the case file, together with a certified copy of its judgment, to the court of appeals.<sup>75</sup> The court of appeals will

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<sup>71</sup> Exhibit CLM-17, *Application of the Int'l Convention on the Elimination of all Forms of Racial Discrimination (Georgia v. Russian Federation)*, Request for the Indication of Provisional Measures, Order (15 October 2008), at para. 129. See also Exhibit CLM-20, *Passage Through the Great Belt (Finland v. Denmark)*, Request for the Indication of Provisional Measures, Order (29 July 1991), at para. 23 (a measure is urgent when "action prejudicial to the rights of either party is likely to be taken before [a] final decision is given") (citation omitted).

<sup>72</sup> Exhibit CLM-2, *Biwater Gauff (Tanzania) Ltd. v. United Republic of Tanzania*, ICSID Case No. ARB/05/22, Procedural Order No. 1 (31 March 2006), at para. 76. See also *id.* at para. 86 (where failure to issue provisional measures would raise a risk of impairing a material right, "the safest course at [an] early stage of the proceedings is to ensure that no adverse step is taken in relation to the same."); Exhibit CLM-3, *Burlington Resources Inc. v. Republic of Ecuador*, ICSID Case No. ARB/08/5, Procedural Order No. 1 (29 June 2009), at pp. 28-29 (restraining Ecuador from taking imminent coercive action to enforce payments pursuant to Law 42); Exhibit CLM-7, *City Oriente Ltd. v. Republic of Ecuador*, ICSID Case No. ARB/06/21, Decision on Provisional Measures (19 November 2007), at para. 67 ("provisional measures are only appropriate if it is impossible to wait for a specific issue to be settled at the merits stage").

<sup>73</sup> Ortega Expert Opinion, at para. 11.

<sup>74</sup> See para. 63 above; see also Canan Witness Statement at para. 21.

<sup>75</sup> Ortega Expert Opinion, at para. 12; Exhibit CLM-25, Ecuadorian Organic Code of the Judicial Power, Art. 142.

then return the case file to the court of first instance.<sup>76</sup> This process normally may take one or two weeks but could be accomplished in a matter of days.<sup>77</sup>

75. Under normal procedure, the court of first instance then issues a notice to the parties that it has received the case.<sup>78</sup> As soon as that notice has been issued, the judgment-creditor may file a petition for execution of the judgment.<sup>79</sup> Upon the filing of such a petition, the court may issue an order of execution.<sup>80</sup> Under Ecuadorian procedure, the court may then direct the judgment-debtor to pay the full amount of the judgment, or to provide the court with a list of assets it is relinquishing voluntarily to satisfy the judgment, within 24 hours of the order.<sup>81</sup>

76. If the judgment-debtor does not pay the judgment, the judgment-creditor may file a petition requesting that the court initiate seizure proceedings.<sup>82</sup> In response, the court will order seizure of the judgment-debtor's assets.<sup>83</sup> The seizure will be carried out by a trustee appointed by the court, with the assistance of Ecuador's National Police.<sup>84</sup> Once the seizure has been carried out, the assets will be appraised and sold at public auction.<sup>85</sup> The proceeds of the auction will be given to the judgment-creditor.<sup>86</sup> These procedures can be accomplished very swiftly. There are no particular waiting periods imposed by Ecuadorian law.<sup>87</sup>

77. Thus, under Ecuadorian procedure, once the National Court of Justice has issued its decision, it will likely be less than a month before Ecuador effectuates the seizure of all of MSDIA's assets in Ecuador.<sup>88</sup>

78. In addition, given that MSDIA does not have sufficient assets in Ecuador to satisfy the judgment, there is a serious and substantial risk that NIFA will seek to enforce the judgment outside Ecuador.

79. It should be noted that the urgency in this case is substantially more acute than in *Chevron*, where the Tribunal issued precisely the interim measures sought here. In that case, the tribunal issued an order on interim measures that restrained the enforcement of the judgment *prior* to the issuance of the judgment in the court of first instance. Subsequently, the tribunal converted that order into an interim award shortly after the court of appeals affirmed the court of

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<sup>76</sup> *Id.*

<sup>77</sup> Ortega Expert Opinion, at para 14.

<sup>78</sup> *Id.*, at para. 15.

<sup>79</sup> Ortega Expert Opinion, at para. 15; Exhibit CLM-24, Ecuadorian Code of Civil Procedure, Arts. 438, 488.

<sup>80</sup> Ortega Expert Opinion, at para. 16; Exhibit CLM-24, Ecuadorian Code of Civil Procedure, Arts. 438, 488.

<sup>81</sup> Ortega Expert Opinion, at para. 16; Exhibit CLM-24, Ecuadorian Code of Civil Procedure, Arts. 430, 438.

<sup>82</sup> Ortega Expert Opinion, at para. 17; Exhibit CLM-24, Ecuadorian Code of Civil Procedure, Art. 439.

<sup>83</sup> Ortega Expert Opinion, at para. 18; Exhibit CLM-24, Ecuadorian Code of Civil Procedure, Art. 439.

<sup>84</sup> Ortega Expert Opinion, at para. 18; Exhibit CLM-24, Ecuadorian Code of Civil Procedure, Art. 440.

<sup>85</sup> Ortega Expert Opinion, at paras. 20-21; Exhibit CLM-24, Ecuadorian Code of Civil Procedure, Art. 439.

<sup>86</sup> Ortega Expert Opinion, at paras. 20-21; Exhibit CLM-24, Ecuadorian Code of Civil Procedure, Art. 478.

<sup>87</sup> Ortega Expert Opinion, at para. 19.

<sup>88</sup> *Id.*

first instance's judgment, but *before* any proceedings in the National Court of Justice. In this case, all proceedings in the National Court of Justice have been completed, and a decision of that court may issue at any moment.<sup>89</sup> Moreover, MSDIA has substantial assets and an ongoing business in Ecuador today, which is plainly at immediate risk.<sup>90</sup>

80. Thus, it is evident here that “action prejudicial to the rights of [MSDIA] is likely to be taken before [a] final decision is given.”<sup>91</sup> The National Court of Justice is almost certain to issue a decision before a final award in this arbitration is rendered. 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. The urgency requirement under international law—a likelihood of irreparable harm to a party's rights before an award on the merits—is therefore plainly met in this case.

*D. There Are No Countervailing Factors Weighing against an Award of Interim Measures*

81. The majority of tribunals in investment treaty arbitrations have applied the three factors outlined above in deciding whether to grant interim measures of protection. As set out above, those three factors are plainly met in this case.

82. Some tribunals have considered two additional factors when awarding interim measures of protection. First, some tribunals have weighed the potential harm to the investor if the requested measures are not granted against the potential harm to the state if they are granted.<sup>92</sup> Second, some tribunals have considered whether the claimant has made a prima facie showing on the merits.<sup>93</sup> Even if the Tribunal were to consider either of these factors—neither of which is broadly accepted as a requirement for granting interim measures—in this case, both factors support MSDIA's request for interim measures.

1. The Potential Harm to MSDIA Outweighs the Potential Harm to Ecuador

83. The interim measures of protection requested by MSDIA would impose no burden on Ecuador. This case involves claims that Ecuador breached its treaty obligations by denying justice to MSDIA in connection with a \$150 million judgment in favor of a private Ecuadorian company. Ecuador itself has no direct interest in that judgment, or in the payment of that judgment, which would be entirely for the benefit of the private judgment-creditor. Staying enforcement of the judgment would therefore cause no harm to Ecuador.

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<sup>89</sup> *Id.* at para. 10.

<sup>90</sup> Canan Witness Statement at paras. 20-22.

<sup>91</sup> Exhibit CLM-20, *Passage Through the Great Belt (Finland v. Denmark)*, Request for the Indication of Provisional Measures, Order (29 July 1991), at para. 23.

<sup>92</sup> See e.g. Exhibit CLM-3, *Burlington Resources Inc. and others v. Republic of Ecuador*, ICSID Case No. ARB/08/5, Procedural Order No. 1 (29 June 2009), at para. 82; Exhibit CLM-12, *Paushok v. Gov't of Mongolia*, UNCITRAL Arbitration Rules, Order on Interim Measures (2 September 2008), at para. 79; Exhibit CLM-15, *Saipem S.p.A v. The People's Republic of Bangladesh*, ICSID Case No. ARB/05/07, Decision on Jurisdiction and Recommendation on Provisional Measures (21 March 2007), at para. 184.

<sup>93</sup> See Exhibit CLM-12, *Paushok v. Gov't of Mongolia*, UNCITRAL Arbitration Rules, Order on Interim Measures (2 September 2008), at para. 55.

84. Indeed, several tribunals have noted that the issuance of interim measures can benefit both the investor and the state. The *Burlington* tribunal, for example, stated: “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. This last observation shows that provisional measures are in the interest of both sides.”<sup>94</sup>

85. The *Paushok* tribunal noted that preserving the going concern in that case meant that if the “Claimants were to prevail, Respondent would probably face a claim for lower damages than if GEM’s activities had been terminated; this is not an insignificant factor, considering Respondent’s tight budgetary constraints.”<sup>95</sup> Thus, the tribunal concluded, “there is considerable advantage for both parties in the issuance of interim measures of protection.”<sup>96</sup>

86. Similarly, in this case, preserving MSDIA’s “ongoing investment . . . benefits both the investor and the state.”<sup>97</sup> As discussed above, if MSDIA’s business in Ecuador were destroyed and MSDIA prevails in this arbitration, Ecuador would have to compensate MSDIA for those damages. Minimizing those damages thus benefits Ecuador. Moreover, a provisional measures order would benefit Ecuador because it would allow MSDIA to continue distributing essential medications to Ecuadorian citizens, including vital drugs for the treatment of HIV, high cholesterol, hypertension, and diabetes, among others, for many of which treatment cannot be interrupted.<sup>98</sup>

87. In addition, staying enforcement of the disputed judgment would not violate the independence of Ecuador’s judiciary or Ecuador’s sovereignty. MSDIA does not seek interim measures staying pending judicial proceedings, and it does not seek to interpose the judgment of this Tribunal for the judgment of the Ecuadorian courts. MSDIA seeks only to restrain state action allowing the seizure of MSDIA’s assets. As set out above, arbitral tribunals have regularly awarded interim measures of protection in similar circumstances. Simply put, there is no risk of harm to Ecuador from the requested measures.

88. Even if the Tribunal were to conclude that there is potential harm to Ecuador, it would have to balance the alleged burden on Ecuador with the consequences to MSDIA if interim measures are not granted.<sup>99</sup> Any potential harm to Ecuador is far outweighed by the potential harm to MSDIA. If the Tribunal restrains Ecuador from enforcing the judgment during the pendency of the arbitration and later finds in favor of Ecuador on the merits, the interim

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<sup>94</sup> Exhibit CLM-3, *Burlington Resources Inc. and others v. Republic of Ecuador*, ICSID Case No. ARB/08/5, Procedural Order No. 1 (29 June 2009), at para. 84-85.

<sup>95</sup> Exhibit CLM-12, *Paushok v. Gov’t of Mongolia*, UNCITRAL Arbitration Rules, Order on Interim Measures (2 September 2008), at para. 84.

<sup>96</sup> *Id.* at para. 85.

<sup>97</sup> Exhibit CLM-3, *Burlington Resources Inc. and others v. Republic of Ecuador*, ICSID Case No. ARB/08/5, Procedural Order No. 1 (29 June 2009), at para. 83.

<sup>98</sup> See Canan Witness Statement at paras 11-14 and accompanying Appendix.

<sup>99</sup> In *Quiborax*, the tribunal “balance[d] the harm caused to Claimants by the criminal proceedings and the harm that would be caused to Respondent if the proceedings were stayed or terminated.” Exhibit CLM-14, *Quiborax S.A. v. Plurinational State of Bolivia*, ICSID Case No. ARB/06/2, Decision on Provisional Measures (26 February 2010), at para. 158. It concluded that even if a stay were to harm Bolivia such harm “[was] proportionately less than the harm caused to Claimants if the criminal proceedings were to continue their course.” *Id.* at para. 165.

measures will be lifted and the judgment can be enforced against MSDIA's assets at that time. If, on the other hand, the Tribunal does not restrain enforcement of the disputed judgment and later finds in favor of MSDIA, MSDIA's business in Ecuador will be gone, and the harm to MSDIA will be substantial and irreparable.<sup>100</sup>

## 2. MSDIA Has Established a Prima Facie Case on the Merits

89. Under the applicable UNCITRAL rules, the merits of the underlying claim are typically not considered in connection with a request for interim measures. The few arbitral awards that have considered the merits of the claimant's case in connection with a request for interim measures have required only that the claimant establish a *prima facie* case on the merits.<sup>101</sup>

90. For example, in *Paushok v. Mongolia*, the tribunal held that it needed "to decide only that the claims made are not, on their face, frivolous or obviously outside the competence of the Tribunal."<sup>102</sup> This is because "[t]o do otherwise would require the Tribunal to proceed to a determination of the facts and, in practice, to a hearing on the merits of the case, a lengthy and complicated process which would defeat the very purpose of interim measures."<sup>103</sup>

91. Even if the Tribunal does consider the merits of MSDIA's claims, however, MSDIA has made a *prima facie* showing of its claims. The disputed judgment against MSDIA was the result of a judicial process that was profoundly flawed and biased each step of the way.

- a) The Trial Court Proceedings and Judgment Were Contrary to Ecuadorian Law and Procedure and to the Minimum Requirements of Due Process and Demonstrated a Clear Bias Against MSDIA

92. The Second Court for Civil Affairs of Pichincha (the trial court) committed a number of procedural irregularities and violations of Ecuadorian procedural law during the evidentiary phase of the proceedings in that court. Among other things, the original trial judge allowed NIFA's only witness to testify on two separate occasions, more than a year apart, without prior notice to MSDIA of the time and place of the testimony. The court ultimately refused to require the witness to respond to many of the questions submitted by MSDIA to be put to the witness.<sup>104</sup>

93. On September 17, 2007, Temporary Judge Victoria Flordelina de Lourdes Chang Huang Castillo replaced the original judge, who had been presiding over the *NIFA v. MSDIA* case since December 2003. At the time Temporary Judge Chang Huang was assigned to the *NIFA v.*

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<sup>100</sup> See Exhibit CLM-8, *City Oriente Ltd. v. Republic of Ecuador*, ICSID Case No. ARB/06/21, Decision on Revocation of Provisional Measures and Other Procedural Matters (13 May 2008), at para. 78 ("having weighed the interests at stake, it is the opinion of this Tribunal that [provisional measures] prevent serious – and even irreparable – damage to the petitioner at the cost of lesser and reparable damage to Respondents.").

<sup>101</sup> See Exhibit CLM-12, *Paushok v. Gov't of Mongolia*, UNCITRAL Arbitration Rules, Order on Interim Measures (2 September 2008), at para. 55 (the tribunal found it "need not go beyond whether a reasonable case has been made which, if the facts alleged are proven, might possibly lead the Tribunal to the conclusion that an award could be made in favor of Claimants.").

<sup>102</sup> *Id.*

<sup>103</sup> *Id.*

<sup>104</sup> MSDIA Notice of Arbitration (29 November 2011) at paras. 51-53.

MSDIA dispute, the evidentiary phase of the case had been long over, and the original judge had decreed the case ready for decision.

94. After assignment to the case, Temporary Judge Chang-Huang took no action on it for three months, during which time court records showed that the entire case file remained in the court's archives and was not accessed by her. Court records further reveal that she took her first action in the case—"taking cognizance" of the matter (a step under Ecuadorian civil procedure by which the judge formally takes jurisdiction)—on December 17, 2007, at 2:06 p.m.<sup>105</sup> Remarkably, *that same day*—less than three and a half hours later—Temporary Judge Chang-Huang issued a 15-page decision resolving a four year litigation with a 6,000 page record.<sup>106</sup> The decision found in favor of NIFA and awarded it the entire \$200 million in alleged damages that it had claimed.<sup>107</sup>

95. Temporary Judge Chang-Huang's decision found no support in the record, and indeed, the circumstances strongly suggest the decision was not the product of her own work.<sup>108</sup> Purporting to be the judge's own reasoning, her opinion was in fact largely a verbatim recitation of the plaintiff's complaint, and the inclusion of identical typographical and grammatical errors suggested the two documents originated from the same source.<sup>109</sup> The decision awarded \$200 million by fiat, without even attempting to undertake any analysis into whether NIFA had suffered damages or the magnitude of any damages.

96. Under Ecuadorian procedural law, MSDIA had three days to exercise its right to appeal the trial court's judgment. The trial court failed to provide notice of its judgment to MSDIA in the manner required by Ecuadorian procedural law.<sup>110</sup> The court's insufficient notice appears to have been calculated to prevent MSDIA from exercising its right to appeal within the 3-day period allowed under Ecuadorian procedure.

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<sup>105</sup> Exhibit C-3 at p. 1.

<sup>106</sup> *Id.* at p. 15; Exhibit C-17, Report of Judicial Inspection of *NIFA v. MSDIA* First Instance Case File, Patricio Carrillo Davila, President of the Provincial Court of Justice of Pichincha, *MSDIA v. Chang-Huang*, 19 December 2008, at p. 3 (describing the record as including 6,243 pages).

<sup>107</sup> Exhibit C-3 at p. 15.

<sup>108</sup> See MSDIA Notice of Arbitration (29 November 2011) at paras 59-64.

<sup>109</sup> Exhibit C-18, Report of Alfonso Leon Asqui and Dr. Bruno Saenz Andrade Regarding *NIFA v. MSDIA* First Instance Judgment, *MSDIA v. Chang-Huang*, dated 26 January 2009 at p. 4-9 (detailing similarities between NIFA's Complaint and the judgment, and concluding that a significant section of the judgment is "essentially, the same text"). The United States Department of State has identified the improper involvement by counsel in preparing judgments for presiding judges in Ecuador as a serious and ongoing problem, concluding that "[w]hile the constitution provides for an independent judiciary, in practice the judiciary was at times susceptible to outside pressure and corruption. The media reported extensively on the susceptibility of the judiciary to bribes for favorable decisions and resolution of legal cases and on judges parcelling out cases to outside lawyers, who wrote the judicial sentences and sent them back to the presiding judge for signature." Exhibit C-36, U.S. Department of State, 2010 Country Report on Human Rights Practices – Ecuador, 8 April 2011, at p. 9, <http://www.state.gov/documents/organization/160163.pdf>. In its most recent Ecuador country report, the State Department also observed that in this past year the Ecuadorian "government recognized extensive corruption in the judicial branch and began a process to reform the judiciary. Academics and think tank analysts said that legal cases were not processed unless the police and judicial officials were bribed." Exhibit C-61, U.S. Department of State, 2011 Country Report on Human Rights Practices – Ecuador, 24 May 2012, at p. 16, <http://www.state.gov/documents/organization/186722.pdf>

<sup>110</sup> See MSDIA Notice of Arbitration (29 November 2011) at paras 65-67.

b) The Court of Appeals' Proceedings and Judgment Were Contrary to Ecuadorian Law and Procedure and to the Minimum Requirements of Due Process and Demonstrated a Clear Bias Against MSDIA

(1) The Court of Appeals Failed to Provide MSDIA Notice of Having Taken Possession of the Case

97. Notwithstanding the trial court's failure to provide notice in the manner required by Ecuadorian law, MSDIA nevertheless managed to file a timely appeal. When the court of appeals took possession of the appeal on July 15, 2008, however, it did not provide notice to MSDIA. By taking possession of the case, the court of appeals triggered a 10-day period of time within which MSDIA had to submit its "Fundamentation of Appeal," a filing MSDIA was required by Ecuadorian law to submit in order to preserve the right to appeal the trial court judgment. Because it was not given notice, MSDIA discovered that the court had taken possession of the appeal only minutes before the expiration of the 10-day deadline but nevertheless managed to file a last-minute, timely Fundamentation. The court's failure to notify MSDIA again appears to have been intended to cause MSDIA to forfeit its right to appeal the \$200 million trial court judgment.<sup>111</sup>

(2) The Court of Appeals Without Justification Supplanted Highly-Credentialed Court-Appointed Experts Who Had Reached Well-Reasoned Conclusions of No Liability and No Damages with Individuals Lacking Relevant Credentials and Expertise Who Favored the Plaintiff

98. As they often do in Ecuadorian litigation, court-appointed experts played an important role in the Ecuadorian second instance proceedings, which are conducted *de novo* and generally involve the further submission of evidence.<sup>112</sup> The court manipulated the process of appointing experts and considering their testimony in a manner that transparently demonstrated its predisposition to rule against MSDIA and in favor of the Ecuadorian plaintiff, regardless of the facts and law.

99. After initially appointing internationally respected and highly credentialed court-appointed experts to assess issues of liability and damages, the court of appeals dismissed their well-reasoned conclusions that there was no basis for liability or damages in this case. Without legal justification under Ecuadorian law or procedure, and without a basis in reason, the court of appeals appointed replacement "experts" who obviously lacked relevant credentials and expertise. These new "experts" submitted unreasoned and unsupported reports that were entirely at odds with the opinions of the first set of court-appointed experts and entirely favorable to the

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<sup>111</sup> See MSDIA Notice of Arbitration (29 November 2011) at paras 69-70.

<sup>112</sup> Under the rules of Ecuadorian procedure, a court may appoint "court-appointed" experts to opine on specified issues at the request of a party. Whenever possible, the courts appoint individuals that have been "accredited" as experts in the relevant subject matter by the regional office of the Council of the Judiciary. See Exhibit CLM-24, Ecuadorian Code of Civil Procedure, Art. 252. Where a party has requested that the court appoint an expert in a subject matter for which there are no accredited experts, the court may seek recommendations from other bodies, such as a relevant Ecuadorian government ministry or trade association.

Ecuadorian plaintiff. The court adopted the conclusions of these replacement experts without analysis and without addressing the evidence of the original court-appointed experts who had concluded that there was no basis for liability or damages.

*The Court-Appointed Experts in Antitrust Law*

100. The court of appeals arbitrarily rejected the well-reasoned opinion of its original court-appointed antitrust expert, Dr. Ignacio De Leon. Dr. De Leon is a prominent expert in Latin American competition law. He has served previously as head of the Venezuelan Competition Authority. More recently, he has provided consulting services on competition policy to organizations such as the World Bank, UNCTAD, the Andean Community and USAID.<sup>113</sup> The court rejected Dr. De Leon's opinion despite the fact that it had appointed him at the recommendation of Ecuador's Competition Authority in 2009,<sup>114</sup> despite Dr. De Leon's unimpeachable credentials and sound analysis, and despite the fact that NIFA offered no basis to reject Dr. De Leon's conclusions.

101. In the court of appeals proceedings, NIFA based its case entirely on an alleged antitrust violation, arguing that MSDIA had "tak[en] advantage of its ... high economic power" in order to prevent NIFA from entering some unspecified market or markets.<sup>115</sup> On February 17, 2010, Dr. De Leon filed an expert report with the court concluding that the antitrust claims asserted by NIFA necessarily failed because there were no applicable legal standards in place governing free competition in Ecuador in 2002 or 2003.<sup>116</sup>

102. Dr. De Leon further concluded that even had a prohibition against anticompetitive acts been in effect in Ecuador, MSDIA's actions did not violate any accepted legal norm of competition law. Among other things, Dr. De Leon concluded that (i) MSDIA did not hold a dominant position in the real estate or pharmaceutical markets,<sup>117</sup> (ii) MSDIA had been under no obligation to sell its plant to NIFA, in part because MSDIA's plant was not, as NIFA had claimed an "essential facility,"<sup>118</sup> and (iii) even if MSDIA had held a dominant position in a relevant market (which it did not), MSDIA had not committed any act that could be viewed as abusing such a position.<sup>119</sup>

103. Shortly after Dr. De Leon filed his independent expert report, Dr. Carlos Guerra Román, an Ecuadorian intellectual property lawyer lacking any training or expertise in competition law,

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<sup>113</sup> Exhibit C-24, Report of Ignacio De Leon, submitted to the Court of Appeals, *NIFA v. MSDIA*, 17 February 2010, at p. 3.

<sup>114</sup> Exhibit C-22, Letter from Fausto E. Alvarado C., Ecuadorian Authority on Competition, submitted to the Court of Appeals, 29 June 2009. Ecuador's Competition Authority was established in March 2009 by Executive Decree No. 1614. See Exhibit C-19.

<sup>115</sup> Exhibit C-16, NIFA Brief, submitted to Court of Appeals, *NIFA v. MSDIA*, 9 October 2008, at p. 2.

<sup>116</sup> Exhibit C-24 Report of Ignacio De Leon, submitted to the Court of Appeals, *NIFA v. MSDIA*, 17 February 2010, at p. 90, 96.

<sup>117</sup> *Id.* at p. 95.

<sup>118</sup> *Id.* at p. 60-61 ("MSD was not in control of an asset, infrastructure, or good that was "essential" to NIFA's production process. The production facilities did not meet the requirements demanded by that doctrine") (emphasis in original).

<sup>119</sup> *Id.* at p. 79-80, 81.



filed an application with the Pichincha Provisional Director of the Council of the Judiciary seeking to be accredited as an antitrust expert. MSDIA was not aware of the application at the time. Dr. Guerra's application reflected no prior experience or training in competition law whatsoever.<sup>120</sup> Nevertheless, despite Dr. Guerra's complete lack of qualifications, also unknown to MSDIA at the time, the Council of the Judiciary approved Dr. Guerra's application on the very day it was submitted, April 5, 2010.<sup>121</sup> This approval itself appears to have lacked the integrity required of a quasi-judicial body like the Council of the Judiciary.

104. A month later, on May 11, 2010, NIFA filed a petition asserting (without any evidentiary support) that Dr. De Leon had committed "essential error" and requesting the appointment of an additional antitrust expert to review Dr. De Leon's report.<sup>122</sup> On December 8, 2010, although NIFA offered literally no evidence in support of this request, the court of appeals (without explanation) nevertheless appointed Dr. Guerra to serve as a second antitrust expert.<sup>123</sup>

105. On February 14, 2011, Dr. Guerra submitted a report concluding that Dr. De Leon had committed "essential error" and opining that MSDIA could be held liable under antitrust principles.<sup>124</sup> Dr. Guerra's report was fraught with text plagiarized without attribution, obvious analytical errors, misstatements of Ecuadorian law and misapplications of broadly accepted antitrust principles. Among other things, Dr. Guerra concluded absurdly that MSDIA's plant had

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<sup>120</sup> As noted below, since the events at issue, Ecuador's Council of the Judiciary has concluded that Dr. Guerra was plainly unqualified to serve as an expert in competition law. See Exhibit C-58, Report of Ivan Escandon, Provincial Director of the Council of the Judiciary for Pichincha, 26 January 2012 (concluding that Dr. Guerra lacked the credentials required by Ecuadorian law to have been properly credited as an expert in competition law); Exhibit C-60, Memorandum from María Augusta Peña, Council of the Judiciary National Director of Legal Counsel, to Mauricio Jaramillo, Director General of the Council of the Judiciary, 30 April 2012, and Memorandum from Daniela Caicedo, Secretary to the Office of the Director General of the Council of the Judiciary, to Ivan Escandon, Provincial Director of the Council of the Judiciary for Pichincha, 4 May 2012 (same).

<sup>121</sup> Exhibit C-25, Carlos Guerra Román application for expert accreditation and accompanying Council of the Judiciary accreditation, at p. 1-2 (application submitted by Dr. Guerra on 5 April 2010, and approved by then-Provincial Director of the Council of the Judiciary Marco Rodas Buchell the same day). The actions of then-Provincial Director Rodas in accrediting Dr. Guerra, and of the court of appeals in accepting Dr. Guerra's service as an expert and preferring his opinion to that of a highly credentialed expert such as Dr. De Leon, are strongly suggestive of improper influence.

<sup>122</sup> Under Ecuadorian procedure, a party may challenge the opinion of a court-appointed expert by filing a petition, supported by evidence, asserting that the expert has committed "essential error." At the request of the petitioning party, the court may open a limited evidence period, during which it will accept evidence from the parties regarding the alleged "essential error." During this evidence period, the court can appoint an expert with a limited mandate to review the report of the original expert and opine whether it contains an "essential error." If, with the benefit of such evidence, the court concludes that the expert in fact committed "essential error," then the court may appoint a second expert in the same subject matter. See Exhibit CLM-24, Ecuadorian Code of Civil Procedure, Art. 258.

<sup>123</sup> Exhibit C-29, Court of Appeals Order dated 8 December 2010.

<sup>124</sup> Exhibit C-32, Report of Carlos Guerra Román, submitted to the Court of Appeals, *NIFA v. MSDIA*, 14 February 2011, at p. 72-74, 77 (English translation at 99-102, 105).

constituted an “essential facility,” a finding that made no sense whatever under the facts of record or recognized principles of antitrust or competition law.<sup>125</sup>

106. Dr. Guerra plagiarized extensively from existing antitrust works. Among others, Dr. Guerra sought to pass off as his own the work of an Argentinean economist and competition expert, Dr. Diego Petrecolla, misappropriating without attribution swaths of language from Dr. Petrecolla’s work and misapplying its principles.<sup>126</sup> The Ecuadorian Competition Authority had previously recommended Dr. Petrecolla to the court of appeals, along with Dr. De Leon, as a potential expert for the case.<sup>127</sup> Because he had been recommended to the court of appeals by the Competition authority, MSDIA asked Dr. Petrecolla to review the reports submitted by Dr. De Leon and Dr. Guerra and to submit to the court his own report, commenting on the work of the two court-appointed experts and offering his own opinion about the issues of antitrust law presented in the case.

107. On March 11, 2011, MSDIA submitted Dr. Petrecolla’s report to the court of appeals. Dr. Petrecolla’s analysis disclosed that Dr. Guerra had extensively plagiarised Dr. Petrecolla’s work, explained that Dr. Guerra had misused and misapplied that work and the applicable principles of competition law, and explained that Dr. Guerra’s analysis and conclusions were wholly unfounded.<sup>128</sup> Dr. Petrecolla concluded that Dr. De Leon’s report and findings had reflected sound antitrust analysis and were entirely correct; namely, there was no possible basis to hold MSDIA liable to NIFA on the facts of record, and any event, NIFA had suffered no harm.<sup>129</sup>

108. Despite the evidence before it and the opinions of its own appointed expert, Dr. De Leon, and of the other expert recommended to it by the Ministry of Competition, Dr. Petrecolla, the court of appeals arbitrarily and without justification adopted the findings of Dr. Guerra, whose

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<sup>125</sup> *Id.* at p. 74 (English translation at p. 101-102). As Dr. De Leon properly concluded, in order for a resource to qualify as an “essential facility” as the concept is recognized in antitrust law, a facility must be controlled by a monopolist, it must constitute an input without which other firms cannot compete with the monopolist, and its reproduction must be impracticable for technical or financial reasons. Exhibit C-24, Report of Ignacio De Leon, submitted to the Court of Appeals, *NIFA v. MSDIA*, 17 February 2010, at p. 60-61; *see also* Exhibit CLM-29, Abbott B. Lipsky Jr. y J. Gregory Sidak, *Essential Facilities*, 51 *Stan. L. Rev.* 1187, 1211-1212 (1999); Exhibit CLM-30, Pitofsky, Patterson and Hooks, *The Essential Facilities Doctrine under United States Antitrust Law*, 70 *Antitrust L.J.* 443 at 448-450 (2002). Moreover, the remedy where a facility is found to be “essential” under the doctrine is typically shared use of the essential resource in exchange for a reasonable royalty. Thus, the concept is most commonly associated with shared access to utility lines owned by a single enterprise. *See, e.g.*, Exhibit CLM-22, *MCI Communications v. American Tel. & Tel. Co.*, 708 F.2d 1081, 1132-33 (7th Cir. 1983) (requiring a telecommunications provider to provide access to the local service network, over which it held a monopoly, to competitors in long-distance services).

<sup>126</sup> *See* Exhibit C-35, Report of Diego Petrecolla, submitted to the Court of Appeals, *NIFA v. MSDIA*, 11 March 2011 at p. 7 (English translation at p. 5).

<sup>127</sup> Exhibit C-22, Letter from Fausto E. Alvarado C., Ecuadorian Authority on Competition, submitted to the Court of Appeals, 29 June 2009. Dr. Petrecolla has served as the Chief Economist for Argentina’s National Competition Commission and as Director of the Center for Regulatory Studies of the World Bank Institute. In addition, he has advised the governments of El Salvador, Costa Rica, Uruguay and Ecuador on competition issues, and has served as a consultant on competition and utility regulation to the World Bank, Inter-American Development Bank and United Nations Conference on Trade and Development. *Id.* at p. 5 (English translation at p. 3).

<sup>128</sup> Exhibit C-35, Report of Diego Petrecolla, submitted to the Court of Appeals, *NIFA v. MSDIA*, 11 March 2011 at p. 7 (English translation at p. 5).

<sup>129</sup> *Id.*

lack of training or experience in competition law had been brought to the court's attention by MSDIA, who had been certified under highly questionable circumstances shortly after Dr. De Leon submitted his report, and whose analysis the court of appeals knew was largely plagiarized and lacked any grounding in the principles of competition law. The court of appeals never expressly held that its own original court-appointed expert, Dr. De Leon, had committed essential error. It never issued a decree rejecting the reports of either Dr. De Leon or Dr. Petrecola.

*The Court-Appointed Experts in Real Estate*

109. Because NIFA's damages theory depended entirely on its allegation that there was no other real estate in the Quito region suitable for a new plant, the court of appeals appointed an expert in the Quito commercial real estate market, Mr. Manuel J. Silva Vásquez. Based on uncontroverted documentary evidence, Mr. Silva's independent report concluded that NIFA had available to it *many* alternatives to MSDIA's small, aging factory. Given the availability of substitute properties, Mr. Silva's December 23, 2009 report demonstrated conclusively that NIFA could not have suffered significant injury from the failure of its attempted acquisition.

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

a. There were a number of existing, available and properly-zoned industrial plants, other structures, and vacant lots on which NIFA could have constructed a new facility after the negotiations with MSDIA ended in January 2003.<sup>130</sup>

b. At least one other pharmaceutical plant was on the market in 2003 (owned by the Ecuadorian pharmaceutical company Albanova), and another facility available at the time was subsequently purchased by Pfizer and converted into a pharmaceutical manufacturing facility.<sup>131</sup>

c. NIFA owned a vacant lot near the MSDIA plant, which it sold to another Ecuadorian company in May 2003, on which it had been permitted under the applicable zoning laws to build and operate a pharmaceutical manufacturing facility more than three times the size of MSDIA's plant.<sup>132</sup>

d. NIFA had been free to expand its existing facility after the negotiations, and had in fact done so. It obtained a regularization permit in 2005 for 1,057 square meters of construction and obtained another permit for an additional 300 square meters expansion in 2008.<sup>133</sup> Under applicable zoning laws in place in 2003, NIFA was free to build up to

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<sup>130</sup> Exhibit C-23, Report of Manuel J. Silva Vásquez, submitted to the Court of Appeals, *NIFA v. MSDIA*, 23 December 2009, at p. 1-7 (English translation at p. 1-6).

<sup>131</sup> *Id.* at p. 1-2.

<sup>132</sup> *Id.* at p. 8, 10 (English translation at p. 7, 8-9).

<sup>133</sup> *Id.* at p. 8-9 (English translation at p. 7-8).

29,000 square meters on its lot, which would have resulted in a facility far larger than the Chillos Valley plant.<sup>134</sup>

111. As with the competition experts, without explaining the basis for any objection to Mr. Silva or his conclusions, NIFA requested appointment of a new expert, and again without explanation, the court of appeals complied, appointing Mr. Marco V. Yerovi Jaramillo.<sup>135</sup> Mr. Yerovi then issued a report that, while irrelevant to the issues before him, were more favorable to NIFA than Mr. Silva's report.<sup>136</sup> The court of appeals then simply ignored the existence of Mr. Silva's report, referred to certain observations in Mr. Yerovi's report, and ignored key findings in Mr. Yerovi's own report that agreed with Mr. Silva's report.<sup>137</sup>

### The Court-Appointed Experts in Damages

112. The court of appeals had appointed Dr. De Leon as its expert on competition law at the request of MSDIA, and upon NIFA's petition filed on June 5, 2009, the court of appeals had also appointed Dr. De Leon to serve as its expert on damages.<sup>138</sup> Dr. De Leon, an economist as well as an internationally recognized competition lawyer and scholar, concluded that NIFA had suffered *no* damages from the failed acquisition, had failed to identify any illegal act that could have caused any damage, and had failed to support its allegations regarding lost profits, which were at best wholly speculative.<sup>139</sup>

113. But as with the competition and real estate issues, the court of appeals rejected its own expert's conclusions, when those conclusions favored a judgment in favor of MSDIA, and at NIFA's request appointed a less qualified person as a so-called "expert" to opine on the same issue. Based on changing and inconsistent explanations, the court of appeals appointed and relied upon the opinion of Mr. Cristian Augusto Cabrera Fonseca. As with Dr. Guerra's appointment as an antitrust expert, Mr. Cabrera's application for accreditation as a damages expert demonstrated no prior experience in the relevant field of damages and lost profits analysis.<sup>140</sup>

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<sup>134</sup> *Id.* at p. 7-8, 11-12 (English translation at p. 6-7, 9-10).

<sup>135</sup> Exhibit C-28, Court of Appeals Order dated 26 October 2010.

<sup>136</sup> Exhibit C-30, Report of Marco V. Yerovi Jaramillo, submitted to the Court of Appeals, *NIFA v. MSDIA*, 20 December 2010.

<sup>137</sup> Exhibit C-4 at p. 11. Notably, Mr. Yerovi's report did not conclude that Mr. Silva had committed essential error. The court of appeals also ignored evidence that NIFA had been in parallel negotiations for other potential manufacturing space at the same time it was negotiating with MSDIA—most notably, it considered the Albanova plant—and that NIFA had considered expanding its existing facility or building a new facility on open land instead of purchasing an existing one.

<sup>138</sup> Exhibit C-24, Report of Ignacio De Leon, submitted to the Court of Appeals, *NIFA v. MSDIA*, 17 February 2010, at p. 98; *see also* Exhibit C-40, MSDIA Petition submitted to Court of Appeals, *NIFA v. MSDIA*, 13 May 2011, at p. 1-2.

<sup>139</sup> Exhibit C-24, Report of Ignacio De Leon, submitted to the Court of Appeals, *NIFA v. MSDIA*, 17 February 2010, at p. 47-49, 98.

<sup>140</sup> As with Dr. Guerra, as discussed below, Ecuador's Council of the Judiciary has since these events determined that Dr. Cabrera was unqualified to serve as an expert on damages. *See* below at paras 123-128.

114. The manner in which Mr. Cabrera was appointed itself further demonstrates the appeals court's bias. Unlike its approach with the competition issues, NIFA did not submit a timely "essential error" petition challenging Dr. De Leon's conclusions on damages. Under Ecuadorian procedure, this would have been the only basis on which the court could have appointed another damages expert.<sup>141</sup> Nevertheless, NIFA filed several petitions requesting that the court of appeals appoint an additional damages expert well after the time periods for seeking the appointment of experts or filing an essential error petition had passed. It filed its second such petition on April 8, 2011, nearly nine months after Dr. De Leon's final submission in the case.<sup>142</sup>

115. On April 25, 2011—fourteen months after Dr. De Leon issued his report finding that NIFA had suffered no damages—the court granted NIFA's request, declaring that it intended to appoint a second damages expert to review Dr. De Leon's damages analysis for essential error.<sup>143</sup> MSDIA's filed an objection to the court's order, explaining to the court that NIFA's request for an essential error expert on damages was improper because NIFA had not filed a timely essential error petition with respect to Dr. De Leon's damages analysis. MSDIA asked the court to revoke its decision, pointing out its procedural error.<sup>144</sup>

116. On May 10, 2011, the court appointed Mr. Cabrera, an Ecuadorian accountant, as a second damages expert.<sup>145</sup> Apparently conceding MSDIA's arguments about the impropriety of Mr. Cabrera's appointment as an essential error expert to review Dr. De Leon's work, the court reversed its decision that the second damages expert be appointed as an essential error expert, but in the same decree the court declared that it was instead appointing Mr. Cabrera as a *substantive* damages expert to issue a new report evaluating NIFA's damages.<sup>146</sup>

117. The court claimed it was now appointing Mr. Cabrera in connection with the request for the appointment of a damages expert NIFA had made during the evidentiary phase of the proceeding almost two years earlier, on June 5, 2009.<sup>147</sup> The court of appeals had already expressly granted that request when it appointed Dr. De Leon. Despite having already granted and fulfilled that request more than two years earlier, the court nevertheless claimed it was responding to that long-satisfied request in this reappointment.<sup>148</sup>

118. On June 21, 2011, Mr. Cabrera submitted a report finding that NIFA was entitled to *\$204 million* in damages for lost profits, and that an additional damages award against MSDIA should be made in favor of "the Ecuadorian people" in the amount of more than *\$642 million*.<sup>149</sup>

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<sup>141</sup> See Exhibit C-38, MSD Petition submitted to Court of Appeals, *NIFA v. MSDIA*, 28 April 2011, at paras 11-17.

<sup>142</sup> Dr. De Leon submitted a supplement to his expert report to the court of appeals, responding to the parties' observations on his expert report and affirming his key conclusions, on 20 July 2010.

<sup>143</sup> Exhibit C-37, Court of Appeals Order dated 25 April 2011.

<sup>144</sup> See Exhibit C-38, MSD Petition submitted to Court of Appeals, *NIFA v. MSDIA*, 28 April 2011, at paras 11-17.

<sup>145</sup> Exhibit C-39, Court of Appeals Order dated 10 May 2011.

<sup>146</sup> *Id.*

<sup>147</sup> *Id.*

<sup>148</sup> See generally Exhibit C-40, MSDIA Petition submitted to Court of Appeals, *NIFA v. MSDIA*, 13 May 2011.

<sup>149</sup> Exhibit C-42, Report of Cristian Augusto Cabrera Fonseca, submitted to the Court of Appeals, *NIFA v. MSDIA*, 21 June 2011, at p. 27, 35 (English translation at 22, 29).

119. Mr. Cabrera's report was wholly divorced from accepted methodology for calculating lost profits. Mr. Cabrera failed to identify any illegal act committed by MSDIA that had harmed NIFA, rendering it impossible to discern the source of any damages. Absurdly, Mr. Cabrera included in his calculation of NIFA's "lost sales" sales that, according to the source on which Mr. Cabrera purported to rely, NIFA *had actually made* between 2003 and 2008.<sup>150</sup> In other words, nonsensically, Mr. Cabrera contended that MSDIA should pay as if NIFA had lost the value of sales NIFA actually did make. Moreover, Mr. Cabrera purported to calculate alleged damages to NIFA over an arbitrarily defined 15 year period ending in 2018, without providing any explanation or basis in fact as to how the unavailability of one piece of property could possibly continue to impose injury for that implausibly long time.<sup>151</sup> To reach his astronomical figures, Mr. Cabrera estimated NIFA's profit margin during that 15-year period at nearly 50%—a profit margin more than *15 times* higher than NIFA's historical margin, and *far exceeding the maximum profit margin on generic pharmaceutical products that was permitted under Ecuadorian law*.<sup>152</sup> And Mr. Cabrera made numerous other similarly indefensible and erroneous determinations, as plainly would be necessary to translate NIFA's inability to purchase one particular small facility valued at only \$1.5 million into his almost one billion dollars in purported injury.

120. On July 15, 2011, MSDIA filed a timely petition charging that Mr. Cabrera had committed essential error and providing a detailed basis for the charge, including the report of another damages expert (Mr. Carlos Montañez Vásquez) who concluded that there was no conceivable basis for Mr. Cabrera's calculation of NIFA's supposed lost profits or harm to the Ecuadorian people.<sup>153</sup> The court of appeals refused even to consider the issue, now asserting once again that Mr. Cabrera was an essential error expert, not a damages expert appointed pursuant to a petition for appointment of such an expert, and therefore was not subject to a challenge for essential error.<sup>154</sup>

121. The court of appeals' purported ground for denying MSDIA the opportunity to challenge Mr. Cabrera's report was flatly inconsistent with the court's prior revocation of Mr. Cabrera's appointment as an essential error expert and his reappointment as a substantive damages expert pursuant to NIFA's June 2009 request. Under the reasoning of the reappointment, Mr. Cabrera should have been subject to scrutiny for essential error just as Dr. De Leon—appointed in response to the same NIFA request two years earlier—had been. The court of appeals' ruling

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<sup>150</sup> Exhibit C-44, Report of Carlos Montañez Vásquez, submitted to the Court of Appeals, *NIFA v. MSDIA*, 15 July 2011 at p. 17 (English translation at 15-16) (analyzing the report submitted by Mr. Cabrera).

<sup>151</sup> *Id.* at p. 12-13 (English translation at 11) (noting that “[Mr. Cabrera] does not list the technical reasons why he believes that fifteen years is a reasonable time to establish a sales forecast, when the usual practice is to do a five-year projection.”)

<sup>152</sup> *See, e.g., id.* at p. 27 (English translation at 24).

<sup>153</sup> *Id.* at p. 2, 28-29 (English translation at p. 2, 26) (Mr. Montañez concluded that the only conceivable basis for damages identified by Mr. Cabrera was \$50,000 in consequential damages associated with costs NIFA claimed it incurred in connection with securing financing for purchasing MSDIA's plant, noted that NIFA had appeared to have introduced evidence into the record establishing those damages.)

<sup>154</sup> Exhibit C-45, Court of Appeals Order dated 19 July 2011 (rejecting MSDIA's essential error petition regarding Mr. Cabrera's report); Exhibit C-46, Court of Appeals Order dated 1 August 2011 (rejecting MSDIA's request for reconsideration of its 19 July 2011 Order, on the grounds that Mr. Cabrera was an essential error expert, reasoning that “there in no procedural formula to prove essential error regarding another essential error”).

denying MSDIA the opportunity to challenge Mr. Cabrera's opinion again revealed its absolute lack of impartiality and denied MSDIA due process of law.

122. Mr. Cabrera's incoherent report was the only evidence cited by the court of appeals in support of its decision to award NIFA \$150 million in damages.<sup>155</sup> In purporting to adopt Mr. Cabrera's analysis, the court neither acknowledged nor even addressed the many incontrovertible problems with the analysis that had been identified by MSDIA and its expert, did not address Mr. Cabrera's failure to demonstrate a causal link between the supposed injuries and any wrongful act by MSDIA, and failed to provide any rationale whatsoever for calculating damages as \$150 million, a number that had not been suggested in the record by the first instance court, NIFA, Mr. Cabrera, or anyone else.

*The Provincial Director of the Council of the Judiciary's January 2012 Report Repudiating the Accreditations of Dr. Guerra and Mr. Cabrera*

123. In the wake of the court of appeals decision, Dr. Ivan Escandon, the Provincial Director of the Council of the Judiciary for Pichincha—the office entrusted with accrediting experts for appointment in judicial matters in the Province—issued a report concluding that his predecessors in the office of the Provincial Director should never have accredited Mr. Cabrera and Dr. Guerra as experts because their respective applications failed to demonstrate the requisite qualifications.<sup>156</sup>

124. Dr. Escandon's report, dated January 26, 2012, concluded, based a review of Dr. Guerra's application materials and qualifications, that Dr. Guerra "has scarce knowledge and experience in intellectual property, unfair competition, competition law and damages law, because none of the certificates he has presented, cover the aforementioned areas; it is obvious that they are incompatible with the requirements to be deemed an expert." As to Mr. Cabrera, Dr. Escandon concluded that he "has not substantiated with any documentation, knowledge or experience his expertise on calculation of damages, consequential damage, lost profit or taxation. It is not clear why he claimed to be an expert . . . ."<sup>157</sup>

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

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<sup>155</sup> Exhibit C-4, p. 14-15.

<sup>156</sup> Exhibit C-58, Report of Ivan Escandon, Provincial Director of the Council of the Judiciary for Pichincha, January 26, 2012. MSDIA alerted the National Court of Justice to Dr. Escandon's report on 23 February 2012. Exhibit C-59, MSDIA Petition dated 23 February 2012.

<sup>157</sup> *Id.*

126. On April 30, 2012, María Augusta Peña, an attorney for the Council of the Judiciary National Director of Legal Counsel, directed a memorandum to Dr. Mauricio Jaramillo, Director General of the Council of the Judiciary.<sup>158</sup> The April 30, 2012 memorandum adopted and confirmed the earlier finding that the Provincial Director should not have accredited Mr. Cabrera and Dr. Guerra as experts because their respective applications failed to demonstrate the requisite qualifications.<sup>159</sup> It therefore recommended that the Provincial Director be asked to “update the [list of] experts that are authorized at this time and to remove from the list those that are currently not authorized, so that only those experts that are suitable to fulfill this function are on the list.”<sup>160</sup> It recommended that the Provincial Director be directed to correct Mr. Cabrera’s accreditation “so that the aforesaid expert will be accredited [only] in the areas where he has experience”—*i.e.*, only in accounting.<sup>161</sup> Finally, it recommended that the relevant materials be sent to the Council of the Judiciary’s Disciplinary Audit Unit, “so that it can determine any possible responsibilities of the public servants and judicial servants, with respect to how the accreditation of [Mr. Cabrera] occurred.”<sup>162</sup>

127. On May 4, 2012, the Secretary to the Office of the Director General of the Council of the Judiciary addressed a memorandum to Dr. Escandon, attaching the April 30, 2012 memorandum and directing Dr. Escandon to implement the recommendations contained therein.<sup>163</sup>

128. Finally, a memorandum addressed to Dr. Escandon on May 31, 2012 confirmed that Mr. Cabrera’s accreditation as an expert in damages and lost profits had been revoked.<sup>164</sup>

(3) The Court of Appeals Arbitrarily Refused to Consider Any Evidence Submitted by MSDIA

129. Faced with overwhelming evidence supporting MSDIA’s position that there was no basis for liability or damages in the case, the court of appeals arbitrarily disregarded MSDIA’s evidence rather than endeavor—as it could not have done—to square the record with its decision in favor of NIFA. In its September 23, 2011 decision, the court of appeals asserted, without legal basis, that it was under no obligation to consider or address any of the evidence submitted by MSDIA. The court of appeals sought to justify its refusal to address the evidence submitted

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<sup>158</sup> Exhibit C-60, Memorandum from María Augusta Peña, Council of the Judiciary National Director of Legal Counsel, to Mauricio Jaramillo, Director General of the Council of the Judiciary, 30 April 2012.

<sup>159</sup> *Id.* At p. 3. The 30 April 2012 memorandum found that Dr. Guerra “does not report sufficient experience to be considered as a specialist in ... unfair competition [or] right of competition.” It concluded that Mr. Cabrera “does not justify any experience in calculating damages, emerging damage, interruption of profit and taxation.”

<sup>160</sup> *Id.*

<sup>161</sup> *Id.* The 30 April 2012 memorandum made no such recommendation with respect to Mr. Guerra’s accreditation based on a finding that Mr. Guerra was no longer accredited at the time of the memorandum. *See id.*

<sup>162</sup> *Id.*

<sup>163</sup> Exhibit C-60, Memorandum from Daniela Caicedo, Secretary to the Office of the Director General of the Council of the Judiciary, to Ivan Escandon, Provincial Director of the Council of the Judiciary for Pichincha, 4 May 2012.

<sup>164</sup> Exhibit C-63, Memorandum from Wilson Rosero Gómez, Chief of Staff, to Ivan Escandon, Provincial Director of the Council of the Judiciary for Pichincha, 31 May 2012.



by MSDIA by asserting in its decision that MSDIA had “expressly waived the evidence aiming to dispel the grounds of the verdict in the first instance.”<sup>165</sup>

130. In support of this post-hoc claim that MSDIA had “waived” all of the evidence it had submitted—including the testimony of 10 fact witnesses, a half-dozen expert reports and hundreds of pages of documents—the court of appeals cited to a petition that MSDIA had filed on April 16, 2010, in which MSDIA withdrew a request it made early in the proceeding for the appointment of a damages expert.<sup>166</sup> Far from “waiv[ing] the evidence aiming to dispel the grounds” for the trial court’s verdict, MSDIA’s petition made clear that it was relying on the evidence already in the record. Dr. De Leon had been appointed to fulfil essentially the same function pursuant to NIFA’s request for appointment of a damages expert. Once Dr. De Leon had done so, there was no need for the parties to pay for the services of an additional expert who would cover the same ground.<sup>167</sup> This retraction of a request for a redundant expert was plainly not a waiver of any evidence at all, and until the final opinion on the merits, no one—not NIFA nor the court—had ever suggested that it could be so considered.

131. The court of appeals’ post-hoc claim that MSDIA had waived the evidence in its defense—evidence it had labored to introduce through eight years of litigation—was obviously unjustifiable. It is clear evidence of the panel’s bias and lack of impartiality.

(4) The Court of Appeals Denied MSDIA the Opportunity to File a Final Brief and a Request for an Oral Hearing

132. When the court of appeals issued its \$150 million judgment against MSDIA on September 23, 2011, it did so while simultaneously deciding pending procedural motions. As a result, MSDIA was denied the ability to file its final brief—which it already had prepared and was waiting to file—or to request an oral hearing on the merits. This action appeared calculated to deny, and in fact did deny, MSDIA the opportunity to present its final arguments on the matter.

c) The Ecuadorian Courts Relied on Substantive Law that Did Not Exist in Ecuador

133. In addition to the numerous procedural violations in the trial court and the court of appeals, the Ecuadorian courts’ judgment was arbitrary, manifestly contrary to the law, and constituted a miscarriage of justice, because—entirely apart from its failure to conform to any antitrust principles known to the law anywhere in the world—at the time of the sale and the judgment, Ecuador by its own clear declarations *did not have an antitrust law* and had not adopted or announced the substantive rules of competition that the courts purported to apply here.

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<sup>165</sup> Exhibit C-4, English translation at p. 15-16.

<sup>166</sup> Exhibit C-26, MSDIA Petition submitted to the Court of Appeals, *NIFA v. MSDIA*, 16 April 2010.

<sup>167</sup> *Id.*

134. That Ecuador did not have an antitrust law at the time of the events at issue in the dispute between MSDIA and NIFA is confirmed by a long history of actions taken, and representations made, by the Ecuadorian government itself.

135. In 2002, the National Congress of Ecuador approved a bill intended to establish legal norms for free competition, but that bill was vetoed by the President.<sup>168</sup>

136. Between 1998 and 2003, governmental experts in antitrust from the Andean Community nations, including representatives from Ecuador, participated in a series of meetings for the purpose of evaluating possible revisions to Andean Community Decision No. 285, which was a 1991 decision establishing antitrust standards for transactions affecting competition in more than one member nation.<sup>169</sup> The official reports summarizing those meetings focus on and affirm the absence of competition law in Ecuador throughout the period. For example, The Report of the Fourth Meeting of Governmental Experts, dated August 1, 2003—almost precisely the moment NIFA was filing its lawsuit against MSDIA—summarizes ongoing efforts towards revising the existing Andean antitrust standards.<sup>170</sup> It notes that the “delegations reached consensus on a procedural [provision], leaving [for] consultation of Bolivia and Ecuador, *countries that do not have competition rules or authorities*, the following articles in the Transitional Provisions...”<sup>171</sup>

137. In March 2005, the Andean Community adopted Andean Community Decision No. 608, revising and replacing the antitrust standard previously set forth in Decision No. 285. Like Decision No. 285, Decision No. 608 applied by its own terms only to conduct affecting competition in more than one Andean Community member state.<sup>172</sup> The terms of Decision No. 608 confirmed that no internal antitrust standards were in place in Ecuador at the time of its enactment. Section 51 of the Decision’s Provisional Directives stated: “For Bolivia, Colombia, Peru and Venezuela, this Decision will enter into force at its day of publication on the Official Gazette of the Cartagena Agreement; and for Ecuador, [this Decision will enter into force] after two calendar years or, *if a national antitrust law is enacted before this last term*, at the date of publication of said domestic law at the Official Registry of Ecuador.”<sup>173</sup>

138. On May 11, 2005, Ecuador’s Secretary of Commerce, Industrialization, Fishing, and Competitiveness sent correspondence to the Secretary General of the Andean Community, recognizing his country’s lack of internal antitrust standards and proposing that the Andean

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<sup>168</sup> See Exhibit C-24, Report of Ignacio De Leon, submitted to the Court of Appeals, *NIFA v. MSDIA*, 17 February 2010, at p. 90.

<sup>169</sup> See, e.g., *id.* at p. 92 (describing Andean Community Decision No. 285 (22 March 1991)).

<sup>170</sup> As noted above, NIFA filed its lawsuit in September 2003, complaining about events taking place in the prior year. See Exhibit C-10, NIFA Complaint dated December 16, 2003; paras. 13-20, above.

<sup>171</sup> Exhibit C-9, Report of the Fourth Meeting of Andean Community Governmental Experts on Free Competition, 1 August 2003, at p 2.

<sup>172</sup> Exhibit C-12, Andean Community Decision No. 608, 28 March 2005, at Article 5 (“This Decision applies to practices carried out in: (a) The territory of one or more Member Countries whose actual effects occur in one or more Member Countries, except when the origin and effect are produced in only one country; and, (b) The territory of a non-Member Country of the Andean Community whose actual effects occur in two or more Member Countries. ... Situations not covered in this Section, will be governed by the domestic law of the respective Member Countries.”)

<sup>173</sup> *Id.* at Article 51.

Community enact a supplement to Decision No. 608 in order to enable Ecuador to apply the standards of Decision No. 608 internally. Ecuador's letter stated, in relevant part:

[C]onsidering that it is important for Ecuador to enjoy the benefits and share the obligations of the stipulations of Decision 608 for businesses within the Sub-Region, permit me to suggest that at the next meeting of the Commission, we progress and decide upon the 'Decision Project, modifying the temporary provisions of Decision 608,' which is attached."<sup>174</sup>

The Draft of Decision attached to Ecuador's 2005 request proposes, in relevant part, to modify Decision No. 608 so that Bolivia and Ecuador may apply this Decision, when applicable, for cases that are "outside the scope described in Article 5" of Decision 608, *i.e.*, cases that impact competition only internally in Ecuador or Bolivia.<sup>175</sup>

139. On July 14, 2005, in response to Ecuador's request, the Andean Community General Secretary proposed a specific regulation for the modification of Decision No. 608 for Ecuador. The proposal explicitly noted that upon the enactment of Decision No. 608, "*Bolivia and Ecuador did not have national rules in matters of free competition*, so that according to the Transitory Provisions of Decision 608, a differentiated treatment was granted concerning the enactment and immediate application of the community rule."<sup>176</sup> That proposal resulted in the adoption of Decision No. 616, enabling Ecuador to apply the standards of Decision No. 608 internally, *but only once it had created an internal competition authority*.<sup>177</sup>

140. In March 2009, in Executive Decree No. 1614, which established Ecuador's competition authority, Ecuadorian President Rafael Correa declared that "*Ecuador did not have an internal regulation for the protection of economic competition at the date when Decision 608 was enacted*," and had not yet enacted an internal antitrust law as of the date of Executive Decree No. 1614.<sup>178</sup> And it was not until 2011 that Ecuador adopted an internal antitrust law of its own.<sup>179</sup>

141. It is clear, then, that at the time of the sale of MSDIA's plant, and indeed up until only the most recent period, Ecuador had no antitrust law and no antitrust rules in effect within the country. The Ecuadorian courts' entry of this enormous judgment against MSDIA based on a supposed violation of antitrust law at a time the country plainly had no such law clearly demonstrated their bias in this case and constituted an independent denial of justice, seeking to

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<sup>174</sup> Exhibit C-13, Letter from Dr. Oswaldo Molestina Zavala, Ecuador Minister for External Commerce, Industrialization, Fisheries and Competition, to Allan Wagner, Secretary General of the Andean Community, 11 May 2005.

<sup>175</sup> *Id.*, and attached proposed "Modification of the Temporary Provisions of Decision 608."

<sup>176</sup> Exhibit C-14, Proposal of the Secretary General of the Andean Community on the Enactment of Decision 608 for the Republic of Ecuador, 14 July 2005 (emphasis added).

<sup>177</sup> Exhibit C-15, Andean Community Decision No. 616, 15 July 2005, at Article 2.

<sup>178</sup> Exhibit C-19, Republic of Ecuador Executive Decree No. 1614, 14 March 2009, at p. 1 (emphasis added).

<sup>179</sup> Organic Law of the Regulation and Control of the Power of the Market, Official Register Supplement No. 555, 13 October, 2011.

impose by *ex post facto* judicial fiat legal standards plainly not in place at the time of MSDIA's conduct.

d) The Damages Award Granted to NIFA Demonstrates the Irrationality and Manifest Partiality of the Ecuadorian Courts' Judgment

142. The massive damages awarded by the courts for supposed lost profits can leave no doubt as to the impropriety of the proceedings. Both the trial court and the court of appeals confirmed their bias and predisposition to rule against MSDIA by awarding \$200 million and \$150 million, respectively, for lost profits. No rational, competent, unbiased court could have awarded damages remotely approaching such amounts.

143. As MSDIA demonstrated to the Ecuadorian courts, NIFA's annual profits in 2002 barely exceeded *two thousand* dollars – they were a mere \$2,165.<sup>180</sup> The acquisition of a small factory for \$1.5 million could not possibly have allowed NIFA instantaneously to earn *100,000 times* (the trial court), or *70,000 times* (the court of appeals) that amount.

144. The evidence before the Ecuadorian courts demonstrated that there was nothing unique about MSDIA's plant that would have enabled a purchaser to realize profits on that scale. In fact, as set out above, there were numerous other facilities available that were suitable for manufacturing pharmaceutical products. Indeed, if—as NIFA contended—there had in fact been something unique about MSDIA's plant that made it the key to realizing \$150 million in additional profits, no rational company would have entertained selling it at all, much less for so paltry a price, and surely there would have been many, many bidders for it. The fact that the price offered by NIFA and agreed upon by MSDIA for the plant and equipment was only \$1.5 million further reveals the implausibility of the courts' damages awards.<sup>181</sup>

145. Indeed, the evidence before the Ecuadorian courts showed that the entire generic pharmaceutical market in Ecuador had sales (let alone profits) of only \$20.4 million in 2002.<sup>182</sup> Profits of course were a small percentage of that gross sales figure. No rational, competent and unbiased court could suppose that a company like NIFA, which had only a tiny share of that small market, could with the purchase of this small facility have somehow earned *additional profits ten times as much as the gross annual sales of its entire market*.

146. NIFA's own evidentiary support for its damages claim in the trial court was a "business plan" (implausibly) claiming the factory was worth \$12.9 million in profits to NIFA over ten years.<sup>183</sup> Given that evidence, itself nothing more than wishful thinking, no rational, competent and unbiased court, considering that evidentiary support, could have awarded \$200 million in

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<sup>180</sup> Exhibit C-20, Report of Rolf Stern, submitted to Court of Appeals, *NIFA v. MSDIA*, 4 June 2009, at p. 26 (English translation at p. 28).

<sup>181</sup> Exhibit C-5, Summary of Meeting Between MSDIA and NIFA, 20 November 2002; Exhibit C-6, Email from NIFA General Manager Miguel Garcia to Ed Jáen (MSDIA consultant), et seq., 25 November 2002.

<sup>182</sup> Exhibit C-20, Report of Rolf Stern, submitted to Court of Appeals, *NIFA v. MSDIA*, 4 June 2009, at p. 15 (English translation at p. 16)

<sup>183</sup> Exhibit C-21, Report of Walter Spurrier Baquerizo, submitted to the Court of Appeals, *NIFA v. MSDIA*, 4 June 2009, at p. 3-4 (summarizing the unrealistic assumptions in NIFA's business plan).

damages, at least \$187 million more than NIFA's own implausibly optimistic evidence could support, nor could the court of appeals rationally have awarded \$137 million more than NIFA itself had hoped.

147. Apart from this and Mr. Cabrera's incoherent "expert report," NIFA's sole evidentiary support for its damages claim in the court of appeals was a purported "IMS report" that concluded that NIFA had \$28 million in lost sales.<sup>184</sup> That claim was itself preposterously high. But even assuming that figure were accurate, at NIFA's historic profit margin, *these additional sales would have resulted in less than \$1 million in lost profits.*<sup>185</sup> No rational, competent and unbiased court, considering that sole evidentiary support, could have awarded NIFA \$150 million in damages, at least \$149 million more than NIFA's own evidentiary submission could support.

e) Ecuadorian Judges Enabled an Abuse of Criminal Process Against MSDIA's Non-Ecuadorian Counsel

148. Ecuadorian judges facilitated and enabled an abuse of criminal process against MSDIA's non-Ecuadorian counsel by initiating a criminal investigation of two of MSDIA's U.S.-based lawyers when MSDIA chose to exercise its rights under the BIT by filing a Notice of Dispute in June 2009. 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, until just days before the court of appeals process ended in September 2011.

149. This sort of abusive tactic is not uncommon in Ecuador. The United States Department of State's country reports on Ecuador warn that criminal process against foreign company officials commonly has been used there as a tool for coercion in connection with commercial litigation.<sup>186</sup>

150. The criminal investigations unfolded in the following manner. In June 2009, MSDIA sent a letter through its U.S. counsel at Wilmer Cutler Pickering Hale and Dorr LLP ("WilmerHale") to the Ecuadorian Attorney General, Dr. Diego García Carrión, notifying Ecuador of an investment dispute in accordance with the Ecuador-United States BIT. The Attorney General contacted the court of appeals to request the case files. In January 2010, NIFA's principal and general manager, Mr. Miguel García Costa, filed a criminal complaint in the Pichincha Provincial Prosecution Office against MSDIA's U.S.-based attorneys over whose signature the notice letter was transmitted, two partners at WilmerHale. The allegations were difficult to comprehend, but in essence Mr. Garcia contended that by sending a notice that the ongoing denial of justice in Ecuador's courts constituted a violation of MSDIA's rights under the

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<sup>184</sup> Exhibit C-44, Report of Carlos Montañez Vásquez, submitted to the Court of Appeals, *NIFA v. MSDIA*, 15 July 2011, at p. 17 (English translation at 15-16) (noting the \$28,026,862 that the "IMS Report" identified, without explanation, as "lost sales").

<sup>185</sup> Exhibit C-21, Report of Walter Spurrier Baquerizo, submitted to the Court of Appeals, *NIFA v. MSDIA*, 4 June 2009 at 22 (English translation at 19). (calculating NIFA's annual profit margin based on NIFA tax returns introduced into the Ecuadorian court record). Applying NIFA's average profit margin between 2003 and 2006 of 3.2%, lost sales of \$28 million translates to lost profits of just under \$900,000.

<sup>186</sup> Exhibit C-33, U.S. Department of State, 2011 Investment Climate Statement – Ecuador, at p.5, <http://www.state.gov/e/eb/rls/othr/ics/2011/157270.htm>.

BIT between Ecuador and the United States, Merck's counsel had somehow sought to deceive the court.<sup>187</sup>

151. In response, the Prosecution Office opened two criminal investigations into the allegations, both of which were premised on MSDIA's attorneys' act of giving notice under the BIT. Both criminal investigations eventually were dismissed, but the second was not dismissed until September 15, 2011.<sup>188</sup> Eight days later the court of appeals issued its \$150 million judgment in the *NIFA v. MSDIA* appeal.

152. The circumstances of the criminal investigation further indicate bias in Ecuador's court system. In March 2011, the prosecutor charged with investigating Mr. Garcia's allegations recommended to the Ecuadorian court that the matter be dismissed for lack of evidence.<sup>189</sup> But in June 2011, with the NIFA appeal still pending, the prosecutor's recommendation was rejected by Judge Elsa Sanchez de Melo on the Criminal Court for Pichincha, who remanded the investigation to a more senior prosecutor, thereby extending its chilling impacts on MSDIA's exercise of its rights in Ecuador and under the treaty.<sup>190</sup> In support of her decision, Judge Sanchez cited only a brief filed by Mr. García, which provided no evidence in support of his allegations (and thus did not address the defect identified by the prosecutor)<sup>191</sup> but which instead engaged in hostile rhetoric, vilifying the prosecutor's recommendation of dismissal as part of a "recurring attempt by the transnationals to always mock not only our sovereignty but also those who like Your Authority constitute the administrators of justice." Mr. García requested that the judge "den[y] such an absurd plan by those who try to mislead the administrators of justice, ... reject the Prosecutor's Office dismissal request [and] avoid[] within this context, being once again ... the laughing-stock of the transnational companies like [MSDIA]." <sup>192</sup> Based on nothing more than this invective, the judge reinstated the investigation, allowing it to persist until the very week before the court of appeals issued its own indefensible decision.

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<sup>187</sup> Exhibit C-27, Criminal Complaint initiated by Miguel Garcia and accompanying papers, as transmitted through the U.S. Department of Justice, on 6 July 2010 (names of MSDIA's U.S. attorneys are redacted on exhibits concerning the criminal investigation). Article 296 of Ecuador's Criminal Code, the provision cited by Mr. Garcia in his complaint, establishes criminal penalties for "[a]nyone who, in the course of a civil or administrative proceeding ... with the intent of deceiving the judge, should through trickery alter the state of things, places or persons..." Criminal Complaint at p. 12.

<sup>188</sup> Exhibit C-31, Provisional Dismissal of criminal investigation (Case No. 10-01-08101), Jaime Lojan Ordoñez, Prosecutor of Pichincha, 12 January 2011; Exhibit C-50, Order of Judge Elsa Sanchez de Melo, 18th Criminal Court of Pichincha dismissing criminal investigation (case no. 284-2011), 15 September 2011.

<sup>189</sup> Exhibit C-34, Recommendation to dismiss criminal investigation (Case No. 10-01-08101), César Almeida Subía, Prosecutor of Pichincha, 10 March 2011.

<sup>190</sup> Exhibit C-43, Order of Judge Elsa Sanchez de Melo, 18th Criminal Court of Pichincha (case no. 284-2011), 24 June 2011.

<sup>191</sup> Indeed, after filing his initial complaint, Mr. García offered no evidence whatsoever in support of his allegations.

<sup>192</sup> Exhibit C-41, Miguel Garcia Brief in Response to Prosecutor's Dismissal Recommendation, submitted to Criminal Court May 13, 2011. On September 14, 2011, after conducting an independent review of the case file, the Provincial Prosecutor transmitted an opinion to Judge Sanchez de Melo affirming the initial prosecutor's earlier recommendation that the criminal investigation be dismissed. In support of his decision, the Prosecutor explained that "during the year that has elapsed ... the investigations carried out have not gathered enough evidence that would allow to deduce an accusation." Exhibit C-49, Recommended dismissal of criminal investigation (Case no. 284-2011), Marco Freire López, District Attorney of Pichincha, 14 September 2011. The following day, Judge Sanchez de Melo finally issued a decree dismissing Mr. García's complaint, as she was procedurally required to do. Exhibit C-50, Order of Judge Elsa Sanchez de Melo, 18th Criminal Court of Pichincha dismissing criminal investigation (case no. 284-2011), 15 September 2011.

f) The Early Proceedings in the National Court of Justice Were Procedurally Irregular and Reflected Manifest Bias

153. In July 2011, the Transitional Judiciary Council was established pursuant to a popular referendum passed in May 2011 with the support of President Correa. The Transitional Judiciary Council assumed all duties of the former Council of the Judiciary, including the power to replace all sitting judges in Ecuador.<sup>193</sup> Shortly after its establishment, and just days after President Correa declared a judicial emergency in Ecuador,<sup>194</sup> the Transitional Judiciary Council announced a process by which it intended to select new judges for every court in the country, and by August 20, 2011, it had established that a new membership of Ecuador's National Court of Justice would be in place by late January, 2012.<sup>195</sup> Those announcements made clear that the current judges on that court would be removed and replaced with judges whose identities were then unknown. In the immediate wake of those announcements Ecuador's courts took various precipitous actions that appeared designed to result in a final decision by the National Court of Justice in this case before the replacement of the sitting judges.

154. As set out above, on September 23, 2011, the court of appeals suddenly issued a decree upholding the decision of the first instance court against MSDIA and awarding damages of \$150 million to NIFA. This decision was issued despite the fact that there were several pending motions before the court for clarification of prior rulings, which should have been ruled on separately from the final merits decision and, had this normal process been followed, would have delayed a final ruling on the merits by a considerable period of time. The sudden merits ruling in that posture prevented MSDIA from submitting a final brief and asking for oral argument on the appeal.

155. After issuance of that decision, MSDIA filed a recourse of cassation seeking review of the court of appeals' decision by the National Court of Justice. On October 24, 2011, the court of appeals set a bond, which MSDIA posted.<sup>196</sup>

156. On October 25, 2011, the court of appeals referred the case to the National Court of Justice.<sup>197</sup> On November 11, 2011, the National Court of Justice issued a decree formally admitting MSDIA's recourse of cassation.<sup>198</sup> The timing of both of these steps was unusual and further suggested an improper judicial interest in expediting the case. In the normal course of litigation, it typically takes several weeks before the court of appeals would refer the case to the National Court of Justice and several months or more before the National Court of Justice would

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<sup>193</sup> Exhibit C-48, Republic of Ecuador Executive Decree No. 872, 6 September 2011.

<sup>194</sup> *Id.*

<sup>195</sup> Exhibit C-47, *Proceso Para Elegir a Los 21 Jueces Nacionales Desde Próxima Semana*, El Universo, 20 August 20, 2011, <http://www.eluniverso.com/2011/08/20/1/1355/proceso-elegir-21-jueces-nacionales-desde-proxima-semana.html> ("As expected, the Transitional Judiciary Council (CJT) will hold the public service examination to restructure the National Court of Justice (CNJ) over the course of next week. ... According to the organization, the new Court will start to function in January 2012.")

<sup>196</sup> Exhibit C-51, Court of Appeals Order dated 24 October 2011; Exhibit C-52, MSDIA Petition submitted to the Court of Appeals, *NIFA v. MSDIA*, October 25, 2011.

<sup>197</sup> Exhibit C-53, Court of Appeals Order dated 25 October 2011

<sup>198</sup> Exhibit C-54, National Court of Justice Order dated 11 November 2011.

admit a recourse of cassation. In this case, however, both courts expedited their processing of the case significantly. Indeed, the National Court of Justice accepted MSDIA's recourse of cassation while dozens of other, earlier-filed recourses were still awaiting the decision of the Court as to acceptance. So far as MSDIA is aware, no other case in the National Court of Justice's Civil Chamber has been referred or accepted in such a short time period.

157. On November 29, 2011, the National Court of Justice set an oral hearing date for Monday, December 12, 2011.<sup>199</sup> The scheduling of this hearing was also highly unusual. As a matter of unvarying practice, the Civil Chamber of the National Court of Justice, as constituted at that time, held oral hearings only on Tuesdays and Thursdays; so far as MSDIA is aware, this was the first oral hearing the Court ever had set for a Monday. Moreover, at the time the Court established this extraordinary hearing date, other cases—which were admitted in the National Court of Justice earlier than MSDIA's case but were not subject to unusual expedition—were having hearing dates set for March or April 2012 because the Court's Tuesday and Thursday calendar was full until then. The Court offered no explanation as to why it chose to treat this case differently or why it had moved this case ahead of dozens of other cases that were still awaiting action by the Court. No other case was scheduled for a hearing on a Monday, Wednesday or Friday before the judges of the Civil Chamber were replaced on January 25, 2012.

158. Under Ecuadorian procedure, a party may file one request for adjournment of an oral hearing date in the National Court of Justice.<sup>200</sup> On December 7, 2011, MSDIA filed a request to adjourn the hearing to a later date, citing the complexity of the case and the need for adequate time to prepare for the hearing.<sup>201</sup>

159. The next day, on December 7, 2011, the National Court of Justice set a new hearing date for *Monday, December 26, 2011*.<sup>202</sup> The timing of this hearing was also highly unusual. Not only was this hearing set for a Monday, which is unique, but it was also set for the day after Christmas. The hearing in this case was the only oral hearing held on December 26, and in fact was the only hearing held during the entire week of December 26. The timing of the hearing made it impossible for MSDIA's corporate representatives in the United States to attend the hearing—indeed, only two of the three judges presiding over the case at the time attended the hearing. MSDIA's Ecuadorian counsel did attend the hearing and presented oral argument. Following the hearing, MSDIA's Ecuadorian counsel filed written post-hearing briefs. Following that hearing, a final decision could issue at any time.

160. Despite the extraordinary expedition of the proceedings in the National Court of Justice to that point and the day-after-Christmas hearing, for reasons not known to MSDIA, no opinion ultimately was issued by the judges who heard the argument.

161. As had been previously announced, on January 25, 2012, the entire membership of the National Court of Justice, including the three Civil Chamber judges presiding over the *NIFA v.*

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<sup>199</sup> Exhibit C-55, National Court of Justice Order dated 29 November 2011.

<sup>200</sup> Exhibit CLM-23, Ecuadorian Cassation Law, Article 14.

<sup>201</sup> Exhibit C-56, MSDIA Petition submitted to the National Court of Justice, *NIFA v. MSDIA*, 7 December 2011.

<sup>202</sup> Exhibit C-57, National Court of Justice Order dated 8 December 2011.



*MSDIA* case, were removed and replaced pursuant to a process established by the Transitional Judiciary Council. On January 30, the six judges of the new Civil Chamber were selected from among the full court.<sup>203</sup> On or about March 26, 2012, three of the six judges assigned to the Civil Chamber were selected by lottery to preside over the *NIFA v. MSDIA* case.

162. On March 27, 2012, *MSDIA* filed a petition requesting a second hearing before the newly-appointed judges. On May 30, 2012, the National Court of Justice denied that request.<sup>204</sup> Consequently, it appears that the case is ready for decision any time.

g) Ecuador's Actions Violated Multiple Provisions of the Ecuador-United States BIT

163. For all of the reasons set out above, and more, Ecuador's actions breached its obligations under the Ecuador-United States BIT, including its obligations:

- a. To permit and treat investments, and activities associated therewith, on a basis no less favorable than that accorded in like situations to investments or associated activities of its own nationals or companies, or of nationals or companies of any third party, whichever is the most favorable (Article II(1));
- b. To accord investments fair and equitable treatment, full protection and security, and treatment no less than that required by international law (Article II(3)(a));
- c. Not to impair by arbitrary or discriminatory measures the management, operation, maintenance, use, enjoyment, acquisition, expansion, or disposal of investments (Article II(3)(b)); and
- d. To provide effective means of asserting claims and enforcing rights with respect to investments (Article II(7)).

164. *MSDIA* has not been treated fairly and equitably by the Ecuadorian courts; its investment has not been accorded full protection and security; its investment has been impaired through arbitrary and discriminatory measures; and its treatment in the Ecuadorian courts has been far below the standards required by international law. In addition, Ecuador has not provided *MSDIA* with effective means of asserting claims and enforcing rights through the Ecuadorian courts. Instead, *MSDIA* was subjected to an unfair and one-sided judicial process that prejudiced its rights and prevented it from having its defenses fully presented and evaluated in accordance with the rule of law.

165. The Ecuadorian proceedings amounted to a denial of justice, which violated Ecuador's obligations under the Ecuador-United States BIT. Simply put, no fair and competent system of justice could lead to the result reached by the Ecuadorian courts here. By any reasonable measure, *MSDIA* has established a *prima facie* case on the merits.

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<sup>203</sup> Exhibit C-62, National Court of Justice Order dated 30 May 2012.

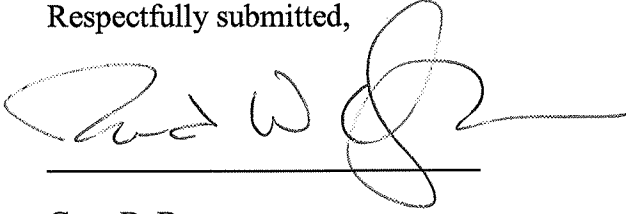
<sup>204</sup> *Id.*

#### **IV. RELIEF REQUESTED**

166. For all of the foregoing reasons, MSDIA respectfully requests that the Tribunal grant the following interim measures of protection pending the outcome of this arbitration:

- a. Order Ecuador to take any and all available steps to prevent enforcement of any judgment in the NIFA litigation against MSDIA;
- b. Order Ecuador to refrain from any action, including by its courts and executive, to enforce any judgment in the NIFA litigation against MSDIA or its assets;
- c. Order Ecuador to make a written representation to any court in which NIFA attempts to enforce any judgment in the NIFA litigation, stating that the judgment is not enforceable pending the outcome of this Arbitration; and
- d. Order Ecuador to refrain from taking any action that would aggravate or exacerbate the dispute, threaten the integrity of these arbitral proceedings or frustrate the effectiveness of any award from this Tribunal.

Respectfully submitted,

A handwritten signature in black ink, appearing to read 'Gary B. Born', written over a horizontal line.

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Dated: 12 June 2012