

PCA Case No. 2012-10

IN THE MATTER OF AN ARBITRATION UNDER THE UNCITRAL  
ARBITRATION RULES 1976 PURSUANT TO THE TREATY BETWEEN THE  
UNITED STATES OF AMERICA AND THE REPUBLIC OF ECUADOR  
CONCERNING THE ENCOURAGEMENT AND RECIPROCAL PROTECTION OF  
INVESTMENT, SIGNED AUGUST 27, 1993

- between -

MERCK SHARP & DOHME (I.A.) LLC

(the "Claimant")

- and -

THE REPUBLIC OF ECUADOR

(the "Respondent", and together with the Claimant, the "Parties")

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DECISION ON INTERIM MEASURES

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*Tribunal*

Sir Franklin Berman KCMG QC (Presiding Arbitrator)  
Judge Stephen M. Schwebel  
Judge Bruno Simma

*Assistant to the Tribunal*

Ms Amal Clooney

*Secretary to the Tribunal*

Mr Martin Doe Rodriguez

7 March 2016

**A. INTRODUCTION**

1. This is the Tribunal's Decision on an urgent application for interim measures under Article 26 of the UNCITRAL Rules 1976 by the Claimant in this arbitration Merck Sharp & Dohme (I.A.) LLC ('MSDIA'). The Respondent in the Arbitration is the Republic of Ecuador. The Parties are represented in these proceedings by the following:

For the Claimant:

Ms Mary Bartkus, MSDIA

Mr Gary B. Born, Mr David Ogden, Ms Rachael D. Kent, Mr Charles S. Beene,  
and Mr Claudio Salas, all of Wilmer Cutler Pickering Hale and Dorr LLP.

For the Respondent:

Dr. Diego García Carrion, Procurador General del Estado

Dra. Blanca Gómez de la Torre, Directora Nacional de Asuntos  
Internacionales y Arbitraje

Dra. Christel Gaibor, Subdirectora de Asuntos Internacionales y Arbitraje

Ms Diana Terán, Procuradoría General del Estado

Mr Paul Reichler, Mr Mark Clodfelter, Mr Ronald Goodman, Mr Alberto Wray,

Ms Janis Brennan, Ms Diana Tsutieva, and Mr Constantinos Salonidis, all of  
Foley Hoag LLP.

2. Given its nature and the surrounding circumstances (see below), this Decision will contain no more than the necessary minimum by way of recital of the factual background and procedural history. These matters will be dealt with in full in the Tribunal's Award on jurisdiction and merits which will follow in the near future.

**B. BACKGROUND TO THE ARBITRATION**

3. The arbitration takes place under the Treaty of 27 August 1993 between the United States of America and the Republic of Ecuador Concerning the Encouragement and Reciprocal Protection of Investment, and is governed by the UNCITRAL Arbitration Rules of 15 December 1976.
4. The dispute submitted to arbitration arises out of litigation in the Ecuadorian courts by Nueva Industria Farmaceutica Asociada, S.A. ('NIFA') against MSDIA following the failed negotiations for the sale of MSDIA's Chillos manufacturing plant in Ecuador to NIFA.<sup>1</sup> NIFA and MSDIA had provisionally arrived at a purchase price of USD 1.5 million, and the plant was subsequently sold to another purchaser for less than USD one million. The Claimant alleges breaches of Articles II(3)(a), II(3)(b) and II(7) of the Treaty in consequence of the actions of the Ecuadorian courts.

**C. PROCEDURAL HISTORY**

5. On 12 June 2012, the Claimant filed a First Request for Interim Measures, which was argued in full, in writing and orally, culminating in a hearing at the Peace Palace in The Hague on 4-5 September 2012. On 28 September 2012, invoking a recent decision by Ecuador's National Court of Justice ('NCJ'), the Claimant requested the Tribunal temporarily to suspend further work on the Request, and subsequently withdrew the Request entirely on 11 March 2013, while reserving its right to resubmit it.
6. Between then and February 2015, the Parties submitted their written pleadings in the main arbitration according to an agreed schedule, and a hearing on jurisdiction and merits took place in London from 16 to 20 March 2015.
7. By letter dated 5 February 2016, the Claimant informed the Tribunal of a decision rendered by the Constitutional Court of Ecuador on 20 January 2016, in the light of which it submitted a Second Request for Interim Measures, and asked the Tribunal to schedule a one-day oral hearing. The Tribunal was by then well advanced in its

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<sup>1</sup> In August 2010, NIFA became PROPHAR S.A. and will for convenience be referred to henceforth in this Decision as 'PROPHAR'.

deliberations, and expected to be in a position to issue its Award on jurisdiction and merits in the near future.

8. By letter dated 8 February 2016, the Tribunal invited the Respondent to comment on the Claimant's Second Request for Interim Measures and invited the Parties to consult on potential dates for a hearing on interim measures.
9. By letter dated 15 February 2016, the Respondent informed the Tribunal that MSDIA had filed with the Constitutional Court a request for clarification of its Judgment, and in consequence sought a postponement of the deadline for its response until the Constitutional Court had rendered its decision on MSDIA's request.
10. By letter of the same date, the Tribunal invited the Claimant to comment on the question of urgency by 17 February 2016 and offered the Respondent a final opportunity to comment on the Claimant's application by 19 February 2016.
11. By letter of 15 February 2016, the Claimant replied to the letters from the Respondent and the Tribunal, submitting that its request for clarification did not affect the urgency of its Second Request for Interim Measures.
12. By letter of 16 February 2016, the Respondent indicated that, although it considered unfair to require it to comment on the Constitutional Court decision of 20 January 2016 before the court had responded to MSDIA's request for clarification, it would respond to the Claimant's application as requested by the Tribunal, which it duly did by letter of 18 February 2016.
13. By letter of 21 February 2016, the Tribunal granted both Parties a further opportunity to comment, but solely on the questions of urgency and of the range and scope of the powers open to the National Court of Justice following the latest decision of the Constitutional Court. The Tribunal reiterated its request that the Parties consult over dates for a potential oral hearing, should the Tribunal consider one to be necessary.
14. By letters of 23 and 25 February 2016, the Parties submitted their further comments as requested, and indicated the earliest dates on which they were both available for a hearing.

15. By subsequent letter of 26 February 2016, the Claimant stated that its belief that the Tribunal had sufficient information – based on the hearing in The Hague in September 2012, the hearing in London in March 2015, and the present written submissions – to grant its application for interim measures without additional proceedings.

**D. FACTUAL BACKGROUND**

16. On 16 December 2003, PROPHAR<sup>2</sup> filed suit in Quito against the Claimant in the Second Court for Civil Affairs of Pichincha ('the Trial Court') for payment of USD 200 million in damages said to result from the failed negotiations for the sale of the Chillos plant, in reliance in particular on Article 244 no. 3 of the 1998 Ecuadorian Constitution which provides that "the State shall [...] [f]oster free competition and punish, under the law, monopolistic and other practices that prevent and distort it."
17. MSDIA alleges before the Tribunal that the Presiding Judge wrongfully prevented it from being able to question a witness put forward by PROPHAR and to have its own evidence properly considered. MSDIA alleges further, that when the Presiding Judge was later elevated to the Court of Appeals and the case was assigned to a Temporary Judge, the Temporary Judge "took cognizance" of the case in the early afternoon and issued a 15-page judgment later the same day, in which she found MSDIA liable for USD 200 million for violating Article 244 no. 3 of the 1998 Ecuadorian Constitution.

**E. THE COURT OF APPEALS PROCEEDINGS**

18. MSDIA appealed against this judgment to the Provincial Court of Justice for Commercial and Civil Matters ('the Court of Appeals'). In the course of these appellate proceedings, PROPHAR asked the Court of Appeals to appoint experts in the areas of antitrust law and damages, and, at a later stage, supplementary experts in these fields, whereas MSDIA requested the appointment of an expert to examine the conclusions reached by its own antitrust expert and an expert on real estate in the Quito region. MSDIA complains before the Tribunal about the process followed by the Court

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<sup>2</sup> As indicated above, NIFA/PROPHAR will, for convenience, be referred to as 'PROPHAR' throughout.

for the appointment of the PROPHAR-requested experts, their lack of competence, and the absence of foundation for their opinions as to the loss or damage suffered by PROPHAR. It invokes instead the finding of its own experts that PROPHAR had available to it alternatives to the Chillos Plant, MSDIA committed no violation of competition law, and that PROPHAR suffered no damages from its failure to purchase the Plant.

19. On 8 June 2009, while the appellate proceedings were in train, the Claimant sent a letter to the Attorney General of Ecuador, in which inter alia: “MSDIA hereby accepts the offer made by the Republic of Ecuador to submit investment disputes for settlement by binding arbitration before the International Centre for the Settlement of Investment Disputes (“ICSID”), pursuant to Article VI of the BIT [...] Notwithstanding and without prejudice to MSDIA’s right to initiate ICSID arbitration at some future date, MSDIA reserves its rights at any time to select any form of arbitration set forth under Article VI(3)(a) of the BIT.”
20. On 23 September 2011, the Court of Appeals upheld the decision of the court of first instance, but reduced the amount of damages to USD 150 million.

#### **F. THE FIRST NCJ PROCEEDINGS**

21. MSDIA and PROPHAR both filed cassation applications seeking review of the Court of Appeals’ decision by the National Court of Justice (‘NCJ’), in the course of which MSDIA brought to the NCJ’s attention that the Council of the Judiciary for Pichincha had concluded that two of the PROPHAR-requested experts lacked knowledge and experience in their alleged areas of expertise, and that in consequence the accreditation of one of them (Mr Cabrera) as a damages expert had been suspended. It should be noted at this point, because of the importance this has acquired in subsequent stages, that Mr Cabrera’s report concluded that PROPHAR was entitled to USD 204 million in damages for lost profits and that the Court should issue an additional award against MSDIA in favour of the “Ecuadorian People” in the amount of more than USD 642 million.

22. On 29 November 2011, this arbitration was initiated.
23. The NCJ's judgment, issued on 21 September 2012, determined that the dispute between NIFA and MSDIA was not an antitrust dispute, but a dispute about unfair competition. It found that the Court of Appeals had failed to substantiate the factual basis for its finding of liability and had acted *ultra petita* calculating compensation over a 15 year period, on which basis, it found MSDIA liable for the sum of USD 1,570,000.00 as the total amount of compensation including loss and damage of any kind. The Trial Court ordered MSDIA to pay PROPHAR that amount, which was promptly paid by MSDIA.

**G. THE FIRST EXTRAORDINARY ACTION FOR PROTECTION AT THE ECUADORIAN CONSTITUTIONAL COURT**

24. On 19 November 2012, PROPHAR filed an Extraordinary Action for Protection ('EPA') in the Constitutional Court alleging a violation of its constitutional rights, notably as regards the treatment of Mr Cabrera's evidence and as regards its right to full reparation; it sought in addition the award of "punitive compensation." MSDIA was not a party to the EPA, but was granted an opportunity to participate as an interested party. The Constitutional Court's decision was eventually handed down on 12 March 2014; on the basis of a finding that the NCJ had erred by considering inadmissible evidence, it vacated the NCJ's decision and remanded the case to a new panel of the NCJ to reconsider the two cassation petitions *de novo*.

**H. THE SECOND NCJ PROCEEDINGS**

25. The new NCJ panel pronounced on 10 November 2014, vacating the Court of Appeals' judgment once again, as there had been no antitrust violation. It rejected unfair competition as a basis for liability, but substituted a finding of liability on the basis of pre-contractual liability for which it awarded USD 7.7 million in damages.
26. Following the rejection of its request for clarification and correction of the calculation of damages, MSDIA complied with the NCJ judgment and paid PROPHAR in July 2015 the balance of the USD 7.7 million.

**I. THE SECOND EXTRAORDINARY ACTION FOR PROTECTION FILED AT THE CONSTITUTIONAL COURT**

27. On 9 January 2015, PROPHAR launched a second EPA against the new NCJ judgment. This action was still pending at the time of the oral hearing in the arbitration in March 2015 (paragraph 6 above). It is the Constitutional Court decision in January 2016, granting PROPHAR's second EPA, that has triggered the present renewed application by MSDIA for interim measures. In its decision the Constitutional Court (a) annulled the NCJ's judgment of 10 November 2014; (b) restored the underlying proceedings between PROPHAR and MSDIA to the state they had been in before that judgment; and (c) remitted the two petitions for cassation to the Chamber of Associate Judges for Civil and Commercial Matters of the NCJ, with an indication that, in doing so, the Chamber was to "consider[] the *decisum* or resolution as well as the central arguments that formed the basis of the decision and constitute the rationale; under warning that the provisions of Article 86 number 4 of the Constitution of the Republic will be enforced if they do not do so." In arriving at this decision, the Constitutional Court based itself in particular on a violation of the constitutional right to legal certainty arising out of the treatment of the expert evidence of Mr Cabrera, notably in respect of Mr Cabrera's assessment of damage over a 15-year period extending to 2018.
28. On 29 January 2016, the Constitutional Court sent its decision and the case file to the NCJ and notified the Claimant. On 3 February 2016, the Claimant filed a request for clarification seeking *inter alia* an indication of how the NCJ's 2014 decision had failed to comply with the prior decision of the Constitutional Court.
29. The Claimant, MSDIA, now requests "interim measures of protection directing Ecuador—including specifically its courts, its executive branch, and its national police—to take all steps within its power to prevent enforcement of any judgment against MSDIA in the *PROPHAR v. MSDIA* case, both within and outside of Ecuador"<sup>3</sup> and invokes in support its earlier submissions on its first application for interim measures in 2012 (see paragraph 5 above). The Claimant further submits that the

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<sup>3</sup> Claimant's letter to the Tribunal, 5 February 2016, p. 8.



decision of the Constitutional Court “exposes MSDIA to the immediate threat of losing its business in Ecuador” through the annulment of the 2014 NCJ decision and the consequent reinstatement of the judgment of the Court of Appeals; it adds “[i]n light of the directions and threats made by the Constitutional Court to the NCJ, there is a serious risk that the NCJ will issue a final decision against MSDIA either affirming the \$150 million court of appeals judgment or awarding PROPHAR even more than that amount.”<sup>4</sup>

30. The Respondent contends that the second request for interim measures should be dismissed out of hand.<sup>5</sup> It urges that “the issuance of the 20 January 2016 decision of the Ecuadorian Constitutional Court in the underlying *PROPIIAR v. MSDIA* litigation plainly does not give rise to an ‘urgent need for interim measures of protection.’”<sup>6</sup> And further that the Claimant has failed to provide any fact demonstrating that a new NCJ decision would cause harm, and to prove that any harm would be irreparable.
31. Considering the particular circumstances in which the current interim measures request arises, the Parties’ submissions have focused on the new developments and situation presented by the latest judgment of the Constitutional Court. The Tribunal has nevertheless considered and addresses below the Parties’ submissions on the Claimant’s First Request for Interim Measures to the extent still relevant.
32. As has been pointed out (paragraphs 2-7 above), the Parties’ cases have been argued in full, both in writing and orally, and the Tribunal’s Award is in an advanced state of preparation. In the absence, however, of any knowledge of how the Tribunal will decide either on jurisdiction or on the merits, the Parties have no alternative but to argue the present application as if all of these matters were still at large. The Claimant contends that, for purposes of interim measures, it need only make a *prima facie* showing that the Tribunal has jurisdiction, and at most a *prima facie* case on the merits, which in the latter context means no more than an assessment of the plausibility and

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<sup>4</sup> Claimant’s letter to the Tribunal, 5 February 2016, pp. 4-7.

<sup>5</sup> Respondent’s letter to the Tribunal, 18 February 2016, p. 9.

<sup>6</sup> Respondent’s letter to the Tribunal, 18 February 2016, p. 1.

reasonableness of the case, and not a full review.<sup>7</sup> The Respondent insists that a *prima facie* case on the merits is a strict requirement but does not dispute the standard put forward by the Claimant.<sup>8</sup>

**J. THE STANDARD FOR EVALUATING A REQUEST FOR INTERIM MEASURES**

33. The Claimant bases its request on Article 26(1) of the UNCITRAL Rules, which states that “the arbitral tribunal may take any interim measures it deems necessary in respect of the subject-matter of the dispute.” It argues that this provision grants tribunals broad authority to award a wide range of potential remedies.
34. The Claimant submits that both the International Court of Justice and the majority of investment treaty tribunals operating under the UNCITRAL Rules have applied the following three requirements for interim measures of protection: (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 harm will likely occur before the arbitral proceeding is concluded.
35. In addition, the Claimant notes that a “minority of tribunals” have considered two further factors:<sup>9</sup> (1) the balance of hardship, which weighs the potential harm caused to the state if the requested interim measures are granted against the harm caused to the investor if the measures are not granted; and (2) a *prima facie* showing on the merits by the Claimant.<sup>10</sup> Although it disputes that these factors are broadly accepted as a requirement for granting interim measures, the Claimant asserts that it meets them both.<sup>11</sup>

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<sup>7</sup> Interim Measures Hearing Transcript, p. 20.

<sup>8</sup> Interim Measures Hearing Transcript, p. 88, 204.

<sup>9</sup> Interim Measures Hearing Transcript, p. 19.

<sup>10</sup> Claimant’s Request for Interim Measures, paras. 81-82.

<sup>11</sup> *Id.*

36. The Respondent's counter is that interim measures are extraordinary measures not to be granted lightly. While agreeing broadly with the Claimant as to the three requirements set out in paragraph 35 above, the Respondent says that the Claimant must also meet the two additional requirements of a *prima facie* showing on the merits and a showing that the imposition of measures would not be disproportionate, based on a balance of hardship.

**K. PRIMA FACIE JURISDICTION**

37. The Tribunal does not believe that any useful purpose would be served in recapitulating in any detail in this interim Decision the argument between the Parties as to its jurisdiction, which will be set out in full in the forthcoming Award. It recalls merely that the Respondent contends that the Tribunal manifestly lacks jurisdiction on the three grounds that the Claimant made a prior exclusive and irrevocable choice of ICSID arbitration such as to exclude subsequent resort to arbitration under the UNCITRAL Rules; that the Claimant lacks any protected investment under the BIT; and that the Claimant has manifestly failed to exhaust local remedies.<sup>12</sup>
38. In particular, the Respondent says that, in the absence of exhaustion of local remedies, no breach of the BIT or of international law can have occurred and no "investment dispute" can therefore have arisen under Article VI of the Treaty. The Respondent contends that the exhaustion of local remedies is a requirement of all international claims arising from judicial misconduct. The Respondent further asserts that the Claimant had a duty to pursue an EPA of its own before the Constitutional Court, even if it constitutes a new proceeding, since that remedy was not obviously futile. The Respondent rejects the Claimant's argument that it cannot be required to exhaust all possible local remedies when this consists of an endless loop of NCJ and Constitutional Court judgments, since, it asserts, there is every reason to believe that the loop will come to an end as soon as the Constitutional Court is satisfied that no constitutional violation remains.<sup>13</sup> The Respondent adds that the fact that the NCJ judgments are

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<sup>12</sup> Respondent's Opposition, para. 79.

<sup>13</sup> Respondent's letter to the Tribunal, 18 February 2016, pp.9-10.

enforceable does not exempt the Claimant from the requirement to exhaust local remedies; having to satisfy a judgment is a normal harm that a Claimant may suffer in the process of exhausting local remedies.

39. The Claimant for its part rebuts these objections. It argues in particular that the local remedies rule is a matter pertaining to the merits, not jurisdiction, and that its claims under Article II(7) of the BIT are, come what may, subject at most to a “qualified requirement of exhaustion of local remedies”. The Claimant argues that it has in any event exhausted all available and effective legal remedies, considering, on the one hand, that the NCJ is the court of last resort in the Ecuadorian legal system and, on the other, that MSDIA should not be required to pursue a wholly ineffective EPA of its own, as the local remedies rule cannot require MSDIA to initiate completely new proceedings.
40. For the reasons already indicated, the Tribunal does not consider it either necessary or proper to pre-empt its eventual decision on the jurisdictional objections. It is sufficient to say that the Tribunal is satisfied that jurisdiction prima facie exists to support it proceeding to a decision on the substance of the Claimant’s present application for interim measures.

**L. THE NECESSITY OF THE REQUESTED MEASURES TO PREVENT SUBSTANTIAL AND IRREPARABLE HARM**

41. The Claimant contends that the harm to its business resulting from a new decision by the National Court of Justice would be substantial and irreparable, as the enforcement of the judgment against it would “swiftly” destroy its investment in Ecuador.<sup>14</sup> According to the Claimant, the risk of substantial and irreparable harm to MSDIA is even greater now, following the Constitutional Court’s decision, than it was in September 2012 prior to the first NCJ decision because the terms of the decision imply that damages higher still than the original \$150 million award would be appropriate.<sup>15</sup> The Claimant refers

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<sup>14</sup> Claimant’s letter to the Tribunal, 23 February 2016, pp. 1-2; Claimant’s letter to the Tribunal, 5 February 2016, pp. 4-8.

<sup>15</sup> Claimant’s letter to the Tribunal, 23 February 2016, p. 1; Claimant’s letter to the Tribunal, 5 February 2016, p. 5.

to various cases where arbitral tribunals have issued interim measures restraining states from enforcing disputed legislative measures or judicial orders.<sup>16</sup>

42. The Claimant further contends that “[i]n light of the directions and threats made by the Constitutional Court to the NCJ, there is a serious risk that the NCJ will issue a final decision against MSDIA either affirming the \$150 million court of appeals judgment or awarding PROPHAR even more than that amount.”<sup>17</sup> While it agrees with the Respondent that as a matter of law the Constitutional Court does not have the power of constraining the NCJ and forcing it to issue a certain decision,<sup>18</sup> it submits that the Constitutional Court has “effectively compelled the NCJ to issue a large award in favor of Prophar by forbidding it to consider the evidence independently and requiring it to accept Cabrera’s Report,”<sup>19</sup> by “chastis[ing] the prior NCJ panel for failing to adopt the findings on damages entered by the Court of Appeals” and by threatening the NCJ judges with sanctions if they do not comply.<sup>20</sup>
43. The Claimant says that MSDIA’s Ecuadorian branch would not have sufficient assets to satisfy an NCJ judgment of \$150 million;<sup>21</sup> even prior to any seizure of assets, MSDIA would lose key customers, employees, suppliers, distributors and leaseholders who would immediately seek new reliable suppliers.<sup>22</sup> Therefore, “if the NCJ upholds the court of appeals’ decision, MSDIA’s ongoing business in Ecuador would be entirely destroyed.”<sup>23</sup> The Claimant warns that, in addition, it is very likely that PROPHAR might attempt to enforce the judgment against MSDIA assets in other countries, thus

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<sup>16</sup> Claimant’s Request for Interim Measures, paras. 43-62.

<sup>17</sup> Claimant’s letter to the Tribunal, 5 February 2016, p. 7; Claimant’s letter to the Tribunal, 23 February 2016.

<sup>18</sup> Claimant’s letter to the Tribunal, 23 February 2016, p. 4.

<sup>19</sup> Claimant’s letter to the Tribunal, 23 February 2016, pp. 4-5.

<sup>20</sup> Claimant’s letter to the Tribunal, 23 February 2016, pp. 5-7; Oyarte Third Expert Report, 23 February 2016, paras. 14-15.

<sup>21</sup> Claimant’s letter to the Tribunal, 5 February 2016, p. 7.

<sup>22</sup> Claimant’s letter to the Tribunal, 5 February 2016, p. 8.

<sup>23</sup> Claimant’s letter to the Tribunal, 5 February 2016, p. 7.

causing substantial and irreparable harm to the Claimant's business.<sup>24</sup> It points out that various arbitral tribunals have specifically rejected the assertion that claimants seeking interim measures could simply pay the disputed amounts and thereby avoid the threatened harm to their businesses.<sup>25</sup>

44. The Respondent counters that the Claimant has failed to meet its burden of showing that it would suffer harm not adequately reparable by an award of damages;<sup>26</sup> the relief sought by the Claimant illustrates "the purely economic nature of [its] alleged injury."<sup>27</sup>
45. The Respondent submits further that the Claimant's arguments are based on a "gross distortion" of the Constitutional Court's decision, which contains no prejudgement of MSDIA's liability or PROPHAR's damages, nor any direction that the NCJ defer to the findings of the Court of Appeals, but merely criticism of the NCJ's reasoning:<sup>28</sup>

"[t]here is plainly nothing in the Constitutional Court's decision that inhibits the power of the NCJ to reject the conclusions and damages calculations of the court of appeals decision (including its reliance upon Mr. Cabrera's report), which are not binding on the NCJ. Indeed, the NCJ retains its discretion to find that MSDIA is not liable to PROPHAR *at all*."<sup>29</sup>

It adds that "references to [potential sanctions for non-compliance] are not unusual in Constitutional Court decisions on extraordinary actions for protection".<sup>30</sup>

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<sup>24</sup> Claimant's letter to the Tribunal, 5 February 2016, p. 8; Claimant's Request for Interim Measures, paras. 64-67; Claimant's Reply on Interim Measures, para. 140.

<sup>25</sup> Claimant's Reply on Interim Measures, paras. 136-137.

<sup>26</sup> Respondent's letter to the Tribunal, 18 February 2016, p. 2; Respondent's Opposition, paras. 120, 128-129; Respondent's Rejoinder on Interim Measures, paras. 163-164.

<sup>27</sup> Respondent's Rejoinder on Interim Measures, paras. 161-163; Respondent's Opposition, paras. 132-133.

<sup>28</sup> Respondent's letter to the Tribunal, 25 February 2016, pp. 6-9; Second Guerrero Report, paras. 8-13, 46.

<sup>29</sup> Respondent's letter to the Tribunal, 18 February 2016, pp. 4, 7 (internal footnotes omitted); Prof. Guerrero, Report, 15 February 2016; Respondent's letter to the Tribunal, 25 February 2016, p. 5.

<sup>30</sup> Respondent's letter to the Tribunal, 25 February 2016, pp. 9-10; Respondent's letter to the Tribunal, 18 February 2016, p. 6; First Guerrero Report, paras. 41-43; Second Guerrero Report, paras. 27-29.

46. The Respondent denies that the Claimant's business in Ecuador, still less its business as a whole, would suffer irreparable harm as a result of even the threat of enforcement, since the Claimant's income statements showed, at least at the time of the First Request for Interim Measures, that its operations remained unaffected by the court proceedings.<sup>31</sup>
47. The Respondent also argues that the Claimant could easily avoid the harm it claims would result from an adverse judgment by paying the judgment rendered against it.<sup>32</sup> According to the Respondent, there can be no doubt that the Claimant has the financial means to pay the worst-case judgment than can possibly be issued against it;<sup>33</sup> it outlines various modes of financing available to the Claimant and its Ecuadorian branch to pay any adverse judgment if MSDIA wanted to do so in order to protect its business.<sup>34</sup> The Respondent concludes that it is not the Ecuadorian judicial system that would cause irreparable harm to the Claimant, "it is Claimant itself that would choose irreparable harm."<sup>35</sup>
48. The Respondent notes finally that it is not itself a beneficiary of the judgment, which also distinguishes the authorities cited by the Claimant.<sup>36</sup>

**M. URGENCY**

49. According to the Claimant, given that the Constitutional Court already sent its judgment and the case file back to the NCJ on 29 January 2016, the NCJ could decide the case within a month or six weeks from when it received the case file, especially since the NCJ is left with very little to decide in light of the judgment of the Constitutional

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<sup>31</sup> Respondent's letter to the Tribunal, 18 February 2016, p. 8.

<sup>32</sup> Respondent's letter to the Tribunal, 18 February 2016, p. 8.

<sup>33</sup> Respondent's letter to the Tribunal, 18 February 2016, p. 8; Respondent's Opposition, paras. 139-140; Interim Measures Hearing Transcript, p. 106; Expert Report of Timothy H. Hart dated July 24, 2012, para. 25 ("**Hart Report**").

<sup>34</sup> Respondent's letter to the Tribunal, 18 February 2016, p. 8; Respondent's Opposition, paras. 157-163.

<sup>35</sup> Respondent's letter to the Tribunal, 18 February 2016, p. 8; Respondent's Opposition, paras. 148-155; Interim Measures Hearing Transcript, p. 107; Second Hart Expert Report, para. 34.

<sup>36</sup> Respondent's Opposition., para. 168.

- Court.<sup>37</sup> The Claimant adds that the Constitutional Court's "highly unusual" decision to forward the case file to the NCJ without waiting for the expiry of period for requests for clarifications is already indicative of an attempt to expedite the process.<sup>38</sup>
50. The Claimant denies that its request for clarification of the Constitutional Court's decision reduces the urgency of its request, since a petition for clarification cannot affect the substance of the Court's decision and none of the questions posed has any relevance to the points raised as the basis for the interim measures request. Although the Claimant acknowledges that it is not possible to predict with certainty the timing of further actions in Ecuador's courts, it argues that there is a very significant risk that the Constitutional Court will respond to MSDIA's petition within days and that the NCJ will thereafter quickly issue a new decision.<sup>39</sup>
51. The Respondent counters that under Article 26 of the UNCITRAL Rules the action allegedly harmful to the applicant must be imminent at the time when the applicant makes its request for provisional measures and not simply harm that is likely to occur before the final award.<sup>40</sup> The Respondent claims that the Claimant does not meet the urgency requirement because the Claimant cannot establish whether the National Court of Justice will issue a decision adverse to it, when that judgment would be issued, or when it would be enforced.<sup>41</sup>
52. While agreeing with the Claimant that it is impossible to predict precisely when the NCJ will render its judgment, the Respondent's case is that "past experience and the procedural imperatives of NCJ proceedings both establish that, in fact, no such decision

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<sup>37</sup> Claimant's letter to the Tribunal, 23 February 2016, pp. 2-3; Oyarte Third Expert Report, 23 February 2016, para. 29.

<sup>38</sup> Claimant's letter to the Tribunal, 23 February 2016, p. 3; Oyarte, Third Expert Report, 23 February 2016, para. 27.

<sup>39</sup> Claimant's letter to the Tribunal, 15 February 2016, p. 1-2.

<sup>40</sup> Respondent's letter to the Tribunal, 25 February 2016, pp. 2-4; Respondent's letter to the Tribunal, 18 February 2016, p. 2.

<sup>41</sup> Respondent's letter to the Tribunal 18 February 2016, pp. 2-4; Respondent's letter to the Tribunal, 25 February 2016, pp. 2-4.



can be expected for months.”<sup>42</sup> The Respondent alludes to the time it took the NCJ to render its two prior judgments in the *PROPHAR v. MSDIA* litigation after MSDIA’s final submission admitted in the proceedings (9 and 7 months respectively),<sup>43</sup> and argues that “[t]here is therefore no reason to assume that the NCJ will act sooner than the time the Tribunal is reasonably expected to render its final award simply because the NCJ ‘now has the power to act at any moment.’”<sup>44</sup>

53. The Respondent insists that the Constitutional Court did not in any way hinder the NCJ’s ability to decide the case freely and thus rejects the Claimant’s argument that the NCJ will rule quickly because the Constitutional Court left it with little to decide.<sup>45</sup> The “mere *possibility* of action, which is what MSDIA’s argument on urgency comes down to, does not equal *likelihood* of action.”<sup>46</sup>

**N. BALANCE OF HARDSHIP**

54. The Claimant asserts that the issue of the balance of hardship is only considered by a minority of investor-State tribunals, and even then only in ancillary fashion, not as a prerequisite for the granting of interim measures. Nevertheless, in its view, interim measures would not impose disproportionate harm on the Respondent in this case; in the unlikely event that the Tribunal finds that the Appeals Court judgment is not the result of a denial of justice, *PROPHAR* could enforce the judgment having suffered only minimal incremental delay which would not amount to a violation of rights under either the Ecuadorian Constitution or the Inter-American Convention on Human Rights (‘IACHR’). The Claimant contends that it is a cardinal rule of international law that a State may not invoke its domestic law to excuse or justify the breach of one of its international obligations. Finally, the Claimant argues that, even if the Tribunal found

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<sup>42</sup> Respondent’s letter to the Tribunal, 18 February 2016, p. 2-4; Respondent’s letter to the Tribunal, 25 February 2016, pp. 2-3.

<sup>43</sup> Respondent’s letter to the Tribunal, 25 February 2016, p. 3; Respondent’s letter to the Tribunal, 18 February 2016, pp. 3-4.

<sup>44</sup> Respondent’s letter to the Tribunal, 25 February 2016, p. 2.

<sup>45</sup> Respondent’s letter to the Tribunal, 25 February 2016, p. 4.

<sup>46</sup> Respondent’s letter to the Tribunal, 25 February 2016, p. 3.

that there is a potential harm to the Respondent (or PROPHAR, if relevant), this would be outweighed by the total loss of the Claimant's business if interim measures were not granted.<sup>47</sup>

55. The Respondent asserts that proportionality is an internationally recognized standard under Article 26 of the UNCITRAL Rules. It avers that MSDIA's rights in questions are fully remediable through monetary damages, whereas an interim measures order "would put Ecuador in an impossible situation," exceeding any benefit it would bestow on the Claimant, in particular because it would ask Ecuador to violate its Constitution, its national laws, and the IACHR, since any State interference in private litigation would breach the principles of judicial independence and legality as well as the fundamental right to effective legal protection. The Respondent further submits that the Claimant has adequate financial resources to satisfy an adverse judgment, and that MSDIA has other avenues open to it to import, distribute and market its medicines in Ecuador.

**O. PRIMA FACIE CASE ON THE MERITS**

56. The Claimant argues that, under the applicable UNCITRAL Arbitration Rules, the merits are typically not considered in connection with a request for interim measures. Nonetheless, the Claimant argues that "to the extent the Tribunal regards there to be a [...] requirement of a *prima facie* case on the merits, MSDIA has easily met that requirement as well."<sup>48</sup> According to the Claimant, the *prima facie* standard only requires it to show that the claims are not "on their face, frivolous or obviously outside the competence of the Tribunal."<sup>49</sup>
57. On the merits, the Claimant argues that the Respondent has committed a denial of justice against it and has thereby breached various obligations under the BIT, including the fair and equitable treatment obligations under Article II(3)(a), the right to effective

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<sup>47</sup> Claimant's letter to the Tribunal, 23 February 2016, p. 2.

<sup>48</sup> Claimant's letter to the Tribunal, 5 February 2016, p. 5.

<sup>49</sup> Claimant's Reply on Interim Measures, paras. 197-198.

means of asserting claims and enforcing rights under Article II(7), the full protection and security obligations under Article II(3)(a), and the prohibition of arbitrary or discriminatory measures under Article II(3)(b).<sup>50</sup> The Claimant submits that it must prove either procedural misconduct or an outrageous decision, not both.<sup>51</sup> In any event, the Claimant says, the most recent decision of the Constitutional Court proves that MSDIA is “caught in an endless spiral of litigation in Ecuador” and “confirms that MSDIA is being subjected to repeated denials of justice in Ecuador’s courts and that the Ecuadorian judicial system fails to provide effective means of asserting and defending claims and enforcing rights.”<sup>52</sup>

58. The Respondent argues that a party requesting interim measures must show a reasonable probability of prevailing on its case, on the hypothesis that its factual allegations are presumed to be true. While agreeing that denial of justice could consist either in fundamentally unfair proceedings or in an outrageously wrong substantive outcome, the Respondent submits that the thresholds that apply in either case are extremely high and that international tribunals called to decide denial of justice cases may not act as courts of appeals over local court decisions. The Respondent rests on the submission that, given the absence of a final action by the Ecuadorian judiciary, and the Claimant’s inability to prove any exception to the requirement of exhaustion of local remedies, the Claimant cannot show a *prima facie* case on the merits.
59. The Respondent insists that a simply erroneous or mistaken judicial decision does not qualify as a denial of justice; the fact that the experts differ on whether the courts’ decisions were correct demonstrates in itself that the substantive error was not outrageous.<sup>53</sup>
60. As regards the appointment of a second set of experts by the Court of Appeals, the Respondent asserts that it was done in full compliance with Ecuadorian procedural law and that non-compliance would not be on its own sufficient to found a denial of justice.

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<sup>50</sup> Claimant’s Memorial, paras. 255, 379-393; Reply Memorial, paras. 774-779.

<sup>51</sup> Reply Memorial, paras. 298-304.

<sup>52</sup> Claimant’s letter to the Tribunal, 5 February 2016, p. 9.

<sup>53</sup> Rejoinder, para. 329.

The Respondent adds that the Claimant waived its rights to object by participating throughout the appointment process, and even proposing the mechanism by which Mr Cabrera was appointed, and then failing to object promptly. The Respondent further argues that there is nothing irregular in the Court of Appeals' reliance on the second set of expert reports because Ecuadorian law grants the Court discretion in this regard.

61. The Respondent argues that the 20 January 2016 Constitutional Court judgment does not deny MSDIA justice,<sup>54</sup> but rather shows the EPA to be an effective remedy which MSDIA should itself have pursued as part of its duty to exhaust local remedies.<sup>55</sup> The Respondent denies that the Constitutional Court has in its latest judgment directed the NCJ to decide the case in certain way;<sup>56</sup> it merely directs the NCJ "to make a more complete analysis of the parties' cassation ground and damages submissions, in case the NCJ finds MSDIA liable to PROPHAR, not how to decide on these matters."<sup>57</sup>
62. The Respondent finally rejects the Claimant's argument that MSDIA is subjected to an endless loop of judgments that deny it justice; "[i]f the normal operation of the system has resulted in multiple extraordinary actions for protection and multiple NCJ decisions, this is because of the particular features of the Ecuadorian legal system and not because of a conspiracy to engage MSDIA in an 'endless spiral of litigation in Ecuador."<sup>58</sup>

## **P. DECISION**

63. In reaching its decision on the Claimant's Second Request on Interim Measures, the Tribunal has reviewed all of the written submissions and correspondence of the Parties in connection with both the original request for preliminary measures filed in 2012, and the current request filed in 2016. It has also taken into account the oral submissions of the Parties at the hearing on interim measures that took place in 2012. The Tribunal is grateful to the Parties for the care and completeness with which they have presented

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<sup>54</sup> Respondent's letter to the Tribunal, 18 February 2016, 18 February 2016, p. 9.

<sup>55</sup> Respondent's letter to the Tribunal, 18 February 2016, 18 February 2016, p. 9.

<sup>56</sup> Respondent's letter to the Tribunal, 18 February 2016, 18 February 2016, p. 10.

<sup>57</sup> Respondent's letter to the Tribunal, 18 February 2016, 18 February 2016, pp. 4-7, 10.

<sup>58</sup> Respondent's letter to the Tribunal, 18 February 2016, 18 February 2016, pp. 9-10.

their arguments on interim measures. It does not, however, find it necessary in the particular circumstances to respond in detail to all of the arguments and submissions summarised above.

64. The Tribunal is issuing this Decision at a stage in the arbitral proceedings at which the case has been fully argued, in writing and orally, and the Tribunal will render its final Award in the near future. For that reason, this Decision incorporates above only an abbreviated account of the factual and procedural background, except as it relates to the question of interim measures. Nothing in this Decision should be taken as pre-empting those issues, as to jurisdiction and merits, that will shortly be definitively determined in the Award.
65. The Tribunal's powers in respect of the grant of interim measures are those laid down in Article 26 of the UNCITRAL Rules, which authorizes it to "take any interim measures it deems necessary in respect of the subject-matter of the dispute." The Parties are in agreement that these powers are broad and general, and are designed to allow a tribunal to adapt whatever course of action it finds appropriate to the specific circumstance of the individual case, against the background that the circumstances of individual cases are capable of great variety and cannot be foreseen in advance. It is worth remarking in addition that, as the Rule formulates it, the judgment whether interim measures are necessary, and if so which particular measures are appropriate, is remitted to the Tribunal itself, in the exercise of the wide measure of discretion assigned to it. That being so, the Tribunal does not consider itself to be bound in any way by the decisions of other arbitral tribunals in respect of the grant or refusal of interim measures, and still less so when the decision of the tribunal in question was made under some other treaty system or procedural rule which may contain its own particular requirements. The Tribunal will nevertheless draw guidance, so far as appropriate, from the way in which other tribunals (and, for that matter, the International Court of Justice) have approached in principle the issue of the granting of interim measures at a stage at which the Tribunal's jurisdiction to hear the case at all has not yet been the subject of a definitive ruling.

66. That the circumstances of the present case are unusual is beyond doubt. Their special character arises out of the fact that the Claimant's complaints lie against the actions of the courts of the Respondent State, but in circumstances in which the Respondent's courts have not yet finally spoken, although (says the Claimant) when they do, and if their decision goes one way rather than the other, that will lead it to face immediate, and substantial or irreparable, harm. That is the central fact which has been at the core of the argument between the Parties before the Tribunal at all stages of the proceedings. The Respondent draws the conclusion that the Claimant is in these circumstances simply not entitled to approach the Tribunal for the grant of interim measures, because it has no right or claim under the BIT while the issue in dispute remains before the courts, and because it can at the highest establish no more than a speculative risk of substantial or irreparable harm, given that there is no means of telling which way the courts will ultimately decide. The Tribunal can accept, to a certain extent, the second of these propositions, but not the first. Although the Tribunal's definitive decision is yet to follow, *prima facie* the Claimant's interests in Ecuador do constitute an 'investment' under the BIT. The Tribunal is in no doubt that, from the moment a claimant establishes an 'investment' in Ecuador, it acquires under the BIT the right to have that investment treated fairly and equitably and to enjoy in respect of that investment the other protections provided for in Article II. The question at issue is less the existence of a right under the BIT (though that, too, will be the subject of a ruling by the Tribunal in its forthcoming Award), than a dispute as to whether that right has or has not been breached so as to bring into play the provisions for arbitration laid down in Article VI. The Tribunal is in no doubt, as evidenced by the depth and scope of the substantive arguments laid out before it on both sides, that no more is required for present purposes to establish, on the side of the Claimant, a properly arguable case on the merits.
67. As to the Respondent's second proposition, going to the speculative nature of the harm alleged, while the argument advanced is factually undeniable, it is its consequences that cause the Tribunal great difficulty. A claimant would be required to wait until it had suffered the actual damage foreseen, not merely to ground its cause of action for reparation to repair the breach of its substantive rights, but in addition to ground its right

to apply to the Tribunal for whatever measures the Tribunal itself might judge appropriate to stave off the damage becoming substantial or irreparable, pending definitive findings by the Tribunal as to its jurisdiction and/or the substantive merits of the dispute. That sets up an inextricable circle. The Tribunal cannot accept that it was intended that the generality of its powers to grant interim relief can be circumscribed – or indeed nullified or pre-empted – in this way.

68. The question remains whether, on the particular showing made by the Claimant, and in the light of the counter-arguments of the Respondent, the circumstances are appropriate for the grant of interim measures, and (perhaps as important) what measures would be appropriate to the particular circumstances, given their unusual character described above.
69. As regards the first, and returning for this purpose to the guidance that can be gleaned from the decisions of other tribunals, the Tribunal accepts the Claimant's analysis that the three central elements that have been brought into play are *prima facie* jurisdiction, a threat of substantial or irreparable harm, and urgency. The Tribunal sees no need for present purposes to go into the question whether other elements, such as a balance of hardship or a *prima facie* case on the merits, are appropriate for consideration in all cases.
70. Basing itself on the distinction elaborated above between the existence of rights under the BIT and their breach, and in the light of the definition of 'investment dispute' in Article VI(1) of the BIT, the Tribunal is satisfied that the Claimant has made a sufficient showing of *prima facie* jurisdiction for present purposes. The Tribunal is also satisfied, for the purposes of this decision, that the Claimant has made a *prima facie* showing that it is not precluded from choosing UNCITRAL as a venue for this arbitration under Article VI(3)(a) of the BIT because of its prior consent to ICSID arbitration in its Notice of Dispute, based on the Claimant's interpretation of Article VI(3). Such issues as may remain as to whether the Claimant exhausted domestic remedies in Ecuador for the purposes of a claim under the BIT will likewise be dealt with in the Tribunal's final Award.

71. As to the magnitude and urgency of the harm foreseen, the Tribunal has studied with care the expert opinions by Dr Rafael Oyarte tendered by the Claimant and by Dr Juan Francisco Guerrero del Pozo tendered by the Respondent. Having done so, the Tribunal finds itself in the position of being confronted by almost diametrically opposite views, from two highly qualified and well respected legal experts, about the meaning and effect of Ecuadorian law governing the respective powers and authority of the Constitutional Court and the National Court of Justice in relation to one another. This leaves the Tribunal in a situation from which there is no obvious escape. The Tribunal cannot set itself up as the final authority to decide the disagreement between these two eminent legal experts. In the final analysis, however, the Tribunal comes to the conclusion that it is this very unpredictability of the operation of the law of Ecuador which constitutes a material factor in the present context. It may be correct from a theoretical point of view, as Dr Guerrero del Pozo has urged on the Tribunal, that the Constitutional Court has a strictly limited mandate, one that does not permit it to influence or to determine the substantive decision of the National Court of Justice or the lower civil courts in a case before them. But even if so in theory, this does not seem to offer an adequate account of the way in which the Ecuadorian courts have actually conducted themselves in relation to the subject matter of the particular dispute before the Tribunal. The Tribunal is not able to get away from the conclusion that there are certain aspects of the latest Judgment of the Constitutional Court which, on the face of it, are out of the ordinary, and therefore arouse a justifiable apprehension on the part of the Claimant (as Dr Oyarte has urged) that their purpose is to exert an influence on the outcome of the future decision of the National Court of Justice to its (the Claimant's) serious detriment. It should be recalled in this connection that the substance of the dispute brought before the Tribunal by the Claimant, MSDIA, is not about the theoretical operation of the Ecuadorian legal system, but rather about the effect of the decisions that have actually been emerging from this system on MSDIA's legally protected interests. There is an inevitable connection, to the Tribunal's way of thinking, between the questions of unpredictability and of urgency. The Respondent is no more in a position to establish, by legal proof, that there is no urgency than the Claimant is to prove that the damage it fears is necessarily imminent. That said, the Claimant has succeeded in satisfying the Tribunal that its worst-case scenario cannot be set aside, and



that the consequences, if this worst-case scenario were to eventuate, would be severe enough that protection by way of interim measures is justified.

72. The more difficult question is then what measures are appropriate to be taken in the particular, and unusual, circumstances of the present case. The Tribunal is acutely conscious of the importance of the principle that the courts of Ecuador, like the courts of any other country, should be independent, and free from direction by the Executive power. The independence of the judiciary represents an essential principle of the rule of law which must be upheld. The Tribunal notes, however, that the underlying issue is one which has confronted other international judicial bodies, including on several recent occasions the International Court of Justice itself, both in the context of judgments on the merits of disputes and in the context of interim measures, and has never been found to stand in the way of the issue of appropriately formulated relief. It is, of course, common ground between both Parties to the present arbitration and the Tribunal, that under international law the actions and omissions of the Courts engage the international responsibility of the State in the same way as other organs of the State.
73. The measures ordered below have been carefully formulated with these principles in mind. They have been designed to bite only once the threat to the Claimant's interests reaches the necessary level of gravity. They have also been designed so as to incorporate an element of flexibility to enable account to be taken of future developments. The Parties' specific attention is drawn in this connection to paragraph 1.B below.

For these reasons, the Tribunal, pursuant to Article 26 of the UNCITRAL Arbitration Rules 1976:

1. **Orders** that, in the event of a Judgment by the National Court of Justice reinstating in whole or in part the judgments of the Trial Court or the Court of Appeals in the litigation by PROPHAR against MSDIA:

- A. Ecuador shall forthwith ensure, by means of its own choosing, that all further proceedings and actions directed towards the enforcement of the judgments mentioned above are suspended pending delivery by the Tribunal of its final Award, and shall inform the Tribunal of the action that has been taken to that effect;
- B. Either Party in the Arbitration may thereafter apply to the Tribunal for variation of this Order in the light of the terms of the Judgment of the National Court of Justice.

2. **Orders further** that Ecuador is under the obligation to communicate this Order without delay to the National Court of Justice and any other authority with jurisdiction to enforce the judgments referred to in paragraph 1 above.

3. **Requests that**, if the parties have notice of the date or likely date of the National Court of Justice's Judgment, they should inform the Tribunal.



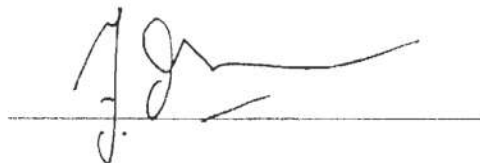
**Judge Stephen M. Schwebel**

**Date:** 6 March 2016



**Judge Bruno Simma**

**Date:** 6 March 2016



**Sir Franklin Berman KCMG QC**

**(Presiding Arbitrator)**

**Date:** 5 March 2016