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VIA EMAIL

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Re: ***MERCK SHARP & DOHME (I.A.) CORP.(U.S.A.) v. THE REPUBLIC OF ECUADOR*** **(PCA CASE NO. 2012-10)**

Dear Sirs:

We write in response to Ecuador's letter dated 18 February 2016.

As we explained in our letter of 5 February, on 20 January 2016, Ecuador's Constitutional Court vacated the November 2014 National Court of Justice ("NCJ") judgment and returned the case to the NCJ for a new (the third) "final" decision. But the Constitutional Court went further: it made improper findings of fact on the merits of the case effectively compelling the NCJ on this third iteration to issue a judgment in favor of claimant Prophar in an amount at least equal to the $150 million court of appeals judgment issued in 2011. The Constitutional Court's decision has already been returned to the NCJ and thus the enormous final judgment can issue at any time. Issuance of that judgment will be followed as a matter of course by prompt enforcement, leading immediately to the destruction of MSDIA's longstanding pharmaceuticals business in Ecuador. Thus, absent intervention by this Tribunal, MSDIA's business in Ecuador faces imminent destruction as a result of Respondent's repeated violations of its Treaty obligations.

In its 18 February letter, Ecuador and its expert Dr. Guerrero del Pozo argue that the Constitutional Court decision does not constrain the NCJ judges on remand from deciding the case as they see fit. The plain words of the Constitutional Court's decision show that those assertions are wrong. The key terms of the Constitutional Court decision expressly direct the

NCJ to endorse factual conclusions that require an enormous—and manifestly unjust—award in favor of Prophar.

Consistent with Mr. Doe's letter dated 21 February, we will limit our discussion here to demonstrating the urgency of MSDIA's application and explaining the terms and consequences of the Constitutional Court's ruling: the "range and scope of the powers now open to the [NCJ] in the proceedings between Prophar and MSDIA." MSDIA addresses only in passing the many other issues raised in Ecuador's 18 February letter. Those issues, including irreparable harm and the other elements that must be considered in an interim measures application, have been briefed at length by the parties in the context of MSDIA's 2012 request for interim measures, briefing that remains highly relevant today.[1] Based on those submissions and the exchange of letters and expert reports on the instant application in 2016, we respectfully submit that MSDIA has more than satisfied its burden for interim measures.

We therefore urge the Tribunal to grant MSDIA's application and protect its business from destruction while it considers the merits of MSDIA's claims.

I. MSDIA's Request is Urgent

Ecuador does not—indeed it cannot—dispute the clear realities that the NCJ now has the power to decide the case at any time, and that enforcement will almost certainly come swiftly following issuance of the NCJ decision. The fact the NCJ now has the power to act at any moment alone demonstrates the urgency of the situation. MSDIA cannot be left merely to hope that the NCJ forbears long enough for this Tribunal to resolve the ultimate merits. Nor—if the NCJ would forbear in any case—would Ecuador be injured as a practical matter by entry of interim measures; those measures would not, in that case, restrain Ecuador in any way. Such measures will have impact only in the event the NCJ acts sooner, in which event (absent interim measures) MSDIA will suffer irreparable injury.

As Professor Oyarte explains, in an accompanying expert declaration, the NCJ can resolve cases quickly,[2] and there are already indications that it could resolve the *PROPHAR v. MSDIA* litigation within a month or six weeks from 29 January, when the NCJ received the case file.[3] In particular, the Constitutional Court's decision to send the case file and its decision back to the

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[1] Among other things, Ecuador now argues, as it did in 2012, that there is no threat of irreparable harm because MSDIA has the financial means to pay the $150 million judgment. In connection with its 2012 request for interim measures, MSDIA established that the enforcement of a $150 million judgment would cause the destruction of its business in Ecuador, that such destruction constitutes irreparable injury, that international law does not force an investor to choose between the destruction of its investment and the payment of sums that far exceed the value of that investment, and that investment treaty tribunals have repeatedly issued interim measures to shield investors from having to make this Hobson's choice. *See* MSDIA Reply in interim measures phase, 5 Aug. 2012, at p. 29-49.
[2] Oyarte Third Expert Report, 23 Feb. 2016, at para. 29.
[3] *Id.*; MSDIA's Letter to the Tribunal, 17 Feb. 2016, and attached Constitutional Court order.

NCJ on the same day it served the decision on the parties—a highly unusual move that ignored the parties' right to make ordinary post-judgment motions—suggests that efforts to expedite the process (perhaps to move more swiftly than this arbitration process) may well be at work. As Professor Oyarte explains, the Constitutional Court's typical practice is not to send the case file back to the court of origin until the expiry of the three-day term the parties have to file petitions of clarification or expansion and the Court's resolution of any such motions.[4] In Professor Oyarte's experience, the Constitutional Court's precipitous action here is without precedent and indicates that the case may move quickly.[5]

Moreover, as explained below, the Constitutional Court's decision by its own terms purports to leave the NCJ very little to decide, further increasing the likelihood of a speedy decision. With no legal impediment to issuance of the judgment, the risk it will issue soon is plainly substantial.

It is no answer to argue, as Ecuador does, that on the prior two occasions that the NCJ has rendered "final" decisions in the *PROPHAR v. MSDIA* case, it did so some months after receiving the case.[6] Ecuador cannot deny that the NCJ has power to rule and that there is no way to predict the timing of an NCJ decision with any degree of certainty. And Ecuador's prior assurances of long forthcoming delays by the NCJ—which it made, as it does here, to assure the Tribunal that there is no urgent need for interim measures—have proved dramatically wrong. On 4 September 2012, at this Tribunal's interim measures hearing in The Hague, Ecuador argued vociferously that there was no urgency because the pending first NCJ decision would not issue until "December 2012 [at] the earliest,"[7] and that the NCJ would "most likely take … 270 business days [beginning from 30 May 2013] to decide," thus forecasting an NCJ decision would issue no earlier than June 2013.[8] Despite Ecuador's assurances to this Tribunal, the NCJ issued its decision less than three weeks later, on 21 September 2012.[9]

There is clearly a substantial risk that the NCJ will act soon despite Ecuador's assurances. There can be no justification for leaving MSDIA's business at risk based on Ecuador's speculation. And, as noted, in the unlikely event that the NCJ forbears long enough for this Tribunal to resolve the merits, Ecuador will not be prejudiced in any way.

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[4] Oyarte Third Expert Report, 23 Feb. 2015, at para. 27.
[5] *Id.* at paras. 28-29.
[6] Ecuador's Letter to the Tribunal, 18 Feb. 2016, at p. 3-4.
[7] Hearing on Interim Measures Transcript, 4 Sept. 2012, at 176:12-15.
[8] *Id.* at 177:1-5. According to the expert on whom Ecuador relied for this calculation, the 270 business day term for a decision was triggered when the NCJ judges formally took jurisdiction of the case, which was on 30 May 2012. *See* Second Expert Opinion Of Luis Alberto Moscoso Serrano, 17 Aug. 2012, at para. 12 and Annex A. Without accounting for holidays, 270 business days after 30 May 2012 falls in June 2013.
[9] *See*, Exhibit C-203, NCJ Judgment, *NIFA v. MSDIA*, 21 Sept. 2012.

II. The Constitutional Court's Decision on Its Face Deprives the NCJ of Power *Not* to Issue an Enormous and Unjustifiable Award in Favor of Prophar

The parties and experts in this arbitration agree, in the words of Ecuador's expert Dr. Guerrero del Pozo, that as a matter of Ecuadorian law the Constitutional Court "is not permitted given the nature of [an] extraordinary protection action" to indicate "how the judges of the [NCJ] should decide in the case."[10] Thus, for example, referring to the outrageous finding in the Cabrera Report that Prophar had suffered $204 million in damages and the "Ecuadorian people" had suffered $642 million in damages—all as the improbable results of Prophar's inability to buy MSDIA's small and decrepit manufacturing facility for $1.5 million—Ecuador's counsel stated at the March 2015 merits hearing in London that the Constitutional Court may not "direct[] the NCJ to ignore or not to ignore Mr. Cabrera's report in any way without exceeding its authority under Ecuador's Constitution."[11]

Proceeding from that premise, Ecuador and Dr. Guerrero del Pozo argue that "there 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."[12] Those contentions are obviously wrong. In direct contravention of Ecuadorian law the Constitutional Court in the present opinion 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.

First, the Constitutional Court holds unambiguously that the NCJ may not independently assess the evidence in deciding the case, and instead must accept the biased factual findings of the court of appeals:

> ***"[T]his Court must point out that … the ability to weigh evidence is the exclusive competence of instance judges, not of national judges, because, if they were to do so, they would attempt against the principle of internal independence. …. If the cassation appellant seeks to have the evidence reviewed, the national judges are forbidden from undertaking such task…..***"[13]

Second, in an extended discussion, the Constitutional Court directs the NCJ to accept Cabrera's Report as the basis for damages and declares that there is no evidence in the record that contradicts him. It states:

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[10] Guerrero del Pozo Expert Report, 18 Feb. 2015, at para. 94.
[11] Merits Hearing Day 2 Transcript, 17 Mar. 2015, at 191:7-11.
[12] Ecuador's Letter to the Tribunal, 18 Feb. 2016 at p. 7. Ecuador has previously defended the NCJ's November 2014 judgment as a "fully reasoned" decision which "cannot be impugned as irrational," and which "disposes of any question of wrongdoing or misapplication of the law below." Merits Hearing Day 2 Transcript, 17 Mar. 2015, at 20:10-13. Astoundingly, Ecuador now defends the 20 January Constitutional Court's conclusion that the NCJ decision was "illogical" and "incomplete." Ecuador's Letter to the Tribunal, 18 Feb. 2016, at pp. 4-5.
[13] Constitutional Court Decision, 20 Jan. 2016, at p. 13.

> ***"[Cabrera's] report makes a determination about the losses suffered by the plaintiff based on real data and data projecting sales growth over fifteen years, that is, until the year 2018. Without giving a clear and adequate explanation in the appealed judgment, the [NCJ] judges [in their prior ruling] do not apply the statute requiring that the compensation be adequate to the damages, that is, that make the victim whole. It is strange how arbitrary the national judges' reasoning is, given that in their determination of the amount of compensation [the respondent] is ordered to pay, they only consider the year 2003 and disregard the damages suffered by the respondent [sic] in the years following 2003."***[14]

Thus, the Constitutional Court finds that the NCJ damages award was insufficient to make Prophar whole, and that it was "arbitrary" for the NCJ to "disregard the damages suffered by [Prophar] in the years following 2003."[15] The Constitutional Court does not say that Prophar ***may*** have suffered additional damages after 2003, and leave that determination to the NCJ; it says clearly that Prophar ***did*** suffer additional damages, findings that deprive the NCJ of the power to conclude otherwise. In support, the Constitutional Court cites approvingly to the Cabrera report, which is the only damages evidence the Constitutional Court acknowledges in its decision.

The Constitutional Court reiterates again and again its finding that Prophar suffered greater damages than awarded by the NCJ. Thus, the Constitutional Court asserts that the NCJ judgment "solely evaluates the damages suffered by the company Prophar S.A., during 2003, and disregards the valuation of the damages that the company must have endured in subsequent years."[16] The Constitutional Court then finds that the NCJ ignored "elements present in the case file that should have been taken into account" and that these "elements point out that the damaging effects of the illicit act continued throughout subsequent years."[17]

Then, the Constitutional Court holds that there is no evidence to the contrary, precluding any possibility that the absurd conclusions in Cabrera's Report might be set aside. Thus, the Constitutional Court holds that "there is no element in the proceedings that would impugn the fact that [Prophar] has suffered effects over time as a result of the tort committed by [MSDIA]"[18] and elsewhere asserts that the NCJ's decision to limit Prophar's damages to 2003 "lacks sufficient factual support."[19]

Third, the Constitutional Court repeatedly chastises the prior NCJ panel for failing to adopt the findings on damages entered by the Court of Appeals, which entered the indefensible award of

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[14] Constitutional Court Decision, 20 Jan. 2016, at p. 16.
[15] *Id.* at 15.
[16] *Id.* at 16.
[17] *Id.*
[18] *Id.*
[19] *Id.*

$150 million. The Court of Appeals exclusively relied on Cabrera.[20] The Constitutional Court makes clear that those Court of Appeals findings must be ratified, stating that the NCJ's new judgment must be "***based on the merits of the facts established in the [repealed Court of Appeals] decision***."[21]

Thus, the Constitutional Court holds that there is evidence the Prophar suffered damages over a 15 year period and no evidence to the contrary. It has directed the NCJ to defer to the findings of the Court of Appeals, which relied exclusively on Cabrera and imposed damages of $150 million.[22] It is therefore clear that the Constitutional Court has directed the NCJ to award damages based on the Cabrera report in at least the amount awarded by the Court of Appeals.[23]

Finally, the Constitutional Court cements its directive for an outcome in favor of Prophar by invoking the threat of sanction on the NCJ judges for non-compliance with its decision. Ecuador suggests that the Constitutional Court's reference to sanctions for non-compliance is a routine matter of little significance.[24] This is clearly not the case.

In its disposition, the Constitutional Court orders the NCJ to issue its new decisions "in accordance with … [a] comprehensive application of this Constitutional decision, that is, considering 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."[25]

As Professor Oyarte explains, the Constitutional Court thus directed the NCJ to follow comprehensively the Constitutional Court's holdings and reasoning.[26] This necessarily includes the holding that the NCJ cannot independently assess the record evidence, and its factual

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[20] Exhibit C-4, Court of Appeals Judgment, *NIFA v. MSDIA*, 23 Sept. 2011, at 14.
[21] Constitutional Court Decision, 20 Jan. 2016, at p. 10.
[22] Exhibit C-4, Court of Appeals Judgment, *NIFA v. MSDIA*, 23 Sept. 2011, at 14.
[23] The Constitutional Court's discussion of damages also shows that the Court found that MSDIA was liable for damages, characterizing MSDIA's actions as "illicit" and as constituting a "tort." Constitutional Court Decision, 20 Jan. 2016, at p. 16. Elsewhere, the Court appears to direct the NCJ to affirm the court of appeals' antitrust theory of liability, holding that the NCJ decision failed to substantiate its reasons for rejecting the court of appeals decision holding MSDIA liable under an antitrust theory. *Id.* at. pp. 14-15. This is clearly false, as the second NCJ panel correctly observed that there was no antitrust law in Ecuador that could apply to the case. Exhibit C-393, NCJ Judgment, *NIFA v. MSDIA*, 10 Nov. 2014, at p. 40. The Constitutional Court's finding that the absence of an antitrust law in Ecuador was not a sufficient basis on which to reject antitrust liability further drives the NCJ towards affirming the court of appeals decision. In any event, the clear implication is that the Constitutional Court not only determined that damages occurred but that MSDIA acted unlawfully.
[24] Ecuador's Letter to the Tribunal, 18 Feb. 2016, at p. 6.
[25] Constitutional Court Decision, 20 Jan. 2016, at p. 24. Article 86(4) provides, in part: "If the sentence or ruling is not complied with by the public servants, the judge shall order their dismissal from their job or employment, without detriment to the civil or criminal liabilities that might be applicable."
[26] Oyarte Third Expert Report, 23 Feb. 2016, at paras. 14-15.

findings that MSDIA is liable for damages calculated in accordance with the Cabrera expert report.[27]

The practical impact of the Constitutional Court's directives therefore is clear and portends the immediate destruction of MSDIA's business in Ecuador. As MSDIA has explained, contrary to the Constitutional Court's findings, Cabrera's Report is irrational and unsupported by evidence or logic[28]—the NCJ in 2012 characterized Cabrera's damages calculation as "lacking all proportion"[29] and in 2014 called it "irrational and illogical."[30]—and Cabrera himself, as determined by Ecuador's Council of the Judiciary, is entirely unqualified to opine on damages.[31] The Constitutional Court now prohibits the NCJ from reaching similar conclusions, despite their obvious correctness. And contrary to the Constitutional Court's dictate, the record in the Court of Appeals was in fact replete with evidence contradicting Cabrera's conclusions, including the contracting parties' contemporaneous valuation of the factory at $1.5 million,[32] the availability of numerous other factory sites suitable to accommodate Prophar's expansion plans,[33] Prophar's own statement that the negotiations delayed its expansion plans by only one year,[34] the conclusion of Ignacio De Leon—the first expert appointed to assess damages by the Court of Appeals—that Prophar in fact suffered no damages,[35] and the well-supported conclusions of three different experts offered by MSDIA to the same effect.[36] The Constitutional Court's square holdings on their face prohibit the NCJ this third time through to consider any of this evidence and mandate the NCJ's acceptance of the obviously irrational conclusions of an unqualified person—an engineer by training—who is pretending to be an expert on damages.

Moreover, the Constitutional Court's direction that the NCJ must accept the Court of Appeals' findings has a similar devastating effect on MSDIA. The Court of Appeals made its evidentiary findings, to which the Constitutional Court has now mandated absolute deference, ***without any consideration of the evidence introduced by MSDIA in second instance proceedings***. That is because the Court of Appeals without basis asserted in its 2011 $150 million judgment that MSDIA had waived its reliance on all of the evidence it had submitted in the Court of Appeals

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[27] *Id.*
[28] *See, e.g.*, Merits Hearing Day 1 Transcript, 16 Mar. 2015, at 89:2-90:5; *MSDIA Memorial at paras. 106-109.*
[29] Exhibit C-203, NCJ Judgment, *NIFA v. MSDIA*, 21 Sept. 2012 at section 16.2
[30] Exhibit C-293, NCJ Judgment, *NIFA v. MSDIA*, 10 Nov. 2014, at p. 79.
[31] *See, e.g.* Merits Hearing Day 1 Transcript, 16 Mar. 2015, at 86:1-92:14; MSDIA Memorial at paras. 103-15; 111-117; MSDIA Reply at paras. 573-612.
[32] MSDIA Memorial at para. 33.
[33] *See, e.g.*, MSDIA Memorial at paras. 78, 101; Merits Hearing Day 1 Transcript, 16 Mar. 2015, at 75:5-18.
[34] Exhibit C-10, NIFA's Complaint, *NIFA v. MSDIA*, Trial Court, 16 Dec. 2003 ("[MSDIA] caused my client to suffer a year of delays in expanding its industrial plant or constructing or acquiring a new one."); *see also* Exhibit C-293, NCJ Judgment, *NIFA v. MSDIA*, 10 Nov. 2014, at p. 34.
[35] Exhibit C-24, Report of Ignacio De León, *NIFA v. MSDIA*, Court of Appeals, 12 Feb. 2010, at 47-49; MSDIA Reply at para. 558(c).
[36] Exhibit C-44, Report of Carlos Montañez Vásquez, submitted to the Court of Appeals, *NIFA v. MSDIA*, 15 Jul. 2011 at p. 2; Exhibit C-20, Report of Rolf Stern, *NIFA v. MSDIA*, Court of Appeals, 4 Jun. 2009, at 1; Exhibit C-21, Report of Walter Spurrier Baquerizo, *NIFA v. MSDIA*, Court of Appeals, 4 Jun. 2009, at 3.

proceedings, concluding that: "For the record, the defendant in this instance expressly waived the evidence aiming to dispel the grounds of the verdict in the first instance."[37] The Court of Appeals therefore considered only the evidence submitted by Prophar, and made no reference anywhere in its judgment to any evidence submitted by MSDIA.[38] This resulted in a distorted and one-sided analysis of the factual record entirely violative of minimum due process, as Ecuador has conceded by declining to defend the Court of Appeals decision. The Constitutional Court now orders the NCJ to adopt those same preposterous and procedurally tainted factual findings.

The bottom line, therefore, is very clear: the Constitutional Court has mandated that the NCJ must disregard all evidence contrary to the conclusions of Cabrera and the Court of Appeals, adopt Cabrera's findings, and enter judgment in at least the amount in the Court of Appeals award. While on its prior adjudications the NCJ has repeatedly rejected Cabrera and the Court of Appeals' analysis as irrational and wildly excessive (only to impose their own irrational rulings in lower amounts in Prophar's favor), given the Constitutional Court's explicit instruction and its explicit threat that non-compliance with its holdings or its reasoning will result in dismissal and/or prosecution, there seems no reason to hope for a ruling from the NCJ that disregards these mandates.

The Constitutional Court's disregard of Ecuadorian law and assumption of power that plainly exceeds its authority therefore, far from providing any comfort that its dictates may be disregarded and due process prevail, instead demonstrates to any objective observer—including the NCJ alternate judges to whom the Constitutional Court has committed the case—that this case will not be decided consistent with the rule of law. The arbitrariness of the Constitutional Court's rulings is patent on their face. The Constitutional Court's holding that the NCJ may not second-guess the Court of Appeals' evidentiary findings, for example, directly contradicts its own prior decision in this very case. In that decision, the Constitutional Court cited with approval a decision of the Supreme Court of Justice (the predecessor court to the NCJ) stating that a court of cassation may independently assess the evidence after vacating a decision:

> "***There are many cases where it has been decided that the cassation court, acting as a trial court, is authorized to review the proceeding in integrum and, if based on such analysis, it concludes that the facts set forth in the repealed resolution are not consistent with the procedural reality (...) it shall proceed to first establish the facts to***

[37] Exhibit C-4, Court of Appeals Judgment, *PROPHAR v. MSDIA*, dated 23 September 2011, at 15-16; *see generally* MSDIA Memorial at paras. 121-123; MSDIA Reply at paras. 641-650.
[38] Second Expert Report of Professor Jaime Ortega, 7 Aug. 2014, at paras. 49-51; Second Witness Statement of Dr. Alejandro Ponce Martínez, 5 Aug. 2014, at para. 82.
[38] Ecuador Counter-Memorial, at paras. 495-496.

> ***then subsume them under the corresponding rule, and thus issue a ruling that is consistent with the procedural truth.***"[39]

That was its prior ruling. Its present ruling directly contradicts it. Ecuador and its experts have affirmed repeatedly the position of the Constitutional Court's first decision in this respect.[40] MSDIA's cassation expert has agreed.[41] But as demonstrated above, the new Constitutional Court decision without explanation departs entirely from that principle, prohibits the cassation court from performing its proper fact-finding role, itself goes on to find the facts (in the process ignoring the extensive contrary evidence in the record), and effectively dictates the result it desires.

Professor Oyarte further explains that the Constitutional Court's threat that failure to comply with its ruling—its holding or its reasoning—will result in sanctions under Article 86(4) is at a minimum very unusual in this context.[42] As a matter of law, the Constitutional Court can impose a sanction under Article 86(4) only ***after*** it has found that a public official has violated a Constitutional Court decision, and it typically makes such a finding in the context of deciding an action of non-compliance. Here, there has been no action for non-compliance; indeed, the judges to whom the Constitutional Court directs its warning did not even render the November 2014 NCJ judgment. As Professor Oyarte explains, in this context the warning can only be viewed as a threat.[43]

Moreover, even if the alternate judges had issued the prior decision, the suggestion that the November 2014 judgment in any way violated the Constitutional Court's prior decision is absurd. As Ecuador itself has explained, the only ground on which the Constitutional Court's prior decision rested was "that the NCJ Judges had acted 'improperly' by admitting and considering … a Memorandum, issued by the Ecuadorian Council of the Judiciary … whereby … the Council suspended Mr. Cristian Cabrera's accreditation as a damages expert."[44] And of

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[39] Exhibit C-285, Constitutional Court Decision, 12 Mar. 2012, at p. 19 (emphasis added).
[40] See Ecuador's Rejoinder at para. 474 (noting that the Constitutional Court "specifically determined that the NCJ acted as a trial court after its cassation of the Court of Appeal's judgment"); *id.* at para 494 (explaining that "once the NCJ had determined that the Court of Appeals' 23 September 2011 decision must be cassated [it was permitted to] do so in the same manner as a court of first instance … that second phase is governed by Article 16 of the Cassation Law, and it involves the NCJ's independent analysis of the evidence from the lower court proceedings"); Second Aguirre Expert Opinion, 16 Feb. 2015, at para. 4. 9. (explaining that "once cassation is sustained (as it occurred in both of the [NCJ decisions in *Prophar v. MSDIA*]), the NCJ proceeded to become a "Trial Court" and to make a decision based on the grounds of Prophar's complaint and the MERCK's defenses , as well as on the evidence presented, in the same manner as it would be handled by any trial court").
[41] Expert Report of Carlos Humberto Páez Fuentes, 1 Oct. 2013, at paras. 19-20.
[42] Oyarte Third Expert Report, 23 Feb. 2016, at paras. 21-26.
[43] *Id.* at para. 26.
[44] Ecuador Counter-memorial at para. 448. As MSDIA has established in this arbitration, that decision lacked a rational basis and absurdly prohibited the NCJ from recognizing that the expert on whom the Court of Appeals had relied in awarding $150 million to Prophar—Mr. Cabrera, whose analysis the Constitutional Court now directs the NCJ to adopt—was not qualified to be a damages expert. Merits Hearing Day 1 Transcript, 16 Mar. 2015, at 119:25-124:9.

course, the NCJ on remand complied with that demand and decided the case, in the second NCJ ruling, without consideration of that Memorandum or the fact that Cabrera had been deemed unqualified, by Ecuador's own Council of the Judiciary, to render the expert opinion at issue.

Nevertheless, the Constitutional Court repeatedly and without basis accuses the second NCJ panel of having failed to comply with its first decision. Among other things, the Constitutional Court now asserts that the NCJ's independent evaluation of the evidentiary record constituted a failure to comply with its first decision,[45] despite the fact that, as explained above, the first Constitutional Court decision ***actually acknowledged the NCJ's authority to make independent evidentiary findings***. Similarly, the Constitutional Court now asserts that the NCJ's decision to limit its damages award to harm supposedly suffered by Prophar in 2003 failed to comply with the Constitutional Court's first decision, despite the fact that its first decision made no reference whatsoever to this issue and left consideration of the record and determination of facts to the NCJ.[46]

Therefore, the Constitutional Court has simply manufactured these and other instances of non-compliance, another unmistakable message that raw power and arbitrary dictate, not the rule of law, must govern this matter on remand. Coupled with the threat of dismissal or prosecution under Article 86(4) for failure to follow the Constitutional Court's "decision," "central arguments," and "rationale,"[47] the obvious purpose of these false findings of past non-compliance by the NCJ is to ensure that the alternate judges will follow the Constitutional Court's directives in full, however much they may exceed the Constitutional Court's authority or be unsupported by the evidence or the law.

III. Conclusion

For the reasons set forth above, MSDIA respectfully requests that the Tribunal grant MSDIA's application and issue 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.

Consistent with MSDIA's 5 February letter, MSDIA reserves the right to submit arguments on how the Constitutional Court's 20 January 2016 decision affects the merits of its claim, and reiterates its request that the Tribunal establish a briefing schedule for that purpose at the appropriate time.

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[45] Constitutional Court Decision, 20 Jan. 2016, at p. 13.
[46] *Id.* at p. 16-17.
[47] Constitutional Court Decision, 20 Jan. 2016, at p. 24.

We have reached out to Ecuador's counsel regarding possible hearing dates for MSDIA's interim measures application. Ecuador's counsel have declined to discuss the matter until seeing this submission, offering to discuss it after we file this letter but before they file their response on Thursday. MSDIA has agreed to discuss the matter with Ecuador's counsel on Wednesday, and will revert to the Tribunal on the matter as soon as that conference takes place.

Sincerely,

David W. Ogden /cs

David W. Ogden

Enclosures

cc: Mr. Martin Doe
Ms. Amal Clooney
Mr. Mark Clodfelter
Ms. Janis Brennan
Ms. Diana Tsutieva
Mr. Ronald Goodman
Mr. Alberto Wray
Mr. Constantinos Salonidis
Dr. Diego Garcia Carrion
Dra. Blanca Gómez de la Torre
Dra. Christel Gaibor
Ab. Diana Terán