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VIA E-MAIL

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Re: *Merck Sharp & Dohme (I.A.) Corp. v. The Republic of Ecuador* -- UNCITRAL Arbitration -- PCA Case No. 2012-10

Dear Members of the Tribunal:

We write in response to Claimant's letter of 15 August 2016, in which Claimant continues its strained effort to stretch the meaning of the 4 August judgment of the National Court of Justice ("NCJ" or the "Court") to fit the scope of the Tribunal's Decision on Interim Measures. In its letter Claimant recycles arguments about the NCJ judgment already raised in its earlier letter of 10 August, and which have been shown to be incorrect in Ecuador's own of 13 August.[1] What is new is, first, Claimant's argument based on an interpretation of the

[1] For example, relying on the very same passages of the NCJ judgment it invoked in its 10 August letter, Claimant argues that "[w]hile the [NCJ judgment] recites and discusses the factual evidence, it is obvious from the text of the judgment that the NCJ did not make an independent assessment of that evidence." Claimant's letter to the Tribunal (15 Aug. 2016), fn. 5. As shown in Ecuador's 13 August letter, however, that is not true. The NCJ assessed the evidence submitted by the parties before concluding that such evidence "reveal[ed]

"purpose of the Tribunal's Decision [on Interim Measures],"[2] which seeks to mislead the Tribunal into extending the ordered interim measures to circumstances clearly not contemplated in its Decision. Claimant seeks essentially the same objective through its alternative request, "in the event the Tribunal were to find that the NCJ's 4 August 2016 Judgment does not fall within the scope of the Tribunal's Decision," that the Tribunal "vary the terms of its Decision to extend the measures of protection it granted previously to protect

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concurrence, at least with regard to […] important facts." From these facts, it drew conclusions which it then subjected to the rules of law it found applicable. The Court did the same when "reconsider[ing] th[e] case from the point of the pre-contractual process." Further, it dismissed the probative value of testimony because it was "mostly procured from persons involved in the negotiation process, having held positions or engagements with [MSDIA], at various levels and at various times"; it based "findings of fact" on the "copious documentation exchanged via email between the parties, which are considered authentic and have probative value in the proceedings"; and it analyzed documents, ultimately rejecting them as having no bearing on the negotiation between Prophar and MSDIA. Ecuador's letter to the Tribunal (13 Aug. 2016), p. 3; NCJ Judgment of 4 August 2016, at *Considerandas* Two-Seven, Nine, pp. 27-34 [Claimant's English Translation].

Similarly, as regards the NCJ's treatment of the Cabrera report, its admission to the record did not "stand in the way of [the NCJ's] review," and the NCJ's eventual correction of "the error committed by the Court of Appeals, in relation to the exaggerated amount of compensation it ordered […]." NCJ Judgment of 4 August 2016, at *Consideranda* Ten, p. 37 [Claimant's English Translation].

Claimant also argues that because the Court said in one passage of its judgment that it "partially set[] aside" the judgment of the Court of Appeals, the latter decision effectively remains in place. Claimant's letter to the Tribunal (15 Aug. 2016), p. 2. However, Claimant reads the terms used by the NCJ out of context. The passage from the Court's judgment reads in pertinent part: "[t]his Court partially sets aside [the Court of Appeals' judgment], and […] ***now takes the place of the lower court***, to complete and rectify the errors and render a judgment on the merits of the facts established in the judgment, ***as provided by Article 16 of the Cassation Law***." NCJ Judgment of 4 August 2016, p. 22 [Claimant's English Translation] (emphasis added). That provision, as Claimant and its expert Prof. Páez have admitted, enables the NCJ, when annulling a lower court decision, to "act as a court of instance and render a ***new*** decision." Claimant's Reply, ¶ 402 (emphasis added); Opinion of Prof. Carlos Páez Fuentes (1 Oct. 2013), ¶¶ 17, 18 (acknowledging that if "the NCJ sets aside the challenged judgment […] [it] must issue ***a new judgment or order in its place***," which "***replace[s] the one it has annulled***" (emphasis added). There can be no question, therefore, that the terms used by the Court at page 22 of its judgment refer only to the fact that MSDIA's *cassation petition* was granted only in part. That has no bearing on the legal implications of the NCJ judgment, which is a *new* adjudication of the merits of the Prophar/MSDIA dispute and the damages flowing from MSDIA's conduct. Those implications are clear as a matter of Ecuadorian law and are set out, as the Court acknowledged in the very same passage, in Article 16 of the Cassation Law. Indeed, elsewhere in its judgement, the Court states even more clearly that the "challenged judgment" (not only a part thereof) must be "set aside" for failing to meet the criteria of the Cassation Law. *See, e.g.*, NCJ Judgment of 4 August 2016, pp. 16-17 [Claimant's English Translation].

Finally, Claimant argues that the reduced amount in damages owed to Prophar was "the only meaningful departure from the court of appeals' decision." Claimant's letter to the Tribunal (15 Aug. 2016), p. 3. That is also not true. As shown in Ecuador's 13 August letter, the NCJ rejected the Court of Appeals' finding of MSDIA's liability on antitrust grounds, which Claimant itself admits is "***the only legal basis*** for the court of appeals' judgment [on liability]." Claimant's Memorial, ¶ 314 (emphasis added); *see also id*., ¶¶ 139, 142, 243, 349, 385; Claimant's Reply, ¶¶ 4, 23, 291, 326, 333, 503, 537. The Court may have upheld MSDIA's liability, but it did so on entirely different grounds, *i.e.*, the commission of an unintentional tort, with the only relevance of Article 244(3) of the Ecuadorian Constitution (the provision relied on by the Court of Appeals for its finding on liability) being limited "to underscore the unilateral attitude of the defendant […]." NCJ Judgment of 4 August 2016, at *Considerandas* Five and Six, pp. 31-33 [Claimant's English Translation]. Claimant did not address this fact in its 15 August letter, which makes its aforementioned allegation even more disingenuous.

[2] Claimant's letter to the Tribunal (15 Aug. 2016), p. 3.

MSDIA from the enforcement of the NCJ's 4 August 2016 Judgment."[3] Further, Claimant argues that Ecuador "has not complied with the Tribunal's Decision on Interim Measures,"[4] and indicates its availability for "an oral hearing regarding MSDIA's requests with respect to interim measures of protection," as well as its preferences concerning the schedule of submissions "regarding the effect of the NCJ's 4 August 2016 Judgment on the parties' prior submissions and on the merits of the issues in dispute in the arbitration."[5] Ecuador addresses these points below in turn.

1. The purpose of the Tribunal's Decision on Interim Measures was to protect MSDIA from a judgment of $150 million or more, and not from an NCJ judgment for a substantially lower amount

Claimant argues that "the purpose of the Tribunal's decision […] was clearly intended to protect MSDIA against enforcement of *a further judgment* in the *Prophar v. MSDIA* litigation […]."[6] However, this is plainly not true.

As Claimant repeatedly expressly stated in its second request for interim measures, it was seeking protection against enforcement of one, and only one, possible outcome of the NCJ proceedings—a judgment of $150 million or more as had been rendered by the lower courts. And the only risk that the Tribunal considered in ordering interim measures was the risk of a judgment of $150 million or more. Claimant did not seek measures against enforcement of any lesser judgment because it erroneously maintained that no outcome other than a judgment of $150 million or more was possible in light of the Constitutional Court's decision of 20 January 2016.

That is why the Tribunal made interim measures applicable only to an NCJ decision "reinstating in whole or in part the judgments of the Trial Court [for $200 million] or the Court of Appeals [for $150 million] […]."[7] And that is why the Decision on Interim Measures does not apply to the 4 August NCJ judgment [for $[42[8]] million].

That the purpose of the Tribunal's Decision was not to protect MSDIA against enforcement of ***any*** further judgment of the NCJ is indisputable and evident from the terms of both the Decision and Claimant's own submissions.

The Tribunal itself stated that the Decision was intended to protect only against Claimant's "worst case scenario."[9] Contrary to the assertion of Claimant's letter of 15 August, that "worst case scenario" was never defined by Claimant as a general risk that "the NCJ would follow the dictates of the Constitutional Court and would issue a judgment against

[3] *Id.*, p. 4.

[4] *Id.*, pp. 4-5.

[5] *Id.*, p. 5.

[6] *Id*. p. 3 (emphasis added.)

[7] Decision on Interim Measures (7 Mar. 2016), Paragraph 1.

[8] Given Claimant's offset rights, recognized at the London Hearing by its expert Prof. Páez (*see* Hearing on the Merits Day 3, 161:20-162:2), it may be assumed that the net payment obligation arising from the 4 August judgment of the NCJ is approximately $34 million, and not $42 million.

[9] Decision on Interim Measures (7 Mar. 2016), ¶ 71.

MSDIA adopting the court of appeals' factual findings and relying specifically on the evidence of damages offered by Mr. Cabrera."[10] Rather, as Claimant's own pleadings show, it was always defined in terms of the risk of rejection of MSDIA's cassation petition in full and *the concomitant reinstatement of the Court of Appeals' judgment* of $150 million by the NCJ—a scenario that never materialized. And of course, that is precisely and solely what the Tribunal addressed in its Decision.

Other assertions by Claimant in its interim measures application also demonstrate that protection against the NCJ's rejection of its cassation petition and reinstatement of the Court of Appeals' $150 million judgment, or the NCJ's award of damages in excess of $150 million, was the only relief that Claimant requested in its application. Indeed, in its 5 February 2016 letter applying for interim measures, Claimant defined the risk of substantial and irreparable harm to its interests in terms of the "***NCJ*** […] ***affirm[ing] the court of appeals judgment of $150 million*** […]."[11] Elsewhere in the same letter, Claimant stated that "***[i]f the NCJ affirms [the $150 million judgment of the court of appeals]***, [it] will face a final and immediately enforceable judgment against it that far exceeds the value of its assets in Ecuador."[12] Later on, it reiterated 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***."[13]

Similarly, in its 23 February letter, Claimant argued that the Constitutional Court "effectively compell[ed] the NCJ […] to issue a judgment in favor of […] Prophar ***in an amount at least equal to the $150 million court of appeals judgment issued in 2011***."[14] Elsewhere in the same letter, Claimant defined the threatened "irreparable" injury in terms of the destruction of its business in Ecuador as a result of the enforcement of "a ***$150 million*** judgment."[15]

The Tribunal, on its part, clearly understood Claimant's argument on the "necessity of the requested measures to prevent substantial and irreparable harm" in terms of the "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***."[16] Further, the Tribunal took note of Claimant's allegation that "MSDIA's Ecuadorian branch would not have sufficient assets to satisfy an NCJ judgment of $150 million […]."[17] That was the only measure of threat to Claimant's interests before the Tribunal; indeed, Claimant never argued any other "necessary level of gravity."[18]

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[10] Claimant's letter to the Tribunal (15 Aug. 2016), p. 3.

[11] Claimant's letter to the Tribunal (5 Feb. 2016), p. 5 (emphasis added).

[12] *Id.*, p. 4 (emphasis added).

[13] *Id.*, p. 7 (emphasis added).

[14] Claimant's letter to the Tribunal (23 Feb. 2016), p. 1 (emphasis added).

[15] *Id.*, fn. 1 (emphasis added).

[16] Decision on Interim Measures (7 Mar. 2016), ¶ 42 (emphasis added).

[17] *Id.*, ¶ 43.

[18] *Id.*, ¶ 73.

It follows that neither the text of the 4 August NCJ judgment nor the "purpose" of the Tribunal's Decision triggers Ecuador's obligations under the Decision on Interim Measures. Respondent therefore reiterates its view that the NCJ judgment does not "reinstat[e] in whole or in part the judgments of the Trial Court or the Court of Appeals," and requests that the Tribunal reject Claimant's associated requests stated on page 5 of its 15 August letter.

2. Claimant's request that the Tribunal vary the terms of its Decision is inconsistent with those very terms and, moreover, seeks to circumvent its burden to show that the requirements for the indication of interim measures currently exist

The Tribunal must similarly reject Claimant's alternative request, "in the event the Tribunal were to find that the NCJ's 4 August 2016 Judgment does not fall within the scope of the Tribunal's Decision," that the Tribunal "vary the terms of its Decision to extend the measures of protection it granted previously to protect MSDIA from the enforcement of the NCJ's 4 August 2016 Judgment."[19]

In that regard, Claimant cites Paragraph 1.B of the *dispositif* of the Tribunal's Decision on Interim Measures. However, as with Ecuador's obligations under Paragraph 1.A, Paragraph 1.B is triggered only "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."[20] Because this "worst case scenario" plainly did not materialize, Claimant has no basis for its alternative request.

Indeed, allowing Claimant to "vary" the terms of the Tribunal's Decision on Interim Measures would be tantamount to permitting Claimant to avail itself of an extension of intrusive interim measures without ever having raised or met its burden to prove that the required elements for their indication exist. Claimant has never attempted to justify interim measures with respect to any lesser other judgment, Ecuador has never had an opportunity to counter such an attempt, and the Tribunal has never considered the elements necessary to warrant interim measures in relation to any lesser judgment. As just one example, Claimant has made no showing whatsoever that the enforcement of a net payment obligation of approximately $34 million[21] would threaten "irreparable" harm to its investment in Ecuador.[22]

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[19] Claimant's letter to the Tribunal (15 Aug. 2016), p. 4.

[20] Decision on Interim Measures (7 Mar. 2016), Paragraph 1 (chapeau).

[21] Given the offset permitted by the enforcing court with regard to the NCJ's November 2014 judgment, it may be assumed that the damages awarded in the 4 August NCJ judgment (approximately $42 million) will be offset by the amounts already paid by MSDIA (approximately $8 million). It may also be assumed that MSDIA, as a self-proclaimed rational actor, will follow the same course that it took with regard to the earlier NCJ decision, *i.e.*, it will seek such an offset.

[22] The Tribunal may recall that MSDIA operates in Ecuador as a branch office that is not a separate legal entity and that, using MSDIA's income and assets as of the 2012 interim proceedings as a guide, represents only a small fraction of the more than ample financial resources available to MSDIA to satisfy the 4 August NCJ judgment against it. Indeed, as demonstrated in Ecuador's pleadings in connection with MSDIA's first request for interim measures, MSDIA was perfectly capable of paying even a $150 million judgment without disruption to its business operations or significant impact on its then-net current assets of $1.13 billion. Ecuador's

Thus, extending the effect of the Tribunal's Decision on Interim Measures to the 4 August NCJ judgment would be improper and unjust; no interim measures can be ordered absent a request and showing by Claimant applicable to the 4 August NCJ judgment.

3. Ecuador has fully complied with the Tribunal's Decision on Interim Measures

Claimant also argues that Ecuador's transmission of the Tribunal's Decision on Interim Measures and the Spanish version thereof to the competent judicial authorities[23] is "woefully inadequate" to ensure compliance with the Tribunal's Decision on Interim Measures.[24] That allegation is absurd. The transmission of the Tribunal's Decision was made in compliance with Paragraph 2 of the dispositif, not Paragraph 1.A.[25] It was Paragraph 2 that obliged Ecuador "to communicate this Order without delay to the National Court of Justice and any other authority with jurisdiction to enforce [the judgments of the Trial Court or the Court of Appeals]."[26]

To the extent that Claimant insinuates that Ecuador is under obligations *other* than that imposed and fully complied with under Paragraph 2 of the Tribunal's Decision, Claimant is, as explained above, wrong. Ecuador's obligations under Paragraph 1 are not triggered because the 4 August judgment does not "reinstat[e] in whole or in part the judgments of the Trial Court of the Court of Appeals."

Finally, in response to the communication received from the Presiding Arbitrator on 16 August 2016, Respondent notes the following. The two issues before the Tribunal are (1) whether the Tribunal's Decision on Interim Measures was intended to apply only to the restoration of the lower court $150 million-plus judgments, which Claimant alleged in February was imminent, or also to an entirely new judgment for a substantially lower amount even though Claimant had not sought protection from any such judgment and (2) whether the terms of the Decision even allow for a request for a variation, in lieu of a new request and showing pertinent to the NCJ judgment as actually rendered, and if so whether to grant a variation. Although Respondent is of course not party to the Ecuadorian proceedings, it appears to be almost no likelihood that anything irrevocable will happen over enforcement of the NCJ judgment before the Tribunal should be in a position to decide those two issues. The Respondent of course undertakes to communicate the decision resulting from the Tribunal's consideration of these two issues without delay to all authorities with jurisdiction to enforce the NCJ judgment.

4. Absent a new request by Claimant, there is no need for an oral hearing on interim measures

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Opposition to Claimant's Request for Interim Measures, ¶¶ 135-160 and accompanying Expert Report of Timothy H. Hart (24 July 2012), ¶¶ 20-36.

[23] Respondent's Letter to the Tribunal (12 Mar. 2016), p. 1.

[24] Claimant's letter to the Tribunal, p. 4.

[25] Respondent's Letter to the Tribunal (12 Mar. 2016), p. 1.

[26] Decision on Interim Measures (7 Mar. 2016), Paragraph 2 (chapeau).

In light of the Parties' existing submissions, scheduling an oral hearing at this point would be premature, as Claimant has not even begun to show that the enforcement of the 4 August 2016 judgment is urgent and threatens "irreparable" harm. If Claimant considers that, despite the above, the circumstances of the case warrant interim measures, it is of course free to approach the Tribunal with a fresh request demonstrating the basis for interim measures with respect to the actual judgment rendered by the NCJ, not the hypothetical judgment for $150 million or more (against which Claimant has based all of its previous arguments, including those made in its first request for interim measures). Until such a request and showing, there is no need to schedule an oral hearing to address the enforcement of a judgment that did not eventually emerge from the NCJ.

5. Any schedule for submissions on the further implications of the 4 August judgment must factor in the deadline for the parties' right to file an extraordinary action for protection

As regards the Tribunal's provision to the Parties of an opportunity to make submissions by 31 August regarding the effect of the NCJ's judgment on the Parties' prior submissions and on the merits of the issues in dispute,[27] Ecuador notes the Tribunal's preparedness to grant a short extension of time "should the Parties not be in a position to meet this time limit."[28] It will be difficult for Ecuador to meet this time limit, and an extension would, moreover, be desirable in light of the deadline by which both parties in the underlying litigation would have to file an extraordinary action for protection before Ecuador's Constitutional Court. As indicated in Claimant's letter, that deadline is on or around 7 September 2016.[29] The actions of the parties in the underlying litigation in light of this deadline are significant in order to determine, *inter alia*, whether Claimant's failure to exercise its remedial rights in the Ecuadorian legal order continues. (As Ecuador argued at the Hearing,[30] and as the Parties' experts agreed, it is still possible for MSDIA to achieve the invalidation of *all* judicial actions carried out within the Prophar/MSDIA litigation;[31]

[27] PCA's letter to the Parties (9 Aug. 2016), p. 2.

[28] *Id.*

[29] Claimant's letter to the Tribunal (15 Aug. 2016), p. 5.

[30] Hearing on the Merits Day 2, 83:23-25, 84:1-16 (Salonidis) ("[T]he Constitutional Court can start from the challenged judgment and move backwards in time to fully repair the constitutional violation. This is of course consistent with the intended purpose of the EPA, to fully repair the constitutional violation. For example, case FG-14, the Constitutional Court found that the trial court, the Court of Appeals and the NCJ all failed to adhere to a valid arbitration agreement and therefore their judgments were rendered in breach of constitutional due process, and in particular the right to be judged by a court or judge with competent jurisdiction. What did the court grant as full reparation in that case? […] [T]he annulment of all relevant judgments, not only the NCJ judgment, and the same outcome could have obtained here. This is yet another reasonable possibility affording Claimant effective relief. This is another illustration of the effectiveness of the EPA as a remedy.").

[31] Hearing on the Merits Day 3, 91:7-11, 92:5-16 (Oyarte) (Q. […] if Merck at the time had submitted an EPA alleging that its constitutional right to be heard by a competent judge was violated, and the Constitutional Court accepted that allegation, then it would have declared the nullity of the whole process and not only of the cassation ruling, correct? A. ***If that was the request, all of the rulings [would be] vacated***.") (emphasis added); Hearing on the Merits Day 4, 149:8-25 (Guerrero) (Q. Let's assume, following the 2012 National Court of Justice decision, that MSDIA had in fact filed an extraordinary action for protection, and let's assume for a moment that MSDIA was successful in that proceeding. One result would be that the National Court of Justice decision, the September 2012 decision, would be annulled? A. That depends on the rights that allegedly were

MSDIA, however, must appeal to the Constitutional Court.) For this reason, and consistent with the Parties' respective burdens of proof, Respondent proposes to make its written submission one week after Claimant makes its own, but in any event not earlier than 7 September 2016.

Claimant appears to assume that the Tribunal's mention of a "possibility that a further oral hearing may be necessary"[32] relates to the opportunity granted to the Parties, by way of the PCA's letter of 9 August 2016, for further argument on the implications of the 4 August judgment for the merits of the case.[33] Claimant is mistaken in this assumption. As its 11 August letter makes clear, the possibility of a further oral hearing was envisaged by the Tribunal in connection with the issue of interim measures. For the reasons described above, Ecuador reiterates that there is no need for an oral hearing in the absence of an interim measures proceeding based upon the NCJ's 4 August judgment. However, should the Tribunal determine that an oral hearing is necessary at this point, its scheduling should take into account that at least four weeks advance notice of the hearing dates will be needed in order for Ecuadorian officials to obtain the UK visas necessary for them to attend.

Respondent thanks the Tribunal for its attention to this correspondence.

Respectfully submitted,

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violated, and that Merck included in its complaint. Lots of things may change. If the allegation is that the cassation ruling was not duly reasoned, then the Constitutional Court may have vacated the cassation decision and it would have ordered for a new Constitution of the Cassation Court to issue a replacement ruling. ***If Merck alleged that there was a subject matter jurisdiction problem and the natural judge was not the one who heard the case, well the full reparation would have entailed that the full proceeding of the lowers courts would have been left without any effect***.") (emphasis added).

[32] PCA's letter to the Parties (11 Aug. 2016), p. 2.

[33] Claimant's letter to the Tribunal (15 Aug. 2016), pp. 5-6.