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13 August 2016

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 connection with the PCA's letter dated 11 August 2016, in which the Tribunal requested Respondent to (a) "respond as rapidly as possible" to the question raised in Claimant's letter of 10 August 2016 as to whether the Tribunal's Decision on Interim Measures applies to the 4 August 2016 judgment of the National Court of Justice ("NCJ" or the "Court") and (b) "indicate to the Tribunal […] the steps it had taken to comply with paragraph 2 of the Tribunal's Decision on Interim Measures,"[1] as well as "any further steps it

[1] Paragraph 2 of the Tribunal's Decision on Interim Measures reads: "**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 [of the Trial Court or the Court of Appeals in the litigation by PROPHAR against MSDIA]" (emphasis in the original text).

has undertaken in the light of paragraph 1.A of the same Decision."[2] In response to the Tribunal's requests, Ecuador submits the following.

In response to the Tribunal's first request: Ecuador does not consider that the Tribunal's Decision on Interim Measures applies to the NCJ's judgment of 4 August 2016 because that decision does not "reinstat[e] in whole or in part the judgments of the Trial Court or the Court of Appeals."[3] For this reason, Ecuador has not taken any steps in connection therewith, nor does it consider being under an obligation to take any steps, in light of paragraph 1.A of the Tribunal's Decision on Interim Measures.

Claimant has admitted that as a matter of Ecuadorian law, "when the NCJ annuls a lower court decision, the NCJ can then act as a court of instance and render a *new* decision."[4] Indeed, according to Claimant's expert Prof. Páez, when "the NCJ sets aside the challenged judgment […] [it] must issue ***a new judgment or order in its place***,"[5] which "***replace[s] the one it has annulled***."[6] Given that the 4 August judgment granted in part MSDIA's cassation petition, the NCJ judgment does not, as a matter of Ecuadorian law, reinstate, either in whole or in part, the judgments of the Trial Court or the Court of Appeals.

Nor does it "affirm" the Court of Appeals' judgment "in most material respects," as Claimant now contends.[7] In particular:

- It is not true that the NCJ "affirm[ed] [the] liability holding [of the Court of Appeals]" by "reject[ing] MSDIA's grounds for cassation challenging [it]."[8] It may be recalled that the Court of Appeals had held MSDIA liable "***exclusively*** on antitrust grounds."[9] Although the NCJ also found MSDIA liable, it did so for the commission of an unintentional tort, and not on antitrust grounds.[10]

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[2] PCA letter to the Parties (11 Aug. 2016), p. 3. Paragraph 1.A of the Tribunal's Decision on Interim Measures reads: "Ecuador shall forthwith ensure, by means of its own choosing, that all further proceedings and actions directed towards the enforcement of the judgments [of the Trial Court or the Court of Appeals in the litigation by PROPHAR against MSDIA] 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."

[3] Decision on Interim Measures, paragraph 1 (chapeau).

[4] Claimant's Reply, ¶ 402. Claimant's expert Prof. Páez acknowledges that the NCJ acting as a cassation court is called to review and annul judicial decisions containing errors provided for in the cassation law, and that after "annulling the challenged decision, the court of cassation *must […] issue a replacement decision*." Opinion of Prof. Carlos Páez Fuentes (1 Oct. 2013), ¶ 8 (emphasis added).

[5] Opinion of Prof. Carlos Páez Fuentes (1 Oct. 2013), ¶ 17 (emphasis added).

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

[7] Claimant's letter (10 Aug. 2016), p. 1.

[8] *Id.*, pp. 1-2.

[9] Claimant's Memorial, ¶ 139 (emphasis added). *See also id.*, ¶¶ 10, 137, 142, 243, 314 ("[a violation of antitrust law] was ***the only legal basis*** for the court of appeals' judgment" (emphasis added)), 349, 385; Claimant's Reply, ¶¶ 4 ([the judgments issued against MSDIA by the trial court and the court of appeals] imposed liability against MSDIA for purported antitrust violations"), 23, 291, 326 ("the two lower courts found MSDIA liable ***only on antitrust***" (emphasis added)), 333, 503, 537.

[10] NCJ Judgment of 4 August 2016, *Considerando* Six, pp. 32-33 [Claimant's English Translation]. For the NCJ, the only relevance of Article 244(3) of the Ecuadorian Constitution (the provision relied by the Court of

- It is not true that the NCJ "did not independently assess the evidence in the record but instead wholly accepted the evidentiary findings of the court of appeals."[11] In support of its erroneous proposition, Claimant points to two passages from the 4 August judgment. However, when stating that in examining the merits of the underlying case it would "refrain[] from weighing any evidence or determining any of the facts of the trial and appeal,"[12] the NCJ merely traced the language of Article 16 of the Cassation Law, which asks that the Court issues its replacement decision "on the substance of the facts established in the [annulled] judgment."[13] That provision has not prevented the Court from evaluating evidence, when acting as an instance court, in the past, and it certainly did not prevent it from doing so now. Indeed, the NCJ recounted the evidence submitted by the parties,[14] assessed it to conclude that such evidence "reveal[ed] concurrence, at least with regard to […] important facts,"[15] and drew certain factual conclusions therefrom,[16] which it then subjected to the rules of law it found applicable.[17] The Court reviewed the evidence in the lower courts' proceedings, which it interpreted to establish several facts supporting its liability findings, including when "reconsider[ing] th[e] case from the point of the pre-contractual process."[18] Even when it expressly stated that the "dispute between the parties cannot lead [it] to weigh evidence," the Court proceeded to do precisely that: 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 certain "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.[19]

- It is not true that the NCJ was "not permitted to second-guess the court of appeals' decision […] to credit [the Cabrera] report."[20] Even though Cabrera's report was "weighed and accepted," *i.e.*, was deemed to be ***admissible*** ("*calificado*" in the Spanish original text), by the lower courts, that did not "stand in the way of [the

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Appeals for its finding on liability) served only "to underscore the unilateral attitude of the defendant." *Id.*, *Considerando* Five, p. 32 [Claimant's English Translation].

[11] Claimant's letter (10 Aug. 2016), p. 3.

[12] NCJ Judgment of 4 August 2016, *Considerando* Two, p. 27 [Claimant's English Translation].

[13] Cassation Law, Article 16 (**CLM-185**).

[14] *Id.*, *Considerando* Three, pp. 27-30 [Claimant's English Translation].

[15] *Id.*, *Considerando* Four, pp. 30-32 [Claimant's English Translation].

[16] *Id.*, *Considerando* Five, p. 31 [Claimant's English Translation].

[17] *Id.*, *Considerando* Six, pp. 32-33 [Claimant's English Translation].

[18] *Id.*, *Considerando* Seven, pp. 33-34 [Claimant's English Translation].

[19] *Id.*, *Considerando* Nine, p. 34 [Claimant's English Translation].

[20] Claimant's letter (10 Aug. 2016), p. 4.

NCJ's] review,"[21] which eventually resulted in the correction of "the error committed by the Court of Appeals, in relation to the exaggerated amount of compensation it ordered."[22]

- Finally, it is not true that in its judgment the NCJ "expressly considered and rejected the application of the Tribunal's Decision on Interim Measures."[23] First, the Tribunal's Decision did not impose any constraints on the NCJ's judicial function, but only to the enforcement of its judgment "in the event of [it] reinstating in whole or in part the judgments of the Trial Court of the Court of Appeals," *i.e.*, in the event of the NCJ judgment dismissing the parties' cassation petitions and leaving the Court of Appeals' judgment in place, which did not happen. Second, the NCJ held only that, to the extent the Tribunal's Decision sought to interfere with the NCJ's "internal" and "external autonomy,"[24] it violates provisions of the Ecuadorian Constitution.[25] The Court said nothing about the actions of the enforcing trial court, nor did it preempt them in any way.

The Tribunal's Decision on Interim Measures imposes on Ecuador a tremendous, even disproportionate,[26] burden if triggered. It therefore cannot be assumed that the Tribunal's use of the terms "reinstating in whole or in part the judgments of the Trial Court or the Court of Appeals" was casual or non-intentional. But that is exactly what Claimant's strained interpretation of those terms does assume. That is, Claimant's position is that the terms were meant to capture, not only an NCJ decision that legally reinstated one of the two lower court judgments (as would have been the case if the NCJ had denied cassation, for example), but *any* decision of the NCJ that found liability and awarded damages. Of course, had that been the intent, one can easily imagine innumerable phrases that would have expressed such a result, which would be quite different from the particular words chosen by the Tribunal.

Each of the members of the Tribunal knows in his own mind what he intended in agreeing to the terms of paragraph 1 of the Tribunal's Decision on Interim Measures. But it would be untenable to presuppose that a Party could reasonably have understood them to have a meaning so drastically more broad than the actual terms used.

Thus, Ecuador does not consider that the NCJ's judgment of 4 August 2016 "reinstat[es] in whole or in part the judgments of the Trial Court or the Court of Appeals," and that it is under an obligation to take any steps in connection therewith, in light of paragraph 1.A of the Tribunal's Decision on Interim Measures.

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[21] NCJ Judgment of 4 August 2016, *Considerando* Ten, p. 37 [Claimant's English Translation].

[22] *Id.*

[23] Claimant's letter (10 Aug. 2016), p. 5.

[24] As Ecuador understands the Tribunal's Decision, this was not the intention of the Tribunal because the Decision did not ask any "governmental official from any other branch of the Government or other judicial body [to] interfere in the administration of justice [by the NCJ]," nor "any government official that is part of the Judicial Branch itself [to] interfere with the jurisdiction [of the NCJ]." NCJ Judgment of 4 August 2016, p. 4 [Claimant's English Translation]. The NCJ's reference to the sanctions under Article 86(4) of the Ecuadorian Constitution must be understood in this context.

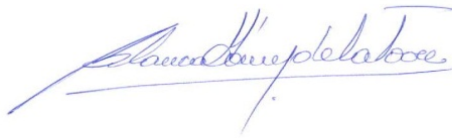
[25] *Id.*

[26] *See, e.g.,* Respondent's Opposition to Claimant's First Request for Interim Measures, ¶¶ 176-195.

In response to the Tribunal's second request: The Tribunal will recall that, as Ecuador informed the Tribunal on 12 March 2016, by way of letter of the Procurador General del Estado dated 11 March 2016 to the Associate Judges of the Civil and Commercial Chamber of the National Court of Justice and to the Presiding Judge of the Civil Judicial Unit of the Metropolitan District of Quito (and copies to the Presidents of the National Court of Justice, the Constitutional Court, and the Council of the Judiciary), transmitting the Tribunal's Decision on Interim Measures and the Spanish version thereof, Ecuador complied with its obligation under paragraph 2 of the Tribunal's Decision.[27]

Respondent thanks the Tribunal for its attention to this correspondence.

Respectfully submitted,



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