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Cc:	"mdoe@pca-cpa.org"; "Amal Clooney (lal@doughtystreet.co.uk)"; "Born, Gary"; "Ogden, David"; "Kent, Rachael"; "Beene, Charles"; "Salas, Claudio"; "Bartkus, Mary E."; "dgarcia@pge.gob.ec"; "bgomez@pge.gob.ec"; "dteran@pge.gob.ec"; "cgaybor@pge.gob.ec"; Clodfelter, Mark; Brennan, Janis; Wray, Alberto; Tsutieva, Diana; Mayorga, Ofilio; Sands, Oonagh; Rebolledo, Jose; Aviles-Alfaro, Anna; Kalinowski, Kathryn
Subject:	PCA Case No. 2012-10: Merck Sharp & Dohme (I.A.) Corp. (U.S.A.) v. The Republic of Ecuador
Date:	Thursday, February 18, 2016 6:35:30 PM
Attachments:	Respondent"s Letter_18022016.pdf R-211.pdf 2016-02-15 Declaracion de Juan Francisco Guerrero del Pozo (original).PDF 2016-02-15 Expert Report of Juan Francisco Guerrero del Pozo (English translation).pdf

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Dear Members of the Tribunal:

On behalf of Respondent the Republic of Ecuador, please see the attached correspondence in the above-referenced arbitration matter. Respondent's letter is accompanied by Respondent's Exhibit R-211 and the expert report of Prof. Juan Francisco Guerrero Del Pozo (together with English translation). The legal authorities referred to in Prof. Guerrero's report (as well as the English translation of relevant excerpts thereof) will be transmitted to the Tribunal separately and in due course.

Respectfully submitted,

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18 February 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 are writing pursuant to the Tribunal's invitation dated 16 February 2016 to respond to the 5 February 2016 letter of Claimant, MSDIA, requesting that the Tribunal order interim measures of protection directing Ecuador "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." For the reasons set out below, the issuance of the 20 January 2016 decision of the Ecuadorian Constitutional Court in the underlying *PROPHAR v. MSDIA* litigation plainly does not gives rise to an "urgent need for interim measures of protection," as MSDIA alleges,[1] much less any need for the expedited schedule that MSDIA requests.

[1] Claimant's letter (5 Feb. 2016), p. 10.

Neither MSDIA's 5 February letter, nor its additional ones of 15 and 17 February, meet the elements required for a proceeding on interim measures. Indeed, the alleged bases for MSDIA's second request for interim measures are even weaker that those it proffered for its first request. MSDIA does not even attempt to justify its conclusory allegations of urgency, and it fails to allege any facts showing that a new NCJ decision would cause it harm, much less irreparable harm. MSDIA also distorts the effect of the Constitutional Court's decision, as demonstrated both by the attached report of Ecuador's expert on Constitutional Law, Prof. Juan Francisco Guerrero, and by MSDIA's own uncertainty about those effects evinced in its request for clarification of the decision still pending with the Constitutional Court.[2] Finally, with regard to the merits of the claims, and contrary to MSDIA's assertions, the Constitutional Court's decision is relevant mostly to further confirm that MSDIA itself could have invoked Constitutional Court remedies for the defects it alleges in the national court proceedings.

If, despite MSDIA's failure to allege the factual predicates for interim measures, most notably the lack of any showing of urgency or imminent irreparable harm, the Tribunal should decide to move forward with MSDIA's request, there is no need for the expedited briefing schedule proposed by MSDIA. Under the realities of a new NCJ proceeding, which – even under MSDIA's theory of its current posture – is incipient only and history has shown will take months to culminate in a decision, a rational and appropriate schedule would allow the same sort of briefing and hearing opportunities set by the Tribunal for MSDIA's 2012 interim measures request. Any schedule that would have the effect of relieving MSDIA of its burden to prove that it meets every element required for the imposition of interim measures or deprive Ecuador of a full opportunity to address MSDIA's arguments and evidence would be unwarranted in the circumstances and fundamentally unfair to Ecuador.

I. Claimant Has Not Alleged Facts Showing Any Threat Of Imminent And Irreparable Harm Sufficient To Warrant Either Interim Measures Of Protection Or An Expedited Schedule To Consider A Request For Such Measures

Article 26 of the applicable 1976 UNCITRAL Arbitration Rules requires that, to merit interim measures, "the party requesting [interim measures of protection] is facing harm to rights it is pursuing in the arbitration and that the harm is *so imminent* that it cannot await the tribunal's final decision on the merits."[3] Moreover, interim measures are necessary only if the claimant will be so prejudiced by the alleged imminent harm that it will not be possible to make its loss whole by monetary compensation of the final award.[4]

MSDIA admits that urgency and threat of an irreparable harm are among the requirements for awarding interim measures of protection.[5] But it has completely failed to

[2] MSDIA's Request for Clarification of the Constitutional Court's Decision (3 Feb. 2016).

[3] S. Baker & M. Davis, THE UNCITRAL ARBITRATION RULES IN PRACTICE: THE EXPERIENCE OF THE IRAN-UNITED STATES CLAIMS TRIBUNAL (1992), p. 139 (**RLM-55**) (emphasis added). *See also EnCana Corporation v. Republic of Ecuador*, LCIA Case No. UN 3481, Interim Award (31 Jan. 2004) (**CLM-10**), ¶ 13 ("*EnCana*"); *Sergei Paushok, CJSC Golden East Company and CJSC Vostokneftegaz Company v. Government of Mongolia*, UNCITRAL (Russia-Mongolia BIT), Order on Interim Measures (2 Sept. 2008), ¶ 39 (**CLM-12**).

[4] *EnCana*, ¶ 17 (**CLM-10**).

[5] Claimant's letter (5 Feb. 2016), p. 5.

allege facts that could make out a case for either. As a result, its request for interim measures of protection is entirely without merit.

A. Claimant Has Failed To Show Any Circumstance Of Urgency

To begin with, MSDIA's entire case for urgency consists of a single statement made on the first page of its 5 February letter, namely that "as experience has shown, the timing of court decisions in Ecuador is impossible to predict and that, as a result, "harm to MSDIA could come at any time."[6] In the same breath, MSDIA admits that any such alleged harm is possible *only* "as soon as the NCJ issues its new decision."[7]

Respondent agrees that it is impossible to predict *precisely* when the NCJ will render its judgment; indeed, predicting the timing of national court or arbitral decisions is not an exact science. However, contrary to what MSDIA alleges, past experience and the procedural imperatives of NCJ proceedings both establish that, in fact, no such decision can be expected for months. In the interim, MSDIA is under no threat whatsoever.

The record shows that the two NCJ decisions that have been rendered in the underlying private litigation between PROPHAR and MSDIA were preceded by substantial briefing, both written and oral, by both parties. Such briefing took place over the course of several months, with the actual decisions themselves being issued several months after the parties' last submissions.

For instance, with respect to the first NCJ decision, PROPHAR (then NIFA) submitted a brief on 17 November 2011,[8] MSDIA sought and was granted a hearing that took place on 26 December 2011,[9] and the NCJ rendered its decision approximately *9 months* later, on 21 September 2012.[10]

Similarly, after the issuance of the Constitutional Court's decision on PROPHAR's first extraordinary protection action, on 12 February 2014,[11] MSDIA sought and was granted the opportunity to submit argument before the NCJ, which it did two and a half months thereafter, on 29 April 2014.[12] The decision of the NCJ was rendered approximately *7*

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[6] *Id.*, p. 1. Claimant repeated this conclusory statement in its 17 February 2016 letter to the Tribunal ("Because the case is now formally before the NCJ, the NCJ may enter a new judgment in the case at any time").

[7] *Id*. As a result of MSDIA's 3 February 2016 request for clarification of the Constitutional Court's 20 January 2016 decision, that cannot happen until after the Constitutional Court decides upon the request, which has not yet occurred at the time of Respondent's present submission. Claimant of course admits as much: *see* MSDIA's letter to the Tribunal (15 Feb. 2016), p. 2 ("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 []") (emphasis added). Claimant's 17 February 2016 letter to the Tribunal, transmitting the Constitutional Court's order transferring the case file to the NCJ, does not modify its view that the NCJ proceedings will go forward only after the Constitutional Court has ruled on its request for clarification.

[8] NIFA's Brief, *NIFA v. MSDIA*, NCJ (17 Nov. 2011) (**C-200**).

[9] Transcript of Hearing, *NIFA v. MSDIA*, NCJ (26 Dec. 2011) (**C-201**).

[10] NCJ Judgment, *NIFA v. MSDIA* (21 Sept. 2012) (**C-203**).

[11] Decision of the Ecuadorian Constitutional Court (12 Feb. 2014) (**C-285**).

[12] MSDIA's NCJ Brief, *NIFA v. MSDIA* (29 Apr. 2014) (**C-292**).

months after that, and almost *9 months* after the proceeding began, on 10 November 2014.[13] Tellingly, throughout the second NCJ proceedings, MSDIA did not seek interim measures, presumably cognizant of the complete lack of an urgent threat of irreparable harm justifying such measures.

MSDIA has offered no reason why the NCJ would proceed any differently this time, and there is no basis for assuming that it will. In addition, given the fact that the Constitutional Court's decision does not foreclose new argument before the NCJ (which, if MSDIA really believes the interpretation of the Constitutional Court's decision it urges on this Tribunal, it surely will seek), urgency is clearly absent in the present circumstances on that ground alone.

B. Claimant Has Failed To Show Any Likelihood That A New NCJ Judgment Would Be Harmful To It

Interim measures are available only in cases of *real* threat of harm, not an uncertain one.[14] Precisely as it did in its first request for interim measures, MSDIA seeks to overcome that hurdle by speculating that the NCJ will actually affirm the court of appeals' decision. This time, MSDIA goes even further; it claims that the risk of a decision adverse to it is "even greater now" than it was at the time of its first request, because this time the Constitutional Court "gave directions to the NCJ about how to decide the case when it is returned to that court []."[15] Comparing that sweeping assertion against the actual text of the decision and Ecuadorian Constitutional Court practice, however, shows that it is a gross distortion. This is shown clearly in the analysis made by Prof. Guerrero in his the attached report, which we commend to the Tribunal's reading in full.

A few instances of MSDIA's misrepresentations of the Constitutional Court's decision will suffice. For example, MSDIA argues that the Constitutional Court "criticized the NCJ's findings on liability," which allegedly "signals to the NCJ that it should uphold the court of appeals' findings [on liability]."[16] While the Constitutional Court was clear that it considered the NCJ's analysis to be "illogical," this was *because it was "incomplete*,"[17] in that it did "not set forth its arguments for the reasons that the decision being appealed was not substantiated," and "ignor[ed] the procedural documents on file in the case, without

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[13] NCJ Judgment, *NIFA v. MSDIA* (10 Nov. 2014) (**C-293**).

[14] *See, e.g., Occidental Petroleum Corporation and Occidental Exploration and Production Company v. Republic of Ecuador*, ICSID Case No. ARB/06/11, Decision on Provisional Measures (17 Aug. 2007), ¶¶ 86-91 (**RLM-45**) (denying interim relief because the claimant failed to establish urgency: specifically, the claimant did not "know what course of action Ecuador intends to take with respect to the future operator of Block 15"); *Interhandel Case (Switzerland v. United States)*, Order on Provisional Measures (24 Oct. 1957), I.C.J. Reports 1957, p. 106 (**RLM-29**) (finding that the sale of shares that the Applicant sought to enjoin was not certain because it was "*conditional* upon a judicial decision rejecting the claims of Interhandel") (emphasis added).

[15] Claimant's letter (5 Feb. 2016), p. 5.

[16] *Ibid.*

[17] Constitutional Court Decision, PROPHAR v. NCJ (20 Jan. 2016), p. 22 ("This incomplete analysis drafted by the Chamber for Civil and Commercial Matters of the National Court of Justice *causes* the decision to be illogical.") (Emphasis added).

adequately justifying that action."[18] The Constitutional Court did not declare that the result was erroneous or legally defective. The only "signal" that the Constitutional Court gave to the NCJ is to carry out a more complete analysis of the parties' cassation grounds, not how to decide those grounds.

The same applies to the Constitutional Court's findings regarding the NCJ's damages analysis. MSDIA argues that the Court "directs the NCJ to award damages in accordance with the Constitutional Court's reasoning that the NCJ should have given weight to the Cabrera report and should have awarded damages over a fifteen year period using the data and projections endorsed by Mr. Cabrera."[19] Again, MSDIA misrepresents what the Constitutional Court actually said. The Court did not say that the NCJ should adopt the Cabrera report; it merely stated that there are "elements present in the case file that should have been taken into account when making a logical assessment," which the NCJ "disregard[ed] without any analysis."[20] That finding obviously does not foreclose the NCJ's latitude to reject any or all elements of the Cabrera report; the Court's only dictate is that the NCJ conduct an adequate analysis of it. The Constitutional Court also did not say that the NCJ should award damages over the entire fifteen-year period covered in Mr. Cabrera's report; it merely stated that the NCJ's explanation for choosing a [one-year] period for assessing damages was "insufficient."[21] Prof. Guerrero confirms this reading of the Constitutional Court's decision. He states in his Report that

> [i]t would be feasible, and constitutionally correct and compatible with the Constitutional Court's judgment, that the Chamber of Associate Judges for Civil and Commercial Matters of the National Court of Justice, in issuing a new decision [] rejects in total or in part the Cabrera report, provided that the decision is well-reasoned.[22]

MSDIA finds additional "signals" to the NCJ in the Constitutional Court's determination that the NCJ breached PROPHAR's constitutional rights by failing to consider PROPHAR's petition for cassation. It argues that such determination "signal[s] to the NCJ that the award of $150 million against MSDIA should be reexamined on the basis that it might insufficiently compensate PROPHAR."[23] Again, the fact that the NCJ may now also have to rule on PROPHAR's ground for cassation does not mean that it is required to accept it, let alone that it would have to affirm the court of appeals' decision should it accept

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[18] *Id*. The Constitutional Court also stated, "In addition, it is evident that the decision is incomplete because at no point does it refer to the motion for cassation filed by PROPHAR S.A; *for these reasons*, it is evident that the requirement of logic has not been met." *Id.* (Emphasis added).

[19] Claimant's Letter (5 Feb. 2016), p. 6.

[20] Constitutional Court Decision, *PROPHAR v. NCJ* (20 Jan. 2016), p. 16. *See also* Expert Report of Professor Juan Francisco Guerrero (15 Feb. 2016) ("Guerrero Report"), ¶ 16 ("The Judgment of the Constitutional Court does not imply that the Chamber of Associate Judges must adopt the conclusions of the Cabrera report. The decision of the Constitutional Court simply states that the arguments for rejecting parts of the report were inadequately reasoned and arbitrary").

[21] Constitutional Court Decision, *PROPHAR v. NCJ* (20 Jan. 2016), p. 16.

[22] Guerrero Report, ¶ 17 (internal footnotes omitted).

[23] Claimant's Letter (5 Feb. 2016), pp. 6-7.

PROPHAR's cassation ground and again find that MSDIA is liable to PROPHAR. As Prof. Guerrero explains, the Constitutional Court's decision regarding PROPHAR's cassation ground only means that the NCJ "must examine both parties' arguments that the judgment of the Provincial Court violates the law."[24]

MSDIA's remaining three arguments that the Constitutional Court has directed the outcome of the new NCJ proceedings are equally specious. First, MSDIA characterizes the Court's reference to Article 86(4) of the Ecuadorian Constitution as a "threat to the judges of the NCJ that they will be exposed to personal liability if they fail to follow the Constitutional Court's directions."[25] The purpose of that constitutional provision is to ensure the constitutional right to the effective judicial protection of persons in Ecuador, and it is frequently cited by the Constitutional Court in its decisions.[26] The Constitutional Court's reference to it in the instant decision must also be understood in its proper context, namely, that this was the second time in the same underlying case that the Constitutional Court had found a violation of constitutional rights by the NCJ. As Prof. Guerrero points out,

> it was logical that the Constitutional Court deemed it necessary to invoke [Article 86(4)] so that the judges charged with deciding the cassation petitions once more be especially careful to guarantee the due process rights of the parties.[27]

Nor is the Constitutional Court's instruction that, on remand, the NCJ apply a "comprehensive application of [the] 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"[28] an attempt to direct the outcome of the new NCJ decision. As explained by Prof. Guerrero, that instruction is unexceptional under Ecuadorian law, which expressly provides that determining the scope of court judgments requires considering both their operative part and reasoning.[29] Indeed, the principle has been consistently applied in the jurisprudence of the Constitutional Court,[30] and would apply even if the Court had not

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[24] Guerrero Report, ¶ 21. Prof. Guerrero explains further:

> What the Constitutional Court has done here is to note that in order to ensure due process and the constitutionally protected dispositive principle, in deciding the cassation petitions it must address–not necessarily accept–the arguments put forward by both parties and to reason its judgment properly.

Id., ¶ 24 (internal footnotes omitted).

[25] Article 86(4) of the Ecuadorian Constitution reads: "If a 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] Guerrero Report, ¶¶ 41, 43.

[27] *Id.*, ¶ 42.

[28] Constitutional Court Decision, *PROPHAR v. NCJ* (20 Jan. 2016), p. 24.

[29] *See* Guerrero Report, ¶¶ 35-36 and the provisions of Ecuadorian law cited therein.

[30] *Id.*, ¶ 37.

expressly referred to it.[31] The Court's reference to it cannot be taken to mean that it was instructing the NCJ how to decide the case as a substantive matter.

MSDIA's final argument – that remand of the case to the NCJ's Associate Judges, and not to its ordinary Civil and Commercial Chamber Judges is "highly unusual – also does not indicate that the Constitutional Court sought to engineer a different outcome []."[32] As Prof. Guerrero explains, the November 2014 NCJ decision was signed by two out of the three ordinary judges currently serving on the NCJ's Civil and Commercial Chamber. It is therefore normal, and consistent with the Constitutional Court's constitutional mandate, for it to ensure the parties' right to an independent and impartial tribunal by referring the case to judges who did not participate in the previous NCJ proceedings, necessitating referral to the NCJ Associate Judges. It was for that reason that the Constitutional Court remanded the case to the Associate Judges, and not to channel the case toward a positive outcome for PROPHAR.[33]

As is evident from the foregoing, MSDIA's mischaracterizations of the Constitutional Court decision and speculation on the entirely uncertain outcome of the NCJ decision do not withstand scrutiny, and they certainly do not allege facts that can make out a case for a real threat of harm. 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 (including its reliance upon Mr. Cabrera's report), which are not binding on the NCJ.[34] Indeed, the NCJ retains its discretion to find that MSDIA is not liable to PROPHAR *at all*.[35]

C. Claimant Has Failed To Show How Any Future NCJ Judgment Would Cause It *Irreparable* Harm

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[31] *Id.*, ¶ 38.

[32] Claimant's letter (5 Feb. 2016), p. 7.

[33] Guerrero Report, ¶¶ 30-31. Indeed, pursuant to Article 201 of the Organic Law of the Judicial Function, the two Judges' participation in the November 2014 decision is an impediment justifying in any event their replacement by the Associate Judges. *Id.*, ¶ 33.

[34] *Id.*, ¶ 18.

[35] As Prof. Guerrero explains, the NCJ retains its discretion to:

- Reject both cassation petitions, thus the judgment by the Provincial Court will be final;
- Reject one of the cassation petitions; and accept the other, or even accept both petitions. If the Court accepts at least one of the petitions, the judgment by the Provincial Court of Pichincha will be vacated, and in its place, the Chamber of Associate Judges for Civil and Commercial matters of the National Court of Justice should issue a new decision on the merits, in which it may conclude that:
    a) There is a defect that invalidates the whole or parts of the process, and therefore, declare its nulity.
    b) MERCK did not engage in an illicit act; or
    c) Merck engaged in an illicit act that caused harm to PROPHAR. Only in this scenario must the Chamber of Associate Judges for Civil and Commercial matters of the National Court of Justice rule on the quantum of damages, which should be properly reasoned as it should have been in any of its prior decisions.

Guerrero Report, ¶ 11.

Given MSDIA's inability to demonstrate that it would be harmed in any way by a future NCJ judgment, it is axiomatic that it has failed to show that it would be *irreparably* harmed, as it must to merit interim measures. Moreover, even in the purely speculative event of the NCJ's affirmation of the court of appeals' judgment or other award of damages against MSDIA, MSDIA's request for interim measures fails because it has failed to allege facts that could show that it would suffer any harm that is not capable of remedy by a monetary award in this arbitration.

Nor are any of MSDIA's three recent letters accompanied by, or even reference, any evidence of how a hypothetical NCJ judgment awarding damages of $150 million (or any other amount) would cause it irreparable harm. Instead, MSDIA falls back on the same sleight of hand that it tried in its 2012 interim measures request – it refers only to how an adverse NCJ judgment would affect its operations in Ecuador.[36] But that contrivance fails for the same reason that it did in the 2012 proceedings: 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 an NCJ judgment against it. As demonstrated in Ecuador's pleadings in connection with MSDIA's first request for interim measures,[37] 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. Nothing in MSDIA's self-serving, purely speculative, and uncorroborated statements, reprised in its 5, 15 and 17 February 2016 letters, demonstrates otherwise.

It would be incumbent on MSDIA to prove in interim measures proceedings that its current revenues and operations as a whole – not just those of its Ecuador branch – would not allow it to pay an NCJ judgment of $150 million (or whatever lesser amount the NCJ might theoretically award) without irreparable harm to its, i.e., MSDIA's, overall business. MSDIA itself did not come forward with that evidence during the 2012 proceedings, such that Ecuador was required to obtain it then through a document production request. Should MSDIA similarly fail to document its new interim measures request with current financial information, it is Ecuador's intention to request it again. At a minimum, any schedule that the Tribunal might set, if it were to permit an interim measures proceeding to go forward, should accord Ecuador sufficient time to obtain meaningful financial information from MSDIA, to analyze that evidence, and to present arguments and expert evidence related to it.

MSDIA's final point on irreparable harm – the alleged destruction of its investment in Ecuador by the enforcement of any future NCJ judgment – is as untenable as its effort to limit its ability to pay any such judgment only to its Ecuadorian branches assets. If, as MSDIA asserts, its Ecuadorian employees and customers were to leave it due to an adverse NCJ judgment, that would only be because MSDIA itself chose not to protect its Ecuadorian business, not because of any inability to pay the judgment against it and maintain that business.

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[36] Claimant's letter (5 Feb. 2016), pp. 7-8.

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

In sum, MSDIA's request for interim measures lacks indispensable allegations of necessary facts and should be dismissed out of hand. Should the Tribunal determine that further briefing of MSDIA's request is required, however, the same deficiencies in its request militates against the extraordinary expedition of the briefing schedule that it proposes, especially given the time that the previous NCJ proceedings required and the fact that the new NCJ proceeding has not even formally commenced.

II. The Constitutional Court's Decision Further Confirms That The Extraordinary Action For Protection Is An Effective Remedy That Claimant Itself Should Have Pursued

MSDIA's final argument is that the Constitutional Court's decision is "highly relevant" to the merits of the MSDIA's claims before the Tribunal as "yet another Ecuadorian court judgment that denies it justice."[38] MSDIA argues this despite the fact that the Constitutional Court vacated the NCJ November 2014 decision for its inadequate damages analysis for which MSDIA *itself* criticized the NCJ at the March 2015 hearing.[39] As a result, the NCJ's analysis and decision – one that, according to MSDIA's scathing criticism at the March 2015 hearing "no unbiased and competent court could have made"[40] – no longer stands and the NCJ will decide the matter anew.

This result in fact proves Ecuador's contentions since the outset of this arbitration: the extraordinary action for protection is an effective remedy that MSDIA should have utilized before asserting its complaints against the two previous NCJ decisions before the Tribunal. There can be no doubt that the Constitutional Court had jurisdiction to remedy the alleged defects and violations of MSDIA's due process rights.[41]

MSDIA has sought to absolve itself of the duty to have recourse to the Constitutional Court in two main ways, both of which are reprised in its 5 February 2016 letter for good measure.

First, MSDIA argues that the Constitutional Court propagates the endless loop of judgments that deny it justice.[42] However, Ecuador and its courts have no right to prevent PROPHAR from making use of the remedies available in the system. There is nothing

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[38] Claimant's letter (5 Feb. 2016), pp. 9-10.

[39] Claimant's assertion is quite ironic in view of the fact that, like the Constitutional Court's holding it argued at the March 2015 hearing that the NCJ's second judgment was insufficiently reasoned. *See*, for example, Day 1, Merits Full Hearing Transcript, p. 138:9-13 ("[] the second NCJ panel's damages award in the amount of $7.7 million and change was itself so irrational and contrary to the evidence in the record that it too constitutes a clear denial of justice").

[40] *Id.*, p. 145:17-18.

[41] *See* **R-211**, attached, Reply by Dr. Alejandro Ponce Martínez acting in his character of counsel for Merck, Extract of Hearing in Extraordinary Protection Action Case No. 0542-15-EP, 14 January 2016 ("We would like to point out that, whatever reasoning mistakes in the judgment of the National Court of Justice, none of them, none of its reasons, none of its motivations … caused harm to PROPHAR. In fact, those mistakes, the mistakes in the judgment, benefited PROPHAR, because thanks to that judgment PROPHAR obtained as compensation a larger sum than the sum it could have justified with its evidence. The judgment, Mr. President and Judges, *violated the constitutional rights of Merck instead*.") (Emphasis added).

[42] Claimant's Letter (5 Feb. 2016), p. 9.

extraordinary in PROPHAR's pursuit of extraordinary actions for protection against the two previous NCJ decisions: PROPHAR's actions were timely and deemed admissible in reasoned decisions (in fact, MSDIA did not even oppose the admissibility of PROPHAR's second extraordinary action for protection). Nor the parties were prevented from submitting written and oral argument on the merits of these actions (in fact, MSDIA did not even submit written argument on the merits of PROPHAR's second extraordinary action for protection, even though nothing in Ecuadorian law would have precluded a request to that effect). What is more, the decisions of the Constitutional Court themselves are substantially reasoned and although reasonable parties may reasonably disagree over their contents, this alone does not render them a denial of justice. If 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."

Second, MSDIA argues that the Constitutional Court's decision "confirms that the Constitutional Court [] cannot provide MSDIA an effective remedy for redressing violations of its due process rights at the hands of other courts" because if MSDIA had filed its own extraordinary action for protection this would only have exposed it to an "increase [in] the damages resulting from denials of justice by the NCJ."[43] MSDIA appears to base this on the same mischaracterizations of the Constitutional Court's decision, which have been addressed above. To repeat: if the Constitutional Court has "signaled" anything to the NCJ this is clearly to make a more complete analysis of the parties' cassation grounds and damages submissions, in case the NCJ finds MSDIA liable to PROPHAR, not how to decide on these matters. As Prof. Guerrero states in his Report,

> Throughout its entire judgment of 20 January 2016, the Constitutional Court emphatically declared that, when deciding on the cassation petitions filed by MERCK and PROPHAR, the National Court of Justice should have and must strictly observe the due process guarantees and especially its obligation to properly and adequately reason its decisions.[44]

And for this reason, there is nothing in the Constitutional Court's decision that contradicts the views of the legal experts of the Parties at the March 2015 hearing on the limits of the Court's jurisdiction.

* * * * *

In sum, Respondent denies that the issuance of the Constitutional Court's decision gives rise to an "urgent need for interim measures of protection," as MSDIA alleges. Should the Tribunal, however, decide to move forward with MSDIA's request, Respondent proposes that the matter be dealt with in the same manner with MSDIA's first request for interim measures, i.e., with a further round or written arguments, followed by a hearing thereafter. Respondent does not see any need for extraordinary expedition of these steps. Finally, if the Constitutional Court's decision is relevant to the merits of the claims pending before the

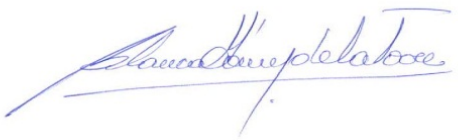
[43] *Ibid.*

[44] Guerrero Report, ¶ 9.

Tribunal, this is to underscore once again the prematurity of such claims and MSDIA's continuous failure to exhaust all available and effective legal remedies in Ecuador.

Respondent thanks the Tribunal for its attention to this correspondence.

Respectfully submitted,



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