PCA Case No. 2012-10

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

- between -

MERCK SHARP & DOHME (I.A.) LLC

(the "Claimant")

- and -

THE REPUBLIC OF ECUADOR

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

SECOND DECISION ON INTERIM MEASURES

Tribunal

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

Assistant to the Tribunal

Ms Amal Clooney

Secretary to the Tribunal

Mr Martin Doe Rodríguez

6 September 2016

A. INTRODUCTION

1. On 7 March 2016 the Tribunal issued a Decision on Interim Measures under Article 26 of the UNCITRAL Rules 1976 (the 'Interim Measures Order' or 'Order'), in which it ordered as follows:

> 1. **Orders** that, in the event of a Judgment by the National Court of Justice reinstating in whole or in part the judgments of the Trial Court or the Court of Appeals in the litigation by PROPHAR against MSDIA:
>
> > A. Ecuador shall forthwith ensure, by means of its own choosing, that all further proceedings and actions directed towards the enforcement of the judgments mentioned above are suspended pending delivery by the Tribunal of its final Award, and shall inform the Tribunal of the action that has been taken to that effect;
> >
> > B. Either Party in the Arbitration may thereafter apply to the Tribunal for variation of this Order in the light of the terms of the Judgment of the National Court of Justice.
>
> 2. **Orders further** that Ecuador is under the obligation to communicate this Order without delay to the National Court of Justice and any other authority with jurisdiction to enforce the judgments referred to in paragraph 1 above.
>
> 3. **Requests that**, if the parties have notice of the date or likely date of the National Court of Justice's Judgment, they should inform the Tribunal.

2. On 4 August 2016, the National Court of Justice (NCJ) handed down its Judgment ('the new NCJ Judgment'), which was transmitted to the Tribunal by the Claimant on the following day and in a complete version on 9 August 2016, followed by an English translation on 11 August 2016, accompanied by an urgent application for a new decision confirming the application of the Interim Measures Order to the new NCJ Judgment, later expanded in the course of subsequent correspondence to include, in the alternative, an application for a new decision varying the terms of the Order to take account of the new NCJ Judgment.

3. In the circumstances, the Tribunal finds it unnecessary to recite once more the procedural and factual background of the arbitration or the representation of the Parties. The present

Decision should instead be read together with the Interim Measures Order for those purposes. It will accordingly contain no more than a brief description of the correspondence and a summary of the Parties' written and oral submissions regarding the new NCJ Judgment. A full factual background and procedural history will be included in the Tribunal's forthcoming Award.

B. PROCEDURAL HISTORY

4. By letter dated 12 March 2016, the Respondent informed the Tribunal that the Attorney-General of Ecuador, in compliance with the Interim Measures Order, had communicated its terms together with an unofficial translation to the Associate Judges of the Civil and Commercial Chamber of the National Court of Justice, to the Presiding Judge of the Civil Judicial Unit of the Metropolitan District of Quito, with copies to the President of the National Court of Justice, the Constitutional Court, and the Council of the Judiciary.

5. The new Judgment of the NCJ in the *PROPHAR v. MSDIA* litigation was handed down on 5 August 2016. It awarded PROPHAR USD 41,966,571.60 in damages for pre-contractual liability.

6. In its letter of 10 August 2016, the Claimant requested the Tribunal: (i) to confirm that the Interim Measures Order applies to the new NCJ Judgment and that Ecuador is, therefore, obliged to "ensure, by means of its own choosing, that all further proceedings and actions directed towards the enforcement of the [Judgment] are suspended pending delivery by the Tribunal of its final Award"; (ii) to "direct Ecuador to inform the Tribunal of the specific steps it has undertaken and will undertake to ensure compliance with the Tribunal's Decision, as directed by the terms of that Decision."

7. By letters of 9 and 11 August 2016, the Tribunal reminded the Parties of the terms of the Interim Measures Order concerning enforcement (see above), and: (a) offered the Parties the opportunity, in the light of the apparent significance of the new NCJ Judgment, to submit observations on its effects on their final submissions in the arbitration and in other respects, and (b) requested the Respondent to respond to the question of whether the new NCJ Judgment fell within the scope of the Interim Measures Order and to indicate to the

Tribunal the steps it had taken to comply with paragraph 2 of the Order, as well as any further steps it has now undertaken in the light of paragraph 1.A. of the Order.

8. By letter of 13 August 2016, the Respondent opposed the Claimant's request on the grounds that the new NCJ Judgment did not fall within the scope of the Interim Measures Order; it recalled the measures that had been taken by the Attorney-General of Ecuador (paragraph 4 above).

9. Following a further exchange of correspondence between the Parties and the Tribunal on 13, 15, and 16 August 2016, the Claimant clarified, via e-mail, that its request was in the first place that the Tribunal should confirm that the new NCJ Judgment fell within the scope of the Interim Measures Order, and only if the Tribunal concluded to the contrary, that the Tribunal should modify its Order to protect against the enforcement of the Judgment.

10. On 17 August 2016, the Respondent, for its part, submitted: (i) that the Interim Measures Order did not apply to the new NCJ Judgment; (ii) that the Claimant's request to vary the terms of the Order would circumvent the requirements for interim measures; (iii) that Ecuador had fully complied with the terms of the Order; (iv) and that any schedule for further submissions should factor in the deadline for any possible Extraordinary Protection Action to be filed against the new NCJ Judgment.

11. On 18 August 2016, the Claimant, by e-mail, objected to the Respondent's "attempt unilaterally to change the procedure established by the Tribunal for written submissions on the implications of the NCJ judgment," and noted that the Respondent had failed to confirm that Ecuador would take all steps to preserve the status quo until the Tribunal's decision on the Claimant's request.

12. On 22 August 2016, a hearing was held by telephone conference-call. All members of the Tribunal, and Counsel and Representatives from both Parties, participated in the hearing, along with the Tribunal's Assistant and members of the PCA. There were two rounds of oral argument and the Parties responded to questions put by members of the Tribunal. At the conclusion of the hearing, the Tribunal gave leave to each Party to introduce further documents, which were duly filed the following day.

13. On 24 August 2016, the Respondent requested leave from the Tribunal to submit a brief response to a new argument raised by the Claimant during the hearing, which the Tribunal granted, and afforded the Claimant the possibility of replying briefly to the Respondent's comments once submitted. The Parties' responses were duly received on 24 and 26 August, respectively.

C. THE NEW NCJ JUDGMENT OF 4 AUGUST 2016

14. On the basis of the Parties' written and oral submissions described above, and the English translation furnished by the Claimant, the Tribunal understands the essence of the new NCJ Judgment to be as follows: -

a) The NCJ "partially set aside" the judgment of the Court of Appeals rendered on 23 September 2011 because it failed "to apply the substantive rule indicated in point 6.5.2 [Article 4 of Law 200-12 (Official Gazette No. 59 of April 17, 2000)] and also failed to provide the sufficient legal reasoning discussed in point 6.2.1 in section SIX of this decision."

b) The NCJ then went on to take "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."

c) The NCJ found that MSDIA was extra-contractually liable, having committed an unintentional tort pursuant to Article 2211 of the Civil Code of Ecuador.

d) The amount of damages was calculated on the basis of the expert report prepared by Mr. Cabrera during the Court of Appeals proceedings and then applying to the results reached therein the 20% maximum profit allowed under Article 4 of the Ecuadorian Law on the Production, Importation, Commercialization and Dispensing of Generic Medications for Human Use of April 17, 2000.

e) On the above basis, PROPHAR was awarded damages in the amount of USD 41,966,571.60.

D. THE PARTIES SUBMISSIONS ON THE APPLICABILITY OF THE DECISION ON INTERIM MEASURES TO THE NEW NCJ DECISION

1. The Claimant's Position

15. The Claimant framed its written request in the following terms:

> that the Tribunal issue an order:
>
> (1) confirming that its Decision of 7 March 2016 applies to the NCJ's 4 August 2016 Judgment, and therefore that Ecuador is obligated to "ensure, by means of its own choosing, that all further proceedings and actions directed towards the enforcement of the [NCJ's 4 August 2016 Judgment] are suspended pending delivery by the Tribunal of its final Award" (or alternatively varying the terms of its 7 March 2016 Decision to cover the NCJ's 4 August 2016 Judgment);
>
> (2) directing that all branches of Ecuador's government, including both the judicial and executive branches, ensure that all further proceedings and actions directed towards the enforcement of the NCJ's 4 August 2016 Judgment are suspended pending delivery by the Tribunal of its final Award; and
>
> (3) directing Ecuador to inform the Tribunal of the specific steps it has taken in this regard, as directed by the terms of the Tribunal's Decision.

16. This was justified on the basis that the First Decision "was intended to prevent enforcement of a judgment against MSDIA that perpetuated the effects of the trial court and court of appeals judgments that are at issue" and that the new NCJ Judgment reinstates at least in part the judgment of the Court of Appeals, as evidenced by the fact that the NCJ itself states that it is only partially setting aside the Court of Appeals' decision. The Judgment rejects MSDIA's grounds for cassation and in particular adopts the Court of Appeals' assessment of the evidence regarding both liability and damages and the Court of Appeals' calculation of damages. Moreover, the NCJ only reduced the damages holding to a portion of the damages awarded by the Court of Appeals, but in doing so relied exclusively, as the basis for its adjusted quantum of damages, on the "blatantly irrational and likely corrupt expert report of Mr. Cristian Cabrera," despite this report having been dismissed as illogical by the previous two NCJ holdings.

17. The Claimant draws the conclusion that Ecuador is already under a subsisting obligation to take steps to avoid the enforcement of the new Judgment, with which it has not complied; Ecuador could, for example, have instructed the "executive branch officials responsible for executing civil judgments to take no steps to enforce the NCJ's 4 August 2016 Judgment."

18. The Claimant denies that the Tribunal's interim measures constitute interference with the independence of Ecuador's judiciary, as Article 363 of Ecuador's General Organic Code of Procedure requires national judges to enforce international arbitral awards and "preventive orders" issued by international arbitral tribunals such as the present one. Ecuador may not in any case assert the limitations of its domestic law as a defence to non-fulfilment of its international obligations. As regards the other provisions of Ecuador's Organic Code of Procedure relied on by the Respondent, they contain rules governing only domestic courts and not international arbitral tribunals. According to the Claimant, an international arbitral tribunal's authority to issue interim measures is broader than that set forth in Ecuador's Organic Code of Procedure—as appears both from the UNCITRAL Arbitration Rules and from Article 9 of Ecuador's Arbitration and Mediation Law—and Article 363 requires the enforcement of such interim measures despite these not being listed in Title III of the Organic Code of Procedure.

19. Finally, the Claimant recalls and repeats its earlier submission that enforcement of the NCJ Judgment would cause irreparable harm, in the shape of the destruction of MSDIA's business in Ecuador considering that the amount awarded by the Third NCJ Judgment exceeds the total value of the assets of MSDIA's Ecuadorian branch. The Claimant submits that this was the risk which the First Decision on Interim Measures sought to prevent, irrespective of whether the NCJ's damages award was USD 150 million or a lesser amount, and reiterates the urgency, given the likelihood of swift enforcement as the NCJ had explicitly rejected the Interim Measures Order and had invoked "the Constitutional Court's threat of criminal sanctions against any judge who does not comply with the Constitutional Court's dictates." It was possible that the enforcement proceedings, including the seizure of MSDIA's assets, could be complete by the beginning of September 2016.

2. The Respondent's Position

20. In rebutting these arguments, the Respondent contends that the new NCJ Judgment does not "reinstate in whole or in part the judgments of the Trial Court or the Court of Appeals" in the terms of paragraph 1.A of the Interim Measures Order; it has not therefore taken any step in respect of that paragraph, but this does not imply a breach of the Order, since the only obligation arising from it is the one set forth in paragraph 2, which it had already complied with (see paragraph 4 above).

21. The Respondent contends that the new NCJ Judgment does not reinstate the Court of Appeals' decision because, in accepting two of the grounds of cassation brought by MSDIA, it annulled the Court of Appeal's decision and consequently issued a new judgment which replaced and did not reinstate the decision of the lower court. Furthermore, (i) the NCJ found MSDIA liable exclusively for the commission of an unintentional tort and not liable on antitrust grounds as the Court of Appeals had done; (ii) the NCJ reassessed the evidence submitted by both parties in the national litigation; (iii) although the NCJ did not question the admissibility of the Cabrera Report, it did review the substance of the Report as seen by the fact that it substantially corrected the amount of damages specified by the expert and awarded by the Court of Appeals.

22. The Respondent further submits that the Interim Measures Order, if it applied in the manner argued by the Claimant, would impose a "tremendous, even disproportionate burden" on Ecuador, because it would apply to any NCJ decision independently of the amount awarded against MSDIA. The Respondent contends, to the contrary, that the purpose of the Order, as is evident from its terms and from the Claimant's submissions during the proceedings which led to the Order, was solely to protect MSDIA from a judgment of USD 150 million or more. According to the Respondent, the Claimant, in fact, "never argued any other 'necessary level of gravity'."

23. The Respondent contends that the NCJ did not reject the Interim Measures Order, which was in any event not directed to the NCJ itself, but to the judges responsible for the enforcement of an NCJ Judgment; all that the NCJ said was that the Order violated

provisions of the Ecuadorian Constitution to the extent that it sought to interfere with the NCJ's internal and external autonomy.

24. The Respondent further contends that the Claimant's request for a variation of the terms of the Interim Measures Order was an attempt to circumvent its burden to satisfy the requirements for interim measures, for example by evading the need to demonstrate irreparable harm. In issuing any decision on interim measures, the Tribunal was required to balance the hardship on both Parties. Were the Tribunal to decide that the Third NCJ Judgment fell within the scope of its interim measures, the Respondent contends that its hardship would be greater by obliging Ecuador to act in contravention of its own laws, and moreover to violate Article 168 of the Constitution—which guarantees the independence of the judiciary—as well as Article 75 of the Constitution and Article 8 of the Inter-American Convention on Human Rights—which guarantee the right to effective judicial protection. The Respondent submits that the Attorney General has no power to intervene in a private litigation, even just to comment on the hierarchy between the constitution and international treaties.

25. The Respondent rejects the argument that the Interim Measures Order is a "preventive order" in the sense of Article 363 of the Organic Law of Procedure, as Title III of that Law exhaustively sets out the available types of "preventive orders": sequestration of assets, retention of assets, prohibition on sale of real property, and orders not to exit the country. Article 363 could not in any event apply in contradiction with the Ecuadorian constitutional order which prohibits the interference with an otherwise enforceable judgment of an Ecuadorian Court, which is prohibited even for the Constitutional Court.

26. As to urgency, the Respondent submits that the procedure for the enforcement of the Third NCJ Judgment is slower than asserted by the Claimant and estimates that it would be completed only by late September 2016.

27. As regards the requirement of irreparable harm, the Respondent recalls that MSDIA is the Claimant in this arbitration and not its Ecuadorian branch, and that MSDIA as a whole could easily afford to make payment of either USD 34 or 42 million on the Third NCJ Judgment without suffering irreparable harm.

28. Finally, the Respondent submits that the NCJ's handling of the Cabrera Report did not constitute a denial of justice because it is a formal expert report which has a formal place in the hierarchy of evidence in the Ecuadorian legal order; Mr. Cabrera had been legitimately appointed as an expert by the Court of Appeals and thus that the Ecuadorian courts had all legitimately considered the Report. The NCJ had legitimately declined to reassess admissibility of the Cabrera Report, but reviewed its substantive content. The Respondent adds that it is not its place to defend the Report, but only to argue that the NCJ was entitled to use it as a starting point for calculating damages.

E. THE TRIBUNAL'S DECISION

29. The Tribunal prefaces its decision by two preliminary observations.

30. The Tribunal was gravely disturbed to read in the new NCJ Judgment that the Tribunal's Order on Interim Measures had been construed by that high jurisdiction as "interference of the Arbitration Tribunal in the affairs of the National Court of Justice … in violation of Rule No. 1 of Article 168, which establishes that Courts shall have internal and external autonomy." Nothing could be further from the truth. To the contrary, the Tribunal was at pains to indicate its recognition of the important principle of judicial independence, as expressly set out in paragraph 2 of the Interim Measures Order in the following terms:

> The Tribunal is acutely conscious of the importance of the principle that the courts of Ecuador, like the courts of any other country, should be independent, and free from direction by the Executive power. The independence of the judiciary represents an essential principle of the rule of law which must be upheld. The Tribunal notes, however, that the underlying issue is one which has confronted other international judicial bodies, including on several recent occasions the International Court of Justice itself, both in the context of judgments on the merits of disputes and in the context of interim measures, and has never been found to stand in the way of the issue of appropriately formulated relief. It is, of course, common ground between both Parties to the present arbitration and the Tribunal, that under international law the actions and omissions of the Courts engage the international responsibility of the State in the same way as other organs of the State.

31. To the above needs be added merely that, as recognized by the Respondent in the present proceedings, the interim measures ordered by the Tribunal (paragraph 1 above) were explicitly framed as a temporary (and contingent) restraint on enforcement, pending the issue of the Tribunal's Award, and could not by any stretch of the imagination be read as interference in the decision making of the competent court of record.

32. The second observation is one that should be equally plain, but in the circumstances seems worth spelling out. In drawing attention, quite properly, to the balance of hardship calculus inherent in any decision to order interim measures, the Respondent has once again made much of what it has described as the burden of having to act contrary to its own law if it were to be required to interfere with the enforcement of the judgment of a competent domestic court in favour of a private party.

33. The Tribunal has no difficulty in grasping the point the Respondent seeks to make. It encounters, however, objections at various levels. At the purely factual level, as has already been pointed out above, the Interim Measures Order is a purely holding measure, pending the issuance of the Tribunal's Award, and the same would be true of any further decision emanating from the present proceedings. Furthermore, as also indicated, the issue is merely one of enforcement, not of external interference with the independent judicial function, and for good measure the Order specifically leaves to Ecuador the choice of means to achieve the stated end. At the legal level, the position is surely as follows: if the Tribunal were, in its Award, to find that it had jurisdiction and that the Claimant's rights under the BIT had been infringed, it would seem inevitably to be the case that the enforcement in the meanwhile of the new NCJ Judgment would be an aggravation of the treaty breach with adverse consequences for the Respondent's liability. In other words, a holding measure of limited duration would be to the ultimate advantage of both sides, not just one of them. The Tribunal adds in this connection its own firm endorsement of the point made in argument during the course of the oral hearing that it is never open to a Government to advance the state of its internal law as a justification for not complying with its international obligations.

34. To move now to the main point at issue, the Tribunal begins by noting that the Interim Measures Order, which in the circumstances was unavoidably contingent in character, incorporated by design a mechanism to cope with future eventualities. As expressed in its paragraph 1.B, "Either Party in the Arbitration may thereafter [i.e. after the handing down of the Judgment] apply to the Tribunal for variation of this Order in the light of the terms of the Judgment of the National Court of Justice." Having made express provision for this eventuality, the Tribunal saw no advantage in diverging from it. It therefore indicated to the Parties in advance of the oral hearing that it would put them on a footing of equality, and treat the Claimant as

(in effect) seeking the variation of the Order so as to make it apply explicitly to the new NCJ Judgment, while treating the Respondent as (in effect) seeking the discharge of the Order on the basis that the Judgment as actually delivered fell outside the intendment of the measures ordered in it.

35. This arrangement corresponds, in the view of the Tribunal, to the reality of the situation, in that the criteria of risk, urgency, harm, and balance of advantage remain as set out in the Decision of 7 March 2016, and the only question that remains is whether the assessment of any of these criteria is to be varied in the light of the circumstances now actually obtaining after the handing down of the new NCJ Judgment. The Tribunal's considered judgment is that they do not. As described above, the main arguments marshalled by the Respondent are (i) that the new NCJ Judgment does not, in strict jurisprudential terms, 'reinstate in whole or in part the judgments of the Trial Court or the Court of Appeals'; (ii) that the orders of magnitude are decisively altered, in that the damages awarded are now no more than USD 42 million, by comparison with an earlier 150 million; and (iii) that an amount of that magnitude can easily be met out of the world-wide resources of Merck Sharp and Dohme.

36. Point (iii) can be set aside without more, as the same point was extensively argued both within the main arbitration proceedings and those on the Interim Measures Order and was taken into account by the Tribunal in issuing that Order, as were the remainder of the requirements for interim measures which need not be re-decided here. Likewise, whether the Respondent's argument as regards point (i) is technically accurate or not, no further explanation is needed that the Tribunal's concern was, and remains, not the form of the domestic judgments, but rather their effect on the interests assessed as being in need of protection.

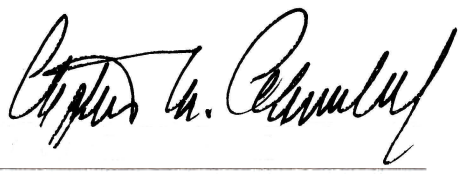
37. The central issue for consideration seems therefore to be point (ii). There is certainly no denying, as the Respondent says, that a judgment debt of 42 million is markedly different from one of 150 million. However, and without entering into questions of the merits which will be dealt with in the Tribunal's forthcoming Award, in the context of the Tribunal's broad powers under the UNCITRAL Rules to take any interim measures it deems necessary, the issue remains not the absolute quantum of liability under the

domestic judicial decisions, but the risk of irreparable harm to the interests meriting protection. Seen in that light, it is clear to the Tribunal, on the basis of the arguments put to it in this phase of the proceedings and earlier, that a domestic liability of USD 42 million is not outside the range of risk previously assessed by it when issuing the Interim Measures Order. This being so, the Tribunal's assessment of the criteria for the taking of interim measures, and whether they are satisfied in this case, remains as in its Order of 7 March 2106. The Tribunal cannot therefore accede to the Respondent's submission that the Order should be discharged as no longer applicable.

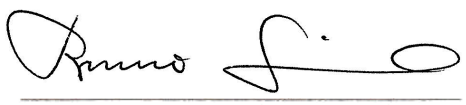
For these reasons, the Tribunal decides, pursuant to Article 26 of the UNCITRAL Arbitration Rules 1976, to vary the terms of the Interim Measures Order of 7 March 2016 to read as follows: -

> Having regard to the Judgment of the National Court of Justice dated 4 August 2106 in the litigation by PROPHAR against MSDIA,
>
> 1. **Orders** that Ecuador shall forthwith ensure, by means of its own choosing, that all further proceedings and actions directed towards the enforcement of that Judgment 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.
>
> 2. **Orders further** that Ecuador is under the obligation to communicate this Order without delay to any authority with jurisdiction to enforce that Judgment.
>
> 3. **Requests** the parties to keep the Tribunal informed of any further developments affecting the matters referred to in paragraphs 1 and 2 above.

This Order may be referred to as the Second Order on Interim Measures.



Judge Stephen M. Schwebel



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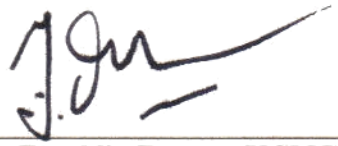

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