

15 August 2016

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Essex Court Chambers
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London WC2A 3EG
United Kingdom

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

Dear Sirs:

We are writing in response to Ecuador's letter of 13 August 2016.

As the Tribunal will appreciate, there is considerable urgency to MSDIA's request that the Tribunal confirm the interim measures of protection that it ordered on 7 March 2016. MSDIA understands from its counsel in Ecuador that proceedings to enforce the National Court of Justice ("NCJ") judgment dated 4 August 2016 in the amount of \$41,966,571.60 could begin as early as this week, when the NCJ is expected to return the case file to the courts of first instance for enforcement of the NCJ's judgment.

Ecuador's letter of 13 August indicates that (i) Ecuador does not regard the NCJ's 4 August 2016 Judgment to fall within the terms of the Tribunal's Decision of 7 March 2016 awarding interim measures of protection to MSDIA, and (ii) Ecuador has not taken and does not intend to take further steps to comply with the Tribunal's Decision. Ecuador's rationale for both positions is deeply flawed.

A. The NCJ's 4 August 2016 Judgment Falls Within the Tribunal's Decision

Contrary to Ecuador's strained reading of the Tribunal's Decision and the NCJ's 4 August 2016 Judgment, in fact, the NCJ's Judgment falls squarely within the terms of the Tribunal's Decision.

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The Tribunal's Decision ordered, in relevant part, 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 ... 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."¹

As MSDIA explained in its letter of 10 August 2016, the NCJ's 4 August 2016 Judgment only "*partially* set[] aside" the court of appeals judgment as to the calculation of damages.² In all other respects, the NCJ rejected the parties' cassation petitions.

Ecuador acknowledges that the NCJ only granted MSDIA's cassation petition "in part,"³ but it argues that as a matter of Ecuadorian procedural law, once the NCJ had done so, it acted as a court of instance, issuing a new decision that replaced, rather than "reinstated" the court of appeals decision. Ecuador's strained reading is disingenuous and contrary to the plain terms of the NCJ's 4 August 2016 Judgment.

The NCJ's 4 August 2016 Judgment specifically says that the NCJ "*partially* sets aside said judgment, and following the teachings of Manuel de la Plaza, 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."⁴ The NCJ adopted the factual findings of the court of appeals, including the court of appeals' reliance on the Cabrera report, and held MSDIA was liable to Prophar.⁵ Then, in discussing the amount of damages to be awarded, which was the only issue as to which the NCJ had granted cassation, the NCJ held "this Court *now finds it relevant to correct the error committed by the Court of Appeals*, in relation to the exaggerated amount of compensation it ordered, by failing to apply [the law establishing a maximum profit margin of 20%]."⁶ The NCJ applied the 20% maximum profit margin to the amount of lost profits calculated by Mr. Cabrera, and thus arrived at its own

¹ Decision on Interim Measures dated 7 March 2016, at p. 26.

² See National Court of Justice Judgment, *NIFA v. MSDIA*, dated 4 August 2016, at p. 22 (English translation); see also *id.* at Section 6.2.1 (setting aside the court of appeals decision only as to "how or in what way the damage was done and the manner or method used to calculate it"); *id.* at 6.5.2 (discussing maximum profit margin for pharmaceutical products).

³ Ecuador's Letter to the Tribunal, dated 13 August 2016, at p. 2.

⁴ See National Court of Justice Judgment, *NIFA v. MSDIA*, dated 4 August 2016, at p. 22 (English translation).

⁵ While the NCJ's 4 August 2016 Judgment recites and discusses the factual evidence, it is obvious from the text of the judgment that the NCJ did not make any independent assessment of that evidence. See National Court of Justice Judgment, *NIFA v. MSDIA*, dated 4 August 2016, at p. 27 (English translation) (explaining that the NCJ is "refraining from weighing any evidence or determining any of the facts of the trial and appeal"); *id.* at p. 34 (finding that "the dispute between the parties cannot lead this court to weigh evidence"); *id.* at 37 (explaining that "The [Cabrera] expert report ... has already been assessed, meaning it has been weighed and accepted, by the lower court judges, and it is not feasible at this time to reassess it").

⁶ National Court of Justice Judgment, *NIFA v. MSDIA*, dated 4 August 2016, at p. 37 (English translation).

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award of \$41,966,571.60.⁷ That reduction in damages is the only meaningful departure from the court of appeals' decision.

Ecuador's position is also contrary to the purpose of the Tribunal's Decision, which was clearly intended to protect MSDIA against enforcement of a further judgment in the *Prophar v. MSDIA* litigation—based (as this one is) on previous injustices and denials of due process such as the Cabrera report and the defective and biased fact-finding by the court of appeals—that would destroy MSDIA's business in Ecuador.

MSDIA's request for interim measures of protection, which led to the Tribunal's 7 March Decision, expressly stated that MSDIA was concerned that the NCJ would follow the dictates of the Constitutional Court and would issue a judgment against MSDIA adopting the court of appeals' factual findings and relying specifically on the evidence of damages offered by Mr. Cabrera. It was specifically that risk that motivated the Tribunal's Decision. The Tribunal paraphrased the basis for MSDIA's request,⁸ and then expressly stated that “the Claimant has succeeded in satisfying the Tribunal that its worst-case scenario cannot be set aside and that the consequences, if this worst-case scenario were to eventuate, would be severe enough that protection by way of interim measures is justified.”⁹

MSDIA's worst case scenario is exactly what has come to pass. The NCJ expressly rejected numerous grounds for cassation that would have vacated the court of appeals decision in its entirety, and instead only “partially set[] aside” the court of appeals judgment, reducing the damages but otherwise reinstating a judgment holding MSDIA liable and awarding damages substantially in excess of the value of the assets of MSDIA's Ecuadorian branch.¹⁰ Enforcement of the NCJ's 4 August 2016 Judgment would destroy MSDIA's business in Ecuador, which is precisely the harm the Tribunal's Decision was intended to prevent.

Finally, in any event, the Tribunal's 7 March Decision expressly invited the parties to “apply to the Tribunal for the variation of this Order in the light of the terms of the Judgment of the

⁷ National Court of Justice Judgment, *NIFA v. MSDIA*, dated 4 August 2016, at pp. 37-38 (English translation).

⁸ The Tribunal stated MSDIA's argument as follows: “that the Constitutional Court has ‘effectively compelled the NCJ to issue a large award in favor of Prophar by forbidding it to consider the evidence independently and requiring it to accept Cabrera's Report,’ by ‘chastis[ing] the prior NCJ panel for failing to adopt the findings on damages entered by the Court of Appeals’ and by threatening the NCJ judges with sanctions if they do not comply.” Decision on Interim Measures dated 7 March 2016., at para. 42.

⁹ Decision on Interim Measures dated 7 March 2016, at para. 71. The Tribunal explained that the measures it adopted were intended “to bite only once the threat to the Claimant's interests reaches the necessary level of gravity” and “so as to incorporate an element of flexibility to enable account to be taken of future developments.” *Id.* at para. 73. The threat to which the Tribunal referred is the threat that prompted MSDIA's request for interim measures: that is, the threat that the NCJ would follow the dictates of the Constitutional Court and issue a decision that required MSDIA to pay further amounts to Prophar (beyond the \$7.8 million it has already paid) that would threaten destruction of MSDIA's business in Ecuador.

¹⁰ National Court of Justice Judgment, *NIFA v. MSDIA*, dated 4 August 2016, at pp. 22, 37-38 (English translation); MSDIA's Reply in Support of Interim Measures, dated 5 August 2012, at para. 146.

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National Court of Justice.”¹¹ MSDIA therefore requests that, 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. That judgment plainly is based on innumerable denials of justice that have been fully explored before this Tribunal, including in prior submissions and the 2015 London hearing, and an injunction against its enforcement is urgently needed in order to prevent irreparable injury.

B. Ecuador Has Not Complied with the Tribunal’s Decision on Interim Measures

Ecuador acknowledges that the only step it has taken thus far to comply with the Tribunal’s Decision is to send a copy of that Decision to the Associate Judges of the Civil and Commercial Chamber of the National Court of Justice (who were responsible for deciding the parties’ cassation petitions) and to the Presiding Judge of the Civil Judicial Unit of the Metropolitan District of Quito (the courts to which the NCJ’s 4 August 2016 Judgment will be sent for enforcement), with copies to the Presidents of the National Court of Justice, the Constitutional Court, and the Council of the Judiciary.¹²

This is woefully inadequate. While the Tribunal’s Decision left Ecuador to implement that Decision “by means of its own choosing,”¹³ that grant of discretion does not allow Ecuador to choose to do nothing (or virtually nothing); to the contrary, it requires Ecuador to take sufficient measures to ensure that the Tribunal’s orders are carried out.

Ecuador plainly has it within its power to comply. Under Ecuadorian procedural law, there are numerous steps involved in enforcement of a civil judgment, which require the involvement of both the courts and executive branch officials. Specifically, the Judicial Police, who are charged with seizing assets to satisfy civil judgments, are part of the executive branch and are under the control of the Ministry of the Interior. Other officials with connections to the executive branch would be involved in execution against specific types of assets, such as the Superintendent of Banks for the seizure of money held in bank accounts.

Ecuador’s Attorney General, who is responsible for advising the Ecuadorian government of its obligations and liabilities, can and should provide specific advice to Ecuador’s courts and executive branch officials regarding their obligations under international law, including specifically their obligation to comply with this Tribunal’s 7 March Decision. Ecuador’s arguments regarding the constitutional separation of powers in Ecuador do not prevent the Attorney General (or other government officials, such as the Council of the Judiciary) from advising Ecuador’s courts on their legal obligations to comply with the Tribunal’s Decision. But even if the Attorney General’s office were unable to advise the courts (which Ecuador has not

¹¹ Tribunal’s Decision on Interim Measures, dated 7 March 2016, at Order, 1(B).

¹² Ecuador’s Letter to the Tribunal, dated 13 August 2016, at p. 5.

¹³ Tribunal’s Decision on Interim Measures, dated 7 March 2016, at Order, 1(A).

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established), Ecuador has offered no justification for its failure to instruct the executive branch officials responsible for executing civil judgments to take no steps to enforce the NCJ's 4 August 2016 Judgment.

* * *

As a consequence of the foregoing, MSDIA respectfully reiterates its request 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.

In light of the urgency of the threat of enforcement proceedings in Ecuador, MSDIA requests that, if the Tribunal would like to hold an oral hearing regarding MSDIA's requests with respect to interim measures of protection, it do so telephonically, as soon as possible, if possible before the end of this week.

MSDIA also notes that the Tribunal's letter dated 9 August 2016 provides the parties an opportunity to make 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 this arbitration. MSDIA intends to make a written submission by 31 August 2016 as directed by the Tribunal.

The Tribunal asked for the parties' availability for an in-person oral hearing in early September 2016.¹⁴ MSDIA notes that the deadline by which Prophar would have to file (yet another) Extraordinary Action for Protection before the Constitutional Court is on or around 7 September 2016. MSDIA respectfully requests that the oral hearing on the merits of the NCJ's 4 August

¹⁴ We note that Ecuador's letter of 13 September 2016 ignored the Tribunal's request that the parties indicate their availability for an oral hearing. We hope that Ecuador's letter does not portend a lack of cooperation by Ecuador in scheduling further proceedings in this arbitration in respect of the NCJ's 4 August 2016 Judgment.

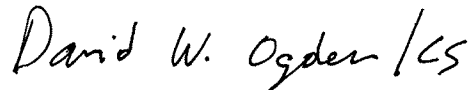
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2016 Judgment be held after that deadline, so that the parties will know whether Propfar has filed another EAP and can address the risk of any further proceedings in Ecuador.

While some members of MSDIA's counsel team have other unavoidable commitments in September 2016, in light of the importance of these matters and the urgency of resolving this dispute as expeditiously as possible, MSDIA is willing to make itself available for a hearing during 12-15 September or 26-30 September (albeit with a somewhat reduced counsel team). We respectfully request that the Tribunal establish hearing dates as promptly as possible.

Sincerely yours,

A handwritten signature in black ink that reads "David W. Ogden /CS". The signature is written in a cursive, slightly slanted style.

David W. Ogden

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