ICSID CASE NO. ARB/22/30

BANK OF NOVA SCOTIA

Claimant,

v.

REPUBLIC OF PERU

Respondent.

RESPONDENT'S REPLY ON RULE 41

25 September 2023

Counsel for the Respondent:

SPECIAL COMMISSION ON INTERNATIONAL INVESTMENT DISPUTES, REPUBLIC OF PERU

GAILLARD BANIFATEMI SHELBAYA DISPUTES

TABLE OF CONTENTS

I. INTRODUCTION

1. It is the Respondent's submission that the Claimant's claims manifestly lack legal merit. The Respondent has clearly set its objections in its Submission filed under Rule 41 of the 2022 Arbitration Rules of the International Centre for Settlement of Investment Disputes (the "**ICSID Arbitration Rules**"). In its Response to the Respondent's Submission (the "**Response**"), the Bank of Nova Scotia ("**Scotiabank**" or the "**Claimant**") has attempted to rebut the Respondent's objections. Far from succeeding, the Claimant's arguments confirm that its claims manifestly lack legal merit. Indeed, rather than truly engaging with the Respondent's objections, the Claimant has opted for presenting straw man arguments, distorting the Respondent's position in this arbitration and attempting unduly to restrict the scope of legal discussions under Rule 41 by misrepresenting as facts questions of law and labelling as disputed facts its legal assertions. In addition, the Claimant has presented authorities allegedly in support of its contentions, which do not only not support the Claimants's arguments but state the contrary of what the Claimant represents they do or do not even mention the concepts that the Claimant's purport they do.

2. Similarly, Scotibank has continued to disaggregate intimately linked measures and parsing its claims to prolong time limits and elide the limits for consent set forth in the FTA, and has shifted its approach depending on whether it is convenient for the Claimant to present its alleged investment as a whole for purposes of jurisdiction but as separate investments for purposes of expropriation.

3. These tactics speak volumes of the weakness of the Claimant's claims. There is simply no reason to resort to these devices when an argument can be straightforward. It is precisely because the flaws in the Claimant's claims are manifest that, instead of engaging with the Respondent's arguments to provide a straightforward answer, the Claimant takes the detours above and presents convoluted arguments including, for instance, its attempt to transform the payment of accrued default interest on a tax liability into an investment by some sort of alchemy or to the possibility to transform procedural recourse into a vested right.

4. As with its Request for Arbitration, everything the Claimant does is finely calculated to circumvent every requirement, carve out and condition agreed by the Contracting States. Words are carefully chosen to avoid certain statements and references are partially quoted and taken out of context to fit the Claimant's contentions, without regard for the real content of the legal authorities on which it purportedly relies.

5. Paradoxically, the Claimant accuses the Respondent of tactically and improperly using its right to raise objections under Rule 41. The accusation is wrong and grievous. The Respondent's arguments speak for themselves: they are cogent and well supported. The Republic of Peru prides itself on the seriousness with which it takes defense and does not invoke defences lightly, merely for tactical purposes.

6. On the contrary, as the Respondent amply shows in this Reply, what Scotiabank seeks in its Response is to draw the Respondent and the Tribunal into a protracted arbitration, forcing the Respondent to expend considerable resources despite the intrinsic and manifest flaws of its claims. The Tribunal should not countenance the Claimant's strategy and should not allow the Claimant's manifestly without legal merits claims to continue.

II. THE RESPONDENT'S OBJECTIONS MAY BE ADEQUATELY ADDRESSED IN RULE 41 PROCEEDINGS

7. Scotiabank's strategy in its Response consists of distorting the standard applicable to Rule 41 objections beyond recognition. By adding limitations to legal discussions, which have neither textual basis in Rule 41 nor support in arbitral case law, and misrepresenting the content and scope of the tribunals' decisions on Rule 41 applications, the Claimant creates a standard which renders Rule 41 nugatory. The Respondent addresses below the Claimant's distortions.

8. In its Response, the Claimant posits, *inter alia*, that: (*i*) the Tribunal must take all the plausible facts pleaded by the Claimant at face value, regardless of whether they are manifestly inaccurate or if the Claimant presents as facts what are really the legal consequences derived from the facts, that (*ii*) the Respondent cannot dispute the legal characterization of the Claimant's claims and its consequences and (*iii*) is barred from arguing the merits of its objections on jurisdiction. The Claimant's submissions are but a transparent and unwarranted attempt to create the most stringent of requirements for the application of Rule 41, making any objections under it impossible. The distorted standard posited by the Claimant is contrary to the text of Rule 41 and contravenes arbitral case law.

9. **As regards the scope of factual review under Rule 41**, despite the Claimant's allegations to the contrary, the Respondent's objections are based on undisputed facts. Moreover, the Claimant contends that the Tribunal should take the facts as pleaded by the Claimant, yet, it conveniently omits that arbitral case law has consistently found that tribunals need not accept facts that are manifestly frivolous or inaccurate and must be careful to distinguish factual allegations from their legal consequences (**A**).

10. **As regards the scope for legal discussions under Rule 41**, the Respondent strongly objects to the Claimant's allegations that Rule 41 cannot address "disputed" questions of law. Much to the contrary, tribunals following the *Trans-Global* standard have reiterated that Rule 41 allows for the discussion of complicated legal issues, including those pertaining to the legal characterization of the Claimant's claims (**B**).

11. **As regards the Claimant's submission that Rule 41 does not allow the Respondent to argue the merits of its jurisdictional objections**, it has been well established that Rule 41 allows for the submission of objections to jurisdiction, which can be argued on the merits. Furthermore, Rule 41 is without prejudice to the Respondent's ability to file preliminary objections under Rule 43 (**C**).

12. As the Respondent demonstrates, the Tribunal has sufficient authority within the proper framework of Rule 41 to rule on the Respondent's application and put an early end to a manifestly improper arbitration.

A. IN DECIDING OBJECTIONS UNDER RULE 41, ARBITRAL TRIBUNALS MUST DRAW THE NECESSARY LEGAL CONSEQUENCES FROM THE FACTS

13. Throughout its Response, the Claimant insists that, under Rule 41, the facts as argued by the Claimant should be accepted on a *prima facie* basis and may not be subject to review, since Rule 41 "*does not permit the determination of factual merit*".[1] The Claimant further contends that (*i*) whether default interest on a tax liability is a matter of "taxation"[2] and (*ii*) whether payment "under protest" confers any rights to the taxpayer[3] are disputed issues of Peruvian law. According to the Claimant, these would be questions of fact that may not be decided under Rule 41 proceedings, given that "[a]*s a matter of international law, municipal law questions are treated as questions of fact*."[4]

14. Relying on the above assertion, the Claimant conflates facts with legal allegations. This is wrong.

---

1 Scotiabank's Response, ¶¶ 14, 50(e).

2 *See* e.g., Scotiabank's Response, ¶ 110.

3 *See* e.g., Scotiabank's Response, ¶ 121.

4 *See* e.g, Scotiabank's Response, ¶ 110.

15. ***First***, all of the Respondent's Rule 41 objections are based on undisputed facts, as the Respondent demonstrates below.[5]

16. ***Second***, the Claimant's contention that, for purposes of international law, municipal law must be treated as a fact does not, as the Claimant avers, transform questions of domestic law into fact. In other words, a legal question continues to be a legal question whether it refers to domestic or international law. The position adopted by tribunals in Rule 41 that they should take the facts as pleaded by the claimants applies to actual facts – not to the question of the interaction between international law and municipal law for purposes of adjudicating a dispute under international law.[6]

17. ***Third***, in addition, even when the dispute is to be decided under international law, the applicable law for the determination of certain questions is domestic law. This is the case, for instance, of the question as to whether the investor has a vested right over its alleged investment, as the Respondent demonstrates below.[7]

18. ***Fourth***, the Claimant strategically omits that tribunals deciding on Rule 41 have consistently found that, while they should accept credible factual allegations, they need not accept any and all facts as pleaded. Whilst Rule 41 is primarily concerned with the legal merits of the claimants' claims, as opposed to their factual basis, tribunals seized of Rule 41 applications have acknowledged that assessing the legal merits of a claim requires an analysis of the underlying factual premises.[8] While conducting this analysis, tribunals need not accept factual allegations that the tribunal considers manifestly unacceptable or "*plainly without foundation*".[9] In the words of the *Trans-Global* tribunal:

---

5 *See* below, § III.2.

6 Peru's Submission on Rule 41, ¶ 21, 22.

7 *See below*, § IV.D.1.

8 *Trans-Global Petroleum, Inc. v. Hashemite Kingdom of Jordan*, ICSID Case No. ARB/07/25, Tribunal's Decision on the Respondent's Objection Under Rule 41(5) of the ICSID Arbitration Rules, 12 May 2008 (**Exhibit RL-0012**), ¶ 97. *See also*, *Brandes Investment Partners v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB/08/3, Decision on the Respondent's Rule 41 Objection, 2 February 2009 (**Exhibit CL-0004**), ¶ 60; *Elsamex, S.A. v. Republic of Honduras*, ICSID Case No. ARB/09/4, Decision on Elsamex S.A.'s Preliminary Objections, 7 January 2014 (**Exhibit RL-0056**), ¶ 106; *Almasryia for Operating & Maintaining Touristic Construction Co. L.L.C. v. State of Kuwait*, ICSID Case No. ARB/18/2, Award on the Respondent's Application under Rule 41(5) of the ICSID Arbitration Rules, 1 November 2019 (**Exhibit RL-0065**), ¶ 31; *Dominion Minerals Corp. v. Republic of Panama*, ICSID Case No. ARB/16/13, Decision of the Ad hoc Committee on the Respondent's Applications for the Stay of Enforcement of the Award and Under Arbitration Rule 41(5), 21 July 2022 (**Exhibit RL-0076**), ¶ 153.

9 *Almasryia for Operating & Maintaining Touristic Construction Co. L.L.C. v. State of Kuwait*, ICSID Case No. ARB/18/2, Award on the Respondent's Application under Rule 41(5) of the ICSID Arbitration Rules, 1 November 2019 (**Exhibit RL-0065**), ¶ 33.

> In applying Rule 41(5), the Tribunal accepts that, as regards disputed facts relevant to the legal merits of a claimant's claim, the tribunal need not accept at face value any factual allegation which the tribunal regards as (manifestly) incredible, frivolous, vexatious or inaccurate or made in bad faith; nor need a tribunal accept a legal submission dressed up as a factual allegation.[10]

19. As a result, even if the Tribunal were to consider that the disputed issues of Peruvian law should be treated as matters pertaining to the facts of the dispute (*quod non*), the Tribunal would have the authority to dismiss any manifestly inaccurate representations as regards the interpretation and application of Peruvian law by the Claimant.

20. ***Fifth***, and relatedly, the Claimant conflates issues of fact with their legal consequences to unduly restrict the scope of the Tribunal's review. To mention but a few examples: (*i*) it is a fact that the Claimant made its payments to the SUNAT "under protest". However, the determination of the legal consequences of a payment with the indication of protest is a question of legal determination under Peruvian law, given the *renvoi* that international law makes to municipal law in this matter;[11] (*ii*) likewise, the Claimant contends that the Tribunal is barred from determining whether the 2021 Constitutional Court Decision may be considered a "taxation measure", since this matter concerns issues of Peruvian Law.[12] However, whether the measure constitutes a "taxation measure" under Article 2203 of the FTA is a legal question to be determined under the Treaty and international law, not an issue of fact.

21. Arbitral tribunals have rejected claimants' submissions disguising legal arguments as factual assertions. Indeed, tribunals have underscored the need to distinguish between purely factual contentions and the legal effects attributed to a given fact or event, which are best considered as legal assertions, or – in the words of the *Trans-Global* tribunal – "*legal submission*[s] *dressed up as* [] *factual allegation*[s]".[13]

---

[10] *Trans-Global Petroleum, Inc. v. Hashemite Kingdom of Jordan*, ICSID Case No. ARB/07/25, Tribunal's Decision on the Respondent's Objection Under Rule 41(5) of the ICSID Arbitration Rules, 12 May 2008 (**Exhibit RL-0012**), ¶ 105 (emphasis added). *See also*, *Rachel S. Grynberg, Stephen M. Grynberg, Miriam Z. Grynberg and RSM Production Corporation v. Grenada*, ICSID Case No. ARB/10/6, Award, 10 December 2010 (**Exhibit RL-0017**), ¶ 6.1.2; *Elsamex, S.A. v. Republic of Honduras*, ICSID Case No. ARB/09/4, Decision on Elsamex S.A.'s Preliminary Objections, 7 January 2014 (**Exhibit RL-0056**), ¶ 107; *Fengzhen Min v. Republic of Korea*, ICSID Case No. ARB/20/26, Decision on the Respondent's Preliminary Objection Pursuant to Rule 41(5) of the ICSID Arbitration Rules, 18 June 2021 (**Exhibit RL-0037**), ¶ 28(c).

[11] *See* below, § IV.D.1.

[12] *See e.g.*, Scotiabank's Response, ¶ 82.

[13] *Trans-Global Petroleum, Inc. v. Hashemite Kingdom of Jordan*, ICSID Case No. ARB/07/25, Tribunal's Decision on the Respondent's Objection Under Rule 41(5) of the ICSID Arbitration Rules, 12 May 2008 (**Exhibit RL-0012**), ¶

22. In a similar vein, the *RSM* tribunal differentiated between factual allegations and legal assertions, noting that:

> Respondent accepts that it is not the function of a Rule 41(5) objection to dispute a claimant's factual allegations and says it does not do so here. Grenada can and does, however, dispute the legal effect that Claimants attribute to certain events. For example, the Request alleges that on 12 January 2004, RSM sent Grenada a notice that *force majeure* no longer applied. Grenada accepts that the letter was sent, but it need not accept Claimants' contention that the letter was "non-binding" and "was not […] effective". Those are legal assertions – indeed, legal assertions that the Prior Tribunal rejected.[14]

23. The tribunal further noted:

> [T]here is no present dispute for present purposes as to the facts alleged either by Claimants or Respondent. It is true that Grenada does dispute the legal effect that Claimants attribute to certain events. But such assertions are legal assertions, and they are a proper subject for assessment on an Article 41(5) application.[15]

24. To sum up, Scotiabank should not be allowed unduly to restrict the Respondent's ability to contend the disputed legal effects of the facts. The Claimant should also be prevented from restricting the scope of the Tribunal's review and the analysis of the facts required to draw the appropriate legal determinations.

B. THE TRIBUNAL IS EMPOWERED UNDER RULE 41 TO DECIDE ON COMPLEX DISPUTED LEGAL ISSUES, WHICH MAY REQUIRE SUBSTANTIVE BRIEFING BY THE PARTIES

25. The Claimant prefaces Section Three of its Response by stating that the Parties agree on the general principles applicable to an objection under Rule 41,[16] and then proceeds to elaborate on the standard to render it increasingly more stringent to the point of making its application not demanding, but impossible. In fact, the Claimant goes as far as submitting, without any basis – either in the text of Rule 41 or in arbitral case law – that for a respondent to submit an objection under Rule 41, the objection should be "*legally certain to succeed*",[17] and contends that the Respondent

---

105; *Rachel S. Grynberg, Stephen M. Grynberg, Miriam Z. Grynberg and RSM Production Corporation v. Grenada*, ICSID Case No. ARB/10/6, Award, 10 December 2010 (**Exhibit RL-0017**), fn. 33.

14 *Rachel S. Grynberg, Stephen M. Grynberg, Miriam Z. Grynberg and RSM Production Corporation v. Grenada*, ICSID Case No. ARB/10/6, Award, 10 December 2010 (**Exhibit RL-0017**), ¶ 4.2.2 (emphasis added).

15 *Rachel S. Grynberg, Stephen M. Grynberg, Miriam Z. Grynberg and RSM Production Corporation v. Grenada*, ICSID Case No. ARB/10/6, Award, 10 December 2010 (**Exhibit RL-0017**), fn. 33.

16 Scotiabank's Response, ¶ 50.

17 Scotiabank's Response, ¶ 64.

cannot address the merits of jurisdictional objections under Rule 41, arguing that this would be duplicative with the purpose of preliminary objections under the ICSID Rules.[18]

26. To support its allegations, the Claimant cites in isolation and without context sentences from the decision of the tribunal in *PNG Sustainable v. Papua New Guinea*, relies on an outlier case (*MOL v. Croatia*) and oversimplifies the relevant case law, ignoring the complexity of the legal disputes in decisions concerning Rule 41. The Respondent addresses these – subtle and less subtle – distortions below:

27. ***First***, in its Response, the Claimant underscores the ruling of the tribunal in *PNG Sustainable v. Papua New Guinea*,[19] stating that "*Rule 41 is not intended to resolve novel, difficult or disputed legal issues, but is instead only to apply undisputed or genuinely indisputable rules of law to uncontested facts*".[20] Later in its Response, the Claimant attempts to draw a parallel between *PNG* and the present case.[21] The Claimant's contention, however, is based on a selective reading of isolated quotes from *PNG Sustainable v. Papua New Guinea* divorced from the very intricate and novel factual and legal issues at stake in the case, which led to the dismissal of the respondent's Rule 41 application.

28. The Respondent will not replicate the complex factual issues and legal allegations involved in the *PNG* case. It suffices to mention some of the tribunal's own statements regarding the case to have glimpse of the intricacies and difficulties of the factual and legal matrix of the *PNG* case that led to the tribunal's finding, as quoted by the Claimant. In *PNG*, the tribunal underscored that the respondent's objections "*call for a factual analysis of the character of the Claimant itself and the circumstances behind its economic activity in PNG*".[22] Also, the tribunal considered that the "*factual circumstances of this case are relatively unusual*" and remarked that the respondent itself had referred to the "'*unique*' *nature of both this case and the Claimant itself*".[23] Similarly, the tribunal noted that in order to determine whether there was consent to arbitrate it was necessary for it to interpret the "*Investment Promotion Act 1992 ("IPA"), either on its own or when read in conjunction*

---

18 Scotiabank's Response, ¶ 60.

19 *PNG Sustainable Development Program v. Independent State of Papua New Guinea*, Decision on Objection under Rule 41, 28 October 2014 (**Exhibit CL-0040**), ¶ 89.

20 Scotiabank's Response, ¶ 10.

21 Scotiabank's Response, Section Four.

22 *PNG Sustainable Development Program v. Independent State of Papua New Guinea*, Decision on Objection under Rule 41, 28 October 2014 (**Exhibit CL-0040**), ¶ 93.

23 *PNG Sustainable Development Program v. Independent State of Papua New Guinea*, Decision on Objection under Rule 41, 28 October 2014 (**Exhibit CL-0040**), ¶ 94.

with section 2 of PNG's Investment Disputes Convention Act 1978 ("IDCA") (as amended by the Investment Disputes Convention (Amendment) Act 1982",[24] as well as the alleged MFN clause in the IPA and the interpretive principles that should apply (*e.g.*, the *effet utile* principle and the rule of *contra proferentem*).[25] Moreover, the tribunal could not rely on any existing case law as guidance to resolve these legal issues.[26]

29. Evidently, the case before the *PNG* tribunal cannot be compared to the present case. In addition, caution should be exercised when reading the paragraph cited by the Claimant, since the mention to "disputed legal issues" must be understood – as it results from the facts and legal issues in *PNG* – as legal issues that were highly controversial. Crucially, in *PNG,* the tribunal dismissed (without prejudice) the respondent's objections under Rule 41 **not** because there was a dispute on legal issues. Rather, as emphasised by the tribunal, because the respondent's arguments raised "*novel issues of law*", which resolution was not suited for summary proceedings. This, indeed, was the crux of the tribunal's decision to dismiss the respondent's application, not – as the Claimant purports – the mere existence of a legal dispute.[27] As the Respondent addresses further in its submission, its objections do not involve complex disputed questions of fact, unique or unusual matters of fact or law, and do not involve novel findings of law. Much to the contrary, the legal issues at stake have been widely addressed in arbitral case law, based on well-established principles of law and interpretation.

30. Moreover, the Respondent notes that the *PNG* tribunal did not create a separate standard from the one set forth by the *Trans-Global* tribunal and the precedent tribunals, which both Parties agree should be the relevant standard for the Tribunal to assess whether the Claimant's claims are manifestly without legal merit. To the contrary, the *PNG* tribunal found that the *Trans-Global* and *Brandes* decisions were "*highly relevant and material*".[28]

---

[24] *PNG Sustainable Development Program v. Independent State of Papua New Guinea*, Decision on Objection under Rule 41, 28 October 2014 (**Exhibit CL-0040**), ¶ 38.

[25] *PNG Sustainable Development Program v. Independent State of Papua New Guinea*, Decision on Objection under Rule 41, 28 October 2014 (**Exhibit CL-0040**), ¶ 95.

[26] *PNG Sustainable Development Program v. Independent State of Papua New Guinea*, Decision on Objection under Rule 41, 28 October 2014 (**Exhibit CL-0040**), ¶ 95.

[27] *PNG Sustainable Development Program v. Independent State of Papua New Guinea*, Decision on Objection under Rule 41, 28 October 2014 (**Exhibit CL-0040**), ¶¶ 94-95.

[28] *PNG Sustainable Development Program v. Independent State of Papua New Guinea*, Decision on Objection under Rule 41, 28 October 2014 (**Exhibit CL-0040**), ¶¶ 87-88.

31. ***Second***, and relatedly, it is important to underscore that the Tribunal's determination under Rule 41 can involve a complicated legal exercise.

32. Indeed, as stated by the *Trans-Global* tribunal, whilst an objection must be established "*clearly and obviously, with relative ease and despatch*" in order to be considered "*manifest*",[29] this does not mean that tribunals will not be required to conduct a complicated legal exercise and require several rounds of briefing:[30]

> Given the nature of investment disputes generally, the Tribunal nonetheless recognises that this exercise may not always be simple, requiring (as in this case) successive rounds of written and oral submissions by the parties, together with questions addressed by the tribunal to those parties. The exercise may thus be complicated; but it should never be difficult.[31]

---

[29] *Trans-Global Petroleum, Inc. v. Hashemite Kingdom of Jordan*, ICSID Case No. ARB/07/25, Tribunal's Decision on the Respondent's Objection Under Rule 41(5) of the ICSID Arbitration Rules, 12 May 2008 (**Exhibit RL-0012**), ¶ 88.

[30] In fact, the very same ICSID report filed by the Claimant shows that most proceedings regarding Rule 41 objections have entailed comprehensive briefing by the parties, comprising at the very least a round of submissions and a hearing with most cases involving two rounds of written submissions and a hearing (*see* ICSIDs Experience with Objections that a Claim Manifestly Lacks Legal Merit, 10 March 2021 (**Exhibit CL-0052**), p. 3. Note that, although Scotiabank filed this document as a legal authority, it is clearly not).

[31] *Trans-Global Petroleum, Inc. v. Hashemite Kingdom of Jordan*, ICSID Case No. ARB/07/25, Tribunal's Decision on the Respondent's Objection Under Rule 41(5) of the ICSID Arbitration Rules, 12 May 2008 (**Exhibit RL-0012**), ¶ 88. *See also Brandes Investment Partners v. Bolivarian Republic of Venezuela*, Decision on the Respondents Rule 41 Objection, 2 February 2009 (**Exhibit CL-0004**), ¶ 63; *Global Trading Resource Corp. and Globex International, Inc. v. Ukraine*, ICSID Case No. ARB/09/11, Award, 1 December 2010 (**Exhibit RL-0016**), ¶ 35; *Mr. Cornelis Willem van Noordenne, Mr. Bartus van Noordenne, Stichting Administratiekantoor Anbadi, Estudios Tributarios AP S.A. and Álvarez y Marín Corporación S.A. v. Republic of Panama*, ICSID Case No. ARB/15/14, Reasoning of the decision on Respondent's preliminary objections pursuant to ICSID Arbitration Rule 41(5), 4 April 2016 (**Exhibit RL-0061**), ¶¶ 79-80; *Mainstream Renewable Power, Ltd., International Mainstream Renewable Power, Ltd., Mainstream Renewable Power Group Finance, Ltd., Horizont I Development, GmbH, Horizont II Renewable, GmbH and Horizont III Power GmbH v. Federal Republic of Germany*, ICSID Case No. ARB/21/26, Decision on Respondent's Application under ICSID Arbitration Rule 41(5), 18 January 2022 (**Exhibit RL-0074**), ¶ 82; *AFC Investment Solutions S.L. v. Republic of Colombia*, ICSID Case No. ARB/20/16, Award on Respondent's Preliminary Objection Under Rule 41(5) of the ICSID Arbitration Rules, 24 February 2022 (**Exhibit RL-0039**), ¶ 195 ("*This does not preclude that the process for determining it may be complicated, requiring perhaps several rounds of arguments, but it cannot be difficult*.") (original in Spanish); *AHG Industry GmbH & Co. KG v. Republic of Iraq*, ICSID Case No. ARB/20/21, Award on the Respondent's Application Under ICSID Rule 41(5), 30 September 2022 (**Exhibit RL-0040**), ¶ 58 ("[T]he high threshold inherent in the word "manifest" does not imply that an ICSID Rule 41(5) procedure somehow proscribes extended and even elaborate arguments by the parties. What is the subject of the inquiry under this provision is not the length or complexity of the parties' arguments, as it would then be enough, for a party resisting such an objection, to create a number of convoluted and complex defenses in order to justify that the "manifest" threshold is not met under the provision; rather, the subject of the inquiry is the claim itself and whether that claim is, on its face, legally meritless."); *Eskosol S.p.A. in liquidazione v. Italian Republic*, ICSID Case No. ARB/15/50, Decision on Respondent's Application under Rule 41(5), 20 March 2017 (**Exhibit CL-0017**), ¶ 41 ("*The Tribunal accepts both propositions, which it does not believe are in tension with one another. Investment proceedings do involve a level of sophistication and the fact that the parties may consider it appropriate to brief legal objections at some length, in order to ensure an appropriate context for assessment, does not in and of itself render the objections too complex for resolution under the 'manifest' standard. At the same time, the Rule 41(5)*

33. Therefore, the Claimant should not be allowed to rely on the complexity of the Respondent's objections, let alone of its own allegations, to argue that the Respondent's Rule 41 application should fail. Endorsing this proposition would amount to leaving the fate of Rule 41 in the hands of the claimants, who could defeat the purpose of the proceedings by making convoluted allegations.

34. ***Third***, in addressing the meaning of "manifest",[32] the Claimant refers to the tribunal's words in *MOL v. Croatia* stating that Rule 41 "*plainly envisages a claim that is so obviously defective from a legal point of view that it can properly be dismissed outright. By contrast, an objection to the jurisdiction or substantive defence (in terms, that a claim "lacks legal merit"), which requires for its disposition more elaborate argument or factual enquiry*," must be made through either a regular preliminary objection or a regular defence on the merits.[33] A "*distinction has to be maintained between a claim by an investor that can properly be rejected out of hand, and one which requires more elaborate argument for its eventual disposition*."[34]

35. The Respondent notes that the decision of the tribunal in *MOL v. Croatia* is an outlier that departs from the widely accepted principle set in *Trans-Global* according to which, in view of the complex nature of investment disputes, the exercise under Rule 41 "*may not always be simple*", but will rather require briefing and may actually be "*complicated*".[35] It must be noted that, in *MOL v. Croatia*, the factual basis underlying the respondent's Rule 41(5) objections were highly complex, including the manner in which the relevant agreements came about (the GMA and the FASHA)[36] and

---

procedure is not intended, nor should it be used, as the mechanism to address complicated, difficult or unsettled issues of law." (emphasis added)).

32 Scotiabank's Response, ¶ 50(c).

33 *MOL Hungarian Oil and Gas Company Plc v. Republic of Croatia (I)*, ICSID Case No. ARB/13/32, Decision on Respondent's Application under ICSID Arbitration Rule 41(5), 2 December 2014 (**Exhibit CL-0037**), ¶ 44.

34 *MOL Hungarian Oil and Gas Company Plc v. Republic of Croatia (I)*, ICSID Case No. ARB/13/32, Decision on Respondent's Application under ICSID Arbitration Rule 41(5), 2 December 2014 (**Exhibit CL-0037**), ¶ 45.

35 *See, MOL Hungarian Oil and Gas Company Plc v. Republic of Croatia (I)*, ICSID Case No. ARB/13/32, Decision on Respondent's Application under ICSID Arbitration Rule 41(5), 2 December 2014 (**Exhibit CL-0037**), ¶ 45 (the tribunal stated that it was "*less convinced*" about the said position in *Trans-Global*).

36 *MOL Hungarian Oil and Gas Company Plc v. Republic of Croatia (I)*, ICSID Case No. ARB/13/32, Decision on Respondent's Application under ICSID Arbitration Rule 41(5), 2 December 2014 (**Exhibit CL-0037**), ¶ 22(2) (The claimant and the Government of Croatia entered into a Shareholders' Agreement to regulate their relations as shareholders in an erstwhile prominent Croatian energy entity, named INA. This Shareholders' Agreement was later amended by the First Amendment to the Shareholders' Agreement, or "FASHA". The Gas Master Agreement or "GMA" was entered into between the claimant's partly locally held entity, INA, and the Government of Croatia pursuant to which INA would enter into a Long Term Gas Supply Agreement with a Croatian Gas Trading Company. All three agreements contained forum selection clauses, which, argued the respondent, precluded the tribunal from entertaining claims arising out of the said agreements).

proceedings on corruption which were "*hotly disputed*".[37] In addition, the respondent's objections were on their face extremely intricate.

36. Indeed, among other arguments, Croatia argued that "*because Hungary is one of the Contracting Parties listed in Annex IA to the ECT, the Claimant, as a Hungarian investor, is disabled from invoking the "umbrella clause" in Article 10(1) ECT*",[38] and "*that the forum selection clauses in the Shareholders' Agreement, the FASHA and the GMA mean that the Tribunal does not have jurisdiction over any claims arising out of, in relation to or in connection with those agreements; or, alternatively, that the Claimant is at least precluded from advancing its "umbrella clause" claim before this Tribunal*".[39]

37. Moreover – and unlike the present case – the questions faced by the arbitral tribunal were indeed novel. For instance, the "*interesting question*" of "*whether private investors could properly be assimilated to 'the reserving State' for the purposes of applying Article 21(1)(b) of the Vienna Convention on the Law of Treaties*";[40] the "*'fairness' or 'inequity' of allowing Hungary to use Annex IA as a shield, while allowing its nationals to use as a sword the substantive treaty provisions which the Annex refers to*".[41]

38. The mere fact that a tribunal is required to interpret a legal instrument to reach a determination regarding an objection under Rule 41 does not mean that the objection is not suitable to be resolved under Rule 41, as the Claimant seems to suggest. The *MOL v. Croatia* case, even as an outlier, does not support this proposition. As the Respondent demonstrated, the issues at stake in *MOL* were truly intricate, novel, and difficult. That is not the case here.

39. ***Fourth***, in fact, as evidenced by numerous decisions, arbitral tribunals have performed sophisticated and complex legal analyses to uphold Rule 41 objections. The decisions of the tribunals in *Lotus v.*

---

[37] *See, MOL Hungarian Oil and Gas Company Plc v. Republic of Croatia (I)*, ICSID Case No. ARB/13/32, Decision on Respondent's Application under ICSID Arbitration Rule 41(5), 2 December 2014 (**Exhibit CL-0037**), ¶ 13.

[38] *MOL Hungarian Oil and Gas Company Plc v. Republic of Croatia (I)*, ICSID Case No. ARB/13/32, Decision on Respondent's Application under ICSID Arbitration Rule 41(5), 2 December 2014 (**Exhibit CL-0037**), ¶ 22(1).

[39] *MOL Hungarian Oil and Gas Company Plc v. Republic of Croatia (I)*, ICSID Case No. ARB/13/32, Decision on Respondent's Application under ICSID Arbitration Rule 41(5), 2 December 2014 (**Exhibit CL-0037**), ¶ 22(2).

[40] *MOL Hungarian Oil and Gas Company Plc v. Republic of Croatia (I)*, ICSID Case No. ARB/13/32, Decision on Respondent's Application under ICSID Arbitration Rule 41(5), 2 December 2014 (**Exhibit CL-0037**), ¶ 48.

[41] *MOL Hungarian Oil and Gas Company Plc v. Republic of Croatia (I)*, ICSID Case No. ARB/13/32, Decision on Respondent's Application under ICSID Arbitration Rule 41(5), 2 December 2014 (**Exhibit CL-0037**), ¶ 48.

Turkmenistan, described above,[42] *Global Trading v. Ukraine*, *AFC v. Colombia* and *Ansung Housing v. China* illustrate the point and exemplify the type, depth, and scope of analysis that the Tribunal is called to adopt.

40. In *Ansung Housing v. China* and *AFC v. Colombia*, the respective tribunals addressed objections under Rule 41 revolving around the interpretation and application of the statute of limitations to commence a claim (as in the present case). Indeed, both arbitral tribunals delved in questions of treaty interpretation.[43]

41. Moreover, tribunals seized of Rule 14 applications have also considered, and rejected, the claimants' characterizations of their claims. As explained by the Respondent,[44] in *Global Trading v. Ukraine*, the tribunal rejected the claimant's characterization of its commercial contract as an "investment". After analysing the factual characteristics of the claimant's alleged investment, the tribunal concluded that, "[w]*hen the circumstances of the present case are examined and weighed, it can readily be seen that the money laid out by the Claimants towards the performance of these contracts was no more than is typical of the trading supplier under a standard CIF contract*."[45]

42. Yet another example where the tribunal grappled with sophisticated legal arguments is the *RSM v. Grenada* case, explained above.[46] In *RSM*, the tribunal was faced with treaty claims brought by RSM's shareholders which concerned matters already adjudicated in a contractual arbitration between RSM and Grenada. Among other allegations, the claimants argued that there was evidence of corruption concerning the termination of the contractual agreement between RSM and Grenada. According to the claimants, the evidence had not been addressed in the contractual arbitration and the evidence could have a material impact on the outcome of the dispute. Grenada filed an application under Rule 41(5) of the 2006 ICSID Arbitration Rules, arguing that the legal and factual contentions underlying the claimants' claims manifestly lacked legal merit since they had already been fully litigated in the contractual dispute. Grenada invoked, *inter alia*, the doctrine of collateral estoppel.

---

42 *See above*, § II.B.

43 *See below*, § IV.E.2.

44 Scotiabank's Response, ¶ 22.

45 *Global Trading Resource Corp. and Globex International, Inc. v. Ukraine*, ICSID Case No. ARB/09/11, Award, 1 December 2010 (**Exhibit RL-0016**), ¶ 56.

46 *See above,* § II.A.

43. The *RSM* tribunal found that the claimants' claims manifestly lacked legal merit, given that the factual basis for the claims had already been decided by the previous tribunal, and that the corruption allegations made by the claimants in their Request for Arbitration could not amount to a violation of the treaty.[47] To reach this conclusion, the tribunal: (*i*) analysed the scope of the factual issues that the previous tribunal had decided; (*ii*) determined the extent to which these overlapped with the facts underlying the claimants' treaty claims; and (*iii*) finally decided that the claimants' corruption claims would not amount to a treaty violation, even taking the facts as pleaded by the claimants.

44. In *RSM*, the tribunal undertook an in-depth legal analysis of the legal arguments on *res judicata* and collateral estoppel advanced by the respondent and the application of these principles to the facts. In its decision, the tribunal upheld the respondent's objection under Rule 41, nothing that several of the claims presented by the claimant had been previously decided in a contract-based arbitration.[48]

45. In turn, the tribunal in *Almasryia v. Kuwait*, analysed whether the claimant had vested property rights over its alleged investment, under the law of Kuwait.[49]

46. To sum up, despite the Claimant's allegations to the contrary, Rule 41 is the appropriate avenue for the Tribunal to address and finally decide on the legal issues underlying the Respondent's objections.

C. NOTHING IN RULE 41 PROHIBITS THE DISCUSSION OF THE MERITS OF JURISDICTIONAL OBJECTIONS

47. Consistent with its overarching objective to create a novel standard for the application of Rule 41, the Claimant states that:

> Rule 41 is not to be used to replace or supplement Rule 44 of the ICSID Rules. Under Rule 44, Peru can seek bifurcation and raise jurisdictional objections in a preliminary hearing. Peru can otherwise argue jurisdictional objections on the merits. Rule 41 is not the forum to argue the merits of such issues, which Peru improperly seeks to do.[50]

---

[47] *Rachel S. Grynberg, Stephen M. Grynberg, Miriam Z. Grynberg and RSM Production Corporation v. Grenada*, ICSID Case No. ARB/10/6, Award, 10 December 2010 (**Exhibit RL-0017**), ¶ 7.2.1.

[48] *Rachel S. Grynberg, Stephen M. Grynberg, Miriam Z. Grynberg and RSM Production Corporation v. Grenada*, ICSID Case No. ARB/10/6, Award, 10 December 2010 (**Exhibit RL-0017**), ¶ 7.2.1.

[49] *Almasryia for Operating & Maintaining Touristic Construction Co. L.L.C. v. State of Kuwait*, ICSID Case No. ARB/18/2, Award on the Respondent's Application under Rule 41(5) of the ICSID Arbitration Rules, 1 November 2019 (**Exhibit RL-0065**), ¶¶ 49-58.

[50] Scotiabank's Response, ¶ 60.

48. This baseless statement by the Claimant contradicts the clear terms of Rule 41, as well as the established arbitral case law. Indeed: (*i*) jurisdictional objections may be argued under Rule 41, including on their merits; and (*ii*) a respondent's application under Rule 41 is without prejudice to its right to reargue the same issues under Rules 43 and 44, should the Rule 41 application fail.

49. ***First***, if there is anything improper, it is the Claimant's accusation of the Respondent's impropriety and its accusation that the Respondent is using Rule 41 in a tactical manner.[51] The Respondent's submission of its Rule 41 objection amounts to nothing other than the exercise of its rights in good faith, as permitted by the ICSID Rules. The cogent legal arguments of the Respondent's objections speak for themselves.

50. ***Second***, the Claimant's allegation that the Respondent cannot argue the merits of its jurisdictional objections under Rule 41 lacks any basis. To the contrary, the very text of Rule 41 provides that the objections may be related to the jurisdiction of the Centre or the competence of the Tribunal.[52]

51. Indeed, it is well-established that jurisdictional objections may be submitted under Rule 41. As stated by the *Brandes* tribunal and reiterated in arbitral case law, the expression "manifest lack of legal merit" relates to objections both to the tribunal's jurisdiction and on the merits.[53] In fact, the vast majority of Rule 41 successful applications concerned jurisdictional objections.

52. Moreover, Rule 41 expressly states that objections could also relate to the merits. It bears mentioning in this regard that the Claimant purposefully ignores the Respondent's objections to the substance of the Claimant's expropriation claim when it refers to the Respondent's objections.[54]

53. ***Third***, and contrary to the Claimant's submission, the ICSID Arbitration Rules expressly provide that jurisdictional objections filed by a respondent under Rule 41 are without prejudice to the

---

51 Scotiabank's Response, ¶¶ 12-13.

52 ICSID Arbitration Rules 2022, Rule 41.

53 *Brandes Investment Partners v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB/08/3, Decision on the Respondent's Rule 41 Objection, 2 February 2009 (**Exhibit CL-0004**), ¶ 62; *Rachel S. Grynberg, Stephen M. Grynberg, Miriam Z. Grynberg and RSM Production Corporation v. Grenada*, ICSID Case No. ARB/10/6, Award, 10 December 2010 (**Exhibit RL-0017**), ¶ 6.1.1; *Almasryia for Operating & Maintaining Touristic Construction Co. L.L.C. v. State of Kuwait*, ICSID Case No. ARB/18/2, Award on the Respondent's Application under Rule 41(5) of the ICSID Arbitration Rules, 1 November 2019 (**Exhibit RL-0065**), ¶ 31.

54 Scotiabank's Response, ¶ 8.

Respondent's right to submit the same arguments as preliminary objections under Rules 43 and 44, in the event that its Rule 41 application fails. Rule 41(4) provides:

> A decision that a claim is not manifestly without legal merit shall be without prejudice to the right of a party to file a preliminary objection pursuant to Rule 43 or to argue subsequently in the proceeding that a claim is without legal merit.[55]

54. In keeping with the clear text of Rule 41(4), tribunals and legal scholars have expressly acknowledged that the purpose of Rule 41 is to provide respondents a procedural stage in which jurisdictional objections may be argued, in addition (and not instead of) Rule 44. In the words of the *Brandes* tribunal, referring to the 2006 ICSID Arbitration Rules:

> [T]here are actually three levels at which jurisdictional objections could be examined. First by the Secretariat, and if the case passes that level, it would then be under Rule 41(5), and if it passes that level, it might still be under Rule 41(1).[56]

55. As stated by the *Brandes* tribunal, the key difference between the analysis of a jurisdictional objection in the context of Rule 41 (former Rule 41(5)) and as a preliminary objection lies on the limited factual analysis permitted by Rule 41.[57] This in no way bars a respondent from arguing the merits of its objections under Rule 41, be it as regards jurisdiction or the merits of the dispute.

56. In sum, it is the Respondent's right to file an objection under Rule 41, and that is without prejudice to the Respondent's right – should its objections under Rule 41 fail – to argue them as preliminary objections or subsequently at the proceedings.

* * *

57. The Claimant unduly – and without basis – intends to heighten the applicable standard under Rule 41 and mischaracterizes the Respondent's position. Contrary to the Claimant's contentions, Rule 41

---

[55] ICSID Arbitration Rules 2022, Rule 41(4).

[56] *Brandes Investment Partners v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB/08/3, Decision on the Respondent's Rule 41 Objection, 2 February 2009 (**Exhibit CL-0004**), ¶ 53. *See also*, Aurélia Antonietti, *The 2006 Amendments to the ICSID Rules and Regulations and the Additional Facility Rules*, ICSID Review (2006) Vol. 21 (2) 2006 (**Exhibit RL-0078**), p. 441: "*Rule 41(5) shall not preclude a party from raising other objections later in the course of the proceeding. It is believed that the wording "[t]he decision of the Tribunal shall be without prejudice to the right of a party to file an objection pursuant to paragraph (1) or to object, in the course of the proceeding, that a claim lacks legal merit" now makes that clear. A party, as the proceeding unfolds, can further raise (i) a "classic" objection to jurisdiction envisaged under Rule 41(1); (ii) the same objections raised during the expedited phase but which was not decided upon at that time; or (iii) any new objections regarding the merits of the case*."

[57] *Brandes Investment Partners v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB/08/3, Decision on the Respondent's Rule 41 Objection, 2 February 2009 (**Exhibit CL-0004**), ¶¶ 65-69.

does not: (*i*) prevent any and all analyses of the fact, including of facts that are manifestly inaccurate; (*ii*) exclude the Tribunal's review of the legal consequences derived from these facts and; (*iii*) proscribe legal discussions, including as to the merits of jurisdictional objections and on the merits of the case. In this case, the Respondent's Rule 41 objections are based on key undisputed facts and well-established investment case law.

III. THE RELEVANT FACTS FOR PURPOSES OF THE RESPONDENT'S OBJECTIONS UNDER RULE 41 APPLICATION ARE NOT DISPUTED

58. The Respondent briefly addresses the Claimant's use of its Response to unduly push forward its one-sided narrative of the facts of the case (**1**) and summarizes the undisputed facts on which the Respondent bases its Rule 41 objections (**2**).

1. Several facts set out by the Claimant in its Response are immaterial to the present objections under Rule 41

59. The Claimant alleges that the Respondent presents a "*partial and selective summary of facts*" and devotes 13 pages of its Response to rehash and supplement its contentions regarding the alleged actions of the Respondent that entailed a breach of the FTA. Amongst the allegations presented by the Claimant are:

(i) The alleged delays in the SUNAT's issuance of the Payment Order by which it formally demanded that Scotiabank Peru pay the outstanding IGV Liability, plus default interest.[58]

(ii) The alleged media and political pressure to which the Constitutional Court was subjected, and the supposed influence on the issuance of the 2021 Decision.[59] This includes grave accusations that an official of the Ministry of Economy put pressure on magistrates of the Constitutional Court to obtain a decision favourable to the State, which appear to be based only on hearsay.[60]

---

[58] Scotiabank's Response, ¶¶ 16-23. The Respondent refers to and incorporates to this Reply the description of the facts that it made in its Submission on Rule 41, including all relevant definitions (*see* Peru's Submission on Rule 41, § III).

[59] Scotiabank's Response, ¶¶ 29-31.

[60] Scotiabank's Response, ¶¶ 32-33.

(iii) The changes in the quorum required for the Constitutional Court to issue a valid decision, which Scotiabank alleges were adopted without following the applicable legal procedures, to allow for the issuance of a decision against Scotiabank Peru.[61]

(iv) The supposed lack of conformity of the Constitutional Court's 2021 Decision with the position previously adopted by the Constitutional Court in allegedly comparable cases.[62]

60. The Respondent does not agree with either the Claimant's accusation on the Respondent's selective rendition of the facts or with various factual allegations made by the Claimant. However, none of these factual allegations are material to the issues currently before the Tribunal.

61. To recall, objections under Rule 41 should be based on the facts as pleaded by the Claimant – unless these facts are implausible, manifestly frivolous, or inaccurate –[63] and that Rule 41 proceedings are not the appropriate stage for the Tribunal to render a final determination of disputed facts.

62. It bears noting that Scotiabank fails to explain how any of its extended allegations relate to the objections raised by the Respondent. The reason is simple: they do not. None of these factual assertions have any bearing on the facts on which the Respondent bases its objections under Rule 41. Rather, they relate to the merits of the Claimant's claims for alleged breaches by the Respondent of its obligation to grant the Claimant, and its investment, treatment in accordance with the Minimum Standard of Treatment and National Treatment standards,[64] which the Respondent does not address in its objections under Rule 41.

63. The Claimant is well aware of this. However, it has chosen to use its factual narrative tactically to distract from the relevant facts and unduly sway the Tribunal by relying exclusively on Scotiabank's one-sided allegations. This conduct is an abuse of the limitations inherent to the summary nature of Rule 41 proceedings, of which the Claimant is cognisant.[65]

64. The Respondent will not engage with any of the facts introduced by the Claimant to unduly crowd the record and distract from the substance and real basis of the Respondent's objections under Rule

---

61 Scotiabank's Response, ¶¶ 38-40.

62 Scotiabank's Response, ¶¶ 43-44.

63 Scotiabank's Response, ¶ 14; *See also*, Peru's Submission on Rule 41, ¶¶ 20-21.

64 *See*, Scotiabank's Response, ¶ 46(a), (c).

65 Scotiabank's Response, ¶ 14.

41. As regards these facts, the Respondent reserves its right fully to dispute the Claimant's unilateral and unchecked rendition. The Respondent also objects in the strongest terms to the Claimant's accusations that the Respondent has engaged in a "*tactical use*" of Rule 41, when it is clearly the Claimant who knowingly abuses its position by rehashing and supplementing a factual narrative at a stage of the proceedings where factual disputes are restricted.

2. The Respondent's objections are based on undisputed facts

65. For the sake of clarity and avoidance of doubt, the Respondent restates the undisputed facts on which it bases its objections:

66. As regards its Financial Services objection (Chapter Eleven of the FTA): It is undisputed that Scotiabank Peru is a financial institution under Peruvian law[66] and that the Claimant has an investment in Scotiabank Peru.[67]

67. In connection with the Taxation carve-out (Article 2203 of the FTA): It is undisputed that: (*i*) the SUNAT Payment Order of 25 November 2013 ordered Scotiabank Peru to pay the IGV Liability, and the default interest accrued; (*ii*) Scotiabank Peru paid these amounts to the SUNAT in ten instalments from December 2013 to February 2014; (*iii*) the proceedings before the Constitutional Court that led to the issuance of the 2021 Constitutional Court Decision of which the Claimant complains in this arbitration concerned the legality of the default interest accrued on the IGV Liability[68] and; (*iv*) it is an indisputable fact that the Peruvian Tax Code provides, at Article 28, that default interest is a "component" of the tax debt:[69]

> **Article 28.- COMPONENTS OF THE TAX DEBT**
>
> The Tax Administration shall demand payment of the tax debt, which is made up of the tax, the penalties and the interest.[70]

---

66 Notice of Intent to Submit a Claim to Arbitration under the Canada-Peru FTA from the Bank of Nova Scotia to the Republic of Peru, 1 September 2021 (**Exhibit C-0021**), ¶ 5; Request for Arbitration, ¶ 18; Peru's Submission on Rule 41, ¶¶ 60, 68, 70-71; Scotiabank's Response, ¶¶ 62, 64.

67 Request for Arbitration, ¶¶ 62, 74(ii); Peru's Submission on Rule 41, ¶¶ 36, 56; Scotiabank's Response, ¶ 119.

68 Request for Arbitration, ¶¶ 28-29, 32(i), 33(*chapeau*), 35, 53(i)-(iii); Peru's Submission on Rule 41, ¶¶ 37-39, 41, 46; Scotiabank's Response, ¶¶ 21-22, 24(a), 25, 41(a)-(c).

69 Peru's Submission on Rule 41, ¶¶ 90, 114, 161; Scotiabank's Response, ¶ 116.

70 Peruvian Tax Code, approved by Legislative Decree Nº 816 of 21 April 1996, as compiled by Supreme Decree Nº 133-2013-EF of 22 June 2013 (**Exhibit R-0003bis**), Article 28. The applicable rate and procedure to calculate default interest due on a tax liability is also set forth by the Peruvian Tax Code, in its Article 33 (Peruvian Tax Code, approved by Legislative Decree Nº 816 of 21 April 1996, as compiled by Supreme Decree Nº 133-2013-EF

68. Regarding the Respondent's objection based on the lack of protected investment (Articles 847 and 823 of the FTA): The Claimant has pleaded that the "investment" that was allegedly expropriated by the Respondent consists of the amounts paid by Scotiabank Peru to the SUNAT as default interest on the IGV Liability.[71] The characterization of the default interest payments as an "investment" under the Treaty and the ICSID Convention is a legal question, that can be fully addressed in these proceedings.[72]

69. As regards the Respondent's objection that the Claimant has no vested rights capable of expropriation: The Claimant claims that the amounts it paid to the SUNAT as default interest on the IGV Liability is the asset that has been expropriated.[73] The Respondent takes the Claimant's premise as presented by the Claimant. As the Respondent explains, the question of whether Peruvian law conferred any rights over these amounts to the Claimant is a legal issue, which may be fully addressed by the Tribunal under Rule 41, contrary to the Claimant's erroneous assertion.[74]

70. With respect to the Respondent's objection on the Claimant's ineffective waiver of domestic proceedings (Articles 823(1)(e) and 823(2)(e) of the FTA): The Respondent's objections are based on the undisputed facts that: (*i*) the Claimant's Tax Appeal is still ongoing;[75] (*ii*) the end result of the Tax Appeal could be that Scotiabank Peru recovers the total amounts paid to the SUNAT (*i.e.* the amount of the IGV liability plus the accrued default interest), plus interest;[76] and (*iii*) the Claimant seeks compensation in this arbitration for an amount corresponding to payments made by Scotiabank Peru to the SUNAT as default interest.[77]

71. Regarding the time bar (Articles 823(1)(c) and 823(2)(c)): The Respondent's argument that the Claimant's expropriation claim falls outside the 39-month time bar in the FTA is predicated on the following undisputed facts: (*i*) Scotiabank Peru paid the amounts ordered by the SUNAT Payment

---

of 22 June 2013 (**Exhibit R-0003bis**), Article 33 "[a]*ny amount of tax unpaid within the terms indicated in Article 29 shall accrue an interest equivalent to the Default Interest Rate*.").

71 Request for Arbitration, ¶¶ 62, 67, 74(ii).

72 *See below*, § IV.C.

73 Request for Arbitration, ¶ 67; Scotiabank's Response, ¶¶ 46(b), 119.

74 Scotiabank's Response, ¶ 121.

75 Scotiabank's Response, ¶ 24(b).

76 Request for Arbitration, ¶ 32(ii), fn. 3; Peru's Submission on Rule 41, ¶¶ 40, 159, 162, 164; Scotiabank's Response, ¶ 24(b).

77 Request for Arbitration, ¶¶ 28, 71(ii); Peru's Submission on Rule 41, ¶¶ 85(iii), 98, 164-167; Scotiabank's Response, ¶ 47.

Order between December 2013 and February 2014. These amounts have not yet been recovered by Scotiabank Peru[78] and; (*ii*) neither the Tax Appeal nor the Default Interest Appeals commenced by Scotiabank Peru suspend the SUNAT Payment Order, which was fully enforceable against Scotiabank Peru.[79]

IV. SCOTIABANK'S CLAIMS ARE MANIFESTLY WITHOUT LEGAL MERIT

72. The Claimant acknowledges that it commenced this arbitration to put pressure on the Constitutional Court to render the 2021 Constitutional Court Decision.[80] This is unsurprising, given the number of patent flaws in the Claimant's claims, submitted in open disregard of the requirements set forth in the FTA to commence arbitration proceedings. The Respondent recalls below the legal basis of each of its objections:

73. ***First***, the Claimant's claims fall under the scope of Chapter Eleven, applicable to the financial sector, therefore the Tribunal lacks jurisdiction over the Claimant's claims under Articles 803 (National Treatment) and 805 (Minimum Standard of Treatment) (**A**).

74. ***Second***, the 2021 Constitutional Court Decision is a "taxation measure" and therefore falls within the scope of the taxation carveout in Article 2203 of the FTA. Accordingly, the Tribunal lacks jurisdiction over the Claimant's claims under Articles 805 (Minimum Standard of Treatment) and 812 (Expropriation) (**B**).

75. ***Third***, the default payment interest is **not** a protected investment under the FTA or an "investment" under Article 25 of the ICSID Convention. Therefore, the Tribunal lacks jurisdiction *ratione materiae* over the Expropriation claim (**C**). Moreover, the Claimant has **no** vested rights over these amounts. Therefore, the Claimant's Expropriation claim also fails on the merits (**D**).

76. ***Fourth***, in any event, the Respondent has not given its consent to arbitrate the Claimant's claims, since the Claimant failed to waive its right to continue domestic proceedings and the Claimant's Expropriation claim is time-barred (**E**).

---

78 Request for Arbitration, ¶¶ 28-29, 32(i)-(ii); Peru's Submission on Rule 41, ¶¶ 37, 41; Scotiabank's Response, ¶¶ 22, 24(a)-(b).

79 Request for Arbitration, ¶ 4; Peru's Submission on Rule 41, ¶¶ 90, fn. 79 (Peruvian Tax Code, Article 33), 94 (Scotiabank's request for relief in amparo proceedings, request "v)"), 161; Scotiabank's Response, ¶ 23, fn. 14.

80 Scotiabank's Response, ¶ 4.

A. THE CLAIMANT'S CLAIMS FALL WITHIN THE SCOPE OF CHAPTER ELEVEN OF THE FTA

77. As already demonstrated by the Respondent in its Rule 41 submission, the Tribunal lacks jurisdiction over the Claimant's claims for the alleged breaches of Articles 803 and 805 of the FTA as the Claimant's claims fall under the scope of Chapter Eleven. Indeed, Article 1101(1) provides as follows:

> 1. This Chapter applies to measures adopted or maintained by a Party relating to:
>
> (a) financial institutions of the other Party;
>
> (b) investors of the other Party, and investments of such investors, in financial institutions in the Party's territory; and
>
> (c) cross-border trade in financial services.[81]

78. The demonstration is straightforward: (*i*) it is indisputable that the Claimant's claims concern a "measure" (the 2021 Constitutional Court Decision) adopted by a Party (the Republic of Peru); (*ii*) the measure relates to (is "connected to") the Claimant's investment in a "financial institution" (Scotiabank Peru). Therefore, the 2021 Constitutional Court Decision falls within the scope of Article 1101 and of Chapter Eleven. This should be the end of the argument.

79. Nonetheless, the Claimant contests this simple reasoning predicated on the clean-cut language of the FTA, arguing that "[t]*he focus* [of Article 1101] *is on the nature of the measure, not the nature of the investor*."[82] According to the Claimant, since the 2021 Constitutional Court Decision is a "*measure that could have affected any investor in any industry*",[83] Article 1101(1) does not apply.

80. The flaw in the Claimant's argument is evident: that is simply not what the FTA says. Contrary to the Claimant's contentions, the Claimant's interpretation is at odds with Articles 31 and 32 of the Vienna Convention on the Law of Treaties ("**VCLT**").

81. As the Respondent demonstrates, the Claimant's interpretation of the FTA is not supported by either the terms of Article 1101(1), in their context (**1**), nor by the object and purpose of the FTA and of Chapter Eleven (**2**). Lastly, the Tribunal needs not be concerned by the FTA's *travaux préparatoires*, since the interpretation of Article 1101(1) under Article 31 VCLT is sufficiently clear (**3**).

---

81 Peru-Canada Free Trade Agreement, 1 August 2009 (**Exhibit C-0001**), Article 1101(1).

82 Scotiabank's Response, ¶ 62.

83 Scotiabank's Response, ¶ 62.

1. The terms and context of Article 1101 are clear: the provision applies to any and all "measures" related to financial institutions, such as Scotiabank Peru

82. The Claimant takes issue with the Respondent's straightforward interpretation of Article 1011 and argues that "*the FTA's revised language more narrowly applies Chapter 11 to 'measures…relating to financial institutions.' The focus is on the nature of the* measure*, not the nature of the investor. Here, the impugned measure is the 2021 Constitutional Court Decision, which is not a measure relating to financial institutions*."[84] The Claimant provides no explanation for its decision to selectively rely on a single word of Article 1101 on which it chooses to base its (erroneous) interpretation. Contrary to the Claimant's representations, this is not a "*proper exercise in treaty interpretation*".[85]

83. It is uncontroversial that the point of departure for the interpretation of a treaty provision, in accordance with Article 31 VCLT, is to observe the ordinary meaning of the terms in their context.[86] Therefore, a "*proper exercise in treaty interpretation*" requires that the terms of a provision be taken as a whole.

84. It is clear that Article 1101(1) does not have one, but rather **three** operative terms: (*i*) an objective element, which requires the existence of a "measure []"; (*ii*) a subjective element, which consists of "an investment[…] in a financial institution"; and (*iii*) an element of connectedness, marked by the phrase "relating to".[87] Contrary to the Claimant's allegations, the Respondent does not ask the Tribunal to ignore the words "measures" and "relating to".[88] To the contrary, the Respondent's interpretation involves taking into consideration the applicable definitions and ordinary meaning of each of the three elements in Article 1101(1), which the Respondent addresses below.

a. The Contracting States did not qualify the term "measures", which is broadly defined in the FTA

85. The crux of the Claimant's argument is its *ipse dixit* proposition that "[t]*he operative word in Article 1101 is 'measures'*."[89] Yet, ironically, the Claimant does not refer to the definition of the term

---

84 Scotiabank's Response, ¶ 62 (emphasis added).

85 Scotiabank's Response, ¶ 63.

86 Mark E. Villiger, *Commentary on the 1969 Vienna Convention on the Law of Treaties* (Brill Nijhoff, 2009), (**Exhibit RL-0080**), Article 31(1), p. 426, ¶ 9 ("*The ordinary meaning is the starting point of the process of interpretation. This is its current and normal (regular, usual) meaning*.").

87 Peru-Canada Free Trade Agreement, 1 August 2009 (**Exhibit C-0001**), Article 1101(1).

88 Scotiabank's Response, ¶ 66.

89 Scotiabank's Response, ¶ 66.

"measure" under the FTA. This is not surprising, given that the definition of the term "measures", in its context, inevitably comprises the 2021 Constitutional Court Decision:

86. ***First***, Article 105 provides definitions of general application that are common to the entire FTA, including the definition of the term "measure".[90] To recall, the definition of "measure" under the FTA is broad, including "*any law, regulation, procedure, requirement or practice*".[91] The Claimant itself admits – in the context of its argumentation on what constitutes a taxation measure – that "*Peru is right that the term "measure" is broad and may encompass a range of acts from an administrative decision to a court decision and comprise measures taken by either the legislative, executive or judicial branches.*"[92] Yet, when it comes to the basic exercise of interpreting the meaning of the terms in Article 1101, the Claimant conspicuously avoids referring to the definition of the term.

87. Pursuant to Article 31(4) VCLT, specific definitions provided by the Contracting States are the relevant definitions that the Tribunal should consider. Indeed, these definitions were specifically established by the Contracting States and reveal the Contracting States' understanding of the terms.[93] Definitions in a treaty are the inescapable point of departure for the interpretation of Article 1101, which the Claimant should not be allowed to disregard or modify.

88. ***Second***, as stated, the definition of the term "measure" is of general application throughout the FTA. In other words, the term "measure" has no different meaning in Chapter Eight and in Chapter Eleven. The Claimant acknowledges that the 2021 Constitutional Court Decision is a "measure" for purposes of bringing a claim under Chapter Eight.[94] Accordingly, it cannot dispute the meaning of the term in the context of Chapter Eleven.

89. Nevertheless, the Claimant attempts to differentiate between what constitutes a measure for the purposes of Chapter Eight and what constitutes a measure under Chapter Eleven, allegedly based on the nature of the measure. In its Response, the Claimant states that the 2021 Decision of the Constitutional Court "*is not a measure like the one in Fireman's Fund that was designed to bail out*

---

90 Peru's Rule 41 Submission, ¶ 84 *et seq*.

91 Peru-Canada Free Trade Agreement, 1 August 2009 (**Exhibit C-0001**), Article 105.

92 Scotiabank's Response, ¶ 89.

93 Vienna Convention on the Law of Treaties, 27 January 1980 (**Exhibit CL-0053**), Article 31(4) ("*A special meaning shall be given to a term if it is established that the parties so intended*.").

94 Request for Arbitration, ¶¶ 15, 60, 63; Scotiabank's Response, ¶¶ 27, 46(a)-(c), 48.

a bank in a time of crisis, nor is it a measure in the financial industry designed to leave room for national decision-making as opposed to harmonizing practices among states in treatment of financial institutions".[95] The argument is unsupported by the text of Article 1101, which refers to "measures" in general, not to "regulatory measures", or to "measures to ensure financial stability", and even less so to the detailed definition that the Claimant has crafted and intends to read into the FTA.

90. ***Third***, had the Contracting States intended to restrict the scope of Chapter Eleven to a certain type of measures, they would have drafted Article 1101 accordingly. In fact, this is precisely what the Contracting States did when they sought to qualify the term "measure" in specific provisions of Chapter Eleven. For instance, in Article 1103(2), the FTA provides that "[a] *Party may recognize prudential measures of a non-Party in the application of measures covered by this Chapter*."[96] The term "prudential reasons" is defined as "*the maintenance of the safety, soundness, integrity, or financial responsibility of individual financial institutions or cross-border financial service suppliers.*"[97] Therefore, it is clear that Chapter Eleven provides for certain qualified "measures", when it so requires, as a subset of the general definition of "measures" comprised by Article 1101(1). In the words of the Claimant: "[d]*ifferent language carries different ordinary meaning*".[98] The Respondent respectfully requests the Tribunal not to ignore the Contracting States' choice for broad, unrestricted language in Article 1101 in favour of the Claimant's unsupported allegations.

91. ***Fourth***, the Claimant contends that the *Fireman's Fund* decision does not support the Respondent's interpretation. In so doing, it intentionally ignores the following words of the *Fireman's Fund* tribunal:

> The expropriation provisions of the NAFTA as set out in Chapter Eleven, including the provisions for investor-State arbitration, were made applicable to claims under Chapter Fourteen, but claims based on other provisions designed to protect cross-border investors and investments, including provisions for National Treatment and Most-Favored-Nation Treatment, **are excluded from the competence of an arbitral tribunal in a case involving investment in**

---

95 Scotiabank's Response, ¶ 77.

96 Peru-Canada Free Trade Agreement, 1 August 2009 (**Exhibit C-0001**), Article 1103(2) (emphasis added). *See also*, Peru-Canada Free Trade Agreement, 1 August 2009 (**Exhibit C-0001**), Article 1103(3), (4).

97 Peru-Canada Free Trade Agreement, 1 August 2009 (**Exhibit C-0001**), Chapter Eleven, fn. 1.

98 Scotiabank's Response, ¶ 68.

> **financial institutions**. Chapter Fourteen contains no counterpart to Article 1105 concerning Minimum Standard of Treatment.[99]

92. This finding was emphasized by the United States in its Non-Disputing Party Submission ("**NDPS**") in the *Carrizosa v. Colombia* arbitration.[100] As shown by the words of the *Fireman's Fund* tribunal and as backed by the United States, the Contracting States excluded the application of the Most Favoured National Treatment and National Treatment *"from the competence of an arbitral tribunal in a case involving investment in financial institutions"*. The scope is markedly, and intendedly, broad. In addition, neither the *Fireman's Fund* nor the United States provide that an arbitral tribunal will lack jurisdiction regarding MFN and National Treatment claims under NAFTA's Investment Chapter if the "measures involved were regulatory measures of general application affecting financial institutions at large".

93. ***Sixth***, and finally, to support its reliance on the alleged importance of the "nature" of the measure, the Claimant refers to Article 802(3) of the FTA, which provides that Chapter Eight shall not apply to "*measures adopted or maintained by a Party to the extent that they are covered by Chapter Eleven (Financial Services)*".[101] According to the Claimant, the use of the term "measure" in Article 802(3) would mean that Articles 1101 and 802(3) were "*drafted consistently to focus on the nature of the measure that is at issue*".[102] With respect, this is a non sequitur. Article 802(3) FTA contains no reference to the "nature" of the measures comprised by Chapter Eleven. Rather, Article 802(3) uses the same term as Article 1101(1) which, in turn, must also be interpreted in accordance with the general definition for "measure" provided in Article 105, without any further qualification as to the intrinsic qualities of the said "measure". The Claimant's attempt purposefully to read terms into the neutral, clear-cut language of the Treaty should be rejected. Contrary to the Claimant's arguments, Article 802(3) of the FTA is consistent with the Respondent's interpretation. Precisely, it confirms that the purpose of the Contracting States was to ensure the existence of two separate regimes: one regime for investment in general and a separate distinct regime for investment in the financial

---

99 *Fireman's Fund Insurance Company v. The United Mexican States*, ICSID Case No. ARB(AF)/02/1, Award, 17 July 2006 (**Exhibit RL-0049**), ¶ 3 (emphasis added).

100 *Alberto Carrizosa Gelzis, Enrique Carrizosa Gelzis, Felipe Carrizosa Gelzis v. Republic of Colombia*, PCA Case No. 2018-56, Submission of the United States of America, 1 May 2020 (**Exhibit RL-0067**), ¶ 10.

101 Peru-Canada Free Trade Agreement, 1 August 2009 (**Exhibit C-0001**), Article 802(3).

102 Scotiabank's Response, ¶ 69 (emphasis in original).

sector. Therefore, the application of Chapter Eleven should not be easily disregarded or circumvented.[103]

94. To conclude, what the Claimant requests is for the Tribunal to interpret the nature of the measure that affects the financial institution and to determine whether, based on that "nature", the measure in question is comprised by Article 1101(1).[104] This is unsupported by the terms of Article 1101(1). The Contracting States did not leave that interpretation and determination to the Tribunal, as they did, for instance, as regards what constitutes a taxation measure. That is why they opted for a broad, all-comprehensive language: "measures relating to financial institutions".

b. Article 1101 is not restricted to measures relating to the financial sector "at large"

95. To recall, pursuant to Article 1118, a "financial institution", is "*any financial intermediary or other enterprise that is authorized to do business and regulated or supervised as a financial institution under the law of the Party in whose territory it is located*".[105] In this case, it is undisputed that Scotiabank and Scotiabank Peru are financial institutions in accordance with Canadian and Peruvian Law, respectively.[106] The Claimant therefore agrees with the meaning of the subjective term of the definition of Article 1101.

96. Rather, the Claimant's argument is that the 2021 Constitutional Court Decision does not fall within Article 1101, because it did not apply with respect to the financial sector "*at large*". In this regard, the Claimant argues that there is no "*legally significant connection*" between the 2021 Constitutional Court Decision and "*financial institutions <u>at large</u> or <u>the regulation</u> of financial institutions*."[107] Once again, the Claimant seeks to rewrite the FTA to unduly introduce terms which were not agreed by the Contracting States.

---

103 The Respondent notes that this regime is in stark contrast with that adopted towards the relation between Chapters Eight and Nine (Cross-Border Trade in Services), as governed by Article 802(4). Instead of excluding any measure covered by Chapter Nine, Article 802(4) incorporates Articles 906 and 909 into Chapter Eight. This difference is not arbitrary. To the contrary, it reaffirms the Contracting States' intention to favour the application of Chapter Eleven over Chapter Eight, which is consistent with the broad definition of the scope of Chapter Eleven in Article 1101.

104 Scotiabank's Response, ¶¶ 62, 69-70.

105 Peru-Canada Free Trade Agreement, 1 August 2009 (**Exhibit C-0001**), Article 1118.

106 Scotiabank's Response, ¶ 64.

107 Scotiabank's Response, ¶ 76 (emphasis added).

97. ***First***, and as explained above, Article 1101 does not refer to "measures relating to financial institutions at large", nor to "measures relating to the financial sector". On the contrary, Article 1101, as drafted, comprises measures that may have been adopted exclusively with regards to **one** specific financial institution. This is evinced by the fact that it refers to "*investments of such investors, in financial institutions*"[108] which will have been made in specific entities, not in the financial sector "at large". Article 1101(1) refers specifically to those financial institution(s) that are relevant to the investment and not to the financial sector "at large", as Scotiabank would have it.

98. ***Second***, since the FTA contains no definition of the term "relating to", it should be construed in accordance with its ordinary meaning. The phrase "relating to" is synonymous with "connected to", and merely signals the existence of a connection between two elements.[109] It is evident that the 2021 Constitutional Court Decision is "connected" to Scotiabank Peru.

99. ***Third***, even applying the test proposed by the Claimant, that there must be a "legally significant connection" between the measure and the financial institution, this test is fulfilled.[110] The Claimant cites for this purpose the Partial Award in *Methanex v. USA*, an arbitration decided under the NAFTA.[111] Specifically, the *Methanex* tribunal found that the phrase *"'relating to' in Article 1101(1) NAFTA* [equivalent to 801 FTA] *signifies something more than the mere effect of a measure on an investor or an investment*".[112] According to the *Methanex* tribunal, a "legally significant connection" is required. The findings of the *Methanex* tribunal on this point were based on the position espoused by the USA in the arbitration, in the following terms:

> [T]he USA contends that, in the context of Article 1101(1), the phrase "relating to" requires a legally significant connection between the disputed measure and the investor. It argues that measures of general application, especially measures aimed at the protection of human health and the environment (such as those at

---

108 Peru-Canada Free Trade Agreement, 1 August 2009 (**Exhibit C-0001**), Article 1101(1)(b) (emphasis added).

109 Merriam-Webster Dictionary, "relate to": https://www.merriam-webster.com/dictionary/relate%20to, accessed on 14 September 2023 (**Exhibit R-0017**); Cambridge Dictionary, "relating to": https://dictionary.cambridge.org/dictionary/english/relating-to, accessed on 14 September 2023 (**Exhibit R-0018**); Oxford Learners' Dictionary, definition of "relate to": https://www.oxfordlearnersdictionaries.com/definition/english/relate-to, last accessed on 25 September 2023 (**Exhibit R-0022**).

110 Scotiabank's Response, ¶ 76.

111 Scotiabank's Response, ¶ 76.

112 *Methanex Corporation v. United States of America*, UNCITRAL, Partial Award, 7 August 2002 (**Exhibit CL-0035**), ¶ 147; *See also*, *William Ralph Clayton, William Douglas Clayton, Daniel Clayton and Bilcon of Delaware, Inc. v. Government of Canada*, PCA Case No. 2009-04, Award on Jurisdiction and Liability, 17 March 2015 (**Exhibit CL-0003bis**) ¶ 240, on which the Claimant relies in reference to the observations of the *Methanex* tribunal. Therefore, the same considerations apply.

> issue here), are, by their nature, likely to affect a vast range of actors and economic interests. Given their potential effect on enormous numbers of investors and investments, there must be a legally significant connection between the measure and the claimant investor or its investment. It would not be reasonable to infer that the NAFTA Parties intended to subject themselves to arbitration in the absence of any significant connection between the particular measure and the investor or its investments.[113]

100. As is clear from the quote above, the USA's and the tribunal's concern behind requiring a "legally significant connection" to exist was to rule out measures of general application that may have only distantly affected the investor and its investment.

101. This standard is clearly fulfilled in the present case. The 2021 Constitutional Court Decision is a particular measure issued specifically in relation to Scotiabank Peru, following legal proceedings initiated by Scotiabank Peru, with regards to a tax debt imposed on Scotiabank Peru. The 2021 Constitutional Court Decision has legal effects on Scotiabank Peru, specifically. There can be no doubt of the "legally significant connection" between Scotiabank Peru and the 2021 Constitutional Court Decision.

102. A similar conclusion follows from the other NAFTA case cited by the Claimant on this point, *Lone Pine Resources v. Canada*. Following the *Methanex* Partial Award, the *Lone Pine* tribunal found that, when analysing whether the threshold for a "legally significant connection" is met, tribunals should consider *inter alia* "*whether the impugned measure has had an "immediate and direct effect" on the investor or the investment*".[114] What the Claimant complains in this arbitration is, precisely, the alleged "immediate and direct effect" that the 2021 Constitutional Court Decision had on its investment. Therefore, it would be impossible for the Claimant to deny the "legally significant connection" between the 2021 Constitutional Court Decision and its investment.

103. ***Fourth***, the fact that Article 1101 can apply to measures adopted specifically with regards to a single entity, not the financial sector "at large", is supported by jurisprudence. As the Claimant itself acknowledges, the measure addressed by the tribunal in the *Fireman's Fund* arbitration had been adopted with respect to a specific financial institution, Banco BanCrecer, not the financial sector "at

---

113 *Methanex Corporation v. United States of America*, UNCITRAL, Partial Award, 7 August 2002 (**Exhibit CL-0035**), ¶ 130.

114 *Lone Pine Resources Inc. v. Government of* Canada, ICSID Case No. UNCT/15/2, Final Award, 21 November 2022 (**Exhibit CL-0033**), ¶¶ 402-403.

large".[115] This was not an impediment for the tribunal to find that it lacked jurisdiction over the claimant's claim under Chapter Fourteen of the NAFTA (equivalent to Chapter Eleven of the FTA).[116]

104. ***Fifth***, Scotiabank argues that "[t]*he 2021 Constitutional Court Decision is a measure that could have affected any investment in any industry.* […] *Access to constitutional protection under the "amparo" procedure is open to any person in Peru, not only financial institutions*."[117] With respect, the reasoning is fallacious. Other than the obvious fact that *amparo* procedures are open to any person in Peru, as part of the rule of law, the measure of which the Claimant complains in this arbitration is the 2021 Constitutional Court Decision, **not** the *amparo* procedure. This is unacceptable, in particular in the face of the Claimant's iterated allegations regarding the alleged "recharacterization" of the measures at dispute. Now, conveniently, the Claimant chooses to change the target of its complaints to the *amparo* procedure, rather than the 2021 Constitutional Court Decision.

2. The object and purpose of the FTA and of Chapter Eleven confirm the Respondent's interpretation

105. As explained above, the terms of Article 1101, in their context, are clear: the provision applies broadly to any and all measures adopted as regards financial institutions, including the 2021 Constitutional Court Decision. Contrary to the Claimant's allegations, this interpretation is further confirmed by the object and purpose of the FTA (**a**) and, specifically, of Chapter Eleven (**b**).

a. The object and purpose of the FTA is to pursue economic growth while preserving the State's ability to safeguard public welfare

106. The Claimant directs the Tribunal's attention to what it alleges is the object and purpose of the FTA, stating that "[…] *in public statements leading up to the implementation of the FTA, the Government of Canada repeatedly stated that the FTA was intended to strengthen protections for Canadian investments, including investments by and in respect of financial institutions. There was no*

---

[115] Scotiabank's Response, ¶ 77 ("*It is not a measure like the one in* Fireman's Fund *that was designed to bail out a bank in a time of crisis* […]").

[116] *Fireman's Fund Insurance Company v. United Mexican States*, ICSID Case No. ARB(AF)/02/1, Decision on the Preliminary Question, 17 July 2003 (**Exhibit RL-0005**), ¶¶ 91, 109, 112.

[117] Scotiabank's Response, ¶ 77.

suggestion that claims by financial institutions, at large, were to be treated any differently."[118] The Claimant's submission is contrary to the most basic rules of treaty interpretation.

107. ***First***, the terms of Article 1101(1), in their context, are clear. Therefore, reference to the object and purpose of the FTA or of Chapter Eleven is not needed.[119]

108. ***Second***, and in any event, unilateral statements of Canadian officials that have no interpretative value under the VCLT. Besides they are extremely broad. Specifically, the Claimant relies on: (*i*) statements made by the Canadian former Minister of International Trade, Mr. Stockwell Day, stating that the FTA "*will provide opportunities for Canadian companies looking to expand their business into Latin America*" and that it would "*open new doors in key sectors such as extractive industries, manufacturing, agriculture and financial services - all areas in which Canadians have extensive expertise*";[120] and (*ii*) Official Reports of the Canadian House of Commons, to a similar effect.[121] The Claimant does not explain how these unilateral statements by Canadian officials would evince the common intent of the Contracting States regarding the object and purpose of the FTA, in accordance with Article 31.[122] They do not. The statements are utterly irrelevant to the Tribunal's interpretation of the FTA.

---

118 Scotiabank's Response, ¶ 71 (emphasis in original).

119 'Article 31', *Vienna Convention on the Law of Treaties: A Commentary* (Oliver Dörr & Kirsten Schmalenbach, eds.) (Springer-Verlag GmbH Germany 2018), 559-616 (**Exhibit RL-0087**), p. 586, ¶ 57 ("*The consideration of object and purpose finds its **limits in the ordinary meaning of the text** of the treaty. It may only be used to bring one of the possible ordinary meanings of the terms to prevail and cannot establish a reading that clearly cannot be expressed with the words used in the text*.") (emphasis added). *See also*, *The United States of America and the Federal Reserve Bank of New York v. The Islamic Republic of Iran and Bank Markazi Iran*, IUSCT Case No. A28, Decision (Decision No. DEC 130-A28-FT), 19 December 2000 (**Exhibit RL-0047**), ¶ 58 ("*Even when one is dealing with the object and purpose of a treaty, which is the most important part of the treaty's context, the object and purpose **does not constitute an element independent of that context**. **The object and purpose is not to be considered in isolation from the terms of the treaty**; it is intrinsic to its text. It follows that, under Article 31 of the Vienna Convention, a treaty's object and purpose is to be used only to clarify the text, not to provide independent sources of meaning that contradict the clear text*.") (emphasis added).

120 "Trade Agreement with Peru Opens Doors to Latin America", Global Affairs Canada, Government of Canada, 18 June 2009 (**Exhibit C-0058**); "Minister Day Announces Canada-Peru Free Trade Agreement", Global Affairs Canada, Government of Canada, 4 August 2009 (**Exhibit C-0059**).

121 Canada House of Commons Debates, Official Report (Hansard 41), 20 April 2009 (**Exhibit C-0056**); Canada House of Commons Debates, Official Report (Hansard 64), 29 May 2009 (**Exhibit C-0057**). *See also*, Scotiabank's Response, ¶ 71.

122 'Article 18', *Vienna Convention on the Law of Treaties: A Commentary* (Oliver Dörr & Kirsten Schmalenbach, eds.) (Springer-Verlag GmbH Germany 2018), 243-260 (**Exhibit RL-0086**), p. 256, ¶ 32 ("*The essential criterion for shaping the interim obligation according to Art 18 is the object and purpose of the treaty, the term being used here with the **same meaning as in other provisions** of the Convention, for example in Arts 19 or 31. As in those articles, "object and purpose" refers to the reasons for which the States concluded the treaty and to the general result, which they want to achieve through it*.") (emphasis added).

109. ***Third***, and moreover, the documents on which the Claimant relies merely contain high-level statements about "opening markets" and creating new investment opportunities for Canadian companies, and do not mention specific investment protections or dispute settlement provisions. Therefore, they cannot be used to draw any conclusions on specific aspects of the protections under the FTA. The Claimant's reliance on the Minister's statements to claim that there was no "*suggestion that claims by financial institutions, at large, were to be treated differently*" is inapposite.[123] There was no mention whatsoever of the protections that **any** investor would be entitled to.

110. ***Fourth***, the Respondent refers to the Claimant's claim that "*Peru's argument overlooks that the predecessor agreement to the FTA contained broader language*."[124] The Respondent rejects the Claimant's proposition that the FIPA had "*broader language*" than the FTA.[125] The Claimant alleges that the FTA added language in Article 1101 so that Chapter Eleven "*applies to measures adopted or maintained by a Party relating to: (a) financial institutions* […]".[126] The Claimant argues that the introduction of the terms "measures" and "relating to" had the purpose of restricting the application of Chapter Eleven. This makes no sense, particularly considering the broad definition of "measure" provided under Article 105 of the FTA, transcribed above, which extends to **any** regulations and procedures.[127] Moreover, prior treaty practice between the parties is not considered part of the relevant "context" for interpretive purposes under Article 31 VCLT.[128]

111. ***Fifth***, determining the object and purpose of the FTA entails a more rigorous exercise than merely citing isolated unilateral statements by an official of one of the Contracting States, as proposed by the Claimant. Generally, arbitral tribunals have found guidance in the preamble of the treaty, as "*the normal place where the parties would embody an explicit statement to that effect*."[129] In this case,

---

123 Scotiabank's Response, ¶ 71.

124 Scotiabank's Response, ¶ 67.

125 Scotiabank's Response, ¶ 62. *See also* Peru-Canada Foreign Investment Promotion and Protection Agreement, 20 June 2007 (**Exhibit R-0090**), Article 21.

126 Peru-Canada Free Trade Agreement, 1 August 2009 (**Exhibit C-0001**), Article 1101(1) (emphasis added).

127 *See* above, ¶ 86. For ease of reference: Peru-Canada Free Trade Agreement, 1 August 2009 (**Exhibit C-0001**), Article 105 defines "measure" as: "*includes any law, regulation, procedure, requirement or practice*".

128 *Nova Scotia Power Incorporated v. Bolivarian Republic of Venezuela (II)*, ICSID Case No. ARB(AF)/11/1, Award, 30 April 2014 (**Exhibit RL-0057**), ¶ 83 and fn. 137 ("*Each treaty or international agreement is a different bargain struck and based on different sets of circumstances*."; "[T]*he prior treaty making practice of two States does not fit within the "context" outlined in Article 31(2) of the VCLT, and, in the event that supplementary means of interpretation under Article 32 of the VCLT are to be employed, nor does it fit within those enumerated*.").

129 'Article 31', *Vienna Convention on the Law of Treaties: A Commentary* (Oliver Dörr & Kirsten Schmalenbach, eds.) (Springer-Verlag GmbH Germany 2018), 559-616 (**Exhibit RL-0087**), p. 583, ¶ 49; *See also*, 'Article 18', *Vienna Convention on the Law of Treaties: A Commentary* (Oliver Dörr & Kirsten Schmalenbach, eds.) (Springer-Verlag

the Preamble of the FTA evinces the Contracting States' desire to preserve certain specific sectors of the economy. Accordingly, the Preamble of the FTA provides, *inter alia*, the Contracting States' intent to "[p]*romote broad-based economic development in order to reduce poverty*" and to "[p]*reserve their flexibility to safeguard the public welfare*".[130] Therefore, it is simply not true that the object and purpose of the FTA is to "*strengthen protections for Canadian investments*". To the contrary, the Preamble of the FTA itself recognizes the need to achieve a balance between economic development and the preservation of public welfare, which obviously includes an area as crucial to the national economy as the financial sector. This is consistent with the Contracting State's intention to ensure that the tailor-made regime in Chapter Eleven would comprehensively apply to the financial sector, including measures adopted with regards to financial institutions.

b. The object and purpose of Chapter Eleven is to provide a separate regime to comprehensively govern the financial sector

112. In any event, Article 1101 should be considered in its context, with particular regard to the object and purpose of the specific Chapter to which it belongs. This is acknowledged by the Claimant, as evinced by the references in its Response to the object and purpose of Chapter Eleven as a relevant factor to interpret Article 1101.[131] However, the interpretation that the Claimant makes of this object and purpose is misguided.

113. According to Scotiabank, both the tribunal's finding and Canada's NDPS in *Fireman's Fund* would confirm its interpretation that "*the financial services chapter is about measures relating to the financial services sector*."[132] This is not supported by the documents on which the Claimant relies. Rather, the tribunal's decision and Canada's NDPS demonstrate that the clear intention of the Parties to provide, in Chapter Eleven, a tailor-made regime for measures and entities in the financial sector which would operate separately from the Investment Chapter of the FTA.

114. ***First***, contrary to the Claimant's contention, Canada's NDPS submission in *Fireman's Fund* emphasises the Contracting States' objective to create a separate regime for financial services.

GmbH Germany 2018), 243-260 (**Exhibit RL-0086**), p. 256, ¶ 34 ("*There are various ways of **identifying object and purpose** of a treaty or a treaty provision. Some treaties contain general clauses specifically stating their purposes, Art 1 UN Charter being the obvious example. Also, recourse to the title of the treaty may be helpful. Moreover, the preamble of a treaty is regularly a place where the parties list the purposes they want to pursue through their agreement*.") (emphasis added).

130 Peru-Canada Free Trade Agreement, 1 August 2009 (**Exhibit C-0001**), Preamble.

131 Scotiabank's Response, ¶ 64 *et seq*.

132 Scotiabank's Response, ¶ 74 (emphasis in original).

Indeed, the Claimant selectively quotes from Canada's NDPS submission to support its allegation that the operative word in Article 1101(1) is "measures", as follows:

> [The provisions in Chapter 14] represent the balance of rights and obligations negotiated by the NAFTA Parties to govern trade in financial services. The intention of the NAFTA Parties to create a separate regime to govern *measures relating to financial services* within the NAFTA is clearly expressed in the provisions governing the scope and coverage of various Chapters.[133] [Emphasis in the Claimant's Response]

115. What the Claimant omits to mention are the sections of Canada's NDPS that contradict its position, and which show that Chapter Fourteen of NAFTA was intended to act as a comprehensive regime applicable to **investors** in the financial sector, establishing:

> In recognition of the uniqueness and importance of the financial services sector, the NAFTA Parties negotiated a set of rules and disciplines specific to that sector. These rules and disciplines are found in Chapter Fourteen. […] All of these provisions have been tailored to the specific nature of the financial services sector. […]
>
> The intention of the NAFTA Parties to create a separate regime to govern measures relating to financial services within the NAFTA is clearly expressed in the provisions governing the scope and coverage of various Chapters.
>
> The scope and coverage of Chapter Fourteen is set out in Article 1401(1), which provides: [citation to Article 1401(1) of the NAFTA omitted]
>
> Thus, Chapter Fourteen applies to measures related to both investments and cross-border trade in financial services. […]
>
> The only provisions of the general regime for investment and cross-border trade in services applicable in the financial services sector are those expressly incorporated by reference into Chapter Fourteen through Article 1401(2) […]
>
> Under Chapter Fourteen, the NAFTA Parties determined the balance of rights and obligations for financial services, including the applicable level of protection **for investors**.[134]

116. Further, contrary to the Claimant's misrepresentations, Canada emphasised the importance of the subjective element of Article 1401 NAFTA:

> Given that Chapters Fourteen and Eleven are mutually exclusive, one must determine which Chapter applies in respect of a particular measure. In this case,

---

133 Scotiabank's Response, ¶ 74(a) (emphasis in original).

134 *Fireman's Fund Insurance Company v. United Mexican States*, ICSID Case No. ARB(AF)/02/1, First Submission of Canada Pursuant to Article 1128 of the NAFTA, 27 February 2003 (**Exhibit RL-0004**), ¶¶ 9-12, 14, 17 (emphasis added).

> a central issue is what constitutes a 'financial institution' for the purposes of Article 1416.[135]

117. Therefore, Canada's NDPS does not support the Claimant's contention that the term "measures" is the key term in Article 1101, to the detriment of the other elements in the provision. Moreover, Canada acknowledges that the object and purpose of Chapter 14 of the NAFTA was to create a separate regime applicable to the financial sector as a whole and to investors in the financial sector, such as Scotiabank.

118. ***Second***, according to the Claimant, the decision of the *Fireman's Fund* tribunal would also support its contention that Chapter Eleven should apply only to financial regulations.[136] This does not arise from the quote of the *Fireman's Fund* decision on which the Claimant relies:

> Looked at from the design of the NAFTA, it is evident that the drafters carved out the financial sector from significant portions of the general provisions, because none of the state Parties was prepared to engage in the kind of harmonization and deregulation that would have been necessary to treat banks, insurance companies, and securities firms (as well as other participants in the financial sector) in the same way as, say, the soft drink, retail trade, or shoe manufacturing industries. As noted above, Chapter Fourteen and the Annexes applicable to that Chapter contain significant differences from the general provisions on national treatment, omit a provision on "fair and equitable treatment," and limit resort to investor-state arbitration. All of these differences, it is clear, are designed to leave room for national decision-making rather than harmonization, and to limit the opportunity of investors from another state Party to resort to international dispute settlement to challenge regulatory measures taken by the respective national authorities.[137]

119. Importantly, the *Fireman's Fund* tribunal did not find that Chapter Fourteen carved out "certain specific measures with regards to the financial sector" or "regulatory measures in the financial sector". Rather, the Contracting States chose to carve out the financial sector as a whole. The fact that the tribunal expressly recognizes that Chapter Eleven limits the opportunity of investors to resort to arbitration to challenge "regulatory measures" does not mean, *a contrario*, that non-regulatory measures may be freely challenged under the general regime in Chapter Eight, as if the investor did not belong to the financial services sector. This is simply unsupported by the terms of

---

135 *Fireman's Fund Insurance Company v. United Mexican States*, ICSID Case No. ARB(AF)/02/1, First Submission of Canada Pursuant to Article 1128 of the NAFTA, 27 February 2003 (**Exhibit RL-0004**), ¶ 18 (emphasis added).

136 Scotiabank's Response, ¶ 74(b).

137 *Fireman's Fund Insurance Company v. United Mexican States*, ICSID Case No. ARB(AF)/02/1, Decision on the Preliminary Question, 17 July 2003 (**Exhibit RL-0005**), ¶ 83 (emphasis added).

Article 1101, and contrary to the Contracting States' intention to carve out the financial sector and subject it to a specific regime.

120. ***Third***, when interpreting Article 1101(1), the specific object and purpose of the provision in itself should be considered.[138] In this sense, Article 1101(1) serves as the gatekeeper to Chapter Eleven. Considering the sensitivity of the financial sector, the Contracting States preferred a clean-cut, broad gateway to Chapter Eleven, under which all measures related to the financial services sector would fall under its scope, regardless of whether they have regulatory nature or are adopted considering the particularities of the financial sector. By doing so, the Contracting States chose not to make the application of Chapter Eleven conditional on the nature or scope of the measures in question and, therefore, vulnerable to conflicting interpretations that could affect and limit its application. The broad language of Article 1101 is in keeping with the Contracting Parties' objective of providing a specific and more restricted regime under Chapter Eleven. Accordingly, the Claimant should not be allowed to escape the application of Chapter Eleven by rewriting the terms of Article 1101(1).

121. ***Fourth***, and in any event, Scotiabank could not argue that the proposition that any claims submitted by financial institutions would fall under Chapter Eleven would lead to an unjust or unreasonable result. It is irrefutable that the Contracting Parties meant to create, and provided, a comprehensive, tailor-made regime for measures applicable to investments and investors in the financial services sector, with its own substantive protections (National Treatment,[139] MFN,[140] Right of Establishment,[141] Cross-Border Trade,[142] New Financial Services,[143] Senior Management and Boards of Directors,[144] Payment and Clearing Systems[145]) and dispute resolution provisions (including, specifically, as regards Investment Disputes[146]), as well as substantive protections incorporated from

---

138 Richard Gardiner, *Treaty Interpretation* (Oxford University Press, 2nd edn., 2015), 161-222 (**Exhibit RL-0083**), p. 210 ("*While the object and purpose of the treaty, as analysed below, is a distinct element assisting the interpreter towards giving meaning to the relevant term in a similar way to the assistance provided by the context, a role for the* ***object and purpose of a particular treaty provision*** *(as distinct from the object and purpose of the treaty as a whole) is not singled out in the general rule*.") (emphasis added).

139 Peru-Canada Free Trade Agreement, 1 August 2009 (**Exhibit C-0001**), Article 1102.

140 Peru-Canada Free Trade Agreement, 1 August 2009 (**Exhibit C-0001**), Article 1103.

141 Peru-Canada Free Trade Agreement, 1 August 2009 (**Exhibit C-0001**), Article 1104.

142 Peru-Canada Free Trade Agreement, 1 August 2009 (**Exhibit C-0001**), Article 1105.

143 Peru-Canada Free Trade Agreement, 1 August 2009 (**Exhibit C-0001**), Article 1106.

144 Peru-Canada Free Trade Agreement, 1 August 2009 (**Exhibit C-0001**), Article 1108.

145 Peru-Canada Free Trade Agreement, 1 August 2009 (**Exhibit C-0001**), Article 1113.

146 Peru-Canada Free Trade Agreement, 1 August 2009 (**Exhibit C-0001**), Article 1117.

other chapters (Transfers, Expropriation and Denial of Benefits, and the right to arbitration regarding breaches thereof).[147]

3. Supplemental sources of interpretation, such as the *travaux préparatoires*, are inapplicable

122. In its Response, the Claimant argues that Scotiabank's position is "*not an argument that is based on "genuinely indisputable" rules of law. Interpretive aids such as the travaux préparatoires will need to be considered*."[148] Seeking to push forward the arbitration, Scotiabank alleges that this exercise could not be adequately dealt with under Rule 41. Contrary to Scotiabank's allegations, recourse to the *travaux préparatoires* is not necessary since Article 1101(1) can be clearly and conclusively interpreted by the means set forth in Article 31 VCLT, as the Respondent has demonstrated.

123. ***First***, once again, Scotiabank completely disregards the rules applicable to treaty interpretation under the VCLT. To state the obvious, resort to supplementary materials, such as the *travaux préparatoires* is not mandatory. Article 32 VCLT provides in this regard:

> Recourse **may** be had to supplementary means of interpretation, including the preparatory work of the treaty and the circumstances of its conclusion, in order to confirm the meaning resulting from the application of article 31, or to determine the meaning when the interpretation according to article 31:
>
> (a) leaves the meaning ambiguous or obscure; or
>
> (b) leads to a result which is manifestly absurd or unreasonable.[149]

124. What is more, Articles 31 and 32 should be applied hierarchically. Only in the event that the result of the application of Article 31 is unsatisfactory, leaving the meaning ambiguous or leading to an unreasonable result, can the interpreter have recourse to supplementary interpretive materials under Article 32.[150] This is not the case here: the terms of Article 1101 are clear, and further

---

147 Peru-Canada Free Trade Agreement, 1 August 2009 (**Exhibit C-0001**), Article 1101(2)(b).

148 Scotiabank's Response, ¶ 78.

149 Vienna Convention on the Law of Treaties, 27 January 1980 (**Exhibit CL-0053**), Article 32 (emphasis added).

150 'Article 32', *Vienna Convention on the Law of Treaties: A Commentary* (Oliver Dörr & Kirsten Schmalenbach, eds.) (Springer-Verlag GmbH Germany 2018), 617-633 (**Exhibit RL-0088**), p. 628, ¶ 28 ("*Nothing in the rules on interpretation precludes a treaty interpreter from looking at the preparatory work in the process of interpretation. What is restricted by the Vienna rules, however, is to actually base a finding on such material at the outset of the process of interpretation, and they do so in order to prevent the agreement of the parties from being replaced by the content of unconsummated exchanges of proposals and arguments that preceded the finalization of the treaty. Thus, preparatory work is designed to determine the meaning of a treaty provision only when certain qualifying conditions are met. And Art 32 contains a procedural restriction in that the interpretative means which are only 'supplementary' may not be employed first, but only after the general rule laid down in Art 31 has been applied*.") (emphasis in original); Charles N. Brower, Devin Bray, et al., 'Chapter 6: Competing Theories of Treaty

confirmed by the object and purpose of the FTA and Chapter Eleven. It is simply not necessary for the Tribunal to consider and analyse the *travaux*, and it should reject the Claimant's strategy, exclusively directed at further delaying these proceedings.

125. ***Second***, and moreover, the Claimant's reliance on *MOL v. Hungary* to support its proposition that "*an examination of the history and negotiation of the treaty* […] *is unsuitable for determination under Rule 41*" is inapposite.[151] As explained, the specific issues of interpretation in *MOL* were effectively novel, intricate and there was a real lack of documentation on the ECT.[152] The Claimant divorces the facts in *MOL v. Hungary* from the ruling to heighten the standard applicable under Rule 41. Moreover, the vast majority of Rule 41 jurisprudence consistently found that Rule 41 proceedings are adequate to address and resolve complicated legal discussions.[153] In fact, that is precisely what numerous Rule 41 tribunals have done in practice, and the Tribunal should not abstain from conducting this exercise.

B. THE 2021 CONSTITUTIONAL COURT DECISION IS A TAXATION MEASURE WHICH SUBSTANCE IS INEXTRICABLE FROM THE TAX DEBT

126. The Respondent submits that the 2021 Constitutional Court Decision of which the Claimant complains in this arbitration constitutes a Tax Measure, comprised under Article 2203 of Chapter Twenty-two of the FTA. Therefore, the Tribunal lacks jurisdiction over the Claimant's claims for alleged breaches of Article 805 (Minimum Standard of Treatment) and 812 (Expropriation). To recall,

---

Interpretation and the Divided Application by Investor-State Tribunals of Articles 31 and 32 of the VCLT', *in* Esme Shirlow and Kiran N. Gore (eds), *The Vienna Convention on the Law of Treaties in Investor-State Disputes: History, Evolution and Future* (Kluwer Law International, 2022) (**Exhibit RL-0089**), p. 118 ("*Thus recourse to supplementary materials is available to a tribunal under Article 32 only if it serves to confirm a prior meaning derived from Article 31 or to resolve an ambiguity, obscurity, or a manifest absurdity or unreasonability arising from the interpretation under Article 31. Thus Article 32 acts as a gatekeeper, preserving the primacy of the plain language of the treaty as spelled out in Article 31, diverging only when Article 31 produces ambiguous, obscure, manifestly absurd or unreasonable results, which terms suggest a high threshold to engage Article 32*."); *Murphy Exploration and Production Company International v. Republic of Ecuador (I)*, ICSID Case No. ARB/08/4, Award on Jurisdiction, 15 December 2010 (**Exhibit RL-0051**), ¶ 71 ("*Taking into account the general rule on the interpretation of treaties of Article 31(1) of the Vienna Convention on the Law of Treaties of 1969, the Tribunal considers that the language of Article 25(4) is clear and unambiguous. It also considers unnecessary to resort to supplementary means of interpretation, in accordance with Article 32 of the Vienna Convention, in order to interpret the ICSID Convention in good faith, within its context and considering its purpose.*"); *Asian Agricultural Products Ltd. (AAPL) v. Republic of Sri Lanka*, ICSID Case No. ARB/87/3, Award, 27 June 1990 (**Exhibit RL-0046**), ¶ 40 ("*The first general maxim of interpretation is that it is not allowed to interpret what has no need of interpretation. When a deed is worded in a [sic] clear and precise terms, when its meaning is evident and leads to no absurd conclusion, there can be no reason for refusing to admit the meaning which such deed naturally presents*.") (emphasis added).

151 Scotiabank's Response, ¶ 78.

152 *See* above, § II.B.

153 *See above*, § II.B.

although claims for expropriation are clawed back into Article 2203, that is subject to the satisfaction of certain prerequisites laid out in Article 2203(8). Specifically, an investor must "*refer the issue of whether a measure is not an expropriation for a determination to the designated authorities of the Parties*".[154] Only after six months have elapsed from the date of such referral, should the designated authorities fail to consider or agree on the issue, may the investor submit its claim for an alleged violation of Article 812 to arbitration.[155] The Claimant in its Response makes no submissions in this regard, and unsurprisingly so. It is undisputed that the Claimant failed to comply with the condition precedent laid out in Article 2203(8) and made no referral to the SUNAT for the determination of whether the challenged measure is expropriatory. As a result, the Claimant cannot avail itself of the claw-back under Article 2203, and the tribunal lacks jurisdiction over the Claimant's expropriation claim.[156]

127. In its Response, the Claimant advances two arguments in rebuttal: *first*, it alleges that "*Peru has mischaracterized the nature of Scotiabank's claim and then argued why that claim is a taxation measure. That is not appropriate*.";[157] *second*, the Claimant argues that investment case law and Peruvian law support its contention that the 2021 Constitutional Court Decision should not be considered a taxation measure. Both arguments are wrong.

128. As the Respondent establishes below, the Claimant's argument that the Respondent has recharacterized its claim is a gross misrepresentation of the Respondent's arguments (**1**). In addition, both default interest on a tax liability and the 2021 Constitutional Court's Decision constitute "taxation measures" under Article 2203 of the FTA and in light of the investment arbitration case law (**2**). Finally, the Respondent clarifies the role of Peruvian in connection to Article 2203(1) of the FTA. As the Respondent shows, the Claimant has manifestly misrepresented certain elements of Peruvian law. The key elements of Peruvian law that the Tribunal requires to issue a decision on the tax carve-out exception are indisputable (**3**).

---

154 Peru-Canada Free Trade Agreement, 1 August 2009 (**Exhibit C-0001**), Article 2203(8). *See also* Peru-Canada Free Trade Agreement, 1 August 2009 (**Exhibit C-0001**), Articles 823(4), (6).

155 Peru-Canada Free Trade Agreement, 1 August 2009 (**Exhibit C-0001**), Article 2203(8).

156 *See*, Peru's Submission on Rule 41, ¶¶ 83, 102, 186(a), 187.

157 Scotiabank's Response, ¶ 85.

1. The Respondent's arguments relate to the 2021 Constitutional Court Decision, not a "recharacterized" version of the Claimant's claims

129. In its Response, the Claimant alleges that "*Peru has mischaracterized the nature of Scotiabank's claim and then argued why that claim is a taxation measure*."[158] Scotiabank's allegations are based on a misrepresentation of the Respondent's position and unsupported by the arbitral case law on which the Claimant seeks to rely:

130. ***First***, the Claimant's argument that the Respondent has based its objection on an improper recharacterization of the Claimant's claim entirely misrepresents the Respondent's position. Contrary to the Claimant's allegations, the Respondent's position is and has always been that the 2021 Constitutional Court Decision **itself** is a "taxation measure".[159] To be clear: the 1999 SUNAT Decision is a taxation measure, and the decision of the Constitutional Court that confirmed it is also a taxation measure. For this reason, Scotiabank's references to the tribunals' decisions in *ECE Projecktmanagement v. Czech Republic* and *Infinito v. Costa Rica* to support its statements that it is for the claimant to characterize its claims are beside the point.

131. ***Second***, the Claimant cannot shield behind the argument that the Tribunal must take the Claimant's case as pleaded to prevent the Respondent from contesting the nature of the measure it alleges is the relevant one (in this case the 2021 Constitutional Court Decision) and challenge the legal effects that the Claimant ascribes to it (in this case, whether the 2021 Constitutional Court Decision can be considered a taxation measure). To recall, discussions on characterization, as any other legal matter, should allow for complicated legal analysis. The Respondent respectfully asks the Tribunal not to allow the Claimant's tactic to muzzle the Respondent and make a mockery of the consent requirements agreed by the Contracting States, who expressly carved out taxation measures.[160]

---

158 Scotiabank's Response, ¶ 85.

159 Peru's Submission on Rule 41, ¶ 84 *et seq*.

160 The Claimant also relies on the cases *Eli Lilly* and *Urbaser* to support its allegation that the Respondent is recharacterizing its claims in the present case – neither of which assist the Claimant. In *Eli Lilly*, the respondent disputed the measure that the claimant alleged had breached its rights under the applicable treaty, which the Respondent does not question in these Rule 41 proceedings (*see*, *Eli Lilly and Company v. Canada*, ICSID Case No. UNCT/14/2, Final Award, 16 March 2017 (**Exhibit CL-0016**), ¶ 137). Similarly, in *Urbaser*, the alleged "mischaracterization" revolved around the claimants' standing to bring a claim in their own capacity, which is not at dispute in these proceedings (*see*, *Urbaser S.A. and Consorcio de Aguas Bilbao Biskaia, Bilbao Biskaia Ur Partzuergoa v. Argentine Republic*, ICSID Case No. ARB/07/26, Decision on Jurisdiction, 19 December 2012 (**Exhibit CL-0047**), ¶¶ 204, 221).

132. ***Third***, and moreover, the arbitral decisions in *ECE Projecktmanagement* and *Infinito* do not advance the Claimant's position, as the Respondent shows below:

133. The Claimant relies on the final Award issued in *ECE Projektmanagement* to support its contention that "[i]*t is the claimant's prerogative to formulate its claim as it sees fit*".[161] In *ECE Projektmanagement*, the respondent contested the substantive protective standards which the claimant alleged had been breached, arguing that the claimant should have brought claims for denial of justice, instead of alleging the breach of the fair and equitable treatment, non-impairment and expropriation standards. In that context, the tribunal rejected the respondent's argument that the claimant's claims were in essence claims of denial of justice and should be assessed *vis-a-vis* the denial of justice standard under customary international law.[162]

134. Clearly, there is no parallel between *ECE Projektmanagement* and the present dispute, and the Claimant does not even attempt to draw one. Rather, the Claimant simply satisfies itself with citing a single quote, out of its original context. As the Claimant is well-aware, the Respondent is not contesting (and has not contested) the Claimant's ability to submit claims for alleged breaches of the Minimum Standard of Treatment, National Treatment, and Expropriation standards, as it has done. The Respondent is also not affirming or suggesting that the Claimant's claims should have been brought under a different protection standard.

135. The Claimant relies on the tribunal's statement in *Infinito* to the effect that "*at the jurisdictional stage, a tribunal must be guided by the case as put forward by the claimant in order to avoid breaching the claimant's due process rights.*"[163] It bears making two considerations as regards the Claimant's reliance on *Infinito*. *First*, that the *Infinito* tribunal bases its decision on the *ECE Projektmanagement* award which, as explained, bears no resemblance to the present dispute. *Second*, and with respect, the *Infinito* tribunal's observations are not persuasive. It is hard to comprehend in what way would a discussion on the legal effects that a claimant attributes to a measure breach the Claimant's due process rights. The Claimant has had and will continue to have ample opportunity to fully brief the Tribunal on its position (as it has already done in its Response).

---

161 Scotiabank's Response, ¶ 85.

162 *ECE Projektmanagement International GmbH and Kommanditgesellschaft PANTA Achtungsechzigste Grundstücksgesellschaft mbH & Co v. The Czech Republic*, PCA Case No. 2010-05, Final Award, 19 September 2013 (**Exhibit CL-0013**), ¶ 4.741.

163 Scotiabank's Response, ¶ 86; *Infinito Gold Ltd. v. Republic of Costa Rica*, ICSID Case No. ARB/14/5, Decision on Jurisdiction, 4 December 2017 (**Exhibit CL-0026**), ¶ 185.

In effect, the limitations on the parties' ability to hold discussions on the facts is meant to ensure the Parties' due process rights. However, the same restrictions do not apply to legal discussions, in particular when they merely consist of drawing the legal consequences of undisputed facts.

136. ***Fourth***, arbitral tribunals have often analysed and ruled on the claimants' characterization of their claims, including under Rule 41 proceedings. The case of *Lotus Holding v. Turkmenistan* is particularly apposite in this regard. The case concerned claims arising from a contract entered between Lotus Enerji, a wholly owned subsidiary of the claimant, and the State of Turkmenistan, for the construction of five power plants.[164] The tribunal's analysis centred on whether the claimant's claims were for breaches of the applicable Turkey-Turkmenistan BIT, as argued, or whether these were rather contractual claims for monies allegedly owed by the government of Turkmenistan. The tribunal rejected the claimant's claims, in the following terms:

> The nature of a contractual claim cannot be altered merely by describing it in different terms. To suggest that non-payment of sums due under a contract in itself constitutes expropriation, or a breach of MFN or national treatment clauses, does not alter the fact that the claim remains one for non-payment under a contract.[165]

137. Thus, in *Lotus*, the tribunal did precisely what the Claimant alleges that tribunals are barred from doing: it rejected the claimant's characterization of its claims, relying instead on the substance of the relief sought. What is more, the tribunal did so in summary Rule 41 proceedings.

138. Similarly, the tribunal seized of a Rule 41 application in *Global Trading v. Ukraine* rejected the claimant's characterization of its investment, analysing the characteristics of the purchase and sale contracts entered into by the claimant with Ukraine to conclude that the claimant lacked an "investment" in terms of the US-Ukraine BIT and Article 25 of the ICSID Convention.[166] Contrary to the Claimant's allegations, these are legal discussions that are not subject to the same limitations as factual disputes.

---

[164] Peru's Submission on Rule 41, ¶¶ 23-24.

[165] *Lotus Holding Anonim Şirketi v. Republic of Turkmenistan*, ICSID Case No. ARB/17/30, Award, 6 April 2020 (**Exhibit RL-0035**), ¶ 171.

[166] *Global Trading Resource Corp. and Globex International, Inc. v. Ukraine*, ICSID Case No. ARB/09/11, Award, 1 December 2010 (**Exhibit RL-0016**), ¶¶ 56-58.

2. Both the 2021 Constitutional Court Decision and the underlying default interest payments are "taxation measures" in accordance with international arbitral case law

139. In its Response, Scotiabank argues that: (*i*) the underlying subject matter of the 2021 Constitutional Court Decision, that is, the default interest accrued on the IGV Liability, is not a "taxation measure";[167] and that (*ii*) the Claimant's claims as regards the 2021 Constitutional Court Decision are for an unfair judicial process, not for the accrual of default interest. Accordingly, it avers that the Decision should not be considered a "taxation measure" in and of itself.[168]

140. The Respondent disagrees on both accounts. International arbitral case law has been clear that the term "taxation measure" is not restricted to measures directly imposing taxes, but rather encompasses any matter sufficiently connected to a taxation law or regulation. This is undoubtedly the case for **both**, the 2021 Constitutional Court Decision and its underlying subject matter, *i.e.*, the default interest payments on a tax liability.

141. To demonstrate this, the Respondent first corrects the Claimant's misrepresentations on how investment arbitration tribunals have interpreted and applied tax carveouts to demonstrate that the "ordinary meaning" of the term "taxation measure" has been construed broadly (**a**), and that the object and purpose of tax carveouts confirms the Respondent's interpretation (**b**). As the Respondent also shows, the Claimant's reliance on *Nissan v. India* as support for its allegation that interest may not be considered a "taxation measure" is also misplaced (**c**).

142. Lastly, the Respondent shows that judicial decisions on the legality of a taxation measure have been considered taxation measures, and that this conclusion is unaltered by the Claimant's contention that its claims relate to the supposed unfair treatment that it was subjected to (**d**).

a. The ordinary meaning of the term "taxation measures" has been construed broadly, to include any measures forming part of the host State's tax regime

143. In its Response, the Claimant advances an alleged "ordinary meaning" argument, claiming that "[t]*ribunals have interpreted the word 'taxation' to mean a measure 'which imposes a liability on classes of persons to pay money to the State for public purposes*."[169] In so doing, the Claimant – once

---

[167] Scotiabank's Response, ¶ 100.

[168] Scotiabank's Response, ¶ 90.

[169] Scotiabank's Response, ¶ 92.

again – quotes from a carefully chosen decision and self-servingly portrays this handpicked quote as a well-established position. The Respondent is compelled to correct the Claimant's misrepresentations:

144. ***First***, the term "taxation measure" is not defined in the FTA. Therefore, it must be interpreted in accordance with international law and the VCLT. In this regard, it bears noting that the ordinary meaning of the term "taxation" may be defined as "*the amount assessed as a tax*"[170] or "*the system of taxing people*".[171] These definitions are obviously broader than the term "tax", and in this case should be construed to include default interest on unpaid tax liabilities which, as the Respondent has demonstrated and further explains below, is (*i*) part of the "tax debt", in accordance with Article 28 of the Peruvian Tax Code and (*ii*) autonomously regulated in the Peruvian Tax Code, and therefore a part of the "system of taxing people".[172] In addition, as the Claimant acknowledges, default interest serves to compensate the State for the delay in payment and also acts as a penalty to compel debtors to comply with their tax obligations.[173] Therefore, default interest is a crucial part of the regime for the enforcement of tax liabilities under Peruvian law. The Respondent further addresses these relevant aspects of Peruvian law below.[174]

145. ***Second***, and accordingly, investment tribunals have interpreted the term "taxation measure" broadly, despite the Claimant's allegations to the contrary. Indeed, the above-quoted definition on which the Claimant relies is a partial excerpt from the test applied by investment tribunals – starting with the *EnCana v. Ecuador* tribunal – to determine whether a given measure should be considered a "taxation measure".[175] The Respondent demonstrates below that the quotation provided by the

---

170 Merriam-Webster, definition of "taxation": https://www.merriam-webster.com/dictionary/taxation, last accessed on 25 September 2023 (**Exhibit R-0019**).

171 Cambridge Dictionary, definition of "taxation": https://dictionary.cambridge.org/dictionary/english/taxation, last accessed on 25 September 2023 (**Exhibit R-0020**). *See also*, Oxford Learners' Dictionary, definition of "taxation": https://www.oxfordlearnersdictionaries.com/definition/english/taxation, last accessed on 25 September 2023 (**Exhibit R-0021**).

172 Peruvian Tax Code, approved by Legislative Decree Nº 816 of 21 April 1996, as compiled by Supreme Decree Nº 133-2013-EF of 22 June 2013 (**Exhibit R-0003bis**), Article 28.

173 Scotiabank's Response, ¶ 80.

174 *See below*, § IV.B.3.

175 *EnCana Corporation v. Republic of Ecuador*, LCIA Case No. UN3481, Award, 3 February 2006 (**Exhibit RL-0008**), ¶ 142(4). *See also Duke Energy Electroquil Partners and Electroquil S.A. v. Republic of Ecuador*, ICSID Case No. ARB/04/19, Award, 18 August 2008 (**Exhibit CL-0012**), ¶ 174; *Burlington Resources, Inc. v. Republic of Ecuador*, ICSID Case No. ARB/08/5, Decision on Jurisdiction, 2 June 2010 (**Exhibit CL-0005**), ¶¶ 131, 164; *Murphy Exploration & Production Company – International v. The Republic of Ecuador (II)*, PCA Case No. 2012-16, Partial Final Award, 6 May 2016 (**Exhibit RL-0028**), ¶ 159; *Nissan Motor Co., Ltd. v. Republic of India, PCA Case No. 2017-37*, Decision on Jurisdiction, 29 April 2019 (**Exhibit CL-0039**), ¶ 384; *BayWa r.e. Renewable Energy GmbH and*

Claimant is taken out of context and that the *EnCana* case supports the Respondent's position, not the Claimant's.

146. In *EnCana*, the tribunal addressed whether certain VAT refunds to which the claimant was allegedly entitled could be considered a "taxation measure" under the Canada-Ecuador BIT. There are three crucial aspects that render the *EnCana* decision particularly apposite: (*i*) the Canada-Ecuador BIT contained a taxation carveout in the same terms as Article 2203 of the FTA; (*ii*) as the FTA, the Canada-Ecuador BIT provided no definition of the term "taxation measure"; and (*iii*) the BIT included a definition of "measure" equivalent to that found in Article 105 of the FTA.

147. The full quote from the *EnCana* decision – as opposed to the selective quote that the Claimant offers – states:

> The question whether something is a tax measure is primarily a question of its legal operation, not its economic effect. A **taxation law** is one which imposes a liability on classes of persons to pay money to the State for public purposes [underlined text corresponds to the quote on which the Claimant relies]. The economic impacts or effects of tax measures may be unclear and debatable; nonetheless **a measure is a taxation measure if it is part of the regime for the imposition of a tax**.[176]

148. As a simple reading of the quote in its entirety reveals, what the Claimant falsely alleges to be the definition of "taxation **measure**" is, in fact, the definition of "taxation **law**". These are two distinct and differentiated concepts, which the Claimant deliberately confounds to strengthen its position. In fact, the *EnCana* tribunal expressly stated:

> **Having regard to the breadth of the defined term "measure", there is no reason to limit Article XII(l) to the actual provisions of the law which impose a tax**. **All those aspects of the tax regime which go to determine how much tax is payable or refundable are part of the notion of "taxation measures"**. Thus tax deductions, allowances or rebates are caught by the term.[177]

BayWa r.e. Asset Holding GmbH v. Kingdom of Spain, ICSID Case No. ARB/15/16, Decision on Jurisdiction, Liability and Directions on Quantum, 2 December 2019 (**Exhibit RL-0066**), ¶ 299; *SunReserve Luxco Holdings SRL v. Italy*, SCC Case No. 132/2016, Final Award, 25 March 2020 (**Exhibit RL-0034**), ¶ 521; *STEAG GmbH v. Kingdom of Spain*, ICSID Case No. ARB/15/4, Decision on Jurisdiction, Liability and Directions on Quantum, 8 October 2020 (**Exhibit RL-0070**), ¶ 325; *Mathias Kruck, Frank Schumm, Joachim Kruck, Jürgen Reiss and others v. Kingdom of Spain*, ICSID Case No. ARB/15/23, Decision on Jurisdiction and Admissibility, 19 April 2021 (**Exhibit RL-0071**), ¶ 318.

176 *EnCana Corporation v. Republic of Ecuador*, LCIA Case No. UN3481, Award, 3 February 2006 (**Exhibit RL-0008**), ¶ 142(4) (emphasis added).

177 *EnCana Corporation v. Republic of Ecuador*, LCIA Case No. UN3481, Award, 3 February 2006 (**Exhibit RL-0008**), ¶ 142(3) (emphasis added).

149. In its Response, the Claimant states that "[i]*f the parties had intended Article 2203 to apply that broadly, they would have used language to that effect.*"[178] Indeed, as illustrated by the *EnCana* tribunal, this is exactly what the Contracting States did under the Peru-Canada FTA.

150. ***Third***, it is clear that the *EnCana* tribunal considered that a "taxation measure" is not restricted to the measures imposing a tax liability. Much to the contrary, in line with the ordinary meaning of the term "taxation", the expression "taxation measure" comprises all measures that are "*part of the regime for the imposition of a tax.*" This is the relevant standard that the Tribunal should apply. As explained above, there can be no doubt that this "regime" encompasses default interest accrued on unpaid taxes and the judicial decisions as to their legality.

151. ***Fourth***, the test proposed by the Claimant — based on a partial and misrepresented quote — is not only inaccurate but leads to absurd results. Under the Claimant's assertion that a tax measure is a "*liability on classes of persons to pay money to the State for public purposes*",[179] any tax assessment made by an authority on the tax liability regarding a specific taxpayer (the "taxation measure" *par excellence*) would not be a taxation measure, since it would by definition concern a specific and concrete taxpayer and not a "class" of persons.

152. ***Fifth***, Scotiabank argues that the function of default interest makes it distinguishable from a taxation measure, alleging that "*taxes are imposed to assist the state with covering social needs and public expenditures. In contrast, interest is imposed on a specific person as a penalty for the late payment of a debt and is compensatory to the government for the loss of use of money because of a taxpayer's default.*"[180] As per its customary practice, Scotiabank reads requirements into the FTA that were not provided by the Contracting States. As noted by the *EnCana* tribunal, the Contracting States did not state that "*nothing in this Agreement shall apply to taxes*", nor did they state that "*nothing in this Agreement shall apply to measures imposed to assist the state with covering social needs and public expenditures*." To the contrary, the Contracting States chose the broad term "taxation measure".

153. ***Sixth***, the Claimant's interpretation of the alleged "ordinary meaning" of the term "taxation measures" also ignores the context of the provision, as prescribed by Article 31 VCLT. The Claimant's

---

178 Scotiabank's Response, ¶ 93.

179 Scotiabank's Response, ¶ 93 (emphasis in original).

180 Scotiabank's Response, ¶ 93 (emphasis in original).

arguments therefore ignore that the very terms of Article 2203, when taken as a whole, show that the tax carveout is intended to apply to measures for the enforcement of tax liabilities:

> **Article 2203**
>
> 1. Except where express reference is made thereto, nothing in this Agreement shall apply to taxation measures. […]
>
> 5. Subject to paragraphs 2, 3, and 6:
>
> (a) Articles 903 (Cross-Border Trade in Services - National Treatment) and Article 1102 (Financial Services - National Treatment) apply to taxation measures on income, capital gains or on the taxable capital of corporations that relate to the purchase or consumption of particular services; and
>
> (b) Articles 803 and 804 (Investment - National Treatment and Most-Favoured Nation Treatment), 903 and 904 (Cross-Border Trade in Services - National Treatment and Most-Favoured Nation Treatment) and 1102 and 1103 (Financial Services - National Treatment and Most-Favoured Nation Treatment) apply to all taxation measures, other than those on income, capital gains or on the taxable capital of corporations.
>
> 6. Paragraph 5 shall not: […]
>
> (g) **apply to any new taxation measure that is aimed at ensuring the equitable and effective imposition or collection of taxes (including, for greater certainty, any measure that is taken by a Party in order to ensure compliance with the Party's taxation system or to prevent the avoidance or evasion of taxes)** and that does not arbitrarily discriminate between persons, goods or services of the Parties.[181]

154. To be clear: the Respondent does not argue, at this stage,[182] that Article 2203(5) should not apply to the Claimant's claims. However, the Respondent respectfully directs the Tribunal's attention to Article 2203(6)(g), which clarifies beyond any doubt that "taxation measures" includes those adopted by a Party "*to ensure compliance with the Party's taxation system*". To state the obvious, if the term "taxation measures" in Article 2203(1) did not include measures designed to enforce tax obligations, the clarification in Article 2203(6)(g) would be unnecessary. In effect, both, the 2021 Constitutional Court Decision and the underlying default interest debt are measures designed for "*ensuring the equitable and effective imposition or collection of taxes*". *First*, as stated, the very reason why default interest on unpaid taxes exists is to compel tax debtors to comply with their obligations. *Second*, it is uncontested that the 2021 Constitutional Court Decision was issued in the

---

[181] Peru-Canada Free Trade Agreement, 1 August 2009 (**Exhibit C-0001**), Article 2203(6)(g) (emphasis added).

[182] The Respondent reserves its rights to submit further arguments under Article 2203(5) at a later stage of the proceedings, should the Tribunal partially or totally dismiss the Respondent's Rule 41 application.

context of *amparo* proceedings regarding the legality of the imposition of default interest on a tax liability, to ensure that it had been rendered in accordance with Scotiabank Peru's constitutional rights.[183] This Decision is therefore part of the Peruvian regime to ensure that the collection and enforcement of debts is equitable.

b. The Respondent's position is aligned and compatible with the object and purpose of the treaty exemption

155. After having laid out its flawed reasoning on the alleged ordinary meaning of the term "taxation measures", the Claimant supposedly interprets Article 2203(1) in accordance with its object and purpose. To this effect, the Claimant acknowledges that the purpose of taxation carve-outs, such as the one in Article 2203(1) of the FTA, is to "*preserve the states' sovereignty in relation to their power to impose taxes*."[184] The Respondent agrees. However, the conclusion that the Claimant draws from this principle is wrong.

156. In its Response, Scotiabank provides a few cherry-picked examples of measures that have been considered by tribunals to relate to the government's sovereign power to impose taxes, including "*taxes on gross income or profits, refunds for value-added tax (VAT), and customs duties.*"[185] Tellingly, the Claimant does not provide any basis to differentiate between those measures that it arbitrarily considers to be a part of the State's sovereign power of taxation and those that fall outside of this category. The Claimant then adds that "[t]*he accrual of default interest does not relate to the sovereign power of taxation*", merely because "[t]*here is no difference between interest accruing on a tax debt or interest accruing on a judicial judgment*", adding that "*they are compensation for the late payment of a liability and not a matter of how taxation is regulated.*"[186] The Claimant's proposition is untenable and merits several remarks:

157. ***First***, it bears noting that the very same examples of measures that the Claimant provides belie the Claimant's assertion that "taxation measure" is synonymous of "taxation law", *i.e.*, a tax *sensu stricto.*

---

183 *See* Peru's Submission on Rule 41, fn. 38.

184 Scotiabank's Response, ¶ 94.

185 Scotiabank's Response, ¶ 95.

186 Scotiabank's Response, ¶ 96.

158. ***Second***, the fact that the concept of a default interest may exist outside the realm of tax liabilities does not mean that default interest on taxes is not a "taxation measure". The Claimant's submission is non-sensical and incongruous, since the very same examples that the Claimant gives as to what it acknowledges are "taxation measures" serve to illustrate the point.

159. For instance, the Claimant recognises that "*refunds for value-added tax*" have been considered taxation measures. Indeed, the concept of refund cuts across all types of economic operations, whether commercial or concerning taxation. A refund can result, for instance, from the overpayment by a commercial consumer of an electricity bill, or from the overpayment of a tax liability by a taxpayer. The ultimate and common purpose of a refund is to return to a party an amount that, for whatever reason, was paid without cause or paid wrongly. This did not prevent tribunals, such as the *EnCana* tribunal on which award both Parties rely – from finding that refunds that relate **specifically** to tax liabilities are taxation measures. The critical element is not whether default interest or refund are common concepts of law that can apply to the commercial, civil, or tax field: the critical and defining element is that the refunds or the accrued interest, as it might be, concern tax liabilities.

160. ***Third***, and in the same vein, court decisions that do not concern the legality of tax liabilities are not "taxation measures", while court decisions which concern, precisely, tax liabilities are "taxation measures", as the Respondent explains below.

161. ***Fourth***, and finally, the Respondent briefly refers to the Claimant's allegations that the *travaux préparatoires* of the FTA will be "*useful evidence*" for the Tribunal to reach a decision on the interpretation of the term "taxation measures" in Article 2203(1).[187] This is not the case.

162. As explained above, under Article 32 of the Vienna Convention on the Law of Treaties, the *travaux préparatoires* constitute a supplementary source for treaty interpretation, which may be consulted only if the ordinary meaning of a provision in accordance with Article 31 VCLT leaves the meaning obscure or leads to a result that is manifestly absurd.[188] In this case, resorting to the *travaux* is not necessary. The terms, context, and object and purpose of Article 2203(1) of the FTA are clear in that the term "taxation measure" is not limited to taxes *sensu stricto* and that it encompasses measures

---

[187] Scotiabank's Response, ¶ 96.

[188] Vienna Convention on the Law of Treaties, 27 January 1980 (**Exhibit CL-0053**), Article 32.

adopted for the enforcement of tax debts. Therefore, default interest on unpaid tax liabilities and the decisions as to their legality should be considered "taxation measures".

c. The cases cited by the Claimant allegedly confirming its interpretation are inapposite

163. As the Respondent has demonstrated, international arbitral case law, which has mainly followed the *EnCana* decision, supports its position in this arbitration. Notwithstanding, Scotiabank argues that "[m]*ultiple tribunals have held that certain types of fines, levies or fees may be required by the government but not constitute a tax, even if they are administered under the domestic tax legislation and by the tax agency.*"[189] In support of this contention, Scotiabank particularly relies on the decision in *Nissan v. India*, arguing that "[i]*t is notable that Peru makes no mention of this jurisprudence*".[190] The reason why the Respondent has made no mention of this jurisprudence is simple: the *Nissan* decision is completely inapposite.

164. ***First***, to state the obvious, the present case does not concern "*fines, levies or fees*" as in the *Nissan* case. It concerns default interest accrued on unpaid tax liabilities and, more specifically, a judicial decision concerning said interest. As the Claimant acknowledges in its submission: the main purpose of interest is to serve as "*compensation for the late payment of a liability*".[191] Although default interest also has a punitive component, this is secondary.[192] Fines, on the other hand, are imposed solely as a sanction for an improper conduct.

165. ***Second***, in its *obiter dictum*, the tribunal in *Nissan* hypothesized whether the non-payment to the claimant of certain tax incentives by the Indian Industries Department could be considered a taxation measure under the applicable treaty. Yet, it made no finding on the matter. The *Nissan* case neither concerned nor directly addressed fines or interest on tax obligations. The Claimant's reliance on *Nissan* is based solely on an *obiter dictum* on a matter that remains, to date, unresolved. This can hardly be persuasive.

---

189 Scotiabank's Response, ¶ 97.

190 Scotiabank's Response, ¶ 99.

191 Scotiabank's Response, ¶ 96. *See also*, Scotiabank's Response, ¶ 112.

192 Scotiabank's Response, ¶ 93.

166. ***Third***, the quote from *Nissan* on which the Claimant relies does not refer to fines or interest imposed on a tax liability but, rather, any "*fines or penalties as punishment for proscribed conduct*".[193] This is also the case with the tribunal's decision in *Murphy*, stating in relevant part that "*not every mandatory payment made by a class of persons to the State for public purposes without direct benefit is necessarily a tax*."[194] This discussion is alien to the present case.

167. For the avoidance of doubt, – the Respondent does not, and has not argued, that *any* fine or *any* interest owed to the State is a "taxation measure" (including, *e.g.*, parking tickets or interest for the late payment of a service provided by the State). Rather, the Respondent submits that, in accordance with Peruvian law, which provides that default interest and taxes *sensu stricto* are part and parcel of the same unitary "tax debt", fines and interest on unpaid tax liabilities are an integral part of the Peruvian tax regime. Therefore, the fall within the concept of "taxation measures" under the Treaty and international law, per the ordinary meaning of the term and the consistent interpretation of tribunals applying the *EnCana* standard.

168. ***Fourth***, equally inapposite is the Claimant's reliance on *Antaris* and *Voltaic v. Czech Republic*.[195] Once again, the Claimant misrepresents the crux of the conclusions reached by both the *Antaris* and *Voltaic* tribunals. To provide some context (which the Claimant omitted): both arbitrations related to a Solar Levy enacted by the Czech government, which imposed certain payments on investors in the solar energy sector in consideration of certain subsidies granted by the government. The tribunals noted that the Solar Levy operated as a reduction of the incentives paid by the State but did not entail an increase in the State's revenues. As a result, both tribunals stated that this characteristic did not correspond to the definition of "tax", which entails an increase in the State's revenues. This is clearly not the case with default interest on a tax, which has the purpose of increasing the States' revenues by (*i*) updating the amount due to the State for IGV Liability, compensating the State for the delay in payment and; (*ii*) imposing a penalty on the taxpayer. Once again, none of the cases on which the Claimant relies are legally or factually comparable to the present dispute.

---

193 *Nissan Motor Co., Ltd. v. Republic of India, PCA Case No. 2017-37*, Decision on Jurisdiction, 29 April 2019 (**Exhibit CL-0039**), ¶ 385.

194 *Murphy Exploration & Production Company – International v. The Republic of Ecuador (II)*, PCA Case No. 2012-16, Partial Final Award, 6 May 2016 (**Exhibit RL-0028**), ¶ 191 (emphasis added). *See*, Scotiabank's Response, ¶ 97, fn. 104.

195 *See* Scotiabank's Response, ¶ 97, fn. 104.

d. The fact that Scotiabank's claims allegedly concern an "unfair court process" does not alter the nature of the measure at stake, which remains a "taxation measure"

169. Finally, the Claimant argues that "*Scotiabank's claims are clearly about an unfair court process*", not about whether "*the 1999 SUNAT Decision violated the FTA*" or whether "*its treaty rights were violated by the accrual of default interest due to the delays of the State.*"[196] According to the Claimant, this leads to the conclusion that the 2021 Constitutional Court Decision is not a "taxation measure". The Claimant's argument is beside the point.

170. ***First***, the Claimant's strategy of circumventing a tax carveout by relabelling its claims as relating to the alleged breach of due process by a judicial decision is not new. As explained by the Respondent in its previous submission, similar situations have previously been addressed by investment tribunals, which have dismissed the claimants' attempts to unduly rebrand their claims to elude jurisdictional carveouts, such as Article 2203. In this sense, tribunals have emphasised that tax carveouts are meant to preserve state sovereignty, which includes deferring to decisions adopted by domestic courts in tax matters. In the words of the *EnCana* tribunal:

> [A]s the Respondent stressed, the Tribunal is not a court of appeal in Ecuadorian tax matters, and provided a matter is sufficiently clearly connected to a taxation law or regulation (or to a procedure, requirement or practice of the taxation authorities in apparent reliance on such a law or regulation), then its legality is a matter for the courts of the host State.[197]

171. By submitting to arbitration not the tax liability but a judicial decision in the extraordinary constitutional recourse of *amparo*, the Claimant attempts to circumvent the carefully negotiated mechanism put in place by the Contracting States in the FTA and make a mockery of the Contracting States' limits to their consent to arbitrate.

172. ***Second***, in line with the above and as already demonstrated by the Respondent in its previous submission, arbitral case law has specifically found that judicial decisions confirming tax liabilities are "taxation measures". The Respondent refers on this point to the decisions issued in *SunReserve v. Italy* and *ESPF v. Italy*. As described at length in the Respondent's Submission,[198] the tribunals in

---

196 Scotiabank's Response, ¶¶ 100-101.

197 *EnCana Corporation v. Republic of Ecuador*, LCIA Case No. UN3481, Award, 3 February 2006 (**Exhibit RL-0008**), ¶ 142(1) (emphasis added).

198 Peru's Submission on Rule 41, ¶¶ 96-98.

SunReserve v. Italy and *ESPF v. Italy* found that "[i]*t is not possible to separate the application of a decision regarding a tax from the same tax measure*."[199]

173. In yet another unsuccessful attempt to support its position, Scotiabank contends that the *SunReserve* award "*does not support Peru's argument*" since in that case the claimant's claims related to the legality of the Robin Hood Tax, not to the propriety of the procedure before the Italian Constitutional Court or the fairness of the process.[200] To support its argument, Scotiabank once again resorts to its often used technique of misrepresenting arbitral awards, claiming that "[t]*he* [*SunReserve*] *tribunal found that the claim challenging the constitutional court decision was a taxation measure because it was centred on the substance of what the court decided*."[201] This is not true. Contrary to the Claimant's representations, the claimant in *SunReserve* also argued that its claims concerned the propriety of the Constitutional Court's Decision, specifically, "*that the Constitutional Court Decision's* ex nunc*, rather than* ex tunc*, application was unfair*."[202] This submission was expressly dismissed by the tribunal:

> Accordingly, **Claimants' characterization of their claim as relating only to the propriety and implications of the Constitutional Court Decision No. 10/2015 is contradicted by their own submissions on the merits. The Tribunal considers that any determination on the Constitutional Court Decision, which was a sequel to the imposition of the Robin Hood Tax, will implicitly entail a decision on the preceding incidence of the Robin Hood Tax itself.** In this regard, the Tribunal agrees with Respondent's argument that "[i]t is not possible to separate the application of a decision regarding a tax from the same tax measure."[203]

174. Not only does the Claimant's argument misrepresent the decision of the *SunReserve* tribunal, but it also ignores the terms of Article 2203. To recall, Article 2203(1) of the FTA does not refer to "claims". Rather, it states that "*nothing in this Agreement shall apply to taxation measures*".[204] Accordingly, the relevant query is whether the 2021 Constitutional Court Decision is a "taxation measure" for the purposes of the FTA. As the Respondent has demonstrated, it is. Clearly, the nature of the measure

---

199 *SunReserve Luxco Holdings SRL v. Italian Republic*, SCC Case No. V 2016/32, Final Award, 25 March 2020 (**Exhibit RL-0034**), ¶ 551. *See also*, *ESPF Beteiligungs GmbH, ESPF Nr. 2 Austria Beteiligungs GmbH, and InfraClass Energie 5 GmbH & Co. KG v. Italian Republic*, ICSID Case No. ARB/16/5, Award, 14 September 2020 (**Exhibit RL-0036**), ¶ 355.

200 Scotiabank's Response, ¶¶ 102-104.

201 Scotiabank's Response, ¶ 103.

202 *SunReserve Luxco Holdings SRL v. Italian Republic*, SCC Case No. V 2016/32, Final Award, 25 March 2020 (**Exhibit RL-0034**), ¶ 496.

203 *SunReserve Luxco Holdings SRL v. Italian Republic*, SCC Case No. V 2016/32, Final Award, 25 March 2020 (**Exhibit RL-0034**), ¶ 551 (emphasis added).

204 Peru-Canada Free Trade Agreement, 1 August 2009 (**Exhibit C-0001**), Article 2203(1) (emphasis added).

at stake is not affected by the type of claim filed by the Claimant. Moreover, this interpretation would be contrary to the object and purpose of tax carveouts since it would entail leaving their application in the hands of the claimants and how they choose to portray their claims.

175. ***Third***, as already explained by the Respondent, one of the reasons for the tribunal's decision in *SunReserve* was the coincidence between the claimant's request for relief in the arbitration proceedings and in the proceedings before the Italian courts. In the words of the tribunal:

> Further evidence of the fact that Claimants' claim, in reality, relates to the propriety and application of the Robin Hood Tax and not the ensuing Constitutional Court Decision No. 10/2015, comes from Claimants' request for relief on this issue. Claimants request this Tribunal, as part of their damages claim, to compensate them for sums they paid to Italy under an unconstitutional taxation regime.[205]

176. As shown by the Respondent,[206] the Claimant seeks damages in this arbitration precisely in the same amount as the default interest payments made to the SUNAT. In its Response, Scotiabank argues that it is "*not true*" that the identity between both amounts shows that the Claimant's "*case is, in substance, about the default interest amount ordered by SUNAT*", but that this amount is "*representative of the damages suffered*."[207] The position is disingenuous and belied by the Claimant's own allegations.

177. Indeed, the Claimant itself emphasises that a "right to action" is distinct from the right that is being asserted in the proceedings, arguing that there is a "*distinction between a claim relating to process and one relating to the underlying subject matter reflected in Peruvian law, which provides litigants with a civil 'right to action' or 'actio.'*"[208] In light of the foregoing, the Claimant's allegation that the amounts paid as default interest are indicative of the damages for "unfair process" is to say the least, questionable.

---

[205] *SunReserve Luxco Holdings SRL v. Italian Republic*, SCC Case No. V 2016/32, Final Award, 25 March 2020 (**Exhibit RL-0034**), ¶ 552.

[206] Peru's Submission on Rule 41, ¶¶ 98-100.

[207] Scotiabank's Response, ¶ 105.

[208] Scotiabank's Response, ¶ 101 (emphasis added).

3. The crucial aspects of Peruvian law that the Tribunal requires to render its decision are undisputed

178. In its Response, Scotiabank argues that "*Peruvian law confirms that this claim does not concern a taxation measure*",[209] states that under international law Peruvian law is fact,[210] and that as such "*how default interest is characterized under Peruvian law is a disputed factual issue between the parties*".[211] On this basis alone, the Claimant requests the Tribunal to dismiss the Respondent's Rule 41 objection.[212] Scotiabank further accuses the Respondent of "*selectively highlight*[ing] *aspects of the Peruvian Tax Code*" and of asking the Tribunal to "*accept its interpretation as correct without expert evidence or a complete record*".[213] Finally, the Claimant alleges that "*in light of the Freeport v. Peru case, Peru cannot credibly suggest that Scotiabank's position on Peruvian law is not 'plausible*'."[214]

179. ***First,*** as stated by the Respondent, what constitutes a "taxation measure" under the FTA, is to be interpreted in accordance with the Treaty and international law. This notwithstanding, the Parties agree that "*the law of the Host State is relevant to establishing whether a measure constitutes a taxation measure*."[215] In other words, domestic law should inform the application of international law. [216] Therefore, the Claimants' contention that "[a]*s a matter of international law, municipal law*

---

209 Scotiabank's Response, ¶ 106.

210 Scotiabank's Response, ¶ 110.

211 Scotiabank's Response, ¶ 110 (emphasis in original).

212 Scotiabank's Response, ¶ 110.

213 Scotiabank's Response, ¶ 108.

214 Scotiabank's Response, ¶ 113.

215 Scotiabank's Response, ¶ 107. *See also* Peru's Submission on Rule 41, ¶ 89. *See also*, *Vincent J. Ryan, Schooner Capital LLC, and Atlantic Investment Partners LLC v. Republic of Poland*, ICSID Case No. ARB(AF)/11/3, Award, 17 November 2015 (**Exhibit RL-0060**), ¶¶ 244-248, 250.

216 *See Sevilla Beheer B.V. and others v. Kingdom of Spain*, ICSID Case No. ARB/16/27, Decision on Jurisdiction, Liability and the Principles of Quantum, 11 February 2022 (**Exhibit RL-0075**), ¶¶ 542-542 ("*As regards Spanish law, the Tribunal agrees that for the purposes of this arbitration, Spanish law, being the national law of the host State, is treated as a fact. However, to the extent that the Claimants' claims under the ECT are based on promises allegedly made under Spanish law, the latter will inform the existence and the content of the commitments (if any) made by Spain towards the Claimants.* […] *The Tribunal is of the view that the vantage point for resolving these claims consists in analyzing the Spanish legal framework that created the purported rights which the Claimants are seeking to vindicate under the ECT. Thus, the Tribunal's analysis of the Respondent's obligations under the ECT requires a detailed assessment of the Spanish legal and regulatory framework in order to identify the existence and content of any commitment made by Spain towards the Claimants*." (emphasis added); *see also Electrabel S.A. v. The Republic of Hungary***,** ICSID Case No. ARB/07/19, Decision on Jurisdiction, Applicable Law and Liability, 30 November 2012 (**Exhibit RL-0053**), ¶¶ 4.128-4.129 ("*The importance of rules contained in a national legal order, as a factual element to be taken into account, has long been acknowledged by international tribunals*. […] *Accordingly, where a binding decision of the European Commission is concerned, even when not*

questions are treated as questions of fact"[217] and, therefore, that any discussion on Peruvian law should be excluded from the scope of Rule 41, is wrong. To recall, the exclusion from the scope of review under Rule 41 concerns actual facts, as interpreted by the *Transglobal* tribunal among others, not laws.[218]

180. ***Second***, even assuming that Peruvian law should be treated as an actual fact (*quod non*), the determination of whether default interest on a tax liability is a "taxation measure" hinges on genuinely indisputable facts which demonstrate that default interest payments on unpaid taxes form part of the Peruvian tax regime (**a**). That being said, it bears calling the Tribunal's attention to the Claimant's manifestly inaccurate allegations as to the content and interpretation of Peruvian law, which the Respondent briefly addressed (**b**).

a. The existence and content of the key provisions of Peruvian Law regarding the nature of default interest on tax liabilities are indisputable

181. Despite the Claimant's attempts to crowd the record with immaterial arguments as to the content of Peruvian law, the question of whether the default interest accrued on an unpaid tax liability is "*part of the regime for the imposition of a tax*" under Peruvian law may be determined based exclusively on undisputed or truly indisputable facts, which are set out below:

182. ***First***, the Peruvian Tax Code contains a specific and express provision on the "Autonomy of Tax Law", underscoring the *lex specialis* nature of Peruvian Tax Law, per the following terms:

> **NORM IX: SUPPLEMENTARY APPLICATION OF PRINCIPLES OF LAW**
>
> In cases not covered by this Code or other tax regulations, different legal norms may be applied as long as they do not contradict or distort them. Supplementary application shall be made of the Principles of Tax Law, or failing that, of Principles of Administrative Law and General Legal Principles.[219]

183. The provision is self-explanatory: all matters covered by the Tax Code are governed by the Tax Code or other tax regulations. Only in the event that a matter is not covered by the Tax Code or other Tax

---

applied as EU law or international law, EU law may have to be taken into account as a rule to be applied as part of a national legal order, as a fact." (emphasis added)).

217 Scotiabank's Response, ¶ 110.

218 *See above*, § II.A.

219 Peruvian Tax Code, approved by Legislative Decree Nº 816 of 21 April 1996, as compiled by Supreme Decree Nº 133-2013-EF of 22 June 2013 (**Exhibit R-0003bis**), Norm IX.

regulations is the application of other legal norms allowed, with the proviso that: (*i*) those legal norms cannot contradict or distort the Tax Code or other tax regulations; and (*ii*) in the event of supplementary application, principles of Tax Law are to be applied first, and only failing those, Principles of Administrative Law and General Legal Principles will apply as supplemental norms.

184. ***Second***, as is also unassailable, Article 1242 of the Peruvian Civil Code provides for the general regime of default interest under civil law,[220] and Article 33 of the Peruvian Tax Code **specifically** regulates the default interest on taxes, as follows:

> **Article 33.- DEFAULT INTEREST**
>
> Any amount of tax unpaid within the terms indicated in Article 29 shall accrue an interest equivalent to the Default Interest Rate (TIM), which cannot be more than 10% (ten percent) above the monthly average market lending rate in local currency (TAMN) published by the Superintendency of Banking and Insurance on the last business day of the preceding month.[221]

185. As stated before by the Respondent, default interest is a legal concept that is common to other areas of law. However, default interest on unpaid tax liabilities is regulated specifically by the Peruvian Tax Code which is the *lex specialis*. The differences between default interest as regulated in the Civil Code and default interest on a tax liability, as governed by the Tax Code are summarized in the table below:

	CIVIL DEFAULT INTEREST	**TAX DEFAULT INTEREST**
ORIGIN	They may arise from an agreement between parties ("conventional" interests) or from the law ("legal interests").	They always have their origin in the law.

[220] Peruvian Civil Code, approved by the Legislative Decree Nº 295 of 24 July 1984, as amended (**Exhibit R-0001bis**), Article 1242.

[221] Peruvian Tax Code, approved by Legislative Decree Nº 816 of 21 April 1996, as compiled by Supreme Decree Nº 133-2013-EF of 22 June 2013 (**Exhibit R-0003bis**), Article 33. *See also*, Peruvian Tax Code, approved by Legislative Decree Nº 816 of 21 April 1996, as compiled by Supreme Decree Nº 133-2013-EF of 22 June 2013 (**Exhibit R-0003bis**), Article 29.

RATES	Rates determined by the Parties' agreement or in accordance with Central Bank regulations.[222]	Rates determined by the SUNAT, in accordance with the parameters established in the Tax Code.[223]
APPLICATION	Not automatically applied (the debtor needs to be in arrears (*mora*)).	Automatically applied (not necessary for the debtor to be in arrears).
CAPITALIZATION	Capitalization is allowed only in mercantile or banking operations.[224]	Capitalization of interest is not allowed.

186. ***Third***, it is undisputable that Article 28 of the Peruvian Tax Code expressly provides that the tax debt is comprised by the tax and the penalties and interest:

> **Article 28.- COMPONENTS OF THE TAX DEBT [*DEUDA TRIBUTARIA*]**
>
> The Tax Administration shall demand payment of the tax debt [*deuda tributaria*], which is made up of the tax [*tributo*], the penalties, and the interest.
>
> The interest may comprise:
>
> 1. Default interest for the late payment of the tax referred to in Article 33°;
>
> 2. Default interest applicable to the penalties referred to in Article 181°; and,
>
> 3. Interest for deferral and/or payment in instalments provided in Article 36°.[225]

187. As it is incontestable from the text of Article 28 above, a "tax debt" under Peruvian law comprises a tax *stricto sensu* (in Spanish, "tributo", which in this case is the IGV Liability originally imposed on Banco Weise), plus the applicable fines and interest. This is only reasonable given that, as acknowledged by the Claimant,[226] default interest serves the purpose of compensating the State for

---

222 Peruvian Civil Code, approved by the Legislative Decree Nº 295 of 24 July 1984, as amended (**Exhibit R-0001bis**), Articles 1243, 1244.

223 Peruvian Tax Code, approved by Legislative Decree Nº 816 of 21 April 1996, as compiled by Supreme Decree Nº 133-2013-EF of 22 June 2013 (**Exhibit R-0003bis**), Article 33.

224 Peruvian Civil Code, approved by the Legislative Decree Nº 295 of 24 July 1984, as amended (**Exhibit R-0001bis**), Articles 1249, 1250.

225 Peruvian Tax Code, approved by Legislative Decree Nº 816 of 21 April 1996, as compiled by Supreme Decree Nº 133-2013-EF of 22 June 2013 (**Exhibit R-0003bis**), Article 28.

226 Scotiabank's Response, ¶¶ 80, 112.

the delay in payment. Therefore, it actualises the amount of tax owed at the time of collection, forming part of the same updated debt.

188. In fact, the commentaries on which Scotiabank relies – allegedly to further its position – that specifically address tax default interest clearly recognize that interests are "part of the tax obligation". Indeed, Ms. Silvia Ysabel Núñez Riva prefaces her commentary by stating that "[t]*he present article has as its objective to analyse the nature of default interest, bearing in mind that said interest forms part of the tax debt*."[227] Another author on which the Claimant relies, Mr. Rosendo Huamaní, states the following:

> The tax debt, in general, 'is constituted by the obligation or series of pecuniary obligations to which a taxpayer is obliged towards the Public Treasury by virtue of different legal situations derived from the application of taxes. [...] As such, **the tax debt is unitary and consists of the amount that the debtor owes (for tax or instalment plus interest and, if applicable, fines) to the tax creditor, and whose total payment will be demanded by the Tax Administration**. Talledo Mazú […], in this regard, argues that **the tax debt is the 'amount owed to the tax creditor for taxes, fines, late interest, and interest on instalment or deferment**.'[228]

189. The Claimant cannot argue with its own sources, which are unequivocal: the tax debt is unitary and comprises the tax *stricto sensu*, as well as any fines and default interest. Therefore, this is indisputable.

190. ***Fourth***, in November 2013, the SUNAT issued its Order No. 011-006-0044596 (the "**SUNAT Payment Orde**r"), demanding that Scotiabank Peru pay the amounts arising from the 2011 SUNAT Payment Decision following its confirmation by the Tax Court. The amounts requested by the SUNAT included both the IGV Liability and the updated amounts for default interest accrued on the IGV Liability.[229]

191. ***Fifth***, between December 2013 and February 2014, Scotiabank Peru paid the total amount ordered under the SUNAT Payment Order in 10 instalments. These payments covered both the amounts owed by Scotiabank Peru as IGV Liability and as default interest on the IGV Liability. Scotiabank Peru

---

[227] Sylvia Ysabel Núñez, ¿Cuándo pagar intereses moratorios tributarios?, Revista Derecho & Sociedad de la Facultad de Derecho de la Pontificia Universidad Católica del Perú, Lima, No. 43 (2014) (**Exhibit C-0062**), p. 229.

[228] Rosendo Huamaní, Código Tributario Comentado, Jurista Editores (2015) (**Exhibit C-0064**), p. 375 (emphasis added).

[229] *See* SUNAT Payment Order No. 011-006-0044596, 25 November 2013 (**Exhibit R-0005**).

did not make separate payments for each concept, but rather made payment of the entirety of the debt arising from the SUNAT Payment Order.[230]

192. These basic undisputed and indisputable facts suffice to show that, under Peruvian law, default interest on an unpaid tax is considered part of a tax liability. Therefore, there can be no doubt that tax default interest is "part of the regime for the imposition of a tax", in line with the standard proposed by the *EnCana* tribunal for it to be considered a "taxation measure" under Article 2203 of the FTA.

b. The Claimant makes manifestly inaccurate misrepresentations as regards the nature of default interest under Peruvian law

193. As stated, the undisputed or truly indisputable facts set out by the Respondent above suffice for the Tribunal to issue a decision on the Respondent's objection under Article 2203 of the FTA. Nonetheless, the Respondent is compelled to correct the manifestly inaccurate representation made by the Claimant according to which "[t]*he Constitutional Court has confirmed that default interest does not have a tax nature, but rather is a civil sanction with the purpose of promoting timely payment and compensating the payee for a delayed payment*."[231] The Decisions of the Peruvian Constitutional Court on which the Claimant bases this statement manifestly do not support this contention.

194. ***First***, the Claimant cites the *amparo* case of *Medina de Baca*, in which the claimant challenged the default interest imposed in a payment order issued by the SUNAT. The relevant portion of the Constitutional Court's Decision in the *Medina de Baca* case reads as follows:

> Taking into account the above, this Constitutional Court deems it necessary to assess whether it is possible to extend the rule that taxes should not be confiscatory- as established in Article 74 of the Constitution – to default interest. Certainly, doing so is problematic. […]
>
> However, it can be argued that this principle may not be applicable since tax default interest has not, certainly, the nature of tribute, but rather considered as a sanction imposed for the non-compliance of the payment of a tax debt.

---

230 Peru's Submission on Rule 41, ¶ 41; *See also*, Letters from Scotiabank Peru to the SUNAT Collection Agent, December 2013 to February 2014 (**Exhibits C-0009** to **C-0018**).

231 Scotiabank's Response, ¶ 112.

> In any case, what is evident is that even these tax sanctions must adhere to the principle of reasonableness as recognized in the jurisprudence of this Constitutional Court […][232]

195. Based on this quote, Scotiabank alleges that the Court confirmed that default interest does not have a tax nature.[233] This is not what the Court says. The Court merely states that default interest is not a tax *stricto sensu* (*tributo*, which the Claimant itself translates in its brief as "tribute", not as "tax").[234]

196. For the avoidance of doubt, the Respondent does not argue that default interest is a tax *stricto sensu* but, rather, that it is a "taxation measure" since it forms part of the tax regime, as demonstrated by the fact that it is a component of the tax debt. The Constitutional Court's Decision in the *Medina de Baca* case in no way contradicts this assertion.

197. What is more, the emphasis placed by the Constitutional Court on the punitive nature of default interest strengthens the Respondent's position: it is because of this punitive nature that it is a key element of the tax regime, to ensure the enforcement of tax obligations and make the State whole for delayed payments.

198. Further, and contrary to Scotiabank's representations, in the same Decision issued in the *Medina de Baca* case on which the Claimant relies, the Constitutional Court found that tax default interest was subject to the prohibition of confiscation, in the same way as taxes *sensu stricto*. Far from supporting Scotiabank's argument that tax default interest does not constitute a taxation measure, the Constitutional Court's finding supports the Respondent's position: both tax default interest and tax *sensu stricto* are subject to the same regime and neither can be confiscatory.

199. ***Second***, the Claimant refers to the *Itacom* case, another *amparo* proceeding before the Constitutional Court relating to the payment of default interest. The Respondent notes that this decision does not address the issue of the nature of tax default interest at all, but merely states that the purpose of tax default interest is to compensate for the delay in payment, which is uncontested.[235]

---

232 Medina de Baca case law, 10 May 2016 (**Exhibit R-0016**), ¶¶ 43-46. The Respondent notes that the Claimant's translation of Exhibit C-0066 is inaccurate. Therefore, the Respondent is compelled to submit an accurate translate of Exhibit C-0066 as one of its own factual exhibits.

233 Scotiabank's Response, ¶ 112.

234 Scotiabank's Response, fn. 121 ("[…] *the tax default interest has not, certainly, the nature of tribute, but rather considered as to sanction imposed by the non-compliance of the payment of a tax debt.*")

235 Scotiabank's Response, fn. 121.

c. The issues under discussion in Freeport v. Peru *have no bearing on the present dispute*

200. To support its position, Scotiabank refers to the arguments raised by the parties in an ongoing ICSID case under a different TPA, *Freeport v. Peru*.[236] *Freeport* revolves around claims brought by a U.S. investor under the U.S.-Peru TPA in relation to, *inter alia*, a decision adopted by SUNAT not to waive penalties and interest on a tax assessment.[237] Scotiabank relies on the fact of the ongoing discussions between the parties in *Freeport* as regards the nature of tax penalties and interest to submit that the characterization of default interest as a "taxation measure" would warrant further discussion in the present case.

201. ***First***, and as is self-evident, the discussion in *Freeport* has no bearing on the present case or on the Tribunal's obligation to issue a decision following the Respondent's Rule 41 application in this arbitration. The Tribunal is in a position to decide this issue on the basis of the evidence presented to it, including Article 28 of the Peruvian Tax Code and all other relevant authorities on record. The circumstance that Peru may have chosen not to raise a Rule 41 objection in one case does not prevent it from resorting to this mechanism (as is its right under the ICSID Rules) in a different dispute.

202. ***Second***, the Respondent takes issue with the Claimant's misrepresentation of Peru's position in *Freeport*. The Claimant states in its Response that, in *Freeport*, "*Peru relies on expert evidence and makes the key concession that under Peruvian law, penalties and interests are <u>not</u> taxes*".[238] Scotiabank then affirms that "[i]*n* Freeport*, Peru has even admitted that interest is <u>not</u> a tax under Peruvian law. Peru's argument before this Tribunal that the issue of whether interest is a matter of taxation under Peruvian law is 'indisputable' and 'well-settled' is inconsistent with the ongoing Freeport proceedings and simply not credible*."[239] On both occasions, Scotiabank relies on an isolated reference not to Peru's submission, as it should be, but rather to Freeport's Rejoinder on Jurisdiction, which in turn refers to the expert reports filed by Peru in *Freeport*, which are not public. The Respondent rejects in the strongest terms the Claimant's unchecked and out-of-context misrepresentation of Peru's position in a different arbitration.

---

236 Scotiabank's Response, ¶¶ 10(b), 83, 113-115, 117-118.

237 *See* Scotiabank's Response, ¶ 113.

238 Scotiabank's Response, ¶ 114(a) (emphasis in original).

239 Scotiabank's Response, ¶ 115 (emphasis in original).

203. To set the record straight: Peru's position in *Freeport* is perfectly consistent with its arguments in this arbitration, as even a cursory reading of Peru's pleadings in *Freeport* demonstrates. In its Rejoinder on Jurisdiction in *Freeport*, as in this arbitration, Peru argues that "*because the imposition of penalties and interest is the specific means by which a government enforces a tax obligation (a taxation measure), the application of tax-related penalties and interests for purposes of enforcing tax obligations must be a "taxation measure" for purposes of Article 22.3.1*."[240] Further, Peru states that "*penalties and interest related to tax assessments are considered 'tax debt' under Peruvian law, and therefore, any measure related to the assessment (calculation), extinction and reprogramming of tax-related penalties and interests is a taxation measure*."[241] Once again, Scotiabank abuses the limited scope for factual review under Rule 41 proceedings to distort the facts and misrepresent the content of documents.

204. Contrary to Scotiabank's allegations, the Respondent's position has been and remains that Peruvian law is unambiguous in that default interests are "taxation measures", since they: (*i*) form part of "tax debts"; (*ii*) are subject to the specific regulations of the Tax Code; and (*iii*) are central to the State's ability to enforce tax obligations and, thus, its sovereignty over tax matters.

205. Moreover, the Respondent is compelled to clarify that the issue of whether penalties and interest on assessed taxes are "taxation measure" is anything but central to the dispute before the *Freeport* tribunal, which concerns legal stabilization agreement signed by Peru and Sociedad Minera Cerro Verde S.A.A., a mining company, in 1998.[242] As an indication of the foregoing, the Respondent notes that Peru's 608-page-long Reply only devotes 7 pages to this issue.[243] Therefore, the Claimant's attempt to compare the Respondent's strategy in both arbitrations falls on its face.

* * *

206. In its Response, the Claimant posits that the question that the Tribunal should ask itself is "*what other materials might either Party (specifically the Claimant) bring to bear if the question at issue*

---

240 *Freeport-McMoRan Inc. v. Republic of Peru*, ICSID Case No. ARB/20/8, Reply on Jurisdiction, 8 November 2022 (**Exhibit CL-0021**), ¶ 774.

241 *Freeport-McMoRan Inc. v. Republic of Peru*, ICSID Case No. ARB/20/8, Reply on Jurisdiction, 8 November 2022 (**Exhibit CL-0021**), ¶ 774.

242 *Freeport-McMoRan Inc. v. Republic of Peru*, ICSID Case No. ARB/20/8, Reply on Jurisdiction, 8 November 2022 (**Exhibit CL-0021**), ¶ 1-4.

243 *Freeport-McMoRan Inc. v. Republic of Peru*, ICSID Case No. ARB/20/8, Reply on Jurisdiction, 8 November 2022 (**Exhibit CL-0021**).

were to be postponed until a later stage of the proceeding? The answer is obvious: expert evidence on Peruvian law is required."[244] That is not the relevant question. Parties may submit evidence on the most trivial and uncontested aspects, if they wish to do so. Rather, the question should be whether it is likely that, should these materials be submitted and analysed, they would alter the Tribunal's conclusions. As the Respondent has explained, the answer to this question is a resounding "no".

207. Scotiabank contrives a dispute where there can be none, and merely seeks to push the arbitration forward by misrepresenting the content of Peruvian law. The Respondent does not "*ask*[] *the Tribunal to accept its interpretation as correct without expert evidence or a complete record*."[245] Rather, Peruvian Tax Law is unambiguous, as demonstrated by the fact that the Respondent's interpretation is further supported by the authorities filed by the Claimant itself. There is simply no need for expert evidence. To extend the proceedings merely to allow the submission of expert evidence on a clear issue would be precisely the type of unjustified expenditure that Rule 41 seeks to prevent.

C. THE DEFAULT INTEREST PAID UNDER PROTEST BY SCOTIABANK IS NOT A COVERED INVESTMENT

208. As stated by the Respondent in its Submission, Scotiabank's argument that the default interest amounts that it paid under protest to the SUNAT are a protected investment under the FTA and the ICSID Convention is manifestly without legal merit.[246] No rhetoric exercise may suffice to transform a tax liability into an asset. This should be the end of the argument.

209. Yet, in its Response, Scotiabank submits *first*, that the default interest paid by Scotiabank Peru to the SUNAT is a protected investment under the FTA, since it falls within one of the categories in its Article 847.[247] *Second*, Scotiabank argues that it is not necessary for the default interest it paid to be an "investment" under Article 25 of the ICSID Convention, since it is undisputed that Scotiabank's shares in Scotiabank Peru are an "investment" and, according to Scotiabank, the Tribunal should take its investment "as a whole".[248] *Third*, and in any event, the Claimant argues that the default

---

244 Scotiabank's Response, ¶ 118.

245 Scotiabank's Response, ¶ 108.

246 Peru's Submission on Rule 41, Section C.

247 Scotiabank's Response, ¶¶ 123 *et seq*.

248 Scotiabank's Response, ¶ 132.

interest payments also meet the threshold to be considered an "investment" under Article 25 of the ICSID Convention.[249]

210. Contrary to the Claimant's submission, Article 847(h) cannot be construed to refer to interest **owed** by an investor (**1**). Moreover, the default interest payments do not qualify investment within the meaning of Article 25 of the ICSID Convention. Indeed, a payment of accrued default interest lacks all the key characteristics of an investment as established in the arbitral case law (**2**).

1. Payment of a default interest accrued on a tax liability is not a protected investment under the FTA

211. In its Response, Scotiabank concedes that Article 847 of the FTA, like the equivalent provision in the NAFTA, contains an exhaustive list of categories of assets that are considered protected investments under the Treaty.[250] Yet, the Claimant contends that the default interest payments that it made to the SUNAT are a protected investment under Article 847(h) of the FTA,[251] which provides:

> [I]nvestment means: […]
>
> **h. interests arising from the commitment of capital or other resources in the territory of a Party to economic activity in such territory**, such as under:
>
> i. contracts involving the presence of an investor's property in the territory of the Party, including turnkey or construction contracts, or concessions, or
>
> ii. contracts where remuneration depends substantially on the production, revenues or profits of an enterprise; […][252]

212. To support its contention that payment of accrued default interest on a tax liability qualifies as an investment under Article 847(h), the Claimant submits that the following elements are satisfied by its alleged "investment": (*i*) it is an interest; (*ii*) arising out of the commitment of capital or other resources in the territory of Peru, and (*iii*) that said capital was committed towards economic activity in Peru.[253]

---

249 Scotiabank's Response, ¶¶ 137 *et seq*.

250 *See also*, Zachary Douglas, *The International Law of Investment Claims* (Cambridge University Press. 2009), 170-189 (**Exhibit RL-0082**), ¶ 356 ("[T]*he definition of an investment in Chapter 11 of NAFTA is drafted as an exclusive list of covered investments.*").

251 Scotiabank's Response, ¶¶ 123 et seq.

252 Peru – Canada Free Trade Agreement, 1 August 2009 (**Exhibit C-0001**), Article 847 (emphasis added).

253 Scotiabank's Response, ¶ 124.

213. Scotiabank's position is untenable. The contention that a debt owed to a State constitutes an investment goes against the very notion of what constitutes an investment from an economical point of view, against the text of Article 847(h) and – frankly - against all common sense, as the Respondent demonstrates below:

214. ***First***, default interest payments are not "interest" in the sense of Article 847(h). The term "interest" needs to be interpreted within the context of the definition of "investment" in Article 847.[254] As reiterated by arbitral case law, this entails the presence of certain objective characteristics, including the elements commonly referred to as the *Salini* test, which are further described below.[255] A debt or liability (be it of capital or interest) is antonymous to a "credit". Payment of money to extinguish a debt or liability is not an asset and even less an investment. As is obvious, payment is not the result of a free, calculated decision made by Scotiabank to obtain a profit but, rather, an act of compliance with its tax obligations towards the Peruvian State.

215. ***Second***, the case law on which the Claimant relies does not support its case. For instance, the Claimant refers to *Lone Pine v. Canada* to allege that the term "interest" must be interpreted "*broadly as covering a broad range of interests*" and that it can potentially include "*both property rights and personal rights*."[256] To be clear, the Respondent does not contest that the term "interest" could potentially include property rights or personal rights. The insurmountable problem for the Claimant is that payment of a liability does not entail a personal or *in rem* right over these amounts. In *Lone Pine*, for instance, the claimant was entitled to a River Permit, that conferred on the claimant the right to mine for oil and gas within a certain area.[257]

216. This is clearly distinguishable from the present case. In this case, the Claimant does not hold any rights over the default interest it paid to the SUNAT. Payment under protest does not **confer** any rights to recover the amounts paid. Scotiabank is careful not to contest this point (it would have no basis to do so, under Peruvian law), but rather states that "*payment under protest **is allowed** and*

---

254 *Romak S.A. (Switzerland) v. Republic of Uzbekistan,* PCA Case No. AA280, Award, 26 November 2009 (**Exhibit RL-0014**), ¶ 188 ("*The term 'investments' has an intrinsic meaning, independent of the categories enumerated in Article 1(2). This meaning cannot be ignored.*")

255 *Rasia FZE and Joseph K. Borkowski v. Republic of Armenia*, ICSID Case No. ARB/18/28, Award, 20 January 2023 (**Exhibit RL-0077**), ¶ 372; *Christian Doutremepuich and Antoine Doutremepuich v. Republic of Mauritius*, PCA Case No. 2018-37, Award on Jurisdiction, 23 August 2019 (**Exhibit RL-0064**), ¶ 118. *See below,* § IV.C.3.

256 Scotiabank's Response, ¶ 125. *See also*, *Lone Pine Resources Inc. v. Government of Canada*, ICSID Case No. UNCT/15/2, Final Award, 21 November 2022 (**Exhibit CL-0033**), ¶¶ 355-356.

257 *Lone Pine Resources Inc. v. Government of Canada*, ICSID Case No. UNCT/15/2, Final Award, 21 November 2022 (**Exhibit CL-0033**), ¶ 193.

preserves *the payees* [sic] *right to recoup the amounts that were paid*."[258] These are carefully chosen words to which Scotiabank resorts to give the appearance of the existence of a right, without effectively arguing that payment under protest creates a right, since it is aware that Peruvian law provides no basis for this.[259] To be clear: there is no specific provision under Peruvian law prohibiting a debtor from stating that it makes a payment under protest, but said "protest" has no legal effect. Under Peruvian law, the only legal effect of payment is to extinguish a debt, regardless of the intention of the debtor.[260]

217. Moreover, as the Respondent further addresses below,[261] a taxpayer has the right to contest the amounts paid to the Tax Administration before the administrative and judicial authorities regardless of whether it uses the expression "under protest". This does not mean that the investor has a right over the paid amounts, but merely that the taxpayer can exercise a recourse to challenge the payments. In fact, the Claimant is well aware of the difference between the "right to action" and "the right that is being asserted in the process itself", as evinced in its Response.[262] The existence of a "right to action" is irrelevant for purposes of Article 847(h). As stated by the tribunal in *Merril & Ring v. Canada*, the crucial point for purposes of Article 847(h) is whether payment under protest confers an "*actual and demonstrable entitlement of the investor to a certain benefit under an existing contract or other legal instrument*",[263] and it is indisputable that payment under protest does not.

218. ***Third***, being aware of the weakness in its argument, Scotiabank once again resorts to its allegation that municipal law should be treated as fact and not be discussed under Rule 41, in order unduly to prevent the Respondent from disputing the point.[264] Unfortunately for the Claimant, municipal law is not a fact for purposes of determining the existence of vested rights. Much to the contrary,

---

258 Scotiabank's Response, ¶ 125.

259 In fact, the Claimant acknowledges in footnote 138 that an eventual right for Scotiabank to recover the amounts paid as interest would only exist to the extent that it is found that these amounts "were unduly or excessively paid." The very reason why the Claimant initiated this arbitration is because this event has not yet occurred.

260 Peru's Submission on Rule 41, ¶ 116.

261 *See below,* § IV.D.2.

262 Scotiabank's Response, ¶ 101.

263 *Merrill & Ring Forestry L.P. v. The Government of Canada*, ICSID Case No. UNCT/07/1, Award, 31 March 2010 (**Exhibit RL-0050**), ¶ 142.

264 Scotiabank's Response, ¶ 125.

Peruvian law is the applicable law for purposes of establishing whether the Claimant has any vested rights, as the Respondent further explains below.[265]

219. ***Fourth***, equally flawed is Scotiabank's contention according to which "*the interest amounts arose out of the commitment in capital in Peru and that capital was committed towards economic activity in Peru*", consisting of the Claimant's investment in Scotiabank Peru.[266] This reasoning is manifestly flawed. The default interest paid by Scotiabank **did not** arise from Scotiabank Peru as a "commitment of capital", but rather from an unpaid tax debt towards the Peruvian state. In this sense, the default interest owed and paid by Scotiabank Peru to the SUNAT was not a product of Scotiabank Peru's economic activities in Peru, consisting of the provision of financial services. They are not profit or revenue of Scotiabank Peru. To the contrary, the interest results from a historical liability inherited by Scotiabank Peru and, therefore, the Claimant. This should be the end of the argument. In fact, under the Claimant's logic, any interest paid by Scotiabank Peru to any Peruvian creditors would be an "investment" under Article 847(h)- this is a distortion of the language and purpose of the FTA, as explained above.

220. ***Fifth***, Scotiabank alleges that the payment of interest "*went towards Scotiabank Peru's economic activity in Peru*" since it "*ensures that its underlying assets and ability to operate were not seized and undermined as a result of the non-payment*."[267]This is simply nonsensical. Following the reasoning proposed by Scotiabank, the payment of any fine or tax imposed by the State, which lack of payment could lead to sanctions, including eventually the seizure of assets, would be an "investment".

221. ***Sixth***, not any "payment" may qualify as a "commitment of capital". The Claimant's argument ignores that arbitral case law has found that, considering Article 847(h) as a whole, the "commitments of capital" protected by paragraph (h) must arise from contracts. In the words of the tribunal in *Lion Mexico v. Mexico*:

> The *chapeau* cannot be read by itself. The NAFTA does not extend protection to any "commitments of capital", but only to those which exhibit certain features so as to give rise to "interests". These features are defined through two illustrative examples in subparagraphs (h.i) and (h.ii). Both sub-paragraphs share a common feature: both refer to "contracts". Thus, it is safe to conclude that a

---

265 *See below,* § IV.D.1.

266 Scotiabank's Response, ¶ 126.

267 Scotiabank's Response, ¶ 126.

> minimum requirement of "commitments of capital" protected by paragraph (h) is to be formalized as contracts.[268]

222. The Claimant's alleged "commitment of capital" does not arise from a contractual arrangement, as required by case law specifically addressing Article 1139 of the NAFTA, identical to Article 847(h). Therefore, on this account, the Claimant's allegation that it has a protected investment under the FTA also fails.

2. The Claimant must establish that the Tribunal has jurisdiction over both alleged "investments"

223. In its Response, the Claimant intentionally distorts the Respondent's argument regarding Scotiabank's lack of basis to argue that its default interest payments are protected investments under the FTA and Article 25 of the ICSID Convention. The Claimant argues that "*the ICSID Convention is inapplicable in determining whether an investment is capable of being expropriated.*"[269] This is a straw man argument.[270] As should be obvious, the Respondent's argument is not that the Claimant's expropriation claim should be resolved under Article 25 of the ICSID Convention- rather, that the Claimant must prove that the Tribunal has jurisdiction over the investment that it alleges the Republic of Peru expropriated, *i.e.*, the default interest payments accrued on the IGV Liability.

224. ***First***, to be clear and for the avoidance of doubt – or rather for the avoidance of distortion by Scotiabank- the Respondent's argument is that the Claimant must prove that the Tribunal must have jurisdiction *ratione materiae*. That is, the Tribunal cannot adjudicate a claim regarding monies that do not constitute an investment both under the Treaty and the ICSID Convention. The amounts paid

---

268 *Lion Mexico Consolidated L.P. v. United Mexican States,* ICSID Case No. ARB(AF)/15/2, Decision on Jurisdiction, 30 July 2018 (**Exhibit RL-0033**), ¶ 205 (emphasis added).

269 Scotiabank's Response, ¶ 130.

270 The Claimant's argument that Article 25 of the ICSID Convention is inapplicable to the merits of an expropriation claim is misplaced and is not the Respondent's position. Therefore, the Respondent does not engage with it. However, the Respondent wishes to underscore t that the Claimant's reliance on authorities to support its straw man argument is once again based on a complete misrepresentation of the cited cases. In its Response, the Claimant states that "there are numerous cases where, in determining if there is an expropriation on the merits, the tribunal assessed if there was an investment capable of being expropriated. Article 25 of the ICSID Convention did not arise in any of those analyses." (*See*, SR, para. 136). To support this, the Claimant refers to the awards in *Lone Pine, Crystallex* and *Cargill*, none of which were resolved under the ICSID Convention (*see*, Scotiabank's Response, fn. 149 referring to *Lone Pine Resources Inc. v. Government of Canada*, ICSID Case No. UNCT/15/2, Final Award, 21 November 2022 (**Exhibit CL-0033**), ¶ 503; *Crystallex International Corporation v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB(AF)/11/2, Award, 4 April, 2016 (**Exhibit CL-0010**), ¶¶ 659-665; *Cargill, Incorporated v. United Mexican States,* ICSID Case No. ARB(AF)/05/2, Award, 18 September 2009 (**Exhibit C-0008**), ¶¶ 349-354.).

by Scotiabank to the SUNAT as a default interest on a tax liability are not an investment under either the Treaty or the ICSID Convention.

225. It bears recalling that in its Request for Arbitration, Scotiabank makes it clear that its expropriation claim relates **solely** to its investment consisting of the default interest payments, as follows:

> Article 812 of the FTA prohibits a Party from nationalizing or expropriating a covered investment directly or indirectly through measures having an effect equivalent to nationalization or expropriation, except for a public purpose, in accordance with due process of law, in a non-discriminatory manner, and on prompt, adequate and effective compensation.
>
> **Peru breached this obligation with respect to Scotiabank's investment in Peru, namely the default interest amount that was paid under protest**. As a result of the measures described above, Scotiabank has lost the ability to recover the default interest amount paid under protest. **The measures set out above have thus unlawfully expropriated <u>that investment</u>.**[271]

226. The Claimant's allegation is clear: its expropriation claim concerns exclusively its alleged investment consisting of the default interest amounts it paid to the SUNAT. Notably, the Claimant does not argue at any point that the Claimant's investment in Scotiabank Peru was expropriated, as it could not do so. That is, the Claimant's expropriation claim does not refer to the other investment it claims to have, namely, its shares in Scotiabank Peru. Scotiabank is very well aware of the fact that it could not argue that it was deprived of its investment in Scotiabank Peru. This is why the Claimant presents two distinct investments before this Tribunal: the shares in Scotiabank Peru, on the one hand, and the monies it paid the SUNAT as default interest on the tax liability. Crucially, Scotiabank's expropriation claim concerns **exclusively** the amounts it paid for accrued interest on the tax liability.

227. ***Second***, faced with the fact that that the monies paid as accrued default interest on the IGV Liability do not and cannot qualify as an investment under either the Treaty or ICSID, the Claimant now argues in its Response that, for the Tribunal to establish that it has jurisdiction over the Claimant's claims, it must "*look at the investment and dispute as a whole, even if only a <u>subset</u> of that investment is alleged to have been expropriated*",[272] further contending that "[n]*umerous tribunals have addressed this issue and held that, in assessing the jurisdictional issue under Article 25, the*

---

271 Request for Arbitration, ¶¶ 66-67 (emphasis added).

272 Scotiabank's Response, ¶ 132 (emphasis added).

tribunal is to look at the investment as a whole, even if only a component of that investment is alleged to be expropriated."[273]

228. Once again, the Claimant's arguments have no bearing on this dispute. The reason for this is simple: the default interest payments are neither a "subset" nor a "component" of Scotiabank Peru, since they do not form part of Scotiabank Peru's operations, and they are not revenue from Scotiabank Peru's activities. Therefore, each and every one of the decisions on which the Claimant relies are inapposite. For the sake of completeness, nonetheless, the Respondent addresses them below:

229. *As regards Magyar v. Hungary:* In *Magyar*, the Parties were in agreement that the claimant's farming business in Hungary constituted an "investment." In this context, the tribunal addressed whether the claimant's leasehold rights over 760 hectares of land, on which it conducted part of its farming activities, also qualified as covered investments. The tribunal found for the claimant, stating that: "[…] *the Tribunal should look at the investment as a whole and ascertain whether the dispute has a sufficiently direct link with the overall investment. This is clearly the case here, where the dispute arises directly out of the activities of the Farm*."[274] The case is clearly distinguishable from the present one. As explained, the default interest paid by the Respondent to the SUNAT is not profit from Scotiabank Peru's activities. These amounts do not relate to the core activities of Scotiabank Peru, as did the land on which Magyar's farms operated. As stated, the default interest payments originated in a tax liability, originally imposed on Banco Weise. They are not profit or revenue of financial activities.

230. Similarly, the decision in *Inmaris v. Ukraine* does not support the Claimant's claim. The case addressed joint claims brought by three companies belonging to the Inmaris group. The dispute arose from the claimants' alleged investment in a Bareboat Charter Contract for the renovation of the *Khersones*, a Ukrainian training ship. The tribunal found that it was not required to assess whether it had *ratione materiae* jurisdiction over each of the claimants' investments separately, since "[i]*t* [was] *clear* […] *that these purported investments are all substantially derivative of, and removed by increasing degrees from, the Bareboat Chater Contract.*"[275] In reaching this conclusion, the tribunal emphasised that each of the claimants' assets were "*interrelated contracts relating to*

---

[273] Scotiabank's Response, ¶ 134 (emphasis added).

[274] *Magyar Farming Company Ltd, Kintyre Kft and Inicia Zrt v. Hungary*, ICSID Case No. ARB/17/27, Award, 13 November 2019 (**Exhibit CL-0034**), ¶ 276.

[275] *Inmaris Perestroika Sailing Maritime Services GmbH and others v. Ukraine*, ICSID Case No. ARB/08/8, Decision on Jurisdiction, 8 March 2010 (**Exhibit CL-0028**), ¶ 90.

the reconstruction and operation of the Khersones" by the Claimants.[276] Therefore, the tribunal concluded that the contracts should be considered jointly, as being part of the same transaction. As is trite, this is clearly not the case in the present dispute since the default interest payment and Scotiabank Peru are not different components of the same transaction.

231. As regards *Cairn v. India*: the case involved claims arising from the claimants' investment in Command Petroleum, an Australian company conducting oil and gas exploration activities in India, which was first acquired by the claimants in 1996 and subsequently restructured. India objected to the tribunal's jurisdiction over the interests in Command Petroleum acquired by one of the claimants in a restructuring process that took place in 2006 and argued that the restructuring was unlawful. The tribunal rejected the respondent's arguments, finding that all of the claimants' claims related to the same investment despite its subsequent transformations, as follows: "[t]*hat the present dispute relates to the Claimants' overall investment is not altered by the fact that one of the Claimants may have been established in the process of the alteration of the form of that investment.*"[277] That is: the tribunal found that it was not required to assess whether it had jurisdiction over the rights acquired by one of the claimants, sine these had arisen from the restructuring of the overall investment, consisting of Cairns' investment vehicle in India. Needless to say, this is not question at issue in the present dispute.

232. Regarding *Infinito v. Costa Rica*: The tribunal found that it need not address whether certain funds owned by the claimant's investment vehicle (Industrias Infinito) were an investment, since the claimant's shareholding in Industrias Infinito was an investment *per se*.[278] In this case, the funds at issue were owned by the claimant's investment. In the present dispute, Scotiabank Peru has no rights over the monies paid to the SUNAT in 2013.

233. In the same vein, the *Saipem v. Bangladesh* does not advance the Claimant's claim. In *Saipem*, the investment at stake was an ICC Award where the tribunal declared that Petrobangla (the Bangladeshi State-owned oil and gas entity) had breached its contractual obligations to the contractor/investor by not making the payments for additional works for which it was liable under

---

[276] *Inmaris Perestroika Sailing Maritime Services GmbH and others v. Ukraine*, ICSID Case No. ARB/08/8, Decision on Jurisdiction, 8 March 2010 (**Exhibit CL-0028**), ¶ 92.

[277] *Cairn Energy PLC and Cairn UK Holdings* Limited *v. The Republic of India*, PCA Case No. 2016-07, Final Award, 21 December 2020 (**Exhibit CL-0006**), ¶ 712.

[278] *Infinito Gold Ltd. v. Republic of Costa Rica***,** ICSID Case No. ARB/14/5, Award, 3 June 2021 (**Exhibit CL-0027**), ¶ 176, fn. 219.

the contract. There was no discussion that the contract qualified as a protected investment. Accordingly, the tribunal found that "*the rights embodied in the ICC Award were not created by the Award but arise out of the Contract. The ICC Award crystallized the parties' rights and obligations under the original contract.*"[279] In other words, the tribunal found that the rights arising from the ICC Award and the contract that constituted the claimant's original investment were one and the same. This situation bears no resemblance whatsoever with the present dispute.

234. In *Ioan Micula v. Romania*, the claimants claimed that they had been deprived of certain investment incentives to which they were entitled under the Romanian legislation. The claimants averred that the incentives were crucial to their business model, since *"their beverage business was initially developed in reliance on the incentive programs*" and "*these incentives allowed them to produce a wide variety of beverages at a low cost."*[280] The tribunal found that it need not assess whether these incentives were assets capable of being expropriated, given their connectedness with the underlying business venture: "[h]*aving established that Claimants have made investments in the territory of Romania out of which the dispute arises, the Tribunal does not need to establish at this stage whether the incentives as such are considered investments capable of expropriation.*"[281] The Claimant has not alleged, nor could it, that the default interest payments were a part of it "investment operation" in Peru, or that any alleged rights over the default interest payments were crucial to its decision to invest in Scotiabank Peru. They could not, particularly considering that they arise from a pre-existing **debt**.

235. ***Third***, the Claimant's position ignores that arbitral case law supports the Respondent's position. Indeed, arbitral tribunals have reiterated that, when the claimant's claims relate to two distinct investments, the claimant must establish that the tribunal has jurisdiction over each of the separate investments in respect of which claims are presented.

236. For instance, in *Lion Mexico v. Mexico*, the claimant submitted claims for the alleged expropriation of (*i*) promissory notes, which the claimant argued were a protected investment under Article 1139(h) of the NAFTA (identical to Article 847(h) and (*ii*) mortgages, which the claimant alleged were

---

279 *Saipem S.p.A. v. People's Republic of Bangladesh*, ICSID Case No. ARB/05/7, Decision on Jurisdiction and Recommendation on Provisional Measures, 21 March 2007 (**Exhibit CL-0043**), ¶ 127 (emphasis added).

280 *Ioan Micula, Viorel Micula and others v. Romania* (ICSID Case No. ARB/05/20) Award, 11 December 2013 (**Exhibit RL-0055**), ¶¶ 158-159.

281 *Ioan Micula, Viorel Micula and others v. Romania*, ICSID Case No. ARB/05/20, Decision on Jurisdiction and Admissibility, 24 September 2008 (**Exhibit CL-0036**), ¶ 128 (emphasis added).

protected under article 1139(g) of the NAFTA (identical to Article 847(g) of the FTA). The promissory notes and the mortgages constituted collateral for three loans that Lion made to two Mexican companies. The tribunal analysed whether it had jurisdiction with regards to each investment, finding that it had jurisdiction over the mortgages, and therefore could adjudicate the claims concerning the mortgages. Conversely, the tribunal considered that it lacked jurisdiction over the claims concerning the promissory notes, which did not qualify as protected investments under the NATA.[282]

237. The reasoning of the tribunal in *Lion v. Mexico* applies here. The Claimant has made it clear in its Request for Arbitration that its expropriation claim refers to the default interest payments as an investment in and of itself, **not** as part of its larger investment in Scotiabank Peru.[283] Therefore, the Tribunal must establish that it has jurisdiction under the ICSID Convention specifically as regards this investment. As the Respondent further demonstrates below, it does not.

3. Amounts paid as default interest accrued on a tax liability do not qualify as an 'investment' under Article 25 of the ICSID Convention

238. In its Response, and building on its straw man argument regarding the inapplicability of the ICSID Convention to the merits of an expropriation claim, the Claimant goes on to argue that "*the interest amounts paid under protest meet the test for 'investment' under Article 25 of the ICSID Convention.*"[284] As the Respondent explains in this Section, the default interest payments do not have the objective characteristics of an "investment" identified by arbitral case law.

239. At the outset, the Respondent notes that the Claimant does not dispute the application of the *Salini* test as guidance for an objective interpretation of the term "investment in Article 25 of the ICSID Convention.[285] The Claimant also concedes that the main aspects of the *Salini* test are those identified and described by the Respondent in its Submission, namely: (*i*) a contribution; (*ii*) a certain duration and (*iii*) a participation on the risks of the transaction.[286] When addressing each of these characteristics, Scotiabank once again ignores the plain meaning of the word "investment",

---

282 *Lion Mexico Consolidated L.P. v. United Mexican States,* ICSID Case No. ARB(AF)/15/2, Decision on Jurisdiction, 30 July 2018 (**Exhibit RL-0033**), ¶¶ 188-197, 229-230, 262.

283 Request for Arbitration, ¶¶ 66-67.

284 Scotiabank's Response, ¶ 137.

285 Scotiabank's Response, ¶ 138.

286 Scotiabank's Response, ¶ 138.

unsuccessfully attempting to turn a payment for a tax liability into not only an asset, but an "investment".

240. The Respondent addresses each of the relevant elements of the *Salini* test, as agreed by the Parties, to debunk each of the Claimant's contorted arguments.

241. ***First***, in connection with the requirement of a "contribution", the Claimant argues that the payments of default interest are a "*contribution in the form of a payment to the state*."[287] According to the Claimant, the payments to the SUNAT were "*a commitment of capital for an economic benefit, including the prevention of deleterious precautionary measures against Scotiabank Peru's assets.*"[288] The allegation is untenable, to say the least. As acknowledged by Scotiabank,[289] ICSID tribunals have found that there must have been a "*contribution to an economic venture*", that must be linked to a process of value creation.[290] Indeed, the Claimant concedes that "[u]*nlike a single payment of money, an investment is linked to an economic venture in the host state*."[291] This test is not met by the default interest payments made by Scotiabank Peru, since it is undisputed that the payment of a tax liability, including default interest, is not a contribution linked to an economic venture. It is elementary that payment of a liability does not create value, but merely cancels a pre-existing tax debt imposed on the taxpayer. This is a complete and irrefutable analysis.

242. ***Second***, and also elementary, the Peruvian State is not an actor engaged in "economic ventures", and the default interest payments are not to be applied to an economically productive activity. As noted by Peru in its Submission, this was the conclusion reached by the tribunal in *Postova banka and Istrokapital v. Greece*, with regards to the Greek State.[292] The Claimant's arguments turn the meaning and purpose of the "contribution" requirement on its head.

---

287 Scotiabank's Response, ¶ 138.

288 Scotiabank's Response, ¶ 138.

289 Scotiabank's Response, ¶ 143 ("*Unlike a single payment of money, an investment is linked to an economic venture in the host state*.")

290 *Poštová banka, a.s. and Istrokapital SE v. Hellenic Republic*, ICSID Case No. ARB/13/8, Award, 9 April 2015 (**Exhibit RL-0025**), ¶ 361. *See also*, *MNSS B.V. and Recupero Credito Acciaio N.V. v. Montenegro*, ICSID Case No. ARB(AF)/12/8, 4 May 2016 **(Exhibit RL-0062**), ¶ 199.

291 Scotiabank's Response, ¶ 143.

292 Peru's Submission on Rule 41, ¶¶ 125-126. The Claimant attempts to distinguish its case from *Postova banka*, stating that in *Postova banka*, the tribunal found no evidence that the purchased bonds had "*any relationship to an economic venture undertaken by the claimant in the host state*" whereas, in the present case, the default interest payments allegedly relate to Scotiabank Peru (*see,* Scotiabank's Response, ¶ 142). The Claimant misrepresents the key findings in *Postova*. In Postovathe tribunal focused its analysis on whether the alleged

243. ***Third,*** - and merely for the sake of completeness, as the Claimant's allegations as regards the default interest as an investment are manifestly meritless – the duration requirement is also missing in the case of a default interest payment. Scotiabank's payments to the SUNAT were made between December 2013 to February 2014- *i.e.,* over a period of three months.[293] Even if, for the sake of argument, payment of default interest were to be considered an investment (*quod non*), arbitral case law has reiterated that, for an investment to have the requisite duration, it should span from two to five years.[294] Yet, Scotiabank attempts artificially to extend the duration of the investment by stating that it considered "*that it may take some reasonable amount of time for its judicial challenges to proceed*".[295] The argument misses the point. For purposes of Article 25(1), the relevant duration is that of the alleged investment, not of any subsequent legal challenges that may or may not have arisen. It is unsurprising, therefore, that the Claimant provides no legal authorities to support its attempt unduly to prolong its investment by resorting to the ensuing litigation.

244. ***Fourth***, the Claimant alleges that the "risk" criterion was also met, since "*Scotiabank Peru faced significant risk by not making the payment, including the seizure of its assets*."[296] Once again, Scotiabank agrees on its face with the elements of the *Salini* test, and then proceeds to turn them on their head. As a preliminary matter, the Respondent notes that the Claimant once again resorts to its strategy of availing itself of its investment in Scotiabank Peru to establish the Tribunal's jurisdiction over the default interest payments. The shifting strategy should not be accepted by the Tribunal. As pleaded by the Claimant — who insists on the fact that the Tribunal should take its allegations as pleaded — the Claimant has two distinct investments: Scotiabank Peru and the default interest payments. The Claimant avers that the Peruvian State expropriated its investment consisting of the monies it paid to the SUNAT as default interest accrued on the tax liability. It is this

---

investment had been "*a contribution involved in an economic operation creating value*", finding that this test was not met (*see*, Poštová banka, a.s. and Istrokapital SE v. Hellenic Republic, ICSID Case No. ARB/13/8, Award, 9 April 2015 (**Exhibit RL-0025**), ¶ 361). The Claimant also argues that the *Postova banka* case "*is inconsistent in its result with other tribunals that found that bonds did fall within the treaty's definition of investments*" (*see*, Scotiabank's Response, ¶ 142). This is completely beside the point. The question is not whether sovereign bonds are protected investment under the FTA or Article 25 of the ICSID Convention. This is not a case about sovereign bonds. Unlike with purchases of sovereign bonds, which respond to voluntary investment decisions by investors and consist of assets held by the investors. On the other hand, the payment of a tax liability responds to a pre-existing obligation and is nothing other than precisely that, a liability.

293 Peru's Submission on Rule 41, ¶ 129.

294 Peru's Submission on Rule 41, ¶ 128, fn. 112.

295 Scotiabank's Response, ¶ 139.

296 Scotiabank's Response, ¶ 140.

alleged investment which is being analysed and which the Respondent submits does not constitute an "investment" for purposes of the ICSID Convention.

245. ***Fifth***, and finally, the Claimant's argument is nothing short of farcical. It is trite that the element of risk set forth in the *Salini* test is the existence of an "investment risk", associated to the expectation of obtaining of a return on investment for a certain economic activity.[297] What is more, as stated by Peru, tribunals have found that the concept of "investment risk" entails a higher standard that than that of a regular "commercial risk".[298] The "risk" to which the Claimant refers is not an expectation associated with an economic venture, but rather the risk that a taxpayer assumes by **failing timely** to comply with a tax obligations. This cannot be – by any means – an investment risk.

* * *

246. To sum up, the Claimant's extremely creative exercise in interpretation regarding Article 847(h) does not accord with the basic principles of Treaty interpretation, is in contradiction with arbitral case law on the matter and defies the most basic tenets of the objective economic elements of an investment. However hard the Claimant tries, it should not be allowed to distort reality to the point where it transforms a tax liability – a debt – into an asset that has the characteristics of an investment.

247. As the Respondent has established, Scotiabank's attempts to pass the default interest accrued over the tax liability paid to the SUNAT as a protected investment are flawed. These monies manifestly do not qualify as an "investment", either under the FTA, or pursuant to Article 25 of the ICSID Convention. It is, therefore, evident that the tribunal lacks jurisdiction over the Claimant's claims over "**that investment**" – to use the Claimant's own words – [299] namely, the Claimant's claim that the Republic of Peru unlawfully expropriated the default interest, in breach of Article 812 of the FTA.

---

[297] *KT Asia Investment Group BV v. Republic of Kazakhstan*, ICSID Case No. ARB/09/8, Award, 17 October 2013 (**Exhibit RL-0022**), ¶ 170.

[298] Peru's Submission on Rule 41, ¶ 130. *See also, Romak S.A. (Switzerland) v. Republic of Uzbekistan,* PCA Case No. AA280, Award, 26 November 2009 (**Exhibit RL-0014**), ¶¶ 229-230; *Poštová banka, a.s. and Istrokapital SE v. Hellenic Republic*, ICSID Case No. ARB/13/8, Award, 9 April 2015 (**Exhibit RL-0025**), ¶¶ 367-369.

[299] Request for Arbitration, ¶ 67.

D. THE CLAIMANT'S EXPROPRIATION CLAIM FAILS ON THE MERITS SINCE SCOTIABANK PERU DOES NOT HAVE VESTED PROPERTY RIGHTS ON THE TAX PAYMENTS TO THE SUNAT

248. As stated by the Respondent in its Submission on Rule 41,[300] the default interest on the tax liability paid by Scotiabank is not a protected investment under the FTA and the ICSID Convention. Nevertheless, even if the Tribunal were to consider that the interest paid was somehow part of an investment, or an investment in and of itself (which is denied), it is manifest that the payment of default interest on a tax liability is not capable of being expropriated. In other words, Scotiabank does not have vested rights on the amounts it paid as default interest over the IGV liability as a matter of Peruvian law and, therefore, the Claimant's expropriation claim is manifestly without merit.

249. The Claimant conveniently chose not to engage with this argument, except for two fleeting references in paragraphs 121 and 144 of its Response. In fact, the Claimant purportedly ignores this argument altogether, alleging that "[o]*n its Rule 41 objection, Peru raises five jurisdictional objections*."[301] Nevertheless, the Claimant makes two key concessions that directly undermine its position:

> **1.** "The threshold question for determining an expropriation has been established is whether Scotiabank had rights capable of being expropriated."
>
> **2.** "In answering that question, the Tribunal will look to Peruvian law."[302]

250. Therefore, it is undisputed that the existence of property rights that are capable of being expropriated is a necessary condition for an expropriation to have occurred, and that the question of whether the Claimant has rights capable of being expropriated can only be determined under the domestic law of the host State.

251. Scotiabank submits two arguments in response to the Respondent's objection: *first*, it claims that, since the existence of property rights over the default interest payments is a matter of Peruvian law, "*this is a disputed factual issue that cannot be determined on a Rule 41 objection because it requires a full and proper record to assess*".[303] As the Respondent shows, the assertion is wrong as a matter

---

300 Peru's Submission on Rule 41, Section IV.C.1.2.

301 Scotiabank's Response, ¶ 8.

302 Scotiabank's Response, ¶ 133.

303 Scotiabank's Response, ¶ 144.

of international law. Arbitral case law has clearly stated that the existence of property rights over the alleged investment, should **not** be treated as a question of fact but of law (**1**). *Second*, Scotiabank contends that "*payment under protest is permitted under Peruvian law and Scotiabank Peru paid the amounts to prevent the seizure of its assets*".[304] The argument holds no water. To recall, the relevant question is not whether payment under protest is "permitted"- or rather "not prohibited"- under Peruvian law, but whether Scotiabank Peru had or has any vested rights on the amounts paid to the SUNAT (**2**).

1. Peruvian law is the applicable law, which determines whether the Claimant's has or not vested rights capable of being expropriated

252. Scotiabank ignores the relevance of municipal law and its relationship with investment law, by stating that "[a]*s a matter of international law, municipal law questions are treated as questions of fact*".[305] Aware of the weakness of its contentions under Peruvian law, the Claimant seeks – once again- unduly to restrict the scope of the Tribunal's review under Rule 41. Unfortunately for the Claimant, its submission that Peruvian law is a matter of fact for all purposes as regards international law is incorrect.

253. Contrary to the Claimant's allegations, arbitral tribunals have recognised that municipal law is the law applicable to determine the existence of vested property rights. The tribunal's decision in *EnCana v. Ecuador* illustrates the point. To recall, in *EnCana*, the tribunal found that it lacked jurisdiction over some of the claimant's claims regarding VAT refunds arising out of four contracts for the exploration and exploitation of oil and gas reserves in Ecuador due to the tax carve out in Article XII of the Ecuador-USA BIT. Since the relevant tax carveout did not exclude claims for expropriation, the tribunal analysed the merits of the claimant's expropriation claim. As a preliminary question, the tribunal found that, for there to be an expropriation, "*the rights affected must exist under the law which creates them, in this case, the law of Ecuador*."[306] The tribunal expressly stated that this operation required the tribunal to "*determine and apply the taxation law of Ecuador to the extent that it is necessary to do so* […]."[307]

---

304 Scotiabank's Response, ¶ 144.

305 Scotiabank's Response, ¶110.

306 *EnCana Corporation v. Republic of Ecuador*, LCIA Case No. UN3481, Award, 3 February 2006 (**Exhibit RL-0008**), ¶ 184.

307 *EnCana Corporation v. Republic of Ecuador*, LCIA Case No. UN3481, Award, 3 February 2006 (**Exhibit RL-0008**), ¶ 184.

254. The tribunal's reasoning in *EnCana* is particularly relevant to the present case, since the governing law provision in the Ecuador-Canada BIT is identical to Article 837 of the Peru-Canada FTA. Article 837 provides that "[a] *Tribunal established under this Section shall decide the issues in dispute in accordance with this Agreement and applicable rules of international law*."[308] Similarly, Article XIII(7) of the Ecuador-Canada BIT provides: "[a] *tribunal established under this Article shall decide the issues in dispute in accordance with this Agreement and applicable rules of international law*."[309] That is, both provisions mandate the application of international law, but do not expressly refer to the laws of the host State. Therefore, the reasoning of the *Encana* tribunal implied that international law includes its own choice of law rules, including a *renvoi* to municipal law as the applicable law to determine whether the putative investor has any vested rights which could be expropriated.[310]

255. The ruling of the *America Móvil v. Colombia* is equally apposite in this regard:

> The starting point for the analysis of the existence and validity of property rights susceptible to expropriation is a matter of applicable law, that is, the identification of the legal system according to which this issue must be resolved. Specifically, the question is whether such a system is the national law of the receiving State or international law, and what role the two systems play. […] The Tribunal - which from this Section decides by majority - highlights that the application of Colombian law to determine the existence of the Right to Non-Reversal is consistent with jurisprudence and doctrine. Indeed, they unanimously agree that it is not international law that creates property rights

---

308 Peru-Canada Free Trade Agreement, 1 August 2009 (**Exhibit C-0001**), Article 837.

309 *EnCana Corporation v. Republic of Ecuador*, LCIA Case No. UN3481, Award, 3 February 2006 (**Exhibit RL-0008**), ¶ 184, p. 67 (Appendix II).

310 Monique Sasson, *Substantive Law in Investment Treaty Arbitration: The Unsettled Relationship between International Law and Municipal Law*, Second Edition, (Kluwer Law International, 2017), 1-14 (**Exhibit RL-0085**), pp. 9-10 ("*Investment treaties protect foreign investors and their investments by setting an independent international law standard such as, fair and equitable treatment and prohibition against expropriation without compensation. But international law often does not regulate the right it protects. Therefore, the standard's application should be determined by renvoi to municipal law, despite the differences from the diplomatic protection context*." (emphasis added)). *See also* Campbell McLachlan *et al*., 'Expropriation' (Ch. 8) in *International Investment Arbitration – Substantive Principles* (Oxford University Press, 2nd edn., 2017), 359-411 (**Exhibit RL-0084**), ¶ 8.64 ("*The property rights that are the subject of protection under the international law of expropriation are created by the host State law. Thus, it is for the host State law to define the nature and extent of property rights that a foreign investor can acquire*." (emphasis added)); *Yukos Capital SARL v. The Russian Federation*, PCA Case No. 2013-31, Interim Award on Jurisdiction, 18 January 2017 (**Exhibit CL-0050**), ¶ 452 ("*The legal materialization of the Investment is to be determined according to the law applicable to the asset in question, which requires a renvoi to municipal law*."); Zachary Douglas, *The International Law of Investment Claims*, (Cambridge University Press, 2009), 52-72 (**Exhibit RL-0081**), ¶ 111 ("*Implicit in this conclusion, which is entirely consistent with Rule 4, is the notion that international law does have its own choice of law rules for issues arising out of an investment dispute*.").

> protected by international law. International law only provides protection for property rights that exist under domestic law.[311]

256. As remarked by the *America Movil* tribunal, it is unanimously recognised that international law does not create property rights, only domestic law does. In *America Movil*, as in *EnCana*, the applicable Colombia-Mexico-Venezuela FTA contained no reference to the laws of the host State. Despite this fact, the tribunal held that "*the fact that the Treaty provision on applicable law does not contain 'any reference to Colombian law' is not enough to render that law irrelevant*."[312] Arbitral case law provides other abundant examples to the same effect.[313]

257. In fact, the assertion that municipal law is to be treated as a fact before an international court or tribunal is, at least, debatable, and requires a more nuanced approach. The host State's domestic law is the law applicable to establish the existence of property rights over an alleged investment, a

---

311 *América Móvil SAB de CV v. Republic of Colombia*, ICSID Case No. ARB(AF)/16/5, Award, 7 May 2021 (**Exhibit RL-0072**), ¶¶ 317-319 (unofficial translation from original Spanish) (emphasis added). See also, *Emmis International Holding, B.V., Emmis Radio Operating, B.V., MEM Magyar Electronic Media Kereskedelmi és Szolgáltató Kft. v. Hungary*, ICSID Case No ARB/12/2, Award, 16 April 2014 (**Exhibit RL-0023**), ¶ 162 ("*In order to determine whether an investor/claimant holds property or assets capable of constituting an investment it is necessary in the first place to refer to host State law. Public international law does not create property rights. Rather it accords certain protections to property rights created according to municipal law.")*; *Emmis International Holding, B.V., Emmis Radio Operating, B.V., MEM Magyar Electronic Media Kereskedelmi és Szolgáltató Kft. V. Hungary*, ICSID Case No. ARB/12/2, Decision on Respondent's Application for Bifurcation, 13 June 2013 (**Exhibit RL-0054**), ¶ 44 ("[…] *the existence and nature of any* [rights held by the Claimants] *must be determined in the first instance by reference to Hungarian law, before the Tribunal proceeds to decide whether any such rights can constitute investments capable of giving rise to a claim for expropriation for the purpose of its jurisdiction under the Treaties and the ICSID Convention.*").

312 *América Móvil SAB de CV v. Republic of Colombia*, ICSID Case No. ARB(AF)/16/5, Award, 7 May 2021 (**Exhibit RL-0072**), ¶ 371 (unofficial translation from original in Spanish) (emphasis added).

313 *Accession Mezzanine Capital L.P. and Danubius Kereskedöház Vagyonkezelö Zrt. v. Hungary*, ICSID Case No. ARB/12/3, Award, 17 April 2015 (**Exhibit RL-0058**), ¶ 75 ("*The question of whether the Claimants had any right to broadcast over a radio frequency in Hungary at the critical point in 2009 can only be answered by reference to Hungarian law. Hence the first and second steps of the Claimants' reasoning as summarised above must be assessed in accordance with Hungarian law. Upon the ascertainment of the existence of such rights under Hungarian law as well as their nature and scope, it then falls to consider whether they are capable of constituting a protected investment for the purposes of Article 1 of the BIT and Article 25 of the ICSID Convention*."); *Vestey Group Ltd v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB/06/4, Award, 15 April 2016 (**Exhibit RL-0027**), ¶ 257 ("*The requirements for acquiring property rights over immovable assets situated in Venezuela are governed by specific norms of Venezuelan property law. For a private person to have a claim under international law arising from the deprivation of its property, it must hold that property in accordance with applicable rules of domestic law*." (emphasis added)); *Jorge Luis Blanco, Joshua Dean Nelson and Tele Fácil México, S.A. de C.V. v. United Mexican States*, ICSID Case No. UNCT/17/1, Final Award, 5 June 2020 (**Exhibit RL-0068**), ¶ 228 ("*Before determining whether the interconnection rights alleged by Claimant and described in the preceding paragraph constitute an investment under NAFTA, the Tribunal must determine (i) whether Tele Fácil had such rights; (ii) if so, what type of rights were they. This is an inquiry that must begin with an analysis of Mexican law. The alleged rights under the interconnection agreement as determined by Resolution 381 derive from Mexican law. Both the alleged interconnection agreement between Tele Fácil and Telmex and any alleged rights under Resolution 381 are governed and derive from Mexican law. Therefore, Claimant has the burden to prove that, under Mexican law, Tele Fácil had the rights that Claimant considers were expropriated*." (emphasis added)).

matter which is not governed by international law, which contains no substantive rules of property law.[314]

258. Therefore, the Claimant's allegations that Peruvian law should be treated as a matter of fact to determine the existence of vested rights over the default interest paid to the SUNAT are wrong as a matter of law. In any event, if the Tribunal were to consider that Peruvian law should be treated as a matter of fact for this purpose (which the Respondent contests) the Claimant's representations on the content of Peruvian law are manifestly inaccurate and, therefore, cannot be taken on a *prima facie* basis, as the Respondent further establishes below.

2. Under Peruvian Law, the Claimant has no vested rights on the payments for accrued default interest it made to the SUNAT

259. In its Response, the Claimant alleges that "*payment under protest is permitted under Peruvian law and Scotiabank Peru paid the amounts to prevent the seizure of its assets. Under Peruvian law, Scotiabank Peru has the right for this amount to be reimbursed, plus interest.*"[315] The Claimant also argues that "[b]*oth SUNAT and the Constitutional Court have recognized that paying under protest has determined legal effects that are different from those associated with a simple payment*",[316] and that payment under protest "*preserves the payees* [sic] *right to recoup the amounts that were paid*."[317] The Claimant's allegations are misleading and lack legal basis under Peruvian law:

260. ***First***, and unsurprisingly, the Claimant does not refer to a single provision in Peruvian law to support its allegations regarding the purported legal effects of payment under protest. The reason for this is simple: "payment under protest" simply does not exist as a matter of Peruvian law, be it Tax Law, Administrative Law, or Civil Law.[318] Moreover, as previously established by the Respondent, the rules

---

314 Andrew Newcombe and Lluís Paradell Trius, *Law and Practice of Investment Treaties: Standards of Treatment* (Kluwer Law International, 2009) (**Exhibit RL-0079**), p. 351 ("*The rights associated with an investment are normally determined by local law. Thus, the nature and scope of property rights are determined by the law of the state in which the property is located (the lex situs). Conceptually, property can only be expropriated if it exists. If a right has never been acquired or has been otherwise extinguished under local law, it cannot be expropriated*." (emphasis added)) *See also*, Zachary Douglas, *The International Law of Investment Claims*, (Cambridge University Press, 2009), 52-72 (**Exhibit RL-0081**), ¶¶ 101, 115; *Emmis International Holding, B.V., Emmis Radio Operating, B.V., MEM Magyar Electronic Media Kereskedelmi és Szolgáltató Kft. v. Hungary*, ICSID Case No. ARB/12/2, Award, 16 April 2014, (**Exhibit RL-0023**) ¶ 162.

315 Scotiabank's Response, ¶ 144.

316 Scotiabank's Response, fn. 138.

317 Scotiabank's Response, ¶ 125.

318 Peru's Submission on Rule 41, ¶ 116.

applicable to payment do not consider the debtor's expression of its objection to the debt, which is immaterial even to preserve its rights to contest a tax debt in court.[319]

261. ***Second***, and relatedly, the Claimant's argument that payment under protest "*preserves the payees' right to recoup the amounts that were paid*"[320] is a gross misrepresentation of Peruvian Law. Under the Peruvian Tax Code, all taxpayers that are directly affected by acts of the SUNAT have the right to impugn the allegedly harmful acts before the competent authorities:

> **Article 132 – RIGHT TO FILE COMPLAINTS**
>
> Tax debtors that are directly affected by acts of the Tax Administration shall be entitled to submit complaints.[321]

262. Moreover, under Peruvian law, payment of an obligation arising from a SUNAT Payment Order is a prerequisite for a taxpayer to file a complaint. The circumstance of whether this payment is made "under protest" or otherwise is irrelevant to this effect.[322]

263. ***Third***, the Claimant's allegation that Scotiabank Peru has "*the right for* [the amount paid under protest] *to be reimbursed, plus interest*" due to its having paid these amounts "under protest" is plainly wrong. Under the Peruvian Tax Code, as stated above, a taxpayer can challenge tax debts before the Tax Administration, the Tax Court and, eventually, the Peruvian Courts. However, the fact that a taxpayer can challenge a tax debt does not entail that it has a right to recover the amounts paid, let alone that it has a vested right on those amounts. This follows from the very same distinction that the Claimant does between the "right to action" and the "right that is being asserted in the process itself".[323] The fact that the Claimant may be entitled to *request* the reimbursement of the funds paid to the SUNAT before the domestic courts does not mean that it has the right to *receive* these amounts. Only in the event that the court renders a decision stating that the liability was wrongfully imposed and ordering the tax authorities to reimburse the taxpayer, the taxpayer will have an actual right to be reimbursed. As shown by the Respondent in its Submission, the

---

319 Peru's Submission on Rule 41, ¶ 116.

320 Scotiabank's Response, ¶ 125.

321 Peruvian Tax Code, approved by Legislative Decree Nº 816 of 21 April 1996, as compiled by Supreme Decree Nº 133-2013-EF of 22 June 2013 (**Exhibit R-0003bis**), Article 132.

322 *See* Peruvian Tax Code, approved by Legislative Decree Nº 816 of 21 April 1996, as compiled by Supreme Decree Nº 133-2013-EF of 22 June 2013 (**Exhibit R-0003bis**), Article 136.

323 Scotiabank's Response, ¶ 101.

Peruvian Tax Code provides that the SUNAT must reimburse taxpayers for any sums that were unduly paid or paid in excess, plus interest.[324] Specifically, Article 38 provides:

> **Article 38.- REIMBURSEMENTS OF UNDUE OR EXCESS PAYMENTS**
>
> Reimbursements of payments unduly made or in excess shall be paid in local currency, plus an interest fixed by the Tax Administration, between the day following the date of payment and the date on which the respective reimbursement is made available to the petitioner […][325]

264. Therefore, it is false that Scotiabank has a right to recover the amounts paid to the SUNAT. Absent a judgment from the Peruvian courts finding that the amounts were either not owed or that there was payment in excess, the Claimant has **no** rights – let alone any vested rights- over the amounts it paid as default interest on the IGV Liability.[326]

265. To be clear an "expectation" or "interest" – in recovering some money- is insufficient to establish the existence of an investment capable of being expropriated in the absence of a vested right under the applicable law.[327] Arbitral case law is unanimous in this regard.

266. For instance, in *Emmis v. Hungary*, the claimants' claims concerned a radio broadcasting license held by their investment vehicle (a Hungarian company). The claimants alleged that the license had been expropriated by the Hungarian government, after it was awarded it to a competitor following the expiration of the licence's initial term. The tribunal rejected the claimants' expropriation claims finding, *inter alia*, that "[i]*t also follows from the basic notion that an expropriation clause seeks to protect an investor from deprivation of his property that the property right or asset must have vested (directly or indirectly) in the claimant for him to seek redress*."[328]

---

[324] Peru's Submission on Rule 41, ¶ 164.

[325] Peruvian Tax Code, approved by Legislative Decree Nº 816 of 21 April 1996, as compiled by Supreme Decree Nº 133-2013-EF of 22 June 2013 (**Exhibit R-0003bis**), Article 38.

[326] *See below*, § IV.E.1. In this sense, the Claimant's contention that "[a]*s of the measures described above, Scotiabank has lost the ability to recover the default interest amount paid under protest.*" (*see*, Request for Arbitration, ¶ 67) is to no avail. As the Respondent explains at length, the "right to action" is not a vested right capable of being expropriated.

[327] *See* Zachary Douglas, *Property, Investment, and the Scope of Investment Protection Obligations*, in *The Foundations of International Investment Law: Bringing Theory into Practice*, Online edn., Oxford Academic, 363-406 (2014) (**Exhibit RL-0042**).

[328] *Emmis International Holding, B.V., Emmis Radio Operating, B.V., MEM Magyar Electronic Media Kereskedelmi és Szolgáltató Kft. v. The Republic of Hungary*, ICSID Case No. ARB/12/2, Award, 16 April 2014 (**Exhibit RL-0023**), ¶ 168 (emphasis added).

267. In *Eskosol v. Italy*, the claimant filed an expropriation claim alleging that it was "*well positioned to eventually secure a legal right*" arising from the program of incentives that Italy had put in place to promote the commissioning of photovoltaic solar facilities. The tribunal rejected the claimant's claims, finding that "[a]*t best, Eskosol might argue that it was well positioned to eventually secure a legal right, but nothing in the Italian legislation transformed positioning to secure a future legal right into a legal right as such. And absent any established right that was abrogated by Government interference, the fact that Government conduct may have impacted a company business plan does not itself amount to expropriation, even if the end result ultimately is that the company was unable to survive financially*."[329]

268. In a similar vein, in *EnCana v. Ecuador,* as regards the merits of the claimant's expropriation claim,[330] the *EnCana* tribunal found that, for there to be an expropriation, "*the rights affected **must exist** under the law which creates them, in this case, the law of Ecuador*."[331] There are several other examples in arbitral case law to the same effect.[332]

269. ***Fourth***, Scotiabank's reliance on the Constitutional Court' Decision in Case N° 2218-2015-PA/TC (the "**Decision**") to support its allegation that "[b]*oth SUNAT and the Constitutional Court have recognized that paying under protest has determined legal effects that are different from those associated with a simple payment*"[333] is manifestly false. In fact, the Decision **does not contain a single reference to "payment under protest"**.[334] With respect, this kind of misrepresentation is

---

329 *Eskosol S.p.A. in liquidazione v. Italian Republic*, ICSID Case No. ARB/15/50, Award, 4 September 2020 (**Exhibit RL-0069**), ¶ 472 (emphasis added).

330 As regards the factual matrix underlying the *EnCana* award, *see* § IV.B.2.a.

331 *EnCana Corporation v. Republic of Ecuador*, LCIA Case No. UN3481, Award, 3 February 2006 (**Exhibit RL-0008**), ¶ 184 (emphasis added).

332 *Generation Ukraine, Inc. v. Ukraine*, ICSID Case No. ARB/00/9, Award, 16 September 2003 (**Exhibit RL-0006**), ¶ 22.1 ("*There cannot be an expropriation of something to which the Claimant never had a legitimate claim. The Tribunal concludes that the failure of the Kyiv City State Administration to secure the Claimant's use of the adjoining property cannot amount to an expropriation.*" (emphasis added)); *Marvin Roy Feldman Karpa v. United Mexican States*, ICSID Case No. ARB(AF)/99/1, Award, 16 December 2002 (**Exhibit RL-0048**), ¶ 118 (The tribunal dismissed the claimant's expropriation claim under Article 1110 of NAFTA, *inter alia*, on the basis that "*the Claimant never really possessed a 'right' to obtain tax rebates upon exportation of cigarettes*"); *Merrill and Ring Forestry L.P. v. Canada*, ICSID Case No. UNCT/07/1, Award, 31 March 2010 (**Exhibit RL-0050**), ¶ 140 (The tribunal dismissed the claimant's expropriation claim, on the basis that the claimant lacked a protected investment under Article 1110 of the NAFTA, stating that "*a potential interest that may or not materialize under contracts the Investor might enter into with its foreign customers*" was insufficient to this effect.).

333 Scotiabank's Response, fn. 138.

334 Constitutional Court judgement in Case N° 2218-2015-PA/TC (**Exhibit C-0068**).

unacceptable and should be considered by the Tribunal when making a determination as to the allocation of costs.

270. The Decision on which the Claimant relies was issued in a Constitutional appeal in the course of which the appellant contested the default interest due over a tax debt. The Court found that it did not have to render a decision on the merits, since "*the appellant voluntarily paid the entire liquidated debt, including default interest*".[335] That is, the Court simply stated that the question has become moot as a result of the appellant's payment. Naturally, this does not mean that, *a contrario*, the appellant would have been entitled to a reimbursement had it paid the amounts "under protest". This simply does not arise from the Constitutional Court's Decision, not expressly, nor implied. Rather, the Court's Decision was predicated on the restricted scope of the Constitutional appeal (*agravio constitutional)*, which is an extraordinary judicial avenue provided "*to restore the exercise of a constitutional right or settle a threat against it*".[336] Therefore, the Court found that "*if the aggression or threat of violation of the right invoked ceases or it becomes irreparable after the claim has been filed, there is no need to issue a pronouncement on the merits* […]."[337] Therefore, the Court's decision and its subsequent reasoning only stated that the Constitutional appeal had been rendered moot by the debtor's payment. This is, a procedural consideration that bears no relation with the substantive conclusions that the Claimant intends to draw.

* * *

271. The Claimant once again abuses the summary nature of these Rule 41 proceedings to make manifestly inaccurate representations on Peruvian law. Despite the Claimant's allegations, a cursory review of Peruvian law shows that payment "under protest" has no legal relevance. Thus, the Claimant's expropriation claim manifestly lacks its most rudimentary requirement: the existence of a right capable of being expropriated.

E. THE CLAIMANT FAILED TO COMPLY WITH THE REQUIREMENTS FOR CONSENT UNDER ARTICLE 823 OF THE FTA AND, ACCORDINGLY, THE TRIBUNAL LACKS JURISDICTION TO ADJUDICATE THE DISPUTE

272. As established by the Respondent in its Rule 41 Submission, Article 823 of the FTA, sets forth a series of conditions that the Claimant needs to comply with in order validly to invoke the State's consent

---

335 Constitutional Court judgement in Case N° 2218-2015-PA/TC (**Exhibit C-0068**), p. 4, ¶ 3.

336 Constitutional Court judgement in Case N° 2218-2015-PA/TC (**Exhibit C-0068**), p. 4, ¶ 2.

337 Constitutional Court judgement in Case N° 2218-2015-PA/TC (**Exhibit C-0068**), p. 4, ¶ 2.

to arbitrate. In other words, and as is well-known by the Tribunal, the Contracting States do not consent to arbitrate unless the Claimant has fully satisfied all of the conditions under Article 823 of the FTA.

273. The Claimant has failed to comply with two of these requirements: it did not validly and effectively waive its right to continue the proceedings that it is currently pursuing before the Peruvian courts, as required by Article 823(e) of the FTA (**1**) and has commenced a claim for expropriation several years beyond the time limit provided in Article 823(c) of the FTA (**2**).

1. The Claimant did not validly and effectively waive its right to continue legal proceedings before Peruvian Courts

274. To recall, pursuant to Articles 823(1)(e) and 823(2)(e) of the FTA, a claimant must "*waive their right to initiate or continue before any administrative tribunal or court under the law of either Party, or other dispute settlement procedures, any proceedings with respect to the measure of the disputing Party that is alleged to be a breach.*"[338]

275. The Claimant does not dispute that: (*i*) a valid and effective waiver is a condition for the State's consent to arbitration, which cannot be retroactively cured and (*ii*) that, for a waiver to be valid and effective, it does not suffice for a claimant to file a formal statement purporting to renounce to or discontinue the domestic proceedings, since, as established by the Respondent, arbitral case law is clear that a consistent behaviour is required for a waiver to be effective.[339]

276. The Claimant has failed to comply with the waiver required by the Article 823 since it has continued to pursue domestic proceedings against the Cassation Decision of Supreme Court dismissing Scotiabank's cassation recourse against the decision of the Contentious Administrative Chamber, which confirmed the validity of the 2013 Tax Court Decision.[340] To recall, in its 2013 Decision, the

---

338 Peru-Canada Free Trade Agreement, 1 August 2009 (**Exhibit C-0001**), Article 823(1)(e) and 823(2)(e).

339 Peru's Submission on Rule 41, ¶ 152. *See also*, *Waste Management, Inc. v. United Mexican States*, ICSID Case No. ARB(AF)/98/2, Arbitral Award, 2 June 2000 (**Exhibit RL-0002**), ¶ 20; *Commerce Group Corp. and San Sebastian Gold Mines, Inc. v. Republic of El Salvador*, ICSID Case No. ARB/09/17, Award, 14 March 2011 (**Exhibit RL-0019**), ¶¶ 79-80; *The Renco Group, Inc. v. Republic of Peru*, ICSID Case No. UNCT/13/1, Partial Award on Jurisdiction, 15 July 2016 (**Exhibit RL-0029**), ¶¶ 60, 73, 135.

340 *See*, Peru's Submission on Rule 41, ¶ 53.

Tax Court confirmed the legality of the 2011 SUNAT Decision.[341] As the Claimant acknowledges, these proceedings are still ongoing.[342]

277. The Claimant's defence centres on the argument that, under Article 823(e) of the FTA, "*the waiver need only extend to local proceedings 'with respect to the measure of the disputing Party that is alleged to be a breach*.'"[343] Scotiabank contends that the present arbitration concerns the 2021 Constitutional Court Decision, whereas the ongoing domestic proceedings relate to the tax debt originally imposed by the SUNAT in the 1999 SUNAT Decision. As a result, the Claimant avers: "[t]*he 2021 Constitutional Court Decision is a different measure and concerns different conduct that what is in issue in the Tax Appeal*."[344] The Claimant further argues that it "*has already set out at length* […] *why Peru's mischaracterization of its claim is wrong and should not be permitted*."[345]

278. ***First***, the Claimant's argument as to the alleged mischaracterization of its claims, as the Respondent has demonstrated, is sophistic.[346] Again, the Claimant artificially segments its claims, seeking to improperly circumvent the requirements and conditions set forth by the Contracting States to provide their consent to arbitrate under the FTA. Consistent with its strategy of preventing the Respondent from drawing the Tribunal's attention to the flaws in the Claimant's arguments and the real impact of the distortions that the Claimant introduces, the Claimant once again alleges that it would be improper for the Respondent to recharacterize the Claimant's claim. Unfortunately for the Claimant, there is nothing improper in what the Respondent does, which is simply to signal the legal consequences of indisputable facts. In this case, this fact is that the Claimant is challenging the 1999 Tax Debt, actualized by the 2011 SUNAT Decision and confirmed by the 2013 Tax Court Decision. If the 1999 Tax Debt is ultimately reversed, this will mean that the Claimant will receive a complete reimbursement of the tax liability and the interests paid, plus interest on those amounts.

279. ***Second***, and moreover, the Claimant's position is in open contradictions with the existing arbitral case law on the matter, which has required that the arbitral proceedings and the domestic

---

341 *See*, Peru's Submission on Rule 41, ¶ 37.

342 Scotiabank's Response, fn 172.

343 Scotiabank's Response, ¶ 150 (emphasis in original).

344 Scotiabank's Response, ¶ 150.

345 Scotiabank's Response, ¶ 151.

346 *See above,* § IV.E.1.

proceedings be "separate and distinct" for a waiver to be considered valid an effective, to avoid the risk of contradictory decisions and double recovery- a risk that is clearly present in this dispute.[347]

280. Indeed, arbitral case law has found that it is not sufficient for two proceedings to formally refer to different "measures" for the waiver requirement to be satisfied. Otherwise, the waiver requirement could be easily circumvented by claimants redirecting their claims to different, yet intimately related, measures, while seeking the same substantive relief. That is, precisely what the Claimant does by strategically choosing to submit its claims in this arbitration not against the SUNAT Payment Order imposing default interest, but against the 2021 Constitutional Court's Decision rejecting Scotiabank's *amparo* against that very same Payment Order.

281. As found by the *Commerce Group v. El Salvador* tribunal, a waiver can be invalid even if the arbitration and the domestic proceedings do not strictly concern the same "measure". As explained by the Respondent in its Submission,[348] it is not enough for the domestic proceedings not to concern the exact same measure being discussed in the arbitral proceedings for a Claimant's waiver to be valid. Indeed, the tribunal in *Commerce Group* addressed this issue, precisely. In that case, the respondent argued that the claimant had breached the waiver requirement, since the domestic judicial proceedings and the arbitration included claims arising from the revocation of permits, and had similar quantification of monetary damages.[349] The claimant argued that, while the issue of the revocation of the environmental permits was addressed in both proceedings, this was submitted in the arbitration as part of the claimant's claim that El Salvador had "*imposed a de facto ban on gold and silver mining*", which was a different measure not submitted to the domestic courts.[350] The tribunal rejected the claimants' claims, as follows:

> [T]he Tribunal has not been confronted with separate and distinct claims. The Tribunal views Claimants' claim regarding the de facto mining ban policy as part and parcel of their claim regarding the revocation of the environmental permits. Indeed, when Claimants sought to challenge the revocation of the

---

347 *Commerce Group Corp. and San Sebastian Gold Mines, Inc. v. Republic of El Salvador*, ICSID Case No. ARB/09/17, Award, 14 March 2011 (**Exhibit RL-0019**), ¶ 111.

348 Peru's Submission on Rule 41, ¶ 156.

349 *Commerce Group Corp. and San Sebastian Gold Mines, Inc. v. Republic of El Salvador*, ICSID Case No. ARB/09/17, Award, 14 March 2011 (**Exhibit RL-0019**), ¶ 89.

350 *Commerce Group Corp. and San Sebastian Gold Mines, Inc. v. Republic of El Salvador*, ICSID Case No. ARB/09/17, Award, 14 March 2011 (**Exhibit RL-0019**), ¶ 94.

> environmental permits before the El Salvador courts, they were not just hoping to have their permits reinstated – they were hoping to be able to mine again.[351]

282. Similarly, in this arbitration, both the Claimant's claims before the Peruvian courts and before this Tribunal are not "separate and distinct". Therefore, the fact that they may on their face relate to separate measures should be immaterial.

283. ***Third***, as established by the Respondent,[352] investment tribunals have found that the object and purpose of waiver requirements as those in Articles 823(1)(e) and 823(2)(e) is to prevent double recovery and contradictory decisions. Therefore, consideration should be given to the relief that may be granted in the arbitration proceedings and that said relief may be accorded by the domestic courts.[353] The words of the *Waste Management v. Mexico* tribunal are particularly apposite:

> In effect, it is possible to consider that proceedings instituted in a national forum may exist which do not relate to those measures alleged to be in violation of the NAFTA by a member state of the NAFTA, in which case it would be feasible that such proceedings could coexist simultaneously with an arbitration proceeding under the NAFTA. **However, when both legal actions have a legal basis derived from the same measures, they can no longer continue simultaneously in light of the imminent risk that the Claimant may obtain the double benefit in its claim for damages.**
>
> **This is precisely what NAFTA Article 1121 seeks to avoid**.[354]

284. In the same vein, and as clearly put by the tribunal in the *Thunderbird v. Mexico* arbitration:

> The consent and waiver requirements set forth in Article 1121 serve a specific purpose, namely to prevent a party from pursuing concurrent domestic and international remedies, which could either give rise to conflicting outcomes (and

---

351 *Commerce Group Corp. and San Sebastian Gold Mines, Inc. v. Republic of El Salvador*, ICSID Case No. ARB/09/17, Award, 14 March 2011 (**Exhibit RL-0019**), ¶ 111.

352 Peru's Submission on Rule 41, ¶¶ 152-154.

353 Peru's Submission on Rule 41, ¶ 150.

354 *Waste Management, Inc. v. United Mexican States*, ICSID Case No. ARB(AF)/98/2, Arbitral Award, 2 June 2000 (**Exhibit RL-0002**), ¶ 27 (emphasis added). The Claimant's attempts to distinguish the present case from *Waste Management* are to no avail. The Claimant relies on the fact that, in *Waste Management*, the claimant submitted a waiver with an express reserving of rights to pursue dispute settlement proceedings involving allegations that Mexico had breached its obligations under sources of law other than the NAFTA. According to the Claimant, this means that the issue was that "[t]*he claimant's waiver would have allowed it to institute and continue proceedings that treaded the same factual ground as the treaty arbitration, so long as it could fit those claims under Mexico's domestic laws*" (*see* Scotiabank's Response, ¶ 156). The Claimant's argument works against the Claimant, since this is precisely what would happen in the present case since, despite the Claimant's claims to the contrary, the factual backdrop for this arbitration and for the ongoing proceedings is the same: the default interest payments made to the SUNAT.

> thus legal uncertainty) **or lead to double redress for the same conduct or measure**.[355]

285. Therefore, the Claimant's contention that this arbitration and the ongoing domestic proceedings concern separate "measures" to pay lip service to the waiver requirement should be rejected. The Claimant ,has decided tactically to attack a measure which underlying subject is the same as the one it is challenging in the domestic courts, being perfectly aware that should it prevail under either the local proceedings or should this Tribunal grant it the relief sought (the reimbursement of the amounts paid as default interest on the tax liability plus pre and post award interest) it will be compensated for the same alleged loss. Therefore, properly to decide this point, the Tribunal should look at the substantive potential overlap between both claims, which in this case demonstrates the existing risk of double recovery. To paraphrase the words of the *Commerce Group* tribunal: the Claimant is not hoping merely to have its procedural right to have the proceedings before the Constitutional Court reinstated as a result of these arbitral proceedings, but requests to be reimbursed for the amounts it paid as interest accrued on the IGV Liability, with interest.

286. ***Fourth***, despite the Claimant's contention that "*Peru's allegations that there is a risk of double recovery is* [sic] *misplaced*",[356] the risk of double recovery posed by the Claimant's simultaneous pursuit of the domestic proceedings and this arbitration is undeniable, and the Claimant has manifestly failed to disprove this.

287. In fact, the Claimant implicitly acknowledges that the end result of the *amparo* proceedings could be the refund of the payments made by Scotiabank Peru to the SUNAT between December 2013 and February 2014. The Claimant's carefully chosen language shows that, despite the Claimant's attempts to disguise it, a possible outcome of the *amparo* proceedings **may** be the reimbursement of the default interest payments to Scotiabank Peru:

---

355 *Thunderbird Gaming Corporation v. The United Mexican States*, Arbitral Award, 26 January 2006 (**Exhibit CL-0029**), ¶ 118 (emphasis added). *See also, The Renco Group, Inc. v. Republic of Peru*, ICSID Case No. UNCT/13/1, Second Non-Disputing Party Submission of the United States of America, 1 September 2015 (**Exhibit RL-0026**), ¶ 5. *See also Air Canada v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB(AF)/17/1, Award, 13 September 2021(**Exhibit RL-0073**), ¶ 228 ("*The purpose of the waiver provision is to protect a respondent State from having to defend itself in multiple fora with respect to the same measure and to minimize the risk of inconsistent decisions and double recovery with respect to such measure*."); *The Renco Group, Inc. v. Republic of Peru*, ICSID Case No. UNCT/13/1, Partial Award on Jurisdiction, 15 July 2016 (**Exhibit RL-0029**), ¶ 84 ("*Renco, Peru and the United States all agree that the object and purpose of Article 10.18(2)(b) is to protect a respondent State from having to litigate multiple proceedings in different fora relating to the same measure, and to minimise the risk of double recovery and inconsistent determinations of fact and law by different tribunals.*").

356 Scotiabank's Response, ¶ 152.

> If Scotiabank Peru is successful before the Constitutional Court, there are multiple possibilities. The Supreme Court **may** be asked to issue a new decision, and that new decision **may** or may not be favourable to Scotiabank Peru. Even if favourable to Scotiabank Peru, the Court **may** not order the repayment of the sums but may ask SUNAT to issue its decision again. That again **may** or may not be favourable to Scotiabank Peru.[357]

288. In short, Scotiabank acknowledges that the result "*may* […] *be favourable to Scotiabank Peru*." Should this be the case, the Supreme Court **may** order the repayment of the sums for default interest to Scotiabank Peru, which coincide exactly with the default interest payments claimed by the Claimant in this arbitration. Both the Constitutional Court's 2021 Decision, the ongoing Tax Appeal and this arbitration form part of the same multifaceted effort by Scotiabank to be made whole for the payments that Scotiabank Peru made to the SUNAT.

289. Further, Scotiabank itself recognizes that "*the damages sought in this* [arbitration] *theoretically overlap with the amounts that may be recovered in the Tax Appeal*".[358] Scotiabank argues that this should not be of concern to the Tribunal, since "*the loss to Scotiabank overlaps, but the harm caused to Scotiabank arises from distinct measures*."[359] Besides the fact that the Respondent does not identify any legal authorities for the purported difference that it seeks to draw between "harm" and "loss", the point is immaterial – and a distinction without a difference - when the compensation for the alleged damage is ultimately the same: "*at least 433,814,656.00 PEN representing the interest amount that was paid under protest*."[360] The Claimant's statement is one more attempt to relabel and rely on meaningless technicalities to circumvent the FTA's clear limitations.

290. ***Fifth,*** the Claimant argues that "[t]*here have been many investment arbitrations where there was a possibility of double recovery because there were overlapping damages in parallel proceedings. Tribunals have recognized that such risk is not a reason to dismiss a claim on the basis of lack of jurisdiction and 'any eventual award … could be fashioned in such a way to prevent double recovery*.'"[361] Once again, the Claimant blatantly misrepresents the legal authorities on which it relies. In support of this claim, the Claimant relies on *Suez v. Argentina*, *Urbaser v. Argentina*, *Webuild v. Argentina, Camuzzi v. Argentina, UFG v. Egypt, Lauder v. Czech Republic, Hochtief v.*

---

357 Scotiabank's Response, fn. 172 (emphasis added).

358 Scotiabank's Response, ¶ 153.

359 Scotiabank's Response, ¶ 153.

360 Request for Arbitration, ¶ 71(ii).

361 Scotiabank's Response, ¶ 154.

Argentina and Impregilo v. Agentina.[362] **None of these cases refer to investment treaties containing waiver requirements comparable to Article 823(c).** The Respondent is compelled to take issue with the gravity and recurrence of the Claimant's misrepresentations of the legal authorities on which it purportedly bases its claims.

291. ***Sixth***, and finally, Scotiabank's willingness to provide an undertaking allegedly to prevent double recovery is irrelevant and immaterial to the Tribunal's determination of whether the Claimant has complied with the waiver required by Article 823(e). To recall, as provided by Article 823(6) of the FTA: "[f]*ailure to meet any of the conditions precedent provided for in paragraphs 1 through 4 shall nullify the consent of the Parties given in Article 825*."[363] Therefore, as explained by the Respondent and as the Clamant itself acknowledges, the existence of a valid waiver is a requirement for the State's consent and, as a result, for the Tribunal's jurisdiction.[364] Consequently, a valid waiver must be present at the outset of the arbitration proceedings, with the submission of the Request for Arbitration. Needless to say, the Claimant's "offer" to provide an undertaking is disingenuous. Not only the lack of effective waiver cannot be retroactively "cured" but an undertaking to avoid double recovery would not cure a fundamental failure to comply with the conditions set forth by the Contracting Parties to consent to arbitrate disputes with investors.[365] It is not up to the investors to rewrite those requirements which have been negotiated by the States. As a matter of policy and of procedural efficiency, a State cannot be forced to undergo parallel proceedings and expend considerable and scarce resources whilst the Claimant hedges its bets in parallel proceedings. Simply put, the Tribunal should not allow the Claimant to make a mockery out of the express requirements agreed by the Contracting Parties to consent to arbitration.

2. The Claimant's claim for expropriation is time-barred

292. Pursuant to Articles 823(1)(c) and 823(2)(c) of the Peru-Canada FTA, claims for alleged breaches of the FTA may only be submitted to arbitration within 39 months as from the date on which the

---

362 *See* Scotiabank's Response, fns. 175-176.

363 Peru-Canada Free Trade Agreement, 1 August 2009 (**Exhibit C-0001**), Article 823(6). Article 825 of the FTA provides: "*Each Party consents to the submission of a claim to arbitration in accordance with the procedures set out in this Section*."

364 *See* Scotiabank's Response, ¶ 155; Peru's Submission on Rule 41, ¶¶ 145-167.

365 *See Waste Management, Inc. v. United Mexican States*, ICSID Case No. ARB(AF)/98/2, Arbitral Award, 2 June 2000 (**Exhibit RL-0002**), ¶ 27; *Commerce Group Corp. and San Sebastian Gold Mines, Inc. v. Republic of El Salvador*, ICSID Case No. ARB/09/17, Award, 14 March 2011 (**Exhibit RL-0019**), ¶ 111.

investor first acquired, or should have first acquired, knowledge of the alleged breach and that the investor has incurred loss or damage as a result of this breach.[366]

293. As the Respondent established in its Submission, for the Claimant's expropriation claim, this time bar started running from the date of issuance by the SUNAT of its Payment Order of 2013.[367] More than 107 months elapsed between the issuance of the SUNAT Payment Order and the Claimant's submission of its Request for Arbitration.[368] Therefore, there can be no doubt that the Claimant's expropriation claim is time-barred.

294. Once again, the Claimant's response consists of "accusing" the Respondent of having "mischaracterized" its claims. Indeed, the Claimant states: "[a]*ccording to Peru, the expropriation of the default interest payments did not crystallize with the 2021 Constitutional Court Decision. Rather, the measure that purportedly crystallized the alleged expropriation arose in November 2013, when SUNAT ordered Scotiabank Peru to pay the 1999 SUNAT Decision, including the default interest amounts*."[369] The Claimant's arguments are once again off the mark, since they are both contrary to the terms ad object and purpose of Article 823(c), and to arbitral case law on the matter:

295. ***First***, the Claimant's argument that "*the loss of the amounts paid under protest only crystallized with the 2021 Constitutional Court Decision*" is nothing but an attempt artificially to extend the applicable time limit. Arbitral tribunals have rejected similar arguments to those advanced by the Claimants, where investors alleged that a breach was "crystallized" or "continued" after the time limit set forth in the relevant treaty, to bring a claim after a time limit had elapsed. The tribunal's decision in *Ansung v. China* is particularly apposite in this regard. The *Ansung* tribunal analysed Article 9(7) of the China-Korea Bilateral Investment Treaty, a provision substantially equivalent to Article 823(1)(c). In *Ansung*, the claimant argued that, as a result of the Chinese State's "continuing" breach, the claimant could only ascertain its loss or damage after its expectation to build a 27-hole golf course was completely frustrated. Among other authorities, the claimant relied on *Pope v. Talbot*, to argue that the time limit under a statute of limitation is triggered by "*actual damage, rather than predicted future damage*".[370] The tribunal in *Ansung* dismissed the claimant's allegations. In particular, the

---

366 Peru-Canada Free Trade Agreement, 1 August 2009 (**Exhibit C-0001**), Article 823(1)(c) and 823(2)(c).

367 *See* Peru's Submission on Rule 41, ¶¶ 37, 170.

368 *See* Peru's Submission on Rule 41, ¶¶ 170, 175.

369 Scotiabank's Response, ¶ 157.

370 *See Ansung Housing Co., Ltd. V. People's Republic of China*, ICSID Case No. ARB/14/25, Award, 9 March 2017 (**Exhibit RL-0030**), ¶ 94.

tribunal relied on the plain meaning of the word "first" which it emphasised, referred to the moment in which the clamant first knew or should have known of the damage that it would suffer, not when this damage was fully ascertained. In the words of the *Ansung* tribunal:

> **Ansung ignores the plain meaning of the words "first" and "loss or damage" in Article 9(7). The limitation period begins with an investor's first knowledge of the fact that it has incurred loss or damage, not with the date on which it gains knowledge of the quantum of that loss or damage.** Ansung's actual sale of its shares on December 17, 2011 marked the date on which it could finalize or liquidate its damage, not the first date on which it had to know it was incurring damage. […] **However, even assuming a continuing omission breach attributable to China, which the Tribunal must assume, and even assuming Ansung might wish to claim damages from a date later than the first knowledge of China's continuing omission – for example, from November 2, 2011, when Ansung tentatively agreed to transfer its shares or even December 17, 2011, when Ansung's commercial patience ran out – that could not change the date on which Ansung first knew it had incurred damage.** And it is that first date that starts the three-year limitation period in Article 9(7).[371]

296. The parallels between *Ansung's* claims and the Claimant's claims in the present case as regards time limits are striking: (*i*) as the Claimant, the claimant in *Ansung* argued that the relevant date to apply the time bar in the treaty was the date that the loss or damage had "crystallized"; (*ii*) the time limit provisions under both the China- Korea Bit and the Peru- Canada BIT are comparable. In both cases, the relevant event that triggers the time calculation is the date on which the claimant "first" knew of the breach or damage; and (*iii*) crucially, in *Ansung*, the tribunal reached its decision in the context of Rule 41 proceedings. There is no reason for the Tribunal to depart from this clear logic.

297. ***Second***, the Claimant's attempt to prolong the applicable time bar by relying on the latest of a series of events, is contrary to the object and purpose of time bars. Indeed, the reasoning of the tribunal in *Berkowitz v. Costa Rica* goes to the point:

> While it may be that a continuing course of conduct constitutes a continuing breach, the Tribunal considers that such conduct cannot without more renew the limitation period as this would effectively denude the limitation clause of its essential purpose, namely, to draw a line under the prosecution of historic claims. **Such an approach would also encourage attempts at the endless parsing up of a claim into ever finer sub-components of breach over time in an attempt to come within the limitation period. This does not comport with the policy choice of the parties to the treaty. While, from a given claimant's perspective, a limitation clause may be perceived as an arbitrary cut off point for the prosecution of a claim, such clauses are a legitimate legal mechanism**

---

[371] *Ansung Housing Co., Ltd. V. People's Republic of China*, ICSID Case No. ARB/14/25, Award, 9 March 2017 (**Exhibit RL-0030**), ¶¶ 110, 113 (emphasis added).

> **to limit the proliferation of historic claims, with all the attendant legal and policy challenges and uncertainties that they bring.**[372]

298. Indeed, as clearly stated by the tribunal in *Berkowitz v. Costa Rica*, a claimant should not be allowed to parse out a claim into sub-components, as Scotiabank does here regarding its expropriation claim. As the Respondent has amply shown, the Claimant seeks redress for the default interest on a tax debt originating in 1999, which it paid between December 2013 and February 2014 and against which it has launched through the years every possible domestic recourse, including the Constitutional *amparo* proceedings on the legality of the default interest on the IGV Liability. This is the very definition of a "historic claim"- precisely the kind of claim against which the Contracting States intended to guard themselves by providing a time limit such as the one in Article 823(1)(e).

299. ***Third***, the Claimant avers that "[w]*here the underlying decision is itself alleged to breach the treaty, the date of the alleged breach and resulting loss happens is the date of that decision*."[373] Once again, the Claimant's analysis is fallacious. As stated by the *Berkowitz* tribunal, in the case of related events falling on either side of a time limit, for a claim not to be affected by a time bar, it must be separately actionable:

> On the issue of first knowledge of the breach, if a claim is to be justiciable for purposes of CAFTA Article 10.18.1, the Tribunal considers that it must rest on a breach that gives rise to a self-standing cause of action in respect of which the claimant first acquired knowledge within the limitation period. The Tribunal notes that this was the approach adopted by the Mondev tribunal, with which it is happy to agree. **This does not preclude, as the Clayton tribunal noted, the possibility that a series of related events, each giving rise to a self-standing cause of action, may be separated into distinct components, some time-barred, some eligible for consideration on the merits. It does mean, though, that for a "component" of a dispute to be justiciable in the face of a time-bar limitation clause, that component must be separately actionable, i.e., it must constitute a cause of action, a claim, in its own right.**[374]

300. There can be no doubt that the expropriation claim regarding the 2021 Constitutional Court Decision is not "separately actionable" from the SUNAT Payment Order. Even less so when they both seek

---

372 *Aaron C. Berkowitz, Brett E. Berkowitz and Trevor B. Berkowitz (formerly Spence International Investments and others) v. Republic of Costa Rica*, ICSID Case No. UNCT/13/2, Interim Award (Corrected), 30 May 2017 (**Exhibit RL-0031**), ¶ 208 (emphasis added).

373 Scotiabank's Response, ¶ 164.

374 *Aaron C. Berkowitz, Brett E. Berkowitz and Trevor B. Berkowitz (formerly Spence International Investments and others) v. Republic of Costa Rica*, ICSID Case No. UNCT/13/2, Interim Award (Corrected), 30 May 2017 (**Exhibit RL-0031**), ¶ 210 (emphasis added).

the reimbursement of the default interest payments. Therefore, the Claimant's attempt strategically to parse its claims to circumvent the time limit is to no avail.

301. ***Fourth***, the Claimant's argument according to which "[i]*nternational jurisprudence is clear that in respect of judicial expropriations, the loss does not crystallize while an appeal on the matter is pending. Rather, the expropriation only occurs with the final appellate decision*"[375] does not help its case. Fatally for the Claimant, the decisions it refers to are inapposite for a very basic reason: Scotiabank's case does not concern a "judicial expropriation", as the term is understood in investment case law.

302. This is not, as the Claimant will likely argue, a "recharacterization" of the Claimant's claims- it is simply the legal consequence that follows from the Claimant's claim as pleaded. It is undisputed that, by 2014 the SUNAT had already issued a Payment Order to the Claimant and the Claimant had already paid.[376] Even if one considers that the interest payments were an "investment", which is denied, by the time that the 2021 Constitutional Court Decision was rendered, the Claimant had been "deprived" of these monies for over seven years. Unlike the cases cited by the Claimant, the 2021 Constitutional Court decision did not suspend the actual payment. To the contrary, it is undisputed that, as a matter of fact, the SUNAT Payment Order had immediate effect and that the extraordinary *amparo* recourse before the Constitutional Court did not suspend either the Order, or the Payment. Therefore, neither as a matter of its nature nor as a matter of its legal effects, the 2021 Constitutional Court Order constitutes a "judicial expropriation".

303. In fact, the entirety of the cases that the Claimant relies upon allegedly to support its case involved takings **originating in judicial decisions that were suspended pending appeal; therefore, no actual deprivation occurred until a final decision was issued**. They are therefore plainly distinguishable from the case at hand, where (*i*) the default interest payments were made following an administrative order, the SUNAT Payment Order, not a judicial decision and (*ii*) that the SUNAT Payment Order was enforceable and not suspended while the tax appeals were still ongoing. The Respondent addresses each of these cases invoked by the Claimant in turn:

---

375 Scotiabank's Response, ¶ 160.

376 *See* Scotiabank's Response, ¶ 22; Peru's Submission on Rule 41, ¶ 41.

304. *Infinito v. Costa Rica:* the Claimant relies, once again, on the tribunal's decision in *Infinito v. Costa Rica*[377] quoting the tribunal's statement according to which "[a] *judicial expropriation can only occur when a final judgment is rendered or when the time limit to appeal has expired*." Referring to *Infinito*, Scotiabank claims that a judicial expropriation does not crystallize while an appeal on the matter is pending.[378] However, unlike the present case, in *Infinito*, the taking of which the claimant complained was the annulment of a concession that was decided by an administrative court, which enforcement was suspended pending the appeal. To be clear: no administrative decision depriving the investor from its concession rights was rendered by Costa Rica prior to the decision of the administrative court annulled the concession, which was later appealed with suspensive effect, and subsequently confirmed. It was the decision of the administrative court that effected the taking and which tribunal referred to as a "judicial expropriation". It was in this context that the *Infinito* tribunal found that:

> [A] judicial expropriation cannot occur through a decision by a first instance court, the execution of which is stayed pending an appeal, because it lacks finality and enforceability. […] From a legal perspective, the expropriation occurred at the time the suspension was lifted, that is, upon issuance of the cassation decision.[379]

305. In other words, the facts in *Infinito* are critically different from the ones in the present case. In *Infinito,* the investor could continue exploiting the concession while the appeal was still pending, whereas in this case, once Scotiabank Peru complied with the SUNAT Payment Order and made payment of the tax debt to the SUNAT between December 2013 and February 2014, Scotiabank Peru ceased to have property and possession of the amounts. In fact, the tribunal in *Infinito* expressly distinguished the situation that it faced from other cases in which the taking occurs due to an administrative decision:

> Court decisions are not final and enforceable if an appellate remedy **with suspensive effect** is still available. **The situation is generally different from administrative decisions**, with the result that, "an expropriation occurs at the moment of the decision of an administrative authority and is not only completed with the final refusal to remedy the administrative act."[380]

---

377 *See* Scotiabank's Response, ¶ 160.

378 Scotiabank's Response, ¶ 160 (emphasis added).

379 *Infinito Gold Ltd. v. Costa Rica* (ICSID Case No. ARB/14/5), Award, 3 June 2021, (**Exhibit CL-0027**), ¶ 239. In a similar vein, *see Apotex Inc. v. United States of America*, ICSID Case No. UNCT/10/2, Award on Jurisdiction and Admissibility, 14 June 2013 (**Exhibit RL-0021**), ¶ 330.

380 *Infinito Gold Ltd. v. Costa Rica* (ICSID Case No. ARB/14/5), Award, 3 June 2021 (**Exhibit CL-0027**), ¶ 240 (emphasis added).

306. This key element of the *Infinito* tribunal's reasoning (distinguishing a "judicial expropriation" from an "administrative expropriation") is in the same page as the portion on which the Claimant relies. Yet, and once again, the Claimant has no issue misrepresenting the contents of the legal authorities on which it relies. The Tribunal should not condone the Claimant's behaviour, which further results in the expenditure of time and resources for the Republic of Peru.

307. Similarly, the Claimant unduly relies in the tribunal's decision in *Eli Lilly v. Canada*. In *Eli Lily*, the claimant, an American pharmaceutical company, alleged that as a result of the decisions rendered by the Canadian courts, Canada has expropriated its investments, consisting of the drug patents "Strattera" and "Zyprexa".[381] As in *Infinito*, and unlike the present case, the alleged "taking" had occurred by virtue of the judicial decision.

308. Finally, the Claimant relies on *Rumeli v. Kazakhstan* which does not even concern the interpretation and application of a time bar and is therefore completely irrelevant.[382]

309. ***Fifth***, the Claimant unsuccessfully attempts to distinguish the present case from the authorities on which the Respondent relies, namely *Apotex v. USA* and *Aaron Berkowitz v. Costa Rica*. To recall, both decisions concern the application of time bars substantially equivalent to the one contained in the FTA to takings occurring through administrative decisions which allegedly interfered with an investor's property and which were followed **by judicial review proceedings without suspensive effect.** Their relevance to the present case may not be overstated. As explained by the Respondent, in cases involving administrative decisions which effects were not suspended tribunals have found that the relevant date for the computation of the applicable time bar is the date of the administrative taking, not that of the conclusion of the judicial proceedings commenced to challenge the administrative decisions (and takings).[383] The Respondent addresses the Claimant's arguments regarding *Apotex* and *Berkowitz* below:

310. As explained by the Respondent in its Rule 41 Submission, the *Apotex* case concerned claims arising from a decision issued by the United States Food and Drug Administration (the "**FDA**") preventing Apotex from commercializing certain products. Apotex subsequently initiated litigation proceedings

---

381 *Eli Lilly and Company v. Canada*, ICSID Case No. UNCT/14/2, Final Award, 16 March 2017 (**Exhibit CL-0016**), ¶¶ 82, 93, 163.

382 *Rumeli Telekom A.S. and Telsim Mobil Telekomunikasyon Hizmetleri A.S. v. Republic of Kazakhstan*, ICSID Case No. ARB/05/16, Award, 29 July 2008 (**Exhibit CL-0042**).

383 *See* Peru's Submission on Rule 41, ¶ 177-179.

against the FDA's administrative decision.[384] The Claimant attempts to distinguish *Apotex* from the present case by arguing that "*Peru claims that in that case, the expropriation claim was time-barred because the decision of the FDA was issued before the cut-off date and the subsequent court proceedings did not change that outcome. What the tribunal instead held was that any claim based on the FDA decision itself was time-barred*."[385] What the Claimant purposefully omits is that the *Apotex* tribunal drew a clear distinction between judicial and administrative measures, in the following terms:

> **Apotex places much reliance upon the Loewen tribunal's statement (quoting the U.S. as respondent in that case) that: "judicial action is a single action from beginning to end so that the State has not spoken (and therefore no liability arises) until all appeals have been exhausted." But this is of no application here, for the simple reason – as Apotex itself asserts elsewhere – that the FDA measure in question is an "administrative decision", not a "judicial action"**; that the FDA measure could have been the subject of a separate complaint under the NAFTA; and that the NAFTA does not require claimants to exhaust all available remedies before challenging non-judicial decisions.[386]

311. In *Apotex*, as in the present case, the claimant attempted to characterize the alleged taking which followed the FDA decision as a "continuous judicial act", purportedly ignoring the crucial differences between administrative and judicial takings to toll the strict time bar set forth by the NAFTA. As in *Apotex*, Scotiabank's attempt to circumvent the limits to the Contracting States' consent to arbitrate under the FTA should be rejected.

312. Similarly, the Claimant unsuccessfully attempts to distinguish the present case form the *Aaron Berkowitz v. Costa Rica* arbitration, in which the tribunal found that the relevant trigger date for the time limit was the date of the decree by which the claimant's properties had allegedly been expropriated, despite the existence of subsequent litigation.[387] The Claimant posits that the *Berkowitz* award is not relevant since "[t]*here were not ongoing court proceedings that suspended when that expropriatory conduct took effect*."[388] This is precisely why this case is exemplary for the present dispute. Under Peruvian law, neither the extraordinary *amparo* proceedings nor the Tax Appeal suspend the enforceability of the SUNAT Payment Order. This is undisputed, as

---

384 *See* Peru's Submission on Rule 41, ¶ 178.

385 Scotiabank's Response, ¶ 163.

386 *Apotex Inc. v. United States of America*, ICSID Case No. UNCT/10/2, Award on Jurisdiction and Admissibility, 14 June 2013 (**Exhibit RL-0021**), ¶¶ 329-330 (emphasis added).

387 Peru's Submission on Rule 41, ¶ 177.

388 *See* Scotiabank's Response, ¶ 162.

acknowledged by the Claimant, who repeatedly states that Scotiabank Peru paid the tax debt owed to the tax authorities to prevent the seizure of Scotiabank Peru's assets.[389] In other words, per the Claimant's admission, the enforcement of the Order could not be suspended.

313. ***Sixth***, and moreover, the Claimant's position according to which any judicial proceedings suspend time limits (regardless of the whether that might be the actual effect under domestic law) would leave compliance with time limits at the complete whim of the claimants, their ability and willingness to pursue domestic legal action. That was not the intention of the Contracting States to the FTA. As expressed by the *Apotex* tribunal, "*the limitation period applicable to a discrete government or administrative measure* […] *is not tolled by litigation, or court decisions relating to the measure*."[390]

314. ***Finally***, the Claimant argues that "*Peru's position is internally inconsistent as it has only challenged the expropriation claim, and not the FET or national treatment claims*."[391] The Claimant's allegation is nonsensical. The Claimant's expropriation case, as argued by the Claimant, concerns the alleged taking of the default interest payments. The Respondent has demonstrated that, particularly as regards claims for administrative expropriations, the relevant trigger date is the date of issuance of the administrative decision that allegedly affected the investment. This does not affect Scotiabank's claims for alleged breaches of other standards, namely, Minimum Standard of Treatment and National Treatment. This is by no means inconsistent: both sets of claims are distinct, since they involve different standards of treatment applied to different investments. It follows that different objections may apply. This is a complete argument.

V. THE CLAIMANT SHOULD BEAR THE COSTS OF THESE PROCEEDINGS

315. Despite the grave and abundant flaws in the Claimant's arguments, its lack of legal basis for its arguments and, what is graver, its repeated misrepresentations of the legal authorities on which it purportedly relies and of the Respondent's position, Scotiabank seeks full costs from the Respondent. Scotiabank bases this request on the Respondent's alleged "tactical" use of Rule 41, stating that the Respondent "*raised five broad jurisdictional objections*", none of which "*are based on well-established legal principles or undisputed facts*."[392] Scotiabank further states that "*Rule 41 is*

---

389 *See* Scotiabank's Response, ¶¶ 2, 22, 23, 126, 140, 144.

390 *Apotex Inc. v. United States of America*, ICSID Case No. UNCT/10/2, Award on Jurisdiction and Admissibility, 14 June 2013 (**Exhibit RL-0021**), ¶ 328.

391 Scotiabank's Response, ¶ 158.

392 Scotiabank's Response, ¶ 12.

only an effective tool when used judiciously to weed out frivolous claim."[393] Several considerations are in order with respect to these baseless allegations:

316. ***First***, the Respondent rejects in the strongest terms, the Claimant's spurious allegation. The Republic of Peru does not exercise its procedural rights lightly and less so in a tactical or abusive manner. All the exceptions it has raised under Rule 41 are serious and supported objections. The Claimant's unwarranted accusation is particularly grievous in view of the Claimant's tactical use of this ICSID arbitration, as demonstrated by its own admission that it initiated these arbitration proceedings to pressurize the Peruvian courts in rendering a decision in the *amparo* proceedings.[394]

317. ***Second***, the Respondent has submitted ample case law to support its objections, including decisions dealing with similar provisions and facts to those currently before the Tribunal. It is the Claimant, on the other hand, who has repeatedly made arguments while citing no legal basis for them or grossly misrepresenting its legal authorities, not to mention the Respondent's position in this arbitration.[395] Moreover, the Claimant has attempted to curtail the Respondent's right to develop and support its objections, artificially imposing restrictions to the Respondent's arguments by improperly alleging that the Respondent's arguments concern facts, when they do not

318. ***Third***, the Respondent emphasizes that Rule 41 is conceived to provide respondent States with a mechanism to defend themselves from frivolous claims.[396] It is the respondent State's prerogative to decide whether it will make use of this right, in addition to its right to file preliminary objections under Rule 43. In fact, in the vast majority of the decisions in which the respondents' Rule 41 applications have been dismissed, the respondent has not been found liable for costs. To the contrary, tribunals have predominantly deferred the question of costs to the end of the proceedings and have ordinarily applied the "costs lie where they fall" rule,[397] or, in certain cases, the "costs

---

393 Scotiabank's Response, ¶ 13.

394 Scotiabank's Response, ¶ 4.

395 *See above,* ¶¶ 8, 25-26, 49, 59-63, 84, 114-115, 127-136, 142, 143-149, 161-163, 166, 171, 185, 190-196, 199, 220, 266-267, 287, 302. *See also* fn. 270.

396 Peru's Submission on Rule 41, Section II.

397 *Brandes Investment Partners, LP v. The Bolivarian Republic of Venezuela*, ICSID Case No. ARB/08/3, Award, 2 August 2011 (**Exhibit RL-0052**) ¶¶ 119-120; *PNG Sustainable Development Program Ltd. v. Independent State of Papua New Guinea*, ICSID Case No. ARB/13/33, Award, 5 May 2015 (**Exhibit RL-0059**), ¶¶ 398, 401, 406-416; *Eskosol S.p.A. in liquidazione v. Italian Republic*, ICSID Case No. ARB/15/50, Award, 4 September 2020 (**Exhibit RL-0069**), ¶¶ 492-498.

follow the event" rule when the respondent prevailed in the final award.[398] In cases in which respondent States have prevailed in their Rule 41 applications, tribunals have often applied the "costs follow the event" rule.[399]

319. In fact, accepting the Claimant's unwarranted accusations and request for costs could have a deterrent effect on respondent States, which would be incompatible with the purpose of Rule 41. To recall, Rule 41 was introduced precisely as an answer to the respondent States' complaints on their inability to defend themselves from abusive claims at an early stage of the proceedings.[400]

320. ***Fourth***, and finally, it is the Claimant who should bear all costs for these Rule 41 proceedings, since its claims manifestly lack legal merit and, thus, should have never been submitted. The Respondent refers in this regard to the tribunal's finding in *RSM v. Grenada*, to the effect that: "[h]*aving regard to its conclusions that Claimants present claims are manifestly without legal merit, and that, it was impermissible for Claimants to advance them in new ICSID proceedings, the Tribunal considers it appropriate that Respondent should be fully indemnified for all of its costs, reasonably incurred or borne, in this proceeding*."[401] Similarly, in this case, given the grave flaws and lack of basis for the Claimant's contentions, it was simply impermissible for them to force the Respondent to defend itself in this arbitration.

VI. THE RESPONDENT'S REQUEST FOR RELIEF

321. For the foregoing reasons, the Respondent respectfully requests that the Arbitral Tribunal issue an Award in the following terms:

---

398 *See* e.g. *Transglobal Green Energy, LLC and Transglobal Green Panama, S.A. v. Republic of Panama*, ICSID Case No. ARB/13/28, Award, 2 June 2016 (**Exhibit RL-0063**), ¶¶ 125-129.

399 *Rachel S. Grynberg, Stephen M. Grynberg, Miriam Z. Grynberg and RSM Production Corporation v. Grenada*, ICSID Case No. ARB/10/6, Award, 10 December 2010 (**Exhibit RL-0017**), ¶¶ 8.3.1, 8.3.3-8.3.6; *Ansung Housing Co., Ltd. v. People's Republic of China*, ICSID Case No. ARB/14/25, Award, 9 March 2017 (**Exhibit RL-0030**), ¶¶ 158-166, 169; *Almasryia for Operating & Maintaining Touristic Construction Co. L.L.C. v. State of Kuwait*, ICSID Case No. ARB/18/2, Award on the Respondent's Application under Rule 41(5) of the ICSID Arbitration Rules, 1 November 2019 (**Exhibit RL-0065**), ¶¶ 61-63; *Lotus Holding Anonim Şirketi v. Turkmenistan*, ICSID Case No. ARB/17/30, Award, 6 April 2020 (**Exhibit RL-0035**), ¶¶ 207-210, 213; *AFC Investment Solutions S.L. v. Republic of Colombia*, ICSID Case No. ARB/20/16, Award on Respondent's Preliminary Objection Under Rule 41(5) of the ICSID Arbitration Rules, 24 February 2022 (**Exhibit RL-0039**), ¶¶ 343-351.

400 Antonio R. Parra, *The Development of the Regulations and Rules of the International Centre for Settlement of Investment Disputes*, ICSID Review - Foreign Investment Law Journal, Volume 22, Issue 1, 55-68 (**Exhibit RL-0041**), p. 65.

401 *Rachel S. Grynberg, Stephen M. Grynberg, Miriam Z. Grynberg and RSM Production Corporation v. Grenada*, ICSID Case No. ARB/10/6, Award, 10 December 2010 (**Exhibit RL-0017**), ¶ 8.3.4; *see also Ansung Housing Co., Ltd. v. People's Republic of China*, ICSID Case No. ARB/14/25, Award, 9 March 2017 (**Exhibit RL-0030**), ¶ 159.

a) **DECLARING** that the Claimant's claims are manifestly without legal merit;

b) **ORDERING** the Claimant to pay to the Republic of Peru all costs incurred in connection with this arbitration including, without limitation, the costs of the arbitrators and ICSID, as well as the legal and other expenses incurred by the Respondent including the fees of its legal counsel, experts and consultants on a full indemnity basis, plus interest thereon at a reasonable rate; and

c) **GRANTING** such further relief against the Claimant as the Tribunal deems fit and proper.

25 September 2023

Respectfully submitted on behalf of the Respondent,

[Signed]

Vanessa del Carmen Rivas Plata Saldarriaga
Jhans Paniguara Aragón
SPECIAL COMMISSION ON INTERNATIONAL INVESTMENT DISPUTES, REPUBLIC OF PERU

Dr. Yas Banifatemi
Ximena Herrera-Bernal
Yael Ribco Borman
Pilar Álvarez
GAILLARD BANIFATEMI SHELBAYA DISPUTES