INTERNATIONAL CENTRE FOR SETTLEMENT OF INVESTMENT DISPUTES

In the proceeding between

BANK OF NOVA SCOTIA

and

REPUBLIC OF PERU

ICSID Case No. ARB/22/30

DECISION ON RESPONDENT'S RULE 41 APPLICATION

Members of the Tribunal
Ms. Lucy Reed, President of the Tribunal
Prof. Dr. Kaj Hobér, Arbitrator
Prof. Zachary Douglas K.C., Arbitrator

Secretary of the Tribunal
Ms. Veronica Lavista

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31 May 2024

REPRESENTATION OF THE PARTIES

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I. INTRODUCTION

1. This case concerns a dispute submitted to the International Centre for the Settlement of Investment Disputes (***ICSID***) on the basis of the ICSID dispute settlement provision contained in the Free Trade Agreement between Canada and the Republic of Peru (signed on 29 May 2008, entered into force on 1 August 2009) (the ***FTA***)[1] and the Convention on the Settlement of Investment Disputes between States and Nationals of Other States (entered into force on 14 October 1966) (the ***ICSID Convention***).

2. The Claimant is Bank of Nova Scotia (***Scotiabank***), which is a company incorporated under the laws of Canada with its principal office and place of business in Toronto, Canada. The Respondent is the Republic of Peru (***Peru***). (The Claimant and the Respondent are collectively referred to herein as the ***Parties***.) The Parties' respective representatives and their addresses are listed above.

3. According to Scotiabank, the dispute arises from a decision in November 2021 by the Constitutional Court of Peru that allegedly deprived Scotiabank's Peruvian subsidiary, Scotiabank Peru S.A.A. (***Scotiabank Peru***), of a remedy of over US $100 million in allegedly illegally charged default interest payments in violation of the fair and equitable treatment, expropriation and national treatment protections in the FTA.

4. This Decision concerns Peru's preliminary objections under Rule 41 of the 2022 ICSID Arbitration Rules (the ***Arbitration Rules***) requesting the Tribunal to dismiss the Claimant's claims for manifest lack of legal merit on four jurisdictional grounds. At a high level, Peru alleges that certain of Scotiabank's claims fall outside the protections of the FTA and the ICSID Convention because: (a) Scotiabank is a financial institution; (b) the claims concern taxation measures; (c) Scotiabank lacks a protected investment; and (d) Scotiabank has failed to comply with certain conditions precedent under the FTA.

5. Also at a high level, Scotiabank accuses Peru of mischaracterizing its claims as concerning a tax debt imposed in 1999, while Scotiabank instead is challenging the unfair treatment to

[1] **Exhibit C-0001**: Peru-Canada Free Trade Agreement, 1 August 2009 (the ***FTA***).

which it was subjected by the Constitutional Court of Peru. Scotiabank contends that, at the Rule 41 stage, due process requires that it be allowed to formulate its claims as it sees fit. Scotiabank further contends that, if Peru must mischaracterize the nature of the claims to support its Rule 41 objections, the claims cannot be manifestly without legal merit.

6. For the reasons set forth below, the Tribunal has determined to grant Peru's Rule 41 Application in part and deny it in part.

II. PROCEDURAL HISTORY

7. As required by Article 823 of the FTA, Scotiabank delivered a Notice of Intent to arbitrate to Peru on 1 September 2021 and an Amended Notice of Intent on 1 February 2022. Thereafter, the Parties held consultations but were unsuccessful in settling Scotiabank's claims.

8. On 31 October 2022, Scotiabank filed with ICSID a Request for Arbitration against Peru under the ICSID Convention and the FTA, together with Exhibits C-1 through C-46. As envisioned in Article 823 of the FTA, Scotiabank and Scotiabank Peru submitted Consents to Arbitration and Waiver on 31 October and 20 October 2022, respectively.

9. On 2 November 2022, the ICSID Secretary-General made certain disclosures to the Parties regarding her connection to the case and the Claimant's representatives, which include a family member. On the same date, the Respondent took note of the communication from the Secretary-General.

10. On 15 November 2022, the Acting Secretary-General of ICSID registered the Request for Arbitration pursuant to Article 36 of the ICSID Convention and Rules 6 and 7 of the ICSID Institutional Rules.

11. On 7 February 2023, following his appointment by the Claimant, Prof. Dr. Kaj Hobér, a national of Sweden, accepted his appointment with the corresponding declaration.

12. On 17 February 2023, following his appointment by the Respondent, Prof. Zachary Douglas KC, a national of Australia (and Switzerland as of August 2023), accepted his appointment with the corresponding declaration.

13. On 6 May 2023, pursuant to the Parties' agreement, Ms. Lucy Reed, a national of the United States of America, accepted her appointment as the President of the Tribunal with the corresponding declaration.

14. On 8 May 2023, following Ms. Reed's acceptance of her appointment, ICSID informed the Parties that the Tribunal was constituted in accordance with ICSID Arbitration Rule 21(1).

15. On 22 May 2023, as discussed with the Parties, the Tribunal confirmed that the First Session would be held by video conference on 29 June 2023.

16. On 9 June 2023, the Tribunal circulated its draft Procedural Order No. 1 and draft Procedural Order No. 2 to the Parties. The Tribunal invited the Parties to consult and revert jointly by 23 June 2023 with: (a) their agreements on procedural matters, transparency and confidentiality; (b) their respective positions regarding issues on which they do not agree; and (c) any additional matters for discussion during the First Session.

17. On 22 June 2023, Peru filed Respondent's Submission on Rule 41 (the ***Rule 41 Application***), together with Exhibits R-1 thought R-15 and Legal Authorities RL-1 through RL-45.

18. On 26 June 2023, not having received the Parties' comments on draft Procedural Orders Nos. 1 and 2 by 23 June 2023 as ordered, the Tribunal directed the Parties to submit their joint proposals before close of business that day.

19. Also on 26 June 2023, the Parties informed the Tribunal of the stage of their consultations and inquired concerning the procedure anticipated for the Rule 41 Application.

20. On 27 June 2023, the Tribunal notified the Parties that it would prefer to postpone the First Session from 29 June 2023 to a date when the Tribunal could also hear the Parties' oral argument on the Rule 41 Application. The Tribunal directed the Parties to consult on a

timetable for the remaining written submissions on the Rule 41 Application and, by 7 July 2023, to revert with proposed dates for the combined Rule 41 Application hearing and First Session. The Tribunal also sought the Parties' agreement by 28 June 2023 on extending the 60-day period under Arbitration Rule 29(3) for the First Session.

21. On 28 June 2023, the Parties confirmed their agreement to extend the 60-day period for the First Session.

22. On 7 July 2023, the Parties reverted to the Tribunal with their agreed timetable for the remaining written submissions on the Rule 41 Application.

23. On 10 July 2023, the Tribunal approved the Parties' agreed timetable for the Rule 41 Application and requested the Parties, by 14 July 2023, to confirm their availability for a remote Rule 41 Application hearing and First Session on 16 or 20 October 2023.

24. On 21 and 22 July 2023, following an approved extension of time, the Parties informed the Tribunal that they did not share an available date for the Rule 41 Application hearing and First Session before the week of 26 February 2024.

25. On 24 July 2023, the Tribunal scheduled the Rule 41 Application hearing and First Session for 26 February 2024 and invited the Parties to consider commensurate amendments to the timetable for the written submissions on the Rule 41 Application and revert by 14 August 2023. The Tribunal also asked the Parties to confer and submit joint comments on draft Procedural Orders Nos. 1 and 2, setting out any different positions as necessary, by 26 January 2024.

26. On 17 August 2023, following an approved extension of time, the Parties submitted their agreed timetable for the remaining written submissions on the Rule 41 Application.

27. On 18 August 2023, Scotiabank filed its Response to the Respondent's Rule 41 Submission (the ***Response***), together with Exhibits C-47 through C-68 and Legal Authorities CL-1 through CL-53.

28. On 6 September 2023, Prof. Douglas informed the Parties that, as of 29 August 2023, he had acquired Swiss citizenship. The Parties did not submit any comments on this disclosure.

29. On 8 September 2023, Scotiabank provided English translations of its Exhibits C-47 to C-54 and C-60 to C-68.

30. On 22 September 2023, at the request of the Parties, the Tribunal amended the timetable for the remaining Rule 41 submissions.

31. On 25 September 2023, Peru filed Respondent's Reply on Rule 41 (the ***Reply***), together with Exhibits R-1bis, R-3bis, R-16 through R-22, and Legal Authorities RL-46 through RL-90. On 9 October 2023, Peru filed the English translations of its Exhibits R-1bis, R-3bis and R-16, as well as the English translations of Legal Authorities RL-56, RL-61, RL-70 and RL-72.

32. On 2 November 2023, Scotiabank filed its Rejoinder to the Respondent's Rule 41 Submission (the ***Rejoinder***), together with Exhibits C-69 through C-74 and Legal Authorities CL-54 through CL-73. On 30 November 2023, Scotiabank filed English translations of its Exhibits C-69 to C-71, C-73 to C-74 and RL-39.

33. On 26 January 2024, the Parties filed their comments on draft Procedural Orders Nos. 1 and 2. The Parties had no disagreements in relation to Procedural Order No. 2, which concerns confidentiality and transparency of the proceedings.

34. On 1 February 2024, in response to the Tribunal's inquiry, Peru requested that the Tribunal issue its decision on the Rule 41 Application simultaneously in English and Spanish, and Scotiabank Bank confirmed that it did not object.

35. On 7 February 2024, the Tribunal sent the Parties an indicative schedule for the Rule 41 Application hearing and First Session, and asked for joint comments by 13 February 2024.

36. On 13 February 2024, the Parties provided their comments on the indicative schedule, after which the Tribunal issued the final schedule for the hearing on the Rule 41 Application (the ***Rule 41 Hearing***) and First Session.

37. On 26 February 2024, the Tribunal conducted the Rule 41 Hearing and First Session remotely by Zoom from 9:00 am until approximately 2:00 pm (EST). The Rule 41 Hearing and First Session were simultaneously translated between English and Spanish.

38. The majority of the time was devoted to the Rule 41 Hearing, with the Tribunal hearing the Parties' arguments and posing questions for discussion. In the brief First Session that followed, the Tribunal offered its views on the limited open issues in draft Procedural Order No. 1.

39. Attending the Rule 41 Hearing /First Session were

Attending:

Tribunal Members:
Ms. Lucy Reed, President of the Tribunal
Prof. Dr. Kaj Hobér, Arbitrator
Prof. Zachary Douglas K.C., Arbitrator

ICSID Secretariat:
Ms. Veronica Lavista, Secretary of the Tribunal

On behalf of the Claimant:
Mr. John Terry
Ms. Emily Sherkey
Ms. Amanda Wolczanski
Ms. Mayra Bryce Alberti
Ms. Frances Fitzgerald
Mr. Alvaro Ayala Margain
Ms. Gia Ghassemi
Mr. Francisco Rivadeneira
Ms. Sacha Larrea Echeandia

On behalf of the Respondent:
Dr. Yas Banifatemi
Ms. Ximena Herrera-Bernal
Ms. Yael Ribco

Ms. María del Pilar Álvarez Díaz
Mr. Federico Achard Brito del Pino
Ms. Vanessa Rivas Plata Saldarriaga
Ms. Claudia Gladys Muñoz Vildoso
Mr. Jhans Armando Panihuara Aragón

On behalf of the Government of Canada, as a non-disputing party:
Ms. Alexandra Dosman
Ms. Elena Lapina
Mr. Tim Cleland

40. On 28 February 2024, the Tribunal issued Procedural Orders No. 1 and No. 2.

41. On 18 March 2024, ICSID forwarded the Final Transcripts of the Hearing (in English and Spanish), with the Parties' agreed corrections, to the Parties and the Tribunal.

42. On 23 April 2024, ICSID notified the Parties on behalf of the Tribunal as follows:

> *The Tribunal finds that it requires an extension of the 26 April 2024 deadline to 31 May 2024 for issuance of its ruling on the Respondent's Application under ICSID Rule 41, given the scope of the written submissions, in particular the Reply and Rejoinder. In addition, given the request of the Parties for both English and Spanish versions of the ruling, the Tribunal must allow time for translation.*
>
> *The Tribunal takes this opportunity to direct the Parties to file their costs submissions by* ***3 May 2024****. The Tribunal does not require argument on the allocation of costs, but only Costs Statements supported by summaries of the legal and other costs incurred by the Parties, including the hours recorded by counsel and disbursements by line item.*

43. By emails dated 24 and 25 April 2024, the Parties consented to the extension of time for the Tribunal's ruling on the Rule 41 Application.

44. On 10 May 2024, following an approved extension of time, the Parties submitted their Costs Statements – the Claimant for the Rule 41 proceedings and the Respondent for the full proceedings. On 13 May 2024, following a request for clarification, the Tribunal directed the Parties to provide separate Costs Statements for (a) the Rule 41 proceedings and (ii) the overall proceedings, by 20 May 2024. On 20 May 2024, the Parties submitted their Costs Statements for the Rule 41 proceedings and the overall proceedings.

III. FACTUAL BACKGROUND

45. The Tribunal summarizes below the factual background of the Parties' dispute as relevant to the Rule 41 Application.

A. HISTORY OF SCOTIABANK'S DEBTS: 1999 TO 2013

46. Scotiabank operates in Peru through Scotiabank Peru, which provides general banking services and is authorized under Peruvian law to purchase, conserve and sell gold. Scotiabank acquired its interest in Scotiabank Peru's predecessor company, Banco Wiese Sudameris (***Banco Wiese***), in 2006.

47. In 1997 and 1998, Banco Wiese engaged in certain gold trading transactions with various suppliers in Peru. In addition to the price, Banco Wiese paid each seller applicable Peruvian value added tax known as Impuesto General a las Ventas (the ***IGV***), which gave Banco Wiese the right to a tax credit deductible from the IGV otherwise payable by Banco Wiese.

48. After an investigation, the Superintendencia Nacional de Aduanas y de Administración Tributaria (the ***SUNAT***) found that Banco Wiese had facilitated the unlawful use of tax credits by certain of the gold sellers. On 23 December 1999, the SUNAT reduced the IGV tax credits claimed by Banco Wiese and imposed on Banco Wiese a tax debt of [redacted] (the ***1999 SUNAT Decision***). The total of [redacted] included the amount of [redacted] for the excess IGV tax credit (the ***IGV Liability***, approximately [redacted] plus the amount of the (then) accrued default interest on the Tax Liability of [redacted] (the ***1999 Default Interest Debt***, approximately [redacted][2]

49. On 19 January 2000, Banco Wiese filed an administrative appeal seeking to revoke the 1999 SUNAT Decision. On 18 July 2000, the SUNAT rejected the claim in a Resolution of Intendency.

[2] Request for Arbitration, para. 21.

50. On 9 August 2000, Banco Wiese appealed the SUNAT Resolution of Intendency to the Peruvian Tax Court, described by Peru as "the authority in charge of deciding, at last instance, any administrative appeal relating to tax matters."[3]

51. According to Scotiabank, although Peruvian law requires administrative appeals such as that filed by Banco Wiese to be decided by the Tax Court within 12 months, the Tax Court did not resolve the appeal until 30 December 2003. The Tax Court partially annulled the SUNAT Resolution of Intendency and ordered the SUNAT to render a new decision.

52. It was on 9 March 2006 that the Scotiabank Group acquired a 78% equity interest in Banco Wiese, which merged with Banco Sudamericano, and the merger culminated in the creation of Scotiabank Peru.[4] Scotiabank reports that it now holds a 99.31% interest in Scotiabank Peru.[5]

53. The SUNAT rendered its new decision on 30 December 2011 (the ***2011 SUNAT Decision***). According to Scotiabank, this far exceeded the six-month time limit set by Peruvian law for the issuance of such decisions, which would have expired in 2004. The SUNAT upheld the 1999 SUNAT Decision, and found that Banco Wiese – now Scotiabank Peru – was liable for both the IGV Liability and the 1999 Default Interest Debt with additional accrued default interest.

54. On 6 January 2012, Scotiabank Peru appealed this decision to the Tax Court and requested that the accrual of default interest be suspended during the 12-year period of delay (from 1999 to 2011) caused by the SUNAT and the Tax Court. The Tax Court rejected this appeal on 11 November 2013 (24 September 2013, according to Peru) (the ***2013 Tax Court Decision***).

55. According to Scotiabank, on 25 November 2013, the SUNAT ordered Scotiabank Peru to pay the IGV Liability and updated amounts of default interest, the latter in the total amount

[3] Rule 41 Application, para. 34.
[4] **Exhibit R-0011**, Scotiabank Peru official website.
[5] **Exhibit C-0024**.

of [redacted] (the ***2013 IGV Payment and the 2013 Default Interest Payments, together the 2013 Payments***).[6] The Claimant emphasizes that the 2013 Default Interest Payment amount is more than 23 times the amount of default interest initially imposed in 1999.[7] The Claimant also contends that, under Peruvian law, the accrual of default interest should have been suspended as of the expiration of the maximum terms for the SUNAT and Tax Court decisions and should not have been calculated on a compounding basis.

56. Between December 2013 and February 2014, Scotiabank made the 2013 Payments, under protest, which stopped the accrual of default interest. According to Scotiabank, it made this payment to avoid seizure of Scotiabank Peru's assets.

B. JUDICIAL PROCEEDINGS: 2013-PRESENT

57. Following the 2013 Tax Court Decision, Scotiabank Peru also commenced two judicial proceedings:

(a) On 15 November 2013, Scotiabank Peru presented a constitutional claim (*demanda de amparo*) to the Peruvian Constitutional courts, asserting that the accrual of default interest during the 14-year period of delay attributable to the SUNAT and the Tax Court was unconstitutional (the ***Default Interest Appeal***). Scotiabank requested the Constitutional courts to enjoin the SUNAT from collecting the default interest assessed against Scotiabank Peru and to revise the default interest amount arising from the 2011 SUNAT Decision. Scotiabank emphasizes that, in the Default Interest Appeal, Scotiabank Peru did not challenge the original SUNAT decision to impose default interest.

[6] Rule 41 Application, para. 91: According to Peru, the SUNAT Payment Order of 25 November 2013 was for the total updated amount of [redacted] comprised of (a) the IGV Liability at [redacted] (b) capitalized interest at [redacted] and (c) default interest at [redacted] **Exhibit R-0005**, SUNAT Payment Order No. 011-006-0044596, 25 November 2013.

[7] Request for Arbitration, para. 28; Response, para. 2.

(b) On 21 November 2013, Scotiabank Peru filed a contentious administrative action seeking annulment of the 2013 Tax Court Decision, which had confirmed the 2011 SUNAT Decision regarding the 1999 Default Interest Debt, challenging the imposition of the debt for the underlying IGV (the ***Tax Appeal***). Scotiabank Peru asserted that the IGV was never legally owed.

(1) The Tax Appeal

58. On 17 December 2014, a first instance administrative court dismissed Scotiabank Peru's claim to annul the 2013 Tax Court Decision.

59. On 14 April 2016, an appellate administrative court again dismissed Scotiabank Peru's claim. Scotiabank filed a Cassation recourse with the Supreme Court of Peru.

60. On 4 July 2017, the Supreme Court upheld the imposition of the IGV against Scotiabank Peru.

61. On 5 July 2018, Scotiabank Peru filed an *amparo* action before a Constitutional court challenging the Supreme Court's ruling. The Court dismissed the *amparo* on 28 December 2020. On 12 January 2021, Scotiabank Peru appealed that decision to the First Constitutional Chamber of Lima, which dismissed the appeal.

62. On 15 August 2022, Scotiabank Peru filed a second *amparo* proceeding before the Constitutional Court, seeking annulment of the Cassation Decision of the Supreme Court as breaching its constitutional due process rights. A hearing took place on 1 June 2023. The decision in this *amparo* remained pending as of the date of the Rule 41 Application hearing.

(2) The Default Interest Appeal

63. As set out in Scotiabank's Request for Arbitration, Scotiabank Peru alleged in the Default Interest Appeal that its constitutional rights had been breached, including:[8]

[8] Request for Arbitration, para. 33.

> *(i) the right to be tried without undue delay (as part of the constitutional right of due process), resulting from the delay of the Tax Court and SUNAT in deciding the dispute;*
>
> *(ii) the right to equal treatment, resulting from the SUNAT and the Tax Court's failure to abide by Article 33 of Legislative Decree No. 981 requiring the suspension of the calculation of default interest after the expiration of the maximum term for SUNAT to render a decision;*
>
> *(iii) the right to private property and the prohibition against confiscatory taxes, resulting from the unlawful calculation of default interest between 1999 and 2013 and the unlawful capitalization of that default interest, contrary to Article 33 of Legislative Decree No. 969; and*
>
> *(iv) the right of access to jurisdiction (as part of the right of effective jurisdictional protection) and the constitutional right of defense, which prohibited SUNAT from collecting the default interest calculated until the issuance of a final and res judicata judgment.*

64. On 7 December 2015, a first instance judge with competence in constitutional matters ruled in part in favor of Scotiabank Peru in the *amparo* proceedings, prohibiting the SUNAT from charging default interest between December 1999 and March 2007 on the ground that the SUNAT had caused that delay. All parties appealed. On 26 September 2016, the appeal court overturned the first instance decision and dismissed Scotiabank's *amparo* claim.

65. On 14 October 2016, Scotiabank Peru filed a special appeal (*agravio constitucional*) before the Constitutional Court, claiming that the accrual of default interest between 1999 and 2013 breached its constitutional rights. Five of the seven judges on the Constitutional Court sat for the hearing on the special appeal on 29 March 2017.

66. According to Scotiabank, a draft decision in the *agravio* appeal in favor of Scotiabank Peru was circulated for signature and then leaked to the media in June 2017. The unfavorable media attention that followed included assertions that the Constitutional Court should not order Peru to pay a large sum to a foreign-owned financial institution like Scotiabank Peru. Further, according to Scotiabank, the leaked draft decision subjected the Constitutional Court to political pressure from present and former members of Congress. In a June 2018 televised statement to the nation, then-President Martin Vizcarra stated: "we have identified big corporations […] that owe the State amounts than represent more than 1% of

GDP, much necessary income for the development of projects and public policies that benefit all Peruvians" and "an *ad hoc* commission will be formed by representatives of the Ministry of Economy and SUNAT, among others, to develop payment mechanisms, with the objective to make the collection of tax debt effective."[9]

67. The Constitutional Court did not issue its decision in the *agravio* appeal until November 2021, beyond the 30-day term set in the Constitutional Procedure Code.

68. Between 2017 and 2021, counsel for Scotiabank Peru met multiple times with judges of the Constitutional Court, which Scotiabank describes as a common practice in Peru. Reportedly, one judge stated that an official from the Ministry of Economy had suggested to another judge that if the Constitutional Court ruled in favor of Scotiabank Peru, the funds for planned new Court facilities would be withheld. One judge reportedly urged Scotiabank Peru to be patient and to expect a decision consistent with the Court's precedents, which were favorable to Scotiabank Peru's position. Scotiabank Peru further understood that, in March 2021, Justice Carlos Ramos Núñez, the judge responsible for drafting the decision, sent a draft to the President of the Court and requested deliberations, without effect.

69. On 10 August 2021, the Minister of Economy and Finance stated publicly that "it is time for companies like Teléfonica and Scotiabank to […] pay their debts" and that the judiciary should work hand-in-hand with the executive branch to achieve this.[10]

70. According to Scotiabank, the Constitutional Court decided at least five other cases between 2016 and 2021 addressing the same default interest accrual issue involved in Scotiabank Peru's case, three of which involved Peruvian parties. The Court ruled in each of the five cases that default interest cannot accrue against a party as a result of delay caused by SUNAT and the Tax Court.[11]

[9] Request for Arbitration, para. 39 (without exhibit).

[10] Request for Arbitration, para. 43 (without exhibit).

[11] The cases are summarized in the Request for Arbitration, para. 44.

71. By September 2021, the mandate of six of the seven judges who were on the Constitutional Court at the time of Scotiabank Peru's hearing had lapsed. The seventh judge, Justice Ramos Núñez, who was in charge of drafting the decision, passed away in September 2021.

72. On 1 September 2021, Scotiabank delivered a Notice of Intent to Peru that it intended to submit an arbitration claim pursuant to the FTA.[12]

73. On 3 November 2021, the Constitutional Court issued Administrative Resolution 205-2021-p/tc, which unilaterally lowered the number of judges required to vote in favor of a decision for it to be valid from four judges to three judges. According to Scotiabank, this Resolution was invalid, because the required number of judges is set in the Constitutional Procedure Code and therefore can be modified only by legislative amendment.

74. On 9 November 2021, the Constitutional Court rendered its Decision No. 919/2021, dismissing Scotiabank's *agravio* appeal and rejecting the *amparo* recourse (the ***2021 Constitutional Court Decision***).[13] According to Scotiabank, the Court announced on its website that it had dismissed Scotiabank Peru's *agravio* appeal by a vote of three to one, with two judges abstaining. As described by Scotiabank, the three-judge majority held that: (a) there was no need for urgent intervention by the Court justifying a constitutional *amparo*, because Scotiabank Peru had paid the accrued default interest in 2013; (b) there was no violation of the right to be tried within a reasonable period of time, because Scotiabank Peru had not challenged the delay through a *queja* (an administrative complaint to the Ministry of Economy and Finance) while the delay was ongoing; and (c) the default interest claim could have been addressed through a judicial review proceeding in the Tax Appeal rather than as a constitutional *amparo*, but, not having done so, Scotiabank Peru was prohibited from filing that judicial review application following the dismissal of the *amparo*. In connection with the last holding, the Court wrote that Scotiabank:[14]

> *has prematurely resorted to the constitutional courts. If in the course of the administrative contentious proceedings, the Tax Court Resolution No. 14935-5-*

[12] **Exhibit C-0021**, Notice of Intent, 1 September 2021.

[13] **Exhibit R-0008**.

[14] **Exhibit R-0008**, para. 21.

> *2013, and the proceeding [is] annulled in [its] entirely, this decision [will] also have […] an [impact] on the determination of the interest [due]. Therefore, it cannot be claimed that the constitutional route may be used for matters- such as the tax interests- that could have well been contested before the ordinary courts.*

75. The dissenting judge considered the decision to be invalid for lack of quorum, because fewer than five judges had deliberated and ruled.

76. On 4 December 2021, the three-judge majority released a clarification decision, stating that their decision was based on precedent (without referencing any cases) and that the Constitutional Court was entitled to ignore its quorum requirement in order to "administer justice."[15] Scotiabank emphasizes that all of the relevant precedents from 2016 to 2021 are in favor of Scotiabank Peru's position on accruing default interest.

77. On 1 February 2022, Scotiabank delivered to Peru an Amended Notice of Intent to arbitrate.

78. Peru does not agree with Scotiabank's "selective rendition" of how the Peruvian judiciary handled the Default Interest Appeal and contends that Scotiabank acted "abusively" by raising these facts, but takes the position that "none of these factual allegations are material to the issues currently before the Tribunal."[16]

IV. SCOTIABANK'S CLAIMS FOR BREACH OF THE FTA

79. In its Request for Arbitration, Scotiabank contends that Peru breached its obligations under the FTA: (a) to accord covered investments the minimum standard of treatment of aliens, including fair and equitable treatment (the ***FET Claim***); (b) not to expropriate a covered investment unlawfully (the ***Expropriation Claim***); and (c) to accord to investors of Canada treatment no less favorable than it accords to its own investors (the ***National Treatment Claim***).

[15] Rule 41 Application, para. 175.

[16] Reply, paras. 59-60.

80. In its Response to Peru's Rule 41 Application, Scotiabank underscores that the "heart of this case is about the unfair treatment before the Constitutional Court," as summarized in the Request for Arbitration:[17]

> *The effect of the Constitutional Court Decision is that 23 years after this dispute first arose, and eight years after the accrued amount of default interest was paid under protest, Scotiabank Peru has been denied the opportunity to have its challenge to the accrual of default interest determined. Scotiabank Peru will never have that opportunity because of the Constitutional Court's politically motivated refusal to issue a timely decision based upon its own precedents. The Constitutional Court's (i) amendment of the law governing the number of judicial votes required for a binding decision, (ii) failure to uphold its own quorum requirements, and (iii) failure to uphold its own precedents regarding the process for deciding default interest issues, preventing the merits of Scotiabank Peru's appeal from ever being decided, reflects a systemic failure of the Peruvian legal system to provide an avenue for redress. That is procedurally unfair and constitutes treatment that would offend any reasonable sense of judicial propriety.*

A. THE FET CLAIM

81. Article 805 of the FTA requires Peru to accord investments "treatment in accordance with the minimum standard of treatment of aliens, including fair and equitable treatment …."

82. Scotiabank alleges that Peru failed to provide fair and equitable treatment to Scotiabank's investments, which include its shares in Scotiabank Peru and the interest amount paid under protest. The wrongful conduct and measures include the Constitutional Court:[18]

> *(i) failing to remain independent and objective, and to issue a timely decision based upon the law and its own precedents, and instead permitting itself to be improperly influenced by political and media pressure;*
>
> *(ii) purporting to lower the number of supporting judges required to issue a valid decision and failing to abide by the Court's quorum requirements; and*
>
> *(iii) preventing Scotiabank Peru from ever having the substance of its challenge determined by the Peruvian courts.*

[17] Response, para. 48 (emphasis from Scotiabank).

[18] Request for Arbitration, para. 63.

83. Scotiabank contends that Peru's conduct:[19]

> *amounts to a denial of justice, and its actions are arbitrary, non-transparent, discriminatory, breach due process and violate Scotiabank's legitimate expectations, including its legitimate expectation that it would receive a fair hearing, and that the Constitutional Court would consistently and dispassionately apply Peruvian law and render an objective and independent decision.*

B. THE UNLAWFUL EXPROPRIATION CLAIM

84. Article 812 of the FTA provides that "[n]either Party may nationalize or expropriate a covered investment either directly, or indirectly through measures having an effect equivalent to nationalization or expropriation (hereinafter referred to as '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."

85. Scotiabank contends that Peru breached this obligation with respect to its investment in Peru in the form of the default interest that was paid under protest. Peru's measures have deprived Scotiabank the ability to recover the default interest amount and hence constitute an unlawful expropriation.

C. THE NATIONAL TREATMENT CLAIM

86. Article 803 of the FTA requires each party to accord to investors of the other party "treatment no less favourable than that accorded, in like circumstances, to its own investors with respect to the establishment, acquisition, expansion, management, conduct, operation and sale or other disposition of investments in its territory."

87. Scotiabank contends that Peru violated this obligation through its treatment of Scotiabank, which was less favorable than that accorded to Peru's own investors under like circumstances. Scotiabank refers to the other Constitutional Court decisions brought by Peruvian companies in which the Court, applying Peruvian law, upheld the applicants' *amparo* claims in constitutional challenges to default interest imposed.

[19] Request for Arbitration, para. 64.

D. REQUEST FOR RELIEF (MERITS)

88. Scotiabank seeks compensation for the losses and damages it suffered as a result of the alleged breaches of the FTA by Peru, specifically the repayment of the default interest amount that Scotiabank paid under protest and pre-award interest on that amount at the rate applicable under Peruvian law.[20]

V. REQUEST FOR RELIEF

89. Peru requests that the Tribunal issue an Award in the following terms:[21]

> *a)* ***DECLARING*** *that the Claimant's claims are manifestly without 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 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.*

90. Scotiabank requests the Tribunal to "dismiss Peru's Rule 41 challenge and order Peru to pay to Scotiabank all costs incurred in connection with this Rule 41 challenge."[22]

VI. PERU'S RULE 41 APPLICATION: INTRODUCTION AND RULE 41 STANDARD

A. INTRODUCTION

91. In the introduction to its Rule 41 Application, Peru sets out its overall position as follows:[23]

> *It is unassailable that the nucleus of all and every single legal recourse commenced by Scotiabank is the 1999 Tax Debt – which under Peruvian Law comprises both the amount imposed as the IGV Liability as well as the default interest accrued on*

[20] Request for Arbitration, para. 71.

[21] Rule 41 Application, para. 188; Reply, para. 321.

[22] Rejoinder, para. 199.

[23] Rule 41 Application, para. 6.

> *it for late payment. Yet, in order to circumvent the limits and requirements established in the Peru-Canada FTA and submit its claim to this Tribunal, the Claimant artificially presents the case as comprising three different and distinct sets of claims and measures: **(i)** a claim regarding the IGV Liability, against which the Claimant has ongoing legal actions in Peru, and which the Claimant claims is not part of this arbitration; **(ii)** the claim and actions concerning the reimbursement of the Tax Payments; and **(iii)** the decision by the Peruvian Constitutional Court of November 2021 on the constitutionality of the SUNAT Payment Order of the 1999 Tax Debt with its interest. This last decision is, according to the Claimant, the object of this arbitration. However, as the Respondent establishes in this submission, despite the Claimant's strenuous efforts to compartmentalize these facts and claims, they all concern the very same tax debt and the Claimant's objective is the same: to have the Tax Payments, including the default interest, reimbursed.*

92. Peru offers four separate grounds on which the Claimant's claims allegedly are manifestly without legal merit. In brief, these are that: (a) Scotiabank, as a financial institution, is barred from commencing arbitration under Chapter 8 of the FTA in connection with the alleged breaches of Articles 803 and 805; (b) the claims fall outside the scope of the Tribunal's jurisdiction because they concern taxation measures carved out in Article 2203 of the FTA; (c) the default interest paid under protest is not a protected investment under either the FTA or the ICSID Convention; and (d) the conditions precedent in the FTA for an effective consent to arbitration by Peru have not been fulfilled.

93. After addressing the standard applicable to a Rule 41 Application, the Tribunal will address each of Peru's four grounds for dismissal of Scotiabank's claims for manifest lack of legal merit under Rule 41.

94. The Tribunal emphasizes that it has reviewed and considered the Parties' positions in detail, before including in this Decision all of the points that it considers most relevant to the necessary analysis and decision. The fact that this Decision may not expressly reference specific facts, evidence or arguments in no way indicates that the Tribunal did not consider those matters.

B. THE APPLICABLE RULE 41 STANDARD

95. Rule 41 of the Arbitration Rules provides, in relevant part, as follows:

> *1.* (1) *A party may object that a claim is manifestly without legal merit. The objection may relate to the substance of the claim, the jurisdiction of the Centre, or the competence of the Tribunal.*
>
> *(2) The following procedure shall apply:*
>
> *(a) a party shall file a written submission no later than 45 days after the constitution of the Tribunal;*
>
> *(b) the written submission shall specify the grounds on which the objection is based and contain a statement of the relevant facts, law and arguments;*
>
> *....*
>
> *(e) The Tribunal shall render its decision or Award on the objection within 60 days after the later of the constitution of the Tribunal or the last submission on the objection.*
>
> *(3) If the Tribunal decides that all claims are manifestly without legal merit, it shall render an Award to that effect. Otherwise, the Tribunal shall issue a decision on the objection and fix any time limit necessary for the further conduct of the proceedings.*
>
> *(4) 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.*

96. It is uncontroversial that the purpose of Rule 41, like the predecessor Rule 41(5) in the 2006 ICSID Arbitration Rules, is to allow early – and efficient – dismissal of patently unmeritorious claims. (For simplicity's sake, the Tribunal will use "Rule 41" to refer to earlier decisions and discussions under Rule 41(5).)

97. The Parties agree on the general principles governing preliminary objections under Rule 41 and, in essence, the standard for determining whether a claim is manifestly without legal merit. Accordingly, the Tribunal need not and does not provide an extensive discussion of the relevant Rule 41 decisions and awards of ICSID tribunals.

98. The standard contains two main elements, meaning that, in the present case, Peru must demonstrate that Scotiabank's claims are: (a) manifestly without (b) legal merit.

99. As for the meaning of the term "manifestly," perhaps the most often cited decision is that of the tribunal in *Trans-Global v. Jordan*.[24] In that 2008 decision, the tribunal observed that the ordinary meaning of "manifestly" requires a respondent "to establish its objection clearly and obviously, with relative ease and despatch."[25] In the words of the tribunal:[26]

> *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.*

100. More colloquially, the tribunal in *Mainstream v. Germany* stated that the respondent "must be able to show the Tribunal that the claim was lost before it left the start line."[27]

101. Turning to the second element of Rule 41, it is clear that a tribunal deciding a Rule 41 application is not to decide the legal merits of the underlying dispute. The *Trans-Global* tribunal observed that the term "legal" is "clearly used in contradistinction to 'factual'," reflecting that, at such an early stage of the proceedings, a tribunal is not in a position to decide disputed facts.[28] In the words of the tribunal in *Lotus v. Turkmenistan*, to dismiss a claim under Rule 41, the tribunal must satisfy itself that "no matter what evidence is adduced, there is a fundamental flaw in the way that the claim is formulated that must inevitably lead to its dismissal."[29]

102. As observed by the tribunal in *Brandes v. Venezuela*, "basically the factual premise has to be taken as alleged by the Claimant" and "[o]nly if on the [basis of the] best approach for the Claimant, its case is manifestly without legal merit, it should be summarily

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

[25] *Trans-Global*, para. 88.

[26] *Trans-Global*, para. 88.

[27] **Exhibit RL-0074**: *Mainstream Renewable Power, Ltd. and others v. Federal Republic of Germany*, ICSID Case No. ARB/21/26, Decision on Respondent's Application under Rule 41(5), 18 January 2022 (***Mainstream***), paras. 81, 96.

[28] *Trans-Global*, para. 97.

[29] **Exhibit RL-0035**: *Lotus Holding Anonim Sirketi v. Republic of Turkmenistan*, ICSID Case No. ARB/17/30, Award, 6 April 2020 (***Lotus Holding***), para. 158.

dismissed."[30] However, returning to the *Trans-Global* decision, a 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."[31]

103. The Parties part ways in certain respects in describing and applying the standard for a Rule 41 dismissal.

104. For its part, Scotiabank emphasizes the "extremely high standard" that Peru must meet to prevail on its Rule 41 Application. Scotiabank relies on the decision in *PNG Sustainable v. Papua New Guinea*, where the tribunal accepted Papua New Guinea's Rule 41(5) application. The tribunal stated that the Rule 41 standard "is very demanding and rigorous" and "a case is not clearly and unequivocally unmeritorious if the Claimant has a tenable arguable case," and noted that Rule 41 "is not intended to resolve novel, difficult or disputed legal issues, but instead only to apply undisputed or genuinely indisputable rules of law to uncontested facts."[32] Scotiabank contends that the Tribunal, at this preliminary stage, must accept "*prima facie* the plausible facts as presented by the Claimant."[33] As counsel stated at the hearing, the standard is high "because [of] the claimant's due process rights, [and] it is an extreme remedy, it is quite extraordinary to dismiss a claim essentially before the Claimant has had a right to be heard."[34] Scotiabank also argues that the sheer complexity of Peru's Rule 41 Application, which is based in large part on Peru's mischaracterization of the claims, demonstrate that this case is not suitable for dismissal under Rule 41.

[30] **Exhibit CL-0004**: *Brandes Investment Partners v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB/08/3, Decision on the Respondent's Objection Under Rule 41(5) of the ICSID Arbitration Rules, 2 February 2009 (***Brandes***), para. 61.

[31] *Trans-Global*, para. 105.

[32] **Exhibit CL-0040**: *PNG Sustainable Development Program Ltd. V. Independent State of Papua New Guinea*, ICSID Case No. ARB/13/33, Decision on the Respondent's Objection under Rule 41(5) of the ICSID Arbitration Rules, 28 October 2014 (***PNG***), paras. 88, 89.

[33] Response, para. 50(e).

[34] Hearing 26 February 2024, Transcript 100: 3-6.

105. In response, Peru charges Scotiabank with "elaborat[ing]" on the demanding Rule 41 standard "to render it increasingly more stringent to the point of making its application not demanding, but impossible."[35] Among other things, Peru insists that Scotiabank "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," if only because "[e]ndorsing 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."[36] This is not a case like *PNG Sustainable*, says Peru, in which the tribunal noted "the intricacies and difficulties of the factual and legal matrix" and did not apply a Rule 41 standard different than that set out in *Trans-Global*.[37] The factual basis underlying Croatia's Rule 41(5) objections in *MOL v. Croatia*, which Peru describes as an outlier, was also highly complex.[38] Peru focuses instead on the recent case of *AHG Industry v. Iraq*, in which the tribunal observed that, regardless of the length or complexity of the arguments, a tribunal is to examine whether "it appears that the Claimant has no tenable arguable case and that the absence of legal merit in each of the Claimant's claims to jurisdiction is clear and obvious."[39] Peru also charges Scotiabank with "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."[40]

106. As is reflected in the Tribunal's analysis below of the Parties' positions on the various grounds in Peru's Rule 41 Application, the Tribunal has not found that the Parties' differences concerning the relative rigor of the applicable Rule 41 standard affect its decisions on the Application. The Tribunal recognizes that, as summarized by Scotiabank,

[35] Reply, para. 25.

[36] Reply, para. 33.

[37] Reply, paras. 28-30.

[38] Reply, para. 35, citing **Exhibit CL-0037**: *MOL Hungarian Oil and Gas Company Plc. v. Republic of Croatia*, ICSID Case No. ARB/13/32, Decision on Respondent's Application under ICSID Arbitration Rule 41(5), 2 December 2014 (***MOL v. Croatia***).

[39] **Exhibit RL-0040**: *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 (***AHG***), para. 58. The President of the instant case sat on the *AHG* tribunal, which was chaired by Peru's lead counsel, Ms. Banifatemi.

[40] Reply, para. 1.

the Rule 41 standard of "manifestly without legal merit" is "indeed exacting – as it should be, given the extreme outcome of summarily dismissing a case."[41] The Tribunal finds guidance in the extended observation offered by the *Lotus v. Turkmenistan* tribunal:[42]

> *The consequence of a summary dismissal under Rule [41] is that the claim set out in the request for arbitration proceed no further. The tribunal rules, in effect, that there is no point in proceeding with the claim because it* ***cannot*** *succeed: no matter what evidence is adduced, there is a fundamental flaw in the way that the claim is formulated that must inevitably lead to its dismissal. The inevitability of dismissal must be manifest. It must be obvious from the submissions of the parties that there is some unavoidable and indisputable fact, or some legal objection in relation to which no possible counter-argument is identified. If the claimant, in its submissions under Rule [41], can point to an arguable case the claim should proceed: but if the tribunal is satisfied that no such arguable case has been identified, it is in accordance with the sound administration of justice that the claim should be halted and dismissed at that point.*

VII. PERU'S RULE 41 APPLICATION: THE PARTIES' POSITIONS

A. ARE SCOTIABANK'S FET AND NATIONAL TREATMENT CLAIMS MANIFESTLY WITHOUT LEGAL MERIT ON THE GROUND THAT SCOTIABANK AND SCOTIABANK PERU ARE FINANCIAL INSTITUTIONS?

(1) The Respondent's Position

107. Peru contends that Scotiabank's National Treatment and FET Claims are manifestly without legal merit because, in brief, Scotiabank cannot bring them as a Canadian financial institution with an alleged investment in Scotiabank Peru as a Peruvian financial institution.

108. Peru's argument is that Article 802(3) of the FTA precludes Scotiabank from bringing its National Treatment and FET Claims under Articles 803 and 805, respectively, of Chapter Eight (Investment) of the FTA. Article 802(3) expressly excludes from the application of Chapter Eight claims regarding "measures adopted or maintained by a Party to the extent that they are covered by Chapter Eleven (Financial Services)." Article 1101 of the FTA

[41] Rejoinder, para. 8.

[42] *Lotus Holding*, para. 158 (emphasis in original).

Financial Services chapter, entitled Scope and Coverage, provides, in relevant part, as follows:

> 1. *This Chapter applies to measures adopted by 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.*
>
> 2. *Chapters Eight (Investment) and Nine (Cross-Border Trade in Services) apply to measures described in paragraph 1 only to the extent that such Chapters or Articles of such Chapters are incorporated into this Chapter.*

109. Peru describes Article 1101 as creating a two-prong analysis to be conducted by the Tribunal: "(i) it must assess whether Scotiabank and Scotiabank Peru are financial institutions and (ii) in that case, it must determine whether the Claimant's claims are based on substantive protections of Chapter Eight that are expressly incorporated into Chapter Eleven."[43]

110. Peru contends that the first prong is easily met, and Scotiabank has not disputed this.[44] Article 1118 of the FTA defines the term "financial institution" as "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," including "all banking and other financial services (excluding insurance)." Scotiabank is listed as a Federally Regulated Financial Institution by the Office of the Superintendent of Financial Institutions of the Government of Canada.[45] Scotiabank Peru is listed by the Peruvian Superintendence of Banks and Insurance (*Superintendencia de Bancos y Seguros*) as a supervised Bank Entity.[46]

[43] Rule 41 Application, para. 64.
[44] Reply, para. 66.
[45] **Exhibit R-0010**.
[46] **Exhibit R-0012**.

111. Turning to the second prong of the FTA Article 1101 analysis, Peru identifies the relevant FTA provisions that are affirmatively incorporated in Article 1101. Article 1101(2) provides:

> 1. *Articles 813 (Investment - Transfers), 812 (Investment – Expropriation and Compensation), 816 (Investment – Special Formalities and Information Requirements), 815 (Investment – Denial of Benefits), 809 (Investment – Health, Safety and Environmental Measures) and 912 (Cross-Border Trade in Services-Denial of Benefits) are hereby incorporated into and made a part of this Chapter.*
>
> 2. *Section B of Chapter Eight is hereby incorporated into and made a part of this Chapter solely for claims that a Party has breached Articles 813 (Investment – Transfers), 812 (Investment – Expropriation and Compensation), or 815 (Investment – Denial of Benefits) as incorporated into this Chapter, or claims pursuant to subparagraph 1(c) of Article 819 (Investment – Claim by an Investor of a Party on its Own Behalf) or subparagraph 1(c) of Article 820 (Investment – Claim by an Investor of a Party on Behalf of an Enterprise) that a Party has breached a legal stability agreement.*

112. Based on Article 1101(2)(a) and (b), Peru argues that it is "self-evident, and fatal for Scotiabank's claims," that Articles 803 and 805 – on which Scotiabank bases its claims for Peru's alleged breaches of the FTA National Treatment and FET protections, respectively – are not among the Chapter Eight articles incorporated in Chapter Eleven through Articles 1101(1) and (2).[47] In comparison, Article 813 on expropriation and compensation is expressly incorporated.

113. Accordingly, says Peru, Scotiabank's FET and National Treatment claims based on the measure Scotiabank complains of – the 2021 Constitutional Court Decision concerning Scotiabank Peru's Default Interest Appeal – are manifestly without legal merit.

114. Peru rejects Scotiabank's defense that the focus of Article 1101 is on the nature of the measure and not on the nature of the investor as a financial institution, and specifically that the 2021 Constitutional Court Decision is a measure that could have affected any investor in any industry and not just financial institutions. Peru contends that Scotiabank's

[47] Rule 41 Application, para. 76.

interpretation of Article 1101 is at odds with Articles 31 and 32 of the Vienna Convention on the Law of Treaties (the ***VCLT***). These Articles provide in relevant part:

> *Article 31*
>
> *A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in light of its object and purpose.*
>
> ....
>
> *Article 32*
>
> *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.*

115. Turning first to VCLT Article 31 and the ordinary meaning of the language of Article 1101(1) in context, Peru identifies three operative terms: an objective element, requiring the existence of a "measure;" a subjective element, consisting of "an investment … in a financial institution;" and an element of connectedness, through the phrase "relating to."

116. As for the objective meaning of the term "measure," Article 105 of the FTA defines the term "measure" broadly as "any law, regulation, procedure, requirement or practice." Peru points out that Scotiabank itself admits, in the context of its argument on what constitutes a taxation measure, "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."[48] As Scotiabank acknowledges that the 2021 Constitutional Court Decision is a "measure" for purposes of bringing its claim under Chapter Eight, Peru says Scotiabank cannot dispute the broad meaning of the term "measure" in the context of Chapter Eleven by focusing narrowly on the nature of the relevant measure. In particular, Peru disagrees with Scotiabank's differentiation of the 2021 Constitutional Court Decision from the relevant government decision in *Fireman's*

[48] Reply, para. 86, citing the Response, para. 89.

Fund v. Mexico "that was designed to bail out a bank in a time of crisis" or "a measure in the financial industry designed to leave room for national decision-making."[49] Peru charges Scotiabank with ignoring the following key finding of the *Fireman's Fund* tribunal:[50]

> *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-National Treatment,* ***are excluded from the competence of an arbitral tribunal in a case involving investment in financial institutions****. Chapter Fourteen contains no counterpart to Article 1105 concerning Minimum Standard of Treatment.*

117. Just as in *Fireman's Fund*, argues Peru, the scope of the Article 1101 exclusion of FET and National Treatment claims that are based on measures related to financial institutions from the protections in Chapter Eight "is markedly, and intendedly, broad."[51] This confirms, says Peru, 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 sector" and, so, "the application of Chapter Eleven should not be easily disregarded or circumvented."[52]

118. Turning to the remaining elements for interpretation of the ordinary meaning of Article 1101 in context, Peru reiterates that Scotiabank and Scotiabank Peru readily meet the subjective element of being covered financial institutions. As for the element of connection between Scotiabank/Scotiabank Peru and the relevant measure, Peru rejects Scotiabank's argument that the 2021 Constitutional Court Decision falls outside of Article 1101 because it did not apply to the financial sector at large or to overall regulation of financial institutions. Peru points out that Article 1101, as drafted, refers to investments in financial institutions, which necessarily are made in specific entities rather than the financial sector

[49] Reply, para. 89; **Exhibit RL-0049**: *Fireman's Fund Insurance Company v. The United Mexican States*, ICSID Case No. ARB(AF)/02/01, Award, 17 July 2006 (***Fireman's Fund***).

[50] *Fireman's Fund*, para. 3 (emphasis from Peru).

[51] Reply, para. 92.

[52] Reply, para. 93.

at large. Even applying Scotiabank's proposed test, relying on the *Methanex* NAFTA decision, that there must be a "legally significant connection" between the relevant measure and the financial institution, Peru argues that the test is met here because 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," leaving "no doubt of the 'legally significant connection' between Scotiabank Peru and the 2021 Constitutional Court Decision."[53]

119. Remaining with the regime of Article 31 of the VCLT, Peru further contends that the object and purpose of FTA Chapter Eleven confirm its interpretation of Article 1101 based on ordinary meaning in context. Among other points, Peru considers that Article 1101(1) itself "serves as the gatekeeper to Chapter Eleven" and that "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."[54] Peru also relies on the tribunal's decision and Canada's Non-Disputing Party Submission in *Fireman's Fund* as demonstrating "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."[55] Peru emphasizes that, contrary to Scotiabank's view, the tribunal in *Fireman's Fund* did not find that NAFTA Chapter Fourteen carved out specific measures or regulatory measures in the financial sector, but rather that "the Contracting States chose to carve out the financial sector as a whole."[56] In Peru's view, the fact that the *Fireman's Fund* tribunal recognized that Chapter Eleven limited investors from resorting to arbitration to challenge regulatory financial measures "does not mean, *a contrario*, that non-regulatory measures may be

[53] Reply, paras. 99-101.
[54] Reply, para. 120.
[55] Reply, para. 113.
[56] Reply, para. 119.

freely challenged under the general regime in Chapter Eight, as if the investor did not belong to the financial services sector."[57]

120. Peru rejects Scotiabank's contrary view of the object and purpose of Chapter Eleven. Among other things, in response to Scotiabank's reliance on the purportedly broader language in the predecessor agreement to the FTA, the 2006 Canada-Peru Foreign Investment Promotion and Protection Agreement,[58] Peru rejects the notion that the addition of the terms "measures" and "related to" restricted the application of Chapter Eleven and, in any event, Peru notes that prior treaty practice is not considered part of the relevant context for interpretative purposes under VCLT Article 31.

121. Finally, Peru rejects Scotiabank's argument that the Tribunal should wait for a preliminary objection from Peru under Rule 43 of the Arbitration Rules and submissions on the *travaux préparatoires* for Chapter Eleven before ruling on the FET and National Treatment Claims. In Peru's estimation, Article 1101 "can be clearly and conclusively interpreted by the means set forth in Article 31 VCLT" and, accordingly, there is no need to for the Tribunal to take the hierarchical step of recourse to supplementary interpretive sources under VCLT Article 32.[59] As for Scotiabank's reliance on *MOL v. Croatia* to support the proposition that an examination of the history and negotiation of the FTA is unsuitable for a Rule 41 determination, Peru notes that the interpretation issues in that case were "effectively novel, intricate and there was a real lack of documentation on the [Energy Charter Treaty]," but nonetheless the tribunal's decision did not entail a heightened standard under Rule 41.[60]

(2) The Claimant's Position

122. Scotiabank challenges Peru's interpretation of the financial services chapter of the FTA, Chapter Eleven, as applying whenever a claimant is a financial institution or whenever the impugned measure relates to an investment in a financial institution. Instead, argues Scotiabank, the text is clear that the chapter applies only to "measures … relating to

[57] Reply, para. 119.
[58] **Exhibit C-0055**: Canada-Peru Foreign Investment Promotion and Protection Agreement, 14 November 2006.
[59] Reply, paras. 122-124.
[60] Reply, para. 125.

financial institutions" and, here, the challenged measure – the 2021 Constitutional Court Decision – is not a measure relating to financial institutions, but rather "a measure that could have affected any investment in any industry."[61] Scotiabank's position is that "[t]he focus is on the nature of the *measure*, not the nature of the investor."[62]

123. Scotiabank primarily bases its interpretation of Chapter Eleven on the ordinary meaning of the language in context. Given that Article 1101(1) provides that Chapter Eleven "applies to measures adopted or maintained by a Party relating to: financial institutions of the other Party; investors of the other party, and investments of such investors, in financial institutions in the other party's territory […]" Scotiabank argues that, by asking the Tribunal to interpret Article 1101(1) to apply to any claim brought by a financial institution, Peru is asking the Tribunal to read the words "measures" and "relating to" out of the provision.[63] In Scotiabank's view, if the FTA drafters had intended Chapter Eleven to apply to all claims brought by financial institutions, they would have used broader language, such as that used in the predecessor agreement to the FTA. That agreement, the 2006 Canada-Peru Foreign Investment Promotion and Protection Agreement, expressly limited claims "with respect to … financial institutions," with no mention of "measures adopted or maintained by a Party relating to" financial institutions.[64] In light of this difference, Scotiabank considers that the *travaux préparatoires* and other negotiating history documents may be of assistance to the Tribunal in interpreting Article 1101. Unlike Peru, Scotiabank considers that it is appropriate under VCLT Article 32 to look to prior treaty practice in interpreting Article 1101, especially where the prior treaty practice of Canada and Peru "is likely to be directly linked to the current language of the subsequent Canada-Peru FTA through the *travaux préparatoires*."[65] As further noted by Scotiabank, the only Party that has access to this negotiating history is Peru.[66]

[61] Response, paras. 10(a) and 62 (emphasis from Scotiabank); Rejoinder, para. 47.
[62] Response, para. 62 (emphasis from Scotiabank).
[63] Response, para. 66 (emphasis from Scotiabank).
[64] Response, para. 67.
[65] Rejoinder, para. 48.
[66] Rejoinder, paras. 42 and 63.

124. Scotiabank also takes a different view than Peru as to the object and purpose of Chapter Eleven, for purposes of interpreting Article 1101(1) under Article 31 of the VCLT. According to Scotiabank, the purpose of Chapter Eleven "is about carving out a sphere for domestic financial regulation" and "creating a Chapter focusing on the *nature of the measure*, but not the nature of the investor."[67] In this regard, Scotiabank looks to *Fireman's Fund v. Mexico*, where the tribunal examined object and purpose in interpreting Article 1401 of the NAFTA, which substantively matches Article 1101 of the FTA. In *Fireman's Fund*, which involved a program of rescue for a Mexican financial services corporation following a fiscal crisis, the Tribunal found as follows:[68]

> *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.*

125. In light of this finding, Scotiabank asserts that Peru – which relies only on *Fireman's Fund* as a legal authority "to support its atextual interpretation of the FTA" – is on weak ground in arguing that Chapter Eleven of the FTA "applies broadly to all claims by a financial institution […] [rather than] ensuring scope for domestic regulation of the financial services industry."[69]

126. Continuing its treaty interpretation argument, Scotiabank argues that, for a measure to "relate to" a financial institution, there must be a "legally significant connection" between

[67] Response, para. 70 (emphasis from Scotiabank).

[68] Response, para. 74(b), quoting *Fireman's Fund Insurance Company v. The United Mexican States, ICSID Case No. ARB(AF)/02/01, Decision on the Preliminary Question, 17 July 2003*, para. 83 (emphasis from Scotiabank).

[69] Response, para. 75.

the impugned measure, on the one hand, and financial institutions or investments in financial institutions, on the other hand.[70] Scotiabank relies on *Methanex v. USA*, where the tribunal concluded that the phrase "relating to" "signifies something more than the mere effect of a measure on an investor or an investment and that it requires a legally significant connection between them."[71] Scotiabank accuses Peru of misstating the import of *Methanex*, in arguing that the "legally significant connection" test was meant only to rule out measures of general application and is satisfied when a measure directly affects a financial institution. In Scotiabank's view, to determine if a measure has a legally significant connection to a financial institution, "the question is not whether it affects a financial institution" but "[r]ather one must look at the pith and substance or nature of the measure in question."[72]

127. There is not such a legally significant connection here, says Scotiabank, where the challenged measure is the 2021 Constitutional Court Decision. To fall within the scope of the financial institution restriction of Article 1101, the 2021 Constitutional Court Decision would have to "relate to Scotiabank because of Scotiabank's nature as a financial institution (e.g., as opposed to a measure that was about Scotiabank as an employer)."[73] However, according to Scotiabank, "[n]either the Court decision nor the underlying factual context that gave rise to the Default Interest Appeal has anything to do with financial institutions at large or the regulation of financial institutions, let alone a legally significant connection to financial institutions."[74] At one level, Scotiabank notes that the gold transactions handled by Banco Wiese could have been undertaken by any type of business.[75] At another level, Scotiabank notes that, unlike the bank rescue program involved in *Fireman's Fund*, the 2021 Constitutional Court Decision "is a measure that could have affected any investment in any industry" and, further, that "[a]ccess to constitutional protection under the '*amparo*' procedure is open to any person in Peru, not only financial institutions" and

[70] Response, para. 76.
[71] Rejoinder, para. 52.
[72] Rejoinder, para. 55.
[73] Rejoinder, para. 55.
[74] Response, para. 76.
[75] Response, para. 76, footnote 82.

"the accrual of default interest … is an issue that has affected many companies in several different types of industries."[76] As counsel stated at the hearing:[77]

> *And the unfair conduct which Scotiabank was subjected by the Constitutional Court, including the breach of its quorum requirements in particular, is a measure that could have affected any investor in any industry. The amparo procedure is open to any person in Peru, and the subject matter, the accrual of default interest, is an issue that's not industry-specific. And there being amparos, including the cases we referred to relating to this issue from companies involving oil and gas, mining and construction, manufacturing, real estate, telecommunications. And we say that none of these measures or this conduct by the Constitutional Court can be said to fit into the category of measures that have to be dealt with under the financial services chapter, i.e., measures that relate to financial institutions.*

128. In conclusion, Scotiabank notes that it is "confident that its interpretation [of Chapter Eleven] is the correct one but, it certainly passes the low bar on a Rule 41 objection of being 'tenably arguable'" and therefore requires a more thorough assessment than is available at the Rule 41 stage.[78]

B. ARE SCOTIABANK'S FET AND EXPROPRIATION CLAIMS MANIFESTLY WITHOUT LEGAL MERIT ON THE GROUND THAT THEY ARE TAXATION MEASURES CARVED OUT UNDER THE FTA?

(1) The Respondent's Position

129. Peru contends that the Tribunal lacks jurisdiction of Scotiabank's FET and Expropriation Claims because they concern taxation measures and hence manifestly lack legal merit.

130. Peru bases its argument on Article 2203 of the FTA, entitled Taxation, which expressly carves out certain taxation measures from the scope of the treaty. Article 2203 provides:

> *1. Except where express reference is made thereto, nothing in this Agreement shall apply to taxation measures.*
>
> *2. Nothing in this Agreement shall affect the rights and obligations of any Party under any tax convention. In the event of any inconsistency between this*

[76] Response, para. 77.

[77] Hearing 26 February 2024, Transcript 115: 1-16.

[78] Response, para. 63.

Agreement and any such convention, the convention shall prevail to the extent of the inconsistency.

131. Paragraphs 4, 5, 6 and 8 of Article 2203 set out the provisions of the FTA that apply to taxation measures and in what circumstances. These paragraphs provide:[79]

> *4. Notwithstanding paragraphs 2 and 3:*
>
> *(a) Article 202 (National Treatment and Market Access for Goods – National Treatment) and such other provisions of this Agreement as are necessary to give effect to that Article applies to taxation measures to the same extent as does Article III of the GATT 1994; and*
>
> *(b) Article 210 (National Treatment and Market Access for Goods – Export Taxes) applies 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.*
>
> *….*
>
> *8. Notwithstanding paragraphs 2 and 3, **Article 812 (Investment-Expropriation)** shall apply to taxation measures except that no investor may invoke that Article*

[79] Rule 41 Application, para. 81 (emphasis from Peru).

> *as the basis for a claim under Article 819 (Investment – Claim by an Investor of a Party on its Own Behalf) or 820 (Investment – Claim by an Investor of a Party on Behalf of an Enterprise), where it has been determined pursuant to this paragraph that a taxation measure is not an expropriation. The investor shall refer the issue of whether a measure is not an expropriation for a determination to the designated authorities of the Parties at the time that it gives notice under subparagraph 1(c) of Article 823 (Investment – Conditions Precedent to Submission of a Claim to Arbitration). If, within a period of six months from the date of such referral, the designated authorities do not agree to consider the issue or, having agreed to consider it, fail to agree that the measure is not an expropriation, the investor may submit its claim to arbitration under Article 824 (Investment – Submission of a Claim to Arbitration).*

132. Peru points out that Article 805 (Minimum Standard of Treatment) is not included in the treaty articles referred to in paragraphs 5(b) or 8 of Article 2203. Accordingly, says Peru, Article 805 "may in no case be invoked in relation to a taxation measure" and Scotiabank's FET Claim is manifestly without legal merit.

133. As for Scotiabank's Expropriation Claim, Peru contends that, "fatally for the Claimant," Scotiabank did not refer its claim of Constitutional Court expropriation to the designated authorities under Article 2203(8), which leaves the Tribunal without jurisdiction of the Expropriation Claim for lack of Peru's consent to arbitrate.[80] Peru notes that Scotiabank did not make submissions on this issue in its Response "and unsurprisingly so."[81] It is therefore undisputed that Scotiabank failed to comply with the condition precedent in Article 2203(8) and the Tribunal lacks jurisdiction over the Expropriation Claim.

134. In general, Peru rejects Scotiabank's assertion in its Request for Arbitration that the default interest assessment "is not a matter of taxation," accusing Scotiabank of "unduly segment[ing] measures which are inextricably linked, and which concern the very same issue: the 1999 Tax Debt."[82]

135. Peru supports its position on several grounds.

[80] Rule 41 Application, para. 102.

[81] Reply, para. 126.

[82] Rule 41 Application, para. 84, citing the Request for Arbitration, para. 76(ix).

136. First, as with its preliminary objection based on Scotiabank's status as a financial institution, Peru cites the definition of the term "measure" in the FTA as including "any law, regulation, procedure, requirement or practice." As noted, Peru includes administrative and judicial decisions in this definition and, contrary to Scotiabank's allegations, Peru insists that its position "is and has always been that the 2021 Constitutional Court Decision **itself** is a 'taxation measure'."[83] As counsel stated at the hearing: "As a matter of international law, the term 'taxation measure' in the FTA comprises all measures relating to the imposition of a tax, including judicial decisions issued in domestic review proceedings."[84]

137. Second, Peru objects to Scotiabank "shield[ing] 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)."[85] Peru reiterates that, for Rule 41 purposes, discussions on characterization should allow for complicated legal analysis. Peru sees no parallel in Scotiabank's reliance on the statement of the tribunal in *Infinito* that, at the jurisdictional phase, it should be guided by the case as put forward by the claimant to avoid breaching the claimant's due process rights, which does not apply to a discussion, as here, on the legal effects Scotiabank attributes to the 2021 Constitutional Court Decision.[86] Further, other tribunals have analyzed and ruled on the claimants' characterizations of their claims. For example, the tribunal in *Lotus Holding* "did precisely what the Claimant alleges […] are barred from doing" in summary Rule 41 proceedings and dismissed the claimant's claims as contractual claims for monies owed by Turkmenistan rather than, as characterized by the claimant, treaty violation claims.[87]

[83] Reply, para. 130 (emphasis from Peru).

[84] Hearing 26 February 2024, Transcript 28:14-17.

[85] Reply, para. 131.

[86] Reply, para. 135, citing **Exhibit CL-0026**: *Infinito Gold Ltd. v. Republic of Costa Rica*, ICSID Case ARB/14/5, Decision on Jurisdiction, 4 December 2017 (***Infinito***).

[87] Reply, paras. 136-137.

138. Third, as for the legal analysis, Peru contests Scotiabank's argument that municipal Peruvian law is a question of fact under international law and so the characterization of default interest under Peruvian law is a disputed factual issue not suitable for resolution under Rule 41. Instead, says Peru, what constitutes a "taxation measure" under the FTA is to be interpreted in accordance with the FTA and international law. Notwithstanding, Peru accepts that domestic law informs international law and considers it "uncontroversial" that host State law is applicable to determine whether a measure constitutes a taxation measure.[88] Turning to the relevant domestic law, Peru states that Peruvian law specifically provides that the default interest on a tax liability is part of a tax obligation.

139. Even assuming that Peruvian law should be treated as fact, Peru argues that "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."[89] Peru first cites Norm IX, entitled "Supplementary Application of Principles of Law" and described as "an express provision on the 'Autonomy of Tax Law'", underscoring the *lex specialis* nature of Peruvian Tax Law:[90]

> *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.*

140. Based on Norm IX, Peru argues that only if a matter is not covered by the Tax Code or regulations is the application of other legal norms allowed, and even such other norms cannot contradict or distort the Tax Code or regulations. The laws relevant here, says Peru, are Article 1242 of the Peruvian Civil Code, which provides a general regime of default

[88] Rule 41 Application, para. 89.

[89] Reply, para. 180.

[90] Reply, para. 182; **Exhibit R-0003bis**, Norm IX.

interest under civil law, and Article 33 of the Peruvian Tax Code, entitled Default Interest, which provides:[91]

> *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 lending rate in local currency (TAMN) published by the Superintendency of Banking and Insurance on the last business day of the preceding month.*

141. Further, Article 28 of the Peruvian Tax Code, entitled Components of the Tax Debt, expressly includes interest in the tax debt:[92]

> *The Tax Administration shall demand payment of the tax debt, which is made up of the tax, the penalties and the interest.*

142. At the hearing, counsel for Peru stressed the unitary nature of taxation under Article 28, arguing that:[93]

> *this is very manifest. This is a very clear question: they are talking about a payment of interest that relates to a VAT which is ongoing before the Peruvian courts, and it's all a unitary tax debt which obviously, evidently, falls in the purview of the taxation carve-out of the FTA.*

143. With these Peruvian Tax Code provisions in mind, Peru emphasizes that Scotiabank Peru, in making the 2013 Payments (under protest), paid all of the IGV Liability, capitalized interest and the default interest. In Peru's view, this "confirms that the default interest owed and paid by Scotiabank Peru alongside the IGV Liability is an element of the 1999 Tax Debt and its imposition is a tax measure."[94]

144. Peru rejects Scotiabank's "manifestly inaccurate representation" that "[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

[91] **Exhibit R-0001bis:** Peruvian Civil Code, approved by Legislative Decree No. 295 of 24 July 1984, as amended, Art. 1242 (***Peruvian Civil Code***); **Exhibit R-0003**: 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 (***Peruvian Tax Code***), Art. 33.

[92] Peruvian Tax Code, Art. 28.

[93] Hearing 26 February 2024, Transcript 17:19-29.

[94] Rule 41 Application, para. 92.

delayed payment."[95] Peru contests Scotiabank's reliance on the *amparo* case of *Medina de Baca*, in which the claimant challenged the default interest imposed in a SUNAT payment order, and expands the quote from the Constitutional Court's decision offered by Scotiabank as follows:[96]

> *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.*
>
> *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 […]*

145. Based on this quote, Peru disagrees with Scotiabank's contention that the Constitutional Court in *Medina de Baca* confirmed that default interest does not have a tax nature.[97] Instead, says Peru, the Constitutional Court merely stated that default interest is not a tax *stricto sensu* or *tributo*. Peru emphasizes that it is not arguing 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 part of the tax debt," which is not contradicted by the Constitutional Court's decision.[98] Peru argues that the Constitutional Court's emphasis on the punitive nature of default interest actually strengthens Peru's position, on the ground that "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." Peru argues further as follows:[99]

> *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*

[95] Reply, para. 193, quoting Response, para. 112.
[96] Reply, para. 194, citing **Exhibit R-0016**, *Medina de Baca* case law, 10 May 2016 (***Medina***), paras. 43-46.
[97] Reply, para. 195, referencing Response, para. 112.
[98] Reply, para. 196.
[99] Reply, para. 198.

> *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.*

146. In related vein, as a matter of ordinary meaning under Article 31 of the VCLT, Peru contends that the term "taxation" is broader than "tax" and may be defined under Peruvian law as the amount assessed as tax or the system of taxing people. This broader definition covers the concept of "tax debt" in Article 28 of the Peruvian Tax Code, by including collection of default interest on unpaid tax liabilities, which serves to compensate the State for delay in payment and compels compliance with tax obligations. Peru emphasizes the meaning of 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*'" or to prevent the avoidance or evasion of taxes.[100] It is Peru's position that both the 2021 Constitutional Court Decision and the underlying default interest are such measures ensuring compliance with Peru's taxation system. As found by the tribunal in *EnCana v. Ecuador*, "a measure is a taxation measure if it is part of the regime for the imposition of tax."[101] Again, in light of this ordinary meaning of "taxation measures" in context, Peru insists that there is no reason for the Tribunal to have recourse to the *travaux* or other supplementary interpretation materials under VCLT Article 32.

147. Fourth, Peru rejects Scotiabank's "attempt artificially to draw a distinction between [its] tax liabilities and the related judicial proceedings."[102] Peru reads paragraph 76(ix) of the Request for Arbitration (quoted above at paragraph 134) as an admission by Scotiabank that the judicial proceedings of which it complains "concern precisely the default interest paid by Scotiabank Peru."[103] Further, Peru describes Scotiabank's request for relief in the *amparo* action in the Default Interest Appeal as revealing that the object of the claim was

[100] Reply, para. 154.

[101] Reply, para. 147, citing **Exhibit RL-0008**: *EnCana Corporation v. Republic of Ecuador*, LCIA Case No. UN3481, Award, 3 February 2006 (***EnCana***), para. 142(4) (emphasis from Peru).

[102] Rule 41 Application, para. 93.

[103] Rule 41 Application, para. 94.

to have the Constitutional Court overturn the imposition of a tax liability, for example by requesting that "the Sunat be enjoined from assessing and collecting from the plaintiff the payment of the default interest accrued […]."[104]

148. In support, Peru notes that arbitral tribunals have found that judicial decisions confirming tax liabilities are "taxation measures." Peru refers specifically to the cases of *SunReserve v. Italy* and *ESPF v. Italy*, where the tribunals rejected the claimants' arguments that their claims related not to a tax known as the Robin Hood Tax but instead to a decision of the Italian Constitutional Court indirectly declaring the Robin Hood Tax unconstitutional.[105] Peru describes the tribunals as having "rejected the claimants' attempts to dissociate the tax measures from the constitutional actions concerning said measures in order to expand the tribunals' jurisdiction," quoting the *SunReserve* tribunal:[106]

> *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."***

149. Peru disagrees with Scotiabank's contention that the *SunReserve* award related to the legality of the Robin Hood Tax and not the propriety of the Italian judicial proceedings. Peru points out that the claimants in *SunReserve* did argue that the Constitutional Court's *ex nunc* (rather than *ex tunc*) application was unfair, and the arbitral tribunal expressly rejected this argument:[107]

> *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***

[104] Rule 41 Application, para. 94.

[105] **Exhibit RL-0034**: *SunReserve Luxco Holdings S.À.R.L. and others v. Italian Republic*, SCC Case No. V 2016/32, Final Award, 25 March 2020 (***SunReserve***); **Exhibit RL-0036**: *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 (***ESPF***).

[106] Rule 41 Application, para. 96 quoting from *SunReserve*, para. 551 (emphasis from Peru).

[107] Reply, para. 173, citing *SunReserve,* para. 551 (emphasis from Peru).

> ***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."*

150. Peru contends that, as evidenced by Scotiabank's words in its Request for Arbitration and its request for relief in the Default Interest Appeal, "the *amparo* proceedings are nothing but a sequel to the 1999 Tax Debt, including the default interest owed to the SUNAT," and so the Tribunal should find that it lacks jurisdiction over Scotiabank's claims concerning the 2021 Constitutional Court Decision.[108]

151. Fifth, Peru notes that the *SunReserve* tribunal found that the fact that the claimant requested compensation for the sums paid as tax to Italy, rather than damages allegedly caused by the Italian Constitutional Court's decision, confirmed that the measure complained of was a taxation measure.[109] Peru contends that Scotiabank has done the same here, by requesting "compensation for all losses and damages suffered as a result of those breaches, namely the amount of at least [redacted] representing the interest amount that was paid under protest."[110]

152. Sixth, Peru objects to Scotiabank's arguments based on the ongoing ICSID case of *Freeport-McMoRan v. Peru*.[111] Putting aside what Peru alleges to be misrepresentations by Scotiabank of its position in *Freeport*, which concerns an unrelated legal stabilization agreement, Peru states that 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."[112]

153. Finally, consistent with its position on the proper interpretation of the term "taxation measures," Peru rejects Scotiabank's position that it is "obvious" that the Tribunal should

[108] Rule 41 Application, para. 97.

[109] Rule 41 Application, para. 98.

[110] Rule 41 Application, para. 99, quoting from the Request for Arbitration, para. 71.

[111] **Exhibit CL-0021**: *Freeport-McMoRan Inc. on its Own Behalf and on Behalf of Sociedad Minera Cerro Verde S.A.A. v. Republic of Peru*, ICSID Case No. ARB/20/08, Respondent's Rejoinder on the Merits and Reply on Jurisdiction, 8 November 2022 (***Freeport-McMoRan***).

[112] Reply, para. 201.

hear expert evidence on Peruvian law.[113] Peru states that Peruvian tax law is unambiguous and, further, "[t]o 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."[114]

154. In conclusion, Peru requests the Tribunal to decline jurisdiction of Scotiabank's FET and Expropriation Claims as claims based on taxation measures that are manifestly without legal merit.

(2) The Claimant's Position

155. Scotiabank opposes Peru's Rule 41 objection to its FET and Expropriation Claims based on the "taxation measures" exemption in Article 2203 of the FTA on several grounds.

156. First, Scotiabank objects that Peru has mischaracterized the nature of Scotiabank's claim, as essentially a tax debt claim, and then argued why that claim is a taxation measure. Although Peru acknowledges in its Reply that Scotiabank's case is about whether the 2021 Constitutional Court Decision is a taxation measure, Scotiabank considers that Peru nonetheless continues to connect the 2021 Constitutional Court Decision to the 1999 IGV Liability and identify that as a taxation measure.[115] Relying on the observation of the tribunal in *ECE Projektmanagement v. Czech Republic* that "it is for the investor to allege and formulate its claims of breach of the relevant treaty standards as it sees fit [and] not the place of the respondent State to recast those claims in a different manner of its own choosing," which the *Infinito* tribunal cited with approval, Scotiabank reiterates that its FET and Expropriation Claims, as pleaded, are based not on the IGV Liability or tax debt but only on the unconstitutionality of the 2021 Constitutional Court Decision.[116] Scotiabank disagrees with Peru that the tribunal in *Lotus* rejected the claimant's

[113] Reply, para. 206, citing Response, para. 118.

[114] Reply, para. 207.

[115] Rejoinder, para. 68, citing Reply, para. 130.

[116] Response, para. 85, citing **Exhibit CL-0013**: *ECE Projektmanagement International GMBH v. The Czech Republic*, PCA Case No. 2010-5, Award, 19 September 2013, para. 4.743 and *Infinito*, para. 185; Rejoinder, para. 71.

characterization of its claim and relied instead on the substance of the relief sought. According to Scotiabank:[117]

> [T]*he tribunal did exactly what it should do: it asked itself whether the Rule 41 objection was made out on the basis of the claim pleaded. The tribunal came to a different legal conclusion than the one argued by the claimant, which it is entitled to do. While Scotiabank argues that it is not clear and obvious that the 2021 Constitutional Court Decision is a taxation measure, the tribunal can come to a different legal conclusion. But whatever determination it comes to, the Tribunal must do so based on the pleaded claims, not Peru's recharacterized ones.*

157. Second, noting Peru's acceptance that the FTA defines the term "measure" as broad enough to include a court decision, Scotiabank states that "operative question is what constitutes 'taxation'," which is not a term defined in the FTA.[118] It is Scotiabank's position that the impugned judicial process before the Constitutional Court does not raise a matter of taxation. For one thing, the underlying subject matter did not relate to the IGV Liability, which is the subject of the underlying Tax Appeal, but to the issue of whether the accrual of default interest caused by State delays violated Scotiabank Peru's constitutional rights.

158. Scotiabank also disputes Peru's interpretation of the term "taxation." Citing to *Nissan v. India*, Scotiabank argues that "taxation" means a measure "which imposes a liability on classes of persons to pay money to the State for public purposes."[119] In contrast, says Scotiabank, the application and accrual of default interest on a debt does not fall within the ordinary meaning of "taxation", because it is instead "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"[120] and "is not a liability on a class of persons where the funds go to the State for public purposes."[121] According to Scotiabank:[122]

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[117] Rejoinder, para. 72.

[118] Response, para. 89.

[119] Response, para. 92, citing **Exhibit CL-0039**: *Nissan Motor Co., Ltd. v. Republic of India*, PCA Case No. 2017-37, Decision on Jurisdiction, 29 April 2019 (***Nissan***), para. 384.

[120] Response, para. 93.

[121] Rejoinder, para. 86.

[122] Response, para. 93 (emphasis from Scotiabank).

> *The fact that the interest was imposed by SUNAT on a tax debt does not change its nature. That simply means that the interest is* ***related*** *to a taxation measure. Article 2203 of the FTA does not apply to measures merely because they are* ***related*** *to taxation measures; it only applies to the taxation measures themselves. If the parties had intended Article 2203 to apply that broadly, they would have used language to that effect.*

159. Even accepting Peru's definition of "taxation" as a "system of taxing people," Scotiabank rejects Peru's "bald declaration" that this system includes default interest on tax debts.[123] Scotiabank offers instead the Black's Law Dictionary definition of "taxation" as "[t]he imposition or assessment of a tax; the means by which the state obtains the revenue required for its activities" – in other words, the definition of taxation is no broader than the definition of tax.[124]

160. In support of its interpretation of "taxation measure" in FTA Article 2203, Scotiabank describes the purpose of taxation exemptions in investment treaties to be to preserve State sovereignty in relation to the taxation power, which is not engaged by the collection of the accrual of default interest. In Scotiabank's view, "[t]here is no difference between interest accruing on a tax debt or interest accruing on a judicial judgment; in both cases, they are compensation for the late payment of a liability and not a matter of how taxation is regulated."[125] Scotiabank adds that the *travaux préparatoires* for the FTA will be useful evidence in support of its interpretation of Article 2203, "underscoring further that this is not an issue for a Rule 41 objection."[126]

161. Scotiabank also refers the Tribunal to international jurisprudence confirming its interpretation of "taxation measure." Specifically Scotiabank notes the recognition of the tribunal in *Nissan v. India* that "the fact that a government ministry or department may impose fines or penalties as punishment for proscribed conduct or alternatively forgive or refund such fines or penalties, does not make these actions necessarily 'taxation

[123] Rejoinder, para. 76.
[124] Rejoinder, para. 77; **Exhibit C-0072**: Black's Law Dictionary, 11th ed. 2019.
[125] Response, para. 96.
[126] Response, para. 96.

measures.'"[127] Scotiabank emphasizes that the *Nissan* tribunal rejected a distinction between the definition of "taxation law" and "taxation measure," a distinction that Scotiabank says Peru wrongly attributes to the tribunal in *EnCana*. In Scotiabank's view, reading the *EnCana* decision in context, the point may be to determine if there is a taxation law, as tax must be imposed by law, but it is necessary then to proceed to analyze broader "taxation measures" including other aspects of the tax regime, such as tax deductions and rebates.[128] Scotiabank rejects Peru's claim that *EnCana* supports its position that a "taxation measure" "comprises all measures that are 'part of the regime for the imposition of tax,'" noting that the tribunal stated that part of the notion of "taxation measures" are those aspects of the tax regime "which go to determine how much of the tax is payable or refundable."[129]

162. Scotiabank disputes Peru's reliance on *SunReserve v. Italy* in support of its argument that Scotiabank is trying to elide the FTA tax carve-out by challenging the Constitutional Court process. According to Scotiabank, the *SunReserve* tribunal identified a number of criteria relevant to the question of what qualifies as a taxation measure, including whether the payment is a contribution to public spending or public expenditure. In Scotiabank's reading of *SunReserve*, while the claimant challenged the constitutional court's decision imposing only prospective application of the so-called Robin Hood tax, there was no dispute that the Robin Hood tax was a taxation measure and, in finding that the claim challenging the constitutional court decision was also a taxation measure, the tribunal had to assess the propriety of the Robin Hood tax itself and recognized that the merits of the claim were not restricted "to the propriety and implications of the constitutional court decision."[130] This arbitration, says Scotiabank, is different, because the underlying subject matter is not about a taxation measure and the claimant in *SunReserve* was not challenging the propriety of the court decision or the fairness of the process; in sum, "the fairness of

[127] Response, para. 98, quoting *Nissan*, para. 385 (emphasis from Scotiabank).
[128] Rejoinder, paras. 81-84.
[129] Rejoinder, para. 85, citing *EnCana*, para. 142.
[130] *SunReserve*, paras. 547-549, 551.

the process before the constitutional court was not impugned in *SunReserve*."[131] In this connection, Scotiabank rejects Peru's contention that the fact that Scotiabank's request for relief in this arbitration equals the amount of default interest paid under protest shows that this arbitration effectively is about the default interest amount ordered by the SUNAT. Scotiabank insists that "[t]his amount is representative of the damages suffered" as the result of the Constitutional Court's unfair treatment and, unlike in *SunReserve*, the propriety of the amount paid does not have to be determined.[132]

163. Third, after noting the Parties' agreement that Peruvian law applies in establishing whether a measure constitutes a "taxation measure," Scotiabank argues that Peruvian law supports its position that its FET and Expropriation Claims do not concern taxation measures.

164. As it does in connection with Peru's other Rule 41 objections, Scotiabank argues that the interpretation of the term "taxation measure" in Article 2203 of the FTA requires proof of the applicable Peruvian law as a factual matter. Scotiabank reiterates the importance of its being allowed to lead expert evidence on Peruvian law to explain its position that default interest is a concept of Peruvian civil law and not tax law, aimed at indemnifying the payee for a delayed payment.

165. Scotiabank takes the position that, as a matter of Peruvian law, default interest caused by the late payment of a debt "is not a concept from tax law but from the civil law," and the Peruvian Civil Code and secondary authorities establish that "the purpose of default interest is to indemnify the payee for a delayed payment."[133] In the context of tax default interest, Scotiabank quotes the following statement of the Constitutional Court in the *amparo* case of *Medina de Baca*: "… 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."[134] Scotiabank disagrees with Peru's interpretation of the *Medina de Baca* decision, contending that the Constitutional Court "did not make a pronouncement

[131] Rejoinder, para. 108.
[132] Response, para. 105.
[133] Response, para. 112; Peruvian Civil Code, Art. 1242.
[134] Response, para. 112; *Medina*, para. 43.

about a tax *stricto sensu* but about the nature of default interest: '*default interest has not, certainly the nature of a tribute'*."[135] In Scotiabank's view, the fact that default interest is not a tax or tribute in nature takes it out of the regime for imposition of a tax, while its punitive and compensatory nature place it in the civil regime under the Civil Code. Further, Scotiabank contends that, although the Constitutional Court applied the prohibition of confiscation to default interest, "it did so not because it is a matter of 'taxation' but because that principle applies to all administrative decisions," leading Scotiabank to underscore the need for expert evidence on Peruvian law in this arbitration.[136]

166. In connection with its arguments on the import of Peruvian law, Scotiabank relies heavily on the pending arbitration of *Freeport-McMoRan v. Peru*, as demonstrating that "Peru cannot credibly suggest that Scotiabank's position on Peruvian law is not 'plausible.'" In that case, as recounted by Scotiabank on the basis of the publicly available record, the claimant argues that Peru breached the FTA by, among other things, failing to waive the penalties and interest that the SUNAT imposed on its Peruvian entity for certain tax assessments; Peru has raised a jurisdictional objection (not a Rule 41 objection) that this is a "taxation measure"; Peru is relying on expert evidence that penalties and interest are not taxes *per se*, but are "taxation measures" because they are means by which the government enforces a tax obligation as part of a "tax debt"; and the claimant is relying on conflicting expert evidence focused on the compensation purpose of interest. Further, according to Scotiabank, the *Freeport-McMoRan* ICSID arbitration concerns the applicability of Article 28 of the Peruvian Tax Code, on which Peru relies in this arbitration, with the claimant putting forward expert evidence that "under Peruvian law, the term 'tax debt' encompasses a 'broad range' of concepts that the Tax Code bundles together for procedural and administrative convenience and are subject to similar procedures for administration, payment, collection and challenge, even though they are not taxes."[137] Scotiabank contends that, in light of what is publicly available about Peru's stance in *Freeport-McMoRan*, the import of the FTA "taxation measures" exemption under the Peruvian Tax

[135] Rejoinder, para. 124.
[136] Rejoinder, para. 124, citing *Medina*, para. 46.
[137] Response, para. 117.

Code must be seen as a contested factual matter not suitable for resolution as a Rule 41 objection.[138]

167. Scotiabank accuses Peru, in its Rejoinder, of "setting out a one-sided interpretation of Peruvian law and baldly asserting [that] this is '*indisputable*.'"[139] Scotiabank contests the issues of Peruvian law put forward by Peru and insists that the relevant Peruvian law principles are far from undisputed or indisputable. Specifically, Scotiabank addresses two principles of Peruvian law that are squarely disputed by the Parties: first, the tax versus civil nature of default interest and, second, Article 28 of the Tax Code.

168. As to the first, Scotiabank necessarily accepts the existence of Norm IX and Article 33 of the Tax Code, but not Peru's "bald conclusion" that "default interest on an unpaid tax is considered part of a tax liability" and is "part of the regime for the imposition of tax."[140] According to Scotiabank, while Norm IX applies to fill gaps with respect to legal norms, it says nothing about whether default interest is part of the concept of taxation under Peruvian law, and Article 33 merely sets out the rate of default interest that applies to an unpaid tax debt. Contrary to Peru's position, says Scotiabank, Article IX of the Preliminary Title of the Civil Code provides that the Civil Code applies to fill remaining gaps, and "[t]he use of civil norms to give content to the definition and scope of default interest on a tax debt has been used by both SUNAT and the Tax Court," with the Tax Court finding that:[141]

> *Since there is no definition of default interest in the Tax Code and, in application of the provisions of both Article IX of the Preliminary Title of the Civil Code and Norm IX of the current Tax Code, to know its nature it is pertinent to refer to Article 1242 of the Civil Code, which mentions that interest is moratory when its purpose is to compensate for late payment.*

169. As for Article 28 of the Tax Code, Scotiabank again necessarily accepts the existence of Article 28, which expressly provides that default interest is a component of the tax debt,

[138] Rejoinder, paras. 112-113.

[139] Rejoinder, para. 114 (emphasis from Scotiabank).

[140] Rejoinder, paras. 120-121, citing Reply, paras. 182-185, 192.

[141] Rejoinder, para. 122, citing **Exhibit C-0069**: Tax Court, Resolution No. 983-3-98.

but not the meaning that Peru ascribes to it – namely that the tax debt indisputably comprises a tax *stricto sensu*. In Scotiabank's view, while Article 28 sets out that interest is part of the tax debt, that is not determinative of whether interest is a matter of "taxation" under Peruvian law. Further, says Scotiabank, Peru's own expert in *Freeport-McMoRan* reportedly takes the position that "tax debt" in Article 28 encompasses concepts that are not taxes, for example, royalties, which Peru has not interpreted to be "taxation measures" in *Freeport-McMoRan*. Scotiabank takes the consistent position that the imposition of interest under Article 28 is "a debt that is enforced and collected by SUNAT, like other non-taxation measures that form part of the tax debt (*e.g.*, royalties) to ensure procedural and administrative conveniences" and not "part of the tax regime or a matter of taxation."[142] To support this position, Scotiabank seeks the opportunity to lead expert evidence – which it does not have at the Rule 41 stage – establishing:[143]

> 2. *how Peruvian law defines a tax (it is to fund public goods and services and is not compensatory or penal in nature; (b) how Peruvian law treats default interest (it is civil, not tax in nature, as its purpose is both compensatory and penal; it does not fall within the three categories of taxes set out in the Tax Code and is an obligation separate and independent from a tax assessment); (c) interest is not the specific means by which Peru enforces its tax obligations and is not part of the tax regime in Peru.*

170. In conclusion, having identified the question facing the Tribunal – on which Peru bears the burden under Rule 41 – to be "whether it is 'clear and obvious'" that the FET and Expropriation Claims relate to "taxation measures,"[144] Scotiabank contends that the answer can only be in the negative.

C. IS SCOTIABANK'S EXPROPRIATION CLAIM MANIFESTLY WITHOUT LEGAL MERIT ON THE GROUND THAT IT LACKS A PROTECTED INVESTMENT UNDER THE FTA AND THE ICSID CONVENTION?

[142] Rejoinder, para. 129.

[143] Rejoinder, para. 129.

[144] Response, para. 79.

(1) The Respondent's Position

171. Peru contends that Scotiabank's Expropriation Claim is manifestly without legal merit because Scotiabank does not have any protected investment under either the FTA or the ICSID Convention.

172. Insofar as Scotiabank identifies its shares in Scotiabank Peru as an investment, Peru points out that Scotiabank does not make a claim for expropriation of that interest and nor could it, as Scotiabank Peru remains an ongoing enterprise.

173. The exclusive subject of Scotiabank's Expropriation Claim is the amount of default interest Banco Wiese paid to the SUNAT under protest. Peru rejects the idea that the default interest payments could constitute a protected investment subject to expropriation under either the FTA or the ICSID Convention.

174. Starting with the FTA, Peru argues that the default interest falls outside the categories of protected investments in Article 847 of the FTA. Article 847 provides:[145]

> *[i]nvestment means:*
>
> *(a) an enterprise;*
>
> *(b) an equity security of an enterprise;*
>
> *(c) a debt security of an enterprise […];*
>
> *(d) a loan to an enterprise […];*
>
> *(e) an interest in an enterprise that entitles the owner to share in income or profits of an enterprise;*
>
> *(f) an interest in an enterprise that entitles the owner to share in the assets of that enterprise on dissolution, other than a debt security or a loan excluded from subparagraphs (c) or (d);*
>
> *(g) real estate or other property, tangible or intangible, acquired in the expectation or used for the purpose of economic benefit or other business purposes; and*

[145] **Exhibit C-0001**, para. 847.

> *(h) interests arising from the commitment of capital or other resources in the territory of a Party to economic activity in such territory […];*
>
> *but investment does not mean,*
>
> *(i) claims to money that arise solely from:*
>
> *(i) commercial contracts for the sale of goods or services by a national or enterprise in the territory of a Party to an enterprise in the territory of the other Party, or*
>
> *(ii) the extension of credit in connection with a commercial transaction, such as trade financing, other than a loan covered by subparagraph (d); and*
>
> *(j) any other claims to money, that do not involve the kinds of interests set out in subparagraphs (a) through (h).*

175. Peru describes Article 847, which is modelled on Article 1139 of NAFTA and therefore unlike other investment treaties, as a closed list of assets protected as investments. In support, Peru cites to *Grand River v. United States of America*, where the tribunal found:[146]

> *NAFTA's Article 1139 is neither broad nor open-textured.* ***It prescribes an exclusive list of elements or activities that constitute an investment for purposes of NAFTA****. As the Claimants' expert Professor Mendelson pointed out,* ***this definition is exclusive and not illustrative****.*

176. Peru contends that it is "manifestly not the case" that the default interest paid on the tax debt incurred by Banco Wiese falls into any of the categories of protected investment in Article 847.

177. In response to Scotiabank's argument that the default interest paid to the SUNAT falls under Article 847(h), Peru says that "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."[147] Among other reasons, Peru argues that default interest payments are not an "interest" in the sense of the term "interests" as used in Article 847(h), as properly

[146] **Exhibit RL-0018**: *Grand River Enterprises Six Nations, Ltd, et.al. v. United States of America*, Ad hoc UNCITRAL arbitration, Award, 12 January 2011 (***Grand River***), para. 82 (emphasis from Peru).

[147] Reply, para. 213.

interpreted within the context of the definition of "investment" in Article 847. This is because a payment of money to extinguish a debt or liability "is not an asset and even less an investment," because "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."[148]

178. Peru rejects Scotiabank's contention that, because it paid the default interest in 2013 and 2014 to the SUNAT under protest, it has an "interest" for purposes of FTA Article 847(h) in the form of a right to claim back the amount of the default interest. Whether such a right exists, says Peru, must be determined by reference to the law that allegedly confers that right, which in this case is Peruvian law.[149] According to Peru, Peruvian law treats any payment, even if made under protest, as extinguishing the relevant pre-existing debt and not conferring any right. Specifically, the expressed intent of a party when making a payment is irrelevant because, under the Peruvian Civil Code, any payment made for an existing obligation in the amount due and in a timely manner has the effect of extinguishing the outstanding obligation and preventing the accrual of interest.[150] This is the case, according to Peru, even if the debtor pays under protest to preserve its right to contest the debt in court. In Peru's words, "[t]he mere possibility that the SUNAT 2011 Decision and the Tax Court 2013 Decision could be overturned does not vest any rights on Scotiabank."[151] In support, Peru cites the statement of the tribunal in *Merrill & Ring v. Canada* that the crucial point for purposes of Article 847(h) of the FTA is whether there is an "actual and demonstrable entitlement of the investor to a certain benefit under an existing contract or other legal instrument," which is not the case with a payment made under protest under Peruvian law.[152]

[148] Reply, para. 214.

[149] Rule 41 Application, para. 115, citing **Exhibit RL-0042**: Zachary Douglas, *Property, Investment, and the Scope of Investment Protection Obligations*, in *The Foundations of International Investment Law: Bringing Theory into Practice*, Online ed., Oxford Academic, 363-406 (2014).

[150] Rule 41 Application, para. 116, citing Peruvian Civil Code, Articles 1132, 1120 and 1240; Reply, paras. 216, 260.

[151] Rule 41 Application, para. 117.

[152] Reply, para. 217, citing **Exhibit RL-0050**: *Merrill & Ring Forestry L.P. v. The Government of Canada*, ICSID Case No. UNCT/07/01, Award, 31 March 2010, para. 142 (emphasis from Peru).

179. Further, Peru describes as "equally flawed" Scotiabank's Article 847(h) argument that the default interest payments arose out of a "commitment in capital … [to] economic activity" in Peru.[153] To the contrary, according to Peru, the payments arose from an unpaid debt of Banco Wiese towards Peru resulting "from a historical liability inherited by Scotiabank Peru," and the payments were "not a product of Scotiabank Peru's economic activities in Peru, consisting of financial services," or "profit or revenue of Scotiabank Peru."[154] Peru labels as "nonsensical" Scotiabank's claim that the default interest payments went towards economic activity in Peru because those payments protected Scotiabank Peru's assets from seizure, noting that, under that reasoning, "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.'"[155]

180. Peru continues, for the sake of completeness, to explain its position that Scotiabank does not meet the jurisdictional test for an investment under Article 25(1) of the ICSID Convention. Article 25(1) provides:

> *The jurisdiction of the Centre shall extend to any legal dispute arising directly out of an investment, between a Contracting State (or any constituent subdivision or agency of a Contracting State designated to the Centre by that State) and a national of another Contracting State, which the parties to the dispute consent in writing to submit to the Centre. When the parties have given their consent, no party may withdraw its consent unilaterally.*

181. Peru rejects Scotiabank's attempt to base jurisdiction *ratione materiae* on the status of its undisputed investment in the shares of Scotiabank, by asking the Tribunal to "look at the investment and dispute as a whole, even if only a subset of that investment is alleged to have been expropriated."[156] Peru distinguishes the case law on which Scotiabank relies in this regard, on the ground that the default interest payments here are not part of Scotiabank

[153] Reply, para. 219.
[154] Reply, para. 219.
[155] Reply, para. 220.
[156] Reply, para. 227, citing Response, para. 132 (emphasis from Peru).

Peru's operations or the revenue earned from its activities, and so cannot be a "subset" of Scotiabank Peru.

182. Peru reiterates that Scotiabank bases its Expropriation Claim solely on the alleged investment of the default interest paid under protest. Acknowledging that the term "investment" is not defined in the ICSID Convention, Peru argues that the default interest payments do not meet the three *Salini* criteria routinely used as the test for an "investment" and accepted by Scotiabank: (a) contribution or commitment of capital or resources to an economic venture; (b) a certain duration of performance; and (c) an assumption of risk.

183. It is Peru's case that the default interest paid by Scotiabank Peru: (a) was not a contribution to an economic venture to create value but simply the payment of an outstanding obligation to a sovereign Tax Authority, and it is "elementary that payment of a liability does not create value, but merely cancels a pre-existing tax debt imposed on the taxpayer;"[157] (b) was made over three months between December 2013 to February 2014, and therefore lacks the duration necessary to have the requisite duration, spanning from two to five years;[158] and (c) involved no element of investment risk, because Scotiabank Peru could have no expectation of a return on investment or profit by paying the default interest, facing at best only the commercial risk that "a taxpayer assumes by failing timely to comply with tax obligations."[159]

184. Finally, even if the Tribunal were to find the default interest payments to constitute a protected investment under the FTA and the ICSID Convention, Peru argues that the Expropriation Claim would still fail for manifest lack of legal merit on its substance. Peru cites the statement of the tribunal in *Generation Ukraine v. Ukraine* that "there cannot be an expropriation unless the complainant demonstrates the existence of proprietary rights in the first place,"[160] and notes that Canada itself recently expressed in its Non-Disputing

[157] Reply, para. 241.

[158] Reply, para. 243.

[159] Reply, para. 245 (emphasis from Peru).

[160] Rule 41 Application, para. 135, citing **Exhibit RL-0006**: *Generation Ukraine, Inc. v. Ukraine*, ICSID Case No. ARB/00/9, Award, 16 September 2003, paras. 6.2, 8.8.

Party Submission in *Odyssey Marine Exploration v. Mexico* that "[a]ny expropriation analysis must begin with determining whether there is a valid property right capable of being expropriated."[161] Here, says Peru, Scotiabank has failed to demonstrate such a property right under the applicable Peruvian law, which treats the default interest payments – although paid under protest – not as a credit "but part and parcel of a liability predating the Claimant's investment in Banco Wiese, of which existence the Claimant knew when it acquired Banco Wiese."[162]

185. Peru disagrees with Scotiabank that, because the existence of property rights is a matter of Peruvian law, this is a disputed factual issue that cannot be determined on a Rule 41 objection. It is Peru's position that the existence of property rights must be treated as a question of law rather than fact, but, even if treated as a matter of fact, Scotiabank's "representations on the content of Peruvian law are manifestly inaccurate and, therefore, cannot be taken on a *prima facie* basis" for Rule 41 purposes.[163] Peru points out that Scotiabank does not refer to a single provision of Peruvian law to support its allegations concerning the purported legal effects of payment under protest, which Peru does not consider surprising given that the concept "simply does not exist as a matter of Peruvian law, be it Tax Law, Administrative Law, or Civil Law."[164] According to Peru, the payment of an obligation arising from a SUNAT payment order is a prerequisite for a taxpayer to file a complaint under Article 132 of the Peruvian Tax Code, and the "circumstance of whether this payment is made 'under protest' or otherwise is irrelevant to this effect."[165] The fact that a taxpayer maybe be able to challenge a tax debt and "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" or a vested right in those amounts.[166]

[161] Rule 41 Application, para. 136, citing **Exhibit RL-0038**: *Odyssey Marine Exploration, Inc. v. United Mexican States*, ICSID Case No. UNCT/20/1, Non-Disputing Party Submission of the Government of Canada Pursuant to NAFTA Article 1128, 2 November 2021, para. 26.

[162] Rule 41 Application, para. 138.

[163] Reply, para. 258.

[164] Reply, para. 260.

[165] Reply, para. 262, citing Peruvian Tax Code, Arts. 132, 136.

[166] Reply, para. 263.

(2) The Claimant's Position

186. Scotiabank defends its position that it has two covered investments for purposes of its Expropriation Claim under the FTA and the ICSID Convention: its investment in Scotiabank Peru and its investment in the amount of default interest paid by Scotiabank Peru under protest.

187. Turning first to Article 847 of the FTA, Scotiabank contends that its need show only that it fits within one of the subparagraphs defining "investment." Scotiabank places the default interest it paid under protest within the Article 847(h) category of "interests arising from the commitment of capital or other resources in the territory of [Peru] to economic activity in such territory."[167] As to the term "interests," which is not defined in the FTA, Scotiabank asserts this must be interpreted broadly enough to cover personal and property rights. Scotiabank claims such rights for the default interest amounts paid, because Peruvian law allows payment under protest and, regardless of whether the payment was made under protest, preserves the payee's right to recoup undue amounts paid; specifically, Article 38 of the Tax Code provides that the Tax Administration is to return undue or excess payments with interest, and Articles 1267 and 1954 of the Civil Code provide generally for restitution and compensation in the context of undue payment.[168] In this connection, Scotiabank rejects Peru's argument that Scotiabank's right to request reimbursement of the default interest does not provide a vested right to reimbursement, on the ground that its right to reimbursement arises under Article 38 of the Tax Code and the Civil Code; in other words, "Scotiabank may use the court process as the means to act on that right, but the right is established independent of that process."[169]

188. As for the requirement of a commitment of capital towards economic activity in Peru, Scotiabank contends that "the interest amounts cannot be isolated from Scotiabank's more significant investment in Scotiabank Peru," because "[i]f Scotiabank Peru did not make the payment, it would have faced significant consequences, including the seizure of its assets,"

[167] Response, paras. 123-124.
[168] Response, para. 125 and footnote 138; Rejoinder, para. 135.
[169] Rejoinder, para. 136.

and the payment "was part of its ongoing operations and ensured that its underlying assets and ability to operate were not seized and undermined" and was "thus associated with Scotiabank Peru's ability to operate and generate revenues."[170] Scotiabank emphasizes that Scotiabank Peru "made a payment of over $100 million to Peru to prevent the significant consequences that may result to its business if it did not do so," which must be seen as "a commitment of capital that is part of its ongoing operations."[171] This situation is different, says Scotiabank, from cases where claims over contractual rights to money were not found to be investments under bilateral investment treaties, such as in *Global Trading v. Ukraine*, which concerned a purchase and sale agreement for poultry. Scotiabank explains that, contrary to Peru's allegation, it is not arguing that there is an investment any time a debt is paid, because in that situation there is no basis to claim recoupment of the debt paid, whereas "[h]ere, Peruvian law establishes a right to such recoupment where amounts were unduly or excessively paid."[172]

189. Turning to the issue of covered investments under the ICSID Convention, Scotiabank offers two arguments as to why Peru's objection must fail.

190. Scotiabank's first argument is that the ICSID Convention is inapplicable in determining whether an investment is capable of being expropriated. It is Scotiabank's position that Article 25(1) of the ICSID Convention – which provides for jurisdiction extending "to any legal dispute arising directly out of an investment" between the parties – applies to "the investment and dispute as a whole, even if only a subset of that investment is alleged to have been expropriated."[173] Here, says Scotiabank, the dispute arises out of Scotiabank's investment in Scotiabank Peru as a whole, which is indisputable and leads to "a complete answer."[174] Once this jurisdiction is assumed, the Tribunal's task is to assess whether Scotiabank has established its claim for expropriation, which turns not on Article 25(1) but on whether Scotiabank had rights capable of being expropriated under Peruvian law. In

[170] Response, para. 126; Rejoinder, para. 139.
[171] Rejoinder, para. 132.
[172] Rejoinder, para. 140.
[173] Response, para. 132.
[174] Response, para. 132; Rejoinder, para. 145.

support, Scotiabank cites to *Magyar Farming v. Hungary*, where the tribunal looked to the claimants' farming business "holistically" as a covered investment even though the expropriation claim went not to the business as a whole but to leasehold rights over the land and, in assessing whether those leasehold rights were capable of being expropriated, looked to domestic law.[175]

191. Scotiabank's second argument is that, even if the Tribunal should decide to apply Article 25 of the ICSID Convention, Scotiabank Peru's payment of the default interest amounts under protest meets the test for a covered investment under that Article. First, Scotiabank made a contribution in the form of a payment to Peru, which was a commitment of capital for an economic benefit, including "the prevention of deleterious precautionary measures against Scotiabank Peru's assets."[176] Second, as for duration of the investment, the relevant period is not, as argued by Peru, the three-month period between December 2013 and February 2014 during which Scotiabank Peru made the default interest payments to the SUNAT, but the many years between those payments and the 2021 Constitutional Court Decision.[177] Third, Scotiabank Peru faced significant risk if it had not made the payments and also, in making the payments, "assumed the risk that it may not succeed in its judicial challenge, assuming that determination was made after a fair and unbiased process (which it was not)."[178] According to Scotiabank, "[t]he judicial impropriety alleged in this action and the existence of this dispute evidences the risk."[179]

192. Scotiabank also rejects Peru's argument that, even if the Tribunal has jurisdiction over the Expropriation Claim, the claim manifestly lacks legal merit because Scotiabank has no right capable of being expropriated under Peruvian law, which does not recognize payment under protest as having legal effect. Scotiabank reiterates that, under Peruvian law,

[175] Response, para. 135, citing **Exhibit CL-0034**: *Magyar Farming Company Ltd., Kintyre Kft. and Inícia Zrt. v. Hungary*, ICSID Case No. ARB/17/27, Award, 13 November 2019 (***Magyar***), para. 249; Rejoinder, paras. 149, 272-276.

[176] Response, para. 138; Rejoinder, para. 155.

[177] Rejoinder, para. 157.

[178] Response, para. 140.

[179] Rejoinder, para. 158.

payment under protest is permitted and Scotiabank Peru has the right to reimbursement of the default interest paid, plus interest.

193. In conclusion, Scotiabank argues that, particularly in light of the disputed issues of Peruvian law, it is not manifestly obvious that "the interest amounts paid under protest are *not* a covered investment," and urges the Tribunal to dismiss this Rule 41 objection to the Expropriation Claim.[180]

D. ARE SCOTIABANK'S CLAIMS MANIFESTLY WITHOUT LEGAL MERIT ON THE GROUND THAT IT FAILED TO COMPLY WITH THE CONDITIONS PRECEDENT TO PERU'S CONSENT TO ARBITRATE?

(1) The Respondent's Position

194. Peru contends that, even if the Tribunal were to find that it has jurisdiction over any of Scotiabank's claims, all of the claims should be dismissed because Scotiabank failed to comply with the conditions precedent to Peru's consent to arbitrate under the FTA. Specifically, Peru alleges that Scotiabank, first, has not validly waived its right to continue proceedings before the Peruvian courts and, second, missed the limitation period for delivering to Peru the Notice of Intent to arbitrate its Expropriation Claim.

195. Article 823(1) of the FTA, entitled Conditions Precedent to Submission of a Claim to Arbitration, provides as follows:

> *1. A disputing investor may submit a claim to arbitration under Article 819 [Claim by an Investor of a Party on Its Own Behalf] only if:*
>
> *(a) the disputing investor consents to arbitration in accordance with the procedures set out in this Section;*
>
> *(b) at least six months have elapsed since the events giving rise to the claim;*
>
> *(c) not more than 39 months have elapsed from the date on which the disputing investor first acquired, or should have first acquired, knowledge of the alleged breach and knowledge that the investor has incurred loss or damage thereby;*

[180] Response, para. 10(c).

> *(d) the disputing investor has delivered the Notice of Intent required under Article 821, in accordance with the requirements of that Article, at least six months prior to submitting the claim; and*
>
> *(e) the disputing investor and, where the claim is for loss or damage to an interest in an enterprise of the other Party that is a juridical person that the investor owns or controls directly or indirectly, the enterprise, 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 referred to in Article 819, except for proceedings for injunctive, declaratory or other extraordinary relief, not involving the payment of damages, before an administrative tribunal or court under the law of the disputing Party.*

196. Article 823(3) of the FTA provides that the waiver referred to in Article 823(1) must be made in the form provided in Annex 823.1, be delivered to the disputing Party, and be included in the submission of a claim to arbitration.

a. Effective Waiver

197. It is undisputed that Scotiabank and Scotiabank Peru submitted effectively identical waivers using the Annex 823.1 form with the Request for Arbitration. In its Consent to Arbitration and Waiver, Scotiabank gave its:[181]

> *Consent to the arbitration in accordance with the procedures set out in the [FTA], and waive Scotiabank's right to initiate or continue before any administrative tribunal or court under the law of either Party to the FTA, or other dispute settlement procedures, any proceedings with respect to the measure of the Republic of Peru that is alleged to be a breach referred to in Article 819 or 820, except for proceedings for injunctive, declaratory or other extraordinary relief, not involved in the payment of damages, before an administrative tribunal or court under the law of the Republic of Peru.*

198. Peru considers the waivers to be ineffective, thereby rendering null Peru's consent to this arbitration.

199. Peru objects that, despite attaching waivers to its Request for Arbitration, "in the same Request for Arbitration, Scotiabank itself admitted that there are remedies still pending

[181] Response, para. 147; **Exhibit C-0044:** Consent to Arbitration and Waiver of Scotiabank; **Exhibit C-0032:** Consent to Arbitration and Waiver of Scotiabank Peru.

before the Constitutional Court regarding the imposition of the 1999 Tax Debt in the SUNAT 2011 Decision, as upheld by the Tax Court 2013 Decision."[182] Specifically, Peru quotes a footnote from Scotiabank's Request for Arbitration:[183]

> *The Tax Appeal concerns whether the application of value added taxes were appropriate, namely whether the impugned gold trading transactions were real and the legality of imposing the tax. On July 4, 2017, the Supreme Court of Peru upheld the imposition of the value added taxes against Scotiabank Peru. On July 5, 2018, Scotiabank Peru filed an* amparo *action challenging the Supreme Court's ruling. On December 28, 2020, the Third Specialized Constitutional Court of Lima dismissed the* amparo*. On January 12, 2021, Scotiabank Peru appealed that decision to the First Constitutional Chamber of Lima, who dismissed the appeal.* ***On August 15, 2022, Scotiabank Peru filed a proceeding before the Constitutional Court of Peru, which is pending as of the date of this Request for Arbitration.*** *The Tax Appeal does not involve the accrual of default interest.*

200. In light of Scotiabank's continuation of the pending Tax Appeal proceedings, Peru charges that Scotiabank has "failed materially" to comply with Article 823(1)(e) of the FTA. In support, Peru cites the NAFTA arbitration of *Waste Management v. Mexico*, where the tribunal stated that "[a]ny waiver […] implies a formal and material act on the part of the person tendering same" and "logically entails a certain conduct in line with the statement issued."[184] In *Waste Management*, despite the existence of a formal waiver letter, the tribunal found that the claimant had failed to act consistently with that waiver by continuing to pursue legal proceedings in Mexico through its Mexican subsidiary. The tribunal rejected the claimant's attempt to differentiate the Mexican proceedings on the ground that they were not based on alleged NAFTA breaches, finding that those proceedings and the arbitration arose from the same measures and so posed "the imminent risk that the Claimant may obtain the double benefit in its claim for damages," which "is precisely what NAFTA Article 1121 seeks to avoid."[185]

[182] Rule 41 Application, para. 149.

[183] Rule 41 Application, para. 150, quoting Request for Arbitration, footnote 3 (emphasis from Peru).

[184] Rule 41 Application, para. 153, quoting **Exhibit RL-0002**: *Waste Management, Inc. v. United Mexican States*, ICSID Case No. ARB(AF)/98/2, Arbitral Award, 2 June 2000 (***Waste Management***), paras. 20, 24.

[185] *Waste Management*, para. 27.

201. In likening the waiver situation here to that in *Waste Management*, Peru rejects Scotiabank's alleged strategy "to circumvent the waiver requirement by artificially compartmentalizing the various legal proceedings which relate to the same measure" and asserts that "the measures that constitute the Respondent's alleged breaches in this arbitration are inextricably related to the ongoing Tax Appeal."[186] Peru identifies four alleged flaws in Scotiabank's strategy:[187]

> *In fact, all of the proceedings (*i.e.*, the so-called "Default Interest Appeal", the "Tax Appeal" and this arbitration)* ***(i)*** *arise from Scotiabank's challenges to the very same SUNAT 2011 Decision, which was upheld by the Tax Court 2013 Decision;* ***(ii)*** *relate to a single tax debt, which includes the value added tax and the default interest owed by Scotiabank Peru;* ***(iii)*** *are so intimately connected that, should Scotiabank prevail in the Tax Appeal, the Tax Payments would be reimbursed (with interest), and the object of this arbitration would be rendered moot; and* ***(iv)*** *an eventual award rendered in this arbitration and a decision in the concurrent domestic proceedings regarding the Tax Appeal entail a risk of double recovery and contradictory decisions.*

202. As to the first flaw, Peru emphasizes that both the Default Interest Appeal and Tax Appeal "arise from the very same measure adopted by the Peruvian government: the SUNAT 2011 Decision, upheld by the Tax Court 2013 Decision, thus confirming the 1999 Tax Debt owed by Scotiabank Peru."[188] Peru denies Scotiabank's argument that this is a mischaracterization of its position, describing that argument as "sophistic."[189]

203. As for the second flaw, which concerns the connection between interest and debt, Peru reiterates that Article 28 of the Peruvian Tax Code (Components of the Tax Debt) provides that "the tax debt … is made up of the tax, the penalties and the interest." Peru also points to Article 33 of the Peruvian Tax Code, which provides that "[a]ny amount of tax unpaid within the terms indicated in Article 29 shall accrue an interest equivalent to the Default Interest Rate."[190] In light of these Tax Code provisions, Peru argues that "the distinction

[186] Rule 41 Application, paras. 157, 159.
[187] Rule 41 Application, para. 159.
[188] Rule 41 Application, para. 160.
[189] Reply, para. 278.
[190] Peruvian Tax Code, Arts. 28, 33.

that Scotiabank artificially draws between the IGV Liability and the default interest paid by Scotiabank is not only unreasonable, but also wrong as a matter of Peruvian law," under which "any liability for default interest is 'part and parcel' of the same debt as the value added tax."[191] In fact, notes Peru, the SUNAT payment order comprised both the IGV Liability and the accrued default interest, and Scotiabank Peru's Tax Payments covered both concepts.

204. As for the third flaw, Peru accuses Scotiabank of glossing over the inextricable relationship between the Tax Appeal and the Default Interest Appeal and the impact that the outcome of the Tax Appeal could have on this arbitration. In Peru's assessment, if Scotiabank prevails in the Tax Appeal, the original tax debt resulting from Banco Wiese's gold trading transactions would be annulled and "all the debt, including the default interest for the delay in payment from 1999 to 2013, which Scotiabank argues was allegedly accrued '*as a result of the delay caused by SUNAT and the Tax Court*' and of which it complains in this arbitration, would be annulled."[192] Peru quotes from the concurring opinion of Justice Miranda Canales issued with the 2021 Constitutional Court Decision, who wrote, after noting that interest is treated as a component of the tax debt under Peruvian law:[193]

> *Therefore, it is possible to affirm that if the tax obligation is rendered ineffective through contentious tax proceedings or, as the case may be, through contentious administrative proceedings, the decision also covers the interest. Therefore, it is not possible to justify a ruling in the constitutional forum on the interest paid over a tax that is still under discussion before the ordinary administrative or judicial authority.*

205. As to the fourth and final flaw, Peru points out that, should Scotiabank prevail in the Tax Appeal, the SUNAT would be required under the Peruvian Tax Code to reimburse Scotiabank Peru in full for the IGV and default interest amounts paid to the SUNAT, plus additional interest from the dates that Scotiabank Peru made the Tax Payments until the

[191] Rule 41 Application, para. 161.

[192] Rule 41 Application, para. 162 (emphasis from Peru).

[193] Rule 41 Application, para. 163 citing **Exhibit R-0008**: Decision No. 919/2021 of the Peruvian Constitutional Court, Opinion of Justice Miranda Canales, 20 November 2021, paras. 8-9.

date of reimbursement.[194] Given that, in this eventuality, Peru would have fully compensated Scotiabank for the default interest previously paid, which was the subject of the Default Interest Appeal, Peru contends that the continuation of this arbitration creates "a high risk of double recovery and contradictory decisions, which is precisely what the waiver requirement seeks to prevent."[195] As Scotiabank acknowledges that the result of the Tax Appeal *amparo* proceedings "may […] be favourable to Scotiabank Peru," Peru insists that "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."[196] As stated by counsel at the hearing:[197]

> *If there's a reimbursement, this entire arbitration is moot because the reimbursement will render, without effect, the arbitration. And therefore, it has under Waste Management, a direct impact, a direct effect on the arbitration. And that's where both collide, and there's a significant and material overlap between the local proceedings and this arbitration.*

206. As for Scotiabank's offer to provide an undertaking to prevent double recovery of the default interest amount, Peru considers this to be "irrelevant and immaterial to the Tribunal's determination of whether the Claimant has complied with the waiver required by Article 823(e)," which is a requirement of Peru's consent to arbitration and the Tribunal's jurisdiction.[198]

207. Peru asks the Tribunal to come to the same conclusion as the tribunal in *Waste Management*, and "given that it is manifest that the ongoing proceedings before the Peruvian courts and this arbitration" arise from the same measures, to find Scotiabank's waiver letters to be ineffective.[199] Absent Scotiabank's fulfilment of this necessary

[194] Peruvian Tax Code, Arts. 33 and 38.
[195] Rule 41 Application, para. 165; Reply, para. 283.
[196] Reply, para. 288.
[197] Hearing 26 February 2024, Transcript 168: 7-13.
[198] Reply, para. 291.
[199] Rule 41 Application, para. 165.

condition precedent to Peru's consent to arbitration set out in Article 823(1)(e) of the FTA, Peru considers that Scotiabank's claims are manifestly without legal merit.

b. Time Bar

208. Peru contends that, even if the Expropriation Claim were somehow to qualify as a protected investment, the Expropriation Claim fails because it is time-barred under Article 823(1)(c) of the FTA.

209. According to Peru, the State measure that purportedly crystallized the alleged expropriation was the 2013 SUNAT payment order to Scotiabank Peru, which was adopted almost nine years before Scotiabank submitted its Request for Arbitration on 31 October 2022 – far more than the 39-month time limit in Article 823(1)(c). Peru underscores that the language in Article 823(1)(c) is peremptory, meaning that Scotiabank could submit the Expropriation Claim only within the 39 months following the date on which it first acquired, or should have acquired, knowledge of the alleged breach of the FTA and loss or damage. Scotiabank's failure to do so nullifies Peru's consent to arbitration.

210. In support, Peru refers to other ICSID cases in which tribunals have found failure to comply with treaty limitation periods time to warrant full or partial dismissal of claims under Arbitration Rule 41. These include *AFC Investments v. Colombia* and *Ansung Housing v. China.*[200] Peru asks the Tribunal not to depart from the "clear logic" of the *Ansung* decision, which has "striking" parallels to the situation here:[201]

> *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)*

[200] Rule 41 Application, para. 173 citing **Exhibit RL-0039**: *AFC Investment Solutions S.L. v. Republic of Columbia*, ICSID Case No. ARB/20/16, Award on Respondent's Preliminary Objection Under Rule 41(5) of the ICSID Arbitration Rules, 24 February 2022 (***AFC Investments***), paras. 196-197 and **Exhibit RL-0030**: *Ansung Housing Co., Ltd. v. People's Republic of China*, ICSID Case No. ARB/14/25, Award, 9 March 2017 (***Ansung Housing***), para. 122.

[201] Reply, para. 296.

crucially, in Ansung, the tribunal reached its decision in the context of Rule 41 proceedings.

211. Peru rejects Scotiabank's argument that the alleged expropriation did not take place until issuance of the Constitutional Court Decision on the Default Interest Appeal in December 2021, which would place the expropriation within 39 months of Scotiabank's filing of its Request for Arbitration. Peru describes this argument as "unsustainable, and in open contradiction with the arbitral case law on the computation of time limits regarding expropriation claims."[202]

212. Other tribunals, says Peru, have found that the relevant trigger to compute the time limit for an expropriation claim is the date on which an investor was deprived of its property rights in the alleged investment. Peru refers to the case of *Alan Berkowitz v. Costa Rica*, which concerns a provision in the Central America-Dominican Republic-United States Free Trade Agreement similar to Article 823(1)(c) of the FTA, in which the tribunal found the claimant's claims to be time-barred because the allegedly expropriatory administrative decisions had been issued more than three years prior to initiation of the arbitration.[203] The *Berkowitz* tribunal found that the relevant date for initiating an arbitration for expropriation was the date in which "the practical and economic use of the properties was irretrievably lost," which occurred no later than the date of the expropriation decree regardless of subsequent court proceedings.[204]

213. Peru also relies upon the NAFTA case of *Apotex v. United States of America*, where the relevant time limit for claim submission in Articles 1116(2) and 1117(2) of the NAFTA, using language similar to that in Article 823(1)(c) of the FTA, was three years.[205] Facing an argument by Apotex that a decision by the U.S. Food and Drug Administration (the ***FDA***) preventing it from commercializing certain products and the conduct of the U.S.

[202] Rule 41 Application, para. 175.

[203] Reply, paras. 309, 312; **Exhibit RL-0031**: *Spence International Investments LLC., Aaron C. Berkowitz et al v. Republic of Costa Rica*, ICSID Case No. UNCT/13/2, Interim Award (Corrected), 30 May 2017 (***Berkowitz***).

[204] *Berkowitz*, para. 264.

[205] Reply, paras. 309-311; **Exhibit RL-0021**: *Apotex Inc. v. United States of America*, ICSID Case No. UNCT/10/2, Award on Jurisdiction and Admissibility, 14 June 2013 (***Apotex***).

courts in later litigation relating to this decision were expropriatory, the tribunal found the claim to be time-barred because the FDA decision itself, which was the cause of the alleged damage suffered by Apotex, had been issued more than three years before the start of the arbitration. The tribunal found that Apotex could not avoid this conclusion by asserting that the FDA decision was part of a continuing breach, with the three-year time limitation being tolled by the subsequent court proceedings. Peru flags the *Apotex* tribunal's emphasis that Article 1116(2) of the NAFTA was a "clear and rigid limitation defense, which … is not subject to any suspension, prolongation or other qualification."[206]

214. Peru asks the Tribunal here to apply the same rationale as the *Apotex* tribunal, and not to allow Scotiabank – which first knew, or should have known, that Peru intended to proceed with collection of the default interest when the SUNAT issued its payment order in 2013 – "artificially to extend the 39-month [FTA] time limit over a period of nearly ten years" and thereby avoid "arbitrating a dispute which Peru has not consented to arbitrate."[207]

215. In sum, Peru argues that Scotiabank's Expropriation Claim is manifestly without legal merit as time-barred.

(2) The Claimant's Position

216. Scotiabank gives short shrift to Peru's position on both of the challenged conditions precedent under Article 823 of the FTA.

a. Effective Waiver

217. As to the waiver under Article 823(1)(e), Scotiabank primarily relies on the text of that Article, which requires a waiver of the right to initiate or continue "any proceedings with respect to the measure of the disputing Party that is alleged to be a breach," and not to waive the right to continue all court actions.[208] Scotiabank insists that it has "unconditionally waived its right to commence or continue all proceedings related to the

[206] *Apotex*, para. 327.
[207] Rule 41 Application, paras. 180-181; Reply, paras. 309-311.
[208] Response, para. 146.

'measures' impugned in this arbitration," which measures concern only the Default Interest Appeal and not the pending Tax Appeal.[209] Scotiabank reiterates that it and Scotiabank Peru have formally waived – in what Scotiabank describes as "unequivocal and unconditional" terms – their "right to initiate or continue before any administrative tribunal or court under the law of either Party to the FTA, or other dispute settlement procedures, any proceedings with respect to the measure of the Republic of Peru that is alleged to be a breach referred to in Article 819 or 820."[210]

218. Scotiabank connects Peru's challenge to the waivers to, again, Peru's mischaracterization of Scotiabank's claims as being linked to the 1999 SUNAT Decision and the ongoing Tax Appeal. Scotiabank contends that, in making this link, Peru is ignoring the important text of Article 823(e) that the waiver need extend only to proceedings "with respect to the measure of the disputing Party that is alleged to be a breach." Scotiabank reiterates that the measure underlying its case before this Tribunal – the unfair treatment judicial treatment it received from the Constitutional Court in relation to the Default Interest Appeal – is a different measure than that underlying the Tax Appeal. In Scotiabank's words, "[t]he issue before this Tribunal is whether the 2021 Constitutional Court Decision breaches the FTA" and "[t]hat issue is not before any other court or tribunal."[211]

219. Scotiabank agrees with Peru that the purpose of the FTA waiver requirement is to avoid or minimize the risk of conflicting outcomes or, in Peru's words, "double redress for the same conduct or measure."[212] However, contrary to Peru's position, Scotiabank says that this does not mean that "every time there is a risk of double recovery, the waiver requirement is triggered."[213] Scotiabank rejects Peru's contention that the waiver must address the possible overlap between the default interest amount at the heart of the 2021 Constitutional

[209] Response, para. 10(d).
[210] Response, para. 147; **Exhibit C-0044:** Consent to Arbitration and Waiver of Scotiabank.
[211] Response, para. 151.
[212] Rejoinder, para. 172, citing Reply, para. 283.
[213] Rejoinder, para. 172.

Court Decision and Scotiabank's potential recovery of the same amount if it is successful in the Tax Appeal. According to Scotiabank:[214]

> *Even if the damages sought in this case theoretically overlap with the amounts that may be recovered in the Tax Appeal, that does not mean, as Peru suggests, that the measures challenged in both proceedings are the same. They are not. It simply means that the loss to Scotiabank overlaps, but the* ***harm*** *caused to Scotiabank arises from distinct measures. Notably, Article 823 does not say that a claimant must waive all proceedings with respect to the same* ***injury*** *or* ***loss****, but with respect to the same* ***measure****.*

220. In any event, Scotiabank denies that there is any risk of double recovery of the default interest amount through this arbitration and the Tax Appeal. Scotiabank states that, even if it prevails in the Tax Appeal, it may not recover the amount of default interest paid under protest and, further, the Peruvian judiciary has recognized that there is no risk of contradictory decisions where a plaintiff pursues both an *amparo* proceeding to challenge the collection of default interest and a judicial process to challenge the tax debt imposed by the SUNAT.[215] Scotiabank also commits to provide an undertaking confirming that, if it should ultimately recover the amount of the accrued default interest by way of the Tax Appeal, it will not seek to recover that amount twice.

221. Scotiabank considers the situation here to be distinguishable from that in *Waste Management v. Mexico*, on which Peru relies. In *Waste Management*, according to Scotiabank, the claimant submitted a waiver that attempted to preserve its right to pursue dispute resolution proceedings based on domestic Mexican law that overlapped with its NAFTA breach claims, thereby – unlike Scotiabank – "tread[ing] the same factual ground as the treaty arbitration."[216]

[214] Response, para. 153.

[215] Response, para. 152, citing **Exhibits C-0063** and **C-0065**: respectively, Resolution No. 7 and Resolution No. 5 issued by the Third Civil Chamber.

[216] Response, para. 156.

b. Time Bar

222. As to the 39-month limitation period in Article 823(1)(c), Scotiabank takes the position that this period did not start to run until the Constitutional Court issued its decision in December 2021, which was the date on which it "first acquired, or should have first acquired, knowledge of the alleged breach" – namely unlawful expropriation by way of the allegedly unfair Constitutional Court Decision – and "knowledge that [it] has incurred loss or damage thereby" – namely that the Constitutional Court Decision had deprived it of any possibility of recovering the default interest it had paid under protest.

223. Scotiabank contends that Peru's contrary position – that any expropriation of the default interest amount crystallized with the 1999 SUNAT Decision – fails for two reasons. First, the position is internally inconsistent, because Peru has challenged only the Expropriation Claim as time-barred even though the FET and National Treatment Claims are based on the same measure. Second, Article 823(1)(c) requires knowledge of both the alleged FTA breach and the resulting loss or damage and, here, it is "a complete answer" that the alleged breach relates to the Constitutional Court's unfair conduct in issuing its Default Interest Appeal decision 2021.[217]

224. Even if the issue of loss or damage is taken into account, Scotiabank asserts that it could not have acquired knowledge of its loss of the default interest paid under protest before the 2021 Constitutional Court Decision. This is because, says Scotiabank, it had a right to reimbursement while the Default Interest Appeal proceedings were pending, which it "finally and irreversibly lost" only with the dismissal of its case by the Constitutional Court.[218] Scotiabank relies on the finding of the tribunal in *Infinito v. Costa Rica*, that "[a] judicial expropriation can only occur when a final judgment is rendered or when the time limit to appeal has expired."[219] As observed by Scotiabank, it "could not have brought this

[217] Response, para. 159; Rejoinder, para. 182.

[218] Response, para. 160.

[219] **Exhibit CL-0027**: *Infinito Gold Ltd. v. Republic of Costa Rica*, ICSID Case ARB/14/5, Award, 3 June 2021, paras. 238-239.

claim sooner," because it "did not arise until after it experienced the unfair judicial process before the Constitutional Court."[220]

225. Scotiabank distinguishes the one authority on which Peru relies in support of its contrary position, *Ansung Housing v. China*, on the ground that the relevant limitations period provision in that case began to run when Ansung first knew, actually or constructively, that it had incurred loss or damage, without reference to knowledge of the relevant breach. Further, Scotiabank states that, unlike Ansung, it has not pleaded facts effectively admitting that it knew it had suffered a loss before the FTA cut-off date and further losses thereafter, and instead pegs the date of its loss in its Request for Arbitration – as relevant to its Expropriation Claim – to the issuance of the Constitutional Court Decision in 2021.

226. Scotiabank emphasizes that Peru has not cited a single award in which a tribunal found that a treaty limitation period began to run with a judicial decision that remained subject to appeal. Scotiabank also distinguishes the two cases relied upon by Peru, *Berkowitz v. Costa Rica* and *Apotex v. United States of America*. As for *Berkowitz*, Scotiabank considers it important that the claimants in that case effectively admitted in their pleadings that the last of line of measures allegedly expropriating their property rights occurred three months before the treaty cut-off date, when there were no ongoing judicial proceedings suspending the alleged expropriation. As for *Apotex*, Scotiabank notes that the tribunal drew a distinction between the application of the treaty limitation period to the claimant's expropriation claim, which was based on the specific FDA decision at issue, and the subsequent court challenges to that decision, adding that where, as here, "the challenged measure is the subsequent court decision, then that is the date of the alleged breach and loss" for limitations purposes.[221]

VIII. THE TRIBUNAL'S ANALYSIS AND DECISION

A. INTRODUCTION

[220] Rejoinder, para. 189.

[221] Response, para. 164.

227. Peru has presented a complicated Rule 41 Application, effectively creating a matrix of four grounds for dismissal for Scotiabank's three treaty breach claims. The Parties' written submissions are extensive, with Peru submitting a 57-page Application later supported by a 103-page Reply. Even with the assistance of counsel's presentations at the hearing, the Tribunal has found it time-consuming to understand and analyze Peru's Rule 41 Application and Scotiabank's defenses to the Application.

228. However, the Tribunal does not accept Scotiabank's suggestion that complexity is itself a sufficient justification to dismiss Peru's Rule 41 Application. In the words of the *Trans-Global* tribunal, "this [Rule 41] exercise may not always be simple," requiring substantial submissions, and "may thus be complicated; but it should never be difficult."[222]

229. The Tribunal accepts, as it must in deciding a Rule 41 Application, the FTA breach claims as reasonably framed by Scotiabank and the facts as alleged by Scotiabank in support of its claims on a reasonable *prima facie* basis. As framed by Scotiabank, the heart of its FET, National Treatment and Expropriation Claims is that the 2021 Constitutional Court Decision wrongfully and permanently closed off its opportunity to obtain reimbursement of the USD 100 million-plus paid in default interest in connection with the Default Interest Appeal. As for the facts, Scotiabank may or may not be able to prove in this arbitration the facts relevant to its alleged mistreatment in the Peruvian judicial proceedings on the Default Interest Appeal. However, this does not mean, as Peru asserts, that Scotiabank has acted abusively by raising these facts in its defense to the Rule 41 Application.

230. In approaching the task of analyzing each of the grounds for Peru's Rule 41 Application, as applicable to Scotiabank's claims, the Tribunal has found helpful the chart below from the Rule 41 Application, in which Peru has matched its objections to Scotiabank's FET, Unlawful Expropriation and National Treatment Claims.[223]

	Article 803 (National Treatment)	**Article 805 (Minimum Standard of Treatment)**	**Article 812 (Expropriation)**

[222] *Trans-Global*, para. 88.

[223] Rule 41 Application, para. 56.

Financial services exception (Chapter Eleven of the FTA)	Standard not incorporated into Chapter Eleven. Therefore, the Tribunal lacks jurisdiction over this claim.	Standard not incorporated into Chapter Eleven. Therefore, the Tribunal lacks jurisdiction over this claim.	-
Tax exception (Articles 2203, 823(4))	-	Not applicable to taxation measures, per Article 2203(1). Therefore, the Tribunal lacks jurisdiction over this claim.	The issue has not been referred to the competent authorities under Article 2203(8). Therefore, the Tribunal lacks jurisdiction over this claim.
Covered investment (Article 847 FTA, Article 25(1) ICSID Convention)	-	-	The interest paid by Scotiabank Peru to the SUNAT is not a covered investment under either Article 847 of the Peru–Canada FTA, or Article 25(1) of the ICSID Convention. Therefore, the Tribunal lacks jurisdiction over this claim.
Time bar (Article 823(1)(c))	-	-	The Claimant's expropriation claim was submitted beyond the 39-month time limit provided in Articles 823(1)(c) and 823(2)(c) of the FTA. Therefore, the Tribunal lacks jurisdiction over this claim.
Waiver (Article 823(1)(e))	The Claimant did not validly and effectively waive its right to continue ongoing proceedings, as required by Articles 823(1)(e) and 823(2)(e). Therefore, there is no valid consent from Peru to arbitrate this dispute and the Tribunal lacks jurisdiction over all of the Claimant's claims.		
Merits	-	-	The Claimant has no vested rights capable of being expropriated.

231. Looking at the overall landscape of the Rule 41 Application and the Parties' positions on each Rule 41 objection, the Tribunal has determined to analyze Peru's objections in the following order: (a) the waiver validity objection under FTA Article 823; (b) the protected investment objection under FTA Article 847 and ICSID Article 25(1); (c) the "financial institution" carve-out objection under FTA Chapter Eleven; and (d) the "taxation measures" exception under FTA Articles 2203 and 823(4).

B. THE WAIVER VALIDITY OBJECTION

232. The Tribunal turns first to Peru's objection that all of Scotiabank's claims – the National Treatment, FET and Expropriation Claims – are manifestly without legal merit on the ground that Scotiabank and Scotiabank Peru have not fulfilled the condition precedent to

Peru's consent to arbitrate under the FTA by validly waiving their rights to continue proceedings before the Peruvian courts. To recall, Article 823(1)(e) of the FTA requires:

> *the disputing investor and, where the claim is for loss or damage to an interest in an enterprise of the other Party that is a juridical person that the investor owns or controls directly or indirectly, the enterprise, 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 referred to in Article 819 … .*

233. In analyzing this objection, the Tribunal appreciates the core of Peru's argument that the FTA Article 823(1) waivers given by Scotiabank and Scotiabank Peru are invalid because, first, there is a potential that Scotiabank will be reimbursed in the amount of the accrued IGV paid, plus interest, if Scotiabank ultimately prevails in its pending *amparo* action in the Tax Appeal and, second, they have not waived their right to such reimbursement. The Tribunal further appreciates that this argument rests on Peru's position that Scotiabank's strategy is "to circumvent the waiver requirement by artificially compartmentalizing the various legal proceedings which relate to the same measure" and that "the measures that constitute the Respondent's alleged breaches in this arbitration are inextricably related to the ongoing Tax Appeal,"[224] because Scotiabank could not pursue the Default Interest Appeal but for SUNAT's original charge of the 1999 Tax Debt to Banco Wiese.

234. However, at this stage, the Tribunal must accept the FTA breach claims as framed by Scotiabank. And Scotiabank is pursuing its claims in this arbitration solely on the basis of the alleged unconstitutionality of the 2021 Constitutional Court Decision in the Default Interest Appeal. It cannot be disputed that Scotiabank and Scotiabank Peru submitted waivers, in the form required by Article 823(1) and Annex 823.1, of "their right to initiate or continue before any administrative tribunal or court … any proceedings with respect to the measure of [Peru] alleged to be a breach referred to in Article 819," specifically the unconstitutionality of the 2021 Constitutional Court Decision.

[224] Rule 41 Application, paras. 158-159.

235. Whether Scotiabank will prevail in its strategy of pursuing the default interest and underlying Tax Debt claims separately remains to be seen, but the Tribunal cannot say at this stage that the strategy is obviously frivolous or absurd. That might be the case if Scotiabank Peru had filed both the default interest and tax claims in one action before the Peruvian courts and then, for whatever reason, pursued only its default interest claim in arbitration. But that is not what happened: in November 2013, Scotiabank Peru filed an *amparo* action for reimbursement of the default interest paid and a separate contentious administrative action seeking annulment of the 2013 Tax Court Decision, and those court cases proceeded separately thereafter.

236. To repeat, there is no way to know at this stage what will happen with the *amparo* action in the Tax Appeal. It is possible that Scotiabank will be reimbursed the full amount of the default interest arising from the 1999 Tax Debt; it is possible that no such reimbursement will be forthcoming.

237. In light of these findings, the Tribunal need not address all of the Parties arguments concerning the validity of the FTA Article 823 waivers, including the import of the decision in *Waste Management v. Mexico* or the concurring opinion of Justice Miranda Canales in the 2021 Constitutional Court Decision.

238. In concluding, the Tribunal recalls the observation of the *Trans-Global v. Jordan* tribunal that a successful Rule 41 applicant must establish its objection "clearly and obviously, with relative ease and dispatch."[225] The Tribunal finds that Peru has not done so here in its efforts to demonstrate that the waivers provided by Scotiabank and Scotiabank Peru are manifestly without legal validity and thereby fall short of the condition precedent in FTA Article 823 to Peru's consent to arbitrate the National Treatment, FET and Expropriation Claims brought by Scotiabank. The Tribunal cannot find on the record so far that Scotiabank has no tenable argument whatsoever to support the validity of its waivers under FTA Article 823.

[225] *Trans-Global*, para. 88.

239. Accordingly, the Tribunal denies Peru's Rule 41 Application on the ground of invalid waivers given by Scotiabank and Scotiabank Peru.

C. THE "FINANCIAL INSTITUTION" CARVE-OUT OBJECTION

240. The Tribunal turns next to Peru's Rule 41 objection based on the status of Scotiabank and Scotiabank Peru as financial institutions. To recall, Article 1101(1) of the financial services section of the FTA, Chapter Eleven, provides (with emphasis added):

> *This Chapter applies to **measures** adopted by 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.*

241. At this stage of the proceeding, the Tribunal cannot accept Peru's interpretation of the carveout in Article 1101(1) for national treatment and FET claims (by cross-reference to Articles 803 and 805 of the investment chapter, Chapter Eight) as manifestly applying whenever a claimant is a financial institution or whenever the impugned measure relates to an investment in a financial institution.

242. The Tribunal must take the National Treatment and FET Claims as reasonably framed by Scotiabank in the Request for Arbitration, specifically to be based on the allegedly unfair judicial treatment leading to the 2021 Constitutional Court Decision. In doing so, the Tribunal finds potential merit in Scotiabank's interpretation under Article 31(1) of the VCLT of the phrase "measures … relating to financial institutions" in FTA Article 1101(1) as focusing on the nature of the "measures" at issue and not on the nature of the investor as a "financial institution." Here, the measure challenged by Scotiabank is the 2021 Constitutional Court Decision concerning the irrevocable liability of Scotiabank Peru for the accrued IGV default interest. The Tribunal agrees with Scotiabank that this measure is not obviously and necessarily connected to the status of Scotiabank and Scotiabank Peru

as financial institutions, because the Constitutional Court could have applied the measure against any debtor investor in debt in any economic sector in Peru.

243. Whether Scotiabank has the better argument that the Article 1101(1) "financial institution" carveout covers only regulatory financial institution measures, which are meant to be left to the FTA States, must await further submissions. At this stage, the Tribunal considers Scotiabank's argument to be at least tenable. Although the Parties may have presented complicated alternative arguments at this stage, the Tribunal finds that – to borrow the language of the *Trans-Global v. Jordan* tribunal –Peru has not established this Rule 41 objection "clearly and obviously, with relative ease and dispatch."[226]

244. To conclude, the Tribunal rejects Peru's objection that Scotiabank's National Treatment and FET claims are manifestly without legal merit for purposes of Rule 41 on the basis of the "financial institution" carve-out in Chapter Eleven of the FTA.

D. THE PROTECTED INVESTMENT OBJECTION

245. The Tribunal turns now to Peru's Rule 41 objection that Scotiabank has no protected investment under either the FTA or the ICSID Convention subject to expropriation.

246. As a preliminary matter, the Tribunal records that the Parties agree that Scotiabank's shareholding in Scotiabank Peru is a protected investment for purposes of both the FTA and the ICSID Convention Article 25(1). Scotiabank Peru remains an ongoing enterprise. Scotiabank makes no allegation that Peru has expropriated its shares in Scotiabank Peru and nor does it claim damages for any loss based on a diminution in the value of those shares due to the Default Interest Appeal.

247. Scotiabank's Expropriation Claim is predicated squarely and exclusively on the theory that Scotiabank's payment of the accrued default interest under protest constitutes a protected investment in-and-of-itself. Peru contends that this theory is manifestly without legal merit for Rule 41 purposes.

[226] *Trans-Global*, para. 88.

248. The Tribunal agrees with Peru that FTA Article 847 , which is modelled on Article 1139 of NAFTA, is a closed list of categories of protected investments. Scotiabank places the 2013 Default Interest Payment into Article 847(h), which identifies "interests arising from the commitment of capital or other resources in the territory of a Party to economic activity in such territory" as an investment.

249. Scotiabank argues that it made the 2013 Default Interest Payment under protest to protect the assets of Scotiabank Peru from seizure, thereby allowing Scotiabank to continue its commitment of capital and resources in economic activity in Peru through Scotiabank Peru. Peru counters that default interest payments cannot be an "interest" in the sense the term "interests" is used in Article 847(h), because the payment was "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."[227] In Peru's view, the amount of the 2013 Default Interest Payment – whether made under protest or not – became Peru's property, and Scotiabank's procedural right to challenge the legality of the assessment of the default interest liability in the Peruvian courts cannot equate to a substantive right over the funds paid.

250. The Tribunal recognizes the importance of Scotiabank's commercial motivation to protect the assets of Scotiabank Peru from potential seizure by making the 2013 Default Interest Payment under protest. If, in fact, that payment had not been made and Peru had seized the assets of Scotiabank – assets that do constitute a protected investment of Scotiabank – the seizure would have been an interference with actual substantive investment rights and the question would be whether that was an unlawful expropriation under the FTA.

251. However, the Tribunal must also recognize that Peruvian Civil Code treats the payment of an debt, even if paid under protest, as extinguishing that debt and preventing the accrual of interest, and the debtor does not retain an interest in the amount paid.[228] Scotiabank's payment of the default interest debt to avoid the potential consequences of non-payment

[227] Reply, para. 214.

[228] Rule 41 Application, para. 116, citing Peruvian Civil Code, Arts. 1132, 120 and 1240; Reply, paras. 216, 260.

on other assets – the Scotiabank Peru shareholding – could not transform the legal relationship pertaining to the 2013 Default Interest Payment. Utilizing the language of FTA Article 847(h), the mere possibility of an asset seizure could not transform the 2013 Default Interest Payment into a protected investment in the form of a "commitment of capital … to economic activity" in Peru. Nor could the procedural possibility of Scotiabank's recovering the amount of the 2013 Default Interest Payment via court proceedings somehow transform that payment into an investment capable of being expropriated.

252. To recall the language of the tribunal in *Lotus v. Turkmenistan*, the Tribunal, by the majority of arbitrators Reed and Douglas, accepts that Peru has demonstrated that, "no matter what evidence is adduced, there is a fundamental flaw in the way that [Scotiabank's] claim is formulated that must inevitably lead to its dismissal."[229] The majority accepts that Scotiabank's Expropriation Claim is manifestly without legal merit because Scotiabank did not have a protected investment in the 2013 Default Interest Payment for the purposes of FTA Article 847 that could be subject to expropriation.

253. In light of the Tribunal majority's decision to grant Peru's Article 41 Application to dismiss Scotiabank's Expropriation Claim as manifestly without legal merit on the ground that Scotiabank has no protected investment that could have been expropriated under FTA Article 847, the Tribunal need not address Peru's related arguments that the 2013 Default Interest Payment did not itself constitute an investment under Article 25(1) of the ICSID Convention and that Scotiabank had no vested rights that could have been expropriated. Nor need the Tribunal address Peru's additional Article 41 objections that the Expropriation Claim is manifestly without legal merit as time-barred under FTA Article 823(1)(c) or as a "taxation measure" under FTA Article 2203.

E. THE "TAXATION MEASURE" EXCEPTION OBJECTION

[229] *Lotus Holding*, para. 158.

254. The Tribunal turns finally to Peru's remaining objection that Scotiabank's FET Claim concerns a "taxation measure" excepted from arbitral jurisdiction under Article 2203 of the FTA and hence manifestly lacks legal merit. The Tribunal has found above that Scotiabank's Expropriation Claim is manifestly without legal merit on another ground and it is undisputed that Scotiabank's National Treatment Claim does not fall within the Article 2203 exceptions.

255. Scotiabank's defense to this objection is, in essence, that the measure of which it complains – the allegedly unconstitutional 2021 Constitutional Court Decision – does not concern a "taxation measure" but rather the unconstitutional imposition of default interest on the IGV Liability.

256. To rule on this Rule 41 objection and defense, the Tribunal must interpret the relevant FTA provisions. As a first step, the Tribunal notes Peru's agreement with Scotiabank that the term "measures" as defined in Article 105 of the FTA – "any law, regulation, procedure, requirement or practice" – includes the 2021 Constitutional Court Decision. This is sufficient, in the Tribunal's view, to negate Scotiabank's argument that Peru is mischaracterizing the basis of its FET Claim as resting on the underlying IGV Liability and not on the 2021 Constitutional Court Decision.

257. The term "taxation" is not defined in the FTA, and hence requires interpretation. Here again the Parties agree on certain principles. As stated by Scotiabank: "Both parties agree on the purpose of the taxation exemption in Article 2203: to preserve the states' sovereignty in relation to their power to impose taxes." Peru, while arguing that a "taxation measure" is to be interpreted in accordance with the FTA and international law, also agrees with Scotiabank that taxation issues necessarily bring domestic Peruvian tax law into play.

258. Without having to reprise the Parties' extended arguments concerning the nature of default interest under Peruvian law, the Tribunal is satisfied that imposition of default interest on a tax debt is not, as the Constitutional Court recognized in the *Medina de Baca* case, a tax or taxation *stricto sensu*. This is common sense, given that the obvious purpose of interest is to compensate for the unexcused late payment of any debt.

259. This, however, is not the end of the inquiry, because the term used in Article 2203 of the FTA – the term requiring interpretation under Article 31(1) of the VCLT – is "taxation measure." The critical question, therefore, is whether Peru's imposition of tax default interest on Scotiabank's IGV Liability was or was not manifestly a "taxation measure" for purposes of the FTA.

260. In answering this question, the Tribunal must start with the text of FTA Article 2203 and specifically the context provided by Article 2203(6)(g). That Article states, with emphasis added, that the limited obligations (which do not include FET) that do apply to certain "taxation measures" in Article 2203(5) do not 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." In the Tribunal's view, there can be no serious argument – and none has been raised by either Party – that a State's imposition of default interest on a tax liability is not a measure taken to ensure compliance with that State's taxation system. It follows that, to borrow the words of the tribunal in *AHG Industry v. Iraq*, it is "clear and obvious" that Peru's imposition of the default interest liability on Scotiabank constitutes a "taxation measure" for purposes of FTA Article 2203.

261. In coming to this conclusion, the Tribunal has not ignored Scotiabank's emphatic argument that the nature of default interest is compensatory and falls under Peruvian civil law rather than the taxation law. It is true that taxation is a sovereign power that necessarily rests on domestic law. However, Peruvian law cannot be controlling in respect of how a term in an international treaty – "taxation measure" – is to be autonomously interpreted under the VCLT. The Parties can have a legitimate debate about whether tax default interest is or is not part of taxation under Peruvian law, but that is not the issue facing the Tribunal. The issue is whether tax default interest is a "taxation measure" for purposes of FTA Article 2203 – and, in the view of the Tribunal by the majority of arbitrators Reed and Douglas, Article 2203(6)(g) leaves no doubt that it is.

262. In any case, the Tribunal majority considers that Peruvian law supports this finding. Given that Article 28 of the Peruvian Tax Code – entitled Components of the Tax Debt – expressly describes a tax debt to be "made up of the tax, the penalties and the interest," Scotiabank's argument that Peru's collection of default interest on Scotiabank's IGV Liability is not a "taxation measure" is, in the assessment of the Tribunal majority, manifestly unsustainable under the autonomous interpretation of that term in FTA Article 2203.

263. Indeed, in the view of the Tribunal majority, it could be said that Article 28 of the Peruvian Tax Code, by adding penalties and interest to the relevant tax as "Components of the Tax Debt," illustrates that the concept of a "taxation measure" or a taxation regime must be broader than a tax *stricto sensu*. This has been observed by the tribunal in *Encana v. Ecuador*, which noted that "a measure is a taxation measure if it is part of the regime for the imposition of tax."[230] In this connection, the Tribunal finds it significant that the Peruvian Constitutional Court in the *Medina de Baco* case, despite recognizing that tax default interest is not a tax *stricto sensu*, found that tax default interest, like a tax itself, cannot be confiscatory under Peruvian law, apparently examining default interest in the context of the broader Peruvian tax regime.

264. It is also perhaps significant in this context that, in its Request for Arbitration, Scotiabank described one of Scotiabank's claims in the Default Interest Appeal to be for the breach of its constitutional right "to private property and the prohibition against **confiscatory taxes**, resulting from the unlawful calculation of default interest between 1999 and 2013 and the unlawful capitalization of that default interest."[231] In the view of the Tribunal majority, it is difficult not to conclude that Scotiabank, at least in connection with its Default Interest Appeal, considered default interest to be a component of "confiscatory taxes."

265. The Tribunal here takes note of Scotiabank's description of the disputed issues concerning Article 28 of the Peruvian Tax Code and other Peruvian law being heard in the *Freeport-McMoRan v. Peru* arbitration, without Peru having filed a Rule 41 objection based on the

[230] *EnCana*, para. 142.

[231] Request for Arbitration, para. 33(iii) (emphasis added).

"taxation measures" exception in the FTA. However, the Tribunal cannot find that Peru's choice not to raise a Rule 41 objection in one case prevents it from doing so in this arbitration or, in itself, undermines the merits of its Rule 41 Application here.

266. To conclude, even in the face of the Parties' extended and complex arguments on the proper interpretation of the term "taxation measure" in FTA Article 2203, the Tribunal majority– applying the standard articulated in *Trans-Global v. Jordan* – has not found it difficult to decide that Scotiabank's FET Claim, based on the 2021 Constitutional Court Decision as an alleged "taxation measure" under the FTA, is manifestly without legal merit for purposes of Rule 41. Borrowing the terminology of the *AHG v. Iraq* tribunal, the Tribunal majority finds that, once the Parties' complex arguments have been carefully examined, "it appears that the Claimant has no tenable arguable case."

267. The Tribunal, by the majority of arbitrators Reed and Douglas, grants Peru's Application to dismiss Scotiabank's FET Claim under Rule 41.

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268. This is, of course, not the end of this arbitration. Going forward, Scotiabank will be able to develop its National Treatment Claim and Peru will be able to raise any preliminary jurisdictional objections under Arbitration Rule 43 and, assuming jurisdiction, argue its defenses on the merits. It remains to be seen whether there will be a need for expert evidence on Peruvian law and resort to the *travaux préparatoires* of the FTA.

IX. COSTS

269. In light of the Tribunal's decision to deny Peru's Rule 41 Application in part, with the result that this arbitration will proceed on Scotiabank's National Treatment Claim, the Tribunal will address only the issue of costs for the Rule 41 proceedings. Both Peru and Scotiabank seek their full costs in connection with the Rule 41 Application.

270. In its Costs Statement, Peru seeks the total amount of US$ 911,720.12 in costs for the Rule 41 proceedings, as follows: (a) legal fees in connection with the Rule 41 Application and hearing, US$ 907,488.60; and (b) disbursements of US$ 4,231.52.

271. In its Costs Statement, Scotiabank seeks the total amount of US$ 312,744.61 in costs for the Rule 41 proceedings, as follows: (a) legal fees in connection with the Rule 41 Application, US$ 219,485.94; (b) legal fees in connection with the Rule 41 Application hearing, US$ 82,606.45; and (c) disbursements of US$ 10,652.22.

272. Given that Peru and Scotiabank have each prevailed with respect to certain of their positions in connection with the Rule 41 Application, the Tribunal has determined that each Party should bear all of its own legal and other costs. The Tribunal has determined to reserve its decision as to the allocation of its fees and other administrative costs for a later stage.

X. DECISION

273. For the reasons set forth above, the Tribunal **decides** as follows:

A) The Tribunal, by the majority of arbitrators Reed and Douglas, **grants** the Respondent's Rule 41 Application on the grounds that: (i) the Claimant's Expropriation Claim is manifestly without legal merit because the alleged object of the expropriation (the 2013 Default Interest Payment) does not constitute an investment under Article 847 of the Free Trade Agreement between Canada and the Republic of Peru, and (ii) the Claimant's FET Claim is manifestly without legal merit because it concerns taxation measures carved out from protection under Article 2203 of the Free Trade Agreement between Canada and the Republic of Peru;

B) As a consequence of the decision to grant the Respondent's Rule 41 Application on these grounds, the Tribunal **dismisses** the Claimant's Expropriation and FET Claims as being manifestly without legal merit under the Free Trade Agreement between Canada and the Republic of Peru;

C) The Respondent's Rule 41 Application is **denied** on all other grounds;

D) The Parties are each to bear their own legal and other costs attributable to the Rule 41 Application;

E) The Tribunal reserves its determination as to the allocation of its fees and other administrative costs until a later phase of the proceedings: and

F) The Parties are to consult on the Procedural Timetable going forward on the Claimant's National Treatment Claim and revert to the Tribunal jointly, or separately if necessary, regarding the same by 21 June 2024.

[Signed]

Prof. Zachary Douglas
Arbitrator

[Signed]

Prof. Dr. Kaj Hobér
Arbitrator
(Dissenting in part)

[Signed]

Ms. Lucy Reed
President