ICSID ARBITRATION No. ARB/22/30

THE BANK OF NOVA SCOTIA

Claimant,

v.

REPUBLIC OF PERU

Respondent

RESPONDENT'S COUNTER-MEMORIAL

27 June 2025

Counsel for the Republic of Peru
GAILLARD BANIFATEMI SHELBAYA DISPUTES

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I. INTRODUCTION

1. On 31 May 2024, the Arbitral Tribunal dismissed The Bank of Nova Scotia's (the "**Claimant**" or "**Scotiabank**") claims for Expropriation and Minimum Standard of Treatment as manifestly without merit. The Tribunal's decision greatly circumscribed the controversy to the question of whether the Republic of Peru had—as the Claimant alleges—failed to observe its obligations towards Scotiabank under the National Standard of Treatment.

2. In normal circumstances, a ruling of an arbitral tribunal dismissing the majority of a claimant's claims pursuant to Rule 41 would have resulted in a drastic reduction of the scope of the controversy and expediting the proceedings. Not here.

3. As the Respondent foreshadowed,[1] the Claimant took advantage of the generous time granted by the Tribunal to file its Memorial, to repackage its claims regarding the Minimum Standard of Treatment as ill-conceived allegations concerning National Treatment, and ultimately to ask the Arbitral Tribunal to sit as an appellate court and review the well-founded reasoning of the decision rendered by the Peruvian Constitutional Court on 9 November 2021. This is clearly impermissible, as the Respondent demonstrates in this submission.

4. Also, as part of its strategy to create great amounts of smoke, the Claimant canvassed every possible media outlet for each iteration or reposting of the very same pieces of news on the topic of Scotiabank's dispute with the SUNAT, or in fact on any general discussion about the tax debts owed to the SUNAT—whether accurately reported or not—to create the impression of an alleged "media campaign", which it has no compunction to presented as orchestrated by the State to pressurize the Constitutional Court into rendering a decision against Scotiabank, without having an iota of actual evidence in this regard.

5. Striking also is the amount of ink spilled by the Claimant in inflammatory accusations based in nothing but distortion, hearsay and plain misrepresentations. In so doing, the Claimant has had no qualms in making baseless accusations as regards the probity of public officials and of the Justices of the Constitutional Court. The accusations against the Justices of the Court are not confined to those Justices who decided that Scotiabank Perú's *amparo* regarding the Default Interest was inadmissible but shockingly extends to the Justices currently sitting at the Court. Indeed, the Claimant has even had the audacity to state, without any evidence, that the current Court—apparently to serve the interest of the Peruvian State in these arbitral proceedings—somehow delayed its Decision in the second *amparo* filed by Scotiabank Perú concerning the imposition of the IGV Liability.

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1 *See* Respondent's communication to the Arbitral Tribunal of 25 June 2024, p. 2.

6. Obviously, Scotiabank's exaggerations and representations cannot substitute evidence. The charge Scotiabank is presenting before in this Tribunal is nothing short of claiming that the highest court of the Republic of Peru decided a case against it under duress. That is an extremely grave accusation, where the accuser needs to prove not only the acts of pressure actually inflicted on the Justices, but that the Justices indeed acted and decided contrary to their convictions due to that pressure or duress in dismissing Scotiabank Perú's *amparo*. For such a grave accusation, Scotiabank presents no evidence. The Republic of Peru decries these accusations and rejects them in the strongest terms.

7. It will not escape the Tribunal, that all the unsupported claims and accusations on supposed undue pressures to the Constitutional Court do not in any event fall within the scope of National Treatment.

8. In order to advance its ill-conceived claim of National Treatment, the Claimant has distorted and morphed National Treatment into a hardly recognizable standard. This is wrong as a matter of law. It is trite that Minimum Standard of Treatment and National Treatment are separate and distinct substantive obligations under the Peru—United States Free Trade Agreement (the "**Treaty**" or the "**FTA**") and the Claimant's attempt to square a circle should be rejected.

9. In addition of utilizing its time gathering hearsay and unsupported gossip, the Claimant expended its time finding cases decided by the Constitutional Court regarding default interest, and even more considerable time cherry-picking amongst them and curating a selection of very few ones, with nothing but very superficial—if any—similarity to Scotiabank Perú's *amparo* to unsuccessfully present them as proper comparators.

10. As the Respondent demonstrates in its submission, the Tribunal lacks jurisdiction over the Claimant's claims regarding Peru's alleged violations of National Treatment, as pursuant Article 1101 its claims are not actionable under Chapter 8 of the Free Trade Agreement between Peru and Canada**.** Also, the Respondent did not consent to arbitrate the Claimant's claim as the Claimant did not validly and effectively waive its rights to initiate or continue other proceedings in the domestic courts. Much to the contrary, the Claimant continued to pursue remedies, including pecuniary ones, though its *amparo* claims regarding the IGV Liability in the local courts. The fact that the Constitutional Court ultimately found against Scotiabank Perú—once again confirming a string of uniform decisions adopted by the courts at every instance—does not make the Claimant's invalid and ineffective waiver valid. To be clear, a valid waiver is required at the inception of the proceedings, as a condition *sine qua non* for the Respondent's consent to arbitrate and cannot be retroactively validated. Holding otherwise would negate the agreement of the Contracting Parties of the Treaty and allow Claimant to do what the very requisite waiver is designed to prevent, which is parallel proceedings and abusive litigation **(II)**.

11. Even if the Tribunal were to consider that it has jurisdiction to adjudicate this dispute, which the Respondent submits it does not, it can only do it as regards Peru's obligation to grant Scotiabank

National Treatment. However, what Scotiabank claims as an alleged violation of the substantive obligation to accord National Treatment is neither supported in the facts or the law.

12. On the facts, despite the fact that the vast majority—not to say almost all—of the Claimant's alleged facts do not concern discrimination, the Claimant presented a selective rendition of the facts marred with distortions and deliberate omissions, which does not support any of the Claimant's grave allegations of undue pressure on the Justices of the Court or discrimination of Scotiabank due to its nature as a foreign investor. Moreover, conspicuously absent from the Claimant's factual narrative is the backdrop of Banco Wiese's situation when it simulated gold sale and purchase operations and attempted to claim tax credits for it. Similarly, the Claimant glosses over the exhaustive investigations that gave rise to the SUNAT's determination—confirmed by the Tax Court—to impose the IGV Liability and default interest, which revealed a string of irregularities in Banco Wiese's gold transactions. Also, conveniently, the Claimant avoids mentioning the risk it took in assuming Banco Wiese's debt disputes with the tax authorities, in particular under the existing applicable regime regarding default interest and contemporaneous case law and its own negligent management of the litigation process before the tax authorities and the courts. The Claimant largely glosses over the very inconvenient fact that it has litigated the default interest—directly or indirectly—at every possible instance and through every possible domestic proceeding, having had a full opportunity to present its case. It also omits that its improper litigation strategy of hedging its bets was greatly misguided.

13. Instead, the Claimant attempts to portray itself as a victim of an orchestrated plan by the SUNAT and the Ministry of Economy and Finance to unduly influence the decision of the Constitutional Court in the Default Interest *amparo* initiated by Scotiabank Perú. Crucially, there was no undue influence let alone threats to the Justices. As the Respondent shows, the evidence directly contradicts Scotiabank's claims that the so-called 2017 Leaked Decision was a voted final decision. Scotiabank Perú's *amparo* was neither voted on 9 May 2017, nor was the barcode inserted in the righthand corner of the "excerpts" published in June 2017 in any way indicative of a nearly final decision just missing the Justices' signatures, as the Claimant avers.

14. Further on the facts, the cases selectively picked by the Claimant as the "Universe of Comparators" do not stand scrutiny, and the decision reached by the Constitutional Court on 9 November 2021 was dictated in accordance with the law. Accordingly, the Claimant's claims must fail **(III)**.

15. As a matter of law, the Claimant has failed to prove the requirements set forth under the Treaty for a breach or Article 803. As the Respondent shows in this submission, international tribunals are not called to second guess, let alone become appellate tribunals, in cases where —as in the present one—claimants attempt abusively to instrumentalize investment arbitration proceedings to have the decisions of domestic courts reviewed on their substance and reasoning. Even as regards claims concerning denial of justice, the arbitral tribunal is not called to revise the

reasoning and substance of the domestic court's decisions, but to determine that a claimant has not had effective access to the judicial system. In any event, claims in this regard should be adjudicated under the Minimum Standard of Treatment. Fatally for the Claimant, the Tribunal has found that it lacks jurisdiction to adjudicate the Claimant's claims regarding the Minimum Standard of Treatment under the Treaty **(IV).**

16. As stated, the Claimant is perfectly aware of this fact, nevertheless it has improperly tried to present its claims of denial of justice under the guise of a violation of the National Standard of Treatment. The Tribunal should not allow it.

17. Even if the Tribunal were to consider that the Claimant's claims can be brought under the National Treatment Standard (*quod non*), it is the Respondent's submission that Scotiabank has failed to established the existence of "treatment" susceptible of breaching Article 803 FTA; it has also failed to provide adequate domestic comparators in "like circumstances" with the Claimant; and failed to demonstrate that Scotiabank Perú was treated less favorably than Peruvian investors. Moreover, even in the unlikely event that the Tribunal were to find that the Claimant has discharged its burden of proving every and all elements required for a claim under the National Treatment Standard (*quod non*), the Claimant's claim would still fail. Indeed, its well established in investment case law that a difference in treatment motivated by legitimate policy concerns will not amount to a violation of the standard. In this case, and as amply demonstrated by the Respondent, the decision of the Constitutional Court—which, for the avoidance of any doubt, is not a regulatory measure and should not be subject to the National Treatment standard in any case—was decided in line with the underlying policy and rationale that informs the *amparo* proceedings under Peruvian law and the Court's duty to administer justice **(IV).**

18. It is trite that, in the absence of an international wrong, no damages are due. Accordingly, Scotiabank's claims for damages must fail. Nevertheless, should the Tribunal find (*quod non*) that the Republic of Peru has violated its obligations under the National Treatment Standard *vis-à-vis* Scotiabank (*quod non*), the Claimant's damages claims are grossly and improperly inflated. Accordingly, damages must be reduced, as demonstrated by the Respondent **(V)**

II. SCOTIABANK'S SELECTIVE RENDITION OF THE FACTS IS MARRED WITH DISTORTIONS AND DELIBERATE OMISSIONS

19. As the Republic of Peru shows below, Scotiabank made a conscious choice to acquire a Banco Wiese, which was being questioned for the lack of proper governance, investigated for attempting to claim a tax credit for regarding simulated gold transactions and with a pending litigation on that respect (**A**). The Respondent further demonstrates that the SUNAT validly imposed the Tax Debt, which was confirmed by the Tax Court and properly issued the relevant Payment Order (**B**). Scotiabank opted for a calculated litigation strategy artificially to challenge the IGV Liability, on one hand, and the Default Interest, on the other, which was misguided, and

it cannot use this Arbitral Tribunal as a court of appeal (**C**). The Respondent further demonstrates that the Claimant's allegations of undue interference and pressure on the Justices of the Constitutional Court, based on exaggeration and innuendo, are wholly unfounded. Moreover, the Claimant's allegation that the Justices of the Constitutional Court succumbed to the alleged undue pressure of the SUNTAT, public officials and the media, and thus changed the position they had adopted in the so-called 2017 Leaked- Decision and dismissed the Claimant's *amparo*, is fully contradicted by the evidence (**D**). Finally, the Respondent demonstrates that, for the avoidance of any doubt, the 2021 Constitutional Court Decision was validly adopted, and that Scotiabank Perú's *amparo* claim was dismissed in accordance with Peruvian law (**E**).

A. SCOTIABANK ACQUIRED BANCO WIESE DESPITE THE PUBLICLY AVAILABLE INFORMATION, *INTER ALIA*, ABOUT BANCO WIESE'S IMPROPER MANAGEMENT OF CREDITS, CONCERNS REGARDING THE BANK'S DEALINGS WITH MR. MONTESINOS, AND WITH KNOWLEDGE OF WIESE'S DEBT TO SUNAT FOR SIMULATED GOLD PURCHASE OPERATIONS

20. In its Memorial on the Merits, the Claimant describes the progressive process by which it acquired Banco Wiese.[2] However, conspicuously absent from the Claimant's description of its progressive acquisition of Banco Wiese is the recount of the legal framework applicable to, and the factual circumstances surrounding, Banco Wiese's attempt to claim a tax credit for simulated gold transactions. Similarly absent from the Claimant's recount are crucial elements of the factual backdrop of the Claimant's decision progressively to increase its participation in Banco Wiese, ultimately leading to the obtention of a majority shareholding in what is today Scotiabank Perú.

21. As the Respondent shows below, the above-referred facts and the legal framework applicable to the investor and its investment at the time of the investment are particularly relevant to contextualize the Claimant's claims.

[2] *See* Claimant's Memorial on the Merits, 29 November 2024, ¶¶ 26-30.

1. At the time the SUNAT reassessed Banco Wiese's IGV, Banco Wiese was in deep financial difficulties due, amongst others, to the improper management of its debt portfolio, lack of required reserves and extension of credits over the legal limit to individuals of the Wiese family and affiliated companies

22. Banco Wiese was established in 1943 by the Wiese group and was considered amongst the most important banks in Peru.[3] However, by 1999, Banco Wiese was in the verge of bankruptcy.[4]

23. As stated in the findings of the Investigative Commission on Economic and Financial Crimes (the "**Commission**"), established by the Congress of the Republic of Peru to examine financial offenses committed between 1990 and 2001, amongst the reasons that led to the insolvency of Banco Wiese, the Commission identified several irregularities committed between 1996 and 1998.[5] These included: (***i***) the over extension of credits beyond the legal limits, including to entities affiliated with Banco Wiese and members of the Wiese Group;[6] (***ii***) the mismanagement of the credit exposure and portfolio;[7] (***iii***) the failure to implement prior recommendations by Peru's financial regulatory authorities and disregard for their regulatory observations,[8] and; (***iv***)

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3 *See* Report of the Superintendency of Banks and Statistical Banking on Insurance and Capitalization corresponding to 1943 (**Exhibit R-0025**), p. 10; "Wiese Family: How did they go from scrubbing floors to founding the MegaPlaza?", La República, 21 October 2022 (**Exhibit R-0276**). *See* also Preliminary Investigation Report of the Investigative Commission on Economic and Financial Crimes Committed Between 1990-2001, "Salvage Process of the Banco Wiese", June 2002 (**Exhibit R-0094**), pp. 6, 19, 80.

4 Preliminary Investigation Report of the Investigative Commission on Economic and Financial Crimes Committed Between 1990-2001, "Salvage Process of the Banco Wiese", June 2002 (**Exhibit R-0094**), p. 19; Final Report of the Investigative Commission on Economic and Financial Crimes Committed Between 1990-2001, June 2002 (**Exhibit R-0095**), pp. 87-88.

5 Preliminary Investigation Report of the Investigative Commission on Economic and Financial Crimes Committed Between 1990-2001, "Salvage Process of the Banco Wiese", June 2002 (**Exhibit R-0094**), pp. 11-14.

6 Preliminary Investigation Report of the Investigative Commission on Economic and Financial Crimes Committed Between 1990-2001, June 2002 (**Exhibit R-0094**), pp. 11, 15, 19 ("*Banco Wiese had continued providing financing to both affiliated and non-affiliated economic groups as well as individual companies in excess of the legal limits established in the General Law.*"); Final Report of the Investigative Commission on Economic and Financial Crimes Committed Between 1990-2001, June 2002 (**Exhibit R-0095**), pp. 88, 155 ("*During the period 1992-1996, Banco Wiese experienced rapid growth fueled by a credit boom lacking precise controls. Later, it was confirmed that many of these loans had been granted to individuals and companies linked to the bank's economic group. Furthermore, it was verified that numerous loans exceeded the legally permitted limits*"), ("*The subsidiary companies Wiese Inversiones Financieras S.A. and Wiese Financial Corporation, along with other companies affiliated with the Wiese Group, engaged in credit operations under more favorable conditions than those offered to their clients*").

7 Preliminary Investigation Report of the Investigative Commission on Economic and Financial Crimes Committed Between 1990-2001, "Salvage Process of the Banco Wiese", June 2002 (**Exhibit R-0094**), pp. 11-12, 16.

8 Preliminary Investigation Report of the Investigative Commission on Economic and Financial Crimes Committed Between 1990-2001, "Salvage Process of the Banco Wiese", June 2002 (**Exhibit R-0094**), pp. 17-18.

the failure to create the required contingency provisions.[9] In addition, (***v***) operations of Banco Wiese, whilst legally compliant in their face, evidence the purpose of circumventing the law.[10] Moreover, (***vi***) the financial surveillance authorities had imposed several sanctions on Banco Wiese for the various breaches.[11]

24. Indeed, in early 1999 Banco Wiese was insolvent. It was only through its integration with Banco de Lima Sudameris and the salvaging operation—in which the State contributed USD 240 million— that, later in the year, Banco Wiese avoided bankruptcy.[12]

25. According to Mr. Miró Quesada, former General Manager of Banco Wiese, Lima Sudameris——in which Scotiabank had a 35% participation since 1997—[13]was aware of the critical financial situation of Banco Wiese and the numerous irregularities arising from the mismanagement of the bank at the time of its merger with Banco Wiese, given that Sudameris Group had conducted due diligence on Banco Wiese from October 1998 to September 1999.[14]

26. Indeed, as stated in the Report of the Commission's investigation:

> Regarding this, Víctor Miró Quesada […], former General Manager of Banco Wiese Ltdo., stated before the commission that the Sudameris Group conducted due diligence for the acquisition of the bank, which began in October 1998 and concluded in September 1999.

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9 Preliminary Investigation Report of the Investigative Commission on Economic and Financial Crimes Committed Between 1990-2001, "Salvage Process of the Banco Wiese", June 2002 (**Exhibit R-0094**), p. 8.

10 Preliminary Investigation Report of the Investigative Commission on Economic and Financial Crimes Committed Between 1990-2001, "Salvage Process of the Banco Wiese ", June 2002 (**Exhibit R-0094**), p. 12 ("*Regarding the aforementioned operation, the Bank formally complied with the obligation to respect the time limit for holding the awarded assets. However, it was established that there was a clear intent to evade this obligation by immediately regaining possession of these assets through a financial leaseback arrangement*").

11 Preliminary Investigation Report of the Investigative Commission on Economic and Financial Crimes Committed Between 1990-2001, "Salvage Process of the Banco Wiese", June 2002 (**Exhibit R-0094**), pp. 18-19.

12 Preliminary Investigation Report of the Investigative Commission on Economic and Financial Crimes Committed Between 1990-2001, "Salvage Process of the Banco Wiese", June 2002 (**Exhibit R-0094**), p. 6, 22-24.

13 Claimant's Memorial on the Merits, 29 November 2024, ¶ 27.

14 Preliminary Investigation Report of the Investigative Commission on Economic and Financial Crimes Committed Between 1990-2001, "Salvage Process of the Banco Wiese ", June 2002 (**Exhibit R-0094**), pp. 10, 81; Final Report of the Investigative Commission on Economic and Financial Crimes Committed Between 1990-2001, June 2002 (**Exhibit R-0095**), p. 88 ("*After the adjustments made by the auditing firm Arthur Andersen, the Sudameris Group began to doubt whether to proceed with the agreement, posing the risk that the operation might fail and Banco Wiese could collapse. For this reason, the State decided to intervene in the operation*").

> [A]ccording to Mr. Miró Quesada, none of the problems that Banco Wiese Ltdo. had were unknown to the Sudameris Group at the time they acquired the bank.[15]

27. However, it appears that the problems and financial situation of Banco Wiese were far more grave, as arises from the Commission's Report:

> On the other hand, according to the statements made to this Commission by Messrs. Eugenio Bertini Vinci and Jean Francois Patarin, representatives of the current management of Banco Wiese Sudameris, and based on the investigative work conducted, it can be established that once the new management was installed in the newly merged bank, the real financial situation of the bank gradually became known, which they were unable to determine during the due diligence; it was found that the deficit was greater than expected. In this regard, the Sudameris Group has to date made contributions of approximately US$600 million to cover this deficit.[16]

28. In a similar vein, on 11 November of that same year, the General Manager of Banco Wiese Sudameris, Mr. Eugenio Bertini Vinci, was recorded in conversations with Vladimiro Montesinos, the infamous strongman of former President Alberto Fujimori, where Mr. Bertini Vinci commented on the terrible situation of Banco Wiese.[17] Mr. Bertini expressed in this regard:"[n]*o control, nothing at all, and besides, every time you lift the carpet, no, you find, uff. Because if we lift the entire carpet, the dust will suffocate you, so you have to go little by little*".[18]

29. In the same video, Mr. Bertini Vinci and Mr. Montesinos discuss tax debts of Banco Wiese, which Banco Wiese was contesting before the Tax Court and where the Tax Court's decisions were expected to be issued and communicated to the SUNAT for enforcement.[19]

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15 Preliminary Investigation Report of the Investigative Commission on Economic and Financial Crimes Committed Between 1990-2001, "Salvage Process of the Banco Wiese", June 2002 (**Exhibit R-0094**), p. 10 (emphasis added).

16 Preliminary Investigation Report of the Investigative Commission on Economic and Financial Crimes Committed Between 1990-2001, "Salvage Process of the Banco Wiese", June 2002 (**Exhibit R-0094**), p. 75 (emphasis added).

17 Video No. 1778, Meeting Bertini and Montesinos, 11 November 1999 (**Exhibit R-0080**); Transcript of Video No. 1788, Meeting Bertini and Montesinos, received on 24 May 2001 (**Exhibit R-0089**), p. 3 ("Mr. Bertini Vinci*. – The bank had been losing between 20 and 27 million per month, per month.* Mr. Montesinos Torres*. – Incredible! That means, it was 270 million a year…"*).

18 Video No. 1778, Meeting Bertini and Montesinos, 11 November 1999 (**Exhibit R-0080**); Transcript of Video No. 1788, Meeting Bertini and Montesinos, received on 24 May 2001 (**Exhibit R-0089**), p. 1.

19 Video No. 1778, Meeting Bertini and Montesinos, 11 November 1999 (**Exhibit R-0080**); Transcript of Video No. 1788, Meeting Bertini and Montesinos, received on 24 May 2001 (**Exhibit R-0089**), pp. 8-9 ("Mr. Montesinos Torres*.* - [...] *I have here some documents related to debts that Banco Wiese has with the State* [...] *Here I have the files that are being sent to the level of, the Tax Court. The annotation is from the Tax Court – I will even give you the file numbers, ok? The 571-98.* Mr. Bertini Vinci*. – Wait.* Mr. Montesinos Torres*. – 575-98, the debt is of 211 thousand and it ends up being 600. It's with the Tax Court, and that goes down to SUNAT for enforcement*").

30. In the conversation, Mr. Montesinos offered Mr. Bertini Vinci to interfere with the Tax Court's issuance of the decisions in order to delay the SUNAT's collection and Mr. Bertini Vinci accepted Mr. Montesino's offer to interfere to withhold the tax resolutions at least until after the end of that fiscal year.[20] Thereafter, Mr. Bertini Vinci advised Mr. Montesinos on how to "move" money outside Peru.[21]

31. It was precisely in the years 1997 to 1999, in this context of lack of proper governance and repeated breaches of tax and financial regulatory obligations, that Banco Wiese attempted to claim a tax credit for gold transactions which proved to be fraudulent, and which gave rise to the imposition by the SUNAT of the IGV liability (the "**IGV Liability**").

32. As the Respondent submits in this Memorial, in its decision to invest in Banco Wiese and to assume Banco Wiese's liabilities, including its debt to the SUNAT, Scotiabank should have considered these circumstances and taken proper measures, instead of what it is now attempting to do: pass the risk it took and the consequences of its decisions on to the State.

2. Banco Wiese attempted to claim a tax credit based on simulated transactions at the very juncture where it was struggling financially and facing a complete lack of proper management

33. To recall, the genesis of this dispute is the IGV Liability imposed by the Peruvian Tax Authority, the SUNAT in 1999 on Scotiabank Perú's predecessor, Banco Wiese Sudameris. The determination of the SUNAT to impose the IGV Liability on Banco Wiese arose following an investigation carried out by the SUNAT into the value added tax ("*Impuesto General a las Ventas*", or "*IGV*", per its acronym in Spanish) owed by Banco Wiese for the 1997-1998 period.[22] The SUNAT commenced an investigation after detecting the simulation of a complex chain of commercialization of gold by a group of enterprises aimed at claiming tax credits in considerable amounts.[23]

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20 Video No. 1778, Meeting Bertini and Montesinos, 11 November 1999 (**Exhibit R-0080**); Transcript of Video No. 1788, Meeting Bertini and Montesinos, received on 24 May 2001 (**Exhibit R-0089**), pp. 8-10 ("Mr. Montesinos Torres*. – So, I am going to send this to you* [...] *I will hold off on the decisions, I will stop the decisions, you tell me. Because if the decisions from the Tax Court come out, they will go down to SUNAT, and they will hit you with the matter, and that's when then it starts* [...] Mr. Bertini Vinci*. – I would ask you to stop it now because the last thing we need now is another fight. Mr. Montesinos Torres. – Of course, I know. Then, I can stop this matter as long as you want, I can stop it for you, even after the year passes*".).

21 Video No. 1778, Meeting Bertini and Montesinos, 11 November 1999 (**Exhibit R-0080**); Transcript of Video No. 1788, Meeting Bertini and Montesinos, received on 24 May 2001 (**Exhibit R-0089**), pp. 15-18.

22 Respondent's Submission on Rule 41, 22 June 2023, ¶ 32.

23 *See* SUNAT Resolution No. 012-03-0000408 (**Exhibit C-0103**), pp. 10, 17; SUNAT's Resolution No. 012-03-0000409, (**Exhibit C-0102**), pp. 43, 46, 48 *et seq*.

34. To that end, enterprises utilized payment receipts that did not correspond to real transactions and allowed exporters to claim credits and obtain reimbursements on payments for IGV amounts which had not actually been paid. In the course of the investigations, the SUNAT found, amongst others: (***i***) links between providers and clients in the chain of commercialization, indicating that the transactions had not been at arms' length; (***ii***) individuals who lacked economic capacity to pay the amounts provided in the receipts; (***iii***) individuals or companies declaring operations with no credit history that would explain their ability to expend the high amounts of money required to perform the gold transactions; (***iv***) receipts printed by the very same individual or in the same place; (***v***) inexistent providers,[24] etc. Moreover, (***vi***) the SUNAT found that Banco Wiese was requesting tax credits corresponding to amounts of gold that kept no correlation with the growth for the respective period in the gold mining production in the relevant areas.[25]

35. The patterns that alerted the SUNAT about fraudulent operations constitute serious, identifiable red flags of irregular operations and money laundering in the gold mining industry.

36. Indeed, in its Report on "*Typologies and red flags associated to money laundering from illegal mining in Latin America and the Caribbean*", the Department against Transnational Organized Crime of the Organization of American States includes as red flags of money laundering in the mining industry, amongst others: (***i***) companies or people that receive or send money for similar amounts to the same recipient from several senders;[26] (***ii***) groups of people making money transfers on similar dates with the same telephone number or with the same sender, recipient, or place-of-origin information;[27] (***iii***) individuals who frequently use intermediaries to carry out commercial or financial operations;[28] (***iv***) international gold traders whose exports increase significantly, with them citing domestic gold purchases even though there is no corresponding increase in domestic production;[29] (***v***) miners who cannot justify the origin of the gold they sell

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24 *See* SUNAT Resolution No. 012-03-0000408 (**Exhibit C-0103**), pp. 10, 17; SUNAT's Resolution No. 012-03-0000409, (**Exhibit C-0102**), pp. 43, 46, 48 *et seq*.

25 *See* SUNAT Resolution No. 012-03-0000408 (**Exhibit C-0103**), pp. 10, 17; SUNAT's Resolution No. 012-03-0000409, (**Exhibit C-0102**), pp. 43, 46, 48 *et seq*.

26 Department against Transnational Organized Crime of the Organization of American States, "*Typologies and red flags associated to money laundering from illegal mining in Latin America and the Caribbean*", January 2022 (**Exhibit R-0270**), p. 21.

27 Department against Transnational Organized Crime of the Organization of American States, "*Typologies and red flags associated to money laundering from illegal mining in Latin America and the Caribbean*", January 2022 (**Exhibit R-0270**), p. 21.

28 Department against Transnational Organized Crime of the Organization of American States, "*Typologies and red flags associated to money laundering from illegal mining in Latin America and the Caribbean*", January 2022 (**Exhibit R-0270**), p. 23.

29 Department against Transnational Organized Crime of the Organization of American States, "*Typologies and red flags associated to money laundering from illegal mining in Latin America and the Caribbean*", January 2022 (**Exhibit R-0270**), p. 45.

or cannot present proof of purchase of the minerals;[30] (***vi***) artisanal miners who sell gold to companies in unusual quantities or that do not match the characteristics of the market or area of exploitation,[31] and; (***vii***) mining company that cannot provide evidence that proves the origin of the gold they produce or trade.[32]

37. In a similar vein, the Financial Action Task Force Report of 2015 (the "**FATF Report**") regarding money laundering and the risks associated with gold mining and gold mining transactions highlights the risks associated to Artisanal Small Scale Gold mining[33] and the use of the various cycles of gold processing for money laundering purposes. The FATF Report underscores how money laundering is carried out by using smelting and refining processes, as well as through fraudulent tax claims.[34] In this regard, the Report states:

> Criminals can exploit jurisdictional tax schemes in relation to precious metals by combining trading and refining activities. In this case, 'syndicates' utilised inter-related transactions with associate entities to conceal the true nature of the transactions in order to fraudulently obtain tax refunds or avoid paying […] goods and services tax (GST). This process is also known as a 'missing trader' fraud.[35]
>
> […] Investigations suggest that gold bullion is cycled through gold refining entities, with claims that the bullion is broken down into a taxable form prior to being 'reconstituted'. It is then sold GST-free to a precious metal dealer after GST credits have been fraudulently claimed on the purchase by misrepresenting the nature and status of the transactions.[36]

38. The FATF Report further explains the various manners in which tax credits are claimed despite no actual payments having taken place.[37]

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30 Department against Transnational Organized Crime of the Organization of American States, "*Typologies and red flags associated to money laundering from illegal mining in Latin America and the Caribbean*", January 2022 (**Exhibit R-0270**), p. 52.

31 Department against Transnational Organized Crime of the Organization of American States, "*Typologies and red flags associated to money laundering from illegal mining in Latin America and the Caribbean*", January 2022 (**Exhibit R-0270**), p. 52.

32 Department against Transnational Organized Crime of the Organization of American States, "*Typologies and red flags associated to money laundering from illegal mining in Latin America and the Caribbean*", January 2022 (**Exhibit R-0270**), p. 62.

33 FATF REPORT, "*Money laundering / terrorist financing risks and vulnerabilities associated with gold*", July 2015 (**Exhibit R-0189**), p. 18.

34 FATF REPORT, "*Money laundering / terrorist financing risks and vulnerabilities associated with gold*", July 2015 (**Exhibit R-0189**), p. 18.

35 FATF REPORT, "*Money laundering / terrorist financing risks and vulnerabilities associated with gold*", July 2015 (**Exhibit R-0189**), p. 18.

36 FATF REPORT, "*Money laundering / terrorist financing risks and vulnerabilities associated with gold*", July 2015 (**Exhibit R-0189**), p. 18.

37 FATF REPORT, "*Money laundering / terrorist financing risks and vulnerabilities associated with gold*", July 2015 (**Exhibit R-0189**), p. 18 ("*the criminal activity occurs through: Claiming GST credits on acquisitions of*

39. In light of the above, it comes as no surprise that, in view of commonly and world-wide recognized red flags of potentially fraudulent activity, including regarding undue claims of tax credits, the SUNAT was compelled to investigate, and ultimately found a series of irregularities in the sale-purchases and chain of commercialization of gold that Banco Wiese had reported and for which it was claiming tax credits.

40. Having conducted the investigation and after several requests for information from Banco Wiese, on 23 December 1999, the SUNAT notified Banco Wiese of its Decisions No 012-03-0000408 and No 012-03-0000409 of 30 November 1999, by which it (***i***) reduced the tax credits in favor of Banco Wiese, and (***ii***) imposed on Banco Wiese a tax debt in the sum of [redacted] composed of an IGV liability for [redacted] (defined above as the "**IGV Liability**") and default interest in the sum of [redacted] (together with the IGV Liability, the "**1999 Tax Debt**").[38]

41. In addition, on 21 January 2000, the SUNAT notified Resolutions No. 012-02-0001305 to 012-02-0001319, imposing penalties on Banco Wiese for making false declarations to the SUNAT, pursuant to Articles 1 and 2 of the Tax Code.[39]

42. On 19 January 2000, Banco Wiese Sudameris, submitted a complain ("*reclamación*") challenging the SUNAT Decisions No 012-03-0000408 and No. 012-03-0000409, of 30 November 1999.[40]

43. Subsequently, Banco Wiese filed an administrative appeal against the 1999 Tax Debt, which was rejected by the SUNAT on 18 July 2000, through the Resolution of Intendency No. 015-4-11940.[41]

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gold which were GST free and no entitlement exists. Incorrectly claiming GST credits under the special rules in relation to acquiring second-hand goods where gold is specifically excluded from the definition of second-hand goods under the GST Act. Incorrectly treating some supplies of gold bullion as GST free where the product does not meet the criteria under the Act. Individuals receiving payments emanating from the proceeds of the GST claims which are not being reported as income in the respective income tax returns. Participants at the end of the supply chain are making GST-free sales (on the assumption gold has changed form) and claiming income tax credits on acquisitions from associated suppliers. Further, individuals within the syndicates are benefiting from the receipt of payments generated by the GST fraud which are not declared as income in the appropriate income tax returns").

38 *See* Respondent's Submission on Rule 41, 22 June 2023, ¶ 33; Request for Arbitration, 31 October 2022, ¶ 21; SUNAT Resolution No. 012-03-0000408 (**C-0103**), pp. 10, 17; SUNAT Resolution No. 012-03-0000409 (**C-0102**), p. 3.

39 *See* SUNAT Fine Resolutions for Banco Wiese Sudameris (**Exhibit C-0104**).

40 *See* Claimant's Memorial on the Merits, 29 November 2024, ¶ 52; Claim submitted by Banco Wiese Sudameris against 1999 SUNAT Decision (**Exhibit C-0105**).

41 Request for Arbitration, 31 October 2022, ¶ 22.

44. In its Resolution of Intendency No. 015-4-1194042, the SUNAT stated, *inter alia*, that the export operations performed by the companies that commercialized gold, which originated in the artisanal and informal mining sector, exceeded the amounts of gold production reported in that sector for the relevant years, and hence it was possible that gold of questionable provenance was being introduced into the commercial chain. The SUNAT further stated that, by receiving and permitting gold transfers of questionable origin, Banco Wiese was participating in a chain of gold commercialization of irregular provenance, and that the gold providers were being incorporated to issue receipts in favor of Banco Wiese so as to allow it to obtain a tax credit.[43]

45. Banco Wiese then resorted to the Peruvian Tax Court, filing an administrative appeal.[44] On 30 December 2003, the Tax Court partially annulled the SUNAT Resolution of Intendency No. 015-4-11940 and ordered the SUNAT to issue a new decision.[45]

3. Scotiabank made a commercial decision to acquire Banco Wiese despite the controversies surrounding Banco Wiese, with full knowledge of the SUNAT's prior decision to impose the IGV Liability, the pending controversy and the applicable tax legal framework concerning the application of capitalized default interest

46. On 9 March 2006, the Scotiabank Group acquired a 78% equity interest in Banco Wiese, which shortly thereafter merged with Banco Sudameris. This merger culminated on 13 May 2006, with the creation of a single entity: Scotiabank Perú S.A.A.[46]

47. Scotiabank's decision to expand its participation in Peru through its investment in Banco Wiese was made in a specific context and applicable legal framework, which Scotiabank must have taken into account at the time, and against which it must have calculated the risks of its investment.

48. It is a well-established principle in investment arbitration——and, in fact, a general principle of law——that a party should not benefit from its own negligence in making bad business decisions.[47] Yet, as Peru demonstrates below, Scotiabank took a calculated risk in acquiring

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42 Request for Arbitration, 31 October 2022, ¶ 22.

43 *See* Resolution of the Intendency No. 015-4-11940, 18 July 2000 (**Exhibit C-0106**).

44 Peruvian Tax Code, approved by Legislative Decree No 816 of 21 April 1996, as compiled by Supreme Decree No. 133-2013-EF of 22 June 2013 (**Exhibit R-0003**), Article 143.

45 Request for Arbitration, ¶ 24; Claimant's Memorial on the Merits, 29 November 2024, ¶ 52; Resolution No. 07517-1-2003 of the Tax Court in Case No. 3518-2000, 30 December 2003 (**Exhibit C-0112**).

46 *See* Submission on Rule 41, 22 June 2023, ¶ 26; Scotiabank Perú's official website, "Reseña Institucional", accessed on 22 June 2023 (**Exhibit R-0011**); Claimant's Memorial on the Merits, 29 November 2024, ¶ 49.

47 *See e.g.*, *Alasdair Ross Anderson and others v. Republic of Costa Rica* (ICSID Case No. ARB(AF)/07/3), Award 19 May 2010, (**Exhibit RL-0111**), ¶ 58 ("*prudent investment practice requires that any investor exercise due diligence before committing funds to any particular investment proposal. An important element of*

liabilities from Banco Wiese, which it—apparently treated as a standing credit ("receivable"),—even when at the time of its investment, all factors militated against this decision.

49. ***First***, to recall, in 2006, when Scotiabank decided to increase its participation in Banco Wiese Sudameris and consolidate its ownership through a restructuring of Banco Wiese Sudameris, it had knowledge of the serious irregularities in the management of Banco Wiese, as described above. Given its participation in Banco Wiese Sudameris since 1999, it was aware of the fact that the SUNAT had considered the gold transactions made by Banco Wiese pursuant to Decisions No. 012-03-0000408 and No. 012-03-0000409 as simulated transactions.[48]

50. ***Second***, Scotiabank knew that the SUNAT was yet to issue a new decision on Banco Wiese's tax liability, which entailed the review of 865 gold trading transactions allegedly entered into by Banco Wiese with third-party suppliers.[49]

51. ***Third***, and critically, Scotiabank was aware, or should have been aware, of the applicable tax legal framework, including Article 33 of the Peruvian Tax Code on default interest, and in particular of the fact that, pursuant to Article 33, capitalized default interest was applicable to standing debts until 30 December 2005, in the event that the taxpayer failed to pay its tax debts within the time limits, irrespectively of whether the taxpayer was contesting the liability.[50]

52. Indeed, Article 33 of the Peruvian Tax Code, as in force when the SUNAT issued the Determination Resolution Nos 012-03-0000408 y 012-03-0000409 on 30 November 1999, provided:

> The amount of tax not paid within the time limits specified in Article 29 shall accrue interest equal to the Default Interest Rate (TIM), which may not exceed twenty percent (20%) above the average monthly market lending rate in national currency (TAMN) published by the Superintendency of Banking and Insurance on the last business day of the previous month.
>
> In the case of debts in foreign currency, the TIM may not exceed one-twelfth of twenty percent (20%) above the annual lending rate for foreign currency

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such due diligence is for investors to assure themselves that their investments comply with the law. Such due diligence obligation is neither overly onerous nor unreasonable. Based on the evidence presented to the Tribunal, it is clear that the Claimants did not exercise the kind of due diligence that reasonable investors would have undertaken"); Churchill Mining and Planet Mining Pty Ltd v. Republic of Indonesia (ICSID Case No. ARB/12/40 and 12/14), Award 6 December 2016 (**Exhibit RL-0124**), ¶ 509, where the tribunal condemned the claimant's lack of diligence overseeing a licensing process and investigating allegations of forgery ("*claims arising from rights based on fraud or forgery which a claimant deliberately or unreasonably ignored are inadmissible as a matter of international public policy*").

48 SUNAT Resolution No. 012-03-0000408 (**Exhibit C-0103**); SUNAT Resolution No. 012-03-0000409 (**Exhibit C-0102**).

49 *See* Claimant's Memorial on the Merits, 29 November 2024, ¶ 50.

50 *See* Expert Report of Prof. Sevillano, ¶ 190.

> transactions (TAMEX) published by the Superintendency of Banking and Insurance on the last business day of the previous month.
>
> The SUNAT shall set the TIM for taxes that it administers or is responsible for collecting. In the case of taxes administered by other bodies, the TIM shall be set by Ministerial Resolution of Economy and Finance.[51]

53. Whilst between the years 1997 and 2006 Article 33 was amended several times as regards the applicable rate of default interest,[52] the rule pursuant to which late payment of a tax liability entailed the uninterrupted application of capitalized default interest remained unchanged. It was not until the issuance of Legislative Decree No. 969, published on 24 December 2006——*i.e.*, after Scotiabank acquired its majority participation in Scotiabank Perú——that the provision on the capitalization of interest was eliminated.[53] As regards debts originated prior to the entry into force of Legislative Decree No. 969, the Second Complementary Provision of Legislative Decree 981 provided:

> Calculation of default interest—Legislative Decree No. 969
>
> As of the enter into force of this Legislative Decree, for the purposes of applying Article 33 of the Tax Code with respect to debts incurred prior to the entering into force date of Legislative Decree No. 969, the concept of unpaid tax includes interest capitalized as of 31 December 2005, if applicable.
>
> The provisions of the preceding paragraph shall also be taken into account for the purposes of calculating tax debt arising from fines, the refund of undue or excess payments, and the allocation of payments.[54]

54. ***Fourth***, in a similar vein, and as explained in detail in the Expert Reports of both Professors Sevillano[55] and Bustamante,[56] at the time Scotiabank acquired Banco Wiese, the Peruvian Tax Code did not provide any interruption or suspension of default interest accrued in the event that the SUNAT or the Tax Court failed to decide within the time periods set in the Tax Code. Indeed,

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51 Article 33 of the Peruvian Tax Code as modified by Article 7 of Law No.27038 of 31 December 1998 (**Exhibit C-0099**).

52 See in this regard Article 33 of the Peruvian Tax Code as modified by the Legislative Decree No. 816, of 21 aril 1996 (**Exhibit C-0096**); Article 33 of the Peruvian Tax Code as modified by Article 7 of Law No.27038 of 31 December 1998 (**Exhibit C-0099**); Article 33 of the Peruvian Tax Code as modified by Law 27335 of 31 July 2000, (**Exhibit C-0107**); Article 33 of the Peruvian Tax Code, as modified by Article 14 of the Legislative Decree No. 953 of 5 February 2004, (**Exhibit C-0115**), and Article 33 of the Peruvian Tax Code, as modified by Legislative Decree No. 969 of 24 December 2006 (**Exhibit C-0144**).

53 Article 33 of the Peruvian Tax Code, as modified by Legislative Decree No. 969 of 24 December 2006 (**Exhibit C-0144**).

54 *See* Second Complementary Provision, Legislative Decree No. 981 of 15 March 2007 (**Exhibit C-0146**).

55 Prof. Sevillano's Expert Report, ¶¶ 277-284

56 Prof. Bustamante's Expert Report, ¶¶ 171-172.

the suspension of the accrual of interest was introduced for the first time by Legislative Decree No. 981 of March 2007.[57] As explained by Professor Sevillano:

> Legislative Decree No. 981, published on March 15, 2007 and in force since April 1, 2007, introduced for the first time the assumption of suspension of interest accrual if the Tax Administration exceeded the term to resolve the claim filed by the taxpayer.[58]

55. ***Fifth***, when Scotiabank Perú decided not to pay the outstanding debt acquired from Banco Wiese in 2006, there was no question about the legality, let alone the constitutionality, of the application of default interest even during delays attributable to the administration.[59] Indeed, Professor Sevillano describes the case law prior to the issuance of the Medina de Baca judgment in 2016 as follows:

> [T]he prevailing position of the judges of the Constitutional Court in the period prior to the Medina de Baca case was to validate the application of late payment interest and that the processes available in the courts, with an evidentiary stage and with the capacity to provide an adequate response to the taxpayer, were the procedural avenue favored by the Court itself.
>
> On the other hand, there was also recognition of the causal connection between default interest with the (unfulfilled) obligation to determine and declare, for which the debtor of a tax debt was responsible and liable. Consequently, the accrual of interest and the associated penalties should be considered internalized within the liability to be assumed by the tax debtor.[60]

56. In fact, as Professors Bustamante and Sevillano underscore, between 2013 and 2014, when Scotiabank paid the outstanding debt "under protest" after having allowed default interest to accrue for seven years, the existing case law confirmed the legality of default interest accrued beyond the legal terms applicable to the SUNAT. Professor Bustamante describes two relevant cases decided during this period: the cases of *Zevallos Arévalo* and *Jorge Baca Campodónico*.

57. In the case of *Zevallos Arévalo*, the Court decided to dismiss the plaintiff's complaint on the merits, emphasizing that the plaintiff should be liable for its failure to comply with his tax obligations. In the words of Justices Eto Cruz and Álvarez Miranda: "[i]*f the plaintiff declares a debt lower than the amount owed, they must necessarily take responsibility for paying both the debt that was not paid on time and any interest and penalties that may apply*".[61] Moreover, the

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57 Prof. Sevillano's Expert Report, ¶¶ 279-280

58 Prof. Sevillano's Expert Report, ¶ 196

59 For the avoidance of any doubt, this was also the relevant legal framework when the Claimant created Scotiabank Perú, in 2006.

60 Prof. Sevillano's Expert Report, ¶¶ 216-217.

61 Judgment No. 3373-2012-PA/TC, 31 October 2013, cited by Prof. Bustamante (*see* Prof. Bustamante's Expert Report, ¶ 289).

Court stressed that it was not within its remit to determine the applicability of the Tax Code to the determination of a debt.[62]

58. Along the same line, the decision of the Constitutional Court in the case *Jorge Baca Campodónico* made it crystal clear that: (***i***) capitalized default interest was owed when a tax debt was due,[63] and; (***ii***) default interest continued to accrue after the administration had exceeded the legal terms to issue a determination.[64] Indeed, as affirmed by Professor Sevillano:

> This jurisprudential line is confirmed with a stellar and emblematic landmark in this aspect, the Jorge Baca Campodónico Case - 2014. This not only dealt with a questioning on the capitalization of interest, but also on the default interest for the excess term. The accumulation of reasons set forth in this judgment to declare the amparo unfounded was lapidary. The Constitutional Court not only reinforced the idea that the accrual of late payment interest has its sole and true reason in the non-compliance of the tax debtor, but also put forward a battery of reasons that could produce inequity if it were allowed to grant an exemption from interest to the litigant of tax debts, as opposed to the tax debtor who has complied.[65]

59. In dismissing the complaint on the merits, the Constitutional Court noted that the plaintiff had failed to timely pay his tax debt, that the interest was a direct consequence of this non-payment,[66] and that the SUNAT had acted in accordance with the law and had simply applied the interest rates applicable per the Tax Code.[67] Moreover, the Court considered that it was not its role to assess the convenience of the legislative policy choices as regards the accrual of interest, unless a fundamental right was clearly violated or threatened.[68] The Constitutional Court further found that the accrual and collection of interest, as a consequence of non-payment, did not affect the constitutionally protected content of any fundamental right.[69] The Constitutional

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62 *See* Prof. Bustamante's Expert Report, ¶ 289.

63 Judgment of the Plenary Session of the Constitutional Court Case No. 03184-2012-PA/TC (Baca Campodonico) (**Exhibit C-0164**), p. 2, ¶ 2.

64 Judgment of the Plenary Session of the Constitutional Court Case No. 03184-2012-PA/TC (Baca Campodonico) (**Exhibit C-0164**), p. 2, ¶ 3.

65 Prof. Sevillano's Expert Report, ¶¶ 218.

66 Judgment of the Plenary Session of the Constitutional Court Case No. 03184-2012-PA/TC (Baca Campodónico) (**Exhibit C-0164**), p. 2, ¶ 2.

67 Judgment of the Plenary Session of the Constitutional Court Case No. 03184-2012-PA/TC (Baca Campodónico) (**Exhibit C-0164**), p. 2, ¶ 6.

68 Judgment of the Plenary Session of the Constitutional Court Case No. 03184-2012-PA/TC (Baca Campodónico) (**Exhibit C-0164**), p. 3, ¶ 6.

69 Judgment of the Plenary Session of the Constitutional Court Case No. 03184-2012-PA/TC (Baca Campodónico) (**Exhibit C-0164**), p. 2, ¶ 2.

Court further emphasized that granting interest exemptions would discriminate against other taxpayers who had paid their debts on time or accepted their obligations with interest.[70]

60. ***Sixth***, and relatedly, despite the fact that Scotiabank sorely complains in its Memorial on the Merits about the delay of the administration in resolving the dispute on the IGV Liability,[71] Scotiabank knew or must have known that Banco Wiese had not made use of the legal means and remedies it had under the law to expedite the SUNAT's pending decision, namely the possibility to treat the SUNAT's failure to issue a new determination on the IGV within the legal time set forth in Article 144 as "*silencio negativo*".[72] That is, pursuant to Article 144 of the Tax Code as in force in 2006, in the absence of a decision by the SUNAT, Banco Wiese could have deemed the lack of determination as a negative determination and proceed to file a claim before the Tax Court.

61. Article 144 of the Tax Code, as in force in 2006, provided in this regard:

> REMEDIES AGAINST THE IMPLIED DENIAL RESOLUTION THAT REJECTS THE CLAIM
>
> When a claim is filed with the Tax Administration and no decision is issued within the following six (6) months, nine (9) months for claims involving resolutions issued as a result of applying transfer pricing rules, two (2) months for implied denials of requests for refunds of balances in favor of exporters or excess payments, or twenty (20) business days for resolutions imposing sanctions such as confiscation of goods, temporary vehicle seizure, and closures—the claimant may consider the claim rejected and proceed with the following remedies:
>
> 1. File an appeal with the superior authority if the claim's decision was to be made by a subordinate body.
>
> 2. File an appeal with the Tax Court if the claim's decision was to be made by a body from which direct recourse to the Tax Court is available.
>
> Additionally, the complaint remedy referred to in Article 155 is applicable when the Tax Court, without justified cause, fails to issue a resolution within the six (6) or nine (9) months mentioned in the first paragraph of Article 150.[73]

62. Moreover, at no point from 2006 (when Scotiabank Perú was created) to 2011 (when the SUNAT rendered its new decision), did Scotiabank make use of the recourses under Article 144 to question the delay of the SUNAT. Rather, it stood still waiting for the SUNAT's resolution, with

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70 Judgment of the Plenary Session of the Constitutional Court Case No. 03184-2012-PA/TC (Baca Campodonico) (**Exhibit C-0164**), p. 3, ¶ 7.

71 *See* Claimant's Memorial on the Merits, 29 November 2024, ¶¶ 6, 49, 52, 53, 59; Request for Arbitration, 31 October 2022, ¶¶ 4, 5, 28.

72 Prof. Sevillano's Expert Report, ¶ 52.

73 Article 144 of the Peruvian Tax Code, as modified by Legislative Decree No. 969 of 24 December 2006 (**Exhibit C-0144**).

plain knowledge that interests—albeit simple ones from 2007 –[74] were accruing. The procedural conduct of both Banco Wiese and Scotiabank Perú begs the question on the reasons for the decision to await a resolution, rather than paying the IGV liability and then repeating against the SUNAT.

63. Professor Bustamante notes in this regard:

> In this context, Scotiabank did not file a complaint regarding the delay in the processing of the tax dispute procedure, nor did it invoke the negative administrative silence mechanism, which would have allowed it to terminate that procedure and timely access the Judiciary through the contentious-administrative process (both mechanisms provided by law); instead, it chose to wait for the Tax Authority to issue a decision. Therefore, it is reasonable to conclude that Scotiabank accepted the delay and, consequently, consented to the accrual of late-payment interest.[75]

64. ***Finally***, the situation and circumstances in which Scotiabank acquired its majority interest in Banco Wiese raise important questions on Scotiabank's due diligence on Banco Wiese, the measures it should have taken to account for the very real risk of having to pay for the 1999 Tax Debt, and the steps it could have taken to mitigate it. It is expected that a savvy investor such as Scotiabank would have conducted a thorough due diligence on the assets and liabilities it was acquiring and obtained from the sellers the necessary representations and warranties, to ensure that it was not assuming a considerable liability.

65. Yet, Scotiabank treated the litigation against the SUNAT and the payment made to the SUNAT as a credit, as reported in its Financial Statements.[76]

66. In this regard, it should be noted that in the Notes to its Financial Statement for 2013, Scotiabank Perú included its claim regarding the SUNAT's debt as a tax credit, stating that, in the opinion of the Bank's Management and its legal advisors, Scotiabank Perú would recuperate the amounts paid as they expect prevail in their claim:

> Additionally, the balance of tax claims as of 31 March 2014, includes S/. 481,846 thousand (S/. 210,000 thousand as of 31 December 2013) corresponding to payments made under protest due to a resolution issued by the Tax Administration, which is being contested in judicial courts by the Bank. In the opinion of the Bank's Management and its legal advisors, these amounts will be refunded to the Bank upon obtaining a favorable resolution in this case.[77]

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74 *See* Second Complementary Provision, Legislative Decree No. 981 of 15 March 2007 (**Exhibit C-0146**).

75 Prof. Bustamante's Expert Report,¶ 216.

76 *See* Scotiabank Perú S.A.A., Notas a los Estados Financieros al 31 de marzo de 2014 y 31 de diciembre de 2013 (**Exhibit R-0168**), p. 11.

77 Scotiabank Perú S.A.A., Notas a los Estados Financieros al 31 de marzo de 2014 y 31 de diciembre de 2013 (**Exhibit R-0168**), p. 11.

67. Scotiabank's approach to treat the 1999 Tax Debt that it acquired from Banco Wiese and paid in 2013 to 2104 as an account receivable, under the circumstances and in view of the applicable legal framework, is perplexing. This leads to questions as regards the purchase price it paid for its participation in Banco Wiese Sudameris and the kind of representations and warranties it did or did not obtain from Banco Wiese Sudameris. The Respondent reserves its rights to further develop this point.

B. THE SUNAT VALIDLY IMPOSED THE TAX DEBT, WHICH WAS CONFIRMED BY THE TAX COURT, AND ISSUED THE CORRESPONDING PAYMENT ORDER

1. The Tax Court confirmed that Scotiabank Perú owed the tax debt

68. As stated above, on 30 November 2011, more than four years after Scotiabank consolidated its ownership of Banco Wiese Sudameris creating Scotiabank Perú—a period during which Scotiabank assumed the consequences of not paying the tax debt and did not interpose the available recourses before the tax authorities to expedite the decision—the SUNAT issued a new decision (the "**SUNAT 2011 Decision**") finding again that Scotiabank Perú was liable for the IGV Liability owed by Banco Wiese and the corresponding default interest.

69. The SUNAT's work entailed reviewing 865 operations, analyzing not merely the acquisition of gold by Banco Wiese but the whole chain of commercialization behind it. In addition to the sheer volume of transactions that the SUNAT had to review, its work also entailed verifying, *inter alia*, the identity of providers, many of whom were deceased or not registered in the civil registry, their economic capacity to acquire the gold they declared as sold, the completeness of the invoices and veracity of the information registered in the invoices, and the provenance of the gold—the vast majority of which was obtained from small scale artisanal mining—to determine whether the declarations on the origin of the gold corresponded to the actual production in the area, amongst other several aspects.[78]

70. On 6 January 2012, Scotiabank appealed the SUNAT 2011 Decision, and alleged, as it did in its Memorial on the Merits,[79] that the SUNAT had only reviewed 15 operations. The allegation is verifiably untrue, as the file of the SUNAT's investigation that led to the SUNAT 2011 Decision demonstrates, and, as ratified, *inter alia*, by the Tax Court,[80] the Supreme Court of Justice[81] and

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78 *See* Witness Statement of [redacted], ¶¶ 18-24.

79 *See* Claimant's Memorial on the Merits, 29 November 2024, ¶ 52(c).

80 Resolution No. 14935-5-2013 of the Tax Court in Case No. 2247-2012, 24 September 2013 (**Exhibit C-0168**).

81 Judgement of the Supreme Court of Justice of Lima, Appeal No. 549-2013, 18 June 2013 (**Exhibit R-0164**).

the Constitutional Court.[82] The Claimant's constant repetition of the same baseless accusation does not make it true.

71. On 24 September 2013, the Tax Court rendered its decision RTF No. 14935-5-2013 (the "**2013 Tax Court Decision**"), pursuant to which it rejected Scotiabank's appeal and its request not to apply the default interest.[83] As regards the decision to deny Scotiabank's request not to apply default interest, the Tax Court found that the SUNAT's decision had been issued prior to the entry into force of Legislative Decree No. 981, and that therefore "*the suspension of the calculation of default interest or the updating of debts under the terms provided by Article 33 of the Tax Code* [did] *not apply*".[84] Moreover, the Tax Court also found that the request to be exempted from default interest on the basis of a prolonged duration of the process could not be upheld.[85]

72. As demonstrated above, and as explained by Professor Sevillano,[86] the Claimant's allegation that the 2013 Tax Court Decision was illegal because "*capitalizing (compounding) of interest on the debts is unconstitutional under Peruvian law*"[87] is simply wrong. The assertion is based on a self-serving interpretation that lacks basis and retroactively applies the decision of the Constitutional Court in the *Maxco* case, which was rendered in 2023 with no retroactive application.[88]

73. In the words of Professor Sevillano:

> According to our position, it is not possible to assert with solid argumentation that the application of the rule of capitalization of late interest in Peru was

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82 Judgment of the Plenary Session of the Constitutional Court in Scotiabank Perú S.A.A. v. SUNAT and the Tax Court (Case No. 222-2017-PA/TC) (**Exhibit C-0340**).

83 *See* Decision of the Tax Court RTF No 14935-5-2013, 24 September 2013 (**Exhibit C-0168**).

84 *See* Decision of the Tax Court RTF No 14935-5-2013, 24 September 2013 (**Exhibit C-0168**), pp. 79-80

85 *See* Decision of the Tax Court RTF No 14935-5-2013, 24 September 2013 (**Exhibit C-0168**), p. 80.

86 Prof. Sevillano's Expert Report,¶¶ 241-244 ("*According to our position, it is not possible to assert with solid argumentation that the application of the rule of capitalization of late interest in Peru was unconstitutional, nor to allege retrospectively or with retroactive effect that its passage through the Peruvian legal system was illegitimate. In the absence of arguments, it seems that we are more faced with a determined will to impose those views than with the rigorousness with which the Tribunal should interpret the law. Therefore, to affirm, as does the Report of Expert Hernández Berenguel that "Therefore, it is evident that the application of the rule of capitalization of late payment interest is not in accordance with our legal system (it is unconstitutional)" (p. 34), although it is functional to the purposes of the position, is not reasonable.*").

87 *See* Claimant's Memorial on the Merits, 29 November 2024, ¶ 52(d).

88 Judgment 10/2023, No. 03525-2021 (Maxco) (**Exhibit C-0382**), p. 20, ¶ 69 ("*Starting from the day after the publication of this judgment, even in ongoing proceedings, the Tax Administration is prohibited from applying default interest once the legal deadline to resolve the administrative appeal has passed, regardless of the date on which the tax debt was determined and regardless of when the appeal was filed, unless it can objectively prove that the delay was caused by the taxpayer's proven bad faith or reckless conduct*.") (emphasis added).

> unconstitutional, nor to allege retrospectively or with retroactive effect that its passage through the Peruvian legal system was illegitimate.[89]

74. Once again, it bears mentioning that, by September 2013, the position of the Constitutional Court as regards the applicability of the default interest was reiterated in 2013 and 2014 in the *Oriol Zevallos*[90] and the *Jorge Baca Campodonico* cases[91] that an *amparo* recourse was deemed innadmissible ("*improccedente*") to claim the non-application of default interest.

75. Accordingly, neither in 2006, when Scotiabank created Scotiabank Perú and chose to persist in the non-payment of Banco Wiese's outstanding debt, nor in 2013, when Scotiabank Perú paid the amounts owed to the SUNAT "under protest" and subsequently filed its *amparo* claim, could Scotiabank have had any expectation that it would recover the interest paid, except in the event that the Tax Debt was declared null and void.

76. As expressed by Prof. Bustamante:

> Scotiabank's petition for constitutional protection was filed on 15 January 2013, seeking to have the judge assigned to the case disapply Article 33 of the Tax Code […] to its specific case in order to grant its claims: that interest not be capitalized on certain tax debt indicated therein, that no default interest be applied after the expiration of the legal deadlines that the Tax Authority had to resolve the matter, and that no interest accrue during the judicial proceedings in which such interest was disputed.
>
> However, as can be seen from the aforementioned rulings, on none of those occasions did the Constitutional Court indicate that Article 33 of the Tax Code was unconstitutional. On the contrary, it applied it to specific cases, requiring the payment of default interest based on it when the taxpayer sought to evade payment, and stating that the application of default interest when the taxpayer is found to be in default does not constitute an infringement of any fundamental right.[92]

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89 Prof. Sevillano's Expert Report,¶ 242 .

90 Plenary Judgment No. 03373-2012-PA/TC (Oriol Zevallos) (**Exhibit C-0163**), p. 4, ¶ 5 ("*It is worth noting that, according to the provisions of Article 28 of the Tax Code, the tax debt consists of the tax, fines, and interest. Therefore, we believe it is not appropriate to use an amparo proceedings against a tax regulation to attempt, for a second time, to judicially challenge a tax debt*)" (emphasis added).

91 Plenary Judgment No. 03184-2012-PA/TC (Baca Campodónico) (**Exhibit C-0164**), p. 3, ¶ 8.

92 Prof. Bustamante's Expert Report,¶¶ 294-295.

2. The SUNAT proceeded to collect payment from Scotiabank Perú in accordance with the law

77. Following the 2013 Tax Court Decision, the SUNAT ordered Scotiabank Perú to pay the totality of the 1999 Tax Debt, including the IGV Liability and the updated amounts of default interest, according to its Payment Order of 25 November 2013 (the "**SUNAT Payment Order**").[93]

78. According to the Claimant, it was with the 2012 Tax Court Decision that "*Scotiabank Perú's debt became final, and therefore enforceable*".[94] This assertion needs to be clarified since, as explained by Professor Sevillano, the concept of enforceability is to be understood in its two different meanings. One, a debt is enforceable in the sense of due from the moment the period set in the law for its payment lapses. And two, if appeals or challenges are commenced against the determination of the debt, once the challenges or appeals have been resolved in favor of the SUNAT's position, the debt is enforceable through coercive means.

79. The Claimant takes issue with fact that the SUNAT requested payment[95] and states that it "*threatened to use 'coercive collection measures*'",[96] which "'*could have seriously damaged Scotiabank's financial situation, as well as its commercial image and reputation' in the market*".[97]

80. The Claimant's statements merit several remarks. To state the obvious, there is nothing anomalous in a State——or in fact any creditor——enforcing payment of a debt due, which of course entails coercive measures, such as the attachment of assets, when there is no voluntary payment. Needless to say, the enforcement procedure and the measures the SUNAT could take to collect payment from taxpayers are fully regulated in the Peruvian Tax Code[98] and the SUNAT simply acted in accordance with its obligations and powers. In fact, the Claimant does not make—and cannot make—any claims as regards impropriety in the manner in which the SUNAT proceeded to request payment. Hence the Claimant's portrayal of the use of the SUNAT's faculties as a "threat" cannot be taken seriously. Scotiabank's emphasis on the alleged consequences that non-payment might entail for Scotiabank is also not serious. Any taxpayer——or in fact any debtor——knows that failure to pay has consequences: the creditor will seek the

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

94 Claimant's Memorial on the Merits, 29 November 2024, ¶ 55.

95 Claimant's Memorial on the Merits, 29 November 2024, ¶ 57.

96 Claimant's Memorial on the Merits, 29 November 2024, ¶ 57.

97 Claimant's Memorial on the Merits, 29 November 2024, ¶ 57. The Claimant annexes as an exhibit excerpts of 2010-C Credit Agreement between Scotiabank Perú S.A.A., Certain Lenders and the Bank of New York Mellon dated 22 September 2010 (**Exhibit C-0155**), an agreement which terms include the consequences of default by the borrower, *i.e.*, Scotiabank. Needless to say, any consequences of Scotiabank's decision not to pay its debt in accordance to Peruvian law would have been self-inflicted.

98 Articles 114 to 123 of the Peruvian Tax Code (**Exhibit R-0003bis**).

permitted measures to ensure payment. Trying to build a reproach on the creditor——in this case the State——after the debt has been revised several times is rich.

81. In its Memorial on the Merits, Scotiabank affirms that Scotiabank Perú "*contacted officials at the SUNAT and the Ministry of Economy and Finance to delay the commencement of the enforcement so that Scotiabank Perú could bring its judicial challenges and pursue an injunction to stop the collection process pending the resolution of these proceedings*"[99] and sought injunctive relief.[100] The Claimant further states that "*despite these requests*", the SUNAT issued a formal request for payment and threatened coercive measures.[101]

82. Again, the Claimant's depiction of the SUNAT's actions in seeking payment is, at the very least, surprising: it is obvious that the SUNAT was obliged to enforce the debt and seek collection. Moreover, under Peruvian tax law, as explained by Professor Sevillano, to "*commence a contentious administrative proceedings* […] *it is necessary to pay the tax debt since the* [contentious administrative] *proceedings do not suspend the effects of the RFT* [the Tax Court Decision]".[102] Therefore, if the SUNAT and the Ministry of Economy and Finance did not agree to stay payment they did so in accordance with the law.

3. Scotiabank made payment of the entirety of the tax debt between 2013-1014

83. As stated, Scotiabank relates that it attempted to obtain injunctive relief by filing before the contentious administrative courts a request for provisional measures to enjoin the SUNAT from enforcing the SUNAT Payment Order.[103] In its request for provisional measures, Scotiabank Perú argued that the measure was justified since:

> In the present case, the scale clearly tips in favor of granting the precautionary measure, given that there is no harm whatsoever to the opposing party or to third parties, and this is because, in the unlikely event that the defendant ultimately obtains a favorable outcome in the proceedings, they will unquestionably be able to recover both the principal amount of the tax debt that is improperly attributed to us, as well as any interest that may have accrued. Harm would only exist if the duration of the legal proceedings could prevent the State from collecting the tax debt attributed to us, along with any accrued interest, which will evidently not occur since we are dealing with a bank of

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99 Claimant's Memorial on the Merits, 29 November 2024, ¶ 57; CWS [redacted], ¶ 21.

100 Claimant's Memorial on the Merits, 29 November 2024, ¶ 58; CWS [redacted], ¶ 22.

101 Claimant's Memorial on the Merits, 29 November 2024, ¶ 57; CWS [redacted], ¶ 21.

102 *See* Prof. Sevillano's Expert Report,, ¶ 45 ("*On the contrary, in order to initiate a contentious-administrative process in the Judiciary, it is necessary to pay the tax debt, since such process does not suspend the effects of the RTF, and SUNAT may initiate collection actions. However, in accordance with article 159 of the Tax Code, in order for the precautionary measure to be granted, the tax debtor must offer a counter-guarantee (personal or real).*").

103 Claimant's Memorial on the Merits ¶ 57, CWS [redacted], ¶ 21.

> recognized international standing, such as Scotiabank, which has financial backing and is supervised by the SBS [Superintendency of Banking and Insurance].[104]

84. It bears mentioning that Scotiabank's request for a injunctive provisional measure——was made in the context of the contentious administrative proceedings it commenced to challenge the 2013 Tax Court Decision——which the Claimant presents in these arbitral proceedings as the "Tax Appeal"—not in the context of the *aAmparo* against the default interest, which culminated in the 2021 Constitutional Court's Decision. The distinction is relevant since it underscores that Scotiabank was fully aware that the proceedings before the contentious administrative courts were the right channel to contest the debt as a whole, comprising the IGV Liability plus interest.[105]

85. As the Claimant points out, the request was denied on 21 January 2014, and the court found that, contrary to Scotiabank's claim, the provisional measure was not being used as it should, that is, as an instrumental measure to "*guarantee the efficacy of this final decision* [in the administrative contentious proceedings]", but rather to obtain an accelerated decision of the final decision in the process".[106]

86. As Scotiabank acknowledges, prior to receiving the decision on the preliminary measure, Scotiabank made payment of the debt.[107] It must be mentioned that the SUNAT agreed to Scotiabank's payment of the debt in 10 instalments, as proposed by Scotiabank, between 6 December 2013 and 14 February 2014, and the SUNAT never imposed any attachment or similar measure.

87. In its Memorial of the Merits, once again Scotiabank repeats its allegations that it paid "*under protest*", and therefore did not accept the debt.[108] As the Republic of Peru demonstrated in its previous submission in the Rule 41 proceedings, a payment, even if made under the so-called "protest", extinguishes a pre-existing obligation: the debt. It does not confer a right, let alone vests a right, on the debtor over the amounts paid.[109] Hence, the legal effects under Peruvian law of the payment of a debt—independently of any manifestation of the payor—are the same:

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104 Scotiabank's Request for Injunctive Relief, 13 December 2013 (**Exhibit C-0176**).

105 Scotiabank's Request for Injunctive Relief, 13 December 2013 (**Exhibit C-0176**), p. 69, ¶ 7.2 (emphasis omitted).

106 Resolution No. 3, Judge of the Tax Appeal Court, 21 January 2014 (**Exhibit C-0179**), p. 17, ¶ 3.5.

107 Claimant's Memorial on the Merits, 29 November 2024, ¶ 60.

108 Claimant's Memorial on the Merits, 29 November 2024, ¶ 60.

109 *See* Respondent's Submission under Rule 41, 22 June 2023, ¶¶ 116, 117; see also Respondent's Reply on Rule 41, 25 September 2023, ¶ 216.

the debt is extinguished. Moreover, under Peruvian law, paying a debt is not a requirement to challenge said debt before the courts—.[110]

C. SCOTIABANK'S CALCULATED LITIGATION STRATEGY ARTIFICIALLY TO CHALLENGE THE IGV LIABILITY, ON THE ONE HAND, AND THE DEFAULT INTEREST, ON THE OTHER, WAS WHOLLY MISGUIDED AND THE ARBITRAL TRIBUNAL CANNOT BE TRANSFORMED INTO COURT OF APPEAL TO RELITIGATE THE PERUVIAN COURTS' DECISIONS

88. It is unassailable that under Peruvian tax law, the tax debt comprises the tax liability and the default interest (**1**). The proper and ordinary proceedings established under Peruvian law to challenge a tax debt—following the exhaustion of the administrative proceedings—are the contentious administrative proceedings before the competent authorities: the contentious administrative courts. It is in this forum that the tax debt should be contested and resolved. Conversely, *amparo* proceedings are reserved as an extraordinary recourse, which is not conceived, and should not operate, as a substitute for ordinary proceedings, and which require compliance with several *sine qua non* requirements (**2**). In the present case, Scotiabank deliberately adopted a strategy to "hedge its bets" by initiating two parallel proceedings—allegedly attacking merely the IGV Liability—and an *amparo* seeking to have a component of the very same tax debt challenged in the ordinary proceedings, running in parallel, to have several bites to the apple. As the Respondent shows below, Scotiabank's ill-conceived legal strategy backfired. Having lost at every single juncture, it cannot now instrumentalize these arbitral proceedings to metamorphose an international arbitration tribunal into an appeal court (**3**).

1. As a matter of Peruvian law, the tax debt comprises the debt for unpaid IGV and the default interest

89. The Respondent has demonstrated[111] that, under Peruvian law, the concept of tax debt includes not only the tax *per se* but also the interests accrued on it, as well as pecuniary sanctions.[112]

90. Indeed, as confirmed by Professor Sevillano:

> The national and comparative doctrine shows agreement on the need to use the expression tax debt since it allows to designate with greater clarity the volume or final amount that a tax debtor must satisfy. Therefore, rather than definitions, what is commonly found are the statements of its components, recognizing that the tax debt may be constituted by the main benefit (the tax) or by a set of pecuniary benefits that may be payable by virtue of different legal situations arising from the application of taxes. In these cases, such as the interest that is generated, we speak of accessory benefits, dependent on the main benefit that

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110 *See* Respondent's Submission on Rule 41, 22 June 2023, ¶¶ 116, 117; Respondent's Reply on Rule 41, 25 September 2023, ¶ 216.

111 *See* Respondent's Reply on Rule 41, 25 September 2023, ¶¶ 188-189.

112 *See* Prof. Sevillano's Expert Report, ¶ 100 *et seq*, Section IV.A.3 on the "*Components of the tax debt*".

> form part of the debt and that are explained by the non-payment, or if applicable the deferment or payment in installments, of the tax or fine.[113]

91. As Professor Sevillano further adds:

> In Peru, Article 28 of the Tax Code establishes that "[t]he Tax Administration will demand payment of the tax debt, which consists of the tax, fines and interest". This mention, however, is not exhaustive because, through a systematic interpretation of the Tax Code, other components of the tax debt can also be identified.[114]

92. To recall, the fact that the tax debt under Peruvian law is unitary is supported by the Claimant's own authorities:

> The tax debt, in general, is constituted by the obligation or series of pecuniary obligations to which a taxpayer is obliged towards the Public Treasury by virtue of different legal situations derived from the application of taxes. [...] As such, the tax debt is unitary and consists of the amount that the debtor owes (for tax or instalment plus interest and, if applicable, fines) to the tax creditor, and whose total payment will be demanded by the Tax Administration. Talledo Mazú […], in this regard, argues that the tax debt is the 'amount owed to the tax creditor for taxes, fines, late interest, and interest on instalment or deferment.'[115]

93. As shown previously in this submission, and further explained below, Scotiabank recognized this reality and treated the IGV Liability and accrued interest as a unit when contesting the tax debt imposed by the SUNAT. Yet, to hedge its bets, Scotiabank decided to initiate parallel proceedings: (***i***) a contentious administrative action where it allegedly contested only the IGV Liability (what Scotiabank purposefully brands as the "Tax Appeal"),[121] but which necessarily concerned both the IGV Liability and the ancillary default interest, and (***ii***) an *amparo* action requesting the Constitutional Court to declare that the default interest on the IGV Liability was not due and aimed at having the SUNAT reimburse the default interest arising from the SUNAT 2011 Decision.[122]

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113 *See* Prof. Sevillano's Expert Report,¶ 96.

114 *See* Prof. Sevillano's Expert Report,¶ 100.

115 Rosendo Huamaní, "Código Tributario Comentado, Jurista Editores" (2015) (**Exhibit C-0064**), p. 375 (emphasis added). *See also*, Sylvia Ysabel Núñez, "¿Cuándo pagar intereses moratorios tributarios?", Revista Derecho & Sociedad de la Facultad de Derecho de la Pontificia Universidad Católica del Perú, Lima, No. 43 (2014) (**Exhibit C-0062**), p. 229.

121 Contentious Administrative Statement of Claim, 21 November 2013 (**Exhibit C-0171**).

122 Application for Amparo filed by Scotiabank Perú S.A.A., 15 November 2013 (**Exhibit C-0169**).

2. *Amparo* proceedings are not meant to serve, nor should they be used, as a mechanism to contest a tax debt, or substitute the jurisdiction of the contentious administrative courts

94. As explained by Professor Sevillano in her expert report, Article 148 of the Peruvian Constitution provides that "*administrative resolutions that cause a state are subject to challenge by means of the contentious-administrative action*". The resolutions that may be the subject of an administrative contentious proceeding are those that put an end to the administrative process, and express the definitive position of the Administration in the matter in controversy". [116]

95. Since the decisions of the Tax Court are definitive—no further recourses can be filed against them in the context of the tax administrative proceedings—a taxpayer who wishes to request the annulment or invalidity of a decision of the Tax Court may do so before the judiciary.[117]

96. Accordingly:

> Once the contentious tax proceeding has been concluded in the administrative venue, it is possible to resort to the Judiciary and initiate the contentious-administrative proceeding to claim the nullity or ineffectiveness of a RTF. In the judicial instance, the contentious process is regulated by Law No. 27584, although the Tax Code also contains some special rules on this matter.[118]

97. In other words, the ordinary conduit and established judicial proceedings to challenge a decision of the Tax Court is the judicial contentious administrative route.

98. Conversely, *amparo* proceedings are exceptional in nature and aimed at providing urgent protection to avoid the violation of fundamental rights.

99. As Professor Bustamante explains in extenso,[119] the purpose of *amparo* proceedings, as provided in Article 200 paragraph 2 of the Peruvian Constitution, is the urgent protection of fundamental rights against an "*act or omission, by any authority, official or person, that violates or threatens*" those rights.[120] The *amparo* is characterized as a recourse "*to meet <u>urgent</u> requirements that*

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116 Prof. Sevillano's Expert Report, ¶ 73; Political Constitution of Peru, 29 December 1993 (amended as of 2023) (**Exhibit R-0059**), Article 148.

117 Prof. Sevillano's Expert Report, ¶ 75.

118 Prof. Sevillano's Expert Report, ¶ 40 .

119 Prof. Bustamante's Expert Report, ¶¶ 110-112.

120 Political Constitution of Peru, 29 December 1993 (amended as of 2023) (**Exhibit R-0059**), Article 200, paragraph 2.

have to do with the affectation of rights directly included within the qualification of fundamental by the Constitution"[121] and it is residual or exceptional in nature.[122]

100. As regards the *amparo*'s residual or exceptional character, Professor Bustamante states:

> The *amparo* in Peru is a residual or exceptional process, in the sense that it does not proceed if there is an ordinary process (civil, labour, contentious-administrative, etc.) to which the plaintiff can resort to obtain a protection equally satisfactory to the one he/she requests, or would request, through the *amparo*. Both the former Constitutional Procedural Code (Law No. 28237), in force since December 1, 2004 until it was repealed by the New Constitutional Procedural Code (Law No. 31307), currently in force since July 24, 2021, confirm this. Article 7, paragraph 2, of the latter Code (as well as Article 5, paragraph 2, of its predecessor) provides: "Constitutional proceedings do not proceed when: [among other assumptions...] There are specific procedural avenues, equally satisfactory, for the protection of the threatened or violated constitutional right, except in the case of habeas corpus proceedings".[123]

101. Adding that:

> This implies that the *amparo* in the Peruvian legal system is not designed to be an alternative to the ordinary process, in the sense that the plaintiff can choose which one to use. If the ordinary proceeding is an equally satisfactory avenue for the protection of the fundamental rights that the plaintiff invokes, then the plaintiff must resort to the ordinary proceeding to obtain the protection he/she seeks, since the *amparo* in that case is inadmissible.[124]

102. This requirement has been reiterated by the Constitutional Court, and was established as a binding precedent in the *Elgo Ríos* case on 12 May 2015.[125] In its submission, the Claimant relies on the *Elgo Ríos* case to allege that Scotiabank was not treated in accordance with the precedent stated in *Elgo Ríos*.[126] Much to the contrary, as Professor Bustamente explains,[127] the decision of the Constitutional Court in Scotiabank accords with the precedent in *Elgo Ríos*.

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121 Prof. Bustamante's Expert Report,¶106 (emphasis added); Judgment No. 4196-2004-AA/TC, 18 February 2005 (**Exhibit R-0111**), ground 6. *See also*, *e.g.*, Judgment No. 1323-2005-PA/TC, 7 December 2005 (**Exhibit R-0122**), ground 1 ("*The purpose of the amparo proceedings is to provide urgent protection*"); Judgment No. 00091-2023-PA/TC, 29 November 2024 (**Exhibit R-0294**), ground 4 and ruling.

122 *See*Prof. Bustamante's Expert Report,, ¶ 108; Judgment No. 0206-2005-PA/TC, 28 November 2005 (**Exhibit R-0119**), grounds 5 and 6; Judgment No. 04366-2016-PA/TC, 6 August 2020 (**Exhibit R-0253**), grounds 7 and 8.

123 Prof. Bustamante's Expert Report,¶ 108 (emphasis added).

124 Prof. Bustamante's Expert Report,¶ 108.

125 Judgment No. 02383-2013-PA/TC, 12 May 2015 (Elgo Ríos) (**Exhibit C-0184**), precedent in ground 12, and third point of the ruling.

126 Claimant's Memorial on the Merits, 29 November 2024 ¶¶ 66-70.

127 Prof. Bustamante's Expert Report, ¶¶ 194-199.

103. In the *Elgo Ríos* case, the Constitutional Court provided that in order to determine whether an ordinary avenue could be considered "*equally satisfactory*" and thus render an *amparo* inadmissible, four conditions must be cumulatively met: (***i***) the structure of the ordinary process is suitable for the protection of the right; (***ii***) the decision that would be issued in the ordinary process could provide adequate protection; (***iii***) there is no risk of irreparability; and (***iv***) there is no need for urgent protection derived from the relevance of the right or the gravity of the consequences.[128]

104. Crucially, in *Elgo Ríos* the Constitutional Court underscored that both judges and parties are responsible for examining that these procedural requirements are complied with, in order to avoid the filing of improper *amparo* claims. In the words of the Constitutional Court:

> This evaluation must be carried out by the judge or by the parties with respect to the circumstances and rights involved in relation to ordinary proceedings. That is, the operators must determine whether the avenue is suitable (insofar as it allows for the protection of the right, from a structural point of view, and is capable of providing adequate protection) and, simultaneously, whether it is equally satisfactory (insofar as there is no imminent risk that the harm may become irreparable, nor is there a need for urgent protection).[129]

105. In addition, pursuant to Article 7 of the New Constitutional Procedural Code (the "**NCPC**"),[130] an *amparo* claim will be inadmissible on the following grounds ("*causales de improcedencia*"):

> 1. The facts and the petition of the complaint do not refer directly to the constitutionally protected content of the right invoked.
>
> 2. There are specific procedural avenues, equally satisfactory, for the protection of the threatened or violated constitutional right, except in the case of habeas corpus proceedings.
>
> 3. The aggrieved party has previously resorted to another judicial proceeding to seek protection of his constitutional right.
>
> 4. Prior remedies have not been exhausted, except in the cases provided for in this code and in the habeas corpus process.
>
> 5. When there is *lis pendens* due to the interposition of another constitutional proceeding.
>
> 6. In the case of constitutional conflicts arising between the branches of government or public administration entities among themselves. Nor does it proceed between regional or local governments or among them, or against the

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128 Prof. Bustamante's Expert Report, ¶ 109; Judgment No. 02383-2013-PA/TC, 12 May 2015 (Elgo Ríos) (**Exhibit C-0184**).

129 Judgment No. 02383-2013-PA/TC, 12 May 2015 (Elgo Ríos) (**Exhibit C-0184**), ground 16.

130 Previously provided for in Article 5 of the Constitutional Procedural Code; *See* Expert Report Bustamante, ¶ 30.

> Legislative, Executive and Judicial Branches, filed by a local or regional government or any public entity whatsoever. In these cases, the controversy is processed through unconstitutionality or competence proceedings, as the case may be.
>
> 7. The time limit for filing the lawsuit has expired, with the exception of the habeas corpus process.[131]

106. Therefore, the *amparo* proceeding is not the proper avenue to establish or declare rights;[132] and, given its nature as an urgent means of protection, both the right invoked and the threat or violation must be manifest, certain, and imminent.

107. Quoting Professor Bustamante's report:

> In synthesis, when the protection requested in the *amparo* is not urgent, or when the alleged violation is not manifest, or even if the threat sought to be avoided with it is not certain or of imminent realization, or if there is a specific procedural route equally satisfactory, among other assumptions; then, in those cases, the *amparo* claim is inadmissible. In such cases, the appropriate way to resolve the controversies is the ordinary judicial process.[133]

108. As further explained in this submission, in the Scotiabank case, the Constitutional Court found that the requirements for the *amparo* to be admissible were not satisfied.[134]

3. Scotiabank opted directly to pursue the constitutional *amparo* action against the default interest debt, and in parallel challenged the IGV Liability before the contentious administrative courts

109. To recall, in November 2013, Scotiabank Perú initiated two courses of legal actions in relation to the Tax Court 2013 Decision: (**a**) an *amparo* action[135] submitted on 15 November 2013 before the Peruvian Constitutional Court and (**b**) six days later, a contentious administrative action ("*demanda contencioso-administrativa*"), submitted on 21 November 2013 before the Peruvian

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131 New Constitutional Procedural Code, Article 7 (**Exhibit C-0319**).

132 Prof. Bustamante's Expert Report, ¶ 120.

133 Prof. Bustamante's Expert Report, ¶ 122.

134 *See* below, Section II.E.2.

135 The *amparo* action is a legal proceeding established for the protection of constitutional rights, which allows a natural person or legal entity to seek urgent relief from the Peruvian constitutional courts when the plaintiff's constitutional rights are breached by a public or private entity (*see* Political Constitution of Peru, 29 December 1993 (amended as of 2023) (**Exhibit R-0059**), Article 200 ("*The Constitutional guarantees are:* […] *2. The amparo action, which may be filed against the action or omission of any authority, official or individual that breaches or threatens the other rights recognized by the Constitution, except for those set forth in the following paragraph.* [The amparo action] *shall not be admissible against legal norms or judicial resolutions issued in regular proceedings*").

civil courts specialized in administrative matters. To be clear, Scotiabank commenced the *amparo* action before it commenced the contentious administrative action.

110. Through the *amparo* action, which the Claimant denominates the "Default Interest Amparo", Scotiabank Perú challenged the default interest amounts arising from the 2011 SUNAT Decision for the periods in which the tax administration exceeded the maximum legal time periods to resolve a recourse.[136]

111. In the contentious administrative judicial proceedings, which the Claimant refers to as the "Tax Appeal", Scotiabank Perú requested the annulment of the Tax Court 2013 Decision, pursuant to which the Tax Court confirmed the SUNAT 2011 Decision regarding the 1999 Tax Debt, including the IGV Liability and the corresponding updated default interest.[137]

112. As regards the development of the *amparo* proceedings regarding the default interest (in the Claimant's terminology the "Default Interest Amparo"), on 7 December 2015, the Eleventh Constitutional Court, a constitutional court of first instance, ruled on Scotiabank's *amparo* requesting to enjoin the SUNAT from collecting the default interest and to revise the default interest due, as per the 2011 SUNAT Decision. The decision of the court of first instance was partially favorable to Scotiabank.[138]

113. This decision was appealed by both parties. On appeal, the Third Civil Chamber of the Superior Court of Justice of Lima (the "**Third Civil Chamber**") overturned the first instance judgment, dismissing Scotiabank Perú's *amparo* claim on 21 September 2016.[139]

114. Following the dismissal, on 14 October 2016 Scotiabank Perú filed yet another recourse,[140] a special constitutional recourse before the Constitutional Court ("*agravio constitucional*").[141]

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136 *See* Claimant's Memorial on the Merits, 29 November 2024, ¶ 53(a).

137 *See* Claimant's Memorial on the Merits, 29 November 2024, ¶ 53(b).

138 Judgment No. 27 of the Superior Court of Justice of Lima in Case No. 35201-2013, 7 December 2015 (**Exhibit C-0185**). *See* Claimant's Memorial on the Merits, 29 November 2024, ¶ 63.

139 Resolution No. 20 of the Third Civil Chamber of the Superior Court of Justice of Lima in Case No. 35201-2013, 21 September 2016 (**Exhibit C-0188**)*; See* Claimant's Memorial on the Merits, 29 November 2024, ¶ 63.

140 Constitutional *agravio* filed by Scotiabank Perú S.A.A. against Resolution No. 20 of the Superior Court of Justice of Lima, 14 October 2016 (**Exhibit C-0189**).

141 An *agravio constitucional* is an extraordinary appeal against second instance decisions confirming the dismissal of an *amparo* or *habeas corpus* action (*See* Peruvian Constitutional Procedural Code, approved by Law No 31307 of 21 July 2021 (**Exhibit R-0007**), Article 24 ("*Against a second instance decision that declares the complaint unfounded or inadmissible, a constitutional appeal may be filed before the Constitutional Court, within ten days as of the day following the date on which the resolution was notified. Once the appeal is granted, the President of the Chamber shall refer the file to the Constitutional Court within a maximum term of three days, plus the term required by distance, subject to liability.*")).

115. On 9 November 2021, the Constitutional Court rendered its Decision No. 919/2021, dismissing Scotiabank Perú's "*agravio*" and, yet again, rejecting the *amparo* recourse (the "**2021 Constitutional Court Decision**").[142]

116. As regards the development of the contentious administrative action, (in the Claimant's language, the so called "Tax Appeal"), on 17 December 2014, a first instance decision was issued by the Twentieth Specialized Contentious Administrative Court with Sub-Specialty in Tax and Customs Matters (the "**Twentieth Contentious Administrative Court**").[143] The Contentious Administrative Court dismissed Scotiabank Perú's claims, finding that the Tax Court 2013 Decision had been issued in accordance with Peruvian law.[144]

117. Scotiabank Perú then appealed the decision of the Twentieth Contentious Administrative Court. On 14 April 2016, the Sixth Contentious Administrative Chamber with Sub-Specialty in Tax and Customs (the "**Sixth Contentious Administrative Chamber**") decided the appeal, dismissing—once again—Scotiabank Perú's claims.[145] Subsequently, Scotiabank Perú filed a cassation appeal, which was again dismissed by the Supreme Court in its Cassation Judgment No. 09261-2016-Lima, of 4 July 2017 (the "**Supreme Court Decision**").[146]

118. Scotiabank then proceeded to file an *amparo* against the Supreme Court Decision, on 5 July 2018. The *amparo* was dismissed on 28 December 2020 by the Third Court Specialized in Constitutional Matters of Lima.[147]

119. On 12 January 2021, Scotiabank Perú appealed the decision of the Third Court. The appeal was dismissed by the First Constitutional Chamber of Lima.[148]

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142 Plenary Judgment, File No. 222-2017-PA/TC, Decision 919/2021, 9 November 2021 (Scotiabank S.A.A v. SUNAT and the Tax Court) (**Exhibit R-0008**).

143 To recall, the Tax Court 2013 Decision had confirmed the SUNAT 2011 Decision regarding the 1999 Tax Debt.

144 Decision No. 16 of the Twentieth Specialized Contentious Administrative Court with Sub-Specialty in Tax and Customs Matters, Superior Court of Lima, 17 December 2014 (**Exhibit R-0180**); see also Case Information Sheet for File No. 9655-2013, Judicial Branch, accessed on 22 June 2023 (**Exhibit R-0015**), p. 45.

145 Decision No. 45 of the Sixth Contentious Administrative Chamber with Sub-Specialty in Tax and Customs, 14 April 2016 (**Exhibit R-0194**); *See* Case Information Sheet for File No. 9655-2013, accessed on 22 June 2023 (**Exhibit R-0015**), p. 10.

146 Cassation Judgment No. 09261-2016-Lima, Supreme Court of Justice, 4 July 2017(**Exhibit R-0214**).

147 Decision No. 22 of the Third Court Specialized in Constitutional Matters of Lima, 28 December 2020 (**Exhibit R-0254**)

148 Decision of the First Constitutional Chamber of Lima, 12 January 2021 (**Exhibit R-0257**)

120. On 15 August 2022, Scotiabank Perú filed a second *amparo* proceeding against the Supreme Court Decision (No. 09261-2016-Lima), seeking the annulment of the Cassation Judgment based on an alleged breach of Scotiabank Perú's constitutional due process rights.

121. On 16 April 2024,[149] the Constitutional Court—whose composition was completely different from that of the Constitutional Court that rendered the 2021 Constitutional Court Decision regarding the default interest—also dismissed this second *amparo* filed against the Supreme Court Decision (Cassation Judgment No. 09261-2016-Lima).[150] Indeed, the Constitutional Court, acting as the last and final instance, declared Scotiabank Perú's *amparo* claim inadmissible and stated that Scotiabank had sought to challenge, via the *amparo*:

> [T]he interpretation and application of legal norms made by the courts, as well as the evidentiary assessment and the jurisdictional criterion assumed in relation to the merits of the controversy discussed in the underlying process, which is not in accordance with the purposes of the *amparo* process.[151]

122. To sum up, at present, Scotiabank has litigated the imposition of the Tax Debt before every possible instance and fora and has had every possible and full opportunity before the courts; ultimately seeking through parallel proceedings the same redress: not to pay its tax debt towards the SUNAT, including the default interest, and have the Peruvian State (through the SUNAT) reimburse the amounts it paid in 2013-2014.

123. As Professor Bustamante explains, the situation created by Scotibank with its launching of these parallel proceedings entailed a question of "*prejudicialidad*". That is a situation when a material question, different but connected—to the one at stake in the proceedings—needs to be previously determined, in order to resolve the one at stake in the proceedings.[152]

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149 Judgment No. 05178-2022-PA/TC, 16 April 2024 (**Exhibit C-0396**), ground 34.

150 *See* Case Information Sheet for File No. 5178-2022-AA, Constitutional Court, 20 June 2023 (**Exhibit R-0013**); Case Details for File No. 5178-2022-AA, Constitutional Court, 20 June 2023 (**Exhibit R-0014**); Judgment No. 05178-2022-PA/TC, 16 April 2024 (**Exhibit C-0396**), ground 34.

151 Judgment No. 05178-2022-PA/TC, 16 April 2024 (**Exhibit C-0396**). The Respondent rejects in the strongest terms the Claimant's allegations that the Respondent delayed the notification of the Constitutional Court Decision to benefit the Respondent in this arbitration (*see* Claimant's Memorial on the Merits, ¶¶ 170-172). Yet again, the Respondent is compelled to reject the Claimant's recourse to speculation and innuendo to tarnish the reputation of the Constitutional Court. For the avoidance of any doubt, the term in which the 2024 Constitutional Court Decision was within normal parameters. In fact, other decisions also issued mid-April 2024 took up to 93, 79 and 75 days (*see* Decision of the Constitutional Court No. 196/2014 issued in Case File No. 00633-2022-PA/TC, 18 April 2024 (Hada Tours) (**Exhibit R-0215**); Decision of the Constitutional Court No. 191/2014 issued in Case File No. 04624-2022-PA/TC, 16 April 2024 (Augusto Pretel Rada) (**Exhibit R-0046**); Decision of the Constitutional Court No. 185/2014 issued in Case File No. 00580-202|-PA/TC, 16 April 2024 (FEDEPCUM) (**Exhibit R-0323**)).

152 Prof. Bustamante's Expert Report, ¶ 195.

124. Indeed, as the Republic of Peru has shown, and as Professor Bustamante underscores, the connexity between the claims presented by Scotiabank in its parallel proceedings is evident:

> In general terms, Article 84 of the Code of Civil Procedure (supplementary applicable to any other procedural order compatible with its nature, by mandate of its First Final Provision) establishes: "There is connexity when there are common elements between different claims or, at least, related elements in them". In the present case, the connection between Scotiabank's *amparo* claim and its contentious administrative claim is not only recognized in the aforementioned pages of the arbitration claim, but it is also an evident connection: if Scotiabank's contentious administrative claim had been declared founded, the determination of its tax obligations discussed therein would have been without effect and, consequently, the interest that it questions in its *amparo* claim would not have accrued either. A connection that is verified by the very factual grounds that Scotiabank alleges in both claims.[153]

125. Yet, in a desperate attempt to justify its strategy, the Claimant tries to deny the patent connexity of the claims by stating that "*the underlying subject matter between the Tax Appeal and the Default Interest Amparo are distinct*. *The Tax Appeal focused on the imposition of the underlying value added tax while the Default Interest Amparo related to the constitutionality of the accrual of default interest resulting from the SUNAT and the Tax Court's delays*".[154] Scotiabank further alleges "*Peru's own courts have recognized the distinction between the Default Interest Amparo at issue in this arbitration, on the one hand, and the Tax Appeal, on the other. The Peruvian appeal court, the Third Civil Chamber, confirmed that the two proceedings concerned different causes of action and that there was no risk of contradictory rulings in the two proceedings*".[155]

126. However, the fact that the two causes of action are different does not negate the connexity of the claims, since Scotiabank's use of parallel proceedings seeks the same result: avoid its tax obligations. In fact, as Respondent demonstrates below,[156] the very same thing that the Claimant sought is what the Claimant is seeking in these proceedings, except re-packaged now as a violation of the National Treatment standard under the Treaty.

127. The very reason why the Constitutional Court dismissed the Claimant's *amparo* in its Decision of 2021 was because the Claimant was attempting to instrumentalize an extraordinary procedure, the *amparo*—created to protect a fundamental constitutional right in urgent and irreparable circumstances—when it had ordinary means at its disposal to obtain redress.

128. In other words, Scotiabank opted to parse out its claims presenting them under the veneer of different causes of action. *First*, challenging the application of the Default Interest through an

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153 Prof. Bustamante's Expert Report, ¶ 154.

154 Claimant's Memorial on the Merits, 29 November 2024, ¶ 201.

155 Claimant's Memorial on the Merits, 29 November 2024, ¶ 201.

156 *See* below, Section IV.

amparo, carefully presenting it as restricted to a claim on the Default interest; *then*, in parallel—six days later—filing an action before the contentious administrative courts, circumscribing the claim to IGV liability, but with plain knowledge that the effect of prevailing on the IGV liability claim would entail the reimbursement of both the amounts paid as IGV and the ancillary default interest.

129. Scotiabank's strategy was carefully crafted to multiply its options and hedge its bets. Unfortunately for Scotiabank, its strategy failed, and it cannot now ask this Arbitral Tribunal to become a court of appeal to remedy its choice of procedural strategies.

D. THE CLAIMANT'S UNFOUNDED ALLEGATIONS OF INTERFERENCE SHOULD NOT BE COUNTENANCED

130. In these proceedings, the Claimant is asking the Arbitral Tribunal to sit as a court of appeal and overturn the decision of a sovereign State's highest court on constitutional matters. As the Respondent demonstrates in this submission, the request has no basis under the Treaty and the Tribunal lacks jurisdiction to adjudicate a claim for denial of justice (when the Claimant has in fact had full access to every layer of judicial review) under the guise of national treatment. That should be the end of the matter.

131. Nonetheless, given the level of misinformation and the extent of the accusations made by the Claimant against the Peruvian State, the Respondent is compelled to set the record straight and to show how the Claimant has built its narrative of supposed undue influence exerted on the Justices of the Constitutional Court on misrepresentations—several of them blatant—baseless accusations, hearsay and inflammatory assertions.

132. Based on smoke and distortion, the Claimant is asking the Tribunal to conclude that the decision of the Justices in 2021 was not the result of their own conviction, but a decision taken under duress. The audacity of the Claimant's pretension is shocking.

1. Scotiabank's accusations regarding the alleged interference of the Ministry of Economy and Finance and the SUNAT in the proceedings are wholly unsupported

133. Scotiabank alleges that (***i***) on 9 June 2017 the journal "*Hildebrandt en sus trece*" published excerpts that the Claimant claims were a voted decision in the *amparo* proceedings commenced by Scotiabank in connection with the default interest, which showed that the Constitutional Court was going to find in favour of Scotiabank.[157] It also claims (***ii***) that according to the journal "*a high-level source in the Constitutional Court, who* [was] *opposed to the alleged favouritism of Scotiabank, gave this weekly a copy of said ruling*",[158] (***iii***) that only two justices "voted" against

[157] Claimant's Memorial on the Merits, 29 November 2024, ¶ 78-80.

[158] Claimant's Memorial on the Merits, 29 November 2024, ¶ 81.

Scotiabank, namely [redacted] and [redacted],[159] and alleges that ***(iv)*** based on the Witness Statement of [redacted], in a meeting he had with [redacted] after the leak—on [redacted] — [redacted] stated that it was his "understanding" that [redacted] had leaked the so-called Leaked Decision.[160] Furthermore, the Claimant adds that (***v***) the fact that [redacted] met with a journalist of "*Hildebrandt en sus trece*", 10 days before the excerpts of the alleged "Leaked Decision" were published, and with another journalist, who was the author of the article, five months after the leak, confirms the "evidence" allegedly provided by [redacted][161]

134. Moreover, the Claimant alleges that "*following the leak, the Constitutional Court was required to: (a) conduct an investigation to determine who was responsible for the leak; and (b) promptly publish the voted judgment*" but did not.[162]

135. As the Republic of Peru demonstrates, the allegations are unsupported, and the Claimant's alleged "evidence" is not such.

a. Contrary to Scotiabank's assertions, the so-called 2017 Leaked Decision was not a voted nearly final judgement

136. First, the so-called Leaked Decision was not voted and could not be a final judgement under Peruvian law, as the Claimant alleges. That is because for a judgement to be considered so it must comply with several requirements set forth in the law and because as the Respondent demonstrates Scotiabank's *amparo* was not voted in 2017.

137. Indeed, Article 48 of the Normative Regulations of the Constitutional Court, in force in 2017 provided that the effects of a judgment: "*begin to take effect from the day following its notification and, as the case may be, publication in the Official Gazette El Peruano* [...]".[163]

138. In other words, for a judgment of the Constitutional Court to be effective, it has to be either notified to the Parties, or published in the Official Gazette, depending on what is provided in the law for the specific case. In the case of a decision on *amparo* proceedings, publication in the

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159 Claimant's Memorial on the Merits, 29 November 2024, ¶ 83.

160 Claimant's Memorial on the Merits, 29 November 2024, ¶ 83.

161 Claimant's Memorial on the Merits, 29 November 2024, ¶ 83.

162 Claimant's Memorial on the Merits, 29 November 2024, ¶ 87.

163 Article 48 of the Rules of Procedure of the Constitutional Court (**Exhibit C-0048**). *See* also Prof Bustamante's Expert Report, ¶ 246.

Official Gazette is required.[164] Failure to comply with these requirements entails the nullity of the decision, as explained by Professor Bustamante:

> [W]ithout the signatures of the Magistrates (in the minimum number required by law) there is no judgment. Furthermore, it cannot take effect, even if it complies with this requirement, if it has not yet been notified to the parties and, if applicable, published in the Official Gazette El Peruano. These precepts align with the provisions of Article 122, paragraph 7, of the Code of Civil Procedure (applicable in a supplementary manner): The resolutions shall contain: [...] "7. The signature of the Judge and the corresponding judicial clerk". And it adds: "The resolution that does not comply with the aforementioned requirements shall be null and void [...]". In addition, the second paragraph of Article 155 of the latter Code provides: "Judicial decisions only produce effects by virtue of notification made in accordance with the provisions of this Code, except in those cases expressly exempted".[165]

139. What is more, pursuant to the Hanbook on Jurisdictional Proceedings of the Constitutional Court approved by Administrative Resolution 68-214 P/ TC of 11 June 2014, applicable at the time of the alleged leak, the Tribunal's Secretariat Reporter must verify that all the Justices have voted and must certify it. In those cases, the signatures of the Justices must be affixed to the Judgement, as well as the signature of the court's registrar that gives faith of the voting and signatures.[166]

140. It bears mentioning that the Handbook on Jurisdictional Proceedings of the Constitutional Court, does not state anywhere that a bar code is "*only assigned to an official decision of the Court after the Plenary Session is held for the judges to vote on a case and once the document is in its final PDF form awaiting signatures for publication*", as the Claimant submits.[167]

141. Finally, even when the Justices have voted, but the decision has not been published, the Rules of Procedure of the Constitutional Court provide the possibility that a Justice may change his or her vote, following a specific procedure. Indeed, Article 44-A of the Rules of Procedure of the Constitutional Court provide that: "[t]*he Magistrate who has cast his vote may only change it*

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164 Handbook on Jurisdictional Proceedings of the Constitutional Court, approved by Administrative Resolution 68-2014 P/ TC of 11 June 2014 (**Exhibit R-0175**), Numeral 6(3), p. 13.

165 *See* also Prof. Bustamante's Expert Report,, ¶ 246.

166 Manual on Jurisdictional Proceedings of the Constitutional Court, approved by Administrative Resolution 68-2014 P/ TC of 11 June 2014 (**Exhibit R-0175**), Numeral 6, p. 13 (" 6.1 Upon receiving the case files in the Secretariat Rapporteur's Office, it is verified whether all the magistrates have cast their votes, in which case the rapporteur certifies the resolution and orders its publication on the Constitutional Court's website. 6.2. Otherwise, if the case file has been submitted with a dissenting vote and this vote is not known to the other magistrates, a note is prepared and sent to the chambers, informing them of the dissenting vote. 6.3. Once the judgment or resolution that concludes the process is published, if a judgment has been issued, copies are sent to the official newspaper *El Peruano,* and the case file is forwarded to the Document Processing and Archiving Office").

167 Claimant's Memorial on the Merits, 29 November 2024, ¶ 80.

with knowledge of the Plenary and prior justification. The Secretary Rapporteur must inform the Plenary of the Constitutional Court when there are changes in the sense of the vote of a Magistrate, under responsibility".[168]

142. Clearly, the published excerpts of the so-called "2017 Leaked Decision" do not comply with the requirements for them to constitute a Judgment of the Constitutional Court.

143. Moreover, and fatally for Scotiabank's case, the allegation that the "*published excerpts confirm that the Court had already met and **voted** on the decision, with a four-judge majority voting in favour of Scotiabank Perú and two judges against*"[169] is unsupported and directly contradicted by the procedural record.

144. [redacted]

145. [redacted][172]

146. On 29 March 2017, the Public Hearing for Case 222-2017 PTC took place,[173] without the presence of Justice Ledesma.

147. [redacted][174]

148. On 5 April 2017, a notification order to the Parties provided that during its session of 4 April 2017, the Plenary had agreed that, since Justice Ledesma was absent from the Public Hearing, she was to gain knowledge of the case ("*avocamiento*"), and for that purpose she would be given access to the video recording of the Public Hearing.[175]

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168 Article 44-A of the Rules of Procedure of the Constitutional Court (**Exhibit C-0048**); *See* Prof. Bustamante's Expert Report,¶ 257.

169 Claimant's Memorial on the Merits, 29 November 2024, ¶ 80.

170 *See* [redacted]

171 *See* [redacted]

172 *See* [redacted]

173 See Video of the Hearing of the Default Interest Amparo, 29 March 2017 (**Exhibit C-0194**).

174 *See* [redacted]

175 "Avocamiento" Justice Marianella Ledesma, 5 April 2017 (**Exhibit R-0204**).

149. [redacted][178]

150. [redacted][183]

151. [redacted][185]

152. Indeed, the highwater mark of the Claimant's allegations that the published excerpts corresponded to a VOTED decision is based on the recollection of its Constitutional Law Expert, Dr. Landa, regarding a supposed practice during his tenure as a Justice of the Court, that is, between 2004 and 2010.[186]

153. Based on Dr. Landa's recollection, the Claimant states that the barcode inserted in the upper right-hand corner, "*is only assigned to an official decision of the Court after the Plenary Session*

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176 *See* [redacted]

177 *See* [redacted]

178 *See* [redacted]

179 *See* [redacted]

180 *See* [redacted]

181 *See* [redacted]

182 *See* [redacted]

183 *See* [redacted]

184 *See* Claimant's Memorial on the Merits, 29 November 2024, ¶ 80

185 *See* [redacted]

186 *See* Profs. Landa and Neyra's Expert Report of, ¶ 4.

is held for the judges to vote on a case and once the document is in its final PDF form awaiting signatures for publication".[187] However, as the Respondent demonstrates, and as explained by [redacted] this is wrong.

154. [redacted] explains that, until the COVID pandemic, when the files of the Constitutional Court files where digitalized under his direction, all the files of the proceedings where physical paper files. To circulate the physical files amongst the different offices of the different Justices, their advisors, or other staff, a servant of the Court needed to physically carry the files and move them back and forth. A physical note ("*cargo*") was created for each movement, entering the names of both the sender (who dispatched the file, document, or project of decision), and the person receiving the file. This system, however, resulted in situations where the actual physical files of a case circulated independently from the projects of decisions on the file,[188] which led to logistical complexities and inefficiencies. As [redacted]:

> The barcode was generated at the time a case file was registered, and a cover sheet was immediately printed, which also included the key details of the case file. […] In this context, when the file was referred to the relevant standing committee, the advisor in charge had to use the system to generate the document containing the draft resolution, selecting the template or outline they considered most appropriate. In turn, the computer system automatically generated a draft outline with the essential details of the file (such as the file number, the origin, and the name of the claimant), in order to reduce the risk of errors in its identification. This number was also printed in barcode form, thus enabling it to be tracked during internal transfer processes. In other words, the barcode is part of the draft resolution, which is not a final document but an internal one, as the intention of introducing this code is to speed up internal processing.
>
> In accordance with the above, it can be said that the incorporation of the barcode fulfils an eminently utilitarian function, aimed at optimizing and speeding up the internal movement of documents.[189]

b. The Claimant's insinuations that the SUNAT were somehow involved in the so-called leak of 2017 are ludicrous

155. In yet another purposefully equivocal assertion, the Claimant states that "*SUNAT had prior knowledge of the existence of the 2017 Leaked Decision. The newspaper article containing the 2017 Leaked Decision included an interview with SUNAT's lawyer, Francisco Eguiguren, who was quoted as saying that the 2017 Leaked Decision would be a 'fatal precedent'*",[190] insinuating

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187 Claimant's Memorial on the Merits, 29 November 2024, ¶ 80.

188 *See* Witness Statement of [redacted]

189 Witness Statement of [redacted] ¶¶ 11-14.

190 Claimant's Memorial on the Merits, 29 November 2024, ¶ 86.

wrongdoing on behalf of the SUNAT. Besides, the Claimant omits that the article also mentions that the magazine had contacted Scotiabank's counsel, who had not responded to a "*written request for an interview with this journal*".[191] The Claimant's insinuation of wrongdoing is disingenuous: the fact that a journalist interviews individuals on supposed news—which the journalist also tried to do with Scotiabank—does not entail any improper prior knowledge by the interviewee.

c. Scotiabank's inaction in the wake of the alleged publication of the so-called" Leaked Decision" reveals that it did not consider that the alleged leak hindered the *amparo* proceedings

156. The Claimant asserts —citing to the Expert Report of Mr. Landa and Ms. Neyra—that the Constitutional Court did not investigate the leak nor proceeded to expedite the decision.[192] The allegation is particularly surprising as it begs the question: if Scotiabank considered that the alleged leaked decision was indeed final and that the leak was somehow orchestrated by the SUNAT,[193] why did it fail to adopt any of the remedies provided in the law to challenge what it deemed a blatant violation of its rights? As Professor Bustamente explains, Scotiabank had several legal mechanisms available, including, *inter alia*: (***i***) the possibility of requesting the nullity of the *amparo* proceedings pursuant to Articles 171 and 173 of the Code of Civil Procedure; (***ii***) commencing proceedings for fraud under Article 178 of the Code of Civil Procedure, or; (***iii***) commencing proceedings complaint before the Public Prosecutor's Office, in accordance with Article 159, paragraphs 1 and 5 of the Constitution.[194]

157. Indeed, as further noted by Professor Bustamante, the review of Scotiabank's briefs before the Constitutional Court in the *amparo* proceedings submitted from 10 April 2017 until 26 May 2021, reveals that Scotiabank never raised the issue of the alleged leak or the allegations that it now presents in these arbitral proceedings about the improper pressure of the Executive Branch on the Constitutional Court.[195]

158. In fact, on 26 July 2017, in the immediate aftermath of the leak, Scotiabank submitted a brief to the Constitutional Court stating:

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191 "Scotiabank will win S$481,000,000 from Constitutional Court decision", Hildebrandt en sus trece, 9 June 2017 (**Exhibit C-0200**), p. 4.22

192 Claimant's Memorial on the Merits, ¶ 87; *See also* CER-Landa/Neyra, ¶¶ 114-116.

193 *See* WS [redacted] ¶ 37 ("*The timing of the leak and the newspaper through which it was made led us to believe that the leak was linked to the pressure that the Executive Branch, through the Ministry of Economy and Finance and SUNAT itself, had been exerting on the judges of the Constitutional Court* […]").

194 *See* Prof. Bustamante's Expert Report, ¶ 249.4.

195 *See* Prof. Bustamante's Expert Report, ¶ 257.

> [W]e reiterate our confidence in the honesty and independence of all members of the Constitutional Court [...].[196]

159. Rather than complaining, Scotiabank continued writing to the Constitutional Court asking it to issue its decision.[197] Clearly, Scotiabank was not concerned, as it now alleges, about impropriety in the process. The concern arose at a later stage when the Constitutional Court actually issued a final decision which was not favorable to Scotiabank. At that juncture, Scotiabank decided to build a narrative of threats and an orchestration campaign by the executive and legislative to force the Justices of the Constitutional Court to "change" their minds.

160. In fact, as further noticed by Professor Bustamante, it was not until the 26 May 2021, that for the first time Scotiabank referred to the publication of the excerpts of the alleged Leaked Decision in the press.[198] In Professor Bustamante's words:

> The surprise becomes even greater when it is noted that in the brief of 26 May 2021, which Scotiabank filed in its *amparo* proceeding through the Virtual Window of the Constitutional Court, where it—apparently—refers for the first time to the alleged "leak" to the journal previously mentioned (although without labelling it as media pressure or accusing any political pressure), Scotiabank does not ask the Constitutional Court to annul all the proceedings (based on that hypothetical defect), nor the initiation of an investigation, and much less to respect the alleged "judgment", that—according to the arbitration claim—would have been "voted on" in June 2017 and would be "final". Scotiabank requested none of that. The only thing it requested, as evidenced by very the text of that brief, is that the Constitutional Court issue a judgment as soon as possible, and it described that alleged "judgment" of June 2017 as a "draft judgment"; in other words, it never recognized the status of a judgment, but at most, of a simple draft […].[199]

161. As per the Claimant's recount, rather than availing itself of the legal remedies, the measures taken by Scotiabank in the wake of the supposed leak were to retain, in June 2017—that is, on the same month of the leak of the alleged decision—a consulting firm specialized in media and government relations, which supposedly advised to contact government officials. According to [redacted], Scotiabank heeded the consulting firm's advise and the [redacted] and [redacted] met with the then Prime Minister and Minister of Economy and Finance, Fernando Zavala, and his Chief of Staff, Mr. Enrique Felices—a former partner in a prestigious law firm—[200] to allegedly voice their concerns and request to "*please ask Sunat to stop its public campaign*

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196 Registration Brief submitted by Scotiabank No. 4548-ES-2017, 26 July 2017 (**Exhibit R-0244**), p. 3.

197 Brief of Requests to the Constitutional Court, July 2018 to August 2021 (**Exhibit C-0284**), p. 183.

198 Scotiabank's Submission on 26 May 2021 in the amparo proceedings (**Exhibit R-0262**).

199 *See* Prof. Bustamante's Expert Report, ¶ 253.

200 Email from [redacted] (**Exhibit C-0231**), p.1.

against our case, and let the judges decide with independence".[201] According to the email of [redacted] summarizing the meeting, the Minister and his Chief of Staff were supportive,[202] stating that "[i]*n parallel, we have continued our one-on-one off-the-record meetings with key journalists. All very positive. Next week we will continue these meetings and will also meet with the Viceminister of Finance*".[203] Per the Claimant's account, [redacted] later met the Vice Minister.[204]

162. It is interesting to note that the Claimant has no qualms lobbying the Executive Branch and feeding—off the record—their own version of the facts to the media to bring the debate in the public forum—but find it reproachable that individuals in the political sphere express their views on the impact that declaring default interest inapplicable will have in the public finances.

163. It bears mentioning that it was the SUNAT who first brought to the attention of the Constitutional Court the publication of the alleged leak, and the fact that [redacted] who had, amongst other judicial actions on behalf of Scotiabak, filed the *amparo* request, and had met in a "personal visit" [redacted] on [redacted]. That is, the personal meeting took place [redacted].[205] As stated in the SUNAT's communication to the Constitutional Court, given that the case was being discussed at the time, [redacted] should not have met [redacted] in his personal capacity. On this basis, the SUNAT requested that [redacted] be recused.[206] [redacted] then asked to abstain from the case, which abstention the Court decided not to accept.

164. ***Finally***, the Claimant alleges that, after the alleged leak, the Constitutional Court should have promptly published the "voted" judgment, relying on the opinion of its experts, Mr. Landa and Ms. Neyra. The Claimant's experts repeat throughout that the alleged Decision was nearly final, and that it had been already voted and discussed by the Court. However, the experts do not provide any legal basis for said assertion.[207]

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201 Email from [redacted] (**Exhibit C-0231**), p.1.

202 Email from [redacted] (**Exhibit C-0231**), p.1.

203 Email from [redacted] (**Exhibit C-0231**), p.1.

204 Claimant's Memorial on the Merits, ¶ 116.

205 *See* SUNAT Submission No. 04380-2017 (**Exhibit R-0355**).

206 *See* SUNAT Submission No. 04380-2017 (**Exhibit R-0355**).

207 Claimant's Memorial on the Merits, ¶ 87, CER-Landa/Neyra ¶¶ 106, 110, 111.

d. The opinions of members of Congress and other public officials on the issues raised by the nonpayment of outstanding debts by several taxpayers, which the Claimant grossly distorts, did not and could not constitute "threats" directed at the Justices of the Constitutional Court

165. In line with its strategy to advance a non-existing case on the basis of smoke and inflammatory statements, the Claimant spills ink referring to press articles—some of which are identical in content–[208] reporting on interviews with the SUNAT's Public Defender and members of the Executive to claim that they exerted undue pressure on the Constitutional Court and that they targeted Scotiabank specifically for being Canadian.[209]

166. As the Respondent demonstrated below, not only the assertions—including on the alleged targeting of Scotiabank for being Canadian—are based on gross distortions but the statements of some public officials can hardly constitute threats to the Justices of the Constitutional Court. Just one example, among multiple others,[210] illustrates the degree of exaggeration: according to the Claimant "*Peruvian officials derisively referred to Scotiabank as a 'Canadian capital bank'* […] *attacking the interests of the Peruvian State*".[211] A perfunctory review of the Spanish article shows that in this regard the press article states that Scotiabank is a "*banco de capitales canadienses*" an expression that objectively describes Scotiabank and has nothing of derisory.[212]

167. In the same vein, the Claimant refers to the opinions of a handful of congresspeople on the consequences that the Constitutional Court's eventual decision to enjoin the SUNAT from collecting amounts due for default interest from several—foreign and Peruvian—tax payers would entail from a legal and an economic perspective. Moreover, the Claimant alleges that the members of the Constitutional Court decided to declare Scotiabank's *amparo* inadmissible because they felt threatened.[213]

168. The accusation that the Members of the Court were under undue influence or threatened is a serious one that needs to be fully substantiated: distorted press releases reflecting the opinion

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208 *See e.g.,* **Exhibit C-0265** and **Exhibit C-0266**; **Exhibit C-0293** and [redacted]; or **Exhibit C-0343** and **Exhibit C-0344**.

209 *See* Claimant's Memorial on the Merits, 29 November 2024, ¶¶ 12, 103-105, 235, 292.

210 The Respondent rebuts some of the salient misrepresentations of the Claimant in this submission; however, given the volume of misrepresentations as regards statements of public officials, publications etc., the Respondent can simply not engage with every single one. Accordingly, the fact that the Respondent does not engage with certain misrepresentations does not entail its acceptance. The respondent reserves all its rights in this regard.

211 Claimant's Memorial on the Merits, 29 November 2024, ¶ 12 (emphasis added); [redacted]

212 [redacted]
Moreover, the article mentions numerous companies which, according to different sources, owed money to the SUNAT, including Lan Peru, Claro, Pluspetrol, Cerro Verde, Doe Run, Buenaventura and Barrick.

213 Claimant's Memorial on the Merits, 29 November 2024, ¶¶ 97-99, 103, 107.

of individuals in the political sphere are far from constituting evidence. Even more grave is to claim that Justices of the highest Court were coerced into their decision by the alleged undue influence of the Executive and Legislative branches, as this is what the Claimant is ultimately saying. If Scotiabank had any proof of this—which is what it claims in these proceedings—it should have started criminal proceedings. It has not and cannot, as it has no basis. The Arbitral Tribunal should not allow the Claimant to bring allegations of this caliber, discrediting Justices, in such a lax and casual manner.

169. As a preliminary matter, it is trite that we are in a society where we are continuously exposed to news that influence us, and the Justices are not exempted from it. However, the fact that information and opinions influence individuals—including judges—is not reproachable. What is reproachable is the undue influence,[214] which can come from any source, including both members of the State or private groups.[215] In the words of Professor Bustamante:

> [T]he independence of judges, or of the judiciary in general, is threatened when those engaged in state activities (civil servants, authorities, etc.) or those who belong to the private sphere (companies, unions, social groups, etc.) attempt to unduly pressure or influence judges or magistrates. Let us not forget that the purpose of the guarantee of independence is to ensure that judges and magistrates exercise their functions free from undue pressure or influence, subject only to the law, regardless of whether that power is of public or private origin. Judicial independence, in any case, is equally enforceable. It is well known, as the United Nations Special Rapporteur on the independence of judges and lawyers emphasizes, that undue influence may come not only from State sectors, but also "individuals or groups with significant economic advantages may seek to unduly influence judges to obtain favorable results". In general terms, history, once again, accredits that among the modes of such improper behavior are: corruption, in all its forms; attempts to influence the composition of the judiciary; threats, direct or indirect, express or implied, against judges or the justice system; training programs for judges paid for by companies or interest groups; attempts to generate, through various strategies, an environment more favorable to specific private interests, to the detriment of society as a whole, etc.[216]

170. Clearly, the threshold for undue influence is high and the expression of views or opinions cannot raise to the level of undue influence. That is particularly so, bearing in mind the crucial importance of the freedom of expression and speech recognized in the Peruvian Constitution.[217]

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214 Prof. Bustamante's Expert Report¶ 58.

215 Prof. Bustamante's Expert Report¶ 59.

216 Prof. Bustamante's Expert Report¶ 59.

217 Political Constitution of Peru, 1993 (amended as of 2023) (**Exhibit R-0059**), Article 2(4) ("*Every person has a right to freedom of information, opinion, expression, and dissemination of thought through spoken or written word, or images, by any means of social communication, without prior authorization, censorship, or any impediment, subject to the penalties established by the law. Crimes committed through books, the press, and other means of social communication are defined in the Criminal Code and are judged in the*

171. Additionally, and crucially, for a claim that a Justice has been unduly influenced to vote in a given way, the crime must be proved.[218] That is clearly not the case here where the Claimant is relying on exaggeration and innuendo.

172. Finally, as further developed below in this submission, the Peruvian legal system provides extensive and significant guarantees regarding the independence of the judges.

173. Having set out the real framework under which any claim regarding undue influence—and even more accusations of threats—need to be analyzed, the Respondent turns to specific examples of what the Claimant states constitute undue pressure and threats.

(i) The interviews provided by specific individuals of the administration do not constitute undue pressure

174. In its Memorial of the Merits, Scotiabank states that "[f]*ollowing the leak of the decision in Scotiabank Perú's favour, Peruvian media began covering Scotiabank Perú's amparo claim extensively.* […] *SUNAT and senior government officials spread legally irrelevant or incomplete information among media outlets to exert pressure on the Constitutional Court to rule against Scotiabank Perú, alleging that a ruling in Scotiabank Perú's favour would create fiscal problems for the Peruvian Government and an incentive for other companies to avoid paying taxes, among other matters*".[219]

175. In support of its assertion, the Claimant cites the press reports of two interviews given by Mr. Antenor Escalante, the Attorney General of the SUNAT, one dated 9 June 2017,[220] and another dated 16 June 2017.[221]

176. To clarify, the role of the Attorney General of the SUNAT is to represent and defend the interests of the SUNAT, including in legal proceedings.[222] The SUNAT's position on the various claims made

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ordinary jurisdiction. Any action that suspends or shuts down any organ of expression or prevents its free circulation constitutes a crime. The rights to inform and to express opinions include the right to establish media outlets").

218 Prof. Bustamante's Expert Report¶ 59.

219 Claimant's Memorial on the Merits, 29 November 2024, ¶ 93.

220 Audio of the interview of Antenor José Escalante, Exitosa, 9 June 2017 (**Exhibit C-0204**); Transcript of the interview of Antenor José Escalante, Exitosa, 9 June 2017 (**Exhibit C-0205**).

221 Video of the Interview of Antenor José Escalante, 16 June 2017 (**Exhibit C-0221**); Transcript of the interview of Antenor José Escalante, 16 June 2017 (**Exhibit C-0222**).

222 Article 29 of the Regulation for the Organization and Functions of the SUNAT, Resolution No. 000092-2023/SUNAT of 28 April 2023 (**Exhibit R-0285**) ("The Attorney General's Office is the body responsible for the representation and legal defense of the rights and interests of SUNAT, in accordance with the provisions of the Law of the National System of State Legal Defense, its regulatory, complementary, and amending rules").

by Scotiabank in the *amparo* proceedings is public, and was presented to the Constitutional Court for consideration. Pretending that the SUNAT's expression of its arguments in public constitutes undue influence is not serious.

177. In the first interview, which is only partially transcribed by the Claimant, Mr. Escalante explained that, according to the SUNAT, the case originated from non-genuine gold transactions by Banco Wiese in 1997 and 1998, that the SUNAT had prevail in the Supreme Court, but that Scotiabank had filed a separate constitutional *amparo* action to contest the interest charges, which the Constitutional Court appeared poised to grant. Mr. Escalante brought attention to the fact that the Constitutional Court had, in its own precedent (295/2012), differentiated between reasonable decision timeframe, and the legal timeframe, and noted that— should the alleged leaked decision be a final decision—the ruling would contrast with two previous decisions where the Constitutional Court refused similar requests, suggesting an inconsistency in its approach.[223] Mr. Escalante then stated that, assuming that the Court decided to not apply the interest, it would have a cascade effect on various other claims of companies pending before the Tribunal, and considered that the fiscal impact of this would be catastrophic. By recounting the genesis of the case, the evolution of the proceedings and commenting on how the Constitutional Court had decided in previous cases, Mr. Escalante can hardly be said to be unduly influencing the Constitutional Court or threatening it.

178. In the second interview, which the Claimant has also selectively quoted, Mr. Escalante explains the dispute with Scotiabank, then emphasizes—something that the Claimant selectively excludes—that there are also other companies like Telefónica or Cerro Verde (that is, both foreign and domestic companies) that have the same type of disputes.[224] During the interview, Escalante repeats the same ideas that he expressed during the interview given on 9 June 2017.

179. The Claimant also states that "[t]he *Minister of Economy and Finance, Alfredo Thorne, similarly asserted in a TV interview with Peruvian media company RPP that the Ministry was concerned and cryptically advised that SUNAT and the Ministry had been working arduously to address the matter*".[225]

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223 Audio of the interview of Antenor José Escalante, Exitosa, 9 June 2017 (**Exhibit C-0204**); Transcript of the interview of Antenor José Escalante, Exitosa, 9 June 2017 (**Exhibit C-0205**). Video of the Interview of Antenor José Escalante, 16 June 2017 (**Exhibit C-0221**) [00:03:56 – 00:06:02]; *See also* Oficio No. 178-2017/SUNAT-L0000, 13 June 2017: SUNAT, through its Deputy Public Prosecutor, requested the President of the Constitutional Court (Judge Miranda Canales), with reference to "Case No. 04082-2012-PA/TC" (Dte. Emilia Rosario del Rosario Medina de Baca) to obtain information on the rapporteur in the Medina de Baca case (**Exhibit C-0066**).

224 Video of the Interview of Antenor José Escalante, 16 June 2017 (**Exhibit C-0221**).

225 Claimant's Memorial on the Merits, 29 November 2024, ¶ 96.

180. As regards the interview with Mr. Arturo Thorne, the Claimant does not only misrepresent its contents but regretfully—and once again—resorts to innuendo to suggest wrongdoing. To set the record straight: the interview was given as Mr. Thorne had just handed his resignation as Minister and the main topic was precisely his resignation and the analysis of his performance as Minister, including his economic model and tax reforms.[226] The question on the potential decision of the Constitutional Court in the Scotiabank case was not an utterance of the Minister targeting Scotiabank, but a response to a question posed by Twitter to the interviewer.[227] Mr. Thorne expressed that it was concerning that several companies engage in contesting the debts in every single court and further explained the problems the SUNAT had in general collecting and how the International Monetary Fund had been working with the SUNAT to ensure proper collection.[228] In fact, Mr. Thorne's response when the interviewer asked him if Telefónica would follow if the Scotiabank decision was favorable to it, Mr. Thorne very elegantly stated that he did not want to personalize.[229] There was nothing cryptic about the words of the departing Minister, let alone any undue pressure.

181. Similarly distorted is the Claimant's assertion that, in a televised allocution by the President Vizcarra's in 2018, where he stated that "[w]*e have identified big corporations that owe the State amounts that represent more than 1% of GDP, much necessary income for the development of projects and public policies that benefit all Peruvians. To that respect, an ad hoc commission will be formed by representatives of the Ministry of Economy and the SUNAT, among others, to develop payment mechanisms, with the objective to make the collection of tax debt effective*", President Vizcarra's comments "*were an obvious reference to Scotiabank Perú*".[230]

182. Moreover, the Claimant's further assertion that President Vizcarra's comments "*were understood contemporaneously*" as "*an obvious reference to Scotiabank*" because " [i]*n reporting on the statement, the El Comercio newspaper confirmed that 'the President referred to the legal*

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226 Video of the interview with Alfredo Thorne (Minister of Economy and Finance), RPP, 21 June 2017 (**Exhibit C-0226**).

227 Video of the interview with Alfredo Thorne (Minister of Economy and Finance), RPP, 21 June 2017 (**Exhibit C-0226**) [01:18:28-01:19:40].

228 Video of the interview with Alfredo Thorne (Minister of Economy and Finance), RPP, 21 June 2017 (**Exhibit C-0226**) [01:19:40-01:20:18].

229 Claimant's Memorial on the Merits, 29 November 2024, ¶¶ 101- 102.

230 President's Televised Address to the Nation 4 June 2018 (**Exhibit C-0279**); Transcript of the Message to the Nation by the President of the Republic, Martín Vizcarra, 4 June 2018 (**Exhibit C-0280**); Transcript of the Message to the Nation by the President of the Republic, Martín Vizcarra, 4 June 2018 (**Exhibit C-0281**); "Sunat: A commission will be created to resolve disputes with large companies," El Comercio, 5 June 2018 (**Exhibit C-0283**). The Respondent notes that all of these exhibits reproduce the exact same message by President Vizcarra.

battles that Sunat (sic) is waging—against firms such as Scotiabank' and other foreign-owned entities"[231] as support for the alleged undue political pressure, holds not water.

183. Besides the fact that at no point did the President mention Scotiabank, whatever connections the press decides to make with one company, or another have no bearing and are not imputable to the President. The Claimant's level of distortion is regrettable.

184. Finally, the Claimant accuses the SUNAT of "*disseminating the statement*" from one interview of Mr. Escalante and the interview of the outgoing Minister, Mr. Thorne, widely by reposting these interviews on its social media pages.[232] The posted interviews correspond to the interview of 16 June 2017 of Mr. Escalante and the interview of the outgoing Minister Mr. Thorne, which were in the public domain. Publication can hardly be considered undue pressure.[233]

185. As regards the statements of Minister Francke in 2021,[234] it bears mentioning that his exhortation to various companies which owed money to the State was made in the context of the pandemic and the economic crisis,[235] and was part of a broader discussion held by Minister Franke after requesting information and analyzing the composition of the debt to the SUNAT and the challenges that the SUNAT was facing to collect unpaid debts.[236]

186. In sum, none of the three grossly distorted interviews support the Claimant's allegation that several "*SUNAT and senior government officials spread legally irrelevant or incomplete information among media outlets to exert pressure on the Constitutional Court*".[237]

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231 Claimant's Memorial on the Merits, 29 November 2024, ¶ 102.

232 Claimant's Memorial on the Merits, 29 November 2024, ¶ 96; SUNAT Tweet, 16 June 2017 (**Exhibit C-0220**); SUNAT Tweet 23 June 2017 (**Exhibit C-0232**).

233 Video of the interview with Alfredo Thorne (Minister of Economy and Finance), RPP, 21 June 2017 (**Exhibit C-0226**); Video of the Interview of Antenor José Escalante, 16 June 2017 (**Exhibit C-0221**).

234 "Francke to large tax debtors: we will use all legal means to ensure compliance", El Peruano, 9 August 2021 (**Exhibit C-0321**); "MEF will use all legal weapons to help SUNAT collect debts," Gestión, 10 August 2021 (**Exhibit C-0323**).

235 "Million-Dollar Tax Debts in Dispute", Ojo Público, 11 October 2021 (**Exhibit R-0330**). According to this investigative article, Francke held that "*the payment of these obligations will be one of the country's sources of revenue during the economic crisis*" and that this was a budget that "*the Government planned to allocate to the health sector in 2022*" and it would be exclusively destined "*to address the [COVID] health emergency*".

236 "Francke to large tax debtors: we will use all legal means to ensure compliance", El Peruano, 9 August 2021 (**Exhibit C-0321**).

237 Claimant's Memorial on the Merits, 29 November 2024, ¶ 93; SUNAT Tweet, 16 June 2017 (**Exhibit C-0220**); SUNAT Tweet 23 June 2017 (**Exhibit C-0232**).

(ii) The political opinions of a handful of Congressmen of minority parties can hardly raise as undue influence

187. In a similar vein, various of the Claimant's contentions[238] regarding the political statements and alleged threats of the five of the 130 members of the Congress in Peru,[239] namely Mr. Justiniano Apaza,[240] Ms. Yeni Vilcatoma,[241] Mr. Jorge Castro[242], Mr. Alberto Quintanilla[243] and Wilbert Rozas[244]—all of whom belong to minority parties in the Congress —[245] are distorted and, in any event, can hardly amount to undue influence. In fact, had the Claimant really considered that they did, it would have filed criminal complaints in this regard. The Claimant does not allege, let alone prove, that it did.

188. For instance, the reported opinion of Mr. Apaza on the legality of an eventual decision of the Constitutional Court pursuant to which the Tribunal will exonerate Scotiabank of the payment of the default interest,[246] it can be shared or not, in particular given that the Tribunal had in precedent opinions considered that the default interest in events of delay in the tax proceedings applied. An opinion on legality does not constitute undue pressure. Similarly, Mr. Castro's comments on the fiscal hole that not receiving payments for default interest, which the tax authorities had considered as due, would entail for the State is hardly a threat.[247]

189. On Congresswoman Vilcatoma, it must be noted that when Ms. Vilcatoma refers to filing a complaint for irregularities at the Constitutional Court she does not refer to Scotiabank but

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238 Claimant's Memorial on the Merits, 29 November 2024, ¶¶ 97-99.

239 *See* Political Constitution of Peru, 29 December 1993, (amended as of 2023) (**Exhibit R-0059**), Article 90 ("*The Legislative Power resides in the Congress of the Republic, which consists of a single chamber. The number of congress members is one hundred thirty* [130]").

240 "Scotiabank v. Sunat," La República, 16 June 2017 (**Exhibit C-0219**).

241 "Vilcatoma denounces corruption in the TC that affect the interests of the State" Exitosa 30 October 2017 (**Exhibit C-0266**); "Lawsuit will be filed if TC rules in favor of bank," Exitosa, 30 August 2017 (**Exhibit C-0254**).

242 "Possible TC ruling in favor of Scotiabank would cause a huge hole in the country" Exitosa 13 September 2017 (**Exhibit C-0257**).

243 "If TC rules in favor of Scotiabank, it would be a betrayal to the State," Exitosa, 26 September 2017 (**Exhibit C-0260**).

244 "If TC rules in favor of Scotiabank, it would be a betrayal to the State," Exitosa, 26 September 2017 (**Exhibit C-0260**).

245 Mr. Alberto Quintanilla (Frente Amplio), Wikipedia page (**Exhibit R-0357**), Jorge Castro (Frente Amplio), Wikipedia page (**Exhibit R-0358**), Yeni Vilcatoma (Fuerza Popular), Wikipedia page (**Exhibit R-0359**), and Justiniano Apaza (Frente Amplio) Wikipedia page (**Exhibit R-0360**),.

246 "Scotiabank v. Sunat," La República, 16 June 2017 (**Exhibit C-0219**).

247 "Possible TC ruling in favor of Scotiabank would cause a huge hole in the country," Exitosa, 13 September 2017 (**Exhibit C-0257**).

mentions the proceedings regarding the "*Antitransfuguismo* Law", a completely unrelated matter.[248]

190. As regards Ms. Marisa Glave, the Claimant itself acknowledges that in 2020, at the time Ms. Glave commented on the leaked of the alleged decision of the Constitutional Court in 2017, Ms. Glave was no longer a congressperson.[249]

191. Unfortunately, Scotiabank's litany of incendiary misrepresentations goes even further. Indeed, in its Memorial on the Merits the Claimant asserts: "[i]*t is clear that the Constitutional Court was aware of this political pressure. Indeed, the threats prompted Justice Espinosa-Saldaña to submit petitions to the IACHR in October 2017 expressing his concern about the Peruvian Government's interference in the Court's processes, and specifically to 'express concerns about what is already being announced in cases such as the Scotiabank case'".*[250]

(iii) The Hearing before the Inter American Court of Human Rights concerning undue pressures to the Constitutional Court concerns the infamous Front Case regarding extrajudicial executions and forced disappearances during Alberto Fujimori's Regime, not Scotiabank

192. To be clear, the Constitutional Court requested a hearing before the IACHR regarding a very specific case, with completely different legal and political dimensions: "*El Frontón*" case. The case concerned extrajudicial executions and forced disappearances during the Alberto Fujimori's Presidency in 1986, which resulted in two rulings from the IACHR holding Perú accountable.[251] Following the rulings of IACHR rulings, the Judiciary in Peru initiated the corresponding investigation, qualifying the acts as crimes against humanity. The Constitutional Court was seized in the matter through a writ of *habeas corpus*, ruling that the acts did not constitute crimes against humanity.[252]

193. It is the context of the *Frontón* case, that three members of the Constitutional Court, Justices Ramos, Ledesma and Espinosa-Saldaña addressed the IACHR. As the video of the hearing shows: (***i***) Justice Ledesma denounced that the Constitutional Court has suffered pressure from the Fujimorist majority in Congress. In particular, Justice Ledesma mentions that the mechanism of

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248 "Vilcatoma denounces corruption in the TC that affect the interests of the State," Exitosa 30 October 2017 (**Exhibit C-0266**). The "Antitransfuguismo" law was a congressional resolution (No. 007-2016-2017-CR) enacted in October 2016 to discourage political defections in Peru's unicameral Congress (**Exhibit R-0196**).

249 Claimant's Memorial on the Merits, 29 November 2024, ¶ 107.

250 Claimant's Memorial on the Merits, 29 November 2024, ¶ 100.

251 *Durand and Ugarte v. Peru*, Inter-American Courts of Human Rights, Judgment on the Merits, 16 August 2000 (**Exhibit RL-0097**).

252 Judgment of the Constitutional Court, File No. 01969-2011-PHC/TC, Habeas Corpus Petition, 14 June 2013 (**Exhibit R-0162**).

impeachment was being used by the Fujimorist majority as means to pressurize the Court,[253] Crucially at no point Justice Ledesma mentions Scotiabank.[254] (***ii***) Then, Justice Ramos shortly addressed the IACHR without ever mentioning Scotiabank.[255] (***iii***) Finally, Espinosa-Saldaña took the floor to address the *Frontón* case and expressed concern as regards pressures from the two majoritarian sectors of the Congress in that case.[256] Then, in a rather telegraphic and vague manner—as he is interrupted by the President of the Court—Justice Espinosa-Saldaña mentions preoccupations for what has been announced—which is not stated—in the cases of Scotiabank and *Perubar*.[257] From the context of the discussion Justice Espinosa-Saldaña is referring to the use of the launching of potential investigations into the conduct of the Justices.[258]

194. Importantly, in his allocution to the IACHR and referring to the *Frontón* case—Justice Espinosa-Saldaña underscores:

> Nobody here is saying that we are in a situation where there is a lack of institutionality, as was the case in Peru in the 90s. What we are detecting is a scenario where, firstly, there is a case discussing the compliance with two rulings by the Inter-American Court, promoted by the Commission, which are institutions that guarantee judicial independence, in an attempt to influence the actions of the judges.
>
> It is not true, as my dear friend—the prosecutor—has said, that nothing is happening. Here, in the dossier that is being handed over to you, there is a comment from the president of the subcommittee of constitutional accusations. The one that initiated the process who mentions attacks that are almost personal, directed at the Justices, stating that "no one has a crown" that "we are under investigation", and that "our position is at risk"; these are the same statements as those made by one of the Vice Presidents of the Board of Directors of Congress. These are the two political forces that, with the votes, add up to an absolute majority in Congress. If that is not a risk, if that is not a threat to judicial

253 Video of the Hearing of the Inter-American Court of Human Rights in the case of the Independence of the Constitutional Court of Peru, 24 October 2017 (**Exhibit C-0262**) [00:06:20-00:08:16]

254 Video of the Hearing of the Inter-American Court of Human Rights in the case of the Independence of the Constitutional Court of Peru, 24 October 2017 (**Exhibit C-0262**) [00:01:48-00:09:49].

255 Video of the Hearing of the Inter-American Court of Human Rights in the case of the Independence of the Constitutional Court of Peru, 24 October 2017 (**Exhibit C-0262**) [00:09:53-00:16:00].

256 Transcript of the Hearing of the Inter-American Court of Human Rights in the case of the Independence of the Constitutional Court of Peru, 24 October 2017 (**Exhibit C-0263**).

257 Note that in the Perubar case, the Constitutional Court had to rule on rights to tranquillity, environment and health of the neighbours of a locality after a local ordinance establishing restrictions to bars, karaoke places, and similar was challenged.

258 Video of the Hearing of the Inter-American Court of Human Rights in the case of the Independence of the Constitutional Court of Peru, 24 October 2017 (**Exhibit C-0262**) [00:50:02-00:51:28].

> independence, tell me, ladies and gentlemen, what is a threat to judicial independence?[259]

195. It bears mentioning that Justice Espinosa-Saldaña makes it absolutely clear that even in the *Frontón* case—where he says there are two majority forces in Congress—whatever influence exists does not impinge on the judiciary in a manner that puts access to the judicial system at stake.

196. In sum, it is incorrect to state, as Scotiabank does, that "*it* [was] *clear that the Constitutional Court* [was] *aware of <u>this</u>* [as in relation to Scotiabank] *political pressure*",[260] when only one Justice mentioned the case, in conjunction with the *Perubar* case, and referring to apparent—yet not expressed—statements regarding the investigation of the Justices.

197. Nonetheless, in an attempt to buttress its argument of the supposed gravity of the pressure, the Claimant relates the opinion of one of the left-wing congressmen who had commented on the alleged leaked decision in 2017, and who opined that the Scotiabank and *Perubar* cases were commercial, not constitutional matters,[261] and hence alien to a query before the IACHR. Independently of the terms in which Mr. Castro expressed himself—which are obviously colored by political views—it is patent that the views and opinions expressed by a handful of congress members of the minority parties could hardly be compared to the *Frontón* case, let alone constitute an actual threat.

e. The Peruvian Legal regime provides reinforced guarantees to ensure the independence of the judiciary, in general, and of the Constitutional Court, in particular

198. As the Republic of Peru has stated, assuming (*quod non*) that there are indeed opinions or views that are meant unduly to influence an adjudicator, the second step for a claim that a court has decided under such a degree of undue influence that it vitiates the Justices' vote is proving that it has actually done so. The threshold is particularly high given that the Peruvian legal system provides a myriad of safeguards to protect the independence of the judiciary.

199. In this regard, Article 201 of the Constitution provides that the jurisdictional functions are exercised by the Constitutional Court and the Judiciary[262] and Article 139 paragraph 2 enshrines

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259 Video of the Hearing of the Inter-American Court of Human Rights in the case of the Independence of the Constitutional Court of Peru, 24 October 2017 (**Exhibit C-0262**); Transcript of the Hearing of the Inter-American Court of Human Rights, 24 October 2017 (**Exhibit C-0263**).

260 Claimant's Memorial on the Merits, ¶ 100.

261 "Jorge Castro: 'Constitutional Court exceeds its functions", Exitosa, 30 October 2017 (**Exhibit C-0264**) ("*The Justice's attitude creates suspicions, as it is about deceiving the IACHR with an unfounded complaint, considering that it is about defending a commercial issue, far from the nature of the IACHR, which is focused on defending the economic rights of the country*").

262 Political Constitution of Peru, 1993 (amended as of 2023) (**Exhibit R-0059**) Article 201.

the independence of the judicial function.[263] In turn, Article 1 of the Organic Law of the Constitutional Court provides the Court's independence from other bodies, and sets forth that the Court is only "*subject to the Constitution and its Organic Law*".[264]

200. As further explained by Professor Bustamante, in order to guarantee the functional independence of the Court, which is the exercise of its functions free of undue pressure, both as regards internal and external undue influence, the Peruvian Constitution provides in Article 139, paragraph 2 that: "*No authority may* may assume jurisdiction over *cases pending before the jurisdictional body or interfere in the exercise of its functions. Nor may it render ineffective resolutions that have become res judicata, or halt ongoing proceedings, modify decisions or delay their execution* [...]".[265]

201. A crucial element of the independence of the Constitutional Court is its operational independence, which entails its budgetary autonomy. As stated by Professor Bustamante:

> On this point, the Third Final Provision of the Organic Law of the Constitutional Court states: "The draft annual budget of the Constitutional Court is submitted to the Executive Branch within the timeframe established by law. It is included in the Budget Bill; it is defended by the President of the Court before the full Congress. This means that it is the Constitutional Court that prepares its own budget, not the Executive Branch or the Congress of the Republic. The annual budget of the Constitutional Court is submitted to the Executive Branch, which will include it in the State Budget Bill presented each year to the Congress so that it may be studied, reviewed and approved by the Congress according to the rules and principles set forth in the Constitution and the laws (Article 77 and following of the Constitution).[266]

202. As regards the budget of the Constitutional Court, Professor Bustamente further explains in his Expert Report that:

> […] Article 24 of its Rules of Procedure provides: "The duties of the President [of the Court] are as follows: [...] 5) To submit to the Plenary, for its approval, the preliminary draft budget, to submit the respective project for its incorporation into the General Budget of the Republic and to support the project before the Congressional Budget Committee and before the Plenary thereof; 6) To establish

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263 Political Constitution of Peru, 1993 (amended as of 2023) (**Exhibit R-0059**) Article 139(2) ("*The independence in the exercise of judicial functions. No authority may assume jurisdiction over cases pending before the judicial body or interfere with the exercise of its functions. Nor can it annul rulings that have attained the status of res judicata, halt ongoing proceedings, modify decisions, or delay their execution. These provisions do not affect the right of pardon or the investigative authority of Congress, whose exercise, however, must not interfere with judicial proceedings or produce any judicial effect*.").

264 Organic Law of the Constitutional Court, Law No. 28301, 23 July 2004 (**Exhibit C-0118**) ("*The Constitutional Court is the supreme body for the interpretation and oversight of constitutionality. It is autonomous and independent from other constitutional bodies* […]").

265 Political Constitution of Peru, 1993 (amended as of 2023) (**Exhibit R-0059**), Article 139(2).

266 Prof. Bustamante's Expert Report, ¶ 64.

> the guidelines for the execution of the budget and to set the limits within which spending authorizations must be previously brought to the attention of the Plenary; 7) To oversee compliance with the guidelines for the execution of the budget and to be aware of its liquidation, formulated by the Director General of Administration [...]". And Article 28 of the same Regulations establishes: "In addition to the competencies established in Article 202º of the Political Constitution and in its Organic Law No. 28301, the following correspond to the Plenary of the Court: [...] 10) To approve the preliminary draft of the Work Plan and the budget of the Constitutional Court, submitted by the President [...]".[267]

203. In light of the above, the Claimant's allegation of alleged threats by the Ministry of Economy and Finance to interfere with the funding for the physical facilities of the Court [268] seems particularly farfetched. In fact, the construction or acquisition of new physical facilities to house the Constitutional Court was authorized pursuant to the Hundred and Third Final Supplementary Provision of Law No. 30114—(Law of the Budget of the Public Sector for the Fiscal Year 2014).[269] Accordingly, the Constitutional Court acquired in 2014 the "Banco de la Nación". The premises are located at Avenida Arequipa Nos. 2720-2740 and Avenida Javier Prados Oeste No. 101, and the Constitutional Courts made the last payment to the seller on 29 March 2026.[270]

204. In addition to the above guarantees regarding the functional and operational independence of the Court, the Constitution of Peru and the Organic Law of the Constitutional Court provide the Justices of the Constitutional Court with various privileges, rights and prerogatives.

205. As regards immunities, Article 201, paragraph 2 of the Constitution states: "*the members of the Constitutional Court enjoy the same immunity and the same prerogatives as the members of Congress*",[271] which means that the Justices of the Constitutional Court, in accordance with Article 93 of the Constitution: 1) "[..] *are not subject to imperative mandates*", 2) "[..] *are not liable before any authority or jurisdictional body for the opinions and votes they render in the exercise of their functions*", and 3) "*the Supreme Court of Justice will be competent for their prosecution for the commission of common crimes* [...] *during the exercise of their tenure*".[272]

206. In addition, Article 14 of the Organic Law of the Constitutional Court provides: "*The Justices of the Court are not subject to imperative mandates, nor do they receive instructions from any*

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267 Prof. Bustamante's Expert Report, ¶ 65.

268 *See* Claimant's Memorial on the Merits, 29 November 2024, ¶¶ 122, 226(a), 228, 291; CWS [redacted] ¶ 16; CWS [redacted] ¶ 30.

269 Hundred and Third Final Supplementary Provision of Law No. 30114 – (Law of the Budget of the Public Sector for the Fiscal Year 2014)

270 *See* Cancellation of Mortgage, 29 March 2016 (**Exhibit R-0356**).

271 Political Constitution of Peru, 1993 (amended as of 2023) (**Exhibit R-0059**) Article 201, paragraph 2.

272 Political Constitution of Peru, 1993 (amended as of 2023) (**Exhibit R-0059**) Article 93. As clarified by Professor Bustamente, prosecution for common crimes can only be conducted once the Justices' immunity is lifted. *See* Expert Report Bustamante ¶ 66.

authority. They enjoy inviolability. They are not liable for the votes or opinions issued in the exercise of their office. They also enjoy immunity. They may not be arrested or prosecuted without the authorization of the plenary of the Tribunal, except in flagrante delicto".[273]

207. As concluded by Professor Bustamente:

> With this arsenal of legal guarantees, it is inconceivable that the Justices of a Constitutional Court would succumb to the interference by power unless, of course, we are not dealing with a Rule of Law State (in which case it makes no sense to speak of a Constitution or a Constitutional Court) or the Justice gives up his most basic function: to control power so that it adheres to the Law, in which case this imputation would have to be proven (sufficiently, beyond reasonable doubt), precisely so as not to undermine the independence of the Justice, and with it, that of the Constitutional Court, with a simple hypothesis or conjecture.[274]

E. CONTRARY TO THE CLAIMANT'S BASELESS ACCUSATIONS, SCOTIABANK PERÚ'S *AMPARO* WAS DISMISSED IN ACCORDANCE WITH THE LAW

208. As will be further explained,[275] States should not be forced to explain the rationale of their judges in adjudication decisions to avoid international liability. This is not what the FTA is meant for, and the Respondent rejects in the strongest terms the Claimant's instrumentalization of an instrument of international law meant to foster and protect trade and investment to pursue an umpteenth appeal against the valid and binding decisions of the Peruvian courts, which have been reviewed and confirmed on various occasions within the Peruvian adjudication system. The Republic of Perú rejects this practice in the strongest terms, and trusts that the Tribunal will adequately resolve the issue in order to prevent the systemic effects that condoning this abusive recourse to investor-State arbitration could have.

209. This notwithstanding, given the Claimant's unabashed attempts to tarnish the reputation of the Constitutional Court and the Peruvian authorities, the Respondent is compelled to briefly address the points raised by the Claimant as regards the legality of the 2021 Constitutional Court Decision. As the Respondent shows, despite the Claimant's nearly slanderous allegations, the 2021 Constitutional Court Decision was issued in full compliance with Peruvian law, both as a matter of the applicable quorums (**1**), as well as on the merits (**2**).

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273 Organic Law of the Constitutional Court, Law No. 28301, 23 July 2004 (**Exhibit C-0118**).

274 Expert Report of Prof. Bustamante, ¶ 67.

275 *See* below Section IV.

1. The 2021 Constitutional Court Decision was validly issued as a matter of Peruvian Constitutional Law

210. Contrary to the Claimant's allegations, the 2021 Constitutional Court Decision fully complied with the requirements under Peruvian law for the issuance of a valid judgment. The Claimant's attempt to question the validity of the Constitutional Court Decision and the Court's ability to regulate its own procedures speaks volumes of its unfamiliarity with basic principles of the Peruvian constitutional system, such as the duty to administer justice and the Court's procedural autonomy, which the Respondent explains below.

(iv) The Constitutional Court has procedural autonomy to dictate the rules it deems necessary to fulfil its constitutional mandate to administer justice

211. The Claimant insists that "*Peruvian law requires a quorum of five judges to decide a case and four judges to vote in favour to issue a valid judgment in an amparo proceeding before the Constitutional Court*,"[276] yet it omits to basic tenets of the Peruvian constitutional legal order, namely: (***i***) the Court has the power and duty to administer justice, which is established in the Constitution, and (***ii***) as an independent entity within the Peruvian State, the Constitutional Court has procedural autonomy to dictate any rules required for it to fulfil its mandate.

212. According to Article 139(8) of the Peruvian Constitution, "[t]*he principles and rights of the jurisdictional function are:* [...] *The principle of not failing to administer justice due to a void or deficiency in the law.*"[277] This principle is reinforced by Article 5 of the Organic Law of the Constitutional Court, which provides that "*in no case shall the Constitutional Court fail to rule*."[278] Consequently, as explained by Prof. Bustamante, the Constitutional Court "*cannot fail to resolve conflicts of any kind that are submitted to its jurisdiction, even if it is faced with a normative vacuum (absence of a norm) or a defect in the applicable norm (indeterminacy or other normative imperfection)*."[279].

213. To this effect, as a matter of Peruvian law, the Constitutional Court has "*procedural autonomy*", conceived as the ability to "*shape the constitutional process autonomously, in the face of gaps or deficiencies in the law*", within the boundaries established by the Constitution.[280] Accordingly,

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276 Claimant's Memorial on the Merits, ¶ 150.

277 Political Constitution of Peru, 29 December 1993 (**Exhibit R-0002**), Article 139 The Constitutional mandate is supplemented by Article 5 of the Organic Law of the Constitutional Court (*see* Law No. 28301, Organic Law of the Constitutional Tribunal (July 1, 2004) (**Exhibit C-0118**)), which provides that "[i]*n no case shall the Constitutional Court fail to rule.*"

278 Law No. 28301, Organic Law of the Constitutional Tribunal, 1 July 2004 (**Exhibit C-0118**).

279 Prof. Bustamante's Expert Report, ¶ 32.

280 *See* Prof. Bustamante's Expert Report, ¶ 51.

the Constitutional Court has built-in authority and flexibility to adapt to unforeseen circumstances, provided it complies with its Constitutional mandate.

(v) Administrative Resolution No. 205-2021-P/TC was validly issued and effective

214. In its Memorial, the Claimant insinuates that Administrative Resolution No. 205-2021 was adopted *ad hoc* to prejudice Scotiabank Perú.[281] According to Scotiabank, Resolution No. 205-2021 "*purported to unilaterally lower the number of judges required to vote in favour of a decision for a judgment to be valid from four judges to three judges*".[282] Nothing could be farther from the truth.

215. As explained by the Respondent,[283] contrary to the Claimant's allegations, Resolution No. 205-2021 was unanimously adopted by the Constitutional Court to confront the unprecedented difficulties posed by the sudden passing of Justice Ramos mid-term, and to enable the Court to fulfil its constitutional mandate to administer justice. Through Administrative Resolution No. 205-2021-P/TC, the Constitutional Court unanimously resolved as follows:

> Article One.- Order the immediate implementation of the Plenary Agreement on the interpretation of the first paragraph of Article 118 of the New Constitutional Procedural Code. The agreement is as follows:
>
> Article 139, paragraph 8 of the Constitution establishes "the principle of not failing to administer justice due to a gap or deficiency in the law," which also applies to constitutional justice. In addition, Article 5 of the Organic Law of the Constitutional Court establishes, in the relevant section, that "in no case shall the Constitutional Court fail to rule."
>
> Therefore, in proceedings of Habeas Corpus, Amparo, Habeas Data, and Compliance, which, in accordance with the Regulatory Rules of the Constitutional Court, are heard by the Full Court, if it is not possible to obtain four concurring votes, the ruling shall be obtained by three concurring votes, in accordance with the first paragraph of Article 117 of the New Constitutional Procedural Code.[284]

216. Far from being "*unilateral and unlawful*", as the Claimant avers, Resolution No. 205-2021 was issued in full compliance with the Constitutional Court's powers and attributions to resolve the unprecedented challenges and delays posed by the sudden passing of Justice Ramos. The Claimant avers that "[a]*s Dr. Landa and Professor Neyra explain, the Court cannot unilaterally*

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281 *See* Claimant's Memorial on the Merits, ¶ 151, noting that Administrative Resolution No. 205-2021 was adopted "*just weeks after Scotiabank delivered its Notice of Intent and one day before Scotiabank and Perú's without prejudice meeting to discuss the claim*".

282 Claimant's Memorial on the Merits, ¶ 151.

283 *See* above, Section II.E.

284 Administrative Resolution No. 205-2021-P/TC of the Plenary Session of the Constitutional Court, 3 November 2021 (**Exhibit C-0333**).

alter its quorum requirements. A regulation such as an administrative resolution cannot contravene a law."[285] With respect, the Claimant's experts' reasoning is flawed. Administrative Resolution No. 205-2021 did not contravene a law, but rather it filled a gap in the existing legal framework. The duty to administer justice is provided in the Constitution and ratified in the same law that Landa says that the Court breached.

217. In this regard, as Prof. Bustamante explains, Resolution No. 205-2021 was adopted by the Constitutional Court in the legitimate exercise of its procedural autonomy, which enables the Court to dictate the rules and procedures governing its own activity.[286] Moreover, the adoption of Resolution No. 205-2021 by the Constitutional Court is a reasonable and proportionate measure, as it enables the Court to comply with its constitutional mandate of administering justice, even in cases where the law is silent or deficient.[287] In this regard, Resolution No. 205-2021 is the least burdensome alternative, as leaving a case unattended would breach the parties' right to an effective judicial protection and, as the Respondent further explains below, compelling a judge to cast a vote on a matter despite being physically or legally unable to do would run contrary to the fundamental rights of the magistrate, as well as of the parties.[288]

218. Equally misplaced is the Claimant's assertion that Resolution No. 205-2021 was specifically adopted to harm Scotiabank Perú.[289] Resolution No. 205-2021 is not case-specific. On the contrary, it expressly applies to any *habeas corpus*, *amparo*, *habeas data* and enforcement proceedings before the Court.[290] Indeed, Resolution No. 205-2021 was applied in two of the default interest cases submitted by the Claimant which were resolved by a majority of four votes,[291] including one case decided against a Peruvian national, Transporte Rodrigo Carranza S.A.[292] The Respondent has also conducted targeted searches and has located at least seven

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285 Claimant's Memorial on the Merits, ¶ 152.

286 *See* Prof. Bustamante's Expert Report, ¶ 147.

287 *See* Prof. Bustamante's Expert Report, ¶ 147.3.

288 *See* Prof. Bustamante's Expert Report, ¶ 147.5.

289 *See* Claimant's Memorial on the Merits, ¶ 151, noting that Administrative Resolution No. 205-2021 was adopted "*just weeks after Scotiabank delivered its Notice of Intent and one day before Scotiabank and Perú's without prejudice meeting to discuss the claim*".

290 Administrative Resolution No. 205-2021-P/TC of the Plenary Session of the Constitutional Court (November 3, 2021) (**Exhibit C-0333**), Article 1. *See* also Prof. Bustamante's Expert Report, ¶ 149.

291 *See* Annex 1, Tab 6 (October 2021—April 2022). *See* also Judgment of the Plenary Session of the Constitutional Court in Case No. 00754-2020-PA/TC, (Transportes Rodrigo Carranza) (**Exhibit C-0358**); Judgment of the Plenary Session of the Constitutional Court in Case 01851-2020-AA/TC, (Pesquera Inca) (**Exhibit C-0425**).

292 *See* Judgment of the Plenary Session of the Constitutional Court in Case No. 00754-2020-PA/TC, (Transportes Rodrigo Carranza) (**Exhibit C-0358**).

other cases resolved by a majority of four votes under Resolution No. 205-2021,[293] including a judgment adopted in respect of an unconstitutionality action[294] and an *habeas corpus* action (in this last case, the majority was composed of Justices Blume, Sardón and Ferrero).[295] Prof. Bustamante also refers to further examples of cases where the Constitutional Court applied Resolution No. 205-2021 to issue a valid judgment from the same period.[296]

219. It is unacceptable for the Claimant to baselessly tarnish the reputation of the Constitutional Court by claiming that Resolution No. 205-2021 was "*unilateral and unlawful*", and that "[t]*he timing of* [Resolution No. 205-2021] *was designed solely to facilitate the issuance of the 2021 Decision*"[297]— claims which only demonstrate the Claimant's sheer ignorance of the Peruvian Constitutional order and the lengths to which it is willing to go to have any purported evidence for its baseless claims of wrongdoing.

(vi) The 2021 Constitutional Court Decision was issued in accordance with the law, including Administrative Resolution No. 205-2021-P/TC

220. The Claimant's objections to the validity of the 2021 Constitutional Court Decision are two-pronged: the Claimant argues that the Decision was issued in breach of (***i***) the minimum session quorum requirement of five judges set out in Article 5 of the Organic Law of the Constitutional Court and Article 10 of the Rules of the Constitutional Court, and (ii) the voting quorum of four magistrates required by law.[298]

221. ***First***, as regards the session requirements applicable to the 2021 Constitutional Court Decision, the Respondent recalls that, when File No. 00222-2017-PA/TC was put to a vote, in November 2021, the Constitutional Court was composed of six Justices, two of whom had abstained from participating in the proceedings. This being the case, as Prof. Bustamante explains, only four Justices could validly participate as members of the Plenary as regards Scotiabank Perú's

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293 Plenary Judgments No. 01294-2021-PA/TC, 26 October 2021 (San Fernando SA) (**Exhibit R-0264)** ; 01627-2021-PHC/TC, 14 December 2021 (Pater Escobar Prado) (**Exhibit R-0268**); 01851-2020-PA/TC, 27 January 2022 (Pesquera Inca) (**Exhibit C-0425**); 02143-2021-PA/TC, 17 February 2022 (Edgard Leonel Alvitez Galvez) (**Exhibit R-0271**); 02445-2021-PA/TC, 9 November 2021 (Unión de Cervecerías) (**Exhibit R-0265**); 02503-2019-PC/TC, 30 November 2021 (Universidad San Ignacio de Loyoloa S.A.) (**Exhibit R-0267**); 02892-2021-AA, 10 March 2022 (Abarca Fernandez) (**Exhibit R-0273**).

294 Judgment 988/2021 of the Constitutional Court, File No. 02503-2019-PC/TC, 30 November 2021 (Universidad San Ignacio de Loyoloa S.A.) (**Exhibit R-0267**).

295 Plenary Judgment 964/2021 of the Constitutional Court, File No. 01627-2021-PHC/TC, 14 December 2021 (Pater Escobar Prado) (**Exhibit R-0268**).

296 *See* Prof. Bustamante's Expert Report, ¶ 150.

297 Claimant's Memorial on the Merits, ¶ 307.

298 Claimant's Memorial on the Merits, ¶ 307.

amparo: Justices Ledesma Narváez, Miranda Canales, Blume Fortini and Espinosa Saldaña.[299] As explained by Prof. Bustamante, the Constitutional Court does not have a system of substitute Justices with which it could have filled the vacancies left by the passing of Justice Ramos and the abstentions of Justices Ferrero and Sardón to continue functioning with six Justices.[300] As Prof. Bustamante explains, in this context, the five-magistrate quorum requirement would "*lack any logical and legal sense*".[301]

222. In this context, the Claimant's argument that the Court failed to comply with the five-judge session requirements in Article 5 of the Organic Law of the Constitutional Court and Article 10 of the Rules of the Constitutional Court fails. As explained, the Court has the power and duty to integrate *lacunae* in order to preserve its constitutional mandate of administering justice—which, as is evident, is superior to the legal provisions cited by the Claimant. This is not a "[f]*ailure to comply with* [a] *legal requirement*[]",[302] as the Claimant argues, but rather the opposite: an effort by the Court to comply with a constitutional requirement, by regulating an unforeseen situation.

223. [redacted]

299 *See* Prof. Bustamante's Expert Report, ¶ 268.

300 *See* Prof. Bustamante's Expert Report, ¶ 44.

301 Prof. Bustamante's Expert Report, ¶ 269.

302 Claimant's Memorial on the Merits, ¶ 44.

303 [redacted]

304 [redacted]

305 [redacted]

306 [redacted]

224. A further argument raised by the Claimant is that "*as noted in Dr. Neyra and Professor Landa's report, the Constitutional Court could have annulled the abstentions.*"[307] As Prof. Bustamante explains, the very meaning of the phrase "to abstain" implies that a Justice can no longer participate in any of the stages in the proceedings, including and particularly in any deliberations.[308] Professor Bustamante also cogently explains why the Claimant's suggestion is extremely problematic. The mere involvement of a Justice who had previously abstained from participating in the proceedings due to a conflict of interest could give rise to doubts about that Justice's impartiality, as well as about his or her ability to influence the other magistrates. This would be at odds with the fundamental right to an independent tribunal. Moreover, in the words of Prof. Bustamante, such an approach would "*turn the 'quorum' into a purely ritualistic requirement, without any purpose whatsoever. This is completely contrary to the principles of reasonableness and prohibition of arbitrariness that are inherent to the constitutional state.*"[309]

225. This rationale was expressly incorporated by the Constitutional Court into the 2021 Constitutional Court Decision, by means of its Order (*Auto*) of 20 November 2021, in respect of the Scotiabank Perú case. In its *Auto*, the Court explained as follows:

> This controversy has placed the Plenary in an exceptional situation not expressly provided for by the legislature, since only four magistrates have voted. However, it is also clear that, quite often procedural codes do not provide for all situations that may arise in the resolution of disputes. […] It is the duty of this Court to issue a final decision on disputes brought before it, especially when the reasons for not reaching the quorum required by Article 10 of the Rules of Procedure are due to circumstances in which the non-participation of the judges who abstained from participating was essential to guarantee the right to due process of both parties to the proceedings.[310]

226. Additionally, as Prof. Bustamante explains, the Justices of the Constitutional Court have a legal duty to abstain whenever there are "reasons for impediment", such as a conflict of interests. There are legal consequences derived from a failure to abstain when this is the proper course of action, including disciplinary and criminal sanctions. This prohibition is incompatible with the Claimant's suggestion that the abstentions should have been "annulled".[311]

227. [redacted]

307 Claimant's Memorial on the Merits, ¶ 159.

308 *See* Prof. Bustamante's Expert Report, ¶ 269.

309 Prof. Bustamante's Expert Report, ¶ 271.

310 Order of the Constitutional Court in Case No. 0222-2017-PA/TC (**Exhibit C-356**), ¶¶ 3-5.

311 *See* Prof. Bustamante's Expert Report, ¶ 270.

[redacted]

228. For the avoidance of any doubt, the Respondent notes that the Claimant's argument that Justices Ferrero and Sardon's abstentions could be "annulled" is an *ex post facto* occurrence, which it did not raise in any of the at least thirty-nine submissions that it made to the Constitutional Court asking for the urgent issuance for a final judgment.[313]

229. ***Second***, As explained by the Respondent, and as the Claimant is well aware, the adoption of a three-vote majority had been enabled by the Constitutional Court in its Administrative Resolution No. 205-2021-P/TC, and was a reasonable and fair measure to issue a decision in a case file that had been delayed, including because of the COVID-19 pandemic. It is at least inconsistent of the Claimant to complain of the very Resolution that enabled the issuance of the decision after Scotiabank Perú submitted at least thirty-nine written requests to the Court asking for a judgment to be issued "*with the least delays possible*".[314]

230. In any event, the Claimant's complaints that the five-Justice session quorum and the four-vote voting quorum were not met is merely formalistic; given that the 2021 Constitutional Court Decision was rendered by a majority of three votes, including that of the President, versus one dissenting vote, it is extremely unlikely that the participation of one or even two additional Justices would have had a material impact on the outcome of the case.

2. Scotiabank Perú's *amparo* was dismissed as a direct result of the Claimant's litigation strategy

231. Despite the Claimant's attempts to shift the burden of the unfavorable outcomes of its legal action in Peru onto the Constitutional Court and the Executive Branch and SUNAT officials which it baseless accuses of colluding against Scotiabank Perú's interests, a closer look at the reasons

312 Claimant's Memorial on the Merits, ¶ 157.

313 *See* Prof. Bustamante's Expert Report, ¶ 267.6.

314 *See* Prof. Bustamante's Expert Report, Section 3.6, ¶ 267.

for the dismissal of Scotiabank Perú's *amparo* and the status of the case law of the Constitutional Court at the time disproves any allegations of arbitrariness.

(i) Scotiabank Perú's *amparo* failed to meet the elements of urgency and exceptionality required for a constitutional appeal to proceed

232. As explained at length by Prof. Bustamante, as a matter of Peruvian law, the *amparo* procedure is an exceptional mechanism which is meant to resolve urgent claims in order to prevent irreparable harm to Constitutional rights, whenever there are no equally effective remedies available.[315] In this regard, the *amparo* is an exceptional and subsidiary mechanism designed to provide urgent relief when all else fails. Scotiabank Perú was well aware of this circumstance, as this had been the clear and consistent case law of the Constitutional Court at the time.[316]

233. As the Tribunal is well aware, the case of Scotiabank Perú related to default interest payments that had already been completed prior to the initiation of the *amparo* proceedings, at no financial risk for the bank.[317] Moreover, the decision by which Scotiabank Perú was ordered to make said payments could have been challenged before the contentious administrative justice, just like any other decision by the Peruvian authorities, exactly as Scotiabank Perú did for the IGV tax.[318] This is the essence of the 2021 Constitutional Court Decision, as shown in the fulsome motivation provided therein.

234. The 2021 Constitutional Court Decision first addresses Scotiabank Perú's failure to demonstrate the existence of a risk of irreparable harm, as follows:

> The criterion of irreparability must therefore be proven on a case-by-case basis. When it comes to matters involving sums of money, the Court notes that, in principle, this type of claim does not demonstrate a situation that could cause irreparable damage, especially when it could have been claimed through ordinary channels. However, this does not prevent that, in some particular cases, the existence of a debt may have a significant impact, but this must be related to a particular factor that causes the payment of a debt to significantly reduce the quality of life of the person or the very existence of a claimant entity. In this type of situation, the constitutional court is competent to resolve the respective claim due to disputes over possible irreparability.
>
> This is not the case of Scotiabank Perú S.A.A., an entity that, to date, continues to operate and has, in fact, paid the tax debt with the interest established by the administration.[319]

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315 *See* Prof. Bustamante's Expert Report, Section 4.2.

316 *See* Prof. Bustamante's Expert Report, ¶178.

317 *See* above Section II.A.3.

318 *See* above Section II.B.3.

319 Decision No. 919/2021 of the Constitutional Court, 9 November 2021 (**Exhibit R-0008**), ¶¶ 19-20.

235. In this regard, in his concurring opinion, Justice Espinosa Saldaña explained that this was a crucial difference between the case of Scotiabank Perú and previous *amparos* resolved in favor of the plaintiffs, while also recalling that the Court's Decision in *Medina de Baca* was not a binding precedent nor jurisprudential doctrine.[320]

236. The Court's Decision also explains why Scotiabank Perú's *amparo* was premature, as the question of the default interest over the tax debt is predicated on the very existence of the tax debt, which was being litigated by Scotiabank Perú in a separate proceeding. According to the Constitutional Court, that would have been the appropriate route to challenge the default interest imposed on the debt:

> In fact, it should also be mentioned that the appellant has prematurely resorted to [the] constitutional justice [system]. If, in the course of the administrative proceedings, the Tax Court's Decision No. 14935-5-2013 and the entire proceedings [are] declared null and void, this decision would also have affected the determination of interest. Therefore, constitutional justice cannot be invoked in matters such as tax interest, which could have been challenged in the ordinary courts.[321]

237. The above understanding was further emphasized by Justice Mirana Canales in his concurring vote, finding that "[i]*t is not possible to justify a constitutional ruling on the interests of a tax that is still being discussed before the administrative or ordinary judicial authority*."[322]

238. As the Constitutional Court notes, the circumstance that the payments were made "under protest" has no bearing on the fact that they did not entail urgent irreparable harm to Scotiabank Perú.[323] Prof. Bustamante agrees with this finding.[324]

239. Furthermore, and without prejudice to the above grounds on which Scotiabank Perú's *amparo* should be rejected, the Constitutional Court also questioned Scotiabank Perú's failure to use all the mechanisms provided under Peruvian law to question the delay of the SUNAT, including the right of complaint (*recurso de queja*) whenever a decision of the Tax Court is not issued within the legal terms, provided in Article 143 of the Tax Code.[325] According to the Court, Scotiabank Perú's failure to submit a complaint before the Tax Court was indicative of a lack of diligence incompatible with the suspension of default interest, and tantamount to an acceptance of the

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320 Decision No. 919/2021 of the Constitutional Court, 9 November 2021 (**Exhibit R-0008**), Vote of Justice Saldaña, ¶¶ 1-3.

321 Decision No. 919/2021 of the Constitutional Court, 9 November 2021 (**Exhibit R-0008**), ¶ 21.

322 Decision No. 919/2021 of the Constitutional Court, 9 November 2021 (**Exhibit R-0008**), Vote of Justice Miranda Canales, ¶ 9.

323 *See* Decision No. 919/2021 of the Constitutional Court, 9 November 2021 (**Exhibit R-0008**), ¶ 20.

324 *See* Prof. Bustamante's Expert Report, ¶ 184.

325 *See* Decision No. 919/2021 of the Constitutional Court, 9 November 2021 (**Exhibit R-0008**), ¶ 32.

delay.[326] Given Scotiabank Perú's failure to question the delay of the administrative authorities at the appropriate juncture, in Justice Ledesma's view, it was barred from challenging the delay of the Tax Court before the Constitutional Court.[327] As Prof. Bustamante explains in his report, this is a reasonable conclusion as a matter of Peruvian constitutional law.[328] This notwithstanding, as arises clearly from the Court's Decision, these "considerations" were not decisive for the outcome of the case, which in the Court's view failed on the grounds described above.[329] Therefore, as further explained below, the Claimant's complaints that this mere reasoning of the Court constituted discriminatory treatment are to no avail.[330]

240. In light of the above, while Scotiabank Perú and the Claimant may disagree with the Decision or be displeased by the unfavorable outcome of the proceedings, but there can be no question that the 2021 Constitutional Court Decision was issued in line with Peruvian law and is by no means arbitrary.

(ii) The Claimant was not entitled to pursue its claims in the contentious administrative route

241. The Claimant also mischaracterizes the main findings in *Elgo Ríos*, which it describes a follows:

> [In *Elgo Ríos*, t]he Constitutional Court also held that, where a constitutional *amparo* proceeding had been commenced before the *Elgo Ríos* decision was released (as in Scotiabank Perú's case), and it was determined that the Constitutional Court was not the correct forum, the litigant must be given the opportunity to pursue their claim in the correct forum (since they could not have reasonably known at the time of commencing their claim which forum to pursue it in).[331]

242. Based on this flawed interpretation of paragraphs 18 through 20 of *Elgo Ríos*, the Claimant avers that, in the 2021 Constitutional Court Decision, "[t]*he Court also took an additional, unforeseen step and barred Scotiabank Perú from submitting a contentious administrative action, contrary to Peruvian law and the binding* Elgo Ríos *precedent*."[332]

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326 *See* Decision No. 919/2021 of the Constitutional Court, 9 November 2021 (**Exhibit R-0008**), ¶ 34.

327 *See* Decision No. 919/2021 of the Constitutional Court, 9 November 2021 (**Exhibit R-0008**), ¶ 38.

328 *See* Prof. Bustamante's Expert Report, ¶ 218.

329 *See* Prof. Bustamante's Expert Report, ¶ 208.

330 *See* Claimant's Memorial on the Merits, ¶¶ 309-312.

331 Claimant's Memorial on the Merits, ¶ 70.

332 Claimant's Memorial on the Merits, ¶ 243.

243. The Claimant mischaracterizes the *Elgo Ríos* precedent. As explained by Prof. Bustamante,[333] and as clearly arises from the Court's ruling in the case, paragraphs 18 through 20 of *Elgo Ríos* explicitly do not constitute a binding precedent:

> 3. Establish as PRECEDENT, in accordance with Article VII of the Preliminary Title of the Constitutional Procedural Code, the rules contained in grounds 12 to 15 and 17 of this judgment.
>
> 4. Establish that, in order to facilitate the proceedings, in all amparo proceedings to which the rules contained in the precedence of the case, until the date of publication of this judgment, the respective period shall be enabled so that, through ordinary channels, the defendant may claim their rights, if they deem it appropriate, in accordance with grounds 18, 19, and 20 of this judgment.[334]

244. In this regard, the *Elgo Ríos* case did not create a right for plaintiffs.[335]

245. Furthermore, as Prof. Bustamante explains, a plaintiff must expressly request the reopening of the contentious administrative route— a failure by the plaintiff to timely submit such a request, such as in the case of Scotiabank Perú, bars said plaintiff from subsequently challenging the decision on this basis.[336] Moreover, this extraordinary possibility that *Elgo Ríos* provides to certain plaintiffs—which, as stated, is not a binding precedent—is not indefinite, and should not be construed as to allow a plaintiff to await a final decision to then resort to the contentious administrative route to give two bites of the apple, as Scotiabank Perú now says that it intended to do.[337] As with its other attempts to cast a shadow on the 2021 Constitutional Court Decision, the Claimant's reliance on *Elgo Ríos* fails.

3. The 2021 Constitutional Court Decision was fully in line with the predominant position within the Constitutional Court at the time it was issued

246. In its Memorial, the Claimant strategically focuses on a few hand-picked cases in which the Constitutional Court decided in favor of taxpayer plaintiffs and against the SUNAT to portray the 2021 Constitutional Court Decision as an arbitrary exception to the predominant case law. As the Respondent shows below, the opposite is true: at the time that the 2021 Constitutional Court Decision was issued, the Court's position was firmly against the admissibility of default interest *amparos*, such as Scotiabank Perú's. Contrary to the Claimant's allegations, any departure from

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333 *See* Prof. Bustamante's Expert Report, ¶ 112.

334 Judgment of the Plenary Session of the Constitutional Court in Case No. 02383-2013-PA/TC (Elgo Ríos) (**Exhibit C-0184**), ¶¶ 3-4.

335 *See* Prof. Bustamante's Expert Report, ¶ 112.1.

336 *See* Prof. Bustamante's Expert Report, ¶ 114.

337 *See* Prof. Bustamante's Expert Report, ¶ 112.2.

the previous case law of the Court is not a sign of arbitrariness, but rather an inevitable result of the feature of the Peruvian constitutional order, as explained below.

(iii) As a collegiate body tasked with the interpretation of an equivocal norm, the Constitutional Court is prone to variations in its jurisprudence

247. By design, the Constitutional Court has the flexibility to deviate from prior decisions to reflect the shifting balances between the opinions that the Justices may have on complex matters which may impact society as a whole.

248. In performing its role as maximum interpreter of the Constitution, the Constitutional Court is often confronted with vague or equivocal norms subject to multiple interpretations,[338] each with different political and ethical aspects.[339] As is evident, the outcome of this exercise varies enormously among Justices, each of whom has his or her own background and preferences.[340] As a collegiate body, the Constitutional Court must therefore opt for the most adequate interpretation of the Constitution at a given point in time, which will ultimately reflect the composition of the magistrates in the Tribunal. As summarized by Professor Bustamante:

> [T]he Constitutional Court is made up of several judges or magistrates, each of whom has their own moral, political, and legal views […]. This multiplicity of interpretative options must be clarified by the Constitutional Court itself, as the supreme interpreter of the Constitution, choosing from among them the interpretation that it considers most appropriate at the historical moment in which it is called upon to choose.
>
> As is logical and inevitable, one composition of judges of the Constitutional Court will choose, at a given historical moment (either by consensus or by majority), a certain interpretative option; and another composition of judges of the same Court may choose, at another given moment (also by consensus or by majority), a different interpretation. The history of the Peruvian Constitutional Court (as well as other courts in comparative law) gives a good account of this.[341]

249. In other words: as a matter of Peruvian Constitutional Law, it is not rare nor unlawful for the Constitutional Court to change its opinion on a legal question. On the contrary, as explained by Prof. Bustamante, there have been multiple instances in which the Constitutional Court has

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338 *See* Prof. Bustamante's Expert Report, ¶ 16 ("*interpreting the Constitution is a complex problem. The vast majority of constitutional norms are open norms, in the sense that they are not sufficiently determined, either because they are vague (their statements are imprecise) or ambiguous (they admit different meanings).*")

339 *See* Prof. Bustamante's Expert Report, ¶ 18 ("[t]*he problem becomes greater when we appreciate that constitutional norms have ethical and political dimensions, as well as legal ones, that affect their content.*").

340 *See* Prof. Bustamante's Expert Report, ¶ 18 ("For these reasons, "*the moral and political philosophy from which the interpreter of the Constitution starts, in addition to his or her legal conception, is decisive fo*r […] *the interpretation of the Constitution*.")

341 Prof. Bustamante's Expert Report, ¶¶ 19-20. *See* also, Prof. Sevillano's Expert Report, ¶ 208.

suddenly changed its position depending on its composition,[342] as can happen in various other jurisdictions. Accordingly, far from being unlawful, the Court's ability to reflect the changing views of its Magistrates is a key feature of the Peruvian Constitutional system, except regarding those matters expressly settled by the Court as valid binding constitutional precedent,[343]or which are binding constitutional practice.[344] In Prof. Bustamante's words:

> [T]he variation in the interpretation made by the Constitutional Court of some norm of the Constitution or, in relation to it, of some infra-constitutional norm, is not only not unusual in the practice of this high Court, but it is also an expression of the peculiarities of the constitutional norms, of the ethical, political and legal conceptions of the respective judges of the Constitutional Court (who with their votes shape the resolutions of this high Court) and, therefore, of the changes in the composition of the same Court that occur over time.[345]

250. Moreover, as Professor Bustamante explains, the qualified quorum of two thirds of the total components of Congress required to elect the Magistrates of the Constitutional Court necessitates agreements between the political parties represented in Congress. As a result, the composition of the Court generally reflects the political composition of the Peruvian Congress.[346]

251. As is the case of many other States, this is a policy choice made by the Peruvian Constitution and which underlies the Constitutional justice system. As the Respondent demonstrates below, this key feature of the Peruvian Constitutional order fully explains the 2021 Constitutional Court Decision, thus disproving the Claimant's baseless accusations of wrongdoing and discrimination.

(iv) Throughout 2021, when the Decision of the Constitutional Court was issued, the vast majority of default interest *amparos* were dismissed

252. In its Memorial, the Claimant seeks to convey that the question of the constitutionality of the default interest accrued over delays attributable to the Tax Administration was settled with *Medina de Baca*, in 2016, and that the 2021 Constitutional Court Decision was irregular and arbitrary in deciding differently. The Claimant's position is summarized in the following quote:

> In 2016, the Constitutional Court released its decision in *Medina de Baca*. This was the first in a series of decisions issued closely in time confirming that the application of accrued default interest during periods of delay caused by the State is unconstitutional. As set out in the expert report of Dr. Landa and Professor Neyra, the Constitutional Court issued multiple decisions on this issue between 2017 and 2021, consistently finding in favour of the taxpayer. In so

342 Prof. Bustamante's Expert Report, ¶ 21 (describing the changes in the Court's position on the appropriateness of diffuse judicial review by the Public Administration under Peruvian law).

343 Prof. Bustamante's Expert Report, ¶ 89.

344 Prof. Bustamante's Expert Report, ¶ 93.

345 Prof. Bustamante's Expert Report, ¶ 23.

346 *See* Prof. Bustamante's Expert Report, ¶ 37.

> doing, the Court developed a line of jurisprudential doctrine on this issue, in particular through the *Industrial Paramonga SAC v. SUNAT ("**Paramonga**"), Icatom v. SUNAT ("**Icatom**"), Jorge Francisco Baca Campodónico v. SUNAT ("**Baca Campodónico**")*, and *Telefónica del Perú S.A.A v. SUNAT ("**Telefónica**")* decisions.[347]

253. The Claimant's statements are demonstrably false, as a brief overview of the numbers for the relevant period shows. The table below sets out the cases decided for the SUNAT and for the plaintiff taxpayer for each year, largely based on the cases provided by the Claimant's experts:[348]

Year	Cases for the SUNAT	Cases for the taxpayer	Total cases
2017	**No relevant cases**		
2018	**1 (*Pluspetrol*)**[349]	**1 (*Icatom*)**	**2**
2019	**1**[350]	**No cases**	**1**
2020	**No cases**	**1 (*Paramonga*)**	**1**
2021	**44 (*Scotiabank Perú* + 43 others)**[351]	**2 (*Telefónica; Jorge Baca II*)**	**46**

254. As the table shows, it is simply not true that the question of the constitutionality of the availability of *amparo* proceedings to question debts for default interest on unpaid taxes was settled with *Medina de Baca* in 2016. On the contrary, over the 2017-2021 period, the position of the Court shifted, with the vast majority of cases concerning the availability of *amparo*

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347 Claimant's Memorial on the Merits, ¶ 141 (emphasis added).

348 The below analysis has been prepared on the basis of the default interest cases presented by the Claimant's experts (*see* Appendix 1 to the Respondent's Counter-Memorial; Expert Report of Profs. Landa and Neyra, Annex II).

349 The Claimant's experts omit mentioning one case decided in 2018, in favor of the SUNAT (*see* Judgment of the Constitutional Court, File No. 1843-2014-AA/TC, 6 March 2018 (Pluspetrol) (**Exhibit R-0314**).

350 The Claimant's experts omit mentioning one case decided in 2019, in favor of the SUNAT (*see* Judgment of the Constitutional Court, File No. 03744-2018-PA/TC, 4 November 2019 (Silver Lake) (**Exhibit R-0315**).

351 The Respondent notes that the Claimant's experts failed to account for many additional cases dismissed during this period. As noted by Prof. Bustamante in his Expert Report, seventy default interest *amparos* were dismissed between 2020 and 2021, with the cases for 2020 being minimal (*see* Prof. Bustamante's Expert Report, ¶ 373.

proceedings to challenge default interest debts over delays caused by the tax administration were decided in favor of the SUNAT, not the taxpayer plaintiff, as the Claimant represents.

255. Contrary to the Claimant's speculation and innuendo, these shifts in the position of the Court are not indicative of wrongdoing or coordinated efforts between the different branches of government to damage a specific investor. On the contrary, these variations result from the natural evolution of the internal dynamics of the Court.

256. Throughout the 2017-2022 period that the Claimant mistakenly oversimplifies, the Justices mostly voted in blocks, as follows: Justices Ledesma Narváez, Miranda Canales and Eloy Saldaña, on the one hand, tended to vote for the SUNAT,[352] while Justices Blume Fortini, Ferrero Costa and Sardón de Taboada tended to vote against the SUNAT and would generally favor the plaintiffs.[353] Justice Ramos' position was variable, meaning that his vote often defined the outcome of the case in one or other direction. Following Justice Ramos' sudden passing, the tendencies of the Court evolved, primarily depending on who was appointed as President, thus vested with a casting vote. This evolution, which is detailed in Annex 1 to the Respondent's Counter-Memorial, may be summarized as follows:

257. Before Justice Ramos' passing (*i.e.*, from May 2014 to September 2021), the outcomes of *amparo* proceedings concerning default interest on tax debts were mixed. During this period, the Constitutional Court issued the judgments on which the Claimant wants the Tribunal to focus, i.e. *Icatom*, *Paramonga*, *Telefónica* and *Jorge Baca Campodónico*. While the Claimant conveniently omits this fact, during this period, the Constitutional Court also issued at least five judgments deciding in favor of the SUNAT, owing in part to Justice Ledesma's appointment as President of the Constitutional Court in December 2019.

258. Following Justice Ramos' passing on 21 September 2021, until December 2021 the outcome of the default interest *amparos* changed drastically. As shown above, the default interest *amparos* submitted by the Claimant's experts show that a total of forty-five *amparos* were dismissed during this period, including the *amparo* submitted by Scotiabank Perú.[354] As Prof. Bustamante explains, this number was actually much larger, rising to seventy dismissals.[355] Unsurprisingly,

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352 Between 2017 and 2022, Justice Miranda Canales voted for the dismissal of default interest *amparos* on 59 occasions, Justice Ledesma Narváez on 62 occasions, and Justice Espinosa Saldaña on 59 occasions (*see* Annex 1 to the Respondent's Counter-Memorial).

353 Between 2017 and 2022, Justice Blume Fortini voted in favor of default interest *amparos* on 34 occasions, Justice Sardón de Taboada on 31 occasions, and Justice Ferrero Costa on 26 occasions (*see* Annex 1 to the Respondent's Counter-Memorial).

354 *See* Appendix 1 to the Respondent's Counter-Memorial; Expert Report of Profs. Landa and Neyra, Annex II.

355 *See* Prof. Bustamante's Expert Report, ¶ 373.

the Claimant makes no mention whatsoever of this overwhelming majority of cases with the same outcome as the case of Scotiabank Perú.

259. This tendency shifted in January 2022, with the appointment of Justice Ferrero Costa as President of the Court. With Justice Ferrero's casting vote, the Court again issued decisions in favor of *Interbank*, *Thyssenkrupp*, *Supermercados Peruanos*, *Mondelez* and *IBM*. During this period, the Court also dismissed an equal number of *amparos*, in the cases of *Interbank*, *IBANBIF*, *Citileasing*, *Cetco* and *Administradora Clínica Ricardo Plama*.[356]

260. Finally, in November 2022, the Court issued a binding precedent on the unconstitutionality of default interest accrued over delays attributable to the administration, in the *Maxco* case,[357] thus putting an end to the variations in the position of the Court on the matter. By issuing this binding precedent, the Court confirmed that there was no previous binding practice which would have prevented the varying outcomes described in the preceding paragraphs.

261. This is the full picture of the evolution of the relevant case law, which the Claimant conceals from the Tribunal in its reprehensible attempt to portray its subsidiary as a victim of prosecution and arbitrariness. By relying on the handful of cases decided in a manner convenient to the Claimant, the Claimant mischaracterizes the reasons behind the 2021 Constitutional Court and accuses the Constitutional Court of wrongdoing, with no evidence to support its grave allegations.

(v) None of the *amparo* cases on which the Claimant relies have the same factual and procedural background as the case of Scotiabank Perú

262. For the avoidance of any doubt, as the Respondent explains below, the *amparo* cases on which the Claimant relies in support of its allegations of arbitrariness do not further its case, as they are not applicable nor comparable to the case of Scotiabank Perú.

263. ***First***, none of the cases to which the Claimant refers in its attempt to portray the 2021 Constitutional Court Decision as an exceptional measure adopted to Scotiabank Perú's prejudice established a binding precedent to be subsequently followed by the Constitutional Court. As explained by Professor Bustamante, an express declaration from the Court is required to establish a binding precedent; absent such declaration, the Constitutional Court is at liberty to freely determine the resolution of a case as best represents the opinion of its Justices at a given time.[358] Indeed, the Claimant acknowledges that the binding precedent on the matter of the

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356 *See* Appendix 1 to the Respondent's Counter-Memorial, Tab 3. *See* also Prof. Bustamante's Expert Report,¶ 375.

357 As Prof. Bustamante explains, there are several issues with the form and substance of the *Maxco* judgment (*See* Prof. Bustamante's Expert Report, Section 5.2).

358 *See* Prof. Bustamante's Expert Report, ¶ 89.

constitutionality of default interest accrued over delays attributable to the SUNAT—albeit questionable—[359] was only established with the *Maxco* judgment, in February 2023.[360]

264. ***Second***, none of these cases have the same factual and procedural matrix as Scotiabank Perú's *amparo* which, to recall, combined two rare procedural choices: (***i***) the decision to pay the amounts owed to SUNAT before initiating its *amparo* which, to recall, is an exceptional proceeding designed to grant urgent relief to protect constitutional rights, and (***ii***) the pursuit of *amparo* proceedings in parallel with a contentious administrative action to question the IGV debt, which could ultimately render the *amparo* proceedings moot. While the Respondent refers to Prof. Bustamante's in-depth treatment of each of these cases, it outlines below the key distinguishing points:

265. *Medina de Baca:* the Constitutional Court expressly found that it did not intend to "*revive deceased proceedings or much less reward taxpayers who have ancient outstanding debts towards the SUNAT.*"[361] Accordingly, the effects of *Medina de Baca* were (***i***) limited to that specific case, and as such was solely binding towards the parties, and (***ii***) its reasoning could not be retroactively applied to collection proceedings that had been completed prior to the publication of the judgment.[362] Moreover, the Respondent notes that the *Medina de Baca* judgment was drafted by Justice Sardón, [redacted] (*see* Habeas Data complaint filed by SUNAT, 10 July 2017.[363] This was a fortunate coincidence for Scotiabank Perú, considering that (***i***) the *Medina de Baca* decision entailed a departure by the Constitutional Court from its previous case law on the matter, and (***ii***) Scotiabank Perú largely based its *amparo* claim on *Medina de Baca*, which it claimed resembled its own case, despite the obvious differences between both complaints.

266. *Icatom*: at the time that the *Icatom amparo* was ongoing, there was an ongoing coercive collection procedure against the plaintiff.[364] Accordingly, the Constitutional Court found that, in

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359 As Prof. Bustamante explains at length, there are several procedural and substantive deficiencies in the reasoning of the Court in *Maxo*. *See* Prof. Bustamante's Expert Report, Section 5.2.

360 Claimant's Memorial on the Merits, ¶¶ 164-165.

361 Judgment of the Plenary Session of the Constitutional Court in Case No. 04532-2013-PA/TC (Icatom) (**Exhibit C-0067**), cited in Prof. Bustamante's Expert Report, ¶ 323.

362 Prof. Bustamante's Expert Report, ¶ 310.

363 Resolution No. 3 of the Seventh Constitutional Court of the Superior Court of Justice of Lima (*First instance judgment*), File No. 11798-2017-0-801-JR-CI-07, 11 May 2018 (**Exhibit R-0225**); Resolution No. 13 of the Second Permanent Constitutional Chamber of the Superior Court of Justice of Lima (*Second instance judgment*), File No. 11798-2017-0-801-JR-CI-07, 21 June 2019 (**Exhibit R-0242**); SUNAT's request No. 49-2019-SUNAT/1L0000 to the President of the Constitutional Court, 28 February 2019 (**Exhibit R-0238**); Constitutional Court's reply No. 014-2019-P/TC to SUNAT's request to the President, 8 March 2019 (**Exhibit R-0239**).

364 Prof. Bustamante's Expert Report, ¶ 329.

the case of *Icatom*, there was a need for urgent relief.[365] To recall, this was one of the main grounds on the basis of which the Constitutional Court resolved to dismiss Scotiabank Perú's *amparo*, given Scotiabank Perú's failure to demonstrate that it required urgent relief, given that it had already paid its outstanding tax obligations in full several years before filing its *agravio* before the Constitutional Court. Moreover, the *Icatom* judgment recalled that the determination of the reasonable term within which an administrative proceeding should be concluded is a fact-specific analysis which depends, *inter alia*, on the complexity of the matter and the conduct of the tax administration.[366] For the avoidance of doubt, as noted by Prof. Bustamante, *Icatom* was not resolved as a binding precedent, which would have required an express statement from the Court in this regard.[367]

267. <u>*Paramonga*</u>: as explained by Professor Bustamante, in the case of *Paramonga*, the plaintiff had requested that the administrative acts imposing its tax debt be declared null and void, which Scotiabank Perú failed to do prior to submitting its *agravio* in File No. 00222-2017-PA/TC.[368] The *Paramonga* case also concerned matters that were not part of the legal discussion in the *amparo* initiated by *Scotiabank Perú*, including a request for suspension of the relevant statute of limitations.[369] As with *Icatom*, Prof. Bustamante notes that the *Paramonga* decision also contradicts the Constitutional Court's previous findings on the effects of the expiration of the legal term, which had been construed as only giving rise to the right to request that the relevant authority immediately render a decision.[370]

268. <u>*Telefónica*</u>: as opposed to Scotiabank Perú, Telefónica had not paid its debt, which remained outstanding and accruing interest as of the date of the *amparo*.[371] As a result, at the time that the Constitutional Court's judgment was issued, there was an ongoing coercive collection procedure against the plaintiff.[372] Moreover, as explained by Prof. Bustamante, in her dissenting opinion, Justice Ledesma cautioned that *Telefónica*'s case was one of abuse of rights, and that the ruling reached by the majority was at odds with the previous case law of the Constitutional Court on at least two points: (***i***) the exceptional and residual nature of the *amparo* proceedings,

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365 Prof. Bustamante's Expert Report, ¶ 321.

366 *See* Prof. Bustamante's Expert Report, ¶ 322. As Prof. Bustamante also explains, the Court's reasoning as regards the effects of the expiry of the reasonable term is also questionable. Given its procedural nature, the expiry of the "reasonable term" can only lead to a procedural outcome, namely: the authority's obligation to immediately resolve an issue (*see* Prof. Bustamante's Expert Report, ¶ 330)

367 *See* Prof. Bustamante's Expert Report, ¶ 324.

368 *See* Prof. Bustamante's Expert Report, ¶ 336.

369 *See* Prof. Bustamante's Expert Report, ¶ 336.

370 *See* Prof. Bustamante's Expert Report, ¶ 341.

371 *See* Prof. Bustamante's Export Report, ¶ 346.

372 *See* Prof. Bustamante's Expert Report, ¶ 348.

and (***ii***) the "reasonable term" in which the Administration could be expected to issue a decision, which the Court had previously decided did not necessarily coincide with the legal term, since it could vary *inter alia* based on the complexity of the matter (as explained above, for *Icatom*).[373]

269. *Jorge Baca Campodónico*: as with other cases, the differences between *Baca Campodónico* and Scotiabank Perú arise from the peculiar legal strategy adopted in the *amparo* initiated by Scotiabank Perú. Yet again, one of the key elements considered by the Constitutional Court to grant the extraordinary urgent relief sought in the *amparo* was the existence of ongoing coercive collection proceedings against Mr. Baca, with potentially catastrophic consequences for his estate.[374]

270. Based on the foregoing, rather than confirm the Claimant's position, the case law on which the Claimant relies confirms that, even had the composition of the Constitutional Court at the time that Scotiabank Perú's amparo been prone to admitting default interest *amparos*, Scotiabank Perú's flawed legal strategy would have still set it apart from those cases in which the Constitutional Court ruled in favor of the plaintiffs.

271.

III. THE TRIBUNAL LACKS JURISDICTION OVER THE PRESENT DISPUTE

272. The Respondent submits that the Tribunal should find that it lacks jurisdiction over the dispute. As explained by the Republic of Peru during the Rule 41 proceedings, the Claimant's claims regarding alleged breaches of the National Treatment standard under Chapter Eight regarding measures relating to financial institutions, such as Scotiabank Perú fall outside the Tribunal's jurisdiction (**A**). Moreover, by continuing domestic proceedings concerning the so-called "Tax Appeal", the Claimant has failed to comply with mandatory waiver requirement under the FTA, which cannot be retroactively cured (**B**).

A. THE CLAIMANT CANNOT COMMENCE AN ARBITRATION UNDER CHAPTER EIGHT OF THE FTA WITH RESPECT TO SCOTIABANK PERÚ, A FINANCIAL INSTITUTION UNDER THE TREATY

273. As Perú has argued doing the Rule 41 proceedings, as a financial institution, the Claimant cannot initiate an arbitration under Chapter Eight (Investment) FTA.[375]

274. The Respondent's argument is simple and is backed by the clear language of the Treaty. Article 802(3) FTA, which governs the relation between Chapter Eight, the regime applicable to Investment under the FTA, and other chapters of the Treaty, expressly excludes from Chapter

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373 *See* Prof. Bustamante's Expert Report, ¶ 351.

374 *See* Prof. Bustamante's Expert Report, ¶ 352.

375 *See* Respondent's Submission on Rule 41, Section IV.A; Respondent's Reply on Rule 41, Section IV.A.

Eight any claims regarding "*measures adopted or maintained by a Party to the extent that they are covered by Chapter Eleven (Financial Services)*".[376]

275. In relevant part, Article 1101(1) FTA defines the scope of application of Chapter Eleven as follows:

> **Article 1101: Scope and Coverage**
>
> This Chapter 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 Party's territory; and
> - cross-border trade in financial services.
>
> 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.[377]

276. Accordingly, under Article 1101, any claims regarding measures adopted by a Party that "relate to" (***i***) financial institutions of the other Party, (***ii***) investors of the other Party, and investments of such investors in financial institutions, or (***iii***) cross-border trade in financial services are not actionable under Chapter Eight, **unless** a specific substantive provision under Chapter Eight is expressly incorporated into Chapter Eleven.

277. Thus, for the Tribunal to determine whether the Claimant's outstanding claim for National Treatment is actionable in these arbitration proceedings, it must conduct a two-pronged analysis: (***i***) it must assess whether Scotiabank and Scotiabank Perú are "*financial institutions*" under the Treaty 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.

278. As regards the first prong of the test, Article 1118 FTA defines "*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*", and specifies that the term "*financial service*" includes "*any service of a financial nature*", including "*all banking and other financial services (excluding insurance)*".[378] As stated by Canada in its Non-Disputing Party Submission in *Fireman's Fund*, this "*self-definition*" of the category of financial institution is meant to provide each Contracting State with flexibility to determine the regulatory framework defining a financial institution as such in accordance with the State's

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

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

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

particular circumstances, objectives and priorities.[379] Thus, whether the Claimant is a financial institution is to be determined pursuant to Canadian law, while Peruvian law should apply as regards Scotiabank Perú.

279. The analysis is straightforward: it is uncontested that Scotiabank and Scotiabank Perú are financial institutions. Per its own words, the Claimant is "*a chartered bank incorporated under the laws of Canada*", while Scotiabank Perú "*is a Peruvian bank organized under the Peruvian Bank Act*" which "*provides general banking services in Peru*".[380] Accordingly, the Bank of Nova Scotia is listed as a Federally Regulated Financial Institution by the Office of the Superintendent of Financial Institutions of the Government of Canada.[381]

280. As regards Scotiabank Perú, it is listed by the Peruvian Superintendence of Banks and Insurance (*Superintendencia de Bancos y Seguros*) as a supervised Bank Entity.[382] Pursuant to the Peruvian General Law of the Financial and Insurance Systems, No. 26702, Bank Entities are those companies which main line of business consists of receiving deposits from the public and utilizing these amounts, as well as its own capital and other financing sources, to grant loans – this activity is further defined by the Law as "*financial intermediation*".[383]

281. Therefore, the requirements set forth under the Peru–Canada FTA for Scotiabank and Scotiabank Perú to qualify as financial institutions are undisputedly met in the present case. The Claimant has not argued to the contrary. Consequently, the Claimant cannot pursue in arbitration any claim in respect of measures adopted by Peru relating to Scotiabank Perú and/or Scotiabank, unless the specific provision of Chapter Eight on which the Claimant relies is expressly incorporated in Chapter Eleven. As explained by the Respondent in its Rule 41 Submission and Reply, this is not the case of Article 803 FTA, on which the Claimant relies to bring its outstanding claim against Perú.[384] Accordingly, the Tribunal should find that it lacks jurisdiction over the Claimant's claims.

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379 *See Fireman's Fund Insurance Company v. United Mexican States*, ICSID Case No. ARB(AF)/02/1, First Submission of Canada Pursuant to Article 1128 of the NAFTA, 27 February 2003 (**Exhibit RL-0004**), ¶ 21.

380 Request for Arbitration, ¶¶ 2, 18. *See* also Notice of Intent to Submit a Claim to Arbitration under the Canada-Peru FTA from the Bank of Nova Scotia to the Republic of Peru, 1 September 2021 (**Exhibit C-0021**), ¶ 5.

381 Office of the Superintendent of Financial Institutions of the Government of Canada, "Federally Regulated Financial Institutions", accessed on 22 June 2023 (**Exhibit R-0010**).

382 Official website of the Superintendencia de Banca, Seguros y AFP, "Empresas bancarias", accessed on 22 June 2023 (**Exhibit R-0012**).

383 General Law of the Financial and Insurance System and Organic Law of the Superintendence of Banking and Insurance, Law Nº 26702 of 6 December 1996 (**Exhibit R-0004**), Article 282, Appendix: Glossary.

384 *See* Respondent's Submission on Rule 41, ¶¶ 74-76; Respondent's Reply on Rule 41, ¶¶ 77-81.

282. Notwithstanding the clear language of the FTA, during the Rule 41 proceedings, the Claimant argued that its claims did not fall under Article 1101 FTA, given that "[t]*he focus* [of Article 1101] *is on the nature of the measure, not the nature of the investor*."[385] According to the Claimant, since the 2021 Constitutional Court Decision is a "*measure that could have affected any investor in any industry*",[386] Article 1101(1) does not apply.

283. As explained by the Respondent in its Reply, the Claimant's argument seeks to rewrite Article 1101(1), interpreted in accordance with its object and purpose:

284. ***First***, the language of Article 1101(1) is broad, and does not support the artificial distinction that the Claimant seeks to draw based on the nature of a measure. Article 1101(1) does not provide that it applies to "*regulatory measures*" or "*financial measures*", but only refers to "*measures*" without further qualification. To recall, the definition of "*measure*" under the Treaty is deliberately board, encompassing "*any law, regulation, procedure, requirement or practice*".[387] The Claimant's entire case hinges on the understanding that the definition of "*measure*" is broad enough to comprise a judicial decision, such as the 2021 Constitutional Court Decision. In fact, the Claimant has expressly acknowledged as much.[388]

285. Had the Contracting States intended to restrict the scope of Chapter Eleven to a certain type of measures specific to the financial services sector, such as measures imposing capital requirements or compliance obligations, they would have drafted Article 1101 accordingly. In fact, this is precisely what the Contracting States did elsewhere in Chapter Eleven. For instance, in Article 1103(2), the FTA provides that "[a] *Party may recognize <u>prudential measures</u> of a non-Party in the application of <u>measures</u> covered by this Chapter*."[389] "*Prudential measures*" under the Treaty are measures adopted for "*prudential reasons*", defined as "*the maintenance of the safety, soundness, integrity, or financial responsibility of individual financial institutions or cross-border financial service suppliers.*"[390] However, despite a readily available definition in the Treaty specific to measures relating to the financial sector, this was not the language the Contracting States used to define the scope of application of Chapter Eleven in Article 1101(1). Instead, they opted for a broader language that includes any measure, regardless of its nature.

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385 Claimant's Reply to Respondent's Submission on Rule 41, ¶ 62.

386 Claimant's Reply to Respondent's Submission on Rule 41, ¶ 62.

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

388 Claimant's Reply on Respondent's Submission on Rule 41, ¶ 89 ("*Peru is right that the term "measure" is broad and may encompass a range of acts from an administrative decision to a court decision and comprise measures taken by either the legislative, executive or judicial branches.*").

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

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

286. Similarly broad is the use made in Article 1101(1) of the propositional phrase "*relating to financial institutions*", which contrasts with more restrictive alternatives, such as "*concerning financial institutions*", "*regulating financial institutions*", or "*applicable to financial institutions*". Accordingly, and contrary to the Claimant's position, the Contracting State's choice of broad language should not be ignored.

287. ***Second***, the broad scope of Article 1101(1) is in line with its object and purpose, namely, to safeguard State decision-making as regards investments in the financial sector, given this sector's complexity, interconnectedness and importance to the economy as a whole.[391] The rationale behind a differentiated treatment of investments in financial institutions was espoused by Canada in its Non-Disputing Party Submission filed in *Fireman's Fund*, where Canada expressed that the financial services chapter of NAFTA "*establishes a separate or special regime for financial services*", given the crucial role that the sector plays in a State's economy.[392] In light of this, it is only reasonable that the Contracting States opted for clean-cut language that would avoid any grey areas arising from semantic ambiguities. In other words, the choice for broad, unambiguous language including "*any measure relating to financial institutions*" was meant to avoid the type of discussion that the Claimant pursues in these proceedings. The Tribunal should not engage in an interpretation exercise that the Contracting States sought to prevent.

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288. In light of the above, the Claimant cannot initiate an arbitration under the dispute settlement mechanism under Articles 819 and 820 FTA in respect of Peru's alleged breaches of the National Treatment standard under Article 803 FTA, and the Tribunal shall find that it lacks jurisdiction over the Claimant's outstanding claim.

B. THE CLAIMANT FAILED TO VALIDLY AND EFFECTIVELY WAIVE ITS RIGHT TO CONTINUE PROCEEDINGS BEFORE THE PERUVIAN COURTS PRIOR TO INITIATING THIS ARBITRATION

289. As the Respondent explained over the course of the Rule 41 proceedings,[393] even if the Tribunal were to find that the Claimant's claims are within the scope of Chapter Eight of the FTA (*quod non*), the Tribunal lacks jurisdiction over the present dispute since the waiver submitted by Scotiabank and Scotiabank Perú regarding proceedings before the Peruvian courts is ineffective and, therefore, a condition precedent for the Respondent's consent to this arbitration was not fulfilled in a timely manner.

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

392 *Fireman's Fund Insurance Company v. United Mexican States*, ICSID Case No. ARB(AF)/02/1, First Submission of Canada Pursuant to Article 1128 of the NAFTA, 27 February 2003 (**Exhibit RL-0004**), ¶¶ 5 6.

393 *See* Respondent's Submission on Rule 41, Section IV.D.1; Respondent's Reply on Rule 41, Section IV.E.

1. In accordance with the terms of the FTA, failure by the Claimant to provide a valid and effective waiver with its Request for Arbitration renders the Respondent's consent to arbitrate null and void

290. Article 823 FTA provides the conditions precedent for the submission of a claim to arbitration. Pursuant to Articles 823(1)(e) and 823(3)(e), this includes the requirement that investors waive their right to initiate or continue proceedings before domestic courts prior to the submission of its claims to arbitration:

> 1. A disputing investor may submit a claim to arbitration under Article 819 [or Article 820] only if: […]
>
> 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 [or Article 820], 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.[394]

291. In addition, Article 823(3) provides that the consent and waiver referred to in paragraph (e) shall be provided in written form, in line with Annex 823.1 of the Treaty, to be then "*delivered to the disputing Party and* […] *included in the submission of a claim to arbitration*."[395] Furthermore, pursuant to Article 823(6), "[f]*ailure to meet any of the conditions precedent provided for in paragraphs 1 through 4* [of Article 823] *shall nullify the consent* [to arbitration] *of the Parties given in Article 825.*"[396].

292. The unambiguous mandatory language of Article 823 ("*only if*"), read jointly with Article 823(6), leaves no doubt that a valid and effective waiver—understood as a formal waiver followed by consistent conduct from the investor—is indispensable for the tribunal to have jurisdiction over a claim brought under Articles 819 and 820 FTA. As clearly stated by Canada in its Non-Disputing Party Submission in *KBR v. Mexico*, with respect to Article 1122(1) NAFTA, which language is identical to that of Article 823(1)(e) and 823(2)(e) FTA:

> There is no consent to arbitration under Article 1122(1), and hence no jurisdiction for a NAFTA tribunal, unless a claimant complies with the conditions precedent to the submission of a claim to arbitration set out in Article 1121. This includes a requirement for the claimant to file a valid waiver with its notice of

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394 Peru-Canada Free Trade Agreement, 1 August 2009 (**Exhibit C-0001**), Articles 823(1)(e), 823(2)(e) (emphasis added).

395 Peru-Canada Free Trade Agreement, 1 August 2009 (**Exhibit C-0001**), Article 823(3).

396 Peru-Canada Free Trade Agreement, 1 August 2009 (**Exhibit C-0001**), Article 823(6) (emphasis added). *See* also Peru-Canada Free Trade Agreement, 1 August 2009 (**Exhibit C-0001**), Article 825.

> arbitration and act consistently with that waiver by abstaining from initiating or continuing domestic proceedings with respect to a measure alleged to breach the NAFTA. This has been the longstanding position of the NAFTA Parties.[397]

293. Indeed, Canada, the United States and Mexico concur,[398] as do several arbitral tribunals.[399] These principles are largely agreed between the Parties.[400]

294. It is corollary of a valid waiver as a condition precedent for consent, that its absence cannot be retroactively cured without the consent of the respondent State, as the NAFTA parties and arbitral tribunals have consistently found.[401] In the words of the *Railroad Development v. Guatemala* tribunal:

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397 *KBR, Inc. v. United Mexican States*, ICSID Case No. UNCT/14/1, Submission of the Government of Canada Pursuant to NAFTA Article 1128, 30 July 2014 (**Exhibit RL-0119**), ¶ 5.

398 *Waste Management, Inc. v. United Mexican States*, ICSID Case No. ARB(AF)/98/2, Submission of the Government of Canada pursuant to NAFTA Article 1128, 17 December 1999 (**Exhibit RL-0096**), ¶¶ 8, 11; *Detroit International Bridge Company v. Government of Canada*, PCA Case No. 2012-25, Submission of the United States of America Purusant to NAFTA Article 1128, 14 February 2014 (**Exhibit RL-0116**), ¶¶ 4-6; *Detroit International Bridge Company v. Government of Canada*, PCA Case No. 2012-25, Submission of Mexico Pursuant to NAFTA Article 1128 of NAFTA, 14 February 2014 (**Exhibit RL-0117**) ¶ 18; *KBR, Inc. v. United Mexican States*, ICSID Case No. UNCT/14/1, Submission of the United States of America Pursuant to NAFTA Article 1128, 30 July 2014 (**Exhibit RL-0120**),¶ 2 ("*As a condition precedent to submission of a claim to arbitration, a claimant must submit an effective waiver together with its Notice of Arbitration. Without an effective waiver, there is no consent of the NAFTA Party necessary for a tribunal to assume jurisdiction over the dispute.*") ; *Waste Management Inc. v. United Mexican States*, Submission of the Government of Canada Pursuant to NAFTA Article 1128, ¶ 10 ("*It is critical that the conditions precedent to submitting a claim to arbitration under Chapter Eleven be strictly observed*.")

399 *See Commerce Group Corp. and San Sebastian Gold Mines, Inc. v. Republic of El Salvador*, ICSID Case No. ARB/09/17, Award, 14 March 2011 (**Exhibit RL-0019**), ¶ 115 ("*the waiver is required as a condition to Respondent's consent to CAFTA.* […] *If the waiver is invalid, there is no consent. The Tribunal, therefore, does not have jurisdiction over the Parties*" *CAFTA dispute." "*); *Waste Management, Inc. v. United Mexican States*, ICSID Case No. ARB(AF)/98/2, Arbitral Award, 2 June 2000 (**Exhibit RL-0002**), ¶ 20 ("[a]*ny waiver, and by extension, that one which is now the subject of debate, implies a formal and material act on the part of the person tendering same*.")

400 *See* Claimant's Response to Respondent's Submission on Rule 41, Part Four, Section IV.A and Claimant's Rejoinder to the Respondent's Submission on Rule 41, Part Four, Section IV.A, where the Claimant does not dispute the principles laid out by Peru in its Rule 41 submissions.

401 *KBR, Inc. v. United Mexican States*, ICSID Case No. UNCT/14/1, Submission of the Government of Canada Pursuant to NAFTA Article 1128, 30 July 2014 (**Exhibit RL-0119**), ¶ 6; *Railroad Development Corporation (RDC) v. Republic of Guatemala*, ICSID Case No. ARB/07/23, Decision on Objection to Jurisdiction CAFTA Article 10.20.5, 17 November 2008 (**Exhibit RL-0108**), ¶61; *Waste Management, Inc. v. United Mexican States*, ICSID Case No. ARB(AF)/98/2, Arbitral Award, 2 June 2000 (**Exhibit RL-0002**), Part IV (finding that the tribunal lacked jurisdiction given the claimant's failure to comply with the waiver requirement in a timely manner); *KBR, Inc. v. United Mexican States*, Submission of the United States of America Pursuant to NAFTA Article 1128, 30 July 2014 (**Exhibit RL-0120**), ¶ 3 ("*although a tribunal may determine whether a waiver complies with the requirements of Article 1121, a tribunal itself cannot remedy an ineffective waiver.*") (unofficial translation); *Detroit International Bridge Company v. Government of Canada*, PCA Case No. 2012-25, Award on Jurisdiction, 2 April 2015 (**Exhibit RL-0024**), ¶ 321 ("*However, considering that Canada was already objecting to the Tribunal's jurisdiction in this arbitration at the time DIBC*

> This being a matter pertaining to the consent of the Respondent to this arbitration, the Tribunal has no jurisdiction without the agreement of the parties to grant the Claimant an opportunity to remedy its defective waiver. It is for the Respondent and not the Tribunal to waive a deficiency under Article 10.18 or to allow a defective waiver to be remedied […].[402]

295. Indeed, failure to timely comply with the waiver requirement in the Treaty led the first *Waste Management* tribunal to entirely dismiss the claimant's claims:

> [T]his Arbitral Tribunal is compelled to hold that it lacks jurisdiction to judge the issue in dispute now brought before it, owing to breach by the Claimant of one of the requisites laid down by NAFTA Article 1121(2)(b) and deemed essential in order to proceed with submission of a claim to arbitration, namely, waiver of the right to initiate or continue before any tribunal or court, dispute settlement proceedings with respect to the measures taken by the Respondent that are allegedly in breach of the NAFTA[.][403]

296. The same conclusion was reached by the NAFTA tribunals in *KBR v. Mexico*,[404] and in *Detroit International v. Canada*,[405] and by the CAFTA tribunal in *Commerce Group v. Ecuador*.[406]

297. This approach is consistent with the object and purpose of waiver requirements as the one in Articles 823(1)(e) and 823(2)(e) FTA. A different interpretation would entail a *carte blanche* for investors to circumvent the clear conditions for consent established by the Contracting States in the FTA. That is, it would allow investors to commence arbitral proceedings concurrently with domestic proceedings, and thereafter—when they fail in the domestic proceedings, as in the present case, or when they see that they stand better changes before the arbitral tribunal—

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submitted the Washington Second and Third Amended Complaints, and that Canada has maintained that objection, the Tribunal does not consider that the submission of such documents could retroactively validate several months of proceedings during which the Tribunal wholly lacked jurisdiction but had some kind of potential existence that might have been realized if it had acquired jurisdiction at some subsequent date. The lack of a valid waiver precluded the existence of a valid agreement between the disputing parties to arbitrate; and the lack of such an agreement deprived the Tribunal of the very basis of its existence.") (emphasis added).

402 *Railroad Development Corp (RDC) v. Republic of Guatemala*, ICSID Case No. ARB/07/23, Decision on Objection to Jurisdiction CAFTA Article 10.20.5, 17 November 2008 (**Exhibit RL-0108**), ¶ 61.

403 *Waste Management, Inc. v. United Mexican States*, ICSID Case No. ARB(AF)/98/2, Arbitral Award, 2 June 2000 (**Exhibit RL-0002**), Part IV.

404 *KBR, Inc. v. United Mexican States*, ICSID Case No. UNCT/14/1, Submission of the United States of America Pursuant to NAFTA Article 1128, 30 July 2014 (**Exhibit RL-0120**), ¶ 161 ("*For the reasons set forth above, the Tribunal rules as follows: The waivers of the Claimant and COMMISA do not comply with Article 1121 of NAFTA; therefore, the conditions for consent to arbitration by the Respondent under Article 1121 are not met, and the Claimant cannot initiate the proceedings at issue.*") (unofficial translation).

405 *Detroit International Bridge Company v. Government of Canada*, PCA Case No. 2012-25, Award on Jurisdiction, 2 April 2015 (**Exhibit RL-0024**), ¶ 336.

406 *Commerce Group Corp. and San Sebastian Gold Mines, Inc. v. Republic of El Salvador*, ICSID Case No. ARB/09/17, Award, 14 March 2011 (**Exhibit RL-0019**), ¶ 115.

pretend to "cure" an invalid waiver retroactively. This is precisely the type of abuse that the Contracting States sought to avoid by introducing the waiver requirement in the FTA, which has the object and purpose of "*ensur*[ing] *that the* [Contracting States] *would not have to defend against claims relating to government measures in multiple proceedings at the same time and from having to continue to defend against such claims after the NAFTA arbitration is concluded.*"[407] In this regard, as also stated by Canada, "[t]*he requirements of Article 1121 are not just technicalities—non-respect of these requirements, in particular a failure to provide a proper waiver, could result in real prejudice to the respondent that may have to incur additional expenses and efforts to defend itself in several concomitant proceedings related to the same measure.*"[408].

298. As regards the scope of the overlap between the arbitration and the ongoing domestic proceedings required to trigger the waiver requirements, tribunals have consistently found that identity between both claims and measures is not required.[409] In this regard, tribunals are called to interpret the phrase "*with respect to*" broadly, in accordance with its ordinary meaning and with the object and purpose of the provision.[410] This approach has been consistently followed by arbitral tribunals seized with waiver objections.

299. In *Waste Management*, the tribunal dismissed the claimant's argument that there was no overlap between the domestic proceedings that it was pursuing in Mexico through its Mexican subsidiary and the arbitration, given that the claims pursued in both proceedings arose from different sources of law.[411] According to the tribunal:

> For purposes of considering a waiver valid when that waiver is a condition precedent to the submission of a claim to arbitration, it is not imperative to know

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407 *KBR, Inc. v. United Mexican States*, ICSID Case No. UNCT/14/1, Submission of the Government of Canada Pursuant to NAFTA Article 1128, 30 July 2014 (**Exhibit RL-0119**), ¶ 9. *See* also *Waste Management, Inc. v. United Mexican States*, ICSID Case No. ARB(AF)/98/2, Submission of the Government of Canada pursuant to NAFTA Article 1128, 17 December 1999 (**Exhibit RL-0096**), ¶ 6 ("*The purpose of NAFTA Article 1121 is to avoid a multiplication of proceedings, forum shopping and double jeopardy*.")

408 *Waste Management, Inc. v. United Mexican States*, Submission of the Government of Canada pursuant to NAFTA Article 1128, 17 December 1999 (**Exhibit RL-0096**), ¶6 ("*The purpose of NAFTA Article 1121 is to avoid a multiplication of proceedings, forum shopping and double jeopardy.*")

409 *See* e.g. *KBR, Inc. v. United Mexican States*, ICSID Case No. UNCT/14/1, Award, 30 April 2015 (**Exhibit RL-0121**), ¶116 ("*The terms of Article 1121 do not suggest that a waiver is granted only with respect to proceedings whose subject matter is "identical" to the measures at issue in the NAFTA context. Rather, the measure(s) at issue in the parallel proceeding must fall within the subject matter of the NAFTA proceeding. A narrow approach based on a formal identity of the measures would not be consistent with the object and purpose of this specific provision.*") (unofficial translation).

410 *KBR, Inc. v. United Mexican States,* ICSID Case No. UNCT/14/1, Submission of the Government of Canada Pursuant to NAFTA Article 1128, 30 July 2014 (**Exhibit RL-0119**), ¶¶ 8-9.

411 *See Waste Management, Inc. v. United Mexican States*, ICSID Case No. ARB(AF)/98/2, Arbitral Award, 2 June 2000 (**Exhibit RL-0002**), ¶ 27.

> the merits of the question submitted for arbitration, but to have proof that the actions brought before domestic courts or tribunals directly affect the arbitration in that their object consists of measures also alleged in the present arbitral proceedings to be breaches of the NAFTA. […]
>
> In effect, it is possible to consider that proceedings instituted in a national forum may exist which do not relate to those measures alleged to be in violation of the NAFTA by a member state of the NAFTA, in which case it would be feasible that such proceedings could coexist simultaneously with an arbitration proceeding under the NAFTA. However, when both legal actions have a legal basis derived from the same measures, they can no longer continue simultaneously in light of the imminent risk that the Claimant may obtain the double benefit in its claim for damages.
>
> This is precisely what NAFTA Article 1121 seeks to avoid.[412]

300. Similarly, in *Commerce Group*, the tribunal dismissed the claimant's attempt to differentiate the domestic challenge filed against the revocation of certain environmental permits from the arbitration, based on the argument that the arbitration did not concern said revocation, but rather a "de facto *mining ban policy*" in breach of El Salvador's obligations under DR-CAFTA. The tribunal stated that it "*view*[ed] *Claimants' claims regarding the de facto mining ban policy as part and parcel of their claim regarding the revocation of the environmental permits*."[413] Consequently, the tribunal concluded that it lacked jurisdiction, since the claimant had failed to show that both proceedings were "s*eparate and distinct*".[414] Hence, the claimant had not validly waived its right to continue proceedings before the local courts.[415]

301. In turn, the tribunal in *KBR v. Mexico* cautioned against the adoption of an "*exceedingly formalistic approach to the interpretation of Article 1121*", arguing for an interpretation in line with the purpose of the provision, which is "*to prevent conflicting results, a waste of resources, and double compensation*."[416]

302. In the case of *Detroit International v. Canada*, after analyzing the request for relief in the domestic proceedings initiated by the claimant before the D.C. courts, the tribunal found that

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412 *Waste Management, Inc. v. United Mexican States*, ICSID Case No. ARB(AF)/98/2, Arbitral Award, 2 June 2000 (**Exhibit RL-0002**), ¶ 27(b) (emphasis added).

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

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

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

416 *See* e.g. *KBR, Inc. v. United Mexican States*, ICSID Case No. UNCT/14/1, Award, 30 April 2015 (**Exhibit RL-0121**), ¶ 124 (unofficial translation).

the claimant's claim before the D.C. courts "*cover the same grounds that the 'measures' put in issue*" in the arbitration.[417]

303. As the Respondent demonstrates below, by failing to provide a proper waiver at the outset of the arbitration proceedings, the Claimant fails to comply with a mandatory condition precedent to the Respondent's consent to arbitration. As a result, the Tribunal was never vested with jurisdiction over the present dispute.

2. The Claimant's continued pursuit of domestic proceedings comprising the default interest debt that the Claimant seeks to recover in this arbitration breached the mandatory waiver requirement in the FTA

304. By choosing to continue to pursue domestic proceedings, which could have resulted in questions before this tribunal becoming moot and potentially leading to the recovery of the same amounts requested in the arbitration after the submission of its purported letters of waiver in these proceedings, the Claimant failed to comply with the mandatory waiver requirement in Articles 823(1)(e) and 823(2)(e) FTA.

305. Together with its Request for Arbitration, the Claimant submitted letters of waiver for itself and on behalf of Scotiabank Perú paying lip service to the waiver requirement set forth Articles 823(1)(e) and 823(2)(e) FTA.[418] This notwithstanding, in the same Request for Arbitration, the Claimant acknowledged the existence of pending proceedings before the Constitutional Court, namely regarding the imposition of the IGV debt in the SUNAT 2011 Decision, as upheld by the Tax Court in its Decision of 2013, which the Claimant referred to as the "Tax Appeal". In the Claimant's own words:

> On November 21, 2013, Scotiabank Perú filed a contentious administrative action against the resolution of the Tax Court challenging the imposition of the value added tax. This is the Tax Appeal, defined above. This proceeding is ongoing as of the date of this Request for Arbitration.[419]

306. The object of this "Tax Appeal" was to obtain the annulment of the 2013 Tax Court Decision in its totality, to reopen the administrative review proceedings in which Scotiabank Perú questioned the legality of the imposition of the Tax Debt.[420] In the Claimant's words, the "Tax

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417 *Detroit International Bridge Company v. Government of Canada*, PCA Case No. 2012-25, Award on Jurisdiction, 2 April 2015 (**Exhibit RL-0024**), ¶ 310.

418 *See* Request for Arbitration, ¶ 75(vi); Consent to Arbitration and Waiver of Scotiabank, 31 October 2022 (**Exhibit C-0032**); Consent to Arbitration and Waiver of Scotiabank Perú S.A., 20 October 2022 (**Exhibit C-0044**).

419 Request for Arbitration, ¶ 32(ii). *See* also Request for Arbitration, ¶ 76(vi).

420 Scotiabank's Contentious Administrative Action against the 2013 Resolution of the Tax Court (Tax Appeal), 21 November 2013 (**Exhibit R-0167**).

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*."[421]

307. After obtaining an unfavorable outcome in the contentious-administrative proceedings and subsequent "*amparo*" proceedings, on 15 August 2022, Scotiabank Perú filed a constitutional appeal before the Constitutional Court, which remained pending as of the date of the Request for Arbitration.[422] On 31 May 2024, Scotiabank Perú was notified of the judgment of the Constitutional Court in the Tax Appeal, by which its claims were, once again, dismissed.[423]

308. As argued by Perú during the Rule 41 proceedings,[424] despite the Claimant's great efforts to portray the "Tax Appeal" and the so-called "Default Interest Appeal" resulting in the 2021 Constitutional Court Decision as two separate courses of action,[425] these proceedings are far from being "*separate and distinct*". On the contrary, the three proceedings (*i.e.*, the so-called "Default Interest Appeal", the "Tax Appeal" and this arbitration) (***i***) arise from the Claimant's challenges to the very same SUNAT 2011 Decision, which was upheld by the Tax Court in 2013; (***ii***) relate to a unitary tax debt, including the value added tax and the default interest owed by Scotiabank Perú.

309. ***First***, to recall, Scotiabank Perú initiated both the "Default Interest Appeal" and the "Tax Appeal" on the basis of the same decision, *i.e.*, the Decision of the Tax Court of 2013 by which it affirmed the SUNAT 2011 Decision confirming Scotiabank Perú's tax debt for the fraudulent gold purchase transactions reported by Banco Wiese. This fact is uncontested and expressly acknowledged by the Claimant in its Request for Arbitration.[426] In fact, the 2021 Constitutional Court Decision cites

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421 Request for Arbitration, fn. 3.

422 Request for Arbitration, fn. 3. The proceedings initiated before the Constitutional Court have had further developments as from the date of the Claimant's Request for Arbitration. Namely, on 25 October 2022, the First Constitutional Chamber of Lima allowed the appeal filed by Scotiabank Perú and referred the file to the Constitutional Court. On 1 December 2022, the file was officially received by the Constitutional Court, as file number 5178-2022-AA. Subsequently, the hearing was held on 1 June 2023. Currently, only the final decision on the file is pending (*see*, Case Information Sheet for File No. 5178-2022-AA, Constitutional Court, 20 June 2023 (**Exhibit R-0013**); Case Details for File No. 5178-2022-AA, Constitutional Court, 20 June 2023 (**Exhibit R-0014**)).

423 *See* Claimant's Memorial on the Merits, ¶171; *see* also Plenary Judgement 158/2022 of the Constitutional Court, File No. 05178-2022-PA/TC, 16 April 2024 (**Exhibit C-0396**).

424 See, Hearing Transcript of the Rule 41 Pleadings, p. 40 l.11 to p.50 l.12

425 *See* e.g. Request for Arbitration, ¶ 6, describing the "Tax Appeal" and the "Default Interest Appeal as "*two separate legal proceedings*".

426 Claimant's Memorial on the Merits, ¶ 53 ("*Following the Tax Court's decision on November 11, 2013, Scotiabank Perú commenced two separate judicial proceedings: (i) On November 15, 2013, Scotiabank Perú filed an application for amparo before the Peruvian Constitutional judicial courts* […] *(ii) On November*

to the Tax Court 2013 Decision as the genesis of the proceedings.[427] Thus, despite the Claimant's attempt artificially to segregate the two courses of action, they both originated from the very same measure adopted by the Peruvian government: the 2013 Decision of the Tax Court confirming the 1999 Tax Debt owed by Scotiabank Perú.

310. ***Second***, by its very nature, the payment of interest is an ancillary obligation, which accrues on an outstanding debt.[428] Article 33 of the Peruvian Tax Code provides in this regard that "[a]*ny amount of tax unpaid within the terms indicated in Article 29 shall accrue an interest equivalent to the Default Interest Rate*."[429] Further, the Peruvian Tax Code provides that a tax debt is a unitary sum composed by the tax obligation *stricto sensu*, plus the corresponding fines and interest.[430] Therefore, under Peruvian law, any liability for default interest is "*part and parcel*" of the same debt as the tax obligation itself, and is "*dependent on the existence or inexistence of an outstanding tax obligation*".[431] In fact, the SUNAT Payment Order comprised both the IGV Liability and the default interest accrued, and the Tax Payments made by Scotiabank Perú between December 2013 and February 2014 covered the full amount of the tax debt including IGV and interest, without distinction.[432]

311. As a corollary of the above, had Scotiabank Perú prevailed in the "Tax Appeal", its payments to the SUNAT could have been reimbursed, including the amounts directly arising from the Value Added Tax and any amounts paid as Default Interest thereon, which the Claimant seeks to recover in this arbitration with interest.[433] This was acknowledged by the Claimant in the context of the Rule 41 proceedings.[434] In the words of Prof. Bustamante, this circumstance renders the connection between both proceedings "evident":

21, 2013, Scotiabank Perú filed a contentious administrative action against the resolution of the Tax Court challenging the imposition of the value added tax.").

427 *See* Decision No. 919/2021 of the Peruvian Constitutional Court, 20 November 2021 (**Exhibit R-0008**), p. 2; *See* also, Claimant's Memorial on the Merits, ¶ 53.

428 *See* Prof. Sevillano*'s* Expert Report, ¶ 151.

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

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

431 Prof. Sevillano's Expert Report, ¶ 166.

432 *See above*, Section IV(B).

433 *See* Claimant's Memorial on the Merits, ¶ 342.

434 *See* Claimant's Response to Respondent's Submission on Rule 41, fn. 172 ("*If Scotiabank Perú is successful before the Constitutional Court, there are multiple possibilities. The Supreme Court **may** be asked to issue a new decision, and that new decision **may** or may not be favourable to Scotiabank Perú. Even if favourable to Scotiabank Perú, the Court **may** not order the repayment of the sums but may ask SUNAT to issue its decision again. That again **may** or may not be favourable to Scotiabank Perú.*"), and ¶ 153 ("*the damages*

> In the present case, the connection between Scotiabank's *amparo* claim and its administrative action is not only recognized in the [Memorial on the Merits], but it is also evident: if Scotiabank's administrative claim had been upheld, the determination of its tax obligations disputed therein would have been rendered ineffective and, consequently, the interest it challenged in its amparo claim would not have accrued.[435]

312. Prof. Bustamante also draws this conclusion from the overlap in the request for relief in Scotiabank's complaint in the Default Interest Appeal and the SUNAT Tax Determination Resolutions Nos. 012-03-0000408 and 012-03-0000409, which were the object of the 2013 Tax Court Decision impugned by Scotiabank Perú in the so-called "Tax Appeal". As Prof. Bustamante explains, at least two items of Scotiabank Perú's prayer for relief in the Default Interest Appeal directly concern the SUNAT Tax Determination Resolutions Nos. 012-03-0000408 and 012-03-0000409, thus confirming the connection between both proceedings.[436]

313. As Prof. Bustamante further notes, the connection between both appeals is such that the claims raised by Scotiabank Perú in the contentious administrative proceedings (i.e., as regards the alleged inexistence of the tax debt) concern the very premises of the legal questions raised in the *amparo* proceedings concerning the default interest amounts, and logically precede the determinations that the Constitutional Court was asked to reach in the *amparo*.[437]

314. The inter-connectedness between the "Tax Appeal" and the "Default Interest Appeal" was one of the reasons leading the Constitutional Court to dismiss Scotiabank Perú's amparo. As expressed by Justice Miranda Canales in his concurring opinion to the Constitutional Court 2021 Decision concerning the so-called "Default Interest Appeal":

> [A]rticle 28 of the [Tax] Code provides that the tax debt is composed by the tax, the fines and interest, stating that this is the default interest in cases of untimely payment and the application of fines. In this sense, the Constitutional Court has considered that default interest is applied due to the failure to timely comply with a tax obligation […], in this line it is possible to note their ancillary nature, since they originate provided there exists an obligation for the payment of taxes that is outstanding and overdue. For this reason, [interest] is treated as a component of the tax debt, finding its justification in its relationship with the tax obligation.
>
> 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

sought in this [arbitration] *theoretically overlap with the amounts that may be recovered in the Tax Appeal*").

435 Prof. Bustamante's Expert Report, ¶ 154.

436 *See* Prof. Bustamante's Expert Report, ¶¶ 169-170.

437 *See* Prof. Bustamante's Expert Report, ¶ 194.

> over a tax that is still under discussion before the ordinary administrative or judicial authority.[438]

315. Finally, for the avoidance of any doubt, the fact that the Tax Appeal has now concluded with an adverse result for Scotiabank Perú bears no impact on the above analysis. As arises from the extensive case law referred to by the Respondent above, the practice of States and arbitral tribunals shows that a failure to meet the mandatory waiver requirement with the submission of the Request for Arbitration cannot be retroactively cured. As a result, the Tribunal must find that the outcome of the proceedings is immaterial to determine the relationship between the two courses of action.

316. To recall, the object and purpose of waiver requirements such as that arising from Articles 823(1)(e) and 823(2)(e) FTA is not exclusively to prevent double recovery, while this of course remains a key concern, but to avoid the abuse of the investor-State dispute settlement system by investors seeking to relitigate their claims after having obtained an adverse outcome in the local courts. As a matter of policy and of procedural efficiency, a State cannot be forced to undergo parallel proceedings and expend considerable and scarce resources whilst the Claimant hedges its bets in parallel proceedings.

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317. Accordingly, the Claimant's remaining claim should be dismissed, given its failure to comply with the mandatory waiver requirement provide as a *sine qua non* condition to arbitrate under Section B of Chapter 8 FTA.

IV. SCOTIABANK'S ATTEMPT TO USE THE NATIONAL TREATMENT STANDARD UNDER THE TREATY TO REVISE THE DECISIONS OF THE PERUVIAN COURTS SHOULD NOT BE COUNTENANCED

318. Following the Respondent's Application under Rule 41 of the ICSID Rules, the Tribunal summarily dismissed the Claimant's claims for an alleged Expropriation and breach of the Minimum Standard of Treatment under the Treaty, which were found "*manifestly without legal merit*".[439] Accordingly, the scope of these proceedings is strictly circumscribed to the Claimant's claims regarding Peru's purported breach of its National Treatment obligations under the Treaty.

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438 *See* Decision No. 919/2021 of the Peruvian Constitutional Court, 20 November 2021 (**Exhibit R-0008**), Opinion of Justice Miranda Canales, ¶¶ 8-9. In this regard, the Constitutional Court also pointed out that Scotiabank appealed to the constitutional justice "*prematurely*" because the *amparo* claim relates to the administrative resolutions that recognized the tax debt, which was also done in the contentious administrative proceedings. *See* Decision No. 919/2021 of the Peruvian Constitutional Court, 20 November 2021 (**Exhibit R-0008**), ¶ 24. *See* also, Decision No. 919/2021 of the Peruvian Constitutional Court, 20 November 2021 (**Exhibit R-0008**), Opinion of Justice Miranda Canales, ¶ 13.

439 Decision on Respondent's Submission on Rule 41, ¶ 273(A).

Nonetheless, the Claimant has repackaged its claims concerning Minimum Standard of Treatment as claims under National Treatment. The Tribunal should not allow this abuse of the Treaty.

319. Arbitral tribunals in an investment dispute do not stand—and should not act—as a court of appeals called to review the decisions of the domestic courts and the reasoning of the domestic adjudicators.[440] Even in the event of claims regarding denial of justice, an arbitral tribunal's review cannot hinge on the foundations or reasoning of the decisions rendered by domestic adjudicators, but is strictly confined to events where no domestic legal system exists or its functioning is so deficient that it provides no real access to justice. In other words, even in a case where an arbitral tribunal is seized of a claim of denial of justice, it cannot review and revise the decisions of domestic adjudicators— *a fortiori*, and for the additional reasons that the Respondent explains below, it cannot do so in the context of a claim regarding National Treatment. The Claimant is barred from bringing a claim of denial of justice in this case under the Minimum Standard of Treatment, not can it do so—as it now attempts— under the guise of a claim for National Treatment. In other words, Peru should not and cannot be compelled to justify the decisions adopted by its Justices in the lawful adjudication of disputes brought before them, such as the 2021 Constitutional Court Decision. Allowing such a claim to proceed would be contrary to the Tribunal's mandate, pursuant to which it is not allowed to act as an appellate court of the domestic adjudication systems.

320. Adjudicative decisions are different in nature from other acts of the State and, as such, must be protected by international law to prevent abusive claimants seeking to get a second bite of the apple after obtaining an adverse decision from domestic courts to instrumentalize international adjudication. As Professor Douglas explains, the "*special nature*" of adjudicative decisions arises from their origin in a procedure which accords affected parties an opportunity to "*present reasoned argument*", which is then disposed of in a decision that has an inherent "*burden of rationality*", meaning that the adjudicator is required to explain his or her decision with a "*transparent set of justifications*."[441] While this means that adjudicative decisions are a "*legitimate source of authority in and of itself*",[442] it is for the same reason that they are particularly vulnerable to ulterior questioning. It is to protect judicial decisions from unjustified and unreasonable questioning that international law has established the strict conditions under

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440 *See* e.g. *Iberdrola Energía, S.A. v. Republic of Guatemala (I)*, ICSID Case No. ARB/09/5, Award, 17 August 2012 (**Exhibit RL-0166**), ¶¶ 502-508.

441 Zachary Douglas, *International Responsibility For Domestic Adjudication: Denial of Justice Deconstructed*, International and Comparative Law Quarterly, Vol 63, Part 3 (July 2014) (**Exhibit RL-0136**), pp. 4-10.

442 Zachary Douglas, *International Responsibility For Domestic Adjudication: Denial of Justice Deconstructed*, International and Comparative Law Quarterly, Vol 63, Part 3 (July 2014) (**Exhibit RL-0136**), p. 12.

which a State can be liable for adjudicative acts in the specific delict of denial of justice. As explained by Prof. Douglas:

> This is the most compelling explanation for international law's special treatment of responsibility for domestic adjudication through the medium of denial of justice. An authoritative determination of a claim of right or accusation of guilt by a domestic adjudicative body cannot be disturbed by an international court or tribunal simply on the basis that a more rational set of reasons was available to that domestic adjudicative body. That would be tantamount to exploiting the vulnerability of decisions produced through adjudication; a vulnerability caused by the very necessity of justifying decisions through a special discourse of argumentation appealing to rationality. International law is deferential to the particular virtues of adjudication by respecting the integrity of the process and the outcomes it produces. This deference is manifest in the finality rule and the idea that denial of justice focuses upon the procedural aspects of the adjudication rather than the substantive reasons for the decision.[443]

321. Moreover, the legitimacy of adjudicative decisions is strengthened by the existence of internal corrective mechanisms in most domestic adjudication systems, by which a system of appeals allows for reasonable review subject to the finality rule.[444] Therefore, adjudicative decisions, as opposed to any State act of another nature, result from proceedings which have embedded guarantees to ensure party equality and due process.

322. As a result of the special nature of adjudication, decisions arising from adjudicative proceedings have been accorded special treatment by international law, which is expressed in the stringent requirements for a State to be liable for adjudication, as summed up in the exacting standard of denial of justice.[445]

> [T]here is something special about the form of decision-making known as adjudication that justifies both the imposition of this additional burden for establishing liability in the form of the rule on recourse to local remedies as well as the existence of a separate delict relating to acts or omissions relating to an adjudicative process more generally. […] International law has in the past and

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443 Zachary Douglas, *International Responsibility For Domestic Adjudication: Denial of Justice Deconstructed*, International and Comparative Law Quarterly, Vol 63, Part 3 (July 2014) (**Exhibit RL-0136**), p. 11 (emphasis added).

444 Zachary Douglas, *International Responsibility For Domestic Adjudication: Denial of Justice Deconstructed*, International and Comparative Law Quarterly, Vol 63, Part 3 (July 2014) (**Exhibit RL-0136**), pp. 11-12.

445 Zachary Douglas, *International Responsibility For Domestic Adjudication: Denial of Justice Deconstructed*, International and Comparative Law Quarterly, Vol 63, Part 3 (July 2014) (**Exhibit RL-0136**), p. 3 ("*International law has in the past and should continue in the future to treat this most exacting and also most vulnerable form of decision-making in a special way through the delict of denial of justice*.")

> should continue in the future to treat this most exacting and also most vulnerable form of decision-making in a special way through the delict of denial of justice.[446]

323. Specifically, the above is reflected in two specific features of the denial of justice delict, namely: (***i***) that exhaustion of local remedies is required to ensure that a judicial system has the opportunity to correct itself, and that the arbitral tribunal is not transformed into a supranational appellate court, which would entail acting beyond its remit,[447] and (***ii***) that any potential claim must be subject to a high threshold of procedural impropriety for liability to exist under international law, which has been famously described by the International Court of Justice in the *ELSI* case as "*wilful disregard of due process of law, an act which shocks, or at least surprises, a sense of juridical propriety*."[448] Accordingly, only denial of justice is appropriate to determine a States' liability for adjudicative acts—understanding otherwise would entail allowing a party to circumvent international law's deference towards domestic adjudicative systems to convert an international arbitral tribunal into a court of appeals .[449]

324. Canada and the United States have confirmed this understanding in their Non-Disputing Party Submissions in cases involving NAFTA-inspired treaties, comparable in this regard to the FTA. In *Alicia Grace and others v. Mexico*, Canada affirmed:

> As noted above, the customary international law minimum standard of treatment reflected in Article 1105 includes the protection of foreign investors against denial of justice by the domestic courts of a respondent State. It is well

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446 Zachary Douglas, *International Responsibility For Domestic Adjudication: Denial of Justice Deconstructed*, International and Comparative Law Quarterly, Vol 63, Part 3 (July 2014) (**Exhibit RL-0142**), p. 3 (emphasis added).

447 *See* e.g. *Apotex Holdings Inc. and Apotex Inc. v. United States of America*, ICSID Case No. UNCT/10/2, Award on Jurisdiction and Admissibility, 14 June 2013 (**Exhibit RL-0115**), ¶¶ 277-297.

448 *Case Concerning Elettronica Sicula S.p.A* (ELSI) (*United States of America v. Italy*), International Court of Justice, Judgment of 20 July 1989 (**Exhibit RL-0095**), ¶ 128.

449 Zachary Douglas, *International Responsibility For Domestic Adjudication: Denial of Justice Deconstructed*, International and Comparative Law Quarterly, Vol 63, Part 3 (July 2014) (**Exhibit RL-0142**), p. 29 ("*The conclusion must be that acts or omissions attributable to the State within the context of a domestic adjudicative procedure can only supply the predicate conduct for a denial of justice and not for any other form of delictual responsibility towards foreign nationals*.") *See* also p. 33 ("*Any other approach would serve to vest international tribunals with appellate jurisdiction over the substantive outcomes in domestic adjudicative procedures*."); *Parkerings-Compagniet AS v. Republic of Lithuania,* ICSID Case No. ARB/05/8, Award, 11 September 2007 (**Exhibit RL-0167**), ¶ 313 ("*Two layers of Lithuanian Courts confirmed that the City of Vilnius acted wrongfully when it refused to recognise the existence of a force majeure situation. On that point, the Courts ruled in favour of BP. The fact that the Lithuanian Courts denied some of BP's claims is not relevant in the present proceedings; indeed subject to denial of justice, which is not at issue here, an erroneous judgment (if there should be one) shall not in itself run against international law, including the Treaty. On that matter, the Respondent did not act arbitrarily in contradiction with the provisions of the Treaty*.") (emphasis added).

> settled that absent a denial of justice, judgments of national courts interpreting domestic law cannot be challenged as a violation of international law.[450]

325. Moreover, the submission of a National Treatment claim against a judicial decision is at odds with the purpose of the standard which, as the Respondent further explains below, is to guarantee a level playing field between foreign companies and their national competitors by prohibiting protectionist domestic regulation.[451] Evidently, a judicial decision, as the 2021 Constitutional Court Decision, is (***i***) not a "protectionist measure", but the result of the application of a legal proceeding against Scotiabank Perú and (***ii***) as an *ex post* review of a debt paid many years before the proceedings were even initiated, it does not affect Scotiabank's standing *vis-à-vis* its national competitors.

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326. For the reasons set out above, denial of justice is the only international delict appropriate to determine States' liability for adjudicative acts, which the Claimant is barred from pursuing in these proceedings, as the Tribunal rightly dismissed the Claimant's claims under the Minimum Standard of Treatment. The Claimant should not be allowed to circumvent the strict standard of denial of justice by resorting to the National Treatment standard under Article 803 of the Treaty to relitigate its failed case for denial of justice and unduly seek to benefit from this Tribunal to submit an umpteenth appeal of its Tax Debt. This should be the end of the Tribunal's analysis.

V. IN ANY EVENT, THE CLAIMANT HAS FAILED TO ESTABLISH THE REQUIREMENTS FOR A BREACH OF ARTICLE 803

327. As explained above, the Claimant cannot pursue its claims regarding the 2021 Constitutional Court Decision in this arbitration. This notwithstanding, in any event, even if the Tribunal were to analyze the merits of the Claimant's claim under Article 803 FTA (*quod non*), it is the Respondent's submission that the Claimant has failed to meet its burden of proof regarding all the elements for liability to arise under the National Treatment standard provided in the Treaty.

328. Article 803 FTA provides:

> Each Party shall accord to investors of the other Party treatment no less favourable than that it accords, in like circumstances, to its own investors with

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450 *Alicia Grace and others v. United Mexican States*, ICSID Case No. UNCT/18/4, Non-Disputing Party Submission of the Government of Canada, 24 August 2021 (**Exhibit RL-0128**), ¶ 33. For the position of the United States, *see Freeport-McMoRan Inc. v. Republic of Peru,* ICSID Case No. ARB/20/8, Non-Disputing Party Submission of the United States of America*,* 24 February 2023 (**Exhibit RL-0132**), ¶ 26 ("[D]*omestic courts performing their ordinary function in the application of domestic law as neutral arbiters of the legal rights of litigants before them are not subject to review by international tribunals absent a denial of justice under customary international law*.")

451 *See* below, Section V.

> respect to the establishment, acquisition, expansion, management, conduct, operation and sale or other disposition of investments in its territory.[452]

329. As the Tribunal well knows, National Treatment clauses are meant to prohibit discrimination against foreign investors and guarantee a level playing field with their local competitors.[453] Accordingly, as opposed to other standards that guarantee a minimum level of substantive protection, the National Treatment standard is a "comparative" or "relative" standard of protection that depends on the treatment conferred to domestic investors.[454] Professor Dolzer summarizes the object of the standard as follows:

> National treatment clauses are meant to provide a level playing field between foreign investors and their local competitors and to prevent protectionist measures by host States in favour of national investors. They oblige host States to make no negative differentiation between foreign and national investors when enacting and applying their rules and regulations and thus to promote the position of the foreign investor to the level accorded to nationals. The standard is therefore contingent, relative, or comparative. The required treatment of foreign investors depends on treatment accorded to national investors.[455]

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452 Free Trade Agreement between Canada and the Republic of Peru (**Exhibit C-0001**), Article 803.

453 A. Reinisch and C. Schreuer, *International Protection of Investments: The Substantive Standards*, Cambridge University Press, 2020 (**Exhibit RL-0148**), ¶ 56, p. 603 ("*National treatment is an expression of the non-discrimination principle and aims at guaranteeing a level playing field for foreign and domestic investors*.")

454 *See* A. Reinisch and C. Schreuer, *International Protection of Investments: The Substantive Standards*, Cambridge University Press, 2020 (**Exhibit RL-0148**)*,* ¶¶ 2-5, p. 591 ("*National treatment obligations aim at counteracting and preventing protectionist measures by host states, intended to favour national investors over foreign competitors.* […] *Together with MFN clauses, national treatment provisions are the cornerstone of the non-discrimination rules usually contained in IIAs. Like MFN, national treatment is a so-called contingent, 'comparative' or 'relative' standard, according treatment depending upon the level of treatment given to nationals or other foreign investors. This sets them apart from the so called absolute standards like fair and equitable treatment or full protection and security*.") *See* also Sicard-Mirabal, J., and Derains, Y., *Introduction to investor-State Arbitration*, Kluwer Law International, 2018, Chapter 6: Standards of Protection (**Exhibit RL-0168**), § 6.05.

455 Rudolf Dolzer et al., *Principles of International Investment Law*, 3rd ed, Oxford University Press, (2022) (**Exhibit RL-0150**), p. 253. *See* also Campbell McLachlan et al., *International Investment Arbitration: Substantive Principles,* Oxford University Press, 2nd ed (2017) (**Exhibit RL-0146**), ¶ 7.267, p. 336 ("*In contrast to the standards discussed so far in this chapter* [Fair and Equitable Treatment and Full Protection and Security]*, this section and the next deal with standards that are contingent in their operation. Each of national treatment and most-favoured-nation treatment are concerned to ensure that the treatment accorded to a foreign investor of another contracting State is no less favourable than that accorded to a national of the host State or of a third State (as the case may be)*."); A. Reinisch and C. Schreuer, *International Protection of Investments: The Substantive Standards*, Cambridge University Press, 2020 (**Exhibit RL-0148**), ¶¶ 78-79, p. 607 ("*National treatment obligations aim at preventing protectionist measures whereby host states favour their own investors to the detriment of foreign ones. National treatment provisions intend to create a level playing field for foreign and domestic competitors. Similar to the purpose of national treatment obligations in trade law, national treatment in investment treaties aims at ensuring the same competitive conditions in the host country market for domestic and foreign investors by prohibiting governmental measures which unduly favour domestic investors over foreign ones*."); *Bayındır İnşaat Turizm Ticaret ve Sanayi A.Ş. v. Islamic Republic of Pakistan*, ICSID Case No. ARB/03/29,

330. Consequently, the Claimant should not be allowed to re-introduce its failed Minimum Standard of Treatment claims under the guise of breaches of the National Treatment standard. In this regard, as further explained below,[456] the National Treatment standard does not enable the tribunal to assess the substantive merit of the measures adopted by the Respondent.[457] Rather, the determination of a breach of the National Treatment standard entails an objective comparison between the treatment received by the Claimant and its investment and domestic comparators in "like circumstances" to determine the existence of discrimination. This is the determination that the Tribunal is called to make in the present case.

331. The Parties agree that the determination of whether a breach of the National Treatment standard under the FTA has taken place is limited to the analysis of three specific elements: the existence of (***i***) treatment under Article 803 FTA; (***ii***) the identification of relevant comparators that are in "like circumstances" to the Claimant and its investment, and (***iii***) the treatment must be less favorable, without a reasonable justification.[458]

332. These requirements are cumulative, and, as the Claimant acknowledges, the Claimant carries the burden of proof.[459] Contrary to the Claimant's submission,[460] this burden of proof never shifts to the Respondent. As clearly stated by the tribunal in *UPS v. Canada*:

> Failure by the investor to establish one of those three elements will be fatal to its case. This is a legal burden that rests squarely with the Claimant. That burden never shifts to the Party, here Canada. For example, it is not for Canada to prove

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Award, 27 August 2009(**Exhibit CL-0084**), ¶ 387 ("[i]*ts purpose is to provide a level playing field between foreign and local investors*.")

456 *See* below, Section V.D.

457 *See Resolute Forest Products Inc. v. Government of Canada*, PCA Case No. 2016-13, Final Award, 25 July 2022 (**Exhibit RL-0130**), ¶ 576 ("*In this framework, the Tribunal wishes to stress that the point of the 'like circumstances' analysis at Article 1102 is not to judge the substantive merit of the Respondent's measures (for instance, telling a Respondent the government could have provided different kinds of support to its industry, etc.). In Mercer, similarly looking into 'like circumstances', the Tribunal stated that it 'accepts as a general legal principle, in the absence of bad faith that a measure of deference is owed to a State's regulatory policies'*.") (emphasis added).

458 *See* Claimant's Memorial on the Merits, ¶ 220.

459 S*ee* Claimant's Memorial on the Merits, ¶ 220 ("*Scotiabank must establish three distinct elements to sustain a breach by Perú of the National Treatment Standard under Article 803* […]") (emphasis added). *See* also *Methanex Corporation v. United States of America*, *Ad hoc* UNICITRAL arbitration, Final Award on Jurisdiction and Merits, 3 August 2005 (**Exhibit CL-0116**), Part IV, Chapter B, ¶ 12 ("*In order to sustain its claim under Article 1102(3), Methanex must demonstrate, cumulatively, that California intended to favour domestic investors by discriminating against foreign investors and that Methanex and the domestic investor supposedly being favored by California are in like circumstances*"); *Pawlowski AG and Projekt Sever s.r.o. v. Czech Republic*, ICSID Case No. ARB/17/11, Award, 1 November 2021 (**Exhibit RL-0129**), ¶¶ 534-535; *Total S.A. v. Argentine Republic*, ICSID Case No. ARB/04/1, Decision on Liability, 27 December 2010 (**Exhibit CL-132**), ¶ 212.

460 *See* Claimant's Memorial on the Merits, ¶ 264.

> an absence of like circumstances between UPS Canada and Canada Post regarding article 1102.[461]

333. This is a shared understanding between the NAFTA parties, which was echoed by Canada in its Non-Disputing Party Submission in *Espíritu Santo v. Mexico,*[462] and by Mexico and the United States in *Mercer v. Canada*.[463]

334. As the Respondent explains, the Claimant fails to satisfy any and all of the elements of the National Treatment standard, namely: the Claimant has not established the existence of "treatment" susceptible of breaching Article 803 FTA (**A**); the Claimant has failed to provide adequate domestic comparators in "like circumstances" with the Claimant (**B**), and the Claimant has failed to demonstrate that Scotiabank Perú was accorded treatment less favorable than Peruvian nationals under the Treaty (**C**). Furthermore, even if the Tribunal were to find that the Claimant did meet its burden of proving the elements of Article 803 FTA (*quod non*), as shown by the Respondent, the 2021 Constitutional Court Decision is not discriminatory, as it was adopted in pursuance of a legitimate public policy objective (**D**).

B. THE CLAIMANT HAS FAILED TO ESTABLISH THE EXISTENCE OF "TREATMENT" SUSCEPTIBLE OF GIVING RISE TO A CLAIM FOR AN ALLEGED BREACH OF ARTICLE 803 FTA

335. The Claimant has failed to show the existence of "treatment" under Article 803 FTA. In the sub-sections below, the Respondent first sets out the standard applicable to establish a breach of the National Treatment standard, which requires behavior with a material effect on the Claimant or its investment, not a mere intention or a theoretical prejudice (**1**). As the Respondent shows, the Claimant's baseless allegations of "interference" and speculations of impropriety fail to meet this standard (**2**).

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461 *United Parcel Service of America, Inc. (UPS)v. Government of Canada*, *Ad hoc* UNICITRAL arbitration, Award on the Merits, 24 May 2007 (**Exhibit CL-133**), ¶ 84.

462 *Espíritu Santo Holdings, LP and L1bre Holding, LLC v. United Mexican States*, ICSID Case No. ARB/20/13, Non-Disputing Party Submission of the Government of Canada, 21 March 2023 (**Exhibit RL-0134**), ¶ 27 ("*A claimant making a claim under Article 1102 bears the burden of demonstrating that: (1) the Party accorded both the claimant or its investment and the domestic comparator "treatment* […] *with respect to the establishment, acquisition, expansion, management, conduct, operation, and sale or other disposition of investments"; (2) the Party accorded the alleged treatment "in like circumstances"; and (3) the treatment accorded to the claimant or its investment was "less favourable" than that accorded to the comparator investor or investment. It is well established that the burden of proving each constituent part of a national treatment claim rests exclusively with the party asserting it. The claimant therefore bears the responsibility of demonstrating all of the elements of an Article 1102 claim. The NAFTA Parties agree that this burden never shifts to the respondent*.") (emphasis added).

463 *Mercer International Inc. v. Government of Canada*, ICSID Case No. ARB(AF)/12/3, Award, 6 March 2018 (**Exhibit CL-113**), ¶¶ 7.12-7.14.

1. The "treatment" required to allege a breach of the National Treatment standard under the FTA must be treatment *vis-à-vis* the investor or its investments, not abstract speculations

336. The Claimant devotes a single paragraph of its Memorial on the Merits to describe the relevant standard for "treatment" to exist under Article 803 FTA. In it, the Claimant states that "'[t]*reatment' is a broad concept*", for which it provides no authorities,[464] and that "[t]*he treatment may be in the form of any measure, which under the FTA includes 'any law, regulation, procedure, requirement or practice*'".[465] The Claimant's reasoning is logically flawed and lacks any legal basis.

337. Indeed, the Claimant's attempt to equate the concept of "treatment", which is not defined in the FTA, with the concept of "measure", for which the Contracting States agreed on an express definition, is wrong. Had the Parties wished for Article 803 to apply to any "measure", they would have so provided. The fact that they did not indicate that the concept of "treatment" should be construed independently, in accordance with the rules established by the Vienna Convention on the Law of Treaties ("**VCLT**") further proves this point.

338. Accordingly, the word "treatment" should be interpreted first in accordance with its ordinary meaning.[466] A brief overview of the definitions provided by the leading English language dictionaries shows what the Claimant omits: the word "treatment" describes an action which is carried out **towards** someone or something;[467] in the context of Article 803 FTA, this "someone or something" is no other than the investor or its investment. Given that the term "treatment" must refer to the host State's conduct towards the foreign investor or its investment, it is the actual treatment accorded by the State to the claimant that is determinative for a claim regarding an alleged breach of the National Treatment standard, not an abstract intent.

339. Arbitral case law and commentary confirm this understanding. As notoriously stated by the often-cited tribunal in *SD Myers v. Canada*: "[t]*he word "treatment" suggests that practical impact is required to produce a breach of Article 1102, not merely a motive or intent that is in*

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464 *See* Claimant's Memorial on the Merits, ¶ 223.

465 *See* Claimant's Memorial on the Merits, ¶ 223.

466 *See* Vienna Convention on the Law of Treaties (VCLT), United Nations, 23 May 1969 (**Exhibit RL-0153**), Article 31.

467 *See* Cambridge Dictionary, definition of "treatment" ("*the way you deal with or behave towards someone or something"*) (**Exhibit R-0300**); Longman Dictionary, definition of "treatment" ("*a particular way of behaving towards someone or of dealing with them*") (**Exhibit R-0301**); Merriam-Webster Dictionary, definition of "treatment" ("*the act or manner or an instance of treating someone or something" such as "conduct or behavior towards another*") (**Exhibit R-0302**).

violation of Chapter 11."[468]. An iteration of the same principle was formulated by the *Daimler v. Argentina* a follows: "*beyond dispute is that 'treatment' deals with the actual behavior of the Host States towards a foreign private investment as measured against the international obligations binding upon the State on the basis of treaty law and general international law.*"[469].

340. As stated by Professors Dolzer *et al*: "[t]*he application of a national treatment clause presupposes some type of 'treatment' by the host State. This indicates that what is required is not a theoretical distinction but actual behaviour*."[470] As shown below, the Claimant's speculations that Peruvian officials improperly attempted to influence the proceedings before the Constitutional Court do not constitute "treatment" for purposes of Article 803 of the Treaty, and therefore should not be considered by the Tribunal to reach a determination on the alleged breach by Peru of the National Treatment standard.

2. Scotiabank's baseless allegations of impropriety do not constitute "treatment" under Article 803 of the Treaty

341. In its Memorial on the Merits, the Claimant avers that "*Peru's treatment that is at issue concerns improper interference by different branches of Peru's Government with the Constitutional Court in the course of Scotiabank Perú's Default Interest Amparo*".[471] The Claimant proceeds to state that the complained treatment is a "connected series of acts", including Peru's allegedly engaging in an undue pressure campaign culminating in the issuance of the 2021 Constitutional Court Decision.[472] The Claimant's ambiguous description of the "treatment" of which it

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468 *S.D. Myers, Inc. v. Government of Canada* (UNCITRAL), Partial Award, 13 November 2000 (**Exhibit CL-0126**), ¶ 254. *See* also *United Parcel Service of America, Inc. (UPS) v. Government of Canada*, *Ad hoc* UNICITRAL arbitration, Award on the Merits, 24 May 2007 (**Exhibit CL-133**), ¶ 83(a) ("*The Tribunal notes that there are three distinct elements which an investor must establish in order to prove that a Party has acted in a manner inconsistent with its obligations under article 1102. These are: a) The foreign investor must demonstrate that the Party* [Canada] *accorded treatment to it* [the Claimant or Canada] *with respect to the establishment, acquisition, expansion, management, conduct, operation, and sale or other disposition of investments*.") (emphasis added); A. Reinisch and C. Schreuer, *International Protection of Investments: The Substantive Standards*, Cambridge University Press, 2020 (**Exhibit RL-0149**), pp. 654-656 ("*According to the S.D. Myers tribunal, distinguishing 'treatment' from 'intent',* [t]*he word 'treatment' suggests that practical impact is required to produce a breach of Article 1102, not merely a motive or intent that is in violation of Chapter 11*."); *Merrill & Ring Forestry L.P. v. The Government of Canada*, ICSID Case No. UNCT/07/1, Award, 31 March 2010 (**Exhibit RL-0050**), ¶ 80 ("[t]*o the extent that a practical impact must be shown, the Tribunal notes that the Investor has identified the adverse effects it believes arise from the treatment received, and thus also meets this particular test, subject, of course, to proving the actual extent of those effects and the adverse consequences that ensue, if any*.")

469 *Daimler Financial Services AG v. Argentina Republic*, ICSID Case No. ARB/05/1, Award, 22 August 2012 (**Exhibit RL-0114**), ¶ 218.

470 Rudolf Dolzer et al. *Principles of International Investment Law*, 3rd ed, Oxford University Press, (2022) (**Exhibit RL-0150**), p. 256.

471 Claimant's Memorial on the Merits, ¶ 224.

472 Claimant's Memorial on the Merits, ¶ 226.

complains seeks to incorporate its allegations of unlawful conduct into the National Treatment claim before this Tribunal, in a manifest attempt to tarnish Peru's reputation and indirectly re-introduce its claims for a violation of the Minimum Standard of Treatment. Additionally, as Peru further explains below,[473] the Claimant's choice to deliberately blur the contours of the specific conduct of which it complains is purposefully aimed at artificially setting the Claimant's case apart from tens of other contemporary cases concerning domestic investors that were resolved by the Constitutional Court in the same way as the Claimant's and which disprove the Claimant's claims of discrimination. The Claimant's strategy, therefore, is both factually and legally misconceived.

342. ***First***, as explained, the Claimant has failed to provide any evidence for its allegations that Peruvian officials from the Ministry of Economy, SUNAT and the Constitutional Court engaged in improper conduct. The Claimant's entire case on Peru's alleged "interference" is based on nothing but speculation, innuendo and hearsay. As explained by the Republic of Peru, there is simply no evidence that any officials from the SUNAT or the Ministry of Economy attempted to influence the outcome of the proceedings.[474] The hearsay evidence provided by the Claimant's witnesses to support the Claimant's fanciful allegations should not be countenanced.[475] The Respondent has laid out at length the guarantees established by the Peruvian legal order—which enshrines the system of checks and balances—to ensure the independence of the Constitutional Court and its Justices, both as regards the Court's budgetary autonomy and the Justices' immunity for their votes and opinions.[476]

343. ***Second***, in any event, even if Scotiabank's allegations of wrongdoing against Peru were true and the Peruvian State, acting through the SUNAT and the Ministry of the Economy and Finance, had effectively interfered with the Constitutional Court by coordinating the leak of the 2017 Draft and threatening some of the Justices with the retention of the funds destined for the premises of the Court's headquarters (*quod non*), the damage would have only been caused if it had been acted upon by the Court.[477] Contrary to its allegations, the Claimant has failed to prove that this alleged interference "*was also effective in reversing the Constitutional Court's unbiased conclusions reflected in the 2017 Leaked Decision*".[478] As demonstrated by Peru at length, far

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473 *See* below, Section VB.1.

474 *See* above, Section II.D.

476 *See* above, Section II.D.2.

477 *See* Zachary Douglas, *International Responsibility For Domestic Adjucation: Denial of Justice Deconstructed*, International and Comparative Law Quarterly, Vol 63, Part 3 (July 2014) (**Exhibit RL-0147**), p. 29 ("*international responsibility towards foreign nationals for acts and omissions associated with an adjudicative procedure can only arise at the point at which the adjudication has produced its final result; it is only at that point that a constituent element of that responsibility has been satisfied, which is the existence of damage to the foreign national*").

478 Claimant's Memorial on the Merits, ¶ 225.

from reflecting "*the Constitutional Court's unbiased conclusions*", the so-called "2017 Leaked Decision" did not "reflect" the will of the Constitutional Court, which is only perfected once a judgment is signed and published. Rather, the leaked draft was nothing but that: an unsigned draft which, in accordance with the Rules and Procedures of the Constitutional Court in force at the time, had not yet been voted, let alone signed, by any Justice.[479] In fact, it was the SUNAT, not Scotiabank, who raised the issue of the leak in the proceedings before the Constitutional Court, pointing to the fact that Justice Blume had met with Scotiabank's representatives shortly before the leak.[480] Tellingly, Scotiabank said nothing regarding the leak in its response to the SUNAT's challenge against Justice Blume, not at any point thereafter during the proceedings before the Constitutional Court (or before any other forum in Peru, for that matter).

344. Moreover, as Peru has explained, there is nothing exceptional about the 2021 Constitutional Court's Decision, which was fully in line with the case law of the Constitutional Court at the time. To recall, Justices Ledesma Narvaez, Espinosa Saldaña and Miranda Canales consistently found that the exceptional *amparo* proceedings could not be used to challenge the legality of a tax debt, which includes a claim for interest.[481] Far from being strange or suspicious, the 2021 Constitutional Court Decision is one more decision in a string of judgments with an identical outcome, concerning both domestic and foreign investors, as Peru further explains below.[482] There is nothing strange or suspicious.

345. ***Third***, even if the Claimant had proven (***i***) the existence of any alleged "interference" by Peruvian officials, and (***ii***) the causal link between said alleged interference and the 2021 Constitutional Court Decision (*quod non*), this interference would still not constitute "treatment" under Article 803 of the Treaty, as it does not directly concern the Claimant or its investment. Indeed, the only measure having a material impact on the Claimant's investment is the 2021 Constitutional Court Decision itself. The Claimant's speculations of interference are nothing but mere "*theoretical distinctions*" with no material impact on the Claimant. Therefore, in accordance with the predominant case law,[483] these allegations are simply not relevant to establish a breach of the National Treatment standard.

346. Given the Claimant's failure to prove the alleged interference of which it complains, and its ultimate irrelevance to the merits of this arbitration, its claim should be decided for what it is: an umpteenth appeal against a judicial decision, which was unfavorable to the Claimant and which it now seeks to revise in these arbitration proceedings. As the Respondent has explained, this is

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479 *See* above, Section II.D.1.a.

480 *See* SUNAT's submission before the Constitutional Court of 20 July 2017 (**Exhibit R-0218**).

481 *See* above, Section II.E.3.

482 *See* below, Section V.B.C.3.

483 *See* above, Section V.A.1.

not a possibility available to the Claimant. Moreover, even if it was (*quod non*), the Claimant has failed to prove that the 2021 Constitutional Court Decision entailed treatment less favorable than that accorded to adequate domestic comparators in "like circumstances".

C. THE CLAIMANT HAS FAILED TO DEMONSTRATE DISCRIMINATORY TREATMENT AGAINST ITS INVESTMENT IN PERU

347. Even if the Tribunal were to find that the treatment of which the Claimant complains is susceptible of giving rise to liability under the National Treatment standard (*quod non*), the Claimant has failed to prove any (let alone all) of the cumulative requirements for liability to exist under Article 803 FTA.

348. The Parties agree that, after having analyzed whether there is "treatment" falling within the scope of Article 803 FTA, an arbitral tribunal seized of a claim for an alleged breach of the National Treatment standard must assess three elements: (***i***) whether there are domestic investors that are in "like circumstances" with the claimant or its investment; (***ii***) whether the claimant or its investment received less favorable treatment than those domestic investors found to be comparable, and (***iii***) whether there is a reasonable justification for any less favorable treatment.[484]

349. As stated above, contrary to the Claimant's assertions, the Claimant has the burden of proving that each of these elements is met in order for its claim of a breach of National Treatment to succeed.[485] Failure by the Claimant to establish any of the prongs of the three-step test identified above inevitably leads to the dismissal of the Claimant's claims.[486]

350. Despite the broad agreement between the Parties on the elements of the test that the Tribunal must apply, there are key differences between the Parties as regards the relevant standards as developed in international law and arbitral case law. In the following sub-sections, the Respondent addresses and corrects the Claimant's mischaracterization of the case law and flawed interpretation of the clear language of the Treaty.

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484 *See* Claimant's Memorial on the Merits, ¶ 220. *See* also *Archer Daniels Midland (ADM) and Tate & Lyle Ingredients Americas, Inc. v. United Mexican States*, ICSID Case No. ARB(AF)/04/5, Award, 21 November 2007 (**Exhibit CL-0081**), ¶ 196; *Bayındır İnşaat Turizm Ticaret ve Sanayi A.Ş. v. Islamic Republic of Pakistan*, ICSID Case No. ARB/03/29, Award, 27 August 2009(**Exhibit CL-0084**), ¶ 399; *Saluka Investments BV v. The Czech Republic*, PCA Case No. 2001-04, Partial Award, 17 March 2006 (**Exhibit RL-0104**), ¶ 313 ("*State conduct is discriminatory, if (i) similar cases are (ii) treated differently (iii) and without reasonable justification*"); *Plama Consortium Limited v. Republic of Bulgaria*, ICSID Case No. ARB/03/24, Award, 27 August 2008 (**Exhibit RL-0106**), ¶ 184 ("*With regard to discrimination, it corresponds to the negative formulation of the principle of equality of treatment. It entails like persons being treated in a different manner in similar circumstances without reasonable or justifiable grounds*.")

485 *See* above, Section V (introductory section).

486 *See* above, Section V (introductory section).

D. THE CLAIMANT HAS FAILED TO IDENTIFY A GROUP OF RELEVANT COMPARATORS "*IN LIKE CIRCUMSTANCES*" WITH SCOTIABANK'S CASE BEFORE THE CONSTITUTIONAL COURT

351. The Claimant has failed to comply with this burden of identifying adequate comparators in "like circumstances" with the Claimant and its investment. It is uncontroversial that, in order to establish the existence of domestic comparators "in like circumstances" to Scotiabank Perú, the Claimant must account for any differences that may legitimately give rise to differential treatment (**1**). Instead, the Claimant has relied on cases which were not decided by the same Justices who ruled on Scotiabank Perú's case (**2**) and failing to identify any adequate comparators in which a decision was issued by a six-judge Court with two abstentions, such as in the case of Scotiabank Perú.

1. To identify domestic comparators "in like circumstances" to Scotiabank Perú, the Claimant must account for any differences that may legitimately give rise to differential treatment

352. The Parties agree—at least in theory— that the identification of domestic comparators in "*like circumstances*" to the Claimant requires a fact-specific analysis, consisting of "*an examination of the surrounding situation in its entirety*".[487] This approach has also been endorsed by tribunals. In the words of the *Pope & Talbot* tribunal, "*the application of the like circumstances standard will require evaluation of the entire fact setting*" surrounding the application of a given measure.[488] Similarly, the *Apotex v. United States* tribunal noted that the analysis "*involves a highly fact-specific inquiry*".[489]

353. However, the Claimant fails to properly apply this test. Instead of choosing truly fact-specific comparators, it relies on a self-servingly overly broad selection of comparators, which fails to account for a key fact that directly impacts the "treatment" received by each investor: the

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487 *See* Claimant's Memorial on the Merits, ¶¶ 249-250 (referring to *Pope & Talbot Inc v. The Government of Canada* (UNCITRAL), Award on the Merits of Phase 2, 10 April 2001 (**Exhibit CL-0123**), ¶ 75).

488 *Pope & Talbot Inc. v. The Government of Canada*, *Ad hoc* UNICITRAL arbitration, Award on the Merits of Phase 2, 10 April 2001 (**Exhibit CL-0123**), ¶ 75.

489 *Apotex Holdings Inc. and Apotex Inc. v. USA United States of America,* ICSID Case No. ARB(AF)/12/1, Award on Jurisdiction, 25 August 2014 (**Exhibit CL-0080**), ¶ 8.15. *See* also *Merrill and Ring Forestry L.P. v. Canada*, ICSID Case No. UNCT/07/1, Award, 31 March 2010 (**Exhibit CL-0114**), ¶ 88 ("*NAFTA tribunals have, on a number of occasions, considered various factors in assessing whether investors are 'in like circumstances' … The environment, trade, the nature of services and functions, and public policy considerations are found among such factors. This also explains why it is not enough on occasions to undertake the comparison solely in the same sector of economic activity and it might be necessary, as in Occidental, to consider whole sectors of the economy and business*."); *Espíritu Santo Holdings, LP and L1bre Holding, LLC v. United Mexican States*, ICSID Case No. ARB/20/13, Non-Disputing Party Submission of the Government of Canada Pursuant to NAFTA Article 1128, 21 March 2023 (**Exhibit RL-0134**), ¶ 31 ("[Article 1102] *requires a detailed consideration of the particular facts of each case and an examination of the totality of the circumstances in which treatment was accorded in order to determine whether those circumstances are 'like'*").

legitimate differences arising from changes in the composition of the Constitutional Court, in line with the governing principles of the Peruvian Constitutional justice system. As the Respondent explains further below,[490] this inevitably renders the Claimant's comparators, which fail to meet the standard set out by the relevant case law, inadequate. This alone is enough for the Claimant's claim under the National Treatment standard to fail.[491]

354. As explained above,[492] the object and purpose of a National Treatment clause is to prevent discrimination against a foreign investor in favor of domestic competitors. Consequently, the selection of comparators that are in "like circumstances" must rule out any differences in circumstances that might reasonably justify differential treatment for a motive other than discrimination.[493]

355. In this regard, comparators must be similar in all relevant aspects. This has been described by Professors Reinisch and Schreuer as a requirement of "*substantial*" or "*material*" similarity.[494] In the words of the tribunal in *Al Tamimi v. Oman*: "*to provide a relevant comparison for a national treatment claim, any comparator investor must still be in materially the same circumstances as the Claimant.*"[495].

356. The test was clearly described by Canada in its Non-Disputing Party submission in T*hunderbird v. Mexico*:

> The expression "in like circumstances" is critical in applying Article 1102 to prohibit discrimination based on nationality. It is clear in Article 1102 that all treatment accorded in unlike circumstances is to be disregarded. Application of Article 1102 begins by considering the treatment accorded by a Party to the

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490 *See* below, Section V.C.2.

491 *See* A. Reinisch and C. Schreuer, *International Protection of Investments: The Substantive Standards*, Cambridge University Press, 2020 (**Exhibit RL-0149**), p. 626 ("*The issue of discriminatory treatment may arise only where the foreign investor and investment are 'comparable' to domestic ones or 'in like circumstances' or 'situations' with domestic ones. In other words, the absence of like circumstances will defeat any claim regarding a breach of national treatment*.") (emphasis added). *See* also *Windstream Energy LLC v. The Government of Canada (I)*, PCA Case No. 2013-22, Award, 27 September 2016 (**Exhibit RL-0123**), ¶ 414; *Renée Rose Levy v. Republic of Peru*, ICSID Case No. ARB/10/17, Award, 26 February 2014 (**Exhibit RL-0118**), ¶ 401; *Railroad Development Corporation (RDC) v. Republic of Guatemala*, ICSID Case No. ARB/07/23, Award, 29 June 2012 (**Exhibit RL-0113**), ¶ 153.

492 *See* above, Section V (introductory section).

493 *See Pawlowski AG and Project Sever s.r.o. v. Czech Republic*, ICSID Case No. ARB/17/11, Award, 1 November 2021 (**Exhibit RL-0129**), ¶ 309 ("*To establish that the treatment effectively is "less favourable," a comparator in like circumstances must be defined. It is also widely accepted that there must be no objective reason which justifies the differential treatment*.")

494 *See* A. Reinisch and C. Schreuer, *International Protection of Investments: The Substantive Standards*, Cambridge University Press, 2020 (**Exhibit RL-0149**), p. 643.

495 *Al Adel A Hamadi Al Tamimi v. Sultanate of Oman*, ICSID Case No. ARB/11/33, Award, 3 November 2015 (**Exhibit RL-0122**), ¶ 463 (emphasis added).

> foreign investor or investment. Consideration is then given to the treatment that is accorded by that Party to an investor or investment where all the relevant circumstances of the according of the treatment are "like", except that the investor or investment is domestic. There is a breach of Article 1102 if, and only if, the foreign investor or investment receives the less favourable of these treatments.[496]

357. Moreover, while the Claimant emphasizes that "[o]*bject and purpose requires a flexible approach to identifying adequate comparators*", allegedly to "*caution*[] *against adopting too narrow of an approach to identifying adequate comparators*",[497] it obviates an uncontroversial rule established by case law: where identical or more similar comparators are available, these should be preferred over broader categories that may not account for all relevant differences. This is the approach was adopted by the tribunal in *Methanex v. United States*:

> The key question is: who is the proper comparator? Simply to assume that the ethanol industry or a particular ethanol producer is the comparator here would beg that question. Given the object of Article 1102 and the flexibility which the provision provides in its adoption of "like circumstances", it would be as perverse to ignore identical comparators if they were available and to use comparators that were less "like", as it would be perverse to refuse to find and to apply less "like" comparators when no identical comparators existed. The difficulty which Methanex encounters in this regard is that there are comparators which are identical to it.[498]

358. In this regard, the Claimant's reliance on this very excerpt of *Methanex* to support its proposition that tribunals should avoid a "narrow" approach to select relevant comparators is inapposite.[499] On the contrary, the reasoning of the *Methanex* tribunal entails that the most similar available comparator must be considered, preferably one that is in identical circumstances. In the words of the Merril and Ring v. Canada tribunal: "[t]*o the extent there are investors in identical circumstances to be compared, this makes it unnecessary to resort to the Methanex alternative choice noted above of finding investors in the most like circumstances*".[500]

359. As the Respondent explains in the sub-sections below, despite paying lip service to the requirement that the domestic comparators be determined in a fact-specific manner, the Claimant has manifestly chosen not to heed its own words. As the Respondent shows, the

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496 *International Thunderbird Gaming Corporation v. The United Mexican States*, *Ad hoc* UNCITRAL arbitration, Submission of the Government of Canada Pursuant to NAFTA Article 1128, 21 May 2004 (**Exhibit RL-0099**), ¶ 18 (emphasis added). *See* also *Merrill and Ring Forestry L.P. v. Canada*, ICSID Case No. UNCT/07/1, Award, 31 March 2010 (**Exhibit CL-0114**), ¶¶ 92-93.

497 Claimant's Memorial on the Merits, ¶ 251.

498 *Methanex Corporation v. United States of America*, *Ad hoc* UNICITRAL arbitration, Final Award on Jurisdiction and Merits, 3 August 2005 (**Exhibit CL-0116**), Part IV, Chapter B, ¶ 17.

499 *See* Claimant's Memorial on the Merits, ¶ 251.

500 *Merrill and Ring Forestry L.P. v. Canada*, ICSID Case No. UNCT/07/1, Award, 31 March 2010 (**Exhibit CL-0114**), ¶ 89.

relevant comparators selected by the Claimant are not in like circumstances with the Claimant, as the Claimant's choice of cases ignores: (***i***) the changes in the case law of the Constitutional Court owing to shifts in its composition and (***ii***) the unique circumstances of the Scotiabank case, in which the Court had to administer justice despite being composed solely by six Magistrates, two of which had submitted abstentions impeding their participation in the case.

2. The Claimant's comparators include cases not decided by the same Justices who ruled on Scotiabank's case and that are therefore not in "like circumstances" with the Claimant

360. In its Memorial on the Merits, the Claimant defines the relevant domestic comparators as "*the general class of taxpayers who were challenging the State's application of accrued default interest beyond the maximum legal term through amparo actions at the Constitutional Court at the same time as Scotiabank Perú was pursuing its Default Interest Amparo.*"[501] Specifically, the Claimant's comparators include all cases in the open database of the Constitutional Court meeting the following conditions:

361. (***i***) cases "*in which 'default interest' was the central issue of the dispute*",[502] i.e. excluding all cases in which default interest is "c*hallenged as a consequence of a challenge to the constitutionality of the tax due itself*";[503] **AND**

362. (***ii***) that were "*analyzed by the Constitutional Court since the entry of Scotiabank Perú's Amparo Proceeding*", thereby purposefully excluding any cases resolved by the Constitutional Court prior to Scotiabank Perú's initiation of the Amparo Proceedings on 23 January 2017;[504] **AND**

363. (***iii***) that were resolved prior to the issuance of the binding precedent in *Maxco*, decided on 11 February 2023;[505] **AND**

364. (***iv***) that had been initiated by Peruvian nationals which, in the case of legal entities, includes entities incorporate in Peru **and** whose majority shareholders are Peruvian entities or citizens.[506]

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501 Claimant's Memorial on the Merits, ¶ 254.

502 Claimant's Memorial on the Merits, ¶ 256. *See* also Expert Report of Profs. Landa and Neyra, ¶80.

503 Expert Report of Profs. Landa and Neyra, ¶ 80.

504 Expert Report of Profs. Landa and Neyra, ¶ 82.

505 Expert Report of Profs. Landa and Neyra, ¶ 83.

506 Expert Report of Profs. Landa and Neyra, ¶ 87.

365. By applying these criteria, the Claimant and its experts reach a grand total of 40 cases involving Peruvian nationals allegedly in "like circumstances" as the Claimant.[507]

366. The Claimant's selection of proposed comparators is severely flawed and should be rejected by the Tribunal.

367. ***First***, the Claimant has failed to satisfy its burden of proof that the domestic comparators that it has selected are "investors". As the Tribunal may appreciate in the transcription of the criteria proposed by the Claimant above, there is no resemblance of an attempt to establish that is proposed comparators are "investors".[508] Despite the express language of Article 803 FTA, Scotiabank wants the Tribunal to believe that "domestic investors" equals "domestic taxpayers" or "domestic nationals", and simply proposes to ignore the use of the term "investors" in the provision it invokes. This interpretation renders the language of the Treaty ineffective and is in breach of the fundamental tenets of treaty interpretation provider under Article 31 of the Vienna Convention on the Law of Treaties, including the basic principle that a treaty must be interpreted in accordance with its ordinary meaning,[509] and the principle of "*effet utile*".[510] Far from being accidental, the FTA's reference to "investors" is fully in line with the object and purpose of the National Treatment standard which, as explained, is to secure a level playing field between foreign investors and their domestic competitors.[511]

368. Accordingly, the Claimant has failed to meet its burden of proving that the comparators that it proposes are "domestic investors", which is the starting point of the "like circumstances" test.

369. ***Second***, the Claimant's proposition that the relevant time to determine the nationality of the alleged comparators is "*the date the plaintiffs filed their* amparo *action*"[512] is wrong. As explained by the Respondent, the only measure having a material impact over the Claimant's investment

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507 Expert Report of Profs. Landa and Neyra, ¶ 88.

508 *See* for Claimant's sole explanation: Memorial on the Merits, ¶ 260.

509 *See* Mark E. Villiger, 'Article 31(1)' in *Commentary on the 1969 Vienna Convention on the Law of Treaties* (Brill Nijhoff, 2009) (**Exhibit RL-0080**), p. 425, ¶ 6.

510 *See Noble Ventures, Inc. v. Romania*, ICSID Case No. ARB/01/11, Award, 12 October 2005 (**Exhibit RL-0102**), ¶ 50 ("[Under article 31 of the Vienna Convention] *treaties have to 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 the light of the object and purpose of the Treaty* […]. *Reference should also be made to the principle of effectiveness (effet utile), which, too plays an important role in interpreting treaties*.") (emphasis added); *see* also *Salini Costruttori S.p.A. and Italstrade S.p.A. v. Hashemite Kingdom of Jordan*, ICSID Case No. ARB/02/13, Decision on Jurisdiction, 29 Nov 2004 (**Exhibit RL-0101**), ¶ 95 ("*Such an interpretation runs counter to the general principle of effectiveness ('effet utile') and for that reason also ought to be set aside*.")

511 *See* above, Section V (introductory section).

512 Claimant's Memorial on the Merits, ¶ 260.

is the 2021 Constitutional Court Decision itself.[513] Therefore, to assess any purported discrimination, the relevant point in time is not when the alleged comparators initiated their proceedings, but rather when the allegedly more favorable treatment was accorded, *i.e.*, when the final decisions on the relevant matters were issued. Evidently, accounting for this materially changes the pool of comparators. A clear example of this is the case of the Volcan group of companies, which comprises two alleged comparators on which the Claimant relies: Volcan Compañía Minera SAA and Empresa Administradora Chungar SAC. In 2017, Glencore International AG acquired an interest of up to 55% in Volcan, which in turn owned Empresa Administradora Chungar.[514] This shareholding structure was in place in 2021, when the decisions of the Constitutional Court in the relevant cases were issued.[515] Therefore, considering the date when the relevant decision was issued, and not the date of the commencement of the proceedings, as the Claimant suggests, these companies may no longer be considered Peruvian nationals, let alone domestic comparators.

370. ***Third***, the Claimant has excluded from the "Universe of Comparable Cases" several cases that meet its allegedly objective criteria, for no apparent reason other than that they further disprove that the treatment received by the Claimant was in any way exceptional, let alone discriminatory. Indeed, the Respondent has identified at least four cases concerning default interest as a "central issue" in dispute, which were resolved between January 2017 and February 2023 (*i.e.*, compliant with the criteria established by the Claimant), which were omitted from the Claimant's and its experts' analysis.[516] Both cases were decided against the plaintiffs. The Claimant's selective presentation of the cases and exclusion of cases disproving any discriminatory treatment against Scotiabank Perú should not be countenanced by the Tribunal.

371. ***Fourth***, the selected comparators are not in "like circumstances" with the Claimant's investment, since there is a crucial differentiating factor that has not been accounted for: the varying composition of the Constitutional Court, and the different outcomes that this legitimately results in. As explained above, under the Peruvian constitutional legal order, changes in the composition of the Constitutional Court may lead to widely different outcomes.[517]

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513 *See* above, Section V.A.1.

514 *See* Volcan Annual Report (2017) (**Exhibit R-0313**), pp. 11, 20; Volcan Annual Report (2015) (**Exhibit R-0311**), p. 14; Volcan Annual Report (2016) (**Exhibit R-0312**), p. 11; Semana Económica, "Glencore is the new majority shareholder of Volan", 9 November 2017 (**Exhibit R-0316**).

515 Consolidated Financial Statements of Volcan Compañia Minera for 2021 (**Exhibit R-0317**), p. 3.

516 Decision No. 936/2021 of the Peruvian Constitutional Court in File No. 5289-2016/AA/TC, 11 November 2021 (**Exhibit R-0266**); Order of the Constitutional Court in File No. 04041/2017, 3 February 2021 (**Exhibit R-0259**); Judgment of the Constitutional Court, File No. 4532-2013-PA/TC, 16 August 2018 (Pluspetrol) (**Exhibit R-0314**); Judgment of the Constitutional Court, File No. 03744-2018-PA/TC, 4 November 2019 (Silver Lake) (**Exhibit R-0315**).

517 *See* above, Section II.E.3.

372. Accordingly, the composition of the Constitutional Court is directly relevant to the "treatment" of which the Claimant complains in this arbitration, given that different compositions of the Court may legitimately reach different decisions, without this being a violation of the Constitution, nor any indication of discrimination. In other words: the risk of obtaining a favorable or unfavorable outcome on a given matter is to a large degree dependent on the composition of the Court. Yet, Scotiabank's proposed comparators fail to consider this fundamental characteristic of the Peruvian Constitutional system, grouping together in their proposed category of comparators cases that have been resolved by the Constitutional Court with three different compositions, leading to dramatically different results, as follows:

373. Composition of the Court from May 2014 to 21 September 2021: prior to Justice Ramos' sudden passing on 21 September 2021, the Court was composed of Justices Miranda Canales, Ledesma Narvaez, Blume Fortini, Ramos Nuñez, Sardón de Taboada, Espinosa Saldaña and Ferrero Costa. As may be seen in Appendix 1 to the Respondent's Statement of Defense, during this period, Justices Miranda Canales, Ledesma Narvaez and Espinosa Saldaña predominantly voted for the inadmissibility of amparo proceedings for default interest claims, while Justices Blume Fortini, Sardón de Taboada and Ferrero Costa consistently voted against the SUNAT.[518] During this period, half of those cases concerning default interest were resolved exactly like Scotiabank Perú's case; specifically, in 4 out of 8 cases, the plaintiffs' claims were found inadmissible by a majority of three composed by Justices Miranda Canales, Ledesma Narvaez and Espinosa Saldaña.[519] On the other hand, in the remaining 4 cases, the plaintiffs' claims were either partially or fully granted on the merits, by a majority composed by Blume Fortini, Ramos Nuñez and Ferrero Costa, which Miranda Canales and Espinosa Saldaña occasionally joined. In two of these cases, *Paramonga* and *Jorge Baca Campodónico*, the plaintiffs were Peruvian nationals. The Claimant's entire case on discrimination hinges on these two cases which, were resolved by a Court with a different integration than the Court that resolved the *Scotiabank Perú* case. Furthermore, as the Respondent further explains below, these cases are anything but representative of the treatment conferred on national taxpayers during the period considered to be relevant by the Claimant.[520]

374. Composition of the Court from 21 September 2021 to December 2021: following Justice Ramos' passing, the Court was composed of the six remaining Justices. As explained by Prof. Bustamante, the Constitutional Court does not have a system of substitute Justices.[521] Consequently, in the

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518 *See* Appendix 1 to the Respondent's Statement of Defense, Tab 1.

519 *See* Appendix 1 to the Respondent's Statement of Defense, Tab 1; *see* also two additional cases in favor of the SUNAT that the Claimant omits from its analysis: Judgment of the Constitutional Court, File No. 03744-2018-PA/TC, 4 November 2019 (Silver Lake) (**Exhibit R-0315**); Judgment of the Constitutional Court, File No. 4532-2013-PA/TC, 16 August 2018 (Pluspetrol) (**Exhibit R-0314**).

520 *See* below, Section V.C.3.

521 *See* Prof. Bustamante's Expert Report, ¶ 44.

exceptional case that one of the Justices is forced to leave the Court before the completion of the ordinary 5-year term, the Court has to continue functioning with the remainder of its components to fulfil its mandate of administering justice. This is the period in which the 2021 Constitutional Court Decision adverse to Scotiabank Perú that it unduly seeks to appeal in this arbitration was issued, on 9 November 2021. Following Ramos' passing, the tight difference between the two voting blocks in the Supreme Court disappeared, in favor of the three-Justice majority composed by Miranda Canales, Ledesma Narvaez (who, as the President of the Court until January 2022, had the casting vote) and Espinosa Saldaña. During this period, crucially, based on the Claimant's own proposed cases, forty-four cases on default interest against Peruvian nationals were treated exactly like Scotiabank Perú's, *i.e.* dismissed on grounds of inadmissibility by Miranda Canales, Ledesma Narvaez and Espinosa Saldaña. According to Prof. Bustamante, the cases were undercounted by the Claimant and its experts, estimating that they amount to a total of seventy.[522]

375. Composition of the Court from January 2022 to May 2022: as explained, following Justice Ferrero's appointment as President of the Court, the Court issued five in favor of the plaintiffs, with a majority composed of Ferrero Costa (with the casting vote), Sardón de Taboada and Blume Fortini. During this period, five cases were also decided in favor of the SUNAT, mostly due to the abstention of Justices belonging to the block inclined to vote in favor of the plaintiffs on this question.[523]

376. Composition of the Court from May 2022 until February 2023: in May 2022, the Constitutional Court was renewed almost in its entirety, with the appointment of Justices Dominguez Haro, Morales Saravia, Monteagudo Valdez, Gutiérrez Ticse, Ochoa Cardich and Pacheco Zerga, who joined Justice Ferrero Costa, who had been appointed in August 2017. According to the Claimant, this period includes a single relevant case, *Maxco*, where the Court issued what it proclaimed as a binding precedent (despite it being *obiter dictum*) on the question of the legality of default interest over periods of delay attributable to the Public Administration.[524] Clearly, in an attempt to include this case among its alleged comparators, the Claimant has gone so far as to include a decision issued by a Court with an entirely different composition from that in place when the 2021 Constitutional Court Decision was issued, with the exception of Justice Ferrero, who abstained from participating in the Scotiabank Perú case. This notwithstanding, the Respondent

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522 *See* Prof. Bustamante's Expert Report, ¶ 373.

523 *See* Appendix 1 to the Respondent's Counter-Memorial, Tab 3. *See* also Prof. Bustamante's Expert Report, paras. 375-376.

524 *See* Respondent's Appendix 1, Tab 3. *See* also Judgment of the Plenary Session of the Constitutional Court in Case No. 03525-2021-AA (*Maxco*) (**Exhibit C-0382**).

reiterates that, in *Maxco*, the Court found the plaintiff's claims inadmissible, as in the case of Scotiabank Perú.[525]

377. The Claimant's strategy is thus exposed: to portray itself as a victim of discrimination, the Claimant has grouped together cases issued by different Courts with different majorities, among which the possibility of having an unfavorable outcome differed enormously. Consequently, the Claimant has failed to comply with is burden of providing adequate comparators in "like circumstances" to the Claimant and its investment *vis-à-vis* the impugned measure in order to establish its claim for a breach of the National Treatment standard.

378. The Claimant and its experts are well aware of the importance of the composition of the Constitutional Court to determine a given outcome, yet they deliberately decided not to take this into consideration to select their proposed comparators. In this regard, the Claimant's experts state that the "*delimitation*" of the Claimant's proposed comparators "*also coincides (although it is not an element that we have adopted to delimit the comparable cases) with those cases that were resolved with a composition of the judges of the Constitutional Tribunal that was mostly similar to the one that existed when the Amparo Process of Scotiabank Perú was resolved*."[526]As explained above, in line with *Methanex*, on which the Claimant itself relies, "mostly similar" is simply not good enough to establish adequate comparators when cases decided by a Court with an identical composition as that in place when the 2021 Constitutional Court Decision was issued are available.

f. The Claimant has failed to identify a single comparator with a six-judge Court and two abstentions, such as Scotiabank

379. Moreover, the Claimant has failed to provide a single comparator in "like circumstances" with the Claimant as regards the quorum with which the 2021 Constitutional Court Decision was adopted. As explained by the Respondent, Justices Ferrero and Sardón abstained from participating in the case of Scotiabank Perú, both of which abstentions were considered and accepted by the Plenary of the Court.[527] As the Respondent has laid out in detail, this rare circumstance, coupled with the vacancy in the Court following Justice Ramos' sudden passing, led the Court to apply Administrative Resolution No. 205-2021-P/TC to issue the 2021 Constitutional Court Decision. Yet, none of the Claimant's proposed comparators resemble these circumstances: as can be seen in the Respondent's Appendix 1, none of the cases identified as the Claimant's "Domestic Comparators" for the period between October 2021 and April 2022

525 *See* Prof. Bustamante's Expert Report, ¶ 353.

526 Expert Report of Profs. Landa and Neyra, ¶ 84.

527 *See* above, Section II.E.1.

during which the Court functioned with six of its Justices and had two abstentions, such as in the case of Scotiabank Perú.[528]

380. In this context, the Claimant's complaint that "[o]*n the same day that the Court was deciding Scotiabank Perú's case, in another case, the Constitutional Court adhered to the five-judge quorum required where the votes of four judges had initially resulted in a tie*" is disingenuous.[529]

[redacted].[530]

381. As further explained below, the only other *amparo* case concerning default interest resolved by the six-Justice Court with two abstentions was a case involving a financial company, Citileasing S.A., which was resolved in exactly the same way as the case initiated by Scotiabank Perú, i.e. by a majority of three votes out of four voting for the dismissal of the claim.[531] This is something that the Claimant is well aware of, as the relevant decision was filed into the record by the Claimant, together with its Memorial on the Merits.[532] Yet, the Claimant purposefully glosses over it.

382. Accordingly, the Claimant has failed to comply with the second requirement of the test for liability to exist under Article 803 FTA, leading to the dismissal of its claims.

E. EVEN RELYING ON THE CLAIMANT'S COMPARATORS, THE CLAIMANT HAS FAILED TO PROVE THAT ITS INVESTMENT WAS ACCORDED TREATMENT LESS FAVORABLE THAN THAT ACCORDED TO DOMESTIC INVESTORS

383. Contrary to the Claimant's assertions that discriminatory intent is irrelevant to determine a breach of the National Treatment, Article 803 FTA requires a showing of express or inferred

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528 *See* Respondent's Appendix 1, Tab 2.

529 *See* Claimant's Memorial on the Merits, ¶ 157.

530 *See* [redacted]

531 *See* Judgment of the Plenary Session of the Constitutional Court in Case No. 02235-2020-PA/TC (Citileasing) (**Exhibit C-376**).

532 Judgment of the Plenary Session of the Constitutional Court in Case No. 02235-2020-PA/TC (Citileasing) (**Exhibit C-376**).

intent to discriminate for a finding on liability (**1**). The Claimant also distorts the level of protection that Article 803 FTA affords to foreign nationals; contrary to its allegations that Peru is under an obligation to provide the Claimant the "best" treatment available to domestic nationals, the National Treatment standard should be construed to prohibit discrimination, not to grant preferential treatment to the Claimant and its investment (**2**).

1. Article 803 FTA requires express or inferred intent to discriminate on the basis of nationality

384. Contrary to the Claimant's allegations,[533] the existence of discriminatory intent lies at the core of the National Treatment standard.

385. ***First***, the object and purpose of National Treatment provision is to prevent discrimination on the basis of nationality.[534] As a result, a breach of the National Treatment standard requires the existence of discriminatory intent. As expressed by Canada in its Non-Disputing Party Submission in *Espiritu Santo Holdings v. Mexico*:

> This analysis has to be conducted in light of the object and purpose of Article 1102, which is to prevent discriminatory treatment based on the nationality of an investor or its investment. NAFTA tribunals have recognized that the central object of Article 1102 is to prevent nationality-based discrimination, not to prevent all measures that result in differences in treatment. [535] Therefore, there can be no breach of Article 1102 unless the evidence establishes that a host State has treated foreign investors, or investments, that are in like circumstances to domestic investors, or investments, less favourably on the basis of their nationality.[536]

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533 *See* Claimant's Memorial on the Merits, Section IV.A.i.

534 *See* e.g. *International Thunderbird Gaming Corporation v. The United Mexican States*, *Ad hoc* UNCITRAL arbitration, Submission of the Government of Canada Pursuant to NAFTA Article 1128, 21 May 2004 (**Exhibit RL-0099**), ¶ 6 ("*the "national treatment" provision in Article 1102 requires a NAFTA Party to accord treatment to an investment of another NAFTA Party that is no less favourable than the treatment it accords, in like circumstances, to domestic investments. It prohibits treatment which discriminates on the basis of the nationality of the investment or the investor*.") *See* also *Archer Daniels Midland and Tate & Lyle Ingredients Americas, Inc. v. United Mexican States,* ICSID Case No. ARB(AF)/04/5, Award, 21 November 2007 (**Exhibit CL-0081**), ¶193 ("[t]*he national treatment obligation under Article 1102 is an application of the general prohibition of discrimination based on nationality*.")

535 *See* e.g. *Resolute Forest Products Inc. v. Canada*, PCA Case No. 2016-13, Final Award, 25 July 2022 (**Exhibit RL-0130**), ¶ 546; *Mercer International Inc. v. Government of Canada*, ICSID Case No. ARB(AF)/12/3, Award, 6 March 2018 (**Exhibit CL-0113**), ¶¶ 7.7-7.10; *Loewen Group, Inc. and Raymond L. Loewen v. United States of America*, ICSID Case No. ARB(AF)/98/3, Award, 26 June 2003 (**Exhibit CL-0130**), ¶ 139; *Archer Daniels Midland and Tate & Lyle Ingredients Americas, Inc. v United Mexican* States, ICSID Case No ARB (AF)/04/5, Final Award, 21 November 2007 (**Exhibit CL-0081**), ¶¶ 193, 205; and *Cargill, Inc. v. United Mexican States*, ICSID Case No. ARB(AF)/05/2, Award, 18 September 2009 (**Exhibit RL-0109**), ¶ 217.

536 *Espíritu Santo Holdings, LP and L1bre Holding, LLC v. United Mexican States*, ICSID Case No. ARB/20/13, Non-Disputing Party Submission of the Government of Canada Pursuant to NAFTA Article 1128, 21 March 2023 (**Exhibit RL-0134**), ¶ 28. *See* also *Gramercy Funds Management LLC, and Gramercy Peru*

386. This is in no way a novel position of the Government of Canada. Previously, in its Non-Disputing Submission in *International Thunderbird v. Mexico*, Canada had also expressed that "[i]*n the case of Article 1102, its clear object is the prohibition of discrimination on the basis of nationality. It is not concerned with distinctions in treatment that are based on some consideration other than nationality*."[537]

387. Similarly, tribunals have expressly rejected propositions such as the Claimant's that a tribunal should focus on the adverse effect of the impugned measure, without considering the existence of discriminatory intent:[538]

> The Tribunal is of the view that the definition of "treatment" provided by the Claimant, with its emphasis on a government policy to favor a domestic in-province investor and its effects outside the province, is at odds with the above framework of analysis. As a general matter, arguments based on sole "adverse effect" or "detrimental effect" on a foreign investor operating in a different province than the one adopting the "measures" (and as a result not subject to that province's jurisdiction) cannot be accepted without more. Indeed, such arguments could lead to a breach of NAFTA Article 1102(3) without the relevant government even knowing that foreign investors are impacted. This goes against the aim of Article 1102 to prevent nationality-based discrimination and would make government regulation impossible without creating (unlimited) liability for damages. In other words, simply "affecting adversely" a foreign national (not subject to the province's jurisdiction), cannot be the standard for "treatment" under Article 1102(3).[539]

388. ***Second***, the fact that an "objective" test such as the "like circumstances" test may be applied, as the Claimant emphasizes,[540] does not mean that the existence of discriminatory intent is irrelevant. On the contrary, the very purpose of the so-called "objective" test resulting from the "like circumstances" comparison is to infer the existence of discriminatory intent by accounting for any other circumstance other than nationality which might reasonably justify differential treatment. This was clearly explained by the Government of Canada in its 2005 Non-Disputing Party Submission in *International Thunderbird v. Mexico*, as follows:

Holdings LLC v. The Republic of Peru, ICSID Case No. UNCT/18/2, Award, 6 December 2022 (**Exhibit CL-0100**), ¶¶ 1238-1239.

537 *International Thunderbird Gaming Corporation v. The United Mexican States*, *Ad hoc* UNCITRAL arbitration, Submission of the Government of Canada Pursuant to NAFTA Article 1128, 21 May 2004 (**Exhibit RL-0099**), ¶ 17.

538 *See* Claimant's Memorial on the Merits, ¶ 263.

539 *Resolute Forest Products Inc. v. Canada*, PCA Case No. 2016-13, Final Award, 25 July 2022 (**Exhibit RL-00130**), ¶ 555.

540 Claimant's Memorial on the Merits, ¶¶ 265-267.

> In the case of Article 1102, its clear object is the prohibition of discrimination on the basis of nationality. It is not concerned with distinctions in treatment that are based on some consideration other than nationality.
>
> The expression "in like circumstances" is critical in applying Article 1102 to prohibit discrimination based on nationality. It is clear in Article 1102 that all treatment accorded in unlike circumstances is to be disregarded. Application of Article 1102 begins by considering the treatment accorded by a Party to the foreign investor or investment. Consideration is then given to the treatment that is accorded by that Party to an investor or investment where all the relevant circumstances of the according of the treatment are "like", except that the investor or investment is domestic. There is a breach of Article 1102 if, and only if, the foreign investor or investment receives the less favourable of these treatments.[541]

389. For the avoidance of doubt, as acknowledged by the Claimant,[542] even when discriminatory intent is proven, this is not sufficient *per se* for a State to be liable for a breach of the National Treatment standard. As explained by the tribunal in *SD Myers v. Canada*:

> Intent is important, but protectionist intent is not necessarily decisive on its own. The existence of an intent to favour nationals over non-nationals would not give rise to a breach of Chapter 1102 of the NAFTA if the measure in question were to produce no adverse effect on the non-national complainant. The word "treatment" suggests that practical impact is required to produce a breach of Article 1102, not merely a motive or intent that is in violation of Chapter 11.[543]

390. In other words, the discriminatory intent ought to have resulted in negative consequences for the investor for it to be relevant to establish a breach of the National Treatment clause. As explained by the *Loewen v. United States* tribunal: "[t]*he Tribunal agrees with Professor Bilder – Respondent's expert 'that Article 1102 is direct* [sic] *only to nationality-based discrimination and that it proscribes only demonstrable and significant indications of bias and prejudice on the basis of nationality, of a nature and consequence likely to have affected the outcome of the trial*".[544]

391. Accordingly, despite the Claimant's attempts to downplay the importance of discriminatory intent under the National Treatment standard, this remains a key element of the test that the Tribunal should apply, which, as explained below,[545] the Claimant has also failed to meet.

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541 *International Thunderbird Gaming Corporation v. The United Mexican States*, *Ad hoc* UNCITRAL arbitration, Submission of the Government of Canada Pursuant to NAFTA Article 1128, 21 May 2004 (**Exhibit RL-0099**), ¶¶ 17-18. *See* also *Mercer International Inc. v. Government of Canada*, ICSID Case No. ARB(AF)/12/3, Award, 6 March 2018 (**Exhibit CL-0113**), ¶¶ 7.7-7.9.

542 *See* Claimant's Memorial on the Merits, ¶ 268.

543 *S.D. Myers, Inc. v. Government of Canada* (UNCITRAL), Partial Award, 13 November 2000 (**Exhibit CL-0126**), ¶ 254 (emphasis added).

544 *Loewen Group, Inc. and Raymond L. Loewen v. United States of America*, ICSID Case No. ARB(AF)/98/3, Award, 26 June 2003 (**Exhibit RL-0098**), ¶ 139.

545 *See* below, Section V.D.

2. Article 803 does not impose on Peru an obligation to grant investors treatment beyond the average treatment accorded to national investors

392. As explained, the Claimant's experts have identified forty alleged national comparators.[546] The Claimant's argument is that it suffices for it to identify one out of those forty cases that was granted more favorable treatment than the Claimant for Peru to be liable under the FTA. In addition to being unreasonable and excessively burdensome for the Respondent, this obligation is simply not backed by the language of the FTA.

393. Contrary to the Claimant's allegations, Article 803 does not impose on Peru an obligation to grant the Claimant the "*best level of treatment afforded to any one national in like circumstances, even if not all similarly situated domestic investors are provided comparably favourable treatment.*"[547] As the Respondent explains below, the Claimant's proposition is contrary to the text and spirit of Article 803 and is based mostly on an attempt by the Claimant to rely on NAFTA case law that in inapposite:

394. ***First***, the clear language of Article 803 contradicts the Claimant's unreasonable contention that the Respondent is under an obligation to provide it with the best treatment accorded to any single domestic investor, regardless of the median treatment regularly granted to domestic investors in general. The clear language of Article 803 FTA simply does not state so. To recall, Article 803 FTA mandates that each Party shall "*accord to investors of the other Party treatment no less favourable than that it accords, in like circumstances, to its own investors*".[548] In the words of Professors Reinisch and Schreuer: "[l]*iterally, 'no less favourable' treatment appears to require host states only to accord treatment that is not below the treatment given to domestic investors generally.*"[549].

395. To state the obvious, nothing would have prevented the Contracting States from providing clear language stating that the obligation to grant National Treatment entailed guaranteeing to an investor from the other Party the best level of treatment available to national investors, had they so intended. They did not. Accordingly, the language of Article 803 FTA allows States to distinguish between the treatment granted to different entities, without necessarily incurring international liability. In the words of the tribunal in *Michael Ballantine v. Dominican Republic*:

> Nothing in Article 10.3 requires that investors or investments of investors of a Party, regardless of the circumstances, be accorded the best, or most favorable, treatment given to any national investor or any investment of a national. The

546 *See a*bove, Section V.C.

547 Claimant's Memorial on the Merits, ¶ 271.

548 Free Trade Agreement between Canada and the Republic of Peru (**Exhibit C-0001**), Article 803.

549 A. Reinisch and C. Schreuer, *International Protection of Investments: The Substantive Standards,* Cambridge University Press, 2020 (**Exhibit RL-0149**), ¶ 312, p. 653.

> appropriate comparison is between the treatment accorded a foreign investment or investor and a national investment or investor *in like circumstances*. This is an important distinction intended by the Parties. Thus, a CAFTA-DR Party may adopt measures that draw distinctions among entities without necessarily violating Article 10.3.[550]

396. This opinion has been shared by the United States of America in its Non-Disputing Submission in *Mason Capital v. Korea*.[551]

397. ***Second***, to recall, the purpose of the National Treatment standard is not to guarantee a level of substantive treatment, but rather to prevent discrimination and ensure a level playing field between national and foreign investors.[552] This purpose is adequately met by granting an investor the same level of treatment granted in average to domestic investors, and should not be stretched to allow investors to identify a single outlier to find the State liable, regardless of whether the all other comparators are treated in the same way as the Claimant.[553] This interpretation would not ensure a level playing field, but would rather give a competitive advantage to foreign investors over the vast majority of national competitors, which is not what the language or the spirit of the National Treatment standard are meant for.

398. ***Third***, the NAFTA case law on which the Claimant relies to support its contention that Article 803 FTA should be interpreted as a guarantee of "best treatment available" is inapposite. In its Memorial, the Claimant alleges that "[t]*ribunals have affirmed this approach this approach with respect to international investment agreements with similar wording to the FTA*",[554] prior to referring to the awards issued in NAFTA cases *Pope & Talbot v. Canada*, *Archer Daniel Midlands v. Mexico* and *UPS v. Canada*. However, despite the significant resemblances between the NAFTA and the FTA—which is, as repeatedly stated by the Respondent, is a NAFTA-inspired treaty—there are significant differences in the provisions in both treaties relating to the National Treatment standard, which render the NAFTA case law cited by the Claimant unhelpful to its case. The differences in the language used in the relevant provisions in both Treaties are summarized below:

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550 *Michael Ballantine and Lisa Ballantine v. The Dominican Republic*, PCA Case No. 2016-17, Submission of the United States of America, 6 July 2018 (**Exhibit RL-0126**), ¶ 15.

551 *Mason Capital L.P. and Mason Management LLC v. Republic of Korea*, PCA Case No. 2018-55, Submission of the United States of America, 1 February 2021 (**Exhibit RL-0127**), ¶ 31.

552 *See* above, Section V (introductory section).

553 *See Abed El Jaouni and Imperial Holding SAL v. Lebanese Republic*, ICSID Case No. ARB/15/3, Decision on Jurisdiction, Liability and Certain Aspects of Quantum, 25 June 2018 (**Exhibit RL-0125**), ¶ 927 ("*The Tribunal does not agree with the Claimants that it would constitute a breach of the National or MFN Treatment Standard, if one sole comparator is afforded better treatment than the investor, irrespective of whether all other comparators are afforded the same treatment as the investor*.")

554 Claimant's Memorial on the Merits, ¶ 272.

NAFTA	FTA
Article 1102: National Treatment 1.Each Party shall accord to investors of another Party treatment no less favorable than that it accords, in like circumstances, to its own investors with respect to the establishment, acquisition, expansion, management, conduct, operation, and sale or other disposition of investments. 2. Each Party shall accord to investments of investors of another Party treatment no less favorable than that it accords, in like circumstances, to investments of its own investors with respect to the establishment, acquisition, expansion, management, conduct, operation, and sale or other disposition of investments. 3. The treatment accorded by a Party under paragraphs 1 and 2 means, with respect to a state or province, **treatment no less favorable than the most favorable treatment accorded, in like circumstances, by that state or province to investors, and to investments of investors**, of the Party of which it forms a part.	**Article 803: National Treatment** 1. Each Party shall accord to investors of the other Party treatment no less favourable than that it accords, 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. 2. Each Party shall accord to covered investments treatment no less favourable than that it accords, in like circumstances, to investments of its own investors with respect to the establishment, acquisition, expansion, management, conduct, operation and sale or other disposition of investments in its territory. 3. The treatment accorded by a Party under paragraphs 1 and 2 means, with respect to a sub-national government, **treatment no less favourable than the treatment accorded, in like circumstances, by that sub-national government to investors, and to investments of investors**, of the Party of which it forms a part.
Article 1104 : Standard of Treatment Each Party shall accord to investors of another Party and to investments of investors of another Party the better of the treatment required by Articles 1102 and 1103.	[No equivalent provision]

399. The differences between the language of Article 1102(3) of NAFTA and Article 803(3) FTA are fatal to the Claimant's reliance on NAFTA case law to support its "best treatment" argument.

Indeed, the language of Article 1103(3)—which has been called a "peculiar feature" of NAFTA—[555] was "*pivotal*" in the "*justification of a most-favoured domestic investor standard in the Pope & Talbot award*".[556] The decision in *Pope & Talbot*, which was reached against the opinions of all NAFTA Contracting States, was then followed by the NAFTA tribunals on which the Claimant relies.[557] This has led scholars to question the relevance of the approach for other cases, cautioning against an "*unthinking replication* [which] *is problematic when we consider the broader challenges at play in constructing a sensible reading of national treatment in this setting*."[558].

400. In light of the above, the Claimant has failed to prove its unreasonable contention that it is entitled under Article 803 FTA to receive the best treatment accorded to any single domestic investor. On the contrary, the only interpretation that is in line with the language, object and purpose of Article 803 FTA is that the Claimant must show that it received treatment less favorable than the average treatment received by Peruvian investors in general. As explained in the following sub-sections, the Claimant is far from meeting this burden.

3. The Claimant did not suffer discrimination resulting in treatment less favorable than Peruvian investors

401. The Claimant has failed to show that its investments in Peru received treatment less favorable than Peruvian investors derived from nationality-based discrimination, to qualify a breach of National Treatment in accordance with the standard described above:

402. ***First***, the Claimant has failed to show any relevant discriminatory intent. The Claimant has failed to point to <u>any</u> evidence that the Justices of the Constitutional Court that issued the 2021 Decision accorded any relevance to the nationality of Scotiabank Perú, or of its shareholders. As explained by Peru,[559] the statements by "[g]*overnment officials and Peruvian media*" describing

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555 A. Reinisch and C. Schreuer, *International Protection of Investment: The Substantive Standards*, Cambridge University Press, 2020 (**Exhibit RL-01149**), ¶ 332.

556 Jürgen Kurtz, *The WTO and International Investment Law: Converging Systems*, Cambridge University Press, 2016 (**Exhibit RL-0145**), p. 114.

557 The *Pope & Talbot* test (**Exhibit CL-0123**) has notably been relied upon by tribunals in *Bilcon et al v. Government of Canada*, PCA Case No. 2009-04, Award on Jurisdiction and Liability, March 17, 2015 (**Exhibit CL-0003**), ¶¶ 723-724; *International Thunderbird Gaming Corporation v. The United Mexican States*, UNCITRAL, Arbitral Award, January 26, 2006 (**Exhibit CL-0029**), ¶ 177, fn. 9 ; *Apotex Holdings Inc. and Apotex Inc. v. United States of America*, ICSID Case No. ARB(AF)/12/1, Award, 25 August 2014 (**Exhibit CL-0080)**, ¶¶ 8.55-8.56 and *Corn Products International Inc. v. United Mexican States*, ICSID Case No ARB(AF)/04/1, Decision on Responsibility, 15 January 2008 (**Exhibit CL-0093**), ¶ 139.

558 Jürgen Kurtz, *The WTO and International Investment Law: Converging Systems,* Cambridge University Press, 2016 (**Exhibit RL-0145**), p. 115.

559 *See* above, Section II.D.1.

Scotiabank Perú as a "*Banco de capitales canadienses*", a "*transnational entity*", a "*multinational company*" and a "*millionaire group*" are obviously (***i***) merely descriptive and certainly not reprehensible, and (***ii***) irrelevant to the outcome of the case before the Constitutional Court and, therefore, not susceptible of having a material effect or causing harm to the Claimant, as required to establish a breach of Article 803 FTA.

403. ***Second***, the Claimant's allegations that members of the SUNAT and Executive Branch tried to unduly interfere with the Constitutional Court are simply not credible. As explained, the Claimant's grave accusations are based on nothing but hearsay and innuendo and should be dismissed as nothing but speculation.[560] Among other accusations, the Claimant avers that Justice Espinosa Saldaña had a conversation eight years ago with [redacted] in which he seemingly told [redacted] that unidentified "*government officials*" had threatened that "*funding to build new institutional headquarters for the Court would be pulled if the Court came out in Scotiabank Perú's favour*."[561] It is truly astounding that the Claimant presents this as what it believes to be credible evidence of wrongdoing. This is particularly so considering that, as explained by Peru, the new headquarters for the Constitutional Court had been purchased well in advance of these facts.[562] As detailed by Prof. Bustamante, as part of the checks and balances established in the Peruvian Constitution, the Constitutional Court has full budgetary independence from other State powers.[563]

404. ***Third***, even if the Claimant's allegations of improper interference were true (*quod non*), the Claimant has failed to establish a causal link between the alleged leak and the 2021 Constitutional Court Decision; no matter how often the Claimant may reiterate its assertion that "*the Constitutional Court gave in to pressure from non-judicial government officials or decided independently to release the 2017 Leaked Decision*",[564] this does not make it true. In this regard, the Claimant's allegation, based exclusively on hearsay, that certain Justices "*conceded that the political climate created as a result of the leak influenced their final decision in 2021*"[565] is equally ludicrous. As explained by Prof. Bustamante, the Peruvian Constitutional order has a panoply of measures specifically designed to protect the independence and immunity of Justices for their decisions.[566]

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560 *See* above, Section II.D.1.

561 Claimant's Memorial on the Merits, ¶ 278.

562 *See* above, fn. 270.

563 Prof. Bustamante's Expert Report, ¶¶ 64-65.

564 Claimant's Memorial on the Merits, ¶ 277.

565 Claimant's Memorial on the Merits, ¶ 282.

566 Prof. Bustamante's Expert Report, ¶¶ 66-67.

405. Moreover, the Respondent is compelled to correct several misrepresentations by which the Claimant tries to cast doubt over the legality of the 2021 Constitutional Court Decision:

406. Claimant's misrepresentation 1: The Claimant insists on its allegation that the alleged leaked decision had been voted on by the judges, without any evidence for this assertion.[567] Contrary to the Claimant's allegations, the Respondent has reviewed and submits along with this pleading all the minutes of the Plenary of the Constitutional Court of 2017 in which File No. 00222-2017-PA/TC was discussed, none of which concern the deliberation and voting on the merits of the case.[568]

407. Claimant's misrepresentation 2: The Claimant claims that the leak was "coordinated" between the Constitutional Court and the SUNAT, based simply on the fact that Hildrebrandt, an independent investigate journal, interviewed SUNAT's lawyer in the case, Professor Eguiguren.[569]

408. Claimant's misrepresentation 3: The Claimant also falsely claims that the leaked draft was "*fully consistent with contemporaneous Constitutional Court rulings in comparable cases, in which the Court held that the application of accrued default interest beyond the legal term was unconstitutional*."[570] This is disingenuous. Contrary to the Claimant's distortions, the 2021 Constitutional Court Decision was fully in line with the case law at the time, which had never before issued a decision finding for the unconstitutionality of default interest in cases of delay attributable to the State in a case involving a legal entity with commercial activity, such as Scotiabank Perú. As explained by Prof. Bustamante, in June 2017, at the time of the leak, only one prior judgment had been issued finding for the unconstitutionality of default interest beyond legal terms, in the case of Rosario Medina de Baca, a widower who had had to face an increase of her deceased husband's tax debt due to delays in the issuance of a decision.[571] The first case in which default interest owed by a legal entity with commercial activity was found

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567 *See* Claimant's Memorial on the Merits, ¶ 279.

568 [redacted]

569 *See* Claimant's Memorial on the Merits, ¶ 279.

570 Claimant's Memorial on the Merits, ¶ 279. *See* also Expert Report of Profs. Landa and Neyra, ¶ 152.

571 *See* above, Section II.A.3.

unconstitutional did not come until the *Icatom* judgment, issued over a year after the Hildebrant article in which the alleged draft decision in the case of Scotiabank Perú was published.[572]

409. Similarly misleading is the Claimant's portrayal of the *Paramonga* decision, which the Claimant describes as follows:

> While Scotiabank Perú's Default Interest Amparo was stalled as a result of the leak, the dozens of other default interest *amparo* cases brought by the Domestic Comparators proceeded without any government interference. As no cases involving the Domestic Comparators were subject to a leak, there are many representative examples. For instance, there is the case of Paramonga, a Peruvian company dedicated to the production of sugar cane and related businesses. In the *Paramonga* case, the Constitutional Court published its decision in December 2020. […] Consistent with the 2017 Leaked Decision, the Constitutional Court in *Paramonga* affirmed its jurisdiction and decided the case on the merits, ruling that the application of accrued default interest beyond the maximum legal time is equally.[573]

410. To set the record straight: contrary to the Claimant's allegations that Scotiabank Perú's case was "stalled as a result of the leak", the resolution of the *Paramonga* case had a duration comparable to Scotiabank Perú's. The *Paramonga* case was initiated approximately mid-June 2016,[574] while the judgment of the Constitutional Court was issued on 12 November 2020,[575] resulting in a total duration of approximately 53 months. On the other hand, Scotiabank Perú's *agravio* reached the Constitutional Court on 23 January 2017,[576] while the final judgment was issued on 9 November 2021. The total duration of the proceedings before the Constitutional Court concerning Scotiabank Perú was, therefore, 57.5 months. While this is slightly longer than the time it took for the Court to decide *Paramonga*, this delay may not justify any allegation that Scotiabank Perú's case was "stalled", considering (***i***) the size of the Scotiabank Perú case file, which totals 6.157 pages,[577] and (***ii***) the delays caused by Justice Ramos' sudden passing in September 2021.

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572 *See* above, Section II.E.3.

573 Claimant's Memorial on the Merits, ¶ 284.

574 *See* Judgment of the Plenary Session of the Constitutional Court in Case No. 02051-2016-PA/TC (Paramonga) (**Exhibit C-0310**), p. 2. While the exact date that the proceedings initiated does not arise from the Court's Judgment, the judgment impugned by Paramonga was issued on 10 March 2016. Considering that the term to file an *agravio* is of 10 business days after the issuance of the impugned decision, and that a few months are generally required for the case file to be transferred from the *ad quem* to the Constitutional Court, it is reasonable to assume that the *Paramonga* case started mid-June 2016.

575 *See* Judgment of the Plenary Session of the Constitutional Court in Case No. 02051-2016-PA/TC (Paramonga) (**Exhibit C-0310**), p. 2.

576 Constitutional Court Case Details for File No. 00222-2017-AA (**Exhibit C-0086**), p. 1. This consistent with the three-month delay in transferring the case file from the Superior Court of Lima to the Constitutional Court assumed for *Paramonga* (*see* above, fn. 574).

577 *See* Constitutional Court Case Details for File No. 00222-2017-AA (**Exhibit C-0086**), p. 1.

411. Moreover, the Claimant omits that the case of *Paramonga* was an exception to the Constitutional Court's predominant case law, which overwhelmingly sided with the SUNAT on the issue of default interest prior to Justice Ramos' passing, and which invariably did so after his decease. The numbers speak for themselves, even relying exclusively on the flawed and incomplete comparators proposed by the Claimant and its experts:

Number of cases (Annex II to Landa/Neyra Report)	Sept. 2017—Sept. 2021 (prior to Ramos' passing)	Oct. 2021—April 2022 (following Ramos' passing)
Total cases concerning default interest	**6**	**56 (including Scotiabank Perú)**
Nationals	**4**	**32**
Foreigners	**2**	**24 (including Scotiabank Perú)**
Cases resolved in favor of the plaintiff	**4**	**6**
Nationals	**2**	**0**
Foreigners	**2**	**1**
Cases resolved in favor of the SUNAT	**2**[578]	**50**[579]
Nationals	**2**	**29**
Foreigners	**0**	**21 (including Scotiabank Perú)**

412. As the table above shows, even on the basis of the cases presented as relevant by the Claimant, the treatment received by the Claimant was exactly like the treatment received by all national plaintiffs whose cases were decided by the same Justices Scotiabank Perú's, and not less favorable than the treatment received by the vast majority of cases decided during the preceding period, with Justice Ramos in the Court.

413. ***Fourth***, Scotiabank Perú was not granted treatment less favorable than domestic plaintiffs as regards the quorum for session or the three-vote majority with which the 2021 Constitutional Court Decision was adopted. As regards the adoption of a three-vote majority to issue a valid judgment, as explained, this was in accordance with Administrative Resolution No-205-2021-P/TC, which was issued in the wake of Justice Ramos' passing to address the delays and difficulties hindering the Court's ability to fulfill its duty to administer justice.[580] Moreover, Resolution No. 205-2021-P/TC was not specific to Scotiabank Perú, but rather applied in general

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578 The Respondent notes that the actual number is certainly larger. As the Respondent has explained, the Claimant omits cases decided in favour of the SUNAT over this period. *See* also, Judgment of the Constitutional Court, File No. 4532-2013-PA/TC, 16 August 2018 (Pluspetrol) (**Exhibit R-0314**); Judgment of the Constitutional Court, File No. 03744-2018-PA/TC, 4 November 2019 (Silver Lake) (**Exhibit R-0315**)).

579 As the Respondent has explained, the number provided by the Claimant's experts omit various additional cases decided in favor of the SUNAT (*see* Prof. Bustamante's Expert Report, ¶ 373, estimating that at least seventy default interest *amparos* were dismissed between 2020 and 2021, with the cases for 2020 being minimal.

580 *See* above, Section II.E.1.b.

to any habeas corpus, *amparo*, habeas data or constitutionality procedure in which a majority of four votes could not be reached; indeed, the Claimant's proposed comparators include other cases in which this Resolution was applied to issue a valid judgment.[581]

414. As regards the relevant session quorum, preliminarily, the Respondent notes that the Claimant's assertion that "[t]*he 2021 Decision also constituted differential treatment insofar as the Court failed to respect the legal session quorum*",[582] seeks to question the legal merit of the 2021 Constitutional Court Decision which determination is not for the Arbitral Tribunal.[583]

415. As explained, the Claimant's assertion that "*in none of the 40 Domestic Comparator cases did the Court issue its final ruling in a session with only four Justices*" is disingenuous, as it fails to account for the fact that none of the 40 Domestic Comparator cases identified by the Claimant had two abstained Justices, like Scotiabank Perú's.[584]The Claimant also omits that one case in the "Universe of Comparable Cases" identified by its experts—the only case provided by the Claimant with two abstentions— was resolved exactly like Scotiabank Perú's.[585]

416. ***Fifth***, the Claimant alleges that Perú accorded Scotiabank Perú treatment less favorable than to national comparators "*by applying* [] *differential reasoning in regards to the recurso de queja*".[586] As explained above, the Constitutional Court's "considerations" on the Claimant's failure to timely submit a *recurso de queja* were not decisive towards the outcome of the case, which was predicated on the basis of Scotiabank Perú's failure to establish the requirements of urgency and the lack of an equivalent available remedy for the *amparo* to proceed.[587] This is not "treatment" under Article 803 FTA, which requires a material effect on the Claimant or its investment—clearly, a mere "*consideration*" of the Court does not meet this standard.

417. Accordingly, the Claimant has failed to prove that its investment was subject to less favorable treatment than domestic comparators in like circumstances, as required by Article 803 FTA.

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581 *See* above, Section II.E.1.c.

582 Claimant's Memorial on the Merits, ¶ 303.

583 *See* above, Section IV.

584 *See* above, Section V.C.

585 Judgment of the Plenary Session of the Constitutional Court in Case No. 02235-2020-PA/TC (Citileasing) (**Exhibit C-0376**).

586 Claimant's Memorial on the Merits, ¶ 312.

587 *See* above, Section II.E.2.

F. DIFFERENCES IN TREATMENT MOTIVATED BY LEGITIMATE POLICY OBJECTIVES DO NOT VIOLATE THE NATIONAL TREATMENT STANDARD

418. Finally, in the unlikely event that the Tribunal finds that the Claimant sufficiently complied with its burden of providing the existence of adequate domestic comparators and that the alleged discriminatory treatment sustained by its investment (*quod non*), the Claimant's claim for an alleged breach of the National Treatment would still fail. As the Respondent explains, it is well established in investment case law that a difference in treatment motivated by legitimate policy concerns will not amount to a violation of the National Treatment standard (**1**). This is precisely the case in the present proceedings, where Scotiabank Perú's claim was decided in line with the underlying policy justifying the exceptional nature of the *amparo* proceedings, and the Constitutional Court's duty to administer justice (**2**).

1. Investment tribunals have long held that differences in treatment motivated by legitimate policy concerns do not breach National Treatment obligations

419. As explained, the purpose of the "like circumstances" test is to infer the existence of discriminatory intent based on demonstrated differentiated treatment between a foreign investor and domestic comparators.[588] Therefore, if a State can prove that any differential treatment obeyed to a legitimate cause other than the foreigner's nationality, the claim is bound to fail. As the Claimant acknowledges,[589] this has been consistently supported by investment tribunals.

420. For instance, the tribunal presided by Prof. Albert Jan van den Berg in *Abed El Jaouni v. Lebanon* stated:

> While various investment tribunals have found that it is sufficient for an investor alleging breach of National or MFN Treatment to demonstrate a de facto discrimination by reference to a comparator, or a prima facie case of discrimination; it must be borne in mind that these findings were in the context, and in recognition of the fact, that it is difficult, and in most cases impossible, to prove that the discrimination was motivated for nationality reasons. In the Tribunal's view, if the host State provides satisfactory evidence that the alleged discrimination was not due to nationality reasons, then a claim for breach of the National or MFN Treatment Standard will not be maintainable.[590]

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588 *See* above, Section V.D.1.

589 *See* Claimant's Memorial on the Merits, ¶¶ 313-314.

590 *Abed El Jaouni and Imperial Holding SAL v. Lebanese Republic*, ICSID Case No. ARB/15/3, Decision on Jurisdiction, Liability and Certain Aspects of Quantum, 25 June 2018 (**Exhibit RL-0125**), ¶ 926 (emphasis added). *See* also *Rusoro Mining Limited v. The Bolivarian Republic of Venezuela* (ICSID Case No ARB(AF)/12/5), Award, 22 August 2016 (**Exhibit CL-0140**), ¶ 563 ("[The tribunal considers that] *the difference in treatment is justified by valid policy reasons*.")

421. It is also peacefully accepted that a State's ability to justify any differences in treatment as owing to legitimate policy concerns is implied as a corollary of legal logic and good faith, despite the absence of specific language in the treaty in this regard.[591]

422. Contrary to the Claimant's assertion that "[t]*ribunals have set a high bar*" for States to provide a rational domestic policy justification,[592] the National Treatment standard does not allow tribunals to question the convenience of measures adopted by the State in pursuance of legitimate policy objectives and have largely deferred to a States' determination that a difference in conduct was justified, requiring only that the justification be "plausible". In the words of the *GAMI v. Mexico* tribunal:

> The Arbitral Tribunal has not been persuaded that GAM's circumstances were demonstrably so "like" those of non-expropriated mill owners that it was wrong to treat GAM differently. Mexico determined that nearly half of the mills in the country should be expropriated in the public interest. The reason was not that they were prosperous and the Government was greedy. To the contrary: Mexico perceived that mills operating in conditions of effective insolvency needed public participation in the interest of the national economy in a broad sense. The Government may have been misguided. That is a matter of policy and politics. The Government may have been clumsy in its analysis of the relevant criteria for the cutoff line between candidates and non-candidates for expropriation. Its understanding of corporate finance may have been deficient. But ineffectiveness is not discrimination. The arbitrators are satisfied that a reason exists for the measure which was not itself discriminatory. That measure was plausibly connected with a legitimate goal of policy (ensuring that the sugar industry was in the hands of solvent enterprises) and was applied neither in a discriminatory manner nor as a disguised barrier to equal opportunity.[593]

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591 *See* A. Reinisch and C. Schreuer, *International Protection of Investments: The Substantive Standards*, Cambridge University Press, 2020 (**Exhibit RL-0149**), p. 668 ("*the continued, implicit availability of justifications is usually found in legal logic or good faith* [which is] *generally endorsed by investment tribunals*.") *See* also Rudolf Dolzer et al, *Principles of International Investment Law,* 3rd ed, Oxford University Press, 2022 (**Exhibit RL-0150**), p. 259 ("*Although most investment treaties do not explicitly say so, it is widely accepted that differentiations are justifiable if rational grounds are shown*.") and p. 250 ("*The third part of an investigation into an alleged violation of a national treatment clause pertains to the justification for a differentiating measure. Although most investment treaties do not explicitly say so, it is widely accepted that differentiations are justifiable if rational grounds are shown*"); *Antonio del Valle Ruiz et al. v. Kingdom of Spain*, PCA Case No. 2019-17, Final Award, 13 March 2023 (**Exhibit RL-0133**), ¶ 735 ("*in the case of treatment that is less favorable, the Tribunal must determine whether any differentiation in treatment was justified. Even though national treatment ("NT") clauses in investment treaties (including Article III) do not explicitly say so, it is widely accepted - and rightly so - that tribunals adjudicating a NT claim must also ascertain whether any difference in treatment is justified*.")

592 Claimant's Memorial on the Merits, ¶ 314.

593 *GAMI Investments, Inc. v. United Mexican States*, *Ad hoc* UNCITRAL arbitration, Final Award, 15 November 2004 (**Exhibit RL-0100**), ¶ 114 (emphasis added). *See* also *Pawlowski AG and Project Sever s.r.o. v. Czech Republic*, ICSID Case No. ARB/17/11, Award, 1 November 2021 (**Exhibit RL-0129**), ¶ 546 ("*But even assuming arguendo that Central Group was a suitable comparator, Claimants' allegation of discrimination would still fail, because there may be valid reasons which justify the difference in treatment. Investment tribunals have consistently held that reasonable distinctions between domestic and*

423. As the Respondent has shown in the preceding sections, the Claimant has failed to establish any of the elements of the "like circumstances" test. Consequently, regardless of whether the impugned treatment is justified by legitimate policy concerns, the Claimant's case for a breach of National Treatment must fail. This notwithstanding, in the odd chance that the Tribunal finds that the Claimant complied with its burden of proving the elements required by the National Treatment standard (*quod non*), the Respondent cannot be liable given that the 2021 Constitutional Court Decision is justified by legitimate policy concerns.

2. Scotiabank's claim was decided in line with the underlying policy of *amparo* proceedings under Peruvian law and the Court's duty to administer justice

424. The Respondent reiterates that it should not be compelled to explain the actions of its judiciary, and that the Claimant's attempt to transform this Tribunal into an umpteenth appellate court for its failed claims in the Peruvian domestic court system should not be countenanced. Moreover, as the Respondent has explained, the 2021 Constitutional Court Decision is not a regulatory measure, and should not be subject to scrutiny under the National Treatment standard. This notwithstanding, the Respondent briefly explains the legitimate policy reasons underlying the 2021 Constitutional Court Decision to dismiss the Claimant's *amparo* claims, which fully complied with Peruvian law, both in substance as in form:

425. ***First***, as cogently explained by Prof. Bustamante, the *amparo* has been conceived to provide urgent protection, the absence of which may result in the plaintiff suffering irreparable harm.[594] Consequently, as repeatedly stated by the Constitutional Court, a plaintiff's failure to establish the need for urgent protection will result in its claim being declared inadmissible.[595] Accordingly, the *amparo* in Peru is a *residual* or *exceptional* course of action, which is not available if there exists an ordinary course of action to which the plaintiff can resort to obtain satisfactory relief.[596] The limited scope of *amparo* proceedings under Peruvian law is a crucial element of the Constitutional Court's reasoning leading to the dismissal of Scotiabank Perú's claims in the 2021

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foreign investors do not imply discrimination. Furthermore, the threshold applied to establish whether a State's conduct was justified has been low.")

594 *See* Prof. Bustamante's Expert Report, ¶ 107 ("*The Constitutional Court has recalled, through a vast jurisprudence, that the "amparo* [...] *has been conceived to meet urgent requirements that have to do with the affectation of rights directly included within the qualification of fundamental by the Constitution" . A plaintiff is in need of urgent protection if, if he does not promptly obtain the required protection, the injury he has suffered or the danger he faces could become irreparable*.")

595 *See* Prof. Bustamante's Expert Report, ¶ 107.

596 *See* Prof. Bustamante's Expert Report, ¶ 108 ("*The amparo in Peru is a residual or exceptional process, in the sense that it does not proceed if there is an ordinary process (civil, labor, contentious-administrative, etc.) to which the plaintiff can resort to obtain a protection equally satisfactory to the one he/she requests, or would request, through the amparo*.")

Constitutional Court Decision. As explained,[597] the Constitutional Court found that (***i***) Scotiabank Perú's claims were not urgent, given that the Tax Debt, including its default interest, had been paid in its entirety and there was no imminent risk of irreparable harm to the Claimant,[598] and (***ii***) that the contentious-administrative route would have provided equally satisfactory relief, hence the Claimant should have resorted thereto instead of pursuing an *amparo*, absent the exceptional circumstances required for an *amparo* to proceed.[599] Accordingly, the 2021 Constitutional Court Decision was justified by the public policy underlying the restricted scope of *amparo* proceedings under Peruvian law, which the Claimant was well-aware when deciding to pursue its flawed legal strategy of initiating *amparo* proceedings with respect to the default interest owed to the SUNAT without previously going through the contentious-administrative route.[600]

426. ***Second***, as explained by the Respondent, the three-vote majority by which the 2021 Constitutional Court Decision was adopted obeyed to a legitimate public concern, namely allowing for the administration of justice, which is a right of the parties and a duty of the Constitutional Court imposed by the Peruvian Constitution.[601] Indeed, given the submission by Scotiabank Perú of forty-five written submissions in the case file before the Constitutional Court asking that the Court expedite the issuance of a decision,[602] it is rich of the Claimant to now question the legitimacy of the very instrument which allowed the resolution of its case and of many more that would have been paralyzed had it not been for Resolution No. 205-2021.

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427. For the reasons stated above, given the Claimant's failure to establish the elements for liability to exist under Article 803 FTA, its claim for a breach of the National Treatment standard under the Treaty must be dismissed.

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597 *See* above, Section II.C.

598 *See* Decision No. 919/2021 of the Peruvian Constitutional Court, 20 November 2021 (**Exhibit R-0008**), ¶¶ 18-19.

599 *See* Decision No. 919/2021 of the Peruvian Constitutional Court, 20 November 2021 (**Exhibit R-0008**), ¶ 15 ("*Therefore, the contentious administrative proceedings are a suitable mechanism for the protection of the right invoked in this case, and also provides adequate protection. In this regard, from an objective perspective, there are no exceptional circumstances for the constitutional jurisdiction to be competent to hear this type of case*.")

600 *See* above, Section II.C.

601 *See* above, Section II.E.1.c.

602 Prof. Bustamante's Expert Report, ¶ 265.

VI. THE DAMAGES REQUESTED BY THE CLAIMANT ARE UNWARRANTED

428. Even if the Tribunal were to find that the Respondent breached the National Treatment standard (*quod non*), the damages requested by the Claimant on its behalf and on behalf of Scotiabank Perú are unwarranted.

429. It is undisputed that, under customary international law, reparation "*must, as far as possible, wipe all the consequences of the illegal act and re-establish the situation which would, in all probability, have existed if that act had not been committed*".[603] Accordingly, to the extent that the Claimant has suffered any losses as a result of a purported breach of the Treaty by the Respondent, "*the Tribunal's award on damages must put Scotiabank and Scotiabank Perú, as far as possible, in the position they would have occupied but for Perú's breach of the FTA*".[604] Nevertheless, should the Claimant be awarded the damages claimed in the arbitration, the Claimant would be placed in a more advantageous position as a result of the alleged breach, as demonstrated below.

430. In the following sections, the Respondent demonstrates that the Claimant bears the burden of proving the fact and the amount of the alleged loss caused by a breach of Treaty (**A**). Accordingly, the Tribunal must reject the Claimant's claim for compensation because the Claimant has failed to demonstrate the alleged losses or that these were caused by the Respondent's actions (**B**). The Tribunal must also reject the Claimant's claim for interest (**C**) and its claim that the award not be subject to taxes (**D**). Finally, the Tribunal must reject the Claimant's claim for costs (**E**).

431. The Respondent's response to the Claimant's damages claim is supported by the independent valuation report prepared by Kiran Sequeira and Paul Baez of Secretariat Advisors (the "**Secretariat Report**").

A. THE CLAIMANT MUST PROVE ITS ENTITLEMENT TO THE DAMAGES CLAIMED

432. It is generally agreed that the party alleging to have suffered losses bears the burden to prove (***i***) the fact and the amount of the alleged loss, and (***ii***) that the loss was caused by an internationally wrongful act of a State.

433. ***First***, the Claimant acknowledges that it "*bears the burden of proving its damages on a balance of probabilities*" and that "*damages cannot be speculative of merely 'possible'*".[605]

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603 *Case Concerning the Factory at Chorzów (Claim for Indemnity) (Merits) (Germany/Poland)*, P.C.I.J. (Ser. A) No. 17, Judgment, 13 September 1928 (**Exhibit CL-0087**), p. 47.

604 Claimant's Memorial, ¶ 320.

605 Claimant's Memorial on the Merits, ¶¶ 326-327.

434. This is largely in line with investment jurisprudence, where is has been confirmed that (***i***) "*the burden of proof falls on the Claimants to show that they have suffered the loss they claims*",[606] and (***ii***) the standard of proof required is "*the balance of probabilities* [which], *of course, means that damages cannot be speculative or uncertain*" or "*merely 'possible'*".[607] In the words of the tribunal in *Occidental v. Ecuador*, "*contingent and indeterminate damage cannot be awarded*".[608]

435. In fact, in the landmark Chorzów Factory case, on which the Claimant relies, the Permanent Court of International Arbitration held that damage that is "*possible but contingent and indeterminate*" is not recoverable:

> In these circumstances, the Court can only observe that the damage alleged to have resulted from completion is insufficiently proved. Moreover, it would come under the heading of possible but contingent and indeterminate damage which, in accordance with the jurisprudence of arbitral tribunals, cannot be taken into account.[609]

436. Accordingly, investment tribunals have dismissed claims if the damages claimed are uncertain or speculative. For example, in *Gemplus v. Mexico* the tribunal dismissed the claimants' damages claim for future profits calculated on the basis of a potential extension of the disputed concession agreement's term as "*far too contingent, uncertain and unproven, lacking any sufficient factual basis for the assessment of compensation under the two BITs*".[610]

437. ***Second***, under customary international law, the Claimant must also prove that its alleged loss was directly caused by a breach of the Respondent's international obligations *vis-à-vis* the Claimant.[611] This requirement has also been incorporated in Article 31 of the International Law

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606 *Khan Resources Inc., et al. v. Mongolia*, PCA Case. No. 2011-09, Award on the Merits, 2 March 2015 (**Exhibit CL-0110**), ¶ 375.

607 *Khan Resources Inc., et al. v. Mongolia*, PCA Case. No. 2011-09, Award on the Merits, 2 March 2015 (**Exhibit CL-0110**), ¶ 375; *Gold Reserve Inc. v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB(AF)/09/1, Award, 22 September 2014 (**Exhibit CL-0099**), ¶¶ 685-686; *Hrvatska Elektroprivreda d.d. v. Republic of Slovenia*, ICSID Case No. ARB/05/24, Award, 17 December 2015 (**Exhibit RL-0157**), ¶ 175.

608 *Occidental Exploration and Production Company v. The Republic of Ecuador*, LCIA Case No. UN 3467, Final Award, 1 July 2004 (**Exhibit CL-0120**), ¶ 210. *See* also *S.D. Myers, Inc. v. Government of Canada*, UNCITRAL, Partial Award, 13 November 2000 (**Exhibit CL-0126**), ¶ 173.

609 *Case Concerning the Factory at Chorzów (Germany v. Poland)*, Judgment, 13 September 1928, 1928 P.C.I.J. (Ser. A) No. 17 (**Exhibit CL-0087**), pp. 56-57.

610 *Gemplus S.A., SLP S.A. & Gemplus Industrial S.A. de C.V. v. The United Mexican States* and *Talsud S.A. v. The United Mexican States*, ICSID Cases No. ARB(AF)/04/3 and ARB(AF)/04/4, Award, 16 June 2010 (**Exhibit RL-0158**), Part XII, ¶¶ 12-49.

611 *See* e.g., Bin Cheng, *General Principles of Law As Applied by International Courts and Tribunals* (1987) (**Exhibit RL-0159**), pp. 244–245 ("*In order that a loss may be regarded as the consequence of an act for purposes of reparation, either the loss has to be the proximate consequence of the act complained of, or the act has to be the proximate cause of the loss. Hence the maxim: In jure causa proxima non remota inspictur*").

Commission's (ILC) Articles on State Responsibility, which provide that the responsible State has the obligation "*to make full reparation for the injury caused by the internationally wrongful act*". The term "*injury*" includes "*any damage, whether material or moral, caused by the internationally wrongful act of a State*".[612]

438. Investment tribunals have consistently required that claimants seeking compensation prove that their loss was directly caused by a breach by the State of its international obligations. For example, in *Biwater v. Tanzania*, the tribunal held that "*it is well settled that one key requirement of any claim for compensation (whether for unlawful expropriation or any other breach of Treaty) is the element of causation*".[613] This means, in the words of the tribunal, that compensation would only be due "*if there is a sufficient causal link between the actual breach of the BIT and the loss sustained by* [the claimant]".[614] In that case, the tribunal found that "*the actual, proximate or direct causes of the loss and damage for which BGT now seeks compensation were acts and omissions that had already occurred by 12 May 2005*". Therefore, Tanzania's violations of the treaty could not have caused the loss and damage claimed by the investor.[615]

439. In the same vein, in *ADM v. Mexico* the tribunal held that a tribunal may only award damages which are "*a direct consequence of the wrongful act*":

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612 International Law Commission, *Draft Articles on Responsibility of States for Internationally Wrongful Acts, with commentaries* (2001) (**Exhibit CL-0105**), Article 31 (emphasis added). *See* also Article 36 regardingcompensation ("*The State responsible for an internationally wrongful act is under an obligation to compensate for the damage caused thereby, insofar as such damage is not made good by restitution*").

613 *Biwater Gauff (Tanzania) Limited v. United Republic of Tanzania*, ICSID Case No. ARB/05/22, Award, 24 July 2008 (**Exhibit CL-0086**), ¶ 778.

614 *Biwater Gauff (Tanzania) Limited v. United Republic of Tanzania*, ICSID Case No. ARB/05/22, Award, 24 July 2008 (**Exhibit CL-0086**), ¶ 779. *See* also, e.g., *Metalclad Corporation v. The United Mexican States*, ICSID Case No. ARB(AF)/97/1, Award, 30 August 2000 (**Exhibit CL-0115**), ¶ 115 ("*The causal relationship between Mexico's actions and the reduction in value of Metalclad's other business operations are too remote and uncertain to support this claim*"); *Duke Energy Electroquil Partners & Electroquil S.A. v. Republic of Ecuador*, ICSID Case No. ARB/04/19, Award, 18 August 2008 (**Exhibit CL-0012**), ¶ 468 ("*compensation will only be awarded if there is a sufficient causal link between the breach of the BIT and the loss sustained by the Claimants*"); *Cervin Investissements S.A. and Rhone Investissements S.A. v. Republic of Costa Rica*, ICSID Case No. ARB/13/2, Award, 7 March 2017 (**Exhibit RL-0160**), ¶ 699 ("*In order to claim damages, the plaintiffs have the burden of proving not only the existence of a violation, but also the causal link between the violation and the alleged damage and its amount.*" (unofficial translation)); *The Rompetrol Group N.V. v. Romania*, ICSID Case No. ARB/06/3, Award, 6 May 2013 (**Exhibit RL-0161**), ¶ 190 ("*it must, as a matter of basic principle, be for the claimant to prove, in addition to the fact of its loss or damage, its quantification in monetary terms and the necessary causal link between the loss or damage and the treaty breach*"); *Joseph Charles Lemire v. Ukraine (II)*, ICSID Case No. ARB/06/18, Award, 28 March 2011 (**Exhibit CL-0108**), ¶ 157 ("*Proof of causation requires that (A) cause, (B) effect, and (C) a logical link between the two be established*").

615 *Biwater Gauff (Tanzania) Limited v. United Republic of Tanzania*, ICSID Case No. ARB/05/22, Award, 24 July 2008 (**Exhibit CL-0086**), ¶ 798.

> Any determination of damages under principles of international law require a sufficiently clear direct link between the wrongful act and the alleged injury, in order to trigger the obligation to compensate for such injury. A breach may be found to exist, but determination of the existence of the injury is necessary and then a calculation of the injury measured as monetary damages. This Tribunal is required to ensure that the relief sought, *i.e.,* damages claimed, is appropriate as a direct consequence of the wrongful act and to determine the scope of the damage, measured in an amount of money.[616]

440. Similarly, the tribunal in *S.D. Myers v. Canada* determined that damages may only be awarded if there is a causal link between the treaty breach and the loss sustained by the investor:

> [D]amages may only be awarded to the extent that there is a sufficient causal link between the breach of a specific NAFTA provision and the loss sustained by the investor. Other ways of expressing the same concept might be that the harm must not be too remote, or that the breach of the specific NAFTA provision must be the proximate cause of the harm.[617]

441. Notably, the *S.D. Myers v. Canada* tribunal held that the requirement of causation was included in the wording of Articles 1116 and 1117 of the NAFTA, which provides that compensation may only be sought if the "*investor has incurred loss or damage by reason of, or arising out of, that breach*".[618] The same wording is present in Articles 819 of the Treaty, pursuant to which an investor may submit to arbitration a claim with respect to a breach by the host State if "*the investor has incurred loss or damage by reason of, or arising out of, that breach*".[619]

442. In light of the above, even if the Claimant were to establish that the Respondent breached the National Treatment standard under the Treaty, the Claimant would still have the burden of proving that any loss suffered—either by the Claimant itself of by Scotiabank Perú—was caused by the Respondent's alleged wrongful conduct.

443. As demonstrated in Section B, the Claimant has failed to prove the fact and amount of the purported losses suffered by either the Claimant or Scotiabank Perú, as well as that any said loss

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616 *Archer Daniels Midland and Tate & Lyle Ingredients Americas, Inc. v. United Mexican States*, ICSID Case No. ARB(AF)/04/5, Award, 21 November 2007 (**Exhibit CL-0081**), ¶ 282.

617 *S.D. Myers, Inc. v. Government of Canada*, UNCITRAL, NAFTA, Second Partial Award, 21 October 2002 (**Exhibit RL-0162**), ¶ 140. *See* also *S.D. Myers, Inc. v. Government of Canada*, UNCITRAL, Partial Award, 13 November 2000 (**Exhibit CL-0126**), ¶ 316 ("*compensation is payable only in respect of harm that is proved to have a sufficient causal link with the specific NAFTA provision that has been breached; the economic losses claimed by SDMI must be proved to be those that have arisen from a breach of the NAFTA, and not from other causes*").

618 *S.D. Myers, Inc. v. Government of Canada*, UNCITRAL, NAFTA, Second Partial Award, 21 October 2002 (**Exhibit RL-0162**), ¶ 118.

619 Free Trade Agreement between Canada and the Republic of Peru (**Exhibit C-0001**), Article 819. Similar wording is present in Article 820 FTA, which allows the investor to submit a claim on behalf of an enterprise with respect to a breach by the host State is "*the enterprise has incurred loss or damage by reason of, or arising out of, that breach*".

was incurred "*by reason of, or arising out of*" a breach by the Respondent of its international obligations *vis-à-vis* the Claimant.

B. THE CLAIMANT HAS FAILED TO ESTABLISH ITS ENTITLEMENT TO THE DAMAGES CLAIMED

444. The Claimant seeks damages on its behalf and on behalf of Scotiabank Perú but acknowledges that the damages overlap and that it is "*not entitled to double recovery*",[620] so the claim to recover its own alleged losses are advanced as the Claimant's primary claim, and the claim for Scotiabank Perú's alleges losses are brought in the alternative. In particular, the Claimant seeks compensation under Article 819 of the Treaty equivalent to [redacted] (with interest up to 20 November 2024) for its alleged losses and, in the alternative, it seeks compensation under Article 820 of the Treaty equivalent to [redacted] (with interest up to 20 November 2024) for the alleged losses suffered by Scotiabank Perú.

445. As demonstrated below, the Tribunal should reject the Claimant's claims because the Claimant has failed to discharge its burden of proof with respect to the fact that either the Claimant or Scotiabank Perú suffered a loss "*by reason of, or arising out of*" a breach by the Respondent of its international obligations *vis-à-vis* the Claimant (***1***) and, in any event, with respect to the amount of damages claimed (***2***).

1. The Claimant has failed to establish that the losses allegedly suffered were "*by reason of, or arising out of*" the Respondent's alleged breach of the Treaty

446. As demonstrated above, the Claimant must prove that its alleged loss was directly caused by a purported violation by the Respondent of its international obligations *vis-à-vis* the Claimant.

447. In this case, the Claimant alleges that the Respondent breached the National Treatment standard by rendering the Amparo decision on 9 November 2021.[621] Nevertheless, the Claimant claims losses in connection with conduct dating back to 2017 and, in particular, assumes that (***i***) the Constitutional Court would have published a judgment in favor of Scotiabank Perú on 1 July 2017 and (***ii***) the SUNAT would have "*repa*[id] *to Scotiabank Perú the Default Interest Delta with interest at the rate prescribed under Peruvian law*" by 1 January 2019.[622] Thus, the Claimant alleges that "*if Peru had not breached the FTA, Scotiabank Perú would have been paid the Default Interest Delta and applicable Peruvian interest accruing to January 1, 2019*".[623]

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620 Claimant's Memorial on the Merits, ¶ 319.

621 Claimant's Memorial on the Merits, ¶ 295.

622 Claimant's Memorial on the Merits, ¶¶ 341-343.

623 Claimant's Memorial on the Merits, ¶ 353.

448. It is, however, inconceivable that a loss purportedly originated in 2017 and being assessed as of 1 January 2019 (from when interest allegedly accrue) would have been incurred "*by reason of, or arising out of*" the Amparo decision rendered four years later, on 9 November 2021. As held by the tribunal in *Biwater v. Tanzania*, any loss which preceded the breach, could not have been caused by said breach.[624]

449. Accordingly, given that the Claimant has allegedly suffered losses at a date which predates the alleged breach, said losses cannot be regarded as having been incurred "*by reason of, or arising out of*" the Respondent's alleged breach of the National Treatment standard. The losses claimed are therefore not compensable.

2. In any event, the Claimant's damages claim is largely based on incorrect assumptions and overstated

450. The Claimant's claim for compensation must also be rejected, to a great extent, because the Claimant have overstated the amount of the losses allegedly suffered by it or by Scotiabank Perú. While it may be true that, as claimed by the Claimant, it "*does not have to establish a but for hypothetical with 'absolute certainty'*"",[625] the Claimant's damages assessment is based on incorrect assumptions which require several adjustments and key factors being overlooked, as demonstrated below and in further detail in the Secretariat Report.

451. ***First***, as demonstrated above, the loss claimed by the Claimant could not have been incurred "*by reason of, or arising out of*" the Amparo decision rendered on 9 November 2021.[626] Accordingly, the Claimant's claim should be rejected because there is no causal link between the losses claimed and the Respondent's alleged wrongful conduct.

452. Even if the Tribunal were to understand that there is a causal link between the Claimant's alleged loss and the Amparo decision (and that the latter is in breach of the Treaty, *quod non*), the But-for Repayment Date would need to be assessed by reference to the Amparo decision, which was rendered on 9 November 2021. Accordingly, the 18-month repayment period assumed by the Claimant must be counted from 9 November 2021 (and not from June 2017, as done by the Claimant). This means that the But-for Repayment Date must be 9 May 2023 and not 1 January 2019, as assumed by the Claimant.

453. In the Secretariat Report, KSV's But-for Repayment Date has been adjusted accordingly.[627] This adjustment reduces damages with pre-award interest by [redacted] under the Primary

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624 *See* above, fn. 614.

625 Claimant's Memorial on the Merits, ¶ 336.

626 *See* above, Section VI.B.1.

627 *See* Secretariat's Report, ¶¶ 5.2-5.4.

Calculation (*i.e.*, 30%) and [redacted] under the Secondary Calculation (*i.e.*, 16%).

454. ***Second***, the Claimant's quantum expert, KSV, assessed the But-for-Default Interest for the period from 1998 to 2005 applying simple interest.[628] As explained by Prof. Sevillano, however, compound interest should be applied to estimate the But-for-Default Interest for that period.[629] Thus, Secretariat capitalized the interest at the end of each year from 1998 to 2005.[630] This adjustment increases the But-for Default Interest by 42%.

455. ***Third***, KSV excluded three periods from its calculation, in which allegedly But-For Default Interest would not have accrued, *i.e.*, (***i***) 21 March 2001 to 30 March 2003, (***ii***) 11 February 2004 to 30 November 2011, and (***iii***) 21 February 2013 to 24 September 2013.[631] As explained by Prof. Sevillano, the start date for each of the three suspension periods should be delayed by one day.[632] Accordingly, Secretariat adjusted the start date for each of the three suspension periods by one day.[633] This adjustment marginally increased the But-for Default Interest by 0.16%.

456. ***Fourth***, KSV used the Tasa de Interés Moratorio ("**TIM**") to calculate interest for the period from 1 January 2014 to 1 January 2019.[634] As explained by Prof. Sevillano, the interest rate applicable to refunds (*i.e.*, the interest rate for *devolución de pagos indebidos o en exceso*) published by the SUNAT should be applied to calculate interest for that period, rather than the TIM.[635] Therefore, Secretariat adjusted the interest calculation for the period from 2014 to 2019 applying the refund rate.[636] This adjustment reduced the calculation of interest on the But-for Interest Delta by 58%.

457. In the Secretariat Report, the four adjustments were implemented resulting in (***i***) the damages as of the But-for Repayment Date in the primary case being reduced from [redacted] to [redacted] excluding interest, *i.e.*, by 24% and (***ii***) the damages as of the But-for

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628 KSV Report, ¶ 5.5.

629 Prof. Sevillano's Expert Report, ¶¶ 171, 174. Conveniently, the Claimant does claim compound interest in connection with its alleged losses, even if it is well aware that simple interest applies under Peruvian law.

630 *See* Secretariat's Report, ¶ 5.6.

631 KSV Report, ¶ 5.6.

632 Prof. Sevillano's Expert Report, ¶¶ 316, 320, 321.

633 *See* Secretariat Report, ¶ 5.7. As noted by Secretariat, shorter suspension periods may be assumed based on the average delay that occurs in this type of case. The Respondent reserves the right to revisit and/or modify its quantum assessment.

634 KSV Report, ¶ 5.16.

635 Sevillano Report, ¶¶ 357, 359, 367.

636 Secretariat Report, ¶¶ 5.9-5.10.

Repayment Date in the secondary case being reduced from [redacted] to [redacted], *i.e.*, by 15%.

458. In addition, Secretariat has identified at least two other assumptions which may require adjustment but which have not been accounted for yet in the Secretariat Report:

459. ***First***, KSV assumed that Scotiabank Perú's alleged loss, *i.e.*, the full [redacted] claimed by the Claimant on behalf of Scotiabank Perú, would have been repatriated to the Claimant via a dividend.[637] As explained by Secretariat, however, KSV failed to consider that not all amounts received by Scotiabank Perú could have been paid as dividends. Dividends may only be issued based on accounting profits. However, Scotiabank Perú recorded its payments to the SUNAT as account receivables and not as expenses, so not all of the recovery would be considered income and would be available for distribution as dividend. If anything, Scotiabank Perú could only have distributed amounts exceeding the receivable balance, estimated at [redacted].[638]

460. At this stage, Secretariat has not provided an adjustment for this factor. The Respondent reserves the right to further its analysis on this point in its Rejoinder.

461. ***Second***, when the Claimant acquired its shares in Banco Wiese in 2006, it was or must have been aware of the bank's potential tax liability towards the SUNAT, as the information was disclosed in Banco Wiese's audited financial statements. As at 2005, the tax liability was estimated at some [redacted] including interest.[639] By 2007, the liability was estimated at [redacted] including interest.[640]

462. While the bank's management and legal advisors did not expect any significant liability to arise from a potential tax audit,[641] the liability had been recognized at the time that the Claimant purchased its shares in Banco Wiese. Moreover, as noted by Secretariat, [redacted].[642] It is therefore reasonable to assume that the Claimant would have accounted for this (and any other) liability in the total price paid for the shares.

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637 KSV Report, ¶ 4.5.

638 Secretariat Report, ¶¶ 5.12-5.15. As also explained by Secretariat, there could be other avenues to repatriate funds to the Claimant, but these would have impacted Scotiabank Perú's regulatory capital requirements.

639 *See* Banco Wiese Sudameris, Financial Statements, 2005, Note 14.a. (**Exhibit R-0333**)).

640 *See* Scotiabank Peru S.A.A. and Subsidiaries, Financial Statements, 2007, Note 15.a. (**Exhibit R-0336**)).

641 *See* Banco Wiese Sudameris, Financial Statements, 2005, Note 14.a. (**Exhibit R-0333**)).

642 Secretariat Report, ¶ 3.4.

463. As of today, the Respondent does not have sufficient information as to whether the acquisition price paid by Scotiabank accounted for the pre-existing tax debt. However, as noted by Secretariat, "[i]*f Scotiabank either paid less or should have paid less for its acquisition on account of the tax debt, a corresponding offset would need to be applied to the damages being claimed*".[643] The Respondent reserves the right to further adjust its quantum assessment should more information become available.

C. THE CLAIMANT'S CLAIM FOR PRE- AND POST-AWARD INTEREST SHOULD BE REJECTED

464. The Claimant alleges that it and Scotiabank Perú are entitled to pre- and post-award interest, calculated from 1 January 2019 and compounded monthly.[644] According to the Claimant, the interest rate must be equivalent to the Claimant's opportunity cost, which the Claimant assumes to be the "Return on Equity".[645]

465. The Respondent agrees that, if the Tribunal were to award damages to the Claimant (*quod non*), post-award interest should apply (subject to 60-day grace period, as demonstrated below). However, the Claimant's interest claim must be rejected because the Claimant applies the wrong starting date for interest (**1**) and an inappropriate interest rate (**2**). In addition, compounding interest monthly, as proposed by the Claimant, is not justified in this case (**3**).

1. The Claimant applies an inappropriate start date for interest

466. The Claimant claims pre-award interest running from 2 January 2019. As demonstrated below, however, the Claimant is not entitled to pre-award interest and, in any event, interest should not start running before 10 May 2023.

467. As acknowledged by international tribunals, interest should not accrue before the lapse of a grace period of sixty days from the Respondent's receipt of the Tribunal's final award. For example, in *Libyan American Oil Company v. Libya* the tribunal rejected pre-award interest as follows:

> But as, in general law, interest on damages is due on claims of money whose amount is known […] it cannot accrue for unliquidated damages before their judicial ascertainment and liquidation. Consequently, this Tribunal has to apply it only from the time of the final assessment of damages at the date of this Award.[646]

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643 Secretariat Report, ¶ 3.5.

644 Claimant's Memorial on the Merits, ¶ 354.

645 Claimant's Memorial on the Merits, ¶¶ 362-363.

646 *Libyan American Oil Company (LIAMCO) v. The Government of the Libyan Arab Republic Relating to Petroleum Concessions 16, 17 and 20*, Award, 12 April 1977, 20 I.L.M. 1 (**Exhibit RL-0163**), p. 164.

468. Similarly, in *Joseph Lemire v. Ukraine*, the tribunal held that interest should not run before the actual amount of damage is established in the award and that, in the case of States, a period of grace shall be granted for payment to be made:

> The Tribunal is of the opinion that the appropriate *dies a quo* is the date of delivery of this Award. This is the date when the actual amount of damages is established, the date when Respondent's obligation to pay the compensation arises and, consequently, the appropriate date for interest to start accruing. Notwithstanding the above, the Tribunal acknowledges that Respondent, being a State, requires a certain period of time to perform the legal formalities required for the payment of a sum of money. Therefore, Respondent shall have a 60 day grace period from the date of delivery of this Award to pay the amounts owed, without interest. If after such period of time any amounts remain pending, interest shall accrue on such amounts as from the date of delivery of the Award.[647]

469. Even if the Tribunal were to order the Respondent to pay pre-award interest, interest should not accrue before the revised But-for Repayment Date. As explained, the only measure which according to the Claimant had a material effect on the Claimant was the Amparo decision, rendered on 9 November 2021. Considering the 18-month repayment period assumed by the Claimant, the But-for Repayment Date must be 9 May 2023 and not 1 January 2019, as assumed by the Claimant.[648] Accordingly, pre-award interest could not have accrued before 9 May 2023.

2. The Claimant applies an inappropriate interest rate

470. The Claimant claims interest at a rate equivalent to the Claimant's opportunity cost, which the Claimant assumes to be the "Return on Equity" ("**ROE**"). KSV provides a sensitivity analysis using two alternatives, *i.e.*, Scotiabank's cost of equity ("**COE**") and Peru's 10-year sovereign bond yield (in PEN).

471. As explained by Secretariat, the ROE (and the COE) is not an appropriate pre-award interest rate because (***i***) the ROE is, by definition, not an interest rate but rather a measure of equity capital profitability, and (***ii***) using the ROE as pre-award interest rate is incorrect from a financial standpoint and would result in overcompensating the Claimant by providing it with above-market interest and compensating it for risks it did not bear.[649]

472. Instead, Secretariat applied the Respondent's cost of debt, which represents the rate of interest paid to other lenders with a monetary claim against the State, such as the Claimant's. As explained by Secretariat, the Respondent's cost of debt represents a commercial rate of interest

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647 *Joseph Charles Lemire v. Ukraine*, ICSID Case No. ARB/06/18, Award, 28 March 2011 (**Exhibit CL-0108**), ¶ 363.

648 *See* above, ¶ 452.

649 Secretariat Report, ¶¶ 6.4-6.9.

because investors who lend money, whether to a sovereign State or a private company, demand a commercially reasonable rate of return. The rate is also widely available to market participants and the most commonly pre-award interest rate in investor-State arbitration. This is evidenced by the fact that the Claimant's expert, KSV, included the Respondent's cost of debt in their sensitivity analysis.[650]

473. As explained by Secretariat, however, while KSV's choice of Peru's sovereign bond yield would be an appropriate pre-award interest rate, KSV incorrectly applied the 10-year sovereign bond yield.[651] Instead, the appropriate bond yield should be based on the yield as of the valuation date for a bond maturing in 2027 or 2028, applied as a fixed rate during the calculation period.[652]

474. Accordingly, assuming a But-for Repayment Date of 9 May 2023, the applicable rates are 4.47% and 6.66% for the Primary and Secondary Calculations, respectively. Alternatively, if the Tribunal were to assess the But-for Repayment Date as at 1 January 2019 (*quod non*), the interest rates applied are 3.64% for the Primary Calculation based on a bond in USD maturing in 2027, and 5.62% for the Secondary Calculation based on a bond in PEN maturing in 2028.[653]

3. Compound interest on a monthly basis is not justified

475. The Clamant's request that interest be compounded monthly is unjustified.

476. ***First***, investment tribunals have denied claims for compound interest on the basis that it would overcompensate the claimant, whereas simple interest sufficiently "*compensates the loss of use of the principal amount of the award in the period of delay*".[654]

477. In particular, in *ADM v. Mexico*, the tribunal held that in case of a breach of national treatment, simple interest—rather than compound interest—would be appropriate.[655]

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650 Secretariat Report, ¶ 6.9-6.15.

651 Secretariat Report, ¶¶ 6.16-6.20.

652 Secretariat Report, ¶ 6.20.

653 Secretariat Report, ¶ 6.26.

654 *CME Czech Republic B.V. v. The Czech Republic*, UNCITRAL, Final Award, 14 March 2003 (**Exhibit RL-0164**), ¶ 647. *See* also, e.g., *Glencore International A.G., C. I. Prodeco S.A., and Sociedad Portuaria Puerto Nuevo S.A. v. Republic of Colombia*, ICSID Case No. ARB/19/22, Award, 19 April 2024 (**Exhibit RL-0165**), ¶ 343.

655 *Archer Daniels Midland and Tate & Lyle Ingredients Americas, Inc. v. United Mexican States*, ICSID Case No. ARB(AF)/04/5, Award, 21 November 2007 (**Exhibit CL-0081**), ¶ 298.

478. Moreover, as explained by Prof. Sevillano, capitalization of interest has been disapplied in Peru since 2006.[656] Accordingly, there is no ground—either under international law or Peruvian law—to apply compound interest to any potential award on damages.

479. ***Second***, even if the Tribunal were to award compound interest, as a matter of principle these should be compounded annually—as clearly stated by the Claimant in its Memorial—[657]and not monthly. Indeed, the Claimant has further acknowledged that even "*some Tribunals*" which have awarded compound interest, have "*ordered the annual compounding of interest*".[658] In practical terms, however, if the Tribunal were to award interest at the rate equivalent to the Respondent's cost of debt, as explained above, this issue would be rendered moot because the Respondent's cost of debt is reported on an annual basis.

480. ***In any event***, as explained by Secretariat, KSV's use of the TIM compounded monthly as an alternative pre-award interest for their Secondary Calculation in PEN is incorrect, as explained by Secretariat.[659]

* * *

481. As discussed above, KSV's calculations need to be adjusted to consider several factors. The adjustments made by Secretariat reduce damages with interest from [redacted] to [redacted] under KSV's Primary Calculation, and from [redacted] (or [redacted]) to [redacted] (or [redacted]) under KSV's Secondary Calculation:[660]

656 Prof. Sevillano's Expert Report, ¶ 279.

657 Claimant's Memorial on the Merits, ¶ 354 ("*Scotiabank and Scotiabank Perú are entitled to interest, compounded annually*").

658 Claimant's Memorial on the Merits, ¶ 372.

659 Secretariat's Report, ¶¶ 6.21-6.22.

660 Secretariat Report's, Tables 1 and 6. *See* also ¶¶ 6.28-6.29.

[redacted]

[redacted]

482. Any award for damages beyond these adjusted calculations would overcompensate the Claimant, in breach of the "*full reparation*" principle.

D. THE CLAIMANT'S CLAIM THAT THE AWARD NOT BE SUBJECT TO TAX SHOULD BE REJECTED

483. The Claimant requests that the Tribunal declare that the Award is made net of all applicable Peruvian taxes and direct that Peru may not tax the Award.[661]

484. To the extent that the damages sought—and the damages to be awarded—effectively "*incorporate all applicable taxes*",[662] the Claimant's request could be acceptable. As of today, the Claimant seems to have considered applicable taxes in its damages assessment. The Respondent reserves the right to elaborate on this request should the Claimant fail to account for some or all of the applicable taxes within its assessment.

E. THE CLAIMANT IS NOT ENTITLED TO COSTS

485. The Claimant requests that the Tribunal award it all of its costs and expenses associated with the arbitration because it "*would not have incurred these arbitration costs if Perú had complied with its obligations under the FTA*".[663]

486. Contrary to the Claimant's allegations, not only is the Claimant not entitled to any costs or expenses, but it should be directed to bear the entirety of the Respondent's costs and the costs of the arbitration. In fact, the sole remaining claim being pursued by the Claimant in the arbitration—following the early dismissal of its other claims for being manifestly without legal

661 Claimant's Memorial on the Merits, ¶ 381.

662 Claimant's Memorial on the Merits, ¶ 377.

663 Claimant's Memorial on the Merits, ¶ 382.

merit—is similarly unmeritorious. Moreover, by bringing frivolous claims that were dismissed at the outset of the proceedings under Rule 41 of the ICSID Rules and by relitigating its failed Minimum Standard of Treatment claim, the Claimant has caused the Respondent to incur considerable and unnecessary costs to defend its rights in the arbitration.

487. The Respondent reserves the right to supplement its request for costs.

VII. REQUEST FOR RELIEF

For the reasons set out above, the Republic of Peru respectfully requests that the Arbitral Tribunal:

(i) **DECLARE** that it lacks jurisdiction over the Claimant's claims;

(ii) In the alternative, **DISMISS** the entirety of the Claimant's claims on the merits;

(iii) In the further alternative, **DECLARE** that the Claimant is not entitled to the damages it seeks, or to any damages;

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

(v) **GRANT** such further relief against the Claimant as the Arbitral Tribunal deems fit and proper.

The Republic of Peru fully reserves its right to amend and/or supplement its case in due course.

27 June 2025

Respectfully submitted on behalf of the Republic of Peru

[Signed]

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