ICSID CASE NO. ARB/22/30

**BANK OF NOVA SCOTIA**

*Claimant,*

*v.*

**REPUBLIC OF PERU**

*Respondent.*

# RESPONDENT'S SUBMISSION ON RULE 41

**22 June 2023**

*Counsel for the Respondent:*

SPECIAL COMMISSION ON INTERNATIONAL INVESTMENT DISPUTES, REPUBLIC OF PERU

GAILLARD BANIFATEMI SHELBAYA DISPUTES

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## I. INTRODUCTION

1. The Respondent submits this application pursuant to Rule 41 of the 2022 Arbitration Rules of the International Centre for Settlement of Investment Disputes (the "**ICSID Arbitration Rules**"), requesting that the Tribunal dismisses the entirety of the Bank of Nova Scotia's (the "**Claimant**" or "**Scotiabank**") claims in this arbitration, as they arise from the Claimant's Request for Arbitration of 31 October 2022 (the "**Request for Arbitration**").

2. The present case is a paradigm of a claim manifestly without legal merit and exemplifies the claimants' creativity to take undue advantage of treaty protections by attempting to elide the carefully negotiated terms of the States' consent to arbitrate and improperly expand the scope of the substantive protections granted by the Contracting Parties to a treaty, in this case, the Free Trade Agreement between Canada and Peru (the "**Peru–Canada FTA**", the "**Treaty**" or the "**FTA**").

3. As the Respondent demonstrates in this submission, the Claimant is acutely aware of the fatal defects of its case, yet it has sought to disguise them and avail itself of the dispute resolution proceedings under Articles 819 and 820 of the Peru–Canada FTA and the protections afforded under the Treaty by artificially segmenting the conduct it complains of and recharacterizing the measures at stake.

4. It is undisputed that the present dispute originates in a decision adopted by the Peruvian Tax Authority, the *Superintendencia Nacional de Aduanas y de Administración Tributaria* (the "**SUNAT**", per its acronym in Spanish) regarding Scotiabank Peru's predecessor, Banco Wiese Sudameris ("**Banco Wiese**"). Following an extended investigation, the SUNAT ordered Banco Wiese to pay the value added tax (*Impuesto General a las Ventas* or "**IGV**", per its acronym in Spanish) on certain gold transactions which were determined not to be real (the "**IGV Liability**"), plus default interest (the "**1999 Tax Debt**"). To be clear, the original IGV Liability was incurred by Banco Wiese in 1999, seven years prior to Scotiabank's acquisition of its shareholding in Banco Wiese in 2006 and well before the Peru–Canada FTA entered into force in 2009.[1] Moreover, Banco Wiese commenced contentious administrative proceedings well before Scotiabank acquired its interest in Banco Wiese. In other words, Scotiabank knew and was fully aware of the outstanding liability of Banco Wiese and the fact that interests were accruing on the unpaid tax debt when it acquired Banco Wiese.

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[1] Peru-Canada Free Trade Agreement, 1 August 2009 (**Exhibit C-0001**); Canada-Peru Free Trade Agreement Implementation Act, S.C. 2009, c. 16, 1 August 2009 (**Exhibit C-0007**); Supreme Decree No. 044-2009-RW, 1 August 2009 (**Exhibit C-0008**).

5. Nevertheless, Scotiabank continued – and continues nowadays – to challenge the IGV Liability and the default interests accrued on it by initiating any and every possible legal action existing under the domestic legislation. Indeed, Scotiabank made payment of the 1999 Tax Debt due to the SUNAT, comprising both the IGV liability and the default interest accrued, between December 2013 and February 2014 (the "**Tax Payments**"),[2] after the decision of the SUNAT ordering payment of the tax liability was confirmed by the Peruvian Tax Court. Subsequently, Scotiabank Peru continued to pursue all legal avenues, including extraordinary and urgent constitutional recourses under Peruvian law, to have the tax liability revoked and the Tax Payments reimbursed.

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

7. The compartmentalization described in the preceding paragraph and the Claimant's decision purportedly to seek remedies from this Tribunal with respect to some of the measures but not others is not haphazard. Similarly, it is not happenstance that the Claimant alleges that the default interest on the IGV Liability paid by Scotiabank Peru to the SUNAT "under protest" is an investment in and on itself and claims that interest on a tax debt is not a taxation measure in nature. It is also not aleatory that it presents the Constitutional Court's Decision of 2021 as a separate question on

[2] While the Claimant repeatedly states in its Request for Arbitration that the payments that it made to the SUNAT between December 2013 and February 2014 concern default interest, it bears noting that the payments covered both the amounts concerning the IGV Liability and the corresponding default interest. As the Respondent explains, this disproves the Claimant's argument that the IGV Liability and the default interest should be treated as distinct claims (*see*, e.g., Request for Arbitration, ¶¶ 5, 7, 29-31, 62, 67, 71(ii)).

constitutionality – completely independent from the tax debt at its origin. Clearly, the Constitutional Court's Decision on the constitutionality of the measure does not float in the legal universe separate from the tax question. Finally, the Claimant glosses over the fact that, as a financial institution, it is not entitled to the same protections as investors in other sectors of the economy.

8. To the contrary, any and all of the Claimant's allegations have been carefully calibrated in an attempt to circumvent jurisdictional and merits requirements set forth in the Treaty. The strategy of the Claimant is to no avail.

9. In this submission, the Respondent sets out the applicable standard pursuant to Rule 41 of the ICSID Arbitration Rules, which was adopted precisely to prevent frivolous claims such as those made by the Claimant in this arbitration (**Section II**).

10. The Respondent then shows that the Claimant's claims are manifestly without legal merit, and disregard the intention of the Contracting Parties to provide differentiated treatment to investors in financial services, as the Claimant, and carve out taxation measures, as those that the Claimant complains of, from the scope of the FTA. Moreover, the Claimant's claims do not concern an "investment" under the Peru–Canada FTA and the Convention on the Settlement of Investment Disputes between States and Nationals of Other Sates (the "**ICSID Convention**"), and do not concern rights capable of being expropriated. Finally, Peru has not consented to arbitrate this dispute since the Claimant has failed to comply with requisite elements set forth in the Peru–Canada FTA for the submission of its claims, that render the Respondent's consent null (**Section III**).

11. For these reasons, the Claimant's claims in this arbitration should be summarily dismissed in their entirety (**Section IV**), as reflected in the Respondent's prayer for relief (**Section V**).

12. Despite the Claimant's efforts, the fatal flaws of its case are apparent and the veils with which the Claimant tries to cloak them fall at the first shake. The Tribunal should not, and could not, countenance Scotiabank's manifestly without legal merit claims and allow it to make a mockery of the arbitration system. It is the Tribunal's duty to avoid the abusive use of the system and prevent the expenditure of the Peruvian taxpayers' resources in a case for which the Peruvian State did not give its consent to arbitrate.

## II. THE CLAIMANT'S CLAIMS ARE MANIFESTLY WITHOUT LEGAL MERIT, IN ACCORDANCE WITH RULE 41 OF THE ICSID ARBITRATION RULES

13. Rule 41 of the ICSID Arbitration Rules provides, in relevant part:

> (1) A party may object that a claim is manifestly without legal merit. The objection may relate to the substance of the claim, the jurisdiction of the Centre, or the competence of the Tribunal.
>
> (2) The following procedure shall apply:
>
> (a) a party shall file a written submission no later than 45 days after the constitution of the Tribunal;
>
> (b) the written submission shall specify the grounds on which the objection is based and contain a statement of the relevant facts, law and arguments;
>
> (c) the Tribunal shall fix time limits for submissions on the objection;
>
> […]
>
> (e) the Tribunal shall render its decision or Award on the objection within 60 days after the later of the constitution of the Tribunal or the last submission on the objection.
>
> (3) If the Tribunal decides that all claims are manifestly without legal merit, it shall render an Award to that effect. Otherwise, the Tribunal shall issue a decision on the objection and fix any time limit necessary for the further conduct of the proceedings.
>
> (4) A decision that a claim is not manifestly without legal merit shall be without prejudice to the right of a party to file a preliminary objection pursuant to Rule 43 or to argue subsequently in the proceeding that a claim is without legal merit.[3]

14. It is uncontroversial that the purpose of Rule 41 of the 2022 ICSID Arbitration Rules, as that of its predecessor, Rule 41(5) of the 2006 ICSID Arbitration Rules, is to allow "*for the early dismissal by arbitral tribunals of patently unmeritorious claims*."[4] At the core of Rule 41 are the principles of

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[3] International Centre for Settlement of Investment Disputes, 2022 Arbitration Rules, Rule 41.

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

The 2022 ICSID Arbitration Rules amended Rule 41(5) of the 2006 Rules, essentially by: (i) specifying that objections may pertain to the substance of the claim, the jurisdiction of ICSID or the competence of the arbitral tribunal, in line with the existing case law; (ii) extending the term for a party to submit an objection to 45 days, instead of 30 days; (iii) setting forth a specific procedure for the submission of such objections and their treatment by arbitral tribunals and (iv) providing a 60-day time limit for tribunals to issue their decisions on Rule 41 applications. This notwithstanding, the legal standard (*i.e.*, that claims should be "manifestly without legal merit" for them to be dismissed on the basis of Rule 41 or Rule 41(5)) has remained unchanged.

procedural efficiency in the administration of justice,[5] and prevention of the abusive use of the ICSID system by claimants whose claims lack sufficient legal basis. As stated by the tribunal in the *Lotus v. Turkmenistan* arbitration:

> The procedure under Rule 41(5) serves the interests of the efficient administration of justice and the interests of both parties in a case. Dismissal of a claim saves the claimant expending time and resources on the pursuit of a claim that cannot succeed, and it saves the respondent expending time and resources in defending a claim that is so manifestly and fundamentally defective that it calls for no further defence before it is dismissed.[6]

15. The language in Rule 41 – "*manifestly without legal merit*" – sets out the requisite elements for a claim to fall within the Rule's scope; namely, it must be (**i**) manifestly without (**ii**) legal (**iii**) merit.

16. *First*, as regards the meaning of the term "manifest", arbitral case law is pacific and has followed the definition of the term first coined by the tribunal in *Trans-Global v. Jordan*, according to which "*the ordinary meaning of the word* ["manifest"] *requires the respondent to establish its objection clearly and obviously, with relative ease and despatch*."[7]

17. The tribunal in *Trans-Global* further clarified that the term "manifest" is not synonymous with "simple" since, given the complex nature of investment disputes, "*this exercise may not always be simple*", and may require successive briefing by the parties, as well as questions addressed by the

[5] *See*, *Fengzhen Min v. Republic of Korea*, ICSID Case No. ARB/20/26, Decision on the Respondent's Preliminary Objection Pursuant to Rule 41(5) of the ICSID Arbitration Rules, 18 June 2021 (**Exhibit RL-0037**), ¶ 73.

[6] *Lotus Holding Anonim Şirketi v. Republic of Turkmenistan*, ICSID Case No. ARB/17/30, Award, 6 April 2020 (**Exhibit RL-0035**), ¶ 159.

[7] *Trans-Global Petroleum, Inc. v. Hashemite Kingdom of Jordan*, ICSID Case No. ARB/07/25, Tribunal's Decision on the Respondent's Objection Under Rule 41(5) of the ICSID Arbitration Rules, 12 May 2008 (**Exhibit RL-0012**), ¶ 88. *See also*, e.g., *Global Trading Resource Corp. and Globex International, Inc. v. Ukraine*, ICSID Case No. ARB/09/11, Award, 1 December 2010 (**Exhibit RL-0016**), ¶ 35; *AHG Industry GmbH & Co. KG v. Republic of Iraq*, ICSID Case No. ARB/20/21, Award on the Respondent's Application Under ICSID Rule 41(5), 30 September 2022 (**Exhibit RL-0040**), ¶ 57; *Fengzhen Min v. Republic of Korea*, ICSID Case No. ARB/20/26, Decision on the Respondent's Preliminary Objection Pursuant to Rule 41(5) of the ICSID Arbitration Rules, 18 June 2021 (**Exhibit RL-0037**), ¶ 72; *AFC Investment Solutions S.L. v. Republic of Colombia*, ICSID Case No. ARB/20/16, Award on Respondent's Preliminary Objection Under Rule 41(5) of the ICSID Arbitration Rules, 24 February 2022 (**Exhibit RL-0039**), ¶ 171.

tribunal to the parties.[8] Hence, for the *Trans-Global* tribunal, and as widely shared by subsequent ICSID tribunals, "[t]*he exercise may thus be complicated; but it should never be difficult.*"[9]

18. In a similar vein, in *AHG Industry v. Iraq*, the arbitral tribunal held that the high threshold inherent to the standard applicable pursuant to Rule 41 did not "*proscribe*[] *extended and even elaborate arguments by the parties*."[10] Moreover, the *AHG Industry* tribunal specified that the subject of inquiry to apply Rule 41 is not merely the length or complexity of the arguments, but rather "*if it appears that the Claimant has no tenable arguable case and that the absence of legal merit in each of the Claimant's claims to jurisdiction is clear and obvious.*"[11] In light of this, in its 75-page award, the tribunal analysed and disposed of each of the claimant's responses to Iraq's objections, finding that it manifestly lacked jurisdiction under the Iraq-Germany BIT (which had not entered into force) and any and all of the grounds for jurisdiction invoked by the claimant.[12]

19. Similarly, in *Ansung Housing v. China*, the tribunal found that the claimant's claims were manifestly without merit since the Claimant had commenced the arbitration proceedings after the three-year time-limit set forth in the applicable treaty had elapsed.[13]

20. *Second*, as regards the meaning and effect of the term "legal" used in Rule 41, the tribunal in *Trans-Global* considered that it was "*clearly used in contradistinction to 'factual' given the drafting genesis of Rule 41(5)*", adding that "[a]*t this early stage of these proceedings, without any sufficient evidence, the Tribunal is in no position to decide disputed facts alleged by either side in a summary*

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[8] *Trans-Global Petroleum, Inc. v. Hashemite Kingdom of Jordan*, ICSID Case No. ARB/07/25, Tribunal's Decision on the Respondent's Objection Under Rule 41(5) of the ICSID Arbitration Rules, 12 May 2008 (**Exhibit RL-0012**), ¶ 88. *See also*, e.g., *Global Trading Resource Corp. and Globex International, Inc. v. Ukraine*, ICSID Case No. ARB/09/11, Award, 1 December 2010 (**Exhibit RL-0016**), ¶ 35; *AHG Industry GmbH & Co. KG v. Republic of Iraq*, ICSID Case No. ARB/20/21, Award on the Respondent's Application Under ICSID Rule 41(5), 30 September 2022 (**Exhibit RL-0040**), ¶ 57; *AFC Investment Solutions S.L. v. Republic of Colombia*, ICSID Case No. ARB/20/16, Award on Respondent's Preliminary Objection Under Rule 41(5) of the ICSID Arbitration Rules, 24 February 2022 (**Exhibit RL-0039**), ¶ 171.

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

[10] *AHG Industry GmbH & Co. KG v. Republic of Iraq*, ICSID Case No. ARB/20/21, Award on the Respondent's Application Under ICSID Rule 41(5), 30 September 2022 (**Exhibit RL-0040**), ¶ 58.

[11] *AHG Industry GmbH & Co. KG v. Republic of Iraq*, ICSID Case No. ARB/20/21, Award on the Respondent's Application Under ICSID Rule 41(5), 30 September 2022 (**Exhibit RL-0040**), ¶ 58.

[12] *AHG Industry GmbH & Co. KG v. Republic of Iraq*, ICSID Case No. ARB/20/21, Award on the Respondent's Application Under ICSID Rule 41(5), 30 September 2022 (**Exhibit RL-0040**), ¶ 225.

[13] *Ansung Housing Co., Ltd. v. People's Republic of China*, ICSID Case No. ARB/14/25, Award, 9 March 2017 (**Exhibit RL-0030**), ¶ 70.

*procedure.*"[14] Nonetheless, the *Trans-Global* tribunal made plain that the fact that a tribunal may lack sufficient evidence to make a final determination on disputed facts at the inception of the proceedings does not mean that the tribunal is barred from conducting any examination of the factual premises of the claims, noting that "*the Tribunal recognises that it is rarely possible to assess the legal merits of any claims without also examining the factual premise upon which that claim is advanced*."[15]

21. In addition, in *Trans-Global*, the tribunal considered that it "*need*[ed] *not accept at face value any factual allegation which the tribunal regards as (manifestly) incredible, frivolous, vexatious or inaccurate or made in bad faith; nor need a tribunal accept a legal submission dressed up as a factual allegation*."[16]

22. The analysis of the tribunal in *Global Trading v. Ukraine* further illustrates the point. In *Global Trading*, the tribunal analysed the factual characteristics of the claimant's alleged investment and found that the purchase and sale contracts entered into by the claimants were "*pure commercial transactions*", which, therefore, could not qualify as an investment for the purposes of the ICSID Convention.[17] Having so established, the tribunal concluded: "[w]*hen the circumstances of the present case are examined and weighed, it can readily be seen that the money laid out by the Claimants towards the performance of these contracts was no more than is typical of the trading supplier under a standard CIF contract.*"[18] For the *Global Trading* tribunal, these considerations were sufficient "*in and of themselves*" to find that the transactions that served as the basis for the claimant's claims could not "*on any interpretation*" be considered protected investments.[19]

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[14] *Trans-Global Petroleum, Inc. v. Hashemite Kingdom of Jordan*, ICSID Case No. ARB/07/25, Tribunal's Decision on the Respondent's Objection Under Rule 41(5) of the ICSID Arbitration Rules, 12 May 2008 (**Exhibit RL-0012**), ¶ 97.

[15] *Trans-Global Petroleum, Inc. v. Hashemite Kingdom of Jordan*, ICSID Case No. ARB/07/25, Tribunal's Decision on the Respondent's Objection Under Rule 41(5) of the ICSID Arbitration Rules, 12 May 2008 (**Exhibit RL-0012**), ¶ 97. Accordingly, the Respondent fully reserves its right to dispute the Claimant's rendition of the facts and request additional evidence in a later stage of these proceedings, should the Tribunal dismiss the Respondent's Rule 41 application.

[16] *Trans-Global Petroleum, Inc. v. Hashemite Kingdom of Jordan*, ICSID Case No. ARB/07/25, Tribunal's Decision on the Respondent's Objection Under Rule 41(5) of the ICSID Arbitration Rules, 12 May 2008 (**Exhibit RL-0012**), ¶ 105.

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

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

[19] *Global Trading Resource Corp. and Globex International, Inc. v. Ukraine*, ICSID Case No. ARB/09/11, Award, 1 December 2010 (**Exhibit RL-0016**), ¶ 57.

23. A similar approach was adopted by the tribunal in *Lotus v. Turkmenistan*, where the tribunal considered that, for a claim to be dismissed under Rule 41, the tribunal must ascertain that "*no matter what evidence is adduced, there is a fundamental flaw in the way that the claim is formulated that must inevitably lead to its dismissal*."[20] It further added that the assessment should be a "practical" one, beyond mere "*theoretical possibility*":

> A tribunal's judgment on a Rule 41(5) application must be practical. While there is perhaps always a theoretical possibility that well-established legal rules and principles could be overturned or not applied in a particular case, a claimant would have to show why it is credible that such a theoretical possibility might operate in the instant case. A tribunal must be able to regard some legal rules and principles as so firmly established that they can serve as premises on the basis of which it can properly conclude that a particular claim will inevitably fail. If that were not the case, Rule 41(5) would be emptied of practical effect.[21]

24. Having applied this standard, the tribunal in *Lotus v. Turkmenistan* upheld the respondent's objections, and found that the claimant's claims were contractual claims for monies, and that the claimant had failed to articulate any claims for breaches of the substantive provisions under the Energy Charter Treaty, applicable to the dispute. Specifically, the tribunal concluded that "[t]*he nature of a contractual claim cannot be altered merely by describing it in different terms*."[22] The tribunal therefore dismissed the totality of the claimant's claims, ordering the claimant to pay ninety percent of the respondent's legal fees and disbursements, as well as the entire costs of the proceedings.[23]

25. *Third*, and finally, as expressly stated in the 2022 Arbitration Rules, the expression "merit" used in Rule 41 should not be equated with the merits of the dispute. In its current drafting, Rule 41 expressly states that objections filed within that framework "*may relate to the substance of the claim, the jurisdiction of the Centre, or the competence of the Tribunal*."[24]

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

[21] *Lotus Holding Anonim Şirketi v. Republic of Turkmenistan*, ICSID Case No. ARB/17/30, Award, 6 April 2020 (**Exhibit RL-0035**), ¶ 160.

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

[23] *See*, *Lotus Holding Anonim Şirketi v. Republic of Turkmenistan*, ICSID Case No. ARB/17/30, Award, 6 April 2020 (**Exhibit RL-0035**), ¶¶ 207 *et seq*.

[24] ICSID Arbitration Rules, Rule 41(1).

26. This is in line with the previous case law on the matter, which unanimously found that Rule 41 objections could pertain either to the tribunal's jurisdiction or to the merits of the dispute.[25]

27. As the Respondent demonstrates in this submission, the Claimant's claim falls squarely under the "manifestly without legal merit" standard in Rule 41 of the ICSID Arbitration Rules and, hence, should be fully dismissed.

## III. BRIEF OVERVIEW OF THE FACTS OF THE DISPUTE SUBMITTED BY SCOTIABANK IN ITS REQUEST FOR ARBITRATION

28. In this Section, the Respondent lays out a brief description of those facts that it considers relevant for the purposes of this submission, largely based on the Claimant's own rendition of the factual background of its claims in its Request for Arbitration.[26]

29. As the Claimant has done in its Request for Arbitration, the Respondent begins by recalling the relevant facts relating to the tax liability imposed by the SUNAT in 1999 on Banco Wiese, Scotiabank Peru's predecessor (**A**), which was later appealed by Banco Wiese in accordance with Peruvian law and confirmed by the Tax Court in 2013 (**B**). As the Respondent notes and further explains, Banco Wiese's 1999 Tax Debt already existed when the Scotiabank Group acquired its interest in Banco Wiese.[27]

30. Following the Tax Court's Decision of 2013, Scotiabank Peru initiated two courses of legal action: an *amparo* action requesting that the Peruvian Tax Authority, the SUNAT, be enjoined from collecting payment and a contentious administrative action, seeking the annulment of the decisions issued by the Tax Court and the SUNAT. Shortly thereafter, Scotiabank Peru paid the amounts owed to the SUNAT, between December 2013 and February 2014 (**C**).

31. As the Respondent explains, the *amparo* proceedings were heard by three courts, and ultimately dismissed by the Peruvian Constitutional Court in its Decision No. 919-2021 of 9 November 2021 (D). As regards the contentious administrative proceedings, Scotiabank Peru's arguments have been

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[25] *See*, e.g., *Rachel S. Grynberg, Stephen M. Grynberg, Miriam Z. Grynberg and RSM Production Corporation v. Grenada*, ICSID Case No. ARB/10/6, Award, 10 December 2010 (**Exhibit RL-0017**), ¶ 4.2.1.

[26] Given the summary nature of the proceedings arising from Rule 41 of the ICSID Arbitration Rules, as described above, the Respondent largely recalls the factual background as presented by the Claimant in its Request for Arbitration. This notwithstanding, the Respondent reiterates that it fully reserves its rights to dispute these facts, should the arbitration proceedings continue.

[27] *See*, Request for Arbitration, ¶¶ 29-31.

already dismissed by four different courts and are currently under consideration by the Constitutional Court in proceedings initiated by Scotiabank Peru in 2022, which are still ongoing (**E**).

### A. Banco Wiese's Tax Debt arose from purported gold transactions found not to be real by the SUNAT, prior to Scotiabank's acquisition of Banco Wiese

32. As acknowledged by the Claimant in its Request for Arbitration, the starting point for the factual background of this dispute is the tax debt imposed by the Peruvian Tax Authority, the SUNAT in 1999 on Scotiabank Peru's predecessor, Banco Wiese Sudameris (defined above as "**Banco Wiese**").[28] This Decision arose from an investigation carried out by the SUNAT into the value added tax (*Impuesto General a las Ventas*, defined above as "**IGV**", per its acronym in Spanish) owed by Banco Wiese for the 1997-1998 period.

33. More specifically, the investigation concerned gold trading transactions between Banco Wiese and various suppliers for which Banco Wiese was claiming tax credits.[29] In the context of this investigation, the SUNAT found that the gold transactions that had resulted in the alleged tax credits did not correspond to real transactions. Consequently, 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 favour of Banco Wiese and (**ii**) imposed on Banco Wiese a tax debt in the sum of ███████ composed of an IGV liability for ███████ (defined above as the "**IGV Liability**") and default interest in the sum of ███████ (defined above as the "**1999 Tax Debt**").[30]

### B. The Peruvian Tax Court confirmed the 1999 Tax Debt, which became enforceable against Scotiabank Peru

34. 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.[31] Banco Wiese then resorted to the Peruvian Tax Court, which is the authority in charge of deciding, as last instance, any administrative appeal relating to tax matters.[32]

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28 *See*, Request for Arbitration, ¶¶ 19 *et seq*.

29 *See*, Request for Arbitration, ¶ 20.

30 *See*, Request for Arbitration, ¶ 21.

31 *See*, Request for Arbitration, ¶ 22.

32 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.

35. As narrated by the Claimant in its Request for Arbitration, 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.[33]

36. On 9 March 2006, the Scotiabank Group acquired a 78% equity interest in Banco Wiese, which shortly thereafter merged with Banco Sudamericano.[34] This merger culminated with the creation of a single entity, known as Scotiabank Peru S.A.A., on behalf of which the Claimant has submitted claims in this arbitration under Article 820 of the FTA.[35] To be clear: the SUNAT had yet to issue a new decision on Banco Wiese's tax liability when the Scotiabank Group acquired its interest in Banco Wiese.

37. On 30 November 2011, the SUNAT issued a new decision (notified to Scotiabank Peru on 20 December 2011) (the "**SUNAT 2011 Decision**"), finding, again, that Scotiabank Peru was liable for the IGV Liability owed by Banco Wiese and the corresponding default interest. Yet again, Scotiabank Peru appealed this decision before the Tax Court. The Tax Court rejected this appeal on 24 September 2013, in its Decision No. 14935-5-2013 (the "**Tax Court 2013 Decision**").[36] Following the Tax Court 2013 Decision, the SUNAT ordered Scotiabank Peru to pay the totality of the 1999 Tax Debt, including the IGV Liability and the updated amounts of default interest, in its Decision No. 011-006-0044596 of 25 November 2013 (the "**SUNAT Payment Order**").[37]

### C. SCOTIABANK PERU CHALLENGED THE SUNAT 2011 DECISION AND THE TAX COURT 2013 DECISION

38. Shortly thereafter, in November 2013, Scotiabank Peru initiated two courses of legal action in relation to the Tax Court 2013 Decision: (**a**) an *amparo* action,[38] submitted on 15 November 2013

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[33] *See*, Request for Arbitration, ¶ 24.

[34] *See*, Scotiabank Peru's official website, "Reseña Institucional", accessed on 22 June 2023 (**Exhibit R-0011**).

[35] The Claimant submits that it holds a 99.31% interest in Scotiabank Peru S.A.A. (*see* Diagram of Scotiabank Peru S.A.A. share structure and ownership, 19 July 2022 (**Exhibit C-0024**)).

[36] *See*, Request for Arbitration, ¶ 28. In its Request for Arbitration, the Claimant refers to this decision as having been issued on 11 November 2013 (*see* Request for Arbitration, ¶ 27).

[37] *See*, SUNAT Payment Order No. 011-006-0044596, 25 November 2013 (**Exhibit R-0005**); Request for Arbitration, ¶ 28.

[38] 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 (**Exhibit R-0002**), 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.*

before the Peruvian constitutional courts and (**b**) a contentious administrative action (*demanda contencioso-administrativa*), filed on 21 November 2013 before the Peruvian civil courts specialized in administrative matters. That is, Scotiabank commenced the *amparo* action before it commenced the contentious administrative action.

39. Through the ***amparo* action**, which the Claimant denominates the "Default Interest Appeal", Scotiabank Peru requested the Peruvian Constitutional courts to enjoin the SUNAT from collecting the default interest owed by Scotiabank Peru, and to revise the default interest amounts arising from the SUNAT 2011 Decision.[39]

40. In the **contentious administrative action**, which the Claimant refers to in its Request for Arbitration as the "Tax Appeal", Scotiabank Peru requested the annulment of the Tax Court 2013 Decision, confirming the SUNAT 2011 Decision regarding the 1999 Tax Debt, including the IGV Liability and the corresponding updated default interest.[40]

41. Shortly after commencing both of these proceedings, between 6 December 2013 and 14 February 2014, Scotiabank Peru paid the amounts corresponding to the SUNAT 2011 Decision, as updated, in 10 instalments, including the IGV Liability and the default interest accrued to that date (defined above as the "**Tax Payments**").[41] It bears mentioning that the SUNAT did not impose – and has never imposed- any precautionary measures to ensure payment of the tax debt by Scotiabank Peru.

### D. THE CONSTITUTIONAL COURT DENIED SCOTIABANK PERU'S *AMPARO* REQUESTING TO ENJOIN THE SUNAT FROM COLLECTING THE DEFAULT INTEREST

42. 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 pursuant to the SUNAT 2011 Decision. The decision of the court of first instance was partially favourable to Scotiabank.[42]

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[The amparo action] *shall not be admissible against legal norms or judicial resolutions issued in regular proceedings.*")).

[39] *See*, Request for Arbitration, ¶ 32(i).

[40] *See*, Request for Arbitration, ¶ 32(ii).

[41] *See*, Letters from Scotiabank Peru to the SUNAT Collection Agent, December 2013 to February 2014 (**Exhibits C-0009 to C-0018**).

[42] *See*, Request for Arbitration, ¶ 34.

43. As described by the Claimant in its Request for Arbitration, this Decision was appealed by both parties. On appeal, the Third Civil Chamber of the Superior Court of Justice of Lima overturned the first instance judgment, dismissing Scotiabank Peru's *amparo* claim on 21 September 2016.[43]

44. Unsatisfied by having had its case heard, and decided, twice by the Peruvian courts, Scotiabank Peru filed yet another appeal, consisting of a special constitutional recourse before the Constitutional Court (*agravio constitucional*).[44]

45. On 1 September 2021, while Scotiabank's *agravio* was still pending, the Claimant delivered a written Notice of Intent to the Respondent under the FTA.[45]

46. Shortly thereafter, on 9 November 2021, the Constitutional Court rendered its Decision Nº 919/2021, dismissing Scotiabank Peru's *agravio* appeal and, yet again, rejecting the *amparo* recourse (the "**Constitutional Court 2021 Decision**").[46] Among the reasons for its Decision, the Constitutional Court found that the contentious administrative proceedings were the adequate legal avenue to question the legality of the Tax Court 2013 Decision and the SUNAT 2011 Decision, including as regards the default interest imposed over the 1999 Tax Debt. Specifically, the Constitutional Court held:

> In fact, it should also be mentioned that the appellant has prematurely resorted to the constitutional courts. If, in the course of the administrative contentious proceedings, the Tax Court Resolution N° 14935-5-2013, and the proceeding is annulled in its entirety, this decision will also have an impact on the determination of the interest [due]. Therefore, the appellant cannot use the constitutional jurisdiction on matters such as the tax interests that could have been challenged before the ordinary courts.[47]

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[43] *See*, Request for Arbitration, ¶ 34.

[44] 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.*")).

[45] *See*, 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**).

[46] *See*, Request for Arbitration, ¶¶ 51-52. *See also*, Decision No. 919/2021 of the Peruvian Constitutional Court, 20 November 2021 (**Exhibit R-0008**).

[47] Decision No. 919/2021 of the Peruvian Constitutional Court, 20 November 2021 (**Exhibit R-0008**), ¶ 21. *See also*, Request for Arbitration, ¶ 53(iii).

47. As the Claimant recalls in its Request for Arbitration, the Constitutional Court also found that there was no need for urgent relief since Scotiabank Peru had already made the Tax Payments.[48]

48. Following the Constitutional Court 2021 Decision, the Claimant delivered to the Respondent an amended Notice of Intent under the Treaty, on 1 February 2022.[49]

49. In short: Scotiabank Peru's request for the Peruvian courts to enjoin the SUNAT from collecting the default interest on the IGV Liability and revise the amount of default interest due to the SUNAT was heard and decided by **three different courts**, and ultimately dismissed by the Respondent's Constitutional Court, the highest judicial authority in constitutional matters in Peru.

### E. SCOTIABANK PERU FILED A CONSTITUTIONAL APPEAL IN THE CONTENTIOUS ADMINISTRATIVE PROCEEDINGS, WHICH ARE STILL ONGOING

50. On 17 December 2014, a first instance decision on the contentious administrative proceedings initiated by Scotiabank Peru on 21 November 2013 to annul the Tax Court 2013 Decision was issued by the Twentieth Specialized Contentious Administrative Court with Sub-Specialty in Tax and Customs Matters (the "**Contentious Administrative Court**").[50] In its Decision, the Contentious Administrative Court dismissed Scotiabank Peru's claims, finding that the Tax Court 2013 Decision had been issued in accordance with Peruvian law.[51]

51. Scotiabank Peru appealed the decision of the Contentious Administrative Court. On 14 April 2016, the Sixth Contentious Administrative Chamber with Sub-Specialty in Tax and Customs decided the appeal, dismissing – once again – Scotiabank Peru's claims.[52] Clearly not content with having had its case heard, and dismissed, twice, Scotiabank Peru filed a cassation recourse, which was again dismissed by the Supreme Court in its Cassation Decision No. 09261-2016-Lima, of 4 July 2017.[53]

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[48] *See*, Request for Arbitration, ¶ 53(i).

[49] *See*, Request for Arbitration, ¶ 59. Notably, the Claimant had already delivered its initial Notice of Intent before the Constitutional Court 2021 Decision was issued, despite now arguing that said Decision constitutes the core of its claims in this arbitration (*see* 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**)).

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

[51] *See*, Case Information Sheet for File No. 9655-2013, Judicial Branch, accessed on 22 June 2023 (**Exhibit R-0015**), p. 45.

[52] *See*, Case Information Sheet for File No. 9655-2013, accessed on 22 June 2023 (**Exhibit R-0015**), p. 10.

[53] *See*, Request for Arbitration, fn. 3.

52. As arises from the Claimant's Request for Arbitration, Scotiabank then proceeded to seek extraordinary relief against the Supreme Court's decision, filing an *amparo* action on 5 July 2018. The *amparo* was dismissed on 28 December 2020 by the Third Court Specialized in Constitutional Matters of Lima. On 12 January 2021, Scotiabank Peru appealed the decision of the Third Court, which was again dismissed by the First Constitutional Chamber of Lima.[54]

53. On 15 August 2022, Scotiabank Peru filed a second *amparo* proceeding against the Cassation Decision of the Supreme Court (No. 09261-2016-Lima), seeking the annulment of this Decision based on an alleged breach of Scotiabank Peru's constitutional due process rights. Recently, on 1 June 2023, a hearing before the Constitutional Court took place, and the final decision is still pending as of the date of this submission.[55]

54. To sum up: as of this date, Scotiabank Peru's request that the Tax Court 2013 Decision confirming the 1999 Tax Debt be annulled has been heard and dismissed by **four different courts** and is still ongoing. As the Respondent further explains below, should Scotiabank Peru prevail in the *amparo* proceedings before the Constitutional Court, the 1999 Tax Debt could be overturned, and the object of this arbitration would be rendered moot.

## IV. THE CLAIMANT'S CLAIMS MANIFESTLY LACK LEGAL MERIT

55. As the Respondent demonstrates in this Section, the entirety of the Claimant's claims manifestly lack legal merit and, therefore, should be dismissed by the Tribunal at this stage of the proceedings, preventing further costs to arise from the Claimant's abuse of the ICSID system.

56. As is evident from the facts, the Claimant has made use and continues to make use of every and all possible legal avenues and appeals under Peruvian law. Not content with putting into motion every single recourse in Peru, including exceptional constitutional recourses, the Claimant now attempts to use this Tribunal as its umpteenth instance to relitigate a preexisting debt, of which the Claimant was fully aware when it bought Banco Wiese, choosing to invest in Peru. To do so, the Claimant conveniently disregards that, as a financial institution with an investment in the financial sector, it is precluded from relying on Articles 803 and 805 to bring forth claims for alleged breaches of the National Treatment and Minimum Standard of Treatment protections in the FTA (**A**).

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[54] *See*, Request for Arbitration, fn. 3.

[55] *See*, Request for Arbitration, ¶ 32, fn. 3. *See also*, 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**).

57. In addition, the Claimant's claims also fall outside the scope of the Tribunal's jurisdiction, as they concern taxation measures comprised by the carve-out provided in Article 2203 of the Peru–Canada FTA. As the Respondent shows, the Claimant's claims, and the redress it seeks in this arbitration, derive directly from the 1999 Tax Debt, including the default interest accrued on the IGV Liability, which is unequivocally a taxation measure as a matter of Peruvian Law (**B**).

58. Further, even if the Claimant could invoke Articles 803 and 805 of Chapter Eight, which is denied, the default interest paid "under protest" by Scotiabank to the SUNAT as part of the Tax Payments does not constitute a protected investment under either the FTA, or the ICSID Convention. Therefore, the Tribunal lacks jurisdiction over this claim. Furthermore, for this very same reason, and because the Claimant does not have vested rights over the default interest paid as part of the Tax Payments, the Claimant's claims regarding a purported expropriation of these sums are also manifestly without legal merit on their substance (**C**).

59. In addition, even in the event that the Tribunal were to dismiss the previous objections, the Claimant's claims would still fail, since the conditions precedent for the Respondent to validly and effectively consent to this arbitration have not been fulfilled (**D**).

## A. BY THE EXPRESS LANGUAGE OF THE TREATY, SCOTIABANK, A FINANCIAL INSTITUTION, IS BARRED FROM COMMENCING ARBITRAL PROCEEDINGS UNDER CHAPTER EIGHT OF THE FTA IN CONNECTION WITH THE ALLEGED BREACHES OF ARTICLES 803 AND 805

60. Scotiabank acknowledges – as it could not be otherwise – that it is "*a chartered bank incorporated under the laws of Canada*", and that Scotiabank Peru "*is a Peruvian bank organized under the Peruvian Bank Act*" which "*provides general banking services in Peru*".[56] Nonetheless, the Claimant submits its claims under Chapter Eight of the FTA, alleging that Peru breached its obligations under the National Treatment and Minimum Standard of Treatment standards (Articles 803 and 805, respectively) and unlawfully expropriated the Claimant's investment (Article 812).

61. In doing so, the Claimant purposefully glosses over Article 802(3), which expressly excludes from the application of Chapter Eight (Investment) claims regarding "*measures adopted or maintained by a Party to the extent that they are covered by Chapter Eleven (Financial Services)*".[57]

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[56] 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.

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

62. Concordantly, Article 1101(1) of the FTA defines the scope of application of Chapter Eleven:

> **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.[58]

63. 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.

64. Thus, for the Tribunal to determine whether the Claimant's claims in this arbitration are actionable, it must conduct a two-pronged analysis: (**i**) it must assess whether Scotiabank and Scotiabank Peru are financial institutions and (**ii**) in that case, it must determine whether the Claimant's claims are based on substantive protections of Chapter Eight that are expressly incorporated into Chapter Eleven.

65. Said analysis was conducted in the *Fireman's Fund v. Mexico* arbitration,[59] in which the tribunal found that it lacked jurisdiction over the claimant's claims that were not based on provisions expressly included in the chapter applicable to financial services. In *Fireman's Fund*, the tribunal emphasised that the Contracting Parties to the North American Free Trade Agreement ("**NAFTA**") had agreed to accord a differential treatment to investments in the financial sector, given that the sector's regulatory intricacies required "*to leave room for national decision-making rather than*

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

[59] The *Fireman's Fund v. Mexico* arbitration was decided under NAFTA, which also includes a financial services chapter that excludes the application of the investment chapter to financial services (*see* North American Free Trade Agreement, 1 January 1994 (**Exhibit RL-0044**), Chapter Eleven: Investment, Article 1101(3) ("*This Chapter does not apply to measures adopted or maintained by a Party to the extent that they are covered by Chapter Fourteen (Financial Services).*"); *See also*, North American Free Trade Agreement, 1 January 1994 (**Exhibit RL-0044**), Chapter Fourteen: Financial Services, Article 1401: Scope and Coverage).

*harmonization, and to limit the opportunity of investors from another state Party to resort to international dispute settlement to challenge regulatory measures*".[60]

66. The same rationale for a differentiated treatment regarding investments in financial institutions was espoused by Canada in its Non-Disputing Party Submission filed in *Fireman's Fund*, in which 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.[61] The Canadian Government also explained that the Investment and the Financial Services chapters of NAFTA are mutually exclusive. Therefore, to determine which chapter applies in a particular case, it is essential to resort to the definition of "*financial institution*" in the treaty, which must be interpreted in light of its object and purpose to establish a special regime applicable to financial services "[i]*n recognition of the uniqueness and importance of the financial services sector*", particularly given the importance of its role in the economy.[62]

67. As the Respondent demonstrates below, it is uncontroversial that the Claimant and Scotiabank Peru are financial institutions comprised by Chapter Eleven of the Peru–Canada FTA (**1**). Accordingly, the Claimant is barred from invoking the dispute settlement mechanism under Articles 819 and 820 in relation to Peru's alleged breaches of either the Minimum Standard of Treatment provided under Article 805 of the Peru–Canada FTA, or the National Treatment standard provided under Article 803, none of which provisions has been expressly incorporated into Chapter Eleven (**2**).

### 1. The Claimant and Scotiabank Peru are financial institutions within the meaning of Articles 1101(1) and 1118 of the FTA

68. Article 1118 of the Peru–Canada FTA defines the term "financial institution" as "*any financial intermediary or other enterprise that is authorized to do business and regulated or supervised as a financial institution under the law of the Party in whose territory it is located*", and specifies that the term "financial service" includes "*any service of a financial nature*", including "*all banking and other financial services (excluding insurance)*".[63] As stated by Canada in its Non-Disputing Party Submission in *Fireman's Fund*, referred above, the "self-definition" of the category of financial institution is

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60 *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.

61 *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.

62 *Fireman's Fund Insurance Company v. United Mexican States*, ICSID Case No. ARB(AF)/02/1, First Submission of Canada Pursuant to Article 1128 of the NAFTA, 27 February 2003 (**Exhibit RL-0004**), ¶¶ 9, 20.

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

meant to provide each Contracting State "*with the flexibility to adopt a regulatory framework that reflects its own particular circumstances, policy objectives and priorities*."[64] Thus, whether Scotiabank is a financial institution is to be determined pursuant to Canadian law, while Peruvian law should apply as regards Scotiabank Peru.

69. The analysis is straightforward. The Claimant and Scotiabank Peru squarely fall within the scope of the definition of "financial institution" under Article 1118, which is uncontested. As acknowledged by the Claimant, [65] 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.[66]

70. As regards Scotiabank Peru, it is listed by the Peruvian Superintendence of Banks and Insurance (*Superintendencia de Bancos y Seguros*) as a supervised Bank Entity.[67] 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*".[68]

71. Therefore, the requirements set forth under the Peru–Canada FTA for Scotiabank and Scotiabank Peru to qualify as financial institutions are undisputedly met in the present case. The Claimant could not argue to the contrary.

72. The main consequence of Scotiabank and Scotiabank Peru's condition as financial institutions providing financial services in Canada and Peru, respectively, is that Chapter Eight does not apply to measures adopted by Peru relating to Scotiabank Peru and/or Scotiabank, unless the specific provision of Chapter Eight on which the Claimant relies is expressly incorporated in Chapter Eleven.

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64 *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.

65 Request for Arbitration, ¶¶ 17-18; *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.

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

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

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

73. Having established that the measures the Claimant complains of were allegedly adopted or maintained in relation to a financial institution and alleged investments of a Canadian investor in a financial institution, the Respondent addresses below the second prong of the analysis; namely, whether the specific provisions of Chapter Eight on which the Claimant relies to commence these arbitral proceedings have been expressly incorporated into Chapter Eleven of the Peru–Canada FTA.

**2. The Claimant's claims for the Respondent's alleged breaches of Articles 803 and 805 of the FTA are not arbitrable under Section B of Chapter Eight**

74. As stated above, pursuant to Article 802(3), the protections afforded to investors under Chapter Eight do not apply to measures covered by Chapter Eleven, unless they are expressly incorporated into Chapter Eleven. Accordingly, Article 1101 of the Peru–Canada FTA expressly provides, in relevant part:

> 1. Articles 813 (Investment - Transfers), 812 (Investment - Expropriation and Compensation), 816 (Investment - Special Formalities and Information Requirements), 815 (Investment - Denial of Benefits), 809 (Investment - Health, Safety and Environmental Measures) and 912 (Cross-Border Trade in Services-Denial of Benefits) are hereby incorporated into and made a part of this Chapter.
>
> 2. Section B of Chapter Eight is hereby incorporated into and made a part of this Chapter solely for claims that a Party has breached Articles 813 (Investment - Transfers), 812 (Investment - Expropriation and Compensation),or 815 (Investment - Denial of Benefits) as incorporated into this Chapter, or claims pursuant to subparagraph 1(c) of Article 819 (Investment - Claim by an Investor of a Party on Its Own Behalf) or subparagraph 1(c) of Article 820 (Investment - Claim by an Investor of a Party on Behalf of an Enterprise) that a Party has breached a legal stability agreement.[69]

75. That is, Article 1101(2) expressly incorporates the investor-state dispute resolution mechanism provided under Section B of Chapter Eight, but **solely** in relation to claims that a State Party has breached the substantive protections in Chapter Eight regarding Transfers (Article 813), Expropriation (Article 812) and/or Denial of Benefits (Article 815).[70]

76. As is self-evident, and fatal for Scotiabank's claims, Articles 803 and 805, on which the Claimant bases its claims for Peru's alleged breaches of the National Treatment and Minimum Standard of Treatment standards, are not included among the incorporated provisions. Hence, the Claimant's claims that the Respondent breached its obligations under these two provisions are manifestly without legal merit.

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[69] Peru-Canada Free Trade Agreement, 1 August 2009 (**Exhibit C-0001**), Article 1101(1)-(2) (emphasis added).

[70] *See*, Peru-Canada Free Trade Agreement, 1 August 2009 (**Exhibit C-0001**), Article 1101(2).

## B. THE CLAIMANT'S CLAIMS CONCERN TAXATION MEASURES AND THEREFORE FALL OUTSIDE THE SCOPE OF THE PERU–CANADA FTA

77. Not only did the Claimant file its claims in this arbitration in manifest disregard of the differentiated treatment that the Contracting Parties to the FTA agreed to accord to investors in the financial sector, but it also wilfully ignored the taxation carve-out in Article 2203 of the Treaty.

78. As the Respondent demonstrates, the Treaty excludes taxation measures from its scope of application, except to the extent that certain express protections are incorporated, subject to the fulfilment of specific, strict, requirements (**1**). Despite the Claimant's attempts to argue otherwise, the measures of which it complains in this arbitration are, in essence, "taxation measures", as interpreted by arbitral case law (**2**). Hence, the Tribunal lacks jurisdiction over the Claimant's claims in relation to any alleged breaches by Peru of the Minimum Standard of Treatment (Article 805) and the Expropriation protection in the Treaty (Article 812).

### 1. The Peru–Canada FTA carves out "taxation measures" from the scope of the Treaty and claws back only specific protections under strict conditions

79. As the Claimant has demonstrated, not only are the Claimant's claims based on Articles 803 and 805 manifestly without merit as they concern measures adopted or maintained regarding financial institutions or investments in financial institutions, but they also fall outside the scope of the Tribunal's jurisdiction since they concern taxation measures.

80. Indeed, Chapter 22 of the Peru–Canada FTA (Exceptions) expressly carves-out taxation measures from the scope of the Treaty. Namely, Article 2203 provides, in relevant part:

> Article 2203: Taxation
>
> 1. **Except where express reference is made thereto, nothing in this Agreement shall apply to taxation measures**.
>
> 2. Nothing in this Agreement shall affect the rights and obligations of any Party under any tax convention. In the event of any inconsistency between this Agreement and any such convention, the convention shall prevail to the extent of the inconsistency [71]

81. Article 2203(1) is unambiguous about the exclusion of taxation measures from the scope of the Peru–Canada FTA, including – needless to say- Chapter Eight (Investment). Article 2203(1) makes clear that certain provisions of the Treaty will exceptionally apply to taxation measures if the Treaty provides so in express terms. In turn, paragraphs 4, 5 and 8 of Article 2203 state in express terms

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

which provisions apply to taxation measures, under what circumstances and the requirements that must be fulfilled for their application, as follows:

> 4. Notwithstanding paragraphs 2 and 3:
>
> (a) Article 202 (National Treatment and Market Access for Goods - National Treatment) and such other provisions of this Agreement as are necessary to give effect to that Article applies to taxation measures to the same extent as does Article III of the GATT 1994; and
>
> (b) Article 210 (National Treatment and Market Access for Goods - Export Taxes) applies to taxation measures.
>
> 5. Subject to paragraphs 2, 3, and 6:
>
> (a) Articles 903 (Cross-Border Trade in Services - National Treatment) and Article 1102 (Financial Services - National Treatment) apply to taxation measures on income, capital gains or on the taxable capital of corporations that relate to the purchase or consumption of particular services; and
>
> (b) **Articles 803** and 804 (Investment - National Treatment and Most-Favoured Nation Treatment), 903 and 904 (Cross-Border Trade in Services - National Treatment and Most-Favoured Nation Treatment) and 1102 and 1103 (Financial Services - National Treatment and Most-Favoured Nation Treatment) apply to all taxation measures, other than those on income, capital gains or on the taxable capital of corporations […]
>
> 8. Notwithstanding paragraphs 2 and 3**, Article 812 (Investment - Expropriation)** shall apply to taxation measures except that no investor may invoke that Article as the basis for a claim under Article 819 (Investment - Claim by an Investor of a Party on Its Own Behalf) or 820 (Investment - Claim by an Investor of a Party on Behalf of an Enterprise), where it has been determined pursuant to this paragraph that a taxation measure is not an expropriation. The investor shall refer the issue of whether a measure is not an expropriation for a determination to the designated authorities of the Parties at the time that it gives notice under subparagraph 1(c) of Article 823 (Investment - Conditions Precedent to Submission of a Claim to Arbitration). If, within a period of six months from the date of such referral, the designated authorities do not agree to consider the issue or, having agreed to consider it, fail to agree that the measure is not an expropriation, the investor may submit its claim to arbitration under Article 824 (Investment - Submission of a Claim to Arbitration).[72]

82. That is, Article 805 (Minimum Standard of Treatment) may in no case be invoked in relation to a taxation measure, since it is not referred to in paragraphs 5(b) and 8 of Article 2203.

83. As to the provisions of Chapter Eight regarding National Treatment standard (Article 803) and protection against unlawful Expropriation (Article 812), these may apply to tax measures, provided that certain requirements are complied with. In particular, as regards a claim by an investor that a

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

tax measure is expropriatory (either under Article 819 or 820), the investor is obliged pursuant to Article 2203(8) to refer the question of whether the tax measure is expropriatory to the designated tax authorities. Under the FTA, referral to the designated authorities is not discretionary for the investor but constitutes a requirement, which lack of compliance renders the State's consent to arbitrate null, pursuant to Articles 823(4) and 823(6). As the Respondent demonstrates, the Claimant has failed to comply with this requirement. Therefore, the Tribunal lacks jurisdiction over the Claimant's expropriation claims.

#### 2. The Decision of the Constitutional Court concerning the Tax Payments is a "taxation measure"

84. The present case manifestly concerns taxation measures, yet the Claimant denies it,[73] and, in order to gain access to this Tribunal- and have it act as an extraordinary umpteenth judicial instance- it unduly segments measures which are intrinsically linked, and which concern the very same issue: the 1999 Tax Debt. In its Request for Arbitration, the Claimant states:

> [T]he requirement in Art. 823(4) relating to taxation authorities does not apply, as this arbitration addresses Peru's judicial treatment of Scotiabank Peru's appeal relating to its constitutional rights regarding the application of default interest; furthermore, the application of default interest to a debt is not a matter of taxation.[74]

85. However, the acts of the State of which Scotiabank complains are taxation measures. The Claimant's attempt artificially to focus its claims on the Constitutional Court 2021 Decision concerning the Tax Payments originated in the 1999 Tax Debt incurred by Banco Wiese does not change this reality. As the Respondent demonstrates, the Treaty provides a broad definition of the term "measure", including judicial decisions (**i**); the imposition of the default interest on the IGV Liability and which the Claimant has challenged in the so-called "Default Interest Appeal" and in this arbitration is a taxation measure as a matter of Peruvian law (**ii**); the Constitutional Court 2021 Decision is inextricably connected to the 1999 Tax Debt, despite the Claimant's attempt to separate both measures (**iii**) and; the Claimant's request for relief in this arbitration evinces that the actions commenced against the 1999 Tax Debt (including as regards the interest generated by the IGV Liability) and these proceedings seek the very same remedy: the reimbursement of the sums paid to the SUNAT (**iv**). The Respondent addresses these points below:

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[73] *See*, Request for Arbitration, ¶ 76(ix).

[74] Request for Arbitration, ¶ 76(ix).

86. *First*, the term "measure" in the Peru–Canada FTA has a broad scope and comprises measures taken by either the Legislative, Executive or Judicial branches:

> [M]easure includes any law, regulation, procedure, requirement or practice;[75]

87. Therefore, an administrative decision imposing a tax debt, and a judicial decision on said tax debt, may be "measures" within the meaning of the Peru–Canada FTA. In fact, the arbitral tribunal in *EnCana v. Ecuador*, considered the meaning and the breadth of a definition of "measure" identical to that of the Peru–Canada FTA and found as follows:

> Having regard to the breadth of the defined term "measure", there is no reason to limit Article XII(l) to the actual provisions of the law which impose a tax. All those aspects of the tax regime which go to determine how much tax is payable or refundable are part of the notion of "taxation measures".[76]

88. Evidently, this broad definition also comprises the judicial proceedings relating to the default interest on a tax liability, which – as will be further explained – is part and parcel of a tax debt under Peruvian law.

89. *Second*, it is uncontroversial that the law of the Host State is relevant to establish whether a measure constitutes a taxation measure. It is uncontentious that States' taxation powers are an essential sovereign prerogative. This is precisely why arbitral tribunals have understood that the object and purpose of tax carve-outs, as the one in Article 2203 of the Peru–Canada FTA, is to preserve fiscal sovereignty.[77] For this reason, tribunals have held that it is "*important to look at the law of that Contracting Party for an answer to the question of what constitutes a provision 'relating to taxes', and, in turn, a 'taxation measure'.*"[78]

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

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

77 *Murphy Exploration & Production Company – International v. Republic of Ecuador*, PCA Case No. 2012-16, Partial Final Award, 6 May 2016 (**Exhibit RL-0028**), ¶ 165 ("*The purpose of Article X specifically is to preserve the States' sovereignty in relation to their power to impose taxes in their territory. Most governments view these powers as a central element of sovereignty. Therefore, while they may be willing to accept international discipline over State conduct, they are reluctant to accept such oversight as regards their powers of taxation. This has led most State parties to modern investment treaties to omit taxation from a treaty's ambit, or restrict the treaty's application to certain types of taxes.*"); *SunReserve Luxco Holdings SRL v. Italian Republic*, SCC Case No. V 2016/32, Final Award, 25 March 2020 (**Exhibit RL-0034**), ¶ 510.

78 *Murphy Exploration & Production Company – International v. Republic of Ecuador*, PCA Case No. 2012-16, Partial Final Award, 6 May 2016 (**Exhibit RL-0028**), ¶ 166 ("*The Tribunal finds that, for it to assess whether a measure is one which was meant to be excluded from an international arbitral tribunal's purview because it concerns a State's sovereign power of taxation, it is necessary for the Tribunal to examine whether that measure comes within the State's domestic tax regime.*"); *SunReserve Luxco Holdings SRL v. Italian Republic*,

90. Peruvian law, contrary to what the Claimant has argued in its Request for Arbitration, specifically provides that the default interest on a tax liability is part and parcel of a tax obligation. Indeed, Article 28 of the Peruvian Tax Code provides that default interest is a "component" of the tax debt, as follows:

> **Article 28.- COMPONENTS OF THE TAX DEBT**
>
> The Tax Administration shall demand payment of the tax debt, which is made up of the tax, the penalties and the interest.[79]

91. In fact, the Tax Payments made by Scotiabank Peru to the SUNAT concern both, the IGV Liability and the default interest accrued. This is clear from the Payment Order issued by the SUNAT on 25 November 2013, following the Tax Court 2013 Decision confirming the legality of the 1999 Tax Debt (defined above as the "**SUNAT Payment Order**"). Indeed, pursuant to the SUNAT Payment Order, Scotiabank Peru was liable for: (**i**) the IGV Liability, valued at [redacted] (**ii**) capitalized interest, for [redacted] and (**iii**) default interest, in the amount of [redacted][80] That is, the total updated 1999 Tax Debt amounted to [redacted] which is precisely the amount that Scotiabank Peru paid with its Tax Payments, as set out in the payment schedule communicated by Scotiabank Peru to the SUNAT in December 2013.[81]

92. The above further confirms that the default interest owed and paid by Scotiabank Peru alongside the IGV Liability is an element of the 1999 Tax Debt and its imposition is a tax measure.

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SCC Case No. V 2016/32, Final Award, 25 March 2020 (**Exhibit RL-0034**), ¶ 510 ("*Given that the provision that contains the taxation measure should either be codified by the Contracting Party in question,* […] *the Tribunal considers it important to look at the law of that Contracting Party for an answer to the question of what constitutes a provision "relating to taxes", and, in turn, a "taxation measure". This is particularly in light of the object and purpose behind treaty provisions such as Article 21 ECT, which the Tribunal considers are intended for the Contracting Parties to preserve fiscal sovereignty over tax related matters.*").

[79] 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. The applicable rate and procedure to calculate default interest due on a tax liability is also set forth by the Peruvian Tax Code, in its Article 33 (Peruvian Tax Code, approved by Legislative Decree Nº 816 of 21 April 1996, as compiled by Supreme Decree Nº 133-2013-EF of 22 June 2013 (**Exhibit R-0003**), Article 33 "[a]*ny amount of tax unpaid within the terms indicated in Article 29 shall accrue an interest equivalent to the Default Interest Rate*.").

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

[81] *See*, Letter from Scotiabank Peru to the SUNAT Collection Agent, 6 December 2013 (**Exhibit C-0009**), p. 3. *See also*, Letters from Scotiabank Peru to the SUNAT Collection Agent, December 2013 to February 2014 (**Exhibits C-0010** to **C-0018**).

93. *Third*, the Claimant's attempt artificially to draw a distinction between Scotiabank's tax liabilities and the related judicial proceedings holds no water. This is confirmed by the language used by the Claimant itself in its Request for Arbitration:

> [T]the requirement in Art. 823(4) relating to taxation authorities does not apply, as **this arbitration addresses Peru's judicial treatment of Scotiabank Peru's appeal relating to its constitutional rights regarding the application of default interest**; furthermore, the application of default interest to a debt is not a matter of taxation.[82]

94. Despite the fact that the Claimant argues that the application of default interest is not a taxation matter, in the very first sentence of the Claimant's statement above, the Claimant admits that the judicial proceedings of which it complains concern precisely the default interest paid by Scotiabank Peru. Moreover, a perfunctory review of Scotiabank Peru's requests for relief in the judicial *amparo* claim filed before the Constitutional Court makes it plain that the very object of Scotiabank's complaint and its very aim is to have the Constitutional Court overturn the imposition of a tax liability. Scotiabank's request for relief in the *amparo* reads as follows:

> On 15 November 2013, Scotiabank Perú S.A.A. filed an amparo action against the *Superintendencia Nacional de Administración Tributaria* (hereinafter, Sunat) and the Tax Court (Ministry of Economy and Finance). It requests the following:
>
> i) As a first autonomous claim, **that the Sunat be enjoined from assessing and collecting from the plaintiff the payment of the default interest** accrued during the following periods:
>
> - From the start of the seventh month counted as from the date on which the appeal filed against the Resolution of Intendency 015-4-11940 was filed before the Tax Court, until the date on which Resolution 07517-1-2003 was issued, which decided the appeal for the first time, *i.e.*, 30 December 2003, and
>
> - From the date on which the proceedings were referred back to the Sunat by the Tax Court (30 December 2003), until 31 March 2007, date on which there was an important regulatory change in the calculation of interests.
>
> ii) As a second autonomous claim, **that article 33 of the Tax Code not be applied in this particular case and, consequently, to suspend the collection of default interest both during the claim phase before the Sunat and during the appeal phase before the Tax Court**, that is, from 1 April 2007 to 11 November 2013.
>
> iii) As a subsidiary claim, if the first two autonomous claims are not upheld, that the Sunat be ordered to refrain from assessing and collecting from the plaintiff the default interest accrued from the date of initiation of the administrative proceedings (23 December 1999) until 11 November 2013.
>
> iv) As a third autonomous claim, **that the Sunat be ordered not to capitalize the interest for the period during which article 33 of the Tax Code was in force**, *i.e.*,

[82] Request for Arbitration, ¶ 76(ix) (emphasis added).

> until 24 December 2006, when assessing and collecting the default interest payment from the plaintiff.
>
> v) As a fourth autonomous claim, **that the Sunat be enjoined from assessing and collecting from the plaintiff the default interest accrued from the filing of the amparo action until the date of issuance of a final judgment with res judicata effects.**[83]

95. As it is evident from the requests above, Scotiabank Peru asked the Constitutional Court to adjudicate a tax dispute and, in fact, to have the interests accruing on the tax liability overturned. Simply put, no matter how the Claimant tries to disguise the matter, it concerns a taxation measure.

96. The attempts to recharacterize a taxation measures as a non-taxation measure by claiming that the question at stake is a question of a judicial decision on the constitutionality of the measure to elide a tax carve-out in a treaty is not new. Arbitral tribunals have faced similar situations as the one at stake in this arbitration. For instance, in *SunReserve v. Italy* and *ESPF v. Italy*, the claimants argued that their claims referred not to a tax (known as the "Robin Hood Tax"), but rather to a decision of the Italian Constitutional Court which had indirectly declared the tax unconstitutional. In both of these cases, the tribunals rejected the claimants' attempts to dissociate the tax measures from the constitutional actions concerning said measures in order to expand the tribunals' jurisdiction. The tribunal in *SunReserve* clearly exposed the unreasonableness of the claimant's proposition, stating:

> The Tribunal considers that any determination on the Constitutional Court Decision, **which was a sequel to the imposition of the Robin Hood Tax**, will implicitly entail a decision on the preceding incidence of the Robin Hood Tax itself. In this regard, the Tribunal agrees with Respondent's argument that **"[i]t is not possible to separate the application of a decision regarding a tax from the same tax measure."**[84]

97. As made plain by the Claimant's own words in its Request for Arbitration and its prayer for relief in the proceedings before the Constitutional Court, the *amparo* proceedings are nothing but a sequel

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[83] Decision No. 919/2021 of the Peruvian Constitutional Court, 20 November 2021 (**Exhibit R-0008**), pp. 2-3 (emphasis added).

[84] *SunReserve Luxco Holdings SRL v. Italian Republic*, SCC Case No. V 2016/32, Final Award, 25 March 2020 (**Exhibit RL-0034**), ¶ 551. *See also*, *ESPF Beteiligungs GmbH, ESPF Nr. 2 Austria Beteiligungs GmbH, and InfraClass Energie 5 GmbH & Co. KG v. Italian Republic*, ICSID Case No. ARB/16/5, Award, 14 September 2020 (**Exhibit RL-0036**), ¶ 355 ("*With respect to the Robin Hood Tax, the Tribunal is of the view that these measures fall within the broad definition of Taxation Measures contained in Article 21 of the ECT. The Tribunal has noted that the Claimants' claim is framed so as not to challenge the Robin Hood Tax itself, but instead to address the means by which the Italian courts implemented their decision as to the application of the tax. In the Tribunal's view, framing the claim in this way does not change the nature of the underlying measures of which the Claimants' complain; they are tax measures and the underlying issue relates to whether the taxes were fair (and not the Italian court's application of the decision with respect to whether those taxes was fair). Accordingly, the Respondent's jurisdictional objection with respect to Claimants' claims arising out of the Robin Hood Tax is upheld*.").

to the 1999 Tax Debt, including the default interest owed to the SUNAT. Thus, as in *SunReserve*, the Tribunal should find that it lacks jurisdiction over the claims regarding the Constitutional Court 2021 Decision.

98. *Fourth*, the Claimant's prayer for relief in this arbitration further confirms the true nature of its claim: to seek the reimbursement of the sums paid as interest to the SUNAT. This was also an element considered by the tribunal in *SunReserve*, which found that the fact that the claimant requested to be compensated for the sums paid as tax to Italy, not for damages allegedly caused by the Italian Constitutional Court's decision, further confirmed that the measure at stake was a taxation measure.[85]

99. This is also the case in the present arbitration. A perfunctory review of the Claimant's prayer for relief in these proceedings suffices to establish this point:

> The standard of compensation to an investor deprived of its investment is full reparation, calculated as the fair market value of the investor's investments. Accordingly, Scotiabank requests an award granting:
>
> (i) a declaration that Peru breached the FTA;
>
> **(ii) compensation for all losses and damages suffered as a result of those breaches, namely the amount of at least 433,814,656.00 PEN representing the interest amount that was paid under protest**, pre-award interest on that amount of at least 10.8%-14.4% as applicable and compounded annually, and any remaining lost opportunity costs to Scotiabank as a result of its payment of the default interest under protest;
>
> (iii) all costs associated with this proceeding, including all professional fees and disbursements;
>
> (iv) payment of a sum of compensation equal to any tax consequences of the award, and to maintain the integrity of the award;
>
> (v) pre-award and post-award interest; and
>
> (vi) such further relief as counsel may advise and this Tribunal may permit.[86]

100. The Claimant's request for relief is diaphanous. Despite its attempts to represent otherwise, the Claimant seeks redress for one thing and one thing only: the default interest paid as part of the Tax

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

[86] Request for Arbitration, ¶ 71 (emphasis added).

Payments to the Peruvian tax authorities which are, unequivocally, a taxation measure under Peruvian law.

101. As explained above, the Peru–Canada FTA excludes from its scope of application claims concerning alleged breaches of Article 805 (Minimum Standard of Treatment) regarding taxation measures. Therefore, the Tribunal lacks jurisdiction over the Claimant's allegations that the Respondent failed to act in accordance with the Minimum Standard of Treatment.

102. In addition, fatally for the Claimant, the Claimant did not refer its claim that the Constitutional Court had purportedly expropriated the amounts paid as default interest on the IGV Liability to the designated authorities under Article 2203(8). Therefore, the Tribunal does not have jurisdiction over the Claimant's claims as the Respondent did not consent to submit expropriation claims regarding a tax measure to arbitration.

103. Accordingly, the Tribunal should decline jurisdiction on the Claimant's claims under Articles 805 (Minimum Standard of Treatment) and 812 (Expropriation).

### C. THE INTEREST PAID BY THE CLAIMANT IS NEITHER A COVERED INVESTMENT UNDER THE FTA NOR UNDER ARTICLE 25 OF THE ICSID CONVENTION

104. In its Request for Arbitration, the Claimant submits that its covered investments in Peru "*include Scotiabank Peru <u>and the interest amount that was paid under protest</u>*."[87] Further, the Claimant argues that its alleged investment consisting of the default interest paid by Scotiabank Peru as part of the Tax Payments was expropriated in breach of Article 812 of the Peru–Canada FTA.[88]

105. It is undisputed that Scotiabank Peru continues to exist, operate and generate profits.[89] Therefore, it is not surprising that, in order to manufacture its claim for an alleged expropriation, the Claimant argues that the default interest paid "under protest" as part of the Tax Payments constitutes a protected investment, and that this investment was expropriated in breach of Article 812 of the Peru–Canada FTA.

106. The Claimant's attempt to provide its expropriation claim with some semblance of credibility does not hold water. As the Respondent demonstrates, the Claimant's alleged investment consisting of

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[87] Request for Arbitration, ¶ 62 (emphasis added).

[88] *See*, e.g., Request for Arbitration, ¶ 67 ("*Peru breached this obligation with respect to Scotiabank's investment in Peru, namely the default interest amount that was paid under protest*.").

[89] *See*, e.g., Consolidated Interim Financial Statements of Scotiabank Perú S.A.A. and Subsidiaries, "Consolidated Interim Financial Statements", 30 September 2022 (**Exhibit R-0009**).

the default interest paid as part of the Tax Payments does not constitute a protected investment under the Treaty or the ICSID Convention.

107. It is well-established that, for the Tribunal to have *ratione materiae* jurisdiction over the present dispute (assuming, *quod non*, that Chapter Eight of the Peru–Canada FTA were applicable to Scotiabank's claims), the Claimant has to satisfy the required double-barrelled test, demonstrating that it has a protected investment both under the Peru–Canada FTA and the ICSID Convention.[90] If the Claimant's purported "investment" is not protected under either of these instruments, as in the present case, the Tribunal must decline jurisdiction to hear the dispute.

108. The Respondent has demonstrated that the Tribunal lacks jurisdiction over the Claimant's claims regarding Articles 803 and 805 of Chapter Eight. Further, the Tribunal lacks jurisdiction over the Claimant's expropriation claim, since the default interest paid "under protest" by Scotiabank Peru as part of the Tax Payments does not constitute a protected investment under either the Peru–Canada FTA (**1**) or Article 25(1) of the ICSID Convention (**2**). Moreover, even if the Tribunal were to consider that it has jurisdiction over this alleged "investment", which is denied, the Claimant's expropriation claim will also fail as manifestly without legal basis on its substance (**3**).

#### 1. The interest paid by the Claimant is not a protected investment under the FTA

109. The Claimant submits that the default interest paid "under protest" to the SUNAT as part of the Tax Payments is in itself a protected investment under the FTA.[91] However, the Claimant has failed to show that the default interest paid as part of the Tax Payments falls into any of the categories of protected investments listed under Article 847 of the Peru–Canada FTA (**i**). In addition, even

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[90] *See*, e.g., *Global Trading Resource Corp. and Globex International, Inc. v. Ukraine*, ICSID Case No. ARB/09/11, Award, 1 December 2010 (**Exhibit RL-0016**), ¶ 43 ("[I]*t is now beyond argument that there are two independent parameters* […]."); *Salini Costruttori S.P.A. and Italstrade S.P.A. v. Kingdom of Morocco*, ICSID Case No. ARB/00/4, Decision on Jurisdiction, 16 July 2001 (**Exhibit RL-0003**), ¶ 44 ("[I]*nsofar as the option of jurisdiction has been exercised in favour of ICSID, the rights in dispute must also constitute an investment pursuant to Article 25 of the Washington Convention. The Arbitral Tribunal, therefore, is of the opinion that its jurisdiction depends upon the existence of an investment within the meaning of the Bilateral Treaty as well as that of the Convention, in accordance with the case law.*"); *Jan de Nul N.V. and Dredging International N.V. v. Arab Republic of Egypt*, ICSID Case No. ARB/04/13, Decision on Jurisdiction, 16 June 2006 (**Exhibit RL-0009**), ¶ 90 ("[T]*he jurisdiction of the Tribunal is contingent upon the existence of an "investment" within the meaning of Article 25 of the ICSID Convention and of an investment under the BIT.*"); *Toto Costruzioni Generali S.p.A. v. Republic of Lebanon*, ICSID Case No. ARB/07/12, Decision on Jurisdiction, 11 September 2009 (**Exhibit RL-0013**), ¶ 66 ("[G]*iven that the case at hand is submitted to an ICSID Tribunal, the Tribunal agrees with Lebanon that, for this Tribunal to have jurisdiction, it is not sufficient that the dispute arises out of an investment as per the meaning of 'investment' given by the parties in the Treaty, but also as per the meaning of 'investment' under the ICSID Convention.*").

[91] *See*, Request for Arbitration, ¶¶ 4, 19-21.

assuming that the Tribunal were to consider that the Claimant has some kind of property rights over the default interest (which is denied), by the Claimant's own characterization, this would at best be a "claim to money", expressly excluded from the definition of "investment" by Article 847 of the Peru-Canda FTA (**ii**).

110. *First*, the evident starting point for this analysis is the Treaty itself. Article 847 of the Peru–Canada FTA defines the term "covered investment" as "*an investment in* [the] *territory* [of a party] *of an investor of the other Party existing on the date of entry into force of this Agreement, as well as investments made or acquired thereafter*".[92] Article 847 enumerates the specific assets which the Contracting Parties agreed to consider as investments for purposes of the Treaty. The closed list of assets is as follows:

> **[I] nvestment means:**
>
> (a) an enterprise;
> (b) an equity security of an enterprise;
> (c) a debt security of an enterprise […];
> (d) a loan to an enterprise […];
> (e) an interest in an enterprise that entitles the owner to share in income or profits of the enterprise;
> (f) an interest in an enterprise that entitles the owner to share in the assets of that enterprise on dissolution, other than a debt security or a loan excluded from subparagraphs (c) or (d);
> (g) real estate or other property, tangible or intangible, acquired in the expectation or used for the purpose of economic benefit or other business purposes; and
> (h) interests arising from the commitment of capital or other resources in the territory of a Party to economic activity in such territory […][93]

111. It bears recalling that, unlike other investment treaties which include an open-ended, non-exhaustive list of categories of assets considered as "investments", the Peru–Canada FTA follows the model of Article 1139 of NAFTA, which uses identical language providing a closed list of assets considered as investments.

112. The fact that the Contracting Parties to NAFTA meant to provide an exhaustive list of categories of assets that constitute a protected investment under the treaty has been widely recognized by arbitral tribunals. For instance, in *Grand River Enterprises v. United States of America*, the tribunal stated:

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[92] Peru-Canada Free Trade Agreement, 1 August 2009 (**Exhibit C-0001**), Article 847.

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

> NAFTA's Article 1139 is neither broad nor open-textured. **It prescribes an exclusive list of elements or activities that constitute an investment for purposes of NAFTA**. As the Claimants' expert Professor Mendelson pointed out, **this definition is exclusive and not illustrative**.[94]

113. The above analysis equally applies to the Peru–Canada FTA. Therefore, for the Tribunal to determine whether the Claimant has an investment under the FTA, it suffices for it to determine whether the Claimant's alleged "investment" is comprised under any of the categories of assets or elements provided under Article 847, transcribed above. This is manifestly not the case, and the Claimant is fully aware of this fact. Tellingly, it does not even attempt to demonstrate which of the categories of assets listed under Article 847 comprises the default interest on the tax debt incurred by Banco Wiese. The reason is simple: it does not fall under any.

114. Evidently, the default interest payments are not an enterprise (a), nor an equity security (b) or debt security (c) of an enterprise, nor a loan to an enterprise (d) or an interest in an enterprise of any sort (e-f), nor intangible property (g). The default interest paid as part of the Tax Payments do not qualify either as "*interests arising from the commitment of capital or other resources in the territory of a Party to economic activity in such territory*" under letter (h). As will be further explained, under Article 28 of the Peruvian Tax Code, the default interest on the IGV Liability is part and parcel of the tax debt, **<u>not</u>** income derived from the commitment of capital or other resources to an economic activity in Peru.[95]

115. *Second*, and moreover, Scotiabank pretends that, to the extent that it paid the default interest "under protest" (*bajo protesto*) – that is, expressing that it "*did not recognize the existence, legality or enforceability of the Alleged Tax Debt*" – it has a right to claim back or recuperate these amounts.[96]

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[94] *Grand River Enterprises Six Nations, Ltd., et.al. v. United States of America*, *Ad hoc* UNICITRAL arbitration, Award, 12 January 2011 (**Exhibit RL-0018**), ¶ 82 (emphasis added). *See also*, *Lion Mexico Consolidated L.P. v. United Mexican States*, ICSID Case No. ARB(AF)/15/2, Decision on Jurisdiction, 30 July 2018 (**Exhibit RL-0033**), ¶¶ 182-183 ("*Art. 1139 NAFTA offers a sophisticated and precise definition of protected investments: the provision lists eight categories of "interests" which are considered as investments, and two categories which are excluded.*"); Lucy Reed, Zoe Scanlon, and Dafina Atanasova, "Protected Investment", *Max Planck Encyclopedia of Public International Law*, 2018 (**Exhibit RL-0043**), ¶¶ 6-7 ("*A comparatively narrow definition of investment has also found its way into treaty practice. First, some treaties provide for the exclusion of specific types of assets from an otherwise broad definition* […]. *Second, some treaties expressly provide for a closed list of qualifying assets (UNCTAD, 2011, 34–36). The North American Free Trade Agreement (1992) ('NAFTA') is an early notable example.*").

[95] Peruvian Tax Code, approved by Legislative Decree № 816 of 21 April 1996, as compiled by Supreme Decree № 133-2013-EF of 22 June 2013 (**Exhibit R-0003**), Article 38. *See below*, Section IV(D)(1).

[96] *See* Letters from Scotiabank Peru to the SUNAT Collection Agent, December 2013 to February 2014 (**Exhibits C-0009 to C-0018**).

However, the determination of whether a right exists or not can only be made by reference to the law which allegedly confers that right: in this case, Peruvian law.[97]

116. Under Peruvian law, payment "under protest" is not provided. Indeed, a payment, even if made "under 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. Indeed, the expressed intent of a party making payment is irrelevant since, pursuant to the Peruvian Civil Code, any payment made (**i**) for an existing obligation;[98] (**ii**) in the amount due[99] and (**iii**) in a timely manner,[100] has the effect of extinguishing the outstanding obligation and preventing the accrual of interest. The debtor's expression of their objection to the existence of the debt is immaterial, even to preserve their rights to contest a debt in court, which exists regardless.[101]

117. To be clear: the Claimant is not entitled to **<u>any</u>** property rights over the default interest paid as part of the Tax Payments that it made to the SUNAT. These payments did at no point give rise to a credit in the Claimant's favour. Much to the contrary, they were made simply to comply with a valid and legitimate tax obligation originally imposed on Banco Wiese by the Peruvian State, in exercise of its sovereign powers. The mere possibility that the SUNAT 2011 Decision and the Tax Court 2013 Decision could be overturned does not vest any rights on Scotiabank. To the extent that Scotiabank does not prevail in the domestic legal proceedings through which it has challenged, and continues to challenge, the SUNAT 2011 Decision and the Tax Court 2013 Decision before the local courts,

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97 *See*, e.g., Zachary Douglas, *Property, Investment, and the Scope of Investment Protection Obligations*, in *The Foundations of International Investment Law: Bringing Theory into Practice*, Online edn., Oxford Academic, 363-406 (2014) (**Exhibit RL-0042**), pp. 373, 401 ("*The test for whether or not the claimant has property is supplied by the law of the host state and it is then for the definition of an investment in the treaty to determine whether that property is an investment.* […] *The object of an expropriation claim must be investment-as-property as defined by the law of the host state* […]."). *See also*, *EnCana Corporation v. Republic of Ecuador*, LCIA Case No. UN3481, Award, 3 February 2006 (**Exhibit RL-0008**), ¶ 184.

98 Peruvian Civil Code, approved by the Legislative Decree Nº 295 of 24 July 1984, as amended (**Exhibit R-0001**), Article 1132.

99 Peruvian Civil Code, approved by the Legislative Decree Nº 295 of 24 July 1984, as amended (**Exhibit R-0001**), Article 1220.

100 Peruvian Civil Code, approved by the Legislative Decree Nº 295 of 24 July 1984, as amended (**Exhibit R-0001**), Article 1240.

101 Juan Maximiliano Aguayo López, *La Obligación Tributaria y el Pago: Antes del Inicio de la Cobranza Coactiva-en la Legislación Peruana. Apuntes y Disquisiciones*, Revista Derecho & Sociedad No. 43, 239-254 (2014) (**Exhibit R-0006**), p. 248. In accordance with Articles 136 and 146 of the Peruvian Tax Code, prior payment is not required to file a challenge against a tax obligation imposed by the SUNAT (*see* Peruvian Tax Code, approved by Legislative Decree Nº 816 of 21 April 1996, as compiled by Supreme Decree Nº 133-2013-EF of 22 June 2013 (**Exhibit R-0003**), Articles 136, 146).

these two decisions maintain their full force and effect, and Scotiabank is not entitled to recover the amounts paid.

118. *Third*, even if the Claimant were entitled to some kind of right over the Tax Payments, which is denied, these would still not qualify as an investment under Article 847. Conveniently, the Claimant carefully avoids making any reference to the list of assets that the Contracting Parties expressly considered **not** to constitute an investment under the FTA: namely, claims to money. The list included in Article 847 provides:

> [B] ut investment does not mean,
>
> (i) claims to money that arise solely from:
>
> (i) commercial contracts for the sale of goods or services by a national or enterprise in the territory of a Party to an enterprise in the territory of the other Party, or
>
> (ii) the extension of credit in connection with a commercial transaction, such as trade financing, other than a loan covered by subparagraph (d); and
>
> **(ii) any other claims to money, that do not involve the kinds of interests set out in subparagraphs (a) through (h)**[102]

119. In other words, even assuming, *quod non,* that the payments for default interest were considered a credit or claim to money, these do not constitute an investment under Article 847 (a) to (h) and, crucially, are expressly considered **not to be** an investment for purposes of the FTA.

120. To conclude, it is manifest that the interest amounts on the IGV Liability paid under protest by Scotiabank do not constitute a covered investment under Article 847 of the Peru–Canada FTA and, hence, the Claimant's claim is manifestly without merit.

### 2. The interest paid by the Claimant does not constitute an investment under Article 25 of the ICSID Convention

121. The Respondent has established above that the default interest paid by Scotiabank Peru does not constitute an investment under the FTA and this should be the end of the query. Nonetheless, for the sake of completeness, the Respondent further demonstrates that the Tribunal also lacks jurisdiction over the Claimant's claim as said payments do not constitute an investment under Article 25(1) of the ICSID Convention.

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

122. It uncontroversial that, for an ICSID tribunal to have jurisdiction over a given dispute, the Claimant must satisfy the requirements set forth in Article 25(1) of the ICSID Convention, which provides:

> The jurisdiction of the Centre shall extend to **any legal dispute arising directly out of an investment**, between a Contracting State (or any constituent subdivision or agency of a Contracting State designated to the Centre by that State) and a national of another Contracting State, which the parties to the dispute consent in writing to submit to the Centre. When the parties have given their consent, no party may withdraw its consent unilaterally.[103]

123. It is also well-known that, whilst the term "investment" is not expressly defined under the ICSID Convention, arbitral case law has consistently confirmed that the term "investment" is an objective and autonomous element,[104] routinely assessed by at least three criteria that cumulatively serve to characterize an economic operation as an "investment": (**i**) a contribution or commitment of capital or resources to an economic venture; (**ii**) a certain duration in the performance of the economic operation; and (**iii**) an assumption of risk.[105] Without any one of these elements, there is no "investment" under the ICSID Convention. In this case, the alleged "investment" of the Claimant consisting of the default interest paid "under protest" fails to satisfy each and every one of these criteria.

124. *First*, as stated above, the default interest paid by Scotiabank Peru as part of the Tax Payments is not a contribution to an economic venture for the creation of value, but rather consisted merely of the payment of an outstanding obligation to a sovereign Tax Authority. In order to fulfil the requirement

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103 ICSID Convention, Article 25(1) (emphasis added).

104 *See*, e.g., *Joy Mining Machinery Limited v. Arab Republic of Egypt*, ICSID Case No. ARB/03/11, Award on Jurisdiction, 6 August 2004 (**Exhibit RL-0007**), ¶ 50; *Mr. Saba Fakes v. Republic of Turkey*, ICSID Case No. ARB/07/20, Award, 14 July 2010 (**Exhibit RL-0015**), ¶ 108; *Quiborax S.A., Non Metallic Minerals S.A. and Allan Fosk Kaplún v. Plurinational State of Bolivia*, ICSID Case No. ARB/06/2, Decision on Jurisdiction, 27 September 2012 (**Exhibit RL-0020**), ¶ 213; *Vestey Group Ltd v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB/06/4, Award, 15 April 2016 (**Exhibit RL-0027**), ¶ 187 ("*A majority of ICSID tribunals hold that the term "investment" in Article 25 of the ICSID Convention has an independent meaning.*").

105 *See*, *e.g.*, *Salini Costruttori S.p.A. and Italstrade S.p.A v. Kingdom of Morocco*, ICSID Case No. ARB/00/4, Decision on Jurisdiction, 16 July 2001 (**Exhibit RL-0003**), ¶ 52 ("*The doctrine generally considers that investment infers: contributions, a certain duration of performance of the contract and a participation in the risks of the transaction (cf. commentary by E. Gaillard, cited above, p. 292). In reading the Convention's preamble, one may add the contribution to the economic development of the host State of the investment as an additional condition.*"); *Mr. Saba Fakes v. Republic of Turkey*, ICSID Case No. ARB/07/20, Award, 14 July 2010 (**Exhibit RL-0015**), ¶ 110; *Quiborax S.A., Non Metallic Minerals S.A. and Allan Fosk Kaplún v. Plurinational State of Bolivia*, ICSID Case No. ARB/06/2, Decision on Jurisdiction, 27 September 2012 (**Exhibit RL-0020**), ¶ 219; *KT Asia Investment Group BV v. Republic of Kazakhstan*, ICSID Case No. ARB/09/8, Award, 17 October 2013 (**Exhibit RL-0022**), ¶¶ 170, 173; *Vestey Group Ltd v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB/06/4, Award, 15 April 2016 (**Exhibit RL-0027**), ¶ 187 ("*On the basis of ICSID jurisprudence as it has evolved, it can now be considered that the definition of 'investment' comprises three components: a commitment or allocation of resources, risk, and duration.*").

for a "contribution" to exist for there to be a protected investment, ICSID tribunals have set out an objective test pursuant to which the claimant must show that it has "*committed some expenditure, in whatever form, in order to pursue an economic objective*."[106]

125. As understood by the tribunal in *Poštová banka and Istrokapital v. Greece*:

> If an "objective" test is applied, in the absence of a contribution to an economic venture, there could be no investment. **An investment, in the economic sense, is linked with a process of creation of value**, which distinguishes it clearly from a sale, which is a process of exchange of values or a subscription to sovereign bonds which is also a process of exchange of values i.e. a process of providing money for a given amount of money in return.[107]

126. In *Poštová banka*, the tribunal found that, since the claimant's alleged "investment" was derived from payments made to the Greek State, which is "*not primarily an economic actor engaged in economic ventures*", these payments could not be considered an "investment" under Article 25(1) of the ICSID Convention.[108]

127. Similarly, the default interest paid as part of the Tax Payments by the Claimant to the Peruvian State is clearly not linked to a process for the creation of value, nor an economic venture; rather, they merely constitute payments which Scotiabank Peru, as a taxpayer, was obliged to make. Therefore, these payments cannot be considered a "contribution" as required by the concept of "investment" in Article 25(1), and the Tribunal lacks jurisdiction over this claim on this basis alone.

128. *Second*, the Claimant's alleged "investment" consisting of the default interest paid as part of the Tax Payments lacks the duration required to demonstrate a commitment beyond a one-off transaction, necessary for an economic contribution to qualify as a protected investment under Article 25(1) of the ICSID Convention.[109] As expressed by the tribunal in *LESI v. Algeria*, for there to be an investment

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[106] *LESI, S.p.A. and Astaldi, S.p.A. v. People's Democratic Republic of Algeria*, ICSID Case No. ARB/05/3, Decision on Jurisdiction, 12 July 2006 (**Exhibit RL-0010**), ¶ 73(i).

[107] *Poštová banka, a.s. and Istrokapital SE v. Hellenic Republic*, ICSID Case No. ARB/13/8, Award, 9 April 2015 (**Exhibit RL-0025**), ¶ 361.

[108] *Poštová banka, a.s. and Istrokapital SE v. Hellenic Republic*, ICSID Case No. ARB/13/8, Award, 9 April 2015 (**Exhibit RL-0025**), ¶¶ 362, 371.

[109] *See*, *Casinos Austria International GmbH and Casinos Austria Aktiengesellschaft v. Argentine Republic*, ICSID Case No. ARB/14/32, Decision on Jurisdiction, 29 June 2018 (**Exhibit RL-0032**), ¶ 189 ("*These three Salini criteria thus exclude non-economic activity and the noncommercial use of assets of foreign nationals from the concept of "investment". They also exclude short-term economic activity, or assets used in that context, such as one-time sales transactions that do not face investment-specific risk, from access to dispute settlement under the ICSID Convention.*"). *See also*, Lucy Reed, Zoe Scanlon, and Dafina Atanasova, "Protected Investment", *Max Planck Encyclopedia of Public International Law*, 2018 (**Exhibit RL-0043**), ¶ 18

under the ICSID Convention, there must be "*economic commitments for a sufficiently long period*."[110] Thus, even if there was a contribution, which is missing in this case, "[a]*n allocation of resources cannot be deemed an investment unless it is made for a certain duration*", since "[t]*he element of duration is inherent in the meaning of an investment*."[111] In this regard, ICSID tribunals have required durations of between two to five years.[112] Alleged "investments" consisting of transactions lasting merely a matter of months have been rejected. For instance, the tribunal in *Romak v. Uzbekistan* found that an economic operation that had been carried out over a period of merely five months lacked the sufficient duration, as it "[did] *not reflect a commitment on the part of* [the claimant] *beyond a one-off transaction, and is not of the sort normally associated with 'investments' according to the common understanding of the term.*"[113] In yet another case, an operation with a duration of 16 months was found insufficient.[114]

129. Hence, assuming merely for the sake of argument that the Claimant had made a contribution, in the present case, the Claimant made the Tax Payments in 10 instalments, from December 2013 to February 2014 – *i.e.*, spanning merely three months.[115] Therefore, the Claimant's purported "investment" consisting of the interest paid by Scotiabank Peru does not satisfy the requisite duration and falls outside the scope of Article 25(1) of the ICISD Convention.

130. *Third*, and finally, the payment of default interest by the Claimant does not involve the element of risk required for a transaction to be considered an "investment" under Article 25(1) of the ICSID Convention, in accordance with the ordinary meaning of the term. Notably, tribunals have

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("*The first Salini criterion is the length of the relationship between the investor and the host state. The relationship cannot be fleeting, but must have been in place for some time.*").

[110] *LESI, S.p.A. and Astaldi, S.p.A. v. People's Democratic Republic of Algeria*, ICSID Case No. ARB/05/3, Decision on Jurisdiction, 12 July 2006 (**Exhibit RL-0010**), ¶ 73(ii).

[111] *KT Asia Investment Group BV v. Republic of Kazakhstan*, ICSID Case No. ARB/09/8, Award, 17 October 2013 (**Exhibit RL-0022**), ¶ 207.

[112] *Salini Costruttori S.p.A. and Italstrade S.p.A v. Kingdom of Morocco*, ICSID Case No. ARB/00/4, Decision on Jurisdiction, 16 July 2001 (**Exhibit RL-0003**), ¶ 54; *Jan de Nul N.V. and Dredging International N.V. v. Arab Republic of Egypt*, ICSID Case No. ARB/04/13, Decision on Jurisdiction, 16 June 2006 (**Exhibit RL-0009**), ¶¶ 93-95.

[113] *Romak S.A. (Switzerland) v. Republic of Uzbekistan*, PCA Case No. AA280, Award, 26 November 2009 (**Exhibit RL-0014**), ¶¶ 226-227.

[114] *See*, *KT Asia Investment Group BV v. Republic of Kazakhstan*, ICSID Case No. ARB/09/8, Award, 17 October 2013 (**Exhibit RL-0022**), ¶ 214.

[115] Letters from Scotiabank Peru to the SUNAT Collection Agent, December 2013 to February 2014 (**Exhibits C-0009 to C-0018**).

considered the required risk to be a qualified "investment" risk, beyond ordinary commercial risks or sovereign risks. As explained by the tribunal in *Romak v. Uzbekistan*:

> All economic activity entails a certain degree of risk. As such, all contracts - including contracts that do not constitute an investment - carry the risk of non-performance. However, this kind of risk is pure commercial, counterparty risk, or, otherwise stated, the risk of doing business generally. It is therefore not an element that is useful for the purpose of distinguishing between an investment and a commercial transaction.
>
> An "investment risk" entails a different kind of alea, a situation in which the investor cannot be sure of a return on his investment, and may not know the amount he will end up spending, even if all relevant counterparties discharge their contractual obligations. Where there is "risk" of this sort, the investor simply cannot predict the outcome of the transaction.[116]

131. Evidently, the payment of default interest on a tax liability does not involve an expectation of a "return on investment" for Scotiabank Peru. Absent an expectation of profit, there can be no investment risk. As stated, by paying the value added tax and the default interest owed to the Peruvian State, Scotiabank Peru was merely complying with its existing tax obligations, not freely undertaking an investment risk.

132. In sum, the Claimant's claim for an alleged expropriation concerns only the amounts paid by Scotiabank Peru as default interest over the tax liability. Since the default interest paid as part of the Tax Payments are the antithesis of a protected investment, both under the FTA and the ICSID Convention, the Tribunal lacks jurisdiction over the Claimant's claim.

### 3. The Claimant's expropriation claim is manifestly without legal merit on its substance

133. Finally, even considering *quod non* that the Tribunal were to determine that is has jurisdiction over the Claimant's claim for the alleged expropriation of the default interest paid as part of the Tax Payments, the claim would fail for manifest lack of legal merit on its substance.

134. It is axiomatic that, in order to bring a claim for unlawful expropriation, a claimant must first establish the existence of a vested property right which can be subject to expropriation. Arbitral case law and

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116 *Romak S.A. (Switzerland) v. Republic of Uzbekistan*, PCA Case No. AA280, Award, 26 November 2009 (**Exhibit RL-0014**), ¶¶ 229-230. *See also*, *Poštová banka, a.s. and Istrokapital SE v. Hellenic Republic*, ICSID Case No. ARB/13/8, Award, 9 April 2015 (**Exhibit RL-0025**), ¶¶ 367-369 ("*In other words, under an "objective" approach, an investment risk would be an operational risk and not a commercial risk or a sovereign risk. A commercial risk covers, inter alia, the risk that one of the parties might default on its obligation, which risk exists in any economic relationship. A sovereign risk includes the risk of interference of the Government in a contract or any other relationship, which risk is not specific to public bonds.*").

Canada have recognized that the determination of whether there is a vested right capable of being expropriated must be made under the domestic law of the Host State.

135. Indeed, as stated by the tribunal in *Generation Ukraine v. Ukraine*: "*there cannot be an expropriation unless the complainant demonstrates the existence of proprietary rights in the first place*".[117] To make this determination, reference to the law of the Host State is necessary. As stated by the *Emmis International v. Hungary* tribunal: "[p]*ublic international law does not create property rights. Rather, it accords certain protections to property rights created according to municipal law.*"[118]

136. Canada has held the very same position, having recently expressed in its Non-Disputing Party Submission in *Odyssey Marine Exploration v. Mexico* that "[a]*ny expropriation analysis must begin with determining whether there is a valid property right capable of being expropriated*."[119]

137. For the avoidance of doubt, tribunals have found this to be the case even when no express reference to the law of the Host State is made in the applicable treaty. For instance, in *EnCana Corporation v. Ecuador*, the tribunal held:

> Unlike many BITs there is no express reference to the law of the host State. However for there to have been an expropriation of an investment or return (in a situation involving legal rights or claims as distinct from the seizure of physical assets) the rights affected must exist under the law which creates them, in this case, the law of Ecuador.[120]

138. As explained above, payment "under protest" is not provided or recognised to have legal effects under Peruvian law, according to which the expressed intent of a party making payment of a debt is immaterial. Therefore, the Claimant's repeated references in its Request for Arbitration to having made the Tax Payments "under protest" is immaterial as regards the creation of rights under

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[117] *Generation Ukraine, Inc. v. Ukraine*, ICSID Case No. ARB/00/9, Award, 16 September 2003 (**Exhibit RL-0006**), ¶¶ 6.2, 8.8. *See also*, *Emmis International Holding, B.V., Emmis Radio Operating, B.V., MEM Magyar Electronic Media Kereskedelmi és Szolgáltató Kft. v. Hungary*, ICSID Case No. ARB/12/2, Award, 16 April 2014 (**Exhibit RL-0023**), ¶ 159 ("*In view of the fact that the only cause of action within the Tribunal's jurisdiction is that of expropriation, Claimants must have held a property right of which they have been deprived. This follows from the ordinary meaning of the term.*").

[118] *Emmis International Holding, B.V., Emmis Radio Operating, B.V., MEM Magyar Electronic Media Kereskedelmi és Szolgáltató Kft. v. Hungary*, ICSID Case No. ARB/12/2, Award, 16 April 2014 (**Exhibit RL-0023**), ¶¶ 159, 162.

[119] *Odyssey Marine Exploration, Inc. v. United Mexican States*, ICSID Case No. UNCT/20/1, Non-Disputing Party Submission of the Government of Canada Pursuant to NAFTA Article 1128, 2 November 2021(**Exhibit RL-0038**), ¶ 26.

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

Peruvian law. Simply put, the alleged payment "under protest" does not create a vested right over these amounts. Much to the contrary, the default interest paid as part of the Tax Payments is not a credit, but part and parcel of a liability predating the Claimant's investment in Banco Wiese, of which existence the Claimant knew when it acquired Banco Wiese.

139. To conclude, given that the Claimant has no vested rights over the default interest paid, its expropriation claim falls also on its merits, as it is manifest that there simply is no right capable of expropriation.

### D. THE CLAIMANT HAS NOT COMPLIED WITH THE REQUIREMENTS UNDER ARTICLE 823 OF THE PERU–CANADA FTA, HENCE PERU HAS NOT CONSENTED TO ARBITRATE THE CLAIMANT'S CLAIMS

140. Even if the Tribunal were to find that it has jurisdiction over any of the Claimant's claims- notwithstanding the objections explained at length above- all of the Claimant's claims should be dismissed given the Claimant's failure to comply with the conditions precedent to the Respondent's consent to arbitrate under the Peru–Canada FTA.

141. Article 823 of the Peru–Canada FTA establishes a series of mandatory requirements to submit a claim to arbitration under Articles 819 and 820 of the Peru–Canada FTA. Pursuant to Article 823, a disputing investor may submit a claim "**only if**":

> (a) the disputing investor consents to arbitration in accordance with the procedures set out in this Section;
>
> (b) at least six months have elapsed since the events giving rise to the claim;
>
> (c) not more than 39 months have elapsed from the date on which the disputing investor first acquired, or should have first acquired, knowledge of the alleged breach and knowledge that the investor has incurred loss or damage thereby;
>
> (d) the disputing investor has delivered the Notice of Intent required under Article 821, in accordance with the requirements of that Article, at least six months prior to submitting the claim; and
>
> (e) the disputing investor and, where the claim is for loss or damage to an interest in an enterprise of the other Party that is a juridical person that the investor owns or controls directly or indirectly, the enterprise, waive their right to initiate or continue before any administrative tribunal or court under the law of either Party, or other dispute settlement procedures, any proceedings with respect to the measure of the disputing Party that is alleged to be a breach referred to in Article 819, except for proceedings for injunctive, declaratory or other extraordinary relief, not involving the

> payment of damages, before an administrative tribunal or court under the law of the disputing Party.[121]

142. Further, the Peru–Canada FTA expressly states that "[f]*ailure to meet any of the conditions precedent provided for in paragraphs 1 through 4 shall nullify the consent of the Parties given in Article 825.*"[122] The FTA leaves no room for doubt that full compliance with each of the requirements set forth under Article 823 is required for the State Party's valid consent to arbitrate a dispute under the Treaty. Article 825(1) of the FTA further confirms the point, by providing that "[e]*ach Party consents to the submission of a claim to arbitration <u>in accordance with the procedures set out in this Section</u>* [Section B of Chapter Eight]."[123]

143. It must be underscored in this regard that the clear meaning of Article 825(1) has been confirmed by arbitral case law, as illustrated by the ruling of the tribunal in *Waste Management v. Mexico*. When interpreting Article 1122(1) of NAFTA, which text is identical to that of Article 825(1), the *Waste Management* tribunal stated:

> NAFTA Article 1122, paragraph one, reads as follows: "Each Party consents to the submission of a claim to arbitration in accordance with the procedures set out in this Agreement." From the literal tenor of this Article, it is understood, for those effects of interest to us at present, that fulfilment, inter alia, of the prerequisites laid down in Article 1121, would translate as consent by NAFTA signatory parties to the dispute settlement procedure established under NAFTA Chapter XI, Section B.[124]

144. Therefore, it is plain that an arbitral tribunal seized under the Peru–Canada FTA lacks jurisdiction to adjudicate a claim unless all the prerequisites set forth in Article 823 have been fulfilled. The lack of compliance with the necessary prerequisites is manifest in the present arbitration, since the Claimant has failed validly and effectively to waive its right to continue proceedings before the Peruvian courts (**1**) and, in any event, its claims concerning the alleged expropriation are time-barred (**2**).

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[121] Peru-Canada Free Trade Agreement, 1 August 2009 (**Exhibit C-0001**), Article 823(1).

[122] Peru-Canada Free Trade Agreement, 1 August 2009 (**Exhibit C-0001**), Article 823(6).

[123] Peru-Canada Free Trade Agreement, 1 August 2009 (**Exhibit C-0001**), Article 825(1) (emphasis added).

[124] *Waste Management, Inc. v. United Mexican States*, ICSID Case No. ARB(AF)/98/2, Arbitral Award, 2 June 2000 (**Exhibit RL-0002**), ¶¶ 16-17.

### 1. The Claimant did not validly and effectively waive its right to initiate or continue proceedings before the Peruvian courts

145. As stated above, even if the Tribunal were to find that the Claimant and its 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 Peru regarding proceedings before the Peruvian courts is ineffective and, therefore, the Respondent's consent to this arbitration is rendered null.

146. Paragraph (e) of Articles 823(1) and 823(2) specifies, as a condition precedent for an investor to submit a claim to arbitration, the following:

> 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.[125]

147. In addition, Article 823(3) adds that the waiver to which paragraph (e) refers shall: (**i**) be made in the form provided in Annex 823(1), (**ii**) delivered to the disputing Party, and (**iii**) included in the submission of a claim to arbitration.[126]

148. In the absence of a valid and effective waiver, the tribunal lacks jurisdiction. As aptly put by the tribunal in *Commerce Group Corporation v. El Salvador,* "[i]*f the waiver is invalid, there is no consent*."[127] Evidently, consent to arbitrate must exist at the time of the submission of the claims to arbitration. Failure to comply with this requirement cannot be retroactively cured.[128]

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

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

[127] *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.

[128] *See*, *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 submitted the Washington Second and Third Amended Complaints, and that Canada has maintained that objection, the Tribunal does not*

149. In the present case, the Claimant submitted with its Request for Arbitration letters of waiver which, according to the Claimant, meet the requirements of the Peru–Canada FTA, including of Annex 823.1.[129] However, in the same Request for Arbitration, Scotiabank itself admitted that there are remedies still pending before the Constitutional Court regarding the imposition of the 1999 Tax Debt in the SUNAT 2011 Decision, as upheld by the Tax Court 2013 Decision. In particular, Scotiabank acknowledges the following:

> On November 21, 2013, Scotiabank Peru 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.[130]

150. The Claimant further specifies, in a footnote in its Request for Arbitration, that it filed a proceeding before the Peruvian Constitutional Court as recently as 15 August 2022:

> The Tax Appeal concerns whether the application of value added taxes were appropriate, namely whether the impugned gold trading transactions were real and the legality of imposing the tax. On July 4, 2017, the Supreme Court of Peru upheld the imposition of the value added taxes against Scotiabank Peru. On July 5, 2018, Scotiabank Peru filed an *amparo* action challenging the Supreme Court's ruling. On December 28, 2020, the Third Specialized Constitutional Court of Lima dismissed the *amparo*. On January 12, 2021, Scotiabank Peru appealed that decision to the First Constitutional Chamber of Lima, who dismissed the appeal. **On August 15, 2022, Scotiabank Peru filed a proceeding before the Constitutional Court of Peru, which is pending as of the date of this Request for Arbitration.** The Tax Appeal does not involve the accrual of default interest.[131]

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*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).

[129] *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**).

[130] Request for Arbitration, ¶ 32(ii). *See also* Request for Arbitration, ¶ 76(vi).

[131] 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 Peru 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**)).

151. Therefore, by Scotiabank's own admission, and despite the statements in the waiver letters submitted by the Claimant, it has failed materially to comply with Articles 823(1)(e) and 823(2)(e).

152. As regards waivers, arbitral case law has reiterated that a mere formal waiver does not suffice to comply with a requirement as the one under Articles 823(1)(e) and 823(2)(e).[132] Rather, a claimant submitting a waiver must behave in a consistent manner, abstaining from initiating or continuing to pursue legal action directly concerning or closely related to the measures that are under discussion in the arbitration.

153. This has been clearly expressed by arbitral tribunals, including in *Waste Management v. Mexico* and *Commerce Group v. El Salvador*. In *Waste Management*, the tribunal began its analysis by stating that: "[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*."[133] Therefore, a statement by a party "*logically entails a certain conduct in line with the statement issued*", which must be assessed by the tribunal to determine the validity and true effectiveness of the waiver.[134]

154. Despite the fact that the claimant submitted a formal waiver letter, the *Waste Management* tribunal considered that the claimant had failed to act consistently with its statements by continuing to pursue legal action in Mexico through its Mexican subsidiary against a state-owned entity, Banco Nacional de Obras y Servicios Públicos, S.N.C., and the City Council of Acapulco. In *Waste Management*, the claimant had argued that the legal proceedings in Mexico were based on a different cause of action, since they did not pertain to breaches of NAFTA. However, the tribunal dismissed this argument, finding that the domestic proceedings and the arbitration were intricately connected, since they were derived from the same measures.[135] In reaching this finding, the tribunal

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

[133] *Waste Management, Inc. v. United Mexican States*, ICSID Case No. ARB(AF)/98/2, Arbitral Award, 2 June 2000 (**Exhibit RL-0002**), ¶ 20.

[134] *Waste Management, Inc. v. United Mexican States*, ICSID Case No. ARB(AF)/98/2, Arbitral Award, 2 June 2000 (**Exhibit RL-0002**), ¶ 24.

[135] *Waste Management, Inc. v. United Mexican States*, ICSID Case No. ARB(AF)/98/2, Arbitral Award, 2 June 2000 (**Exhibit RL-0002**), ¶ 27.

emphasised that the object and purpose of the waiver requirement was precisely to avoid duplicative proceedings and prevent double recovery.[136] In the words of the tribunal:

> 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.**[137]

155. Based on the above reasons, the tribunal concluded that it lacked jurisdiction over the dispute, given that the claimant had failed effectively to waive its right to continue legal proceedings in Mexico.

156. Similarly, in *Commerce Group*, the tribunal found that it lacked jurisdiction given that the claimant had not provided a valid waiver in the terms required under Article 10.18(2)(b) of the Dominican Republic-Central America Free Trade Agreement ("**DR-CAFTA**"), which is comparable to Articles 823(1)(e) and 823(2)(e) of the Peru–Canada FTA.[138] The claimant had submitted a written statement in line with Article 10.18(2)(b) of DR-CAFTA, but had continued to pursue proceedings before the Supreme Court of El Salvador to challenge the revocation of certain environmental permits, while arguing in the arbitration that this revocation had been made in the context of 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*."[139] Consequently, the tribunal concluded that it lacked jurisdiction, since the claimant had failed to show that both proceedings were

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[136] *Waste Management, Inc. v. United Mexican States*, ICSID Case No. ARB(AF)/98/2, Arbitral Award, 2 June 2000 (**Exhibit RL-0002**), ¶ 27. *See also*, *The Renco Group, Inc. v. Republic of Peru*, ICSID Case No. UNCT/13/1, Partial Award on Jurisdiction, 15 July 2016 (**Exhibit RL-0029**), ¶¶ 84-85; *The Renco Group, Inc. v. Republic of Peru*, ICSID Case No. UNCT/13/1, Second Non-Disputing Party Submission of the United States of America, 1 September 2015 (**Exhibit RL-0026**), ¶ 5 ("*The purpose of the waiver provision is to avoid the need for a respondent to litigate concurrent and overlapping proceedings in multiple forums with respect to the same measure, and to minimize not only the risk of double recovery, but also the risk of "conflicting outcomes (and thus legal uncertainty).*").

[137] *Waste Management, Inc. v. United Mexican States*, ICSID Case No. ARB(AF)/98/2, Arbitral Award, 2 June 2000 (**Exhibit RL-0002**), ¶ 27 (emphasis added).

[138] *See*, Central America-Dominican Republic-United States Free Trade Agreement (2004) (**Exhibit RL-0045**), Article 10.18(b).

[139] *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.

"*separate and distinct*".[140] Hence, the claimant had not validly waived its right to continue proceedings before the local courts.[141]

157. Scotiabank is clearly aware of the deficiency in its waiver. Yet –as it has done in other respects in its Request for Arbitration– it seeks to circumvent the waiver requirement by artificially compartmentalizing the various legal proceedings which relate to the same measure. Indeed, as stated above, Scotiabank recognizes that there are proceedings pending concerning the validity of the SUNAT 2011 Decision in relation to the IGV Liability and the corresponding default interest. Yet, it submits that its claim in these arbitration proceedings merely concerns the Constitutional Court 2021 Decision regarding the default interest paid as part of the Tax Payments.

158. To this end, Scotiabank states in its Request for Arbitration that it commenced "*two separate legal proceedings*", distinguishing between (**i**) a constitutional "*amparo*", or so-called "**Default Interest Appeal**", allegedly relating to the "*accrual of interest as a result of the delay caused by SUNAR and the Tax Court*", which culminated with the decision of the Constitutional Court and (**ii**) a contentious-administrative action, or so-called "**Tax Appeal**", allegedly relating to "*the imposition of the underlying value added tax*".[142] According to Scotiabank, "[t]*he Tax Appeal does not involve the accrual of default interest*."[143] Furthermore, Scotiabank submits that this arbitration relates to the Default Interest Appeal, and "*Perú's imposition of value added tax does not form part of this arbitration*."[144]

159. However, far from being "*separate and distinct*", the measures that constitute the Respondent's alleged breaches in this arbitration are inextricably related to the ongoing Tax Appeal. In fact, all of the proceedings (*i.e.*, the so-called "Default Interest Appeal", the "Tax Appeal" and this arbitration) (**i**) arise from Scotiabank's challenges to the very same SUNAT 2011 Decision, which was upheld by the Tax Court 2013 Decision; (**ii**) relate to a single tax debt, which includes the value added tax and the default interest owed by Scotiabank Peru; (**iii**) are so intimately connected that, should Scotiabank prevail in the Tax Appeal, the Tax Payments would be reimbursed (with interest), and

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140 *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.

141 *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.

142 Request for Arbitration, ¶¶ 6, 32.

143 Request for Arbitration, fn. 3.

144 Request for Arbitration, ¶ 6.

the object of this arbitration would be rendered moot; and (**iv**) an eventual award rendered in this arbitration and a decision in the concurrent domestic proceedings regarding the Tax Appeal entail a risk of double recovery and contradictory decisions.

160. *First*, to recall, Scotiabank Peru initiated **both** the "Default Interest Appeal" and the "Tax Appeal" on the basis of the same decision, *i.e.*, the Tax Court 2013 Decision, affirming the SUNAT 2011 Decision. This fact is uncontested and expressly acknowledged by the Claimant in its Request for Arbitration.[145] In fact, the Constitutional Court 2021 Decision (which the Claimant itself presents as the alleged core of its claims in this arbitration), cites to the Tax Court 2013 Decision as the genesis of the proceedings.[146] Thus, despite the Claimant's attempt artificially to segregate the two proceedings, they both arise from the very same measure adopted by the Peruvian government: the SUNAT 2011 Decision, upheld by the Tax Court 2013 Decision, thus confirming the 1999 Tax Debt owed by Scotiabank Peru.

161. *Second*, by its very nature, the payment of interest is an ancillary obligation, which follows from an outstanding debt. 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*."[147] Further, as explained above,[148] the Peruvian Tax Code clearly provides that a tax debt is composed by the tax itself, plus the corresponding fines and interest, including default interest, interest on fines, and interest for delayed payment and/or partial payment.[149] As a result, the distinction that Scotiabank artificially draws between the IGV Liability and the default interest paid by Scotiabank is not only unreasonable, but also wrong as a matter of Peruvian law. Under Peruvian law, any liability for default interest is "*part and parcel*" of the same debt as the value added tax. In fact, the SUNAT Payment Order comprised both the IGV Liability and the default

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[145] Request for Arbitration, ¶ 32 ("*Following the Tax Court's decision on November 11, 2013, Scotiabank Peru commenced two separate judicial proceedings: (i) On November 15, 2013, Scotiabank Peru filed an application for amparo before the Peruvian Constitutional judicial courts* […] *(ii) On November 21, 2013, Scotiabank Peru filed a contentious administrative action against the resolution of the Tax Court challenging the imposition of the value added tax.*").

[146] *See*, Decision No. 919/2021 of the Peruvian Constitutional Court, 20 November 2021 (**Exhibit R-0008**), p. 2; *See also*, Request for Arbitration, ¶ 65.

[147] 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.

[148] *See above*, Section IV(B).

[149] 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.

interest accrued, and the Tax Payments made by Scotiabank Peru between December 2013 and February 2014 covered both concepts.[150]

162. *Third*, and relatedly, Scotiabank conveniently glosses over the inextricable relationship between the so-called "Tax Appeal" and the "Default Interest Appeal", and the impact that the outcome of the pending "Tax Appeal" could have on the claims filed by Scotiabank in this arbitration. By Scotiabank's own admission, the "Tax Appeal" concerns "*whether the application of value added taxes were appropriate, namely whether the impugned gold trading transactions were real and the legality of imposing the tax*."[151] Evidently, the default interest paid as part of the Tax Payments was predicated on the unpaid balance of the IGV Liability owed by Scotiabank to the SUNAT. Thus, if Scotiabank were to prevail in the "Tax Appeal", the tax debt resulting from Banco Wiese's gold trading transactions would be annulled. That is: all the debt, including the default interest for the delay in payment from 1999 to 2013, which Scotiabank argues was allegedly accrued "*as a result of the delay caused by SUNAT and the Tax Court*" and of which it complains in this arbitration, would be annulled.[152]

163. In fact, the close relationship between the "Tax Appeal" and the "Default Interest Appeal" was confirmed by Justice Miranda Canales in his concurring opinion to the Constitutional Court 2021 Decision concerning the so-called "Default Interest Appeal". In the words of Justice Miranda:

> [A]rticle 28 of the same [Tax] Code provides that the tax debt is composed by the tax, the fine 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 over a tax that is still under discussion before the ordinary administrative or judicial authority.**[153]

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[150] *See above*, Section IV(B).

[151] Request for Arbitration, fn. 3.

[152] Request for Arbitration, ¶ 6.

[153] *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

164. *Fourth*, and consequently, should Scotiabank prevail in the "Tax Appeal", the Peruvian Tax Code mandates that the SUNAT should reimburse Scotiabank Peru in full for the amounts paid to the SUNAT, including the payments for default interest. What is more, the SUNAT would also have to pay additional interest from the date in which Scotiabank Peru paid the SUNAT (between December 2013 and February 2014), until the date in which these amounts are reimbursed to Scotiabank.[154] In other words, should the "Tax Appeal" result in a decision favourable to Scotiabank, the tax debt would be extinguished **in its totality** and the SUNAT would be liable to pay back the Tax Payments made by Scotiabank Peru, including any payments for default interest, plus interest.[155] That is, the Peruvian State would fully compensate Scotiabank.

165. In light the above, it is evident that, if this arbitration were to proceed, there would be a high risk of double recovery and contradictory decisions, which is precisely what the waiver requirement seeks to prevent, as expressed by the tribunal in *Waste Management v. Mexico*. The situation in this case is no different from that of *Waste Management*, and the same conclusion should apply: given that it is manifest that the ongoing proceedings before the Peruvian courts and this arbitration "*have a legal basis derived from the same measures*", Scotiabank and Scotiabank Peru's waivers are ineffective.

166. Indeed, although the Claimant has carefully tailored its claims in this arbitration to present them as separate from those in the domestic proceedings and involving unrelated measures, it is evident that they have the same nucleus and that both proceedings would ultimately provide the Claimant full reparation, if the Claimant were to prevail.

167. In sum, the Claimant has not effectively waived the pending domestic proceedings. Much to the contrary, it is pursuing parallel legal proceedings in relation to the same measures challenged in these proceedings and seeking to obtain the same relief. Accordingly, there is no valid consent from the Respondent to arbitrate the claims submitted by the Claimant.

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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.

154 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**), Articles 38, 33.

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

### 2. Scotiabank's expropriation claim is time-barred pursuant to Articles 823(1)(c) and 823(2)(c) of the Peru–Canada FTA

168. In addition, even assuming for the sake of argument that the money paid as default interest by the Claimant would qualify as an investment, capable of being expropriated (which is denied), the Claimant's expropriation claim still fails as it is time-barred under the Peru–Canada FTA.

169. To recall, Article 823(1)(c) and 823(2)(c) of the Peru–Canada FTA provides as follows:

> A disputing investor may submit a claim to arbitration under Article 819 [or Article 820] only if: […]
>
> c. not more than 39 months have elapsed from the date on which the disputing investor first acquired, or should have first acquired, knowledge of the alleged breach and knowledge that the investor has incurred loss or damage thereby;[156]

170. Indeed, the State measure that would have purportedly crystallized the alleged expropriation is the SUNAT 2013 Payment Order, through which the SUNAT demanded payment from Scotiabank Peru. That is, a measure adopted **almost nine years** before the Claimant submitted its Request for Arbitration in October 2022, well beyond the 39-month time limit provided by Article 823(2)(c) of the Treaty.

171. It must be underscored that the language in Articles 823(1)(c) and 823(2)(c) is peremptory: the claim can **only** be submitted within the time limit provided in the Treaty, *i.e.*, within 39 months from the date on which the investor first acquired, or should have first acquired, knowledge of the alleged breach and the loss or damage allegedly caused by the breach.

172. To recall, all of the requirements in Article 823 of the Peru–Canada FTA are conditions for the State's consent to arbitrate, as further confirmed by Article 823(6), which mandates that "[f]*ailure to meet any of the conditions precedent provided in paragraphs 1 through 4 shall nullify the consent of the Parties given in Article 825*."[157] Therefore, the Claimant's manifest failure to comply with the time limit set forth in Articles 823(1)(c) and 823(2)(c) for commencing arbitration proceedings for expropriation renders the consent of the Republic of Peru to arbitrate this dispute null and deprives the Tribunal of jurisdiction to adjudicate this dispute.

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

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

173. Failure to comply with time limits set forth in treaties has been considered by several tribunals as a ground for the dismissal of claims under Rule 41, as illustrated by the decisions of the tribunals in *AFC Investments v. Colombia*,[158] *Ansung Housing v. China*[159] and *Min v. Korea*,[160] where the claimants' claims were fully or partially dismissed on the basis of Rule 41 as being manifestly without legal merit as the time limits provided in the applicable treaties to commence the proceedings had elapsed. The situation is no different in the present case, since the Claimant brought its expropriation claim manifestly outside the 39-month time limit set forth in the Peru–Canada FTA.

174. Faced with the time limit in the Treaty, in its Request for Arbitration the Claimant framed its expropriation claim in the following terms:

> Peru breached this obligation with respect to Scotiabank's investment in Peru, namely the default interest amount that was paid under protest. As a result of the measures described above [*i.e.*, the measures described by the Claimant in the section of its Request for Arbitration relating to the factual background of its claims], **Scotiabank has lost the ability to recover the default interest amount paid under protest**.[161]

175. In other words, according to the Claimant, even though the 1999 Tax Debt was first imposed by the SUNAT in its 2011 Decision, ordered by the SUNAT in 2013, and paid by Scotiabank between December 2013 and February 2014, the actual expropriation did not take place until almost eight years later, with the Decision of the Constitutional Court of December 2021. This is plainly unsustainable, and in open contradiction with the arbitral case law on the computation of time limits regarding expropriation claims.

176. Indeed, in stark contrast with the Claimant's position in this arbitration, arbitral tribunals have repeatedly found that the relevant trigger to compute the time limits concerning expropriation claims is the date in which an investor was deprived of its property rights over its alleged investment, including by the claimant's inability to dispose of these assets and receive their economic benefits.

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[158] *See*, *AFC Investment Solutions S.L. v. Republic of Colombia*, ICSID Case No. ARB/20/16, Award on Respondent's Preliminary Objection Under Rule 41(5) of the ICSID Arbitration Rules, 24 February 2022 (**Exhibit RL-0039**), ¶¶ 196-197.

[159] *See*, *Ansung Housing Co., Ltd. v. People's Republic of China*, ICSID Case No. ARB/14/25, Award, 9 March 2017 (**Exhibit RL-0030**), ¶ 122.

[160] *See*, *Fengzhen Min v. Republic of Korea*, ICSID Case No. ARB/20/26, Decision on the Respondent's Preliminary Objection Pursuant to Rule 41(5) of the ICSID Arbitration Rules, 18 June 2021 (**Exhibit RL-0037**), ¶¶ 83-96.

[161] Request for Arbitration, ¶ 67 (emphasis added).

177. For instance, in the *Alan Berkowitz et al v. Costa Rica case*, the tribunal reviewed Article 10.18(1) of DR-CAFTA,[162] a provision almost identical to Articles 823(1) and (2)(c) of the Peru–Canada FTA and found that the claimant's claims were time-barred given that the administrative decisions which the Claimant complained of in the arbitration as being expropriatory of its land had been issued more than three years prior to the initiation of the proceedings. Having analysed the applicable provision, the tribunal found that the relevant date on which the time limit for commencing an arbitration for unlawful expropriation started was the date in which "*the practical and economic use of the properties was irretrievably lost*". According to the tribunal, this event had occurred no later than the date of the decree of expropriation.[163] In *Berkowitz v. Costa Rica*, like in the present case, the taking of the property was followed by court proceedings. However, the tribunal found that it had no jurisdiction over expropriation claims relating to these court proceedings, since "[t]*o adopt such an approach would amount to an assumption of jurisdiction over the Claimant's expropriation claims more widely*", which were clearly time-barred.[164]

178. The tribunal in the NAFTA case *Apotex v. United States of America* adopted a similar reasoning. Articles 1116(2) and 1117(2) of NAFTA establish a three-year time limit for the submission of a claim to arbitration, with a language that is almost identical to that of Articles 823(1)(c) and 823(2)(c) of the Peru- Canada FTA.[165] In the *Apotex* case, the claimant claimed that a decision issued by the United States Food and Drug Administration ("**FDA**") preventing it from commercializing certain products and the subsequent conduct of the U.S. courts in relation to this decision were expropriatory. The tribunal found that the claimant's expropriation claim was time-barred, since the

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[162] Central America-Dominican Republic-United States Free Trade Agreement (2004) (**Exhibit RL-0045**), Article 10.18(1).

[163] *Aaron C. Berkowitz, Brett E. Berkowitz and Trevor B. Berkowitz (formerly Spence International Investments and others) v. Republic of Costa Rica*, ICSID Case No. UNCT/13/2, Interim Award (Corrected), 30 May 2017 (**Exhibit RL-0031**), ¶ 264. *See also*, *Aaron C. Berkowitz, Brett E. Berkowitz and Trevor B. Berkowitz (formerly Spence International Investments and others) v. Republic of Costa Rica*, ICSID Case No. UNCT/13/2, Interim Award (Corrected), 30 May 2017 (**Exhibit RL-0031**), ¶¶ 260-265; *Compañia del Desarrollo de Santa Elena S.A. v. Republic of Costa Rica*, ICSID Case No. ARB/96/1, Final Award, 17 February 2000 (**Exhibit RL-0001**), ¶¶ 76, 81 (with regards to the relevant time to consider that an expropriation existed for valuation purposes, considered by the tribunal in *Berkowitz v. Costa Rica* as equally apposite for the application of time limits).

[164] *Aaron C. Berkowitz, Brett E. Berkowitz and Trevor B. Berkowitz (formerly Spence International Investments and others) v. Republic of Costa Rica*, ICSID Case No. UNCT/13/2, Interim Award (Corrected), 30 May 2017 (**Exhibit RL-0031**), ¶¶ 276, 280.

[165] *See*, North American Free Trade Agreement (1 January 1994) (**Exhibit RL-0044**), Articles 116(2) and 117(2) ("*An investor may not make a claim if more than three years have elapsed from the date on which the investor first acquired, or should have first acquired, knowledge of the alleged breach and knowledge that the investor has incurred loss or damage.*").

decision of the FDA, which had effectively caused a damage or loss to the claimant, had been issued more than three years prior to the initiation of the arbitration. In so doing, the tribunal rejected the claimant's attempt to circumvent the time limit set forth in NAFTA by arguing that the court proceedings following the FDA's decision constituted the relevant starting point to compute the time within which it had to commence arbitral proceedings. In the words of the tribunal:

> Apotex cannot avoid this conclusion by asserting that the FDA measure is part of a "continuing breach" by the United States, or "part of the same single, continuous action," in so far as this is intended as a mechanism to use later court proceedings to toll the limitation period for the earlier FDA measure.
>
> As the Respondent has forcefully argued, **nothing in the text or jurisprudence of NAFTA Chapter Eleven suggests that a party can evade NAFTA's limitation period in this way**. […]
>
> Further, **there is support in previous NAFTA decisions for the proposition that the limitation period applicable to a discrete government or administrative measure (such as the FDA decision of 11 April 2006) is not tolled by litigation, or court decisions relating to the measure**.[166]

179. Furthermore, the *Apotex* tribunal emphasised that Article 1116(2) of NAFTA (which, as mentioned, is practically identical to Articles 823(1)(c) and (2)(c) of the Peru–Canada FTA) had been found to be a "*clear and rigid limitation defense, which* […] *is not subject to any suspension, prolongation or other qualification*."[167]

180. The same rationale applies to the time limit set forth in the Canada-Peru FTA, and the Claimant should not be allowed artificially to extend the 39-month time limit over a period of nearly ten years. Otherwise, the Tribunal would be arbitrating a dispute which Peru has not consented to arbitrate.

181. At least from 2013, with the issuance by the SUNAT of its Payment Order, the Claimant knew, or should have known, that the State had decided to proceed with collection. The Claimant should not be allowed to make a mockery of the time limit set forth in the Treaty in open violation of Peru's express requirements to consent to arbitration.

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[166] *Apotex Inc. v. United States of America*, ICSID Case No. UNCT/10/2, Award on Jurisdiction and Admissibility, 14 June 2013 (**Exhibit RL-0021**), ¶¶ 325, 326, 328. Notably, the tribunal also found it relevant that NAFTA did not require the claimant to exhaust local remedies prior to resorting to arbitration – this is also the case of the Peru–Canada FTA (*see*, *Apotex Inc. v. United States of America*, ICSID Case No. UNCT/10/2, Award on Jurisdiction and Admissibility, 14 June 2013 (**Exhibit RL-0021**), ¶ 330).

[167] *Apotex Inc. v. United States of America*, ICSID Case No. UNCT/10/2, Award on Jurisdiction and Admissibility, 14 June 2013 (**Exhibit 0021**), ¶ 327, citing to *Grand River Enterprises Six Nations, Ltd., et.al. v. United States of America*, *Ad hoc* UNICITRAL arbitration, Decision on Objections to Jurisdiction, 20 July 2006 (**Exhibit RL-0011**), ¶ 29.

182. To conclude: the Claimant's claim for expropriation is untenable and manifestly without legal merit for the following reasons: (**i**) the payment of interest on a tax debt does not constitute an investment under either the FTA or the ICSID Convention, (**ii**) as a matter of Peruvian law, the Claimant has no vested rights on the sums paid to the tax authorities for a tax debt, (**iii**) despite filing a formal waiver, the Claimant has failed to discontinue the ongoing proceedings on the so-called "Tax Appeal" and (**iv**) in any event, even if the Tribunal were to find that the Claimant has made an investment, has rights capable of expropriation and has effectively waived its right to continue domestic proceedings, which the Respondent disputes, the expropriation claim is time-barred pursuant to Articles 823(1)(c) and 823(2)(c).

## V. THE TRIBUNAL SHOULD DISMISS THE CLAIMANT'S CLAIMS ON THE BASIS OF RULE 41 OF THE ICSID ARBITRATION RULES

183. As explained at length by the Respondent in **Sections I-IV**, the entirety of the Claimant's claims are irreparably and manifestly flawed, be it because the Tribunal lacks jurisdiction over them, or on their merits. For the reasons explained, and which the Respondent summarizes below, the Tribunal lacks jurisdiction over the Claimant's claims with respect to each of the substantive protections invoked, namely: Minimum Standard of Treatment (Article 805) (**i**), National Treatment (Article 803) (**ii**) and protection against unlawful Expropriation (Article 812) (**iii**).

184. *First*, in its Request for Arbitration, the Claimant argues that the Respondent breached its obligation to accord the Claimant National Treatment, pursuant to Article 803 of the Peru–Canada FTA, since it granted the Claimant treatment less favourable than that accorded to Peruvian nationals in *amparo* claims allegedly comparable to those pursued by Scotiabank Peru in relation to the default interest paid as part of the Tax Payments.[168] This claim also manifestly fails, on the following grounds:

   (a) Article 803 has not been expressly incorporated into Chapter Eleven (Financial Services);

   (b) in any event, the Respondent's consent to arbitrate has been rendered null and void following the Claimant's failure effectively to comply with the waiver requirement under Articles 823(1)(e) and 823(2)(e). **Therefore, the Tribunal does not have jurisdiction over the Claimant's claims regarding Article 803 of the Peru–Canada FTA.**

185. *Second,* the Claimant alleges that Peru breached its obligations to treat its purported investments fairly and equitably in accordance with the Minimum Standard of Treatment pursuant to Article 805

[168] *See*, Request for Arbitration, ¶¶ 68-69.

of the FTA by denying justice to the Claimant, as well as by carrying out actions that are "*arbitrary, non-transparent, discriminatory,* [in] *breach* [of] *due process and* [which] *violate Scotiabank's legitimate expectations*".[169] Notwithstanding the fatal flaws that this claim has on the merits, which are not addressed in this submission,[170] it is apparent that the Tribunal lacks jurisdiction over this claim, since:

(a) Article 805 is not expressly incorporated into Chapter Eleven (Financial Services);

(b) Article 805 (Minimum Standard of Treatment) does not apply to taxation measures, such as those at the core of this dispute; and

(c) in any event, the Respondent's consent to arbitrate has been rendered null by the Claimant's failure effectively to comply with the waiver requirement under Articles 823(1)(e) and 823(2)(e). **For this reason, the Tribunal lacks jurisdiction over all the claims advanced by the Claimant regarding Article 805 of the Peru–Canada FTA.**

186. *Third,* the Claimant submits its expropriation claim on the basis that Scotiabank's investment in Peru was "*the default interest amount that was paid under protest*" and that, as a result of measures allegedly adopted by Peru, "*Scotiabank has lost the ability to recover the default interest amount paid under protest*", thus having unlawfully expropriated that investment.[171] This claim is also manifestly without legal merit for the following reasons:

(a) for an expropriation claim regarding a taxation measure to be actionable in an arbitration proceeding under the FTA, this claim must first be referred to the competent authorities under Article 2203(8), which the Claimant did not do;

(b) further, the Claimant has failed to prove that it has a "protected investment" under both Article 847 of the FTA and Article 25(1) of the ICSID Convention;

(c) even assuming for the sake of argument that the Claimant had a protected investment which could be expropriated, the Tribunal also lacks jurisdiction over the Claimant's expropriation

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169 Request for Arbitration, ¶ 64.

170 The Respondent fully reserves its rights to dispute the merits of the Claimant's claims regarding an alleged breach of Article 805 in the event that the Tribunal finds that it has jurisdiction over them.

171 Request for Arbitration, ¶¶ 66-67.

claim as the Claimant's failure validly and effectively to waive its right to continue domestic proceedings nullified Peru's consent;

(d) the Claimant's expropriation claim is time-barred; and

(e) the Claimant does not have vested rights over the Tax Payments, including the default interest accrued. **Therefore, the Tribunal does not have jurisdiction over the Claimant's claim under Article 812 of the Peru–Canada FTA, which is also manifestly without legal merit on its substance.**

187. The Respondent's objections to the Claimant's claims under Rule 41, their basis and implications for the Claimant's claims are graphically represented below:

| | Article 803 (National Treatment) | Article 805 (Minimum Standard of Treatment) | Article 812 (Expropriation) |
|---|---|---|---|
| **Financial services exception (Chapter Eleven of the FTA)** | Standard not incorporated into Chapter Eleven. Therefore, the Tribunal lacks jurisdiction over this claim. | Standard not incorporated into Chapter Eleven. Therefore, the Tribunal lacks jurisdiction over this claim. | - |
| **Tax exception (Articles 2203, 823(4))** | - | Not applicable to taxation measures, per Article 2203(1). Therefore, the Tribunal lacks jurisdiction over this claim. | The issue has not been referred to the competent authorities under Article 2203(8). Therefore, the Tribunal lacks jurisdiction over this claim. |
| **Covered investment (Article 847 FTA, Article 25(1) ICSID Convention)** | - | - | The interest paid by Scotiabank Peru to the SUNAT is not a covered investment under either Article 847 of the Peru–Canada FTA, or Article 25(1) of the ICSID Convention. Therefore, the Tribunal lacks jurisdiction over this claim. |
| **Time bar (Article 823(1)(c))** | - | - | The Claimant's expropriation claim was submitted beyond the 39-month time limit provided in Articles 823(1)(c) and 823(2)(c) of the FTA. Therefore, the Tribunal lacks jurisdiction over this claim. |
| **Waiver (Article 823(1)(e))** | The Claimant did not validly and effectively waive its right to continue ongoing proceedings, as required by Articles 823(1)(e) and 823(2)(e). Therefore, there is no valid consent from Peru to arbitrate this dispute and the Tribunal lacks jurisdiction over all of the Claimant's claims. | | |
| **Merits** | - | - | The Claimant has no vested rights capable of being expropriated. |

## VI. THE RESPONDENT'S REQUEST FOR RELIEF

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

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

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

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

22 June 2023

Respectfully submitted on behalf of the Respondent,

[Signed]

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

Dr. Yas Banifatemi
Ximena Herrera-Bernal
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