INTERNATIONAL CENTRE FOR
THE SETTLEMENT OF INVESTMENT DISPUTES

IN THE MATTER OF:

BANK OF NOVA SCOTIA

Claimant

and

REPUBLIC OF PERU

Respondent

ICSID Case No. ARB/22/30

CLAIMANT'S RESPONSE TO THE RESPONDENT'S RULE 41 SUBMISSION

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PART ONE. OVERVIEW

1. ***Scotiabank's Claim***. This is a claim by The Bank of Nova Scotia ("**Scotiabank**") against the Republic of Peru ("**Peru**") arising out of the Constitutional Court of Peru's unfair treatment of Scotiabank's enterprise, Scotiabank Peru S.A.A. ("**Scotiabank Peru**"). Scotiabank is one of the top five banks in Canada. It serves more than 25 million customers around the world and offers a range of products and services, including personal and commercial banking, wealth management, private banking, corporate and investment banking, and capital markets. With more than 100,000 employees, Scotiabank trades on the Toronto and New York exchanges.

2. In 1999, the Superintedencia Nacional de Aduanas y Administración Tributaria ("**SUNAT**"), which enforces customs and taxation in Peru, determined that Scotiabank Peru's predecessor company owed historic value added taxes and default interest on that debt. When Scotiabank Peru objected to that determination, SUNAT and the Tax Court took 14 years to hear and dismiss the appeal. The delay in doing so was outside the maximum term permitted by Peruvian law and was attributable solely to the state. In the interim, the amount of default interest that was owed by Scotiabank Peru continued to accrue. As a result, in 2013, Peru demanded more than 23 times the original default interest amount. To prevent a seizure of its assets, Scotiabank Peru paid this default interest under protest in the amount of approximately US$109 million. Peru profited from its own 14-year delay and was in breach of Peruvian law.

3. Scotiabank Peru presented a constitutional claim to the Constitutional Court (*demanda de amparo*) where it challenged the constitutionality of the accrual of default interest during the period of delay caused by the state. The Constitutional Court had already affirmed that proposition in a line of established cases on the point. The Constitutional Court heard Scotiabank Peru's appeal in March 2017. Shortly after, a draft and partially signed decision in Scotiabank Peru's favour was improperly leaked to the media. This caused media and political pressure to be exerted on the Constitutional Court to change its position and rule against Scotiabank Peru, including government officials threatening to withhold funds for the Constitutional Court if it maintained its position in Scotiabank Peru's favour. In the face of that pressure, the Constitutional Court simply avoided issuing a decision for over four years. Over that period, the Court issued decisions in at least five other cases addressing the same issue, two of which involved hearings after Scotiabank Peru's case. In each case, the Constitutional Court ruled in favour of the claimant.

4. Faced with the Constitutional Court's apparent refusal to issue a decision, Scotiabank notified Peru of its intention to pursue a claim under the Canada-Peru Free Trade Agreement ("**FTA**"). Immediately after this, the Constitutional Court took steps to release its decision.

5. Historically and according to Peruvian law, a ruling of the Constitutional Court was only valid when there was a quorum of five judges and a minimum of four of the Court's seven judges voted in favour of it. In November 2021, just two months after Scotiabank delivered its notice of intent, the Constitutional Court purported to lower the minimum number of judges required to vote in favour in order to form a binding decision from four judges to three. Immediately thereafter, it dismissed Scotiabank Peru's appeal on procedural grounds, avoiding the substance of the claim (the "**2021 Constitutional Court Decision**"). It did so without a quorum of five judges and by a vote of three to one. Notably, in another case under deliberation that same day, the Constitutional Court refused to issue a decision without quorum and thus respected the rules in that case.

6. In its Request for Arbitration ("**RFA**"), Scotiabank pleads that the 2021 Constitutional Court Decision is deeply flawed, unfair and the result of a politically tainted judicial process. In response to significant political and media pressure over the draft judgment in Scotiabank Peru's favour, the Constitutional Court simply avoided deciding Scotiabank Peru's case for years. Caught between the duty to decide cases independently and domestic political pressure if it followed its own precedents, the Constitutional Court engineered a solution designed to avoid the consequences of both paths by retroactively changing the laws governing its procedures in order to dismiss the case on contrived procedural grounds. In doing so, it abdicated the responsibility to decide the case independently based on the law, as Scotiabank reasonably expected it would. Scotiabank Peru has no other avenue to redress the unconstitutional default interest that it paid under protest.

7. Scotiabank Peru pleads that through the 2021 Constitutional Court Decision, Peru has breached three provisions of the FTA: (i) Peru has failed to treat Scotiabank and its investments fairly and equitably, including by denying Scotiabank justice (the "**FET Claim**"); (ii) Peru has expropriated the interest amounts paid under protest (the "**Expropriation Claim**"); and (iii) Peru provided less favourable treatment to Scotiabank than it accorded its own investors in similar circumstances (as the Constitutional Court determined the default interest claims of other Peruvian companies in an objective and neutral manner) (the "**National Treatment Claim**").

8. ***Peru's Rule 41 Objection***. On its Rule 41 objection, Peru raises five jurisdictional objections. These objections inaccurately characterize the nature of Scotiabank's claim and argue why that recharacterized claim should not proceed. That is not open to Peru. It is for the investor to formulate its claims as it sees fit. At this preliminary stage, due process requires that the Tribunal consider the claim as framed by Scotiabank; otherwise, it incurs the risk of dismissing the case based on arguments not presented by Scotiabank.[1] Moreover, if Peru must mischaracterize the nature of Scotiabank's claim to make an objection, it underscores the inappropriateness of bringing a Rule 41 objection, which is only intended to weed out claims that are patently unmeritorious.

9. Peru attempts to recharacterize this claim as one about a tax debt imposed by SUNAT in 1999. Peru claims that it is "unassailable that the nucleus of all and every single legal course commenced by Scotiabank is the 1999 Tax Debt" and that Scotiabank "artificially presents" its case as one concerning the Constitutional Court in order to circumvent the limits and requirements of the FTA.[2] On a plain reading of the RFA, Peru's attempt to recharacterize the claim must fail. Scotiabank is not challenging the underlying tax debt. It is challenging the unfair treatment that it was subjected to by the Constitutional Court in a proceeding relating to the constitutionality of the accrual of default interest due to delays by the state.

10. Scotiabank is confident that when it is time to address the merits of each jurisdictional objection, it will succeed in defeating them. However, that is not the standard on a Rule 41 objection. The question at this stage is whether Scotiabank's claim is manifestly without legal merit. Scotiabank need only present a tenable argument to defeat the Rule 41 objection. It is well-established that Rule 41 is not intended to resolve novel, difficult or disputed legal issues, but is instead only to apply undisputed or genuinely indisputable rules of law to uncontested facts. None of the five objections raised by Peru meets this threshold.

(a) ***Financial Institutions.*** Peru's objection turns on a disputed interpretation of the scope of the financial services chapter of the FTA, not a well-settled and indisputable legal issue. Peru argues that the FET Claim and National Treatment

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[1] See **CL-0026,** *Infinito v. Costa Rica* (ICSID Case No. ARB/14/5), Decision on Jurisdiction, 4 December 2017, ¶ 185 ("*Infinito*, Decision on Jurisdiction").

[2] Peru's Rule 41 Submission, ¶¶ 6, 12.

Claim must fail because the financial services chapter applies whenever a claimant is a financial institution. However, the plain language of the FTA is that the chapter only applies to "measures…relating to financial institutions." Here, the challenged measure – the 2021 Constitutional Court Decision – is not a measure relating to financial institutions. It is a measure that could have affected any investment in any industry. To resolve this disputed treaty interpretation, the parties and Tribunal will require the *travaux prépatoires*, particularly given the FTA uses narrower language on the scope of the financial services chapter than its predecessor. Scotiabank submits that its interpretation of the FTA is the correct one, and thus surpasses the low bar required on a Rule 41 application of being tenably arguable.

(b) ***Taxation Measures.*** Peru argues that the Tribunal lacks jurisdiction over the FET Claim and Expropriation Claim because the FTA's exemption for "taxation measures" applies. There are three reasons this objection must fail. *First*, the objection is premised on Peru's mischaracterization of Scotiabank's claim as challenging the underlying tax debt. Scotiabank challenges the 2021 Constitutional Court Decision, not the underlying tax debt. *Second*, both international jurisprudence and Peruvian law support Scotiabank's position that the subject-matter of the Constitutional Court proceeding – the accrual of default interest – is a matter relating to compensation under civil law, not taxation. *Third*, Peru does not mention that it is currently litigating this very issue in another ICSID case, *Freeport v. Peru*, in which both parties have put forward contested expert evidence on Peruvian law. The substance of Peruvian law is a contested factual matter that cannot be resolved on a Rule 41 objection. As such, the Tribunal will have to grapple with disputed facts and disputed legal principles.

(c) ***Covered Investment.*** Peru argues that the Expropriation Claim must fail because the interest amounts paid under protest are not a covered investment. This is wrong for two reasons. *First*, in assessing whether it has jurisdiction, the Tribunal is to look at Scotiabank's investments as a whole. It is not disputed that Scotiabank has a covered investment in Scotiabank Peru. That is sufficient for establishing jurisdiction over Scotiabank's dispute. *Second*, in any event, it is not manifestly

obvious that the interest amounts paid under protest are *not* a covered investment. The parties dispute whether, under Peruvian law, Scotiabank retained rights over those amounts when it paid them under protest. As this also entails a factual dispute on what Peruvian law requires, it cannot be resolved on a Rule 41 objection.

(d) ***Waiver.*** Peru argues that Scotiabank has not submitted a valid and effective waiver because it has a different proceeding before the Peruvian courts challenging SUNAT's decision to impose the underlying tax debt (as opposed to the default interest issue). Scotiabank's waiver unconditionally waived its right to commence or continue all proceedings related to the "measures" impugned in this arbitration. Peru's objection depends on its mischaracterization of Scotiabank's claim as also relating to the tax debt. The 2021 Constitutional Court Decision is a different measure and concerns different conduct than what is at issue in the tax appeal. There is no risk of contradictory decisions or double recovery.

(e) ***Limitation Period.*** Peru argues that the Expropriation Claim is time-barred because the default interest amounts were paid under protest in 2013. However, the alleged breach of the FTA relates to the 2021 Constitutional Court Decision. That conduct arose within the limitation period. The loss of the interest amounts paid under protest only crystallized with the release of the 2021 Constitutional Court Decision. Investment jurisprudence is clear that judicial expropriations do not crystallize while an appeal on the matter is pending. Peru's position is not based on indisputable legal principles; rather, it is contrary to the legal authorities.

11. ***Scotiabank Seeks Full Costs***. Rule 41 is an important tool to screen out abusive claims. However, while Rule 41 enables ICSID tribunals to guard the integrity of the process by providing for the ability to summarily dismiss patently unmeritorious claims, it is equally important that Rule 41 not be improperly used by respondent states to add delay and cost to proceedings.

12. Peru has used Rule 41 tactically. It has raised five broad jurisdictional objections. None of its objections are based on well-established legal principles or undisputed facts. Peru seeks to put forward legal interpretations of the FTA that have been rejected by other tribunals or, at their best, are disputed issues based on disputed facts. Rule 41 has no application in such circumstances.

13. The ICSID Rules provide other mechanisms for respondent states who wish to have jurisdictional objections heard at a preliminary stage. Rule 41 is not a defensive tactic to be used by respondent states to get two bites at the cherry on jurisdictional challenges, nor should it be a tool to be used to add another round of submissions, and thus further cost and delay. Rule 41 is only an effective tool when used judiciously to weed out frivolous claims. Scotiabank asks the Tribunal to sanction tactical uses of procedural rules like Rule 41 by ordering full recovery of Scotiabank's fees and costs incurred in opposing this objection.

PART TWO. FACTUAL BACKGROUND

14. Rule 41 permits claims that manifestly lack legal merit to be dismissed. It does not permit the determination of factual merit or weighing evidence. It is well-established that at this early stage, tribunals should not be called upon to decide disputed facts. Peru acknowledges that on a Rule 41 objection, the Tribunal accepts the plausible facts as presented by the Claimant.[3]

15. Peru's Rule 41 Submission sets out a partial and selective summary of facts and fails to address the *actual* measures that are challenged in this claim. In this section, Scotiabank describes the factual background underlying the dispute, the nature of the claim and the relief sought.

I. 1999-2013: 14 Years of Delay by SUNAT and the Tax Court Causes a 23-Fold Increase to the Default Interest

16. On December 23, 1999, SUNAT reduced the tax credit claimed by Scotiabank's predecessor company, Banco Wiese (the "**1999 SUNAT Decision**"). This tax credit related to value added tax that Banco Wiese paid on certain gold transactions in 1997 and 1998.[4]

17. The 1999 SUNAT Decision ordered Scotiabank to pay approximately [redacted] [redacted] as at the date of the RFA). This amount was composed of two amounts: (a) default interest in the amount of approximately [redacted] [redacted] [redacted] and (b) value added tax ("IGV") in the amount of approximately [redacted] (approximately [redacted] as at the date of the RFA).[5]

[3] Peru's Rule 41 Submission, ¶¶ 20, 22; see ¶ 50(d) below.

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

[5] Request for Arbitration, ¶ 21.

18. Scotiabank Peru filed a claim before SUNAT to challenge the 1999 SUNAT Decision. SUNAT rejected that claim. Scotiabank Peru then appealed that decision to the Tax Court. Under Peruvian law, that appeal was required to be decided within one year. Instead, the Tax Court took three years and four months.[6]

19. On December 30, 2003, the Tax Court partially annulled SUNAT's decision and ordered it to render a new decision. Under Peruvian law, SUNAT was required to do so within 6 months. Instead, SUNAT took eight years to render a new decision.[7]

20. On December 20, 2011, SUNAT finally rendered its decision, maintaining the 1999 SUNAT Decision. Scotiabank Peru appealed this decision to the Tax Court. In its appeal, Scotiabank Peru requested that the accrual of default interest imposed in the 1999 SUNAT Decision be suspended during the 12-year period of delay caused by SUNAT and the Tax Court.[8]

21. The Tax Court did not issue its decision in one year, as required under Peruvian law. Instead on November 11, 2013, almost two years later, the Tax Court issued a decision confirming the decision rendered by SUNAT.[9] As a result, Scotiabank Peru was ordered to pay approximately [REDACTED] in default interest (approximately [REDACTED]. That is more than 23 times the default interest amount initially imposed.[10]

22. At SUNAT's request, and to prevent any seizure of Scotiabank Peru's assets, Scotiabank paid the full amount of default interest under protest through several payments between December 6, 2013 and February 14, 2014.[11]

23. In its Rule 41 Submissions, Peru states that SUNAT did not impose precautionary measures to ensure payment of the debt.[12] In Resolution No. 11-006-0044596, SUNAT gave Scotiabank Peru seven days to pay the debt, or it would use precautionary measures and initiate an enforcement

[6] Request for Arbitration, ¶¶ 22-23.
[7] Request for Arbitration, ¶ 24.
[8] Request for Arbitration, ¶¶ 25-26.
[9] Request for Arbitration, ¶ 27.
[10] Request for Arbitration, ¶ 28.
[11] Request for Arbitration, ¶ 29.
[12] Request for Arbitration, ¶ 41.

proceeding.[13] Under Peruvian law, the enforceability of a debt is not suspended even when it is judicially challenged.[14] Scotiabank Peru paid these amounts to protect itself against these precautionary measures, which include several forms of seizure of Scotiabank Peru's assets. As a bank, Scotiabank Peru is subject to regulatory and other significant consequences if its assets are seized.

II. 2013-2016: Scotiabank Peru Separately Appeals the Default Interest Amount and the Tax Debt Ordered by SUNAT

24. Following the Tax Court's November 11, 2013 decision, Scotiabank commenced two separate judicial proceedings:[15]

(a) On November 15, 2013, Scotiabank Peru filed an application for an *amparo* before the constitutional courts seeking an order prohibiting SUNAT from collecting the default interest that accrued on the tax debt during the 14-year period of delay attributable to SUNAT and the Tax Court (*i.e.*, from December 23, 1999 to November 11, 2013) (the "**Default Interest Appeal**"). Scotiabank argued that its constitutional rights had been breached. To be clear, this *amparo* challenged the *accrual* of default interest due to the delay by SUNAT and the Tax Court and the wrongful capitalization of default interest applied by SUNAT. It did not challenge the original decision to impose the value added tax or the default interest.

(b) On November 21, 2013, Scotiabank Peru filed a contentious administrative action challenging the imposition of the value added tax or IGV (the "**Tax Appeal**"). This proceeding is separate from the Default Interest Appeal and is ongoing as at the date of the RFA.

25. This arbitration only concerns the unfair procedure to which Scotiabank Peru was subject to during the Default Interest Appeal.[16]

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[13] **R-0005**, Coercive Resolution No. 011-006-0044596.

[14] **C-0049**, Law No. 28237, Constitutional Procedural Code in force in 2013, art. 15; **C-0050**, Supreme Decree No. 013-2008-JUS, Law which regulates the Contentious-Administrative Proceeding (law in force in 2013), art. 25.

[15] Request for Arbitration, ¶¶ 6, 32-33.

[16] Request for Arbitration, ¶¶ 6, 33.

26. With respect to the Default Interest Appeal, the judge ruled in Scotiabank Peru's favour at first instance, prohibiting SUNAT from charging interest during the period from December 1999 to March 2007, because that delay was due to SUNAT. All parties appealed that decision, and on September 26, 2016, the appeal court overturned that decision and reinstated the default interest.[17]

27. On October 14, 2016, Scotiabank filed a special constitutional appeal to the Constitutional Court of Peru (*recurso de agravio constitucional*), the final court for this type of matter. The hearing on the Default Interest Appeal was held on March 29, 2017 before five of the seven judges of the court.[18] As described in the following section, the Constitutional Court rendered a decision over 4 years later, in November 2021, after facing significant media and political pressure to rule against Scotiabank Peru. The decision of the Constitutional Court is the measure at issue.

28. In its Rule 41 Submission, Peru impugns Scotiabank Peru for commencing this appeal to the Constitutional Court: "[u]nsatisfied by having had its case heard, and decided, twice by the Peruvian courts, Scotiabank Peru filed yet another appeal…"[19] There is no basis to cast such aspersions. *First*, a judge had already ruled in Scotiabank Peru's favour. *Second*, as set out in the RFA and below, the judicial precedents consistently established that the default interest amounts should not accrue due to delay caused by SUNAT and the Tax Court. *Third*, Scotiabank Peru cannot be faulted for exercising its rights and seeking to protect its interests through available appeal mechanisms. Scotiabank Peru expected an independent and objective assessment of the merits of its claim. That did not occur, as described below.

III. 2016-2021: The Constitutional Court Fails to Administer Justice After Being Subjected to Media and Political Pressure to Rule Against Scotiabank Peru

29. The facts set out in this section, originally set out in the RFA, are omitted from Peru's Rule 41 Submission. This section sets out the measures giving rise to this claim.

30. ***First Draft Decision Leaked and Political Pressure***. Within three months of the hearing before the Constitutional Court, a draft and a partially signed decision in Scotiabank Peru's favour was improperly leaked to the media. Draft decisions are prohibited from being made public to

[17] Request for Arbitration, ¶ 34.

[18] Request for Arbitration, ¶¶ 35-36.

[19] Request for Arbitration, ¶¶ 35-36.

avoid the very type of media and political pressure that subsequently resulted in this case.[20] The following is a summary of the media and political pressure pleaded in the RFA:[21]

(a) The considerable media attention that followed the leaked draft decision questioned the draft ruling, baselessly accused Scotiabank Peru of corruption, questioned the independence and impartiality of the judges, and asserted the Constitutional Court should not order Peru to repay such a large sum of money to a foreign-owned institution like Scotiabank Peru.

(b) In June 2017, a member of Peru's congress questioned the leaked draft ruling and declared it was illegal. Another former member of Congress accused Scotiabank Peru of corruption and questioned the impartiality and independence of the judges.

(c) In a televised statement to the nation in June 2018, Peru's president announced that the state had:

> identified big corporations that owe the State amounts that represent more than 1% of GDP, much necessary income for the development of projects and public policies that benefit all Peruvians. To that respect, an *ad hoc* commission will be formed by representatives of the Ministry of the Economy and the SUNAT, among others, to develop payment mechanisms, with the objective to make the collection of tax debt effective.

31. In the face of this pressure, the Constitutional Court abstained from issuing a decision for over four years until November 2021. It took this long to issue a decision even though the law on the substance of the default interest issue was settled and the Constitutional Court issued rulings in other similar cases that were heard *after* Scotiabank Peru's.[22] In the RFA, Scotiabank provides details of five other cases that were heard and decided by the Constitutional Court between 2016-2021 addressing the same default interest issue. In each of those cases, the Constitutional Court

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[20] Peru Rule 41 Submission, ¶ 44. See **C-0048**, Constitutional Court Rules, art. 19.5 ("The duties of the Constitutional Court's Judges are [...] 5. Keep absolute confidentiality with respect to the matters of discussion in which they intervene.").

[21] Request for Arbitration, ¶¶ 38-39.

[22] Request for Arbitration, ¶ 40.

ruled in favour of the debtor and held that default interest cannot accrue as a result of delay caused by SUNAT and the Tax Court. Yet, the Constitutional Court refused to issue a decision in Scotiabank Peru's case.[23]

32. ***Scotiabank Peru's Meetings with Judges***. While awaiting a decision, between 2017-2021, Scotiabank Peru's counsel held several meetings with the judges of the Constitutional Court (a common and permitted practice in Peru). In one meeting, one of the judges stated that an official from the Ministry of Economy had suggested to another judge that if the Constitutional Court ruled in Scotiabank Peru's favour, funds for the Court's new facilities would be withheld.[24]

33. In another meeting, a judge stated that although the case would be simple to resolve in light of the Court's precedents on the matter, it was not the appropriate moment to issue a decision due to the constant media pressure, active participation of SUNAT in the media creating an uncomfortable political environment for the Constitutional Court, and the Court's desire to avoid a conflict with Congress. The judge further stated that Scotiabank Peru should be patient and expect a decision consistent with the Court's precedents.[25]

34. ***Second Draft Decision and Political Pressure***. On March 16, 2021, the judge in charge of drafting Scotiabank Peru's decision sent a draft to the President of the Constitutional Court and sought to have the judges meet to deliberate on the case. Scotiabank Peru understands that this draft was also in Scotiabank Peru's favour. The President of the Constitutional Court refused to allow the draft to be deliberated on.[26]

35. On August 10, 2021, the Minister of Economy and Finance stated publicly that it was time for companies that owed money to SUNAT to make those payments and Peru should do everything in its power to make sure that happens. He stated, "*it is time for companies like Télefonica and Scotiabank to […] pay their debts*." He also stated that the judiciary should work hand in hand ("*trabajar de la mano*") with the executive branch to achieve this end because the government

[23] Request for Arbitration, ¶¶ 44-45.

[24] Request for Arbitration, ¶ 41.

[25] Request for Arbitration, ¶ 41.

[26] Request for Arbitration, ¶ 42.

provides the judiciary with its facilities. The Minister made this statement even though the judiciary is supposed to be autonomous and independent from the executive branch.[27]

36. ***September 2021: Scotiabank Notified Peru of its Intent to Submit a Claim to Arbitration***. By September 2021, the mandate of six of the seven judges of the Constitutional Court who heard Scotiabank Peru's appeal in March 2017 had lapsed. One of those judges, who was in charge of drafting the decision in Scotiabank Peru's case, passed away in September 2021. It was thus unclear when, if ever, a decision would be rendered.[28]

37. On September 1, 2021, Scotiabank Peru delivered a written notice to Peru advising of its intention to submit a claim to arbitration pursuant to the FTA.[29] In that notice, Scotiabank Peru asserted that the delay in having its decision issued violated the FTA, and that the Constitutional Court had been improperly influenced by Peruvian Government Officials to either rule in favour of the State or not rule at all.[30]

38. ***November 2021: The Constitutional Court Decision***. The minimum number of judges required to decide a case at the Constitutional Court is five. Until November 2021, a ruling of the Constitutional Court was also only valid and binding if four of the Court's seven judges voted in favour of the result with at least five judges deliberating on the case.[31]

39. On November 3, 2021, the Constitutional Court issued a resolution purporting to lower the minimum number of judges required to vote in favour of a decision for it to be binding from four judges to three. The Constitutional Court does not have the power to make this change. The required number of judges to form a binding decision is entrenched in legislation and can only be modified by legislative amendment.[32]

40. Just days later, on November 9, 2021, the Constitutional Court announced that it had dismissed Scotiabank Peru's appeal by a vote of three to one, with two judges abstaining. This

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[27] Request for Arbitration, ¶ 43.

[28] See Request for Arbitration, ¶ 46.

[29] See Request for Arbitration, ¶ 47.

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

[31] Request for Arbitration, ¶¶ 48-49.

[32] Request for Arbitration, ¶ 50.

meant that only four judges participated in the session, breaching the legal quorum requirement that five judges are required to deliberate on a case and failing to obtain the required four judges to issue a majority ruling. The Court made this announcement without notifying Scotiabank Peru, contrary to its normal practice.[33]

41. The Constitutional Court issued reasons for its decision on November 24, 2021. The three-judge majority held that:[34]

(a) There was no need for urgent intervention by the Court that would justify an *amparo* because Scotiabank Peru had paid the default interest in 2013.

(b) There was no violation of the right to be tried within a reasonable period of time because Scotiabank Peru had not challenged the delay through a *queja* (an administrative complaint to the Ministry of Economy and Finance) while the delay was ongoing, which would have involved asking the Ministry to compel the Tax Court to conclude its proceeding on the basis that the time permitted under Peruvian law to decide the case had expired.

(c) The claim could have been addressed through a judicial review proceeding in the Tax Appeal rather than as a constitutional *amparo*; however, given the passage of time, Scotiabank Peru was prohibited from filing that application following the dismissal of the *amparo*.

42. The dissenting judge held that the Constitutional Court Decision was invalid because it did not comply with the Court's own quorum requirements.[35]

43. The majority's stated reasons for dismissing the case are contrary to the Court's own precedents, which confirm that default interest challenges can indeed be decided through a constitutional *amparo* proceeding, even where an applicant has paid the underlying amounts.[36]

[33] Request for Arbitration, ¶ 51.

[34] Request for Arbitration, ¶ 53.

[35] Request for Arbitration, ¶ 54.

[36] Request for Arbitration, ¶ 56.

44. In the RFA, Scotiabank pleads that the majority's decision is "deeply flawed and the result of a politically tainted judicial process":

> In addition to the quorum issue, the decision is manifestly unfair. After avoiding ruling on the case for more than four years, and in the face of significant, adverse political and media pressure, the majority opted to retroactively change the laws that previously assured a fair judicial process, in order to avoid deciding the substantive issue raised in Scotiabank Peru's appeal regarding the constitutionality of the default interest. By dismissing the case in this way, the Court ensured that the Peruvian judiciary and government would never have to address the substantive issue raised by Scotiabank Peru, permanently avoiding making a politically contentious decision. [37]

IV. Scotiabank's Claim and Requested Relief: The Impugned Measure is the 2021 Constitutional Court Decision

45. The section summarizes the three alleged breaches of the FTA and relief sought. It then addresses Peru's allegation that the impugned measure is the 1999 SUNAT Decision, not the 2021 Constitutional Court decision.[38]

46. ***Scotiabank's Claims and Relief Sought***. Scotiabank's claims are:

(a) ***FET***. Article 805 of the FTA requires Peru to accord to covered investments "treatment in accordance with the minimum standard of treatment of aliens, including fair and equitable treatment." Peru's conduct and measures that violate the FET requirement include "the Constitutional Court: (i) failing to remain independent and objective, and to issue a timely decision based upon the law and its own precedents, and instead permitting itself to be improperly influenced by political and media pressure; (ii) purporting to lower the number of supporting judges required to issue a valid decision and failing to abide by the Court's quorum requirements; and (iii) preventing Scotiabank Peru from ever having the substance of its challenge determined by the Peruvian courts."[39]

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[37] Request for Arbitration, ¶¶ 55-56.

[38] See Peru's Rule 41 Submission, ¶¶ 6, 85.

[39] Request for Arbitration, ¶ 63.

As a result, "Peru's conduct amounts to a denial of justice, its actions are arbitrary, non-transparent, discriminatory, breach due process and violate Scotiabank's legitimate expectations, including its legitimate expectation that it would receive a fair hearing, and that the Constitutional Court would consistently and dispassionately apply Peruvian law and render an objective and independent decision."[40]

(b) ***Expropriation.*** Article 812 of the FTA prohibits unlawful expropriation. Peru breached this obligation with respect to the interest amounts paid under protest. As a result of the measures described in the RFA, Scotiabank has lost its right to recover those amounts and that investment has been unlawfully expropriated.[41]

(c) ***National Treatment***. Article 803 of the FTA requires Peru to accord to Scotiabank "treatment no less favourable than that it accords, in like circumstances, to its own investors." In other Constitutional Court decisions respecting Peruvian companies, the Constitutional Court upheld those companies' *amparo* claims in constitutional challenges to accrual of default interest. The Court determined those claims on the merits, and objectively, consistently and dispassionately applied Peruvian law. That is not how Scotiabank Peru was treated and it thus received less favourable treatment in like circumstances.[42]

47. ***Relief Sought***. Scotiabank seeks compensation for the losses and damages it suffered as a result of the alleged breaches, namely the repayment of the default interest amount that was paid under protest and pre-award interest on that amount at the rate applicable under Peruvian law.[43]

48. ***The Impugned Measure is the 2021 Constitutional Court Decision***. The heart of this case is about the unfair treatment before the Constitutional Court. The claim is succinctly summarized in the RFA as follows:

[40] Request for Arbitration, ¶ 64.

[41] Request for Arbitration, ¶ 67.

[42] Request for Arbitration, ¶ 69.

[43] Request for Arbitration, ¶ 72.

> The effect of the Constitutional Court Decision is that 23 years after this dispute first arose, and eight years after the accrued amount of default interest was paid under protest, Scotiabank Peru has been denied the opportunity to have its challenge to the accrual of default interest determined. Scotiabank Peru will never have that opportunity because of the Constitutional Court's politically motivated refusal to issue a timely decision based upon its own precedents. The Constitutional Court's (i) amendment of the law governing the number of judicial votes required for a binding decision, (ii) failure to uphold its own quorum requirements, and (iii) failure to uphold its own precedents regarding the process for deciding default interest issues, preventing the merits of Scotiabank Peru's appeal from ever being decided, reflects a systematic failure of the Peruvian legal system to provide an avenue for redress. That is procedurally unfair and constitutes treatment that would offend any reasonable sense of judicial propriety.[44]

49. In its Rule 41 Submission, Peru asks this Tribunal to ignore the measures pleaded in the RFA. It instead asks this Tribunal to summarily dismiss Scotiabank's claim based on its inaccurate recharacterization of the impugned measures. Peru's attempt to recharacterize the nature of Scotiabank's claim as a challenge to the 1999 SUNAT Decision should not be allowed and is not consistent with what is actually pleaded in the RFA.

PART THREE. THE RESPONDENT'S HIGH BURDEN ON A RULE 41 OBJECTION

50. The parties agree on the general principles that apply to preliminary objections under Rule 41 and the extremely high standard that a respondent must meet to succeed on such an objection:

(a) ***Purpose of Rule 41.*** The purpose of Rule 41 is to allow "for the early dismissal by arbitral tribunals of patently unmeritorious claims." At the core of Rule 41 are the principles of procedural efficiency in the administration of justice and preventing abuse of the ICSID system by claimants whose claim "is so manifestly and fundamentally defective that it calls for no further defence before it is dismissed."[45]

[44] Request for Arbitration, ¶ 65. [Emphasis added].

[45] Peru's Rule 41 Submission, ¶ 14, citing **RL-0035**, *Lotus Holding Anonim Şirketi v. Republic of Turkmenistan* (ICSID Case No. ARB/17/30), Award, 6 April 2020 ¶ 159 ("*Lotus*"). [Emphasis added].

(b) ***Meaning of 'Manifest'.*** For a claim to be manifestly without legal merit, the respondent must establish its objection "clearly and obviously, with relative ease and dispatch. The standard is thus high…The exercise may thus be complicated; but it should never be difficult." It is a matter of "due process" that Rule 41 is "directed only at clear and obvious cases" or "patently unmeritorious claims."[46]

(c) Rule 41 "plainly envisages a claim that is so obviously defective from a legal point of view that it can properly be dismissed outright. By contrast, an objection to the jurisdiction or substantive defence (in terms, that a claim "lacks legal merit"), which requires for its disposition more elaborate argument or factual enquiry," must be made through either a regular preliminary objection or a regular defence on the merits.[47] A "distinction has to be maintained between a claim by an investor that can properly be rejected out of hand, and one which requires more elaborate argument for its eventual disposition."[48]

(d) ***Meaning of 'Legal Merit'.*** Rule 41 relates to legal merit, in contradistinction to factual merit. At this early stage of the proceedings, without any sufficient evidence, the tribunal is in no position to decide disputed facts in a summary procedure.[49] For a claim to be summarily 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."[50]

(e) At this preliminary stage, the tribunal accepts *prima facie* the plausible facts as presented by the Claimant.[51] As put by the tribunal in *Brandes v. Venezuela*,

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[46] Peru's Rule 41 Submission, ¶ 16, citing **RL-0012**, *Trans-Global Petroleum, Inc. v. Hashemite Kingdom of Jordan* (ICSID Case No. ARB/07/25), Decision on the Respondent's Objection under Rule 41(5), 12 May 2008, ¶¶ 88, 92 ("*Trans-Global*").

[47] **CL-0037**, *MOL v. Croatia*, Decision on Respondent's Application under ICSID Arbitration Rule 41(5), December 2, 2014, ¶ 44 ("*MOL v. Croatia*"). [Emphasis added].

[48] **CL-0037**, *MOL v. Croatia,* ¶ 44.

[49] Peru's Rule 41 Submission, ¶ 20, citing **RL-0012**, *Trans-Global*, ¶ 105. See also **CL-0004**, *Brandes Investment Partners v. Bolivarian Republic of Venezuela*, Decision on the Respondents Rule 41 Objection, February 2, 2009, ¶ 59 ("*Brandes*").

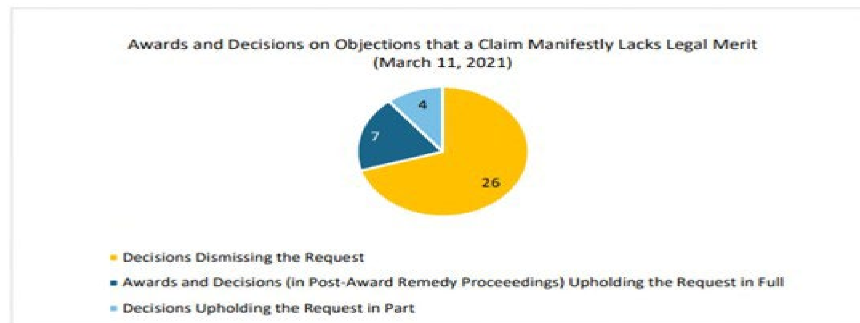
[50] Peru's Rule 41 Submission, ¶ 22, citing **RL-0035**, *Lotus*, ¶ 158. [Emphasis added].

[51] **CL-0004**, *Brandes*, ¶ 69; **RL-0030**, *Ansung Housing Co., Ltd. v. People's Republic of China* (ICSID Case No. ARB/14/25, Award, 9 March 2017, ¶¶ 32, 71 ("*Ansung*").

"basically the factual premise has to be taken as alleged by the Claimant. Only if on the best approach for the Claimant, its case is manifestly without legal merit, it should be summarily dismissed."[52]

51. As explained by the tribunal in *PNG Sustainable v. Papua New Guinea*, the standard that a respondent must meet under Rule 41 "is very demanding and rigorous. In the opinion of the Tribunal, a case is not clearly and unequivocally unmeritorious if the Claimant has a tenable arguable case." Rule 41 "is not intended to resolve novel, difficult or disputed legal issues, but instead only to apply undisputed or genuinely indisputable rules of law to uncontested facts."[53] This standard has been confirmed by other tribunals.[54]

52. In March 2021, ICSID published a note on its experience with Rule 41 objections. It noted that the standard is "high" and is not met in the vast majority of cases:[55]



53. In its Rule 41 Submission, Peru highlights four of the relatively few decisions where tribunals have granted this extraordinary relief.[56] These cases do not assist Peru. To the contrary, they illustrate the type of "patently unmeritorious" or abusive claims that Rule 41 is intended to weed out and are all very different from this case.

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[52] **CL-0004**, *Brandes*, ¶ 61.

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

[54] **RL-0040**, *AHG Industry GmbH & Co. KG v. Republic of Iraq*, ICSID Case No. ARB/20/21, Award on the Respondent's Application under ICSID Rule 41(5), 30 September 2022, ¶ 58 ("*AHG v. Iraq*"); **CL-0017**, *Eskosol S.p.A v. Italian Republic*, Decision, March 20, 2017, ¶ 41; **RL-0035**, *Lotus*, ¶ 158.

[55] **CL-0052**, ICSID's Experience with Objections that a Claim Manifestly Lacks Legal Merit.

[56] Peru's Rule 41 Submission, ¶¶ 18-19, 22-23.

54. In *AHG Industry v. Iraq*, the tribunal found that the claim manifestly lacked legal merit because the claimant relied on the Iraq-Germany BIT, but that BIT had never entered into force. The tribunal made that conclusion with two paragraphs of analysis.[57] Peru highlights that this is a 75-page award, implicitly suggesting that the analysis on a Rule 41 objection can be akin to a full decision on jurisdiction.[58] The decision is lengthy because the tribunal had to consider if it had jurisdiction based on the numerous legal instruments invoked by the claimant, but the tribunal's analysis in respect of each issue was straightforward. None of those instruments was an investment treaty. Indeed, one of the treaties *excluded* investor-state protection from its scope.[59]

55. In *Ansung Housing v. China*, the issue was whether the claim was commenced outside the three-year limitation period. The claim was commenced in October 2014. The tribunal held that the claimant "repeatedly pleaded facts" that set out that the date it first acquired knowledge that it had incurred loss or damage was before October 2011.[60] It was a straightforward assessment based on the facts pleaded by the claimant. It was not a case involving disputed legal issues and re-characterizations of disputed facts.

56. In *Lotus v. Turkmenistan*, the tribunal held that it was "abundantly clear" that the claims made were for monies owed under contracts. The request for arbitration provided no explanation of why the alleged contractual breaches could be considered breaches of the BIT. Furthermore, the claimant was not a party to the contracts.[61] The tribunal was able to make this succinct analysis based on the facts pleaded and established principles of law.

57. In *Global Trading v. Ukraine*, the claimant had a sale and purchase contract to supply poultry. Ukraine failed to pay for and accept the delivery of the imported poultry. The tribunal found purely commercial transactions are not an investment under the BIT or ICSID Convention.

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[57] **RL-0040**, *AHG v. Iraq*, ¶¶ 69-71.

[58] Peru's Rule 41 Submission, ¶ 18.

[59] **RL-0040**, *AHG v. Iraq*, ¶¶ 98-99.

[60] **RL-0030**, *Ansung*, ¶ 107.

[61] **RL-0035**, *Lotus*, ¶¶ 170-172, 176, 195.

On the facts alleged, these were individual contracts, of limited duration for the purchase and sale of (perishable) goods. It is well-settled that contracts of that kind are not investments.[62]

58. The tribunal in *Global Trading* emphasized that tribunals ought not dismiss a claim summarily without ensuring "that it has considered all of the relevant materials before reaching a decision to that effect, with all the consequences that follow from it." The tribunal should pose to itself the question of what other materials either Party (specifically the Claimant) might bring to bear if the question at issue were to be postponed until a later stage of the proceeding?[63]

PART FOUR. PERU HAS NOT SHOWN THE CLAIMS MANIFESTLY LACK LEGAL MERIT

59. Peru has raised five jurisdictional objections in its Rule 41 Submission. None are based on issues that involve undisputed facts and settled indisputable principles of law. Peru has asserted new and contested facts about what Peruvian law requires, and novel or disputed legal interpretations of the FTA.

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

I. Scotiabank's Claim Does Not Involve Measures Relating to a Financial Institution

61. Peru's first objection is that Scotiabank's claims for breaches of Articles 803 (National Treatment) and 805 (Minimum Standard of Treatment) are barred by Article 1101 because Scotiabank and Scotiabank Peru are "financial institutions."[64] This objection does not impact Scotiabank's claim for breach of Article 812 (Expropriation).[65] Peru does not rely on any well-settled principles of law. It advances a novel and disputed interpretation of the FTA.

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[62] **RL-0016**, *Global Trading Resource Corp. and Globex International, Inc. v. Ukraine* (ICSID Case No. ARB/09/11) Award, 1 December 2010, ¶¶ 51, 55-56 ("*Global Trading*").

[63] **RL-0016**, *Global Trading*, ¶ 34.

[64] Peru's Rule 41 submissions, ¶¶ 64, 67.

[65] Peru's Rule 41 submissions, ¶ 187.

62. There is no dispute that Scotiabank and Scotiabank Peru are "financial institutions." For this reason alone, Peru claims that the financial services chapter of the FTA (Chapter 11) applies to bar the FET and National Treatment Claims. However, the FTA does not state that Chapter 11 applies to claims brought by financial institutions. In fact, broader language was contained in the FTA's predecessor and was not included in the FTA. Instead, the FTA's revised language more narrowly applies Chapter 11 to "measures…relating to financial institutions." The focus is on the nature of the *measure*, not the nature of the investor. Here, the impugned measure is the 2021 Constitutional Court Decision, which is not a measure relating to financial institutions. It is a measure that could have affected any investor in any industry.

63. Peru advances a disputed interpretation of the FTA. To resolve this issue, the Tribunal will have to conduct a proper exercise in treaty interpretation, including reviewing any *travaux prépatoires* or negotiating history specific to the FTA. Scotiabank is confident that its interpretation is the correct one but, it certainly passes the low bar on a Rule 41 objection of being "tenably arguable."[66] Peru has not cited a single case that supports its position, and its interpretation is inconsistent with the FTA's ordinary meaning, context and purpose.

A. Scotiabank's Interpretation of the FTA is Supported by the Text, Context and Purpose of Chapter 11

64. According to Peru, the Tribunal must determine if Scotiabank and Scotiabank Peru are financial institutions. If so, then Chapter 11 applies and Scotiabank's claims for breach of Articles 803 and 805 of the FTA cannot proceed.[67] It is not disputed that Scotiabank and Scotiabank Peru are financial institutions. However, Peru's interpretation of Article 1101 as applying simply because the claimant is a financial institution is wrong. In any event, as it relates to the standard on this Rule 41 objection, Peru's objection is not legally certain to succeed.

65. Under the Vienna Convention on the Law of Treaties, a treaty is interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.[68] When the text of Article 1101 is read in context and in light

[66] **CL-0040**, *PNG v. Papua New Guinea*, ¶ 88; **RL-0040**, *AHG v. Iraq*, ¶ 58.
[67] Peru's Rule 41 submissions, ¶¶ 64, 67.
[68] **CL-0053**, Article 31 of the Vienna Convention on the Law of Treaties.

of the FTA's object and purpose, it is evident that the drafters only intended to create a separate regime for measures relating to financial institutions. The fact that Scotiabank and Scotiabank Peru are financial institutions is therefore of little significance in the present case, as the proper focus should be on the nature of the challenged *measure*, not the nature of the claimant.

66. ***Ordinary meaning and context.*** Chapter 11 of the FTA is the financial services chapter. Article 1101 provides that 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 other party's territory, and cross-border trade in financial services." [69] The operative word in Article 1101 is "measures." Peru's interpretation asks the Tribunal to interpret Article 1101 as saying it applies to claims brought by financial institutions. That interpretation asks the Tribunal to read out the words "measures" and "relating to." The Tribunal's task is to apply the FTA, not to rewrite it.[70]

67. If the drafters had intended Chapter 11 to apply to all claims brought by financial institutions, they would have drafted the FTA accordingly. Peru's argument overlooks that the predecessor agreement to the FTA contained broader language. The 2006 Canada-Peru Foreign Investment Promotion and Protection Agreement (FIPA)[71] limited claims "with respect to… financial institutions".[72] There was no mention of "measures adopted or maintained by a Party relating to" financial institutions, as found in the FTA.

FIPA	FTA
Limitation of Claims with Respect to Financial Institutions With respect to: (a) financial institutions of a Party; and	Article 1101: Scope and Coverage This Chapter applies to measures adopted or maintained by a Party relating to: • financial institutions of the other Party;

[69] **C-0001**, Canada-Peru FTA, Article 1101.

[70] **CL-0041**, *Renergy S.à.r.l. v. Kingdom of Spain* (ICSID Case No. ARB/14/18), Award, ¶ 558.

[71] The FTA supersedes the FIPA. Under Article 845 of the FTA, the FIPA is suspended from the date of entry into force of the FTA, but will remain operative for a period of 15 years after the entry into force of the FTA "for the purpose of any breach of the obligations of the FIPA that occurred before the entry into force of this Agreement."

[72] **C-0055**, Canada-Peru Foreign Investment Promotion and Protection Agreement; Article 21.

(b) investors of a Party, and investments of such investors, in financial institutions in the other Party's territory, this Section applies only in respect of claims that the other Party has breached an obligation under Articles 13, 14, or 18.6	• 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.

68. Different language carries different ordinary meaning. The *travaux prépatoires* and other negotiating history documents may be relevant to understanding the use of different language.

69. Similar language is found in Article 802(3) of the FTA. That provision provides that Chapter 8 of the FTA (the Investment Chapter) does not apply "to measures adopted or maintained by a Party to the extent that they are covered by Chapter 11."[73] Article 1101 and Article 802(3) were drafted consistently to focus on the nature of the measure that is at issue, and not on the nature of the investor as a financial institution.[74] That choice of language must be given meaning.

70. ***Purpose of the Treaty and Chapter 11.*** The purpose of the FTA and Chapter 11 ground the interpretation advanced by Scotiabank. Chapter 11 is about carving out a sphere for domestic financial regulation. In other words, it is about creating a Chapter focusing on the *nature of the measure*, but not the nature of the investor. This is supported by public statements by Canada in the context of the FTA. It is also supported by interpretations of the financial services chapter of the NAFTA, on which the FTA is based.

71. First, in public statements leading up to the implementation of the FTA, the Government of Canada repeatedly stated that the FTA was intended to strengthen protections for Canadian

[73] Peru Rule 41 submissions at ¶ 61; **C-0001**, Canada-Peru FTA, Article 802(3).

[74] See **RL-004**, *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, ¶ 18, where Canada recognizes that "Given that Chapters Fourteen and Eleven are mutually exclusive, one must determine which Chapter applies in respect of a particular measure" ("*Fireman's Fund*, Canada's Submissions") [Emphasis added].

investments, including investments by and in respect of financial institutions.[75] There was no suggestion that claims by financial institutions, at large, were to be treated any differently.

72. Second, the purpose and context surrounding the creation of NAFTA's financial services chapter supports Scotiabank's interpretation in the present case. Article 1401 of the NAFTA is substantively the same as Article 1101 of the FTA.[76] Chapter 11 of the FTA was modelled after the financial services chapter in NAFTA.

73. The purpose of Chapter 14 of the NAFTA was considered in *Fireman's Fund v. Mexico*. In that case, the claimant, an insurance company, had agreed to be part of a program of rescue and recapitalization for a Mexican financial services corporation following a serious financial crisis in Mexico. It brought a Chapter 11 NAFTA claim after Mexico facilitated the purchase of debentures denominated in Mexican pesos and owned by Mexican investors, but not facilitating the purchase of debentures denominated in U.S. dollars and owned by the claimant. Both series of debentures were issued at the same time and by the same Mexican financial services corporation.

74. Mexico challenged the jurisdiction of the tribunal and argued that Chapter 14 of the NAFTA applied. In that case, Canada made submissions about, and the tribunal made findings on, the purpose of the financial services chapter. Both confirm Scotiabank's interpretation that the financial services chapter is about *measures* relating to the financial services sector. In summary:

(a) ***Canada's submissions.*** Canada explained the unique nature of the financial services sector in the economy because of its importance in underpinning economic growth. Widespread failure in the financial sector presents serious risks, and therefore "efficient and effective regulation and supervision are key to financial services market." In recognition of this, the NAFTA parties negotiated a set of rules specific to that sector, found in Chapter 14. These provisions "represent the balance of rights and obligations negotiated by the NAFTA Parties to govern trade in financial services. The intention of the NAFTA Parties to create a separate regime

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[75] **C-0058**,"Trade Agreement with Peru Opens Doors to Latin America," Government of Canada, June 18, 2009 (5:30 p.m. EDT); **C-0059**, Minister Day Announces Canada-Peru Free Trade Agreement," Government of Canada, August 4, 2009 (10 a.m. EDT); **C-0056**, Hansard - 41 (April 20, 2009); **C-0057**, Hansard - 64 (May 29, 2009).

[76] **RL-0044,** NAFTA, Article 1401.

to govern *measures relating to financial services* within the NAFTA is clearly expressed in the provisions governing the scope and coverage of various Chapters." Chapter 14 "applies to measures related to both investment and cross-border trade in financial services."[77]

(b) ***Tribunal's findings.*** The tribunal found that the purpose of Chapter 14 was to create a safe harbor for states with respect to financial regulation; it ensured that the NAFTA Parties would not have to harmonize their regulations in the financial services industry:

> […] Looked at from the design of the NAFTA, it is evident that the drafters carved out the financial sector from significant portions of the general provisions, because none of the state Parties was prepared to engage in the kind of harmonization and deregulation that would have been necessary to treat banks, insurance companies, and securities firms (as well as other participants in the financial sector) in the same way as, say, the soft drink, retail trade, or shoe manufacturing industries. As noted above, Chapter Fourteen and the Annexes applicable to that Chapter contain significant differences from the general provisions on national treatment, omit a provision on "fair and equitable treatment," and limit resort to investor-state arbitration. All of these differences, it is clear, are designed to leave room for national decision-making rather than harmonization, and to limit the opportunity of investors from another state Party to resort to international dispute settlement to challenge regulatory measures taken by the respective national authorities.[78]

75. The only authority relied upon by Peru to support its atextual interpretation of the FTA is *Fireman's Fund*.[79] As set out above, *Fireman's Fund* does not stand for the proposition that the

[77] **RL-0004**, Canada's submission in *Fireman's Fund,* ¶¶ 6-12. [*Emphasis* added].

[78] **RL-0005**, *Fireman's Fund Company v. United Mexican States* (ICSID Case No. ARB(AF)/02/1), Decision on Preliminary Question, ¶ 83 ("*Fireman's Fund,* Preliminary Decision"). The tribunal stated that "complaints by investors of another Party in the financial sector concerning regulations imposed by agencies of the host country are governed by Chapter [14]." [Emphasis added].

[79] See Peru's Rule 41 Submission, ¶ 65.

chapter applies broadly to all claims by a financial institution. The tribunal recognized that the chapter is about ensuring scope for domestic regulation of the financial services industry.[80]

B. The Challenged Measure Does Not "Relate To" Financial Institutions

76. To be a measure "relating to" financial institutions, there must be a "legally significant connection" between the impugned measure and financial institutions or investments in financial institutions.[81] Here, the challenged measure is the 2021 Constitutional Court Decision. The politically motivated refusal of the Constitutional Court to issue a timely and fair decision is not a measure "relating to" financial institutions. Neither the Court decision nor the underlying factual context that gave rise to the Default Interest Appeal has anything to do with financial institutions at large or the regulation of financial institutions, let alone a legally significant connection to financial institutions.[82]

77. The 2021 Constitutional Court Decision is a measure that could have affected any investment in any industry. It is not a measure like the one in *Fireman's Fund* that was designed to bail out a bank in a time of crisis, nor is it a measure in the financial industry designed to leave room for national decision-making as opposed to harmonizing practices among states in treatment of financial institutions.[83] Access to constitutional protection under the "*amparo*" procedure is open to any person in Peru, not only financial institutions. Further, even if one considers the subject

[80] The issue in *Fireman Fund's* was whether the claimant's investment in the financial holding company fell within the definition of a "financial institution." If it did, there was no dispute that the impugned *measure* related to the financial services industry following steps taken in response to Mexico's fiscal crisis. **RL-0005**, *Fireman's Fund*, Preliminary Decision, ¶ 76.

[81] **CL-0035**, *Methanex Corporation v. United States of America*, UNCITRAL, Partial Award, 7 August 2002, at ¶ 147; **CL-0033**, *Lone Pine Resources Inc. v. Government of Canada* (ICSID Case No. UNCT/15/2), Final Award, 21 November 2022, ¶¶ 402-403 ("*Lone Pine*"); **CL-0003**, *Bilcon v. Government of Canada*, UNCITRAL, Award on Jurisdiction and Liability, 17 March 2015, ¶ 240.

[82] Even if the Tribunal looks deeper at the underlying factual context that gave rise to the 2021 Constitutional Court Decision, it is evident that the underlying factual context does not relate to financial institutions. The transactions that resulted in the 1999 SUNAT Decision against Scotiabank's predecessor related to value added tax paid on certain gold transactions. The gold transactions could have been undertaken by any type of business. The resulting issue in the Default Interest Appeal then focused on whether default interest could accrue due to delays caused by the state. The fact that Scotiabank and Scotiabank Peru are financial institutions is of no meaning to the nature of the issue in the Default Interest Appeal and the resulting 2021 Constitutional Court Decision.

[83] **RL-0005**, *Fireman's Fund*, Preliminary Decision, ¶ 83.

matter underlying the 2021 Constitutional Court Decision, the accrual of default interest, this is an issue that has affected many companies in several different types of industries.[84]

78. Scotiabank's interpretation of the scope of Chapter 11 of the FTA is at least "tenabl[y] arguable."[85] This is not an argument that is based on "genuinely indisputable" rules of law. Interpretive aids such as the *travaux préparatoires* will need to be considered. The tribunal dismissed a Rule 41 objection in *MOL v. Hungary* where the objection required a similar type of assessment. In that case, the tribunal recognized that the disputed interpretation of the treaty required a textual interpretation, as well as an assessment of the contextual and purposive elements that might give meaning to the text. This required an examination of the history and negotiation of the treaty, which the tribunal held is unsuitable for determination under Rule 41.[86]

II. Scotiabank's Claim Does Not Concern Taxation Measures

79. Peru's second objection is that the Tribunal lacks jurisdiction over two of Scotiabank's claims (breach of Article 805 (FET) and Article 812 (Expropriation)) because the measures Scotiabank challenges in this arbitration are "taxation measures."[87] This objection does not impact Scotiabank's claim for breach of Article 803 (National Treatment).[88] The question before the Tribunal is whether it is "clear and obvious" that Scotiabank's claim relates to "taxation measures." The Rule 41 objection must be dismissed. Scotiabank's position that the claim does not relate to taxation measures is correct and thus clearly surpasses the low threshold of being tenably arguable.

80. The measure challenged by Scotiabank is the 2021 Constitutional Court Decision. The underlying subject matter of that court proceeding related to the accrual of default interest. The imposition of default interest on a debt is compensatory and a penalty; it is not a matter of "taxation" under either international jurisprudence or Peruvian law. It makes no difference whether the interest is due to late payment on a tax debt, a court judgment or any other type of liability. In this case, the fact that the default interest accrued on a tax debt just means that the interest is

[84] For example, there are *amparos* related to this issue from companies involved in oil and gas, mining, construction, manufacturing, real estate, telecommunication, among many others.

[85] **CL-0040**, *PNG v. Papua New Guinea,* ¶ 88; **RL-0040**, *AHG v. Iraq*, ¶ 58; **RL-0035**, *Lotus*, ¶ 158.

[86] **CL-0037,** *MOL v. Croatia*, ¶¶ 29, 31, 48.

[87] Peru's Rule 41 Submission, ¶ 77.

[88] Peru's Rule 41 Submission, ¶ 187.

factually related to a taxation measure, but does not make the interest itself a taxation matter. International tribunals have rejected such broad interpretations of the term "taxation measure."[89]

81. Furthermore, Scotiabank's claim is about the unfairness of a court decision. The Constitutional Court allowed itself to be influenced by media and political pressure, purported to arbitrarily change quorum requirements and avoided ruling on a politically contentious case by ensuring that Scotiabank Peru would never have the opportunity to have its case heard on the merits. None of those challenges made in this arbitration are about a taxation measure, or even default interest, but rather about a fair judicial process. This is consistent with Peruvian law, where the right to a fair process is independent of the underlying issue being discussed.

82. In trying to meet the high standard on a Rule 41 objection, Peru has: (a) mischaracterized Scotiabank's claim and argued why *that* claim is a taxation measure, (b) ignored the international jurisprudence that supports Scotiabank's position, and (c) premised its objection on inaccurate assertions about what Peruvian law provides. Expert evidence on Peruvian law will be needed to resolve this dispute. The Tribunal will have to grapple with disputed facts and legal principles. The jurisprudence is clear that a Rule 41 objection should not succeed in such circumstances.

83. Notably, Peru does not mention that it is currently litigating a similar taxation measure issue in the *Freeport-McMoRan Inc. v. Republic of Peru* ICSID matter. In that case, the parties have exchanged submissions and expert evidence on the issue of whether SUNAT's decision not to waive penalties and interest that had accrued on a tax assessment falls within the scope of "taxation measures." Peru did not bring a Rule 41 objection in that case, nor did it seek to bifurcate that jurisdictional objection, but asks this Tribunal to decide the issue prematurely here.

A. Peru's Objection is Based on a Mischaracterization of Scotiabank's Claim

84. In its Rule 41 Submission, Peru argues that this case is about a court decision "imposing a tax debt" and that the actual impugned measure is the 1999 SUNAT Decision. Peru alleges that

[89] See ¶¶ 97 to 98 below.

Scotiabank attempts to "artificially" focus its claim on the 2021 Constitutional Court Decision and that decision is "inextricably linked" to the 1999 SUNAT Decision.[90]

85. Peru has mischaracterized the nature of Scotiabank's claim and then argued why *that* claim is a taxation measure. That is not appropriate. The question is whether the claim, as pleaded by Scotiabank, falls within the scope of the taxation measure exemption in Article 2203 of the Treaty. It is the claimant's prerogative to formulate its claim as it sees fit.[91] As aptly put by the tribunal in *ECE Projektmanagement v. The Czech Republic*:

> [I]t is for the investor to allege and formulate its claims of breach of the relevant treaty standards as it sees fit. It is not the place of the respondent State to recast those claims in a different manner of its own choosing and the Claimants' claims accordingly fall to be assessed on the basis of which they are pleaded.[92]

86. In *Infinito v. Costa Rica*, the tribunal quoted the above statement with approval and added: "at the jurisdictional stage, a tribunal must be guided by the case as put forward by the claimant in order to avoid breaching the claimant's due process rights. To proceed otherwise is to incur the risk of dismissing the case based on arguments not put forward by the claimant, at a great procedural cost for that party."[93] The repercussions on the claimant's due process rights are even starker in the context of a Rule 41 objection, as opposed to a preliminary hearing on jurisdiction.

87. Peru's recharacterization of Scotiabank's claim cannot be accepted. As set out at paragraphs 48 to 49 above, it is clear that the measure Scotiabank has challenged is the 2021 Constitutional Court Decision. The pleaded breaches of the FTA all relate to the conduct of the Constitutional Court. Scotiabank has not pleaded a breach of the FTA related to the 1999 SUNAT Decision. The 1999 SUNAT Decision is a background fact. This case is about the unfair judicial

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[90] Peru's Rule 41 Submission, ¶¶ 84-86.

[91] **CL-0026,** *Infinito*, Decision on Jurisdiction, ¶ 185.

[92] **CL-0013**, *ECE Projektmanagement v. Czech Republic*, Award, 19 September 2013, ¶ 4.743. See also **CL-0016**, *Eli Lilly & Co. v. Canada*, ICSID Case No. UNCT/14/2 (Award) (March 16, 2017), ¶¶ 162-165 ("*Eli Lilly*"); **CL-0047,** *Urbaser S.A. and Consorcio de Aguas Bilbao Bizkaia, Bilbao Biskaia Ur Partzuergoa v. Argentine Republic*, ICSID Case No. ARB/07/26, Decision on Jurisdiction, 19 December 2012, ¶¶ 235-237 ("*Urbaser*").

[93] **CL-0026,** *Infinito*, Decision on Jurisdiction, ¶ 185. [Emphasis added].

process before the Constitutional Court. Scotiabank's focus on the 2021 Constitutional Court Decision is not "artificial." It is the heart of Scotiabank's claim.

88. Peru also asserts that Scotiabank is asking the Tribunal to "act as an extraordinary umpteenth judicial instance" on the 1999 SUNAT Decision.[94] *First*, Scotiabank is not seeking to use this Tribunal as a further appeal. Scotiabank expected to have its *amparo* determined in a fair and impartial manner. That did not happen. Scotiabank has properly sought relief for the breaches of its treaty rights, including for the denial of justice that occurred. *Second*, as set out at paragraph 28 above, Peru's attempt to characterize Scotiabank as an abusive or frivolous litigant must be rejected. Scotiabank cannot be faulted for pursuing its legal rights through the Peruvian courts. That is the purpose of having appeal rights. Its appeal to the Constitutional Court was not frivolous – one judge had already ruled in Scotiabank Peru's favour and the judicial precedents supported Scotiabank Peru's position. Nor is it frivolous for Scotiabank to have brought this claim to the Tribunal under the FTA, in view of the manifest unfairness of the Constitutional Court proceeding.

B. International Jurisprudence Confirms This Claim Does Not Concern a Taxation Measure

89. The term "taxation measure" is not defined in the FTA. Peru relies on the breadth of the definition of "measure." "Measure" is defined as including "any law, regulation, procedure, requirement or practice." Peru is right that the term "measure" is broad and may encompass a range of acts from an administrative decision to a court decision and comprise measures taken by either the legislative, executive or judicial branches.[95] However, the operative question is what constitutes "taxation." That term is not defined. It must thus be interpreted in accordance with the Vienna Convention on the Law of Treaties.[96]

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[94] Peru's Rule 41 Submission, ¶ 84.

[95] Peru's Rule 41 Submission, ¶ 86.

[96] **CL-0039**, *Nissan Motor Co., Ltd. v. Republic of India*, PCA Case No. 2017-37, Decision on Jurisdiction, April 29, 2019, ¶ 383 ("*Nissan*"); **RL-0028**, *Murphy Exploration & Production Company – International v. The Republic of Ecuador (II)*, PCA Case No. 2012-16, Partial Final Award, 6 May 2016 ¶ 159 ("*Murphy*").

90. There are two reasons why the impugned judicial process before the Constitutional Court does not raise a matter of "taxation": (a) the underlying subject matter of the process does not relate to "taxation" and (b) Scotiabank's claim is about the unfairness of the judicial process.

i. Underlying Subject Matter Does Not Engage a "Taxation Measure"

91. The subject matter of the impugned judicial process related to whether accrual of default interest due to delays by the state violated Scotiabank Peru's constitutional rights. The proceeding was not about the tax debt, which is the subject of a separate proceeding (the Tax Appeal). The application of default interest to a debt is not a matter of "taxation" based on its ordinary meaning and the purpose of the treaty exemption. This is supported by international jurisprudence.

92. ***Ordinary meaning of "taxation."*** Tribunals have interpreted the word "taxation" to mean a measure "which imposes a liability on classes of persons to pay money to the State for public purposes."[97] For example, this includes measures regulating the obligation to pay taxes to the government or measures granting exemptions, rebates and refunds of taxes.[98]

93. The application and accrual of default interest to a debt does not fall within the ordinary meaning of "taxation;" it is not a liability on *classes* of persons to pay money to the State for public purposes. For example, taxes are imposed to assist the state with covering social needs and public expenditures. In contrast, interest is imposed on a *specific* person as a <u>penalty</u> for the late payment of a debt and is <u>compensatory</u> to the government for the loss of use of money because of a taxpayer's default. The fact that the interest was imposed by SUNAT on a tax debt does not change its nature. That simply means that the interest is *related* to a taxation measure. Article 2203 of the FTA does not apply to measures merely because they are *related* to taxation measures; it only

[97] **CL-0039**, *Nissan*, ¶ 384; **RL-0028**, *Murphy*, ¶ 159; **RL-0008**, *EnCana Corporation v. Republic of Ecuador*, LCIA Case No. UN3481, Award, 3 February 2008, ¶ 142(4) ("*EnCana*"); **RL-0034**, *SunReserve Luxco Holdings SRL v. Italian Republic*, SCC No. V 2016/32, Final Award, 25 March 2020, ¶ 520 ("*SunReserve*"); **CL-0012**, *Duke Energy Electroquil Partners & Electroquil S.A. v. Republic of Ecuador* (ICSID Case No. ARB/04/19), Award, 18 August 2008, ¶ 174 ("*Duke Energy*"); **CL-0005**, *Burlington Resources Inc. v. Republic of Ecuador* (ICSID Case No. ARB/08/5) Decision on Jurisdiction, 2 June 2010, ¶¶ 164-165.

[98] **CL-0039**, *Nissan*, ¶ 384; **RL-0008**, *EnCana,* ¶ 142(3); **CL-0012**, *Duke Energy*, ¶ 175.

applies to the taxation measures themselves. If the parties had intended Article 2203 to apply that broadly, they would have used language to that effect.

94. ***Purpose of Treaty exemption.*** The purpose of taxation exemptions is to preserve the states' sovereignty in relation to their power to impose taxes. As explained by the tribunal in *Murphy v. Ecuador*, "[m]ost 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."[99] Peru agrees that this is the purpose of the taxation exemption in Article 2203 of the FTA.[100]

95. Thus, the term "taxation measure" is meant to capture, and then exclude from the FTA, measures that relate to the government's sovereign power to impose taxes. Examples of measures that have fallen with the scope of "taxation measures" include taxes on gross income or profits,[101] refunds for value-added tax (VAT),[102] and customs duties.[103] These are all measures directly engaging the sovereign power to regulate matters of taxation.

96. The accrual of default interest does not relate to the sovereign power of taxation. There is no difference between interest accruing on a tax debt or interest accruing on a judicial judgment; in both cases, they are compensation for the late payment of a liability and not a matter of how taxation is regulated. They don't engage the purpose of the treaty exemption for tax measures. The *travaux prepatoires* for the FTA will be useful evidence in support of this interpretative exercise, underscoring further that this is not an issue for a Rule 41 objection.

97. ***International jurisprudence.*** The international jurisprudence confirms Scotiabank's interpretation of "taxation measure." Matters such as interest, fees or penalties do not qualify as

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[99] **RL-0028**, *Murphy*, ¶ 165. [Emphasis added].

[100] Rule 41 Submission, ¶ 89 (Peru also quoted affirmatively from the *Murphy* decision).

[101] See **CL-0015**, E*iser Infrastructure Limited and Energía Solar Luxembourg S.à r.l. v. Kingdom of Spain*, ICSID Case No. ARB/13/36, Award, May 4, 2017, ¶ 266 (a law imposed a tax on energy); **RL-0034**, *SunReserve*, ¶ 239 (the Robin Hood tax on windfall profits of energy companies).

[102] **RL-0008**, *EnCana*, ¶¶ 1, 142(4).

[103] **CL-0012**, *Duke Energy*, ¶ 175.

"taxation measures" simply because they are factually connected to a taxation measure and/or imposed by the state's taxation authority. Multiple tribunals have held that certain types of fines, levies or fees may be required by the government but not constitute a tax, even if they are administered under the domestic tax legislation and by the tax agency.[104]

98. For example, in *Nissan v. India*, the tribunal recognized that not "every instance of a governmental authority imposing monetary obligations, relieving a party of such obligations, or returning moneys to a party is necessarily assessing, exempting, rebating or refunding a 'tax.' […] [T]he fact that a government ministry or department may impose fines or penalties as punishment for proscribed conduct, or alternatively forgive or refund such fines or penalties, does not make these actions necessarily 'taxation measures' either."[105] The tribunal rejected India's argument that a matter is a taxation measure if it is "sufficiently clearly connected to a taxation law or regulation." It found the "connection" element was too broad. Rather, the inquiry is more nuanced and involves examining the purpose of the relevant measures, including whether they were motivated principally by tax objectives.[106]

99. It is notable that Peru makes no mention of this jurisprudence in its Rule 41 Submission. In its reply submission, Peru will undoubtedly attempt to distinguish these cases. However, regardless of Peru's position on them, these cases illustrate that this issue is far from a "settled" and "indisputable" legal principle, which is required for the Rule 41 objection to succeed.

ii. Scotiabank's Claim is about an Unfair Judicial Process

100. Not only is the subject matter that was before the Constitutional Court not one relating to a matter of "taxation," but in any event, Scotiabank's claim in this arbitration is not about that underlying subject matter. Scotiabank has not alleged that the 1999 SUNAT Decision violated the

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[104] **RL-0028**, *Murphy*, ¶ 191 ("not every mandatory payment made by a class of persons to the State for public purposes without direct benefit is necessarily a tax. For example, certain types of fines, fees or special contributions may be required payments to the government but not constitute a tax"); **CL-0002**, *Antaris GMBH and Dr. Michael Gode v. The Czech Republic*, PCA Case No. 2014-01, Award, 2 May 2018, ¶¶ 230, 242, 252 (the fact that a solar levy was administered by the Tax Administration Law was not dispositive; the primary purpose of the levy was not to raise revenue for the state). See also **CL-0048**, *Voltaic Network GMBH (Germany) v. the Czech Republic*, PCA Case No. 2014-20, Award, 15 May 2019, ¶ 246.

[105] **CL-0039,** *Nissan*, ¶ 385. [Emphasis added].

[106] **CL-0039**, *Nissan*, ¶¶ 386-387.

FTA or, more specifically, Scotiabank has not alleged that its treaty rights were violated by the accrual of default interest due to the delays of the State.

101. As set out at paragraphs 48 to 49 above, Scotiabank's claims are clearly about an unfair court process. They relate to how the Constitutional Court failed to remain independent and objective, and instead bowed to political and media pressure, including by retroactively changing the process that previously assured a fair process and issued a decision without quorum. This distinction between a claim relating to process and one relating to the underlying subject matter reflected in Peruvian law, which provides litigants with a civil "right to action" or "*actio*." The right to action is the right to present your case to a judge; it is a right to a process regardless of whether the party is right on the merits, and that process needs to meet certain basic guarantees. The right to action is distinct from the right that is being asserted in the process itself.[107]

102. In its Rule 41 Submission, Peru cites *SunReserve v. Italy* to suggest that by challenging the judicial process, Scotiabank is trying to "elide a tax carve-out."[108] *SunReserve* does not support Peru's argument. In that case, Italy imposed taxes on windfall profits of energy companies, known as the Robin Hood Tax. The constitutional court found that the extension of the Robin Hood Tax to renewable energy companies was unconstitutional, but that finding did not have retroactive effect. As a result, the claimant was not reimbursed for any amounts paid. The claimant challenged the prospective application of that tax.[109] There was no dispute that the Robin Hood Tax, and thus the underlying subject matter before the constitutional court, was a taxation measure.

103. The tribunal found that the claim challenging the constitutional court decision was a taxation measure because it was centred on the substance of what the court decided. It required the tribunal to assess the propriety of the taxation measure itself, the Robin Hood Tax. In so finding, the tribunal recognized that the merits of the claim were "not restricted to the proprietary and implications of the constitutional court decision," but required the tribunal to assess the nature of

[107] **C-0052,** See PRIORI, G. (2003) La efectiva tutela jurisdiccional de las situaciones jurídicas materiales: hacia una necesaria reivindicación de los fines del proceso. Ius Et Veritas N° 26, p. 276; **C-0061**, PRIORI, G. (2014) Del derecho de acción a la efectiva tutela jurisdiccional de los derechos. Ius Et Veritas N° 49, pp. 147-156; **C-0060**, MARINONI, L., PÉREZ, A., & NÚÑEZ, R. (2010) Fundamentos del proceso civil. Hacia una teoría de la adjudicación. AbeledoPerrot, p. 202.

[108] Peru's Rule 41 Submission, ¶ 96.

[109] **RL-0034**, *SunReserve*, ¶¶ 239-248, 496.

the Robin Hood Tax and whether it was properly extended to certain types of energy companies. It was not possible to separate the decision from the same tax measure.[110]

104. This case is very different. *First*, as set out above, the underlying subject matter is not about a taxation measure. *Second*, the claimant in *SunReserve* was not challenging the propriety of the court decision or the fairness of the process; the claimant argued the court decision was correct.[111] In contrast, Scotiabank's claim is about the fairness of the court process.

105. In its Rule 41 Submission, Peru relies on the fact that Scotiabank's prayer for relief represents the amount of interest that was paid under protest. It claims that this shows that this case is, in substance, about the default interest amount ordered by SUNAT.[112] That is not true. This amount is representative of the damages suffered. Because of the Constitutional Court's unfair and discriminatory treatment, it avoided ruling on a politically contentious issue and Scotiabank will never have the substance of its appeal heard on the merits. Scotiabank will not have the opportunity to recover those amounts in a fair and unbiased manner. Unlike in *SunReserve*, the propriety of the amounts paid does not have to be determined.

C. Peruvian Law Confirms that This Claim Does Not Concern a Taxation Measure

106. Peru's argument that Scotiabank's claim falls within the definition of a "taxation measure," and thus Article 2203 of the FTA, is not only not supported by the plain language of the FTA and international jurisprudence, but is also contrary to Peruvian law. Peruvian law recognizes that the application of default interest to a debt, even a tax debt, is not a matter of "taxation."

107. Both parties agree that the law of the Host State is relevant to establishing whether a measure constitutes a taxation measure.[113]

108. Peru asserts that under Peruvian law, judicial proceedings related to the default interest on a tax liability are part and parcel of the tax debt.[114] To support its position, it selectively highlights

[110] **RL-0034**, *SunReserve*, ¶¶ 547-549, 551.
[111] **RL-0034**, *SunReserve*, ¶ 552.
[112] Peru's Rule 41 Submission, ¶¶ 98-100.
[113] Peru's Rule 41 Submission, ¶ 89. See **CL-0039**, *Nissan*, ¶ 383.
[114] Peru's Rule 41 Submission, ¶¶ 88, 90.

aspects of the Peruvian Tax Code and asks the Tribunal to accept its interpretation as correct without expert evidence or a complete record. Peru does so even though it directly acknowledges that its position is "contrary to what the Claimant has argued in its Request for Arbitration."[115]

109. There are four reasons Peru's assertion of how default interest is characterized under Peruvian law should be rejected on this Rule 41 application.

110. *First,* how default interest is characterized under Peruvian law is a disputed *factual* issue between the parties. As a matter of international law, municipal law questions are treated as questions of fact.[116] As acknowledged by Peru, on a Rule 41 objection, the Tribunal is in "no position to decide disputed facts."[117] For this reason alone, this objection should be dismissed. On a Rule 41 objection, the Tribunal is to accept only the plausible facts as presented by Scotiabank.[118] Peru has admitted that its position is contrary to what Scotiabank has pleaded in its RFA.[119]

111. *Second,* when it is the appropriate time to respond to Peru's jurisdictional argument in full, Scotiabank will lead expert evidence to establish that its interpretation is supported by Peruvian law. As summarized in the paragraph below, Peruvian law is consistent with the international jurisprudence discussed above that establishes that interest is not a matter of taxation, even if the interest is accruing on a tax debt.

112. As a matter of Peruvian law, the interest imposed by SUNAT against Scotiabank Peru was default interest caused by the late payment of a debt. Default interest is not a concept from tax law but from the civil law. The Peruvian Civil Code and secondary authorities establish that the purpose of default interest is to indemnify the payee for a delayed payment.[120] This is supported

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[115] Peru's Rule 41 Submission, ¶ 90.

[116] **CL-0030**, *Ioannis Kardassopoulos v. Georgia* (ICSID Case No. ARB/05/18), Decision on Jurisdiction, 6 July 2007, ¶¶ 144-146.

[117] Peru's Rule 41 Submission, ¶ 20, citing **RL-0012**, *Trans-Global*, ¶ 105. See also **CL-0004**, *Brandes*, ¶ 59.

[118] **CL-0004**, *Brandes*, ¶ 69; **RL-0030** *Ansung*, ¶¶ 32, 71.

[119] Peru's Rule 41 Submission, ¶ 90.

[120] **C-0047**, See Peruvian Civil Code, art. 1242: ("The compensatory interest compensates the use of money or any other good. It is a default interest when it has the purpose of indemnify the delay on the payment."); **C-0051,** Felipe Osterling and Mario Castillo Freyre. Consideraciones generals acerca del pago de intereses. Estudio Castillo Freyre, link:, https://www.osterlingfirm.com/Documentos/articulos/consideraciones_generales_acerca_del_pago.pdf ("The compensatory interest compensates the use of money or any other good. It is a default interest when it has the purpose of indemnify the delay on the payment."); **C-0053,** Luciano Barchi Velaochaga. Commentary to article 1235 of the Peruvian Civil Code. Peruvian Civil Code commented by the best 100 specialists. Part VI, Obligations, Lima, Gaceta

by Peruvian jurisprudence. The Constitutional Court has confirmed that default interest does not have a tax nature, but rather is a civil sanction with the purpose of promoting timely payment and compensating the payee for a delayed payment.[121]

113. *Third*, in light of the *Freeport v. Peru* case, Peru cannot credibly suggest that Scotiabank's position on Peruvian law is not "plausible,." *Freeport* is an ongoing ICSID dispute between a U.S. investor and Peru. The claimant argues that Peru breached the treaty by, among other things, failing to waive the penalties and interest that SUNAT imposed on its Peruvian entity for certain tax assessments. Peru has raised a jurisdictional objection that this is a taxation measure.[122] Peru did not bring a Rule 41 objection to challenge this measure, nor did it seek to bifurcate the proceedings to argue this on a preliminary basis. That issue is being heard with the merits of the arbitration.

114. In *Freeport*, both parties have exchanged written submissions on the issue of whether "penalties and interests" are "taxation measures," including expert reports on how Peruvian law treats such matters. The following summarizes the parties' arguments and evidence:

(a) Peru relies on expert evidence and makes the key concession that under Peruvian law, penalties and interests are <u>not</u> taxes (their tax experts state that "neither delinquent interest nor penalties are taxes *per se*").[123] However, Peru and its experts argue that the term "taxation measures" is broader than what constitutes a "tax" and

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Jurídica (Professor Barchi holds that the default interest indemnifies "…the damage caused by the delay…"); **C-0054,** César Fernández Fernández. Commentary to article 1242 of the Peruvian Civil Code. Peruvian Civil Code commented by the best 100 specialists. Part VI, Obligations, Lima, Gaceta Jurídica (Professor César Fernández concludes that the default interest "…has the purpose to indemnity the delay on the payment"); **C-0064**, HUAMANÍ, Rosendo. Código Tributario Comentado. Jurista Editores, 2013, p. 376 ("The nature of the tax default interest is similar to the interest in Private Law; therefore, it can be considered as the Civil Code express (article 1242): the default interest has the purpose to compensate the delayed payment."); **C-0062,** NÚÑEZ, Sylvia Ysabel. ¿Cuándo pagar intereses moratorios tributarios? Revista Derecho & Sociedad de la Facultad de Derecho de la Pontificia Universidad Católica del Perú, Lima, No. 43, 2014, p. 236 ("…the current criteria of the Constitutional Court is that the nature of the tax default interest is a compensatory interest").

[121] **C-0066,** See Medina de Baca case law, paragraph 43 and 45 ("…the tax default interest has not, certainly, the nature of tribute, but rather considered as to sanction imposed by the non-compliance of the payment of a tax debt."); **C-0067,** Icatom case law, paragraph 19 ("The purpose of the payment of tax default interest is to promote the timely payment by the taxpayers, as well as to compensate the State by the delays in the payment by the taxpayers […] with its collection, the purpose is not to sanction an eventual economic benefit of the taxpayer, but rather is to compensate the State by the delays in the payment by the taxpayers.").

[122] **CL-0019,** *Freeport McMoRan Inc. v. Republic of Peru* (ICSID Case No. ARB/20/08) ("*Freeport*")*,* Respondent's Memorial on Jurisdiction, 4 May 2022, ¶¶ 455, 458.

[123] See **CL-0022,** *Freeport,* Claimant's Rejoinder on Jurisdiction, 16 December 2022, ¶ 79, fn 384.

penalties and interests are "taxation measures" because they are part of the means by which the government enforces a tax obligation and is part of the "tax debt."[124]

(b) Freeport argues that Peru's position is not supported by either the investment treaty authorities or Peruvian law. Freeport relies on a Peruvian tax expert to support its position.[125] Its Counter-Memorial on Jurisdiction, Freeport explains why interest is not classified as one of the three categories of taxes in the Tax Code and is an obligation "separate and independent" from a tax assessment. Peruvian law defines a tax as a monetary obligation "which does not constitute a penalty for an unlawful action" and the "purpose of taxes is to fund the provision of public goods and services to help redistribute wealth to fight social inequality. In contrast, as the Constitutional Court has repeatedly recognized, "interest serves a distinct function from taxes – the purpose of interest is to "compensate the Government for the losses of the use of money as a result of the taxpayer's default."[126]

115. Peru does not mention *Freeport* in its materials, even though it is currently litigating this very issue with expert evidence on what Peruvian law requires. In *Freeport*, Peru has even admitted that interest is not a tax under Peruvian law.[127] Peru's argument before this Tribunal that the issue of whether interest is a matter of taxation under Peruvian law is "indisputable" and "well-settled" is inconsistent with the ongoing *Freeport* proceeding and simply not credible.

116. *Fourth,* Peru's position in its Rule 41 Submission that interest is a matter of "taxation" under Peruvian law is based on Article 28 of the Tax Code.[128] Article 28 of the Tax Code provides that interest is a component of the tax debt. Peru asks the Tribunal to accept its position is determinative of what Peruvian law requires based only on this single provision.

117. Peru fails to mention that it raised this same argument in *Freeport*. In that case, the claimant has put forward expert evidence to support its argument that this position by Peru is inaccurate and

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[124] **CL-0021,** *Freeport,* Respondent's Reply on Jurisdiction, 8 November 2022, ¶¶ 772-775.

[125] **CL-0020,** *Freeport,* Claimant's Counter-Memorial on Jurisdiction, 13 September 2022, ¶¶ 271-273; **CL-0022,** *Freeport*, Claimant's Rejoinder on Jurisdiction, ¶ 80.

[126] **CL-0020,** *Freeport*, Claimant's Counter-Memorial on Jurisdiction, ¶¶ 272-273. [Emphasis added].

[127] See **CL-0022,** *Freeport*, Claimant's Rejoinder on Jurisdiction, ¶ 79, fn 384.

[128] See Peru's Rule 41 Submission, ¶¶ 90-92.

misleading. The claimant's expert explains that, under Peruvian law, the term "tax debt" encompasses a "broad range" of concepts that the Tax Code bundles together for procedural and administrative convenience and are subject to similar procedures for administration, payment, collection and challenge, even though they are not taxes. For example, Peruvian law classifies royalties as components of the "tax debt" by authorizing SUNAT to administer those laws, but Peru did not contest that the royalty measures are not taxation measures.[129] In other words, just because something is classified as a tax debt does not make such debts a "tax" or a taxation measure. As set out above, Peru has admitted that interest amounts are not taxes *per se*.[130]

118. Scotiabank agrees with the claimant in *Freeport* that Peru's reliance on Article 28 of the Tax Code is inaccurate and misleading. Scotiabank intends to lead expert evidence that will illustrate that Article 28 of the Tax Code does not support Peru's position. Respectfully, it would be inappropriate on this Rule 41 objection to accept Peru's assertion that a single provision of the Tax Code is determinative. As set out at paragraph 58 above, in *Global Trading v. Ukraine*, on a Rule 41 objection, the tribunal emphasized that a claim ought not be summarily dismissed without ensuring "that it has considered <u>all of the relevant materials</u>" and the tribunal should ask itself what other materials might either Party (specifically the Claimant) bring to bear if the question at issue were to be postponed until a later stage of the proceeding?[131] The answer is obvious: expert evidence on Peruvian law is required.

III. The Interest Amount Paid Under Protest is a Covered Investment

119. In its Request for Arbitration, Scotiabank asserts that it has two covered investments in Peru: its investment in Scotiabank Peru and the interest amounts that were paid under protest.[132] With respect to its expropriation claim, Scotiabank argues that the default interest amounts paid under protest have been unlawfully expropriated.[133] Peru does not dispute that Scotiabank's investment in Scotiabank Peru is a covered investment. Rather, Peru's jurisdictional objection is that the Tribunal lacks jurisdiction over Scotiabank's expropriation claim because the interest paid

[129] **CL-0022,** *Freeport*, Claimant's Rejoinder on Jurisdiction, ¶ 81(a).
[130] See **CL-0022,** *Freeport*, Claimant's Rejoinder on Jurisdiction, ¶ 79, fn 384.
[131] **RL-0016**, *Global Trading*, ¶¶ 51, 55-56. [<u>Emphasis</u> added].
[132] Request for Arbitration, ¶ 62.
[133] Request for Arbitration, ¶ 67.

under protest is not a covered investment under the FTA or the ICSID Convention. This objection does not impact Scotiabank's other two claims, FET and National Treatment.[134]

120. Peru raises three arguments in support of its objection. *First,* it incorrectly argues that the interest amounts paid under protest do not meet the definition of investment under Article 847 of the FTA. They do. *Second,* Peru argues that the interest amounts paid under protest do not meet the definition of investment under Article 25 of the ICSID Convention. It is not disputed that Scotiabank has a covered investment through Scotiabank Peru. As a result, Article 25 of the ICSID Convention is met. It is well-established that in assessing jurisdiction for the purposes of Article 25, the Tribunal is to look at the investment as a whole.

121. *Third,* Peru claims that it is manifestly obvious that the substance of Scotiabank's expropriation claim will fail on the merits as Scotiabank does not have a vested property right that is subject to expropriation. This issue turns on the parties' disputed positions regarding Peruvian law. Like its position on taxation measures, Peru asks this Tribunal to simply accept that its characterization of Peruvian law is correct. It cannot do so; this is the very reason disputed factual matters are not to be resolved on Rule 41 objections.

122. In respect of each of these issues, Scotiabank has met the low threshold of presenting tenably arguable positions. Scotiabank submits it will meet the higher threshold of establishing, in fact, that it has a covered investment. But, that is not the standard on this Rule 41 application.

A. The Interest Paid under Protest is an "Investment" under the FTA

123. "Investment" is defined under Article 847 of the FTA. Scotiabank only needs to show that it fits within one of the subparagraphs of this Article to hold a covered investment.[135] The interest Scotiabank paid under protest satisfies the definition of "investment" under subparagraph (h):

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[134] Peru's Rule 41 Submission, ¶ 187.

[135] **RL-0033,** *Lion Mexico Consolidated L.P. v. United Mexican States* (ICSID Case No. ARB(AF)/15/2), Decision on Jurisdiction, 30 July 2018, ¶ 248 ("*Lion Mexico*").

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

124. To qualify as a protected investment under Article 847(h), the investment must be (i) an interest, (ii) arising out of the commitment of capital or other resources in the territory of Peru, (iii) which capital, must have been committed towards economic activity in Peru.[136]

125. *First,* the interest amounts are an "interest." The term "interest" is not defined under the FTA and, as other tribunals have held, must be interpreted broadly as covering a broad range of interests. The term is broad enough to cover both property rights and personal rights.[137] Under Peruvian law, payment under protest is allowed and preserves the payees right to recoup the amounts that were paid.[138] In its Rule 41 Submission, Peru disputes that this is what Peruvian law requires.[139] Disputed factual issues are not to be resolved on a Rule 41 objection.

126. *Second,* the interest amounts arose out of the commitment of capital in Peru and that capital was committed towards economic activity in Peru. In this context, the interest amounts cannot be isolated from Scotiabank's more significant investment in Scotiabank Peru. This is not simply an isolated claim for money, as Peru contends. It was not the result of a one-time transaction. It was linked to the operation of Scotiabank Peru. If Scotiabank Peru did not make the payment, it would

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[136] **CL-0033,** *Lone Pine*, ¶ 347.

[137] **CL-0033,** *Lone Pine*, ¶¶ 355- 356.

[138] Under Article 38 of the Tax Code, undue payments or payments in excess are to be returned by the Tax Administration with interest. Additional provisions in the Civil Code provide for restitution and compensation in the context of undue payment more generally (Articles 1267 and 1954). That means that Scotiabank Peru has a right to the amounts paid, if they were unduly or excessively paid. Scotiabank is not estopped from exercising its rights for the return of those payments, given that it did not "voluntarily" make the payment and made the payment under protest. Both SUNAT and the Constitutional Court have recognized that paying under protest has determined legal effects that are different from those associated with a simple payment: **C-0068**, Constitutional Court judgement in Case N° 2218-2015-PA/TC.

[139] Peru's Rule 41 submissions, ¶ 116.

have faced significant consequences, including the seizure of its assets. This payment is therefore a commitment of capital – it is a payment of money in Peru – that went towards Scotiabank Peru's economic activity in Peru. It was part of its ongoing operations and ensured that its underlying assets and ability to operate were not seized and undermined as a result of the non-payment. The payment was thus associated with Scotiabank Peru's ability to operate and generate revenues.

127. The situation is distinguishable from cases where claims over contractual rights to money were not found to be covered investments under other BITs. As described at paragraph 57 above, in *Global Trading v. Ukraine*, the tribunal found that a contract for the purchase and sale of poultry was a purely commercial transaction that did not qualify as an investment under the BIT or the ICSID convention. Those contracts were not only of limited duration, but oriented towards the purchase and sale of perishable goods. In the present arbitration, Scotiabank's "interest" in the interest paid under protest runs deeper than a limited duration contract for the sale and purchase of goods – such amounts are connected with the underlying investment Scotiabank made in Scotiabank Peru.

128. Peru claims that even if Scotiabank had rights over the default interest, this is simply a "claim for money" that is expressly excluded from the definition of "investment."[140] Article 847 does not exclude "claims for money" generally. Rather, it excludes "claims to money that arise solely from…commercial contracts," "the extension of credit in connection with a commercial transaction," and "<u>any other claims to money, that do not involve the kinds of interests set out in subparagraphs (a) through (h).</u>" As the interest amounts are a "kind of interest" that falls within one of the other subparagraphs of Article 847, this exclusion does not apply.

129. As set out above, the role on of the Tribunal on this Rule 41 objection is not to determine this jurisdictional objection. If Scotiabank has a "tenable argument," Peru's objection must fail.

B. The Interest Paid under Protest is an "Investment" under the ICSID Convention

130. There are two reasons Peru's argument with respect to the ICSID Convention must fail. *First,* the ICSID Convention is inapplicable in determining whether an investment is capable of

[140] Peru's Rule 41 Submission, ¶¶ 109, 118.

being expropriated. *Second*, in any event, the interest amounts paid under protest meet the requirements of Article 25 of the ICSID Convention.

131. ***ICSID Convention is inapplicable***. Article 25 of the ICSID Convention provides that "[t]he jurisdiction of the Centre shall extend to any legal dispute arising directly out of an investment" between the parties.[141] Peru seeks to apply Article 25 of the ICSID Convention to aspects of Scotiabank's claim – here the Expropriation Claim – instead of the dispute as a whole. Peru's approach is flawed in so far as it conflates two distinct issues.

132. *First,* the Tribunal is to determine if it has jurisdiction over the legal dispute under Article 25 of the ICSID Convention. The task is to look at the investment and dispute as a whole, even if only a subset of that investment is alleged to have been expropriated.[142] Here, the dispute arises out of Scotiabank's investment in Scotiabank Peru and there is no dispute that Scotiabank Peru is a covered investment. That is a complete answer.

133. *Second,* assuming that there is jurisdiction, the Tribunal will then go on to assess whether Scotiabank has established its claim for expropriation. The threshold question for determining if an expropriation has been established is whether Scotiabank had rights capable of being expropriated.[143] In answering that question, the Tribunal will look to Peruvian law.[144] However, Article 25 of the ICSID Convention is not relevant to this inquiry. Peru has not cited a single case where, in applying the test for expropriation, a tribunal has applied Article 25 of the ICSID Convention. The weight of authorities stands against it.

134. Numerous tribunals have addressed this issue and held that, in assessing the jurisdictional issue under Article 25, the tribunal is to look at the investment as a whole, even if only a component of that investment is alleged to be expropriated.[145]

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[141] **CL-0051**, ICSID Article 25.

[142] **CL-0034,** *Magyar Farming Company Ltd, Kintyre Kft and Inicia Zrt v. Hungary* (ICSID Case No. ARB/17/27), Award, 13 November, 2019, ¶¶ 251, 260, 279 ("*Magyar*").

[143] **CL-0010,** *Crystallex International Corporation v. Bolivarian Republic of Venezuela* (ICSID Case No. ARB(AF)/11/2) Award, 4 April, 2016, ¶ 659 ("*Crystallex*").

[144] See Peru's Rule 41 Submission, ¶ 134.

[145] **CL-0028,** *Inmaris Perestroika Sailing Maritime Services GmbH and others v. Ukraine* (ICSID Case No. ARB/08/8), Decision on Jurisdiction, 8 March 2010, ¶ 92; **CL-0006,** *Cairn Energy PLC and Cairn UK Holdings*

135. For example, in *Magyar Farming v. Hungary*, in assessing whether Article 25 of the ICSID Convention was met, the tribunal looked at the claimants' investment as a whole and found there was no dispute that the claimants' farming business was an investment. The tribunal held that, "[i]t is well established that in the investment treaty jurisprudence that, for the purposes of subject-matter jurisdiction, <u>the existence of an investment must be assessed holistically.</u>"[146] The tribunal undertook that holistic assessment even though the farm as a whole was not the subject of the expropriation claim; the claimants continued to derive profit from it. Rather, the expropriation claim was for leasehold rights over the land.[147] The tribunal then assessed whether those leasehold rights were expropriated and in so doing, looked to domestic law to determine if they were capable of being expropriated. Article 25 of the ICSID Convention was not relevant to that latter analysis.[148]

136. Consistent with this line of authorities, there are numerous cases where, in determining if there is an expropriation on the merits, the tribunal assessed if there was an investment capable of being expropriated. Article 25 of the ICSID Convention did not arise in any of those analyses.[149]

137. ***ICSID Convention Test is Met***. In any event, the interest amounts paid under protest meet the test for "investment" under Article 25 of the ICSID Convention.

Limited v. The Republic of India (PCA Case No. 2016-07) Final Award, 21 December 2020, ¶ 712; **CL-0027,** *Infinito,* Award, 3 June 2021, ¶ 176, fn 219; **CL-0043,** *Saipem S.p.A. v. People's Republic of Bangladesh* (ICSID Case No. ARB/05/7) Decision on Jurisdiction, 21 March 2007, ¶¶ 112-114, 129-134 ("*Saipem*") (in assessing if there was an investment pursuant to Article 25 of the ICSID Convention, the tribunal looked at the claimant's investment as a whole and held the notion of investment under that provision must be "understood as covering all the elements of the operation." The tribunal then went on to consider if a subset of that investment, an ICC Award, was expropriated); **CL-0036,** *Ioan Micula, Viorel Micula and others v. Romania* (ICSID Case No. ARB/05/20) Decision on Jurisdiction and Admissibility, 24 September 2008, ¶¶ 28-31, 118-128 (like this case, Romania did not dispute the claimants' shareholding in corporate companies was an investment. The tribunal held that was sufficient at the jurisdictional juncture, to determine if there was an investment pursuant to Article 25 of the ICSID Convention and the BIT. The claimants argued that their interest in investment incentives was expropriated. The tribunal held whether those were capable of being expropriated is to be determined on the merits, not at the jurisdictional phase).

[146] **CL-0034,** *Magyar*, ¶¶ 249, 272-276. [<u>Emphasis</u> added].

[147] **CL-0034,** *Magyar*, ¶¶ 251, 260, 279.

[148] **CL-0034,** *Magyar*, ¶¶ 338-363.

[149] **CL-0033,** *Lone Pine*, ¶ 503; **CL-0010,** *Crystallex*, ¶¶ 659-665; **CL-0014,** *Eco Oro Minerals Corp. v. Republic of Colombia* (ICSID Case No. ARB/16/41), Decision on Jurisdiction, Liability and Directions on Quantum, 9 September 20201, ¶¶ 440, 617, 623-624; **CL-0008,** *Cargill, Incorporated v. United Mexican States* (ICSID Case No. ARB(AF)/05/2) Award, 18 September 2009, ¶¶ 349-354.

138. The *Salini* factors provide that "investment" infers (i) a contribution, (ii) a certain duration, and (iii) a participation in the risks of the transaction.[150] These factors are guidelines.[151] They are met in this case. A contribution can take any form.[152] Here, it is a contribution in the form of a payment to the state. This was a commitment of capital for an economic benefit, including the prevention of deleterious precautionary measures against Scotiabank Peru's assets.

139. As for duration, duration is a flexible term that can be anything from a couple months to a couple of years.[153] Scotiabank Peru made the payment under protest understanding that it may take some reasonable amount of time for its judicial challenges to proceed (although it did not expect the Constitutional Court to wait four years to rule on the case). The payment was made in 2013 and the Constitutional Court did not render a decision until 2021.

140. The risk criterion was also met. Scotiabank Peru faced significant risk by not making the payment, including the seizure of its assets. Furthermore, when Scotiabank Peru made the payment, it assumed the risk that it may not succeed in its judicial challenge, assuming that determination was made after a fair and unbiased process (which it was not). As recognized by tribunals, the very existence of a dispute is an indication of risk.[154] That risk materialized in the judicial impropriety that led to the 2021 Constitutional Court Decision.

141. Peru relies upon the fact that the interest payment was a one-time transaction.[155] However, that does not detract from its quality as an investment in this case. There are numerous cases where the tribunal found a judgment or credit for money owed was an investment when considered in the context of the claimant's operations.[156] For example, in *Saipem v. Bangladesh*, the tribunal found

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[150] **RL-0003**, *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, ¶ 52.

[151] **CL-0001,** *Ambiente Ufficio SpA and others (formerly Giordano Alpi and others) v Argentine Republic* (ICSID Case No. ARB/08/9) Decision on Jurisdiction and Admissibility, 8 February 2013, ¶ 479; **CL-0011,** *Deutsche Bank AG v. Democratic Socialist Republic of Sri Lanka* (ICSID Case No. ARB/09/2) Award, 31 October, 2012, ¶ 294 ("*Deutsche Bank*").

[152] **CL-0011,** *Deutsche Bank*, ¶ 297.

[153] **CL-0011,** *Deutsche Bank*, ¶ 303.

[154] **CL-0011,** *Deutsche Bank*, ¶ 301.

[155] Peru's Rule 41 Submission, ¶ 128.

[156] See **CL-0023,** *Marco Gavazzi and Stefano Gavazzi v. Romania* (ICSID Case No. ARB/12/25) Decision on Jurisdiction, Admissibility and Liability, 21 April 2015, ¶ 120 (an award which compensated for an investment was found to be a protected investment; the tribunal reasoned the award "forms part of the Claimants' overall

the actions of the Bangladeshi courts were expropriatory when they deprived the claimant of the benefit of an ICC arbitration award. This was tantamount to taking the residual contractual rights arising from the investments as crystallized in the ICC Award.[157] Even though the ICC Award was a judgment for the payment of money, it was capable of being expropriated and was considered as part of the claimant's overall operations.

142. Peru cites *Poštová banka and Istrokapital v. Greece*.[158] In that case, the tribunal found that government bonds were not a protected investment under the BIT. There was no evidence that purchasing the bonds had any relationship to an economic venture undertaken by the claimant in the host state. The purchase of the bonds was analogous to a regular purchase and sale transaction.[159] Furthermore, this case is inconsistent in its result with other tribunals that found that bonds did fall within the treaty's definition of investments. However, the tribunal recognized that in this case, the Slovakia-Greece BIT contained a much narrow definition of investment.[160]

143. Unlike a single payment of money, an investment is linked to an economic venture in the host state.[161] In this case, the interest paid under protest is linked to the continued operation of Scotiabank Peru. But for the payment under protest, Scotiabank Peru would have been faced with significant financial and operational consequences. Scotiabank gave Peru the default interest under protest so that Peru would not take something else – Scotiabank Peru's assets.

investments"); **CL-0018,** *Fedax N.V. v. the Republic of Venezuela* (ICSID Case No. ARB/96/3), Decision of the Tribunal on Objections to Jurisdiction, ¶¶ 21-43 (the tribunal found the purchase of promissory notes was an investment. While they were procured through a one-time payment, they represented credit that was put to work through a period of time for Venezuela's financial needs); **CL-0009,** *Ceskoslovenska Obchodni Banka, a.s. v. The Slovak Republic* (ICSID Case No. ARB/97/4), Decision of the Tribunal on Objections to Jurisdiction, 24 May 1999, ¶¶ 78-81 (a loan constituted an investment and could not be disassociated from the other transactions involved in restructuring the bank); **CL-0011,** *Deutsche Bank*, ¶¶ 292-312, 521 (the prevention of payments under a hedging agreement was found to be expropriatory. The tribunal rejected the argument that there was no investment because this was just an agreement to pay an amount of money).

[157] **CL-043,** *Saipem*, ¶¶ 129-134; **CL-044**, *Saipem S.p.A. v. The People's Republic of Bangladesh*, ICSID Case No. ARB/05/07, Award, June 30, 2009, ¶ 129.

[158] Peru's Rule 41 Submission, ¶ 126.

[159] **RL-0025**, *Poštová banka, a.s. and Istrokapital SE v. Hellenic Republic* (ICSID Case No. ARB/13/8, Award, 9 April 2015, ("*Poštová banka")* ¶¶ 361-371.

[160] **RL-0025**, *Poštová banka*, ¶¶ 298-316.

[161] **CL-0050,** *Yukos Capital SARL v. The Russian Federation*, PCA Case No. 2013-31, Interim Award on Jurisdiction, 18 January 2017, ¶ 434.

C. The Expropriation Claim is not Manifestly Without Legal Merit

144. Peru's third argument is that even if the Tribunal has jurisdiction over this claim, the substance of the claim manifestly lacks legal merit. Peru claims that there is no right capable of being expropriated because, under Peruvian law, payment "under protest is not provided or recognized to have legal effects.[162] Scotiabank disagrees. As set out at paragraph 125 above, payment under protest is permitted under Peruvian law and Scotiabank Peru paid the amounts to prevent the seizure of its assets. Under Peruvian law, Scotiabank Peru has the right for this amount to be reimbursed, plus interest. In any event, this is a disputed factual issue that cannot be determined on a Rule 41 objection because it requires a full and proper record to assess.

IV. Scotiabank has Complied with Article 823 of the FTA

145. Peru's fourth and fifth jurisdictional objections both relate to Article 823 of the FTA. Peru alleges that Scotiabank has failed to meet the mandatory requirements of submitting a claim to arbitration under Article 823 of the FTA. *First*, Peru alleges that all three claims (FET, national treatment and expropriation) must fail as Scotiabank has not validly and effectively waived its right to continue proceedings before the Peruvian courts. *Second*, Peru alleges that the expropriation claim is time-barred. Both objections depend on Peru's mischaracterization of this claim as one challenging the 1999 SUNAT Decision. These are each addressed in turn below.

A. Scotiabank's Waiver is Valid and Effective

146. Under Article 823 of the FTA, a claimant must "waive their right to initiate or continue before any administrative tribunal or court under the law of either Party, or other dispute settlement procedures, any proceedings with respect to the <u>measure</u> of the disputing Party that is alleged to be a breach."[163] In other words, a claimant does not have to waive their right to continue all court actions, but only those that relate to the same measure that is impugned in the arbitration.[164]

[162] Peru's Rule 41 Submission, ¶¶ 133-139.

[163] **C-0001,** Canada-Peru FTA, Article 823(1)(c) and 823(2)(c). [<u>Emphasis</u> added].

[164] See **CL-0029,** *International Thunderbird Gaming Corporation v. The United Mexican States,* Arbitral Award, 26 January 2006, ¶¶ 114, 116 ("*International Thunderbird*"); See also **CL-0032,** *Lion Mexico Consolidated L.P. v. United Mexican States* (ICSID Case No. ARB(AF)/15/2) Award 20 September 2021, ¶ 806 "(*Lion Mexico*, Award").

147. In this case, there is no dispute that Scotiabank submitted with its RFA letters of waiver from both itself and Scotiabank Peru.[165] Those waivers are unequivocal and unconditional and state that Scotiabank and Scotiabank Peru:

> Consent to the arbitration in accordance with the procedures set out in the [FTA], and waive Scotiabank's right to initiate or continue before any administrative tribunal or court under the law of either Party to the FTA, or other dispute settlement procedures, any proceedings with respect to the measure of the Republic of Peru that is alleged to be a breach referred to in Article 819 or 820, except for proceedings for injunctive, declaratory or other extraordinary relief, not involving the payment of damages, before an administrative tribunal or court under the law of the Republic of Peru.[166]

148. The RFA provides that these waivers do "not apply to the Tax Appeal, which is pending, as that proceeding does not relate to measures that are alleged to be in breach of the FTA."[167] Peru says for this reason, the waivers do not comply with the FTA.[168]

149. Peru's argument is premised on its mischaracterization of Scotiabank's claim as relating to a challenge of the 1999 SUNAT Decision and the underlying tax debt imposed. Peru claims that the alleged breaches "are inextricably linked to the ongoing Tax Appeal" and alleges that if Scotiabank prevails in the Tax Appeal, it will be repaid the full amount paid under protest and the object of this arbitration will be rendered moot and thus raises the risk of double recovery and contradictory decisions.[169] There are a number of reasons this argument must be dismissed.

150. The language of Article 823 of the FTA is clear that the waiver need only extend to local proceedings "with respect to the measure of the disputing Party that is alleged to be a breach."[170] Other investment tribunals have recognized that the purpose of such waiver provisions is to "prevent a party from pursuing concurrent domestic and international remedies," which could

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[165] Peru's Rule 41 Submission, ¶ 149; RFA, ¶ 76(vi); **C-0044,** Consent to Arbitration and Waiver of Scotiabank; **C-0032,** Consent to Arbitration and Waiver of Scotiabank Peru S.A.A.

[166] **C-0044,** Consent to Arbitration and Waiver of Scotiabank; **C-0032,** Consent to Arbitration and Waiver of Scotiabank Peru S.A.A..

[167] RFA, ¶ 76(vi), fn 16.

[168] Peru's Rule 41 Submission, ¶ 151.

[169] Peru's Rule 41 Submission, ¶¶ 157-159.

[170] **C-0001**, Canada-Peru FTA, Article 823(1)(c) and 823(2)(c). [Emphasis added].

"either give rise to conflicting outcomes…or lead to double redress for the same conduct or measure."[171] Here, the 2021 Constitutional Court Decision is a different measure and concerns different conduct than what is in issue in the Tax Appeal.

151. Scotiabank has already set out at length above why Peru's mischaracterization of its claim is wrong and should not be permitted. This case is not about the underlying 1999 SUNAT Decision or the imposition of the tax debt; that is at issue in the Tax Appeal. This case is about the 2021 Constitutional Court Decision and the unfair judicial treatment to which Scotiabank was subject. The issue before this Tribunal is whether the 2021 Constitutional Court Decision breaches the FTA. That issue is not before any other court or tribunal and there is no risk of contradictory decisions. Furthermore, the underlying subject matter that was before the Constitutional Court in the Default Interest Appeal is not at issue in the Tax Appeal. There simply is no overlap in "measures," as required by Article 823.

152. Peru's allegation that there is a risk of double recovery is misplaced. There are three key points to note. *First*, if Scotiabank succeeds in the Tax Appeal, it may not recover the amounts paid under protest, including the default interest amounts. That outcome does not follow a successful result.[172] *Second*, under Peruvian law, the judiciary has denied that there was a risk of contradictory decisions where a plaintiff commences an (i) *amparo* proceeding to challenge the collection of default interest (like the Default Interest Appeal) and (ii) a judicial process to challenge the tax debt imposed by SUNAT (like the Tax Appeal).[173] They relate to two separate issues. This has also been recognized by the judiciary in Scotiabank Peru's case specifically.[174]

[171] **CL-0029,** *International Thunderbird*, ¶¶ 114, 116; See also **CL-0032,** *Lion Mexico*, Award, ¶ 806.

[172] The Tax Appeal is currently an *amparo* before the Constitutional Court challenging an underlying judicial ruling. Scotiabank Peru challenged the imposition of the underlying tax debt through a contentious administrative proceeding. On July 4, 2017, the Supreme Court of Peru upheld the imposition of the value added taxes against Scotiabank Peru. Scotiabank Peru filed an *amparo* challenging that decision. If Scotiabank Peru is successful before the Constitutional Court, there are multiple possibilities. The Supreme Court may be asked to issue a new decision, and that new decision may or may not be favourable to Scotiabank Peru. Even if favourable to Scotiabank Peru, the Court may not order the repayment of the sums but may ask SUNAT to issue its decision again. That again may or may not be favourable to Scotiabank Peru. None of this relates to the issue that was raised in the Default Interest Appeal of whether or not the accrual of default interest violated Scotiabank Peru's constitutional rights.

[173] **C-0063**, Resolution No. 7 issued by the Third Civil Chamber; **C-0065,** Resolution No. 5 issued by the Third Civil Chamber.

[174] **C-0066**, File No. 4082-2012-PA/TC, Medina de Baca caselaw, Sentence issued on September 21, 2016.

153. *Third*, even if Scotiabank ultimately recovered such sums, there is no risk of double recovery. Scotiabank Peru would not seek to recover any of the amounts that overlapped with damages ordered in this arbitration. Even if the damages sought in this case theoretically overlap with the amounts that may be recovered in the Tax Appeal, that does not mean, as Peru suggests, that the measures challenged in both proceedings are the same. They are not. It simply means that the loss to Scotiabank overlaps, but the *harm* caused to Scotiabank arises from distinct measures. Notably, Article 823 does not say that a claimant must waive all proceedings with respect to the same *injury or loss*, but with respect to the same *measure*.

154. There have been many investment arbitrations where there was a possibility of double recovery because there were overlapping damages in parallel proceedings. Tribunals have recognized that such risk is not a reason to dismiss a claim on the basis of lack of jurisdiction and "any eventual award … could be fashioned in such a way to prevent double recovery."[175] For example, in *Urbaser v. Argentina*, the tribunal recognized the theoretical risk of double recovery and noted that such risk "is inherent in many investment disputes that also raise, directly or indirectly, a possible option for recovery on the purely domestic level" but that does not restrict the jurisdiction of the tribunal. This is a theoretical argument because the granting of compensation in either sphere would impact the granting of compensation in the other.[176] Tribunals have accepted undertakings from the claimant that it will not seek double recovery in fashioning awards that will prevent that outcome.[177]

155. Scotiabank is not seeking double recovery and is willing to provide an undertaking to that effect. If it is successful in the Tax Appeal and ultimately achieves reimbursement (which, as set

[175] **CL-0045,** *Suez, Sociedad General de Aguas de Barcelona S.A., and InterAguas Servicios Integrales del Agua S.A. v. Argentine Republic* (ICSID Case No. ARB/03/17) Decision on Jurisdiction, 16 May 2006, ¶ 51; **CL-0047,** *Urbaser* ¶¶ 253-54; **CL-0049,** *Webuild S.p.A. (formerly Salini Impregilo S.p.A.) v. Argentine Republic* (ICSID Case No. ARB/15/39) Decision on Jurisdiction and Admissibility, 23 February, 2018, ¶ 173; **CL-0007,** *Camuzzi Int'l S.A. v. Argentine Republic* (ICSID Case No. ARB/03/2) Decision on Objections to Jurisdiction, 11 May 2005, ¶ 91; **CL-0046** *Unión Fenosa Gas S.A. v. Egypt* (ICSID Case No. Arb/14/4) Award, 31 August, 2018 ¶¶ 10.13, 10.142, 11.33 ("*Unión Fenosa*");**CL-0031,** *Lauder v. Czech Republic*, UNCITRAL, Final Award, 3 September 2001, ¶172 ("*Lauder*"); **CL-0024,** *Hochtief v. Argentina* (ICSID Case No. ARB/07/31) Decision on Liability, 29 December 2014, ¶ 180.

[176] **CL-0047,** *Urbaser*, ¶ 253. See also **CL-0025,** *Impregilo S.p.A. v. Argentine Republic,* ICSID Case No. ARB/07/17, Award, June 21, 2011, ¶ 139.

[177] See **CL-0031,** *Lauder*, ¶172; **CL-0046,** *Unión Fenosa,* ¶¶ 6.82, 10.142, 11.33.

out above, may not be the result even if it is successful in the Tax Appeal), then it will set off against that amount any damages ordered and paid pursuant to this arbitration.

156. The situation is distinguishable from *Waste Management v. Mexico*, which Peru cites in favour of its position on the waiver objection.[178] In *Waste Management*, the claimant submitted a waiver that attempted to preserve its right to dispute settlement proceedings involving allegations that Mexico had violated duties imposed by <u>sources of law other than the specific chapters of NAFTA that were the subject of the request for arbitration</u>.[179] The claimant's waiver would have allowed it to institute and continue proceedings that treaded the same factual ground as the treaty arbitration, so long as it could fit those claims under Mexico's domestic laws. That is entirely different than the circumstances of the waiver in this case. Here, Scotiabank's waiver unconditionally waves the right to continue proceedings related to the measures impugned in this arbitration, namely the 2021 Constitutional Court Decision.

B. Scotiabank's Expropriation Claim is not Time-Barred

157. The 39-month limitation period under Article 823 starts to run on 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. Peru claims that the expropriation claim is time barred. According to Peru, the expropriation of the default interest payments did not crystallize with the 2021 Constitutional Court Decision. Rather, the measure that purportedly crystallized the alleged expropriation arose in November 2013, when SUNAT ordered Scotiabank Peru to pay the 1999 SUNAT Decision, including the default interest amounts.[180]

158. Peru's position must fail for two reasons. *First*, Peru's position is internally inconsistent as it has only challenged the expropriation claim, and not the FET or national treatment claims. All claims are based on the same measure: the 2021 Constitutional Court Decision.

159. *Second*, as set out above, Article 823 requires both knowledge of the alleged breach and knowledge of the loss or damage. The alleged breach relates to the Constitutional Court's conduct

[178] Peru's Rule 41 Submission, ¶¶ 153-155, 165.

[179] **RL-0002**, *Waste Management, Inc. v. United Mexican States* (ICSID Case No. ARB(AF)98/2), Arbitral Award, 2 June 2000, ¶¶ 26-30.

[180] Peru's Rule 41 Submission, ¶¶ 37, 170, 175.

in respect of Scotiabank Peru's judicial proceeding. Peru does not allege that conduct occurred outside the limitation period, nor could it. That is a complete answer.

160. In any event, as it relates to the loss or damage that Scotiabank incurred, the loss of the amounts paid under protest only crystallized with the 2021 Constitutional Court Decision. While the Constitutional Court proceeding was pending, the amounts paid to Peru under protest were not final and irreversible. Scotiabank Peru had a right for it to be reimbursed plus interest. However, upon the dismissal of Scotiabank Peru's claim by the 2021 Constitutional Court Decision, Scotiabank Peru finally and irreversibly lost the right to recover those amounts. International jurisprudence is clear that in respect of judicial expropriations, the loss does not crystallize while an appeal on the matter is pending. Rather, the expropriation only occurs with the final appellate decision.[181] As explained by the tribunal in *Infinito v. Costa Rica*, "[a] judicial expropriation can only occur when a final judgment is rendered or when the time limit to appeal has expired."[182]

161. Peru has not cited a single award in which a tribunal has concluded that the clock for a limitation period begins to run with a decision that is subject to an appeal. Peru cites two cases which do not support its position.

162. In *Alan Berkowitz v. Costa Rica*, the claimants' properties within a national park were allegedly unlawfully expropriated by Costa Rica.[183] Peru claims that this is an example of a case where the underlying administrative decision was time-barred, even though the taking of the property was followed by court proceedings.[184] This misrepresents what happened in this case. In that case, according to the claimants' own pleading, the last of the line of measures that permanently deprived them of their property rights happened three months before the cut-off date.[185] There were not ongoing court proceedings that suspended when that expropriatory conduct

[181] **CL-0027,** *Infinito*, Award, ¶¶ 238, 239; **RL-0021**, *Apotex Inc. v. United States of America* (ICSID Case No. UNCT/10/2), Award on Jurisdiction and Admissibility, 14 June 2013, ¶¶ 315-316, 333-334 ("*Apotex*"); **CL-0042** *Rumeli Telekom A.S. and Telsim Mobil Telekomunikasyon Hizmetleri A.S. v. Republic of Kazakhstan* (ICSID Case No. ARB/05/16) Award, July 29, 2008, ¶¶ 795-796; **CL-0016,** *Eli Lilly,* ¶ 170.

[182] **CL-0027,** *Infinito*, Award, ¶¶ 238, 239. [Emphasis added].

[183] **RL-0031**, *Aaron C. Berkowitz and others v. Republic of Costa Rica* (ICSID Case No. UNCT/13/2) Interim Award (Corrected) 30 May 2017 ("*Berkowitz*").

[184] Peru's Rule 41 Submission, ¶ 177.

[185] **RL-0031**, *Berkowitz*, ¶¶ 114-115, 152, 297.

took effect. Rather, there were court proceedings to determine the quantum of compensation to be paid for those expropriations, but they were not appeals that suspended the expropriation.[186]

163. The other case Peru cites is *Apotex v. USA*. Peru claims that in that case, the expropriation claim was time-barred because the decision of the FDA was issued before the cut-off date and the subsequent court proceedings did not change that outcome.[187] What the tribunal instead held was that any claim based on the FDA decision *itself* was time-barred.[188] However, the tribunal found that there was no time-bar with respect to the subsequent court challenges of the FDA decision and "clearly, any claim that these judicial decisions constituted a breach of the NAFTA would require at least some consideration of the prior administrative and judicial decisions."[189]

164. The tribunal in *Apotex* drew a distinction based on the measure alleged to breach the treaty. Where the underlying decision is itself alleged to breach the treaty, the date of the alleged breach and resulting loss happens is the date of that decision. However, where the challenged measure is the subsequent court decision, then that is the date of the alleged breach and loss.[190]

165. Here, there is no allegation that the FTA was breached by conduct that occurred in 2013. Rather, the alleged breach and loss occurred with the 2021 Constitutional Court Decision. It was only at that time that the interest amounts paid under protest were permanently taken. The case law clearly establishes that Scotiabank's position is correct. However, as set out above, Scotiabank need not even be "correct" to defeat the Rule 41 objection. Peru's position is a far cry from being based on indisputable legal principles. Indeed, the well-established legal principles show that it is Peru's objection that manifestly lacks legal merit. Peru is simply seeking to argue the merits of its jurisdictional objection. It may not do so. This is not the proper use of a Rule 41 objection.

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[186] **RL-0031**, *Berkowitz,*¶¶ 246, 274-280.

[187] Peru's Rule 41 Submission, ¶ 178.

[188] **RL-0021**, *Apotex*, ¶ 318: "In other words, Apotex cannot now assert that the FDA decision constituted – in and of itself – a breach of NAFTA.." [emphasis in original].

[189] **RL-0021**, *Apotex,* ¶ 333.

[190] **RL-0021**, *Apotex,* ¶ 334.

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Respectfully submitted on behalf of
The Bank of Nova Scotia

[Signed]

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[Signed]

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