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 REJOINDER TO THE RESPONDENT'S RULE 41 SUBMISSION

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PART ONE. OVERVIEW

1. ***Peru Has Not Met its Burden***. This is a challenge under Rule 41 of the ICSID Rules. It is not a preliminary jurisdictional objection or a determination of the merits of Peru's defences. Although Scotiabank is confident it will succeed on the merits of each of Peru's objections, that is not the question before the Tribunal. Rather, the question is whether Scotiabank's claim is "*manifestly without legal merit*." Peru bears the exacting burden of showing that it is "*clear and obvious*" that the claim is "*patently unmeritorious*" and that Scotiabank has no "*tenabl[y] arguable*" case.[1] As put by tribunal in *Mainstream v. Germany*, "*[t]he Respondent must be able to show the Tribunal that the claim was lost before it left the start line*."[2]

2. In its Reply Rule 41 Submissions ("**Peru's Reply**"), Peru requires 103 pages to explain to the Tribunal why it is clear and obvious Scotiabank's claim must fail. Given the high standard on a Rule 41 challenge, it has been rarely invoked and even more rarely applied to dismiss a claim. Yet, Peru claims that all <u>five</u> of its objections meet this "*demanding and rigorous*" standard.[3] As already explained in Scotiabank's Response to the Rule 41 Submissions ("**Scotiabank's Response**"), Peru is seeking to use the Rule 41 challenge to litigate essentially all of its preliminary objections. This is not appropriate. This undermines the purpose of Rule 41, which is to prevent the waste of time and resources on a claim that is so "*manifestly and fundamentally defective*" that it calls for no further defence before it is dismissed.[4] Rule 41 is not to be used by respondents simply because they are of the one-sided view that they have strong defences.

3. As set out in Scotiabank's Response, this case is about the unfair judicial process before the Constitutional Court that resulted in the 2021 Constitutional Court Decision. Scotiabank pleads that the 2021 Constitutional Court Decision is deeply flawed, unfair and the result of a politically tainted judicial process. As a result, Scotiabank has pleaded three breaches of the Canada-Peru

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[1] **CL-0037**, *MOL v. Croatia*, Decision on Respondent's Application under ICSID Arbitration Rule 41(5), December 2, 2014, ¶ 44 ("***MOL v. Croatia***"); **RL-0035**, *Lotus Holding Anonim Sirketi v. Republic of Turkmenistan*, ICSID Case No. ARB/17/30, Award, 6 April 2020, ¶ 159 ("***Lotus***"); **CL-0040**, *PNG Sustainable Development Program v. Independent State of Papua New Guinea*, Decision on Objection under Rule 41, October 28, 2014, ¶ 88 ("***PNG***"); **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, 105 ("***Trans-Global***").

[2] **RL-0074**, *Mainstream Renewable Power, Ltd. et al. v. Federal Republic of Germany*, ICSID Case No. ARB/21/26, Decision on Respondent's Application under Rule 41(5), 18 January 2022, ¶¶ 81, 96 ("***Mainstream***").

[3] **CL-0040**, *PNG*, ¶ 88.

[4] **RL-0035**, *Lotus*, ¶ 159.

Free Trade Agreement ("**FTA**"): the FET Claim, the Expropriation Claim, and the National Treatment Claim. In both its Rule 41 Submissions and its Reply, Peru seeks to recharacterize this claim as one about a tax debt imposed by SUNAT in 1999. It cannot do so. That is not the claim that has been brought by Scotiabank.

4. None of Peru's numerous objections meet the high threshold on a Rule 41 challenge. Peru's objections are based on contested interpretations of Peruvian law that will require expert evidence to assess, novel and disputed matters of treaty interpretation that will be informed by the *travaux prépatoires*, and/or mischaracterizations of the measures actually challenged by Scotiabank. None of them involve applying settled principles of law to undisputed facts, as required.[5] In summary:

(a) Financial Institutions. Peru argues that the Tribunal lacks jurisdiction over the FET Claim and National Treatment Claim because they involve measures relating to a financial institution. This turns on a novel and disputed matter of treaty interpretation. This issue has not previously been addressed by the international authorities (indeed, the only case that does exist supports Scotiabank's position). The *travaux prépatoires* will be important in addressing this claim, particularly given that the parties dispute the purpose of Chapter 11 of the FTA and the scope of the language chosen by the state parties to the treaty.

(b) Taxation Measures. Peru argues that the Tribunal lacks jurisdiction over the FET Claim and the Expropriation Claim because the claims relate to "taxation measures." This requires the Tribunal to grapple with disputed facts and unsettled legal principles. The parties dispute whether the subject matter before the Constitutional Court, the accrual of default interest, is a matter relating to "taxation" under Peruvian law. The substance of Peruvian law is a contested factual matter and tribunals are not to resolve factual disputes on a Rule 41 challenge. The international legal authorities also do not support Peru's broad interpretation of the ordinary meaning of "taxation measures."

(c) Covered Investment. Peru argues the Expropriation Claim must fail because the interest amounts paid under protest are not a covered investment and, in any event, are not

[5] See ¶¶ 19-26 below.

a right capable of being expropriated. This objection turns on disputed interpretations of Peruvian law as to what rights Scotiabank has to these amounts.

(d) Waiver. Peru argues that Scotiabank has not submitted a valid and effective waiver because of the Tax Appeal, which challenges SUNAT's decision to impose the tax debt. This objection is premised on the mischaracterization of Scotiabank's claim. The 2021 Constitutional Court Decision is distinct from the measures challenged 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. This also turns on a mischaracterization of the nature of Scotiabank's claim. Scotiabank has not challenged the 2013 administrative decision by Peru to demand payment of the default interest amounts. It has challenged the unfair judicial process before the Constitutional Court and that conduct arose within the limitation period.

5. In its Reply, Peru recognizes that many of its objections turn on disputed interpretations of Peruvian law. Yet, Peru puts forward its one-sided characterization of what Peruvian law requires and asserts that expert evidence is not required because the Tribunal can accept as true Peru's unproven and disputed interpretation of foreign law. Peru also claims it is appropriate to summarily determine novel and disputed matters of treaty interpretation without reference to the *travaux prépatoires*, again asking the Tribunal to accept the truth of its position without evidence. None of this is appropriate on a Rule 41 objection. Scotiabank has rights under the FTA and is entitled to avail itself of those rights and to have an opportunity to be heard. Due process requires that Scotiabank's claim proceed.

6. ***Peru's Inflammatory Accusations***. In its Reply, Peru relies on inflammatory rhetoric and makes serious unfounded accusations of misconduct against Scotiabank. Throughout its Reply, Peru accuses Scotiabank of acting "*strategically*" and "*purposely*" to "*grossly misrepresent*" and "*distort*" the legal authorities, Peru's position and/or Peruvian law.[6] Peru even accuses Scotiabank

[6] See Peru's Reply Rule 41 Submissions, ¶¶ 4, 7, 18, 131, 271, 290, 316, 317.

of acting "*abusively*" with respect to its reliance on the pleaded facts.[7] Peru accuses Scotiabank of tactics that seek to "*muzzle*" Peru and "*make a mockery of the consent requirements*" of the treaty.[8]

7. These assertions are nothing more than rhetoric. Scotiabank strongly rejects both the use of such language and the accuracy of these statements made by Peru; Scotiabank responds to them below. It is not appropriate to level inflammatory attacks, particularly allegations of "*abusive*" conduct, simply when parties have differing legal and factual positions.

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

8. As set out in Scotiabank's Response, the parties agree on the general principles that apply to a Rule 41 objection.[9] Despite this general agreement, in its Reply, Peru alleges that Scotiabank "*distort[s] the standard applicable to Rule 41 objections beyond recognition*" and would "*mak[e] any objections under it impossible*."[10] Peru raises three specific issues with respect to the legal standard. Each of these issues is addressed below. In short, Peru's claim that the standard is too high is simply a complaint against the well-established threshold. The standard is indeed exacting – as it should be, given the extreme outcome of summarily dismissing a case.

I. The Scope of Factual Review is Limited

9. Peru's Reply raises three issues with respect to the scope of factual review.

10. ***The Tribunal Must Accept the Plausible Facts Presented by the Claimant***. The parties agree on the limited scope of factual review on a Rule 41 objection: Rule 41 is concerned with cases that manifestly lack ***legal*** merit, *i.e.*, at this early stage of the proceedings, without any sufficient evidence, the Tribunal cannot on a Rule 41 objection decide disputed facts.[11]

11. In its Reply, Peru agrees with Scotiabank that the Tribunal must accept *prima facie* the plausible facts as presented by the claimant,[12] but claims that Scotiabank has "*posit[ed]*" that the

[7] See Peru's Reply Rule 41 Submissions, ¶¶ 63, 64, 203, 271.
[8] See Peru's Reply Rule 41 Submissions, ¶¶ 131, 171, 291.
[9] See Scotiabank's Response, ¶ 50.
[10] Peru's Reply Rule 41 Submissions, ¶¶ 7-8.
[11] Scotiabank's Response, ¶ 50(d); Peru's Rule 41 Submissions, ¶ 20, citing **RL-0012**, *Trans-Global*, ¶ 97.
[12] See Scotiabank's Response, ¶ 50(c).

Tribunal must do so "*regardless of whether [such facts] are manifestly inaccurate*."[13] Scotiabank never took that position. There is no issue between the parties. Both parties agree that while the Tribunal must accept the plausible facts presented by the claimant, it does not have to accept facts that are "*(manifestly) incredible, frivolous, vexatious or inaccurate or made in bad faith; nor need a tribunal accept a legal submission dressed up as a factual allegation.*"[14] In its Rule 41 Submission, Peru made no such allegations regarding Scotiabank's facts.

12. ***Municipal Law Questions are Matters of Fact***. Peru disagrees with Scotiabank that disputed issues relating to Peruvian law are disputed factual matters. Peru claims that matters of domestic law are legal issues that can be determined on a Rule 41 objection and accuses Scotiabank of attempting to unduly restrict the scope of Rule 41.[15]

13. The Tribunal will determine this dispute under international law and is deemed to know international law. As a result, questions of law, in contrast to questions of fact, do not have to be proven by the parties. However, the principle that the tribunal is deemed to know the law only applies in respect of international law.[16]

14. Tribunals are often called upon to apply municipal law in deciding matters of international law. It is well-established that questions of municipal law are considered ***questions of fact***, which are subject to proof in the same way as any other fact. Scotiabank cites ten legal authorities that have made this extremely clear.[17]

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[13] Peru's Reply, ¶¶ 8, 18.

[14] Peru's Reply, ¶ 18.

[15] Peru's Reply, ¶¶ 16, 20, 24, 179.

[16] **CL-0072**, Chittharanjan F. Amerasinghe, Evidence in International Litigation 54 (2005) ("**Chittharanjan**"), pp. 50-53.

[17] **CL-0072**, Chittharanjan, p. 54; **CL-0030**, *Kardassopoulous*, ¶¶ 144-146 ("***Georgian law is relevant as a fact*** …"); **CL-0055**, *AES Summit Generation Limited and AES-Tisza Erömü Kft. v. Republic of Hungary (II)*, ICSID Case No. ARB/07/22, Award - 23 Sept 2010, ¶ 7.6.6 ("*[i]t is common ground that in an international arbitration,* ***national laws are to be considered as facts***…"); **CL-0070**, *WCV Capital Ventures Cyprus Limited and Channel Crossings Limited v. The Czech Republic*, PCA Case No. 2016-12, Final Award - 26 July 2023, ¶¶ 182, 191 ("***the Tribunal will treat municipal law as a fact***…"); **CL-0058**, *Certain German Interests in Polish Upper Silesia*, PCIJ Series A. No 7, Judgment, May 25, 1926, p. 19 ("***municipal laws are merely facts***…"); **CL-0062**, *Cyprus Popular Bank Public Co. Ltd. v. Hellenic Republic*, ICSID Case No. ARB/14/16, Decision on Jurisdiction and Liability, 8 January 2019, ¶¶ 328, 663; **RL-0053**, *Electrabel S.A. v. The Republic of Hungary*, ICSID Case No. ARB/07/19, Decision on Jurisdiction, Applicable Law and Liability, 30 November 2012, ¶¶ 4.127-4.129 ("***Electrabel***"); **RL-0075**, *Sevilla Beheer B.V. and others v. Kingdom of Spain*, ICSID Case No. ARB/16/27, Decision on Jurisdiction, Liability and the Principles of Quantum, 11 February 2022, ¶¶ 799-801 ("***Sevilla Beheer***"); **CL-0061**, *Cook (U.S.A.) v. United Mexican States*,

15. Peru does not cite a single authority that supports its position. Indeed, the two authorities it does cite state the opposite and make clear that domestic law is a factual question.[18] The Tribunal must therefore obtain proof of domestic law just as it would any other fact, rather than simply accept Peru's pronouncements on Peruvian law.[19] Such matters will need to be proven before the Tribunal as part of the factual record, through expert reports.

16. ***Distinction Between Facts and Their Legal Consequences***. Peru alleges that Scotiabank "*conflates issues of fact with their legal consequences to unduly restrict the scope of the Tribunal's review*."[20] Scotiabank disagrees that it improperly disguises legal arguments as factual assertions. However, it will respond to those assertions as they arise in the context of the specific objections.

17. As it relates to the legal standard, Scotiabank agrees with Peru that the Tribunal does not need to accept "*a legal submission dressed up as a factual allegation*." However, the Tribunal should not "*otherwise weigh the credibility or plausibility of a disputed factual allegation.*"[21] A tribunal may examine the factual premise of a claim to assess its legal merits; for example, to determine if a limitation period has expired, it must look at the date of the alleged violation. However, examining that factual premise is distinct from examining the factual merits of a claim. The latter is not before the Tribunal on a Rule 41 objection.

18. Even where the issue between the parties relates to the legal effect of a fact, that does not mean it is a "*legal issue.*" Those issues may still be part of the contested factual matrix. In *Mainstream v. Germany*, the parties agreed on the occurrence or existence of several events or instruments, including several judicial decisions, but disagreed on their effect. The tribunal found that the respondent state had not established a foundation of "*unavoidable and indisputable fact*" to proceed to grant the Rule 41 objection. Even though the dispute related to the legal effect of

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General Claims Commission, Decision, 5 November 1930, p. 663 ("***Cook (U.S.A.)***"); **CL-0039**, *Nissan Motor Co., Ltd. v. The Republic of India*, PCA Case No. 2017-37, Decision on Jurisdiction, April 29, 2019 ("***Nissan***"), ¶ 383.

[18] Peru's Reply, ¶ 179, citing **RL-0053**, *Electrabel*, ¶¶ 4.127-4.129 (the tribunal sets out that EU law is a "***fact,***" something that has "*long been acknowledged by international tribunals*"); **RL-0075**, *Sevilla Beheer*, ¶¶ 799-801 (in analyzing the regulatory framework as part of assessing the investor's legitimate expectations, the tribunal recognized that "***municipal laws are merely facts…***" and characterized this regulatory framework as "*factual background*").

[19] **CL-0061**, *Cook (U.S.A.)*, p. 663 ("*just as when a foreign law is invoked before a domestic court it must be proved as a matter of fact,* ***so domestic law must be proved before an international tribunal…***").

[20] Peru's Reply, ¶ 20.

[21] **RL-0012**, *Trans Global*, ¶ 105.

those instruments, the tribunal held this was part of the contested factual matrix and was inappropriate for resolution on a Rule 41 challenge.[22]

II. Peru Must Demonstrate that Scotiabank's Claim "Must Inevitably" be Dismissed and that Peru is Not Raising Novel, Difficult or Unsettled Issues of Law

19. In its Response, Scotiabank set out that Rule 41 should not be used to resolve novel or difficult legal issues but should apply genuinely indisputable rules of law to uncontested facts.[23] Peru's four criticisms of Scotiabank and this well-established position should be rejected.

20. First, Peru claims that Scotiabank "*without any basis*" argues that the Rule 41 objection should be "*legally certain to succeed.*"[24] Scotiabank's position is supported by the jurisprudence, including legal authorities relied upon by Peru, which provide that a Rule 41 objection cannot succeed if a claimant has a "*tenabl[y] arguable case*."[25] In *Lotus v. Turkemanistan*, one of Peru's legal authorities, the tribunal held that the Rule 41 legal standard requires that the respondent show that the claim "*cannot succeed*" or "*must inevitably*" be dismissed:

> The consequence of a summary dismissal under Rule [41] is that the claim set out in the request for arbitration proceed no further. The tribunal rules, in effect, that there is no point in proceeding with the claim **because it *cannot* succeed**: no matter what evidence is adduced, there is a fundamental flaw in the way that the claim is formulated **that must inevitably lead to its dismissal. The inevitability of dismissal must be manifest**. It must be obvious from the submissions of the parties that there is some unavoidable and undisputable fact, or some legal objection in relation to which **no possible counter-argument is identified**. If the claimant, in its submissions under Rule [41], **can point to an arguable case**, the claim should proceed: but if the tribunal is satisfied that no such arguable case has been identified, it is in accordance with the sound administration of justice that the claim should be halted and dismissed at that point.[26]

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[22] **RL-0074**, *Mainstream*, ¶¶ 102-107.

[23] Scotiabank's Response, ¶ 51.

[24] Peru's Reply, ¶ 25.

[25] **CL-0040**, *PNG*, ¶ 88; **RL-0035**, *Lotus*, ¶ 158; **RL-0040**, *AHG Industry GmbH $ Co. KG v. Republic of Iraq*, ICSID Case No. ARB/20/21, Award on Rule 41 Application, September 30, 2022 ("***AHG***"), ¶ 58; **CL-0063**, *Vasilisa Ershova et al. v. Republic of Bulgaria*, ICSID Case No. ARB/22/29, Decision of the Respondent's Preliminary Objection, July 25, 2023, ¶ 56 ("***Ershova***").

[26] **RL-0035**, *Lotus*, ¶ 158. [**Emphasis** added]. [*Emphasis* in original].

21. Second, in its Response, Scotiabank cited *PNG v. Papua New Guinea* for the principle that Rule 41 "*is not intended to resolve novel, difficult or disputed legal issues, but instead only to apply undisputed or genuinely indisputable rules of law to uncontested facts*."[27] Peru claims Scotiabank "*distort[s]*" the standard and cites this case "*in isolation and without context*."[28] Peru's criticisms of Scotiabank are unfounded for the following reasons.

22. Scotiabank does not rely on *PNG* "*in isolation*" but cites a number of other decisions.[29] For example, in *Eskosol v. Italy*, the tribunal held that the Rule 41 procedure "*is not intended, nor should it be used, as the mechanism to address complicated, difficult, or unsettled issues of law*."[30] This line from *Eskosol* was quoted with approval by Peru in its Reply[31] and has been affirmed in two other decisions, both of which are authorities relied upon by Peru.[32]

23. Peru suggests that this principle is inconsistent with the standard established by *Trans-Global*, which recognizes that Rule 41 can involve a complicated legal exercise.[33] Both parties agree that Rule 41 can involve a complicated legal exercise; but as the tribunal in *Trans-Global* made clear, the objection must be established "*clearly and obviously, with relative ease and dispatch*" and while the exercise may be complicated, and require successive rounds of legal submissions, "*it should never be difficult*."[34] In other words, while the exercise may be complicated, the Tribunal should not be resolving difficult or unsettled issues of law.

24. Peru wrongly accuses Scotiabank of relying on the "*complexity*" of Peru's objections to argue the Rule 41 objection should fail.[35] Peru's objections are based on contested interpretations of Peruvian law that will require expert evidence to assess, unsettled matters of treaty interpretation

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[27] Scotiabank's Response, ¶ 51, citing **CL-0040**, *PNG*, ¶ 88.

[28] Peru's Reply, ¶¶ 26-27.

[29] Scotiabank's Response, ¶ 51, citing **CL-0040**, *PNG*, ¶ 88; **RL-0040**, *AHG*, ¶ 58; **CL-0017**, *Eskosol S.p.A. in Liquidazione v. Italian Republic*, ICSID Case No. ARB/15/50, Decision on Respondent's Rule 41 Application, March 20, 2017, ¶ 41 ("***Eskosol***"); **RL-0035**, *Lotus*, ¶ 158.

[30] **CL-0017**, *Eskosol*, ¶ 41. See also **CL-0063**, *Ershova*, ¶ 56.

[31] Peru's Reply, fn 31.

[32] **RL-0074**, *Mainstream*, ¶ 83; **RL-0065**, *Almasryia For Operating & Maintaining Touristic Construction Co., LLC. v. State of Kuwait*, ICSID Case No. ARB/18/2, Award on Respondent's Rule 41 Application, November 1, 2019 ("***Almasryia***") ¶ 32.

[33] Peru's Reply, ¶¶ 30-32.

[34] Peru's Reply, ¶ 32, citing **RL-0012**, *Trans-Global*, ¶ 88. [Emphasis added].

[35] Peru's Reply, ¶ 33.

that will be informed by the *travaux prépatoires*, and/or mischaracterizations of the measures challenged by Scotiabank. These objections do not involve the application of settled issues of law to undisputed facts, even if the application of such legal issues is complicated.

25. Third, Peru takes issue with Scotiabank's reliance on *MOL v. Croatia* and claims this decision is an "*outlier*" that departs from *Trans-Global*.[36] The tribunal in *MOL* held that for a Rule 41 objection to succeed, the claim must be "*so obviously defective*" from a legal point of view, it can be dismissed outright. The tribunal draws a distinction between such a claim and one that requires "*more elaborate argument or factual enquiry*," which should instead be made the subject of a regular preliminary objection or regular defence on the merits.[37] That is not inconsistent with *Trans-Global*, which recognizes a Rule 41 objection should "*never be difficult*" to resolve.[38] Furthermore, there is no basis for finding *MOL* is an outlier. Peru's own counsel, Dr. Banifatemi, wrote a chapter on Expedited Proceedings in International Arbitration and cites both *MOL* and *PNG* as authoritative sources for the legal standard under Rule 41.[39]

26. Fourth, Peru summarizes a handful of decisions that it says engage in "*sophisticated and complex legal analyses*" to uphold Rule 41 objections.[40] Peru highlights six of the 37 decisions that have addressed a Rule 41 objection. None support Peru. In each example, whether the analysis was complicated or not (and many times it was not), the tribunal applied well-settled law to undisputed facts.[41]

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[36] Peru's Reply, ¶ 35.

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

[38] Peru's Reply, ¶ 32, citing **RL-0012**, *Trans-Global*, ¶ 88.

[39] **CL-0073**, Expedited Procedures in International Arbitration, Chapter 1, pp. 17-18.

[40] Peru's Reply, ¶¶ 39-45.

[41] In **RL-0030**, *Ansung Housing Co., Ltd. v. People's Republic of China*, ICSID Case No. ARB/14/25, Award, March 9, 2017, ("***Ansung***") ¶ 107, the tribunal applied well-settled law and applied it to the undisputed facts pleaded by the claimant. The claimant's pleadings were clear that it first acquired knowledge or loss before the cut-off date. There was no disputed legal issues or re-characterizations of disputed facts, and the analysis was not complex.

In **RL-0039**, *AFC v. Colombia*, ICSID Case No. ARB/20/16, Award, February 24, 2022, ¶¶ 184-186, 196, 197, the tribunal similarly applied the well-settled limitations law to the undisputed facts as pleaded by the claimant. There was no dispute that the arbitration was commenced in 2020, one year after the limitation period ended. The claimant argued, however, that it complied with the 3-year deadline because it notified Colombia of the dispute in 2018. The issue between the parties was purely a legal one on whether the notification provided was sufficient to commence a claim (claimant said yes and respondent said no, filing of an arbitration claim was necessary). The tribunal held that such an issue "*can be resolved relatively easily*."

III. Rule 41 is a Distinct Remedy from a Preliminary Objection on Jurisdiction

27. In its Response, Scotiabank explained that Rule 41 is a distinct remedy from Rules 43 to 45 of the ICSID Rules and the ability of the respondent state to raise preliminary objections.[42] Peru's criticisms of this position are addressed in turn below.

28. First, Peru incorrectly claims this position is "*baseless*," is inconsistent with the "*established arbitral case law*" and is part of an "*overarching objective to create a novel standard for the application of Rule 41*."[43] In *Mainstream v. Germany*, a legal authority relied upon by Peru, the tribunal explained that there are three levels of potential jurisdictional challenges: (i) the threshold level by the Secretariat under Article 36 of the ICSID Convention; (ii) the summary dismissal level by a tribunal under Rule 41; and, (iii) a preliminary jurisdictional objection (which could be heard separately or together with the merits) by a tribunal under Rules 43-45. The tribunal then explained the importance of distinguishing between these remedies:

> The purpose of Rule [41] must be to enhance, rather than impede, efficient disposal of proceedings. **It could not have been intended to create two identical jurisdictional proceedings, once pursuant to Rule [41] and then again pursuant to Rule [43]**. What plainly differentiates Rule [41] is its very high standard, requiring it to be clear, obvious or patent that there is no legal dispute between the parties. […].[44]

In **RL-0016**, *Global Trading Resource Corp. and Globex International, Inc. v. Ukraine*, ICSID Case No. ARB/09/11, Award, December 1, 2010, ("***Global Trading***") ¶¶ 51, 55-56, the facts alleged issues with contracts of limited duration for the purchase and sale of perishable goods and it is well-settled such contracts are not investments.

In **RL-0017**, *RSM v. Grenada*, ICSID Case No. ARB/10/6, Award, December 10, 2010, ¶¶ 7.1.8-8.2.1, a previous ICSID tribunal had dismissed a contractual claim brought by RSM under a petroleum exploration agreement. RSM and its shareholders then sought to bring a BIT claim in respect of the same agreement and the same legal and factual contentions. The tribunal dismissed this attempt as a collateral attack. Contrary to Peru's arguments, the analysis was quite straightforward. The tribunal looked at the findings in the prior arbitration and determined what findings were made that are binding on the claimants and may not be re-litigated. The tribunal then looked at the claims made by the claimant and whether they re-raised those issues.

In **RL-0065**, *Almasryia*, ¶¶ 34-58, two Rule 41 objections made. The analysis in respect of each issue was simple. On the first issue, the tribunal found that lacked jurisdiction because it was manifest, clear and obvious that the claimant did not give the required notice and wait for the 6-month cooling off period. The second issue was whether the claimant had rights capable of being expropriated. There were no disputed issues of what the claimant held under Kuwaiti law. The tribunal accepted what the claimant argued its rights were and but found the claimant did not present any evidence that such rights were a property right under Kuwaiti law.

[42] Scotiabank's Response, ¶ 60.

[43] Peru's Reply, ¶¶ 47-48.

[44] **RL-0074**, *Mainstream*, ¶¶ 95. [**Emphasis** added].

29. Second, Peru creates a straw person argument; it raises and then attacks an argument not raised by Scotiabank. Peru claims that Scotiabank alleges Peru "*cannot argue the merits of its jurisdictional objections under Rule 41*" and states that it is well-established that Rule 41 permits jurisdictional challenges.[45] To be clear, Scotiabank agrees that jurisdictional objections can be raised and decided under Rule 41. The point is that the Tribunal's task in assessing such an objection is distinct under Rule 41 than under the other ICSID Rules. Under Rule 41, the question is whether the claim is "*manifestly without legal merit,*" as opposed to which of the parties' legal position should ultimately prevail.[46]

30. Because the rules have distinct purposes, tribunals should not permit Rule 41 to be used by states as a tactical means to get two bites at the jurisdictional cherry and/or to add delay and cost to the proceedings. Rule 41 should be invoked in good faith in only the rare circumstances where the rigorous and demanding standard under Rule 41 can be met. It should not be used to litigate the respondent's preliminary objections or defences (*e.g.*, Peru has raised five objections here). To allow otherwise would result in Rule 41 being regularly used in proceedings in a way that would undermine its purpose of bringing efficiency to the ICSID arbitral process.

PART THREE. FACTUAL BACKGROUND

31. Peru raises three issues in its Reply with respect to the factual background.

I. Scotiabank has not Acted "Abusively" by Explaining the Challenged Measures

32. In its Reply, Peru accuses Scotiabank of using its Response to "*unduly push forward its one-sided narrative of the facts of the case*" and acting "*abusive[ly]*" by putting forward facts that Peru claims are not relevant to the Rule 41 objections.[47]

33. All facts raised by Scotiabank are relevant to the issues before the Tribunal on this Rule 41 challenge, as they are central to understanding what *actual measures* have been put in issue in this arbitration. Peru seeks to have this case dismissed summarily on the basis that, among other things, the impugned measures relate to financial institutions, the impugned measures are taxation

[45] Peru's Reply, ¶ 50.

[46] **RL-0074**, *Mainstream*, ¶¶ 95, 98.

[47] Peru's Reply, ¶¶ 58, 63, 64.

measures, and there is no valid waiver because the impugned measures overlap with the Tax Appeal. Peru's Rule 41 Submissions argued that this case, as recharacterized by Peru, is about the 1999 SUNAT Decision and it put forward a limited summary of the facts to support that narrative.[48]

34. In response, Scotiabank provided the full context to the Tribunal to understand *what this case is actually about*. To answer the questions of whether the measures are taxation measures, relate to financial institutions, overlap with the Tax Appeal, etc., the Tribunal must assess what the impugned measures are. The factual summary Scotiabank provided is relevant to doing so.

35. Peru claims Scotiabank acted "*abusively*" by raising the facts related to the (a) alleged media and political pressure on the Constitutional Court, (b) the change in the Constitutional Court's quorum requirements, and (c) the lack of conformity of the 2021 Constitutional Court Decision with other comparable cases.[49] Not one of these factual issues is extraneous or immaterial. Each relates to the *actual measures* being impugned by Scotiabank. The measures challenged in this arbitration are "*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 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.*"[50] Scotiabank has not acted "*abusively*" for setting out the very facts that constitute the measures it has challenged in this arbitration.

II. Peru's Objections are Not Based on Undisputed Facts

36. Peru's characterization in its Reply that its objections are based on undisputed facts is wrong.[51] As set out at paragraph 4 above, Peru's objections turn on disputed issues of Peruvian law (a disputed factual matter as set out at paragraphs 12 to 15 above), mischaracterizations of the nature of Scotiabank's claim, and/or disputed and novel interpretations of the FTA that require the production of any *travaux prépatoires* or negotiating history specific to the FTA.

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

[49] Peru's Reply, ¶ 59.

[50] Scotiabank's Response, ¶¶ 46(a), 48.

[51] See Peru's Reply, ¶¶ 65-71.

III. Peru's Misleading Statement that Scotiabank Tactically Brought this Arbitration

37. Peru states that Scotiabank "*acknowledges that it commenced this arbitration to put pressure on the Constitutional Court to render the 2021 Constitutional Court Decision*"[52] and that this is a "*tactical use of this ICSID arbitration.*"[53] That is simply false.

38. Peru purports to rely on paragraph 4 of Scotiabank's Response where Scotiabank writes: "*Faced with the Constitutional Court's apparent refusal to issue a decision, Scotiabank notified Peru of its intention to pursue a claim under the [FTA]. Immediately after this, the Constitutional Court took steps to release its decision.*" There is no basis in that sentence to credibly suggest that Scotiabank "*acknowledges*" the purpose of this arbitration was tactical pressure.

39. Scotiabank Peru's hearing before the Constitutional Court was in March 2017. Over four years later, a decision had still not been released (although a draft ruling in Scotiabank Peru's favour had been unlawfully leaked, resulting in undue political and media pressure being exerted on the Court to rule against Scotiabank Peru). The mandate of six of the seven judges who had heard the case had lapsed and one of those judges, the one in charge of drafting the decision, died. On September 1, 2021, Scotiabank delivered written notice to Peru advising of its intention to submit a claim to arbitration pursuant to the FTA. The measures impugned by Scotiabank included the delay of the Constitutional Court in issuing a decision.[54]

40. Nothing about this history suggests that Scotiabank sought to use the arbitration process tactically. Scotiabank waited over four years for a decision. In the face of political and media pressure, the Constitutional Court was refusing to issue a decision. Scotiabank was uncertain that a decision would ever be released, particularly given the lapsed mandates and death of one judge. Scotiabank exercised its right to enforce its treaty protections. It cannot be faulted for doing so. Shortly after Scotiabank provided that notice, the Constitutional Court purported to change its quorum requirements and issued the 2021 Constitutional Court Decision.

[52] Peru's Reply, ¶ 72.

[53] Peru's Reply, ¶ 316.

[54] Scotiabank's Response, ¶¶ 36-37; **C-0021**, Notice of Intent, pp. 15-16.

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

41. None of Peru's objections meet the "*demanding and rigorous*" standard.[55] With respect to each objection, Scotiabank has presented an "*arguable case*" and "*a possible counter-argument*" (indeed, Scotiabank maintains that it will be successful on the merits of each one).[56] Peru has not demonstrated that the claim "*must inevitably"* be dismissed.[57] Below, Scotiabank responds to the assertions made by Peru in its Reply in respect of each of the five objections.

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

42. Peru claims the Tribunal lacks jurisdiction over two of Scotiabank's claims (National Treatment and FET claims, but not the Expropriation claim) because the claims fall under the scope of Chapter 11 of the FTA. In its Reply, Peru argues the Tribunal should decide this disputed and unsettled issue on this Rule 41 challenge, without regard to the *travaux prépatoires* or prior treaty practice. Notably, it is Peru that has access to this negotiating history, not Scotiabank, and these relevant documents may very well inform the treaty interpretation exercise.

A. The Ordinary Meaning of Article 1101

43. Article 1101 of the FTA sets out the scope of Chapter 11. Article 1101 provides that Chapter 11 "*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.*"[58] In its Response, Scotiabank outlines how the text, context and purpose of Chapter 11 support its interpretation of Article 1101. Article 1101 does not say that it applies to all claims brought by financial institutions, as Peru contends; rather, it applies to *measures* that *relate to* financial institutions.[59] As it relates to the ordinary meaning of Article 1101, Peru has raised several issues in its Reply. They are each addressed in turn.

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[55] **CL-0040**, PNG, ¶ 88.

[56] **RL-0074**, *Mainstream*, ¶ 84; **RL-0035**, *Lotus*, ¶ 158.

[57] **RL-0035**, *Lotus*, ¶ 158.

[58] **C-0001**, Canada-Peru FTA, Article 1101 [Emphasis added].

[59] Scotiabank's Response, ¶¶ 66-69.

44. First, in its Rule 41 Submission, Peru raised an unduly broad interpretation of Article 1101. It argued that if the claimant is a financial institution, then Chapter 11 applies.[60] In its Reply, Peru retreated from that position, arguing instead that Article 1101 applies because the impugned measure, the 2021 Constitutional Court Decision, is a measure that is related to Scotiabank's investment in a financial institution, *i.e.*, Scotiabank Peru.[61] Peru has seemingly acknowledged that for Article 1101 to apply, the question is whether the impugned ***measure*** ***relates to*** a financial institution or an investment in a financial institution.

45. Second, Peru claims that Scotiabank selectively relies on the word "*measure*" and ignores the other operative terms in Article 1101, namely "*relating to*" and "*financial institutions.*"[62] Scotiabank does not. In its Response, Scotiabank clearly explained that all three words must be given meaning and it is Peru's position, which provides that Chapter 11 applies to all claims brought by financial institutions, that seeks to read out this language.[63]

46. Third, Peru claims that Scotiabank seeks to restrict the scope of Chapter 11 to certain types of measures (*i.e.*, measures that are about the regulation of financial institutions) and states that Article 1101 does not permit restrictions to the types of measures that fall within its scope.[64]

47. This mischaracterizes Scotiabank's position. Scotiabank responded to Peru's argument that Chapter 11 applies *whenever* the claimant is a financial institution: Article 1101 applies where there is a (1) *measure,* (2) *relating to* a financial institution. The focus of the inquiry is on the *nature of the measure,* not the nature of the investor. Scotiabank agrees with Peru that the meaning of "*measure*" under Chapter 11 is the same as under any other chapter of the FTA. The issue between the parties is not what "*measure*" means but the meaning of "*relating to*." The only question is whether the challenged measure – here the 2021 Constitutional Court Decision – is one *relating to* a financial institution. Scotiabank's position on this is set out further at paragraphs 49 to 57 below.

[60] See Peru's Rule 41 Submission, ¶¶ 64, 67.
[61] Peru's Reply, ¶ 78.
[62] Peru's Reply, ¶¶ 82-84.
[63] See Scotiabank's Response, ¶¶ 66, 76-78.
[64] Peru Rely, ¶¶ 85-94.

48. Fourth, in its Response, Scotiabank set out how the FTA's predecessor agreement contained broader language with respect to limitations of claims involving financial institutions and this change in language must be given meaning (and the *travaux prépatoires* may be helpful for understanding the use of different language).[65] In its Reply, relying on one authority, Peru claims that prior treaty practice is not relevant.[66] Contrary to Peru's assertion, numerous tribunals have confirmed that prior treaty practice is relevant as part of the exercise of treaty interpretation (including treaties the state Parties have entered into with *other* states, not just the predecessor agreement to the existing treaty between the same state Parties), and in any event, that prior treaty practice of Canada and Peru is likely to be directly linked to the current language of the subsequent Canada-Peru FTA through the *travaux prépatoires*.[67]

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

49. In its Response, Scotiabank explained why the 2021 Constitutional Court Decision is not a measure "*relating to*" financial institutions. The politically motivated refusal of the Constitutional Court to issue a timely and fair decision has nothing to do with financial institutions at large or the regulation of financial institutions. The 2021 Constitutional Court Decision is a measure that could have affected any investment in any industry.[68] Peru raises several issues in its Reply setting out its disagreement with this position.

50. First, Peru argues that the phrase "*relating to*" only requires that there be "*a connection*" between the measure and the financial institution. It cites no authority to support that interpretation, only dictionary definitions of the phrase "*relating to*."[69] The legal authorities provide that that the phrase "*relating to*" means that there is "*a legally significant connection*" and this requires something more than "*the mere effect of a measure*" on the investor or here, the financial

[65] Scotiabank Response, ¶¶ 67-68.

[66] Peru's Reply, ¶ 110.

[67] **CL-0060,** *Churchill Mining and Planet Mining Pty Ltd v. Republic of Indonesia*, ICSID Case No. ARB/12/40 and 12/14 (2012) ¶ 182; **CL-0071,** *Mr. Jürgen Wirtgen, Mr. Stefan Wirtgen, and JSW Solar (zwei) GmbH & Co.KG v. Czech Republic*, PCA Case No. 2014-03 (2017) ¶ 231; **CL-0066**, *Metal-Tech Ltd. v. Republic of Uzbekistan*, ICSID Case No. ARB/10/3 (2013) ¶ 159; **CL-0054**, *ADC Affiliate Limited and ADC & ADMC Management Limited v. Republic of Hungary*, ICSID Case No. ARB/03/16, Award, 2 October 2006 ¶ 359; **CL-0064**, *Kimberly-Clark Dutch Holdings, B.V., Kimberly-Clark S.L.U., and Kimberly-Clark BVBA v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB(AF)/18/3 (2021) ¶ 230.

[68] Scotiabank's Response, ¶ 76.

[69] Peru's Reply, ¶ 98.

institution.[70] Tribunals have rejected the same argument put forward by Peru and found that "*none of these dictionary definitions decide the issue*" and, in any event, these dictionary definitions imply a connection beyond a mere impact.[71]

51. Second, relying on *Methanex v. USA*, Peru argues that the "*legally significant connection*" test was meant to rule out measures of general application and is satisfied anytime a measure directly affects a financial institution.[72] This misstates that case.

52. In *Methanex*, the claimant produced methanol in the U.S., which was a key ingredient in the gasoline additive MTBE. California banned the use of MTBE for environmental reasons. The issue was whether that measure "*related to*" Methanex and its investment. Methanex argued that it was sufficient that the measure "*affect*" the investor or its investment and the U.S. argued that something more was needed as measures of general application are, by their nature, likely to affect a vast range of actors and economic interests.[73] In rejecting the claimant's interpretation of the phrase "*related to*," the tribunal found that if the threshold was met anytime a measure *affected* an investor, "*it would be satisfied wherever any economic impact was felt by an investor or an investment*" and the NAFTA's "*significant threshold*" of requiring measures be "*related to*" an investor would be "*no threshold at all*." As a result, the tribunal concluded that the phrase "*relating to*" "*signifies something more than the mere effect of a measure on an investor or an investment and that it requires a legally significant connection between them.*"[74]

53. The tribunal in *Methanex* was thus clear that a measure must do more than *affect* or impact an investor to be one that meets the "*significant threshold*" of being "*related to*" an investor. Peru's

[70] Scotiabank's Response, ¶ 76, citing **CL-0035**, *Methanex Corporation v. United States of America*, UNCITRAL UN/0015/02, Partial Award, August 7, 2002, ("***Methanex***") ¶ 147, **CL-0033**, *Lone Pine Resources Inc. v. The Government of Canada*, ICSID Case No. UNCT/15/2, Final Award, November 21, 2022, ("***Lone Pine***") ¶¶ 402-403; **CL-0003**, *Bilcon et al. v. Government of Canada*, PCA Case No. 2009-04, Award on Jurisdiction and Liability, March 17, 2015, ("***Bilcon***") ¶ 240.

[71] **CL-0035**, *Methanex*, ¶¶ 135-136.

[72] Peru's Reply, ¶¶ 99-102. Peru also relies on **CL-0033**, *Lone Pine*, ¶¶ 402-403. In *Lone Pine*, the tribunal adopted the test from *Methanex* and did not suggest any other standard applied. It then listed a number of criteria to assess whether the "legally significant connection" threshold has been reached, including whether the measure has a direct effect on the investor or the investment. These criteria were set out as a necessary but not independently sufficient criterion to fulfil.

[73] **CL-0035**, *Methanex*, ¶¶ 127-131.

[74] **CL-0035**, *Methanex*, ¶¶ 137, 147.

interpretation that all that is required is that the measure be one that directly affects Scotiabank is not consistent with *Methanex*'s ruling.

54. Third, both parties agree that Article 1101 may apply to a measure that was adopted about one specific financial institution (Peru incorrectly argues Scotiabank suggested otherwise).[75] However, Peru argues that alone is sufficient to trigger Article 1101. Peru argues that because the 2021 Constitutional Court Decision was issued specifically in relation to Scotiabank Peru, it must have a "*legally significant connection*" to Scotiabank Peru, a financial institution.[76]

55. To determine if a measure has a "*legally significant connection*" to a financial institution, the question is not whether it *affects* a financial institution. Rather, one must look at the pith and substance or nature of the measure in question. To fall within the scope of Article 1101, the measure must relate to Scotiabank because of Scotiabank's nature as a financial institution (*e.g.*, as opposed to a measure that was about Scotiabank as an employer). Peru's interpretation is unreasonable and would lead to absurd results. It would mean that there are limited treaty protections, including no FET claims, for financial institutions, regardless of whether the challenged measure has anything to do with the financial service industry. For example, financial institutions would *never* have a claim for denial of justice even where the court proceeding has nothing to do with the nature of the investor as a financial institution. That is the case here and would be the case in many other examples (*e.g.*, a bank is sued for wrongful dismissal and is subject to a denial of justice in the rendering of that court decision, which is about the bank being an employer and has nothing to do with the investor being a financial institution).

56. This interpretation is consistent with the purpose of Chapter 11. As set out in the Response and addressed at paragraphs 58 to 65 below, the purpose of Chapter 11 is to create a safe harbor for states with respect to financial regulation and to create a separate regime for measures that relate to financial services. This was so the state parties would not have to harmonize their regulations in that industry.[77] The purpose was not to create a separate chapter for anytime a

[75] Peru's Reply, ¶¶ 97, 103.

[76] Peru's Reply, ¶ 101.

[77] Scotiabank's Response, ¶ 74.

measure impacted or affected a financial institution, regardless of the nature of the measure, even if the measure was adopted exclusively to one specific financial institution.

57. Fourth, in its Response, Scotiabank made the point that the 2021 Constitutional Court Decision is a measure that could have affected any investment in any industry. The *amparo* procedure is open to any person in Peru and the subject matter underlying the 2021 Constitutional Court Decision, the accrual of default interest, is an issue that affects many companies in several different industries.[78] In its Reply, Peru claims that Scotiabank "*conveniently*" recharacterizes its dispute to focus on the *amparo* procedure, not the 2021 Constitutional Court Decision.[79] Scotiabank's claims have always focused on the 2021 Constitutional Court Decision, the substance of which has nothing to do with financial institutions. Scotiabank's point is simply that the 2021 Constitutional Court Decision is the product of a process that could affect any investor in any industry and this further supports Scotiabank's interpretation.

C. The Purpose of the FTA and Chapter 11 and the Importance of the *Travaux Prépatoires*

58. The following section addresses the issues raised by Peru in its Reply with respect the purpose of the FTA and Chapter 11, and the relevance of the *travaux prépatoires*.

59. ***Object and Purpose of Chapter 11***. Peru claims that the terms of Article 1101 are clear so there is no need to refer to the object and purpose of the FTA or Chapter 11.[80] This is contrary to Article 31 of the VCLT, which requires the tribunal to look at each of the ordinary meaning, the context and the object and purpose.[81] Article 31 of the VCLT is a "*process of progressive encirclement*" with an iterative three-step process: (1) ordinary meaning, (2) context and (3) object and purpose. None of these steps "*enjoy primacy*" over the others and each "*should be given equal weight and be taken together in an iterative approach to interpretation*…"[82]

[78] Scotiabank's Response, ¶ 77.

[79] Peru's Reply, ¶ 104.

[80] Peru's Reply, ¶ 107.

[81] **CL-0053**, Vienna Convention of the Law of Treaties (1969) ("**VCLT**"), Article 31.

[82] **CL-0056**, *Aguas del Tunari, S.A., v. Republic of Bolivia*, ICSID Case No. ARB/02/3, Decision on Respondent's Objections to Jurisdiction, 21 October 2005 ¶ 91. **CL-0057**, *Beijing Everyway Traffic & Lighting Tech. Co., Ltd v. The Republic of Ghana* (I), PCA Case No. 2021-15, Final Award on Jurisdiction, January 30, 2023, ¶ 149.

60. In any event, the interpretation of Article 1101 is by no means "*straightforward*" as Peru claims,[83] or a "*settled*" issue of law, as the Rule 41 standard requires.[84] Article 1101 has never been interpreted by a tribunal before. Peru has cited one decision involving Chapter 14 of the NAFTA (which Chapter 11 of the FTA was modelled after): *Fireman's Fund v. Mexico*.[85] Scotiabank has already explained why the *Fireman's Fund* case supports its interpretation of Article 1101, not Peru's. That case involved measures aimed at rescuing a financial institution in a time of crisis, which were clearly "*measures…relating to financial institutions.*"[86]

61. In its Reply, Peru highlights one line in the Award in *Fireman's Fund* to claim that the tribunal had determined that Chapter 14 of the NAFTA applies in any case involving investment in financial institutions.[87] This is not what the tribunal held. First, the tribunal determined the issue of the application of Chapter 14 in the Decision on Preliminary Question, not the Award. Peru is not relying on the relevant decision, which supports Scotiabank's position.[88] Second, in any event, Peru takes the one line out of context and does not refer to the preceding paragraphs, which make clear that Chapter 14 is about a separate regime for the regulation of the financial services industry. While lengthy, these paragraphs are reproduced in full below because the context is important:

> This is the first case under the North American Free Trade Agreement (NAFTA) to be heard under Chapter Fourteen, devoted to cross-border investment in Financial Services. As spelled out in more detail in the Decision on the Preliminary Question in this case, the architects of the NAFTA were aware that the Governments of each of the State Parties **regulated in considerable detail the activities of financial institutions engaged in securities transactions, insurance, banking and related activities**. These regulations were often of a macro-economic character and involved prudential considerations of various kinds.

[83] Peru's Reply, ¶ 82.

[84] See ¶¶ 19 to 26 above.

[85] **RL-0005**, *Fireman's Fund*, ICSID Case No. ARB(AF)/02/01, Decision on the Preliminary Question, July 17, 2003. Peru also relies on the U.S. non-disputing submissions in **RL-0067**, *Carrizosa et al v. Colombia*, PCA Case No 2018-56, Submissions of the United States of America, May 1, 2020, which similarly does not support its position. That case also involved a measure aimed at rescuing a financial institution in a time of crisis. Citing from *Fireman's Fund*, the U.S. in its submissions states that the parties did not consent to National Treatment or Minimum Standard of Treatment claims "***for financial services matters***." ¶ 11.

[86] See Scotiabank's Response ¶¶ 74-75.

[87] Peru's Reply, ¶ 91.

[88] See Scotiabank's Response ¶¶ 74-75.

> **The regulations concerning financial services were not the same in all three countries, but each of the State Parties was clear that challenges to such regulations or interpretations of the regulations and the relevant authorities should not be committed to investor-State arbitration under the NAFTA**. On the other hand investment in financial institutions across borders was to be encouraged, and investors were to be protected through the NAFTA from expropriation and measures tantamount to expropriation.
>
> **The solution arrived at in the NAFTA was to include a separate Chapter Fourteen on Financial Services**. The expropriation provisions of the NAFTA as set out in Chapter Eleven, including the provisions for investor-State arbitration, were made applicable to claims under Chapter Fourteen, but claims based on other provisions designed to protect cross-border investors and investments, including provisions for National Treatment and Most-Favored-Nation Treatment, are excluded from the competence of an arbitral tribunal in a case involving investment in financial institutions. Chapter Fourteen contains no counterpart to Article 1105 concerning Minimum Standard of Treatment.[89]

62. The tribunal in *Fireman's Fund*, in Scotiabank's submission, could not have been clearer that the purpose of Chapter 14 was to create a separate regime relating to regulations concerning the financial services industry.[90]

63. ***The Relevance of the Travaux Prépatoires***. The parties disagree about the object and purpose of Chapter 11 of the FTA. As set out in Scotiabank's Response, the *travaux prépatoires* may prove to be important in enabling the Tribunal to resolve this disputed interpretative issue.[91] These are documents in the possession of Peru, but not Scotiabank. In its Reply, Peru claims that by so arguing Scotiabank "*completely disregards the rules applicable to treaty interpretation*

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[89] **RL-0049**, *Fireman's Fund*, Award ¶¶ 1-3. [**Emphasis** added].

[90] In its Response, Scotiabank explained why Canada's submissions in *Fireman's Fund* also supports its interpretation: see ¶ 74. In its Reply, Peru disagrees, see ¶¶ 114-117. The passages highlighted by Peru further Scotiabank's point: they illustrate that the purpose of Chapter 14 of the NAFTA was to "*create a separate regime to govern measures relating to financial services.*" Scotiabank will not repeat itself and Canada's submissions should be read in context.

Peru highlights one statement by Canada without context: Canada states the central issue in that case was "*what constitutes a 'financial institution'*?" Peru uses that statement to suggest Canada's was highlighting this as the question of what the inquiry is under Chapter 14 more broadly, see Peru's Reply, ¶ 116. This is incorrect. In *Fireman's Fund*, there was no dispute that the measure was one related to the financial services sector and was to bail out a financial services corporation. The issue *in that case* was whether the claimant's investment in that company fell within the definition of "financial institution." That is all that Canada's statement means.

[91] See Scotiabank's Response, ¶ 78.

under the VCLT" and recourse to such documents is not necessary because Article 1101 can be clearly and conclusively interpreted without recourse to supplementary means of interpretation.[92]

64. Peru is incorrect that the Tribunal may have regard to supplementary means of interpretation under Article 32 of the VCLT, and thus the *travaux prépatoires*, "*[o]nly in the event that the result of the application of Article 31 is unsatisfactory, leaving the meaning ambiguous or leading to an unreasonable result*."[93] Article 32 explicitly states that recourse may be had to supplementary means of interpretation "*in order to* ***confirm*** *the meaning resulting from the application of article 31*."[94] In any event, for the reasons already set out above, Peru's interpretation of Chapter 11 of the FTA, with which Scotiabank disagrees, is certainly not clear and unambiguous and would lead to an illogical and unreasonable result.

65. This is not an objection that meets the Rule 41 standard. This issue does not involve settled issues of law.[95] Peru has failed to show that the dismissal of Scotiabank's claim under Chapter 11 is manifestly inevitable; Scotiabank has, at a minimum, pointed to an arguable case.[96]

II. Scotiabank's Claim Does Not Concern Taxation Measures

66. Peru claims that the 2021 Constitutional Court Decision is a taxation measure and, further to Article 2203 of the FTA, the Tribunal lacks jurisdiction over two of Scotiabank's claims (FET and Expropriation, although not the claim for National Treatment).[97] In its Response, Scotiabank provided three reasons why Scotiabank has, at a minimum, raised a tenable argument: (a) Peru's objection is based on a mischaracterization of Scotiabank's claim, (b) the international jurisprudence supports Scotiabank's position and (c) Peruvian law also supports Scotiabank's position. This section addresses Peru's response to each issue.

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[92] Peru's Reply, ¶¶ 122-123.

[93] Peru's Reply, ¶ 124.

[94] **CL-0053**, VCLT, Article 32.

[95] **CL-0017**, *Eskosol*, ¶ 41. See also **CL-0063**, *Ershova*, ¶ 56.

[96] **RL-0035**, *Lotus*, ¶ 158.

[97] Peru's Reply, ¶ 126. With respect to the Expropriation claim, it is undisputed that Scotiabank did not refer the issue of whether a taxation measure is an expropriation to the designated authorities pursuant to Article 2203(8). It did not do so as this claim does not involve a "taxation measure" and Article 2203 is inapplicable. In any event, if this Tribunal finds that this claim does challenge a "taxation measure" (which is denied), Scotiabank agrees that the Tribunal would lack jurisdiction over both of the FET and Expropriation Claims.

A. Peru's Mischaracterization of Scotiabank's Claim

67. In its Response, Scotiabank reiterated that this case is about the unfair judicial process before the Constitutional Court and not, as Peru had alleged, about the 1999 SUNAT Decision.[98] In its Reply, Peru raises three points.

68. First, Peru acknowledges that this case is about the 2021 Constitutional Court Decision and whether *that* measure is a "taxation measure."[99] Despite this acknowledgment, Peru claims that Scotiabank "*gross[ly] misrepresent[ed]*" Peru's position when it argued that Peru wrongly characterized this case as being about the 1999 SUNAT Decision.[100] This accusation is unfounded.

69. Peru's Rule 41 Submission stated that Scotiabank "*attempt[s] artificially to focus its claims on the Constitutional Court 2021 Decision concerning the Tax Payments originated in the 1999 Tax Debt*", and that "*[Scotiabank] unduly segments measures which are intrinsically linked, and which concern the very same issue: the 1999 Tax Debt*."[101] In its Response, Scotiabank explained that this claim is about the unfair judicial treatment before the Constitutional Court. This focus is not "*artificial*;" the claim is not about the 1999 SUNAT Decision.[102] Scotiabank did not misrepresent Peru's position, but responded to what was asserted.

70. Second, in its Response, Scotiabank explained that the question is whether the claim, *as pleaded by the claimant*, falls within the scope of the taxation measure exemption and it is not open to the respondent to recharacterize the claim.[103] In its Reply, Peru claims that Scotiabank attempts to "*shield behind*" this argument and seeks to "*muzzle*" Peru.[104] However, it is not open to Peru to claim that Scotiabank's focus on the 2021 Constitutional Court Decision is "*artificial*" and recharacterize this claim. Pointing out that improper recharacterization is not "muzzling".

[98] Scotiabank's Response, ¶¶ 84, 87-88.
[99] Peru's Reply, ¶ 130.
[100] Peru's Reply, ¶¶ 128, 130.
[101] Peru's Rule 41 Submission, ¶¶ 84-85.
[102] Scotiabank's Response, ¶¶ 84, 87-88.
[103] Scotiabank's Response, ¶ 85.
[104] Peru's Reply, ¶ 131.

71. Peru takes issue with the two cases Scotiabank cites for the principle that the Tribunal should assess the claim as pleaded by the claimant, particularly at the preliminary stage to avoid due process concerns (*ECE Projektmanagement* and *Infinito*).[105] This should not be a contested principle: it is common sense that the Tribunal should be assessing the claim, as pleaded. The facts in *ECE* are different than the present case, but the principle remains true and applicable.

72. Third, Peru cites two Rule 41 cases where it claims the tribunal did what Scotiabank "*alleges tribunals are barred from doing: it rejected the claimant's characterization of its claim, relying instead on the substance of the relief sought.*"[106] In those cases, the tribunal did exactly what it should do: it asked itself whether the Rule 41 objection was made out on the basis of the claim pleaded.[107] The tribunal came to a different legal conclusion than the one argued by the claimant, which it is entitled to do. While Scotiabank argues that it is not clear and obvious that the 2021 Constitutional Court Decision is a taxation measure, the tribunal can come to a different legal conclusion. But whatever determination it comes to, the Tribunal must do so based on the pleaded claims, not Peru's recharacterized ones.

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

73. In its Reply, Peru claims that the international arbitral case law is clear that "taxation measure" encompasses "*any matter sufficiently connected to a taxation law or regulation*" and claims that Scotiabank "*misrepresent[s]*" the case law.[108] Peru is wrong, and its position has been rejected by international tribunals. Scotiabank's responses are set out below.

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[105] Peru's Reply, ¶¶ 132-135.

[106] Peru's Reply, ¶¶ 136-138.

[107] In **RL-0035**, *Lotus*, ¶¶ 166-171, the tribunal reviewed the claim as pleaded and found it was "*abundantly clear*" that the claims were for monies owed under the contracts. For a non-payment of a contract to constitute a breach of a treaty standard, that argument "*must be properly pleaded out*" and it was not: "*the Request for Arbitration provides no explanation of why the alleged contractual breaches should, or could, be considered to be, in themselves, breaches of the BIT and/or the ECT*."

Similarly, in **RL-0016**, *Global Trading*, ¶¶ 51-56, the tribunal asked itself the legal question of whether the facts, as pleaded, gave rise to an investment. It concluded no, as the purchase and sale contracts entered into by the claimants were purely commercial transactions.

[108] Peru's Reply, ¶¶ 139-142.

i. The Ordinary Meaning of Taxation Measure

74. Peru inaccurately accuses Scotiabank of making misrepresentations of the legal authorities to support its position on the meaning of "taxation measure."[109] Scotiabank's position is well-supported by the ordinary meaning of "taxation measure" and the international legal authorities. It is Peru that has failed to show its position is based on settled law and is certain to succeed.

75. ***Dictionary Definition***. Scotiabank agrees with Peru that the term "taxation measure" is not defined in the FTA, although the term "measure" is, and the term "taxation" must be interpreted in accordance with international law and the VCLT.[110] Peru claims the ordinary meaning of the term "taxation" is broader than "tax" and is defined as the "*system of taxing people*." Peru then declares that this definition includes default interest paid on tax debts, as this is part of the "*system of taxing people*" under Peruvian law.[111] Scotiabank has two responses.

76. First, even accepting Peru's definition of "taxation" as a "*system of taxing people*" (which is overly broad, as explained in the paragraph below), there is no basis for Peru's bald declaration that this "*system*" includes default interest accrued on tax debts. The parties heavily dispute whether that is true under Peruvian law. Therefore, even if Peru's interpretation of the ordinary meaning of "taxation measure" is accepted, the Tribunal cannot determine if the 2021 Constitutional Court Decision is such a measure without reference to Peruvian law, a disputed factual matter that requires expert evidence, as set out in the Response and further below.[112]

77. Second, the ordinary meaning of "taxation" is not as broad as the "*system of taxing people*." Black's Law Dictionary defines "taxation" as "*[t]he imposition or assessment of a tax; the means by which the state obtains the revenue required for its activities*."[113] Merriam-Webster defines "taxation" as "*the amount assessed as a tax*."[114] Peru also relies on the Merriam-Webster definition.[115] The definitions do not define "taxation" as being broader than the definition of "tax."

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[109] Peru's Reply, ¶ 143.
[110] Peru's Reply, ¶ 144.
[111] Peru's Reply, ¶ 144.
[112] See ¶¶ 107-118 of the Response and ¶¶ 110-130 below.
[113] **C-0072**, Black's Law Dictionary (11th ed. 2019) - definition of "taxation".
[114] **R-0019**, Merriam-Webster Dictionary - definition of "taxation".
[115] Peru's Reply, ¶ 144.

The definitions focus on the nature and purpose of the debt: its nature is that it is an amount assessed as a tax and its purpose is for the state to obtain revenue for public services.

78. Peru relies on the Cambridge Dictionary for the definition of taxation as a "*system of taxing people*," but does not mention that the Cambridge Dictionary further defines taxation as "*the process by which the government of a country obtains money from its people in order to pay for its expenses*" and "*money that is collected as tax*."[116] Those definitions are more akin to the Black's Law Dictionary and Merriam-Webster definitions set out above.

79. ***International Authorities' Treatment of "Taxation Measures."*** The definitions of "taxation" from Black's Law Dictionary and Merriam-Webster are also consistent with the international legal authorities. As set out in Scotiabank's Response, tribunals have interpreted "taxation" to mean a measure "*which imposes a liability on classes of persons to pay money to the State for public purposes.*"[117] In its Reply, Peru disputes that this is the proper definition of "taxation measure." Peru claims that Scotiabank relies on a "*partial and misrepresented quote*" from *EnCana v. Ecuador* and that *EnCana* supports Peru's position.[118]

80. First, this definition arises from multiple authorities, not just *Encana*, that have consistently held that this is the ordinary meaning of taxation measure.[119] In *SunReserve v. Italy* – one of Peru's legal authorities – the tribunal held that there are a number of criteria to apply to determine what qualifies as a taxation measure, including whether the payment is made as a contribution to public spending or public expenditure, and is generally intended for a public purpose.[120]

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[116] **R-0020**, Cambridge Dictionary - definition of "taxation".

[117] Scotiabank's Response, ¶ 92; **CL-0039,** *Nissan*, ¶ 384; **RL-0028,** *Murphy v. The Republic of Ecuador*, PCA Case No. 2012-16, Partial Final Award, May 6, 2016, ("***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 ("***Burlington***"), ¶¶ 164-165.

[118] Peru's Reply, ¶¶ 145, 151.

[119] **CL-0039**, *Nissan*, ¶ 384; **RL-0028**, *Murphy*, ¶ 159; **CL-0012**, *Duke Energy*, ¶ 174; **CL-005**, *Burlington*, ¶¶ 123, 159-164.

[120] **RL-0034**, *SunReserve*, ¶¶ 520-521.

81. Second, Peru wrongly claims that *EnCana* distinguishes between a "*taxation law*" and a "*taxation measure,*" that the definition Scotiabank relies on relates to "*taxation law,*" and that Scotiabank "*deliberately confounds*" these distinct concepts to strengthen its position.[121] This is not what *Encana* states. This same argument seeking to distinguish the definition of "*taxation law*" from "*taxation measure*" was rejected by the tribunal in *Nissan v. India*, discussed below.

82. *EnCana* concerned claims for VAT refunds. The claimant challenged measures taken by the tax authorities that sought to deny tax credits and refunds to oil companies. In interpreting the ordinary meaning of the term "taxation measure," the tribunal held:

> (a) It is in the nature of a tax that it is imposed by law.
>
> (b) There is no reason to limit the term 'taxation' to direct taxation and so indirect taxes, like VAT, are included.
>
> (c) Having regard to the breadth of the defined term 'measure,' "*there is no reason to limit the taxation exemption provision to the actual provisions of law which impose a tax. All of those aspects of the tax regime which go to determine how much of the tax is payable or refundable are part of the notion of 'taxation measures." Thus, tax deductions, allowances or rebates are caught by the term.*"
>
> (d) "*The question of whether something is a taxation measure is primarily a question of its legal operation, not its economic effect. A taxation law is one which imposes a liability on classes of persons to pay money to the State for public purposes. The economic impacts or effects of tax measures may be unclear and debatable; nonetheless a measure is a taxation measure if it is part of the regime for the imposition of a tax. A measure providing relief from taxation is a taxation measure just as much as a measure imposing the tax in the first place.*"[122]

83. Reading the tribunal's statements in context, the starting point for determining if there is a taxation measure is to determine if there is a "taxation law" as it is "*in the nature of a tax that it is imposed by law*." If so, the analysis may not end there as the term "taxation measure" may be broader and include other aspects of that tax regime, such as tax deductions and rebates. This is consistent with how *EnCana* has been treated by other tribunals, as set out at paragraph 79 above.

[121] Peru's Reply, ¶ 148.

[122] **RL-0008**, *EnCana*, ¶ 142 [Emphasis added].

84. In *Nissan v. India*, like Peru, India argued that *Encana* distinguished between "*taxation laws*" and "*taxation measures*" and argued that the definition of "*taxation measure*" is broader than the definition of "*taxation law*."[123] This was not accepted by the tribunal. The tribunal held that the "*international law meaning of the word 'taxation'*" is the general definition set out in *EnCana* and the subsequent authorities that "*[a] taxation law is one which imposes a liability on classes of persons to pay money to the State for public purposes.*"[124]

85. Third, Peru claims that *EnCana* supports its position that a "taxation measure" "*comprises all measures that are 'part of the regime for the imposition of a tax*."[125] It does not. The tribunal stated that what is part of the notion of "taxation measure" are those aspects of the tax regime "*which go to determine how much of the tax is payable or refundable*," like tax refunds.[126]

86. Fourth, in its Response, Scotiabank explained why the accrual of default interest does not meet this definition of "taxation measures." It is a specific penalty that compensates the state for the lost time value of money. It is not a liability on a class of persons where the funds go to the State for public purposes.[127] Peru claims this reads requirements into the FTA as the FTA does not provide that the funds must go to such purposes.[128] Peru misses the point. The FTA is silent on the definition of "taxation." This criterion regarding the purpose of the monetary obligation is part of the ordinary meaning of "taxation measures" set out by both the dictionary definitions and by international law, as described above.

87. Fifth, Peru argues that Scotiabank's interpretation ignores Article 2203(6)(g) of the FTA.[129] Article 2203(5) sets out what provisions of the FTA apply to taxation measures and Article 2203(6) sets out some limitations. Article 2203(6)(g) provides that subsection (5) does not apply to new taxation measures aimed at ensuring the equitable and effective imposition or collection of taxes, including those that seek to ensure compliance with the Party's taxation system or to prevent the

[123] **CL-0039**, *Nissan*, ¶¶ 349-351.
[124] **CL-0039**, *Nissan*, ¶ 384.
[125] Peru's Reply, ¶ 150.
[126] **RL-0008**, *EnCana*, ¶ 142.
[127] Scotiabank Response, ¶¶ 92-93.
[128] Peru's Reply, ¶ 152.
[129] Peru's Reply, ¶ 154.

avoidance or evasion of taxes. This provision does not provide a broad definition of taxation measures as Peru suggests. It sets out a limitation in respect of *certain* types of taxation measures: new measures aimed at ensuring the equitable and effective imposition or collection of taxes. Within that subset, one such measure may be those that seek compliance with the taxation system.

88. Nothing in this language suggests that the term "taxation measure" is broader than the meaning set out under international law, discussed above. Indeed, the fact that the drafters had to add that compliance measures were included in this specific subset of taxation measures suggests such measures would not be included in the ordinary definition of "taxation measure." The *travaux prépatoires* will be important to assess the context of why such language was included.

89. In any event, the accrual of default interest on a debt is not a measure designed to ensure the equitable and effective imposition or collection of taxes. Peru baldly asserts that it is,[130] but this is a matter requiring proof of Peruvian law. Scotiabank intends to lead evidence to illustrate that how Peru seeks compliance with a tax obligation is the coercive collection procedure. Default interest is an obligation independent from the tax assessment that has a distinct function: while it penalizes the debtor for the late payment, that penalty is compensatory in nature.[131]

ii. The Purpose of the Treaty Exemption

90. Both parties agree on the purpose of the taxation exemption in Article 2203: to preserve the states' sovereignty in relation to their power to impose taxes.[132] Scotiabank argues that the accrual of default interest does not fall within this sovereign power and Peru argues that it does.

91. First, in its Response, Scotiabank highlighted examples of measures that have been found to fall within the scope of the government's sovereign power to impose taxes, including taxes on gross income or profits, refunds on value-added taxes and customs duties.[133] Peru claims Scotiabank's examples are "*cherry-picked*," but Peru does not explain why these are non-representative examples and what other types of taxation measures have been found by tribunals

[130] See Peru's Reply, ¶ 154.

[131] See **CL-0022**, *Freeport*'s Rejoinder on Jurisdiction, ¶ 80 and **CL-0020**, *Freeport*'s Counter-Memorial on Jurisdiction, ¶ 273 citing expert evidence on this issue.

[132] Peru's Reply, ¶ 155.

[133] Scotiabank's Response, ¶ 95.

that were not included in these examples.[134] Peru also claims that Scotiabank "*arbitrarily*" decided what falls within the scope of the state's sovereign power of taxation.[135] These are the types of measures that have been found by international tribunals to be taxation measures. This is what is provided by international law, not by Scotiabank.

92. Second, these types of measures are different than a measure relating to the accrual of default interest. Nothing is more quintessentially a tax than a law imposing a tax on income or profits.[136] Similarly, a refund on taxes directly goes to what tax is assessed and owed.[137] These measures all relate to "*how much of the tax is payable or refundable*," as set out in *EnCana*.[138] Default interest is different in kind. The tax amount, or the taxable event, has already been determined and the tax obligation created. Unlike those measures that are part of the sovereign taxation power, default interest has a different purpose. It is not to determine what tax amounts are owed to fund public goods and services, but to compensate the state for the time value of money.

93. Peru disagrees with this distinction and argues that a refund on a tax debt is akin to default interest because both concepts impact different industries (*e.g.*, a refund can be owed on an electricity bill) but it is still a taxation measure when it relates to a taxation liability.[139] But this ignores the point that a refund goes to determining how much of the tax is payable and default interest does not. It is different in kind and is not part of what is assessed as a tax.

94. Third, Scotiabank explained in its Response that that the *travaux prépatoires* will be useful evidence in understanding the purpose behind Article 2203 and the scope of the sovereign power over taxation.[140] In its Reply, Peru claims this is not necessary because the language of Article 2203 is clear. Respectfully, this simply asks the Tribunal to baldly accept Peru's position and to ignore relevant evidence that exists that will inform this interpretative exercise.

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[134] Peru's Reply, ¶ 156.

[135] Peru's Reply, ¶ 156.

[136] **CL-0015**, *Eiser 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; **RL-0034**, *SunReserve*, ¶ 239.

[137] **RL-0008**, *EnCana*, ¶ 142.

[138] **RL-0008**, *EnCana*, ¶ 142.

[139] Peru's Reply, ¶ 159.

[140] Scotiabank's Response, ¶ 96.

iii. Scotiabank's Interpretation is Supported by the Jurisprudence

95. In its Response, Scotiabank set out the jurisprudence that confirms that matters such as interest, fees and penalties do not qualify as "taxation measures." Peru's position that taxation measure includes "*any matter sufficiently connected to a taxation law or regulation*"[141] has been rejected by the international authorities.[142] In its Reply, Peru wrongly claims these cases are inapposite.[143] This issue is far from a "settled" legal principle, as required under Rule 41.

96. First, Peru argues that the *Nissan v. India* case is inapposite. Peru claims that, unlike *Nissan*, this case does not concern a fine imposed for penal purposes, as the primary purpose of default interest is to compensate the state and the punitive component is secondary.[144] Peru's bald assertion about what aspects of the purpose of default interest are primary and secondary is an unproven issue under Peruvian law. In any event, the tribunal in *Nissan* did not limit its analysis to amounts imposed for only penal reasons.

97. The tribunal's analysis in *Nissan* is relevant, as the tribunal rejected arguments raised by India that are similar to those being raised by Peru. In *Nissan*, the issue was whether certain incentives granted to the investor's consortium amounted to taxation measures. India argued these incentives were tax refunds. Alternatively, India argued, like Peru in this case, that a measure is a taxation measure if it is broadly part of the general framework of the applicable tax regime.[145]

98. The tribunal rejected this broad approach to interpreting taxation measures. First, as set out at paragraph 84 above, the tribunal rejected India's position on the definition of "taxation measure" and adopted the definition from *Encana*. Second, applying that definition, the tribunal recognized that not "every *instance of a governmental authority imposing monetary obligations […] is assessing, exempting, rebating or refunding a 'tax.'*" It gave as one example the imposition of fines or penalties as punishment for proscribed conduct. Its analysis was not limited to that issue.[146]

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[141] Peru's Reply, ¶¶ 139-142.

[142] Scotiabank's Response, ¶¶ 97-99.

[143] Peru's Reply, ¶¶ 163-168.

[144] Peru's Reply, ¶ 164.

[145] **CL-0039**, *Nissan*, ¶¶ 334, 347, 351.

[146] **CL-0039**, *Nissan*, ¶¶ 384-385. Peru also argues that the tribunal in *Nissan* refers to "any 'fines or penalties as punishment for proscribed conduct" (such as interest imposed on the late payment of a parking ticket) and the tribunal does not refer to penalties imposed on a tax liability. See Peru's Reply, ¶¶ 166-167. Peru is drawing a distinction that

Third, it rejected India's argument that the test only requires that a matter be "*sufficiently clearly connected to a taxation law or regulation*." The tribunal held this was too broad and a more nuanced inquiry was required focusing on the "who," "what" and "why" of the domestic law framework, including whether the measures were "*motivated principally by tax objectives*."[147]

99. Here, default interest is not "*motivated principally by tax objectives*." Interest serves a punitive and compensatory purpose and, regardless of which purpose is "primary," these purposes are different than the purpose of taxation, which is to fund public goods and services. The fact that the interest amount is imposed on a tax debt simply makes it *factually connected* to a taxation measure. The tribunal in *Nissan* makes clear that this is not sufficient for it to be a taxation measure.

100. Peru also argues that *Nissan* is inapposite because the tribunal's findings were made in *obiter* and it made no finding on the matter.[148] *Nissan* exemplifies why it is inappropriate for the Tribunal to determine this issue on a Rule 41 objection. That case was a Decision on Jurisdiction. Even at that later stage of the proceeding, the tribunal held that it could not make the determination of whether the measures were taxation measures without a more developed evidentiary record.[149] The tribunal recognized that "*most of the tribunals that ultimately resolved contested tax exclusion issues did so only after considering a full evidentiary record*."[150]

101. Second, Scotiabank cited *Antaris* and *Voltaic* for the point that certain types of monetary obligations are not taxation measures, even if they are administered under the domestic tax legislation or by the tax agency.[151] Peru accuses Scotiabank of "*misrepresenting*" these cases but does not then explain what was "*misrepresented*." On the contrary, Peru then sets out a summary of the *Antaris* case that is consistent with the one Scotiabank provided.[152]

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is not present in the tribunal's analysis. The tribunal did not use the word "*any.*" The tribunal's analysis was focused on measures relating to taxation, not to parking tickets.

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

[148] Peru's Reply, ¶ 165.

[149] **CL-0039**, *Nissan*, ¶¶ 4, 389-398.

[150] **CL-0039**, *Nissan*, ¶ 389.

[151] Scotiabank Response, ¶ 97.

[152] Peru's Reply, ¶ 168: the tribunal found Solar Levy "*operated as a reduction of the incentives paid by the State but does not entail an increase in the State's revenues*" and this did not meet the definition of 'tax.' Similarly, in its

102. In *Antaris*, the tribunal held that the "*fact that the Solar Levy is administered by the Tax Administration Law is not dispositive of the question whether the Solar Levy constitutes a tax in substance*."[153] The Solar Levy was not a taxation measure" as its principal objective was to reduce the level of payments owed by certain investors, not to raise revenue for the State.[154] Peru claims this is distinct because the purpose of default interest is to increase the State's revenues as it compensates the state for delay and increases the amount due by the debtor as a penalty.[155]

103. Peru's position conflates the *effect* of the measure (*i.e.*, it results in an additional monetary payment to the state) with its *purpose*. If Peru's position were accepted, then any mandatory payment to the state for almost any purpose could constitute a tax (including interest on a parking ticket to take Peru's example at paragraphs 166 and 167 of its Reply) because it would have the practical effect of putting money in the state's proverbial pockets. Tribunals have been clear that not every mandatory payment to the state is a taxation measure.[156] The imposition of interest serves a distinct purpose from taxes as it is not imposed to obtain revenue for public purposes.

104. Peru claims none of Scotiabank's cases are "*legally or factually comparable*."[157] For the reasons set out above, that is wrong. But it should not be forgotten that this is Peru's Rule 41 challenge. Peru bears the burden, not Scotiabank. Peru has not presented a single case that has found that interest is a taxation measure. Instead, Peru argues for a broad interpretation of the term taxation measures (arguing that it is "*any matter sufficiently connected to a taxation law or regulation*")[158] when such positions have been rejected by other tribunals, as explained above.[159]

Response, fn 104, Scotiabank explained that in those cases "*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*."

[153] **CL-0002**, *Antaris Solar GmbH and Dr. Michael Göde v. Czech Republic, PCA Case No. 2014-01, Award, May 2, 2018*, ("***Antaris***") ¶ 230.

[154] **CL-0002**, *Antaris*, ¶¶ 252-253.

[155] Peru's Reply, ¶ 168.

[156] See **RL-0028**, *Murphy*, ¶ 191; **CL-0039**, *Nissan*, ¶ 385.

[157] Peru's Reply, ¶ 168.

[158] Peru's Reply, ¶¶ 139-142.

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

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

105. Scotiabank explained that not only was the subject matter before the Constitutional Court (*i.e.*, the accrual of default interest) not one relating to a matter of "taxation", but, in any event, this case is about an unfair judicial process.[160] Peru raises the following issues in its Reply.

106. First, Peru claims Scotiabank is "*relabelling*" its claims to elude the tax exclusion and this attempts to "*make a mockery of the Contracting States' limits to their consent to arbitrate*."[161] Scotiabank is not relabelling its claim. The Request for Arbitration speaks for itself. This case is about how the Constitutional Court failed to remain objective and independent, bowed to political and media pressure, retroactively changed the process that previously assured a fair process and then issued a decision without quorum. None of that is about a taxation measure.

107. Second, Peru relies on *SunReserve v. Italy* to support its position that if a judicial decision is regarding a tax, it cannot be separated from that underlying subject matter.[162] Scotiabank has addressed Peru's reliance on *SunReserve* in its Response.[163] In Reply, Peru again accuses Scotiabank of misrepresenting the decision, but then fails to explain how Scotiabank has done so. Again, it sets out a summary of the decision that is akin to the one provided by Scotiabank.[164] Scotiabank and Peru disagree with the interpretative meaning that should be ascribed to the case. It is common for parties to have such differing positions, but such disagreement does not equate to "*misrepresentation*."

108. In *SunReserve*, the constitutional court held that the extension of the Robin Hood Tax to renewable energy companies was unconstitutional but that finding did not have a retroactive effect (it was *ex nunc*, not *ex tunc*). The claimant challenged that prospective application of the law as unfair. The tribunal disagreed with the claimant that this was just a challenge to the "*propriety and implications of the of the Constitutional Court Decision*," and held instead that it would require

[160] Scotiabank Response, ¶¶ 100-105.

[161] Peru's Reply, ¶¶ 170-171.

[162] Peru's Reply, ¶ 172.

[163] Scotiabank Response, ¶¶ 102-104. Peru also relies on **RL-0036**, *ESPF Beteiligungs GmbH et v. Italian Republic*, ICSID Case No. ARB/16/5, Award, September 14, 2020 ("***ESPF***"). This case is just like *SunReserve* and is distinct for the same reasons.

[164] Peru's Reply, ¶ 173.

assessing the propriety of the Robin Hood Tax itself.[165] The claims, *as pleaded*, alleged that the claimant reasonably expected the Robin Hood Tax would not apply to its plants and this expectation was violated by the prospective, not retroactive, application of the law. The tribunal held that to assess that claim, it had to go beyond assessing the court decision and review whether the Robin Hood Tax itself should be extended to the claimant's plants.[166] That is clearly distinct from the situation here. Unlike the issue in this case, the fairness of the process before the constitutional court was not impugned in *SunReserve*.

109. Third, Peru argues that Article 2203 does not refer to "*claims*" but to taxation *measures* and so it does not matter that Scotiabank's claim is about an unfair judicial process. Rather, the relevant query is whether the 2021 Constitutional Court Decision is a taxation measure.[167] Scotiabank has alleged that the measures that violated the FTA are the Constitutional Court (i) failing to remain independent and objective, (ii) purporting to lower the quorum requirements that previously assured a fair process and failing to abide by its quorum requirements, and (iii) preventing Scotiabank Peru from ever having the substance of its challenged determined by the Peruvian courts.[168] The challenged conduct clearly relates to the unfair judicial process.

C. Peruvian Law Supports Scotiabank's Position that This Claim Does Not Concern a Taxation Measure

110. Both parties agree that Peruvian law is relevant to establishing if the measure is a taxation measure. Peruvian law is a factual issue that cannot be determined on a Rule 41 challenge and, in any event, supports Scotiabank's position.

i. Peruvian Law is a Factual Issue

111. Peru claims that the interpretation of Peruvian law informs the application of international law and is a legal, not a factual, matter.[169] For the reasons set out at paragraphs 12 to 15 above, this is wrong. In *Nissan v. India*, the tribunal noted that in interpreting the term "taxation" in

[165] Scotiabank Response, ¶ 102; Peru's Reply, ¶ 173; **RL-0034**, *SunReserve*, ¶¶ 247, 496, 551.
[166] **RL-0034**, *SunReserve*, ¶¶ 550-552.
[167] Peru's Reply, ¶ 174.
[168] Request for Arbitration, ¶ 63.
[169] Peru's Reply, ¶ 179.

accordance with international law, "*significant importance must be paid **as a matter of fact** to the domestic law system at issue…*[170]

ii. The Freeport Litigation

112. In its Response, Scotiabank highlighted that Peru is currently litigating the issue of whether penalties and interest are taxation measures in the *Freeport v. Peru* matter.[171] Peru claims that this decision has no bearing in the present case as the Tribunal can decide this issue "*on the basis of the evidence presented to it.*"[172] This misses Scotiabank's point. Peru asks this Tribunal to accept its declaration that its one-sided position on Peruvian law is *indisputable*. This position is belied by the *Freeport* case. In that case, the parties have presented contested expert evidence on these very issues showing Peru's position is not, as Peru claims, straightforward and indisputable.

113. As noted in Scotiabank's Response, in Freeport's Rejoinder, Freeport claims that Peru has admitted penalties and interest are not taxes under Peruvian law (citing the following sentence from Peru's expert report, "*neither delinquent interest nor penalties are taxes* per se. *In that, we are in full agreement with Claimant's tax law expert*").[173] Peru claims that Scotiabank misrepresents Peru's position and accuses Scotiabank of "*abus[ing] the limited scope for factual review under Rule 41…*"[174] It is not clear how this misrepresents Peru's position. It is what was asserted in Freeport's Rejoinder and is consistent with what Peru has stated in its Reply in this case, where it stated that it is not arguing that "*default interest is a tax* stricto sensu."[175] Scotiabank does not have access to the non-public expert reports in *Freeport* and can only rely on what is contained in the parties' public written submissions, which demonstrate that this issue is not as indisputable or straightforward as Peru claims. Scotiabank is not committing any "*abuses*" in pointing to what is in the *Freeport* case. It is directly relevant.

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[170] **CL-0039**, *Nissan*, ¶ 383. [**Emphasis** added].

[171] Scotiabank Response, ¶¶ 113-115.

[172] Peru's Reply, ¶ 201.

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

[174] Peru's Reply, ¶¶ 202-203.

[175] Peru's Reply, ¶ 196.

iii. The Content of Peruvian Law is Not Indisputable

114. Peru spends five pages in its Reply setting out a one-sided interpretation of Peruvian law and baldly asserting this is "*indisputable*." When Scotiabank raises opposing arguments regarding the content of Peruvian law, Peru claims this is an "*attempt to crowd the record with immaterial arguments*"[176] and that Scotiabank "*contrives a dispute where there can be none*."[177] In essence, even though the Tribunal is not to determine disputed factual issues on a Rule 41 challenge, Peru is asking the Tribunal to do exactly that and to ignore Scotiabank's position.

115. ***Tribunal is to Accept Scotiabank's Facts***. Peru claims the Tribunal can accept Peru's declarations respecting the content of Peruvian law because these issues are "*truly indisputable*."[178] As set out at paragraphs 10 to 11 above, the Tribunal is in no position on a Rule 41 challenge to decide disputed facts and instead accepts the *prima facie* facts as presented by the claimant unless those facts are frivolous, vexatious, inaccurate, etc.

116. In *Mainstream* (one of Peru's authorities), the tribunal held that the respondent did not establish a foundation of "*unavoidable and indisputable fact*" from which to proceed to determine a Rule 41 challenge. As set out at paragraph 18 above, while the parties did not dispute the occurrence of certain events and legal instruments, the accuracy of the respondent's description of those instruments and their effect was firmly in issue between the parties. The tribunal held that this factual matrix put forward by the respondent cannot be said to be complete or undisputed.[179]

117. In this case, Scotiabank clearly contests the issues of Peruvian law put forward by Peru. It challenges the completeness of what Peru has presented: Peru has cherry-picked isolated provisions of the tax legislation and presented a one-sided interpretation of what this means. Scotiabank will lead expert evidence setting out its own interpretation of these relevant Peruvian tax legislation and case law. Clearly, these factual matters are not "*indisputable*."

118. ***Peru Has Not Raised Truly Indisputable Facts***. Peru sets forth two principles of Peruvian law that it claims are determinative of the issue. Below are Scotiabank's responses to each principle

[176] Peru's Reply, ¶ 181.
[177] Peru's Reply, ¶ 207.
[178] Peru's Reply, ¶¶ 181, 193.
[179] See **RL-0074**, *Mainstream*, ¶¶ 99-107.

and to Peru's continued allegation that Scotiabank has made misrepresentations each time Peru disagrees with Scotiabank's position.

119. The Tax vs. Civil Nature of Default Interest. This is a disputed issue between the parties: is the nature of default interest one of tax law (Peru's position) or civil law (Scotiabank's position)?

120. Peru relies on Norm IX of the Tax Code, which provides that all matters covered by the Tax Code are governed by said code and where there are gaps, different legal norms may be applied as long as they do not contradict or distort the Tax Code or tax regulations. Peru then claims that Article 33 of the Peruvian Tax Code regulates default interest on taxes and so default interest on a tax liability is distinct from default interest arising under the Peruvian Civil Code.[180] Peru then extrapolates from these provisions the bald conclusion that "*default interest on an unpaid tax is considered part of a tax liability*" and is "*part of the regime for the imposition of tax*."[181] That conclusion is not set out in Article 33 or Norm IX of the Tax Code.

121. Scotiabank does not dispute the existence of these two isolated provisions of the Tax Code. However, Peru is not relying on their mere existence but is going further and ascribing interpretative meaning to them. Scotiabank disputes that interpretation. As set out in Scotiabank's Response, the purpose of default interest is set out in civil law and establishes that the purpose is to indemnify the payee for a delayed payment. This purpose is not tax-like in nature.[182]

122. Norm IX applies to fill gaps with respect to legal norms but says nothing about whether default interest is part of the concept of "taxation" under Peruvian law. Article 33 sets out the rate of default interest that applies to an unpaid tax debt. But, contrary to Peru's position, according to Article IX of the Preliminary Title of the Civil Code, the Civil Code applies to fill in the remaining gaps, including its definition, content, nature and purpose. The use of civil norms to give content to the definition and scope of default interest on a tax debt has been used by both SUNAT and the Tax Court. As the Tax Court has found: "*Since there is no definition of default interest in the Tax Code, and, in application of the provisions of both Article IX of the Preliminary Title of the Civil*

[180] Peru's Reply, ¶¶ 182-185.

[181] Peru's Reply, ¶ 192.

[182] See Scotiabank's Response, ¶ 112.

Code and Norm IX of the current Tax Code, to know its nature it is pertinent to refer to Article 1242 of the Civil Code, which mentions that interest is moratory when its purpose is to compensate for late payment."[183]

123. In its Response, Scotiabank cited Constitutional Court authority for the principle that default interest does not have a tax nature, but is a civil sanction.[184] Peru claims that in so arguing, Scotiabank "*makes manifestly inaccurate misrepresentations*."[185] With respect to the *Medina de Baca* case, Peru claims that what the court found is that default interest is not a tax *stricto sensu* but the court did not address whether it is tax in nature and part of the tax regime. Peru also claims this decision supports its position because the court found default interest was subject to the prohibition of confiscation, like tax *stricto sensu*.[186]

124. Scotiabank disagrees this is the proper way to interpret that case. In that case, the Constitutional Court did not make a pronouncement about a tax *stricto sensu* but about the nature of default interest: "*default interest has not, certainly the nature of a tribute*."[187] The fact that it is not tax or tribute in nature means it is not part of the regime for the imposition of a "tax." Rather, its punitive and compensatory nature show it is part of the civil regime under the Civil Code. While the Court applied the prohibition of confiscation to default interest, it did so not because it is a matter of "taxation" but because that principle applies to all administrative decisions.[188] Clearly, expert evidence on the proper interpretation and meaning of this case and Peruvian law is needed.

125. Lastly, even if Peru's interpretation of Peruvian law were accepted, at most that means that the Tax Code governs the legal norms applicable to default interest on a tax debt. But, as set out at paragraph 101 above, the fact that certain types of monetary obligations imposed by the

[183] **C-0069**, Tax Court, Resolution N° 983-3-98. See also **C-0071**, SUNAT, Report N° 36-2017-SUNAT/340000 (SUNAT looked to Article 1242 of the Civil Code as setting out the concept of default interest and that interest is "*regulated in a special way within the Civil Code itself*"); **C-0074**, SUNAT, Report N° 124-2020-SUNAT/7T0000 (SUNAT looked to Article 1242 of the Civil Code as establishing that interest is compensatory and moratory).

[184] Scotiabank's Response, ¶ 112 citing, **C-0066**, Medina de Baca case law and **C-0067**, Icatom case law.

[185] Peru's Reply, ¶ 193.

[186] Peru's Reply, ¶¶ 194-198.

[187] **C-0066**, Medina de Baca case law.

[188] **C-0066**, Medina de Baca case law, ¶ 46.

government are administered under the domestic tax legislation or by the tax agency is not sufficient to make it a taxation measure.

126. Article 28 of the Tax Code. Peru relies on Article 28 of the Tax Code, which provides that default interest is a component of the tax debt. Peru then claims that under Peruvian law the "tax debt" comprises a tax *stricto sensu* and this is indisputable.[189] Once again, the existence of Article 28 of the Tax Code is indisputable but the meaning being ascribed to it by Peru is quite disputed.

127. *First*, Peru's position is internally inconsistent. Peru on the one hand claims that it is "*unequivocal*" that "*the tax debt is unitary and comprises the tax* stricto sensu*, as well as any fines and default interest*."[190] Yet, just a few paragraphs later, Peru claims that the Constitutional Court has held that "*default interest is not a tax* stricto sensu" and that, in this arbitration, Peru "*does not argue that default interest is a tax* stricto sensu."[191]

128. *Second*, Peru's reliance on Article 28 is misplaced. Article 28 sets out that interest is part of the tax debt, but that is not determinative of whether interest is a matter of "taxation" under Peruvian law. As set out in Scotiabank's Response, Peru has raised this same argument in *Freeport* and the claimant has responded with expert evidence to support its position that this argument is inaccurate and misleading. Freeport's expert explains that the term "tax debt" encompasses a broad range of concepts that the Tax Code bundles together purely for procedural and administrative convenience so that they are administered collectively, *even though they are not taxes*.[192] Peruvian law similarly classifies royalties as components of the tax debt that is administered by SUNAT, yet in *Freeport*, Peru did not contest that such measures are not taxation measures.[193] This was raised in Scotiabank's Response and not addressed by Peru in its Reply.

129. At the appropriate time, Scotiabank will lead expert evidence that establishes that default interest is not a matter of "*taxation*" under Peruvian law. Like the claimant in *Freeport*, Scotiabank will lead evidence establishing: (a) how Peruvian law defines a tax (it is to fund public goods and

[189] Peru's Reply, ¶¶ 186-189.
[190] Peru's Reply, ¶ 189.
[191] Peru's Reply, ¶¶ 195-196.
[192] Scotiabank's Response, ¶ 117; **CL-0022**, *Freeport's* Rejoinder on Jurisdiction, ¶ 81(a).
[193] **CL-0022**, *Freeport's* Rejoinder on Jurisdiction, ¶ 81(a).

services and is not compensatory or penal in nature); (b) how Peruvian law treats default interest (it is civil, not tax in nature, as its purpose is both compensatory and penal; it does not fall within the three categories of taxes set out in the Tax Code and is an obligation separate and independent from a tax assessment); (c) interest is not the specific means by which Peru enforces its tax obligations and is not part of the tax regime in Peru.[194] Rather, the imposition of interest under the Tax Code establishes that this is a debt that is enforced and collected by SUNAT, like other non-taxation measures that form part of the tax debt (*e.g.*, royalties), to ensure procedural and administrative conveniences. That does not make it part of the tax regime or a matter of taxation.

130. Peru claims there is "*simply no need for expert evidence*" as Scotiabank "*contrives a dispute where there can be none*" and "*merely seeks to push the arbitration forward by misrepresenting the content of Peruvian law*."[195] These allegations are clearly unfounded. Scotiabank has legitimate arguments on the content of Peruvian law. These allegations also ignore the context of what Peru is asking of this Tribunal on a Rule 41 standard. Peru is requesting this Tribunal to summarily dismiss Scotiabank's case before it has the chance to be heard. As set out above, there is a reason the legal standard to do so has been set so high and disputed factual issues are not determined on a Rule 41 challenge.

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

131. Peru's third objection is that the Tribunal does not have jurisdiction over Scotiabank's Expropriation Claim because the interest amount paid under protest is not a covered investment under either the FTA or the ICSID Convention. Peru further argues that the Expropriation Claim must fail substantively because there is no investment capable of being expropriated. As set out in the Response, this objection does not meet the Rule 41 standard as it turns on disputed interpretations of Peruvian law and, in any event, Scotiabank meets the criteria for an investment under both instruments (and certainly crosses the low threshold of having a tenable argument).[196] This section of the Rejoinder addresses the points raised by Peru in its Reply.

[194] Scotiabank Response, ¶¶ 113-114; **CL-0020**, *Freeport's* Counter-Memorial on Jurisdiction, ¶¶ 272-273; **CL-0022**, *Freeport's* Rejoinder on Jurisdiction, ¶ 80.

[195] Peru's Reply, ¶ 207.

[196] Scotiabank's Response, ¶¶ 119-143.

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

132. The issue between the parties is whether the interest amount paid under protest meets the definition of "investment" under Article 847(h) of the FTA, which provides that "*interests arising from the commitment of capital or other resources in the territory of a Party to economic activity in such territory [...]*" are covered investments. Peru wrongly claims that Scotiabank is seeking "*to transform a tax liability into an asset*."[197] Scotiabank Peru made a payment of over $100 million to Peru to prevent the significant consequences that may result to its business if it did not do so. This was a commitment of capital that is part of its ongoing operations. It made that payment under protest and reserved its right under Peruvian law to have the amounts recouped.

133. ***The Parties Dispute Whether There is an "Interest" Under Peruvian Law***. Peru claims that the interest amount paid under protest is not an "interest" under Article 847(h). Peru recognizes that the term "interest" must be interpreted broadly and can include both property rights or personal rights.[198] Peru claims there are no such rights over these amounts because payment under protest "*does not confer any rights to recover the amounts paid*" under Peruvian law. Peru claims that Scotiabank has "*carefully chosen words*" to say that "*payment under protest is allowed*" under Peruvian law to give the appearance of a right where there is none.[199]

134. Scotiabank clearly asserted that under Peruvian law, it has a <u>right</u> to the return of the amounts paid under protest: "*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). <u>That means that Scotiabank Peru has a right to the amounts paid, if they were unduly or excessively paid</u>. Scotiabank is not estopped from exercising <u>its right for the return of those payments</u>, given that it did not 'voluntarily' make the payment and made the payment under protest*."[200]

[197] Peru's Reply, ¶ 208.

[198] Peru's Reply, ¶ 215.

[199] Peru's Reply, ¶ 216.

[200] Scotiabank's Response, ¶ 124, fn 138. [<u>Emphasis</u> added].

135. Peru wrongly focuses on the question of *whether payment under protest* confers a right. As set out in the paragraph above, per the Tax Code and Civil Code, Scotiabank Peru has a right to the repayment of the interest when it was unduly paid. That right exists regardless of whether the payment was made under protest. Because it was made under protest, no estoppel, waiver or other type of argument arises to suggest that Scotiabank is no longer entitled to act upon that right. The Constitutional Court has recognized the right to restitution where payment under protest has been made and has recognized that it means the payee does not accept the propriety of the debt.[201]

136. In its Reply, Peru argues that this right to reimbursement is not vested. Rather, Scotiabank Peru can challenge a tax debt in the courts to seek reimbursement. Peru claims the fact Scotiabank can *request* reimbursement does not provide a *right* to reimbursement.[202] Peru is wrong. Scotiabank's entitlement to reimbursement arises because of Article 38 of the Tax Code and the Civil Code. Scotiabank may use the court process as the means to act on that right, but the right is established independent of that process.

137. To resolve this issue, the Tribunal will have to make determinations of what rights Scotiabank holds under Peruvian law, a disputed factual matter. Peru incorrectly claims that Scotiabank resorts to this argument "*being aware of the weakness of its argument,*" to "*unduly prevent [Peru] from disputing the point*" and that Scotiabank has made "*manifestly inaccurate representations on Peruvian law,*"[203] Scotiabank's position on Peruvian law is accurate. There are important due process reasons for why tribunals are not to make factual determinations on this summary process. Scotiabank is merely holding Peru to the Rule 41 standard, contrary to Peru's rhetoric. Peru is asking this Tribunal to summarily dismiss its case before Scotiabank can put forward expert evidence on the content of Peruvian law.

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[201] **C-0070**, Ruling in Case N° 00319-2013-PA/TC, ¶ 32 (the Constitutional Court held that the claimant's claim for restitution of the tax paid in advance under protest is tenable); **C-0073**, Ruling in Case N° 02644-2016-PA/TC, ¶ 11 (the Constitutional Court determined that paying under protest is a sign of unacceptance of the debt.). See also **C-0068**, Constitutional Court judgment in Case No. 2218-2015-PA/TC (the Constitutional Court dismissed an amparo claim because the applicant had voluntarily paid the debt. While the Constitutional Court did not mention payment under protest explicitly, it implicitly recognized a distinction arose when the debt was voluntarily made).

[202] Peru's Reply, ¶ 263.

[203] Peru's Reply, ¶ 271.

138. ***There was a Commitment of Capital in Peru***. For Article 847(h) of the FTA to apply, there must not only be an "interest," but also a commitment of capital or other resources in Peru towards economic activity in Peru.[204]

139. First, Peru claims that there was no such commitment of capital. The amounts paid were not a product of Scotiabank's Peru's economic activities in Peru, *i.e.*, the provision of financial services, but are simply the payment of a liability.[205] As set out in Scotiabank's Response, this was not a one-time payment but was a commitment of capital made to Peru to ensure that Scotiabank Peru's operations could continue and would not be seized by the state.[206] Arbitral tribunals have recognized that other one-time payments connected to the continued operation of a business, when viewed in context, amount to an "investment."[207]

140. Peru relies on exaggerated hypotheticals, arguing that if Scotiabank is correct, then any interest paid to a Peruvian creditor is an "investment" under Article 847(h) or any payment of a fine or tax, which lack of payment could lead to sanctions, would be an "investment."[208] Neither is like the present case. Scotiabank does not argue that any time a debt is paid or there is a potential for sanctions, there is an "investment." In those hypotheticals, there is no basis for the investor to claim a right in recoupment of the amounts paid. It is just a payment of a debt. Here, Peruvian law establishes a right to such recoupment where amounts were unduly or excessively paid.

141. Scotiabank paid a large sum of money – over US$100 million – to Peru under protest as it claims such amounts were never properly owed. For the last 10 years, Peru has had control of that huge sum of capital and Scotiabank has not. Scotiabank committed that capital to Peru while

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[204] Scotiabank's Response, ¶ 124.

[205] Peru's Reply, ¶¶ 214, 219.

[206] Scotiabank's Response, ¶ 126.

[207] See **CL-0043**, *Saipem S.p.A. v. The People's Republic of Bangladesh, ICSID Case No. ARB/05/07, Decision on Jurisdiction and Recommendation on Provisional Measures, March 21, 2007 ("**Saipem,* **Decision on Jurisdiction**"), ¶¶ 129-134; **CL-0044**, *Saipem S.p.A. v. The People's Republic of Bangladesh*, ICSID Case No. ARB/05/07, Award, June 30, 2009, ¶ 129 and the authorities cited at footnote 156 of Scotiabank's Response: **CL-0023**, *Marco Gavazzi and Stefano Gavazzi v. Romania*, ICSID Case No. ARB/12/25, Decision on Jurisdiction, Admissibility and Liability, April 21, 2015, ¶ 120; **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; **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 ("***Ceskoslovenska***"), ¶¶ 78-81; **CL-0011**, *Deutsche Bank AG v. Democratic Socialist Republic of Sri Lanka*, ICSID Case No. ARB/09/2, Award, October 31, 2012, ("***Deutsche Bank***"), ¶¶ 292-312, 521.

[208] Peru's Reply, ¶¶ 219-220.

maintaining its right to recoup such amounts and did so to ensure Scotiabank Peru's economic activity in Peru could continue. It was part of Scotiabank Peru's ongoing operations and its ability to operate and generate revenues.

142. Second, relying on *Lion v. Mexico*, Peru wrongly argues that for there to be a "*commitment of capital*" under Article 847(h), such capital "*must arise from contracts*."[209] This is inconsistent with the plain language of Article 847(h). Article 847(h) states that investment means interest arising from the commitment of capital in Peru to economic activity in Peru, "*such as under*" (1) contracts involving the presence of an investor's property in Peru, including turnkey or construction contracts or concessions, or (2) contracts where remuneration depends substantially on production, revenues or profits of an enterprise. These contracts are given as *representative examples* of the commitment of capital but are not mandatory requirements.

143. The tribunal in *Lion* rightly recognized that these are "*two illustrative examples*." The tribunal's further finding that Article 1139(h) of the NAFTA, the equivalent of Article 847(h) of the FTA, requires that the commitment of capital be formalized as contracts is, respectfully, inconsistent with the plain language of the provision. Furthermore, this was an *obiter* finding as in that case as the loans in question were governed by a different provision of the NAFTA.[210]

B. The Tribunal has Jurisdiction Under Article 25 of the ICSID Convention

144. As Scotiabank stated in its Response, the Tribunal has jurisdiction over this dispute under the ICSID Convention, whether the Tribunal determines that jurisdiction can be found based on Scotiabank's investment in Scotiabank Peru as a whole (as it should) or, alternatively, with respect to the default interest payment as an investment on its own.[211] Scotiabank responds below to several points raised in Peru's Reply with respect to this issue.

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[209] Peru's Reply, ¶ 221.

[210] **RL-0033**, *Lion Mexico Consolidated LP v. United Mexican States*, (ICSID Case No. ARB(AF)/15/2) Decision on Jurisdiction, July 30, 2018, ("***Lion Mexico***") ¶¶ 205, 207.

[211] Scotiabank Response, ¶¶ 131-143.

i. The Holistic Approach to Article 25 of the ICSID Convention

145. In assessing whether there is jurisdiction pursuant to Article 25, the question is whether there is an investment, looking at the investment holistically. Scotiabank's investment in Scotiabank Peru is a complete answer. Peru is wrong that the inquiry focuses more narrowly on whether the interest amounts paid under protest meet Article 25's requirements.[212]

146. First, Peru alleges that Scotiabank "*intentionally distorts*" Peru's argument with respect to Article 25 of the ICSID Convention by arguing that the ICSID Convention is inapplicable in determining whether an investment is capable of being expropriated.[213] Peru's accusation is itself based on a mischaracterization of Scotiabank's position.

147. There is no dispute that Peru's position is that to have jurisdiction under Article 25 of the ICSID Convention, the Tribunal must assess whether the interest amounts paid under protest meet Article 25's requirements, as that is the investment alleged to have been expropriated.[214] Scotiabank has not distorted that argument but has responded to it: in applying Article 25, the tribunal is not to look at individual components of an investment, even if only a component of that investment is alleged to be expropriated (as is the case here). Rather, as established by numerous legal authorities, the Tribunal is to look at the investment and dispute as a whole.[215]

148. Second, Peru claims that the interest payments are neither a "subset" nor "component" of Scotiabank Peru since they do not form part of Scotiabank Peru's operations and are not revenue

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[212] Scotiabank Response, ¶¶ 131-134.

[213] Peru's Reply, ¶ 223.

[214] Peru's Reply, ¶ 223.

[215] Scotiabank Response, ¶¶ 131-136, citing **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***"); **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 Limited v. The Republic of India* (PCA Case No. 2016-07) Final Award, 21 December 2020, ¶ 712; **CL-0027**, *Infinito Gold Ltd. v. Costa Rica,* ICSID Case No. ARB/14/5, Award, June 3, 2021, ("***Infinito Gold,* Award**"), ¶ 176, fn 219; **CL-0043**, *Saipem,* Decision on Jurisdiction, ¶¶ 112-114, 129-134; **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. See also **CL-0065**, *Koch Minerals Sàrl and Koch Nitrogen International Sàrl v. Bolivarian Republic of Venezuela,* ICSID Case No. ARB/11/19 Oct 2017 award, ¶ 6.59; **CL-0009**, *Ceskoslovenska*, ¶ 72.

from its activities. Peru argues that the numerous authorities on which Scotiabank relies are inapposite.[216] Peru's attempt to distinguish these cases only underscores their applicability.

149. For example, in *Magyar v. Hungary*, the claimant's farming business was not alleged to have been expropriated, just a subset of the investment – its leasehold rights over land. The tribunal's assessment of Article 25 was based on the investment as a whole, not the leasehold rights. There was jurisdiction because there was no dispute the farming business was an investment (just as there is no dispute that Scotiabank Peru is an investment).[217] Peru claims this case is distinguishable because the claimant conducted its farming activities on its leasehold land whereas the interest amounts are not part of Scotiabank Peru's core activities.[218] Scotiabank has already set out at paragraphs 132, 139, 141 above why the interest payments are part of the ongoing operations of Scotiabank Peru and part of its core activities. In any event, in *Magyar*, the tribunal's key point was that in assessing Article 25, you look holistically at the investment. Whether the interest amounts are part of the core activities or not has no bearing on that issue.

150. In *Infinito v. Costa Rica*, the tribunal held that it did not need to address whether certain funds owned by the local company, Industrias Infinito, were an investment as Infinito's shareholding in Industrias Infinito was an investment *per se*.[219] Peru seeks to distinguish this case by saying the funds were owned by Industrias Infinito but "*Scotiabank Peru has no rights over the monies paid to the SUNAT in 2013*."[220] It is a disputed matter of Peruvian law whether such rights exist (Scotiabank has already explained at paragraph 134 above why it has such rights).

151. Peru's attempt to distinguish the numerous other authorities Scotiabank relies on for this principle must be rejected for the same reasons as *Magyar* and *Infinito*.[221]

152. Third, Peru accuses Scotiabank of "*ignor[ing]*" the case law that supports Peru's position and then cites only *Lion v. Mexico*.[222] In *Lion*, the tribunal considered whether promissory notes

[216] Peru's Reply, ¶ 228.
[217] **CL-0034**, *Magyar*, ¶¶ 249, 251, 260, 272-276, 279.
[218] Peru's Reply, ¶ 229.
[219] Peru's Reply, ¶ 232.
[220] Peru's Reply, ¶ 232.
[221] See Peru's Reply, ¶¶ 230-234.
[222] Peru's Reply, ¶ 235.

and mortgages each independently qualified as investments under Article 1139 of the NAFTA. The tribunal in *Lion* did not consider Article 25 of the ICSID Convention.[223]

ii. In Any Event, the ICSID Convention Test is Met

153. Even if the Tribunal assesses whether the default interest payments are an investment under Article 25 of the ICSID Convention, Scotiabank has already responded to Peru's arguments as to why Peru has not shown it is manifestly inevitable that Peru will succeed in establishing there is a lack of jurisdiction.[224] In its Reply, Peru maintains its rhetoric that Scotiabank has raised "*contorted arguments*" that must be "*debunked*."[225] Peru premises its arguments as though Scotiabank bears the burden on this Rule 41 challenge. It does not. Peru bears a burden it has not met.

154. The parties agree that the *Salini* factors are helpful guidelines to determine if an investment under Article 25 has been met.[226] These factors are not jurisdictional requirements or a set of mandatory legal requirements but are "*typical features*" of an investment.[227]

155. The first factor is whether there is a "contribution." It is well-established that the term "contribution" has a broad meaning and can take several forms.[228] Peru claims the default interest payments are not a contribution as they are not linked to an economic venture and do not create value.[229] Scotiabank has already explained at paragraphs 132, 139, 141 above why the payments are linked to its economic venture in Scotiabank Peru. This was a commitment of capital for an economic benefit, to allow for the continued operation of Scotiabank Peru and to prevent the seizure of its assets. The continued operation of Scotiabank Peru is tied to the creation of value.

156. Peru maintains its reliance on *Postova Banka* and claims that because Peru is not an actor engaged in "economic ventures," the default interest payment is not being applied to an

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[223] **RL-0033**, *Lion Mexico*, ¶¶ 105, 124, 189-191, 200-202.

[224] Scotiabank Response, ¶¶ 137-143.

[225] Peru's Reply, ¶ 240.

[226] Scotiabank Response, ¶ 138; Peru's Reply, ¶ 239.

[227] **CL-0068**, *Philip Morris Brands Sarl et al. v. Oriental Republic of Uruguay*, (ICSID Case No. ARB/10/7) Decision on Jurisdiction, July 2, 2013, ¶ 206.

[228] **CL-0011**, *Deutsche Bank*, ¶ 297; **CL-0069**, *Rand Investments Ltd. et al. v. Republic of Serbia*, (ICSID Case No. ARB/18/8) Award, June 29, 2023, ¶ 234.

[229] Peru's Reply, ¶ 241.

economically productive activity.[230] Scotiabank has already explained why this case is inapposite.[231] In that case, the tribunal noted the claimants did not argue the money paid for the bonds "*was used in economically productive activities.*" Rather, the funds were used for Greece's budgetary needs and to repay its debts.[232] In contrast, Scotiabank has argued here that the monetary contribution was used towards its own economically productive activities.

157. With respect to "duration," Peru claims the relevant duration was only the three-month period between December 2013 to February 2014 when Scotiabank Peru made the payments to SUNAT.[233] The relevant period has in fact been many years. The payment was made in 2013 and the Constitutional Court did not render a decision until 2021. Scotiabank Peru has thus committed this capital for many years with its right to recoup the amounts outstanding.

158. With respect to the third factor of "risk," the interest payment was made because of the risk Scotiabank Peru faced in not making the payment. Scotiabank Peru then assumed the risk that its judicial challenge may not succeed, assuming there was a fair and unbiased process. That did not happen. The judicial impropriety alleged in this action and the existence of this dispute evidences the risk.[234] Peru des not respond to this argument. Instead, Peru accuses Scotiabank of turning the *Salini* factors "*on their head*" and engaging in a "*shifting strategy*" because Scotiabank's arguments focus on its investment in Scotiabank Peru, not the payment amounts more specifically.[235] This is wrong. Scotiabank's position squarely deals with why there was risk in making the payment amounts under protest.

159. Peru concludes by claiming that Scotiabank's argument is "*farcical*", and that Scotiabank is seeking to "*distort reality.*"[236] That is simply not true. Scotiabank's position is supported by Peruvian law and the legal authorities, as explained above. Peru may be of the view that it has a

[230] Peru's Reply, ¶ 242.

[231] Scotiabank Response, ¶ 142.

[232] **RL-0025**, *Poštová Banka, A.S. and Istrokapital SE v. The Hellenic Republic*, (ICSID Case No. ARB/13/8), Award, April 9, 2015, ¶ 363.

[233] Peru's Reply, ¶ 243.

[234] Scotiabank Response, ¶ 140.

[235] Peru's Reply, ¶ 244.

[236] Peru's Reply, ¶¶ 245-246.

strong defence, just as Scotiabank is of the view that it has strong claims. A Rule 41 challenge is not the venue for resolving the merits of such positions, regardless of the strong rhetoric used.

C. The Expropriation Claim is Not Manifestly Without Legal Merit

160. Peru has an alternative argument that even if the default interest amounts are a covered investment, there is no right capable of being expropriated because Scotiabank has no vested rights under Peruvian law in the amounts paid under protest.[237]

161. Peru wrongly alleges that Scotiabank "*conveniently chose not to engage with this argument*" except for two "*fleeting references*."[238] In its Response, Scotiabank has a heading dedicated to this issue and explained why, under Peruvian law, it has the right to the reimbursement of the interest amounts.[239] The analysis was brief because the content of Peruvian law was already established in a different section of the Response. Indeed, Peru's own analysis on this issue was the same length.[240]

162. Both parties agree that to have an expropriation, there must be a right capable of being expropriated and to make that determination, the Tribunal must look to Peruvian law.[241] The issue between the parties is whether such rights exist under Peruvian law. For the reasons already set out at paragraphs 12 to 15 above, this is a disputed factual matter.[242]

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[237] Peru's Reply, ¶ 248.

[238] Peru's Reply, ¶ 249.

[239] Scotiabank Response, ¶ 144.

[240] See Peru's Rule 41 Submission, ¶ 138. The preceding paragraphs were establishing the legal standard that to have an expropriation, there must be a valid property right under domestic law. This was not contested by Scotiabank so required no substantive response. Like Scotiabank, Peru then dedicated <u>one substantive paragraph</u> to arguing its position on whether such rights exist under Peruvian law.

Peru also claims that Scotiabank purported to ignore this issue by alleging that Peru raised "*five jurisdictional objections*," but this is a substantive merits objection: Peru's Reply, ¶ 249. Scotiabank correctly stated that Peru raised five jurisdictional objections. Peru's third objection is that the Tribunal lacks jurisdiction because there is no covered investment. *Within that objection*, Peru has raised this alternative point that the Expropriation Claim must inevitably fail in substance. Given Peru's complaint about this characterization, it can be said that Peru has brought <u>six</u> objections on a Rule 41 challenge: five jurisdictional and one substantive.

[241] Scotiabank Response, ¶ 133; Peru's Reply, ¶ 249.

[242] In its Reply, Peru spends over three pages setting out the law that says, to determine if there are valid property rights, the tribunal must apply domestic law. Peru then draws from those authorities the bald conclusion that this issue is one of law, not fact. Not a single one of its authorities make that conclusion. Peru's Reply, pp. 78-81.

Scotiabank agrees with the law set out by Peru that to decide if there is a right capable of being expropriated, the Tribunal has jurisdiction to determine and apply Peruvian law as the applicable law. However, none of those

IV. Scotiabank has Complied with Article 823 of the FTA

163. Peru's final two objections relate to compliance with Article 823 of the FTA. Peru argues that there was no valid waiver under the FTA and the Expropriation Claim is time-barred. Peru's Reply with respect to these two issues is addressed below.

A. Scotiabank's Waiver is Valid and Effective

164. The issue between the parties is whether the existence of the Tax Appeal impacts the validity of Scotiabank's waiver. As Scotiabank explained in its Response, Peru's argument centers on its mischaracterization of Scotiabank's claim as relating to a challenge of the underlying tax debt and the 1999 SUNAT Decision.[243] Peru maintains this mischaracterization in its Reply.

165. ***Peru's Mischaracterization of Scotiabank's Claim.*** First, Peru claims this argument of mischaracterization is "*sophistic*," that Scotiabank "*artificially segments its claim*," and has a "*strategy of preventing the Respondent from drawing the Tribunal's attention to the flaws in the Claimant's arguments and the real impact of the distortions that the Claimant introduces*." Peru then claims that what Scotiabank "*is challenging is the 1999 Tax Debt*."[244] Scotiabank has already explained at length why Peru cannot recharacterize its claim. This is not part of a "*strategy*" of preventing Peru from making proper arguments; it is to ensure that this Tribunal does not dismiss a claim that Peru claims Scotiabank is making and that Scotiabank is, in fact, not making.

166. The Request for Arbitration is clear: Scotiabank is not challenging the 1999 SUNAT Decision or the underlying tax debt. The pleading speaks for itself. This case is about the unfair judicial treatment before the Constitutional Court, including the lack of independence and the improper last-minute change to the quorum requirements. None of that is at issue in the Tax Appeal. The question for the Tribunal is whether the measure challenged in this case, the 2021

authorities address the manner of how Peruvian law is proved before the Tribunal. As set out above, Peruvian law is a question of fact. *E.g.*, Peru relies on *Nelson v. Mexico* and in that case, the tribunal recognized it had to determine if the claimant had rights under Mexican law. When it went to assess that issue, it determined the content of Mexican law by reference to expert reports.

[243] Scotiabank Response, ¶ 149.

[244] Peru's Reply, ¶ 278.

Constitutional Court Decision, is a different measure and concerns different conduct than what is at issue in the Tax Appeal. Scotiabank has already explained why the answer is yes.[245]

167. Second, Peru acknowledges that the Tax Appeal involves separate measures than this arbitration and does not involve the 2021 Constitutional Court Decision.[246] Peru relies on *Commerce Group v. El Salvador* for its argument that a waiver can be invalid even if the arbitration and domestic proceedings do not strictly concern the same measure.[247]

168. In *Commerce Group*, the measure challenged in the domestic litigation involved the revocation of certain permits. The claimant argued that the measure challenged in the arbitration was the *de facto* ban on gold and silver mining.[248] The tribunal agreed with El Salvador that there were no "*separate and distinct claims*." Rather, the claims regarding the mining ban are "*part and parcel of their claim regarding the revocation of the environmental permits*." The tribunal further held that the mining ban does constitute a "measure" under the treaty; rather, the revocation of the permits was the measure that put an end to the claimant's mining and processing activities.[249] In other words, the tribunal found that the arbitration and domestic proceedings *concerned the same measure*: the revocation of the permits.

169. ***Peru's Unfounded Claims Regarding Double Recovery***. This section deals with three arguments raised by Peru on the issue of double recovery.

170. First, Peru argues that there is a risk of double recovery and Scotiabank "*has manifestly failed to disprove this*."[250] Peru again seeks to shift the burden on this Rule 41 challenge to Scotiabank. In any event, Scotiabank has illustrated why there is not a risk of conflicting outcomes or double recovery.[251]

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[245] See Scotiabank Response, ¶¶ 149-151.

[246] Peru's Reply, ¶ 282.

[247] Peru's Reply, ¶¶ 280-281.

[248] **RL-0019**, *Commerce Group Corp and San Sebastian Gold Mines, Inc. v. The Republic of El Salvador*, (ICSID Case No. ARB/09/17) Award, March 14, 2011, ("***Commerce Group***") ¶¶ 89, 94, 109.

[249] **RL-0019**, *Commerce Group*, ¶¶ 111-112.

[250] Peru's Reply, ¶ 286.

[251] Scotiabank Response, ¶¶ 150-156.

171. Second, Peru takes issue with the numerous cases Scotiabank cited for the point that many tribunals have recognized that the risk of double recovery in parallel proceedings can be addressed in the way an award is fashioned. Peru claims that Scotiabank "*blatantly misrepresents*" these cases because none of them involve treaties with a comparable waiver requirement.[252] Scotiabank cited these cases for the point that tribunals have found ways to address the potential risk of double recovery in the way an award is fashioned. Peru does not dispute that the cases stand for that principle. Scotiabank never represented that these cases involved comparable waiver requirements.

172. In any event, that is not a reason to distinguish the principle set out in these cases. Both parties agree that the purpose of a waiver requirement is to avoid or minimize the risk of conflicting outcomes or "*double redress for the same conduct or measure*."[253] This does not mean that every time there is a risk of double recovery, the waiver requirement is triggered. Rather, Article 823 of the FTA only requires the claimant to waive domestic proceedings "*with respect to the measure of the disputing Party that is alleged to be a breach*."[254] As put by the tribunal in *Waste Management I*, the question is whether the two parallel proceedings "*have a legal basis derived from the same measures*."[255] If the domestic litigation does not involve the same measure, it does not violate the waiver requirement, even if there is a potential risk of double recovery. Article 823 does not say the claimant must waive all proceedings with respect to the same *injury or loss*.

173. While the cases cited by Scotiabank are not cases dealing with a waiver requirement, they are helpful in illustrating the principle that the mere existence of double recovery is not fatal to a claim and may itself not be problematic. Rather, the risk of double recovery is "*inherent in many investment disputes*" and can be dealt with in how an award is fashioned to prevent that outcome.[256]

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[252] Peru's Reply, ¶ 290.

[253] Peru's Reply, ¶ 283; Scotiabank Response, ¶ 150.

[254] **C-0001**, Article 823(1)(c) and 823(2)(c) [Emphasis added].

[255] **RL-0002**, *Waste Management, Inc. v. United Mexican States*, (ICSID Case No. ARB(AF)/98/2), Arbitral Award, June 2, 2000, ¶ 27 (pp. 235-236).

[256] Scotiabank Response, ¶ 154; **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 S.A. and Consorcio de Aguas Bilbao Bizkaia, Bilbao Biskaia Ur Partzuergoa v. Argentine Republic*, ICSID Case No. ARB/07/26, Decision on Jurisdiction, December 19, 2012 ¶¶ 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.*

174. Third, the concerns of conflicting outcomes and double recovery are not at issue here. There is no possibility for inconsistent outcomes and Peru has not argued that there is.[257] Peru's allegations around double recovery are misplaced. Peru has not disputed that even if Scotiabank is successful in the Tax Appeal, it may not recover the amounts paid under protest. Rather, Peru argues that because the damages amounts in the two proceedings *potentially* overlap, and the amounts *could* be recovered in the Tax Appeal, that triggers the waiver.[258] Peru is wrong.

175. Even if such sums are ultimately recovered in the Tax Appeal, there is no risk of double recovery. The concerns raised by Peru are entirely illusory. Scotiabank has said that it will provide an undertaking that it will not seek to recover the amounts twice if that hypothetical potential ever generates into a realistic possibility.[259] In *Chevron*, the tribunal found that there was no danger of double recovery after noting the claimants' express undertaking to that effect. The tribunal held that "*the Claimants' recovery should not be reduced based on the uncertain possibility of a favourable outcome in the national court proceedings, noting that in any case, international law and decisions as well as domestic court procedures offer numerous mechanisms for preventing the possibility of double recovery*."[260]

176. Peru claims that this willingness to provide an undertaking is "*irrelevant and immaterial*," and "*disingenuous*" because it cannot cure an invalid waiver.[261] This misses the point. There is a valid waiver because the two proceedings do not relate to the *same measure*. The theoretical overlap of the potential damages amount does not make the two proceedings relate to the same measure. That is a complete answer, regardless of the risk of double recovery. Despite that, Scotiabank in good faith provided an undertaking when it did not need to do so. As a result, double

Egypt (ICSID Case No. Arb/14/4) Award, 31 August, 2018 ¶¶ 10.13, 10.142, 11.33; **CL-0031**, *Lauder v. Czech Republic*, UNCITRAL, Final Award, 3 September 2001, ¶172; **CL-0024,** *Hochtief v. Argentina* (ICSID Case No. ARB/07/31) Decision on Liability, 29 December 2014, ¶ 180; **CL-0025**, *Impregilo S.p.A. v. Argentine Republic,* ICSID Case No. ARB/07/17, Award, June 21, 2011, ¶ 139.

[257] See Scotiabank Response, ¶¶ 151-152.

[258] Peru's Reply, ¶¶ 285, 288.

[259] See Scotiabank Response, ¶¶ 153-155.

[260] **CL-0059**, *Chevron Corporation and Texaco Petroleum Company v. The Republic of Ecuador* (I), PCA Case No. 2007-02/AA277, Partial Award on the Merits, 30 March 2010, ¶ 557.

[261] Peru's Reply, ¶ 291.

recovery is not a possibility in this arbitration. That fact is relevant and material to this Tribunal's determination of the issues.

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

177. Peru's last objection is that the Expropriation Claim is time barred. Peru claims that the clock began to run in 2013 when SUNAT demanded payment from Scotiabank as that is when the loss occurred.[262] Scotiabank claims that Article 823 is clear that the clock only starts to run from when there is knowledge of both the alleged breach and the loss or damage resulting thereby. The alleged breach relates to the Constitutional Court's conduct and the loss only occurred with that conduct which denied Scotiabank the ability to recover the amounts paid under protest. Peru has not established that the Expropriation Claim is manifestly without legal merit; it has not proved that its objection will inevitably succeed or that Scotiabank has no tenable argument.

178. ***No Knowledge of Alleged Breach.*** Articles 823(1)(c) and 2(c) of the FTA require that the claimant have knowledge (actual or constructive) of both the alleged breach and the loss or damage incurred thereby. There are three questions for the Tribunal in deciding whether the claim was made in accordance with the FTA's limitation period: (a) what is the cut-off date for the 39-month limitation period? (b) did Scotiabank first know, or should it have known, about the alleged breach before the cut-off date? and (c) did Scotiabank first know, or should it have known, that it incurred loss or damage before that date?[263]

179. With respect to the first question, the Request for Arbitration is dated October 31, 2022 and was registered on November 15, 2022. Thus, the cut-off date is between July 31, 2019 and August 15, 2019, depending which date is used. Nothing turns on which of those dates are used.

180. With respect to the second question, as explained by the tribunal in *Infinito* which dealt with a similar limitation period provision, a tribunal "*must consider the Claimant's claim as pleaded*" and "*assess whether the Claimant knew or should have known of the breaches* as alleged

[262] Peru's Reply, ¶ 294.

[263] **CL-0027**, *Infinito Gold*, Award, ¶ 217.

by the Claimant *before the cut-off date*."[264] The tribunal further held that "*the limitations period only starts to run once the breach (as a legal notion) has occurred*."[265]

181. As set out in the RFA, all three alleged breaches of the FTA (Expropriation, FET and National Treatment) arose with the 2021 Constitutional Court Decision. With respect to the Expropriation Claim, Scotiabank alleges that as a result of this measure, Scotiabank has lost the ability to recover the default interest amount paid under protest.[266]

182. This is a complete answer to the limitation argument. Peru did not respond to this argument in its Reply and instead focused only on the third question, which is when Scotiabank first knew (actually or constructively) that it had suffered loss or damage flowing from the alleged breach.[267]

183. ***No Knowledge of Loss or Damage***. For the reasons set out in Scotiabank's Response, Scotiabank did not acquire knowledge, actual or constructive, that it had suffered a loss or damage flowing from the alleged breach until the 2021 Constitutional Court Decision.

184. First, Peru claims that Scotiabank "*attempt[s] artificially to extend the applicable time limit*" by arguing that the "*loss of the amounts paid under protest only crystallized with the 2021 Constitutional Court Decision*." It then points to a single case, *Ansung*, as comparable to argue the Tribunal should reject Scotiabank's position.[268]

185. Contrary to Peru's assertion,[269] the limitation provision in *Ansung* was distinct. In that treaty, the limitation period began to run from when the investor first knew (actually or constructively) that the investor had incurred loss or damage. The sole question was when the loss or damage occurred. Unlike the FTA, the treaty did not *also* require there to be knowledge of an alleged breach or that the loss flow from that breach.[270]

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[264] **CL-0026**, *Infinito Gold*, Decision on Jurisdiction, ¶ 332 [*Emphasis* in original] [Emphasis added].

[265] **CL-0027**, *Infinito Gold*, Award, ¶ 220. See also **CL-0067**, *Mobil v. Canada*, (ICSID Case No. ARB/15/6), Decision on Jurisdiction and Admissibility, July 13, 2018, ¶ 148.

[266] Request For Arbitration, ¶¶ 63, 67, 69.

[267] **CL-0026**, *Infinito Gold*, Decision on Jurisdiction, ¶ 333.

[268] Peru's Reply, ¶ 294.

[269] Peru's Reply, ¶ 296.

[270] **RL-0030**, *Ansung*, ¶ 105.

186. In any event, *Ansung* is inapplicable. In that case, the claim was commenced in October 2014. Relying on the facts as pleaded by the claimant, the tribunal found that the claimant had "*repeatedly pleaded facts*" that set out that the date it first acquired knowledge that it had incurred loss or damage was before October 2011. The claimant characterized the losses that it incurred within the limitation period as "*further losses.*"[271] The tribunal therefore found that, on its own admission, the claimant first knew it had suffered a loss or damage before the cut-off date. The fact that it suffered further losses later just went to *quantifying* the extent of harm.[272]

187. Unlike *Ansung*, Scotiabank has not pleaded facts that set out it had incurred a loss before the cut-off date and then further losses thereafter. Scotiabank paid the amounts under protest in 2013 but it did not lose the ability to recover those amounts until the 2021 Constitutional Court Decision. Peru is wrong that Scotiabank is simply trying to rely on the latest of a series of events.[273] It was only with the unfair judicial process before the Constitutional Court that the alleged breach arose and the loss or damage flowing *thereby* occurred, as Article 823 requires.

188. Second, Peru argues that the expropriation claim regarding the 2021 Constitutional Court Decision is not "*separately actionable*" from the 2013 payment demand from SUNAT and that Scotiabank seeks to parse its claims to circumvent the time limit.[274] Scotiabank is not seeking to parse its claims. Scotiabank has not alleged that the 2013 payment demand is expropriatory or breached the FTA. It is not challenging the 1999 SUNAT Decision. It is challenging the unfair judicial process before the Constitutional Court, which is actionable.

189. Scotiabank could not have brought this claim sooner. As explained in *Infinito*, for the period to start running, "*the claimant must be legally in a position to bring a claim. If a claim cannot be brought for legal reasons (for instance, because the claim is not ripe), it would be fundamentally unfair to find that the statute of limitations has started to run*."[275] Scotiabank's claim did not arise until after it experienced the unfair judicial process before the Constitutional Court.

[271] **RL-0030**, *Ansung*, ¶ 107.
[272] **RL-0030**, *Ansung*, ¶¶ 109-110.
[273] Peru's Reply, ¶ 297.
[274] Peru's Reply, ¶ 300.
[275] **CL-0027**, *Infinito Gold*, Award, ¶ 247.

Before that, it had not experienced the conduct that gave rise to the alleged breach of the FTA or lost the ability to recover the default interest amount paid under protest.

190. Third, Scotiabank explained in its Response that the loss did not happen until the 2021 Constitutional Court Decision as the taking was not final and irreversible before that date.[276] Peru claims that this is not a judicial expropriation because Scotiabank was deprived of the monies paid in 2013 and the 2021 Constitutional Court Decision did not suspend the demand for payment.[277]

191. Peru's argument around the suspension of the payment amounts is unproven (Peru has not established under Peruvian law whether there is such a suspensive effect or not). In any event, it is irrelevant. Scotiabank paid the amounts in 2013 but there was no permanent loss at that time. As set out at paragraphs 134 to 136 above, under Peruvian law, Scotiabank had a right to reimbursement of those unduly paid amounts. That right was created when Scotiabank made the payment under protest. It was never suspended, and existed until it was taken by the 2021 Constitutional Court Decision and the unfair process before the Court.

192. Peru is wrong that the judicial expropriation cases Scotiabank cited are inapposite because they involved an appeal from a lower court judicial decision.[278] This case does involve an appeal. The judicial history underlying this case is set out in Scotiabank's Response. In summary, the Default Interest Appeal was commenced in 2013 to challenge SUNAT and the Tax Court's determinations regarding the accrual of default interest.[279] The default interest payment was made under protest while those appeals were underway. While those appeals were outstanding, Scotiabank had its right to reimbursement of the amounts. These judicial expropriation cases are applicable in showing that an expropriation does not occur until the loss is final and irreversible.[280]

[276] Scotiabank's Response, ¶ 160.
[277] Peru's Reply, ¶ 302.
[278] Peru's Reply, ¶ 302.
[279] Scotiabank's Response, ¶¶ 16-25.
[280] Scotiabank's Response, ¶ 160.

193. Fourth, Peru continues its rhetoric that Scotiabank has "*misrepresented*" the legal authorities on which it relies. In this instance, Peru claims Scotiabank misrepresented the *Infinito* decision.[281] Once again, Peru makes that serious accusation when it is unfounded.

194. Peru claims that *Infinito* (argued by Scotiabank's counsel in this arbitration) is distinguishable because it involved an appeal from a lower court decision and "*the investor could continue exploiting the concession while the appeal was still pending*."[282] That is false. In *Infinito*, there was an injunction issued that prevented the project from moving forward while the appeal was underway.[283] Peru also claims that "*Scotiabank ceased to have property and possession of the amounts*" once the payment was made, unlike in *Infinito* where the claimant had an interest while the appeal was outstanding.[284] Scotiabank has already set out at paragraphs 134 to 136 above that it did have a reimbursement right while its *amparo* was proceeding.

195. Peru also claims *Infinito* is distinguishable because it involved an appeal from a court decision, not an administrative decision.[285] This case does not involve an expropriation from an administrative decision (*e.g.*, if Scotiabank asked SUNAT to reconsider the payment order, SUNAT denied that request and Scotiabank challenged that denial). It is a case about judicial expropriation. *Infinito* is relevant and applicable.

196. Fifth, Peru maintains its reliance on two authorities, *Berkowitz* and *Apotex*, as examples where a taking occurred with an administrative decision and was followed by judicial review proceedings without suspensive effect.[286] As set out in the Response, the *Apotex* case supports Scotiabank's position. In that case, any claim challenging the administrative decision itself was time-barred but a claim challenging the subsequent court proceedings were permitted. In that case, the claimant clearly pleaded a challenge to the administrative decision itself.[287] Here, there is no

[281] Peru's Reply, ¶ 306.

[282] Peru's Reply, ¶ 305.

[283] **CL-0027**, *Infinito Gold*, Award, ¶ 98.

[284] Peru's Reply, ¶ 305.

[285] Peru's Reply, ¶¶ 305-306.

[286] Peru's Reply, ¶ 309.

[287] **RL-0021**, *Apotex Inc. v. The Government of the United States of America*, Award on Jurisdiction, June 14, 2013, ¶¶ 317-319, 333-334; Scotiabank's Response, ¶¶ 163-164.

challenge to the SUNAT payment order. *Apotex* confirms that the separate challenge to the subsequent court proceedings is permitted.

197. As explained in the Response, in *Berkowitz*, the last line of measures that permanently deprived the claimant of their property rights happened before the cut-off date. The subsequent court challenges did not seek to reverse the expropriatory decision, only to quantify the compensation to be paid.[288] Scotiabank has already explained that it had a right to the reimbursement of the payment amounts while the Default Interest Appeal was pending and so there was no permanent taking, making this case completely different than *Berkowitz*.

198. This objection must therefore fail. Like the other objections made by Peru, Peru has failed to meet the high burden imposed on it for this Rule 41 challenge. It has not shown Scotiabank's claim manifestly lacks legal merit. As set out in the Response and above, Peru is seeking to argue the merits of its objections. That is not the purpose for which Rule 41 is to be used.

V. Scotiabank's Request for Relief

199. Scotiabank respectfully requests that this Tribunal dismiss Peru's Rule 41 challenge and order Peru to pay to Scotiabank all costs incurred in connection with this Rule 41 challenge.

November 2, 2023

Respectfully submitted on behalf of
The Bank of Nova Scotia

[Signed]

Torys LLP

[Signed]

Payet, Rey, Cauvi, Pérez Abogados

[288] Scotiabank's Response, ¶ 162; **RL-0031**, *Spence International Investments, LLC Berkowitz, et al v. Republic of Costa Rica*, (ICSID Case No. UNCT/13/2) Interim Award, May 30, 2017, ¶¶ 114-115, 152, 297.