PUBLIC VERSION

INTERNATIONAL CENTRE FOR THE SETTLEMENT OF INVESTMENT DISPUTES

IN THE MATTER OF:

THE BANK OF NOVA SCOTIA

Claimant

and

REPUBLIC OF PERÚ

Respondent

ICSID Case No. ARB/22/30

CLAIMANT'S MEMORIAL ON THE MERITS

November 29, 2024

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TABLE OF ABBREVIATIONS

Abbreviation	Description
1999 SUNAT Decision	SUNAT resolutions dated December 23, 1999 that reduced the tax credit claimed by Banco Wiese and imposed a debt of [redacted]
2000 SUNAT Decision	SUNAT decision dated July 19, 2000 rejecting Banco Wiese's claim seeking revocation of 1999 SUNAT Decision
2003 Appeal Decision	Tax Court decision dated December 2003 partially annulling the 2000 SUNAT Decision and ordered SUNAT to render a new decision
2011 SUNAT Decision	SUNAT decision dated November 30, 2011 maintaining the 1999 SUNAT Decision
2013 Tax Court Decision	Tax Court decision dated November 11, 2013 upholding the 2011 SUNAT Decision
2017 Leaked Decision	Leaked decision of the Constitutional Court finding in Scotiabank Perú's favour
2021 Decision	Judgment of the Plenary Session of the Constitutional Court dismissing the Default Interest Amparo by three votes to one. Judgement indexed as Scotiabank Perú S.A.A. v. SUNAT and the Tax Court (Case No. 222-2017-PA/TC), issued November 20, 2021
Baca Campodónico	Sentencia del Pleno del Tribunal Constitucional en el Expediente No. 01808-2013-PA/TC
Banco Wiese	Banco Wiese Sudameris, Perú's third largest bank by assets, loans and deposits in 2006 (acquired by Scotiabank to form Scotiabank Perú)
CAD	Canadian Dollars
Court	Constitutional Court
Default Interest Amparo	*Amparo* proceeding commenced by Scotiabank Perú before the Constitutional Court. The Court's decision is defined as 2021 Decision.
Default Interest Delta	Maximum default interest that could be charged under Peruvian law to derive the amount that Scotiabank Perú would have been reimbursed by SUNAT had the Constitutional Court ruled pursuant to the 2017 Leaked Decision and ordered the reimbursement of the unlawful accrued default interest

Abbreviation	Description
Domestic Comparators	Comparator cases involving Peruvian investors relevant to the inquiry under Article 803 of the FTA
Elgo Ríos	Judgment of the Plenary Session of the Constitutional Court in Case No. 02383-2013-PA/TC Decision in which the Constitutional Court explains the criteria for what issues should be addressed through a contentious administrative proceeding and alternatively when a Constitutional Court *amparo* proceeding is appropriate
FTA	Canada-Perú Free Trade Agreement
Government Judicial Interference	Improper interference by different branches of Perú's Government with the Constitutional Court in the course of Scotiabank Perú's Default Interest Amparo
IACHR	Inter-American Court of Human Rights
Icatom	Sentencia del Pleno del Tribunal Constitucional en el Expediente No. 04532-2013-PA/TC
IGV	Value added tax
ILC Articles on Responsibility of States	International Law Commission's *Draft Articles on Responsibility of States for Internationally Wrongful Acts*
Interbank	Sentencia 44/2022 del Pleno del Tribunal Constitucional en el Expediente No. 03468-2019-PA/TC
KSV	KSV Soriano Inc. Mr. Errol Soriano, Scotiabank's damages expert in this proceeding, is the Managing Director of KSV's Advisory Valuation and Disputes Practice
Maxco	Sentencia del Pleno del Tribunal Constitucional en el Expediente No. 03525-2021-PA/TC
Medina de Baca	Judgment of the Plenary Session of the Constitutional Court in Case No. 04082-2012-PA/TC Decision in which the Constitutional Court considers the constitutionality of accruing default interest during periods of delay by SUNAT and the Tax Court, and the proper forum for bringing such challenges

Abbreviation	Description
National Treatment Standard	Obligation in Article 803 of the FTA to provide "treatment no less favourable" to Canadians and their investments in Perú than it accords to Peruvians in like circumstances
Paramonga	Sentencia del Pleno del Tribunal Constitucional en el Expediente No. 02051-2016-PA/TC
PEN	Peruvian Soles
Republic of Perú	Perú
RFA	Scotiabank's Request for Arbitration dated October 31, 2022, which commenced this proceeding.
SBS	Superintendencia de Banca y Seguros
Scotiabank	The Bank of Nova Scotia
Scotiabank Perú	Scotiabank Perú S.A.A, a subsidiary of Scotiabank
SUNAT	Superintendencia Nacional de Aduanas y de Administración Tributaria
Tax Appeal	Contentious administrative action filed by Scotiabank Perú filed against the 2013 Tax Court Decision on November 21, 2013. Court's decision indexed as Judgment 158/2022 of the Plenary Session of the Constitutional Court in Case No. 05178-2022-PA/TC (April 16, 2024) Tax Appeal Decision
Tax Court	Administrative tribunal of the Peruvian Ministry of Finance
Telefónica	Sentencia del Pleno del Tribunal Constitucional en el Expediente No. 02051-2016-PA/TC
Vienna Convention	Vienna Convention on the Law of Treaties

PART ONE. INTRODUCTION

I. Overview

1. The Bank of Nova Scotia (**"Scotiabank"**) is as synonymous with Canada as Bank of Shanghai is with China, Credit Suisse with Switzerland, or Bank of America with the United States. In the Republic of Perú (**"Perú"**), Scotiabank conducts its business through a subsidiary, Scotiabank Perú S.A.A (**"Scotiabank Perú"**).

2. In exchange for Canada's promise to do the same, the Republic of Perú undertook through Article 803 of the Canada-Perú Free Trade Agreement (**"FTA"**) to provide "treatment no less favourable" to Canadians and their investments in Perú than it accords to Peruvians in like circumstances in the management, conduct and operation of their investments (the **"National Treatment Standard"**).[1] This National Treatment Standard embodies the fundamental principle of non-discrimination at the core of modern investment treaties.

3. In Scotiabank's case, Perú did not live up to that undertaking. Perú breached the FTA through its treatment of Scotiabank Perú's *amparo* proceeding challenging the constitutionality of the government's application of default interest to a tax debt; specifically, by (a) threatening judges of the Constitutional Court to withhold funding for the Court unless they ruled in the government's favour; (b) leaking the decision of the Court in which a majority of its judges found in Scotiabank Perú's favour on the eve of its publication to derail the formal rendering of the judgment; (c) conducting political and media campaigns against the Court to have it change its decision to rule in Scotiabank Perú's favour; (d) ignoring quorum requirements applicable to the Court for it to issue valid decisions; and (e) the Court yielding to this campaign of government pressure and interference by reversing its decision and prohibiting Scotiabank Perú from having the substantive issue at the core of its proceeding adjudicated. All of this conduct is "treatment" within the meaning of Article 803 and all of it is less favourable than that which was accorded to Peruvians when they brought similar claims before the Constitutional Court to assert constitutional rights in the face of punitive default interest imposed by the State. Perú therefore treated Scotiabank and its

[1] **C-0001**, Free Trade Agreement between Canada and the Republic of Perú, arts. 803(1)-(2).

investment less favourably than Peruvians in like circumstances, in breach of Article 803 of the FTA.

4. As described in greater detail in this Memorial and summarized in this overview, in 1999, the authority within the Peruvian Ministry of Finance that is responsible for the collection of taxes, Superintendencia Nacional de Aduanas y de Administración Tributaria (**"SUNAT"**), disallowed historical tax credits claimed by one of Scotiabank Perú's predecessor companies on certain gold transactions and imposed value added tax (**"IGV"**) and default interest on that debt.

5. Between 1999 and 2013, Scotiabank Perú litigated the IGV before both SUNAT and an administrative tribunal of the Peruvian Ministry of Finance (the **"Tax Court"**). Throughout this period, SUNAT and the Tax Court repeatedly failed to issue decisions within the deadlines prescribed under Peruvian law. For example, in one instance, SUNAT took over eight *years* to make a decision that was required to be made within thirty *days*.

6. In 2013, the Tax Court issued a final decision in favour of SUNAT and against Scotiabank Perú. Notwithstanding SUNAT and the Tax Court's extensive delay, SUNAT imposed default interest on the IGV for the entire period of time going back to 1998. It also calculated that interest on a compound basis, contrary to Peruvian law. As a result, through no fault of Scotiabank Perú, default interest on the IGV grew by *more than twenty-three times* the initial amount, from [redacted].

7. After paying the IGV and default interest under protest in order to avoid a seizure of Scotiabank Perú's assets that could have had detrimental ripple effects, Scotiabank Perú commenced an *amparo* proceeding before the Constitutional Court, asserting that the imposition of default interest in this manner breached its constitutional rights to due process, equal treatment, property, and effective judicial protection and defence (the **"Default Interest Amparo"**).

8. The Constitutional Court heard Scotiabank Perú's case in March 2017. As one of the judges of the Court later acknowledged, the case posed "little legal complexity" given the existing

precedents on the issue.[2] Just one year earlier, the Constitutional Court released a seminal decision called *Medina de Baca* in which it declared as unconstitutional SUNAT's practice of charging default interest for periods of delay beyond the deadlines under Peruvian law and on a compound basis, a proposition the Court has confirmed in several other cases, most of which involved Peruvian plaintiffs.

9. Yet, the treatment of Scotiabank Perú's case turned out to be nothing like those cases. At a routine meeting with one of the judges of the Court approximately one month after the hearing, Scotiabank learned that Peruvian officials had threatened to withhold funds earmarked for the Court's facilities unless the Court ruled in the government's favour. Then, on June 9, 2017, a Peruvian newspaper with an avowed position against foreign investors published substantial excerpts from a leaked decision of the Constitutional Court finding in Scotiabank Perú's favour (the **"2017 Leaked Decision"**). These excerpts confirmed that the Court had voted to decide the case in Scotiabank Perú's favour, disclosed the Court's reasoning (which was consistent with prior cases like *Medina de Baca*) and provided the names of the four judges who had voted in favour of the decision and the two judges who had dissented.

10. In connection with this arbitration, Scotiabank has asked the former President of the Constitutional Court, Dr. Cesar Landa, and the former Peruvian Minister of Justice and Human Rights, Professor Ana Neyra to review Scotiabank Perú's case before the Constitutional Court. As Dr. Landa and Professor Neyra note in their expert report, the 2017 Leaked Decision was in final form when it was leaked, had already been formally voted upon by the judges of the Court, and had the barcode seal applied to it that is only applied when a judgment has been voted on and is circulated for final signature.[3] There is thus no mystery as to how the Constitutional Court was going to rule in the Default Interest Amparo in the absence of impermissible governmental inference: Scotiabank Perú's amparo claim would succeed.

11. The newspaper also identified that a member of the Court who opposed the judgment had leaked it. Only two judges opposed the ruling: [redacted].

[2] **C-0288**, Email from [redacted].

[3] Expert Report of Cesar Landa and Ana Neyra, dated November 29, 2024 ("**CER-Landa/Neyra**"), ¶¶ 109-112.

One of the judges of the Court subsequently advised Scotiabank Perú that [redacted] was likely the source of the leak. Consistent with that evidence, Scotiabank has confirmed in this arbitration using public records that [redacted] met with reporters from the newspaper in the days leading up to the 2017 Leaked Decision and in the days following.

12. The 2017 Leaked Decision caused a political and media firestorm. Rather than condemning the leak, SUNAT went on the offensive, giving several interviews and making public statements bemoaning the "catastrophic" loss of revenue that would allegedly result from a decision in Scotiabank Perú's favour, which SUNAT "want[ed] to collect, but in this case the Constitutional Court would not let [it]."[4] Members of the legislative and executive branches publicly asserted that the 2017 Leaked Decision was a "betrayal to the State" and threatened to file complaints against the judges of the Court in Congress if they granted judgment in Scotiabank Perú's favour.[5] Peruvian officials derisively referred to Scotiabank as a "*Canadian capital bank*… attacking the interests of the Peruvian State."[6] Public officials and the resulting media coverage emphasized Scotiabank's status as a multinational (*i.e.*, not Peruvian) financial institution and the local uses that the amounts paid under protest would be put toward. One of the judges of the Court even complained to the Inter-American Commission on Human Rights about the government's interference in the Court's process.[7]

13. As Dr. Landa and Professor Neyra note, between 2017 and 2021, while Scotiabank Perú's case was stalled, the Constitutional Court issued multiple decisions in cases raising the same substantive question about the constitutionality of applying default interest beyond the maximum periods of time for deciding tax cases under Peruvian law, consistently finding in favour of the taxpayer.[8] Most of these cases involved Peruvian plaintiffs. None of them involved government

[4] **C-0204**, Audio of the interview of Antenor José Escalante, Exitosa (June 9, 2017); **C-0205**, Transcript of the interview of Antenor José Escalante, Exitosa (June 9, 2017). *See* also, **C-0221**, Video of the Interview of Antenor José Escalante (June 16, 2017); **C-0222** Transcript of the interview of Antenor José Escalante (June 16, 2017).

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

[6] **C-0270**, "Large companies owe SUNAT more than 7 billion soles," Exitosa (June 3, 2018).

[7] **C-0262**, Video of the Hearing of the Inter-American Court of Human Rights in the case of the Independence of the Constitutional Court of Perú (October 24, 2017); **C-0263** Transcript of the Hearing of the Inter-American Court of Human Rights (October 24, 2017).

[8] CER-Landa/Neyra, ¶ 75; Annex II: Universe of Comparable Cases.

threats to withhold Court funding, leaking decisions, political and media campaigns, or, as described below, the Court abandoning its procedural quorum requirements to reverse a decision upon which it had already voted. To the contrary, when Peruvians challenged the constitutionality of SUNAT and the Tax Court's application of punitive default interest, the Court was allowed to render a decision free from political interference and related considerations irrelevant to the independent and dispassionate application of Peruvian law to the facts of the case.

14. Between July 2018 and August 2021, Scotiabank Perú made over forty requests for the Constitutional Court to issue its decision. In hopes that it might spur the Court into action, Scotiabank issued a Notice of Intent to commence arbitration pursuant to the FTA on September 1, 2021. In one sense, it worked. Shortly after Scotiabank issued the Notice, the Constitutional Court purported to unilaterally lower the number of judges required to vote in favour of a decision for it to be valid from four judges to three. A requirement that at least five judges rule on a case to issue a valid decision remained in place. Just days later, on November 9, 2021, the Court dismissed the Default Interest Amparo by three votes to one (the **"2021 Decision"**). Although it had already addressed the merits of the case in the 2017 Leaked Decision, the Constitutional Court suddenly reversed course and declared that Scotiabank Perú's case was "inadmissible."

15. The only credible explanation for the Court's about-face was the pressures placed on it by numerous government officials over the intervening years. The 2021 Decision was made without meeting the five-judge quorum requirement applicable to the Court. It not only avoids any discussion of the substantive legal issue at the heart of the Default Interest Amparo, but expressly prohibited Scotiabank Perú from having that issue determined.

16. In the absence of government interference with the Constitutional Court, Scotiabank Perú would have been granted a judgment in its favour and recouped much of the default interest that it had paid under protest, with interest accruing since those amounts were paid in 2013 and 2014. As a result of Perú's breaches of Article 803 of the FTA, Scotiabank and Scotiabank Perú were deprived of those funds.

17. The FTA entitles Scotiabank to bring a claim on its own behalf under Article 819 and on behalf of its "enterprise", Scotiabank Perú, under Article 820. As the investor and the 99.3% equity holder of Scotiabank Perú, Scotiabank's primary claim is for the loss of the value of its equity in

Scotiabank Perú in an amount equal to the repatriatable value of the money that should have been repaid to Scotiabank Perú. In the alternative, Scotiabank advances a claim on behalf of Scotiabank Perú.

18. Scotiabank has retained KSV Soriano Inc. (**"KSV"**) to calculate the quantum of Scotiabank and Scotiabank Perú's losses resulting from Perú's breach of the FTA. Scotiabank's losses are [redacted]. Scotiabank Perú's losses are [redacted]. Scotiabank asks the Tribunal to award it its damages, plus interest and its costs of the arbitration.

II. Evidence Submitted with this Memorial

19. In support of this Memorial, Scotiabank submits witness statements from:

(a) [redacted] provides evidence about Scotiabank Perú's payment under protest of the tax debt and default interest, Scotiabank Perú's Default Interest Amparo, the 2017 Leaked Decision, the political and media pressure campaign triggered by the leak, and the ruling of the Constitutional Court in November 2021 against Scotiabank.

(b) [redacted] provides evidence about the [redacted] meetings with justices [redacted], and the 2017 Leaked Decision in June 2017 and subsequent political and media pressure campaign.

20. Scotiabank also submits expert reports from:

(a) ***Dr. Cesar Landa and Professor Ana Neyra.*** Dr. Landa is a professor of law at Pontificia Universidad Católica de Perú. As noted, he was a judge of the

Constitutional Court from 2004 to 2010 and served as President of the Constitutional Court from 2006 to 2008. He was also the Peruvian Minister of Foreign Affairs in 2022. Professor Neyra is a lawyer and professor of law at Pontificia Universidad Católica de Perú and Universidad del Pacífico. She was the Peruvian Minister of Justice and Human Rights in 2020 and held other positions in the executive branch of the Peruvian state prior to that, including as advisor to the Ministry of Justice and with the National Jury of Elections. Dr. Landa and Professor Neyra provide evidence on the Peruvian legal and court system, and analyze the treatment of the Default Interest Amparo. Their expert report describes the Constitutional Court's role and its independence. They analyze the various irregularities in Scotiabank Perú's proceeding, including political interference, lowering quorum requirements after the hearing, and the Constitutional Court's ultimate decision to dismiss the case. Dr. Landa and Professor Neyra compare the treatment Scotiabank Perú received with the way in which other default interest cases involving Peruvian nationals were decided, finding grave differences.

(b) ***Professor Luis Hernández Berenguel***. Professor Hernández is a Peruvian lawyer specializing in tax and corporate law and a founding partner at the law firm Hernández & Cía. He provides evidence on the calculation of default interest on a tax debt under Peruvian law, the interest that would have applied to a repayment by SUNAT if the Default Interest Amparo had been granted, and other matters of Peruvian tax law.

(c) ***Errol Soriano of KSV.*** Mr. Soriano is the Managing Director of KSV's Advisory Valuation and Disputes Practice. He is a certified Chartered Professional Accountant and Chartered Business Valuator with over 30 years of experience in valuation and loss calculation. KSV calculates Scotiabank's loss as a result of Perú's breach of the treaty, including damages and pre-award interest to present day.

PART TWO. THE FACTS

21. The facts section of this Memorial is organized as follows:

(a) Parts I and II describe Scotiabank, its investment in Perú, and the relevant Peruvian governmental entities.

(b) Part III describes the 23-fold increase in default interest caused by Perú's delay between 1999 and 2013, Scotiabank Perú's proceedings challenging the IGV and default interest, and Scotiabank Perú's payment of the IGV and default interest under protest.

(c) Parts IV and V describe the executive branch's threats to withhold the Constitutional Court's funding, the unlawful leak of the Constitutional Court's decision in Scotiabank Perú's favour, the political and media pressure on the Court that followed, Scotiabank Perú's meetings with the judges of the Constitutional Court while the case was under reserve, Scotiabank's initial notice of intent to commence arbitration in September 2021, and the subsequent lowering of the Court's quorum requirements and issuance of the 2021 Decision dismissing the *amparo*.

(d) Part VI discusses the Constitutional Court's treatment of other cases raising the substantive legal issue presented by the Default Interest Amparo and the Court's confirmation that it is unconstitutional in Perú for the executive branch to charge default interest during periods of delay caused by the State.

I. Scotiabank and its Investment in Perú

A. Scotiabank and Scotiabank Perú

22. ***Scotiabank***. Scotiabank is a Canadian chartered bank incorporated under the Canadian *Bank Act*.[9] It was founded in 1832 in Halifax, Nova Scotia, Canada. Scotiabank's head office is

[9] **C-0023**, *Bank Act*, S.C. 1991, c. 46.

located in Toronto, Ontario, Canada. It is one of the "Big Five" Canadian banks, a colloquial term used to describe the five largest and most dominant banks in the country.

23. Scotiabank serves over 23 million customers globally, with over 2,300 branches and offices and more than 88,000 employees in more than 120 countries.[10] It provides financial advice and banking solutions to millions of customers in Canada and around the world through a range of business lines, including:

(a) Canadian Banking, which provides a full suite of financial advice and banking solutions to over 11 million customers, who are served through Scotiabank's network of over 940 branches and over 3,700 automated banking machines, as well as online, mobile and telephone banking, and specialized sales teams.[11]

(b) International Banking, which offers diverse financial advice and solutions to over 12 million customers around the world. Scotiabank's geographical footprint encompasses over 15 countries with a particular emphasis on Latin America, including Mexico, Chile, Perú, Colombia, Brazil, Uruguay, and other markets across Central America and the Caribbean.[12]

(c) Global Wealth Management, which focuses on delivering comprehensive wealth management advice and solutions across Scotiabank's operations. It serves over 2 million investment fund and advisory clients across 13 countries, administering over $600 billion in assets.[13]

(d) Global Banking and Markets, which provides corporate clients with lending and transaction services, investment banking advice and access to capital markets. This is a full-service wholesale bank in the Americas, with operations in over 20

[10] **C-0383**, Scotiabank 2023 Annual Report, p. 134; **C-0077**, Scotiabank Employee Fact Sheet.

[11] **C-0383**, Scotiabank 2023 Annual Report, p. 42.

[12] **C-0383**, Scotiabank 2023 Annual Report, p. 45.

[13] **C-0383**, Scotiabank 2023 Annual Report, p. 49.

countries, serving clients across Canada, the United States, Latin America, Europe and Asia-Pacific.[14]

24. ***Scotiabank Perú***. Scotiabank Perú is a subsidiary of Scotiabank. It commenced operations in Perú on May 13, 2006 following the acquisition and integration of Banco Wiese Sudameris and Banco Sudamericano, both well-known financial institutions in Perú at the time. This transaction is described further in the section below.

25. Scotiabank Perú is Perú's third largest bank with 170 branches. It serves more than 3 million clients across its retail, corporate, business, institutional and investment banking arms and employs over 5,000 people in Perú. Over the last fifteen years, Scotiabank Perú has been consistently recognized as a leading financial institution in Perú.[15] In addition to providing financial services and employment, Scotiabank Perú makes other contributions to the Peruvian economy and society, including contributing millions of dollars in social projects benefiting hundreds of thousands of Peruvians.[16]

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[14] **C-0383**, Scotiabank 2023 Annual Report, p. 53.

[15] [redacted] **CWS-**[redacted]") ¶ 7; **C-0079**, Institutional profiles of Scotiabank Perú; **C-0394**, 2023 Annual Report of Scotiabank, pp. 3-4.

[16] **C-0393**, Press Release, "Scotiabank and Latin American Leadership Academy join forces to train 400 young people in Perú" (February 1, 2024).

Some examples include: (a) In August 2020, Scotiabank launched the first edition of it ScotiaRISE Impact Fund and offered more than PEN 1 million in financing to five projects in the area of financial education, employability, diversion and inclusion and environmental action. These projects will receive resources aimed at benefitting more than half a million people in Perú. **C-0398**, Press Release, "Scotiabank will benefit more than half a million Peruvians thanks to its commitment to Social Impact" (August 8, 2024)

(b) Scotiabank established a powerful alliance with the Latin American Leadership Academy to train and contribute to the professional growth of talent in Perú, with the training of entrepreneurship skills, social innovation, socio-emotional learning and critical thinking. **C-0393**, Press Release, "Scotiabank and Latin American Leadership Academy join forces to train 400 young people in Perú" (February 1, 2024)

(c) Scotiabank executed a project with the District Municipality of La Matanza to construct a 6.4 kilometer road in the town, which demanded an investment of PEN 5.7 million and will directly benefit 6,000 residents of La Matanza. **C-0080**, Press Release, "Scotiabank completes construction of highway in Piura through a Works for Taxes scheme".

B. Scotiabank's Investment in Perú

26. Scotiabank's presence in Perú dates back to 1997 when it acquired a 35% interest in another Peruvian bank, Banco Sudamericano.[17]

27. In the early 2000s, Scotiabank actively pursued international acquisitions as part of a global growth strategy focused on growing in markets where it already had a presence, including Perú.[18] As part of that strategy, in 2006, Scotiabank completed a US$330 million acquisition of Banco Wiese Sudameris ("**Banco Wiese**") – Perú's third largest bank by assets, loans and deposits at the time – and merged Banco Wiese with Banco Sudamericano to create Scotiabank Perú.[19] Through the acquisition and merger, Scotiabank's share of the Peruvian market increased from 2% to 17%.[20]

28. The transaction creating Scotiabank Perú was completed in three stages between 2005 and 2006:

(a) First, Scotiabank acquired the majority of Banco Wiese's shares from Banca Intesa and 100% of the shares of Banco Sudamericano.[21] Scotiabank obtained the various required regulatory approvals for the transaction and an agreement with Perú's Ministry of Economy and Finance regarding the cancellation of a US $250 million guarantee in favour of Banco Wiese, freeing those funds to be used by the Peruvian Government for other government projects and initiatives.[22]

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[17] **C-0078**, Scotiabank Correspondent Banking Services Fact Sheet: Scotiabank Perú S.A.A.

[18] **C-0121**, Scotiabank 2005 Annual Report, pp. 5, 22-23, 54.

[19] **C-0128**, Press Release: Scotiabank makes investment in Perú to expand presence in Latin America (December 5, 2005); **C-0161**, Scotiabank Latin America Investor Day (January 2013), p. 4.

[20] **C-0129**, Scotiabank 2006 Annual Report, p. 16.

[21] **C-0127**, Share Purchase Agreement between the Bank of Nova Scotia and Banca Intesa, S.P.A. (December 5, 2005) (pursuant to which Scotiabank acquired 76.70% of the common shares of Banco Wiese). **C-0128**, Press Release: Scotiabank makes investment in Perú to expand presence in Latin America (December 5, 2005); **C-0131**, Press Release: Scotiabank completes purchases in Perú to expand Latin American Presence (March 9, 2006).

[22] **C-0128**, Press Release: Scotiabank makes investment in Perú to expand presence in Latin America (December 5, 2005); **C-0141**, Notification letter from Banco Wiese Sudameris to the CONASEV (June 19, 2006); **C-0142**, Letter from Banco Wiese Sudameris to CONASEV (June 21, 2006); **C-0130**, Notification letter from Banco Wiese Sudameris to CONASEV (March 9, 2006). **C-0126**, Commitment to enter into an agreement between the Shareholders and the Bank of Nova Scotia (December 3, 2005); **C-0131**, Press Release: Scotiabank completes purchases in Perú to expand Latin American Presence (March 9, 2006).

(b) Second, Scotiabank and Banca Intesa executed a "Put and Call Option" agreement through which Scotiabank could purchase, or Banco Intesa could require that Scotiabank purchase, the remaining shares of Banco Wiese on the five-year anniversary of the closing date of the transaction.[23]

(c) Third, after acquiring a controlling interest in both banks, Scotiabank merged Banco Sudamericano and Banco Wiese through a reorganization in which the assets of Banco Sudamericano were transferred to Banco Wiese in exchange for shares of Banco Wiese.[24] In order to affect the reorganization, authorization was required from the Peruvian Superintendencia de Banca y Seguros ("**SBS**"), which SBS provided on May 9, 2006.[25]

29. The reorganization took effect on May 13, 2006, and Scotiabank Perú officially came into existence.[26]

30. Currently, Scotiabank owns 99.31% of the shares of Scotiabank Perú through a holding company, Scotia Perú Holdings S.A. Scotiabank directly owns 63.04% of Scotia Perú Holdings S.A.'s shares, and indirectly owns 36.96% of its shares through a subsidiary, BNS International (Bahamas) Limited.[27] Scotiabank's holding structure is depicted below:

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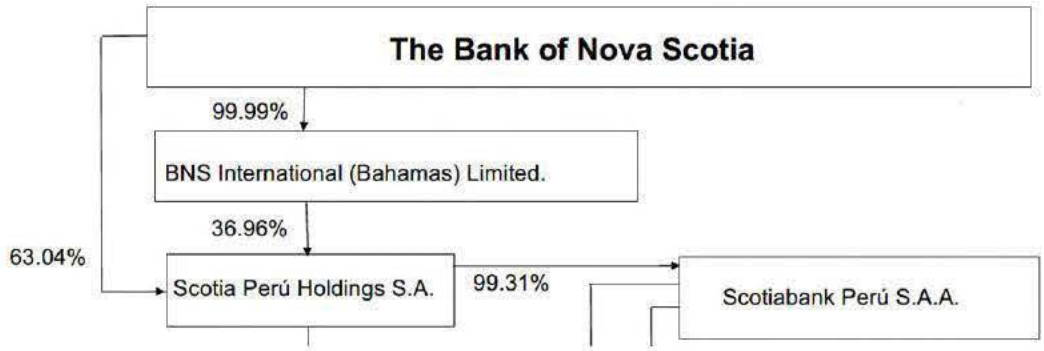
[23] **C-0076**, Put and Call Option Agreement between the Banca Intesa, S.p.A and the Bank of Nova Scotia, 9 March 2006.

[24] **C-0127**, Share Purchase Agreement between the Bank of Nova Scotia and Banca Intesa, S.P.A. (December 5, 2005), clause 9.17; **C-0137**, Minutes of the General Shareholders' Meeting of Banco Wiese Sudameris No. 024 (April 28, 2006); **C-0136**, Minutes of the General Shareholders' Meeting of Banco Sudamericano No. 0354 (April 28, 2006).

[25] **C-0134**, Letter from Banco Wiese Sudameris y Banco Sudamericano to the Superintendence of Banking, Insurance and AFP (April 3, 2006); **C-0138**, Resolution S.B.S. of the Superintendence of Banking, Insurance and AFP No. 560-2006 (May 9, 2006).

[26] **C-0140,** Minutes of Simple Reorganization, and Partial and Total Modification of Bylaws entered into by Banco Wiese Sudameris and Banco Sudamericano (May 13, 2006); **C-0139**, Minutes of Simple Reorganization, and Partial and Total Modification of Bylaws entered into by Banco Wiese Sudameris and Banco Sudamericano (May 13, 2006); **C-0325**, Articles of Association of Scotiabank Perú Holdings S.A. (August 27, 2021); **C-0326**, Articles of Association of Scotiabank Perú S.A.A. (August 27, 2021).

[27] **C-0024**, Diagram of Scotiabank Perú S.A.A. share structure and ownership, January 18, 2023; **C-0019**, Articles of Association for BNS International (Bahamas) Limited dated August 28, 2019; **C-0039**, Certificate of Registration of Scotia Perú Holdings S.A. dated October 27, 2022; **C-0040**, Certificate of Registration of Scotiabank Perú S.A.A. dated October 27, 2022; **C-0036**, Certificate from [redacted], Scotiabank dated October 25, 2022; **C-0033**,



C-00024, Diagram of Scotiabank Perú's share structure

II. Relevant Peruvian Ministries and Judicial Bodies

A. The Ministry of Economy and Finance (SUNAT and the Tax Court)

31. ***SUNAT.*** SUNAT is the Peruvian authority responsible for the collection and control of taxes and is a part of the Ministry of Economy and Finance.[28] It is a branch of the executive government responsible for tax collection and overseeing compliance with Perú's tax and customs regime. SUNAT has the authority to impose administrative sanctions on taxpayers who commit infractions and its decisions can be challenged, first before the Tax Court and thereafter before the Peruvian judiciary.[29]

32. ***Tax Court.*** The Tax Court is also part of the executive branch of the Peruvian Government (specifically, the Ministry of Economy and Finance). It is a specialized administrative tribunal that hears tax and customs matters, and is primarily responsible for resolving appeals submitted by taxpayers relating to tax disputes with SUNAT. As a part of the executive branch of government, taxpayers can challenge resolutions issued by the Tax Court to the Contentious Administrative Court and to the Constitutional Court.

Certificate from [redacted], Scotiabank Perú S.A.A. dated October 20, 2022; **C-0034**, Certificate from [redacted]; **C-0045**, Certificate from [redacted].

[28] **C-0403**, Description of SUNAT (November 20, 2024); **C-0389**, Organizational Chart of the Ministry of Economy and Finance (September 27, 2023). *See* also, Appendix 1: Peruvian State Organization Chart.

[29] **C-0403**, Description of SUNAT (November 20, 2024).

B. The Contentious Administrative Court

33. In the context of taxation disputes, a resolution issued by the Tax Court ends the administrative phase of the proceeding. The Tax Court's resolution can then be challenged in an administrative judicial proceeding before a branch of the Peruvian judiciary specializing in administrative law matters called the Contentious Administrative Court.

34. At first instance, a challenge to a Tax Court resolution is be made to a single judge of the Contentious Administrative Court. An appeal from the decision of that single judge lies to a specialized chamber of the Contentious Administrative Court called the Superior Court of Justice. From there, a Cassation Appeal may be filed before the Supreme Court against the decision of the Chamber of the Superior Court of Justice.

C. The Constitutional Court

35. Separate from the administrative law regime before the Contentious Administrative Courts, parties whose constitutional rights may be engaged can also file *amparo* challenges from resolutions of the Tax Court to the Constitutional Court.

36. An *amparo* must first be admitted and considered by a judge of first instance, known as the Constitutional Court Judge of the Judiciary. That judge's decision may be appealed to a Court Chamber of the Judiciary. A decision of the Court Chamber can be further appealed to the Constitutional Court by submitting a *Recurso de Agravio Constitucional*, a special constitutional appeal.

37. Understanding the role of the Constitutional Court and its independence from other branches of the Peruvian Government is of central importance in this arbitration. The following section describes the Constitutional Court's role and process.

i. The Role and Independence of the Constitutional Court

38. Perú's current Constitution was established in 1993. Like most modern democracies, it provides for a separation of powers between the executive, legislative and judicial branches of

government.[30] The Constitutional Court is an autonomous body charged with overseeing adherence to the Constitution. It does not form part of the executive, legislative or judicial branches of government.[31] It is the highest authority in Perú on constitutional matters.[32]

39. As Dr. Landa and Professor Neyra explain, the Constitutional Court is the ultimate guarantor of fundamental rights and must determine the constitutionality of laws or regulations issued by the legislative or executive branches, which "represent[s] a constitutional control of the power to legislate."[33] The Constitutional Court's decisions can be "binding precedent" or form part of "jurisprudential doctrine". A binding precedent is a decision that creates a legal rule in response to a gap in the law or uncertainty as to the interpretation of a particular law.[34] The Court must identify when a decision constitutes binding precedent, and cannot deviate from a previous binding precedent unless five of the Court's seven judges agree and provide reasons.[35] Similarly, a series of decisions from the Court on the same subject matter constitute jurisprudential doctrine and are binding on the judiciary. Both the Constitutional Court and judges of other cards are required to explain their reasoning if they depart from jurisprudential doctrine.[36]

40. The Constitutional Court thus plays an important role in Perú and is sometimes required to make decisions that touch on important political issues. While the Court itself is not a political body, its decisions frequently "may have political relevance, since the criteria established by the Constitutional Court serve as a parameter or guide, and in some cases as limits, for the subsequent decisions of the branches of Government and other public and private entities."[37]

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[30] **C-0094,** Political Constitution of Perú (December 29, 1993).

[31] An organizational chart of the Peruvian state, including the three branches of government and the Constitutional Court, is at Appendix 1, Peruvian State Organization Chart. See also, CER-Landa/Neyra, ¶¶ 10-12, 37-39.

[32] CER-Landa/Neyra, ¶ 39.

[33] CER-Landa/Neyra, ¶¶ 32-33.

[34] CER-Landa/Neyra, ¶ 20.

[35] CER-Landa/Neyra, ¶¶ 18-19, 23; **C-0319**, Law No. 31307, New Constitutional Procedural Code (July 21, 2021), Preliminary Title, Article VI.

[36] CER-Landa/Neyra, ¶¶ 24-25, 29.

[37] CER-Landa/Neyra, ¶ 34.

41. It is therefore critical that the Constitutional Court remain independent in its decision-making. Dr. Landa and Professor Neyra emphasize that it is because of "precisely the fact that [the Constitutional Court's] decisions have political relevance that it requires an even higher standard of impartiality and independence."[38]

42. Article 201 of the Constitution expressly confirms the autonomy and independence of the Constitutional Court.[39] To protect this autonomy, the Constitution provides that the Court must not be subject to the will of any State entity, nor held accountable by other branches of the Peruvian Government for decisions it issues in discharging its functions.[40] As Dr. Landa and Professor Neyra explain, there are several protections in place to protect the Constitutional Court's independence, including:

(a) The seven judges of the Constitutional Court are selected by Congress, not the executive branch. The selection process is public, transparent, and based on merit, and requires the approval of a two-thirds majority in Congress.[41]

(b) Judges must exercise their functions without being accountable to the individuals who nominated or approved them.[42]

(c) To facilitate judicial independence, Article 201 of the Constitution grants judges of the Constitutional Court legal immunity, meaning they cannot be held liable by any Peruvian authority for their opinions or votes, so long as they are issued in accordance with the judge's official duties. This is intended to protect the Court

[38] CER-Landa/Neyra, ¶ 36.

[39] **C-0094,** Political Constitution of Perú (December 29, 1993). See also, **C-0118**, Law No. 28301, Organic Law of the Constitutional Tribunal (July 1, 2004), art. 1: "The Constitutional Court is the supreme body of interpretation and control of constitutionality. It is autonomous and independent from the other constitutional bodies. It is subject only to the Constitution and its Organic Law. The Constitutional Court has its seat in the city of Arequipa. It may, by majority agreement of its members, hold decentralized sessions in any other place of the Republic."

[40] CER-Landa/Neyra, ¶ 40.

[41] CER-Landa/Neyra, ¶¶ 41, 43.

[42] CER-Landa/Neyra, ¶ 44.

from interference and prevent the composition of the Court from being impacted or altered through external accusations or proceedings.[43]

(d) While the budget for the Constitutional Court is submitted by the executive branch for approval by Congress, budgetary discussions with the government do not involve discussions about ongoing cases or possible decisions. Dr. Landa explains that during his years as President of the Constitutional Court, the determination of the Court's budget was never related to the issuance of a particular decision as this could impact the Court's ability to decide cases independently and objectively.[44]

ii. Quorum Requirements

43. As a seven-judge court, the Constitutional Court has entrenched quorum requirements that must be met for it to issue a judgment. Article 5 of the *Organic Law of the Constitutional Court* and Article 10 of the *Rules of the Constitutional Court* set out the session quorum requirement: decisions must be rendered with **a minimum of five judges** hearing a case, otherwise the Constitutional Court cannot issue a legally binding decision.[45] In addition, a voting quorum requirement came into force on July 21, 2021 that requires four judges to vote in favour of an *amparo* decision for it to be valid.[46]

44. As Dr. Landa and Professor Neyra explain, these quorum requirements exist to protect due process and ensure that decisions cannot be made by a non-representative minority of the Court.[47] They are legal requirements "whose compliance is guaranteed by the right to a process

[43] CER-Landa/Neyra, ¶ 45; **C-0094,** Political Constitution of Perú (December 29, 1993), art. 201.

[44] CER-Landa/Neyra, ¶¶ 47, 49.

[45] CER-Landa/Neyra, ¶ 193; **C-0118**, Law No. 28301, Organic Law of the Constitutional Tribunal (July 1, 2004), art. 5: "The quorum of the Constitutional Court is five of its members. The Court issues resolutions by a simple majority of the votes cast, except to resolve the inadmissibility of the claim of unconstitutionality or to issue a sentence declaring the unconstitutionality of a norm with the force of law, cases in which five agreeing votes"; **C-0119**, Administrative Resolution No. 095-2004-P-TC (September 14, 2004), art. 10: "The quorum of the Constitutional Court is five of its members."

[46] CER-Landa/Neyra, ¶ 205; **C-0319**, Law No. 31307, New Constitutional Procedural Code (July 21, 2021), art. 118.

[47] CER-Landa/Neyra, ¶ 192.

predetermined by law."[48] Failure to comply with these legal requirements constitutes a breach of due process.[49]

iii. The Constitutional Court's Process for Voting on and Issuing Decisions

45. In their expert report, Dr. Landa and Professor Neyra explain the Constitutional Court's procedure for how judgments are drafted, voted on and then issued by the Court.

46. The seven judges of the Constitutional Court make up the Plenary of the Court. There are also two Chambers of the Court, each composed of three judges. Subject to certain exceptions, the seventh judge, the President of the Court, generally does not sit in either Chamber. Once a proceeding has been filed in the Constitutional Court, it is assigned either to a Chamber or the Plenary depending on the nature of the proceeding. Cases that are important, novel or otherwise noteworthy are assigned to the Plenary. Once a case has been assigned to the Plenary, it cannot be determined by a Chamber.[50]

47. In cases like Scotiabank Perú's Default Interest Amparo heard and decided by the Plenary, one judge is assigned the role of "rapporteur" for the case and is responsible for penning the Court's judgment. After a hearing, a draft judgment is circulated in Microsoft Word format to the other judges for their consideration and a Plenary Session is held to discuss the case. At this session, other judges provide feedback on the draft judgment. The judges then proceed to vote on the draft by a show of hands.[51] As Dr. Landa explains, any changes to the text of the judgment following the Plenary Session are typically limited to the incorporation of suggestions received at the session, since the judges vote based on the positions and arguments described in the draft judgment on which they voted.[52]

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[48] CER-Landa/Neyra, ¶ 191.

[49] CER-Landa/Neyra, ¶ 191.

[50] CER-Landa/Neyra, ¶ 53-56, 58.

[51] CER-Landa/Neyra, ¶¶ 59-60, 62-64.

[52] CER-Landa/Neyra, ¶ 67.

48. Following the vote, the voted judgment is circulated to the other judges of the Court for the application of their respective signatures. At this stage, the voted judgment is in PDF format and includes the barcode of the case, which appears on published judgments of the Court. As such, a barcode on a PDF draft judgment connotes an official judgment that only needs the signatures of the judges who have already voted for it in the Plenary Session before it is published officially. Judges have two working days to sign the voted judgment.[53] Once a voted judgment reaches this stage, it is "extremely rare" that the judgment is not signed and published in the following days and weeks.[54]

III. 1999-2016: Scotiabank Perú Pursues a Constitutional Amparo after 14 Years of Delay by Perú Causes a 23-Fold Increase to Default Interest

49. When Scotiabank Perú was created in 2006, it inherited an ongoing dispute in connection with a disputed debt that SUNAT alleged Banco Wiese owed as a result of certain gold trading transactions. This debt was the subject of administrative and judicial proceedings in Perú that languished for 14 years from 1999-2013 as a result of SUNAT and the Tax Court's delay. At the end of this process, in 2013, SUNAT charged Scotiabank Perú default interest that had accrued on the debt over this lengthy period of delay, outside the time limits for deciding such disputes under Peruvian law. This accrual of default interest during the period of delay became the subject of Scotiabank Perú's Default Interest Amparo that gives rise to the present arbitration. The procedural history leading to the Default Interest Amparo is described below.

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

50. In 1997 and 1998, Banco Wiese engaged in 865 gold trading transactions with various third-party suppliers located in Perú. The bank claimed a tax credit in respect of these transactions.

51. On December 23, 1999, on the theory that the gold trading transactions were simulated or "not real," SUNAT issued two resolutions that reduced the tax credit claimed by Banco Wiese and imposed a debt of approximately [redacted]. This debt was made up of IGV (*i.e.*, value added tax) in the amount

[53] CER-Landa/Neyra, ¶¶ 69-70.

[54] CER-Landa/Neyra, ¶ 70.

of [redacted][55] and default interest in the amount of [redacted].[56]

52. As a result of significant delay by SUNAT and the Tax Court in deciding the case, the default interest on the IGV increased by more than twenty-three times the original amount that had been charged, ballooning from approximately [redacted]. SUNAT and the Tax Court's 14 years of delay between 1999 and 2013 is described below:

(a) Less than a month after the 1999 SUNAT Decision was released, Banco Wiese filed a claim before SUNAT seeking to have it revoked.[57] SUNAT rejected this claim on July 19, 2000 (the "**2000 SUNAT Decision**").[58]

(b) In August 2000, Banco Wiese appealed the 2000 SUNAT Decision to the Tax Court.[59] The Tax Court was required under Peruvian law to issue a decision within six months.[60] Instead, more than three years later, it issued a decision in December 2003 in which it partially annulled the 2000 SUNAT Decision and ordered SUNAT to render a new decision (the **"2003 Appeal Decision"**).[61]

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[55] [redacted]

[56] **C-0103**, SUNAT Resolution No. 012-03-0000408 (Banco Wiese Sudameris) (November 30, 1999); **C-0102**, SUNAT Resolution No. 012-03-0000409 (Banco Wiese Sudameris) (November 30, 1999); **C-0104**, SUNAT Fine Resolutions for Banco Wiese Sudameris (November 30, 1999).

[57] **C-0105**, Claim submitted by Banco Wiese Sudameris against 1999 SUNAT Decision (January 19, 2000).

[58] **C-0106**, Intendency Resolution No. 11940 (July 18, 2000).

[59] **C-0108**, Appeal submitted by Scotiabank Perú S.A.A. against the 2000 SUNAT Decision (August 8, 2000).

[60] **C-0101**, Supreme Decree 135-99-EF (August 19, 1999), art. 150: "The Tax Court will resolve the appeals within a period of six (6) months from the date of receipt of the submissions to the Court."

[61] **C-0112**, Resolution No. 07517-1-2003 of the Tax Court in Case No. 3518-2000 (December 30, 2003), p. 4: "[...] it is necessary that in the present case [...] SUNAT carry out the necessary verifications that allow it to determine if the gold trading transactions referred to in the observed invoices are not real, analyzing the relation between the quantity of minerals acquired through the vouchers and the one entered according to the documentation issued both by its suppliers and that generated by Scotiabank, as is the case of the entry guides to the safe deposit box and vault, settlements and the respective valued Kardex, as well as the relation of said figures with those established for the support of internal sales made by Scotiabank, all of which must be evaluated together with the supplier's testimonies."

(c) SUNAT was required to issue a new decision within 30 business days.[62] Instead, it took eight *years*. SUNAT's decision, which was dated November 30, 2011 but not received by Scotiabank Perú until December 20, 2011, maintained its 1999 Decision (the "**2011 SUNAT Decision**"). SUNAT provided no explanation for this extensive delay. SUNAT also failed to analyze all of the 865 transactions at issue. In fact, contrary to the Tax Court's direction in the 2003 Appeal Decision, and despite taking eight years, SUNAT considered just 15 transactions.[63]

(d) On January 6, 2012, Scotiabank Perú appealed the 2011 SUNAT Decision to the Tax Court.[64] Scotiabank Perú requested that the Tax Court suspend the accrual of default interest imposed during the period of delay caused by the Government.[65]

The Tax Court had twelve months to issue a decision.[66] Instead, it took nearly two years, rejecting the appeal on November 11, 2013 and upholding SUNAT's decision (the "**2013 Tax Court Decision**").[67] Through a Coercive Resolution, SUNAT then imposed default interest against Scotiabank Perú for the combined 14 years despite SUNAT and the Tax Court's failure to render decisions within the deadlines for doing so under Peruvian law. SUNAT demanded that Scotiabank Perú pay [redacted].[68] This amount was calculated by adding, and in some years capitalizing, the additional interest accrued to the initial amount of interest owed from the 1999 SUNAT Decision until November 11, 2013. As Professor Hernández notes, this

[62] **C-0101**, Supreme Decree 135-99-EF (August 19, 1999), art. 156: "In the event that it is required to issue a compliance resolution or issue a report, the procedure will be completed within a maximum period of thirty (30) business days from receipt of the file, under responsibility, unless the Tax Court indicates a different deadline."

[63] **C-0157**, Administrative Resolution No. 0150150001042 issued by SUNAT (November 30, 2011).

[64] **C-0159**, Appeal submitted by Scotiabank Perú S.A.A. against the 2011 SUNAT Decision (January 5, 2012).

[65] **C-0165**, Brief submitted by Scotiabank Perú S.A.A. to the Tax Court (May 20, 2013).

[66] **C-0101**, Supreme Decree No. 135-99-EF, (August 19, 1999), art. 150: "The Tax Court will resolve the appeals within a period of twelve (12) months from the date of receipt of the submissions to the Court."

[67] **C-0168**, Resolution No. 14935-5-2013 of the Tax Court in Case No. 2247-2012 (September 24, 2013). The resolution is dated September 24, 2013, but Scotiabank Perú did not receive it until November 11, 2013. The delay in formal notification was the result of the retirement of a judge.

[68] **C-0172**, Coercive Execution Resolution No. 011-006-0044596 (November 25, 2013).

"capitalizing" (compounding) of interest on the debt is unconstitutional under Peruvian law. Instead, default interest is required to be calculated on a simple basis.[69]

B. Scotiabank Perú Challenges the Default Interest and Separately Challenges the IGV

53. Following the 2013 Tax Court Decision, Scotiabank Perú commenced two judicial proceedings to challenge (a) the excess default interest applied by SUNAT and, separately, (b) the underlying tax debt:

(a) ***The Default Interest Amparo.*** On November 15, 2013, Scotiabank Perú filed an *Acción de Amparo* before a Constitutional Judge seeking a declaration that the accrual of default interest outside the maximum legal term for SUNAT and the Tax Court to issue their decisions and the capitalization of default interest breached Scotiabank Perú's constitutional rights. It thus sought to prohibit SUNAT from collecting default interest that accrued during the 14-year period of delay attributable to SUNAT and the Tax Court (i.e., from December 23, 1999 to November 11, 2013).[70]

(b) ***The Tax Appeal.*** On November 21, 2013, Scotiabank Perú filed a contentious administrative action against the 2013 Tax Court Decision challenging the imposition of IGV on the underlying gold trading transactions (the "**Tax Appeal**").[71]

54. There is a fundamental distinction between the Default Interest Amparo, on the one hand, and the Tax Appeal, on the other. Indeed, in the Default Interest Amparo, the Third Civil Chamber of the Constitutional Court expressly rejected an argument by SUNAT and the Tax Court that the

[69] Expert Report of Louis Hernández Berenguel ("**CER-Hernández**"), ¶¶ 13(a)(i), 15; **C-0143**, Legislative Decree No. 969, modifying Supreme Decree No. 135-99-EF (December 24, 2006).

[70] CWS-[redacted], ¶ 17; **C-0169**, Application for Amparo filed by Scotiabank Perú S.A.A. (November 15, 2013).

[71] **C-0171**, Contentious Administrative Statement of Claim (November 21, 2013). The Tax Appeal eventually became the subject of an *amparo* before the Constitutional Court that challenged an underlying judicial ruling. As discussed below, the Constitutional Court released its decision in that case on May 31, 2024.

Default Interest Amparo should be dismissed on the basis that it overlapped with the Tax Appeal. The Court confirmed that the two proceedings were distinct and raised distinct issues:

> "...the petition for *amparo* denounces the violation of the constitutional rights to be tried within a reasonable time, equality in tax matters, right to property and the principle of non-conflictuality, alleging the need for urgent protection since the appellant has been condemned to pay the delinquent interest accrued since December 23, 1999 to date, being that, according to the plaintiff, the amount of said interest exceeds the original capital debt by more than 890%, while the claim for nullity of the administrative act seeks to invalidate the RTF. No. 14935-5-2013, where the plaintiff is attributed an alleged tax debt, being questioned in the ordinary proceeding because it has been issued in contravention of the principles of legality, assessment of evidence, due motivation, and having been issued ignoring a final judicial decision, but that such claim [the Tax Appeal] is not linked to the default interest that is being questioned in the amparo proceeding; consequently, it is evident that we are not faced with the same *causa petendi* [cause of action], and the application of section 3 of article 5 of the Civil Procedure Code is erroneous."[72] [Emphasis added]

C. 2013-2014: Scotiabank Perú Pays the IGV and Default Interest Under Protest to Avoid Seizure of its Assets

55. As Professor Hernández explains, Scotiabank Perú's debt to SUNAT became final, and therefore enforceable, with the 2013 Tax Court Decision.[73]

56. The issuance of the 2013 Tax Court Decision brought an end to the administrative process before SUNAT and the Tax Court. Although Scotiabank Perú could challenge SUNAT and the Tax Court's resolutions before a Constitutional Judge and the Contentious Administrative Court, that would not prevent SUNAT from seeking to enforce the debt in the meantime. Once SUNAT made a formal demand, Scotiabank Perú would have seven business days to make payment, failing

[72] **C-0063**, Resolution No. 7, issued by the Third Civil Chamber, File No. 35201-2013, ¶ 10. Scotiabank Perú's amparo application was initially rejected by 11th Constitutional Judge, a first instance judge: **C-0174**, Resolution No. 2 of the Superior Court of Justice in Case No. 35201-2013 (December 5, 2013). This decision was overturned by the Third Civil Chamber in June 2014: **C-0063**, Resolution No. 7, issued by the Third Civil Chamber, File No. 35201-2013. As a result, on July 14, 2014, the 11th Constitutional Judge admitted Scotiabank Perú's application for amparo: **C-0182**, Resolution No. 4 of the Superior Court of Justice of Lima in Case No. 35201-2013 (July 14, 2014). *See* also, Appendix 3: Procedural History of Scotiabank Perú's challenge of the Tax Debt and Default Interest.

[73] CER-Hernández, ¶ 93.

which SUNAT could commence enforcement proceedings, including seizing the bank's assets.[74] Non-compliance with the payment of a tax debt would also expose Scotiabank Perú to collection measures under Article 121 of the Tax Code, which, as Professor Hernández notes, "could have seriously damaged Scotiabank's financial situation, as well as its commercial image and reputation in the market."[75]

57. As [redacted] describes in his witness statement, following the 2013 Tax Court Decision, Scotiabank Perú contacted officials at SUNAT and the Ministry of Economy and Finance to attempt to delay the commencement of the enforcement process so that Scotiabank Perú could bring its judicial challenges and pursue an injunction to stop the collection process pending the resolution of those proceedings. Despite these requests, on November 25, 2013, SUNAT issued a formal demand for payment in which it threatened to use "coercive collection measures" unless payment was made.[76]

58. Following this November 25 demand, Scotiabank Perú had seven business days to make payment (*i.e.*, by December 5, 2013) or it risked the seizure of its assets. The bank pursued injunctive relief in Peruvian courts in an attempt to halt the collection process, but commencing a proceeding and securing a judicial determination in less than seven days was not feasible. Ultimately, Scotiabank Perú's application for injunctive relief was denied some two months later.[77]

59. Scotiabank Perú was thus left with two options: (a) pay the amount demanded in full and pursue a challenge in court, or (b) attempt to reach a settlement with SUNAT in which it would have to acknowledge the debt in order to pay it in instalments. Scotiabank Perú was unwilling to acknowledge the debt and, in particular, the imposition of punitive default interest that resulted entirely from delays by SUNAT and the Tax Court. Accordingly, option (b) was not viable.[78]

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[74] CWS-[redacted], ¶ 19; CER-Hernández, ¶¶ 97-98.

[75] CER-Hernández, ¶ 99. See *e.g.*, **C-0155**, 2010-C Credit Agreement between Scotiabank Perú S.A.A., Certain Lenders and The Bank of New York Mellon (September 22, 2010).

[76] CWS-[redacted], ¶ 19; **C-0172**, Coercive Execution Resolution No. 011-006-0044596 (November 25, 2013).

[77] **C-0176**, Scotiabank's Request for Injunctive Relief (December 13, 2013); **C-0179**, Resolution No. 3, Judge of the Tax Appeal Court (January 21, 2014).

[78] CWS-[redacted], ¶ 21.

60. Instead, Scotiabank Perú met with SUNAT to explore a third option. Scotiabank Perú proposed that it would make a significant down payment to SUNAT in early December 2013, and then additional weekly payments thereafter until the debt was paid. These payments would be expressly made under protest, without any formal settlement with SUNAT, so that Scotiabank Perú's position in its judicial proceedings would not be prejudiced by the payment. SUNAT accepted this proposal and agreed not to take coercive collection measures when the debt was not paid in full by December 5, 2013.[79]

61. In accordance with that agreement, Scotiabank Perú paid [redacted] on December 6, 2013 followed by nine other installment payments until February 14, 2014, totaling [redacted].[80] These payments were made under protest and, as stated explicitly in the cover letters accompanying the payments, were for the "sole purpose" of avoiding the coercive collection measures that SUNAT had otherwise threatened to take against Scotiabank Perú.[81]

IV. 2016-2021: Unlike in Cases Involving Domestic Litigants, Perú Interfered with the Constitutional Court in Order to Affect the Outcome of Scotiabank Perú's Default Interest Amparo

62. In the Default Interest Amparo, Scotiabank Perú alleged that the executive branch of the State had breached the bank's constitutional rights to due process, equal treatment, property, and effective judicial protection and defence by imposing default interest for periods outside of the legal term for SUNAT and the Tax Courts to issue their decisions, as well as by capitalizing the interest.[82]

63. Between 2013 and 2016, the Default Interest Amparo worked its way through the Constitutional Court system. In December 2015, the 11th Constitutional Judge ruled partially in favour of Scotiabank Perú, holding that SUNAT could not charge default interest from July 2000

[79] CWS-[redacted], ¶ 23.

[80] CWS-[redacted], ¶ 24.

[81] CWS-[redacted], ¶ 24; **C-0009**, Payment to SUNAT (December 6, 2013); **C-0010**, Payment to SUNAT (December 16, 2013); **C-0011**, Payment to SUNAT (December 23, 2013); **C-0012**, Payment to SUNAT (December 26, 2013); **C-0013**, Payment to SUNAT (January 6, 2013); **C-0014**, Payment to SUNAT (January 13, 2014); **C-0015**, Payment to SUNAT (January 20, 2014); **C-0016**, Payment to SUNAT (January 27, 2014); **C-0017**, Payment to SUNAT (February 3, 2014); **C-0018**, Payment to SUNAT (February 14, 2014).

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

until March 31, 2007.[83] All parties appealed. On September 21, 2016, the Third Civil Chamber overturned the lower court decision and reinstituted the default interest amount in its entirety.[84]

64. On October 14, 2016, Scotiabank Perú filed a special constitutional appeal (*Recurso de Agravio Constitucional*) before the Constitutional Court of Perú, the highest court in the Constitutional Court system.[85] The hearing took place on March 29, 2017. It is this proceeding that forms the basis of Scotiabank's FTA claim.

65. As described below, elements of the Peruvian State interfered with and imposed extraordinary pressure on the Constitutional Court that ultimately led a minority of the Court to dismiss Scotiabank Perú's case. This campaign by the Government of Perú to exert pressure on and interfere with the Court so that it would rule against Scotiabank Perú, and the Court's reaction to that pressure, stands in contrast to the treatment that dozens of Peruvian litigants who similarly challenged the application of default interest to a tax debt received.

A. The *Elgo Ríos* and *Medina de Baca* Decisions

66. In order to put the treatment of Scotiabank Perú's case in context, the Tribunal must understand two decisions of the Constitutional Court: *Elgo Ríos Nuñez* ("***Elgo Ríos***")[86] and *Emilia Rosario del Rosario Medina de Baca v. SUNAT* ("***Medina de Baca***").[87]

67. In *Elgo Ríos*, the Constitutional Court explained the criteria for determining which cases should be decided through a contentious administrative proceeding and, alternatively, when a Constitutional Court *amparo* proceeding is appropriate.[88] In *Medina de Baca*, the Constitutional

[83] **C-0185**, Judgment No. 27 of the Superior Court of Justice of Lima in Case No. 35201-2013 (December 7, 2015).

[84] **C-0188**, Resolution No. 20 of the Superior Court of Justice of Lima in Case No. 35201-2013 (September 21, 2016). See also, CWS-[redacted], ¶ 26.

[85] **C-0189**, Constitutional grievance presented by Scotiabank Perú S.A.A. against Resolution N. 20 of the Superior Court of Justice (October 14, 2016). See also, CWS-[redacted], ¶ 26.

[86] **C-0184**, Judgment of the Plenary Session of the Constitutional Court in Case No. 02383-2013-PA/TC (Elgo Ríos).

[87] **C-0066**, Judgment of the Plenary Session of the Constitutional Court in Case No. 04082-2012-PA/TC (Medina de Baca).

[88] CER-Landa/Neyra, ¶ 167; **C-0184**, Judgment of the Plenary Session of the Constitutional Court in Case No. 02383-2013-PA/TC (Elgo Ríos), ¶ 15.

Court considered the constitutionality of accruing default interest during periods of delay by SUNAT and the Tax Court, and the proper forum for bringing such challenges.[89] These decisions are described in greater detail below and form part of the context for understanding the treatment Scotiabank received.

68. ***Elgo Ríos***. In July 2015, the Constitutional Court used the *Elgo Ríos* case to explain when claims commenced as *amparos* should be decided by the Constitutional Court and when they should be decided in other forums, including the Contentious Administrative Court.[90]

69. The case concerned the alleged unlawful dismissal of a public sector employee. The Constitutional Court found that the employee's grievance should have been resolved through a summary labour dispute process and not by an *amparo* before the Constitutional Court.

70. The Constitutional Court's decision turned on whether another forum provided an equally satisfactory venue to resolve the dispute. The Court issued a binding precedent setting out the criteria for making that determination. The Constitutional Court also held that, where a constitutional *amparo* proceeding had been commenced before the *Elgo Ríos* decision was released (as in Scotiabank Perú's case), and it was determined that the Constitutional Court was not the correct forum, the litigant must be given the opportunity to pursue their claim in the correct forum (since they could not have reasonably known at the time of commencing their claim which forum to pursue it in).[91]

71. ***Medina de Baca***. In the *Medina de Baca* case, Ms. Rosario Medina de Baca – a Peruvian national – asserted that SUNAT and the Tax Court had breached her constitutional rights by applying default interest during the Tax Court's four-year delay in deciding her case and by capitalizing default interest.[92] On September 21, 2016, the Constitutional Court sided with Ms.

[89] CER-Landa/Neyra, ¶ 155; **C-0066**, Judgment of the Plenary Session of the Constitutional Court in Case No. 04082-2012-PA/TC (Medina de Baca).

[90] CER-Landa/Neyra, ¶ 167; **C-0184**, Judgment of the Plenary Session of the Constitutional Court in Case No. 02383-2013-PA/TC (Elgo Ríos), ¶ 15.

[91] CER-Landa/Neyra, ¶ 168; **C-0184**, Judgment of the Plenary Session of the Constitutional Court in Case No. 02383-2013-PA/TC (Elgo Ríos), ¶¶ 18-20.

[92] **C-0066**, Judgment of the Plenary Session of the Constitutional Court in Case No. 04082-2012-PA/TC (Medina de Baca).

Medina de Baca and confirmed that the accrual of default interest in this manner was unconstitutional. It thus ordered SUNAT to suspend the accrual of default interest during the periods of SUNAT and the Tax Court's delay.[93] The Constitutional Court also ordered SUNAT to calculate the default interest owed without capitalizing the debt (*i.e.*, on a simple interest basis), which had quintupled the tax debt in that case.[94]

72. Like Scotiabank Perú, Ms. Medina de Baca had also initiated a contentious administrative claim against the decisions of SUNAT and the Tax Court challenging the calculation of the principal tax amount, separate and apart from her Constitutional Court *amparo* challenging the accrual of default interest. The Constitutional Court confirmed that this contentious administrative proceeding did not render the *amparo* claim inadmissible, as the Constitutional Court and Contentious Administrative Court claims involved two distinct judicial challenges that engaged separate issues.[95] It also held that a proceeding in the Contentious Administrative Court was not an "equally satisfactory" way for Mrs. Medina de Baca to protect her constitutional rights, which were separate from the rights and entitlements asserted in the contentious administrative proceeding.[96]

73. The Constitutional Court also rejected SUNAT's argument that Ms. Medina de Baca was required to have submitted a *recurso de queja* (*i.e.*, a challenge in the administrative courts) against the Tax Court as a result of its delay and that the *amparo* should be dismissed on that basis. To the contrary, the Constitutional Court noted that the submission of a *recurso de queja* did not suspend the effects of SUNAT's enforcement mechanisms, and therefore the taxpayer would still be exposed to coercive enforcement measures.[97]

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[93] **C-0066**, Judgment of the Plenary Session of the Constitutional Court in Case No. 04082-2012-PA/TC (Medina de Baca), ¶¶ 70-71.

[94] **C-0066**, Judgment of the Plenary Session of the Constitutional Court in Case No. 04082-2012-PA/TC (Medina de Baca), ¶¶ 49, 54-55, 72.

[95] **C-0066**, Judgment of the Plenary Session of the Constitutional Court in Case No. 04082-2012-PA/TC (Medina de Baca), ¶¶ 28-30.

[96] **C-0066**, Judgment of the Plenary Session of the Constitutional Court in Case No. 04082-2012-PA/TC (Medina de Baca), ¶¶ 17-20.

[97] **C-0066**, Judgment of the Plenary Session of the Constitutional Court in Case No. 04082-2012-PA/TC (Medina de Baca), ¶¶ 5-7.

B. June 2017: SUNAT and a Constitutional Court Judge Leak a Decision in Scotiabank Perú's Favour

74. In October 2016, at the time Scotiabank Perú commenced its appeal, the Constitutional Court was composed of the following judges: (a) Manuel Miranda (President), (b) Óscar Urviola, (c) Ernesto Blume, (d) Carlos Ramos, (e) José Luis Sardón, (f) Eloy Espinosa-Saldaña, and (g) Marianella Ledesma.[98]

75. The hearing took place on March 29, 2017 before six of the seven judges of the Court. [redacted][99]

76. At the hearing, SUNAT made political arguments as to why the Constitutional Court should rule against Scotiabank Perú.[100] For example, SUNAT argued that the Peruvian Government needed to keep the funds paid by Scotiabank Perú in order to repair public infrastructure in the wake of landslides and natural disasters in certain parts of the country.[101] At the time, these arguments did not cause Scotiabank Perú great concern as it was "fully confident that the Constitutional Court would decide [the case] based on legal [arguments]."[102]

77. As described in the paragraphs below, and consistent with the *Medina de Baca* case, three months after the hearing, a decision in Scotiabank Perú's favour signed by a majority of the Court was improperly leaked to the national press, causing a significant uproar and, ultimately, a political campaign to have the Court rule against Scotiabank Perú.

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[98] **C-0406**, List of previous justices of the Constitutional Court. *See* also, Appendix 1: Peruvian State Organization Chart.

[99] **C-0340**, Judgment of the Plenary Session of the Constitutional Court in Scotiabank Perú S.A.A. v. SUNAT and the Tax Court (Case No. 222-2017-PA/TC); **C-0411**, Resolution of the Court regarding Justice Sardón's recusal (April 24, 2017).

[100] CWS [redacted] ¶ 27; **C-0194**, Video of the Hearing of the Default Interest Amparo, (March 29, 2017); **C-0195**, Transcript of the Public Hearing of the Plenary Constitutional Court (March 29, 2017).

[101] CWS [redacted] ¶ 27; **C-0194**, Video of the Hearing of the Default Interest Amparo, (March 29, 2017); **C-0195**, Transcript of the Public Hearing of the Plenary Constitutional Court (March 29, 2017).

[102] CWS [redacted] ¶ 27.

i. The 2017 Leaked Decision was Voted Upon and in Final Form when it was Leaked by One of the Constitutional Court Judges

78. On June 9, 2017, several excerpts from a decision in Scotiabank Perú's favour were published in a national Peruvian newspaper, *Hildebrandt en sus Trece*.[103] As [redacted] note in their witness statements, this newspaper has an acknowledged position against foreign investors.[104] The article emphasized the Claimant's multinational presence, nothing that Scotiabank was, at that time, the sixth largest financial institution in Latin America.[105]

C-0200, Headline about Scotiabank Perú's case, as published in *Hildebrandt en sus Trece*: "Scotiabank will win S$481,000,000 from Constitutional Court decision"

79. The newspaper published multiple excerpts from the decision. These excerpts confirmed that the decision was in Scotiabank Perú's favour, disclosed the Court's reasoning, and provided the names of the four judges who had signed on to the majority ruling and the two who opposed it. Accordingly, it was apparent from the excerpts that the newspaper had not only been tipped off about the result of the decision, but had actually received the text of the decision that the Constitutional Court intended to issue:

[103] CWS-[redacted], ¶ 32; **C-0200**, "Scotiabank will win S$481,000,000 from Constitutional Court decision" Hildebrandt en sus trece (June 9, 2017).

[104] CWS-[redacted], ¶ 45; CWS-[redacted], ¶ 20.

[105] **C-0200**, "Scotiabank will win S$481,000,000 from Constitutional Court decision" Hildebrandt en sus trece (June 9, 2017).

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SENTENCIA DEL TRIBUNAL CONSTITUCIONAL

En Lima, a los 9 días del mes de mayo de 2017, el Pleno del Tribunal Constitucional, integrado por los señores magistrados Miranda Canales, Urviola Hani, Blume Fortini, Ramos Núñez, Sardón de Taboada y Espinosa-Saldaña Barrera, pronuncia la siguiente sentencia; con el avocamiento de la magistrada Ledesma Narváez, aprobado en la sesión de pleno del 4 de abril de 2017; con la abstención del magistrado Sardón de Taboada, aprobada en la sesión de pleno del 19 de abril de 2017; con los votos singulares de los magistrados Ledesma Narváez y Urviola Hani que se agregan.

ASUNTO

Recurso de agravio constitucional interpuesto por Scotiabank Perú S.A.A. contra la resolución de fojas 3274, de fecha 21 de setiembre de 2016, expedida por la Tercera Sala Civil de la Corte Superior de Lima, en todos sus extremos. La referida Sala revocó la sentencia de primera instancia en el extremo que declaró fundada en parte la demanda al estender que la deuda tributaria no generó intereses moratorios desde el 20 de julio de 2000 hasta el 31 de marzo de 2007, y, reformándola la declaró infundada. Asimismo, confirmó la sentencia de primera instancia en los demás extremos que desestimaron el resto de pretensiones planteadas por el demandante.

ANTECEDENTES

Con fecha 15 de noviembre de 2013, Scotiabank Perú S.A.A. interpone demanda de amparo en contra de la Superintendencia Nacional de Administración Tributaria (en adelante, Sunat) y el Tribunal Fiscal (Ministerio de Economía y Finanzas). Solicita lo siguiente:

i) Como primera pretensión autónoma, que se ordene a la Sunat abstenerse de liquidar y requerir a la parte demandante el pago de intereses moratorios devengados durante los siguientes periodos:

- Desde el inicio del séptimo mes contado a partir de la fecha de ingreso al Tribunal Fiscal del recurso de apelación interpuesto contra la Resolución de Intendencia 015-4-11940, hasta la fecha en la que se expidió la Resolución 07517-1-2003 que resolvió dicho recurso por primera vez, es decir, el 30 de diciembre de 2003, y

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La conducta de las autoridades administrativas

28. La conducta de la Sunat y del Tribunal Fiscal en este caso ha tenido incidencia sobre la dilación del procedimiento. Esto se verifica en primer lugar, del hecho que el Tribunal Fiscal demoró más de tres años para resolver el primer recurso de apelación planteado por la entidad recurrente contra la Resolución de Intendencia 11940, de fecha 18 de julio de 2000, pese a que el artículo 150 del Código Tributario, vigente en ese momento, establecía un plazo máximo de doce meses para su resolución. Así, mientras que dicho recurso fue presentado el 9 de agosto de 2000, el Tribunal Fiscal lo resolvió mediante Resolución 07517-1-2003 del Tribunal Fiscal, de fecha 30 de diciembre de 2003; allí dispuso la nulidad del extremo de la resolución apelada referido a la verificación de las operaciones de compra venta respecto de las cuales se podía el reconocimiento del crédito tributario, por lo que se ordenó a Sunat emitir un nuevo pronunciamiento en dicho extremo.

29. Ahora bien, en segundo momento en el que se pone en evidencia el actuar dilatorio de la autoridad administrativa, se advierte en los casi ocho años que la Sunat demoró en dar cumplimiento a lo dispuesto por el Tribunal Fiscal, pues fue recién con la Resolución de Intendencia 0150150001042, de fecha 30 de noviembre de 2011, que esta entidad declaró infundada la impugnación hecha por el Banco tras concluir su labor de verificación. Finalmente, el Tribunal Fiscal tardó un año y ocho meses aproximadamente en resolver el segundo recurso de apelación interpuesto por el demandante, a pesar de que el referido artículo 150 del Código Tributario mantenía el plazo máximo de doce meses para su resolución.

30. Si bien es cierto que el incumplimiento del plazo legal no puede configurar *per se* una violación de la garantía del plazo razonable, toda vez que su evaluación debe tomar en cuenta las circunstancias particulares de cada caso, este Tribunal considera que el tiempo que tomó en este caso la administración tributaria para resolver los recursos planteados por la entidad recurrente en el procedimiento administrativo resultó ser excesivo, perjudicando de esa manera al contribuyente y poniéndolo en una situación prolongada de incertidumbre. Aún cuando se tratara de un caso complejo por la cantidad y volumen de información que procesar como se indicó *supra*, no se advierte razón alguna que justifique un lapso de ocho años en labores de verificación de operaciones comerciales. Asimismo, la excesiva carga procesal alegada por la administración tributaria no puede ser invocada sin más como motivo justificante del retardo en la absolución de un recurso administrativo.

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Las consecuencias que la demora produce en la situación jurídica del interesado

31. Finalmente, para este Tribunal resulta evidente que la excesiva demora en la resolución del procedimiento administrativo por parte tanto de la Sunat como del Tribunal Fiscal se ha traducido en un perjuicio significativo para la demandante. En efecto, ello se aprecia del hecho que, como ha señalado la demandante –y que no ha sido refutado por ninguna de las entidades demandadas– en todo el tiempo que duró el procedimiento la deuda se incrementó aproximadamente en un 890%.

32. Esta situación, aun cuando la parte demandante haya hecho efectivo el pago del monto total de la deuda el 14 de febrero de 2014 (fojas 1854), ha significado un desmedro económico para la misma. En consecuencia, resulta claro que el transcurso del tiempo ha afectado de manera particular la situación de la parte interesada, es decir, del contribuyente.

Conclusión sobre el plazo razonable

33. Luego del análisis de estos cuatro elementos para determinar la razonabilidad del plazo, este Tribunal concluye que las autoridades administrativas a cargo del procedimiento tributario en el presente caso, no actuaron con la debida diligencia y celeridad a fin de resolver en un plazo razonable la situación jurídica de la demandante, razón por la cual se ha incurrido en una violación del derecho a que el procedimiento dure un plazo razonable.

Efectos de la vulneración del derecho al plazo razonable

34. De acuerdo a la doctrina jurisprudencial vinculante establecida en el fundamento 12 de la STC N.° 00295-2012-PHC/TC, el Tribunal Constitucional ha precisado, en el ámbito del proceso penal, que si se constata la violación del derecho a ser juzgado dentro de un plazo razonable como consecuencia de estimarse la demanda, se ordenará al órgano jurisdiccional que conoce el proceso penal que, en el plazo más breve posible, según sea el caso, emita y notifique la correspondiente sentencia que defina la situación jurídica del procesado, bajo apercibimiento. Y es que el plazo para el pronunciamiento definitivo sobre el fondo del asunto no debe ser fijado una vez y para siempre, de modo que sea aplicable en todos los casos, sino que éste debe ser fijado de manera objetiva y razonable por el juez constitucional en atención a las circunstancias concretas de cada caso.

35. En cuanto a los procedimientos administrativos, este Tribunal ha entendido que, ante la constatación de una vulneración al plazo razonable, declarar nulo el procedimiento administrativo y establecer la reposición de las cosas al estado anterior, no podría ser un efecto inmediato o automático, toda vez que las demás garantías procesales que conforman del debido procedimiento si fueron

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administrativa de última instancia. Asimismo, tampoco resulta aplicable a aquellos procesos judiciales (contencioso administrativos o procesos constitucionales) que, con anterioridad a la publicación de la sentencia, cuenten con resolución judicial firme.

67. En consecuencia, el criterio establecido en el Exp. 04082-2012-PA/TC sólo será aplicable a aquellos procedimientos contencioso tributarios, procedimientos de cobranza coactiva, o procesos judiciales que, luego de publicada la sentencia, se encuentren aún en trámite o pendientes de resolución firme.

Por estos fundamentos, el Tribunal Constitucional, con la autoridad que le confiere la Constitución Política del Perú,

HA RESUELTO

1. Declarar **FUNDADA** en parte la demanda, por haberse acreditado la vulneración del derecho al plazo razonable y el principio de razonabilidad por parte de la administración tributaria.

2. En consecuencia, **DISPONER** la nulidad de la Resolución de Ejecución Coactiva 011-006-0044596, y que la Sunat vuelva proceda a calcular los intereses moratorios de conformidad con lo establecido en los fundamentos 48, 51 y 61 de la presente sentencia;

3. Declarar **IMPROCEDENTE** la demanda respecto a la presunta afectación del derecho de acceso a la tutela jurisdiccional efectiva.

4. Ordenar que la entidad emplazada y demás entidades competentes en el conocimiento de casos similares, tomen en cuenta, en lo sucesivo, los criterios establecidos en los fundamentos 65 a 67 de la presente sentencia.

Publíquese y notifíquese.

SS.

MIRANDA CANALES
BLUME FORTINI
RAMOS NÚÑEZ
ESPINOSA-SALDAÑA BARRERA

C-0200, Excerpts from the 2017 Leaked Decision, as published in *Hildebrandt en sus Trece*, showing that the Constitutional Court held a Plenary vote on May 9, 2017 with four out of six Justices voting in favour of the decision to grant Scotiabank Perú's Default Interest Amparo.

80. The published excerpts confirmed that the Court had already met and **voted on** the decision, with a four-judge majority voting in favour of Scotiabank Perú and two judges against.[106] As Dr. Landa and Professor Neyra explain, the decision also included a barcode in the upper right-hand corner, which, as explained at paragraph 48 above, is only assigned to an official decision of the Court after the Plenary Session is held for the judges to vote on a case and once the document is in its final PDF form awaiting signatures for publication.[107]

81. The 2017 Leaked Decision confirmed that the Court was going to grant Scotiabank Perú's claim and that there had been a breach of Scotiabank Perú's constitutional rights.[108] In particular, the Constitutional Court concluded that the alleged complexity of the case did not justify the delays on the part of SUNAT and the Tax Court.[109]

82. Notably, the article also indicated who was behind the leak. According to the newspaper, "**a high-level source in the Constitutional Court, who [was] opposed to the alleged favouritism** of Scotiabank, gave this weekly a copy of said ruling..."[110]

83. There were only two judges opposed to the majority's decision: [redacted] and [redacted] As set out at paragraph 134 below, Scotiabank Perú was later informed by [redacted] that [redacted] was likely the source of the leak.[111] Consistent with that evidence, [redacted] [112] The log also confirms that, following the leak, on

[106] CER-Landa/Neyra, ¶¶ 108-110, 112.

[107] CER-Landa/Neyra, ¶ 111.

[108] **C-0200**, "Scotiabank will win S$481,000,000 from Constitutional Court decision" Hildebrandt en sus trece (June 9, 2017).

[109] **C-0200**, "Scotiabank will win S$481,000,000 from Constitutional Court decision" Hildebrandt en sus trece (June 9, 2017).

[110] **C-0200**, "Scotiabank will win S$481,000,000 from Constitutional Court decision" Hildebrandt en sus trece (June 9, 2017) p. 3 [emphasis added].

[111] CWS-[redacted], ¶ 50.

[112] **C-0198**, Record of visits to the judges of the Constitutional Court [redacted] **C-0081**, LinkedIn profile of [redacted].

[redacted]:[113]

[redacted]

ii. SUNAT Publicly Criticized the Outcome of the Leaked Decision and the Peruvian Government Never Investigated the Leak

84. As Dr. Landa and Professor Neyra explain, leaking a decision of the Court before it can be issued is an improper and unlawful act that seriously undermines due process and the independence of the Court.[114] Specifically, leaking a decision after it has been approved but before it has been issued breaches the legal and ethical duties of confidentiality applicable to Constitutional Court judges.[115] Violating confidentiality in this way is one of only a handful of bases that can result in the termination of a judge's position on the Court.[116] As one would expect, the purpose of this duty is to avoid inappropriate interference in the Constitutional Court's decision-making and functioning. Without confidentiality, judges would invariably be exposed to pressure from the political branches of government and society more broadly, which threatens the Court's independence and its ability to carry out its judicial functions objectively and dispassionately.[117]

85. There are two important points for the Tribunal to bear in mind when considering the Peruvian Government's conduct in relation to the 2017 Leaked Decision.

86. *First*, SUNAT had prior knowledge of the existence of the 2017 Leaked Decision. The newspaper article containing the 2017 Leaked Decision included an interview with SUNAT's

[113] **C-0268**, Record of visits to the judges of the Constitutional Court [redacted]

[114] CER-Landa/Neyra, ¶ 113.

[115] CER-Landa/Neyra, ¶¶ 96, 113; **C-0048**, Constitutional Court Rules, art. 19(5) "The duties of the Judges of the Constitutional Court are: [...] 5. Maintain absolute confidentiality with respect to the matters in which they are involved."

[116] CER-Landa/Neyra, ¶ 97; **C-0118**, Law No. 28301, Organic Law of the Constitutional Tribunal (July 1, 2004), art. 16(5).

[117] CER-Landa/Neyra, ¶ 99.

lawyer, Francisco Eguiguren, who was quoted as saying that the 2017 Leaked Decision would be a "fatal precedent."[118]

87. *Second*, as Dr. Landa and Professor Neyra explain, following the leak, the Constitutional Court was required to: (a) conduct an investigation to determine who was responsible for the leak; and (b) promptly publish the voted judgment. It did neither.

88. There is no evidence that an investigation into the leak was ever undertaken. This means that the person responsible for the leak may have continued to participate in Scotiabank Perú's case, and may have voted on the decision that was ultimately released in 2021.[119] If the judge responsible for the leak was [redacted] as Scotiabank Perú was later told and the contemporary evidence strongly suggests, [redacted], did in fact continue to participate in the case and formed part of the plurality of the Court that ultimately dismissed the case in 2021.

89. The Constitutional Court also failed to promptly issue the decision. Instead, the Court refrained from issuing the decision, which exposed the judges who had voted in favour of the 2017 Leaked Decision to pressure from various Peruvian politicians and officials who sought to have the decision reversed. This is contrary to the established procedures of the Court and inherently impacts its independence.[120]

90. As Dr. Landa and Professor Neyra describe, the leaking of judgments has only occurred in a handful of "politically sensitive" cases involving tensions between different branches of government.[121] On those rare occasions when a draft judgment had been leaked in the past, it had always led to attempts to exert political pressure on the justices of the Constitutional Court with the aim of pressuring them to change their vote.[122] For example, a draft judgment relating to

[118] **C-0200**, "Scotiabank will win S$481,000,000 from Constitutional Court decision" Hildebrandt en sus trece (June 9, 2017), p. 3.

[119] CER-Landa/Neyra, ¶ 114.

[120] CER-Landa/Neyra, ¶¶ 115-116.

[121] CER-Landa/Neyra, ¶ 101.

[122] CER-Landa/Neyra, ¶¶ 100, 105.

whether former president Alberto Fujimori could run as a presidential candidate for a third term was leaked to the media. In that case, the Inter-American Court of Human Rights ("**IACHR**") later confirmed that following the publication of the decision, "the judges of the Constitutional Court began to be pressured by politicians and the media."[123]

91. Dr. Landa and Professor Neyra confirm that in no other comparable case involving a Peruvian national challenging the imposition of default interest by SUNAT was there a leak of a judgment or vote, let alone a reversal of the Constitutional Court's decision after a leak.[124]

C. Government Officials Exert Pressure on the Constitutional Court to Rule Against Scotiabank Perú

92. The following section describes the extensive media and political pressure exerted on the Constitutional Court to rule against Scotiabank Perú following the 2017 Leaked Decision, which stands in stark contrast to the treatment received by Peruvian litigants who pursued default interest claims before the Constitutional Court.

i. Media and Political Pressure in Scotiabank Perú's Case

93. Following the leak of the decision in Scotiabank Perú's favour, Peruvian media began covering Scotiabank Perú's *amparo* claim extensively. The coverage was politically tense and largely unfavourable to Scotiabank and Scotiabank Perú. SUNAT and senior government officials spread legally irrelevant or incomplete information among media outlets to exert pressure on the Constitutional Court to rule against Scotiabank Perú, alleging that a ruling in Scotiabank Perú's favour would create fiscal problems for the Peruvian Government and an incentive for other companies to avoid paying taxes, among other matters.[125] [redacted]

[123] **C-0162**, Judgment of the Inter-American Court of Human Rights in Justices of the Constitutional Tribunal v. Perú (January 31, 2001), ¶ 42; See also, CER-Landa/Neyra, ¶ 101.

[124] CER-Landa/Neyra, ¶¶ 120-121.

[125] CWS-[redacted], ¶ 37; **C-0206**, "Sunat: Possible TC ruling in favor of bank would create a fiscal hole of S/10,000 million," RPP (June 9, 2017); **C-0224**, "This is the astonishing story of how Perú would lose S/ 10,000 million because of the Constitutional Court," Utero (June 20, 2017).

[redacted][126]

94. As the examples below reflect, the considerable attention that followed the 2017 Leaked Decision questioned the ruling, baselessly accused Scotiabank Perú of corruption, questioned the independence and impartiality of the judges who had voted in favour of the decision, and asserted that the Constitutional Court should not order Perú to repay such a large sum of money to a foreign-owned institution like Scotiabank Perú.

95. Dr. Landa and Professor Neyra explain that the public statements made, and the accompanying media pressure, demonstrated an intention on the part of the executive and legislative branches of the Peruvian Government to influence the judges of the Constitutional Court to change their decision.[127] In Dr. Landa's and Professor Neyra's experience, public statements from other branches of government can have an "undesirable influence" on the way judges decide cases.[128] This type of pressure is a risk to the independence of the Constitutional Court and to judicial impartiality. The pressure in Scotiabank Perú's case violated the principles of independence and equality before the law, as political pressure and media coverage had a direct impact on the decision of the Constitutional Court.[129]

96. ***Political pressure at the time of the leak.*** Immediately following the leak, the SUNAT prosecutor, José Escalante, gave several interviews criticizing the 2017 Leaked Decision and stating that the decision would impact other default interest cases totaling 10 billion PEN, representing 10% of SUNAT's annual collection.[130] He also noted that SUNAT "want[ed] to

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126 [redacted]

127 CER-Landa/Neyra, ¶ 138.

128 CER-Landa/Neyra, ¶ 141.

129 CER-Landa/Neyra, ¶ 142.

130 **C-0221**, Video of the Interview of Antenor José Escalante (June 16, 2017); **C-0222**, Transcript of the interview of Antenor José Escalante (June 16, 2017); **C-0204**, Audio of the interview of Antenor José Escalante, Exitosa (June 9, 2017); **C-0205**, Transcript of the interview of Antenor José Escalante, Exitosa (June 9, 2017); **C-0207** Interview with Jose Escalante (SUNAT), RPP News (June 9, 2017); **C-0208**, Transcript of Interview with Jose Escalanate, RPP News (June 9, 2017).

collect, but in this case the Constitutional Court would not let [it]".[131] In interviews with the state TV channel, *TV Perú*, Mr. Escalante asserted that a decision in favour of Scotiabank Perú would be "catastrophic" and only serve to "discourage companies from paying their taxes on time," favoring "large companies that have the economic capacity to litigate with the tax administration for long years, in lengthy and onerous legal proceedings."[132] The Minister of Economy and Finance, Alfredo Thorne, similarly asserted in a TV interview with Peruvian media company *RPP* that the Ministry was concerned and cryptically advised that SUNAT and the Ministry had been working arduously to address the matter.[133] SUNAT disseminated these statements widely by reposting these interviews on its social media pages.[134]

C-0220 and C-0232, SUNAT accounts on Twitter/X sharing interviews with SUNAT prosecutor, José Escalante and the Minister of Economy and Finance, Alfredo Thorne, regarding Scotiabank Perú's case

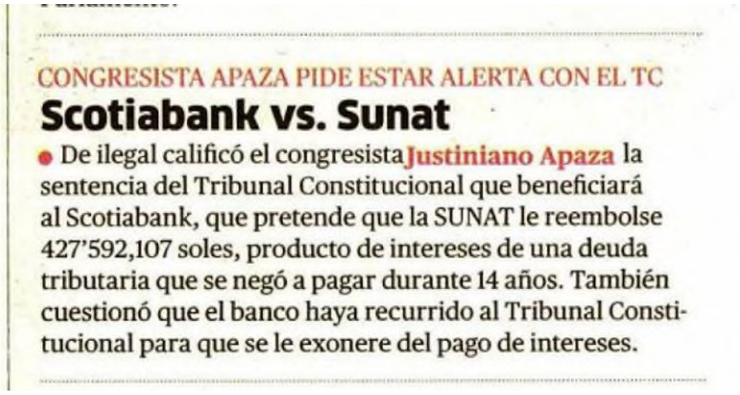
[131] **C-0204**, Audio of the interview of Antenor José Escalante, Exitosa (June 9, 2017); **C-0205**, Transcript of the interview of Antenor José Escalante, Exitosa (June 9, 2017). See also **C-0221**, Video of the Interview of Antenor José Escalante (June 16, 2017); **C-0222** Transcript of the interview of Antenor José Escalante (June 16, 2017).

[132] **C-0204**, Audio of the interview of Antenor José Escalante, Exitosa (June 9, 2017), 9 June 2017 (06:50-07:05); **C-0205**, Transcript of the interview of Antenor José Escalante, Exitosa (June 9, 2017). *See* also, **C-0210**, "Sunat says that a possible TC ruling could discourage the timely payment of taxes," El Comercio (June 10, 2017).

[133] **C-0226**, Video of the interview with Alfredo Thorne (Minister of Economy and Finance); **C-0227**, Transcript of the interview with Alfredo Thorne (Minister of Economy and Finance).

[134] **C-0220**, SUNAT Tweet (June 16, 2017); **C-0232**, SUNAT Tweet (June 23, 2017).

97. That same month, a member of Congress, Justiniano Apaza, publicly described the ruling in favour of Scotiabank Perú as "illegal" in the Peruvian newspaper, *La Republica*.[135]



CONGRESISTA APAZA PIDE ESTAR ALERTA CON EL TC

Scotiabank vs. Sunat

● De ilegal calificó el congresista **Justiniano Apaza** la sentencia del Tribunal Constitucional que beneficiará al Scotiabank, que pretende que la SUNAT le reembolse 427'592,107 soles, producto de intereses de una deuda tributaria que se negó a pagar durante 14 años. También cuestionó que el banco haya recurrido al Tribunal Constitucional para que se le exonere del pago de intereses.

98. In an August 2017 interview with the Peruvian television channel *Exitosa*, another member of Congress, Yeni Vilcatoma, publicly threatened the judges of the Constitutional Court, asserting that if they voted in favour of Scotiabank Perú in the Default Interest Amparo they would face complaints in Congress.[136]

99. In September 2017, Congressman Jorge Castro deplored that the 2017 Leaked Decision would generate a "massive fiscal and tax loophole" which would be "contrary to the interests of the State."[137] Later that month, Congressman Alberto Quintalla went further, publicly asserting that ruling in favour of Scotiabank Perú would constitute "betrayal to the State." His statements were published widely in the *Exitosa* newspaper.[138] In the same newspaper, Congressman Wilbert Rozas demanded that the Constitutional Court reconsider the 2017 Leaked Decision "so as not to harm the country."[139]

[135] **C-0219**, "Scotiabank v. Sunat," La República (June 16, 2017).

[136] **C-0266**, "Vilcatoma denounces corruption in the TC that affect the interests of the State," Exitosa (October 30, 2017). These threats were also repeated in November: **C-0267**, "Yeni Vilcatoma exerts political and media pressure to disrupt possible ruling of the Constitutional Court," La Primera (November 1, 2017).

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

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

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

100. It is clear that the Constitutional Court was aware of this political pressure. Indeed, the threats prompted Justice Espinosa-Saldaña to submit petitions to the IACHR in October 2017 expressing his concern about the Peruvian Government's interference in the Court's processes, and specifically to "express concerns about what is already being announced in cases such as the Scotiabank case."[140] In response, Peruvian politicians openly disparaged the Justice, accusing him of having committed "libel against the Peruvian State," of "lying shamelessly,"[141] and asserting that through the complaint, he had undermined the integrity of the Peruvian State.[142]

101. ***Political pressure continues for years following the leak.*** The media and political pressure in Scotiabank Perú's case continued for years after the 2017 Leaked Decision. A full year after the leak, in a nationally televised address to the nation in June 2018, the then President of Perú, Martin Vizcarra proclaimed:

> "We have identified big corporations that owe the State amounts that represent more than 1% of GDP, much necessary income for the development of projects and public policies that benefit all Peruvians. To that respect, an *ad hoc* commission will be formed by representatives of the Ministry of Economy and the SUNAT, among others, to develop payment mechanisms, with the objective to make the collection of tax debt effective." [143]

102. President Vizcarra's comments were an obvious reference to Scotiabank Perú and were understood contemporaneously as such. In reporting on the statement, the *El Comercio* newspaper confirmed that "the President referred to the legal battles that Sunat (sic) is waging – against firms such as Scotiabank" and other foreign-owned entities.[144]

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[140] **C-0262**, Video of the Hearing of the Inter-American Court of Human Rights in the case of the Independence of the Constitutional Court of Perú (October 24, 2017); **C-0263** Transcript of the Hearing of the Inter-American Court of Human Rights (October 24, 2017).

[141] **C-0265**, "Judge of the Constitutional Court denounces Perú before IACHR for Scotiabank and Perúbar," Exitosa (October 30, 2017).

[142] **C-0264**, "Jorge Castro: 'Constitutional Court exceeds its functions," Exitosa (October 30, 2017).

[143] **C-0283**, "Sunat: A commission will be created to resolve disputes with large companies," El Comercio (June 5, 2018). See also, **C-0279**, President's Televised Address to the Nation (June 4, 2018); **C-0280**, Transcript of the Message to the Nation by the President of the Republic, Martín Vizcarra, (June 4, 2018); **C-0281** Transcript of the Message to the Nation by the President of the Republic, Martín Vizcarra, (June 4, 2018).

[144] **C-0283**, "Sunat: A commission will be created to resolve disputes with large companies," El Comercio (June 5, 2018).

103. That same month, yet another Peruvian Congressman, Roberto Vieria, attacked Scotiabank Perú's legal representatives for acting on behalf of a "Canadian capital bank", [redacted]

[redacted]

104. [redacted][146]

105. These kinds of statements confirm what [redacted] that Scotiabank Perú is widely known in Perú as the local subsidiary of a major Canadian bank, and is viewed as such by Peruvians.[147] Consistent with that observation, Scotiabank Perú's status as a foreign-owned bank was a repeated emphasis in the media coverage following the leak.[148]

106. Scotiabank Perú's case stayed in the spotlight as the Constitutional Court found in favour of taxpayers in other default interest cases, such as the *Icatom* case. In November 2018, the Peruvian publication *Caretas* highlighted that Justice Luis Sardón had voted in favour of the claimant in *Icatom* and noted that he was the [redacted] The publication insinuated that Justice Sardón had voted that way in order to pre-empt a similar

[145] [redacted]

[146] CWS-[redacted], ¶ 25.

[147] CWS-[redacted], ¶ 7.

[148] [redacted] **C-0293**, "Lan Perú, Claro, Interbank, Pluspetrol and others owe Sunat more than 7 billion soles," Lima al día (January 3, 2019); **C-0305**, "TC Judgment would force Sunat to return more than S/ 400 million to Scotiabank," Wayka (February 25, 2020); **C-0330**, "Millionaire tax debts in dispute," Ojo Público (October 11, 2021); **C-0341**, "Scotiabank loses S/ 482 million against Sunat after TC decision," Huaral (November 9, 2021); **C-0344**, "Scotiabank: Constitutional Court rules against million-dollar refund," Perú 24 (November 10, 2021); **C-0343**, "Constitutional Court rules against the refund of millions of dollars," La República, (November 10, 2021).

verdict in Scotiabank Perú's case.[149] Justice Sardón responded that the allegations were "disgraceful."[150]

107. In February 2020, nearly three years after the 2017 Leaked Decision in Scotiabank Perú's favour, a former member of Congress, Marisa Glave, posted a video on her Facebook page in which she:

(a) questioned the legitimacy of the *amparo* claim, accused Scotiabank Perú of corruption and alleged that the delays leading to the Tax Court's decision in 2013 were caused by clandestine deals made during meetings between former general managers of Banco Wiese;

(b) challenged the impartiality and independence of the Constitutional Court judges who had voted to grant Scotiabank Perú's *amparo* and baselessly accused them of maintaining familiar and close relations with Scotiabank Perú officials and personal relations with Scotiabank's lawyers; and

(c) noted the impact repayment of a large amount of money in favor of Scotiabank Perú could have on the country's finances. [151]

108. Further, in August 2021, the Minister of the Economy and Finance, Pedro Francke, urged in the official gazette of Perú (*El Perúano*), "[g]entlemen from Scotiabank, all those mentioned (in the television program), and Telefónica, don't you think that this is the moment when you should make a gesture for Perú and pay your debts?" The Minister went on to state that the Government would "work hand in hand [*trabajar de la mano*] with the Judiciary" to achieve that outcome,[152] and would use "all legal weapons" to collect on those amounts.[153]

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[149] **C-0286**, "Conflict of interests," Caretas (November 8, 2018).

[150] **C-0287**, "Scotiabank and SUNAT," Caretas (November 9, 2018).

[151] **C-0303**, Facebook video of former congresswoman Marisa Glave (February 20, 2020); **C-0304**, Transcript of video posted on Facebook by former congresswoman Marisa Glave (February 20, 2020).

[152] **C-0321**, "Francke to large tax debtors: We will use all legal means to ensure compliance," El Perúano (August 9, 2021).

[153] **C-0323**, "MEF will use all legal weapons to help SUNAT collect debts," Gestión (August 10, 2021).

109. [redacted]. In a September 2019 interview with *Hildebrandt en sus trece* – the same newspaper that published the 2017 Leaked Decision – Justice Ledesma acknowledged that although the 2017 Leaked Decision had already been voted on, the judges who had voted in favour of the decision were reticent to publish it in the wake of the leak:

> "César Hildebrandt [interviewer]: The Constitutional Court has also become a supreme instance in civil litigation matters involving millions of soles and many large interests. I remember, for example, the ruling in relation to the "UPC" and the "Universidad Privada del Norte", which were favored in terms of income tax. **Isn't it a shame that the Constitutional Court is dedicated to these things?**
>
> Marianella Ledesma: **It is true.** No discussion about the political situation should prevent us from seeing that here in the Court there are economic interests to be defined. There is a lot at stake.
>
> César Hildebrandt [interviewer]: And there are those who are in the queue. For example, Telefonica, **Scotiabank**, Gremco, not to mention the agrarian bondholders who are in the hands of vulture funds. What do we do?
>
> Marianella Ledesma: **What happens is that this plenary has not wanted to make a new decision in these cases**, and it was said that the new Judges should come and resolve them. It has happened that, **thanks to the press, it was known what the trend was and the judges who were going to vote in favor of these interests preferred to abstain themselves.**"[154] [Emphasis added]

ii. The Absence of Political Pressure and Government Interference in Comparable Cases Involving Peruvian Litigants

110. The political pressure and government interference in Scotiabank Perú's case stands in stark contrast to the experience of political pressure and government interference Peruvian taxpayers in comparable default interest challenges.

[154] **C-0298,** "I was offered to stay if I voted for Keiko's freedom," Hildebrandt (September 27, 2019) [emphasis added]. *See* also Justice Ramos' comments in **C-0238**, Carlos Ramos, "The Constitutional Court: Two Decades of Lessons," El Perúano (July 11, 2017), where he condemned the Government's negative interference, which he believed was intended to "guide the result of a decision".

111. Of the sixty-two comparable default interest cases discussed in Dr. Landa's and Professor Neyra's report, forty involved Peruvian-owned companies or Peruvian citizens.[155] There are over a dozen different Peruvian companies are represented in this sample. Based on publicly available information from more than 150 Peruvian news and media sources consulted by Scotiabank, not only were none of these comparator cases the subject of a leak, they were also not the target of persistent public statements and political pressure from government officials prior to the release of a final decision like Scotiabank Perú.[156]

112. ***None of the comparable cases involving Peruvian taxpayers were the subject of a leaked decision.*** None of the forty cases involving Peruvian-owned companies or Peruvian citizens were leaked to the media prior to the issuance of a final decision.

113. ***Cases with no political pressure or Government interference***. Twenty-nine cases relating to sixteen different Peruvian companies did not receive any material media coverage and were not the subject of public commentary from government officials.[157]

114. ***Cases with limited media coverage but no political pressure***. There were only eleven comparable default interest cases involving five Peruvian companies that received material media attention: Sulfato de Cobre, Interbank, Industrial Paramonga, Primax and Supermercados Perúanos. The media coverage in these cases generally started after the release of a final decision. Even where there was some media coverage prior to the release of a final decision, such as in cases involving Sulfato de Cobre and Interbank, this coverage was limited to one-off articles reporting on the facts of the case or the steps SUNAT had taken in a particular proceeding.[158] None of these companies were on the receiving end of persistent government or public commentary, threats, or

[155] CER-Landa/Neyra, Annex I: Default Interest Cases; Annex II: Universe of Comparable Cases.

[156] This analysis is based on review of the sources set out in Appendix 2: Peruvian Media Sources.

[157] This sample includes companies such as Transporte Rodrigo Carranza S.A.C., Administradora del Comercio S.A., Gestiones y Recuperaciones de Activos S.A., among others.

[158] *See*, **C-0404**, "Sunat asks to remove Eloy Espinosa-Saldaña," Expreso (February 28, 2021); **C-0380**, "Constitutional Court: there are 10 proceedings of amparo against Sunat for voting," Contadores y Empresas (April 5, 2022).

declarations from Peruvian officials prior to the release of a final decision like Scotiabank Perú.[159] Moreover, in none of these cases did the Government threaten to withhold funding from the Constitutional Court nor was a final decision leaked to the press.

iii. Scotiabank Perú Seeks to Have SUNAT Stop its Media Campaign

115. Scotiabank Perú decided not to issue a press release or make public statements in the wake of the 2017 Leaked Decision and the resulting media frenzy. Instead, the bank retained a consulting firm specializing in media and government relations, Llorente & Cuenca, and sought to connect with government officials and media contacts off the record to counter SUNAT's campaign – informing stakeholders about why the default interest charged to the bank was illegitimate and how the leaked Constitutional Court ruling was consistent with the Constitutional Court's decisions in other cases.[160] The bank hoped that his would change public discourse on the issue.

116. To this end, [redacted] met with the Peruvian Prime Minister and Minister of Finance, Fernando Zavala, along with his Chief of Staff Enrique Felices.[161] In that meeting, the bank's representatives voiced their concerns and asked that SUNAT cease its public campaign against Scotiabank Perú's case and allow the judges

[159] *Sulfato de Cobre*, *Interbank*, *Industrial Paramonga*, *Primax* and *Supermercados Perúanos* are the five cases in which there was limited media attention: **C-0357,** Judgment 991/2021 of the Plenary Session of the Constitutional Court in Case No. 00418-2020-PA/TC (Sulfato de Cobre); **C-0365**, Judgment 994/2021 of the Plenary Session of the Constitutional Court in Case No. 04932-2019-PA/TC (Sulfate de Cobre); **C-0364**, Judgment 980/2021 of the Plenary Session of the Constitutional Court in Case No. 04399-2019-PA/TC (Sulfato de Cobre); **C-0363**, Order of the Constitutional Court in Case No. 04336-2019-PA/TC (Sulfato de Cobre); **C-0370**, Judgment 44/2022 of the Plenary Session of the Constitutional Court in Case No. 03468-2019-PA/TC (Interbank); **C-0310,** Judgment of the Plenary Session of the Constitutional Court in Case No. 02051-2016-PA/TC (Paramonga); **C-0374,** Judgment 12/2022 of the Plenary Session of the Constitutional Court in Case No. 1339-2019-PA/TC (Primax); **C-0362**, Order of the Constitutional Court in Case No. 02547-2019-PA/TC (SPSA); **C-0372**, Judgment 61/2022 of the Plenary Session of the Constitutional Court in Case No. 04084-2019-PA/TC (SPSA); **C-0337,** Order of the Constitutional Court in Case No. 03036-2017-PA/TC (SPSA).

[160] CWS-[redacted], ¶ 39.

[161] CWS-[redacted], ¶ 41.

to decide the case independently. Mr. Zavala said he understood and supported Scotiabank Perú's position.[162]

117. Shortly thereafter, [redacted] met with the then Vice-Minister of the Economy, Claudia Cooper, to make the same request. The Vice-Minister told [redacted] that SUNAT was acting on its own and that she could not prevent them from making statements in the press. As [redacted] explains, the Vice-Minister made it clear that she was "following the case closely due to the public notoriety it had acquired," but did not want to get involved in the issue.[163]

D. 2017-2018: Constitutional Court Judges Confirm the Peruvian Government was Exerting Pressure on the Court to Rule Against Scotiabank Perú

118. In Perú, it is ordinary practice for the parties to a proceeding to hold meetings with judges hearing their case in order to provide additional information on legal or procedural issues.[164] In Dr. Landa's experience, these meetings are "part of the daily practice" and it is normal for judges to meet with legal advisors of both parties during a case.[165] The occurrence of these meetings is generally recorded in the access registry at the Constitutional Court, which is available to the public.[166]

119. Consistent with this practice, legal advisors of Scotiabank Perú met with judges of the Constitutional Court on several occasions before and after the 2017 Leaked Decision. [redacted][167] As their evidence shows, whereas an initial meeting prior to the 2017 Leaked Decision suggested that the Constitutional Court process for deciding the case was proceeding in the ordinary course, subsequent meetings

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[162] CWS-[redacted], ¶ 41; **C-0231**, Email from [redacted].

[163] CWS-[redacted], ¶ 42.

[164] CWS-[redacted], ¶ 9; CWS-[redacted], ¶ 28; CER-Landa/Neyra, ¶ 61.

[165] CER-Landa/Neyra, ¶ 61.

[166] CWS-[redacted], ¶ 9; See e.g., **C-0198,** Record of visits to the judges of the Constitutional Court ([redacted]

[167] CWS-[redacted], ¶¶ 11-41; CWS-[redacted], ¶¶ 29-31, 43-55.

with judges leading up to and after the leak confirmed that the Court was being pressured by other elements of the Government to rule against the bank.

i. Meeting with Judges Prior to the 2017 Leaked Decision

120. Prior to June 2017, Scotiabank Perú's counsel met with various judges from the Constitutional Court to discuss the anticipated timing of the Court's decision. Following their initial meeting in [redacted], Scotiabank Perú had no concerns about improper influence on the case and expected the decision to be issued in short order.[168] However, rather than allow the Constitutional Court to decide the case and issue a decision in the ordinary course, the Peruvian Government began exerting pressure on the Court, including making improper threats to withhold funding from the Court if it did not rule in favour of SUNAT.

121. ***Meeting with*** [redacted] ***in*** [redacted], attended a meeting with [redacted][169] As [redacted] witness statement, they had a brief discussion about the case with [redacted] and left the meeting, which lasted about 30 minutes, with the understanding that a draft judgment would be circulated among the Plenary shortly to be voted upon, and that a final decision would be issued in the following weeks.[170]

122. ***Meeting with*** [redacted]. When a judgment had yet to be issued by [redacted] requested a meeting with [redacted] to discuss the status of the case.[171] [redacted] informed [redacted] that a legal representative of SUNAT had also recently met with him. [redacted] explained to [redacted] that **officials from the Ministry of the Economy and Finance had told the judges of the Constitutional Court that if the Court found**

[168] CWS-[redacted], ¶ 29.

[169] CWS-[redacted], ¶ 13.

[170] CWS-[redacted], ¶¶ 13-14.

[171] CWS-[redacted], ¶ 15; CWS-[redacted], ¶ 29; **C-0196**, Record of visits to the judges of the Constitutional Tribunal [redacted].

in favour of Scotiabank Perú, the Ministry would not authorise the disbursement of money that the Court required to remodel new facilities.[172]

123. [redacted][174]

124. ***Meeting with*** [redacted] ***on*** [redacted]. [redacted] subsequently met with [redacted].[175] As [redacted] explains, the purpose of the meeting was to "obtain more clarity on the procedural status of the case" and ensure that the Ministry of Economy's threats had not "resonated" with the Court.[176] After this meeting, [redacted] called both [redacted]. [redacted] explained that, according to [redacted], Scotiabank Perú's case was continuing to work its way through the Court's normal procedure, was not legally complex, and that a judgment was expected soon.[177] According to [redacted], this update "allayed" any concerns and led Scotiabank Perú to await a judgment without requesting further meetings with the justices.[178]

ii. Meetings with Judges After the 2017 Leaked Decision

125. In the aftermath of the 2017 Leaked Decision, the tone of Scotiabank Perú's meetings with the judges changed. SUNAT began to pressure the Constitutional Court within days of the June 9,

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[172] CWS-[redacted], ¶ 16. See also: **C-0192**, Press Release from the Constitutional Court (January 6, 2017), discussing the mayor's support for the Court's remodelling; **C-0233**, Press Release from the Constitutional Court (June 23, 2017), discussing the Court's ongoing remodel.

[173] CWS-[redacted], ¶ 17.

[174] CWS-[redacted], ¶ 30.

[175] **C-0197**, Record of visits to the judges of the Constitutional Tribunal [redacted].

[176] CWS-[redacted], ¶ 18; CWS-[redacted], ¶ 31.

[177] CWS-[redacted], ¶ 19; CWS-[redacted], ¶ 31.

[178] CWS-[redacted], ¶ 19.

2017 leak. [redacted].[179] [redacted],[180] over time, it became apparent that the request was part of a broader strategy by SUNAT to pressure the Court on several fronts, including through the public statements in the media described above.

126. As described in further detail below, this pressure manifested itself not only in further requests for recusal, but also in a general sense at the Court that it could not issue a decision in favour of the bank given the politically-charged climate created by the leak. [redacted] explains that the judges became "visibly uncomfortable" in the aftermath of the leak.[181] As [redacted] testifies, [redacted] confirmed in a subsequent meeting with representatives of the bank that SUNAT's media campaign had created an "unfavourable political environment," and the Court was therefore waiting for the "right moment" to issue its decision.[182]

127. ***Meeting with*** [redacted] ***on*** [redacted]**.** The first indication of a change in tone at the Court came in a meeting on [redacted] when [redacted] informed Scotiabank Perú's representatives that the process for obtaining a final judgement would be delayed because SUNAT had received a request for documentation related to the administrative files that gave rise to the underlying tax debt and the default interest as a result of the leak. [redacted] also told [redacted] that he and the other judges were "visibly uncomfortable" about the leak.[183]

128. SUNAT then filed two new requests for recusal, this time against [redacted]

[179] CWS-[redacted], ¶ 23; [redacted]

[180] CWS-[redacted], ¶ 23; [redacted]

[181] CWS-[redacted], ¶ 28.

[182] CWS-[redacted], ¶ 50.

[183] CWS-[redacted], ¶ 28.

[redacted].[184] This, despite the fact that SUNAT's legal representatives had themselves met with several of the judges of the Constitutional Court, including [redacted] and that such meetings are normal and entirely legal.[185]

129. As [redacted] explains, although these challenges were meritless, Scotiabank Perú nonetheless decided not to hold further meetings with judges in the following months in hopes that the political and media frenzy around the 2017 Leaked Decision would pass and the Court would issue its decision.[186]

130. ***Meetings with*** [redacted] ***on*** [redacted] ***and with*** [redacted] ***on*** [redacted]. When the Court still had not issued its decision several months after the leak, Scotiabank Perú's legal counsel resumed meeting with the Constitutional Court judges in order to understand the procedural status of the case.[187]

131. On [redacted] met with [redacted] to determine when the Court planned to issue its judgement.[188] [redacted] advised that, as a result of the events that had occurred since the 2017 Leaked Decision, the judges were still unwilling to issue a judgment "for fear of public opinion."[189]

132. [redacted] on [redacted] met with [redacted] to ask the same question. As [redacted] explains, they were advised that there were no further developments, that the Court was in the process of obtaining additional information from other agencies, and that the case was not presently on the Court's agenda for issuing a judgement.[190]

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[184] CWS-[redacted], ¶ 29; [redacted]

[185] CWS-[redacted], ¶ 29; [redacted]

[186] CWS-[redacted], ¶ 31.

[187] CWS-[redacted], ¶ 32.

[188] CWS-[redacted], ¶ 33.

[189] CWS-[redacted], ¶ 33.

[190] CWS-[redacted], ¶ 34.

133. ***Meeting with*** [redacted] ***on*** [redacted]. [redacted] subsequently met with [redacted] in [redacted].[191] They expressed Scotiabank Perú's concerns about the unusual treatment that the case had received, which [redacted] acknowledged were justified. [redacted] reported on this meeting [redacted] just days later by e-mail, which has been provided with [redacted] witness statement.

134. As described in [redacted] witness statement and confirmed in [redacted] contemporaneous e-mail, [redacted]:[192]

(a) Urged [redacted] to remain calm as the case had "little legal complexity" and the Court had previously already resolved similar cases on default interest in favour of the claimant.

(b) Told [redacted] that they should have "a little…patience" because the case presented other types of "complexities" such as the media campaign instigated by SUNAT representatives in the wake of the 2017 Leaked Decision.

(c) Stated that media coverage and the pressure that SUNAT had been exerting through written and social media had created an "uncomfortable political environment" for issuing the Court's decision.

(d) Advised that he had requested that the legal representatives of SUNAT not make any more public statements on the case but that his efforts had been without success.

(e) Expressed his understanding that [redacted] was likely responsible for the 2017 Leaked Decision.

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[191] CWS-[redacted], ¶ 50. **C-0288,** Email from [redacted] See also, CWS-[redacted] ¶ 35.

[192] **C-0288,** Email from [redacted].

(f) Told Scotiabank Perú's representatives that the Constitutional Court was waiting for the "appropriate" time to issue the decision.

135. ***Meetings with [redacted] on [redacted] and [redacted] on [redacted].*** While Scotiabank Perú had heeded [redacted]'s calls to remain patient, by the end of 2019, over two years had passed since the hearing of the Default Interest Amparo and the 2017 Leaked Decision in the bank's favour.

136. On [redacted] met with [redacted] to obtain an update on the status of the case. As [redacted], [redacted]'s message was similar to his message during the meeting in [redacted].[193] [redacted] explained that it was not yet "prudent or politically appropriate" to issue a judgement in Scotiabank Perú's case, as the Court was aware that a decision would "generate a deep backlash from the Government and public opinion."[194]

137. [redacted].[195] Justice Ramos conveyed his frustration regarding Scotiabank Perú's case. He indicated that, despite his efforts to have the Court deliberate on the case and issue its judgement, other judges were "adamantly opposed to discussing the case," considered the matter to be "a very sensitive issue," and that it was "not convenient" to address the case and "confront" the Government at that time.[196]

138. Following the meeting, [redacted] to provide him with an update. Both were "disappointed that the proceeding could not move forward after such a long time."[197] A few days after this meeting, the Constitutional Court suspended in-person meetings with the judges

[193] CWS-[redacted], ¶ 37.
[194] CWS-[redacted], ¶ 52.
[195] CWS-[redacted], ¶ 38; CWS-[redacted], ¶ 53.
[196] CWS-[redacted], ¶ 38.
[197] CWS-[redacted], ¶ 39.

due to COVID-19. Neither [redacted] had further meetings with the judges regarding Scotiabank Perú's case.[198]

139. ***SUNAT's meetings with the Justices.*** As noted above, SUNAT representatives also met with the justices of the Court in the months leading up to and after the hearing and the 2017 Leaked Decision. [redacted].[199]

E. The Constitutional Court Refrains from Issuing a Decision in Scotiabank Perú's Case, Despite Issuing Decisions in Similar Cases

140. The Constitutional Court heard Scotiabank Perú's appeal in March 2017. Following the hearing, the Court made several requests for information between March 2017 and May 2018, which were promptly fulfilled by the parties.[200] After May 2018, there were no further requests for information. Despite this, the Court did not issue a decision for another three and a half years.

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

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[198] CWS-[redacted], ¶ 40.

[199] See e.g., visits from [redacted]: **C-0193**, Record of visits to the judges of the Constitutional Court ([redacted]; **C-0300**, Record of visits to the judges of the Constitutional Court ([redacted] **C-0301**, Record of visits to the judges of the Constitutional Court [redacted]; **C-0302**, Record of visits to the judges of the Constitutional Court ([redacted] and visits from [redacted]: **C-0294**, Record of visits to the judges of the Constitutional Court ([redacted]); **C-0296**, Record of visits to the judges of the Constitutional Court ([redacted]). See also, **C-0244**, [redacted]); CWS-[redacted], ¶¶ 16, 29.

[200] **C-0237**, Decree of the Constitutional Court in Case No. 222-2017-PA/TC (July 5, 2017), **C-0241**, Brief by the SUNAT to the Constitutional Court in Case No. 222-2017-PA/TC with annexes (July 18, 2017), **C-0269**, Decrees of the Constitutional Court in Case No. 222-2017-PA/TC (March 5, 2018), **C-0272**, Letter from Scotiabank Perú, S.A.A. to the Constitutional Court re Case No. 222-2017 with annexes (March 14, 2018) (the annexes to this letter are voluminous and have been omitted for the purpose of this exhibit), **C-0276**, Brief by the SUNAT to the Constitutional Court in Case No. 222-2017-PA/TC (April 2, 2018) (the annexes to this letter are voluminous and have been omitted for the purpose of this exhibit), **C-0278**, Decrees of the Constitutional Court in Case No. 222-2017-PA/TC (May 15, 2018).

Paramonga SAC v. SUNAT ("***Paramonga***"),[201] *Icatom v. SUNAT* ("***Icatom***"),[202] *Jorge Francisco Baca Campodónico v. SUNAT* ("***Baca Campodónico***"),[203] and *Telefónica del Perú S.A.A v. SUNAT* ("***Telefónica***") decisions.[204]

142. For example, in *Paramonga*, a challenge by a Peruvian company in the sugar cane industry, the Constitutional Court held that the application of accrued default interest during the period of delay caused by the State was as harmful to companies as it was to individuals.[205] SUNAT's application of default interest during periods of its own delay was unconstitutional.

143. Between July 2018 and August 2021, Scotiabank Perú submitted over forty unsuccessful requests to the Constitutional Court seeking to have it issue its decision. In making these requests, Scotiabank Perú noted that other cases raising similar legal issues had been resolved in significantly less time than Scotiabank Perú's case.[206] The Court never provided a substantive response.

144. As the years passed, the composition of the Constitutional Court began to change. Justice Augusto Ferrero replaced Justice Óscar Urviola. Justice Ledesma – one of the two judges who apparently sided against Scotiabank Perú in the 2017 Leaked Decision – became President of the Court in 2020. As President, Justice Ledesma had the power to convene, preside over and set the agenda for plenary sessions and public hearings, and to decide cases in the event of a tie.[207]

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[201] **C-0310**, Judgment of the Plenary Session of the Constitutional Court in Case No. 02051-2016-PA/TC (Paramonga).

[202] **C-0067**, Judgment of the Plenary Session of the Constitutional Court in Case No. 04532-2013-PA/TC (Icatom).

[203] **C-0313**, Judgment of the Plenary Session of the Constitutional Court in Case No. 01818-2013-PA/TC (Baca Campodónico).

[204] **C-0312**, Judgment of the Plenary Session of the Constitutional Court in Case No. 00225-2017-PA/TC (Teléfonica)l; CER-Landa/Neyra, ¶¶ 27, 152-155.

[205] *See* **C-0310**, Judgment of the Plenary Session of the Constitutional Court in Case No. 02051-2016-PA/TC (Paramonga), ¶¶ 26-28; CER-Landa/Neyra, ¶¶ 152, 155.

[206] CWS-[redacted], ¶ 55; **C-0284**, Brief of Requests to the Constitutional Court (July 2018 to August 2021).

[207] **C-0048**, Administrative Resolution No. 095-2004-P-TC, Rules of Procedure of the Constitutional Court (September 14, 2004), art. 24.10; CER-Landa/Neyra, ¶¶ 63-68.

F. September 2021: Scotiabank Submits a Notice of Intent to Commence Arbitration under the FTA

145. On March 17, 2021, an article published in the newspaper *Diario la Republica* claimed that Scotiabank Perú's case would soon be resolved by the Constitutional Court and that Justice Ramos had delivered a draft judgment to the President of the Constitutional Court to schedule it for debate in the coming weeks and, for the sake of transparency and clarity, proposed that the debate be held in a public session of the Plenary.[208]

146. Yet, as of September 2021, a decision still had not been issued. By then, the mandate of six of the seven judges who had heard Scotiabank Perú's appeal in March 2017 had lapsed.[209] [redacted].[210]

147. Scotiabank was thus faced by September 2021 with the reality that the case would not be decided by the judges who had actually heard arguments in 2017. If the case proceeded before newly appointed judges to the Constitutional Court, those judges may have required a new hearing and started the process all over again.

148. On September 1, 2021, Scotiabank delivered written notice to Perú advising of its intention to submit a claim to arbitration pursuant to the FTA.[211]

149. In accordance with the process provided for under the FTA, representatives from Scotiabank, Scotiabank Perú, and their lawyers participated in a without prejudice meeting with representatives of Perú on November 4, 2021 to discuss the Notice of Intent and Scotiabank's FTA claim. No agreement was reached.[212]

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[208] **C-0314**, "TC could hear Scotiabank's injunction against SUNAT within two weeks," La República (March 17, 2021).

[209] Although those Judges could and still did remain on the Court in 2021.

[210] CER-Landa/Neyra, ¶ 59.

[211] **C-0021**, Notice of Intent (NOI), September 1, 2021.

[212] CWS-[redacted], ¶ 57.

V. 2021-2022: Constitutional Court Purports to Change its Quorum Requirement and Dismisses Scotiabank's Case

A. The Constitutional Court Purports to Change its Quorum Requirement

150. As explained at paragraphs 43 to 44 above, Peruvian law requires a quorum of five judges to decide a case and four judges to vote in favour to issue a valid judgment in an *amparo* proceeding before the Constitutional Court.[213] Compliance with the quorum requirements is "guaranteed by the right to a process predetermined by law."[214] As Dr. Landa and Professor Neyra explain, the Constitution protects this right, and ignoring legal requirements such as quorum is considered a breach of due process.[215]

151. On November 3, 2021 – just weeks after Scotiabank delivered its Notice of Intent and one day before Scotiabank and Perú's without prejudice meeting to discuss the claim – the Constitutional Court adopted a Plenary Agreement (Administrative Resolution 205-2021-P/TC) in which it purported to unilaterally lower the number of judges required to vote in favour of a decision for a judgment to be valid from four judges to three judges (*i.e.*, without a majority of the seven-judge court).[216] The other quorum requirement – that at least five judges must rule for a decision to be valid – remained.

152. As Dr. Landa and Professor Neyra explain, the Court cannot unilaterally alter its quorum requirements. A regulation such as an administrative resolution cannot contravene a law. The Constitution prevails over any legal rule, which in turn prevails over rules lower in the hierarchy, such as regulations. Therefore, an administrative resolution could not modify the requirement in Article 118 of the *New Constitutional Procedural Code* for four judges to vote in favour of a decision for it to be valid.[217] In Dr. Landa's and Professor Neyra's opinion, the requirement to

[213] CER-Landa/Neyra, ¶¶ 183, 205.

[214] CER-Landa/Neyra, ¶ 191.

[215] CER-Landa/Neyra, ¶ 191; **C-0094,** Political Constitution of Perú (December 29, 1993), art. 139, numeral 3.

[216] CER-Landa/Neyra, ¶ 206; **C-0333**, Administrative Resolution No. 205-2021-P/TC of the Plenary Session of the Constitutional Court (November 3, 2021), art. 1.

[217] CER-Landa/Neyra, ¶¶ 207-208.

obtain four votes in favour of an outcome was fully enforceable at the time of the issuance of the judgment in Scotiabank Perú's case just weeks later in November 2021.[218]

B. A Minority of the Court Dismisses the Default Interest Amparo

153. On November 9, 2021, in a complete reversal of the 2017 Leaked Decision, the Constitutional Court announced on its website that it had dismissed Scotiabank Perú's Default Interest Amparo by a vote of three to one, with two judges abstaining.[219] The decision was thus made without the quorum of five judges required to issue a decision and without four votes in favour.[220]

154. Contrary to its normal practice, the Court made this announcement without providing prior notice to Scotiabank Perú as one of the parties to the *amparo*.[221]

155. The Court issued its reasons for dismissing the Default Interest Amparo on November 20, 2021. The three judges who dismissed the case held that:[222]

(a) Despite paying under protest, there was no need for urgent intervention by the Court that would justify an *amparo* because Scotiabank Perú had paid the default interest in 2013.[223]

(b) Because Scotiabank Perú had challenged the principal tax debt in a contentious administrative proceeding, which could eliminate the debt and the accrued default interest, it had filed for injunctive relief prematurely.[224]

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[218] CER-Landa/Neyra, ¶ 207.

[219] CWS-[redacted], ¶ 58; **C-0340**, Judgment of the Plenary Session of the Constitutional Court in Scotiabank Perú S.A.A. v. SUNAT and the Tax Court (Case No. 222-2017-PA/TC).

[220] CER-Landa/Neyra, ¶¶ 195-196, 204, 209.

[221] CWS-[redacted], ¶ 58; **C-0342**, Press release of the Constitutional Court, "TC declared Scotiabank's lawsuit against SUNAT and the Tax Court inadmissible" (November 9, 2021).

[222] CER-Landa/Neyra, ¶ 150-151; **C-0340**, Judgment of the Plenary Session of the Constitutional Court in Scotiabank Perú S.A.A. v. SUNAT and the Tax Court (Case No. 222-2017-PA/TC).

[223] **C-0340**, Judgment of the Plenary Session of the Constitutional Court in Scotiabank Perú S.A.A. v. SUNAT and the Tax Court (Case No. 222-2017-PA/TC), ¶¶ 18-20.

[224] CER-Landa/Neyra, ¶ 150(b).

(c) There was no violation of the right to be tried within a reasonable period of time because Scotiabank Perú had not filed a *recurso de queja* with the Tax Court while the delay was ongoing.[225] This would have involved asking the Ministry to compel the Tax Court to conclude its proceeding on the basis that the time permitted under Peruvian law to decide the case had expired.[226] According to the three-judge majority, this was tantamount to consenting to the delay.[227]

(d) The claim could have been addressed through a contentious administrative proceeding rather than as a constitutional *amparo*.[228] However, given that the Court dismissed the *amparo* on more than one basis, Scotiabank Perú was prohibited from filing that application following the dismissal of the *amparo*.[229] This effectively closed the door on Scotiabank pursuing the claim in the Contentious Administrative Court, which was contrary to the Court's precedent in *Elgo Ríos*, described at paragraphs 68 to 70 above.[230] As Dr. Landa and Professor Neyra note, the Court did not have the power to prohibit Scotiabank Perú from pursuing its action in the Contentious Administrative Court. Only the Contentious Administrative Court could have done so.[231]

156. Justice Blume dissented, holding that the Constitutional Court's decision was invalid because it did not comply with the Court's quorum requirements.[232] Contrary to the majority, Justice Blume disagreed that the session quorum applies only to the creation of the Plenary Session.

[225] CER-Landa/Neyra, ¶ 150(c).

[226] CER-Hernández, ¶ 79.

[227] CER-Landa/Neyra, ¶ 150(c).

[228] CER-Landa/Neyra, ¶ 150(a).

[229] CER-Landa/Neyra, ¶ 151.

[230] CER-Landa/Neyra, ¶ 151.

[231] CER-Landa/Neyra, ¶ 177.

[232] **C-0340**, Judgment of the Plenary Session of the Constitutional Court in Scotiabank Perú S.A.A. v. SUNAT and the Tax Court (Case No. 222-2017-PA/TC), p. 22.

He held that the session could not continue once there was a lack of quorum, and that voting could therefore not proceed either.[233]

157. On the same day that the Court was deciding Scotiabank Perú's case, in another case, the Constitutional Court adhered to the five-judge quorum requirement where the votes of four judges had initially resulted in a tie.[234] In that case, [redacted] requested that a fifth judge participate in the voting session, so that a decision in-keeping with the Court's quorum requirement could be reached.

158. The three-judge majority in Scotiabank Perú's case also released a follow-up "clarification" decision dated November 30, 2021, and published on December 4, 2021.[235] As Dr. Landa and Professor Neyra opine, the issuance of this kind of "clarification" suggests that the Court itself recognized the irregularity of purporting to issue a decision with only four judges.[236]

159. The "clarification" asserted that the Court was entitled to ignore its own quorum requirements to "administer justice" in accordance with Article 5 of the Organic Law of the Constitutional Court. According to the "clarification", the Constitutional Court was required to vote with only four judges in order to issue a decision, as it was not possible to reach the required quorum due to the abstentions of Justices Sardón and Ferrero.[237] However, as noted in Dr. Neyra and Professor Landa's report, the Constitutional Court could have annulled the abstentions.[238] The "clarification" makes no mention of this.[239]

[233] **C-0340**, Judgment of the Plenary Session of the Constitutional Court in Scotiabank Perú S.A.A. v. SUNAT and the Tax Court (Case No. 222-2017-PA/TC), p. 22.

[234] CER-Landa/Neyra, ¶ 196; **C-0338**, Constitutional Court Plenary Session (November 9, 2021), 00:54:58.

[235] **C-0356**, Order of the Constitutional Court in Case No. 0222-2017-PA/TC (November 30, 2021).

[236] CER-Landa/Neyra, ¶ 197.

[237] CER-Landa/Neyra, ¶ 199.

[238] CER-Landa/Neyra, ¶ 196, fn. 264.

[239] CER-Landa/Neyra, ¶ 200.

C. February 2022: Scotiabank Proceeds with this Arbitration

160. Following the issuance of the Constitutional Court's decision, Scotiabank delivered an amended Notice of Intent to submit a claim to arbitration on February 1, 2022.[240] The parties held a further without prejudice meeting on July 15, 2022.[241]

161. Scotiabank delivered its Request for Arbitration ("**RFA**") on October 31, 2022.[242]

VI. 2022-2024: The Constitutional Court Confirms the Unconstitutionality of Default Interest Charged During the State's Delay and Scotiabank Perú's Tax Appeal is Dismissed

A. The Constitutional Court Renders a Binding Precedent Confirming the Unconstitutionality of Accruing Default Interest During Periods of Delay Caused by the State

162. As described above at paragraphs 140 to 142, until 2021, the Constitutional Court released multiple decisions confirming the proposition laid down in *Medina de Baca* that accruing default interest during a period of delay by the state was unconstitutional. While the Court dismissed a number of other default interest cases on procedural grounds beginning in 2021, it never overturned the substantive holding from *Medina de Baca* and, as a result, continued releasing judgments in favour of taxpayers in a number of cases.[243]

163. For example, in *Banco Internacional del Perú S.A.A.-Interbank v. SUNAT* ("***Interbank***"), a case involving a Peruvian-owned bank, the Constitutional Court confirmed that the application of accrued default interest beyond the maximum legal time allowed for making a decision was unconstitutional.[244] The decision was issued in April 2022.

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[240] **C-0022**, Amended NOI, February 1, 2022.

[241] CWS-[redacted], ¶ 60

[242] Request for Arbitration.

[243] CER-Landa/Neyra, ¶ 76. *See*, *e.g., Interbank*, decided in 2022: **C-0370**, Judgment 44/2022 of the Plenary Session of the Constitutional Court in Case No. 03468-2019-PA/TC (January 27, 2022); *Teléfonica*, decided in 2021: **C-0312**, Judgment of the Plenary Session of the Constitutional Court in Case No. 00225-2017-PA/TC (Teléfonica); *Baca Campodónico*, decided in 2021: **C-0313**, Judgment of the Plenary Session of the Constitutional Court in Case No. 01818-2013-PA/TC (Baca Campodónico).

[244] **C-0370**, Judgment 44/2022 of the Plenary Session of the Constitutional Court in Case No. 03468-2019-PA/TC (Interbank).

164. In February 2023, the Constitutional Court issued its decision in the *Maxco SAC v. SUNAT* case ("***Maxco***"). As the Court explicitly stated, this decision established a binding precedent that the accrual of default interest during periods of delay caused by the State is unconstitutional.[245]

165. The Court laid down the rule governing when SUNAT and the Tax Court can apply default interest:

> "As of the day following the publication of this sentence, even in proceedings in process, the Tax Administration is prohibited from applying late payment interest after the legal term to resolve the administrative appeal has expired, regardless of the date on which the tax debt was determined and regardless of the date on which said appeal was filed, unless it can objectively prove that the reason for the delay is a consequence of the proven bad faith or reckless conduct of the taxpayer."[246]

166. As Dr. Landa and Professor Neyra explain, to the extent it was ever in doubt, *Maxco* conclusively settles any debate about the substantive issue posed by the Default Interest Amparo: it is unconstitutional under Peruvian law to apply default interest during a period that exceeds the legal time limit for the SUNAT and the Tax Court to decide challenges.[247]

B. The Constitutional Court Dismisses Scotiabank Perú's Tax Appeal on the Same Day that the Tribunal Releases its Rule 41 Decision

167. As described in this Memorial, the issue at the heart of this FTA claim is the improper involvement of the executive and other branches of the Peruvian Government in judicial proceedings that are supposed to be determined without regard to non-legal considerations, particularly when similarly situated Peruvians experienced no such treatment. Unfortunately, the Constitutional Court's November 2021 Decision dismissing the Default Interest Amparo is not the last example of that kind of treatment.

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[245] CER-Landa/Neyra, ¶¶ 77, 83; CER-Hernández, ¶¶ 72-73; **C-0382**, Judgment of the Plenary Session of the Constitutional Court in Case No. 03525-2021-PA/TC (Maxco), p. 1. The judgment was issued February 11, 2023.

[246] **C-0382**, Judgment of the Plenary Session of the Constitutional Court in Case No. 03525-2021-PA/TC (Maxco), ¶ 69.

[247] CER-Landa/Neyra, ¶¶ 77, 83.

168. As described above, Scotiabank Perú's Tax Appeal proceeded separately from the Default Interest Amparo. That proceeding was ongoing at the time of the Rule 41 application in this arbitration.

169. In the Rule 41 application, Perú argued that the arbitration should be dismissed, among other reasons, because Scotiabank's and Scotiabank Perú's waivers are invalid as they do not include the Tax Appeal in their scope. Central to this argument was Perú's position that there was a risk of double recovery if the arbitration proceeded and the Tax Appeal succeeded.[248] The Tribunal asked several questions about this issue at the Rule 41 hearing.

170. The Tribunal's ruling on the Rule 41 application was initially to be delivered in April 2024 under the ICSID rules. On April 23, 2024, the Tribunal advised the parties that it required additional time and would render its decision on or by May 31, 2024. [249]

171. The very same day, on the afternoon of May 31, 2024, the Constitutional Court released its decision, dismissing Scotiabank Perú's Tax Appeal.[250] Notably, the Court made the decision on April 16, 2024.

172. Put otherwise, despite making the decision six weeks earlier to dismiss the Tax Appeal, thereby ensuring that the potential for double recovery that Perú relied on in the Rule 41 hearing could never come to pass, the Court refrained from releasing its decision for more than a month and only released it on the same date that the Tribunal had advised Perú it would be issuing its Rule 41 decision.

[248] Perú's Rule 41 Submission, ¶¶ 159, 165.

[249] **C-0397**, Letter from ICSID Tribunal to the Parties (April 23, 2024).

[250] **C-0396**, Judgment 158/2022 of the Plenary Session of the Constitutional Court in Case No. 05178-2022-PA/TC (April 16, 2024).

PART THREE. THE TRIBUNAL HAS JURISDICTION OVER THE CLAIMS

173. The Tribunal has jurisdiction over Scotiabank's claim that Perú has breached Article 803 of the FTA through its treatment of Scotiabank Perú. Scotiabank establishes the Tribunal's jurisdiction in the four sections below.

174. Article 801 of the FTA provides that Chapter 8, the investment chapter, applies to measures adopted or maintained by a Party relating to (a) investors of the other Party and (b) covered investments. In Section I below, Scotiabank establishes that it is both an investor within the meaning of the FTA and that it has made an investment that is protected under the FTA.

175. In Section II below, Scotiabank explains how it has satisfied the jurisdictional criteria in Article 25 of the ICSID Convention. In particular, Scotiabank explains that it is a national of an ICSID Contracting State other than Perú that has made an investment that is protected under the ICSID Convention.

176. In Section III below, Scotiabank demonstrates that the conditions precedent to a submission of a claim to arbitration set out in Article 823 of the FTA have also been satisfied: (a) Scotiabank has consented to arbitration in accordance with the required procedures; (b) at least six months have elapsed since the events giving rise to the claim; (c) the claim was commenced within the required limitation period; (d) Scotiabank has delivered the Notice of Intent required under Article 821 at least six months prior to submitting the claim; and (e) Scotiabank and Scotiabank Perú have provided valid waivers.

177. Finally, in Section IV, Scotiabank explains that its claim does not involve "measures […] relating to financial institutions of [Perú]" for purposes of Chapter 11 of the FTA and the Tribunal is therefore not deprived of jurisdiction. At the Rule 41 stage, the Tribunal did not accept Perú's broad interpretation of the scope of the financial services section of the FTA in Chapter 11 as manifestly applying whenever a claimant is a financial institution or whenever the impugned measure relates to an investment in a financial institution.[251] Rather, it saw "potential merit" in Scotiabank's interpretation that the Chapter's application focuses on the nature of the measures at

[251] Rule 41 Decision, ¶ 241.

issue, not the nature of the investor as a financial institution.[252] The plain language of the FTA does not support Perú's position; it does not say that claims by financial institutions, writ large, are limited to Chapter 11. If that were the State Parties' intention, it would have been easy to draft the treaty accordingly.

I. Scotiabank is an Investor that made a Covered Investment in Perú Within the Meaning of the FTA

178. Article 847 of the FTA defines "investor of a Party" in the case of Canada as "a national or enterprise of Canada that seeks to make, is making or has made an investment."[253] Scotiabank meets these definitions.

179. ***Scotiabank is an enterprise of Canada***. Enterprise is defined in Article 847 as "an enterprise constituted or organized under the law of [Canada], and a branch located in the territory of [Canada] and carrying out business activities there."

180. Scotiabank is an enterprise constituted under Canadian law. Scotiabank was originally incorporated by the Legislative Council and Assembly of the then British colony of Nova Scotia, the Act of Incorporation coming into force on March 30, 1832. Scotiabank commenced business on August 29, 1832. Scotiabank maintained its charter under the legislative authority of Nova Scotia until 1867.[254]

181. In 1867, at the time of Confederation (when Canada came into existence as a country), all Canadian banks came under the jurisdiction of the laws of the federal government of Canada, subject to the Canadian *Bank Act*, as periodically revised.[255] In 1874, another federal Act was enacted that established Scotiabank's corporate name as "The Bank of Nova Scotia."[256]

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[252] Rule 41 Decision, ¶ 242.

[253] **C-0001**, Free Trade Agreement between Canada and the Republic of Perú, art. 847.

[254] **C-0037**, Affidavit from [redacted], ¶ 1; **C-0002**, Act of Incorporation dated March 30, 1832.

[255] **C-0037**, Affidavit from [redacted], ¶ 2; **C-0023**, Bank Act, S.C. 1991, c.46 dated June 30, 2022; **C-0003**, An Act respecting Banks dated December 21, 1867, **C-0004**, An Act respecting Banks and Banking dated May 12, 1870; **C-0005**, An Act relating to Banks and Banking dated April 14, 1871.

[256] **C-0006**, An Act respecting the Bank of Nova Scotia dated May 26, 1874: The prior name of Scotiabank was "The President, Directors and Company of the Bank of Nova Scotia."

182. Section 13 of the Canadian *Bank Act* states that "This Act is the charter of and applies to each bank."[257] Scotiabank is named under Schedule I of the Canadian *Bank Act*. It is governed by the Canadian *Bank Act*, which is its sole charter.[258] The Canadian Government – through the Office of the Superintendent of Financial Institutions – has confirmed that Scotiabank is a Canadian bank governed by Canada's *Bank Act*.[259]

183. Scotiabank's corporate head office is located in Toronto, Ontario. Scotiabank actively carries out its business in Canada. As set out at paragraphs 22 to 23 above, Scotiabank provides financial advice and banking solutions to millions of customers in Canada through its various business lines, including Canadian Banking, Global Wealth Management, and Global Banking and Markets. For example, its Canadian Banking division alone provides a full suite of financial advice and banking solutions to over 11 million Canadian customers who are served through Scotiabank's Canadian network of over 940 branches and over 3,700 automated banking machines across Canada, as well as online, mobile and telephone banking, and specialized sales teams.

184. ***Scotiabank has made an investment in Perú***. Article 847 of the FTA defines the term "investment" as including "an enterprise," "an equity security of an enterprise, and "an interest in an enterprise that entitles the owner to share in income or profits of the enterprise." Article 847 of the FTA also provides that "investment" covers an investment that is owned or controlled "directly or indirectly" by an investor.

185. As set out at paragraphs 28 to 29 above, Scotiabank Perú is a Peruvian entity that commenced operations in Perú on May 13, 2006 following the integration of two other Peruvian

[257] **C-0023**, Bank Act, S.C. 1991, c.46 s. 13.

[258] **C-0037**, Affidavit from [redacted], ¶ 4; **C-0023**, Bank Act, S.C. 1991, c.46 dated June 30, 2022.

[259] **C-0020**, Certificate of Confirmation from the Office of the Superintendent of Financial Institutions dated August 26, 2021.

banks.[260] This reorganization establishing Scotiabank Perú was authorized by the Peruvian government.[261]

186. Scotiabank owns 99.31% of the shares of Scotiabank Perú through Scotiabank Perú Holdings S.A.,[262] an entity incorporated in Lima.[263] Scotiabank directly owns 63.04% of Scotiabank Perú Holdings S.A.'s shares and indirectly owns 36.96% of its shares through its subsidiary, BNS International (Bahamas) Limited.[264]

187. As Perú acknowledged in the Rule 41 proceeding, Scotiabank's indirect shareholding in Scotiabank Perú (a Peruvian enterprise) constitutes an investment under Article 847 of the FTA.[265] Scotiabank is therefore a protected investor that has made covered investments within the meaning of Article 801 of the FTA.

II. The Requirements of Article 25 of the ICSID Convention Have Been Met

188. Article 25(1) of the ICSID Convention provides that ICSID has jurisdiction over: (a) "any legal dispute", (b) "arising directly out of an investment", (c) "between a[n] [ICSID] Contracting

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[260] **C-0140**, Minutes of Simple Reorganization, and Partial and Total Modification of Bylaws entered into by Banco Wiese Sudameris and Banco Sudamericano (May 13, 2006); **C-0139**, Minutes of Simple Reorganization, and Partial and Total Modification of Bylaws entered into by Banco Wiese Sudameris and Banco Sudamericano (May 13, 2006).

[261] **C-0134**, Letter from Banco Wiese Sudameris y Banco Sudamericano to the Superintendence of Banking, Insurance and AFP (April 3, 2006); **C-0138**, Resolution S.B.S. of the Superintendence of Banking, Insurance and AFP No. 560-2006 (May 9, 2006).

[262] **C-0024**, Diagram of Scotiabank Perú S.A.A. share structure and ownership dated January 18, 2023; **C-0019**, Articles of Association for BNS International (Bahamas) Limited dated August 28, 2019; **C-0039**, Certificate of Registration of Scotia Perú Holdings S.A. dated October 27, 2022; **C-0040**, Certificate of Registration of Scotiabank Perú S.A.A. dated October 27, 2022; **C-0036**, Certificate from [redacted], Scotiabank dated October 25, 2022; **C-0033**, Certificate from [redacted], Scotiabank Perú S.A.A. dated October 20, 2022; **C-0034**, Certificate from [redacted]; **C-0045**, Certificate from [redacted]

[263] **C-0039**, Certificate of Registration of Scotia Perú Holdings S.A. dated October 27, 2022.

[264] **C-0024**, Diagram of Scotiabank Perú S.A.A. share structure and ownership dated January 18, 2023; **C-0019**, Articles of Association for BNS International (Bahamas) Limited dated August 28, 2019; **C-0039**, Certificate of Registration of Scotia Perú Holdings S.A. dated October 27, 2022; **C-0040**, Certificate of Registration of Scotiabank Perú S.A.A. dated October 27, 2022; **C-0036**, Certificate from [redacted], Scotiabank dated October 25, 2022; **C-0033**, Certificate from [redacted], Scotiabank Perú S.A.A. dated October 20, 2022; **C-0034**, Certificate from [redacted]; **C-0045**, Certificate from [redacted].

[265] Rule 41 Hearing Transcript, p. 77:16-19 (wherein Perú acknowledged that "the shares are an investment. We're not denying it").

State […] and a national of another Contracting State", and (d) "which the parties to the dispute consent in writing to submit to [ICSID]."

189. These requirements have been satisfied:

(a) There is a legal dispute arising from Perú's breach of its obligations under the FTA. Scotiabank alleges that Perú breached the National Treatment obligation, as set out in the Liability Section below.

(b) This dispute arises directly out of Scotiabank's investment in Perú, Scotiabank Perú. This is a qualifying investment under the ICSID Convention. The term "investment" is not defined in the ICSID Convention so as to leave flexibility in its application.[266] The principal legal framework to determine the existence of an "investment" is the will of the parties as set forth in the definition of an "investment" under the applicable treaty.[267] As set out at paragraphs 178 to 187 above, Scotiabank's shareholding in Scotiabank Perú is a qualifying investment under the FTA, and is thus also an investment under the ICSID Convention. In any event, it is well-established that holding shares in a local enterprise for over twenty years constitutes an investment under the ICSID Convention.[268]

(c) The dispute is between Perú, which is an ICSID Contracting State,[269] and Scotiabank, a national of another Contracting State other than Perú (*i.e.*, Canada).[270]

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[266] **CL-0068**, *Philip Morris Brands Sarl et al. v. Republic of Uruguay* (ICSID Case No. ARB/10/7), Decision on Jurisdiction, July 2, 2013, ¶ 196 ["***Philip Morris v. Uruguay***"].

[267] **CL-0102**, *Hassan Awdi, Enterprise Business Consultants Inc. and Alfa El Corporation v. Romania* (ICSID Case No. ARB/10/13), Award, 2 March 2015, ¶¶ 197-199; **CL-0074**, *Abalclat and Others v. Argentina* (ICSID Case No. ARB/07/5), Decision on Jurisdiction, August 4, 2011, ¶ 364; **CL-0086**, *Biwater Gauff (Tanzania) Ltd. v. United Republic of Tanzania* (ICSID Case No. ARB/05/22), Award, 24 July 2008, ¶¶ 317-318.

[268] **CL-0041**, *RENERGY S.à.r.l. v. Kingdom of Spain* (ICSID Case No. ARB/14/18), Award, May 6, 2022, ¶ 564; **CL-0068**, *Phillip Morris v Uruguay*, ¶¶ 183, 209.

[269] The ICSID Convention entered into force for Perú on September 8, 1993, following its signature of the Convention on September 4, 1991 and its deposit of its instrument of ratification on August 9, 1993.

[270] The ICSID Convention entered into force for Canada on December 1, 2013, following its signature of the Convention on December 15, 2006 and its deposit of its instrument of ratification on November 1, 2013.

Scotiabank is a "juridical person which ha[s] the nationality of [Canada]," as set out in Article 25(2)(b) of the ICSID Convention.

(d) Perú's consent to submit this dispute to ICSID arbitration is set forth in Article 825 of the FTA. Scotiabank provided its consent to ICSID arbitration through its Request for Arbitration dated October 31, 2022, in accordance with Articles 823(1)(a) and 823(2)(a) of the FTA, as set out at paragraphs 190 to 199 below.

III. The Conditions Precedent to Arbitration in Article 823 are Satisfied

190. Scotiabank has commenced this arbitration on its own behalf pursuant to Article 819 of the FTA and on behalf of Scotiabank Perú under Article 820.[271] Article 823 contains the conditions precedent to a disputing investor submitting a claim to arbitration under Articles 819 and 820.

191. Each of the preconditions has been met.

192. ***Consent***. Articles 823(1)(a) and 823(2)(a) require that Scotiabank and Scotiabank Perú consent to arbitration in accordance with the procedures set out in this section. Article 823(3) provides that the required consent "shall be in the form provided for in Annex 823.1, shall be delivered to the disputing Party and shall be included in the submission of a claim to arbitration."

193. As part of its Request for Arbitration, Scotiabank provided the required consent for both itself and Scotiabank Perú.[272]

194. ***Cooling Off Period***. Articles 823(1)(b) and 823(2)(b) require that at least six months have elapsed since the events giving rise to the claim. The series of events giving rise to the claim ended with the Constitutional Court Decision, which Scotiabank Perú was notified of on November 20, 2021. The arbitration was commenced more than six months later. The Request for Arbitration is dated October 31, 2022 and was registered on November 15, 2022.

[271] Request for Arbitration, ¶ 2.

[272] Request for Arbitration, ¶ 76(i); **C-0044**, Consent to Arbitration and Waiver of Scotiabank dated October 31, 2022; **C-0032**, Consent to Arbitration and Waiver of Scotiabank Perú S.A.A. dated October 20, 2022.

195. ***Limitation Period***. Articles 823(1)(c) and 823(2)(c) require that "not more than 39 months have elapsed from the date on which the disputing investor [or enterprise] acquired, or should have first acquired, knowledge of the alleged breach and knowledge that the investor [or enterprise] has incurred loss or damage thereby." For the limitation period to begin to toll, the investor must have knowledge of both the alleged breach and that it has incurred loss or damage as a result.[273]

196. The conduct by Perú that breached the FTA is described in the Liability Section below. In summary, this claim is about the Peruvian Government's interference with the Default Interest Amparo, resulting in the 2021 Decision. Scotiabank and Scotiabank Perú incurred loss or damage when they were notified of the Constitutional Court Decision on November 20, 2021 – it was on this date that they first learned that they had lost the ability to recover the default interest amount paid under protest. Scotiabank submitted the claim to arbitration less than one year later, well within the 39-month limitation period.

197. ***Notice of Intent and Consultations***. Articles 823(1)(d) and 823(2)(d) require the disputing investor to deliver the Notice of Intent required under Article 821 at least six months prior to submitting the claim. Scotiabank delivered a Notice of Intent to Perú in accordance with Article 821 on September 1, 2021 and an Amended Notice of Intent on February 1, 2022, more than six months before the Request for Arbitration was submitted on October 31, 2022.[274]

198. After a Notice of Intent is delivered, Article 822 of the FTA requires the disputing parties to hold consultations to attempt to settle a claim amicably before a disputing investor can submit its claim to arbitration. As set out at paragraphs 149 and 160 above, following the issuance of the Notice of Intent and the Amended Notice of Intent, the parties had without prejudice meetings on November 3, 2021 and July 15, 2022, but did not reach a resolution.

199. ***Waiver***. Articles 823(1)(e) and 823(2)(e) require the disputing investor and the enterprise to "waive their right to initiate or continue before any administrative tribunal or court under the

[273] **CL-0026**, *Infinito Gold Ltd. v. Republic of Costa Rica,* (ICSID Case No. ARB/14/5), Decision on Jurisdiction (December 4, 2017), ¶ 330; **CL-0027**, *Infinito Gold Ltd. v. Costa Rica, ICSID* Case No. ARB/14/5, Award (June 3, 2021), ¶¶ 221, 223; **CL-0067,** *Mobil Investments Canada Inc. v. Government of Canada,* ICSID Case No. ARB/15/6, Decision on Jurisdiction and Admissibility (July 13, 2018), ¶ 148.

[274] **C-0021**, Notice of Intent dated September 1, 2021; **C-0022**, Amended Notice of Intent dated February 1, 2022.

law of either Party, or other dispute settlement procedures, any proceedings with respect to **the measure** of the disputing Party that is alleged to be a breach [of the FTA]" [emphasis added]. Both Scotiabank and Scotiabank Perú delivered that waiver with the Request for Arbitration.[275]

200. In its Rule 41 challenge, Perú argued that the waivers are invalid because there was a potential that, in the Tax Appeal, Scotiabank would be reimbursed the default interest amounts it had paid and the Tax Appeal was excluded from the scope of the Article 823(1) waivers.[276] As Scotiabank explained, the waivers are valid because the Tax Appeal does not pertain to the measures alleged to breach the FTA in this arbitration.[277] This remains the case. This arbitration is about the Peruvian Government's interference with the Constitutional Court's decision-making in the Default Interest Amparo, interference and pressure that culminated with the Court's 2021 Decision. The Tax Appeal has nothing to do with that conduct.

201. Moreover, the underlying subject matter between the Tax Appeal and the Default Interest Amparo are distinct. The Tax Appeal focused on the imposition of the underlying value added tax while the Default Interest Amparo related to the constitutionality of the accrual of default interest resulting from the SUNAT and the Tax Court's delays.[278] As set out at paragraph 54 above, Perú's own courts have recognized the distinction between the Default Interest Amparo at issue in this arbitration, on the one hand, and the Tax Appeal, on the other. The Peruvian appeal court, the Third Civil Chamber, confirmed that the two proceedings concerned different causes of action and that there was no risk of contradictory rulings in the two proceedings.[279]

202. With respect to Perú's argument that the waivers were invalid because of the potential risk of double recovery, in its Rule 41 Decision, the Tribunal rightly noted that "there is no way to

[275] **C-0044**, Consent to Arbitration and Waiver of Scotiabank dated October 31, 2022; **C-0032**, Consent to Arbitration and Waiver of Scotiabank Perú S.A.A. dated October 20, 2022.

[276] Perú's Rule 41 Submission, ¶¶ 145, 158-159.

[277] Scotiabank's Response to Perú's Rule 41 Submission, ¶¶ 146-151.

[278] Scotiabank's Response to Perú's Rule 41 Submission, ¶ 152; (noting the judiciary has denied that there was a risk of contradictory decisions where a plaintiff commences an (i) amparo proceeding to challenge the collection of default interest and (ii) a judicial process to challenge the tax debt imposed by SUNAT); Rule 41 Hearing Transcript, pp. 157:18-160:2, 160:12-165:15; **C-0063**, Resolution No. 7 issued by the Third Civil Chamber dated June 10, 2014. See also: **C-0066**, Judgment of the Plenary Session of the Constitutional Court in Case No. 04082-2012-PA/TC (Medina de Baca).

[279] **C-0063**, Resolution No. 7, File No. 35201-2013, Third Civil Chamber, June 13, 2014.

know at this stage what will happen with the *amparo* action in the Tax Appeal. It is possible that Scotiabank will be reimbursed the full amount of the default interest arising from the 1999 Tax Debt; it is possible that no such reimbursement will be forthcoming."[280]

203. As described at paragraphs 167 to 171 and 200 to 204 above, the *amparo* action in the Tax Appeal has now been dismissed and there is no longer any possibility that Scotiabank will be reimbursed any amount in that proceeding.[281] Thus, while Scotiabank had already undertaken to this Tribunal that it would not benefit from a double recovery in any circumstance, there is no longer any possible risk of double. The concerns that Perú raised in the Rule 41 challenge concerning the existence of the Tax Appeal are thus not only irrelevant (as the Tax Appeal does not pertain to the measures at issue in this arbitration) but are now moot.

204. Finally, as discussed above, the timing and circumstances surrounding the dismissal of the Tax Appeal and the timing of the Rule 41 Decision are noteworthy. On the late afternoon of May 31, 2024 – the day Perú knew the Tribunal would release its Rule 41 Decision – the Constitutional Court released its decision dismissing the Tax Appeal. The actual date of the Court's decision is April 16, 2024, more than six weeks before it was released, and before the Tribunal indicated it would release its Rule 41 Decision.[282] If the Tax Appeal decision had been released before May 31, it could have had a material adverse effect for Perú's waiver argument on the Rule 41 proceeding, and would have been brought to the attention of the Tribunal to consider as part of its deliberation. Given the history described above, it is difficult to accept this timing as mere coincidence.

IV. Scotiabank's Claim Does Not Involve Measures "Relating to Financial Institutions"

205. Chapter 11 of the FTA is the financial services section of the treaty. Article 1101(1) provides (emphasis added):

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[280] Rule 41 Decision, ¶ 236.

[281] **C-0396**, Judgment 158/2022 of the Plenary Session of the Constitutional Court in Case No. 05178-2022-PA/TC (April 16, 2024).

[282] **C-0396**, Judgment 158/2022 of the Plenary Session of the Constitutional Court in Case No. 05178-2022-PA/TC (April 16, 2024).

> This Chapter applies to measures adopted by or maintained by a Party relating to:
>
> (a) financial institutions of the other Party;
>
> (b) investors of the other Party, and investments of such investors, in financial institutions in the Party's territory; and
>
> (c) cross-border trade in financial services.

206. In its Rule 41 challenge, Perú argued that the Tribunal lacks jurisdiction over the National Treatment claim because the claim falls under the scope of Chapter 11 of the FTA.[283] In its Rule 41 Decision, the Tribunal held that it could not accept Perú's interpretation of the carveout in Article 1101(1) as manifestly applying whenever a claimant is a financial institution or whenever the impugned measure relates to an investment in a financial institution, at least at such an early stage in the proceeding.[284] Rather, the Tribunal found "potential merit" in Scotiabank's interpretation that the phrase "measures…relating to financial institutions" in Article 1101(1) focuses on the nature of the measures at issue, not the nature of the investor as a financial institution.[285]

207. The measures challenged in this arbitration are the Peruvian Government's interference with a judicial proceeding concerning the accrual of default interest on a challenged tax assessment (*i.e.*, the Default Interest Amparo claim that Scotiabank Perú filed with Constitutional Court), together with the 2021 Decision succumbing to that political pressure and interference. None of this conduct had anything to do with Scotiabank and Scotiabank Perú's status as financial institutions. As the Tribunal has already noted, "the Constitutional Court could have applied the measure against any debtor in debt in any economic sector in Perú."[286] Indeed, the application of default interest on a challenged tax assessment is an issue that is industry-agnostic, affecting natural persons and businesses across any and all industries.[287]

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[283] Perú's Rule 41 Submission, ¶ 67.

[284] Rule 41 Decision, ¶ 241.

[285] Rule 41 Decision, ¶ 242.

[286] Rule 41 Decision, ¶ 242 (emphasis added).

[287] *See*, CER-Landa/Neyra, Annex I: Default Interest Cases; Annex II: Universe of Comparable Cases.

208. Furthermore, Perú established in its Rule 41 application that the challenged measures are "taxation" measures as the majority of the Tribunal ruled that the imposition of default interest on a tax liability is "a measure taken to ensure compliance with the State's taxation system."[288] As the majority of the Tribunal held that they are "taxation" measures, they are not measures focused on or relating to financial institutions.

209. If Perú maintains this jurisdictional objection, then it bears the burden of proving its application and Scotiabank will respond directly to those arguments at that time. Until then, Scotiabank has no obligation to disprove the application of an exception to the Tribunal's jurisdiction. In any case, Scotiabank relies on its detailed submissions from the Rule 41 proceeding regarding the proper interpretation of Article 1101(1).

PART FOUR. PERÚ BREACHED ARTICLE 803 OF THE FTA

210. As described in the prior sections of this Memorial, the arbitration concerns unlawful treatment by Perú on Scotiabank Perú in connection with a claim brought by Scotiabank Perú before the Constitutional Court that was pending between January 2017 and November 2021 – the Default Interest Amparo. Over the same time span, dozens of other cases were also brought by Peruvian taxpayers similarly contending that SUNAT had wrongfully applied default interest in connection with disputed tax assessments that had taken the State an excessive time to resolve.

211. The separation of powers is a bedrock principle of any democracy. An important manifestation of that principle is the independence of the judiciary. As in most nations, Peruvian law is supposed to uphold the independence of the judiciary from the influence of other branches of government and outside interests.[289] However, whereas the cases of purely domestic (*i.e.*, non foreign-owned) taxpayers were decided without government interference, Scotiabank Perú's case was plagued with government manipulation and interference. Scotiabank Perú thus received treatment less favourable than the purely domestic (non foreign-owned) taxpayers who were also challenging SUNAT's application of default interest in breach of Article 803 of the FTA.

[288] Rule 41 Decision, ¶ 260.

[289] *See* CER-Landa/Neyra, ¶¶ 37-40; **C-0094,** Political Constitution of Perú (December 29, 1993) art. 201; **C-0118**, Law No. 28301, Organic Law of the Constitutional Tribunal (July 1, 2004), art. 1.

212. In Scotiabank Perú's case, the Constitutional Court had approved a detailed decision in Scotiabank Perú's favour granting its Default Interest Amparo and confirming that default interest was not due. That is not a supposition: the 2017 Leaked Decision makes that apparent. However, it appears that the judgment was not politically tolerable for Perú's Government. As a consequence, a high-level insider at the Constitutional Court leaked the unsigned copy of the final judgment to a newspaper that was notorious for opposing foreign investors in Perú.[290] As a result, the 2017 Leaked Decision, which had been finalized by the Constitutional Court Justices subject only to signature, became a focal point of intense scrutiny from a host of Government officials, a number of whom openly challenged the conclusions of the 2017 Leaked Decision, made threats against the Justices, threatened to withhold the Court's funding if it maintained the conclusions of the 2017 Leaked Decision, and accused the Court of acting against the interests of the State if it were to issue the 2017 Leaked Decision as a final judgment.[291]

213. As a result of this intense political interference, the Constitutional Court decided not to release a signed copy of the 2017 Leaked Decision that had found in Scotiabank Perú's favour. Rather, the Court sat on it for over four years until, in November 2021, the Constitutional Court suddenly passed a resolution reducing the quorum requirements for voting on final judgments. Days later, the Constitutional Court released a signed decision in Scotiabank Perú's case rejecting Scotiabank's Default Interest Amparo in a complete reversal of the 2017 Leaked Decision (the 2021 Decision). The Constitutional Court issued the 2021 Decision without the five-judge quorum required by law, and with just three judges voting in favour.

214. Perú breached the national treatment provision contained in Article 803 of the FTA because, in dozens of analogous cases brought by domestic Peruvian taxpayers, no comparable governmental interference took place to seek to reverse the Constitutional Court's conclusions or otherwise impact the Constitutional Court's decision-making process. Accordingly, by undermining the independence of the Constitutional Court in Scotiabank Perú's Default Interest Amparo and not in comparable cases involving SUNAT's wrongful application of default interest, Perú treated Scotiabank Perú less favourably than it treated domestic investors in like

[290] CWS-[redacted], ¶¶ 20, 22; CWS-[redacted], ¶¶ 34, 50. *See* ¶¶ 78-83, 134, above.

[291] *See* ¶¶ 92-138, above.

circumstances. Perú also treated Scotiabank Perú less favourably than other investors when the Constitutional Court succumbed to the political interference, reversed the 2017 Leaked Decision and applied illogical reasoning not found in the decisions involving the domestic comparators.

215. This Part Four of the Memorial contains the following four Sections:

(a) In Section I, Scotiabank sets out the contours of the national treatment standard under Article 803 of the FTA and, in particular, the three elements that Scotiabank must establish for its claim.

(b) In Section II, Scotiabank addresses the first element of the national treatment test—namely, that Scotiabank Perú received "treatment" that is covered by the scope of Article 803 of the FTA.

(c) In Section III, Scotiabank addresses the second element of the national treatment test—namely, that there are Peruvian investors in "like circumstances" to Scotiabank Perú.

(d) In Section IV, Scotiabank addresses the third element of the national treatment test—namely, that none of the Peruvian investors were subjected to the treatment that Scotiabank Perú received and, accordingly, Scotiabank Perú received less favourable treatment than such investors. Perú has provided no reasonable justification for conferring Scotiabank less favourable treatment, nor can it.

I. The National Treatment Standard Under Article 803 of the FTA

216. The law to be applied by the Tribunal in resolving this dispute is determined pursuant to Article 42(1) of the ICSID Convention and is "such rules of law as may be agreed by the parties".[292] In this case, Article 837 of the FTA sets out the agreed rules of law applicable to this dispute, which include the "[FTA] and applicable rules of international law."[293]

[292] **CL-0089**, Christoph Schreuer, *Schreuer's Commentary on the ICSID Convention*, 3rd ed (Cambridge: Cambridge University Press, 2022), art. 42, p. 814-815 (finding that when consent is based on a treaty, such as a Free Trade Agreement, "the two States may agree on the applicable law").

[293] **C-0001,** Free Trade Agreement between Canada and the Republic of Perú, art. 837(1).

217. Scotiabank's claims concern Perú's violations of its substantive obligations under the FTA. The FTA is therefore the primary source of law applicable to this dispute.[294] Relevant principles of public international law, including the customary international rules on treaty interpretation as codified in the Vienna Convention on the Law of Treaties ("**Vienna Convention**"), inform and complement the content of the FTA.[295]

218. Article 803 of the FTA requires Perú to accord Scotiabank and its investments treatment no less favourable than that which it accords, in like circumstances, to its own investors and their investments (the National Treatment Standard):

> (1) Each Party shall accord to investors of the other Party treatment no less favourable than that it accords, in like circumstances, to its own investors with respect to the establishment, acquisition, expansion, management, conduct, operation and sale or other disposition of investments in its territory.
>
> (2) Each Party shall accord to covered investments treatment no less favourable than that it accords, in like circumstances, to investments of its own investors with respect to the establishment, acquisition, expansion, management, conduct, operation and sale or other disposition of investments in its territory.

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[294] **CL-0083**, *Asian Agricultural Products Ltd v. Sri Lanka* (ICSID Case No ARB/87/3), Final Award, 27 June 1990 ("***Asian Agricultural***"), ¶¶ 20-21 (finding that the BIT on which the arbitration was based provided the "primary source of applicable legal rules"); **CL-0135**, *Wena Hotels Limited v. Arab Republic of Egypt* (ICSID Case No ARB/98/4) Award, 8 December 2000 ("***Wena Hotels***"), ¶¶ 78-79 (finding that because the case "turns on an alleged violation" by Egypt of the BIT, "the Tribunal […] considers the [BIT] to be the primary source of applicable law"); **CL-0079**, Andrew Newcombe & Lluís Paradell Trius, *Law and Practice of Investment Treaties: Standards of Treatment* (Kluwer Law International: 2009) ("***Newcombe and Paradell***"), p. 91 ("the substantive standards of the [international investment agreement] are *lex specialis* and the primary source of applicable law").

[295] **CL-0088**, Chin Leng Lim, Jean Ho & Martins Paparinskis, *International Investment Law and Arbitration* (Cambridge: Cambridge University Press, 2021) ("***Lim, Ho and Paparinskis***"), Chapter 6, Section 1.1 ("[w]hen international law is identified as a source of laws, this can refer to treaty law, customary law and/or general principles of law [as set out in art. 38(1) of the Statute of the International Court of Justice]"); **CL-0081**, *Archer Daniels Midland and Tate & Lyle Ingredients Americas, Inc. v United Mexican States* (ICSID Case No ARB (AF)/04/5), Final Award, 21 November 2007 ("***ADM v. Mexico***"), ¶ 174 (interpreting the equivalent governing law provision in art. 1131 of NAFTA and finding that "by virtue of Article 1131 of the NAFTA [the applicable substantive law is] not only the provisions of Section A, but all customary international law rules not covered by the *lex specialis* under Chapter Eleven"); **CL-0134**, *Waste Management Inc v. Mexico (I)* (ICSID Case No ARB(AF)/98/2), Award, 2 June 2000, ¶¶ 8-9 (finding that "[t]he thrust of [art. 1131 of NAFTA] permits this Arbitral Tribunal to be guided, in matters of interpretation, by the rules laid down by the [Vienna Convention]"); **CL-0097**, *Fireman's Fund Insurance Company v. United Mexican States* (ICSID Case No ARB(AF)/02/01), Award on Jurisdiction, 17 July 2003, ¶¶ 62-63 (finding that the tribunal in that case "will follow the rules of interpretation set forth in Articles 31 and 32 of the [VCLT]"). Canada and Perú are both parties to the Vienna Convention—since 14 October 1970 and 14 September 2000, respectively.

(3) The treatment accorded by a Party under paragraphs 1 and 2 means, with respect to a sub-national government, treatment no less favourable than the treatment accorded, in like circumstances, by that sub-national government to investors, and to investments of investors, of the Party of which it forms a part.[296]

219. The National Treatment Standard protects Canadian investors and their investments from treatment less favourable than the treatment accorded by Perú to Peruvian investors and their investments (and vice versa).[297] It embodies the fundamental principle of non-discrimination at the core of modern investment treaties.

220. Scotiabank must establish three distinct elements to sustain a breach by Perú of the National Treatment Standard under Article 803:

(a) *first*, that Perú accorded some form of "treatment" to Scotiabank or Scotiabank Perú with respect to its "establishment, acquisition, expansion, management, conduct, operation and sale or other disposition" of its investment;[298]

(b) *second*, that there are Peruvian investors that are in "like circumstances" with Scotiabank or Scotiabank Perú;[299]

[296] **C-0001**, Free Trade Agreement between Canada and the Republic of Perú, art. 803(1)-(3).

[297] *See* **CL-0079**, *Newcombe and Paradell*, p. 151; **CL-0125**, Rudolf Dolzer and Christoph Schreuer, "Standards of Protection" in Principles of International Investment Law, 2nd ed (Oxford: Oxford University Press, 2012) ("***Dolzer & Schreuer***"), p. 198; **CL-0078**, Andrea Kay Bjorklund, "The National Treatment Obligation" in Katia Yannaca-Small (ed), Arbitration Under International Investment Agreements: A Guide to the Key Issues, 2nd ed (Oxford: Oxford University Press, 2018) ("***Bjorklund***"), pp. 533-534.

[298] **C-0001**, Free Trade Agreement between Canada and the Republic of Perú, art. 803(1); **CL-0133**, *United Parcel Service of America Inc. v. Government of Canada* (ICSID Case No UNCT/02/1), Final Award, 24 May 2007 ("***UPS v. Canada***"), ¶ 83 (setting out the three-pronged test); **CL-0093**, *Corn Products International Inc. v. United Mexican States* (ICSID Case No ARB(AF)/04/1), Decision on Responsibility, 15 January 2008 ("***Corn Products v. Mexico***"), ¶¶ 116-118 (endorsing the three-pronged test in *UPS v. Canada*).

[299] **CL-0133**, *UPS v. Canada*, ¶ 83; **CL-0132**, *Total S.A. v Argentine Republic* (ICSID Case No ARB/04/1) Decision on Liability, 27 December 2010 ("***Total v. Argentina***"), ¶ 212 (finding a claimant must "identify the local subject for comparison" and prove that the claimant is in "like circumstances with the national comparator(s)" in order to establish a breach of national treatment); **CL-0003**, *William Ralph Clayton, Douglas Clayton, Daniel Clayton, and Bilcon of Delaware, Inc. v Government of Canada* (PCA Case No. 2009-04), Award on Jurisdiction and Liability, 17 March 2015 ("***Bilcon***"), ¶ 692 (finding that art. 1102 of NAFTA refers to "like circumstances" and this is not as restrictive as other trade-liberalizing agreements that refer to "like-products").

(c) *third*, that Perú treated Scotiabank or Scotiabank Perú less favourably than those Peruvian investors in "like circumstances" and that Perú has no reasonable justification for its less favourable treatment.[300]

221. Perú breached Article 803 of the FTA. In the sub-sections below, Scotiabank: (*a*) explains the relevant treatment that Perú accorded to Scotiabank Perú (Section II); (*b*) describes the analytical framework for the "like circumstances" analysis and identifies numerous Peruvian investors in "like circumstances" with Scotiabank Perú (Section III); and (*c*) explains the applicable legal principles to the assessment of differential treatment ("treatment no less favourable") and shows that Scotiabank Perú received less favourable treatment to Peruvian investors in "like circumstances" (Section IV).

II. First Element: Scotiabank Perú Received "Treatment" that Falls Within the Ambit of Article 803 of the FTA

A. Article 803 Provides a Broad Definition of "Treatment"

222. The first step in establishing a claim under Article 803(1) is to identify the impugned treatment by the State towards the investor.

223. "Treatment" is a broad concept. The treatment to which Article 803(1) refers can be with respect to the establishment, acquisition, expansion, management, conduct, operation and sale or other disposition of a foreign investor's investments. The treatment may be in the form of any measure, which under the FTA includes "any law, regulation, procedure, requirement or practice".[301] This broad definition covers both substantive and procedural measures, such as less favourable administrative or judicial procedures to enforce rights.[302] Tribunals interpreting treaties with similar provisions have found that such treatment can include "almost any conceivable

[300] **CL-0133**, *UPS v. Canada*, ¶ 83; **CL-0132**, *Total v. Argentina*, ¶ 212 (finding a claimant must "demonstrate that it received less favourable treatment in respect of its investment, as compared to the treatment granted to the specific local investor or the specific class of national comparators").

[301] **C-0001**, Free Trade Agreement between Canada and the Republic of Perú, art. 105.

[302] **CL-0079**, *Newcombe and Paradell*, p. 184 ("[t]he term treatment is wide enough to cover both substantive and procedural requirements […] For instance, less favourable administrative or court procedures to enforce rights might give rise to a breach of national treatment obligations").

measure that can be with respect to the beginning, development, management and end of an investor's business activity."[303]

B. The Impugned "Treatment" Accorded by Perú to Scotiabank Perú

224. Perú's treatment of Scotiabank Perú that is at issue concerns improper interference by different branches of Perú's Government with the Constitutional Court in the course of Scotiabank Perú's Default Interest Amparo ("**Government Judicial Interference**") and the Constitutional Court's succumbing to that interference in reversing the 2017 Leaked Decision in the 2021 Decision by dismissing the Default Interest Amparo on procedural grounds. The pursuit of domestic litigation squarely falls within the ambit of "management, conduct, [and] operation" of Claimant's investment in Scotiabank Perú. Indeed, as noted by Newcombe and Paradell,[304] less favourable court procedures can give rise to a breach of national treatment obligations. Accordingly, the treatment of which Scotiabank complains here falls within the scope of Article 803 of the FTA.

225. The Government Judicial Interference was problematic – and, as discussed below, "less favourable" – treatment than that accorded to domestic investors and their investments. It was also effective in reversing the Constitutional Court's unbiased conclusions reflected in the 2017 Leaked Decision and thus caused severe detriment to Scotiabank. Indeed, the 2017 Leaked Decision shows that the Constitutional Court had resolved to rule in favour of Scotiabank Perú's Default Interest Amparo in the absence of Government Judicial Interference. As Dr. Landa and Professor Neyra explain, the 2017 Leaked Decision had all the hallmarks of a finalised Constitutional Court decision on which the justices had already voted (including a bar code) and its form suggested that its release was imminent.[305] Regrettably for Scotiabank and Scotiabank Perú, that was not an outcome that Perú considered politically tolerable. And so, once it had been leaked, Perú initiated a campaign to interfere and reverse the Constitutional Court's conclusions. That interference was enabled by a dissenting Judge who leaked the Court's judgment in 2017. In the end, the

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[303] **CL-0114**, *Merrill & Ring Forestry L. P. v. Canada* (ICSID Case No UNCT/07/1) Final Award, 31 March 2010 ("***Merrill & Ring***"), ¶ 79. *See also* **CL-0133**, *UPS v. Canada*, ¶ 85 (rejecting Canada's arguments that Canada Customs' processing of goods did not constitute "treatment").

[304] *See* **CL-0079**, *Newcombe and Paradell*, p. 184.

[305] CER-Landa/Neyra, ¶ 110.

Constitutional Court yielded to Government Judicial Interference by simply reversing the 2017 Leaked Decision in the 2021 Decision, denying Scotiabank Perú's claim on procedural grounds.

226. Accordingly, the impugned treatment at issue in this case is comprised of the following connected series of acts, the damage in respect of which only became apparent by the release of the 2021 Decision:

(a) threats made by the Ministry of Economy and Finance to the Justices of the Constitutional Court, prior to the publication of the 2017 Leaked Decision, indicating that the Government would not authorize the funds needed for the Court's new institutional headquarters if it were to rule in favour of Scotiabank Perú;[306]

(b) the leak by the Constitutional Court of the 2017 Leaked Decision to a newspaper known for its hostile views to foreign investment by the office of one of the Justices who had voted against the decision;[307]

(c) public statements made and retaliatory actions taken against the Constitutional Court after the publication of the 2017 Leaked Decision by government officials from the Ministry of the Economy and Finance and others who were dissatisfied with the outcome;[308] and

(d) the Constitutional Court yielding to the Government Judicial Interference and rendering the 2021 Decision rejecting Scotiabank Perú's amparo, a conclusion diametrically opposed to the 2017 Leaked Decision which had accepted Scotiabank Perú's amparo.[309]

[306] *See* ¶¶ 120-124; CWS-[redacted], ¶ 16.

[307] *See* ¶¶ 78-83; **C-0198**, Record of visits to the judges of the Constitutional Court [redacted] p. 2 ([redacted]; **C-0081**, LinkedIn profile of Ricardo Velazco Herrera; **C-0200**, "Scotiabank will win S$481,000,000 from Constitutional Court decision" Hildebrandt en sus trece (June 9, 2017); CWS-[redacted], ¶¶ 20, 22; CWS-[redacted], ¶¶ 34, 50.

[308] *See* ¶¶ 93-109, above.

[309] *See* ¶¶ 153-159, above.

227. In the sub-sections below, Scotiabank describes the impugned "treatment" in further detail. Cross -references to the relevant fact sections are included to permit a more detailed review of the underlying facts.

i. The Peruvian Government Threatens the Constitutional Court Following the March 2017 Scotiabank Perú Hearing

228. The hearing at the Constitutional Court for Scotiabank Perú's Default Interest Amparo took place on 29 March 2017.[310] As set out at paragraphs 122 to 123 above, in a meeting in [redacted], [redacted] revealed to [redacted], that the Constitutional Court was receiving threats from government officials.[311] In particular, he revealed that representatives from the Ministry of Economy and Finance threatened the Justices from the Constitutional Court that the Ministry would not authorize the disbursement of money required to remodel a building for the Constitutional Court's new institutional headquarters if it were to issue a decision in favour of Scotiabank Perú.[312]

229. While meetings between litigating parties and Justices of the Constitutional Court are an accepted feature of domestic litigation in Perú, Scotiabank's experts on Peruvian law, Dr. Landa and Professor Neyra explain that it is improper for individuals other than those acting for litigating parties to hold meetings with the Justices.[313] Those meetings are, plainly, all the more improper where they involve meetings with officials from Ministries and government departments who are not litigating parties in which such officials seek to influence the outcome of a case.[314] As Dr. Landa and Professor Neyra explain, meetings and threats of that kind contravene basic principles enshrined in Peruvian law regarding the independence of judicial institutions like the Constitutional Court.[315]

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[310] *See* ¶ 75 above.

[311] CWS-[redacted], ¶¶ 15-16.

[312] CWS-[redacted], ¶ 16.

[313] CER-Landa/Neyra, ¶ 61.

[314] CER-Landa/Neyra, ¶ 61.

[315] CER-Landa/Neyra, ¶¶ 136, 142.

ii. The Constitutional Court Leaks the 2017 Leaked Decision in Coordination with SUNAT

230. On June 9, 2017, the well-known news source *Hildebrandt* published an article leaking the 2017 Leaked Decision.[316] The *Hildebrandt* is widely and publicly known for its opposition to foreign investors in Perú.[317]

231. As set out at paragraphs 78 to 81 above, the excerpts of the 2017 Leaked Decision show that the Constitutional Court had held a Plenary vote on May 9, 2017 with four out of six Justices voting in favour of the decision to grant Scotiabank Perú's Default Interest Amparo.[318] Consistent with prior Constitutional Court default interest cases, the published pages showed that the Court had found that SUNAT and the Tax Court had breached Scotiabank Perú's constitutional right to be tried without undue delay, which had materially prejudiced Scotiabank Perú through SUNAT's application of the default interest during the unduly delayed administrative tax proceedings.[319] The 2017 Leaked Decision contained a bar code on the cover page, which as former Constitutional Court Justice and President Dr. Landa explains, means that it was in its final form, only pending the Justices' signatures.[320]

232. The *Hildebrandt* article also included an interview with SUNAT's counsel in the Default Interest Amparo, the former Minister of Justice Francisco Eguiguren, who had received access to the 2017 Leaked Decision and who claimed that a final decision in favour of Scotiabank Perú would be "extremely serious".[321] According to the article, the leak had come from "a high-level source in the [Constitutional Court] who [was] opposed to the alleged favouritism of

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[316] **C-0200**, "Scotiabank will win S$481,000,000 from Constitutional Court decision" Hildebrandt en sus trece (June 9, 2017).

[317] *See* ¶¶ 78-83, above; CWS-[redacted], ¶ 20; CWS-[redacted], ¶ 34.

[318] **C-0200**, "Scotiabank will win S$481,000,000 from Constitutional Court decision" Hildebrandt en sus trece (June 9, 2017), pp. 2-3.

[319] **C-0200**, "Scotiabank will win S$481,000,000 from Constitutional Court decision" Hildebrandt en sus trece (June 9, 2017), p. 2; CER-Landa/Neyra, ¶ 108.

[320] **C-0200**, "Scotiabank will win S$481,000,000 from Constitutional Court decision" Hildebrandt en sus trece (June 9, 2017); CER-Landa/Neyra, ¶ 111.

[321] **C-0200**, "Scotiabank will win S$481,000,000 from Constitutional Court decision" Hildebrandt en sus trece (June 9, 2017) p. 2. According to the 2017 Draft Decision, only Justices Marianella Ledesma and Oscar Urviola opposed voting in favor of Scotiabank. *See also* CWS-[redacted], ¶ 34.

Scotiabank".[322] The article also identified Scotiabank as the "sixth largest financial entity in Latin America."[323] Just one week prior to the leak of the voted judgment, on May 30, 2017, [redacted].[324] Following the leak, [redacted].[325] [redacted] expressed concern that [redacted] was the *Hildebrandt's* source for the 2017 Leaked Decision.[326]

233. The leak of an unsigned copy of Scotiabank Perú's Constitutional Court decision was unlawful and exceptional. As explained by Dr. Landa and Professor Neyra, the leak of a judicial decision not yet rendered, especially from the Constitutional Court, is highly unusual and, in recent Peruvian history, typically occurs only in highly politicized cases.[327] As they explain in their report, the leaking to the public of a decision that has not yet been issued is unlawful and undermines the independence of the judiciary.[328] A few days after these excerpts came to light, the then-Chief Justice of the Constitutional Court, Miranda Canales, confirmed that the leak was "illegal".[329]

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[322] **C-0200**, "Scotiabank will win S$481,000,000 from Constitutional Court decision" Hildebrandt en sus trece (June 9, 2017). *See also* CWS-[redacted], ¶ 34.

[323] **C-0200**, "Scotiabank will win S$481,000,000 from Constitutional Court decision" Hildebrandt en sus trece (June 9, 2017) p. 4.

[324] **C-0198**, Record of visits to the judges of the Constitutional Court [redacted] p. 2.

[325] **C-0268**, Record of visits to the judges of the Constitutional Court ([redacted]), p. 8.

[326] CWS-[redacted], ¶ 50 (noting that [redacted] expressed these suspicions in a meeting [redacted].

[327] CER-Landa/Neyra, ¶¶ 100-101.

[328] CER-Landa/Neyra, ¶¶ 104-105.

[329] **C-0223**, "Miranda, from the TC: There is still no final resolution in the Scotiabank case," La República (June 17, 2017).

iii. The Government Launches a Campaign to Interfere with the Constitutional Court

234. Following the publication of the 2017 Leaked Decision, government officials began an intense campaign to interfere with the Constitutional Court to deter it from issuing its ruling on Scotiabank Perú's Default Interest Amparo as set out in the 2017 Leaked Decision.[330] The object of the campaign was to pressure the Constitutional Court to change the decision that the Justices had already voted on – from granting Scotiabank Perú's Default Interest Amparo to dismissing it.

235. Using Peruvian media, government officials focused on Scotiabank Perú's foreign ownership by singling out Scotiabank Perú as a "Canadian capital bank", a "foreign bank" and a large "transnational entity".[331] As part of their campaign, public officials accused the Constitutional Court of bias towards "the multinational company", of favouring "the rich" and "millionaire groups" and of taking "money … from all the Peruvians" to repay a foreign-owned institution.[332] Officials emphasized the "multiple urgencies" in the country, including the devastating results of the coastal *El Niño* phenomenon.[333] SUNAT's representative, José Escalante, publicly warned that the 2017 Leaked Decision would bring catastrophic effects,[334] and jeopardize the healthcare, education and public services in Perú.[335]

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[330] *See*, ¶¶ 92-138, above.

[331] *See*, ¶¶ 103-105, above; **C-0217**, "TC gives 481 million to Scotiabank," La Nación (June 13, 2017); **C-0236**, "Supreme Court to vote on dispute between Scotiabank and Sunat," La República (July 5, 2017); **C-0206**, "Sunat: Possible TC ruling in favor of bank would create a fiscal hole of S/10,000 million," RPP (June 9, 2017), p. 1.

[332] *See* **C-0217**, "TC gives 481 million to Scotiabank," La Nación (June 13, 2017); **C-0306**, "The Constitutional Court would issue a judgment that forces Sunat to return more than S/ 400 million to Scotiabank," Informate Perú (February 26, 2020). Even [redacted].

[333] **C-0200**, "Scotiabank will win S$481,000,000 from Constitutional Court decision" Hildebrandt en sus trece (June 9, 2017), p. 2.

[334] **C-0204**, Audio of the interview of Antenor José Escalante, Exitosa (June 9, 2017), 9 June 2017 (06:50-07:05); **C-0205**, Transcript of the interview of Antenor José Escalante, Exitosa (June 9, 2017).

[335] **C-0203**, "The Constitutional Court is preparing a ruling that could benefit a banking entity," La República (June 9, 2017); **C-0206**, "Sunat: Possible TC ruling in favor of bank would create a fiscal hole of S/10,000 million," RPP (June 9, 2017), p. 1 ("The attorney general [of SUNAT] added that 'a decision of this type, which lacks legal support, is also counterproductive in a scenario of multiple urgencies and demands of the population because it significantly reduces tax revenues'").

236. The coordination between the Ministry of Economy and Finance and SUNAT increased after the 2017 Leaked Decision emerged.[336] By June 2017, the pressure campaign also involved two state-owned media outlets, "El Perúano" and "TV Perú".[337] "TV Perú" hosted SUNAT's counsel, Francisco Eguiguren and SUNAT's attorney general, José Escalante, in interviews noting how it would be detrimental to the Peruvian State to reimburse Scotiabank Perú the default interest it had paid (under protest) in 2013 and 2014.[338] SUNAT then reposted the interviews on its social media accounts.[339] These and other statements by SUNAT's representatives were later echoed by other media outlets.[340] On June 21, 2017, Mr. Alfredo Thorne, then Minister of Economy and Finance described the 2017 Leaked Decision as "very dangerous", while noting that SUNAT and the Ministry had been "working arduously" on this issue without indicating how the executive could "work arduously" in respect of a matter subject to the jurisdiction of the Constitutional Court.[341] SUNAT subsequently shared the interview on its social media accounts.[342]

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[336] *See* ¶¶ 92-109, 120, 125-138 above.

[337] *See* **C-0213**, "Possible TC ruling would create a fiscal hole of S/10,000 million, "El Perúano (June 10, 2017); **C-0214**, Video of news "Scotiabank won trial over the SUNAT," by TV Perú News (June 11, 2017); **C-0221**, Video of the Interview of Antenor José Escalante (June 16, 2017) (02:00-02:30); **C-0222**, Transcript of the interview of Antenor José Escalante (June 16, 2017). *See also* **C-0089**, Legislative Decree No. 181, Peruvian Publishing Services Company Law (June 12, 1981), art. 3 (setting out that *Editora Perú*, owned by the Peruvian State, is responsible for editing, printing and distributing *inter alia* the "El Perúano" media outlet); **C-0097**, Legislative Decree No. 829, creating the National Institute of Radio and Television of Perú - IRTP (July 5, 1996) art. 2 (establishing that the National Institute of Radio and TV of Perú (IRTP) manages the operation of media outlets owned by the Peruvian State, such as "TV Perú"); **C-0082**, National Institute of Radio and Television of Perú: Organization *National Institute of Radio and Television (IRTP)* (showing that TV Perú has been a State-owned media channel for over 55 years).

[338] **C-0221**, Video of the Interview of Antenor José Escalante (June 16, 2017) (08:30-09:30); **C-0214**, Video of news "Scotiabank won trial over the SUNAT," by TV Perú News (June 11, 2017) (01:50-02:00).

[339] **C-0220**, SUNAT Tweet (June 16, 2017).

[340] *See*, for example, **C-0217**, "TC gives 481 million to Scotiabank," La Nación (June 13, 2017); **C-0211**, "Sunat says that possible failure of the TC could discourage timely payment of taxes", El Comercio (June 10, 2017); **C-0202**, "Sunat: State may lose S/ 10,000 million due to probable ruling in favor of Scotiabank," Gestion (June 9, 2017).

[341] **C-0226**, Video of the interview with Alfredo Thorne (Minister of Economy and Finance), RPP (June 21, 2017) (01:18:35-01:19:40); **C-0227**, Transcript of the interview with Alfredo Thorne (Minister of Economy and Finance), RPP (June 21, 2017). Mr. Thorne later posted this interview on Twitter reaffirming in the description that a decision favouring Scotiabank was of concern and that the Minister of Economy and Finance and SUNAT were "evaluating a response"; **C-0229**, SUNAT Tweet (June 22, 2017) (sharing Mr. Thorne's post).

[342] **C-0229**, SUNAT Tweet (June 22, 2017); **C-0232**, SUNAT Tweet (June 23, 2017).

237. During the subsequent months, several members of the Peruvian Congress publicly threatened the Constitutional Court and accused it of corruption.[343] For example, between June and September 2017: (a) Mr. Justiniano Apaza, a Peruvian congressman, declared that the result of the 2017 Leaked Decision would be "illegal";[344] (b) Ms. Yeni Vilcatoma, a Peruvian congresswoman, announced that "she [would] bring a constitutional complaint against the members of the Constitutional Court, if its ruling [was] favorable to Scotiabank" and that Congress would remain "vigilant";[345] (c) Mr. Jorge Castro, a Peruvian congressman, stated that he did not expect that the Court would issue a decision in favour of Scotiabank, noting that it would "be contrary to the interests of the State" and generate a "massive fiscal and tax loophole";[346] (d) Mr. Alberto Quintanilla, another Peruvian congressman, stated that "a decision in favour of Scotiabank would constitute a betrayal to the State";[347] and (e) yet another congressman, Mr. Wilbert Rozas, publicly called on the Constitutional Court to review its decision so as not to place the country in jeopardy.[348]

238. In the following years, the political interference from high-ranking government officials and members of Congress continued.[349] In 2018, then-President Martín Vizcarra stated to the foreign press that the Government would collect tax debts from "big corporations that owe the State amounts that represent[ed] more than 1% of [Perú's] GDP".[350] He urged the creation of a commission comprised of members of the Government, SUNAT and the judiciary to collect

[343] *See* ¶¶ 96-100, above.

[344] **C-0219**, "Scotiabank v. Sunat," La República (June 16, 2017).

[345] **C-0249**, Audio of the interview of Yeni Vilcatoma, Exitosa (August 25, 2017) (04:13-05:00). *See also* **C-0266**, "Vilcatoma denounces corruption in the TC that affect the interests of the State," Exitosa (October 30, 2017); **C-0254**, "Lawsuit will be filed if TC rules in favor of bank," Exitosa (August 30, 2017); **C-0251**, "If the TC rules in favor of Scotiabank, it will cause millions in damages," Exitosa (August 26, 2017).

[346] **C-0254**, "Lawsuit will be filed if TC rules in favor of bank," Exitosa (August 30, 2017); **C-0257**, "Possible TC ruling in favor of Scotiabank would cause a huge hole in the country," Exitosa (September 13, 2017).

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

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

[349] *See* ¶¶ 101-109, above.

[350] **C-0283**, "Sunat: A commission will be created to resolve disputes with large companies," El Comercio (June 5, 2018) Notice related to the June 2018 televised statement to the nation. *See also*, **C-0279**, President's Televised Address to the Nation (June 4, 2018) Video of televised statement to the nation (05:00 – 05:40).

outstanding taxes.[351] That same year, Peruvian congressman Mr. Roberto Vieira stated that Perú could not "continue to allow bad lawyers to defend the interests of tax-evading companies … [such as] Canadian-owned bank, Scotiabank" because it was "against the interests of the Peruvian State".[352] Later on, in August 2021, then-Minister of Economy and Finance, Pedro Francke Ballvé, stated that the Government had to "work together [with the judiciary]" so "companies like … Scotiabank … pay [their] debts".[353]

239. This targeted political interference of the Constitutional Court from the executive and legislative branches had a noticeable effect on the Court's Justices, as evidenced by numerous private and public admissions by the Justices:

(a) *First*, [redacted] admitted in a meeting with [redacted] that he and other Justices of the Constitutional Court were "uncomfortable" with the intense media attention surrounding Scotiabank Perú's case.[354]

(b) *Second,* in a public opinion published later in July 2017, Justice Ramos condemned the Government's negative interference, which he believed was intended to "guide the result of a decision".[355]

(c) *Third*, in October 2017, Judge Espinosa-Saldaña denounced before the IACHR the threats made by the Peruvian members of congress to the Constitutional Court, emphasizing their apparent intent to interfere with the resolution of the Scotiabank Perú case.[356] In speaking about the decision in the Scotiabank Perú case that had

[351] **C-0283**, "Sunat: A commission will be created to resolve disputes with large companies," El Comercio (June 5, 2018) Notice related to the June 2018 televised statement to the nation. *See also*, **C-0279**, President's Televised Address to the Nation (June 4, 2018) Video of televised statement to the nation (05:00 – 05:40).

[352] **C-0270**, "Large companies owe SUNAT more than 7 billion soles," Exitosa (June 3, 2018).

[353] **C-0321**, "Francke to large tax debtors: We will use all legal means to ensure compliance," El Perúano (August 9, 2021), p. 1.

[354] CWS-[redacted], ¶ 28.

[355] **C-0238**, Carlos Ramos, "The Constitutional Court: Two Decades of Lessons," El Perúano (July 11, 2017), p. 2.

[356] **C-0262**, Video of the Hearing of the Inter-American Court of Human Rights in the case of the Independence of the Constitutional Court of Perú (October 24, 2017) (19:05-20:55; 50:00-50:40), October 24, 2017 (19:48-20:45, 52:00-52:36); **C-0263**, Transcript of the Hearing of the Inter-American Court of Human Rights (October 24, 2017), pp.1-2.

already been "announced", he bemoaned the threat to "judicial independence" and posed the question: "How are we going to guarantee these conditions of non-interference if every time we are about to issue a ruling on an issue that is controversial for certain members of Congress, we are impeached or threatened with impeachment?"[357]

(d) *Fourth*, in [redacted], [redacted] told Scotiabank Perú's legal representatives that, despite the case's "little legal complexity", Scotiabank Perú needed to "have patience" because the Court was waiting for "the right moment" politically to issue the decision.[358]

(e) *Finally*, in a *Hildebrandt* interview published on September 27, 2019, [redacted] that, as a result of the press campaign, the Justices who had voted in favour of the original 2017 Leaked Decision now preferred to defer or abstain from ruling on the case.[359]

240. As Dr. Landa and Professor Neyra explain in their report, the repeated statements by government officials regarding the 2017 Leaked Decision and the statements regarding the Constitutional Court jeopardised the Constitutional Court's independence.[360] Indeed, they explain that government officials breached Peruvian law in seeking to influence the outcome of the Default Interest Amparo.[361]

241. However, while it was clear that there was concerning political interference being exerted on the Constitutional Court, at the time, Scotiabank remained confident that the Constitutional

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[357] **C-0262**, Video of the Hearing of the Inter-American Court of Human Rights in the case of the Independence of the Constitutional Court of Perú (October 24, 2017) (19:05-20:55); **C-0263**, Transcript of the Hearing of the Inter-American Court of Human Rights (October 24, 2017), pp.1-2.

[358] CWS-[redacted] ¶ 50. *See also* **C-0288**, Email from [redacted].

[359] **C-0298**, "I was offered to stay if I voted for Keiko's freedom," Hildebrandt (September 27, 2019), pp. 3-4. [redacted] p. 18.

[360] CER-Landa/Neyra, ¶ 136.

[361] CER-Landa/Neyra, ¶¶ 137, 141-142.

Court would ultimately render an independent judgment and in accordance with the judgment it had already drafted and voted upon. As [redacted], [redacted] had emphasized in meetings that Scotiabank Perú should be patient to allow the political situation to calm down, but never indicated any greater problem with the merits of the case: "nothing made us think that the direction of the decision would change with respect to the draft judgment voted on a year ago."[362]

iv. The Constitutional Court Yields to the Government's Interference and Issues a Final Decision in November 2021 Diametrically Opposed to the 2017 Leaked Decision

242. By September 2021, Justice Carlos Ramos had passed away leaving the Court with only six members.[363] During this time, the mandates of other Justices that had heard Scotiabank Perú's appeal in March 2017 had lapsed and Justice Ledesma—one of the two judges who opposed the original 2017 Leaked Decision—had taken the Presidency of the Court in 2020.[364]

243. As set out at paragraphs 153 to 154 above, on November 9, 2021, the Constitutional Court announced the 2021 Decision without notifying Scotiabank Perú, contrary to its normal practice.[365] The 2021 Decision reversed the 2017 Leaked Decision and rejected the amparo application. The Constitutional Court denied Scotiabank Perú the right to reimbursement of the accrued default interest that it had paid in 2013 and 2014.[366] The Court also took an additional, unforeseen step and barred Scotiabank Perú from submitting a contentious administrative action, contrary to Peruvian law and the binding *Elgo Ríos* precedent.[367] This decision was also *ultra vires*, as the question of whether a plaintiff may file a contentious administrative action under Peruvian law is not for the

[362] CWS-[redacted], ¶ 36.

[363] CER-Landa/Neyra, ¶ 84, fn. 105.

[364] CER-Landa/Neyra, ¶¶ 59, 84, fn. 105.

[365] **C-0342**, Press release of the Constitutional Court, "TC declared Scotiabank's lawsuit against SUNAT and the Tax Court inadmissible" (November 9, 2021), p. 2.

[366] *See* **C-0340**, Judgment of the Plenary Session of the Constitutional Court in Scotiabank Perú S.A.A. v. SUNAT and the Tax Court (Case No. 222-2017-PA/TC), p. 1. *See also* CER-Landa/Neyra, ¶ 150.

[367] **C-0340**, Judgment of the Plenary Session of the Constitutional Court in Scotiabank Perú S.A.A. v. SUNAT and the Tax Court (Case No. 222-2017-PA/TC), ¶¶ 22-23; CER-Landa/Neyra, ¶ 151.

Constitutional Court to decide as it is within the competence of the contentious administrative courts .[368]

244. The Constitutional Court rendered the 2021 Decision with only four Justices in session (and two abstaining), thereby failing to meet the five-Justice session quorum.[369] Only three Justices voted in favour—contrary to the four Justice voting quorum—which the Court purportedly justified by a new Administrative Resolution conveniently adopted just six days earlier in which the Court unilaterally lowered the voting quorum.[370] In issuing this Administrative Resolution, however, the Court exceeded its own jurisdiction, as the voting quorum could only be modified by legislative amendment.[371] Indeed, Justice Blume dissented on the basis that the Constitutional Court's decision was invalid because it did not comply with the Court's own quorum requirements.[372] In an *ex officio* clarification published on December 4, 2021, the Constitutional Court attempted to justify its failure to respect the quorum requirements. However, as Dr. Landa and Professor Neyra explain, the explanation is not well-founded in Peruvian law.[373]

245. The dismissal of Scotiabank Perú's Default Interest Amparo in the 2021 Decision resulted from four years of consistent Government Judicial Interference aimed at deterring the Constitutional Court from issuing the decision it had agreed upon in the 2017 Leaked Decision.[374] In November 2021, Perú finally succeeded in reversing the Constitutional Court's conclusion to obtain the political outcome that it sought. This Government Judicial Interference is the treatment

[368] CER-Landa/Neyra, ¶ 169.

[369] Justices Marianella Ledesma, Manuel Miranda and Eloy Espinosa-Saldaña voted in favor of the decision. This decision was rendered two months after Scotiabank delivered its Notice of Arbitration on 1 September 2021, and just five days after Scotiabank participated in amicable consultation meetings with Perú; CWS-[redacted], ¶ 56-58; CER-Landa/Neyra, ¶ 196.

[370] **C-0333**, Administrative Resolution No. 205-2021-P/TC of the Plenary Session of the Constitutional Court (November 3, 2021), p. 2.

[371] CER-Landa/Neyra, ¶ 105.

[372] **C-0340**, Judgment of the Plenary Session of the Constitutional Court in Scotiabank Perú S.A.A. v. SUNAT and the Tax Court (Case No. 222-2017-PA/TC), p. 22.

[373] CER-Landa/Neyra, ¶¶ 197-200; **C-0356**, Order of the Constitutional Court in Case No. 0222-2017-PA/TC (November 30, 2021), p. 1-2. This "clarification" asserted that the majority's decision was based on case law, without referencing any cases, and that the Court was entitled to ignore its own quorum requirements to "administer justice."

[374] *See* ¶¶ 92-138, 153-159.

that was unique to Scotiabank and not applied to domestic plaintiffs raising similar issues before the Constitutional Court as we shall come on to see.

246. Scotiabank only has access to limited information regarding Perú's Government Judicial Interference and improper interactions between government officials and the Constitutional Court. Accordingly, Scotiabank reserves the right to update and amend the "treatment" that gives rise to its claim under Article 803 of the FTA as further information becomes available to Scotiabank regarding the interactions between the Constitutional Court and other branches of the Government.

III. Second Element: Peruvian Investors with Default Interest Amparo Claims Before the Constitutional Court are in "Like Circumstances" to Scotiabank Perú

247. The second step in establishing a claim under Article 803(1) is to identify investors or investments "in like circumstances". The "like circumstances" requirement involves identifying Peruvian investors who have been exposed to similar excessive default interest due to the delay of SUNAT and the Tax Court and that challenged the constitutionality of such default interest through amparo claims at the Constitutional Court. In the present case, during the period when Scotiabank Perú was pursuing its Default Interest Amparo, a number of Peruvian investors were bringing identical claims before the Constitutional Court but such claims were not subject to governmental interference as was the case with Scotiabank Perú.[375] Those investors were situated such that they could have been (but, as discussed in Section IV, were not) exposed to the same type of treatment that Scotiabank Perú received. Accordingly, Peruvian investors with similar *amparo* claims challenging the unconstitutional application by the State of default interest on tax assessments are sufficiently comparable and are in "like circumstances" for purposes of Article 803 of the FTA.

248. Scotiabank elaborates on these points below.

A. The "Like Circumstances" Analysis Requires a Fact-Specific Inquiry That Must be Undertaken in Accordance with the Purpose of the National Treatment Standard

249. In order to interpret the expression "in like circumstances", the Tribunal must examine the ordinary meaning of these words, in their context and in light of the object and purpose of Article

[375] *See* ¶¶ 110-114.

803.[376] This is a fact-specific analysis.[377] As the *Pope & Talbot* tribunal explained, "[b]y their very nature, 'circumstances' are context dependent and have no unalterable meaning across the spectrum of fact situations."[378]

250. ***Ordinary meaning requires a fact-specific analysis.*** Tribunals have found that the ordinary meaning of the word "circumstances" requires "an examination of the surrounding situation in its entirety" which should focus on the "'circumstances' in which the treatment was accorded".[379] As Professor Andrea Bjorklund stated, "[t]he appropriate comparison … [is] between the like-circumstanced *treatment* accorded the … investors[], rather than between the like-circumstanced … investors[] themselves."[380] The *Mercer v Canada* tribunal explained further that the question of whether the "treatment is in 'like circumstances' with any comparator [must be determined] with respect to the particular measures in question… [including] 'the rationale for the measure and its policy objective.'"[381] Tribunals also take into account the legal context in which the notion is applied, including the investment-liberalizing objectives of the applicable treaty.[382] Tribunals have affirmed that this analysis must be undertaken autonomously from restrictive trade law considerations.[383]

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[376] **CL-0053**, *Vienna Convention on the Law of Treaties* (1969), art. 31(1).

[377] **CL-0126**, *SD Myers, Inc v Government of Canada* (UNCITRAL), Partial Award, 13 November 2000 ("***SD Myers***"), ¶¶ 244-251; **CL-0133**, *UPS v. Canada*, ¶ 87.

[378] **CL-0123**, *Pope & Talbot Inc v. The Government of Canada (UNCITRAL),* Partial Award, 10 April 2001 ("***Pope & Talbot***"), ¶ 75.

[379] **CL-0081**, *ADM v. Mexico*, ¶ 197 (looking to "[t]he dictionary meaning of the word 'circumstance'", which "refers to a condition, fact, or event accompanying, conditioning, or determining another, or the logical surroundings of an action" (referring to **CL-0116**, *Methanex Corporation v United States of America* (UNCITRAL), Final Award, 3 August 2005) ("***Methanex***"), Part IV, Chapter B, ¶ 37)).

[380] **CL-0078**, *Bjorklund*, p. 541 (emphasis in the original).

[381] **CL-0113**, *Mercer International Inc v. Government of Canada* (ICSID Case No ARB(AF)/12/3,) Final Award, 6 March 2018, ¶¶ 7.20-7.21 (quoting **CL-0008**, *Cargill, Incorporated v United Mexican States* (ICSID Case No ARB(AF)/05/2) Award, 18 September 2009 ("***Cargill v. Mexico***"), ¶ 206).

[382] **CL-0121**, *Olin Holdings Ltd v. Libya* (ICC Case No 20355/MCP), Final Award, 25 May 2018, ¶ 202 ("***Olin Holdings***") (quoting **CL-0132**, *Total v. Argentina*, ¶ 210); **CL-0123**, *Pope & Talbot*, ¶ 77 (agreeing with the claimant that the legal context includes the "investment-liberalizing objectives" of the treaty at issue, and with Canada that the legal context includes "the entire background of its disputes" concerning the area of trade at issue); **CL-0126**, *SD Myers*, ¶ 250.

[383] Article 803(1) refers to situations where investors find themselves in "like circumstances". The language is not restricted to "like products" as it is in other trade-liberalizing agreements. **CL-0114**, *Merrill & Ring*, ¶¶ 86-87

251. ***Object and purpose requires a flexible approach to identifying adequate comparators.*** Tribunals and doctrinal writers have highlighted that the object and purpose of the national treatment standard is to prevent the unjustified discrimination of foreign investors, cautioning against adopting too narrow of an approach to identifying adequate comparators.[384] As the *Methanex* tribunal found, "it would be as perverse to ignore identical comparators if they were available and to use comparators that were less 'like', as it would be perverse to refuse to find and to apply less 'like' comparators when no identical comparators existed."[385] Similarly, Professor Kenneth Vandevelde has observed that:

> The purpose of the like circumstances requirement is not to permit the host state to engage in discriminatory action whenever no sufficiently close comparator exists … [r]ather, [it] is to prevent unjustified discriminations … The like circumstances test supports the policy behind the nondiscrimination provisions by attempting to remove from consideration comparators whose different treatment was based on legitimate, nondiscriminatory policies, but it was not intended to provide a technical defense for adverse treatment resulting from a discriminatory motive.[386]

252. ***Tribunals focus on specific circumstances in light of purpose of national treatment.*** Numerous tribunals have exemplified this approach to analyzing "like circumstances" by focusing on the circumstances in which the treatment was accorded and the purpose of the national treatment standard. For example:

(a) In *Occidental v Ecuador*, the tribunal analyzed whether exporters to whom a tax scheme was applied were in "like circumstances" with the foreign investor. The

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(cautioning against the use of WTO/GATT law when analyzing "like circumstances"); **CL-0084**, *Bayindir Insaat Turizm Ticaret Ve Sanayi A.S. v. Islamic Republic of Pakistan (I)* (ICSID Case No ARB/03/29) Award, 27 August 2009 ("***Bayindir***"), ¶ 389 (affirming that the national treatment clause should be interpreted autonomously from trade law); **CL-0120**, *Occidental Exploration and Production Company v. Republic of Ecuador* (LCIA Case No. UN3467), Final Award, 1 July 2004, ("***Occidental v. Ecuador***"), ¶¶ 174-175 (finding that "the purpose of national treatment in this dispute is the opposite of that under the GATT/WTO").

[384] *See* **CL-0125**, *Dolzer & Schreuer*, p. 200 ("noting that tribunals have been cautious not to construe the basis of comparison […] too narrowly" and that "'like circumstances' should be interpreted broadly in order to open the way for a full review of the measure under the national treatment clause").

[385] **CL-0116**, *Methanex*, Part IV, Chapter B, ¶ 17.

[386] **CL-0109**, Kenneth J. Vandevelde, *Bilateral Investment Treaties* (Oxford, Oxford University Press, 2010) ("***Vandevelde***"), s. 7.2.5.

claimant argued that Ecuador breached the national treatment obligation because a number of local companies involved in the export of other goods, such as flowers, mining and seafood products, received VAT refunds that it did not receive as a foreign investor.[387] Ecuador argued that "'in like situations' can only mean that all companies in the same sector are to be treated alike."[388] However, the tribunal disagreed, holding that "'in like situations' cannot be interpreted in the narrow sense … by addressing exclusively the sector in which [a] particular activity is undertaken."[389] In the *Occidental* case, the relevant treatment (*i.e.*, the tax scheme granting VAT refunds) was applied to all exporters, regardless of their sector. The tribunal observed that "the purpose of national treatment in this dispute … is to avoid exporters being placed at a disadvantage in foreign markets because of the indirect taxes paid in the country of origin".[390] As a result, the tribunal found that all exporters were appropriate comparators for the purpose of the "like circumstances" analysis.

(b) In *Olin v Libya*, the tribunal examined whether two local investors that were subject to an expropriation order were in "like circumstances" with the foreign investor. The claimant alleged that the respondent failed to accord national treatment in executing the expropriation order because two local investors had received an express exemption from the expropriation order, whereas it had not. In undertaking the "like circumstances" analysis, the tribunal considered the geographic location of the local investors as a factor, among others, given that the expropriation order targeted manufacturers operating within a specific parcel of land.[391] On this basis, it found that the two local investors put forward by the claimant that were also

[387] **CL-0120**, *Occidental v. Ecuador*, ¶ 168.

[388] **CL-0120**, *Occidental v. Ecuador*, ¶ 171.

[389] **CL-0120**, *Occidental v. Ecuador*, ¶¶ 173-174.

[390] **CL-0120**, *Occidental v. Ecuador*, ¶ 175.

[391] **CL-0121**, *Olin Holdings*, ¶¶ 93, 130, 207.

subject to (albeit ultimately exempt from) the expropriation order were adequate domestic comparators for the purposes of the "like circumstances" test.[392]

(c) In *Apotex v United States*, the tribunal analyzed whether three local investors that manufactured drugs in the U.S. were in "like circumstances" with the foreign investors. The claimants operated a U.S. company that sold drugs on the U.S. market that were produced at two of their Canadian facilities. The claimants alleged that they were discriminated against in the application of an "Import Alert" by the U.S. Food and Drug Administration (FDA) that subjected the claimants' Canadian products to detention or refusal at the U.S. border.[393] The claimants proposed as comparators three U.S.-based drug manufacturing companies that had received FDA warning letters.[394] The respondent contended that none of the domestic comparators identified by the claimants were in "like circumstances" because they were not bound by the same legal and regulatory regime applicable to foreign drug producers and could therefore never have been subject to the Import Alert.[395] The tribunal agreed with the respondent that the question of whether the claimants were subject to the same legal regime governing the impugned measure was important.[396] Accordingly, the tribunal found that the proposed domestic comparators were not in "like circumstances" because "the only domestic comparators proposed by the Claimants could never have been subject to any similar measure".[397]

(d) Likewise, in *Bilcon v Canada* the tribunal analyzed whether local investors that sought regulatory approval for their mining operations under Canada's environmental impact assessment scheme were in "like circumstances" with the claimants. The claimants alleged that Canada applied a more rigorous evaluative

[392] **CL-0121,** *Olin Holdings*, ¶ 208.

[393] **CL-0080**, *Apotex Holdings Inc. and Apotex Inc. v. United States of America* (ICSID Case No. ARB(AF)/12/1) Award, 25 August 2014 ("***Apotex v. USA***"), ¶¶ 2.15, 2.30-2.31.

[394] **CL-0080**, *Apotex v. USA*, ¶¶ 8.25-8.26.

[395] **CL-0080**, *Apotex v. USA*, ¶¶ 8.16, 8.30-8.31.

[396] **CL-0080**, *Apotex v. USA*, ¶¶ 8.43, 8.53.

[397] **CL-0080**, *Apotex v. USA*, ¶ 8.57.

> standard in their environmental impact assessment than it did vis-à-vis local investors.[398] In response, Canada alleged that the treatment in the environmental assessments of the local investors identified by the claimants was not accorded in "like circumstances" due to differences in the underlying factual circumstances of each case, such as zoning, environmental impact, geographical scope, federal jurisdiction and public opposition to the projects, among others.[399] Canada suggested that only projects subject to a joint federal-provincial review panel and local opposition were comparable projects.[400] The majority of the tribunal rejected Canada's "narrow range of possible comparators."[401] It agreed that many of the comparison cases brought forward by the investors were "sufficiently" similar because they were subject to similar environmental assessments.[402] It found that the "the operative word in Article 1102 is 'similar', not 'identical'" and that "[i]n addition to giving the reasonably broad language of Article 1102 its due, a Tribunal must also take into account the objects of NAFTA, which include … 'to increase substantially investment opportunities in the territories of the Parties'."[403]

253. In determining whether domestic investors are in "like circumstances", the Tribunal must primarily be guided by the challenged measure(s) in defining the scope of domestic investors, based on a fact-specific examination of which domestic investors could have been subject to a risk of similar treatment stemming from similar measures. In undertaking this analysis, the Tribunal must respect the object and purpose of the FTA by not defining the comparator group too narrowly.[404]

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[398] **CL-0003**, *Bilcon*, ¶ 614.

[399] **CL-0003**, *Bilcon*, ¶¶ 654-681.

[400] **CL-0003**, *Bilcon*, ¶ 690.

[401] **CL-0003**, *Bilcon*, ¶ 691.

[402] **CL-0003**, *Bilcon*, ¶¶ 695-696.

[403] **CL-0003**, *Bilcon*, ¶ 692.

[404] **CL-0120**, *Occidental v. Ecuador*, ¶¶ 173-174. *See* **CL-0125**, *Dolzer & Schreuer*, p. 200.

B. Peruvian Investors Challenging the Application of Default Interest at the Constitutional Court are in "Like Circumstances" with Scotiabank Perú and are Appropriate Comparators

254. Determining an appropriate comparator group requires that the Tribunal identify one or more domestic investors subject to comparable or "like" risk of treatment similar to the treatment that Scotiabank challenges in this Arbitration. In this case, the impugned treatment encompasses the Government Judicial Interference and the Constitutional Court yielding to that interference in ultimately dismissing Scotiabank Perú's Default Interest Amparo in the 2021 Decision. Accordingly, the universe of Peruvian investors in "like circumstances" with Scotiabank Perú is the general class of taxpayers who were challenging the State's application of accrued default interest beyond the maximum legal term through *amparo* actions at the Constitutional Court at the same time as Scotiabank Perú was pursuing its Default Interest Amparo.

255. The appropriate group of Peruvian investors in "like circumstances" to Scotiabank Perú is derived in the following way.

256. *First,* to obtain all cases similar to Scotiabank Perú's Default Interest Amparo, Dr. Landa and Professor Neyra have used the Constitutional Court database available online.[405] This database contains all published decisions of the Constitutional Court, covering more than 10,000 rulings since 1996.[406] From that database, a search was undertaken for all cases in which "default interest" was the central issue of the dispute, such as in the Default Interest Amparo.[407]

257. *Second*, to establish whether the comparable group involves investors subject to a risk of similar treatment, Dr. Landa and Professor Neyra delimited the comparable cases to those that were submitted to the Constitutional Court after January 23, 2017, when Scotiabank Perú's Default Interest Amparo reached the Constitutional Court.[408] Furthermore, the experts have applied a cut-off date (February 7, 2023) for the comparable group – the date that the Constitutional Court

[405] CER-Landa/Neyra, ¶ 81; **C-0084**, Screenshot of the "General search" of the Constitutional Court jurisprudence.

[406] CER-Landa/Neyra, ¶ 81, fn. 96. *See* **C-0084**, Screenshot of the "General search" of the Constitutional Court jurisprudence.

[407] CER-Landa/Neyra, ¶ 81.

[408] CER-Landa/Neyra, ¶ 82.

published *Maxco*, a binding constitutional precedent, ruling that the application of accrued default interest beyond the maximum legal term was unconstitutional.[409]

258. Therefore, the appropriate time period considered for the purposes of determining the group of domestic investors in "like circumstances" is between January 23, 2017 and February 7, 2023.[410] This time period corresponds to approximately the same period of time when Scotiabank Perú was before the Constitutional Court for its Default Interest Amparo (January 2017 to November 2011), and therefore reflects the time period when other litigating parties with similar claims were theoretically exposed to the risk of similar treatment regarding interference by the Peruvian Government with the Constitutional Court.

259. In this way, the experts identified a class of sixty-eight cases involving different taxpayers who were challenging before the Constitutional Court the State's application of default interest beyond the maximum legal term.[411] The first such case was brought in 2008. Applying the relevant time-frame, the number of possible comparators is reduced to sixty-two.[412]

260. *Third*, the Claimant has identified based on publicly available information which of the sixty-two comparable cases involved domestic investors. The Claimant treats as "domestic": (a) individual citizens with Peruvian nationality, and (b) corporations incorporated in Perú and majority-owned by Peruvian shareholders, as of the date the plaintiffs filed their *amparo* action.[413] Through this filtering exercise, the list of relevant comparators is reduced from sixty-two total

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[409] CER-Landa/Neyra, ¶ 83.

[410] This time period also coincides with the period in time in which the same six of seven Justices that decided Scotiabank Perú's case were sitting at the Court. CER-Landa/Neyra, ¶ 84 ([redacted] After June 2022, the Court's composition changed following the election and swearing in of new Justices at the Court: CER-Landa/Neyra, ¶ 84.

[411] As Dr. Landa and Professor Neyra explain, this group excludes disputes in which default interest was challenged as an automatic consequence of a challenge to the constitutionality of the underlying tax, as the legal issue in such cases is different from Scotiabank Perú's Default Interest Amparo. CER-Landa/Neyra, ¶ 80.

[412] CER-Landa/Neyra, Annex II, Tab 1, Universe of Comparable Cases showing the comparable cases irrespective of nationality. The experts also examined the five previous cases not subject to this temporal delimitation and found that they confirm the conclusions of their report. *See* CER-Landa/Neyra, ¶ 82.

[413] CER-Landa/Neyra, ¶¶ 86-88. The Claimant used a publicly available registry and shareholding information, annual report, and company websites that expressly refer to the plaintiffs' Peruvian nationality, among others. See, **C-0100**.

cases to forty cases involving Peruvian investors relevant to the inquiry under Article 803 of the FTA ("**Domestic Comparators**", listed as Annex II to the Expert Report of Dr. Landa and Professor Neyra).[414]

IV. Third Element: Scotiabank's Treatment was Less Favourable than the Treatment Accorded to Peruvians in Like Circumstances

261. Once a group of adequate comparators is identified, the Tribunal must then compare the treatment granted by the host State to the comparators with the treatment afforded to the protected investor. The less favourable treatment may be attributable directly or indirectly to the nationality of the investor or investment, *i.e.*, a measure can be openly linked to nationality (*de jure* discrimination) or neutral on its face but with adverse effects felt by the foreigner (*de facto* discrimination).[415]

262. None of the Domestic Comparators were subjected to the same or remotely similar treatment to that which Scotiabank Perú received. Accordingly, for purposes of Article 803 of the FTA, Scotiabank Perú was treated less favourably than the Domestic Comparators and Perú is therefore liable for a breach of the FTA. Below, Scotiabank first addresses the legal standard applicable to the examination of whether Scotiabank Perú received "treatment no less favourable" than the Domestic Comparators. Scotiabank then explains that Scotiabank Perú indeed received less favourable treatment. Finally, Scotiabank observes that there is no rational domestic policy to which Perú can cite for treating Scotiabank less favourably.

A. The Legal Standard for Measuring "Treatment No Less Favourable"

i. Comparing the treatment accorded is an objective test that analyzes effect, not intent

263. The test for determining less favourable treatment is an objective test, which requires the Tribunal to focus on whether the "effect" of the State's conduct creates a disproportionate adverse

[414] Annex II, Tab 2: Domestic Comparators, CER-Landa/Neyra, ¶ 88.

[415] **CL-0081**, *ADM v. Mexico*, ¶ 193 (noting that "[*de jure*] measures […] on their face treat entities differently, whereas [*de facto*] measures […] are neutral on their face but […] result in differential treatment"); **CL-0132**, *Total v. Argentina*, ¶ 211.

impact on the foreign investor.[416] The treatment of the investor must not only be different but must "*in fact* ha[ve] been a less favorable treatment".[417] Importantly, a claimant does not need to establish discriminatory intent in order to prevail on a national treatment claim.[418]

264. The burden of proof is shifted to the respondent where the claimant has submitted *prima facie* evidence of a national treatment violation.[419]

265. ***Objective test does not require proof of discriminatory intent.*** The objective test was set out in *Feldman v Mexico*.[420] In *Feldman*, the claimant alleged that Mexico's tax law that denied tax rebates to the local tobacco exporter owned by the claimant breached the national treatment standard. The tax law did not discriminate against foreign investment on its face, but it was applied in such a way that the foreign investor was treated differently than the domestic companies. The tribunal found that Mexico's denial of tax rebates amounted to a breach of the national treatment standard. It observed that "it is not self-evident … that any departure from national treatment must be *explicitly* shown to be a result of the investor's nationality … [because] requiring a foreign investor to prove that discrimination is based on his nationality could be an insurmountable burden to the Claimant, as that information may only be available to the government."[421] The tribunal

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[416] The majority of tribunals have endorsed the objective test. *See* **CL-0126**, *SD Myers*, ¶ 254 ("a practical impact is required […] not merely a motive or intent […]"); **CL-0123**, *Pope & Talbot*, ¶ 78 (holding that "[d]ifferences in treatment will presumptively violate [the national treatment standard in NAFTA]"); **CL-0029**, *International Thunderbird Gaming Corporation v. United Mexican States* (UNCITRAL), Arbitral Award, 26 January 2006, ¶ 177 (finding that it is not necessary that a claimant "show separately that the less favourable treatment was motivated because of nationality"); **CL-0093**, *Corn Products v. Mexico*, ¶ 138 (noting that "intention to discriminate is not a requirement for a breach [of the national treatment obligation in NAFTA]"); **CL-0075**, *Alpha Projektholding GmbH v. Ukraine* (ICSID Case No ARB/07/16) Award, 8 November 2010, ¶ 427 ("***Alpha v. Ukraine***") (endorsing **CL-0126**, *SD Myers*).

[417] **CL-0120**, *Occidental v. Ecuador*, ¶ 177 (emphasis added).

[418] **CL-0119**, Noah Rubins and N. Stephan Kinsella, *International Investment, Political Risk and Dispute Resolution* (New York, Oceana Publications, Inc: 2005), p. 226 ("State measures may violate non-discrimination provisions whether intentional or well-meaning but discriminatory in effect"); **CL-0078**, *Bjorklund*; **CL-0125**, *Dolzer & Schreuer*, p. 197 ("[t]ribunals generally favour an objective approach that looks at the consequences of a particular measure and not at discriminatory intent"); **CL-0079**, *Newcombe and Paradell*, pp. 152, 175 ("the investor need not demonstrate protectionist intent or motive"); **CL-0088**, *Lim, Ho and Paparinskis*, Chapter 13, Section 2.2 ("intent is neither sufficient nor necessary").

[419] **CL-0112**, *Marvin Roy Feldman Karpa v. United Mexican States* (ICSID Case No. ARB(AF)/99/1), Award, 16 December 2002 ("***Feldman***"), ¶¶ 177-178.

[420] **CL-0112**, *Feldman*, ¶¶ 177-178.

[421] **CL-0112**, *Feldman*, ¶¶ 181, 183.

found that "by its terms [Article 1102 of NAFTA] suggests that it is sufficient to show less favorable treatment for the foreign investor than for domestic investors in like circumstances."[422] In the absence of evidence to the contrary, the tribunal drew adverse inferences to reach the conclusion that the less favourable treatment was a result of the claimant's nationality.

266. The *Occidental v Ecuador* tribunal did not require any proof of a discriminatory motive or intent (whether express or inferred) in its finding of a breach of the national treatment standard. In analyzing the less favourable treatment accorded to the claimant, it acknowledged that the differential treatment was not the result of an intent to discriminate against the foreign investor, but rather the result of the application of a differential tax policy that did not have a legitimate regulatory justification.[423] The tribunal stated that it was "convinced that [the application of less favourable treatment] has not been done with the intent of discriminating against foreign-owned companies."[424] Despite the lack of proof of express or inferred intent, the tribunal concluded that there was a violation of the national treatment standard.

267. Other tribunals have more closely followed *Feldman* by inferring or presuming the discriminatory intent on a national treatment claim. In *Bilcon v Canada*, the tribunal affirmed that a national treatment claim "does not require a demonstration of discriminatory intent". In *Bilcon*, the tribunal found that the claimant satisfied the *prima facie* test because the difference in treatment accorded by Canada in conducting the environmental impact assessment "amounted to unequal and unfavorable treatment of Bilcon."[425] Similarly, the *Bayindir v Pakistan* tribunal rejected the requirement that a claimant must prove intent, stating that "a showing of discrimination [against] an investor who happens to be a foreigner is sufficient."[426]

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[422] **CL-0112**, *Feldman*, ¶ 181.

[423] **CL-0120**, *Occidental v. Ecuador*, ¶¶ 141-143 (noting that the Supreme Court of Ecuador had ruled that the imposition of VAT depended not on the source of the goods, but rather on their final destination, ruling out any relevant regulatory justification based on the type or source of goods).

[424] **CL-0120**, *Occidental v. Ecuador*, ¶ 177.

[425] **CL-0003**, *Bilcon*, ¶¶ 716, 718-719.

[426] **CL-0084**, *Bayindir*, ¶ 390 (note that the tribunal did not find a breach of the national treatment standard in this case).

268. ***Even where discriminatory intent is proven, the focus is on differential effect.*** Even where tribunals have found both differential effect and discriminatory intent, they have underscored the importance of effect, rather than intent. For example, in *Corn Products v Mexico*, despite finding that the claimant was treated differently because of its nationality, the tribunal noted that proof of discriminatory intent was not required to sustain the claim.[427] Likewise, the *ADM v Mexico* tribunal, in addition to finding that the tax measure showed discriminatory intent, acknowledged that previous tribunals have focused on the "measure's adverse effects on the relevant investors … rather than on the intent of the Respondent State".[428]

269. ***Few tribunals have endorsed a subjective standard – they should be disregarded.*** While several tribunals have endorsed a higher, subjective standard that requires discriminatory intent, these tribunals are in the minority.[429] For example, the *Loewen v USA* tribunal stated that the national treatment obligation relates only to "nationality-based discrimination and … it proscribes only demonstrable and significant indications of bias and prejudice on the basis of nationality , of a nature and consequence likely to have affected the outcome of the trial."[430] This view was echoed by the *Gramercy Funds* tribunal in its finding that the national treatment standard only protected against "nationality-based discriminatory measure[s]".[431]

270. Even in those cases where the tribunal held that the less favourable treatment must be motivated, at least inferentially, by nationality-based discrimination, doctrinal writers have commented that the best way to analyze the element of discriminatory motive is by reference to

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[427] **CL-0093**, *Corn Products v. Mexico*, ¶¶ 137-138.

[428] **CL-0081**, *ADM v. Mexico*, ¶¶ 209-211.

[429] *See* ¶ 263 and cases cited therein.

[430] **CL-0130**, *The Loewen Group, Inc and Raymond L Loewen v. United States of America* (ICSID Case No ARB(AF)/98/3) Final Award, 26 June 2003, ¶ 139. In *Loewen*, the claimants alleged that a Mississippi trial court, "by admitting extensive anti-Canadian and pro-American testimony and prejudicial counsel comment," violated the national treatment standard. The tribunal found that the test failed on the "like circumstances" analysis, yet its later reasoning suggests that it would have found such discriminatory intent since it concluded that the Mississippi jury trial was a "disgrace" and a "miscarriage of justice". See also, ¶¶ 39, 54, 119 and 140.

[431] **CL-0100**, *Gramercy Funds Management LLC and Gramercy Perú Holdings LLC v. Republic of Perú* (ICSID Case No UNCT/18/2) Final Award, 6 December 2022, ¶¶ 1238-1239. *See also,* **CL-0133***, UPS v. Canada*, ¶ 177 (similarly suggesting in obiter dicta that the appropriate question would be whether the disparate treatment suggested some nationality-based motivation).

the purpose of the measure.[432] Accordingly, in undertaking the objective analysis of the less favourable treatment, the Tribunal should analyze whether the nexus to nationality is either apparent from an objective assessment of the measure or can be inferred because the host State is unable to justify the differential treatment.

ii. The Level of Treatment to be Accorded is the Best Treatment Accorded to Domestic Comparators

271. In comparing the treatment granted by the host State to the comparators with the treatment afforded to the protected investor, the yardstick for the standard of treatment is the best level of treatment afforded to any one national in like circumstances, even if not all similarly situated domestic investors are provided comparably favourable treatment.[433]

272. Tribunals have affirmed this approach with respect to international investment agreements with similar wording to the FTA. For example:

(a) The *Pope & Talbot* tribunal, in interpreting NAFTA Article 1102, found that the words "no less favorable" meant "equivalent to, not better or worse than, the best treatment accorded to the comparator."[434] It affirmed that the national treatment standard granted "the right to treatment equivalent to the 'best' treatment accorded to domestic investors or investments in like circumstances."[435] The *Archer Daniels Midlands* tribunal likewise found that "[the investor] [is] entitled to the best level of treatment available to any other domestic investor … operating in like circumstances".[436]

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[432] **CL-0079**, *Newcombe and Paradell*, p. 175.

[433] *See* **CL-0081**, *ADM v. Mexico*, ¶ 205 ("[the investor] [is] entitled to the best level of treatment available to any other domestic investor […] operating in like circumstances").

[434] **CL-0123**, *Pope & Talbot*, ¶¶ 41-42. *See also*, **CL-0079**, *Newcombe and Paradell*, p. 187 (noting that the ruling by the *Pope & Talbot* tribunal is "consistent with the purpose of protecting the individual foreign investor or investment from injury caused by nationality-based discrimination" otherwise the State could accord super-preferential treatment to a national champion, while using less favourable treatment accorded to other domestic investors as a yardstick).

[435] **CL-0123**, *Pope & Talbot*, ¶¶ 41-42.

[436] **CL-0081**, *ADM v. Mexico*, ¶ 205. *See also* **CL-0133**, *UPS v. Canada*, ¶¶ 59-60 (noting that "[a] violation is not mitigated by existence of discrimination against other domestic investors and investments as well as against foreign

(b) In *Olin v Libya*, the tribunal rejected the respondent's arguments that Olin had received treatment more favourable than that which Libya had accorded to certain domestic investors whose buildings Libya had destroyed and whose occupants Libya had expelled therefrom, whereas Olin's building was one of the few buildings that was left standing after the execution of the expropriation order.[437] Indeed, the tribunal placed no weight on Libya's arguments, and instead focused its analysis on the fact that Olin had, in effect, received less favourable treatment than the two proposed domestic comparators, which had been expressly exempt from the expropriation order.[438] In the tribunal's assessment, the fact that Olin's factory was not ultimately demolished, even though some domestic investors' factories had been, did not detract from the fact that Libya had accorded more favourable treatment to other domestic comparators.[439]

273. Other tribunals have questioned whether "no less favourable" means that the investor is entitled to the best treatment afforded to domestic investors, or simply the average treatment afforded to a group of similarly-situated local investors or treatment no less favourable than any one domestic investor received. For example, the *Feldman* tribunal noted that the NAFTA national treatment provision is "on its face unclear as to whether the foreign investor must be treated in the most favorable manner provided for any domestic investor".[440] Nonetheless, this lesser than the best treatment afforded to domestic investors standard has not been widely endorsed by investment tribunals.[441]

274. In conclusion, in determining whether the treatment accorded to Scotiabank was less favourable than that which Perú accorded to the Domestic Comparators, the Tribunal must adopt an objective analysis to determine whether the "effect" of the State's conduct generated treatment

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investors or investments", finding that the national treatment obligation required "an effective parity" between domestic and foreign investors which prohibited a State from granting more favourable treatment to a domestic investor, even if some local entities also received less favourable treatment).

[437] **CL-0121**, *Olin Holdings*, ¶¶ 188-190, 211.

[438] **CL-0121**, *Olin Holdings*, ¶¶ 211-215.

[439] **CL-0121**, *Olin Holdings*, ¶ 211.

[440] **CL-0112**, *Feldman*, ¶¶ 185.

[441] *See* **CL-0079**, *Newcombe & Paradell*, pp. 186-187; **CL-0078**, *Bjorklund*, pp. 554-555.

that was less favourable than the best treatment accorded to the Domestic Comparators. Scotiabank would also satisfy the more restrictive, subjective standard, requiring a showing of discriminatory intent in the treatment accorded by Perú, should the Tribunal apply that subsidiary standard, as described above in subsection i and further addressed in the next section. In terms of the level of "treatment" to which Scotiabank is entitled, even if the Tribunal were to adopt a lower standard than the "best treatment" accorded to the Domestic Comparators, Perú would still fall afoul of Article 803 of the FTA because—as also discussed next—none of the Domestic Comparators received treatment remotely similar to Scotiabank Perú.

B. Perú Accorded Scotiabank Perú "Treatment Less Favourable" Than That Which it Accorded to the Domestic Comparators

275. In the subsection below, Scotiabank demonstrates that the treatment faced by Scotiabank Perú was not replicated across any of the Domestic Comparators. Accordingly, Perú treated Scotiabank Perú less favourably than Domestic Comparators, giving rise to a breach of Article 803 of the FTA. Finally, Scotiabank sets out that Perú has the burden of justifying its less favourable treatment, and explains that, in all events, there can be no reasonable justification for Perú's Government Judicial Interference with Scotiabank Perú's Default Interest Amparo before the Constitutional Court.

276. Perú accorded Scotiabank Perú less favourable treatment in several different ways, each of which independently and collectively give rise to a breach of Article 803 of the FTA.

i. Perú Breached Article 803 of the FTA When the Constitutional Court Leaked the 2017 Leaked Decision

277. Perú treated Scotiabank Perú less favourably than Domestic Comparators when the Constitutional Court gave in to pressure from non-judicial government officials or decided independently to release the 2017 Leaked Decision. In none of the other default interest *amparo* cases brought by the Domestic Comparators did the Constitutional Court leak an unsigned, final draft of a judgment before ultimately rendering the decision. The leak of an unissued judgment from a court constitutes "less favourable" treatment because – by publicly revealing the anticipated outcome of a case considered politically sensitive before a final judgment was rendered – Perú

created the opportunity (as in fact materialised here) for State and non-State actors to influence and change the outcome.[442]

278. As discussed above, in [redacted] following the hearing on the Default Interest Amparo, [redacted] revealed that the Constitutional Court was receiving threats from government officials that funding to build new institutional headquarters for the Court would be pulled if the Court came out in Scotiabank Perú's favour.[443] Scotiabank is unaware of the extent of the Government's further interference and contacts with the Constitutional Court regarding Scotiabank Perú's Default Interest Amparo in the months immediately following the March 2017 hearing. Yet, it cannot be disputed that in June 2017, the Constitutional Court leaked a version of the decision in the Scotiabank Perú case.[444]

279. The 2017 Leaked Decision showed that the Constitutional Court had already decided the case in a Plenary session with four votes in favour of granting Scotiabank Perú's *amparo* claim.[445] As described by Dr. Landa and Professor Neyra, "[i]t was a final draft decision, pending only the signatures of the justices who had already voted in favour of it, and the incorporation of the individual votes of the two justices who expressed differences with the majority vote."[446] The experts go on to explain that the 2017 Leaked Decision was fully consistent with contemporaneous Constitutional Court rulings in comparable cases, in which the Court held that the application of accrued default interest beyond the legal term was unconstitutional.[447]

280. As Dr. Landa and Professor Neyra explain further, there have only been a handful of Constitutional Court cases in the last three decades where an unsigned decision was improperly leaked before being formally issued.[448] As they point out, all of those cases were highly political

[442] *See* CER-Landa/Neyra, ¶ 117.

[443] CWS-[redacted], ¶ 15-16.

[444] **C-0200**, "Scotiabank will win S$481,000,000 from Constitutional Court decision" Hildebrandt en sus trece (June 9, 2017), p. 2.

[445] **C-0200**, "Scotiabank will win S$481,000,000 from Constitutional Court decision" Hildebrandt en sus trece (June 9, 2017), p. 2.

[446] CER-Landa/Neyra, ¶ 112.

[447] CER-Landa/Neyra, ¶ 152.

[448] CER-Landa/Neyra, ¶¶ 100-105.

in Perú.[449] Dr. Landa and Professor Neyra conclude that the only common motive behind a leak of an unsigned Constitutional Court judgment is a last resort attempt by those opposing the decision to engender a different outcome.[450]

281. The 2017 Leaked Decision was leaked to interfere and pre-empt its final release and publication by the Constitutional Court in the form in which it existed (*i.e.*, upholding Scotiabank Perú's Default Interest Amparo). In particular: (a) it was leaked via the *Hildebrandt*, a newspaper notorious for holding anti-foreign investment views, in an article that heavily criticized the outcome,[451] (b) the newspaper stated that the leak had come from "a high-level source in the Constitutional Court who [was] opposed to the alleged favoritism of Scotiabank",[452] ([redacted][453] (d) it was leaked in a coordinated way with SUNAT, given that its counsel in the Default Interest Amparo made comments in the newspaper article containing the 2017 Leaked Decision,[454] and (e) it was followed shortly thereafter by an intense media campaign involving other government officials speaking out against the 2017 Leaked Decision (discussed further in the next sub-section).[455]

282. Regardless of the motive for the leak (which is irrelevant to the question of liability), it later became clear that the leak interfered with the Constitutional Court's decision-making on Scotiabank Perú's Default Interest Amparo. Indeed, specific Constitutional Court Justices conceded that the political climate created as a result of the leak influenced their final decision in 2021.[456]

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[449] CER-Landa/Neyra, ¶¶ 101, 103.

[450] CER-Landa/Neyra, ¶¶ 100, 104.

[451] *See* ¶ 78, above.

[452] *See* ¶ 82, above.

[453] *See* ¶ 83, above.

[454] *See* ¶¶ 85-88, above.

[455] *See* ¶¶ 92-109, above.

[456] *See* ¶¶ 100, 109, 127, 133-134, above. CWS-[redacted], ¶ 37; CWS-[redacted], ¶ 50; **C-0262**, Video of the Hearing of the Inter-American Court of Human Rights in the case of the Independence of the Constitutional Court of Perú (October 23-24, 2017), (19:28-20:55, 50:05-53:10).

283. Establishing that none of the Domestic Comparators were similarly subjected to a leak of a draft of their decision requires proving a negative. Nevertheless, Dr. Landa and Professor Neyra, as constitutional law scholars, researched whether unissued, unsigned Constitutional Court decisions involving the Domestic Comparators were made available through any channel familiar to them.[457] They concluded from the sources that they consulted that to the best of their knowledge only signed, final decisions were made public in all of the Domestic Comparator cases through the customary methods for the release of Constitutional Court judgments.[458] The Claimant has also conducted a review across all major media outlets and was unable to identify a single instance in which an unsigned Constitutional Court decision involving the Domestic Comparators was leaked.[459]

284. While Scotiabank Perú's Default Interest Amparo was stalled as a result of the leak, the dozens of other default interest *amparo* cases brought by the Domestic Comparators proceeded without any government interference. As no cases involving the Domestic Comparators were subject to a leak, there are many representative examples. For instance, there is the case of Paramonga, a Peruvian company dedicated to the production of sugar cane and related businesses. In the *Paramonga* case, the Constitutional Court published its decision in December 2020. As in the Default Interest Amparo, Paramonga challenged the constitutionality of the application of accrued default interest on the ground that it infringed the principle of reasonableness.[460] Like Scotiabank, Paramonga's claim was also significant, amounting to PEN 132.032.133 or over US$40 million by September 2013.[461] Consistent with the 2017 Leaked Decision, the Constitutional Court in *Paramonga* affirmed its jurisdiction and decided the case on the merits, ruling that the application of accrued default interest beyond the maximum legal time is equally

[457] CER-Landa/Neyra, ¶¶ 7(d), 118-121.

[458] *See* CER-Landa/Neyra, ¶ 119.

[459] *See* above, ¶¶ 110-114 (explaining that this investigation included the review of over 150 individual news and media outlets, as set out in Appendix 2: Peruvian Media Sources).

[460] **C-0310**, Judgment of the Plenary Session of the Constitutional Court in Case No. 02051-2016-PA/TC (Paramonga), p. 3. *See* CER-Landa/Neyra, ¶ 155.

[461] **C-0310**, Judgment of the Plenary Session of the Constitutional Court in Case No. 02051-2016-PA/TC (Paramonga), ¶ 32.

harmful to companies as it is to individuals.[462] The Court concluded that the administrative authorities did not "act with diligence", thus violating the principle of reasonableness, and ruled that the application of accrued default interest to Paramonga was unconstitutional.[463]

285. Scotiabank Perú's 2017 Leaked Decision and the *Paramonga* decision are consistent in upholding the unconstitutional nature of the default interest.[464] But, the companies diverge widely in how they were ultimately treated. The Constitutional Court issued its final ruling in the *Paramonga* case without an initial leak of an unsigned copy of its decision and without an accompanying media campaign involving government officials.[465] Of course, as shown above, the same cannot be said in the Scotiabank Perú case.

286. A further example involved the case brought by Interbank. Interbank is a Peruvian-owned bank that has been operating in Perú for over 120 years.[466] Interbank similarly brought an *amparo* action before the Constitutional Court challenging the constitutionality of the application of accrued default interest beyond the maximum legal term on the grounds that it infringed the principle of reasonableness. The case was heard and decided by the same Court at a similar time to Scotiabank Perú's Default Interest Amparo, with the Constitutional Court registering the *Interbank* case in September 2019 and publishing the final decision in April 2022 – just five months after the 2021 Decision.[467] Just as in the *Paramonga* case, the Court admitted the *Interbank* case and ruled that the application of accrued default interest beyond the maximum legal time was unconstitutional.[468] As a consequence, Interbank was successfully exempted from paying millions

[462] **C-0310**, Judgment of the Plenary Session of the Constitutional Court in Case No. 02051-2016-PA/TC (Paramonga), ¶¶ 41, 54-55. *See* CER-Landa/Neyra, ¶ 155.

[463] **C-0310**, Judgment of the Plenary Session of the Constitutional Court in Case No. 02051-2016-PA/TC (Paramonga), ¶¶ 36, 58, p. 22-23. *See* CER-Landa/Neyra, ¶ 27.

[464] CER-Landa/Neyra, ¶¶ 75, 158.

[465] CER-Landa/Neyra, ¶¶ 7(d), 118-121, 144.

[466] *See* **C-0075**, Interbank website, "Our History".

[467] **C-0370**, Judgment 44/2022 of the Plenary Session of the Constitutional Court in Case No. 03468-2019-PA/TC (Interbank), p. 1.

[468] **C-0370**, Judgment 44/2022 of the Plenary Session of the Constitutional Court in Case No. 03468-2019-PA/TC (Interbank), p. 1.

of dollars of default interest to SUNAT. Interbank was not subject to a leaked version of its decision before it was rendered in final form.

287. The *Paramonga* and *Interbank* cases are indicative examples of the treatment accorded to all the Domestic Comparators. In none of the Constitutional Court cases involving the Domestic Comparators did the Court first leak an unsigned version of the decision. In other words, there are many cases like *Paramonga* and *Interbank*. On the other hand, there are no examples of cases involving any of the Domestic Comparators that faced adverse treatment in the form of a leaked decision. In other words, there are no other cases involving treatment akin to what Scotiabank Perú endured. The Government Judicial Interference was reserved for the foreign-owned bank, Scotiabank Perú.

288. For these reasons, Perú accorded Scotiabank Perú treatment "less favourable" than the treatment accorded to domestic investors in like circumstances and breached Article 803 of the FTA.

ii. Perú Breached Article 803 of the FTA When Non-Judicial Government Institutions Interfered with the Independence of the Constitutional Court Following the Emergence of the 2017 Leaked Decision

289. Perú treated Scotiabank Perú less favourably than the Domestic Comparators when Peruvian Government actors outside of the judiciary pressured and interfered with the Constitutional Court's independence by speaking out against and making threats to the Constitutional Court as a result of the 2017 Leaked Decision (*i.e.*, the Government Judicial Interference, as defined above).

290. Once again, the comparative assessment between the treatment accorded to Scotiabank Perú and that accorded to the Domestic Comparators requires proving a negative—*i.e.,* that the cases of the Domestic Comparators were not the subject of judicial interference by government officials. Scotiabank Perú was subjected to no less than 16 individual instances of Government Judicial Interference.[469] These are reflected in the table that follows paragraph 291 below. Dr.

[469] *See* ¶¶ 92-109, above.

Landa and Professor Neyra have analyzed these statements and concluded that "[a]ll these objective facts are elements that, taken together … [show] that in the Scotiabank Perú Amparo Process there was an impact on the Constitutional Court's independence and impartiality".[470]

291. Scotiabank has consulted more than 150 news and media outlets to determine whether similar statements were made regarding the Domestic Comparators' default interest cases before the Constitutional Court. The list of Peruvian media sources that were consulted are set out in Appendix 2: Peruvian Media Sources.[471] No comparable adverse instances of judicial interference by government officials emerge from an archival review of those sources.

Date	Name and Position	Adverse Action involving the Scotiabank Perú Default Interest Amparo	Analogous Action involving the amparo actions of the Domestic Comparators
Mid-April 2017	Ministry of Economy and Finance	Representatives of the Ministry of Economy and Finance told the Justices of the Constitutional Court that the Ministry would not authorize the disbursement of the money that the Constitutional Tribunal had required to remodel its new institutional headquarters if the Court ruled in favor of Scotiabank Perú.[472]	N/A
June 9, 2017	Francisco Eguiguren (SUNAT's lawyer)	In the *Hildebrandt* article discussing the 2017 Leaked Decision, SUNAT's lawyer commented: "It would be extremely serious if the Constitutional Court were to rule in favour of Scotiabank. It is a case that will pull in others and, in the end, the State could end up losing close to 10,000 million soles."[473] Scotiabank Perú was not informed of the 2017 Leaked Decision until reading about it in the *Hildebrandt* article.	N/A

[470] CER-Landa/Neyra, ¶ 142.

[471] Appendix 2: Peruvian Media Sources.

[472] CWS-[redacted], ¶ 16.

[473] **C-0200**, "Scotiabank will win S$481,000,000 from Constitutional Court decision" Hildebrandt en sus trece (June 9, 2017), p. 3.

Date	Name and Position	Adverse Action involving the Scotiabank Perú Default Interest Amparo	Analogous Action involving the amparo actions of the Domestic Comparators
June 9, 2017	José Escalante (SUNAT's attorney general)	In a media interview regarding the 2017 Leaked Decision, SUNAT's attorney general stated: "SUNAT's preliminary calculations show that this decision would have a rebound effect on large taxpayers with similar proceedings and that approximately S/. 10 billion would be at stake. This is more or less 10% of what SUNAT collects in a year [...] We hope that this version – this decision – is not true, because the effects would be catastrophic. […] [We] want to collect, but the Constitutional Court in this case would not let us do it. […] I hope this is a nightmare and not a reality."[474]	N/A
June 16, 2017	Justiniano Apaza (Congressman)	In a public statement regarding the 2017 Leaked Decision, the congressman described the ruling as "illegal".[475]	N/A
June 16, 2017	José Escalante (SUNAT's attorney general)	In a media interview regarding the 2017 Leaked Decision, SUNAT's attorney general stated: "The money that is at stake here is the money of all Peruvians, of those who need health, education and work […] When we are about to collect [,] the Constitutional Tribunal intervenes […] preventing us from collecting."[476]	N/A
June 21, 2017	Alfredo Thorne (Minister of Economy and Finance)	In a media interview regarding the 2017 Leaked Decision, the Minister stated: "Yes, we are concerned [about the 2017 Decision]. We have expressed it. It is something that SUNAT and my team at the [Ministry of Economy and Finance] are working on arduously […] We need to increase compliance in tax payments […] For us this is very dangerous."[477]	N/A

[474] **C-0353**, Order of the Constitutional Court in Case No. 02798-2016-PA/TC (November 19, 2021); **C-0204**, Audio of the interview of Antenor José Escalante, Exitosa (June 9, 2017) (05:30-07:05); **C-0205**, Transcript of the interview of Antenor José Escalante, Exitosa (June 9, 2017).

[475] **C-0219**, "Scotiabank v. Sunat," La República (June 16, 2017).

[476] **C-0221**, Video of the Interview of Antenor José Escalante (June 16, 2017), (01:34-01:50; 08:19-08:34; 08:40-08:45; 09:00-09:15). *See also* **C-0222**, Transcript of the interview of Antenor José Escalante (June 16, 2017).

[477] **C-0226**, Video of the interview with Alfredo Thorne (Minister of Economy and Finance), RPP (June 21, 2017) (01:18:35-01:19:40); **C-0227**, Transcript of the interview with Alfredo Thorne (Minister of Economy and Finance), RPP (June 21, 2017).

Date	Name and Position	Adverse Action involving the Scotiabank Perú Default Interest Amparo	Analogous Action involving the amparo actions of the Domestic Comparators
August 25, 2017	Yeni Vilcatoma (Congresswoman)	In a media interview regarding the 2017 Leaked Decision, the congresswoman stated: "It is concerning that this entity, the highest interpreter of the constitution is ruling at this level, against the interests of the State […] We must remain vigilant, because this news is concerning to us. We hope that the Constitutional Court does not rule in that way, but to the contrary […] Because unfortunately if we receive this type of decision, we would also have to file constitutional complaints [against the Judges] again […] We are concerned that the Constitutional Court would issue a resolution against the interests of the State and, in this way, it would benefit large companies."[478]	N/A
August 29, 2017	Yeni Vilcatoma (Congresswoman)	In a media interview regarding the 2017 Leaked Decision, the congresswoman stated: "I am sincerely very concerned about this type of decision […] Let's hope that this suspicion that we have based on the news published by César Hildebrandt's *Semanario* does not materialize because the damage to the State is going to be millions of dollars."[479]	N/A
September 13, 2017	Jorge Castro (Congressman)	In a media interview regarding the 2017 Leaked Decision, the congressman stated: "[A decision in favour of Scotiabank] would cause not only a massive fiscal and tax loophole [since] it would open the door for individuals (natural and legal) not to pay their taxes on time) […] Let us hope that [this] does not happen, since it would be contrary to the interests of the State."[480]	N/A
September 26, 2017	Alberto Quintanilla (Congressman)	In a media interview regarding the 2017 Leaked Decision, the congressman stated: "A decision in favour of Scotiabank would constitute a betrayal to the State."[481]	N/A

[478] **C-0249**, Audio of the interview of Yeni Vilcatoma, Exitosa (August 25, 2017) (04:13-05:00; 05:30-06:00; 06:05-06:21); **C-0250**, Transcript of the interview of Yeni Vilcatoma, Exitosa (August 25, 2017).

[479] **C-0252**, Audio of the interview of Yeni Vilcatoma, Exitosa (August 29, 2017) (25:55-26:30); **C-0253**, Transcript of the interview of Yeni Vilcatoma, Exitosa (August 29, 2017).

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

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

Date	Name and Position	Adverse Action involving the Scotiabank Perú Default Interest Amparo	Analogous Action involving the amparo actions of the Domestic Comparators
October 23, 2017	Walter Gutiérrez (Ombudsman)	In a media interview regarding the 2017 Leaked Decision, the Ombudsman stated: "You have companies that are disputing tax assessments at the Constitutional Court . If these appeals are eventually upheld, it will be terrible. However, those same companies want to contract with the State. The State has to be very careful with them […] I am referring to Scotiabank […]"[482]	N/A
October 23, 2017	Eloy Espinosa-Saldaña (Constitutional Court Justice)	In a statement before the IACHR, Justice Espinosa-Saldaña stated: "[j]udicial independence means, among other things, guaranteeing conditions so that there is no external interference. How are we going to guarantee these conditions of non-interference if every time we are about to issue a ruling on an issue that is controversial for certain members of Congress, we are impeached or threatened with impeachment? [...] The first is to express the concern of the Commission, the honorable Commission, if it sees fit, to express concerns about what is happening, not only with this 'El Frontón' case, but also to express concerns about what has already been announced in cases such as the 'Scotiabank' case, where, in view of our decision on the behaviour of the National Tax Superintendency regarding [*interruption*] […] So, what they are telling us is, that if we do not rule as they want us to rule, then they will open a proceeding to condition our actions. And once a proceeding has been opened they threaten to open another proceeding. That is the situation."[483]	N/A

[482] **C-0261**, "Walter Gutiérrez: 'The act of corruption damages public reputation'," La República (October 23, 2017).

[483] **C-0262**, Video of the Hearing of the Inter-American Court of Human Rights in the case of the Independence of the Constitutional Court of Perú (October 24, 2017) (19:28-20:55; 50:05-53:10).

Date	Name and Position	Adverse Action involving the Scotiabank Perú Default Interest Amparo	Analogous Action involving the amparo actions of the Domestic Comparators
October 30, 2017	Yeni Vilcatoma (Congresswoman)	In a media interview regarding Justice Espinosa-Saldaña's statement to the IACHR, the congressman stated: "With this strategy he intends to whitewash the decision that illegally favors Perúbar and Scotiabank. [Judge Espinosa] has been totally untruthful and has lied before an international commission, he has made a mockery of a supranational organization."[484] The congresswoman announced that she would file a constitutional complaint against the Constitutional Court as a result.[485]	N/A
March 16, 2018	David Tuesta (Minister of Economy and Finance)	In a media interview with the Peruvian Congressional Commission on the Economy, Minister David Tuesta stated: "The [tax] collection issue has become an alternative in which many companies … in some cases fairly ... believe that the [tax] auditor's handling of the case gives them a reason to appeal [it] and that is why the courts exist. But in other cases, this [practice] is not [fair]. Perhaps it is a strategy to delay the payment and gain financing […] [T]he losses in terms of lower tax contributions … is an issue for SUNAT to address in great detail. We are talking about more than 2 [percent] of the GDP […]".[486]	N/A
June 4, 2018	Martín Vizcarra (President)	In a national announcement, President Vizcarra stated: "We have identified large companies that owe the State amounts that represent more than 1% of the GDP, a much needed income for the development of works and public policies that benefit all Peruvians […] An ad hoc commission will be formed with representatives from the Ministry of Economy and Finance and Sunat, among others, to create payment mechanisms for the collection of accumulated debts".[487]	N/A

[484] **C-0266**, "Vilcatoma denounces corruption in the TC that affect the interests of the State," Exitosa (October 30, 2017).

[485] **C-0266**, "Vilcatoma denounces corruption in the TC that affect the interests of the State," Exitosa (October 30, 2017).

[486] **C-0273**, Video of the presentation by David Tuesta (former Minister of Economy and Finance) before the Congressional Economic Commission (March 16, 2018) (42:02-43:01); **C-0274**, Transcript of the presentation by David Tuesta (former Minister of Economy and Finance) before the Congressional Economic Commission.

[487] **C-0279**, President's Televised Address to the Nation (June 4, 2018) (05:00-05:30); **C-0282**, "Vizcarra announces ad hoc commission to collect accumulated debt from large companies," RPP (June 4, 2018).

Date	Name and Position	Adverse Action involving the Scotiabank Perú Default Interest Amparo	Analogous Action involving the amparo actions of the Domestic Comparators
August 9, 2021	Pedro Francke Ballvé (Minister of Economy and Finance)	In a media interview, the Minister Francke Ballvé stated: "Messrs. of Scotiabank, […] do you not believe that this is the moment in which you should make a gesture for Perú and pay your debts?"[488] The Minister then stated that if they refused to do so, the Ministry of Economy and Finance would use "all legal weapons" to collect those amounts.[489]	N/A

292. Government statements demonstrate the discriminatory motive for the Government's interference in Scotiabank Perú's Default Interest Amparo before the Constitutional Court. Government officials and Peruvian media consistently referred to Scotiabank Perú as a "Canadian capital bank", a "transnational entity" and a "multinational company" and a rich "millionaire group".[490] They distinguished between Scotiabank Perú as a foreign company and "the millions of Peruvians" and the "multiple urgencies" of the country, such as the need to rebuild public infrastructure and contribute to the healthcare, education and public services in Perú.[491]

293. The assessment of the differential treatment accorded to Scotiabank Perú as compared to the Domestic Comparators is further supported by Justice Espinosa-Saldaña's remarks to the IACHR on behalf of the Constitutional Court in October 2017. In complaining about undue interference by the Peruvian Government, he singled out the case of Scotiabank Perú (and spoke of no other Constitutional Court cases involving default interest).[492]

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[488] **C-0321**, "Francke to large tax debtors: We will use all legal means to ensure compliance," El Perúano (August 9, 2021).

[489] **C-0323** "MEF will use all legal weapons to help SUNAT collect debts," Gestión (August 10, 2021).

[490] **C-0236**, "Supreme Court to vote on dispute between Scotiabank and Sunat," La República (July 5, 2017); **C-0217**, "TC gives 481 million to Scotiabank," La Nación (June 13, 2017).

[491] *See* **C-0206**, "Sunat: Possible TC ruling in favor of bank would create a fiscal hole of S/10,000 million," RPP (June 9, 2017), p. 3; **C-0200**, "Scotiabank will win S$481,000,000 from Constitutional Court decision" Hildebrandt en sus trece (June 9, 2017), p. 2.

[492] **C-0263**, Transcript of the Hearing of the Inter-American Court of Human Rights (October 24, 2017) IACHR Hearing, 24 October 2017, p. 1 (19:48-20:05) (questioning "How are we going to guarantee these conditions of non-

294. Accordingly, the Peruvian Government interfered (publicly and privately) in the Scotiabank Perú Default Interest Amparo while refraining from interfering in the cases involving the Domestic Comparators. In doing so, Perú treated Scotiabank Perú less favourably than it treated its own domestic investors in like circumstances and breached Article 803 of the FTA.

iii. Perú Breached Article 803 of the FTA When the Constitutional Court Issued its 2021 Decision Succumbing to the Government Judicial Interference

295. In November 2021 the Constitutional Court succumbed to the interference from the Peruvian Government and issued the 2021 Decision.[493] The Constitutional Court's rendering of the 2021 Decision breaches Article 803 of the FTA in several ways, discussed below.

296. ***The Constitutional Court succumbed to the Government Judicial Interference and rendered a decision diametrically opposed to the 2017 Leaked Decision, which no other Domestic Comparator faced***. In a complete reversal from the 2017 Leaked Decision, the Constitutional Court dismissed Scotiabank Perú's case on the grounds that the case was inadmissible.[494] That is, although four years earlier it considered the case admissible and capable of being ruled upon (as concluded in the 2017 Leaked Decision), the same Constitutional Court in November 2021 refused to render a decision on the merits of Scotiabank Perú's Default Interest Amparo.[495] However, from the 2017 Leaked Decision until the issuance of the 2021 Decision, the parties made no further submissions on the substance of the case.[496] The only substantive difference between the two decisions was the Government Judicial Interference described above. Accordingly, the only explanation is that, in reversing course between the 2017 Leaked Decision and the 2021 Decision, the Constitutional Court succumbed to the Government Judicial Interference.

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interference if every time we are about to issue a ruling on an issue that is controversial for certain members of Congress, we are impeached or threatened with impeachment?").

[493] *See* ¶¶ 153-159, above.

[494] **C-0340**, Judgment of the Plenary Session of the Constitutional Court in Scotiabank Perú S.A.A. v. SUNAT and the Tax Court (Case No. 222-2017-PA/TC), p. 14.

[495] *See* CER-Landa/Neyra, ¶¶ 146-147, 156-159.

[496] For further details on the procedural history of Scotiabank Perú's proceedings, *see* Appendix 3: Procedural History of Scotiabank Perú's challenge of the Tax Debt and Default Interest.

297. By comparison, in none of the cases involving the Domestic Comparators did the Constitutional Court reach and vote on a decision, write a judgment and leak that judgment, only to then face intense political pressure and interference in connection with that unissued judgment resulting in the rendering of a final judgment diametrically opposed to the earlier draft. Only Scotiabank Perú faced that rollercoaster of Government Judicial Interference. In this way, Perú breached Article 803 of the FTA.

298. ***The Constitutional Court barred Scotiabank from submitting a contentious administrative action against the application of accrued default interest, which no other Domestic Comparator faced***. In July 2015, two years after Scotiabank Perú submitted its Default Interest Amparo, the Constitutional Court issued the binding *Elgo Ríos* precedent, which set out the criteria for determining when a plaintiff should bring a claim through an amparo action or, alternatively, through the contentious administrative courts.[497] In *Elgo Ríos*, the Court also established that plaintiffs with amparo actions dismissed on procedural grounds that were filed before the July 2015 release of the *Elgo Ríos* precedent (such as Scotiabank Perú's Default Interest Amparo) were entitled to submit a contentious administrative action following the dismissal of the case.[498] Therefore, according to Dr. Landa and Professor Neyra, the binding *Elgo Ríos* precedent would have entitled Scotiabank Perú to submit a contentious administrative action upon the Court's dismissal of its Default Interest Amparo, which would have been successful based on the binding caselaw at the time.[499]

299. However, Dr. Landa and Professor Neyra explain that the Constitutional Court not only dismissed Scotiabank Perú's Default Interest Amparo on procedural grounds, but took an additional *ultra vires* step in preventing Scotiabank Perú from submitting a contentious administrative action upon the Court's dismissal of its Default Interest Amparo.[500] Not only did the Constitutional Court fail to apply the *Elgo Ríos* precedent, but it acted beyond its competence, as

[497] *See* ¶¶ 67-70, above.

[498] **C-0184**, Judgment of the Plenary Session of the Constitutional Court in Case No. 02383-2013-PA/TC (Elgo Ríos), ¶¶ 18-20.

[499] CER-Landa/Neyra, ¶¶ 180-184.

[500] CER-Landa/Neyra, ¶ 178.

the authority to decide whether a plaintiff may file a contentious administrative action falls within the purview of the contentious administrative courts.[501]

300. Dr. Landa and Professor Neyra have reviewed the Domestic Comparator cases and have confirmed that in none of those cases did the Constitutional Court bar the plaintiff from pursuing further recourse in the contentious administrative courts.[502] As Dr. Landa and Professor Neyra highlight:

> "[I]n none of the cases within the [Domestic Comparators], and even within the total Universe of Comparator Cases, have we found that the Constitutional Court, as a body, has restricted in this way the possibility of resorting to the contentious administrative process after having declared the inadmissibility of an amparo claim."[503]

301. Among the Domestic Comparators, the case involving Transportes Rodrigo Carranza offers a notable comparative example. Transportes Rodrigo Carranza S.A.C. is a leading Peruvian company dedicated to the State-wide transport of heavy cargo. The case, contemporaneous with Scotiabank Perú's Default Interest Amparo, was filed on September 5, 2014, prior to the *Elgo Ríos* precedent, and dismissed on admissibility grounds in December 2021.[504] When Transportes Rodrigo Carranza's *amparo* action was dismissed on procedural grounds, the Court applied the *Elgo Ríos* precedent and did not prohibit Transportes Rodrigo Carranza from pursuing a contentious administrative action.

302. In this way, the Constitutional Court treated Scotiabank Perú less favourably than the Domestic Comparators and breached Article 803 of the FTA.

303. ***The Constitutional Court illegitimately decided the Default Interest Amparo without quorum for session, which no other Domestic Comparator faced***. The 2021 Decision also

[501] CER-Landa/Neyra, ¶¶ 173-177.

[502] CER-Landa/Neyra, ¶¶ 178-179.

[503] CER-Landa/Neyra, ¶ 177.

[504] **C-0184**, Judgment of the Plenary Session of the Constitutional Court in Case No. 02383-2013-PA/TC (Elgo Ríos).

constituted differential treatment insofar as the Court failed to respect the legal session quorum, which it uniformly respected across all Domestic Comparator cases.[505]

304. Throughout Scotiabank Perú's Constitutional Court appeal, and at the time of the 2021 Decision, the presence of five Justices was required by law in order to hold a Plenary session to deliberate and vote on a case.[506] As explained by Dr. Landa and Professor Neyra, these quorum requirements are important to ensure that parties' due process rights are respected and that decisions will not be made by a non-representative minority of the Court.[507] This rule was incontrovertible at the time. Even then Chief-Justice Ledesma, who voted to dismiss the Default Interest Amparo, recognized two months prior to the 2021 Decision that the Court needed "a quorum of five justices […] to hold sessions".[508]

305. Yet the Constitutional Court issued its ruling in Scotiabank Perú's Default Interest Amparo in a session with only four Justices (out of the seven seats – one was deceased and two declared conflicts).[509] This prompted Justice Blume to dissent on the basis that the Court's decision was invalid because it did not comply with the Court's own session quorum requirements.[510] Dr. Landa and Professor Neyra agreed noting that "without having the quorum to hold a session in the Scotiabank Perú case, the Constitutional Court could not act validly".[511]

306. Contrary to the Constitutional Court's conduct in the Scotiabank Perú case, in none of the 40 Domestic Comparator cases did the Court issue its final ruling in a session with only four

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[505] *See* ¶¶ 150-159, above.

[506] **C-0118**, Law No. 28301, Organic Law of the Constitutional Tribunal (July 1, 2004) A-084. art. 5 ("The quorum of the Constitutional Court is five of its members. The Court issues resolutions by a simple majority of the votes cast, except to resolve the inadmissibility of the claim of unconstitutionality or to issue a sentence declaring the unconstitutionality of a norm with the force of law, cases in which five agreeing votes are required."); **C-0119**, Administrative Resolution No. 095-2004-P-TC (September 14, 2004), art. 10: ("The quorum of the Constitutional Court is five of its members.").

[507] CER-Landa/Neyra, ¶ 192.

[508] **C-0327**, "President of the CC following the death of Carlos Ramos: 'We have the quorum to continue holding sessions'" El Comercio, (September 21, 2021).

[509] **C-0340**, Judgment of the Plenary Session of the Constitutional Court in Scotiabank Perú S.A.A. v. SUNAT and the Tax Court (Case No. 222-2017-PA/TC), pp. 2, 22.

[510] **C-0340**, Judgment of the Plenary Session of the Constitutional Court in Scotiabank Perú S.A.A. v. SUNAT and the Tax Court (Case No. 222-2017-PA/TC), p. 22.

[511] CER-Landa/Neyra, ¶ 196.

Justices. Based on a review of all of the session quorums in the decisions of the Domestic Comparators, Dr. Landa and Professor Neyra have concluded that "of all the cases resolved by the Plenary of the Constitutional Court on the matter of default interest where the claimant was an individual or a legal entity of Peruvian nationality (according to the established criteria), **the Scotiabank Perú Amparo is the only case that was decided without respecting the quorum of five (5) Justices**."[512]

307. In rendering the 2021 Decision, the Constitutional Court also failed to respect the voting quorum which by law required a majority of four Justices in order to issue a decision. To side-step this rule, the Constitutional Court issued a unilateral and unlawful Administrative Resolution in which it purported to reduce the voting quorum from four to three Justices – a resolution which it conveniently published just six days prior to issuing the 2021 Decision, and in which it ignored the requirement that the legal voting quorum be amended only by legislation issued by the Peruvian Congress.[513] In all prior Domestic Comparator cases, rendered before the 2021 Decision, the Constitutional Court respected the original voting quorum requirement.[514] The timing of the purported change was designed solely to facilitate the issuance of the 2021 Decision as, after a short period of time, the Constitutional Court reversed the resolution to return back to the original requirement.[515]

308. In this way, the Constitutional Court treated Scotiabank Perú less favourably than the Domestic Comparators and breached Article 803 of the FTA.

309. ***The Constitutional Court acted inconsistently with its rulings in the cases brought by the Domestic Comparators by requiring the submission of a prior recurso de queja***. Finally, the 2021 Decision also amounted to less favourable treatment through the Court's application of inconsistent and novel reasoning in relation to the issue of whether a plaintiff must bring a

[512] CER-Landa/Neyra, ¶ 204 (emphasis added). Coincidentally, the only case from the universe of default interest claims (without distinguishing nationality) in which the Constitutional Court issued its decision in a session with four judges was the case brought by Citileasing, a subsidiary of another multinational bank, Citi.

[513] **C-0333**, Administrative Resolution No. 205-2021-P/TC of the Plenary Session of the Constitutional Court (November 3, 2021), p. 2; CER-Landa/Neyra, ¶¶ 205-211.

[514] CER-Landa/Neyra, ¶ 7(f).

[515] *See* CER-Landa/Neyra, ¶ 206.

challenge in the administrative courts (a *recurso de queja*) against the underlying delay caused by the administrative tax proceedings in order to preserve its right to bring an amparo action challenging the application of accrued default interest applied as a consequence of such delay.

310. In the 2021 Decision, the three-Justice majority reasoned that Scotiabank Perú was "negligent" for not having submitted a *recurso de queja* and was therefore precluded from challenging the accrued default interest that was applied as a result of the SUNAT and Tax Court's delay.[516]

311. However, as Dr. Landa and Professor Neyra explain, this reasoning was not adopted in any of the 40 Domestic Comparator cases. According to Dr. Landa and Professor Neyra, Scotiabank Perú's Default Interest Amparo is "the only case that we have been able to identify where the *recurso de queja* is interpreted in this way, as an alleged validation of the delay by the Tax Administration to issue a resolution, which would not then allow recourse to the constitutional protection provided by the *amparo* process."[517]

312. Therefore, by applying this differential reasoning in regards to the *recurso de queja* and imposing an additional requirement on Scotiabank Perú that was not imposed on any of the 40 Domestic Comparators, the Constitutional Court treated Scotiabank Perú less favourably, in breach of Article 803 of the FTA.

C. Perú Had No Reasonable Justification for the Less Favourable Treatment Granted to Scotiabank Perú vis-à-vis the Domestic Comparators

313. Once a *prima facie* case of differential treatment is made out, the burden of proof shifts to the respondent State to prove that the differential treatment was justified based on a rational domestic policy.[518] Differences in treatment will presumptively violate Article 803, unless the respondent state can establish that the measures "have a reasonable nexus to rational government policies that (1) do not distinguish, on their face or *de facto*, between foreign-owned and domestic

[516] **C-0340**, Judgment of the Plenary Session of the Constitutional Court in Scotiabank Perú S.A.A. v. SUNAT and the Tax Court (Case No. 222-2017-PA/TC), ¶¶ 34-41.

[517] CER-Landa/Neyra, ¶ 190.

[518] **CL-0121**, *Olin Holdings*, ¶ 216-217; **CL-0112**, *Feldman*, ¶¶ 177-178, 181.

companies, and (2) do not otherwise unduly undermine the investment liberalizing objectives of [the FTA]."[519]

314. Even if a respondent state can proffer a rational domestic policy justification, the differential treatment in question must be no greater than that which is necessary for legitimate regulatory reasons.[520] Tribunals have set a high bar for the respondent State in this regard. For example, in *Cargill v Poland*, Poland invoked social and economic reasons to justify the alleged differential treatment in the quotas that the claimant had challenged.[521] The impugned quotas affected the production of isoglucose, a product that was solely produced by Cargill, whereas domestic sugar producers were allocated generous quotas. Poland argued that limiting beet (and thus sugar) production could have dire economic and social consequences in the poorest parts of the country.[522] Despite these compelling arguments, the tribunal found no evidence to suggest that such restrictive quotas were necessary.[523] Consequently, the tribunal rejected Poland's domestic policy justification.

315. The Peruvian Government cannot establish that its differential, less favourable treatment of Scotiabank Perú was justified based on a rational domestic policy and not motivated by preference of domestic over foreign investors. There can never be a rational domestic policy for undermining the independence of the judiciary when dealing with foreign investment, while maintaining the independence of the judiciary when dealing with domestic actors. That

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[519] **CL-0123**, *Pope & Talbot*, ¶ 78; **CL-0003**, *Bilcon*, ¶ 723 (finding further that "[i]t is the host state that is in a position to identify and substantiate the case, in terms of its own laws, policies and circumstances, that an apparently discriminatory measure is in fact compliant with the 'national treatment' norm"); **CL-0080**, *Apotex v. USA*, ¶¶ 8.55-8.56.

[520] *See* **CL-0109**, Vandevelde, s. 7.2.5 (noting that the *SD Myers* tribunal found that the ban at issue violated national treatment and was "not necessary" to achieve the State's "legitimate goal," and that "alternative ways consistent with NAFTA obligations were available for achieving that goal").

[521] **CL-0137**, *Cargill, Incorporated v Republic of Poland* (ICSID Case No ARB(AF)/04/2) Final Award, 29 February 2008 ("***Cargill v. Poland***"), ¶¶ 346, 379-382.

[522] **CL-0137**, *Cargill v. Poland*, ¶¶ 379-382.

[523] **CL-0008**, *Cargill v. Mexico*, ¶¶ 382-385, 410. *See also* **CL-0093**, *Corn Products v. Mexico*, ¶ 142 (noting that "[d]iscrimination does not cease to be discrimination, nor to attract the international liability stemming therefrom, because it is undertaken to achieve a laudable goal or because the achievement of that goal can be described as necessary").

differential, less favourable treatment smacks of precisely the type of discrimination that will fall afoul of international law and, for present purposes, Article 803 of the FTA.

PART FIVE. SCOTIABANK AND SCOTIABANK PERÚ'S DAMAGES FOR PERÚ'S BREACHES OF THE FTA

316. Scotiabank and Scotiabank Perú are entitled to damages as a result of Perú's breaches of Article 803 of the FTA.

317. The 2017 Leaked Decision makes clear how the Default Interest Amparo would have been decided absent the breaches. The Constitutional Court would have signed and issued the judgment it had already drafted and voted on. But for Perú's unlawful conduct, SUNAT would have been required to reimburse Scotiabank Perú the unconstitutional amounts of default interest that it had paid under protest with interest (calculated using applicable Peruvian rates) from the date of Scotiabank Perú's payment under protest until the repayment was made. Upon repayment by SUNAT, those funds would have been available to repatriate to Scotiabank in Canada. Pre- and post-award interest must reflect the return that Scotiabank and Scotiabank Perú would have earned had they had access to the funds to which they are entitled.

318. The FTA entitles Scotiabank to bring, in one arbitration, a claim for its own losses under Article 819[524] of the FTA as well as a claim on behalf of Scotiabank Perú for losses that Scotiabank Perú suffered as a result of Perú's breaches of the FTA.[525]

319. In this case, the damages that Scotiabank and Scotiabank Perú have suffered overlap. While Scotiabank is entitled to bring claims on behalf of itself and Scotiabank Perú under Articles 819 and 820, it is not entitled to double recovery. Scotiabank, as the investor, thus advances the claim

[524] **C-0001**, Free Trade Agreement between Canada and the Republic of Perú, art. 819(1) (providing that "[a]n investor of a Party may submit to arbitration under this Section a claim that the other Party has breached … an obligation under Section A … and that the investor has incurred loss or damage by reason of, or arising out of, that breach" (emphasis added)).

[525] **C-0001**, Free Trade Agreement between Canada and the Republic of Perú, art. 820(1) (providing that "[a]n investor of a Party, on behalf of an enterprise of the other Party that is a juridical person that the investor owns or controls directly or indirectly, may submit to arbitration under this Section a claim that the other Party has breached … an obligation under Section A … and that the enterprise has incurred loss or damage by reason of, or arising out of, that breach" (emphasis added)).

to recover its own losses as its primary claim, and the claim for Scotiabank Perú's losses in the alternative.

320. In all events, the Tribunal's award of damages must put Scotiabank and Scotiabank Perú, as far as possible, in the position they would have occupied but for Perú's breach of the FTA.

321. Scotiabank's investment (Scotiabank Perú) is plainly worth less in the absence of money to which Scotiabank Perú was (and is) entitled. Scotiabank's loss is therefore the loss of equity in its investment, calculated by determining the loss of repatriatable cash to Scotiabank in Canada. In order to determine that amount, it is necessary to determine the amount that SUNAT would have been required to repay to Scotiabank Perú but for the breaches, which also constitute Scotiabank Perú's losses.

322. Errol Soriano of KSV calculates the damages owed to Scotiabank and Scotiabank Perú. Mr. Soriano is a professional accountant and chartered business valuator with over 30 years of professional experience in business valuations, damages quantification, financial litigation and corporate finance-related matters.[526]

323. In summary, and as described further herein and in the KSV Report, KSV calculates the loss suffered by (a) Scotiabank and, in the alternative, (b) Scotiabank Perú as a result of Perú's breaches as follows:

(a) ***Primary claim for Scotiabank's losses under Article 819 of the FTA.*** Scotiabank's loss is calculated by computing: (a) the actual default interest paid to Perú under protest by Scotiabank Perú, minus (b) the maximum default interest that could be charged under Peruvian law to derive the amount that Scotiabank Perú would have been reimbursed by SUNAT had the Constitutional Court ruled pursuant to the 2017 Leaked Decision and ordered the reimbursement of the unlawful accrued default interest (the "**Default Interest Delta**"), plus (c) interest accrued from the date of Scotiabank Perú's payment under protest until the "but for" date of repayment had the Constitutional Court rendered its decision in 2017 consistent

[526] Expert Report of KSV, dated November 29, 2024 ("**CER-KSV**"), ¶¶ 1.13.

with the 2017 Leaked Decision.[527] KSV then calculates the amount of this cash repatriatable to Scotiabank in Canada in Canadian Dollars ("**CAD**") as of the date of repayment under the "but for" scenario by applying the relevant taxes applicable on a repatriation of funds from Scotiabank Perú to Scotiabank. Scotiabank's damages, prior to pre-award interest, are [redacted].[528]

(b) ***Alternative claim for Scotiabank Perú's losses under Article 820 of the FTA.*** Scotiabank Perú's loss is calculated by taking the Default Interest Delta plus interest accrued from the date of payment under protest until the "but for" date of repayment.[529] Scotiabank Perú's damages calculation is rendered in Peruvian Soles ("**PEN**"). Scotiabank Perú's damages, prior to pre-award interest, are [redacted].

324. KSV then adds pre-award interest using commercial rates of interest and, alternatively in the case of Scotiabank Perú, the rate of interest applicable under Peruvian law, to Scotiabank and Scotiabank Perú's respective damages.[530]

325. In the following sections, Scotiabank describes: (a) why customary international law applies to the calculation of Scotiabank and Scotiabank Perú's losses (Section I), (b) the application of the customary international law standard of full reparation (Section II); (c) the "but for" scenario that informs the calculation of damages (Section III); (d) the calculation of Scotiabank's and, in the alternative, Scotiabank Perú's damages (Section IV); (e) Scotiabank's entitlement to pre- and post-award interest (Section V); (f) Scotiabank's entitlement to a declaration that any Award is made on a net-of-taxes basis and to an indemnity for any attempt by Perú to tax the Award after it is rendered (Section VI), and (g) Scotiabank's entitlement to its costs of the arbitration (Section VII).

[527] CER-KSV, ¶ 4.4.

[528] CER-KSV, ¶ 4.7.

[529] CER-KSV, ¶ 4.4.

[530] CER-KSV, ¶¶ 4.9-4.12.

I. Damages Should be Determined Pursuant to Customary International Law

326. A claimant bears the burden of proving its damages on a balance of probabilities.[531]

327. Though damages cannot be speculative or merely "possible," they also need not be "scientific[ally] certain."[532] A claimant is required to show that a damages valuation will produce a "sufficiently reliable result," not a result that is "certain" or "scientifically precise".[533]

328. The only *lex specialis* standard of compensation found in the FTA is in Article 812(2), which sets the standard of compensation for lawful expropriations.[534] The FTA is silent on the standard of compensation for a breach of any other provision of the treaty. In the absence of any *lex specialis*, the appropriate standard of compensation is the customary international law principle of full reparation.[535] As the tribunal in *ADC v. Hungary* put it:

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[531] **CL-0099**, *Gold Reserve Inc. v. Bolivarian Republic of Venezuela* (ICSID Case No. ARB(AF)/09/1), Award, 22 September 2014 (**"*Gold Reserve*"**), ¶ 685; **CL-0110**, *Khan Resources Inc., Khan Resources B.V. and CAUC Holding Company Ltd. v. Government of Mongolia and Monatom Co., Ltd.* (PCA Case No. 2011-09), Award on the Merits, 2 March 2015 (**"*Khan*"**), ¶ 375.

[532] **CL-0110**, *Khan*, ¶ 375. See also **CL-0099**, *Gold Reserve*, ¶ 686; **CL-0103**, *Himpurna California Energy v. PT (Persero) Perúsahaan Listruik Negara* (UNCITRAL), Award, 4 May 1999, ¶ 376; **CL-0108**, *Joseph Charles Lemire v. Ukraine* (ICSID Case No. ARB/06/18), Award, 28 March 2011 (**"*Lemire (Award)*"**), ¶ 246.

[533] **CL-0129**, *Tethyan Copper Company Pty Limited v. Islamic Republic of Pakistan* (ICSID Case No. ARB/12/1), Award, 12 July 2019 (**"*Tethyan Copper (Award)*"**), ¶ 297. See also **CL-0010**, *Crystallex International Corporation v. Bolivarian Republic of Venezuela* (ICSID Case No. ARB(AF)/11/2), Award, 4 April 2016, ¶¶ 868-869.

[534] Article 812(2) of the Treaty provides that where an expropriation is taken for a public purpose, in accordance with due process of law, in a non-discriminatory manner, and on prompt, adequate and effective compensation, such compensation shall be equivalent to the fair market value of the expropriated investment immediately before the expropriation took place, and shall not reflect any change in value occurring because the intended expropriation had become known earlier.

[535] **CL-0077**, *Amoco International Finance Corp. v. The Government of the Islamic Republic of Iran, et al.* (15 Iran-U.S. C.T.R. 189), Partial Award No. 310-56-3, 14 July 1987 (**"*Amoco (Partial Award*"**), ¶¶ 112, 189, 193-99; **CL-0054**, *ADC Affiliate Limited and ADC & ADMC Management Limited v. The Republic of Hungary* (ICSID Case No. ARB/03/16), Award of the Tribunal, 2 October 2006 (**"*ADC*"**), ¶¶ 481-484; **CL-0127**, *Siemens A.G. v. The Argentine Republic* (ICSID Case No. ARB/02/8), Award, 17 January 2007, ¶¶ 349-352; **CL-0043**, *Saipem S.p.A. v. The People's Republic of Bangladesh* (ICSID Case No. ARB/05/07), Award, 30 June 2009, ¶ 201; **CL-0050**, *Yukos Universal Limited (Isle of Man) v. The Russian Federation* (PCA Case No. AA 227), Final Award, 18 July 2014 (**"*Yukos*"**), ¶¶ 1765-1766; **CL-0124**, *Quiborax S.A., Non Metallic Minerals S.A. and Allan Fosk Kaplún v. Plurinational State of Bolivia* (ICSID Case No. ARB/06/2), Award, 16 September 2015 (**"*Quiborax*"**), ¶ 326. See also **CL-0104**, I. Marboe, "The Difference between Lawful and Unlawful Expropriations with Regard to the Amount of Compensation" (presented at 2008 Remedies in Commercial, Investment and Energy Arbitrations, Houston, TX, April 17-19, 2008), p. 11, ("in case of lawful expropriations the treaty applies while in case of unlawful expropriations – i.e., expropriations in violation of the treaty provisions on expropriation – the customary international law rules of the law of State responsibility apply").

> "[I]n the present case the BIT does not stipulate any rules relating to damages payable in the case of an unlawful expropriation. The BIT only stipulates the standard of compensation that is payable in the case of a lawful expropriation, and these cannot be used to determine the issue of damages payable in the case of an unlawful expropriation since this would be to conflate compensation for a lawful expropriation with damages for an unlawful expropriation. […] Since the BIT does not contain any *lex specialis* rules that govern the issue of the standard for assessing damages in the case of an unlawful expropriation, the Tribunal is required to apply the default standard contained in customary international law in the present case."[536] [Emphasis added]

329. Perú breached Article 803 of the FTA. Scotiabank and Scotiabank Perú, respectively, are therefore entitled to damages under the customary international law standard.

II. The Standard Applicable for Determining Damages is the Customary International Law Principle of Full Reparation

330. It is a basic principle of international law that States incur responsibility for their wrongful acts. The corollary to this principle is that a responsible State must repair the damage caused by its wrongful act(s).[537]

331. The customary international law standard for the assessment of damages was set out in the Permanent Court of International Justice's seminal decision of *Chorzów Factory*:

> "[R]eparation must, as far as possible, wipe out all the consequences of the illegal act and re-establish the situation which would, in all probability, have existed if that act had not been committed. Restitution in kind, or, if this is not possible, payment of a sum corresponding to the value which a restitution in kind would bear; the award, if need be, of damages for loss sustained which would not be covered by the restitution in kind or payment in place of it—such are the principles which should serve to determine the amount of compensation due for an act contrary to international law."[538]

[536] **CL-0054**, *ADC*, ¶¶ 481, 483. See also **CL-0077**, *Amoco (Partial Award)*, ¶ 189.

[537] **CL-0124**, *Quiborax*, ¶ 327.

[538] **CL-0087**, *Case Concerning the Factory at Chorzów (Claim for Indemnity) (Merits) (Germany/Poland)*, P.C.I.J. (Ser. A) No. 17, Judgment, 13 September 1928, p. 47.

332. Numerous international courts and tribunals have affirmed the *Chorzów Factory* principle, including the International Court of Justice.[539] There is "no doubt about the present vitality of the *Chorzów Factory* decision."[540]

333. This principle has also been codified in Article 31 of the International Law Commission's *Draft Articles on Responsibility of States for Internationally Wrongful Acts* ("**ILC Articles on Responsibility of States**") as follows:

> Article 31 – Reparation
>
> 1. The responsible State is under an obligation to make full reparation for the injury caused by the internationally wrongful act.
>
> 2. Injury includes any damage, whether material or moral, caused by the internationally wrongful act of a State.[541]

334. Reparation must be "full," in that it must eliminate all consequences of the wrongful act and restore the injured party to the situation that would have existed if the State had not committed the wrongful act.[542] If restitution in kind is "impossible or not practicable, the compensation awarded must wipe out all of the consequences of the wrongful act."[543]

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[539] **CL-0124**, *Quiborax*, ¶¶ 327-328; **CL-0099**, *Gold Reserve*, ¶ 678; **CL-0042**, *Rumeli Telekom A.S. and Telsim Mobil Telekomunikasyon Hizmetleri A.S. v. Republic of Kazakhstan* (ICSID Case No. ARB/05/16), Award, 29 July 2008, ¶ 792; **CL-0025**, *Impregilo S.p.A. v. Argentine Republic* (ICSID Case No. ARB/07/17), Award, 21 June 2011, ¶ 361; **CL-0115**, *Metalclad Corporation v. The United Mexican States* (ICSID Case No. ARB(AF)/97/1), Award, 30 August 2000 ("***Metalclad***"), ¶ 122; **CL-0126**, *S.D. Myers, Inc. v. Government of Canada* (UNCITRAL), Partial Award, 13 November 2000, ¶ 311; **CL-0090**, *CMS Gas Transmission Company v. The Republic of Argentina* (ICSID Case No. ARB/01/8), Award, 12 May 2005, ¶ 400; **CL-0122**, *Petrobart Limited v. The Kyrgyz Republic* (SCC No. 126/2003), Award, 29 March 2005, pp. 77-78; **CL-0076**, *MTD Equity Sdn. Bhd. And MTD Chile S.A. v. Republic of Chile* (ICSID Case No. ARB/01/7), Award, 25 May 2004 ("***MTD***"), ¶ 238; **CL-0098**, *Gabčikovo-Nagymaros Project (Hungary v. Slovakia)* (1997 I.C.J. 7), Judgment, 25 September 1997, ¶¶ 149-150; **CL-0131**, *The PV Investors v. Spain* (PCA Case No. 2012-14), Final Award 28 February 2020 (**"*PV Investors*"**); **CL-0082**, *Arrest warrant of 11 April 2000 (Democratic Republic of Congo v. Belgium)* (2002 I.C.J. 3), Judgment, 14 February 2002, ¶¶ 72-77.

[540] **CL-0054**, *ADC*, ¶ 493.

[541] **CL-0105**, International Law Commission, "Draft Articles on Responsibility of States for Internationally Wrongful Acts, with commentaries" in Y*earbook of the International Law Commission*, vol. II, Part Two (2001), art. 31.

[542] **CL-0124**, *Quiborax*, ¶ 328.

[543] **CL-0124**, *Quiborax*, ¶ 328.

335. "Full reparation" is thus the standard of compensation for Perú's breach of the FTA. As the *Vivendi II* tribunal observed, "regardless of the type of investment, and regardless of the nature of the illegitimate measure, the level of damages awarded in international investment arbitration is supposed to be sufficient to compensate the affected party fully and to eliminate the consequences of the State's action."[544]

III. The "But For" Scenario Reflecting What Would "In All Probability" Have Occurred if Perú Had Not Breached Article 803 of the FTA

336. The goal of awarding compensation for a breach of a treaty obligation is to put an investor, as closely as possible, in the situation that it would have occupied but for the State's unlawful acts. As noted above, Scotiabank does not have to establish a but for hypothetical with "absolute certainty." As the tribunal recognized in *Lemire*:

> [C]alculating the precise amount of compensation is fraught with […] difficulty, inherent in the very nature of the 'but for' hypothesis. Valuation is not an exact science. The Tribunal has no crystal ball and cannot claim to know what would have happened under a hypothesis of no breach; the best any tribunal can do is make an informed and conscientious evaluation."[545]

337. This Tribunal must therefore determine the "but for" scenario that would in all probably have existed using reasonable assumptions about the treatment of the Default Interest Amparo had Perú's conduct that gives rise to the breaches of Article 803 not taken place[546] and assuming that Perú did not engage in any further wrongful conduct in connection with Scotiabank's investment.[547]

338. As described in Part Four above, Perú breached the FTA through its conduct associated with the 2017 Leaked Decision and improper political pressure and interference on the Constitutional Court culminating in its November 2021 Decision to dismiss the Default Interest Amparo. Accordingly, to give effect to the customary international law principle of full reparation, the proper "but for" scenario is one in which (a) high-level government officials would not have

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[544] **CL-0091**, *Compañiá de Aguas del Aconquija S.A. and Vivendi Universal S.A. v. Argentine Republic* (ICSID Case No. ARB/97/3), Award, 20 August 2007 (**"*Vivendi II*"**), ¶ 8.2.7. See also, **CL-0076**, *MTD*, ¶ 238.

[545] **CL-0108**, *Lemire (Award)*, ¶ 248.

[546] **CL-0108**, *Lemire (Award)*, ¶¶ 243-261; **CL-0050**, *Yukos*, ¶¶ 1803-1829.

[547] **CL-0108**, *Lemire (Award)*, ¶ 244.

made threats in private to the Justices of the Constitutional Court prior to the emergence of the 2017 Leaked Decision; (b) a high level insider within the Constitutional Court would not have leaked the 2017 Leaked Decision in favour of Scotiabank Perú in June 2017 prior to the release of the Court's judgment; (c) Peruvian Government officials would not have applied political pressure and taken or threatened retaliatory actions against the Constitutional Court to compel it to change its decision and rule in favour of the State following the 2017 Leaked Decision; and (d) the Constitutional Court would not have succumbed to that pressure by reversing the 2017 Leaked Decision and dismissing the Default Interest Amparo as inadmissible.

339. As described above, the customary international law principle of full reparation requires the Tribunal to determine what would "in all probability" have occurred in the absence of the Perú's unlawful conduct. In most cases involving governmental interference with a judiciary, that would require drawing inferences about the impact that such interference had on a court. In this case, however, inferences are unnecessary because the available evidence makes the impact apparent and observable. The Tribunal knows how the Constitutional Court would have ruled because of the 2017 Leaked Decision. As Dr. Landa and Professor Neyra confirm in their report, the 2017 Leaked Decision has all the hallmarks of a decision that had already been decided and voted on by the Constitutional Court Justices, and was ready to be published.[548] The Constitutional Court had decided the Default Interest Amparo in favour of Scotiabank Perú and determined to order SUNAT to reimburse Scotiabank Perú for the excess default interest it had paid under protest.[549]

340. This outcome would not have been unique or surprising. The 2017 Leaked Decision is fully in line with the *Medina de Baca* line of cases (since confirmed in *Maxco*) affirming that, as a matter of Peruvian law, it is unconstitutional for SUNAT to charge accrued default interest beyond the maximum period of time provided for resolving tax cases unless the debtor is to blame for the delay, as described in paragraphs 162 to 166 above.[550]

[548] CER-Landa/Neyra, ¶¶ 108-112.

[549] CER-Landa/Neyra, ¶¶ 108-109; *see* ¶¶ 82-83 above.

[550] CER-Landa/Neyra, ¶¶ 75-76, 155; *see* ¶¶ 73-74, 142-143.

341. Accordingly, but for Perú's breaches of Article 803 of the FTA, the Constitutional Court would, in all probability, have formally rendered judgment in the Default Interest Amparo in favour of Scotiabank Perú on the terms of the 2017 Leaked Decision. Based on the opinion of Dr. Landa and Professor Neyra, the Claimant uses the date of July 1, 2017 – a few weeks after the publication of the 2017 Leaked Decision – as a reasonable estimate for when the Constitutional Court would have published that judgment but for the State's breaches. As Dr. Landa and Professor Neyra explain, once a decision that has been voted upon is circulated within the Constitutional Court, the "process of signatures after the vote is fast", as each Justice has just two days to sign the decision and it is "extremely rare that it is not signed within this period and published in the following weeks."[551]

342. As a result of the Constitutional Court's judgment in favour of Scotiabank Perú, SUNAT would have been required to repay to Scotiabank Perú the Default Interest Delta with interest at the rate prescribed under Peruvian law described in the expert report of Professor Hernández from the date of the payments by Scotiabank Perú between December 2013 and February 2014 to the date of repayment by SUNAT.[552] It is reasonable to assume that SUNAT would have repaid this Default Interest Delta with interest on or around January 1, 2019 (*i.e.*, approximately eighteen months following the issuance of the Constitutional Court decision in favour of Scotiabank Perú in the "but for" scenario). The assumption that Perú would have taken approximately eighteen months to make the repayment is reasonable because it corresponds with the approximate amount of time from a decision to repayment in other cases where the government was ordered to reimburse a taxpayer such as *Icatom*.[553]

343. Accordingly, as of January 1, 2019, Scotiabank Perú would have received payment from SUNAT in the following amounts:

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[551] CER-Landa/Neyra, ¶ 70**.**

[552] CER-Hernández, ¶¶ 127-129.

[553] *See*, for example, **C-0374**, Judgment 12/2022 of the Plenary Session of the Constitutional Court in Case No. 1339-2019-PA/TC (Primax); **C-0067**, Judgment of the Plenary Session of the Constitutional Court in Case No. 04532-2013-PA/TC (Icatom); **C-0373**, Judgment 33/2022 of the Plenary Session of the Constitutional Court in Case No. 03439-2019-PA/TC (Mondelez).

(a) The Default Interest Delta: [redacted];[554] and

(b) Interest payable on the Default Interest Delta to January 1, 2019: [redacted].[555]

344. Upon this repayment by SUNAT to Scotiabank Perú, the funds would have been available in Scotiabank Perú for repatriation by Scotiabank to Canada.[556]

IV. Quantum of Scotiabank and Scotiabank Perú's Losses

345. Scotiabank and Scotiabank Perú both suffered damages as a result of Perú's breaches of Article 803 of the FTA and are both, independently, entitled to compensation. However, since the losses that Scotiabank and Scotiabank Perú suffered overlap, payment of compensation to both would amount to double recovery. Accordingly, Scotiabank asserts as its primary case its claim under Article 819 of the FTA for the damages that it suffered as the investor. In the alternative, Scotiabank claims under Article 820 of the FTA for the loss suffered by its enterprise, Scotiabank Perú.

346. Scotiabank's damages in connection with its primary claim and Scotiabank Perú's damages in connection with the alternative claim are described below.

A. Primary Claim: Scotiabank's Quantum Calculation under Article 819 of the FTA

347. As a result of Perú's conduct, Scotiabank's subsidiary (Scotiabank Perú) was deprived of money to which it was entitled and that it would have received but for Perú's breaches of the FTA.

348. KSV explains that the value that a shareholder like Scotiabank enjoys in free cash flow in a foreign subsidiary like Scotiabank Perú – here, the Default Interest Delta to which Scotiabank Perú was entitled plus interest through January 1, 2019 (*i.e.*, the expected repayment date by SUNAT to Scotiabank Perú) – is equal to the value of that money upon repatriation to the

[554] CER-KSV, ¶ 5.13.

[555] CER-KSV, ¶ 5.16.

[556] CER-Hernández, ¶ 142.

shareholder.[557] Scotiabank has suffered a loss because, as a result of the State wrongfully depriving its subsidiary of money, Scotiabank was deprived of funds in its subsidiary that would have been available to dividend to Scotiabank.[558] Scotiabank has suffered a loss because, as a result of the State wrongfully depriving its subsidiary of money, Scotiabank was deprived of funds in its subsidiary that would have been available to dividend to Scotiabank.[559] The loss amounts to a diminution in the equity value of Scotiabank Perú.[560] When its subsidiary is deprived of money to which it is entitled, Scotiabank suffers a loss in the equity value that it holds in its subsidiary, calculated as the difference between the equity value in the subsidiary with the money to which it was entitled (*i.e.*, but for the State's unlawful conduct) and without the money to which it was entitled (*i.e.*, the actual scenario persisting as a result of the State's unlawful conduct).[561] The value to the shareholder (Scotiabank) of that differential cash position of a subsidiary (Scotiabank Perú) is subject to the cost to the shareholder to repatriate the funds.[562]

349. In that regard, KSV calculates the loss to Scotiabank as a result of Perú's breaches of Article 803 of the FTA as follows:

(a) *First,* KSV determines the "but for" default interest, which is the maximum default interest on the IGV that SUNAT could have charged Scotiabank Perú under Peruvian law.[563] For this calculation, KSV use the parameters set out in the Hernández Report, including the time periods in which it would have been constitutional for default interest to accrue (and those time periods in which it would not have accrued), as well as the applicable interest rates.[564]

[557] CER-KSV, ¶¶ 4.5-4.7.

[558] CER-KSV, ¶¶ 4.5-4.7.

[559] CER-KSV, ¶ 4.5.

[560] CER-KSV, ¶ 4.5.

[561] CER-KSV, ¶ 4.5.

[562] CER-KSV, ¶ 4.7.

[563] CER-KSV, ¶ 5.3.

[564] CER-KSV, ¶¶ 5.3-5.11; CER-Hernández, ¶ 128.

(b) *Second,* KSV calculates the Default Interest Delta.[565]

(c) *Third*, KSV applies the applicable interest under the "but for" scenario to the Default Interest Delta from the midpoint of the installment payments that Scotiabank Perú made under protest to January 1, 2019, under the assumptions that (i) the Constitutional Court would have issued a decision in Scotiabank Perú's favour on July 1, 2017, and (ii) Perú would have repaid the Default Interest Delta to Scotiabank Perú, with interest, on January 1, 2019.[566]

KSV use the applicable interest rate under Peruvian law, as set out in the Hernández Report.[567] As Professor Hernández confirms in his report, none of these sums would have attracted any income or other tax upon SUNAT's repayment to Scotiabank Perú.[568] The Default Interest Delta and, as an accessory to that reimbursement, the interest accruing on the Default Interest Delta does not attract income or other tax.[569] This sum, in PEN, is Scotiabank Perú's loss as a result of Perú's breaches of Article 803 of the FTA.

(d) *Fourth*, in order to determine Scotiabank's losses as a result of Perú's breaches of Article 803, KSV calculates the repatriation value of these funds to Scotiabank in Canada, having regard to the taxes applicable under Peruvian law upon repatriation and Scotiabank's shareholding, depicted in the chart below for ease of reference:[570]

[565] CER-KSV, ¶¶ 5.12-5.13.

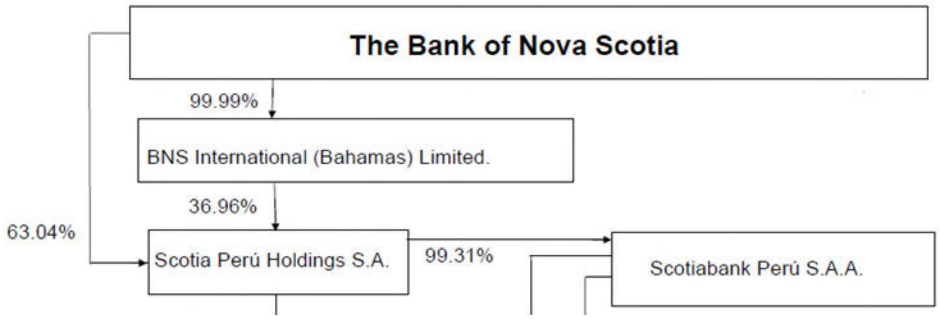
[566] CER-KSV, ¶ 5.14.

[567] CER-KSV, ¶¶ 5.15-5.16; CER-Hernández, ¶ 128.

[568] CER-Hernández, ¶¶ 136-137.

[569] CER-Hernández, ¶¶ 136-137.

[570] CER-KSV, ¶¶ 9.1.2-9.1.4.



[redacted]

[redacted]

[redacted]

[redacted]

[571] CER-Hernández, ¶¶ 13(e), 142.

[572] CER-KSV, Schedule 3: Scotiabank's Loss.

[573] CER-Hernández, ¶¶ 142-146.

[redacted][577]

350. In summary, the total value to Scotiabank on January 1, 2019 of the money its subsidiary was deprived as a result of Perú's breaches of the FTA is [redacted]. That amount reflects Scotiabank's loss as of January 1, 2019 that Perú should be ordered to pay to Scotiabank to compensate it for its losses, together with pre- and post-award interest.

[574] CER-KSV, Schedule 3: Scotiabank's Loss.

[575] CER-Hernández, ¶ 142.

[576] CER-KSV, Schedule 3: Scotiabank's Loss. Note that the Bahamian Dollar is pegged to the US dollar 1-to-1.

[577] **C-0019**, Articles of Association for BNS International (Bahamas) Ltd. (August 28, 2019).

B. Alternative Claim: Scotiabank Perú's Quantum Calculation under Article 820 of the FTA

351. Scotiabank's alternative claim for the losses to Scotiabank Perú overlaps with its primary claim. The Tribunal need not order the payment of compensation for Scotiabank's alternative claim in the event that Scotiabank is compensated fully pursuant to its primary claim under Article 819.

352. As discussed above, pursuant to Article 820 of the FTA, Scotiabank is entitled to make a claim on behalf of its "enterprise", Scotiabank Perú, for losses that Scotiabank Perú incurred as a result of Perú's breaches of Article 803 of the FTA.

353. As discussed, above, if Perú had not breached the FTA, Scotiabank Perú would have been paid the Default Interest Delta and applicable Peruvian interest accruing to January 1, 2019.[578] That equals the value of Scotiabank Perú's loss through that date. Accordingly, Scotiabank Perú's loss resulting from Perú's breaches of the FTA is [redacted], before pre-award interest is applied.[579]

V. Scotiabank is Entitled to Pre- and Post-Award Interest

354. Scotiabank and Scotiabank Perú are entitled to interest, compounded annually, applied pre and post-award, including on costs. For both of Scotiabank's primary and alternative claims, pre-award interest should be calculated from January 1, 2019.

355. As discussed below, interest payable pursuant to the customary international law standard must fully compensate a claimant for the loss it suffers as a result of a breach and place the claimant in the position it in all likelihood would have occupied but for the State's unlawful conduct. The computation of interest must therefore consider, first and foremost, the opportunity cost to the claimant as a result of being deprived of funds to which it was entitled. As the Claimant in this case is one of the world's leading and most sophisticated financial institutions, it is uniquely placed to deploy capital to maximize its returns and the award of interest must reflect that.

[578] CER-KSV, ¶ 1.5(b).

[579] CER-KSV, Schedule 4: Scotiabank Peru's Loss.

356. In the subsections below, Scotiabank explains why: (*i*) interest should be calculated based on Scotiabank's opportunity cost (subsection A), (*ii*) full reparation requires interest to be compound (subsection B), and (*iii*) the rate and compounding period for post-award interest should equal pre-award interest (subsection C).

A. The Interest Rate Must Be Equivalent to the Claimant's Opportunity Cost

357. It is an "accepted legal principle" that, absent treaty terms to the contrary, tribunals may include an award of interest in a claimant's favour.[580] Interest is considered an "integral part of the compensation due…" after a treaty breach.[581] The purpose of an award of interest is "to compensate the damage resulting from the fact that, during the period of non-payment by the debtor, the creditor is deprived of the use and disposition of that sum he was supposed to receive."[582]

358. As such, an award of interest is not separate from full reparation under the *Chorzów Factory* standard; it is a component of that full reparation.[583] The requirement of full reparation must inform all aspects of an award, including the determination of an appropriate rate of interest and whether (as discussed below) interest should be simple or compound.

359. If Scotiabank and Scotiabank Perú had not been deprived of the funds to which they were entitled, they could have put those funds to productive use. That is why interest must account for their opportunity cost. As one of the leading commentators on the calculation of interest, John Gotanda, explains: "awarding compound interest at the claimant's opportunity cost would be the most appropriate way to compensate it for the loss of the use of its money."[584] Gotanda and Sénéchal further explain:

> Thus, a claimant may argue that if a wrongful act had not occurred, it would have used its money earlier and would have invested it. According to the claimant, it would have invested the money in a

[580] **CL-0091**, *Vivendi II*, ¶ 9.2.1.

[581] **CL-0117**, *Middle East Cement Shipping and Handling Co. S.A. v. Arab Republic of Egypt* (ICSID Case No. ARB/99/6), Award, 12 April 2002 ("***Middle East Cement"***), ¶ 174.

[582] **CL-0091**, *Vivendi II*, ¶ 9.2.3.

[583] **CL-0083**, *Asian Agricultural*, ¶ 114; **CL-0115** *Metalclad*, ¶ 128; **CL-0117**, *Middle East Cement*, ¶ 174.

[584] **CL-0107**, John Y. Gotanda, "A Study of Interest" in *VI Dossiers of the ICC Institute of World Business Law* (2008) ("***Gotanda***"), p. 34.

> manner that would earn a certain rate of return. The claim is actually a claim for damages for loss directly resulting from the respondent's conduct. The claimant is arguing that an award of these damages is necessary to re-establish the situation that likely would have existed if the respondent had not acted improperly.[585]

360. The focus on the investor's opportunity cost has been endorsed by investment arbitration tribunals. The tribunal in *Vivendi v. Argentina* confirmed the rationale underlying this approach:

> The object of an award of interest is to compensate the damage resulting from the fact that, during the period of non-payment by the debtor, the creditor is deprived of the use and disposition of that sum he was supposed to receive.[586]

361. In *Sylvana Technical Systems v Iran*, the tribunal applied the opportunity cost theory in awarding interest based on the return the investor could have earned if it had funds owing to it available for an alternative investment.[587] Similarly, in *France Telecom v. Lebanon*, the tribunal awarded pre-award interest of 10%, noting that this rate reflected the reasonable profitability of the capital that the claimant was deprived of by Lebanon's unlawful actions.[588]

362. As KSV explains, international banks like Scotiabank are uniquely placed to deploy and make earnings on available capital.[589] One of the best metrics of a bank's performance and its ability to make returns on capital is the "Return on Equity", which computes a bank's after-tax earnings divided by the book value of the shareholders' equity.[590] That information is publicly available, widely used, and informs the rate at which Scotiabank was, in any given period, making returns on its available assets and capital.[591]

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[585] **CL-0144**, John Y. Gotanda and Thierry J. Senechal, "Interest as Damages", Villanova University Charles Widger School of Law (2009), pp. 516-517.

[586] **CL-0091**, *Vivendi II*, ¶ 9.2.3.

[587] **CL-0145**, I. Marboe, Calculation of Compensation and Damages in International Investment Law, 2nd ed (Oxford: Oxford University Press, 2017), p. 356.

[588] **CL-0141**, *France Telecom Mobile International, S.A. FTML, S.A.L. v. Lebanese Republic*, Arbitral Award, 31 January 2005, ¶ 209.

[589] CER-KSV, ¶ 4.10.

[590] CER-KSV, ¶ 4.12.

[591] CER-KSV, ¶ 4.13.

363. Accordingly, as KSV explains, the "Return on Equity" provides the most reasonable basis upon which to compute the opportunity cost to Scotiabank (and, in the alternative, to Scotiabank Perú) as a result of having been deprived of money to which it was entitled.[592] It provides a direct and company-specific metric as to the loss suffered by *this* investor as a result of the breach. To calculate Scotiabank's Return on Equity, KSV adopts the "trailing-twelve-month reported return on equity for Scotiabank Perú for each month in the Loss Period as reported by S&P Capital IQ."[593] KSV calculates that rate on a monthly basis from January 1, 2019 (the presumptive date on which SUNAT would have repaid Scotiabank Perú and on which those funds would have been remitted to Scotiabank) to present.[594] The results are presented in the following table:

364. KSV applies the same methodology to calculate Scotiabank Perú's Return on Equity as part of Scotiabank's alternative claim.[595]

[592] CER-KSV, ¶ 4.13.

[593] CER-KSV, ¶ 4.14.

[594] CER-KSV, ¶¶ 7.5-7.6.

[595] CER-KSV, ¶¶ 6.5-6.6.

365. KSV also perform sensitivity analyses on their interest calculation. First, KSV provides for both the primary and alternative claims interest calculations based on Scotiabank's and Scotiabank Perú's cost of equity.[596] There is robust support in awards of international tribunals that a claimant's cost of capital is an appropriate measure of interest.[597] However, the Return on Equity approach should be preferred because calculating interest based on Scotiabank and Scotiabank Perú's lower cost of equity would undercompensate them. Second, KSV provides for both the primary and alternative claims' interest calculations based on Perú's cost of debt (*i.e.*, bond rates).[598] The economic theory behind this alternative calculation of interest is premised on the notion that, as a result of Perú's unlawful actions, Scotiabank and Scotiabank Perú have been forced to loan the value of their losses to Perú. While there is also support in the case law for such an approach,[599] that too would tend to undercompensate Scotiabank and Scotiabank Perú because – as their Return on Equity shows – they would in all probability have earned higher returns had they been able to deploy the money as they chose instead of being, in effect, forced to loan it to Perú at the sovereign debt rate. Third, for losses in the alternative claim only (*i.e.*, the Article 820 claim for losses to Scotiabank Perú), KSV provides (for context only) the considerably higher interest that would accrue under applicable Peruvian rates of interest.[600]

B. Full Reparation Requires Compound Interest

366. Consistent with the *Chorzów Factory* standard of full reparation, the Tribunal should award pre-award interest on a compound rather than a simple basis.[601] Compound interest accounts for the additional sum that an investor would have earned if the money it was deprived of had been

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[596] CER-KSV, ¶ 4.15.

[597] **CL-0091**, *Vivendi II*, ¶ 9.2.3; **C-0142**, *Phillips Petroleum Company Venezuela Limited and ConocoPhillips Petrozuata B.V. Petroleos De Venezuela, S.A.*, (ICC Case No. C-16849/JRF/CA), Final Award, 17 September 2012, ¶ 295(ii); **C-0143**, *SAUR International S.A. v Argentine Republic* (ICSID Case No. ARB/04/4), Decision on Jurisdiction and Liability (SPA), 6 June 2012, ¶¶ 296-298, 430; **C-0075**, *Alpha v. Ukraine*, ¶ 514.

[598] CER-KSV, ¶ 5.15(b).

[599] **CL-0131**, *PV Investors*, ¶ 834; **CL-0085**, *Bear Creek Mining Corporation v. Republic of Perú* (ICSID Case No. ARB/14/21), Award, 30 November 2017, ¶ 713; **CL-0101**, *Grenada Private Power Limited and WRB Enterprises, Inc. v. Grenada* (ICSID Case No. ARB/17/13), Award, 29 March 2020 ("***Grenada Private Power***"), ¶ 350; and **CL-0015**, *Eiser Infrastructure Limited and Energía Solar Luxembourg S.à r.l. v. Kingdom of Spain* (ICSID Case No. ARB/13/36), Award, 4 May 2017 ("*Eiser*"), ¶¶ 475-478.

[600] CER-KSV, ¶ 5.15(c).

[601] **CL-0094**, *EDF International S.A., SAUR International S.A. and León Participaciones Argentinas S.A. v. Argentine Republic* (ICSID Case No. ARB/03/23), Award, 11 June 2012 ("***EDFI"***), ¶ 1337.

reinvested each year at the prevailing rate of interest.[602] Compound interest is the generally accepted standard in international investment arbitrations. The *Middle East Cement* tribunal confirmed that "compound (as opposed to simple) interest is at present deemed appropriate as the standard of international law."[603]

367. An award of compound interest serves three distinct goals: (a) to ensure that a claimant receives the "full present value of the compensation that it should have received at the time of the taking";[604] (b) to prevent the State [from being] unjustly … enrich[ed] … by reason of the fact that the payment of compensation has long been delayed";[605] and (c) to promote efficiency by removing the incentive for a respondent to delay the arbitral proceedings and payment of the award.[606]

368. Simple interest falls short of full reparation because it does not "account accurately for the time value of money until the date of payment."[607] In contrast, compound interest reflects the actual damages suffered.[608] Unlike simple interest, compound interest ensures that the amount of compensation reflects the additional sum that an investor would have earned if the money had been reinvested each year at generally prevailing rates of interest, thereby placing a claimant in the actual position it would have occupied "but for" the breach.

369. As the Tribunal observed in *Grenada Private Power Limited v. Grenada*:

> There is *jurisprudence constante* awarding compound interest in investor-state disputes. Where, as here, "the claimant could have

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[602] **CL-0135**, *Wena Hotels*, ¶ 129; **CL-0092**, *Compañia del Desarrollo de Santa Elena S.A. v. Republic of Costa Rica* (ICSID Case No. ARB/96/1), Final Award, 17 February 2000 (**"*Santa Elena*"**), ¶ 104; **CL-0050**, *Yukos*, ¶ 1689.

[603] **CL-0117**, *Middle East Cement*, ¶ 174. *See* also **CL-0092**, *Santa Elena*, ¶ 104; **CL-0135**, *Wena Hotels*; **CL-0091**, *Vivendi II*, ¶ 9.2.6; **CL-0111**, *LG&E Energy Corp., LG&E Capital Corp., and LG&E International, Inc .v. Argentine Republic* (ICSID Case No. ARB/02/1), Award, 25 July 2007, ¶ 103; **CL-0076**, *MTD,* ¶ 251; **CL-0095**, *Emilio Agustín Maffezini v. The Kingdom of Spain* (ICSID Case No. ARB/97/7), Award, 13 November 2000 (**"*Maffezini*"**), ¶ 96; **CL-0096**, *Enron Corporation and Ponderosa Assets, L.P. v. Argentine Republic* (ICSID Case No. ARB/01/3), Award, 22 May 2007, ¶ 452.

[604] **CL-0092**, *Santa Elena*, ¶ 101.

[605] **CL-0092**, *Santa Elena*, ¶ 101.

[606] **CL-0107**, Gotanda, p. 4; **CL-0106**, Jeffery M. Colon & Michael S. Knoll, "Prejudgment Interest in International Arbitration" (2007) University of Pennsylvania Law School Faculty Scholarship Paper 185, pp. 3, 8, 23.

[607] **CL-0094**, *EDFI*, ¶ 1337.

[608] **CL-0091**, *Vivendi II*, ¶¶ 8.3.20, 9.2.4, 9.2.6, 9.2.8.

> received compound interest merely by placing its money in a readily available and commonly used investment vehicle, it is neither logical nor equitable to award the claimant only simple interest."[609]

370. This rationale is particularly compelling in the context of this case, in which the Claimant is a sophisticated commercial bank who almost certainly would have invested the funds it was deprived of as a result of the breach.

371. KSV also confirms that, from an economic perspective, it is appropriate to award compound interest in order to fairly compensate Scotiabank:

> From a financial perspective, given the objective to fully compensate a claimant for a loss caused by a breach, Pre-Award Interest should be calculated using a commercial rate of interest (i.e., the rate of return) and on a compound basis. We say this because most commercial financing involves compound interest and the Alleged Breach prevented Scotiabank/ Scotiabank Peru from being able to deploy the lost capital in investments that would have included compounding effects. Compounding is also the common approach to calculate the present value of cash flow streams in commercial transactions. Simple interest would undercompensate the injured parties.[610]

372. While some Tribunals have awarded compound interest have ordered the annual compounding of interest,[611] KSV explains in their report that in this case interest should be compounded monthly, which is the typical compounding period used by banks when they deploy cash in a commercial transaction.[612]

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373. Applying the positions described above, KSV has calculated interest based on a rate that updates monthly based on Scotiabank and Scotiabank Perú's 12-month rolling Return on Equity.

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[609] **CL-0101**, *Grenada Private Power*, ¶ 328.

[610] CER-KSV, ¶ 4.10.

[611] **CL-0050**, *Yukos*, ¶ 1671.

[612] CER-KSV, ¶ 4.11.

The following table from KSV's report shows the interest owing to Scotiabank, on its primary claim (under Article 819 of the FT)A, as of the date of its report:[613]

374. KSV's report also shows the interest owing to Scotiabank Perú, on the alternative claim (under Article 820 of the FTA), as of the date of its report as follows:[614]

C. Post-Award Interest Should Equal Pre-Award Interest

375. Scotiabank is also entitled to post-award interest from the date of the Award to the date on which it is paid. Like pre-award interest, post-award interest is necessary to achieve full

[613] CER-KSV, ¶ 1.9.

[614] CER-KSV, ¶ 1.11.

reparation.[615] Post-award interest also serves a separate function on top of the compensatory goal underlying pre-award interest: to incentivize a respondent to comply with the terms of an award expediently.[616]

376. The Tribunal should order post-award interest using Scotiabank's Return on Equity as of the date of the Award. The Tribunal should order that post-award interest compound on a monthly instead of a yearly basis, as several tribunals have done in order to promote compliance with an award.[617]

VI. The Award Should State that Compensation is Net of Peruvian Taxes

377. As described above, KSV's valuation of Scotiabank's loss on its primary (Article 819) claim and on its alternative (Article 820) claim both fully account for all applicable taxes.[618] As Mr. Hernández explains, the Default Interest Delta and interest accruing on it through January 1, 2019 are considered post-tax amounts in Perú and would accrue no additional taxes upon repayment to Scotiabank Perú.[619] For purposes of computing Scotiabank's loss, KSV incorporates Mr. Hernández's application of all applicable taxes that would apply for funds to be repatriated from Perú to Canada.[620] Accordingly, under both permutations of its claim, the damages sought already incorporate all applicable taxes.[621]

378. Consequently, any taxation by Perú of the eventual Award in this arbitration, whether applied directly or indirectly, would result in Scotiabank being effectively double-taxed. That

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[615] **CL-0076**, *Amco Asia Corporation and others v. Republic of Indonesia* (ICSID Case No. ARB/81/1), Award, 20 November 1984, ¶ 281.

[616] **CL-0099**, *Gold Reserve*, ¶ 856.

[617] **CL-0095**, *Maffezini*, ¶¶ 96-97; **CL-0115**, *Metalclad*, ¶ 131. *See* also **CL-0090**, C*MS*, ¶ 471, where the tribunal awarded pre-award interest on a simple basis but that post-award interest should be compounded.

[618] *See* ¶¶ 349(c)-(d).

[619] CER-Hernández, ¶¶ 136-137.

[620] CER-Hernández, ¶ 142.

[621] CER-KSV, ¶¶ 9.1.1, 9.1.4(b), Schedule 3: Scotiabank's Loss. *See also,* **C-0001**, Free Trade Agreement between Canada and the Republic of Perú, art. 812(3) (providing that compensation for expropriation shall be "paid without delay and shall be fully realizable and freely transferable"). *See also,* **CL-0138**, *Glencore International AG and CI Prodeco SA v Republic of Colombia* (ICSID Case No ARB/16/6) Award, 27 August 2019 ("***Glencore***"), ¶ 1625 (interpreting a similar provision in regards to the claimants' request that the tribunal declare that the amounts awarded be net of taxes and holding that "although the rule refers to expropriation, it can be extended by analogy to compensation for violations of other provisions of the BIT").

would subvert the purpose of the Award – *i.e.*, to place Scotiabank in the financial position in which it would have been had Perú not breached its obligations under the FTA.

379. International arbitration tribunals expressly note, in the dispositive sections of their awards, when sums awarded are "net" of applicable taxes. Such findings are essential to give effect to the principle of full reparation and to ensure that, after a tribunal is *functus officio*, that a State does not seek to improperly tax award proceeds. For instance, in *ConocoPhillips v Venezuela*, the tribunal observed that, having awarded damages incorporating all applicable taxes, "applying the same or further taxes to the amount awarded would undermine the principle of full compensation."[622] The tribunal thus provided the following declaration in the dispositive section of the award:

> The Tribunal declares that (a) the Award is net of all applicable Venezuelan taxes; (b) Venezuela shall not tax or attempt to tax the Award; (c) the Claimants have no further taxation obligations to Venezuela in respect of the three Projects; and (d) in case taxes have nonetheless to be paid by the Claimants, the Respondent shall be liable to compensate the Claimants for the corresponding amount in such a way that the amount effectively received by the Claimants after deduction of all applicable taxes corresponds to the full amount (including interest) granted by this Tribunal.[623]

380. Other tribunals have granted similar relief. In *Rusoro v Venezuela*, the tribunal declared that "compensation, damages and interest granted in this Award are net of any taxes imposed by [Venezuela]" and it ordered Venezuela "to indemnify Rusoro with respect to any Venezuelan taxes imposed on such amounts."[624] Similarly, in *Glencore v Colombia (I)*, the tribunal declared the award to be neutral with regard to Colombian taxes and ordered Colombia to indemnify the claimants for any future tax liability that may be imposed in violation of the treaty "in order to

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[622] **CL-128**, *ConocoPhillips Petrozuata B.V., ConocoPhillips Hamaca B.V. and ConocoPhillips Gulf of Paria B. V. v Bolivarian Republic of Venezuela* (ICSID Case No. ARB/07/30) Award, 8 March 2019 ("***ConocoPhillips***"), ¶ 957.

[623] **CL-128**, *ConocoPhillips*, ¶ 1010(10).

[624] **CL-140**, *Rusoro Mining Limited v The Bolivarian Republic of Venezuela* (ICSID Case No ARB(AF)/12/5), Award, 22 August 2016, ¶¶ 852-855; **CL-0139**, *OperaFund Eco-Invest SICAV PLC and Schwab Holding AG v Kingdom of Spain* (ICSID Case No ARB/15/36) Final Award, 6 September 2019 ("***OperaFund***"), ¶¶ 705, 746 (ordering Spain to indemnify the claimants for any future tax liability or withholding that may be imposed in Spain in violation of the Energy Charter Treaty).

guarantee that Claimants receive full reparation for Colombia's international wrong."[625] The tribunal in *OperaFund v Spain* granted similar relief.[626]

381. In the circumstances, Scotiabank requests that the Tribunal declare and direct that: (a) its Award is made net of all applicable Peruvian taxes; and (b) Perú may not tax or attempt to tax the Award. Further, and in addition to the above, Scotiabank seeks an indemnity from Perú in respect of any adverse consequences that may result from the imposition of additional, duplicative tax liability by the Peruvian tax authorities if the declaration in the Tribunal's Award recognizing that the Award is net of Peruvian taxes is not accepted by Perú's tax authorities as the equivalent of evidence of payment.

VII. Scotiabank is Entitled to Costs

382. Scotiabank also requests that the Tribunal award it all of its costs and expenses associated with this proceeding, including lawyers' fees, save those costs relating to the Rule 41 application that the Tribunal has already adjudicated. Scotiabank would not have incurred these arbitration costs if Perú had complied with its obligations under the FTA. As such, the Tribunal should award Scotiabank all costs, expenses, and lawyers' fees incurred for the purposes of this Arbitration, in order to fully compensate Scotiabank for Perú's breaches of the FTA. Scotiabank will present its full cost submission at the conclusion of this proceeding or as otherwise directed by the Tribunal.

PART SIX. RELIEF REQUESTED

383. On the basis of the foregoing, without limitation and reserving Scotiabank's right to supplement these prayers for relief, Scotiabank respectfully requests that the Tribunal:

(a) DECLARE that the Tribunal has jurisdiction over this dispute;

(b) DECLARE that Perú has breached Article 803 of the FTA;

(c) ORDER Perú to compensate Scotiabank pursuant to Article 819 of the FTA for Perú's breaches of the FTA in an amount of [redacted], plus pre-award

[625] **CL-0138**, *Glencore*, ¶¶ 1625-1627, 1630.

[626] **CL-0139**, *OperaFund*, ¶¶ 705, 746 (ordering Spain to indemnify the claimants for any future tax liability or withholding that may be imposed in Spain in violation of the Energy Charter Treaty).

compound interest from January 1, 2019 until the date of the Tribunal's Award at Scotiabank's reported return on equity calculated monthly using the trailing twelve month reported return on equity as reported by S&P Capital IQ, compounded monthly, or at such other rate and compounding period as the Tribunal determines will ensure full reparation;

(d) if the Tribunal does not grant Scotiabank the relief sought under paragraph (c), alternatively ORDER Perú to compensate Scotiabank Perú pursuant to Article 820 of the FTA for Perú's breaches of the FTA in an amount of [redacted], plus pre-award compound interest from January 1, 2019 until the date of the Tribunal's Award at Scotiabank Perú's reported return on equity calculated monthly using the trailing twelve month reported return on equity as reported by S&P Capital IQ, compounded monthly, or at such other rate and compounding period as the Tribunal determines will ensure full reparation;

(e) ORDER Perú to pay post-award compound interest from the date of the Tribunal's Award until the date of payment at the rates and compounding period set out in paragraph (c) or, in the alternative paragraph (d), above, or at such other rate and compounding period as the Tribunal determines will ensure full reparation;

(f) DECLARE that any award of damages and interest pursuant to paragraphs (c), (d) and (e) is made net of applicable Peruvian taxes and that Perú may not deduct taxes in respect of the payment of the award of damages and interest pursuant to paragraphs (c), (d) and (e);

(g) ORDER Perú to pay all of the costs and expenses of this arbitration, including Scotiabank's legal and expert fees, the fees and expenses of the Tribunal and ICSID's other costs and fees; and

(h) AWARD such further other relief as the Tribunal considers appropriate.

DATED: November 29, 2024

Respectfully submitted on behalf of
The Bank of Nova Scotia

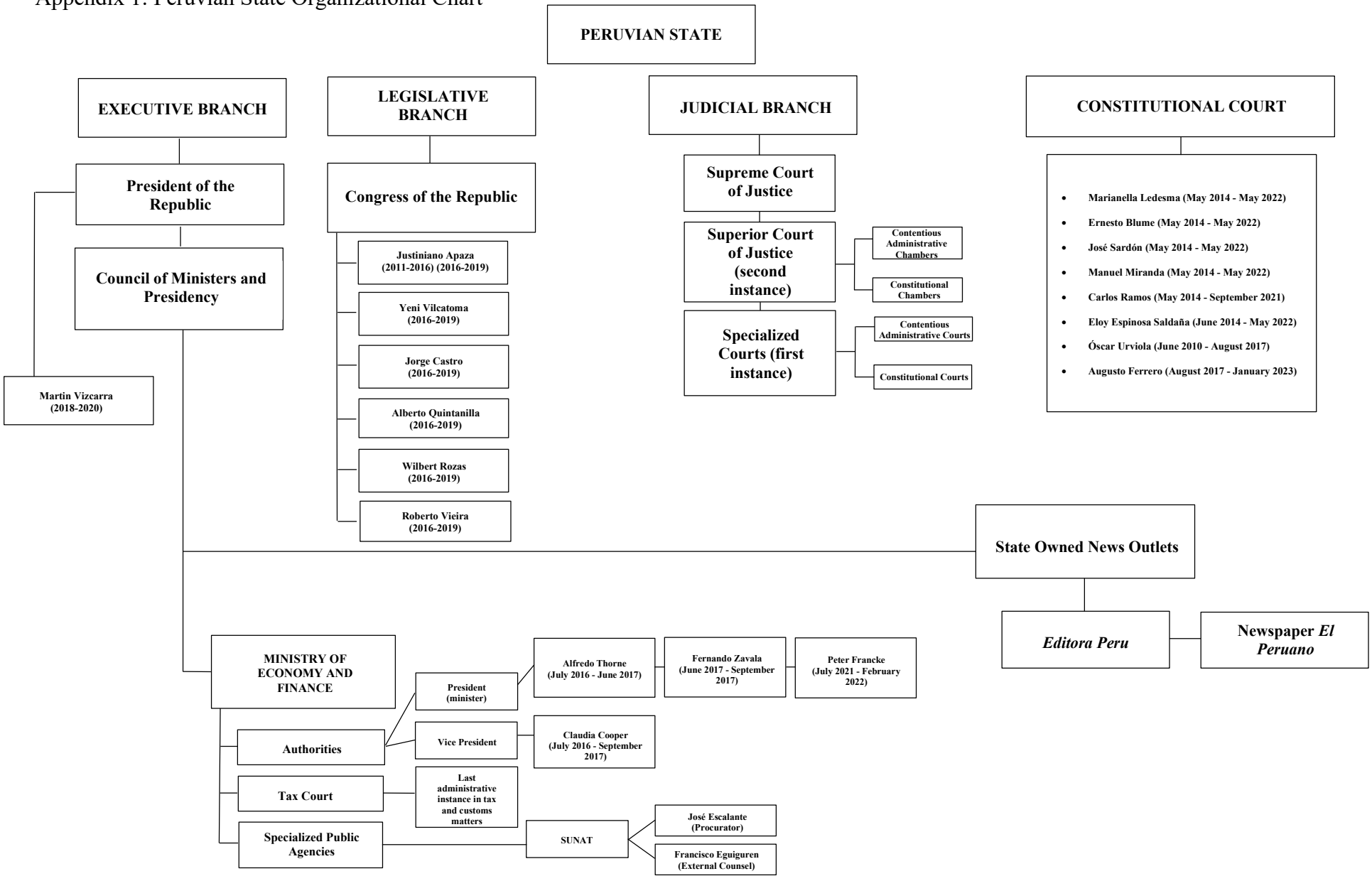
[Signed]

Torys LLP

[Signed]

Payet, Rey, Cauvi, Pérez Abogados

Appendix 1: Peruvian State Organizational Chart



(1) This table only includes the relevant entities and representatives of the Peruvian State referenced in the Scotiabank's Memorial of November 29, 2024.
(2) *Editora Peru* is considered part of the Executive Branch. *See* here, the official chart of the Executive Branch.
(3) *Editora Peru,* owned by the Peruvian State, is responsible for editing, printing and distributing the *El Peruano* media outlet. *See* **C-0089**, Legislative Decree No. 181, art. 3.

Appendix 2: Peruvian Media Sources

Scotiabank has consulted the below news sources to investigate whether Peruvian Government officials made materially similar statements regarding the Domestic Comparators' default interest cases before the Constitutional Court as were made by Peruvian Government officials in connection with Scotiabank Perú's Default Interest Amparo.

News Sources	
Radio	
1.	Radio Nacional
2.	Radio Exitosa
3.	RPP
4.	Radio Victoria Arequipa
5.	Radio Melodía Arequipa
6.	Radio RBC
7.	Radio FM Capital
8.	Radio Victoria AM
9.	Radio Melodía [Arequipa]
10.	Radio Karibeña
11.	Ritmo Romántica
12.	Radio la luz
13.	Estación Wari
14.	Radio Oxígeno
15.	Radio La Zona
16.	Wari
Television	
17.	RPP TV

18.	ATV
19.	Canal N
20.	TV Perú
21.	Panamericana
22.	Exitosa TV
23.	Capital TV
24.	Congreso TV
25.	Cosmos TV Puno
26.	América TV
27.	Latina
28.	ATV+
29.	Willax
Newspapers/Weekly Journals/Magazines	
30.	Hildebrandt en sus trece
31.	El Peruano
32.	Exitosa
33.	Gestión
34.	La República
35.	Perú 21
36.	Diario Expreso
37.	El País
38.	Diario Uno
39.	Caretas
40.	La Nación

41.	El Comercio
42.	La Razón
43.	Correo
44.	Diario Nuevo Sol
45.	Diario Sin Fronteras
46.	Diario Nuevo Norte
47.	Boletín de Noticias del Tribunal Constitucional
48.	Ojo
49.	Somos
50.	Rumbo Económico
51.	Trome
Digital Media	
52.	Sudaca
53.	Gestión
54.	El Comercio
55.	RPP
56.	Andina
57.	La Voz de Perú
58.	Ius 360°
59.	Contadores y Empresas
60.	Perú Legal
61.	CMS Law
62.	La Nación
63.	Shalom Plus

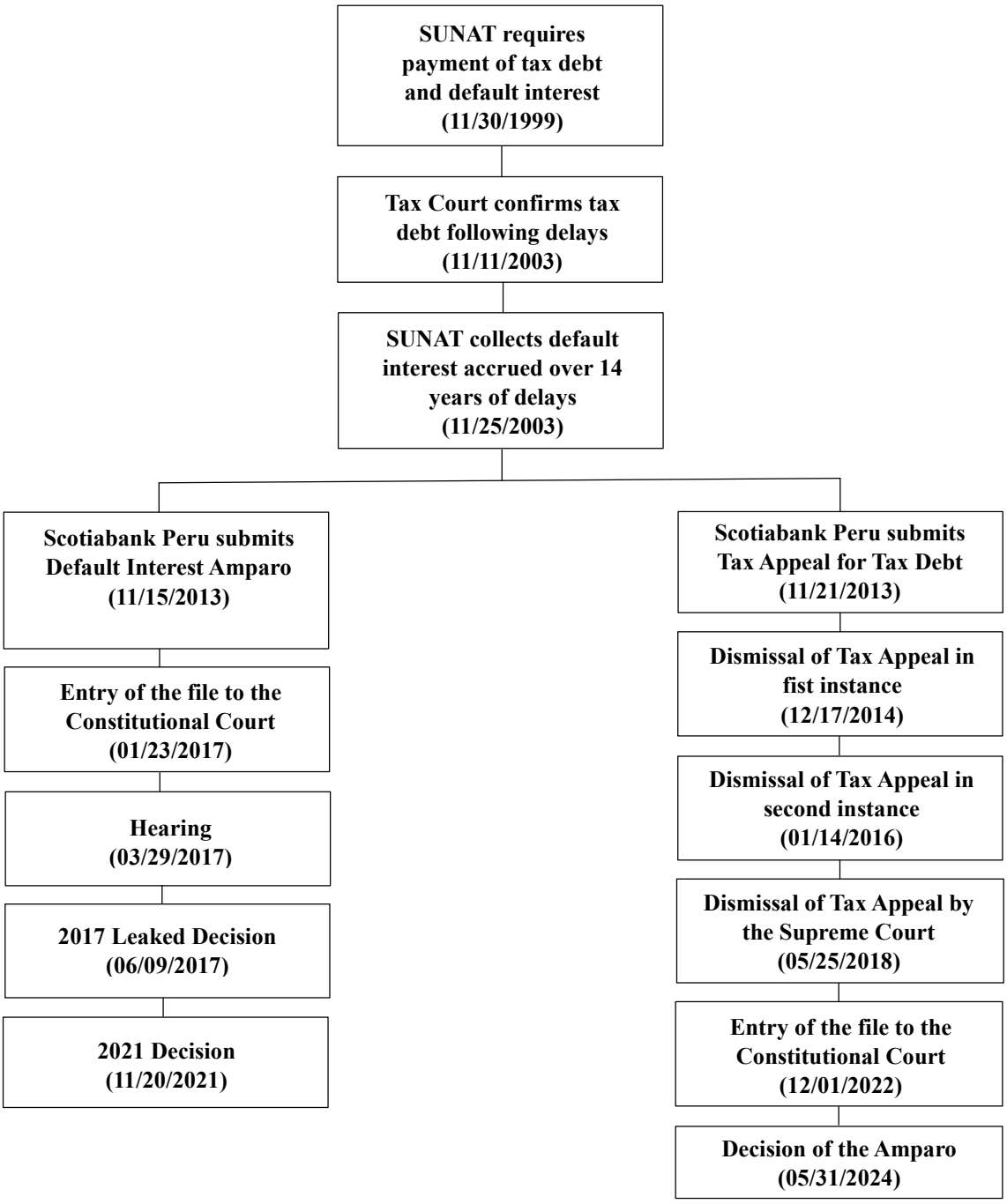
64.	Inforegión
65.	Revista Economía
66.	El Peruano
67.	El Bocón
68.	Rumbo Minero
69.	IDL Reporteros
70.	Perú Retail
71.	Gana Más
72.	Infomercado
73.	Perú Rec Informa
74.	Mercado Negro
75.	La Cámara
76.	La Lupa
77.	La Mula
78.	Wapa
79.	Servindi
80.	Exitosa
81.	Trujillo es Hoy
82.	La Patria
83.	Gato Encerrado
84.	La verdad del pueblo
85.	Actualidad Empresarial
86.	Trujillo Informa
87.	La República

88.	Útero.pe
89.	Serperuano
90.	Correo
91.	Perú 21
92.	Del País
93.	Diario Uno
94.	Señal Alternativa
95.	Wayka
96.	Spaciolibre.pe
97.	La Primera
98.	Político.pe
99.	Semana Económica
100.	El Economista
101.	Alerta económica
102.	Grupoverona.pe
103.	Acceso Perú
104.	Legis.pe
105.	La opinión
106.	La Ley
107.	Trome
108.	Lima al día
109.	La noticia renovada
110.	Karibeña
111.	Infórmate Perú

112.	Ojo público
113.	Extra
114.	Cutivalú
115.	Servindi
116.	EnergiMinas
117.	Sin rodeos
118.	Periodismo en línea
119.	El Perfil
120.	Diario Ahora Huánuco
121.	Revista Embajador
122.	La Industria Trujillo
123.	Convoca
124.	Voces
125.	El Regional Piura
126.	Chiclayo en Línea
127.	Macronorte
128.	NewsTrujillo
129.	El Foco
130.	AP Noticias Perú
131.	Ancash al Día
132.	Noticias Trujillo
133.	ETC Noticias
134.	Realidad Nacional
135.	La Rotativa

136.	Sin Fronteras
137.	Panorama Cajamarquino
138.	Nuevo Norte
139.	Forbes
140.	El Popular
141.	El Montonero
142.	LP Pasión por el Derecho
143.	El Búho
144.	Huaral.pe
145.	El Tiempo
146.	Perú Top Publications
147.	Lima Gris
148.	Blog PUCP
149.	Salud con lupa
150.	Huaraz en línea
151.	Vox Populi

Appendix 3: Procedural history of Scotiabank Peru's challenge of the Tax Debt and Default Interest Amparo



INDEX

Contentious-Tax Proceeding		
Date	**Brief/Resolution**	**Entity**
November 30, 1999	• Determination Resolution No. 012-03-0000408 • Determination Resolution No. 012-03-0000409 calculating the principal of the tax debt at [redacted] and default interest at [redacted] • Resolutions on Fines	SUNAT
January 19, 2000	Appeal against Determination Resolutions	Scotiabank Peru
July 19, 2000	Intendancy Resolution No. 015-4-11940 rejecting Scotiabank Peru's Appeal	SUNAT
August 9, 2000	Appeal against Intendency Resolution No. 015-4-11940	Scotiabank Peru
December 30, 2003	Resolution No. 07517-1-2003 declaring null and void the Intendency Resolution No. 015-4-11940 and ordering SUNAT to issue a new pronouncement	Tax Court
December 20, 2011	Intendency Resolution No. 0150150001042 rectifying the principal of the tax debt to the amount of [redacted] and calculating the default interest at [redacted]	SUNAT
January 6, 2012	Appeal against the Intendency Resolution No. 0150150001042	Scotiabank Peru

Contentious-Tax Proceeding		
Date	**Brief/Resolution**	**Entity**
November 11, 2013	Resolution No. 14935-5-2013 confirming the Intendency Resolution No. 0150150001042 and rejecting Scotiabank Peru's appeal	Tax Court
November 25, 2013	Coactive Collection Resolution No. 011-006-0044596 requiring Scotiabank Peru to pay the principal of the tax debt [redacted] and default interest [redacted]	SUNAT

Contentious-Administrative Proceeding on the Tax Debt		
Date	**Brief/Resolution**	**Entity**
November 21, 2013	Contentious-Administrative Claim	Scotiabank Peru
December 9, 2013	Resolution No. 2 admitting Scotiabank Peru's Contentious-Administrative Claim for processing	Twentieth Contentious-Administrative Court Sub Specialized in Tax and Customs Matters of the Superior Court of Justice of Lima
December 13, 2013	Request for injunctive relief	Scotiabank Peru
January 20, 2014	Resolution No. 3 rejecting Scotiabank Peru's request for injunctive relief	Twentieth Contentious-Administrative Court Sub Specialized in Tax and Customs Matters of the Superior Court of Justice of Lima
January 30, 2014	Appeal against Resolution No. 3 rejecting Scotiabank Peru's request for injunctive relief	Scotiabank Peru
July 3, 2014	Resolution No. 2 confirming Resolution No. 3 and rejecting Scotiabank Peru's request for injunctive relief	Twentieth Contentious-Administrative Court Sub Specialized in Tax and Customs Matters of the Superior Court of Justice of Lima
December 17, 2014	Resolution No. 16 declaring Scotiabank Peru's Contentious-Administrative Claim unfounded	Twentieth Contentious-Administrative Court Sub Specialized in Tax and Customs Matters of the Superior Court of Justice of Lima (first instance)
December 30, 2014	Appeal against Resolution No. 16	Scotiabank Peru

Contentious-Administrative Proceeding on the Tax Debt		
Date	**Brief/Resolution**	**Entity**
January 14, 2016	Resolution No. 45 confirming Resolution No. 16 and rejecting Scotiabank Peru's Contentious-Administrative Claim	Sixth Sub Specialized Contentious-Administrative Chamber for Tax and Customs Matters of the Superior Court of Justice of Lima (second instance)
April 28, 2016	Appeal against Resolution No. 45	Scotiabank Peru
July 4, 2017	Hearing	Supreme Court of Justice
May 25, 2018	Decision of Appeal confirming Resolution No. 45 and rejecting Scotiabank Peru's Contentious-Administrative Claim	Supreme Court of Justice

Amparo Proceeding on the Contentious-Administrative Proceeding on the Tax Debt		
Date	**Brief/Resolution**	**Entity**
July 5, 2018	Amparo Claim against the Decision on Appeal of the Contentious-Administrative Proceeding	Scotiabank Peru
July 17, 2018	Resolution No. 1 admitting Scotiabank Peru's Amparo Claim	Third Transitory Constitutional Court of the Superior Court of Justice of Lima (first instance)
December 28, 2020	Resolution No. 22 declaring Scotiabank Peru's Amparo Claim unfounded	Third Transitory Constitutional Court of the Superior Court of Justice of Lima (first instance)
January 12, 2021	Appeal against Resolution No. 22	Scotiabank Peru
March 1, 2022	Resolution No. 5 confirming Resolution No. 22 and rejecting Scotiabank Peru's Amparo Claim	First Constitutional Chamber of the Superior Court of Justice of Lima (Second Instance)
August 15, 2022	Constitutional Tort Claim	Scotiabank Peru
June 1, 2023	Hearing	Constitutional Court
May 31, 2024	Decision rejecting Scotiabank Peru's Amparo Claim	Constitutional Court

Default Interest Amparo Proceeding			
Date	**Brief/Resolution**	**Entity**	**Exhibit No.**
November 15, 2013	Default Interest Amparo	Scotiabank Peru	**C-0169**
July 14, 2014	Resolution No. 4 admitting Scotiabank Peru's Amparo Claim	Eleventh Constitutional Court Sub specialized in Tax, Customs and INDECOPI matters of the Superior Court of Justice of Lima (first instance)	**C-0182**
December 7, 2015	Resolution No. 27 declaring in part the Amparo Claim of Scotiabank Peru to be well founded	Eleventh Constitutional Court Sub specialized in Tax, Customs and INDECOPI matters of the Superior Court of Justice of Lima (first instance)	**C-0185**
September 21, 2016	Resolution No. 19 revoking Resolution No. 27 and rejecting Scotiabank Peru's Amparo Claim in its entirety	Third Civil Chamber of the Superior Court of Justice of Lima (second instance)	**C-0188**
October 14, 2016	Special constitutional appeal	Scotiabank Peru	**C-0189**
March 29, 2017	Hearing for the special constitutional appeal	Constitutional Court	**C-0194**
June 9, 2017	Leaking of the 2017 Leaked Decision Voted by the Constitutional Tribunal in favour of Scotiabank Perú		**C-0200**
April 24, 2017	Decree communicating the abstention of Justice José Sardón de Taboada	Constitutional Court	**C-0411**
June 27, 2017	Order declaring the challenge against Justice Carlos Ramos to be unfounded	Constitutional Court	**C-0225**
August 3, 2017	Decrees that resolve not to accept proposals for abstention	Constitutional Court	**C-0246 / C-0247**

Default Interest Amparo Proceeding			
Date	**Brief/Resolution**	**Entity**	**Exhibit No.**
	by Justices Ernesto Blume and Eloy Espinosa-Saldaña		
March 2, 2018	Decree accepting request for abstention of Justice Augusto Ferrero	Constitutional Court	-
November 9, 2021	Deliberation and voting session	Constitutional Court	**C-0338**
November 20, 2021	Decision declaring inadmissible the Default Interest Amparo of Scotiabank Peru	Constitutional Court	**C-0340**
December 4, 2021	Ex officio clarification of the decision	Constitutional Court	**C-0356**