

**INTERNATIONAL CENTRE FOR
THE SETTLEMENT OF INVESTMENT DISPUTES**

IN THE MATTER OF:

THE BANK OF NOVA SCOTIA

Claimant

and

REPUBLIC OF PERU

Respondent

ICSID Case No. ARB/22/30

CLAIMANT'S REPLY MEMORIAL ON THE MERITS

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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 Peru's favour
2017 Signed Judgment	Draft judgment of the Constitutional Court finding in Scotiabank Peru's favour, bearing the signatures of Justices Ramos and Blume
2021 Decision	Judgment of the Plenary Session of the Constitutional Court dismissing the Default Interest Amparo. Judgement indexed as Scotiabank Peru 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 in Case No. 01808-2013-PA/TC
Banco Wiese	Banco Wiese Sudameris, Peru's third largest bank by assets, loans and deposits in 2006 (acquired by Scotiabank to form Scotiabank Peru)
CAD	Canadian Dollars
Case Log	Internal case log maintained by the Constitutional Court for the Default Interest Amparo to track the distribution of the case file within the court
Court	Constitutional Court
Default Interest Amparo	<i>Amparo</i> proceeding commenced by Scotiabank Peru before the Constitutional Court against the SUNAT regarding the accrual and capitalization of interest owing to SUNAT resolving the Tax Court's own 14-year delay
Default Interest Delta	Maximum default interest that could be charged under Peruvian law to derive the amount that Scotiabank Peru would have been reimbursed by SUNAT had the Constitutional Court ruled pursuant to the 2017 Signed Judgment and ordered the reimbursement of the unlawful accrued default interest
Domestic Comparators	Comparator cases involving Peruvian investors relevant to the inquiry under Article 803 of the FTA

Abbreviation	Description
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 <i>amparo</i> proceeding is appropriate
FTA	Canada-Peru Free Trade Agreement
FET	Fair and equitable treatment
Hildebrandt	Peruvian newspaper <i>Hildebrandt en sus trece</i>
Hildebrandt Article	Published news article from <i>Hildebrandt en sus trece</i> describing and containing images of four pages of what it called “a final form judgment” in the Default Interest Amparo
IACHR	Inter-American Court of Human Rights
Icatom	Sentencia del Pleno del Tribunal Constitucional in Case No. 04532-2013-PA/TC
IGV	Value added tax
ILC Articles on Responsibility of States	International Law Commission’s <i>Draft Articles on Responsibility of States for Internationally Wrongful Acts</i>
Interbank	Sentencia 44/2022 del Pleno del Tribunal Constitucional in Case 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 in Case 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
National Treatment Standard	Obligation in Article 803 of the FTA to provide “treatment no less favourable” to Canadians and their investments in Peru than it accords to Peruvians in like circumstances
Paramonga	Sentencia del Pleno del Tribunal Constitucional in Case No. 02051-2016-PA/TC
PEN	Peruvian Soles
Republic of Peru	Peru
RFA	Scotiabank’s Request for Arbitration dated October 31, 2022, which commenced this proceeding.

Abbreviation	Description
SBS	Superintendencia de Banca y Seguros
Scotiabank	The Bank of Nova Scotia
Scotiabank Peru	Scotiabank Peru S.A.A, a subsidiary of Scotiabank
SUNAT	Superintendencia Nacional de Aduanas y de Administración Tributaria
Tax Appeal	Contentious administrative action filed by Scotiabank Peru against SUNAT regarding the 2013 Tax Court Decision on November 21, 2013
Tax Court	Administrative tribunal of the Peruvian Ministry of Finance
Telefónica	Sentencia del Pleno del Tribunal Constitucional in Case No. 02051-2016-PA/TC
TIM	Tasa de Interes Moratorio
Universe of Comparable Cases	Cases of which forty involved Peruvian-owned companies or Peruvian citizens (the Domestic Comparators)
Vienna Convention	Vienna Convention on the Law of Treaties

PART ONE. OVERVIEW

1. Peru's Counter-Memorial has failed to establish any defences to Scotiabank's National Treatment claim. Meanwhile, Peru's own documents—obtained during document production over Peru's persistent refusals—only reinforce what Scotiabank has already established.
2. Under Article 803 of the Treaty, Peru was obliged to accord Scotiabank and its investments—including its wholly owned subsidiary Scotiabank Peru—treatment no less favourable than that which was provided to Peruvian investors in like circumstances.
3. In 2017, Scotiabank Peru filed an *amparo* action with Peru's Constitutional Court challenging the legality of SUNAT's application of default interest for periods extending beyond the statutory deadlines within which Peruvian authorities were required to resolve contested tax debts (the “**Default Interest Amparo**”). Around the same time, dozens of Peruvian investors brought Constitutional Court *amparo* actions for precisely the same reason. That is, a large class of plaintiffs pursued contemporaneous claims before the same court, all centered on the same legal question.
4. As Scotiabank showed in its Memorial, as compared to the class of these Peruvian investors, Scotiabank Peru was singled out, to its detriment, and treated less favourably.
5. In 2016, the Constitutional Court had issued a ruling in a case involving a Peruvian national, *Medina de Baca*, that raised the same legal question as Scotiabank Peru's *amparo*. The Court ruled, by majority, that the application of default interest in periods of government-caused delay was unconstitutional and ruled in favour of Ms. Medina de Baca.
6. When the same legal issue was back before the Court in 2017 with Scotiabank Peru's case, the Court resolved, by majority, to decide the case in precisely the same way and prepared a judgment to that effect. Peru contends in its Counter-Memorial—without evidentiary support—that any decision the Court had reached was no more than preliminary. Peru then fought hard to keep the Court's drafting history hidden. But, when those documents were finally produced (months after Peru's document production deadline), they showed that the decision was anything but preliminary. Multiple drafts had been prepared. They were fully reasoned and edited. Peru appears to have prepared its defence without consulting—or with a complete indifference to—

what the Constitutional Court records show. Indeed, that is the only basis to explain Peru's incorrect assertion in its Counter-Memorial that any decision was preliminary because no justice had signed the judgment that was in circulation within the Court at the time. But, by the end of May 2017, not one but two justices participating in the majority had already affixed their signatures to every single page of the judgment. The Court's logbook showing the distribution of the judgment within the Court likewise confirms that it was being distributed for "final signature."

7. After that, things went awry.

8. In June 2017, a "high level source" within the Constitutional Court—who opposed the Court ruling in Scotiabank Peru's favour—leaked the judgment to the press before the Court could finish obtaining signatures and officially publish the decision. That is not speculation. The attribution as to the source of the leak and that individual's stance vis-à-vis the judgment was contemporaneously reported by the Peruvian publication to which the unpublished judgment was leaked, *Hildebrandt en sus trece* ("**Hildebrandt**")—a publication with a notoriously anti-foreign investment byline. Hildebrandt did not just say that it had obtained a copy of the judgment in Scotiabank Peru's favour; it showed it. In its news article, it plastered four pages of the judgment, including the dispositive section showing how individual justices were ruling. [REDACTED]

[REDACTED]

[REDACTED]

9. In its Counter-Memorial, Peru refuses to accept that there was any leak at all—an inexplicable position given the content of the Hildebrandt article. How else could Hildebrandt have obtained the unpublished judgment if not from a leak? But Peru offers no evidence (whether through witnesses or documents) to rebut Hildebrandt's contemporaneous reporting. What we now know from Peru's documents obtained in discovery is that—consistent with its biases—Hildebrandt only informed SUNAT, and not Scotiabank Peru, that it was in possession of the Court's unpublished judgment. Rather than taking action to stop the leak of an unpublished judgment in a pending case in which it was a party (which would have been the ethically appropriate course of action), the government agency threw its support behind the publication of the article, by providing Hildebrandt with alarmist sound bites as to the severe consequences that would flow if the leaked judgment were finally issued in favour of the foreign bank..

10. Peru chose not to investigate the leak, despite the manifest violation of the Court's rules on confidentiality (even though, in its privilege motion before the Tribunal, Peru emphasized the importance of protecting the secrecy of the deliberative process). Instead, in the following days and weeks—and, later, months and years ahead—a chorus of State actors spoke out and severely criticized the Constitutional Court for its intention to rule in Scotiabank Peru's favour often focusing on its status as the subsidiary of a foreign-owned bank. Scotiabank's fact witnesses also heard directly from the Court itself that pressure was being applied by State actors behind the scenes. Of course, those interactions are not of the type to generate a substantial paper trail.

11. Yet, there can be no doubt that there was State interference in Scotiabank Peru's case before the Constitutional Court: it is shown in print. Indeed, in an interview that Justice Ledesma gave to Hildebrandt, the newspaper she had met with just days before it leaked the judgment, she confirmed that in the wake of the media frenzy generated by the leaked judgment—for which she is most likely responsible—members of the Court were unwilling to complete the final signatures and issue the judgment in Scotiabank Peru's case. She even expressed gratitude (by “thanking” the press for exposing the justices who were voting for Scotiabank Peru). The extent of the State interference was so blatant that one of the justices raised the issue expressly, in the presence of two other justices, while testifying at the Inter-American Court of Human Rights (“**IAHCR**”). If that is what is available publicly, and if the pressure was so substantial in the Scotiabank Peru case that a justice testified to the fact under oath before a renowned international tribunal, one may only imagine the level of State interference that took place in a way that is not discoverable to Scotiabank or the Tribunal behind closed doors.

12. What is available from the documentary record is that, after the leak in early June 2017 and the subsequent public rebuke of the Constitutional Court by different State actors for the ruling it was about to make, the partially signed judgment was stopped in its tracks. By July 2017, the Court had reversed the status of the case back to the deliberative stage, where it would remain for more than four years. Notwithstanding the efforts of some members of the Court during the intervening years, [REDACTED] ensured that the Scotiabank Peru case would be held in perpetual abeyance until she was able to take control. That is clear from the numerous internal Constitutional Court records that Peru finally produced, as well as the contemporaneous explanations that Scotiabank's witnesses were provided by the Court when they inquired as to the status of the case.

13. [REDACTED]
[REDACTED]
[REDACTED]

[REDACTED] rushed through an unlawful amendment to the Court's procedures to seek to empower the Court to issue a judgment without the constitutionally-required quorum. Once that amendment was passed in November 2021, [REDACTED] within a mere three days a new judgment finding against Scotiabank Peru—precisely the opposite outcome to the one reached by the Court four and a half years earlier.

14. Peru contends—again without any evidence—that the issuance of the judgment in November 2021 (the “**2021 Decision**”) was just an application of ordinary case management principles. But that contention is disproven by the Court's own records. There was no ordinary case management. There was no explanation at all for the persistent decision to ignore calls by Scotiabank Peru and by justices within the court for a final ruling on the case.

15. Scotiabank's claim calls for a comparative assessment with Peruvian investors who were similarly situated and at risk of similar “treatment” to that which was accorded to Scotiabank Peru. To conduct that assessment, Scotiabank identified dozens of comparable Peruvian investors pursuing the same type of *amparo* action.

16. Was a single Peruvian investor subjected to a leak of an unpublished judgment from a high-ranking official of the Constitutional Court who opposed a finding in its favour? Was a single Peruvian investor subjected to numerous government actors speaking out against the Constitutional Court through the media? Was a single Peruvian investor subjected to more clandestine forms of State interference of the variety reported to Scotiabank's witnesses? Was a single Peruvian investor's case held in abeyance for years because of the politicized environment surrounding the case? Was a single Peruvian investor's case subject to a complete reversal, as was the case between the leaked judgment in June 2017 and the one that was finally rendered in November 2021?

17. The answer to each of these questions is no.

18. Scotiabank has done substantial research into these questions based on documents available to it, including based on the judgments rendered by the Court and a review of the publications of more than 150 media outlets. In its Counter-Memorial, Peru offered no evidence of any Peruvian investor being subjected to the treatment described above. Scotiabank also invited Peru to produce documents addressing these matters, but Peru declined.

19. Unable to engage on the most relevant facts, Peru has two principal arguments that it repeats throughout its Counter-Memorial, neither of which helps its defence.

20. *First*, Peru argues that the 2021 Decision is not unique because there are other Constitutional Court judgments on the default interest issue that were issued around the same time that also found against the plaintiff. In other words, Peru's argument is that, in its view, the Constitutional Court reached a defensible outcome on the substance. That is a classic strawman. The question before the Tribunal is not whether the Court's decision was defensible substantively under Peruvian law (it was not). The question before the Tribunal concerns the treatment that occurred to lead to that outcome in November 2021 and whether similarly situated Peruvian investors received the same treatment. Peru tries to sidestep the four-and-a-half year saga that resulted in the 2021 Decision by pretending that the judgment exists in isolation from the facts that preceded it.

21. *Second*, Peru emphasizes purported constitutional safeguards that protect the independence of its judiciary, using much rhetoric to attack Scotiabank for bringing a claim that questions the Court's independence. Peru's position is, in effect, because such safeguards are written on paper, they must be effective. But that contention is impossible to accept given the numerous indicia on the record of justices complaining about improper State interference in the judicial function in Scotiabank's Default Interest Amparo.

22. Peru's defences all fail.

23. When the Tribunal turns to damages, the approach is straightforward. The Tribunal has the benefit of knowing that the Constitutional Court had prepared a judgment in final form in Scotiabank Peru's favour in May 2017. From there, some reasonable assumptions can be made regarding the date (by January 1, 2019) on which Peru would have repaid to Scotiabank Peru the

default interest payments that were deemed unconstitutional, in the amount of [REDACTED]. To that, a reasonable, commercial interest rate must be applied to reflect Scotiabank Peru's opportunity cost of capital.

* * *

24. This Reply submission is accompanied by:

- (a) Appendices labelled A to D;
- (b) the second witness statement of [REDACTED] (testifying about issues relating to the June 2017 leak of the Constitutional Court's judgment finding in Scotiabank Peru's favour and Scotiabank Peru's subsequent reactions);
- (c) the first witness statement of [REDACTED] (testifying about issues relating to Scotiabank's acquisition of its Peruvian business);
- (d) the first expert report of Jeffrey H. Luber (opining on the attribution of signatures affixed to unpublished Constitutional Court judgments finding in Scotiabank Peru's favour);
- (e) the second expert report of César Landa and Ana Neyra (opining on issues of Peruvian constitutional law, and Constitutional Court law and practice);
- (f) the second expert report of Luis Hernández (opining on issues of Peruvian tax law);
- (g) the second expert report of Errol Soriano (KSV) (opining on damages);
- (h) fact exhibits labelled C-0200(a) and C-0443 to C-0729; and
- (i) legal authorities labelled CL-0182 to CL-0202.

PART TWO. THE FACTS

25. In spite of Peru's dismissive characterization of Scotiabank's factual assertions, it does not dispute many of the foundational facts establishing the discriminatory treatment to which

Scotiabank Peru and the Default Interest Amparo were subjected, and to which the relevant domestic plaintiffs with similar claims were not.

26. Importantly, in its Counter-Memorial, Peru does not dispute the following key facts:

- (a) A final form judgment in the Default Interest Amparo was reported on by the press. On June 9, 2017, Hildebrandt published a news article (the “**Hildebrandt Article**”) describing and containing images of four pages of what it called “a final form judgment” in the Default Interest Amparo (“**2017 Leaked Decision**”).¹ There is no dispute that the images reflect authentic pages of a judgment described by the article as “in final form” that had been prepared by the Constitutional Court.²
- (b) The Hildebrandt Article reported that the 2017 Leaked Decision was in final form and that a majority was finding in Scotiabank Peru’s favour. Peru does not dispute that the contemporaneous reporting by Hildebrandt and the accompanying images of the 2017 Leaked Decision set forth the following:³
 - the majority of the Constitutional Court—comprised of [REDACTED] [REDACTED]—was deciding in favor of Scotiabank Peru;⁴
 - the majority concluded that “the excessive delay in resolution of the administrative proceedings on the part of both SUNAT and the Tax Court

¹ C-0200, “Scotiabank will win [REDACTED] from Constitutional Court decision,” Hildebrandt en sus trece (June 9, 2017), p. 2.

² C-0200(a), 2017 Leaked Decision; Memorial, ¶¶ 78-80; Counter-Memorial, ¶¶ 136-154.

³ C-0200, “Scotiabank will win [REDACTED] from Constitutional Court decision,” Hildebrandt en sus trece (June 9, 2017) p. 2; C-0200(a), 2017 Leaked Decision; Memorial, ¶ 79; Counter-Memorial, ¶¶ 136-154. Peru does not dispute the content of Hildebrandt’s article, nor of the images of the Leaked Decision, but only challenges the use of the term “Leaked Decision” and its finality.

⁴ C-0200, “Scotiabank will win [REDACTED] from Constitutional Court decision,” Hildebrandt en sus trece (June 9, 2017) p. 2; C-0200(a), 2017 Leaked Decision, pp. 1, 4; Memorial, ¶ 79; Counter-Memorial, ¶¶ 136-154.

has resulted in significant prejudice to the claimant” which “resulted in a violation of the right for proceedings to last a reasonable term”;⁵ and

- the majority decided, in the dispositive section of the 2017 Leaked Decision, that Scotiabank Peru had “proved a violation of the right to a reasonable term” and ordered the SUNAT to suspend the accrual of default interest during the periods in which SUNAT and the Tax Court exceeded the legal term to resolve Scotiabank Peru’s administrative challenges, and to recalculate the default interest accordingly.⁶

(c)

Peru inexplicably disagrees with labelling Hildebrandt’s reporting on the 2017 Leaked Decision as a “leak.”⁷ However, Peru does not challenge the Hildebrandt Article’s statement that the 2017 Leaked Decision had been provided by a “high-level source” from within the Constitutional Court who disagreed with the outcome of the decision (*i.e.* the very definition of a leak).⁸ Nor does Peru offer any alternative explanation as to how Hildebrandt obtained the 2017 Leaked Decision. Official Constitutional Court records also show—and Peru does not deny—that a few days prior to the publication of the Hildebrandt Article, [REDACTED] met with a Hildebrandt journalist.⁹

(d) Government actors publicly spoke out against the 2017 Leaked Decision and the Constitutional Court. The Hildebrandt Article includes a statement by SUNAT’s

⁵ C-0200, “Scotiabank will win S\$481,000,000 from Constitutional Court decision,” Hildebrandt en sus trece (June 9, 2017) p. 2; C-0200(a), 2017 Leaked Decision, p. 3; Memorial, ¶¶ 79, 81; Counter-Memorial, ¶¶ 136-154.

⁶ Memorial, ¶¶ 79, 81; C-0200, “Scotiabank will win [REDACTED] from Constitutional Court decision,” Hildebrandt en sus trece (June 9, 2017) p. 2; C-200(a), 2017 Leaked Decision, p. 4; Counter-Memorial, ¶¶ 136-154.

⁷ Counter-Memorial, ¶¶ 160, 404. *See also* Procedural Order No. 6, Annex 1, p. 10.

⁸ Counter-Memorial, ¶¶ 133-154.

⁹

[REDACTED] : Memorial, ¶ 83; Counter-Memorial, ¶¶ 133, 142, 155-164. Peru only challenges that

[REDACTED] However, Peru does not dispute that [REDACTED] actually met with a journalist from Hildebrandt just a few days before the leak, nor that [REDACTED] voted consistently in favor of the SUNAT. *See* Counter-Memorial, ¶¶ 133, 143-144, 406-407.

lawyer, Dr. Eguiguren, on the substance of the 2017 Leaked Decision, stating that “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 [REDACTED].”¹⁰ Shortly following the leak, numerous State actors made public statements speaking out against the outcome of the 2017 Leaked Decision and the Constitutional Court itself, including the Minister of Economy and Finance, SUNAT’s senior counsel and legal representatives, members of the Peruvian Congress and the Ombudsman.¹¹ SUNAT’s general counsel (“Procurador Público”), José Escalante, held televised and radio interviews speaking out against the 2017 Leaked Decision and the Constitutional Court.¹² These and other statements made in the press cannot be denied because they exist in printed word.¹³

- (e) The Constitutional Court justices have spoken openly regarding improper State interference in connection with the Default Interest Amparo. Three weeks after the publication of the Hildebrandt Article, Justice Ramos publicly condemned the State’s interference with the Constitutional Court.¹⁴ Subsequently, in October 2017, Justice Espinosa-Saldaña testified before the IACHR in a hearing requested by the Constitutional Court’s justices for the purpose of denouncing State interference in the Court’s independence. In the hearing he specifically mentioned concerns regarding interference in connection with the Default Interest Amparo “after a decision” had been reached finding against SUNAT.¹⁵

¹⁰ C-0200, “Scotiabank will win [REDACTED] from Constitutional Court decision,” Hildebrandt en sus trece (June 9, 2017), p. 3; Memorial, ¶ 291; Counter-Memorial, ¶ 155.

¹¹ Memorial, ¶¶ 96–99, 291; Counter-Memorial, ¶¶ 165–191.

¹² 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-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); Memorial, ¶¶ 96, 291; Counter-Memorial, ¶¶ 176–178.

¹³ See Appendix B: Political Interference Statements.

¹⁴ C-0238, Carlos Ramos, “The Constitutional Court: Two Decades of Lessons,” El Peruano (July 11, 2017), p. 2. Memorial, ¶ 239; Counter-Memorial, ¶ 168–172, 198–207.

¹⁵ 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 Peru (October 24, 2017) (19:05–20:55); C-0263, Transcript of the Hearing of the Inter

- (f) [REDACTED] acknowledged that a decision had already been reached and attributed delays in publishing the decision to the aftermath of the leak. Months after the Hildebrandt Article appeared following her meeting with the Hildebrandt journalist, Justice Ledesma gave an exclusive interview to Hildebrandt and discussed the Scotiabank case. She explained that “[the] plenary has not wanted to make a new decision in [the Scotiabank case]” because “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.”¹⁶
- (g) A more than four-year delay ensued. Although Peru advances its own theory as to the reason for this inordinate delay, it is undisputed that—after the Hildebrandt Article reporting on a “decision that will reimburse Scotiabank [REDACTED]” in 2017¹⁷—it took the Constitutional Court until November 2021 to finally issue and publish the 2021 Decision.¹⁸ It is also undisputed that—from a temporal standpoint—the issuance of the 2021 Decision came just two months after Scotiabank submitted its Notice of Intent to commence this arbitration, just one month after [REDACTED]
[REDACTED]
[REDACTED].¹⁹ The

American Court of Human Rights (October 24, 2017), pp.1-2; Memorial, ¶¶ 100, 239; Counter-Memorial ¶¶ 192-196. Peru, without disputing Justice Espinosa-Saldaña’s statements regarding “Scotiabank’s case”, merely highlights an irrelevant point that Claimant has never contested—specifically, that the proceeding before the IACHR concerned generally the *Frontón* case. See Counter-Memorial, ¶¶ 193-194.

¹⁶ C-0298, “I was offered to stay if I voted for Keiko’s freedom,” Hildebrandt (September 27, 2019), pp. 3-4; Memorial, ¶ 109; Counter-Memorial, ¶¶ 168-172, 198-207, 410.

¹⁷ C-0200, “Scotiabank will win [REDACTED] from Constitutional Court decision” Hildebrandt en sus trece (June 9, 2017), p. 2.

¹⁸ C-0340, Judgment of the Plenary Session of the Constitutional Court in Scotiabank Peru S.A.A. v. SUNAT and the Tax Court (Case No. 222-2017- PA/TC); Memorial, ¶ 153; Counter-Memorial, ¶¶ 138, 142, 210, 240, 410.

¹⁹ C-0340, Judgment of the Plenary Session of the Constitutional Court in Scotiabank Peru S.A.A. v. SUNAT and the Tax Court (Case No. 222-2017- PA/TC); C-0021, Notice of Intent (September 1, 2021); [REDACTED]

[REDACTED]; C-0333, Administrative Resolution No. 205-2021-P/TC of the Plenary Session of the Constitutional Court (November 3, 2021); Memorial, ¶¶ 146-153; Counter-Memorial, ¶ 70, fn. 82, ¶¶ 214-215, fn. 281, ¶¶ 218, 221, 223, 225, 258, 279, fn. 380, ¶ 374; see also Procedural Order No. 6, Annex 1, Peru’s Comments on the Claimant’s General Remarks and Specifications, p. 16 (disputing whether the change in quorum requirement should be considered “sudden,” but not contesting that the change occurred shortly after Scotiabank submitted its Notice of Intent).

2021 Decision found against Scotiabank Peru and was therefore diametrically opposed to the 2017 Leaked Decision (as well as the signed versions of that decision, as explained further below) reached by the Constitutional Court.²⁰

- (h) No similar treatment accorded to domestic plaintiffs pursuing similar cases before the Constitutional Court. Around the time of the Default Interest Amparo, dozens of Peruvian plaintiffs were pursuing similar default interest *amparo* claims before the Constitutional Court.²¹ In none of those cases did a domestic plaintiff face (i) the leaking of an unpublished decision in its case, (ii) government pressure against the Constitutional Court in reaction to the outcome reflected in the unpublished decision, and (iii) after a lengthy delay following a leak, a subsequent reversal of positions by the Constitutional Court.²²

27. As these facts cannot be disputed, Peru pivots and devotes many pages in its Counter-Memorial to a slew of facts that are irrelevant to the case. For instance, Peru delves into what it considers Scotiabank should have legitimately expected at the time of its acquisition of its Peruvian subsidiary, as if Scotiabank's case was one built on legitimate expectations (it is not).²³ It is thus Peru that is advancing arguments befitting a defence to a fair and equitable treatment claim, while (wrongly) accusing Scotiabank of packaging an FET claim into the rubric of a National Treatment claim. Although irrelevant to the case, Scotiabank summarily addresses a number of Peru's factual misstatements and does so at the end of the fact section (starting at Subsection V below).

²⁰ **C-0200(a)**, 2017 Leaked Decision, p. 4; **C-0443**, 2017 Signed Judgment, p. 22; **C-0340**, Judgment of the Plenary Session of the Constitutional for sure Court in Scotiabank Peru S.A.A. v. SUNAT and the Tax Court (Case No. 222-2017- PA/TC), pp. 1, 14; Memorial, ¶ 153; Counter-Memorial, ¶¶ 133-155, 167, 174-186, 258, 374. *See also* Procedural Order No. 6, Annex 1, Peru's Comments on the Claimant's General Remarks and Specifications, p. 16 (arguing that the two decisions were not diametrically opposed because some of the justices voted the same way on both occasions, but failing to dispute that the final outcomes were diametrically opposed).

²¹ Memorial, ¶ 210; Counter-Memorial, ¶¶ 252-261.

²² Memorial, ¶¶ 110-114, 214, 277, 283-297; CER-Landa/Neyra #1, ¶¶ 118-121, 144; Counter-Memorial, ¶¶ 17, 402-412; RER-Bustamante, ¶¶ 372-377.

²³ Counter-Memorial, ¶¶ 46-55, 64.

28. The core factual issues that are relevant to the case concern:

- (a) the circumstances around the leaking to Hildebrandt of the Court’s “judgment in final form” in the Default Interest Amparo (including the meeting of [REDACTED] with the Hildebrandt journalist) and—as it is disputed by Peru —what can be determined as to the finality of that judgment;
- (b) the circumstances around the pressure exerted by Government and State actors against the Constitutional Court because the 2017 Leaked Decision had concluded in Scotiabank Peru’s favour;
- (c) the circumstances around the Constitutional Court’s four-year delay following the 2017 Leaked Decision before it issued the diametrically opposed 2021 Decision within weeks of the change of rapporteur [REDACTED]; and
- (d) whether the treatment to which Scotiabank Peru and its Default Interest Amparo were subjected can be observed in the State’s conduct towards Peruvian plaintiffs that were advancing their own default interest *amparos* before the Constitutional Court.

29. Peru’s observations in its Counter-Memorial on these issues are addressed in Subsections I to IV below.

I. The 2017 Leaked Decision in the Hildebrandt Article Reflects How the Constitutional Court Had Decided to Rule on the Default Interest Amparo

30. This Section addresses the 2017 Leaked Decision appearing in the Hildebrandt Article. In particular, it addresses the status of the Court’s decision making at the time of the leak, the source of the leak and observations to be drawn regarding the publication to which the leak was made.

A. Peru Misstates the Status of the Constitutional Court's Decision-Making

31. Peru provides no explanation for how the leak occurred nor why it failed to investigate such a concerning event.²⁴ Instead, it responds (without providing any direct evidence) that the unpublished decision provided to Hildebrandt did not reflect the final views of the majority of the Constitutional Court.²⁵

32. The status of the 2017 Leaked Decision—final or not—is not dispositive (a leak of a less than final judgment remains problematic and results in differential treatment). However, contrary to Peru's assertions, the record demonstrates that the Constitutional Court had decided, by majority, to issue a judgment in Scotiabank Peru's favor.

33. Indeed, the very title of the Hildebrandt Article—“Judgment from the Constitutional Court will make Scotiabank win [REDACTED]” (“*Sentencia del TC le hará ganar [REDACTED] a Scotiabank*”)²⁶—used unequivocal language. It refers to a judgment (not a draft decision) and that such judgment “will” (future, not conditional tense) result in a win for Scotiabank of a substantial payment. The article included images from four pages of the Constitutional Court's unpublished judgment in the Default Interest Amparo (English translations of which are set out below), including the dispositive section showing that the court was ruling in Scotiabank's favor (*i.e.*, as defined above, the 2017 Leaked Decision).²⁷

²⁴ **C-0701**, Peru's Letter to Scotiabank regarding Peru's Document Production in ICSID Case No. ARB/22/30 – Bank of Nova Scotia v. Republic of Peru (January 30, 2026), pp. 3, 5. Counter-Memorial, ¶¶ 136-164. This is abnormal considering that prior leaks of draft judgments and dissenting opinions of the Constitutional Court have prompted internal investigations to determine responsibility and implement corrective measures. CER-Landa/Neyra #2, ¶ 101, fn. 199.

²⁵ Counter-Memorial, ¶¶ 136-154.

²⁶ Memorial, ¶ 79; **C-0200**, “Scotiabank will win [REDACTED] from Constitutional Court decision,” Hildebrandt en sus trece (June 9, 2017).

²⁷ **C-0200**, “Scotiabank will win [REDACTED] from Constitutional Court decision,” Hildebrandt en sus trece (June 9, 2017); **C-0200(a)**, 2017 Leaked Decision. *See also* Memorial, ¶ 79-81; CER-Landa/Neyra #1, ¶¶ 77, 152, 155, 181-182.



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JUDGMENT OF THE CONSTITUTIONAL COURT

In Lima, on May 9, 2017, the Plenary Session of the Constitutional Court, composed of Justices Miranda Canales, Urviola Hani, Blume Fortini, Ramos Núñez, Sardón de Taboada, and Espinosa-Saldaña Barrera, issues the following ruling, with the recusal of Justice Ledesma Narváez, approved at the plenary session of April 4, 2017; with the abstention of Justice Sardón de Taboada, approved at the plenary session of April 19, 2017; with the dissenting opinions of Justices Ledesma Narváez and Urviola Hani attached.

SUBJECT MATTER

Constitutional grievance appeal filed by Scotiabank Perú S.A.A. against the decision on page 3274, dated September 21, 2016, issued by the Third Civil Chamber of the Superior Court of Lima, in its entirety. The aforementioned Chamber reversed the judgment of the court of first instance insofar as it had declared the claim partially well-founded based on the understanding that the tax debt did not accrue default interest from July 20, 2000, to March 31, 2007, and, overturning it, declared the claim unfounded. Likewise, it affirmed the first-instance judgment in the remaining aspects that dismissed the rest of the claims submitted by the claimant.

BACKGROUND

On November 15, 2013, Scotiabank Perú S.A.A. filed an amparo petition against the National Superintendency of Customs and Tax Administration (hereinafter, SUNAT) and the Tax Court (Ministry of Economy and Finance). It seeks the following:

- i) As a first independent claim, that SUNAT be ordered to refrain from assessing and demanding from the claimant the payment of default interest accrued during the following periods:
 - From the beginning of the seventh month counted from the date the appeal filed against Intendancy Resolution No. 015-4-11940 was submitted to the Tax Court, until the date on which Resolution No. 07517-1-2003 was issued resolving said appeal for the first time, that is, December 30, 2003, and



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Conduct of the administrative authorities

28. The conduct of SUNAT and the Tax Court in this case contributed to the delay in the proceeding. This is evidenced, first, by the fact that the Tax Court took more than three years to resolve the first appeal filed by the appellant against Intendancy Resolution No. 11940 dated July 18, 2000, even though Article 150 of the Tax Code, in force at that time, established a maximum period of twelve months for its resolution. Thus, while said appeal was filed on August 9, 2000, the Tax Court resolved it through Tax Court Resolution No. 07517-1-2003 dated December 30, 2003; therein, it declared the nullity of the portion of the appealed resolution concerning the verification of the purchase and sale transactions for which recognition of the tax credit was requested, and therefore ordered SUNAT to issue a new decision on that matter.
29. A second instance evidencing the dilatory conduct of the administrative authority can be observed in the nearly eight years that SUNAT took to comply with the provisions of the Tax Court, as it was only through Intendancy Resolution No. 0150150001042 dated November 30, 2011, that it declared the Bank's challenge without merit after verifying. Finally, the Tax Court took approximately one year and eight months to resolve the second appeal filed by the claimant, despite the fact that the aforementioned Article 150 of the Tax Code required a period of twelve months as the maximum for its resolution.
30. Although it is true that failure to comply with the statutory period does not *per se* constitute a violation of the guarantee of a reasonable term, since its assessment must take into account the particular circumstances of each case, this Court considers that the time taken in this case by the Tax Administration to resolve the appeals filed by the appellant in the administrative proceeding was excessive, thereby harming the taxpayer and placing it in a prolonged situation of uncertainty. Even though this was a complex case due to the amount and volume of information to be processed, as noted *above*, there appears to be no reason justifying an eight-year delay in the verification of commercial transactions. Furthermore, the excessive procedural burden alleged by the tax authority cannot simply be invoked as a justification for the delay in ruling on an administrative appeal.



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Consequences of the delay on the legal situation of the interested party

31. Finally, it is evident to this Court that the excessive delay in resolution of the administrative proceeding on the part of both SUNAT and the Tax Court has resulted in significant prejudice to the claimant. Indeed, this is demonstrated by the fact that, as stated by the claimant, and not refuted by any of the defendant entities, during the entire duration of the proceeding the debt increased by approximately 890%.
32. This situation, even though the claimant paid the total amount of the debt on February 14, 2014 (page 1854), resulted in economic harm to the claimant. Consequently, it is clear that the passage of time particularly affected the legal situation of the interested party, that is, the taxpayer.

Conclusion regarding the reasonable term

33. After analyzing these four elements to determine the reasonableness of the time period, this Court concludes that the administrative authorities in charge of the tax proceeding in this case did not act with due diligence and promptness in order to resolve the claimant's legal situation within a reasonable term; therefore, this has resulted in a violation of the right to have the proceedings last a reasonable term.

Effects of the violation of the right to a reasonable term

34. In accordance with the binding case law doctrine established in ground 12 of STC No. 00295-2012-PHC/TC, the Constitutional Court has clarified, in the context of criminal proceedings, that if a violation of the right to be tried within a reasonable term is established as a result of upholding the claim, the judicial body hearing the proceedings shall be ordered to issue and notify the corresponding judgment defining the legal situation of the defendant within the shortest possible time, under warning. The time limit for a final ruling on the merits should not be fixed once and for all so that it is applicable in all cases; rather, it must be determined objectively and reasonably by the constitutional judge, taking into account the specific circumstances of each case.
35. Regarding administrative proceedings, this Court has held that, upon finding a violation of the reasonable term requirement, declaring the administrative proceeding null and restoring matters to their previous state cannot be an immediate or automatic consequence, since the other procedural guarantees that form part of due process were



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administrative court of last resort. Likewise, it is also not applicable to judicial proceedings (contentious administrative court proceedings or constitutional court proceedings) which, prior to the publication of said judgment, already had a final court decision regarding the calculation of default interest.

67. Consequently, the criterion established in Case No. 04082-2012-PA/TC shall apply only to those tax litigation proceedings or judicial proceedings that, following the publication of the judgment, are still pending or awaiting a final decision.

On these grounds, the Constitutional Court, by virtue of the authority conferred upon it by the Constitution of Peru,

HAS RESOLVED

1. Declare the claim partially **WITH MERIT**, for having proved a violation of the right to a reasonable term and the principle of reasonableness on the part of the tax administration.
2. Consequently, **ORDER** the annulment of Coercive Execution Resolution No. 011-006-0044596, and that SUNAT recalculate the default interest in accordance with the provisions set forth in grounds 48, 51, and 61 of this judgment;
3. Declare the claim **INADMISSIBLE** regarding the alleged violation of the right of access to effective judicial protection.
4. Order the respondent and other competent authorities handling similar cases to take into account, hereinafter, the criteria set forth in paragraphs 65 through 67 of this judgment.

Publish and Notify.

SS.
MIRANDA CANALES
BLUME FORTINI
RAMOSNÚÑEZ
ESPINOSA-SALDAÑA B. ARRERA

34. Peru characterizes the 2017 Leaked Decision as no more than an “unvoted and unsigned draft”²⁸ and defines it as a mere “Published Document.”²⁹

35. Peru offers no witness in support of its contention, which contradicts Hildebrandt’s contemporaneous reporting that—“according to documents seen by this magazine” and further to information provided by a “high-level source from the Constitutional Court”—the Court had “already determined” the outcome of the case “and had a judgment prepared that will refund Scotiabank [REDACTED].”³⁰ Moreover, notwithstanding its unfettered access to Constitutional Court witnesses and documents, Peru did not include with its Counter-Memorial a single piece of evidence to support its thesis that the 2017 Leaked Decision was preliminary.³¹

36. Given Peru put in issue the status of the Court’s decision-making in the 2017 Leaked Decision, Scotiabank requested documents from Peru showing the Court’s drafting history.³² Despite their obvious relevance and materiality in responding to Peru’s own position, Peru refused to produce them.³³ In objecting to production, Peru even went as far as to dispute that “*a draft judgment in the Scotiabank Amparo was leaked*” at all, and disputed that “*the news article displays authentic snapshots of the draft judgment in the Scotiabank Amparo.*”³⁴ Subsequently, Peru was ordered by the Tribunal to produce drafts of the decision but still withheld them, invoking grounds of confidentiality and deliberative secrecy.³⁵ It was not until early February 2026—several months after the document production deadline and just weeks before the Reply Memorial deadline—that Peru finally produced full versions of the Constitutional Court’s unpublished decision in the Default Interest Amparo, after being compelled to do so by the Tribunal.³⁶

²⁸ Procedural Order No. 6, Annex 1, Peru’s Response to Request No. 1, p. 23. *See also* Counter-Memorial, ¶ 343.

²⁹ Procedural Order No. 6, Annex 1, Peru’s Comments on the Claimant’s General Remarks and Specifications, p. 14.

³⁰ **C-0200**, “Scotiabank will win [REDACTED] from Constitutional Court decision,” Hildebrandt en sus trece (June 9, 2017).

³¹ Counter-Memorial, ¶¶ 136, 343.

³² Procedural Order No. 6, Annex 1, Scotiabank’s Request No. 1, pp. 25-26.

³³ Procedural Order No. 6, Annex 1, Peru’s Response to Request No. 1, pp. 26-27.

³⁴ Procedural Order No. 6, Annex 1, Peru’s Response to Request No. 1, p. 26.

³⁵ Peru’s Response to the Claimant’s Application Regarding Peru’s Privilege and Confidentiality Log (December 23, 2025), ¶¶ 30-56, Appendix.

³⁶ *See* Procedural Order No. 7, ¶ 52.

37. It is now clear why Peru fought so hard to avoid producing the Constitutional Court’s drafting history. They fully discredit Peru’s argument that there was no “leak” or that the 2017 Leaked Decision was no more than a preliminary draft.³⁷ Based on the contemporaneous documentary record following Peru’s forced production, the record on the status of the 2017 Leaked Decision in the Hildebrandt Article can now be summarized as follows.

38. *First*, as noted at paragraph 26(c) above, the Hildebrandt Article itself reported that it received information from a “high-level source from the Constitutional Court” and that the Court’s decision in the Default Interest Amparo had already “been determined.”³⁸ It then included images from what it said was the decision that the Constitutional Court was going to render in the Default Interest Amparo, which included a barcode.³⁹ The text of the 2017 Leaked Decision reproduced in the Hildebrandt Article also specifies how the different justices of the Court were ruling. The images also included the dispositive section of the decision, showing that the majority was ruling in Scotiabank Peru’s favour.⁴⁰

39. The reporting speaks for itself. But, for completeness, Scotiabank’s Peruvian law experts—former Constitutional Court President, Dr. Landa and former Minister of Justice and Human Rights, and constitutional law scholar, Prof. Neyra—reviewed the article and the images and concluded that the images have the hallmarks of an authentic judgment of the Constitutional Court that is all but final (*i.e.*, just missing the signatures).⁴¹

40. *Second*, Peru produced the internal case log maintained by the Constitutional Court for the Default Interest Amparo to track the distribution of the case file within the court (“**Case Log**”),⁴² which reinforces what is reported in the Hildebrandt Article. Appendix A of this Reply contains a detailed description of each entry of the Case Log.

³⁷ Counter-Memorial, ¶ 343.

³⁸ C-0200, “Scotiabank will win [REDACTED] from Constitutional Court decision,” Hildebrandt en sus trece (June 9, 2017), p. 2.

³⁹ C-0200, “Scotiabank will win [REDACTED] from Constitutional Court decision,” Hildebrandt en sus trece (June 9, 2017), p. 2; C-0200(a), 2017 Leaked Decision.

⁴⁰ C-0200(a), 2017 Leaked Decision.

⁴¹ CER-Landa/Neyra #1, ¶¶ 110-112; CER-Landa/Neyra #2, ¶¶ 5(b), 45-47, 62-66.

⁴² C-0687, Default Interest Amparo Case Log.

41. [REDACTED]

[REDACTED] Dr. Landa indicates, based on the same short hand codes that had been used during his tenure at the court, that the log reflects that a judgment (“STC” for “*Sentencia*”)⁴⁵ was sent with (“CON”) final signatures (“*Firma Final*” (“FF”)) belonging to justices corresponding to the initials [REDACTED]⁴⁶ That aligns with the names of two of the justices who were joining the Court majority. [REDACTED]

42. *Third*, the finality of the decision reflected by the Case Log is reinforced by the full copies of different versions of the judgment produced by Peru. Peru produced five full copies of a decision in the Default Interest Amparo, all bearing the same May 9, 2017 date reflected in the images of the decision appearing in the Hildebrandt Article (Peru produced other versions from 2018 and

43. [REDACTED]

⁴⁴ C-0687, Default Interest Amparo Case Log, item 18, p. 1. *See also* Appendix A: Default Interest Amparo Case Log, item 18, p. 5. In Dr. Landa’s experience, the inclusion in a draft judgment of a list of justices forming the majority implies that those justices have expressed their stance on how the case should be resolved. CER-Landa/Neyra #2, ¶ 97(b). This view is consistent with the circulation of the draft judgment for signatures, as well as the full versions of four draft judgments and a partially signed judgment dated 9 May 2017 produced by Peru, all of which included a list of the same members of the majority that appear in the Leaked Decision. *See* ¶¶ 42-45, below.

45. [REDACTED]

⁴⁶ CER-Landa/Neyra #2, ¶ 64.

⁴⁷ CER-Landa/Neyra #2, ¶¶ 62-64.

48. [REDACTED]

As Dr. Landa explains [REDACTED] for the purpose of obtaining his signature. CER-Landa/Neyra #2, ¶ 66. [REDACTED]

later as well, discussed below).⁴⁹ The May 9, 2017 copies reflect minor textual differences in two places but are complete and contain full reasoning.⁵⁰ Most importantly, [REDACTED]

[REDACTED] and that coincides verbatim with the four pages appearing in the 2017 Leaked Decision, as shown in the comparison below.⁵¹

⁴⁹ [REDACTED]

⁵⁰ CER-Landa/Neyra #2, ¶¶ 41, 45-46. Three copies of the decision diverge slightly from the 2017 Leaked Decision in the following ways: [REDACTED]

The copies are otherwise identical.

⁵¹ [REDACTED]

. See CER-Landa/Neyra #2, ¶ 45.

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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 entender 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 pedía el reconocimiento del crédito tributario, por lo que se ordenó a Sunat emitir un nuevo pronunciamiento en dicho extremo.
29. Ahora bien, un 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.º 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 sí 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.

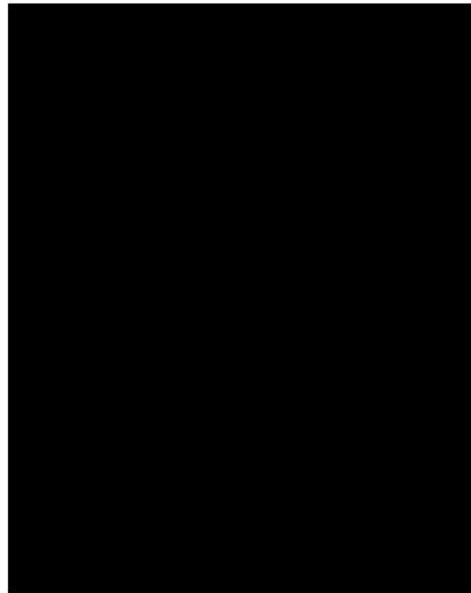
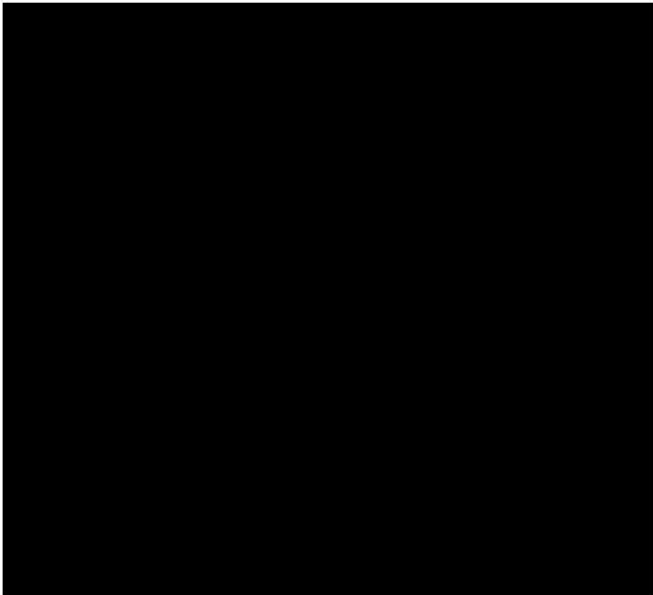
Publiquese y notifiquese.

SS.

MIRANDA CANALES
BLUME FORTINI
RAMOS NÚÑEZ
ESPINOSA-SALDAÑA BARRERA

43. As can be seen below and as confirmed by Scotiabank's handwriting expert (comparing the signatures in the [REDACTED] to signatures appearing in a Constitutional Court judgment accessed from the Court's website), the signatures clearly belong to [REDACTED]

[REDACTED]⁵²



44. [REDACTED]
[REDACTED]
[REDACTED]

45. In the circumstances described above, the identity of the signatures affixed to the [REDACTED] [REDACTED] should not be contentious. Yet, when Scotiabank asked Peru to confirm the

⁵² CER-Luber, ¶¶ 28-64. *See* Exhibit A – Constitutional Court Decisions with Known Signatures for [REDACTED]
[REDACTED].

⁵³ [REDACTED]
[REDACTED]

authors of the signatures appearing on the 2017 Signed Judgment, Peru refused.⁵⁴ As a result, Scotiabank retained a handwriting expert, Mr. Jeffery Luber, who attributes the signatures to

[REDACTED].⁵⁵

46. In sum, Peru's assertion in its Counter-Memorial that the leaked judgment was "nothing but [...] an unsigned draft which, [...] had not yet been voted, let alone signed, by any Justice"⁵⁶ proved to be demonstrably false. This is of grave concern given that Peru had exclusive access to documents which it refused to produce voluntarily which showed the statement in its Counter-Memorial to be untrue.

47. That two justices had already affixed their signatures to the decision is enough to put to rest any question as to the finality of the text of the decision.⁵⁷ As confirmed by Dr. Landa and Prof. Neyra, and is self-evident, no justice of the Constitutional Court (or any respectable court) would sign a judgment unless it was considered final and ready for publication.⁵⁸ In fact, Peru itself recognizes that the affixing of signatures is the final substantial step before publishing a judgment.⁵⁹

48. *Finally*, in its Counter-Memorial, Peru argues that the date of May 9, 2017 appearing in the 2017 Leaked Decision is anomalous because, it says, [REDACTED]

[REDACTED]

[REDACTED]

⁵⁴ C-0703, Scotiabank Letter to Peru regarding Peru's Document Production in ICSID Case No. ARB/22/30 – Bank of Nova Scotia v. Republic of Peru (Feb. 13, 2026); C-0704, Peru's Letter to Scotiabank regarding Peru's Document Production in ICSID Case No. ARB/22/30 – Bank of Nova Scotia v. Republic of Peru (February 26, 2026).

⁵⁵ CER-Luber, ¶¶ 45-47, 59. In conducting this analysis, Mr. Luber: (i) identified the known signature of [REDACTED] by observing the lone full signature placed next to the printed name [REDACTED] on a published Constitutional Court judgment; (ii) followed the same process to identify the known signature of [REDACTED]; (iii) compared the known signatures of both [REDACTED] as they appear on published Constitutional Court judgments to the signatures in the [REDACTED]; and (iv) drew conclusions as to authorship of signatures contained in [REDACTED]. See fn. 52, above; [REDACTED].

⁵⁶ Counter-Memorial, ¶ 343.

⁵⁷ CER-Landa/Neyra #2, ¶ 45.

⁵⁸ CER-Landa/Neyra #2, ¶ 96.

⁵⁹ Counter-Memorial, ¶¶ 139, 166.

⁶⁰ Counter-Memorial, ¶¶ 143-144, 151.

[REDACTED].⁶¹ Peru uses this to call into question the status of the Court’s decision-making reflected in the 2017 Leaked Decision.

49. However, the absence of meeting minutes establishing the date on which the justices of the Court voted on the outcome is irrelevant. As Dr. Landa and Prof. Neyra explain, it is Constitutional Court practice for justices to align on the outcome of the case through internal communications, especially in circumstances where—as here—the Court had recently ruled on the same legal issues.⁶² Here, the majority’s alignment on the substantive question at the time of the [REDACTED] [REDACTED] is beyond dispute. The majority had recently established its position in *Medina de Baca* (published in September 2016) that the collection of default interest accrued during periods of the tax authorities’ own delays was unconstitutional.⁶³ The [REDACTED] and the 2017 Leaked Decision applied precisely the same reasoning to Scotiabank Peru’s case.⁶⁴ In the very next default interest judgment issued by the Court, *Icatom* (published in August 2018), the same majority extended the *Medina de Baca* reasoning to cases involving commercial entities,⁶⁵ confirming that the position reflected in the [REDACTED] and the 2017 Leaked Decision was the established view of the majority of the Court at the time.⁶⁶

50. Moreover, the Court’s justices, including Justice Espinosa-Saldaña who was voting in favor of Scotiabank Peru and Justice Ledesma who was dissenting, publicly acknowledged that the Court had reached a decision prior to the leak.⁶⁷ Indeed, in October 2017 Justice Espinosa-Saldaña testified—in a hearing before the IACHR denouncing interference with the Court’s independence—regarding concerns about interference involving a “decision” made in the Default

⁶¹ Counter-Memorial, ¶ 406.

⁶² CER-Landa/Neyra #2, ¶ 61.

⁶³ **C-0066**, Judgment of the Plenary Session of the Constitutional Court in Case No. 04082-2012-PA/TC (*Medina de Baca*).

⁶⁴ [REDACTED].

⁶⁵ **C-0067**, Judgment of the Plenary Session of the Constitutional Court in Case No. 04532-2013-PA/TC (*Icatom*).

⁶⁶ CER-Landa/Neyra #2, ¶ 183; CER-Hernández, ¶¶ 13, 28-30.

⁶⁷ **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 Peru (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; **C-0298**, “I was offered to stay if I voted for Keiko’s freedom,” Hildebrandt en sus trece (September 27, 2019).

Interest Amparo.⁶⁸ Justice Ledesma also observed around the same time that “thanks to the press, it was known what the trend was and the justices who were going to vote in favor of” Scotiabank.⁶⁹ That is a clear expression that, even to a dissenting justice, it was apparent that a decision had been reached in the Default Interest Amparo.

51. In sum, Peru’s contention that the 2017 Leaked Decision was no more than a preliminary draft is baseless. Its own documents—that it chose not to present with its Counter-Memorial and that it then resisted producing in this arbitration—make that clear.

B. The Constitutional Court is the Source of the 2017 Leaked Decision

52. Peru contends that Scotiabank’s allegation that there was a leak by anyone from the Constitutional Court of an unpublished decision in the Default Interest Amparo is “unsupported.”⁷⁰ Peru’s refusal to accept that there was a leak at all defies credibility.⁷¹ The evidence is undeniable.

53. *First*, Peru has provided not a single shred of evidence—from a witness or in any document—to supplant what is apparent on the face of the Hildebrandt Article. The article explains that a “high-level source from the Constitutional Court, who opposes” the decision “provided this magazine with a copy of the ruling.”⁷²

54. *Second*, the article includes images of four pages from the unpublished decision in the Default Interest Amparo.⁷³ The images include a unique barcode applied by the Constitutional Court.⁷⁴ Now that Peru has produced versions of the decision circulating within the Court at the

⁶⁸ **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 Peru (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.

⁶⁹ **C-0298**, “I was offered to stay if I voted for Keiko’s freedom,” Hildebrandt en sus trece (September 27, 2019).

⁷⁰ Counter-Memorial, ¶¶ 133, 135.

⁷¹ In the document production phase, Peru attempted to dispute the existence of the leak by claiming that Scotiabank “failed to provide any evidence that the [Leaked Decision] had been ‘leaked’ by the Constitutional Court.” See Procedural Order No. 6, Annex 1, Peru’s Comments on the Claimant’s General Remarks and Specifications, p. 14.

⁷² **C-0200**, “Scotiabank will win [REDACTED] from Constitutional Court decision,” Hildebrandt en sus trece (June 9, 2017), p. 2.

⁷³ **C-0200**, “Scotiabank will win [REDACTED] from Constitutional Court decision,” Hildebrandt en sus trece (June 9, 2017), p. 2. See ¶ 33, above.

⁷⁴ **C-0200(a)**, 2017 Leaked Decision; CER-Landa/Neyra #1, ¶¶ 110-112. Peru sought to undermine the significance of the barcode appearing on the 2017 Leaked Decision by submitting the witness statement of [REDACTED], the head of the Constitutional Court’s Office of Technology since 1996, to testify on the function

time, it can be, and is, established that those images are authentic reproductions of the Court's unpublished decision.⁷⁵ Accordingly, the 2017 Leaked Decision is plainly authentic and the Hildebrandt Article was truthful in stating that it had obtained a copy of an unpublished decision in the Default Interest Amparo.

55. As Dr. Landa and Prof. Neyra explain, unpublished decisions are not public documents and are protected by a duty of confidentiality.⁷⁶ Peru agrees that the Court benefits from deliberative secrecy as is evident from its own attempt to withhold the Court's documents in the face of the Tribunal's document production order.⁷⁷ Accordingly, only an impermissible leak—of the variety described on the face of the Hildebrandt Article—could render an unpublished decision of the Constitutional Court public. As Peru itself explains, “[t]he principle of the secrecy of deliberations inherent in the judicial function is of paramount importance [...] as it protects the Court and its Justices from public scrutiny to enable them to independently and effectively fulfil their duty to uphold the Constitution.”⁷⁸ Yet, as discussed below, notwithstanding the paramount importance of the secrecy of judicial deliberations, no action was taken by Peruvian authorities to investigate the leak of the 2017 Leaked Decision to Hildebrandt.⁷⁹

56. *Third*, there are important circumstantial details regarding interactions between Hildebrandt and the Constitutional Court. The Hildebrandt Article notes that [REDACTED] was dissenting from and opposed the majority decision reached by the Constitutional Court to rule in Scotiabank Peru's favour.⁸⁰ [REDACTED]

of the barcode system. However, far from supporting Peru's position, [REDACTED] testimony confirms that the barcode is automatically generated at the time of a case registration within the Court and is incorporated into draft resolutions produced through the Court's internal case management system for the purpose of tracking and facilitating the internal circulation of documents within the Court. In other words, the presence of the barcode on the 2017 Leaked Decision confirms that it was a document generated within and belonging to the Constitutional Court's case file for the Default Interest Amparo. See RWS [REDACTED], ¶ 13-15.

⁷⁵ See ¶ 42 above.

⁷⁶ CER-Landa/Neyra #2, ¶¶ 91(a), 99-100. See also CER-Landa/Neyra #1, ¶¶ 96-98.

⁷⁷ Peru's Response to the Claimant's Application Regarding Peru's Privilege and Confidentiality Log (December 23, 2025), ¶¶ 29, 31.

⁷⁸ Peru's Response to the Claimant's Application Regarding Peru's Privilege and Confidentiality Log (December 23, 2025), ¶ 31.

⁷⁹ See ¶ 59 below.

⁸⁰ C-0200, “Scotiabank will win [REDACTED] from Constitutional Court decision,” Hildebrandt en sus trece (June 9, 2017), p. 3.

means by which the unpublished decision was leaked by the Constitutional Court is immaterial. It is known, from Hildebrandt's own contemporaneous reporting, that the leak came from a senior source from within the Constitutional Court—and Peru has provided no evidence to the contrary. It alone would possess that information. In particular:

- (a) Peru has access to the Constitutional Court documents and records. It is therefore the party to this arbitration uniquely capable of marshalling documentary evidence regarding the leak. In that regard, the Tribunal ordered Peru to produce internal Constitutional Court documents, including emails, regarding the leak.⁸⁹ Peru did not produce a single document in response to that order, nor include any responsive documents on its privilege log.⁹⁰ It is shocking that Peru was unable to identify a single document or email generated by the Court regarding the leak. It is, very evidently, something that would or should have generated discussion, including around safeguards to ensure that leaks of that variety would not re-occur. That is particularly so given the high premium supposedly placed by the Government on the independence and deliberative secrecy of the Constitutional Court, as Peru has emphasized in its submissions.⁹¹
- (b) Peru was also ordered to produce documents relating to any investigation conducted by the Constitutional Court or other relevant authorities regarding the leak, which was a manifest violation of the Court's rules on confidentiality.⁹² Peru did not produce a single document in response to that order either, explaining that no investigation had been conducted.⁹³ It is similarly shocking that, faced with such a manifest breach of the Court's confidentiality, no action was taken to determine how the leak had unfolded so as to admonish whomever was responsible and ensure

⁸⁹ Procedural Order No. 6, Annex 1, Claimant's Request No. 1, pp. 21-34.

⁹⁰ **C-0702**, Peru's Privilege Log (February 2, 2026).

⁹¹ Peru's Response to the Claimant's Application Regarding Peru's Privilege and Confidentiality Log (December 23, 2025), ¶¶ 30-56; Counter-Memorial, ¶¶ 108-207.

⁹² Procedural Order No. 6, Annex 1, Claimant's Request No. 18, pp. 107-112.

⁹³ **C-0701**, Peru's Letter to Scotiabank regarding Peru's Document Production in ICSID Case No. ARB/22/30 – Bank of Nova Scotia v. Republic of Peru (January 30, 2026), p. 3.

that it would not happen in the future.⁹⁴ Even more so when the Constitutional Court itself, two months after the leak, issued an official statement condemning the leak of “a draft judgment or various aspects of a deliberation that, by its very nature, is reserved, which will generate, after the corresponding investigation a drastic sanction to those who are responsible”.⁹⁵ The Court’s own statement thus confirms that the leak was an event of the utmost institutional gravity. Yet, according to Peru, no investigation followed, no sanction was imposed, and no documents regarding any inquiry into the leak were produced in this arbitration.

60. Only two plausible inferences can be drawn. Either Peru has documents responsive to the requests that it chose not to produce because they would corroborate the Hildebrandt Article. Or, alternatively, there was such a general institutional antipathy towards Scotiabank Peru that the leak of the 2017 Leaked Decision was so unsurprising and noteworthy that it generated not a single piece of paper or document.

61. Regardless, in the absence of any other documents from Peru, the record is unequivocal that the source of the leak was a high-ranking source from within the Constitutional Court who opposed the fact that the Court was in the midst of signing a judgment finding in favour of Scotiabank Peru.

C. Hildebrandt is Ideologically Opposed to Foreign Investment and Provided Only SUNAT With a Platform to Comment on the 2017 Leaked Decision

62. In its Memorial, Scotiabank observed that Hildebrandt is known as a publication that is avowedly hostile to foreign investment as a general matter (and, unsurprisingly therefore, the Hildebrandt Article emphasized Scotiabank’s foreign origin and presence).⁹⁶ Peru does not deny

⁹⁴ This is even more striking given that, as Dr. Landa and Prof. Neyra explain, public information confirms that internal investigations have been conducted by the Constitutional Court to determine responsibilities and implement corrective measures following leaks of draft judgments or separate opinions in the few other cases in which this anomalous situation occurred. See CER-Landa/Neyra #2, ¶ 101.

⁹⁵ C-0543, Official Communication from the Plenary of the Constitutional Court (August 31, 2017).

⁹⁶ Memorial, ¶¶ 78, 226, 230, 281.

Hildebrandt's hostility to foreign investment and foreign investors.⁹⁷ Instead, it contends that the publication's "editorial line is irrelevant to this dispute."⁹⁸

63. Hildebrandt's stance on foreign investment is relevant because it gives context and colour as to what must have been intended by the "high-level source" leaking the Court's unpublished decision: create a media and political firestorm, compare the foreign investor's interests to those of Peruvian nationals, and generate pressure against the Constitutional Court to prevent it from proceeding with the decision that it had reached. That objective was achieved, as discussed in the Memorial and further below.⁹⁹ It is no coincidence that Hildebrandt was also the source that was used a year before when, as explained at paragraph B.5757 above, Justice Ledesma's dissenting vote was leaked to disrupt another decision in a case that, according to Hildebrandt would "exonerate" a "powerful United States holding [company]."¹⁰⁰

64. Scotiabank's characterization of Hildebrandt's editorial is also reinforced by the favouritism that it displayed in its communications with each side in the Default Interest Amparo prior to publishing its June 2017 article. In requesting a call with SUNAT's lawyers prior to publication, the Hildebrandt journalist revealed that he had obtained "certain sensitive information that [he] would like to share" and discuss prior to his imminent publication of the article.¹⁰¹ In his outreach on the same day to Scotiabank Peru's lawyers, Hildebrandt's journalist made no reference to his possession of any sensitive information and no mention of the imminent publication of the article.¹⁰² Instead, he posed generic questions about the Default Interest Amparo. The differences between the tone of the two emails are manifest and can be observed in the screenshots below:

⁹⁷ Counter-Memorial, ¶¶ 133-164.

⁹⁸ Procedural Order No. 6, Annex 1, Respondent's Objections to Claimant's Request No. 8, p. 62.

⁹⁹ Memorial, ¶¶ 92-196; See Section II, below.

¹⁰⁰ **C-0518**, "Powerful gentlemen: The Constitutional Court has forgiven 65 million in taxes owed by UPC and more than 4 million by Universidad Privada del Norte, both of which belong to the powerful U.S. based holding company Laureate Education. Only two justices of the Constitutional Court voted against the decision," Hildebrandt en sus trece (July 7, 2016), pp. 1-2. The article went on to describe the company's head as an American that "had found his own 'El Dorado' in emerging countries," and argued that "countries like Peru, where education has become a lucrative business –now free from all taxes thanks to the Constitutional Court– are crucial for raising cash and paying down [his] multimillion-dollar debt."

¹⁰¹ **C-0533**, Email from [REDACTED] (Hildebrandt) to [REDACTED] (SUNAT) (June 6, 2017).

¹⁰² **C-0532**, Email from [REDACTED] (Hildebrandt) to Payet, Rey, Cauvi, Pérez Abogados (June 6, 2017).

Subject: [REDACTED]
Date: June 6, 2017 5:46:01 PM

Sent: Tuesday, June 6, 2017, 7:22 p.m.
To: [Payet, Rey, Cauvi, Pérez Abogados](#)
Subject: Hildebrandt en sus trece

Dear Mr. Escalante, good morning. This is [REDACTED] from César Hildebrandt's weekly newspaper. I am working on a report about the constitutional appeal filed by Scotiabank with the Constitutional Court (TC) seeking a refund of [REDACTED] from SUNAT, representing interest on its tax debt. I have some sensitive information that I would like to share with you, but I would also like to speak with you to get SUNAT's position on these claims. My cell phone number is [REDACTED]. I would appreciate it if you could contact me. I am wrapping up my article on Thursday morning. I look forward to hearing from you. Thank you very much,

a.

--

Good evening, this is [REDACTED] a reporter for César Hildebrandt's weekly newspaper. I understand that the Payet law firm is advising Scotiabank on the constitutional appeal filed by this financial institution regarding the payment of more than [REDACTED] resulting from its tax debt to SUNAT. I would like the opportunity to speak with the attorney handling the case to understand the basis for this appeal filed with the Constitutional Court. Some questions I have are as follows:

- Does Scotiabank consider that interest to be illegal?
- Isn't compensatory interest a legitimate part of a debt?
- Is Scotiabank seeking to have SUNAT, through the Constitutional Court, refund the interest already collected through enforcement proceedings?

Yours sincerely,

P.S.: My phone number is [REDACTED]

--

C-0533, Email from [REDACTED]
(Hildebrandt) to [REDACTED]
(SUNAT) (June 6, 2017) (ENG)

C-0532, Email from [REDACTED]
(Hildebrandt) to Payet, Rey, Cauvi, Pérez
Abogados (June 6, 2017) (ENG)

65. Scotiabank Peru's lawyers declined to respond to the email, following Scotiabank's institutional practice of not commenting publicly in the press on ongoing litigation.¹⁰³ As [REDACTED] explains, it was not until the Hildebrandt Article was published three days later that Scotiabank Peru first learned of the 2017 Leaked Decision.¹⁰⁴

66. It is unknown whether anyone within SUNAT had been involved in discussions with the Constitutional Court prior to the leak. What is apparent, however, is that—upon learning of the “sensitive” information that Hildebrandt would come to share—SUNAT's lawyers did not seek to quash the leak, report the matter to the Constitutional Court and discourage the leaking of an unpublished decision in a pending case (which would have been the ethical course of action).¹⁰⁵

67. Instead, SUNAT fully leveraged the leak to its advantage, with one of its lawyers offering scathing remarks against Scotiabank Peru and the Court that are referenced throughout the

¹⁰³ CWS- [REDACTED] #2, ¶ 6.

¹⁰⁴ See CWS- [REDACTED] #1, ¶¶ 32, 36; CWS- [REDACTED] #2, ¶ 4.

¹⁰⁵ Memorial, ¶¶ 74-91.

Hildebrandt Article.¹⁰⁶ That was only the beginning. SUNAT thereafter frequently discussed the Default Interest Amparo in the press as part of the broader political and media firestorm that ensued, as discussed in further detail below.¹⁰⁷

68. To deflect, Peru contends that “it was the SUNAT who first brought to the attention of the Constitutional Court the publication of the alleged leak.”¹⁰⁸ However, there is no evidence that SUNAT “reported” the leak in an effort to uphold judicial propriety. Instead, in addition to pursuing its media campaign to attack the Constitutional Court, it used information in the Hildebrandt Article in an unsuccessful application requesting the recusal of one of the Court’s justices who was reported as voting against SUNAT’s interests.¹⁰⁹

* * *

69. In summary, the record now supplemented with the documents that Peru sought not to produce, shows that:

- (a) the Constitutional Court had, by May 2017, drafted a complete judgment in the Default Interest Amparo and it was clear how each justice would rule (with a majority finding in favour of Scotiabank Peru and two justices dissenting);¹¹⁰
- (b) although the finality of the decision is ultimately immaterial, the decision was described as in a form for final signature (“Sentencia firma final”) and that two justices had already affixed their signatures to it;¹¹¹

¹⁰⁶ **C-0200**, “Scotiabank will win [REDACTED] from Constitutional Court decision,” Hildebrandt en sus trece (June 9, 2017), pp. 2-3 (*e.g.*, “It would be extremely serious if the Constitutional Court were to side with Scotiabank. It is a case that will attract others, and in the end, the State could end up losing close to [REDACTED] [...] By ruling in favour of Scotiabank, the [Constitutional Court] would be sending the following political message: do not pay your debts, contest and delay them, because the administration will take time to collect them, so in the end you will not have to pay interest and you will get away with it. In other words, those who pay on time are the real fools and those who do not pay on time are the clever ones [...] [Scotiabank is] using the [Constitutional Court] as a false door to carry out their plans.”).

¹⁰⁷ See ¶¶ 69(f)-71, below.

¹⁰⁸ Counter-Memorial, ¶ 163.

¹⁰⁹ **R-0355**, SUNAT Submission No. 04380-2017, pp. 6-7.

¹¹⁰ See ¶¶ 38-42, above.

¹¹¹ See ¶¶ 40-45, above.

- (c) the unpublished judgment was leaked by a high-ranking individual within the Constitutional Court who opposed the outcome;¹¹²
- (d) that individual provided the judgment to Hildebrandt, which is known for opposing foreign investment and which then advised only SUNAT (and not Scotiabank Peru) that it was in possession of the 2017 Leaked Decision;¹¹³
- (e) no internal Constitutional Court or government investigative records are available reacting to or responding to the leak;¹¹⁴ and
- (f) rather than seeking to quash the manifest violation of judicial confidentiality, SUNAT seized on the opportunity to widely publicize its vehement criticism of the Constitutional Court and alarmist views as to the impact that a decision in Scotiabank Peru’s favour would have.¹¹⁵

70. From SUNAT’s alarmist remarks was borne a broader Government campaign to speak out against the Constitutional Court in connection specifically with the 2017 Leaked Decision, discussed next.

II. The Constitutional Court’s Handling of the Default Interest Amparo is Impacted by the Peruvian State’s Interference with the Court’s Judicial Independence

71. In its Memorial, Scotiabank showed that—following the Hildebrandt Article—numerous Peruvian State actors publicly and repeatedly criticized the Constitutional Court for its decision to rule in Scotiabank Peru’s favour.¹¹⁶ SUNAT, Ministers, officials and lawmakers described the outcome reflected in the 2017 Leaked Decision as “illegal”, “dangerous” and a “betrayal to the

¹¹² See Part Two, Section I(B), above.

¹¹³ See Part Two, Section I(C), above. See also **C-0498**, “Humala Moves to the Center,” Hildebrandt en sus trece (April 15, 2011) (criticizing the Peruvian government for “enacting a Constitution that prioritizes foreign investment over national industry and agriculture,,” highlighting its “servile subservience to anything that [is] not Peruvian.”); **C-0541**, “Market Economy,” by C. Hildebrandt (August 17, 2007).

¹¹⁴ See ¶ 59 above.

¹¹⁵ See ¶ 26(d) above. See also **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-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); Counter-Memorial, ¶¶ 176-178.

¹¹⁶ Memorial, ¶¶ 96-109.

State”¹¹⁷, warning of grave fiscal and social consequences—including fiscal deficit and an inability to fund health and education services—should the Constitutional Court proceed with its expected ruling.¹¹⁸ These statements were disseminated widely across media platforms in a sustained campaign to pressure the Constitutional Court to reverse its position and rule against Scotiabank Peru.¹¹⁹ The public statements were also buttressed by pressure that occurred behind closed doors, as was reported by the Court to Scotiabank’s fact witnesses in routine meetings described in the Memorial.¹²⁰

72. In its Counter-Memorial, Peru attempts to downplay the significance of the public media campaign, contending that Scotiabank “canvassed every possible media outlet” to create the impression of state-orchestrated pressure on the Court.¹²¹ In other words, Scotiabank was thorough in its showing. What emerges from that review is undeniable evidence of widespread criticism from various Government actors against the Constitutional Court in tone and to such a degree that—as Dr. Landa and Prof. Neyra conclude—crossed the line into improper interference with judicial independence.¹²²

73. Peru cannot contest the existence of numerous statements attributable to numerous State actors criticizing the Constitutional Court for having resolved in Scotiabank Peru’s favour—those statements exist in print. Instead, Peru attempts to pick apart individual statements contending that they do not amount to “undue influence or threat[s]” that could compromise judicial independence (so, apparently, they amount to an attempt to influence and threaten, just not to an “undue” level).¹²³ Peru’s distinction between “influence” and “undue influence” is a red herring. There should have been no attempt by the Government to influence how the Constitutional Court was going to rule on a case outside the framework of legitimate submissions to the Court within the established

¹¹⁷ Memorial, ¶¶ 97-99, 236, 291.

¹¹⁸ Memorial, ¶¶ 235, 291-292.

¹¹⁹ Memorial, ¶¶ 93, 96, 236.

¹²⁰ Memorial, ¶¶ 125-138; CWS [REDACTED], ¶¶ 43, 49-53; CWS- [REDACTED], ¶¶ 28, 33-34, 37-39.

¹²¹ Counter-Memorial, ¶ 4.

¹²² CER-Landa/Neyra #2, ¶¶ 107, 109-110.

¹²³ Counter-Memorial, ¶ 168; RER-Bustamante, ¶¶ 57-59.

procedure.¹²⁴ This is the very reason why confidentiality safeguards are supposed to be upheld—judicial independence depends on them.

74. Scotiabank responds in Appendix B to Peru’s observations on the individual statements raised in the Memorial evincing the Government’s campaign of interference. The statements are, on their face, inappropriate and cross the line necessary to preserve judicial independence.¹²⁵ However, Peru’s parsing of specific words in each individual statement ignores the compounding effect of the collective chorus of Government voices that were speaking out together against the Constitutional Court.¹²⁶ Peru also offers no good explanation why so many State voices were simultaneously speaking out against the Court (and why none were concerned about the existence of the leak itself, as shown by the lack of a single document on the matter).¹²⁷ The only plausible explanation was to pressure the Court to refrain from issuing the 2017 Leaked Decision in Scotiabank Peru’s favour and reach a different outcome. In applying that pressure, it is also no coincidence that the Peruvian State’s pressure campaign was directed at a case in which the beneficiary of a favourable ruling was a foreign-owned bank that was cast—as government officials repeatedly did—as a wealthy multinational seeking to take money from “all Peruvians.”¹²⁸

75. As a general matter, the reason that strict adherence to judicial independence as part of the constitutionally-enshrined separation of powers in Peru is so important is that—where there is an impermissible encroachment by one branch of government into the functioning of a judicial body—it can become impossible to measure its precise impact.¹²⁹ That would otherwise require understanding precisely what each individual justice may have had in their mind—conscious or subconscious—when deciding to rule on a case in which there was such an encroachment.¹³⁰ For this reason, conduct that raises the objective appearance or risk of bias on its own undermines

¹²⁴ CER-Landa/Neyra #2, ¶¶ 27, 109, 110.

¹²⁵ CER-Landa/Neyra #2, ¶¶ 27, 29, 109-110.

¹²⁶ See Memorial, ¶ 291; Appendix B: Political Interference Statements.

¹²⁷ Counter-Memorial, ¶¶ 174-186.

¹²⁸ **C-0283**, “Sunat: A commission will be created to resolve disputes with large companies,” *El Comercio* (June 5, 2018). See **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).

¹²⁹ CER-Landa/Neyra #2, ¶¶ 24, 27-28.

¹³⁰ CER-Landa/Neyra #2, ¶ 23.

judicial independence, even where the subjective motivations of individual justices remain impossible to prove.¹³¹ In short, judicial independence prohibits other branches of government from making extemporaneous statements regarding active litigation and how a sitting court should rule.¹³²

76. Here, however, we are not left to guess or infer the impact of the politicized campaign against the Constitutional Court. Instead, there is direct evidence of the impact:

- (a) some of the Constitutional Court justices made statements regarding the presence of inappropriate State pressure (addressed in Subsection II(A) below);
- (b) [REDACTED], in light of the politicized atmosphere, it was deferring its decision on the Default Interest Amparo, which aligns fully with the testimony provided by Scotiabank’s fact witnesses regarding information that they were receiving directly from some of the justices at the time and with public statements by [REDACTED] to this effect (addressed in Subsection II(B) below); and
- (c) ultimately, after years of delay, the Court opportunistically (and unlawfully without quorum) rushed out its 2021 Decision that was diametrically opposite to the decision the Court had reached in May 2017, prior to the leak (addressed in Subsection III below).

A. Constitutional Court Justices Publicly Discussed the State’s Interference With its Judicial Independence

77. Peru contends that it would be “inconceivable” for Constitutional Court justices to succumb to external interference because of Peruvian constitutional safeguards to judicial independence.¹³³ But, even Peru does not believe in the impenetrability of its own purported safeguards. After all, without a single iota of proof, Peru contends that a familial relationship

¹³¹ CER-Landa/Neyra #2, ¶ 15-16, 28.

¹³² CER-Landa/Neyra #2, ¶ 12, 15, 110.

¹³³ Counter-Memorial, ¶¶ 198–207. Peru’s expert Mr. Bustamante refers to the “operational independence, including “budgetary autonomy,” by the procedures laid out in the Organic Law of the Constitutional Court for the preparation of the Court’s annual budget. RER-Bustamante, ¶¶ 64–67.

between one of the Constitutional Court’s justices [REDACTED] and a Scotiabank executive “may have . . . influenced” the Court’s ruling in the *Medina de Baca* case, which was decided before Scotiabank Peru’s case but which addressed the same legal question.¹³⁴ Peru’s thesis appears to be that the Court was influenced by that relationship to decide in Ms. Medina de Baca’s favour in order ultimately to benefit Scotiabank. That contention is wholly unsupported—indeed, if Peru had such concerns, it never conducted any investigation as one would expect. But, importantly, it shows Peru’s own belief regarding the fragility of the constitutional safeguards that Peru trumpets in its Counter-Memorial.

78. Safeguards written on paper do not guarantee their effectiveness.¹³⁵ Had those safeguards worked, there would never have been a leaked decision. Moreover, both as a general matter and specifically in connection with the Default Interest Amparo, Constitutional Court justices have spoken out publicly regarding improper State interference in the judicial function.

79. *First*, on July 11, 2017, three weeks after the leak, Justice Ramos publicly condemned the State’s improper interference in the functioning of the Constitutional Court.¹³⁶ On the topic of judicial independence from other branches of government, Justice Ramos lamented that the Court is “not always faced with the sound criticism of judicial decisions, but with the perverse desire to direct the direction of a judgment.”¹³⁷ Justice Ramos did not speak to the Default Interest Amparo directly but the timing of his statement as compared to the contemporaneous Government backlash that had ensued during the preceding month since the Hildebrandt Article was published is notable.

80. *Second*, and most saliently, in October of 2017, Justices Ramos, Ledesma, and Espinosa-Saldaña appeared before the IACHR to express their concerns about the Peruvian State’s interference in the Court’s independence.¹³⁸ At that hearing, Justice Espinosa-Saldaña stated: “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

¹³⁴ Procedural Order No. 6, Annex 2, Peru’s Document Request No. 8, p. 22

¹³⁵ CER-Landa/Neyra #2, ¶¶ 19-20.

¹³⁶ **C-0238**, Carlos Ramos, “The Constitutional Court: Two Decades of Lessons,” *El Peruano* (July 11, 2017), p. 2; Memorial, ¶ 239.

¹³⁷ **C-0238**, Carlos Ramos, “The Constitutional Court: Two Decades of Lessons,” *El Peruano* (July 11, 2017), p. 2.

¹³⁸ **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 Peru (October 24, 2017) (19:05-20:55).

threatened with impeachment?”¹³⁹ And a few minutes later, Justice Espinosa-Saldaña specifically raised concerns regarding the Government’s conduct relating to the “Scotiabank case” after the Court had reached “a decision” against SUNAT.¹⁴⁰ By October 2017, the only decision in the Scotiabank case to which Justice Espinosa-Saldaña could have been referring was the 2017 Leaked Decision.¹⁴¹ Neither of the other two justices testifying with Justice Espinosa-Saldaña intervened or disagreed.

81. The fact that a sitting justice testified before the IACHR and considered it appropriate to raise, by name, the improper State interference in the Default Interest Amparo is significant and powerful. Peru attempts (unsuccessfully) to downplay its import.

82. Peru observes that the hearing was focused on the State’s interference with judicial independence in a different case (the *Frontón* case), rather than Scotiabank’s.¹⁴² But that only underscores the point. That Justice Espinosa-Saldaña felt compelled to draw an analogy to the State’s conduct in Scotiabank’s case reinforces the severity of his concerns regarding improper State interference in the Default Interest Amparo.¹⁴³

83. Peru contends that Justice Espinosa-Saldaña’s comment is somehow inapplicable here because the thrust of his testimony concerned investigations launched by Congress against sitting justices.¹⁴⁴ But the threat of such investigations was in fact also made in response to the 2017 Leaked Decision and was therefore part of the Peruvian State’s pressure campaign in connection with the Default Interest Amparo.¹⁴⁵

¹³⁹ 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 Peru (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.

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 Peru (October 24, 2017) (19:05-20:55); C-0263, Transcript of Hearing of the Inter-American Court of Human Rights (October 24, 2017), p. 2 (emphasis added).

¹⁴¹ [REDACTED]

¹⁴² Counter-Memorial, ¶ 192.

¹⁴³ CER-Landa/Neyra #2, ¶¶ 25, 144.

¹⁴⁴ Counter-Memorial, ¶ 193.

¹⁴⁵ See Appendix B: Political Interference Statements, pp. 7-8, 12; See e.g. C-0266, “Vilcatoma denounces corruption in the TC that affect the interests of the State,” Exitosa (October 30, 2017); C-0267, “Yeni Vilcatoma exerts political and media pressure to disrupt the possible ruling of the Constitutional Court,” La Primera (November 1, 2017).

84. Finally, Peru tries to diminish the value of the testimony by noting that the statement is vague and reflects the views of a single justice.¹⁴⁶ However, Justice Espinosa-Saldaña testified to the existence of this pressure in the Default Interest Amparo in the presence of two other justices [REDACTED] neither of whom intervened to disagree.¹⁴⁷ Moreover, the forum in which the statement was made is important. Even if it was a singular comment that was not the focus of the hearing, Justice Espinosa-Saldaña made the comment in the context of giving testimony before a leading international judicial human rights court. His words therefore carry particular weight in the circumstances.¹⁴⁸

85. Peru's attempt now to downplay Justice Espinosa-Saldaña's testimony before the IACHR is particularly meaningless in circumstances where no investigation was taken at the time following his testimony.¹⁴⁹ It stands to reason that—when a sitting justice not only complains about State interference with a court's judicial independence in a specific case, but testifies to that fact before a renowned international court—appropriate domestic authorities in Peru ought to have conducted an investigation into the allegation (and indeed, as Dr. Landa and Prof. Neyra confirm, it was their duty to do so).¹⁵⁰ Yet, Peru revealed that no investigation was ever conducted.¹⁵¹ Thus, nothing was done by Peru in response to either the 2017 Leaked Decision or Justice Espinosa-Saldaña's testimony raising direct concern about the impacts resulting from that leak on the Constitutional Court.

86. Furthermore, Peru said that it was unable to produce any documents from Justice Espinosa-Saldaña's files on the subject because his email account was closed, and its contents lost, when he

¹⁴⁶ Counter-Memorial, ¶ 196.

¹⁴⁷ The reality that the justices considered the irregularities in the Scotiabank Default Interest Amparo to be relevant to the IACHR hearing is confirmed by a report prepared by Peru's attorney general about the hearing, which Peru produced in the Document Production phase. See **C-0546**, Internal Report from Peru's Attorney General on Public Hearing before the IACHR (November 2, 2017), p. 1.

¹⁴⁸ CER-Landa/Neyra #2, ¶¶ 113, 144.

¹⁴⁹ Counter-Memorial, ¶¶ 193-196. Scotiabank requested from Peru all documents relating to any investigation undertaken by any Peruvian government entity into the allegations of government interference in the Default Interest Amparo raised in the IACHR hearing. In response, Peru only produced one report, which merely covered what occurred in the hearing itself. See **C-0546**, Internal Report from Peru's Attorney General on Public Hearing before the IACHR (November 2, 2017).

¹⁵⁰ CER-Landa/Neyra #2, ¶¶ 99-100, 113, 144.

¹⁵¹ **C-0701**, Peru's Letter to Scotiabank regarding Peru's Document Production in ICSID Case No. ARB/22/30 – Bank of Nova Scotia v. Republic of Peru (January 30, 2026), p. 5.

retired from the Court—even though Peru was, by that time, already in receipt of Scotiabank’s Notice of Dispute and so should have had a legal hold in place to prevent this destruction of evidence from occurring.¹⁵²

87. *Finally*, as described at paragraph 50 above, in September 2019, Justice Ledesma gave an interview to Hildebrandt in which she was asked about the Default Interest Amparo. She expressed that “thanks to the press” (*i.e.*, Hildebrandt) the justices that were inclined at the time to vote “in favor of those [Scotiabank’s] interests preferred to abstain themselves” and acknowledged that in the circumstances the Court has “not wanted” to issue its decision.¹⁵³ The press had, in the prior months, been used as a means by which various Government actors voiced their condemnation of the Constitutional Court and Justice Ledesma’s explanation to Hildebrandt acknowledges that the media campaign had a chilling effect on the Court’s issuance of a final decision in the Default Interest Amparo.¹⁵⁴

B. The Constitutional Court’s Internal Records Show That the Politicized Atmosphere Surrounding the Default Interest Amparo Resulted in the Perpetual Deferral of the Court’s Issuance of Its Decision

88. Beyond the public statements of the Constitutional Court justices, the Court’s handling of the Default Interest Amparo following the Hildebrandt Article and the 2017 Leaked Decision reflects the political firestorm playing out in the media (and more directly behind closed doors). As the Court had already circulated a judgment for final signature by May 2017 (and had already obtained signatures of two justices in rapid succession), the issue decision should have been released by the Court within a few weeks thereafter.¹⁵⁵ Yet it took the Constitutional Court a further four-and-a-half years, until November 2021, to eventually publish its decision (in the form of the 2021 Decision).¹⁵⁶

¹⁵² **C-0701**, Peru’s Letter to Scotiabank regarding Peru’s Document Production in ICSID Case No. ARB/22/30 – Bank of Nova Scotia v. Republic of Peru (January 30, 2026), p. 8; **C-0021**, Notice of Intent (September 1, 2021).

¹⁵³ **C-0298**, “I was offered to stay if I voted for Keiko’s freedom,” Hildebrandt (September 27, 2019), p. 4.

¹⁵⁴ See Appendix B: Political Interference Statements; It is notable that Justice Ledesma’s remark “thanks to the press” refers specifically to Hildebrandt, as she was acknowledging—indeed, expressing appreciation to—the very newspaper conducting the interview for its role in making public the 2017 Leaked Decision.

¹⁵⁵ CER-Landa/Neyra #2, ¶¶ 47, 67; **C-0697**, Default Interest Amparo Case Log, items 17-19, p. 1; Appendix A: Default Interest Amparo Case Log, items 17-19, p. 5.

¹⁵⁶ CER-Landa/Neyra #1, ¶¶ 115-117; CER-Landa/Neyra #2, ¶¶ 81-82, 84.

89. Peru's principal explanation—made without reference to any contemporaneous documents—is that this extraordinary delay is a consequence of the Court's apparent routine application of case prioritization to manage its case load.¹⁵⁷ Yet again, when Scotiabank requested Peru to produce documents that would support this allegation Peru produced none.¹⁵⁸ Peru's explanation is incompatible with the finality of the Court's decision reached by May 2017,¹⁵⁹ the statements by the justices (including [REDACTED]) to the contrary (as set out at paragraph 50 above), and the statements by the justices to Scotiabank Peru and its representatives.¹⁶⁰ It is also undermined by what can be observed from the Court's internal documents showing its handling of Scotiabank's case.

90. [REDACTED]
[REDACTED]
[REDACTED]

91. [REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]

¹⁵⁷ Counter-Memorial, ¶ 410.

¹⁵⁸ During the document production phase, Scotiabank requested documents concerning the application of Constitutional Court Administrative Resolution 157-2018-P/TC—which established caseload prioritisation criteria—to the Default Interest Amparo's timeline. Peru responded that no responsive documents existed. C-0701, Peru's Letter to Scotiabank regarding Peru's Document Production in ICSID Case No. ARB/22/30 – Bank of Nova Scotia v. Republic of Peru (January 30, 2026), p. 6. See C-0568, Constitutional Court Administrative Resolution 157-2018-P/TC (August 2, 2018).

¹⁵⁹ See ¶¶ 32-35, 38-46, above.

¹⁶⁰ CWS-[REDACTED] #1, ¶¶ 50-53; CWS-[REDACTED], ¶¶ 33-34, 37-38.

¹⁶¹ [REDACTED]
[REDACTED].

¹⁶² [REDACTED]
[REDACTED]

¹⁶³ [REDACTED]
[REDACTED]

¹⁶⁴ See ¶ 43 above; [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

92. As Dr. Landa and Prof. Neyra explain, it is highly irregular for a case for which a decision is being circulated for final signature to then suddenly be the object of a request for additional party information.¹⁶⁶

93. [REDACTED]

[REDACTED] The only developments between those two dates are the emergence of the 2017 Leaked Decision and the Government backlash that emerged during the ensuing weeks.¹⁶⁸ There are no other case developments—and none to which Peru has pointed or provided evidence—to explain the Court’s change of course regarding its decision-making and resolution of Scotiabank Peru’s case.

¹⁶⁵ [REDACTED]

¹⁶⁶ CER-Landa/Neyra #2, ¶¶ 69-72.

¹⁶⁷ [REDACTED]

¹⁶⁸ See ¶¶ 65, 71, above. See also Memorial, ¶ 296; CER-Landa/Neyra #1, ¶ 147.

94.

As a result, the Default Interest Amparo remained in perpetual limbo through to the end of 2021.

95. There appears to have been no effort by the Court to revisit the Default Interest Amparo in 2017,¹⁷⁰ which aligns with what Justice Ledesma explained in her September 2019 interview with Hildebrandt.¹⁷¹ That inaction by the Court persisted into the first half of 2018.¹⁷²

96. Eventually, there was a renewed effort by some members of the Court to issue a ruling.

169

170

¹⁷¹ C-0298, “I was offered to stay if I voted for Keiko’s freedom,” Hildebrandt en sus trece (September 27, 2019).

172

173

[REDACTED]

97. In Dr. Landa's experience, it is highly unusual [REDACTED]

[REDACTED]

98. The irregularity becomes even more apparent when viewed against the Court's contemporaneous handling of other default interest *amparos*. Between the leak in June 2017 and March 2021—[REDACTED]
[REDACTED]—the Constitutional Court decided four other default interest

174 [REDACTED]

175 [REDACTED]

176 [REDACTED]

¹⁷⁷ CER-Landa/Neyra #2, ¶¶ 81-82.

¹⁷⁸ CER-Landa/Neyra #2, ¶ 81.

amparo cases,¹⁷⁹ two of which had a hearing after Scotiabank Peru's, all in favour of the taxpayer.¹⁸⁰

In none of these cases that were resolved while the Default Interest Amparo was pending was there a leak of a draft judgment or any governmental pressure.¹⁸¹ These facts evidence that the delay in Scotiabank's case was not the result of the Court's general approach to the default interest issue, but rather the result of a targeted campaign against Scotiabank to influence the outcome of the Default Interest Amparo.

99. [REDACTED]
[REDACTED]
[REDACTED].

100. [REDACTED]
[REDACTED]
[REDACTED] [REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]

101. [REDACTED]
[REDACTED]
[REDACTED] [REDACTED]

¹⁷⁹ CER-Landa/Neyra #2, ¶ 167; Appendix D: Comparative Analysis. *See also* C-0067, Judgment of the Plenary Session of the Constitutional Court in Case No. 04532-2013-PA/TC (Icatom); C-0310, Judgment of the Plenary Session of the Constitutional Court in Case No. 02051-2016-PA/TC (Paramonga); C-0312, Judgment of the Plenary Session of the Constitutional Court in Case No. 00225-2017-PA/TC (Teléfonica); C-0313, Judgment of the Plenary Session of the Constitutional Court in Case No. 01818-2013-PA/TC (Baca Campodónico).

¹⁸⁰ CER-Landa/Neyra #2, ¶ 167; Appendix D: Comparative Analysis. As Dr. Landa and Prof. Neyra explain, Peru's reference to the cases of *Pluspetrol* and *Silver Lake* as cases allegedly resolved in favor of the SUNAT in the same time period is misleading, as those cases did not involve as the subject-matter of the dispute a default interest claim. Counter-Memorial, ¶ 253; CER-Landa/Neyra #2, ¶ 181.

¹⁸¹ CER-Landa/Neyra #2, ¶¶ 140-143, Appendix D: Comparative Analysis.

182 [REDACTED]
183 [REDACTED]
184 [REDACTED]

[REDACTED]

102. [REDACTED]

103. [REDACTED]

185 [REDACTED]
186 [REDACTED]. In June 2018, a press article reported that Justice Ledesma also met with the Superintendent of SUNAT and Congresswoman Vilcatoma—who, it bears recalling, had threatened to file constitutional complaints against the Constitutional Court justices if the Leaked Decision were finalized—to “analyze the cases that SUNAT currently has pending before the Constitutional Court” against “big companies.” This pattern of meetings points to a close and ongoing connection between [REDACTED] and government actors who were pressuring the Court regarding the outcome of the Default Interest Amparo. C-0561, [REDACTED] in the spotlight. Constitutional Court justice reportedly met with the head of SUNAT,” La Razón (June 11, 2018).

187 [REDACTED]
188 [REDACTED]
189 [REDACTED]
190 [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

104. [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

105. Peru has sought to cast aside the testimony as amounting to “inflammatory accusations based in nothing but distortion, hearsay and plain misrepresentations.”¹⁹⁵ However, both

¹⁹¹ [REDACTED]

¹⁹² Indeed, SUNAT’s own representatives met with the justices on multiple occasions regarding this very case. Memorial, ¶¶ 128, 139; CWS [REDACTED] ¶¶ 16, 29; [REDACTED]

¹⁹³ Memorial, ¶¶ 125–138; CWS- [REDACTED] ¶¶ 28, 33, 37–38; CWS- [REDACTED] #1, ¶¶ 43, 50, 52–53; C-0288, Email from [REDACTED] (November 25, 2018).

¹⁹⁴ Memorial, ¶¶ 135–139; CWS- [REDACTED] ¶ 37; CWS- [REDACTED] #1, ¶ 52.

¹⁹⁵ Counter-Memorial, ¶ 5.

[REDACTED] have testified to meetings in which they participated or what they were told contemporaneously about meetings that took place.¹⁹⁶ And, where available, they cite to contemporaneous documents, which support their account of the meetings.¹⁹⁷ What emerges from the Constitutional Court's internal documents and the justices public statements, described above, is consistent with and only reinforces the testimony of [REDACTED] as to the reasons that were reported to them for the lengthy delay in the Constitutional Court's formal issuance of its decision in the Default Interest Amparo.¹⁹⁸

* * *

106. In sum, there is no room for any debate as to whether the Government's pressure campaign and the resulting politicized media environment impacted the case. The evidence shows that it did. That first manifested itself in the form of the lengthy delay to the Court's publication of a decision in the case, as discussed above. It then manifested itself in the form of a complete reversal of the Court's ruling on the case, as discussed next.

III. The Constitutional Court Folds to Government Pressure to Find Against Scotiabank Peru in the 2021 Decision

107. As explained in the Memorial, in November 2021, after more than four years of deliberate inaction, the Constitutional Court rushed to issue the 2021 Decision within weeks of Scotiabank's issuance of its Notice of Intent in this arbitration.¹⁹⁹ The 2021 Decision was diametrically opposed to the judgment for final signature that the Court had reached in May 2017, prior to the Hildebrandt Article.²⁰⁰

¹⁹⁶ CWS-[REDACTED] I, ¶¶ 43, 45-46, 50, 52-53; CWS-[REDACTED], ¶¶ 28, 33-39; CWS-[REDACTED] II, ¶¶ 21-23.

¹⁹⁷ CWS-[REDACTED] I, ¶ 50 [REDACTED]

¹⁹⁸ See ¶¶ 77-104, above.

¹⁹⁹ Memorial, ¶¶ 146-149, 151, 153.

²⁰⁰ Memorial, ¶ 153.

108. In its Counter-Memorial, Peru argues that the 2021 Decision was the correct decision as a matter of Peruvian law.²⁰¹ While Scotiabank disagrees, the supposed correctness or compatibility of the 2021 Decision with Peruvian law misses the point entirely.²⁰² The issue before this Tribunal is not to determine the compatibility or not of the 2021 Decision with domestic law, but whether the process that produced it—a process marred by the leaked unpublished judgment in Scotiabank Peru’s favour, then a more than four-year delay followed by a sudden, irregular rush to issue a diametrically opposed judgment—constituted treatment less favourable than that accorded to domestic investors in like circumstances, in breach of Peru’s obligations under the FTA.

109. The question is what would have happened “but for” Peru’s unlawful conduct in breach of the national treatment standard and the answer is clear—the 2017 Signed Judgment would have continued to be circulated amongst the remaining justices to collect their signature and would have been issued in favor of Scotiabank Peru, just as the cases that immediately preceded it (*Medina de Baca*) and immediately followed it (*Icatom*)—all decided by the same court. What a differently constituted court may or may not have done four years later is irrelevant to that exercise. We know what the decision in this case would have been as we have its very text

A. The 2021 Constitutional Court Decision Was Rushed After Scotiabank Sent the Notice of Dispute

110. According to Peru, the Court’s conduct in reducing quorum obligations and rushing the issuance of the 2021 Decision was justified because “leaving a case unattended would breach the parties’ right to an effective judicial protection”.²⁰³ The irony of this argument is difficult to overstate.

111. By natural extension of Peru’s own argument, for over four years following the leak, the Constitutional Court breached the parties’ rights: it left the case unattended as a response to political pressure following the leak.²⁰⁴ No urgency was invoked during those four years to protect Scotiabank Peru’s right to effective judicial protection. [REDACTED]

²⁰¹ Counter-Memorial, ¶¶ 210-270.

²⁰² It is worth noting that Peru departs even further from the relevant issues before this Tribunal by submitting witness testimony purporting to justify the delays of SUNAT and the Tax Court in issuing decisions in Scotiabank’s tax proceedings in 2011 and 2013, respectively. See RWS-[REDACTED].

²⁰³ Counter-Memorial, ¶ 217.

²⁰⁴ See ¶¶ 88, 90, 94, 96 above.

[REDACTED]

112. [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED] Peru cannot credibly invoke the

duty to administer justice as a justification for bypassing legal quorum requirements when the Court itself deliberately violated that duty for four years.

113. The manifest rush of the Constitutional Court to issue a decision in the Default Interest Amparo is demonstrated by the timeline of events: [REDACTED]

[REDACTED]

[REDACTED]; (ii) on September 1, 2021, Scotiabank sent its Notice of Intent to initiate this arbitration;²⁰⁸ (iii) on September 21, 2021, Justice Ramos passed away;²⁰⁹ [REDACTED]

[REDACTED] (v) on November 3, 2021, the Constitutional Court issued Administrative Resolution 205-2021-P/TC, which unlawfully changed the legal voting quorum requirement;²¹¹ [REDACTED]

[REDACTED]

²⁰⁵ Memorial, ¶¶ 145-152.

²⁰⁶ Memorial, ¶ 151; CER-Landa/Neyra #1, ¶ 206; **C-0333**, Administrative Resolution No. 205-2021-P/TC of the Plenary Session of the Constitutional Court (November 3, 2021), art. 1; **C-0657**, [REDACTED]

²⁰⁷ See [REDACTED]

²⁰⁸ **C-0021**, Notice of Intent (September 1, 2021).

²⁰⁹ CER-Landa/Neyra #1, ¶ 59.

²¹⁰ CER-Landa/Neyra #2, ¶ 83.

²¹¹ **C-0333**, Administrative Resolution No. 205-2021-P/TC of the Constitutional Court Plenary (November 3, 2021), art. 1; CER-Landa/Neyra #1, ¶¶ 206-208.

[REDACTED]
[REDACTED]² and (vii) on November 9, 2021, [REDACTED]
[REDACTED]—a minority of the Constitutional Court issued the 2021 Decision.²¹⁵

114. This swift and highly irregular sequence of events—from a four-year limbo to a definitive decision (by a minority of the court) within a month, coinciding precisely with Scotiabank’s arbitration notice and a sudden shift in the Court’s internal dynamics due to Justice Ramos’ death—unmistakably signals an improper rush to decide the Default Interest Amparo.

115. The irregularity extended to the very announcement of the decision. On the same day that the Plenary voted on the Default Interest Amparo—November 9, 2021—a Constitutional Court press release was published disclosing the outcome and the individual vote of each justice, before the reasoned decision even had been made available to the parties or the public.²¹⁶ As Dr. Landa and Prof. Neyra explain, this is an irregular action that constitutes a further violation of the duty of confidentiality governing the Court’s proceedings, indicating a direct and improper flow of information from within the Court to the press. Scotiabank Peru was not given prior notice of the decision, contrary to normal practice.²¹⁷

B. The 2021 Decision in Breach of the Legal Session and Voting Quorum Requirements

116. As Scotiabank explained in its Memorial, the Constitutional Court unlawfully bypassed the voting quorum requirement through the issuance of Administrative Resolution 205-2021-P/TC,

²¹² [REDACTED]

²¹³ CER-Landa/Neyra #2, ¶ 84. A period that Dr. Landa and Prof. Neyra describe as “insufficient for informed and responsible deliberation,” particularly given the case’s complexity [REDACTED]

²¹⁴ See [REDACTED]

²¹⁵ C-0340, Judgment of the Plenary Session of the Constitutional Court in Scotiabank Peru S.A.A. v. SUNAT and the Tax Court (Case No. 00222-2017) (November 20, 2021); C-0342, Press release of the Constitutional Court, “TC declared Scotiabank’s lawsuit against SUNAT and the Tax Court inadmissible” (November 9, 2021).

²¹⁶ C-0342, Press release of the Constitutional Court, “TC declared Scotiabank’s lawsuit against SUNAT and the Tax Court inadmissible” (November 9, 2021).

²¹⁷ CER-Landa/Neyra #2, ¶ 86.

thereby allowing the 2021 Decision to be issued by a minority of the Court.²¹⁸ Scotiabank further explained that the Court could not unilaterally lower the voting quorum requirement contained in Article 118 of the New Constitutional Procedural Code, because a regulation such as an administrative resolution cannot contravene a law.²¹⁹

117. Peru argues that the Constitutional Court acted under its procedural autonomy and constitutional mandate to administer justice.²²⁰ This authority, Peru asserts, grants the Court the necessary flexibility to adapt its rules in order to fill legal gaps in existing norms and to address unforeseen circumstances.²²¹ As such, according to Peru, Administrative Resolution 205-2021-P/TC was a reasonable and proportionate measure to address the “unprecedented difficulties” caused by Justice Ramos’s passing, which in any event was also applied in other comparable cases.²²²

118. *First*, Peru’s claim of urgency to “administer justice” as an excuse to bypass the legal quorum is unpersuasive. For over four years, until Justice Ramos’s passing, the quorum requirement was met, yet the Court chose not to issue a decision in Scotiabank Peru’s case [REDACTED]. This inaction fundamentally discredits any claim that procedural autonomy justified, after four years, a rushed decision (as opposed to one that could have been issued when a quorum was in place).²²⁴

119. *Second*, Peru’s assertion that adhering to the five-judge quorum would “lack any logical and legal sense” is fundamentally flawed.²²⁵ As Dr. Landa and Prof. Neyra explain, the session quorum exists to guarantee a minimum level of deliberation among the justices as a condition

²¹⁸ Memorial, ¶¶ 150-159, 307.

²¹⁹ Memorial, ¶¶ 152, 307; CER-Landa/Neyra #1, ¶ 207.

²²⁰ Counter-Memorial, ¶¶ 210-213.

²²¹ Counter-Memorial, ¶ 213; RER-Bustamante, ¶ 147.

²²² Counter-Memorial, ¶¶ 215-217.

²²³ See ¶¶ 96, 99-103, above.

²²⁴ In the same vein, Peru’s argument that Scotiabank complaints on Administrative Resolution 205-2021-P/TC are “at least inconsistent” because the resolution enabled the issuance of the decision after “Scotiabank Peru submitted at least thirty-nine written requests to the Court asking for a judgment to be issued” does not withstand scrutiny. Counter-Memorial, ¶ 229. Scotiabank’s insistence on an expeditious resolution after 4-years of unjustified delays and manifest unwillingness to move forward with the case cannot imply a waiver of due process or consent to fundamental legal quorum requirements being disregarded.

²²⁵ Counter-Memorial, ¶ 221; RER-Bustamante ¶ 269.

precedent to a valid decision.²²⁶ Its purpose is not merely ceremonial: it ensures that the decision adopted enjoys institutional legitimacy.²²⁷ Moreover, the quorum requirements are established by law—Article 5 of the Organic Law of the Constitutional Court and Article 118 of the New Constitutional Procedural Code—and therefore form part of the constitutional block of norms that can only be modified through organic law enacted by the legislature, not through a simple administrative resolution issued unilaterally by the Court.²²⁸ Any claim that the Court’s autonomy permits it to bypass such fundamental procedural requirements, for example through an Administrative Resolution, would render all constitutional limitations on its power obsolete.²²⁹

120. *Third*, Scotiabank also noted in its Memorial that Administrative Resolution 205-2021-P/TC was conveniently adopted just six days before issuing the 2021 Decision.²³⁰ Peru argues that Administrative Resolution 205-2021-P/TC was later also applied in other cases, which would prove that it was not directed to allow a minority of the Constitutional Court to decide Scotiabank Peru’s case.²³¹ Yet, Peru itself recognized in its Counter-Memorial that the Resolution was a measure “to issue a decision in a case file that had been delayed”.²³² Regardless, as opposed to the Default Interest Amparo, in the three other cases where this Resolution was invoked: (i) the Court had complied with the quorum for session; and (ii) it was used to break a tie, not to allow a 3-1 majority to issue a decision.²³³

121. In fact, as Dr. Landa and Prof. Neyra explained in their first report, during the very same plenary session during which the 2021 Decision was voted, the Court considered that a fifth judge was necessary to meet the quorum session requirements to decide on a different case.²³⁴ Peru argues that this other case is not relevant because the fifth judge who was asked to participate to form the quorum had not abstained from the case (unlike the situation of [REDACTED] in the

²²⁶ CER-Landa/Neyra #1, ¶¶ 191-192, 206-208; CER-Landa/Neyra #2, ¶¶ 121-122.

²²⁷ CER-Landa/Neyra #1, ¶¶ 191-192, 208.

²²⁸ CER-Landa/Neyra #1, ¶ 207; CER-Landa/Neyra #2, ¶ 116.

²²⁹ CER-Landa/Neyra #1, ¶ 207; CER-Landa/Neyra #2, ¶¶ 121-123.

²³⁰ Memorial, ¶ 244.

²³¹ Counter-Memorial, ¶ 218.

²³² Counter-Memorial, ¶ 229.

²³³ CER-Landa/Neyra #2, ¶ 135.

²³⁴ CER-Landa/Neyra #1, ¶ 196; [REDACTED].

Default Interest Amparo).²³⁵ This distinction is irrelevant to the point: the Court was fully aware of the quorum requirements and chose to comply with them in another case decided on the same day, while deliberately circumventing them in the Default Interest Amparo.

122. In any event, any attempt to reduce the quorum must be subject to a rigorous test of reasonableness and proportionality to ensure that such a reduction does not undermine the fundamental principles the quorum rules are designed to protect.²³⁶ As explained by Dr. Landa and Prof. Neyra, the Constitutional Court could have reached the required quorum by annulling [REDACTED] abstention, thereby precluding any need for the Court to create new, unlawful rules or solutions.²³⁷ In fact, in case N° 1059-2009-PA/TC, the Court faced a materially similar situation—two abstentions and a split vote—and resolved it by annulling the abstentions of Justices Calle Hayen and Urviola Hani to preserve the quorum necessary to issue a decision.²³⁸

123. Moreover, in at least one contemporaneous case facing an identical quorum problem—the Ley de Usura proceedings (case N° 00010-2021-PI/TC and 00012-2021-PI/TC)—the Court opted to wait until a seventh justice was appointed rather than proceed without the legally mandated quorum.²³⁹ In the Default Interest Amparo, the Court could similarly have awaited the appointment of new justices, which was imminent.²⁴⁰ After all, it had already waited four-and-a-half years since the 2017 Leaked Decision was published by Hildebrandt. The Court’s decision to rush to judgment further confirms that Resolution 205-2021-P/TC was not a principled response to a legal gap, as Peru contends, but a targeted measure to enable the dismissal of Scotiabank Peru’s case quickly before the Court’s composition could shift again.

124. Peru’s argument that Scotiabank did not raise these alternatives in the thirty-nine submissions asking for the urgent issuance of a final judgment is absurd.²⁴¹ Scotiabank had no reason to suspect that the Court would not comply with the quorum requirements at the time, as

²³⁵ Counter-Memorial, ¶ 227.

²³⁶ CER-Landa/Neyra #2, ¶ 123.

²³⁷ CER-Landa/Neyra #2, ¶ 124.

²³⁸ CER-Landa/Neyra #2, ¶ 124.

²³⁹ CER-Landa/Neyra #2, ¶ 125.

²⁴⁰ CER-Landa/Neyra #2, ¶ 125.

²⁴¹ Counter-Memorial, ¶ 228.

Peru itself acknowledges that quorum became an issue only after Justice Ramos died in September 2021.²⁴² And even then, the Court had tools to issue the decision without contravening quorum.

C. The 2021 Decision Departed from the 2017 Leaked Decision and the 2017 Signed Judgment, the Jurisprudential Doctrine and Contemporary Decisions

125. Peru dedicates a significant part of its Counter Memorial to argue that the 2021 Decision was supposedly correct as a matter of Peruvian law.²⁴³ Before addressing Peru's flawed arguments, it is important to restate that the issue before this Tribunal is not whether the 2021 Decision was correct as a matter of Peruvian law. Scotiabank's claim arises not from the legal reasoning of the decision but from the discriminatory process that produced it: a signed judgment that was subsequently reversed, a State pressure campaign, a proceeding frozen for four years, and a reversed judgment ultimately rushed through without lawful quorum once the Court's composition had shifted in SUNAT's favour, none of which had been utilized for national claimants with regard to the same legal question. Peru's extensive defence of the reasoning in the 2021 Decision under domestic law is thus irrelevant.

126. In its Memorial, Scotiabank established that the 2021 Decision was a departure from the position the Court had adopted in the 2017 Leaked Decision.²⁴⁴ Scotiabank explained that the 2021 Decision also departed from the Constitutional Court's line of jurisprudential doctrine initiated by *Medina de Baca*—holding the unconstitutionality of accruing default interest caused by State-caused delays²⁴⁵—and further developed in subsequent decisions, including *Paramonga*, *Icatom*, *Baca Campodónico* and *Telefónica*.²⁴⁶

127. Peru responds with two arguments. *First*, relying on an expert that is not independent from SUNAT and thus conflicted,²⁴⁷ Peru argues that neither *Medina de Baca* nor the subsequent default interest *amparos* constituted binding precedent or jurisprudential doctrine and therefore the Constitutional Court was at liberty to freely determine the resolution of cases as best represented

²⁴² Counter-Memorial, ¶ 413.

²⁴³ Counter-Memorial, ¶¶ 210-270.

²⁴⁴ Memorial, ¶ 296.

²⁴⁵ Memorial, ¶ 162.

²⁴⁶ Memorial, ¶ 141; CER-Landa/Neyra #1, ¶¶ 27, 152-155.

²⁴⁷ It is ironic that Peru relies so heavily on the analysis of Prof. Bustamante, who, by his own admission, continues to act as a legal advisor to SUNAT. Counter-Memorial, ¶¶ 262-270, 425; RER-Bustamante, ¶¶ 3-5.

the opinion of its Justices at any given time.²⁴⁸ *Second*, Peru further argues that such cases are not comparable to Scotiabank Peru’s case, contending that its “flawed legal strategy” would set it apart from them.²⁴⁹

128. What matters here is the following: regardless of how Peru characterizes the prior caselaw,

[REDACTED]

[REDACTED] The 2021 Decision did not explain why it was departing from this four-year-long internal consensus. It simply reversed it, for a short period of time, until that reversal was itself subsequently overturned in *Maxco*.²⁵³

129. Moreover, as Dr. Landa and Prof. Neyra confirm in their second report, the specific factual differences that Peru identifies between Scotiabank Peru’s case and the comparator cases were present in those very comparator cases and did not lead to dismissal: (i) in *Icatom* and *Telefónica*, the taxpayers had paid their debts before the Constitutional Court’s decision; (ii) in *Medina de Baca* and *Telefónica*, the taxpayers had initiated parallel contentious administrative proceedings;

²⁴⁸ Counter-Memorial, ¶¶ 263, 265. *See* RER-Bustamante ¶¶ 307-309.

²⁴⁹ Counter-Memorial, ¶¶ 262-270, 425.

²⁵⁰

[REDACTED]

²⁵¹ [REDACTED]; C-0200(a), CER-Landa/Neyra #2, ¶ 97(b).

²⁵²

[REDACTED]

²⁵³ CER-Landa/Neyra #1, ¶¶ 22, 183; C-0382, Judgment of the Plenary Session of the Constitutional Court in Case No. 03525-2021-AA (Maxco).

and (iii) in *Medina de Baca, Icatom, and Baca Campodónico*, no *queja* had been filed.²⁵⁴ None of these factual features prevented the Court from admitting and granting those *amparos*. The only factual difference between Scotiabank Peru’s case and those cases was the 2017 Leaked Decision and subsequent State interference.

130. Furthermore, in every other case in which the Constitutional Court dismissed a default interest *amparo*, the Court limited itself to declaring the claim inadmissible.²⁵⁵ In the Default Interest Amparo alone, the Court took the additional and unprecedented step of expressly barring Scotiabank Peru from pursuing its claim through the contentious administrative route, in direct contravention of the binding *Elgo Ríos* precedent.²⁵⁶ The Court’s refusal to allow Scotiabank Peru to pursue the contentious-administrative route—while consistently applying it to domestic comparators²⁵⁷—ensured that Scotiabank Peru was not merely denied relief in the Constitutional Court forum, but was effectively shut out of every available judicial avenue in Peru to challenge the unconstitutional default interest. Dr. Landa and Prof. Neyra have reviewed all Domestic Comparator cases and confirmed that “in 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.”²⁵⁸ Peru does not contest these facts.²⁵⁹

131. Instead, Peru attempts to shift the discussion to whether the *Elgo Ríos* precedent is binding as a matter of Peruvian law.²⁶⁰ It is. Dr. Landa and Prof. Neyra demonstrate that the three justices

²⁵⁴ CER-Landa/Neyra #2, ¶ 185.

²⁵⁵ CER-Landa/Neyra #1, ¶ 177; CER-Landa/Neyra #2, ¶ 147(b).

²⁵⁶ CER-Landa/Neyra #1, ¶ 179; CER-Landa/Neyra #2, ¶ 147(b).

²⁵⁷ Memorial, ¶ 301; CER-Landa/Neyra #1, ¶ 179. *Administradora del Comercio* is a notable domestic comparator in which the Constitutional Court allowed the plaintiff to proceed with a contentious administrative action to challenge the default interest. Likewise, the Court granted that relief in *Transportes Rodrigo Carranza*, *Volcan* and *Chungar*, which are also Domestic Comparators. See CER-Landa/Neyra #2, ¶ 192 and Annex II(bis). See also Appendix D: Comparative Analysis; C-0369, Judgment of the Plenary Session of the Constitutional Court in Case No. 04559-2018-AA/TC (Administradora del Comercio); C-0315, Order of the Constitutional Court in case No. 02020-2016-PA/TC (Volcan); C-0346, Order of the Constitutional Court in Case No. 01976-2016-PA/TC (Chungar).

²⁵⁸ CER-Landa/Neyra #1, ¶ 177. On the contrary, as Dr. Landa and Prof. Neyra explain, in the case of Volcan, while the *amparo* was dismissed, the taxpayer was allowed to pursue the contentious-administrative route in which it was ultimately successful in its claim against the imposition of default interest *amparo*. See CER-Landa/Neyra #2, ¶ 192.

²⁵⁹ Counter-Memorial, ¶¶ 383-417.

²⁶⁰ Counter-Memorial, ¶¶ 243-244.

who formed the majority in the 2021 Decision—[REDACTED]
[REDACTED]—themselves recognized in a contemporaneous proceeding that the *Elgo Ríos* decision constitutes a “procedural rule with the character of precedent.”²⁶¹

132. Finally, Peru’s baseless suggestion that [REDACTED] influenced the *Medina de Baca* decision to favor Scotiabank Peru’s future *amparo*, due to [REDACTED]
[REDACTED],²⁶² is not only unsupported by any evidence but also inconsistent with the established jurisprudential doctrine on default interest and contradictory to Peru’s own other claims. *First*, Peru fails to note that the key finding in *Medina de Baca* —that default interest during State delays is unconstitutional—was consistently reaffirmed by the Constitutional Court in subsequent decisions²⁶³ and ultimately established as binding precedent in *Maxco*, after [REDACTED]
[REDACTED] had left the Court.²⁶⁴ *Medina de Baca* is therefore a robust doctrine, not an isolated, improperly influenced decision. *Second*, Peru repeatedly claims that it is “inconceivable” for Justices to be influenced due to their “arsenal of legal guarantees”²⁶⁵ yet simultaneously suggests the *Medina de Baca* majority was improperly swayed by [REDACTED].²⁶⁶ Peru cannot credibly claim that the Court is impervious to pressure when it suits its narrative yet simultaneously argue that it was vulnerable to influence when it leads to an unfavorable decision like *Medina de Baca*. Finally, any insinuation of [REDACTED] potential influence in the Default Interest Amparo is wholly unfounded [REDACTED].²⁶⁷

²⁶¹ C-0666, Order of the Constitutional Court in Case No. 01872-2021-PA/TC, ¶ 2. *See also* CER-Landa/Neyra #2, ¶¶ 199-200.

²⁶² Counter-Memorial, ¶ 265.

²⁶³ CER-Landa/Neyra #1, ¶¶ 27, 75, 155; C-0310, Judgment of the Plenary Session of the Constitutional Court in Case No. 02051-2016-PA/TC (Paramonga); C-0067, Judgment of the Plenary Session of the Constitutional Court in Case No. 04532-2013-PA/TC (Icatom); C-0313, Judgment of the Plenary Session of the Constitutional Court in Case No. 01818-2013-PA/TC (Baca Campodónico); C-0312, Judgment of the Plenary Session of the Constitutional Court in Case No. 00225-2017-PA/TC (Teléfonica).

²⁶⁴ CER-Landa/Neyra #1, ¶¶ 22, 183; C-0382, Judgment of the Plenary Session of the Constitutional Court in Case No. 03525-2021-PA/TC (Maxco).

²⁶⁵ Counter-Memorial, ¶¶ 198-207.

²⁶⁶ Counter-Memorial, ¶ 265.

²⁶⁷ [REDACTED]

IV. The Comparable Cases Were Not Subjected to Similar Treatment

133. In its Memorial, Scotiabank established that the treatment that Scotiabank Peru received in the Default Interest Amparo was uniquely irregular.²⁶⁸ As Scotiabank demonstrated, of the sixty-two comparable default interest cases identified by Dr. Landa and Prof. Neyra, forty involved Peruvian-owned companies or Peruvian citizens.²⁶⁹ Based on publicly available information from more than 150 Peruvian news and media sources, none of these comparator cases were the subject of a leaked draft judgment (or any Court deliberative document), persistent public statements from government officials prior to the release of a final decision, or threats from the executive or legislative branches against the Constitutional Court.²⁷⁰

134. As Scotiabank demonstrated in its Memorial—and as Peru has not contested— of the forty Domestic Comparator cases, (i) twenty-nine involving sixteen different Peruvian companies received no material media coverage and were not the subject of any public commentary from government officials whatsoever; (ii) the remaining eleven cases involving five Peruvian companies received only limited media attention, generally commencing after the release of a final decision; and (iii) even where some pre-decision coverage existed—as in isolated articles concerning *Sulfato de Cobre* and *Interbank*—this coverage was confined to factual reporting on the procedural status of the case.²⁷¹ In none of these cases did the Government threaten to withhold funding from the Constitutional Court,²⁷² was a draft decision leaked to the press prior to the issuance of a final judgment, was there a significant backlash by a variety of State actors, or was

²⁶⁸ Memorial, ¶¶ 110-114.

²⁶⁹ Memorial, ¶ 111; CER-Landa/Neyra #1, ¶¶ 85-88; CER-Landa/Neyra #1, Annex II.

²⁷⁰ Memorial, ¶ 111; CER-Landa/Neyra #1, ¶¶ 118-121; CER-Landa/Neyra #2, ¶ 89-90, 145.

²⁷¹ Memorial, ¶¶ 113-114.

²⁷² Peru challenges this allegation on three grounds: (i) the new headquarters for the Constitutional Court had already been purchased by the time this threat was allegedly made; (ii) the Constitutional Court is guaranteed budgetary independence under the Peruvian Constitution; and (iii) ██████████ testimony regarding the threat is not credible. Counter-Memorial, ¶¶ 201–203, 342, 403. These arguments can be dispensed with easily: (i) the Government’s threat was to withhold funding for the remodel of the Constitutional Court’s new headquarters, not for the purchase of the building itself, see Memorial, ¶ 212; CWS-██████████, ¶ 16; (ii) Scotiabank has already explained that written safeguards of independence are no guarantee of their effectiveness, See ¶ 78, above; and (iii) Peru’s criticism of ██████████ are unfounded and her testimony consistent with Peru’s own documents, See ¶ 104, above.

a decision in the case delayed for years in view of such a backlash.²⁷³ Peru has identified no evidence to the contrary.²⁷⁴

135. Despite Peru’s unfounded challenges to the Domestic Comparators sample—which Scotiabank addresses in Part Four, Section III—Peru has not identified a single Domestic Comparator case in which an unpublished decision was leaked, in which State officials publicly pressured the Constitutional Court to reverse its position, or in which members of Congress threatened constitutional complaints against the justices.²⁷⁵ As detailed in Appendix D, neither the Bustamante Report nor the Counter-Memorial identifies a single comparable case—whether among the Domestic Comparators or even among the cases allegedly comparable identified by Prof. Bustamante—in which the taxpayer experienced treatment remotely analogous to the treatment that Scotiabank Peru endured.²⁷⁶

136. Lacking any evidence of comparable State interference, Peru instead attempts to shift the comparison to the outcome of each *amparo*, pointing to the large number of default interest *amparos* dismissed in late 2021 and asserting that the 2021 Decision was consistent with the predominant position of the Court at that time.²⁷⁷ As Dr. Landa and Prof. Neyra explain, Peru muddles the comparative analysis with this approach. It focuses on the alleged similarity between the final outcome of Scotiabank’s case and that of other default interest *amparos*, while ignoring the process—which was uniquely irregular in Scotiabank’s case—by which these outcomes were reached.²⁷⁸ Peru’s argument is therefore legally irrelevant, and it is also factually misleading.

137. There is no uncertainty as to how the Constitutional Court intended to decide the Default Interest Amparo. [REDACTED]

²⁷³ Memorial ¶¶ 112-114; CER-Landa/Neyra #1, ¶¶ 118-120, 144; CER-Landa/Neyra #2, ¶¶ 140, 142, 145, Annex II(bis).

²⁷⁴ Counter-Memorial, ¶¶ 351-383.

²⁷⁵ Counter-Memorial, ¶¶ 351-383.

²⁷⁶ Appendix D: Comparative Analysis. *See also*, Counter-Memorial, ¶¶ 351-383; RER-Bustamante, ¶¶ 372-377; CER-Landa/Neyra #2, ¶¶ 141-145.

²⁷⁷ Counter-Memorial, ¶¶ 252-254.

²⁷⁸ CER-Landa/Neyra #2, ¶¶ 141-145.

[REDACTED]

138. Indeed, contrary to what Peru asserts, Scotiabank explained in its Memorial that between 2017 and 2021, while Scotiabank Peru’s case was stalled, the Constitutional Court issued multiple decisions in similar default interest cases finding that the application of accrued default interest during periods of delay caused by the State is unconstitutional.²⁸¹ In doing so, the Court developed a line of jurisprudential doctrine initiated in 2016 by the *Medina de Baca* case—whose substantive holding was never overturned²⁸²—and then developed through *Paramonga*, *Icatom*, *Baca Campodónico* and *Telefónica*.²⁸³ But for the State’s interference, the Default Interest Amparo would have been just another decision in that consistent jurisprudential doctrine.²⁸⁴

139. Peru misleadingly provides a table of cases spanning 2017 to 2021 and argues that the “vast majority of cases” were decided in favour of SUNAT.²⁸⁵ What Peru’s table actually reveals—once the numbers are properly disaggregated—is a dismissal of *amparos* concentrated in just a few months in late 2021, concurrently with the 2021 Decision.²⁸⁶ Such shift only occurred after Justice Ledesma’s appointment as President and the death of Justice Ramos in September 2021.²⁸⁷ Justice Sardón confirmed this sudden jurisprudential shift in a separate opinion issued at the beginning of 2022.²⁸⁸

²⁷⁹ [REDACTED]

²⁸⁰ See ¶¶ 41-43, 47, 96, above.

²⁸¹ Memorial ¶¶ 141-142; CER-Landa/Neyra #1, ¶¶ 27, 152-155.

²⁸² Memorial, ¶ 162; CER-Landa/Neyra #1, ¶¶ 27, 75, 155.

²⁸³ Memorial, ¶ 141; CER-Landa/Neyra #1, ¶¶ 27; CER-Landa/Neyra #2, ¶¶ 177, 179.

²⁸⁴ See CER-Landa/Neyra #1, ¶ 152; CER-Landa/Neyra #2, ¶ 179, Appendix.

²⁸⁵ Counter-Memorial, ¶ 253; Appendix D: Comparative Analysis.

²⁸⁶ CER-Landa/Neyra #2, ¶ Annex II(bis); Appendix D: Comparative Analysis. See ¶¶ 113, 120, above.

²⁸⁷ CER-Landa/Neyra #2, ¶ 83-85; Appendix D: Comparative Analysis.

²⁸⁸ **C-0667**, Judgment of the Plenary Session of the Constitutional Court in Case No. 00739-2020-PA/TC (March 6, 2022) (separate opinion of Justice Sardón).

In the first 21 months of Ledesma's presidency, the Constitutional Court resolved barely more than one tax case involving excessive default interest per month on average. Upon Ramos's death on September 21, 2021, the pace of resolving these cases increased 23-fold! In November and December 2021, in fact, 46 cases were resolved. However, in honor of the pursuit of justice that this Constitutional Court represents, I cannot speculate on this matter and must instead assume that this was a coincidence.

**C-0667, Judgment of the Plenary Session of the Constitutional Court in Case No.
00739-2020-PA/TC (ENG)**

140. The relevant question is not whether the Default Interest Amparo was dismissed at the same time as other cases. The relevant question is why it was still pending in November 2021 when, but for the State interference, it would have been decided—in Scotiabank Peru's favour—in mid-2017. In fact, the Default Interest Amparo was the only case in which there was a four-and-a-half-year period between the hearing and the final decision.²⁸⁹

141. Notwithstanding the clear irregularities in the treatment of the Default Interest Amparo, it is not disputed that the forty-four other cases dismissed in late 2021 were not the subject of a leaked decision, a four-year political pressure campaign, or a sudden reversal of a signed draft judgment.²⁹⁰ Those cases followed the ordinary course of the Constitutional Court's deliberations with a composition that—as Peru itself explains—had shifted against taxpayers following Justice Ramos's death. Scotiabank's case, by contrast, was artificially held in limbo until the Court's composition had changed enough to produce a different result.²⁹¹ The State interference ensured that Scotiabank's case was not decided when the Court's jurisprudence and composition would have produced a favourable outcome, and was instead decided only when the “voting blocks” had shifted against the taxpayer.²⁹²

142. Furthermore, even a limited—and flawed—comparative exercise focusing exclusively on the 2021 Decision and on cases dismissed for procedural grounds during September-December 2021, confirms that Scotiabank was singled out. Of the 37 amparos involving Domestic Comparators that were dismissed during the same period, at least eleven were filed within the Elgo

²⁸⁹ Appendix D, Comparative Analysis; CER-Landa/Neyra #2, ¶ 147.

²⁹⁰ Appendix D: Comparative Analysis; Counter-Memorial, ¶¶ 252-254, 412; RER-Bustamante, ¶¶ 372-377; CER-Landa/Neyra #2, ¶ 90, 140-141.

²⁹¹ See Memorial, ¶¶ 140-144, 213; CER-Landa/Neyra #2, ¶¶ 147, 167.

²⁹² See ¶ 139, above.

Ríos applicable time period, just as the Default Interest Amparo was.²⁹³ In each of those cases, the Constitutional Court’s dismissal preserved the plaintiff’s right to pursue the contentious-administrative route, consistent with the Elgo Ríos precedent.²⁹⁴ Moreover, even among cases that fell outside the Elgo Ríos applicable time period, the Court granted the Elgo Ríos relief in several instances, permitting those plaintiffs to pursue the contentious-administrative route despite not being technically entitled to it.²⁹⁵ In other words, the Court extended the benefit of the Elgo Ríos precedent to domestic litigants—even to some that were not entitled to it—while denying that same right, and indeed imposing the opposite result, on Scotiabank Peru. The consequence was not merely procedural.²⁹⁶ By expressly barring Scotiabank Peru from pursuing the contentious-administrative route, the 2021 Decision permanently foreclosed the only remaining judicial avenue through which it could have obtained relief.²⁹⁷ The case of Volcan, for example, illustrates the practical significance of this disparity: although the Court dismissed Volcan’s amparo on procedural grounds, Volcan was permitted to pursue the contentious-administrative route and ultimately succeeded in its claim against the imposition of default interest.²⁹⁸ Scotiabank Peru, by contrast, was expressly prohibited from doing so.

²⁹³ Appendix D: Comparative Analysis, tab “Nationals 10.21 to 05.22”; CER-Landa/Neyra II, Annex II(bis). These cases are: **C-0582**, Judgment of the Constitutional Court in Case No. 2385-2016-PA/TC (Volcan); **C-0612**, Judgment of the Constitutional Court in Case No. 4136-2019-PA/TC (Supermercados Peruanos); **C-0709**, Judgment of the Constitutional Court in Case No. 00997-2019-PA/TC (Supermercados Peruanos); **C-0614**, Judgment of the Constitutional Court in Case No. 03129-2019-PA/TC (Banco Internacional del Peru); **C-0615**, Judgment of the Constitutional Court in Case No. 00552-2019-PA/TC (Cicsa Peru); **C-0616**, Judgment of the Constitutional Court in Case No. 03530-2019-PA/TC (Supermercados Peruanos); **C-0618**, Judgment of the Constitutional Court in Case No. 01444-2020-PA/TC (Pirua Financial Services Corp); **C-0624**, Judgment of the Constitutional Court in Case No. 02734-2017-PA/TC (Supermercados Peruanos); **C-0625**, Judgment of the Constitutional Court in Case No. 2856-2019-PA/TC (Compañía Minera Santa Luisa); **C-0632**, Judgment of the Constitutional Court in Case No. 01786-2019-PA/TC (Terpel); **C-0727**, Judgment of the Constitutional Court in Case No. 00073-2019-PA/TC (KS Depor).

²⁹⁴ CER-Landa/Neyra #2, ¶ 147; Appendix D: Comparative Analysis, tab “Nationals 10.21 to 05.22”

²⁹⁵ CER-Landa/Neyra #2, ¶ 200, fn. 372.

²⁹⁶ CER-Landa/Neyra #2, ¶ 192.

²⁹⁷ **C-0340**, Judgment of the Plenary Session of the Constitutional Court in Scotiabank Peru S.A.A. v SUNAT and the Tax Court (Case No. 00222-2017-PA/TC), ¶ 23 (“However, in this case it is possible to note [...] that there are additional arguments for dismissing the claim, so that the enforced term referred to in the precedent established in File 02383-2013-PA/TC does not apply.”).

C-0693, Judgment of the Twenty-Second Contentious-Administrative Court with Tax and Customs Subspecialty in Case No. 09205-2022-0-1801-JR-CA-22 (Volcan); **C-509**, Application for Amparo filed by Volcan Minera S.A.A. in Case File No. 11703 before the Superior Court of Justice of Lima, Eleventh Court specialized in Tax and Customs Subspecialty in Case No. 11703-2015 (July 22, 2015). See CER-Landa/Neyra #2, ¶ 192, fn. 360.

143. In short, Peru cannot use the coincidence of timing engineered by the Court under [REDACTED] to disguise what occurred. The Domestic Comparators' cases were decided in the ordinary course by a Court whose composition had naturally evolved. The Default Interest Amparo was deliberately stalled through State interference until the Court's composition had evolved enough to reverse the 2017 Signed Judgment (and even then, that was only achieved by upending quorum requirements) and prevent Scotiabank Peru from pursuing any further action to recover the amounts paid under protest.²⁹⁹

144. Finally, it is undisputed that Scotiabank's position regarding the unconstitutionality of default interest accruing during State delays has been conclusively vindicated by the Constitutional Court itself, through its decision in *Maxco*.³⁰⁰ This landmark decision established a binding precedent that explicitly prohibits the accrual of default interest during periods of delay attributable to the State, demonstrating that Scotiabank was, in fact, correct in its substantive challenge all along.³⁰¹ As Dr. Landa and Prof. Neyra note, to the extent there was ever any doubt, *Maxco* conclusively resolves the central issue addressed in the Default Interest Amparo: under Peruvian law, it is unconstitutional to apply default interest for periods exceeding the statutory deadline for SUNAT and the Tax Court to resolve challenges.³⁰²

V. Peru's Remaining Factual Arguments are Irrelevant

145. In its Counter-Memorial, Peru devotes considerable space to matters that have no bearing on the discriminatory treatment that Scotiabank Peru received in the Default Interest Amparo. These arguments fall into three categories. *First*, Peru recounts at length the history of Banco Wiese's financial difficulties and insinuates that Scotiabank should have anticipated the tax liability and default interest when it acquired Banco Wiese, characterizing Scotiabank's claim as an attempt to "pass off" a risk it knowingly assumed.³⁰³ *Second*, Peru claims that SUNAT was merely exercising its lawful collection powers when it demanded payment from Scotiabank Peru, that payment under protest extinguishes the debt as a matter of Peruvian law, and questions

²⁹⁹ See discussion in this section above and analysis in Part Four, Sections III and IV, below.

³⁰⁰ Counter-Memorial, ¶ 260; C-0382, Judgment of the Plenary Session of the Constitutional Court in Case No. 03525-2021-AA (*Maxco*).

³⁰¹ Memorial, ¶¶ 164-166.

³⁰² CER-Landa/Neyra #2, ¶¶ 22-23, 77.

³⁰³ Counter-Memorial, ¶¶ 22-32.

Scotiabank Peru's decision to record the payment as an account receivable rather than an expense.³⁰⁴ *Third*, Peru argues that Scotiabank Peru's submission of the Default Interest Amparo and the Tax Appeal constituted an improper attempt to "hedge its bets" and that the alleged "connexity" between the two proceedings rendered the *amparo* inadmissible.³⁰⁵

146. As Scotiabank demonstrates below, each of these arguments is both factually wrong and legally irrelevant to this arbitration and nothing more than a distraction to the core issues before the Tribunal. Scotiabank is not challenging the underlying tax debt. It is not challenging in this arbitration any of the conduct that led to either the Tax Appeal nor the Default Interest Amparo (indeed, it is Peru that is the one putting that pre-2013 conduct in issue, given its own witness statement about why SUNAT took so long to render the 2011 decision).³⁰⁶ Nothing about the discriminatory treatment at issue is explained by the history of Scotiabank's investment, the manner in which it paid the tax debt, or the domestic litigation strategy it pursued.

A. The History of Scotiabank's Investment and the Origins of the Tax Debt Are Irrelevant

147. In over fifteen pages of its Counter-Memorial, Peru engages in a colorful retelling of the circumstances surrounding Banco Wiese's financial situation in the 1990s, the origin of the Tax Debt, and Scotiabank's 2006 acquisition of Banco Wiese. It claims that these facts are "particularly relevant to contextualize Scotiabank's claims."³⁰⁷ It seeks to cast aspersions on Scotiabank's decision to invest in Banco Wiese and claims that Scotiabank assumed the risk of Banco Wiese's tax liabilities and seeks to "pass the risk" it assumed to the state.³⁰⁸

148. Peru's narrative is both legally irrelevant and factually misguided. This is not a case involving an investor's legitimate expectations where the circumstances surrounding the investment decision are relevant. In any event, Peru misses the point. In making the decision to invest in Banco Wiese in 2006, Scotiabank did not and should not have somehow anticipated that

³⁰⁴ Counter-Memorial, ¶¶ 67-76, 87.

³⁰⁵ Counter-Memorial, ¶¶ 124-129.

³⁰⁶ RWS- [REDACTED], ¶¶ 38-43.

³⁰⁷ Counter-Memorial, ¶ 21.

³⁰⁸ Counter-Memorial, ¶¶ 32, 48.

Peru's imposition of IGV in 1999 would result in the situation the bank found itself in following the 2021 Decision: litigating undue State interference in the Default Interest Amparo.

149. ***Peru's narrative is irrelevant.*** The circumstances surrounding or expectations at the time of an investment are relevant in certain cases, such as where an investor claims a breach of its legitimate expectations in an FET claim or where a respondent state has brought a jurisdictional or admissibility objection based on the illegality of the investment. Neither of these are present in this case. Peru has not cited any cases suggesting that outside those contexts, it is relevant for the Tribunal to look at the circumstances surrounding the investment.³⁰⁹

150. Peru cannot escape the consequences of its misconduct fifteen years after the investment was made by pointing to alleged risks taken at the time of the investment. There can be no suggestion that Scotiabank somehow expected to be mistreated or to have a subsequent court action be subjected to improper government influence.

151. ***Peru's narrative is factually misguided.*** In any event, the "facts" Peru points to in support of its conclusions are baseless and must be assessed in context.

152. *First*, Peru spends many pages of its Counter-Memorial summarizing Banco Wiese's financial offences in the 1990s and the investigation SUNAT undertook into the alleged gold transactions, leading to the 1999 SUNAT Decision.³¹⁰ That history has nothing to do with Scotiabank or this case:

- (a) Peru wrongly states that Scotiabank participated in Banco Wiese since 1999.³¹¹ As explained in Mr. Cruell's witness statement, Scotiabank did not acquire a

³⁰⁹ Cases cited by Peru refer to cases in which the Respondent state was challenging the legality of the investment. See cases relied upon by Peru: **RL-0111**, *Alasdair Ross Anderson and others v. Republic of Costa Rica* (ICSID Case No. ARB(AF)/07/3), Award 19 May 2010, ¶¶ 52-59; **RL-0124**, *Churchill Mining and Planet Mining Pty Ltd v. Republic of Indonesia* (ICSID Case No. ARB/12/40 and 12/14), Award 6 December 2016, ¶¶ 508-509, 528.

³¹⁰ Counter-Memorial, ¶¶ 22-45.

³¹¹ Counter-Memorial, ¶ 49.

participation interest in Banco Wiese until 2006.³¹² Prior to 2006, Scotiabank had a 35% interest in an unrelated bank, Banco Sudamericano.³¹³

- (b) After Banco Wiese's financial troubles in the 1990s, it merged with another Peruvian bank (Banco de Lima Sudameris) in a government-approved bailout. This resulted in Banco Wiese becoming "Banco Wiese Sudameris," a financial institution indirectly owned by Banca Intesa, which in turn improved the quality of Banco Wiese's portfolio.³¹⁴ In and around 2005, Banca Intesa was looking to exit the Latin American market and Scotiabank was approached about the opportunity to acquire Banco Wiese.³¹⁵ Scotiabank expanded its minority interest in Banco Sudamericano to acquire the bank and then merged it with Banco Wiese to create Scotiabank Peru, giving it a stronger market presence. Regulators in both Canada and Peru approved it.³¹⁶

153. *Second*, in its Counter-Memorial, Peru questions Scotiabank Peru's decision not to pay the tax liability imposed in the 1999 SUNAT Decision, arguing it accepted the risk of default interest accruing based on the legal framework in place at the time.³¹⁷ Peru conveniently ignores that, at the time Scotiabank acquired Banco Wiese in 2006, the 1999 SUNAT Decision had been overturned and SUNAT had not yet rendered a new decision.³¹⁸ There was thus no tax liability to pay until SUNAT rendered a new decision, which it did not do until 2011 (five years after Scotiabank had acquired Banco Wiese).³¹⁹ Thus, Peru seeks to fault Scotiabank for not paying a tax liability that did not exist at the time it made the investment, and for not foreseeing that it would

³¹² CWS-[REDACTED] ¶¶ 12-25.

³¹³ CWS-[REDACTED], ¶ 12.

³¹⁴ CWS-[REDACTED] ¶ 17. As part of the government-approved bailout, Banco Wiese had been capitalized with a promissory note worth hundreds of millions of dollars.

³¹⁵ CWS-[REDACTED], ¶ 13.

³¹⁶ **C-0131**, Press Release: Scotiabank completes purchases in Peru to expand Latin American Presence (March 9, 2006).

³¹⁷ Counter-Memorial, ¶¶ 51-55, 62.

³¹⁸ Memorial, ¶ 52(b)-(c); **C-0112**, Resolution No. 07517-1-2003 of the Tax Court in Case No. 3518-2000 (December 30, 2003).

³¹⁹ Memorial, ¶ 52(c); **C-0157**, Administrative Resolution No. 0150150001042 issued by SUNAT (November 30, 2011).

take SUNAT another five years to render its decision. This is a perfect example of Peru's continued attempts to blame for Scotiabank for its own misdoings.

154. In that vein, Peru similarly faults Scotiabank Peru for not making use of certain domestic complaint procedures to question SUNAT's delay, asserting that it was reasonable to conclude that Scotiabank Peru "consented to the accrual of late-payment interest."³²⁰ As explained by Prof. Hernández, it is the state that failed to comply with its statutory time limit, at no fault of the taxpayer.³²¹ In fact, the Constitutional Court rejected this very argument by SUNAT in the 2017 Signed Judgment, as it would "shift[] the responsibility for the delay...to the party concerned."³²²

155. *Third*, Peru criticizes Scotiabank Peru's decision to treat the 1999 tax debt, paid in 2013 and 2014, as an "account receivable" or "tax credit", calling this decision "perplexing," and questions whether it impacted the purchase price for Banco Wiese.³²³ The tax debt did not impact the purchase price. As [REDACTED] explains in his witness statement and supported by the contemporaneous transaction documents, Scotiabank did not view the possibility of the tax debt as a significant liability.³²⁴ As a result, Scotiabank did not assign value to this matter and it did not affect the purchase price in 2006.³²⁵ It also did not affect the subsequent transactions in 2008, which completed the acquisition.³²⁶

156. [REDACTED] explains the similar reasons why the debt was treated as an "account receivable." As he explains, the payments were made under protest to reflect Scotiabank Peru's position that no debt was owing and its expectation was that the amounts would be returned after the completion of the ongoing legal proceedings.³²⁷ Because of that expectation, it was not appropriate to classify the payment as an expense, which would have distorted the true picture of the bank's financial situation: it would have meant reporting a definitive loss when a recovery was

³²⁰ Counter-Memorial, ¶¶ 62-63 (quoting RER-Bustamante, ¶ 216).

³²¹ CER- Hernández #2, ¶¶ 77-79.

³²² C-0443, 2017 Signed Judgment, ¶ 26.

³²³ Counter-Memorial, ¶¶ 66-67.

³²⁴ CWS-[REDACTED] ¶¶ 21-22; C-0477, Schedule 8.1(a), p. 77.

³²⁵ CWS-[REDACTED] ¶ 22.

³²⁶ CWS-[REDACTED] ¶ 27.

³²⁷ CWS-[REDACTED] #2, ¶ 28.

expected.³²⁸ This was done in consultation with KPMG, the bank's external tax auditor and complied with Peru's regulatory requirements.³²⁹

B. Scotiabank Peru's Payment Under Protest Does Not Validate the Tax Debt or Undermine its Claim

157. Peru devotes several pages to explaining the validity of the underlying tax debt imposed on Scotiabank Peru; the application of default interest to that debt; and SUNAT's actions in seeking to enforce the alleged debt and attached default interest.³³⁰ Peru further remarks that, based on the Peruvian Constitutional Court's jurisprudence at the time that Scotiabank Peru made its payment under protest, Scotiabank Peru could not have expected that it would recover the interest paid.³³¹ These arguments are built on the inclusion of facts that are irrelevant and the omission of key facts.

158. It bears repeating that Scotiabank is not challenging the underlying tax debt, nor is it challenging the conduct of SUNAT or the Tax Court that led to the 2013 Tax Appeal. As such, Peru's recitation of SUNAT's work in reviewing gold operations, as well as its explanation for why the 2013 Tax Court Decision was legally sound is irrelevant.³³²

159. Yet Peru leaves out the conduct of SUNAT and the Tax Court where it matters. Crucially, it was the conduct of these two entities—not the conduct of Scotiabank Peru, as Peru insinuates³³³—that caused the accrual of default interest to increase so sharply. The 2011 SUNAT Decision was issued eight years after the Tax Court ordered SUNAT to render a new decision with respect to the underlying tax debt.³³⁴ Subsequently, the Tax Court waited nearly two years to rule on Scotiabank Peru's appeal of the 2011 SUNAT Decision, when it was required to do so within twelve months.³³⁵ As Prof. Hernández explains, due to these delays and the application of default

³²⁸ CWS-[REDACTED] #2, ¶ 29.

³²⁹ CWS-[REDACTED] #2, ¶ 30.

³³⁰ Counter-Memorial, ¶¶ 68-82.

³³¹ Counter-Memorial, ¶¶ 74-75.

³³² See Counter-Memorial, ¶¶ 68-76.

³³³ Counter-Memorial, ¶¶ 68, 75, 80.

³³⁴ Memorial, ¶ 52(c); CER-Hernández #1, ¶ 134; CER-Hernández #2, ¶ 50.

³³⁵ Memorial, ¶ 52(d); CER-Hernández #1, ¶ 134; CER-Hernández #2, ¶ 50.

interest on a capitalized basis, the debt imposed upon Scotiabank Peru increased by [REDACTED].³³⁶ Peru completely ignores the role of SUNAT and the Tax Court in creating these delays, mentioning only in passing the “prolonged duration of the process.”³³⁷

160. An accurate factual account of the accrual of default interest is relevant to reveal the exigency of the circumstances facing Scotiabank Peru when it decided to pay the alleged tax debt and default interest under protest. As Scotiabank explained in its Memorial, the 2013 Tax Court Decision rendered the alleged tax debt final and enforceable.³³⁸ On November 25, 2013, SUNAT issued Coercive Execution Resolution No. 011-006-0044596, demanding full payment within seven days and explicitly threatening “coercive collection measures.”³³⁹ Faced with this threat, and to avoid the seizure of its assets, Scotiabank Peru paid the full [REDACTED] between December 2013 and February 2014, making clear in its correspondence with SUNAT that the payment was made “under protest” to preserve its right of challenge.³⁴⁰

161. Peru takes issue with this evidence, arguing that its coercive resolution was not a threat but merely the standard exercise of its lawful powers.³⁴¹ To be clear, Scotiabank is not impugning Peru’s conduct with respect to the coercive resolution. Peru misses the point. The coercive resolution explains why Scotiabank Peru had to make the payment under protest: the commercial reality was the severe risk SUNAT’s actions posed to a major financial institution.³⁴² As [REDACTED] explains, the seizure of Scotiabank Peru’s assets would have been catastrophic, potentially triggering cross-default clauses in other financial contracts and jeopardizing the bank’s

³³⁶ CER-Hernández #2, ¶¶ 13.b, 36.

³³⁷ Counter-Memorial, ¶ 71. Prof. Hernández emphasizes that Peruvian law requires the suspension of the calculation of default interest where the decision-making authority exceeds the legal time limit for issuing a decision, and where the delay is entirely attributable to the decision-making body. Furthermore, he emphasizes that capitalization of default interest was, and remains, unconstitutional, because it generates interest that is excessive and disproportionate to the underlying tax debt, and is therefore confiscatory and violative of the principle of reasonableness. CER-Hernández #2, ¶¶ 20-32, 33-44. These points and their relevance to this arbitration are further addressed in Part Two, Section V.

³³⁸ Memorial, ¶ 55; *see also* CER-Hernández #1, ¶ 93; CER-Hernández #2, ¶¶ 61-72.

³³⁹ Memorial, ¶ 57; **C-0172**, Coercive Execution Resolution No. 011-006-0044596 (November 25, 2013).

³⁴⁰ Memorial, ¶¶ 58-61; CWS-[REDACTED] #1, ¶¶ 19-24; **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).

³⁴¹ Counter-Memorial, ¶¶ 79-82.

³⁴² Memorial, ¶¶ 56-61; CER-Hernández #1, ¶¶ 98-99.

stability and reputation.³⁴³ The payment was a necessary defensive measure to mitigate imminent and unacceptable harm.

162. Peru's arguments are also flawed and internally contradictory. *First*, Peru claims that paying a tax debt is not a requirement to challenge it in court.³⁴⁴ Yet, Peru relies on its own expert, Prof. Sevillano, to argue the exact opposite: that “to ‘commence a contentious administrative proceedings [sic] [...] it is necessary to pay the tax debt.’”³⁴⁵

163. In reality, Peru conflates two distinct legal concepts under Peruvian law, as explained by Prof. Hernández.³⁴⁶ While a tax obligation may be “enforceable” in the sense of it being due from the moment a tax return is filed (per Article 3 of the Tax Code), it only becomes subject to “coercive collection” (i.e., seizure of assets) once administrative appeals are exhausted (per Article 115 of the Tax Code). Scotiabank Peru paid precisely when it did—after the 2013 Tax Court Decision³⁴⁷—because that was the moment SUNAT acquired the power to forcibly seize its assets.³⁴⁸ The payment was not a recognition of the debt's validity³⁴⁹ but a necessary prerequisite to avoid seizure and thus preserve the bank's ability to continue its legal challenges.³⁵⁰

C. Peru's Arguments Regarding the Admissibility of the Default Interest Amparo Are Irrelevant and Baseless

164. As explained in the Memorial, following the 2013 Tax Court Decision, Scotiabank Peru commenced two distinct judicial proceedings: (a) the Default Interest Amparo (challenging the constitutionality of the accrual and capitalization of interest arising from SUNAT and the Tax Court's fourteen-year delay); and (b) the Tax Appeal (challenging the Tax Court's 2013 decision upholding SUNAT's imposition of tax).³⁵¹

³⁴³ CWS- [REDACTED] #2, ¶ 26.

³⁴⁴ Counter-Memorial, ¶ 87.

³⁴⁵ Counter-Memorial, ¶ 82 (quoting RER-Sevillano, ¶ 45) (ellipses in original).

³⁴⁶ CER-Hernández #2, ¶¶ 68-71.

³⁴⁷ Memorial, ¶ 57; Counter-Memorial, ¶ 77; C-0172, Coercive Execution Resolution No. 011-006-0044596 (November 25, 2013).

³⁴⁸ CWS- [REDACTED] #1, ¶¶ 19-20; CER-Hernández #1, ¶¶ 96-98.

³⁴⁹ See Counter-Memorial, ¶¶ 86-87.

³⁵⁰ CER-Hernández #1, ¶¶ 100, 107-110; Memorial, ¶¶ 56-61.

³⁵¹ Memorial, ¶ 53.

165. Peru claims that Scotiabank Peru sought to “hedge its bets” by initiating these two proceedings in parallel.³⁵² According to Peru, Scotiabank Peru used parallel proceedings seeking the same result, and has now “re-packaged” that claim as a violation of the National Treatment.³⁵³ Peru’s arguments are irrelevant and, in any event, wrong for several reasons.

166. *First*, as already explained at paragraph 125 above, Scotiabank’s claim before the Tribunal is not that the Peruvian courts erred as a matter of Peruvian law when deciding the Default Interest Amparo and/or the Tax Appeal. Nothing about Scotiabank’s domestic litigation strategy can explain or justify the State conduct that is under review: the leak of a fully-reasoned decision in Scotiabank Peru’s favour that was in the process of being signed by the Court, the subsequent campaign of State interference, the lengthy delay and refusal to decide the case given the politicized climate and then the issuance of a diametrically opposed decision in anomalous quorum circumstances, as compared to the treatment received by Peruvian litigants pursuing comparable default interest *amparos* before the same Constitutional Court.

167. *Second*, Peru attempts to frame Scotiabank Peru’s parallel proceedings as “improper” and “misguided” but does not allege that submitting both was impermissible under Peruvian law.³⁵⁴ Whatever gripes Peru may have with Scotiabank’s domestic litigation strategy, it cannot claim that Scotiabank Peru acted unlawfully or in bad faith. Scotiabank Peru was within its rights to pursue all legal remedies available to it, including between the Peruvian Constitutional and Civil Court systems, which—as Peru has emphasized repeatedly—are distinct avenues for relief.³⁵⁵

168. *Third*, at the time Scotiabank Peru submitted the Default Interest Amparo, the *amparo* proceeding was not only proper but expressly recognized as an appropriate avenue for urgent constitutional relief where a taxpayer contests the accrual of default interest resulting from the State’s excessive delay in resolving tax disputes.³⁵⁶ Indeed, around the time that Scotiabank Peru

³⁵² Counter-Memorial, ¶¶ 88, 93, 129.

³⁵³ See Counter-Memorial, ¶¶ 88-129.

³⁵⁴ See *e.g.*, Counter-Memorial, ¶ 12.

³⁵⁵ See CER-Hernández #2, ¶ 105. See also RER-Bustamente, ¶ 17 (“In Peru ‘Constitutional court system is exercised in parallel by two different institutions’: the Judiciary and the Constitutional Court [...] ‘the Peruvian Judiciary is maintained as a separate institution from the Constitutional Court’, but ‘they are linked when Constitutional Court processes are eventually denied by the Judiciary to then be heard by the Constitutional Court as the last instance of the Peruvian State.’”) (cleaned up).

³⁵⁶ CER-Hernández #2, ¶ 101-102; CER-Landa/Neyra #1, ¶¶ 75-76, 152-155.

filed its Default Interest Amparo and Tax Appeal, taxpayers were being confronted with unprecedented tax debts and rapidly accruing interest due to SUNAT's imposition of controversial tax debts and subsequent delay in resolving the appeals, which required frequent intervention from the Constitutional Court.³⁵⁷ Taxpayers were forced to submit *amparo* proceedings to urgently safeguard their constitutional rights against SUNAT's conduct. And the Constitutional Court granted them relief.³⁵⁸

169. *Fourth*, Peru argues that the “connexity” between the Default Interest Amparo and the Tax Appeal rendered parallel proceedings improper.³⁵⁹ As explained by Prof. Hernández, “connexity” is not a relevant factor to determine the admissibility of an *amparo* claim such as the Default Interest Amparo and, in any event, there is no “connexity” between that proceeding and the contentious administrative claim against the Tax Debt.³⁶⁰ [REDACTED]

[REDACTED]

[REDACTED]

³⁵⁷ CER-Hernández #2, ¶ 101-102. Between 2017 and 2021, 61 cases entered into the Constitutional Court regarding taxpayers in Peru that had initiated *amparos* to vindicate their constitutional right against the accrual of default interest owing to the State's delay beyond the legal term. See CER-Landa/Neyra, Annex II (bis), tab Universe of Comparable Cases.

³⁵⁸ CER-Hernández #2, ¶ 102; CER-Landa/Neyra #1, ¶ 155. The Constitutional Court further clarified that the existence of a parallel administrative dispute over the tax assessment does not preclude recourse to *amparo* when the gravamen relates to the impairment of constitutional rights by the application of punitive default interest during administrative delay. See C-0066, Judgment of the Plenary Session of the Constitutional Court in Case No. 04082-2012-PA/TC (Medina de Baca), ¶¶ 28-30 (contentious administrative proceeding did not render *amparo* inadmissible), 70-71 (interest due to Government's delay is unconstitutional). See also Memorial, ¶ 72.

³⁵⁹ Counter-Memorial, ¶¶ 124-125. Peru attempted to argue this in the domestic proceedings as well. The Third Civil Chamber, however, rejected Peru's argument and confirmed that the Default Interest Amparo and the Tax Appeal were distinct proceedings with separate causes of action. Memorial, ¶ 54; C-0063, Resolution No. 7, issued by the Third Civil Chamber, File No. 35201-2013, ¶ 10. Peru responds here that “the fact that the two causes of action are different does not negate the connexity of the claims” and that the “launching of these parallel proceedings entailed a . . . situation when a material question, different but connected . . . needs to be previously determined, in order to resolve the one at stake in the proceedings.” Counter-Memorial, ¶¶ 123, 126. This argument, however, blatantly ignores the Third Civil Chamber's explicit holding, which not only found that the causes of action were different but that “there was no risk of contradictory rulings in the two proceedings.” C-0063, Resolution No. 7, File No. 35201-2013, Third Civil Chamber, June 13, 2014 (emphasis added).

³⁶⁰ CER-Hernández #2, ¶¶ 6(vi), 95-109.

³⁶¹ [REDACTED]

[REDACTED]

[REDACTED]³⁶² Likewise, in an earlier phase of the Default Interest Amparo, the Third Civil Chamber of the Constitutional Court expressly rejected the argument that the Tax Appeal and Default Interest Amparo were mutually exclusive, confirming that the two proceedings raised distinct issues.³⁶³

D. Scotiabank Peru's Actions in the Aftermath of the Leak Are Not Relevant to Assess Peru's Treatment of the Default Interest Amparo

170. Peru unsuccessfully seeks to equate Scotiabank's actions after the publication of the 2017 Leaked Decision with the State interference of which Scotiabank complains. In that context, Peru argues that Scotiabank Peru was exercising undue pressure by "*lobbying*"³⁶⁴ and requesting the Constitutional Court to issue the 2017 Leaked Decision through continuous submissions.³⁶⁵ Peru further argues that Scotiabank fabricated its claims of State interference only after the issuance of the 2021 Decision because—Peru says—Scotiabank Peru did not raise concerns with the State's actions or pursue legal remedies in connection therewith at the time.³⁶⁶

171. Peru's arguments are contradictory, factually inaccurate and irrelevant.

172. *First*, as Scotiabank explained in its Memorial, following the publication of the 2017 Leaked Decision and the Government's own media campaign, Scotiabank Peru decided not to issue any public statement.³⁶⁷ Instead, Scotiabank Peru engaged Llorente & Cuenca, a public relations advisor, to connect with media contacts off the record to correct factual inaccuracies that were emerging through the press's reporting about the case.³⁶⁸ Moreover, Scotiabank Peru representatives met with the Peruvian Prime Minister, the Minister of Finance and the Vice-

³⁶² [REDACTED]

³⁶³ Memorial, ¶¶ 54, 201; C-0063, Resolution No. 7, File No. 35201-2013, Third Civil Chamber, June 13, 2014.

³⁶⁴ Counter-Memorial, ¶ 162.

³⁶⁵ RER-Bustamante, ¶ 267.3.

³⁶⁶ Counter-Memorial, ¶ 156.

³⁶⁷ Memorial, ¶ 115.

³⁶⁸ Memorial, ¶ 115; CWS-[REDACTED] #1, ¶ 39; CWS-[REDACTED] #2, ¶¶ 13-16; C-0531, Scotiabank Peru's Media Briefing Notes (June 2017); C-0545, Scotiabank Peru's Media Briefing Notes (October 2017); C-0539, Scotiabank Peru's Summarized Media Briefing Notes.

Minister of the Economy, to voice concerns about the politicized media campaign.³⁶⁹ That was not impermissible “lobbying” but was rather a proper and private channel through which to attempt to de-escalate the politicized atmosphere.

173. *Second*, Peru’s allegation that Scotiabank Peru was entirely passive, from a procedural standpoint and in terms of seeking remedies, during the period following the leak is incorrect.³⁷⁰ Scotiabank Peru requested, through procedural remedies available to it, that the Constitutional Court issue its decision in the case, which led to the submission of over forty unsuccessful requests between July 2018 and August 2021.³⁷¹ This was not harassment, as Peru contends. These submissions were made in accordance with available legal means.³⁷² Furthermore, as Dr. Landa and Prof. Neyra explain, and Prof. Hernández confirms, the remedies that Peru argues that Scotiabank could have pursued were either inadmissible or ineffective to grant Scotiabank Peru adequate relief.³⁷³

174. *Third*, it is wrong to suggest that Scotiabank Peru’s decision not to pursue other formal legal remedies—outside of its numerous requests for the Constitutional Court to finally issue its decision—somehow amounts to a tacit acceptance of the politicization of the Default Interest Amparo or reflects a lack of concern around the State interference, including the leaked decision itself.³⁷⁴ As explained by Scotiabank’s witnesses, Scotiabank Peru convened—through appropriate and accepted practices in Peru—meetings with Constitutional Court justices to express their concerns over the treatment of the case.³⁷⁵ It was through these meetings that Scotiabank Peru learned more about the State interference, including the type of interference that was not seen in the media reports and was happening behind closed doors. Documents show Scotiabank Peru’s

³⁶⁹ Memorial, ¶ 116; CWS-[REDACTED] #1, ¶¶ 41-42; C-0231, Email from [REDACTED] [REDACTED] (June 23, 2017).

³⁷⁰ Counter-Memorial, ¶ 156.

³⁷¹ Memorial, ¶ 143; CWS-[REDACTED] #1, ¶ 55; C-0284, Brief of Requests to the Constitutional Court (July 2018 to August 2021).

³⁷² CER-Landa/Neyra #1, ¶ 104.

³⁷³ CER-Landa/Neyra #2, ¶¶ 103, 105-106; CER-Hernández #2, ¶ 8(v).

³⁷⁴ Counter-Memorial, ¶¶ 156-160.

³⁷⁵ CWS-[REDACTED] #1, ¶¶ 43-55; CWS-[REDACTED] #2, ¶¶ 21-22; CWS-[REDACTED], ¶¶ 26-40.

internal, contemporaneous reporting of those facts, expressing concern over the circumstances.³⁷⁶ Notwithstanding those concerns, as [REDACTED] explains, Scotiabank Peru was taking a delicate and intentional approach to managing the situation, with the support of management and external counsel.³⁷⁷ It was not in Scotiabank Peru’s interests to further fuel the politicization of the case.

175. Moreover, at the time, Scotiabank was confident that the Constitutional Court would ultimately publish a decision that aligned with the outcome reflected in the 2017 Leaked Decision.³⁷⁸ Scotiabank had no reason to believe that the leak and State interference would have the dire impact of resulting in a complete reversal to how the Court had decided it would rule on the case. This confidence was (at the time) entirely reasonable, given that the Constitutional Court had already made its position clear in the 2017 Leaked Decision, and that stance was being consistently reaffirmed in similar cases around the same period (such as in *Icatom*, *Paramonga*, and *Telefónica*).³⁷⁹ Even [REDACTED] later confirmed this view, by advising Scotiabank Peru to “have patience,” and explaining that the Court was waiting for the “right political moment” to issue its decision.³⁸⁰

176. Accordingly, Scotiabank’s management made a strategic decision to avoid actions that might further inflame the situation—such as public statements or additional legal actions before the Constitutional Court—out of concern of causing any additional delays to the Court’s issuance of its decision in Scotiabank Peru’s favour.³⁸¹

³⁷⁶ See e.g. C-0228, Email from [REDACTED] (June 21, 2017); C-0231, Email from [REDACTED] (June 23, 2017); C-0288, Email from [REDACTED] (November 25, 2018).

³⁷⁷ CWS-[REDACTED] #2, ¶ 21.

³⁷⁸ CWS-[REDACTED] #1, ¶ 36; CWS-[REDACTED] #2, ¶¶ 19, 24.

³⁷⁹ See CER-Landa/Neyra #1, ¶ 27. See also C-0067, Judgment of the Plenary Session of the Constitutional Court in Case No. 04532-2013-PA/TC (*Icatom*); C-0310, Judgment of the Plenary Session of the Constitutional Court in Case No. 02051-2016-PA/TC (*Paramonga*); C-0312, Judgment of the Plenary Session of the Constitutional Court in Case No. 00225-2017-PA/TC (*Telefónica*); CWS-[REDACTED] #2, ¶ 23.

³⁸⁰ CWS-[REDACTED] I, ¶ 50; CWS-[REDACTED] #2, ¶¶ 21-22; C-0288, Email from [REDACTED] (November 25, 2018).

³⁸¹ CWS-[REDACTED] I, ¶ 36; CWS-[REDACTED] #2, ¶¶ 12, 19.

177. Finally, Peru's suggestion that Scotiabank used the media in the same manner that SUNAT did for its political media campaign is baseless.³⁸² Scotiabank made no attempt to improperly influence media coverage so as to pressure the Constitutional Court. As [REDACTED] explained, prior to the press meetings, Scotiabank Peru prepared briefing notes summarizing the discussion topics to share with the journalists.³⁸³ These notes confirm that the meetings were purely informative and fact-based, covering the context of the proceedings before the SUNAT and the Tax Court, as well as the status of the ongoing contentious administrative proceedings and Default Interest Amparo.³⁸⁴

178. In any event, Peru's position is plainly inconsistent. The very fact that Scotiabank Peru took all of these steps—and pursued a delicate media strategy—demonstrates the genuine concern it had with respect to the State interference. It was not, as Peru now claims, a narrative invented by Scotiabank for the purposes of this arbitration.

PART THREE. THE TRIBUNAL HAS JURISDICTION

179. Peru raises two objections to the Tribunal's jurisdiction, both of which it unsuccessfully raised in its Rule 41 challenge. Peru bears the burden to prove its objections to jurisdiction. It has failed to do so.

180. **Financial institutions.** Peru claims that the Tribunal lacks jurisdiction over Scotiabank's National Treatment claim because it falls under the scope of the Financial Services Chapter of the FTA, Chapter 11. It does so by arguing that Chapter 11 applies because Scotiabank and Scotiabank Peru are financial institutions. This interpretation is fundamentally at odds with the plain language of the FTA. The Financial Services Chapter of the FTA (Chapter 11) is about the nature of the measure, not the nature of the investor.

181. **Waiver.** Peru also maintains its jurisdictional objection that Scotiabank and Scotiabank Peru have not complied with the FTA's waiver requirement because of the Tax Appeal. This objection similarly ignores the plain language of the FTA. Under the FTA, a claimant does not

³⁸² Counter-Memorial, ¶ 162.

³⁸³ CWS-[REDACTED] #2, ¶ 14.

³⁸⁴ C-0531, Scotiabank Peru's Media Briefing Notes (June, 2017); C-0545, Scotiabank Peru's Media Briefing Notes (October, 2017); C-0539, Scotiabank Peru's Summarized Media Briefing Notes.

have to waive their right to continue all court actions, but only those that relate to the measure that is impugned in the arbitration. The Tax Appeal was about Scotiabank Peru's liability for the underlying tax debt. The measures at issue in this arbitration relate to the State's interference with the Constitutional Court's decision-making in a separate proceeding concerning default interest as well as the Constitutional Court succumbing to that pressure in 2021, and the extent to which that treatment was differential to the treatment accorded to Peruvian actors. They are completely distinct.

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

182. The parties have already exchanged numerous written submissions on this issue in respect of Peru's Rule 41 challenge. Peru's Counter-Memorial simply repeats the arguments it already made to the Tribunal.

183. Peru claims that its interpretation of Chapter 11 of the FTA, as applying whenever a claimant is a financial institution, is based on the "clear language of the FTA."³⁸⁵ But the Tribunal has already determined that its interpretation was not so clear to meet the Rule 41 standard. Rather, it found "potential merit" in Scotiabank's interpretation of Article 1101(1) as focusing on the nature of the measures at issue.³⁸⁶ Peru has put forward no new arguments and continues to rely on only a single case that, contrary to Peru's arguments, confirms that the purpose of the financial services chapter is about ensuring scope for domestic regulation of the financial services industry. The Tribunal should dismiss its jurisdictional objection, just as it did at the Rule 41 stage.

184. The text, context and purpose of Chapter 11 all support Scotiabank's interpretation of Article 1101. It in no way says it applies to claims brought by financial institutions, as Peru contends. It applies to measures that relate to financial institutions. This interpretation is further supported by the negotiation history documents produced by Peru in this arbitration. The measures at issue are State interference in a judicial proceeding about accrual of default interest on a challenged tax assessment (a legal issue arising in a panoply of industries and to individuals in

³⁸⁵ Counter-Memorial, ¶¶ 274, 282.

³⁸⁶ Rule 41 Decision, ¶ 242.

their personal capacity too), the court succumbing to that pressure, and the differential nature of that treatment. None of that relates to financial institutions.

A. The Text, Context and Purpose of Chapter 11 Support Scotiabank's Interpretation: It is a Separate Regime for the Regulation of the Financial Services Industry

185. Peru argues that the only question for the Tribunal to determine is whether Scotiabank and Scotiabank Peru are financial institutions. It claims that if the answer is yes (and it is not contested that they are financial institutions), then Chapter 11 applies.³⁸⁷ It claims this reading is “clear” on the text of Article 1101. But, for the reasons already set in Scotiabank’s Rule 41 submissions and summarized again below, this is plainly wrong. Consistent with the Vienna Convention on the Law of Treaties,³⁸⁸ when the text of Article 1101 is read in context and in light of Chapter 11’s purpose, it is clear the drafters intended to create a separate regime for the domestic regulation of the financial services industry. It is not about every measure that happens to apply to financial institutions. The applicability of the chapter is governed by the nature of the measure, not the nature of the claimant.

ii. Ordinary Meaning of Article 1101

186. Article 1101 sets forth the “Scope and Coverage” of the Financial Services Chapter and provides that it “applies to measures adopted or maintained by a Party relating to: financial institutions of the other Party; investors of the other party, and investments of such investors, in financial institutions in the other party’s territory, and cross-border trade in financial services”. Article 1101 concludes by saying that “Chapters Eight (Investment) and Nine (Cross-Border Trade in Services) apply to measures described in paragraph 1 only to the extent that such Chapters or Articles of such Chapters are incorporated into this Chapter...”.³⁸⁹

187. The operative word in Article 1101 is “measures:” is it a measure relating to a financial institution or an investment in a financial institution? Peru instead asks the Tribunal to interpret

³⁸⁷ Peru’s Counter-Memorial, ¶¶ 277, 281.

³⁸⁸ **CL-0053**, Article 31 of the Vienna Convention on the Law of Treaties: A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.

³⁸⁹ **C-0001**, Canada-Peru FTA, Article 1101 (emphasis added).

Article 1101 as asking: is the claim with respect to a financial institution? That interpretation reads out the words “measures” and “relating to.” The Tribunal’s task is to apply the FTA, not to rewrite it.³⁹⁰

188. As set forth in Scotiabank’s Rule 41 submissions,³⁹¹ if the drafters had intended Chapter 11 to apply to all claims brought by financial institutions, they would have drafted the FTA accordingly. Indeed, the predecessor agreement to the FTA did contain that broader language and said it limited claims “[w]ith respect to: financial institutions of a Party...”³⁹² The drafters of the FTA did not use that language when they agreed to Chapter 11. That choice must be given meaning.

iii. Context of Article 1101

189. The structure of Chapter 11 as a whole shows that the Chapter is, at its core, about setting standards regarding the regulation of the financial services sector and limiting recourse for certain measures directed at this regulation. It is not about claims generally brought by financial institutions, but measures relating to the regulation of this industry. Several examples illustrate the point.

190. **Article 1102: National Treatment.** Article 1102 sets out National Treatment protections that are substantively identical to those in Article 803, with additional language confirming that the provision was designed with the regulation of financial services in mind: it requires each Party to accord no less favourable treatment to its own financial institutions or investors in financial institutions, with respect to the “establishment, acquisition, expansion, management, conduct, operation and sale or other disposition of financial institutions and investments.”³⁹³ The focus is thus on measures relating to the disposition and operation of financial institutions.

191. Sub-paragraph 5 further clarifies that “[d]ifferences in market share, profitability or size do not in themselves establish a breach of the obligations under this Article.”³⁹⁴ These are exactly

³⁹⁰ **CL-0041**, *Renergy S.à.r.l. v. Kingdom of Spain* (ICSID Case No. ARB/14/18), Award, ¶ 558.

³⁹¹ Scotiabank’s Response to Rule 41 Submissions, ¶¶ 67-68.

³⁹² **C-0055**, Canada-Peru Foreign Investment Promotion and Protection Agreement, Article 21.

³⁹³ **C-0001**, Canada-Peru FTA, Article 1102(1).

³⁹⁴ **C-0001**, Canada-Peru FTA, Article 1102(5).

the type of metrics that, left unchecked, could have negative repercussions on the state's financial services ecosystem. This sub-paragraph addresses concerns with preserving state prerogative to take steps to regulate sectors covered by the Chapter in ways that may affect investment metrics like market share, profitability, or size (not with limiting any and all investment disputes that may arise in connection with a financial institution).

192. **Article 1103: Most Favored Nation Treatment.** Article 1103 includes a specific carve-out for “prudential measures.” It allows a Party to recognize “prudential measures” of a non-Party “in the application of measures covered by this Chapter.” This language thus confirms that what is covered by this Chapter is focused on the application of measures.

193. Peru argues that the carve-out for prudential measures in Article 1103 shows that it did not intend Chapter 11 more broadly to be “specific to measures relating to the financial sector.”³⁹⁵ But that is an illogical leap that departs from the language. Article 1101 says it applies to measures relating to financial institutions. Peru is thus suggesting the drafters did not mean what they wrote. Such measures may *include* prudential measures but are broader than just those measures.

194. Peru's argument suggests that “prudential measures” covers the full scope of measures relating to the financial industry sector, and thus this Tribunal should “read in” meaning into the lack of reference to “prudential measures” in Article 1101. But this is wrong. Prudential measures are a subset of measures that may relate to financial institutions. They are measures adopted for “prudential reasons,” defined as “the maintenance of the safety, soundness, integrity, or financial responsibility of individual financial institutions or cross-border financial service suppliers.”³⁹⁶ Thus, prudential measures would fall within the scope of Article 1101, but they are not the full scope. For example, a prudential measure could be a regulation to mitigate the impact of a bank going bankrupt. But a measure that regulates the banking industry more generally (*e.g.*, certain filing or board oversight requirements within financial institutions) is a measure that relates to a financial institution, but is not a “prudential” measure.

³⁹⁵ Peru's Counter-Memorial, ¶ 285.

³⁹⁶ Peru's Counter-Memorial, ¶ 285; C-0001, Canada-Peru FTA, Chapter 11, Footnote 1.

195. **Article 1110: Exceptions.** Article 1110 describes the exceptions to the Chapter, focusing on excepted measures. The excepted measures are specifically focused on those directed toward the regulation of financial services, namely “measures for prudential reasons,” including measures which protect certain investors and persons to whom a financial institution owes a fiduciary duty and ensuring the integrity and stability of the financial system. Article 1110(1) concludes that where “such measures do not conform with the provisions of this Agreement referred to in this paragraph, they shall not be used as a means of avoiding the Party’s obligations under such provisions.” Thus, the clear focus is, again, on the nature of the *measures*.

196. This focus on measures continues in the other subparagraphs of this article. Article 1110(2) sets forth that nothing in this Chapter or certain other chapters applies to “non-discriminatory measures of general application taken by any public entity in pursuit of monetary and related credit policies or exchange rate policies.” This is also a good example of a measure that may relate to a financial institution (as relating to the regulation of credit policies) but may not be a prudential measure. Similarly, Article 1110(3) and (4) speak to application, adoption or enforcement of certain *measures* focused on the regulation of financial institutions (*e.g.*, measures relating to the effects of a “default on financial services contracts”).

197. **Article 1111: Transparency.** This provision underscores that Chapter 11 is focused on the regulation of the financial services industry, as it seeks to address the regulatory impact of such measures. Article 1111(1) sets forth that “[t]he Parties recognize that transparent regulations and policies governing the activities of financial institutions and financial service suppliers are important in facilitating both access of financial institutions and financial service suppliers to, and their operations in, each other’s markets. Each Party commits to promote regulatory transparency in financial services.” The provision then goes on to impose certain requirements related to “all measures of general application to which this Chapter applies,” underscoring that the scope of the Chapter’s application is in relation to *measures*.³⁹⁷

198. **Articles 1115 and 1116: Consultations and Dispute Settlement.** Where a matter arises under the FTA “that affects financial services,” a Party may request consultations with the other Party. Under Article 1116, where a dispute arises under Chapter 11, the dispute settlement chapter

³⁹⁷ C-0001, Canada-Peru FTA, Article 1111(2) (emphasis added).

of the FTA (Chapter 21) applies, except as modified therein. These modifications include that Article 1115 consultations “with respect to a measure or matter” constitute consultations under Chapter 21 and that the panel of three appointed members shall have “expertise or experience in financial services law or practice, which may include the regulation of financial institutions.” The language in these provisions once again underscores Scotiabank’s interpretation that Chapter 11 only applies to measures that relate to financial institutions, as the language is focused on the regulation of and expertise in this area.

iv. Purpose of Article 1101

199. The ordinary meaning and context of Article 1101 thus make clear that its scope is not broadly about *any* claim by financial institutions, but *measures* relating to financial institutions. This is consistent with the purpose of Chapter 11, which is to carve out a sphere for domestic regulation of the financial services industry. As set out in Scotiabank’s Rule 41 submissions, this is supported by public statements by Canada and the *Fireman’s Fund* case.³⁹⁸

200. *First*, in public statements leading up to the implementation of the FTA, the Government of Canada repeatedly stated that the FTA was intended to strengthen protections for Canadian investments, including investments by and in respect of financial institutions.³⁹⁹ It did not suggest that claims by financial institutions, at large, were to be treated any differently.

201. *Second*, Chapter 11 of the FTA was modelled after Chapter 14 of the NAFTA. The purpose of Chapter 14 of the NAFTA was considered in *Fireman’s Fund v. Mexico*, the only authority relied upon by Peru to support its atextual interpretation of the FTA.⁴⁰⁰ But this case stands against its position. Rather, the tribunal recognized that the financial services chapter is about ensuring scope for domestic regulation of the financial services industry.⁴⁰¹

³⁹⁸ Scotiabank’s Response to the Rule 41 Submissions, ¶¶ 70-75.

³⁹⁹ **C-0058**, “Trade Agreement with Peru Opens Doors to Latin America,” Government of Canada, June 18, 2009 (5:30 p.m. EDT); **C-0059**, Minister Day Announces Canada-Peru Free Trade Agreement,” Government of Canada, August 4, 2009 (10 a.m. EDT); **C-0056**, Hansard - 41 (April 20, 2009); **C-0057**, Hansard - 64 (May 29, 2009).

⁴⁰⁰ See Peru’s Rule 41 Submission, ¶ 65.

⁴⁰¹ The issue in *Fireman’s Fund* was whether the claimant’s investment in the financial holding company fell within the definition of a “financial institution.” If it did, there was no dispute that the impugned *measure* related to the financial services industry following steps taken in response to Mexico’s fiscal crisis. **RL-0005**, *Fireman’s Fund*

202. In that case, the claimant, an insurance company, had agreed to be part of a program of rescue and recapitalization of a Mexican financial services corporation following a serious financial crisis in Mexico. It brought a Chapter 11 NAFTA claim after Mexico facilitated the purchase of debentures denominated in Mexican pesos and owned by Mexican investors, but did not facilitate the purchase of debentures denominated in US dollars and owned by the claimant. Mexico challenged the tribunal's jurisdiction, arguing Chapter 14 applied.

203. In its preliminary decision on jurisdiction, the tribunal found that the purpose of Chapter 14 was to create a safe harbor for states with respect to financial regulation and to ensure the Parties would not have to harmonize their regulations in the financial services industry:

[...] Looked at from the design of the NAFTA, it is evident that the drafters carved out the financial sector from significant portions of the general provisions, because none of the state Parties was prepared to engage in the kind of harmonization and deregulation that would have been necessary to treat banks, insurance companies, and securities firms (as well as other participants in the financial sector) in the same way as, say, the soft drink, retail trade, or shoe manufacturing industries. As noted above, Chapter Fourteen and the Annexes applicable to that Chapter contain significant differences from the general provisions on national treatment, omit a provision on "fair and equitable treatment," and limit resort to investor-state arbitration. All of these differences, it is clear, are designed to leave room for national decision-making rather than harmonization, and to limit the opportunity of investors from another state Party to resort to international dispute settlement to challenge regulatory measures taken by the respective national authorities.⁴⁰²

204. This was reemphasized by the tribunal in its Award. It highlighted that Chapter 14 was created by the NAFTA Parties because they were aware that each government "regulated in considerable detail the activities of financial institutions engaged in securities transactions, insurance, banking and related activities," these regulations "were not the same in all three

Company v. United Mexican States (ICSID Case No. ARB(AF)/02/1), Decision on Preliminary Question, 17 July 2003, ¶ 76 ("**Fireman's Fund, Preliminary Decision**").

⁴⁰² **RL-0005, Fireman's Fund**, Preliminary Decision, ¶ 83. The tribunal stated that "complaints by investors of another Party in the financial sector concerning regulations imposed by agencies of the host country are governed by Chapter [14]" (emphasis added).

countries” and that “challenges to such regulations or interpretations of the regulations and the relevant authorities should not be committed to investor-State arbitration under the NAFTA.”⁴⁰³

205. The tribunal could not have been clearer that the scope and purpose of the financial services chapter was to create a separate regime focused on the regulation of the financial services sector.

206. This was consistent with the submissions by Canada, who explained that the focus of Chapter 14 was to negotiate a set of rules specific to the financial services sector because of its importance in underpinning economic growth. It was to “create a separate regime to govern measures relating to financial services” and to balance the Parties’ rights and regulations “to govern trade in financial services.”⁴⁰⁴

B. Negotiating History Supports Scotiabank’s Interpretation

207. The meaning of the FTA is not ambiguous, obscure, manifestly absurd or unreasonable, such that resort to supplementary means of interpretation is not necessary. On the contrary, the meaning is quite clear and commercially sensible. Nonetheless, the negotiation history of the FTA may be relevant as it “confirm[s] the meaning” resulting from the interpretation of Chapter 11 of the FTA, further to Article 32 of the Vienna Convention.

208. As set out at paragraph 188 above, the predecessor agreement to the FTA contained broad language restricting claims “with respect to: financial institutions of a Party.” As can be deduced from the negotiation history documents produced by Peru, the drafters departed from that language and instead chose to adopt text based on Chapter 14 of NAFTA:

- (a) There were four rounds of negotiations regarding Chapter 11 of the FTA between July and November 2007.⁴⁰⁵

⁴⁰³ **RL-0049**, *Fireman’s Fund*, Award, 17 July 2006, ¶¶ 1-3.

⁴⁰⁴ **RL-0004**, Canada’s submissions in *Fireman’s Fund*, ¶¶ 6-12.

⁴⁰⁵ **C-0482**, First Round of Negotiations (Negotiating Group on Financial Services), July 19-20, 2007 (SPA); **C-0483**, First Round of Negotiations (Negotiating Group on Financial Services), July 19-20, 2007 (ENG); **C-0485**, Second Round of Negotiations (Negotiating Group on Financial Services), September 6-7, 2007 (SPA); **C-0486**, Second Round of Negotiations (Negotiating Group on Financial Services), September 6-7, 2007 (ENG); **C-0487**, Third Round of Negotiations (Negotiating Group on Financial Services), October 1-2, 2007 (SPA); **C-0488**, Third Round of Negotiations (Negotiating Group on Financial Services), October 1-2, 2007 (ENG); **C-0489**, Fourth Round of

- (b) The first draft of the Chapter appears to have been submitted for discussion by Canada.⁴⁰⁶ The starting point for what would become Article 1101 closely tracks the corresponding NAFTA financial services chapter (which Canada was also a party to). This is confirmed in a subsequent exchange of drafts and comments with Peru where Canada notes that the proposed text comes from Article 1401 of NAFTA.⁴⁰⁷
- (c) As part of the negotiations, the parties presented on, discussed, and asked questions about their respective regulatory and institutional frameworks regarding financial services,⁴⁰⁸ confirming that regulation of this sector is central to the Chapter.
- (d) A note summarizing the content of the Chapter which appears to have been drafted by Peru affirms that the purpose of the Chapter is to “substantially consolidate Peru’s current openness in trade in financial services... creating a context of greater certainty and predictability for investments and the bilateral provision of financial services” (translation). These commitments “do not in any way affect the prudential regulatory authority of [certain entities]” (translation).⁴⁰⁹

209. Consistent with Scotiabank’s interpretation, the Chapter thus appears to have been understood as primarily directed towards the regulation of financial institutions, with the goal of enhancing certainty and predictability of investments in this sector, while maintaining a protected sphere of financial regulatory authority for the state.

Negotiations (Negotiating Group on Financial Services), November 28-30, 2007 (SPA); **C-0490**, Fourth Round of Negotiations (Negotiating Group on Financial Services), November 28-30, 2007 (ENG).

⁴⁰⁶ **C-0480**, July 10, 2007 draft FTA sent by Canada, p. 1; **C-0482**, First Round of Negotiations (Negotiating Group on Financial Services), July 19-20, 2007 (SPA).

⁴⁰⁷ **C-0484**, August 21, 2007 draft FTA including comments from Peru and Canada, p. 1.

⁴⁰⁸ **C-0481**, First Round of Negotiations (Negotiating Group on Financial Services), July 19-20, 2007 (SPA): “*Las delegaciones presentaron sus respectivos marcos regulatorios e institucionales en materia de servicios financieros.*” (The delegations presented their respective regulatory and institutional frameworks for financial services). See also **C-0446**, Questions for Canada (Financial Services Chapter), which appears to be a note about the Chapter on among other things, the structure, regulation, functioning and relevant authorities of the Canadian financial system.

⁴⁰⁹ **C-0447**, Canada Peru FTA (Content of the Financial Services Chapter), p. 1.

C. The Arbitration Does Not Concern “Measures Relating To” Financial Institutions

210. In its Counter-Memorial, Peru notably does not make a single submission on why the measures at issue “relate to” financial institutions. Its only argument is that they do because Scotiabank and Scotiabank Peru are financial institutions. But to be a measure “relating to” financial institutions, there must be a “legally significant connection” between the impugned measure and financial institutions or investments in financial institutions. This requires something more than “the mere effect of a measure” on the investor or here, the financial institution.⁴¹⁰ As put by the tribunal in *Mason Capital v. Republic of Korea*, the “mere negative effect of a measure on an investor or an investment is insufficient to establish a legally significant connection.”⁴¹¹

211. As set out in Scotiabank’s Memorial, the measures here do not have a “legally significant connection” to Scotiabank or Scotiabank Peru because of their status as financial institutions. Such status is of no moment or relevance to the existence or application of the measures.⁴¹² None of the conduct at issue with respect to the State interference in a judicial proceeding—nor the underlying subject matter in the Default Interest Amparo concerning the accrual of default interest on a challenged tax assessment⁴¹³—has anything to do with financial institutions at large or the regulation of the financial services industry, let alone a legally significant connection. Indeed, many of the other cases concerning default interest involve individual tax payers or corporate entities which are not conducting business in the financial services sector.⁴¹⁴

⁴¹⁰ **CL-0035**, *Methanex Corporation v. United States of America*, UNCITRAL, Partial Award, 7 August 2002, ¶ 147; **CL-0033**, *Lone Pine Resources Inc. v. Government of Canada* (ICSID Case No. UNCT/15/2), Final Award, 21 November 2022, ¶¶ 402-403; **CL-0003**, *Bilcon v. Government of Canada*, UNCITRAL, Award on Jurisdiction and Liability, 17 March 2015 (“**Bilcon**”), ¶ 240.

⁴¹¹ **CL-0190**, *Mason Capital L.P. and Mason Management LLC v. Republic of Korea*, (PCA Case No 2018-55), Final Award, 11 April 2024 (“**Mason Capital**”), ¶ 371.

⁴¹² Memorial on the Merits, ¶ 207.

⁴¹³ Even if the Tribunal looks deeper at the underlying factual context that gave rise to the 2021 Constitutional Court Decision, it is evident that the underlying factual context does not relate to financial institutions. The transactions that resulted in the 1999 SUNAT Decision against Scotiabank’s predecessor related to value added tax paid on certain gold transactions. The gold transactions could have been undertaken by any type of business. The resulting issue in the Default Interest Amparo then focused on whether default interest could accrue due to delays caused by the state. The fact that Scotiabank and Scotiabank Peru are financial institutions is of no meaning to the nature of the issue in the Default Interest Amparo and the resulting 2021 Decision.

⁴¹⁴ See, e.g., **C-0310**, Judgment of the Plenary Session of the Constitutional Court in Case No. 02051-2016-PA/TC (Paramonga), **C-0313**, Judgment of the Plenary Session of the Constitutional Court in Case No. 01818-2013-PA/TC

212. The measures in question here are not like the measures in *Fireman’s Fund* that were designed to bail out a bank in a time of crisis, nor are they measures in the financial industry designed to leave room for national decision-making as opposed to harmonizing practices among states in treatment of financial institutions.⁴¹⁵

213. Peru’s first jurisdictional objection must therefore be rejected.

II. Scotiabank Has Complied with the Waiver Requirement in the FTA

214. There is no dispute that a valid waiver is required for the Tribunal to have jurisdiction under Chapter 8. But Peru is wrong that the waivers submitted by Scotiabank and Scotiabank Peru were ineffective. Just as it did in the Rule 41 stage, Peru continues to put forward arguments based on mischaracterizations of both Article 823 of the FTA and Scotiabank’s claim.

A. Article 823 Only Requires a Waiver Extending to Proceedings with Respect to “The Measure” at Issue in the Arbitration

215. Articles 823(1)(e) and 823(2)(e) of the FTA do not require a disputing investor to submit a waiver that broadly applies to any and all local proceedings. Rather, the disputing investor, and if applicable its enterprise, must “waive their right to initiate or continue ... any proceedings with respect to the measure of the disputing Party that is alleged to be a breach....”.⁴¹⁶ Peru wrongly argues that, despite such clear language, there need not be an identity between both claims and measures. Its interpretation is inconsistent with the plain language of the FTA and the jurisprudence. Peru is also wrong that this requirement is to be interpreted formalistically, without an ability to cure supposed deficiencies.

216. ***The Proceedings Must Relate to the Same Measure.*** The FTA’s language is not unique. The limitation has been described as “only logical as the waiver provision seeks to prevent parallel proceedings against a respondent in relation to the same measure *by that respondent* brought in a

(Baca Campodónico); **C-0316**, Order of the Constitutional Court in Case No. 05358-2016 PA/TC (Chungar); **C-0335**, Order of the Constitutional Court in Case No. 02043-2021 PA/TC, (Polo Contreras); see also, Appendix C: Qualifying domestic investors with qualifying investments under the FTA.

⁴¹⁵ **RL-0005**, *Fireman’s Fund*, Preliminary Decision, ¶ 83.

⁴¹⁶ **C-0001**, Canada-Peru FTA, Article 823(1)(c) and 823(2)(c) (emphasis added).

different fora...”.⁴¹⁷ Put differently, it is “intended to curb the multiplicity of lawsuits relating to essentially similar or identical matters and to protect the State from having to defend itself against such lawsuits.”⁴¹⁸ The rationale for the rule is twofold: to avoid contradicting decisions between the local courts and international arbitration, and to prevent “double redress for the same conduct or measure.”⁴¹⁹

217. In its Counter-Memorial, Peru argues that the phrase “with respect to” in Article 823 must be read broadly such that “identity between both claims and measures is not required.” It then proceeds to rely on a number of cases that do not support it.⁴²⁰ Its argument must be rejected.

218. Peru ignores the plain language of Article 823. The provision specifically states that the waiver must relate to proceedings involving “the measure” being impugned in the arbitration. It does not say involving “overlapping facts,” “overlapping subject-matter” or “overlapping damages,” as Peru would have this Tribunal conclude. Article 823 thus allows for the potential existence of parallel proceedings involving the same underlying factual matrix and even overlapping losses or damages, provided that the measure at issue does not overlap.

219. To be clear, having overlapping measures refers to the conduct at issue. It does not require there to be identity between the legal causes of action. The focus of the inquiry is on the governmental conduct that gives rise to the dispute, and not on the legal cause of action to which such a measure may give rise.⁴²¹

220. Peru’s argument is unsupported by the case law. Peru claims that its broad interpretation, which does not require an identity between the claims and measures, has been “consistently”

⁴¹⁷ **RL-0133**, *Antonio del Valle Ruiz and others v. Kingdom of Spain*, PCA Case No. 2019-17, Final Award, 13 March 2023, ¶ 247 (emphasis added; *emphasis in original*).

⁴¹⁸ **CL-0189**, *Gabriel Resources Ltd. and Gabriel Resources (Jersey) v. Romania (I)*, ICSID Case No. ARB/15/31, Award, 8 March 2024, (“**Gabriel Resources**”) (emphasis added) ¶ 696. See also **CL-0199**, *Supervision y Control S.A. v. Republic of Costa Rica*, ICSID Case No. ARB/12/4, Award, 18 January 2017, ¶¶ 293-295 (“for the risk [of contradictory decisions] to be present, the dispute in both for a must be identical or have significant overlap...”).

⁴¹⁹ **CL-0029**, *International Thunderbird Gaming Corporation v. The United Mexican States*, UNCITRAL, Arbitral Award, 26 January 2006 (“**Thunderbird**”), ¶ 118; **CL-0032**, *Lion Mexico Consolidated L.P. v. United Mexican States* (ICSID Case No. ARB(AF)/15/2), Award, 20 September 2021 (“**Lion**”), ¶¶ 805-808.

⁴²⁰ Counter-Memorial, ¶¶ 298-303.

⁴²¹ **RL-0024**, *Detroit International Bridge Company v. Government of Canada*, UNCITRAL, PCA Case No. 2012-25, Award on Jurisdiction, 2 April 2015 (“**DIBC**”), ¶ 303; **RL-0002**, *Waste Management, Inc. v. United Mexican States*, ICSID Case No. ARB(AF)/98/2, Arbitral Award, 2 June 2000 (“**Waste Management I**”), ¶¶ 26-30.

supported by tribunals. But it only cites a single authority, the *KBR v. Mexico* decision, which did not adopt such an interpretation.

221. In *KBR*, the tribunal interpreted the identical waiver requirement in the NAFTA and held that “the measure alleged to be in violation under NAFTA arbitration must fall within the subject matter of local or international parallel proceedings.”⁴²² The tribunal adopted the test set forth by the *Waste Management I* tribunal, which requires that the “object” or “subject matter” of the parallel proceeding consist of measures impugned in the arbitration.⁴²³ The *Waste Management I* tribunal further elaborated the test as whether both proceedings have “a legal basis derived from the same measures.”⁴²⁴

222. Peru has not cited a single authority where there was not identity between the measures raised in parallel proceedings. Rather, Peru’s authorities all show that the measures (as distinct from the legal causes of action raised) must be the same to render a waiver ineffective:

- (a) In *KBR v. Mexico*, the two measures challenged in the arbitration were (1) the Mexican court’s set aside of an ICC award and (2) Mexico’s liquidation of certain performance bonds. But the claimant also had ongoing court proceedings to enforce that very ICC award. The tribunal found the enforcement proceedings were “inextricably” linked to both impugned measures, as the set-aside of the award was a “central issue” in deciding whether to enforce the award and the enforcement of the performance guarantee was part of the claim.⁴²⁵
- (b) In *Waste Management I*, both the arbitration and the local proceedings impugned the same conduct: Mexico’s refusal to pay certain invoices under a concession agreement. The claimant argued the waiver was valid because the local proceedings alleged breaches of local law, not the NAFTA. The tribunal rejected that

⁴²² **RL-0121**, *KBR, Inc. v. United Mexican States*, ICSID Case No. UNCT/14/1, Award, 30 April 2015 (“*KBR*”), ¶ 112.

⁴²³ **RL-0002**, *Waste Management I*, ¶ 27, cited in **RL-0121**, *KBR*, ¶ 12.

⁴²⁴ **RL-0002**, *Waste Management I*, ¶ 27, cited in **RL-0121**, *KBR*, ¶ 115.

⁴²⁵ **RL-0121**, *KBR*, ¶¶ 123, 130, 132, 136, 138.

argument.⁴²⁶ What matters is that the proceedings involve the same measures, as these clearly did, not that the theory of liability arising from such measures differs.

- (c) In *Commerce Group v. El Salvador*, the tribunal concluded that the local proceedings “relate very much to the same ‘measures’” as “[i]t is undisputed that the relevant ‘measures’ in this case and the El Salvador proceedings are the revocation of the environmental permits.”⁴²⁷ The tribunal did not accept the claimants’ argument that only the mining ban was at issue in the arbitration because (a) it was not a “measure” under the treaty, and (b) the tribunal was not presented with a distinct claim for breach based on the mining ban, but was part and parcel of the claim regarding the revocation of the environmental permits.⁴²⁸
- (d) In *DIBC v. Canada*, the tribunal asked itself whether the measures in the local proceeding “are the same as” those at stake in the NAFTA arbitration.⁴²⁹ Applying that test, the tribunal determined that both proceedings “deal with the same measures:” they both challenged Canada’s attempts to divert traffic from the claimant’s bridge through the construction of its competing bridge and the non-improvement of roads to the claimant’s bridge.⁴³⁰
- (e) In *RDC v. Guatemala*, the tribunal similarly asked itself whether the measures in the parallel proceedings are “the same.”⁴³¹ In both proceedings, the claimant challenged Guatemala’s failure to remove squatters from a right of way and to make contractually obligated payments to rehabilitate that right of way. The tribunal rejected the claimant’s argument that they were just factual context and not part of its legal claims in the arbitration.⁴³²

⁴²⁶ **RL-0002**, *Waste Management I*, ¶¶ 26-30.

⁴²⁷ **RL-0019**, *Commerce Group Corp. and San Sebastian Gold Mines, Inc. v. The Republic of El Salvador*, ICSID Case No. ARB/09/17, Award, 14 March 2011 (“**Commerce Group**”), ¶ 101.

⁴²⁸ **RL-0019**, *Commerce Group*, ¶¶ 111-112

⁴²⁹ **RL-0024**, *DIBC*, Award on Jurisdiction, ¶ 300.

⁴³⁰ **RL-0024**, *DIBC*, ¶¶ 307-313, 320.

⁴³¹ **CL-0193**, *Railroad Development Corporation v. Republic of Guatemala*, ICSID Case No. ARB/07/23, Decision on Objection Article 10.20.5, 17 November 2008 (“**RDC**”), ¶ 48.

⁴³² **CL-0193**, *RDC*, ¶¶ 10, 52, 62.

223. Thus, in every case cited by Peru, the waiver was found ineffective in circumstances where the same measures were impugned in parallel proceedings. Peru has not cited a single authority where a broader test applied or where a claim was rejected because there were overlapping facts or overlapping damages absent overlapping measures.

224. **Remedy for an Invalid Waiver.** According to Peru, in the event that an invalid waiver is delivered, it cannot be retroactively cured without the consent of the respondent State.⁴³³ But Peru fails to distinguish between substantive defects and procedural defects. The cases are clear that formalistic defects can be cured. For example, in *International Thunderbird v. Mexico*, the tribunal held that the waiver defect was cured by the subsequent filing of a valid waiver. It concluded that, “the requirement to include the waivers in the submission of the claim is purely formal, and that a failure to meet such requirement cannot suffice to invalidate the submission if the so-called failure is remedied at a later stage of the proceedings. The Tribunal joins the view of other NAFTA tribunals that have found that Chapter Eleven provisions should not be construed in an excessively technical manner.”⁴³⁴ This view has been endorsed by numerous tribunals.⁴³⁵

B. Scotiabank and Scotiabank Peru Submitted Valid Waivers

225. As the Tribunal held in its Rule 41 decision, “[i]t cannot be disputed that Scotiabank and Scotiabank Peru submitted waivers, in the form required by Article 823(1) and Annex 823.1.”⁴³⁶ This is clear from the waivers submitted with the Request for Arbitration.⁴³⁷ Those waivers are unequivocal and unconditional and state that Scotiabank and Scotiabank Peru:

Consent to the arbitration in accordance with the procedures set out in the [FTA], and waive Scotiabank’s right to initiate or continue before any administrative tribunal or court under the law of either Party to the FTA, or other dispute settlement procedures, any proceedings with respect to the measure of the Republic of Peru that is alleged to be a breach referred to in Article 819 or 820, except for

⁴³³ Counter-Memorial, ¶¶ 294-296.

⁴³⁴ **CL-0029**, *Thunderbird*, Award, ¶ 117⁴³⁴ **CL-0029**, *Thunderbird*, ¶ 117

⁴³⁵ **CL-0191**, *Pope & Talbot Inc. v. The Government of Canada*, UNCITRAL, Award in Relation to Preliminary Motion by the Government of Canada, 24 February 2000, ¶¶ 16-18; **CL-0188**, *Ethyl Corporation v. The Government of Canada*, UNCITRAL, Award on Jurisdiction, 24 June 1998 ¶ 91; **CL-0189**, *Gabriel Resources*, ¶ 706.

⁴³⁶ Rule 41 Decision, ¶ 234.

⁴³⁷ RFA, ¶ 76(vi); **C-0044**, Consent to Arbitration and Waiver of Scotiabank; **C-0032**, Consent to Arbitration and Waiver of Scotiabank Peru S.A.A.

proceedings for injunctive, declaratory or other extraordinary relief, not involving the payment of damages, before an administrative tribunal or court under the law of the Republic of Peru.⁴³⁸

226. The RFA provides that these waivers do “not apply to the Tax Appeal” which at the time was “pending,” “as that proceeding does not relate to measures that are alleged to be in breach of the FTA.”⁴³⁹

227. Applying the plain language of Article 823(1) and the test applied by the tribunals in *DIBC v. Canada* and *RDC v. Guatemala*, the question for the Tribunal is whether the Tax Appeal related to the “same measures” impugned in this arbitration?⁴⁴⁰ Applying the test by the tribunals in *KBR v. Mexico* and *Waste Management v. Mexico (I)*, do the impugned measures fall within the “object” or “subject matter” of the Tax Appeal? Is the legal basis of both proceedings derived from the same measures?⁴⁴¹ The end goal is to ensure that Peru is not defending itself in respect of the same conduct in multiple proceedings, and to avoid inconsistent decisions and double recovery.

228. For the reasons that follow, it is clear that the two proceedings involve distinct measures or conduct by the government, there is no risk of inconsistent decisions or double recovery.

229. ***No Overlapping Measures or Risk of Inconsistent Decisions.*** The conduct or measures at issue in the Tax Appeal is plainly distinct from the present arbitration:

- (a) The parties agree that conduct at issue in the Tax Appeal was the imposition of the underlying value added taxes on the gold trading transactions underlying the 1999 SUNAT Decision.⁴⁴² It was commenced in 2013, *before* any of the impugned measures in this arbitration arose.
- (b) The conduct or measures at issue in the present arbitration is the State’s interference with the Constitutional Court’s decision-making in the Default Interest Amparo,

⁴³⁸ **C-0044**, Consent to Arbitration and Waiver of Scotiabank; **C-0032**, Consent to Arbitration and Waiver of Scotiabank Peru S.A.A.

⁴³⁹ RFA, ¶ 76(vi), fn. 16.

⁴⁴⁰ See **RL-0024**, *DIBC* and **CL-0193**, *RDC*.

⁴⁴¹ **RL-0002**, *Waste Management I*, ¶ 27, cited in **RL-0121**, *KBR*, ¶ 115.

⁴⁴² See Counter-Memorial, ¶ 306. See also **C-0171**, Contentious Administrative Statement of Claim (November 21, 2013).

interference and pressure that started with the 2017 Leaked Decision (*i.e.*, conduct that arose four years after the Tax Appeal was commenced) and resulted in measurable loss with the 2021 Decision. None of that was at issue in the Tax Appeal.

230. The lack of overlapping measures is underscored by the absence of any risk of conflicting decisions. The Tax Appeal has been dismissed, and thus the underlying tax assessment upheld. None of that has *any* relevance to or bearing on this arbitration. There is no risk this Tribunal will render a decision that in any way conflicts with that outcome.

231. There is also no risk of having Peru defend itself in respect of the same conduct in multiple proceedings. The validity of the tax assessment is not at issue. Peru has not had to address in another proceeding the propriety of its conduct in respect of the Default Interest Amparo. But, if this case is jurisdictionally dismissed, then Scotiabank will be barred from challenging in *any* forum the merits of its claim in respect of such government misconduct. That is clearly not the purpose of the waiver requirement: it is meant to ensure that there is only one bite at the cherry, not no bites at the cherry.

232. This case is thus not akin to the circumstances in the other cases relied upon by Peru and set out above where the challenged conduct was identical in the parallel proceedings. Rather, this case is much more akin to *Gabriel Resources v. Romania*. In that case, the measures challenged in the arbitration were Romania's practice of denying approvals for the project and depriving license rights. Romania asserted that domestic proceedings challenging its VAT assessment invalidated the waiver. In rejecting that argument, the tribunal found:

"...that the subject matter of the VAT assessment proceedings is different from that of the present investment arbitration. The former concerns the tax laws of the State and their application, while the latter concerns allegations relating to the activities of the tax authorities as part of Romania's alleged unjustified treatment of Claimants' investments. On this basis, the VAT challenge does not fall within the necessary scope of the waiver itself. Therefore, the Tribunal finds that Claimants complied with the substantive aspect of the waiver provision of the Canada-Romania BIT."⁴⁴³

⁴⁴³ CL-0189, *Gabriel Resources*, ¶¶ 701, 705 (emphasis added).

233. **No Risk of Double Recovery.** As recognized by the Tribunal in its Rule 41 decision,⁴⁴⁴ Peru's objection turns on its argument that the waiver is invalid because of the potential risk of double recovery: if Scotiabank Peru was successful in the Tax Appeal (which it wasn't), then the underlying tax assessment, plus any of the resulting default interest amounts, would have been reimbursed. As put by Peru in its Counter-Memorial, "[b]y choosing to continue to pursue domestic proceedings, which could have resulted in questions before this tribunal becoming moot and potentially leading to the recovery of the same amounts requested in the arbitration after the submission of its purported letters of waiver in these proceedings, Scotiabank failed to comply with the mandatory waiver requirement."⁴⁴⁵

234. There are three reasons this must be rejected. *First*, Article 823 does not require a claimant to waive proceedings where there are overlapping "damages," but only those that involve the same "measures." It does not say that a claimant must waive all proceedings with respect to the same *injury or loss*. Peru is thus asking the Tribunal to invalidate the waiver by re-writing the FTA's requirements. It cannot do so. This is a complete answer.

235. *Second*, in any event and as set out in detail in Scotiabank's Rule 41 submissions, the hypothetical possibility of double recovery does not invalidate a waiver. There are many investment arbitrations where such a possibility existed and tribunals recognized that such a risk is not a reason to jurisdictionally dismiss a claim because "any eventual award could be fashioned in such a way to prevent double recovery."⁴⁴⁶ Scotiabank undertook not seek to recover any amounts that overlapped with damages ordered in the arbitration.

⁴⁴⁴ Rule 41 Decision, ¶ 233.

⁴⁴⁵ Counter-Memorial, ¶ 272.

⁴⁴⁶ Scotiabank's Response to the Rule 41 Submissions, ¶ 154, citing **CL-0045**, *Suez, Sociedad General de Aguas de Barcelona S.A., and InterAguas Servicios Integrales del Agua S.A. v. Argentine Republic* (ICSID Case No. ARB/03/17) Decision on Jurisdiction, 16 May 2006, ¶ 51; **CL-0047**, *Urbaser S.A. and Consorcio de Aguas Bilbao Bizkaia, Bilbao Biskaia Ur Partzuergoa v. Argentine Republic*, ICSID Case No. ARB/07/26, Decision on Jurisdiction, 19 December 2012, ¶¶ 253-254; **CL-0049**, *Webuild S.p.A. (formerly Salini Impregilo S.p.A.) v. Argentine Republic* (ICSID Case No. ARB/15/39) Decision on Jurisdiction and Admissibility, 23 February, 2018, ¶ 173; **CL-0007**, *Camuzzi Int'l S.A. v. Argentine Republic* (ICSID Case No. ARB/03/2) Decision on Objections to Jurisdiction, 11 May 2005, ¶ 91; **CL-0046** *Unión Fenosa Gas S.A. v. Egypt* (ICSID Case No. Arb/14/4) Award, 31 August, 2018 ¶¶ 6.82, 10.13, 10.142, 11.33; **CL-0031**, *Lauder v. Czech Republic*, UNCITRAL, Final Award, 3 September 2001, ¶172; **CL-0024**, *Hochtief v. Argentina* (ICSID Case No. ARB/07/31) Decision on Liability, 29 December 2014, ¶ 180. *See also* **CL-0025**, *Impregilo S.p.A. v. Argentine Republic*, ICSID Case No. ARB/07/17, Award, June 21, 2011, ¶ 139.

236. It is problematic to find the inverse, as it may immunize the state from the consequences of its wrongful conduct. It would deprive an investor of a legitimate claim because of a phantom or hypothetical concern of double recovery when there are other means and remedies to avoid any such result (whether through fashioning an award prohibiting that result, as well as estoppel and double recovery principles prohibiting such an outcome). Clearly, that is the outcome the FTA drafters sought to avoid by drafting Article 823 to pertain to overlapping measures, not losses. The Tax Appeal has been dismissed, and yet Peru is claiming that the distinct claims of wrongdoing should never be adjudicated on their merits. That is not what the waiver requirement was intended to achieve.

237. *Third*, even though the risk of double recovery was always hypothetical (and nonexistent given Scotiabank’s undertaking), it is now known that the risk will never crystallize as the Tax Appeal has been dismissed. Peru wrongly argues this is irrelevant because a defective waiver cannot be cured. But it underscores that the waiver was never defective to begin with, as hypothetical risks that do not crystallize should not invalidate an otherwise valid claim and waiver. Moreover, that is putting form before substance. As set out at paragraph 224 above, numerous tribunals have allowed subsequent conduct to remedy a formal defect in a waiver. For example, in *Gabriel Resources*, the claimants provided an additional waiver in their reply memorial, and this was held to be appropriate and satisfied the waiver requirements of the BIT.⁴⁴⁷

C. Peru’s Irrelevant and Misplaced Arguments Regarding the “Connexity” between the Tax Appeal and the Default Interest Amparo

238. Peru tries to bolster its argument through its experts to say that there is a “connexity” or “connection” between the claims in the Tax Appeal and the Default Interest Amparo.⁴⁴⁸ The Tribunal should disregard this submission for several reasons.

239. *First*, it is irrelevant. Peru wrongly focuses on the claims in the two domestic proceedings: the Tax Appeal and the Default Interest Amparo.⁴⁴⁹ The correct frame of reference involves comparing the measures in the Tax Appeal with those at issue in the present arbitration. Although

⁴⁴⁷ CL-0189, *Gabriel Resources*, ¶¶ 702, 706.

⁴⁴⁸ Counter-Memorial, ¶¶ 124-126, 308-316.

⁴⁴⁹ Counter-Memorial, ¶¶ 308-314. Peru repeatedly refers to the claims in the Tax Appeal and the Default Interest Amparo as opposed to the requests for relief set out in the RFA and Scotiabank’s Memorial.

the present arbitration relates to the Default Interest Amparo, they are separate proceedings. As set forth in paragraph 229 above, when the proper comparison is undertaken, it is clear that the Tax Appeal and the present arbitration concern distinct measures.

240. *Second*, in any event, the supposed connections drawn between the domestic proceedings are entirely superficial. Peru argues that the two domestic proceedings are connected because they both arise from the 2011 SUNAT Decision, upheld in the 2013 Tax Court Decision, and that the value added tax and the default interest is a “unitary tax debt.”⁴⁵⁰ But that just means there is a connection in the underlying factual matrix arising in the two proceedings; it does not create a unity between the causes of actions or claims.

241. In his responding report, Prof. Hernández explains that there is no “relatedness” or “connection” between the Tax Appeal and the Default Interest Amparo as a matter of Peruvian law. He explains that the claims in both proceedings are different: the Default Interest Amparo was about the application of default interest and did not address the substantive correctness of the tax debt, such as whether the gold sales transactions were genuine. Such issues were raised in the Tax Appeal which, likewise, did not contain a separate claim addressing the application of default interest. Thus, “there was no common legal issue between the claims in both proceedings, nor did they depend on the resolution of a common legal matter.”⁴⁵¹ Peru’s own courts have confirmed these two proceedings concern different causes of action with no risk of conflicting results.⁴⁵²

242. Prof. Hernández concludes that “what is therefore noted is not a “connection” between the proceedings brought by Scotiabank Peru, but rather that the only thing that could exist is a potential link between the possible outcome of both cases.”⁴⁵³ As Prof. Hernández explains, such a link would only have arisen if Scotiabank Peru had succeeded in the Tax Appeal.⁴⁵⁴ As is clear now, no such link has or could materialize given that Scotiabank Peru was unsuccessful in the Tax Appeal.

⁴⁵⁰ Counter-Memorial, ¶ 308.

⁴⁵¹ CER - Hernández #2, ¶ 107(b).

⁴⁵² See Scotiabank’s Memorial on the Merits, ¶ 201; **C-0063**, Resolution No. 7, issued by the Third Civil Chamber, File No. 35201-2013.

⁴⁵³ CER - Hernández #2, ¶ 108.

⁴⁵⁴ CER - Hernández #2, ¶¶ 108-109.

243. Moreover, there is nothing under Peruvian procedural law or constitutional law preventing tax and default interest matters that may arise as a consequence of the same tax assessment from being properly addressed in two distinct proceedings: a contentious administrative proceeding challenging a tax assessment on the one hand and a constitutional *amparo* challenging default interest on the other.⁴⁵⁵ Indeed, as Prof. Hernández notes, over the past decade, it was precisely through *amparo* proceedings that many taxpayers succeeded in challenging the collection of excessive default interest on constitutional grounds, irrespective of the validity of the underlying tax assessment.⁴⁵⁶ Indeed, according to Prof. Hernández, following a judicial precedent issued in 2023, it could be argued that contentious administrative proceedings (like the Tax Appeal) may be suitable avenues for seeking relief from the application of default interest on the ground that the statutory time limit has expired. But that was not the case for the years prior to that, including when Scotiabank initiated the Tax Appeal and the Default Interest Amparo in 2013. Prof. Hernández thus concludes that “Scotiabank Peru’s claims were valid and consistent with the relevant tax case-law and legislation at the time of their submission”.⁴⁵⁷

* * *

244. In conclusion, Peru’s jurisdictional objections should be dismissed. It has not made out its burden in respect of either objection.

PART FOUR. Peru Breached Article 803 of the FTA

I. Scotiabank’s Claim Falls Squarely Within Article 803 of the FTA

245. Article 803 of the Treaty protects Scotiabank and Scotiabank Peru from treatment less favourable than the treatment Peru accords to its own investors. It provides:

Each Party shall accord to investors of the other Party treatment no less favourable than that it accords, in like circumstances, to its own investors with respect to the establishment, acquisition, expansion, management, conduct, operation and sale or other disposition of investments in its territory.⁴⁵⁸

⁴⁵⁵ CER - Hernández #2, ¶¶ 98-101.

⁴⁵⁶ CER - Hernández #2, ¶¶ 101-102.

⁴⁵⁷ CER - Hernández #2, ¶ 109.

⁴⁵⁸ **C-0001**, Free Trade Agreement between Canada and Peru, art. 803.

246. The claim is straightforward: Scotiabank Peru’s case in the Default Interest Amparo was subjected to improper State interference while other cases brought by domestic investors were not. In sum: in May 2017, the Constitutional Court began to sign a judgment in Scotiabank Peru’s favour in its Default Interest Amparo; in June 2017, that decision was leaked to a newspaper hostile to foreign investment; immediately, the Government launched a sustained campaign of political pressure against the Court; [REDACTED]
[REDACTED]
[REDACTED]; and then in November 2021—after purporting to lower its own quorum requirements—issued a diametrically opposed decision rejecting Scotiabank Peru’s claim.⁴⁵⁹ None of this happened to any of the dozens of Peruvian plaintiffs pursuing identical constitutional challenges against the unlawful application of default interest.⁴⁶⁰ Given that differential, less favourable treatment, Peru breached Article 803 of the FTA.⁴⁶¹ Had Scotiabank as an investor been treated in the same manner as Peruvian plaintiffs without the State interference and conduct identified above, it is clear that the 2017 Signed Judgment—i.e., the “judgment for final signatures” [REDACTED]
[REDACTED]—would have been issued.

247. In its Counter-Memorial, Peru ignores the conduct that led to the Constitutional Court’s issuance of its 2021 Decision. Instead, it focuses on the decision itself, in isolation, and contends that the 2021 Decision is compatible with the state of Constitutional Court jurisprudence emerging in late 2021. In that regard, Peru contends that Scotiabank is asking this Tribunal to sit as an appellate court of its most senior justices.⁴⁶² That is incorrect for reasons that have been explained above and ignores that Scotiabank’s case would not have still been pending in 2021 but for the State interference. The State interference ensured Scotiabank’s case remained in limbo until the Court’s composition changed and [REDACTED] was able to push through, on a rushed basis, a decision by upending the quorum requirement.

248. Peru’s strategy in isolating the 2021 Decision is obvious. It is impossible for Peru to point to any comparable treatment faced by Peruvian investors when it comes to the conduct at issue.

⁴⁵⁹ See Part Two, Sections I-III, above.

⁴⁶⁰ See Part Two, Section IV, above; Memorial, ¶ 226.

⁴⁶¹ See Memorial, ¶ 214.

⁴⁶² Counter-Memorial, ¶ 319.

By focusing only on the 2021 Decision in isolation, Peru tries to avoid the four-and-a-half year period that preceded its issuance.⁴⁶³

249. Unable to rebut Scotiabank’s showing of differential treatment, Peru advances three arguments as part of its attempt to sidestep the claim. Each misses the mark.

250. *First*, Peru contends that, because the claim involves conduct relating to the Constitutional Court, Scotiabank is recasting as a national treatment claim what is in substance a denial of justice claim.⁴⁶⁴ But, there is no recasting in the face of the Tribunal’s Rule 41 decision. Scotiabank’s national treatment claim has always been part of its claims against Peru from the outset of the arbitration.⁴⁶⁵ Moreover, Peru’s mischaracterization of Scotiabank’s claim as one focused uniquely on the substantive outcome of its Default Interest Amparo is misplaced.⁴⁶⁶ That the judiciary is involved in Peru’s breach does not limit Scotiabank only to denial of justice claims. Indeed, tribunals have frequently found treaty violations in cases involving judicial conduct outside of the denial of justice context.⁴⁶⁷ This makes perfect sense—the judicial branch is a branch of the State

⁴⁶³ See Memorial, ¶ 283; CER-Landa/Neyra #1, ¶¶ 119-125; CER-Landa/Neyra #2, ¶ 139.

⁴⁶⁴ Counter-Memorial, ¶¶ 319, 326.

⁴⁶⁵ Request for Arbitration, ¶¶ 68-69.

⁴⁶⁶ In support, Peru cites Prof. Zachary Douglas KC, *International Responsibility For Domestic Adjudication: Denial of Justice Deconstructed*, International and Comparative Law Quarterly, Vol 63, Part 3 (July 2014) (**RL-0136**) (“The conclusion must be that acts or omissions attributable to the State within the context of a domestic adjudicative procedure can only supply the predicate conduct for a denial of justice ... [because] any other approach would serve to vest international tribunals with appellate jurisdiction over the substantive outcomes in domestic adjudicative procedures”), *Parkerings-Compagniet AS v. Republic of Lithuania*, ICSID Case No. ARB/05/8, Award, 11 September 2007 (**RL-0167**) (a “Court[’s] deni[al] ... of [a Claimant’s] claims is not relevant in [international law] proceedings [and is] subject to denial of justice”), *Iberdrola Energía, S.A. v. Republic of Guatemala (I)*, ICSID Case No. ARB/09/5, Award, 17 August 2012, (**RL-0166**), *Apotex Holdings Inc. and Apotex Inc. v. United States of America*, ICSID Case No. UNCT/10/2, Award on Jurisdiction and Admissibility, 14 June 2013 (“**Apotex v. USA**”) (**RL-0115**), and *ELSI Case Concerning Elettronica Sicula S.p.A (ELSI) (United States of America v. Italy)*, International Court of Justice, Judgment of 20 July 1989 (**RL-0095**). See Counter-Memorial, ¶¶ 319, 323 fns. 447-449. These cases are inapposite. Peru mischaracterizes Scotiabank’s claim as challenging the “substantive outcome” of the domestic adjudicative procedure, overlooking that Scotiabank is instead challenging the series of connected actions of State interference.

⁴⁶⁷ See e.g., **CL-0200**, *Telefónica SA v. Republic of Colombia* (ICSID Case No. ARB/18/13), Award, 12 November 2024, ¶¶ 135, 142 (“Accordingly, denial of justice constitutes a breach of international law, but this does not preclude a judicial decision from violating international law on another basis”) (translated from Spanish); **CL-0196**, *Rumeli Telekom AS and Telsimb Mobil Telekomunikasyon Hizmetleri A.S. v. Republic of Kazakhstan* (ICSID Case No. ARB/05/16), Award, 29 July 2008, ¶¶ 705-706 (finding that the decision of the domestic court breached the expropriation clause under the treaty, without reaching or considering a denial of justice); **CL-0202**, *White Industries Australia Limited v. Republic of India* (UNCITRAL), Final Award, 30 November 2011, ¶ 11.4.19 (finding that a domestic court decision was not a denial of justice but constitutes a breach of the obligation of providing effecting means of asserting claims and enforcing rights); **CL-0198**, *Sistem Mühendislik İn aat Sanayi ve Ticaret A. v. Kyrgyz Republic* (ICSID Case No. ARB(AF)/06/1), Award, 9 September 2009, ¶¶ 117-119 (finding that a domestic court decision constituted an expropriation).

and its act may breach the treaty standards in the same way as the acts of the executive or legislative branches. And, here, given the State interference described above, the relevant State conduct is attributable not only to individuals within the Constitutional Court but also to actors in other branches of government.

251. *Second*, Peru’s repeated (and incorrect) references to the substantive merit of the Constitutional Court’s decision are equally misplaced.⁴⁶⁸ By asking the Tribunal to draw conclusions on the substantive correctness of the outcome of the Default Interest Amparo as the principal focus of its argument, it is Peru—not Scotiabank—that calls on the Tribunal to carry out an appellate style review. However, the correct inquiry is not to consider whether the 2021 Decision was the correct outcome (for the avoidance of doubt, it was not).⁴⁶⁹ Even if the 2021 Decision was substantively correct, that does not immunize Peru from the consequences of the lesser favourable treatment accorded to Scotiabank Peru. The ends do not justify the means. Rather, the relevant inquiry is whether the impugned conduct constituted treatment less favourable than that accorded to similarly situated domestic investors. That inquiry shows that the 2021 Decision was the product of a less favourable process that no similarly situated domestic investor experienced. “But for” that less favorable treatment, the 2017 Signed Judgment would have been issued and there would have been no four-and-a-half year delay, no changes to the quorum rules, and no alteration in the composition of the Court that decided *Medina de Baca* and *Icatom* before and after the 2017 Signed Judgment.

252. *Third*, Peru seeks to exclude the impugned treatment from the scope of the national treatment standard by asserting that the standard is limited to “prohibiting protectionist domestic regulation.”⁴⁷⁰ This is also incorrect. Nothing in the FTA limits qualifying treatment to protectionist

⁴⁶⁸ Counter-Memorial, ¶¶ 318-326, 330.

⁴⁶⁹ For the avoidance of doubt, the 2017 Leaked Decision was in line with prevailing default-interest cases at the time. The Constitutional Court repeatedly held that charging accrued default interest for delays attributable to the State is unconstitutional, beginning with *Medina de Baca*, reaffirmed in *Paramonga*, *Icatom*, *Baca Campodónico*, and *Telefónica*, and conclusively resolved with the *Maxco* decision. See ¶¶ 126, 130, above.

⁴⁷⁰ Counter-Memorial, ¶¶ 325, 329. See also *ibid.*, ¶ 424 (“the 2021 Constitutional Court Decision is not a regulatory measure, and should not be subject to scrutiny under the National Treatment standard”).

regulatory measures.⁴⁷¹ As explained below, the treatment at issue falls squarely within the text of the FTA and the interpretation of “treatment” pursuant to arbitral jurisprudence.⁴⁷²

253. The inquiry before the Tribunal is to apply the three-pronged test under Article 803: (i) evaluate the presence of qualifying “treatment” within the meaning of Article 803;⁴⁷³ (ii) identify domestic comparators in “like circumstances” with Scotiabank and its investment;⁴⁷⁴ and (iii) determine if there was treatment towards Scotiabank less favourable than that accorded to Peruvian investors in “like circumstances.”⁴⁷⁵

254. In the following Sections, Scotiabank demonstrates that each element is satisfied. Namely, in Section II, Scotiabank demonstrates that the challenged measures constitute actionable “treatment” within the meaning of Article 803 of the FTA; in Section III, Scotiabank identifies appropriate domestic comparators in like circumstances; and in Section IV, Scotiabank demonstrates that its investment was accorded less favourable treatment than that accorded to similarly situated Peruvian investors, with no legitimate policy justification.

II. Peru Has Accorded Actionable “Treatment” Under Article 803

255. Article 803 protects Scotiabank and Scotiabank Peru from less favourable “treatment.” In its Memorial, Scotiabank explained that Article 803 of the FTA refers to “treatment” in a very broad manner as including any State measure affecting the “establishment, acquisition, expansion, management, conduct, operation and sale or other disposition of a foreign investor’s investments.”⁴⁷⁶ Arbitral jurisprudence has interpreted this definition as encompassing the entire

⁴⁷¹ Article 105 of the FTA defines “measure” to include “any law, regulation, procedure, requirement or practice.”

⁴⁷² See Part Four, Section II, below.

⁴⁷³ **C-0001**, Free Trade Agreement between Canada and the Republic of Peru, art. 803(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”).

⁴⁷⁴ **C-0001**, Free Trade Agreement between Canada and the Republic of Peru, art. 803(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”).

⁴⁷⁵ **C-0001**, Free Trade Agreement between Canada and the Republic of Peru, art. 803(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”).

⁴⁷⁶ Memorial, ¶ 223.

lifespan of an investment.⁴⁷⁷ Scotiabank demonstrated that Peru's impugned conduct described above falls under the definition of "treatment" under Article 803.⁴⁷⁸

256. In its Counter-Memorial, Peru disagrees with Scotiabank's position on the meaning of the term "treatment" and contends that the State conduct at issue does not constitute "treatment."⁴⁷⁹ Both arguments require Peru to take anomalous (and extreme) positions, including that there was nothing "strange or suspicious" about the procedure that led to the 2021 Decision—and, therefore, no "treatment."⁴⁸⁰ Scotiabank addresses both arguments in the subsections below.

A. Peru Accepts that the Definition of "Treatment" is Broad

257. Peru first takes issue with Scotiabank equating "treatment" with "measure," the former of which is not defined in the FTA and the latter of which is (but is not a word used in Article 803). Peru's attempted distinction between the two words is both unsupported and irrelevant.⁴⁸¹

258. The FTA does not define "treatment." It does provide a broad definition of "measure" that includes "any law, regulation, procedure, requirement or practice."⁴⁸² Several provisions of the FTA show that "treatment" may be accorded through various types of "measures" adopted by a State.⁴⁸³ For example, Article 811 on compensation for losses to an investment uses both terms interchangeably: "[e]ach Party shall accord to investors of the other Party, and to covered

⁴⁷⁷ See **CL-0183**, *ADF Group Inc. v. United States of America* (ICSID Case No ARB (AF)/00/1) Final Award, 9 January 2003, ¶ 153 (holding that the broad definition of "treatment" under NAFTA extends to "'the establishment, acquisition, expansion, management, conduct, operation and sale or other disposition of investments.' [...] In slightly different terms, Article 1102 entitles an investor of another Party and its investment to equal (in the sense of 'no less favorable') treatment, in like circumstances, with a Party's domestic investors and their investments, from the time of entry and 'establishment' or 'acquisition' of the investment in the territory of that Party, through the 'management,' 'conduct,' and 'operation' and 'expansion' of that investment, and up to the final 'sale or other disposition' of the same investment").

⁴⁷⁸ See Memorial, ¶¶ 222-246.

⁴⁷⁹ Counter-Memorial, ¶¶ 335-350.

⁴⁸⁰ Counter-Memorial, ¶ 344.

⁴⁸¹ See Counter-Memorial, ¶ 337.

⁴⁸² Memorial, ¶ 223 (citing **C-0001**, Free Trade Agreement between Canada and the Republic of Peru, art. 105).

⁴⁸³ See **C-0001**, Free Trade Agreement between Canada and the Republic of Peru, art. 202.2 (explaining that "Paragraph 1 [on national treatment accorded to the goods of the other party] does not apply to the measures set out in Annex 202.2" (emphasis added)); art. 903 on National Treatment in cross-border trade (referring to "treatment [...] with respect to measures adopted or maintained by a sub-national government"); see also *ibid.* art. 811(1)-(2).

investments, non-discriminatory *treatment* with respect to *measures* it adopts or maintains [...].”⁴⁸⁴ Additional provisions of the FTA reinforce the connection between “treatment” and “measures.”⁴⁸⁵

259. Tribunals interpreting similar treaty language confirm that there is no meaningful difference between the two words.⁴⁸⁶ But, if one were to split hairs, “treatment” is broader than “measures” as it can encompass a range of conduct or behaviour beyond the definition of “measures.” As Peru accepts, definitions of the word “treatment” include “the act or manner or an instance of treating someone or something” and “the way you deal with or behave towards someone or something.”⁴⁸⁷ Indeed, the tribunal in *Merrill & Ring Forestry L. P. v. Canada* explained that “[t]reatment” can include “almost any conceivable measure that can be with respect to the beginning, development, management and end of an investor’s business activity.”⁴⁸⁸ Commentators likewise explain that “treatment” may refer to any “conduct, behaviour; action or behavior towards a person”⁴⁸⁹ and that “[t]reatment is not limited to legal and regulatory measures.”⁴⁹⁰

260. Accordingly, on Peru’s own invocation of the definitions of the word “treatment,” the Parties agree that any behaviour that is attributable to the State can amount to “treatment” for

⁴⁸⁴ **C-0001**, Free Trade Agreement between Canada and the Republic of Peru, art. 811(1)-(2) (emphases added).

⁴⁸⁵ See **C-0001**, Free Trade Agreement between Canada and the Republic of Peru, arts. 202, 811(1)-(2), 903.

⁴⁸⁶ See **CL-0190**, *Mason Capital*, ¶¶ 761, 769 (where the claimants argued that “treatment” was a broad concept “comprising any *measures* undertaken by the State that bear upon the investor’s business activities”) (emphasis added), ¶¶ 769, 787-788 (where the tribunal rejected the respondent’s arguments on “treatment,” including that it contained an additional requirement that “treatment” be “directed towards an investor or its investment”); **CL-0079**, Andrew Newcombe & Lluís Paradell Trius, *Law and Practice of Investment Treaties: Standards of Treatment* (Kluwer Law International: 2009) (“**Newcombe and Paradell**”), §4.24, Examples of less favourable treatment, p. 184.

⁴⁸⁷ Counter-Memorial, ¶ 338 (referencing exhibits **R-300**, Cambridge Dictionary, definition of “treatment”; **R-0301**, Longman Dictionary, definition of “treatment”; **R-302**, Merriam-Webster Dictionary, definition of “treatment”).

⁴⁸⁸ **CL-0114**, *Merrill & Ring Forestry L. P. v. Canada* (ICSID Case No UNCT/07/1), Award, 31 March 2010 (“**Merrill & Ring**”), ¶ 79. See also **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**”), ¶ 85 (rejecting Canada’s arguments that Canada Customs’ processing of goods did not constitute “treatment”).

⁴⁸⁹ **CL-0079**, *Newcombe and Paradell*, §4.21 (citing the Oxford English Dictionary Definition). See also **CL-0197**, *Siemens A.G. v. The Argentine Republic* (ICSID Case No. ARB/02/8), Decision on Jurisdiction, 3 August 2004 (“**Siemens Decision on Jurisdiction**”), ¶ 85 (noting that “treatment” ordinarily means “behaviour in respect of an entity or a person”).

⁴⁹⁰ **RL-0148**, A. Reinisch and C. Schreuer, *International Protection of Investments: The Substantive Standards*, Cambridge University Press, 2020, ¶ 328 (citing *Bayindir v. Pakistan*). The *Bayindir* tribunal found that “the scope of the national treatment and MFN clauses in Article II(2) is not limited to regulatory treatment.” **CL-0084**, *Bayindir Insaat Turizm Ticaret Ve Sanayi A.Ş. v. Islamic Republic of Pakistan (I)* (ICSID Case No ARB/03/29), Award, 27 August 2009, ¶ 388.

purposes of Article 803, so long as that behaviour is “accord[ed] to [an] investor[] of the other Party” (here, Scotiabank).

261. The interpretation of “treatment” should end there. However, Peru then departs from the rules of treaty interpretation applicable under the Vienna Convention and enters the realm of invention. It argues that—for there to be qualifying “treatment” for purposes of Article 803—the conduct in question must have a “material” impact on the investment.⁴⁹¹

262. Scotiabank does not dispute that, under the national treatment clause, a practical impact or an adverse effect from the challenged treatment is required.⁴⁹² But Article 803 contains no words through which to read in Peru’s self-invented “materiality” threshold. The plain language of the provision applies to *any* “treatment” that is “accorded to investors of the other Party” that is differential to treatment accorded in like circumstances to Peru’s own investors with respect to “the establishment, acquisition, expansion, management, conduct, operation and sale or other disposition of investments in its territory.”

263. The “materiality” argument also finds no support in arbitral jurisprudence or legal commentary.⁴⁹³ By contrast, tribunals have required the showing of *any* “practical impact.”⁴⁹⁴ The tribunal in *Merrill & Ring*, for instance, held that identifying *any* “adverse effects” suffices to amount to “treatment” for purposes of evaluating a national treatment claim.⁴⁹⁵

⁴⁹¹ Counter-Memorial, ¶¶ 335, 339.

⁴⁹² See Counter-Memorial, ¶ 339; Memorial, ¶ 223.

⁴⁹³ Counter-Memorial, ¶¶ 335, 345. Peru further argues that the concept must involve conduct directed “towards” the investor or its investment. Counter-Memorial, ¶ 338. As explained below, the impugned “treatment” satisfies this requirement as it comprises conduct that directly targeted and adversely affected Scotiabank Peru. See Part Four, Section IV, below; **CL-0126**, *S.D. Myers Inc. v. Government of Canada*, (UNCITRAL), Partial Award, 13 November 2000 (“**SD Myers**”), ¶ 254; **CL-0114**, *Merrill & Ring*, ¶ 80; **CL-0197**, *Siemens* Decision on Jurisdiction, ¶ 85.

⁴⁹⁴ **CL-0126**, *S.D. Myers*, ¶ 254 (a “practical impact is required”); **CL-0127**, *Siemens A.G. v. The Argentine Republic* (ICSID Case No. ARB/02/8), Award, 6 February 2007 (“**Siemens Award**”), ¶ 320 (same). See also **CL-0081**, *Archer Daniels Midland and Tate & Lyle Ingredients Americas, Inc. v United Mexican States* (ICSID Case No. ARB (AF)/04/5), Award, 21 November 2007, ¶ 209 (“[i]n establishing whether the Tax affords ‘less favorable treatment’ [...] Tribunals have relied on the measure’s adverse effects on the relevant investors and their investments”).

⁴⁹⁵ **CL-0114**, *Merrill & Ring*, ¶ 80.

264. In any event, as Scotiabank demonstrates below, Peru’s conduct in question here not only had a practical impact, but a “material” one. And so, Scotiabank satisfies even Peru’s higher threshold that goes beyond the terms of Article 803.

B. The Impugned Conduct Falls Within Peru’s Definition of “Treatment”

265. Peru goes on to argue that the conduct at issue in this arbitration does not qualify as “treatment” for purposes of Article 803.⁴⁹⁶ Peru says that the allegations are instead only advanced “in a manifest attempt to tarnish Peru’s reputation and indirectly re-introduce its claims for a violation of the Minimum Standard of Treatment.”⁴⁹⁷

266. That contention is difficult to follow because (i) Scotiabank has identified specific State behavior directed specifically towards Scotiabank Peru’s case before the Constitutional Court, which (ii) it has compared to the absence of similar State behavior towards domestic plaintiffs with similar cases before the Constitutional Court. That comparative exercise is what Article 803 calls for. The comparison is not brought, as Peru alleges, for the purpose of “tarnish[ing] Peru’s reputation” but for purposes of obtaining the relief identified in Scotiabank’s Request for Relief.

267. Moreover, Peru’s position that there is no Article 803 treatment here is untenable based on its own definition of “treatment.” As noted above, Peru contends that “treatment” means “the act or manner or an instance of treating someone or something” and “the way you deal with or behave towards someone or something.”⁴⁹⁸ And it goes on to observe that—for “treatment” to be caught by Article 803—it must be “vis-à-vis the investor or its investments, not abstract speculations.”⁴⁹⁹ On Peru’s own definition, the inquiry is whether the State has *behaved* in a manner affecting—to quote the words directly from Article 803—the “establishment, acquisition, expansion, management, conduct, operation and sale or other disposition of a foreign investor’s [*i.e.*, Scotiabank’s] investments in its territory.”⁵⁰⁰

⁴⁹⁶ Counter-Memorial, ¶¶ 335-346.

⁴⁹⁷ Counter-Memorial, ¶ 341.

⁴⁹⁸ Counter-Memorial, ¶ 338, footnote 467 (citing **R-0300**, Cambridge Dictionary, definition of “treatment”; **R-0301**, Longman Dictionary, definition of “treatment”; **R-0302**, Merriam-Webster Dictionary, definition of “treatment”).

⁴⁹⁹ Counter-Memorial, Section V.B.1.

⁵⁰⁰ Counter-Memorial, ¶ 328.

268. The answer to that inquiry is found in the evidence. The evidence shows that Peru has *behaved* in a manner that affected and was specifically directed at Scotiabank Peru’s Default Interest Amparo. Even if Peru’s undefined “materiality” threshold were to apply, the impact to Scotiabank Peru can only be viewed as “material.” State interference in a judicial process, and a court succumbing to that interference, cannot be anything short of “material.” Furthermore, such treatment impacted the ultimate outcome in November 2021 (denying Scotiabank Peru the refund of unconstitutional sums of default interest on disputed tax payments), as compared to how the Constitutional Court had resolved to decide the Default Interest Amparo by May 2017 in the 2017 Signed Judgment (in Scotiabank Peru’s favour on that very point).

269. The specific instances of the State’s treatment, described in the Memorial⁵⁰¹ and reiterated in Part Two, Sections I(B)-(C), II and III above, include the following (together, the “**Treatment**”⁵⁰²):

- (a) a senior individual within the Constitutional Court (*i.e.*, a public official and State actor) leaked an unpublished judgment in the Default Interest Amparo—because that public official and State actor is reported to have opposed the decision coming out in Scotiabank Peru’s favour—to a publication that is notoriously opposed to foreign investment;⁵⁰³
- (b) SUNAT (a State actor) was given advance notice of the leak and, instead of raising concern about the violation of the Constitutional Court’s procedures seeking to

⁵⁰¹ Memorial, ¶¶ 224-246, 291.

⁵⁰² Under customary international law, each of the acts described as the challenged Treatment constitutes conduct of a State organ and is attributable to the State of Peru pursuant to Article 4 of the ILC Articles on State Responsibility. See **CL-0105**, *Draft Articles on Responsibility of States for Internationally Wrongful Acts, with commentaries* (“**ARSIWA**”), art. 4. The conduct of a person entitled to exercise elements of governmental authority, acting in their capacity, is attributable to the state even if their conduct exceeds their authority. See art. 7, cmts. 5-7 (unauthorized conduct is attributable where a person acted under cover of their status and used means placed at their disposal on account of their status). The involvement of multiple State actors does not diminish attribution: international law treats the conduct of all State organs—judicial, executive, or otherwise—as unitary State conduct (art. 4(1) & cmts. 5-6); **CL-0090**, *CMS Gas Transmission Company v. The Republic of Argentina* (ICSID Case No. ARB/01/8), Decision of the Tribunal on Objections to Jurisdiction, 17 July 2003, ¶ 108. The inter-branch nature of the conduct constitutes coordinated or cumulative conduct by different State actors directed at a particular investor—here expressly singling out Scotiabank Peru on the basis of its foreign ownership—and remains attributable to the State as a whole. See **RL-0130**, *Resolute Forest Products v. Canada*, PCA Case No. 2016-13, Final Award, 25 July 2022 (“**Resolute Forest**”), ¶¶ 298-300.

⁵⁰³ See ¶¶ 33, 38, above.

protect its independence, its counsel (a public official and State actor) instead decided to make public statements condemning the 2017 Leaked Decision;⁵⁰⁴

- (c) following the leak, various State actors applied pressure on the Constitutional Court to reverse its position singling out Scotiabank Peru by reference to its foreign ownership and warning of catastrophic fiscal consequences affecting Peruvian nationals;⁵⁰⁵
- (d) the Constitutional Court (a State actor) then deliberately delayed deciding on Scotiabank Peru's Default Interest Amparo for more than four years, [REDACTED], and periodically acknowledging that the delays were attributable to the politicized environment around the case;⁵⁰⁶ and
- (e) when an opportunity presented itself upon the death of one of the Constitutional Court justices, after Scotiabank issued its Notice of Intent to commence this arbitration and without quorum, the Constitutional Court rushed out the 2021 Decision, finding against Scotiabank Peru (diametrically opposed to the 2017 Leaked Decision and the 2017 Signed Judgment) and then—ignoring binding precedent—barred Scotiabank Peru from pursuing its claim through the contentious administrative route.⁵⁰⁷

270. Peru makes three anomalous arguments regarding the alleged Article 803 treatment.

271. *First*, Peru contends that Scotiabank has “blur[red] the contours of the specific conduct of which it complains” in order to “set[] [its] case apart” from the comparator cases.⁵⁰⁸ But there is nothing obscure about the specific State behaviour—the Treatment—that forms the subject of the claim. Scotiabank has, from the outset, referred to specific, identifiable acts that are attributable to

⁵⁰⁴ See ¶¶ 64, 66-67, above.

⁵⁰⁵ See ¶¶ 71, 73-74, above.

⁵⁰⁶ See ¶¶ 88, 90-105, above.

⁵⁰⁷ See ¶¶ 116, 118-120, above.

⁵⁰⁸ Counter-Memorial, ¶ 341.

the Peruvian State and directed towards the Default Interest Amparo.⁵⁰⁹ Those acts provide a baseline level of State behaviour—again, the Treatment—to enable the comparative assessment that Article 803 requires.

272. *Second*, Peru argues that the 2021 Decision cannot constitute “treatment” for which it can be held liable under the FTA because the ultimate outcome (finding against Scotiabank Peru) purportedly aligned with the outcome of other default interest *amparo* cases resolved around the same time.⁵¹⁰ While Peru is wrong in its characterization of the case law (as discussed at length above),⁵¹¹ the more salient point is that the 2021 Decision was the final outcome of a series of State acts—the Treatment—that is the subject of the case. As set out at paragraph 249249249251 above, Peru’s focus on the substantive outcome of the decision misses the point. The 2021 Decision is inseparable from the process that produced it. Peru’s focus on other decisions that had the same ultimate outcome ignores the procedure and pathway—informed by the Treatment—that led to the 2021 Decision. It ignores the fact that—as shown above—*but for* the Treatment, the Constitutional Court would have issued a judgment in Scotiabank Peru’s favour in May 2017.⁵¹² In that sense, Peru’s position that the procedural history, from the time of the 2017 Leaked Decision to the 2021 Decision, is not “strange or suspicious” is not remotely capable of being credited.⁵¹³

273. *Finally*, Peru goes on to confusingly argue that—even if Scotiabank’s assertions regarding the State conduct at issue can be shown to have resulted in the 2021 Decision—that would still not be “treatment” for purposes of Article 803 because “it does not directly concern the Claimant or its investment.”⁵¹⁴ The Treatment all directly concerns Scotiabank Peru’s litigation before the Constitutional Court. Every single part of the Treatment—from the acts occurring external to the Constitutional Court by Government actors from other branches of the Peruvian State to the acts occurring within the Constitutional Court—concerns Scotiabank Peru’s Default Interest Amparo.

⁵⁰⁹ Memorial, ¶¶ 226-246, 291.

⁵¹⁰ Counter-Memorial, ¶ 344.

⁵¹¹ See ¶¶ 126, 128-129, above.

⁵¹² See ¶¶ 41-43, above; CER-Landa/Neyra #2, ¶¶ 47, 62-67.

⁵¹³ Counter-Memorial, ¶ 344.

⁵¹⁴ Counter-Memorial, ¶ 345.

274. Relatedly, Peru calls on the Tribunal to draw inferences from the fact that, in its telling, Scotiabank Peru did not avail itself of all available domestic remedies to challenge the Treatment, including by filing criminal complaints in connection with the leak and other allegations of State interference. Peru contends that Scotiabank Peru’s failure to exhaust all domestic remedies shows that the Treatment cannot be considered as prejudicial as Scotiabank now contends—and therefore, Peru says, is not Article 803 treatment at all.⁵¹⁵ But no such inference can be drawn. Although the leak of any judgment (advanced or not) is an assault on the independence of the judiciary,⁵¹⁶ the 2017 Signed Judgment showed that the Constitutional Court had decided to rule in Scotiabank Peru’s favour.⁵¹⁷ It was therefore in Scotiabank Peru’s interests not to disturb that finding and instead to call on the Court—as it did over forty times—to proceed to finally issue the decision.⁵¹⁸ Scotiabank Peru could not know that the totality of the Treatment would result in a complete reversal of the Court’s intended decision in the Default Interest Amparo until the Court finally issued the 2021 Decision in November 2021, under the dubious conditions described above.⁵¹⁹ As [REDACTED] explains in his second witness statement, Scotiabank’s strategy was deliberate: following the leak, Scotiabank’s objective was to mitigate any risk that might delay or hinder the formal issuance of the judgment.⁵²⁰ Initiating legal actions such as those proposed by Peru would have been, in [REDACTED] view, “a misguided strategy and contrary to our interests at that time.”⁵²¹

* * *

275. In sum, Peru advances broad definitions of “treatment” that plainly capture the type of State conduct that is at issue here.

⁵¹⁵ Counter Memorial, ¶¶ 168, 187, 343.

⁵¹⁶ See ¶¶ 55, 59(a)-(b), 75, above; CER-Landa/Neyra #2, ¶¶ 88, 92-93, 95, 99.

⁵¹⁷ See ¶¶ 41-43, 47, above; CER-Landa/Neyra #2, ¶¶ 32, 45-47, 97(c). See also Memorial, ¶ 80.

⁵¹⁸ Memorial, ¶ 143; CWS-[REDACTED] #1, ¶ 55; **C-0284**, Brief of Requests to the Constitutional Court (July 2018 to August 2021).

⁵¹⁹ See ¶ 175, above.

⁵²⁰ CWS-[REDACTED] #2, ¶ 21.

⁵²¹ CWS-[REDACTED] #2, ¶ 19.

III. The Domestic Comparators Are in “Like Circumstances” to Scotiabank Peru

276. The second element of the National Treatment test determines whether there are any Peruvian investors in “like circumstances” to enable the comparative assessment of treatment called for under Article 803 of the Treaty.

277. The Parties agree in principle that determining whether domestic comparators are in “like circumstances” requires a fact-specific inquiry into the surrounding situation as a whole.⁵²² As Scotiabank explained in its Memorial, the inquiry focuses on the treatment granted to the foreign investor and asks which domestic investors could have faced a comparable risk of similar treatment arising from similar measures.⁵²³

278. In its Memorial, Scotiabank explained that the appropriate group of Peruvian investors in “like circumstances” is the general class of taxpayers who—at the same time that Scotiabank Peru pursued its Default Interest Amparo—were also challenging the State’s application of accrued default interest beyond the maximum legal term through *amparo* actions at the Constitutional Court.⁵²⁴ In other words, the relevant comparator group is comprised of those Peruvian investors who had the same cause of action as Scotiabank, in the same forum, around the same time as the Default Interest Amparo was pending and therefore subject to risks of similar Article 803 “treatment.”⁵²⁵

279. To identify this group, Scotiabank’s constitutional law experts Dr. Landa and Prof. Neyra searched the Constitutional Court’s online case database, which contains all published decisions of the Court since 1996 (more than 10,000 cases).⁵²⁶ Then, with directions from Scotiabank, they applied three delimiting parameters: (i) subject matter: only *amparo* proceedings in which the taxpayer’s principal claim was the challenge to the constitutionality of default interest beyond the maximum legal term due to State-caused delays (*i.e.*, the same cause of action as pursued by

⁵²² Counter-Memorial, ¶ 352; Memorial, ¶¶ 249-250.

⁵²³ See Memorial, ¶¶ 249-250 (quoting **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**”), p. 541)).

⁵²⁴ Memorial, ¶ 254.

⁵²⁵ Memorial, ¶¶ 254-260.

⁵²⁶ Memorial, ¶ 256; CER-Landa/Neyra #1, ¶ 81 and footnote 96.

Scotiabank Peru);⁵²⁷ (ii) temporal scope: cases considered by the Constitutional Court from the date Scotiabank Peru’s Default Interest Amparo entered the Court (January 23, 2017) until the publication of the binding *Maxco* precedent (February 11, 2023), which conclusively settled the legal question (*i.e.*, cases that were temporally adjacent to Scotiabank Peru’s case and even cases that were decided subsequently);⁵²⁸ and (iii) nationality: to distinguish between domestic and foreign litigants, only individual citizens with Peruvian nationality and corporations incorporated in Peru whose majority shareholders were Peruvian entities or citizens, verified as of the date of the filing of their *amparo* action, were included.⁵²⁹ Through this filtering exercise, the experts identified a universe comprising sixty-two default interest *amparo* cases (the “**Universe of Comparable Cases**”), of which forty involved Peruvian-owned companies or Peruvian citizens (the “**Domestic Comparators**”).

280. Peru contends that Scotiabank has taken an overly broad approach and has selected a group of Domestic Comparators that is too large.⁵³⁰

281. Before addressing Peru’s substantive observations, there is an obvious weakness to its argument that Scotiabank was over inclusive in selecting its domestic comparator group. A broader comparator group is, evidently, less favourable to Scotiabank. If Peru were correct that the treatment accorded to Scotiabank Peru was ordinary and non-discriminatory, then it should be easier—not harder—to find comparable treatment in a broader sample of cases. The broader the group, the more likely it would be to contain cases in which a domestic taxpayer experienced the Treatment. Yet, even in what Peru contends is an overly broad group—encompassing every default interest *amparo* decided by the Constitutional Court over a six-year period—not a single such case exists.

282. Peru’s attempt to narrow down the comparator group until no comparator exists undermines the investment-liberalizing objectives of the FTA.⁵³¹ As Kenneth Vandavelde

⁵²⁷ Memorial, ¶ 256; CER-Landa/Neyra #1, ¶¶ 80-81; CER-Landa/Neyra #2, ¶ 149(a).

⁵²⁸ Memorial, ¶¶ 257-259; CER-Landa/Neyra #1, ¶¶ 82-85; CER-Landa/Neyra #2, ¶ 149(b).

⁵²⁹ Memorial, ¶ 260; CER-Landa/Neyra #1, ¶¶ 86-88; CER-Landa/Neyra #2, ¶ 149(c).

⁵³⁰ Counter-Memorial, ¶¶ 9, 353, 372, 377, 381.

⁵³¹ See Memorial, ¶ 250; **CL-0121**, *Olin Holdings Ltd v. Libya* (ICC Case No 20355/MCP), Final Award, 25 May 2018 (“*Olin Holdings*”), ¶ 202 (quoting **CL-0132**, *Total v. Argentina* (ICSID Case No. ARB/04/1), Decision on

observes, 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.”⁵³² Tribunals have consistently found that the “like circumstances” analysis should focus on the treatment accorded and the context in which the challenged measure was applied, without imposing a “materiality” requirement.⁵³³ The relevant circumstances surrounding the challenged State conduct (*i.e.*, the *treatment* at issue) serve as the benchmark for identifying domestic investors who faced a risk of similar treatment.⁵³⁴ As the tribunal in *Mercer v. Canada* explained, whether treatment is in “like circumstances” must be assessed with respect to “the particular measures in question,” including their rationale and policy objectives.⁵³⁵

283. Scotiabank’s group of Domestic Comparators focuses on precisely those Peruvian investors who were exposed to the same risk as Scotiabank Peru.⁵³⁶

284. Nevertheless, Peru challenges four aspects of Scotiabank’s group of Domestic Comparators: (a) the alleged lack of consideration of the Court’s composition; (b) the alleged omission of additional cases that, in Peru’s telling, were missed from the group of Domestic Comparators; (c) the appropriate date for determining the nationality of the plaintiffs in those

Liability, 27 December 2010, ¶ 210); **CL-0123**, *Pope & Talbot v. Government of Canada*, Award on the Merits of Phase 2, 20 April 2001 (“**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.

⁵³² **CL-0109**, Kenneth J. Vandewelde, *Bilateral Investment Treaties* (Oxford, Oxford University Press, 2010) (“**Vandewelde**”), s. 7.2.5 (explaining that the “like circumstances” test was not designed to “provide a technical defense for adverse treatment resulting from a discriminatory motive” wherever no sufficiently close comparator exists). See also **CL-0116**, *Methanex Corporation v. United States of America (UNCITRAL)*, Final Award, 2 August 2005, Part IV, Chapter B, ¶ 17 (“[I]t would be perverse to refuse to find and to apply less ‘like’ comparators when no identical comparators existed.”).

⁵³³ See Memorial, ¶¶ 250, 252-253. Tribunals have applied this principle across diverse contexts, confirming that “like circumstances” is not confined to a “materiality” threshold. See, *e.g.*, **CL-0120**, *Occidental Exploration and Production Company v. Republic of Ecuador* (LCIA Case No. UN3467), Final Award, 1 July 2004 (“**Occidental v. Ecuador**”), ¶¶ 168-175 (involving exporters subject to a uniform export tax scheme); **CL-0121**, *Olin Holdings*, ¶¶ 93, 130, 207 (involving manufacturers facing expropriation based on the geographical locale of their facilities); **CL-0121**, *Olin Holdings*, ¶¶ 93, 130, 207; and **CL-0003**, *Bilcon*, ¶¶ 654-695 (involving mining companies undergoing similar environmental assessments).

⁵³⁴ See Memorial, ¶ 253.

⁵³⁵ See Memorial, ¶ 250 (quoting **CL-0113**, *Mercer International Inc v. Canada* (ICSID Case No ARB(AF)/12/3,) Final Award, 6 March 2018 (“**Mercer**”), ¶¶ 7.20-7.21).

⁵³⁶ Memorial, ¶¶ 256-260.

cases; and (d) whether the plaintiffs in those cases qualify as domestic “investors.”⁵³⁷ Scotiabank addresses each of these baseless arguments below.

A. Peru’s Requirement of Perfect Identity of Constitutional Court Justices Is Unfounded and Outcome Irrelevant

285. Peru alleges that Scotiabank’s comparator group is “overly broad” because it comprises cases involving different compositions of the Constitutional Court, which Peru argues contributes to “widely different outcomes.”⁵³⁸ According to Peru, these variations in the Court’s composition should be considered “a differentiating factor” that would justify the “unfavorable outcome” in Scotiabank Peru’s case.⁵³⁹

286. The theory behind Peru’s argument is that it can use any personnel changes within the government body that is accused of according differential treatment as a differentiating factor justifying such treatment. However, Article 803 focuses on the *State’s* discriminatory treatment. Peru’s thesis that discriminatory conduct can only be found where there is a perfect identity of individuals responsible for the relevant conduct finds no support in the case law, nor in the written commentary about the national treatment standard.⁵⁴⁰

287. Nevertheless, Peru divides the time when Scotiabank Peru’s Default Interest Amparo was pending before the Constitutional Court—the period from January 2017 to November 2021—and the surrounding time periods into four periods based on variations in the Court’s composition⁵⁴¹ and contends that Scotiabank should have limited its comparator group to other cases that were

⁵³⁷ Counter-Memorial, ¶¶ 371-372.

⁵³⁸ Counter-Memorial, ¶¶ 353, 371-372.

⁵³⁹ Counter-Memorial, ¶¶ 371, 377.

⁵⁴⁰ See, e.g., **CL-0126**, *SD Myers*, ¶ 244; **CL-0078**, *Bjorklund*, p. 541; **CL-0109**, *Vandeveld*, s. 7.2.5.

⁵⁴¹ The four subperiods are: (i) May 2014–September 2021, prior to Justice Ramos’ death, when the Court included Justices Miranda Canales, Ledesma Narváez, Blume Fortini, Ramos Núñez, Sardón de Taboada, Espinosa Saldaña, and Ferrero Costa; (ii) September–December 2021, after Justice Ramos’ passing, when just six justices remained (when the Court issued the 2021 Decision in the Scotiabank Peru case); (iii) January–May 2022, following Justice Ferrero’s appointment as President; and (iv) May 2022–February 2023, when the Court was comprised of Justices Domínguez Haro, Morales Saravia, Monteagudo Valdez, Gutiérrez Ticse, Ochoa Cardich, Pacheco Zerga and Ferrero Costa. Counter-Memorial, ¶¶ 373-376.

decided in the September to December 2021 period, when the Constitutional Court’s composition was identical to the Court’s composition upon its issuance of the 2021 Decision.⁵⁴²

288. Peru’s argument is based on the flawed premise that the problematic “treatment” that is the subject of Scotiabank’s claim is, on a standalone basis, the 2021 Decision. It is because of that singular and misplaced focus that Peru contends, incorrectly, that Scotiabank’s case is akin to a further appeal from a domestic law court.⁵⁴³ But, in reality, any faithful review of Scotiabank’s Memorial makes clear that the 2021 Decision is the outcome of, and the final event in, a series of other State conduct that forms the “treatment” that Scotiabank challenges in the case—as described in detail above—that commenced in 2017 and culminated with the 2021 Decision (which resulted in the loss suffered by Scotiabank).⁵⁴⁴

289. Peru’s exclusive focus on the time period immediately adjacent to the issuance of the 2021 Decision is illogical because (i) it does not coincide with the entirety of the four-year period when Scotiabank Peru was subjected to the Treatment, and (ii) it ignores that, because of the multi-year delay following the leak (a delay that was caused by the leak and ensuing political media firestorm), the timing of the 2021 Decision itself was a result of the Article 803 “treatment” that is at issue. Indeed, the fact that the Default Interest Amparo was resolved by the Court’s composition during the brief September–December 2021 period—and not by the composition that was in place during the four years prior—is itself a direct consequence of Peru’s breach of the FTA.⁵⁴⁵ To accept Peru’s flawed reasoning, the Tribunal would have to hold that because the discriminatory Treatment produced unique procedural consequences, those circumstances render comparison impossible—and therefore no breach can ever be established. That is not a defence; it is a logical fallacy.

290. Likewise, Peru’s claim that only cases decided with the same quorum as the 2021 Decision—*i.e.*, a six-justice court with two abstentions—can appropriately be considered

⁵⁴² Counter-Memorial, ¶¶ 371-378.

⁵⁴³ See Counter-Memorial, ¶¶ 208-209.

⁵⁴⁴ See ¶¶ 33, 41-45, 53, 71, 90, 107, above.

⁵⁴⁵ The State interference froze the case for four years; that delay caused it to remain pending when Justice Ramos died; his death altered the composition of the Court; and the altered composition produced the result Peru now points to as the baseline for comparison. See ¶¶ 106, 113, **Error! Reference source not found.**, above.

comparators in like circumstances, is illogical.⁵⁴⁶ As Scotiabank has explained, the resolution of its *amparo* proceeding by a four-justice court (with three voting for the majority decision) was itself a violation of the Constitutional Court’s quorum requirements and one of the irregularities that form part of the Treatment.⁵⁴⁷ The irregularity is emphasized by Peru’s admission that only one other default interest *amparo*—*Citileasing*, another case involving a foreign investor—was resolved with a six-justice court, with two abstentions.⁵⁴⁸ Limiting the pool of eligible comparators in the way Peru suggests would be to allow Peru to use its own mistreatment of Scotiabank as a differentiating factor justifying differential treatment. That is, plainly, illogical.

291. In any event, the Domestic Comparators do account for similarities in the composition of the Court. As Dr. Landa and Prof. Neyra explain, the temporal delimitation adopted by Scotiabank largely coincides with the period during which six of the seven justices assigned to Scotiabank Peru’s case sat on the Court.⁵⁴⁹ From March 2017 to September 2021, the Court’s composition remained substantially stable, with the only change being the replacement of Justice Urviola by Justice Ferrero Costa—who abstained from the case—in 2018.⁵⁵⁰

B. Peru’s Identification of Additional Cases Involving Domestic Investors is Irrelevant

292. Peru contends that Scotiabank improperly omitted cases from the Universe of Comparable Cases that fall within the proposed time period advanced by Scotiabank (*i.e.*, the cases heard between January 23, 2017 to February 7, 2023).⁵⁵¹ Peru identifies four cases in its Counter-Memorial, while Mr. Bustamante’s report identifies twenty-eight additional cases and Prof. Sevillano’s report identifies another five that, according to Peru’s experts, would meet the criteria of the Universe of Comparable Cases.⁵⁵²

⁵⁴⁶ See Counter-Memorial, ¶ 379.

⁵⁴⁷ See ¶¶ 116, 118-120, above. See also, CER-Landa/Neyra #2, ¶¶ 116, 127-130, 147(a), 169.

⁵⁴⁸ See Counter-Memorial, ¶ 381.

⁵⁴⁹ CER-Landa/Neyra #1, ¶ 84; CER-Landa/Neyra #2, ¶ 166.

⁵⁵⁰ Memorial, ¶¶ 144, 159; RER-Bustamante, ¶ 261; [REDACTED]; CER-Landa/Neyra #2, ¶ 168.

⁵⁵¹ Counter-Memorial, ¶ 370.

⁵⁵² Counter-Memorial, ¶ 370; RER-Bustamante, ¶¶ 373-375; RER-Sevillano, Anexo 7.

293. Peru’s allegation that Scotiabank would have deliberately excluded cases to strengthen its position is baseless.⁵⁵³ Peru has not argued—much less proved—that any of these cases received treatment comparable to the Default Interest Amparo, which would be, on Peru’s own logic, the only reason to exclude them. Moreover, even accepting Peru’s flawed premise that the treatment at issue is the substance of the 2021 Decision,⁵⁵⁴ only four out of the thirty-seven cases raised by Peru and its experts can be considered apt comparators:

- (a) Of the four cases that Peru claims were overlooked by Scotiabank, and the five additional cases identified by Prof. Sevillano, none involved as their central issue a challenge to the constitutionality of default interest accruing during State-caused delays.⁵⁵⁵ Moreover, the five cases identified by Prof. Sevillano were all resolved prior to the entry of the Default Interest Amparo into the Constitutional Court.⁵⁵⁶
- (b) Of the twenty-eight cases raised by Mr. Bustamante,⁵⁵⁷ twenty-four were excluded because the taxpayer’s principal claim did not involve a challenge to the constitutionality of default interest accruing during State-caused delays.⁵⁵⁸ The remaining four cases were not included because they did not appear in the Constitutional Court’s online search engine at the time the original search was conducted—nor do they appear today—and so their exclusion was

⁵⁵³ See Counter-Memorial, ¶¶ 353, 370, 377-378.

⁵⁵⁴ See ¶¶ 135-136, above.

⁵⁵⁵ CER-Landa/Neyra #2, ¶¶ 160-162. As Dr. Landa and Prof. Neyra explain, in the *Pluspetrol* case, the taxpayer did not challenge the accrual of default interest during delays attributable to the State; in *Silver Lake*, the justices never addressed the merits, but rather only considered whether the “recurso de agravio constitucional” should be dismissed on procedural grounds; in *Alpha Consult*, the central debate was whether to resort to the contentious administrative route; and in *Bingo Plaza Camacho*, the dispute concerned the enforcement of prior judicial decisions, not default interest. CER-Landa/Neyra #2, ¶¶ 160-162.

⁵⁵⁶ CER-Landa/Neyra #2, ¶ 153.

⁵⁵⁷ According to Mr. Bustamante’s expert report, seventy comparable cases were decided during the presidency of Justice Ledesma (January 2020 to January 2022), while five comparable cases were decided during the presidency of Justice Ferrero (January 2022 to January 2023). RER-Bustamante, ¶¶ 373-375. Peru incorrectly cites Mr. Bustamante’s report to indicate that he identified seventy cases during the September 21, 2021 to December 2021 period alone, and five cases during the period from January 2022 to May 2022 alone. See Counter-Memorial, ¶¶ 374-375. In any event, Dr. Landa and Prof. Neyra have analyzed these seventy-five cases and, after taking into account overlap, concluded that Mr. Bustamante includes twenty-eight additional allegedly comparable cases not included in the Universe of Comparable Cases. CER-Landa/Neyra #2, ¶¶ 154-155.

⁵⁵⁸ CER-Landa/Neyra #2, ¶¶ 155-156. Specifically, twenty-one were resolved through interlocutory denial orders under the Vásquez Romero precedent—a procedurally distinct mechanism in which the justices did not address the merits and the parties were not afforded the right to be heard—and the other three do not concern default interest accruing during State-caused delays as their central issue. One of these latter three cases overlaps with the four cases raised by Peru and addressed above.

neither deliberate nor arbitrary.⁵⁵⁹ Upon analysis of these four cases, Dr. Landa and Prof. Neyra conclude that they comply with the criteria for inclusion in the Universe of Comparable Cases.⁵⁶⁰ However, only one of these four cases—*Supermercados Peruanos*—involves a Peruvian taxpayer, and has therefore been added to the Domestic Comparators.⁵⁶¹

294. Critically, none of the few additional cases that qualify for consideration reflect any of the irregularities (the Treatment) present in Scotiabank Peru’s case. The same is true even of those other cases identified by Peru and its experts that do not qualify for inclusion in the group of Domestic Comparators.

295. The conclusion is therefore unchanged. Regardless of whether one applies Peru’s narrowed parameters (*i.e.*, identical composition of the Court), or broader parameters, not a single Domestic Comparator experienced a leaked draft judgment, a sustained government pressure campaign, a four-year freeze on a signed decision, or a rushed reversal without lawful quorum.⁵⁶² The differential treatment is not a product of Scotiabank’s selection methodology. It is a product of the facts.⁵⁶³

C. The Nationality of the Domestic Comparators Has Been Determined at an Appropriate Time

296. As explained in its Memorial, Scotiabank determined the nationality of the domestic comparators as of the date each plaintiff filed its *amparo* action.⁵⁶⁴ This is the appropriate reference point because the Treatment evolved during the course of time when the Default Interest Amparo was pending before the Constitutional Court, and not just at the singular moment when the 2021 Decision was finally issued in November 2021.

⁵⁵⁹ CER-Landa/Neyra #2, ¶ 156 and fn. 300. These cases are: (i) *Duke Energy* (Exp. 03511-2017-PA/TC), (ii) *Supermercados Peruanos* (Exp. 00758-2019-PA/TC), (iii) *Compañía Minera Santa Luisa* (Exp. 00378-2020-PA/TC); and (iv) *Pfizer* (Exp. 01870-2021-PA/TC).

⁵⁶⁰ CER-Landa/Neyra #2, ¶ 156.

⁵⁶¹ CER-Landa/Neyra #2, ¶ 156.

⁵⁶² CER-Landa/Neyra #2, ¶ 137-139.

⁵⁶³ CER-Landa/Neyra #2, ¶ 137-139.

⁵⁶⁴ Memorial, ¶ 260.

297. Peru argues that because the only measure “having a material impact o[n] the Claimant’s investment” is the 2021 Decision, the nationality of the domestic comparator cases should be assessed at the time those decisions were issued.⁵⁶⁵ Peru goes on to identify two cases (*Volcan Compañía Minera SAA* and *Empresa Administradora Chungar SAC*) as examples of companies that became foreign-owned while their default interest *amparo* cases were pending before the Constitutional Court.⁵⁶⁶ According to Peru, those companies should have been considered foreign-owned and excluded from Scotiabank’s group of Domestic Comparators.

298. Peru’s argument fails, as we explain below. Nonetheless, Dr. Landa and Prof. Neyra have also re-examined the nationality of the domestic comparator cases, limiting the pool only to those cases brought by plaintiffs whose nationality remained Peruvian as of the date on which the Constitutional Court rendered its decision in each case.⁵⁶⁷ That resulted in a total of twenty-nine comparator cases.⁵⁶⁸ However, that does not change the ultimate outcome because Peru is unable to show that any of those Peruvian plaintiffs faced remotely comparable treatment to that received by Scotiabank Peru.

299. Moreover, contrary to Peru’s assertion, Scotiabank is not challenging the 2021 Decision in isolation. Rather, Scotiabank contests the series of events, described above, that occurred while the Default Interest Amparo was pending before the Constitutional Court up to and including the issuance of the 2021 Decision.⁵⁶⁹ Scotiabank Peru’s foreign ownership exposed it to the Treatment not just at the singular moment when the 2021 Decision was issued but also during the preceding four-and-a-half years leading up to its issuance.⁵⁷⁰

300. Accordingly, to capture the time when domestic investors with similar default interest cases before the Constitutional Court were exposed to risks of similar (or differential) treatment, it is necessary to identify the attributed nationality of the plaintiffs in the comparator cases from the

⁵⁶⁵ Counter-Memorial, ¶ 369.

⁵⁶⁶ Counter-Memorial, ¶ 369.

⁵⁶⁷ CER-Landa/Neyra #2, ¶ 175.

⁵⁶⁸ CER-Landa/Neyra #2, ¶ 175.

⁵⁶⁹ See Part Two, Sections I(B)-(C) and II, above; Memorial, Part Two, Sections IV-VI, Part Four, Sections II, IV.

⁵⁷⁰ See contemporaneous press statements referencing Scotiabank’s foreign nationality, cited in Appendix B; Memorial, ¶¶ 78-159, 289-294.

registration of their cases.⁵⁷¹ Once a domestic investor had lodged a default interest *amparo* similar to Scotiabank Peru’s case before the Constitutional Court, it became exposed to the relevant risks that are at the heart of the comparative exercise relevant here.

D. The Domestic Comparators Involve Plaintiffs Before the Constitutional Court that are Qualifying Peruvian Investors with Qualifying Investments

301. Peru contends, in conclusory fashion, that Scotiabank has failed to establish that the claimants in the domestic comparator cases qualify as “investors,” arguing that Scotiabank has improperly equated “domestic taxpayers” with “domestic investors.”⁵⁷² Peru asserts that interpreting “investors” as encompassing any domestic taxpayer would render the word ineffective and would be inconsistent with the object and purpose of the National Treatment standard of securing a level playing field between foreign investors and their domestic competitors.⁵⁷³ That contention is unfounded and is unsupported by a plain reading of the FTA.

302. Article 803 of the FTA requires each Party to accord treatment no less favourable than that it accords to “its own investors.” Article 847 defines “investor of a Party” as “a national or an enterprise of [a] Party, that seeks to make, is making or has made an investment.” In turn, “investment” is defined broadly to include “an enterprise” (itself defined as a range of types of entities incorporated under Peruvian law), all different types of interests in an enterprise, “real estate or other property, tangible or intangible, acquired in the expectation or used for the purpose of economic benefit or other business purposes,” “interests arising from the commitment of capital or other resources in the territory of a Party to economic activity in such territory,” and “any other claims to money.”⁵⁷⁴

303. The Domestic Comparators—which include both natural persons and commercial entities incorporated and operating in Peru—qualify as Peruvian “investors” under these definitions: they are nationals or enterprises of Peru that have made investments in Peru. Appendix C establishes how each Peruvian plaintiff with a default interest *amparo* included in the group of Domestic Comparators satisfies the definition of “investment” in the Treaty. The fact that these investors

⁵⁷¹ CER-Landa/Neyra #2, ¶ 176.

⁵⁷² Counter-Memorial, ¶ 367.

⁵⁷³ Counter-Memorial, ¶ 367.

⁵⁷⁴ C-0001, Free Trade Agreement between Canada and the Republic of Peru, art. 847.

pursued their *amparo* claims in their capacity as taxpayers does not strip them of their status as investors any more than Scotiabank ceases to be an investor because it pursued its Default Interest Amparo as a taxpayer. Peru’s argument would lead to the absurd result that Article 803 could never be invoked in connection with tax proceedings, because the domestic comparators would always be characterized as mere “taxpayers” rather than “investors.” That result is belied by the fact that the FTA excluded Article 803 from the scope of the exclusion for taxation measures.

304. At any rate, the Domestic Comparator Group includes Peruvian “investors” in the same industry (*i.e.*, banking) as Scotiabank Peru, such as *Interbank*, a Peruvian-owned bank operating for more than 120 years.⁵⁷⁵ The Court registered *Interbank*’s case in September 2019 and published its decision in April 2022—just five months after the 2021 Decision in Scotiabank Peru’s Default Interest Amparo.⁵⁷⁶ In the *Interbank* case, there was neither a Constitutional Court leak of a draft judgment nor any sign of any State interference during the proceeding. Notably, the Constitutional Court—comprised of the very same justices who had dismissed Scotiabank Peru’s *amparo*—ruled in favour of *Interbank*.⁵⁷⁷

* * *

305. Accordingly, “like circumstances” is a fact-specific, contextual inquiry focused on the challenged treatment and its surrounding circumstances, not a search for near-identical comparators. Arbitral jurisprudence cautions against an unduly narrow comparator definition or a “material” similarity threshold that would undermine the FTA’s investment-liberalizing purpose by allowing discrimination whenever no sufficiently close comparator exists. Tribunals therefore focus the analysis on the challenged treatment and the context in which the measure was applied to determine whether a domestic investor faced a comparable risk of differential treatment. Applying that standard, Scotiabank’s Domestic Comparators—Peruvian taxpayers bringing default interest *amparos* before the Constitutional Court during the relevant period—are in “like circumstances” with Scotiabank Peru.

⁵⁷⁵ **C-0370**, Judgment 44/2022 of the Plenary Session of the Constitutional Court in Case No. 03468-2019-PA/TC (*Interbank*); CER-Landa/Neyra #1, ¶ 159, footnotes 185-186, Annex II.

⁵⁷⁶ See Memorial, ¶ 286.

⁵⁷⁷ **C-0370**, Judgment 44/2022 of the Plenary Session of the Constitutional Court in Case No. 03468-2019-PA/TC (*Interbank*).

IV. Scotiabank's Investment Was Accorded Less Favourable Treatment than Peruvian Investors in Like Circumstances

306. The final element of the three-part test is establishing whether Scotiabank Peru was treated less favourably from the Domestic Comparators. This is primarily a factual inquiry and—in its defence—Peru relies on the same erroneous arguments that are addressed in Section III above, which are not repeated here.

307. The comparative assessment requires establishing an omission: that the unfavourable treatment accorded to Scotiabank Peru was not also accorded to domestic investors. In its Memorial, Scotiabank explained the work that it performed to make that showing based on the evidentiary record available to it, including the extensive review of over 150 Peruvian media outlets to determine whether there had been anything approaching the leak and State interference that had occurred in the Default Interest Amparo.⁵⁷⁸ Other documents that would bear on that comparison are exclusively in Peru's possession. In its Counter-Memorial, Peru could identify no similar treatment that was accorded to its domestic investors and submitted no documentary evidence establishing any type of similar treatment.⁵⁷⁹ Then, during the document production phase, Peru refused to produce documents regarding treatment accorded to the Domestic Comparators.⁵⁸⁰ With the evidentiary door now having been shut by Peru on this issue, the only conclusion that can be drawn is that the omission that Scotiabank sought to prove has now been established. No domestic investor faced anything analogous to the Treatment accorded to Scotiabank Peru, which is plainly less favourable.

308. Scotiabank addresses below the remainder of Peru's arguments going to the application of the third element of the test. *First*, in Section A, Scotiabank addresses two arguments that Peru makes going to the nature of the test: whether Scotiabank must establish discriminatory intent (which is, in any case, present here) and the correct level of comparative treatment accorded to domestic investors (which Peru incorrectly says should simply be the most average treatment, which is irrelevant because Scotiabank Peru received the worst treatment not just average

⁵⁷⁸ Memorial, ¶¶ 110-114.

⁵⁷⁹ See Counter-Memorial, ¶¶ 351-833; RER-Bustamante, ¶¶ 372-377.

⁵⁸⁰ Order No. 6, Annex I, Peru's Response to Request Nos. 9, 10(iii)-(iv), 12, 13, 14, 15, pp. 70-74, 76-77, 86-87, 89-91, 95-98, 101-102.

treatment). *Second*, in Section B, Scotiabank summarizes the facts establishing the differential treatment that gives rise to Peru’s breach of Article 803. *Third*, in Section C, Scotiabank explains that there is no rational basis for according less favourable treatment to Scotiabank Peru.

A. The Test That Is Applicable to the Comparative Assessment of Peru’s Treatment of its Domestic Investors

a. Scotiabank Need Not Establish Discriminatory Intent (Even Though it Is Established Here)

309. In its Memorial, Scotiabank explained that the appropriate legal standard for determining whether, for purposes of Article 803 of the Treaty, a foreign investor received “less favourable” treatment than domestic investors in like circumstances is objective in nature.⁵⁸¹ Under this test, a tribunal examines the “effect” of the State’s conduct on the foreign investor to determine whether it created an adverse impact compared to domestic investors in like circumstances.⁵⁸² As the tribunal in *Feldman v. Mexico* observed, “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.”⁵⁸³ Thus, a facially neutral measure that nonetheless adversely affects a foreign investor (*de facto* discrimination) suffices, and tribunals may infer or presume discriminatory intent.⁵⁸⁴

310. Peru contends that showing adverse effects alone is not sufficient and that Article 803 “requires a showing of express or inferred intent to discriminate for a finding on liability.” Peru argues that Scotiabank’s claim must fail because, according to Peru, discriminatory intent has not been established.⁵⁸⁵

311. However, the overwhelming weight of arbitral authority on the national treatment test concludes that proof of discriminatory intent is not a separate element that a claimant must independently establish.⁵⁸⁶ Thus, an effects-based analysis that reveals differential treatment not

⁵⁸¹ Memorial, ¶ 263.

⁵⁸² Memorial, ¶ 263.

⁵⁸³ Memorial, ¶ 265; **CL-0112**, *Marvin Roy Feldman Karpa v. United Mexican States* (ICSID Case No. ARB(AF)/99/1), Award, 16 December 2002 (“*Feldman*”), ¶¶ 181, 183.

⁵⁸⁴ See Memorial, ¶¶ 261, 265, 267, 391.

⁵⁸⁵ Counter-Memorial, ¶¶ 383, 387.

⁵⁸⁶ See Memorial, ¶ 263.

justified by legitimate policy considerations is sufficient to establish a breach of the national treatment standard. Intent may be inferred from the differential treatment itself, but it need not be proven as an independent element.⁵⁸⁷

312. Peru’s attempt to elevate intent into a standalone requirement would effectively immunize States from liability for *de facto* discrimination—precisely the type of discrimination that is hardest to detect and that the national treatment standard is designed to prevent.⁵⁸⁸ As the *Corn Products v. Mexico* tribunal noted, “intention to discriminate is not a requirement for a breach” of the national treatment obligation.⁵⁸⁹ The *Bilcon v. Canada* tribunal similarly affirmed that a national treatment claim “does not require a demonstration of discriminatory intent.”⁵⁹⁰

313. Peru relies heavily on Canada’s Non-Disputing Party Submissions in *Thunderbird* and *Espíritu Santo* for the proposition that discriminatory intent lies “at the core” of the National Treatment standard.⁵⁹¹ But Canada does not state that the investor must prove discriminatory intent as a standalone requirement for there to be a breach of the National Treatment standard. What Canada states is that the “like circumstances” test is the mechanism through which nationality-based discrimination is identified—by comparing the treatment of the foreign investor with that of domestic investors in all relevant respects except nationality.⁵⁹² If, after accounting for all

⁵⁸⁷ See Memorial, ¶ 263; **CL-0127**, *Siemens Award*, ¶ 321 (“The tribunal concurs that intent is not decisive or essential for a finding of discrimination”); **CL-0195**, *RFCC v. Morocco* (ICSID Case No. ARB/00/6), Award, 22 December 2003, ¶ 74 (“Yet even if there was no intentional discriminatory conduct as such, there may still have been a violation of the obligation to grant foreign investors treatment no less favorable than that accorded to domestic investors”) (translated from French).

⁵⁸⁸ **CL-0112**, *Feldman*, ¶¶ 181, 183 (“However, 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.”).

⁵⁸⁹ **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**”), ¶ 138.

⁵⁹⁰ **CL-0003**, *Bilcon*, ¶ 716.

⁵⁹¹ Counter-Memorial, ¶ 384-388 (citing Canada’s Non-Disputing Party Submissions in *Thunderbird v. Mexico* and *Espíritu Santo v. Mexico*).

⁵⁹² **RL-0099**, *International Thunderbird Gaming Corporation v. The United Mexican States*, Ad hoc UNCITRAL arbitration, Submission of the Government of Canada Pursuant to NAFTA Article 1128, 21 May 2004, ¶ 17 (“In the case of [the National Treatment standard], its clear object is the prohibition of discrimination on the basis of nationality. It is not concerned with distinctions in treatment that are based on some consideration other than nationality. The expression ‘in like circumstances’ is critical in applying [the National Treatment standard] to prohibit discrimination based on nationality.”); see also **RL-0134**, *Espíritu Santo Holdings, LP and L1bre Holding, LLC v. United Mexican States*, ICSID Case No. ARB/20/13, Non-Disputing Party Submission of the Government of Canada

legitimate differentiating factors, the foreign investor still received less favourable treatment, the inference of nationality-based discrimination arises.⁵⁹³

314. Peru also relies on an outlier case, *The Loewen Group v. United States*, which endorsed a higher, subjective standard requiring “demonstrable and significant indications of bias and prejudice on the basis of nationality.”⁵⁹⁴ As discussed below, there are such indications here. But, for purposes of determining the correct test, tribunals and commentators overwhelmingly reject *Loewen* and endorse the effects-based, objective test as the appropriate standard for “treatment no less favourable.”⁵⁹⁵ For example, the tribunal in *Occidental v. Ecuador* found a violation of the national treatment standard even after concluding that the differential treatment did not stem from

Pursuant to NAFTA Article 1128, 21 March 2023 (“*Espíritu Santo v. Mexico*”), ¶ 31 (“Determining the existence of ‘like circumstances’ [...] requires a detailed consideration of the particular facts of each case and an examination of the totality of the circumstances in which treatment was accorded in order to determine whether those circumstances are ‘like.’”).

⁵⁹³ **RL-0099**, *International Thunderbird Gaming Corporation v. The United Mexican States*, Ad hoc UNCITRAL arbitration, Submission of the Government of Canada Pursuant to NAFTA Article 1128, 21 May 2004, ¶ 18; **RL-0134**, *Espíritu Santo v. Mexico*, ¶ 31.

⁵⁹⁴ Counter-Memorial, ¶ 390, citing **CL-0130**, *The Loewen Group, Inc and Raymond L. Loewen v. United States of America* (ICSID Case No. ARB(AF)/98/3) Award, 26 June 2003, ¶ 139. It bears noting that, although the tribunal found that the test failed on the “like circumstances” analysis, its reasoning suggests that it would have found the presence of discriminatory intent as the Tribunal concluded that the “trial court permitted the jury to be influenced by persistent appeals to local favoritism as against a foreign litigant.” *Ibid.* ¶ 136. Furthermore, after concluding that the methods employed by the jury and countenanced by the judge were the antithesis of due process, the Tribunal highlighted that it is “the responsibility of the courts of a State to ensure that litigation is free from discrimination against a foreign litigant and that the foreign litigant should not become the victim of sectional or local prejudice.” See *ibid.*, ¶¶ 39, 54, 119-123, 136, 140. Tribunals endorsing this subjective standard remain in the significant minority. See **CL-0100**, *Gramercy Funds Management LLC and Gramercy Peru Holdings LLC v. Republic of Peru* (ICSID Case No. UNCT/18/2) Final Award, 6 December 2022 (“*Gramercy*”), ¶¶ 1238-1239 (finding that the national treatment standard only protected against “nationality-based discriminatory measure[s]”); **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). See also Memorial, ¶ 263 and the cases cited therein.

⁵⁹⁵ See Memorial, ¶¶ 263-265, 267-270. The majority of tribunals have endorsed the objective test. See **CL-0123**, *Pope & Talbot*, ¶ 78 (holding that “[d]ifferences in treatment will presumptively violate [the national treatment standard in NAFTA]”); **CL-0029**, *Thunderbird*, ¶ 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 (endorsing **CL-0126**, *S.D. Myers*); **CL-0112**, *Feldman*, ¶ 173; **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*, p. 541; **CL-0125**, Rudolf Dolzer & Christoph Schreuer, “Standards of Protection” in *Principles of International Investment Law*, 2nd ed (Oxford: Oxford University Press, 2012) (“*Dolzer and 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 (“[t]he investor need not demonstrate protectionist intent or motive”); **CL-0088**, Chin Leng Lim, Jean Ho & Martins Paparinskis, *International Investment Law and Arbitration* (Cambridge: Cambridge University Press), Chapter 13, Section 2.2 (“intent is neither sufficient nor necessary”).

an intent to discriminate against the foreign investor.⁵⁹⁶ Likewise, in *Feldman v. Mexico*, the tribunal concluded that Mexico's denial of tax rebates violated the national treatment obligation, although the law was facially neutral and did not expressly discriminate against the foreign investors.⁵⁹⁷ The tribunal there observed that the similarly worded national treatment standard contained in NAFTA made it "sufficient to show less favourable treatment for the foreign investor than for domestic investors in like circumstances," without establishing the reason for that less favourable treatment.⁵⁹⁸

315. Peru also cites the *Resolute Forest Products v. Canada* tribunal for the proposition that arguments based on "sole adverse effect" on a foreign investor "cannot be accepted without more."⁵⁹⁹ But *Resolute Forest* is distinguishable on its facts because the foreign investor was not even subject to the jurisdiction of the sub-national government whose conduct was allegedly discriminatory.⁶⁰⁰ That the sub-national government body had no awareness of the foreign investor made it more difficult to find discrimination and more difficult to find that the government body had accorded any "treatment" at all.⁶⁰¹

316. That is plainly not the situation here, given that all elements of the Treatment were directed with specificity to Scotiabank Peru's Default Interest Amparo and the bank was repeatedly singled out by government officials as a "Canadian capital bank" and a "foreign bank."⁶⁰² There is no question that the Peruvian Government knew that its conduct was directed at a foreign-owned entity. Government officials contrasted Scotiabank Peru's interests with those of "all Peruvians,"⁶⁰³ warning that money paid to the foreign bank would come at the expense of "health, education and

⁵⁹⁶ See **CL-0120**, *Occidental v. Ecuador*, ¶¶ 141-143.

⁵⁹⁷ **CL-0112**, *Feldman* ¶¶ 177-178.

⁵⁹⁸ **CL-0112**, *Feldman*, ¶ 181.

⁵⁹⁹ Counter-Memorial, ¶ 387, citing **RL-0130**, *Resolute Forest*, ¶ 555.

⁶⁰⁰ **RL-0130**, *Resolute Forest*, ¶ 598.

⁶⁰¹ See **RL-0130**, *Resolute Forest*, ¶ 555.

⁶⁰² See ¶¶ 26(d), 74, above, and Appendix B: Political Interference Statements.

⁶⁰³ Memorial, ¶ 101; **C-0283**, "Sunat: A commission will be created to resolve disputes with large companies," *El Comercio* (June 5, 2018); **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).

work”⁶⁰⁴ and “the development of projects and public policies that benefit all Peruvians.”⁶⁰⁵ A member of Congress attacked Scotiabank Peru’s own lawyers for representing a “Canadian capital bank” against “the interests of the Peruvian State.”⁶⁰⁶ The Ombudsman singled out Scotiabank by name, warning that “the State has to be very careful” with companies disputing tax assessments before the Constitutional Court.⁶⁰⁷ And the Minister of Economy publicly called on “Messrs. of Scotiabank” to “make a gesture for Peru and pay your debts.”⁶⁰⁸

317. Peru’s reliance on *Gramercy v. Peru* is equally inapposite on this point. The tribunal’s national treatment analysis comprised only two paragraphs, as it had already found a breach on another basis. It then found on the facts that the relevant treatment “affects Peruvian and US investors equally.”⁶⁰⁹ That conclusion cannot be sustained here, given the differential treatment.

318. Finally, Peru’s reliance on the principle from *S.D. Myers v. Canada* that “practical impact is required to produce a breach of Article 1102, not merely a motive or intent” does not assist its case.⁶¹⁰ Scotiabank does not dispute that “impact” is required. That “impact” is already described above.⁶¹¹

⁶⁰⁴ Memorial, ¶ 291 (June 16, 2017 Statement of José Escalante); **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).

⁶⁰⁵ Memorial, ¶ 101; **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).

⁶⁰⁶ Memorial, ¶ 103; [REDACTED]

⁶⁰⁷ Memorial, ¶ 291 (October 23, 2017 Statement of Walter Gutiérrez); **C-0261**, “Walter Gutiérrez: ‘The act of corruption damages public reputation’,” *La República* (October 23, 2017).

⁶⁰⁸ Memorial, ¶ 108; **C-0321**, “Francke to large tax debtors: We will use all legal means to ensure compliance,” *El Peruano* (August 9, 2021).

⁶⁰⁹ **CL-0100**, *Gramercy*, ¶¶ 1238-1239.

⁶¹⁰ Counter-Memorial, ¶ 263 (citing **CL-0126**, *S.D. Myers*, ¶ 254).

⁶¹¹ See Part Two, Section III, above.

b. Scotiabank Was Accorded the Worst Treatment as Compared to Domestic Investors, and so Peru’s Argument That It Was Only Owed “Average” Treatment is Irrelevant

319. As explained in the Memorial, the appropriate yardstick for determining 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.⁶¹²

320. Peru disagrees and contends that Article 803 of the FTA does not guarantee foreign investors treatment superior to the “average treatment” accorded to national investors generally, but fails to explain how “average treatment” should be measured.⁶¹³ Peru argues that: (i) the FTA’s text supports its interpretation of “average treatment” accorded to national investors generally;⁶¹⁴ (ii) the purpose of Article 803 is to ensure a level playing field, not a particular substantive standard;⁶¹⁵ and (iii) NAFTA jurisprudence cited by Scotiabank in its Memorial is inapplicable due to differences in treaty language.⁶¹⁶ Scotiabank addresses these meritless arguments in turn below.

321. At the outset, any debate between “best” and “average” treatment is purely academic in this case. Even if the Tribunal were to adopt “average” treatment instead of “best,” Peru would still breach Article 803 because—as discussed in the next section—not a single Domestic Comparator received treatment remotely similar to Scotiabank Peru.⁶¹⁷ The Treatment accorded to Scotiabank Peru is not decidedly average—it was severely detrimental and unique. Whether measured against the best, average, or worst treatment accorded to any domestic comparator, the result is the same: Scotiabank Peru was singled out for treatment that no comparably situated domestic investor experienced. Indeed, while devoting considerable space to this moot debate, Peru has not identified any practical difference between the “best” treatment and the “average” treatment as applied to the facts of this case.⁶¹⁸

⁶¹² Memorial, ¶ 271.

⁶¹³ Counter-Memorial, ¶¶ 392-400.

⁶¹⁴ Counter-Memorial, ¶ 394.

⁶¹⁵ Counter-Memorial, ¶ 397.

⁶¹⁶ Counter-Memorial, ¶¶ 398-399. Peru also asserts that the obligation created under Scotiabank’s reading of “treatment no less favourable” would be “unreasonable and excessively burdensome for the Respondent.” Counter-Memorial, ¶ 392.

⁶¹⁷ See Part Four, Section IV(B), below.

⁶¹⁸ See Counter-Memorial, ¶¶ 392-400.

322. ***The text of the FTA.*** Peru argues that if the Parties had intended the national treatment clause to guarantee the best treatment available to domestic investors, they would have expressly stated so in the text.⁶¹⁹ Peru refers to the non-disputing party submissions in *Mason v. Korea* and *Michael Ballantine v. Dominican Republic*, but they do not support its position.⁶²⁰ Rather, these submissions confirm that the scope of domestic investors used to determine “treatment” is limited by the “like circumstances” requirement and is not measured against national investors generally.

323. The drafters included *no language* defining how to measure “no less favourable” treatment, specifying neither the “best” nor the “average” treatment in the FTA.⁶²¹ The drafters intentionally refrained from prescribing a rigid formula, thereby requiring tribunals to interpret the standard in light of the treaty’s object and purpose, as addressed below.⁶²²

324. ***The object and purpose of the National Treatment provision.*** Scotiabank explained in its Memorial that the purpose of the national treatment standard is to prevent discriminatory treatment and ensure competitive equality between foreign and domestic investors.⁶²³ Peru argues that Scotiabank’s interpretation would allow investors to “identify a single outlier” to establish liability

⁶¹⁹ Counter-Memorial, ¶ 395.

⁶²⁰ Counter-Memorial, ¶¶ 395-396; **RL-0127**, *Mason Capital*, Submission of the United States of America, 1 February 2021, ¶ 31. **RL-0126**, *Michael Ballantine and Lisa Ballantine v. The Dominican Republic*, PCA Case No 2016-17, Submission of the United States of America, 6 July 2018, ¶ 15 (“Nothing in Article 10.3 requires that investors or investments of investors of a Party, regardless of the circumstances, be accorded the best, or most favorable, treatment given to any national investor or any investment of a national. The appropriate comparison is between the treatment accorded a foreign investment or investor and a national investment or investor in like circumstances. This is an important distinction intended by the Parties”). The passage quoted affirms that the national treatment provision does not obligate a State to treat foreign investors or investments with the best or most favourable treatment of any national investor or investment “*regardless of circumstances*”; rather the appropriate comparison is between the treatment accorded the foreign investor and the treatment accorded those national investors or investments “*in like circumstances*” (emphasis added).

⁶²¹ Article 803 of the FTA could have included the language “no less favourable than the best level of treatment,” just as it also could have included the language “no less favourable than [the treatment] that it accords generally” or incorporated the phrase “average” or “median treatment.” It did not.

⁶²² Peru also relies on the absence from the FTA of an equivalent to NAFTA Article 1104, which requires each Party to accord investors “the better of the treatment required by Articles 1102 and 1103.” See Counter-Memorial, ¶ 398. However, Article 1104 serves a different function: it addresses the relationship between the national treatment and most-favoured-nation obligations, requiring that investors receive the more favourable of the two. Its absence from the FTA says nothing about how “no less favourable” treatment should be measured within Article 803 itself. The question of whether a foreign investor is entitled to the best or average treatment accorded to domestic comparators in like circumstances is a question of the interpretation of Article 803, not of the interplay between national treatment and MFN—which is what Article 1104 addresses.

⁶²³ Memorial, ¶¶ 219, 251, 252(a) (quoting **CL-0120**, *Occidental v. Ecuador*, ¶ 175).

and confer a “competitive advantage” over most domestic competitors.⁶²⁴ This approach, however, fails to give effect to the provision’s object and purpose. By requiring the “best treatment” afforded to any domestic investor in like circumstances, the provision fulfills its purpose of preventing differential treatment of foreign investors and safeguarding them against nationality-based discrimination, as noted by Newcombe and Paradell.⁶²⁵ Any lesser standard would permit States to grant super-preferential treatment to national champions while avoiding liability by citing less favourable treatment of other comparable domestic investors.⁶²⁶ Accordingly, the “best treatment” standard best fulfills the purpose of the National Treatment provision.⁶²⁷ As for Peru’s characterization of the “best treatment” standard as “unreasonable and excessively burdensome,”⁶²⁸ this argument rings hollow in a case where the treatment Scotiabank Peru received was unlike anything experienced by any domestic comparator.

325. **NAFTA case law is relevant.** Peru argues that NAFTA case law is irrelevant because the text of NAFTA’s national treatment provision at Article 1102(3) requires a host state to accord a foreign investor “treatment no less favorable than the most favorable treatment accorded,” whereas Article 803 of the FTA does not contain this language.⁶²⁹ Contrary to its position here, Peru has extensively relied on NAFTA cases for interpreting other aspects of the National Treatment standard in the FTA.⁶³⁰ Tribunals have endorsed the “best treatment” standard both within and outside the NAFTA context.⁶³¹ For example, in *Olin Holdings v. Libya*, the tribunal applied the “best treatment” standard under a treaty with language materially identical to Article 803 of the

⁶²⁴ Counter-Memorial, ¶ 397.

⁶²⁵ Memorial, ¶ 272, footnote 434 (quoting **CL-0079**, *Newcombe and Paradell*, p. 187).

⁶²⁶ See Memorial, ¶ 272, footnote 434 (quoting **CL-0079**, *Newcombe and Paradell*, p. 187).

⁶²⁷ Peru’s reference to the *Abed El Jaouni v. Lebanon* tribunal decision is also misplaced. In that case, the claimant sought to rely on a single outlier that had received uniquely favourable treatment for reasons unrelated to the nationality of the claimant. That is not this case here. On the contrary, the outlier in this case was Scotiabank Peru. See Counter-Memorial, ¶ 397, footnote 553.

⁶²⁸ Counter-Memorial, ¶ 392.

⁶²⁹ Counter-Memorial, ¶ 398.

⁶³⁰ Counter-Memorial, ¶ 330 (citing **RL-0130**, *Resolute Forest* for the National Treatment standard objectives); Counter-Memorial, ¶ 333 (citing **RL-0134** *Espíritu Santo v. Mexico* and **CL-0113**, *Mercer* for the burden of proof in National Treatment claims).

⁶³¹ **CL-0121**, *Olin Holdings*, ¶¶ 188-193, 209-215; see Memorial, ¶ 272.

FTA.⁶³² Accordingly, NAFTA jurisprudence is not inapposite for determining the meaning of the Article 803 of the FTA.

B. Peru Accorded Scotiabank Peru “Treatment Less Favourable” Than That Which It Accorded to the Domestic Comparators

326. The various academic debates that Peru advances in connection with the appropriate group of domestic comparators is, as described above, moot. That is because—regardless of how the group of comparators grows or shrinks (based on Peru’s contentions of cases that have been missed or cases having been improperly included)—none of the Domestic Comparators faced treatment remotely similar to the Treatment accorded to Scotiabank Peru. That inquiry is a factual one and is at the heart of the case. In the table below, Scotiabank summarizes (i) the specific unfavourable treatment to which Scotiabank Peru was subjected, (ii) the key supporting evidence, buttressed by the factual background, and (iii) the evidentiary record regarding the lack of comparable treatment accorded to the Domestic Comparators.

⁶³² **CL-0121**, *Olin Holdings*, ¶¶ 188-193, 209-215; see Memorial, ¶ 272; see also Cyprus-Libya BIT, art. 3.2 (“Each Contracting Party shall in its territory accord to investors of the other Contracting Party, as regards to their management, maintenance, use, enjoyment, expansion or disposal of their investment, treatment not less favourable than that accorded to its own investors or to investors of any third State, whichever is more favourable to the investors concerned”).

Article 803 – Less Favourable Treatment accorded to Scotiabank Peru	Supporting Evidence/Discussion	Treatment accorded to Domestic Comparators
A senior individual within the Constitutional Court leaked an unpublished decision in the Default Interest Amparo—because that individual is reported to have opposed the decision coming out in Scotiabank Peru’s	Scotiabank has established that the Constitutional Court’s draft judgment in the Default Interest Amparo—reflecting, as was reported at the time, a decision that was reached in Scotiabank Peru’s favour—was leaked to a publication notoriously hostile to foreign investors by a senior individual within the Constitutional Court who opposed the outcome (likely [REDACTED]). Moreover, SUNAT was aware of the leak before the Hildebrandt Article was published and, rather than seeking to halt the publication, it used the opportunity to speak out strongly against the Constitutional Court. ⁶³⁴	Scotiabank has consulted more than 150 news and media outlets to determine whether an authentic official deliberative document was leaked to the press in any of the Domestic Comparators.⁶³⁷ There is no evidence of any comparable leak. Dr. Landa and Prof. Neyra independently conducted research of publicly available media sources and concluded that they were unable to identify any evidence of a leak in any Domestic Comparator case.⁶³⁸ Peru did not submit any evidence of a leak of a confidential deliberative document in any Domestic Comparator. Scotiabank then requested Peru to produce internal Constitutional Court documents regarding leaks of

⁶³⁴ On the authenticity of the Leaked Decision, *see* C-0200, C-0200(a) (Hildebrandt Article and 2017 Leaked Decision); [REDACTED]; CER-Landa/Neyra #1, ¶¶ 108-112; CER-Landa/Neyra #2, ¶¶ 44-47. On the anti-foreign investment profile of Hildebrandt, Peru does not dispute Hildebrandt’s hostility to foreign investment. *See* Counter-Memorial, ¶¶ 133, 155. *See also* CWS-[REDACTED], ¶ 20; C-0498, “Humala Moves to the Center,” Hildebrandt en sus trece (April 15, 2011); C-0541, “Market Economy,” by C. Hildebrandt (August 17, 2007); C-0518, “Powerful gentlemen: The Constitutional Court has forgiven 65 million in taxes owed by UPC and more than 4 million by Universidad Privada del Norte, both of which belong to the powerful U.S. based holding company Laureate Education. Only two justices of the Constitutional Court voted against the decision,” Hildebrandt en sus trece (July 7, 2016). On a senior individual of the Constitutional Court—[REDACTED]—being the source of the leak, *see* ¶¶ 56-58, above; *see also* C-0200 (Hildebrandt Article); [REDACTED]; C-0081, LinkedIn profile of [REDACTED]; C-0288, Email from [REDACTED] (November 25, 2018); C-0519, “Scandal at the Constitutional Court: Leak of Justice Marianella Ledesma’s dissenting opinion sparks the fury and threats of Eloy Espinosa-Saldaña. At stake are the 65 million soles in taxes that the Court is poised to forgive for the Peruvian University of Applied Sciences!,” Hildebrandt en sus trece (August 11, 2016); C-0298, “I was offered to stay if I voted for Keiko’s freedom,” Hildebrandt (September 27, 2019); C-0048, Constitutional Court Rules; CWS-[REDACTED] #1, ¶ 50; CER-Landa/Neyra #2, ¶ 80, 84-85, 88, 114(b). On the SUNAT’s participation in the Hildebrandt Article and first-hand knowledge of the leak, *see* C-0200 (Hildebrandt Article); C-0533, C-053 (Emails from Hildebrandt to SUNAT/Payet); [REDACTED] #1, ¶ 34; CWS-[REDACTED] #2, ¶¶ 6-7, 9.

⁶³⁷ Memorial, ¶ 111, Appendix 2: Peruvian Media Sources.

⁶³⁸ CER-Landa/Neyra #1, ¶ 118.

Article 803 – Less Favourable Treatment accorded to Scotiabank Peru	Supporting Evidence/Discussion	Treatment accorded to Domestic Comparators
favour—to a publication that is notoriously opposed to foreign investment, in coordination with SUNAT whose counsel condemned the 2017 Leaked Decision in the Hildebrandt Article. ⁶³³	Peru has conducted no investigation in connection with the leak. ⁶³⁵ Peru's documents show that the Court's decision, finding in Scotiabank Peru's favour, was at such a state of finality that it bore the signatures of two justices. ⁶³⁶	confidential deliberative documents in the Domestic Comparator cases. Peru objected to this request. ⁶³⁹ Peru—which has access to all Constitutional Court files and records—was uniquely positioned to identify any such instances of leaks involving the Domestic Comparators. Its failure to do so is telling. For the Reply, Scotiabank conducted an updated review of publicly available Peruvian news and media sources and confirmed the findings from the Memorial: no evidence of any leak of a confidential Constitutional Court document was identified in any Domestic Comparator case.
Following the leak, various Government actors applied pressure on the Constitutional Court	Scotiabank has documented multiple instances of a coordinated public campaign by officials from the executive and legislative branches against the Court's decision to rule in Scotiabank Peru's favor, contrasting Scotiabank Peru's foreign ownership with the interests of the Peruvian State and its citizens. ⁶⁴¹ Peru does not	Scotiabank has consulted more than 150 news and media outlets to determine whether similar statements were made regarding the Domestic Comparators' cases before the Court. No comparable adverse instances of judicial interference by

⁶³³ See Part Two, Section I, above.

⁶³⁵ C-0701, Peru's Letter to Scotiabank regarding Peru's Document Production in ICSID Case No. ARB/22/30 – Bank of Nova Scotia v. Republic of Peru (January 30, 2026, pp. 4-5; Procedural Order No. 6, Annex 1, Claimant's Request No. 18, pp. 111-116.

⁶³⁶ On the finality of the 2017 Leaked Decision *see* C-0200; C-0697; C-0527; C-0529; C-0528; C-0530; C-0443 (as described in fn. 634 above); CER-Landa/Neyra #2, ¶¶ 63-65; Luber I, ¶¶ 30-66. *See also* C-0262, C-0263 (Video and transcript of IACHR hearing); C-0298 "I was offered to stay if I voted for Keiko's freedom," Hildebrandt (September 27, 2019).

⁶³⁹ Procedural Order No. 6, Annex 1, Peru's Response to Request No. 9, pp. 66-70.

⁶⁴¹ *See* Memorial, ¶¶ 291-294 and the table below paragraph 291. Evidence shows that the pressure campaign was broad and sustained, involving the President, Ministry of Economy, the most senior legal advisors of SUNAT, multiple members of Congress, and the Ombudsman. On the outrage expressed by the Constitutional Court justices concerning [REDACTED] meeting with the MEF, following statements made by a MEF representative regarding the Default Interest Amparo, *see* [REDACTED] For the meetings to discuss the Default Interest Amparo while the proceeding was still pending held

Article 803 – Less Favourable Treatment accorded to Scotiabank Peru	Supporting Evidence/Discussion	Treatment accorded to Domestic Comparators
to reverse its position, singling out Scotiabank Peru by reference to its foreign ownership and warning of catastrophic fiscal consequences affecting Peruvian nationals.⁶⁴⁰	deny that any of these officials’ statements—describing the 2017 Leaked Decision as “illegal,” “dangerous,” and a “betrayal to the State”—took place.⁶⁴² Appendix B of this Reply includes evidence of each statement and a rebuttal to Peru’s baseless attempts to discredit them. ██████████ expressed that, in official meetings with Constitutional Court justices, the justices admitted feeling “uncomfortable” and reluctant to rule on Scotiabank’s case “for fear of public opinion” and because it was not “politically prudent to confront the Government.”⁶⁴³ The justices further acknowledged waiting for a “politically appropriate” moment to issue the decision, which they assured had no legal	government officials emerge from an archival review of those sources.⁶⁴⁷ Dr. Landa and Prof. Neyra independently conducted research of publicly available media sources and concluded that they were unable to find evidence of government officials interfering with the Court’s independent deliberation in those cases.⁶⁴⁸ Peru did not submit any evidence of Government actors publicly or privately interfering with the Court’s deliberations in any of the Domestic Comparators.⁶⁴⁹ Scotiabank requested that Peru produce documents related to the treatment afforded to the Domestic Comparators;⁶⁵⁰ but Peru objected and did not produce a single document.⁶⁵¹

between ██████████, SUNAT and ██████████—who threatened the justices with a constitutional complaint if the Leaked Decision was finalized, *see* C-0561, (Article June 11, 2018).

⁶⁴⁰ See Part Two, Section II, above.

⁶⁴² See ¶¶ 71, 73, 74, above; Memorial, ¶ 291.

⁶⁴³ CWS-██████████, ¶¶ 28, 33, 36-38; CWS-██████████ #1, ¶¶ 49-53; C-0288, Email from ██████████ (November 25, 2018).

⁶⁴⁷ Memorial, ¶ 111; Memorial, Appendix 2: Peruvian Media Sources.

⁶⁴⁸ CER-Landa/Neyra #1, ¶ 144.

⁶⁴⁹ See Counter-Memorial, ¶¶ 351-427.

⁶⁵⁰ Scotiabank requested Peru to produce documents related to the following aspects of the treatment to Domestic Comparators: (i) interactions between the SUNAT and the media; (ii) public or media statements made by Government actors; (iii) *ex parte* meetings between SUNAT branches and the justices, clerks or any employees of the Constitutional Court; (iv) communications between government actors and justices or employees of the Constitutional Court. Procedural Order No. 6, Annex 1, Scotiabank Document Requests No. 10, 12, 13, 14, pp. 74-75, 85, 88, 93-94.

⁶⁵¹ Procedural Order No. 6, Annex 1, Peru’s Response to Document Requests No. 10, 12, 13, 14, pp. 76-77, 86, 89-91, 95-98.

Article 803 – Less Favourable Treatment accorded to Scotiabank Peru	Supporting Evidence/Discussion	Treatment accorded to Domestic Comparators
	complexity. ⁶⁴⁴ Their testimonies are fully consistent with the Court’s justices publicly acknowledging the effect of the targeted political interference, and admitting on the record to “uncomfortable” political calculations, ⁶⁴⁵ compromising the independence of the Court in the Default Interest Amparo. ⁶⁴⁶	For the Reply, Scotiabank conducted an updated review of publicly available Peruvian media sources and was again unable to find evidence of State interference in any of the Domestic Comparators.
The Constitutional Court deliberately delayed deciding on the Default Interest Amparo for more than four years, rolling it back from the signature stage to the deliberation stage, and periodically acknowledging that the delays were attributable	[REDACTED]	After consulting publicly available information regarding the handling of the Domestic Comparators before the Constitutional Court, Scotiabank did not find any other case in which the proceeding reverted from the “final signature” stage back to the deliberation stage, followed by a lengthy multi-year delay to rule on the case. ⁶⁵⁶ Peru—which has access to all Constitutional Court files and records—was uniquely positioned to identify any similar instances. Yet, Peru did not submit any evidence of a

⁶⁴⁴ CWS-[REDACTED] ¶ 37; CWS-[REDACTED] #1, ¶ 50; CWS-[REDACTED] #2, ¶ 23; Memorial, ¶ 134; C-0288, Email from [REDACTED] (Scotiabank Peru) to [REDACTED] (Scotiabank) (November 25, 2018).

⁶⁴⁵ See ¶¶ 80, 87, 102-104, above. On the justices’ public statements regarding government interference see C-0298, “I was offered to stay if I voted for Keiko’s freedom,” Hildebrandt (September 27, 2019); C-0262, C-0263 Video and transcript of IACHR hearing; C-0546, Internal Report from Peru’s Attorney General on Public Hearing before the IACHR (November 2, 2017); C-0238, Carlos Ramos, “The Constitutional Court: Two Decades of Lessons,” *El Peruano* (July 11, 2017); CER-Landa/Neyra #1, ¶¶ 139-140; CER-Landa/Neyra #2, ¶¶ 113, 144.

⁶⁴⁶ CER-Landa/Neyra #1, ¶¶ 139-140; CER-Landa/Neyra #2, ¶¶ 88, 92-93, 95, 99.

⁶⁵³ [REDACTED]
[REDACTED] : CER-Landa/Neyra #2, ¶¶ 5(d), 69, 70, 114(a).

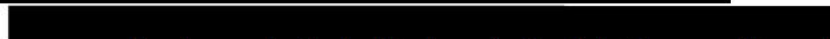
CER-Landa/Neyra #2, ¶¶ 70-73.

⁶⁵⁶ Memorial, ¶¶ 296-297; CER-Landa/Neyra #2, ¶¶ 139, 157, 172.

Article 803 – Less Favourable Treatment accorded to Scotiabank Peru	Supporting Evidence/Discussion	Treatment accorded to Domestic Comparators
to the politicized environment around the case. ⁶⁵²	 ⁶⁵⁵	Domestic Comparator facing similar circumstances. ⁶⁵⁷ When Scotiabank requested that Peru produce such evidence, Peru objected. ⁶⁵⁸ The differential treatment becomes all the more apparent when considering that between the June 2017 leak and September 2021, the Constitutional Court decided six default interest <i>amparo</i> cases, four of which had a hearing after Scotiabank's March 2017 hearing. ⁶⁵⁹ In this regard, Peru's attempt to compare the duration of Scotiabank's proceedings (fifty-seven-and-a-half months) with <i>Paramonga</i> (fifty-three

⁶⁵² See Part Two, Section II, above.

⁶⁵⁴ 

⁶⁵⁵ See  During document production, Scotiabank requested that Peru to produce documents concerning the caseload prioritization criteria of the Court and its application to the Default Interest Amparo. Procedural Order No. 6, Annex 1, Scotiabank Document Production Request No. 7, pp. 61-62. Peru responded there were no responsive documents, further proving that there was no legitimate reason for freezing the Default Interest Amparo. See Peru's Letter to Scotiabank regarding Peru's Document Production in ICSID Case No. ARB/22/30 – Bank of Nova Scotia v. Republic of Peru (January 30, 2026), pp. 6-7.

⁶⁵⁷ See Counter-Memorial, ¶¶ 36-76.

⁶⁵⁸ Procedural Order No. 6, Annex 1, Scotiabank Document Request No. 4, p. 49; Procedural Order No. 6, Annex, Peru's Response to Document Request No. 4, pp. 50-51.

⁶⁵⁹ See C-0067, C-0310, C-0312, C-0313, C-0315, C-0316 (*Amparo* cases decided between June 2017 and September 2021); CER-Landa/Neyra #1, ¶ 152; CER-Landa/Neyra #2, ¶ 167, Annex II(bis).

Article 803 – Less Favourable Treatment accorded to Scotiabank Peru	Supporting Evidence/Discussion	Treatment accorded to Domestic Comparators
		months) to suggest the delay was unremarkable is disingenuous: ⁶⁶⁰ the lengthy delay in the Scotiabank Peru case came once the Court had prepared a decision bearing the signatures of two justices, whereas in the <i>Paramonga</i> case, the hearing was held in November 2020 and the judgment was published the following month. ⁶⁶¹
When an opportunity presented itself upon the death of one of the Constitutional Court justices, after Scotiabank issued its Notice of Intent to commence this arbitration, the Constitutional Court rushed out the 2021 Decision, finding	After Scotiabank’s Notice of Intent (September 1, 2021) and Justice Ramos’s death (September 21, 2021), [REDACTED] by rushing to issue Resolution 205-2021-P/TC unlawfully lowering the voting quorum (November 3, 2021). ⁶⁶³ [REDACTED] issuing the 2021 Decision	Scotiabank reviewed the Court’s decisions in the Domestic Comparators—as well as the publicly available information described in Subsection III above—and found no other case reflecting the anomalies affecting the Court’s issuance of the 2021 Decision. ⁶⁶⁷ Dr. Landa and Prof. Neyra conducted an independent analysis using publicly available information and the decisions in the Domestic Comparators and were also unable to identify cases involving similar anomalies. ⁶⁶⁸ Peru has

⁶⁶⁰ Counter-Memorial, ¶ 410.

⁶⁶¹ See C-0310, Judgment of the Plenary Session of the Constitutional Court in Case No. 02051-2016-PA/TC (*Paramonga*); see also CER-Landa/Neyra #2, ¶ 172, Annex II(bis).

⁶⁶³ See ¶ 113, above. On Scotiabank’s Notice of Intent see C-0021 [REDACTED]

[REDACTED] On the sudden rush to issue Administrative Resolution 205-2021 to unlawfully lower the quorum requirements, see [REDACTED]; C-0333, Administrative Resolution No. 205-2021-P/TC of the Plenary Session of the Constitutional Court (November 3, 2021); CER-Landa/Neyra #1, ¶ 206-208; CER-Landa/Neyra #2, ¶ 85. See also [REDACTED] C-0667, Judgment of the Plenary Session of the Constitutional Court in Case No. 00739-2020-PA/TC.

⁶⁶⁷ Memorial, ¶¶ 296-312.

⁶⁶⁸ CER-Landa/Neyra #1, ¶¶ 89-211; CER-Landa/Neyra #2, ¶¶ 139-140, 142, 157, 172.

Article 803 – Less Favourable Treatment accorded to Scotiabank Peru	Supporting Evidence/Discussion	Treatment accorded to Domestic Comparators
against Scotiabank Peru (diametrically opposed to the 2017 Leaked Decision), in circumstances that were procedurally anomalous, and then—ignoring binding precedent—barred Scotiabank Peru from pursuing its claim through the contentious administrative route.⁶⁶²	(November 9, 2021) and announcing it to the press on the very same day.⁶⁶⁴ Further, it has been established that, in deciding the Default Interest Amparo, the Constitutional Court engaged in several irregularities: - the Court failed to satisfy both the session and voting quorum legal requirements. The fact that the Court issued a clarification order explaining its alleged compliance with quorum requirements <i>only</i> in the Default Interest Amparo—as Peru acknowledged—⁶⁶⁵ illuminates the irregular nature of the Court’s actions; - the Court barred Scotiabank Peru from submitting a contentious administrative action against the application of accrued default interest (departing from the binding <i>Elgo Ríos</i> precedent);	provided no evidence that any Domestic Comparator faced similar anomalies.⁶⁶⁹ In summary, <u>there is no evidence in the record showing that:</u> - any case among the Domestic Comparators was decided without respecting the five-justice session quorum <u>and</u> the four-justice voting majority.⁶⁷⁰ Peru’s reference to <i>Citileasing</i>, as a case that Scotiabank “glosses over” is unavailing. The fact that another subsidiary of a foreign bank (not a Domestic Comparator) was the only case resolved with the same quorum as the Default Interest Amparo supports Scotiabank’s case.⁶⁷¹ - the Constitutional Court barred any of the Domestic Comparators from resorting to the contentious administrative process after dismissing the <i>amparo</i> claim (departing from the binding <i>Elgo Ríos</i> precedent).⁶⁷² Indeed, the case of <i>Transportes</i>

⁶⁶² See Part Two, Section III, above.

⁶⁶⁴ [REDACTED]

[REDACTED] : CER-Landa/Neyra #2, ¶ 84. On the Constitutional Court voting and issuing the 2021 Decision and announcing it to the press on the same day *see* C-0340, [REDACTED], C-0342 (2021 Decision, [REDACTED] and press release).

⁶⁶⁵ C-0356, Order of the Constitutional Court in Case No. 0222-2017-PA/TC; C-0701, Peru’s Letter to Scotiabank (January 30, 2026), p. 6.

⁶⁶⁹ Counter-Memorial, ¶¶ 351-427.

⁶⁷⁰ CER-Landa/Neyra #1, ¶ 204, CER-Landa/Neyra #2, ¶¶ 147(a).

⁶⁷¹ Counter-Memorial, ¶ 381.

⁶⁷² CER-Landa/Neyra #1, ¶¶ 177-178; CER-Landa/Neyra #2, ¶ 147(b), Annex II(bis).

Article 803 – Less Favourable Treatment accorded to Scotiabank Peru	Supporting Evidence/Discussion	Treatment accorded to Domestic Comparators
	- the Court dismissed Scotiabank Peru’s <i>amparo</i> through a novel requirement of the submission of a <i>recurso de queja</i>; - the Court issued a press release disclosing the outcome and each justice’s vote, before the reasoned decision was duly notified and available to the parties.⁶⁶⁶	<i>Rodrigo Carranza S.A.C.</i> is a notable example. It was dismissed on admissibility grounds in December 2021 (the month after the Scotiabank Peru 2021 Decision) and in which the Court applied the <i>Elgo Ríos</i> precedent and did not prohibit the domestic investor from pursuing a contentious administrative action.⁶⁷³ - the Constitutional Court dismissed any case of the Domestic Comparators on the basis that a plaintiff failed to submit a <i>recurso de queja</i>.⁶⁷⁴ - the Constitutional Court published a press release announcing the outcome of a decision in any of the Domestic Comparators’ cases prior to the Court’s formal notification to the parties involved.⁶⁷⁵

⁶⁶⁶ On the Constitutional Court failing to meet the session and voting quorum legal requirements when issuing the 2021 Decision *see* C-0340, C-0659 (2021 Decision and minutes); CER-Landa/Neyra #1, ¶¶ 193-211; CER-Landa/Neyra #2, ¶ 147(a). On the Constitutional Court deciding the Default Interest Amparo in contravention of the binding *Elgo Ríos* precedent *see* C-0340, C-0184 (2021 Decision and *Elgo Ríos*); CER-Landa/Neyra #1, ¶¶ 167-176; CER-Landa/Neyra #2, ¶¶ 190-194. On the Constitutional Court dismissing Scotiabank Peru’s *amparo* for not submitting a *recurso de queja*, *see* C-0340 (2021 Decision); CER-Landa/Neyra #1, ¶¶ 186-189. On the Constitutional Court issuing a press release informing the outcome for the case before proper notice was given to the parties *see* C-0342 (press release); CER-Landa/Neyra #1, fn. 229; CER-Landa/Neyra #2, ¶ 86; CWS- [REDACTED] #1, ¶ 58.

⁶⁷³ CER-Landa/Neyra #1, ¶ 179; C-0727, Judgment of the Plenary Session of the Constitutional Court in Case No. 00073-2019-PA/TC (KS Deport); CER-Landa/Neyra #1, ¶ 179; C-0358, Judgment of the Plenary Session of the Constitutional Court in Case No. 00754-2020-PA/TC (Transportes Rodrigo Carranza); *see* ¶ 130, above; Memorial, ¶ 301.

⁶⁷⁴ CER-Landa/Neyra #1, ¶ 188; CER-Landa/Neyra #2, Annex II(bis); Appendix D: Comparative Analysis.

⁶⁷⁵ For the Reply, Scotiabank conducted a review of the “press releases” section in the Constitutional Court’s website, using the publication dates of the decisions in the Domestic Comparators and conducting keyword searches, to determine whether in any of those cases the Constitutional Court had issued a press release announcing the outcome of a Plenary Session vote prior to the official publication of the judgment. No such irregularity was found in any of the Domestic Comparators.

C. Peru Has Not Established a Legitimate Policy Justification for According Scotiabank Peru Less Favourable Treatment

a. Peru Bears the Burden of Rebuttal Following a *Prima Facie* Case of Differential Treatment

327. Where a claimant adduces sufficient evidence to raise a *prima facie* case that it has been treated in a different and less favourable manner, the burden shifts to the respondent State to rebut that presumption.⁶⁷⁶ Peru wrongly argues that the burden of proof “never shifts” to the State.⁶⁷⁷

328. It is a generally accepted canon of law that the party asserting a fact bears the burden of proof. However, once evidence sufficient to raise a presumption of a violation of the National Treatment standard exists, because the elements of the test have been met, the burden shifts to the other party to rebut it.⁶⁷⁸ Indeed, as the tribunal in *Bilcon v. Canada* observed, “once a *prima facie* case is made out under the three-part *UPS* test, the onus is on the host state to show that a measure is still sustainable within the [national treatment standard] ... that an apparently discriminatory measure is in fact compliant with the ‘national treatment’ norm set out in Article 1102.”⁶⁷⁹ Consistent with this approach, international investment tribunals have repeatedly held that, once this threshold is met, the burden shifts to the respondent to show a legitimate, non-discriminatory policy rationale for the measure.⁶⁸⁰

b. Peru’s Attempts to Proffer a Legitimate Policy Justification Fail

329. The governing standard for assessing a State’s justification is well settled in arbitral jurisprudence. The *Pope & Talbot* tribunal articulated the prevailing test: differential treatment is presumptively a breach of the national treatment standard unless the measure “ha[s] a reasonable

⁶⁷⁶ **CL-0112**, *Feldman*, ¶¶ 177-178; Memorial, ¶¶ 313-314.

⁶⁷⁷ Counter-Memorial, ¶ 332; **CL-0133**, *UPS v. Canada*, ¶¶ 83-84. Peru relies on the *UPS* tribunal but misconstrues its holding. The *UPS* tribunal was referring to the claimant’s burden to establish a *prima facie* case of the three prongs of national treatment – namely, (i) treatment accorded to the foreign investor, (ii) the existence of like circumstances between the foreign investor or investment and domestic comparators, and (iii) less favourable treatment of the foreign investor or investment. As the *UPS* tribunal made clear, “it is not for Canada to prove an absence of like circumstances between *UPS Canada* and *Canada Post* regarding article 1102.” *Ibid*.

⁶⁷⁸ **CL-0112**, *Feldman* ¶ 177 (“[i]f [a] party adduces evidence sufficient to raise a presumption that what is claimed is true, the burden then shifts to the other party, who will fail unless it adduces sufficient evidence to rebut the presumption”) (quoting United States – Measures Affecting Imports of Woven Wool Shirts and Blouses from India, , WT/DS33/AB/R, Adopted 23 May 1997, p. 14).

⁶⁷⁹ **CL-0003**, *Bilcon*, ¶ 723.

⁶⁸⁰ See Memorial, ¶ 313.

nexus to rational government policies that (1) do not distinguish, on their face or *de facto*, between foreign-owned and domestic companies, and (2) do not otherwise unduly undermine the investment liberalizing objectives of [the FTA].”⁶⁸¹ This framework is no outlier; it has been repeatedly adopted and endorsed by subsequent tribunals.⁶⁸² Peru does not dispute the authority of the *Pope & Talbot* test for this purposes.

330. Peru seeks to dilute the governing standard by recasting *GAMI v. Mexico* as endorsing a minimal “plausibility” threshold for State justifications.⁶⁸³ *GAMI* does not support that view.⁶⁸⁴ The tribunal observed that Mexico’s measure “was plausibly connected with a legitimate goal of policy.”⁶⁸⁵ Peru improperly conflates the *plausibility of the link* with the *substance of the justification itself*. The tribunal’s wording does not mean that any “plausible” excuse will suffice; it requires a logical and demonstrable link—a “reasonable nexus,” in *Pope & Talbot*’s terms⁶⁸⁶—between the State’s measure and an actual, legitimate policy objective. Properly understood, the standard applied in *GAMI* is functionally indistinguishable from the *Pope & Talbot* formulation.

331. Regardless of the precise formulation, investment tribunals agree on a critical point: a respondent State cannot rebut a *prima facie* showing of discrimination with mere assertions or abstract policy statements; it must adduce concrete evidence. The *Resolute Forest* tribunal captured the point with compelling clarity:

The tribunals had recourse to a proxy: for instance, the *Pope & Talbot* tribunal looked for “a reasonable nexus to rational government policies”, the *SD Myers* tribunal for “legitimate public policy measures that are pursued in a reasonable manner”,

⁶⁸¹ **CL-0123**, *Pope & Talbot*, ¶ 78. See Memorial, ¶ 313.

⁶⁸² See e.g., **CL-0003**, *Bilcon*, ¶¶ 722-723; **RL-0166**, *Apotex v. USA*, ¶ 8.55; **CL-0112**, *Feldman*, ¶ 184; **RL-0130**, *Resolute Forest*, ¶ 575; **RL-0167**, *Parkerings-Compagniet AS v. Republic of Lithuania*, ICSID Case No. ARB/05/8, Award, 11 September 2007, ¶ 370; **CL-0187**, *ELA U.S.A., Inc. v. The Republic of Estonia*, PCA Case No. 2018-42, Award, 21 February 2025, ¶ 1130.

⁶⁸³ See Counter-Memorial, ¶ 422.

⁶⁸⁴ The tribunal dismissed the national-treatment claim because the claimant did not meet its initial burden to show “like” circumstances; the tribunal was “not ... persuaded” that the relevant comparators were genuinely comparable. Having failed at the threshold step, the claimant’s case did not turn on Mexico’s asserted policy goals, and the tribunal’s discussion of those goals was ancillary rather than dispositive. *GAMI* therefore provides no support for Peru’s attempt to lower the established national-treatment standard. **RL-0100**, *GAMI Investments, Inc. v. United Mexican States*, Ad hoc UNCITRAL arbitration, Final Award, 15 November 2004 (“*GAMI v. Mexico*”), ¶ 114.

⁶⁸⁵ **RL-0100**, *GAMI v. Mexico*, ¶ 114.

⁶⁸⁶ **CL-0123**, *Pope & Talbot*, ¶ 78.

the *Feldman* tribunal for “a rational justification” or reasonable distinction, the *GAMI* tribunal for “a plausible connection with a legitimate goal of policy”, the *Cargill* tribunal searched for a link between the alleged difference and the “rationale and objective of the measure in question”. ***While the tribunals have varied in their formulations, the bottom line is the same.*** Using the *Pope & Talbot* formulation as an illustration: a tribunal will conclude the less favorable treatment proven *prima facie* by the Claimant was not provided “in like circumstances” where the Respondent ***can provide evidence*** that the differences in treatment have a “reasonable nexus to rational government policies” that do not distinguish on their face or *de facto* between foreign and domestic investors or investments. Conversely, if the Respondent ***cannot provide such evidence***, the tribunal will assume that nationality was the reason for the differential treatment (see e.g. *Feldman*).⁶⁸⁷

332. Other tribunals—including *Abed El Jaouni v. Lebanon*, cited by Peru—affirm this high evidentiary burden. The *Abed El Jaouni* tribunal held that a claim would only fail if the host State provides “satisfactory evidence” that the discrimination was not due to nationality.⁶⁸⁸ Similarly, the *Feldman* tribunal required the respondent State to introduce “credible evidence” to rebut the claimant’s *prima facie* case.⁶⁸⁹

333. Measured against this clear and consistent legal standard, Peru’s defence fails. It argues that two legitimate policy reasons motivated the 2021 Decision, namely that (i) Scotiabank’s claims were not urgent, and (ii) the contentious administrative route would have provided equally satisfactory relief.⁶⁹⁰ However, Peru has adduced no evidence that the Treatment bore any connection to a legitimate, non-discriminatory policy objective.

334. Peru’s attempt to divert the Tribunal with general explanations of the *amparo* process is irrelevant.⁶⁹¹ Scotiabank’s claim is neither an appeal of the 2021 Decision nor an invitation for this Tribunal to review its domestic legal merits. The claim is straightforward: in those proceedings,

⁶⁸⁷ **RL-0130**, *Resolute Forest*, ¶ 575.

⁶⁸⁸ **RL-0125**, *Abed El Jaouni and Imperial Holding SAL v. Lebanese Republic*, ICSID Case No. ARB/15/3, Decision on Jurisdiction, Liability and Certain Aspects of Quantum, 25 June 2018 (“*Abed El Jaouni v. Lebanon*”), ¶ 926. See Counter-Memorial, ¶ 420.

⁶⁸⁹ **CL-0112**, *Feldman*, ¶ 177.

⁶⁹⁰ Counter-Memorial, ¶¶ 424-426. Peru’s argument ignores the fact that Scotiabank Peru was barred from initiating a contentious administrative claim.

⁶⁹¹ See Counter-Memorial, ¶¶ 425-426.

government officials and the Constitutional Court subjected Scotiabank Peru to discriminatory treatment that similarly situated Peruvian plaintiffs did not face, and the State offered no legitimate justification.

335. Peru’s reliance on Prof. Bustamante’s Expert Report is equally misplaced and does nothing to cure the evidentiary void.⁶⁹² An expert opinion—by SUNAT’s own attorney—describing the general features of the *amparo* process cannot substitute the State’s obligation to provide evidence justifying its specific discriminatory actions in this case. The issue is not the nature of *amparo* proceedings in the abstract, but the concrete discriminatory treatment to which Scotiabank was subjected. Peru was required to prove its case with facts and evidence. It has not done so.

336. Peru’s other purported justification—that Resolution 205-2021 and the reduced quorum were necessary to fulfil the Constitutional Court’s duty to administer justice—is equally unavailing.⁶⁹³ Even assuming that the duty to administer justice could constitute a legitimate policy objective in the abstract, Peru cannot establish the required “reasonable nexus” between that objective and the specific discriminatory treatment at issue. For over four years following the leak, the Constitutional Court had the full quorum necessary to decide Scotiabank Peru’s case, yet chose not to do so. [REDACTED]

[REDACTED].⁶⁹⁴ No urgency was invoked during those four years. The alleged duty to administer justice was discovered only after Justice Ramos’s death allowed [REDACTED] to take over the control of the Default Interest Amparo.

337. Even if such a concern were legitimate, as Dr. Landa and Prof. Neyra explain, the Court had less restrictive alternatives available that would have preserved the quorum without contravening the law: it could have annulled Justice Ferrero’s abstention, as it had done in Case No. 1059-2009-PA/TC under materially similar circumstances;⁶⁹⁵ or it could have awaited the appointment of the seventh justice, as it chose to do in the contemporaneous *Ley de Usura* proceedings facing an identical quorum problem.⁶⁹⁶ The Court’s decision to rush to judgment

⁶⁹² Counter-Memorial, ¶¶ 425.

⁶⁹³ Counter-Memorial, ¶ 413.

⁶⁹⁴ See ¶ 98, above.

⁶⁹⁵ CER-Landa/Neyra #2, ¶¶ 124, 130.

⁶⁹⁶ CER-Landa/Neyra #2, ¶ 125.

instead—lowering the quorum six days before issuing the 2021 Decision, after four years of deliberate inaction—cannot credibly be characterized as a principled response to a constitutional duty. It was a targeted measure to enable the dismissal of Scotiabank Peru’s case before the Court’s composition shifted again. A policy justification that is invoked selectively—applied to Scotiabank Peru but not to domestic comparators facing the same procedural circumstances—is not a legitimate non-discriminatory policy. It is the opposite.

338. In conclusion, Peru has failed to rebut the *prima facie* case of discrimination established by Scotiabank. Having presented no evidence of a rational, non-discriminatory policy objective justifying its actions, Peru has failed to meet its burden of proof. Accordingly, Peru has breached the national treatment obligation under Article 803 of the FTA.

* * *

339. Scotiabank has satisfied each element of the national treatment test and has established that Peru breached Article 803 of the FTA. Peru therefore owes compensation, as discussed in the next section.

PART FIVE. SCOTIABANK IS ENTITLED TO ITS DAMAGES FOR PERU’S BREACH OF THE FTA

340. In the Memorial, Scotiabank established that Scotiabank and Scotiabank Peru had suffered substantial losses. Scotiabank asserted claims for its own losses, pursuant to Article 819 of the FTA and for the losses of Scotiabank Peru, pursuant to Article 820 of the FTA.

341. To simplify the issues before the Tribunal, Scotiabank has elected not to pursue its Article 819 claim, and to proceed with its Article 820 claim for the losses of Scotiabank Peru. Scotiabank does so without acknowledging, and by expressly denying, the foundation of any of the criticisms by Peru of the ability of Scotiabank Peru to dividend funds to its shareholders in the amount that would have been repaid by SUNAT. Scotiabank Peru could easily have done so because it retained substantial earnings from operating a profitable business, which would have enabled Scotiabank Peru to meet all applicable accounting and regulatory capital requirements while declaring substantial dividends. Scotiabank Peru reserves the right to declare dividends following payment of any arbitral award while complying with applicable laws.

342. KSV has updated its quantification of Scotiabank Peru's losses in view of the factors discussed below. Scotiabank Peru's losses are [REDACTED], plus pre-award interest amounting to [REDACTED] as of the date of KSV's first report (to be further updated).⁶⁹⁷

343. Scotiabank Peru's losses reflect the following "but for" scenario, set out at paragraphs 338 to 344 of the Memorial, and which reflects what would have occurred "in all probability" had Peru not breached Article 803 of the FTA:

- (a) High level government officials would not have made threats in private to the Justices of the Constitutional Court before the emergence of the 2017 Leaked Decision.
- (b) A high-level insider within the Constitutional Court would not have leaked the 2017 Leaked Decision.
- (c) Peruvian State 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.
- (d) The Constitutional Court would not have succumbed to that pressure by reversing the 2017 Leaked Decision (and the 2017 Signed Judgment) and dismissing the Default Interest Amparo as inadmissible.
- (e) The Constitutional Court would have ruled in favour of Scotiabank Peru in line with the 2017 Leaked Decision and the 2017 Signed Judgment, which showed four Justices voting in favour, and in line with the *Medina de Baca* line of cases. The Court would have done so around July 1, 2017, which Dr. Landa and Prof. Neyra explain would have been reasonable timing given that the draft judgment was being circulated for signature and had already been signed by two justices.

⁶⁹⁷ CER-KSV #2, ¶ 3.6(b).

- (f) SUNAT would have repaid Scotiabank Peru within eighteen months, or by January 1, 2019.
- (g) SUNAT would have repaid Scotiabank Peru the Default Interest Delta (*i.e.*, the actual default interest paid to Peru under protest, minus the maximum default interest that could be legally charged by Peru during SUNAT's delay), plus interest from the time that payment under protest was made in 2013-2014 until January 1, 2019. By that date, Scotiabank Peru would have received payment of the Default Interest Delta and interest payable on that amount.

344. Peru raises four arguments in response. *First*, Peru argues that Scotiabank has not established that its damages were “by reason of, or arising out of” Peru’s treaty breach. *Second*, Peru argues that the damages claimed rely on incorrect assumptions and are overstated. *Third*, the claim for pre-and post-award interest should be rejected. *Fourth*, Peru argues that the Tribunal should reject the claim that the award should not be subject to tax. Scotiabank addresses each below.

I. Scotiabank Has Established That its Damages Were Suffered “By Reason of, or Arising Out of” Peru’s Breach of the FTA

345. The parties appear to agree on the broad principles underlying analysis of damages, set out in the Memorial at paragraphs 326 to 335 and the Counter-Memorial at paragraphs 432 to 443. The Claimant does not deny that it bears the burden of proving its damages, as highlighted by Peru.

346. Peru argues that damages cannot be “merely speculative.” However, in approaching this analysis, tribunals have repeatedly emphasized that a claimant does not need to establish a “but for” scenario with certainty because the very reason for constructing a “but for” scenario is that we cannot know what would have happened with precision as a result of the state’s treaty breach. 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.⁶⁹⁸

347. Similarly, the tribunal in *Cyprus Popular* recognized that there is always some uncertainty in proving damages:

[...] it is a commonly accepted standard for awarding forward looking compensation that damages must not be speculative or uncertain, but proved with reasonable certainty; the level of certainty is unlikely, however, to be the same with respect to the conclusion that damages have been caused, and the precise quantification of such damages. Once causation has been established, and it has been proven that the *in bonis* party has indeed suffered a loss, less certainty is required in proof of the actual amount of damages; for this latter determination Claimant only needs to provide a basis upon which the Tribunal can, with reasonable confidence, estimate the extent of the loss.⁶⁹⁹

348. This flexible, common-sense approach has been endorsed by numerous tribunals.⁷⁰⁰

349. This is not a complicated damages case, such as those related to future profits for early-stage projects. Such cases often involve complex causation analyzes about what have happened in the but-for world, including whether regulatory approvals would have been obtained and what profits would have been earned on hypothetical sales. The questions here are significantly more tangible: the timing for repayment by SUNAT and the calculation of interest.

⁶⁹⁸ **CL-0108**, *Joseph Charles Lemire v. Ukraine* (ICSID Case No. ARB/06/18), Award, 28 March 2011 (“**Lemire**”), ¶ 248.

⁶⁹⁹ **CL-0185**, *Cyprus Popular Bank Public Co. Ltd. v. Hellenic Republic*, ICSID Case No. ARB/14/16, Award, (April 15, 2021), ¶ 195 (citing **CL-0194**, *Republic of Kazakhstan v. Rumeli Telekom A.A. and Tel Sim Mobil Telekomunikasyon Hizmetleri A.S.*, (ICSID Case No. ARB/05/16) (Annulment Proceeding), Decision of the Ad Hoc Committee (March 25, 2010); **CL-0010**, *Crystallex International Corporation v. Bolivarian Republic of Venezuela* (ICSID Case No. ARB(AF)/11/2), Award, 4 April 2016; and **CL-0108**, *Lemire*).

⁷⁰⁰ In addition to those authorities already cited in the Memorial, see e.g., **CL-0186**, *Delagoa Bay Railway case*, G. F. de Martens, *Nouveau recueil général de traités*, 2nd series, vol. XXX, p. 329 (1900) [French], p. 407; **CL-0184**, *Azurix Corp. v. The Argentine Republic*, (ICSID Case No. ARB/01/12) (Annulment Proceeding), Decision on the Application for Annulment of the Argentine Republic (September 1, 2009), ¶ 298(h); **CL-0182**, *Abengoa S.A. y COFIDES S.A. v. United Mexican States*, ICSID Case No. ARB(AF)/09/2, Award (April 18, 2013), ¶¶ 686-687; **CL-0128**, *ConocoPhillips Petrozuata B.V., ConocoPhillips Hamaca B.V. and Others v. Bolivarian Republic of Venezuela*, (ICSID Case No. ARB/07/30), Award (March 8, 2019), ¶¶ 263-264; **CL-0192**, *Quasar De Valores SICA V S.A. and Others v. The Russian Federation*, (Arbitration Institute of the Stockholm Chamber of Commerce), Award (July 20, 2012), ¶ 212.

350. The authorities Peru relies on are distinguishable. For example, Peru relies on *Gemplus v. Mexico*, which addressed a claim for future profits on the basis of a potential extension to a disputed concession to produce national vehicle license plates; the but for scenario was found to be “lacking any factual basis.”⁷⁰¹ That is not the case here, where Scotiabank’s damages are founded on the actual payment of default interest and the existence of the 2017 Leaked Decision and 2017 Signed Judgment in its favour (requiring repayment to Scotiabank Peru), none of which cannot be disputed. Once liability is found, damages can easily be assessed by calculating the amount of the Default Interest Delta plus interest from the date of payment under protest, using reasonable timing assumptions.

351. Relying on *Biwater v. Tanzania*, Peru claims that since the alleged losses arose in 2017 and are being assessed as of January 1, 2019, they predate the breach resulting from the 2021 Decision, and it is “inconceivable” that loss which predates the breach could have been caused by the breach.⁷⁰² *Biwater* is inapplicable here. In that case, the claimant’s damages were the consequence of its own conduct, prior to the violation of the BIT.⁷⁰³ Peru conflates the “loss” with the but/for scenario assumptions. In any event, in Scotiabank’s case, there is no loss that predates the breach. The loss did not arise until the 2021 Decision, which was when Scotiabank lost the ability to recover the default interest amounts paid under protest. In establishing the appropriate but/for scenario, it is necessary to reverse the wrongful conduct that *led* to that loss. Far from being “inconceivable,” it is a logical requirement for such conduct to predate the loss, particularly where the government misconduct occurs over a lengthy period of time.

352. Indeed, contrary to Peru’s argument, tribunals have awarded damages in a similar manner in circumstances involving measures that extended over long periods of time and objective facts that ground the valuation date at an earlier time:

⁷⁰¹ Counter-Memorial, ¶ 436.

⁷⁰² Counter-Memorial, ¶ 438.

⁷⁰³ **CL-0086**, *Biwater Gauff (Tanzania) Ltd. v. United Republic of Tanzania* (ICSID Case No. ARB/05/22), Award, 24 July 2008, ¶¶ 788-792, 798; The tribunal in *Lemire* distinguished *Biwater* on this basis. **CL-0108**, *Lemire*, ¶¶ 209-211.

- (a) In *Gramercy v. Peru*, the tribunal awarded damages based on a valuation date of January 1, 2009, despite the measures at issue arising between 2013 and 2017.⁷⁰⁴ Though the measures breaching the treaty arose later, the tribunal found that in the context of the case, the appropriate valuation date was from January 1, 2009, the date on which the claimant completed its investment in the government bonds at issue.⁷⁰⁵ The damages award in that case was the purchase price for the bonds, plus interest accruing over the ensuing years. That is directly comparable to Scotiabank's case, in which Scotiabank claims the Default Interest Delta (i.e. the default interest that would have been returned following a successful decision in the Default Interest Amparo) plus interest accruing over the following years.
- (b) In *Lion v. Mexico*, the tribunal awarded damages based on valuation dates of September 7, 2012 and October 16, 2012, corresponding to the dates on which the mortgages at issue were originally cancelled through a fraudulent court proceeding initiated by certain debtors.⁷⁰⁶ This was despite the fact that the substance of the denial of justice claim extended to the denial of due process in Lion's subsequent attempts to overturn the mortgage cancellations, and pursue the debtors in Mexican courts in the years that followed.⁷⁰⁷ As the tribunal observed in that case, "Mexico's denial of justice occurred over several judicial instances and an extensive period of time; but the origin of the denial of justice can be pinpointed to the Cancellation Judgment issued by the *Juez de lo Mercantil*, and the subsequent cancellation of the Mortgages by the Public Registries."⁷⁰⁸

353. Scotiabank's claim for damages thus falls squarely within the types of damages awarded at international law.

⁷⁰⁴ CL-0100, *Gramercy*, ¶¶ 1396, 781-813, 976-990.

⁷⁰⁵ CL-0100, *Gramercy*, ¶ 1325.

⁷⁰⁶ CL-0032, *Lion*, ¶¶ 631-632.

⁷⁰⁷ CL-0032, *Lion*, ¶¶ 371, 449-509.

⁷⁰⁸ CL-0032, *Lion*, ¶ 631.

II. Scotiabank's Damages Rely on the Facts and Reasonable Assumptions

354. Beyond the general criticisms related to legal principles discussed above, Peru raises six fact-specific points that it says have caused Scotiabank to overstate its losses. None are well-founded. Scotiabank responds to each below.

355. *First*, Peru argues that default interest for the period from 1998 to 2005 should be calculated using compound interest, rather than simple interest. This would have the effect of increasing the amount of interest that was validly charged under Peruvian law, and decreasing the amount of Scotiabank's default interest that was paid under protest which would be refunded by SUNAT after the Constitutional Court's decision (i.e. decreasing the Default Interest Delta).⁷⁰⁹ This is wrong for three reasons:

- (a) As Prof. Hernández explains, it is wrong that compound interest could or would have been charged. Compound interest, or the capitalization of default interest, “does not confirm with the Peruvian legal system; rather, it was and is unconstitutional, and should not be applied as it generates an unreasonable and disproportionate increase in tax debt.”⁷¹⁰ Prof. Hernández emphasizes: “This conclusion is expressed, among others, in separate rulings issued by the Constitutional Court, and subsequently by the Supreme Court itself.”⁷¹¹
- (b) As Prof. Hernández also emphasizes: “The [2017] Signed Judgment also shared this understanding, ruling that the capitalization rule was inapplicable because it violated the principle of reasonableness.”⁷¹² Indeed, the 2017 Leaked Decision and the 2017 Signed Judgment both state: “In the present case, it is observed that said rule goes beyond the compensatory nature of default interest, as the plaintiff points out—a fact that has not been refuted by any of the defendants—throughout the entire duration of the proceedings, the debt increased by approximately [REDACTED]”⁷¹³

⁷⁰⁹ Counter-Memorial, ¶ 454.

⁷¹⁰ CER-Hernández #2, ¶¶ 8(iii), 33-42.

⁷¹¹ CER-Hernández #2, ¶¶ 8(iii), 33-42.

⁷¹² CER-Hernández #2, ¶¶ 8(iii), 33-42.

⁷¹³ CER-Hernández #2, ¶ 36; C-0443, 2017 Signed Judgment, ¶ 60, p. 20.

and “SUNAT must calculate the applicable default interest without taking that [capitalization] rule into account.”⁷¹⁴

- (c) Paragraphs 170 to 174 of Prof. Sevillano’s report, which Peru cites and relies on in its Counter-Memorial,⁷¹⁵ do not support Peru’s argument regarding compound interest. These paragraphs discuss the issue of the legality of compound interest generally, but do not discuss the application of that rule by SUNAT in the “but for” world. Where Prof. Sevillano addresses the calculation in the “but for” world at paragraph 322, she states that “each IGV debt should accrue default interest without capitalization.”⁷¹⁶

356. *Second*, Prof. Sevillano asserts that in respect of three suspension periods in which default interest would not have accrued, the start date should be adjusted by one day for each period, with the result of a marginal reduction of the Default Interest Delta.⁷¹⁷ As Prof. Hernández explains, Prof. Sevillano is incorrect and there is no basis to adjust the dates for these three suspension periods, which become enforceable “on the day following the expiration of the payment deadline, and interest may begin to accrue from that date.”⁷¹⁸

357. Separate from Prof. Sevillano’s critique in relation to the suspension periods, documents produced by Peru have enabled Prof. Hernández to more accurately determine the first two of the three suspension periods.⁷¹⁹ KSV has updated its damages calculations based on the adjustments to those suspension periods set out below:⁷²⁰

⁷¹⁴ CER-Hernández #2, ¶ 36.

⁷¹⁵ Counter-Memorial, ¶ 454.

⁷¹⁶ RER-Sevillano, ¶ 322.

⁷¹⁷ Counter-Memorial, ¶ 455.

⁷¹⁸ CER-Hernández #2, ¶¶ 8(iv), 48-50.

⁷¹⁹ CER-Hernández #2, ¶¶ 43-50, Appendix 1.

⁷²⁰ CER-KSV #2, ¶ 3.6(b).

Description	Hernandez Report		Hernandez Reply Report	
	From	To	From	To
First day of delay to issue the first Tax Court decision to the date of issuance of the 2003 Tax Court decision.	21-Mar-01	30-Dec-03	19-Feb-01	30-Dec-03
First day of delay to issue the second SUNAT decision to the date of issuance of the 2011 SUNAT decision.	11-Feb-04	30-Nov-11	4-Mar-04	30-Nov-11

358. *Third*, Prof. Sevillano asserts that the “average market passive rate” is lower than the Tasa de Interes Moratorio (“**TIM**”) and should be applied to the calculate interest on the Default Interest Delta from 2014 to 2019, because SUNAT did not err in collecting the tax debt and capitalized default interest.⁷²¹ Prof. Hernández explains that this is not correct: “the criteria for determining each of the rates applicable to a refund for undue or excess payments are clear: if the undue payment stems from a demand by SUNAT (as a result of a document issued by SUNAT), the TIM shall apply; whereas if it arose from other situations (due to an error by the taxpayer), the ‘refund rate’ shall apply.”⁷²² The former clearly circumstance applies here. Moreover, as Prof. Hernández highlights, Peru had produced two cases in which SUNAT repaid taxpayers in these circumstances, and in both cases SUNAT applied the TIM, not the refund rate advocated by Peru.⁷²³ The TIM is the correct interest rate to apply to repayment of the default interest that was illegally collected by SUNAT.

359. *Fourth*, Peru baldly asserts that at the time that Scotiabank acquired it shares in Banco Wiese in 2006, it was or must have been aware of the potential tax liability and that Scotiabank accounted for this in the price paid for the shares.⁷²⁴ At the time of the Counter-Memorial this claim was speculative and lacking any foundation, which Peru admitted.⁷²⁵ This argument is factually incorrect, as well as both illogical and irrelevant.

⁷²¹ Counter-Memorial, ¶ 456.

⁷²² CER-Hernández #2, ¶ 56.

⁷²³ CER-Hernández #2, ¶¶ 59-60.

⁷²⁴ Counter-Memorial, ¶¶ 461-462.

⁷²⁵ Counter-Memorial, ¶ 463.

- (a) In his witness statement, [REDACTED] confirms that this potential liability was not incorporated into purchase price paid for Banco Wiese's shares.⁷²⁶ This is corroborated by the contemporaneous documents.⁷²⁷
- (b) It is illogical to argue that Scotiabank accounted for this liability in 2006 when it did not exist anywhere near its ultimate scale at that time (indeed, it was not known then that it would take SUNAT another five years to issue its decision in 2011). It grew exponentially as of 2013-2014 because of illegally charged compound interest over those intervening years after the 2006 acquisition.
- (c) What Scotiabank accounted for at the time of acquisition in 2006 is irrelevant to the assessment of damages in this arbitration. Scotiabank is entitled to the damages caused by the breach, *i.e.*, the reimbursement of the default interest amounts paid under protest with interest. None of that is contingent or impacted by a purchase price for a transaction occurring fifteen years prior. This would result in a windfall to Peru. But for the breach, Scotiabank would not have paid more for Banco Wiese.

360. *Fifth*, Secretariat asserts that, in respect of Scotiabank's Article 819 claim, not all amounts repaid by SUNAT to Scotiabank Peru could have been conveyed to Scotiabank by dividend.⁷²⁸ This argument has no basis, as at the relevant time Scotiabank Peru held substantial retained earnings (*i.e.* profits) which gave it great flexibility in what it could dividend to its shareholders. However, this issue is now irrelevant as discussed at paragraph 320 above, as it has no bearing on Scotiabank's Article 820 claim on behalf of Scotiabank Peru.

361. *Sixth*, and finally, Peru argues that the valuation date should be eighteen months from the date of the 2021 Decision, or May 9, 2023.⁷²⁹ The foundational problem with Peru's position is that it conflates the "but for" world in which the damages scenario takes place with the actual world in which the breach takes place. In the "but for" world, there is no 2021 Decision and thus

⁷²⁶ CWS-[REDACTED], ¶¶ 21-27.

⁷²⁷ **C-0477**, Share Purchase Agreement, Schedule 8.1(a) - Balance Sheets and Interim Balance Sheets; **C-0478**, BWS/BSA Purchase Price Equation Memorandum.

⁷²⁸ Counter-Memorial, ¶ 459.

⁷²⁹ Counter-Memorial, ¶¶ 451-453.

the valuation date cannot take place eighteen months from a decision that never would have existed. As discussed above and in the Memorial, January 1, 2019 is the correct date for the valuation of damages in the “but for” world. It is the date that undoes Peru’s wrongful conduct and puts Scotiabank in the position that it would have held, had the Constitutional Court not succumbed to improper pressure, and had it issued its decision in the Default Interest Amparo in the ordinary course. This eighteen-month period is now reinforced by new documents that Peru produced: the

362. In the alternative event that the Tribunal accepts Peru’s argument that May 9, 2023 is the correct valuation date, KSV has calculated Scotiabank’s and Scotiabank Peru’s damages as of that date, correcting Peru’s errors discussed above. Scotiabank Peru’s loss in this scenario is [REDACTED]. The increased damages largely flow from the four additional years of interest accrued before repayment by SUNAT in 2023, as compared to a repayment date at the beginning of 2019. The impact of valuation date is summarized in the chart below.

	If Scotiabank’s January 1, 2019 valuation date is accepted	If Peru’s May 9, 2023 valuation date is accepted
Scotiabank Peru’s Damages (before interest)	[REDACTED]	[REDACTED]

III. Scotiabank’s Claims for Pre- and Post-Award Interest are Well-Founded

363. Scotiabank is entitled to interest, compounded annually, applied pre- and post-award, for the reasons set out beginning at paragraph 354 of the Memorial.

364. Peru does not substantially respond to the arguments or authorities cited in the Memorial that support an award of pre- and post-award interest. Both are commonly ordered in this context. Instead Peru raises three arguments: (a) interest should run from sixty days following the award;

⁷³¹ CER-KSV #2, ¶ 3.6(d).

(b) Scotiabank applies an inappropriate interest rate; and (c) compound interest on a monthly basis is not justified. None is supported.

A. Pre-Award Interest Required in Order to Provide Full Reparation and is the Norm

365. Peru relies on two cases—*Libyan American Oil Company v. Libya*, and *Lemire v. Ukraine*—to argue that pre-award interest should not be applied. Both are inapplicable, and have been distinguished by other tribunals such as *Venezuela US, S.R.L. v. Bolivarian Republic of Venezuela*, as follows:

- (a) In *Libyan American Oil Company*, the tribunal decided the interest issue on the basis that domestic law dictated whether and over what period pre-award interest would be payable. The tribunal indicated it would “take[] into consideration the proper law of the contract which is international law only when consistent with Libyan domestic law.”⁷³² The tribunal found that Article 229 of the Libyan Civil Code governed interest and applied, restricting pre-award interest. In its Counter-Memorial, Peru notably omitted this direct reference to the Libyan Civil Code, from the quote it pasted at paragraph 467, which renders this case wholly irrelevant.⁷³³
- (b) In *Lemire*, the Tribunal awarded interest from the expiration date of a sixty-day grace period following the date of delivery of the final award. However, Peru has omitted the preceding paragraph in which the tribunal discusses that the claimant in that case had “left the determination of the *dies a quo* rather vague, referring to the date on which the compensation is determined to have been due to Claimant.”⁷³⁴ In that circumstance, the tribunal found it suitable to have interest run from after date of the award. That case also involved a convoluted set of facts related to multiple licensing decisions of radio broadcast frequencies over many years and a

⁷³² **RL-0163**, *Libyan American Oil Company (LIAMCO) v. The Government of the Libyan Arab Republic Relating to Petroleum Concessions 16, 17 and 20*, (20 I.L.M. 1), Award, April 12, 1977, ¶ 362.

⁷³³ But as, in general law, interest on damages is due on claims of money whose amount is known (above mentioned terms of the Libyan Civil Code), it cannot accrue for unliquidated damages before their judicial ascertainment and liquidation. Consequently, this Tribunal has to apply it only from the time of the final assessment of damages at the date of this Award. [emphasis added]

⁷³⁴ **CL-0108**, *Lemire*, ¶ 362.

resulting composite breach of the fair and equitable treatment standard unfolding over time. All of this is distinct from Scotiabank's case.

- (c) In *Venezuela US, S.R.L.*, the tribunal rejected these arguments and reliance on *Libyan American Oil Company* and *Lemire* to avoid pre-award interest. The tribunal found that these two cases were inapplicable for the reasons discussed above. The tribunal found that full reparation requires interest to run "from the date when the principal sum should have been paid."⁷³⁵

366. Numerous other tribunals, including the tribunals in *Gramercy v. Peru*, *Cairn v. India*, *Metalclad v. Mexico*, and *Pope & Talbot v. Canada*, have held that pre-award interest must be awarded from the valuation date.⁷³⁶ Such authorities also include cases relied upon by Peru throughout its Counter-Memorial, such as *Gemplus v. Mexico*.⁷³⁷

B. The Interest Rate Applied by Scotiabank is Reasonable

367. In the Memorial, Scotiabank established that the interest rate applied must be equivalent to Scotiabank's opportunity cost, which, in the context of Scotiabank's financial services business is a return on its equity.⁷³⁸ Had Scotiabank and Scotiabank Peru not been deprived of the funds to which they were entitled, they would have put those funds to productive use in the context of their business. The full reparation standard of compensation requires that this be taken into account.

368. Peru argues that that return on equity is not an interest rate and it would overcompensate Scotiabank. As explained by KSV, that would not provide Scotiabank with full reparation for its losses, i.e. it would not place Scotiabank in the position it would have occupied but for Peru's breach of the FTA, because damages "must be assessed based on the rate of return on equity that

⁷³⁵ **CL-0201**, *Venezuela US, S.R.L. (Barbados) v. Bolivarian Republic of Venezuela* (PCA Case No. 2013-34), Final Award (Quantum), 4 November 2022, ¶¶ 57-59.

⁷³⁶ See **CL-0100**, *Gramercy*, ¶ 1396; **CL-0006**, *Cairn Energy PLC and Cairn UK Holdings Limited (CUHL) v. Government of India* (PCA Case No. 2016-7), Final Award, December 21, 2020, ¶¶ 1955-1962; **CL-0115**, *Metalclad Corporation v. The United Mexican States* (ICSID Case No. ARB(AF)/97/1), Award, 30 August 2000, ¶ 128; *Pope & Talbot Inc v. The Government of Canada* (UNCITRAL), Award in Respect of Damages, ¶¶ 89-90; **RL-0158**, *Gemplus, S.A., SLP, S.A., and Gemplus Industrial S.A. de C.V. v. United Mexican States* (ICSID Case No. ARB(AF)/04/3) ("**Gemplus**"), ¶ 16.21.

⁷³⁷ Counter-Memorial ¶ 436; **RL-0158**, *Gemplus*, ¶ 16.21.

⁷³⁸ Memorial, ¶¶ 357 to 365.

Scotiabank Peru would have realized had it had access to the funds.”⁷³⁹ Secretariat’s argument that this compensates for “risks not taken” is irrelevant as Scotiabank was prevented by Peru from deploying this capital into productive uses and taking these risks.⁷⁴⁰

369. As a corroborative calculation, in its initial report, KSV noted that the loss can be considered a “forced loan” to Peru. KSV therefore calculated interest based on the ten-year Peruvian bond yield rate. Peru appears to accept, in principle, the use of its bond yield rates but Secretariat applies a rate from 2023 with a yield as of the valuation date for a bond maturing in 2027 or 2028 (*i.e.* a four- or five-year bond).⁷⁴¹ KSV explains that Peru’s approach is inconsistent with the “forced loan” principle underlying the use of this rate: “under the forced loan theory, at the time the ‘loan’ was set, the term of the loan was not known (and it is still not known today). We agree that the term of the bond should be set equal to the term of the loan, but that term is not yet known, and, in our view, a ten-year bond is the most reasonable approximation.”⁷⁴² In addition, that rate is correct “as that rate changes over the term of the ‘forced loan’ because the risk of the loan changes over the time (e.g. monthly) and this is reflected in the updates to the bond rates set by the market.”⁷⁴³ Peru’s adoption of a shorter bond with a lower rate does not reflect the reality that in this hypothetical, the term of the forced loan was not known.

C. Compound Interest is Justified

370. In the Memorial, Scotiabank explained that full reparation requires an award of compound interest. Scotiabank relied on more than a dozen authorities that stand for the proposition that compound interest is the generally accepted standard in international investment arbitration.⁷⁴⁴

371. Peru highlights one case, *ADM v. Mexico*, to argue that simple interest is appropriate in the context of a national treatment claim.⁷⁴⁵ That case is clearly outweighed by the weight of authority.

⁷³⁹ CER-KSV #2, ¶ 6.5(a).

⁷⁴⁰ CER-KSV #2, ¶ 6.5(b).

⁷⁴¹ Counter-Memorial, ¶¶ 471-474.

⁷⁴² CER-KSV #2, ¶ 6.19.

⁷⁴³ CER-KSV #2, ¶ 6.20.

⁷⁴⁴ Memorial, ¶¶ 366-377.

⁷⁴⁵ Counter-Memorial, ¶ 477.

There is nothing unique about a national treatment claim, as compared to other investment treaty breaches, that would justify an award of simple interest over compound interest.

372. Moreover, as Scotiabank and KSV explained at the Memorial stage, in the context of this case, interest should be compounded monthly, as this is the typical compounding period used by banks when they deploy cash in a commercial transaction.⁷⁴⁶ Just as the return on equity rate must be used in order to place Scotiabank in the position that it would have held but for Peru's breaches, as Scotiabank would have deployed the capital that was used to pay the default interest, interest must be compounded monthly in order to reflect how the underlying capital would have been deployed and to place Scotiabank in the position it would have held but for Peru's breaches.

373. Scotiabank reserves the right to further update interest calculations for the hearing.

IV. The Award Should be Net of Tax and Peru Has Raised No Taxes That are Not Accounted For

374. In the Memorial, Scotiabank established, from paragraph 377, that relevant taxes have been accounted for in its damages calculations and the award should therefore state that it is net of Peruvian taxes. Though Peru baldly says that this claim "should be rejected," Peru goes on to acknowledge that Scotiabank's request "could be acceptable" if the damages awarded "incorporate all applicable taxes," and that "the Claimant seems to have considered applicable taxes in its damages assessment."⁷⁴⁷

375. Scotiabank has done so. There is no basis to tax an award in this case. Scotiabank reserves its rights should Peru change its position.

V. No Merit to Peru's Claim for Costs

376. Scotiabank is entitled to its costs of this arbitration, as Scotiabank set out at paragraph 382 of the Memorial. There is no merit to Peru's request for costs at paragraphs 485 to 487 of the Counter-Memorial. There is no basis for Peru's argument that Scotiabank's claim is "unmeritorious" or "frivolous." As set out in this Reply, Peru's own documents demonstrate

⁷⁴⁶ Memorial, ¶ 372; CER-KSV #1, ¶ 4.11. KSV has also provided alternative interest calculations on the basis of annual compounding: CER-KSV #2, ¶ 6.26-6.28.

⁷⁴⁷ Counter-Memorial, ¶ 484.

political interference by the Government in the Constitutional Court's decision-making process and strongly support Scotiabank's case that it was treated differently and prejudicially as compared to similarly situated Peruvian investors. There is also no merit to Peru's argument that Scotiabank is bringing a claim that was dismissed at on the Rule 41 application: the Tribunal ruled expressly that Scotiabank's National Treatment claim would proceed. Peru's attempt to relitigate the Rule 41 application on costs is irrelevant. Scotiabank is entitled to recover its costs for the reasons set out in the Memorial.

PART SIX. RELIEF REQUESTED

377. On the basis of the foregoing and those set out in its Memorial, Scotiabank respectfully requests that the Tribunal:

- (a) DECLARE that the Tribunal has jurisdiction over this dispute;
- (b) DECLARE that Peru has breached Article 803 of the FTA;
- (c) ORDER Peru to compensate Scotiabank Peru pursuant to Article 820 of the FTA for Peru's breaches of the FTA in the amount of [REDACTED] plus pre-award compound interest from 1 January 2019 until the date of the Tribunal's Award at Scotiabank Peru's return on equity calculated monthly using the trailing twelve month 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) ORDER Peru 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) above, or at such other rate and compounding period as the Tribunal determines will ensure full reparation;
- (e) DECLARE that any award of damages and interest pursuant to paragraphs (c) and (d) above is made net of applicable Peruvian taxes and that Peru may not deduct taxes in respect of the payment of the award of damages and interest pursuant to paragraphs (c) and (d);

- (f) ORDER Peru to pay all of the costs and expenses of this arbitration, including Scotiabank's legal and expert fees and expenses of the Tribunal and ICSID's other costs and fees; and
- (g) AWARD such further and other relief at Scotiabank may request and as the Tribunal considers appropriate.

DATED: April 10, 2026

Respectfully submitted on behalf of
The Bank of Nova Scotia

[Signed]

Torys LLP

[Signed]

Payet, Rey, Cauvi, Pérez Abogados