

**IN THE MATTER OF AN ARBITRATION UNDER THE RULES OF THE
INTERNATIONAL CENTRE FOR SETTLEMENT OF
INVESTMENT DISPUTES**

Eco Oro Minerals Corp.

Claimant

AND

Republic of Colombia

Respondent

ICSID Case No. ARB/16/41

NON-DISPUTING PARTY SUBMISSION OF CANADA

27 February 2020

Trade Law Bureau
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I. INTRODUCTION

1. Canada makes this submission pursuant to Article 827(2) of the *Free Trade Agreement between Canada and the Republic of Colombia* signed on 21 November 2008 and which entered into force on 15 August 2011 (the “Agreement”), which provides a non-disputing Party the right to make submissions to a tribunal on a question of interpretation of the Agreement.

2. By letter dated February 11, 2020, Canada notified the Tribunal and the disputing parties that it intended to file a submission pursuant to Article 827(2) of the Agreement. On February 13, 2020 the Secretary to the Tribunal invited Canada to file its written submission by March 4, 2020 and subsequently, on February 20, 2020, requested Canada’s submission by February 27, 2020.

3. In this submission, Canada provides its views on certain questions of interpretation of the Agreement. This submission is not intended to address all interpretative issues that may arise in this proceeding or in relation to the questions raised by the Tribunal in Procedural Order No. 11 of January 28, 2020. To the extent that certain issues raised by the disputing parties or the Tribunal have not been addressed, no inference should be drawn from Canada’s silence. Canada does not, through this submission, take a position on issues of fact or on the application of these submissions to the facts of this dispute.

II. ARTICLE 811 (EXPROPRIATION)

4. Article 811 of the Agreement reflects and incorporates the customary international law standard with respect to expropriation.¹ It provides that the investments of investors of either Contracting Party shall not be nationalized, expropriated or subjected to measures having an effect equivalent to nationalization or expropriation (i.e., indirect expropriation) in the territory of the other Contracting Party, except for a public purpose; under due process of law; in a non-discriminatory manner; and against prompt, adequate and effective compensation.

5. The first step in analysing whether there has been a breach of Article 811 is to identify the specific investment alleged to have been expropriated.² Any expropriation analysis must begin with determining whether there is a valid property right capable of being expropriated.³ A

¹ *Glamis Gold, Ltd. v. The United States of America* (UNCITRAL) Final Award, 8 June 2009, (“*Glamis Award*”), ¶ 354 (interpreting the similar provision in the NAFTA and holding that “inclusion in Article 1110 of the term “expropriation” incorporates by reference the customary international law regarding that subject”).

² *Generation Ukraine v Ukraine* (ICSID Case No. ARB/00/9) Award, 16 September 2003, ¶ 6.2 (“Since expropriation concerns interference in rights in property, it is important to be meticulous in identifying the rights duly held by the Claimant at the particular moment when allegedly expropriatory acts occurred”).

³ *Chemtura Corporation v. Government of Canada* (UNCITRAL) Award, 2 August 2010 (“*Chemtura Award*”), ¶ 242 (holding that the first step in an expropriation claim is to determine “whether there is an investment capable of being expropriated”); *Crystallex International Corporation v. Bolivarian Republic of Venezuela* (ICSID Case No. ARB(AF)/11/2) Award, 4 April 2016, ¶ 659 (“The Tribunal starts its analysis on expropriation with the threshold question as to whether the Claimant had rights capable of being expropriated.”) See, also e.g., Rosalyn Higgins, *The Taking of Property by the State: Recent Developments in*

potential property right or one that is conditional, in that it may or may not materialize, is not vested and is not capable of being expropriated.⁴

6. This determination of whether there is a property right capable of being expropriated requires a *renvoi* to the domestic law of the Party in question. Only legal rights that have vested under the applicable domestic law are capable of being expropriated. The law of the host State will determine the existence, nature, and scope of the “property right” at issue including any applicable limitation.⁵ In this respect, international tribunals have generally recognized that domestic courts interpreting legal rights under domestic law should be accorded deference.⁶

International Law, 176 R.C.A.D.I. (“Higgins”) 259, 272 (1982) (“[O]nly property deprivation will give rise to compensation.”) (emphasis in original); Rudolf Dolzer, *Indirect Expropriation of Alien Property*, 1 ICSID Review, Foreign Investment Law Journal 41 (1986) (“Once it is established in an expropriation case that the object in question amounts to ‘property,’ the second logical step concerns the identification of ‘expropriation’”).

⁴ *Emmis International Holding, B.V. Emmis Radio Operating, B.V. Mem Magyar Electronic Media Kereskedelmi Es Szolgaltato KFT v. Hungary* (ICSID Case No. ARB/12/2) Award (“*Emmis Award*”), 16 April 2014, ¶ 168 (“It also follows from the basic notion that an expropriation clause seeks to protect an investor from deprivation of his property that the property right or asset must have vested (directly or indirectly) in the claimant for him to seek redress.”)

⁵ See, e.g., Campbell McLachlan, Laurence Shore & Matthew Weiniger, *International Investment Arbitration: Substantive Principles*, 2nd ed. (Oxford University Press, 2017) (“McLachlan, Shore & Weiniger”) ¶ 8.64 (“The property rights that are the subject of protection under the international law of expropriation are created by the host State law.”); Zachary Douglas, *The International Law of Investment Claims* (2009), ¶ 102 (“whenever there is a dispute about the scope of the property rights comprising the investment, or to whom such rights belong, there must be a reference to a municipal law of property.”); See also *Emmis Award*, ¶ 161-162; *EnCana Corporation v. Republic of Ecuador* (UNCITRAL) Award, 3 February 2006, ¶ 184; *Glamis Gold Ltd. v. United States of America* (UNCITRAL) Rejoinder of Respondent United States of America, 15 March 2007, pg. 11 (agreeing with expert report of Professor Wälde that in an instance where property rights are subject to legal limitations existing at the time the property rights are acquired, any subsequent burdening of property rights by such limitations does not constitute an impairment of the original property interest).

⁶ *Eli Lilly and Company v. Government of Canada* (ICSID Case No. UNCT/14/2) Final Award, 16 March 2017, ¶¶ 221, 224 (“[t]he Tribunal emphasizes that a NAFTA Chapter Eleven tribunal is not an appellate tier in respect of the decisions of the national judiciary. It is not the task of a NAFTA Chapter Eleven tribunal to review the findings of national courts and considerable deference is to be accorded to the conduct and decisions of such courts.”); *Perenco Ecuador Limited v. Republic of Ecuador* (ICSID Case No. ARB/08/6) Decision on Remaining Issues of Jurisdiction and on Liability, 12 September 2014, ¶ 583 (“But in applying international law, the Tribunal does not act as a court of appeal on questions of Ecuadorian law. This jurisdictional limit is well-established in the jurisprudence. The Tribunal must recognise the allocation of competencies between adjudicatory bodies at the national and international levels. An international tribunal cannot second-guess the court’s interpretation and application of local law.”); *Mr. Frank Charles Arif v. Republic of Moldova* (ICSID Case No. ARB/11/23) Award, 8 April 2013, ¶ 417 (holding that since “the agreements have been found [by domestic courts] to be invalid under Moldovan law this Tribunal is not persuaded that there can be deprivation of invalid rights. The invalidity of these agreements ... resulting from the application of Moldovan law by the Moldovan courts as a result of lawsuits filed by private competitors cannot be interpreted as an expropriation of Mr. Arif’s rights, as Claimant pretends”).

7. For there to be an expropriation, a property right must have been taken.⁷ In other words, there must be a taking of fundamental ownership rights, either directly or indirectly, that causes a substantial deprivation of economic value of the investment.⁸ Mere interference with an investor's use or enjoyment of the benefits associated with property is insufficient to constitute an expropriation at international law.⁹

8. In considering allegations that the State has "taken" or "expropriated" the investor's property rights through its regulatory powers, consideration must be given to State's police power, which is a well recognized concept at customary international law: a host State is not required to compensate an investment for any loss sustained by the imposition of a non-discriminatory, regulatory measure designed and applied to protect legitimate public welfare objectives.¹⁰ This principle allows governments the necessary flexibility to regulate without having to pay compensation for every effect of regulation. Otherwise, governments would be unable to tax, set standards, take important health or environmental measures or carry on the functions that citizens expect from governments.¹¹ As the tribunal in *Suez InterAgua v. Argentina* recognized, "in evaluating a claim of expropriation it is important to recognize a State's

⁷ See, e.g., McLachlan, Shore & Weiniger ¶ 8.68 ("In fact, the central element is that property must be 'taken' by State authorities or the investor must be deprived of it by State authorities."); Higgins, 259, 272 (1982) ("[O]nly property deprivation will give rise to compensation.") (emphasis in original); See also for e.g., *Glamis Award*, ¶ 356 ("There is for all expropriations, however, the foundational threshold inquiry of whether the property or property right was in fact taken."); *SD Myers v. Canada* (UNCITRAL) First Partial Award on the Merits, 13 November 2000 ("*SD Myers Partial Award*"), ¶ 280 ("In general, the term "expropriation" carries with it the connotation of a "taking" by a governmental-type authority of a person's "property" with a view to transferring ownership of that property to another person, usually the authority that exercised its *de jure* or *de facto* power to do the "taking").

⁸ *Pope & Talbot Inc. v. Government of Canada* (UNCITRAL) Interim Award, 26 June 2000 ("*Pope & Talbot Interim Award*"), ¶ 102 ("[t]he test is whether that interference is sufficiently restrictive to support a conclusion that the property has been 'taken' from the owner. Thus, the *Harvard Draft* defines – the standard as requiring interference that would 'justify an inference that the owner will not be able to use, enjoy, or dispose of the property.'"). See also, *Glamis Award*, ¶ 357; *Grand River Enterprises Six Nations, Ltd., et al. v. United States of America* (UNCITRAL) Award, 12 January 2011, ¶ 148; *Técnicas Medioambientales Tecmed, S.A. v. United Mexican States* (ICSID Case No. ARB (AF)/00/2) Award, 29 May 2003, ¶ 115.

⁹ *Glamis Award*, ¶¶ 356-357 ("The Tribunal agrees with these statements and thus begins its analysis of whether a violation of Article 1110 of the NAFTA has occurred by determining whether the federal and California measures "substantially impair[ed] the investor's economic rights, *i.e.* ownership, use, enjoyment or management of the business, by rendering them useless. Mere restrictions on the property rights do not constitute takings."); *Pope & Talbot Interim Award*, ¶¶ 101-102; *SD Myers Partial Award* ¶¶ 281-282.

¹⁰ See, e.g., *Methanex Corporation v. United States of America* (UNCITRAL) Final Award, 3 August 2005, ¶ 7; *SD Myers Partial Award*, ¶¶ 281-282.

¹¹ *Methanex Corporation v. United States of America* (UNCITRAL) Fourth Submission of The Government of Canada, 30 January 2004, ¶ 14 ("A key aspect of the international law of expropriation is the exclusion of a state's regulatory or 'police power' from the scope of expropriation. At international law, expropriation does not result from *bona fide* regulation: a state is not required to compensate an investment for any loss sustained by the imposition of a non-discriminatory, regulatory measure protecting legitimate public welfare objectives"). See also, *Koch Minerals Sarl and Koch Nitrogen International Sarl v. Bolivarian Republic of Venezuela* (ICSID Case No. ARB/11/19) Award, 30 October 2017, ¶¶ 7.17-7.22.

legitimate right to regulate and to exercise its police power in the interests of public welfare and not to confuse measures of that nature with expropriation.”¹²

9. In the Agreement, the police powers of the State are expressly reflected in Annex 811. As its title indicates, Annex 811 of the Agreement addresses “Indirect Expropriation”.¹³ It provides guidance on how to distinguish measures that constitute indirect expropriation from otherwise legitimate governmental action not requiring compensation. Once the scope of the property interest, including applicable limitations, has been established, determining whether an indirect expropriation has occurred requires a case-by-case, fact based inquiry that considers and balances a number of factors. These include: (i) the economic impact of the measure or series of measures, although the sole fact that a measure or series of measures of a Party has an adverse effect on the economic value of an investment does not establish that an indirect expropriation has occurred; (ii) the extent to which the measure or series of measures interfere with distinct, reasonable investment-backed expectations; and (iii) the character of the measure or series of measures (for example if the measure is general in nature as opposed to targeting a particular investment).

10. No one factor is determinative or can be considered in isolation. As such, the impact on the investment is only one of the relevant factors; it must be considered together with the extent of interference with distinct reasonable investment backed expectations, the character of the measure and any other relevant factors.

11. Ultimately, a non-discriminatory measure that is designed and applied to protect legitimate public welfare objectives such as health, safety and the protection of the environment, does not constitute indirect expropriation, except in rare circumstances.¹⁴ This conclusion set out in Annex 811.2(b) reflects the deference given to States in their determination of the level of

¹² *Suez, Sociedad General de Aguas de Barcelona SA, and InterAgua Servicios Integrales del Agua SA v. The Argentine Republic* (ICSID Case No. ARB/03/17) Decision on Liability, 30 July 2010, ¶ 128. *See also, Chemtura Award*, ¶ 266 (holding that Canada’s regulation of the pesticide lindane was a non-discriminatory measure motivated by health and environmental concerns and that a measure “adopted under such circumstances is a valid exercise of the State’s police powers and, as a result, does not constitute an expropriation”).

¹³ Language similar to Annex 811 is found in recent trade agreements and investment treaties to which Canada is a Party and further explains what States mean and provides interpretative guidance on the meaning of indirect expropriation and the analysis that must be followed in considering an alleged indirect expropriation.

¹⁴ This conclusion is found in interpretive annexes on expropriation of recent Canadian investment treaties and is meant to reflect customary international law with respect to “indirect expropriation”. It does not constitute an exception that applies after an expropriation has been found but is a recognition that the exercise of police powers does not engage State responsibility. *See e.g.*, Ian Brownlie, *Principles of Public International Law*, 539 (1998) (“Cases in which expropriation is allowed to be lawful in the absence of compensation are within the narrow concept of public utility prevalent in laissez-faire economic systems, i.e. exercise of police power, health measures, and the like.”); G.C. Christie, *What Constitutes a Taking of Property Under International Law*, 38 *Brit. Y.B. Int’l*, 307, 338 (1962) (“If, however, such prohibition can be justified as being reasonably necessary to the performance by a State of its recognized obligations to protect the public health, safety, morals or welfare, then it would normally seem that there has been no ‘taking’ of property”).

protection they seek to achieve and the regulatory choices to achieve these objectives.¹⁵ If the impact of a measure is so severe in the light of its purpose that it cannot be reasonably viewed as having been adopted and applied in good faith, this may however indicate that an indirect expropriation is at issue, not the exercise of police powers. The use of the phrase “except in rare circumstances” and the reference to measures that “cannot reasonably be viewed as having been adopted and applied in good faith” are consistent with the high degree of deference that States’ regulatory choices should be accorded. Therefore, *bona fide* non discriminatory regulatory measures to protect the environment even if they are based on precaution (i.e. *in dubio pro ambiente*) will ordinarily not require compensation even if they affect the value and/or viability of an investment of an investor of another Party.

III. ARTICLE 2201 (EXCEPTIONS)

A. Proper Interpretation and Application of Article 2201

12. Chapter 22 (Exceptions) of the Agreement sets out several exceptions that apply across the Agreement.

13. Article 2201 (General Exceptions) contains different public policy exceptions that apply as general exceptions to the obligations in the Agreement. General Exceptions are a common feature of most international trade agreements.

14. Article 2201 is composed of four paragraphs. The first paragraph sets out the exceptions that apply with respect to trade in goods chapters (paragraph 1). It incorporates the general exception in GATT 1994 Article XX, and clarifies its application to environmental measures. The second paragraph sets out the exceptions that apply with respect to trade in services (paragraph 2) and incorporates by reference GATS XIV (a), (b) and (c) and clarifies its application to environmental measures. A separate paragraph, paragraph 3 identifies the specific exceptions that are relevant to and apply to the obligations under Chapter Eight (Investment). Finally, paragraph 4 addresses the extent to which a public order exception can be invoked in relation to treatment of nationals (natural persons of the other Party).

15. The general exceptions in paragraph 1 to 3 are standard in Canada’s trade agreements and the language used is generally similar across Canada’s agreements.¹⁶

16. Importantly, the general exceptions in Article 2201 only apply once there has been a determination of breach of an obligation in the Agreement. In the context of investment obligations, the exception in Article 2201(3) only applies once there has been a determination that there is a breach of a primary obligation in Chapter Eight (Investment) of the Agreement.

¹⁵ Similarly, the minimum standard of treatment in Article 805 by its nature does not allow tribunals to second guess regulatory choices made by States.

¹⁶ Although Canada’s free trade agreements always include general exceptions, Canada’s practice with respect to the inclusion of general exceptions in its investment agreements, as well as their applicability to the investment obligations in its free trade agreements, has varied.

For the general exception in Article 2201(3) to apply, the measure must (1) not be applied in a manner that constitutes arbitrary or unjustifiable discrimination between investments or between investors, or a disguised restriction on international trade or investment; (2) relate to one of the policy objectives set out in paragraphs (a)-(c) (which includes the protection of the environment) and (3) be “necessary” to achieve these objectives.¹⁷ If the general exception applies, then there is no violation of the Agreement and no State liability. Payment of compensation would therefore not be required.

B. Relevance of Article 2201(4)

17. In addition to the general exceptions such as those in Article 2201(1) to (3), Canada’s treaties include on occasion a public order exception.¹⁸ However, the wording of the public order exception in Article 2201(4) is unique in that language similar to the second sentence of Article 2201(4) is not included in any of Canada’s other treaties.

18. In this regard, Canada notes that the Parties’ understanding in the second sentence of paragraph 4 with respect to the interaction with other obligations in the Agreement only relates to the public order exception in Article 2201(4). It cannot be read into or inform the other paragraphs of Article 2201 and has no bearing on their interpretation. Each paragraph of Article 2201 has its own scope of application.

C. Relation Between the General Exceptions in Article 2201(3) and the Investment Obligations

19. Many of the investment provisions contain their own internal flexibilities that determine whether regulatory action is legitimate or if it amounts to a breach of an obligation. For example, States can differentiate between investments on the basis of a broad range of policy objectives without breaching the national treatment obligation because the treatment was not accorded in like circumstances in light of the policy objectives pursued.

¹⁷ See for e.g., decisions of the World Trade Organization analysing the requirements under Article XX of the GATT 1994 and Article XIV of the GATS such as: Appellate Body Report, *United States – Standards for Reformulated and Conventional Gasoline*, WT/DS2/AB/R, adopted 20 May 1996; Appellate Body Report, *Brazil – Measures Affecting Imports of Retreaded Tyres*, WT/DS332/AB/R, adopted 17 December 2007; Appellate Body Report, *Korea – Measures Affecting Imports of Fresh, Chilled and Frozen Beef*, WT/DS161/AB/R, adopted 10 January 2001; Appellate Body Report, *European Communities – Measures Affecting Asbestos and Asbestos-Containing Products*, WT/DS135/AB/R, adopted 5 April 2001; Appellate Body Report, *United States – Measures Affecting the Cross-Border Supply of Gambling and Betting Services*, WT/DS285/AB/R, adopted 20 April 2005, Appellate Body Report, *Argentina – Measures Relating to Trade in Goods and Services*, WT/DS453/R and Add. 1, adopted 9 May 2016.

¹⁸ In recent agreements where it has included such an exception, Canada has clarified that the public order exception may only be invoked where a genuine and sufficiently serious threat is posed to one of the fundamental interests of society. See for e.g., *Canada-European Union Comprehensive Economic and Trade Agreement*, Article 28.3.2.

20. As a result, legitimate regulatory actions will rarely need to be justified on the basis of the general exception in Article 2201(3) because they will not constitute breaches of the investment obligations in the first place. In this sense, the general exceptions are an additional tool or a final “safety net” to protect the State’s exercise of regulatory powers in pursuit of the specific legitimate objectives identified in the exceptions.

21. While some of the considerations that relate to a finding of breach of one of the investment obligations may be similar to those that would form part of the general exceptions analysis, whether a measure is justified under Article 2201(3) is a distinct enquiry that must be viewed through a different lens.

22. Only if a tribunal concludes that the measure breaches a Chapter Eight (Investment) obligation can there be consideration of the application of the general exception in Article 2201(3) to justify the breach. Because the exception in Article 2201(3) applies *generally* to all obligations in Chapter Eight (Investment), its relevance to a specific measure or to an alleged breach may vary.

23. The exceptions in Article 2201 cannot be used to broaden the scope of the primary obligations. Such a reading would have unintended consequences. Thus, for example, environmental measures that have the effect of depriving investors of the use and enjoyment of their property or vested rights must therefore first and foremost be considered in light of Annex 811.2 to determine whether there is a compensable expropriation. The Parties’ intention was never to limit the scope of legitimate policy objectives that States can pursue and that would not breach the investment obligations in the first place.

IV. INVESTMENT OBLIGATIONS AND ENVIRONMENTAL PROTECTION

24. As is clear from various provisions in the Agreement, the Parties did not view their investment obligations as being at odds with the protection of environmental and social goals and their environment and human rights obligations. Notably, the Preamble of the Agreement not only refers to “the promotion and protection of investments”, but also to a number of other social and environmental goals. For example, the Parties “undertook to implement the Agreement in a manner that is consistent with environmental protection and conservation”, to “enhance and enforce environmental laws and regulations, and to strengthen cooperation on environmental matters” “promote sustainable development” and they “preserve[d] their flexibility to safeguard the public welfare”.

25. Further, in Article 1701 the Parties affirmed that trade and environment policies are mutually supportive and that the Agreement should be implemented, and therefore interpreted, “in a manner consistent with environmental protection and conservation and sustainable use of their resources”. Indeed, a good faith interpretation of investment obligations in their context and in light of the purpose and objective of the treaty, will not be inconsistent with a State’s ability to adopt environmental protection measures. In this respect, in the context of an allegation that a regulatory measure is in breach of Article 811, a proper analysis of the measure in light of the guidance provided in Annex 811.2 (and if necessary under Article 2201(3)) will not limit the State’s ability to regulate in the public interest for the protection of the environment.

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Respectfully submitted on behalf of Canada,



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