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

BETWEEN:

Lupaka Gold Corp.

Claimant

AND:

Republic of Peru

Respondent

ICSID CASE NO. ARB/20/46

NON-DISPUTING PARTY SUBMISSION OF THE GOVERNMENT OF CANADA

May 26, 2022

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TABLE OF CONTENTS

I. INTRODUCTION

1. Canada makes this submission pursuant to Article 832 of the *Free Trade Agreement between Canada and the Republic of Peru* signed on May 29, 2008, which entered into force on August 1, 2009 ("Canada-Peru FTA" or "the Agreement").

2. Canada's submission does not address all interpretative issues that may arise in this proceeding. 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 819(1) (CLAIM BY AN INVESTOR OF A PARTY ON ITS OWN BEHALF)

3. In order for a tribunal to have jurisdiction over a claim under Section B of the Canada-Peru FTA, a claimant submitting a claim on its own behalf must meet the requirements of Article 819. A determination in this regard is a question to be decided in accordance with the Agreement and applicable rules of international law.[1]

4. Article 819(1) does not expressly address the situation where a claimant no longer owns or controls the investment that is the subject of its claim at the time that it submits the claim to arbitration. Article 819(1) provides, in relevant part, that "[a]n investor of a Party may submit to arbitration under this Section a claim that the other Party has breached: (a) an obligation under Section A ... and that the investor has incurred damage by reason of, or arising out of, that breach". Accordingly, to bring a claim on its own behalf, a claimant must be: (1) an "investor of a Party," (2) who has allegedly suffered a breach of an obligation under Section A, and (3) who has allegedly suffered damage by reason of, or arising out of, that breach. Canada addresses each jurisdictional requirement in turn.

5. First, Article 819(1) requires that a claimant demonstrate that it is an "investor of a Party" as that term is defined under Article 847 of the Agreement. Article 847 defines an "investor of a Party" as, in the case of Canada, "a national or an enterprise of Canada that seeks to make, is making or has made an investment". A person's ability to bring a claim as an investor is therefore tied to the investment that it is seeking to make, is making, or

[1] Article 837(1): "A Tribunal established under this Section shall decide the issues in dispute in accordance with this Agreement and applicable rules of international law."

has made in the past.[2] Canada notes that the definition contemplates circumstances where an investor may have started and completed the relevant investment entirely in the past. Read together, Article 819 and the definition of "investor of a Party" in Article 847 do not expressly require that a person own or control an investment at the time it submits a claim to arbitration.

6. Second, to properly assert a violation of an obligation in Section A, a claimant must have been protected under the treaty when the alleged violation occurred.[3] Article 801 (Scope and Coverage) of the Agreement establishes that the Chapter applies to measures adopted or maintained that *relate to*: (a) investors of the other Party, and (b) covered investments.[4] To establish standing under Article 819, a claimant must establish a close connection between itself, its investment, and the measure at issue. *Inter alia*, this "relating to" requirement limits the standing of later-in-time owners of an investment from asserting a claim under Article 819 with respect to an alleged breach that occurred prior to its acquisition of the investment in question.

7. Third, the use of the word "the" in Article 819(1) to describe the investor who has incurred damage makes clear that the investor bringing the claim must be the *same investor* that suffered damage because of the alleged breach. A claim under Article 819(1) can only be for damage that the claiming investor has itself suffered.

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[2] Article 847 also defines the term "investment," which encompasses a wide range of assets, including "an equity security of an enterprise," "an interest in an enterprise that entitles the owner to share in income or profits of the 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" and "contracts involving the presence of an investor's property in the territory of the Party, including . . . concessions[.]"

[3] It is well-established that a claimant must demonstrate that it was a protected investor with a protected investment at the time of the alleged breach. See, for example, *Westmoreland Mining Holdings Limited, LLC v. Government of Canada* (ICSID Case No. UNCT/20/3), Award ¶¶ 194-207. See also *Mesa Power Group, LLC v. Government of Canada* (UNCITRAL, PCA Case No. 2012-17), Award, ¶¶ 325-327, where the tribunal held that "investment arbitration tribunals have repeatedly found that they do not have jurisdiction *ratione temporis* unless the claimant can establish that it had an investment at the time the challenged measure was adopted. […] Accordingly, this Tribunal's jurisdiction *ratione temporis* is limited to measures that occurred after the Claimant became an "investor" holding an "investment;" *B-Mex, LLC and Others v. United Mexican States* (ICSID Case No. ARB(AF)/16/3), Partial Award, ¶ 145, where the tribunal agreed with the disputing parties in that case that, "Claimants must establish that they owned or controlled the [relevant investment] at the time of the treaty breaches;" and Zachary Douglas, who states: "the timing of the investor's acquisition of its investment determines the commencement of the substantive protection afforded by the investment treaty and hence the temporal scope for the tribunal's adjudicative power over claims based upon an investment treaty obligation." Zachary Douglas, *The International Law of Investment Claims* (New York: Cambridge University Press, 2009), p. 303; p. 631; and Rule 32.

[4] "Covered investment" is defined in Article 847 as: "with respect to a Party, an investment in its territory of an investor of the other Party existing on the date of entry into force of this Agreement, as well as investments made or acquired thereafter."

8. Provided that the investor bringing the claim is the same investor that held the relevant investment at the time of the alleged breach, and that suffered the alleged damage as a result of the alleged breach, Article 819 does not limit that investor's ability to bring a claim on its own behalf, even if it no longer holds the investment when the claim is submitted to arbitration. While the circumstances surrounding the divestment of the relevant investment in any particular case may hold relevance for other parts of a claimant's claim (for example, quantum of damages), divestment of the subject investment between the date of the alleged breach and the filing of the claim alone does not present a jurisdictional hurdle under Article 819.

III. ARTICLE 801(1) (SCOPE AND COVERAGE)

9. Article 801 sets out the scope and coverage of the investment chapter in the Canada-Peru FTA. Pursuant to Article 801(1), the measures that are "adopted or maintained by a Party."[5]

10. A Party to the Agreement is responsible for the acts of any organ of its government, whether at the central/national level or by any organ of its sub-national levels of government. This principle is enshrined in Article 104 of the Agreement, which provides:

> Each Party is fully responsible for the observance of all provisions of this Agreement and shall take such reasonable measures as may be available to it to ensure observance of the provisions of this Agreement by the sub-national governments and authorities within its territory.

11. Such responsibility is a foundational rule of the customary international law regarding State responsibility.[6]

12. It is widely accepted that the actions of persons or entities that are not state organs can nevertheless be attributed to a State in circumstances where the person or entity in question is "empowered" by the law of the State to exercise certain elements of governmental authority. Article 5 of the International Law Commission's *Responsibility of*

[5] Emphasis added.

[6] *Case Concerning Application Of The Convention On The Prevention And Punishment Of The Crime Of Genocide* (Bosnia And Herzegovina v. Serbia and Montenegro), International Court Of Justice, Judgment of 26 February 2007, ¶ 385 (the "Genocide Convention case"). Canada also notes that Article 837(1) of the Agreement provides: "A Tribunal established under this Section shall decide the issues in dispute in accordance with this Agreement and applicable rules of international law. Disputes under the treaty are to be decided in accordance with the Agreement, and principles of international law."

States for Internationally Wrongful Acts ("ILC Articles") summarizes these rules of customary international law, providing:

> The conduct of a person or entity which is not an organ of the State under article 4 but which is empowered by the law of that State to exercise elements of the governmental authority shall be considered an act of the State under international law, provided the person or entity is acting in that capacity in the particular instance.[7]

13. As the tribunal in *Jan de Nul N.V. and Dredging International N.V. v. Arab Republic of Egypt* explained, this rule of attribution is associated with a two-part test: "first, the act must be performed by an entity empowered to exercise elements of governmental authority [and] second, the act itself must be performed in the exercise of governmental authority."[8] This is ultimately a "functional test" that aims at assessing whether the impugned conduct of an entity concerns purely "governmental activity and [not] other private or commercial activity."[9]

14. Article 5 does not attempt to identify precisely the scope of "governmental authority" for the purpose of attribution.[10] This is both correct and important because the type of authority that is regarded as "governmental" necessarily involves a contextual inquiry that depends on "the particular society, its history and traditions."[11] Assessing whether a particular act of a non-organ entity can be attributed to a State under international law is a fundamentally context- and fact-driven analysis that requires consideration of all relevant circumstances. A number of factors may be relevant to a tribunal considering

[7] Emphasis added.

[8] *Jan de Nul N.V. and Dredging International N.V. v. Arab Republic of Egypt*, ICSID Case No. ARB/04/13, Award, ¶ 163 (6 November 2008); *Gustav F W Hamester GmbH & Co KG v. Republic of Ghana*, ICSID Case No. ARB/07/24, Award, ¶ 175 (18 June 2010) (expressly applying the same two part test); see also *Bayindir Insaat Turizm Ticaret Ve Sanayi A.S. v. Islamic Republic of Pakistan*, ICSID Case No. ARB/03/29, Award, ¶ 121-122 (27 August 2009) (explaining that the "general" empowerment of an entity to exercise elements of governmental authority is insufficient in itself for purposes of attribution).

[9] James Crawford, *State Responsibility: The General Part* (New York: Cambridge University Press, 2014), p. 52 [Crawford].

[10] See *Jan Oostergetel and Theodora Laurentius v. The Slovak Republic*, Final Award, 23 April 2012, ¶¶ 162-163, where the Tribunal confirmed that purely private or commerce activity is excluded from the scope of application of ILC Article 5.

[11] Commentary to ILC Article 5, ¶ 6. See also Crawford, p. 131.

attribution in the context of a particular case, including those set out in the commentary to ILC Article 5.[12]

IV. ARTICLE 805(1) (MINIMUM STANDARD OF TREATMENT)

A. Article 805(1) Guarantees Treatment in Accordance with the Customary International Law Minimum Standard of Treatment

15. Article 805(1) of the Agreement establishes that each Party "shall accord to covered investments treatment in accordance with the customary international law minimum standard of treatment of aliens, including fair and equitable treatment and full protection and security."[13] Article 805(2) of the Agreement confirms that the concept of "fair and equitable treatment" in paragraph 1 "do[es] not require treatment in addition to or beyond that which is required by the customary international law minimum standard of treatment of aliens."

16. Pursuant to the principle of effectiveness, or *effet utile*, the phrase "in accordance with the customary international law minimum of standard of treatment," alongside the words "fair and equitable treatment," in both paragraphs 1 and 2 must be given meaning.[14]

17. Canada emphasizes that the content of the minimum standard of treatment at customary international law requires proof of State practice and *opinio juris*. In this regard, the decisions and awards of international courts and tribunals do not constitute instances of State practice for the purpose of proving the existence of a customary norm and are only relevant to the extent that they include an examination of State practice and *opinio juris*. As the Tribunal in *Glamis Gold* noted, awards of international tribunals can "serve as illustrations of customary international law if they involve an examination of customary

[12] These could include, e.g. the content of the powers possessed by the person or entity, the nature of the conferral of those powers, the purpose of the powers at issue, and the level of accountability or supervision exercised by the State over the entity in question. See Crawford, pp. 130-131.

[13] Emphasis added.

[14] As held by the tribunal in *Renco*, "the principle of effectiveness (*effet utile*) is broadly accepted as a fundamental principle of treaty interpretation. This principle requires that provisions of a treaty be read together and that 'every provision in a treaty be interpreted in a way that renders it meaningful rather than meaningless (or *inutile*).'" *Renco Group Inc. v. Republic of Peru* (UNCITRAL), Decision as to the Scope of the Respondent Preliminary Objections Under Article 10.20.4, 18 December 2014, ¶ 177. See also *Noble Ventures, Inc. v. Romania*, ICSID Case No. ARB/01/11, Award, 12 October 2005, ¶ 50 (holding that "the principle of effectiveness (*effet utile*)… plays an important role in interpreting treaties.").

international law," but they "do not constitute State practice and thus cannot create or prove customary international law."[15]

18. In the 1969 *North Sea Continental Shelf* case, the International Court of Justice ("ICJ") stated that "[n]ot only must the acts concerned amount to a settled practice, but they must also be such, or be carried out in such a way, as to be evidence of a belief that this practice is rendered obligatory by the existence of a rule of law requiring it."[16] The ICJ more recently elaborated that such evidence may include, for example, the judgments of national courts, domestic legislation, or statements made by States.[17] The weight to be accorded to this evidence will depend on the particular circumstances of the case, including the overall context and the nature of the alleged rule.[18]

19. Thus, the applicable standard must be ascertained by considering evidence of an applicable customary international law rule, and not simply by referring to language in other awards or relying on a *Vienna Convention* analysis of the meaning of "fair and equitable."

B. Article 805(1) Does Not Protect an Investor's Legitimate Expectations

20. There is no general obligation under the customary international law minimum standard of treatment, and therefore under Article 805(1) of the Agreement, to protect an investor's legitimate expectations. The mere fact that a State takes or fails to take an action that may be inconsistent with an investor's expectations does not constitute a breach of the customary international law minimum standard of treatment, even if there is loss or damage to the investment as a result.[19] Tribunals have recognized that the customary international

[15] *Glamis Gold, Ltd. v. United States of America*, UNCITRAL, Award, 8 June 2009, ¶ 605 [*Glamis – Award*]. See also, *Cargill, Incorporated v. Mexico* (ICSID Case No. ARB(AF)/05/2), Award, 18 September 2009, ¶ 277: "It is important to emphasize, however, as Mexico does in this instance, that the awards of international tribunals do not create customary international law but rather, at most, reflect customary international law. Moreover, in both the case of scholarly writings and arbitral decisions, the evidentiary weight to be afforded such sources is greater if the conclusions therein are supported by evidence and analysis of custom."

[16] *North Sea Continental Shelf Cases*, International Court Of Justice, Judgment of 20 February 1969, ¶ 77.

[17] *Jurisdictional Immunities of the State (Germany v. Italy: Greece intervening)*, International Court of Justice, Judgment of 3 February 2012, ¶ 55. *See also*, United Nations, "Draft Conclusions on Identification of Customary International Law with Commentaries", 13 January 2018, p. 125.

[18] Ian Brownlie, "Principles of Public International Law", 7th ed. (Oxford: Oxford University Press, 2008), p. 128.

[19] Several of Canada's treaty partners, including all three NAFTA Parties, agree on this point. See, for example, *Windstream Energy, LLC v. Canada* (UNCITRAL) Canada's Reply to the 1128 Submissions of the United States and Mexico, 29 January 2016, ¶¶ 33-36.

law minimum standard of treatment "is not, and was never intended to amount to, a guarantee against regulatory change, or to reflect a requirement that an investor is entitled to expect no material changes to the regulatory framework within which an investment is made."[20]

C. Article 805(1) Does Not Extend Beyond Physical Protection and Security of Investments

21. Article 805(1) of the Agreement provides that "[e]ach Party shall accord to covered investments treatment in accordance with the customary international law minimum standard of treatment of aliens, including… full protection and security."

22. The full protection and security ("FPS") standard was historically "developed in the context of physical protection and security of the company's officials, employees or facilities"[21] and "notions of 'protection and constant security' or 'full protection and

[20] *Glamis – Award*, ¶ 354: holding that "inclusion in Article 1110 of the term 'expropriation' incorporates by reference the customary international law regarding that subject"; *Archer Daniels Midland Company v. Mexico* (ICSID Case No. ARB(AF)/04/05), Award, 21 November 2007, ¶ 237: "The key terms in Article 1110 –'nationalization,' 'expropriation,' and 'measures tantamount thereto' – are not defined in the NAFTA. The interpretation of these terms requires an analysis of the applicable rules of international law, in accordance with Article 1131 of the NAFTA." See also the positions of the NAFTA Parties on this issue: *Mondev International Ltd. v. United States of America* (ICSID Case No. ARB(AF)/99/2), Second Submission of Canada, ¶¶ 64-65: defining "expropriation" in Article 1110 with reference to international law; *Metalclad Corporation v. Mexico* (ICSID Case No. ARB(AF)/97/1), Submission of the United States, 28 July 1999, ¶ 10: stating that the United States "believes that it was the intent of the Parties that Article 1110(1) reflect customary international law as to the categories of expropriation."; *Methanex Corporation v. United States of America* (UNCITRAL) Mexico Fourth Submission per Article 1128, 30 January 2004, ¶ 13: "Article 1110, which must be interpreted in accordance with the applicable rules of customary international law, incorporates the principle that States generally are not liable to compensate aliens for economic loss resulting from non-discriminatory regulatory measures taken to protect the public interest, including human health.". G.C. Christie, "What Constitutes a Taking of Property under International Law?", 38 *British Yearbook of International Law* 307 (1962); Restatement of the Law Third: The Foreign Relations of the United States, Vol. 2 (St. Paul, MN: American Law Institute, 1987). See also these seminal cases of the customary international law of expropriation: *Oscar Chinn Case (UK v. Belgium)*, Judgment, 12 December 1934, PCIJ Ser A/B, No. 63 (1934); *Norwegian Shipowners' Claims (Norway v. USA)*, Permanent Court of Arbitration, Award of 13 October 1922, 1 RIAA 307; *German Interests in Polish Upper Silesia (Germany v. Poland)*, Judgment, 25 May 1926, PCIJ Ser A, No. 7 (1926); *Chorzow Factory Case (Jurisdiction)*, (1927), Ser. A, no. 9; *Barcelona Traction Light and Power Company Limited (Belgium v. Spain)*, International Court of Justice, Judgement of 5 February 1970.

[21] *Enron Corporation and Ponderosa Assets, L.P. v. Argentine Republic*, ICSID Case No. ARB/01/3, Award, 22 May 2007, ¶¶ 284-287.

security' in international law have traditionally been associated with situations where the physical security of the investor or its investment is compromised."[22]

23. Interpreting the phrase "protection and security" in accordance with Article 31(1) of the *Vienna Convention*[23] further confirms that the standard is concerned with physical protection; the dictionary definitions of the words "protection" and "security" both point to a general meaning of safety from physical harm, injury or impairment.[24]

24. This interpretation has also been recognized by numerous investment tribunals.[25] For example, in *Crystallex v. Venezuela*, the tribunal found that the FPS obligation is limited to physical protection and security:

> [T]he Tribunal considers that such treaty standard only extends to the duty of the host state to grant physical protection and security. Such interpretation best accords with the ordinary meaning of the terms "protection" and "security". Furthermore, this interpretation is supported by a line of cases involving the same or a similar phrase.[26]

[22] *BG Group Plc. v. The Republic of Argentina* (UNCITRAL), Final Award, 24 December 2007, ¶ 324 [*BG Group – Final Award*].

[23] *Vienna Convention on the Law of Treaties*, U.N.T.S., Vol. 1155 (1969) done at Vienna on 23 May 1969, entered into force on 27 January 1980, Article 31(1), available at: https://legal.un.org/ilc/texts/instruments/english/conventions/1_1_1969.pdf.

[24] As defined in the Oxford dictionary, the word "protection" means "[t]he action of protecting, or the state of being protected", and to "protect" means "[k]eep safe from harm or injury". "Harm" defined as "[p]hysical injury, especially that which is deliberately inflicted" and "injure" as "[d]o physical harm or damage to (someone)" or "[h]arm or impair (something)". "Security" is in turn defined as "[t]he state of being free from danger or threat", with "danger" defined as "[t]he possibility of suffering harm or injury" and "threat" defined as "[a] statement of an intention to inflict pain, injury, damage, or other hostile action on someone inretribution for something done or not done" or "[a] person or thing likely to cause damage or danger". See: Lexico, a collaboration between Dictionary.com and Oxford University Press, available at: https://www.lexico.com/

[25] See, for example, *Saluka Investments BV (The Netherlands) v. The Czech Republic* (UNCITRAL), Partial Award, 17 March 2006, ¶¶ 483 and 484 [*Saluka – Partial Award*]; *Gold Reserve Inc. v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB(AF)/09/1, Award, 22 September 2014, ¶¶622 and 623; *BG Group – Final Award*, ¶¶ 323-328.

[26] *Crystallex International Corporation v. Bolivarian Republic of Venezuela* (ICSID Case No. ARB(AF)/11/2), Award, ¶¶ 632 and 633.

25. Likewise, the *Saluka v. Czech Republic* tribunal determined that the FPS obligation is not meant to address all types of impairment, and is limited to the physical integrity of investments:

> The "'full protection and security'" standard applies essentially when the foreign investment has been affected by civil strife and physical violence.
>
> [T]he standard obliges the host State to adopt all reasonable measures to protect assets and property from threats or attacks which may target particularly foreigners or certain groups of foreigners. The practice of arbitral tribunals seems to indicate, however, that the "full security and protection" clause is not meant to cover just any kind of impairment of an investor's investment, but to protect more specifically the physical integrity of an investment against interference by use of force.[27]

26. Canada's recent treaty practice confirms its understanding that the FPS obligation concerns physical protection and security. For example, the *Canada-United States-Mexico Agreement*,[28] *Canada-European Union Comprehensive Economic and Trade Agreement*,[29] *Canada-Korea Free Trade Agreement*,[30] and *Canada-Romania Foreign Investment Protection and Promotion Agreement*,[31] all provide that the FPS obligation refers to physical security or police protection.

27. Accordingly, the FPS obligation of Article 805(1) does not extend beyond the physical protection and security of investments.

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[27] *Saluka – Partial Award*, ¶¶ 483 and 484 (emphasis added).

[28] *Canada-United States-Mexico Agreement* ("CUSMA"), Article 14.6(2)(b) ("'full protection and security' requires each Party to provide the level of police protection required under customary international law.")

[29] *CETA*, Article 8.10(5) ("For greater certainty, "full protection and security" refers to the Party's obligations relating to the physical security of investors and covered investments.")

[30] *Canada-Korea FTA*, Article 8.5(3)(b) ("The obligation in paragraph 1 to provide 'full protection and security' requires each Party to provide the level of police protection required under customary international law.")

[31] *Agreement Between the Government of Canada and the Government of Romania for the Promotion and Reciprocal Protection of Investments*, 8 May 2009 (entered into force 23 November 2011), Annex D ("For greater certainty… 'full protection and security' requires the level of police protection required under the customary international law minimum standard of treatment of aliens.")

V. ARTICLE 804 (MOST-FAVOURED-NATION TREATMENT)

28. Article 804 of the Agreement does not allow for the importation of substantive obligations or procedural rules contained in other international investment treaties.[32]

29. Article 804 requires each Party to accord to investors of the other Party and covered investments treatment no less favourable than that it accords, in like circumstances, to investors of a non-Party and their investments. For Article 804 to apply, there must be an actual instance of more favourable treatment to an investor of a third party. Substantive obligations and procedural rights in other international treaties do not constitute "treatment" of investors. Hypothetical treatment that may result from a treaty cannot give rise to a breach of the most-favoured nation treatment obligation.

VI. ARTICLE 812 (EXPROPRIATION)

30. Article 812 of the Canada-Peru FTA provides that a Party shall not "nationalize or expropriate a covered investment either directly, or indirectly through measures having an effect equivalent to nationalization or expropriation", except under certain circumstances. For there to be an expropriation, a property right must have been taken.[33] In other words,

[32] Campbell McLachlan et al, *International Investment Arbitration: Substantive Principles* (Oxford University Press 2007), pp. 256 and 257; *Plama Consortium Limited v. Republic of Bulgaria* (ICSID Case No. ARB/03/24), Decision on Jurisdiction, 8 February 2005, ¶ 223: ("[A]n MFN provision in a basic treaty does not incorporate by reference dispute settlement provisions in whole or in part set forth in another treaty, unless the MFN provision in the basic treaty leaves no doubt that the Contracting Parties intended to incorporate them.")

[33] See, for example, Rosalyn Higgins, "The Taking of Property by the State: Recent Developments in International Law", 176 R.C.A.D.I. 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, FOR. INVESTMENT L.J. 41, 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.'" Note that a determination of whether there is a property right capable of being expropriated requires *a renovi* to the domestic law of the Party in question. See, for example, *EnCana Corporation v. Republic of Ecuador* (UNCITRAL) Award, 3 February 2006, ¶ 184 ("Unlike many BITs there is no express reference to the law of the host State. However, for there to have been an expropriation of an investment or return (in a situation involving legal rights or claims as distinct from the seizure of physical assets) the rights affected must exist under the law which creates them, in this case, the law of Ecuador."); *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, 16 April 2014 [*Emmis – Award*], ¶¶ 161-162 ("In order to determine whether an investor/claimant holds property or assets capable of constituting an investment it is necessary in the first place to refer to host State law. Public international law does not create property rights."); *Accession Mezzanine Capital L.P. and Danubius Kereskedőház Vagyonkezelő Zrt v. Hungary* (ICSID Case No. ARB/12/3) Award, 17 April 2015, ¶ 75; *Tidewater Investment SRL and Tidewater Caribe, C.A. v. Bolivarian Republic of Venezuela* (ICSID Case No. ARB/10/5) Award, 13 March 2015, ¶ 116 ("Expropriation under international law undoubtedly contemplates property rights existing under national law that have been taken by the State."); *Vestey Group*

there must be a taking of fundamental ownership rights, either directly or indirectly, that causes a substantial deprivation of economic value of the investment.[34] Mere interference with an investment's use or enjoyment of the benefits associated with property is not the standard for expropriation at international law.[35]

31. Where an allegation of an indirect expropriation is made, recourse must be had to Annex 812(1) of the Agreement. The Annex sets out the Parties' shared understanding of the factors that must be present for a measure to constitute an indirect expropriation. In particular, 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:

- 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;
- the extent to which the measure or series of measures interfere with distinct, reasonable investment-backed expectations; and
- 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).

Ltd v. Bolivarian Republic of Venezuela (ICSID Case No. ARB/06/4) Award, 15 April 2016, ¶ 257; *Lion Mexico Consolidated L.P. v. United Mexican States* (ICSID Case No. ARB(AF)/15/2) Decision on Jurisdiction, 30 July 2018, ¶ 231 ("NAFTA does not offer a definition of the term 'intangible real estate' used in its Art. 1139(g). Absent such definition, to determine whether an investor holds 'intangible real estate', it is necessary to refer to the law of the host state."); *América Móvil S.A.B. de C.V. v. Republic of Colombia* (ICSID Case No. ARB(AF)/16/5) Award, 07 May 2021, ¶ 319; *Infinito Gold v. Republic of Costa Rica* (ICSID Case No. ARB/14/5), Award, ¶¶ 705 ("If no valid rights exist under domestic law, there can be no expropriation.") and 711.

[34] *Pope & Talbot Inc. v. Canada* (UNCITRAL) Interim Award, 26 June 2000, [*Pope & Talbot – Interim Award*], ¶ 102; *Grand River Enterprises Six Nations, Ltd., et al. v. United States* (UNCITRAL) Award, 12 January 2011, ¶ 148; *Glamis – Award*, ¶ 357.

[35] *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.'" See also *Pope & Talbot – Interim Award*, ¶¶ 101-102; *S.D. Myers, Inc. v. Government of Canada – Partial Award*, ¶¶ 281-282.

32. No single factor is determinative or can be considered in isolation. Moreover, 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 where its impacts are so severe in the light of its purpose that it cannot be reasonably viewed as having been adopted and applied in good faith.[36]

Dated this 26th day of May, 2022.

Respectfully submitted
on behalf of Canada,

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[36] Annex 812(1)(c).