IN THE MATTER OF AN ARBITRATION UNDER THE NORTH AMERICAN FREE TRADE AGREEMENT AND THE ICSID CONVENTION

FIRST MAJESTIC SILVER CORP.

Claimant

and

UNITED MEXICAN STATES

Respondent

(ICSID Case No. ARB/21/14)

DECISION ON THE CLAIMANT'S REQUEST FOR PROVISIONAL MEASURES

Members of the Tribunal

Prof. Giorgio Sacerdoti, President of the Tribunal
Prof. Stanimir A. Alexandrov, Arbitrator
Prof. Yves Derains, Arbitrator

Secretary of the Tribunal

Ms. Sara Marzal

26 May 2023

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I. INTRODUCTION

1. This Decision addresses the Request for Provisional Measures submitted on 4 January 2023 by First Majestic Silver Corp. ("**First Majestic**" or the "**Claimant**"), on its own behalf and on behalf of Primero Empresa Minera, S.A. de C.V. ("**PEM**"), on the basis of NAFTA Article 1134, Article 47 of the ICSID Convention and ICSID Arbitration Rule 39.

II. RELEVANT PROCEDURAL HISTORY

2. On 1 March 2021, the Claimant submitted its Request for Arbitration ("**Request for Arbitration**").

3. On 25 April 2022, the Claimant filed its Memorial on Jurisdiction and the Merits ("**Memorial**").

4. On 25 November 2022, the Respondent filed its Counter-Memorial on Admissibility, Jurisdiction and the Merits ("**Counter-Memorial**").

5. By letter dated 15 December 2022, the Claimant objected to certain information and statements contained in the Counter-Memorial and indicated that it would be seeking provisional measures from the Tribunal.

6. On 30 December 2022, the Respondent presented a letter in response, reserving its right to respond to any request for provisional measures and noting that the Parties were in the process of conferring regarding a procedural order on confidentiality.

7. On 4 January 2023, the Claimant filed the Request for Provisional Measures (the "**Request**").

8. Following communications from the Parties dated 4 and 5 January 2023, the Respondent was invited to provide its response to the Claimant's Request by 27 January 2023. Pending a decision on the Claimant's Request, the Tribunal further invited the Parties "to abstain from measures and initiatives that might aggravate the dispute or prejudice any decision by the Tribunal on the Claimant's Request."

9. On 20 January 2023, the Respondent informed the Tribunal that it had attempted to reach an agreement with the Claimant to obtain an extension for the presentation of its response to the Request but noted that the Parties were unable to reach an agreement. Accordingly, the Respondent requested a two-week extension.

10. On 23 January 2022, the Claimant responded to Mexico's correspondence, indicating that it opposed the two-week extension on the grounds that it would be prejudicial to the Claimant, "including by exacerbating the dispute, prolonging it and cause irreparable harm."

11. On 24 January 2023, the Tribunal granted the Respondent's request for a two-week extension and indicated that it would expect the Respondent's response by 10 February 2023. It further reminded the Parties "to abstain from measures and initiatives that might aggravate the dispute or prejudice any decision by the Tribunal on the Claimant's Request, as already indicated in the Tribunal's letter of January 10, 2023."

12. On 10 February 2023, the Respondent presented its Response to the Claimant's Request for Provisional Measures (the "**Response**").

13. On 13 February 2023, the Centre informed the Parties of the Tribunal's intention to hold a half-day virtual hearing "to further clarify the respective positions of the Parties on the Request" (the "**Hearing**"). Additionally, the Tribunal requested that the Parties submit jointly – or, where they are unable to agree, separately – one week before the hearing date, a chronology of relevant facts.

14. On 6 March 2023, the Parties informed the Tribunal that they had been unable to jointly prepare a chronology of relevant facts and both Parties submitted their own separate chronologies.

15. On 9 March 2023, the Tribunal issued Procedural Order No. 4 on the organization of the Hearing, which included a list of questions to be addressed by the Parties during their oral arguments.

16. On 13 March 2023, the Tribunal held the Hearing with the Parties by video conference. The following individuals participated in the session:

Members of the Tribunal:
Giorgio Sacerdoti, President of the Tribunal
Stanimir Alexandrov, Member of the Tribunal
Yves Derains, Member of the Tribunal

ICSID Secretariat:
Sara Marzal, Secretary of the Tribunal

On behalf of the Claimant:
Riyaz Dattu, ArentFox Schiff LLP
Lee Caplan, ArentFox Schiff LLP
Timothy Feighery, ArentFox Schiff LLP
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Luis Salvador Robles Espinoza, First Majestic

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Geovanni Hernández, Secretaría de Economía
Luis Muñoz, Secretaría de Economía
Laura Mejía, Secretaría de Economía
Alicia Islas, Secretaría de Economía
Alejandro Rebollo, Secretaría de Economía
Fabián Trejo, Secretaría de Economía
Vincent DeRose, Tereposky & DeRose LLP
Ximena Iturriaga, Tereposky & DeRose LLP

Court Reporters:
David Kasdan, B&B Reporters
Dante Rinaldi, D-R Esteno

Interpreters:
Silvia Colla
Daniel Giglio

Technical Support Staff:
Gina Pollard, Sparq

17. On 27 March 2023, the Claimant requested the introduction of three new documents into the record.

18. On 3 April 2023, the Respondent objected to the Claimant's above-mentioned request.

19. By letter of the same date, the Claimant informed the Tribunal that on Friday, 31 March 2023 it had served the Respondent with a NAFTA Notice of Intent seeking recovery of VAT refunds [redacted].

20. On 6 April 2023, the Tribunal rejected the Claimant's request to introduce new documents into the record.

III. THE PARTIES' POSITIONS[1]

A. The Claimant's Request

21. The Claimant requests that the Tribunal recommend the following provisional measures:

> *a) The suspension or stay of the proceedings pending before the Collegiate Court, in relation to the* amparo *relief requested by PEM from the Collegiate Court.*
>
> *b) Requiring the SAT and any other authority working in conjunction with the SAT, to refrain from:*
>
> *i. undertaking any additional enforcement measures, whether* [redacted] *against the Claimant and its investment (and the assets of the investment);*
>
> *ii. undertaking any further tax audits and issuing any additional tax reassessments based on any methodology other than provided for in the APA issued in 2012; and*
>
> *iii. initiating any proceedings, whether* [redacted]*, against the management personnel of the Claimant and its investment, whether in Mexico or residing outside the country, and whether currently or previously employed, in relation to the measures currently under adjudication before this Tribunal and also any settlement offer made to the Respondent (whether or not in compliance with Mexican law formalities) offers made by PEM.*

[1] This summary does not intend to be a detailed and exhaustive description of all of the Parties' arguments. Its objective is merely to establish the general context for this decision.

c) Requiring the SAT to make all payments of VAT refunds owed to PEM after the filing of the Request for Arbitration and all future VAT refund payments into a newly opened bank account of PEM that will remain free from SAT's seizure or freezing order; and

d) maintaining strict confidentiality of the arbitration proceeding such that no written or other media statements are made by the President of Mexico and any other Mexican government official, concerning the arbitration proceedings or the legal dispute with First Majestic and its investment.[2]

22. In its Request, the Claimant first indicates that it seeks provisional measures on its own behalf and on behalf of its investment in order to:

a) fully protect the Tribunal's jurisdiction,

b) ensure that the Tribunal's jurisdiction is made fully effective, and

c) to preserve their rights as detailed herein.[3]

23. The Claimant specifies the purpose of its requests as follows:

The provisional measures requested seek to avoid having the Government of Mexico, while this Tribunal is exercising its jurisdiction, from:

a) interfering with the Tribunal's exclusive jurisdiction pursuant to Article 26 of the ICSID Convention to adjudicate the dispute in a neutral manner and in an international forum (and to the exclusion of any domestic process in Mexico), in relation to the measures taken and not taken, that have been identified by the Claimant to be in violation of Chapter 11 of NAFTA;

b) exacerbating the dispute including by causing irreparable harm to the Claimant and its investment; and

c) impinging on any legal rights of the Claimant and its investment including the ability to carry on its business at the San

[2] Request, para. 153.
[3] Request, para.12.

> *Dimas Mine which is the source of livelihood for hundreds of its employees and their families in Mexico.*[4]

24. The Claimant further explains the content of the provisional measures requested, which it describes as having been framed in a "*narrow, specific and proportionate manner*", as follows:

> *a*) Immediate Suspension of the amparo proceedings relegated to the Mexican Fourteenth Collegiate Court on Administrative Matters of the First Circuit (Collegiate Court) proceeding*: The stay or suspension order requested by the Claimant concerns an* amparo *filed by PEM with the Collegiate Court on November 30, 2020 and which was thereafter admitted on February 23, 2021. The* amparo *was filed by PEM as a necessary protective measure to preserve the validity of the APA, and before the filing by the Claimant of the Request for Arbitration and the formation of this Tribunal. As discussed further below, based on political interference and machinations, the* amparo *proceeding was sought to be transferred by the Government to the Mexican Supreme Court based on an unusual and rarely used procedure known as the 'power of attraction.' However, the Government of Mexico has now, after the lapse of two years, inexplicably withdrawn as of December 8 and 9, 2022, each of the two separate petitions filed for the transfer of the* amparo *to the Mexican Supreme Court. The decision on the* ***amparo****, after this inordinate delay, has been relegated back to the Collegiate Court which has acknowledged receipt of the case on December 12, 2022. A decision has yet to be issued by the Collegiate Court, but could be issued any day.*
>
> *b)* Prohibition against the Mexican government officials' use of the Public Media to Discuss the Dispute*: The order requested would prohibit any statements by the President of Mexico, the Minister of Economy and any other Mexican government official, to the public media concerning matters that are the subject of this arbitration proceeding including its progress.*
>
> *c)* Future VAT refunds payable to PEM*: The requested order would require the SAT to make all VAT refunds that have accrued to PEM after the date of the filing of the Request for Arbitration, and all future VAT refund payments, to be made fully accessible to PEM.*

[4] Request, para. 18 (footnotes omitted).

Furthermore, the order would require that these VAT refunds remain free from SAT's seizures or freezing of bank accounts.

d) Stay of Enforcement, Transfer Pricing Audits and [redacted] *The order would ensure that the SAT and any other authority working in conjunction with the SAT, will refrain from:*

i. Undertaking any additional enforcement or collection measures against the Claimant and its investment (including the assets of the investment), whether [redacted] *in relation to any amounts claimed to be owing as taxes, penalties, interest and surcharges for the 2010 to 2014 taxation years of PEM.*

ii. Undertaking any transfer pricing related investigations or audits and issuing any additional tax reassessments for 2010 and all subsequent years, based on any methodology other than that provided for in the APA issued in 2012.

iii. Initiating any proceedings, whether [redacted] *against the management personnel of the Claimant and its investment, whether residing in Mexico or outside the country, and whether currently or previously employed, including in relation to:*

a. the obtaining by PEM of the APA in 2012, and any amounts claimed by the SAT to be owing as taxes, penalties, interest, and surcharges for the 2010 to 2020 taxation years of PEM, and any other measures currently under adjudication before this Tribunal; and

b. any settlement offer made to the Respondent (whether or not in compliance with Mexican law formalities) by PEM for any reassessments for its taxation years 2010 to 2020 in order to achieve a final resolution of the dispute.[5]

25. According to the Claimant, the provisional measures it requests:

are necessary to fully protect and make effective the Tribunal's jurisdiction, to avoid the exacerbation of this dispute, and to permit the Claimant and its investment to preserve their legal rights. Furthermore, they are narrow, specific, necessary, urgent, and

[5] Request, para.19 (footnotes omitted).

proportional and will avoid irreparable harm that will otherwise be suffered by the Claimant and its investment.[6]

26. As a legal basis for the Tribunal's authority to grant the provisional measures requested, the Claimant refers "cumulatively" to NAFTA Article 1134, Article 47 of the ICSID Convention, and Rule 39 of the ICSID Arbitration Rules:

> *Article 47 ICSID Convention*
>
> *Except as the parties otherwise agree, the Tribunal may, if it considers that the circumstances so require, recommend any provisional measures which should be taken to preserve the respective rights of either party.*
>
> *Rule 39 ICSID Arbitration Rules: Provisional Measures*[7]
>
> *(1) At any time after the institution of the proceeding, a party may request that provisional measures for the preservation of its rights be recommended by the Tribunal. The request shall specify the rights to be preserved, the measures the recommendation of which is requested, and the circumstances that require such measures.*
>
> *(2) The Tribunal shall give priority to the consideration of a request made pursuant to paragraph (1).*
>
> *(3) The Tribunal may also recommend provisional measures on its own initiative or recommend measures other than those specified in a request. It may at any time modify or revoke its recommendations.*
>
> *(4) The Tribunal shall only recommend provisional measures, or modify or revoke its recommendations, after giving each party an opportunity of presenting its observations.*
>
> *(5) If a party makes a request pursuant to paragraph (1) before the constitution of the Tribunal, the Secretary-General shall, on the application of either party, fix time limits for the parties to present*

[6] Request, para. 21.

[7] ICSID Arbitration Rules of 10 April 2006, in force when this arbitration was initiated and applicable pursuant to Procedural Order No. 1, para. 1.

observations on the request, so that the request and observations may be considered by the Tribunal promptly upon its constitution.

(6) Nothing in this Rule shall prevent the parties, provided that they have so stipulated in the agreement recording their consent, from requesting any judicial or other authority to order provisional measures, prior to or after the institution of the proceeding, for the preservation of their respective rights and interests.

Article 1134 NAFTA: Interim Measures of Protection

A Tribunal may order an interim measure of protection to preserve the rights of a disputing party, or to ensure that the Tribunal's jurisdiction is made fully effective, including an order to preserve evidence in the possession or control of a disputing party or to protect the Tribunal's jurisdiction. A Tribunal may not order attachment or enjoin the application of the measure alleged to constitute a breach referred to in Article 1116 or 1117. For purposes of this paragraph, an order includes a recommendation.

27. The Claimant refers specifically to Article 1134 NAFTA pointing out that, in its view, such provision "explicitly provides this Tribunal broad discretionary authority to award interim relief to preserve the rights of a disputing party, protect the Tribunal's jurisdiction and to ensure that its jurisdiction is made fully effective, provided the order does not constitute an '…attachment or enjoin the application of measures alleged to constitute a breach referred to in Article 1116 or 1117.'" The Claimant adds, in relation to the limitation found in the last sentence of Article 1134, that "[n]one of the provisional measures requested seek to attach or enjoin the application of the measures that have been enumerated by the Claimant to constitute a breach of Mexico's NAFTA obligations."[8]

28. The Tribunal summarizes hereafter the reasons, in law and in fact, which the Claimant has set forth in order to support its request.

1. *Prima facie* jurisdiction

29. First, the Claimant states that the Tribunal has the *prima facie* jurisdiction required to issue provisional measures, since the Respondent has not asked for bifurcation of the

[8] Request, paras. 23-24.

proceedings in relation to its objection to the Tribunal's jurisdiction and the Tribunal has received the evidence that confirms such *prima facie* jurisdiction over the claims.[9]

30. In the Claimant's view, the Tribunal should find *prima facie* jurisdiction based on the evidence submitted in the Memorial. In particular, the Claimant argues that: (i) it is an investor of Canada; (ii) it has made significant investments in Mexico for close to twenty years, including in the San Dimas Mine; (iii) the measures taken "by the executive branch and the administrative courts [of the Respondent], have detrimentally and severely impacted the Claimant's ability to carry on its business in Mexico;" (iv) it is entitled to bring its claims on its own behalf, and on behalf of PEM, pursuant to NAFTA Articles 1116 and 1117; (v) all temporal requirements set out in NAFTA Chapter 11 have been satisfied; (vi) the requirements in NAFTA Article 1121 and under the ICSID Convention, the ICSID Institution Rules and the ICSID Arbitration Rules have also been met; and (vii) the measures at issue are not excluded from the scope of NAFTA Chapter 11, including NAFTA Article 2103(1) as they are not "taxation measures", and furthermore the Claimant has complied with the requirements of NAFTA Article 2103(6) as the competent authorities failed to agree within the requisite period that an expropriation has not occurred.[10]

2. The Claimant's factual presentation

a. First request: that the pending amparo proceedings be immediately suspended

31. The Claimant argues that such a stay is necessary for the "protection of the Tribunal's jurisdiction", for making its jurisdiction "fully effective" and for "avoiding irreparable harm".

32. As to the "protection of the Tribunal's jurisdiction", the Claimant argues that the domestic *amparo* proceedings contradict the exclusive jurisdiction of this Tribunal to resolve the dispute in accordance with Article 26 of the ICSID Convention "without its process being up-ended or usurped in whole or in part by the Mexican courts and administrative decision-

[9] Request, paras. 27-33.
[10] Request, para. 33.

makers."[11] The Claimant adds that "seeking to have the Collegiate Court suspend its proceedings is entirely appropriate an compelling" because Mexican courts "are obligated to adhere to international law and decisions of international tribunals, and do so regularly," especially in view of the exclusive jurisdiction granted to the Tribunal under the NAFTA "to establish what rights are owed to Claimant and its investments, under relevant international law and treaties."[12]

33. The Claimant lists a series of considerations that, in its opinion, "support imposing an immediate stay on the Collegiate Court process and maintaining the status quo, so as to preserve the Tribunal's jurisdiction" which are summarized hereunder:[13]

- The political interference in the administrative and judicial processes in respect of the recourse by SAT to the *Lesividad* proceeding "to unlawfully coerce PEM to abandon reliance on the APA"; the lack of fairness, due process and justifiable legal grounds in respect of the decision of the TFJA of 23 September 2020 which concluded the *Lesividad* proceeding with the annulment of the APA with retroactive effects; the proposed transfer to the Supreme Court of Mexico at the behest of a single Member of the Court "through the 'power of attraction' process" of the amparo proceedings, by which PEM had challenged the TFJA decision, and its transfer back to the Collegiate Court in December 2022.[14]

- The "irreparable harm" which will be caused to the Claimant and its investment should the current status of the APA not be preserved by preventing a possibly unfavorable decision of the Collegiate Court due to "PEM's legal right to defend against the unlawfulness of the amounts claimed by SAT as taxes, penalties, interest and surcharges" being "immediately extinguished under Mexican law;" [redacted]

[11] Request, paras. 39-40.
[12] Request, paras. 48-50.
[13] Request, para. 56.
[14] Request, para. 54.

[redacted]

34. More specifically, the Claimant submits that:

> *[i]t is evident from the facts available to this Tribunal that the Collegiate Court ruling on PEM's amparo request, if negative and rendered before the Tribunal makes its final award, will cause the Claimant and PEM irreparable harm particularly if leave to appeal to the Mexican Supreme Court is refused. In the absence of the provisional measures requested, PEM* [redacted][16]

35. In light of the above factors, the Claimant submits that its request of stay of the Collegiate Court proceedings is also justified to avoid aggravating or extending the dispute, to maintain the orderly conduct and the integrity of the proceedings, and to protect the Claimant's and PEM's rights.[17]

36. To support its request that the *amparo* proceedings be suspended, the Claimant relies on a number of ICSID cases, which it considers have dealt with situations similar to the one at hand. In those cases, tribunals issued provisional measures enjoining, or rather recommending, that certain pending domestic proceedings be suspended or discontinued in order not to prejudice the integrity of the arbitration proceedings (so as to ensure that the arbitration tribunal may render its final award) or not to aggravate or extend the dispute.[18]

[15] Request, para. 55. The Claimant additionally states that the request sub (a) has also as a principal objective "the preservation of existing legal rights (i.e., maintaining the status quo)", Request, para.77.
[16] Request, paras. 103, 137.
[17] Request, para. 64.
[18] The Claimant relies (at para. 44 of its Request) on *Biwater Gauff (Tanzania) Limited v. United Republic of Tanzania*, ICSID Case No. ARB/05/22, Procedural Order No. 3, dated 29 September 2006, para. 135, CL-0086; at para. 46 on *Holiday Inns S.A. and others v. Morocco*, ICSID Case No. ARB/72/1, Further Decision on Jurisdiction, dated 12 May 1974, CL-0085; at para. 66 on *MINE v. Republic of Guinea (II)*, ICSID Case No. ARB/84/4, Decision on Provisional Measures, dated 4 December 1985, CL-0085; at para.68 on *Tokios Tokolés v. Ukraine*, ICSID Case No. ARB/02/18, Procedural Order No. 1, dated 1 July 2003, CL-0085 and CL-0089; and at para. 69 on *Lao Holdings N.V. v. Lao People's Democratic Republic (I)*, ICSID Case No. ARB(AF)/12/6, Decision on Claimant's Amended Application for Provisional Measures, dated 17 September 2013, ¶ 30, CL-0094. The Claimant also refers extensively to various paragraphs of Christoph H. Schreuer, *Schreuer's Commentary on the ICSID Convention*, Cambridge University Press, 3rd Ed., 2022, especially to the commentary on Article 47 ICSID Convention, vol II; p.1053 ff. CL-0085.

b. Second request: that certain statements made to the Media (Press Releases) be prohibited

37. The Claimant complains that the current President of Mexico:

> *has made the Claimant and its investment a consistent target of his media campaign of over three years of 'naming and shaming' multi-national companies. The very act of initiating this arbitration proceeding resulted in the President's singling out of the Claimant unjustifiably as a Canadian mining company that allegedly refuses to pay taxes. These statements to the press show no sign of abating. As recently as December 2022, the Minister of Economy, Ms. Raquel Buenrostro (previously the Head of the SAT), has continued to malign Canadian mining companies as being corrupt, with specific reference to the Claimant.*[19]

38. The Claimant considers that such statements made to the public media "can have the potential of affecting the integrity of the arbitration process including its interim and final awards or have the potential to aggravate the dispute."[20] The Claimant lists what it submits are "[e]xamples of the President, as well as the Tax Prosecutor and the Head of the SAT (now the Minister of Economy), engaging in the public 'naming and shaming' media campaign and using the press to publicly brand First Majestic [redacted][21]

39. The Claimant concludes that:

> *[t]he provisional remedy requested for prohibiting the President of Mexico, the Minister of Economy and government officials from making media statements is necessary for the prevention of the aggravation of the dispute. Furthermore, this provisional measure is necessary to preserve the rights of the Claimant, to avoid irreparable harm, meet the existing urgency, has been framed in a narrow manner, and is clear and specific.*[22]

40. In support of its request, the Claimant refers to two cases where the circumstances were, it submits, factually similar to those present here. In *Biwater v. Tanzania*, the tribunal considered that "the prosecution of a dispute in the media or in other public fora, or the

[19] Request, para. 73 (footnotes omitted).
[20] Request, para. 70. The Claimant additionally states that the request sub (b) has also as a principal objective, just as its request sub (a), "the preservation of existing legal rights (*i.e.,* maintaining the *status quo*), Request para.77.
[21] Request, para. 122.
[22] Request, para.112.

uneven reporting and disclosure of documents or other parts of the record in parallel with a pending arbitration, may aggravate or exacerbate the dispute and may impact upon the integrity of the procedure."[23] The Claimant further relies on the reasoning and decision in *Legacy Vulcan v. Mexico* where:

> *the circumstances were very similar to the present case, except that in that case the current President of Mexico made prejudicial statements at the late stages of an ongoing arbitration process, where as in the present case the same President has made the Claimant and its investment a consistent target of his media campaign of over three years of 'naming and shaming' multi-national companies.*[24]

41. The Claimant quotes Procedural Order No. 7 issued in *Legacy Vulcan v. Mexico* where:

> *[t]he Tribunal therefore considers that public comments made by Mexico's President on Claimant's claims and damages sought in these proceedings jeopardise the integrity of the arbitral process and are tantamount to prosecution of the dispute in the media and other public fora, contrary to the non-aggravation of the dispute. Such harm is irreparable, in the sense that it cannot be compensated by damages. Subject to its considerations on urgency below, the Tribunal therefore finds it necessary to issue a recommendation in relation to this item.*[25]

c. Third request: Future VAT refunds payable to PEM to be made fully accessible to PEM and to remain free from SAT's seizure or freezing of bank accounts

42. In respect of this request, the Claimant explains that PEM is entitled to VAT refunds in accordance with Mexican law which are periodically paid to it by SAT to its bank accounts. Currently, the equivalent of about [redacted] of such refunds, in part as a result of deposits made after the filing of the Request of for Arbitration, are deposited on bank accounts of PEM which have been blocked or seized by SAT as a result of certain tax

[23] *Biwater Gauff (Tanzania) Ltd v. United Republic of Tanzania*, ICSID Case No. ARB/05/22, Procedural Order No. 3 on Provisional Measures, dated 29 September 2006, para. 136 (emphasis added), CL-0086, as quoted in the Request, para. 72.
[24] Request, para. 73, *Legacy Vulcan, LLC v. United Mexican States*, ICSID Case No. ARB/19/1, Procedural Order No. 7, dated 11 July 2022, para. 83, CL-0091.
[25] Request, paras 74 and 120.

enforcement and collection measures against PEM.[26] The Claimant does not ask that the freezing of the account be lifted (since this would run counter to the prohibition contained in the last sentence of Article 1134 NAFTA), but rather that refunds not be deposited on such frozen account, while SAT has "continued depositing the VAT refunds into frozen bank accounts without any direction or authorization from PEM."[27]

43. According to the Claimant, this request – that the Respondent does not impede the rights and entitlement of the Claimant to VAT refunds ("*which is not in dispute*") –, seeks to ensure the preservation of the *status quo* so as not to exacerbate the dispute.[28]

d. Fourth request: Stay of Enforcement, Transfer Pricing Audits and [redacted]

44. The Claimant lists a number of actions that Mexican authorities have undertaken in respect of PEM, notably: [redacted] and the methodology provided there for the determination of transfer prices; [redacted] "[29]

45. To use the words of the Claimant:

> *the Claimant requests that the Tribunal issue provisional measures requiring the Respondent to maintain* status quo *and to allow the Claimant and PEM management personnel to maintain and operate the San Dimas mine, from within Mexico or from outside the country, without being subject to (i) additional enforcement measures, whether* [redacted]*; (ii) additional tax investigations, audits and reassessment that is inconsistent with the methodology provided for in the APA; and (iii) threat of* [redacted]

[26] These measures are described by the Claimant at para. 97 of the Request, especially at para. 97 (ii) and (v), [redacted] The Claimant indicates that, on average, these VAT refunds payable in the future amount to [redacted]

[27] Request, paras 80-81.

[28] Request, paras 79, 83. The Claimant refers in support of its request to *Burlington Resources, Inc. v. Republic of Ecuador*, ICSID Case No. ARB/08/5, Procedural Order No. 1 on Burlington Oriente's Request for Provisional Measures, dated 29 June 2009, ¶ 31, CL-0093, whereby that tribunal granted a provisional measure against the seizure of the oil production by Ecuador for the purpose of "preservation of the status quo and non-aggravation of the dispute."

[29] Request, paras.97 and 148.

> [redacted] *against management personnel of the Claimant and the Mexican subsidiaries including in relation to any settlement offer made to the Respondent (whether or not in compliance with Mexican law formalities).*[30]

46. The Claimant considers that:

> *[t]hese measures are necessary to avoid exacerbation of the dispute, to avoid delays and the disruption of the current arbitration proceedings (such that the Tribunal can exercise its jurisdiction based on the existing claims made by the Claimant in its Request for Arbitration and the Claimant's Memorial), and also so as to avoid irreparable harm to the Claimant and its investment which are already subject to restrictive measures arising from previous enforcement actions of the SAT.*[31]

47. Finally, the Claimant argues that the requested provisional measures are narrow in their scope and specific in their application, thus adhering to the legal requirements set out in the applicable provision of NAFTA, the ICSID Convention and the ICSID Arbitration Rules.[32]

B. The Respondent's Response

48. The Respondent opposes the Claimant's Request both on the facts and on its legal basis.

49. In the Respondent's view:

> *los tribunales sólo pueden recomendar medidas provisionales si la parte solicitante demuestra los siguientes elementos: i) que el Tribunal tiene jurisdicción* prima facie*; ii) que existe un derecho susceptible de protección; iii) que la medida provisional es necesaria; iv) que la medida solicitada es urgente, y v) la proporcionalidad de la medida frente a los derechos de la contraparte en la controversia, siendo en este caso el Estado mexicano.*
>
> *La Demandante debió demostrar estos cinco elementos para cada una de las medidas provisionales que solicitó, lo cual, no realizó. En su lugar, la Solicitud contiene una sesgada caracterización de*

[30] Request, para. 98.
[31] Request, para. 99.
[32] Request, paras. 142-144.

> *los hechos en controversia en este arbitraje, particularmente aquellos relacionados con un juicio de amparo promovido por Primero Empresa Minera, S.A. de C.V. ("PEM") en contra de la sentencia del Tribunal Federal de Justicia Administrativa que resolvió el Juicio de Lesividad (Amparo 12/2021); las auditorías de precios de transferencia; los procesos civiles/penales; los procedimientos de devolución de IVA, y las declaraciones de funcionarios públicos hechas como parte de un ejercicio informativo dirigido a la ciudadanía.*[33]

50. First of all, the Respondent describes in detail Mexico's proceedings, measures and actions in respect of which the Claimant asks the provisional measures, as a basis to argue that Mexico's actions are legitimate and that the requested provisional measures are not required to preserve the Claimant's rights.

1. The Pending *Amparo* Proceeding 12/2021

51. As to the pending *amparo* proceedings 12/2021, which the Claimant requests be suspended,[34] the Respondent explains that the "*juicio de Lesividad*" was initiated by SAT in front of the TFJA to annul the APA (or MPT[35]) in view of certain procedural and substantive irregularities that vitiated it ("*el abuso fiscal de PEM*"[36]). It was PEM who challenged, by filing an *amparo* (12/2021), the decision of the TFJA which on 23 September 2020 annulled the APA/MPT by a decision "*en la que concluyó,* inter alia*, que existieron múltiples irregularidades en la emisión de la Resolución MPT que la llevaron a declararla nula*." [37]

52. After a request to remit the case to the Supreme Court was filed in 2021 but was subsequently withdrawn in December 2022, the *amparo* proceeding is currently pending "*al 2° Tribunal Colegiado en Materia Administrativa del Primer Circuito ("2° Tribunal Colegiado"), por lo que se advierte que el Amparo 12/2021 continúa su trámite normal.*

[33] Response, paras. 4-5.
[34] Response, para.70.
[35] *Resolución en Materia de Precios de Transferencia*.
[36] Response, para. 26.
[37] Response, para. 16 with reference to R-00045.

La Demandada desconoce cuándo se emitirá la resolución del Amparo 12/2021, pero se estima que ocurrirá en los próximos meses."[38]

53. The Respondent describes the possible outcomes of the pending *amparo* proceeding as follows:

> *El 2º Tribunal Colegiado, en pleno ejercicio de sus facultades, concluirá en próximas fechas si existen causales de improcedencia que conduzcan a su sobreseimiento, o si procede alguna otra acción como negar el Amparo 12/2021; revocar la sentencia del TFJA u ordenar al SAT que emita una nueva resolución siguiendo ciertas directrices que establezca el 2º Tribunal Colegiado.*[39]

54. The Respondent adds that:

> *[e]n todo caso, si el 2º Tribunal Colegiado emite una resolución que la Demandante no considere favorable a sus intereses, ésta podrá impugnar la decisión a través de un recurso establecido en la legislación mexicana denominado 'recurso de revisión', por lo que no existiría un daño irreparable para la Demandante que no pueda ser resarcido por otros medios legales.*[40]

55. By detailing the developments of the case, the Respondent points out that the suspension of the *amparo* proceeding which the Claimant requests lacks the requirements of being urgent or necessary, "*pues no existe un riesgo de que la resolución del mismo cause (o amenace en causar) un daño irreparable a los derechos de la Demandante*."[41]

2. The Press Releases (*Notas de prensa*)

56. The Respondent opposes the Claimant's complaint that certain press statements of the President of Mexico and other high officials have singled out the Claimant or PEM within a campaign against Canadian mining companies that allegedly refuse to pay taxes. According to the Respondent:

> *las ruedas de prensa matutinas que realza el Presidente de México.... constituyen un mecanismo de rendición de cuentas y de*

[38] Response, para. 21.
[39] Response, para. 22.
[40] Response, para. 156.
[41] Response, para. 171.

> *difusión de información que sirve para asegurar el derecho de acceso a la información de todos los ciudadanos mexicanos, en el pleno ejercicio del derecho a la libertad de expresión.*[42]

57. More specifically:

> *[E]stas declaraciones están relacionadas con procedimientos de fiscalización iniciados en contra de diversas empresas, algunos de los cuales comenzaron mucho antes de que entrara en funciones el actual gobierno de México. Se observa que estas notas de prensa acompañaron al Memorial de Demanda, y prácticamente los mismos argumentos planteados en la Solicitud se encuentran reflejados en el Memorial de Demanda.*[43]

58. As to the latest press releases of the current *Secretaria de Economía*: "*de una simple lectura de la nota de prensa exhibida como anexo C-0047 queda claro que no se menciona a la Demandante o a PEM*."[44] Thus, the Respondent submits that:

> *[e]l Estado mexicano en ningún momento ha iniciado una 'campaña mediática' en contra de la Demandante. El hecho de que algunos funcionarios del gobierno de México se refieran a la situación fiscal de algunas empresas de algún sector o industria en particular se debe a que es un tema de interés general y una problemática que ha tenido que ser analizada por las autoridades competentes.*[45]

59. The Respondent notes that "*el TLCAN no prohíbe este tipo de manifestaciones realizadas en el pleno ejercicio de la libertad de expresión y como parte de un mecanismo de transparencia*."[46]

60. The Respondent concludes that:

> *no son las 'declaraciones a los medios de comunicación' las que tienen el potencial de exacerbar una controversia entre dos partes ante un tribunal arbitral, sino más bien la divulgación unilateral de ciertos documentos específicos relacionados con el proceso arbitral. La Demandada no hizo ninguna divulgación unilateral. Las acciones de la Demandada no están de hecho agravando esta*

[42] Response, para. 26.
[43] Response, para. 27.
[44] Response, para. 25.
[45] Response, para. 29.
[46] Response, para. 29.

controversia y, en consecuencia, este Tribunal no debe recomendar las medidas provisionales solicitadas por la Demandante.[47]

3. Future VAT Refunds Payable to PEM / *Devoluciones del Impuesto al Valor Agregado (IVA)*

61. According to the Respondent, upon a close examination of the Claimant's request that VAT refunds to PEM not be made on accounts that are blocked by SAT so that they may be freely available to PEM, "*todo indica que su reclamación, en realidad, es que las devoluciones en cuestión se depositaron en cuentas congeladas sin la autorización o instrucción de PEM*."[48] According to the Respondent, SAT has fully refunded, without any reduction upon verification, all VAT refunds that PEM has filed.

62. Furthermore, the Respondent submits that:

> *cuando existe un saldo favorable o un saldo que deba ser devuelto a un contribuyente, es el propio contribuyente quien indica la cuenta bancaria a la cual se tiene que transferir la devolución de la contribución en cuestión. Esto significa que cualquier devolución por devolución de IVA que el SAT haya realizado a la fecha, se depositó en las cuentas bancarias que la propia Demandante o PEM especificó para tal propósito.*[49]

> *Para que PEM pueda recibir tales recursos, únicamente debe indicar en la solicitud de devolución, la cuenta bancaria a la cual se tiene que realizar el depósito correspondiente. Claramente, esta no es una situación que requiera la intervención del Tribunal.*[50]

63. The Respondent further notes that "*el 3 de abril de 2020 el SAT inició un procedimiento administrativo de ejecución de créditos fiscales, conforme al cual se ordenó el aseguramiento provisional de cinco cuentas bancarias de PEM, con la finalidad de proteger el interés fiscal adeudado por la empresa*." However, "*PEM impugnó esta decisión y los tribunales mexicanos suspendieron el congelamiento de dichas cuentas*

[47] Response, para. 31.
[48] Response, para. 34.
[49] Response, para. 37.
[50] Response, para. 38.

bancarias. Por lo tanto, PEM puede disponer de los fondos depositados en tales cuentas bancarias."[51]

4. Stay of Enforcement, Transfer Pricing Audits and [redacted] / *Suspensión de la ejecución, auditorías de precios de transferencia y* [redacted]

64. The Respondent contends that:

> *[l]a Solicitud busca suspender cualquier auditoría y* [redacted] *que las autoridades mexicanas puedan iniciar en contra de la Demandante o PEM. Por si no fuera poco, la Solicitud ni siquiera precisa a qué auditorías o procedimientos legales se refiere. Por esta razón la Demandada se ve en la necesidad de precisar, a continuación, varios aspectos en torno a las alegaciones de la Demandante.*[52]

65. The Respondent distinguishes under this heading, as the Claimant does, the latter's requests relating to (1) "*la ejecución de los montos que se adeudan por concepto de impuestos, multas, intereses y recargos incurridos por PEM de 2010 a 2013*", (2) "*Auditorías relacionadas con los precios de transferencia*", and (3) [redacted]

66. As to (1), the Respondent explains that Mexican tax authorities have the power to review tax payers tax returns and statements and to enforce collection of any amount due through "*un procedimiento administrativo de ejecución*". Taxpayers have however a right to challenge the tax assessment and initiate judicial proceedings before the TFJA asking for the suspension of the tax determination. In respect of PEM, SAT has determined through several assessments that PEM owes taxes ("*credito fiscal*" in favor of SAT) for each of the years 2010, 2011, 2012 and 2013. SAT's tax audits for the years 2014 to 2021 are pending (at various stages of the audit process).[53]

[51] Response, paras. 37-39.
[52] Response, para. 40.
[53] Response, paras. 43-44.

67. As a consequence, PEM "*tenía la obligación de garantizar los créditos fiscales, ya determinados por el SAT,* [redacted] *pero no lo hizo*." The consequence has been that:

> *el SAT* [redacted] *iniciara un procedimiento administrativo de ejecución. Como parte de dicho procedimiento, se* [redacted] *No obstante, como se señaló anteriormente, PEM puede manejar estas cuentas bancarias libremente gracias a que logró obtener las suspensiones correspondientes en un juicio de amparo.*[54]

68. The Respondent concludes that since these proceedings (tax assessments and a taxpayer's right to challenge them) are in conformity with Mexican law applicable to all taxpayers, a provisional measure by the Tribunal to exempt PEM from general tax obligations, by restricting SAT from auditing and assessing PEM would violate "*el principio de igualdad tributaria*".[55]

69. As to the Claimant's request (3) of provisional measures enjoining proceedings against the management personnel of the investor and its investment ("*Procedimientos* [redacted]"), the Respondent first explains the basic features of [redacted] in Mexico. Such proceedings are initiated whenever a complaint signals a likely liability of a legal or natural person for having committed a crime or *ex officio*. The Mexican system fully recognizes the "presumption of innocence", protects the constitutional right of defense and safeguards the confidentiality of investigations. Only if sufficient elements are collected at the investigation stage, a [redacted] trial will follow with full rights of defense for the accused as well as right to appeal.[56] [redacted][57]

70. In the light of the above, the Respondent concludes that:

[54] Response, para. 45.
[55] Response, para. 47.
[56] Response, paras. 52-57.
[57] Response, para. 118.

> *la Demandante ni siquiera proporcionó información de algún* [redacted] *enfrentado por algún ejecutivo o trabajador de PEM, o de la propia Demandante. Esto demuestra que las medidas provisionales requeridas por la Demandante son especulativas y únicamente buscar generar controversia sobre hechos que ni siquiera se explican con claridad en la Solicitud.*[58]

5. The Respondent's Legal Arguments

71. The Respondent elaborates on the applicable legal standards and the five requirements under Article 47 of the ICSID Convention regarding all of the Claimant's requests and in light of previous ICSID cases on provisional measures similar to those requested by the Claimant. Namely, measures enjoining the respondent State from carrying on certain domestic proceedings and actions that would allegedly prejudice the conduct of the arbitral proceedings and cause irreparable damage to a claimant.[59]

72. Preliminarily, the Respondent states that provisional measures are extraordinary measures "*which should not be recommended lightly*" and that the threshold for recommending them is very high.[60]

73. Also preliminarily, the Respondent challenges the admissibility of the Claimant's request under Article 1134 NAFTA which "*establece que '[u]n tribunal no podrá ordenar el embargo, ni la suspensión de la aplicación de la medida presuntamente violatoria a la que se refiere el Artículo 1116 o 1117.*'". According to the Respondent:

> *[a]l pretender suspender el Amparo 12/2021, prohibir declaraciones públicas y ordenar devoluciones de IVA, la Solicitud de la Demandante intenta orillar al Tribunal a prejuzgar si tiene jurisdicción y resolver aspectos relacionados con las medidas reclamadas en este arbitraje, lo cual está prohibido en virtud del Artículo 1134 del TLCAN.*[61]

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[58] Response, para. 58.
[59] See above para. 48. The criteria listed are: "*i) que el Tribunal tiene jurisdicción prima facie; ii) que existe un derecho susceptible de protección; iii) que la medida provisional es necesaria; iv) que la medida solicitada es urgente, y v) la proporcionalidad de la medida frente a los derechos de la contraparte en la controversia, siendo en este caso el Estado mexicano*."
[60] Response, paras. 63-64 with reference to various precedents.
[61] Response, paras. 89-91.

74. As to the specific legal standards for granting provisional measures, in respect to the Tribunals' *prima facie* jurisdiction, the Respondent recalls that it has contested the Tribunal's jurisdiction in its *Memorial de Contestación* and that the Tribunal has not yet examined its objection.[62] The Respondent further contends that "[l]*a Demandada no niega que el Tribunal cuente con la facultad de recomendar medidas provisionales conforme al TLCAN, el Convenio CIADI y las Reglas de Arbitraje del CIADI*." However:

> *[l]a cuestión a considerar es que el Tribunal no tiene competencia para recomendar las medidas provisionales requeridas por la Demandante, toda vez que el TLCAN no impide a ningún Estado Parte aplicar su legislación interna, ni brinda inmunidad en contra de auditorías e investigaciones penales a cargo de autoridades investigadoras. Las cortes y tribunales domésticos son las únicas instancias competentes para conocer y resolver la situación jurídica de una persona o empresa auditada, demandada o acusada de cometer un ilícito conforme a derecho mexicano.*[63]

75. The Respondent stresses that, in any case, "[s]*i el Tribunal determina que cuenta con jurisdicción prima facie para resolver la Solicitud, nada impide que en una etapa posterior estudie y resuelva objeciones jurisdiccionales, y como resultado de ello concluya que es incompetente para conocer de la controversia planteada por la Demandante*."[64]

76. Looking at the rights that the Claimant intends to protect through the suspension of the *amparo* and other pending proceedings in Mexico (criterion (ii) above), the Respondent opposes the Claimant's request relying on the following legal principles:

- the *amparo* proceedings concern fiscal measures which are excluded from NAFTA Chapter 11 as provided for in Article 2103(1) NAFTA, an exclusion which the Respondent recalls it has raised in its Counter-Memorial;[65]

[62] Response, paras. 67-68.
[63] Response, para.71.
[64] Response, para.68, referencing at fn. 61 *PNG v. Papúa Nueva Guinea. PNG Sustainable Development Program Ltd. v. Independent State of Papua New Guinea*, ICSID Case No. ARB/13/33, Decisión a la Solicitud de Medidas Provisionales de la Demandante, 21 January 2015, paras. 108, 121, 124 ("[…] *an order recommending provisional measures must not preclude the tribunal from ultimately deciding the issues in the arbitration in any particular way after the parties have fully presented their cases on disputed substantive issues (such as jurisdiction or the merits of the claims)*."), RL-0094.
[65] Response, para. 103 with reference to paras 399-422 of the Counter-Memorial.

- Article 26 of the ICSID Convention invoked by the Claimant does not establish the exclusivity of ICSID proceedings in respect of domestic proceedings such as the *amparo* because the *amparo* (initiated by the Claimant itself before the arbitration and whose suspension the Claimant could ask for at any moment)[66] does not have the same object as the arbitration (the validity of the APA vs. the alleged breach of the NAFTA);[67]

- as to the "integrity" of the arbitration, the Respondent submits that "*[l]a Demandante tampoco demostró cómo es que la resolución que, en su momento, emita el 2° Tribunal Colegiado en el Amparo 12/2021 podría afectar la integridad del presente caso o cómo podría afectar la capacidad de la Demandante de participar en este arbitraje*."[68]

77. As to the criterion that provisional measures may be warranted to avoid the aggravation of a dispute, the Respondent submits that the furtherance of domestic proceedings by Mexico authorities (such as the *amparo* and the assessment and recovery of taxes) in which the Claimant and PEM are allowed to fully exercise their rights are not aggravating the dispute.[69] Moreover the Claimant has failed to sufficiently identify the [redacted] that it has criticized.[70]

78. The Respondent denies that the declarations of high Mexican officials may aggravate the dispute in view of their general focus, considering that the President "*no ha realizado*

[66] Response, paras. 73, 106.
[67] Response, paras. 102, 112. The Respondent denies that the provisional measures discussed in the cases relied upon by the Claimant (*Tokios Tokelés v Ukraine, Teinver v. Argentina, Quiborax v. Bolivia* and *Finley v. Mexico*) involved relations between domestic proceedings and international arbitrations comparable to those in the present case, Response, paras. 108-110. The Respondent also points out that the ICSID tribunal in *Finley Resources Inc., MWS Management Inc., and Prize Permanent Holdings, LLC v. United Mexican States*, Decision on the Claimants' Application for interim measures, ICSID Case No. ARB/21/25, 26 January 2022, para. 34, RL-0111 stated that the jurisdiction of an international tribunal cannot be affected by facts subsequent to its establishment.
[68] Response, para. 115. According to Respondent, "[e]*l otorgamiento de una medida se da con objeto de evitar un daño sustancial o irreparable a los derechos de una de las partes, el cual debe de estar relacionado con la integridad del proceso arbitral, es decir, debe de existir una amenaza clara y sustancial que ponga en riesgo la capacidad de alguna de las partes para continuar con el arbitraje*", Response, para. 96.
[69] Response, paras. 120-127, relying on *Plama Consortium Limited v. Republic of Bulgaria*, ICSID Case. No ARB/03/24, Order, 6 September 2005, paras. 42-43, RL-0096 (at fn 114).
[70] Response, para. 124.

alguna proclamación, y mucho menos amenazas, en contra de First Majestic o PEM."[71] The present case must therefore be distinguished from *Legacy Vulcan* where press releases by Mexican authorities were found to affect the capacity of CALICA (the Mexican subsidiary of Legacy Vulcan) to operate in Mexico.

79. In the Respondent's view:

> *Un razonamiento análogo en este caso llevaría a este Tribunal a concluir que una prohibición a los funcionarios mexicanos a hablar con los medios de comunicación sobre esta disputa sería válida, únicamente, si afectara la capacidad de la Demandante de afectar la capacidad del inversionista para reanudar operaciones en México (parafraseando al tribunal en Legacy Vulcan). En este caso la reanudación de operaciones no es un factor porque PEM no ha cesado sus operaciones en la mina San Dimas. Por lo tanto, las declaraciones de los funcionarios mexicanos a medios de comunicación no han afectado negativamente el derecho de PEM a realizar sus operaciones.*[72]

80. On the contrary, the Respondent contends that "[l]*a Demandante omitió mencionar que ella misma ha hecho pronunciamientos públicos en contra de la Demandada, y se ha referido explícitamente a este arbitraje y a las medidas que dan lugar a la controversia*."[73] Notably, "*a escasos días de la presentación de la Solicitud, la Demandante hizo públicos, en una presentación corporativa, sus ataques en contra de las acciones del Estado mexicano, haciendo referencia explícita al presente arbitraje*."[74]

81. As to the "necessity" of the provisional measures (criterion (iii)), the Respondent submits that "[l]*as medidas solicitadas por la Demandante no son necesarias*". According to the Respondent, "[u]*na medida es 'necesaria' si tiene como finalidad prevenir que los derechos de una parte sean afectados por un 'daño irreparable'. En otras palabras, debe existir una amenaza clara y sustancial a la capacidad de una parte de continuar con el proceso arbitral. Además, el posible daño debe estar relacionado con la integridad*

[71] Response, para. 129.
[72] Response, paras. 132-133, referring to *Legacy Vulcan, LLC v. United Mexican States*, ICSID Case No. ARB/19/1, Procedural Order No. 7, dated 11 July 2022, paras. 80, 82, CL-0091.
[73] Response, para. 135.
[74] Response, para. 141, with reference to First Majestic Booklet, January 2023, p. 31, R-0199.

procesal del arbitraje y no con cuestiones ajenas a éste. Es justamente por esta razón que resulta indispensable que la parte solicitante de la medida provisional identifique con precisión el derecho que considera necesario proteger." [75]

82. The Respondent denies that the damages that the Claimant alleges as possible, should the actions of Mexican authorities not be stopped so to maintain the *status quo* (such as an unfavorable decision of the *amparo*), would represent an "imminent harm", would be irreparable and could not in any case be made good by the payment of a monetary compensation. Even in case of an unfavorable decision in the *amparo*, the arbitration proceeding would not be affected and could continue, as the Claimant itself recognizes.[76]

83. The same holds true, according to the Respondent, with respect to the non-availibility of the VAT refunds (which the Respondent argues are in any case available to PEM since Mexican tribunals "*concedieron la suspensión definitiva a PEM, permitiéndole manejar de manera libre las cuentas aseguradas por el excedente de la cantidad que constituyó la inmovilización, hasta en tanto se resuelva el fondo del asunto*").[77] The Respondent further argues that this is also the case "*con relación a supuestas auditorías, recaudaciones fiscales o el inicio de procesos civiles o penales en contra de personas relacionadas con la Demandante*"[78]

84. According to the Respondent, the requested provisional measures are moreover not "urgent" (condition (iv)) and thus cannot be granted since urgency (which is closely related to necessity) is in any case required as international case law abundantly confirms.[79]

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[75] Response para. 145 relying on *Plama Consortium Limited v. Republic of Bulgaria*, ICSID Case. No ARB/03/24, Order, 6 September 2005, paras. 45-46, RL-0096; *PNG Sustainable Development Program Ltd. v. Independent State of Papua New Guinea*, ICSID Case No. ARB/13/33, Decisión a la Solicitud de Medidas Provisionales de la Demandante, 21 January 2015, para. 109 ("[T]*he party requesting provisional measures must demonstrate that, if the requested measures are not granted, there is a material risk of serious or irreparable harm*."), RL-0094; Cameron Miles, "Provisional Measures before International Courts and Tribunals", CUP (2017), p. 257, CL-0092; *Quiborax S.A. and Non-Metallic Minerals S.A. v Plurinational State of Bolivia*, Caso CIADI No. ARB/06/2, Decisión sobre Medidas Provisonales, 26 February 2010, para. 113, RL-0088.
[76] Response, paras. 153-157 with reference to the Request, para. 136.
[77] Response, para. 160.
[78] Response, para. 162.
[79] Response, paras. 166-168.

85. The Respondent submits that since no relevant development has happened in the domestic proceedings on which the Claimant focuses since the initiation of this arbitration, the lack of urgency is shown in the first place by the Claimant having waited until now to present its Request.[80] The suspension of the *amparo* is not urgent since a (negative) decision is not imminent and, in any case, would not risk to cause an irreparable damage to the Claimant's rights.[81]

86. The same can be said with respect to the VAT refund issue, since "*la Demandante tiene la facultad de requerir, en su solicitud de devolución, que los montos sean transferidos a cualquier otra cuenta bancaria que considere conveniente sin la intervención de este Tribunal*."[82] As to the press releases, the Respondent points out that "*lo que realmente no explica la Demandante es que tales declaraciones ocurrieron en 2020, 2021 y 2022. El transcurso de tiempo le resta credibilidad a los argumentos de la Demandante sobre la supuesta "urgencia" de las medidas*."[83]

87. As to the last (v) requirement (proportionality of the measures), according to the Respondent, it is necessary "*que el Tribunal realice un balance entre el supuesto daño causado o inminente a la parte solicitante de la medida provisional y la posible afectación que la medida provisional solicitada causará a la contraparte,* i.e*., a México.*"[84] The measures sought would "unduly encroach on the State's sovereignty and activities serving public interests" with respect to: (i) the judicial *amparo* proceedings, (establishing a sort of inadmissible "*mecanismo judicial supranational*"); (ii) the SAT activities (whose possible negative effects on PEM have been suspended pursuant to PEM's judicial recourse); and (iii) the right of public officials to issue statements to the press (which do not aggravate the pending arbitration).[85]

88. The Respondent further argues that the Claimant's requests would breach the proportionality requirement. The Respondent relies on *Caratube II v. Kazakhstan*, in which

[80] Response para.173-175, relying on *Sergei Viktorovich Pugachov v. Russian Federation*, Interim Award, 7 July 2017, UNCITRAL, para. 250, RL-0099.
[81] Response, para.171.
[82] Response, para. 172.
[83] Response, para.177.
[84] Response, para. 180.
[85] Response, paras. 184-186.

the tribunal considered that a proportional measure must be "*appropriate*," which implies balancing the interests at stake of the parties and taking into account that the respondent is a sovereign State.[86] The Respondent submits that the provisional measure consisting of the stay of the *amparo* proceeding does not comply with the principle of proportionality and would violate the Constitution of Mexico, its laws, and the independence of the judiciary.

89. Based on the above arguments, the Respondent urges the Tribunal to reject all of the Claimant's requests for provisional measures.

IV. THE TRIBUNAL'S ANALYSIS

A. Applicable Legal Principles

90. The starting point for the Tribunal to decide on the Request is to summarize the applicable principles for granting provisional measures, based on the relevant provisions in Article 47 of the ICSID Convention, Rule 39 of the ICSID Arbitration Rules and Article 1134 of the NAFTA, and in light of previous case law. Previous arbitral decisions on provisional measures offer an important guidance, both because the provisions mentioned are in part generic, and because previous decisions offer a variety of circumstances, some similar to those at hand in the present dispute, in the context of which such requests have been submitted and analyzed by investment tribunals.[87]

91. According to Article 47 of the ICSID Convention and ICSID Arbitration Rule 39 "provisional measures" in the form of "recommendations" may be granted by a tribunal, at the request of a party, to "preserve the respective rights of either party." According to Article 1134 of the NAFTA, interim measures of protection may be ordered or recommended by a tribunal to "preserve the rights of a disputing party" or "to ensure that

[86] *International Oil Company LLP & Mr. Devincci Salah Hourani v. Republic of Kazakhstan*, ICSID Case No. ARB/13/13, Decision on the Claimants' Request for Provisional Measures, 4 December 2014, RL-0097.

[87] Although the 2022 ICSID Arbitration Rules are not applicable to this arbitration (which is governed by the 2006 ICSID Arbitration Rules), Rule 47 of the 2022 ICSID Arbitration Rules provides some clarity by describing provisional measures as measures to "*(a) prevent action that is likely to cause current or imminent harm to that party or prejudice to the arbitral process; (b) maintain or restore the status quo pending determination of the dispute; or (c) preserve evidence that may be relevant to the resolution of the dispute.*"

the Tribunal's jurisdiction be made fully effective", or "to protect the Tribunal's jurisdiction."[88]

92. The Parties do not significantly differ on the substantive requirements, conditions or elements that are necessary to grant provisional measures under those provisions, but differ as to their contour, exact content, their respective importance and, of course, as to their presence or absence in respect of the Claimant's Request. While the Claimant has referred to them throughout the presentation of its various requests, the Respondent has listed them as five requirements or elements that must be present for provisional measures to be granted.[89] The Tribunal rephrases them hereunder as appropriate to deal with the matter before it.

93. Those requirements are (a) that the Tribunal has *prima facie* jurisdiction; (b) that the provisional measures are aimed at protecting, while the dispute is pending, either a substantive right of the requesting party, (c) or a procedural right, notably as to the integrity of the arbitral process, the exclusivity of the ICSID arbitration, and/or are aimed at avoiding the aggravation of the dispute (maintaining the *status quo* while the dispute is pending); (d) from actions by the other party that are likely to cause an actual or imminent serious (irreparable) harm to the above rights, so that the requested measures appear to be necessary (proportionate) and urgent. Moreover, the measures are by their nature provisional, *i.e.*, temporary, and must not prejudge the final decision of the dispute.[90]

94. In this arbitration under NAFTA, an additional condition for granting interim measures under Article 1134 NAFTA is that such measures must not "enjoin the application of the measure alleged to constitute a breach referred to in Article 1116 or 1117."

95. As to (a), that the Tribunal have *prima facie* jurisdiction to decide on the Request, this requirement means that there has to be an appearance of a proper basis for the Tribunal to rule upon the dispute, such as the existence and applicability of a treaty under which the

[88] The distinction between recommendations and orders does not appear to be relevant because it is generally admitted that "*tribunals have developed a doctrine under which provisional measures have binding effects on the parties,*" Schreuer et al., 3rd ed., *Commentary to Article 47*, para. 21, CL-0085.
[89] Response, para. 4, see above Section III.B.
[90] See generally Schreuer et al., 3rd ed., Commentary to Article 47, para. 83 ff, CL-0085.

claimant is qualified to bring against the respondent the pending dispute, which ICSID has duly registered.[91] A finding of *prima facie* jurisdiction at this stage, *ratione temporis, materiae, personae,* is without prejudice of further analysis as to jurisdiction and the merits in subsequent stages of the proceedings.[92]

96. As to (b), the protection of both substantive and procedural rights can be the object and aim of provisional measures. As to *substantive rights*, such measures may aim at avoiding that the rights that a claimant accuses the respondent to breach in violation of an international obligation not be irreparably prejudiced or destroyed while the case is pending. The *prima facie* existence of such rights must be shown. As to *procedural rights*, the integrity and exclusivity of the arbitration, and the avoidance of aggravation of the dispute (maintaining the *status quo*) may come into play. In this respect, provisional measures have been issued by ICSID tribunals against actions by a respondent State that would have interfered with the carrying out of the arbitration. This could be the case of domestic proceedings which might jeopardize the impartiality and fairness of the arbitration or hamper a party's or its counsel and experts unincumbered right to participate in the proceedings.[93]

97. As to the exclusivity of the ICSID proceedings, as provided in Article 26 of the ICSID Convention, tribunals have reaffirmed that "the parties to a dispute over which ICSID has jurisdiction must refrain from any measure capable of having a prejudicial effect on the rendering or implementation of an eventual ICSID award or decision," such as ("parallel") proceedings in any other forum in respect of the subject matter of the dispute before ICSID.[94]

98. The non-aggravation of the dispute (maintaining the *status quo*), in compliance with the general obligation to conduct arbitration in good faith, so not to hinder the resolution of the

[91] See to this effect Schreuer et al., 3rd ed., Commentary to Article 47, para. 64, CL-0085.
[92] See Response, para. 68 and the references cited there at fn 67.
[93] See *International Oil Company LLP & Mr. Devincci Salah Hourani v. Republic of Kazakhstan*, ICSID Case No. ARB/13/13, Decision on the Claimants' Request for Provisional Measures, 4 December 2014, para.137, RL-0097. The tribunal held that "a particularly high threshold must be overcome before an ICSID tribunal can indeed recommend provisional measures regarding [redacted] conducted by a state."
[94] *Tokios Tokolés v. Ukraine*, ICSID Case No. ARB/02/18, Procedural Order No. 1, dated 1 July 2003, para. 2, CL-0085 and CL-0089.

dispute, can concern avoiding heightened tension between the parties, may aim at ensuring the confidentiality of the arbitration and may entail the stay of domestic proceedings.[95]

99. As to (d) (preventing actual or imminent serious, possibly irreparable, harm), the actions by the other party which a provisional measure is aimed at preventing or blocking must be such as to cause or threat to cause an actual or imminent serious harm to the rights to the requesting party while the case is pending. On the other hand, the substantive rights which a claimant aims at protecting *lite pendente* are not definitely ascertained as long as there is no decision on the merits. The protection of such a "putative" right of a claimant must therefore be balanced with the need not to excessively limit the other party in carrying out activities which for the time being appear to be legitimate.[96]

100. Hence, the paramount requirement is that provisional measures be necessary to protect such rights, appropriate to preserve the *status quo* and to avoid serious, in principle irreparable, harm to a right of the requesting party, even if disputed.[97]

101. On the other hand, the concept of "necessity" also entails a notion of proportionality between the measure and its objective, in that a measure that goes beyond what is (strictly) necessary to avoid (additional) harm ceases to be necessary, would not be proportionate to the need, nor balanced considering the right of the opposing party.[98]

102. The requirement of urgency is inherent to the nature of provisional measures, since they are based on the premise that the protection of a party's right may not wait until a decision is taken in the merits at the end of the proceedings, and/or that these must be ensured immediately as to their proper conduct while pending (integrity). Therefore, the action of

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[95] This is a common feature at the basis of provisional measures orders, see for the discussion of relevant cases generally Schreuer et al., 3rd ed., *Commentary to Article 47*, para. 191 ff, CL-0085.

[96] See *Sergei Pausok, et al. v. Mongolia*, UNCITRAL, Order on interim Measures of 2 September 2008, para 55, RL-0090.

[97] *Alleged Violations of the 1955 Treaty of Amity, Economic Relations, and Consular Rights (Iran v. USA)*, CIJ, Order, 3 October 2018, para 77 ("*The Court, pursuant to Article 41 of its Statute, has the power to indicate provisional measures when there is a risk that irreparable prejudice could be caused to rights which are the subject of judicial proceedings or when the alleged disregard of such rights may entail irreparable consequences*."), RL-0112; *Victor Pey Casado and President Allende Foundation v. República de Chile*, Caso CIADI No. ARB/98/2, Decisión sobre la adopción de medidas provisionales solicitadas por las partes, 25 de septiembre de 2001, paras. 2, 18-19, 20-6, RL-0113.

[98] See *Occidental Exploration and Production Company v. Republic of Ecuador*, ICSID Case No. ARB/06/11, Decision on Provisional Measures, 17 August 2007, para. 59, RL-0114.

the other party that is being enjoined must be imminent and likely to cause prejudice *medio tempore* while the dispute is pending.[99]

103. It is in light of these criteria that the Tribunal, based on the arguments of the Parties, will deal with the Claimant's requests that the Tribunal enjoin the Respondent from carrying out certain activities (judicial proceedings, press releases, tax assessments and enforcement, [redacted] against employees) that may cause serious (irreparable) prejudice to its rights, aggravate the dispute, and prejudice the integrity and exclusivity of the arbitration.

B. The Tribunal's Evaluation of the Claimant's Requests for Provisional Measures

104. The Tribunal observes at the outset that, as far as it results from the Parties' briefs, the Parties are not in agreement on the characterization of Mexico's actions that the Claimant asks to be enjoined, or on the impact, immediate, likely or threatened, that they may have on the Claimant's rights and on the regular conduct of the arbitration. In light of this situation, in its Procedural Order No. 4 the Tribunal posed a number of questions to the Parties to be answered during the Hearing to clarify the factual situation and asked them to supply chronological tables of the various relevant developments. The answers of the Parties at the Hearing provided some clarity but have not dispelled all doubts. The Tribunal will nevertheless duly take into consideration those answers to resolve as far as possible the above factual doubts.

1. *Prima Facie* Jurisdiction

105. As to the Tribunal having *prima facie* jurisdiction on the dispute, the Tribunal considers that this is undoubtedly the case. The Claimant's Request for Arbitration was registered by ICSID on 31 March 2021, following a preliminary examination by the Secretary-General in conformity with Article 36(3) of the ICSID Convention. The Respondent has not challenged that the Claimant is a Canadian company entitled to bring an arbitration against

[99] *Occidental Petroleum Corp. v. Republic of Ecuador*, ICSID Case No. ARB/06/11, Decision on Provisional Measures, 17 August 2007, para. 89, RL-0114.

Mexico also *ratione temporis* as provided by the "legacy provisions" of Annex 14-c of the Canada-United States-Mexico Agreement ("USMCA") which has replaced the NAFTA.

106. The fact that the Respondent has raised a jurisdictional objection to the Claimant's action *ratione materiae* based on Article 2103(1) of the NAFTA (exclusion of tax measures from the dispute settlement mechanism of NAFTA Chapter 11) does not exclude that the Tribunal has currently *prima facie* jurisdiction to entertain the dispute and conduct proceedings, in any case until this exception has been adjudicated. The further course of the proceedings has been decided by the Tribunal in agreement with the Parties in Procedural Order No. 1, which covers its course up to further determinations concerning the hearing on jurisdiction and the merits.

107. It is now time for the Tribunal to examine each of the various requests of the Claimant to determine whether the conditions for the granting of the provisional measures are met.

2. Suspension of the *Amparo* Proceedings

108. As summarized above, the *amparo* proceedings currently pending before the Collegiate Court were initiated by PEM, the Claimant's Mexican investment, to challenge the decision of the TFJA of 2020 by which the TFJA annulled with retroactive effects the 2010 APA. By means of the APA (an administrative act), SAT in 2012 had accepted [redacted] for the sales of PEM's mine's silver to foreign related companies ("Streaming Agreement") as a basis to calculate PEM's revenues for the years 2010-2013. In turn, the decision of the TFJA was issued at the conclusion of a judicial proceeding initiated by SAT in 2015 in which PEM exercised its full rights to contradict and defend the validity of the APA.

109. As mentioned above,[100] the Claimant lists two reasons in support of its request that the *amparo* proceedings be stayed.

110. First, to ensure the "protection of the Tribunal's jurisdiction." Under this heading the Claimant argues that the domestic *amparo* proceedings – which allegedly have been

[100] See above Section III.A.2.a.

marred by political interference – contradict the exclusive jurisdiction of this Tribunal to resolve the dispute in accordance with Article 26 of the ICSID Convention. The Claimant recalls that the arbitration is meant to establish under the NAFTA "what rights are owed to Claimant and its investment, under relevant international law principles and treaties," [101] "without its process being up-ended or usurped in whole or in part by the Mexican courts and administrative decision-makers." [102]

111. Secondly, to avoid the "irreparable harm" that Claimant and its investment would allegedly suffer should the current status of the APA not be preserved, by preventing a possibly unfavorable decision of the Collegiate Court. In such a case, "PEM's legal right to defend against the unlawfulness of the amounts claimed by SAT as taxes, penalties, interest and surcharges" would be "immediately extinguished under Mexican law." [redacted] [103] [...]

112. The Claimant submits that "the Collegiate Court ruling on PEM's *amparo* request, if negative and rendered before the Tribunal makes its final award, will cause the Claimant and PEM irreparable harm particularly if leave to appeal to the Mexican Supreme Court is refused." [104]

113. In order to determine exactly what impact the decision of the TFJA may have on the Claimant, the Tribunal posed various questions to the Parties. From theirs answers at the Hearing the Tribunal has gathered the following factual conclusions: [105]

[101] Request, paras. 48, 50.
[102] Request, paras. 39-40.
[103] Request, paras. 55, 163, 137, and Hearing Transcript, p. 48 ff.
[104] Request, para. 103.
[105] See List of Questions, Annex D to Procedural Order No. 4.

(a) It is undisputed that the *amparo* proceedings were initiated by PEM in 2021 to challenge the decision of the 2020 TFJA which had annulled the 2010 APA pursuant to an annulment request of SAT (*Juicio de Lesividad)*.

(b) Since an *amparo* proceeding against the TFJA decision is pending, the annulment decision of the TFJA is not effective and the APA is still in force.[106]

(c) The decision by the Collegiate Court, which is expected not before some months, may be favorable or unfavorable to PEM:

(i) If the decision is favorable, the annulment of the APA will be cancelled or revoked so that the APA will remain in force. SAT, however, may appeal this decision to the Supreme Court of Mexico which will finally decide the issue.[107]

(ii) If the decision of the TFJA is unfavorable to PEM, the annulment of the APA will be confirmed, but PEM may appeal to the Supreme Court. In this case, the annulment of the APA by the TFJA will continue to be suspended until a final decision.[108]

114. The *amparo* proceeding is thus likely to go on for some time before the TFJA and, in all likelihood, before the Supreme Court, without the annulment of the APA becoming effective, if at all. In light of this factual situation and considering the applicable legal principle highlighted above, the Tribunal concludes that the continuation of the *amparo* proceedings does not entail an imminent threat of a serious prejudice or harm to the Claimant's rights, so that the issuance of a provisional measure to stay the proceedings would not be justified.

115. Moreover, the consequences of the annulment of the APA feared by the Claimant are far from certain or even likely, based on the limited evidence supplied by the Claimant. The Tribunal has received no figures upon which it could conclude, with some certainty, that

[106] Hearing Transcript, pp. 88-89 (Respondent's statement).
[107] The Supreme Court could also annul the TFJA judgment only in part and remand the case to it. Hearing Transcript, p. 49.
[108] Hearing Transcript, p. 50 (Respondent's answer).

such a development – assuming tentatively that the annulment of the APA would be in breach of the NAFTA – would lead to the bankruptcy of PEM, assuming that such an event might be defined as irreparable, insofar that it could not be fully compensated by monetary damages.

116. As to the other ground put forth by the Claimant in support of its request, the Tribunal is not convinced that the continuation of the *amparo* proceeding, or in any case a decision of the *amparo* challenge, is incompatible with the integrity and exclusivity of the ICSID proceedings.

117. First of all, from a purely *legal* point of view, the ICSID arbitration is unaffected by the fact that the *amparo* proceeding is pending before the courts of Mexico or by whatever final decision these courts may issue concerning the validity of the APA. This Tribunal will continue exercising its responsibilities in this case, steering it to a final decision according to the ICSID Convention and Arbitration Rules and the various procedural orders, issued or to be issued in the future, irrespective of the development of the *amparo* case.

118. The legal and factual divide that distinguishes the domestic *amparo* proceedings from this arbitration makes it unlikely that the latter may be *factually* negatively affected by the first one, *e.g*., in the sense that a forthcoming final decision of the *amparo* on the validity of the APA would render the ICSID award inutile. The two proceedings have different objects: the present proceedings must determine whether the Claimant is right in claiming that Mexico has breached certain standards of treatment laid down in the NAFTA by annulling the APA (or possibly by the very initiation by SAT of the *Lesividad* annulment proceedings). In the *amparo* proceedings, PEM challenges that same annulment under Mexican law. Should PEM prevail before the Mexican courts, the ICSID arbitration might become moot in respect of that claim because the alleged breach of the NAFTA would have been cured at the domestic level.

119. The Tribunal is also unconvinced that the continuation of the *amparo* proceedings would aggravate the dispute in such a way that a stay would be warranted. This is so, first, because, as highlighted above, the two proceedings, domestic and international, are situated

at different levels. Additionally, it appears contradictory to hold that the regular prosecution of the *amparo*, which has been filed by PEM *before* the initiation of the ICSID proceedings in the furtherance of the Claimant's interests, could aggravate the ICSID dispute, which has also been initiated by the Claimant.

3. Prohibition of Press Releases (Statements to the Media)

120. As recalled above,[109] the Claimant has requested a provisional remedy prohibiting the President of Mexico, the Minister of Economy and government officials generally, from making derogatory media statements (such as the ones made in the past), which the Claimant considers necessary for the prevention of the aggravation of the dispute, to preserve its rights and avoid irreparable harm.

121. In order to support its request, the Claimant relies on previous decisions on provisional measures of ICSID tribunals such as in *Biwater v. Tanzania* and *Legacy Vulcan v. Mexico*.[110] In *Biwater* the tribunal recommended that high authorities of the respondent State cease or abstain from "the prosecution of the dispute in the media or in other public fora, or the uneven reporting and disclosure of documents or other parts of the record in parallel with a pending arbitration," considering that such actions "may aggravate or exacerbate the dispute and may impact upon the integrity of the proceedings".[111]

122. As to *Legacy Vulcan v. Mexico*, the Claimant points out the tribunal's finding that "*public comments made by Mexico's President on Claimant's claims and damages sought in these proceedings jeopardise the integrity of the arbitral process and are tantamount to prosecution of the dispute in the media and other public fora, contrary to the non-aggravation of the dispute,*" causing "*irreparable*" harm.[112]

123. The Tribunal agrees that such focused public statements by high authorities of the respondent State, singling out a specific foreign investor, criticizing the legitimate recourse

[109] See above Section III.A.2.b.
[110] See the reference at the following footnotes.
[111] Request, para. 119; *Biwater Gauff (Tanzania) Limited v. United Republic of Tanzania*, ICSID Case No. ARB/05/22, Procedural Order No. 3, dated 29 September 2006, para. 135, CL-0086.
[112] Request, para. 74; *Legacy Vulcan, LLC v. United Mexican States*, ICSID Case No. ARB/19/1, Procedural Order No. 7, dated 11 July 2022, para. 93, CL-0091.

by it to international arbitration and presenting the dispute in an unfavorable light may aggravate the dispute and jeopardize the integrity of the arbitral process, so to warrant the issuance of a provisional recommendation restraining such conduct.

124. An examination of the exhibits that the Claimant has introduced to document the conduct of Mexican authorities as to this request does not show, however, that these authorities have engaged in this type of objectionable conduct towards the Claimant or PEM. The stenographic version of the press conference of the President of Mexico of 7 February 2022 does mention First Majestic as a Canadian mining company that has an open dispute with SAT on the payment of taxes and that the Mexican authorities believe that the company, similarly to other foreign companies (also named), are not paying them correctly. The tone is however informative, although understandably the point of view of the government is stressed. The statement acknowledges that the dispute is pending both in international arbitration and before the Mexican judiciary; it concludes with the President expressing full faith in the objectivity of the judiciary in respect of the dispute.[113] The Tribunal does not find that such a statement (which dates about one year back) can be considered improper in view of the pending arbitration and capable of interfering with it. In fact, the arbitration has proceeded regularly since.

125. The same can be said about the more recent statement of December 2022 of the Minister of the Economy (previously head of SAT) which, according to the Claimant "has continued to malign Canadian mining companies as being corrupt, with specific reference to the

[113] See Request, para. 73 referencing *Versión estenográfica de la conferencia de prensa matutina del presidente Andrés Manuel López Obrador*, dated 7 February 2022, p. 1, C-0003, p. 89, where the reference to First Majestic (named by the journalist questioning the President and not by him) is found at pp. 103-105 of the transcript. Relevant passages are as follows: "*Interlocutora: Presidente durante la conferencia del 22 de febrero de 2021 informó que en Tayoltita, Durango, la minera First Majestic se negaba a pagar impuestos, por lo que usted pidió al embajador de Canadá en México, Graeme Clark, solicite a la compañía cumplir con sus obligaciones fiscales. Hoy sabemos que esta empresa sigue litigando en tribunales internacionales y que incluso está esperando un fallo de la Suprema Corte de Justicia de la Nación para dejar de pagar más de 11 mil millones de pesos a México por la extracción de los minerales preciosos de la nación. En este sentido, presidente, ¿cuál ha sido el resultado del acercamiento que tuvo usted con el embajador? Y también tenemos entendido que con el primer ministro Justin Trudeau se trató de este tema. Presidente Andrés Manuel López Obrador: Sí, con las mineras canadienses tenemos sólo dos asuntos, o tenemos dos asuntos, queda uno, queda este que es fiscal y sí lo traté con el primer ministro Trudeau. El de Cosalá ya está resuelto, pero sí nos queda pendiente el de Tayolita, Durango, porque es un asunto fiscal, no quieren pagar impuestos. Interlocutora: Alegan discriminación fiscal en tribunales internacionales. Presidente Andrés Manuel López Obrador: Sí, sí, sí. Entonces, sí existe una denuncia de parte nuestra que está resolviéndose en el Poder Judicial que lo que tú sostienes. Voy a ver cómo va, pero estamos pendientes y afortunadamente en el Poder Judicial se está actuando con rectitud en este caso*."

Claimant."[114] The Tribunal notes that the statement complained of by the Claimant consists of an isolated sentence reported from an article in an economic magazine (the echo of whose publication, even if accurate, the Tribunal cannot evaluate) where the Claimant is not named.[115] Even admitting that the statement *per se*, if correctly reported, would be objectionable if not supported by evidence or based on the result of objective investigations, it does not appear to the Tribunal that such a statement may affect (or has affected) the proper conduct of this arbitration, in light of the criteria applied by other ICSID tribunals mentioned above.

126. The Tribunal therefore concludes that the conditions for enjoining Mexican authorities to abstain from expressing similar statements in the future are not met.

4. Availability of VAT Refunds

127. As highlighted above,[116] the Claimant complains that tax refunds owed to PEM have been deposited, without PEM's authorization, in accounts of PEM that have been blocked by SAT pursuant to pending tax enforcement proceedings. The Claimant seeks an order restraining SAT from continuing to deposit VAT refunds on accounts that PEM cannot use so to ensure that the *status quo* is preserved and so not to exacerbate the dispute.[117]

128. After having examined the Claimant's Request and the Respondent's Response, the exact factual situation has remained unclear to the Tribunal. The Claimant has specified that it "is not seeking to have the freezing of PEM's bank accounts undone including the funds

[114] Request, para. 73, fn 129: "See *Sector minero no tributa y es corrupto: Economía, El Economista,* dated December 7, 2022, p. 1 (quoting Buenrostro: *'*they do not want to pay their taxes, because there was a person who worked in the SAT and had a brother who worked in an office, and they gave them an interpretation according to criteria')", C-0047.
[115] The relevant sentence of the interview to the Minister in the article C-0047 is textually "*Buenrostro narró el caso de una empresa extranjera que lleva a cabo un juicio legal con la Secretaría de Economía, en la que argumenta 'discriminación', cuando 'no quieren pagar sus impuestos, porque había una persona que trabajaba en el SAT, y tenía un hermano que trabajaba en el despacho, y les hicieron una interpretación de criterio a modo'. Ella abundó que este juicio está en la Suprema Corte de Justicia y, con ese criterio, la empresa decidió no pagar impuestos durante 10 años*". The Tribunal does not see in these comments any public "naming and shaming" media campaign against the Claimant, or "using the press to publicly brand First Majestic as a [redacted]" as the Claimant alleges, Request, para. 122.
[116] See above Section III.A.2.c.
[117] Request, paras 79, 83. The Claimant refers in support of its request to *Burlington Resources, Inc. v. Republic of Ecuador*, ICSID Case No. ARB/08/5, Procedural Order No. 1 on Burlington Oriente's Request for Provisional Measures, dated 29 June 2009, para. 59, CL-0093, whereby that tribunal granted a provisional measure against the seizure of the oil production by Ecuador for the purpose of "preservation of the status quo and non-aggravation of the dispute."

that were on deposit at the time of the seizure, which could be viewed as directed at a measure being challenged in this arbitration," contrary to the prohibition of Article 1134 of the NAFTA.[118] The Respondent, on the other hand, has stated that VAT refunds are paid into accounts that the taxpayer indicates to the tax authorities in charge to make such payment. It is up to PEM therefore to indicate to these authorities (apparently SAT) on which accounts it wishes to have the VAT refunds deposited, given that such refunds are *per se* are available to PEM.[119]

129. In this context, the Tribunal observes that the Claimant's request concerns future deposits and not the amounts already deposited in the past.[120] On the other hand, the unblocking of these previously deposited amounts would not be a proper object of a provisional measure because it would be a sort of anticipation of a decision on the merits on this issue.

130. The Tribunal has felt the need to ask for clarifications to the Parties, which they provided during the Hearing, as to the reasons why the payments were made on these blocked accounts and as to what would prevent future deposits to be made at PEM's request on other accounts that are freely at its disposal.[121]

131. The Tribunal must say that the factual situation has not been fully clarified by the Parties. According to the Respondent, past deposits were made on those accounts because those were the accounts indicated by PEM for such purposes.[122]

[118] Request, para. 80.
[119] Response, paras. 34-39. Specifically, "*la demandada tiene conocimiento que no se le ha negado ninguna de las solicitudes de devolución que PEM ha presentado mensualmente,*" at para. 36.
[120] See Request, para 80. The Claimant's request concerns however "payments of VAT refunds owed to PEM as to the filing of the Request for Arbitration" as well as "all future payments" (at para.78). The Tribunal considers however that a provisional measure of the type requested by the Claimant, concerning the VAT refunds to which PEM is entitled, in order not to aggravate the dispute and to maintain the *status quo*, cannot cover actions by the Respondent that predate the relevant request (4 January 2023).
[121] See Hearing Transcript, pp. 105-110.
[122] See Response, para. 33. According to the Respondent, those accounts had been blocked by SAT in order to ensure payments allegedly due by PEM under the (re-) assessments, although tax collection under the latter have been judicially suspended as a result of PEM's challenges against them, see Counter-Memorial, para. 260; Hearing Transcript, p. 104.

132. Indeed, the Respondent at the Hearing stated that it is for PEM to indicate to the tax authorities the accounts in which it intends to receive VAT refunds.[123] It is not clear to the Tribunal whether this means that since the amounts of VAT to be refunded in the future pertain to PEM and PEM can freely use them, if PEM indicates to SAT other unblocked accounts in which it wishes to have the tax refunds deposited, SAT will do so.

133. On the other hand, the Tribunal considers that if SAT were to block further payments of future VAT refunds owed to PEM, this would aggravate the dispute and affect the *status quo*.

134. In light of the principles recalled above[124] governing the issuance of provisional measures intended to avoid the aggravation of the dispute and maintain the *status quo* while the arbitration is pending, the Tribunal grants the following provisional measure: the Tribunal recommends to the Respondent not to block payments of VAT refunds owed by Mexican tax authorities to PEM since the date of the Claimant's Request (4 January 2023) and those accruing to PEM in the future while the arbitration is pending, and that such payments be made into accounts to be indicated by PEM and to be maintained freely available to PEM.[125]

135. Finally, the Tribunal considers that the above recommendation is not prevented by the prohibition of Article 1134 of the NAFTA against provisional measures that would "enjoin the application of the measure alleged to constitute a breach referred to in Article 1116 or 1117." This is because the denial by SAT of PEM's free access to future VAT refunds is not a measure challenged by the Claimant in its Request for Arbitration nor discussed in its Memorial.

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[123] See Hearing Transcript pp. 75-76: "*in connection with VAT refund procedures, we have explained that it is the Claimant itself who has the possibility of choosing the bank accounts in which it wishes refunds to be made. This obviously does not require the Tribunal's involvement*."

[124] See above Section IV.A.

[125] The Tribunal considers appropriate to remind here that although provisional measures under Article 47 of the ICSID Convention are labelled "recommendations", ICSID tribunals have consistently held that such provisional measures have a binding effect on the parties, see Schreuer et al., 3rd ed., Commentary to Article 47, para. 21, CL-0085, with reference to relevant case law at paras. 21-32, concluding at para.32 that "there is now almost universal acceptance that provisional measures have binding force." The Tribunal shares this view, based also on Article 1134 of the NAFTA on "Interim Measures of Protection," which authorizes tribunals to issue orders and not only recommendations to this effect.

5. Stay of Enforcement, Transfer Pricing Audits and [redacted]

136. Under this heading the Claimant complains, as mentioned above,[126] that Mexican authorities have proceeded with tax reassessments for the years 2010-2013 and tax investigations and audits for the subsequent years, without taking into account the existence of the APA and the methodology provided there for the determination of transfer prices. The Claimant also complains of [redacted][127]

137. The Claimant considers that such actions breach the *status quo* and aggravate the dispute. It requests the Tribunal to issue a provisional measure to stay all such proceedings to avoid the exacerbation of the dispute, as well as delays in and the disruption of the current arbitration proceedings, and irreparable harm to its business.

138. According to the Respondent, these actions are carried out in the normal exercise of administrative functions, equally applicable to any taxpayer, in respect of which the Claimant is exercising its own right of defense. The Respondent complains of the vagueness of the Claimant complains, particularly as to the [redacted] it mentions, which are in any case conducted in strict compliance with [redacted] and other applicable statutes.[128]

139. While the Claimant and the Respondent have provided information as to the tax proceedings mentioned, the Claimant has remained vague as to the [redacted] and prosecutions it complains of. The Tribunal is therefore not in the position to determine whether and how these investigations relate to the subject matter of the arbitration. In any case, there is no evidence that such proceedings and investigation have disrupted in any way the arbitration or have not respected the Claimant's right of defense.

[126] See above Section III.A.2.d
[127] Request, paras. 97 and 148.
[128] Response, para. 47.

140. As to tax assessments and audits, notwithstanding the additional information sought by the Tribunal and submitted by the Parties at the Hearing, the factual and legal basis of these actions has remained uncertain, especially as to their relation with the APA and its validity. Since it is acknowledged that the APA concerning export prices to related buyers is applicable only to the years [redacted] and is provisionally valid while the *amparo* is pending, tax assessments and enforcements for those year appear based on unrelated premises. The same should hold true for the subsequent years. These tax actions by Mexican authorities appear thus not to be directly related to the dispute in this arbitration and unlikely, at present, to aggravate it.

141. The Claimant has not provided evidence that these tax measures are not based on generally applicable Mexican legislation or are intended to harass and single out the Claimant because of its challenge of the APA and other Mexican measure in this arbitration. It is further uncontested that the Claimant and PEM are exercising, with some success, their rights to contradict and oppose, procedurally and in the merits, in those proceedings, having obtained judicial suspensions of the reassessments.[129]

142. The slow path of the proceedings (which are still *sub judice* for all the years since 2010) makes it unlikely, at the present moment, that their outcome may bring irreparable damages to the Claimant's business in Mexico. The Tribunal concludes therefore that the requirements of necessity and urgency are lacking in respect of the provisional measures requested by the Claimant.

[129] See the relevant references at note 122 above.

I. THE TRIBUNAL'S DECISION

143. In light of the foregoing, the Tribunal unanimously decides as follows:

1. RECOMMENDS as provisional measure pursuant to Article 47 of the ICSID Convention, Rule 39 of the ICSID Arbitration Rules and Article 1134 of the NAFTA that the Respondent not block payments of VAT refunds owed by Mexican tax authorities to PEM since the date of the Claimant's Request for Provisional Measures (4 January 2023) and those accruing to PEM in the future while the arbitration is pending, and that such payments be made into accounts to be indicated by PEM and to be maintained freely available to PEM;

2. REJECTS all other provisional measures requests by the Claimant; and

3. RESERVES for the Award the decision on the allocation of costs resulting from the Request.

Prof. Stanimir A. Alexandrov
Arbitrator

Prof. Yves Derains
Arbitrator

Prof. Giorgio Sacerdoti
President

Dated: 26 May 2023