INTERNATIONAL CENTRE FOR SETTLEMENT OF INVESTMENT DISPUTES

ICSID Case No. ARB/21/14

BETWEEN:

FIRST MAJESTIC SILVER CORP.

Claimant/Investor

- and -

GOVERNMENT OF UNITED MEXICAN STATES

Respondent/Contracting Party

CLAIMANT'S RESPONSE TO PRELIMINARY OBJECTION TO JURISDICTION

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GLOSSARY

TERM	DEFINITION
APA	Advanced Pricing Agreement
APA Arbitration	*First Majestic Silver Corp. v. United Mexican States*, ICSID Case No. ARB/21/14.
Claimant	First Majestic Silver Corp.
Counter-Memorial	*First Majestic Silver Corp. v. United Mexican States*, ICSID Case No. ARB/21/14, Respondent's Counter-Memorial, dated November 25, 2022.
Claimant's Request	Claimant's Request for Provisional Measures, ("Claimant's Request"), dated January 4, 2023.
Claimant's Reply to Request for Revocation	Claimant's Reply to Respondent's Request for Revocation of Recommendation of Provisional Measures, dated July 21, 2023
Decision on Provisional Measures or **Decision**	Decision on the Claimant's Request for Provisional Measures, dated May 26, 2023
Enforcement Measures	The SAT's enforcement measures based on its claim of tax deficiencies related to PEM's reliance on the APA.
MAPs	Mutual Agreement Procedures
Memorial	*First Majestic Silver Corp. v. United Mexican States*, ICSID Case No. ARB/21/14, Claimant's Memorial, dated April 25, 2022.
NAFTA	North American Free Trade Agreement
Objection to Jurisdiction	*First Majestic Silver Corp. v. United Mexican States*, ICSID Case No. ARB/21/14, Respondent's Preliminary Objection to Jurisdiction, dated July 28, 2023.
Order	The Tribunal's order in its Decision on the Claimant's Request for Provisional Measures, dated May 26, 2023.

PEM	Primero Empresa Minera, S.A. de C.V.
Respondent	Government of the United Mexican States
Respondent's Response	Respondent's Response to Claimant's Request for Provisional Measures, dated February 10, 2023
Revocation Request	Respondent's Request for Revocation, dated June 19, 2023
SAT	Servicio de Administración Tributaria
Second RFA	Request for Arbitration, dated June 29, 2023.
TFJA	High Chamber of the Tribunal Federal de Justicia Administrativa (Federal Court of Administrative Justice)
Transcript	*First Majestic Silver Corp. v. United Mexican States*, ICSID Case No. ARB/21/14, Transcript of the Request for Provisional Measures Hearing, dated March 13, 2023.
VAT	Value Added Tax
VAT Arbitration	*First Majestic Silver Corp. v. United Mexican States*, ICSID Case No. ARB/23/28.
VAT Entitlement Measures	PEM's entitlement to VAT Refunds based on its silver and gold exporting activities

I. INTRODUCTION

1. Claimant has set out herein its response to Respondent's Preliminary Objection to Jurisdiction (**Objection to Jurisdiction**) in accordance with the Tribunal's invitation to do so by September 1, 2023.

2. The Objection to Jurisdiction seeks the following:

i) Suspension of the current arbitration proceeding (ICSID Case No. ARB/21/14) (**APA Arbitration**);

ii) Declaration that the Tribunal lacks jurisdiction to continue the APA Arbitration, and *in the alternative,* a finding that it lacks jurisdiction to hear the claim concerning the freezing of accounts and/or access to the VAT refunds; and

iii) Suspension of the Decision on the Provisional Measures made on May 26, 2023 (**Decision on Provisional Measures** or **Decision**), on the grounds that the granting of such a remedy would form part of the Claimant's claim pursuant to the Request for Arbitration filed on June 29, 2023 (ICSID Case No. ARB/23/28) in relation to the VAT Arbitration (**VAT Arbitration**).

3. Claimant respectfully requests that the Tribunal dismiss the Objection to Jurisdiction in its entirety.

4. Claimant also asks the Tribunal to deny the request for suspensions of both the APA Arbitration and the Decision on Provisional Measures. The Decision on Provisional Measures by this Tribunal does not form part of Claimant's claim in the recently initiated VAT Arbitration,[1] as has been claimed by Respondent.

5. Both the APA Arbitration and the VAT Arbitration are separate proceedings.

6. The final award in the APA Arbitration will relate to the measures of the SAT in seeking to revoke the APA, the denial of domestic and international remedies to PEM, and the unlawfulness of the enforcement measures (i.e., ***enforcement measures***), of the SAT (based on its repudiation of the APA).

[1] Objection to Jurisdiction, ¶ 70(iii).

7. Specifically, in relation to the Objection to Jurisdiction, the measures under challenge in the APA Arbitration relate to the blocking by SAT of several bank accounts required by PEM to carry on its mining business, and the depositing by the SAT of VAT refunds belonging to PEM in *one* of those accounts (i.e., *enforcement measures*).

8. By contrast, the final award in the VAT Arbitration will relate to the entitlement of PEM to receive VAT refunds and the refusal of the SAT to pay the refunds to PEM (i.e., ***VAT entitlement measures***).

9. After summarizing the relevant facts, Claimant will set out its legal submissions in support of the following requests to the Tribunal:

i. Dismiss the Objection to Jurisdiction as it lacks serious merit,

ii. Deny the request for suspension of the APA Arbitration and the Decision on Provisional Measures.

iii. With respect to Respondent's alternate position as reflected in its prayer for relief (*viz.*, "in the alternative, that [the Tribunal] lacks jurisdiction to hear the claim concerning the freezing of accounts and/or access to the VAT refunds"[2]):

a) The Tribunal, should reject Respondent's jurisdictional objection concerning the *enforcement measures* as these objections were not raised in a timely manner in Respondent's Counter-Memorial;

b) Deny the Objection to Jurisdiction in relation to PEM's entitlement and access to VAT refunds. The *VAT entitlement measures* are exclusively within the jurisdiction of the Tribunal that is to be appointed in the VAT Arbitration.

10. This Tribunal in making its Decision on Provisional Remedies accepted Claimant's position, that NAFTA Article 1134 did not bar Claimant from requesting payment from the SAT of the VAT refunds (i.e., the *VAT entitlement measures*). NAFTA Article 1134 prohibits provisional relief in circumstances that require adjudication of the same measures as are in dispute in the merits phase in an arbitration.

11. The Decision of the Tribunal has therefore already rejected Respondent's assertions that the *enforcement measures* arising out of the dispute on the validity of the APA, and

[2] Objection to Jurisdiction, ¶ 70(ii).

the *VAT entitlement measures* that relate to PEM seeking to exercise its rights and entitlement to obtain VAT refunds, are the same measures.

12. In summary, the *enforcement measures* in dispute related to the blocking of all bank accounts belonging to PEM *are not the same measures* as the *VAT entitlement measures*, as has been argued by Respondent.[3]

13. Furthermore, Claimant can also confirm that its right to receive future VAT refunds, which is the subject of the Tribunal's Decision on Provisional Measures, is not part of the damages claim in the VAT Arbitration proceeding.

14. Claimant expects Respondent to comply with the Tribunal's Decision on Provisional Measures if that Decision is not revoked by the Tribunal. As of the filing of this submission, Respondent has failed to comply with the Tribunal's Decision on Provisional Measures notwithstanding the clearest of directions from the Tribunal that Respondent is required to do so pending the Tribunal's decision on the Respondent's Request for Revocation, dated June 19, 2023 (**Revocation Request**).

15. To the extent that Respondent does not abide by its legal obligations under the Decision on Provisional Remedies, Claimant will necessarily have to consider its available legal options, without in any way compromising or hindering its ability to continue with the APA Arbitration (in which it has already invested considerable resources over a period of more than two years, as has the Tribunal and Respondent).

16. Some of the considerations that will weigh into Claimant's decision on future steps will include: (i) the outcome of the Tribunal's decision on the Revocation Request, (ii) whether Respondent will promptly and fully comply with the Tribunal's Decision on Provisional Measures (if upheld), and (iii) whether Respondent will accept the guarantees offered by Claimant for any claimed income tax deficiencies.

17. The acceptance of the guarantees by the SAT, based on its obligation to act in accordance with Mexican laws[4] and its obligations under international law to act in good faith, should result in Claimant receiving all VAT refunds owed to it by the SAT, currently amounting to more than [redacted].

[3] Objection to Jurisdiction, ¶ 2.

[4] Legal requirements have been met. *See* Articles 85, 86, 141, Mexican Federal Tax Code, **R-0005**; *see also* Format 134/CFF Annex 1A of the Miscellaneous Tax Resolution, **CL-0116**.

18. If the SAT accepts the guarantees for the relevant taxation years of PEM and lifts all the *enforcement measures*, there would be no purpose served by the VAT Arbitration proceeding, and it would be discontinued.

II. FACTS

A. PEM's Legal Entitlement To VAT Refunds

19. It has been very clearly established within the existing record in this arbitration that PEM has legal entitlement to receive its VAT refunds from the SAT arising from its export of silver and gold it produced in Mexico. Respondent has at no time refuted that PEM has this legal entitlement, and in fact has affirmed the accuracy of Claimant's position.[5]

20. This is because Mexico's VAT legislation imposes a zero rate on exports and treats all inputs in the supply chain leading to export transactions as eligible for refunds.

21. That PEM is legally entitled to receive VAT is based not only on the Mexican legislative framework, but PEM's own historical experience from operating mines in Mexico spanning decades, and the well-established practice of the SAT in providing VAT refunds to all other mining companies operating in Mexico that are involved in export transactions.

B. SAT has Barred PEM Access to its VAT Refunds

22. While the SAT clearly recognizes PEM's entitlement to receive VAT refunds, it has unlawfully barred PEM access to the refunds, by depositing the refunds into one of the bank accounts it has blocked since April 2020.

23. Furthermore, it has and continues to deposit the VAT refunds into the blocked bank account notwithstanding the Tribunal's Decision on Provisional Measures, and against the specific instructions from the Tribunal reminding Respondent to comply with its Order.

24. The SAT has also restricted PEM's ability to open and use a new bank account, again in the face of the Order arising from the Tribunal's Decision on Provisional Measures, directing Respondent to permit the opening of a new bank account by PEM for the deposit of VAT refunds to which it has clear entitlement.

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[5] *See* Respondent's Response to Claimant's Request for Provisional Measures, dated February 10, 2023, ("Respondent's Response"), ¶ 161.

25. Furthermore, there is no indication from the SAT when and if VAT refunds required to be paid to PEM, will become available to PEM for use in its business operation.

26. PEM has made offers of providing guarantees, both in the past and as recently as in the July and August 2023 period,[6] to cover amounts that the SAT claims are based on deficient payment of taxes, penalties, interest, and inflation factor for each of the audited tax years. The SAT is required by Mexican law to accept these guarantees, and yet the SAT has arbitrarily refused to do so.

27. Instead, the SAT continues to withhold VAT refunds owed to PEM, amounting to [REDACTED] as of January 4, 2023, and an additional amount of [REDACTED] that has accrued since that date. Each month of delay in providing VAT refunds to PEM results in a further accumulation of approximately [REDACTED] being deposited by the SAT into a blocked bank account.

C. Respondent's Steadfast Refusal to Release the VAT Refunds to PEM

28. As we discuss further below, it is extremely clear that the Objection to Jurisdiction has been motivated by the SAT's unwillingness (and intransigence in the face of the Order from this Tribunal) to pay VAT refunds owed to PEM, even if this means it is acting unlawfully under Mexican law and not acting in good faith as required by international law.

29. This steadfast refusal to pay the VAT refunds to PEM, currently amounting to over [REDACTED], and especially the VAT refunds owed as of January 4, 2023 as ordered by this Tribunal, is exacerbating the dispute and causing irreparable harm to PEM. The sequestration of the [REDACTED] also makes amicable settlement of the current dispute difficult, as the actions of Respondent are not only severely aggravating the current dispute but jeopardizing the existence of mutual trust which is indispensable in making and maintaining a hospitable business investment environment in Mexico.

30. An amicable settlement cannot be achieved if one of the parties in the dispute is not acting in good faith. The withholding of [REDACTED] by Respondent, knowing as it does that it has *no* entitlement to such monies, makes the chances of a settlement between the parties appear unlikely. Effectively, Respondent is using the withholding of the VAT refunds so as to be able to

[6] *See* Claimant's Guarantee for 2010, dated July 14, 2023, **C-0064**; Claimant's Guarantee for 2011, dated July 14, 2023, **C-0065;** Claimant's Guarantee for 2012, dated July 14, 2023, **C-0066**; *see also* Riyaz Dattu's letter to Alan Bonfiglio, dated August 14, 2023, **C-0063**.

dictate to Claimant its own terms for settlement. That is, the [redacted] (approximately 20 percent of the claimed tax deficiencies), is and can reasonably be expected to be used as unfair leverage by Respondent in any settlement negotiations. Such actions are unconscionable.

31. Respondent's unconscionable conduct has arisen from the outset and continues to this time. Of all the measures taken by the SAT after 2015 (notwithstanding the continuing validity of the APA), it can fairly be stated that the enforcement measures taken in April 2020 and in particular the blocking of PEM's bank accounts is severely impacting PEM's day-to-day activities.

32. The unconscionable conduct extends to SAT's refusal to accept good faith offers of settlement made by Claimant, on the asserted basis that these settlement offers are tantamount to bribes[7] (even when there is simply no basis for such a conclusion under Mexican law or international law). Furthermore, the SAT has consistently refused several offers of guarantees so that some of the enforcement measures can be lifted.

33. In summary, the conduct of Respondent continues to be high handed and is focused on needlessly bringing interlocutory proceedings such as the Revocation Request and the Objection to Jurisdiction, for matters already decided or that could await adjudication as part of the merits of this case. However, the intransigence in refusing to pay VAT refunds (even if limited to future monthly payments) seems to be singularly driving Respondent's actions that are frivolous and vexatious.

34. The following additional facts make it clear that Respondent is not acting within the bounds of reason, and its actions are unreasonable:

i. the purported income tax deficiencies for the years 2010-12, which the SAT is providing as justification for blocking PEM's bank accounts, are in fact bereft of any legal basis due to the existence of the APA (which continues to be valid). While the APA remains valid, PEM cannot be said to be deficient in its payment of taxes for the relevant years.

ii. Furthermore, even if the APA is set aside and the High Chamber of the Tribunal Federal de Justicia Administrativa (TFJA) decision is upheld (following all available appeals), there is nothing within the TFJA decision that countenances the quantification by the SAT of the tax deficiencies. The amounts that the SAT has calculated for each of the relevant years, do not

[7] *See* Counter-Memorial, ¶ 335-336.

find support in Mexico's laws and have not been sanctioned by any decision of the Courts of Mexico.

iii. Respondent has failed to admit throughout the current arbitration, that the TFJA decision in fact states (and requires) that the SAT undertake additional analyses (which is yet to be undertaken). That is, the TFJA decision, even if upheld, will require the SAT to address the issues highlighted by that administrative court, before it can determine the appropriate transfer price and thereafter calculate the tax deficiencies (if any).

iv. In summary, the SAT claims of tax deficiencies lack legal support, and the amounts imposed for taxes, interest, penalties and inflation are punitive, all imposed for the purpose of being used as leverage in any settlement discussions (i.e., the claimed amount of tax deficiencies is artificially exaggerated).

35. In addition to having no legal basis for withholding the VAT refunds, and asserting that the withholding of the VAT refunds is due to the tax deficiencies (which would normally result in the acceptance of guarantees), it is highly likely that the true reason for leaving over [REDACTED] in a blocked bank account, is that Respondent is accumulating a large sum of money to counteract its subordinated status as an unsecured creditor under Mexico's insolvency and bankruptcy laws. If PEM is forced out of business through the actions of Respondent, the SAT is extremely unlikely to receive any payouts from a trustee or receiver after the secured creditors are paid and employee payroll obligations, including termination payments, are made.

36. Otherwise, the sequestering of the now [REDACTED] plus [REDACTED] a month, in a blocked bank account belonging to PEM, has no other purpose or economic rationale. The withholding of such huge amounts in a bank account (which only benefits the bank) was unreasonable conduct on the part of the SAT when prevailing interest rates were low, but is inexplicable and truly unacceptable in the current interest rate environment. Such conduct on the part of the SAT is inexcusable and amounts to bad faith conduct (especially as there are alternate means to resolve the concerns of the SAT, including obtaining a guarantee).

37. As also previously mentioned, the SAT's refusal to accept guarantees that have been offered by PEM and which exceed the minimum requirements for guarantees set out in the applicable regulation, remains unexplained by Respondent.[8]

38. Recounting events from a brief period preceding the present, it should be recalled that Respondent's sequestering of the VAT refunds, by imposing blocking measures against PEM's bank accounts, were taken in the face of a Mexican court injunction.

39. Furthermore, to set aside the injunction, the SAT perfunctorily declined to participate in the MAPs procedures under the three relevant avoidance of double taxation treaties. Having dismissed the MAPs requests, by refusing to comply with its treaty obligations, the SAT was thereafter able to claim before the Mexican Courts that the provisions in the legislation that provided for the injunction were no longer applicable.

40. Finally, Respondent has refused to pay PEM VAT refunds for the period as of January 4, 2023, thereby blatantly violating the Order of this Tribunal set out in its Decision for Provisional Measures.

D. Respondent's Objection to Jurisdiction is Without Serious Merit

41. In its Objection to Jurisdiction, Respondent claims that filing of the June 29, 2023 Request for Arbitration by Claimant (i.e., the VAT Arbitration) has resulted in a breach of Article 1121(2) of NAFTA, which reads as follows:

> A disputing investor may submit a claim under Article 1117 to arbitration only if both the investor and the enterprise:
>
> (a) consent to arbitration in accordance with the procedures set out in this Agreement; and
>
> (b) waive their right to initiate or continue before any administrative tribunal or court under the law of any Party, or other dispute settlement procedures, *any proceedings with respect to the measure of the disputing Party that is alleged to be a breach referred to in Article 1117*, except for proceedings for injunctive, declaratory or other extraordinary relief, not involving the payment of damages, before an administrative tribunal or court under the law of the disputing Party.[9]

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[8] *See* Letter from Alan Bonfiglio to Riyaz Dattu, dated August 23, 2023, **C-0062**.

[9] NAFTA Article 1121(2) (emphasis added), **PP-0001**.

42. Respondent's position would appear to be that the *enforcement measures* that are the subject of this arbitration and have been before this Tribunal for adjudication for in excess of two years, *are the same measures* that are in dispute in the newly filed Request for Arbitration which is solely concerned with the *VAT entitlement measures*. It follows, according to Respondent, that Claimant and PEM have breached the respective waivers provided at the outset of the current proceeding pursuant to Article 1121(2) of NAFTA.

43. Claimant disagrees with the characterization of the measures in dispute being the same measures in both the current arbitration proceeding before this Tribunal and in the newly filed arbitration proceeding that was launched with the filing of the Request for Arbitration dated June 29, 2023.

44. The measures at issue in this arbitration encompass far more than the measures related to the blocking of PEM's bank accounts. These measures include: (i) the bringing of the *Jucio de Lesividad* by the SAT in relation to the APA (validly obtained by PEM in 2012) and to apply the consequences of the revocation (if it is permitted by the Mexican courts) on a retroactive basis to the 2010-2014 taxation years of PEM; (ii) the denial of access to remedies, both local and international, to First Majestic and PEM; and (iii) the imposition of illegal *enforcement measures* of the SAT against First Majestic and PEM, notwithstanding that the APA remains valid.

45. Claimant has taken issue with no less than seventeen measures[10] of the SAT in the current arbitration proceeding which is before this Tribunal for resolution. *The enforcement measures* of the SAT related to blocking all of PEM's bank accounts are described as follows within the text of Claimant's Memorial: "Unjustifiably encumbering, attaching, and freezing of PEM bank accounts and other assets."[11] Additionally, the list of measures in dispute also references "depositing VAT refunds in frozen bank accounts."[12]

46. The blocking of all of PEM's bank account, and the deposit of VAT refunds in one of these blocked accounts concern enforcement by the SAT of alleged tax deficiencies. These measures are clearly not the same measures as the *VAT entitlement measures*.

47. The measures in relation to PEM's entitlement of the VAT refunds and the obligation of the SAT to pay such amounts to PEM at its direction, instead of depositing such

[10] *See, e.g.*, Memorial, ¶ 158.
[11] Memorial, ¶ 5(f).
[12] *Id.* at ¶ 158(l).

amounts into blocked bank accounts, have from the outset been outside the scope of this arbitration. They are discrete, relating only to SAT's failure to pay VAT refunds to PEM.

48. In concluding that the VAT refunds payable to PEM as of January 4, 2023 and monthly refunds of VAT should be paid by the SAT to PEM, the Order in the Tribunal's Decision on Provisional Measures states:

> 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.*[13]

49. In so providing, the Tribunal had to ensure that NAFTA Article 1134 did not prohibit the granting of this interim relief:

> 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.*[14]

E. Dismissal of Preliminary Objection to Jurisdiction based on Res Judicata, Estoppel, Vexatious and Abusive Conduct

1. Res Judicata/Issue Estoppel

50. Respondent has now for the third time asked the Tribunal to rule in a manner, which would in the result, deny PEM access to its VAT refunds, for the period as of January 4, 2023 and payable in the future. These three instances are as follows:

a. In Respondent's opposition to Claimant's Request for Provisional Measures

[13] Decision, ¶ 143(1) (emphasis added).
[14] *Id.* at ¶ 135.

51. While not consistent and clear, Respondent in its response to Claimant's Request for Provisional Measures, made statements that amounted to asking the Tribunal not to rule on Claimant's request for VAT refunds, because this was not a matter that required the Tribunal's intervention:

> For PEM to receive these funds, it only needs to indicate in the refund request the bank account to which the corresponding deposit is to be made. Clearly, this is not a situation that requires the intervention of the Tribunal.[15]

52. But then in the very next paragraph, Respondent stated, in response to the position of Claimant that the *blocking of the bank accounts* and the *SAT providing unrestricted access to PEM of the VAT refunds* were different measures, as follows:

> *Contrary to what the Claimant asserts, the matters related to VAT refunds do form part of the claims it has filed throughout this arbitration*. As explained by the Respondent in its Counter Memorial, on April 3, 2020, the SAT initiated tax collection proceedings in which it ordered the provisional seizure of five of PEM's bank accounts in order to protect the company's actual and potential tax liability. However, PEM challenged this decision and the Mexican courts suspended the freezing of these bank accounts. Therefore, PEM may dispose of the funds deposited in the accounts.[16]

Moreover, Respondent provided misleading information to this Tribunal when it stated that the Mexican courts suspended the freezing of PEM's accounts, and that, "PEM can dispose of the funds deposited in those bank accounts." To this day, Claimant still does not have access to the VAT refunds in its blocked bank accounts.

53. The Tribunal, in this first instance, ruled against Respondent holding that the measures challenged by Claimant in the APA arbitration were limited to the SAT's *enforcement measures* taken in April 2020, and did not deal with *VAT entitlement measures*:

> 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.*[17]

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[15] Respondent's Response, ¶ 38.
[16] Respondent's Response, ¶ 39 (emphasis added).
[17] Decision, ¶ 135 (emphasis added).

b. Challenge to the Tribunal's Decision on Provisional Measures:

54. On June 19, 2023, Respondent initiated a challenge to the Tribunal's Decision on Provisional Measures, seeking to have the Tribunal revoke its own decision which provides that the SAT not block payments of VAT refunds owed to PEM as of January 4, 2023 and accruing in the future, while the arbitration is ongoing. [18]

55. The Revocation Request was entirely unexpected not only because such revocations requests are very infrequent, but also because they are required to meet a very high legal threshold to succeed.

56. Furthermore, representations repeatedly made to the Tribunal by Respondent – that Claimant was legally entitled to VAT refunds and that it was not necessary for Claimant to seek access to VAT refunds as a provisional measures – would have suggested that the Tribunal's Decision on the Provisional Measures was giving effect to Respondent's position at the hearing that PEM could open a new bank account and direct the SAT to deposit future VAT refunds into a bank account that would remain unblocked.[19]

57. Therefore, the bringing of the Revocation Request squarely contradicts Respondent's position as reflected in its representations made throughout the hearing on the Provisional Measures, held on March 13, 2023.

58. Additionally, the Revocation Request included the argument that Claimant's intention as reflected in its Notice of Intent dated March 31, 2023 to bring another NAFTA claim provided grounds for the Revocation Request.

59. As was made clear by Claimant in its response to the Revocation Request, the Notice of Intent was framed to deal with PEM's VAT refunds entitlement and was not intended to challenge the *enforcement measures* including the blocking of bank accounts, arising out of the revocation of the APA.[20]

60. The two NAFTA arbitration proceedings are independent of each other: (i) the first initiated more than two years ago is related to the APA being challenged by the SAT, the claimed tax deficiency as calculated by the SAT, and its *enforcement measures*; (ii) while the newly

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[18] *See* Decision, ¶ 143(1).
[19] *See* Appendix A.
[20] Claimant's Reply to Respondent's Request for Revocation of Recommendation of Provisional Measures, dated July 21, 2023 ("Claimant's Reply to Request for Revocation"), ¶ 88.

initiated arbitration concerns enforcing rights and entitlement related to VAT refunds owed by the SAT to PEM (i.e., *VAT entitlement measures*).

c. Preliminary Objection to Jurisdiction seeks to reverse the Tribunal's Decision of Provisional Remedies by asserting that the Tribunal has no jurisdiction over the entirety of the dispute

61. The Preliminary Objection to Jurisdiction is now the latest, most blunt, and blatant attempt for Respondent to refuse to comply with its legal obligation pursuant to the Decision of the Tribunal on the Request for Provisional Measures.

62. This most recent challenge of Respondent is excessively broad but nevertheless entirely misses the mark. The Objection to Jurisdiction not only seeks to again render the Tribunal's Decision on Provisional Measures inapplicable (even before the Tribunal has rendered its decision on the Revocation Request), but seeks to have the entirely of the arbitration proceeding discontinued.

63. The loss of this Tribunal's jurisdiction is argued by Respondent to arise from Claimant initiating a distinctly separate and narrowly framed proceeding (exclusively related to VAT entitlement) before another Tribunal (yet to be constituted) under the provisions of Chapter 11 of NAFTA. Respondent's position is incorrect, as Claimant can bring a new NAFTA proceeding provided that its *VAT entitlement measures* are not being adjudicated in this arbitration.

64. Respondent has not been able to refer this Tribunal to any statements made by Claimant in this arbitration proceeding, submitting the VAT entitlement measures for its adjudication, except in the context of future VAT refunds which has been the subject matter of the Decision on Provisional Measures in compliance with NAFTA Article 1134.

65. In grasping for any apparent statements made by Claimant that would provide some basis for violation of its waivers under NAFTA Article 1121, Respondent has claimed that:

> In its Second RfA, First Majestic tries to distinguish the new claim from the one it filed in this arbitration process by arguing that "[*t]his claim concerns obtaining compensation for the VAT refunds payable to PEM*," and *"[i]t is not limited to challenging the banking "blocking" measures of the Government of Mexico which have been used to restrain access to the funds*."[21] However, the use of the phrase "it is not limited to" in the above quote implies that there is a partial (if not absolute) juxtaposition among the measures that are

[21] Request for Arbitration dated June 29, 2023, ("Second RFA"), ¶ 28 (emphasis added).

> the object of claims in both proceedings. This juxtaposition is not resolved by simply changing the description of the measure.[22]

66. While Claimant accepts that the use of the term "it is not limited to" *could* suggest, if not read within context, that the VAT Arbitration goes beyond seeking an adjudication on its VAT entitlements, it should have been clear to Respondent (when read in context of the preceding paragraphs) that the enforcement measures are being adjudicated exclusively by this Tribunal.

67. To put the phrase referenced by Respondent in context, here are the relevant paragraphs from the Request for Arbitration filed in the VAT Arbitration:

> The principal means used by the SAT to withhold the VAT refunds owing to PEM is by imposing a "block" on all of PEM's bank accounts including the one in which the SAT has been depositing the monthly VAT refunds.
>
> *The matter of the imposition of the measures related to the "blocking" and refusal to lift the "blocking" is the subject of an ongoing arbitration between First Majestic and the Government of Mexico (ICSID Case. No. ARB-21-14).*
>
> *This claim concerns obtaining compensation for the VAT refunds payable to PEM*. It is not limited to challenging the banking "blocking" measures of the Government of Mexico which have been used to restrain access to the funds. *As noted, the measures related to the "blocking" of the bank accounts are the subject of another arbitration proceeding.*[23]

68. A clearer expression that could have been used is that the new VAT arbitration "is not directed at" challenging the banking blocking measures of the SAT. However, the required clarity is provided in the very first sentence and again in the last sentence, which reads: "As noted, the measures related to the 'blocking of the bank accounts are the subject of another arbitration." Both the first and last sentences were omitted by Respondent, in desperately seeking to challenge this Tribunal's adjudication of the enforcement measures and the several other measures that have harmed Claimant and its investment in Mexico.

69. Claimant, based on the reasons set out in this submission, asks the Tribunal to reject the arguments made, on this third attempt, by Respondent which seeks to relitigate the issue of

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[22] Objection to Jurisdiction, ¶ 57.

[23] Second RFA, ¶¶ 26-28 (emphasis added).

PEM's entitlement to VAT refunds being the same measures as the challenge to SAT's enforcement measures.

2. Estoppel

70. The Request for Arbitration in the VAT Arbitration was accepted for registration by ICSID on July 21, 2023 (ICSID Case No. ARB/23/28). No further steps have been taken by the parties in the newly initiated NAFTA proceeding.

71. The Request for Arbitration in the newly initiated proceeding was filed to protect PEM's rights in view of the continuing refusal of the SAT to make available the VAT refunds to PEM. The SAT's refusal to recognize and act on PEM's VAT entitlement has occurred in the face of very clear and repeated previous representations to this Tribunal, acknowledging in clear terms, both in writing and orally, PEM's entitlement to the VAT refunds.

72. Furthermore, Respondent also consistently indicated that the existing differences between Claimant and Respondent could be easily resolved by PEM opening a new bank, and directing the SAT to deposit VAT refunds into that new account which would remain unblocked. Furthermore, Respondent claimed Claimant had unnecessarily sought to have the Tribunal intervene as there existed a practical solution that simply required PEM to open a new bank account, and thereafter direct the SAT to deposit the VAT refunds in the new bank account.[24]

73. Those representations were repeatedly made, likely in order to convince the Tribunal that there did not exist a dispute, and that Claimant had within its means the ability to obtain VAT refunds but had failed to take the necessary steps. This reasonably created in the mind of the Tribunal confusion as to the actual facts, as noted in the Tribunal's Decision on Provisional Relief.

74. However, the Tribunal will recall that when requested by Claimant's counsel at the hearing to act upon these representations, Respondent claimed that PEM needed to follow up with the SAT.

75. Claimant has since followed up with Respondent (including the SAT), and has been provided no explanation for its refusal to act on its representation and more importantly to abide by the Tribunal's Decision on Provisional Measures (even though the Tribunal has twice reminded

[24] *See* Appendix A.

it to comply with the Order while the Revocation Request is being reviewed at the instance of Respondent).[25]

76. Beyond being necessitated by the expiry of the time limit for filing its NAFTA claim (by the end of June, 2023), the NAFTA claim was very much prompted by clear claims and assertions made by Respondent at the hearing (of the entitlement of PEM to the VAT refunds), which have been transcribed, as follows:

- If PEM would want for those amounts to be deposited in a different account, they would only need to identify the details of that account in their refund request. This *clearly, in our opinion, does not require the intervention of the Arbitral.*[26]

- Second, 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.[27]

77. For a full list of Respondent's representations acknowledging PEM's right to the VAT refunds, please see Appendix A.

78. In the face of such clear representations that the entitlement of PEM to obtain the VAT refunds was unquestionable, and that the only issue related to practicalities of accessing the VAT refunds not covered by the Tribunal's Order (i.e., PEM access to refunds for periods prior to January 4, 2023), Claimant filed its Request for Arbitration before the July 1, 2023 deadline. This was done so as to enhance Claimant's ability to obtain the [redacted] that would not be recoverable pursuant to the Tribunal's Order for provisional measures.

79. However, all attempts made by Claimant to find solutions, including by offering a guarantee, have been rebuffed by Respondent despite earlier representations during the hearing.

80. In the face of Respondent's conduct seeking to resile from its representations, and in view of the filing of the Request for Revocation which clearly expressed Respondent's clearest confirmation that it has moved away from adhering to its previous representations and admissions, Claimant was left with no choice but to protect its legal entitlement to the VAT refunds.

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[25] *See* Letter from Riyaz Dattu to Alan Bonfiglio, dated June 15, 2023, **C-0060**; *see also* Letter from Riyaz Dattu to Alan Bonfiglio, dated August 11, 2023, **C-0061**.
[26] First Majestic Silver Corp. v. United Mexican States, ICSID Case No. ARB/21/14, Transcript of the Request for Provisional Measures Hearing, dated March 13, 2023, ("Transcript"), p. 61 (emphasis added).
[27] Transcript, p. 80 (emphasis added).

81. Furthermore, Claimant has throughout the proceeding been absolutely clear that the legal entitlement to receive VAT refunds has not been the subject matter of this ongoing arbitration, which has been limited to the issues of the unlawful revocation of the APA, the denial of access to remedies both domestic and international, and the harsh *enforcement measures* taken by the SAT notwithstanding the existence of a Court injunction. Only one of the many measures of enforcement taken concerned the blocking of bank accounts belonging to PEM, and these *enforcement measures* are within the ambit of the current arbitration.

82. Claimant has not referred to its *VAT entitlement* in its pleadings to date in this arbitration proceeding (except in relation to its Provisional Remedies Request). However, the imposition of the blocking measures by the SAT on all of PEM's bank accounts has been clearly enumerated as a measure being challenged.

83. The recoverability of the VAT was advanced by Claimant in the Provisional Measures Request precisely because the legal entitlement to that amount could be claimed in the Request without running afoul of Article 1134 of NAFTA.

84. The Tribunal has taken note of this in its Decision on the Request for Provisional Measures:

> *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."[28]
>
> …
>
> 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.[29]
>
> …
>
> The Claimant has specified that it "is not seeking to have the freezing of PEM's bank accounts undone including the funds that were on deposit at the time of the seizure, which could be viewed as

[28] Decision, ¶ 42 (quoting Claimant's Request for Provisional Measures, ("Claimant's Request"), dated January 4, 2023, ¶¶ 80-81 (emphasis added).
[29] *Id*. at ¶ 43 (emphasis added).

> directed at a measure being challenged in this arbitration," contrary to the prohibition of Article 1134 of the NAFTA.[30]
>
> …
>
> *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*. 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.[31]

3. Vexatious Conduct

85. Respondent has explained the timing of the bringing of the Objection to Jurisdiction to this Tribunal can be attributed to the Claimant filing its Request for Arbitration on June 29, 2023 in connection with Respondent's measures denying PEM's *VAT entitlement*.

86. However, the relief asked for by Respondent is expansive and unnecessary, calling for the immediate suspension of the current arbitration proceeding and as well a suspension of the provisional measures recommended in the Decision on the Provisional Measures made on May 26, 2023, ordering future VAT refunds be paid to PEM.

87. By their nature, provisional measures are to be provided based on the existence of urgency, necessity, maintenance of status quo, and to avoid irreparable harm. Furthermore, once a request for provisional measures is made, it has to be given priority by the Tribunal in the proceedings.[32]

88. It is clear that in seeking to both suspend the merits phase of the current arbitration proceeding and the provisional relief provided, Respondent is acting in a manner that is vexatious. It has filed two interlocutory requests, one after the other, and then sought to stay its own Revocation Request filed on June 19, 2023 within its Objection to Jurisdiction filed on July 28, 2023.

89. All of Respondent's recent actions, in filing the Revocation Request and Objection to Jurisdiction have had one ultimate objective: to avoid paying PEM the VAT refunds owed to it.

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[30] *Id*. at ¶ 128.
[31] *Id*. at ¶ 132 (emphasis added).
[32] *See* ICSID Convention, Regulations and Rules, dated October 14, 1966, Article 39(2), **CL-0012**.

This is made clear by Respondent's unwillingness to abide by its own laws and the Tribunal's Decision on Provisional Measures, which require the SAT to pay VAT refunds to PEM

90. The Tribunal should see through Respondent's behavior for what it is – as entirely vexatious conduct. Respondent is misusing the applicable rules to simply achieve one end: Avoidance of its legal obligations by bringing multiple challenges, including to the Tribunal's jurisdiction to resolve the dispute concerning the SAT's repudiation of the APA that has been underway for more than two years, and which began three years ago with the filing of the Notice of Intent on May 13, 2020.

91. Rather than simply accepting the guarantees that have been offered to the SAT (consistent with Mexican law), Respondent continues to bring frivolous interlocutory proceedings hoping to end the entirety of the proceedings initiated by Claimant in connection with the SAT's challenge to the APA.

92. Respondent has not only refused to accept PEM's guarantees, but has provided no explanation for its unwillingness to accept the guarantees that have been offered in compliance with the applicable requirements of Mexican laws and guidelines.[33]

III. LEGAL ARGUMENTS

A. The Proceedings Should Not Be Bifurcated

93. Respondent's Objection to Jurisdiction is without any merit and should be dismissed. Alternatively, the jurisdictional objections raised should be added to the merits phase to the extent that such objections have been made in a timely manner, and there should be no suspension of the current proceeding.

1. Objection to Jurisdiction is without any merit

94. Respondent's jurisdictional objection, if it is to be adjudicated upon by this Tribunal, must be *prima facie* serious and substantial. As explained by the tribunal in *Eco Oro*, "for an objection to be held to be 'serious and substantial' a higher threshold must be applied than merely requiring that the objection is not frivolous or vexatious."[34]

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[33] *See* Letter from Alan Bonfiglio to Riyaz Dattu, dated August 23, 2023, **C-0062**.

[34] *Eco Oro Minerals Corp. v. Republic of Colombia*, ICSID Case No. ARB/16/41, Procedural Order No. 2 Decision on Bifurcation, dated June 28, 2018, ¶ 51, **RL-0144**.

95. Respondent's Objection to Jurisdiction is not "serious and substantial." The Objection to Jurisdiction, brought at this stage of the current arbitration proceeding is motivated by a single purpose: to throw up as many obstacles as possible so as to thwart PEM's clear entitlement to VAT refunds amounting to over [redacted] at the present time.

96. Respondent has undertaken the following to achieve its objective of depriving PEM of its legal entitlement to VAT refunds:

i. Refusing to accept guarantees provided by PEM on several occasions, evidencing bad faith behavior on the part of the SAT.

ii. Accepting in its Response to the Request for Provisional Measures PEM's entitlement to VAT refunds and making the same representations at the hearing, but then refusing during the hearing to acknowledge and accept that the Tribunal should order provisional relief for the VAT measures.

iii. Refusing to respond to Claimant's counsel's letters seeking compliance with the Tribunal's Decision on Provisional Remedies.

iv. Seeking to revoke the Decision on Provisional Remedies by filing a Revocation Request.

v. Filing its Objection to Jurisdiction on the basis of Claimant's pursuit of legal proceedings to enforce its VAT refund rights pursuant to the VAT arbitration.

vi. Seeking stay of the Tribunal's current arbitration proceedings and the Tribunal's Order requiring the SAT to pay VAT refunds as of January 4, 2023, and to deposit monthly refund amounts into a new bank account of PEM that would not be blocked by the SAT.

97. The SAT's over-zealous, over-reaching and unlawful behavior, in preserving for itself access to monies (to which it has no right) by unlawfully depositing VAT refunds into a blocked account (without any authorization from PEM) demonstrates Respondent's total disregard of the applicable laws.

98. This most recent attempt at maintaining control over the VAT refunds (amounting now to over [redacted]), uses the Objection to Jurisdiction to terminate this arbitration proceeding based on wholly deficient factual and legal grounds.

99. The factual basis for the Objection to Jurisdiction is entirely bereft of any substance. It is absolutely clear that the proceedings before this Tribunal concern the *enforcement measures*

of the SAT, in blocking several bank accounts belonging to PEM, only one of which contained amounts of VAT refunds deposited by the SAT.

100. The *VAT entitlement measures* are not covered within the scope of this arbitration, as has already been ruled upon by this Tribunal. The Tribunal's Decision on the Request for Provisional Measures was made in the context of Article 1134 of NAFTA. However, both Article 1121 and 1134 focuses exclusively on what measures are already before this Tribunal for adjudication pursuant to Article 1117 of NAFTA. In that respect, the Tribunal's decision in relation to NAFTA Article 1134 (concerning provisional relief) has direct relevance and applicability to its decision under NAFTA Article 1121 (in relation to waivers).

101. In the Decision on the Request for Provisional Measures, the Tribunal confirmed, when examining the restrictions imposed by NAFTA Article 1134, that *"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."*[35]

102. This Tribunal's analysis, which focused on the term "measures," is consistent with the other authorities that have considered whether certain "measures" are the same as some other "measures," including in the context of "waivers."

103. When analyzing the scope of NAFTA Article 1121, the tribunal in *DIBC v. Government of Canada* found that it was "necessary to first define the term 'measures.'"[36] The tribunal found that "Article 201 defines 'measures' as 'any law, regulation, procedure, requirement, or practice'."[37] The Tribunal thereafter continued with its analysis and concluded as follows:

> *Article 1121 focuses on the State measure - the governmental act - which has given rise to the dispute, and not on the claims to which such a measure may give rise*. For instance, if a discriminatory licensing denial gives rise to distinct legal claims under NAFTA and under a domestic law, both claims relate to the same measure, regardless of the legal cause of action under the respective laws.
>
> At the same time, a measure is a discrete act. *The fact that multiple discriminatory acts may be part of a common plan does not make them one measure. If* a State discriminates against a foreign investor by successively denying a license, imposing a special tax, and

[35] Decision, ¶ 135 (emphasis added).
[36] *Detroit International Bridge Company v. Government of Canada*, PCA Case No. 2012-25, Award on Jurisdiction, dated April 2, 2015, ¶ 301, **RL-0153**.
[37] *Id.* at ¶ 302, **RL-0153**.

> subsidizing a domestic competitor, these constitute separate measures, and need not all be pursued in one forum.[38]

104. The views of the tribunal in *DIBC v. Government of Canada* have been shared by other tribunals that have considered the waiver provisions in NAFTA Article 1121. In *Waste Management v. Government of Canada* (I), referred to by Respondent in its Objection to Jurisdiction, the tribunal there focused on ensuring that the "same measures" were not considered in multiple proceedings.[39]

105. Respondent's Objection to Jurisdiction also argues, while agreeing that the focus should be on the "impugned measure,"[40] that NAFTA Article 1121(2) setting out the waiver provision applies even where the "two actions are not identical."[41] This proposition is quoted from Waibel, which the Respondent reproduced at paragraph 38 of its Objection to Jurisdiction. It should be noted that Waibel in using the phrase was comparing the waiver provision in NAFTA Article 1121(2) with other means of coordinating parallel proceedings. The ultimate sentence within the quote reproduced in the Respondents' objection to Jurisdiction states:

> This waiver is broad, as the focus is on the impugned measure, in contrast to the triple identity test of lis pendens and res judicata examined in section 4.2. It also applies if the two actions are not identical.[42]

106. However, the quoted extract from Waibel does not assist Respondent, as the measures in issue in the two arbitrations, are not identical, same or similar. The goal of the two arbitrations, the APA Arbitration and the VAT Arbitration, are also quite different.

107. The subject matter of the *enforcement measures* relates to steps taken by the SAT in April 2020 that blocked several bank accounts of PEM supposedly to secure payment of any tax deficiencies if and when finalized. One of these bank accounts contained VAT refunds payable to PEM, and was thereafter also where the SAT deposited additional VAT refunds that have accumulated over time.

108. On the other hand the *VAT entitlement measures* concern access to the VAT refunds, which do not require the lifting of the enforcement measures (in relation to any one of the

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[38] *Id.* at ¶¶ 303-304, **RL-0153** (emphasis added).

[39] *Waste Management v. Mexico (I)*, ICSID Case No. ARB(AF)/98/2, Award, June 2, 2000, ¶ 27, **RL-0151**.

[40] Objection to Jurisdiction, ¶ 38 (*citing* Waibel, Michael. Coordinating Adjudication Processes, in The Foundations of International Law (Zachary Douglas, Joost Pauwelyn & Jorge E. Viñuales eds., (OUP 2014), p. 521, **RL-0156)**.

[41] *Ibid.*

[42] *Ibid.*

blocked bank accounts). The VAT refund claim requires the SAT to take additional steps, that it has *not* taken, because it has resiled from the position taken previously including at the hearing of the Provisional Remedies, which is that PEM is entitled to open a new bank account and direct the SAT to deposit the VAT refunds belonging to PEM in this new bank account and refrain from further blocking this bank account.

109. Indeed, the *enforcement measures* consisted of *acts* undertaken by the SAT in April 2020, which consisted of active steps taken to sequester the VAT refunds and thereafter additional active steps of depositing VAT refunds into those accounts without instructions from PEM.

110. On the other hand, the *VAT entitlement measures* that are the subject matter of the challenge in the newly initiated arbitration proceeding, the VAT Arbitration, deal with *omissions* of the SAT, rather than active steps taken by the SAT.

111. These measures consist of refusing to allow new bank accounts being opened by PEM which will remain unblocked, and refusing to deposit VAT refunds into the new bank account.

112. It is plainly obvious that the SAT's *enforcement measures* (which extended beyond the bank account containing VAT refunds and included other bank accounts) are not the "same measures" as the *VAT entitlement measures* which concern deprivation of PEM from obtaining money that fully belong to it as an exporter of metals from Mexico.

113. This interpretation of the term "same measures" is consistent with the approach taken by this Tribunal in its Decision on Request for Provisional Measures.

114. On the basis of the foregoing, the Tribunal should immediately dismiss Respondent's Objection to Jurisdiction.

2. Grounds for Bifurcation do not Exist

115. In its Objection to Jurisdiction, Respondent has vaguely outlined that "[t]he preliminary objection raised by Respondent meets the three [part test]"[43] for bifurcation.

116. However, Respondent has failed to provide any analysis in relation to each of the three-fold criteria considered by tribunals when considering a request for bifurcation. Respondent offers the following three-part test: 1) be *prima facie* serious and substantial; 2) result in a material

[43] Objection to Jurisdiction, ¶¶ 10-11.

reduction of the next phase; and 3) not be intertwined with the merits.[44] Further, tribunals have found that even where all three factors are satisfied, a tribunal in its exercise of discretion may nevertheless refuse to bifurcate a jurisdictional objection based on the particular circumstances of the arbitration proceeding.[45]

117. Although tribunals are not required to rigidly apply the three-fold criteria and there are variations that have been applied by tribunals,[46] here Respondent fails to meet the requirements of the very test it relies upon in its Objection to Jurisdiction.

a. The jurisdictional objection is not prima facie serious and substantial

118. As previously discussed, in order for a jurisdictional objection to be bifurcated the objection must be *prima facie* serious and substantial, a higher threshold than merely requiring that the objection is not frivolous or vexatious."[47] This requirement was elaborated on by the tribunal in *Red Eagle Corporation* which found:

> The Tribunal is of the view that between frivolous and serious there may be degrees of seriousness that do not carry the weight to justify bifurcation. *It is relevant here to recall that, in deciding whether or not to bifurcate the proceeding the Tribunal has discretion and needs to consider not only procedural efficiency but also fairness; it needs to strike a balance between the two*. Both parties agree that the Tribunal needs to conduct an efficient and fair proceeding.[48]

119. Respondent's Objection to Jurisdiction is clearly not *prima facie* serious and substantial, as similar arguments made concerning the *enforcement measures* and the *VAT entitlement measures* in the context of Claimant's Request for Provisional Remedies have failed. This Tribunal has already rejected Respondent's arguments, and has decided that Article 1134 does not limit the Tribunal's jurisdiction to provide remedy for recovery of VAT refunds in the

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[44] *Id.* at ¶ 10.

[45] *See Rand Investments Ltd., William Archibald Rand, Kathleen Elizabeth Rand, Allison Ruth Rand, Robert Harry Leander Rand, and Sembi Investment Limited v. Republic of Serbia*, ICSID Case No. ARB/18/8, Procedural Order No. 3 (Bifurcation), dated June 24, 2019, ¶ 13-15, **CL-0108**.

[46] *See, e.g., Standard Chartered Bank (Hong Kong) Limited v. United Republic of Tanzania*, ICSID Case No. ARB/15/41, Procedural Order No. 3 on Bifurcation, dated October 11, 2016, ¶ 56**, CL-0111**.

[47] *See Eco Oro Minerals Corp. v. Republic of Colombia*, ICSID Case No. ARB/16/41, Procedural Order No. 2 Decision on Bifurcation, dated June 28, 2018, ¶ 51, **RL-0144**.

[48] *Red Eagle Exploration Limited v. Republic of Colombia*, ICSID Case No. ARB/18/12, Decision on Bifurcation, dated August 3, 2020, ¶ 42, (emphasis added), **CL-0113**.

future: "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."[49]

120. Considering Respondent's repeated attempts to re-argue an already rejected argument, it is clear that Respondent's Objection to Jurisdiction is not *prima facie* serious and substantial. Further, if the jurisdictional objection were to be bifurcated, as we discuss further below, the procedural efficiency and fairness of these proceedings would be seriously jeopardized as Claimant will have to expend additional resources to respond to Respondent's jurisdictional objections during the bifurcation proceeding, and then again deal with the several other remaining objections to jurisdiction in the merits phase of the proceeding.

121. The adoption of the bifurcation of process in the present cases would add several more months to the current arbitration proceeding, with the concomitant incurring of costs for submissions from both parties and likely an additional hearing before the Tribunal concerning the jurisdictional objections arising from the Objection to Jurisdiction. However, additional jurisdictional objections contained in the Counter-Memorial would remain to be adjudicated with the merits of the dispute.

b. Bifurcation would not result in a material reduction of the next phase

122. Tribunals have refused to bifurcate jurisdictional objections where doing so would *not* result in a material reduction of the next phase.

123. Here, a bifurcated proceeding will not reduce but in fact add considerable time to achieving a final resolution. The likelihood of this Tribunal deciding that it can no longer continue with this arbitration based on assertions that the enforcement measures and the VAT entitlement measures are the same, is weak and highly unlikely to succeed, given the views already expressed by the Tribunal in the Decision on Provisional Measures in the context of Article 1134 of NAFTA.

124. To this point, the tribunal in *TC Energy and Trans Canada Pipelines v. U.S.A.,* found:

> [T]he Arbitral Tribunal needs to assess whether a bifurcation would be efficient, which is to say whether it would result in a gain of time or in reduced costs. *In order to assess gains of efficiency, it is necessary to compare the gains in time and costs that would result from bifurcation in the hypothesis of no-jurisdiction, with the added*

[49] Decision, ¶ 135.

> *costs and time that would result from bifurcation in case the Tribunal decides that it has jurisdiction*.[50]

125. Similarly, the tribunal in *Rand Investments v. Republic of Serbia* found that "if the bifurcation is unlikely to produce efficiency gains, a tribunal should be disinclined to bifurcate."[51] In that case, the tribunal refused to bifurcate the proceeding as it found that "Respondent would suffer no prejudice in light of the content of the objections and of their interactions with the merits, not to speak of the fact that any extra costs possibly incurred in vain could be compensated by way of an award of costs."[52]

126. In this case, the bifurcation of Respondent's Objection would not result in a material reduction in the next phase, and as noted previously can be expected to add time and cost burden on the parties, prolong the arbitration, and impose additional time and other obligations on this Tribunal.

127. Respondent has raised several jurisdictional objections when filing its Counter-Memorial, having chosen not to seek bifurcation of the proceedings and thereby retaining all of its objections to be dealt with at the merits stage. To seek bifurcation of the single jurisdictional issue at this stage in the proceedings, and then again to require Claimant to deal with the remaining jurisdictional issues in its Reply on the Merits, is inefficient for all involved in this arbitration, and unfair to Claimant.

c. Respondent's argument, even without consideration of the merits, fails

128. On this third consideration on whether or not to bifurcate Respondent's Objection to Jurisdiction, Claimant concedes that it may be possible to consider the jurisdictional challenge based on NAFTA Article 1121 separately from the merits of this arbitration proceeding. However, there is a danger in ruling on the jurisdictional issues without a full appreciation of the merits of this case on measures of Respondent such as the rejection of guarantees offered by PEM and the blocking of the bank accounts, and whether Respondent can block avenues of redress for PEM to

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[50] *TC Energy Corporation and TransCanada Pipelines Limited v. United States of America*, ICSID Case No. ARB/21/63, Procedural Order No. 2, dated April 13, 2023, ¶ 31 (emphasis added), **CL-0112**.

[51] *Rand Investments Ltd., William Archibald Rand, Kathleen Elizabeth Rand, Allison Ruth Rand, Robert Harry Leander Rand and Sembi Investment Limited v. Republic of Serbia*, ICSID Case No. ARB/18/8, Procedural Order No. 2 (Bifurcation), dated June 24, 2019, ¶ 15, **CL-0108**.

[52] *Id.* at ¶ 19.

recover its VAT refunds, all the while acknowledging that PEM has full entitlement to the VAT refunds.

129. The other factors, principally efficiency and the absence of **serious and substantial** jurisdictional grounds within the Preliminary Objection to Jurisdiction, weigh against the Tribunal ordering bifurcation of this arbitration proceeding that have been moving forward over the last two years. Additionally, the fact that it would be inefficient and cumbersome for Claimant to respond to Respondent's jurisdictional objections both under a bifurcated process and then again when it files its Reply on the Merits (i.e., to Respondent's jurisdictional challenges that it agreed to join to its jurisdictional objections the merits phase of this proceeding) should weigh heavily against ordering bifurcation.

130. Respondent argues that "all that the Tribunal would need to determine is whether Claimant has initiated a second dispute settlement procedure based on the same measures claimed in this arbitration procedure."[53] Respondent's position fails, as the measures in the two arbitrations at hand are different, and the Tribunal has already decided this.

131. The objection to jurisdiction based on NAFTA Article 1121 is not only weak but is also novel, and without any direct authority cited by Respondent in support of its position that can be considered as analogous.

132. The awards cited by Respondent including *DIBC v. Canada* and *Waste Management v. Canada* are easily distinguishable as blatant examples of the claimants, in those cases, either litigating the "same measures" before U.S. and Canadian courts or seeking to expressly exclude from the written waiver what is expressly not permissible based on NAFTA Article 1121.

133. The key aspect of the present dispute and the APA Arbitration proceeding concerns the unlawful revocation of the APA by the SAT including its retroactive application, denial of local and international remedies to PEM, and *enforcement measures* taken by the SAT in the face of an injunction.

134. Even in the context of the *enforcement measures* taken, the SAT engaged in taking several actions including seizing over 100 of PEM's parcels of lands, 33 valuable mineral

[53] Objection to Jurisdiction, ¶ 12.

concessions[54] and several bank accounts.[55] The failure to pay VAT refunds was not a measure referred to by Claimant in the list of *enforcement measures* either in the Request for Arbitration or in its Memorial. The Tribunal has already confirmed this in its Decision on Provisional Measures.

135. There is nothing within the text of Article 1121, that compels a decision that this Tribunal immediately cease to have jurisdiction based on a newly initiated VAT Arbitration proceeding under Chapter 11 of NAFTA, where another tribunal has yet to be appointed.

136. When constituted, Claimant will advance its case before the newly constituted tribunal based principally on the SAT's omissions in failing to provide VAT refunds to PEM (i.e., the *VAT entitlement measures*). The arguments made by Respondent are not only weak and novel, but fly in the face of the objectives of bifurcation, where the overriding principle in the Tribunal's decision-making authority is to strive for efficiency. Respondent's request for bifurcation does the opposite.

137. Finally, there is no prejudice to Mexico if its Preliminary Objection to Jurisdiction is joined to the merits and all of its various jurisdictional objections are dealt with at one time by Claimant and thereafter ruled upon by the Tribunal through its award – as here, the very next step in this proceeding is for Claimant to prepare its Reply on the Merits and to file responses to Objections to the Jurisdictional Challenges. Respondent has nothing further to do concerning its Preliminary Objection to Jurisdiction (if it is not dismissed at this stage), other than to receive Claimant's Objections to all of its jurisdictional challenges.

B. <u>Additional Factors that should result in Immediate Dismissal</u>

138. The following additional factors support the immediate dismissal of Respondent's Preliminary Objection to Jurisdiction by the Tribunal.

1. Res Judicata/Issue Estoppel

139. Professor Emmanuel Gaillard in his paper on coordination of international arbitration proceedings,[56] refers to the following definition of *res judicata*, provided by Peter R. Barnett in his book on this subject, with approval:

> [A] judicial decision of special character because, being pronounced by a court of tribunal having jurisdiction over the subject-matter and

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[54] Memorial, ¶ 5(g).
[55] Memorial, ¶ 5(f).
[56] Emmanuel Gaillard, *Coordination or Chaos: Do the Principles of Comity, Lis Pendens, and Res Judicata Apply to International Arbitration?,* The American Review of International Arbitration (ARIA), Vol. 29, No. 3, dated 2018, **CL-0110**.

> the parties, it disposes finally and conclusively of the matters in controversy, such that --- other than on appeal – the subject-matter cannot be re-litigated between the same parties or their privies.[57]

140. Accordingly, the "decision becomes vested with *res judicata* effect once a competent international tribunal or court renders a final decision concerning the same parties, the same legal grounds, and the same claims."[58]

141. The U.S. Draft Restatement, also referenced by Professor Gaillard in this paper, states the following:

> It is generally acknowledged that international arbitral awards are entitled to claim preclusive or 'res judicata' effect, thus barring a party from seeking to relitigate a claim that was previously adjudicated in the arbitration.[59]

142. He therefore concludes that "as a matter of principle, nothing prevents arbitrators from assessing the impact of previously adjudicated matters on the dispute before them in the same way as national courts."[60]

143. Furthermore, in the context of the issue before this Tribunal whether the *enforcement measures* and the *VAT entitlement measures* are the same measures, and the Tribunal having decided in the Decision on Provisional Remedies, that these measures are not the same, the principle of *res judicata*, the doctrine of preclusive effect, or issue estoppel renders Respondent's argument that these are same matter, *albeit* in reference to NAFTA Article 1121, inadmissible:

> As a matter of principle, nothing prevents arbitrators from assessing the impact of previously adjudicated matters on the dispute before them in the same way as national courts. The principle is uncontroversial and has been accepted as a general principle of international law. As noted in an early award, it would be paradoxical for an arbitral tribunal not to recognize the binding effect of a prior arbitral award. *The same logic applies to prior awards rendered by the same arbitral tribunal in the course of the same proceedings.* In some jurisdictions, it may even be considered a violation of public policy not to give *res judicata* effect to a previous award.[61]

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[57] *Id.* at p. 218 (quoting Peter R. Barnett, *Res Judicata, Estoppel and Foreign Judgements*, § 1.11, dated 2001).
[58] *Id.* at p. 2019.
[59] *Id.* at p. 220, (quoting DRAFT RESTATEMENT (THIRD) OF THE U.S. LAW OF INTERNATIONAL COMMERCIAL ARBITRATION, § 4-9 reporters' note a (AM LAW INST., Tentative Draft No. 4, dated 2015).
[60] *Id.* at p. 225.
[61] *Id.* at p. 225-226.

144. Reaffirming the role and applicability of *res judicata* in international arbitration, Professor Gaillard notes the following:

> *The principle of res judicata is itself uncontroversial*. It is accepted in virtually every legal system, and has been accepted as a general principle of international law. More difficult, however, is the question of whether the *res judicata* principle applies only to the operative part of the award or extends to the reasons underlying the operative part. *A comparative law study would likely show that in a majority of legal systems only the dispositive part of the decision is vested with res judicata effect, with the caveat that reasons can be considered to enlighten the meaning of the dispositive part (as the International Court of Justice has accepted).*
> *In certain legal systems, res judicata is supplemented by the notice of issue estoppel, with less stringent conditions*. To the extent, however, that issue estoppel is ignored in civil law systems, it is not sufficiently widely accepted to be recognized as a genuine transnational principle.[62]

145. In the context of the common law acceptance of the doctrine of *res judicata* as including both "claim preclusion" and "issue preclusion" or "issue estoppel', Professor Guillard expands on the application of these principles by referring to the *United States Supreme Court decision in S. Pac. R.R. Co. v. United States*, 168 U.S. 1, 48-49 (1897), which may help guide this Tribunal in assessing the preclusive effect of its Decision on Provisional Measures and the reasons for deciding that Article 1134 is not a bar to providing relief by way of future VAT refunds to PEM:

> The general principle announced in numerous cases is that a right, question, or fact distinctly put in issue, and directly determined by a court of competent jurisdiction, as a ground of recovery, cannot be disputed in a subsequent suit between the same parties or their privies; *and even if the second suit is for a difference cause of action, the right, question or fact once so determined must, as between the same parties or their privies, be taken as conclusively established, so long as the judgement in the first suit remains unmodified*. This general rule is demanded by the very object for which civil courts have been established, which is to secure the peace and repose of society by the settlement of matters capable of judicial determination.[63]

[62] *Id.* at p. 227.
[63] *Id.* at p. 227, footnote 109, (emphasis added.

146. Allowing for the fact that the Decision on Provisional Measures, by its very nature is not a final award, and subject to modification by the Tribunal on its own accord or based on a request by one of the parties, it is indeed the case that that the Tribunal's decision on provisional measures does not remain immune from review based on the principle of *res judicata*. However, Respondent is nevertheless to be restrained from rearguing the conclusion already made by this Tribunal that the *enforcement measures* and the *entitlement measures* are not the "same measures", while the Decision on Provisional Remedies remains in effect.

147. If the Decision on Provisional Measure remains unaltered by the Revocation Request, then what constitutes the "same measures" should be considered as having been decided, and the principles of "claim preclusion," "issue preclusion" or "issue estoppel" should apply.

2. Estoppel

148. Estoppel is an internationally recognized[64] legal doctrine that prevents a party from relying on certain facts or legal rights where such reliance may be unconscionable.[65]

149. An estoppel may arise when a party in a dispute makes a representation by words or conduct acknowledging a certain state of affairs; that party is thereby precluded ("estopped") from asserting that the opposite was true in law or in fact, whether or not it actually was.

150. In the international investment law context, estoppel could be characterized as a legal response to prevent inconsistent behavior. For example, the tribunal in *Grenada Private Power v. Grenada*[66] explained:

> Estoppel is generally relevant as a "shield" where an opposing party is seeking to enforce rights to which it is otherwise entitled but is "estopped" from doing so by its collateral representations or conduct.[67]

151. Professor Tran Thang Long, in his paper dealing with the subject of estoppel in international law states:

> Estoppel is regarded as one of the "*most powerful and flexible instruments to be found in any system of court jurisprudence*." The

[64] James Crawford, *Brownlie's Principles of Public International Law*, 9th ed., Oxford University Press 2019, p. 407 ("A considerable weight of authority supports the view that estoppel is a general principle of international law, resting on principles of good faith and consistency."), **CL-0115**.
[65] *Id.* at p. 408 ("An estoppel is precisely not a unilateral act; it is a representation the truth of which the entity on whose behalf it is made is precluded from denying in certain circumstances…").
[66] *Grenada Private Power Limited and WRB Enterprises, Inc. v. Grenada*, ICSID Case No. ARB/17/13, Award, dated March 19, 2020, **CL-0105**.
[67] *Id.* at ¶ 208.

> concept of *estoppel* in international law originated from the legal traditions, both in Anglo-American common law and European civil law systems, which the analogous concept is "preclusion" or "forclusion." Although being derived from English law, the term "estoppel" comes from the French word *estouppail*. The principle underlying estoppel is often expressed in the Latin maxim *allegans contraria non audiendus est* , which is interpreted as "*one should not benefit from his or her own inconsistency* ".*Estoppel doctrine is said to stem from fundamental notions of justice and fairness*.[68]

152. Professor Tran Thang Long also refers in his paper to the legal and other dictionaries which define "estoppel" as follows:

> According to the Black's Law Dictionary, "*estoppel*" is defined as (1) A bar that prevents one from asserting a claim or right that contradicts what one has said or done before or what has been legally established as true: (2) *A bar that prevents the relitigation of issues;* (3) An affirmative defense alleging good-faith reliance on a misleading representation and an injury or detrimental change in position resulting from that reliance. *According to the Collins Dictionary (UK), " estoppel" is a rule of evidence whereby a person is precluded from denying the truth of a statement of facts he or she has previously asserted*.[69]

153. Furthermore, Long states that "in international law, *estoppel* is regarded as 'a legal technique whereby states deemed to have consented to a state of affairs cannot afterwards alter their position.' *Estoppel* thus obliges a State '*to be consistent in its attitude to a given factual or legal situation*.'"[70]

154. In application, there have been two approaches to the doctrine of estoppel: the "strict view" and the "broad view."

155. Under the dominant "strict view," estoppel arises when: 1.) a party makes a clear and unambiguous statement[71] 2.) the statement is made voluntarily, unconditionally, and is

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[68] Than Thang Long, *The Application of Estoppel in International Law and Experiences for Vietnam*, Vietnamese Journal of Legal Sciences, Vol. 1, No. 1, dated 2019, p. 91, (emphasis added), **CL-0114**.
[69] *Ibid.*
[70] *Id.* at p. 91-92,(citing Ian MacGibbon, *Estoppel in International Law*, 7 International and Comparative Law Quarterly, pp. 458, 468, dated 1958).
[71] *See Green Power K/S and SCE Solar Don Benito APS v. Kingdom of Spain*, SCC Case No. V2016/135, Award, dated June 16,2022, ¶ 455, **CL-0104**.

authorized by the maker[72]; and 3.) the recipient party of the statement relies on good faith upon that statement to its detriment or to the advantage of the party making the representation.[73]

156. Under the "broad view," "a State cannot adopt inconsistent positions in respect of the same state of facts (an application in the international sphere of the principle known in Anglo-Saxon jurisdictions as estoppel)."[74] Some have argued that the "broad view" incorporates public international law's acknowledgement of the principle of fairness[75] and good faith,[76] without reliance by the recipient party being demonstrated. In summary, the "broad view" therefore requires only the first two conditions of the "strict view" to establish estoppel and not the third condition of reliance on the part of the party that is the object of the statements made.

157. Here, both the "strict view" and "broad view" approaches for estoppel apply to the statements made by Respondent.

158. First, Respondent has repeatedly made clear and unambiguous statements that the VAT refunds belong to Claimant and that Claimant only needs to open a new bank account and direct Respondent to deposit the VAT refunds in order to receive the funds. Several examples of these statements have been reproduced previously.

159. Thus, the first element of Respondent being estopped from reneging on its clear and unambiguous statements clearly exists.

160. Second, Respondent made the above statements voluntarily, unconditionally and in front of this Tribunal.

161. Third and lastly, Claimant has acted upon Respondent statements, and Respondent has still not made good on its own representations.

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[72] *See Duke Energy International Peru Investments No. 1 Ltd. v. Republic of Peru*, ICSID Case No. ARB/03/28, Award, dated August 18, 2008, ¶ 434, **CL-0101**.

[73] *See Oded Besserglik v. Republic of Mozambique, ICSID Case No. ARB(AF)/14/2*, Award, dated October 28, 2019, ¶ 423, **CL-0106**.

[74] *Fraport AG Frankfurt Airport Services Worldwide v. Republic of the Philippines (I)*, ICSID Case No. ARB/03/25, Dissenting Opinion of Mr. Bernardo M. Cremades (Award), dated August 16, 2007, ¶ 28, **CL-0103**.

[75] *See Fraport AG Frankfurt Airport Services Worldwide v. Republic of the Philippines (I)*, ICSID Case No. ARB/03/25, Award, dated August 16, 2007, ¶ 346, **CL-0102**.

[76] *See Rumeli Telekom A.S. and Telsim Mobil Telekomunikasyon Hizmetleri A.S. v. Republic of Kazakhstan*, ICSID Case No. ARB/05/16, Award, dated July 29, 2008, ¶ 335, **CL-0109**.

162. On June 15, 2023, Claimant reminded Respondent of its obligations in connection with the Tribunal's decision on Claimant's Request for Provisional Measures and informed Respondent that Claimant has opened a new bank account for the depositing of the VAT refunds. Claimant provided the banking details.[77]

163. On August 11, 2023, Claimant sent a second notification to Respondent asking Respondent to comply with the Tribunal's Decision.[78] Respondent has yet to provide a response to Claimant's correspondence seeking compliance with the Tribunal's Decision on Provisional Measures. Additionally, it has yet to deposit any funds into this PEM's new bank account, thereby acting in a manner that contradicts its numerous representations as stated above.

164. Indeed, to avoid being ordered by the Tribunal to make VAT refunds available to PEM, Respondent made the statements with the clear expectation that these statements would be relied upon by the Tribunal, which would then decide to dismiss the request made by Claimant for provisional relief in relation to VAT refunds.

165. As Respondent's statements and contradicting actions satisfy all the conditions for the application the principle of "estoppel." Respondent should therefore be prohibited from bringing its Objection to Jurisdiction.

166. This latest jurisdictional challenge (in addition to those previously made by Respondent), is merely another attempt by Respondent to circumvent its obligations to pay the VAT refunds it owes to Claimant, and to continue to ignore the Tribunal's direct Decision on Provisional Measures.

3. Contradicting Decisions and Double Recovery can be avoided

167. Not only are the *enforcement measures* and *entitlement measures* not the same measures, the factual and legal grounds for recovering compensation or damages in the APA Arbitration and the NAFTA Arbitration are different. Therefore, risk of contradicting decisions is not a legitimate concern.

168. Whether Respondent will be required to compensate Claimant in the APA Arbitration will depend a number of factors including whether Claimant will succeed in relation

[77] *See* Letter from Riyaz Dattu to Alan Bonfiglio, dated June 15, 2023, **C-0060**.
[78] *See* Letter from Riyaz Dattu to Alan Bonfiglio, dated August 11, 2023, **C-0061**.

to the unlawfulness of repudiation by the SAT of the APA, the measures of Respondent denying Claimant and PEM access to both local and international remedies, and the consistency of its *enforcement measures* with the applicable standards of treatment set out in Section A of Chapter 11 of NAFTA.

169. The ability to obtain compensation for the *enforcement measures* is therefore dependent on a number of factors and the basis for the remedy under Chapter 11 of NAFTA will be fairly distinct in relation to the "enforcement measures" such as under the "fair & equitable" standard of treatment, and other bases.

170. On the other hand, the compensation claim and the grounds for compensation under the VAT Arbitration will focus almost exclusively on Respondent's representations, the lack of legal basis for the *VAT entitlement measures*, and Respondent's failure to meet its obligation in connection with Claimant's entitlement. The VAT Arbitration claim is far less complex that the APA Arbitration, and the amount of compensation claimed and the defenses that can and could be mounted by Respondent will be dramatically different. Furthermore, the amount of compensation that has been claimed in the two arbitrations are substantially different, with more than [redacted] claimed in the APA Arbitration, and approximately [redacted] claimed under the VAT Arbitration.

171. Furthermore, the risk of double recovery can be adequately managed given that Respondent can avail itself of remedies to avoid such an outcome, including reliance on the principle of *lis pendens* and on the principle of exclusivity under ICSID Article 26.

172. Some of these remedies plainly fall within the jurisdiction not of this Tribunal but the tribunal to be constituted pursuant to the VAT Arbitration.

173. As such, it will be in the interest of Respondent to comply with the ICSID Convention and the Arbitration rules, and to move forward on the appointment of the arbitrators.

174. ICSID Article 26 states:

> Consent of the parties to arbitration under this Convention shall, unless otherwise stated, be deemed consent to such arbitration to the exclusion of any other remedy. A Contracting State may require the exhaustion of local administrative or judicial remedies as a condition of its consent to arbitration under this Convention.[79]

[79] ICSID Convention, Regulations and Rules, dated October 14, 1966, Article 26, **CL-0012**.

175. As Schreuer states in his Commentary on the ICSID Convention:

> One of the functions of Art. 26 is to create a rule of priority vis-à-vis other systems of adjudication in order to avoid contradictory decisions[.][80]

176. Respondent has the ability to ensure that the VAT Arbitration tribunal is entirely responsible and would be able to exclusively adjudicate on the VAT entitlement claims advanced by Claimant. By so doing and agreeing to have the VAT measures adjudicated by the tribunal in the VAT Arbitration, Respondent has provided Claimant grounds for claiming before this Tribunal that it cannot adjudicate on matters that are within the exclusive jurisdiction (pursuant to Article 26) of the tribunal in the VAT Arbitration. This Tribunal has paved the way for such an approach, as it has already ruled that the *VAT entitlement measures* are not within its jurisdiction including by referencing Claimant's Request for Arbitration and Claimant's Memorial as confirming that the *VAT entitlement measures* have not been presented for adjudication before this Tribunal.

177. Alternatively, Respondent can bring a *lis pendens* claim in the VAT Arbitration. Tribunals have found the doctrine of *lis pendens* applies where there exists the possibility in parallel proceedings of divergent outcomes, and generally allows the proceeding first initiated to be given priority.[81]

178. While Claimant does not view the APA Arbitration and VAT Arbitration as "parallel proceedings" as they are based on very different measures (i.e., *enforcement measures* and *VAT entitlement measures*), it may be possible for Respondent to seek to delay the commencement of the VAT Arbitration on the basis of *lis pendens* or at the minimum allow the Tribunal in the VAT Arbitration to take cognizance of the possibility of double recovery.

179. Additionally, Respondent would be able to rely on doctrines of abuse of process or other doctrines to avoid outcomes that would result in double recovery of damages by Claimant.

180. In summary, Respondent's concerns are premature and should be directed at the tribunal in the VAT Arbitration, and as the measures in the two arbitrations are in fact not the same, any risk of double recovery can be managed.

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[80] *See* Christoph H. Schreuer, *Schreuer's Commentary on the ICSID Convention, Cambridge University Press*, 3rd Ed., dated 2022, p. 584, ¶ 170, **CL-0085**.

[81] *See* Michael Waibel, *Coordinating Adjudication Processes*, Legal Studies Research Paper Series, University of Cambridge Faculty of Law Legal Studies, Paper No. 6/2014, dated 2014, p. 41, **CL-0107.**

4. The jurisdictional objection is vexatious conduct

181. As explained in *Eco Oro*, Respondent's objection must be, "'serious and substantial' a higher threshold must be applied than merely requiring that the objection is not frivolous or vexatious."[82] However, Respondent's Objection to Jurisdiction and its conduct leading up to it fail even the minimum factor of not being vexatious.

182. The Objection to Jurisdiction should be considered by this Tribunal to be vexatious as it lacks any merit.

183. The remedy being sought by Respondent, out of this narrow issue of VAT recoverability (which was not raised by Claimant in its Request for Arbitration and does not appear in Claimant's Memorial), includes: (i) suspension of the current arbitration proceeding pending the Tribunal's Decision on the Respondent's Objection to Jurisdiction, (ii) decision from this Tribunal that it lacks jurisdiction to continue the current arbitration proceeding and, *in the alternative,* a finding that it lacks jurisdiction to hear the claim concerning the freezing of accounts and/or access to the VAT refunds; and (iii) suspension of the provisional measures recommended in the Decision on the Provisional Measures.

184. The scope of the relief sought is highly inappropriate in seeking immediate suspension of the current proceedings, and even more so in requesting the Tribunal to suspend its Decision on Provisional Measures, which was made on the basis of irreparable harm and the failure of the SAT to pay VAT refunds as exacerbating the current dispute.[83]

185. Respondent's list of egregious and vexatious conduct continues to grow:

a. Acknowledging PEM's entitlement to the VAT refunds and claiming PEM only needs to open a new bank account for the funds to be deposited, while refusing to actually deposit the monies, and

b. Continuing to reject the guarantees offered by Claimant.

186. Claimant has offered multiple guarantees that provide more than what is legally required under Mexican law. Still, Respondent continues to arbitrarily reject these guarantees,

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[82] *Eco Oro Minerals Corp. v. Republic of Colombia*, ICSID Case No. ARB/16/41, Procedural Order No. 2 Decision on Bifurcation, dated June 28, 2018, ¶ 51, R**L-0144**.

[83] *See* Decision, ¶¶ 134, 137.

despite the fact that they meet all legal requirements and the SAT has not cited any provisions under Mexican law[84] as a basis for rejecting them.

187. Furthermore, there would be no further need for the VAT Arbitration if the SAT accepts a guarantee from Claimant, yet Respondent decided instead to initiate an objection to this Tribunal's jurisdiction over this arbitration due to the VAT Arbitration. Clearly, this Objection to Jurisdiction is another one of Respondent's many attempts to avoid its obligations to Claimant.

188. PEM has made offers as recently as in the July and August 2023 period to resolve the issues between the parties, without success.

189. On August 14, 2023, Claimant's counsel sent a letter to Respondent's counsel expressing Claimant's openness to continue good faith negotiations and reminding Respondent that Claimant had submitted the guarantees that satisfy all requirements imposed by the SAT for the years 2010, 2011, and 2012.[85] Copies of the guarantees provided to the SAT by PEM in July 2023 were attached o the letter.[86]

190. On August 23, 2023, Respondent replied to Claimant's counsel with a letter refusing the guarantee again and repeating its unwillingness to meet or negotiate with Claimant.[87]

191. Respondent's unabashed confirmation that it has no intention of cooperating with Claimant, and its continual conduct in violation of its own laws is emblematic of Respondent's vexatious actions against Claimant.

C. Both Proceedings Should be Permitted to Unfold, As the Bringing of a Protective NAFTA case is a Defensive Posture Given the High-Handed and Unconscionable conduct of Respondent.

192. In order to protect its legal rights in the face of Respondent's blatant disregard for its own laws and this Tribunal's Order in relation to the provisional remedies, Claimant had no choice but to commence the VAT Arbitration.

193. Claimant previously commenced its APA Arbitration under NAFTA, which was thereafter replaced by the United States-Mexico-Canada Agreement (USMCA) in 2020.

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[84] Legal requirements have been met. *See* Articles 85, 86, 141, Mexican Federal Tax Code, **R-0005**; *see also* Format 134/CFF Annex 1A of the Miscellaneous Tax Resolution, **CL-0116**.

[85] *See* Riyaz Dattu's letter to Alan Bonfiglio, dated August 14, 2023, **C-0063**.

[86] *See* Claimant's Guarantee for 2010, dated July 14, 2023, **C-0064**; Claimant's Guarantee for 2011, dated July 14, 2023, **C-0065;** Claimant's Guarantee for 2012, dated July 14, 2023, **C-0066.**

[87] *See* Letter from Alan Bonfiglio to Riyaz Dattu, dated August 23, 2023, **C-0062**.

194. The Claimant resorted to initiating this APA Arbitration based on Respondent's violations of its obligations under NAFTA, and also because Respondent foreclosed all domestic and other international avenues of redress.

195. The continuation of this APA Arbitration is critical to the defense of the Claimant's legal rights, and so it will *not* take any action that would deprive this Tribunal of the jurisdiction to adjudicate the APA related measures.

196. Claimant views Respondent's Objection to Jurisdiction as yet another hurdle to Clamant seeking redress. While Respondent has been able to manipulate access to local remedies including international remedies under the applicable avoidance of double taxation treaties, it lacks the ability to get its own way in this APA Arbitration, which offers a neutral, independent, and objective assessment of the dispute and potential remedies.

197. As for the VAT Arbitration, as previously noted, any right to commence a legacy investment claim terminated after a three-year period, as provided for in the USMCA. This made it necessary that the VAT Arbitration be commenced before July 1, 2023.

198. In light of Respondent's contradictory statements at the hearing for provisional measures (and Respondent's refusal to comply with the Tribunal's Decision on Provisional Measures), Claimant filed its Request for Arbitration for the VAT Arbitration on June 29, 2023 to preserve its *VAT entitlement*. The need for the VAT Arbitration would have been moot if Respondent had carried out its legal obligations to pay PEM its VAT refunds for the period before and after January 4, 2023.

199. However, since the events have unfolded as they have, and in view of Respondent's unconscionable conduct in violation of the law and this Tribunal's Order, Claimant would like to ensure that both arbitrations be permitted to proceed.

200. Claimant does not wish to exacerbate its differences with Respondent. It does however have a right to pursue remedies consistent with the provisions of Chapter 11 of NAFTA. Claimant is also mindful of what it can and cannot do pursuant to the applicable provisions of NAFTA Chapter 11, the USMCA, the ICSID Convention, the ICSID Convention Arbitration Rules and other applicable international instruments.

201. Claimant's next steps will be guided by: i) the relevant treaty provisions referenced previously, (ii) the outcome of the Tribunal's decision on the Revocation Request, (iii) whether Respondent will promptly and fully comply with the Tribunal's Decision on Provisional Measures

(if upheld), and (iv) whether Respondent will accept the guarantees offered by Claimant for any claimed income tax deficiencies.

202. Claimant is fully committed to completing this arbitration proceeding in accordance with the applicable rules, and assures the tribunal that it will do so by cooperating and extending full professional courtesies to this Tribunal and to counsel for the Respondent.

IV. REQUESTED RELIEF

203. In view of the above, Claimant respectfully requests that this Tribunal:

i) Dismiss the Objection to Jurisdiction as it lacks serious merit;

ii) Deny Respondent's request for suspension of the APA Arbitration and the Decision on Provisional Measures, especially in light of Respondent's continuing refusal to make owed VAT refunds available to Claimant in accordance with its legal entitlement;

iii) With respect to Respondent's alternate request:

a) Reject Respondent's jurisdictional objection concerning the *enforcement measures* as these objections were not raised in a timely manner in Respondent's Counter-Memorial;

b) Deny the Objection to Jurisdiction in relation to PEM's entitlement and access to VAT refunds (i.e., *VAT entitlement measures*). The *VAT entitlement measures* are exclusively within the jurisdiction of the Tribunal that is to be appointed in the VAT Arbitration.

204. Claimant will address the Tribunal on the matter of costs of this submission at a time when the Tribunal considers it appropriate.

Date: September 1, 2023

Respectfully submitted,

Riyaz Dattu

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APPENDIX A

RESPONDENT'S ADMISSIONS: VAT REFUNDS

Location	Admission[88]
Transcript, p. 61.	PEM as well as all the taxpayers that paid taxes in Mexico are the ones that indicate to SAT the account in which the VAT refund should be deposited. If PEM would want for those amounts to be deposited in a different account, they would **only need to identify the details of that account in their refund request**.
Transcript, p. 62.	It should be recalled that **the Claimant has acknowledged that SAT has not denied VAT refunds**, and that given that VAT's determinations and payments are self-declaratory activities, VAT refunds have depended--relied exclusively on the information indicated in the request that PEM makes and submits to SAT. The second aspect to consider is that, even though it is true that SAT requested the freezing of several PEM's bank accounts, it is also true that PEM challenged this measure in Mexican courts, suspended the freezing of the bank accounts based on which **PEM has been able and is able right now to have the funds available as deposited in these bank accounts.**
Transcript, p. 80.	Second, 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.
Respondent's Response, ¶¶ 36-38.	On the one hand, the Respondent is aware that **<u>none</u> of the refund requests that PEM has submitted on a monthly basis has been denied**. The SAT has review powers to verify that the VAT refunds requested by taxpayers are correct. This review power is not the same as audit powers**.** However, to date, the **SAT has not initiated audits with regard to requests for VAT refunds submitted by PEM.** On the other hand, when there is a favorable balance, i.e. a balance to be returned to a taxpayer, it is the taxpayer itself that indicates the bank account to which the refund of the tax in question is to be transferred. This means that any refund of VAT that the SAT has made so far was deposited in the bank accounts specified by the Claimant or PEM. **For PEM to receive these funds, it only needs to indicate in the refund request the bank account to which the corresponding deposit is to be made.** Clearly, this is not a situation that requires the intervention of the Tribunal.
Respondent's Response, ¶ 78.	**PEM has not been denied any of the VAT refunds it has requested month after month**, and it is PEM that has identified the bank account in which the refunds are to be deposited. This procedure is carried out with the SAT, and the SAT can only modify the account in which the tax refunds are to be made at the taxpayer's request. As the Tribunal can see, **the fact that the SAT has**

[88] Note that bolded emphasis in the admissions column has been added and is not part of the original text.

	transferred refunds to PEM in bank accounts that were secured is attributable solely to PEM and is a situation that the company itself can remedy without the intervention of this Tribunal.
Respondent's Response, ¶ 116.	With regard to the VAT refund, the **Claimant itself acknowledges that the SAT has not rejected PEM's requests for refunds**. However, it was the Claimant itself that, in its request for VAT refunds, identified the bank accounts in which the refunds were to be deposited. This shows that it was the Claimant itself that caused the VAT refunds to be made in secured bank accounts. Therefore, the integrity of the present case has not been affected, and the company can remedy the situation without this Tribunal's intervention.
Respondent's Response, ¶ 123.	The VAT refund procedure referred to by the Claimant in its Request is a process of self-assessment by the taxpayer in which **the authority does not require the taxpayer's authorization to refund the tax**
Respondent's Response, p. 36, fn 117.	It is reiterated that it is PEM that has submitted monthly the requests for VAT refunds with the account references that it has considered relevant, i.e., those that were frozen due to the enforcement of various assessments of tax liabilities. However, **it may at any time request that the VAT refund be made in different accounts.** See VAT Refund Procedure. https://www.sat.gob.mx/tramites/25255/solicita-la-devolucion-para-tu-empresa
Respondent's Response, ¶ 172.	Similarly, the Claimant has been unable to show that the claim for the VAT refund requires the recommendation of an "urgent" interim measure, since the **Claimant has the power to request, in its refund request, that the amounts be transferred to whichever other bank account it considers fit** without the intervention of this Tribunal.
Respondent's Response, ¶ 186.	As for the VAT refund procedures referred to by the Claimant, as noted above, the **Claimant itself may request that the refunds be deposited in the bank accounts that PEM or the Claimant consider fit, following the procedures established by the SAT. PEM may freely manage the surplus amounts in the accounts that were secured as a result of proceedings to enforce the collection of tax liabilities.**