

**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

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**CLAIMANT'S REJOINDER TO PRELIMINARY OBJECTION TO JURISDICTION**

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**November 6, 2023**

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## TABLE OF CONTENTS

<b>GLOSSARY</b> .....	<b>ii</b>
<b>I. INTRODUCTION</b> .....	<b>1</b>
<b>II. BACKGROUND AND OVERVIEW</b> .....	<b>3</b>
A. Respondent’s Conduct Continues to be Shocking.....	3
B. Respondent Seeks to Have the Tribunal Avoid Dealing with Key Facts before making its Decision.....	5
C. Respondent’s Conduct Seeks to Derail this Arbitration Simply Over its Steadfast Refusal to Pay VAT Refunds Owed to PEM.....	6
D. Respondent’s Conduct is Motivated by Illegal Considerations.....	9
E. Exercise of Control over Amounts of VAT Refunds belonging to PEM.....	14
<b>III. ADDITIONAL FACTS RELATED TO BIFURCATION REQUEST</b> .....	<b>15</b>
A. PEM’s Legal Entitlement to VAT Refunds.....	15
B. Tribunal’s Decision on Provisional Measures and its Reaffirmation of its Decision subsequent to the Respondent’s Challenge.....	17
C. Respondent’s Conduct Precipitated the New VAT Arbitration.....	19
D. Request for Bifurcation and Objection to Jurisdiction should be Denied.....	22
<b>IV. LEGAL ARGUMENTS</b> .....	<b>26</b>
A. Objection to Jurisdiction is Without any Merit.....	26
B. Absence of Material Increase in Efficiency in the Next Phase.....	30
C. Respondent’s Argument, Even Without Consideration Of The Merits, Fails.....	31
<b>V. REQUESTED RELIEF</b> .....	<b>31</b>

## GLOSSARY

<b>TERM</b>	<b>DEFINITION</b>
<b>APA</b>	Advanced Pricing Agreement.
<b>APA Arbitration</b>	<i>First Majestic Silver Corp. v. United Mexican States</i> , ICSID Case No. ARB/21/14.
<b>Claimant</b>	First Majestic Silver Corporation.
<b>Counter-Memorial</b>	<i>First Majestic Silver Corp. v. United Mexican States</i> , ICSID Case No. ARB/21/14, Respondent’s Counter-Memorial, dated November 25, 2022.
<b>Claimant’s Request for Provisional Measures</b>	<i>First Majestic Silver Corp. v. United Mexican States</i> , ICSID Case No. ARB/21/14, Claimant’s Request for Provisional Measures, dated January 4, 2023.
<b>Claimant’s Reply to Request for Revocation</b>	<i>First Majestic Silver Corp. v. United Mexican States</i> , ICSID Case No. ARB/21/14, Claimant’s Reply to Respondent’s Request for Revocation of Recommendation of Provisional Measures, dated July 21, 2023
<b>Claimant’s Response to Objection to Jurisdiction</b>	<i>First Majestic Silver Corp. v. United Mexican States</i> , ICSID Case No. ARB/21/14, Claimant’s Response to Preliminary Objection to Jurisdiction, dated September 1, 2023.
<b>Decision on Provisional Measures</b>	<i>See First Majestic Silver Corp. v. United Mexican States</i> , ICSID Case No. 21/14, Decision on the Claimant’s Request for Provisional Measures, dated May 26, 2023.
<b>Decision on the Revocation Request</b>	<i>First Majestic Silver Corp. v. United Mexican States</i> , ICSID Case No. 21/14, Decision on Respondent’s Request for Revocation of Provisional Measures, dated September 1, 2023.

<b>Enforcement Measures</b>	The SAT's enforcement measures based on its claim of tax deficiencies related to PEM's reliance on the APA.
<b>MAPs</b>	Mutual Agreement Procedures.
<b>Claimant's Memorial and Memorial</b>	<i>First Majestic Silver Corp. v. United Mexican States</i> , ICSID Case No. ARB/21/14, Claimant's Memorial, dated April 25, 2022.
<b>NAFTA</b>	North American Free Trade Agreement.
<b>Objection to Jurisdiction and Respondent's Objection to Jurisdiction</b>	<i>First Majestic Silver Corp. v. United Mexican States</i> , ICSID Case No. ARB/21/14, Respondent's Preliminary Objection to Jurisdiction, dated July 28, 2023.
<b>Order</b>	The Tribunal's order in its Decision on the Claimant's Request for Provisional Measures, dated May 26, 2023.
<b>PEM</b>	Primero Empresa Minera, S.A. de C.V.
<b>Respondent</b>	Government of the United Mexican States.
<b>Respondent's Reply on Jurisdiction</b>	<i>First Majestic Silver Corp. v. United Mexican States</i> , ICSID Case No. 21/14, Respondent's Reply to Claimant's Response to the Preliminary Objection to Jurisdiction, dated October 9, 2023.
<b>Respondent's Response to Provisional Measures Request</b>	<i>First Majestic Silver Corp. v. United Mexican States</i> , ICSID Case No. ARB/21/14, Respondent's Response to Claimant's Request for Provisional Measures, dated February 10, 2023.
<b>Respondent's Revocation Request</b>	<i>First Majestic Silver Corp. v. United Mexican States</i> , ICSID Case No. 21/14, Respondent's Request for Revocation Recommendation for Provisional Measures, dated June 19, 2023.
<b>SAT</b>	Servicio de Administración Tributaria.

<b>Second RFA</b>	<i>First Majestic Silver Corp. v. United Mexican States</i> , ICSID Case No. 23/28, Claimant’s Request for Arbitration, dated June 29, 2023.
<b>TFJA</b>	High Chamber of the Tribunal Federal de Justicia Administrativa (Federal Court of Administrative Justice).
<b>Transcript</b>	<i>First Majestic Silver Corp. v. United Mexican States</i> , ICSID Case No. ARB/21/14, Transcript of the Request for Provisional Measures Hearing, dated March 13, 2023.
<b>USMCA</b>	United States-Mexico-Canada Agreement.
<b>VAT</b>	Value Added Tax.
<b>VAT Arbitration</b>	<i>First Majestic Silver Corp. v. United Mexican States</i> , ICSID Case No. ARB/23/28.
<b>Entitlement Measures</b>	The SAT’s unwillingness to allow Claimant and PEM access to VAT refunds based on its entitlement as an exporter of silver and gold.

## I. INTRODUCTION

1. The Tribunal issued directions on September 13, 2023, permitting the Respondent to file by October 9, 2023, a brief Reply to the Claimant's Response of September 1, 2023 (**Respondent's Reply on Jurisdiction**) to the Respondent's Preliminary Objection to Jurisdiction dated July 28, 2023 (**Objection to Jurisdiction** and **Respondent's Objection to Jurisdiction**).

2. Claimant has been allowed to submit this Rejoinder to Respondent's Reply on Jurisdiction (**Rejoinder**) by November 6, 2023.

3. The decision on the Respondent's Request for Bifurcation has been reserved pending deliberation by the Tribunal of the parties' submissions.

4. The Claimant's understanding of the directions is that the Tribunal will first determine whether the Respondent has met the high burden for seeking bifurcation of the ongoing proceeding, based on the following three-fold criteria: (i) the Objection to Jurisdiction is "serious and substantial"; (ii) the earlier resolution of the Objection to Jurisdiction will lead to material gain in efficiencies in the next phase; and (iii) the factual issues for resolution of the jurisdictional issues are not intertwined with the merits of the claims.

5. Furthermore, the Tribunal may, in the exercise of its discretion, refuse to bifurcate proceedings based on the particular circumstances before it, even when all three considerations for bifurcation are satisfied.

6. The Claimant will therefore make its submissions on the issue of bifurcation by addressing the three-fold considerations. It reserves the right to make additional submissions concerning the Objection to Jurisdiction should the Tribunal decide to provide for a bifurcated process.

7. Additionally, the Claimant asks that the Tribunal exercise its discretion, to the extent required, after considering the three-fold considerations, by refusing to bifurcate the proceedings based on the fact that this arbitration has proceeded well beyond its mid-point, over a two-and-a-half-year period, and even more importantly based on the Respondent's conduct that

is egregious and shocking in failing to abide by the Tribunal's Order (the **Order**) in the Decision on Provisional Measures, dated May 26, 2023 (**Decision on Provisional Measures**) especially after the Respondent was unsuccessful in its challenge of this decision.

8. The Respondent which as a former signatory of the North American Free Trade Agreement (**NAFTA**) and a current signatory of the United States-Mexico-Canada Agreement (**USMCA**), has demonstrated a total lack of regard for the integrity of the proceedings established under these instruments.<sup>1</sup> Failure to comply with, and indeed blatantly ignoring the Tribunal's Order (upheld on a further review before this Tribunal), should have serious consequences.

9. As a signatory to NAFTA and its successor agreement, the USMCA, Mexico bargained for both the benefits flowing from these treaties as well as the obligations imposed on it by the terms of these treaties. One such important obligation is to abide by an Order issued by international arbitration tribunals when determining, on a neutral and objective basis, that an investor is entitled to interim relief pending the final award.

10. In summary, the Respondent has amply demonstrated that it will ignore international treaties and practices, its own laws, its agreements entered into freely with investors, decisions of its own courts, and Orders issued by this Tribunal, in furtherance of achieving its own political and other objectives.

11. As we explain further below, the conduct of the Respondent has on the whole been shocking and egregious and clearly demonstrates that notwithstanding its own statements, representations, and promises, it intends to continue to trample on the legal rights and entitlements of the Claimant (all of which began before the commencement of this arbitration and have continued during the course of the arbitration proceeding as evidenced by the Respondent's refusal to comply with this Tribunal's Decision on Provisional Measures).

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<sup>1</sup> See Arts. 18, 26, Vienna Convention on the Law of Treaties, dated 1969, ■■■-0001.

12. In the context of the Value Added Tax (VAT) refunds, and the Respondent's ongoing unwillingness to even partially provide for VAT refunds for the period as of January 4, 2023 (rather than as of April 2020), the Respondent has inexcusably ignored the Tribunal's Order in this regard which clearly imposed certain obligations on the Respondent, has done so without any legal justification, and has demonstrated an unwillingness to comply with the Order in the future pending the final award.

## II. BACKGROUND AND OVERVIEW

### A. Respondent's Conduct Continues to be Shocking

13. The recent rounds of submissions concerning the Request for Bifurcation and the Objection to Jurisdiction have become necessary only because of the refusal of the Respondent to act on the rights and legal entitlements of the Claimant and Primero Empresa Minera, S.A. de C.V. (PEM), to receive VAT refunds as of April 2020 (and in particular the amount accumulated in blocked bank accounts as of January 4, 2023).

14. The Respondent has deliberately decided to run roughshod over the rights of the Claimant and PEM under both domestic law and international law notwithstanding repeated statements by the Respondent that: (i) the Claimant and PEM are owed VAT refunds (belonging to them), and (ii) they have entitlement to the VAT refunds. The Respondent, when asked to act on these statements, has refused to do so.

15. It is clear that these statements were initially made with the intention of having them relied upon by this Tribunal, at the March 13, 2023 hearing on the Claimant's Request for Provisional Measures dated January 4, 2023 (**Claimant's Request for Provisional Measures**). The Respondent also claimed at the hearing that all that was required for the release of the VAT refunds was for PEM to open new bank accounts and a direction to the SAT to deposit the VAT refunds in those accounts.<sup>2</sup> These statements misrepresented the true intentions of the Respondent in refusing to pay VAT refunds to PEM. Since making those statements, the

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<sup>2</sup> See, e.g., *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, p. 80 (**Transcript**).



Respondent has been intransigent and continues to refuse to pay the VAT refunds into the bank account newly opened by PEM.<sup>3</sup>

16. This consistent refusal to act in accordance with its own laws and indeed an Order from this Tribunal set out in its Decision on Provisional Measures, indicates that the Respondent has no intention of complying with the Tribunal's Order. Certainly, it has not advanced any evidence to the contrary, including a clear statement and commitment to comply with the Tribunal's Order.

17. The reaffirmation by this Tribunal on September 1, 2023, further to a review sought by the Respondent, that the Respondent is obligated by the Order of this Tribunal to make VAT refunds to PEM as of January 4, 2023, has not had the effect it was intended to have, *viz.*, of acceptance by the Respondent of its obligation to comply with the Tribunal's Order following the review. In its latest (and second) submission filed with the Tribunal concerning the Objection to Jurisdiction, the Respondent is silent on whether it will comply with the Order.

18. While the Respondent has been quick to repeatedly exercise all avenues of objections and review, hoping to get a decision from this Tribunal allowing it to refuse to pay VAT refunds to PEM, it nevertheless continues to engage in its unwillingness to pay the VAT refunds even when subject to decisions issued by this Tribunal that require the Respondent to make such payment.

19. Simply put, the Respondent has chosen to blatantly and shamelessly ignore the Tribunal's factual findings and decisions based on applicable laws, but, at the same time, promptly demands due process and seeks to fully exercise its perceived legal rights with this Tribunal. It makes express statements and demands to the Tribunal asking for due process when it believes its rights are even remotely being compromised.<sup>4</sup>

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<sup>3</sup> See generally *First Majestic Silver Corp. v. United Mexican States*, ICSID Case No. ARB/21/14, 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**), § II.B.

<sup>4</sup> See, e.g., *First Majestic Silver Corp. v. United Mexican States*, ICSID Case No. 21/14, Respondent's Reply to Claimant's Response to the Preliminary Objection to Jurisdiction, dated October 9, 2023 (**Respondent's Reply on Jurisdiction**), ¶ 36; see also *First Majestic Silver Corp. v. United Mexican States*, ICSID Case No. 21/14,

20. Such conduct and behavior are reprehensible as they bring disrepute to the very rules-based process the Respondent has agreed to adopt and promote pursuant to its many investment treaties, in addition to NAFTA and the USMCA.<sup>5</sup>

**B. Respondent Seeks to Have the Tribunal Avoid Dealing with Key Facts before making its Decision**

21. The Respondent in its Reply on Jurisdiction urges the Tribunal to ignore a certain number of key facts set out in the Claimant's submissions filed on September 1, 2023, that explain the distinction between the measures at issue in this ongoing arbitration<sup>6</sup> and the newly initiated arbitration concerning VAT refunds.<sup>7</sup>

22. These facts, far from being irrelevant, are very much pertinent to the Tribunal's decision on the Objection to Jurisdiction.

23. The Claimant in its submission provides an explanation of three categories of disputed measures before this Tribunal: (i) the challenge by the SAT to the Advanced Pricing Agreement (**APA**) (which continues to be valid), (ii) the denial by the SAT of the Claimant's and PEM's right to seek remedies both domestic and international (related to the challenge to the APA), and (iii) the illegality of the Respondent's enforcement measures including the rejection of the guarantees offered to the SAT, the blocking of PEM's bank accounts and restrictions on the sale of other assets (*i.e.*, **enforcement measures**).<sup>8</sup>

24. On the other hand, as the facts will confirm, the measures related to the legal entitlement to receive VAT refunds, and full and free access to the VAT refunds (*i.e.*, **entitlement measures**) are not measures that are at issue in this ongoing arbitration.

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Respondent's Request for Revocation Recommendation for Provisional Measures, dated June 19, 2023 (**Respondent's Revocation Request**), ¶ 7.

<sup>5</sup> See Vienna Convention on the Law of Treaties, dated 1969, ■■■-0001.

<sup>6</sup> *First Majestic Silver Corp. v. United Mexican States*, ICSID Case No. ARB/21/14 (**APA Arbitration**).

<sup>7</sup> *First Majestic Silver Corp. v. United Mexican States*, ICSID Case No. ARB/23/28 (**VAT Arbitration**).

<sup>8</sup> See, e.g., *First Majestic Silver Corp. v. United Mexican States*, ICSID Case No. ARB/21/14, Claimant's Response to Preliminary Objection to Jurisdiction, dated September 1, 2023 (**Claimant's Response to Objection to Jurisdiction**), ¶ 133.

25. These are key facts that the Tribunal should consider during its deliberations on the Objection to Jurisdiction, and which are not being repeated here as they can be found in the Claimant's submission filed on September 1, 2023.

**C. Respondent's Conduct Seeks to Derail this Arbitration Simply Over its Steadfast Refusal to Pay VAT Refunds Owed to PEM**

26. The Respondent has regularly deposited VAT refunds owed to PEM in a blocked bank account and left these funds unreachable for any productive use in PEM's operations at the San Dimas Mine. In that sense, these funds have not been "paid" to PEM, as claimed by the Respondent. Depositing monies into an account that is intentionally made inaccessible to the account holder does not constitute "payment."

27. These refunds are not only inaccessible by PEM, but they reflect outlays being made by PEM on inputs of goods and services that it acquires, on which it has to pay VAT. Effectively, PEM's financial resources are being depleted every month that it pays VAT.

28. Put simply, by paying VAT to the SAT on a monthly basis, PEM is acting in accordance with its legal obligations to the Mexican state on an activity that is zero-rated, while the latter refuses to follow its own laws and (as of January 4, 2023) an Order from this Tribunal to ensure that the VAT refunds are made accessible to PEM.

29. The current Objection to Jurisdiction goes even further than the refusal to comply with the Tribunal's Decision on Provisional Measures.

30. It seeks to derail in its entirety this ongoing arbitration process, which began two-and-a-half years ago, where the central issue concerns the repudiation of the APA (that the SAT voluntarily entered into with PEM) based on information required and requested by the SAT.<sup>9</sup> To date, there has been no decision, whether by an administrative agency or from the Courts, that has determined any wrongdoing on the part of PEM in obtaining the APA and complying with the obligations imposed on PEM concerning compliance.

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<sup>9</sup> As will be demonstrated extremely clearly in the Claimant's Reply currently due on January 15, 2024, the Respondent simply cannot demonstrate that it has a legal basis for revoking the APA.

31. Nevertheless, the Respondent seeks to terminate this arbitration based on its assertions concerning the violation of waivers filed by both the Claimant and PEM for seeking to recover VAT refunds that belong to PEM under Mexican law.

32. The Respondent is intent on derailing this ongoing arbitration even though it is abundantly clear that the Claimant and PEM have focused their attention exclusively on their three-pronged dispute with the SAT in this arbitration: (i) the SAT's repudiation of the APA, (ii) blocking PEM's access to remedies under domestic laws and international treaties, and (iii) the premature and illegal enforcement of the tax reassessments.

33. At this time, as the Respondent has admitted on several occasions, PEM does not owe any income taxes for the period covered by the APA (*i.e.*, 2010 to 2014) so long as the APA remains valid.<sup>10</sup> While the SAT has sought to reassess PEM for income taxes, the Respondent has further admitted it cannot collect those amounts as "taxes," as the APA remains valid.<sup>11</sup> Furthermore, its enforcement activities have been based on illegalities including refusing to engage in the Mutual Agreement Procedures (**MAPs**) process.<sup>12</sup>

34. The measures challenged and properly described in the previous submission when aggregated, as "enforcement measures," are necessarily ancillary to the issue of the current validity of the APA and are descriptive of what the SAT officials engaged in when illegally raiding the offices of PEM in April 2020.

35. There is no claim within any of the pleadings, including the Request for Arbitration in relation to this arbitration (the **APA Arbitration**),<sup>13</sup> that the Claimant and PEM seek recovery of the VAT refunds from the SAT based on PEM's entitlement to those funds.

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<sup>10</sup> See generally Respondent's Counter-Memorial (The Respondent alleges PEM owes additional taxes under the reassessments but does not argue this under the APA).

<sup>11</sup> Transcript, p. 70 ("[T]he tax liabilities are not currently suspended. However, their collection cannot be made until the nullity lawsuits filed by PEM against the tax liabilities are decided.").

<sup>12</sup> See Witness Statement of ██████████, dated April 25, 2022, ¶¶ 97-98 ("Pursuant to Mexican law and the applicable DTTs, a request seeking the initiation of the MAP process resulted in a stay or suspension of any tax collection up until 2022, when the law has been amended. PEM initiated several MAP requests that were filed before 2022, which should have restrained the SAT from collecting what it claimed to be tax deficiencies.").

<sup>13</sup> See *First Majestic Silver Corp. v. United Mexican States*, ICSID Case No. ARB/21/14.

36. Therefore, this Objection to Jurisdiction is being advanced by the Respondent on factual and legal grounds that do not exist, and in the face of this Tribunal's repeated confirmation that the Claimant and PEM have not in the current arbitration brought challenges to measures related to entitlement to VAT refunds (*i.e., entitlement measures*).

37. Indeed, this Tribunal has confirmed that it was within its ability to issue a provisional remedy for the period as of January 4, 2023, for the Respondent to pay PEM VAT refunds it is owed without breaching Article 1134 of NAFTA.<sup>14</sup>

38. The Tribunal's authority to issue provisional remedies is circumscribed not only by Article 1134 of NAFTA but also by the requirements and criteria for issuing provisional remedy measures.<sup>15</sup> These include urgency, necessity, irreparable harm, and maintaining the *status quo*, and so it was within this Tribunal's discretion to limit the extent of the remedy to the period as of January 4, 2023.<sup>16</sup>

39. The Tribunal's decision to limit the remedy to the period as of January 4, 2023, was not based on concerns that the recovery of VAT refunds was pleaded as part of this ongoing arbitration. Indeed, if this were the case, the Tribunal could not have made its Decision on Provisional Measures for the recovery of VAT for the period as of January 4, 2023.

40. The Tribunal's decision for using January 4, 2023 as the appropriate date for future relief was to maintain the *status quo*, and based on considerations of necessity, irreparable harm, and urgency. An order that extended the ability to recover VAT refunds back to April

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<sup>14</sup> See *First Majestic Silver Corp. v. United Mexican States*, ICSID Case No. 21/14, Decision on Respondent's Request for Revocation of Provisional Measures, dated September 1, 2023 (**Decision on the Revocation Request**), ¶ 43 ("In reaching this conclusion, the Tribunal also noted ... *the effective payment of those VAT refunds was not a claim that Claimant was making in this arbitration, so that a provisional order of payment would not be contravening the provision in Article 1134 of the NAFTA that: '[a] Tribunal may not order attachment or enjoin the application of the measure alleged to constitute a breach referred to in Article 1116 or 1117.'*" (emphasis added)).

<sup>15</sup> See *First Majestic Silver Corp. v. United Mexican States*, ICSID Case No. 21/14, Decision on the Claimant's Request for Provisional Measures, dated May 26, 2023 (**Decision on Provisional Measures**), ¶ 26.

<sup>16</sup> Decision on Provisional Measures, fn 120 ("The Claimant's request concerns however 'payments of VAT refunds owed to PEM as to the filing of the Request for Arbitration' as well as 'all future payments' (at para. 78). The Tribunal considers however that a *provisional measure of the type requested by the Claimant, concerning the VAT refunds to which PEM is entitled, in order not to aggravate the dispute and to maintain the status quo*, cannot cover actions by the Respondent that predate the relevant request (4 January 2023).") (emphasis added)).

2020 would, as has been pointed out by the Tribunal, also be viewed as an *indirect* and *premature* adjudication of the measures (being challenged in this arbitration proceeding) concerning the blocking of PEM's bank account (*i.e.*, *enforcement measures*).<sup>17</sup>

41. Furthermore, the Tribunal concluded that it was not in a position to rectify what had occurred in the past within the framework of provisional measures, which are to be issued based on ongoing and future harm.<sup>18</sup>

**D. Respondent's Conduct is Motivated by Illegal Considerations**

42. The Respondent, on no less than four occasions, has been requested by the Claimant to comply with this Tribunal's Order but has failed to offer reasons for its lack of compliance other than by indicating the matter is being looked into.<sup>19</sup>

43. The challenge to the Tribunal's jurisdiction which was filed on July 28, 2023 (even while the Tribunal was considering the Respondent's challenge to the Decision) is not grounded in accurate facts, is weak on legal arguments, and is motivated by obstinacy and continued use of illegal means to maintain control over the VAT refunds even if the amounts belong to and should rightly be paid regularly to PEM.

44. The deficiency in facts is obvious when the Respondent excuses its unwillingness to engage with key facts advanced in the Claimant's first submission, purportedly based on relevance. It is not up to the Respondent to decide which facts advanced by the Claimant are relevant or irrelevant. Such conduct usurps the role of the Tribunal as the fact finder in this arbitration.

45. Its weak legal position is evidenced by its acceptance that it cannot point to any arbitration award in support of its position, claiming that this case is unique and yet also warning

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<sup>17</sup> *See id.*

<sup>18</sup> *See id.*

<sup>19</sup> *See* Letter from Riyaz Dattu to Alan Bonfiglio Rios, dated June 15, 2023, **C-0060**; *see also* Letter from Riyaz Dattu to Alan Bonfiglio Rios, dated August 11, 2023, **C-0061**; Letter from Riyaz Dattu to Alan Bonfiglio Rios, dated September 12, 2023, **C-0067**; Email from Riyaz Dattu to Alan Bonfiglio Rios, dated October 18, 2023, **C-0068**.

the Tribunal of “open[ing] the door” for many other similar cases that will follow (*i.e.*, “flood gates argument”), if it decides against the Respondent.<sup>20</sup> The Respondent has not provided any international arbitral authority for the application of such a principle in adjudication of international disputes, because to our knowledge none exists.

46. The following ultimate paragraph, in the Respondent’s most recently filed submission, makes clear the motivations underlying each of the recent challenges of the Respondent. According to the Respondent, PEM is to be restricted from obtaining VAT refunds, so that the sequestered funds (belonging to PEM) remain at all times accessible to the SAT, notwithstanding the ongoing APA proceedings in the local courts:

Nor can the applicant justify its decision to violate the Waivers in the alleged financial constraint to obtain VAT refunds to continue its operation. *Alleging or insinuating that the failure to return VAT compromises PEM’s operation is further misleading if it is considered that the plaintiff acquired that company knowing that it was committed to selling every ounce of silver produced in San Dimas substantially below its market price.* Indeed, for every ounce of silver it sells to its subsidiary in Barbados, PEM loses the difference between the price agreed with its subsidiary (approximately ██████████) and the market price that currently stands at around ██████████. *The losses due to the lack of access to VAT refunds pale against the losses of PEM associated with the inter-company agreement (i.e., the so-called “stream agreement”).*<sup>21</sup>

47. The foregoing paragraph is replete with gross inaccuracies and misrepresentations and is not befitting a factual and legal pleading by the Respondent to a Tribunal that has been engaged in this proceeding for two-and-a-half years, has had the benefit of one round of Memorials from the parties, along with numerous expert reports and several facts witness statements. Furthermore, the issue of irreparable harm was detailed in the Claimant’s Request for Provisional Measures, and the Tribunal has ruled on this issue.<sup>22</sup>

48. The following uncontroversial facts make it clear that the Respondent, in its framing of the above position, is advancing representations that are highly inaccurate:

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<sup>20</sup> See Respondent’s Reply on Jurisdiction, ¶¶ 5, 66.

<sup>21</sup> Respondent’s Reply on Jurisdiction, ¶ 90.

<sup>22</sup> See generally Decision on Provisional Measures.

- a) The Tribunal has already found that based on principles of necessity, irreparable harm, maintaining the *status quo*, and other grounds, PEM is entitled to provisional relief pending the final award.<sup>23</sup> It is highly improper for the Respondent to claim that the Claimant is “*insinuating that the failure to return VAT compromises PEM’s operation.*”<sup>24</sup> The Tribunal has made a clear finding that the payment of VAT refunds into blocked accounts is aggravating the current dispute and is severely impacting PEM financially.<sup>25</sup> The Tribunal, on September 1, 2023, in response to the Respondent’s challenge, has reaffirmed that the Provisional Remedies Decision should remain in place based on the serious harm consideration and avoidance of aggravation of the current dispute.<sup>26</sup> The Respondent has nevertheless continued to violate the Order over a period of more than five months, based on its own inaccurate version of facts that PEM is not deserving of the VAT refunds relief granted by this Tribunal.
- b) The Respondent then asserts in the foregoing paragraph that PEM’s injury related to failure to obtain VAT refunds as Ordered by the Tribunal “*pale against the losses of PEM associated with the [stream agreement]*” that establishes a fixed selling price.<sup>27</sup> On this point, Respondent’s position is incomplete and inaccurate and does not differentiate between the years that PEM was owned by Primero Canada and the current period (which is the time relevant for the making of the Tribunal’s Order).<sup>28</sup> It is indeed true that First Majestic acquired PEM in 2018 with the knowledge that PEM was bound by a stream agreement with the predecessor of Wheaton Precious Metals Corp.

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<sup>23</sup> See *id.* at ¶¶ 127-135, 143.

<sup>24</sup> Respondent’s Reply on Jurisdiction, ¶ 90.

<sup>25</sup> See Decision on Provisional Measures, ¶ 133 (“[T]he tribunal considers that if SAT were to block further payments of future VAT refunds owed to PEM, this would aggravate the dispute and affect the *status quo*.” (emphasis in the original)).

<sup>26</sup> See *generally* Decision on the Revocation Request.

<sup>27</sup> Respondent’s Reply on Jurisdiction, ¶ 90 (emphasis added).

<sup>28</sup> See *id.*



(Wheaton), and also with the information that the APA entered into by PEM with the SAT continued to be valid (which is also the case at this time).<sup>29</sup> The Claimant then went on to renegotiate the stream agreement in the years following the acquisition from Primero Canada, by paying Wheaton considerable sums of money, and has turned PEM from being a company under financial constraints to one that is successful.<sup>30</sup> The San Dimas mine is currently the largest revenue contributor to First Majestic’s overall revenues due to the steps taken by the current management.<sup>31</sup> This turnaround has benefitted the Mexican Government’s ability to collect various taxes, in addition to income tax, from PEM such as payroll taxes, and ensured that PEM continues to maintain a highly paid and large workforce. PEM’s continued financial viability has also benefitted the surrounding communities. However, First Majestic did not expect that the SAT would unlawfully withhold its VAT refunds as there is no legal basis for this action. The Respondent’s justification that PEM should continue to suffer harm is nothing other than retributive conduct on the part of the Respondent for challenging the SAT’s repudiation of the APA, both in the Mexican courts and before this Tribunal. The language in the foregoing paragraph smacks of the Respondent intentionally seeking to inflict additional harm on PEM, which is exactly what this Tribunal ordered should not be allowed to continue.

- c) The above paragraph is also indicative of the fact that the dispute, as far as the Respondent is concerned, is based on the supposed failure of PEM to capitalize on “spot prices” for silver, which the Respondent claims without

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<sup>29</sup> See generally *First Majestic Silver Corp. v. United Mexican States*, ICSID Case No. 21/14, Claimant’s Memorial, dated April 26, 2022 (**Claimant’s Memorial**), § III.F.

<sup>30</sup> See *id.* at § II.G.4; see also Witness Statement of ██████████, dated April 25, 2022, ¶ 23, █████0000 (explaining that “the measures that have been taken by the Government against PEM have been extremely damaging to the company and its ability to continue to operate, grow, and prosper as well as to First Majestic.”).

<sup>31</sup> See Expert Report of ██████████, dated April 25, 2022, ¶ 167 (“BMO undertook a sum-of-the-parts (“SOTP”) valuation of the different projects/assets that make up First Majestic’s project portfolio in Mexico. Of these projects, San Dimas was by far the most valuable.”), █████-0000

providing supporting evidence, has resulted in huge losses.<sup>32</sup> As noted above, the Respondent’s view of the transaction between PEM and the Barbados subsidiary (which then sells the silver at the same prices to an unrelated party), is as follows: “indeed, for every ounce of silver it sells to its subsidiary in Barbados, ... *PEM loses the difference between the price agreed with its subsidiary (approximately [REDACTED]) and the market price that currently stands at around [REDACTED].*”<sup>33</sup> This statement does not reflect commercial and economic reality, and yet it inaccurately underpins the entirety of the Respondent’s central position in the dispute. As previously noted, and as explained in the [REDACTED] Expert Report, stream agreements are extremely common in the mining sector and are used by sophisticated and large mining companies as an alternate form of financing.<sup>34</sup> The upfront payment made amounting to [REDACTED] by a counterparty such as Wheaton is the reason why a mining company agrees to sell its mineral production on a fixed and long-term basis, with the full understanding that it will not be able to charge “spot prices” (or as the Respondent inaccurately refers to the “spot prices” as “market prices”). By so doing, sophisticated mining companies are not deliberately (without economic rationale) entering into what the Respondent perceives to be transactions that result in losses. The fixed long-term price for the sale of minerals, set out in the stream agreement, is a commercially negotiated price in consideration of the advance payment of [REDACTED] by the stream company to the mining company.<sup>35</sup> This is the basis for the APA negotiated with and entered into by the SAT with PEM. However, it is far easier for the Respondent to ignore all these important and cogent facts and fundamental economic principles when attempting to cast the Claimant

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<sup>32</sup> See Respondent’s Reply on Jurisdiction, ¶ 90.

<sup>33</sup> *Id.* (emphasis added).

<sup>34</sup> See Expert Report of [REDACTED], dated April 25, 2022, ¶ 56, [REDACTED]-0000.

<sup>35</sup> See Claimant’s Memorial, ¶ 54.

as deliberately foregoing revenue (and therefore presumably avoiding taxes payable to the SAT), including when publicizing in the Mexican media the wrongful claim that PEM is refusing to pay income taxes it owes and is therefore deserving of being publicly chastised. The refusal to pay directly to PEM its VAT refunds and the depositing of these sums in blocked bank accounts is all part of the Respondent's attempts to establish a segregated fund for enforcing tax collection (for amounts not yet owed). The segregated fund would also allow the Respondent to potentially access funds in priority over secured creditors.

**E. Exercise of Control over Amounts of VAT Refunds belonging to PEM**

49. The thrust of the Respondent's position throughout, beginning with its challenge of June 19, 2023, to the Tribunal's Decision on Provisional Measures, followed by its Objection to Jurisdiction filed on July 28, 2023, has been to maintain control over all of the VAT refunds belonging to PEM regardless of any applicable laws of Mexico, requirements of international law as set out in NAFTA Chapter 11, and the Tribunal's Order dated May 26, 2023.

50. The Respondent agrees that PEM is owed VAT refunds by the SAT.<sup>36</sup> However, it also states that it "pays" the VAT refunds, when seeking to oppose the Claimant's position that depositing the VAT refunds into a blocked bank account does not constitute payment of the refunds to PEM.

51. The Tribunal has ruled on this matter and confirmed that PEM is entitled under the Provisional Measures Decision to have free access to the VAT Refunds for use in its business.<sup>37</sup>

52. Nevertheless, the Respondent continues to justify its actions of sequestering the VAT refunds repeatedly by claiming that this constitutes payment of the VAT refunds.<sup>38</sup> It is

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<sup>36</sup> See generally Claimant's Reply to Request for Revocation, § II.B.

<sup>37</sup> See generally Decision on Provisional Measures; see also Decision on the Revocation Request.

<sup>38</sup> See Respondent's Reply on Jurisdiction ¶¶ 18-22.

unwilling to take any additional steps or measures to ensure that the Claimant's subsidiary, PEM, obtains its VAT refunds such that the refunds can be used in its San Dimas mining activities.

53. In summary, it is clear that the Respondent has failed to take the necessary actions to give effect to the Tribunal's Provisional Measures Decision. This Objection to Jurisdiction is thus nothing more than another means of avoiding its obligation to pay VAT refunds to PEM by alleging that this Tribunal's lacks jurisdiction to adjudicate the dispute concerning the revocation of the APA, and thereby hoping to derail this arbitration.

### III. ADDITIONAL FACTS RELATED TO BIFURCATION REQUEST

#### A. PEM's Legal Entitlement to VAT Refunds

54. It has been very clearly established within the existing record in this arbitration that PEM has a legal entitlement to receive its VAT refunds from the SAT arising from its export of silver and gold it produces in Mexico.<sup>39</sup> The Respondent has at no time refuted that PEM has this legal entitlement and has affirmed the accuracy of the Claimant's position.<sup>40</sup>

55. However, the Respondent has repeatedly confirmed that it will not refund any portion of the VAT refunds owed to PEM and has sought to oppose an outcome that results in some or all of the VAT refunds becoming accessible to PEM even if this means refusing to comply with this Tribunal's Order and ultimately seeking to bring an end to this arbitration proceeding. A chronology of the facts relevant to the Respondent's refusal to comply with the Tribunal's Order can be summarized as follows:

- a. **May 26, 2023:** Decision on Provisional Measures is rendered.<sup>41</sup>
- b. Letter dated **June 15, 2023:** The Claimant sends its first reminder to the Respondent of its obligations pursuant to the Tribunal's Decision on Provisional Measures and provides a new bank account number and the name of the bank manager to the Respondent, to ensure that instructions are provided that the bank

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<sup>39</sup> See generally Claimant's Reply to Request for Revocation, § II.B.

<sup>40</sup> See *First Majestic Silver Corp. v. United Mexican States*, ICSID Case No. 21/14, Respondent's Response to Claimant's Request for Provisional Measures, dated February 10, 2023 (**Respondent's Response to Provisional Measures Request**), ¶ 161.

<sup>41</sup> See Decision on Provisional Measures.

account is not to be blocked and to facilitate the deposit of the VAT refunds for the period as of January 4, 2023.<sup>42</sup>

- c. **August 2, 2023:** The Tribunal issues directions that, pending the Tribunal's Decision on the Respondent's Revocation request, the Order on provisional measures relief remains in effect.<sup>43</sup>
- d. Letter dated **August 11, 2023:** The Claimant reminds the Respondent a second time to comply with the Tribunal's Decision on Provisional Measures.<sup>44</sup>
- e. Letter dated **August 14, 2023:** The Claimant expresses its openness to continue good faith negotiations and reminds the Respondent that the Claimant has submitted the guarantees that satisfy all requirements imposed by the SAT for the years 2010, 2011, and 2012. Copies of the guarantees provided to the SAT by PEM in July 2023 were attached to the letter.<sup>45</sup>
- f. Reply Letter dated **August 23, 2023:** The Respondent replies, refusing the guarantees and repeating its unwillingness to meet/negotiate.<sup>46</sup>
- g. **September 1, 2023:** Decision on Respondent's Request For Revocation (**Decision on the Revocation Request**).<sup>47</sup>
- h. Letter dated **September 12, 2023:** The Claimant sends a third reminder to the Respondent to comply with the Tribunal's Decision on Provisional Measures.<sup>48</sup>
- i. Reply Letter dated **September 14, 2023:** The Respondent simply states: "The Respondent is making its best efforts to gather the necessary information in connection with its communication of 12 September regarding the Decision on the Request for Provisional Measures."<sup>49</sup>
- j. Email dated **October 18, 2023:** The Claimant sends a fourth reminder requesting the Respondent to comply with the Tribunal's Order.<sup>50</sup>

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<sup>42</sup> See Letter from Riyaz Dattu to Alan Bonfiglio Rios, dated June 15, 2023, **C-0060**.

<sup>43</sup> See Email from Sara Marzal, dated August 2, 2023 ("In the meantime, the Tribunal's Decision on Provisional Measures of 26 May 2023 remains in effect.").

<sup>44</sup> See Letter from Riyaz Dattu to Alan Bonfiglio Rios, dated August 11, 2023, **C-0061**.

<sup>45</sup> See Letter from Riyaz Dattu to Alan Bonfiglio Rios, dated August 14, 2023, **C-0063**.

<sup>46</sup> See Letter from Alan Bonfiglio Rios to Riyaz Dattu, dated August 23, 2023 **C-0062**.

<sup>47</sup> See Decision on the Revocation Request.

<sup>48</sup> See Letter from Riyaz Dattu to Alan Bonfiglio Rios, dated September 12, 2023, **C-0067**.

<sup>49</sup> See Letter from Alan Bonfiglio Rios to Riyaz Dattu, dated September 14, 2023, **C-0069**.

<sup>50</sup> See Email from Riyaz Dattu to Alan Bonfiglio Rios, dated October 18, 2023, **C-0068**.

56. It is clear that the Respondent has no intention to comply with the Tribunal's Decision on Provisional Measures.

57. Instead, it has challenged this Tribunal's jurisdiction to adjudicate the dispute related to the APA (which remains valid). This constitutes yet another evasive tactic for delaying payment of the VAT refunds, with the possibility that the Tribunal will issue a decision on jurisdiction that results in the termination of this proceeding, and thereby provide the Respondent basis for refusing to pay to PEM VAT refunds pursuant to the Tribunal's Decision on Provisional Measures.

58. While the Respondent can bring this jurisdictional challenge as part of the next rounds of Memorials related to the merits of the proceeding and jurisdictional objections, it nevertheless seeks to carve out a special process for this particular jurisdictional challenge by seeking at this late stage bifurcation of the arbitration proceeding.

59. However, notwithstanding two rounds of submissions on bifurcation and Objection to Jurisdiction, it has entirely failed to provide sufficient factual and legal basis for obtaining bifurcation. We discuss this further below including the high burden imposed on the Respondent when seeking bifurcation of the proceedings.

**B. Tribunal's Decision on Provisional Measures and its Reaffirmation of its Decision subsequent to the Respondent's Challenge**

60. In concluding that the VAT refunds are payable to PEM as of January 4, 2023, 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*.<sup>51</sup>

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<sup>51</sup> Decision on Provisional Measures, ¶ 143(1) (emphasis added).

61. 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.*<sup>52</sup>

62. Furthermore, the Tribunal in the foregoing Decision provided clarity that by granting relief for the period January 4, 2023, until a final award is rendered in this arbitration, it was not suggesting that the period prior to January 4, 2023 (and the refunds accrued prior to date as far back as April 2020), were presented by the Claimant for adjudication in this ongoing arbitration:

The Tribunal considers however that a provisional measure of the type requested by the Claimant, concerning the VAT refunds to which PEM is entitled, in order not to aggravate the dispute and to maintain the status quo, cannot cover actions by the Respondent that predate the relevant request (4 January 2023).<sup>53</sup>

63. As a result, the Tribunal only granted the Claimant access to future VAT refunds *not because prior VAT refunds were measures already contested in the First Arbitration but because the type of provisional measure requested cannot cover actions by the Respondent that predate the relevant request.*

64. The Tribunal has again clarified the basis for the making of its decision concerning VAT refunds limited to the period as of January 4, 2023. On September 1, 2023, in its Decision on the Revocation Request concerning its earlier decision made on May 26, 2023, the Tribunal has confirmed that it does not view the VAT Arbitration proceeding commenced on June 28, 2023, as challenging the measures that are in whole or in part in dispute before this Tribunal:

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<sup>52</sup> *Id.* at ¶ 135 (emphasis added).

<sup>53</sup> Decision on Provisional Measures, fn 120.

In the new ICSID case, First Majestic claims that the deposit by SAT of the VAT refunds into a blocked account represents a breach of certain NAFTA provisions by Respondent for which Claimant is entitled to damages of a corresponding amount. *Such a claim, for the reasons stated above, as confirmed by Claimant itself, is not before this Tribunal.*<sup>54</sup>

65. Notwithstanding the foregoing clear explanation from the Tribunal, the Respondent continues to persist in repeating its argument that the Tribunal's Decision on Provisional Measures "only found that free access to future VAT refunds was not a measure claimed in this arbitration."<sup>55</sup> This is an incorrect understanding of the Tribunal's explanation that the dispute described in the Claimant's Request for Arbitration dated June 29, 2023 (**Second RFA**)<sup>56</sup> is *not duplicative* of the current dispute based on the repudiation by the SAT of the APA.

### C. Respondent's Conduct Precipitated the New VAT Arbitration

66. Notwithstanding prior oral and written representations and assurances that the Respondent was willing to pay VAT refunds owed to PEM, it has refused to do so and has mounted challenges to the Decision on Provisional Measures requiring payment of VAT refunds as of January 4, 2023, and the Objection to Jurisdiction motivated by its steadfast refusal to pay PEM VAT refunds.

67. As previously noted, this unwillingness to pay illustrates the Respondent's retributive action or punishment for the Claimant challenging the reassessment of the income taxes that the Respondent believes it is owed retroactively for the period 2010 to 2014, which it claims far exceed the denied VAT refunds. This claim is made even though the Claimant is entitled to rely on the APA, and is pursuing legal remedies in Mexico and before this Tribunal to challenge the actions of the SAT.

68. This refusal to pay the VAT refunds to PEM, currently amounting to in excess of [REDACTED], and in particular the VAT refunds owed as of January 4, 2023, as ordered by

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<sup>54</sup> Decision on the Revocation Request, ¶ 45 (emphasis added).

<sup>55</sup> See Respondent's Reply on Jurisdiction, ¶ 71 (emphasis in the original).

<sup>56</sup> *First Majestic Silver Corp. v. United Mexican States*, ICSID Case No. 23/28, Claimant's Request for Arbitration, dated June 29, 2023 (**Second RFA**).



this Tribunal (which currently amount to [REDACTED], or [REDACTED] of the total amount of VAT refunds), is exacerbating the dispute and causing irreparable harm to PEM.

69. The refusal to pay VAT refunds undeniably owed to PEM is indicative (and offers clear insights for the Tribunal) of the lengths to which the Respondent is willing to act illegally to achieve its objectives. In effect, these actions of the Respondent relating to the VAT refunds unreservedly owed to PEM, provide a “window” into the Respondent’s unconscionable conduct and its treatment of the Claimant from the outset and which continues to this time.

70. Furthermore, the SAT has consistently refused several offers of guarantees consistent with and as required by Mexican law, so that some of the enforcement measures can be lifted and the VAT refunds can be released.<sup>57</sup> It has not accepted any of these offers of guarantees and has provided no reasons for its unwillingness to accept the guarantees. Equally, it has provided no reasons for refusing to comply with the Tribunal’s Order requiring VAT refunds to be paid as of January 4, 2023.

71. On the other hand, the Respondent has made the following statements clearly and openly acknowledging the entitlement of the Claimant to all of the VAT refunds that it has blocked in the bank accounts of 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.<sup>58</sup>

...

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 transferred refunds to PEM in bank accounts that were secured is attributable solely to PEM and is a*

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<sup>57</sup> See Claimant’s Reply to Request for Revocation, § II.A.2.

<sup>58</sup> Respondent’s Response to Provisional Measures Request, ¶ 38.

*situation that the company itself can remedy without the intervention of this Tribunal.*<sup>59</sup>

...

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.<sup>60</sup>

72. Yet, it has thereafter refused to act not only on the representations made to the Tribunal in its written and oral submissions but also has continued to ignore an Order of this Tribunal.

73. In summary, the conduct of the Respondent continues to be high-handed and is focused on needlessly bringing interlocutory proceedings such as Respondent's Revocation Request and the Objection to Jurisdiction, for matters already decided or that could await adjudication as part of the merits of this case.

74. However, the intransigence in refusing to pay VAT refunds (even if limited to future monthly payments as of January 4, 2023) seems to be singularly driving the Respondent's actions that are frivolous and vexatious.

75. The Claimant has therefore been put in a position where it needs to ensure that its legal rights are protected, and that it is not hereafter accused by the Respondent of being out of time (*e.g.*, in relation to the expiry period for bringing legacy claims under NAFTA). The Respondent has already indicated that it will be challenging the Claimant's position that its recent VAT Arbitration proceeding was commenced within the three-year time limit for bringing claims.

76. The Claimant also has a strong interest in ensuring that the Respondent acts in accordance with its acknowledged legal obligations and does not threaten or bully the Claimant (as it has repeatedly done according to its *modus operandi*, before the initiation of this arbitration

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<sup>59</sup> *Id.* at ¶ 78.

<sup>60</sup> *Id.* at ¶ 186.

proceeding) into submission, by launching a barrage of interlocutory proceedings that are without merit.

77. The Claimant has the right, as a Canadian legal entity, to seek legal recourse through international arbitration, which is not available to many other investors in Mexico. Accordingly, it should be allowed to access these remedies particularly as this Tribunal has correctly pointed out that the period before January 4, 2023, cannot be the subject of provisional remedies,<sup>61</sup> and indeed that the claim in the new arbitration commenced on June 29, 2023 (the **VAT Arbitration**) concerns measures that are not before this Tribunal.<sup>62</sup>

**D. Request for Bifurcation and Objection to Jurisdiction should be Denied**

78. The Respondent has repeatedly altered its position on exactly what it is claiming in its Objection to Jurisdiction.

79. In its Request for Relief as set out in its Reply on Jurisdiction, it has requested a determination by the Tribunal that it “has no jurisdiction to hear ICSID Case ARB/21/14 and, in the alternative, that it has no jurisdiction to hear the claim related to the blocking of accounts and/or access to VAT refunds and/or the deposit of VAT refunds on frozen accounts.”<sup>63</sup>

80. These alternate requests for relief suggest:

- a) that in the case of a determination by the Tribunal that it has “no jurisdiction to proceed” with the entirety of the APA Arbitration, the Tribunal has to find that both of the arbitrations (the ongoing and newly initiated arbitration) concern the same measures; and

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<sup>61</sup> See Decision on Provisional Measures, fn 120 (“The Claimant’s request concerns however “payments of VAT refunds owed to PEM as to the filing of the Request for Arbitration” as well as “all future payments” (at para. 78). The Tribunal considers however that a provisional measure of the type requested by the Claimant, concerning the VAT refunds to which PEM is entitled, *in order not to aggravate the dispute and to maintain the status quo, cannot cover actions by the Respondent that predate the relevant request (4 January 2023)*” (emphasis added)).

<sup>62</sup> Decision on the Revocation Request, ¶ 45 (“*In the new ICSID case, First Majestic claims that the deposit by SAT of the VAT refunds into a blocked account represents a breach of certain NAFTA provisions by Respondent for which Claimant is entitled to damages of a corresponding amount. Such a claim, for the reasons stated above, as confirmed by Claimant itself, is not before this Tribunal.*” emphasis added).

<sup>63</sup> Respondent’s Reply on Jurisdiction, ¶ 91(ii).

- b) If, however, the alternate remedy is being sought by the Respondent, only certain measures in both the arbitrations have to be the same measures and must be “related to the blocking of accounts and/or access to VAT refunds and/or the deposit of funds into frozen accounts.”

81. While the Respondent’s earlier position was not clear, the Claimant accepts that the Respondent is now asking for the following from the Tribunal when making its determination:

However, to avoid any confusion, the measures that are claimed in both arbitrations are: (i) *the freezing or blocking of accounts, and (ii) the deposit of VAT refunds on one of the blocked accounts*, in particular those deposited between April 2020 and January 4, 2023.<sup>64</sup>

82. At the outset, the Claimant wishes to point out that the Request for Arbitration filed on June 29, 2023, does not seek to challenge the measures summarized above that are the subject of this ongoing arbitration.<sup>65</sup> The Request for Arbitration seeks remedies concerning PEM’s entitlement.

83. For ease of reference, and to ensure that the Claimant is clear on what is covered by this ongoing APA Arbitration and the VAT Arbitration, it developed definitional terms: “enforcement measures” and “entitlement measures.”<sup>66</sup> These definitions only became necessary, so as to identify the distinct nature of the measures being considered, when the Claimant had to respond to the Objection to Jurisdiction. Therefore, the Respondent’s accusation against the Claimant, for belatedly creating an “artificial construction,” is far from correct.<sup>67</sup>

84. The need for clarity necessitated that distinctions be made and explained when dealing with the Respondent’s claims of the “same measures” being at issue in both arbitrations.

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<sup>64</sup> Respondent’s Reply on Jurisdiction, ¶ 14.

<sup>65</sup> See generally Second RFA.

<sup>66</sup> Claimant’s Response to Objection to Jurisdiction, ¶¶ 6-12.

<sup>67</sup> Respondent’s Reply on Jurisdiction, ¶ 3.

85. The terms “enforcement measures” and “entitlement measures,” as defined and used, point out the real and substantive distinctions between the measures that are before this Tribunal. In the first case, for adjudication of the impropriety of the “enforcement measures” of the Respondent (arising from the APA dispute), as distinct from measures at issue in the VAT Arbitration (that concern “entitlement measures.”)

86. The measures at issue in this arbitration are the “enforcement measures.” However, as has been stated before, this arbitration encompasses far more than the measures related to the blocking of PEM’s bank accounts. These measures include: (i) the bringing of the *Juicio 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.

87. The blocking of all of PEM’s bank accounts, and the deposit of VAT refunds in one of these blocked accounts are part of the “enforcement measures” of the SAT based on allegations of taxes owed by PEM.

88. The “entitlement measures” relate to PEM’s right to be paid VAT refunds. These measures also relate to the obligation of the SAT to pay such amounts to PEM without restrictions, and based on directions issued by PEM. These measures 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.

89. This distinction has been accepted by the Tribunal in both its Decision on Provisional Measures and in its Decision on the Revocation.<sup>68</sup>

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<sup>68</sup> See Decision on Provisional Measures, ¶ 135 (“Finally, the Tribunal considers that the above recommendation is not prevented by the prohibition of Article 1134 of the NAFTA against provisional measures that would “enjoin the application of the measure alleged to constitute a breach referred to in Article 1116 or 1117.” This is *because the denial by SAT of PEM’s free access to future VAT refunds is not a measure challenged by the Claimant in its Request for Arbitration nor discussed in its Memorial.*” (emphasis added)); see also Decision on the Revocation

90. Turning back to what the Respondent in its clarified prayer for relief is seeking, the Claimant is of the view that the alternate relief sought *does make* the Tribunal’s task much easier. The Tribunal simply has to find that the following measures are not claimed in both arbitrations but are only to be adjudicated in the APA arbitration: “(i) *the freezing or blocking of accounts, and (ii) the deposit of VAT refunds on one of the blocked accounts.*”<sup>69</sup> Both of these are “enforcement measures.”

91. As for the refunds, and “in particular those deposited between April 2020 and January 4, 2023”, these are not part of the measures in dispute in the ongoing arbitration.<sup>70</sup> Rather, the refunds payable from January 4, 2023 are the subject of an Order of the Tribunal for compliance by the Respondent, and which was made consistent with the requirements of NAFTA Article 1134.<sup>71</sup>

92. The position of the Respondent, as clarified and stated above, does not ask for a determination that the “entitlement measures” (determining whether PEM has an entitlement to VAT refunds and relief equal to compensation for the sequestered amount that is not being released) are before this Tribunal. It is clear, and has been accepted by this Tribunal, that the “entitlement measures” are not before this Tribunal but are before the tribunal to be constituted for the new arbitration proceeding.

93. In summary, based on the relief requested by the Respondent, the Tribunal should not bifurcate the proceedings, as the “enforcement measures” are to be adjudicated with the merits of this proceeding because they are inextricably linked to the factual issues in this arbitration and more importantly, they have been before the Tribunal for adjudication on the merits from the outset of this arbitration proceeding. On the other hand, these “enforcement measures” are not measures that have been challenged in the newly initiated VAT Arbitration.

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Request, ¶ 45 (“*In the new ICSID case, First Majestic claims that the deposit by SAT of the VAT refunds into a blocked account represents a breach of certain NAFTA provisions by Respondent for which Claimant is entitled to damages of a corresponding amount. Such a claim, for the reasons stated above, as confirmed by Claimant itself, is not before this Tribunal.*” (emphasis added)).

<sup>69</sup> See Respondent’s Reply on Jurisdiction, ¶ 14.

<sup>70</sup> *Id.*

<sup>71</sup> See generally Decision on Provisional Measures.

94. *The Respondent has not claimed in its latest submission that the “entitlement measures” are before this Tribunal, and therefore there is no jurisdictional issue to be resolved.* The “entitlement measures” are yet to be adjudicated in the newly initiated arbitration.

95. To the extent that there remains any ambiguity in the Request for Arbitration filed on June 29, 2023, as to the scope of the measures at issue in that arbitration, the Claimant can amend the Request for Arbitration. Such an amendment would avoid any ambiguity that the same measures being adjudicated in that arbitration are also before this arbitration. Amending the Request for Arbitration is feasible as the new proceedings are just commencing, and a tribunal has yet to be appointed. Furthermore, in filing its pleadings, the Claimant can make clear that the measures at issue in the newly initiated VAT Arbitration related to PEM’s entitlement to VAT refunds and access to those funds. The damages to be claimed in the newly initiated arbitration will include VAT refunds that remain unpaid (*i.e.*, are inaccessible by PEM) by the SAT.

#### **IV. LEGAL ARGUMENTS**

96. The Respondent’s Request for Bifurcation and its Objection to Jurisdiction fail to meet the three-fold requirements for bifurcation 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.

##### **A. Objection to Jurisdiction is Without any Merit**

97. The Respondent’s Preliminary Objection on Jurisdiction, if it is to be adjudicated upon by this Tribunal, must be *prima facie* serious and substantial. The Claimant has explained in its first submission the high threshold that has to be met by the Respondent when seeking bifurcation. It is not sufficient that the jurisdictional objection is “not frivolous or vexatious.”<sup>72</sup>

98. The Respondent’s second submission is bereft of any analysis explaining why in this case its Objection to Jurisdiction is “serious and substantial” beyond repeatedly stating that breach of waivers constitutes a violation of Article 1121 of NAFTA, and that the giving of

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<sup>72</sup> *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**.

waivers by investors and its investment constitute “fundamental commitment[s]” and the basis for the Respondent’s consent to arbitrate.<sup>73</sup>

99. The Claimant does not question the critical importance of compliance with Article 1121 of NAFTA. However, the Respondent has not provided any analysis in support of its position that in this case there has been a breach of the waivers provided. Simply asserting “and it cannot be the case that a respondent State continues to be bound by the commitment to arbitrate a dispute, where the claimant party deliberately violates one of the conditions under which the State consented to arbitration,”<sup>74</sup> is not sufficient.

100. There is simply no support for the Respondent’s position that the Claimant set out to deliberately violate the waivers. In fact, the Claimant has throughout been clear that it has not violated either Article 1134 of NAFTA in seeking its provisional relief concerning VAT refunds (by confirming that it had made the narrowest request possible to ensure compliance with that provisions)<sup>75</sup> and has categorically stated in the Request for Arbitration dated June 29, 2023, that the measures in this arbitration are not the same as the measures leading to the dispute in that arbitration.<sup>76</sup>

101. Furthermore, while the Respondent claims that the Claimant and PEM have violated their waivers, it cannot demonstrate by way of providing examples to previous authorities accompanied by its own analysis, that there had been a breach of the waivers in accordance with Article 1121 of NAFTA.<sup>77</sup> It argues that this proceeding is *sui generis*, due to the blatant violation of the waivers.<sup>78</sup> However, this simplistic retort should not be accepted by this Tribunal. What this response confirms is that the Respondent has found no authorities on point.

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<sup>73</sup> Respondent’s Reply on Jurisdiction, ¶ 50.

<sup>74</sup> *Id.* at ¶ 51.

<sup>75</sup> See *First Majestic Silver Corp. v. Government of United Mexican States*, ICSID Case No. ARB/21/14, Claimant’s Request for Provisional Measures (**Claimant’s Request for Provisional Measures**), dated January 4, 2023, ¶¶ 78-80.

<sup>76</sup> See generally Second RFA.

<sup>77</sup> See generally Respondent’s Reply on Jurisdiction, Section III.B.

<sup>78</sup> See *id.* at ¶ 37.



102. The reality is that the Respondent simply would like to ignore repeated statements made by this Tribunal that the measures in dispute in the newly initiated arbitration are not the same as the measures in dispute in this ongoing arbitration. In particular, the Decision on the Revocation Request, which was issued on September 1, 2023, made it abundantly clear (for the second time) that the measures in dispute in the two arbitrations are not the same:

In the new ICSID case, First Majestic claims that the deposit by SAT of the VAT refunds into a blocked account represents a breach of certain NAFTA provisions by Respondent for which Claimant is entitled to damages of a corresponding amount. Such a claim, for the reasons stated above, as confirmed by Claimant itself, is not before this Tribunal.

The introduction of the new ICSID Case No. ARB/23/28 and the fact that it is pending do not remove the situation of aggravation of the dispute in the present ICSID Case No. ARB/21/14 nor of the prejudice to the status quo represented by the unavailability of the VAT refunds for PEM.

The Tribunal recognizes that the fact that the provisional measure is in place may (de facto) have an impact on the new case. Thus, as mentioned by Claimant itself, compliance by Respondent with the provisional measure (that is, making the VAT refunds accrued from 4 January 2023 freely available to PEM) might make the claim submitted by Claimant in ICSID Case No. ARB/23/28 in part moot.

This possible future evolution is however not a matter of concern for this Tribunal, since it will be a matter to be addressed (if and when) by the tribunal that will be appointed to preside over ICSID Case No. ARB/23/28. Moreover, this possible future evolution does not affect the jurisdiction of this Tribunal in respect of the provisional measure recommended in the PM Decision, nor does it undermine its continued validity, since the circumstances underpinning its issuance have not changed.<sup>79</sup>

103. The Respondent also takes the position that if the Tribunal finds that there has been a breach of the waiver, then inextricably the current proceedings have to come to an end.<sup>80</sup> Such a determination cannot be made in a bifurcated proceeding when what is at issue in this arbitration concerns a complex set of facts spanning over decades concerning the validity of the APA, access to remedies and extremely harsh enforcement. In fact, this position of the Respondent is contradicted by its earlier emphasis, when responding to the Claimant, that the

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<sup>79</sup> Decision on the Revocation Request, ¶¶ 45-48.

<sup>80</sup> See, e.g., Respondent's Reply on Jurisdiction, ¶ 62.

Tribunal *does not have to review all of the measures in dispute in this arbitration*, when assessing the existence of the “same measures.”<sup>81</sup>

104. The Respondent’s “all or nothing approach” is therefore inapplicable in the present circumstances, given the Respondent’s acknowledgment that this Tribunal has several more measures for adjudication than the two measures related to blocking of the bank account and deposit of VAT refunds into the blocked accounts by the SAT. Simply stated, the Respondent itself has resiled from its position that the breach of the waiver in relation to the entitlement and recovery of the VAT refunds, based on the initiation of the VAT Arbitration, means that the Tribunal has no ability to proceed on the several other measures in dispute in this ongoing arbitration.

105. In the Submission made by the Government of the United States in *Finely Resources, Inc. and Others v. Mexico*, the following proposition was advanced in a case concerning the Respondent (and which the Respondent has relied upon in this proceeding):

As the tribunal in *Commerce Group* observed, *the waiver provision permits other concurrent or parallel domestic proceedings where claims relating to different measures at issue in such proceedings are “separate and distinct” and the measures can be “teased apart.”*<sup>82</sup>

106. In this case, the fact that the two proceedings are “separate and distinct” has already been confirmed by the Tribunal, as the measures that are being challenged in each of the two arbitrations are not the same. There is therefore no need for the “teasing apart” of the “enforcement measures” (before this Tribunal) from the “entitlement measures” (for resolution before the VAT Tribunal). However, the position taken by the U.S. Government in *Finely Resources, Inc. and Others v. Mexico* confirms that a finding of breach of waivers provided requires careful analysis and any determination made should consider other possible outcomes that permit the ongoing arbitration to continue.

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<sup>81</sup> See Respondent’s Reply on Jurisdiction, ¶¶ 12-14.

<sup>82</sup> *Finely Resources Inc., MWS Management Inc., and Prize Permanent Holdings, LLC v. United Mexican States*, ICSID Case No. ARB/21/25, Submission of the United States of America, dated August 31, 2023, ¶ 16, **RL-0163**.

**B. Absence of Material Increase in Efficiency in the Next Phase**

107. Tribunals have refused to bifurcate jurisdictional objections when doing so would *not* result in a material increase in efficiencies in the merits phase.

108. The Respondent’s position in its second submission appears to be as follows: “the preliminary objection is based on a single fact that is unrelated to the merits of the dispute, namely whether the claimant violated the Waivers by submitting a second claim to arbitration based on measures that it also claims in this proceeding.”<sup>83</sup>

109. The Respondent concedes that all the other objections to jurisdiction contained in its Counter-Memorial were not appropriate for bifurcation as they could not be dealt with separately from the merits of the case.<sup>84</sup> The inevitable conclusion from this concession is that the Tribunal would have to order bifurcation of the jurisdictional objection concerning the waivers, and then again deal with the remaining jurisdictional issues that have been raised by the Respondent. This would be an inefficient process for all involved in this arbitration.

110. The only circumstance where there would be material gain in efficiency is if the Tribunal were to unequivocally terminate the entirety of the arbitration based on the argument that the waivers were irretrievably breached without regard to all the relevant facts. However, those are not the circumstances in this case. The Tribunal would require evidence of the facts and events that led to the filing of the newly initiated VAT arbitration. These facts and evidence include the representations made by the Respondent at the hearing of the Claimant’s Request for Provisional Measures, correspondence between the parties preceding and after the filing of the Notice of Intent in March 2023, the direct impact of the Decision on Provisional Measures on the framing of the Second RFA filed on June 29, 2023, and the various correspondence between the parties concerning VAT refunds.

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<sup>83</sup> Respondent’s Reply on Jurisdiction, ¶ 61.

<sup>84</sup> *See id.* at ¶ 60 (“The Defendant wishes to begin by clarifying that the objections to jurisdiction that were included in the Memorial on the merits are linked to the facts of this case and would be difficult to resolve them without entering into the analysis of the merits. It is for this reason that the Respondent did not request the fork of the jurisdiction phase in relation to those objections.”).

**C. Respondent’s Argument, Even Without Consideration Of The Merits, Fails**

111. On this third consideration on whether or not to bifurcate the Respondent’s Objection to Jurisdiction, as previously stated in the Claimant’s first submission, the Claimant is willing to concede that it may be *possible* to consider the jurisdictional challenge based on NAFTA Article 1121 separately from the merits of this arbitration proceeding.<sup>85</sup>

112. However, as outlined above, there is a serious danger in ruling on the jurisdictional issues without a full appreciation of the merits of this case on measures of the Respondent such as the rejection of guarantees offered by PEM and the blocking of the bank accounts, and whether the Respondent can block avenues of redress for PEM to recover its VAT refunds, all the while acknowledging that PEM has full entitlement to the VAT refunds.

113. Finally, and as indicated previously by the Claimant, there is no prejudice to Mexico if its Objection to Jurisdiction is joined to the merits and all of its various jurisdictional objections are dealt with at one time by the Claimant and thereafter ruled upon by the Tribunal through its award—as here, the very next step in this proceeding is for the Claimant to prepare its Reply on the Merits and to file its responses to all the jurisdictional challenges.

114. The Respondent has nothing further to do concerning its Objection to Jurisdiction (if it is not dismissed at this stage), other than to receive the Claimant’s response to its various jurisdictional challenges.

**V. REQUESTED RELIEF**

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

- i) Deny the Request for Bifurcation;
- ii) Dismiss the Objection to Jurisdiction as it lacks serious merit;
- iii) Determine that the Claimant and PEM have not breached the waivers provided at the outset of this arbitration, and that the *VAT entitlement measures* are exclusively within the jurisdiction of the tribunal that is to be

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<sup>85</sup> See Claimant’s Response to Objection to Jurisdiction, ¶ 128.

appointed in the VAT Arbitration, and are not before this Tribunal for adjudication; and

- iv) Deny the Respondent's request for suspension of the APA Arbitration and the Decision on Provisional Measures.

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

Date: November 6, 2023

Respectfully submitted,



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